

The Court's Struggle to Define Indian Sovereignty

Introduction: In *Wagnon v. Prairie Band Nation* the Supreme Court held that, where the legal incidence of a Kansas State motor-fuel tax falls on a nonmember distributor in a transaction occurring off-reservation, the State tax is permissible.

The issue arose when Kansas amended its Motor Fuel Tax Act in 1995 and began "collecting a tax on motor fuel distributed to Indian lands." In response, the Prairie Band Potawatomi Nation ("Nation") sued for injunctive and declaratory relief, challenging the tax arguing that, although the legal incidence fell on the nonmember distributor, it was ultimately passed to the Indian retailer. The fuel was sold on the reservation at a Tribal-owned gas station primarily to nonmember patrons of the Nation's casino. The Nation claimed that the tax was invalid because it was "preempted by federal law and that it infring[ed] on [its] rights of self-government."

The district court found for the Secretary of the Kansas Department of Revenue ("Secretary") and the Nation appealed. The United States Court of Appeals, Tenth Circuit, applied the *Bracker* balancing test, and reversed the decision below, finding that the "balance of tribal, federal, and state interests prohibits state taxation as a matter of law." The Secretary appealed the decision and the Supreme Court granted certiorari and reversed.

Background: Although the Court has not established a categorical test to determine where Indian sovereignty ends and state jurisdiction begins, it has shaped two principles into a guiding framework for determining when a state may tax a tribe within its borders. The first principle is that of an Indian tribe's right to a sovereign government. Historically, the notion of Tribes as independent from states but subject to the federal government, arose from treaties signed between Indian tribes and the United States and Congress' Commerce Clause power. This quasi-sovereign status was clearly defined by Justice Marshall in *Worcester v. Georgia* when he invalidated the State of Georgia's assertion of authority over the Cherokee Nation and defined the Cherokee as a "distinct community occupying its own territory . . . in which the laws of [a state] have no force."

The second principle evolved out of the Court's acknowledgement of both Indian sovereignty and the proliferation of federal law and policy regulating tribal affairs. In *Williams v. Lee*, the Court announced a new rule in which the Court held that a state's authority to act over tribes or tribal members would depend on whether that action "infringed on the right of the reservation Indians to make their own laws and be ruled by them." However, in the absence of federal law or policy, a state could act provided that its actions did not

infringe on tribal sovereignty. A decade after *Williams*, federal policy shifted towards "promoting tribal self-sufficiency and economic development." Congressional action proliferated, leading to increased interaction between tribes, nonmembers, and states through business development, construction projects and the exploitation of on-reservation resources. Tribes also began promoting their tax-exempt status to attract nonmembers to tribal businesses on-reservation.

In turn, the Court was faced with the question of whether a state could tax Indian related, on-reservation activity involving nonmember businesses normally subject to state tax. In *White Mountain Apache Tribe v. Bracker*, citing both federal law and Indian sovereignty as "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members," the Court announced the "*Bracker* interest-balancing test" which requires a "particularized inquiry into the nature of the state, federal, and tribal interests at stake . . . designed to determine whether, in the specific context, the exercise of state authority would violate federal law" is called for. Notably, although the Court recognized the importance of "the tradition of Indian sovereignty," it was no longer considered a primary factor, but rather a "backdrop" for other considerations. This

test dominated for a decade and produced much of the modern Indian law precedent at issue in *Wagnon*.

Although the Court continued to use the language of *Bracker*, decisions such as *Cotton Petroleum Corp. v. New Mexico*, marked a change in its application, particularly allowance for increasing state action. In *Oklahoma Tax Comm'n v. Chickasaw Nation*, the Court, recognizing that "[t]he initial and frequently dispositive question . . . is who bears the legal incidence if a tax," announced the "legal incidence test," holding that where the legal incidence of a tax falls on a Tribe or tribal member, the tax is categorically invalid. Kansas, following the Court's directive, amended its fuel-tax Statute to expressly state that the tax's legal incidence fell on the distributor. However, the *Chickasaw* decision and the ensuing statutory reform did not eradicate litigation and confusion, giving rise to such cases as *Potawatomi Nation v. Richards*.

Analysis: In *Wagnon*, Justice Thomas, writing for the Court, determined the case by finding that the Kansas fuel-tax was imposed on a transaction occurring off reservation between the State and the nonmember distributor, rejecting the Tribe's first contention, supported by "the United States as *amicus*," that, according to the fairest reading of the Statute, the tax is imposed on the Tribe. Citing the language of the Kansas Statute as dispositive, Thomas rejects the Tribe's alternative

assertion that, even if the legal incidence is imposed off-reservation, "the tax arises out of a distributor's on-reservation transaction with the Tribe and is therefore subject to the *Bracker* balancing test." The Court adopts the "legal incidence test" articulated in *Chickasaw*, arguing that the "interest-balancing test has never been applied where, as here, the State asserts its taxing authority over non-Indians off the reservation." Noting that the Court has "never addressed this precise issue," Thomas writes that precedent "counsels against such an application," and therefore the *Bracker* interest-balancing test should not be applied in such cases.

To support its finding, the Court proceeds through a discussion of Indian tax cases and concludes that "geographical component of tribal sovereignty" is the primary consideration. In contrast, "when a State asserts its taxing authority outside of Indian Country," unless there is "federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law." Therefore, the Court reasons, if a State may tax an Indian off-reservation, it follows that the State may tax a nonmember involved in an off-reservation transaction. The Court reinforces this argument with a policy consideration, maintaining that limiting the interest-balancing test to those situations involving nonmember activities on-reservation is

consistent with "efforts to establish 'bright line standard[s]'
in the context of tax administration."

In her dissent, Justice Ginsberg, joined by Justice Kennedy, maintains that the Court has misread the Kansas Motor Fuel Statute and argues that the tax, albeit technically imposed on the nonmember distributor, is ultimately passed onto the tribal retailer. Furthermore, Kansas' and, by implication, the Court's "attribution of controlling effect to the formal legal incidence of the tax" comes from a misreading of *Chickasaw*, as limiting the balancing test rather than as an exception to it.

Ginsberg argues that *Chickasaw* only asserts a categorical rule for cases where, by imposing a legal incidence of a state tax on a tribe or tribal members, there is an "overt disrespect for a Tribe's independence and dignity;" however, where the legal incidence is on a nonmember, "the Court has resisted adoption of a categorical rule." According to Ginsberg, *unless* the state is blatantly taxing a tribe or tribal members, the Court has, and should continue to "focus on the particular levy and evalua[te] the federal, state, and tribal interests at stake." Thus, Ginsburg affirms the lower court's holding, ascertained by application of the interest-balancing test.

Evaluation: Although the Court's opinion proceeds logically and seems to adequately address the issues it identifies as relevant, in its quest for bright-line tests and

categorical rules, the Court oversimplifies its own precedent and side-steps several important issues altogether. The viability of the holding turns on the Court's assertion that "Indian tax immunity cases counsel against" the application of the *Bracker* interest-balancing test to situations where the "the State asserts its taxing authority over non-Indians off the reservation." Considering the Court's modern Indian law jurisprudence, and established federal policy goals of promoting economic development and self-reliance within Tribes, it is difficult to discern where the Court finds this "counsel."

Throughout its decisions since the *Bracker* balancing test emerged in 1980, the Court rarely spoke unanimously. With every decision advocating the balancing of federal law and policy weighed, tribal, and state interests, there was a dissenter, most consistently Justice Rehnquist, advocating for a categorical rule that would eliminate case-by-case analysis. The Court's decisions in the last decade indicate a shift towards Rehnquist's approach. However, advocates and scholars have criticized this shift as ignoring the reality that, despite some profitable ventures, many tribes rely heavily on revenue generated from taxes they impose on nonmembers. In cases such as *Wagnon* where both the Tribe and the State are imposing taxes, the dilemma of double taxation arises, and the Tribe has to

either forgo its tax or forgo the nonmember business which is attracted to the reservation because of lower prices.

Although the Court's decisions should not remain stagnant, precedent recognizing that "there is no definitive formula" should not be abandoned. In light of federal policy which has stimulated continual change and development within Indian tribes, a logical response from the Court is to retain its flexible framework such that its decisions are not rendered obsolete or Indian sovereignty completely eroded. Ginsburg's application of the balancing test to the facts in *Wagon*, reveals that although the Court's solution is clean and concise, it fails to address problems that will inevitably engender future litigation.

Moreover, in order for a categorical approach to work, the Court must rely on technicalities, such as a statute's facial assertion that a tax legally falls on the distributor rather than an examination of where and on whom the tax actually falls. Typically, the Court has looked beyond the face of tax statutes to examine their economic burdens and it has chided states for trying to avoid precedent by simply calling a tax by a new name. Furthermore, as Justice Ginsberg identifies in her dissent, the Court's sole focus on defining a bright-line rule closes the door to potential compromise between States and Indian Nations

such as compacts, and may have adverse affects on the tax administration it intends to support.

Conclusion: The Supreme Court's crucial role in defining the boundaries of state and Indian tax jurisdiction has, until recently, been defined largely in response to federal policy and Congressional directives. The Supreme Court's decision in *Wagnon v. Prairie Band Potawatomi Nation* marks a significant development in the framework previously utilized by the Court, particularly its focus on articulating bright-line rules.

This Comment recognizes the need for consistency and predictability to facilitate amicable relationships between states and tribes. However, complete abdication of principles both Congress and the Court have recognized as paramount will unlikely quell litigation or illicit cooperative relationships that satisfy both parties' need for tax revenues. Considering the complexity of the tripartite relationship among states, Indians and the federal government, a viable solution is unlikely to be mechanical and will more likely come from Congress than the Court.