DUAL TAXATION IN INDIAN COUNTRY: THE STRUGGLE TO CORRECT *COTTON PETROLEUM*

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ABSTRACT

One of the more pressing issues in Indian Country is the prevalence of dual taxation of non-Indian businesses—both the tribal government and a state government attempting to assert a tax upon the same business. Costing tribes billions of dollars every year, state tax intrusions create yet another barrier tribal governments must overcome in order to reach prosperity and sustainability. This Article examines the history of state-

level intrusions into Indian Country and argues that the Supreme Court decision that opened the floodgates to dual taxation in Indian Country broke from established precedents and flagrantly ignored critical balancing considerations that should have swung the case in favor of tribal sovereignty. Additionally, this Article looks forward to potential regulatory and legislative fixes. While the Department of the Interior has the power to address dual taxation issues, the Department's actions thus far leave much to be desired. The first set of rules promulgated to attack dual taxation were met with heavy skepticism from the courts and the second set of proposed changes languish in rulemaking limbo. Ultimately, tribes may not be freed from this burden until Congress chooses to intervene.

I. INTRODUCTION

Federal Indian law is often a Gordian knot of centuries-old case law, judicially made doctrines that are discarded as quickly as they are created, and court decisions seemingly crafted with the intent to arrive at a specific outcome. This is especially true when federal Indian law is mixed with another field that is often considered dry, complex, and result-driven—taxation. One of the many intersections between federal Indian law and taxation strikes right at the heart of both fields, implicating tribal sovereignty, federalism, and the right to tax: can a state and tribe simultaneously tax the same non-Indian[1] business operating on tribal land?

As more mineral deposits continue to be discovered and excavated in the United States, taxation of non-Indian[2] businesses that are contracted to extract these minerals is emerging as a large revenue source for any governmental entity capable of imposing the tax.[3] When these deposits are

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1. This Article recognizes there are many other terms used by indigenous peoples to self-identify. In order to keep continuity with caselaw and the legal discourse on the topic, this Article will use the term "Indian" throughout, as it is the dominant term used in this area of law.

2. The identity and classification of the business is critical. *See* Bryan v. Itasca County, 426 U.S. 373, 389–390 (1976). States do not have the power to tax enrolled members of tribes earning income on their reservation or tribal-owned businesses operating on their reservation. *Id.* This bar does not apply to non-Indian individuals and entities doing business on reservations, however, opening them up to potential state taxation. *Id.*

3. *See* Valerie Volcovici, *Native American Tribes Decry State Taxation of Reservation Energy Projects*, REUTERS (Jan. 27, 2017, 12:01 AM), https://www.reuters.com/article/usa-trump-tribes-tax/native-american-tribes-decry-state-taxation-of-reservation-energy-projects-idUSL5N1FG6EW [https://web.archive.org/web/

on state land, state governments impose taxes on the businesses.[4] But, when these deposits are found on reservations, both state governments and tribal governments impose taxes on the businesses.[5] This unfortunate circumstance creates a regime of dual taxation, which may have harmful effects on both the tribe and the business.

These instances of dual taxation are tolerated under current caselaw due to the landmark Supreme Court decision *Cotton Petroleum Corp. v. New Mexico*.[6] *Cotton Petroleum* is a perfect example of the aforementioned Gordian knot—a judicially made doctrine that selectively discards previous precedent, seemingly crafted to reach a specific outcome.[7] The decision was the foundation needed to allow this harmful system of dual taxation to exist, leading to devasting effects on tribal governments and reservations.[8] *Cotton Petroleum* was wrongly decided; dual taxation of these businesses is unconstitutional under the Indian Commerce Clause[9] and impermissible under the *Williams v. Lee* balancing test.[10] In Part II, this Article first details the history and application of the Indian Commerce Clause and the *Williams* balancing test as context for the precedent before *Cotton Petroleum*.[11] Part III examines *Cotton Petroleum* itself, analyzing the impact of the decision on tribes across the country, and explains why the decision was such a shocking break from existing case law.[12] Then, in Part IV, this Article examines attempts to rectify this situation and proposes possible solutions.[13]

II. THE INDIAN COMMERCE CLAUSE, PREEMPTION, AND THE *WILLIAMS V. LEE* BALANCING TEST

In the setting of federal Indian law, there are currently two different frameworks under which state laws reaching onto reservations may be

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20210620232744/https://www.reuters.com/article/usa-trump-tribes-tax/native-american-tribes-decry-state-taxation-of-reservation-energy-projects-idUSL5N1FG6EW] (noting state governments are imposing taxes upon energy and resource developments on reservations).

4. *See, e.g.,* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) (discussing the state power to impose a tax if the taxed entity establishes sufficient nexus within the taxing state).

5. *See* Volcovici, *supra* note 3.

6. 409 U.S. 163 (1989).

7. *Id.*

8. *See* discussion *infra* Part III.B.

9. U.S. Const. art. I, § 8.

10. Williams v. Lee, 358 U.S. 217 (1959).

11. *See* discussion *infra* Part II.

12. *See* discussion *infra* Part III.

13. *See* discussion *infra* Part IV.

evaluated.[14] However, as this Article will address, in more than one instance the Supreme Court chose to decide dual taxation cases without addressing either of the two major frameworks, adding another unpredictable element to this realm. Historically, taxation on reservations could be evaluated through an analysis of the Indian Commerce Clause[15] or through a more modern analysis that incorporates preemption and a balancing test.[16] This Part will track the history and application of the Indian Commerce Clause before introducing the Supreme Court's preemption analysis and the *Williams* balancing test.[17]

A. The History of the Indian Commerce Clause

The Indian Commerce Clause is the final phrase in Article 1, Section 8, of the U.S. Constitution, and reads: "[t]he Congress shall have Power . . . [t]o regulate Commerce with . . . the Indian tribes."[18] This grants the federal government power to regulate all aspects of commerce with recognized tribes. The Indian Commerce Clause starred in its first major case in 1831, *Cherokee Nation v. Georgia*.[19] In *Cherokee Nation*, Chief Justice Marshall held that because tribes were listed separately from "foreign nations" in the Commerce Clause, tribes were not foreign nations, but rather some distinct classification, thereby depriving the federal courts of jurisdiction over the matter at issue in the case.[20] Though *Cherokee Nation* itself did little to explain the scope or power of the Indian Commerce Clause, it was instrumental in setting the foundation for *Worcester v. Georgia*.[21] In *Worcester*, Chief Justice Marshall elaborated on the power the Indian Commerce Clause grants the federal government, stating that "[t]he whole intercourse between the United States and [the Cherokee Nation], is, by our constitution and laws, vested in the government of the United States."[22] This quote shows that, at least at the time of *Worcester*, the Indian Commerce Clause was understood to encapsulate all intercourse with tribes.[23] Though Chief Justice Marshall did not explicitly refer to the Indian Commerce Clause in this passage, it has been regularly assumed by scholars that Marshall draws this grant of

14. *See* discussion *infra* Part II.B.
15. U.S. CONST. art. I, § 8.
16. *See* discussion *infra* Part II.B.
17. Williams v. Lee, 358 U.S. 217 (1959).
18. U.S. CONST. art. I, § 8.
19. 30 U.S. 1 (1831).
20. *Id.* at 19.
21. 31 U.S. 515 (1832), *abrogated by* Nevada v. Hicks, 533 U.S. 353 (2001).
22. *Id.* at 520.
23. *Id.*

power from the Indian Commerce Clause.[24] This conclusion is further strengthened by Justice McLean's concurrence, in which he states that the Constitution vests the federal government with the power to regulate commerce among the tribes, clearly signaling the consideration of the Indian Commerce Clause.[25] Notably, Justice McLean went a step further, stating that the Constitution *exclusively* vests Congress with this power.[26]

After the Civil War, as territories and states with large indigenous populations began to economically develop, the territorial and state authorities increasingly became interested in imposing taxes on indigenous peoples and tribes. The Court cited *Worcester* extensively in post-Civil War state taxation cases,[27] affirming that states had no authority over tribal affairs. The Indian Commerce Clause was directly cited as the source for this authority.[28]

However, the Supreme Court shifted in favor of the states through the 1898 case *Thomas v. Gay*.[29] In *Thomas*, the Court considered a state tax imposed upon non-Indians doing business on a reservation.[30] In a shocking twist of precedent, the Court found that the Indian Commerce Clause did not prevent the state from imposing the tax.[31] To do so, the Court cited *Utah & Northern Railway Co. v. Fisher* as controlling.[32] In *Utah & Northern*, the Court held that a railway line built on land withdrawn from a reservation was subject to state taxation.[33] Critically, the railroad never raised the Indian Commerce Clause as a defense, and it was not considered by the Court; further, the Court found it important that the railroad was built on land *withdrawn* from a reservation, rather than on the reservation itself.[34] Returning to *Thomas*, the Court stated that the Indian Commerce Clause defense was conclusively decided in favor of the states in *Utah & Northern*.[35] The Court's conclusion here is puzzling. If *Utah & Northern* did not address the Indian Commerce Clause, how can the case be cited in *Thomas* as limiting the Clause's power?

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24. *See* Richard D. Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 TAX LAW. 897, 969–72 (2010).

25. *Worcester*, 31 U.S. at 580 (McLean, J., concurring).

26. *Id.*

27. Pomp, *supra* note 24, at 978–79.

28. Timothy J. Preso, Comment, *A Return to Uncertainty in Indian Affairs: The Framers, The Supreme Court, and the Indian Commerce Clause*, 19 AM. INDIAN L. REV. 443, 456–57 (1994).

29. 169 U.S. 264 (1898).

30. *Id.* at 264–69.

31. *Id.* at 284.

32. Utah & N. Ry. Co. v. Fisher, 116 U.S. 28 (1885).

33. *Id.* at 33.

34. *See generally id.* (discussing the withdrawn land throughout).

35. *Thomas*, 169 U.S. at 274–75.

Following *Thomas*, the Court was far more willing to allow state taxation on reservation land and far less willing to consider Indian Commerce Clause defenses. For example, in *Warren Trading Post Co. v. Arizona State Tax Commission*,[36] a critical mid-twentieth century case regarding taxation on reservation land, the Court stated that it believed addressing the Indian Commerce Clause was "unnecessary."[37] The Court also adopted a new understanding of the federal government's authority. Shortly after *Thomas*, the Court reiterated in *Lone Wolf v. Hitchcock* that Congress enjoys plenary power over "Indian affairs," but neglected to cite the Indian Commerce Clause as a source of that power.[38] *Thomas* had changed the landscape. While the Court could not avoid acknowledging Congress's plenary authority, eliminating the Indian Commerce Clause from preemption analysis allowed the Court to uphold a broader range of state action on reservation land. Though *Thomas* severely weakened the *Worcester*-style Indian Commerce Clause preemption argument, the Court later adopted a weaker preemption argument based on the Supremacy Clause.[39]

B. The Construction of Federal Preemption and Williams v. Lee

The modern defenses employed by tribes against state taxation are much different than the Constitutionally rooted Indian Commerce Clause argument. Modern defenses to state taxation are centered around one of two theories: the *Williams* balancing test or federal preemption. This section will discuss the construction of the *Williams* balancing test in *Williams v. Lee*, as well as its subsequent application to cases of taxation, the test's later modification, and its casual disregard by the Supreme Court. Then, this section details federal preemption analysis in the context of Federal Indian Law, showing how this analysis can be quite different from the preemption analysis in other contexts.

1. The History and Application of Williams v. Lee

In the 1959 case *Williams v. Lee*,[40] the Supreme Court introduced a balancing test to determine the permissibility of state action on a reservation. Though taxation was not at issue in *Williams*,[41] this case has come to define how modern taxation arguments are understood. *Williams*

36. 380 U.S. 685 (1965).
37. *Id.* at 686.
38. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903).
39. *See* discussion *infra* subpart II.B.2.
40. 358 U.S. 217 (1959).
41. *Id.* at 217–18.

involved a non-Indian business owner operating on tribal land via a tribal license, who wanted to sue a member of the tribe in state court, rather than tribal court.[42] The resulting jurisdictional dispute between the state and the tribe pushed *Williams* to the Supreme Court for guidance.[43] In a unanimous decision, Justice Black held that Arizona did not have jurisdiction over the case.[44] The Court stated that "the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them," citing to *Utah & Northern*.[45] This curious citation does not pinpoint where Justice Black drew the quoted language from the *Utah & Northern* decision,[46] perhaps representing another example of the Court creating new standards by an *ex post facto* reading of them into older cases. Nevertheless, the *Williams* language became the new standard for state action regarding state lawmaking on reservation land. This standard is significant for two reasons. First, Justice Black qualified that statement by clarifying that this language only constituted a standard "absent governing Acts of Congress,"[47] thereby invoking the *Worcester* decision's emphasis on federal preemption. In this way, *Williams* preserves the understanding that a state cannot involve itself in tribal affairs if precluded from doing so by a congressional act. But *Williams* flips the *Worcester* presumption. Under *Worcester* and the old Indian Commerce Clause cases, states could not legislate on reservation land unless expressly authorized to do so by Congress.[48] Under the *Williams* test, states can legislate on reservations until the point that legislation interferes with a tribe's ability to make their own laws and be ruled by them.[49] In other words, under the old analysis states were assumed to be unable to interfere on reservations; under *Williams*, states are assumed to have this power unless Congress takes it away.

The Supreme Court later clarified *Williams* and extended its reasoning to taxation issues. In *McClanahan v. State Tax Commission of Arizona*,[50] the Supreme Court considered whether Arizona could impose an income tax on reservation residents earning income on the reservation.[51] In Part IV of that opinion, the Court applied the *Williams* balancing test to determine whether the imposition of state income tax upon the reservation

42. *Id.*
43. *Id.*
44. *Id.* at 223.
45. *Id.* at 220.
46. *Id.*
47. *Id.*
48. Pomp, *supra* note 24, at 978.
49. *Id.*
50. 411 U.S. 164 (1973).
51. *Id.* at 165.

resident was an impermissible burden on tribal sovereignty.[52] The Court held that that the *Williams* test was primarily used in situations involving both indigenous peoples and non-Indians, expressing great hesitancy over whether the test was intended to be invoked in disputes between indigenous peoples and a state government.[53] The Court reasoned that the *Williams* test was instituted to resolve disputes when both the tribe and a state have interests in the treatment of non-Indians,[54] something that is critical in the context of taxation of non-Indians on reservation land. The Court ultimately decided to apply the *Williams* test to this dispute anyway. In its brief analysis, the Court decided that a state tax could fail the *Williams* test by burdening tribal members as a collective entity, rather than purely looking to whether the tribal government itself was burdened.[55] This is a critical distinction, because the Court goes beyond simply an analysis of whether the tribal government entity itself is being burdened, instead looking to whether the tribe is wholly burdened by the state action. State income taxation of indigenous peoples earning income on reservations was later flatly barred in *Bryan v. Itasca County*.[56] While *Bryan* resolved the issue of taxing indigenous peoples on reservations, it left unresolved the issue of taxing non-Indians on reservations.[57]

2. The Unique Use of Preemption in Federal Indian Law

Another defense indigenous litigants present in state taxation cases is federal preemption. In *Worcester*, Chief Justice Marshall stated that "all intercourse" with tribes fell *exclusively* within the power of the federal government.[58] However, after the highly questionable opinion of *Thomas*, federal preemption of state taxes via the Indian Commerce Clause was left largely toothless. The modern understanding of preemption in federal Indian law begins with the *Williams* test, which requires that courts must first consider whether an explicit act of Congress has barred states from exercising legislative power over a tribe.[59] The Court illustrated this analysis in the context of taxation in *Warren Trading*.[60] In *Warren*

52. *Id.* at 179–81.
53. *Id.* at 179.
54. *Id.*
55. *Id.* at 181.
56. 426 U.S. 373 (1976).
57. *See generally id.* (failing to make a decision on state taxation of non-natives on tribal land).
58. Worcester v. Georgia, 31 U.S. 515, 519 (1832) *abrogated by* Nevada v. Hicks, 533 U.S. 353 (2001).
59. Williams v. Lee, 358 U.S. 217, 220 (1959).
60. Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685 (1965).

Trading, Arizona levied an income tax upon a business operating on a reservation pursuant to a federally issued license.[61] The Court found that the since the business could only operate on tribal land pursuant to a federal license, "the business of Indian trading on reservations" was totally preempted, barring the imposition of the state tax.[62] Interestingly, the Court did not explain how a state income tax is preempted by the federal licensure system; instead, the Court merely stated that the very existence of the federal licensure system necessarily meant all of "Indian trading" was preempted.[63]

Since *Warren Trading*, the Supreme Court has clarified the preemption analysis in Indian law. The Court stressed in *White Mountain Apache Tribe v. Bracker* that the preemption analysis "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."[64] This preemption analysis should be done for "the specific context" of the case, rather than under a broad sweep.[65] Further, the Court reiterated this clarification in *Ramah Navajo School Board v. Bureau of Revenue of New Mexico* and added that the analysis should be "particularized" and careful to truly examine all "of the relevant state, federal, and tribal interests."[66] It is important to note that tribal interests won out in both *Bracker* and *Ramah*. While these quotes, when taken out of context, may appear to be helpful to the interests of the state, these statements were used to reverse opinions in lower courts that did not adequately consider tribal interests. *Bracker* and *Ramah* ensure that courts do not simply take any proffered state interest as sufficient to prevent preemption without first examining the larger context of the issue.

An especially relevant preemption case came before the Supreme Court in 1985. In *Montana v. Blackfeet Tribe of Indians*, the Court considered whether the state of Montana could tax tribal royalties earned from mineral leases licensed to non-Indian businesses on tribal land.[67] The mineral licenses were granted to the non-Indian businesses pursuant to the Indian Mineral Lease Act of 1938.[68] First, the Court reiterated that Congress maintains plenary power over affairs with indigenous peoples

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61. *Id.*
62. *Id.* at 690.
63. *Id.* at 691–92.
64. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980).
65. *Id.*
66. Ramah Navajo School Bd., Inc. v. Bureau of Rev. of New Mexico, 458 U.S. 832, 838 (1982).
67. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 761 (1985).
68. *Id.*; *see also* Indian Mineral Lease Act, Pub. L. No. 97-382, 96 Stat. 1938 (1938).

through the Indian Commerce Clause.[69] The Court reasoned that because Montana wanted to impose the tax directly upon the tribe, the tax would be preempted unless Montana was directly authorized to do so by Congress.[70] The Court ultimately decided that the Indian Mineral Lease Act did not delegate states the power to directly tax tribes, and the tax was struck down.[71] This case is particularly peculiar because the Court cites a number of pre-*Thomas* cases in which the Court struck down state taxation of tribal income through the Indian Commerce Clause,[72] before adding that the Court "never wavered from the views expressed in [those] cases," and citing a number of mid-twentieth century cases.[73] The analysis in *Blackfeet* is remarkably similar to the late-nineteenth century pre-*Thomas* cases it cites. Inexplicably, the Court assumes the state cannot impose the tax unless authorized to do so by Congress, a stance that the Court certainly wavered from in the post-*Thomas* cases it cites. Perhaps telling, though, is the fact that Justice Stevens joined the dissent in *Blackfeet*, just four years before he would author *Cotton Petroleum*.[74]

The evolution of Indian law preemption continued into *California v. Cabazon Band of Mission Indians*, a 1987 case. In *Cabazon*, California wanted to subject bingo games on a reservation to the state penal code.[75] If California were allowed to do so, the staffing, prizes, and profitability of the bingo games would be drastically restricted.[76] The Court undertook a different analysis than in some previous cases, stating that preemption hinged on whether the state action was incompatible with "traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."[77] Though this is quite a vague standard, it is relatively similar to the core question in *Williams*, asking whether the state action impairs the sovereignty of the tribe. The Court reasoned that the bingo games were critical to the tribe because the games were the tribe's major source of income.[78] California's interest in regulation was comparably weak, as the state's justification was concern

69. *Blackfeet*, 471 U.S. at 764.
70. *Id.* at 765.
71. *Id.* at 768.
72. *Id.* at 764–65.
73. *Id.* at 765.
74. *Id.* at 768 (White, J., dissenting); Cotton Petroleum Corp. v. New Mexico, 409 U.S. 163 (1989).
75. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 204–07 (1987).
76. *Id.* at 205–07.
77. *Id.* at 216 (citing New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334–35 (1983)).
78. *Id.* at 204.

over the bingo games' potential infiltration by organized crime.[79] Because the state's interest was unable to overcome the strength of the tribe's interest, the Court held that the regulations could not be imposed upon the tribe's bingo games.[80] This analysis is quite distinct for a couple reasons. First, the Court held that the state's regulations were preempted without identifying a federal statute or regulation to preempt them. Instead, the State's interest was seemingly preempted by the federal government's interest in self-sufficient and sovereign tribes. Second, the crux of the Court's analysis looked to the economic well-being of the tribe, something that would be a factor under the *Bracker* and *Ramah* test, though not the sole determining factor. Strangely, the Court only cited *Bracker* in passing, without examining the lessons of that decision.[81] The Court did not cite *Ramah* at all.[82] Another interesting consideration is that Justice Stevens wrote *Cabazon*'s dissenting opinion, at that point just two years before he authored *Cotton Petroleum*.[83]

These cases exist in stark contrast to preemption analyses outside of the context of federal Indian law. In other jurisprudence, courts apply a canon of interpretation that assumes Congress does not intend to preempt state power unless Congress explicitly states that intention.[84] Rarely, preemption can be found even when the state and federal law are not directly in conflict and without an express statement of preemption from Congress, but this is usually reserved for situations in which Congress has regulated an industry so thoroughly that there is simply no room for state intrusion.[85] In the context of federal Indian law, the Supreme Court is much more willing to find preemption,[86] possibly stemming from the unique trust relationship between tribes and the federal government.

III. THE CURIOUS CASE OF *COTTON PETROLEUM*

The issue of dual taxation on non-Indian businesses on reservation land finally came before the Supreme Court in the 1989 case *Cotton Petroleum v. New Mexico*,[87] and the Court allowed both state and tribal taxation of businesses operating on reservation land. This Part first relays

79. *Id.* at 220–21.
80. *Id.* at 221–22.
81. *Id.* at 216–17.
82. *See generally id.* (showing the lack of any citation to *Ramah*).
83. *Id.* at 222.
84. *See generally* Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) (discussing federal preemption).
85. *Id.*
86. *Id.*
87. 490 U.S. 163 (1989).

the important facts and reasoning of the case, then discusses the case's impact on tribes nationwide. After, this Article examines *Cotton Petroleum*'s inconsistencies with prior case law and the suspect reasoning employed by the Supreme Court to reach its legal conclusion.

A. The Foundation of the Case and the Court's Analysis

The facts of *Cotton Petroleum* were not disputed. Cotton Petroleum was a non-Indian business that was extracting minerals from tribal trust land[88] pursuant to the Indian Mineral Leasing Act of 1938, a federal statute.[89] Cotton Petroleum was paying royalty and production taxes to the tribe and was simultaneously required to pay multiple oil and gas taxes to the state of New Mexico,[90] resulting in a total tax burden of 14%, substantially higher than the 8% rate paid by similar companies operating off-reservation.[91] The tribe was not a party to the suit, but it filed an *amicus* brief arguing that the state tax impeded the tribe's ability to impose its own tax regime, thereby interfering with its right to be self-governing.

Justice Stevens, writing for the Court, first stated that state taxes imposed on reservations are presumptively valid.[92] Continuing from that premise, Justice Stevens discussed the intergovernmental tax immunity doctrine, stating that if the state's tax was nondiscriminatory and the tribe was not granted immunity from Congress, the doctrine did not bar the state's imposition of the tax.[93] Finding that the state's tax was nondiscriminatory, the Court turned to a much longer discussion regarding whether the tribe had been granted immunity, expressly or impliedly, from state taxation by Congress.[94] Ultimately, the Court decided that Congress had not immunized the tribe.[95] Justice Stevens reasoned that the Indian Mineral Leasing Act did not explicitly bar state taxation, and no other act of Congress could be read to bar state taxation of mineral extraction businesses operating on tribal land.[96] Therefore, according to Justice Stevens, the state tax was not preempted. Lastly, Justice Stevens engaged a Commerce Clause argument. Justice Stevens stated that the Interstate Commerce Clause operates to protect free trade among the several states, while the Indian Commerce Clause grants the federal government plenary

88. *Id.* at 163.
89. *Id.*; Indian Mineral Lease Act, Pub. L. No. 97-382, 96 Stat. 1938 (1938).
90. *Cotton Petroleum*, 490 U.S. at 163.
91. *Id.*
92. *Id.* at 173.
93. *Id.* at 175.
94. *Id.* at 177–83.
95. *Id.* at 183.
96. *Id.* at 186.

power over Indian affairs.[97] Since the Indian tribes are not states, they are not protected by the Interstate Commerce Clause.[98] Justice Stevens did not address whether the Indian Commerce Clause itself would instead apply and provide any protection.

B. The Importance of Cotton Petroleum and Double Taxation to Tribes

Cotton Petroleum opened resource operations on tribal land to double taxation, a result that has a substantial and far-reaching impact on both tribes and tribal governments. Extensive mineral and oil deposits have been found on reservations in North Dakota, Montana, Colorado, New Mexico, and Arizona, among others.[99] The United States has massive resource deposits throughout its territories, and a substantial amount of those deposits are found on reservation land. Though reservations only cover about 2% of the country's surface, it has been estimated that 20% of the United States' oil and gas reserves are on or below reservation land.[100] The Bureau of Indian Affairs notes that reservations contain massive deposits of coal, metals, and industrial minerals.[101] Reservations contain 30% of the United States' coal west of the Mississippi river, and 50% of potential uranium deposits. One study concluded that those resources are worth roughly $1.5 trillion dollars.[102] The value of these deposits are a stark contrast to the living conditions on many of these same reservations, which often suffer from sky-high unemployment rates, lack of access to healthcare and quality education, and low median incomes.[103]

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97. *Id.* at 191–92.

98. *Id.* at 192.

99. Valerie Volcovici, *Red Tape Chokes off Drilling on Native American Reservation*, REUTERS (Jan. 27, 2017, 1:24 AM), https://www.reuters.com/article/us-usa-trump-tribes-regulations-insight/red-tape-chokes-off-drilling-on-native-american-reservations-idUSKBN15B0E7 [https://web.archive.org/web/20210406105227/https://www.reuters.com/article/us-usa-trump-tribes-regulations-insight/red-tape-chokes-off-drilling-on-native-american-reservations-idUSKBN15B0E7]; SHAWN REGAN & TERRY L. ANDERSON, THE ENERGY WEALTH OF INDIAN NATIONS, PROPERTY & ENVIRONMENT RESEARCH CENTER: GEORGE W. BUSH INSTITUTE 2 (2014); *see generally* DEP'T OF THE INTERIOR, HEAVY-MINERAL PLACE DEPOSITS OF THE UTE MOUNTAIN UTE INDIAN RESERVATION, SOUTHWESTERN COLORADO AND NORTHWESTERN NEW MEXICO (1994).

100. *See* Volcovici, *supra* note 99.

101. *Solid Minerals/Aggregate*, BUREAU OF INDIAN AFFAIRS, https://www.bia.gov/bia/ots/demd/minerals [https://web.archive.org/web/20210730000824/https://www.bia.gov/bia/ots/demd/minerals] (last visited Jan.5, 2022).

102. REGAN & ANDERSON, *supra* note 99, at 2.

103. *See generally Indian Country Demographics*, NATIONAL CONGRESS OF AMERICAN INDIANS (JUNE 1, 2020), https://www.ncai.org/about-tribes/demographics [https://web.archive.org/web/20211012195845/https://www.ncai.org/about-tribes/demographics]

The two largest issues tribes face when trying to capitalize on these resource deposits are lack of access and approval for excavation and dual taxation.[104] Double taxation is crippling for two specific reasons. First, states can take a large cut of potential revenue from the tribe, despite not having a claim to the actual resources. The state would have no right to excavate, sell, or license the sale of these resources, but under *Cotton Petroleum*, the state has the power to tax these endeavors. This reality creates an unjust and predatory taxation scheme. Why should the state, whether under a legal or normative analysis, have the right to tax the extraction of resources over which the state has no other power or responsibility?

Second, the imposition of state taxes can also indirectly take away potential revenues from the tribe. The fact that on-reservation businesses are subject to double taxation means, in many circumstances, they are less competitive and less economically viable than off-reservation businesses that are not subjection to double taxation. If the state takes a cut of the metaphorical taxation pie, that necessarily leaves less available revenue for the tribe to harvest. Further, because the state and tribe do not work in tandem to pass taxation frameworks, this reality leaves open the possibility that the combined taxation framework will overburden the business, through no fault of the tribe. The imprecise and burdensome nature of double taxation can cause businesses to fail, profit margins to thin, and business plans to change. Tribal authorities themselves claim *Cotton Petroleum* is responsible for a loss in billions of dollars of tax revenue to tribes.[105] It is unhealthy for the long-term outlook of the business, which necessarily means it is unhealthy for the tribes that are trying to collect taxes from those businesses.

(detailing demographic information of indigenous peoples); Dale A. Miller, *RE: Licensed Indian Traders Regulations*; *25 CFR Part 140* (Aug. 18, 2017), https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/6%20-%20Elk%20Valley%20Rancheria.pdf [https://web.archive.org/web/20210801102109/https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/6%20-%20Elk%20Valley%20Rancheria.pdf]. For a more specific look at the reservation, consider the demographic information the Elk Valley Rancheria tribe recently provided to the Department of the Interior.

104. The details regarding the regulations and statutes governing how and when a tribe may hire companies to excavate resource deposits are important but beyond the scope of this Article.

105. NATIONAL CONGRESS OF AMERICAN INDIANS, ADDRESSING THE HARMS OF DUAL TAXATION IN INDIAN COUNTRY THROUGH MODERNIZING THE INDIAN TRADER REGULATIONS 2 (2017), https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/39%20-%20Ewiiaapaayp%20Band%20of%20Kumeyaay%20Indians%204%20of%204.pdf [http://web.archive.org/web/20211118000023/https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/39%20-%20Ewiiaapaayp%20Band%20of%20Kumeyaay%20Indians%204%20of%204.pdf].

Beyond resource extraction leases, *Cotton Petroleum*'s influence reaches into dual taxation generally. Though *Cotton Petroleum*'s facts only involved mineral leases, *Cotton Petroleum*'s analysis severely damaged the existing analytical framework for determining whether state taxes are permissible on tribal land. As will be discussed throughout this Article, *Cotton Petroleum* rewrites the precedent and permanently weakens the litigating position of tribes on the topic of dual taxation, allowing more pervasive state taxation regimes to be found permissible. For these reasons, *Cotton Petroleum* poses a substantial problem for any tribe that sits atop resource deposits.

C. The Weaknesses and Inconsistencies of Cotton Petroleum's Analysis

Justice Stevens's opinion in *Cotton Petroleum* is not without a litany of concerning flaws. Critically, the weaknesses of the opinion are not specifically in what Justice Stevens writes, but in what Justice Stevens omits. This section proceeds by discussing the authority under which the State is granted the power to impose the tax in question in the first instance, then examines the Court's federal preemption analysis, and lastly analyzes the Court's decision to omit the *Williams* test and the Court's formulation of the Indian Commerce Clause.

1. The Source of the State's Power to Tax in Indian Country

First, Justice Stevens does not specify from where the state's authority to impose taxes on reservation land derives.[106] Seven years before *Cotton Petroleum*, the Supreme Court faced the question of whether *tribes* could impose taxes upon non-Indian entities operating on reservation land, in *Merrion v. Jicarilla Apache Tribe*.[107] In *Merrion*, the Court stated that tribes indeed have the power to tax non-Indian entities operating on reservation land, reasoning that the power to do so derived not from the tribe's power to exclude, but from the tribe's sovereign status.[108] The Court reiterated that "[t]he power to tax transactions occurring on trust lands . . . is a fundamental attribute of sovereignty."[109] The Court also stated that the policy of allowing such taxation is just because the companies in question are granted the "substantial privilege of carrying on business" within the reservation lands, along with all the protections and benefits that come

106. Cotton Petroleum Corp. v. New Mexico, 409 U.S. 163, 173 (1989).
107. 455 U.S. 130 (1982).
108. *Id.* at 137.
109. *Id.* (citing Washington v. Confederated Tribes of Colville Rsrv., 447 U.S. 134, 137 (1980)).

along with it.[110] The Court also cited congressional materials that acknowledged the tribal power to tax is a necessary aspect of tribal self-government.[111] Finally, addressing the possible issue of dual taxation when a company is subjected to both a tribal and state tax, the Court reasoned in a footnote that a challenge to such a tax scheme should be directed at whether the state's taxation is invalid under the Commerce Clause, rather than the tribe's taxation.[112] However, since *Merrion* itself did not involve state taxation, the Court did not directly take up that issue.

Returning to *Cotton Petroleum*, the Court then faced the exact scenario it hypothesized in the *Merrion* footnote: a state and tribe both impose taxation upon a non-Indian entity operating on reservation land. Taxation is a fundamental aspect of sovereignty. The Court has ruled that states, as sovereigns, have an inherent power to tax. This inherent power is not absolute, however. State powers of taxation can be restricted by the federal government's power to regulate commerce, for example.[113] Typically, the entity subject to state tax must meet a nexus requirement within the taxing state.[114] States cannot tax entities that do not meet the minimum level of connections within their state,[115] just as a state cannot subject a party to the jurisdiction of its courts without a certain level of minimum contact with the state asserting jurisdiction. This analysis is complicated by the fact that tribes are both dependent entities and sovereigns in their own right.[116] The Court already prevents some state taxation on reservation land due to this sovereignty, considering states cannot tax tribal members on income derived from sources on tribal land.[117]

However, in *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, the Court established that states may impose nondiscriminatory taxes upon non-Indians on tribal land.[118] Critically, *Moe* establishes the premise that nondiscriminatory taxes are potentially valid, not that all nondiscriminatory taxes on non-Indians on tribal land are permissible. *Moe*, just like *Cotton Petroleum*, fails to cite any authority

110. *Id.* (citing Mobil Oil Corp. v. Comm'r of Taxes of Vermont, 445 U.S. 425, 437 (1980)).

111. *Id.* at 139.

112. *Id.* at 158 n.26.

113. *See generally* C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383 (1994) (discussing the general structure and purpose of the Dormant Commerce Clause analysis).

114. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977)

115. *Id.*

116. *See generally* Worcester v. Georgia, 31 U.S. 515 (1832) (recognizing tribes did not lose their sovereignty through treaties or relationships with the federal government).

117. McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164, 165 (1973).

118. Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv., 425 U.S. 463 (1976).

as to why the state may impose a tax on reservation land.[119] *Moe* does, however, briefly discuss the benefits tribes receive from state governments, from social services to roads to the fact that tribal members can participate in state government.[120] This very well may be a justification for allowing state taxation on reservation land, but the *Moe* decision stops short of expressly linking the benefits to the state's authority.

Additionally, in a later case, *Nevada v. Hicks*,[121] Justice Scalia went as far as to state that "an Indian reservation is considered part of the territory of the State."[122] Justice Scalia's only support for this bold assertion is a 1958 publication by the Department of the Interior, which is not only non-binding on the Court, but was published during the federal government's "termination era" policy, a stance which has since been abandoned.[123] In sum, state governments may have justification for imposing taxes upon non-Indians on tribal land, but *Cotton Petroleum* wrongfully takes this position as truth without acknowledging that proposition's unsupported and dubious history.

Further, it must be remembered that even if a state has the power to impose a tax, that does not mean that every tax it imposes is permissible. States have the power to tax businesses; but, if the businesses do not have the requisite nexus in the state, the tax is impermissible. Similarly, assuming *Moe* is correct, states may have the power to impose nondiscriminatory taxes on non-Indian individuals and entities on tribal land, but if the tax is preempted or fails the *Williams* test, the tax is impermissible. This is a far cry from Justice Stevens's original assertion that state taxes on reservation land are presumptively valid.

2. Federal Preemption and a Changing Standard

In *Cotton Petroleum*, the Court also discussed the possibility of federal preemption, though the Court articulated a more restrictive view of federal preemption than what the Court had previously outlined and applied in its own precedent. At the outset of the analysis, Justice Stevens acknowledged that federal preemption in federal Indian law cases is analyzed differently than federal preemption in other jurisprudence.[124] Citing *Bracker*, the Court stated, "[a]s a result, questions of pre-emption in this area are not resolved by reference to standards of pre-emption that

119. *Id.*
120. *Id.* at 467.
121. 533 U.S. 353 (2001).
122. *Id.* at 361–62.
123. *Id.*
124. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 176 (1989).

have developed in other areas of the law, and are not controlled by 'mechanical or absolute conceptions of state or tribal sovereignty.'"[125] The Court then specified that federal preemption analysis in federal Indian law cases "requires a particularized examination of the relevant state, federal, and tribal interests," citing *Ramah*.[126] This paragraph concludes with the Court reiterating that preemption may be done either expressly or impliedly by Congress.[127]

But, after reciting the precedent, Justice Stevens pivots, seemingly ignoring *Bracker* and *Ramah*. The actual analysis employed by the Court is exactly the type of broad-sweep mechanical determination that *Bracker* and *Ramah* were meant to prevent. Cotton Petroleum, the business, argued that the 1938 Indian Mineral Leasing Act created a federal system of regulation, which should totally preempt any state regulation, especially considering the lower bar for preemption in federal Indian law cases.[128] Justice Stevens counters this point by describing *Ramah* and *Bracker* not as the controlling precedent, but examples of cases involving a "special factor," thereby making *Ramah* and *Bracker* exceptions to an amorphous, undetermined rule, rather than the rule itself.[129] Justice Stevens never identifies what "special factors" of *Ramah* and *Bracker* were at play in those cases.[130] In this discussion, Justice Stevens also frequently refers to the fact that the economic incidence of the tax falls upon a private party, rather than the tribe.[131] This is particularly curious, as the preemption analysis in *Ramah*, *Bracker*, and even *Warren Trading* hinged on the federal statutory language, not economic incidence. When the Court did turn to the statutory language, it found that the Indian Mineral Leasing Act neither explicitly allowed nor disallowed state taxation.[132] Lastly, the Court considered the state's role on the reservation. According to Justice Stevens, it was important to note that the state regulated the spacing and integrity of the oil wells on the reservation, though these regulations were pursuant to federally created and defined standards.[133] The Court could not determine exactly what role the state played in regulating the wells. After

125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 177.
129. *Id.* at 187.
130. *See generally id.* (failing to ever identify what the special factors of *Ramah* and *Bracker* were).
131. *See generally id.* (discussing the economic incidence of the state tax throughout the majority opinion).
132. *Id.* at 177.
133. *Id.* at 186.

considering all these factors, the Court held that Congress had no express or implied preemption of state authority.[134]

At first glance, Justice Stevens's analysis may seem to be thorough, considering federal, state, and tribal factors. However, this analysis boils down to a muddled, precedent-changing, and result-driven exercise. Justice Stevens reaches his conclusion by turning the precedent of *Ramah* and *Bracker* into exceptions rather than by running *Cotton Petroleum* through the analysis put forward in those two cases. To do so, Justice Stevens simply declares that *Ramah* and *Bracker* are exceptions involving special factors, without explaining how the Court came to that decision or what the special factors in *Ramah* and *Bracker* even are. This monumental break from precedent then allowed Justice Stevens to introduce a completely new factor into the analysis—economic incidence—to argue that the state's power cannot be preempted because the tribe is not *explicitly* burdened by a tax.

Additionally, Justice Stevens manages to push *Cabazon*'s analysis out of the picture. *Cabazon* stood for the principle that state actions could be preempted without express language from Congress if those state actions impermissibly burdened tribal self-sufficiency and sovereignty.[135] Justice Stevens avoids this discussion by putting great weight on the fact that the tax in *Cotton Petroleum* did not fall directly on the tribe, as the regulations in *Cabazon* would have, but instead fell upon the non-Indian business.[136] Because the incidence of the tax did not fall on the tribe and because there was no detailed economic analysis of the monetary loss this would cause the tribe, Justice Stevens held that the tax would not be a meaningful burden upon the tribe.[137] This is problematic for two reasons. First, the tribe was not a party to the litigation. It is unrealistic to expect the outside business to have this detailed economic information on the tribe's finances and how loss of tax revenue would affect those finances. Second, *Cabazon* did not hinge on a detailed economic analysis; Justice Stevens's opinion expects Cotton Petroleum, the company, to answer an argument that had never been part of the Court's prior analysis. *Cabazon* held that the state regulations were preempted because they went against an established federal policy or goal of tribal self-sufficiency and sovereignty.[138] *Cotton Petroleum* does not analyze whether the tax violated these principles. In fact, *Cabazon* is cited not once in Justice Stevens's majority opinion.[139]

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134. *Id.*

135. *See supra* notes 75–82 and accompanying text.

136. *Cotton Petroleum*, 490 U.S. at 166.

137. *Id.* at 167–73.

138. *See supra* notes 75–82 and accompanying text.

139. *See generally Cotton Petroleum*, 490 U.S. 163 (failing to cite *Cabazon* in the majority opinion).

Bluntly, the Court's analysis is as cursory as it is shocking. As noted above, why is it the responsibility and burden of Cotton Petroleum, the company, to articulate economic arguments on behalf the tribe? Why did the Court expect Cotton Petroleum to articulate economic impact arguments at all, when such arguments were never found in previous precedent regarding this exact issue? The Court essentially robs the tribe of the ability to exclude state instructions by hand-waving away critical precedential cases and inserting never before argued factors into the analysis. Further, the Court makes this decision in a case where the tribe *cannot even defend its own interests*.

In sum, after *Ramah*, *Bracker*, and *Cabazon* are pushed away, Justice Stevens reasons that because the tax does not directly fall on the tribe and because the state is performing a small regulatory chore that the federal government is delegating to it, the tax on mineral operations cannot be federally preempted without express language in the federal statute. This reasoning is a stark break from the understanding of federal preemption in Indian law cases prior to *Cotton Petroleum*. The conclusion of Justice Stevens's federal preemption analysis would seem incomprehensible to the Court that decided *Warren Trading*. Recall that in *Warren Trading*, the Court unanimously found that a federal license to trade on reservation land was enough to preempt state taxation on a non-native business.[140] In *Cotton Petroleum*, a federal license and regulatory scheme were not enough without explicit preemptory language. This stunning reversal is perpetrated quietly. Justice Stevens does not explicitly overrule *Ramah* and *Bracker* and does not even bother to cite *Cabazon*. Instead, Justice Stevens merely hopes the reader will not catch the Court's magic act.

The importance of this change cannot be overstated. After *Cotton Petroleum*, it became substantially harder for tribal authorities to argue that a state tax had been federally preempted. *Cotton Petroleum*, for this reason, has been called "the near-death of preemption" in the context of taxation cases on reservations.[141] There is good reason for that dramatic title—the Supreme Court did not invalidate any state taxation over non-Indians on reservations for at least 20 years after *Cotton Petroleum*.[142] Lower courts, recognizing the changing view of the Supreme Court, followed suit and regularly upheld exercises of state taxation over non-Indian businesses on reservations.[143] In short, *Cotton Petroleum* removed

140. Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685, 691 (1965).

141. Erik M. Jenson, *Taxation and Doing Business in Indian Country*, 60 ME. L. REV. 1, 74 (2008).

142. *Id.*

143. *See, e.g.*, Mashantucket Pequot Tribe v. Town of Ledyard, 722 F.3d 457, 476 (2d Cir. 2013); Ute Mountain Ute Tribe v. Rodriguez, 660 F.3d 1177, 1202–03 (10th Cir. 2011); Gila River Indian Community v. Waddell, 91 F.3d 1232, 1239 (9th Cir. 1996).

an important legal tool intended to protect tribal authorities from the encroaching reach of state taxation.

3. Invoking the Indian Commerce Clause and the Mysterious Absence of Williams v. Lee

The Court's opinion in *Cotton Petroleum* also leaves much to be desired in its analysis of the Indian Commerce Clause and the *Williams* balancing test. Shockingly, the majority opinion does not even mention or cite *Williams*.[144] As discussed *supra*, the *Williams* test is used to determine whether a state action impermissibly burdens a tribe's sovereignty, asking whether the state action infringes on the tribe's ability to "make their own laws and be ruled by them."[145] The Court has explicitly applied the *Williams* test to issues of state taxation, as it did in *McClanahan*.[146] Further, the majority opinion seemingly set itself up for the perfect segue into a *Williams* analysis; typically, the *Williams* test starts by determining if a balancing test is unnecessary because of congressional preemption. The Court, as discussed *supra*, undertook this preemption analysis, but then neglected to take the next logical step and begin the *Williams* balancing test.[147] Why the majority neglected to discuss this key piece of caselaw remains a mystery. Though Justice Blackmun's dissent disagreed with the majority principally on the grounds that the dissenters believed the state tax was preempted, the dissent still took care to explicitly mention *Williams*.[148] *Williams* was also extensively cited in subsequent cases on a variety of other federal Indian law topics. In other words, the majority was well aware of the *Williams* test but did not discuss it nor explain why it should not be used in *Cotton Petroleum*.[149]

Perhaps equally as concerning as the majority opinion's total avoidance of *Williams* is the flippant way the majority dismisses the Indian Commerce Clause argument. The Court's Indian Commerce Clause analysis begins by correctly stating that the Indian Commerce Clause vests Congress with plenary power over Indian affairs.[150] In the past, the Court

144. *See generally Cotton Petroleum*, 490 U.S. 163 (showing the majority opinion failed to cite *Williams v. Lee*).

145. Williams v. Lee, 358 U.S. 217, 220 (1959).

146. *See generally* McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164 (1973) (discussing *Williams* throughout).

147. *See generally Cotton Petroleum*, 490 U.S. 163 (showing the majority opinion failed to discuss *Williams v. Lee* after concluding its preemption analysis).

148. *Id.* at 204 (Blackmun, J., dissenting).

149. *See generally id.* (excluding *Williams* in its briefing, possibly due to an oversight because Cotton Petroleum was not advocating on behalf of future tribal rights, but rather on its motivation to avoid taxation, as *Arizona* failed to discuss *Williams* as well).

150. *Id.* at 192.

stated the Constitution both explicitly and implicitly grants this power.[151] But, after acknowledging this absolute grant of power, the *Cotton Petroleum* majority opinion stated that "the fact that States and tribes have concurrent jurisdiction over the same territory makes it inappropriate to apply Commerce Clause doctrine developed in the context of commerce 'among' States with mutually exclusive territorial jurisdiction to trade 'with' Indian tribes."[152]

The overarching point seems to be clear enough: the Court will not import Dormant Commerce Clause analysis to the Indian Commerce Clause. In other contexts, outside of federal Indian law, the Commerce Clause implicitly prevents states from burdening interstate or foreign commerce.[153] The Court's statement here rejects extending that premise to federal Indian law, an understanding that would implicitly prevent states from regulating trade with tribes. The details of this assertion and its relation to Congress's plenary power are particularly concerning – exactly what is the "territory" to which the Court is referring, and why do states and the federal government have concurrent jurisdiction over it? First, the Court is extremely vague when it declares that "States and tribes have concurrent jurisdiction over the same territory."[154] Does the Court mean that the state and tribe have concurrent criminal jurisdiction, based on the identities of the perpetrator and the victim, on tribal land? Such a statement is true but would seem totally extraneous to the underlying discussion. Why would criminal jurisdiction be the deciding factor as to whether Dormant Commerce Clause caselaw should be imported to the Indian Commerce Clause? Does the Court mean that the state and tribe have concurrent regulatory or lawmaking jurisdiction over the same territory? This seems to be the more plausible reading of the Court's language, as this interpretation is actually relevant to the discussion at hand; even still, states only exercise limited regulatory and lawmaking jurisdiction on reservations, as evidenced by the fact that Congress could choose to totally bar state action on the reservation, if it so wished. And, if Congress can choose to totally bar state action on the tribe's land, as the Court itself recognizes earlier in the *Cotton Petroleum* decision, then the jurisdiction is not truly concurrent at all. The Court's point is unclear and does not seem to lead into its conclusion regarding importation of the Dormant Commerce Clause to the Indian Commerce Clause.

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151. Morton v. Mancari, 417 U.S. 535, 551 (1974).

152. *Cotton Petroleum*, 490 U.S. at 192.

153. *ArtI.S8.C3.1.4.1 Dormant Commerce Power: Overview*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artI_S8_C3_1_4_1/ [https://web.archive.org/web/20210913000731/https://constitution.congress.gov/browse/essay/artI_S8_C3_1_4_1/] (last visited Jan. 5, 2022).

154. *Cotton Petroleum*, 490 U.S. at 192.

Second, the Court describes the federal government and states as having "mutually exclusive territorial jurisdiction to trade 'with' Indian tribes."[155] It is unsurprising that the Court neglects to provide any citation for this bold assertion. Since the ratification of the Constitution, states have never possessed an independent and exclusive right to trade with tribes.[156] The use of the term "exclusive" seems especially problematic here, as the Court, just a few paragraphs above this assertion, stated that Congress possesses plenary power over tribal affairs and determined that the Indian Mineral Lease Act did not bar state taxation.[157] If a state possessed the "exclusive" power to trade with tribes, a power mutually shared with Congress, those previous analyses would be moot. It is almost nonsensical to assert that a state may possess "exclusive" power to trade with tribes while simultaneously admitting that the federal government can choose to divest states of regulatory and lawmaking authority on reservations whenever Congress chooses to do so.

Lastly, this discussion leaves the Court's understanding of plenary power in a confusing place. Recall that the Court precedes the self-contradictory statement quoted above by reiterating that Congress enjoys plenary power over tribal affairs.[158] The Court had previously described the Indian Commerce Clause as granting "plenary and exclusive" power over tribal affairs, in *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*.[159] The use of the word "exclusive" in *Yakima* shows that, at least in 1979, the Court believed the Indian Commerce Clause vested the power to regulate tribal affairs solely in Congress. *Yakima*'s understanding of the plenary power was expressly affirmed by *Blackfeet* in 1985,[160] and again in the 2004 case *U.S. v. Lara*.[161] The continued affirmation of Congress's power over Indian affairs as "plenary and exclusive" puts the conclusion of *Cotton Petroleum* in an uncomfortable situation. If Congress's power is ultimate and exclusive, why does the majority opinion assume the state has the power to regulate on tribal land unless preempted? Furthermore, why does the Court place so much weight on looking for an explicit bar on state action from congressional legislation when Congress has already taken the affirmative step of regulating the industry? The Court seems to want it both ways: it pays lip-service to the fact that Congress has exclusive power while simultaneously allowing states to impose their own legislation upon tribal

155. *Id.*
156. *See supra* notes 22–25 and accompanying discussion.
157. *Id.* at 186.
158. *Id.* at 192.
159. 439 U.S. 463, 470–71 (1979).
160. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 764 (1985).
161. 541 U.S. 193, 194 (2004).

lands unless prevented from doing so by an explicit, totally comprehensive affirmative act by Congress. But, if Congress's power is "plenary and exclusive," why must Congress make an explicit, totally comprehensive act in order to prevent state legislation? Exclusive power would suggest the power is vested only in Congress, not the states. From where is the states' core grant of power coming? The Court is either unable or unwilling to answer this question.

IV. ALTERNATIVE METHODS OF STOPPING DOUBLE TAXATION ON TRIBAL LAND

In light of the peculiar decisions made in the *Cotton Petroleum* case, this Article offers three different approaches to solving the problem of dual taxation in *Cotton Petroleum*. First, this Part examines a different interpretation of the Indian Commerce Clause and applies it to the facts of *Cotton Petroleum*. Then, this Part discusses the *Williams* test, showing that an application of the *Williams* test in *Cotton Petroleum* would have resulted in the state's tax being ruled impermissible. Finally, this Part proposes possible regulatory reforms to ameliorate dual taxation situations on reservations and prevent them from arising in the future.

A. Revitalizing the Indian Commerce Clause

Following the total miscarriage of justice that is *Thomas v. Gay*,[162] the Supreme Court took a substantial step back from its previous Indian Commerce Clause jurisprudence. Previously, the Indian Commerce Clause had been used as a powerful weapon in the federal government's arsenal; invoking the clause meant relying upon Congress's plenary power over indigenous affairs.[163] The Indian Commerce Clause was understood to prevent states from asserting legislative power over tribes.[164] Recall that in *Thomas*, the Court cited *Utah & Northern* to support the proposition that the Indian Commerce Clause could not bar state taxation on tribal land—despite the fact that the *Utah & Northern* case involved only land withdrawn from a reservation, not reservation land itself, and the Indian Commerce Clause was not discussed.[165] *Thomas*, or perhaps even its one faulty citation to *Utah & Northern*, totally reshaped the Court's conception of the Indian Commerce Clause for the next century. The Court should

162. *See supra* notes 29–35 and accompanying text.
163. *See supra* notes 15–25 and accompanying text.
164. *Id.*
165. *See supra* notes 32–35 and accompanying text.

finally correct this wrong and return to its prior understanding of the Indian Commerce Clause.

The post-*Thomas* interpretation of the Indian Commerce Clause creates an uncomfortable paradox that the Supreme Court is unable to explain away. The Court has confirmed in cases such as *Yakima*, *Blackfeet*, and *Lara* that Congress's power over Indian affairs is "plenary and exclusive."[166] Congress's plenary power over indigenous affairs stems from the Indian Commerce Clause.[167] However, in practice, the Court does not apply the Indian Commerce Clause as a plenary and exclusive grant of power to Congress. Congress's power cannot be plenary and exclusive if the states are allowed to impose regulations upon tribal land without congressional authorization—such a scenario runs plainly afoul of the concept of "exclusive" power vested in the federal government. In the post-*Thomas* era, the Court allows the states to do just that. A return to the proper understanding of the Indian Commerce Clause would result in the Court truly applying the plenary and exclusive power of Congress in cases that involve the Indian Commerce Clause. Under such an analysis, the Indian Commerce Clause would preempt all state economic regulation on reservations unless Congress expressly authorizes state action in a specific area.

Understandably, this would have been quite a radical outcome in 1989, when *Cotton Petroleum* was decided. In fact, it would likely be considered a radical change even today. The fact that the defining moment of *Thomas* took place over 100 years ago makes the Indian Commerce Clause difficult to revive, even though *Thomas* wrongfully ended its importance. In light of these considerations, a return to the former and proper understanding of the Indian Commerce Clause is an unlikely future outcome, though the most just one.

B. Applying Williams v. Lee to Dual Taxation

A far more palatable option open to the Supreme Court is the use of the *Williams* test, which was totally absent from the *Cotton Petroleum* majority decision. The Court's decision to avoid discussion of the *Williams* test is an odd one. *Williams*, as discussed *supra*, is an analysis meant to check if a state action impermissibly infringes upon the sovereignty of a tribe, asking first if the state action inhibits the tribe's

166. *Lara*, 541 U.S. at 194; Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 764 (1985); Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 470–71 (1979).

167. *See supra* notes 30–35 and accompanying text.

ability to "make their own laws and be ruled by them."[168] Specifically, *Williams* is applied when the tribe and state both have an interest in regulating a non-Indian entity on reservation land that is in a consensual relationship with the tribe,[169] once it has been determined that the state action is not federally preempted.[170] The facts of *Cotton Petroleum* hit the intended scope of *Williams* perfectly. Cotton Petroleum was a non-Indian entity willingly doing business on a reservation, subjected to taxation by both the tribe and the state.[171] After the Court determined that Congress did not preempt the state tax, it should have transitioned to a *Williams* analysis to see if the state tax, even if not preempted, was still an impermissible burden on the tribe.

The *Williams* analysis goes beyond simply a literal look at whether the state action prevents tribes from being able to "make their own laws and be ruled by them."[172] In *Williams* itself, the Court held that undermining the authority of tribal courts in respect to non-Indians failed the test;[173] similarly, in *McClanahan*, the Court stated that a state action may fail the *Williams* test even if it does not burden the tribal government as an entity, but burdens the tribe as a collective, in some way.[174] The dual taxation of entities doing business on reservation land is an impermissible burden on tribal sovereignty and should therefore fail the *Williams* test. The dual taxation in *Cotton Petroleum* raised the effective tax rate for Cotton Petroleum, the company, from 6% to 14%, a substantial change considering the average off-reservation rate was 8%.[175] This rate change immediately made Cotton Petroleum uncompetitive in the marketplace compared to off-reservation alternative businesses. Tribes must be able to raise revenue to survive; relying solely on federal and state aid is not a feasible path towards enduring prosperity. If every non-Indian business that attempts to locate on a reservation is subject to the burden of dual taxation, then every non-Indian business on tribal land is not operating efficiently compared to competitors, reducing the amount of tax revenue that the tribe can collect from the business.

Consider the following example. A hypothetical business located on reservation land can survive with a tax burden of up to 15%. The state assesses an 8% tax. The tribe is now forced to limit its tax on the business to 7%, or the business will fail. In the absence of the state tax, the tribe

168. Williams v. Lee, 358 U.S. 217, 220 (1959).
169. McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164, 179–80 (1973).
170. *Williams*, 358 U.S. at 220.
171. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 163 (1989).
172. *Williams*, 358 U.S. at 220.
173. *Id.* at 223.
174. *McClanahan*, 411 U.S. at 181.
175. *Cotton Petroleum*, 490 U.S. at 168–69.

could impose a full 15% tax on the business. The existence of a state tax burden on tribal land prevents tribes from raising the full amount of tax revenue that they otherwise could; in the rudimentary example above, the tribe loses out on the revenue that would be raised from the additional 8% tax rate. Groups representing indigenous interests often highlight this point, stressing that the existence of dual taxation on reservation lands forces tribal government to choose between forgoing the possibility of generating revenue from the business or risk driving the business off the tribe's land.[176] The United States made a similar argument in favor of tribal governments under the *Williams* test in an *amicus* brief for *Warren Trading*.[177] The United States argued that "Indian self-government cannot be a meaningful enterprise if the power of the tribe to tax transactions with Indians on the reservation is drained by duplicate State taxation of the very same transactions."[178] Critically, the United States was highlighting the exact scenario presented in *Cotton Petroleum*. Lastly, the facts of *Cotton Petroleum* are also applicable to the lessons of *McClanahan*. The imposition of a state tax may not specifically harm the tribal government, but that does not mean the reduced possibility of tax revenue does not harm the tribe as a collective.

For another perspective, consider an argument that the Navajo Nation recently made in a comment submitted to the Department of the Interior.[179] Looking at regulatory difficulties, the Navajo Nation describes how difficult it is for tribes to open businesses on their own land.[180] Using the example of a McDonald's, the comment notes that an investor will need $1 million to $2.2 million in order to open a McDonald's franchise on the reservation, with at least $750,000 in liquid capital.[181] The comment points out that even with loan guarantees from the Bureau of Indian Affairs, a Navajo person wishing to open the franchise location would personally need at least $200,000 in liquid capital.[182] In the words of the comment, "[t]here are not that many, if any, Navajos who live on the reservation who can meet that requirement."[183] The tribe is essentially caught between a

176. NATIONAL CONGRESS OF AMERICAN INDIANS, *supra* note 105.

177. Memorandum for the United States, Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685, 3 (1964).

178. *Id.*

179. Letter from Dr. Gavin Clarkson, on behalf of the Navajo Nation, to U.S. Dep't of Interior (Aug. 29, 2017) https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/8%20-%20Navajo%20Nation.pdf [https://web.archive.org/web/20210801102619/https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/8%20-%20Navajo%20Nation.pdf].

180. *Id.* at 1–4.

181. *Id.* at 3.

182. *Id.*

183. *Id.*

rock and a hard place. The business can avoid state taxation if a Navajo person on the reservation owns it.[184] But few, if any, Navajo people on the reservation have the money needed to open a business. If an outside investor opens a business on the reservation, the state will impose state taxes upon it, making it uncompetitive and restricting the amount of tax revenue the tribe can harvest from the business, preventing the tribe from having the tax revenue necessary to provide economic opportunities for its members. How, exactly, is the tribe meant to escape this situation?

The *Williams* test asks whether the state action infringes upon the tribe's right to "make their own laws and be ruled by them."[185] Dual taxation fails this test and should be impermissible under a *Williams* analysis. Tribes lose out on potential revenue, hurting the entire collective. If a tribe cannot impose its own tax regime, free of external considerations, its ability to self-govern is impermissibly burdened. State taxes force tribal governments to alter tax regimes or risk destroying the businesses that have agreed to work on reservation land. A proper application of the *Williams* test recognizes these concerns and prevents states from threatening tribal sovereignty any further.

C. Legislative and Regulatory Corrections

Outside of the courts, there are other avenues for relief, as well. The Department of the Interior ("DOI"), through the Bureau of Indian Affairs ("BIA") has twice attempted to take matters into its own hands and correct the *Cotton Petroleum* issue itself. However, both attempts fail to meet the mark necessary to free tribes from *Cotton Petroleum*'s burden. This section will discuss DOI's regulatory attempts to attack the *Cotton Petroleum* precedent and conclude by proposing a long-term legislative fix.

1. Mineral Lease Regulations

In 2012, DOI promulgated a new regulation striking at the heart of *Cotton Petroleum*'s fact pattern. The DOI rule stated that "permanent improvements on . . . leased land" from reservations "are not subject to any fee, tax, assessment, levy, or other charge imposed by any State or political subdivision of a State."[186] At first glance, this rule would essentially overturn *Cotton Petroleum*'s central holding. Businesses extracting minerals from land leased from tribal governments cannot be

184. Bryan v. Itasca Cty., 426 U.S. 373, 389–90 (1976).
185. Williams v. Lee, 358 U.S. 217, 220 (1959).
186. 25 C.F.R. § 162.017(a) (2012).

subject to dual taxation if the regulation expressly forbids states from taxing this type of activity. Unfortunately, the application of the rule is not that straightforward. Critically, courts are unsure of whether DOI actually holds the authority to preempt state taxation under any of its enabling statutes. The first major consideration of the rule came from the Ninth Circuit, in a case involving the Chehalis reservation and a county in Washington state.[187] Rather than make a conclusive determination as to whether the rule preempts state taxation and as to whether courts must give DOI any deference on the application of it, the Ninth Circuit instead chose to dodge the question altogether and rule in favor of the Chehalis reservation on other grounds.[188]

The Eleventh Circuit also considered the rule a year later.[189] At the trial level, the district court found that the rule did not merit *Chevron*[190] deference.[191] Instead, citing *Mead*,[192] the court merely gave the rule and the Secretary of the Interior's conclusions in promulgating the rule "some deference."[193] Without coming to a sweeping conclusion, the district court found that the tribe's citation of the rule was enough to distinguish the case from *Cotton Petroleum*, and held that the rule preempted the state taxation in question.[194]

On appeal, the Eleventh Circuit ultimately agreed with the district court's conclusion but walked back the lower court's analysis to a substantial degree.[195] The Eleventh Circuit found that DOI was not due any deference whatsoever on its understanding and interpretation of its rulemaking.[196] Instead, the Eleventh Circuit applied the *Bracker* analysis and weighed the interests of the tribe against the interests of the state.[197] The Eleventh Circuit ultimately sided with the tribe and upheld the district court's decision to strike down the tax on mineral leases on the reservation,

187. Confederated Tribes of Chehalis Rsrv. v. Thurston Cty. Bd. of Equalization, 724 F.3d 1153, 1157–59 (9th Cir. 2013).

188. *Id.* at 1157 n.6.

189. Seminole Tribe of Florida v. Florida, 49 F. Supp. 3d 1095, 1108 (S.D. Fla. 2014).

190. Chevron v. Nat'l Res. Def.Council, Inc., 467 U.S. 837, 842–43 (1984). If a rule is afforded *Chevron* deference, the agency's interpretation of the underlying statute is binding unless the interpretation is found to be arbitrary and capricious. *Id.* at 842–43. But, critically, a rule only receives *Chevron* deference if the agency is interpreting an ambiguous congressional statute. *Id.* at 843.

191. *Seminole Tribe of Florida*, 49 F. Supp. 3d at 1099.

192. U.S. v. Mead Corp., 533 U.S. 218, 234–35 (2001) (including a discussion on how agency actions should be treated and what level of deference they should be given if the actions do not warrant *Chevron* deference).

193. *Seminole Tribe of Florida*, 49 F. Supp. 3d at 1099.

194. *Id.* at 1102.

195. Seminole Tribe of Florida v. Stranburg, 799 F.3d 1324, 1335 (11th Cir. 2015).

196. *Id.* at 1338, 1342.

197. *Id.* at 1338–43.

but did so while damaging the position of tribes generally. Firstly, the state admitted it did not have any contact with the mineral leases and did not provide any services or regulations to the businesses in question whatsoever.[198] In other words, the state tried to assert its power to tax non-Indians doing business on reservation land despite having no ties to the business activity—a clear overstep of the state's power to tax. Despite this, the court still found it necessary to undergo an extensive analysis of both the interests of the tribe and the state, even though the state readily admitted it did not actually have any interest in the mineral lease. In fact, the Eleventh Circuit cited *Cotton Petroleum* throughout, and only distinguished the instant case from the facts of *Cotton Petroleum* on the grounds that in the instant case the state did not even bother to pretend it had a legitimate interest in the business activity on tribal land.[199]

Next, the Eleventh Circuit reaffirms *Cotton Petroleum*'s understanding of federal preemption. In a single paragraph and by citing only *Cotton Petroleum*, the Eleventh Circuit agreed with the statement that "the federal interest in promoting Indian economic development does not automatically preempt all state taxes when any reduction of Indian income is threatened."[200] Though framed as a reasonable statement—federal interest in economic development alone does not count as preemption—the Eleventh Circuit is actually touching on the issue of Congress's plenary and exclusive power to regulate commerce with tribal authorities. Here, the Eleventh Circuit is echoing *Cotton Petroleum*'s view that federal preemption in the realm of taxation of non-Indians on reservation land requires an affirmative manifestation of preemption on the part of Congress, rather than the original understanding that state action was barred in this sector unless Congress expressly allows it.

Further, in a similarly brusque manner, the Eleventh Circuit brushes aside the *Williams* balancing test in summary fashion. Recall that the *Williams* balancing test asks whether the state action impermissibly burdens the tribe's ability to self-govern.[201] When confronted with the question of whether dual taxation threatens tribal interests in self-government, the Eleventh Circuit, without any detailed analysis, stated that dual taxation does not threaten tribal interests in self-government.[202] To do so, the Eleventh Circuit cited *Wagnon v. Prairie Band Potawatomi Nation*, a case in which Kansas attempted to tax a non-Indian fuel

198. *Id.* at 1342 ("Here, Stranburg has offered no evidence that Florida is involved in any way with a non-Indian's leasing of commercial property from an Indian tribe on Indian land except taxing it.").

199. *Id.* at 1339–42.

200. *Id.* at 1340.

201. *See supra* notes 32–44 and accompanying text.

202. *Seminole Tribe of Florida*, 799 F.3d at 1340.

distributor that was responsible for selling gasoline to a gas station the tribe owned.[203] However, a discerning eye will notice that the issue in *Wagnon* is not at all similar to the issue of dual taxation. In the typical dual taxation scenario, both the tribe and the state attempt to tax the same non-Indian business on reservation land. In *Wagnon*, the tribe argued that because it owned a gas station that was buying gas from a non-Indian vendor subject to state taxation, the downstream effects of the state taxation impacted the tribe's business.[204] Unfortunately, the Eleventh Circuit did not recognize the difference between these two scenarios and uses *Wagnon* as justification to state that it "seems clear" that dual taxation regimes, in general, do not threaten tribal interests.[205] While the Eleventh Circuit went on to note that dual taxation was not at issue in this particular case, the fact that the Eleventh Circuit summarily stated this position is troubling. In a section of the case discussing upholding the district court's preemption analysis on alternate grounds, the Eleventh Circuit may have weakened the litigating position of tribes within its jurisdiction generally—by reiterating a faulty understanding of federal preemption and using a bad citation to suggestion that dual taxation does not impact the ability of tribal government to self-govern.

Ultimately, both cases examined in this section show that DOI's attempt to preempt state taxation of mineral leases on reservation land has fallen short. The Ninth Circuit dodged the application of this regulation altogether. The Eleventh Circuit opted to move forward without giving any deference to the agency's understanding or interpretation of the rule and ruled in favor of the tribe because the state did not cite a single connection to the taxed activity, all while weakening the litigating position of tribes in the future.

2. Future Regulations

In addition to DOI's new regulation regarding mineral leases, DOI is also in the process of reviewing existing regulations regarding the power of non-Indians to do business with tribes generally. In 1901, Congress passed a statute granting the Commissioner of Indian Affairs the power to regulate what individuals or entities are allowed to trade with "the Indians on any Indian reservation."[206] Flowing from that enabling statute, DOI promulgated rules in 1957 governing this type of activity.[207] However,

203. Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 113–14 (2005).
204. *Id.*
205. *Seminole Tribe of Florida*, 799 F.3d at 1340.
206. 25 U.S.C. § 262.
207. 25 C.F.R. § 140 (2012).

those rules have not been updated in a comprehensive manner since 1965.[208] In 2017, DOI began a new rulemaking process with the intention of determining whether these regulations need to be updated to address modern problems.[209] Unfortunately, the process is still ongoing.[210] The most recent action DOI took on the proposal taken was to cancel tribal listening sessions that were scheduled for March of 2021.[211] Those listening sessions have not yet been rescheduled,[212] signaling an indefinite hiatus for the project.

This rulemaking presents DOI with another major opportunity to divest states from the power to institute dual taxation regimes. Indeed, the tribes themselves recognize this and have proposed amendments to the regulations in question that explicitly attempt to stop dual taxation from occurring.[213] In response to the DOI's proposed rulemaking, DOI received comments from or on behalf of 43 different tribal authorities, advocacy groups, and business entities.[214] All of them expressed support for updating the "Indian Trader" regulations at issue.[215] Of the 43 different groups, 36 of them expressly discussed the need to stop dual taxation or outright preempt state taxation on tribal land.[216] Despite this

208. *Indian Traders (25 CFR 140)*, BUREAU OF INDIAN AFFS., https://www.bia.gov/as-ia/raca/archived-regulatory-efforts/indian-traders-25-cfr-140 [https://web.archive.org/web/20210801101928/https://www.bia.gov/as-ia/raca/archived-regulatory-efforts/indian-traders-25-cfr-140] (last accessed Jan. 5, 2022).

209. *Id.*

210. *Id.*

211. *Regulations and Other Documents in Development*, BUREAU OF INDIAN AFFS., https://www.bia.gov/as-ia/raca/regulations-and-other-documents-in-development [https://web.archive.org/web/20210803223320/https://www.bia.gov/as-ia/raca/regulations-and-other-documents-in-development] (last visited Jan. 5, 2022).

212. *Id.*

213. NATIONAL CONGRESS OF AMERICAN INDIANS, *supra* note 105 at 3–4.

214. *Indian Traders (25 CFR 140)*, *supra* note 208.

215. *Id.*

216. The groups that expressly discussed the need to stop dual taxation or outright preempt state taxation on tribal land include the Rincon Band of Luiseno Indians, Cota Holdings & TechSource, Mandan Hidatsa & Arikara Nation, Northern Arapaho Business Council, Elk Valley Rancheria, Navajo Nation, Rosebud Economic Development Corporation (REDCO), Salt River Pima-Maricopa Indian Community, Redding Rancheria, Seneca Nation of Indians, Quapaw Tribe of Oklahoma, Ho-Chunk Inc., Ysleta del Sur Pueblo, Fort Belknap Indian Community, Tunica-Biloxi Tribe of Louisiana, Ute Indian Tribe, Mashantucket Pequot Tribal Nation, Pueblo of Pojoaque, Oglala Sioux Tribe, Sac and Fox Nation, Squaxin Island Tribe, Nez Perce Tribe, Chickasaw Nation, Yurok Tribe, Reno-Sparks Indian Colony, Gila River Indian Community, Affiliated Tribes of Northwest Indians, Prairie Island Indian Community, National Congress of American Indians (NCAI), Santa Ynez Band of Chumash Indians, San Manuel Band of Mission Indians, Ewiiaapaayp Band of Kumeyaay Indians, National Indian Gaming Association, Cowlitz Indian Tribe, and Cheyenne River Sioux Tribe.

overwhelming support from tribal entities for the modernization of these rules and the inclusion of language striking at the heart of dual taxation and preemption of state taxation, the regulations remain in limbo for the time being. Though updating these regulations has the potential to solve many of the problems discussed throughout this article, regulations will actually need to be promulgated to make a difference.

3. Long-term Legislative Solutions

Unfortunately, any amendments to existing regulatory frameworks in 25 C.F.R. §§ 140 and 162 will continue to face the same pitfalls—after *Cotton Petroleum*, courts are skeptical that Congress has truly manifested an intent to preempt state taxation. While the statutes underlying those regulations give DOI the power to regulate contact with tribes, the lack of language explicitly stating that DOI has the power to preempt statute actions has proven a difficult hurdle to overcome in the courts. In the face of inaction or complicity from the Supreme Court, the only solution that ensures tribes are able to unburden themselves from the shackles of dual taxation involves congressional action. Courts will continue to deny *Chevron* deference to agency rulemakings and question whether regulatory structures truly preempt state action until Congress makes an explicit statement allowing DOI to preempt state law on this issue. The solution requires a new enabling statute. Congress has the power to grant DOI, through BIA, the power to preempt state taxation of non-Indian businesses on reservation land. Through such an enabling statute, DOI's promulgated regulations will be afforded their proper preemptive power and *Chevron* deference, finally freeing tribes of dual taxation issues. Absent a manifestation of such congressional power, DOI regulations alone will likely not be powerful or persuasive enough to stop the recurrence of this issue.

V. CONCLUSION

Dual taxation of non-Indian businesses on reservation land produces substantial concerns for the long-term well-being of tribes, particularly those that do not have access to alternative means of generating large amounts of revenue. While *Cotton Petroleum* currently allows dual taxation to exist, the Supreme Court's arguments and reasoning behind the *Cotton Petroleum* decision have not withstood the test of time. Disregard for precedent, poor understanding of the field, and neglecting to consider the economic realities many tribes face define *Cotton Petroleum*'s legacy. While a full overturning of *Cotton Petroleum* looks as unlikely as a return to the original understanding of the Indian Commerce Clause, there are

steps the Supreme Court can take to rectify this travesty. The Supreme Court, as discussed *supra*, can use the *Williams* test to prevent states from imposing dual taxation regimes upon non-Indian businesses operating on reservation land. Doing so would likely require distinguishing *Cotton Petroleum* on factual grounds, though the Court could go a step further and state the *Williams* argument was not considered in *Cotton Petroleum* and that the issue, therefore, deserves a fresh look. Regardless of the avenue the Supreme Court has taken, dual taxation is a grave situation that will plague tribes for years to come unless corrected. Other solutions exist outside of the court system, as well. DOI has tried, and continues to try, to promulgate rules to prevent dual taxation situations. Unfortunately, the effectiveness of these strategies is questionable. For that reason, the best option for a long-term solution to this pressing concern likely falls to Congress—the passage of a new enabling statute, allowing for DOI to effectively preempt state taxation of non-Indians on reservation land without interference from the courts. Only time will tell if Congress possesses the political willpower to correct this dire situation.