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A Judicial Framework for Applying Supreme Court Jurisprudence to the State Income Taxation of Indian Traders

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Introduction

Over forty years ago, the United States Supreme Court, in Warren Trading Post v. Arizona Tax Commission, held that Indian traders licensed under federal law were immune from state sales taxes because the federal law preempted the states from

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1 380 U.S. 685 (1965).
imposing these taxes.² In this very important case, the Supreme Court initiated a string of decisions³ that validated federal authority and tribal sovereignty at the expense of state taxing powers and regulatory authority. Warren Trading Post was the Warren Court’s second decision in a line of three cases that were unmistakably pro-tribe.⁴ This trend continued under the Burger Court,⁵ lost steam under the Rehnquist Court,⁶ and seems unlikely to become pro-tribe again under the Roberts Court.⁷

² Id. at 691.
³ See McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973) (general federal law preempts the imposition of Arizona’s income tax on a member who lives and works on the Navajo Nation); Central Machinery Co. v. Arizona Tax Commission, 448 U.S. 160 (1980) (federal Indian trader statute and regulations preempted Arizona’s transaction privilege tax on sale of farm machinery to a tribe by an unlicensed Indian trader where the company’s place of business was located off the reservation but where most of the transaction took place on the reservation); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (Arizona’s motor fuel and motor carriers excise taxes imposed on a non-Indian company providing transportation services to the Tribe were preempted by federal statutes and regulations covering the Tribe’s timber harvesting and processing business); Ramah Navajo School Board v. Bureau of Revenue of New Mexico, 458 U.S. 832 (1982) (New Mexico’s gross receipts tax on construction services performed by a non-Indian construction company was preempted by federal statutes and regulations authorizing the formation of a tribal school board and the construction of a school); Cotton Petroleum Corporation v. New Mexico, 490 U.S. 163 (1989) (New Mexico severance tax was not preempted by federal law on oil and gas production from wells located on tribal lands where the sales were to customers located off the reservation); Department of Taxation and Finance of New York v. Milhelm & Attea Brothers, Inc., 512 U.S. 61 (1994) (federal Indian trader statute and regulations did not preempt state statute designed to measure and tax cigarette sales by a licensed Indian trader to non-Indians); Arizona Department of Revenue v. Blaze Construction Co., 526 U.S. 32 (1999) (federal Indian trader statute does not preempt Arizona’s transaction privilege tax imposed on road construction services performed on the reservation under a contract with the United States).

⁴ See Williams v. Lee, 358 U.S. 217 (1958) (state court did not have jurisdiction over lawsuit brought by an Indian trader who sold goods on credit to a tribal member living on the Navajo Nation; jurisdiction was in the tribal court); Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685 (1965) (federal preemption of state sales tax imposed on a federally licensed Indian trader); Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968) (the Tribe’s treaty hunting and fishing rights continued even after a federal statute terminated the Tribe’s status as a federally recognized Indian tribe).

⁵ See, e.g., McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973) (state income tax on a tribal member who lived and worked on the Navajo Nation infringed the Tribe’s right of self-government and was preempted by US-Navajo Treaty and federal legislation); Morton v. Mancari, 417 U.S. 535 (1974) (Indian preference hiring policy adopted and used by the Bureau of Indian Affairs did not violate the equal protection rights of a non-Indian who was denied a promotion because the classification was based on political, not racial, status); Bryan v. Itasca County, 426 U.S. 373 (1976) (a state county could not impose its property tax on the mobile home located on the Leech Lake Reservation when it was owned and occupied by a tribal member); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (the Tribe possessed the inherent power to tax activities carried on by a non-member within the Tribe’s reservation); United States v. Mitchell, 463 U.S. 206 (1983) (various pieces of federal legislation, when taken together, constituted a waiver of the sovereign immunity of the United States and permitted an individual Indian to sue for damages for federal mismanagement of funds); County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) (permitting the Oneida Nation to assert a land claim for tribal lands illegally transferred in 1795); National Farmers Union Insurance Companies v. Crow Tribe, 471 U.S. 845 (1985) (before seeking review in federal court, a party to a tribal court action must first exhaust tribal remedies).

⁶ See, e.g., Cotton Petroleum Corporation v. New Mexico, 490 U.S. 163 (1989) (New Mexico severance tax permitted on oil and gas production on tribal lands); Brendale v. Confederated Tribes and Bands of the Yakima Indians, 492 U.S. 408 (1989) (permitting state county to impose its zoning laws on some lands located within a tribe’s reservation boundaries); Duro v. Reina, 495 U.S. 676 (1990) (the Tribe did not have criminal jurisdiction over an Indian who committed a crime on the Tribe’s reservation because he was a
The Warren Trading Post line of cases, nonetheless, remains relatively robust even though other Supreme Court cases have continually eroded tribal sovereignty from the early eighties to the present. Perhaps the continuing robustness of Warren Trading Post lies in its validation of the plenary power of Congress over Indian affairs. Or perhaps the Rehnquist Court was, and Roberts Court is, willing to validate federal authority at the expense of state taxing power because the economic stakes are relatively low from the federal perspective.

This article looks at the power of states to impose their income taxes on licensed and unlicensed Indian traders. Warren Trading Post dealt with Arizona’s retail sales tax as applied to a licensed Indian trader that operated on the reservation of the Navajo Nation and sold goods almost exclusively to members of the Tribe. The Supreme Court found that the federal regulatory scheme that applied to Indian traders left no room for state tax law to operate. The federal regulatory scheme preempted state law and barred Arizona’s sales tax. Federal statutes continue to regulate Indian traders and provide that the power to appoint Indian traders lies exclusively with the Commissioner of Indian affairs,\textsuperscript{8} that traders must follow the rules established by the Commissioner,\textsuperscript{9} that the President of the United States has the authority and discretion to prohibit specific trade with specific tribes,\textsuperscript{10} and that unlicensed traders are subject to fine and forfeiture of their goods.\textsuperscript{11} In addition, detailed federal regulations also continue to regulate this area.\textsuperscript{12} Accordingly, federal preemption still limits the state power to tax.

In a series of subsequent cases, the Supreme Court applied this preemption approach to other state taxes\textsuperscript{13} and to unlicensed Indian traders.\textsuperscript{14} The Supreme Court, however, has

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  \item [7] See, e.g., Wagnon v. Kansas Department of Revenue, 546 U.S. 95 (2005) (Kansas, because it taxed off-reservation wholesalers, could tax gasoline sales to non-members of the Tribe made by a gas station on the reservation and owned by the Tribe).
  \item [9] See id. at § 262.
  \item [10] See id. at § 263.
  \item [11] See id. at § 264.
  \item [14] Central Machinery Co. v. Arizona Tax Commission, 448 U.S. 160 (1980) (federal Indian trader statute and regulations preempted Arizona’s sales tax on the sale of farm machinery to a tribe by an unlicensed Indian trader where the company’s place of business was located off the reservation but where most of the transaction took place on the reservation).
\end{itemize}
limited the preemptive effect of federal law when the sales were to non-Indians.\textsuperscript{15} These later cases, although limiting in effect, have nonetheless revalidated the broad preemption approach initially taken in Warren Trading Post.\textsuperscript{16} No federal cases have considered whether Warren Trading Post extends to state income taxes. A simple example helps illustrate the issue I explore in this article.

T, a licensed Indian Trader, sells a variety of goods on the reservation of X Tribe. T’s business and residence are located on the reservation of X Tribe. T is a non-Indian. X Tribe is located in State M. State M has a retail sales tax of 6\% and an income tax of 4\% on net income. About 95\% of T’s customers are members of X Tribe. In the current year, T makes retail sales of $2 million and has net income from these sales of $200,000. Under Warren Trading Post, T is exempt from M’s 6\% retail sales tax. But is T exempt from M’s 4\% tax on net income of $200,000? In this situation, $8,000 is at stake each year.

A 1970s case from the Supreme Court of North Dakota seems to provide some answer to the question of whether the federal Indian trader statute preempts a state’s income tax. In White Eagle v. Dorgan,\textsuperscript{17} the North Dakota Supreme Court seemed to say that the federal Indian trader statute did preempt North Dakota’s state income tax.\textsuperscript{18} The question has resurfaced in North Dakota. In a recent decision of an administrative law judge, the Tax Commissioner of North Dakota in Luger v. Fong appears to have conceded that White Eagle actually decided the state income tax question in favor of federal preemption.\textsuperscript{19}

The decision of the North Dakota Supreme Court in White Eagle and the decision of the administrative law judge in Luger v. Fong seem remote, obscure, and inconsequential. These two cases, however, could have important revenue implications for all those states with an income tax and with federally recognized Indian tribes engaged in substantial economic activity.\textsuperscript{20} If the White Eagle and Luger cases become the predominant

\textsuperscript{15} See Cotton Petroleum Corporation v. New Mexico, 490 U.S. 163 (1989) (New Mexico’s severance tax was not preempted by federal law on oil and gas production from wells located on tribal lands where the sales were to customers located off the reservation); Department of Taxation and Finance of New York v. Milhelm & Attea Brothers, Inc., 512 U.S. 61 (1994) (federal Indian trader statute and regulations did not preempt state statute designed to measure and tax cigarette sales by a licensed Indian trader to non-Indians); Arizona Department of Revenue v. Blaze Construction Co., 526 U.S. 32 (1999) (federal Indian trader statute does not preempt Arizona’s transaction privilege tax imposed on road construction services performed on the reservation under a contract with the United States).

\textsuperscript{16} See, e.g., Arizona Department of Revenue v. Blaze Construction Co., 526 U.S. 32, 37 (1999) (citing three preemption cases and noting that the sales in those cases were to tribes or to tribal members).

\textsuperscript{17} 209 N.W.2d 621 (1973).

\textsuperscript{18} Id. at 624. The North Dakota Supreme Court found the holding in Warren Trading Post to be so sweeping that North Dakota’s attempt “to impose its taxes in these [consolidated] cases” could not be sustained. Id. One of the taxes involved was North Dakota’s income tax imposed on a licensed Indian trader. Id. at 622.


\textsuperscript{20} Some of these states are Arizona, California, Connecticut, Michigan, Minnesota, Montana, New Mexico, New York, North Dakota, Oklahoma, Oregon, Utah, and Wisconsin. But see Loveness v. Arizona
paradigm, then states face the potential loss of income tax revenues from vendors that sell goods and services to Indian tribes. The potential loss of revenue could be huge because the United States Supreme Court has held that the preemptive effect of the Indian trader statute extends even to those vendors that are not licensed under the Indian trader statute when they sell goods and services to a tribe or to its members and if the transaction is located predominantly on the reservation. Giving preemptive effect for both licensed and unlicensed Indian traders expands the number of taxpayers who may be exempt from state income taxation on the portion of their profits attributable to their Indian trade.

The stakes are large for the taxpayers and well worth litigating. Because the taxes involved are state taxes and because federal law denies federal courts jurisdiction to consider the validity of state taxes by operation of federal law, taxpayers must litigate their cases within state systems that provide administrative and judicial review. As a result, federal review will come only in the United States Supreme Court on an appeal from a state appellate court that has provided final review. In cases involving state taxation within Indian country, state courts have a long history of validating the taxing power of the states in which they sit. Tax revenues from state taxation run a state’s government, including its judicial system. Consequently, we should expect state tax authorities and their courts to have a pro-state bias. And, of course, the decided state cases paint just such a picture.

Department of Revenue, 963 P.2d 303 (Ct. App. Ariz. 1998), cert. denied, 525 U.S. 1178 (1999). In the Loveness case, the Arizona Court of Appeals decided that the federal statutes and regulations that preempted Arizona’s motor fuel and motor carriers excise tax in White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), did not preempt the imposition of Arizona’s income tax. Id. at 308. Loveness and White Mountain Apache involved the same taxpayer, the same Tribe, and the same underlying transactions. Id. at 306.

21 See Central Machinery Co. v. Arizona Tax Commission, 448 U.S. 160 (1980) (federal Indian trader statute and regulations preempted Arizona’s transaction privilege tax on the sale of farm machinery to a tribe by an unlicensed Indian trader where the company’s place of business was located off the reservation but where most of the transaction took place on the reservation).

22 See 28 U.S.C. § 1341 (2007). An exception to § 1341 exists in cases when a tribe brings the lawsuit to contest the validity and application of the state tax. For a recent example, see Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 100 (2005) (the Tribe sued for a declaratory judgment and for injunctive relief in the federal court). This exception applies because a separate federal statute, 28 U.S.C. § 1362 (2007), provides federal court jurisdiction in suits brought by tribes that raise a federal question. See Prairie Band Potawatomi Nation v. Richards, 241 F.Supp.2d 1295, 1299 (D. Kan. 2003). Moreover, the state does not enjoy 11th amendment sovereign immunity if a tribe is the party bringing the lawsuit. Id. at 1301.

23 See The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867) (United States Supreme Court invalidated the attempt by a county in Kansas to impose its real property tax on property owned by Native Americans; the Kansas Supreme Court approved of the taxation; for the state case see Blue Jacket v. Commissioners, 3 Kan. 299 (Kan. 1865)); McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973) (state income tax on a tribal member who lived and worked on the Navajo Nation infringed the Tribe’s right of self-government and was preempted by US-Navajo Treaty and federal legislation, but Arizona Court of Appeals had upheld the tax; for the state court case see McClanahan v. State Tax Commission, 484 P.2d 221 (1971)); Bryan v. Itasca County, 426 U.S. 373 (1976) (a state’s county could not impose its property tax on a mobile home located on the Leech Lake Reservation when it was owned and occupied by a tribal member, but the Minnesota Supreme Court approved imposition of the tax; for this decision see Bryan v. Itasca County, 228 N.W.2d (Minn. 1975).

24 The strength of state concern over its power to tax within Indian Country is reflected in the large number of state amici briefs filed in Arizona Department of Revenue v. Blaze Construction Co., 526 U.S. 32
The purpose of this article is to provide a distinctly federal perspective that takes tribal interests into account. This article, without apology, asserts that exemption from state income taxation for licensed and unlicensed Indian traders is a logical extension of the United States Supreme Court’s decision in Warren Trading Post. A state income tax imposed on the profits of an Indian trader treads on the federal and tribal interests just as much as a retail sales tax on groceries and clothing or an excise tax on gasoline or cigarettes. In anticipation of an ultimate victory in the United States Supreme Court, licensed and unlicensed Indian traders should begin filing refund claims for the state income taxes they have paid on income earned on their sales of goods and services to tribes and tribal members when the underlying transactions can be located within Indian country. In most states, this means filing claims for the current year and the three to four preceding years. Each year of delay means that the particular state statute of limitations bars a claim for another taxable year.

Part I of this article begins with the Indian trade in North America by providing a very brief history of the fur and pelt trade through the middle of the 19th century. Part II of the article turns to the significant Supreme Court cases of the 19th century and explains how Justice John Marshall set the stage with his 1832 opinion in Worcester v. Georgia. The tax cases in the late 19th century are briefly reviewed but provide little useful guidance on the question of state income taxation of Indian traders. Part III turns to the seminal case of Warren Trading Post v. Arizona Tax Commission and the line of cases that the United States Supreme Court subsequently has decided. In Part IV the discussion turns to the two states that have judicial authority addressing the state income tax question. Part V makes a general proposal for a logical and unified approach to state taxation in Indian country, placing emphasis on the role of Congress and on the ability of states to seek relief there through remedial legislation. In Part VI the article applies the general preemption analysis of the cases to the specific question of whether states can impose their income tax on the income that Indian traders earn from on-reservation activity. Part VII considers some of the variables that may come into play as the courts explore the reach of federal preemption in this area. And in Part VIII the article considers whether preemption will extend to the sale of services to tribes and their members.

I. In the Beginning There Was the Fur and Pelt Trade

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26 31 U.S. (6 Peters) 515 (1832) (Georgia’s civil and criminal laws did not extend to a non-Indian living on the Cherokee reservation located within Georgia).
28 For these cases, see supra note ___.
A. British and Colonial Regulation

For those of us who study federal Indian law, looking back into the 16th, 17th, 18th, 19th, and 20th centuries for relevant legal authority is not an uncommon experience. Our current journey begins during the 17th century colonial period. The 17th century saw the rise of the North American fur and pelt trade. The economics of the fur and pelt trade were quite simple: furs and pelts were abundant in North America and scarce in Europe while common European products, such as axes, muskets, iron pots, and woolen blankets, were relatively inexpensive as trade items. Furs and pelts had the added advantage of being light in weight and small in volume when compared to other items of equal value. This reduced transportation costs and increased profits. The fur and pelt trade in North America remained an important economic force through the 19th century.

Life on the ground in the 17th century British colonies of North America was a challenging existence. Early experience showed that the violence between colonists and the various tribes often arose out of fraudulent trade practices by the Europeans. As a result, colonial governments began regulating Indian trade to reduce instances of cheating practiced by European traders. A second reason for regulating the fur and pelt trade was control of trade. British laws, for example, required colonial exports to be transported in British ships, which enhanced British shipping income and also forced the trade into and out of Britain.

For a substantial part of the 17th and 18th centuries, France and Britain contended for control of the North American fur and pelt trade. Much of the colonial regulation of the

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31 See 1 Phillips, supra note __, at 113 (furs were light weight for shipping).
33 See Debo, supra note __, at 31-50.
35 See 1 Phillips, supra note __, at 392.
36 See Norton, supra note __, at 93 (noting that all cargoes of furs and pelts in New York were required to be shipped out of a British port by the early 18th century) and 1 Phillips, supra note __, at 377-89 (summarizing regulation by the British Board of Trade and its efforts to further British interests).
fur and pelt trade was aimed at preserving and expanding colonial interests. The French and Indian War was the culmination of the Anglo-French rivalry in North America, with Britain emerging as the primary European power. Following this victory, King George III issued the Royal Proclamation of 1763. Improving relations with the tribes, many of which had fought alongside France, and promoting the fur and pelt trade were key goals of the Proclamation. To that end, the Proclamation required all Indian traders to apply for a license and to give security, which could be forfeited if the trader did not follow the regulations imposed.

B. Regulation under the Articles of Confederation and the Constitution

Britain’s hegemony in North America, however, was short-lived. The Atlantic colonies banded together, declared independence, and ultimately won the Revolutionary War. Under the Articles of Confederation, the United States continued to regulate the Indian trade. In fact, the regulation of the Indian trade was so important that Congress, under the Articles of Confederation, had the power to regulate Indian trade. Even during the Revolutionary War, Congress paid attention to the Indian trade and made some attempts to regulate it even though the states were at war with Britain. After the end of the war and before the adoption and implementation of the Constitution in 1789, Congress under the Articles of Confederation spent significant time regulating Indian affairs, including regulation of trade with Indians. Congress under the Articles of Confederation negotiated treaties with various tribes, many of which contained some language dealing with regulating trade.

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38 See id. at 390-430 (explaining colonial regulation of the fur trade).
39 See id. at 523-44. “The British triumph after a century and a half of conflict left the French with no fur lands of their own.” Id. at 544.
41 For a general discussion on British promotion of trade with the Indians following the Proclamation, see Robert N. Clinton, The Dormant Commerce Clause, 27 Conn. L. Rev. 1055, 1092-93 (1995).
42 See Washburn, supra note __, at 2135-39.
43 See Ordinance for the Regulation of Indian Affairs, August 7, 1786, 31 Journals of the Continental Congress (GPO Washington, DC) (1934) pp. 490-93 (requiring Indian traders to be licensed and to post bond, among other requirements).
44 Articles of Confederation, art. 9, § 4, reprinted in 1 Stat. 7 (“The United States in Congress assembled shall have the sole and exclusive right and power of …regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated…”).
45 See, e.g., Treaty with the Delawares, Sept. 17, 1778, 7 Stat. 13 (article V of the treaty dealt with trade, with an emphasis on one that was “well regulated” and fair).
46 See, e.g., Ordinance for the Regulation of Indian Affairs, supra note __.
47 See, e.g., Treaty with the Cherokee, Nov. 28, 1785, 7 Stat. 18 (article IX of the treaty stated: “For the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper”); Treaty with the Choctaw, Jan. 3, 1786, 7 Stat. 21 (article VIII contained a trade provision); Treaty with the Wyandot, Jan. 9, 1789, 7 Stat. 28 (article VII dealt with trade and provided that traders without a license would be arrested).
Under the Constitution, Congress quickly stepped in to assert the federal power to regulate trade with the Indian tribes and passed legislation in July 1790. This first federal legislation under the Constitution in 1790 was merely a continuation of the earlier practices of regulating the Indian trade by the British and the Continental Congress. The requirement of a license and the posting of security was a regulatory approach that had been used during the colonial period. The federal legislation that came at the end of the 18th century reflected the continuing need to regulate the Indian trade for the twin purposes of promoting peaceful relationships with tribes and promoting beneficial commerce.

By 1796 the federal government entered the Indian trade directly and authorized the establishment of federally owned and operated trading posts. The purpose of this strategy was twofold. First, Congress believed that it could reduce frictions on the boundaries between Indian and non-Indian territories if federal traders charged fair prices and extended reasonable credit. Second, the extension of credit created debts that could later be extinguished through land cessions negotiated in treaties. It was fairly obvious to Congress and to the Washington administration that this methodology for securing...
territorial concessions might be cheaper than by direct payment or through military actions. Indeed, the method had its successes and ended a few decades later only when private Indian traders prevailed upon Congress to discontinue the system. Private traders felt that the federal traders were unfair competition and effectively prevented them from making a fair return on their investments. Direct federal participation in the fur and pelt trade nonetheless showed the presence of a strong federal interest.

From our perspective in the 21st century, we associate the fur and pelt trade with a populist American history that includes Davy Crockett, Daniel Boone, Kit Carson, and the mountain men who penetrated the Rocky Mountains to trap beaver and then bring them to market. As the above discussion shows, however, the fur and pelt trade was an important part of a multi-century commerce having a global dimension. The trade was so important that France, Britain, and America contended for control of it and fought major wars aimed at gaining control over this trade. By the mid 19th century, the North American fur trade was, when compared to mining, railroads, cotton, and manufacturing, a relatively less important part of the North American economy. Nonetheless, federal regulation of the Indian trade continued and still takes place today. Indian traders still apply for and receive licenses for the right to conduct trade within Indian country with Indians and with tribes. These 21st Indian traders operate gas stations, grocery stores, banks, hotels, and restaurants. They build roads, construct buildings, and provide goods and services to tribally owned gaming operations.

During the early federal period, after the federal government acquired its own power to tax in the new Constitution, tax issues involving the Indian trade did arise. First mention that this author has found is in the Jay Treaty, which Congress ratified in 1794. Following the Revolutionary War, the British retained occupation of a number of forts within what had become American territory by operation of the Treaty of Paris. In

57 See Thomas Jefferson letter to William Henry Harrison, supra note __.
58 See 1 Francis Paul Prucha, The Great Father: The United States Government and the American Indian (University of Nebraska Press, Lincoln) (1984) pp. 115-34 (giving an overview of the system and concluding that private fur traders lobbied Congress and caused the demise of the factory system).
59 Id.
61 See id. at 523-44 (describing the French and Indian War).
62 See 2 Phillips, supra note __, at 563-76 (summarizing the history of the North American fur trade).
63 See id. at 523-44 (describing the French and Indian War).
64 See 25 C.F.R. Part 140 (2006) (sections 140.1 through 140.26 deal with the regulation and licensing of Indian traders).
65 U.S. Const. art. I, § 8, cl. 1 (providing that “Congress shall have the power to lay and collect taxes”).
66 See Treaty of Amity, Commerce and Navigation, Nov. 19, 1794, art. III, 8 Stat. 116, 118 (which provides: “No duty of entry shall ever be levied by either party on peltries brought by land, or inland navigation into the said territories respectively, nor shall the Indians passing or repassing with their own proper goods and effects of whatever nature, pay for the same any impost or duty whatever.”).
addition, American access to the Mississippi was contested. The Jay Treaty, which was extremely unpopular in the United States, was an attempt to resolve these and other issues. Of importance to us is the language that dealt with the Indian trade. This language stipulated that the Indian trade would be largely tax free until it reached a point of appropriate federal taxation. This meant that states were not free to impose their taxes. In a 1799 tax statute, Congress specifically granted tax exempt status on furs, pelts, and goods traded or carried by Indians. These early examples of Indian trade and its immunity from state taxation demonstrate that general tax exemption was very much the status quo. It is safe to assume that the United States and the various tribes that negotiated treaties understood that they would be free of federal and state taxation unless otherwise stated in the particular treaty.

II. Important Judicial Decisions before Warren Trading Post

The first federal case dealing with state powers within Indian country was Worcester v. Georgia. In 1832 the United States Supreme Court held that Georgia’s statutes attempting to regulate non-Indian activity within the Cherokee Nation had no force or effect. The federal relationship that the Cherokee Nation had with the federal government of the United States preempted Georgia’s attempt to regulate behavior within the territory of the Cherokee Nation. This federal preemption occurred even though the territory of the Cherokee was within the boundaries of the state of Georgia. Worcester v. Georgia is important in the context of state taxation of Indian traders because the Georgia laws, although not tax laws, were held to be invalid by the United States Supreme Court and were aimed at non-Indians.

The parallels between Worcester v. Georgia and state income taxation of Indian traders are quite important. Samuel Worcester, who was the defendant in the Georgia criminal prosecution, was a missionary who was present on the Cherokee Nation with permission from the federal government and from the Tribe. In fact, Worcester’s missionary society received federal funding to support his efforts to civilize and Christianize the Cherokee. A number of treaties and federal statutes established a federal regulatory

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68 See Treaty of Amity, supra note ___.
69 See Act of March 2, 1799, ch. XXII, § 104, 1 Stat. 627, 701 (exempting Indians from taxes imposed by the statute).
70 31 U.S. (6 Pet.) 515 (1832).
71 Id. at 561 (“The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.”).
72 Id.
73 See id. at 562 (Worcester “was residing in the nation with its permission, and by authority of the president of the United States”).
presence aimed at preserving the political autonomy of the Cherokee Nation.\textsuperscript{75} The presence of these treaties and statutes nullified Georgia’s attempt to assert jurisdiction over the territory held by the Cherokee Nation.\textsuperscript{76} In particular, the Georgia legislation regulated Worcester’s conduct and criminalized it if the conduct did not conform to the statute.\textsuperscript{77} Indeed, Worcester was convicted and sentenced to four years at hard labor.\textsuperscript{78}

In the Worcester case, we see that a pervasive federal presence reflected in treaties and federal legislation was more than enough to restrict the legislative authority of Georgia, even when it involved an attempt to regulate the conduct of a non-Indian. The 20\textsuperscript{th} century state tax cases involving Indian traders undertake an analytical approach that is almost identical to the one taken by Justice John Marshall in his Worcester opinion.

Later in the 19\textsuperscript{th} century, the United States Supreme Court decided four cases involving territorial taxation of railroads and cattle owners within Indian reservations. The first two cases involved railroads whose rights of way crossed Indian reservations. In Utah & Northern Railway v. Fisher,\textsuperscript{79} the Supreme Court validated a real property tax imposed by the Territory of Idaho on a right of way granted by a tribe to the railroad. The railroad argued that its right of way was on the reservation and, therefore, beyond the taxing power of the territory.\textsuperscript{80} Justice Field, writing for the court, concluded that the right of way extinguished any rights of the Tribe. This extinguishment, he asserted, converted the right of way into non-reservation lands.\textsuperscript{81} Justice Field, however, conceded that the parties had stipulated that the railroad’s right of way was geographically within the reservation.\textsuperscript{82} Nonetheless, he concluded that the granting of the right of way by Congress effected a termination of tribal interest and a transfer of governmental authority to the territory.\textsuperscript{83}

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\textsuperscript{75} Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 551-57 (1832) (describing and quoting from two treaties and two pieces of federal legislation).

\textsuperscript{76} Id. at 562 (“It is the opinion of this court that the judgment of the superior court for the county of Gwinnett, in the state of Georgia, condemning Samuel A. Worcester to hard labour, in the penitentiary of the state of Georgia, for four years, was pronounced by that court under colour of a law which is void, as being repugnant to the constitution, treaties, and laws of the United States, and ought, therefore, to be reversed and annulled.”)

\textsuperscript{77} Id. at 542 (The Georgia statute provided that “all white persons, residing within the limits of the Cherokee nation on the 1st day of March next, or at any time thereafter, without a license or permit from his excellency the governor, or from such agent as his excellency the governor shall authorise to grant such permit or license, and who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeanor, and, upon conviction thereof, shall be punished by confinement to the penitentiary, at hard labour, for a term not less than four years.”).

\textsuperscript{78} Id. at 562.

\textsuperscript{79} 116 U.S. 28 (1885).

\textsuperscript{80} Id. at 31-32.

\textsuperscript{81} Id.

\textsuperscript{82} Id. at 32-33.

\textsuperscript{83} Id at 32 (“By force of the cession thus made, the land upon which the railroad and other property of the plaintiff are situated was, so far as necessary for the construction and the working of the road, and the construction and use of the buildings connected therewith, withdrawn from the reservation. The road and property thereupon became subject to the laws of the Territory relating to railroads, as if the reservation had never existed.”).

\end{footnotesize}
The underlying problem with Justice Field’s analysis is his failure to see the ambiguities in the underlying federal statute authorizing the granting of the right of way.\(^{84}\) The statute restates the agreement between the Tribe and the United States.\(^{85}\) This agreement uses language suggesting that the Tribe conveyed fee title to the United States.\(^{86}\) The agreement also restates that the existing treaty between the United States and the Tribe remains in full force.\(^{87}\) The statute implementing this agreement grants a right of way from the United States to the railroad.\(^{88}\) The right of way is subject to various conditions.\(^{89}\) The statute fails to state who will own the property when and if the railroad stops using it as a rail line.\(^{90}\) The statute also fails to state whether the underlying fee interest is held by the United States as trustee for the Tribe or whether the United States acquired and retained full fee title.\(^{91}\) Given this ambiguity, Justice Field failed to consider whether the canons of construction should apply in favor of the interest of the Tribe.\(^{92}\) He probably could not conceive of the possibility that the Tribe might some day want to tax the railroad right of way in the same way that the territory did. In addition, he could not see how the Tribe might actually have some governmental interest in the railroad’s use of the right of way as a matter of health and safety for tribal members.

The next railroad case was Maricopa and Phoenix Railroad v. Arizona Territory.\(^{93}\) In this case, Justice Edward Douglass White, writing for the Court, faced a set of circumstances quite different from those found in the Utah & Northern case. In Phoenix Railroad, Congress granted a right of way to the railroad without the consent of the Tribe, even though the federal statute authorizing the granting of the right of way required the consent of the Tribe. For some reason, the Court viewed the federal statute creating the reservation and the federal statute authorizing the granting of the right of way as something other than a treaty. This much was true. However, the status of the reservation as created unilaterally by statute instead of by treaty did not nullify the need of the consent of the Tribe, which Congress required.\(^{96}\)

\(^{85}\) Id. at 148-49.
\(^{86}\) Id. at 148 (the Tribe is described as surrendering title and ceding the lands to the United States).
\(^{87}\) Id. at 148-49.
\(^{88}\) Id. at 149 (statute grants from the United States to the railway a “right of way” and “use” of land).
\(^{89}\) Id. at 149-50 (the statute conditions the railroad’s continued use of the land for railroad purposes on the railroad’s promise to pay damages to the Tribe for fires that it might cause).
\(^{90}\) Id.
\(^{91}\) Id.
\(^{92}\) The canons of construction had already developed. For a good summary of these canons, see Antoine v. Washington, 420 U.S. 194, 199-200 (1975) (stating that federal legislation must be construed in the light of the longstanding canon that treaties and statutes involving Indians should be construed in their favor). Justice Field, however, may have chosen not to apply the canons of construction because he may have viewed the railroad, and not the Tribe, as the beneficiary of such an interpretation.
\(^{93}\) 156 U.S. 347 (1895).
\(^{95}\) See Act of January 17, 1887, c. 26, 24 Stat. 361-63 (“Congress may at any time amend, add to, alter, or repeal this act.”).
\(^{96}\) Id. at § 2, 24 Stat. at 362.
The statute authorizing the granting of the right of way allowed the United States to alter, amend, or repeal the terms of the right of way. Of great significance, the statute explicitly stated that, upon discontinuance of use of the right of way by the railway, the property would revert back to the Tribe. Finally, the statute explicitly subjected the railway to laws governing dealings with Indians. Given these factual differences, it is surprising that Justice White relied on the Utah & Northern case to conclude that the granting of the right of way exposed the railway to full taxation by the Arizona Territory. Any sensible reading of the law and the facts demonstrates that Congress intended the granting of the right of way to affect the territorial rights of the Tribe as little as possible. Given this Congressional purpose, it is difficult to conclude that the action of Congress did not supersede or displace the Territory’s attempt to tax the railroad. Whereas Justice Field’s opinion is defensible given the text of the statute creating the property interest in the railroad, Justice White’s opinion is an example of shoddy judicial effort that is largely oblivious to the possible impact that the taxation of the railroad might have on the Tribe. The sovereignty and territorial integrity of the Tribe receive no consideration from Justice White.

The next two cases involved the Oklahoma Territory and its attempt to tax cattle owned by non-Indians. The cattle were on reservation lands under grazing leases that the tribes had negotiated with non-Indian cattle owners. The first and key case is Thomas v. Gay. Justice Shiras wrote the opinion for the court and spent considerable effort explaining the validity of the tax. Unlike the taxes imposed by the territories of Idaho and Arizona in the two railroad cases, which applied to all property within the territory, the Oklahoma tax initially applied only to property within organized counties. Because much of the land within the Territory of Oklahoma was in the hands of numerous Indian tribes, this type of tax by its terms seemed to exclude reservation lands that were not part of counties. The law was changed, however, to extend the tax to all lands within the territory even if the lands were not within an organized county. The revenues from the tax were earmarked for the county based on a system that looked to the jurisdiction of the local courts. The facts clearly showed that the county government received all the tax revenues and provided the Tribe with no benefits.

Justice Shiras relied heavily on the two railroad cases. Those cases, however, were based on the shaky assumption that a grant of a right of way conferred taxing power on the territory. Here, no rights of way had been granted. So Justice Shiras asserted that the territorial tax fell on a non-Indian’s property and that the existing treaties and federal

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97 See id. at § 11, 24 Stat. at 363.
98 Id. at § 2, 24 Stat. at 362.
99 Id. at § 5, 24 Stat. at 362.
100 169 U.S. 264 (1898).
101 See id. at 271-73.
102 Id. at 264.
103 Id.
104 Id. at 265-66.
105 See id. at 268-69.
106 Id. at 273 (citing them for the proposition that the territory was free to tax non-Indians even if their economic activity took place within Indian country).
The statutes did not supersede or annul the territory’s power to tax.\textsuperscript{107} The treaties, however, made it clear that the tribes were not to be included within a territory or a state.\textsuperscript{108} And the federal statute creating the territory stated that the treaty rights of the tribes were not to be abrogated.\textsuperscript{109} Given this legal framework, one wonders how Justice Shiras could conclude that the cattle were subject to tax. Nonetheless, he essentially concluded that the federal statute creating the territory abrogated the earlier treaties.\textsuperscript{110} He relied on the rule that more recent legislation supersedes earlier inconsistent legislation.\textsuperscript{111} In addition, Justice Shiras focused on the ownership of the cattle and minimized the financial impact on the Tribe.\textsuperscript{112} He pointed out that the Tribe did not own the cattle and did not pay the taxes.\textsuperscript{113} He even went so far as to assert that imposition of the tax placed essentially no burden on the Tribe.\textsuperscript{114} This conclusion was contradicted by the facts, which showed that, once the taxes were asserted, the cattle owners started taking their cattle out of the territory.\textsuperscript{115} Obviously, if the cattle owners could remove their cattle, they were unlikely to pay their grazing fees to the Tribe.

In a closely related case, Wagoner v. Evans,\textsuperscript{116} Justice Shiras reused his flawed analysis from Thomas v. Gay and concluded that any tax immunity the cattle owners might have had under earlier treaties was lost when subsequent legislation abrogated those treaties.\textsuperscript{117} One factual twist in Wagoner was a federal requirement that lessees who grazed cattle and horses under a grazing lease with the Tribe should be required to employ members of the Tribe as herders.\textsuperscript{118} Justice Shiras, however, failed to see how this federal regulation of the leasing process affected the territorial power to tax.\textsuperscript{119} The obvious point is that taxation increases the costs of the cattle operation, which then affects the wages that the lessees can afford to pay. With the expectation of future taxation, lessees are likely to pay lower rentals on future leases or lease renewals.

The United States Supreme Court decided these four territorial cases during the early part of the allotment process when federal Indian policy sought to eliminate tribes as political entities and to hasten the assimilation of Native Americans.\textsuperscript{120} Given this context, it is not surprising that the Supreme Court paid little or no attention to the possible ill effects of their decisions on the tribes. Instead, the members of the Court probably viewed territorial taxation as an important part of a broad federal policy of closing the frontier.

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\textsuperscript{107} Id. at 275. \\
\textsuperscript{108} Id. at 268-70. \\
\textsuperscript{109} Id. at 272. \\
\textsuperscript{110} See id. at 271-72. \\
\textsuperscript{111} See id. at 271 (relying on The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1870), which held that a subsequent federal tax statute abrogated a tax exemption in a treaty). \\
\textsuperscript{112} See id. at 273 ("it is obvious that a tax put upon the cattle of the [non-Indian] lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians.") \\
\textsuperscript{113} See id. \\
\textsuperscript{114} See id. \\
\textsuperscript{115} See id. at 265. \\
\textsuperscript{116} 170 U.S. 588 (1898). \\
\textsuperscript{117} See id. at 590. \\
\textsuperscript{118} See id. at 591. \\
\textsuperscript{119} Id. \\
\textsuperscript{120} See The General Allotment Act (February 8, 1887), ch. 119, 24 Stat. 388-91. \\
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establishing new states, and finishing the process of manifest destiny. Given their flawed reasoning and their obvious lack of impartiality, these four cases should be viewed as unworthy of any precedential value.

III. Warren Trading Post and Subsequent Cases

A. Warren Trading Post v. Arizona Tax Commission

The United State Supreme Court decided Warren Trading Post v. Arizona Tax Commission in 1965 at a high point in the civil rights movement. The case involved a non-Indian taxpayer that was contesting the application of the Arizona sales tax on the sale of goods to members of the Navajo Nation. Neither a tribal member nor the Navajo Nation was a party to the action. Nor was the United States a party. Nonetheless, the United States and the Navajo Nation filed separate amicus curiae briefs. The federal government asserted that a vital federal interest was at stake, and the Navajo Nation asserted that Arizona’s taxation was infringing its sovereignty. Arizona, not surprisingly, asserted that its taxing power should extend to all persons within its boundaries unless Congress restricted its taxing power through specific federal legislation. In the absence of a federal statute providing such an exemption, Arizona claimed that it was free to impose its tax on Warren Trading Post.

In its amicus brief, the United States described the long history of federal control of Indian affairs and Indian trade. The federal licensing of Indian traders, under a federal statute and in accordance with federal regulations, left no room for state participation, even something as incidental and small as Arizona’s 2% sales tax.

The Navajo Nation emphasized the economic impact on its members and the effect the tax had on its sovereignty. The tax, even though imposed on a non-Navajo person, burdened the Navajo consumer by increasing prices. In terms of the Navajo Nation’s sovereignty, the tax was important because it affected the economic welfare of its members whose incomes were then, as now, quite limited. The Navajo Nation did not

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124 Id. at 685.
125 See Memorandum for the United States as Amicus Curiae in Support of Appellant, filed July 9, 1964, at 4-8 (asserting that Indian trade had always been an area of federal regulation and that it should continue that way).
126 Amicus Brief of Navajo Nation, filed Dec. 10, 1964, at 6-7 (asserting that state taxation would thwart tribal regulation of traders and reduce the rentals that the Tribe could charge).
128 Id.
129 Memorandum of the United States, supra note ___ at 4 (citing a federal statute from 1876).
130 Id. at 7 (the tax would affect prices).
131 Amicus Brief of Navajo Nation, supra note ___, at 6-7.
132 Id. at 3 (estimating the annual tax burden at $4.11 for each Navajo, which was significant given the low incomes on the reservation).
emphasize the effect of the tax on the Navajo Nation’s own taxing power. The United States Supreme Court did not affirm the existence of a tribe’s power to tax until fifteen years later\(^{133}\) and not specifically for the Navajo Nation until 1985.\(^{134}\) So it is understandable that the Navajo Nation’s brief did not include this line of argument. This argument, however, is a vital point and must be part of the analysis that considers whether the holding in Warren Trading Post should be extended to state income taxes. For now, however, we will focus on the arguments that the Supreme Court had before it.

The taxpayer, Warren Trading Post, argued that federal law preempted state law.\(^{135}\) This argument, however, was not so convincing on its face. Although the federal government had regulated Indian traders continuously from 1790 to the present, no specific federal statute, regulatory provision, or treaty article specifically addressed limitations on Arizona’s power to tax. In some cases, the federal government specifically had addressed state taxation within Indian country, prohibiting it in some cases\(^{136}\) and permitting it in others.\(^{137}\) Without specific federal text preempting Arizona’s sales tax, the taxpayer had to rely on general federal preemption.\(^{138}\) A general preemption argument requires a showing of a federal presence that leaves little or no room for the exercise of the state taxing power.\(^{139}\)

A unanimous Supreme Court, in its opinion written by Justice Black, concluded that Congress and the executive branch had so occupied the field of regulation of Indian traders that Arizona could not burden this commerce with its taxation.\(^{140}\) In reaching this conclusion, Justice Black began with a treaty of 1778 and noted continuous federal participation through the time that Arizona attempted to impose its tax on Warren Trading Post.\(^{141}\) Justice Black’s reasoning did not consider the sovereignty interest of the Navajo Nation.

It is at this point that the Navajo Nation has a critical sovereignty interest, which is its own power to tax. If Arizona is permitted to tax economic activity within the territory of the Navajo Nation, then the taxing power of the Navajo Nation is diminished. In

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\(^{133}\) See Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152 (1980) (finding that the “power to tax transactions occurring on [tribal] trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain…”) and Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982) (concluding that a tribe’s “power to tax is an essential attribute of sovereignty because it is a necessary instrument of self-government and territorial management.”).


\(^{137}\) Indian Oil Leasing Act of 1924, ch. 210, 43 Stat. 244 (1924) (authorizing state taxation of oil and gas production on Indian lands and authorizing the Secretary of Interior to collect the tax on the royalty interests of tribes and to pay the tax to the states).

\(^{138}\) Justice Black, writing for the Court, did not actually use the word “preemption” to describe the effect of the federal regulatory presence. Instead, he concluded that “no room remains for state laws.” Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685, 690 (1965).

\(^{139}\) Id.

\(^{140}\) Id.

\(^{141}\) Id. at 688-90.
addition, state and tribal taxation of the same transactions on the reservation substantially burdens and deeply affects commerce within the reservation. A simple example illustrates this point.

Wal-Mart considers building a store on the Navajo Nation. Arizona and the Navajo Nation each impose a 6% sales tax on all retail sales that take place within their respective jurisdictions. Consumers who purchase goods at the Navajo store have to pay a sales tax of 12% (6% in Arizona tax and 6% in Navajo tax). By comparison, a Wal-Mart store located just outside the reservation boundary enjoys a competitive advantage because only the state sales tax applies. So, a consumer buying $100 worth of merchandise at the Navajo store must pay $12 in sales tax. In comparison, the shopper at the Wal-Mart store located just off the reservation has to pay just $6 in Arizona sales tax. Obviously, the store that is not on the reservation enjoys a competitive price advantage. The law of supply and demand is that demand for identical goods will increase if the price is lower. Therefore, demand for goods sold off the reservation is higher than for those sold on the reservation.

In the above example, Wal-Mart management easily understands that business at its reservation store will face a competitive disadvantage. Facing this multiple taxation, Wal-Mart will decide to locate its store off the reservation. Alternatively, Wal-Mart might insist on a tax waiver from the Navajo Nation to eliminate this multiple taxation. The important point here, one that Justice Black missed, was the Navajo Nation’s interest in protecting its tax base. This omission by Justice Black, however, is understandable. Although the Navajo Nation, as an attribute of its sovereignty, always had the power to tax persons and activity within its territory, the Supreme Court did not judicially confirm this power until 1985, twenty years after its decision in Warren Trading Post.\(^\text{142}\)

Instead of focusing on the sovereignty of the Navajo Nation, Justice Black looked to federal power. In the arena of Indian affairs, Congress is said to have plenary power.\(^\text{143}\) States, in contrast, have virtually no power over Indian affairs unless Congress grants it to them.\(^\text{144}\) In Warren Trading Post, Justice Black saw the federal statutes and regulations as federal efforts to protect Indians from unscrupulous Indian traders.\(^\text{145}\) Indeed, this theme has important historical resonance, as my earlier discussion demonstrates. This perspective, however, emphasizes the guardian/ward relationship and places the federal government in the role of protector and the tribal members in a subordinated position requiring protection. By contrast, an analysis that includes considerations of tribal sovereignty places needed emphasis on the simple fact that a tribe is a government within

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\(^{143}\) See United States v. Kagama, 118 U.S. 375, 384-85 (1886) (finding that the federal government has legislative power over Indian tribes) and Lone Wolf v. Hitchcock, 187 U.S. 553, 565-66 (1903) (Congress has plenary power over Indian tribes and that power includes the power to abrogate treaties).

\(^{144}\) See Warren Trading Post v. Arizona Tax Commission, 380 U.S. 532, n. 3 (observing that “state laws have been permitted to apply to activities on Indian Reservations, where those laws are specifically authorized by acts of Congress...”).

\(^{145}\) See id. at 689.
the federal system and that its governmental integrity is worthy of consideration and encouragement.

B. McClanahan v. Arizona State Tax Commission

Decided eight years after Warren Trading Post, McClanahan v. Arizona State Tax Commission involved Arizona’s assertion of its power to impose its income tax on the income earned by a member of the Navajo Nation who lived and worked on the reservation. For our purposes in this article, the holding in McClanahan is relatively unimportant because the case did not involve an Indian trader. The Court’s reasoning, however, is quite important to us.

Rosalind McClanahan was a tribal member and tribal employee who Arizona asked to pay $16.20 in income tax on her modest salary earned as a secretary. The importance of McClanahan is its development of a preemption analysis that includes explicit consideration of tribal sovereignty. The Supreme Court, in its opinion written by Justice Thurgood Marshall, stated that tribal sovereignty is a backdrop against which federal preemption is measured.

Stated another way, the Court asked whether the exercise of state power, in this case state taxation of a Navajo member’s income, impermissibly infringed tribal sovereignty. At this point, Justice Marshall’s analysis never really explained how we determine when the state action constitutes an impermissible infringement. Instead, his opinion goes on to consider whether Congress ever granted Arizona the power to tax the income of tribal members who live and work on the Navajo Nation. The most persuasive part of his opinion is his consideration of the Buck Act. The Buck Act, a federal statute, gave states the power to impose various state taxes within federal enclaves. Importantly, the Buck Act stated that it did not authorize the state taxation of any Indian not otherwise taxed. So, the Buck Act maintains the status quo for Indians not subject to state taxation. The Buck Act, however, does not delineate those areas of non-taxation. Justice Marshall infers from the Buck Act and other federal statutes that Congress recognizes a pre-existing and broad immunity from state taxation for reservation Indians.

147 Id. at 165-66.
148 See id. at 166.
149 See id. at 172 (describing “Indian sovereignty” as a “backdrop against which the applicable treaties and federal statutes must be read.”).
150 See id.
151 In fact, Justice Marshal observed that the applicable treaty with the Navajo did not provide an explicit exemption from state taxation. Id. at 174. He also notes that the Arizona enabling statute provides a specific exemption from state property taxation. Id. at 176.
152 See id.
154 Id. at § 109.
Absent from the McClanahan analysis is the obvious point that Arizona’s income tax on tribal members will have an adverse impact on the Navajo Nation’s own power to tax. Any state taxes imposed on and paid by tribal members lessens their ability to pay tribal taxes of any kind. This impairment of the tax base is especially true given the historically low per capita income of tribal members living within the Navajo Nation. Justice Marshall’s omission here is forgivable because tribal taxation was not on anyone’s radar screen at this point.156

C. Central Machinery v. Arizona State Tax Commission

Central Machinery explored the application of the Warren Trading Post holding to a case involving an unlicensed Indian trader whose place of business was located off the reservation.157 Central Machinery Company sold farm machinery out of its place of business in Casa Grande, Arizona.158 One of its commercial transactions involved the sale of machinery to the Gila River Tribe.159 Central Machinery, relying on Warren Trading Post, contended that the Arizona sales tax was preempted by the federal statute and regulations that applied to Indian traders.160 The Arizona Supreme Court, however, pointed out that the taxpayer was not a licensed Indian trader and, therefore, was not exempt under the holding of Warren Trading Post.161 The United States Supreme Court, however, in an opinion by Justice Thurgood Marshall, pointed out that the federal Indian trader statute applied to all sales of goods in Indian country or on any Indian reservation.162 The court considered the location of the transaction and concluded that it took place predominantly on the reservation because the contract, delivery, and payment were all executed on the reservation.163 This was a sufficient factual basis for the court to conclude that the transaction involved a person who “introduce[d] goods … on [the] Indian reservation.”164 The sale of such goods was a crime under federal law.165 The Court acknowledged that no federal law enforcement officials seemed to really care that such transactions were common place.166 Instead, the Court concluded that the federal regulation of Indian traders was still broad enough to preempt state taxation of unlicensed

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158 Id.
159 Id. at 426-27.
161 Arizona v. Central Machinery Co., 589 P.2d 426, 427 (Ariz. 1978) (then Arizona Supreme Court Justice Sandra Day O’Connor, writing for the court, said that because “Central Machinery is not an Indian trader within the meaning of Warren and since this transaction has not run afoul of any congressional enactments passed to protect and guard its Indian wards, we do not find a federal preemption which would forbid the imposition of this tax.”).
163 Id.
164 Id. at 165.
166 See 448 U.S. at 165 (“It is the existence of the Indian trader statutes, then, and not their administration, that pre-empts the field of transactions with Indians occurring on reservations.”).
Indian traders whose business premises were located off the reservation and who sold goods to tribes.\textsuperscript{167}

Central Machinery has left open the question of how we go about placing the sale outside of or within the reservation. A logical reading of the case, given the language of the statute on which the Court relies, is that state taxation of off-reservation sales to Indians or to tribes is not preempted by the Indian trader statute. On-reservation sales, however, are preempted. Central Machinery’s facts indicate that when the contract, delivery, and payment are executed on the reservation, then the sale is on the reservation. This on/off dichotomy has led to different approaches by different states. New Mexico, for example, has exacting regulations that make exemption from its state sales tax very difficult to establish.\textsuperscript{168} In contrast, California approaches the problem with greater generosity and merely assumes that the transaction is exempt if the property is delivered on the reservation or if ownership of the property is acquired on the reservation.\textsuperscript{169} This is probably sufficient to provide an exemption in most cases in California so long as the parties agree that title transfers once the property is placed in use at home by the purchaser if the purchaser is a member of the Tribe and lives on the reservation.

In Central Machinery, the court read the Indian trader statute as having a broad and sweeping preemptive effect.\textsuperscript{170} We can now safely say that an unlicensed Indian trader who sells goods on the reservation or within Indian country to the Tribe or to a tribal member is exempt from a state’s sale tax. Central Machinery’s broad reading of the Indian trader statute is important as we consider whether the same statute extends to state income taxes. The rationale behind Warren Trading Post and Central Machinery certainly justifies such preemption. States, however, are ever vigilant and fight fiercely to maintain and protect their own tax base, even if it may be at the expense of impairing a tribe’s tax base. Most states will not concede this issue willingly. Moreover, we can expect that most state courts, when they consider this issue, will side with their own state taxing authorities, as they have often done in the past.\textsuperscript{171} Ultimately, then, the question of

\textsuperscript{167} Id.


\textsuperscript{171} See, e.g., The Kansas Indians, 72 U.S. 737 (1867) (United States Supreme Court invalidated the attempt by a county in Kansas to impose its real property tax on property owned by Native Americans; the Kansas Supreme Court approved of the taxation; for the state case see Blue Jacket v. Commissioners, 3 Kan. 299 (Kan. 1865)); McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973) (state income tax on a tribal member who lived and worked on the Navajo Nation infringed the Tribe’s right of self-government and was preempted by US-Navajo Treaty and federal legislation, but the Arizona Court of Appeals had upheld the tax; for the state court case see McClanahan v. State Tax Commission, 484 P.2d 221 (1971)); Bryan v. Itasca County, 426 U.S. 373 (1976) (a state’s county could not impose its property tax on a mobile home located on the Leech Lake Reservation when it was owned and occupied by a tribal member, but the Minnesota Supreme Court approved imposition of the tax; for this decision see Bryan v. Itasca County, 228 N.W.2d (Minn. 1975).
state income taxation of licensed and unlicensed Indian traders will have to be answered by the United States Supreme Court, unless Congress decides to step in and provide explicit legislation.

In summary, then, Central Machinery expanded the preemptive effect of the Indian trader statute and regulations to unlicensed Indian traders whether they operated on or off the reservation. The next preemption case addresses a different federal statute and different state taxes.

D. White Mountain Apache Tribe v. Bracker

In White Mountain Apache Tribe v. Bracker, decided the same day as Central Machinery, the Supreme Court, in another opinion written by Justice Thurgood Marshall, applied a preemption analysis to federal regulation of a tribal timber operation. The underlying transactional framework included a wholly owned tribal corporation that managed, harvested, processed, and sold timber from reservation lands of the White Mountain Apache Tribe in Arizona. The tribal corporation was formed under a federal regulation with the approval of the Secretary of the Interior. The timber harvesting took place under a program governed by federal regulations and included contracts between the tribal corporation and the United States. To assist with its timber operation, the tribal corporation contracted with an Arizona corporation to transport timber. Arizona imposed a motor carrier license fee on the state corporation measured by the carrier’s gross receipts. In addition, the state corporation used fuel on which Arizona imposed a fuel excise tax of eight cents per gallon.

The Arizona corporation paid the taxes under protest and then sued in state court. The Tribe agreed to reimburse the corporation and intervened as the plaintiff in the case. The Arizona Court of Appeals upheld the state taxes. The Arizona court downplayed the preemptive effect of the federal statute and regulations and concluded that Congress showed no intent to preempt its state taxes.

The United States Supreme Court applied the preemption/infringement analysis it had developed in McClanahan. Justice Marshall, writing for the court, articulated the test as one involving a double hurdle. If Arizona could not pass over each hurdle, then its taxes would be invalid. The first hurdle was federal preemption, and the second hurdle

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173 Id. at 138.
174 Id. at 138-39.
175 Id. at 139.
176 Id.
177 Id.
178 Id.
179 Id.
180 Id. at 140.
181 Id.
182 Id. at 141.
183 See id.
184 Id. at 142-43.
was state infringement of tribal sovereignty. “The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members.” In deciding whether federal preemption occurs in cases in which the federal statute or regulatory scheme is unclear, the Court must consider the need to preserve the tribal right to self-government. Therefore, infringement of tribal sovereignty is an important “backdrop” against which “vague or ambiguous federal enactments must always be measured.” With this language, Justice Marshall seemed to be merging the second hurdle into the first. In reality, he was explaining that the preemption analysis must take place within the context that the exercise of federal authority in the area of Indians affairs often leaves little room for the application of state laws.

The preemption analysis in this case, as in McClanahan, involved a set of federal statutes that were silent about the state’s power to tax. Arizona asserted that its power to tax could be limited only by an explicit federal statute barring the tax or creating a specific exemption. Justice Marshall, however, explained that “the federal regulatory scheme is so pervasive as to preclude the additional burdens sought to be imposed in this case.” And he concluded that there “is no room for these taxes in the comprehensive regulatory scheme.” To reach this conclusion, Justice Marshall reviewed the statutes involved, the promulgated regulations, and the quantity of federal involvement and supervision.

On the infringement front, Justice Marshall’s opinion does not specifically conclude that these two Arizona taxes constitute impermissible infringement. Instead, he describes the adverse effects of the taxes on the Tribe and suggests that this adds strength to the preemption analysis. In considering the burdens on the Tribe, Justice Marshall notes the lack of state justification for the imposition of the revenue. This type of analysis suggests that a state, even when there is a pervasive federal scheme that leaves no room for state involvement, might still be able to impose a tax if it has good and sufficient interests. Justice Marshall’s language is that the infringement “inquiry is not dependent on mechanical or absolute conceptions of State or tribal sovereignty, but has called for a particularized inquiry into the nature of the State, Federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.” This language is much quoted in later cases and is used, more often than not, to justify state taxation when general federal preemption seems obvious in light of Warren Trading Post, McClanahan, Central Machinery, and White Mountain Apache Tribe.

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185 Id. at 143.
186 Id.
187 Id. at 150-51.
188 Id. at 148.
189 Id.
190 See id. at 149-50.
191 See id. at 151.
192 See id. at 150.
193 Id. at 145.
194 See, e.g., Cotton Petroleum Corporation v. New Mexico, 490 U.S. 163, 176 (1989) (citing White Mountain Apache language stating that the preemption is not “mechanical or absolute” and concluding that
Nonetheless, Justice Marshall’s opinion does look at specific burdens. Of particular importance is the economic burden of the taxes on the Tribe.\(^{195}\) Here Justice Marshall correctly concludes that state taxes imposed on the Arizona corporation ultimately will be an economic burden on the Tribe. In a footnote, however, he concedes that an economic burden on the Tribe is not a sufficient factor by itself to cause the tax to be preempted.\(^{196}\) Further in the footnote, Justice Marshall explains that the comprehensiveness of the federal scheme is sufficient to preempt the Arizona taxes.\(^{197}\) In the end, the footnote suggests that the economic burden on the Tribe would be an important factor, and perhaps a controlling factor, in a weaker case.

The White Mountain case is important in the context of our inquiry because it shows that federal preemption of state taxation can and does occur when federal statutes, other than the Indian trader statute, are involved. It also shows that the Court will take a case-by-case approach when federal preemption of a state tax is involved. Accordingly, the question of whether the Indian trader statute preempts the imposition of a state income tax ultimately will require Supreme Court review.

E. Ramah Navajo School Board v. Bureau of Revenue

Two years after its decision in White Mountain the Supreme Court decided Ramah Navajo School Board v. Bureau of Revenue.\(^{198}\) Ramah involved the New Mexico gross receipts tax imposed on a New Mexico construction company that provided construction services to the tribal school board.\(^{199}\) The formation of the school board and the funding of the school construction involved federal statutes and regulations and direct involvement of the Bureau of Indian Affairs.\(^{200}\) The school board’s second contract with the construction company specifically stated that the contract price included the New Mexico gross receipts tax but that the school board would be entitled to any refund of the tax if it could be established that the tax was invalid.\(^{201}\)

The Ramah School Board sued for recovery of the taxes and lost and then appealed to the New Mexico Court of Appeals.\(^{202}\) On rehearing, the New Mexico Court of Appeals considered the Supreme Court’s decision in White Mountain.\(^{203}\) The New Mexico court concluded that White Mountain was distinguishable and that there was no pervasive federal scheme that triggered federal preemption of the state tax.\(^{204}\) In the United States

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\(^{195}\) White Mountain Apache, 448 U.S. at 149.

\(^{196}\) Id. at n. 15.

\(^{197}\) Id.

\(^{198}\) 458 U.S. 832 (1982).

\(^{199}\) Id. at 834.

\(^{200}\) Id. at 834-35.

\(^{201}\) Id. at 835-36.

\(^{202}\) Id. at 836.

\(^{203}\) Id.

\(^{204}\) Id.
Supreme Court, Justice Thurgood Marshall, writing for the majority, concluded that White Mountain was indistinguishable and, therefore, was controlling precedent.\textsuperscript{205} His analysis in Ramah followed his analysis in White Mountain.\textsuperscript{206} Ramah is important because it extends general federal preemption to cases involving tribal contracts using federal funds under federal programs.

Of substantial interest is Justice Rehnquist’s dissent. Justice Rehnquist argued that federal preemption should not occur unless the federal statute, regulations, and activity specifically govern the activity being taxed by the state.\textsuperscript{207} He asserted that the federal scheme did not regulate the construction of the school.\textsuperscript{208} Without a pervasive federal scheme regulating the construction of the school, Justice Rehnquist asserted that the only other impediment to state taxation was the financial burden on the Tribe’s school board.\textsuperscript{209} He pointed to the footnote in White Mountain where Justice Marshall stated that, by itself, the economic burden on the Tribe was not sufficient to justify federal preemption.\textsuperscript{210} Justice Rehnquist contended, then, that Justice Marshall and his six-vote majority were concluding in effect that an economic burden on a tribe, and that alone, was sufficient for federal preemption.\textsuperscript{211} The flaw in Justice Rehnquist’s reasoning is that the general federal preemption cases did not involve specific federal regulation of the activity that was the subject of the state tax. In White Mountain, for example, one of the taxes was a motor fuel tax. The federal scheme in White Mountain did not regulate motor fuels. Instead, the scheme provided for regulation of the timber harvesting, processing, and sale activity. Transportation of the timber was part of the overall activity. Similarly, construction of a school is part of running a tribal education system. That system was subject to federal regulation and existed only through federal funding. Justice Rehnquist also ignored the Tribe’s interest in running an education system. Public education is a core function of governments, a function that Congress encouraged the Tribe to undertake through specific federal legislation and funding. Justice Rehnquist’s dissenting opinion ignores this completely.

F. Cotton Petroleum Corp. v. New Mexico

The next case to consider federal preemption of state taxation of non-Indian activity within Indian Country was Cotton Petroleum Corp. v. New Mexico.\textsuperscript{212} This case came seven years after Ramah. The Cotton Petroleum case marks a significant departure from the Warren Trading Post, McClanahan, Central Machinery, White Mountain, and Ramah line of cases. The Cotton Petroleum case and its impact on tribal sovereignty and economic development within Indian Country is by far the most important case in this line of cases.

\textsuperscript{205} Id. at 839.
\textsuperscript{206} Id. at 839-45.
\textsuperscript{207} See id. at 855.
\textsuperscript{208} Id. at 852 (“The BIA simply does not regulate the construction activity which the State seeks to tax.”).
\textsuperscript{209} Id. at 855.
\textsuperscript{210} Id. at 854.
\textsuperscript{211} Id. at 855.
\textsuperscript{212} 490 U.S. 163 (1989).
Cotton Petroleum Corporation entered into oil and gas leases with the Jicarilla Apache Tribe in New Mexico. Under the leases, Cotton Petroleum paid the Tribe a percentage royalty on the production of oil and gas wells located on the Tribe’s reservation. The Tribe had also imposed its own severance tax, which the Supreme Court had recently validated as within the scope of the Tribe’s governmental powers. New Mexico also imposed its own severance taxes on the oil and gas production.

In the United States Supreme Court, Cotton Petroleum asserted that these state taxes violated the federal constitution’s commerce clause and were, therefore, impermissible because New Mexico imposed these taxes without providing any significant benefits to the Tribe or its members. Cotton Petroleum also argued that federal laws and policies preempted the state taxes.

Justice Stevens wrote the opinion for the six-vote majority. Justice Stevens had joined Justice Rehnquist in his dissent in the Ramah decision. The analytical starting point of Justice Stevens’ opinion in Cotton Petroleum is a surprising abandonment of the general preemption analysis found in Warren Trading Post, McClanahan, Central Machinery, White Mountain, and Ramah. He noted that federal law provides no specific or implied prohibition of the state tax. Justice Stevens was not looking for a pervasive federal presence through statutes, regulations, and federal activity. Instead, he was looking for an explicit statutory exemption or language implying that Congress intended to provide such an exemption. This was quite a departure from White Mountain and Ramah where the Court was merely looking for a pervasive federal scheme that left little room for state involvement. Had Justice Stevens looked, he would have found a quantum of federal presence sufficient to find a pervasive federal scheme.

In addition, Justice Stevens made much of the history surrounding the federal mineral leasing laws that were enacted specifically for mineral leases on Indian lands. This very history suggested that Congress intended that the oil and gas production on Indian lands should be exempt from state taxation. The 1924 federal mineral leasing statute specifically authorized state taxation. The 1938 statute, which replaced the 1924 statute, provided no authorization and no exemption. Presumably, then, Congress

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213 Id. at 168.
214 Id.
215 Id. at 167-68.
216 Id. at note 4.
217 Id. at 170 and at 187-88.
218 Id. at 177.
219 See Ramah Navajo School Board v. Bureau of Revenue of New Mexico, 458 U.S. 832, 847-57.
220 See Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 173 (1989) ("At one time, such a tax was held invalid unless expressly authorized by Congress; more recently, such taxes have been upheld unless expressly or impliedly prohibited by Congress.” This articulation deviates substantially from the general preemption analysis developed in the earlier cases.).
221 See id. at 177.
222 See id. (concluding that the committee reports of the House and Senate “shed little light on congressional intent concerning state taxation of oil and gas produced on leased lands.”).
223 See id. at 181.
224 See id. at 177.
viewed mineral extraction from Indian lands to be exempt from state taxation unless such exemption was removed by a federal statute. When Congress repealed the 1924 legislation and provided no exemption, we can infer either that Congress intended mineral extraction on Indian lands after 1938 to be exempt from state taxation, as it was before 1924, or that Congress omitted a rule permitting state taxation because of neglect, inadvertence, or mistake. In any case, the 1938 statute does not permit state taxation.

Justice Stevens’ explanation is rather far-fetched. He accurately explained that during the 1920s the United States Supreme Court viewed Indian tribes as federal instrumentalities and, therefore, immune from state taxation. He then explained that the Court abandoned this view in the 1930s. Justice Stevens assumed that the provision in the 1924 statute permitting state taxation was there to address the perceived tax immunity that tribes enjoyed as federal instrumentalities. He then assumed that such a provision was not needed in 1938 because the federal instrumentality doctrine had been abandoned by then. His reasoning has two flaws. First, the federal instrumentality doctrine never applied to non-Indians. Thomas v. Gay is a good example. In that case, the non-Indian holders of grazing leases on Indian lands were not immune from a territorial property tax. Second, the Court did not abandon the federal instrumentality doctrine as applied to tribes until 1943 in the case of Oklahoma Tax Commission v. United States. This was five years after Congress passed the 1938 act. Therefore, Justice Stevens’ historical interpretation of the 1938 act is wholly incorrect.

Even with the flawed reasoning contained in Cotton Petroleum, the case nonetheless validates the general federal preemption approach found in Warren Trading Post, McClanahan, Central Machinery, White Mountain Apache, and Ramah Navajo School Board. An important factual distinction in Cotton Petroleum, when compared to these cases, is that the economic activity of the oil and gas producer involved sales of petroleum products off the reservation to non-Indian and non-tribal consumers. The Court noted that the royalty payment to the Tribe was not burdened by New Mexico’s severance tax. This critical factual distinction placed Cotton Petroleum outside the scope of Warren Trading Post, Central Machinery, White Mountain, and Ramah Navajo School Board. In those four cases, the consumers of the goods and services were the specific tribe or its members.

The Court’s decision in Cotton Petroleum is important and of lasting negative significance to tribes. The decision seriously and permanently impaired the tax base of tribes. If states are allowed to tax on-reservation activity of non-members, then

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225 See id. at 181.  
226 Id. at 174-75.  
227 See, e.g., 169 U.S. 264 (1898).  
228 Id. at 273.  
229 See 319 U.S. 598, 603-4 (1943). In 1941 Felix Cohen, considering the effect Gillespie v. Oklahoma, 257 U.S. 501 (1922), the case that was so important to Justice Stevens, wrote that “the instrumentality doctrine, in so far as it relates to Indians, their property and their affairs, remains unchanged.” Felix S. Cohen, Handbook of Federal Indian Law (GPO, Washington, D.C.) p. 257 (1942).  
231 See id. at 185.
a single activity is subject to the taxing power of the federal, state, and tribal government. This triple taxation in Indian Country effectively means that tribes, which have the power to tax, must take what remains after the federal and state governments have exercised their powers to tax. In terms of economic development, after Cotton Petroleum, tribes find themselves with little practical ability to tax economic activity. The unimpaired part of the tax base that is left is the activities of Indian traders and the on-reservation businesses of members and the Tribe. This is something of a digression, but the point here is quite simple: Cotton Petroleum has made tribal taxation a very difficult proposition and has impaired the ability of tribes to raise tax revenues.232

G. Department of Taxation and Finance v. Milhelm Attea & Bros., Inc.

Department of Taxation and Finance v. Milhelm Attea & Bros., Inc.,233 specifically involved the application of the Indian trader statute to the sale of cigarettes to non-Indians.234 Milhelm Attea was a licensed Indian trader doing business on various Indian reservations in New York.235 One of the products that Mill hem Attea sold was cigarettes.236 The state of New York had enacted a statutory and regulatory scheme to make sure that cigarettes sold to non-Indians would be subject to the state tax on cigarettes.237 Milhelm Attea asserted that the federal statutory and regulatory scheme that applied to Indian traders preempted all state regulation of their sales, including record keeping requirements designed to determine how many sales were to non-Indians.238 Justice Stevens wrote the opinion for a unanimous court.239 In his opinion, he revisited language from Warren Trading Post that suggested that no state regulation of Indian traders would be permitted unless authorized by Congress.240 Justice Stevens revisited other cases involving the state taxation of cigarettes sold on the reservation and extracted from that line of cases a general principle that states have an interest in taxing non-Indians when the underlying transaction involves marketing a tax exemption.241 Here, Justice Stevens relied on Washington v. Confederated Tribes of the Colville Indian Reservation and made specific reference to the circumstances where a tribe is marketing a tax exemption.242 He extended that reasoning in Milhelm Attea and found that New York had a legitimate interest in taxing an activity involving sales to non-Indians when the activity was on the reservation only because the vendor was claiming a tax exemption.243

234 Id. at 64.
237 Id. at 64.
238 Id. at 67-68.
239 Id. at 64.
240 See id. at 70-71.
241 See id. at 71-72.
242 See id. (noting that preemption analysis did not permit tribes “to market an exemption from state taxation to persons who would normally do their business elsewhere” citing Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 155 (1980)).
243 Id. at 73.
Milhelm Attea is an extension of the Cotton Petroleum and another line of cases involving on-reservation cigarette sales to non-Indians. Of significant importance is recognition in the Milhelm Attea case that cigarette sales to tribal members are exempt from state taxation. This reaffirms the continuing validity of Warren Trading Post. In fact, language from Justice Black’s opinion in Warren Trading Post is consistent with Justice Stevens’ opinion in Milhelm Attea. Justice Black had said that Arizona’s tax would “frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Congress.” This fairly narrow language when applied to the facts in Milhelm Attea suggests that Congress did not intend to permit Indian traders to market a tax exemption for sales to non-Indians.

H. Arizona Department of Revenue v. Blaze Construction Company

The last in the line of general federal preemption cases involving the state taxation of on-reservation activity of non-Indians is Arizona Department of Revenue v. Blaze Construction Company. In the Blaze case, the taxpayer was a corporation owned by a member of the Black Feet Tribe in Montana. Blaze had road construction, repair, and improvement contracts with the Bureau of Indian Affairs for roads located on numerous Arizona Indian reservations. Blaze asserted that federal statutes and regulations demonstrated a congressional intent to preempt the imposition of the state taxes on road

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244 This line of cases includes Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation, 425 U.S. 462, 481-83 (1976) (state has authority to impose cigarette excise tax on sales made to non-Indians in stores owned by tribal members and located on the reservation); Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 150-62 (1980) (state has authority to impose tax on non-Indian purchasers of cigarettes sold in stores owned by members or by the Tribe and located on the Tribe’s reservation); Oklahoma Tax Commission v. Citizen Band of Potawatomi Tribe of Oklahoma, 502 U.S. 505, 509-11 (1991) (state has power to tax sales of cigarettes to non-members in stores owned and operated by the Tribe, but the Tribe retains its sovereign immunity, which prevents the state from enforcing its claim in a federal court).

245 See Department of Taxation and Finance v. Milhelm Attea & Bros., Inc., 512 U.S. 61, 68 (1994) (summarizing New York’s law, which recognized that sales to tribal members are exempt from the state’s power to tax).

246 See id. at 71 (where Justice Stevens distinguishes Warren Trading Post on the grounds that the sales in that case were made to tribal members).


248 The difficulty, of course, with this line of analysis is that the Supreme Court must assume a distinctly legislative role to fill in the rather large gaps that arise when Congress passes specific legislation governing Indian affairs. Such a role for the Supreme Court is a natural one that it plays every term when it determines the meaning of federal legislation, regulations, and administrative authority. The difficulty, however, arises because the individual tribe must go to Congress to correct mistakes. This mistake correction process is so lengthy and burdensome that it does not represent a meaningful option for individual tribes or for organizations representing general tribal interests. States, however, have actual access to Congress because of the constitutional and political structure of Congress. For discussion on how this constitutional and political fact of life should inform Supreme Court decision making, see, infra, discussion accompanying footnotes through .


250 Id. at 34.

251 Id.
construction. Justice Thomas, writing for a unanimous Court, distinguished the earlier preemption cases by noting that the purchaser of the construction services was the United States, not a tribe or one of its members. Instead of following the general federal preemption line of cases, Justice Thomas followed United States v. New Mexico, a case in which the Court permitted New Mexico to impose its gross receipts tax on the sales of goods and services to the federal government.

Unlike Milhelm Attea, where the activity involved marketing untaxed cigarettes, the Blaze facts involved road construction on the reservation to promote tribal welfare. Justice Thomas neglected to note that Arizona wanted to tax the road construction activity but did not want to construct the roads. Blaze did involve a case where the Court should have extended the general federal preemption analysis of the Warren Trading Post line of cases because the federal presence was so substantial. If Justice Thomas had adopted the reasoning of White Mountain, he would have had to consider the interest of Arizona. And the facts would have shown that Arizona was taking no responsibility for road building and was happy to collect a tax windfall of sorts to be used for building roads off the reservation.

Nonetheless, Blaze actually confirms that general federal preemption still applies when federal statutes and regulations occupy the field and leave little or no room for state intervention when the Tribe or its members purchase the goods or services. After Blaze, the BIA and the Tribes are now well advised to fund road building through tribal organizations. Road builders should become licensed Indian traders, the BIA should enter into contracts with the Tribes to make road building grants, and the Tribes should then enter into road construction contracts with the road builders. Under this set of circumstances, Warren Trading Post will clearly apply. The Arizona transaction privilege tax will be preempted, and more money will be available for road building in areas that desperately need roads.

I. Summary of the Warren Trading Post Line of Cases

252 See id. at 36.
253 Id. at 34.
254 Id. at 37.
255 Id.
259 Justice Thomas did not cite Warren Trading Post. Instead, he cited to and quoted Ramah. “In cases involving taxation of on-reservation activity, we have undertaken this ‘particularized examination,’ Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S. 832, 838 (1982), where the legal incidence of the tax fell on a non-tribal entity engaged in a transaction with tribes or tribal members.”
260 This advice assumes that the tax savings justify the additional transaction costs that may be associated with structuring the transaction in the way that I have suggested.
The line of cases from Warren Trading Post to Blaze Construction leaves intact the basic principle that federal statutes and regulations can provide a general federal preemption of state sales or excise taxes. The preemption applies to sales of good and services to tribes and to their members. Sales to non-Indians, especially when they involve the marketing of a tax exemption, do not enjoy exemption from state taxation. Sales to the federal government fall into this same category and are not exempt from state taxation. When sales are to non-Indians, then the United States Supreme Court looks for explicit language granting an exemption.

IV. State Cases Involving Income Taxation of Indian Traders

No federal cases involve the state income taxation of an Indian trader. The only two states with reported cases involving this or related issues are North Dakota and Arizona.

A. The North Dakota Cases

In White Eagle v. Dorgan, the North Dakota Supreme Court confronted a variety of state tax issues dealing with Indian country. The case involved four different plaintiffs, one of whom was a licensed Indian trader, R.B. Luger, whose store, the Diamond Z Food Center, was located on the reservation of the Standing Rock Tribe. The court’s opinion mentions sales and income taxes and cites Warren Trading Post. In its conclusion, the court stated that the Indian trader statute preempted the “taxes,” which presumably included North Dakota’s income tax as applied to R.B. Luger. The North Dakota Supreme Court’s reasoning gave broad preemptive effect to the Indian trader statute and regulations. And because the court was not trying to justify or explain North Dakota’s imposition of its taxes, the opinion was short—little more than a citation to Warren Trading Post and McClanahan and a conclusion regarding their precedential effect.

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261 I have not included the most recent United States Supreme Court decision involving state taxation within Indian Country. See Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 126 (2005) (sustaining a Kansas fuel excise tax imposed on gasoline sales to nonmembers made by a gas station owned and operated by the tribe in support of its gaming operation). The Court located the taxable transaction off the reservation and, therefore, refused to extend the preemption line of cases. Id. at 106.

262 209 N.W.2d 621 (N.D. 1973).

263 See id. (caption of the case in which R.B. Luger is listed as one of the parties).

264 The reported decision of the North Dakota Supreme Court says nothing specifically about Mr. Luger and the Diamond Z Food Center. These facts come from the decision of the administrative law judge in Thelma Luger v. Fong, OAH File No. 20050257 at Findings of Fact 17 & 20 (Dec. 28, 2006) (copy in author’s file).


266 Id. at 623.

267 See id.

268 Id. (stating that the holding in Warren Trading Post was “so sweeping that it cannot be successfully argued that the attempt by the State to impose its taxes in these cases can in any way be sustained.”).
The income tax issue has recently arisen in a case involving R.B. Luger’s widow, Thelma Luger. Mrs. Luger is a member of the Cheyenne River Sioux Tribe but lives on the reservation of the Standing Rock Tribe in North Dakota. She continues to operate the family store through a subchapter S corporation. In the case that has gone before an administrative law judge, the North Dakota Tax Commissioner has conceded that a licensed Indian trader is exempt from the North Dakota income tax. The commissioner asserted, however, that exempt status of the income is lost once the income passes through the subchapter S corporation. The commissioner asserted that the corporation is a separate legal entity and that its exempt status could not transfer to its shareholder. Amazingly, the administrative law judge agreed with the commissioner’s contention even though federal income tax law and North Dakota’s income tax law are clear that the status of income at the corporate level retains its character in the hands of the shareholder. A simple example illustrates this point.

Assume that T owns SCo, a subchapter S corporation. SCo owns a United States Treasury bill that pays $10,000 in interest. This income is exempt from the North Dakota income tax, but subject to the federal income tax. The income is reported at the corporate level on line 3 of Schedule K of North Dakota’s Form 60 (2006). The exemption of the income from North Dakota’s income tax is preserved in the hands of the shareholder, as reflected on line 3 of the Schedule K-1 (2006) sent to the shareholder.

The income that is earned by Mrs. Luger’s subchapter S corporation as a licensed Indian trader selling groceries and gasoline on the reservation is really no different from the interest earned on a Treasury bill. Both sorts of income, although subject to the federal income tax, are exempt from state income tax as a matter of federal law and should not lose their exempt status just because they are earned by a subchapter S corporation. The primary purpose of the subchapter S regime is to eliminate income taxation at the corporate level and move that taxation to the shareholder level. The nature of the income remains the same in the hands of the shareholder. The Luger had been appealed but has settled. Certainly, the treatment of Indian trader income as transformed into taxable income as it passed through the corporation was clearly erroneous and would have been reversed.

B. The Arizona Case

See id. at Conclusion of Law 12.
Id. at Conclusion of Fact 16.
See id. at Conclusion of Law 14.
See id.
Id.
Id.
See I.R.C. § 1366(b).
The Arizona case is Loveness v. Arizona Department of Revenue and involves the state income taxation of on-reservation profits earned by the same taxpayers involved in the White Mountain Apache case. Mr. and Mrs. Loveness were the owners of Pinetop Logging Company. They elected to have that corporation be taxed as a subchapter S corporation. As a result, the profits earned by the corporation were not taxed at the corporate level but instead at the shareholder level.

Mr. and Mrs. Loveness asserted that the same federal statutory and regulatory scheme that preempted Arizona’s motor fuel and motor carrier taxes in the White Mountain Apache case also preempted Arizona’s income tax. The Arizona Court of Appeals, not surprisingly, distinguished the White Mountain Apache case on the sole basis that the taxes involved were different. The Arizona court recognized the presence of the federal regulatory scheme and its preemptive effect. Nonetheless, the court reasoned that the scope of the federal preemption was narrow because the state income tax involved in Loveness was an undifferentiated tax that did not fall on the activity. In contrast, the Arizona motor fuel tax and motor carriers tax fell directly on the activity taking place on the reservation. The court’s reasoning is specious. Mr. and Mrs. Loveness claimed exemption only on that part of their income that came from the on-reservation activities of its subchapter S corporation. Placing the source of the income on the reservation is quite simple. The contracts were with the Tribe and all activity took place on the reservation.

The Arizona court implied that the nature of an income tax made it difficult to source the income. This is not true. In fact, the Arizona income tax statute apportions income among states. So, for example, if an Arizona corporation had income generated in Nevada, a state without an income tax, then the income sourced in Nevada would not have been subject to Arizona’s income tax. For individuals, if a source of income is

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280 See id. at 305-6 (noting that Pinetop, the corporation involved in White Mountain Apache, converted into a subchapter S corporation under federal income tax, which, in turn, caused the state income tax liability to fall on Gary and Elizabeth Loveness, the owners of the S corporation).
283 Id.
284 Id. at 307.
285 Id.
286 See id. at note 3.
287 Id. at 306.
288 Id. at 307.
289 Id. at 306 (noting that Arizona’s “income tax is an undifferentiated tax not identified with, or a function of, any particular source of gross income”).
exempt from the state income tax as a matter of federal law, then its source is determined as a means of providing the exemption.  

Having distinguished the Arizona income tax from the motor fuel and motor carrier taxes, the court’s analysis turned to the off-reservation residence of Mr. and Mrs. Loveness. In those cases, the United States Supreme Court found no pervasive federal statutory and regulatory scheme of the kind found in White Mountain Apache. Accordingly, application of those cases was wholly inappropriate. Absent from the Arizona court’s discussion was the off-reservation residence of the taxpayer in Central Machinery. In Central Machinery, the taxpayer was not a licensed Indian trader and its store was located off the reservation. Nonetheless, the United State Supreme Court reasoned that the federal Indian trader statute and regulations preempted the Arizona sales tax because most of the transaction involving the sale of farm machinery took place on the reservation. Central Machinery, then, undermines the Arizona court’s reasoning because residence in that case did not matter given the preemptive effect of the federal statute and regulations. The facts in Loveness show that all the activity producing the income that Mr. and Mrs. Loveness claimed as exempt from the Arizona income tax was generated solely and exclusively on the reservation.

Therefore, the Arizona court’s reliance on the off-reservation residence of the taxpayers went well beyond the scope of the cases cited in the Loveness opinion. If the Arizona court was correct that residence is dispositive, then an Indian trader living on the reservation would enjoy exemption from the Arizona income tax. Unfortunately, however, the first part of the court’s opinion relied on the conclusion that the state income tax, because it is an undifferentiated tax, is not subject to federal preemption. If the court’s conclusion is correct, then the discussion about residence was wholly unnecessary. Perhaps the court was hedging its bets in anticipation of further appellate review by the Arizona Supreme Court or the United State Supreme Court.

V. A Logical and Unified Approach to State Income Taxation of Indian Traders

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294 Id.

295 See Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450, 462-67 (1995) (unless preempted by federal legislation, a state can impose its income tax on Native Americans living or working off the reservation); Oklahoma Tax Commission v. Sac & Fox Nation, 508 U.S. 114, 123-26 (1993) (tribal members living and working within Indian Country are exempt from state income taxation unless Congress authorizes such taxation through affirmative legislation).


297 Id.

298 Id. at 165-66.
If we connect the dots supplied by the precedents in this area, we see that Warren Trading Post and Central Machinery provide a sufficient basis for exempting the income of licensed and unlicensed Indian traders from the imposition of a state income tax. The calculation of the income tax is a little more difficult because not all sales will produce income that is exempt from tax. For example, sales to non-Indians, whether on or off the reservation, do not enjoy exemption in the case of a sales or excise tax and, applying those cases in the income tax context, should not enjoy an exemption from state income tax. In the case of a sales tax, the tax is imposed on the sales price. Income taxes, however, are applied to gross income reduced by deductible expenses. The allocation of deductions to the exempt and non-exempt sales requires some additional calculations. These types of calculations, however, are done with the federal income tax and with most of the state income taxes. In fact, most states have rules for the allocation of income and deductions for corporations that have operations in more than one state. Rules similar to these could apply in this arena.

The presence of these technical problems does not justify the imposition of state income taxes that federal law preempts. Even so, the current Supreme Court, whose Indian law opinions may be described as largely oblivious to tribal sovereignty and whose interpretations of federal statutes often favor state interests, may look back on Warren Trading Post and on Central Machinery and merely conclude that a sales tax is one thing and an income tax is something wholly different. Justice Thomas or Justice Scalia could conclude that tax exemptions should be narrowly construed. They might decide that, in the absence of a federal statute or treaty granting an exemption from a state income tax, no exemption from the state income tax should be allowed.

However, both Justice Thomas and Justice Scalia should appreciate the federal role in regulating commerce with the Indian tribes because it is a power found in the Articles of Confederation and in the United States Constitution. Federal regulation of the Indian trade began under the Articles of Confederation and continues to this day under

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300 448 U.S. 160 (1980).
302 See, e.g., IRC § 265(a)(1) (2006) (disallowing deductions allocable to income that is exempt from the federal income tax).
305 Articles of Confederation, art. 9, § 4, reprinted in 1 Stat. 7 (“The United States in Congress assembled shall have the sole and exclusive right and power of …regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated…”).
306 U.S. Const. art. I, § 8, cl. 3 (granting Congress the power “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”).
307 See Ordinance for the Regulation of Indian Affairs, August 7, 1786, 31 Journals of the Continental Congress (GPO Washington, DC) (1934) pp. 490-93 (requiring Indian traders to be licensed and to post bond, among other requirements).
the Indian Commerce Clause.\textsuperscript{308} States at the time of the ratification of the Constitution knew and understood that their taxing powers did not extend over Indian lands.\textsuperscript{309} This is reflected in the “Indians not-taxed” clause.\textsuperscript{310} If Georgia had had a taxing power over Indian lands, tribal members, and all non-Indians within the Cherokee Nation, then Georgia most assuredly would have asserted that power, imposed property taxes, and forfeited title for non-payment of taxes. Instead, Georgia tried to control outsider access to the Cherokee Nation and to make life so bad for tribal members so that they would agree to be removed west.\textsuperscript{311}

It is of great importance that the United States Supreme Court confirmed the absence of state power to tax Indian lands in 1867 in the Kansas Indians case\textsuperscript{312} and the New York Indians case.\textsuperscript{313} This broad tax immunity is reiterated in the text of the 14th Amendment, which the states ratified in 1868.\textsuperscript{314} Finally, the federal enabling statutes of new states in the late 19\textsuperscript{th} century and early 20\textsuperscript{th} century reminded these states that their power to tax did not extend to Indian lands.\textsuperscript{315} This is a comprehensive originalist approach\textsuperscript{316} showing that the framers of the original Constitution and that the drafters of the 14th Amendment, along with a substantial number of 19\textsuperscript{th} century Supreme Court justices, understood that state powers, including the power to tax, did not extend into Indian Country. This distinctly originalist approach, however, probably will not appeal to Justices Thomas or Scalia. Instead, they are likely to insist on explicit statutory

\textsuperscript{308} See 25 U.S.C. §§ 261-64 (2206).

\textsuperscript{309} In the 1860s, Kansas and in New York were the first states attempting to tax Indian lands. In both instances, the states conceded that they did not have the power to tax Indian lands. In both cases, the states asserted that they had the power to tax the lands because the Indian title in the lands had been extinguished. In both cases, however, the Court found that the Indian title had not been extinguished and that Congress had not authorized taxation by the states. See The Kansas Indians, 72 U.S. (5 Wall.) 737, 755 (1867) (construing the treaties and legislation as retaining the character of lands as Indian lands even though individual members owned separate allotments held in trust by the United States; Kansas conceded that any tribal lands held in common would remain tax exempt, but asserted that the individual allotments could be taxed as non-Indian lands) and The New York Indians, 72 U.S. (5 Wall.) 761, 767 (1867) (pointing out that a current conveyance transferring full title in the future did not extinguish the Indian title and did not thereby subject the lands to state taxation).

\textsuperscript{310} See U.S. Const. art. I, § 1, cl. 3 (apportioning representatives in the House based on the census taken without counting “Indians not taxed”).


\textsuperscript{312} The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867) (United States Supreme Court invalidated the attempt by a county in Kansas to impose its real property tax on property owned by Native Americans).

\textsuperscript{313} The New York Indians, 72 U.S. (5 Wall.) 761 (1867) (United States Supreme Court invalidated New York’s attempt at acquiring title to Indian lands through non-payment of property taxes).

\textsuperscript{314} U.S. Const. amend. XIV, § 2 (apportioning representatives in the House among the states based on the census but not counting “Indians not taxed”).

\textsuperscript{315} See, e.g., the enabling legislation for New Mexico, Act of June 20, 1910, 36 Stat. 557, 558-59, ch. 310 (exempting Indian lands from state taxation until Congress removes restriction).

\textsuperscript{316} See Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cinn. L. Rev. 849 (1989) (explaining originalism as a process of looking at sources to determine the likely meaning of text in a constitution); Blatchford v. Native Village of Noatak, 501 U.S. 775, 779-82 (1991) (Justice Scalia using the absence of original sources to conclude that there was no evidence that states waived their sovereign immunity when they adopted the constitution); Scott A. Taylor, The Native American Law Opinions of Judge Noonan, 1 U. of St. Thomas L. J. 148, 170-76 (2004) (criticizing the quality of Justice Scalia’s originalist analysis in Blatchford v. Native Village of Noatak by pointing to numerous originalist sources that supported the conclusion that states did waive their sovereign immunity when they ratified the constitution).
exemptions from Congress, as Justice Thomas required in Blaze.\footnote{317} Or perhaps they will adopt the approach that Justice Rehnquist took in his dissent in Ramah Navajo School Board.\footnote{318} This approach would require the federal scheme to regulate the precise activity being taxed before general federal preemption would apply.

These approaches, however, completely miscomprehend the place that tribes occupy in our federal system. Whether we like it or not, Congress has had a judicially confirmed plenary power over Indians affairs since the late 19th century decision in Kagama\footnote{319} and the early 20th century decision in Lone Wolf.\footnote{320} Congress has exercised this power in such a way that we now have a legislative and regulatory mess. Justice Thomas asserts that Congress and the Supreme Court are very much to blame.\footnote{321} Given this mess, should we interpret ambiguities against tribes? Justices Thomas and Scalia have never thought otherwise. According to their thinking, the Tribes, when they receive an adverse decision from the United States Supreme Court, just need to contact Congress and get things fixed.\footnote{322} Sadly, Justice Edward Douglass White’s opinion in Lone Wolf basically says something quite similar.\footnote{323}

A far better approach, especially when states are attempting to assert power within Indian country, within reservations, and against tribes, is to look for clarity in the federal law. If Congress has provided clarity, then the answer is simple. If, however, Congress expects the Supreme Court to fill in the blanks because Congress cannot be bothered to provide sufficient guidance to answer the particular question, then the Court should construe the ambiguous provision in favor of the Tribe and tribal interests. This approach is consistent with a fairly long line of precedents that are rooted in logic and experience.\footnote{324} The compelling justification for this approach has to do with the constitutional framework of our government. States, and their interests, are structurally and practically well represented in all three branches of government. Tribes, on the other hand, have

\footnotesize{318} See Ramah Navajo School Board v. Bureau of Revenue of New Mexico, 458 U.S. 832, 852 (1982) (Rehnquist, J, dissenting) (noting that the BIA did “not regulate the construction activity which the State seeks to tax”).
\footnotesize{319} See United States v. Kagama, 118 U.S. 375 (1886) (confirming the power of Congress to enact legislation making homicide, among other things, a federal crime when committed in Indian Country by one Indian against another).
\footnotesize{320} See Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (confirming the power of Congress to abrogate a treaty that required a procedure for adult members of the tribe to approve land transfers).
\footnotesize{321} See United States v. Lara, 541 U.S. 193, 214-15 (2004) (Thomas, J., concurring) (asserting that the plenary power of Congress is inconsistent with the concept that tribes retain sovereignty).
\footnotesize{322} See, e.g., Arizona Department of Revenue v. Blaze Construction Company, 526 U.S. 32, 38 (1999) (stating that exemption from “Arizona’s transaction privilege tax is not our decision to make; that decision rests, instead, with the state of Arizona and with Congress” and, of course, ignoring the question of whether the Navajo Nation, whose roads received diminished funding, should have some say and failing to respond to the amicus brief filed by the Navajo Nation).
\footnotesize{323} See Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903) (stating that if “injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts”).
\footnotesize{324} See Antoine v. Washington, 420 U.S. 194, 199-200 (1975) (stating that federal legislation must be construed in the light of the longstanding canon that treaties and statutes involving Indians should be construed in their favor).
absolutely no structural role in our government.\textsuperscript{325} Moreover, tribes do not serve as feeders for the federal government in the same way that state governments do. Adult tribal members, admittedly, have the right to vote in state and federal elections. Their numbers in most states, however, are such that most candidates for federal office can ignore them and still win elections.

States, in contrast, have direct political representation in the United States Senate. Each state elects two senators in state-wide elections.\textsuperscript{326} These senators, to retain their seats, must remain loyal to the population in the state that he or she serves. Many senators, before being elected, served in state or local offices of state and local governments. For example, Jeff Bingaman and Pete Domenici are the two sitting senators from New Mexico. Senator Bingaman was the Attorney General of the State of New Mexico before being elected to Congress.\textsuperscript{327} Senator Domenici served as the chairman of the city commission of Albuquerque (equivalent to being mayor).\textsuperscript{328} These positions that they held earlier in their political careers provided them with knowledge about state and local interests in New Mexico. Accordingly, they are uniquely qualified, along with many of their colleagues in the Senate, to sponsor remedial legislation that will protect the interest of their state against federal legislation that injures New Mexico. Another example is Senator Byron Dorgan of North Dakota. He served as the North Dakota Tax Commissioner in White Eagle v. Dorgan,\textsuperscript{329} a case his office lost before the North Dakota Supreme Court.\textsuperscript{330} The White Eagle case is one of only two reported cases that have addressed the issue that is the focus of this article.

Membership in the House of Representatives, except for seven states,\textsuperscript{331} is based on districts within a particular state. Accordingly, the political structure of the House, as a matter of our Constitution, is not intended to represent state interests. Nonetheless, former state and local government officials hold many of the positions in the House. Like Senators Bingaman and Domenici, these members of the House are more than able to look out for state interests.\textsuperscript{332}

\textsuperscript{325} Four of the last five presidents were governors of states before becoming president. Many federal judges and members of Congress served in state or local offices before serving in a federal position. Except for the Bureau of Indian Affairs, Native Americans are not well represented in any of the branches of the federal government.
\textsuperscript{326} See U.S. Const. amend. XVII.
\textsuperscript{327} See Biography of Jeff Bingaman, available at: \url{http://bingaman.senate.gov/about/} (accessed July 17, 2007).
\textsuperscript{328} See Biography of Pete Domenici, available at: \url{http://domenici.senate.gov/about/background.cfm} (accessed July 17, 2007).
\textsuperscript{329} 209 N.W.2d 621 (N.D. 1973).
\textsuperscript{330} See Biography of Byron Dorgan, available at \url{http://dorgan.senate.gov/about/biography/}. His website proudly states that his “public service career began at age 26, when he was appointed to the office of State Tax Commissioner in North Dakota. He was the youngest constitutional officer in North Dakota’s history. He was re-elected to that office by large margins in 1972 and 1976, and was chosen one of “Ten Outstanding State Officials” in the United States by the \textit{Washington Monthly} magazine.” (accessed July 17, 2007).
\textsuperscript{331} These states are: Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming. See: \url{http://www.house.gov/house/MemStateSearch.shtml} (accessed July 19, 2007).
\textsuperscript{332} For example, Heather Wilson is a representative from New Mexico and served as Secretary of the Children, Youth, and Families Department of the State of New Mexico before being elected to the House of
In stark contrast, Indian tribes and their members have no structural role in Congress. Very few members of tribes are ever elected to Congress. As a result, tribal interests are most often represented by a small number of senators and representatives who have taken a moral interest in the historic mistreatment of Native Americans. These friendly members of Congress rarely have the influence or the votes to promote tribal interests.

Given the constitutional structure of the Senate and the obvious fact that states and local governments are well represented in Congress, the federal courts should construe federal legislation in favor of tribes and their sovereignty. If states are unhappy with the judicial result, then the states can go to Congress easily and quickly because they are already there. It is at this juncture where Justices Thomas and Scalia have turned the tables and made states the winners whenever Congress legislates with less than clarity. States, under our constitutional framework, have their interests well represented. Tribes, on the other hand, have no structural or de facto seat at the table. Tribal interests are served in Congress only when a rare member of Congress decides to summon the moral courage to advance a tribal interest.

A good example of how the process operates is Indian gaming. The legal history of Indian gaming is not pretty, but it illustrates how states, if they really want something from Congress, can get it and get it quickly. The main part of the story starts with California v. Cabazon Band of Mission Indians. In that case, the United States Supreme Court held that federally recognized Indian tribes in California could operate high stakes bingo without regard to California laws that limited bingo prizes to $250. California believed that Congress had granted regulatory authority to the state when it passed Public Law 280 in 1953. The Court disagreed and found that California was

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333 The 110th Congress has only one Native American, Tom Cole, who represents the 4th District of Oklahoma and who is a member of the Chickasaw Tribe. See Biography at: http://www.house.gov/cole/bio.htm (accessed July 19, 2007). Representative Cole served as Secretary of State of Oklahoma and does have experience in state government. His biography, however, does not indicate that he has served as an official within the government of the Chickasaw Nation.


335 The case law dealing with canons of construction that favor tribes does not consider the absence of a political place for tribes within our political structure. See, e.g., see Antoine v. Washington, 420 U.S. 194, 199-200 (1975) (stating that federal legislation must be construed in the light of the longstanding canon that treaties and statutes involving Indians should be construed in their favor because Native Americans are a weak and defenseless people who are wards of the federal government). Consider New Zealand, which has created seats in Parliament to represent the Maori peoples. See Georgina McGill, Reserved Seats in Parliament for Indigenous Peoples—the Maori Example, Research Note 51, Information and Research Services, Department of the Parliamentary Library, Canberra (June 1997) available at: www.aph.gov.au/library/Pubs/RN/1996-97/97rn51.pdf (accessed July 24, 2007).

337 See id. at 214-22.

338 See id. at 207-8.

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granted a more limited power of prohibiting bingo.\textsuperscript{339} If California had prohibited all bingo within the state, then the Tribes would have been unable to operate bingo legally. However, if California regulated bingo, but left it legal, then the Tribes were free to conduct bingo games without regard to the state regulations.

The implications of the Cabazon decision did not escape the notice of all the states having reservations within their borders. Those states governed by Public Law 280\textsuperscript{340} quickly realized that tribes could conduct any gaming on their reservations if the gaming was legal in the state. In addition, this tribal gaming could now be conducted without any state limitation or regulation. Those states not governed by Public Law 280 understood that Indian gaming could take place on the reservation of a tribe even if such gaming was illegal as a matter of state law. Facing an explosion of Indian gaming, the states quickly convinced Congress that federal legislation should be passed to limit the application of the Cabazon case.\textsuperscript{341} This legislation, passed a year after the Cabazon decision, is known as the Indian Gaming Regulatory Act (IGRA)\textsuperscript{342} and allows tribes to conduct most forms of gaming only if the Tribes enter into a compact with the state in which they are located.\textsuperscript{343} If a state refused to negotiate in good faith, then the negotiations were channeled into a federal court process that gave the federal courts the final say on the form of the compact.\textsuperscript{344}

Florida contested this provision in IGRA and asserted that Congress, because of the 11\textsuperscript{th} amendment, did not have the power to waive a state’s sovereign immunity.\textsuperscript{345} The United States Supreme Court agreed and invalidated this provision in IGRA.\textsuperscript{346} The Department of Interior, in response to this case, developed regulations in which the process became administrative.\textsuperscript{347} The Secretary of the Interior was given the power to prescribe a compact if a state was unwilling to negotiate in good faith.\textsuperscript{348} So far, this process has survived judicial challenge. In other states, the compacting process has taken various forms. Some states, such as Connecticut,\textsuperscript{349} succeeded in extracting huge revenue sharing payments from its two tribes. Other states, such as Minnesota, secured no revenue sharing payments at all.\textsuperscript{350} Other states have gone through marathon litigation
and political wrangling.\textsuperscript{351} In retrospect, IGRA demonstrates that states have the ability to seek remedial legislation in Congress precisely because their interests are so well represented there. The solution was not pretty partly because the legislation was rushed and not well thought out. Nonetheless, the states forced tribes to negotiate with them and to share revenues.

Given the experience with IGRA, the United States Supreme Court should see that states have ready access to Congress. Therefore, if Congress writes a statute whose application is not clear under the circumstances, then the Court should interpret the statute in favor of the tribal interest. If states are unhappy, then they can go to Congress. If, instead, the Court starts from the proposition that tribes are subject to all state authority unless Congress provides otherwise, then the states will gladly take this extra authority and the Tribes will continue to lose their sovereignty. States are often in a position to block most legislation that tribes propose. So every United States Supreme Court decision in favor of state power is likely to shift that power permanently to the states and away from the Tribes.

A gap in the Supreme Court’s jurisprudence on state taxation within Indian Country is the impact that state taxation has on a tribe’s power to tax. A particular economy has only so much tax capacity. In addition, over-taxation stunts economic growth. So, if states are given free reign to tax anything and everything that takes place within Indian country, then the Tribes will be deprived of most of their tax base. The Cotton Petroleum case is an excellent example. The Court minimized the economic effect that multiple taxation would have on the Jicarilla Apache Tribe.\textsuperscript{352} By allowing New Mexico to impose its severance tax on top of the tribal severance tax, oil and gas produced on the Jicarilla Apache reservation were among the most heavily taxed. This, of course, reduced future drilling. It also encouraged drilling on lands just outside the reservation where the production was less heavily taxed. This meant that much of the natural resources underneath tribal lands was being taken away from the Tribe. This in turn reduced royalty and tax revenue. These economic effects have taken their toll on the Tribe.\textsuperscript{353}

If, instead, Justice Stevens in Cotton Petroleum had analyzed the case as one involving an ambiguity in the 1938 legislation, then he would have had a basis for concluding that Congress was unclear in its intent. The Court could have concluded that New Mexico’s tax was invalid. Had this happened, the states would have probably gone to Congress,\textsuperscript{354} and Congress probably would have devised a compromise in which the states and the Tribes ended up sharing the tax base.\textsuperscript{355} As things now stand, the states receive the bulk

\begin{footnotes}
\item[351] See Rand and Light, supra note \_, at 169-70.
\item[353] See Cowan, supra note \_.
\item[354] At least fourteen different states filed amici briefs urging affirmance of the state power to tax. See Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 165 (1989).
\item[355] The New Mexico Legislature actually understood that the multiple taxation permitted by the decision in the Cotton Petroleum case was extremely unfair to the Tribe. As a result, the New Mexico Legislature passed remedial legislation. Because the Tribe did not have a bargaining position, the effective date of the legislation was prospective and, therefore, left most of the tribal tax base still subject to multiple taxation. See N.M. Stat. Ann. § 7-29C-1 (2007) (effective for wells drilled after March 1, 1995).
\end{footnotes}
of the revenue and the Tribes are left trying to devise tax systems when little tax capacity remains.356

VI. Application of General Federal Preemption to State Income Taxation

This article, although it refers to cases going beyond the preemptive effect of federal statutes other than the Indian trader provisions, is focused solely on state income taxation of licensed and unlicensed Indian traders. When we look at the Indian trader statute itself, we find no specific language providing or suggesting that Indian traders should be exempt from state taxation.357 If Congress had provided an explicit provision, then, of course, the litigation in Warren Trading Post and subsequent cases would have been unnecessary.

Congress has provided explicit tax exemptions involving tribes and their members. A substantial number of state enabling statutes explicitly prohibit states from imposing their property taxes on Indian lands.358 In the Burke Act, however, Congress was a little less explicit, but it did provide that individual allotments held in trust for individual Indians, when transferred to them free of any restrictions, would be transferred free of any taxes.359 This more general provision was construed to preempt all state and federal taxes.360 In a provision enacted in 1934, Congress specifically provided that lands acquired by the United States and held in trust for a tribe would be exempt from state and local taxation.361 When authorizing payment of damages in land claims cases, Congress usually provides exemption from state and federal income taxation.362 Finally, Congress has provided a broad exemption from state taxation for tribal members earning income from treaty fishing rights.363

But as the review of the cases, starting with Utah & Northern Railway v. Fisher,364 shows, Congress just as often fails to include specific language dealing with state taxation even when it enacts federal statutes that regulate activity on the reservation or transactions with Indians and tribes. If we look at the statutory record as a whole, we see

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356 See, e.g., Sithe Global LLC, A Comparative Study of Tax Costs in San Juan County, NM and Other Locations, p. 12 (June 2005) (on file with author) (showing, because of multiple taxation, a far higher effective tax rate for a proposed coal-fired electricity generating power plant located on the Navajo Nation when compared to one located off the reservation).
358 See, e.g., enabling legislation for New Mexico, Act of June 20, 1910, 36 Stat. 557, 558-59, ch. 310 (exempting Indian lands from state taxation until Congress removes restriction).
362 For a general provision providing a broad exemption from federal and state taxes in the case of distributions of judgment funds, see 25 U.S.C. § 1407 (2007).
364 See discussion, supra, at notes ____ through ____.
that Congress has provided specific exemptions, general exemptions, and no exemptions. Congress has rarely authorized state taxation.\(^{365}\) In all three instances, we find that state taxes are preempted. When Congress is specific, the preemption goes unquestioned. The treatment of treaty fishing rights income is a good example.\(^{366}\) When the exemption provision is general, and therefore ambiguous, then questions naturally arise. And finally, when Congress is silent, then the analysis turns to the extent of the federal regulation and the effect that state taxation has on the Tribe and on Indians living on the reservation. This analysis, in the face of silence, finds its most well developed formulation in White Mountain Apache,\(^{367}\) a case that focused first on the pervasiveness of the federal scheme in light of its effect on tribal interest and second on the effect the state tax would have on the Tribe’s right of self-government. We will refer to this as a preemption/infringement analysis.

Application of this preemption/infringement analysis to state income taxation of Indian traders produces a clear result. The Indian trader statute should preempt a state’s income tax. The pervasiveness of the federal scheme is not lessened merely because the state tax is an income tax. In most cases, the state income tax and the state sales tax, if permitted, would be a personal liability of the Indian trader. In addition, both taxes require the taxpayer to calculate the tax base with adjustments before applying the rate of tax. In some cases, depending on the rate of tax and the calculation of the tax base, the total income tax may be higher than the sales tax. Both taxes affect the prices that the trader charges. In both cases, the taxes increase prices. The extent to which the trader can absorb these taxes or pass them on to the consumer is more a function of market forces than anything else.\(^{368}\) In most cases, the taxes increase prices and thereby lower demand. Lower demand reduces sales and, in turn, reduces the trader’s net profit. A lower net profit adversely affects the trader’s capital and impedes business operations.

On the consumption side, prices are higher because of state taxation. If the Indian consumer has to pay higher prices because of state taxation, then the federal interest in protecting Indians living on a reservation is compromised. As a group, Native Americans have among the lowest per capita income in the United States.\(^{369}\) This is especially true for those reservations that are located a substantial distance from metropolitan areas. Because incomes are very low for many Native Americans living on a reservation, keeping prices as low as possible becomes a matter of simple fairness.

\(^{365}\) For a rare example, see Indian Oil Leasing Act of 1924, ch. 210, 43 Stat. 244 (explicitly authorizing state taxation of mineral production on Indian lands).

\(^{366}\) See 25 USC § 71 (2007) (no reported cases involving a state attempt to impose its income tax on income from the exercise of treaty fishing rights).


The preemption/infringement analysis also requires a consideration of the effect of the state taxation on the individual tribe. At the time that the United States Supreme Court decided Warren Trading Post, Central Machinery, White Mountain Apache, and Ramah Navajo School Board, tribal taxation did not exist because the Court had not yet provided a categorical confirmation of the power of tribes to impose taxes.370 Obviously, state taxation of a tax base that is potentially subject to tribal taxation necessarily diminishes the tribal power to tax. This is an issue that the Court has yet to consider when looking at the extent to which state taxation adversely affects a tribe’s right of self-government.371

In fact, the tenacity of state efforts to tax tribes, their members, their property, and anything and everything within Indian country shows that states understand that their governments could not exist without revenue. Tribes, like states, also need revenue to provide governmental services to their members. If states go after the same tax base as the Tribes, then the tribal power to tax is diminished. If states are allowed to impose their income taxes on Indian traders, then the Tribes are effectively precluded from imposing their own income taxes.

State income taxation of Indian traders also limits a tribe’s ability to affect its own economic development policies. States have already perfected the art of granting tax concessions to major firms that are considering locating within their boundaries. Some states have used the absence of a state income tax as a drawing card. South Dakota is a good example of success in attracting financial service companies to the state.372 In fact, it expresses pride in not having an income tax and lists it as a positive factor for companies.373 If states with income taxes are allowed to impose them on Indian traders, then tribes do not have the same option as South Dakota to use the absence of an income tax as an attraction.

If we now apply a federal preemption approach that decides in favor of the tribal interest when Congress is silent but nonetheless regulates the field, we see that the federal Indian trader statute and its regulations leave no room for state income tax. The tribal interest is

370 The first judicial confirmation of the tribal power coming from the United States Supreme Court is Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 152-54 (1980) (finding that the Tribe had the power to tax on-reservation sales of cigarettes to non-members). The Supreme Court also decided Central Machinery and White Mountain Apache in 1980 after the Colville case, but the Court failed to consider the effect that state taxation might have on the power to tax of the individual tribes. The Court committed the same omission in its decision in the Ramah Navajo School Board case decided in 1982. More explicit confirmations of the tribal power to tax came in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) and Kerr-McGee v. Navajo Nation, 471 U.S. 195 (1985).

371 See Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 101-3 (2005) (refusing to look at the negative effect on tribal sovereignty where the legal incidence of the state motor fuel tax fell on non-Indian wholesalers involving wholesale transactions taking place off the reservation even though the economic incidence of the tax fell on the retail consumer). The Wagnon case is beyond the scope of the Indian trader line of cases because the Tribe, which was the owner and operator of the gas station, was not the consumer of the gasoline. Instead, the Tribe was buying the gasoline to resell it to consumers who were visiting the Tribe’s casino. The state taxation of the wholesalers increased the price and lessened the financial viability of the gas station. See Prairie Band Potawatomi Nation v. Richards, 379 F.3d 979, 981-82 (10th Cir. 2004).


373 Id.
substantially and negatively affected because state taxation raises prices for Indian consumers, reduces economic development, impairs the tribal tax base, and impedes the ability of tribes to develop the same tax incentives that states use on a routine basis. If states faced similar challenges, they would be in Congress in a flash and remedial legislation would be passed in short order.

VII. Application to Specific Factual Situations

The above discussion demonstrates that state income taxation of Indian traders is preempted by the federal statute and regulations. In addition, this taxation impermissibly infringes a tribe’s right to self-government. Given the current pro-state, anti-tribe sentiment of the current Court, further analysis of a number of variables is necessary. These variables are: 1) licensed or unlicensed Indian trader, 2) sales to Indians, non-Indians, and the Tribe, 3) location of the transaction on or off the reservation, and 4) the residence of the trader on or off the reservation. As the ensuing discussion shows, the case law answers most of these questions.

A. Licensed or Unlicensed Indian Traders

Warren Trading Post, the leading case, involved a licensed Indian trader. The case emphasized the federal purpose of the regulation, which was protection of the Indians from unfair prices and practices. This purpose, then, together with the statute and regulations, preempted the field and left no room for Arizona’s sales tax. Even so, the language of the opinion in several parts of the text clearly emphasized the status of the trader as “licensed.”

The preemptive reach of the Indian trader statute to unlicensed traders arose in Central Machinery. In that case, the taxpayer was not licensed. This fact was important to the Arizona Supreme Court and was the basis that the Arizona court used to distinguish the case from Warren Trading Post. The United States Supreme Court, however, found the status of the trader to be irrelevant. The Court instead focused on the pervasiveness of the federal scheme and its application to the sale of the farm machinery to the Tribe. The Court found that the statutory provision requiring Central Machinery to secure a license and another imposing a penalty for not doing so was enough to put the transaction within the statute and to preempt the Arizona tax.

375 See id. at 691-92.
376 448 U.S. 160 (1980).
377 Id. at 161.
378 See Arizona v. Central Machinery Company, 589 P.2d 426 (Ariz. 1978) (Sandra Day O’Connor, J., later appointed to the United States Supreme Court in 1981, stated that “by the use of the words ‘Indian traders’ the Court [in Warren Trading Post] meant a defined group of persons licensed under authority of the United States statutes to carry on the business of trading on Indian reservations with Indians. This case is clearly distinguishable. Central Machinery is not an "Indian trader", although it may on occasions do business with reservation Indians, even to the extent of going on the reservation to solicit business.” Id. at 427).
379 448 U.S. at 164 (1980).
380 Id.
381 Id. at 165.
In the case of a state income tax, the licensed status of the Indian trader should also be irrelevant so long as the transaction is otherwise governed by the Indian trader statute. The statute applies to anyone who trades with a tribe or its members on the reservation. Therefore, a trader who sells goods and services on a reservation to a tribe or its members should be exempt from a state income tax on income derived from those sales. Central Machinery provides ample authority for this conclusion.

B. Sales to the Tribe, Indians, and Non-Indians

The facts in the Warren Trading Post line of cases through Ramah involved sales of goods and service to the Tribe or its members. These factual circumstances are the clearest examples of when federal preemption applies. The federal interest is at its highest and the burden on the Tribe and its members is likewise clear. In the case of a state income tax, some states might assert that the tax is a direct tax on the Indian trader and therefore of no harm to the Tribe or its members. This argument is totally without substance because economic studies show that direct taxes such as an income tax can increase prices. How much is unclear. Moreover, state income taxation of an Indian trader adversely affects a tribe’s tax base and efforts to promote economic development. Therefore, sales of goods and services to a tribe and to its members generate income that states should not be able to reach with their income taxes. The case involving income from sales to non-Indians is less clear.

The Milhelm Attea case clearly establishes that an Indian trader that markets a tax exemption by selling untaxed cigarettes to non-Indians cannot avoid the imposition of a state cigarette excise tax. A close look at the facts in Milhelm Attea shows that New York did not actually try to impose its cigarette excise tax on the Indian trader. Instead, the state attempted to prevent Indian traders from acquiring tax-exempt cigarettes above an amount estimated for consumption by tribal members. To determine the number of cigarettes that should be exempt, the state imposed a record-keeping requirement on all Indian traders to determine how many packs of cigarettes were purchased by Indians and how many by non-Indians. Milhelm Attea Brothers, the Indian trader, contested the validity of these record keeping requirements. One can safely assume that if New York imposed a requirement on Milhelm Attea Brothers to collect and pay the tax, then the United States Supreme Court would have found the tax valid notwithstanding these additional burdens. Therefore, state taxation of transactions of sales to non-Indians involving the marketing of a tax exemption is not preempted by the Indian trader statute.

382 See McClure and Graetz, supra note ___.
383 512 U.S. 61, 64 (1994) (pointing out that New York cannot tax cigarette sales to members).
384 Id. at 65.
385 Id. at 65-67.
386 Id. at 69-70.
387 See id. at 71-72.
Nonetheless, the question still remains whether regular sales to non-Indians would still be subject to taxation. For example, if a non-Indian buys a Whopper at a Burger King owned by an Indian trader on the Reservation of the Navajo Nation in Arizona, is this burger subject to Arizona’s transaction privilege tax? Milhelm Attea is easily distinguishable because that case involved an Indian trader that was selling cheap, untaxed cigarettes primarily to non-Indians who went to the store just for that purpose. In the case of the Burger King, most of the customers are Navajo who mingle now and then with an occasional tourist. Clearly, the Indian trader is not attempting to market a tax exemption. No consumers are going to drive many miles just to save $.10 on a Whopper. Actually, the savings would be less because the Navajo Nation imposes its own retail sales tax on the transaction at the rate of 4%.388 This example further illustrates how the Arizona tax, if allowed to apply, adversely affects the sovereignty of the Navajo Nation. The clerks at the Burger King would have to ask each of the customers whether they are tribal members and then charge and collect an additional tax on non-members. The extra compliance costs would burden the Burger King, a burden that does not arise for off-reservation Burger Kings. If a potential Burger King can choose a location that is equally good, but just off the reservation, then the Navajo Nation loses its tax base altogether.

In fact some Indian traders may have a line of merchandise of arts and crafts that they purchase from tribal members for resale to tourists.389 This sort of activity obviously facilitates the Indian trader’s business, promotes income production among tribal members, and encourages tourism, which has its economic benefits for the Tribe. This type of activity has traditionally taken place at Indian trading posts for the last 100 years or so and has been part of what the federal regulatory scheme regulates. Therefore, Milhelm Attea should not be extended to sales to non-Indians unless the transactions involve the marketing of a tax exemption. This approach is entirely appropriate. The United States Supreme Court, when it considers such a case, should hold in favor of a tax exemption. If the result is one that the states do not like, then they can go to Congress and get the fix they want, as they did in response to Cabazon where they secured passage by Congress of the Indian Gaming Regulatory Act.390

If sales to non-Indians are not exempt from state taxation, then another difficulty arises. This involves the treatment of Indian consumers who are not members of the Tribe where the Indian trader is located. In the case of marketing a tax exemption, the United States Supreme Court, in Washington v. Confederated Tribe of the Colville Indian Reservation,391 has answered the question and held that non-member Indians who lived on the Colville Reservation were treated the same as non-Indians.392 In that case, the Court treated non-member Indians the same as non-Indians by looking at whether non-member Indians had a role to play in the self-government of the Tribe.393 The Court saw before it no evidence showing that the non-member Indians participated in tribal

390 See discussion supra accompanying notes ___ through ___.
392 Id. at 161.
393 Id. at 160-61.
government. It would be improper to extend the holding in Colville beyond its facts, which focus so heavily on the marketing of a tax exemption. This is especially true because the Court later distinguished Colville in Cabazon and noted that the state’s interest in regulating conduct lessens when a tribe is not marketing an exemption. So, the holding in Colville should not extend beyond its narrow limits. Instead, the Court should look at the connection between the non-member Indians and the individual Tribe. This will show that as often as not the non-member Indians are spouses or relatives of members or frequently employees of the Tribe. Under these circumstances, the Tribe clearly has an interest in promoting the family life of its members and in hiring employees to provide needed services. It is also important to note that many tribes have a history of inclusion, adoption, consolidation, and amalgamation. Given this history, it is inappropriate for the Court to assume that non-member Indians have no role to play in the social, cultural, spiritual, economic, and political life that constitutes an Indian tribe. Instead, it is safer to assume that non-member Indians who live on the reservation of another tribe play a vital role in everyday life and in the future of the Tribe. Accordingly, non-member Indians, except in the case of transactions involving the marketing of a tax exemption, should be treated the same as members of the Tribe.

C. Location of Transactions On or Off the Reservation

Location of the transaction is not really an issue when the Indian trader has commercial premises located on the reservation. In these cases, the transaction is clearly on the reservation and federal preemption applies. But if the Indian trader travels on and off the reservation or has a business located off the reservation, then locating the transaction on the reservation could be factually sensitive. In Mescalero Apache Tribe v. Jones, the United States Supreme Court held that a tribe that engages in conduct off the reservation exposes itself to state taxation. This was not an Indian trader case. Instead, it was a case involving direct state taxation of the Tribe. In Mescalero, the Tribe had constructed a ski resort on land leased from the federal government. New Mexico attempted to impose its gross receipts tax on the operations of the ski resort. The Court permitted this state taxation on the theory that the Tribe’s immunity from taxation applied only within its own borders. Although the Tribe did assert general federal preemption, the Court ignored the general preemption approach as then reflected in Warren Trading Post and

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394 Id.
396 See Padraic I. McCoy, The Land Must Hold the People, 27 Am. Indian L. Rev. 421, 430 (2002/2003) (observing that the Wind River Reservation is home for the Shoshone and the Arapahoe and that the Fort Berthold Reservation is home for the Mandan, Gros Ventre, and Arikara people).
397 See, e.g., New Mexico Taxation and Revenue Department v. Greaves, 864 P.2d 324, 325 (N.M. Ct. App. 1993) (imposing the New Mexico income tax on the salary of a tribal judge who lived and worked on the reservation of the Jicarilla Apache Tribe but who was a member of the Rosebud Sioux Tribe in South Dakota) and LaRock v. Wisconsin Department of Revenue, 621 N.W.2d 907, 908-9 (Wisc. 2001) (imposing the Wisconsin income tax on Joan LaRock, who was a member of the Menominee Tribe, who lived and work on the reservation of the Oneida Reservation, and who was married to an Oneida member).
399 See id. at 146.
400 See id. at 147.
401 See id. at 148-49.
McClanahan. Mescalero, therefore, holds that immunity from direct state taxation of the Tribe when its activity takes place off the reservation can occur only when Congress provides an explicit exemption.

A reading of Mescalero and Central Machinery together would indicate that immunity from state taxation for off-reservation activity will require an explicit exemption from Congress, even in a case involving an Indian trader. Accordingly, general federal preemption does not seem to extend to transactions that occur wholly off the reservation. The Central Machinery case, however, involved a transaction in which some of the activities took place on and some off the reservation. The Indian trader’s place of business was located off the reservation. The tribal representatives visited the off reservation business location of the trader to view the farm machinery. The parties then negotiated the contract on the reservation. Central Machinery delivered the machinery to the Tribe on the reservation and received payment on the reservation. These three factors (contract formation, delivery, and payment) were sufficient to lead the Court to conclude that the transaction had taken place on the reservation. The opinion in Central Machinery suggests that if the transaction had taken place off the reservation, then the Arizona sales tax would have been valid.

Central Machinery failed to articulate the precise factors that would be necessary to locate the transaction on the reservation in transactions involving different facts. We can see this by considering an example. For example, if a tribe orders a computer from BestBuy online and requests delivery on the reservation, then is the transaction on the reservation or off the reservation? The contract is negotiated in two places—on the reservation and at Best Buy’s server, which could be located anywhere and is almost certainly not located on the reservation. Delivery is to the Tribe on the reservation. And payment, like the contract, is taking place at more than one place. Assuming a credit card is used, then the authorization occurs on the reservation and payment occurs wherever Best Buy processes credit card payments. The Tribe’s payment of the credit card charge will likely involve execution of a check on the reservation and mailing to an off reservation location. The credit card company will then receive the check and deposit it

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402 See id. at 147-49.
403 Id. at 149-50 (“It is thus clear that in terms of general power New Mexico retained the right to tax, unless Congress forbade it, all Indian land and Indian activities located or occurring outside of an Indian reservation.”)
404 For an example of an off-reservation exemption, see 25 U.S.C. § 71 (2007), which provides exemption from a state income tax on income produced from the exercise of treaty fishing rights even if exercised off the reservation.
407 Id.
408 Id.
409 Id. 165.
410 Id.
411 Id. at 165-66.
412 See id. at note 3.
to the company’s account. The check will then clear and be debited against the Tribe’s bank account, which is no doubt at a bank located off the reservation.

The opinion in Central Machinery really provides little help in deciding if this computer purchase occurs on or off the reservation. In the world of interstate taxation of retail sales, we follow a model in which the state of destination retains the power to impose its sales tax. The origination state does not exercise its power to impose its sales tax on sales of goods destined for other states. Perhaps this interstate model should apply to sales of goods to tribes and to their members. Using this model, the focus should be on the purchaser and the location of the use of the property. Under this model, Central Machinery’s requirement of an on-reservation transaction could be satisfied if the purchaser is the Tribe or one of its members and if the property purchased is used wholly or primarily on the reservation. This would simplify things considerably and dispense with a case-by-case analysis of every transaction and the various facts involving its completion. Formation of the contract, place of delivery, modes of transportation, and place and mode of payments would become irrelevant. In the case of the computer sale, this model treats the transaction as taking place on the reservation. In contrast, if a tribal member has a primary residence located off the reservation and purchases goods for use there, then the transaction takes place off the reservation and no exemption from state taxes applies. Applying this model to state income taxation, the seller merely needs to keep track of on-reservation sales to tribes and their members and exclude the income generated by those sales.

D. Residence of the Trader

Because the tax we are considering is a state income tax, states are certainly going to raise the question of residence. This was the case in Loveness, the Arizona case dealing with the state income taxation of the non-Indian taxpayer in White Mountain Apache. The Arizona court’s primary reason for upholding its income tax was that it was not a motor carrier tax or a motor fuel tax, both of which the United States Supreme Court invalidated in White Mountain Apache. To buttress its holding, the Arizona court adopted a second and independent line of reasoning, which relied on the off-reservation residence of the taxpayer. Under its residence logic, the Arizona court adopted the principle that Arizona residents are subject to income taxation on their world-wide income. Conspicuously absent from the court’s analysis was any meaningful reference to Central Machinery. In Central Machinery, the tax at issue was Arizona’s transaction

414 The calculation of the amount excluded would also require a related calculation of the deductions associated with the particular sale. So, for example, if an Indian trader made 20% of its sales to an Indian tribe, which in turn generated 20% of its gross revenues, then it would need to eliminate 20% of its deductions. Other methods of allocation would be reasonable taking into account cost of goods sold, direct costs, and indirect costs.
416 Id. at 308.
417 Id.
privilege tax, a tax imposed on the privilege of doing business in Arizona.\footnote{418} In that case, the taxpayer’s place of business was within Arizona and off the reservation and was subject to the Arizona transaction privilege tax for all sales except those preempted by the Indian trader statute.\footnote{419} The Indian trader statute preempted the Arizona tax precisely because the sale of the machinery was to the Tribe and took place on the reservation.\footnote{420} The facts in Loveness are indistinguishable from Central Machinery with the exception that the state tax is an income tax instead of a sales tax.\footnote{421} In Loveness, the transactions were clearly on the reservation because the taxpayer transported the timber from the site of the cutting to the tribal sawmill.\footnote{422} The taxpayer’s trucks, when they were hauling tribal timber, did not leave the reservation.\footnote{423} So the real question in Loveness is whether the income generated by its on-reservation business is exempt as a matter of federal law. If the income is exempt from state taxation, then the residence of the taxpayer on or off the reservation is wholly irrelevant. The treatment of the income earned by Mr. and Mrs. Loveness is similar to the treatment of interest income that taxpayers earn on federal bonds.\footnote{424} This interest income is immune from state taxation because of the federal law articulated in McCulloch v. Maryland.\footnote{425} Likewise, the income of Mr. and Mrs. Loveness should be exempt from the Arizona income tax under federal law because of the pervasive federal regulation of the Tribe’s timber harvesting and processing business, as explained in White Mountain Apache Tribe v. Bracker.\footnote{426} The question, then, is one of exemption and not one of residence.

\section*{VIII. Some Thoughts about the Sale of Services}

The Indian trader cases decided in the United States Supreme Court involved the sale of goods. Accordingly, states are likely to challenge an Indian trader that sells services to a tribe or its members. The first argument of the states will be that the Indian trader statute extends only to the sale of goods. This argument, however, is answered by reference to the statute itself, which, although it refers to goods, is broad enough to extend to the sale of services.\footnote{427} At least one higher state court has interpreted the Indian trader statute as applying to the sale of services.\footnote{428}

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\item 418 448 U.S. 160 (1980).
\item 419 Id.
\item 420 Id. at 165-66.
\item 421 Arguably, the fact that the corporation owned by the taxpayers was not a licensed Indian trader is an important factual difference. However, the Supreme Court in White Mountain Apache v. Bracker, 448 U.S. 136 (1980), held that a different set of federal statutes and regulations had the same preemptive effect as the Indian trader statute and regulations in Warren Trading Post. Id. at 152.
\item 423 See id.
\item 425 17 U.S. (4 Wheat.) 316 (1819).
\item 426 See 448 U.S. 136 (1980).
\item 428 See New Mexico Taxation and Revenue Department v. Laguna Industries, 855 P.2d 127 (N.M. 1993).
\end{thebibliography}
In addition, White Mountain Apache v. Bracker involved the sale of services.\textsuperscript{429} Likewise, Ramah Navajo School Board v. Bureau of Revenue of New Mexico dealt with construction services purchased to build a school.\textsuperscript{430} These two cases involved federal statutory schemes other than the Indian trader statute and regulations. Nonetheless, the facts in both cases involved the purchase of services, instead of goods. As a result, it makes sense to treat the sale of services the same as the sale of goods when a licensed or unlicensed Indian trader is involved.

The harder question with the sale of services may very well be locating the performance of the services on or off the reservation. In the cases where the services are performed exclusively on the reservation, placing the transaction on the reservation is obvious. Some services, however, may be more difficult to locate. For example, an architect who designs a tribal building will no doubt visit the proposed construction site, meet with tribal officials on the reservation, and check on construction from time to time. The actual design will likely take place in the architect’s office, which will probably be located off the reservation. Locating these architectural services on or off the reservation is quite difficult because the actual services are both on and off the reservation. These problems also arise in the case of legal or accounting services.

States will undoubtedly assert that the location of the office is the focal point of the services and, therefore, places them off the reservation. In reality, some of the services in most cases will be performed partly on and partly off the reservation. In these cases, especially where the services can be measured by the amount of time expended delivering them, could be allocated based on the time spent on and off the reservation. In the example of the architect, the income could be split between that generated on the reservation and that generated off the reservation. If the architect spends 75% of her time on the reservation, then 75% of the income from the contract could be allocated to the reservation and treated as exempt from the state income tax under the general preemption doctrine arising from the Indian trader statute. The other 25% would be subject to the state income tax.

Another approach might be a bright line test that looks to the recipient of the services. Under this approach, services performed for the benefit of a tribe or a tribal member would be treated as services performed on the reservation. For example, the lawyer representing the White Mountain Apache Tribe at all stages of the lengthy litigation was performing legal services for the Tribe. Because the Tribe was the recipient of those services, they could be treated as rendered on the reservation for the benefit of the Tribe. This approach makes sense in the context of the White Mountain Apache case because the underlying dispute involved the Tribe’s extensive timber operations.\textsuperscript{431} The continued economic success of the timber operation was critical in generating revenues

\textsuperscript{429} See 448 U.S. 136, 139 (1980) (the services included felling the timber, cutting to size, and transporting the timber to the tribally owned sawmill).

\textsuperscript{430} See 458 U.S. 832, 835 (1982).

\textsuperscript{431} A lawyer’s or an accountant’s work may be just as essential to the Tribe’s timber operation as is the transportation of the harvested trees to the sawmill for processing.
for the effective operation of the tribal government. Under this approach, then, the professional fees paid to the lawyer in the White Mountain Apache case would be treated as service performed on behalf the Tribe on the reservation and would be exempt from the Arizona income tax. This approach could work well for accounting, legal, financial, and consulting services performed by professionals for the Tribe or its members.

Conclusion

States consistently have asserted their power to tax everything and anything that takes place within their boundaries even if it takes place within Indian Country and directly involves tribes and their members. This article identifies and explains a robust line of United States Supreme Court cases concluding that federal statutes and regulations involving licensed and unlicensed Indian traders preempt state sales and excise taxes on sales to tribes and their members. No federal cases have yet considered whether this federal preemption extends to state income taxes. The two reported state cases are split. Arizona finds no preemption. North Dakota apparently has concluded that Warren Trading Post is expansive enough to preempt state income taxes. In this article, I conclude that the reasoning underlying the sales and excise tax line of cases logically extends to state income taxation. Licensed and unlicensed Indian traders should begin making claims for refund of their overpaid state income taxes allocable to their Indian trader income. Timely claims are critical so that the relevant state statute of limitations does not bar claims. Ultimately, the United States Supreme Court will have to answer the question. And when the United States Supreme Court addresses this issue, it should hold in favor of exemption from state income taxation unless and until Congress provides otherwise. If states do not like this conclusion, then they should go to Congress where their interests are well represented.