THE OTHER TAXATION: TRIBES, TERRITORIES, AND FISCAL AUTONOMY

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Native Americans pay taxes. Territories, by contrast, tax in place of the federal government. Both live with the legacy of American imperialism. Both seek the elusive fiscal self-governance and autonomy promised by Congress. The Supreme Court—through preemption, the plenary power doctrine, and interpretive principles—has hollowed out the Native tax base, forcing tribes to compete fiercely with Congress, states, and localities for revenue. By contrast, territorial residents pay no federal or state taxes on territorially sourced income by edicts of Congress and geography. But such tax exemption enabled the creation of incentive regimes that have only invited more criticism as entrenching subordination. This Article argues that the conceptual underpinnings of the divergent tax treatment of tribes and territories are unsound. Under a more robust vision of fiscal autonomy, judicial limits on Native tax sovereignty are misguided. The territories' wide latitude in designing revenue streams merits increased scrutiny. While imperfect, a uniform, nonrefundable federal income-tax credit for tribal and territorial taxes paid is a promising path forward. This Article thus provides the first systematic study of subfederal taxation beyond states and localities—the "other" American taxation often overlooked in scholarship.

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INTRODUCTION

Fiscal autonomy forms the foundation of self-governance. The power to tax enables robust provision of public goods.[1] Allocation of tax burdens effects the regime's vision of distributive justice and is the primary tool of income redistribution in the United States.[2] A key motivation of the 1787

1. See, e.g., Owen M. Fiss, Why the State?, 100 Harv. L. Rev. 781, 789 (1987) ("Examples of this form of state intervention include aid to public libraries, public schools, private and state universities, public broadcasting, and presidential candidates."); Liam Murphy & Thomas Nagel, Taxes, Redistribution, and Public Provision, 30 Phil. & Pub. Affs. 53, 54 (2001) (explaining how taxation "plays a central role in determining how the social product is shared out among different individuals, both in the form of private property and in the form of publicly provided benefits").

2. See Kirk J. Stark, Fiscal Federalism and Tax Progressivity: Should the Federal Income Tax Encourage State and Local Redistribution?, 51 UCLA L. Rev. 1389, 1390 (2004) ("[F]ederal law (especially federal tax law) has served as the primary vehicle through which income and wealth were redistributed in the United States."); see also Joseph Bankman & Thomas Griffith, Social Welfare and the Rate Structure: A New Look at Progressive Taxation, 75 Calif. L. Rev. 1905, 1910–18 (1987) (describing that "a theory of distributive justice" is needed "[t]o determine the desirability of a tax structure"); Ariel Jurow Kleiman, Impoverishment by Taxation, 170 U. Pa. L. Rev. 1451, 1453 (2022) ("The tax and transfer system improves on market outcomes by redistributing resources from rich to poor.").

Constitution was Congress's taxing power.[3] The Articles of Confederation set up a federal government with no independent means of raising revenue, relying instead on the states' generosity to implement federal policy.[4] A generation of social mobilization fought for the possibility of a progressive income tax.[5] Even today, lawmakers and scholars clash with the Supreme Court over Congress's power to tax the ultrarich on their unrealized gains and wealth—a power critical to federal fiscal autonomy in an age of tax cuts, increased spending, and astonishing budget shortfalls.[6]

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3. See The Federalist No. 30, at 188 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing for "a general power of taxation" to "be interwoven in the frame of the government").

4. See Articles of Confederation of 1781, art. IX (relying on revenue by requisition from the states); Pekka Pohjankoski, Federal Coercion and National Constitutional Identity in the United States 1776–1861, 56 Am. J. Legal Hist. 326, 328–33 (2016) (noting that even though "requisitions were 'binding' according to the Articles, in reality there was widespread noncompliance by the states" (quoting Articles of Confederation of 1781, art. IX)); see also Saikrishna Bangalore Prakash, Field Office Federalism, 79 Va. L. Rev. 1957, 1964–65 (1993) (describing how the Articles of Confederation "enfeebled" Congress by denying it "a robust, reliable stream of funds").

5. See generally Ajay K. Mehrotra, Making the Modern American Fiscal State: Law, Politics, and the Rise of Progressive Taxation, 1877–1929 (2013) [hereinafter Mehrotra, Making the Modern American Fiscal State] (examining the transformation of American public finance from a system of indirect, regressive taxation to a direct, progressive income tax).

6. See Moore v. United States, 144 S. Ct. 1680, 1685 (2024) (considering whether Congress has the power to enact the mandatory repatriation tax under Article I and the Sixteenth Amendment); Brief of Amici Curiae Professors Bruce Ackerman, Joseph Fishkin & William E. Forbath, in Support of Respondent at 1, *Moore*, 144 S. Ct. 1680 (No. 22-800) ("Amici's interest . . . is in exploring the original understanding of the Sixteenth Amendment . . . and why it should continue to define the scope of Congress's power of taxation as the nation confronts the challenges of the twenty-first century."); Brief of Amici Curiae Reuven Avi-Yonah, Clinton G. Wallace & Bret Wells, in Support of Respondent at 2, *Moore*, 144 S. Ct. 1680 (No. 22-800) (arguing that Nonrealization Rules "are essential to the broader scheme of income taxation envisioned by the Sixteenth Amendment—to ensure comprehensive and consistent taxation of all income across varied sources . . . ."); John R. Brooks & David Gamage, The Original Meaning of the Sixteenth Amendment, 102 Wash. U. L. Rev. 1, 5–6 (2024) (arguing that the Sixteenth Amendment was designed to overrule *Pollock v. Farmers' Loan & Trust Co.* and to restore Congress's broad power over income taxation); Alex Zhang, Rethinking *Eisner v. Macomber*, and the Future of Structural Tax Reform, 92 Geo. Wash. L. Rev. 179, 181–83 (2024) (examining the legal movement to constitutionalize the realization requirement and to shift federal power over distributive policy from Congress to the Supreme Court); see also Ari Glogower, A Constitutional Wealth Tax, 118 Mich. L. Rev. 717, 721–22 (2020) (describing income-tax workarounds to implement a federal wealth tax); Dawn Johnsen & Walter Dellinger, The Constitutionality of a National Wealth Tax, 93 Ind. L.J. 111, 113–14 (2018) (challenging the view that enactment of a federal wealth tax requires constitutional amendment). For tax cuts and deficits, see Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017); Michael J. Graetz, Foreword—The 2017 Tax Cuts: How Polarized Politics Produced Precarious Policy, 128 Yale L.J. Forum 315, 316 (2018), https://www.yalelawjournal.org/pdf/Graetz_z4nc57qx.pdf [https://perma.cc/25UV-VBMP] (noting that the 2017 tax act "created significant new differences in income tax" and "massive and unsustainable increases in deficits and the national debt"). For a

Scholars have intensely debated the reach of the federal taxing power.[7] They have also assessed state and local autonomy, often in the shadow of the Commerce Clause and the fiscal hegemony of Congress.[8] But within the United States, two other subnational governments have distinctive powers to tax. First, Native tribes can tax as an inherent attribute

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description of the modern anti-tax movement, see generally Michael J. Graetz, The Power to Destroy: How the Antitax Movement Hijacked America (2024).

7. See supra note 6 (collecting scholarly arguments); see also Bruce Ackerman, Taxation and the Constitution, 99 Colum. L. Rev. 1, 4–6 (1999) (arguing for broad congressional discretion in tax policy); John R. Brooks & David Gamage, Taxation and the Constitution, Reconsidered, 76 Tax L. Rev. 75, 82 (2022) (discussing past judicial deference to tax legislation through the "Excise Tax Canon"); Daniel Hemel, Taxing Wealth in an Uncertain World, 72 Nat'l Tax J. 755, 756–57 (2019) (discussing the "constitutional uncertainty" of structural tax reform); Erik M. Jensen, Did the Sixteenth Amendment Ever Matter? Does It Matter Today?, 108 Nw. U. L. Rev. 799, 802 (2014) (arguing for constitutional constraints on innovation in federal tax structure); Alex Zhang, The Forgotten Income-Attribution Power, 135 Yale L.J. 923, 995–1007 (2026) (assessing the federal power to tax corporate income to shareholders after *Moore v. United States*). Constraints on national taxing powers also arise from international tax competition and the rise of tax havens. See Reuven S. Avi-Yonah, Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State, 113 Harv. L. Rev. 1573, 1576–78 (2000) [hereinafter Avi-Yonah, Globalization, Tax Competition] (explaining that globalization "limits governments' ability to collect . . . revenues").

8. See, e.g., Peter D. Enrich, Saving the States From Themselves: Commerce Clause Constraints on State Tax Incentives for Business, 110 Harv. L. Rev. 377, 405 (1996) ("The states find themselves caught, by competitive pressures compounded by political imperatives, in a contest that none of them can win."); Brian Galle, Kill *Quill*, Keep the Dormant Commerce Clause: History's Lessons on Congressional Control of State Taxation, 70 Stan. L. Rev. Online 158, 159 (2018), https://review.law.stanford.edu/wp-content/uploads/sites/3/2018/03/70-Stan.-L.-Rev.-Online-158-Galle.pdf [https://perma.cc/RWW4-J64L] ("*Quill* established a kind of penalty default, denying states an important aspect of fiscal autonomy in the hopes that they would then use their political sway with Congress to craft a more pragmatic solution."); David Gamage & Darien Shanske, Tax Cannibalization and Fiscal Federalism in the United States, 111 Nw. U. L. Rev. 295, 297–98 (2017) [hereinafter Gamage & Shanske, Tax Cannibalization] (explaining that state-level taxes on corporate income, capital gains, and possibly ordinary income impose large, wasteful costs through "tax cannibalization"); Ariel Jurow Kleiman, Tax Limits and the Future of Local Democracy, 133 Harv. L. Rev. 1884, 1885 (2020) [hereinafter Kleinman, Tax Limits] ("[T]ax limits may reflect genuine concerns about government profligacy and nonresponsiveness."); Michelle D. Layser, Removing Barriers to State Tax Incentive Reform, 171 U. Pa. L. Rev. 1235, 1237–38 (2023) ("[S]tate-level place-based tax incentive reforms face significant constitutional barriers that are absent at the federal level."); Darien Shanske, Local Fiscal Autonomy Requires Constraints: The Case for Fiscal Menus, 25 Stan. L. & Pol'y Rev. 9, 12 (2014) (asserting that new state-level rules can be implemented to "enhance the operations of local democracy"); Daniel Shaviro, An Economic and Political Look at Federalism in Taxation, 90 Mich. L. Rev. 895, 897 (1992) (urging Congress to use its Commerce Clause powers to restrain states' taxing authority to the determination of their tax rates as opposed to the determination of the applicable tax bases); see also Richard Briffault, Our Localism: Part II—Localism and Legal Theory, 90 Colum. L. Rev. 346, 453 (1990) (problematizing local autonomy); Daniel J. Hemel, Federalism as a Safeguard of Progressive Taxation, 93 N.Y.U. L. Rev. 1, 5 (2018) (contending that the Supreme Court's federalism doctrine has shifted fiscal and revenue-generation pressure to the much more progressive federal income tax system).

of sovereignty.[9] This authority extends at least as far as nonmembers' economic activities on trust lands.[10] As the Supreme Court has explained, tribal taxing power fosters "self-government" by "defray[ing] the cost of providing governmental services."[11] Despite the rhetoric of autonomy, federal courts have shrunk this power and simultaneously expanded the states' power to tax on Native land.[12] As a result, commentators and Native communities have decried tax policy as modern instruments of wealth extraction that limit essential services on reservations.[13] Their demand is simple but powerful: "You Can't Tax Stolen Lands," and Congress should put tribes on an equal fiscal footing as states.[14]

Second, U.S. territories—American Samoa, Guam, Northern Mariana Islands (CNMI), Puerto Rico, and the Virgin Islands—can tax pursuant to

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9. Washington v. Confederated Tribes of the Colville Indian Rsrv., 447 U.S. 134, 152 (1980) ("The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty . . . . The widely held understanding within the Federal Government has . . . been that federal law to date has not worked a divestiture of Indian taxing power.").

10. See Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 159 (1982) (holding that the tribe had not surrendered its tribal taxing power); see also The Kansas Indians, 72 U.S. (5 Wall.) 737, 757 (1866) (holding that the state did not have the power to tax trust lands).

11. *Merrion*, 455 U.S. at 137; see also Exec. Order No. 14,112, 88 Fed. Reg. 86022 (Dec. 11, 2023) (calling for "administ[ration of federal] funding in a manner that provides Tribal Nations with the greatest possible autonomy to address the specific needs of their people").

12. See Atkinson Trading Co. v. Shirley, 532 U.S. 645, 659 (2001) ("The Navajo Nation's imposition of a tax upon nonmembers on non-Indian fee land within the reservation is . . . presumptively invalid."); Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 512–13 (1991) ("Although the doctrine of tribal sovereign immunity applies to the Potawatomis, that doctrine does not excuse a tribe from all obligations to assist in the collection of validly imposed state sales taxes."); infra sections I.B–.C.

13. See, e.g., Nat'l Cong. of Am. Indians, Res. No. SD-15-036, Support for Tribal Tax Reform and Setting Tax Policy Priorities (2015), https://home.treasury.gov/system/files/226/For%20the%20Record%209182019%20NCAI%20Tax%20Priorities%20Resolution%20SD-15-036.pdf [https://perma.cc/7QKL-THPH]; Maya Srikrishnan, Shannon Shaw Duty & Joaqlin Estus, Tribes Need Tax Revenue. States Keep Taking It., Ctr. Pub. Integrity (Dec. 20, 2022), https://publicintegrity.org/podcasts/integrity-out-loud/tribes-need-tax-revenue-states-keep-taking-it [https://perma.cc/5C9F-AVRH].

14. Misha Hill, You Can't Tax Stolen Land, Inst. Tax'n & Econ. Pol'y (Apr. 12, 2019), https://itep.org/you-cant-tax-stolen-land [https://perma.cc/TY35-MN3H]; see also Hearing on Examining the Impact of the Tax Code on Native American Tribes Before the Subcomm. on Selected Revenue Measures of the H. Comm. on Ways & Means, 116th Cong. 3 (2020), https://democrats-waysandmeans.house.gov/sites/evo-subsites/democrats-waysandmeans.house.gov/files/documents/Rodney%20Butler%20Testimony.pdf [https://perma.cc/Q376-XY5D] (statement of Rodney Butler, Chairman, Mashantucket Pequot Tribal Nation); Matthew L.M. Fletcher, In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue, 80 N.D. L. Rev. 759, 767 (2004) [hereinafter Fletcher, In Pursuit of Tribal Economic Development] (outlining how the practical response to issues in tribal taxation is to treat tribes as governments).

authorization by Congress.[15] As in the context of federal Indian law, territorial taxing power has been grounded in fiscal autonomy and self-government.[16] Unlike tribes, however, territories face little tax competition. They have no overlapping jurisdiction with states and fall outside of the Internal Revenue Code's (the "Code") definition of the "United States."[17] Bona fide residents of the territories—including U.S. citizens—are therefore exempt from federal taxation of territorially sourced income.[18] Instead, they pay a local tax on such income to fulfill their fiscal obligations to both the territorial and the federal government.[19] Congress has even empowered Puerto Rico and American Samoa to deviate from federal-income-tax rules: As a matter of formal statutory authorization, they can craft their own tax regimes to incentivize investment and effect territorial policy.[20] By contrast, Guam, CNMI, and the Virgin Islands are "mirror-Code" jurisdictions and must use the federal income tax as the local, territorial tax regime.[21] Puerto Rico has exercised this power and enacted

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15. See Alex Zhang, The Origins of U.S. Territorial Taxation and the *Insular Cases*, 134 Yale L.J. Forum 556, 585–86 (2025), https://www.yalelawjournal.org/pdf/ZhangYLJForumEssay_id98771d.pdf [https://perma.cc/U58S-HNGU] [hereinafter Zhang, The Origins of U.S. Territorial Taxation] ("The evolution of interterritorial variation in income-tax powers again reflects Congress's focus on safeguarding federal tax receipts.").

16. The rhetoric of autonomy has permeated congressional discussions of territorial tax design since the turn of the twentieth century. See id. at 560.

17. I.R.C. § 7701(a)(9) (2018) (defining the "United States" to include "only the States and the District of Columbia").

18. See id. §§ 931, 933; 48 U.S.C. § 734 (2018); United States v. Vaello Madero, 142 S. Ct. 1539, 1543 (2022) (describing Puerto Rico residents' exemption from most forms of federal income, gift, and estate taxation). This general tax exemption is subject to several exceptions (e.g., income sourced to mainland United States or to foreign—that is, nonmainland and nonterritorial—jurisdictions like the United Kingdom, as well as income of federal government employees). See I.R.C. §§ 861(a), 931(d), 933(1), 937(b)(1); infra note 287 and accompanying text.

19. See, e.g., I.R.C. § 933(1) (exempting from taxation, "[i]n the case of an individual who is a bona fide resident of Puerto Rico during the entire taxable year, income derived from sources within Puerto Rico (except amounts received for services performed as an employee of the United States or any agency thereof)"); *Vaello Madero*, 142 S. Ct. at 1542.

20. See Tax Reform Act of 1986, Pub. L. No. 99-514, § 1271, 100 Stat. 2085, 2591–93; P.R. Laws Ann. tit. 13, § 30061 (LexisNexis, LEXIS through 2025 Legis. Sess.) (taxing income at 7%–33%, rates which are lower than federal income tax rates). The Tax Reform Act of 1986 conditioned the power of Guam, American Samoa, and the Northern Mariana Islands to deviate from the federal income tax on an implementation agreement. See Tax Reform Act of 1986, § 1277(b). Such an agreement is in effect only for American Samoa, which has, in any event, adopted a system mirroring federal income taxation. See Am. Sam. Code Ann. §§ 11.0401, 11.0403 (2021); Tax Implementation Agreement Between the United States of America and American Samoa, Dec. 10, 1987–Jan. 7, 1988, IRS, https://www.irs.gov/pub/irs-lbi/tax_implementation_agreement_between_the_us_and_american_samoa.pdf [https://perma.cc/DCL2-JTH8]. Of course, many practical considerations (such as poverty and Congress's distaste for direct investment) prevent the territories from enacting cohesive and completely self-sustaining tax regimes. See infra Part II.

21. 48 U.S.C. §§ 1397, 1421i(a); Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No.

a host of tax incentives to attract the wealthy to relocate from the mainland.[22] This has increased economic inequality and led to an influx of cryptocurrency tycoons and hedge fund managers.[23] Locals have criticized these tax regimes as fueling a predatory "tsunami of gentrification."[24]

Both Native and territorial taxing powers are thus grounded in fiscal autonomy. But this concept cannot rest on taxing power alone. For Native tribes, diminished power to tax has impoverished their members.[25] On the other hand, the robust taxing powers of territorial governments—even to replace the federal income tax—have brought neither prosperity nor self-governance.[26] Missing from the scholarship is an account of what exactly fiscal autonomy entails in subfederal taxation.[27] This involves a robust understanding of how federal tax law treats Native tribes and the territories and how fiscal self-governance works for communities living with the legacy of American imperialism.

This Article fills the gap. It analyzes the federal tax regime as applied to tribal and territorial communities, showing their diametrically opposite treatment under federal law.[28] Based on this analysis, it argues that fiscal autonomy is a twofold concept.[29] First-order structural autonomy concerns

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94-241, Art. VI, § 601(a), 90 Stat. 263, 269 (1976) (codified as amended in the notes of 48 U.S.C. § 1801); Organic Act of Guam, Pub. L. No. 81-630, § 31, 64 Stat. 384, 392 (1950).

22. See, e.g., P.R. Laws Ann. tit. 13, §§ 10831-10844 (LexisNexis, LEXIS through 2025 Legis. Sess.) (codifying Act 20 to Promote the Export of Services); id. §§ 10851-10855 (codifying Act 22 to Promote the Relocation of Individual Investors to Puerto Rico).

23. See Mariah Espada, Influencers, Developers, Crypto Currency Tycoons: How Puerto Ricans Are Fighting Back Against the Outsiders Using the Island as a Tax Haven, Time (Apr. 19, 2021), https://time.com/5955629/puerto-rico-tax-haven-opposition (on file with the *Columbia Law Review*) (discussing the tax exemptions available for wealthy individuals who move to Puerto Rico but are unavailable to Puerto Rican residents).

24. Id. (internal quotation marks omitted) (quoting Myrna Veda Pagan Gómez).

25. See, e.g., Nat'l Cong. of Am. Indians, Res. No. MOH-17-011, Equitable Treatment for Tribal Nations in Congressional Tax Reform, at 1 (2017), https://ncai.assetbank-server.com/assetbank-ncai/action/viewAsset?id=627&index=0&total=1&view=viewSearchItem (on file with the *Columbia Law Review*) (noting that the differential treatment of state and tribal governments in taxing power "significantly handicaps tribal authority to provide much needed government revenue for tribal programs and prevents economic growth on tribal lands"); infra sections I.B–C.

26. See infra notes 363–373 and accompanying text (criticizing Puerto Rico's tax-incentive regimes). This point is salient as Native communities have gestured toward the territories as examples of fiscal autonomy. See Nat'l Cong. of Am. Indians, Res. No. SD-15-036, supra note 13, at 3 (calling for tribal "autonomy from the Internal Revenue Service like the Commonwealth of Puerto Rico").

27. See infra section III.A (surveying scholarship).

28. See infra Part I. This analysis unsettles the traditional rhetoric of "preferential" treatment for Native Americans. See Carole Goldberg, American Indians and "Preferential" Treatment, 49 UCLA L. Rev. 943, 944–45 (2001) (describing equality-based challenges to the "[s]eparate rights, preferences, governmental recognition, and benefits for Indian nations" in American law).

29. This fiscal, institutional concept of autonomy contrasts with the liberal tradition of individual autonomy. See infra notes 433–436 and accompanying text; see also Angela R. Riley, (Tribal) Sovereignty and Illiberalism, 95 Calif. L. Rev. 799, 802 (2007) (contrasting

taxing power as to the substance and receipt of funds.[30] Subnational governments can tax to the exclusion of others with no formal tax competition or share funds acquired from the same tax base with other jurisdictions. This question goes to *how much* revenue is available to them within the confines of their tax base. Further, subnational governments can have substantial authority to design their own tax regimes or must tax in ways derivative of or shaped by the distributive preferences of the national community. This question goes to *how* they may raise revenue, which implicates key questions of fairness.

By contrast, second-order governance autonomy concerns democratic decisionmaking.[31] Given the degree of structural, first-order autonomy enjoyed by subnational governments, to what extent can they tax in accordance with their citizens' sense of distributive equity? Constraints on democratic and responsive fiscal governance can be internal to the subnational community—for example, because the wealthy dominate internal distributive politics.[32] They can also be external to the subnational community—for example, because its members lack representation in the national government.[33] Further, these constraints can be formal, like institutional or process defects that fail to channel preferences into lawmaking, or functional, like outsized influence of wealth on preference formation itself.

The interaction between first- and second-order autonomy is dynamic: The degree to which subnational governments deserve the former rests on its capacity for the latter. That is, robust taxing powers demand adherence to the citizens' vision of distributive justice in fashioning tax policy.[34] Any claims to autonomy thus entail an assessment of not only tribal and territorial authorities to tax but also their potential for fiscal self-governance—both of which have inevitably been influenced by extractive and paternalist federal policies, past and present.[35] Thus framed, the concept of fiscal autonomy captures the element of sovereignty that relates to self-governance in taxation but is not co-extensive with the traditional or

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tribal sovereignty and federal Indian law principles with the standard demands of Western liberalism).

30. See infra section III.B.1.

31. Second-order fiscal autonomy tracks, but does not perfectly replicate, contemporary philosophical discussions of autonomy. See infra notes 423–432, 481–485 and accompanying text (surveying contemporary discussions of individual autonomy, including the use of hierarchical theories and second-order value formation to define autonomy in contrast to unconstrained freedom). See generally Harry G. Frankfurt, Freedom of the Will and the Concept of a Person, 68 J. Phil. 5 (1971) (contrasting first-order desires with second-order volitions in the context of individual autonomy).

32. See infra notes 487–500, 517–533 and accompanying text.

33. See infra notes 501–516 and accompanying text.

34. See infra section III.B.2.

35. See infra Figure 1 (illustrating the fiscal capacity and tax-design powers of tribes and territories); infra Table 2 (summarizing the infrastructure of tribes and territories for democratic and responsive fiscal governance).

doctrinal concept of sovereignty.[36] Overall, this Article's normative framework suggests that judicial limits on tribal taxing power are misguided. By contrast, the territories' wide latitude in designing revenue streams merits further scrutiny.

This analysis is functionalist: It focuses on tribal and territorial governments' capacity in designing tax policy that is responsive to the will of the people they govern. Formal mechanisms of democracy (e.g., written constitutionalism, procedural safeguards in legislation, or numeric representation[37]) may provide strong but *non-exclusive* evidence for such capacity. This is an important point for Native governance because a significant number of tribes do not have written constitutions or might not be democracies in the strictest sense.[38] It is not the argument of this Article that these tribes must adopt canonical documents establishing the basic machinery of government—whether grounded in separation of powers or another articulated structure of popular sovereignty—to gain the privilege to tax. Instead, robust operations of implicit tribal norms or the reciprocal obligations to tribal members—both in collecting revenue and distributing the proceeds—may be enough. On the flipside, democratic fiscal governance in the territories (or its suboptimal presence) often results not from local resistance. Instead, *federal* control over and neglect of territorial constitutionalism, coupled with Congress's distaste for direct spending in the islands, have necessitated the development of tax incentive regimes that further increased inequality.[39] The continuation of such neglect and distaste makes certain forms of territorial taxing power incoherent with

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36. In subfederal governance, this point is especially salient as to territorial and local governments, which do not enjoy, as a matter of doctrinal analysis, sovereignty independent from Congress or the states which created them. See Puerto Rico v. Sanchez Valle, 579 U.S. 59, 69–70, 75 (2016) (distinguishing the sovereignty of tribal and state governments from the authority of territorial governments).

37. See Matthew L.M. Fletcher, American Indian Tribal Law 138 (3d ed. 2024) [hereinafter Fletcher, Tribal Law] ("Tribal constitutions often borrow heavily from the United States Constitution—for example, some form of separation of powers.").

38. Id. at 123 ("Indian nations have a relatively new tradition of constitutionalism, and some tribes—most notably the Navajo Nation—still have no written constitution.").

39. U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."); see infra notes 497–500 and accompanying text (describing democracy deficits in and popular desires to amend territorial organic acts). One prominent, recent example of Congress's reluctance to make a direct fiscal investment in the territories is its failure to make the Supplemental Security Income program available to territorial residents. See United States v. Vaello Madero, 142 S. Ct. 1539, 1541 (2022) ("For various historical and policy reasons, including local autonomy, Congress has not required residents of Puerto Rico to pay most federal income, gift, estate, and excise taxes. Congress has likewise not extended certain federal benefits programs to residents of Puerto Rico."); Andrew Hammond, Territorial Exceptionalism and the American Welfare State, 119 Mich. L. Rev. 1639, 1641–43 (2021); Zhang, The Origins of U.S. Territorial Taxation, supra note 15, at 556–58.

second-order autonomy. It also puts the burden on Congress to remedy both the democratic deficit and the persistent impoverishment.[40]

The Article thus aims to integrate Native and territorial issues into the mainstream discourse about taxation.[41] It makes three main contributions. First, it evaluates the doctrinal and statutory regimes that govern the taxing powers of Native tribes and U.S. territories.[42] It is therefore the first Article to offer a systematic analysis of the law of subfederal taxation beyond states and localities.[43] Second, the Article deconstructs the concept of fiscal autonomy. It propels both scholarly and policy discussions beyond their current focus on a generalized concept of taxing power. Third, the conceptual framework yields insights for reform. A uniform federal income-tax credit for tribal and territorial taxes paid coheres more with Congress's promise of fiscal autonomy than the existing regime.

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40. Further, this Article's reference to the territories' power to tax in place of Congress and to deviate from federal income-tax rules does not imply that the territories make no contribution to the federal fisc. In a previous article, I have detailed how Congress designed territorial tax systems, including their exemption from internal-revenue regimes, "as part of its broader calculus in devising what it sees as the optimal revenue system for the mainland." That is, territories indirectly bear the costs of *federal* tax design. Zhang, The Origins of U.S. Territorial Taxation, supra note 15, at 560.

41. See infra section III.A (situating this Article's claims within existing scholarship); see also Elizabeth A. Reese, The Other American Law, 73 Stan. L. Rev. 555, 561 (2021) [hereinafter Reese, The Other American Law] (integrating tribal law into mainstream discourse); infra notes 338–371 and accompanying text (analyzing Puerto Rico tax law). This Article primarily discusses the federal law that has shaped tribal (and territorial) fiscal capacity, but its proposed income tax-credit regime enables tribes to develop their own tax laws and policies. Such tribal tax policy, when it emerges, also deserves serious study.

42. This account is much needed for not only scholarship but also teaching. The standard law school course in U.S. subnational taxation concerns state and local tax. See, e.g., Walter Hellerstein, Kirk J. Stark & Joan M. Youngman, State and Local Taxation at xi–xx (12th ed. 2025) (focusing on state and local taxation).

43. See infra notes 397–411 and accompanying text (scholarship on Native taxation); infra notes 412–417 and accompanying text (scholarship on territorial taxation). There has been no substantial scholarly treatment of taxation in the U.S. territories in general (rather than of Puerto Rico alone) in the last four decades. See, e.g., Diane Lourdes Dick, U.S. Tax Imperialism in Puerto Rico, 65 Am. U. L. Rev. 1, 16–83 (2015) (providing a historical account of U.S. economic domination of Puerto Rico only); Karla Hoff, U.S. Federal Tax Policy Towards the Territories: Past, Present and Future, 37 Tax L. Rev. 51, *passim* (1981) (exploring contemporary and historical treatment of territorial taxation, but predating major reforms in 1986). The literature on tribal taxation focuses on the Supreme Court's adjudication of state–tribal tax conflicts. See, e.g., Adam Crepelle, Taxes, Theft, and Indian Tribes: Seeking an Equitable Solution to State Taxation of Indian Country Commerce, 122 W. Va. L. Rev. 999, 1000 (2020) [hereinafter Crepelle, Taxes, Theft, and Indian Tribes] ("Several factors contribute to Indian country's economic despair, but state taxation of Indian country commerce is the most severe impediment to tribal economies."); Fletcher, In Pursuit of Tribal Economic Development, supra note 14, at 768–74 (offering a comparative analysis of tribal revenue needs); Richard D. Pomp, The Unfulfilled Promise of the Indian Commerce Clause and State Taxation, 63 Tax Law. 897, 911–12 (2010) (analyzing primarily "seminal cases involving state taxation of Indians and those doing business with them and, to a lesser extent, those involving tribal taxation"). No one has examined—to the author's knowledge—both territories and Native tribes as species of subfederal taxation.

The remainder of this Article proceeds as follows. The Article first provides a comparative analysis of existing law. Part I addresses Native tribes, covering federal tax treatment, tribal taxing power, and interactions between tribal and state tax regimes. It shows (1) how divergent interpretive principles and collision of executive agencies, specialty tribunals, and general jurisdiction courts have led to narrowing federal tax exemption; (2) how the battle between dependent-sovereign and strict-autonomy theories has contracted tribal fiscal capacity; and (3) how the failure of preemption by delegation has forced tribes to engage in intense tax competition with the states. Part II examines territorial tax systems, including the territories' general federal tax exemption and Puerto Rico's tax-incentive regime. It shows how the territorial government's exercise of delegated tax discretion has invited criticism of tax shelter and imperialism.[44]

Part III builds a framework of fiscal autonomy. It assesses the scholarship about Native taxation, territorial tax policy, autonomy in other forms of subnational taxation, and the constitution of American imperialism. Part III then contends that fiscal autonomy is a twofold concept, incorporating first-order taxing power and second-order governance. It ends with policy and doctrinal reform proposals, including the design of a nonrefundable federal income-tax credit for tribal and territorial taxes paid.

I. NATIVE TAXING POWER

This Part examines tribal taxing powers. Section I.A examines the federal tax treatment of Native populations. Section I.B analyzes judicial limits on tribal tax sovereignty. Section I.C assesses the reach of state and local taxes in Native territory.

The doctrinal, primarily judge-made framework that governs Native taxation is complex and tripartite.[45] First, the federal government exer-

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44. By showing the distinctive echoes of imperialism in contemporary federal tax policy as to tribes and territories, this Article is in conversation with a burgeoning literature that includes: Maggie Blackhawk, The Supreme Court, 2022 Term—Foreword: The Constitution of American Colonialism, 137 Harv. L. Rev. 1, 151 (2023) [hereinafter Blackhawk, The Constitution of American Colonialism] (offering "a long overdue reckoning with American colonialism" and noting that "[t]he horizons of our constitutional law and theory have been limited in many ways by the American colonial project"); James T. Campbell, *Aurelius*'s Article III Revisionism: Reimagining Judicial Engagement With the *Insular Cases* and "The Law of the Territories", 131 Yale L.J. 2542, 2651 (2022) (arguing that "[s]o long as American legal thought overlooks empire's path dependencies, judicial resolution of its foundational questions will imperil self-determination and invite promise breaking" and "call[ing] for better theories of judicial engagement with the law of the territories . . . and empire's role in American constitutional development"); see also infra notes 418–419 and accompanying text (collecting scholarship).

45. For a critical account of judicial supremacy and the formalist methodology courts used to achieve it in federal Indian law, see, e.g., Alex Tallchief Skibine, Formalism and Judicial Supremacy in Federal Indian Law, 32 Am. Indian L. Rev. 391, 416–36 (2008) (showing "how federal Indian common law has been recently reshaped by formalism").

cises plenary power over Indian affairs.[46] Congress has thus subjected tribal members to federal taxation but exempted tribes themselves and specific streams of income from trust land.[47] Second, tribes can tax as an inherent attribute of sovereignty and without congressional authorization.[48] But poverty and judicial carve-outs have diminished the tribal tax base.[49] Third, states' power to tax in Indian country has expanded.[50] As this analysis shows, the rhetoric of self-government and autonomy goes only so far. The Supreme Court's jurisprudence has removed sovereignty to the periphery of the inquiry. Instead of assuming jurisdiction, the Court has found a web of factual predicates that deprive tribes of taxing power—exceptions that threaten to swallow up the general rule.[51] Such doctrinal evolution has thus resulted in the diminution of tribal taxing power.

A. *Federal Taxation of Native Communities*

1. *Federal Taxation of Tribes and Tribal Entities.* — As a basic principle, Congress exercises plenary power over Indian affairs, including in taxation.[52] This differentiates tribes from states as to fiscal capacity. Congress

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46. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.").

47. Squire v. Capoeman, 351 U.S. 1, 6–7 (1956) (exempting income derived directly from trust land from taxation); Superintendent of Five Civilized Tribes v. Comm'r, 295 U.S. 418, 421 (1935) (holding that Native individuals are generally liable to the federal income tax); Rev. Rul. 94-16, 1994-1 C.B. 19, 20 (exemption of Native tribes from federal income taxation); see also infra section I.A.

48. See Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134, 152 (1980) ("The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain . . . .").

49. See, e.g., Atkinson Trading Co. v. Shirley, 532 U.S. 645, 649–59 (2001) (rejecting the Navajo Nation's ability to impose a hotel occupancy tax on nonmembers on non-Indian fee land within its reservation); infra section I.B.

50. See infra section I.C.

51. See, e.g., Montana v. United States, 450 U.S. 544, 565–66 (1981) (detailing circumstances in which a tribe may exercise civil authority on fee land owned by nonmembers, and finding that "[n]o such circumstances . . . are involved in this case"); infra notes 204–211, 252–268 and accompanying text.

52. See, e.g., United States v. Lara, 541 U.S. 193, 200 (2004); Negonsott v. Samuels, 507 U.S. 99, 103 (1993). The plenary power doctrine has its critics, though scholars have recently suggested using it to foster tribal self-governance. E.g., Philip P. Frickey, Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of *Lone Wolf*, 38 Tulsa L. Rev. 5, 19 (2002) ("Under either understanding of 'plenary,' however, as a matter of federal common law, tribes retained inherent sovereignty except with respect to land transfers and government relations."); Nell Jessup Newton, Federal Power Over Indians: Its Sources, Scope, and Limitations, 132 U. Pa. L. Rev. 195, 233 (1984) ("[V]estiges of the judicial attitude of nonintervention developed and nurtured in the plenary power era remain, especially in the areas of tribal sovereignty and property rights where the Court continues to rely on an inherent Indian affairs power of almost unlimited scope."); see also Sarah H. Cleveland, Powers Inherent in Sovereignty:

can fully extend its taxing powers to the former but not the latter, as federalism shields states from direct federal taxation.[53] Under the intergovernmental tax-immunity doctrine, Congress cannot impose a tax on state governments that unduly interferes with state sovereignty.[54] The precise contours of immunity are blurry. The Supreme Court used to draw, but has since abrogated, a distinction between the state's governmental and proprietary capacity.[55] But at a minimum, it protects states from federal taxation of income "uniquely capable of being earned only by a State."[56] For example, Congress can tax state business activities like selling mineral water, but not a state's receipt of taxes paid by its residents.[57]

Due to plenary power, intergovernmental immunity does not protect Native tribes from federal taxation.[58] Constraints on Congress's taxation of

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Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs, 81 Tex. L. Rev. 1, 25–81 (2002) (analyzing the inherent power of the federal government over Native tribes); Matthew L.M. Fletcher, Resisting Federal Courts on Tribal Jurisdiction, 81 U. Colo. L. Rev. 973, 975 (2010) (describing the judicial assumption "that federal courts have plenary authority over tribal courts"); Zachary S. Price, Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction, 113 Colum. L. Rev. 657, 658 (2013) ("[T]he Supreme Court established that Congress has 'plenary' governmental authority, beyond its usual limited enumerated powers, with respect to Indian tribes and the territories."); Michalyn Steele, Plenary Power, Political Questions, and Sovereignty in Indian Affairs, 63 UCLA L. Rev. 666, 672 (2016) (recommending that courts use the political question and the plenary power doctrines to make Congress the ultimate arbiter over inherent tribal authority).

53. South Carolina v. Baker, 485 U.S. 505, 518 n.11 (1988) (explaining state tax immunity as a product of "constitutional structure and . . . state sovereignty").

54. States, of course, cannot tax federal instrumentalities. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 330 (1819). See generally Alex Zhang, U.S. National Report: Tax Immunity of Federal, State, and Tribal Governments, Am. J. Comp. L. (forthcoming 2026) [hereinafter Zhang, Tax Immunity] (providing an overview of the intergovernmental tax immunity doctrine).

55. *Baker*, 485 U.S. at 523 n.14.

56. New York v. United States, 326 U.S. 572, 582 (1946).

57. Compare id. at 582 ("[O]nly a State can get income by taxing."), with id. at 583–84 (upholding federal excise taxation of the bottling and sale of mineral water by New York). Today, much of state governments' and their instrumentalities' exemption from federal taxation comes from the IRS's expansive interpretation of § 115 of the Internal Revenue Code. See, e.g., Ellen P. Aprill, Revisiting Federal Tax Treatment of States, Political Subdivisions, and Their Affiliates, 23 Fla. Tax Rev. 73, 108 (2019) (explaining the implied statutory exemption from federal taxation for state governments and their instrumentalities); Zhang, Tax Immunity, supra note 54 (manuscript at 13) ("As to non-integral instrumentalities of state governments, the IRS has read § 115 of the Internal Revenue Code expansively to find exemptions which Congress may not have intended."); see also I.R.C. § 115.

58. See Reuven S. Avi-Yonah, The Dubious Constitutional Origins of Treaty Overrides: A Response to Rosenbloom and Shaheen, 26 Fla. Tax Rev. 287, 293 (2022) (citing The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1870)) (situating the federal taxation of tobacco on Indian land in the context of plenary power). Intergovernmental immunity does protect Native tribes from state taxes whose legal incidence falls on tribes, but this protection is subject to federal abrogation. See Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995) (holding states without power to tax Native tribes absent "cession of jurisdiction" or

tribes thus arise from limits specified in the Constitution, like apportionment of direct taxes or uniformity of duties and excises.[59] Exemption stems from legislative grace rather than constitutional mandate.[60] And the famous "political safeguards of federalism"—the protection afforded the states from their role in the "composition and selection" of the national government—have only a generalized and feeble existence as to tribes.[61] Native influence on federal policy must come from individual participation in the democratic process or group lobbying.[62] Shifts in political winds—or judicial sympathies—can quickly change the federal–tribal taxing relationship.

Current law exempts a small subset of Native economic activities from taxation. It is distinctive in three respects: (1) statutory and administrative *exemption* of tribes themselves (and select tribal corporations) from the federal income tax; (2) general *coverage* of Native populations under income-tax regimes, with a specific exclusion for income derived directly from trust land; and (3) the outsized role played by the judiciary, including specialty tribunals, in crafting tax policy.[63]

First, the Treasury Department has long construed Congress to exempt Native tribes from the income tax.[64] The federal government taxes

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federal statutory authorization); County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 251, 270 (1992) (holding that a local government can tax the value of real property held by a tribe because Congress authorized state taxation in the General Allotment Act).

59. U.S. Const. art. I, § 2, cl. 3 (direct taxation); id. § 8, cl. 1 (uniform duty, impost, and excise).

60. See Uniband, Inc. v. Comm'r, 140 T.C. 230, 242 (2013) ("[I]f and when Congress acts to subject Indian tribes to Federal tax liability, they become liable—for example, for the Federal excise tax on wagering . . . .").

61. See Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543, 543 (1954) (describing the ways in which federalism protects and elevates the status of states within the broader Union).

62. Unlike other groups, Native Americans have succeeded less in representative politics (i.e., by electing themselves to Congress) and achieved more through interest-group politics. Kirsten Matoy Carlson, Beyond Descriptive Representation: American Indian Opposition to Federal Legislation, 7 J. Race, Ethnicity & Pol. 65, 65–67 (2022). See generally David E. Wilkins & Heidi Kiiwetinepinesiik Stark, American Indian Politics and the American Political System (4th ed. 2018) (offering a political science overview of Native tribes' relationship with the federal and state governments).

63. But see James W. Colliton, Standards, Rules and the Decline of the Courts in the Law of Taxation, 99 Dick. L. Rev. 265, 267 (1995) (arguing that the rise of complex statutes has reduced the judicial role in taxation generally).

64. E.g., Rev. Rul. 81-295, 1981-2 C.B. 15, 16; see also Staff of Joint Comm. on Tax'n, 112th Cong., Overview of Federal Tax Provisions and Analysis of Selected Issues Relating to Native American Tribes and Their Members 3 (2012) ("No specific Code provision governs the U.S. income tax liability of Indian tribes. However, the Internal Revenue Service . . . has long taken the position that Federally recognized Indian tribes and wholly owned tribal corporations . . . are not taxable entities for U.S. income tax purposes . . . ." (footnotes omitted)).

corporate income.[65] The regulations define "corporation[s]" to include "association[s]."[66] While tribes are plausibly taxable associations,[67] administrative rulings have consistently recognized tribal exemption from the corporate income tax.[68]

Further, under section 17 of the Indian Reorganization Act of 1933 (IRA), tribes can petition the Secretary of the Interior to create federally chartered corporations.[69] Section 17 corporations are owned by, but distinct from, the tribes and afford Indigenous nations modern vehicles of business organization.[70] Treasury has recognized section 17 corporations as nontaxable, like tribes themselves.[71] It relied on the Supreme Court's dictum that tribal tax immunity cannot "turn on the particular form in which the Tribe chooses to conduct its business."[72] But one should not read into this substance-over-form pronouncement: While section 17 corporations do not pay income taxes, wholly owned tribal corporations chartered

65. I.R.C. § 11 (2018).

66. Treas. Reg. §§ 301.7701-2(b)(1)–(2) (1996); see also Sloan G. Speck, The Social Boundaries of Corporate Taxation, 84 Fordham L. Rev. 2583, 2584–85 (2016) (analyzing concepts of the corporation for tax purposes).

67. See United States v. Mazurie, 419 U.S. 544, 557 (1975) (describing tribes as "unique aggregations possessing attributes of sovereignty"). Such arguments are unpersuasive. Treas. Reg. § 301.7701-2(b)(1) refers to business entities organized under tribal statutes. It thus characterizes Native tribes as entities that can create—rather than themselves constitute—corporations. Judicial deference to tax regulations is now an open question, however, after *Loper Bright Enterprises v. Raimondo*. 144 S. Ct. 2244, 2273 (2024).

68. See Rev. Rul. 94-16, 1994-1 C.B. 19, 20 ("[A]n Indian tribe is not a taxable entity . . . ."); Rev. Rul. 81-295, 1981-2 C.B. 15, 16 (finding that federally chartered Indian tribal corporations are not taxable on "income from activities carried on within the boundaries of the reservation"); Rev. Rul. 67-284, 1967-2 C.B. 55, 58 ("Income tax statutes do not tax Indian tribes."); Mark J. Cowan, Leaving Money on the Table(s): An Examination of Federal Income Tax Policy Towards Indian Tribes, 6 Fla. Tax Rev. 345, 352 (2004) ("While the tax-free status of Indian tribes is clear enough, the rationale and analysis behind it is far from obvious.").

69. 25 U.S.C. § 5124 (2018) (codifying as amended the IRA, Pub. L. No. 73-383, § 17, 48 Stat. 984, 988 (1934)). Some tribal casinos and cigarette businesses, for example, are § 17 corporations. See, e.g., PBP Entertainment Corporation and Casino, Prairie Band Potawatomi Nation, https://www.pbpindiantribe.com/pbp-entertainment-corporation [https://perma.cc/42YF-LMWZ] (last visited Feb. 18, 2026) (describing the creation of the Prairie Band Potawatomi Entertainment Corporation, a § 17 corporation, under Tribal Council Resolution No. 2006-208); see also Big Sandy Rancheria Enters. v. Bonta, 1 F.4th 710, 714 (9th Cir. 2021) (considering "whether California cigarette tax regulations apply to inter-tribal sales of cigarettes by a federally chartered tribal corporation wholly owned by a federally recognized Indian tribe").

70. See U.S. Dep't of the Interior, Choosing a Tribal Business Structure 3–4 (2019), https://www.bia.gov/sites/default/files/dup/assets/as-ia/ieed/pdf/Choosing%20a%20Tribal%20Business%20Structure%204.8.19.pdf [https://perma.cc/BS5U-5N78].

71. Rev. Rul. 81-295, 1981-2 C.B. 15, 15; see also Entities Wholly Owned by Indian Tribal Governments, 90 Fed. Reg. 58,151, 58,151 (Dec. 16, 2025) (to be codified at 26 C.F.R. pts. 1, 301) ("[E]ntities that are wholly owned by Tribes and organized or incorporated under the laws of one or more of the Tribes that own them generally are not recognized as separate [taxable] entities for Federal tax purposes.").

72. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 157 n.13 (1973).

under *state* law do.[73] The form of incorporation matters, and section 17 corporations' tax exemption reflects (1) their close relationship with the federal government itself and (2) their genesis in the IRA, an exercise of Congress's power to promote constitutional democracy in core tribal *governance* functions.[74]

2. *Federal Taxation of Native Individuals.* — Tribes and *federally* chartered tribal corporations are thus exempt from federal taxation. This contrasts with the treatment of Native individuals: Congress has taxed accretions to their wealth since the infancy of the modern fiscal state.

The first test came in *Choteau v. Burnet*.[75] The 1931 case asked whether Congress intended to tax Native individuals' income derived from their interests in the *tribes'* income.[76] There, the petitioner-taxpayer held shares in the royalties for oil-and-gas leases on tribal trust land.[77] The tribal council entered into the leases with the approval of the Secretary of the Interior.[78] Fees were paid to the U.S. Treasury and distributed quarterly among tribal members.[79]

In a unanimous decision, the Supreme Court rejected the petitioner's challenge to income taxation of distributed tribal income. The Court reasoned that petitioner's "status as an Indian" only sheltered his income and property subject to federal supervision.[80] Congress aimed "to emancipate [Native populations] from [their] former status as a ward."[81] Courts therefore presume tax exemption for property placed under the federal government's tutelage, but not for income over which Native taxpayers had "absolute" dominion and "untrammeled ownership," even if it originated from an exercise of tribal sovereignty approved by the U.S. Department of the Interior.[82] The Revenue Act of 1919, tracking the Sixteenth Amend-

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73. Rev. Rul. 94-16, 1994-1 C.B. 19, 21.

74. See Maggie Blackhawk, Federal Indian Law as Paradigm Within Public Law, 132 Harv. L. Rev. 1787, 1813 (2019) [hereinafter Blackhawk, Federal Indian Law as Paradigm] ("The [IRA] offered the Native Nations the opportunity to ratify a written constitution, which the United States would recognize as governing within each Nation's territory, and to form a separate corporate charter in order to foster economic development and manage natural resources."); Judith Resnik, Dependent Sovereigns: Indian Tribes, States, and the Federal Courts, 56 U. Chi. L. Rev. 671, 704 (1989) (describing how the IRA let Indian tribes adopt constitutional governance under the supervision of the Secretary of the Interior).

75. 283 U.S. 691 (1931); see also Robyn L. Robinson, A Discussion of the Application of FICA and FUTA to Indian Tribes' On-Reservation Activities, 25 Am. Indian L. Rev. 37, 51 (2000) (noting that "[i]n *Choteau v. Burnet*, the Supreme Court held that a member's per capita share of the tribe's mineral royalty income was subject to federal income tax").

76. *Choteau*, 283 U.S. at 693.

77. Id. at 692–93.

78. Id.

79. Id. at 693.

80. Id. at 694.

81. Id.

82. Id. at 696 (citing Work v. United States ex rel. Lynn, 266 U.S. 161 (1924); Work v. United States ex rel. Mosier, 261 U.S. 352 (1923)).

ment's language, broadly included as "income" any gains "derived from any source whatever."[83] The result of *Choteau* is that tribes' exemption from the corporate income tax comes at the cost of subjecting tribal members to the individual income tax.[84] Congress, as construed by the Court, has functionally subjected Native tribes to the partnership tax regime.[85] Tribal income flows through—taxable—to individual members instead of being taxed at the entity level.[86]

Four years later, in *Superintendent of Five Civilized Tribes v. Commissioner*, the Supreme Court held Native individuals generally taxable on *all* streams of income.[87] *Five Tribes* arose from the peculiar history of Native ownership (and loss) of land: The General Allotment Act of 1887 tried to assimilate Native populations by allotting land to individual tribal members.[88] The United States held the allotment at first for twenty-five years to prevent state taxation.[89] The allotment regime led to a precipitous decline in Native land ownership, and Congress abandoned it in 1934.[90] In *Five Tribes*, the petitioner-taxpayer received income from his restricted allotment beyond the needs of daily consumption.[91] The taxpayer's excess income was held in trust by the superintendent and invested under the direction of the Interior Secretary.[92]

Did Congress intend to tax the investment income pursuant to the Revenue Act of 1928?[93] The Court answered yes. It pointed to the income-tax statute's broad language as evidence of Congress's exercise of its full

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83. Revenue Act of 1919, ch. 18, § 213, 40 Stat. 1057, 1065–66; see also U.S. Const. amend. XVI; *Choteau*, 283 U.S. at 693.

84. See supra notes 64–74 and accompanying text.

85. Today, per capita distributions to tribal members from trust funds held by Interior are not taxable. I.R.S. Notice 2015-67, 2015-41 I.R.B. 546; see also supra section I.A.1. Other distributions like income from gaming operations are expressly taxable. 25 U.S.C. § 2710(b)(3)(D) (2018).

86. I.R.C. §§ 701–771 (2018) (pass-through-taxation regime); Laura E. Cunningham & Noël B. Cunningham, The Logic of Subchapter K 1–17 (6th ed. 2020).

87. 295 U.S. 418, 421 (1935).

88. In general, each head of household received 160 acres. Dawes Severalty Act (General Allotment Act), ch. 119, § 5, 24 Stat. 387, 389–90 (1887).

89. Id. § 5, 24 Stat. at 389.

90. IRA, Pub. L. No. 73-383, § 1, 48 Stat. 984, 984 (1934); Kenneth H. Bobroff, Retelling Allotment: Indian Property Rights and the Myth of Common Ownership, 54 Vand. L. Rev. 1559, 1561 (2001) ("[T]he [allotment] policy had cost Indians almost 90 million acres, two-thirds of the land they owned."); Jessica A. Shoemaker, Complexity's Shadow: American Indian Property, Sovereignty, and the Future, 115 Mich. L. Rev. 487, 492–93 (2017) (describing and criticizing the allotment regime).

91. See *Five Tribes*, 295 U.S. at 418–19 ("Certain funds, said to have been derived from his restricted allotment, in excess of his needs were invested.").

92. Five Civilized Tribes v. Comm'r, 29 B.T.A. 635, 636 (1933).

93. *Five Tribes*, 295 U.S. at 419; see also Revenue Act of 1928, ch. 852, §§ 11–12, 45 Stat. 791, 795–97 (imposing normal and sur- taxes on individual income).

taxing powers under the Sixteenth Amendment.[94] Importantly, it appeared to dismiss Native taxpayers' control over the underlying income or property as key to taxability.[95] Gone was *Choteau*'s language of assimilative colonialism.[96] But so was the focus on fostering Native autonomy as a countervailing federal priority. The Court instead required an expression of "definite intent" before finding an exclusion from gross income.[97] Tax—and the revenue needs of Congress—thus prevailed over federal Indian law.

Choteau and *Five Tribes* established the general rule today: Congress taxes Native individuals on their income like everyone else. Courts, however, have found one stream of income exempt. Under the General Allotment Act, Congress conveys individually allotted Native land to the beneficial owner "free of all charge or incumbrance whatsoever" after the trust relationship terminates.[98] In a 1956 case, *Squire v. Capoeman*, the Supreme Court construed this language to imply an income-tax exemption for profits "derived directly" from trust land.[99] Proceeds from sale of timber on allotted trust land thus fell outside of capital-gains taxation.[100] In so holding, the Court noted two additional facts. First, the Interior Department sold timber on Native land in large quantities.[101] Purchasers were then required to make significant advanced payments.[102] This created challenges for access and infrastructure, so only the largest companies could bid.[103] Native timber was sold at steep discounts, thus reducing the income realized by the tribe and its citizens.[104] Second, the Court stated that the land was worth little after clearing the forest.[105] Taxing income

94. See *Five Tribes*, 295 U.S. at 420 ("The intent of Congress was to levy the tax with respect to all residents of the United States and upon all sorts of income."). The Court had used similar reasoning in *Eisner v. Macomber*, stating that "Congress intended in that [income tax] act to exert its power to the extent permitted by the [Sixteenth] [A]mendment." 252 U.S. 189, 203 (1920).

95. See *Five Tribes*, 295 U.S. at 421 ("Non-taxability and restriction upon alienation are distinct things.").

96. See Elizabeth Hidalgo Reese, Tribal Representation and Assimilative Colonialism, 76 Stan. L. Rev. 771, 776 (2024) [hereinafter Reese, Tribal Representation] (defining assimilative colonialism with reference to "strategies to refashion Indigenous groups into the dominant culture's likeness, . . . notably includ[ing] the practice of offering American political power—whether citizenship, the right to vote, or the possibility of statehood—only on terms of racial, cultural, or political erasure").

97. *Five Tribes*, 295 U.S. at 421.

98. General Allotment Act, ch. 119, § 5, 24 Stat. 388, 389–90 (1887).

99. 351 U.S. 1, 9 (1956).

100. Id. at 10.

101. Id. at 4 n.7.

102. Id.

103. Id.

104. Id.

105. Id. at 10.

from the sale of timber would deprive Native populations of the "chance of economic survival in competition with others."[106]

3. *Case Study:* Capoeman *Doctrine, Agency Conflicts, and Interpretive Collision.* — The evolution of the *Capoeman* doctrine presents a classic case study of federal Native tax law.[107] It dramatizes collisions between differing (1) statutory-construction methods and (2) institutional and judicial decisionmaking cultures. First, federal Indian law and tax law each employ distinctive interpretive principles. One interpretive canon in tax asks courts to construe deductions or exclusions from income narrowly, recognizing that Congress taxes accretions to wealth in exertion of its full powers under the Sixteenth Amendment.[108] But courts also read ambiguous terms in treaties and statutes in favor of Native tribes.[109] Second, taxation of Native communities engages actors with divergent institutional goals. The Bureau of Indian Affairs (BIA), a federal agency within the Interior Department, shapes Native policies, often to promote tribal autonomy.[110] By contrast, the Treasury Department raises revenue and aims to protect the federal fisc.[111]

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106. Id.

107. The *Capoeman* doctrine is not an idiosyncrasy of U.S. federal Indian law. Australia has a similar tax exemption known as Native title benefits. See Receiving Native Title Benefits, Australian Tax'n Off., https://www.ato.gov.au/aboriginal-and-torres-strait-islander-peoples/aboriginal-and-torres-strait-islander-peoples-and-individual-tax/receiving-native-title-benefits [https://perma.cc/94FT-K6NH] (last updated May 2, 2025).

108. See U.S. Const. amend. XVI; I.R.C. § 61 (2018) (defining gross income broadly to cover "all income from whatever source derived"); United States v. Burke, 504 U.S. 229, 244 (1992) (Scalia, J., concurring in the judgment) (citing United States v. Centennial Sav. Bank FSB, 499 U.S. 573, 582–83 (1991)) ("[T]he provision at issue here is a tax exemption, a category of text for which we have adopted a rule of narrow construction."); Old Colony Tr. Co. v. Comm'r, 279 U.S. 716, 729 (1929) (holding that an employer's payment of their employee's income taxes were taxable to the employee); Eisner v. Macomber, 252 U.S. 189, 203 (1920) ("Congress intended in [the income tax] act to exert its power to the extent permitted by the [Sixteenth] Amendment."); see also William N. Eskridge, Interpreting Law 444 (2016) (describing a "narrow interpretation" of federal tax exemptions and a "presumption" against tax deductions).

109. E.g., Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."); Metlakatla Indian Cmty. v. Dunleavy, 58 F.4th 1034, 1042 (9th Cir. 2023) (collecting cases).

110. The BIA has sometimes failed in its fiduciary duties to tribes. See Stephen L. Pevar, The Rights of Indians and Tribes 64 (4th ed. 2012) (explaining that federal agencies, like the BIA, "have too often ignored their responsibilities and taken actions that have stifled rather than supported tribal self-government"); Valerie Lambert, The Big Black Box of Indian Country: The Bureau of Indian Affairs and the Federal-Indian Relationship, 40 Am. Indian Q. 333, 335–42 (2016) ("The BIA is for many Indians a powerful symbol of US government oppression and subjugation of Indians and ongoing federal paternalism toward Indians."). But in its external battle with the Treasury, the Interior Department has favored Native interests. See, e.g., infra notes 123–124 and accompanying text.

111. See Stanley S. Surrey, A Comment on the Proposal to Separate the Bureau of Internal Revenue From the Treasury Department, 8 Tax L. Rev. 155, 156–57 (1953)

The confluence of these forces showed from the beginning. The Treasury urged the Court to decide *Squire v. Capoeman* "as an ordinary tax case," pointing to the broad statutory definition of gross income and no express exemption for income from trust land.[112] The Court disagreed. It acknowledged the clear-statement rule for tax exemptions.[113] But citing academic works and administrative guidance, Chief Justice Earl Warren found Indian-law principles controlling.[114] Because courts read "[d]oubtful expressions" in favor of Native tribes, the Allotment Act's mandate to transfer trust property "free of all charge or incumbrance" included a guarantee of nontaxability.[115]

The battle between tax and federal Indian law thus favored tribes at first. But *Capoeman* raised more questions than it answered. The key conceptual issue is how to administer the direct-derivation standard. Most economic value ultimately derives from activities on and use of land. The inquiry therefore becomes a line-drawing exercise focused on the meaning of the word "directly." Formalists may ask how many intermediate steps separate land use and the activity taxed. Functionalists may ask how much economic value is attributable to the land (e.g., fair market rent). Add to the conceptual question two doctrinal nitty-gritties: Does income-tax exemption apply to (1) specific allotment acts which do not contain the General Allotment Act's "charge or incumbrance" language;[116] and (2) land purchased by tribal members from the original allottees?[117]

Courts answered the two doctrinal questions first. As in *Capoeman*, they applied federal-Indian-law principles to find implied tax exemptions. *Stevens v. Commissioner* featured a direct conflict between Treasury and Interior.[118] There, a Native taxpayer sought exemption for income derived from his ranch located on land purchased from other Native allottees in

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(describing the U.S. practice of integrating tax administration and policymaking within one agency).

112. Squire v. Capoeman, 351 U.S. 1, 5, 9 (1956); see also Brief for the Petitioner at 7, 10–11, *Capoeman*, 351 U.S. 1 (No. 55-134) (arguing that tribal membership is no exception to the sweep of the "broad provisions of . . . the Internal Revenue Code").

113. See *Capoeman*, 351 U.S. at 6 ("[T]o be valid, exemptions to tax laws should be clearly expressed.").

114. Id. at 7–9 (citing Carpenter v. Shaw, 280 U.S. 363, 367 (1930); T.D. 3754, 1925-2 C.B. 37; T.D. 3570, 1924-1 C.B. 85; Income Tax—Five Civilized Tribes of Indians, 34 U.S. Op. Att'y Gen. 275, 281 (1924); Felix S. Cohen, Handbook of Federal Indian Law 265 (1940)).

115. *Capoeman*, 351 U.S. at 6–7 (first quoting *Carpenter*, 280 U.S. at 367; then quoting General Allotment Act, ch. 119, § 5, 24 Stat. 388, 389 (1887)); see also Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832) (asserting that ambiguous language, when used in treaties, should not be construed to prejudice Native tribes).

116. § 5, 24 Stat. at 389.

117. See Rev. Rul. 62-16, 1962-1 C.B. 7 (agency ruling that the *Capoeman* exemption does not apply to Native interests in land acquired "through an arm's length purchase rather than . . . through allotment, gifts, devise, or inheritance").

118. 452 F.2d 741, 743 (9th Cir. 1971).

Fort Belknap Reservation.[119] Unlike the General Allotment Act, the Fort Belknap Allotment Act does not mandate incumbrance-free transfer of property after the trust relationship terminates.[120] Treasury thus argued that the absence of an exemption provision in Fort Belknap Reservation's allotment act made the income taxable.[121]

The Ninth Circuit disagreed.[122] The court deferred to the Interior Department's position—appended, at Interior's request, to Treasury's appellate briefing[123]—that it exercised its statutory power to issue allotments in Fort Belknap with the same guarantees as the General Allotment Act.[124] It also relied on the "long-standing Congressional policy of treating Indians equally except where differences in tribal circumstances justify special legislation."[125] As to the exemption of income derived from *purchased* allotted land, the court again sided with Interior. The Ninth Circuit noted Native taxpayers' reliance interests: The BIA had facilitated exchanges of allotted land, with knowledge that Native communities presumed the nontaxability of purchased allotted land under *Capoeman*.[126] The court did not find persuasive tax principles like restrictive readings of exemption from gross income.[127] The *Capoeman* doctrine, the Ninth Circuit explained, was "not . . . technical or narrow," but grounded in Native autonomy, administrative practice, and the interpretive presumption in favor of tribes.[128]

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119. Id. at 742.

120. Compare Fort Belknap Allotment Act, ch. 135, § 1, 41 Stat. 1355, 1355–56 (1921) (providing for the allotment of land within the Fort Belknap Indian Reservation in Montana, but without the General Allotment Act's exemption language), with General Allotment Act, § 5 (providing that "at the expiration of said [trust] period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and *free of all charge or incumbrance whatsoever*" (emphasis added)).

121. *Stevens*, 452 F.2d at 744 ("The Commissioner argues that by reason of differences in the provisions of the General Allotment Act of 1887 and the Fort Belknap Allotment Act . . . under which the allotted lands were granted, Squire v. Capoeman is not applicable.").

122. Id. at 746, 749.

123. Id. at 748.

124. See id. at 746 ("As the agency charged with the administration of the Indian laws and responsible for drafting many of them, Interior's interpretation is entitled to 'great weight' and 'is not to be overturned unless clearly wrong.'" (quoting United States v. Jackson, 280 U.S. 183, 193 (1930))); id. at 745 n.10 (noting that the statement included at the Interior's request in the Commissioner's brief represents the position of the Interior Department); see also Brief for the Petitioner-Appellant at 42–43, *Stevens*, 452 F.2d 741 (Nos. 26193, 26281) ("The Secretary of the Interior has been given the responsibility to approve any transfers in trust and he is aware that abuses of the tax exemption could arise.").

125. *Stevens*, 452 F.2d at 745.

126. Id. at 748 (citing a letter from the Solicitor of the Department of the Interior to the Solicitor General).

127. Id. at 744 ("The Court recognized that 'to be valid, exemptions to tax laws should be clearly expressed' and that the 'Government's promise to transfer the fee "free of all charge or incumbrance whatsoever" is not expressly couched in terms of nontaxability . . . .'" (quoting Squire v. Capoeman, 351 U.S. 1, 6 (1956))).

128. See id. at 744–45.

The Interior Department thus triumphed in the immediate aftermath of *Capoeman*—at least in general jurisdiction courts that knew federal Indian law better than they liked tax. But Treasury prevailed on the conceptual—arguably more important—issue. It built on a string of victories in specialty tribunals like the Tax Court and the Court of Claims, whose expertise—if not sympathy—lies with the public fisc.[129] This process started with subregulatory guidance. In revenue rulings, Treasury negotiated the boundaries of the *Capoeman* exclusion: It first articulated a formula that apportioned income between land (exempt) and labor (nonexempt).[130] When administrability issues arose, it revoked apportionment in favor of complete exclusion, but limited the exclusion by (1) how taxpayers acquired the land; and (2) the funds dispensed in its acquisition.[131] When the Ninth Circuit decided *Stevens*, Treasury acquiesced, conceding these two points.[132]

Failure of agency action produced more vigorous contests in courts. The first major test came in 1979.[133] A Native taxpayer sought exemption for income from motel operations located within the reservation on trust land, in which she held certificates of possessory holding.[134] Relying on the allotment statute and *Capoeman*, she contended that her business generated value on land.[135] Treasury disagreed and argued that income-tax exemption applied only "where the *essential* and *primary* source of the revenue is the land itself."[136] The en banc Court of Claims (a now-defunct,

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129. See Deborah A. Geier, The Tax Court, Article III, and the Proposal Advanced by the Federal Courts Study Committee: A Study in Applied Constitutional Theory, 76 Corn. L. Rev. 985, 998 tbls. I & II (1991) (showing that the government won or partially won 70.5% of tax cases docketed at the district court, while winning or partially winning 90.4% of cases docketed at the Tax Court); David Laro, The Evolution of the Tax Court as an Independent Tribunal, 1995 U. Ill. L. Rev. 17, 24–25 (highlighting the expertise of Tax Court judges); Leandra Lederman, (Un)Appealing Deference to the Tax Court, 63 Duke L.J. 1835, 1880–85 (2014) (describing the specialization of Tax Courts and the concomitant potential for bias).

130. See, e.g., Rev. Rul. 60-377, 1960-2 C.B. 13 (allocating income from the sale of livestock raised by Native taxpayers on allotted land between the portion attributable to the land and the portion attributable to labor and the use of equipment and exempting up to the market grazing fees).

131. See, e.g., Rev. Rul. 56-342, 1956-2 C.B. 20 (scope of the *Capoeman* exemption); Rev. Rul. 58-64, 1958-1 C.B. 12 (taxing income from sale of cattle raised on allotted land); Rev. Rul. 62-16, 1962-1 C.B. 7 (taxing income derived from land acquired through arms-length transactions).

132. Rev. Rul. 74-13, 1974-1 C.B. 14 (acquiescing to *Stevens*, 452 F.2d at 741).

133. Critzer v. United States, 597 F.2d 708 (Ct. Cl. 1979) (en banc).

134. Id. at 709. Certificates of possessory holding, unlike allotments, cannot ripen into fee title. In *Critzer*, the original trial judge held both equivalent for tax exemption. Treasury declined to appeal this ruling. Id. at 711 n.7; Critzer v. United States, No. 134-75, 1977 WL 3788, at *7 (Ct. Cl. July 12, 1977).

135. *Critzer*, 597 F.2d at 712.

136. Id. (emphasis added).

specialty Article III court) sided with the government.[137] The court's reasoning was rooted in tax policy rather than doctrinal exegesis. It laid out a spectrum of taxable activities. On the one end are taxpayers selling stocks from on-reservation phonebooths.[138] Their businesses, while conducted on trust land, generate value from nonexempt labor.[139] On the other end are taxpayers with capital gains from sale of timber—income which the court "easily" saw was "directly derived" from land and thus exempt in *Capoeman*.[140] The court analogized the taxpayer's motel to the former, attributing her income to labor and improvements severable from land.[141] Exemption would embolden "businessmen" with "perpetual and total tax shelters . . . unavailable to all others."[142] The en banc court thus declined to apply federal-Indian-law principles to tax: Congress grants exemptions, "even those affecting Indians, . . . by a definite expression."[143]

The morass of agency guidance, judge-made law, and conflicting principles created what one court called "a crazy-quilt pattern."[144] In 1986, the doctrine crystallized through a creative rereading of *Capoeman* itself. In familiar fact patterns, Native taxpayers sought exemption for income derived from commercial activities like gift stores, gas stations, and smoke shops on trust land.[145] The Claims Court sided with Treasury. The court grounded its decision in *Capoeman*'s observation that the sale of timber significantly reduced the value of the allotted land, which was unsuitable for other uses.[146] Income-tax exemption therefore applies only "if the

137. Id. at 709. The Court of Claims was an Article III tribunal with subject-matter jurisdiction over money claims against the government. Glidden Co. v. Zdanok, 370 U.S. 530, 571, 584 (1962). In 1982, Congress terminated its operation, transferring trial functions to the new United States Claims Court (now the Court of Federal Claims) and appellate functions to the new Court of Appeals for the Federal Circuit. See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25; Philip R. Miller, The New United States Claims Court, 32 Clev. St. L. Rev. 7, 7–8 (1983).

138. *Critzer*, 597 F.2d at 713 ("If plaintiff were to sit in a telephone booth on her Indian land and sell stocks and bonds by phone from the booth, it would be ludicrous to attempt to argue that any income, so earned, was directly derived from the land.").

139. Id. at 713.

140. Id. at 713–14 (citing Squire v. Capoeman, 351 U.S. 1, 9 (1956)).

141. Id. at 714; see also id. at 713 (distinguishing Stevens v. Comm'r, 452 F.2d 741 (9th Cir. 1971); United States v. Daney, 370 F.2d 791 (10th Cir. 1966); and Big Eagle v. United States, 300 F.2d 765 (Ct. Cl. 1962)).

142. Id. at 714. The use of tax shelters by wealthy taxpayers caused serious issues until the Tax Reform Act of 1986. Tanina Rostain, Sheltering Lawyers: The Organized Tax Bar and the Tax Shelter Industry, 23 Yale J. on Reg. 77, 83 (2006); George K. Yin, Getting Serious About Corporate Tax Shelters: Taking a Lesson From History, 54 SMU L. Rev. 209, 210 (2001).

143. *Critzer*, 597 F.2d at 715 (citing Mescalero Apache Tribe v. Jones, 411 U.S. 145, 156 (1973); *Capoeman*, 351 U.S. at 6; Okla. Tax Comm'n v. United States, 319 U.S. 598, 606–07 (1943)).

144. Saunooke v. United States, 9 Cl. Ct. 537, 545 (1986).

145. Dillon v. United States, 792 F.2d 849, 851–52 (9th Cir. 1986); *Saunooke*, 9 Cl. Ct. at 537–38.

146. *Saunooke*, 9 Cl. Ct. at 540–41 (quoting *Capoeman*, 351 U.S. at 10).

value of the land from which the income is generated is diminished or the land no longer serves the purpose for which [it was] allotted"[147]—that is, only if income results from exploitation of land that decreases its value. Under this standard, nonextractive uses of land—commerce, manufacturing, and even most forms of agriculture—receive no exemption. This reasoning soon spread from specialty tribunals to general jurisdiction courts.[148] Within a year, the Ninth Circuit adopted the diminution rationale. In a stunning reversal, the court called Native taxpayers' argument—even to apportion and exempt part of the income—"another attempt by taxpayers to broaden the rule in *Capoeman*."[149]

The diminution rule is a specious interpretation of *Capoeman*—better seen in the context of judicial attempts to curb tax shelters and protect the income-tax base in the 1980s.[150] *Capoeman* does not limit the exemption to exploitation of land. The Supreme Court mentioned diminution of land value only to illustrate the "wisdom" of tax exemption in "the facts of the instant case."[151] Those precise facts never marked the boundary of taxability. As the Ninth Circuit itself held, *Capoeman* was "not a technical or narrow decision."[152] Further, stated without qualification, the diminution rationale hardly explains case outcomes. In *Capoeman*, the sale of timber reduced the property's value. The same is true in later cases, in which the sale of commercial operations would have reduced property value.[153] The distinction must be one between natural growths (e.g., forest) and man-made capital improvements (e.g., buildings and equipment). But *Capoeman* articulated no such distinction. And this natural-growth/capital-improvement divide would exclude from the *Capoeman* doctrine activities long recognized as exempt.[154] Finally, as to policy, the diminution rule vio-

147. Id. at 541.

148. Beyond general money claims, the Court of Claims handled claims by Native tribes against the federal government accruing after August 13, 1946, exercised jurisdiction over appeals from the Indian Claims Commission, and resolved disputes pending at the Indian Claims Commission when it dissolved in 1978. Indian Claims Commission Act, Pub. L. No. 79-726, §§ 20, 24, 60 Stat. 1049, 1054–55 (1946) (terminated by 25 U.S.C. § 70v (2018)); Indian Claims Commission Appropriations Act, Pub. L. No. 94-465, § 2, 90 Stat. 1990, 1990 (1976).

149. *Dillon*, 792 F.2d at 857.

150. See supra note 142; see also Marvin A. Chirelstein & Lawrence A. Zelenak, Tax Shelters and the Search for a Silver Bullet, 105 Colum. L. Rev. 1939, 1951 (2005) (describing the retail "tax shelter wars," which featured "the mass marketing of debt-financed tax shelters to upper-middle (and even middle-middle) income taxpayers in the 1970s and 1980s").

151. See *Capoeman*, 351 U.S. at 10.

152. Stevens v. Comm'r, 452 F.2d 741, 744 (9th Cir. 1971).

153. See supra notes 133–149 and accompanying text.

154. See Rev. Rul. 62-16, 1962-1 C.B. 7 (exempting "proceeds from the sale or exchange of cattle and other livestock raised by an Indian on his allotted and restricted lands"); Rev. Rul. 56-342, 1956-2 C.B. 20 (exempting "proceeds of sales of the natural resources of such land, and income from the sale of crops grown upon the land and from the use of the land for grazing purposes"); see also Cross v. Comm'r, 83 T.C. 561, 572 (1984)

lates horizontal equity (i.e., the principle that the tax system should treat similarly situated taxpayers similarly).[155] The result of *Saunooke v. United States* and *Dillon v. United States* is that Native taxpayers receive income-tax exemption *only* if they rent out commercial establishments for others to operate, but are deprived of the exemption if they run the business themselves.[156] This contradicts principles of tax fairness and operates as an obstacle to Native economic development.[157]

This case study of the *Capoeman* exemption yields three insights. First, agency conflicts and divergent decisional cultures have driven doctrinal evolution. Treasury proved more assertive in carrying out its statutory mandate (revenue-raising) than Interior was consistently faithful to Native interests. This is unsurprising. Broader political and social changes often shift the BIA's effectiveness and institutional loyalty.[158] By contrast, any gov-

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(Parker, J., dissenting in part) ("Farming and ranching, unless improperly conducted, do not damage or diminish the value of the trust land.").

155. Scholars have criticized horizontal equity as derivative because market, pre-tax income is not a fair baseline for redistribution. See Liam Murphy & Thomas Nagel, The Myth of Ownership 12–39 (2002) [hereinafter Murphy & Nagel, The Myth of Ownership] (arguing that horizontal equity may or may not be appropriate considering the goal that tax justice "be part of an overall theory of social justice and of the legitimate aims of government"); Lawrence Zelenak & Ajay K. Mehrotra, Introduction to A Half-Century With the Internal Revenue Code: The Memoirs of Stanley S. Surrey, at xxxv-xxxviii (Lawrence Zelenak & Ajay K. Mehrotra eds., 2022) (summarizing academic critiques of horizontal equity theories); Louis Kaplow, Horizontal Equity: Measures in Search of a Principle, 42 Nat'l Tax J. 139, 139 (1989) ("[Horizontal equity] is now frequently measured and applied even though there has been virtually no exploration of why one should care about the principle in the contexts and in the manner in which it is now being used."). Others have defended it as a matter of politics and compromise. Ira K. Lindsay, Tax Fairness by Convention: A Defense of Horizontal Equity, 19 Fla. Tax Rev. 79, 83 (2016) (offering a limited defense of horizontal equity "as a compromise principle for people who disagree about the justice of redistributive taxation"); James Repetti & Diane Ring, Horizontal Equity Revisited, 13 Fla. Tax Rev. 135, 138–39 (2012) (grounding the persistence of debate over horizontal equity in "a shared belief that government should communicate the rationale for treating people differently"). In conceptualizing horizontal equity within federal Indian law and *Capoeman*, Native autonomy becomes a critical factor.

156. Dillon v. United States, 792 F.2d 849, 856 (9th Cir. 1986) (denying tax exemption for income "not generated principally from the use of reservation land and resources" but rather "earned primarily through . . . taxpayers' labor, the sale of goods produced off the reservation and improvements constructed on the trust land"); Saunooke v. United States, 9 Cl. Ct. 537, 545 (1986) (describing the "anomaly" that "if an Indian rents his possessory holding to someone who operates a gift shop, his rental income is tax[-]exempt, but if the same Indian is industrious enough to run the business himself, the income allocable to rent is taxable").

157. See generally Fletcher, In Pursuit of Tribal Economic Development, supra note 14 (assessing tribal commercial development as a partial substitute for tax revenue); Richard J. Ansson, Jr. & Ladine Oravetz, Tribal Economic Development: What Challenges Lie Ahead for Tribal Nations as They Continue to Strive for Economic Diversity?, 11 Kan. J.L. & Pub. Pol'y 441 (2001) (providing an overview of challenges in tribal attempts at economic diversification).

158. See generally Russel Lawrence Barsh, The BIA Reorganization Follies of 1978: A Lesson in Bureaucratic Self-Defense, 7 Am. Indian L. Rev. 1 (1979) (analyzing the BIA's

ernment's inherent fiscal needs will sustain a bureaucratic culture that fights for the fisc.[159] The structure of federal courts that adjudicate tax disputes adds to this dynamic. The Tax Court and the Court of Federal Claims make for litigation fora sympathetic to tax principles.[160] When agency actions fail, Treasury can ventilate its positions in venues that, because of their expertise in taxation, replicate administrative rather than judicial mores.[161] Interior has no second-chance forum. In contesting the reach of *Capoeman*, Treasury could compensate defeats by riding the momentum of victories in specialty tribunals.[162] Timing helped. General jurisdiction courts—less partial to the fisc—have lost interest in tax cases in the last few decades.[163] Scholars have commented on the strangeness of advocating

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1978 reorganization as a bureaucratic self-preservation effort that undermined tribal sovereignty); Felix S. Cohen, The Erosion of Indian Rights, 1950–1953: A Case Study in Bureaucracy, 62 Yale L.J. 348 (1953) (demonstrating that federal administrative actions in the mid-twentieth century weakened tribal rights through bureaucratic decisionmaking rather than legislation).

159. See Kristin E. Hickman, Administering the Tax System We Have, 63 Duke L.J. 1717, 1724 (2014) (explaining that the IRS's bureaucratic culture and practices are oriented toward revenue raising, despite Congress's delegation of regulatory and welfare-policy tasks); Nat'l Taxpayer Advoc., 2012 Annual Report to Congress, at x (2012), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2012-Annual-Report-to-Congress-Executive-Summary.pdf [https://perma.cc/6QXZ-9AWE] (explaining that an underfunded IRS is a significant source of taxpayer issues).

160. See Nina J. Crimm, Tax Controversies: Choice of Forum, 9 B.U. J. Tax L. 1, 2 (1991) (analyzing the range of fora available in tax cases); Thomas D. Greenaway, Choice of Forum in Federal Civil Tax Litigation, 62 Tax Law. 311, 311–317 (2009) (same).

161. See Lawrence Baum, Probing the Effects of Judicial Specialization, 58 Duke L.J. 1667, 1677 (2009) (arguing that specialist judges with subject-matter expertise are "likely to be more assertive than generalists in their policymaking"); Laura G. Pedraza-Fariña, Understanding the Federal Circuit: An Expert Community Approach, 30 Berkeley Tech. L.J. 89, 94–96 (2015) (conceptualizing the Federal Circuit as an expert community).

162. Compare Saunooke v. United States, 9 Cl. Ct. 537 (1986) (judgment for Treasury), and Cross v. Comm'r, 83 T.C. 561 (1984) (en banc) (same), and Hoptowit v. Comm'r, 78 T.C. 137 (1982) (same), and Critzer v. United States, 597 F.2d 708 (Ct. Cl. 1979) (en banc) (same), with Stevens v. Comm'r, 452 F.2d 741 (9th Cir. 1971) (judgment for Native taxpayer); United States v. Daney, 370 F.2d 791 (10th Cir. 1966) (same).

163. In 1941, Stanley Surrey counted tax as the largest subject matter on the Supreme Court's docket. Stanley S. Surrey, The Supreme Court and the Federal Income Tax: Some Implications of the Recent Decisions, 35 Ill. L. Rev. 779, 779 (1941). Today, the Court hears at most a few tax cases each term. See, e.g., Moore v. United States, 144 S. Ct. 1680, 1687 (2024) ("We must decide whether the 2017 Mandatory Repatriation Tax, or MRT, exceeds Congress's constitutional authority."); Connelly v. United States, 144 S. Ct. 1406, 1411 (2024) ("We granted certiorari . . . to address whether life-insurance proceeds that will be used to redeem a decedent's shares must be included when calculating the value of those shares for purposes of the federal estate tax." (citation omitted)). At the trial level, the Tax Court and the Court of Federal Claims have 28,500 cases in an average year, while the district courts docket 600 tax cases. Nat'l Taxpayer Advoc., Annual Report to Congress 188 & fig. 3.13 (2022) (on file with the *Columbia Law Review*) (noting that the Tax Court hears about 28,200 cases and the Court of Federal Claims hears about 300).

Native interests in "courts of the conqueror."[164] Tax-specialty tribunals amplified these dynamics.

Second, the collision of interpretive principles has framed but hardly predetermined case outcomes. Tax principles—at least as invoked by federal courts in adjudicating Native tax disputes—often place high bars on claims of exemption or deduction from gross income.[165] Federal Indian law suggests the opposite should be the case, establishing interpretive defaults against the federal government.[166] Immediately after *Capoeman*, courts favorably applied—as the Supreme Court did—Native canons of construction to find additional income-tax exemptions at the interstices.[167] That was at the expense of tax principles and motivated by (even if paternalist) concerns for Native autonomy. As one court remarked, Native Americans may no longer need tax exemption because of their status as "independent, qualified member[s] of the modern body politic," so "all the 'ordinary' tax principles should [apply]."[168] Mindful of separation-of-powers concerns, the court punted that task to Congress.[169] But as doctrine matured, another form of judicial restraint—hesitating to intrude into federal fiscal policy—prevailed. Expert adjudicators chose the doctrinal strictures of their craft (tax), and Native canons became an afterthought.[170] Favorable construction of treaties evolved into a strict requirement of "express exemptive language."[171] The invocation and battle between these principles thus mask normative choices made by agencies and the courts.

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164. Nell Jessup Newton, Indian Claims in the Courts of the Conqueror, 41 Am. U. L. Rev. 753, 753 (1992); see also Glen A. Wilkinson, Indian Tribal Claims Before the Court of Claims, 55 Geo. L.J. 511, 511 (1966) ("Perhaps the most fascinating aspect of the jurisdiction exercised by the Court of Claims is its jurisdiction over Indian tribal claims against the United States.").

165. See supra note 108 and accompanying text.

166. See supra note 109 and accompanying text.

167. See, e.g., *Stevens*, 452 F.2d at 749 (holding that income derived from certain lands purchased by the Secretary of the Interior on behalf of Native tribes is exempt from income tax by the General Allotment Act); *Daney*, 370 F.2d at 795 (interpreting the statute to extend a tax exemption to income derived from Native land).

168. *Daney*, 370 F.2d at 795.

169. Id.

170. See supra notes 133–157 and accompanying text; see also, e.g., Saunooke v. United States, 9 Cl. Ct. 537, 543 (1986) ("The conclusion flowing from this morass of authorities is that *Capoeman* borrowed from Cohen's treatise only the notion of the 'derived directly' test and developed a *narrow* meaning for it in broadly construing the General Allotment Act to exempt income generated by trust lands from federal taxation." (emphasis added)).

171. Hoptowit v. Comm'r, 78 T.C. 137, 142–43 (1982) (internal quotation marks omitted) (quoting United States v. Anderson, 625 F.2d 910, 913 (9th Cir. 1980)) "[A]mbiguous language in a treaty or statute is to be construed in favor of Indians. . . . This principle 'comes into play,' however, 'only if such statute or treaty contains language which can reasonably be construed to confer income [tax] exemptions.'" Id. at 142 (second alteration in original) (citations omitted) (quoting Holt v. Comm'r, 364 F.2d 38, 40 (8th Cir. 1966)).

This again tracks broader developments in judicial interpretive practices. Tax principles arise from two rules that ask courts to contextualize provisions within the statutory scheme and mandate narrow construal of exceptions/proviso clauses.[172] After all, Congress taxes "all income from whatever source derived."[173] Any exemption is therefore a carve-out from the Code. By contrast, federal-Indian-law canons are like the rule of lenity. They construe statutory language in favor of distinct, disadvantaged groups of people (e.g., Native populations and criminal defendants).[174] While the framework behind tax principles remains a foundation of statutory construction, the use of lenity has declined since the 1950s.[175]

Third, divergent agency priorities, institutional cultures, and conceptual approaches produced a doctrine that instantiated neither Native nor tax values. The key question raised by *Capoeman* prompts a line-drawing exercise. On the one end are Native citizens who practice law on their allotted trust land. On the other are Native landowners who receive compensation for damage to their allotted land through heavy industrial mining.[176] If *Capoeman* aims to promote Native autonomy, courts should draw the line close to the former. Income from commerce on allotted trust land, even if derived from labor, should be exempt. The en banc Court of Claims cast as "ludicrous" attempts to exclude such earned income.[177] But its concern with tax shelters was overblown. Not every lawyer or doctor can claim exemption under *Capoeman*. Instead, *Native* taxpayers must operate their business on allotted *trust land*.[178] The better tax-policy argument is that exemption disproportionately benefits higher-income Native taxpayers and reduces progressivity.[179] But this overlooks *federal* exemption's

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172. E.g., King v. Burwell, 576 U.S. 473, 496–97 (2015) (whole-act rule); Comm'r v. Clark, 489 U.S. 726, 739 (1989) (narrow construal of exceptions); Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945) ("To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process . . . ."); Eskridge, supra note 108, at 411 (defining the "Whole act rule").

173. See I.R.C. § 61 (2018).

174. See, e.g., Yates v. United States, 574 U.S. 528, 547–49 (2015) (plurality opinion) (applying the rule of lenity to narrow the purview of a criminal statute); Eskridge, supra note 108, at 430 (defining the "Rule of lenity").

175. Zachary Price, The Rule of Lenity as a Rule of Structure, 72 Fordham L. Rev. 885, 885–86 (2004) ("[T]he rule [of lenity] has lately fallen out of favor . . . ."); David S. Romantz, Reconstructing the Rule of Lenity, 40 Cardozo L. Rev. 523, 534–47 (2018) (describing the decline of the Court's application of lenity since the 1950s).

176. This is a more precise formulation of the taxable/nontaxable activities distinction articulated in *Critzer v. United States*. 597 F.2d 708, 713–14 (Ct. Cl. 1979) (noting that income is exempt from taxation when derived "just [from] the land," whereas income is taxable when derived from "utilization of the capital improvements constructed on the land").

177. Id.

178. The *Capoeman* exemption is grounded in the General Allotment Act, ch. 119, § 5, 24 Stat. 388, 389–90 (1887), not tribal membership alone.

179. The federal income tax features progressive marginal rates: A $1 *Capoeman* exemption is worth 37 cents for taxpayers in the highest taxable bracket and 10 cents for those in the lowest bracket. I.R.C. § 1 (2018).

potential to spur *tribal* redistribution. That is, a more capacious *Capoeman* exemption leaves tribes with a larger fiscal capacity and enables them to impose income taxes in accordance with their members' sense of fairness.[180] And the tribal tax system may well have progressive distributive effects.

By contrast, faithfulness to income-tax principles should have resulted in apportionment.[181] Treasury can apportion mixed income from land, labor, and capital improvements among its sources under *Capoeman*.[182] Income attributable to the allotted land's value should be exempt—an approach that respects horizontal equity and substance over form.[183] Current doctrine does not. It incentivizes Native taxpayers to rent out their allotted land—as rental income receives the federal tax subsidy—instead of developing such land on their own accord.[184] This is inefficient: Why should Native allottees face higher post-tax costs for business operations than outside companies?[185] It is reminiscent of colonialism.[186] There are reasons for this outcome. But they sound in historical and institutional contingency rather than analytical rigor.

As this study of *Capoeman* and its doctrinal progeny shows, federal courts have narrowly construed one of the only tax exemptions for Native individuals grounded in their Indian status.[187] Although tribal members

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180. See infra sections I.B, III.B.

181. Apportionment is a familiar concept in taxation. See, e.g., Reuven S. Avi-Yonah, Kimberly A. Clausing & Michael C. Durst, Allocating Business Profits for Tax Purposes: A Proposal to Adopt a Formulary Profit Split, 9 Fla. Tax Rev. 497, 498 (2009) (arguing for a system of formulary apportionment in multinational corporate income taxation). *Critzer* discussed the possibility of apportionment, but the plaintiffs failed to raise the argument. 597 F.2d at 714 ("[I]t might be appropriate in certain instances to allocate income based upon the relative value of the land vis-a-vis any improvements or services."). *Dillon* and *Saunooke* rejected apportionment. See Dillon v. United States, 792 F.2d 849, 857 (9th Cir. 1986) ("We reject taxpayers' attempt to exempt a portion of their income based on the fair rental value of the property."); Saunooke v. United States, 9 Cl. Ct. 537, 545 (1986) ("Plaintiffs' argument [for tax apportionment] must be rejected.").

182. Squire v. Capoeman, 351 U.S. 1, 10 (1956).

183. See Anne L. Alstott, Income Taxation in Six Concepts 7–8 (2018) (substance over form); supra note 155 (criticism and defenses of horizontal equity).

184. See supra note 156 and accompanying text.

185. That is, tax incentivizes some Native taxpayers with a competitive advantage in conducting business on their allotted land to rent the land to external companies, because rental income is exempt. See supra note 156 and accompanying text.

186. See Blackhawk, The Constitution of American Colonialism, supra note 44, at 9 n.31 (collecting scholarship); see also Joseph Bankman, Daniel N. Shaviro, Kirk J. Stark & Erin Adele Scharff, Federal Income Taxation 109–10 (19th ed. 2023) (discussing the relationship between taxation and the social contract, as well as the potential of using tax policy to remedy subordination, in the context of *Capoeman*).

187. Morton v. Mancari, 417 U.S. 535, 554 (1974) (describing the BIA's employment preference for Indians "not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion"); United States v. Bruce, 394 F.3d 1215, 1223 (9th Cir. 2005) (explaining the

prevailed in the early contests, the Treasury Department soon succeeded in limiting the exemption to extractive uses of land that diminish its value. The diminution principle does not reflect the most natural reading of the original case law or robust applications of income-tax logic. Instead, it has resulted from divergent institutional decisionmaking cultures and interpretive preferences.

B. *Tribal Taxing Power: Benefits Theory, Dependent Sovereigns, and Strict Autonomy*

The previous section's analysis structures our understanding of tribal taxing power. The federal tax regime grants little preferential treatment to Native Americans.[188] Congress subjects tribal members to income taxation like all U.S. citizens, except for income derived from trust land under *Capoeman*, but federal courts have narrowly construed the exemption to encompass only those activities that decrease the value of the land itself.[189] Tribal governments are not taxed as corporations, but distributions to members are generally taxable as ordinary income.[190] As a result, Native tribes compete with Congress, in addition to states, for revenue.[191]

"judicially explicated" meaning of Indian status (internal quotations omitted) (quoting United States v. Broncheau, 597 F.2d 1260, 1263 (9th Cir. 1979))).

188. Section I.A focuses on income taxes, the largest federal receipt. As to payroll taxes: Tribes must pay employer-collected portions of payroll taxes, except on compensation paid for services as tribal councilors. In 2018, Congress enabled tribes, through voluntary agreement with the Social Security Commissioner, to cover tribal councilors under employment taxes and federal social-insurance programs funded by those taxes. Thirty-one tribes have entered into such agreements. See Tribal Social Security Fairness Act of 2018, Pub. L. No. 115-243, § 2, 132 Stat. 2894, 2894–96 (codified at 42 U.S.C. § 418a(a) (2018)) ("The Commissioner of Social Security shall, at the request of any Indian tribe, enter into an agreement . . . [to] extend[] the insurance system established by this title to services performed by individuals as members of such Indian tribe's tribal council."); Staff of Joint Comm. on Tax'n, 115th Cong., Description of H.R. 6124, The "Tribal Social Security Fairness Act of 2018," at 3–4 (2018) ("The proposal amends the Social Security Act to provide that, at the request of an Indian tribe, the Commissioner of Social Security will enter into an agreement with the Indian tribe to cover services performed by individuals as members of the Indian tribe's tribal council under the OASDI and Medicare programs."); Rev. Rul. 59-354, 1959-2 C.B. 24 (exempting tribal councilors' wages from federal employment taxes); SSA, Program Operations Manual System RS 01901.700, Services Performed by Members of Indian Tribal Councils (2025) (outlining procedures for voluntary agreements with tribes).

189. See supra section I.A.3.

190. See supra note 85 and accompanying text (noting the exception for per capita distribution to tribal members from trust funds). Payments by tribes to foster general welfare are excludable, under the general welfare doctrine (not specific to Native households). See I.R.C. § 139E (2018); Samuel D. Brunson & Christian A. Johnson, Good Intentions: Administrative Fiat and the General Welfare Exclusion, 100 Wash. U. L. Rev. 1411, 1440–41 (2023) ("[I]n 2014 Congress enacted the Tribal General Welfare Exclusion Act which codified the general welfare exclusion as it applied to Native American Tribes.").

191. See infra section I.C (discussing the states' power to tax Native communities).

Importantly, carving out the federal income-tax base to support the fiscal capacity of subfederal entities is not unprecedented.[192] This is precisely how Congress treats the U.S. territories today. As this Article shows, Congress has forgone collection of federal income, estate, and excise taxes in jurisdictions like Puerto Rico and Guam to enlarge its revenue streams.[193] Expansive delegation to territorial governments has not produced beacons of success.[194] But differentiation between tribes and territories—over both of which Congress holds plenary power and vows to foster autonomy—in federal tax treatment and delegated fiscal power raises difficult conceptual questions and demands justification.[195]

Federal taxation thus constrains tribal fiscal capacity. Add to these constraints judicial limits on tribal taxing jurisdiction. Few Native tribes tax their own members, due to poverty and the absence of federal subsidy.[196] Disputes therefore focus on tribes' taxation of *nonmembers* for their economic activities on reservations.[197] At first, the Supreme Court embraced an expansive conception of tribal tax authority. In *Washington v. Confederated Tribes of the Colville Indian Reservation*, the Court allowed tribes to tax on-reservation sale of cigarettes at forty to fifty cents per carton.[198] According to the Court, the power to tax transactions "on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty."[199] Exercise of this sovereignty is presumptively valid unless divested by statute or by implication of tribes' dependent status. The Court found no such divestiture.[200] Likewise in *Merrion v. Jicarilla Apache Tribe*,

192. Congress has not attempted a modern wealth or sales tax. See generally Ajay K. Mehrotra, The Missing U.S. VAT: Economic Inequality, American Fiscal Exceptionalism, and the Historical U.S. Resistance to National Consumption Taxes, 117 Nw. U. L. Rev. 151 (2022) (examining American resistance to a value-added tax). This decision leaves room for state and local taxation of property and consumption.

193. See infra section II.A.

194. See infra notes 355–371 and accompanying text (describing congressional and territorial criticism of the Puerto Rico tax incentive regime).

195. See infra section II.A.

196. See, e.g., Adam Crepelle, Federal Policies Trap Tribes in Poverty, ABA (Jan. 6, 2023), https://www.americanbar.org/groups/crsj/resources/human-rights/archive/federal-policies-trap-tribes-poverty/ (on file with the *Columbia Law Review*) [hereinafter Crepelle, Federal Policies] (describing the weak economic state of Native tribes and the lack of federal support). Congress provides a limited federal subsidy through an income tax deduction for tribal taxes paid (on the same terms as state and local taxes). See I.R.C. § 164 (2018) (state- and local-tax deduction); I.R.C. § 7871(a) ("An Indian tribal government shall be treated as a State . . . for purposes of section 164.").

197. See, e.g., Atkinson Trading Co. v. Shirley, 532 U.S. 645, 649 (2001) (invalidating hotel occupancy taxes imposed by the Navajo Nation on nonmembers visiting the reservation).

198. 447 U.S. 134, 144, 154 (1980). Most purchasers were nonmembers, who bought cigarettes on reservation land because of their (contested) exemption from the higher excise taxes imposed by the state. Id.

199. Id. at 152.

200. Id. at 152–53 (citing Morris v. Hitchcock, 194 U.S. 384, 393 (1904); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956); Buster v. Wright, 135 F. 947, 950 (8th Cir. 1905); Trespassers on Indian Lands, 23 U.S. Op. Att'y Gen. 214 (1900); Intruders on Lands

the Court upheld tribal severance taxes on oil-and-gas production on tribal lands.[201] *Merrion* and *Colville* emphasized the "taxing power of Indian tribes as an essential instrument of self-government"[202] and as manifestations of "autonomy that has roots deep in [Native] independence."[203]

This expansive conception of Native taxing power did not last. In Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001), the Supreme Court struck down the Navajo Nation's hotel-occupancy taxes on nonmembers staying on fee land within its reservation.[204] And *Atkinson Trading* is not a one-off. It reflects a paradigm shift that requires both territorial and ownership nexus for Native tribes to assume civil jurisdiction over nonmembers.[205] Under *Montana v. United States*, tribes have no inherent power over nonmember activities on non-Indian land in a reservation beyond what is necessary to control "internal relations."[206] The Court articulated two exceptions. Tribes can regulate such activities if nonmembers enter into consensual relationships with tribes or their members, or if nonmember conduct threatens tribal political integrity or economic security.[207] *Atkinson Trading* found *Montana* applicable to taxation and faulted the tribes for showing neither exception.[208] Importantly, consensual relationships can only arise from arrangements like contracts or commercial dealings.[209] And operation of a lodge on non-Indian fee land within the Navajo reservation, the Court said, did not imperil the tribe's political integrity or welfare.[210] *Atkinson Trading* thus significantly diminished tribal power to tax nonmember activities on reservations.[211]

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of the Choctaws and Chickasaws, 17 U.S. Op. Att'y Gen. 134 (1881); Jurisdiction of the Courts of the Choctaw Nation, 7 U.S. Op. Att'y Gen. 174 (1855)).

201. 455 U.S. 130, 137 (1982).

202. Id. at 139.

203. *Colville*, 447 U.S. at 167 (Brennan, J., concurring in part and dissenting in part).

204. 532 U.S. at 649.

205. See Montana v. United States, 450 U.S. 544, 559 (1981) (allowing tribal civil jurisdiction on non-Indian fee land only under narrow conditions); Matthew L.M. Fletcher, A Unifying Theory of Tribal Civil Jurisdiction, 46 Ariz. St. L.J. 779, 790 (2014) (describing how *Montana* limited tribes' civil jurisdiction over nonmembers to situations in which the nonmember has engaged in a consensual commercial relationship with the tribe or in which the tribe's welfare is significantly affected); Judith V. Royster, *Montana* at the Crossroads, 38 Conn. L. Rev. 631, 631 (2006) (describing *Montana*'s impact and how it may pave the way for further limitations to the scope of tribal civil jurisdiction). Scholars have noted that the doctrine's focus on land ownership is odd. See, e.g., Joseph William Singer, Sovereignty and Property, 86 Nw. U. L. Rev. 1, 31 (1991) (questioning the assumption that exclusive ownership of land inside a reservation is a prerequisite to tribal sovereignty).

206. *Montana*, 450 U.S. at 564.

207. Id. at 565–66.

208. *Atkinson Trading*, 532 U.S. at 654.

209. Id. at 655 (quoting *Montana*, 450 U.S. at 565).

210. Id. at 659.

211. *Atkinson Trading* was the culmination of a line of cases that used *Montana* to erode tribal taxing power over nonmembers. See Strate v. A-1 Contractors, 520 U.S. 438, 454–56 (1997) (analogizing federally granted rights-of-way to non-Indian fee land to hold that tribal

Three notions of Native tax power have animated the doctrinal shifts: benefits theory, dependent-sovereign status, and strict autonomy. First, both litigants and the Court seem to ground tribes' taxing jurisdiction in their provision of government services. This idea tracks the popular but much-criticized benefits principle of taxation: Individuals should bear the costs of governance insofar as they benefit from public goods funded by taxes in a transactional, almost quid pro quo arrangement with the state.[212] But the benefits theory is a red herring. It often yields to legal categories and values prevailing in federal courts. In *Colville*, the Court noted that tribal civil jurisdiction is strongest when "the taxpayer is the recipient of tribal services."[213] In *Merrion*, it highlighted the "police protection," the "'substantial privilege of carrying on business' on the reservation," and "'the advantages of a civilized society' . . . assured by the existence of tribal government."[214] But *Atkinson Trading* found such services not enough to sustain tribal taxation: Nonmembers' "actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection" for the tribe to levy taxes under the first *Montana* exception.[215] The benefits theory thus operates in the background, rhetorically invoked but seldom dispositive.[216]

Second, the Court has framed Native tribes as dependent *fiscal* sovereigns. This view starts with a default that tribes can tax nonmembers for their on-reservation conduct.[217] It takes a functional approach to autonomy:

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courts cannot adjudicate negligence claims involving nonmembers occurring on federal rights-of-way); Big Horn Cnty. Elec. Coop. v. Adams, 219 F.3d 944, 953 (9th Cir. 2000) (relying on *Strate* to strike down tribal property taxes where the jurisdictional nexus consisted in a right-of-way granted by the federal government to the utilities company).

212. See Murphy & Nagel, The Myth of Ownership, supra note 155, at 17–19 (noting that the modern economy and the system of property rights that make earning wages, owning homes, and holding bank accounts possible would be impossible without a framework of government support funded by taxes); Joseph M. Dodge, Theories of Tax Justice: Ruminations on the Benefit, Partnership, and Ability-to-Pay Principles, 58 Tax L. Rev. 399, 399–400 (2005) (describing common critiques of the benefits principle on the grounds of its impracticality and incompatibility with the welfare state); Matthew Weinzierl, Revisiting the Classical View of Benefit-Based Taxation, 128 Econ. J. 37, 38–39 (2018) (describing classical arguments for the benefits principle and the move away from it).

213. Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134, 157 (1980).

214. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137–38 (1982) (first quoting Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 437 (1980) and Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444–45 (1940); then quoting Exxon Corp. v. Wisc. Dep't of Revenue, 447 U.S. 207, 228 (1980)).

215. *Atkinson Trading*, 532 U.S. at 655.

216. The quid pro quo feature of the benefits theory, of course, contrasts with the modern, progressive federal income tax and its underlying rationale of ability to pay. See Mehrotra, Making the Modern American Fiscal State, supra note 5, at 9 (explaining the concept of "ability to pay" that animated calls for progressive income taxation).

217. See Seth Davis, Eric Biber & Elena Kempf, Persisting Sovereignties, 170 U. Pa. L. Rev. 549, 558 (2022) (exploring the concept of "dependent sovereigns"); Resnik, supra note 74, at 675–80 ("The capacity of the United States government to try to obliterate smaller

Self-government requires revenue, so taxing power is inherent to Native sovereignty.[218] If the minimum nexus of territoriality or membership is met, the only question is whether Congress, a superior sovereign, has deprived the tribe of its authority to tax.[219] This is the majority opinion in *Merrion*, which upheld a tribal oil-and-gas severance tax despite the tribe's earlier contractual agreement with the producer not to raise the royalty rates.[220] Reviewing executive pronouncements, legislative history, and case law, Justice Thurgood Marshall found all three branches in agreement that the "taxing power of Indian tribes [is] an essential instrument of self-government and territorial management."[221]

Third, Justice John Paul Stevens marshaled a conception of *strict* fiscal autonomy in his vigorous *Merrion* dissent. As noted, the dependent-sovereign theory endorses robust, first-order taxing powers to solidify the fiscal foundations of tribal government.[222] By contrast, the strict-autonomy view emphasizes second-order governance autonomy. It relies on the absence of democratic participation to set up a default that tribes have no inherent jurisdiction to tax nonmember activities, at least on fee land within a reservation.[223] For Justice Stevens, limits on tribal taxing power are "appropriate[] . . . because nonmembers are foreclosed from participation in tribal government."[224] Strict autonomy thus sharply divides members, who exert influence over tribal decisionmaking and can be taxed, from nonmembers, who have no say in the design or the imposition of the taxes they bear. As to members, tribal taxing power stems from sovereignty, which federal courts have consistently protected.[225] As to nonmembers, tribal taxing power stems from the tribe's right to *exclude* from its reservation, which a fortiori includes the power to grant entry into the reservation

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'sovereigns' illuminates reasons to respect and maintain semi-sovereigns and demonstrates the complexity of the interaction and interdependence of 'sovereigns' in the United States."); supra section I.A.1 (discussing the plenary power doctrine).

218. E.g., *Merrion*, 455 U.S. at 137 (arguing that the power to tax "derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction"); see also id. at 141 ("[S]overeign taxing power is a tool for raising revenue necessary to cover the costs of government.").

219. Id. at 139–44; see also Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134, 154 (1980) ("[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government . . . .").

220. *Merrion*, 455 U.S. at 133–36. *Colville* also applied this approach. See supra notes 198–200 and accompanying text.

221. *Merrion*, 455 U.S. at 139.

222. See supra notes 217–218 and accompanying text.

223. E.g., *Merrion*, 455 U.S. at 183 (Stevens, J., dissenting).

224. Id.

225. Id. at 170 (citing United States v. Wheeler, 435 U.S. 313 (1978); Fisher v. Dist. Ct., 424 U.S. 382 (1976); Jones v. Meehan, 175 U.S. 1, 29 (1899); Roff v. Burney, 168 U.S. 218 (1897)) (affirming, as exercises of tribal sovereignty, powers to prosecute members for criminal law violations, to define tribal citizenship, to establish rules of inheritance that supersede state law, and to determine child custody).

on conditions like taxation.[226] Parties can bargain around the right to exclude (but not sovereignty) through contracts. Justice Stevens reasoned that the Jicarilla Apache Tribe had done just that in *Merrion*.[227] The Tribe could not later condition on the payment of additional fees its previous permission to let oil-and-gas producers enter the reservation.[228] Underlying his dissent is the intuition that taxation as a *sovereign* activity (rather than a right against trespass) requires the consent of the governed.[229]

Ultimately, strict autonomy prevailed. As *Atkinson Trading* adopted the *Montana* framework, Justice Stevens's member/nonmember dichotomy is critical to judicial inquiry into the bounds of Native taxation.[230] But as this Article argues, Justices Marshall and Stevens are both right.[231] A robust taxing power is integral to autonomy. So is the regime's prospect for self-governance through the exercise of that power. The question is how to operationalize second-order autonomy in today's subnational fiscal landscape.[232]

C. *Interactions Between State and Native Tax Regimes: The Failure of Preemption by Delegation*

States also compete with Native communities for revenue. Again, strict autonomy structures the doctrine, differentiating between state power to tax *members* and *nonmembers* on their economic activities.[233] Along with

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226. See id. at 171–72 (citing Montana v. United States, 450 U.S. 544, 564 (1981); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)) (holding that Native tribes lack the inherent power to assert jurisdiction over nonmembers' criminal conduct).

227. See id. at 186–88 ("The power to exclude petitioners would have supported the imposition of a discriminatory tribal tax on petitioners when they sought to enter the Jicarilla Apache Reservation to explore for minerals . . . . [T]he Tribe did not impose any tax prior to petitioners' entry or as a condition attached to the privileges granted by the leases in 1953.").

228. Id. at 189. As to policy, Justice Stevens called for "additional sources of revenue to better the economic conditions of many Indian tribes." Id. at 190.

229. See id. at 173 ("Since nonmembers are excluded from participation in tribal government, the powers that may be exercised over them are appropriately limited."). Justice Marshall disagreed. Id. at 147 (opinion of the Court) (affording consent "little if any role in measuring the validity of an exercise of legitimate sovereign authority").

230. See Atkinson Trading Co. v. Shirley, 532 U.S. 645, 647, 650 (2001) (acknowledging "[t]he delineation of members and nonmembers, tribal land and non-Indian fee land, [that] stemmed from the dependent nature of tribal sovereignty").

231. Infra notes 578–581 and accompanying text.

232. See infra section III.B.2.

233. Infra notes 234–243, 247–262 and accompanying text (describing case law governing states' power to tax the economic activities of tribal members, on the one hand, and nonmembers, on the other hand); Reese, Tribal Representation, supra note 96, at 775, 823–24 (noting that "Indians are now citizens of states," and that "tribal citizens can vote in state elections"). More precisely, it differentiates between Native interests in immunity from state taxation when the legal incidence of the tax is on tribal members and such interests when the incidence is on nonmembers. After all, Native individuals are citizens of the state where they reside and vote in state elections. But hostilities to Native political participation in state politics remain. See Jeanette Wolfley, You Gotta Fight for the Right to Vote: Enfranchising

territoriality, this creates four categories of analysis. First, courts have barred state taxation of tribal members' on-reservation activities. They include income from on-reservation employment, property held in trust, and transactions in Indian country (e.g., taxes on cigarette and gas sales).[234] The case law rests on the "semi-autonomous status of Indians" as "distinct political communities" with exclusive power over tribal members on Indian lands.[235] It scrutinizes legislative intent—whether Congress has authorized states to extract revenue from Native communities.[236] Its approach mirrors the dependent-sovereign theory, which looks to congressional *abrogation* to shift the default of tribal taxing power.[237] Given the federal objective of Native autonomy, courts rarely find statutory authorization for states to tax tribes.[238]

This categorical bar on state taxation of tribal members' activities on Indian land has produced peculiar methodologies.[239] Despite invocations of *Native* autonomy, courts apply principles of *federal* preemption. The Supreme Court has repeatedly cautioned against "platonic notions of Indian sovereignty," instead relying on "treaties and statutes to define the limits of state power."[240] This reflects a broader, positivist rejection of the

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Native American Voters, 18 U. Pa. J. Const. L. 265, 269–70 (2015) ("State election officials are reluctant to provide access to the franchise for Indian voters, and Indian voters cautiously participate in state and local elections.").

234. E.g., Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 123, 128 (1993) (holding that states cannot impose motor-vehicle tax and registration fees on tribal members in "Indian country"); Washington v. Confederated Tribes of the Colville Indian Rsrv., 447 U.S. 134, 141–42 (1980) (upholding a state excise scheme that taxes nonmembers but not members for on-reservation cigarette sales); Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv., 425 U.S. 463, 480–81 (1976) (invalidating a state "tax on [tribal members'] personal property located within the reservation"); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172–73 (1973) (precluding, through preemption, state taxation of tribal members' income derived from reservation sources); The Kansas Indians, 72 U.S. (5 Wall.) 737, 757 (1866) (precluding state taxation of Native trust land).

235. *McClanahan*, 411 U.S. at 164–65, 168 (internal quotation marks omitted) (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832)).

236. See, e.g., *Sac & Fox Nation*, 508 U.S. at 126 (exploring whether Congress authorized states to tax Native communities).

237. See supra notes 217–221 and accompanying text.

238. County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 258 (1992) ("[O]ur cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has 'made its intention to do so unmistakably clear.'" (quoting Montana v. Blackfeet Tribe, 471 U.S. 759, 765 (1985))). Authorization usually includes taxing royalties from oil and gas production on leased reservation land, and taxing fee land on reservations. See 25 U.S.C. § 349 (2018) (Indian fee land); 25 U.S.C. § 398 (mineral leases); *County of Yakima*, 502 U.S. at 270 (upholding a state property value tax on fee land under the General Allotment Act but disallowing a state excise tax on the sale of such land).

239. *Sac & Fox Nation*, 508 U.S. at 127; *County of Yakima*, 502 U.S. at 258.

240. *McClanahan*, 411 U.S. at 172; see also *County of Yakima*, 502 U.S. at 257 ("The 'platonic notions of Indian sovereignty' that guided Chief Justice Marshall have, over time, lost their independent sway." (quoting *McClanahan*, 411 U.S. at 172 & n.8)).

law as "brooding omnipresence in the sky."[241] But it has the effect of delineating and seeing tribal autonomy through the lens of federal enactments rather than Native practice. The Court itself has acknowledged tribal sovereignty only as a "backdrop" against which to read the language of Congress.[242] The costs of this approach will become apparent in the fourth doctrinal bucket.[243]

The second and third doctrinal categories are straightforward. States have broad powers to tax nonmembers' off-reservation activities pursuant to state constitutions and their own sovereignty.[244] Further, states can impose nondiscriminatory taxes on tribal members' (and tribes') off-reservation activities.[245] And when tribal members live off reservation, the Supreme Court has relied on principles of international and interjurisdictional taxation to enable the states of residence to tax their entire income.[246]

The fourth doctrinal category has generated sharp disagreement. It concerns state power to tax nonmembers for on-reservation activities, especially when tribes tax the same conduct. The doctrine centers on the *legal* incidence of taxation.[247] For example, the Court has invalidated state motor-carrier license and fuel taxes on non-Indian taxpayers contracted to cut timber on a Native reservation, due to pervasive federal regulation of tribal timber-harvesting and the federal policy of tribal self-government.[248] By contrast, the Court has upheld state taxes on *off-reservation* receipt of fuel by non-Native distributors who later delivered to tribal gas stations.[249] The formalist approach thus distinguishes taxable off-reservation events from nontaxable on-reservation events. It serves predictability at the expense of gamesmanship: States can easily avoid judicial limits on their taxing power by redrafting the statute to tax upstream commercial

241. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting); see also Stephen E. Sachs, Finding Law, 107 Calif. L. Rev. 527, 529–30 (2019).

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

243. See infra text accompanying note 269.

244. States still face constraints in taxation, but such constraints do not arise from federal Indian law. See Cal. Const. art. XIII A (limiting California's taxing power); Richard Briffault, Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law, 34 Rutgers L.J. 907, 909 (2003) (explaining that states have authority to tax their citizens); David Gamage & Darien Shanske, The Federal Government's Power to Restrict State Taxation, 81 St. Tax Notes 547, 551–53 (2016) ("The federal government almost certainly can impose significant restrictions on state taxing power, though within limits."); Tracey A. Kaye, Show Me the Money: Congressional Limitations on State Tax Sovereignty, 35 Harv. J. on Legis. 149, 183–88 (1998) (describing states' taxation powers).

245. E.g., Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 113 (2005); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 158 (1973).

246. See Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 462–63 (1995) ("[A] jurisdiction, such as Oklahoma, may tax all the income of its residents, even income earned outside the taxing jurisdiction.").

247. *Wagnon*, 546 U.S. at 101.

248. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 153 (1980); see also Warren Trading Post Co. v. Ariz. Tax Comm'n, 380 U.S. 685, 686 (1965).

249. *Wagnon*, 546 U.S. at 99.

activities before their eventual performance on tribal lands.[250] In one case, Justice Ruth Bader Ginsburg vigorously dissented from this formalism: The key question is who *functionally* bears the costs, not who collects the tax while passing the costs to downstream actors.[251]

The core conflict between state and tribal tax regimes concerns not the formalism/functionalism divide but defects embedded in the preemption framework. *Colville* is a prime example.[252] There, Washington imposed excise ($1.6 per carton) and sales (5%) taxes on cigarettes sold to nonmembers by tobacco outlets authorized by tribes to operate on reservations.[253] The tribes imposed, and the Supreme Court upheld, a lower (forty-to-fifty cents per carton) cigarette tax.[254] Interior approved the tribal tax ordinances, so *Colville* asked whether tribes—by Native sovereignty or federal preemption—could oust state taxation of the same transactions.[255] Writing for a splintered Court, Justice Byron White said no.[256] He conceded the "congressional concern with fostering tribal self-government and economic development."[257] But no statute guaranteed an "artificial" tax advantage to businesses on tribal lands.[258] Further, the majority refused to give preemptive effect to the Secretary's approval of tribal tax ordinances and rejected the inference that Congress gave Native tribes the "far-reaching authority to pre-empt valid state sales and cigarette taxes."[259]

Justice William Brennan penned a forceful dissent. He noted the twin federal policy of "tribal self-government" *and* "Indian economic and commercial development."[260] Washington's consumption taxes brought these two goals in conflict, because imposing tribal taxes on the same transactions taxed by the state would drive business away from reservations.[261] Tribes must choose either to tax (and forgo economic development) or to promote business activities (and forgo taxation). For Justice Brennan, this impossible choice violates the presumption of Native "autonomy that has roots deep in [Native] independence."[262]

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250. Id. at 121 (Ginsburg, J., dissenting) (describing Kansas's amendment of its fuel-tax statute to shift the tax's legal incidence away from on-reservation activities).

251. Id. at 116–17, 123.

252. See Washington v. Confederated Tribes of the Colville Indian Rsrv., 447 U.S. 134, 154–56 (1980) (describing why preemption arguments are defective).

253. Id. at 141; see also Wash. Rev. Code §§ 82.08.020, 82.24.020 (1976).

254. The Yakima Tribe imposed a 22.5-cent tax on the wholesale price. *Colville*, 447 U.S. at 145.

255. The Secretary also approved each tribe's governance by a tribal council. Id. at 144.

256. Id. at 159. Four Justices joined Justice White's opinion on the non-preemption of state taxes.

257. Id. at 155.

258. Id.

259. Id. at 156.

260. Id. at 168 (Brennan, J., dissenting).

261. Id. at 170.

262. Id. at 167.

The *Colville* line of case law thus denies tribes the power to immunize on-reservation commerce from state taxation. It rests on the doctrine of implied agency conflict preemption. The Supremacy Clause affords three opportunities to displace state law: express, field, and conflict.[263] It allows three actors to preempt: Congress through statute, agencies through regulations pursuant to delegated power, and private entities through devolution.[264] No federal statute expressly preempts state taxes in the Native context. But state taxation renders tribal taxes functionally inoperative. Taxpayers would conduct the same transactions elsewhere to avoid the additional tribal tax.[265] It thus frustrates tribal taxation's revenue-raising purpose—which exemplifies conflict preemption.[266] Further, Congress could clearly delegate to other entities its preemptive power.[267] But *Colville* rejected this logic. Despite the Interior Department's approval of both tribal governance structures (including the tribal council that imposed the tax) and the tax ordinances themselves, the majority declined to find any preemptive force.[268] (Of course, this framing of preemption and delegation is not to say that tribal power, including tribal authority to tax, *is* (delegated) federal power. Instead, the point is that exercises of tribal tax sovereignty are part of executing federal policies of tribal self-governance and could carry the same preemptive weight.)

The failure of delegated conflict preemption produces real costs for Native tribes. The *Colville* tribes alone lost several hundred thousand dollars—as valued in 1975—of annual revenue needed to provide basic services and infrastructure on reservations.[269] Factors inherent to preemption contributed to this outcome. First, the *agency* model ill fits Native-state tax conflicts. While tribes are governance bodies that replicate structural protections of the federal Constitution, they are not part of the federal government itself.[270] The usual underpinnings of administrative legitimacy are absent—for example, accountability through the president to a con-

263. E.g., Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992); Caleb Nelson, Preemption, 86 Va. L. Rev. 225, 226–31 (2000); see also Richard Briffault, The Challenge of the New Preemption, 70 Stan. L. Rev. 1995, 1998, 2018 (2018) (analyzing preemption as a threat to local autonomy).

264. See Craig Konnoth, Privatization's Preemptive Effects, 134 Harv. L. Rev. 1937, 1956–57 (2021) (preemption by private entities); Catherine M. Sharkey, Inside Agency Preemption, 110 Mich. L. Rev. 521, 526 (2012) (preemption by administrative rulemaking).

265. See supra section I.B (noting the general requirement of a geographic nexus for tribal taxing power).

266. E.g., *Colville*, 447 U.S. at 154.

267. Sharkey, supra note 264, *passim*.

268. *Colville*, 447 U.S. at 156.

269. Id. at 144–45.

270. See 25 U.S.C. § 1302 (2018) (prescribing the rights and responsibilities of tribal governments as separate from those of the federal government); Angela R. Riley, Good (Native) Governance, 107 Colum. L. Rev. 1049, 1050–51 (2007) (describing how tribes are viewed as separate sovereigns from federal and state governments); Tribal Executive Branches, 129 Harv. L. Rev. 1662, 1664–66 (2016) (describing the history and structure of tribal governments under the Indian Reorganization Act).

stituency including the states whose laws are preempted.[271] Their absence makes it harder to convince federal courts to accord preemptive force to *tribes* through *federal* power.

Second, recent development has made the preemption doctrine even less hospitable to tribal taxing power. Since *Colville*, the Supreme Court has undergone a federalism transformation.[272] Its protection of traditional state powers and requirement of a "clear and manifest purpose" raise the bar for tribal plaintiffs.[273] The specter of the nondelegation doctrine and the major-question inquiry make the chain of delegation of preemptive force—from Congress to tribes through the Interior Department—even more attenuated.[274]

II. TERRITORIAL TAXING POWERS

This Part discusses territorial taxing powers. The United States acquired the territories—American Samoa, Guam, CNMI, Puerto Rico, and the Virgin Islands—through conquest or treaty.[275] Located outside of the continental United States, territories have no overlapping jurisdiction and face little tax competition with the states.[276] Congress, not federal courts, is the key policymaker.[277] Statutory rules have created a territorial fiscal landscape that diverges from the Native context but with its own unique challenges.

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271. See Jerry L. Mashaw, Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law 209 (2012) ("Administrators operate within three overlapping systems of accountability[, including] political accountability to elected executives and legislatures . . . ."); Alex Zhang, Separation of Structures, 110 Va. L. Rev. 599, 669–88 (2024) (describing values of accountability in deciding structural separation-of-powers disputes).

272. See Richard H. Fallon, Jr., The "Conservative" Paths of the Rehnquist Court's Federalism Decisions, 69 U. Chi. L. Rev. 429, 429 (2002) (referring to the well-accepted view that "the Supreme Court has an agenda of promoting constitutional federalism"); Ernest A. Young, The Rehnquist Court's Two Federalisms, 83 Tex L. Rev. 1, 2 (2004) (disentangling the Rehnquist Court's "Federalist Revival").

273. Wyeth v. Levine, 555 U.S. 555, 565 (2009).

274. See West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2607–10 (2022) (describing the major questions doctrine); Nina A. Mendelson, A Presumption Against Agency Preemption, 102 Nw. U. L. Rev. 695, 699 (2008) (arguing for a clear statement rule for congressional delegation of preemptive authority to agencies).

275. See generally Daniel Immerwahr, How to Hide an Empire: A History of the Greater United States (2019) (providing a historical account of American territorial imperialism); Sam Erman, Truer U.S. History: Race, Borders, and Status Manipulation, 130 Yale L.J. 1188, 1193, 1232 (2021) (reviewing and extending Immerwahr's account through the lens of status manipulation, with specific reference to the territories).

276. The competition for revenue between states and territories is not, strictly speaking, tax competition. Instead, it arises from economic development, which incentivizes territorial residents to migrate to the mainland in search of jobs or commercial opportunities. Indeed, because territories tax in place of Congress, they enjoy a tax advantage over states. See infra note 445–446.

277. See, e.g., I.R.C. §§ 931–933 (2018).

Unlike Native tribes, the U.S. territories have no inherent sovereignty, at least in a strict doctrinal sense.[278] That is, tribal taxing authority does not derive from Congress's constitutional powers over Indian affairs or the federal taxing power granted by Article I and the Sixteenth Amendment.[279] Instead, it derives from the tribe's inherent powers as a governance entity whose existence predated the 1789 Constitution.[280] After all, revenue collection and fiscal expenditures are essential to the operation of any government. Congress, of course, has conditioned certain exercises of tribal taxing authority on approval by the Interior Department. But that additional procedural hurdle does not change the substantive source of tribes' authority to tax (i.e., their own sovereignty), even if it might imbue tribal tax ordinances with federal force for purposes of the preemption analysis.[281] By contrast, territorial governments were at first created by Congress.[282] Their taxing authority derives ultimately from federal sovereignty and statutes enacted under Congress's power to rule and regulate the territories.[283] Territorial governments thus tax where authorized by Congress. This differentiation between tribes and territories appears a priori to favor the former. In practice, however, Congress has delegated broad discretion to the territories, while federal courts have shrunk tribal tax capacity.[284]

This Part proceeds as follows. Section II.A examines bona fide residents' exemption from federal taxation, in particular as to income sourced to the territories where they live. Section II.B scrutinizes Congress's delegation of substantive tax-design powers, highlighting its application to Puerto Rico.

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278. See Puerto Rico v. Sanchez Valle, 579 U.S. 59, 69–70, 75 (2016) (holding that, unlike Native tribes, the dual-sovereignty doctrine does not apply to Puerto Rico).

279. U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . ."); id. cl. 3 (authorizing Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"); id. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.").

280. See Washington v. Confederated Tribes of the Colville Indian Rsrv., 447 U.S. 134, 152 (1980) ("The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status.").

281. See supra section I.C.

282. E.g., Organic Act of Guam, Pub. L. No. 81-630, 64 Stat. 384 (1950); Revised Organic Act of the Virgin Islands, Pub. L. No. 83-517, 68 Stat. 497 (1954).

283. U.S. Const. art. IV, § 3, cl. 2.

284. See supra Part I; infra sections II.A, II.B.

A. *Exemption From Federal Taxation*

First, the Code defines the "United States" to exclude the U.S. territories.[285] And Congress exempts their bona fide residents from the federal income tax.[286] The main exceptions are income derived from federal-government employment and income sourced to the United States (e.g., disposition of real property located on the mainland) or foreign jurisdictions (e.g., disposition of real property located in the United Kingdom).[287] As a result, any income "derived from" and "effectively connected to" territorial sources are untaxed by the federal government.[288] This includes labor income and capital gains from personal property accrued during territorial residency.[289] Taxpayers with only territorially sourced income therefore pay a local income tax to their *territorial* governments in satisfaction of their fiscal obligations to *both* the territorial and the federal government. This generous tax treatment contrasts with the fierce tax competition faced by Native tribes. While the Supreme Court extended the federal income tax to Native taxpayers under *Choteau* and *Five Tribes* with a limited *Capoeman* exemption for trust land, Congress has broadly relieved the territories from federal taxation with limited inclusion of income not sourced to the territories where they reside.[290]

Two filing systems have emerged to administer this distinctive tax treatment. In Puerto Rico and American Samoa, residents file two income-tax returns: one to the territory including their worldwide income and a second to the federal government reporting any United States–sourced

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285. I.R.C. § 7701(a)(9) (2018) ("The term 'United States' when used in a geographical sense includes only the States and the District of Columbia.").

286. Id. §§ 931, 933, 935. Bona fide residence requires physical presence for at least 183 days during the taxable year, absence of a "tax home" outside of the territories, and maintenance of no closer relationship to anywhere other than the territories. Id. § 937; Treas. Reg. § 1.937-1 (2006). Section 935 continues to govern Guam and CNMI. The Tax Reform Act of 1986's repeal of section 935 is effective only upon an implementing agreement going into effect between the territory and the United States. This condition has not been met. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1277, 100 Stat. 2085, 2600–02.

287. I.R.C. §§ 861(a), 931(d), 933(1), 937(b)(1) (exempting from federal taxation bona fide territorial residents' income derived from territorial sources and effectively connected with a trade or business in the territories—that is, not income sourced to the mainland or foreign jurisdictions). See generally Mitchell A. Kane, A Defense of Source Rules in International Taxation, 32 Yale J. on Reg. 311 (2015) (arguing that "source rules can be a robust part of the international tax system and that such rules are not deeply flawed in the manner that has come to be commonly accepted").

288. I.R.C. §§ 931, 933.

289. Id. § 865. Special source rules govern assets acquired before taxpayers' move to the territories: Gains upon sale of those assets are sourced to the United States for ten years after bona fide residency. But taxpayers may elect to source gains accrued during bona fide residency to the territory instead. See Treas. Reg. § 1.937-2(f), (k) (2008) (allowing former mainland residents to "elect to treat as gain from sources within the relevant possession the portion of the gain attributable to the individual's possession holding period").

290. See supra sections I.A.2–3.

income.[291] The Code exempts their territorial income, and they can claim a tax credit for any federal taxes paid against their territorial income-tax liability.[292] By contrast, in Guam, CNMI, and the Virgin Islands, residents file a single tax return to their territorial government reporting their worldwide income, including from U.S. sources.[293] The territorial governments apportion such income between those that are United States-sourced and territory-sourced, and cover over taxes on United States-sourced income to the federal treasury.[294] The distinction between single and dual filing systems tracks the substantive design of territorial fiscal systems.[295]

Second, Congress has exempted most territorial residents from estate and gift taxes.[296] U.S. citizens are subject to taxation on worldwide property upon wealth transfer at death and on gifts during lifetime.[297] Estate and gift taxes affect only the wealthiest Americans and are meant to embody—even if they do not precisely track—principles like equal opportunity at birth.[298] But Americans who acquired their U.S. citizenship solely through territorial citizenship or birth face no such tax except for United States-situated property.[299] Mainland Americans, that is, cannot move to the territories to avoid estate-and-gift-tax liability, unlike with income tax.[300] The estate-and-gift-tax base in the territories is admittedly small, but not insignificant.[301] The exemption could apply, for example, to Orlando

291. IRS, Publication 570: Tax Guide for Individuals With Income From U.S. Territories 16, 19 (2024), https://www.irs.gov/pub/irs-pdf/p570.pdf [https://perma.cc/54HP-KEUP] [hereinafter IRS, Publication 570].

292. I.R.C. §§ 931, 933; P.R. Laws Ann. tit. 13, § 30201(a)(1) (LexisNexis, LEXIS through 2025 Legis. Sess.); IRS, Publication 570, supra note 291, at 18.

293. IRS, Publication 570, supra note 291, at 22, 24, 27.

294. Staff of Joint Comm. on Tax'n, 112th Cong., Federal Tax Law and Issues Related to the United States Territories 10, 20 (2012) [hereinafter Joint Comm. on Tax'n, Territories].

295. Single-filing jurisdictions are "mirror-Code" and impose the same income tax as the federal government. Infra section II.B.

296. See I.R.C. §§ 2208, 2501(b).

297. I.R.C. § 2001 (estate tax); id. § 2031 (defining gross estate to include "the value at the time of [the taxpayer's] death of all property"); id. § 2501 (gift tax).

298. See Michael J. Graetz & Ian Shapiro, Death by a Thousand Cuts: The Fight Over Taxing Inherited Wealth 3 (2005) (explaining that estate taxes are based on principles of equal opportunity); Anne L. Alstott, Equal Opportunity and Inheritance Taxation, 121 Harv. L. Rev. 469, 470 (2007) ("Equality of opportunity is widely understood as one of the bedrock principles supporting the taxation of inheritance.").

299. I.R.C. §§ 2208, 2501(b).

300. See supra note 286 and accompanying text.

301. This is because the federal estate tax exempts wealth transfer below $15 million—that is, all but the largest estates. See IRS, Estate Tax (Dec. 22, 2025), https://www.irs.gov/businesses/small-businesses-self-employed/estate-tax [https://perma.cc/T5VL-KZC3].

Bravo, a multi-billionaire born in Puerto Rico, if he maintained territorial residency.[302]

Third, most federal excises (on commodities like alcohol) do not apply to the territories.[303] This patent violation of the constitutional uniformity requirement is tolerated because of the *Insular Cases*.[304] Excise exemptions do not cover merchandise shipped from Puerto Rico and the Virgin Islands for sale in the mainland.[305] This equalizes tax burdens to prevent any artificial tax advantage to territorial manufacturers.[306] But even there, the United States covers the collected excise to territorial treasuries.[307] Such revenue is significant. In 2007, Puerto Rico received $458 million in excise-tax transfers from the federal government.[308] In the 1980s, this fiscal allure prompted Puerto Rico and the Virgin Islands to sue the Treasury Department in hopes of obtaining additional excise-tax allocations from custom and gasoline duties.[309]

Finally, territorial residents pay federal employment taxes. Payroll taxes burden solely labor income, up to a salary cap that makes them the most regressive form of taxes levied by Congress.[310] The most significant payroll tax, imposed by the Federal Insurance Contributions Act (FICA), covers all five territories through FICA itself or the territory's organic act.[311] Only Puerto Rico and the Virgin Islands are subject to the Federal Unemployment Tax Act (FUTA).[312] Coverage of the territories under

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302. See Orlando Bravo, Forbes, https://www.forbes.com/profile/orlando-bravo [https://perma.cc/7WVG-67EF] (last updated Sep. 9, 2025) (estimating a $12.8 billion net worth).

303. Joint Comm. on Tax'n, Territories, supra note 294, at 14.

304. See U.S. Const. art. I, § 8, cl. 1 ("[A]ll Duties, Imposts and Excises shall be uniform throughout the United States . . . ."); Downes v. Bidwell, 182 U.S. 244, 250–51 (1901) (holding the Uniformity Clause inapplicable to Puerto Rico). The Court has relaxed the application of the Uniformity Clause more broadly in United States v. Ptasynski, 462 U.S. 74, 84 (1983) ("We do not think that the language of the Clause or this Court's decisions prohibit all geographically defined classifications.").

305. I.R.C. § 7652 (2018).

306. E.g., Dick, supra note 43, at 33 n.179.

307. I.R.C. § 7652(a)(3), (e)(1).

308. Steven Maguire, Cong. Rsch. Serv., R41028, The Rum Excise Tax Cover-Over: Legislative History and Current Issues 4–5 tbl.I (2012).

309. Virgin Islands v. Blumenthal, 642 F.2d 641, 642 (D.C. Cir. 1980); Puerto Rico v. Blumenthal, 642 F.2d 622, 623 (D.C. Cir. 1980).

310. Linda Sugin, Payroll Taxes, Mythology, and Fairness, 51 Harv. J. on Legis. 113, 116, 120 chart 1 (2014).

311. I.R.C. § 3121(e)(1); Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, § 606, 90 Stat. 263, 270–71 (1976); Fang Ling Ai v. United States, 809 F.3d 503, 508 (9th Cir. 2015); see also IRS, Publication 80 (Circular SS), Federal Tax Guide for Employers in the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands 28 (2023), https://www.irs.gov/pub/irs-prior/p80–2023.pdf [https://perma.cc/66PY-U2TT].

312. I.R.C. § 3306(j).

payroll taxation contrasts with their exemption from income, estate, and excise taxes. But this is not necessarily a burden: Payroll taxes fund social-insurance programs like Social Security and Medicare.[313] The benefits on the spending side can at least partially offset the extraction on the tax side. Guam's exemption from the FUTA comes at the cost of not having unemployment insurance for its residents.[314] Only in 2022 did the Island receive federal funding to even study the feasibility of such programs for Guamanians.[315]

Congress has thus carved out—more or less entirely—its tax base for income, estates, gifts, and excises so that territories tax *in place of* the federal government.[316] Territorial tax exemption dates to the very beginnings of American imperialism.[317] The Foraker Act, for example, removed Puerto Rico from the reach of internal revenue in 1900, shortly after Spanish cession.[318] Congress has repeatedly grounded fiscal segregation in territorial autonomy—rhetoric that bears an uncanny similarity to appeals to dependency and self-governance in the Native context. At the time of acquisition, Representative Charles Addison Russell of Connecticut, sitting on the Ways and Means Committee, characterized the committee's tax proposals for Puerto Rico as designed to "protect and sustain a possession . . . until she be able to stand alone to assume her full stature of equality and responsibility and burdens among the rest of her sisters in one great Republic."[319] In 1986, the Senate Finance Committee singled out "promot[ion of] fiscal autonomy of the possessions" as the key goal of territorial-tax coordination rules which exempt territorially sourced income from federal taxation.[320] Today, the Treasury Department considers U.S.

313. See 42 U.S.C. § 401 (2018) (providing the sources of taxpayer funding for the Federal Old-Age and Survivors Insurance Trust Fund); SSA, Publication No. 05-10297 (2023).

314. U.S. Dep't of Labor, Exploring Unemployment Insurance (UI) Program Options for Guam: Options Brief 1 (2023), https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/Exploring-Unemployment-Insurance-Program-Options-for-Guam.pdf (on file with the *Columbia Law Review*) ("Guam does not have an existing federal-state UI program . . . .").

315. Press Release, U.S. Dep't of the Interior, OIA Announces Additional $1.3 Million in Final TAP Awards, Closes Out FY2022 Year (Sep. 12, 2022), https://www.doi.gov/oia/press/OIA-Announces-Additional-%241.3-Million-in-Final-TAP-Awards-Closes-Out-FY2022-Year [https://perma.cc/9D55-46S7].

316. See supra notes 285–309 and accompanying text.

317. See Zhang, The Origins of U.S. Territorial Taxation, supra note 15, at 593 (illustrating the ways in which territorial tax exemption resulted from American imperialism at the turn of the twentieth century as well as the fiscal needs of Congress).

318. An Act Temporarily to Provide Revenues and a Civil Government for Porto Rico, and for Other Purposes (Foraker Act), ch. 191, § 14, 31 Stat. 77, 79 (1900) ("[T]he statutory laws of the United States not locally inapplicable . . . shall have the same force and effect in Porto Rico as in the United States, except the internal-revenue laws . . . .").

319. 33 Cong. Rec. 2142 (1900) (statement of Rep. Charles A. Russell).

320. S. Rep. No. 99-313, at 478 (1986).

territories as jurisdictions with fiscal autonomy, at least for information-reporting purposes.[321]

B. *Design Discretion, Tax Shelters, and Imperialism*

The search for autonomy has even led Congress to delegate substantive discretion. The territories fall into two categories of varying authority to design local tax law. Puerto Rico and American Samoa are non-mirror-Code jurisdictions. Since at least the Jones Act of 1917 (now known for its grant of U.S. citizenship to Puerto Ricans), Congress has authorized Puerto Rico to deviate from federal-income-tax rules and create its own revenue system.[322] Puerto Rico has exercised this power and today taxes income at slightly lower rates than the federal government.[323] Like Puerto Rico, American Samoa can also design its own revenue system but has chosen the federal rules as its local income tax.[324] The Tax Reform Act of 1986 affirmed American Samoa's power to "enact [income-]tax laws . . . in lieu of" the federal regime.[325] Congress conditioned this authority on a tax implementation agreement intended to eliminate double taxation and evasion of the U.S. income tax, while facilitating information exchange.[326] American Samoa and the federal government executed such an agreement shortly after the passage of the 1986 Act.[327]

By contrast, current law requires Guam, CNMI, and the Virgin Islands to impose the federal income tax as the territorial income tax.[328] They are

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321. Treas. Reg. § 1.6038-4(b)(7) (2016); see also Staff of Joint Comm. on Tax'n, 117th Cong., U.S. International Tax Policy: Overview and Analysis 65 n.239 (2021) (noting that jurisdictions, such as Puerto Rico, that have fiscal autonomy must provide certain information for the purposes of country-by-country jurisdiction).

322. Jones Act of 1917, ch. 145, § 3, 39 Stat. 951, 953 (codified as amended at 48 U.S.C. § 741a (2018)) (authorizing the Puerto Rico Legislature to provide for internal insular revenue); id. § 9, 39 Stat. at 954 (codified as amended at 48 U.S.C. § 734 (2018)) (excluding application of U.S. internal revenue laws in Puerto Rico); Act of March 4, 1927, ch. 503, § 1, 44 Stat. 1418, 1418 (amending the Jones Act's tax exemption to include specifically income taxes).

323. Compare P.R. Laws Ann. tit. 13, § 30061 (LexisNexis, LEXIS through 2025 Legis. Sess.) (income tax at 7%–33%), with I.R.C. § 1 (2018) (10%–37%). For Puerto Rico's tax incentives, see infra notes 338–353 and accompanying text.

324. Am. Sam. Code Ann. §§ 11.0401, 11.0403 (2021).

325. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1271(a), 100 Stat. 2085, 2591.

326. Id. § 1271(b), 100 Stat. at 2592.

327. Tax Implementation Agreement Between the United States of America and American Samoa, supra note 20.

328. 48 U.S.C. § 1397 (2018) (U.S. Virgin Islands); 48 U.S.C. § 1421i (Guam); Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union With the United States of America, Pub. L. No. 94-241, Art. VI, § 601(a), 90 Stat. 263, 269 (1976) (codified as amended in the notes of 48 U.S.C. § 1801); Organic Act of Guam, Pub. L. No. 81-630, § 31, 64 Stat. 384, 392 (1950); Naval Appropriations Act of 1921, ch. 44, 42 Stat. 122, 123 (U.S. Virgin Islands). The split between mirror-Code and non-mirror-Code jurisdictions emerged in a somewhat haphazard fashion, but Congress seems to have been motivated by the desire to lessen territorial dependence on federal fiscal support and

mirror-Code jurisdictions because their organic acts (or in the case of the Virgin Islands, the Naval Appropriations Act of 1921) mandate the "mirroring" of federal tax law.[329] These territories still tax in place of Congress and enjoy federal exemptions.[330] But they have little authority to decide *what* and *how* to tax (e.g., rates, exclusions, deductions, and credits).[331] Unlike Puerto Rico, they derive revenue from taxing income in exactly the same way as Congress.[332] Unlike American Samoa, they cannot change these rules through territorial legislation.[333] Congress has attempted to delegate substantive design discretion to mirror-Code jurisdictions: The 1986 Act empowered Guam and CNMI to tax territorially sourced income differently from Congress.[334] It again conditioned this power on tax implementation agreements.[335] Guam and the United States executed such an agreement in 1989, but they indefinitely postponed the agreement's effective date due to disputes about the dual-filing agreement.[336]

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congressional appropriations. Before the Organic Act, for example, Guamanian citizens paid no federal or territorial income tax. Congress imposed the mirror-Code requirement on Guam in 1950 to close the "loophole" and to prop up federal receipts. Likewise, Congress extended the federal structure of income taxation to the Virgin Islands because it had been forced to fund the operations of territorial government while exempting its citizens from the federal revenue laws. See 96 Cong. Rec. 7577 (1950) (statement of Rep. Arthur L. Miller) (indicating that the mirror-Code requirement was adopted in order to close loopholes and protect the federal tax base); 61 Cong. Rec. 3173 (1918) (statement of Rep. Horace M. Towner) ("[W]e are required very largely to furnish money to run the government of the Virgin Islands. We hope that condition will not very long exist, but it does exist to-day, as you will see by the appropriation . . . ."); Zhang, The Origins of U.S. Territorial Taxation, supra note 15, at 585–86 (noting that the U.S. Virgin Islands are "exempt from federal income taxation, but . . . are required to institute the federal income-tax regime as the territorial income tax").

329. Guam can levy an additional tax at less than 10% of the taxpayer's annual income tax liability. 48 U.S.C. § 1421i(a). But even if exercised, this power only amplifies the distributive effects of the federal regime.

330. See supra notes 285–309 and accompanying text.

331. Territorial organic acts typically bake future Congress's tax policy into the mirror Code. E.g., 48 U.S.C. § 1421i(a) ("The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in Guam . . . .").

332. See supra notes 322–323 and accompanying text.

333. See supra notes 325–327 and accompanying text.

334. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1271, 100 Stat. 2085, 2591–93; see also Guam Commonwealth Act, S. 692, 102nd Cong., tit. VI (1991); H.R. 98, 101st Cong., tit. VI (1989); infra notes 497–498 and accompanying text (explaining territorial efforts—and congressional reluctance—to reform outdated organic acts and to enhance territorial self-determination).

335. H.R. 98 tit. VI; see also § 1271(b), 100 Stat. at 2592.

336. See Tax Implementation Agreement Between the United States and Guam, 1989-1 C.B. 342; Amendment to the Tax Implementation Agreement Between the United States and Guam (Dec. 27, 1990) (explaining the postponement of the agreement's effective date); Stephen A. Cohen, Guam Tax Department Carries on in Wake of Big Shakeup, Tax Notes, Oct. 7, 1993, at 972, 973 (explaining that the agreement's effective date stalled because of disagreement about the dual return filing requirement).

Likewise, no tax implementation agreement is in effect between the United States and CNMI to enable the latter's tax-design powers.[337]

Puerto Rico's territorial tax regime is controversial. Enabled by Congress's delegation of substantive powers, the Puerto Rican legislature has enacted, since 2012, programs that encourage the wealthy to migrate from the mainland.[338] These programs reduce the total (federal/territorial, entity-level/individual) tax burden on eligible business income to 4% and exempt from taxation all capital gains accrued during one's bona fide residence in Puerto Rico.[339] The mechanics are as follows[340]: Act 20 authorizes the Puerto Rico Secretary of Economic Development and Commerce to approve "decrees" to "eligible" businesses.[341] To be eligible, a business must export services (including professional, legal, and financial) to nonresidents of Puerto Rico (e.g., mainland U.S. clients).[342] Act 20 then entitles the holder of approved decrees to a fixed income-tax rate of 4%.[343] The Act defines such decrees as contracts between Puerto Rico and the taxpayer to prevent abrogation of the tax benefits by future legislation, as the Puerto Rican Constitution bars the impairment of contracts.[344] If the eligible business is a corporation, all dividends paid to shareholders are exempt from territorial taxation after the 4% entity-level tax.[345] Further, Act 22 exempts from territorial taxation capital gains accrued after the taxpayer has established bona fide residence in Puerto Rico.[346] On capital gains *accrued* before bona fide residence, taxpayers receive preferential 5%

337. Joint Comm. on Tax'n, Territories, supra note 294, at 8 ("The changes [pursuant to the Tax Reform Act of 1986] are not yet in effect for Guam or the Northern Mariana Islands, because the effective date is contingent upon the existence of an implementation agreement, and the contingency has not been met.").

338. P.R. Laws Ann. tit. 13, §§ 10831–10844 (LexisNexis, LEXIS through 2025 Legis. Sess.) (codifying Act 20 to Promote the Export of Services); id. §§ 10851–10855 (codifying Act 22 to Promote the Relocation of Individual Investors to Puerto Rico).

339. See supra note 338.

340. Acts 20 and 22 were folded into Act 60 in 2019. IRS, Introduction to Puerto Rico for Acts 20/22, at 16 (2021), https://www.irs.gov/pub/irs-pgld/introduction-to-puerto-rico-acts-20-and-22.pdf [https://perma.cc/HY4R-LWSQ]. For clarity, this Article cites to both Acts 20 and 22 and parallel provisions in Act 60.

341. See P.R. Laws Ann. tit. 13, §§ 10831(b), 10838 (defining decree); id. § 45151 (outlining eligibility requirements).

342. See id. § 10831(k) (defining eligible services); id. § 10831(m) (explaining what constitutes an export of such services to outside of Puerto Rico); id. § 45231 (further defining export of services).

343. Id. §§ 10832(a), 45032(a)(1).

344. Id. § 10838(a) ("Decrees granted under this chapter shall be deemed as contracts between the eligible business, its shareholders, partners, or owners and the Government of Puerto Rico . . . ."); id. § 45004(b); see also P.R. Const. art. II, § 7 (LexisNexis, LEXIS through 2011) ("No laws impairing the obligation of contracts shall be enacted.").

345. Tit. 13, § 10834(a) ("Shareholders, partners, or members of an eligible business that holds a decree granted under this chapter shall not be subject to income tax on distributions of dividends . . . ."); id. § 45032(b)(1).

346. See id. § 10851(a) (defining resident individual investors entitled to such capital-gain exclusion); id. § 10853(b) (capital-gain exclusion); id. § 45142(b).

territorial tax rates if they *realize* the gains after the tenth year of residence.[347] At that time, special federal rules also exempt from taxation gains accrued before territorial residence.[348] As to the remaining Act 20 income and Act 22 gains, section 933 provides a general exemption from *federal* taxation.[349]

In sum, mainland emigrants who become bona fide residents of Puerto Rico enjoy a 4% tax rate on labor income and full forgiveness on capital gains, until at least 2036.[350] And according to the Puerto Rico Department of Economic Development, an estimated six thousand exemption decrees were approved under the territorial tax incentive programs between their creation in 2020 and 2023.[351] These tax incentives make the island perhaps the only place on earth where U.S. citizens can avoid the federal income tax, dodge the local income tax, and maintain U.S. citizenship.[352] Their allure led to the migration of, according to one account, "[t]housands of ultrarich individuals" to Puerto Rico.[353] The territorial government has accomplished what Congress and the Supreme Court have admonished that Native tribes cannot do: marketing tax exemptions to attract commercial activities.[354]

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347. Id. §§ 10853(a), 45142(a).

348. In general, federal law does not recognize gains from dispositions of investment property (1) acquired before territorial residence and (2) realized within ten years of becoming a territorial resident as being territorially sourced. See Treas. Reg. § 1.937-2(f) (2008).

349. I.R.C. § 933 (2018).

350. P.R. Laws Ann. tit. 13, §§ 10853, 45142.

351. Nicole Acevedo, Do Puerto Rico Tax Breaks Displace Locals to Benefit the Wealthy? Here Are 5 Things to Know., NBC News (Sep. 13, 2023), https://www.nbcnews.com/news/latino/tax-breaks-puerto-rico-wealthy-displacement-five-things-to-know-rcna104683 [https://perma.cc/UCH6-9HJ9] (stating that "the Puerto Rico Department of Economic Development has approved at least 3,198 tax exemption decrees" under Act 20, and that "[a]n estimated 6,000 tax exemption decrees have been approved under Act 22 since it was enacted").

352. Congress taxes U.S. citizens on worldwide income. See, e.g., Ruth Mason, Citizenship Taxation, 89 S. Cal. L. Rev. 169, 172 (2016).

353. Alberto C. Medina, Opinion, Tax Cheats Are Taking Advantage of Puerto Rico—the US Government Can Stop Them, The Hill (Nov. 21, 2023), https://thehill.com/opinion/finance/4319700-tax-cheats-are-taking-advantage-of-puerto-rico-the-us-government-can-stop-them (on file with the *Columbia Law Review*).

354. See Washington v. Confederated Tribes of the Colville Indian Rsrv., 447 U.S. 134, 155 (1980) ("[P]rinciples of federal Indian law [do not] authorize Indian tribes . . . to market an exemption from state taxation . . . ."); Oversight Hearing to Provide for Indian Legal Reform: Hearing Before the Comm. on Indian Affs., 105th Cong. 7 (1998) (statement of Rep. Ernest J. Istook, Jr.) (arguing that exempting tribal sale of goods from state taxes "drives legitimate taxpaying competition out of business" and "destroys the tax base . . . that creates the network of roads on which we . . . drive[,] which creates the network of schools, which creates the network of public safety, of health care systems"); Fletcher, In Pursuit of Tribal Economic Development, supra note 14, at 767–68 (noting that tribes are generally prohibited from marketing the exemption, even though "state and local governments market their exemptions without objection").

But this exercise of fiscal autonomy has provoked backlash—from both Congress and the island itself. Policymakers have criticized the incentives as creating tax shelters: In 2023, members of Congress asked the Comptroller General to assess the Puerto Rico tax incentives.[355] They blamed Acts 20 and 22 for enabling "fraud," "significant tax avoidance by wealthy individuals," and "tax benefits that Americans could not obtain anywhere else in the world."[356] In 2024, the Senate Finance Committee urged the Internal Revenue Service (IRS) to crack down on Puerto Rico tax shelters, suspecting that "people were potentially evading billions of dollars in taxes."[357] An IRS investigation identified about one hundred high-income individuals who claimed tax incentives while flouting bona fide residence and sourcing rules.[358] But due to underfunding, the agency apparently has not recovered any evaded taxes since its "high-profile campaign announced more than three years ago to unearth possible abuse."[359] This has harmed the fisc. An IRS report to Congress stated that a group of around six hundred Act 22 decree-holders had paid $557 million in federal income taxes in the five years before their relocation to Puerto Rico.[360] The true cost to Congress is likely far higher, both because the IRS report only covers a subset of mainland emigrants to Puerto Rico and because more have established territorial residency for tax benefits after the pandemic.[361] Using the 2023 estimate of six thousand exemption decrees as a (conservative) baseline, the federal tax-expenditure cost well exceeds $1 billion.[362]

Further, Puerto Ricans themselves have criticized tax incentives as instruments reminiscent of imperialism. First, because Acts 20 and 22 aimed to incentivize *migration* from the mainland,[363] the statutes denied *long-term residents* of *Puerto Rico* the tax benefits. For the capital-gain exclusion, taxpayers may not have lived in Puerto Rico during the ten years

355. See Letter from Raúl M. Grijalva, Nydia M. Velázquez, Alexandria Ocasio-Cortez & Ritchie Torres, Members of Cong., to Gene Dodaro, Comptroller Gen. of the U.S. 1 (July 20, 2023), https://democrats-naturalresources.house.gov/imo/media/doc/gao_request_letter_for_act_60_puerto_rico_tax_review.pdf [https://perma.cc/S8B7-KW9J].

356. Id. at 1–2.

357. Jesse Drucker, I.R.S. Failed to Police Puerto Rico Tax Break, Whistle-Blower Says, N.Y. Times (May 28, 2024), https://www.nytimes.com/2024/05/28/business/irs-puerto-rico-tax.html (on file with the *Columbia Law Review*) (last updated May 29, 2024).

358. Press Release, IRS, Building on Filing Season 2023 Success, IRS Continues to Improve Service, Pursue High-Income Individuals Evading Taxes, Modernize Technology (July 14, 2023), https://www.irs.gov/newsroom/building-on-filing-season-2023-success-irs-continues-to-improve-service-pursue-high-income-individuals-evading-taxes-modernize-technology [https://perma.cc/Y2KE-4CA8].

359. Drucker, supra note 357.

360. IRS, Report to Congress Pursuant to Pub. L. 116-93 Regarding Interaction of Certain Puerto Rico and U.S. Tax Laws 5 (2020) [hereinafter IRS, Report to Congress].

361. Id. at 4–5.

362. See supra note 351 and accompanying text.

363. See supra note 338 and accompanying text.

before the effective date of the most recent enactment in 2019.[364] After all, no government can survive without revenue. And abuse of the incentives meant that taxpayers spent little time in Puerto Rico, contributing less to its economic development than anticipated (or compared to the tax benefits they reaped).[365] Thus, while mainland hedge fund and cryptocurrency managers received generous tax breaks, the locals—impoverished by decades of underinvestment and neglect—bore the costs of governance.[366]

Second, tax incentives have exacerbated structural problems. Puerto Rico already experiences the highest level of economic inequality among subnational jurisdictions.[367] Entrance of the wealthy—immune from taxation, a key redistributive tool—has further divided the rich and the poor.[368] The march away from egalitarianism intensifies the political-economy dynamics that make it even harder to vindicate the public's, rather than wealthy migrants', sense of tax fairness.[369] Gentrification has

364. P.R. Laws Ann. tit. 13, § 45013(a)(4) (LexisNexis, LEXIS through 2025 Legis. Sess.) (excluding from Act 22 "resident individual of Puerto Rico for the last ten . . . taxable years prior to the effective date of this Code").

365. See Press Release, IRS, supra note 358 ("We recently identified about 100 high-income individuals claiming benefits in Puerto Rico without meeting the residence and source rules involving U.S. possessions. These wealthy individuals are attempting to avoid U.S. taxation on U.S. source income, and we expect many of these cases to proceed to criminal investigation."); Luis Valentín, Joel Cintrón Arbasetti & Dalila M. Olmo López, Puerto Rico Act 22 Tax Incentive Fails, Centro de Periodismo Investigativo (June 25, 2021), https://periodismoinvestigativo.com/2021/06/puerto-rico-act-22-fails (on file with the *Columbia Law Review*) (reporting that Puerto Rico's Act 22, which exempts new resident individual investors from capital gains taxes, has fallen short of its promises, creating fewer jobs than desired while attracting tax opportunists who invest little to nothing).

366. See Fernando Goyco Covas, Puerto Rico: A Tax Haven for Hedge Fund Managers, 152 Tax Notes 1131, 1131 (2016) ("[A]bout 500 individuals, including securities traders, investment advisers, and managers, have since moved to Puerto Rico for the tax benefits."); Nitasha Tiku, 'Crypto Colonizers' in Puerto Rico Try to Sell Locals on the Dream, Wash. Post (Jan. 13, 2022), https://www.washingtonpost.com/technology/2022/01/13/crypto-puerto-rico (on file with the *Columbia Law Review*).

367. In 2023, the Gini coefficient (a standard measure of income inequality) for Puerto Rico reached 0.5483. D.C. had the second-highest Gini index, at 0.5163. Most states' Gini coefficients are below 0.5. U.S. Census Bureau, Gini Index of Income Inequality, B19083 (2024), https://data.census.gov/chart/ACSDT1Y2024.B19083?q=gini+index [https://perma.cc/B5EX-HW2N] [hereinafter Census Bureau, B19083].

368. See Lily Batchelder & David Kamin, Policy Options for Taxing the Rich, *in* Maintaining the Strength of American Capitalism 200, 202 (Melissa S. Kearney & Amy Ganz eds., 2019) (identifying the existing "vast disparities of income and opportunity"); Jim Wyss & Michelle Kaske, Hedge Fund Paradise Hides Puerto Rico's Crisis in the Making, Bloomberg (Aug. 18, 2023), https://www.bloomberg.com/news/features/2023-08-18/puerto-rico-s-power-problem-spotlights-poverty-affordability-crisis (on file with the *Columbia Law Review*) ("40% of the population lives in poverty and an affordability crisis has deepened, thanks in part because of the influx of wealthy residents.").

369. See Frederick Solt, Economic Inequality and Democratic Political Engagement, 52 Am. J. Pol. Sci. 48, 48 (2008) ("[E]conomic inequality powerfully depresses political interest, discussion of politics, and participation in elections among all but the most affluent . . . .").

inflated real estate prices, displacing local residents who can no longer afford housing.[370] All this has fueled opposition to Acts 20 and 22. In a recent protest, demonstrators gathered before a former children's museum in San Juan that Brock Pierce—child actor turned Bitcoin-billionaire—had remodeled into a "crypto clubhouse;" they graffitied the building, labeling Pierce a "colonizer."[371] Such actions reflect broader discontent with the tax-incentive regime. Although polling on this precise topic is spotty, a recent survey showed that 41% of Puerto Rico voters "[s]trongly oppose[d]" and an additional 16% "[s]omewhat oppose[d]" the tax incentives.[372] By contrast, only 12% of Puerto Rico voters "[s]trongly support[ed]" and an additional 20% "[s]omewhat support[ed]" the tax incentives.[373]

* * *

Parts I and II of the Article have analyzed Native and territorial tax authority. The same rhetoric of autonomy has produced divergent regimes. Native tribes have little fiscal power: Their populations are generally subject to federal taxation. A battle among Treasury, Interior, general jurisdiction courts, and specialty tribunals have narrowed the small exemption for income derived from land. The Supreme Court has limited Native taxing jurisdiction over non-tribal members and declined to have tribes preempt state taxation. The result is fierce tax competition with Congress and the states, diminishing the tribal tax base that is already hollowed out by impoverishment. By contrast, U.S. territories are generally exempt from federal taxation, possess robust powers to tax all residents, and face no formal tax competition with the states. Some territories can even derogate from federal rules and design their own tax regimes.

The following table illustrates the two contrasting fiscal regimes:

370. Coral Murphy Marcos & Patricia Mazzei, The Rush for a Slice of Paradise in Puerto Rico, N.Y. Times (Jan. 31, 2022), https://www.nytimes.com/2022/01/31/us/puerto-rico-gentrification.html (on file with the *Columbia Law Review*) (last updated June 22, 2023).

371. Id. (internal quotation marks omitted).

372. Gustavo Sánchez, Survey of Voters in Puerto Rico & U.S. Diaspora, 2024, IZQ Strategies (2024), https://labregayfuerza.org/wp-content/uploads/2024/05/IZQ-ByF-Survey-Report-C3-202405.pdf [https://perma.cc/84J4-VBQF].

373. Id.

TABLE 1. NATIVE AND TERRITORIAL TAX REGIMES

	Native Tribes	**U.S. Territories**
Overarching value	**Native and territorial autonomy**	
Primary institutional actors	*Supreme Court* (applying doctrines of federal Indian law, preemption, and delegation). *Lower federal courts* (collision between tax and Native-interpretive principles). *Treasury and Interior* (administrative rulemaking, litigation).	*Congress* (through statutory exemption, sourcing, and coordination rules). *Treasury* (implementation of statutory regime).
Federal tax treatment	*No general exemption* from the federal income tax (*Choteau* and *Five Tribes*). Exception for income derived from trust land; scope of exemption narrowed in lower courts (*Capoeman* and doctrinal progeny).	*General exemption* from the federal income tax (I.R.C. §§ 931–935). Narrow exceptions, including income sourced to non-territorial jurisdictions and salary of federal-government employees (e.g., I.R.C. § 931(1)).
Local taxing power	*Limited power* to tax on-reservation activities by non-tribal members (*Colville* and *Merrion*, constrained by *Atkinson Trading*); battle between strict-autonomy and dependent-sovereign theories. More robust power to tax tribal members; not exercised due to poverty and the absence of federal exemption.	*Robust power* to tax territorial residents and economic activities. *Power to derogate* from federal tax rules for Puerto Rico (exercised), American Samoa (not exercised), and potentially Guam and Northern Mariana Islands (pending implementation agreement under the Tax Reform Act of 1986).
Interactions with other subnational tax regimes	*Intense competition* with states for revenue due to nonpreemption of state taxes (*Warren Trading*, *Bracker*, *Colville*, and *Wagnon*).	*No overlapping tax jurisdiction* with states due to geography.

Distinct tax law produced similar echoes of imperialism. Federal courts have come to see Native interests not through Indigenous perspectives but *federal* laws and *federal* preemption.[374] The doctrine exempts activities of nonmembers from tribal taxation, though nonmembers nonetheless benefit from tribal services.[375] It does not allow tribes—even when they exercise taxing power with federal approval—to preempt state taxation of the same stream of commerce.[376] And courts have narrowly interpreted the *Capoeman* exemption for income derived from trust land.[377] By contrast, Congress has permitted territorial governments to tax locally sourced income to the exclusion of the federal government.[378] It has also given Puerto Rico plenty of tax-design power. The exercise of such power has incentivized hedge fund managers, crypto-tycoons, and influencers to move from the mainland.[379] Tax incentives have thus created a class of wealthy migrants constitutionally shielded from the burdens of taxation, which Puerto Ricans must bear.[380]

A synthesis is due before moving onto Part III. How did tribes and territories end up in such divergent positions as to taxing authority and fiscal capacity? Many have rightly attributed the current state of federal Indian law and the law of the territories to the legacy of U.S. imperialist acquisition and colonialism.[381] Under the historical and doctrinal account provided thus far in this Article, several additional factors are important, especially in generating the tribal/territorial divide: timing, institutions, and the distinctive mechanisms of doctrinal propagation compared to the political process.

First is timing. The structure of territorial tax policy—most prominently, territories' general exemption from the internal-revenue regime—was decided prior to the ratification of the Sixteenth Amendment and the income tax. Puerto Rico, for example, was acquired at the turn of the twentieth century and quickly exempted from compliance with *internal* revenue laws.[382] At that time, *external* revenue (e.g., tariffs) constituted the

374. See supra notes 263–271 and accompanying text.

375. See supra section I.B.

376. See supra notes 253–275.

377. See supra notes 134–158.

378. See supra section II.A.

379. Medina, supra note 353; Tiku, supra note 366.

380. See P.R. Laws Ann. tit. 13, § 45013 (LexisNexis, LEXIS through 2025 Legis. Sess.) (defining categories of individuals for preferential taxation programs predicated on their economic contributions); supra notes 350–366 and accompanying text.

381. Blackhawk, The Constitution of American Colonialism, supra note 44, at 6–8 (observing that "a body of law within the United States comprises the constitutional law of American colonialism," including "federal Indian law [and] the law of the territories" (footnotes omitted)).

382. Foraker Act, ch. 191, § 14, 31 Stat. 77, 79–80 (1900) (exempting Puerto Rico from "internal-revenue laws"); Treaty of Peace Between the United States of America and the Kingdom of Spain art. II, Spain-U.S., Dec. 10, 1898, 30 Stat. 1754 (ceding Puerto Rico and Guam).

bulk of federal receipts, so it was less costly to grant territories exemption from internal revenue.[383] By contrast, tribes' existence predates that of the federal government, and any serious thinking about exempting tribal members from federal taxation did not emerge until almost the mid-twentieth century, as for example in *Capoeman*.[384] By that time, income taxes and internal revenue had already replaced tariffs to become the largest component, by far, of the federal fisc.[385] All that made tax exemption for tribes more costly compared to the territories. And beyond the timing, the *discrete moment* for deliberation mattered. When the United States acquired the territories, Congress had to make a deliberate decision about territorial tax policy. Those decisive moments made Congress think hard (even if it reached imperfect results) about how to fund local governance.[386] Internal-revenue exemption was the result Congress reached after substantial debate.[387] On the other hand, Congress has never devoted such serious attention to a rational, systematic tax solution for tribes at a discrete, deliberate moment.

Further, different institutions have been responsible for the policy decisions. Congress made all the rules for the territories and set up the general tax structure more than a century ago.[388] But its reluctance to do so for tribes (in part because the absence of a deliberate, decisive moment further enabled legislative inertia) made the courts and Treasury play key roles.[389] After the 1950s, however, courts and Treasury had little appetite to carve out general exemptions from income taxes. The reason is obvious for the Treasury, whose statutory mandate, after all, is to collect revenue.[390] As to the courts, a few developments mattered. In part due to the influence of the Legal Process School, there was general agreement (perhaps even a consensus) that the representative branches, in particular Congress,

383. Mehrotra, Making the Modern American Fiscal State, supra note 5, at 7 (showing that customs duties constituted 56%, 57%, 41%, and 49% of all federal receipts in 1880, 1890, 1900, and 1910, respectively).

384. Squire v. Capoeman, 351 U.S. 1, 10 (1956) (discussing reasons to exempt a tribal member from federal taxation); see also Sarah Krakoff, They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum, 69 Stan. L. Rev. 491, 498–99 (2017) ("In short, the Constitution's unique treatment of tribes assumes that they are successors to the peoples who occupied the continent before the arrival of European explorers and American settlers.").

385. Mehrotra, Making the Modern American Fiscal State, supra note 5, at 7 (showing that income taxes constituted 59% of federal receipts in 1930).

386. See Zhang, The Origins of U.S. Territorial Taxation, supra note 15, at 570–87 (analyzing extensive legislative debate over the design of territorial tax systems, variously motivated by the desire "to create a self-sustaining territorial fiscal system," the view "that Puerto Rico could not bear a direct property tax," the perception of congressional "generosity," and "the serious threat of territorial free trade").

387. Foraker Act § 14.

388. See supra section II.A.

389. See supra Part I.

390. See supra note 111 and accompanying text (describing the Treasury Department's statutory mandate).

should craft tax policy.[391] Judicial interest diminished: Tax declined from the largest subject matter on the Supreme Court's docket to one of the smallest.[392] At the same time, the income tax regime gained in complexity. As the statutory rules became more and more detailed, courts became even less willing to read general exemptions without specific legislative directive.[393] One of the main areas in tax in which the judiciary did important work was curbing the use of tax shelters by high-income groups in the 1970s and 1980s.[394] The tribal tax cases were of course not about tax shelters. But that mode of reasoning and the judicial instinct to protect the federal fisc led to less sympathetic treatment of tribal tax issues.[395] And the judicial principle of guarding against the erosion of the income-tax base built a set of precedents and analytical approaches that have not responded adequately to the now more pressing concern of tribal tax sovereignty.[396]

III. TOWARD A CONCEPTUAL FRAMEWORK OF FISCAL AUTONOMY

Why would the same normative goal produce divergent law for tribes and territories? Part of the answer is the lack of a coherent framework of fiscal autonomy for communities living with the legacy of American imperialism. This Part of the Article provides this account. It proposes policies that will pave the path for more consistent federal tax treatment, while fostering fiscal capacity to realize the promise of self-governance.

This Part proceeds as follows. Section III.A evaluates existing scholarship. Section III.B argues that fiscal autonomy is a twofold concept. It

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391. See, e.g., Daniel J. Hemel, The President's Power to Tax, 102 Corn. L. Rev. 633, 639 (2017) (describing how the President and the Treasury Department have often asked Congress to change tax law, "even when existing statutes gave them ample (or at least arguable) authority to enact a desired change, and even when legislative gridlock made it exceedingly unlikely that Congress would act").

392. See supra note 163 and accompanying text (describing the decline in judicial interest in deciding tax disputes, in particular in an Article III forum and at the Supreme Court).

393. See Stanley S. Surrey, Complexity and the Internal Revenue Code: The Problem of the Management of Tax Detail, 34 Law & Contemp. Probs. 673, 674, 699–700 (1969) (examining "the characteristics and attributes" that have increased the complexity of the federal income tax regime).

394. See, e.g., Est. of Franklin v. Comm'r, 544 F.2d 1045, 1046 (9th Cir. 1976) (attempting to curb the use of retail, overvaluation shelters by high-income taxpayers to generate depreciation and interest deductions).

395. See supra section I.A.3 (describing the evolution of the *Capoeman* exemption in the lower courts, which often declined to extend the exemption to different factual predicates out of a desire to protect the income-tax base).

396. See generally Philip P. Frickey, A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers, 109 Yale L.J. 1 (1999) (analyzing the judiciary's common-law reasoning in disputes about federal Indian law); David H. Getches, Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law, 84 Calif. L. Rev. 1573 (1996) (noting throughout the central role of the Supreme Court in matters of federal Indian law).

centers on the dynamic relationship between a first-order structural component (taxing power) and a second-order governance component (democratic decisionmaking). Under this view, Native tribes hold promise for fiscal self-governance but little taxing power. By contrast, Congress's delegation of tax-design power to the territories merits additional scrutiny. Section III.C articulates policy proposals, including a uniform, nonrefundable income-tax credit for tribal and territorial taxes paid.

A. *Literature Review*

Existing scholarship fits into four general categories: (1) analysis of Native tribes' power to tax, especially its interaction with state taxation and as a strand of federal Indian law; (2) a small literature about taxation in Puerto Rico, especially in relation to welfare policy; (3) a broader discussion about American imperialism as to territories and tribes; and (4) the fiscal capacity of subnational governments, almost exclusively about state and local governments. As this survey shows, no scholar has conducted a systematic study of subnational taxation beyond states and their subdivisions or shown the divergent federal treatment of territorial and Native authorities to tax.

First, scholars have assessed the case law governing taxation on Indian lands.[397] This literature centers on the Supreme Court's adjudication of state–Native tax conflicts and faults it—in the spirit of Justice Brennan's *Colville* dissent[398]—for permitting double taxation of business activities which hinders Native economic development.[399] Most have focused on commodity taxes, but some have criticized state's income taxation on reservation lands as an invasion of tribal sovereignty.[400] Existing law's failure

397. E.g., Dominic A. Azzopardi, Dual Taxation in Indian Country: The Struggle to Correct *Cotton Petroleum*, 67 Wayne L. Rev. 311, 313–31 (2022); Mark J. Cowan, Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal Government in Protecting Tribal Governmental Revenues, 2 Pitt. Tax Rev. 93, 105–07 (2005) [hereinafter Cowan, Double Taxation]; Crepelle, Taxes, Theft, and Indian Tribes, supra note 43, at 1001–09; Angelique A. EagleWoman, The Philosophy of Colonization Underlying Taxation Imposed Upon Tribal Nations Within the United States, 43 Tulsa L. Rev. 43, 50–70 (2007); Fletcher, In Pursuit of Tribal Economic Development, supra note 14, at 759–74; David D. Haddock, To Tax Tribes or Not to Tax Tribes? *That* Is the Question, 12 Lewis & Clark L. Rev. 971, 975–88 (2008); Erik M. Jensen, Taxation and Doing Business in Indian Country, 60 Me. L. Rev. 1, 16–93 (2008); Pomp, supra note 43, at 946–1214; Scott A. Taylor, The Unending Onslaught on Tribal Sovereignty: State Income Taxation of Non-Member Indians, 91 Marq. L. Rev. 917, 954–75 (2008).

398. See supra notes 260–262 and accompanying text.

399. E.g., Azzopardi, supra note 397, at 325–34; Cowan, Double Taxation, supra note 397, at 94; Crepelle, Taxes, Theft, and Indian Tribes, supra note 43, at 1001; Haddock, supra note 397, at 973; Dale T. White, Five Restatements: Charting the History of the Law on State Taxation of Non-Tribal Members in Indian Country, 2022 Wis. L. Rev. 329, 351–68.

400. See Taylor, supra note 397, at 918–19 ("Tribes, their members, and all others within Indian Country continue to be subject to state attempts to impose their taxes whenever they can, even though *Worcester v. Georgia* seems to say that state power stops at the reservation boundary." (citing 31 U.S. (6 Pet.) 515 (1832))); see also Jennifer Nutt Carleton,

to strike a fair balance between state and tribal interests—in particular the legal-incidence test—has led scholars to call for reform.[401] Proposals include: (1) using the Indian Commerce Clause to invalidate state taxes on tribal lands,[402] (2) crafting state–tribal compacts to avoid double taxation while reducing the judiciary's role,[403] and (3) reimagining the preemption framework, including interventions by the Interior Department and Congress.[404] One prominent scholar has faulted the unsatisfying doctrine for forcing tribes to resort to raising revenue through economic development.[405]

The focus on *state*–tribal taxation, often in piecemeal response to cases, is unsurprising.[406] Conflicts at the Supreme Court attract scholarly

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State Income Taxation of Nonmember Indians in Indian Country, 27 Am. Indian L. Rev. 253, 256 (2002).

401. See, e.g., Haddock, supra note 397, at 989 (criticizing the legal-incidence test); David Y. Kwok, Taxation Without Compensation as a Challenge for Tribal Sovereignty, 84 Miss. L.J. 91, 103–08 (2014); Pomp, supra note 43, at 1198; Anna-Marie Tabor, Sovereignty in the Balance: Taxation by Tribal Governments, 15 U. Fla. J.L. & Pub. Pol'y 349, 372–89 (2004).

402. E.g., Crepelle, Taxes, Theft, and Indian Tribes, supra note 43, at 1023; Pomp, supra note 43, *passim*.

403. Richard J. Ansson, Jr., State Taxation of Non-Indians Whom Do Business With Indian Tribes: Why Several Recent Ninth Circuit Holdings Reemphasize the Need for Indian Tribes to Enter Into Taxation Compacts With Their Respective State, 78 Or. L. Rev. 501, 504 (1999) ("Tribes must compact with states in an effort to pre-set the levels of taxation which the Tribe and the state may impose on nonmembers doing business in Indian country."); Matthew L.M. Fletcher, The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreements, 82 U. Det. Mercy L. Rev. 1, 4, 44–45 (2004) (favoring voluntary tax agreement between tribes and states due to coordination, predictability, and economic cooperation); White, supra note 399, at 370; see also Larry EchoHawk, Balancing State and Tribal Power to Tax in Indian Country, 40 Idaho L. Rev. 623, 653–55 (2004) (advocating for discussion between states and tribes, with the advice of independent bodies like universities or commissions). But see Pippa Browde, Sacrificing Sovereignty: How Tribal-State Tax Compacts Impact Economic Development in Indian Country, 74 Hastings L.J. 1, 6 (2022) ("[C]ompacts do not live up to their promise of resolving juridical taxation in a way that promotes the economic development activities and opportunities that tribes need.").

404. See Robert William Alexander, The Collision of Tribal Natural Resource Development and State Taxation: An Economic Analysis, 27 N.M. L. Rev. 387, 391 (1997) (concluding "that Congress easily could remedy the current uncertainty created in the case law by explicitly preempting such state taxation"); Cowan, Double Taxation, supra note 397, at 143–49 (discussing express federal preemption of state taxation); Crepelle, Taxes, Theft, and Indian Tribes, supra note 43, at 1024, 1028–31 (putting forth a proposal to allow tribes to tax off-reservation activities as retaliatory, subnational tariffs); White, supra note 399, at 371 ("An effective fix would be for Congress to amend the Indian Trader Statutes." (citing 25 U.S.C. §§ 261–264 (2018))).

405. Fletcher, In Pursuit of Tribal Economic Development, supra note 14, *passim*.

406. See generally Stacy Leeds & Lonnie Beard, A Wealth of Sovereign Choices: Tax Implications of *McGirt v. Oklahoma* and the Promise of Tribal Economic Development, 56 Tulsa L. Rev. 417 (2021) (exploring "the sovereign power of taxation" among "federal, tribal, state, and local taxing authority" in the wake of McGirt v. Oklahoma, 140 S. Ct. 2452 (2020)).

attention, produce outcomes dependent on judicial personnel, and make it easy to view them as species of federal Indian law rather than taxation.[407] One recent study declared: "[S]tate taxation of Indian country commerce is the most severe impediment to tribal economies."[408] Thus, even when scholars have proposed federal fiscal support, they have done so to lessen dual *state*–tribal tax burdens on the same economic activities on reservations.[409] While precisely tailored for double taxation, this approach misses the forest for the trees. As Part I has shown, one key constraint on tribal fiscal capacity is Congress's failure to carve out the *federal* tax base for Native populations.[410] Congress has done exactly that in the territories for the same goal of autonomy and exercising a similar plenary power.[411]

Second, a few scholars have written about territorial taxation, and they have focused almost exclusively on Puerto Rico.[412] This scholarly strand arose from *United States v. Vaello Madero*, in which the Supreme Court sustained Congress's denial of Supplemental Security Income to Puerto Rico residents based on their exemption from income, estate, and gift taxes.[413] Other accounts provide tax-planning advice.[414] The last com-

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407. See William C. Canby, Jr., The Status of Indian Tribes in American Law Today, 62 Wash. L. Rev. 1, 6, 11–15 (1987) (reviewing the application of Supreme Court doctrines to the balance between state and tribal power); Daniel L. Rotenberg, American States and Indian Tribes: Power Conflicts in the Supreme Court, 92 Dick. L. Rev. 81, 82 (1987) ("[S]o long as Congress withholds legislation and its awesome power over the tribes, the disputes remain. Their resolution falls into the hands of the Supreme Court.").

408. Crepelle, Taxes, Theft, and Indian Tribes, supra note 43, at 1000.

409. See Cowan, Double Taxation, supra note 397, at 140–42 (evaluating federal tax credits as a solution to the dual state and tribal tax issue); Pomp, supra note 43, at 1099–120 (discussing tribal-tax credits in Native–state tax conflicts).

410. See supra notes 188–195 and accompanying text.

411. See supra section II.A.

412. A recent historical study traces federal tax policy in Puerto Rico from 1898. It contends that the United States used tax as an instrument of economic subordination to promote mainland corporate interests, leaving the island fiscally crippled. Dick, supra note 43, *passim*. Others have analyzed the welfare-policy consequences of tax exemption, advocating the extension of federal economic-security programs into the territories based on social citizenship, doctrinal coherence, and history. See Hammond, supra note 39, at 1677–94 (advocating "commitment to social citizenship" and economic security for territorial residents); Francine J. Lipman, Not Taxing Puerto Rico: Whitewashing Impoverishment in *United States v. Vaello Madero*, 77 Tax Law. 357, 364 (2024) (challenging *Vaello Madero*'s holding that "Congress can rationally deny . . . federal benefits to Puerto Ricans" based on income tax exemption); Zhang, The Origins of U.S. Territorial Taxation, supra note 15, at 559 (contending that Congress segregated territorial tax regimes for its own foreign-policy goals).

413. 142 S. Ct. 1539, 1542–43 (2022).

414. See generally Robert S. Griggs, Operating in Puerto Rico in the Section 936 Era, 32 Tax L. Rev. 239 (1977) ("In exercising its taxing power, Puerto Rico has provided, since 1919, tax exemption, of varying scope and duration, to qualifying businesses." (footnote omitted)); Juan Mendez-Torres, The Internal Revenue Code's Role in Puerto Rico's Economic Development, 15 J. Int'l Tax'n 22, 29 (2004) (assessing congressional tax incentives and reform options); Zoltan M. Mihaly, Tax Advantages of Doing Business in Puerto Rico, 16 Stan. L. Rev. 75, 75 (1963) ("Of prime importance as to Puerto Rican taxes is the

prehensive scholarly treatment of territorial taxation is more than four decades old.[415] It predates Puerto Rico's current tax incentives and the Tax Reform Act of 1986 (e.g., delegation of substantive design powers to American Samoa, Guam, and CNMI pending tax implementation agreements).[416] No scholar has systematically compared territorial and Native tax regimes, in part because the Code's exclusion of the territories from the United States invites treating them under international tax law.[417]

Third, scholars have written on the imperialist roots of American public law. Both federal Indian law and the law of the territories—in particular the framework animated by the *Insular Cases*—have proved fertile ground for exposing how empire and conquest have shaped the development of our constitutional polity.[418] A small but burgeoning subset of this literature, primarily historical and sociological inquiries, has theorized taxation as a fiscal tool of imperialism.[419] This Article adds to the discourse

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Industrial Incentive Act, which makes it possible for a qualified business to derive income free of tax in the first ten, twelve, or seventeen years of operations in Puerto Rico . . . ." (footnote omitted)); Jason Sampas, Puerto Rico: America's Tax Haven or Vacation Paradise, 21 Law & Bus. Rev. Ams. 49, 50 (2015) (explaining how "Puerto Rican incentives . . . could affect" groups such as retired couples, wealthy couples, and entrepreneurs); Covas, supra note 366 (explaining the tax advantages that hedge fund managers can receive by becoming "bona fide resident[s] of Puerto Rico").

415. See generally Hoff, supra note 43 (explaining federal income and excise-tax treatment of Puerto Rico, the Virgin Islands, and Guam, in response to excise-allocation litigation in the early 1980s).

416. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1271, 100 Stat. 2085, 2591–93; see also supra section II.B.

417. I.R.C. § 7701(a)(9) (2018) (defining the United States to "include[] only the States and the District of Columbia").

418. Full discussion of this literature is beyond this Article's scope. But some representative works include Blackhawk, The Constitution of American Colonialism, supra note 44; Blackhawk, Federal Indian Law as Paradigm, supra note 74; Seth Davis, American Colonialism and Constitutional Redemption, 105 Calif. L. Rev. 1751 (2017); Erman, supra note 275; Philip P. Frickey, Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law, 107 Harv. L. Rev. 381 (1993); K-Sue Park, The History Wars and Property Law: Conquest and Slavery as Foundational to the Field, 131 Yale L.J. 1062 (2022); Christina Duffy Ponsa-Kraus, The *Insular Cases* Run Amok: Against Constitutional Exceptionalism in the Territories, 131 Yale L.J. 2449 (2022); Angela R. Riley & Kristen A. Carpenter, Owning *Red*: A Theory of Indian (Cultural) Appropriation, 94 Tex. L. Rev. 859 (2016); Juan R. Torruella, Why Puerto Rico Does Not Need Further Experimentation With Its Future: A Reply to the Notion of "Territorial Federalism", 131 Harv. L. Rev. Forum 65 (2018), https://harvardlawreview.org/forum/vol-131/a-reply-to-the-notion-of-territorial-federalism [https://perma.cc/4W4J-7YHP]; José A. Cabranes, Puerto Rico: Colonialism as Constitutional Doctrine, 100 Harv. L. Rev. 450 (1986) (book review).

419. See generally Dick, supra note 43 (describing federal tax policy as economic subordination of Puerto Rico); Kyle Willmott, Taxes, Taxpayers, and Settler Colonialism: Toward a Critical Fiscal Sociology of Tax as White Property, 56 Law & Soc'y Rev. 6 (2022) (exploring the relationship between taxation and racial fiscal entitlements); Maximilien Zahnd, Not "Civilized" Enough to Be Taxed: Indigeneity, Citizenship, and the 1919 Alaska School Tax, 48 Law & Soc. Inq. 937 (2023) (scrutinizing how school taxes allowed Alaska to construct indigeneity and civilization); Maximilien Zahnd, Praise the Gardeners, Dun the Hunters: Alaska Natives, Taxation, and Settler Colonialism, 65 Comp. Stud. Soc'y & Hist.

an original comparative analysis of Native and territorial taxation. It shows how divergent federal tax treatment, under the same rhetoric of autonomy, has impoverished both tribes and territories.

Finally, scholars have assessed state and local governments' fiscal capacity. They have advocated constraining states' power to determine the tax base, criticized property-tax limits as diminishing voter power through excessive focus on tax reduction, and invited Congress to override the Dormant Commerce Clause to make state tax incentives more effective.[420] This literature focuses on states and their subdivisions.[421] But as Part I shows, tribes and territories—also subnational governments—have distinctive powers to tax. Congress's promise to foster their fiscal autonomy merits scholarly attention. The lacuna is especially pressing because extractive federal policies have harmed tribes and territories, which, unlike states, have no special representation in the federal government.[422]

B. *Conceptualizing Autonomy in Subnational Taxation*

This section builds a conceptual framework of fiscal autonomy. The term "autonomy" conjoins two ancient Greek words, *autos* ("oneself") and *nomos* ("custom," and as customs evolve to acquire institutional form, "law").[423] It first appeared as an adjective, used by Sophocles to describe

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932 (2023) (detailing how Alaska used a fur tax to "civilize" Native hunters); Zhang, The Origins of U.S. Territorial Taxation, supra note 15 (describing territorial tax exemptions as tools to protect the federal tax base); see also Jeremy Bearer-Friend, Race-Based Tax Weapons, 14 U.C. Irvine L. Rev. 1067, 1069 (2024) (illustrating the use of "universalist," or race-neutral, tax statutes to target vulnerable taxpayers).

420. See Kleiman, Tax Limits, supra note 8, at 1890–91 (arguing that "tax limits" can "undermine public control by reducing local voter power"); Layser, supra note 8, at 1238–39 (contending that the Dormant Commerce Clause constrains the efficiency of state place-based incentives); Shaviro, supra note 8, at 897 (favoring "confining states' taxing authority to the determination of their tax rates").

421. Commentators have provided comparative analyses of the fiscal autonomy of state and local governments. See generally, e.g., Hansjörg Blöchliger & David King, Less Than You Thought: The Fiscal Autonomy of Sub-Central Governments, 43 OECD Econ. Stud. 155 (2006) (finding that "[t]he taxing power of sub-central governments is limited" and that "[t]axing power is lower for state than for local governments"); Sandra Gomes, Fiscal Powers to Subnational Governments: Reassessing the Concept of Fiscal Autonomy, 22 Reg'l & Fed. Stud. 387 (2012) ("[I]t is not valid to infer autonomy to spend from the way governments get their revenue.").

422. See U.S. Const. art. I, § 3, cl. 1 (state composition of Senate); Wechsler, supra note 61, at 543–46 (emphasizing the importance of states as separate sources of authority and their role in composing the central government).

423. See A Greek–English Lexicon 41, 185, 282–83 (H.G. Liddell & R. Scott eds., 9th ed. 1996); see also Lawrence Haworth, Autonomy 11 (1986); James T. Kloppenberg, Toward Democracy 7–8 (2016). The evolution of nomos from social-group customs to law animated the development of an influential piece of scholarship. Robert M. Cover, The Supreme Court, 1982 Term—Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4, 28 (1983).

the tragic heroine Antigone.[424] In the eponymous play, Antigone defies her city's decrees, instead relying on unwritten laws in a daring act of civil disobedience.[425] The chorus thus calls her *autonomos*, "of her own laws."[426] Autonomy emerged as a prominent concept in modern philosophy through social-contract theories. Autonomous agents, capable of rational thought and value formation, helped formulate what powers and restrictions one would consent to in government.[427]

Autonomy thus centers on *self-governance*. It describes the condition, primarily of individuals, combining (1) capacity for rational deliberation; (2) independence from external coercion or distortion, including from legal rules, in the deliberative process to establish authentic values for oneself; and (3) capacity to realize those values within a political community.[428] Contemporary accounts of autonomy—though not all—have taken a proceduralist approach. They focus on perfecting the process of deliberation rather than arriving at specific substantive values.[429] In part because of its social-contract origins, autonomy bears a close relationship with state legitimacy: Public discourse and deliberation by individuals with autonomy legitimate the collective decisions of the community.[430] Autonomy thus differs from (a) *unconstrained freedom*: autonomy by definition features

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424. See Sophocles, Antigone *passim* (H.D.F. Kitto trans., Oxford Univ. Press 1994); David N. McNeill, Antigone's Autonomy, 54 Inquiry 411, 412 (2011) (describing "the first recorded instance of the word *autonomos*").

425. Sophocles, supra note 424, at 16–17; Teresa Godwin Phelps, Narratives of Disobedience: Breaking/Changing the Law, 40 J. Legal Educ. 133, 136–39 (1990); Robert P. Lawry, Ethics in the Shadow of the Law: The Political Obligation of a Citizen, 52 Case W. Res. L. Rev. 655, 690 (2002).

426. Sophocles, Sophoclis Fabulae 216 (H. Lloyd-Jones & N.G. Wilson eds., Oxford Univ. Press 1990) (translated by author) [("αὐτόνομος")].

427. See, e.g., John Rawls, A Theory of Justice 390 (1971) (using the social-contract tradition to construct the original position, a method of reasoning focusing on how equal citizens would agree to cooperate in political society); see also Gerald Dworkin, The Theory and Practice of Autonomy 9 (1988) [hereinafter, Dworkin, Theory and Practice] ("Rawls uses the idea of autonomous persons as part of a contractual argument for certain principles of distributive justice.").

428. See Bernard Berofsky, Liberation From Self 3 (1995) (describing subjective sources of distortion like prejudices and cognitive biases); Kloppenberg, supra note 423, at 8 ("[T]he concepts of popular sovereignty, autonomy, and equality are mutually constitutive."); James E. Fleming, Securing Deliberative Autonomy, 48 Stan. L. Rev. 1, 30–36 (1995) (analyzing the relationship between autonomy and deliberation); Frankfurt, supra note 31, at 6–7, 14–17 (describing, as a condition of autonomy, authenticity or the coherence between basic desires and second-order evaluation of those desires); see also Stefaan E. Cuypers, Harry Frankfurt on the Will, Autonomy and Necessity, 5 Ethical Persps. 44, 44–45 (1998) (putting Frankfurt's views in explicit terms of autonomy and authenticity).

429. Berofsky, supra note 428, at 122–29 (defending "procedural independence" as necessary to autonomy); Dworkin, Theory and Practice, supra note 427, at 18 (describing independence in reflective procedures as part of autonomy); see also Fabian Freyenhagen, Autonomy's Substance, 34 J. Applied Phil. 114, 115–17 (2017) (contrasting procedural and substantive conceptions of autonomy).

430. See, e.g., Jürgen Habermas, Between Facts and Norms 103–04 (William Rehg trans., 1996).

being governed and therefore constrained (i) by the rules prescribed to instantiate one's own normative commitments and (ii) by the legitimate demands of others in the same polity;[431] and (b) *paternalism*: autonomy refers to the capacity of realizing one's own authentic values, not those imposed by others, even if the values imposed are designed to further one's own good.[432]

Translation of this concept into our discussion presents two puzzles. First, in origins and contemporary discourse, autonomy primarily concerns individuals.[433] Attributing autonomy to subnational jurisdictions therefore entails refashioning it for an institutional context. This Article interprets the principle of fiscal autonomy to incorporate a democratic element.[434] The values that democratic governments should have the capacity to realize are those shared by their constituencies. This requires the regime to integrate accountability mechanisms that translate the public's distributive values into policy.[435] Second, this Article concerns not any type of decisional autonomy but *fiscal* autonomy. This requires analysis of subnational jurisdictions' *taxing* power, structured by formal constitutional and statutory provisions, and its tax base, shaped by the relative wealth (or poverty) of its citizens and tax competition.[436] It underscores the effects of *economic* rather than political inequality in distorting policy outcomes.

This section fleshes out this framework of fiscal autonomy, parts of which are implicit in Part I's discussion. Section III.B.1 addresses taxing power. Section III.B.2 addresses democratic fiscal governance.

1. *Autonomy as the Power to Tax.* — First-order fiscal autonomy centers on taxing power. Federalism overlaps governance structures: The revenue needs of central and subnational governments limit each other's power to tax.[437] These restrictions affect both receipt of funds and substantive tax

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431. Isaiah Berlin, Two Concepts of Liberty, *in* Four Essays on Liberty 118, 121–31 (describing negative freedom); Berofsky, supra note 428, at 182 (describing how "autonomous agent[s] may enter relationships which entail (self-imposed) limitations"); John Christman, Autonomy and Personal History, 21 Canadian J. Phil. 1, 2–3 (1991) (distinguishing autonomy from freedom).

432. See Sarah Conly, Against Autonomy: Justifying Coercive Paternalism 16–18 (2013) (defending versions of paternalism against autonomy); Gerald Dworkin, Paternalism, 56 Monist 64, 83 (1972) (suggesting that people are "most likely to consent to paternalism in . . . instances in which it preserves and enhances for the individual his ability to rationally consider and carry out his own decisions"); David Enoch, What's Wrong With Paternalism: Autonomy, Belief, and Action, 116 Proc. Aristotelian Soc'y 21, 45–47 (2016) (explaining why paternalism is objectionable with reference to "the value of autonomy and its related constraints").

433. See supra notes 423–432 and accompanying text.

434. See Avishai Margalit & Joseph Raz, National Self-Determination, 87 J. Phil. 439, 440 (1990) (describing the concept of "self-government" for territories and jurisdictions).

435. See infra section III.B.2.

436. See infra section III.B.1.

437. See Blöchliger & King, supra note 421, at 156–59 (discussing how financial transfers, federal regulatory policies, and other structural features of federalism affect central and sub-central taxing power).

design. They arise from distinct sources of law (federal and subfederal constitutional norms, statutes, and case law) and decisions made by distinct actors (Congress, courts, the executive, and subfederal governments).[438] They raise questions of substantive fairness (is the divergent tax treatment of tribes and territories justified?) and of the Legal Process School (which institution has the competence and expertise to decide?).[439] This section provides an analytical taxonomy of first-order fiscal autonomy, and uses it to categorize the taxing powers of Native tribes and U.S. territories.

First, both formal and functional competition can constrain subnational taxing power as to receipt of funds. By *formal* tax competition, this Article refers to how law and overlapping governance structures can crowd jurisdictions into extracting revenue from the same tax base or leave them to tax to the exclusion of others. By *functional* tax competition, this Article refers to how each subnational jurisdiction can reduce tax rates and burdens to incentivize investment.[440] As Part I shows, territories are on one extreme. Statutes exempt territorial residents from federal taxation on territorially sourced income, including from labor, personal property, and real property located in the relevant territories.[441] Due process and geography mean that territories do not share their tax base with state and local governments.[442] They thus face little formal tax competition.

Further, because territories tax *in place of* Congress, they often enjoy an insurmountable advantage in functional tax competition. Guam, CNMI, and the Virgin Islands are required by statute to impose the federal

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438. See generally Peter D. Enrich, supra note 8 (describing state taxing power); Erin Adele Scharff, Powerful Cities?: Limits on Municipal Taxing Authority and What to Do About Them, 91 N.Y.U. L. Rev. 292 (2016) (discussing the taxing power of cities); supra Part I (describing constitutional, doctrinal, and executive constraints on Native and territorial taxing powers).

439. See Guido Calabresi, An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts, 55 Stan. L. Rev. 2113, 2123 (2003) ("The answer that the Legal Process approach advocated lay in comparative institutional analysis."); William N. Eskridge, Jr. & Philip P. Frickey, The Making of the Legal Process, 107 Harv. L. Rev. 2031, 2032–33 (1994) (describing "'institutional competence'" as a "legal process concept" (quoting Felix Frankfurter)).

440. See Avi-Yonah, Globalization, Tax Competition, supra note 7, at 1575–76 (describing international tax competition as situations in which "sovereign countries aim to attract both portfolio and direct investment by lowering their tax rates on income earned by foreigners"); Diane Ring, Democracy, Sovereignty and Tax Competition: The Role of Tax Sovereignty in Shaping Tax Cooperation, 9 Fla. Tax Rev. 555, 561–62 (2009) (describing tax competition as "a country's use of any feature of its tax system to 'enhance' its competitive advantage in the marketplace for capital, investment, and/or nominal business presence").

441. I.R.C. §§ 861, 931, 933, 935, 937 (2018).

442. See Shaffer v. Carter, 252 U.S. 37, 57 (1920) ("As to nonresidents, [state-tax] jurisdiction extends only to their property owned within the State and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from those sources."). While the Court has abolished a physical-presence requirement, states must still show a "substantial nexus" with the commercial activity they wish to tax. South Dakota v. Wayfair, Inc., 585 U.S. 162, 188 (2018).

income tax as the territorial income tax.[443] American Samoa has chosen to do so.[444] No states can subject their residents—who at a minimum must pay the federal income tax—to lower tax burdens than mirror-Code territories.[445] Only by completely forgoing state and local income taxes can states maintain parity with mirror-Code territories.[446]

Puerto Rico holds an even stronger tax advantage. Because it can deviate from federal tax rules, the island has enacted preferential regimes that reduce the tax burden on labor income to 4% and capital gains to 0%.[447] No state has such power: They can forgo state income taxes but cannot eliminate *federal* tax burdens for their residents. Even the normal income-tax rates in Puerto Rico are lower than on the mainland.[448] This makes it almost impossible for states to attract investment from Puerto Rico by lowering taxes. To be sure, many residents have emigrated from the island.[449] But this is due to *economic* opportunities on the mainland, not the states' power to engage in functional tax competition with the territory.[450]

By contrast, Native tribes face fierce tax competition. Formally, they share the same tax base with not only states and their subdivisions but also Congress.[451] As to members residing on reservations, tribes can tax their incomes to the exclusion of states but not Congress.[452] Due to the

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443. 48 U.S.C. §§ 1397, 1421i (2018); Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, Art. VI, § 601(a), 90 Stat. 263, 269 (1976) (codified as amended in the notes of 48 U.S.C. § 1801).

444. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1271(a), 100 Stat. 2085, 2591.

445. I.R.C. § 1.

446. Seven states impose no income tax. Andrey Yushkov, State Individual Income Tax Rates and Brackets, 2024, Tax Found. (Feb. 20, 2024), https://taxfoundation.org/data/all/state/state-income-tax-rates-2024 [https://perma.cc/KDJ7-SHMY] (explaining each state's tax regime). States can, through welfare programs, effect a negative income tax and reduce their residents' tax burdens below those in mirror-Code territories. See Robert A. Moffitt, The Negative Income Tax and the Evolution of U.S. Welfare Policy, 17 J. Econ. Persps. 119, 119 (2003) (explaining the connection between welfare programs and a negative income tax). But absent significant transfers from Congress or revenue streams beyond taxation, this is impossible for a broad swath of taxpayers (because states must fund such welfare programs).

447. See supra notes 340–350 and accompanying text.

448. P.R. Laws Ann. tit. 13, § 30061 (LexisNexis, LEXIS through 2025 Legis. Sess.).

449. See Press Release, Jason Schachter & Angelica Menchaca, U.S. Census Bureau, Net Outmigration From Puerto Rico Slows During Pandemic (Dec. 21, 2021), https://www.census.gov/library/stories/2021/12/net-outmigration-from-puerto-rico-slows-during-pandemic.html [https://perma.cc/CFP6-CRKG].

450. See Alexis R. Santos-Lozada, Matt Kaneshiro, Collin McCarter & Mario Marazzi-Santiago, Puerto Rico Exodus: Long-Term Economic Headwinds Prove Stronger Than Hurricane Maria, 42 Population & Env't 43, 53 (2020) (concluding that economic factors were the driving force behind emigration from Puerto Rico).

451. See supra sections I.A–C.

452. McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 165 (1973) (concluding that states cannot tax tribal members on income derived from reservation sources); Choteau

narrowing *Capoeman* doctrine, Native communities are exempt only on income derived directly from land which diminishes the land's value.[453] As to nonmembers residing on reservations, tribes share the same tax base as Congress *and* states.[454] Commodity taxes follow the same pattern.[455] Regarding functional tax competition, Native tribes often occupy a position of insurmountable disadvantage. Because reservations are located *within* other subnational jurisdictions like states, tribes cannot reduce tax rates below the level outside of reservations. That is, tribes can only impose additional taxes on top of federal and state tax burdens for nonmembers.[456] Any exercise of their taxing power works to drive nonmembers out of tribal jurisdiction rather than attract them in.[457] Both formal and functional tax competition thus constrain Native fiscal capacity.

Poverty limits the tax base of tribes and territories—some of lowest-income jurisdictions within the United States.[458] This becomes especially pressing for tribes because multiple taxing jurisdictions share the same impoverished tax base.[459] Territories' exemption from federal taxation leaves far more of their tax base for local taxation. Such exemption is not unjustified. The key question is how to translate a coherent notion of fiscal autonomy into federal tax policy—which this Article will address.[460]

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v. Burnet, 283 U.S. 691, 695–96 (1931) (subjecting Native populations to federal income taxation).

453. See supra notes 144–157 and accompanying text.

454. *McClanahan* only precludes state taxation of tribal members' income derived from reservation sources. 411 U.S. at 175–76. Later case law permits states to tax nonmembers (even if members of other Native tribes) residing in a reservation on their income derived from that reservation, and on their income derived from the reservation of the tribe of which the taxpayer is a member. See Mike v. Franchise Tax Bd., 106 Cal. Rptr. 3d 139, 147 (Ct. App. 2010) (permitting California to tax enrolled members of the Twenty-Nine Palms Band of Mission Indians, residing on a different tribe's reservation, on income derived from sources on the Twenty-Nine Palms Band Reservation); LaRock v. Wis. Dep't of Revenue, 621 N.W.2d 907, 908 (Wis. 2001) (permitting Wisconsin to tax "an enrolled member of the Menominee Tribe," "living and working on the Oneida Reservation," on income generated on the Oneida Reservation).

455. See supra section I.C.

456. Tribes can lower resident members' tax burdens by taxing less than the state, because *McClanahan* exempts those members from state taxation. 411 U.S. at 173. But this hardly enables tribes to engage in tax competition. The off-reservation investments and taxpayers tribes need to attract are unlikely to be members of the tribe already.

457. For example, assume the tribe and the state each imposes a 5% tax on cigarettes. Buying cigarettes off reservation would be subject to a 5% state tax only. Buying cigarettes on reservation would be subject to a 10% tax (5% state and 5% tribal). Buyers would then try to purchase cigarettes off reservation only to avoid the additional 5% tax.

458. Craig Benson & Alemayehu Bishaw, Persistent Poverty in Puerto Rico and the U.S. Island Areas, U.S. Census Bureau (2024), https://www2.census.gov/library/publications/2024/demo/acs-57.pdf [https://perma.cc/N4N5-AJAG]; American Indian and Alaska Native Health, U.S. Dep't Health & Hum. Servs., https://minorityhealth.hhs.gov/american-indian-and-alaska-native-health [https://perma.cc/59VE-WUKS] (last visited Mar. 19, 2026).

459. See supra section I.C.

460. See infra section III.C.

Second, subnational governments possess varying degrees of substantive power. Some wield full control over the design of their tax regimes; others must tax in ways derivative of or shaped by the national community's distributive preferences.[461] Again, Puerto Rico lies on one end. It uniquely combines federal tax exemption with the power to derogate from federal rules.[462] Puerto Rico's exercise of this authority has produced for its longtime residents a local tax structure slightly less progressive than the federal income tax.[463] It has also devised generous incentives for mainland transplants who tend to be very wealthy.[464] Such policy thus enables Puerto Rico to realize a vision of distributive justice divergent from Congress or other subnational jurisdictions. By contrast, mirror-Code territories like Guam have minimal tax-design powers.[465] They levy the federal income tax as their primary source of revenue.[466] Their tax regimes therefore embody the distributive judgment of Congress and its national constituency. Native tribes are in the same boat, though for different reasons. Courts and Congress have hollowed out their tax base.[467] Tribal governments having little fiscal capacity, the key rules that structure inequality and distribution in Native communities are those of federal and state taxation.

Figure 1 illustrates the first-order fiscal autonomy of U.S. subnational governments.

461. See supra notes 321–336 and accompanying text (distinguishing between mirror-Code jurisdictions, which must impose federal income-tax rules, and non-mirror-Code jurisdictions, which can design their own tax regimes).

462. See supra notes 303–309, 323 and accompanying text.

463. Compare I.R.C. § 1 (2018) (taxing income at 10%-37%) with P.R. Laws Ann. tit. 13, § 30061 (LexisNexis, LEXIS through 2025 Legis. Sess.) (taxing income at 7%-33%).

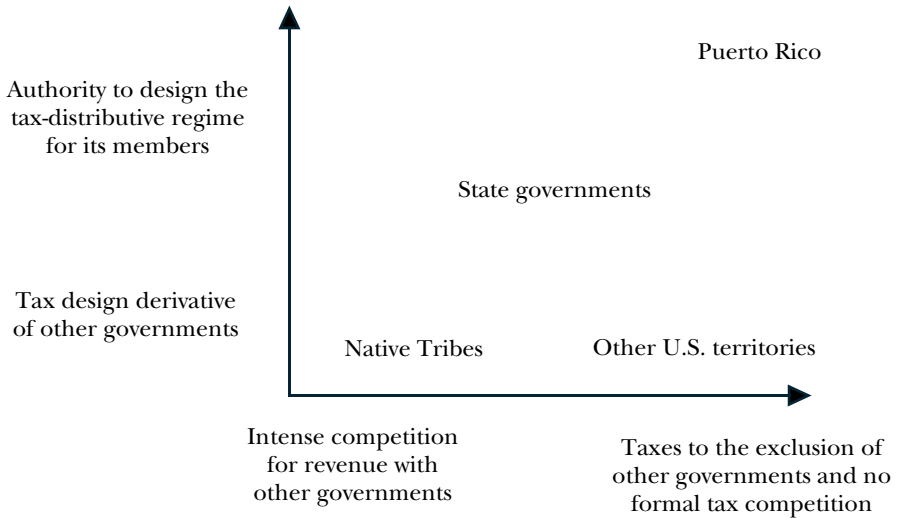
464. P.R. Laws Ann. tit. 13, §§ 10831–10844, 10851–10855 (providing a low fixed tax rate for certain businesses and for certain new residents of Puerto Rico).

465. See supra notes 328–336 and accompanying text.

466. See supra notes 328–336 and accompanying text.

467. See supra section I.A.

FIGURE 1. FIRST-ORDER FISCAL AUTONOMY OF SUBNATIONAL JURISDICTIONS



As Figure 1 shows, Puerto Rico has no overlapping jurisdiction as to territorially sourced income, faces little tax competition, *and* has robust tax-design powers.[468] Other territories—Guam, CNMI, the Virgin Islands, and American Samoa—tax to the exclusion of other governments, but in ways beholden to Congress's distributive judgment.[469] Native tribes face intense tax competition *and* have little tax-design power.[470] In the middle are the states. They share the same tax base as Congress (and occasionally tribes) and compete with each other for revenue.[471] Constrained by the floor set by the federal income tax, they also have limited freedom to design a tax regime that instantiates their own, rather than the national, preferences in distribution.

One caveat: As illustrated by Figure 1, this section's discussion focuses on the statutory and doctrinal coordination of subfederal governments' taxing authority. It does not provide a general assessment of congressional generosity in using tax policy to stimulate tribal or territorial economy. Nor does it place substantial weight on subfederal governments' limited spending or budgetary power after they have collected the tax revenue. For example, the arguments that Puerto Rico can tax to the exclusion of others, faces little tax competition, and has significant tax-design discretion do not imply that Congress has always supported the island in designing federal tax policy, or that Puerto Rico has significant discretion in

468. See supra notes 285–289, 321–322, 337–353 and accompanying text.
469. See supra notes 285–289, 327–336 and accompanying text.
470. See supra Part I.
471. See supra section I.C.

spending its tax receipts. Indeed, the Financial Oversight and Management Board exerts both substantive power and informal pressure over Puerto Rico's fiscal discipline.[472] Such external control over the island's budget and obligations certainly impairs its fiscal autonomy in a broader sense.[473] Further, Congress has been more generous to Puerto Rico in designing federal tax policy in the past, especially as to the corporate income tax. For the twenty years after the Tax Reform Act of 1976, for example, section 936 of the Code allowed U.S. corporations a credit for the full amount of federal corporate tax liability on income sourced to the U.S. possessions.[474] In practice, the vast majority of this tax benefit accrued to U.S. companies operating in Puerto Rico, spurring industrialization and commercial development.[475] The repeal of section 936 in 1996 depressed the territorial economy.[476] It contributed to the fiscal crisis that eventually led to the Puerto Rico Oversight, Management, and Economic Stability Act of 2016 (PROMESA).[477] But the end of this federal tax subsidy does not diminish the island's first-order autonomy over its own residents. Puerto Rico corporations remain generally immune from the federal corporate income tax.[478]

2. *Autonomy as Democratic or Responsive Fiscal Governance.* — By "fiscal autonomy," policymakers have generally referred to taxing power. They

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472. Samuel Issacharoff, Alexandra Bursak, Russell Rennie & Alec Webley, What Is Puerto Rico?, 94 Ind. L.J. 1, 30 (2019) ("Under PROMESA, any fiscal plan or budget developed by the Commonwealth's central government needs to be approved by an Oversight Board before implementation.").

473. Brief Amici Curiae of the Service Employees International Union et al. at 6, United States v. Vaello Madero, 142 S. Ct. 1539 (2022) (No. 20-303) (contending that the Financial Management and Oversight Board's authority deprives Puerto Rico of fiscal autonomy).

474. I.R.C. § 936 (1976).

475. U.S. Gen. Acct. Off., GAO-93-109, Puerto Rico and the Section 936 Tax Credit 2 (1993) ("Since 1983, over 99 percent of the benefits of [section 936 of the 1976 act] have gone to companies operating in Puerto Rico. The Joint Committee on Taxation estimates that federal revenues forgone due to the section 936 tax credit will total $3.9 billion in fiscal year 1994.").

476. Scott Greenberg & Gavin Ekins, Tax Policy Helped Create Puerto Rico's Fiscal Crisis, Tax Found. (June 30, 2015), https://taxfoundation.org/blog/tax-policy-helped-create-puerto-rico-fiscal-crisis [https://perma.cc/T6WV-PD6K] ("When section 936 was repealed in 2006, foreign investment began to flee. Without a strong domestic corporate presence to fill the void, the economy began to contract, along with tax revenues.").

477. Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), Pub. L. No. 114-187, 130 Stat. 549 (2016).

478. Staff of Joint Comm. on Tax'n, 114th Cong., Federal Tax Law and Issues Related to the Commonwealth of Puerto Rico 16 ("In general, a corporation organized under the laws of Puerto Rico is a foreign corporation for U.S. tax purposes. The United States taxes foreign corporations only on income that has a sufficient nexus to the United States."); see also I.R.C. § 7701(a)(4) ("The term 'domestic' when applied to a corporation or partnership means created or organized in the United States or under the law of the United States or of any State unless, in the case of a partnership, the Secretary provides otherwise by regulations.").

have emphasized the tribe's or territory's exclusive control over its tax base and revenue streams.[479] This corresponds to the part of first-order autonomy that concerns the government's receipt of funds.[480]

But autonomy involves more than fiscal capacity. Indeed, existing doctrinal and policy moves resemble impoverished notions of unconstrained freedom that theories of autonomy are designed to replace.[481] After all, autonomy does not entail license to do whatever one likes.[482] In a famous argument, the late philosopher Harry Frankfurt described as "wanton" those purely motivated by first-order desires.[483] Instead, "second-order volitions" assess first-order desires under values formed through rational deliberation.[484] The coherence between the two—exercises of brute capacity and authentic normative commitments—thus defines both personhood and autonomy.[485] In subnational taxation, the critical process of value formation is democracy: Governments have no values of their own. Rather,

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479. See, e.g., Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982) (noting that the power to tax "derives from the tribe's general authority, as sovereign, to . . . requir[e] contributions from persons or enterprises engaged in economic activities within that jurisdiction"); Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134, 167 (1980) (Brennan, J., concurring in part) (noting that Indigenous authority over the receipt of tax funds flows from "a presumption of sovereignty or autonomy that has roots deep in aboriginal independence"); see also I.R.C. §§ 931, 933, 935 (allowing the territories exclusive tax jurisdiction over territorially sourced income).

480. See supra notes 440–460 and accompanying text.

481. E.g., Berofsky, supra note 428, at 182 (describing a framework of autonomy that incorporates rationality, individual values, and other factors in addition to freedom); Christman, supra note 431, at 2–4 (distinguishing autonomy from the rudimentary notion of freedom as "the absence of various types of restraints (internal or external, positive or negative) that might stand between an agent's desires and the performance of her actions" (footnote omitted)); John Christman, Autonomy in Moral and Political Philosophy, Stanford Encyclopedia of Philosophy (2020), https://plato.stanford.edu/archives/fall2020/entries/autonomy-moral/ [https://perma.cc/J5KE-RWPD] (generally distinguishing autonomy from freedom).

482. See supra notes 423–432 and accompanying text; see also Richard H. Fallon, Jr., Two Senses of Autonomy, 46 Stan. L. Rev. 875, 877 (1994) ("To be autonomous, one must be able to form a conception of the good, deliberate rationally, and act consistently with one's goals.").

483. Frankfurt, supra note 31, at 11.

484. Id. at 10.

485. See John J. Davenport, Narrative Identity, Autonomy, and Mortality: From Frankfurt and MacIntyre to Kierkegaard 1 (2012) (describing the influence of hierarchical theories and "higher-order volitions" in contemporary understanding of autonomy); Cuypers, supra note 428 (describing Frankfurt's three conceptions of the will); Laura Waddell Ekstrom, A Coherence Theory of Autonomy, 53 Phil. & Phenomenological Rsch. 599, 600–03 (1993) ("By taking into account our higher-order mental states, contemporary hierarchical conceptions of freedom such as Frankfurt's make progress over classical compatibilist conceptions."); Frankfurt, supra note 31, at 15 ("It is in securing the conformity of his will to his second-order volitions, then, that a person exercises freedom of the will."); Marilyn A. Friedman, Autonomy and the Split-Level Self, 24 S.J. Phil. 19, 19 (1986) (noting that philosophers employ hierarchies when conceptualizing the self); Dennis Loughrey, Second-Order Desire Accounts of Autonomy, 6 Int'l J. Phil. Stud. 211, 211 (1998) (stating that the hierarchical model is the prevailing approach to understanding personal autonomy).

they have varying capacity to translate their citizens' normative vision into tax policy.

Second-order autonomy thus implicates democratic governance. Given first-order fiscal autonomy, how much will subnational governments tax in accordance with their citizens' sense of distributive justice? As relevant here, constraints on democracy can be internal/external, and formal/functional. *Internal–formal* constraints arise when the subnational jurisdiction's internal process fails to channel public preferences into lawmaking. *External–formal* constraints arise when the democratic processes of other governments with jurisdiction over that subnational community (e.g., federal vis-à-vis state) overlook the subnational community's preferences in formulating policy. By contrast, functional failures do not rest on process or institutional-design defects. *Internal–functional* constraints thus arise when economic inequality distorts the subnational government's tax policymaking. Likewise, *external–functional* constraints arise when interjurisdictional economic inequality distorts the federal or state government's tax and fiscal policy to (dis)favor the subnational community.[486]

Under this view, Native tribes have at least as much capacity for democratic and responsive fiscal governance as the territories. First, as to internal process, about half of Native tribes today have adopted written constitutions.[487] They add to the longstanding Native tradition of responsive and constitutional governance.[488] In general, written tribal constitutions divide government functions into executive, legislative, and judicial departments and provide for popular election (and occasionally legislative appointment) of tribal officers.[489] They provide the process by which tribes

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486. See Jacob M. Grumbach, Laboratories of Democratic Backsliding, 117 Am. Pol. Sci. Rev. 967, 967 (2022) (noting the decline in state-level democracy).

487. Robert Miller, Tribal Constitutions and Native Sovereignty, *in* Oxford Handbook Topics in Politics (Oxford Univ. Press 2015), https://academic.oup.com/edited-volume/41327/chapter/496999456 (on file with the *Columbia Law Review*) (estimating that 230 tribes have written constitutions). Many tribes adopted their constitutions pursuant to the IRA, Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 5101–5129 (2018)). Early views characterized IRA constitutions as boilerplate documents drafted by the BIA with little regard for tribal differentiation. Recent scholarship has challenged the received wisdom, contending that "Native communities had a fair amount of self-determination to decide what kinds of provisions they wanted to have in their organic charters." David E. Wilkins & Sheryl Lightfoot, Oaths of Office in Tribal Constitutions, 32 Am. Indian Q. 389, 391 (2008); see also Elmer Rusco, The Indian Reorganization Act and Indian Self-Government, *in* American Indian Constitutional Reform and the Rebuilding of Native Nations 49, 49 (Eric D. Lemont ed., 2006) (describing as "seriously flawed" the view that the IRA forced cookie-cutter, non-Native governments on most tribes).

488. See Seth Davis, The Constitution of Our Tribal Republic, 65 UCLA L. Rev. 1460, 1467–71 (2018) (arguing that agreements among tribes and colonial governments constitute part of American constitutional law).

489. See, e.g., Const. of the Cherokee Nation arts. VI–VIII; Const. of the Chickasaw Nation. arts. V–XIII; Const. of the Choctaw Nation of Okla. arts. V–XIV; see also William C. Canby, Jr., American Indian Law in a Nutshell 74–77 (7th ed. 2020) (explaining that most tribes have adopted a tripartite system of government).

levy taxes and spend the proceeds.[490] They therefore resemble the organic acts and constitutions that structure territorial governments.[491] Importantly, this is not to say that tribes must adopt written constitutions to exercise sovereignty in taxation, but only to show that many tribal governments share the formal features of responsive governance in the territories. Indeed, an emphasis on having a written constitution as a necessary marker of legitimate governance carries a history of colonial baggage for tribes.[492] And as one scholar has documented, tribes have developed institutional and functional checks when formal democratic mechanisms fail.[493] Further, many tribal taxes require federal approval. The tribal taxes at dispute in *Colville*, for example, were approved by Interior, prompting the issue of preemption by delegation.[494] As a result, Native tax policy benefits from additional scrutiny by the federal administrative apparatus, itself subject to mechanisms of democratic accountability.[495] These strictures of lawmaking and internal-process tools help tribes exercise their taxing power in accordance with Native communities' vision of distributive equity—at least as much as the territories.

Indeed, aspects of Native governance enable more robust local democracy than federal law allows the territories. What may have started as "boilerplate" constitutions have evolved through amendment and reform to structure tribes more in accordance with their cultures and norms.[496] By contrast, federal neglect of territorial governance means that some territories still live under organic acts enacted by Congress more than seventy years ago to replace military rule.[497] Guam has pursued greater self-determination in its territorial constitution, and presented to

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490. E.g., Const. of the Cherokee Nation art. X (fiscal matters); Const. of the Chickasaw Nation art. VII, § 9, art. XI, § 4 (budget process); Const. of the Choctaw Nation of Okla. art. VII, § 5 (same); id. art. IX, § 8 (same).

491. E.g., P.R. Const. arts. III–V; Organic Act of Guam, Pub. L. No. 81-630, §§ 6–23, 64 Stat. 384, 386–90 (1950) (codified as amended at 48 U.S.C. §§ 1421–1424b (2018)); Revised Organic Act of the Virgin Islands, Pub. L. No. 83-517, §§ 5–27, 68 Stat. 497, 498–507 (1954) (codified as amended at 48 U.S.C. §§ 1541–1645).

492. See supra note 487 and accompanying text (describing scholarly debate on early IRA and boilerplate tribal constitutions).

493. See Reese, The Other American Law, supra note 41, at 584–621 (detailing the adaptability of tribal law).

494. Washington v. Confederated Tribes of the Colville Indian Rsrv., 447 U.S. 134, 143–44 (1980); see also supra notes 252–271 and accompanying text.

495. See Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2331–39 (2001) (outlining mechanisms of democratic accountability in the administrative state).

496. Jason P. Hipp, Note, Rethinking Rewriting: Tribal Constitutional Amendment and Reform, 4 Colum. J. Race & L. 73, 74, 76 (2013) (describing "a substantial wave of [Native] constitutional amendment and reform"); Beth Redbird & Erin F. Delaney, Tribal Constitutions Project, 1 J. for Digit. Legal Hist. 2023, at 2 fig.1 (documenting the rise of Native constitutional amendments since 1960); see also Fletcher, Tribal Law, supra note 37, at 123–89 (providing an overview of tribal constitutions).

497. Organic Act of Guam, Pub. L. No. 81-630, 64 Stat. 384 (1950); Revised Organic Act of the Virgin Islands, Pub. L. No. 83-517, ch. 558, 68 Stat. 497 (1954).

Congress draft Commonwealth Acts in the late 1980s after plebiscites, but without success.[498] Further, Congress has subjected Puerto Rico's fiscal policies to bureaucratic scrutiny, in appearance like BIA's review of tribal tax ordinances.[499] But the Financial Oversight and Management Board—colloquially known as "la junta"—has invited criticism of democratic *deficit* rather than accountability.[500]

Second, as to external democratic process, both territories and tribes suffer from inadequate representation that accentuates the need for first-order autonomy. Territories send only nonvoting representatives to Congress and have no Electoral College vote in presidential elections.[501] Puerto Rico alone has a federal district court staffed by Article III judges.[502] Article IV courts sit in Guam, CNMI, and the Virgin Islands, while federal-question cases arising from American Samoa often proceed in the district courts for the District of Columbia or Hawaii.[503] Unlike territories, Native communities receive *formal* representation in the federal government (and government of the state where they live). They vote in state and federal elections, but their size and dispersion diminish their voice.[504] And it

498. Guam Commonwealth Act, H.R. 98, 101st Cong. (1989); Guam Commonwealth Act S. 692, 102nd Cong. (1991); Paul Lansing & Peter Hipolito, Guam's Quest for Commonwealth Status, 5 UCLA Asian Pac. Am. L.J. 1, 2 (1998) ("By 1982, the people of Guam had confirmed their desire for commonwealth status."); Lizabeth A. McKibben, The Political Relationship Between the United States and Pacific Islands Entities: The Path to Self-Government in the Northern Mariana Islands, Palau, and Guam, 31 Harv. Int'l. L.J. 257, 287–91 (1990) ("Guamanians have in recent years made a concerted effort to achieve additional autonomy.").

499. PROMESA, Pub. L. No. 114-187, 130 Stat. 549 (2016) (codified at 48 U.S.C. 2101 (2018)).

500. Issacharoff et al., supra note 472, at 31–32 (discussing "the troubling antidemocratic character of PROMESA" and the Oversight Board).

501. U.S. Const. art. I, §§ 2–3; id. art. II, § 1; 48 U.S.C. §§ 891, 1711, 1751–1752 (2018); see also Luis Fuentes-Rohwer, Bringing Democracy to Puerto Rico: A Rejoinder, 11 Harv. Latino L. Rev. 157, 158 (2008) (describing the "mass disenfranchisement of all American citizens within [Puerto Rico's] borders"); Tom C.W. Lin, Americans, Beyond States and Territories, 107 Minn. L. Rev. 1183, 1204 (2023) ("The Territories do not have a vote in either chamber of Congress or an electoral vote for the President . . . .").

502. 28 U.S.C. § 119 (2018); see also James T. Campbell, Note, Island Judges, 129 Yale L.J. 1888, 1895 (2020) [hereinafter Campbell, Island Judges] ("The legislation that gave Puerto Rico's federal judges Article III protections carefully excluded the other territorial district judges in Guam, the U.S. Virgin Islands, and the Panama Canal Zone.").

503. 48 U.S.C. §§ 1424, 1424b, 1611, 1614, 1821; United States v. Lee, 472 F.3d 638, 639 (9th Cir. 2006) (upholding jurisdiction and venue in the district of Hawaii for federal criminal offenses committed in American Samoa); United States v. Gurr, 471 F.3d 144, 154–55 (D.C. Cir. 2006) (finding the same in the D.C. federal district court); Campbell, Island Judges, supra note 502, at 1901–02 (describing the Article IV judgeships in CNMI, the U.S. Virgin Islands, and Guam); Uilisone Falemanu Tua, Note, A Native's Call for Justice: The Call for the Establishment of a Federal District Court in American Samoa, 11 Asian-Pac. L. & Pol'y J. 246, 251 (2009).

504. Congress has historically enacted some of the most detrimental policies for tribes. See General Allotment Act, ch. 119, § 5, 24 Stat. 388, 389–90 (1887); supra notes 88–90 and accompanying text (describing the loss of Native land following the General Allotment Act).

is important not to assume this formal permission to vote—in particular in state elections—will translate into adequate political power or is conceptually coherent with our multilayered structure of governance. Elizabeth Reese has rightly observed that states and tribes are frequent "rivals for resources, territory, and power," and has argued that tribes' exclusion from the structure of the United States's representative democracy is a symptom of "assimilative colonialism."[505] Pointing to tribal "distrust" of and "tension" with state government, she has challenged the practice of apportioning tribal citizens into states for purposes of federal representation as a deviation from "the United States's fundamental commitment to representative democracy for all."[506] Indeed, territories and tribes do not *compose* the federal government in the same way states do. Herbert Wechsler famously wrote about the political safeguards of federalism, contending that the federal political process adequately protects the states through, for example, equal representation in the Senate.[507] Other subnational governments have no such privilege.

Such constraints mean that federal and state governments will not adequately account for Native and territorial distributive preferences in formulating fiscal policy. History bears out this observation. One scholar, for example, has shown how federal tax policy in Puerto Rico has evolved to facilitate U.S. corporate expansion rather than territorial interests.[508] Congress first experimented with tax incentives to transform the island into a low-cost manufacturing base.[509] It then tried to defend its corporate tax base by regaining control over American capital accumulation on the island, producing shifts in tax policy that debilitated the territorial economy.[510] Tribes have suffered similar economic extraction at the hands of the federal government.[511] And *Wagnon v. Prairie Board Potawatomi Nation*, a key case about states' power to tax Native commercial activities, illustrates

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But recently, advocates have turned to Congress to protect Native interests, with better but still mixed results. See Kirsten Matoy Carlson, Congress and Indians, 86 U. Colo. L. Rev. 77, 85–88 (2015) ("Recent assertions that Indians may fare better in Congress than in the courts contradict popular narratives about the political success of minority groups.").

505. Reese, Tribal Representation, supra note 96, at 776, 820.

506. Id. at 775–79, 826.

507. Wechsler, supra note 61, at 543–46; cf. Larry D. Kramer, Putting the Politics Back Into the Political Safeguards of Federalism, 100 Colum. L. Rev. 215, 224 (2000) (characterizing Wechsler's conclusion that the Senate protects state interests as "baffling").

508. Dick, supra note 43, *passim*.

509. Id. at 53–68.

510. Id. at 68–78.

511. Most prominent is the loss of Native land. See McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020) (discussing the loss of land resulting from the Trail of Tears); Theda Perdue & Michael D. Green, The Cherokee Nation and the Trail of Tears, at xiii–xiv (2007) ("In the early nineteenth century, the United States forced the Cherokee Nation to surrender its homeland and relocate west of the Mississippi."); Ethan Davis, An Administrative Trail of Tears: Indian Removal, 50 Am. J. Legal Hist. 49, 49 (2008) ("[T]he federal government uprooted the so-called five 'Civilized Tribes' of the South and sent them westward to modern day Oklahoma."); supra notes 88–90 and accompanying text.

the failure of state democratic process.[512] *Wagnon* concerned a Kansas tax on the receipt of motor fuel by non-Indian distributors.[513] The majority upheld the tax, even though the distributor sold fuel to on-reservation gas stations.[514] Justice Ginsburg decried the state's discriminatory treatment of Native communities in distributing the benefits of tax revenue. Kansas failed to maintain even *state* roads on the reservation of the tribe that functionally bore the costs of the fuel tax.[515] She noted that Kansas allocated a large portion of its fuel tax revenue for counties and localities but "expend[ed] *none* of its fuel tax revenue on the upkeep or improvement of tribally owned reservation roads."[516] All these exemplify failures of external process to channel the subnational community's distributive preferences into broader policy. They counsel in favor of robust local taxing powers (i.e., first-order autonomy).

Third, functional constraints hinder democratic fiscal governance in territories more than in Native communities. Economic inequality distorts tax legislation.[517] Wealthy taxpayers gain concrete benefits through the reduction of rates and progressivity in the overall tax system.[518] They exert extraordinary political influence through campaign contributions,[519] amplified speech in media,[520] and direct participation in the political process.[521] All these can produce tax and fiscal policies that deviate from a subnational community's collective judgment on distributive equity, even

512. 546 U.S. 95, 130 (2005) (Ginsburg, J., dissenting).

513. Id. at 99 (majority opinion).

514. Id.

515. Id. at 129 (Ginsburg, J., dissenting).

516. Id. at 129–30 (Ginsburg, J., dissenting) (citing Prairie Band Potawatomi Nation v. Richards, 379 F.3d 979, 986–87 (10th Cir. 2004)); see also Kan. Stat. Ann. §§ 79–34,142 (2025); 1999 Kan. Sess. Laws 1124.

517. By "distortion," this Article refers to fiscal policies' deviation from the public's vision of distributive equity, rather than taxation's tendency to produce inefficient economic behavior. See James R. Repetti, Democracy and Opportunity: A New Paradigm in Tax Equity, 61 Vand. L. Rev. 1129, 1154 (2008) ("[H]igh-income individuals can distort the political process.").

518. See Thomas Piketty & Emmanuel Saez, How Progressive Is the U.S. Federal Tax System? A Historical and International Perspective, 21 J. Econ. Persps. 3, 3 (2007) (describing "a dramatic decline in top marginal individual income tax rates"); see also David Hope & Julian Limberg, The Economic Consequences of Major Tax Cuts for the Rich, 20 Socio-Econ. Rev. 539, 539 (2022) (referring to "the dramatic fall in taxes on the rich across the Organisation for Economic Co-operation and Development (OECD) countries").

519. See Kristin A. Goss, Policy Plutocrats: How America's Wealthy Seek to Influence Governance, 49 Pol. Sci. & Pol. 442, 442 (2016) ("These [millionaire and billionaire] donors are directing not only their money but also their time, ideas, and political leverage toward influencing public policy.").

520. Erin L. Miller, Amplified Speech, 43 Cardozo L. Rev. 1, 10 (2021) (describing how wealthy citizens can "amplify their speech to the largest audiences—often with great difficulty and cost—in the contemporary media environment").

521. James R. Repetti, Democracy, Taxes, and Wealth, 76 N.Y.U. L. Rev. 825, 849 (2001) ("[C]oncentrations of wealth enable wealthy individuals to influence disproportionately the elective and legislative process . . . .").

given robust operation of *formal* tools of democratic accountability. In short, money talks, and its chatter shifts how society allocates economic resources and spreads the costs of governance.[522] This point is especially salient in the age of *Citizens United v. Federal Election Commission*, which allows wealth unimpeded influence over politics.[523]

Native communities experience much lower *internal* economic inequality than territories. A recent study has shown that income distribution is more egalitarian among Indigenous populations in the United States than white, Asian, and miscellaneous non-classified ethnicities.[524] As a result, economic inequality less likely distorts tax policymaking in tribes than, for example, in Congress and certain states, for the wealthy cannot exert disproportionate influence over the tribal political process. To be sure, much of the lower inequality is attributable to poverty. Wealthy Indigenous taxpayers have less to gain from tribal tax policy because few exist.[525] But this accentuates the tribes' need for first-order autonomy. Poverty and lower inequality mean that tribes will struggle to have federal policy reflect their members' distributive preferences but face fewer functional constraints on the democratically responsive exercise of their own taxing power.[526]

By contrast, income distribution is much less egalitarian in the territories. Indeed, Puerto Rico has the highest level of income inequality among all subnational jurisdictions in the United States.[527] The wealthy thus attain outsized influence in territorial tax and fiscal policymaking.

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522. See Benjamin I. Page, Larry M. Bartels & Jason Seawright, Democracy and the Policy Preferences of Wealthy Americans, 11 Persps. on Pol. 51, 52–53 (2013) (noting that "[w]ealthy Americans tend to be highly active in politics, far more so than the typical citizen" and "much more conservative than the non-affluent on issues of taxes, economic regulation, and social welfare").

523. 558 U.S. 310 (2010); see also Benjamin I. Sachs, Unions, Corporations, and Political Opt-Out Rights After *Citizens United*, 112 Colum. L. Rev. 800, 803 (2012) (illustrating the asymmetry between capital and labor in their constitutional capacity for political speech).

524. Randall Akee, Maggie R. Jones & Sonya R. Porter, Race Matters: Income Shares, Income Inequality, and Income Mobility for All U.S. Races, 56 Demography 999, 1012, app. 34 fig. A6 (2019).

525. Id. app. 41 fig. A1; U.S. Dep't Health & Hum. Servs., supra note 458.

526. See also Matthew L.M. Fletcher, The Three Lives of Mamengwaa: Toward an Indigenous Canon of Construction, 134 Yale L.J. 696, 703 (2025) ("[T]ribal governments care about matters such as income inequality . . . .").

527. Census Bureau, B19083, supra note 367 (showing a Gini coefficient—a standard measurement of income inequality—of 0.5486 for Puerto Rico, compared to 0.4823 for the United States). The Virgin Islands also experiences higher income inequality than the mainland. U.S. Census Bureau, Gini Index of Income Inequality, PCT59 (2024) (showing a Gini coefficient of 0.5049). Income inequality in Guam tends to be lower (but not significantly) than the national average. Census Bureau, B19083, supra note 366 (showing a Gini coefficient of 0.4408); see also Maria Claret M. Ruane & Ning Li, Guam's Income Distribution, 1981–2005, 8 J. Int'l Bus. Rsch. 101, 106–07 (2009) ("Another observation is that, since 1989, Guam's Gini index estimates have been lower than those for the U.S., thus suggesting a more equal distribution of household incomes on Guam than in the U.S.").

The enactment of tax incentives (Acts 20 and 22) provides a dramatic illustration. According to a recent study of campaign filings, beneficiaries of those incentives have become major political donors in Puerto Rico.[528] They have contributed more than $1 million to candidates for territorial offices, circumventing campaign-contribution rules by bundling donations from family members.[529] Persistence of tax incentives creates a vicious cycle. As more wealthy taxpayers migrate from the mainland to avoid federal income taxation, pre-tax income inequality on the island keeps growing.[530] Because wealthy migrants pay little in taxes to Puerto Rico—after all, the point of Acts 20 and 22 is to reduce overall federal *and* territorial tax burdens—the territorial government collects little revenue to redistribute through spending.[531] This fuels the rise of a group with vested, concentrated, constitutional fiscal interest in preserving existing incentives and makes it even harder to design a tax regime that reflects the broader public's normative vision.[532] Such political-economy dynamics help explain the continued existence of Puerto Rico's tax incentives despite their unpopularity among the locals.[533]

The following table summarizes second-order fiscal autonomy of subnational jurisdictions.

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528. Popular Democracy in Action, Pain & Profit: The Act 22 Donors Influencing Puerto Rico's Elections 3 (2024), https://populardemocracyinaction.org/wp-content/uploads/2025/06/pain-and-profit-the-act-22-donors-influencing-puerto-ricos-elections-c4-1.pdf [https://perma.cc/PYQ8-X4AZ].

529. Id. at 7, 9.

530. By 2023, more than five thousand people had moved to Puerto Rico for tax incentives, with numbers dramatically increasing in recent years. IRS, Report to Congress, supra note 360, at 3–4; Letter from Congress to Comptroller General, supra note 355.

531. Assuming good tax planning, the most significant tax that an Act 60 decree-holder will pay to Puerto Rico is a 4% income tax on the export of services. See supra notes 340–349 and accompanying text.

532. See Susannah Camic Tahk, Public Choice Theory and Earmarked Taxes, 68 Tax L. Rev. 755, 762 (2015) ("[Laws with] diffuse costs and concentrated benefits . . . [are] relatively easy to maintain and to extend.").

533. E.g., Popular Democracy in Action, supra note 528; Pedro Cabán, Gringo Go Home! Puerto Rico Is Not for Sale!, Am. Prospect (Aug. 21, 2023), https://prospect.org/power/2023-08-21-gringo-go-home-puerto-rico-not-for-sale [https://perma.cc/3BHG-ZXPL]; Matt Stieb, Puerto Rico to Finance Bros: 'Go Home', N.Y. Mag. (Sep. 22, 2022), https://nymag.com/intelligencer/2022/09/puerto-rico-to-finance-bros-gringo-go-home.html [https://perma.cc/X25A-726D].

TABLE 2. SECOND-ORDER FISCAL AUTONOMY OF SUBNATIONAL JURISDICTIONS

	Native Tribes	**U.S. Territories**
Internal process constraints	Written constitutions (half of federally recognized Tribes) in addition to informal tribal norms. Voting in tribal elections and other mechanisms of responsive governance. Requirement of federal approval for tribal taxes.	Written constitutions and organic acts. Voting in territorial elections.
External process constraints	Formal representation in federal and state governments through election. Diminished legislative influence due to small, dispersed voting blocs and competition with states.	No overlapping jurisdiction with states. No voting representation in the federal government.
Functional constraints	Fewer functional constraints due to lower economic inequality than U.S. average and robust operation of unwritten tribal norms.	More functional constraints due to higher economic inequality (e.g., support for Puerto Rico's tax incentives by the very wealthy).

As Table 2 shows, tribes have as much capacity for democratic fiscal governance as territories. Both jurisdictions have similar internal-process mechanisms of democracy. External-process constraints and inadequate representation in federal (and for tribes, state) governments favor more robust first-order autonomy. As to functional constraints, economic inequality besets fiscal governance of territories far more than that of tribes.

Importantly, second-order autonomy centers the functional value of democratic and responsive fiscal governance. Formal mechanisms of accountability (e.g., separation of powers and electoral control) provide strong indications of subfederal governments' responsiveness to the popular will. But they are not the sine qua non of taxing power. As a result, this Article's analysis does not require all Native tribes to adopt written constitutions to gain the privilege to tax. Instead, robust operation of informal tribal norms may offer equally compelling evidence of democracy.

* * *

Recall that autonomy differs from unconstrained freedom.[534] Autonomy rests on the coherence between first-order taxing power and second-order democratic fiscal governance.[535] Fiscal capacity and authority to design the substance of taxation thus demand adherence to the public's vision of distributive justice. As this section shows, tribes face intense tax competition and possess little tax-design authority, but they hold promise for democratic and responsive fiscal governance. By contrast, territories face little tax competition. Puerto Rico possesses significant tax-design authority but has exercised it in ways that deviate from its citizens' distributive preferences. These discrepancies counsel in favor of (1) increasing tribes' first-order taxing power and (2) constraining Puerto Rico's first-order taxing power to mitigate concerns of tax shelters and imperialism.[536]

This is not to say that territories must share their tax base or be powerless to design their revenue streams. Nor is it to fault territories for developing deficient tax regimes. Our system of territorial taxation arose from decades of federal extraction and Congress's distaste for direct investment in overseas possessions (rather than, for example, tax expenditures like federal tax exemption).[537] The key question is thus how to translate the promise of fiscal autonomy into coherent federal policy for both tribes and territories. Indeed, this Article's account highlights the central role that the federal government has played in diminishing the territories' democratic infrastructure. Such neglect—and plenary power—put the onus on Congress to remedy the deficit in second-order autonomy.

C. *Paths Forward*

This section proposes policy solutions. It advocates a uniform, nonrefundable federal income-tax credit for tribal and territorial income taxes paid. The design of this credit need not be complex. It can mirror existing provisions of the Code like the foreign tax credit.[538] A straightforward section will do:

In the case of an individual, there shall be allowed against the tax imposed by this chapter for the taxable year an amount equal to income taxes paid by the taxpayer to American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, the U.S. Virgin Islands, and Indian tribal

534. See supra notes 428–432 and accompanying text.

535. See supra notes 481–485 and accompanying text.

536. Vertical externalities accentuate this point. Scholars have analyzed situations in which "some of the costs or benefits of a [subnational] tax policy decision affect the federal government rather than the [subnational jurisdiction] making the tax policy decision." Gamage & Shanske, Tax Cannibalization, supra note 8, at 297. Congress and the federal fisc bear the costs of Puerto Rico's tax-incentive regime.

537. Dick, supra note 43, at 85; Zhang, The Origins of U.S. Territorial Taxation, supra note 15, at 593.

538. I.R.C. § 901 (2018). In fact, non-bona fide residents of the territories already receive a foreign tax credit to the extent they pay territorial taxes (e.g., on territorially sourced income like employment).

governments as defined in § 7871(c)(3)(E)(ii), except in the case of amounts attributable to deductions taken under § 164.[539]

The nonrefundable nature of the credit means that Congress will not subsidize tribes and territories more than the federal income-tax base itself, preventing potential abuse.[540] Unlike a blanket exemption, the credit regime disables tax-incentive programs that harm the federal fisc without yielding revenue for tribes or territories.[541] Such tax shelters are normatively undesirable—and politically infeasible given Congress's scrutiny over wealthy migrants to Puerto Rico.[542] The goal is to foster tribal and territorial autonomy, not to enable the wealthy to dodge the federal income tax while distorting the Native or territorial communities' distributive politics. Further, the credit mechanism is better than a tax deduction. Deductions create upside-down subsidies by offering more economic value for higher-income taxpayers.[543] They are substantially less generous than the territories' current tax exemption[544] and will not provide enough subsidy to foster Native tribes' taxing power.

With the credit regime, Congress should enact the following coordination rules. As to tribes, Congress can repeal or maintain the current deduction of up to $10,000 for tribal taxes paid.[545] Taxpayers will elect the more generous tribal-tax credit even if the deduction remains an option.

As to the territories, Congress should repeal their existing exemption from the federal income tax and continue to allow them to tax local-

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539. The proviso clause prevents taxpayers from double dipping—that is, taking advantage of both the proposed nonrefundable tax credit and the existing deduction allowed under § 164 and § 7871. Congress should draft careful coordination provisions to ensure that the operation of the nonrefundable tax credit for tribal taxes paid does not hinder claims for refundable tax credits like the earned income-tax credit.

540. Under a refundable-credit regime, subnational governments can tax their citizens' income at far higher than federal rates. Those citizens can recoup the excess above federal tax burdens from the fisc, enriching subnational treasuries. Such blatant abuse is unlikely given mechanisms of democratic control at the national level (and plenary power). But the effect of a refundable-credit regime is to enlarge the substantive tax-design discretion of subnational jurisdictions, which section III.B.2 has problematized.

541. See supra section II.B.

542. See supra notes 355–360 and accompanying text.

543. See Lily L. Batchelder, Fred T. Goldberg, Jr. & Peter R. Orszag, Efficiency and Tax Incentives: The Case for Refundable Tax Credits, 59 Stan. L. Rev. 23, 24 (2006) ("Currently the vast majority of tax incentives operate through deductions or exclusions, which link the size of the tax preference to a household's marginal tax bracket. Higher-income taxpayers, who are in higher marginal tax brackets, thus receive larger incentives than lower-income taxpayers.").

544. Current law exempts income derived from territorial sources from federal income taxation for bona fide residents of such territories. I.R.C. §§ 931, 933. Current law also provides a deduction for tribal taxes paid by construing tribes as states for purposes of § 164. Id. § 7871(a)(3). But this deduction has not produced significant increases in tribal tax revenue, because it only removes a slight tribal disadvantage in tax competition with states. Id. § 164 (providing a deduction for state and local taxes).

545. See id. § 164(b)(6)(B) (capping the deduction at $10,000 until 2025); supra note 544 (discussing the deduction for tribal taxes).

sourced income. The effect of this repeal will differ among the territories. As a reminder, three territories (Guam, CNMI, and the Virgin Islands) are statutorily required to impose the federal income tax as the territorial income tax, and one territory (American Samoa) has chosen to do so.[546] For most taxpayers in mirror-Code jurisdictions, a federal income-tax credit will produce the same outcome as the existing tax-exemption regime. Bona fide residents with only territorially sourced income will incur the same tax liability under the territorial income tax and the federal income tax (since the two regimes are the same).[547] Those taxpayers will pay income taxes to the territory. They will receive the whole amount as a credit against their federal tax liability.

By contrast, recall that Puerto Rico taxes income at slightly lower rates than Congress.[548] Under a tax-credit-with-no-exemption regime, Puerto Rico taxpayers will likely incur a small tax liability to Congress. Bona fide residents with only Puerto Rico-sourced income will incur a slightly smaller liability under the territorial income tax than under the federal income tax. Those taxpayers will pay income taxes to Puerto Rico, and receive the whole amount as a credit against, but not fully offsetting, their federal tax liability. This cost is worth bearing. In 2022, the Supreme Court upheld Congress's denial of Supplemental Security Income (SSI) benefits to Puerto Ricans based on territorial tax exemption.[549] Subjecting Puerto Rico to a minimal level of federal taxation would thus deprive Congress of this rational basis for differential treatment of territories in welfare policy and force it to extend the SSI program to an impoverished jurisdiction.[550]

The largest impact will be on decree-holders under Puerto Rico's tax-incentive regime. Recall that with the right tax planning, they can reduce their capital-gains tax rate to zero and their ordinary income-tax rate to 4% by moving to Puerto Rico.[551] Under a tax-credit-with-no-exemption regime, their liability under the territorial income tax will be miniscule

546. See supra notes 324–336 and accompanying text.

547. Mirror-Code jurisdictions may not replicate all aspects of the federal tax regime. Guam's mirroring provision, for example, specifies that income tax laws "manifestly inapplicable or incompatible with the intent" of the mirroring provision will not apply in the territory. 48 U.S.C. § 1421i(d)(1) (2018). But those exceptions operate in the margins, not the core, of the income tax.

548. See supra notes 322–323 and accompanying text.

549. See United States v. Vaello Madero, 142 S. Ct. 1539, 1543 (2022); see also 42 U.S.C. § 1382c(a)(1)(B)(i), (e) (excluding Puerto Rico from the definition of the United States for the SSI program); Hammond, supra note 412, at 1641 (describing the First Circuit's opinion that was eventually overturned by the Supreme Court in *Vaello Madero*).

550. The credit regime subjects Puerto Ricans to a slightly higher federal tax burden. But the cost is made up by the extension of federal welfare programs to the island. See U.S. Gov't Accountability Off., GAO-14-31, Puerto Rico: Information on How Statehood Would Potentially Affect Selected Federal Programs and Revenue Sources 82 (2014) (estimating that the federal government would need to spend $1.5–1.8 billion to bring the SSI program to Puerto Rico in 2011).

551. See supra notes 338–349 and accompanying text.

compared to their liability under the federal income tax. They will pay a small tax to Puerto Rico, claim it as a credit against the federal income tax, and owe additional taxes to the federal government. This reform will not violate Puerto Rico's guarantee to the taxpayers. The island has defined the Act 60 decrees as "contracts" to bring them under the protection of the Puerto Rican Constitution.[552] Under the tax-credit regime, Puerto Rico continues to honor its contractual obligations by granting the decree-holders preferential territorial tax treatment. Decree-holders simply owe more to the federal treasury. Puerto Rico, of course, does not promise to—and cannot—bind the hands of Congress.[553]

The effects of this uniform tribal- and territorial-tax credit are thus threefold. First, it builds tribes' fiscal capacity by affording them the same federal tax treatment as territories.[554] As this Article has argued, tribes' capacity for responsive fiscal governance entitles them to more robust first-order taxing power. The credit regime does precisely that, carving out the federal income-tax base to foster Native autonomy as Congress and the Supreme Court have so often promised. Second, it preserves the same tax outcome for most residents in mirror-Code territories. Extractive and paternalist federal policies in the past, Congress's unwillingness to invest directly in these impoverished jurisdictions, and Native communities' lack of representation in the federal political process still ground their need for first-order autonomy. Third, the credit regime limits the design authority of Puerto Rico by subjecting all U.S. citizens to the same minimum burden of the federal income tax. It preserves a level of first-order autonomy commensurate with the jurisdiction's capacity for democratic fiscal governance. It prevents subnational tax incentives from imposing undue vertical externalities and costs on the federal fisc.[555]

An additional implication concerns the administration of the Tax Reform Act of 1986. Recall that the 1986 Act affirmed American Samoa's—and granted to Guam and CNMI—power to deviate from federal rules and to enact their own territorial tax regimes, all predicated on a tax implementation treaty.[556] There is no effective treaty between the federal gov-

552. P.R. Const. art. II, § 7; P.R. Laws Ann. tit. 13, §§ 10838(a), 45004(b) (LexisNexis, LEXIS through 2025 Legis. Sess.).

553. See U.S. Const. art. IV, § 3, cl. 2; Cleveland, supra note 52, at 239–40 ("Puerto Ricans were allowed to adopt a constitution, form their own government, and were given commonwealth status between 1950 and 1952, although their constitution remained subject to amendment by Congress.").

554. A uniform federal income tax credit for tribal taxes paid only is also desirable. That is, should political momentum fail on territorial-tax reform, Congress should nonetheless pursue an improvement in Native fiscal capacity. That will still bring federal tax policy closer to the conceptual ideal of autonomy.

555. See supra note 536.

556. See Tax Reform Act of 1986, Pub. L. No. 99-514, § 1271, 100 Stat. 2085, 2591–93 (authorizing Guam, American Samoa, and CNMI to "enact[] tax laws (which shall apply in lieu of the mirror system) with respect to income" sourced to the territories or received by territorial residents "only if . . . an implementing agreement is in effect between the United

ernment and either Guam or CNMI, and Treasury should give serious thought before signing one.[557] As this Article has shown, delegation of substantive discretion in tax design to the territories—while depriving them of democratic infrastructure—has created tax shelters that damage the fisc and distort federal redistribution.[558] If Congress desires to create more non-mirror-Code jurisdictions, it must grapple with the variation in subnational governments' capacity for democratic and responsive fiscal governance—not the least because federal policies have created, and continue to shape, that variation. In the interim, the nonrefundable credit provision will incentivize those jurisdictions to adopt federal rules as the local tax regime. That will entitle them to the maximum amount of federal subsidy.

Legislative intervention is not easy. But recent criticism of territorial tax shelters, calls for Native sovereignty, and opposition to the legacy of imperialism have built enough momentum to be hopeful. Further, the cost of a nonrefundable income-tax credit is relatively insignificant to the federal fisc. A rough estimate of the cost as applied to tribal taxes *only*, based on the median income of Native households and current federal income-tax rates, is $1.5–2 billion.[559] This is dwarfed by other items in the federal tax-expenditure budget, some of which cost more than $200 billion per year.[560] Complete enactment of the credit provision would further decrease the cost. If Congress abolishes the existing territorial tax exemption and enacts the coordination rules described in this section, taxpayers would not be able to escape federal income taxation by moving to Puerto Rico.[561] This recapture of revenue lost under Puerto Rico's Act 60 would return at least several hundred million dollars to the Treasury each year.[562]

States and such possession"); see supra notes 324–336 and accompanying text (discussing this authorization by the 1986 Act).

557. See Amendment to the Tax Implementation Agreement Between the United States and Guam, supra note 336 (delaying indefinitely the effective date of the agreement); see supra notes 335–336 and accompanying text.

558. See supra section II.B.

559. I.R.C. § 1 (2018) (current income tax rates); Press Release, U.S. Census Bureau, Census Bureau Releases New American Community Survey Selected Population Tables and American Indian and Alaska Native Tables (June 15, 2023), https://www.census.gov/newsroom/press-releases/2023/acs-selected-population-aian-tables.html [https://perma.cc/GV74-DBMF] (median income of Native households). This rough estimate results from applying the average effective tax rates to the median incomes of Native households, without taking into account the effects, if any, on other tax credits claimed by the households.

560. Tax exemptions for contributions to retirement plans and employer-provided health insurance cost the federal government more than $200 billion per year. U.S. Dep't of the Treasury, Tax Expenditures Fiscal Year 2026 tbl. 1 (2024), https://home.treasury.gov/system/files/131/Tax-Expenditures-FY2026.pdf [https://perma.cc/4T4Z-S3HR]. Even HSAs (Health Savings Accounts)—a relatively small tax expenditure—cost Congress about $14 billion per year, seven times the cost of the proposed credit regime. Id.

561. See supra notes 545–553 and accompanying text (describing the operation of the coordination rules, especially in the territories).

562. In 2020, the IRS estimated that a group of around six hundred Act 22 decreeholders had paid $557 million—that is, $111.4 million on average each year—in federal

The reasonable cost of the credit regime raises a concern in the Native context. The tax-expenditure cost—roughly estimated at $2 billion each year[563]—to the federal government equals the subsidy that tribes will receive. If so, the credit regime's direct fiscal impact is limited, especially compared to other sources of tribal revenue and federal spending. For example, in 2024, tribal gaming revenue reached a record $43.9 billion.[564] At a profit margin of 26%, casinos generated $11 billion for tribes to distribute to their members and to invest in their general welfare.[565] Further, in the Infrastructure and Jobs Act of 2021 and other statutes, Congress appropriated $3 billion for a multiyear grant program to expand access to broadband internet on tribal lands.[566] These figures make the subsidy in the form of the refundable tax credit look less significant. They pose two key questions: How much would this Article's proposed policy reform benefit the tribes, given other sources of tribal revenue? Further, what difference does it make for *tribes* to tax, if Congress—with a powerful and perhaps more efficient administrative apparatus—can simply reroute substantial federal revenue to expenditure programs on tribal lands?

Under this Article's framework, the credit regime is still valuable for tribes, for two main reasons. First, the reduced impact of the tax credit sounds in first-order autonomy—that is, how much the proposed regime will build the fiscal capacity of tribal government. Here, intertribal variation is a critical factor. The $2 billion figure may seem insignificant compared to the $11 billion annual profit from casino operations.[567] But gaming revenue is not evenly distributed among the tribes. In 2022, about 250 out of the 574 federally recognized tribes operated casinos.[568] More

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income taxes in the five years before moving to Puerto Rico. IRS, Report to Congress, supra note 360, at 5. The actual annual figure is significantly higher because the IRS Report did not cover all decree-holders under Act 22, and because more taxpayers have moved to the island during the pandemic and the era of remote work. Id.

563. See supra note 559 and accompanying text.

564. Press Release, Nat'l Indian Gaming Comm'n, NIGC Announces Record $43.9 Billion in FY 2024 Gross Gaming Revenues (July 31, 2025), https://www.nigc.gov/nigc-announces-record-43-9-billion-in-fy-2024-gross-gaming-revenues/ [https://perma.cc/QQ7K-3PZ3].

565. See Wipfli Releases 2024 Annual Indian Gaming Cost of Doing Business Report, Indian Gaming (Aug. 28, 2024), https://www.indiangaming.com/wipfli-releases-2024-annual-indian-gaming-cost-of-doing-business-report [https://perma.cc/4V2L-YZ5V] (noting a 26% average net profit percentage in 2023).

566. See Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, div. J, tit. II, 135 Stat. 429, 1353 (2021) (appropriating an additional $2 billion for the Tribal Broadband Connectivity Program (TBCP)); Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. N, §§ 905(b)–(c), 134 Stat. 1182, 2138 (appropriating $1 billion for the TBCP).

567. See supra notes 559, 564 and accompanying text.

568. See Nat'l Indian Gaming Comm'n, U.S. Dep't of the Interior, Budget Justifications and Performance Information Fiscal Year 2026, at 2 (2025), https://www.doi.gov/sites/default/files/documents/2025-07/nigc-fy26-greenbook508.pdf [https://perma.cc/F9Q3-5LTH] (stating that under the Indian Gaming Regulatory Act, the National Indian Gaming Commission oversees "more than 520 gaming establishments licensed by approximately 250 federally recognized tribes located within 29 states"); About Us, Bureau of Indian Affs.,

than half of the tribes therefore had no gaming revenue. Among the tribes that did, cash flows are concentrated in a handful of especially successful operations.[569] The credit regime will thus bring non-negligible fiscal benefits to the many tribal governments without large commercial operations. To be sure, tribes with wealthier members might receive a larger subsidy through the credit regime because they have more to tax. But this is a feature rather than a bug of the proposal. The federal government has vowed to foster the sovereignty and the fiscal autonomy of all tribes, regardless of their entrepreneurship.

Second, taxation holds promises distinct from direct federal spending. This implicates three elements of sovereignty: symbolic, discursive, and dignity-based. As this Article has discussed, and scholars have widely recognized, robust powers to tax lie at the center of governance.[570] As to symbolic or expressivist values, this means that fiscal sovereigns like tribal governments cannot simply be conduits or statutory categories through which to channel federal spending. For example, one of the largest sources—or *the* largest source, depending on the mode of categorization—of revenue for state governments in the United States is intergovernmental transfers from Congress.[571] But we would all agree that states lose an aspect of sovereignty and federalism when direct federal spending replaces state tax receipts. Likewise, framing tribes as holding only a contractual right to exclude rather than the authority to tax communicates a social or doctrinal norm that devalues their capacity for governance.[572] More concretely, it may reduce their civil jurisdiction in other areas of the law, as courts rely on limiting tax precedents to articulate generally applicable principles.[573]

Dep't of the Interior, https://www.bia.gov/about-us [https://perma.cc/3AK4-EWTM] (last visited Jan. 16, 2026) ("There are 574 federally recognized American Indian tribes and Alaska Native Villages in the United States.").

569. See, e.g., Mohegan Tribal Gaming Auth., Annual Report for the Fiscal Year Ended September 30, 2024, at 8 (Dec. 31, 2024), https://mohegangaming.com/wp-content/uploads/Mohegan-Fiscal-2024-Annual-Report.pdf [https://perma.cc/H2CT-MKJ3] (recording gaming revenue totaling $1.242 billion for the Mohegan Tribal Gaming Authority).

570. See supra notes 1–14 and accompanying text.

571. What Are the Sources of Revenue for State and Local Governments?, Tax Pol'y Ctr., https://taxpolicycenter.org/briefing-book/what-are-sources-revenue-state-and-local-governments (on file with the *Columbia Law Review*) (last updated Jan. 2024) (listing intergovernmental transfers as constituting 37% of all state-government receipts, a larger share than individual income taxes (19%), sales taxes (14%), or corporate income taxes (3%)).

572. See, e.g., Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 171–73 (1982) (Stevens, J., dissenting) (grounding tribal taxation of nonmembers in the right to exclude rather than as an act of sovereignty); see supra notes 225–229 and accompanying text.

573. This risk is also salient in the territorial context. The Supreme Court first held that the Constitution did not *ex proprio vigore* apply to unincorporated territories like Puerto Rico in tax cases. See De Lima v. Bidwell, 182 U.S. 1, 23 (1901) (concluding that Puerto Rico ceased to be a foreign country for purposes of the U.S. tariff regime); see also Downes v. Bidwell, 182 U.S. 244, 287 (1901) (concluding, despite the Court's holding in *De Lima*, that the constitutional requirement of uniform imposts did not apply to Puerto Rico). But it

Further, enabling taxation brings discursive benefits that bolster tribes' second-order autonomy. This applies both to impoverished tribes that need tax revenue and wealthier ones that can do without. That is, encouraging members to think through tribal tax policy (e.g., whether to adopt federal income-tax rules as tribal tax rules or to deviate from the former in ways that cohere with the specific tribal contexts) generates meaningful distributive speech. It will provide both epistemic opportunity and legislative occasion for members to learn about and reflect on tax-policy choices and tradeoffs, as well as their roles in shaping inequality and the provision of public goods. This builds democratic infrastructure. By contrast, if tribes must resort to commercial development to raise revenue, business talk will prevail over distributive discourse.[574] And as tribes develop their capacity for democratic or responsive fiscal governance through deliberation and tax legislation, they become entitled to greater fiscal capacity and first-order autonomy. Participation in the federal political process to vie for congressional appropriations does not produce the same discursive effect. Larger tribes and the elite representatives are bound to wield more influence, and ordinary tribal members less likely to participate.

In addition, recovering a lost aspect of sovereignty furthers the values of dignity. Both the federal government and the states have deprived tribes of the economic and legal tools of self-governance. The allotment regime has led to dramatic decreases in wealth and Native land ownership.[575] As this Article and other scholars have observed, the Supreme Court has often declined to protect tribes or eroded their power with inconsistent and unsympathetic doctrine.[576] These historical practices underscore the role of corrective justice: According tribes taxing power equal to their capacity for democratic and responsive governance also respects their dignity.

In the absence of action by Congress, doctrinal reform can help. Recall that the Supreme Court's jurisprudence in adjudicating Native tax disputes centers on a collision between dependent-sovereign and strict-

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quickly relied on the original *Insular Cases* to hold other constitutional rights inapplicable to territorial residents. See, e.g., Balzac v. Porto Rico, 258 U.S. 298, 305–07 (1922) (concluding that the Sixth Amendment right to a jury trial did not apply to unincorporated territories).

574. After all, a core principle of business enterprise is to maximize profits to various stakeholders (in contrast to, for example, ensuring a fair distribution of profits among the stakeholders). See, e.g., Robert J. Rhee, A Legal Theory of Shareholder Primacy, 102 Minn. L. Rev. 1951, 1951–52 (2018) (describing the shareholder primacy principle and the norm of maximizing shareholder wealth).

575. See supra note 90 and accompanying text.

576. See Elizabeth Reese, Welcome to the Maze: Race, Justice, and Jurisdiction in *McGirt v. Oklahoma*, U. Chi. L. Rev. Online (2020), https://lawreview.uchicago.edu/online-archive/welcome-maze-race-justice-and-jurisdiction-mcgirt-v-oklahoma [https://perma.cc/JWU8-PEMQ] ("Previous Supreme Court opinions have made clear that tribal sovereignty has been eroded and tribal governments have been denied the consistent protection of American law partially because they were judged as 'the other' or otherwise unworthy to survive as robust contemporary governments in the United States."); supra Part I.

autonomy theories.[577] Justice Marshall, writing for the majority in *Merrion*, saw tribes as fiscal sovereigns with inherent power to tax nonmembers on commercial activities within reservations.[578] Only Congress, a superior sovereign, can change the default.[579] By contrast, Justice Stevens, in a vigorous dissent which guided later case law, drew a sharp division between members and nonmembers. Tribes should, by default, have no authority to tax nonmembers because nonmembers cannot vote in tribal elections and have no voice in formulating tribal tax legislation.[580]

Justice Marshall's and Justice Stevens's views thus track the distinction between first-order and second-order autonomy. Seeing tribes as dependent fiscal sovereigns emphasizes their first-order fiscal capacity and substantive power. Requiring accountability for the authority to tax speaks to second-order constraints on democratic governance. But both are critical to fiscal autonomy in the subnational context. It is unrealistic to leave scrutiny of Native taxation to Congress. It defies the logic of interjurisdictional taxation to demand electoral accountability by all actors burdened by a government's levies.[581] Instead, courts should find the equilibrium where the tribe's democratic infrastructure or informal norms ground its power to tax. As this Article has shown, current judicial limits constrain tribal fiscal policy more than is due under the federal promise of autonomy.[582] Courts should thus embrace a stronger vision of tribal sovereignty to tax in adjudicating conflicts between tribes and states.[583]

But case law is ultimately less effective than legislation. Court action invites arbitrary outcomes. In *McGirt v. Oklahoma*, the Supreme Court held that much of eastern Oklahoma remained Native American territory.[584] A doctrine of tax sovereignty more favorable to tribes would either disable Oklahoma from taxing certain economic activities in Native territory or allow tribes taxing jurisdiction over half of the state. That, perhaps, is not a bad outcome for the tribes. But why should Oklahoma bear the entire cost when Georgia and Alabama drove the Creek Nation away from its

577. See supra section I.B.

578. See Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982) (describing the power to tax as arising from tribes' sovereignty).

579. See id. at 139–44 (noting the power of Congress to limit tribes' taxing power).

580. See id. at 183 (Stevens, J., dissenting) ("Tribal powers over nonmembers are appropriately limited because nonmembers are foreclosed from participation in tribal government.").

581. States and other countries impose various consumption and income taxes on noncitizens who cannot vote and have no opportunity for democratic participation in the respective government. See, e.g., Mason, supra note 352, at 171–72.

582. See supra section I.B.

583. Another option is to expand the *Capoeman* doctrine, which the lower courts narrowed. See Squire v. Capoeman, 351 U.S. 1, 9 (1956) (stating the rule that income derived from trust land is exempt from federal taxation); see supra section I.A.3.

584. See 140 S. Ct. 2452, 2459 (2020) (holding that much of Eastern Oklahoma remained Native American territory).

ancestral lands?[585] Even if doctrine improves tribal economic conditions, it will lead to more of the same litigation which generated only bitter, zero-sum contests between tribes and states in the past few decades.[586] A federal credit regime better—and more rationally—spreads the cost.

CONCLUSION

This Article studies the distinctive taxing powers of Native tribes and the U.S. territories. It shows that the same vow of autonomy and federal plenary power has produced complex, divergent tax treatment. The Article provides the missing account of fiscal autonomy for these subnational jurisdictions. It proposes policy reforms that bring the federal government closer to fulfilling its promise of self-governance for jurisdictions long afflicted by the legacy of American imperialism.

Indeed, such calls for fiscal autonomy echo the constitutional values that underpin the federal government's own authority to tax. In 1787, Alexander Hamilton argued passionately for Congress's taxing power:

> Money is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion and enables it to perform its most essential functions. A complete power, therefore, to procure a regular and adequate supply of revenue, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution. From a deficiency in this particular, one of two evils must ensue: either the people must be subjected to continual plunder, as a substitute for a more eligible mode of supplying the public wants, or the government must sink into a fatal atrophy, and, in a short course of time, perish.[587]

Hamilton's vision resonates with this Article's discussion of fiscal autonomy. Effective government requires revenue—"the vital principle of the body politic"[588]—and the power to tax. Democratic governance—what constitutes the state and "propriety"[589]—constrains its exercise. Despite a century of promise of fiscal self-governance, tribes and territories have long been overlooked. It is time to integrate them into the scholarly discourse and public debate about taxation.

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585. Id.

586. See supra section I.C.

587. The Federalist No. 30, at 188 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

588. Id.

589. Id.