The Diminishing Role of "Legal Incidence" in Mediating Tribal Sovereignty and State Commodity Taxation

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THE DIMINISHING ROLE OF “LEGAL INCIDENCE” IN MEDIATING TRIBAL SOVEREIGNTY AND STATE COMMODITY TAXATION

David Kwok*

INTRODUCTION

Indian tribes and U.S. states have spent decades litigating the imposition of taxes: are tribes subject to various state taxes such as income taxes and sales taxes? In this paper I focus on the dispute over high tax commodities such as cigarettes and motor vehicle fuels. The most visible conflict is the problem of overlapping taxation authority. If tribal commodity sales are exempt from state taxation, non-tribal members may effectively evade state taxes by crossing into tribal territory and purchasing cigarettes there instead. If tribal sales are not exempt, however, tribes lose an important source of government funding because double taxation of tribal sales places tribal businesses at a competitive disadvantage.

The federal courts have interpreted tribal sovereignty as a limited form of tribal immunity from state taxation. They have attempted to establish bright line rules around this immunity in an effort to ensure administrative feasibility. These decisions, however, do not seem to have stemmed the tide of litigation. I suggest that the courts’ emphasis on bright line rules has not achieved the goal of clarifying the tax regime and reducing litigation; courts should consider whether other aspects of these tax decisions may be contributing to the ongoing disputes. In particular, the courts’ attention to state expenditures in justifying taxes may be an element leading to uncertainty.

Moreover, I suggest that the Supreme Court in Wagnon v. Prairie Band Potawatomi Nation has reached the logical conclusion of its “legal incidence” doctrine; namely, that its bright line rule in defining the limits of state-tribal taxation powers is hampered by economic reality. For a number of extra-legal reasons, including the argument that upstream taxation is

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1 In this piece I follow U.S. legal standards in using “Indian” as a term of art referring to Native American interests. I do not intend any disrespect to Native Americans, nor do I intend any reference to southern Asia.

2 See, e.g., Confederated Tribes & Bands of the Yakama Nation v. Gregoire, 658 F.3d 1078 (9th Cir. 2011).

likely the most easily administrable taxation scheme, Wagnon’s majority opinion is a practical and logical result. In some ways, I therefore argue that Wagnon should be interpreted broadly—it should be relatively easy for courts to uphold state taxation schemes despite tribal complaints. Wagnon establishes a clear bright line rule that makes it straightforward to legitimate taxation schemes.

I also argue, though, that the expanded state power described in Wagnon should be balanced with expanded tribal power. The taxation rights of tribes stem from judicial interpretation of the concept of tribal sovereignty. While tribal sovereignty certainly incorporates the right of tribes to tax their own members and lands, I suggest it should also incorporate a judicially cognizable claim for a portion of state tax revenues. Wagnon suggests the importance of expenditures in relation to the legitimacy of a tax; at an appellate level, Wagnon’s cursory analysis of expenditures is sufficient. I therefore suggest that Wagnon only addresses the legitimacy of state taxation; there remains the question of whether tribes are entitiled to portions of the state taxation revenue. The state’s collection of a tax does not automatically entitle it to decide unilaterally how those revenues are to be dispersed. Arbitrators and district courts should carefully consider tribal claims for state tax revenues; these fact-dependent analyses for a fair distribution of tax revenues should be entitled to great deference on appellate review.

I begin with some background on the conflicts between state and tribes on commodity taxation. I next discuss the Supreme Court’s decision in Wagnon, which demonstrates the limits of the “legal incidence” doctrine in ascribing tribal sovereignty. In Part III I address some of the potential underlying motivations that may be leading to the conflicts between states and tribes on commodity taxation. I suggest in Part IV that there is only one taxation scheme that is practically sustainable. Therefore, in Part V I discuss how courts might reduce conflicts and encourage cooperation between states and tribes. In Part VI I address some potential concerns with my proposal, and I conclude in Part VII.

I. BACKGROUND ON STATE AND TRIBAL TAXATION OF COMMODITIES

The relationship among the tribes, states, and federal government has a rich history which I do not summarize here; suffice it to say that the present era has been described as one of self-determination and self-governance emphasizing government-to-government relationships. The federal

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4 See generally Cohen's Handbook of Federal Indian Law § 1.07 Self-Determination and Self-Governance (1961-present)
government presently views tribes as governmental entities that are capable of pursuing the welfare of tribe members. Tax revenues are central to the viability of any government entity. Tribal sovereignty and the underlying basis for state taxation of Indian tribes stem from this history, and for my purposes, it is important to note that the modern regime regulating such taxation is primarily a federal judicial creation.

I focus this paper on the practical present regime surrounding state taxation. I look only at the taxation of non-produced commodities, namely cigarettes and motor vehicle fuel. Since the 1970s, Indian tribes and U.S. states have had numerous conflicts over various state taxes impacting Indian tribal business with non-tribal members. The Supreme Court has noted that Congress could exercise statutory or regulatory powers to address the state-tribal tax relationship, but Congress has not done so. The federal courts have therefore developed various doctrines to mediate tax disputes between tribes and states. In particular, the courts have interpreted tribal sovereignty to imply some exemption from state taxation, and this exemption stems from tribal lands. I now review some of the central cases describing the legal incidence doctrine as presently applied.

A. State taxation of an Indian tribe on Indian land is generally impermissible

The Supreme Court has held that states are barred from taxing Indians on income derived wholly from reservation sources or transactions among

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5 See Bracker, 448 U.S. 136 at 144 n.10 (describing Congressional intent to “help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities” and to “rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.”)


8 See id.

9 Id.
tribal members on tribal land.10 “[W]hen a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians” the Supreme Court employs a “more categorical” test for the validity of the tax: “‘[A]bsent cession of jurisdiction or other federal statutes permitting it,’ . . . a State is without power to tax reservation lands and reservation Indians.”11

The first question for courts, then, is when a state tax on commodities is a tax on Indians on tribal land. From an economic reality perspective, the fact that a party pays a tax directly to the government does not mean that the party has less money: the party may be able to pass along the tax to its customers, for example. Consider a gas station selling fuel to consumers at three dollars per gallon before taxes. The state chooses to tax the gas station at one dollar per gallon of motor fuel sold. The gas station may respond in a number of ways. At one extreme, it might continue selling fuel at three dollars per gallon and entirely absorb the tax. Under this scenario, the gas station bears the full economic burden of the tax. At the other extreme, it might raise the price of fuel sold to four dollars per gallon, thus fully passing along the tax to customers. A third choice is a price in between three and four dollars per gallon. Under both of the latter scenarios, customers bear at least some economic burden of the tax originally levied on the gas station. For simplicity, I do not address the factors leading to the gas station’s price decision here. Suffice it to say that although a gas station may be assessed a tax on motor fuel, it could pass those taxes along to customers.12 The party that finally ends up with less money as a result of the tax bears the economic incidence or burden of the tax.13

Determining economic incidence is a difficult proposition.14 The

12 This assumes that customers are inelastic as to the purchase of motor fuel, of course.
13 This is an oversimplification of economic incidence, as a party may suffer a relative loss in utility rather than a loss of money. For example, if the tax results in the price exceeding the value of the good to the consumer, the consumer simply declines to make the purchase. She does not have less money (actually, she has more having not made the purchase), but she suffers a relative loss of utility in contrast to a world lacking the tax, assuming that she would have enjoyed some consumer surplus had she made the tax-free purchase.
14 See Oklahoma Tax Com’n v. Chickasaw Nation, 515 U.S. 450, 459-60 (1995) (acknowledging that legal incidence might have “no relationship to economic realities,” but that economic analysis might be “daunting,” requiring consideration of “how completely
Supreme Court instead wanted a “reasonably bright-line standard which . . . responds to the need for substantial certainty as to the permissible scope of state taxation authority.” As a result, courts developed the concept of the “legal incidence,” roughly corresponding to the party with the legal obligation to pay the tax. “As a general rule for deciphering legal incidence, the United States Supreme Court has instructed that [courts] are to conduct ‘a fair interpretation of the taxing statute as written and applied.’” “The person or entity bearing the legal incidence of the tax is not necessarily the one bearing the economic burden.” Courts analyze the “legal obligations imposed upon the concerned parties” rather than “divining the legislature’s ‘true’ economic object.” Returning to the gas station example, while the gas station might bear the legal incidence of a fuel tax if it is legally responsible for paying such a tax, but it might not bear any economic incidence if it is able to pass along the tax to customers without affecting the customers’ purchase levels.

Under the legal incidence doctrine, the “initial and frequently dispositive question in Indian tax cases” is who bears the legal incidence of a tax. If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization. “The question of where the legal incidence of a tax lies is decided by federal law.”

Legal incidence depends on a variety of factors. Courts may consider whether the statute contains a “pass through” which moves incidence down the distribution chain (i.e. from wholesaler to a retailer or purchaser). They may consider who is compensated for “collecting and remitting” the tax on behalf of the State or what invoices show regarding payment of the tax. Courts also may evaluate whether a retailer can recoup the tax paid retailers can pass along tax increases without sacrificing sales volume—a complicated matter dependent on the characteristics of the market for the relevant product.”

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15 Id. at 460 (internal citation omitted).
16 Id. at 681 (quoting Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe, 474 U.S. 9, 11 (1985) (per curiam)).
17 Id. (citing Chickasaw Nation, 515 U.S. at 460).
18 Id. (citing Crow Tribe of Indians v. Montana, 650 F.2d 1104, 1111 (9th Cir. 1981)).
19 Id. at 458.
20 Id. Cf. Bracker, 448 U.S. at 144 (suggesting that state taxation is generally impermissible under such circumstances because “the State’s regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest,” thus implying that a balancing test is actually at play.)
21 Couer D’Alene Tribe of Idaho v. Hammond, 384 F.3d 674, 681 (9th Cir. 2004).
22 See Hammond, 384 F.3d at 685–86. Cf. Cal. State Bd. of Equalization v. Chemehuevi Indian Tribe, 474 U.S. at 11 (no requirement that pass-through provisions be “explicitly stated.”)
23 See Hammond, 384 F.3d at 686.
for unsold product,\textsuperscript{24} or if the retailer is refunded the tax when a consumer fails to pay,\textsuperscript{25} and who is penalized for non-payment.\textsuperscript{26} “[A] party does not bear the legal incidence of the tax if it is merely a transmittal agent for the state tax collector.”\textsuperscript{27}

In \textit{Chickasaw Nation}, the state of Oklahoma attempted to tax motor fuels sold by tribal retailers on tribal land.\textsuperscript{28} The Court noted that the Oklahoma tax statute did not explicitly identify who bore the legal incidence of the fuel tax.\textsuperscript{29} It noted, though, that the legislation did not contain a “pass through” provision that required distributors or retailers to pass the tax along to customers.\textsuperscript{30} The statute did require fuel distributors to remit taxes “on behalf of a licensed retailer.”\textsuperscript{31} Combined with the fact that the distributor could deduct uncollected taxes, the Court concluded that the distributor was a mere transmittal agent rather than bearing the legal incidence.\textsuperscript{32} Because the retailer was not described in similar terms in the statute, the Court concluded that the retailer was not a transmittal agent and therefore bore the legal incidence of the fuel tax.\textsuperscript{33}

By pursuing this legal incidence analysis, the first method a tribe might use to litigate against a state tax would be to argue that the legal incidence falls impermissibly upon a tribe member on tribal land.

\textbf{B. State taxation of non-Indian parties on Indian land may be permissible}

If a court following the legal incidence doctrine demonstrates that the state tax falls upon a permissible party, the next question is the location of the permissible party. If the permissible party and the transaction are on tribal lands, Supreme Court decisions typically apply some sort of balancing test.\textsuperscript{34}

In \textit{Confederated Tribes of Colville Indian Reservation v. Washington},\textsuperscript{35} the Supreme Court approved a cigarette tax whose legal incidence fell upon

\textsuperscript{24} See id. at 684.
\textsuperscript{25} See id. at 687–88.
\textsuperscript{26} See Wagnon, 546 U.S. at 103.
\textsuperscript{27} Hammond, 384 F.3d at 681 (citing Chickasaw Nation, 515 U.S. at 461–62).
\textsuperscript{28} 515 U.S. at 452-53.
\textsuperscript{29} Chickasaw Nation, 515 U.S. at 461.
\textsuperscript{30} Id.
\textsuperscript{31} Id.
\textsuperscript{32} Id. at 461-62.
\textsuperscript{33} Id. at 462.
\textsuperscript{34} See, e.g., Chickasaw Nation, 515 U.S. at 459 (“But if the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy.” (internal citations omitted)).
\textsuperscript{35} 447 U.S. 134, 159 (1980).
the nontribal purchaser. It further held that not only could the state impose such a tax, but it could also impose at least “minimal” burdens on the Indian retailers to enforce and collect the tax. The Supreme Court appeared to use some form of balancing test in weighing the tribal interest in tax revenue against the state’s interest in tax revenue. The Court considered this cigarette tax nondiscriminatory. While the tribes also taxed tribal cigarette sales to nontribal purchasers, this tax was substantially lower than the prevailing state tax. The Court held that the tribal smokeshops were offering nontribal customers “solely an exemption from state taxation.” It thus believed that the sole reason nontribal customers came to these smokeshops was for the lower tax-inclusive price. The state did not give the smokeshops a credit for tribal taxes paid, but the Court noted that the tribes failed to demonstrate the impact of such a hypothetical credit. Implicitly, the Court did not believe that nontribal members would come to these smokeshops to purchase cigarettes, regardless of whether the smokeshops’ tax-inclusive prices were equal or higher than those off reservation.

As a contrast to Colville, the Supreme Court in Bracker struck down state taxes imposed upon a non-Indian business. In Bracker, the state of Arizona attempted to apply motor carrier license and use fuel taxes to a non-Indian logging enterprise operating on reservation land. The Supreme Court noted that timber on reservation land “is owned by the United States for the benefit of the Tribe and cannot be harvested for sale without the consent of Congress.” In dicta, Bracker describes the state taxation of purely tribal affairs on tribal lands as improper due to a comparison of minimal state interests against a strong federal interest in encouraging tribal self-government. Federal regulation of the timber is “comprehensive,” as the Bureau of Indian Affairs exercises “daily supervision over the harvesting and management of tribal timber.” This led the Court to declare

There is no room for these taxes in the comprehensive federal regulatory scheme. In a variety of ways, the assessment of state taxes would obstruct federal policies. And equally important, respondents have been
unable to identify any regulatory function or service performed by the State that would justify the assessment of taxes for activities on Bureau and tribal roads within the reservation.\textsuperscript{47}

The Court noted that the state taxes interfered with the federal objective of the Indians to receive the benefits of the forest, the Secretary’s ability to set fees and rates, and the tribe’s ability comply with mandated sustained-yield policies.\textsuperscript{48} The Court further noted that the economic burden of the taxes fell upon the tribe, although it is unclear what role that factor played in the decision.\textsuperscript{49} The Court indicated that the state’s “generalized interest” in raising revenue was insufficient to permit interference with the federal regulatory scheme.\textsuperscript{50} While not an explicit description of a balancing test, the Court appears to have balanced the state’s interests against the federal and tribal interests in holding the state taxes preempted.\textsuperscript{51}

\textbf{C. State taxation of a non-Indian party on non-Indian land is permissible}

The most permissive judicial regime is the state taxation of a non-tribal entity not on tribal land. If the courts determine that the party and transaction occur off tribal lands, the state tax is generally permissible. In \textit{Wagnon v. Prairie Band Potawatomi Nation},\textsuperscript{52} the Supreme Court upheld a sales tax scheme that applied the legal incidence of a fuel tax to the supplier’s entry of fuel into the state. Thus, all fuel sold was subject to the tax. Since the tribe purchased fuel from these off-reservation suppliers, it paid a higher tax-inclusive price for fuel.\textsuperscript{53} This strategy allowed Kansas to tax effectively all fuel sales on the reservation, as this tax-inclusive higher fuel price would be paid by both tribal members and nontribal members alike. We might conclude that Kansas learned from \textit{Chickasaw Nation} by expressly indicating in legislation that the legal incidence of the fuel tax was on the distributor.\textsuperscript{54}

Of particular significance is that the Court explicitly distinguished and rejected the balancing test utilized in \textit{White Mountain Apache Tribe v. }

\begin{itemize}
\item \textsuperscript{47} Id. at 148-49.
\item \textsuperscript{48} Id. at 149-50.
\item \textsuperscript{49} See id. at 151 n. 15.
\item \textsuperscript{50} Id. at 150.
\item \textsuperscript{51} Id. at 150. Note also that \textit{Bracker} preemption doctrine is distinct from other forms of federal preemption. See \textit{Bracker} at 143 (“The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law.”)
\item \textsuperscript{52} 546 U.S. 95 (2005).
\item \textsuperscript{53} Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 99.
\item \textsuperscript{54} See Wagnon at 102.
\end{itemize}
Bracker. Wagnon similarly did not follow the balancing test suggested by dicta in Chickasaw Nation.

Note also that Wagnon was not the first instance of the upstream taxation strategy: the state of Washington applied upstream taxation to cigarettes in Colville, and the Supreme Court has endorsed the strategy in other settings.

The central question in this line of Indian tax cases is location of taxation. While this analysis may appear straightforward, it leaves many unanswered questions. How did the Supreme Court determine that the upstream supplier was not merely a “transmittal agent” that did not bear the legal incidence of the tax? Is there some point at which a “minimal burden” on a transmittal agent becomes sufficiently great such that the agent actually bears the legal incidence of the state tax? Relatedly, how does the Supreme Court determine the location of a transaction?

I raise these questions not to offer answers, but rather to highlight the possibility that Supreme Court jurisprudence could still vary greatly after Wagnon. While these decisions purport to draw bright line rules, many of these concepts remain highly contestable.

II. THE LIMITS OF LEGAL INCIDENCE AND ECONOMIC REALITY

Legal incidence has been an attractive test because of its relative ease in judicial determination. Determining the actual economic burden of a tax requires social science techniques, and the party bearing the economic burden may change over time. If the purpose of legal incidence doctrine is to reduce litigation and uncertainty about the appropriate limits of state taxation power over tribes, however, the Wagnon decision highlights a number of problems. First, if we read Wagnon broadly, there may be no practical limit to the state’s power to tax commodities on tribal lands. Second, Wagnon continues a line of reasoning on state expenditures that invites uncertainty and litigation.

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55 Id. (limiting application of White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (applying balancing test to determine validity of tax on a non-Indian enterprise that contracted with Tribe to harvest timber from reservation forests)).

56 Id. at 121, 122 (limiting application of Chickasaw Nation, 515 U.S. at 459).

57 See Colville, 447 U.S. 134, 141-42.

58 See, e.g., Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 514 (1991) (“States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores.” (internal citations omitted)).
A. Legal incidence provides no practical limitations on state taxation power

The decision in Wagnon demonstrates the ease with which states can apply commodity taxes to tribes via the upstream strategy. By formally stating that the legal incidence falls upon upstream distributors, states can be assured of judicial affirmation. There is little need to “require” distributors to pass along these taxes to retailers; basic profit-seeking behavior suggests they will do so. Moreover, Wagnon demonstrates that that earlier restrictions on state taxation power are easily circumvented. In Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.,59 the Supreme Court prohibited the state taxation of tribal-tribal sales. By following the upstream taxation strategy described in Wagnon, however, states can effectively tax all commodities on tribal lands that are brought in through the state.

My intention at this point is not to criticize the legal incidence rule’s outcome as applied by Wagnon; as I discuss in Part IV, there may be no practical and justiciable limit to the state taxation power of commodities. I do find fault, though, with some of the arguments used in Wagnon to support the majority’s conclusion.

The Court in Wagnon conflates multiple arguments regarding the economic consequences of the state’s motor fuel tax.60 First, because the tribe owns the gasoline station, the Court discusses how “taxation” and “profits” are indistinguishable. This should not be a consideration, though, since the tribe should be entitled to generate taxes from such transactions regardless of the actual owner of the business. I discuss this point further in Part V.A. Second, the Court further argues that both the tribe and the state should be able to cumulatively tax the same transaction, analogizing to the federal government and the state’s ability to simultaneously tax motor fuels and income.61

Following economic theory, this latter argument can trigger serious confusion. There are two independent mechanisms by which incremental taxation could affect the tribe’s ability to tax. As a starting point, taxation increases the effective price of the good in question. If demand for the good is perfectly inelastic, then there will be no change in the consumption of the good. Under this scenario, a state tax has no impact on the tribe’s ability to tax. The only parties worse off are the consumers; their inelastic demand results in their purchase of the same level of gasoline or cigarettes, but they end up spending more on those goods.

60 See Wagnon at 114-15.
61 Id.
Perfectly inelastic demand is unrealistic, though, as demand generally decreases as prices increase. Important to note, though, is that demand decreases as prices increase for two reasons. First, there is an income effect: as prices increase, consumers simply cannot afford as much of the product as they could before. Second, there is also a substitution effect: consumers might decide that alternative products are more attractive because the taxed good bears a relatively higher price now. For my purposes, I focus on a particular substitution effect: the availability of a good without the tribe’s tax.

This substitution effect is the difference between the state-tribe taxation and the federal-state taxation analogies. A federal tax on fuel applies throughout the country. A consumer cannot escape the federal tax short of leaving the country (and this still depends on border controls and tariffs). Therefore, for customers considering purchase of fuel subject to both federal and state taxes, the federal tax does not provide an opportunity for the customer to search elsewhere. A customer traveling to another state will still be subject to the federal tax. The greater threat to state taxation is neighboring state taxation; if a neighboring state is readily accessible, the neighbor’s decision to not tax or have relatively lower taxes on fuel creates the substitution effect pressure. At some point, if a state is sufficiently small, it may become impossible to tax fuel differently from the neighboring state because every potential consumer could drive out of state to purchase fuel.

Parallel state and tribal taxation of fuel raises substitution effect problems similar to that of neighboring-state taxation. If both state and tribe tax fuel and the tribal stations must levy both taxes, it is relatively easy for individuals to drive off tribal lands and purchase fuel not subject to tribal tax. This substitution effect grows stronger as the ease of driving off tribal lands increases.

Justice Ginsburg recognizes this problem, noting that as “a practical matter, . . . the two tolls cannot coexist [because] scarcely anyone will fill up at [tribal] pumps.”62 Uncontroverted expert testimony similarly suggested that customers were unwilling to pay a premium for gasoline on the reservation.63

My general concern is that courts can only go so far under the construct of “legal incidence” while disregarding economic reality. At some point, courts must recognize the economic reality that state taxation does have an economic impact on tribes. The next step is to determine how courts can reasonably react to this reality.

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62 Wagnon at 116.
63 Wagnon at 126.
B. Justification of taxes based upon expenditures

Separate from the concern regarding legal incidence, note that both the majority and the dissent in Wagnon discuss expenses incurred by the state as potential justification of taxation. This is the same argument used in part to invalidate the state taxation in Bracker, and the Court has raised this concern in other Indian tax cases. This form of judicial review is troubling for a court interested in bright line rules. The possibility that a state tax is upheld by courts due to specific expenditures made by the state can trigger substantial uncertainty. For example, if the state declines to make those expenditures in the future, does that raise a new opportunity for tribes to litigate and attempt to strike down the tax? The Supreme Court does not explicitly discuss it in Wagnon, but does there need to be some level of proportionality between the tax and the expenditures?

I find this doctrinal method of upholding a state tax to be vulnerable to ambiguity and to run counter to the principles supporting bright line tax rules. The facts of costs, expenditures, and actual usage may vary greatly over time; striking down a tax based on those principles seems to create more uncertainty in the tax system.

I am not, however, arguing that this consideration of expenditures be entirely rejected. From a public policy perspective, government expenses must be balanced by revenue typically raised via taxation. I later argue that evaluation of expenditures should be central to resolving disputes over state taxation. For now, I simply suggest that invalidating a state tax because of current state expenditures may be an undesirable judicial rule.

III. PURPOSES OF TAXATION

Wagnon is the latest attempt by the Supreme Court to help address this ongoing state-tribal conflict. I want to take a step back and consider the potential underlying reasons for the conflict. The most basic concern, of course, is that both the state and the tribe have an interest in raising and spending tax revenues. As discussed above, both the majority and the dissent in Wagnon discuss how tax revenues may be spent. Important to note, though, is that the raising of revenue is not necessarily the only purpose for establishing a tax. Governments may be also concerned about the incentive effects of taxation: from an economic perspective, taxation can help individuals internalize the external costs of production or consumption.

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64 See Wagnon at 115, 129.
65 See Bracker at 148-49.
66 See, e.g., Colville at 157 (the state’s interest in taxation is strongest “when the taxpayer is the recipient of state services.”)
Policymakers might want to discourage gasoline consumption, for example, because the resulting pollution affects people other than the driver of the vehicle, and the driver of the vehicle might not voluntarily reduce her level of driving without the price signal from taxation. Taxation may also have expressive value: even if the tax does not drive individual behavior through increased prices, it may be a signal that society frowns upon particular activities.\textsuperscript{67} Taxes on cigarettes and alcohol are often referred to as “sin” taxes. Policymakers may also have the goal of redistribution through taxation: typically to take money away from those who have more and to shift it to those who have less.

\textit{A. Potential conflicts arising from the various purposes of taxation}

Given the varying purposes of taxation, I suggest we should look at the reasons conflicts may arise over commodity taxation between tribes and states. First, both parties have an interest in raising funds for governance. To some extent, raising government funds is a zero sum game—the more the state collects in tax revenue, the less there is available for the tribe. This form of dispute tends to be subjective and fact intensive: how do we compare the state’s entitlement to tax revenues with that of the tribe? Nonetheless, tax revenues may not be strictly zero sum between the state and the tribe—additional revenue may be available at the expense of the taxed parties, too.

Let us look at a hypothetical example. Why would a tribe attempt to place a 5\% excise tax on cigarette sales when the state applies a 10\% excise tax? One possibility is that the tribe is competing against the state for cigarette tax revenue: by offering a lower excise tax, consumers pay a lower effective price and are thus induced to purchase from a store under the tribal tax regime rather than a store under the state taxation regime. This competitive strategy was rejected by the Supreme Court in \textit{Colville}.\textsuperscript{68}

On the other hand, the offer of a lower excise tax might not be purely competitive in nature. The tribe might have the same goal of maximizing tax revenue, but it may have determined that the elasticity of demand for cigarettes (even ignoring the state’s tax rate) was such that it could obtain greater aggregate tax revenues at 5\% rather than 10\%. Stated another way, if the tribe could convince the state to lower its excise tax to the same 5\%, both the state and the tribe would have more tax revenues in total. This increase in total tax revenue would be attributable to the increased consumption of cigarettes at the 5\% tax rate, which would have to be

\begin{itemize}
\item[\textsuperscript{68}] 447 U.S. at 155
\end{itemize}
sufficiently high to offset the reduced per-cigarette tax revenue. I label this as a potentially cooperative strategy. While this is cooperative strategy a possibility, if a tribe were to unilaterally set its excise tax at a lower rate, it is difficult to determine how much its increase in tax revenue is attributable to displaced state consumption versus the amount attributable to a better estimate of demand elasticity. A clear demonstration of this cooperative strategy would be an attempt by the tribe to convince the state to match the tribe’s lower rate.

Another possibility for the tribe’s choice of a lower excise tax rate could be linked to the incentives argument. The tribe may believe, just as the state may believe, that cigarettes should be taxed because of the negative externalities of second hand smoke. Nonetheless, the tribe may estimate the harm from second hand smoke to be less than the state’s estimate, resulting in the tribe’s selection of a lower tax rate.

A different explanation for the tribe’s choice of tax rate might surround the expressive value of the tax rate. The tribe might believe that a 10% tax rate too strongly condemns the practice of smoking and that a 5% tax rate is a better balance between the governmental interests in tax revenue and the interests of the individual smokers.

Finally, the tribe might choose the lower 5% tax rate because they feel taxation of cigarettes is regressive in nature and that the state is improperly penalizing the poor.

**B. The role of legal incidence in conflict resolution**

Legal incidence doctrine does not directly address the above taxation purposes. Its main value is as a bright line rule that is judicially administrable. Bright line rules for permissible taxation are desirable for at least two reasons. First, there is the ease and cost of administration. States need to know what taxes are permissible; vague limitations may exacerbate conflict and litigation. Second, bright line rules may also be desirable for facilitating negotiation. We might think of bright line rules as a method of minimizing transaction costs for negotiations between tribes and states. If parties have greater mutual certainty as to reasonable negotiating positions, they may be more likely to come to agreement. As noted by W. Ron Allen

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69 See Wagnon, 546 U.S. at 113.
and the Arizona legislature, over 200 tribes in 18 states have negotiated state-tribal compacts regarding taxes.  

It is possible, though, that bright line rules might exacerbate conflict and not facilitate negotiations. If the bright line rules seem to defy common sense or provide many openings for refinements & exceptions, these might increase the potential for conflict. Bright line rules that also seem terribly unfair or unjust might similarly spur conflict. Although Justice Ginsburg does not explicitly follow this line of reasoning in her dissent, she does suggest that the Wagnon majority’s decision may cause more problems from a negotiation perspective.

Determining the true intent of the state or tribe in levying taxes can be a difficult task, analogous to any political, group, or legislative intent analysis. For purposes of this article, I presume that the disputes are primarily around tax revenue. While there are other purposes of taxation, I believe each side is mainly concerned about funding government services for which it requires tax revenues. I also assume that courts are interested in reducing litigation and facilitating negotiation between tribes and states.

IV. WHICH TAXATION AND JUDICIAL REVIEW SYSTEMS WILL ENABLE PURSUIT OF THESE GOALS?

With these goals in mind, I consider three possible taxation regimes. The first is a parallel, cumulative taxation regime under which both the state and the tribe may tax commodities. The second is a taxation regime in which the state or the tribe may tax a commodity to the exclusion of the other, and the final regime is one in which the state and tribe set the same exact tax on a commodity. I review these regimes in turn, followed by a consideration of the appropriate judicial review process.

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73 Id.

74 See Wagnon, 546 U.S. at 130-31 (noting that majority position “is particularly troubling because of the cloud it casts over the most beneficial means to resolve conflicts of this order . . . By truncating the balancing-of-interests approach, the Court has diminished prospects for cooperative efforts to achieve resolution of taxation issues through constructive intergovernmental agreements.”)
A. Parallel, cumulative taxation

Under this system, both parties may assess taxes on any commodities; these taxes are cumulative, so the fact that the state charges a 10% sales tax and the tribe charges a 14% sales tax results in a cumulative 24% sales tax on commodities. This effectively is the Wagnon majority’s proposed system.

Assuming that the tribe can only obtain enforcement of tax collection within its borders, this system is harmful to the tribe’s ability to raise revenues. Consumers will unilaterally pay a higher tax-inclusive price for commodities within tribal borders, making it difficult for tribal retailers to compete. The tribe will generally be forced to attract customers via alternative mechanisms, such as the casino described in Wagnon, although, as suggested by the record in Wagnon, casino visitors may be unwilling to purchase gasoline or cigarettes at a premium.

To the extent that the tribe disagrees with the state’s estimate of demand elasticity, this parallel concurrent system offers no benefits. No consumers will actually face the lower tax-inclusive price the tribe believes is a superior policy option, as all sales will include the higher state tax, too.

There is no advantage from an incentives perspective, unless we believe that governments (state, federal, and tribal alike) systematically underestimate the negative externalities due to commodity consumption. If all parties systematically underestimate, perhaps there is some benefit in making all taxes cumulative.

The expressive value of tribal taxes is unclear under this system. While the tribe’s tax rate might be lower than the state’s tax rate, customers must still pay both taxes. If the tribe already believed that a 10% tax rate was an excessive condemnation of cigarette consumption, it may be difficult to claim that the tribe’s support of an additional, cumulative 5% tax rate results in less condemnation. Nonetheless, if the tribe continues to argue that the state’s tax rate should not apply, there is perhaps expressive value in the tribe’s decision to apply the 5% tax rate.

There is no redistributive value in this system for the tribe, unless the tribe believed that commodity consumption was insufficiently taxed for purposes of redistribution. Even if the commodity were insufficiently taxed, however, the ease of evasion of the tribal tax by making purchases off-reservation will likely circumvent any redistributive value of the tribe’s additional tax.

B. Exclusive taxation

An alternative is to allow tribes and states to tax commodities separately
but to not make the taxes cumulative. Thus, a tribe could place a 5% tax on cigarette sales while the state applied a 10% tax on cigarette sales. If a consumer purchased the cigarette on tribal lands, she would pay a 5% sales tax. If she were to purchase the cigarette off-reservation in the state, she would pay a 10% sales tax. This roughly was the situation before Wagnon under Colville, although in principle, only tribal customers could benefit from the tribal sales tax—non-tribal members legally owed the state tax on cigarettes purchased on reservation.

In theory, this system allows both tribes and states to pursue the various tax interests described earlier. The main problem with this proposal is the high potential for the competitive tax strategy. It is generally easy to cross reservation borders, and if the tax differential is high enough, the tribe could obtain cigarette sales solely by way of the lower tax-inclusive price. These tax differential problems across international borders are usually addressed via border controls and tariffs, but these are impractical solutions for tribal-state boundaries.

From an empirical perspective, the prevalence of this competitive tax strategy is unclear. Tribes already have challenges in attracting non-member visitors and business to tribal lands with perhaps the exception of gaming facilities. Nonetheless, the Supreme Court disapproved of the competitive tax strategy in Colville. Furthermore, in Colville it allowed states to place at least “minimal burdens” on tribes in enforcing these taxes, but the effectiveness of these burdens in reducing competitive tax strategies may be in question. Overall, the problem of porous borders and competitive tax strategies may dwarf any potential gains in vindicating non-revenue purposes of taxation.

C. Same tax level, non-cumulative taxation

I suggest there is only one practical taxation scheme: one in which the tribe and state set the same commodity tax level. Customers thus pay the same commodity tax regardless of the location of purchase. Assuming that the commodity market is otherwise competitive, customers pay the same tax-inclusive price everywhere. This minimizes the risks of competitive taxation. This scheme fits well with the upstream taxation method, which is probably the most efficient method in terms of collections and auditing.

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75 447 U.S. 134 (1980).
76 447 U.S. at 155.
77 Id. at 151.
78 It may be similarly fine for the tribe to agree to a higher tax rate than that of the state, but I do not see evidence of tribes attempting to do so in reality.
Numerous tribes and states have negotiated such arrangements.79

The tradeoff is the lack of ability for the tribe to utilize taxation independently for the other purposes described. If the tribe has a say in the state’s taxation level, it may be able to pursue various taxation goals. To the extent the tribe can apply higher taxes than the state, it may still have some ability to handle redistribution. Market forces—the choice of consumers to avoid those higher taxes by going to shops on state land—may render that strategy ineffective, though. Assuming this scheme generally encourages improved negotiation between tribes and states, though, it at least improves the possibility that some of the other interests supported by taxation could be vindicated through variation in negotiated agreements.

Supporting this strategy allows courts and society to emphasize two general principles. First, tribes should not be allowed to manipulate commodity tax rates to obtain greater tax revenues at the expense of the state. This is something that is relatively easy for courts to identify and discourage. Second, tribes and states should be able to negotiate fair distributions of tax revenues through arbitration. Determining fair distributions is a fact-intensive process that does not lend itself towards appellate judicial analysis.

Furthermore, this proposal encourages predictability in the assessed taxation scheme. Businesses and customers will face less uncertainty and variation as to the taxes they owe on commodity purchases.80 This enables better business planning and requires less attention to ongoing litigation and legislative proposals.

V. THE ROLE OF THE COURTS

Given the judicial deference to Congress in matters of state-tribal taxation, the easiest implementation of this tax scheme would be via federal statute. Short of Congressional action, though, courts can still encourage this scheme post-*Wagnon*. The current balance of state and tribal tax powers is a judicial development of the concept of tribal sovereignty. I propose that courts extend the concept of tribal sovereignty to grant tribes a special claim to state tax revenues. This is distinct from the concept of tribal sovereignty as granting immunity to state taxation.

First, I suggest reading “legal incidence” under *Wagnon* broadly. In practical terms, I believe legal incidence analysis is a trivial exercise—it should be straightforward for states to pass tax laws following *Wagnon* that


80 See Miller, 40 Ariz. St. L.J. 1297 at 1314.
do not trigger legal incidence issues. The main remaining test is that of impermissibly discriminatory taxation. The test as outlined in Wagnon is sufficient; if there is some reasonable explanation for the state’s tax, namely the state’s maintenance of infrastructure leading to tribal assets, then the state tax is acceptable.\textsuperscript{81} States should not discriminate against tribes, but the Wagnon standard for discriminatory taxation is rather easy to satisfy. Moreover, because of my proposed tribal sovereignty claim on state tax revenues, tribes can negate the impact of borderline discriminatory taxes by claiming the resulting revenues.

I urge courts to read the core of Wagnon, though, as an analysis of the legitimacy of state taxes: when should the court strike down a state commodity taxation scheme? As implied by both Wagnon’s majority and dissent, expenditures incurred by parties are relevant to analysis. I suggest that Wagnon’s discussion of state expenditures is sufficient for purposes of legitimacy, but there is an unresolved question of state expenditures in the context of the distribution of state tax revenues. Furthermore, I argue that Wagnon and its predecessors fit within a judicial review structure that includes a tribal sovereignty claim for a portion of state tax revenues. Thus, while the state is certainly free to impose a dollar per gallon excise tax on all motor fuel entering the state under Wagnon, there is still an open question as to how those tax revenues will be allocated.

\textit{A. A limited class of inappropriate tax revenue usage}

\textit{Wagnon} already discusses expenditures related to tax revenues.\textsuperscript{82} The Supreme Court generally describes expenditures as being relevant to allowing taxation: the fact that a party incurs expenses related to the market for the good helps legitimate a tax. I argue, however, that there should be prohibited uses for taxes: artificially supporting a business or using the money as a rebate/coupon/promotion for the sold good is inappropriate activity that must be rejected. This usage of tax revenue is analogous to improper competition via tax rates.

This restriction should be narrowly construed, though. There may be a variety of expenditures that may be in support of a business. For example, the construction of a nearby casino or other amenities may serve to attract customers to a gasoline station.\textsuperscript{83} Nearly any expenditure by a tribe might be interpreted as a support for tribal businesses, as the attractiveness of tribal lands as a destination could bring in more customers to any tribal business. Moreover, the tribe itself might own businesses, similar to the

\textsuperscript{81} See Wagnon at 115.
\textsuperscript{82} Wagnon at 115.
\textsuperscript{83} See Wagnon at 126.
tribally owned gas station in *Wagnon*.

I suggest that these forms of subsidy are acceptable, though, as they do not have as direct of an impact upon the sale price of the good. Tribes already have enough challenges in attracting non-tribal customers to its lands.\(^8^4\) Allowing a broad restriction would similarly complicate analysis of state expenditures. I argue that the offense is limited to the marketing of an effectively reduced price good; as long as the facility continues to sell the commodity at a market competitive price, there is no harm from these forms of subsidy.

**B. A tribal claim on state tax revenues**

Thus far, I suggest that a broad reading of *Wagnon* should make the legitimation of state tax schemes easier; most states should be able to tax commodities easily under *Wagnon*’s legal incidence application. I propose that the superior channel for tribal concerns is via the distribution of those resulting tax revenues.

The Supreme Court’s focus on state expenses in *Wagnon* implies some recognition of benefit theory in taxation. “Under benefit theory, a just tax distributes the tax burden in accordance with the distribution of governmental goods and services.”\(^8^5\) Since a state is incurring expenses connected to the delivery and consumption of the fuel, it is entitled to recoup some of those expenses from the party benefiting from the fuel. A logical conclusion, then, is that a tribe may similarly be entitled to recoup some of its expenses connected to the delivery and consumption of the fuel.

I thus propose that the Supreme Court may be ready to recognize a tribal claim for a portion of state commodity tax revenues under its tribal sovereignty doctrine. This tribal sovereignty claim would be a unique claim; normal taxpayers cannot unilaterally demand some portion of tax revenues. Tribal government, however, has a unique, federally authorized responsibility to help restore Indian independence and self-sufficiency;\(^8^6\) tax revenues are an essential part of this equation. Ideally, this claim would simply be negotiated between the state and tribe. There are, of course, various principles that might come into play in determining fair shares of tax revenue;\(^8^7\) I do not attempt to cover them here. I do note, though, that a

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\(^8^4\) See Miller, 40 AZSLJ at 1317-18 (describing typical geographical isolation of Indian lands).

\(^8^5\) Nancy H. Kaufman, Fairness and the Taxation of International Income, 29 Law and Policy in International Business 145,157 Winter, 1998

\(^8^6\) See Bracker, 448 U.S. 136 at 144 n.10

\(^8^7\) For example, ability to pay may be an important factor in determining who should bear commodity related costs. See id.
fair distribution of revenues is a highly fact-intensive affair. I therefore suggest that this tribal sovereignty claim for state tax revenues should be subject to arbitration.

Because this form of claim does not yet have a substantial history, it is likely that parties presently may be unable to agree to terms as to the distribution of the tax revenues. The courts will play a critical role in helping guide this process, but the temptation to set bright line rules as to appropriate revenue distribution may be troublesome. The nature of the inquiry is quantitative and fact intensive, and bright line rules may lead to inequitable results.

I suggest that federal district courts conduct a highly deferential review of the arbitration, as per existing arbitration policy. Courts should certainly be aware of improper tax revenue usage as noted above. It may also be appropriate to consider expenditures in resolving tax revenue distribution. Although it may seem tedious, a detailed analysis is important to avoid skewing the balance of power in pre-litigation negotiations. The base assumption, though, could be that parties are entitled to the tax revenues stemming from consumer transactions on their land. Arbitration rather than litigation is probably best suited towards aiding such negotiation. Both parties are free to argue how various costs should come into play in dividing up the aggregate tax revenues. Resulting legal decisions would be fact-specific and of little precedential value, which hopefully would deter strategic litigation.

Again, this distribution of revenues does not affect the legitimacy of the state and tribal taxes; this avoids the unpleasant situation in which a tax loses legitimacy due to a change in expenditures. All that is fought over at this point is distribution of the ensuring tax revenues.

C. Limits to the tribe’s ability to claim tax revenues

Allowing tribes to make a claim on state tax revenues could open the door for a wide variety of claims. The routine claim would be the state’s taxation of cigarettes purchased by tribal members from a tribal retailer on tribal land. Under Wagon, this transaction can be taxed upstream by states. Tribes must be able to make a claim for these taxes if they are to be able to obtain any tax revenues from those products.

On the other hand, what happens to a tribal member who leaves tribal

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88 See, e.g., Shearson/American Exp., Inc. v. McMahon, 482 U.S. 220, 226 (1987) (recognizing a “federal policy favoring arbitration, requiring that we rigorously enforce agreements to arbitrate.” (citations and internal quotation marks omitted)).
lands, drives to a retail store in the state, and purchases a pack of cigarettes? The tribal member’s purchase is ordinarily subject to state taxation. Could the tribe apply a claim to that revenue?

I suggest that the answer is yes. We can imagine all sorts of commodities that would be taxed by the state. The state could ostensibly tax any commodity on a non-discriminatory basis; it levies the same tax for tribal and non-tribal customers. Nonetheless, the practical effect might be a disproportionate impact on the tribe if the tribe is the primary consumer of the commodity. Allowing the tribe to make a claim for the resulting tax revenues provides judicial review for state taxation schemes that may be creative discriminatory schemes.

Adding complexity are taxes on profits or on some non-per-unit tax that would impact commodity prices. I do not address the wider variety of state taxation schemes in this paper, but there are other state taxes, such as business registration fees, that may be contested. For example, in *Bracker*, the state applied taxes on trucks hauling timber that had been harvested from tribal lands. It may be that the existing legal incidence framework is sufficient to address these other tax schemes, and I do not have a comprehensive answer at this point. My initial reaction is that courts should be suspicious of such taxation schemes and make every effort to determine whether they are discriminatory in nature. As a parallel measure, allowing tribes to make a claim on such tax revenues may help alleviate problems that could be caused by such indirect taxation. Furthermore, allowing tribes to make revenue claims would avoid further line-drawing problems in establishing limits to non-discriminatory state taxes.

VI. REACTIONS

I am confident states and tribes will continue to find creative tax and revenue strategies; hopefully arbitration and the judicial system will encourage the two sides to sign tax compacts that will minimize ongoing conflicts. Besides the basic commodity tax schemes I described earlier in Part IV, I now address some alternative potential concerns with this proposal.

First, one broad alternative solution to these commodity tax concerns is border controls. If the state-tribal boundaries were to have effective border controls, differential levels of taxation between the state and tribe might not be as great of a problem. Border controls, however, are costly to maintain and patrol. Moreover, greater border controls may also further isolate tribal communities from the broader U.S. society. Tribes already have challenges in attracting people and investments to tribal lands; border controls may be another barrier to greater economic development and self-sufficiency for
tribes. From a doctrinal perspective under *Wagnon*, states have little incentive to pay for border controls if they can simply utilize upstream taxation to gain revenue from all commodity sales. I do not see aggressive border controls as a likely practical alternative solution.

A second concern is that this proposal is weakening the concept of tribal sovereignty. This may be true to some extent. If sovereignty is the freedom to set tax rates without constraint, tribes suffer some loss—they cannot unilaterally set a lower commodity tax rate to undercut the state tax. Nonetheless, tribes may have effectively lost this freedom already given the *Wagnon* upstream taxation strategy for states. If sovereignty instead is the ability to gain and spend tax revenues, this proposal may increase tribal sovereignty. If tribes presently have no real ability to pursue the other purposes of taxation, focusing on the ability to gain revenues may be a gain for tribal governance and sovereignty. By decoupling the process of taxation and assignment of tax revenues, it is possible that tribes may actually gain greater tax revenues by cooperating with states. This form of sovereignty may be as important as sovereignty tied to land usage, given the often low productive quality of reservation land and the modern service economy growth. If tribes pursue greater economic growth and self-sufficient through increased trade and inter-dependence with extra-tribal entities, a focus on generalized tribal claims as opposed to tribal lands may be a superior long term strategy.

A third concern could be that this proposal may not reduce the resources committed to litigation; instead, it might shift litigation onto the question of distribution of tax revenues. It is, of course, possible that the decades of litigation over “legal incidence” doctrine might simply be replicated in the area of tax revenue distribution. I suggest, though, that claims for tax revenues will be quantitative, fact-intensive discussions about tribal and state budgets. I believe appellate courts will be inclined to be highly deferential to arbitrators and trial courts in these decisions, so there should be a reduction in the level of appeals. This is likely because of appellate aversion to detailed quantitative and budgetary reviews. Moreover, the lack of strong remedies such as the wholesale invalidation of a certain state tax will reduce the stakes available on appeal; the parties will likely only perceive small marginal benefits from appeals. Thus, regardless of risk aversion, rational parties will tend to limit appellate litigation expenditures.

**VII. Conclusion**

As described by *Wagnon*, the judicially created concept of legal incidence has lost its value as a constraint on state-tribal taxation of commodities. I suggest that Congress and courts recognize this economic
reality and revisit the concept of tribal sovereignty. First, I encourage Congress and courts to show special deference to state-tribal compacts in which the tribes agree to match the state’s level of commodity taxation. This matched taxation rate minimizes the possibility of competitive tax strategies and is a practical equilibrium. Second, I suggest courts re-interpret tribal sovereignty as a unique claim on state tax revenues rather than emphasizing partial immunity to state taxation. Instead of disputing the state’s ability to tax, this interpretation of tribal sovereignty gives tribes the judicially enforceable right to make a claim to some portion of the state’s resulting tax revenue. Arbitrators can handle the fact-intensive disputes over the distribution of revenues, and I urge courts to be deferential to such arbitration results. By eliminating disputes over the state’s ability to tax, appellate courts can reduce uncertainty for business and customers in providing consistent tax rates.

Future work might include broad empirical analysis of the determinants of successful state-tribal negotiations. Some states such as New York have had a long history of cooperation with tribes regarding taxation; it could be helpful to isolate judicial, social, and organizational factors that have contributed to cooperation rather than litigation. Some variation of interest would be states that have come to differing agreements with different tribes in its borders. Also of particular interest would be any tribes that have been able to negotiate with multiple states, as those cases might shed some light on the comparative negotiating ability of states and tribes. There may be other useful parallels in state-state negotiations, particularly in the geographically dense Northeast U.S.

Other future work would also take a more comprehensive analysis of taxation and revenue for tribes and not be limited to this paper’s focus on taxation of commodities. On one end, as Justice Ginsburg noted in Wagnon, tribes may add value to commodities by selling them in proximity to complementary goods and services. Should courts consider the amount of value added to commodity sales in determining whether they are subject to state taxation? Tribes may also push towards production of commodities and services. As tribes move towards online provision of loans, for example, should states have the capability of taxing such transactions? The traditional tie of sovereignty to the physical land of the reservation steadily loses meaning given the various transactions utilized by modern tribes.

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89 See Wagnon at 126.