COMMENT

STEALING FROM THE POOR TO GIVE TO THE RICH: WHY NEW YORK SHOULD ABANDON ATTEMPTS TO COLLECT FUEL TAXES ON RESERVATIONS

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I. INTRODUCTION

Midsummer 1992 was a volatile period in New York State history. The State had attempted to impose and collect sales and excise taxes on fuel sold by Indian[1] reservation businesses to non-Indian buyers.[2] The tension that erupted between the Indians and the state government was reminiscent of the tension that existed centuries before. The tension, however, did not arise from the state

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[1] This article, in an effort to maintain consistency with federal and state case and statutory law, will use the term "Indian," despite what seems to be a general misconception that the more appropriate term is "Native American." In a 1995 Census Bureau study, in which members of different racial and ethnic groups were asked to choose a term that they preferred, nearly 50% of Indians preferred the term "American Indian." CLYDE TUCKER ET AL., BUREAU OF THE CENSUS & BUREAU OF LABOR STATISTICS, A STATISTICAL ANALYSIS OF THE CPS SUPPLEMENT ON RACE AND ETHNIC ORIGIN 17–18 tbl.4 (1995), *available at* http://www.census.gov/prod/2/gen/96arc/ivatuck.pdf. Another 37% preferred the term "Native American." *Id.* Nearly half of the remaining surveyed Indians indicated no preference. *Id.*

[2] *See* Agnes Palazzetti & Anthony Cardinale, *Senecas Clash with State Police: 2 Troopers Hurt, 14 People Arrested; Thruway Closed*, BUFFALO NEWS, July 16, 1992, at A1 (describing the protests as a response to a State plan and Court of Appeals case aimed at collecting taxes on non-Indian purchases).

government's conquest into Indian territory in a literal sense; rather, the conquest was one, according to the tribal leaders, of a sovereign nature.[3] Tribal leaders characterized the State's action as infringement on tribal sovereignty—breaching a longstanding treaty.[4]

The tension that arose in the summer of 1992 was not mere passive dissent. Furious with the State's action, Indians burned tires and stockpiled other debris in major commercial thoroughfares that were critical to the economy of New York State, feeding such markets as Buffalo, Rochester, Syracuse, Albany, and to some extent, New York City.[5] The protest shut down a major section of the upstate portion of the New York State Thruway, Interstate 90.[6] Other protests, similar to the burning of tires in the Thruway, took place in New York's "southern tier," shutting down then-Route 17, currently Interstate 86.[7] These two highways are the only two major routes entering New York from the west.[8]

The State's attempt to collect the taxes and the consequent shutdown of more than sixty miles of commercial roadways[9] did not only injure the upstate New York economy; state troopers, along with Indian protestors, were also injured.[10] Several protestors were arrested, and some claimed that state troopers used excessive force.[11]

The protests eventually stopped, and New York has since refused to enforce the collection of sales and excise taxes.[12] But the

[3] *See id.* (quoting then-Seneca President Calvin John, who characterized the State plan as the "most recent attempt . . . to undermine [the Seneca people's] existence").

[4] *Id.*; *see also* Dana Milbank, *Native Americans' State Tax Breaks Provoke Disputes: Indian Merchants in New York Can Offer Big Discounts to Rivals' Prices*, WALL ST. J., July 20, 1992, at B2 (reporting that Native Americans have relied on a 198 year-old treaty to pursue a particular line of business, namely building "an empire of 100 gas stations . . . that rake in hundreds of millions of dollars a year"); Associated Press, *Seneca Indians Block Highway, Protest N.Y. Sales-Tax Demands*, ORLANDO SENTINEL, July 18, 1992, at A3 [hereinafter *Seneca Indians Block Highway*] (quoting a Seneca patrolman, who characterized the State plan as "New York breaking their word to another sovereign government").

[5] Palazzetti & Cardinale, *supra* note 2 (New York State Thruway); *Seneca Indians Block Highway*, *supra* note 4 (Route 17 [currently Interstate 86]).

[6] Palazzetti & Cardinale, *supra* note 2 (reporting that the protest shut down thirty-one miles of the Thruway).

[7] Associated Press, *Indian Tax Protest Turns Fiery*, CHI. TRIB., July 17, 1992, at 6 (reporting that the police shut down a thirty-mile stretch of Route 17).

[8] N.Y. STATE DEP'T OF TRANSP., NEW YORK STATE ATLAS 5 (4th ed. 1998) ("Mileage Map").

[9] *See supra* notes 6–7 and accompanying text (estimating closures of about thirty miles on each of the only two major highways that enter New York from the west).

[10] Palazzetti & Cardinale, *supra* note 2.

[11] *Id.*

[12] *See* Tom Precious, *Seneca-Sponsored Study Lowers Forecast of Tobacco Tax Revenue*,

potential exists for more violent protests, and the State's recent attempts to devise a method, using tax-exempt coupons, to collect the taxes have infuriated tribal nations.[13]

This article will examine whether New York should impose and collect sales and excise taxes on fuel sold by reservation businesses to non-members. The answer to that question depends largely on whether and under what circumstances New York can impose *any* taxes on reservation businesses. The discussion should also be guided by the practical realities that result from taxation, for example, the economic effects. Accordingly, this article will analyze the current state of the law regarding state taxation of reservation activities and the potential consequences of further State attempts to collect taxes.

Part II will examine reservations in New York. The population of Indians in New York, the geographic characteristics of reservations, and the economic realities of reservation life will all be explored. Part III will discuss a State's authority to impose taxes on Indians and non-Indians, on and off-reservation. Part III will focus on New York. Included will be a discussion of the relevant treaties and longstanding precedent. Part IV will examine New York's current taxing scheme and New York's recently failed attempt at reservation taxation. Part V will argue in favor of self-restraint on part of the New York legislature. The argument will be supported by an examination of the real economic consequences of inducing reliance on a policy of non-taxation and subsequent, abrupt imposition of unjust taxes on reservation activities. In Part VI, this article will conclude with a plea to New York voters to hold legislators responsible for failing to fulfill their duty to represent the best interests of the entire population, including reservation members.

BUFFALO NEWS, May 12, 2004, at A7 (reporting that, despite legislative encouragement, Governor Pataki has refused to collect taxes on non-member purchases); *see also* Tom Precious, *Pataki Delays Collection of Indian Taxes*, BUFFALO NEWS, Jan. 21, 2004, at A1 (indicating that Governor Pataki, fearful of violent uprisings, would rather work cooperatively with the Indians to boost state revenues). *But see* Jon R. Sorenson, *Pataki Described as Eager to Collect Indian Taxes; Action Could Come Soon After Taking Office*, BUFFALO NEWS, Dec. 2, 1994, at A4 (reporting that there was, before Governor Pataki actually took office, "little doubt that [Governor Pataki would] move quickly to impose taxes on reservation sales").

[13] *See* S. 6822-B, 227th Leg. Sess. (N.Y. 2004); *see also supra* note 12 (recognizing the potential for violence).

II. RESERVATIONS IN NEW YORK

A. Introduction

New York State, exclusive of New York City, is home to more than 84,000 Indians, a large portion of which live on reservations.[14] While New York only embraces slightly more than one percent of the total tribes nationwide,[15] New York ranks sixth in Indian population.[16] Admittedly, some of those Indians are not "enrolled members" of any particular New York tribe, but the State does maintain a government-to-government relationship with nine Indian tribes.[17] Of the nine New York tribes, seven are federally recognized tribes, which entitles them to certain protections of the federal government.[18] Those seven tribes—the Seneca Nation, the Tonawanda Band of Seneca Indians, the Tuscarora Nation, the Oneida Nation, the Cayuga Nation, the St. Regis Band of Mohawk Indians, and the Onondaga Nation[19]—are all located in upstate New York.[20]

[14] *See* STELLA U. OGUNWOLE, U.S. DEP'T OF COMMERCE, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2000, at 5 tbl.2, 8 tbl.3 (2002), *available at* http://www.census.gov/prod/2002pubs/c2kbr01-15.pdf (recording the state population of American Indians either alone or in combination with other races at 171,581 and the corresponding American Indian population of New York City at 87,241).

[15] The federal government recognizes some 562 tribes nationwide. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 68 Fed. Reg. 68,180, 68,180–84 (Dec. 5, 2003). New York is home to seven federally recognized tribes. *See id.* at 68,180, 68,182–83.

[16] OGUNWOLE, *supra* note 14, at 4.

[17] LAURENCE M. HAUPTMAN, FORMULATING AMERICAN INDIAN POLICY IN NEW YORK STATE, 1970–1986, at x–xi (1988).

[18] Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 68 Fed. Reg. 68,180, 68,180, 68,182–83.

[19] *Id.* The two state-recognized, but federally-unrecognized, tribes in New York are the Poospatuck Indians and the Shinnecock Indians. Both tribes are located on Long Island. *See infra* note 30 and accompanying text.

[20] THE CONFEDERATION OF AM. INDIANS, INDIAN RESERVATIONS: A STATE AND FEDERAL HANDBOOK 194–205 (1986) (locating four reservations (two Seneca Nation, one Tonawanda Band of Senecas, and one Tuscarora) in western New York, one reservation (Onondaga) in central New York, and one reservation (St. Regis Band of Mohawk Indians) in northeastern New York). Importantly, a tribe primarily located in central New York (Cayuga Nation) does not occupy any of its own reserved land. Instead, the tribe either does not occupy reservation land or occupies the reservations of other tribes. Furthermore, in 1805, the Oneida Nation—which is also primarily located in central New York—sold much of its reserved land to New York; the tribe, almost two centuries later, repurchased part of the sold land on the open market and sought to exempt the purchased land from taxes under the theory that the land's acquisition "revived the Oneidas' ancient sovereignty piecemeal over each parcel." *See* City of Sherill v. Oneida Indian Nation, 125 S. Ct. 1478, 1482–83 (2005). In March 2005, the United States Supreme Court rejected the Oneida Indian Nation's theory, stating that "[t]he Oneidas

B. Geographic Characteristics

Nearly 88,000 acres within New York constitute reservation land.[21] The highest density of Indian land is in western New York. The Pickering Treaty of 1794 between the United States and the Seneca Nation of Indians reserved the two largest portions of land in New York for Indian use.[22] Those two reservations—the Allegany Reservation and the Cattaraugus Reservation—together consist of more than 50,000 acres.[23] The Allegany Reservation is located solely within Cattaraugus County, while the Cattaraugus Reservation is located in Cattaraugus, Chautauqua, and Erie Counties.[24] The majority of the voiced opposition against taxation resonates from those two reservations.[25]

Another 7,500 acres is reserved for the Tonawanda Band of Seneca Indians in Niagara, Erie, and Genesee Counties.[26] Close in proximity and in size is the Tuscarora Reservation in Niagara County.[27] These four reservations lie in western New York.

Moving eastward, the next reservation is located in Onondaga County. The Onondaga Reservation consists of 7,300 acres and is located just south of Syracuse.[28] Along the St. Lawrence River, in Franklin County, more than 14,000 acres constitute the St. Regis Mohawk Reservation.[29] Two state-recognized, but not federally recognized, reservations lie in Long Island—the Poospatuck Indian Reservation and the Shinnecock Indian Reservation in Suffolk County.[30]

C. Economic Realities

The economies of the reservations in upstate New York are, at best, suffering. Generally, reservation median income is

long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders." *Id.* at 1483.

[21] *See* THE CONFEDERATION OF AM. INDIANS, *supra* note 20, at 194–205.

[22] *See id.* at 194–96.

[23] *Id.*

[24] *Id.*

[25] The Seneca Nation of Indians, which occupies the Allegany and Cattaraugus Reservations, has lobbied aggressively against taxation. *See supra* notes 2–11 and accompanying text.

[26] THE CONFEDERATION OF AM. INDIANS, *supra* note 20, at 203.

[27] *Id.* at 204.

[28] *Id.* at 198–99.

[29] *Id.* at 201.

[30] *Id.* at 200–01.

substantially lower than the state or national median income. The median income in New York for full-time, year-round male workers as determined by the 2000 United States Census was over $40,000 per year.[31] On the Cattaraugus Reservation, where 89% of the population is American Indian (or a combination of American Indian and one or more races), the median income for full-time, year-round male workers barely broke $25,000[32]—a difference of $15,000 per year.

The low median income on reservations is the rule rather than the exception: five of the six reservations in New York exhibited a median income that fell short of the state median income.[33] The inclusion of New York City and its typically higher salaries in the data in determining the state median income does not alter the result to any significant extent. The national median income was similar to that of New York.[34]

The reservations also suffer from a high unemployment rate. Nationally, the percentage of those in the labor force that were unemployed at the time of the 2000 Census was less than six percent.[35] The reservations in New York exhibited significantly higher percentages, with the Cattaraugus Reservation unemployment rate more than doubling the state-wide and national rates.[36]

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[31] 1 U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, NO. PHC-2-34, NEW YORK: 2000; SUMMARY SOCIAL, ECONOMIC, AND HOUSING CHARACTERISTICS 255 tbl.11 (2003) [hereinafter NEW YORK SUMMARY ECONOMIC CHARACTERISTICS] ($40,236).

[32] *Id.* at 283 tbl.12 (indicating that the largest population density of the reservation, in Erie County, earns a median income of $25,735). Because some reservations span multiple counties, the Census Reports in print form are difficult to use to obtain a concrete number. The Census Bureau's website allows for summary information for particular reservations notwithstanding their location in multiple counties. Specifically, one can enter a state and reservation name in a searchable database to download a summary .pdf file for that particular reservation. *See* U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CENSUS 2000 DEMOGRAPHIC PROFILES, http://censtats.census.gov/pub/Profiles.shtml (last visited Aug. 18, 2005). Similar summary reports, indicating all necessary demographic and economic data for each federally recognized reservation in New York, are on file with the author.

[33] *See* NEW YORK SUMMARY ECONOMIC CHARACTERISTICS, *supra* note 31, at 280, 283, 298, 300 (Allegany Reservation, Cattaraugus Reservation, St. Regis Mohawk Reservation, Tonawanda Reservation, and Tuscarora Reservation, respectively). *But see id.* at 295 (Onondaga Reservation).

[34] CARMEN DENAVAS-WALT ET AL., U.S. DEP'T OF COMMERCE, NO. P60-266, INCOME, POVERTY, AND HEALTH INSURANCE IN THE UNITED STATES: 2003, at 34 tbl.A-2 (2004), *available at* http://www.census.gov/prod/2004pubs/p60-226.pdf.

[35] SANDRA LUCKETT CLARK ET AL., HOUSING AND HOUSEHOLD ECONOMIC STATISTICS DIVISION, COMPARING EMPLOYMENT, INCOME, AND POVERTY: CENSUS 2000 AND THE CURRENT POPULATION SURVEY 6, 20 tbl.1 (2003) [hereinafter EMPLOYMENT, INCOME, AND POVERTY].

[36] *See* 2 U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, NO. PHC-2-34, NEW YORK: 2000 SUMMARY SOCIAL, ECONOMIC, AND HOUSING CHARACTERISTICS 798 tbl.36 (2003) (reporting the

Significantly, the unemployment rates include only those people who are actually unemployed and who are seeking employment.[37] Those who are frustrated with the job market—and who therefore have forfeited their attempt to find employment, those who are unable to work due to illness or age, and those who simply choose not to work are not included in the computation of the unemployment rates.[38] Those included *want* to work, but are unable to find continuing employment.[39]

A natural result of the low median income and the high unemployment rate is a high poverty rate. Indeed, the poverty rate of reservations in New York far surpasses the national poverty rate. Nationwide, those that fell below the poverty level constituted just over twelve percent of the population.[40] The numbers coming from New York reservations dwarfed the national poverty rate.[41] In some instances, the poverty rate was ten percentage points higher than the national rate, as in the cases of the Allegany, Cattaraugus, and St. Regis Mohawk reservations.[42]

Just a brief visit to these reservations proves the point. New York reservations are economically depressed. Little income and few jobs are available. Small, Indian-owned businesses, such as gas stations, provide a large portion of what little income and few jobs are available.[43]

III. NEW YORK'S AUTHORITY TO IMPOSE TAXES

Without the sustenance of taxation, the government would surely starve.[44] The general power to tax is not enumerated in the state

unemployment rate on the Cattaraugus Reservation as 15.2%).

[37] EMPLOYMENT, INCOME, AND POVERTY, *supra* note 35, at 3–4 (defining the terms "unemployed" and "unemployment rate").

[38] *Id.* at 3–4.

[39] *Id.* at 3.

[40] DENAVAS-WALT ET AL., *supra* note 34, at 9.

[41] *See, e.g.*, 1 U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, NO. PHC-2-34, NEW YORK: 2000 SUMMARY SOCIAL, ECONOMIC, AND HOUSING CHARACTERISTICS 357 tbl.15 (2003) (reporting the poverty rate of families in 1999 on the Cattaraugus Reservation in Erie County at 27.8%).

[42] *Id.* at 353 (Allegany Reservation: poverty rate of 22.6%); *Id.* at 357 (Cattaraugus Reservation (Erie County): poverty rate of 30.6%); *Id.* at 358 (St. Regis Mohawk Reservation: poverty rate of 22.4%).

[43] The author has personally witnessed, for more than twenty years, the economically depressed conditions on the Allegany Reservation and the Cattaraugus Reservation. In his opinion, however, it is only necessary to briefly visit the reservations to witness such conditions.

[44] People *ex rel.* Hatch v. Reardon, 77 N.E. 970, 973 (N.Y. 1906), *aff'd*, 204 U.S. 152 (1907); *see also* Shapiro v. City of New York, 325 N.Y.S.2d 787, 789 (Sup. Ct. Kings County 1971)

constitution;[45] it is a power inherent in the existence of government.[46] However, federal law limits that power. As discussed below, those limitations are defined by nuances that pervade the area of state taxation on reservations.

A. The Buffalo Creek Treaty of 1842

The first federal limitation on a state's power to tax activities on reservations rests in the United States Constitution: the Supremacy Clause mandates that a duly ratified treaty prevails over any inconsistent laws.[47] In the context of Indian reservation taxation, the potential exists for that clause to play a role. Since the period immediately following this country's independence from England, the executive branch has entered into—and the Senate has ratified—close to four hundred treaties with Indian tribes.[48] Some of these have carved out particular areas of land for reservations,[49] some have required the westward removal of Indians to remote frontiers,[50] and some have clarified prior treaties.[51]

In the context of New York Indians, several treaties were drawn, agreed to, and ratified. However, only one is of paramount significance to the concept of state taxation—the Buffalo Creek Treaty.[52] Representatives of the United States Government and chiefs of the Seneca Nation agreed to the Buffalo Creek Treaty in May 1842.[53]

The federal government, by signing and ratifying the Buffalo Creek Treaty, agreed to incorporate provisions of an indenture entered into by the Seneca Nation and two individuals—Thomas L.

("[W]ithout [the power to tax,] government could not exist or perform its functions."), *aff'd*, 296 N.E.2d 230 (N.Y. 1973).

[45] *Reardon*, 77 N.E. at 973. *But see* N.Y. CONST. art. XVI, § 1 (acknowledging the existence of the state government's power to tax).

[46] *Reardon*, 77 N.E. at 973.

[47] U.S. CONST. art. VI, § 2 (mandating that treaties made under the authority of the United States be supreme to any conflicting state constitution or law).

[48] *See* FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY app. B at 446–503 (1994).

[49] *See, e.g.*, Articles of a Treaty, U.S.-Miami Tribe, arts. I, II, Oct. 23, 1826, 7 Stat. 300, 300 (reserving for tribal use certain sections of lands ceded to the United States by the Miami Tribe).

[50] *See, e.g.*, Articles of a Convention, U.S.-Creek Nation, art. II, Feb. 12, 1825, 7 Stat. 237, 237–38 (removing the Creek Nation from Georgia to territory west of the Mississippi).

[51] *See, e.g.*, Articles of a Treaty, U.S.-Chippewa Tribe-Menomonie Tribe-Winebago Tribe, art. I, Aug. 11, 1827, 7 Stat. 303, 303 (clarifying the southern boundary of a reservation that was left undefined in a prior treaty).

[52] Articles of a Treaty, U.S.-Seneca Nation, May 20, 1842, 7 Stat. 586.

[53] *Id.*

Ogden and Joseph Fellows.[54] Ogden and Fellows had agreed to purchase certain tracts of land held by the Seneca Nation, and the indenture clarified that the Seneca Nation was permitted to occupy certain reserved parcels of land.[55]

Of particular relevance was the ninth article of that indenture, which provided:

> The parties to this compact mutually agree to solicit the influence of the Government of the United States to protect such of the lands of the Seneca Indians, within the State of New York; as may from time to time remain in their possession from *all taxes*, and assessments for roads, highways, *or any other purpose* until such lands shall be sold and conveyed by the said Indians, and the possession thereof shall have been relinquished by them.[56]

The language of that provision speaks for itself: the parties to the agreement guaranteed that the reserved lands would not be subject to *any* form of taxation, regardless of that taxation's purpose. The plain language of the compact supports only that interpretation. Before evaluating interpretative decisions surrounding that provision, interpretative principles must be clarified.

The Supreme Court has consistently held that, where ambiguities arise, treaties are to be interpreted in a way that is favorable to the Indian tribes.[57] Some basic reasons underlie those holdings: the Indians probably were not well-versed in English,[58] the Indians did not benefit in negotiations from the assistance of non-government sanctioned attorneys,[59] and the Indians were in a severely impaired bargaining position.[60]

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[54] *Id.* at 590 ("*First*, The United States of America consent to the several articles . . . contained in the [incorporated agreement] between [the Seneca Nation] and . . . Thomas Ludlow Ogden and Joseph Fellows . . . .").

[55] *Id.* at 587–88.

[56] *Id.* at 590 (emphasis added).

[57] *See, e.g.*, McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 174 (1973); Carpenter v. Shaw, 280 U.S. 363, 367 (1930) ("Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.").

[58] *See* PRUCHA, *supra* note 48, app. A at 430 (indicating that, although treaties with foreign nations were usually translated into a foreign language to allow foreign representatives to clearly understand the provisions, no such written language existed in the case of Indian tribes and therefore treaties with Indian tribes were only transcribed in English).

[59] *See id.* at 210–11 (illustrating that most of the treaty negotiations consisted of government representatives explaining their demands, debate among tribal members, and tribal approval).

[60] *See id.* at 129 (describing the United States government's dominance over Indian tribes following the War of 1812).

The Third Department of New York's Appellate Division has interpreted the "all taxes" language of the Buffalo Creek Treaty.[61] In *Snyder v. Wetzler*, an Indian retailer sought declaratory relief after the State assessed a tax deficiency against his retail store.[62] The tax deficiency resulted from the retailer selling tobacco products and gasoline to non-members without collecting state excise and sales taxes.[63] In denying the retailer's claim, the court held that the "all taxes" language in the treaty refers only to property taxes.[64] This, the court clarified, is because the compact does not exempt the *activities on reservation lands* from all taxes, but rather exempts only the *lands themselves* from all taxes.[65] The court did not consider the provision to be ambiguous.[66] Absent ambiguity, the Supreme Court's longstanding doctrine of favorable interpretation for Indians did not apply.[67]

In support of its holding, the court examined the time period during which the treaty was negotiated.[68] The court found that there were land tax disputes immediately before the signing of the treaty.[69] Certainly, such disputes might be relevant in the negotiation of the treaty. But, whether the Indians negotiated for immunity from property taxes or for immunity from taxes in general remains unanswered. How anomalous it would be for the Indians to oppose property taxes but not other forms of taxation. If the government officials included the ninth article expecting that the Indians would interpret the provision as protection solely from property taxation, then the government officials' expectations were baseless and their negotiations careless. Had they truly intended such a result, they should have unequivocally stated as much. A simple phrase to the effect that the provision is inapplicable to other forms of taxation would have sufficed.

Indeed, the court's holding that the provision only applied to property taxes, and not to taxes in general, is based on the

[61] *See* Snyder v. Wetzler, 603 N.Y.S.2d 910, 912 (N.Y. App. Div. 1993), *aff'd on other grounds*, 644 N.E.2d 1369 (N.Y. 1994).

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.* at 912–13.

[66] *See id.* at 912 ("We find the Treaty clearly refers only to taxes levied upon real property or land.").

[67] *See supra* text accompanying note 57.

[68] *See Snyder*, 603 N.Y.S.2d at 912–13.

[69] *Id.* at 913. The court never opined that the Buffalo Creek Treaty actually resolved the disputes.

interpretation of the negotiating government officials.[70] The court relied solely on New York government reactions to supposed land tax disputes; the court did not indicate any reliance on Seneca Nation reactions.[71] The Supreme Court, however, has long been unsympathetic to an interpretation given a treaty provision by the officials who signed it.[72] Rather, the Supreme Court favors Indian interpretation.[73] As a result, the support cited by the Third Department is questionable and the court's holding is hardly supported. Thus, the result in *Snyder v. Wetzler* is suspect.[74]

B. Tribal Sovereignty

Because it only bars property taxes, the Buffalo Creek Treaty's promise of no taxation lacks teeth. Nonetheless, New York Indians may still be protected from state taxation. As explored below, even absent a controlling treaty provision, the federal government generally retains control over the area of taxation of Indian activities.[75]

The Indian opposition to taxation, while probably partly based on economic factors, also rests on the sovereignty of Indian tribes.[76] However, the Indian tribes do not enjoy full sovereignty.[77] Instead, they enjoy what may be termed "quasi-sovereignty."[78] Sovereignty includes both the power to self-govern and the right to be free from outside governance.[79] Without question, tribes have some power to pass laws, implement a court system, and enforce tribal laws—the power to self-govern.[80] However, tribes lack the second element of

[70] *See id.* at 912–13 (referring repeatedly to the actions of government bodies or officials at the time of the treaty signing: the County of Erie, the Comptroller, the New York State Legislature, and the New York Court of Appeals).

[71] *See id.*

[72] *See supra* text accompanying note 57.

[73] *See supra* text accompanying note 57.

[74] The Indian retailer appealed to the New York Court of Appeals. *See* Snyder v. Wetzler, 644 N.E.2d 1369, 1370 (N.Y. 1994). However, the Court of Appeals never reached the issue of treaty interpretation because the argument was unpreserved. *Id*.

[75] *See* McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 168–69 (1973) (clarifying the principle that, even absent a treaty provision explicitly governing the issue, "state law could have no role to play within the reservation boundaries").

[76] *See* Press Release, Seneca Nation of Indians, Buffalo Creek Treaty Commemoration Ceremony on Friday (May 20, 2004), *available at* http://www.honorindiantreaties.org/news/index.cfm?article=64&archive=1 (claiming sovereign immunity from state taxation).

[77] Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 165 (1980) (Brennan, J., concurring in part and dissenting in part).

[78] *See id.* at 165–68 (discussing the boundaries of tribal sovereignty).

[79] *See* BLACK'S LAW DICTIONARY 1402 (7th ed. 1999).

[80] *See Colville Indian Reservation*, 447 U.S. at 166 (Brennan, J., concurring in part and

true sovereignty—freedom from outside governance—because tribes are not entirely immune from state and federal governance.[81] This unusual form of sovereignty caused the Supreme Court to shift its focus in analyzing government-tribe relations from the sovereign nature of Indian tribes to preemption analysis;[82] preemption analysis is discussed below.[83]

Several distinct situations result in differing doctrines in the area of state taxation of Indians or of reservation activities. First, the state can attempt to tax the members of the tribe.[84] Second, the state can attempt to tax non-members when they engage in activities on reservations.[85] In this second scenario, the state has two options in its method of collection: allow the non-members themselves to report due taxes or enlist tribal retailers to collect due taxes.[86] Third, a state might impose a tax that ostensibly imposes the legal incidence of the tax on non-members when, in reality, the statute imposes the legal incidence of the tax on members.[87] Each possibility will be discussed in turn.

C. Taxation of Members

The first scenario, state taxation of members of the tribe, often fails. The analysis begins in the Constitution: Congress possesses the authority "[t]o regulate Commerce . . . with the Indian Tribes."[88] In *Warren Trading Post v. Arizona State Tax Commission*, the Supreme Court held that the passage of the Indian Trader Statutes and the corresponding regulations indicated that Congress left no room for the states to regulate commerce with the Indian tribes.[89]

dissenting in part).

[81] *See, e.g.*, Dep't of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., 512 U.S. 61, 75 (1994) (holding that Indian traders may be subject to reasonable state attempts to assess and collect lawful taxes).

[82] *See Colville Indian Reservation*, 447 U.S. at 155–56.

[83] *See infra* Part III.C–G.

[84] *See infra* Part III.C.

[85] *See infra* Part III.D.

[86] *See infra* Part III.D.

[87] *See infra* Part III.E.

[88] U.S. CONST. art. I, § 8, cl. 3.

[89] 380 U.S. 685, 690 (1965). The Indian Trader Statutes, located at 25 U.S.C. §§ 261–264 (2000), were all passed between 1876 and 1903. The passage of the Indian Trader Statutes has been classified by the Supreme Court as "[a]n exercise of Congress' power to 'regulate Commerce . . . with the Indian Tribes.'" Dep't of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., 512 U.S. 61, 70 (1994). The Indian Trader Statutes delegate authority to the Commissioner of Indian Affairs to designate what traders are permitted to engage in commerce with the Indian tribes. 25 U.S.C. § 261. The Commissioner of Indian Affairs also has the power to set quotas and prices. *Id.* The President has the power to prohibit trading

The state collection of revenue, via taxation, is an economic action by the state that undoubtedly affects commerce with reservations by placing additional burdens on traders beyond those that Congress or Congress's delegate has imposed.[90] As a result, when a tax is imposed on members of a tribe on reservation, it will likely fail constitutional scrutiny.[91] As Justice Scalia so directly stated: "'[A]bsent cession of jurisdiction or other federal statutes permitting it,' . . . a State is without power to tax reservation lands and reservation Indians."[92]

D. Taxation of Non-Members

The Supreme Court's categorical approach in *Warren Trading Post* only applies when a state attempts to tax reservation lands or reservation Indians.[93] The second scenario involves state taxation of non-members when they engage in activities on reservation lands. In this context, whether a state taxation statute will pass constitutional scrutiny will depend upon the relationship between the various interests at stake: state interests, federal interests, and tribal interests.[94] If the state interest outweighs the federal and tribal interests, the state taxing statute will survive.[95]

The weight of the interests at stake, be they federal, tribal, or state, necessarily depends upon how a particular court defines those interests. A failure to accurately or realistically define the interests may prove fatal to either side. In a general taxing statute that explicitly directs collection of taxes from non-members and no collection from members, the state interest might seem relatively clear: collection of revenue from non-members engaged in on-reservation activity.

Apparently, Justice Rose H. Sconiers disagreed that the state interest was so clear in *In re New York State Department of*

with Indians "whenever in his opinion the public interest may require the same." *Id.* § 263. By their very terms, the Indian Trader Statutes were passed in the federal government's capacity as protector of the Indian tribes. *See id.* § 262 ("[T]he Commissioner of Indian Affairs may prescribe [rules and regulations] for the protection of [the] Indian[] [tribes].").

[90] *See Milhelm Attea & Bros.*, 512 U.S. at 70–71.

[91] County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 251, 258 (1992).

[92] *Id.* (alteration in original) (citing Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973) (White, J.)).

[93] *See Warren Trading Post*, 380 U.S. at 689–90.

[94] *See* Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995).

[95] *See Milhelm Attea & Bros.*, 512 U.S. at 73.

Taxation & Finance (Bramhall).[96] Although reversed on appeal, Justice Sconiers vigorously criticized the State's purported—almost pretextual—interest.[97] The real state interest was not collection of revenue, noted Justice Sconiers, but instead was "retail parity."[98] Justice Sconiers found that the State had entered into agreements with the Indians whereby the Indians would raise their prices to match those of non-reservation businesses.[99] Under the agreements, the excess—the difference between the post-agreement price and the pre-agreement price—would be funneled back into the tribe, instead of being remitted to the State (as a tax would have been).[100] From a logical perspective, the purported state interest in "enforcing and collecting taxes" begins to resemble what it truly is—an attempt to benefit non-reservation retailers at the expense of reservation retailers. In *Bramhall*, the State accomplished this objective by imposing a price floor on reservation-sold products.[101]

In her scathing account of the State's unjust relationship with Indians, Justice Sconiers forcefully emphasized the consistent defeat of Indian hopes by government betrayal:

> Having been so restricted to these Lands as the sole remaining place where Indian culture and custom could be practiced; having persevered through poverty and prejudice . . . and having believed to have finally found a method whereby that Land and the Treaties upon which it was set aside could work to their economic gain; it must now

[96] 660 N.Y.S.2d 329 (Sup. Ct. Erie County 1997), *rev'd*, 667 N.Y.S.2d 684 (N.Y. App. Div. 1997).

[97] *Id.* at 332. The court stated:

> It is thus clear, even to the casual observer, that the real interest underlying this recent extraordinary showing of the State's police powers, is the desire, not to collect taxes, but rather to advance the commercial interest of "retail parity" and thereby defeat the previous competitive advantage of Reservation sales.

Id.

[98] *Id.*

[99] *Id.*

[100] *Id.* Justice Sconiers termed the difference between the pre-agreement price and the post-agreement price the "tax saving differential." *Id.* Admittedly, the scrutinized agreement was not a taxing statute. However, the agreement resulted from negotiations between the State and the tribe after the tribe refused to collect taxes. *Id.* at 330. If the State was genuinely concerned with the collection of revenue—and not with retail parity—then certainly it would demand remittance of the tax saving differential.

[101] *See id.* at 332. Further support for the argument that the real state interest is "retail parity," rather than the collection of revenue, is evidenced by recent proposed legislation that would exempt certain non-Indian retail businesses from collecting gasoline taxes. In February 2005, a bill was introduced in the New York State Assembly that would have repealed gasoline taxes in all areas within twenty miles of Indian reservations. Assemb. 5048, 228th Leg. Sess. (N.Y. 2005).

> seem . . . that they are once again being told, that what appeared to have been an unbreachable allodial right in and upon their Reservation land was . . . only so much smoke in the wind.[102]

Similarly, the definition of tribal interests proves problematic. The question arises as to what tribal interest is really at stake. The Supreme Court has defined the tribal interest in some instances to be the interest in marketing a tax exemption to non-members "who would ordinarily shop elsewhere."[103] Such an implication that the tax exemption is invalid begs the question: if the Supreme Court defined the tribal interest differently, the tax exemption marketed to non-members might not be invalid.

The tribal interest should be defined more deeply than as a mere marketing ploy. The true tribal interest is more aptly characterized as maintenance of tribal sovereignty. As noted earlier, economic depression on reservations is rampant.[104] Sales to non-members are not a luxury, as the Supreme Court seems to imply. Rather, at this point, they are a necessity. As Justice Sconiers illustrates, the New York Indians have found the one benefit of their dealings with the State—the ability to use their sovereignty for some economic growth when it is so desperately needed.[105]

The Supreme Court notes that there is no value added on the reservation to such tax-exempt products as gasoline and tobacco products.[106] Whether value is added or not, an economically depressed tribe's interest in retaining its sovereignty carries more weight than an interest in what the Supreme Court seems to imply is a marketing ploy. By implying that the tribal interest is a marketing ploy, the Supreme Court ignores the backdrop of the tribes' decision to not collect taxes: tribal sovereignty. The tribes should not have to sacrifice their heritage or sovereignty to attain an adequate standard of living for their members.

When realistically defined, the interests tend to tip the scales in favor of reservation businesses. The tribal interest of ensuring livable standards on reservations carries great weight. The alleged state interest, on the other hand, of collecting revenues through

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[102] *Bramhall*, 660 N.Y.S.2d at 332.

[103] *See, e.g.*, Dep't of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., 512 U.S. 61, 73 (1994).

[104] *See supra* Part II.C.

[105] *See Bramhall*, 660 N.Y.S.2d at 332; *see also supra* Part II.C.

[106] *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 154–55 (1980).

laws that are difficult to enforce, and to some extent administratively impracticable,[107] founders in comparison. This is especially true where the actual state interest may in fact be retail parity rather than revenue collection.

The Supreme Court has attributed little significance to the tribal interest at stake by not recognizing the real differences between on-reservation standards of living and off-reservation standards of living. As a result, the analysis often ends with determining on whom the tax is being imposed. If imposed on members, the tax fails. If imposed on non-members, the tax survives because the state's supposed interest in the collection of revenue outweighs the tribal interest, which the courts have conveniently defined as being the marketing of a tax break.

E. State Classification of Taxation

The taxing scheme is not always analyzed by how the state characterizes it. Where the statute fails to clearly provide that the burden does not rest upon the tribe or its members, but the legal incidence of the tax falls on the tribe, the Supreme Court has deemed the tax to be imposed on the tribe.[108] Thus, the Supreme Court has utilized an intensively factual, independent review of such taxes.

One example of this factual review of such taxes occurred in *Oklahoma Tax Commission v. Chickasaw Nation*.[109] There, the state taxation scheme at issue did not clarify upon whom the legal incidence of the tax fell.[110] Despite what may have been a general understanding that the real tax imposed would fall eventually on the non-member consumers, the Court found that the ultimate responsibility for remitting the tax was imposed on reservation retailers.[111] The Court reached this result not by applying general principles that, for instance, a state can impose taxes on sales to non-members; rather, the Court examined the language of the statute.[112] The Court noted that distributors of fuel, under the

[107] *See infra* Part IV.C–D (criticizing New York's latest attempt at collection); *see also infra* Part IV.F (discussing Governor Pataki's reasoning behind his veto of the collection bill).

[108] *See* Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 461–62 (1995) (reasoning that where a statute does not explicitly declare upon whom the legal incidence falls, the burden may effectively be imposed on member retailers).

[109] *Id.*

[110] *Id.* at 461.

[111] *See id.* at 462.

[112] *See id.* at 461.

statute, paid the tax as agents for the retailer.[113] Nothing further was mentioned in the statute with respect to the retailer passing the tax to non-member consumers.[114] Indeed, from a general business standpoint, presumably the retailer would pass the economic impact of the tax to the consumers although the statute did not direct the retailer to do so. Nonetheless, because the state statute failed to explicitly direct the burden to be passed to non-member consumers, the Court invalidated the statute as an imposition of the legal incidence of the tax on the reservation retailers.[115] As indicated, the Court eschewed application of convenient assumptions in favor of a thorough examination of the particular statute in question.

F. Summary

In sum, when a state attempts to levy a tax on reservation activities, the analysis usually turns on whether the tax is imposed on members of the tribe or on non-members.[116] A state can only tax members when the federal government explicitly cedes authority to tax to the state.[117] On the other hand, states have generally been permitted to impose taxes on non-members who make purchases on reservations.[118] The main difference between imposing taxes on members and imposing taxes on non-members results from "who

[113] *Id.*

[114] *See id.* at 462.

[115] *See id.* The Supreme Court heard arguments on October 3, 2005, in a similar case, *Wagnon v. Prairie Band Potawatomi Nation*, on certiorari from the Tenth Circuit. *See* Prairie Band Potawatomi Nation v. Richards, 379 F.3d 979 (10th Cir. 2004), *cert. granted*, 125 S. Ct. 1397 (U.S. Feb. 28, 2005) (No. 04-631). At time of publication, a decision had not yet been rendered by the Supreme Court. *Wagnon* involves a state's attempt to impose a tax on non-Indian distributors who sell gasoline to Indian retailers. *Id.* at 982. The taxed non-Indian distributor was statutorily—although perhaps not constitutionally—permitted to pass the tax onto the retailers. *Id.* The Indian retailers are located around an Indian casino, and the Indian tribe imposes its own tax of about twenty cents per gallon. *Id.* at 981–82. The revenues collected by the Indian tribe are used to maintain tribal highways, for which the tribe receives no state assistance. *Id.* at 982. The Tenth Circuit invalidated the tax, recognizing that the demand for tribally sold gasoline is a result of a tribally created value (the casino), and that the State's generalized interest in collecting revenue was insufficient to justify imposing a state tax that would effectively preclude the tribe's own collection of taxes. *Id.* at 985–87. For tribal sovereignty's sake, the Tenth Circuit's decision that the State's "general interest [in raising revenue] is insufficient to justify the tax . . . because it interferes with and is incompatible with strong tribal and federal interests against taxation" should be affirmed. *Id.* at 987. Whether the Supreme Court agrees remains to be seen.

[116] *Chicasaw Nation*, 515 U.S. at 458.

[117] *Id.*

[118] *See supra* Part III.D (examining a state's authority to impose taxes on non-members).

bears the legal incidence of a tax."[119] When a state attempts to tax in such a manner as to require the tribe or its members to be responsible for the tax, the Supreme Court has held the tax invalid.[120] When the legal incidence of the tax falls on non-members, rather than on the tribe or its members, the Supreme Court has approved the tax.[121]

G. Are There Any Limits?

A state may even impose the burden on reservation businesses to collect a valid tax on non-members so long as the method is not unreasonable.[122] Where the state tax scheme places the legal incidence of the tax on non-members and the state interests outweigh the tribal interests, the state can enlist tribal businesses to collect the tax if the burden imposed is minimal and tailored reasonably to the ultimate collection of otherwise valid taxes.[123]

As illustrated above, state and federal courts have stripped the Indians of many protections. Therefore, solely relying on the courts to protect the Indians from the devastating impact of taxation would be ineffective. It is the legislature, not the courts, that holds the power to avoid injustices. The legislative process is flexible enough to allow for the situation to be studied in reality, rather than in the vacuum of appellate briefs.[124] As such, demands to refrain from taxation should be directed at the legislature.

To be sure, New York has made no attempt to tax fuel sales to members. In fact, in 1965, the legislature adopted an explicit exemption for tribal members.[125] New York simply wants to collect taxes on fuel sales from non-members only. Estimates of New York's foregone revenue due to the ability of non-members to avoid sales and excise taxes by traveling to reservations to make purchases vary from forty million dollars per year to more than one

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[119] *Chickasaw Nation*, 515 U.S. at 458.

[120] *Id.* at 458–59.

[121] *See supra* Part III.D (examining a state's authority to impose taxes on non-members).

[122] *See* Dep't of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., 512 U.S. 61, 73 (1994) (holding a state scheme to collect taxes from non-members valid since the burden on member retailers was "minimal" and "reasonably tailored to the collection of valid taxes").

[123] *Id.*

[124] Whether that flexibility translates into proper decisionmaking is an entirely different issue.

[125] *See* N.Y. TAX LAW § 1116(a)(6) (McKinney 2004) ("[T]he following shall not be subject to . . . taxes imposed under this article: . . . (6) The following Indian nations or tribes residing in New York State: Cayuga, Oneida, Onondaga, Poospatuck, Saint Regis Mohawk, Seneca, Shinnecock, Tonawanda and Tuscarora, where it is the purchaser, user or consumer.").

billion dollars per year.[126] Such a discrepancy illustrates how susceptible the debate is to manipulation. It also demonstrates that the alleged fiscal benefits of taxation are indeed uncertain.

IV. CURRENT NEW YORK STATE TAXATION OF FUEL

A. Generally

Currently, New York imposes an excise tax of eight cents per gallon on both diesel fuel and gasoline.[127] This amount is unaffected by changes in price; if the price of gasoline or diesel fuel skyrockets, the excise tax will remain at eight cents per gallon.[128]

New York also imposes a sales tax on diesel fuel and gasoline sales. Depending on where in the state the purchase is made, the rate varies.[129] In upstate New York, where all the federally recognized reservations are located, the rate was—until May 2005[130]—6.25%.[131] Put simply, for every dollar spent on gasoline or

[126] *Compare* Tom Precious, *Seneca-Sponsored Study Lowers Forecast of Tobacco Tax Revenue*, BUFFALO NEWS, May 12, 2004, at A7 (reporting that Governor Pataki has estimated foregone revenues in tobacco and gasoline taxes between forty and sixty million dollars), *and* Dan Herbeck, *Senecas Will Ask Bush for Help in Tax Dispute*, BUFFALO NEWS, Dec. 19, 2003, at C2 (reporting on an official estimate reaching hundreds of millions of dollars per year), *with* Tom Precious, *Allies Press Pataki on Indian Sales Tax*, BUFFALO NEWS, Apr. 29, 2004, at C6 (citing a committee report claiming losses of over one billion dollars in forgone revenue). Importantly, a large portion of those revenues probably are attributable to tobacco sales; however, the ability to impose and collect fuel taxes is closely related to the ability to impose and collect tobacco taxes.

[127] N.Y. TAX LAW §§ 282-a(1), 282-b, 282-c (McKinney 2004 & Supp. 2004) (imposing a four-cent excise tax, an additional three-cent excise tax, and a supplemental one-cent tax on diesel fuel); N.Y. TAX LAW §§ 284, 284-a, 284-c (McKinney Supp. 2004) (imposing similar excise taxes on gasoline as are imposed on diesel fuel). As indicated in the text, an excise tax is a tax imposed on a product—here, a gallon of gasoline—that remains at the same level, regardless of fluctuations in price.

[128] *See* sources cited *supra* note 127.

[129] *Compare* N.Y. TAX LAW § 1111(e)(2)(i) (McKinney 2004) (seven and one-quarter percent), *with* N.Y. TAX LAW § 1111(e)(2)(ii) (McKinney 2004) (six and one-quarter percent). *See generally* N.Y. TAX LAW § 1111(e)(1) (McKinney 2004) (differentiating between various parts of the state for purposes of sales tax on fuel); N.Y. PUB. AUTH. LAW § 1262 (McKinney 1999) (creating the Metropolitan Commuter Transportation District, which is comprised of the twelve most southerly counties in New York). A sales tax is a tax imposed on a product—here, a gallon of gasoline—which is a percentage of its purchase price.

[130] Curiously, the main goal of passing legislation to collect taxes on purchases made by non-members is, according to Senator Spano (the bill's sponsor), to recoup foregone revenue. However, inconsistent as it may seem, the state government passed a law in 2003 that first raised the sales tax rate, and then dropped the sales tax rate from either six and one quarter percent to six percent, or from seven and one quarter percent to seven percent. This anomaly is discussed below. *See infra* Part IV.E.

[131] N.Y. TAX LAW § 1111(e)(2)(ii) (McKinney 2004).

diesel fuel, an additional $0.0625 is paid in sales tax.

Currently, the average New York price per gallon of mid-grade unleaded gasoline is, before tax, over $1.95.[132] As a result, consumers in New York currently pay more than $0.20 in state taxes[133] on each gallon of gasoline (or diesel fuel) purchased. Consumption of fuel, despite high fuel taxes and increasing market prices, has changed only negligibly.[134]

B. Recent State Attempts at Enforcement

To say that New York State has refused to tax fuel sales made on reservations to non-members is false. In fact, the legislature has already passed a statute explicitly allowing for enforcement of state fuel taxes on non-members.[135] However, under the current statutory scheme, the executive branch—namely, the Commissioner of Taxation and Finance—is delegated the authority to prescribe the means for enforcing the tax.[136] Under the Pataki administration, and likely due to Governor Pataki's urging, the Commissioner has done nothing to collect the taxes.[137]

C. The Spano Position

Legislation, which was delivered to the Governor's desk on November 3, 2004, would have divested the executive branch of the authority to enforce collection by implementing its own method of collecting the tax.[138] Under the bill, which was sponsored by State

[132] ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, PETROLEUM MARKETING MONTHLY: OCTOBER 2005, at 60 (2005) (compiling data as of July 2005).

[133] This figure does not include the federal fuel excise tax, which is currently $0.184 per gallon. 26 U.S.C. §§ 4081(a)(2)(A)(i), (B) (2000). Of that figure, $0.183 is revenue collected by the government and $0.001 is deposited into a trust account established for the purpose of cleaning up fuel spills. *Id.* Thus, on a gallon of gasoline in New York, consumers pay nearly $0.40 in total taxes—about 21% of the pre-tax price.

[134] *See* ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, ANNUAL ENERGY REVIEW 2004: AUGUST 2005, at xxiv figs.19 & 21, *available at* http://www.eia.doe.gov/emeu/aer/pdf/aer.pdf (indicating graphically that, despite a steady increase in price since 2001, consumption of motor fuel continues to increase steadily).

[135] *See* N.Y. TAX LAW § 1112 (McKinney 2004) ("Where a non-native American person purchases . . . any retail sale item on . . . reservation land . . . the commissioner shall promulgate rules and regulations necessary to implement the collection of . . . taxes . . . ."); N.Y. TAX LAW § 284-e (McKinney Supp. 2004) ("Where a non-native American person purchases . . . any motor fuel on . . . reservation land . . . the commissioner shall promulgate rules and regulations necessary to implement the collection of . . . taxes . . . .").

[136] N.Y. TAX LAW §§ 284-e, 1112.

[137] *See supra* note 12 and accompanying text.

[138] S. 6822-B, 227th Leg. Sess. (N.Y. 2004).

Senator Nick Spano, the state would issue tax-exempt coupons to tribes.[139] The bill provides that after the tribe, using the tax-exempt coupons, has purchased fuel for its own consumption, the remainder of the coupons would be distributed to the member retailers of the tribe.[140]

The amount of coupons allotted to each tribe would have remained under the superintendence of the Commissioner of Taxation and Finance.[141] However, the Commissioner's authority would have been very narrow. The Commissioner, under the legislation, would have been required to base each tribe's allotment on probable demand per capita.[142] First, the Commissioner would rely upon data including the United States average consumption per capita.[143] Then the Commissioner would add the tribal government's probable consumption to the product of the number of enrolled members and the estimated per capita consumption.[144] The result is the total number of coupons allotted to each tribe.[145]

D. Flaws of the Spano Bill

Several problems inhere in such a system.[146] First, the complexity of studying the market based on paper data rather than on realities would create either excess shortages or surpluses of coupons. Consequently, either not enough members would realize the tax exemption or the tribe would be left with an excess of coupons. If not enough members received the coupons, the state fuel tax would, in fact, burden the members of the tribe. If that were the result, the state would violate federal constitutional law since states are without authority to impose tax burdens on members of Indian tribes.[147]

On the other hand, too many coupons might be allocated and the

[139] *Id.* §§ 4, 6 (seeking to amend N.Y. TAX LAW §§ 284-e, 1112 (McKinney 2004 & Supp. 2004)).

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] Because the legislation was never approved by the Governor, none of the problems described in this section have actually been uncovered by any studies or statistics. This section represents the opinion of the author, which is informed largely by personal observation.

[147] *See supra* Part III.C, D, F (discussing the difference between taxing members and taxing non-members).

tribal government might be left with a surplus. Assuming that the tribe distributes all the remaining coupons to member businesses notwithstanding a surplus, those member businesses may be tempted to use the coupons to solicit business from non-members. Member businesses could price gasoline sold to non-members somewhere between the pre-tax price and the post-tax price and reap even higher profits. Given the poor economic conditions that reservations exhibit,[148] there is a possibility—indeed, a probability—that such a phenomenon will occur. Once the potential exists for non-members to purchase fuel at a price below off-reservation price, non-members will likely take advantage of the money-saving opportunity, and tribal retailers are unlikely to turn those tax-exempt, non-member customers away. This is especially true if the newly imposed taxing scheme has driven many of the customers away on its own. The tribal retailers would have a reason to engage in that type of practice: a surplus of coupons might produce excessive profits with respect to the purchases made by non-members, who would in turn reap the reward of avoiding the tax.[149]

An additional problem of the potential taxing scheme is the practical burden placed on the tribe and on tribal retailers. Differentiating between payments made by members (who are tax-exempt by way of the coupons) and non-members (who must pay the tax) would likely bog down operations. Different accounting systems, different pumps for different prices, increased administrative costs, or even simple confusion on the part of workers and consumers impose a direct and inescapable burden on tribal retailers. No such burden exists off-reservation. All people, members or not, must pay the taxes when purchasing fuel off-reservation. No new costs are imposed on the off-reservation businesses by a sudden distinction between members and non-members on-reservation.

A third, more culturally-based problem results as well. The current conditions allow—in fact, encourage—interaction between non-members and members, even if the non-member's exposure to

[148] *See supra* Part II.C (detailing the invariability of poverty, unemployment, and lower median income on New York reservations).

[149] Some may contend that reservation retailers might not engage in that type of practice solely because it is unlawful. First, failure to collect taxes under the current scheme is unlawful, yet it occurs. Second, if the retailers sincerely believe that the State is without power to impose taxes, then the retailers may also sincerely believe that failing to collect the taxes is not unlawful.

the reservation is limited to a brief visit to fill up the tank.[150] If nothing else, non-members are at least aware of the poor conditions of the reservations. Imposing the tax will stifle that interaction. Non-members will stop traveling to the reservations and will no longer be exposed to the reservation plight. Some non-members may ignore the reservation and its members altogether. Such an argument is not based on any assumed prejudice of non-members; it is based on the practical realities of everyday life. Non-members will simply lose the incentive to visit reservations.

E. The Compromised Purpose of the Spano Bill

Besides the practical problems the Spano legislation posed, the alleged purpose is compromised by recent state legislation.[151] Instead of maintaining a consistent, unwavering sales tax rate on fuel purchases, the state government, in 2003, first increased and later reduced the sales tax rate.[152] The enacted automatic repeal of the increase works to drop the fuel sales tax rate 0.25%.[153] The sudden imposition of taxes on reservations is inconsistent with an automatic decrease in taxes statewide. While a decrease of 0.25% may seem trivial, the effect on revenue is anything but. With New Yorkers purchasing, through retail outlets, 3,253,300 gallons of gasoline *per day* (as measured in July 2005),[154] the lost potential revenue will likely exceed $5.78 million per year due to the drop in the sales tax rate.[155]

Perhaps the subsequently lowered tax rate seems trivial because, to consumers, it is. While the state stands to lose millions of dollars per year, consumers will likely not notice a decrease in the sales tax rate; in fact, consumers would likely not notice an *increase* of 0.25% in the fuel sales tax rate. Instead of approaching the foregone

[150] As acknowledged implicitly throughout this entire article, non-members that live within a reasonable distance are often willing to alter their daily lives to take advantage of the price difference between on-reservation businesses and off-reservation businesses. *Cf.* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 145 (1980) (acknowledging that, in the context of tobacco sales, "[t]he [non-member] purchaser saves more than a dollar on each carton, and that makes the trip [to nearby reservations] worthwhile").

[151] *See* Introducer's Memorandum in Support, S. 6822-B, 227th Leg. Sess. (N.Y. 2004) (declaring the purpose of the legislation to be to collect foregone revenue that results from non-members evading sales taxes).

[152] *See* 2003 N.Y. Laws 526–27.

[153] *Id.* at 527.

[154] ENERGY INFO. ADMIN., *supra* note 132, at 108.

[155] Assumed in such a figure is that every gallon will sell for $1.95 before sales tax, and every gallon will be subject to the sales tax.

revenue with an eye toward bettering relations with Indians by either maintaining a consistent sales tax rate or even slightly increasing the sales tax rate permanently, the state essentially gives a future tax break to millions of consumers who are not going to notice it and turns around and slaps the bill on some of the poorest New Yorkers—New York Indians.

F. The Pataki Position: "Cooperation, not confrontation"

Consistent with his most recent stance on the issue, Governor George Pataki vetoed the Spano legislation, claiming that it had "serious flaws."[156] He also emphasized the cultural divide that such legislation would cause. His veto message used some very strong, critical language: "[T]he bill fails to respect and appreciate Native American history and culture."[157] Governor Pataki further noted that the passage of the legislation would "be viewed as an assault on tribal sovereignty."[158]

The Governor unearthed some valid points. First, he noted particular administrative difficulties, ranging from simple adjustment by the Department of Taxation and Finance, to more fundamental issues such as the disallowance of tribal governments to assert their rights under federal treaties.[159] Governor Pataki thus seemed to implicitly recognize that the interpretation of the Buffalo Creek Treaty of 1842 is flawed.[160]

Second, the Governor worried that such legislation would impair the state's ability to negotiate with tribes to devise some arrangement that would be mutually beneficial.[161] The legislation only benefits the state, while an alternative agreement may allow the tribe to engage in revenue raising activity, such as the building of a casino, as long as some proceeds are funneled to the state.[162] Such an agreement would avoid taxation of reservation retailers while raising revenue for the state.

Third, the Governor questioned the real impact of the bill: "[M]any members of the Cayuga Nation reside on lands held by [other tribes], but the bill would require these tribal members to

[156] Governor George E. Pataki, Veto Message No. 265 (Nov. 15, 2004) [hereinafter "Veto Message"] (vetoing S. 6822-B) (on file with author).
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *Id. See generally supra* Part III.A.
[161] Veto Message, *supra* note 156.
[162] *Id.*

pay . . . taxes on goods and services purchased on such lands."[163] If the Governor's anxiety turns out to be realistic, the result of the tax would be an imposition of the legal incidence of the tax on Indians—in clear violation of settled Supreme Court precedent.[164]

The theme that pervades Governor Pataki's veto memorandum is "cooperation, not confrontation."[165] Cooperation may in fact be the best option. Cooperation, i.e., a state-tribal agreement, has the potential to resolve the issue in a favorable way for both parties. The state can ensure collection of revenue, through taxes or otherwise. The tribes can retain sovereignty by negotiating favorable terms for their members.

V. THE RELIANCE MARKET

The ultimate effect of a tax on gasoline or diesel fuel is an increase in price to consumers. As indicated above, the state government can impose high fuel tax rates without forcing consumers to stop purchasing gasoline or diesel fuel.[166] This results from consumers being insensitive to fuel price changes.

Such a statement, however, assumes that the price changes are uniform in the geographic area in which consumers are located. Where there are non-uniform price changes within a particular geographic market, businesses that charge a higher price will invariably lose customers to businesses that charge a lower price.[167] Therefore, while consumers generally will not stop purchasing gasoline or diesel fuel as a result of a uniform price increase,[168] consumers will change their selection of retailers within a particular geographic market where prices differ.

The state's non-enforcement of the collection of taxes on gasoline and diesel fuel sold to non-members has created what this article will term a "reliance market."[169] Reservation businesses have relied

[163] *Id.*

[164] *See supra* Part III.C.

[165] Veto Message, *supra* note 156.

[166] *See supra* note 134 and accompanying text (observing that changes in consumption, despite rising fuel prices, are only negligible).

[167] *See* GEORGE LELAND BACH, ECONOMICS: AN INTRODUCTION TO ANALYSIS AND POLICY 397 (2d ed. 1957) ("It is market price that acts as the adjuster between demand and supply. . . . [O]ther things equal, people will buy more [of a product] at a low than at a high price.").

[168] *See supra* note 134 and accompanying text.

[169] By consciously avoiding enforcement of taxes on sales to non-members for more than a decade, the State has induced tribal members into investing time and capital into businesses that, with sudden enforcement, will surely fail. *Cf.* Washington v. Confederated Tribes of the

upon the state's non-enforcement over the past decade in choosing strategic locations within the reservation so that they will attract non-member customers.[170] According to the New York Association of Convenience Stores, in some areas, choosing strategic locations may be irrelevant because "enterprising non-Indian customers" manage to find even those stores that are not located on the outer fringes of the reservation.[171] Essentially, tribal members have seen an opportunity to equalize their standard of living with that of off-reservation citizens. Similarly, off-reservation businesses have probably relied on state non-enforcement when selecting their locations, e.g., locating in areas where the loss of customers to reservation businesses will be minimal.[172]

The reliance market theory answers many of the proponents of enforcement who claim that off-reservation businesses suffer as a result of non-enforcement.[173] A business that anticipates opening a gas station in upstate New York can avoid losing customers to reservation retailers simply by locating far enough away to make traveling to the reservation too burdensome.[174] Also, gas stations that have opened within traveling distance of reservations likely never had as customers those non-members who purchase gasoline or diesel fuel on reservations. If those gas stations have survived up to this point, then continued non-enforcement is unlikely to cause more consumers to travel to reservations to purchase fuel.[175]

Colville Indian Reservation, 447 U.S. 134, 145 (1980) ("[T]he Indian retailer's business is to a substantial degree dependent upon his tax-exempt status, and if he loses that status his sales will fall off sharply.").

[170] *See* E-mail from James Calvin, President, New York Association of Convenience Stores, to Jonathon B. Tingley (Aug. 25, 2005, 16:21:24 EDT) (on file with author) (stating that "[t]here's absolutely no question that most of the tribal stores target non-Indian customers").

[171] *Id.*

[172] In opening a business, surely one of the necessary inquiries is whether a demand market exists sufficient to support the proposed business. In this context, that inquiry would be guided, if not determined, by the probability and frequency of non-Indian trips to the reservation to purchase such tax-exempt goods.

[173] Such proponents of enforcement include, predictably, associations of non-tribal retailers (such as the National Association of Convenience Stores and the New York Association of Convenience Stores) and legislators from New York's Metropolitan Commuter Transportation District, such as the sponsor of S. 6822-B, Senator Nick Spano (Yonkers (R)). A substantial portion of tax revenues is invested in the Metropolitan Commuter Transportation District. *See* N.Y. TAX LAW §§ 282-b, 282-c, 284-a, 284-c (McKinney Supp. 2005) (distributing revenues according to N.Y. TAX LAW § 301-j(d) (McKinney Supp. 2005)). *See generally* N.Y. TAX LAW § 301-j(d) (McKinney Supp. 2005); N.Y. PUB. AUTH. LAW § 1262 (McKinney 1999).

[174] From a common-sense standpoint, if traveling to the reservations becomes too costly to justify the savings that would result, then most consumers will not travel the distance.

[175] However, as the price of gasoline increases, so does the amount of tax that a consumer must pay. Therefore, the higher the price of gasoline, the more willing a consumer is to travel a greater distance to enjoy the tax-free benefits of reservation shopping.

Enforcement would simply result in a windfall for the off-reservation businesses, at the expense of the reservation businesses.

The reliance market theory also supports an argument against enforcement because of the effects enforcement will have on the already floundering economies of reservations. As indicated, reservation members likely relied on their ability to market their tax-break when choosing to open gas stations on the outer fringes of reservations.[176] Abruptly forcing those member businesses to collect taxes will undoubtedly cripple those businesses.[177] If it cripples those businesses to the point of bankruptcy, more unemployment and poverty will result.[178]

VI. CONCLUSION

The federal and various state governments have recognized the need to promote interaction between various groups of people. Driving the reservations into worse economic conditions by stripping the draw that reservations have for non-members will do nothing to further that cause. Not only will non-members visit reservations less frequently, but animosity will surely develop between members and non-members. As the state government is a product of the governed, the member businesses may lay the ultimate blame on non-member citizens. The responsibility for the actions of the government, ultimately, rests with its citizens. The citizens of this state must act to prevent kindling of tensions between Indians and non-Indians by holding their legislators responsible for their unjust assaults on tribal sovereignty.

A second responsibility of the state government is to further the interests of all—the majority as well as the minority. By this attempt at taxation, the state is providing a windfall to non-reservation businesses at the expense of the tribes and their members. Further, the reservations—the minority—are suffering even absent state enforcement of fuel taxes. The state will be abusing the reservations if flawed legislation, such as the failed Spano bill, ever passes. Unfortunately, New York may not always have a governor who is willing to consider Indian concerns.

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[176] *See supra* note 170 and accompanying text.

[177] *Cf.* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 145 (1980) (stating that the sudden imposition of taxes on the sales of cigarettes would have a devastating impact on tribal retailers whose business depends largely on tax-exempt status).

[178] *See generally supra* Part II.C (discussing the economic frailties prevalent on reservations throughout New York).

State invasion into tribal sovereignty by taxing on-reservation transactions reeks of injustice. The economic depression that permeates reservation lands is partly caused by past injustices asserted against native tribes. Taxation would drive the reservations into further economic depression, without allowing them the chance to prosper. The legislature may, under not-so-convincing court precedent, have some authority to impose taxation on reservation activities. However, such a course of action is not an honorable one. Indeed, the honorable course is restraint.