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## Rebalancing Bracker Forty Years Later

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## Rebalancing Bracker Forty Years Later

### Cover Page Footnote

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# REBALANCING *BRACKER* FORTY YEARS LATER

By William T. McClure\* & Thomas E. McClure\*\*

I. INTRODUCTION .....	334
II. DEVELOPMENT AND APPLICATION OF LAWS AFFECTING NON-INDIANS ON TRIBAL LANDS ...	336
A. <i>The Pre-Bracker Legal Landscape</i> .....	337
1. Tribal Taxing Authority .....	338
2. Preemption of State Authority Relating to Tribes .....	338
B. <i>Foundations of Implied Preemption</i> .....	339
III. LOWER COURTS' APPLICATION OF <i>BRACKER</i> .....	348
A. <i>Dependent and Principal Independent Variables</i> .....	353
B. <i>Explanatory Variables</i> .....	353
C. <i>Results</i> .....	355
D. <i>Discussion of Results</i> .....	356
IV. LOWER COURT INCONSISTENCIES .....	357
A. <i>Non-Indian Standing to Assert Tribal Interest</i> .....	358
B. <i>The Weight Afforded to Economic Effect on Tribes</i> .....	359
C. <i>The Preemptive Force of Specific Federal Regulations</i> .....	362
1. Gaming.....	362
2. Real Estate Leasing.....	364
V. PROPOSED SOLUTIONS .....	365
A. <i>Potential Solutions Outside of Bracker</i> .....	366
1. Tribal-State Tax Compacts .....	366
2. Congressional Fix .....	367
3. Executive Branch Efforts .....	368
4. Abandoning <i>Bracker</i> , in Whole or in Part .....	369
B. <i>Standing</i> .....	370
C. <i>Economic Burden</i> .....	371
D. <i>The Preemptive Force of Specific Federal Regulations</i> .....	373
VI. CONCLUSION.....	374

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<sup>1</sup> The terms “Indian” and “Indian law” are legal terms of art and used to describe the laws regarding the groups of indigenous peoples of North America.

## I. INTRODUCTION<sup>1</sup>

Nestled in its own corner of American Indian law, the *White Mountain Apache v. Bracker*<sup>2</sup> balancing test, also known as implied federal preemption, and its progeny have shaped the application of state tax laws within tribal lands for four decades.<sup>3</sup> Under this test, a court balances federal, tribal, and state interests to determine whether a state's taxing authority is impliedly preempted by federal law.<sup>4</sup> The *Bracker* balancing test is confined to state assertions of authority "over the conduct of non-Indians engaging in activity on the reservation."<sup>5</sup> In a recent dissent, Chief Justice Roberts described the *Bracker* balancing test as "a nebulous balancing test," which lacks rigidity and "mires state efforts to regulate on reservation lands in significant uncertainty, guaranteeing that many efforts will be deemed permissible only after extensive litigation, if at all."<sup>6</sup> Put simply, the present iteration of the *Bracker* balancing test is unworkable.

This Article argues that the *Bracker* balancing test, in its current form, does not produce predictable outcomes. By examining decisions in which a court conducted the *Bracker* balancing test, we conclude that the test fails to provide clear guidance of its application, thus seeding unpredictability for tribes, states, and enterprises conducting business with tribes. We argue that after forty years, the *Bracker* balancing test must be remodeled to provide sorely needed clarity. Such a position is not, in and of itself, groundbreaking. Many tribal scholars have criticized the current Herculean task litigants face when *Bracker* is at issue and the resulting uncertainty for states, tribes, and tribal business partners.<sup>7</sup> This Article departs from prior scholarship by examining data from lower federal and state court decisions. We analyze lower courts' application of the *Bracker* balancing test since the test's inception to identify how the lack of clarity has manifested in litigated controversies.

"The power to tax is a fundamental, necessary sovereign power of government."<sup>8</sup> But identifying which sovereigns wield taxing powers in particular scenarios has produced decades of

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<sup>2</sup> 448 U.S. 136 (1980) (hereinafter "Bracker").

<sup>3</sup> Although the *Bracker* balancing test has been employed for a variety of state assertions of authority, *see generally*, e.g., *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (rejecting the state's attempt to regulate a tribe's game hunting enterprise), this Article focuses solely on state taxation authority because most of the cases that conduct the *Bracker* balancing test address state taxing power.

<sup>4</sup> *Bracker*, 448 U.S. at 142-45.

<sup>5</sup> *Id.* at 144.

<sup>6</sup> *McGirt v. Oklahoma*, 521 U.S. \_\_\_, 140 S.Ct. 2452, 2501 (2020) (Roberts, C.J., dissenting).

<sup>7</sup> Alex Tallchief Skibine, *From Foundational Law to Limiting Principles in Federal Indian Law*, 80 MONT. L. REV. 67, 89-97 (2019); Anthony Broadman, *How I Learned To Stop Worrying and Love Bracker*, GALANDA BROADMAN (Aug. 14, 2013), <https://www.galandabroadman.com/blog/2013/08/how-i-stopped-worrying-and-learned-to-love-bracker> [<https://perma.cc/3L25-WX6A>] ("[I]t seems every time courts apply the *Bracker* balancing test, it becomes erroneously less possible to pass."); F. Michael Willis, *Courts Side with Tribes in the First Tax Disputes Testing the Obama Administration Land Leasing Regulations*, NATIVE AM. RESOURCE COMMITTEE (2016), <https://www.hobbsstrauss.com/wp-content/uploads/2016/09/Michael-Willis-State-Taxation-and-the-Indian-Land-Leasing-Regulations.pdf> [<https://perma.cc/FU2Y-38V8>] ("Administering [the *Bracker* balancing test] adds a layer of legal uncertainty to an already challenging environment for economic development. . . . The result has been the loss of tribally generated revenues to those outside jurisdictions, legal uncertainty that stifles economic development in tribal communities, and frequent resort to litigation."); John Hayden Dossett, *Indian Country and the Territory Clause: Washington's Promise at the Framing*, 68 AM. U. L. REV. 205, 274-75 (2018).

<sup>8</sup> *Elster v. City of Seattle*, 444 P.3d 590 (2019).

inconsistent outcomes in the lower courts.<sup>9</sup> States' power to tax certain enterprises or activities on tribal lands potentially conflicts with the federal government's interests in promoting tribal sovereignty and self-governance. The conditions under which state taxes are preempted by the *Bracker* balancing test remain unclear. The disparate outcomes in recent gaming cases are illustrative of such disparities.

Many tribes own and operate gaming facilities.<sup>10</sup> Instead of purchasing their own gaming equipment, some tribes lease equipment from non-Indian corporations.<sup>11</sup> Some states have imposed *ad valorem*, or personal property, taxes on the non-Indian's gaming equipment even though it is located only within tribal boundaries.<sup>12</sup> When a state asserts taxation authority over a non-Indian on tribal land, the *Bracker* balancing test applies.<sup>13</sup> Employing the *Bracker* balancing test, the Oklahoma Supreme Court held that the state tax on the gaming equipment was preempted by federal law.<sup>14</sup> Yet, the Second Circuit upheld the equivalent tax imposed by the State of Connecticut.<sup>15</sup> Both courts applied the same test to like taxes on gaming equipment. Yet, the courts reached opposite results.<sup>16</sup>

In October 2020, the Supreme Court had the occasion to review this Oklahoma Supreme Court decision, but denied certiorari.<sup>17</sup> Justice Thomas dissented from this denial, arguing that the opposite holdings in the Oklahoma and Second Circuit decisions presented a "square conflict."<sup>18</sup> He recognized that the Court had "an opportunity to clear up tensions among courts about how to apply pre-emption principles at the intersection of federal law, state law, and tribal land."<sup>19</sup> But with the denial of certiorari, "pre-emption law will remain amorphous."<sup>20</sup> Justice Thomas's frustration with the denial puts him in good company.

Many scholars lament how the *Bracker* balancing test has evolved from its original meaning.<sup>21</sup> Several commentators have called on Congress fix the problem.<sup>22</sup> Instead of adopting

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<sup>9</sup> See *infra* Part IV.

<sup>10</sup> *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013); *Video Gaming Techs., Inc. v. Rogers Cty. Bd. of Tax Roll Corr.*, 475 P.3d 824 (Okla. 2019), *cert. denied*, 141 S. Ct. 24 (2020).

<sup>11</sup> *Mashantucket Pequot*, 722 F.3d at 459-60; *Video Gaming Techs.*, 475 P.3d at 827.

<sup>12</sup> *Mashantucket Pequot*, 722 F.3d at 459-60; *Video Gaming Techs.*, 475 P.3d at 827.

<sup>13</sup> *Mashantucket Pequot*, 722 F.3d at 471-73; *Video Gaming Techs.*, 475 P.3d at 830-31.

<sup>14</sup> *Video Gaming Techs.*, 475 P.3d at 834.

<sup>15</sup> *Mashantucket Pequot*, 722 F.3d at 473-74.

<sup>16</sup> *Compare Mashantucket Pequot*, 722 F.3d at 473-74, with *Video Gaming Techs.*, 475 P.3d at 834.

<sup>17</sup> *Rogers Cty. Bd. of Tax Roll Corr. v. Video Gaming Techs., Inc.*, 141 S.Ct. 24, 24 (2020).

<sup>18</sup> *Id.* (Thomas, J. dissenting).

<sup>19</sup> *Id.* at 25.

<sup>20</sup> *Id.*

<sup>21</sup> See, e.g., Richard D. Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 TAX LAW. 897, 908-09 (2010); Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391, 420-21, (2008); Jesse K. Martin, *Kansas v. Prairie Band Potawatomi Nation: Undermining Indian Sovereignty Through State Taxation*, 6 U. MD. L.J. RACE RELIG. GENDER & CLASS 251, 265-66 (2006); Charley Carpenter, *Preempting Indian Preemption: Cotton Petroleum Corp. v. New Mexico*, 39 CATH. U. L. REV. 639, 666-71 (1990); Erik M. Jensen, *Taxation and Doing Business in Indian Country*, 60 ME. L. REV. 1, 74-75 (2008).

<sup>22</sup> See, e.g., Jensen, *supra* note 21, at 17-19 (proposing federal legislation to explicitly restrict states' powers to tax certain activities within tribal lands); Skibine, *supra* note 21, at 420-21 (criticizing congressional inaction and

a legislative approach, this Article advocates that the judiciary maintain the *Bracker* framework. We examine the current utility of the *Bracker* balancing test to determine whether courts are in fact weighing tribal, federal, and state interests. We perform a statistical analysis of a dataset comprised of 59 lower court taxation opinions which conducted a *Bracker* balancing analysis. Specifically, we determine whether there are any factors that may explain why the majority of lower courts rule against tribal interests.

First, this Article recounts the Supreme Court’s modern Indian law jurisprudence governing states’ regulation of tribes, their members, and their lands. Although this Article focuses on *Bracker* and its progeny, *Bracker* itself acknowledges that it fits within a broader progression of the Court’s recognition of state authority related to tribal business operations. Justice Thurgood Marshall’s opening line in the *Bracker* decision stated, “In this case we are once again called upon to consider the extent of state authority over the activities of non-Indians engaged in commerce on an Indian reservation.”<sup>23</sup> To more fully consider the data set of 59 lower court opinions, we lay out a brief outline of implied preemption in this context.

Second, we cross-tabulate the judicial finding of no preemption with key characteristics of the cases in the dataset. We then present the results of regression analyses<sup>24</sup> which we employed to determine whether any factor explained why tribal interests lose tax challenges almost two-thirds of the time. Contrary to expectations, there was no significant relationship between the passage of time and preemption case outcomes. Our models revealed that lower courts were less likely to find preemption of cigarette taxes but apt to find that state fuel taxes were preempted.

Third, we explore the inconsistent decisions rendered by lower courts in their application of the *Bracker* balancing test. After identifying these incongruities in which courts render conflicting decisions, we present ways in which the judiciary can revise and clarify the *Bracker* balancing test in the hope of providing greater predictability and producing uniformity in the lower courts.

## II. DEVELOPMENT AND APPLICATION OF LAWS AFFECTING NON-INDIANS ON TRIBAL LANDS

This Part chronicles Supreme Court Indian law jurisprudence from *Williams v. Lee*<sup>25</sup> in 1959 to *Wagon v. Prairie Band Potawatomi Nation*<sup>26</sup> in 2005. Conflicts between states and tribes significantly predate 1959.<sup>27</sup> Three late nineteenth-century cases provide the context important to

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emphasizing the problem of judicial supremacy); see also Michalyn Steele, *Congressional Power and Sovereignty in Indian Affairs*, 2018 UTAH L. REV. 307, 337 (2018) (proposing an Indian Sovereignty Affirmation Act).

<sup>23</sup> *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 137 (1980).

<sup>24</sup> Regression analysis is a statistical method used to describe the relationship between a dependent variable (outcome variable) and one or more independent variables (predictive or explanatory variables).

<sup>25</sup> 358 U.S. 217 (1959).

<sup>26</sup> 546 U.S. 95, 110 (2005).

<sup>27</sup> See e.g., *United States v. Kagama*, 118 U.S. 375, 384 (1886) (“[Tribes] owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies.”); see also Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divesture of Indian Tribal Authority over Non-Members*, 109 YALE L.J. 1, 8-16 (1999).

understanding the modern doctrine.<sup>28</sup> Sometimes referred to as the “Non-Indian Lessee Cases,”<sup>29</sup> the Supreme Court upheld state taxation of non-Indian property within an Indian reservation when the state’s tax would not interfere with tribal treaty rights.<sup>30</sup> But the modern doctrine blazed a trail that is distinct from the early Non-Indian Lessee Cases.

### A. *The Pre-Bracker Legal Landscape*

The Supreme Court’s modern jurisprudence begins with *Williams v. Lee*.<sup>31</sup> In *Williams*, a non-Indian operated a general store on the Navajo Indian Reservation and sold goods to a tribe member on credit.<sup>32</sup> Seeking to collect the amount owed, the store owner brought suit against the tribe member in Arizona state court.<sup>33</sup> The Supreme Court held:

There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that [the store owner] is not an Indian. He was on the Reservation and the transaction with an Indian took place there.<sup>34</sup>

The *Williams* Court stated, “Through conquest and treaties [Native American tribes] were induced to give up complete independence and the right to go to war in exchange for federal protection, aid, and grants of land.”<sup>35</sup> Looking back to Chief Justice Marshall in 1832, the Court recognized the independent communities of native nations, their ownership of distinct lands, and their separation from the laws of the states where tribal lands are located.<sup>36</sup> The essential question regarding a state’s jurisdiction, absent Congressional authorization, “has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.”<sup>37</sup> *Williams* generated two lines of cases: (1) those related to tribal governance and taxing authority and (2) those related to state authority.<sup>38</sup> After we give a brief overview of tribal governance as it relates to tribal taxing powers, we focus on the cases pertaining to state authority.<sup>39</sup>

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<sup>28</sup> *Utah & N. Ry. Co. v. Fisher*, 116 U.S. 28, 33 (1885); *Thomas v. Gay*, 169 U.S. 264, 274-75 (1898); *Wagoner v. Evans*, 170 U.S. 588, 592-93 (1898).

<sup>29</sup> *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 472 (2d Cir. 2013).

<sup>30</sup> *Utah & N. Ry. Co.*, 116 U.S. at 33; *Thomas*, 169 U.S. at 274-75; *Wagoner*, 170 U.S. at 592-93.

<sup>31</sup> See Bethany R. Berger, *Williams v. Lee and the Debate Over Indian Equality*, 109 MICH. L. REV. 1463 (2011), for a comprehensive examination of the case’s history.

<sup>32</sup> *Williams v. Lee*, 358 U.S. 217, 217, (1959).

<sup>33</sup> *Id.* at 218.

<sup>34</sup> *Id.* at 222.

<sup>35</sup> *Id.* at 218.

<sup>36</sup> *Id.* at 219.

<sup>37</sup> *Id.* at 220.

<sup>38</sup> Matthew L. M. Fletcher, *A Short History of Indian Law in the Supreme Court*, 40 HUM. RTS. 3, 5 (2015).

<sup>39</sup> See Alex Tallchief Skibine, *Constitutionalism, Federal Common Law, and the Inherent Powers of Indian Tribes*, 39 AM INDIAN L. REV. 77 (2014); Jensen, *supra* note 21, for a much more thorough examination. See Rebecca Tsosie, *Tribal Data Governance and Informational Privacy: Constructing “Indigenous Data Sovereignty,”* 80 MONT. L. REV. 229 (2019), for an interesting look ahead into the digital era.

## 1. Tribal Taxing Authority

*Williams* affirmed the principle of tribal governance authority. Tribes are domestic, dependent sovereigns and retain their authority to govern. The tribal right to govern is aboriginal, not a creation of the Constitution, and, in fact, predates the Constitution.<sup>40</sup> Although tribes retain a number of sovereign powers, like sovereign immunity and the power to exclude people from their lands,<sup>41</sup> tribal sovereignty is diminished in a variety of ways.<sup>42</sup> Setting aside other limitations or ambiguities regarding tribal authority, tribes clearly possess the power to tax members and nonmembers on Indian land.<sup>43</sup>

Tribal taxing power is “an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management.”<sup>44</sup> Taxation is an exercise of inherent tribal governmental power that “derives from the tribe’s general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services [by requiring those acting within the territory to contribute].”<sup>45</sup> Tribes can develop any type of taxation scheme simply because taxation remains in their inherent sovereign powers.<sup>46</sup> However, the federal government, as the dominant sovereign, can modify tribal sovereign authority.<sup>47</sup>

## 2. Preemption of State Authority Relating to Tribes

More relevant for our purposes is the percolation of state taxation authority into tribal affairs. Regarding state authority, *Williams* created the “infringement test,” which provided that unless Congress has legislated to the contrary, state governments cannot infringe on the internal affairs of tribal governance.<sup>48</sup> Following *Williams*, the Supreme Court held that states may not tax transactions on tribal land involving tribal members nor the on-reservation income of tribal members.<sup>49</sup> But a tribe’s off-reservation activity is subject to general taxation.<sup>50</sup> Although the infringement test remains an independent basis for the invalidation of state action, the *Bracker*

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<sup>40</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

<sup>41</sup> *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (sovereign immunity); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 136-37 (1982) (power to exclude people from Indian land).

<sup>42</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978) (tribes lacked criminal jurisdiction over non-Indians) (quoting *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 572 (1823); *Montana v. United States*, 450 U.S. 544 (1981) (creating the *Montana* test for limited tribal civil jurisdiction over non-Indians and the *Montana* test exceptions).

<sup>43</sup> *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980).

<sup>44</sup> *Merrion*, 455 U.S. at 137.

<sup>45</sup> *Id.*

<sup>46</sup> Jensen, *supra* note 21, at 23.

<sup>47</sup> *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 435 (1989) (Stevens, J., concurring).

<sup>48</sup> *Williams v. Lee*, 358 U.S. 217, 220 (1959).

<sup>49</sup> *Warren Trading Post Co. v. Ariz. State Tax Comm’n*, 380 U.S. 685 (1965); *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164 (1973).

<sup>50</sup> *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

balancing test for implied preemption has mostly swallowed up any independent infringement analysis when the issue involves non-Indians.

### *B. Foundations of Implied Preemption*

Notwithstanding that it is often called the *Bracker* balancing test, implied preemption analysis began fifteen years before *Bracker* with *Warren Trading Post Co. v. Arizona State Tax Commission*.<sup>51</sup>

In *Warren*, Arizona imposed a two percent transaction privilege tax on a non-Indian who was licensed by the federal government to conduct business on the Navajo Reservation.<sup>52</sup> The Supreme Court examined the history and level of federal regulations of Indian traders and noted that the federal government largely allowed Indians to “govern themselves, free from state interference.”<sup>53</sup> The Court struck down the tax as an intrusion into federal licensing and regulation of Indian traders on reservations and stated that Arizona had been relieved of any obligations to the Navajo Reservation because the federal government provided roads, education, and other services to the tribe.<sup>54</sup> Simply put, federal regulation of Indian traders was pervasive, and Arizona did not possess any duties or responsibilities that would justify the tax.<sup>55</sup> Following *Warren Trading Post*, the Court decided a series of cases regarding retail cigarette taxes.

These retail cigarette cases require us to take a detour to examine the narrow subject of state taxation authority related to tribes and Indians themselves. In *Moe v. Confederated Salish and Kootenai Tribes*, the Supreme Court upheld the State of Montana’s retail tax on cigarettes sold by an Indian on tribal lands.<sup>56</sup> Although the legal incidence of Montana’s tax fell on the consumer, the Indian seller collected the tax.<sup>57</sup> The Supreme Court determined this collection requirement did not interfere with either federal interests or tribal self-government and was a minimal burden to collect a lawfully imposed tax.<sup>58</sup> Thus, a state may impose a nondiscriminatory tax on non-Indian consumers of Indian sellers doing business on tribal land, even if that tax is detrimental to the Indian seller’s business with non-Indians.<sup>59</sup>

The Court built on this principle a few years later in *Washington v. Confederated Tribes of Colville Indian Reservation* (“*Colville*”).<sup>60</sup> There, the State of Washington sought to collect retail sales tax on cigarettes sold on tribal lands to non-tribal members.<sup>61</sup> The tobacco sellers were

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<sup>51</sup> *Warren Trading Post Co.*, 380 U.S. 685.

<sup>52</sup> *Id.* at 685-86.

<sup>53</sup> *Warren Trading Post Co.*, 380 U.S. at 686-87.

<sup>54</sup> *Id.* at 690-91.

<sup>55</sup> *Id.* at 691.

<sup>56</sup> *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 482-83 (1976).

<sup>57</sup> *Id.* at 482-83.

<sup>58</sup> *Id.* at 482-83.

<sup>59</sup> *Moe*, 425 U.S. at 482-83; *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 151 (1980).

<sup>60</sup> *Colville*, 447 U.S. 134.

<sup>61</sup> *Id.* at 141.

federally licensed Indian traders and subject to tribal taxation of their cigarette sales.<sup>62</sup> Many of the purchasers were “non-Indians – residents of nearby communities who journey to the reservation especially to take advantage of the claimed tribal exemption from the state cigarette and sales taxes.”<sup>63</sup> In other words, “the Indian retailer’s business [was] to a substantial degree dependent upon his tax-exempt status,” and the Indian retailer’s sales would fall sharply if the retailer lost this tax-exempt status.<sup>64</sup>

As a result, the Court held that “the value marketed by the smokeshops . . . is not generated on the reservations by activities in which the Tribes have a significant interest.”<sup>65</sup> In *Colville*, federal statutes did not preempt the state tax like in *Warren Trading Post*. Because Washington’s taxation scheme did not interfere with tribal sovereignty and because the tribes were merely marketing a tax exemption, the Court upheld the tax.<sup>66</sup> In comparing the economic interests of the tribes with Washington’s interest in raising revenues through their own taxation, the Court stated:

the [tribal] interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.<sup>67</sup>

Almost three weeks after the Court decided *Colville*, it issued *Bracker*.

In *Bracker*, the White Mountain Apache Tribe and Pinetop Logging Co., a non-Indian business, filed for a refund of a motor carrier license tax and use fuel taxes paid for logging activities conducted solely on tribal land.<sup>68</sup> They argued that the taxes were preempted by federal law, or, in the alternative, that the taxes unlawfully infringed on tribal self-governance. After creating the *Bracker* balancing test, the Supreme Court held that these taxes were preempted by federal law, and thus, improperly assessed.<sup>69</sup>

The Court initially clarified three principles of Indian law jurisprudence. First, the Court stated that there are two independent, yet related barriers that will preclude a state’s taxation authority: (1) the exercise of taxation authority is preempted by federal law and (2) the exercise of taxation authority unlawfully infringes on the rights of tribal members on tribal lands “to make their own laws and be ruled by them.”<sup>70</sup> Either barrier can independently block a state’s taxation authority regarding “activity undertaken on the reservation or by tribal members.”<sup>71</sup> Yet, although

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<sup>62</sup> *Id.* at 144. The Indian Trader Statutes set for the requirements for a federally licensed Indian trader. 25 U.S.C. §§ 261-264; *see also* Mashantucket Pequot Tribe v. Town of Ledyard, 722 F.3d 457, 467-69 (2d Cir. 2013).

<sup>63</sup> *Colville*, 447 U.S. at 145.

<sup>64</sup> *Id.* at 145.

<sup>65</sup> *Id.* at 155.

<sup>66</sup> *Id.* at 155-57.

<sup>67</sup> *Colville*, 447 U.S. at 156-57. *See also* Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991).

<sup>68</sup> *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 137-38 (1980).

<sup>69</sup> *Id.* at 152-53.

<sup>70</sup> *Id.* at 142 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

<sup>71</sup> *Id.* at 143.

principles of tribal self-governance are “deeply engrained in our jurisprudence,” tribal self-governance remains dependent on, and subject to, Congress.<sup>72</sup>

Second, the Court acknowledged that tribal sovereignty is distinct in form and substance from state sovereignty, and as such, the typical federal preemption analysis is not relevant.<sup>73</sup> Thus, “[t]he tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law.”<sup>74</sup> As a result, courts consider the broad policies underlying tribal sovereignty, construe ambiguities in federal law generously, and do not limit federal preemption in this context to scenarios where Congress explicitly announced an intent to preempt state activity.<sup>75</sup>

Third, the Court limited this new balancing test to state assertions of authority “over the conduct of non-Indians engaging in activity on the reservation.”<sup>76</sup> It emphasized that the on-reservation conduct of tribe members is generally immune from state taxation because a state’s regulatory interest is likely minimal, and the federal interest in fostering tribal self-governance is “at its strongest.”<sup>77</sup>

In finding federal preemption, the Court employed what is now known as the *Bracker* balancing test. The Court’s formulation of this test stated in full:

More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This 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.<sup>78</sup>

The Court held that federal regulation of harvesting timber on tribal lands was extensive, stating that “the Bureau of Indian Affairs exercises literally daily supervision over the harvesting and management of tribal timber.”<sup>79</sup> Any state taxation interference would obstruct federal policies, including the revitalization of tribal self-governance and tribal control of their own business and economic affairs.<sup>80</sup> “[E]qually important, [Arizona was] unable to identify any regulatory function, or service performed . . . that would justify the assessment of taxes for activities on Bureau and tribal roads with the reservation.”<sup>81</sup>

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 143-44.

<sup>76</sup> *Id.* at 144-45.

<sup>77</sup> *Id.* at 144.

<sup>78</sup> *White Mountain Apache Tribe*, 448 U.S. at 144-45.

<sup>79</sup> *Id.* at 145-47.

<sup>80</sup> *Id.* at 148-49.

<sup>81</sup> *Id.*

Although the clear focus in *Bracker* was on the pervasiveness of federal regulation and involvement in the timber operation, the Court, like in *Warren Trading Post*, emphasized the complete lack of involvement of Arizona for the taxed activities, stating that a state’s general desire to raise revenue was insufficient to justify the tax.<sup>82</sup>

Lastly, the Court seemed to give weight to undisputed fact that “the economic burden of the asserted taxes will ultimately fall on the Tribe.”<sup>83</sup> However, the Court couched this statement with a footnote explaining that this fact alone did not result in preemption.<sup>84</sup> Rather, *Bracker* rested “on the pre-emptive effect of the comprehensive federal regulatory scheme.”<sup>85</sup> Thus, Arizona’s motor carrier license tax and use fuel taxes were preempted.<sup>86</sup> The dissent argued that Arizona’s “relatively trivial taxes” did not impose “an economic burden that would threaten to ‘obstruct federal policies.’”<sup>87</sup>

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<sup>82</sup> *Id.* at 150.

<sup>83</sup> *Id.* at 151.

<sup>84</sup> *Id.* at 151 n.15. Footnote 15 states in full:

Of course, the fact that the economic burden of the tax falls on the Tribe does not by itself mean that the tax is pre-empted, as *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976), makes clear. Our decision today is based on the pre-emptive effect of the comprehensive federal regulatory scheme, which, like that in *Warren Trading Post Co. v. Arizona Tax Comm’n*, 380 U.S. 685 (1965), leaves no room for the additional burdens sought to be imposed by state law.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 152-53.

<sup>87</sup> *Id.* at 157-59 (Stevens, J. dissenting). More fully, the dissent stated

Even assuming, however, that the state courts would uphold the imposition of taxes based on the use of BIA roads, despite their similarities to private and tribal roads, I would not find those taxes to be pre-empted by federal law. In *Warren Trading Post v. Arizona Tax Comm’n*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165, the Court held that state taxation of a non-Indian doing business with a tribe on the reservation was pre-empted because the taxes threatened to “disturb and disarrange” a pervasive scheme of federal regulation and because there was no governmental interest on the State’s part in imposing such a burden. See *Central Machinery Co. v. Arizona State Tax Comm’n*, 448 U.S. 160, 168, 100 S.Ct. 2592, 2596, 65 L.Ed.2d 684 (Stewart, J., dissenting). In this case we may assume, *arguendo*, that the second factor relied upon in *Warren Trading Post* is present. As a result, Pinetop may well have a right to be free from taxation as a matter of due process or equal protection. But I cannot agree that it has a right to be free from taxation because of its business relationship with the petitioner Tribe. . . .

From a practical standpoint, the Court’s prediction of massive interference with federal forest-management programs seems overdrawn, to say the least. The logging operations involved in this case produced a profit of \$1,508,713 for the Indian tribal enterprise in 1973. As noted above, the maximum annual taxes Pinetop would be required to pay would be \$5,000–\$6,000 or less than 1% of the total annual profits. Given the State’s concession in this Court that the use of certain roads should not have been taxed as a matter of state law, the actual taxes Pinetop would be required to pay would probably be considerably less. It is difficult to believe that these relatively trivial taxes could impose an economic burden that would threaten to “obstruct federal policies.”

Under these circumstances I find the Court’s reliance on the indirect financial burden imposed on the Indian Tribe by state taxation of its contractors disturbing. As a general rule, a tax is not invalid simply because a nonexempt taxpayer may be expected to pass all or part of the cost of the tax through to a person who is exempt from tax. See *United States v. Detroit*, 355 U.S. 466, 469, 78 S.Ct. 474, 476, 2 L.Ed.2d 424, cf. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10. In *Warren Trading Post* the Court found an exception to this rule where Congress had chosen to regulate the relationship between an Indian

Issued on the same day as *Bracker*, Justice Marshall also penned *Central Machinery Co. v. Arizona State Tax Commission*.<sup>88</sup> Arizona imposed a transaction privilege tax on business conducted in the state, which was imposed on the seller.<sup>89</sup> Central Machinery sold eleven farm tractors to Gila River Farms, an enterprise of the Gila River Indian Tribe.<sup>90</sup> Gila River Farms operated on tribal and trust land on the Gila River Reservation.<sup>91</sup> Central Machinery solicited the sale, contracted, received payment, and delivered the tractors on the reservation.<sup>92</sup> Further, Central Machinery included the anticipated transaction privilege tax amount in its contract price.<sup>93</sup>

The Court determined that this case was similar to *Warren Trading Post*, with two immaterial differences: (1) Central Machinery was not a federally-licensed Indian Trader and (2) Central Machinery did not have a permanent place of business on the reservation.<sup>94</sup> Because the transaction occurred on the reservation, it was “plainly subject to federal regulation,” regardless of whether Central Machinery was a licensed trader.<sup>95</sup> Further, because the transaction fell within the Indian Trader Statutes, federal law expressly preempted the state tax.<sup>96</sup> *Central Machinery’s* only reference to *Bracker* related to the relief of state burdens and responsibilities when a tribe is left to conduct its affairs without state interference.<sup>97</sup>

In his dissent, Justice Stewart argued that the transaction did not fall within the Indian Trader Statutes.<sup>98</sup> Rather, Central Machinery was like any other corporation doing business in Arizona, deriving benefits and services from the state at the taxpayer’s expense.<sup>99</sup> As a result, the dissent argued that the majority should have considered “the State’s valid governmental justification for taxing the transaction.”<sup>100</sup> Further, the majority should have inquired into “federal, tribal and state interests, without which a rational accommodation of those interest is not possible.”<sup>101</sup> In other words, the dissent argued that there should have been a *Bracker* balancing analysis, where presumably, the dissent would have upheld Arizona’s taxation authority.<sup>102</sup>

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tribe and a non-Indian trader to such an extent that there was no room for the additional burden of state taxation. In this case, since the state tax is unlikely to have a serious adverse impact on the tribal business, I would not infer the same congressional intent to confer a tax immunity. Although this may be an appropriate way in which to subsidize Indian industry and encourage Indian self-government, I would require more explicit evidence of congressional intent than that relied on by the Court today.

<sup>88</sup> *Cent. Mach. Co. v. Ariz. State Tax Comm’n*, 448 U.S. 160 (1980).

<sup>89</sup> *Id.* at 161-62.

<sup>90</sup> *Id.* at 161.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Cent. Mach. Co.*, 448 U.S. at 164.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 165-66.

<sup>97</sup> *Id.* at 164.

<sup>98</sup> *Id.* at 168-69 (Stewart, J. dissenting).

<sup>99</sup> *Id.* at 169.

<sup>100</sup> *Id.* at 170.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* In a separate dissent, Justice Powell wrote to explain why he joined the majority in *Bracker* but dissented from *Central Machinery*. *Id.* at 170 (Powell, J. dissenting).

Although *Bracker* was “in all relevant respects indistinguishable from *Warren Trading Post*,”<sup>103</sup> *Bracker* created a new balancing test for implied preemption while leaving intact an avenue for more traditional explicit preemption in cases like *Warren Trading Post* and *Central Machinery*.<sup>104</sup>

Just two years later, in *Ramah Navajo School Board v. New Mexico*, the Supreme Court employed the *Bracker* balancing test to strike down New Mexico’s gross receipts tax on a non-Indian construction company that developed school facilities for the Ramah Navajo School Board.<sup>105</sup> The school board solicited funds from Congress for new school facilities, contracted with the Bureau of Indian Affairs (BIA) for the design and construction of the school, and subcontracts were subject to BIA approval.<sup>106</sup> Writing for the majority once again, Justice Marshall stated, “This case is indistinguishable in all relevant respects from [*Bracker*.]”<sup>107</sup> Federal regulation of the construction and financing of tribal educational institutions was both comprehensive and pervasive.<sup>108</sup> Although the Court recognized that New Mexico had a regulatory interest regarding the services it provided to the non-Indian contractor off the reservation, this interest was “not a legitimate justification for a tax whose ultimate burden falls on the tribal organization.”<sup>109</sup> Thus, as recognized by Justice Rehnquist’s dissent, the majority gave significance to the economic burden of the tribe in addition to the pervasiveness of federal regulation—weight that was not explicitly given in *Bracker* itself.<sup>110</sup>

Neither *Bracker* nor *Ramah* provided specifics regarding the required considerations for balancing state, federal, and tribal interests. And after the membership of the Supreme Court changed during the 1980s, the Court strayed from Justice Marshall’s initial concept of implied preemption.

In 1989, the Court once again considered the contours of the *Bracker* balancing test in *Cotton Petroleum Corp. v. New Mexico*.<sup>111</sup> Under the Indian Mineral Leasing Act of 1938, the Jicarilla Apache Tribe had the authority to execute mineral leases.<sup>112</sup> The Tribe’s mineral leases covered a substantial portion of its land and constituted the primary source of the Tribe’s revenues.<sup>113</sup> Cotton Petroleum was one of the Tribe’s non-Indian lessees, paying the Tribe severance and privilege taxes which amounted to about six percent of Cotton Petroleum’s revenue.<sup>114</sup> Cotton Petroleum also paid five of New Mexico’s taxes, equal to about eight percent of its revenue.<sup>115</sup>

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<sup>103</sup> *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 153 (1980).

<sup>104</sup> *Cent. Mach.*, 448 U.S. at 165-66.

<sup>105</sup> *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832, 834-35 (1982).

<sup>106</sup> *Id.* at 835.

<sup>107</sup> *Id.* at 839.

<sup>108</sup> *Id.*

<sup>109</sup> *Ramah Navajo Sch. Bd.*, 458 U.S. at 844. The Court also rejected the Solicitor General’s invitation to modify this preemption analysis to rely on the dormant Indian Commerce Clause. U.S. Const. Art I, § 8, cl. 3. *Id.* at 845-46.

<sup>110</sup> *Id.* at 853-54 (Rehnquist, J. dissenting); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 n.15 (1980).

<sup>111</sup> *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).

<sup>112</sup> *Id.* at 167.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

*Cotton Petroleum* was the sequel to *Merrion v. Jicarilla Apache Tribe*.<sup>116</sup> In *Merrion*, the Supreme Court affirmed the Tribe's power to impose a severance tax on the production of oil and gas by non-Indian lessees operating on the Tribe's land.<sup>117</sup> *Cotton Petroleum* addressed whether New Mexico could also impose severance taxes on that same production of oil and gas.<sup>118</sup>

In *Cotton Petroleum*, the Court held that the New Mexico tax was not preempted.<sup>119</sup> The Indian Mineral Leasing Act of 1938 supported the concept of providing tribes with an additional revenue source, but Congress had not intended to remove all barriers to maximized profits.<sup>120</sup> Further, the Court discussed the repudiation of intergovernmental tax immunity in the first third of the twentieth century, and states' longstanding ability to tax oil and gas leases on public lands.<sup>121</sup> Thus, the Court found that the Act neither expressly prohibited nor permitted state taxation of these mineral leases.<sup>122</sup>

Turning to *Bracker and Ramah*, the Court found distinctions in the pervasiveness of federal regulation of mineral leases.<sup>123</sup> Here, New Mexico provided services to both the Tribe and Cotton Petroleum.<sup>124</sup> New Mexico's services included regulating Cotton Petroleum's wells located on the reservation.<sup>125</sup> The federal and tribal regulations were "extensive," but these regulations were not exclusive.<sup>126</sup> And although Cotton Petroleum argued that the tax amount paid to New Mexico was disproportionate to the services it received, the Court rejected the proportionality argument.<sup>127</sup>

The Court held:

We thus conclude that federal law, even when given the most generous construction, does not pre-empt New Mexico's oil and gas severance taxes. This is not a case in which the State has had nothing to do with the on-reservation activity, save tax it. Nor is this a case in which an unusually large state tax has imposed a substantial burden on the Tribe. It is, of course, reasonable to infer that the New Mexico taxes have at least a marginal effect on the demand for on-reservation leases, the value to the Tribe of those leases, and the ability of the Tribe to increase its tax rate. Any impairment to the federal policy favoring the exploitation of on-reservation oil and gas resources by Indian tribes that might be caused by these effects, however, is simply too indirect and too insubstantial to support Cotton's claim of pre-emption. To find pre-emption of state taxation in such indirect burdens on this broad congressional purpose, absent some special factor such as those present in *Bracker and Ramah Navajo School Bd.*, would be to return to the pre-1937 doctrine of intergovernmental tax immunity. Any adverse effect on the

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<sup>116</sup> *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

<sup>117</sup> *Id.* at 144.

<sup>118</sup> *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 166 (1989).

<sup>119</sup> *Id.* at 177.

<sup>120</sup> *Id.* at 180.

<sup>121</sup> *Id.* at 179-80.

<sup>122</sup> *Id.* at 179-80.

<sup>123</sup> *Id.* at 186.

<sup>124</sup> *Id.* at 185.

<sup>125</sup> *Id.* at 186.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

Tribe’s finances caused by the taxation of a private party contracting with the Tribe would be ground to strike the state tax. Absent more explicit guidance from Congress, we decline to return to this long-discarded and thoroughly repudiated doctrine.<sup>128</sup>

Additionally, the Court endorsed the multiple taxation of Cotton Petroleum by the Tribe and New Mexico.<sup>129</sup> Recognizing that three different governments had jurisdiction over Cotton Petroleum’s wells that were located (1) on the Tribe’s land, (2) within New Mexico, and (3) within the United States, the Court stated, “The federal sovereign has the undoubted power to prohibit taxation of the Tribe’s lessees by the Tribe, by the State, or by both, but since it has not exercised that power, concurrent taxing jurisdiction over all of Cotton’s on-reservation leases exists.”<sup>130</sup> The Court acknowledged that this concurrent jurisdiction could be detrimental to the Tribe, but held:

There is simply no evidence in the record that the tax has had an adverse effect on the Tribe’s ability to attract oil and gas lessees. It is, of course, reasonable to infer that the existence of the state tax imposes some limit on the profitability of Indian oil and gas leases—just as it no doubt imposes a limit on the profitability of off-reservation leasing arrangements—but that is precisely the same indirect burden that we [previously] rejected as a basis for granting non-Indian contractors an immunity from state taxation.<sup>131</sup>

Justice Blackmun’s dissent in *Cotton Petroleum* pointed out the majority’s alterations of the *Bracker* balancing test. First, the majority’s approach allowed preemption only when a state is “*entirely* excluded from a sphere of activity and provides *no* services to the Indians or to the lessees they seek to tax.”<sup>132</sup> This, according to the dissent, was inconsistent with a flexible balancing test.<sup>133</sup>

Second, the dissent continued, “Under the majority analysis, insignificant state expenditures, reflecting minimal state interests, are sufficient to support state interference with significant federal and tribal interests.”<sup>134</sup> This disregard for the proportionality of interests in a balancing inquiry was antithetical to implied preemption.<sup>135</sup>

Third, the dissent criticized the approval of multiple taxation by the majority, which minimized its adverse effects on the Tribe.<sup>136</sup> A market can only bear a certain amount of taxation, and inevitably, a state’s taxes will create a ceiling on tribal tax revenues.<sup>137</sup> Because tribal taxation

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<sup>128</sup> *Id.* at 186-87.

<sup>129</sup> *Id.* at 188.

<sup>130</sup> *Id.* at 188-89.

<sup>131</sup> *Id.* at 191.

<sup>132</sup> *Id.* at 204 (Blackmun, J., dissenting).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 208.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 210.

is essential to protecting tribal interests, multiple taxation is a threat to those tribal interests.<sup>138</sup> The dissent reasoned that the Court should necessarily consider the importance of the taxed activity of the tribe, in addition to the size of the tax.<sup>139</sup>

But not all state taxation is subject to *Bracker* balancing. In *Oklahoma Tax Commission v. Chickasaw Nation*, Oklahoma attempted to collect retail sales tax from the Chickasaw-owned gas stations.<sup>140</sup> The Court held, “The initial and frequently dispositive question in Indian tax cases, therefore, is who bears the legal incidence of a tax.”<sup>141</sup> When the legal incidence falls on a tribe or its members for sales within Indian country, the tax cannot be imposed absent explicit congressional authorization.<sup>142</sup> If the legal incidence instead falls on a non-Indian, there is no categorical bar to the tax, and the *Bracker* balancing test determines its validity.<sup>143</sup> Thus, a threshold question is on whom does the legal incidence of the tax fall. In Oklahoma’s taxation scheme, the retailer of the fuel bore the legal incidence of the tax.<sup>144</sup> As a result, Oklahoma could not enforce the tax on tribal fuel retailers.<sup>145</sup>

Similarly, the most recent Supreme Court case related to implied preemption, *Wagnon v. Prairie Band Potawatomi Nation*, did not apply the *Bracker* balancing test.<sup>146</sup> In *Wagnon*, Kansas imposed a fuel tax on the receipt of fuel by distributors within the state.<sup>147</sup> Under this taxation scheme, the fuel distributor, who delivered the gasoline to a Tribe-owned gas station, paid the tax on its initial receipt of fuel and passed along the cost of the tax to the Tribe.<sup>148</sup> The Tribe’s gas station was adjacent to the Tribe’s multi-million dollar casino, in an otherwise remote and rural area.

Before *Wagnon* arrived in the Supreme Court, the Tenth Circuit conducted a *Bracker* balancing analysis and held that the tax was preempted because the value generated on the Tribe’s land by the casino created the fuel market for the Tribe’s gas station.<sup>149</sup> Thus, the appellate court held that the Tribe’s interest outweighed the state’s general interest to raise revenues.<sup>150</sup> But the Supreme Court reversed.<sup>151</sup> Because the legal incidence of the tax fell on the fuel distributor who was operating off-reservation, the Court held that *Bracker* did not apply to the distributor’s off-reservation fuel purchases that were then sold at the Tribe’s gas station.<sup>152</sup> Accordingly, *Wagnon* clarified a second threshold determination before a court conducts a *Bracker* balancing analysis. In addition to determining whether the legal incidence falls on an Indian or non-Indian as set out

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<sup>138</sup> *Id.* at 209.

<sup>139</sup> *Id.*

<sup>140</sup> Okla. Tax Comm’n v. Chickasaw Nation, 515 U.S. 450, 453 (1995).

<sup>141</sup> *Id.* at 458.

<sup>142</sup> *Id.* at 459.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 461-62.

<sup>145</sup> *Id.*

<sup>146</sup> *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005).

<sup>147</sup> *Id.* at 99.

<sup>148</sup> *Id.* at 99-100.

<sup>149</sup> *Prairie Band Potawatomi Nation v. Richards*, 379 F.3d 979, 987 (10th Cir. 2004).

<sup>150</sup> *Id.*

<sup>151</sup> *Wagnon*, 546 U.S. at 101.

<sup>152</sup> *Id.* at 101-02.

in *Chickasaw Nation*, a court considers whether the challenged tax is assessed on or off tribal land.<sup>153</sup>

The Supreme Court has not addressed the *Bracker* balancing test since 2005 in *Wagnon*.<sup>154</sup> The intervening fifteen years have seen a variety of state and federal courts wrestling with *Bracker* for a number of different taxes. Although the Supreme Court was given the opportunity to address state and federal court applications of the *Bracker* balancing test in October 2020, the Court denied certiorari.<sup>155</sup>

### III. LOWER COURTS' APPLICATION OF *BRACKER*

This Part examines a collection of lower court decisions citing *Bracker* that determined whether state tax laws were preempted. We present the regression analysis models under which we found a relationship between federal preemption and two categories of state taxes. Both models demonstrated that courts were more likely to find that a cigarette tax was not preempted and less likely to hold that a motor fuel tax was preempted. Our analyses also revealed the absence of any significant association between federal preemption and other variables, such as the court system in which the case was filed, the presence of a tribe in the litigation, the wealth of the tribe, and the tribal law expertise of the attorney challenging the tax.

When we compiled this set of cases, we first identified all opinions in the Westlaw database that cited *Bracker* during the period June 27, 1980 through June 27, 2020.<sup>156</sup> We eliminated decisions that did not concern challenges to state taxes. If a case was appealed to a higher court and the higher court issued an opinion, we omitted the decision of the subordinate court even if the higher court did not cite *Bracker*.<sup>157</sup> When a court issued multiple decisions in the same matter, we kept the final opinion and omitted the court's earlier decisions in the same lawsuit. After filtering out over 400 lower court decisions, 59 cases remained.<sup>158</sup>

We adjusted the database to account for situations in which one court ruled on challenges directed against multiple unrelated taxes. As a result, we created three replica cases in instances in

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<sup>153</sup> *Id.* at 102.

<sup>154</sup> However, Chief Justice Roberts recently mentioned the *Bracker* balancing test in his dissent in *McGirt v. Oklahoma*, 521 U.S. \_\_\_, 140 S.Ct. 2452 (2020) (Roberts, C.J., dissenting).

<sup>155</sup> *Rogers Cty. Bd. of Tax Roll Corr. v. Video Gaming Techs., Inc.*, 141 S. Ct. 24, 24 (2020).

<sup>156</sup> The 40-year period of this study begins on June 27, 1980, the date the Supreme Court decided *Bracker*. Lower courts continue to cite *Bracker*. For instance, in *Flandreau Santee Sioux Tribe v. Terwilliger*, No. 4:17-CV-04055-KES, 2020 U.S. Dist. (D.S.D. Oct. 21, 2020), the District Court for South Dakota conducted a full *Bracker*, and determined that an excise tax was preempted. The decision is currently on appeal in the Eighth Circuit. Similarly, in *Pickereel Lake Outlet Ass'n v. Day Cty.*, 953 N.W.2d 82 (S.D. 2020), the South Dakota Supreme Court upheld *ad valorem* property taxes on non-Indian owners of improvements on Indian trust land.

<sup>157</sup> If on appeal the higher court did not issue an opinion, we did not eliminate the case from the dataset. *E.g.*, *Crow Tribe of Indians v. Montana*, 819 F.2d 895 (9th Cir. 1987), *summarily aff'd sub nom.* *Montana v. Crow Tribe of Indians*, 484 U.S. 997 (1988).

<sup>158</sup> Our data set of 59 cases includes some decisions in which the court did not conduct a complete *Bracker* balancing analysis. Sometimes, a court decides whether a tax is preempted without explicitly weighing federal, tribal, and state interests. We included these cases because the courts cited *Bracker* in determining the issue of preemption, albeit in a cursory fashion.

which two taxes were challenged<sup>159</sup> and three replica cases when a court ruled on three taxes.<sup>160</sup> After making these adjustments, the final number of cases in the dataset was 64.<sup>161</sup> The complete list of cases appears in Appendix A.

We examined each case to identify a variety of characteristics including date of decision, level of court, jurisdiction, and types of businesses subject to tax. Table 1 displays a cross-tabulation of the data on these characteristics in comparison to the court outcomes on the question of *Bracker* preemption.

TABLE 1. Cross-tabulation of Findings of No Preemption by Lower Court Case Characteristics

	<i>No preemption</i>	<i>Total cases</i>	<i>% State prevailed</i>
<b>Decade of decision</b>			
1980-89	8	17	47%
1990-99	10	15	67%
2000-09	8	13	62%
2010-19	14	18	78%
2020	1	1	100%
<b>Level of court</b>			
U.S. District Court	7	10	70%

<sup>159</sup> *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324 (11th Cir. 2015) (rental and utility taxes); *Ute Mountain Ute Tribe v. Rodriguez*, 660 F.3d 1177 (10th Cir. 2011) (five taxes on the extraction of oil and gas); *Maryboy v. Utah State Tax Comm’n*, 904 P.2d 662 (Utah 1995) (income tax claims by two different litigants); *Eastern Band of Cherokee Indians v. Lynch*, 632 F.2d 373 (4th Cir. 1980) (income and personal property taxes).

<sup>160</sup> *Tulalip Tribes v. Washington*, 349 F.Supp.3d 1046 (W.D. Wash. 2018) (retail sales & use; business & occupation; and personal property).

<sup>161</sup> Some cases involving multiple taxes were not cloned because the taxes were intertwined. *See, e.g.*, *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16 (1st Cir. 2006) (en banc) (cigarette sale and excise taxes); *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989) (timber yield and timber reserve fund taxes); *Hoopa Valley Tribe v. Nevins*, 590 F. Supp. 198 (N.D. Cal. 1984) (timber yield and timber reserve fund taxes); *Crow Tribe*, 819 F.2d 895 (coal severance & gross proceeds from coal sales taxes); *Crow Tribe of Indians v. Montana*, 650 F.2d 1104 (9th Cir. 1981), *amended* 665 F.2d 1390 (1982), *cert. denied*, 459 U.S. 916 (1982) (coal severance & gross proceeds from coal sales taxes).

U.S. Court of Appeals	16	28	57%
State intermediate court	10	13	77%
Highest state court	8	13	62%
<b>Jurisdiction</b>			
Federal (district and appellate)			
1st Circuit	1	1	100%
2nd Circuit	3	3	100%
4th Circuit	0	2	0%
8th Circuit	2	5	40%
9th Circuit	12	20	60%
10th Circuit	4	5	80%
11th Circuit	1	2	50%
All federal courts	23	38	61%
State (appellate and supreme)			
Alaska	2	2	100%
Arizona	5	6	83%
California	3	3	100%
Idaho	0	1	0%
Kansas	0	1	0%
Montana	1	1	100%
New Mexico	3	5	60%
Oklahoma	0	1	0%
Utah	1	3	33%

Washington	1	1	100%
Wisconsin	<u>2</u>	<u>2</u>	100%
All state courts	18	26	69%
Type of business			
Education	0	4	0%
Personal residences (non-business)	0	1	0%
Timber/logging	1	3	33%
Gaming	2	5	40%
Hospitality	2	4	50%
Personal income taxed	3	6	50%
Mining	4	6	67%
Manufacturing/distribution	2	3	67%
Retail/wholesale	15	19	79%
Construction	5	6	83%
Retail/commercial leasing	6	6	100%
Legal services	1	1	100%

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Most of the data did not suggest a pattern explaining case outcomes. Even though some jurisdictions rendered uniform rulings, there were an insufficient number of cases in those jurisdictions from which to draw meaningful conclusions. Likewise, lower courts appeared to be consistent in their preemption decisions concerning certain types of businesses. Again, the sample size was too small to establish a pattern.

There did appear, however, that over time lower courts were less likely to find that a state tax was preempted. This trend somewhat paralleled the decreasing success rates of advocates for Indian interests at the United States Supreme Court. Several scholars have observed that tribal interests' win-loss rate have significantly dropped from the Burger Court years to the first decade

of the Roberts Court era. Tribes lost 42% of their cases decided by the Burger Court,<sup>162</sup> did not prevail in the Rehnquist Court 77% of the time,<sup>163</sup> and lost 82% of the time during the first decade of the Roberts Court.<sup>164</sup>

The pattern seemed to be true for rulings concerning federal preemption of state taxes. As presented in Part II above, the Supreme Court’s post-*Bracker* decisions arguably weakened tribal interests’ ability to prevail under the balancing test. Table 2 illustrates how the cases were distributed in terms of two benchmarks, the dates on which the Supreme Court released its opinions in *Cotton Petroleum* (04/25/1989) and *Wagnon* (12/06/2005).<sup>165</sup> The table organizes cases into three periods separated by these benchmarks.

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TABLE 2. Findings of No Preemption by Benchmark Periods

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<i>Benchmark period</i>	<i>No preemption</i>	<i>Total cases</i>	<i>% State prevailed</i>
Pre- <i>Cotton Petroleum</i> (06/20/1980-4/25/1989)	8	16	50%
Post- <i>Cotton</i> /pre- <i>Wagnon</i> (04/26/1989-12/06/2005)	14	23	61%
Post- <i>Wagnon</i> (12/07/1989-06/20/2020)	19	25	76%

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<sup>162</sup> David H. Getches, *Beyond Indian Law: The Rehnquist Court’s Pursuit of States’ Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 280 (2001).

<sup>163</sup> *Id.*

<sup>164</sup> Bethany R. Berger, *Hope for Indian Tribes in the U.S. Supreme Court?: Menominee, Nebraska v. Parker, Bryant, Dollar General . . . and Beyond*, 2017 U. ILL. L. REV. 1901, 1901 (2017). For an interesting perspective on the influences behind Indian law in the Supreme Court, see Grant Christensen, *Judging Indian Law: What Factors Influence Individual Justices’ Votes on Indian Law in the Modern Era*, 43 U. TOL. L. REV. 267 (2012).

<sup>165</sup> *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989); *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005).

### A. *Dependent and Principal Independent Variables*

Based on the apparent pattern over time, we designed two models. The first model tested the hypothesis that lower courts were more likely to find that a challenged state tax is not preempted as the length of time transpiring after the Supreme Court decided *Bracker* increased. The dependent variable for our first models was the case outcome on the issue of federal preemption of the challenged tax, i.e., whether the challenged tax was preempted. The principal independent variable of *days after Bracker* represented the number of days the lower court decision was entered after June 20, 1980, when the Supreme Court published *Bracker*. Values range from 59 to 14,472.

The second model focused on outcomes entered in the three benchmarked periods presented in Table 2. This model tested the hypothesis that lower courts were increasingly likely to find that a challenged state tax was preempted after the Supreme Court entered a ruling that limited tribal interests in its application of the *Bracker* balancing test. Using the same dependent variable, the second model employed the principal independent variable of *benchmark period*. Cases decided the day *Cotton Petroleum* was published or before are coded “1.” We labeled a case “3” if the court issued the decision later than the day after the Supreme Court announced its decision in *Wagnon*. The cases falling within these periods were coded “2.”

### B. *Explanatory Variables*

We included six additional explanatory factors as control variables in both models to test the relationship between the principal independent variable and the dependent variable. *Federal court* was an independent control variable because tribal interests appeared to succeed more before federal courts than in state courts (61% v. 69%). One possible explanation was that federal judges were not subject to the political pressure that may have influenced their state counterparts.<sup>166</sup> Some state courts may have been less inclined to enter a ruling striking a source of revenue that indirectly funded judicial operations.

*Tribe in case* was included because we expected that when a tribe participated in the litigation, it was more likely to convince the court of the strength of its interest than if it did not have a voice in the proceedings. A recent California appellate court reinforced this assumption. The court stated, “Notably, the Tribe is not a party to this case” and found the state’s interest outweighed federal and tribal interests.<sup>167</sup> This variable denoted the presence of one or more tribes in the case as either a party or amicus curiae.

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<sup>166</sup> We did not investigate whether political pressure was exerted in the cases included in the dataset. We note that federal judges, unlike most state judges, are appointed for life and presumably should not be influenced by external factors.

<sup>167</sup> *Herpel v. County of Riverside*, 258 Cal. Rptr. 3d 444, 447 (App. 2020).

*Tribal wealth* measured the relative prosperity of the tribe whose interests were at stake in the case. We hypothesized that wealthy tribes and their business partners were better equipped to present their case than less affluent tribes and their associates.<sup>168</sup> For this variable, we used the median 1999 household income of the tribe as reported by the United States Census.<sup>169</sup> When more than one tribe participated in the case, we averaged the median income of each tribe. In the single case in which the court did not identify tribes doing business with the non-tribal litigant, we averaged the median household incomes for all of tribes in the dataset.<sup>170</sup> This variable, admittedly, is not an exact measure of affluence. For our analysis, however, it operated as a crude proxy of relative wealth among tribes.

*Attorney tribal law specialty* was used to denote whether one of the attorneys, representing a tribe or a party advancing tribal interests, possessed an expertise in American Indian law. We used this label when attorneys or their firms represented themselves as specialists in this field. Likewise, when the attorney represented different tribes in different cases, the attorney was deemed a specialist.

The final two control variables are related to the type of tax at issue.<sup>171</sup> *Cigarette tax* denoted that the case involved a challenge to a state cigarette tax. Seventeen days before *Bracker* was decided, the Supreme Court in *Colville* held that a state cigarette sales tax levied against on-reservation purchases made by non-members of the tribe was valid.<sup>172</sup> We hypothesized that lower courts faced with a challenge to a cigarette tax would have found *Colville* dispositive and thus would not have found that the tax was preempted under the *Bracker* balancing test.

*Fuel tax* was an explanatory variable denoting that the case concerned a challenge to a state motor fuel tax (MFT). Fifteen years after the Court decided *Bracker*, it ruled in *Chickasaw Nation* that a state could not apply its MFT to fuels sold by a tribe in Indian country.<sup>173</sup> We anticipated

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<sup>168</sup> One scholar speculated that there “would have had a different outcome [in *Mashantucket Pequot*, 722 F.3d 457] if the Mashantucket Pequot Tribe was much less financially impressive, or if the property tax had a greater impact on the Tribe’s bottom line.” Edward A. Lowe, Comment, *Mashantucket Pequot Tribe v. Town of Ledyard: The Preemption of State Taxes Under Bracker, the Indian Trader Statutes, and the Indian Gaming Regulatory Act*, 47 CONN L. REV. 197, 215 (2014). It is also noteworthy that some courts have referenced the wealth of the tribe when conducting a *Bracker* balancing test analysis. *E.g.*, *Tulalip Tribes v. Washington*, 349 F.Supp.3d 1046, 1048-49 (W.D. Wash. 2018) (“Tulalip is by all accounts in excellent financial health”).

<sup>169</sup> *See*, U.S. DEPARTMENT OF COMMERCE, ECONOMICS & STATISTICS ADMINISTRATION, U.S. CENSUS BUREAU, CHARACTERISTICS OF AMERICAN INDIANS AND ALASKAN NATIVES BY TRIBE AND LANGUAGE: 2000, 715-729. (December 2003). The list of tribes along with their respective 1999 median household incomes is presented in Appendix B.

<sup>170</sup> *See* *Everi Payments, Inc. v. Wash. State Dep’t of Rev.*, 432 P.3d 411 (Wash. Ct. App. 2018).

<sup>171</sup> We chose cigarette and fuel taxes as control variables because the Supreme Court reviewed preemption challenges to these taxes near the time that *Bracker* was decided but did not rely on the *Bracker* balancing test in its analysis.

<sup>172</sup> 447 U.S. 134 (1980). *Colville* is one of three tribal tobacco case decided by the Court during the past fifty years that upheld the challenged taxes. *E.g.*, *Dep’t of Taxation and Fin. v. Milheim Attea & Bros., Inc.*, 512 U.S. 61 (1994) (upholding New York statute imposing recordkeeping requirements and quantity limitations on cigarette wholesalers who sell untaxed cigarettes to reservation Indians); *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976) (upholding Montana law requiring Indian retailers on tribal land to collect a state cigarette tax imposed on sales to non-Indian customers).

<sup>173</sup> 515 U.S. 450 (1995).

that lower court rulings on challenges to motor fuel taxes would follow *Chickasaw Nation* concluding that the state was barred from applying its tax to tribes.

*Tribal wealth* was a continuous variable. The five other explanatory variables were binary, coded “1” for the presence of the characteristic and “0” for its absence.

### C. Results

There was no relationship between federal preemption and the primary independent variables or for three of the five explanatory variables. Table 3 presents the analysis for both models. Surprisingly, neither primary independent variable was significantly related to the case outcome on the issue of federal preemption. Two control variables were associated with case outcomes at statistically significant levels. For *cigarette tax*, the association was positive, and *fuel tax* was negatively related to the finding of no preemption. There was no relationship between preemption and the other control variables.

TABLE 3. Predictions of No Preemption Outcomes (N=64)

	<i>Model 1</i>	<i>Model 2</i>
Days after <i>Bracker</i> decided	0.000 (0.000)	
Three benchmark periods		0.064 (0.083)
Federal court	-0.017 (0.128)	-0.007 (0.129)
Tribe in case (party or amicus)	-0.069 (0.166)	-0.079 (0.168)
Tribal wealth	6.730 (9.257)	0.000 (9.83)
Attorney tribal law specialty	-0.023 (0.210)	-0.027 (0.216)
Cigarette tax	0.327* (0.163)	0.341* (0.165)

Fuel tax	-0.484** (0.191)	-0.479* (0.193)
Constant	0.142 (0.303)	0.416 (0.307)
R <sup>2</sup>	0.257	0.249
Adjusted R <sup>2</sup>	0.164	0.155

Note: The top line of each entry indicates the coefficient from a linear regression predicting a ruling of no preemption of tax. The parentheses in the second line of each entry contain the corresponding standard errors. Asterisks: \*  $p \leq 0.05$  and \*\*  $p \leq 0.01$ .

#### D. Discussion of Results

There are several noteworthy findings of these analyses. Both models revealed that lower courts adhere to the key Supreme Court decisions when the type of tax being challenged is the same as the tax ruled upon by the Supreme Court. As we expected, lower courts were more likely to find no preemption in cigarette cases, in harmony with *Colville*. Likewise, lower courts were apt to find that fuel taxes were preempted, consistent with the holding of *Chickasaw Nation*.

Contrary to expectations, there was no significant relationship between the passage of time or benchmark period and preemption case outcomes. To ferret out possible explanations, we took a closer look at the decisions rendered in the cases. We discovered discrepancies in the manner in which lower courts approached the *Bracker* balancing test. Some took state interests into account but did not consider tribal interests in reaching their decisions.<sup>174</sup> Others cited *Bracker* but did not balance federal, tribal, and state interests.<sup>175</sup>

We also discovered inconsistent rulings on a number of issues. For instance, courts differed as to whether a non-tribal party had standing to assert a tribe's sovereign right to self-government.<sup>176</sup> Others disagreed regarding a tax's economic effect on tribes and whether such

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<sup>174</sup> To determine whether this phenomenon affected our results, we substituted *tribal interest* for preemption outcome as the dependent variable in both models and ran the tests. Again, there was no relationship between the key independent variables with the dependent variable in either model.

<sup>175</sup> *E.g.*, *Eastern Band of Cherokee Indians v. Lynch*, 632 F.2d 373 (4th Cir. 1980) (state taxing tribe for activities occurring on reservation); *Rodey, Dickason, Sloan, Akin & Robb, P.A. v. Rev. Div. of Dep't of Taxation and Rev.*, 759 P.2d 186 (N.M. 1988) (tribal activity was beyond reservation boundaries thereby susceptible to state taxation); *Fatt v. Utah State Tax Comm'n*, 884 P.2d 1233 (Utah 1994) (individual Indian claimed exemption from income tax); *Maryboy v. Utah State Tax Comm'n*, 904 P.2d 662 (Utah 1995) (individual Indians claimed exemption from income tax); *Confederated Tribes of Chehalis Reservation v. Thurston Cty. Bd. of Equalization*, 724 F.3d 1153 (9th Cir. 2013) (property taxes on permanent improvements on non-reservation land owned by the United States and held in trust for Indians).

<sup>176</sup> *Compare Peabody Coal Co. v. Arizona*, 761 P.2d 1094 (Ariz. Ct. App. 1988) (finding that non-Indian coal company had standing to raise tribe's right of self-government) *with Northern Border Pipeline Co. v. Montana*, 772

effect should have been taken into account in balancing interests.<sup>177</sup> Decisions varied as to whether federal leasing regulations or the Indian Trader Statutes and Indian Gaming Regulatory Act (IGRA) created a strong interest in promoting tribal self-government and tribal self-sufficiency.<sup>178</sup> The next Part examines these inconsistencies.

#### IV. LOWER COURT INCONSISTENCIES

In this Part, we consider divergent sets of decisions in the lower courts. As set forth in Part III, aside from cigarette and retail fuel taxes, the application of the *Bracker* balancing test is unpredictable. Justice Rehnquist in his *Ramah* dissent anticipated such variant outcomes.<sup>179</sup> He pointed to the contrasting levels of significance the *Bracker* and *Ramah* majorities gave to the economic burden a challenged tax imposes on a tribe. The *Bracker* Court afforded minimal weight,<sup>180</sup> whereas the *Ramah* majority gave “paramount consideration” to the economic burden on the tribe.<sup>181</sup> Justice Rehnquist stated, “The general question presented by this case has occupied the Court many times in the recent past, and seems destined to demand its attention over and over again until the Court sees fit to articulate, and follow, a consistent and predictable rule of law.”<sup>182</sup> The Supreme Court’s inconsistent application of the *Bracker* balancing test within the early years of its formulation foretold of its discrepant treatment by the lower courts for the decades that followed.

Ten years after *Ramah*, Justice Abrahamson of the Wisconsin Supreme Court echoed Justice Rehnquist’s criticism, describing the *Bracker* balancing test as “uncertain guidance to state and federal courts.”<sup>183</sup> Most recently, Chief Justice Roberts described it as “a nebulous balancing test,” which lacks rigidity and “mires state efforts to regulate on reservation lands in significant uncertainty, guaranteeing that many efforts will be deemed permissible only after extensive

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P.2d 829 (Mont. 1989) (finding that non-tribal pipeline company does not have standing to assert the tribes’ sovereign right of self-government).

<sup>177</sup> *Compare* Indian Country, U.S.A., Inc. v. Okla. Tax Comm’n, 829 F.2d 967, 986 n.9 (10th Cir. 1987) (“preemption analysis cannot turn on the severity of a direct economic burden on tribal revenues caused by the state tax”) with *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013) (minimal economic effect of tax on tribe is considered in balancing interests).

<sup>178</sup> *Compare* *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324, 1341 (11th Cir. 2015) (federal regulations governing the leasing of Indian land sufficiently bring the federal interests within the scope of *Bracker*) with *Herpel v. County of Riverside*, 258 Cal. Rptr. 3d 444 (App. 2020) (federal leasing regulations concerning Indian country insufficient to outweigh state interests).

<sup>179</sup> *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832, 847-48 (1982) (Rehnquist, J. dissenting).

<sup>180</sup> *Id.* at 853.

<sup>181</sup> *Id.* at 848.

<sup>182</sup> *Id.* at 847.

<sup>183</sup> *Anderson v. Wisconsin Dep’t of Rev.*, 484 N.W.2d 914, 923 (Wis. 1992) (Abrahamson, J. dissenting). *See also* Judge Rosenbaum’s introduction in *Seminole Tribe v. Stranburg*, “Benjamin Franklin said, ‘[I]n this world nothing can be said to be certain, except death and taxes.’ He was almost right. As this case illustrates, even taxes are not certain when it comes to matters affecting Indian tribes.” 799 F.3d 1324, 1326 (11th Cir. 2015) (quoting Letter from Benjamin Franklin to Jean-Baptiste Le Roy (Nov. 13, 1789), in 12 THE WORKS OF BENJAMIN FRANKLIN 160, 161 (John Bigelow, ed., Federal ed.1904) (1888)).

litigation, if at all.”<sup>184</sup> Nearly forty years after *Ramah*, Justice Rehnquist’s prophecy rings true—the *Bracker* analysis continues to spawn inconsistent outcomes. This Part examines three sets of contradictory results in the lower courts: a non-Indian’s standing to assert tribal interests, the weight afforded economic effect on tribes, and the preemptive force of specific federal regulations.<sup>185</sup>

#### A. Non-Indian Standing to Assert Tribal Interest

The first set of divergent decisions involves the right of a non-Indian litigant to present tribal interests in support of *Bracker* preemption. When setting forth the initial test in *Bracker*, the Court held that there should be “a particularized inquiry into the nature of the state, federal, and tribal interests at stake.”<sup>186</sup> Perhaps because a tribe was a named party in the case, the *Bracker* court did not address whether a non-Indian could assert tribal interests for this balancing test. But tribes are not always parties in *Bracker* balancing cases. As a result, lower courts in different states soon came to opposite conclusions on the issue of non-Indian party standing after the Court decided *Bracker*.

In *Peabody Coal Co. v. Arizona*, the State of Arizona attempted to assess a number of taxes on Peabody Coal Company, a non-Indian corporation, that mined coal on tribal lands.<sup>187</sup> Peabody challenged the taxes, arguing in part that the taxes were preempted under *Bracker* because the taxes imposed burdens on the tribes and infringed on tribal sovereignty.<sup>188</sup>

The State of Arizona argued that Peabody lacked standing to claim interference with tribal sovereignty.<sup>189</sup> The Arizona Court of Appeals rejected the argument and determined that Peabody had standing to assert tribal interests.<sup>190</sup> It held, “Because the preemption issue cannot be considered without also considering the tribal sovereignty issue Peabody, of necessity, must have standing to raise the issue of interference of tribal sovereignty.”<sup>191</sup> Washington and New Mexico appellate courts have similarly rejected this type of standing challenge.<sup>192</sup>

The Montana Supreme Court took the opposite position in *Northern Border Pipeline Co. v. Montana*.<sup>193</sup> Northern Border, the non-Indian owner of a natural gas pipeline, contested property

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<sup>184</sup> *McGirt v. Oklahoma*, 521 U.S. \_\_\_, 140 S.Ct. 2452 (2020) (Roberts, C.J., dissenting). Roberts served as one of Justice Rehnquist’s law clerks from 1980 until 1981. *Bracker* was handed down at the end of the prior term of the Court, and *Ramah* was decided during the subsequent term.

<sup>185</sup> We do not intend for this Part to contain comprehensive list of all the lower court contradictions and variable analyses in *Bracker* balancing cases. However, we address these three issues because they are directly conflicting outcomes in the lower courts.

<sup>186</sup> *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980).

<sup>187</sup> *Peabody Coal Co. v. Arizona*, 761 P.2d 1094, 1095 (Ariz. Ct. App. 1988).

<sup>188</sup> *Id.* at 1096.

<sup>189</sup> *Id.* at 1098.

<sup>190</sup> *Id.* at 1099.

<sup>191</sup> *Id.* at 1099.

<sup>192</sup> *Everi Payments, Inc. v. Wash. State Dep’t of Rev.*, 432 P.3d 411, 423 n.12 (Wash. Ct. App. 2018).; *see Cotton Petroleum v. New Mexico*, 745 P.2d 1170, 1172 n.2 (N.M. Ct. App. 1987).

<sup>193</sup> 772 P.2d 829.

taxes assessed by the State of Montana on portions of the pipeline located on tribal lands.<sup>194</sup> Like Peabody, Northern Border argued that the property tax was preempted under *Bracker*, in part because the tax interfered with tribal self-governance.<sup>195</sup> Montana argued that Northern Border lacked standing to assert interference with tribal self-governance, and the Supreme Court of Montana agreed.<sup>196</sup> The court held that Northern Border, as a non-Indian corporation, could not assert the interests of a tribe when the tribe is not a party to the suit.<sup>197</sup> Subsequent Montana and North Dakota supreme court decisions adopted the *Northern Border Pipeline* standing rationale and denied non-Indian litigants the opportunity to present tribal interests.<sup>198</sup>

### *B. The Weight Afforded to Economic Effect on Tribes*

Second, there is significant inconsistency among the courts as to the weight to be given to the economic effect on tribes. This incongruence began at the Supreme Court level before it emerged in lower court applications of the *Bracker* balancing test. Indeed, a close examination of *Bracker*, *Ramah*, and *Cotton Petroleum* reveals the disparate positions the Supreme Court took as to the importance of and emphasis on tribal economic burdens.<sup>199</sup> In *Bracker*, the Court recognized the economic burden but dismissed its relevance to a footnote.<sup>200</sup> In contrast, the *Ramah* Court relied on the economic burden as a preeminent part of its preemption analysis.<sup>201</sup> But in *Cotton Petroleum*, the Court dismissed the adverse economic effect of dual taxation and diminished value of tribal leases as “too indirect and too insubstantial” to warrant preemption.<sup>202</sup> With the Supreme Court’s various approaches to the weight afforded the tribal economic burden, it is no surprise that lower courts have charted different courses in the wake of uncertainty. Lower courts’ analyses of the economic effect on tribes tend to be rather nuanced and typically manifest as varying degrees of consideration. Lower courts choose from the variable Supreme Court precedent to best fit the desired outcome while still adhering to the *Bracker* balancing test. Courts giving great weight to tribal interests typically refer to *Ramah*, whereas courts generally rely on *Cotton Petroleum* when

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<sup>194</sup> *Id.* at 831.

<sup>195</sup> *Id.* at 835.

<sup>196</sup> *Id.* at 836.

<sup>197</sup> *Id.* at 835-36. One could argue that the Montana Supreme Court gave at least some minimal consideration to tribal interests in its *Bracker* balancing analysis and held only that Northern Border Pipeline could not assert tribal sovereignty as an independent basis for preemption. However, that court four years later removed any doubt regarding the lack of standing for non-Indians in a *Bracker* analysis in *State ex rel. Poll v. Mont. 9th Jud. Dist.*, 851 P.2d 405, 410 (Mont. 1993) (“Based upon *White Mountain Apache [v. Bracker]* and *Northern Border*, we conclude that the defendants do not have standing to raise the argument that the action of the State interferes with the self-government of the Blackfeet Reservation.”).

<sup>198</sup> *State ex rel. Poll*, 851 P.2d at 409-10; *Baker Elec. Coop., Inc. v. Public Serv. Comm’n*, 451 N.W.2d 95, 98 (N.D. 1990).

<sup>199</sup> *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 n.15 (1980); *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832, 844 (1982); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186-87 (1989).

<sup>200</sup> *Bracker*, 448 U.S. at 151 n.15.

<sup>201</sup> *Ramah Navajo Sch. Bd.*, 458 U.S. at 844.

<sup>202</sup> *Cotton Petroleum*, 490 U.S. at 186-87.

dismissing a tribe's financial interests. A brief examination of five decisions illustrates the variable approaches taken in the lower courts.

In *Indian Country, U.S.A., Inc. v. Oklahoma Tax Commission*, the State of Oklahoma attempted to impose a sales tax on non-Indian consumers of the Creek Nation's bingo enterprise.<sup>203</sup> In balancing interests, the Tenth Circuit held that the tax was preempted, stating:

The imposition of a sales tax would burden the tribal enterprise by increasing the total cost of playing bingo and by imposing collection, remittance, and record keeping requirements. Although these burdens alone might not serve to displace the tax, we believe they are relevant, when, as here, the state's own interest in taxing the on-reservation transaction is minimal.<sup>204</sup>

But at the same time, the Tenth Circuit, referencing *Bracker* and *Ramah*, noted that it did not read *Colville* as creating a per se rule permitting taxation of Indian retailers and nonmember consumers; it concluded that the "preemption analysis cannot turn on the severity of a direct economic burden on tribal revenues caused by the state tax."<sup>205</sup> Thus, while rejecting the idea that tribal economic burden alone could not tip the *Bracker* balancing test, the Tenth Circuit nonetheless concluded that the tribal economic burden was "relevant."<sup>206</sup>

In *Mashantucket Pequot Tribe v. Town of Ledyard*, the Second Circuit upheld a municipality's imposition of a personal property tax on the non-Indian lessors of slot machines used at tribal casinos.<sup>207</sup> Conducting a *Bracker* balancing test, the Second Circuit fully considered the economic effect on the tribe.<sup>208</sup> The Court compared the amount of the tax to amount of revenues and contextualized the tax amount within the Tribe's profitability of its slot machine leases.<sup>209</sup> Although the Second Circuit acknowledged that the tax was a "substantial sum,"<sup>210</sup> it found that the tribal economic burden was minimal.<sup>211</sup> In doing so, the Court relied on the Supreme Court's holding in *Cotton Petroleum*.<sup>212</sup> It distinguished *Indian Country U.S.A.* as within the comprehensive regulation of gaming of IGRA, while the property tax that was at issue was not within "IGRA's pervasive reach."<sup>213</sup>

In *Crow Tribe of Indians v. Montana*, the State of Montana imposed severance and gross proceeds taxes on coal mined from tribal lands by a non-Indian.<sup>214</sup> The Ninth Circuit found that the taxes were preempted.<sup>215</sup> In balancing federal and tribal interests against state interests, the

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<sup>203</sup> 829 F.2d 967, 983-84 (10th Cir. 1987).

<sup>204</sup> *Id.* at 986-87 (footnote omitted).

<sup>205</sup> *Id.* at 986 n.9.

<sup>206</sup> *Id.* at 986-87.

<sup>207</sup> 722 F.3d 457, 459-60 (2d Cir. 2013).

<sup>208</sup> *Id.* at 473-74.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 474.

<sup>211</sup> *Id.* at 473.

<sup>212</sup> *Id.* at 476.

<sup>213</sup> *Id.* at 473 n.16.

<sup>214</sup> 819 F.2d 895, 897 (9th Cir. 1987).

<sup>215</sup> *Id.* at 902.

Ninth Circuit afforded great weight to an economic study finding that Montana’s taxes decreased tribal coal production and prevented the tribe’s coal from competing with other coal producers.<sup>216</sup> It also stated, “Coal production is vital to the economic development of the Crow Tribe.”<sup>217</sup> Thus, the Ninth Circuit held that the state was unable to overcome the heavy burden of showing that its interests outweighed the Tribe’s economic interests and as a result, found the taxes were preempted.<sup>218</sup>

Factually similar to *Crow Tribe* is *Ute Mountain Ute Tribe v. Rodriguez*.<sup>219</sup> The State of New Mexico assessed several severance taxes on oil and gas extracted from the Ute Tribe’s land by non-Indian lessees.<sup>220</sup> The District Court found that, although the legal incidence of the taxes was on the non-Indian lessees, the economic burden of the taxes rested with the Tribe.<sup>221</sup> The Tenth Circuit dismissed this economic consideration.<sup>222</sup> Closely adhering to *Cotton Petroleum*, it stated that “indirect economic burdens on the Tribe’s ability to increase its own taxes and attract new leases” were not relevant to the *Bracker* balancing test.<sup>223</sup> Thus, these economic burdens were not proper justifications for preemption.<sup>224</sup>

In *Tulalip Tribes v. Washington*, the Tulalip Tribes developed a commercial retail center which, along with the Tulalip Casino and Tulalip Resort, hosts retailers, restaurants, and an outlet mall.<sup>225</sup> This commercial center, bordering a major interstate highway, attracts thousands of non-Indian visitors and customers per day from outside the Tribe’s reservation.<sup>226</sup> The State of Washington and Snohomish County collected tens of millions of tax dollars from the non-Indian retailers through an 8.9% sales tax.<sup>227</sup> The Tribe challenged these taxes as impliedly preempted and an infringement on its tribal sovereignty. Following the *Cotton Petroleum* line of cases, the District Court disagreed and allowed the general state taxes of the non-Indian retailers within Tulalip’s commercial center.<sup>228</sup> In the District Court’s balancing, it considered the Tribe’s interests in economic development, relied on a report from an expert, and stated that “Tulalip is by all accounts in excellent financial health.”<sup>229</sup>

These decisions illustrate the varying degrees of consideration given to the tribal economic burdens. From outright rejecting any tribal economic burden to carefully weighing and considering economic evidence from experts, courts do not adhere to uniform standards. Even in factually

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<sup>216</sup> *Id.* at 899-900.

<sup>217</sup> *Id.* at 901

<sup>218</sup> *Id.* at 901-02.

<sup>219</sup> 660 F.3d 1177 (10th Cir. 2011).

<sup>220</sup> *Id.* at 1183.

<sup>221</sup> *Id.* at 1198.

<sup>222</sup> *Id.* at 1198.

<sup>223</sup> *Id.* at 1198.

<sup>224</sup> *Id.* at 1198.

<sup>225</sup> 349 F.Supp.3d 1046, 1048-49 (W.D. Wash. 2018).

<sup>226</sup> *Id.* at 1049.

<sup>227</sup> *Id.* at 1049.

<sup>228</sup> *Id.* at 1059-62.

<sup>229</sup> *Id.* at 1057. For a more detailed examination of this taxation conflict between the Tulalip Tribes and the State of Washington see Adam Creppelle, *Taxes, Theft, and Indian Tribes: Seeking an Equitable Solution to the State Taxation of Indian Country Commerce*, 122 W. VA. L. REV. 999, 1009-14 (2020).

similar cases, courts give different emphasis to the tribal economic burden. Because of the inconsistent Supreme Court precedent, most lower courts have great discretion to decide the appropriate weight to be afforded the financial burden imposed on tribes. Thus, tribes, tribal business partners, and taxing bodies are faced with an unpredictable commercial environment. Unfortunately, the divergence in cases involving factually similar scenarios is not confined merely to the tribal economic burden.

### *C. The Preemptive Force of Specific Federal Regulations*

Third, courts render inconsistent decisions concerning taxes on gaming and real estate leasing. This is in contrast to cases involving challenges to taxes levied on tobacco sales or retail fuel taxes. Lower courts consistently upheld cigarette taxes and held that retail fuel taxes are preempted. These two patterns likely stem from Supreme Court precedent focused on both of these categories of taxes.<sup>230</sup> Unlike these areas of taxation, the Supreme Court has not considered preemption challenges to taxes imposed on gaming or real estate leasing. Thus, the preemptive force of federal regulations in these types of regulations remains unclear.<sup>231</sup>

#### 1. Gaming

Frequently, lower courts address Indian gaming and IGRA. Congressional policies underlying IGRA include promotion of tribal economic development, self-sufficiency, and strong tribal governments.<sup>232</sup> IGRA expressly preempts the governance of gaming on tribal lands.<sup>233</sup> At the same time, IGRA grants states some role in the regulation of certain Indian gaming, requiring Tribal-State compacts that regulate a tribe's gaming activities.<sup>234</sup> These compacts may include

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<sup>230</sup> Indeed, *Colville, Milheim Attea*, and *Moe* upheld state cigarette taxes on tribal land. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (upholding Washington cigarette sales tax levied on on-reservation purchases made by non-members of the tribe); *Dep't of Taxation and Fin. v. Milheim Attea & Bros., Inc.*, 512 U.S. 61 (1994) (upholding New York statute imposing recordkeeping requirements and quantity limitations on cigarette wholesalers who sell untaxed cigarettes to reservation Indians); *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976) (upholding Montana law requiring Indian retailers on tribal land to collect a state cigarette tax imposed on sales to non-Indian customers). Likewise, *Chickasaw Nation* held that a state could not apply its motor fuel tax to fuels sold by a tribe in Indian country. 515 U.S. 450 (1995).

<sup>231</sup> In addition, there may be variability with the taxation of mineral and gas leases. Two decisions have found preemption, and two have not. *Crow Tribe*, 819 F.2d at 902 (preempted); *Crow Tribe of Indians v. Montana*, 650 F.2d 1104 (9th Cir. 1981) (preempted); *Cotton Petroleum v. State*, 745 P.2d 1170 (N.M. Ct. App. 1987) (not preempted); *Ute Mountain Ute Tribe*, 660 F.3d at 1198. However, all these decisions were resolved before *Cotton Petroleum*. There are no decisions in our data set regarding mineral or gas leases after *Cotton Petroleum*. See Appendix A.

<sup>232</sup> 25 U.S.C. § 2702.

<sup>233</sup> *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996).

<sup>234</sup> 25 U.S.C. § 2710. For an in-depth examination of IGRA's implementation and administration, see Kevin K. Washburn, *Agency Conflict and Culture: Federal Implementation of the Indian Gaming Regulatory Act by the National Indian Gaming Commission, The Bureau of Indian Affairs, and the Department of Justice*, 42 ARIZ. ST. L.J. 303 (2010) and Kevin K. Washburn, *Recurring Problems in Indian Gaming*, 1 WYO. L. REV. 427 (2001).

provisions regulating “subjects that directly related to the operation of gaming activities.”<sup>235</sup> However, courts employ the *Bracker* balancing test when certain taxed activities are associated with Indian gaming, but do not fall directly within IGRA and the resulting compacts.<sup>236</sup>

Mentioned above, the Second Circuit in *Mashantucket Pequot Tribe v. Town of Ledyard* upheld the imposition of a personal property tax on the non-Indian lessors of slot machines used at tribal casinos.<sup>237</sup> The taxed activity fell outside of the activities regulated by IGRA.<sup>238</sup> After balancing interests, the Second Circuit determined that the tax was not preempted.<sup>239</sup> The Washington Court of Appeals came to a similar result with a business and occupational tax on cash-access machine transactions executed on the floor of tribal casinos.<sup>240</sup> Likewise, the Ninth Circuit has held that a tax on a non-Indian construction contractor’s materials for a tribal casino were outside IGRA and not preempted under *Bracker*.<sup>241</sup>

However, the Supreme Court of Oklahoma recently diverged from this line of cases. In *Video Gaming Technologies, Inc. v. Rogers County Board of Tax Roll Corrections*, a non-Indian corporation, Video Gaming Technologies (VGT), leased its electronic gaming equipment to a Cherokee Nation business.<sup>242</sup> The Nation’s business owned and operated ten gaming facilities and rented VGT’s gaming equipment and software at these facilities.<sup>243</sup> Rogers County assessed *ad valorem* taxes on business personal property within its borders, including the VGT gaming equipment located at the Nation’s facilities.<sup>244</sup> The Court acknowledged the similarity of these facts to *Mashantucket Pequot*, but found unpersuasive its focus on ownership rather than the role the equipment plays in gaming which is the activity comprehensively regulated under IGRA. The Court held that the *Bracker* balancing test required preemption because of the threat posed to federal policies underlying IGRA, the economic burden imposed on the Cherokee Nation, and the County’s failure to justify the tax other than as a generalized interest in raising revenue.<sup>245</sup>

Similarly, the Eighth Circuit in *Flandreau Santee Sioux Tribe v. Noem*, held that *Bracker* preempted South Dakota’s taxes on casino amenities.<sup>246</sup> The State of South Dakota imposed a use tax on goods and services purchased by non-tribe members at the Flandreau Santee Sioux Tribe’s casino.<sup>247</sup> The Eighth Circuit did not find that IGRA expressly preempted the taxation of non-gaming purchases. Nonetheless, it held that the amenities significantly impacted the success of the Tribe’s gaming operations.<sup>248</sup> South Dakota’s taxation of these amenities would potentially reduce

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<sup>235</sup> 25 U.S.C. § 2710(d)(3)(C)(vii).

<sup>236</sup> 722 F.3d 457, 471-72 (2d Cir. 2013)

<sup>237</sup> *Id.* at 459-60.

<sup>238</sup> *Id.* at 473-74.

<sup>239</sup> *Id.* at 469, 473-74.

<sup>240</sup> *Everi Payments, Inc. v. Wash. State Dep’t of Rev.*, 432 P.3d 411, 419, 424 (Wash. Ct. App. 2018).

<sup>241</sup> *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1192-93 (9th Cir. 2008); *see also Flandreau Santee Sioux Tribe v. Haeder*, 938 F.3d 941 (8th Cir. 2019).

<sup>242</sup> *Video Gaming Techs., Inc. v. Rogers Cty. Bd. of Tax Roll Corr.*, 475 P.3d 824, 827 (Okla. 2019).

<sup>243</sup> *Id.* at 826-27.

<sup>244</sup> *Id.* at 827.

<sup>245</sup> *Id.* at 832-34.

<sup>246</sup> 938 F.3d 928, 937 (8th Cir. 2019).

<sup>247</sup> *Id.* at 931.

<sup>248</sup> *Id.* at 936.

the Tribe's revenues and go against IGRA's policies.<sup>249</sup> As a result, the Eighth Circuit held the taxes to be preempted under the *Bracker* balancing test.<sup>250</sup>

## 2. Real Estate Leasing

Less often than gaming, lower courts resolve issues regarding state taxation of real estate leasing. Section 5108 of the Indian Reorganization Act of 1934 authorizes the Secretary of Interior to acquire interests within and outside of existing reservations "for the purpose of providing land for Indians" and exempts this realty from state and local taxation.<sup>251</sup> The Long-Term Leasing Act grants Indian owners the right to lease any restricted Indian lands for business, residential, and other delineated purposes with the approval of the Secretary of the Department of Interior.<sup>252</sup> Neither act exhibits an express intent to exclude state taxation. In accordance with the Long-Term Leasing Act, the Department promulgated extensive regulations entailing all facets of leasing, although they do not govern mineral leases ("the Leasing Regulations").<sup>253</sup>

The courts in *Seminole Tribe of Florida v. Stranburg* and *Herpel v. County of Riverside* considered these federal enactments and regulations in their application of the *Bracker* balancing test to determine whether state or local taxes on rental agreements were preempted.<sup>254</sup> In *Seminole Tribe*, the Tribe entered into long-term leases with non-Indian corporations to provide food operations at its casinos.<sup>255</sup> The State of Florida imposed a commercial rent tax on rents paid to the Tribe by these non-Indian lessees. The tax was described as a tax on the privilege of engaging in the business of renting real property in the state.<sup>256</sup> The Eleventh Circuit found that federal regulation of Indian land and leasing of Indian land was "extensive, exclusive, comprehensive, and pervasive."<sup>257</sup> Even though the Tribe presented no economic impact evidence, the court found that the regulatory scheme itself was a sufficient federal interest to outweigh the state's generalized interest in raising revenue that was not specifically linked to governmental services benefiting the Tribe. Thus, the rental tax was preempted under the *Bracker* balancing test.<sup>258</sup>

Conversely in *Herpel*, the California Court of Appeals came to a different conclusion as to a local possessory interest tax imposed on non-Indians who leased Indian Land within Riverside County.<sup>259</sup> Relying extensively on *Cotton Petroleum*, the Court of Appeals held that the nature of

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<sup>249</sup> *Id.* at 936-37.

<sup>250</sup> *Id.* at 937.

<sup>251</sup> 25 U.S.C. § 5108 (2016).

<sup>252</sup> 25 U.S.C. §§ 415-416j (2012). Although Congress has adopted a number of amendments, the Act maintains Department of Interior control over Indian leasing.

<sup>253</sup> *See* 25 C.F.R. §§ 162.001-703.

<sup>254</sup> *Herpel v. County of Riverside*, 258 Cal. Rptr.3d 444, 460-61 (App. 2020); *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324, 1341 (11th Cir. 2015).

<sup>255</sup> *Seminole Tribe*, 799 F.3d at 1326.

<sup>256</sup> *Id.* at 1326.

<sup>257</sup> *Id.* at 1341.

<sup>258</sup> *Id.* at 1342-43.

<sup>259</sup> *Herpel*, 258 Cal. Rptr.3d at 460-61.

federal regulations was not strong enough to support preemption.<sup>260</sup> In so holding, the California Court of Appeals acknowledged that it strayed from *Seminole Tribe* and other decisions that afforded great weight to the federal interest embodied in the scheme set up by the Leasing Regulations.<sup>261</sup> As in *Seminole Tribe*, there was no proof of the economic impact the tax had on the Tribe. Thus, the tax was not preempted under the *Bracker* balancing test.

These decisions illustrate the disparity of lower court outcomes. In Montana and North Dakota, non-Indians do not have standing to present one of the three components of the *Bracker* balancing test.<sup>262</sup> Whereas in Arizona and Washington, there is no question that a non-Indian litigant may assert the tribal interest for *Bracker* balancing purposes.<sup>263</sup> In the Ninth Circuit, courts consider the tribal economic burden regarding non-Indian mineral and gas lessees.<sup>264</sup> But the Tenth Circuit does not extend the benefit of that same consideration to mineral and gas litigants.<sup>265</sup> Taxes on leased gaming equipment are preempted in Oklahoma, but upheld in the Second Circuit.<sup>266</sup> From non-Indian standing to assert the tribal interest, to the depth of consideration of the tribal economic burden, to conflicting decisions analyzing the same federal regulations, lower court decisions present a labyrinth of inconsistency and unpredictability. In Part V, we propose how to improve the *Bracker* balancing test to remedy the currently unworkable standard.

#### PART V: PROPOSED SOLUTIONS

In this Part, we recommend adjustments to the *Bracker* balancing test to resolve the lower court discrepancies described in Part IV. Initially though, we acknowledge several extrajudicial efforts and proposed solutions to lessen the unpredictability surrounding *Bracker*. Although some suggested solutions simplify implied preemption or even act as a death knell to the *Bracker* balancing test, we choose to work within the existing *Bracker* precedent to resolve the disparate outcomes in the lower courts as we explain below. We suggest that courts should grant non-Indians standing to assert tribal interests, consider the economic burden on tribes as a key component of the tribal interest, and standardize the preemptive force of specific federal regulations.

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<sup>260</sup> *Id.* at 456.

<sup>261</sup> *Id.* at 456 (citing *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324, 1341 (11th Cir. 2015); *Segundo v. City of Rancho Mirage* 813 F.2d 1387, 1392 (9th Cir. 1987). *See also* *Confederated Tribes of Chehalis Reservation v. Thurston Cty. Bd. of Equalization*, 724 F.3d 1153 (9th Cir. 2013) (preempting a property tax based on the same federal regulation of Indian land).

<sup>262</sup> *Northern Border Pipeline Co. v. Montana*, 772 P.2d 829, 835-36 (Mont. 1989).

<sup>263</sup> *Peabody Coal Co. v. Arizona*, 761 P.2d 1094, 1099 (Ariz. Ct. App. 1988); *Everi Payments, Inc. v. Wash. State Dep't of Rev.*, 432 P.3d 411, 423 n.12 (Wash. Ct. App. 2018).

<sup>264</sup> *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 902 (9th Cir. 1987).

<sup>265</sup> *Ute Mountain Ute Tribe v. Rodriguez*, 660 F.3d 1177, 1198 (10th Cir. 2011).

<sup>266</sup> *Video Gaming Techs., Inc. v. Rogers Cty Bd. of Tax Roll Corr.*, 475 P.3d 824, 834 (Okla. 2019); *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 473-74 (2d Cir. 2013).

## A. Potential Solutions Outside of Bracker

Forty years of lower courts' application of the *Bracker* balancing test has produced some unfavorable consequences for tribes. The negative impact of state taxation within tribal territory is well-documented.<sup>267</sup> Aside from the judicial unpredictability issue, the Supreme Court in *Cotton Petroleum* acknowledged and endorsed dual taxation.<sup>268</sup> The detrimental effect of dual taxation on tribal economic development is well-established.<sup>269</sup> Unsurprisingly, some tribes and states have entered into taxation compacts to avoid litigating the *Bracker* balancing test. In addition to compacts, scholars have proposed congressional fixes or abandoning *Bracker* altogether. Further, the executive branch through the adoption of administrative regulations has attempted to put a thumb on the scales of the *Bracker* balancing test without success. We briefly summarize each of these concepts.<sup>270</sup>

### 1. Tribal-State Tax Compacts

The most successful alternative to litigating an implied preemption issue is the tribal-state tax compact. Through this form of revenue-sharing agreement, the tribe and the governmental unit voluntarily assign rights, delegate duties, and delineate authority to each party.<sup>271</sup> The scope, detail, and revenue proportions vary widely among compacts.<sup>272</sup> Revenue-sharing agreements limit costly

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<sup>267</sup> Angelique A. EagleWoman, *Tribal Values of Taxation Within the Tribal Economic Theory*, 18 KAN. J.L. & PUB. POL'Y 1, 13-15, 22-23 (2008) (calling for exclusive tribal taxing authority in tribal territory); David Y. Kwok, *Taxation without Compensation as a Challenge for Tribal Sovereignty*, 84 MISS. L.J. 92, 97 (2014); Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development As A Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759 (2004); Jennifer Hendry & Melissa L. Tatum, *Justice for Native Nations: Insights from Legal Pluralism*, 60 ARIZ. L. REV. 91, 100-03 (2018).

<sup>268</sup> 490 U.S. 163, 188-90 (1989).

<sup>269</sup> F. Michael Willis, *The Power to Tax Economic Activity in Indian Country*, 28 ABA NAT. RESOURCES & ENV'T 1, 2-3 (2014); Erin Marie Erhardt, *States Versus Tribes: The Problem of Multiple Taxation of Non-Indian Oil and Gas Leases on Indian Reservations*, 38 AM. INDIAN L. REV. 533, 550-54 (2014); Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1172 (2004); Carpenter, *supra* note 21, at 371; Mark J. Cowan, *Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal Government in Protecting Tribal Governmental Revenues*, 2 PITT. TAX REV. 93, 118-23 (2005); Daniel Gick, *Fracking in the Badlands: Can Levying a Carbon Tax Against Oil and Gas Companies Help Native American Tribes Raise Revenue While Preserving Cherished Tribal Lands?*, 29 GEO. ENVTL. L. REV. 397, 411-14 (2017). We assume that tribal economic development is a positive goal. For an analysis of this point see Jensen *supra* note 21, at 94-95.

<sup>270</sup> For an examination of what actions tribes could take with their own laws regarding preemption, see Lance Morgan, *The Rise of Tribes and the Fall of Federal Indian Law*, 49 ARIZ. ST. L.J. 115 (2017).

<sup>271</sup> Joel H. Mack & Gwyn Goodson Timms, *Cooperative Agreements: Government-to-Government Relations to Foster Reservation Business Development*, 20 PEPP. L. REV. 1295, 1309 (1993); *see also* Matthew L.M. Fletcher et al., *Indian Country Law Enforcement and Cooperative Public Safety Agreements*, 89 MICH. B.J. 42 (2010). These compacts have been encouraged by the Supreme Court. Jennifer H. Weddle, *Suffer No Tyranny: How State-Tribal Relations Might Evolve in Light of the Supreme Court's Michigan v. Bay Mills Indian Community Reluctance to Referee Intergovernmental Disputes*, 62-Apr FED. LAW. 64, 65 (2015).

<sup>272</sup> Cowan, *supra* note 269 at 133-34; Richard J. Ansson, Jr., *State Taxation of Non-Indians Whom Do Business with Indian Tribes: Why Several Recent Ninth Circuit Holdings Reemphasize the Need for Indian Tribes to Enter Into Taxation Compacts with Their Respective State*, 78 OR. L. REV. 501, 545-49 (1999).

litigation, avoid dual taxation, and provide certainty.<sup>273</sup> For example, the State of Montana has entered into these agreements with seven reservation governments regarding the taxation of alcohol, tobacco, fuel, and in one agreement, oil and natural gas production.<sup>274</sup>

However, tribal-state compacts are not without problems. Compacts may create enforcement issues, be overly broad, lack necessary enabling authorities, or improperly conflict with federal law.<sup>275</sup> One party to the agreement often has unequal bargaining power.<sup>276</sup> As a result, tribes sometimes make major concessions to support negotiations, such as agreeing to an indefinite waiver of sovereign immunity.<sup>277</sup> Further, because courts are likely to uphold state taxation, states may not be motivated to enter into a tax compact. Thus, a state may risk potential litigation because of the likelihood of success in court. In contrast however, states have less bargaining power with environmental regulation because state environmental laws are more likely to be preempted due to the pervasiveness of federal regulation of tribal environmental issues.<sup>278</sup> Thus, states have a stronger incentive to enter a compact for environmental regulation than a revenue-sharing agreement. Although tribal-state compacts vastly improve the prospects of predictable outcomes and are frequently employed, litigation requiring a *Bracker* balancing analysis remains a prevalent issue in state and federal courts. As a result, clarity regarding the *Bracker* balancing test is still necessary.

## 2. Congressional Fix

Congress has plenary power over Indian tribes as well as over the states regarding Indian affairs.<sup>279</sup> The Supreme Court in *Cotton Petroleum* reiterated that the federal government wields the “undoubted power to prohibit taxation” on tribal lands.<sup>280</sup> As a result, an act of Congress could prohibit states from exercising their taxing authority on Indian land. One solution is federal legislation to explicitly restrict states’ powers to tax certain activities within tribal lands.<sup>281</sup> Professor Erik Jensen suggests:

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<sup>273</sup> Krakoff, *supra* note 269, at 1174; Mack & Timms, *supra* note 271, at 1305-06.

<sup>274</sup> *Policy Basics: Taxes in Indian Country*, MONT. BUDGET & POLICY CENTER 13-14 (2017) <https://mbadmin.jaunt.cloud/wp-content/uploads/2017/11/Taxes-in-Indian-Country-Tribal-Governments.pdf> [<https://perma.cc/V2HA-HKL8>]; See also Matthew L.M. Fletcher, *The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreements*, 82 U. DET. MERCY L. REV. 1, 27, 33 (2004) (detailing Michigan’s compacts with various tribes located within its borders regarding sales and use, tobacco, and motor fuel taxes); Larry Echohawk, *Balancing State and Tribal Power to Tax in Indian Country*, 40 IDAHO L. REV. 623 (2004) (examining Idaho’s state taxation uncertainty and proposing tribal-state compacts).

<sup>275</sup> Mack & Timms, *supra* note 271, at 1313, 1320.

<sup>276</sup> Cowan, *supra* note 269, at 134-35.

<sup>277</sup> Fletcher, *supra* note 274, at 44.

<sup>278</sup> Mack & Timms, *supra* note 271, at 1309.

<sup>279</sup> Jensen, *supra* note 21, at 17. *United States v. Lara*, 541 U.S. 193, 200 (2004); *Worcester v. Georgia*, 31 U.S. 515 (1832).

<sup>280</sup> *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 189 (1989).

<sup>281</sup> Cowan, *supra* note 269, at 97; see also Michalyn Steele, *Congressional Power and Sovereignty in Indian Affairs*, 2018 UTAH L. REV. 307, 337 (2018) (proposing an Indian Sovereignty Affirmation Act).

Congress could exempt on-reservation transactions, and the parties participating in those transactions, from federal taxation; it could provide that states have no power to tax any person doing business in Indian country or any transaction occurring there; it could take away the tribes' otherwise sovereign power to impose taxes; it could impose whatever regulatory restrictions on doing business that it thinks appropriate; and so on. Congress thus could make Indian country more attractive as a place for investment simply by clarifying the respective governments' taxing powers.<sup>282</sup>

But any congressional action is unlikely and subject to political pressures that would prevent this type of tribal tax preemption.<sup>283</sup> After all, congressional leaders are unlikely to choose tribal interests over the interests of their state constituents.<sup>284</sup>

### 3. Executive Branch Efforts

Additionally, the executive branch has attempted to provide some certainty regarding leasing on Indian land. The BIA has promulgated regulations that provide explicit preemptory language to transactions involving leases of Indian land.<sup>285</sup> 25 C.F.R. § 167.017 provides:

The Federal statutes and regulations governing leasing on Indian lands (as well as related statutes and regulations concerning business activities, including leases, by Indian traders) occupy and preempt the field of Indian leasing. The Federal statutory scheme for Indian leasing is comprehensive, and accordingly precludes State taxation. In addition, the Federal regulatory scheme is pervasive and leaves no room for State law.

This regulatory language was mentioned in *Seminole Tribe v. Stranburg*, but the Eleventh Circuit stated that the *Bracker* balancing test requires a particularized factual inquiry and, as a result, the court did not defer to BIA's regulation regarding the Florida tax at issue.<sup>286</sup> Federal circuits that have addressed whether an agency's preemption determination is entitled to *Chevron* deference unanimously hold that they are not.<sup>287</sup> Thus, the BIA's regulatory attempts to clarify implied

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<sup>282</sup> Jensen, *supra* note 21, at 19.

<sup>283</sup> Jensen, *supra* note 21, at 19-20. Skibine, *supra* note 21, at 420-21 (criticizing congressional inaction and emphasizing the problem of judicial supremacy); Alexander Tallchief Skibine, *The Supreme Court's Last 30 Years of Federal Indian Law: Looking for Equilibrium or Supremacy?*, 8 COLUM. J. RACE & L. 277, 320-21 (2018).

<sup>284</sup> Carpenter, *supra* note 21, at 670.

<sup>285</sup> Bureau of Indian Affairs, Residential, Business, and Wind and Solar Resource Leases on Indian Lands, 77 Fed. Reg. 72,440 (Dec. 5, 2012) (codified at 25 C.F.R. 162); *see also*, Willis *supra* note 269, at 12.

<sup>286</sup> *Seminole Tribe of Florida v. Stranburg*, 799 F.3d 1324, 1338 (11th Cir. 2015); *see also* *Wyeth v. Levine*, 555 U.S. 555, 576-77 (2009).

<sup>287</sup> *Grosso v. Surface Trans. Bd.*, 804 F.3d 110, 116-17 (1st Cir. 2015) (collecting cases).

preemption in certain areas do not seem to effectuate any more certainty for the *Bracker* balancing test.<sup>288</sup>

#### 4. Abandoning *Bracker*, in Whole or in Part

Finally, scholars have recommended replacing the *Bracker* balancing test. Some suggest reevaluating the *Bracker* balancing test's role in federal Indian law.<sup>289</sup> Others advocate abandoning the *Bracker* balancing test altogether.<sup>290</sup> For example, one scholar argues that the Supreme Court should walk back its decision in *Wagnon* and apply the *Bracker* balancing test “irrespective of a tax’s legal incidence and notwithstanding whether a tax arises as a result of on-reservation or off-reservation activity.”<sup>291</sup> Another contends that abandoning *Bracker* in favor of the *Williams v. Lee* infringement test would be “a more administrable standard.”<sup>292</sup> The infringement test, which is rooted in the Territory Clause, allows state action only to the extent that the action does not infringe on tribal self-governance. The infringement test continues to be an independent ground for invalidating state action, regardless of the *Bracker* balancing test.<sup>293</sup>

However, recent cases like *Bay Mills* suggest that the Supreme Court is unlikely to abandon *Bracker* any time soon.<sup>294</sup> In *Bay Mills*, the Court was asked to reexamine tribal sovereign immunity precedent set forth in *Kiowa Tribe v. Manufacturing Techs., Inc.*, 523 U.S. 751 (1998).<sup>295</sup> The Court declined the invitation to stray from *Kiowa*'s precedent, holding that (1) *Kiowa* came from a long line of precedent regarding tribal sovereign immunity, (2) the Supreme Court has subsequently relied on *Kiowa*, (3) “tribes across the country, as well as entities and individuals doing business with them, have for many years relied on *Kiowa* (along with its forebears and progeny), negotiating their contracts and structuring their transactions against a backdrop of tribal immunity,” and (4) Congress retains authority over tribal immunity and may alter the law whenever it deems appropriate.<sup>296</sup>

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<sup>288</sup> Recently, President Biden signed an executive memorandum promoting tribal sovereignty. Joseph R. Biden, *Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships*, (Jan. 26, 2021) <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships> [https://perma.cc/D93A-D3TJ]. The extent to which this may impact state taxation of non-Indians on tribal lands is yet to be determined. For an examination of potential subdelegations of authority by the federal executive branch to tribes, see Samuel Lazerwitz, *Sovereignty-Affirming Subdelegations: Recognizing the Executive’s Ability to Delegate Authority and Affirm Inherent Tribal Powers*, 72 STAN. L. REV. 1041 (2020).

<sup>289</sup> John Hayden Dossett, *Indian Country and the Territory Clause: Washington’s Promise at the Framing*, 68 AM. U. L. REV. 205, 207-08 (2018).

<sup>290</sup> *Id.* at 274-75.

<sup>291</sup> Martin, *supra* note 21, at 265-66.

<sup>292</sup> Dossett, *supra* note 289, at 274-75.

<sup>293</sup> *But see* Nathan Quigley, *Defining the Contours of the Infringement Test Involving the State Taxation of Non-Indians after Williams v. Lee*, 1 AM. INDIAN L.J. 147 (2012) (arguing that the Supreme Court has diminished the infringement test).

<sup>294</sup> *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014).

<sup>295</sup> *Id.* at 797-98.

<sup>296</sup> *Id.* at 798-99.

These four justifications for adhering to precedent clearly apply to the *Bracker* balancing test. First, *Bracker* fits within a long line of precedent regarding state taxation on tribal land. Second, the Supreme Court has relied on the *Bracker* balancing test for decades. Third, tribes, states, and business entities consider the *Bracker* balancing test when contracting and conducting their business on tribal lands. And fourth, Congress undoubtedly wields the power to permit or restrict state taxation that is currently subject to a *Bracker* balancing analysis. Because the Supreme Court is extremely unlikely to abandon the *Bracker* balancing test, courts will continue to work within the *Bracker* framework.

Although some extrajudicial solutions work to avoid the uncertainty of the *Bracker* balancing test and indeed have reaped mutually positive outcomes for tribes and the states,<sup>297</sup> our focus and ultimate recommendations remain rooted within the current iteration of implied preemption under *Bracker*. Tribal-state compacts have limitations; Congress is unlikely to act; the executive branch lacks the authority to declare its regulations preemptory; and the Supreme Court is unlikely to abandon the *Bracker* balancing test. Accordingly, we provide suggestions for the *Bracker* balancing test regarding the issues of standing, economic burden, and preemptive force of specific federal regulations.

## B. Standing

As set forth in Part IV, lower courts have diverged regarding the standing of a non-Indian litigant to present tribal interests in support of a *Bracker* balancing analysis. Courts in Arizona, Washington, and New Mexico have allowed non-Indians to present tribal interests for the *Bracker* balancing test, while courts in Montana and North Dakota have not.<sup>298</sup> This issue was not before the Supreme Court in *Bracker* because the White Mountain Apache Tribe was a party to the suit.<sup>299</sup> To adequately conduct a *Bracker* balancing test, we argue that a non-Indian party must have standing to assert tribal interests.

The *Bracker* balancing test requires a consideration of tribal interests when determining whether state authority may encompass a non-Indian's activity on tribal lands.<sup>300</sup> The *Bracker* court stated, "The tradition of Indian sovereignty over the reservation and tribal members *must*

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<sup>297</sup> For example, the conflict between the State of Washington and the Tulalip Tribes detailed in Part IV was tentatively settled through a revenue-sharing agreement instead of resolving in the Ninth Circuit. Jerry Cornfield, *Deal ends legal fight and allows Tulalips a cut of sales tax*, HERALDNET (Jan. 29, 2020) <https://www.heraldnet.com/news/deal-ends-legal-fight-and-allows-tulalips-a-cut-of-sales-tax> [<https://perma.cc/NRA8-X9VW>].

<sup>298</sup> *Peabody Coal Co. v. Arizona*, 761 P.2d 1094, 1099 (Ariz. Ct. App. 1988); *Everi Payments, Inc. v. Wash. State Dep't of Rev.*, 432 P.3d 411, 423 n.12 (Wash. Ct. App. 2018); *Northern Border Pipeline Co. v. Montana*, 772 P.2d 829, 835-36 (Mont. 1989); *State ex rel. Poll v. Mont. Ninth Judicial Dist.*, 851 P.2d 405, 409-10 (Mont. 1993); *Cotton Petroleum v. New Mexico*, 745 P.2d 1170, 1172 n.2 (N.M. Ct. App. 1987); *Baker Elec. Coop., Inc. v. Public Serv. Comm'n*, 451 N.W.2d 95, 98 (N.D. 1990).

<sup>299</sup> Likewise, tribes or their organizations were litigants in the key Supreme Court cases decided after *Bracker*. *E.g.*, *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982); *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453 (1995); *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005). The litigant conducting business on the reservation in *Cotton Petroleum* did not assert the tribal interest.

<sup>300</sup> *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980).

inform the determination whether the exercise of state authority has been pre-empted by operation of federal law.”<sup>301</sup> Courts are to consider the broad policies underlying tribal sovereignty.<sup>302</sup> As a result, courts include tribal economic development and tribal sovereignty within this consideration.<sup>303</sup>

The *Bracker* balancing test applies to a state assertion of authority over a non-Indian’s actions on tribal lands. When a court conducts a *Bracker* balancing test, it should weigh all of the competing factors at stake. Failing to take into account one third of the essential interests that a court is required to consider is undoubtedly contrary to the test’s origin and purpose. Requiring a tribe to become a litigant in order to permit another party to present the information necessary for a court to conduct a full *Bracker* analysis imports an additional burdensome prerequisite for the test. A complete analysis of the *Bracker* balancing test should not hinge on whether a tribe is a party to the litigation. Thus, courts should hold that non-Indians have standing to assert tribal interests for the purpose of the *Bracker* balancing test.

### C. Economic Burden

Unlike non-Indian standing, the variability regarding tribal economic burden began with the Supreme Court itself. Through *Bracker*, *Ramah*, and *Cotton Petroleum*, the Court has taken divergent paths when conducting a *Bracker* balancing analysis.<sup>304</sup> And because more recent opinions do not disavow the reasoning of the previous ones, lower courts are presented with a range of precedents from which to draw to resolve an implied preemption issue.<sup>305</sup> Regardless, the Court’s analysis in *Cotton Petroleum* supports the argument that tribal economic burden must be considered in the *Bracker* balancing test.

We make two observations about *Cotton Petroleum* that support a full consideration of tribal economic burden. First, the Court emphasized the factual findings of the New Mexico District Court.<sup>306</sup> The Court quoted the finding that “[n]o economic burden falls on the tribe by virtue of the state taxes.”<sup>307</sup> The Court also stated that the tribe could increase its own taxes without adversely affecting the development of its oil and gas production.<sup>308</sup>

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<sup>301</sup> *Id.* at 143 (emphasis added).

<sup>302</sup> *Id.* at 143-44.

<sup>303</sup> *Ramah*, 458 U.S. at 838 (“[T]he traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts promoting tribal independence and economic development, inform the pre-emption analysis that governs this inquiry.”); see e.g., *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 471 (2d Cir. 2013); *Everi Payments, Inc. v. Wash. State Dep’t of Rev.*, 432 P.3d 411, 423 (Wash. Ct. App. 2018).

<sup>304</sup> *Bracker*, 448 U.S. at 151 n.15; *Ramah Navajo Sch. Bd.*, 458 U.S. at 844; *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186-87 (1989).

<sup>305</sup> See also *Jensen supra* note 21, at 78 (“Economic burden mattered, in theory at least, even in [*Cotton Petroleum*] where the Court assumed that little or no such burden existed.”).

<sup>306</sup> *Cotton Petroleum*, 490 U.S. at 185.

<sup>307</sup> *Id.* at 185.

<sup>308</sup> *Id.* at 185.

Second, the Court acknowledged the Ninth Circuit *Crow Tribe* decision, which it summarily affirmed two years before *Cotton Petroleum*.<sup>309</sup> There, the Ninth Circuit held that the severance and gross proceeds taxes were preempted after affording great weight to an economic study that found Montana’s taxes decreased tribal coal production, prevented the tribe’s coal from competing with other coal producers, and harmed the tribe’s economic development.<sup>310</sup> The *Cotton Petroleum* Court distinguished *Crow Tribe* as “a case in which an unusually large state tax has imposed a substantial burden on the Tribe.”<sup>311</sup> The Court further noted that it would not reexamine its summary affirmance of *Crow Tribe*, that the taxes in *Crow Tribe* had a negative effect on the marketability of the coal, and according to the Tribe’s expert, the effective rate of the taxes were 32.9 percent.<sup>312</sup> Thus, full consideration of the tribal economic burden comports with even the least tribe-favorable precedence.

To thoroughly conduct a fact-specific balancing test under *Bracker*, courts must examine the tribal economic burden. *Cotton Petroleum* acknowledges as much.<sup>313</sup> When conducting this particularized inquiry, courts must consider the broad policies underlying tribal sovereignty, which includes tribal economic development.<sup>314</sup> However, the Court in *Cotton Petroleum* also made clear that tribal economic burden is not necessarily determinative. This reasoning is consistent with footnote 15 in *Bracker* itself, noting that tribal economic burden alone will not determine preemption.<sup>315</sup> Such a result makes sense. *Bracker* implied preemption is, after all, a balancing test.

But the Court in *Cotton Petroleum* limited what considerations are included within the tribal economic burden.<sup>316</sup> Some factors, like dual taxation and unsupported conceptions of lesser profits, do not appear to be within the tribal economic burden consideration.<sup>317</sup> In *Cotton Petroleum*, the Court stated, “There is simply no evidence in the record that the tax has had an adverse effect on the Tribe’s ability to attract oil and gas lessees.”<sup>318</sup> This suggests that part of the tribal economic burden consideration includes whether a state tax adversely effects a tribe’s ability to attract business enterprises. Further, the *Cotton Petroleum* Court’s discussion of *Crow Tribe* suggests that the tribe’s ability to produce a good and the tribe’s ability to compete in the market for that good are considered within the tribal economic burden.<sup>319</sup> Thus, although the Court in *Cotton Petroleum* and *Ramah* weighed the tribal economic burden, this consideration does not necessarily encompass every negative consequence that state taxation has on a tribe.<sup>320</sup>

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<sup>309</sup> *Id.* at 186 n.17; *Montana v. Crow Tribe of Indians*, 484 U.S. 997 (1988).

<sup>310</sup> *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 899-902 (9th Cir. 1987).

<sup>311</sup> *Cotton Petroleum*, 490 U.S. at 186.

<sup>312</sup> *Id.* at 186 n.17.

<sup>313</sup> *Id.* at 185-86.

<sup>314</sup> *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980).

<sup>315</sup> *Id.* at 151 n.15.

<sup>316</sup> *Cotton Petroleum*, 490 U.S. at 185, 191.

<sup>317</sup> *Id.* at 185-86.

<sup>318</sup> *Id.* at 191.

<sup>319</sup> *Id.* at 186 n.17.

<sup>320</sup> *Id.* at 186 (rejecting effects that were “too indirect and too insubstantial”).

Lastly, we note that courts should rely on economic expert testimony to determine the tribal economic burden. The Supreme Court adopted this approach in *Cotton Petroleum* when it relied on the district court's factual findings regarding tribal economics that were based in large part on expert testimony.<sup>321</sup> Although many lower courts in their *Bracker* test analysis relied on expert testimony in determining the tribal economic burden, some have afforded no weight to economic expert opinions without explanation.<sup>322</sup>

#### *D. The Preemptive Force of Specific Federal Regulations*

The judiciary can reduce disparate outcomes in the application of the *Bracker* balancing test if it changes the manner in which federal interests are considered in two respects. The first is by standardizing the weight afforded to the federal interest when similar enterprises are being taxed. The second is by adopting a rebuttable presumption against preemption when the area of regulation is one in which the states have traditionally legislated.

Initially, we suggest a categorical standardized weight be assigned to the federal interest because this interest does not vary as to similar categories of enterprises. This contrasts with tribal and state interests which are likely to differ from case to case.<sup>323</sup> The federal interest is defined by its statutes, administrative regulations, and the manner in which the United States Government administers these policies. Hence, for each category of Indian affairs supervised by the national government, the federal interest at stake is static. Accordingly, there is justification to assign the strength of the federal interest an equivalent weight in cases in which the state is attempting to tax the same types of enterprises. In other words, courts should deem the weight of the federal interest as a constant in the balancing equation when the same category of enterprise is the target of the challenged tax.

In addition to standardizing the strength of the federal interest, we recommend that the courts apply a presumption that is used to analyze preemption in the context of federalism. The Supreme Court has promulgated the presumption that the state's historic police powers are not to be superseded by federal law when there is an historic presence of state law in a given area of regulation.<sup>324</sup> The incorporation of this principle into federal preemption analysis as to tribal

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<sup>321</sup> See *Cotton Petroleum v. New Mexico*, 745 P.2d 1170, 1175 (N.M. Ct. App. 1987).

<sup>322</sup> Compare, *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 899-901 (9th Cir. 1987); *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 473 (2d Cir. 2013); *Tulalip Tribes v. Washington*, 349 F.Supp.3d 1046, 1057 (W.D. Wash. 2018) (all gave weight to expert testimony that state taxes imposed an economic burden on the tribe and its members) with *Ute Mountain Ute Tribe v. Rodriguez*, 660 F.3d 1177 (10th Cir. 2011) (gave no weight to the economic expert's testimony—which had been adopted by the district court—that state taxes imposed an economic burden on the tribe).

<sup>323</sup> The economic consequences of a tax on a tribe differs from project to project. Likewise, there is fluctuation between cases as to the amount of revenue a state generates from the tax imposed on a business located on the reservation. The cost of state services expended for the benefit of the tribe or its business partner varies, as well.

<sup>324</sup> *Wyeth v. Levine*, 555 U.S. 555 (2009). The Supreme Court appeared to have abandoned the presumption against preemption before it decided *Wyeth*. See generally, Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085 (2000). It appears that the doctrine “is part of the landscape of preemption jurisprudence, perhaps now more than at any time in recent memory.” Mary J. Davis, *The New Presumption against Preemption*, 61 HASTINGS L.J. 1217, 1254 (2009).

interests provides a parsimonious lens through which to determine the strength of the federal interest if a thorough examination of the statutory and regulatory scheme does not clearly demonstrate that federal government's policy is comprehensive and exclusive.

To illustrate how these principles apply to likely scenarios, we examine the federal interest at stake in cases involving gaming enterprises operating on reservations. With the exception of Nevada and possibly New Jersey, states historically have not exercised their regulatory power in the realm of legal betting. Hence, the presumption against preemption would not apply. Congress enacted IGRA to create the opportunity for tribes to develop gaming within their reservations. IGRA recognizes a strong interest in promoting tribal self-government and tribal self-sufficiency.<sup>325</sup> It is comprehensive even though it grants states some role in the regulation of certain Indian gaming, requiring tribal-state compacts that regulate a tribe's gaming activities.<sup>326</sup> Although the IGRA does not clearly define the exact scope of state regulations, as the Supreme Court indicated in *Cotton Petroleum*, "ambiguities in federal law are, as a rule, resolved in favor of tribal independence."<sup>327</sup> Thus, when the state attempts to impose a tax on gaming enterprises, the court should view the federal interest as substantial. This in turn imposes the burden on the state to demonstrate that it possesses an even stronger interest that is greater than the federal and tribal interests. In gaming cases, the federal interest should uniformly be considered significant.<sup>328</sup>

Leasing of tribal property provides another example of how the federal interest may be characterized. The federal interest in tribal on-reservation leasing is defined by Section 5108 of the Indian Reorganization Act of 1934, the Long-Term Leasing Act, and the Leasing Regulations.<sup>329</sup> Although a reasonable argument can be proffered that the federal regulation of Indian land and leasing of Indian land is extensive and comprehensive, the regulation of leaseholds traditionally has been the subject of state regulation with little federal oversight.<sup>330</sup> The presumption of preemption would apply. Accordingly, the litigant challenging the imposition of the tax would have to overcome the presumption. The federal interest in this context thus should not be given as much weight as the federal interest in gaming cases.<sup>331</sup>

## VI. CONCLUSION

Forty years of applying the *Bracker* balancing test has produced inconsistent outcomes. After examining lower court decisions that conducted a *Bracker* balancing test, we concluded that

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<sup>325</sup> 25 U.S.C. § 2702 (2010).

<sup>326</sup> 25 U.S.C. § 2710 (2010).

<sup>327</sup> 490 U.S. at 177.

<sup>328</sup> Applying these principles in IGRA cases, the outcomes of *Video Gaming Technologies, Inc* and *Flandreau Santee Sioux Tribe v. Noem* would remain the same, but the outcome of *Mashantucket Pequot* would differ.

<sup>329</sup> 25 U.S.C. § 5108; 25 U.S.C. §§ 415-416j; 25 C.F.R. §§ 162.001-703.

<sup>330</sup> Except for civil rights and national emergencies, landlord-tenant law is governed by state statutes and the common law rather than federal law. Cornell Law School, Legal Information Institute, Landlord-Tenant Law [https://www.law.cornell.edu/wex/landlord-tenant\\_law](https://www.law.cornell.edu/wex/landlord-tenant_law) [<https://perma.cc/S2L4-4SEP>].

<sup>331</sup> In the leasing cases, the application of these principles would produce the same outcome in *Stranburg* and the opposite result in *Herpel*.

the test fails to provide clear guidance of its application. Our statistical analysis did not reveal any factors guiding lower court decisions, save for the two areas of law on which the Supreme Court has clearly ruled: cigarette and retail fuel taxes. To encourage lower courts to increase consistency, we suggested three ways to produce more predictable outcomes: (1) non-Indian litigants should have standing to argue the tribal interest prong, (2) courts should consider the tribal economic burden as presented through expert testimony, and (3) courts should standardize the weight afforded to the federal interest when the similar enterprises are being taxed and adopt a rebuttable presumption against preemption when the area of regulation is one in which the states have traditionally legislated.

In May 2020, the United States Supreme Court denied a petition for writ of certiorari filed in *Noem v. Flandreau Santee Sioux Tribe* thereby declining the opportunity to reevaluate the *Bracker* balancing test in the context of taxation of gaming on tribal lands.<sup>332</sup> In July 2020, Chief Justice Roberts criticized *Bracker* in his dissent in *McGirt v. Oklahoma*, recognizing the test's uncertainty and the resulting litigious consequences.<sup>333</sup> Compounding Chief Justice Roberts's *McGirt* dissent was the October 2020 denial of certiorari for the Oklahoma Supreme Court's *Video Gaming Technologies* decision.<sup>334</sup> The opposite holdings of the Oklahoma Supreme Court and the Second Circuit in nearly identical factual situations presented a straightforward opportunity to clarify the *Bracker* balancing test.<sup>335</sup> But with the denial of certiorari, Justice Thomas correctly concluded that "pre-emption law will remain amorphous."<sup>336</sup> Unless the Supreme Court grants certiorari of a case applying the *Bracker* balancing test, lower courts will continue to inconsistently apply this currently unworkable test to the detriment of states, tribes, and interested third parties. Until then, the *Bracker* balancing test for implied preemption will continue to fall short as a predictable judicial resolution for state taxation in Indian lands.

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<sup>332</sup> *Noem v. Flandreau Santee Sioux Tribe*, 140 S.Ct. 2804 (2020). See also Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933 (2009). Although the case presented an opportunity to clarify certain aspects of the *Bracker* balancing test, the Flandreau Santee Sioux Tribe welcomed the denial. *Securing Victory for Tribes in Landmark Tax Case*, PEEBLES KIDDER (May 27, 2020), <http://www.ndnlaw.com/securing-victory-for-tribes-in-landmark-tax-case.php>.

<sup>333</sup> *McGirt v. Oklahoma*, 521 U.S. \_\_\_, 140 S.Ct. 2452 (2020) (Roberts, C.J., dissenting).

<sup>334</sup> *Rogers Cty. Bd. v. Video Gaming Techs., Inc.*, 141 S.Ct. 24, 24 (2020).

<sup>335</sup> *Id.* at 24-25 (Thomas, J. dissenting).

<sup>336</sup> *Id.*

APPENDIX A. Dataset - 64 Cases\*

\*Duplicate cases are labeled A and B, and the triplicate set of cases is labeled A, B, and C.

<i>Date</i>	<i>Case Name &amp; Citation</i>	<i>Tax</i>	<i>Outcome</i>
08/25/1980	Mescalero Apache Tribe v. O'Cheskey, 625 F.2d 967 (10th Cir. 1980), <i>cert. denied</i> , 450 U.S. 959 (1982)	gross receipts	not preempted
10/10/1980	<u>A</u> : Eastern Band of Cherokee Indians v. Lynch, 632 F.2d 373 (4th Cir. 1980)	income	preempted
10/10/1980	<u>B</u> : Eastern Band of Cherokee Indians v. Lynch, 632 F.2d 373 (4th Cir. 1980)	personal property	preempted
07/13/1981	Crow Tribe of Indians v. Montana, 650 F.2d 1104 (9th Cir. 1981) (Crow I), amended 665 F.2d 1390 (1982), <i>cert. denied</i> , 459 U.S. 916 (1982)	coal severance & gross proceeds	preempted
06/16/1983	Board of Equalization v. Alaska Native Bhd. and Sisterhood, Camp No. 14, 666 P.2d 1015 (Alaska 1983)	ad valorem	not preempted
07/6/1984	Hoopa Valley Tribe v. Nevins, 590 F. Supp. 198 (N.D. Cal. 1984)	timber yield & timber reserve fund	preempted
09/5/1984	Marty Indian Sch. v. South Dakota, 592 F. Supp. 1236 (D. S.D. 1984)	sales	preempted
01/24/1986	Sqauxin Island Tribe v. Washington, 781 F.2d 715 (9th Cir. 1986)	liquor sales	not preempted
09/26/1986	Chemehuevi Indian Tribe v. California State Bd., 800 F.2d 1446 (9th Cir. 1986)	cigarette	not preempted
06/11/1987	Crow Tribe of Indians v. Montana, 819 F.2d 895 (9th Cir. 1987) (Crow II) <i>summarily aff'd</i> 484 U.S. 997 (1988)	coal severance & gross proceeds	preempted
07/31/1987	Marty Indian Sch. Bd., Inc. v. South Dakota, 824 F.2d 684 (8th Cir. 1987)	fuel (MFT)	preempted
09/17/1987	Cotton Petroleum v. New Mexico, 106 N.M. 517 (App. 1987)	oil & gas	not preempted
09/22/1987	Indian Country, U.S.A., Inc. v. Okla. Tax Comm'n, 829 F.2d 967 (10th Cir. 1987)	sales	preempted
05/10/1988	Peabody Coal Co. v. Arizona, 761 P.2d 1094 (Ariz. Ct. App. 1988)	transaction privilege	not preempted

08/10/1988	Rodey, Dickason, Sloan, Akin & Robb, P.A. v. Revenue Div. of Dep't of Taxation and Revenue, 759 P.2d 186 (N.M. Ct. App. 1988)	gross receipts	not preempted
04/20/1989	Northern Border Pipeline Co. v. Montana, 772 P.2d 829 (Mont. 1989)	ad valorem (property)	not preempted
07/28/1989	Hoopa Valley Tribe v. Nevins, 881 F.2d 657 (9th Cir. 1989)	timber yield & timber reserve fund	preempted
09/24/1991	Ariz. Dep't of Revenue v. Dillon, 826 P.2d 1186 (Ariz. Ct. App. 1991)	luxury privilege (tobacco)	not preempted
06/23/1992	Anderson v. Wisconsin Dep't of Revenue, 484 N.W.2d 914 (Wis. 1992)	income	not preempted
06/26/1992	Gila River Indian Cmty. v. Waddell, 967 F.2d 1404 (9th Cir. 1992) (Gila River II)	transaction privilege	preempted
10/6/1992	Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue, 729 P.2d 1243 (N.M. Ct. App. 1986)	gross receipts	preempted
10/18/1994	Blaze Const. Co., Inc. v. Taxation and Revenue Dep't, 884 P.2d 803 (N.M. 1994)	gross receipts	not preempted
10/27/1994	Fatt v. Utah State Tax Comm'n, 884 P.2d 1233 (Utah 1994)	income	preempted
01/5/1995	Arizona Dep't of Revenue v. M. Greenberg Const., 897 P.2d 699 (Ariz. Ct. App. 1995)	contracting privilege	not preempted
03/21/1995	Salt River Pima-Maricopa Indian Cmty. v. Arizona, 50 F.3d 734 (9th Cir. 1995)	sales	not preempted
09/14/1995	<u>A</u> Maryboy v. Utah State Tax Comm'n, 904 P.2d 662 (Utah 1995)	income	preempted
09/14/1995	<u>B</u> Maryboy v. Utah State Tax Comm'n, 904 P.2d 662 (Utah 1995)	income	not preempted
07/31/1996	Gila River Indian Cmty. v. Waddell, 91 F.3d 1232 (9th Cir. 1996) (Gila River I)	sales	not preempted
01/9/1997	Pimalco, Inc. v. Maricopa Cty., 937 P.2d 1198 (Ariz. Ct. App. 1997)	possessory interest	not preempted
06/30/1997	Yavapai-Prescott Indian Tribe v. Scott, 117 F.3d 1107 (9th Cir. 1997)	business transaction privilege	not preempted
01/22/1998	Loveness v. Ariz. Dep't of Rev., 963 P.2d 303 (Ariz. Ct. App. 1998)	individual income	not preempted
03/4/1999	Ramah Navajo Sch. Bd., Inc. v. New Mexico Taxation & Revenue Dep't, 977 P.2d 1021 (N.M. Ct. App. 1999)	gasoline	preempted
05/30/2000	Sac and Fox Nation v. Pierce, 213 F.3d 566 (10th Cir. 2000)	fuel	not preempted
02/13/2001	LaRock v. Wisconsin Dep't of Revenue, 621 N.W.2d 907 (Wis. 2001)	income	not preempted

06/8/2001	Goodman Oil Co. v. Idaho State Tax Comm'n, 28 P.3d 996 (Idaho 2001)	fuel	preempted
08/14/2003	Luther Const. Co., Inc. v. Ariz. Dep't of Rev., 74 P.3d 276 (Ariz. Ct. App. 2003)	transaction privilege	preempted
08/15/2003	Ketchikan Gateway Borough v. Ketchikan Indian Corp., 75 P.3d 1042 (Alaska 2003)	ad valorem	not preempted
02/27/2004	Omaha Tribe v. Miller, 311 F. Supp. 2d 816 (S.D. Iowa 2004)	tobacco escrow fund	not preempted
08/19/2004	Coeur D'Alene Tribe v. Hammond, 384 F.3d 674 (9th Cir. 2004)	fuel (MFT)	preempted
02/3/2006	Squaxin Island Tribe v. Stephens, 2006 WL 278559 (W.D. Wash. 2006)	motor vehicle excise	preempted
05/24/2006	Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16 (1st Cir. 2006) (en banc)	cigarette sales & excise	not preempted
02/5/2007	Winnebago Tribe v. Kline, 150 P.3d 892 (Kan. 2007)	fuel (MFT)	preempted
6/18/2008	Barona Band of Mission Indians v. Yee, 528 F.3d 1184 (9th Cir. 2008)	sales	not preempted
01/4/2010	Confederated Tribes and Band of the Yakama Nation v. Gregoire, 680 F.Supp.2d 1258 (E.D. Wash. 2010)	cigarette tax	not preempted
10/14/2010	Seneca Nation of Indians v. Paterson, 2010 WL 4027796 (W.D. N.Y. 2010)	cigarette sales	not preempted
05/9/2011	Oneida Nation v. Cuomo, 645 F.3d 154 (2d Cir. 2011)	cigarette sales	not preempted
07/27/2011	Ute Mountain Ute Tribe v. Rodriguez, 660 F.3d 1177 (10th Cir. 2011)	oil & gas severance	not preempted
02/28/2012	Muscogee (Creek) Nation v. Pruitt, 669 F.3d 1159 (10th Cir. 2012)	tobacco excise	not preempted
07/15/2013	Mashantucket Pequot Tribe v. Town of Ledyard, 722 F.3d 457 (2d Cir. 2013)	ad valorem (personal property)	not preempted
07/30/2013	Confederated Tribes of Chehalis Reservation v. Thurston County Bd. of Equalization, 724 F.3d 1153 (9th Cir. 2013)	ad valorem (property)	preempted
08/26/2015	<u>A</u> Seminole Tribe of Florida v. Stranburg, 799 F.3d 1324 (11th Cir. 2015)	rental	preempted
08/26/2015	<u>B</u> Seminole Tribe of Florida v. Stranburg, 799 F.3d 1324 (11th Cir. 2015)	utility	not preempted
09/28/2017	People ex rel. Becerra v. Rose, 16 Cal. App. 5th 317 (2017)	cigarette excise	not preempted
10/4/2018	<u>A</u> Tulalip Tribes v. Washington, 349 F.Supp.3d 1046 (W.D. Wash. 2018)	retail sales & use	not preempted
10/4/2018	<u>B</u> Tulalip Tribes v. Washington, 349 F.Supp.3d 1046 (W.D. Wash. 2018)	business & occupation	not preempted

10/4/2018	<u>C</u> Tulalip Tribes v. Washington, 349 F.Supp.3d 1046 (W.D. Wash. 2018)	personal property	not preempted
12/11/2018	Everi Payments, Inc. v. Wash. State Dep't of Rev., 432 P.3d 411 (Wash. Ct. App. 2018)	business & occupational	not preempted
01/28/2019	Agua Caliente Band of Cahuilla Indians v. Riverside County, 749 Fed. App. 650 (9th Cir. 2019)	possessory interest	not preempted
02/25/2019	People ex. rel. Becerra v. Huber, 32 Cal. App. 5th 524 (2019)	cigarette excise	not preempted
08/13/2019	Big Sandy Rancheria Enterprises v. Becerra, 395 F.Supp.3d 1314 (E.D. California)	cigarette excise	not preempted
09/6/2019	Flandreau Santee Sioux Tribe v. Haeder, 938 F.3d 941 (8th Cir. 2019)	gross receipts	not preempted
09/6/2019	Flandreau Santee Sioux Tribe v. Noem, 938 F.3d 928 (8th Cir. 2019)	use	preempted
12/17/2019	Video Gaming Techs., Inc. v. Rogers Cty. Bd. of Tax Roll Corr., 475 P.3d 824 (Okla. 2019)	ad valorem (equipment)	preempted
02/10/2020	Herpel v. County of Riverside, 258 Cal. Rptr. 3d 444 (App. 2020)	possessory interest	not preempted

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APPENDIX B. Median 1999 Household Income for Tribes in 64 Case Dataset

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<i>Tribes in each case</i>	<i>Median 2000 household income</i>
Mashantucket Pequot	\$60,132
Agua Caliente	\$41,131
Flandreau Santee Sioux	\$37,500
Chemehuevi	\$35,750
Squaxin Island	\$35,750
Squaxin Island & Swinomish	\$35,732
Menominee & Oneida	\$33,886
Yavapai-Prescott	\$33,750
Oneida of New York, Seneca Nation, Unkechaug, & Mohawk	\$32,859
Coeur d'Alene	\$32,847
Tulalip Tribes	\$32,045
Puyallup Tribe of Washington	\$31,728
Chehalis	\$31,250
Seneca Nation & Cayuga	\$30,572
Salt River Pima-Maricopa	\$30,450
Yakama	\$30,338
Seminole Tribe	\$30,313
Lake Superior Chippewa	\$30,234

Coeur D'Alene, Nez Perce, & Shoshone-Bannock	\$29,366
Sac & Fox, Iowa, & Kickapoo	\$29,167
Cherokee Nation	\$28,791
Cherokee	\$28,658
Hoopa Valley Tribe	\$28,657
Muscogee Creek	\$28,390
Unknown (average of medians)	\$28,502
Mission	\$27,885
Ketchikan	\$27,768
Jicarilla Apache, Navajo, Laguna Pueblo, & Zia Pueblo	\$27,572
Navajo (Utah)	\$26,787
Jicarilla Apache	\$26,667
Gila River	\$26,339
Crow	\$25,344
Alturas Indian Ranchera & Karuk	\$25,016
Wiyot Band of Indians	\$24,910
Western Mono	\$24,750
Navajo (Arizona) & Hoppi	\$24,433
Navajo (Arizona)	\$22,647
Mescalero	\$22,447
Navajo (New Mexico)	\$21,830
Winnebago of Nebraska	\$21,705
Assiniboine & Sioux	\$21,448

Omaha	\$20,893
Yankton Sioux	\$20,409
Ute Mountain	\$19,390
White Mountain Apache	\$17,227
Narragansett	\$16,094

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