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# State Income Taxation of Nonmember Indians in Indian Country

Jennifer Nutt Carleton

# STATE INCOME TAXATION OF NONMEMBER INDIANS IN INDIAN COUNTRY

*Jennifer Nutt Carleton**

A long-standing tension exists between Indian peoples who enjoy the protection of a Congress that retains plenary power over Indian affairs,[1] and the individual states in which Indian reservations are located. One need only look to the disagreements between states and Indian nations located within their borders over the issues of gaming compacts, environmental regulation, treaty rights, and land claims to see the modern results of this tension. Congress attempts to address this problem through the use of federal legislation arbitrating the boundaries of state and tribal jurisdiction, with limited success.[2]

In the most contentious arena of all, state taxation of activities within Indian Country, Congress remains silent. Congress has not passed a single law specifically addressing the ability of a state to tax individuals, activities, or income within Indian Country.[3] Faced with this congressional silence, the task of developing standards for the levying of state taxes in Indian Country falls to state and federal courts, again with mixed results.

As a general rule, absent cession of jurisdiction or other federal statutes permitting it, a state is without power to tax reservation lands and reservation

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*B.A., 1991, Indiana University; J.D., 1996, University of Wisconsin Law School. Senior staff attorney, Oneida Tribe of Indians of Wisconsin. Special thanks to Attorney Gerald L. Hill for all his help and guidance in the writing of this article, and to Francis J. Carleton for his encouragement and support.

1. "It must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 154 (1980).

2. *See* Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 18 U.S.C. §§ 1166-1168 (2000) and 25 U.S.C. §§ 2701-2721 (2000)); Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (2000); Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 589 (codified at 28 U.S.C. § 1360 (2000)) (Public Law 280).

3. Indian country is:

> all land within the limits of any Indian reservation under the jurisdiction of the U.S. Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation . . . and all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2000). "Indian country may be reservation land, reservation land which has been allotted, or land which is occupied by a 'dependent Indian community.'" Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 527 (1998).

Indians.[4] Unfortunately, this rule raises more questions than it answers. What constitutes "reservation lands" and "reservation Indians" is a decades-long debate between Indian peoples and state governments.

*Joan LaRock v. Wisconsin Department of Revenue* presented the Wisconsin Supreme Court with the following question: Should a Menominee Indian living and working on the Oneida Tribe of Indians of Wisconsin Reservation be subject to the State of Wisconsin's taxation of income? The Wisconsin Supreme Court answered this question in the affirmative, holding that Joan LaRock, a Menominee Indian, living and working on the Oneida Reservation is subject to the State of Wisconsin's income taxation.[5]

This question of first impression in Wisconsin affected not only the eleven Indian Tribes within the state[6] and the thousands of Indians that live and work in Indian Country located in Wisconsin, it also set a precedent for future extension of state taxation in Indian Country. This article examines the Indian tax case law leading up to *LaRock* and the arguments presented by the taxpayer in that case. This article then analyzes the Wisconsin Supreme Court's holding in *LaRock*, which has already proven to be a guidepost for subsequent Indian tax adjudication. Finally, this article discusses the implications of *LaRock* for Indian people, Indian reservations, and Indian identity.

### *I. Procedural History*

Joan LaRock resided on land that is part of the Oneida Tribe of Indians of Wisconsin Reservation.[7] She worked at the Oneida Bingo and Casino, a business wholly owned and operated by the Oneida Tribe of Indians of Wisconsin.[8] The land upon which Ms. LaRock resided, as well as the land upon which the Casino is located, are titled to the United States of America and held in trust for the Oneida Tribe.

Ms. LaRock is an enrolled member of the Menominee Indian Tribe. She married an Oneida Indian, with whom she had four children. Joan LaRock's

4. Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995).

5. LaRock v. Wis. Dep't of Revenue, 621 N.W.2d 907 (2001).

6. The eleven Indian Tribes in the State of Wisconsin are the Bad River Band of Lake Superior Chippewa Indians, the Forest County Potawatomi Community of Wisconsin, the Ho-Chunk Nation, the Lac Courte Oreilles Band of Lake Superior Chippewa Indians, the Lac du Flambeau Band of Lake Superior Chippewa Indians, the Menominee Indian Tribe of Wisconsin, the Oneida Tribe of Indians of Wisconsin, the Red Cliff Band of Lake Superior Chippewa Indians, the Sokaogon Chippewa Community, the St. Croix Chippewa Indians of Wisconsin, and the Stockbridge-Munsee Community.

7. *LaRock*, 621 N.W.2d at 909.

8. *Id.*

children are all enrolled members of the Oneida Tribe.[9]

In 1996, the Wisconsin Department of Revenue (DOR) sent notice to Joan LaRock that she owed $588.80 plus interest for income earned in 1994 and 1995.[10] Ms. LaRock appealed the DOR's finding to the Wisconsin Tax Appeals Commission. The Tax Appeals Commission entered a decision and order dated May 11, 1998, awarding summary judgement in favor of the DOR.[11] The Tax Appeals Commission held that the State of Wisconsin may impose a tax on the income of Joan LaRock because she did not live on the Menominee Indian Reservation at the time she earned the income. "[T]he absence of proper residency or the proper situs for income is fatal to an Indian seeking immunity from state income tax. We hold that nonmember status on a reservation is also disqualifying."[12]

On appeal to the Brown County District Court, Judge Zuidmulder upheld the findings of the Tax Appeals Commission in a decision and order dated February 11, 1999.[13] Judge Zuidmulder held that because Joan LaRock is not an Oneida Indian, the State of Wisconsin may tax her income. "It follows that since Petitioner is not a member of the Oneida Nation [sic], she enjoys no protected status that would allow her to claim immunity from the duty she owes as a citizen of the State of Wisconsin to pay income taxes."[14] On December 28, 1999, a three-judge panel of the Wisconsin Court of Appeals affirmed the decision and order issued by Judge Zuidmulder.[15] The court of appeals examined the treaties creating the Oneida Reservation and the congressional acts delineating the state's jurisdiction within Indian Country, and could not "conclude that the treaties or federal statutes preempt state tax jurisdiction here."[16]

On appeal to the Wisconsin Supreme Court, Joan LaRock argued that federal, not state, law determines an individual's status as an "Indian" and what constitutes "Indian Country;" that Congress never expressly granted the State of Wisconsin the power to tax Indians living on the Oneida Reservation; and consequently, the State of Wisconsin's taxation of her income is prohibited. Ms. LaRock argued that, although she is a not a member of the

9. *Id.* at 908-09.

10. *Id.*

11. LaRock v. Wis. Dep't of Revenue, No. 96-I-539, slip op. at 15 (Wis. Tax Appeals Comm'n May 11, 1998).

12. *Id.* at 8.

13. LaRock v. Wis. Dep't of Revenue, No. 98CV723, slip op. at 5 (Brown County Dist. Ct. Feb. 11, 1999).

14. *Id.*

15. LaRock v. Wis. Dep't of Revenue, 606 N.W.2d 580 (Wis. Ct. App. 1999).

16. *Id.* at 584.

Oneida Tribe, she maintains her special status as an Indian, regardless of her residence. Ms. LaRock also argued that the federal treaties creating the Oneida Reservation and congressional recognition of the Oneida Reservation as Indian Country preempt the imposition of Wisconsin's income tax. Ms. LaRock maintained that the State of Wisconsin has no jurisdiction to tax the income of Indians that live and derive their income from Indian Country, unless specifically granted this jurisdiction by Congress. Because Congress did not act to grant this authority to the State of Wisconsin, Ms. LaRock took the position that the State's taxation of her income was prohibited.[17]

The Wisconsin Supreme Court disagreed. In a decision authored by Justice Wilcox, the court upheld the decision of the Wisconsin Court of Appeals finding that "the State is not barred by principles of tribal sovereignty from taxing LaRock's income because, although she is an enrolled member of the Menominee Tribe, she is not an enrolled member of the Oneida Tribe."[18]

### *II. Backdrop of Indian Sovereignty*

In general, states do not have the power to tax Indian tribes or their members on activities within Indian Country.[19] Congress can authorize state authority to tax Indian lands, but such authorization must be "unmistakably clear:"[20]

> In *The Kansas Indians*, for example, the Court ruled that lands held by Indians in common as well as those held in severalty were exempt from state taxation. . . . [I]n *The New York Indians*, the Court characterized the State's attempt to tax Indian reservation land as extraordinary, an "illegal" exercise of state power, and "an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations." As the Government points out, this Court has never wavered from the views expressed in these cases.[21]

Traditionally, Congress authorizes such state authority through federal legislation or treaties. As noted on many occasions by the United States Supreme Court, Indian sovereignty "provides a backdrop against which the applicable treaties and federal statutes must be read."[22]

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17. *Id.*

18. LaRock v. Wis. Dep't of Revenue, 621 N.W.2d 907, 917 (Wis. 2001).

19. Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 456 (1995).

20. County of Yakima v. Confederated Tribes & Bands of Yakima Nation, 502 U.S. 251, 258 (1992) (quoting Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 765 (1985)).

21. *Montana*, 471 U.S. at 764-65 (citations omitted).

22. McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172 (1973).

The Wisconsin Supreme Court acknowledged this principle, then applied it in a wholly unique way in the *LaRock* decision. The Wisconsin Supreme Court noted that Congress has the power to open the doors of reservations to state laws because it derives its power from the "federal responsibility for regulating commerce with Indian tribes and treaty making."[23] From this basic tenet, the Wisconsin Supreme Court moved to the conclusion that it is the tribe, and not the tribal member, that enjoys a trust relationship with the federal government and that "the notion of the 'tribe,' grounded in our federal constitution, is the essential *political* unit in American Indian law."[24]

The findings of the Wisconsin Supreme Court in *LaRock* are problematic for a number of reasons. First and foremost, there exists a trust relationship between the federal government and Indian peoples, not just Indian tribes. Congress historically applies its laws and statutes to all Indians, regardless of tribal membership. Under the Wheeler-Howard Act (commonly referred to as the Indian Reorganization Act), an "Indian" is defined as: "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation . . . ."[25] A "tribe" is defined as "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation."[26]

"For nearly two hundred years, the operative distinction for jurisdictional purposes in Indian country has been the distinction between Indians and non-Indians, *not* Indian members and nonmembers."[27] Congress repeatedly enunciates its plenary authority over Indians within Indian Country, regardless of tribal affiliation. Numerous federal statutes define "Indian" as being "any person who is a member of an Indian tribe."[28] The Department of the Interior issued regulations governing the implementation of the Indian Self-Determination and Education Assistance Act of 1975.[29] These

23. *LaRock*, 621 N.W.2d at 910 (citing *McClanahan*, 411 U.S. at 172 n.7).

24. *Id.* (emphasis added).

25. 25 U.S.C. § 479 (2000).

26. *Id.*

27. Amicus Curiae Brief of Oneida Indian Tribe of Wisconsin and Forest County Potawatomi Community at 2, LaRock v. Wis. Dep't of Revenue, 621 N.W.2d 907 (Wis. 2001) (No. 99-0951). In support of this proposition, the amici tribes cite to the Trade and Intercourse Act of 1802, the General Crimes Act, and the United States Supreme Court decisions in *Ex Parte Crow Dog*, *United States v. Rogers*, *United States v. Kagama*, *Worcester v. Georgia*, and *McClanahan*. *Id.* at 2-4.

28. 20 U.S.C. § 4402(4) (2000); 42 U.S.C. § 1437a(b)(9) (2000); 42 U.S.C. § 1996a(c)(1) (2000); 20 U.S.C. § 7881 (2000); 25 U.S.C. § 3703 (2000); 25 U.S.C. § 4103 (2000).

29. 48 C.F.R. § 1452.204-71 (1987); 41 C.F.R. § 60-1.5(a)(6) (1987).

regulations specifically prohibit discrimination among Indians on the basis of tribal affiliation in extending employment preference. The Bureau of Indian Affairs also does not distinguish between members of various tribes for the purposes of awarding benefits.[30]

Reservation health care facilities funded by the United States government must provide health services to *all* Indians, regardless of tribal affiliation.[31] The language for this funding does not distinguish between Indians on the basis of tribal membership.[32] "Federally-administered programs and services are provided to Indian people because of their status as Indians without regard to whether their Tribal membership is the same as their reservation residence."[33]

The logic behind this congressional policy is evident. The distinctions between Indians become very fine when viewed in an historical light. The Oneida Tribe of Indians of Wisconsin migrated from their aboriginal lands in New York. There are currently three Oneida Tribes, located in Wisconsin, New York, and Canada. Originally, these Tribes were all one with a common history, heritage, and culture.[34] Would the state's ability to tax nonmember Indians be the same for a New York Oneida? The hair splitting becomes even more acute in the case of the Bands of Chippewa who reside in Wisconsin, Michigan, Minnesota, North Dakota, and Montana.

In *LaRock*, the Wisconsin Supreme Court skirted this issue by noting that each tribe and band are "distinct political units; therefore they are separate federally recognized Indian tribes."[35] This logic ignores the problematic nature of federal recognition.[36] "The most precise definition of federal

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30. *See* 25 C.F.R. § 20.20(a)(1-3) (1985); 25 C.F.R. § 256.3(b) (1991); 25 C.F.R. § 635.117(d) (1998).

31. 25 U.S.C. § 1644 (2000).

32. *See also* 42 U.S.C. §§ 1395qq, 1396j (2000).

33. H.R. REP. No. 101-938, at 133 (1990).

34. *See* Oneida County v. Oneida Indian Nation of N.Y., 470 U.S. 226, 229-30 (1985) (citing Oneida Indian Nation of N.Y. v. Oneida County, 434 F. Supp. 527, 535 (D.C.N.Y. 1977)).

35. LaRock v. Wis. Dep't of Revenue, 621 N.W.2d 907, 910 n.2 (2001).

36. Mark D. Myers, *Federal Recognition of Indian Tribes in the United States*, 12 STAN. L. & POL'Y REV. 271 (2001); *see also* L. Scott Gould, *The Congressional Response to* Duro v. Reina: *Compromising Sovereignty and the Constitution*, 28 U.C. DAVIS L. REV. 53, 60-61 (1994). Gould states:

> Some who claim to be Indian, and who may receive preferences in governmental programs upon such basis, may have less than 1/2000 Indian blood. Others who gain tribal membership may have no Indian blood at all. Still others of full blood may not even be recognized as Indians by the federal government, or if they are, may have little or no land upon which to operate a tribal government.

recognition, as articled in *United States v. Sandoval*, describes it as the federal government's decision to establish a government-to-government relationship by recognizing a group of Indians as a dependent tribe under its guardianship."[37] As argued by Joan LaRock before the Wisconsin Supreme Court, federal recognition of a particular tribe is not equal to the trust responsibility of the federal government to individual Indians. Indians enjoy a similar, equal but separate, trust relationship with the federal government.[38]

The Wisconsin Supreme Court determined that an individual's status as an Indian is dependent on residence. This holding fails to recognize that an Indian remains an Indian regardless of her residence. Wisconsin's eleven Indian communities do not constitute homogenous groups of tribal members. Indian people living within Indian Country include Bureau of Indian Affairs and Indian Health Service employees, Indians married to members of other tribes, as in the case of Ms. LaRock, the offspring of these marriages, and increasing numbers of Indians residing and working on other reservations.[39] The State of Wisconsin recognizes this reality in the provision of social services and economic grants to Wisconsin Indians.[40]

Treaties and statutes setting aside reservations for particular tribes often provided that other Indians might be settled on the same reservations.[41] The United States filed an *amicus curiae* brief in the case of *Topash v. Commis-*

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*Id.*

37. Myers, *supra* note 36, at 272 (citing United States v. Sandoval, 231 U.S. 28, 46 (1913)).

38. McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 181 (1973); *see also* Eugenia Allison Phipps, *The Burden of Proof in the Federal/Indian Fiduciary Relationship*, 53 VAND. L. REV. 1637 (2000). "Despite the strong evidence of a fiduciary tie, courts, relying on a distinction between the typical common law fiduciary relationship and the 'unique' relationship between the government and the Indians, historically have refused to hold the government to the full fiduciary standards imposed on other, private fiduciaries." *Id.*

39. William Glaberson, *Who Is a Seminole, and Who Gets to Decide?*, N.Y. TIMES, Jan. 29, 2001, at A1.

40. *See* WIS. STAT. §§ 39.38, 39.40 (2000) (providing for student assistance to Wisconsin Indian students and minority teachers); *id.* § 46.70 (providing for social services to American Indians); *id.* § 46.71 (providing for the prevention and treatment of American Indian drug abuse); *id.* §§ 560.86 to 560.875 (providing for an economic liaison program for "tribal enterprises" and "Indian businesses" located on and off Indian reservations). None of these Wisconsin social service programs distinguish on the basis of tribal affiliation, regardless of an Indian's residence.

41. *See* Thomas v. Gay, 169 U.S. 264, 269 (1898); United States v. McGowan, 302 U.S. 535, 537 (1937); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 466-67 (1976).

*sioner of Revenue*,[42] setting forth examples of such treaties and statutes. In its brief, the United States noted:

> While federal policy has always recognized Indian tribes as governmental entities, it has at the same time recognized Indians as individuals, different from other individuals, and to whom special rules apply. The particular tribe to which an individual Indian belongs has been of no consequence insofar as his status as an Indian *vis-a-vis* the federal government has been concerned.[43]

In *Topash*, the United States took the position that the State of Minnesota's attempts to tax the income of an Indian living and working in Indian Country "ignores the whole tradition of Indian law, which gives special protection to Indians, of whatever tribe, residing on Indian reservations."[44] The Minnesota Supreme Court agreed.

*Topash* involved an enrolled Tulalip Indian living and working within the Red Lake Reservation in Minnesota. This individual sought a refund of state taxes paid on the basis that, as an Indian, the state had no jurisdiction to tax income derived from Indian Country sources.[45] The Minnesota Supreme Court held that federal Indian jurisdiction includes Indians of all Tribes, and thus preempts the State of Minnesota's ability to tax an Indian living in Indian Country, regardless of tribal affiliation.[46] Ironically, a month before oral arguments were presented to the Wisconsin Supreme Court in *LaRock*, the Minnesota Supreme Court overturned the *Topash* decision.

*State v. R.M.H.* addressed Minnesota's ability to enforce its speeding and driver's license laws against an Indian who committed offenses on a state highway located within the reservation of an Indian tribe of which he was not an enrolled member.[47] The nonmember Indian relied on *Topash* in arguing that the state's laws did not apply to him. In response, the Supreme Court of Minnesota found that its holding in *Topash* was no longer controlling:

> Our conclusion in *Topash* that Indian jurisdiction includes Indians of all tribes conflicts with how the Supreme Court has defined Indian sovereignty in *Oliphant* and its progeny, which cases lead to a distinction between nonmember Indians and Indians who are

42. 291 N.W.2d 679 (Minn. 1980).

43. Amicus Curiae Brief of United States at 5, Topash v. Comm'r of Revenue, 291 N.W.2d 679 (Minn. 1980) (No. 003248).

44. *Id.*

45. *Topash*, 291 N.W.2d at 680.

46. *Id.* at 683.

47. 617 N.W.2d 55, 57 (2000).

> members of the tribe on whose reservation they reside. Our reasoning in *Topash* is specifically refuted by the Supreme Court's decision in *Colville*, where the Court reached the opposite result. Because Supreme Court cases conflict with part of our decision in *Topash*, we conclude that *Topash* is no longer controlling on this issue.[48]

The Wisconsin Supreme Court came to the same conclusion, reasoning that a taxpayer's status as an Indian is somehow dependent on residence. The Wisconsin Supreme Court even went so far as to note that "federal legislation over the past century has sought in some instances to encourage tribal coherence."[49] This holding of the Wisconsin Supreme Court in *LaRock* is insupportable in light of congressional law and policy regarding the treatment of Indians.

### *III. Residence in Indian Country*

As noted above, a state is without power to tax reservation lands and reservation Indians.[50] The first question to be answered, therefore, is whether an Indian resides in a state for the purposes of income taxation. In Wisconsin, "residency" in a particular jurisdiction may serve as the basis for taxation.[51] Wisconsin may tax persons resident within its borders who do not live on reservations because it confers upon these persons the benefit of domicile and its accompanying privileges and advantages.[52] However, an Indian's residence within Indian Country cannot serve as the basis for the imposition of Wisconsin income tax.

In the leading case on income tax immunity of Indians, *McClanahan v. Arizona State Tax Commissioner*,[53] the United States Supreme Court held that a Navajo Indian, residing on the Navajo Reservation, was not subject to state income tax for money earned on the reservation:

> The residence of a tribal member is a significant component of the McClanahan presumption against state tax jurisdiction. But our cases make clear that a tribal member need not live on a formal

48. *Id.* at 64 (citations omitted).

49. LaRock v. Wis. Dep't of Revenue, 621 N.W.2d 907, 910 (2001).

50. *See* discussion *supra* Part II (regarding backdrop of Indian sovereignty).

51. *See* WIS. STAT. § 71.02(1) (2000).

52. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Zeuske, 145 F. Supp. 2d 969, 975 (W.D. Wis. 2000).

53. 411 U.S. 164 (1973).

> reservation to be outside the State's taxing jurisdiction; it is enough that the member live in "Indian country."[54]

If an Indian resides within Indian Country, the state has no jurisdiction to tax the income of the Indian. Indians that live within Indian Country do not "reside" in a state for income taxation purposes. The standard of review for a tax levied on an Indian tribe or an Indian *residing in Indian Country* is as follows: "Absent cession of jurisdiction or other Federal statutes permitting it, . . . a state is without power to tax reservation lands and reservation Indians."[55]

The United States Supreme Court consistently differentiates between a state's jurisdiction over Indians living in Indian Country and those that reside outside Indian Country. In *Chickasaw*, the Supreme Court held that the State of Oklahoma could tax income earned in Indian Country by Indians living outside of Indian Country.[56] The key to this analysis was whether the Indians in question lived in Indian Country, not whether they lived in their own tribe's Indian Country. In *Chickasaw*, the residence of the taxpayer was the determinative factor used by the Supreme Court to decide if the state had taxing authority over the income of the Indians in question.

The Supreme Court also emphasized the importance of an Indian's residence in *Oklahoma Tax Commissioner v. Sac & Fox Nation*.[57] "To determine whether a tribal member is exempt from State income taxes under *McClanahan*, a court first must determine the residence of that tribal member."[58] The question presented in *Sac & Fox* was whether the State of Oklahoma had the jurisdiction to tax employees of the Sac and Fox Nation.[59] In its decision, the Tenth Circuit Court of Appeals drew a distinction between the taxation of tribal members and nonmembers. It found tribal members exempt from income taxation, regardless of residence.[60] The Tenth Circuit further found that nonmembers of the Tribe, including nonmember Indians, were subject to state income taxation regardless of their residence.[61]

Despite the fact that the United States Supreme Court could have simply affirmed the findings on appeal of the Tenth Circuit, the Court did not

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54. Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123 (1993).

55. Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995) (citing County of Yakima v. Confederated Tribes & Bands of Yakima Nation, 502 U.S. 251, 258 (1992)).

56. *Id.* at 464.

57. 508 U.S. 114 (1993).

58. *Id.* at 124.

59. Sac & Fox Nation v. Okla. Tax Comm'n, 967 F.2d 1425, 1427 (10th Cir. 1992), *vacated by* Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993).

60. *Id.* at 1428-29.

61. *Id.* at 1429.

distinguish between members and nonmembers of the Sac and Fox Nation to determine if the state had jurisdiction to tax their income. Instead, the Court remanded the case to determine whether all of the taxpayers in question resided in Indian Country. "[W]e ask only whether the land is Indian country."[62] According to the Supreme Court's analysis under *Sac & Fox*, the determination of residency is independent from whether the individual taxpayers are members of the Sac and Fox Nation.

The Wisconsin Supreme Court echoed this emphasis on residency in *Anderson v. Wisconsin Department of Revenue*.[63] In *Anderson*, the Wisconsin Supreme Court addressed whether the State of Wisconsin had the authority to tax income earned within Indian Country by an Indian not residing in Indian Country. The court found Mr. Anderson's income taxable, noting that "[t]he tax upon Anderson's income only exists because Anderson lives off-reservation. As the department conceded at oral argument, there would not be a tax on the income at issue here if Anderson lived on the reservation."[64]

It is interesting to note that the Wisconsin Supreme Court stated in *Anderson* that "the term 'reservation Indian' refers to an Indian living on the reservation."[65] A Menominee Indian residing on the Oneida Reservation clearly falls under this definition of a "reservation Indian." Nevertheless, the Wisconsin Supreme Court "clarified" its holding in *Anderson* in its *LaRock* decision, noting:

> In *Anderson*, however, we were referring to the specific reservation of the particular tribe in which Anderson was enrolled: the Lac Courte Oreilles Band of the Lake Superior Chippewa Indians. LaRock attempts to stretch this definition to include all Indian reservations, a proposition for which she provides no authority. Inasmuch as LaRock is not an enrolled member of the Oneida Tribe living on the Oneida Reservation, she is not a "reservation Indian" as that term is used in United States Supreme Court precedent or in our *Anderson* decision.[66]

The Wisconsin Supreme Court's decision in *LaRock* does not comport with the presumption that as long as an Indian resides in Indian Country and derives her income from Indian Country, the state is presumed to have no taxation jurisdiction. Under the United States Supreme Court's analysis in

62. *Sac & Fox*, 508 U.S. at 125.
63. 484 N.W.2d 914 (Wis. 1992).
64. *Id.* at 921-22.
65. *Id.* at 922.
66. LaRock v. Wis. Dep't of Revenue, 621 N.W.2d 907, 916-17 (2001).

*Sac & Fox*, an Indian need not reside on her own reservation, or any established reservation, to benefit from the presumption that the state has no jurisdiction to tax her income. The Indian need only reside in Indian Country.

### *IV. Federal Preemption of State Taxation*

In Indian Country, no activity is presumed taxable by the state. A state does not have the inherent ability to tax the income of an Indian living and working in Indian Country. Any extension of the state's jurisdiction into Indian Country must be at the express consent of Congress.[67] Consequently, applicable treaties and federal statutes must be read to determine if they allow state jurisdiction.

In 1948, Congress codified the concept of Indian Country under 18 U.S.C. § 1151. In order to qualify as Indian Country, the federal government must "set aside" the land in question for the exclusive use and occupancy of Indian peoples.[68] Indian Country may be reservation land, allotted reservation land, or land occupied by a dependent Indian community.[69] Indian Country is not dependent on the presence of a governing tribe.

It is in the creation and oversight of Indian Country that the federal government preempts the state's ability to tax Indian tribes and individuals. As the United States Supreme Court noted in *Venetie*, "the federal set-aside requirement also reflects the fact that because Congress has plenary power over Indian affairs, see U. S. Const., Art. I, §8, cl. 3, some explicit action by

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67. As the Supreme Court held in *White Mountain Apache Tribe v. Bracker*:

> Respondents' argument is reduced to a claim that they may assess taxes on non-Indians engaged in commerce on the reservation whenever there is no express congressional statement to the contrary. This is simply not the law. In a number of cases we have held that state authority over non-Indians acting on tribal reservations is pre-empted even though Congress has offered no explicit statement on the subject. The court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty.

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 150-51 (1980); *see also* Bryan v. Itasca County, 426 U.S. 373 (1976).

68. 18 U.S.C. § 1151 (2000).

69. Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 527 (1998). A "dependent Indian community" must consist of lands set aside by the Federal Government for the use of Indians as Indian land, and must be under federal superintendence. *See* Foreman v. Dep't of Revenue, No. 2001714557, 2001 WL 938972, at *3 (Or. Tax Magis. Div. July 17, 2001) (holding that Klamath Indian was not exempt from Oregon state tax on income earned through work as Tribal Chairman because Klamath County was not set aside for the Klamath Tribe and its land is not regulated or controlled by the federal government).

Congress (or the Executive, acting under delegated authority) must be taken to create or to recognize Indian country."[70]

Congress or the Executive must act to create Indian Country. When it does so, the exercise of jurisdiction and the encroachment of law is preempted:

> The federal set-aside requirement ensures that the land in question is occupied by an "Indian community"; the federal superintendence requirement guarantees that the Indian community is sufficiently "dependent" on the Federal Government that the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question.[71]

The treaties or congressional acts establishing a reservation preclude the extension of state income tax law to any Indians on that reservation. "Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in Worcester v. Georgia, was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed."[72] In *McClanahan*, the United States Supreme Court, while noting that the Navajo Reservation was set aside for the occupancy and use of the *Navajos*, held that state tax law did not extend to *Indians* on the Navajo Reservation.[73] The Supreme Court did not distinguish between Navajos and other Indians residing on the Navajo Reservation.

Only Congress or action by the President of the United States may modify the tenure of the Indians on a reservation. A state's attempt to levy a tax based solely upon an Indian's residence within Indian Country, its core purpose being to provide a refuge from state authority and a "home" for Indians, is illogical, unjust, and violative of the rights guaranteed Indians by the United States pursuant to its treaty making authority.

### *V. A State Has No Inherent Jurisdictional Authority Over Nonmember Indians*

The ability to determine and define a state's jurisdiction over Indians within Indian Country is left solely to the federal government. Congress has

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70. *Venetie*, 522 U.S. at 531 n.6.

71. *Id.* at 521.

72. Williams v. Lee, 358 U.S. 217, 221-22 (1959); *see* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

73. The Supreme Court held that the 1868 federal treaty between the Navajo and the United States precluded Arizona state income taxation despite the fact that Arizona did not become a state until 1912. McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 174-75 (1973).

exercised this plenary power over Indian affairs by specifically rejecting the contention that a state has inherent jurisdiction over nonmember Indians within Indian Country. In *LaRock*, the Wisconsin Supreme Court cited to *Duro v. Reina*[74] for the proposition that the state may tax the income of a nonmember Indian residing within Indian Country.[75] The court also noted that "Congress responded to the Court's invitation by passing the 'Duro fix' which granted tribes criminal jurisdiction over nonmember Indians on tribal lands."[76] This is only part of the *Duro* story.

In *Duro*, the United States Supreme Court found that the Salt River Tribe did not have criminal jurisdiction over a Mission Indian who killed a Salt River Pima-Maricopa Indian on the Salt River Reservation.[77] In response to the Supreme Court's holding in *Duro*, Congress adopted Public Law 102-137, commonly referred to as the "*Duro* fix." Citing *United States v. Kagama*,[78] the United States House of Representatives noted that federal courts repeatedly hold that the term "Indian" includes any Indian in Indian Country, without regard to tribal membership.[79] The House of Representatives Conference Report noted:

> [T]he exception [to jurisdiction] is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally, of the family of Indians; and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs.[80]

The legislative history of Public Law 102-137 indicates that Congress simultaneously recognized the multitribal nature of reservation populations and supported tribal jurisdiction, for both civil and criminal matters, over all Indians on reservations.[81] Reaffirming tribal governments' inherent[82]

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74. 495 U.S. 676 (1990).

75. LaRock v. Wis. Dep't of Revenue, 621 N.W.2d 907, 913-14 (2001).

76. *Id.* at 914.

77. *Duro*, 495 U.S. at 693.

78. 118 U.S. 375, 383 (1886).

79. H.R. CONF. REP. NO. 102-261, at 4 (1991) (accompanying H.R. 972, ultimately signed into law as Pub. L. No. 102-137).

80. *Id.* (citing United States v. Rogers, 45 U.S. 567, 573 (1846)).

81. *See* Alex Tallchief Skibine, Duro v. Reina *and the Legislation That Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CAL. L. REV. 767 (1993).

82. Not all legal scholars agree that Congress had the ability to recognize inherent tribal sovereign authority when it enacted the "Duro fix":

> Thus, we are presented with a legislative enactment purporting to recast history in a manner that alters the Supreme Court's stated understanding of the

criminal jurisdiction over all Indians on their reservations, the United States Senate stated that congressional action:

> [I]s premised upon the reality and practice of reservation life: that non-tribal member Indians own homes and property on reservations, are part of the labor force on the reservation, and frequently are married to tribal members. Non-tribal member Indians receive the benefits of programs and services provided by the tribal government. Their children attend tribal schools, and their families receive health care services in tribal hospitals and clinics. . . . In addition, over the course of many years, Federal policy forced the relocation of many tribes onto one reservation.[83]

Far from distinguishing between member and nonmember Indians, Congress acknowledged the extent which reservations are intertwined with Indians of various tribal origins. The Wisconsin Supreme Court rejected this analysis, instead finding that "[a]lthough Congress granted 'Indian tribes' jurisdiction over Indians committing a crime on their tribal lands, it does not follow that Congress eliminated the distinction between Indian tribes."[84]

Congress retains plenary authority over Indian affairs.[85] Consequently, Congress has the sole power to define a state's jurisdiction over Indian Country, Indian tribes, and individual Indians.[86] Despite the Wisconsin Supreme Court's holding to the contrary in *LaRock*, Congress's "*Duro* fix" not only overturned the United States Supreme Court's decision in *Duro v. Reina*, it also legislatively confirmed that there is no inherent state jurisdiction over nonmember Indians within Indian Country.

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> organizing principles by which the Indian tribes were incorporated into our constitutional system of government. The question we must address, then, is whether the amendment's authorization of criminal jurisdiction over nonmember Indians is, as Congress asserted, simply a non-substantive "recognition" of inherent rights that Indian tribes have always held or whether it constitutes an affirmative delegation of power.

United States v. Weaselhead, 156 F.3d 818, 823 (8th Cir. 1998); *see also* Gould, *supra* note 36 (arguing that the Supreme Court may find the "Duro fix" unconstitutional because it violates the Equal Protection Clause).

83. S. REP. NO. 102-153, at 7 (1991).

84. LaRock v. Wis. Dep't of Revenue, 621 N.W.2d 907, 914 (2001).

85. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 765 (1985); Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 527 (1998).

86. For a discussion of the origin, rationale, and consequences of Congress' treatment of Indians and Indian tribes, see David Wilkins, *The Manipulation of Indigenous Status: The Federal Government as Shape-Shifter*, 12 STAN. L. & POL'Y REV. 223 (2001).

### *VI. Reversing the Presumption*

Both Congress and the United States Supreme Court suffer from a lack of precision and specificity when defining the respective roles of states and tribes, especially in the area of Indian taxation. For example, in *Montana v. United States*, the Supreme Court addressed the ability of the Crow Indian Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by "nonmembers of the Tribe."[87] Throughout its decision, the Supreme Court uses the term "nonmember" and "non-Indian" interchangeably. As the issue presented in *Montana* did not involve nonmember Indians, and the decision did not address nonmember Indians at all, it is unclear if the Court actually meant to draw this distinction. Congress is equally imprecise in the drafting of statutes ostensibly designed to protect tribal sovereignty.[88]

Perhaps in part due to this imprecision, the "canon of construction" for Indian law has evolved. The United States Supreme Court has stated on numerous occasions that it must be guided by "that eminently sound and vital canon . . . that statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians."[89] Courts must "avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power."[90] According to conventional wisdom, the essential point of the canons is to encourage narrow construction against invasions of Indian interests and broad construction favoring Indian rights.[91]

The Wisconsin Supreme Court utilized the opposite analysis to reach its conclusion, noting that "LaRock has not cited any other federal law as having preempted the State from imposing income tax in such a situation."[92] The Wisconsin Supreme Court did not presume that the income of the Indian taxpayer was immune from taxation. Instead, the court examined the applicable treaties and federal laws to determine if they explicitly exempted the income of Ms. LaRock from taxation.[93] Such an analysis stands federal Indian tax law on its head.

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87. 450 U.S. 544, 556-57 (1981).

88. See *supra* notes 36, 80, and accompanying text for discussion regarding "Duro fix."

89. Bryan v. Itasca County, 426 U.S. 373, 392 (1976); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 174 (citing Carpenter v. Shaw, 280 U.S. 363, 367 (1930)).

90. *McClanahan*, 411 U.S. at 172.

91. Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1141 (1990).

92. LaRock v. Wis. Dep't of Revenue, 621 N.W.2d 907, 916 (2001).

93. *Id.* at 915.

Contrary to the holding of the Wisconsin Supreme Court in *LaRock*, there exists a presumption *against* the state's power to tax Indians or Indian property in Indian Country. State jurisdiction does not generally lie within reservation boundaries. The assertion of taxing authority is not excepted from this principle.[94] In order to overcome this presumption, the state must point to express congressional consent to tax Indians or their property in Indian Country. "This is so because . . . Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate [a tax] immunity and allow states to treat Indians as part of the general community."[95] The tradition of Indian sovereignty requires that "the rule [of federal reluctance to interfere with state taxation] be reversed" when addressing the State's power to tax Indians or Indian property on reservations.[96] "[T]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history."[97]

Income earned from Indian Country is presumed to be beyond the state's taxing jurisdiction. The earning of income is substantially connected to the land, and is taxed based on the *residence* of the tax payer. This is what distinguishes taxation of income from sales taxation or transactions in personalty. In those cases that relate to an Indian deriving income from Indian Country, the tax is presumed impermissible unless specifically allowed by Congress:

> However relevant the land-income distinction may be in other contexts, it is plainly irrelevant when, as here, the tax is resisted because the State is *totally lacking in jurisdiction over both the people and the land it seeks to tax.* In such a situation, the State has *no more jurisdiction to reach income generated on reservation lands than to tax the land itself.*[98]

If the activity is substantially connected to Indian Country, the state is presumed not to have the ability to tax the activity unless Congress specifically grants such ability. "It is clear that the exemption accorded tribal and restricted Indian lands extends to the income derived directly therefrom."[99]

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94. County of Yakima v. Confederated Tribes & Bands of Yakima Nation, 502 U.S. 251, 257 (1992).

95. Bryan v. Itasca County, 426 U.S. 373, 392 (1976) (citing Okla. Tax Comm'n v. United States, 319 U.S. 598, 613-14 (1943)).

96. Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 124 (1993).

97. McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 168 (1973) (citing Rice v. Olson, 324 U.S. 786, 789 (1945)).

98. *Id.* at 181 (emphasis added).

99. Squire v. Capoeman, 351 U.S. 1, 9 (1956) (citing FELIX S. COHEN, HANDBOOK OF

The United States Supreme Court consistently draws a distinction between transactions based in personalty and those related to Indian income.[100] In *McClanahan*, the State of Arizona attempted to impose a tax on the income of a Navajo Indian residing on the Navajo Reservation whose income was "wholly derived from reservation sources."[101] The Supreme Court did not examine the source of Rosalind McClanahan's income to determine the existence of a comprehensive federal regulatory scheme regarding the source of her income. In fact, *McClanahan* fails to mention how Ms. McClanahan was employed in the years in question. The Court simply concluded that

> by imposing the tax in question on this appellant, the State had interfered with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves. The tax is therefore unlawful as applied to reservation Indians with income derived wholly from reservation sources.[102]

The rule of *McClanahan* should also control when a nonmember Indian resides and derives her income from Indian Country.[103]

In *LaRoque v. State*, the Supreme Court of Montana noted the importance of this "coalescence of situs (reservation) and status (Indian)."[104] The *LaRoque* court found that Montana had no taxation jurisdiction over the income of an enrolled member of the Turtle Mountain Chippewa Tribe of

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FEDERAL INDIAN LAW 265 (1942)).

100. *See* Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 466 (1976) (holding that in the absence of congressional consent the state was disabled from imposing a personal property tax on motor vehicles owned by Indians living in Indian Country, but could impose a tax on the sale of cigarettes to non-Indians); *Bryan*, 426 U.S. at 381 (holding that Public Law 280 did not grant the states the authority to tax "Indians or Indian property on reservations").

101. *McClanahan*, 411 U.S. at 165.

102. *Id.*

103. The District Court of Montana clarified the meaning of non-Indian:

> Defendants seek a clarification of the term "Non-Indian", contending that with respect to the sale of cigarettes on the Flathead Reservation anyone who is not an enrolled member of the plaintiff Tribes is a non-Indian. We do not agree. The cases and texts discussed supra refer generally to reservation Indians or Indians residing on the reservation. We conclude that all Indians residing on the Flathead Reservation are exempt from the payment of the cigarette tax.

Confederated Salish & Kootenai Tribes v. Moe, 392 F. Supp. 1297, 1312 (D.C. Mont. 1975). On appeal, the United States Supreme Court noted that the State of Montana had not challenged this holding and the Court would consequently not rule on it. *Moe*, 425 U.S. at 481 n.16.

104. 583 P.2d 1059, 1064 (Mont. 1978).

North Dakota or an unenrolled Chippewa Indian of mixed heritage, stating that "tribal affiliation was unimportant as long as situs on a reservation and status as an Indian coalesced."[105] The court went on to find that:

> Since both appellants are Indians residing on the reservation, and since each of their incomes were derived wholly from reservation sources, their activity is "totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves." Therefore, we hold the State was without authority to impose its income tax on these Indian residents of an Indian reservation.[106]

The Supreme Court of North Dakota made a similar finding in *White Eagle v. Dorgan.*[107]

For Indians that live and work in Indian Country, a state "is totally lacking in jurisdiction over the people and the lands it seeks to tax."[108] In order to overcome the presumption that states are unable to tax an Indian in Indian Country, a state must show that Congress *expressly* provided for state taxation of the activity in question:[109]

> In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of taxes on Indian tribes and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so *unmistakably clear.*[110]

Indians are not treated as part of the "general community" for taxation purposes. The state must show that Congress manifested a clear intent to terminate an Indian's tax immunity before a court may find that it has been so terminated:

> [I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes, there has been no satisfactory authority for taxing . . . Indian income from activities carried on within the

105. *Id.*

106. *Id.* at 1064-65. The Supreme Court of Montana cited *LaRoque* with deference in *State v. Bird*, 829 P.2d 941, 943 (Mont. 1992) (holding that the State of Montana lacks authority to impose individual income taxes on an Indian residing within Indian Country and deriving income from Indian Country).

107. 209 N.W.2d 621, 624 (N.D. 1973).

108. McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 181 (1973).

109. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980).

110. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 765 (1985) (emphasis added).

> boundaries of the reservation, and *McClanahan* lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent.[111]

None of the Acts passed by Congress regarding the jurisdiction of the states over Indian Country specifically grant the power to tax the income of Indians residing in, and deriving their income from, Indian Country. If Congress is silent, the state has no jurisdiction to impose its tax.

One might be tempted to assume that a state tax on the income of an Indian in Indian Country has a substantial burden of proof to overcome. The combination of two presumptions, the "narrow construction in favor of Indian interest" presumption and the "presumption against state jurisdiction to tax," might seem at first glance to be an insurmountable obstacle to state taxation. As the Wisconsin Supreme Court's decision in *LaRock* illustrates, however, these presumptions are as useful as a left-handed spatula. On November 27, 2001, the United States Supreme Court ruled in *Chickasaw Nation v. United States* that tribal governments are not exempt from the federal pull-tab excise and occupation taxes.[112] The Chickasaw Nation argued that Congress, in passing the Indian Gaming Regulatory Act,[113] intended to treat tribal governments on par with state and local governments for purposes of federal gambling tax laws. The Supreme Court found that tribal governments are not entitled to exemption from federal excise taxes because the Internal Revenue Code contained what the Court found to be a "mistake."[114] The most telling point of the Court's discussion on this topic is its evaluation of the applicable canons of construction:

> Moreover, the canon that assumes Congress intends its statutes to benefit the tribes is offset by the canon that warns us against interpreting federal statutes as providing tax exemptions unless those exemptions are clearly expressed. Nor can one say that the pro-Indian canon is inevitably stronger — particularly where the interpretation of a congressional statute rather than an Indian treaty is at issue. This Court's earlier cases are too individualized, involving too many different kinds of legal circumstances, to warrant any such assessment about the two canons' relative strength.[115]

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111. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973) (citation omitted).
112. Chickasaw Nation v. United States, 534 U.S. 84, 86 (2001).
113. 25 U.S.C. §§ 2701-2721 (2000).
114. Chickasaw Nation v. United States, 534 U.S. at 91.
115. *Id.* at 95 (citations omitted).

### *VI. Balancing State, Federal, and Tribal Interests*

"[T]he federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case."[116] It was not the intent of the United States Supreme Court when it decided *McClanahan* to require each state attempting taxation of an Indian's income to review the federal regulatory scheme related to that individual's occupation. The United States Supreme Court employs a "categorical" approach to determine if Indians that live in, and derive their income from, Indian Country are subject to state income taxation:

> We have balanced federal, state, and tribal interests in diverse contexts, notably, in assessing state regulation that does not involve taxation. . . . But when a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed instead of a balancing inquiry, a "more *categorical* approach: '[A]bsent cession of jurisdiction or other federal statutes permitting it,' we have held, a State is without power to tax reservation lands and reservation Indians." . . . Taking this categorical approach, we have held unenforceable a number of state taxes whose legal incidence rested on a tribe or on tribal members inside Indian country.[117]

The category that the United States Supreme Court has defined is an Indian that resides in Indian Country and derives her income from Indian Country. If the taxpayer is a non-Indian, or the taxpayer does not reside or derive income from Indian Country, then the income may be taxable based on the specific circumstances. It is at this point that the "particularized inquiry into the nature of the state, federal, and tribal interests at stake" enunciated by the Supreme Court in *White Mountain Apache Tribe v. Bracker* is utilized.[118]

For example, in *White Mountain*, the State of Arizona sought to impose a motor carrier license tax and use fuel tax on a non-Indian logging company operating solely within the boundaries of the Fort Apache Reservation.[119] The state assessed these taxes on all commercial users of its highways. The

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116. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987) (citing *Jones*, 411 U.S. at 148).

117. Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1985) (emphasis added) (citing County of Yakima v. Confederated Tribes & Bands of Yakima Nation, 502 U.S. 251, 251 (citation omitted)).

118. 448 U.S. 136, 145 (1980).

119. *Id.* at 139.

Supreme Court initially noted that "when on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the state's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest."[120] The Court went on to analyze the *nature* of the proposed tax. Because the tax was not substantially connected to the land, the Court utilized the second "barrier to the assertion of state regulatory authority over tribal reservations and members," namely, a balancing of the federal, state, and tribal interests in the activity.[121] The Court concluded that the tax proposed by the State of Arizona was impermissible, as the federal and tribal interests in the logging industry performed solely on the reservation outweighed the state's interest in raising revenues.[122]

Similarly, in *Washington v. Confederated Tribes of the Colville Indian Reservation*,[123] the Supreme Court reviewed the State of Washington's attempt to tax the sale of cigarettes on the Colville Indian Reservation to nonmember Indians and non-Indians. The taxes concerned "transactions in personalty with no substantial connection to reservation lands."[124] The Supreme Court found Washington's taxes permissible, as they were "reasonably designed to prevent the Tribes from marketing their tax exemption to nonmembers who do not receive significant tribal services and who would otherwise purchase their cigarettes outside the reservations."[125] The key to the Supreme Court's analysis in *Colville* was that the transaction involved the taxation of goods. The Court employed a balancing test of the state and tribe's interest in the activity in question, and found that the tribe did not have an interest in the imposition of a sales tax not substantially connected to the Indian Country in question.

The "categorical" approach enunciated by the Supreme Court in *Chickasaw* is the appropriate means by which a court should review a state's ability to tax an Indian's income. However, even if the *White Mountain* balancing test is utilized, the federal and tribal interests in the income of Indians living and working in Indian Country heavily outweigh any state interest in the same income. The federal government has an interest in promoting and regulating the employment of Indians in Indian Country and in keeping Indian families together. Indian tribes have an interest in the income of Indians, whether members or nonmembers, earned within Indian Country, as well as services

120. *Id.* at 144.
121. *Id.* at 145-53.
122. *Id.* at 152.
123. 447 U.S. 137, 145 (1979).
124. *Id.* at 156.
125. *Id.* at 157.

the tribe provides to those Indians. A state's only interest in the income of Indians earned in Indian Country is in taxing it. This is a case "in which the state has had nothing to do with the on-reservation activity, save tax it."[126]

*A. Federal Interest in Nonmember Income*

"[T]he federal and tribal interests arise from the broad power of Congress to regulate tribal affairs under the Indian Commerce Clause, Art. I, § 8, cl. 3, and from the semi-autonomous status of Indian tribes."[127] Congress historically and continuously expresses an interest in promoting the employment and welfare of Indians, taking direct action to support Indian employment with the passage of Title VII of the Civil Rights Act of 1964, and by explicitly exempting from its coverage the preferential employment of Indians by Indian Tribes or by industries located on or near Indian reservations.[128] In *Mancari*, the Supreme Court found that "[t]his exemption is consistent with the Federal Government's policy of encouraging Indian employment and with the special legal position of Indians."[129]

More recently, Congress expressed an intent to promote Indian employment through passage of sections 13,321 and 13,322 of the Omnibus Budget Reconciliation Act of 1993.[130] The Act provides tax incentives for the establishment of businesses in Indian Country and for hiring Indians and their spouses. The incentives offered are not limited to the hiring of members of that particular reservation's tribe, demonstrating the importance and need of providing employment to *all* Indians in Indian Country. Congress' recognition of the need to provide income to Indians through increased employment opportunities distinguishes income tax from any other taxes imposed in Indian Country.

The federal government also strongly supports keeping Indian families together. In an effort to stop the removal of Indian children from their reservations and the break up of Indian families, Congress passed the Indian Child Welfare Act.[131] The Wisconsin Supreme Court's failure to recognize the validity of a nonmember Indian's status as an Indian and encourage her presence on the reservation where her children are enrolled contradicts this effort to keep Indian families together.

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126. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 186 (1989).

127. Ramah Navajo Sch. Bd. v. Bureau of Revenue of N.M., 458 U.S. 832, 837 (1982) (citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1973)).

128. 42 U.S.C. §§ 2000e(b), 2000e-2(i) (2000); *see also* Morton v. Mancari, 417 U.S. 535, 545 (1974).

129. *Mancari*, 417 U.S. at 546 (citing 110 CONG. REC. 12,723 (1964)).

130. 26 U.S.C. §§ 168(j), 45(A) (2000).

131. 25 U.S.C. § 1901(4) (2000).

The federal government established a vast regulatory scheme both to promote Indian employment and to oversee those employed within Indian Country. Accordingly, the federal government has an interest in the employment of nonmember Indians and in their residence in Indian Country that outweighs any state interest in taxing income earned by nonmember Indians.

*B. Tribal Interest in Nonmember Income*

A tribe also has an interest in nonmembers that live and work in its Indian Country. Under treaties creating Indian Country, a tribe's interests include protecting and providing a home for all Indians within its borders. The jurisdiction of a tribe extends to all Indians within its borders, both members and nonmembers.[132]

Tribal powers extend "over both their members and their territory."[133] These powers can extend over members going beyond reservation boundaries, as well as individuals within those boundaries. Most tribes have laws that affect employment, including wage laws, employee incentive laws, conflict of interest laws, and whistle blower laws. Tribes also provide services to all Indians within their jurisdiction, whether members or nonmembers. Such services include trash pickup, public transit, food distribution, utility services, funeral expenses, public schooling, health services, travel monies for attending a funeral, and higher education reimbursement. The receipt of "significant tribal services" is an important consideration in balancing the interests of the state, the federal government, and the tribe.[134]

A tribe has a further interest in keeping its children with their Indian families. The Supreme Court recognized the overwhelming interest that an Indian tribe has in its children in *Mississippi Band of Choctaw Indians v. Holyfield*.[135] The Supreme Court implies in *Holyfield* that the correct angle from which a court should view ethnicity and the cultural ties of an Indian within Indian country is from the vantage point of the tribe's interests.

In *LaRock*, the Wisconsin Supreme Court found that a nonmember Indian was subject to the State of Wisconsin's income tax, noting that "The fact is that LaRock — who is an enrolled member of the Menonminee [sic] Tribe — has no voice in the affairs of the Oneida Tribe as she may in the affairs of the Menominee Tribe."[136] *In Re Mehojah* raised a similar ar-

132. 25 U.S.C. § 1301 (2000); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153 (1980).

133. United States v. Mazurie, 419 U.S. 544, 557 (1975).

134. *Colville*, 447 U.S. at 157.

135. 490 U.S. 30, 32 (1989).

136. LaRock v. Wis. Dep't of Revenue, 621 N.W.2d 907, 917 (Wis. 2001).

gument before the Idaho Board of Tax Appeals. The Idaho Board found that the State of Idaho had no jurisdiction to tax the income of a nonmember Indian working for the Shoshonee-Bannock Tribe on the Fort Hall Reservation:

> The case of McClanahan v. State Tax Commission . . . is decisive of the present case. In McClanahan, the State of Arizona attempted to collect a tax from a Navajo Indian on income wholly earned within the Navajo Reservation. The Supreme Court held that it could not do so. The Tax Commission attempted to distinguish the present case from McClanahan on the ground that Appellant was not a member of the tribe living on the reservation, and that therefore the tax imposed did not interfere with tribal self government. But the Supreme Court considered and rejected this argument in McClanahan . . . . Respondent assumed that since Appellant could not vote in tribal elections held on the Fort Hall Reservation, state action did not interfere with tribal self government, but such argument is patently specious.[137]

The Idaho Board of Tax Appeals went on to find that the State of Idaho has no jurisdiction to tax the income of an Indian residing in and deriving such income from Indian Country, regardless of his tribal affiliation. This holding is now codified in the Idaho Tax Guidelines.[138]

While it is true that nonmember Indians cannot vote in tribal elections, the same may be said of many tribal members. For instance, the Oneida Constitution does not allow tribal members to vote in elections until they are twenty-one years of age, yet they can be employed before this date. Despite being unable to participate in tribal elections, an eighteen-year-old Oneida Indian residing on the Oneida reservation and deriving her income from the Oneida reservation would not be subject to the State of Wisconsin's income taxation. The inability to vote does not grant the state the ability to tax.

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137. No. 73-1-27, 1974 WL 21924, at *3 (Idaho Bd. Tax App. Feb. 1974) (citations omitted).

138. IDAHO CODE § 63-3026A(4)(b)(iv) (2002). The instructions in the Idaho tax pamphlet state that Native Americans enrolled as members of a federally recognized tribe, living and working on a reservation, may deduct all income received from employment on the reservation if the income is included on the front of Form 43. Income earned off the reservation cannot be deducted, nor can income earned on the reservation if you live off the reservation. *In re* Mettler, No. 97-B-764, 1998 WL 208151, at *2 (Idaho Bd. Tax App. Apr. 13, 1998).

*C. State Interest in Nonmember Income*

A state's power to tax depends on its jurisdiction over the objects of taxation. In *Wisconsin v. J.C. Penney Co.*, the United States Supreme Court set forth the simple but controlling question — namely, "whether the state has given anything for which it can ask in return."[139] The key to this analysis is whether the state's interest in the income of the Indian is different if the Indian resides on the Menominee Reservation or the Oneida Reservation. There is an insufficient nexus between the Indian's status as a Menominee Indian and the Oneida Reservation's location in the State of Wisconsin to support the State's imposition of its income tax in Indian Country.

In *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Zeuske*,[140] the Wisconsin Western District addressed a related question. A member of the Lac du Flambeau Band of Lake Superior Chippewa Indians living on the Lac du Flambeau reservation in Wisconsin protested the State of Wisconsin's attempts to tax income earned in the State of Minnesota from employment as a truck driver. The state argued that the interests of the Lac du Flambeau did not extend to tribal members who go beyond the reservation in order to earn money.[141] Judge Crabb held that the state had no authority to tax the income, noting that the State of Wisconsin did not cite to any statute authorizing it to impose taxes on Indians based solely on residency on a reservation located within the state.[142]

The majority of other states to consider this issue have already acknowledged that they have no jurisdiction to tax the income of Indians residing in, and deriving their income from, Indian Country. The State of Oregon passed a statute specifically exempting "[a]ny income derived from sources within the boundaries of federally recognized Indian Country in Oregon by any enrolled member of a federally recognized American Indian Tribe residing in federally recognized Indian country" from state taxation.[143] California also exempts "Indian-owned units located on an Indian reservation or Rancheria" from taxation.[144] The Indian must simply be a "member of a federally recognized American Indian Tribe" and reside on a "Indian Reservation or Rancheria."[145] These states do not differentiate between

139. Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940).
140. 145 F. Supp. 2d 969 (W.D. Wis. 2000).
141. *Id.* at 974.
142. *Id.* at 975.
143. OR. STAT. § 316.777 (2001).
144. CAL. CODE REGS. tit. 25, § 5664 (2002).
145. *Id.* § 5664(a)(1)(B-C).

members of different tribes living in Indian Country. The New York Attorney General issued a Formal Opinion that "[i]ncome earned from employment on an Indian reservation by an Indian who resides on such reservation is not subject to New York State personal income tax."[146] Wisconsin did not join North Dakota, Idaho, Oregon, California, and New York in finding that a state has no jurisdiction to tax nonmember Indians living and working in Indian Country.

### *VII. Conclusion*

Ms. LaRock is an Indian who lives in Indian Country and derives her income solely from Indian Country. She is currently subjected to Wisconsin state income tax on the basis that she is not living and working on her own tribe's reservation.

Federal, not state, law determines an individual's status as an "Indian" and what constitutes "Indian country." Congress never expressly granted the State of Wisconsin the power to tax Indians living on the Oneida Reservation. Nevertheless, under the Wisconsin Supreme Court's decision in *LaRock*, the State of Wisconsin may tax the income of Joan LaRock.

In order to reverse precedent like *LaRock*, Indian tribes must take a more active role in the legislative and judicial processes. For example, the Oneida or Menominee Tribes could have brought Ms. LaRock's claim in federal court, rather than proceeding through state court.[147] A federal judge may have given a more favorable review to Ms. LaRock's claim. Another alternative would be the passage of taxation legislation by the Oneida and Menominee Tribes, similar to the reciprocity agreements entered into between states for taxation purposes.[148] Such agreements might balance the scales in favor of the "tribal interests" in the income of nonmember Indians, such as Joan LaRock, residing in Indian Country. A final alternative would be the passage of state legislation specifically exempting Indian income from Indian Country within the state, regardless of tribal membership, such as that in

146. 76 N.Y. Op. Atty. Gen. 1977.

147. *See, e.g.*, Lac du Flambeau Band of Lake Superior Chippewa Indians v. Zeuske, 145 F. Supp. 2d 969 (W.D. Wis. 2000).

148. "Our conclusion in no way limits the Tribes' ample opportunity to advance their interests when they choose to do so." Ariz. Dep't of Revenue v. Blaze Constr. Co., 526 U.S. 32, 38 (1999) (holding that a company owned and operated by a Blackfeet Indian which built and repaired roads on the Navajo, Hopi, Fort Apache, Colorado River, Tohono O'Odham, and San Carlos Apache Indian Reservations in Arizona was subject to state gross proceeds tax). "As the company concedes, Blaze is the equivalent of a non-Indian for purposes of this case because none of its work occurred on the Blackfeet Reservation." *Id.* at 34.

Oregon and California.[149] A more likely alternative to such legislation might be an agreement between the State and the tribes exempting nonmember income in exchange for other taxation stipulations, such as cigarette and gas sales to non-Indians.

While the door is not forever closed on nonmember Indians seeking to enjoy the same level of freedom from state interference as their tribal member counterparts, the Wisconsin Supreme Court clearly expressed its view of Indians within Indian Country. The Wisconsin Supreme Court reversed the presumption against state taxation when it found that Wisconsin has jurisdiction to tax a Menominee Indian's income earned on the Oneida Reservation. In Wisconsin, an Indian is only an Indian on her own reservation.

149. *See supra* Part V.