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CHICKASAW NATION V. UNITED STATES AND THE POTENTIAL DEMISE OF THE INDIAN CANON OF CONSTRUCTION

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Introduction

On November 27, 2001, the Supreme Court decided *Chickasaw Nation v. United States*,[1] ruling that §§ 4401(a)(1) and 4411 of the Internal Revenue Service Code of 1986 (I.R.C. or the Code) applied to pull-tab gaming activities conducted on tribal land.[2] The Court heard this case on a writ of certiorari from the Tenth Circuit, which in April 2000, also ruled that I.R.C. §§ 4401(a)(1) and 4411 apply to the pull-tab gaming activities of the Chickasaw Nation (the Nation).[3] The Court granted the Nation's petition for certiorari after the Court of Appeals for the Federal Circuit issued a ruling in *Little Six, Inc. v. United States*,[4] exempting the Shakopee Mdewakanton Sioux (Dakota) Community of Minnesota from paying federal excise and occupational taxes on their pull-tab games operation. These two decisions immediately brought to the forefront an issue that was an area of uncertainty in Federal Indian law since the 1982 passage of the Indian Tribal Governmental Tax Status Act.[5]

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1. 534 U.S. 84 (2001).

2. I.R.C. § 4401(a)(1) (2000) (concerning the application of the federal wagering tax); I.R.C. § 4411 (2000) (concerning the application of the federal occupational tax).

3. Chickasaw Nation v. United States, 208 F.3d 871 (10th Cir. 2000).

4. 210 F.3d 1361 (Fed. Cir. 2000).

5. I.R.C. § 7871 (2000); *see* Scott A. Taylor, *An Introduction and Overview of Taxation and Indian Gaming*, 29 ARIZ. ST. L.J. 251, 257 (1997).

Since the Court heard the case on October 2, 2001, approximately 185 Indian tribes conducting gaming operations in the United States[6] anxiously awaited the Supreme Court's ruling because they knew that it could potentially cost their $10-billion-dollar-per-year industry[7] over $25 million annually.[8] The Court's ruling for the government will cost the Chickasaw Tribe itself $44,721.53 in unpaid wagering excise taxes and interest for the period from August 1991 through August 1994, in addition to more than one-quarter of one percent of their *gross* revenue generated from pull-tab gaming activities from August 1994 into the future.[9] More importantly, the Chickasaw and other tribes are concerned that this ruling indicates the Court's abandonment of the Indian canon of construction, which requires that ambiguous statutes and treaties be interpreted in favor of the Indians.[10] The death of this canon would be the most hurtful upshot of what Judge William Canby, Jr., has termed the Indians' recent "string of losses at the Supreme Court level."[11] Many tribes believe that it could open the door to additional federal regulation of tribes and lead to a further increase of federal taxes on Indian gaming revenue, a source of tribal income, which has remained largely untouched by federal income tax provisions, and other taxes imposed by the Internal Revenue Service.[12]

This article argues that the Supreme Court's decision in *Chickasaw Nation* applying the federal wagering excise tax and federal occupational tax to Indian gaming operations was incorrect for two reasons. First, the Court misinterpreted the language of the statute, and more importantly, the Court failed to properly apply the 200-year-old Indian canon of construction requiring ambiguous treaty and statute provisions to be interpreted in favor of the Indians. Part I briefly outlines the history of Indian Law in the United

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6. National Indian Gaming Commission, *at* <http://www.nigc.gov/nigc/nigcControl?option=GAMING_TRIBES&REGION10=0&SORT=1> (last visited Mar. 5, 2003) [hereinafter NIGC].

7. David W. Chen & Charlie LeDuff, *Bad Blood in Battle over Casinos*, N.Y. TIMES, Oct. 28, 2002, at A21.

8. Twenty-five percent of $10,000,000,000 under I.R.C. § 4401(a) (2000), plus $50 under I.R.C. § 4411 (b) (2000).

9. *Chickasaw Nation*, 208 F.3d at 874 (emphasis added).

10. The Indian canon of construction was most recently used in *Little Six, Inc. v. United States*, 210 F.3d 1361, 1364 (Fed. Cir. 2000).

11. Jeff Hinkle, *The U.S. 9th Circuit Court of Appeals, Still a Foothold for Tribal Sovereignty*, AM. INDIAN REP., Oct. 2001, at 8, 9.

12. *See* Rev. Rul. 94-16, 1994-1 C.B. 19. *But see* Priv. Ltr. Rul. 90-43-066 (Aug. 2, 1990) (holding the tribe liable for the employer's portion of the FICA tax).

States and gives an overview of the taxation of Indian tribes and their business activities. Part II recounts Native American involvement in, and the federal government's regulation of, tribal gaming operations. Finally, Part III analyzes the Court's decision in *Chickasaw Nation v. United States*,[13] by examining the arguments of both the government and the Tribe, as well as the circuit court decisions in *Chickasaw Nation v. United States*,[14] and *Little Six, Inc. v. United States*.[15] This article concludes with an assertion that the Court's decision was erroneous, not only because it incorrectly interpreted the language of the statute in question, but more importantly, it failed to properly apply one of the hallmarks of Federal Indian law, the Indian canon of construction.

I. History of Federal Indian Law

Federal Indian Law occupies a unique place in American legal history. As one commentator noted, "[t]here are a number of scattering forces that push Indian law away from any center," creating a body of law without precedent.[16] Since European settlement first began on the North American continent, there have been at least two, and most often three, sovereign political entities vying for power.[17]

The U.S. Constitution, ratified in 1789, laid the groundwork for Federal Indian law. Article I, Section 8, Clause 3, more commonly known as the Commerce Clause, vested exclusive authority in Congress to regulate trade and commerce.[18] The Constitution also granted the President, with the consent of the Senate, the power to make treaties with the Indian tribes.[19] Yet, the Constitution did not solve every question in the emerging field of Indian law, particularly those of jurisdiction. However, "[t]his was a far simpler and clearer declaration of legislative authority over Indian tribes than the superseded Articles of Confederation contained."[20]

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13. 534 U.S. 84 (2001).

14. 208 F.3d 871 (10th Cir. 2000).

15. 210 F.3d 1361 (Fed. Cir. 2000).

16. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 3 (1987).

17. "Sovereign" is used here to describe the federal government's power as well as that of the states, U.S. territories, and the Indian tribes. The latter three are, in reality, semi-sovereign political entities.

18. U.S. CONST. art. I, § 8, cl.3.

19. U.S. CONST. art. II, § 2, cl.2.

20. CASES AND MATERIALS ON FEDERAL INDIAN LAW 62 (David H. Getches et al. eds., 4th ed. 1998) [hereinafter GETCHES].

Following the ratification of the Constitution, most of Indian law was marked by a series of Trade and Intercourse Acts in which Congress attempted to further subject all intercourse between Indians and non-Indians to federal control.[21] In 1823 the Supreme Court decided the first of three cases known as the Marshall Trilogy.[22] The Trilogy, beginning with *Johnson v. M'Intosh*,[23] is generally recognized as the most important group of cases in the history of Federal Indian law, and has served as the legal foundation of most of the Indian law cases decided by the Court since the 1830s.

A. The Marshall Trilogy

Johnson v. M'Intosh,[24] involved the validity of a land grant made by an Indian tribe to non-Indian individuals prior to the passage of the Trade and Intercourse Acts. In the opinion, Chief Justice John Marshall wrote that, despite the fact that the tribes retained a "title of occupancy"[25] to their lands, "complete ultimate title"[26] was vested in the United States. Consequently, the Court held the transfers invalid based on a doctrine of discovery which gave the discovering European sovereign a title good against all others, and "the sole right of acquiring the soil from the natives."[27] This decision acknowledged the Indians' legal right in their land, however it recognized that this right existed at the discretion of the federal government.

The second case of the Trilogy, *Cherokee Nation v. Georgia*,[28] involved attempts by the State of Georgia to extinguish Indian title to all lands within the State and distribute the land to several Georgia counties. The Court ruled that the Cherokee Nation was not a "foreign state" despite the fact that it was "a state, . . . a distinct political society, separated from others, capable of managing its own affairs and governing itself."[29] Marshall wrote that the Indian Nations may be more correctly "denominated as domestic dependent nations," with their relationship to the United States resembling "that of a

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21. *See* Act of July 22, 1790, ch. 33, 1 Stat. 137; Act of Mar. 30, 1802, ch. 13, 2 Stat. 139; Act of June 30, 1834, ch. 161, 4 Stat. 729.

22. Kathryn R.L. Rand & Steven A. Light, *Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POL'Y & L. 381, 387 (1997).

23. 21 U.S. (8 Wheat.) 543 (1823).

24. *Id.*

25. *Id.* at 592.

26. *Id.* at 603.

27. *Id.* at 573.

28. 30 U.S. (5 Pet.) 1 (1831).

29. *Id.* at 16.

ward to his guardian."[30] These words, now the touchstone of Federal Indian law, established the trust relationship between the federal government and the Indian tribes that remains to this day.

Worcester v. Georgia,[31] the third case in the Marshall Trilogy, took the Court's *Cherokee Nation* ruling one step further and established the legal precedent excluding the states from power over Indian affairs. The case involved the State of Georgia's arrest of non-Indian missionaries residing in Cherokee territory for not obtaining a license from the State's governor. The Court ruled that the Trade and Intercourse Acts "manifestly consider the several Indian nations as distinct and political communities, having territorial boundaries, within which their authority is exclusive."[32] This case, along with the other two cases of the Marshall Trilogy established the "sovereignty" of the tribes. This sovereignty is a unique sovereignty, that of domestic dependent nations that "are afforded only limited sovereignty subject to the 'ultimate domain' of the federal government," and is at the root of the complexity of Federal Indian law.[33]

B. 1871-1968

Following *Worcester*, the United States continued to enter into treaties in which the tribes gave up their land rights to the federal government to make way for white settlement.[34] In 1871, in an attempt to eradicate Indian tradition and culture, the United States embarked on a policy of allotment and assimilation.[35] This policy put an end to the creation of treaties between the federal government and the tribes, and started a process of allotting tribal land to reservation Indians. This resulted in a nearly two-thirds reduction in the acreage of tribal lands and a corresponding impoverishment of tribal Indians.[36]

After the federal government realized that allotment was not going to serve its purpose of completely integrating all Indians into the white American society, Congress began considering a more protectionist position. In 1934,

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30. *Id.* at 17.

31. 31 U.S. (6 Pet.) 515 (1832).

32. *Id.* at 557.

33. Rand & Light, *supra* note 22, at 389.

34. *See* David H. Getches, *A Philosophy of Permanence: The Indians' Legacy for the West*, J. WEST, July 1990, at 54-68.

35. FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 128 (Rennard Strickland et al. eds., 1982).

36. WILKINSON, *supra* note 16, at 20.

Congress passed the Indian Reorganization Act,[37] ending allotment and returning unsold lands to tribal ownership.[38] However, this period of tolerance for the Indian tribes was short-lived, and in 1953 Congress passed a resolution with the stated intent of ending the status of Indians as "wards of the United States,"[39] and the implied goal of terminating all tribes as political entities.

Again, realizing limited success, Congress began to reconsider its position of termination. The Civil Rights Movement of the 1960s brought with it a more tolerant approach, and perhaps even an appreciation of Native American culture. Consequently, in 1968 the United States, led by President Johnson, ushered in a new period in Federal Indian law: one of self-determination for the tribes. This new policy, which was carried on by President Nixon, called for the end of termination and paternalism, and urged Congress to return control of federal Indian programs to the tribes.[40]

Just as the Marshall Trilogy's unique definition of sovereignty helped give birth to a body of law unparalleled in American legal history, Congress's constantly shifting governmental policy toward the Indians adds to the complexity of Federal Indian law. This environment has cultivated substantial litigation, and has left both lawyers and scholars unsure of exactly where Federal Indian law stands at any point in time.

C. Federal Taxation of Indian Tribes

The oxymoron of "limited sovereignty," and the environment of uncertainty is nowhere more apparent than in the area of taxation of Indian tribes.[41] While Congress has never passed legislation that explicitly exempts Indian Tribes from federal income taxation, the Internal Revenue Service (IRS) has taken

37. Indian Reorganizaton Act, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (2000)).

38. *Id.* §§ 461-463.

39. H.R. Con. Res. 108, 83d Cong. (1953).

40. Rand & Light, *supra* note 22, at 392.

41. Tribes have long been recognized to have the power to tax activities that take place on tribal land. *See* Morris v. Hitchcock, 194 U.S. 384 (1904). However, Tribes are also subject to at least some forms of federal taxation. *See* Priv. Ltr. Rul. 90-43-066 (Aug. 2, 1990) (finding a tribe liable for the employer's portion of the FICA tax). *But see* Rev. Rul. 94-16, 1994-1 C.B. 19 (exempting tribes from federal income tax). Tribes are also open to state taxation in some circumstances. *See* County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251 (1992) (holding that the General Allotment Act of 1887 (Dawes Act), 25 U.S.C. § 348 (Supp. I 2001), authorizes the states to tax fee land within a reservation, whether owned by Indians or non-Indians).

the position that tribes are generally exempt.[42] However, this exemption does not apply to Federal Insurance Contributions Act (FICA)[43] or Federal Unemployment Tax Act (FUTA)[44] taxes. In addition, despite Congress's passage of the Indian Tribal Governmental Tax Status Act of 1982, tribes may still be subject to a number of federal excise taxes.[45]

The Indian Tribal Governmental Tax Status Act was passed for the purpose of clarifying federal taxation as it applies to Indian tribes by treating them as states for certain federal tax purposes.[46] It exempts tribes from the special fuels tax, manufacturers excise tax, communications excise tax, and highway vehicles tax.[47] However, these exemptions only extend to tribal activities undertaken in furtherance of "an essential governmental function."[48] Whether the excise tax exemption applies to other tribal activities, such as Indian gaming, is unclear.[49] Professor Scott Taylor, an authority on the taxation of Indian tribes and Indian gaming, states that "[t]he extensive lottery activity of states, together with the legal history of gaming, argues strongly in favor of finding that Indian gaming *does involve* the exercise of an essential governmental function, and therefore *fits within the exemption* of the Indian Tribal Government Tax Status Act."[50]

II. Indian Gaming and Federal Regulation

Indian gaming operations are the fastest growing segment of the country's

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42. Rev. Rul. 94-16. Individual Indians however, have no general exemption from federal income taxation simply by being an Indian. Lafontaine v. C.I.R., 533 F.2d 382 (8th Cir.1976).

43. I.R.C. § 3128 (2000); Priv. Ltr. Rul. 90-43-066 (Aug. 2, 1990).

44. I.R.C. § 3311 (2000); Priv. Ltr. Rul. 93-45-037 (Nov. 12, 1993) (finding a tribe liable for FUTA tax); *see also In re* Cabazon Indian Casino, 57 B.R. 398 (B.A.P. 9th Cir. 1986); Washoe Tribes of the State of Nevada & California v. United States, 79-2 T.C.M. (CCH) 9718 (D. Nev. 1979).

45. The Indian Tribal Governmental Tax Status Act excise tax exemption extends only to tribal activities that are undertaken in furtherance of "an essential governmental function." I.R.C. § 7871(b) (2000).

46. H.R. CONF. REP. No. 97-984, at 4 (1982).

47. I.R.C. § 7871 (a)(2)(D) (2000).

48. *Id.* § 7871(b).

49. I.R.C. § 4401(a) (2000) imposes a wagering tax of one-quarter of one percent on the amount of all wagers placed on betting pools or lotteries conducted under state law. However, because tribal lotteries and pull-tabs are not authorized under the laws of a state, but by Congress, it is unclear whether this tax applies to the tribes' gaming activities. Taylor, *supra* note 5, at 257.

50. *Id.* at 256-57 (emphasis added).

most rapidly expanding industry (legalized gambling).[51] Currently over 185 tribes participate in Indian gaming,[52] generating more than $10 billion of revenue annually.[53] Consequently, gaming has undeniably affected the tribes in many favorable ways, and leads some scholars to believe that the "economic benefits of Indian gaming arguably have done (at least for the members of successful gaming tribes) what federal Indian policy could not, or would not accomplish."[54] Gaming helps many tribes obtain a higher level of economic self-sufficiency by creating jobs and dramatically improving the standard of living on many reservations.[55] It also gives the tribes the financial resources necessary to fund community improvement projects and increase their political clout.[56] Perhaps most importantly, the financial success that gaming brings contributes to a "rising pride and can-doism on reservations."[57]

Notwithstanding the positive effects that Indian gaming has produced, both for reservation Indians and for non-Indians residing in and around the reservations,[58] it is not without controversy. The majority of this controversy is a direct result of the clash of the conflicting political forces which is at the heart of Indian law. While the tribes as sovereign political entities argue that they should be able to conduct gaming activities without interference from the states, the states argue that they should be able to regulate all gaming on the reservations just as they regulate gaming on nontribal lands within their respective boundaries.[59] The states also contend that the special tax status of Indian tribes and their gaming operations gives them an unfair competitive advantage not enjoyed by most businesses incorporated under state law.[60] This has encouraged the states to put pressure on an already eager Congress to draft legislation subjecting tribal gaming operations to more federal taxes. This state/tribe conflict over gaming first came to the Supreme Court in 1987 in *California v. Cabazon Band of Mission Indians*.[61]

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51. Paul Brietzke, *The Law and Economics of Native American Casinos*, 78 NEB. L. REV. 263 (1999).

52. NIGC, *supra* note 6.

53. Chen & LeDuff, *supra* note 7, at A21.

54. Rand & Light, *supra* note 22, at 404.

55. *See* Dirk Johnson, *Economic Pulse: Indian Country; Economics Come to Life on Indian Reservations*, N.Y. TIMES, July 3, 1994, at A1.

56. Rand & Light, *supra* note 22, at 404.

57. *Id.* at 402.

58. Chen & LeDuff, *supra* note 7, at A21.

59. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

60. Taylor, *supra* note 5, at 253.

61. *Cabazon*, 480 U.S. 202.

A. California v. Cabazon Band of Mission Indians[62]

In *Cabazon*, the State of California attempted to prohibit certain types of gaming on the Cabazon Band reservation.[63] Because California is a Public Law 280 state, its criminal laws extend to Indians in Indian country. Its regulatory and legislative authority, however, do not.[64] The issue before the Court was whether California's law prohibiting certain types of gaming operations in the state were "criminal/prohibitory" or "civil/regulatory" in nature.[65] The Court reasoned that because California permits a substantial amount of gaming, and even promotes gambling through its state run lottery, its attempt to regulate gaming on the Cabazon Band reservation was civil/regulatory in nature, and therefore not permissible.[66]

B. Indian Gaming Regulatory Act

The *Cabazon* decision increased the intense pressure on Congress to draft legislation regulating Indian gaming. Responding to this pressure, in 1988 Congress passed the Indian Gaming Regulatory Act (IGRA).[67] This statute provides that: "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity."[68]

The IGRA divides Indian gaming into three classes. Class I games include "social games" for prizes with nominal value, and traditional tribal games.[69] This class of gaming is subject solely to the jurisdiction of the Indian tribe. Class II games include bingo, instant bingo, lotto, punch boards, tip jars, pull-tabs, and other bingo-like games.[70] These games are fully subject to the laws and regulations of the state governing hours of operation, in addition to wager

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62. *Id.*

63. *Id.*

64. Public Law 280, 28 U.S.C. § 1360 (2000). Public Law 280 originally transferred to five willing states and offered all others, civil and criminal jurisdiction over reservation Indians regardless of the Indians' preference for continued autonomy. GETCHES, *supra* note 20, at 489.

65. *Cabazon*, 480 U.S. at 202. California law prohibited bingo games unless conducted by charitable organizations awarding pots limited to $250. *Id.* at 205.

66. *Id.* at 211.

67. 25 U.S.C. §§ 2701-2721 (2000); 18 U.S.C. § 1166 (2000).

68. 25 U.S.C. § 2701(5) (2000).

69. GETCHES, *supra* note 20, at 749.

70. *Id.*

and pot size limitations. However, the remaining regulation of Class II games is conducted jointly by the Indian tribes and the National Indian Gaming Commission.[71] Class III games include all games not included in either Class I or II, such as card games played against the house, and electronic facsimiles of these games.[72] Class III games may be conducted or licensed and regulated by a tribe "in a State that permits such gaming," subject to an allocation of regulatory authority between the state and the tribe set forth in a tribal-state compact.[73]

III. Chickasaw Nation v. United States[74]

Despite Congress's fairly complex and exhaustive attempt, the IGRA did not resolve all questions regarding the regulation of tribal gaming. Many of these unresolved issues arise in the area of the federal taxation of Indian gaming activities. One such question concerns the application of I.R.C. §§ 4401(a)(1) and 4411 to pull-tab gaming activities conducted by the tribes. I.R.C. § 4401 imposes an excise tax on all wagers,[75] and I.R.C. § 4411

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71. *Id.* The IGRA established the National Indian Gaming Commission, which is within the Department of the Interior. It has broad regulatory and investigative authority to assure that Indian gaming is not influenced by organized crime. It is funded by an assessment on Indian Class II gaming enterprises. The assessment cannot exceed five percent of the gross revenues in excess of $1,500,000. *Id.*

72. *Id.*

73. *Id.*

74. Chickasaw Nation v. United States, 534 U.S. 84 (2001).

75. I.R.C. § 4401 provides:

> (a) Wagers
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> (1) State authorized wagers — There shall be imposed on any wager authorized under the law of the State in which accepted an excise tax equal to 0.25 percent of the amount of such wager.
>
> . . . .
>
> (b) Amount of wager — In determining the amount of any wager for the purposes of this subchapter, all charges incident to placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.
>
> (c) Persons liable for tax — Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered

imposes a related occupational tax.[76] In April 2000 the, Tenth Circuit addressed this question in *Chickasaw Nation v. United States*, on appeal from the United States District Court for the Eastern District of Oklahoma.[77]

A. Chickasaw Nation v. United States, 208 F.3d 871 (10th Cir. 2000)

The Chickasaw Nation is a Tribe with its principal place of business in Ada, Oklahoma.[78]

> [T]he Nation operates a number of for-profit business activities within the State of Oklahoma, including gaming centers, tobacco shops, convenience stores, gas stations, a motel, a restaurant, an accounting firm, a radio station, an internet service provider, and a computer store. All of these businesses are open to and utilized by members of the Nation and the general public.[79]

The Nation also sells "pull-tabs" at a variety of locations.[80] Similar to the more popular state "scratch-off" lottery tickets, each pull-tab is a two inch by four inch card or ticket containing five windows covered with tabs.[81] A player wins when her ticket reveals a certain pattern of symbols after she removes the covered tabs. "Each pull-tab typically costs between 25 cents and one dollar, and typically allows players to win between 25 cents and $2500," and the award can be redeemed at the point of sale.[82]

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under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

I.R.C. § 4401.

76. I.R.C. § 4411 states:

(a) In general — There shall be imposed a special tax of $500 per year to be paid by each person who is liable for the tax imposed under section 4401 . . .

(b) Authorized persons — Subsection (a) shall be applied by substituting "$50" for "$500" in the case of —

(1) any person whose liability for tax under section 4401 is determined only under paragraph (1) of section 4401(a), and

(2) any person who is engaged in receiving wagers only for or on behalf of persons described in paragraph (1).

I.R.C. § 4411.

77. 208 F.3d 871 (10th Cir. 2000).

78. *Id.* at 873.

79. *Id.* at 873-74.

80. *Id.* at 874.

81. *Id.*

82. *Id.*

From January 1993 through August 1994, the "Nation did . . . not pay federal wagering excise taxes or federal occupational taxes in connection with its pull-tab sales."[83] After the IRS conducted an audit in 1994, it determined that the Nation was subject to the taxes in question. The Nation paid the taxes for July 1993 and subsequently filed a claim for a refund. The government filed a counterclaim for the unpaid portion of the taxes and interest assessed on this amount for the period.[84]

The Chickasaw Nation appealed the entry of summary judgment for the IRS by the district court on four grounds:

> (1) pull-tabs do not involve a taxable wager, as defined in [I.R.C.] § 4421, (2) it is not a "person" subject to federal waging excise taxes, (3) the Indian Gaming Regulatory Act demonstrates Congress' intent not to subject Indian gaming activities to federal wagering excise taxes, and (4) the self-government guarantee of the 1855 treaty between the United States and the Nation precludes imposition of the taxes in question.[85]

After reciting I.R.C. § 4421 and its definition of "wager," the Tenth Circuit held that it could not determine whether pull-tab gaming constitutes a "lottery" for the purposes of the I.R.C. by viewing each individual purchase of a pull-tab ticket unto itself. The court reasoned however, that because the Nation purchases the tickets in bulk and the winning tickets are randomly distributed throughout a 24,000 ticket series, "when a player purchases a ticket, he is competing against all other persons who purchase tickets from that same series."[86] Consequently, the court ruled that, when viewed on the whole, the purchase of a pull-tab ticket constitutes a "lottery" and therefore is a "wager" for the purpose of I.R.C. § 4401.[87]

Next, the court addressed the question of whether the Nation was a "person" for purposes of the federal taxes at issue. The court first looked to the definition of "person" under I.R.C. § 7701(a)(1) because the term is not defined in either I.R.C. §§ 4401 or 4411. Section 7701(a)(1) states that "[t]he term 'person' shall be construed to mean and include an individual, a trust, estate, partnership, association, company, or corporation."[88] Using this

83. *Id.*
84. *Id.*
85. *Id.* at 875.
86. *Id.* at 877.
87. *Id.*
88. I.R.C. § 7701(a)(1) (2000).

expansive definition of the term "person," the court concluded that Indian tribes are "persons" for the purposes of I.R.C. §§ 4401 and 4411. The court reasoned that to decide that Indian tribes did not fit the I.R.C. § 7701(a)(1) definition of "person" would "essentially exempt tribes and tribal organizations from many forms of federal tax liability and render entire sections of the I.R.C. superfluous."[89]

The court then moved to the question of whether the IGRA indicates congressional intent not to impose federal wagering excise taxes or federal occupational taxes on Indian gaming activities. After reciting the purpose of the IGRA,[90] the court held that "[t]he clear and unambiguous language of [the IGRA] contradicts the Nation's assertion that Congress' sole intent in enacting the IGRA was to 'maximize tribal gaming revenues.'"[91] While the court conceded that Congress was interested in promoting tribal economic development and self-sufficiency, "the statute's statement of purpose does not . . . demonstrate any type of Congressional intent to place tribal gaming revenues beyond the reach of federal wagering excise or federal occupational taxes."[92]

The court next addressed the tribe's assertion that "the IGRA *expressly* prohibits the imposition of federal wagering excise taxes on Indian tribal organizations engaged in gaming activities."[93] The Nation contended that 25 U.S.C. § 2719(d), the subsection entitled "Application of Internal Revenue Code of 1986," "demonstrates Congress' intent to apply only a limited number of I.R.C. provisions" to Indian gaming operations.[94] The court answered the Nation's assertion by looking to the historical backdrop of the IGRA. The court's historical examination focused primarily on the language of the Indian Tribal Governmental Tax Status Act of 1982.[95] While the court noted that the original language of the bill that became the IGRA[96] "included an explicit exemption for Indian gaming from [the] federal [wagering] excise tax, . . . that

89. *Chickasaw Nation*, 208 F.3d at 879.

90. The purpose of the statute as stated in 25 U.S.C. § 2702(2).

91. *Chickasaw Nation*, 208 F.3d at 881.

92. *Id.*

93. *Id.* (emphasis added).

94. *Id.* at 882. Title 25 U.S.C. § 2719(d) specifically mentions only a limited number of I.R.C. provisions (I.R.C. §§ 1441, 3402(q), 6041, and 6050I, and chapter 35 of the Code). The Nation argued that only those provisions mentioned apply to Indian gaming, and not those provisions of the Code that impose tax liability.

95. I.R.C. § 7871 (2000).

96. S. 555, 100th Cong. § 37 (1987).

exemption was deleted prior to passage."[97] The court gave little weight to a letter sent by Senator Daniel Inouye, one of the authors of the IGRA, to the Commissioner of the IRS, which suggested "that by specifically referring to Chapter 35 in § 2719(d), 'it was the intention of Congress that the tax treatment of wagers conducted by Tribal governments be the same as that for wagers conducted by state governments under Chapter 35 of the Internal Revenue Code'."[98] The court stated that "[i]n light of this history, we believe it is to assume . . . that Congress intended," by way of negative inference from § 2719(d), to exempt Indian tribes from the federal wagering excise taxes.[99]

Finally, the court addressed whether the 1855 treaty precluded imposition of federal wagering excise taxes on the Nation. In deciding this question, the court first determined the standard of review that it should use to analyze the treaty language. The court cited the standard of review used by both the Third and Eighth Circuits, which is whether a treaty "contains language which can reasonably be construed to confer [tax] exemptions."[100] Using this test, the court concluded that the language of the treaty[101] could not be "reasonably construed to give rise to an exemption from any federal excise taxes."[102]

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97. *Chickasaw Nation*, 208 F.3d at 882-83 (quoting Little Six, Inc. v. United States, 43 Fed. Cl. 80, 83 (Fed. Cl. 1999)).

98. *Id.* at 883.

99. *Id.*

100. *Id.* at 884 (quoting Lazore v. Commissioner, 11 F.3d 1180, 1185 (3d Cir. 1993), in turn quoting Holt v. Commissioner, 364 F.2d 38, 40 (8th Cir. 1966)).

101. The Nation pointed to Article VII of the 1855 Treaty which states that,

> So far as may be compatible with the Constitution of the United States and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Choctaws and Chickasaws shall be secured in the unrestricted right of self-government, and full jurisdiction, over persons and property, within their respective limits; excepting, however, all persons, with their property, who are not by birth, adoption or otherwise citizens or members of either the Choctaw or Chickasaw Tribe, and all persons, not being citizens or members of either Tribe, found within their limits, shall be considered intruders and be removed from, and kept out of the same, by the United States agent, assisted if necessary by the military, with the following exceptions, viz.: Such individuals as are now, or may be in the employment of the Government, and their families; those peacefully traveling or temporarily sojourning in the country of trading therein, under license from the proper authority of the United States, and such as may be permitted by the Choctaws or Chickasaws, with the assent of the United States agent, to reside within their limits, without becoming citizens or members of either said Tribes.

Chickasaw Nation, 208 F.3d at 884.

102. *Id.*

Having addressed the four arguments presented by the Chickasaw Nation, the court ruled that the district court was correct in ruling in favor of the government and, consequently, the tribe was liable for the wagering taxes imposed by I.R.C. § 4401 and the occupational taxes imposed under I.R.C. § 4411.

B. Little Six, Inc. v. United States, 210 F.3d 1361 (Fed. Cir. 2000)

Just nineteen days after the Tenth Circuit issued its opinion in *Chickasaw Nation*, the Federal Circuit addressed the question of whether I.R.C. §§ 4401 and 4411 apply to Indian gaming operations in *Little Six, Inc. v. United States*.[103] The facts of this case were very similar to those of *Chickasaw Nation*. The Shakopee Mdewakanton Sioux (Dakota) operate gaming activities on tribal lands in the state of Minnesota through its wholly owned corporation, Little Six, Inc.[104] Included in these gaming operations are the sale of "pull-tab" games.[105] The case came before the Federal Circuit after the United States Court of Federal Claims denied the tribe's claim for a refund of federal excise taxes and related occupational taxes paid on the wagers placed on the "pull-tab" games operated on the reservation.

In *Little Six*, the Shakopee Mdewakanton Sioux argued that the wagering excise tax imposed by I.R.C. § 4401 and the related occupational tax imposed under I.R.C. § 4411 did not apply to wagers on pull-tab games because they were not "state authorized."[106] The tribe also contended that 25 U.S.C. § 2719(d)(1) (a provision in the IGRA) exempts Indian tribes from the taxes at issue.[107]

The court first concluded that the wagers placed on these pull-tab games were "state authorized," and therefore subject to taxation under §§ 4401 and 4411.[108] It reasoned that the IGRA authorizes the tribe to operate "class II gaming" activities (including pull-tabs) provided that "such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity."[109] Because Minnesota permits nonprofit organizations to conduct pull-tab games, and the sale of pull-tabs is therefore authorized by

103. 210 F.3d 1361 (Fed. Cir. 2000).

104. *Id.* at 1362.

105. These "pull-tab" games are similar in every material respect to those at issue in *Chickasaw Nation*.

106. *Little Six*, 210 F.3d at 1363.

107. *Id.*

108. *Id.*

109. 25 U.S.C. § 2710(b)(1)(A) (2000).

federal law under the IGRA, the court concluded that the "wagers placed on those games are 'state authorized' for the purpose of assessing taxes under §§ 4401 and 4411 of the Internal Revenue Code."[110]

The court then turned to the tribe's contention that it was exempt from excise and occupational taxes in the same manner as state gaming.[111] The tribe argued for this exemption on two related grounds. First, it contended that because state-conducted lotteries are exempt under I.R.C. § 4402(3) from the taxes imposed by I.R.C. §§ 4401 and 4411, under 25 U.S.C. § 2719(d)(1), tribes should be as well. Second, the tribe argued that, to the extent 25 U.S.C. § 2719(d)(1) is unclear, the Indian canon of construction requires any ambiguity in the statute to be resolved in favor of the Indians.[112]

The court agreed that the tribe was exempt from the taxes in question under 25 U.S.C. § 2719(d)(1). It grounded this holding on the language of I.R.C. § 2719(d)(1) which states (in relevant part) that:

> The provisions of Title 26 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such title) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter . . . in the same manner as such provisions apply to State gaming and wagering operations.[113]

The court interpreted this, by its parenthetical reference to chapter 35, to mean that chapter 35 of the Internal Revenue Service Code applies to Indian gaming in the same manner as it does to state gaming.[114] As a result, § 4402(3), which is found in chapter 35 of the I.R.C., applies to the tribe and provides an express tax exemption for "any wager placed in a sweepstakes, wagering pool, or lottery which is conducted by an agency of a State acting under authority of State law."[115] Accordingly, the court held that, "section 2719(d)(1) can reasonably be construed as providing a tax exemption for wagers placed on lotteries and pull-tab games conducted by Indian tribes, because chapter 35 of the Internal Revenue Code provides such an exemption to state gaming operations."[116]

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110. *Little Six*, 210 F.3d at 1364.
111. *Id.*
112. *Id.* at 1365.
113. 25 U.S.C. § 2719(d)(1) (2000).
114. *Little Six*, 210 F.3d at 1365.
115. I.R.C. § 4402(3) (2000).
116. *Little Six*, 210 F.3d at 1365.

In response to the government's argument that § 2719(d)(1) only applies to those tax provisions that concern "the reporting and withholding of taxes with respect to the winnings,"[117] the court relied on the canon of construction demanding that when construing a statute it "must give effect and meaning to all of its terms if possible."[118] The court rejected the government's interpretation of the statute because it "would render language in the statute superfluous . . . ."[119]

The court further explained its decision by noting "the inconsistency between the statute's reference to 'winnings,' and its reference to [I.R.C.] § 6050I and Chapter 35 of the I.R.C.," rendered the language in § 2719(d)(1) ambiguous.[120] Citing *Montana v. Blackfeet Tribe of Indians*, the court wrote that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."[121] The court went on to imply that the Tenth Circuit's opinion in *Chickasaw Nation v. United States*,[122] was incorrect because the court failed to "discuss the Indian canon of construction."[123]

The Federal Circuit expanded on its decision by refuting the government's argument that tax exemptions must be clearly expressed by statute.[124] The court again cited the Supreme Court in *Montana*, stating that "although tax exemptions generally are to be construed narrowly, in 'the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal.'"[125] The court stated that its conclusion was further supported by the legislative history of the IGRA, which had the promotion of tribal economic development and self-sufficiency as one of its primary purposes.[126] "Equal treatment of tribes and states with respect to exemptions from federal wagering taxes is consistent with this legislative intent, and is in accord with the concept of co-equal sovereignty."[127]

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117. 25 U.S.C. § 2719(d)(1) (2000).

118. *Little Six*, 210 F.3d at 1365 (applying rule used by the Supreme Court in *Baily v. United States*, 516 U.S. 137, 145 (1995)).

119. *Id.*

120. *Id.*

121. 471 U.S. 759, 766 (1985).

122. 208 F.3d 871 (10th Cir. 2000).

123. *Little Six*, 210 F.3d at 1365.

124. *Id.*

125. *Montana*, 471 U.S. at 766 n.4 (quoting Choate v. Trapp, 224 U.S. 665, 675 (1912)).

126. *Little Six*, 210 F.3d at 1366.

127. *Id.*

C. *Chickasaw Nation v. United States*[128]

Following the Federal Circuit Court's ruling in *Little Six*, and recognizing the conflict between the Circuits it created, the Supreme Court accepted *Chickasaw Nation* on a writ of certiorari from the Tenth Circuit. Realizing that the Supreme Court would likely dismiss its previous arguments as the Tenth Circuit did, the Chickasaw Nation modified its case to be more in-line with the decision of the Federal Circuit in *Little Six*. However, despite the stronger argument, the Court ruled in a seven to two opinion that the tribe was not exempt from the taxes imposed under I.R.C. §§ 4401 and 4411.[129]

Justice Breyer, writing for the Court, began Part I of his opinion by reciting 25 U.S.C. 2719(d)(1).[130] In particular, he isolated the conflicting language within the statute, finding that the language "concerning the reporting and withholding of taxes"[131] was inconsistent with the statute's parenthetical reference to chapter 35, which "imposes [excise and occupational taxes related to gambling] from which it exempts certain state-controlled gambling activities."[132] He then conceded that rejecting the Tribe's "argument reduces the phrase 'including chapter 35' to surplusage."[133] However, he wrote that "we can find no other reasonable reading of the statute."[134]

Breyer explained his conclusion by assessing the role of the parenthetical in the statute, writing "the more plausible role for the parenthetical to play in this subsection is that of providing an illustrative list of examples. So considered, chapter 35 is simply a bad example "an example that Congress included inadvertently."[135] He supported this position by reviewing the original Senate bill,[136] which became the IGRA. It included the language "*the taxation and* the reporting and withholding of taxes."[137] "With the 'taxation' language present, it would have made sense to include chapter 35, which concerns taxation, in a parenthetical . . . ."[138] Yet, the phrase "the taxation and" was removed prior to the time of the enactment of the IGRA for an

128. 534 U.S. 84 (2001).
129. *Id.*
130. *Id.* at 86-87.
131. 25 U.S.C. § 2719(d) (1) (2000).
132. Chickasaw Nation v. United States, 534 U.S. 84 (2001); *see* I.R.C. § 4402(3) (exempting state-operated gambling operations, such as lotteries, from the tax).
133. *Chickasaw Nation*, 534 U.S. at 89.
134. *Id.*
135. *Id.* at 90.
136. S. 555, 100th Cong. § 37 (1997).
137. *Id.*
138. *Chickasaw Nation*, 534 U.S. at 91.

unknown reason, while the reference to chapter 35 in the parenthetical remained. Justice Breyer explained that

> [i]t is far easier to believe that the drafters, having included the entire parenthetical while the word 'taxation' was still part of the bill, unintentionally failed to remove what had become a superfluous numerical cross-reference particularly since the tax-knowledgeable Senate Finance Committee never received the opportunity to examine the bill.[139]

Justice Breyer then proceeded to address the Indian canon of construction and another canon, which requires a court to, if possible, give effect to every word of a statute.[140] First, the Court countered the second canon with another canon, stating that "[t]he canon requiring a court to give effect to each word '*if possible*' is sometimes offset by the canon that permits a court to reject words 'as surplusage' if 'inadvertently inserted or if repugnant to the rest of the statute . . . .'"[141] Then, Justice Breyer moved on to the Indian canon of construction, and immediately countered it with what he believes to be an offsetting canon, the canon "that warns us against interpreting federal statutes as providing tax exemptions unless those exemptions are clearly expressed."[142] Justice Breyer concluded the majority opinion by stating that "the canons here cannot make the difference for which the Tribes argue," because "the Court's earlier cases are too individualized, . . . to warrant any such assessment about the two canons' relative strength."[143]

Despite the fact that Justice Breyer did a more thorough job than either of the Circuits of illuminating the contradictions in the statute, his conclusion was less logical than that of the Federal Circuit in *Little Six*. First, his opinion did not point to any conclusive evidence that would indicate Congress intended to subject tribes to the taxes imposed under I.R.C. §§ 4401 and 4411. It is just as plausible that Congress intended to exclude the language of the statute which reads "concerning the reporting and withholding of taxes,"[144] as it is that Congress meant to delete "chapter 35" from the parenthetical of the statute. Obviously, the drafters made some kind of error when drafting the

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139. *Id.*

140. *Id.* at 95. The Federal Circuit used this other canon to refute the government's argument. Here, Justice Breyer used it to refute the tribe's argument.

141. *Id.* at 94.

142. *Id.* at 95.

143. *Id.*

144. 25 U.S.C. § 2719(d)(1) (2000).

statute but, as O'Connor wrote in the dissenting opinion, "I agree with the Court that §2719(d) incorporates an error in drafting. I disagree however, that the section's reference to chapter 35 is necessarily that error."[145] The majority "can do no more than speculate that the bill's drafters included the parenthetical while the original restriction was in place and failed to remove it when that restriction was altered."[146] Admittedly, both the Court's interpretation of the statute, and the interpretation of the Chickasaw Nation requires a rewriting of the statute, but "[n]either of these rewritings is necessarily more 'serious' than the other."[147] In fact, the Court's interpretation "goes beyond treating statutory language as mere surplusage . . . [it] negates language that undeniably bears separate meaning."[148] The Nation's interpretation, on the other hand, simply dismisses "the reporting and withholding of taxes"[149] as surplus language.

Second, the majority's opinion failed to give sufficient weight to the power of the Indian canon of construction. It is unclear whether the case would have come out differently had the Court given the Indian canon of construction its due, especially considering that Justice Breyer wrote, "[t]he language of the statute is too strong to bend as the Tribes would wish."[150] Nevertheless, the majority found enough confusion in the statutory language to at least address, and attempt to refute, the Nation's argument.

The Court's primary attempt to rebut the Nation's argument that the Indian canon of construction should control and tip the statutory scales in favor of the Nation concerned a conflicting canon of interpretation. This canon requires federal statutes containing tax exemptions to be interpreted strictly unless those exemptions are clearly expressed. Although this too is an important canon of construction, as the dissent pointed out, "[the] Court has repeatedly held that, when these two canons conflict, the Indian canon predominates."[151] Justice O'Connor went on to state that in past cases the "Court has failed to apply the Indian canon to extend tax exemptions to the Nations only when nothing in the language of the underlying statute or treaty suggests the Nations

145. Chickasaw Nation v. United States, 534 U.S. 84 (2001) (O'Connor, J., dissenting).

146. *Id.* at 97.

147. *Id.* at 98.

148. *Id.* at 97-98.

149. 25 U.S.C. § 2719(d) (1) (2000).

150. *Chickasaw Nation*, 534 U.S. at 89.

151. *Id.* at 100-01 (O'Connor, J., dissenting) (citing Choate v. Trapp, 224 U.S. 665, 674-75 (1912); Squire v. Capoeman, 35 U.S. 1, 6-7 (1956); McClanahan v. Ariz. State Tax Comm'n., 411 U.S. 164, 176 (1973); and Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 194 n.5 (1999)).

should be exempted."[152] In this case, given the statute's reference to chapter 35, it is at least possible that Congress intended to exempt tribes from these taxes.

Conclusion

The Supreme Court's decision in *Chickasaw Nation v. United States*[153] could cost the Indian gaming industry over $25 million annually.[154] This seems contrary to the legislative intent of the IGRA, which was to provide "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."[155] While many successful gaming tribes will have little problem paying the taxes imposed by I.R.C. §§ 4401 and 4411, other tribes like the Chickasaw Nation have not been as successful with their gaming operations. Any additional tax imposed by the federal government will reduce the Nation's prospects of ever achieving self-sufficiency. It will noticeably decrease the tribal resources necessary to continue to provide services for its people given that "all the Chickasaw's gambling proceeds go toward such projects as funding the tribal government, spurring regional economic growth, running alcohol treatment programs and providing education and social services for the tribe," and the tribe has few other viable sources of revenue.[156]

The government's victory in this case could also reverse another trend that began with the rise of the Indian gaming industry — less gaming revenue could mean fewer jobs for reservation Indians. In the Mille Lacs Band alone, unemployment went from forty-five percent to zero in two years after the tribe began its gaming operations.[157] A rise in unemployment could negatively affect the sense of "can-doism" fostered by gaming on reservations.[158]

However, beyond the potential drastic effects the application of I.R.C. §§ 4401 and 4411 could have on some Indian tribes, this Supreme Court ruling could also mean the death of the Indian canon of construction. The canon's

152. *Id.* at 101.

153. 534 U.S. 84 (2001).

154. Twenty-five percent of $10,000,000,000 under I.R.C. § 4401(a) (2000), plus $50 under I.R.C. § 4411(b) (2000). *See supra* note 8.

155. 25 U.S.C. § 2702(1) (2000).

156. Tom McCann, *Chickasaw Nation v. U.S.*, ON THE DOCKET (Northwestern Univ.), *at* http://journalism.medill.northwestern.edu/docket/cases.srch (link to "Chickasaw Nation v. U.S.").

157. Rand & Light, *supra* note 22, at 403.

158. *Id.* at 402.

death has much more serious implications, and potentially affects all tribes regardless of any involvement in gaming. The Indian canon of construction has been an overriding doctrine in Indian law for about 200 years.[159] Prior to *Chickasaw Nation*,[160] the Court applied the canon whenever it determined treaty or statutory language to be ambiguous.[161]

The canon was originally created to account for the language difference between the tribes and the non-Indian, English-speaking drafters of treaties and legislation, and is "rooted in the unique trust relationship between the United States and the Indians."[162] A shift in policy would put not only that trust relationship in jeopardy, but would also leave all Indian tribes, gaming and nongaming, without one of the doctrines on which they have based both their social and business activities for over two centuries. Yet, given the changing attitude in Indian jurisprudence,[163] this decision may indicate that is exactly where the Court is headed.[164] Even if this decision against the Chickasaw Nation has not officially put an end to the Indian canon of construction, it has likely removed the canon's teeth. Considering the murky language of 25 U.S.C. § 2719(d)(1), it is difficult to imagine many statutes being less lucid. If the Court believes that the canon is not strong enough to apply here, it is hard to envision the Court applying it to any statute in the future. Regardless of the canon's remaining strength or the Court's perception thereof, one thing is for certain, this ruling contributes to the confusion that has haunted Federal Indian law since the Marshall Trilogy and has Indians unsure of where Federal Indian policy is headed.

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159. Choate v. Trapp, 224 U.S. 665, 675 (1912) ("This rule of construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases.").

160. Chickasaw Nation v. United States, 534 U.S. 84 (2001).

161. *See* Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 174 (1973); Choctaw Nation v. United States, 318 U.S. 423, 431-32 (1943); Tulee v. Washington, 315 U.S. 681, 684-85 (1942); Carpenter v. Shaw, 280 U.S. 363, 367 (1930); Choate v. Trapp, 224 U.S. 665, 675 (1912); Winters v. United States 207 U.S. 564, 576-77 (1908).

162. *Montana*, 471 U.S. at 766 (citing Oneida County v. Oneida Indian Nation, 470 U.S. 226, 247 (1985)).

163. *See generally* Ben Welch, *A Slippery Slope, The U.S. Supreme Court Has Become a Precarious Site for Fighting Sovereignty Battles*, AM. INDIAN REP., Oct. 2001, at 12.

164. Douglas W. Chase, *The Indian Gaming Regulatory Act and State Income Taxation of Indian Casinos: Cabazon Band of Mission Indians v. Wilson and County of Yakima v. Yakima Indian Nation*, 49 TAX L. 275 (1995) (citing recent case law and legislative activity demonstrating that taxation of Native American casinos may be a viable option for both state and federal legislatures); *see also* Welch, *supra* note 163.