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Jesse K. Martin

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# **KANSAS v. PRAIRIE BAND POTAWATOMI NATION: UNDERMINING INDIAN SOVEREIGNTY THROUGH STATE TAXATION**

JESSE K. MARTIN\*

## I. INTRODUCTION

In *Kansas v. Prairie Band Potawatomi Nation*,<sup>1</sup> the Supreme Court undermined the historic and deeply-rooted sovereign status of Indian tribes by focusing on a hyper-technical application of precedent and ignoring the practical impact of the Kansas motor fuel tax. The Court determined that the state tax, as applied to the Nation Station's sale of gasoline and diesel fuel was nondiscriminatory, reversing the decision of the Court of Appeals for the Tenth Circuit. Specifically, the Court found that the application of the Kansas motor fuel tax was imposed on an off-reservation transaction between non-Indians.

Focusing on the “who” and the “where” of the tax, the Court rejected the application of the *Bracker*<sup>2</sup> interest-balancing test. The elements of the *Bracker* test “provide[] for a particularized inquiry into the nature of the state, federal, and tribal interests at stake”<sup>3</sup> to determine “whether in the specific context, the exercise of state authority would violate federal law” or “unlawfully infringe on the right of reservation Indians to make their own laws and be ruled by them.”<sup>3</sup> In *Kansas v. Prairie Band Potawatomi Nation*, the Court

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\* J.D. Candidate 2007, University of Maryland School of Law; B.A., Sweet Briar College. The author wishes to thank Mrs. Lisa Welsh for her contributions to the early drafts of this paper.

1. 126 S. Ct. 676 (2005), *reh'g denied*, 2006 U.S. LEXIS 1058 (Jan. 23, 2006) (Prairie III).

2. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (holding that the Arizona state tax applied to non-Indians harvesting timber on a reservation is preempted by federal law). In the Court's opinion, a rigid rule does not exist which addresses whether a particular state law can be applied to an Indian reservation or its tribal members. *See id.* at 142. Consequently, the Court set forth an interest-balancing test to be applied only where, “a State asserts authority over the conduct of non-Indians engaging in activity on the reservation.” *Id.* at 144. The interests that must be considered are those of the state, the federal government, and the tribe. Accordingly, “[s]tate jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertions of State authority.” *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983).

3. *Id.*

determined that this test does not apply to a tax levied in an off-reservation transaction between non-Indians.<sup>4</sup>

While on its face, the Court's analysis may appear technically in accordance with the law, the legal incidence of a tax, as well as the location of the activity which triggers the tax, are events subject to manipulation by the state legislature, a body that has a vested interest in generating tax revenue. The bona fide fact that the off-reservation imposition of the tax on the distributor affects tribal members, because the distributor is economically forced to push the tax downstream, highlights the inequities that exist in the prerequisites to the *Bracker* interest-balancing test. The sovereignty of Indian tribes should not rest upon such fragile, tenuous, and easily manipulated prerequisites. Moving forward, courts should, at a minimum, apply the *Bracker* interest-balancing test irrespective of a tax's legal incidence and notwithstanding whether a tax arises as a result of on-reservation or off-reservation activity, as these indicia are subject to manipulation and are hardly determinative of a tax's ultimate impact.

## II. THE CASE

The Prairie Band Potawatomi Nation (the Tribe) is a federally recognized Indian tribe with its reservation located in Jackson County, Kansas.<sup>5</sup> Pursuant to the Indian Gaming Regulatory Act,<sup>6</sup> the Tribe owns and operates a thirty-five million dollar casino on its reservation near Mayetta, Kansas,<sup>7</sup> which significantly increases the number of people who travel to this otherwise remote area.<sup>8</sup>

Nation Station, a convenience store and gas station owned and operated by the Tribe on its reservation, is located near the casino.<sup>9</sup> Eleven of the Nation Station's fifteen employees are Indians and seven of these employees are members of the Tribe.<sup>10</sup> Seventy-one percent

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4. See *Prairie III*, 126 S. Ct. at 687 (noting that "[l]imiting the interest-balancing test to on-reservation transactions between a nontribal entity and a tribe or tribal member is consistent with our unique Indian tax immunity jurisprudence").

5. *Prairie Band Potawatomi Nation v. Kansas*, 241 F. Supp. 2d 1295, 1297 (Kan. 2003) (*Prairie I*).

6. 25 U.S.C. § 2701 *et seq.* (2006).

7. *Prairie Band Potawatomi Nation v. Kansas*, 379 F.3d 979, 981 (10th Cir. 2004) (*Prairie II*).

8. *Id.*

9. *Prairie I*, 241 F. Supp. 2d at 1297.

10. *Prairie II*, 379 F.3d at 981.

of the Nation Station's proceeds are generated by its fuel sales.<sup>11</sup> The Tribe imposes on these fuel sales a per-gallon tax of sixteen cents for gasoline and eighteen cents for diesel fuel.<sup>12</sup> The Nation Station's fuel sales provide the Tribe with its sole source of fuel tax revenue, approximately \$300,000 per year.<sup>13</sup>

The Tribe uses the revenue from the fuel tax collected at Nation Station to construct and maintain roads and to provide critical government services including, *inter alia*, law enforcement, fire protection, emergency response, educational services, urban planning, and court services.<sup>14</sup> Most importantly, however, the fuel tax revenue pays for the maintenance of the roads and bridges that connect to the reservation; this includes U.S. Highway 75, the road connecting to the casino.<sup>15</sup> The Tribe receives no financial assistance from the State of Kansas to maintain this thoroughfare.<sup>16</sup>

The gasoline and diesel fuel sold at the Nation Station are imported from outside the reservation.<sup>17</sup> Seventy-three percent of the Nation Station's fuel sales are made to patrons and employees of the casino.<sup>18</sup> An additional eleven percent of the fuel sales are made to people who live or work on the reservation.<sup>19</sup> That is, approximately eighty-four percent of Nation Station's fuel sales come from reservation activity and residents. Indeed, as the Tribe's expert testified, the Nation Station is a location-dependent business because, "but for the casino, there would not be enough traffic to support [the station] in its current location."<sup>20</sup>

Prior to May of 1995, the Kansas Department of Revenue did not collect motor fuel taxes on fuel distributed on Indian lands. In 1995, however, the Kansas legislature amended the Kansas Motor Fuel Tax Act, and the Department of Revenue began to impose taxes on fuel distributed to Indian tribes on tribal land.<sup>21</sup> The express structure of the legislation places the legal incidence of the tax on the fuel distributors; yet, the distributors are permitted to pass the tax along to retailers like Nation Station, which distributors choose to do as a

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11. *Prairie I*, 241 F. Supp. 2d at 1298.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Prairie II*, 379 F.3d at 982.

16. *Id.*

17. *Prairie I*, 241 F. Supp. 2d at 1297.

18. *Prairie II*, 379 F.3d at 982.

19. *Id.*

20. *Id.*

21. *Prairie I*, 241 F. Supp. 2d at 1298.

general business practice.<sup>22</sup> Historically, however, the Nation Station has indisputably sold fuel at fair market prices.<sup>23</sup> As a result, Nation Station has never advertised an exemption from state fuel taxes.<sup>24</sup> The Tribe's expert concluded that "the Nation is not marketing a tax exemption because the price of the fuel at the Nation Station is set above cost, including the Nation's tax, and within two cents per gallon of the price prevailing in the local market."<sup>25</sup> Thus, the Nation Station's prices were competitive and comparable in all material respects with the fuel prices charged by off-reservation stations, even in the absence of the Kansas state fuel tax.<sup>26</sup>

In response to the legislature's amendment to the Kansas Motor Fuel Tax Act, the Tribe sued the State of Kansas for declaratory judgment and injunctive relief from the collection of state fuel tax from distributors delivering fuel to the reservation.<sup>27</sup> The primary impetus behind the suit was the fact that the tribal fuel tax and the state fuel tax are mutually exclusive, *i.e.*, only one can be collected without rendering the Nation Station's fuel prices uncompetitive.<sup>28</sup> To this end, and as noted above, the Tribe uses the revenues generated from its fuel tax to construct and maintain roads, bridges and related infrastructure on the reservation without state assistance.<sup>29</sup> In contrast, Kansas spends none of its fuel tax revenue on the maintenance or improvement of reservation roads owned by the Tribe.<sup>30</sup>

During the early stages of the litigation, both parties filed motions for summary judgment.<sup>31</sup> The district court, applying the *Bracker* test, granted the Department of Revenue's motion for summary judgment noting that the balance of state, federal, and tribal interests tilted in favor of the State of Kansas.<sup>32</sup> On appeal before the Court of Appeals for the Tenth Circuit, the district court's decision was reversed.<sup>33</sup> The Tenth Circuit found that the Tribe's fuel revenues were derived primarily from the Tribe's construction of the casino and

22. *Id.*

23. *Prairie II*, 379 F.3d at 982.

24. *Id.*

25. *Id.*

26. *Id.*

27. *See generally Prairie I*, 241 F. Supp. 2d 1295.

28. *Prairie III*, 126 S. Ct. at 696 (Ginsburg & Kennedy, JJ., dissenting).

29. *Id.*

30. *Id.* at 697 (Ginsburg & Kennedy, JJ., dissenting).

31. *See Prairie I*, 241 F. Supp. 2d at 1297.

32. *See supra* note 2 and accompanying text.

33. *See generally Prairie II*, 379 F.3d 979.

the ensuing fuel market created by the development of tribal land.<sup>34</sup> The Tenth Circuit also found that the revenues derived from the tribal fuel tax were necessary to preserve and maintain the reservation's infrastructure.<sup>35</sup> Accordingly, the Tenth Circuit held that the Tribe's sovereignty and federal interests against taxation outweighed the State's general interest in raising revenue.<sup>36</sup> The State of Kansas petitioned for a writ of certiorari before the Supreme Court.

The Supreme Court granted the State's petition to resolve two threshold questions: first, to determine upon whom the legal incidence of the tax is focused; and second, to decide whether Kansas may impose a tax on a non-Indian distributor's off-reservation receipt of fuel, which is subsequently passed on to tribal members, without subjecting the tax to the *Bracker* interest-balancing test.<sup>37</sup> The Court, reversing the Tenth Circuit, determined that the legal incidence of the Kansas tax is focused on the non-Indian distributors.<sup>38</sup> The Court also decided that the lower courts improperly applied the *Bracker* interest-balancing test, opining that notwithstanding the ultimate impact of the tax on tribal members, the tax is triggered by the distributor's receipt of fuel off the reservation.<sup>39</sup> Accordingly, the Court held that "the Kansas motor fuel tax is a nondiscriminatory tax imposed on an off-reservation transaction between non-Indians."<sup>40</sup> As such, the tax was found to be "valid and [to] pose[] no affront to the Nation's sovereignty."<sup>41</sup> The Court subsequently denied the Nation's petition for rehearing.<sup>42</sup>

### III. LEGAL BACKGROUND

The underlying legal conflict in this case between the State of Kansas and the Prairie Band Potawatomi Nation has historical roots in

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34. *See id.* at 984 ("the Nation's fuel market does not exist because of a claimed state tax exemption; rather, the Nation created a new fuel market by financing and building its gaming facilities").

35. *See id.*

36. *See id.* at 987.

37. *See Prairie III*, 126 S. Ct. at 681.

38. *See generally Prairie III*, 126 S. Ct. 676 (2005), *reh'g denied*, 2006 U.S. LEXIS 1058 (Jan. 23, 2006).

39. *Prairie III*, 126 S. Ct. at 686-89.

40. *Id.* at 689.

41. *Id.*

42. *See Kansas v. Prairie Band Potawatomi Nation*, 126 S. Ct. 1187 (2006) (denying petition for rehearing).

issues of tribal self-government, the Indian Commerce Clause, and the Hayden-Cartwright Act, the latter of which is the legislation that gave rise to the use of fuel taxes to support highway maintenance.

A. *The Boundary Between State Regulatory Authority and Tribal Self-Government*

From its earliest days, the United States has recognized the sovereign status of Indian tribes.<sup>43</sup> Chief Justice Marshall's view was that "the laws of [a state could] have no force" within reservation boundaries.<sup>44</sup> While Justice Marshall's view is not strictly applied today, traditional notions of Indian self-government are nevertheless deeply engrained in our jurisprudence, and as a result provide an important "backdrop"<sup>45</sup> with respect to conflicts arising between Indian tribes and the state in which they reside. The courts have also recognized that Indian tribes "retain attributes of sovereignty over both their members and their territory."<sup>46</sup> The status of Indian tribes has been described as

an anomalous one and of complex character, for despite their partial assimilation into American culture, the tribes have retained a semi-independent position . . . not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.<sup>47</sup>

Therefore, Indian tribes, such as the Prairie Band Potawatomi Nation, have traditionally been recognized as self-governing and generally not subject to the laws of the state in which they reside.

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43. See *Cherokee v. Georgia*, 30 U.S. 1, 17 (1831).

44. *Worcester v. Georgia*, 31 U.S. 515, 520 (1832).

45. *Bracker*, 448 U.S. at 143.

46. *United States v. Mazurie*, 419 U.S. 544, 557 (1979).

47. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1959).

### B. *The Indian Commerce Clause of the U.S. Constitution*

Despite the tradition of Indian self-government, however, the federal government does retain some power with respect to certain issues involving Indian tribes. The Indian Commerce Clause grants Congress broad power to regulate affairs between the United States and Indian tribes, including affairs concerning tribal lands.<sup>48</sup> Specifically, the Constitution provides that, “[t]he Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>49</sup> However, pursuant to the Court’s holding in *Bracker*, when a federal preemption analysis is applied to a state’s assertion of authority over the conduct of non-Indians engaging in activity on an Indian reservation, courts must assess how state sovereignty differs from that of tribal sovereignty.<sup>50</sup> Conversely, when “the legal incidence [of a state tax] rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization.”<sup>51</sup>

### C. *The Hayden-Cartwright Act*

The Hayden-Cartwright Act of 1936,<sup>52</sup> enacted in part under the Indian Commerce Clause, is the historical authority for the Kansas motor fuel tax. In relevant part, the Hayden-Cartwright Act provides:

All tax[es] levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other

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48. *United States v. Lara*, 541 U.S. 193, 200 (2004) (the “‘central function of the Indian Commerce Clause . . . is to provide Congress with plenary power to legislate in the field of Indian affairs’”) (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989)); see also *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 837 (1982) (“broad power” to regulate matters between the United States and Indian sovereigns under the Indian Commerce Clause); *Bracker*, 448 U.S. at 142 (same).

49. U.S. CONST. art. I, § 8, cl. 3; but cf. *Lara*, 541 U.S. at 224 (Thomas, J., concurring) (Justice Thomas noting that he cannot agree that the Indian Commerce Clause “‘provide[s] Congress with plenary power to legislate in the field of Indian affairs.’”) (quoting *Cotton Petroleum Corp.*, 490 U.S. at 192). Justice Thomas continued that “[a]t one time, the implausibility of [the majority’s] assertion at least troubled the Court.” *Lara*, 541 U.S. at 224 (Thomas, J., concurring) (citing *United States v. Kagama*, 118 U.S. 375, 378-79 (1886) (noting that such a construction is “very strained”). Justice Thomas then suggests that the Court revisit the question. *Lara*, 541 U.S. at 224 (citing *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549, 584-93 (1995)).

50. *Bracker*, 448 U.S. at 143.

51. *Okla. Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995).

52. *Hayden-Cartwright Act*, 4 U.S.C. § 104(a) (1936).



motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State . . . within whose border the reservation may be located.<sup>53</sup>

While the Hayden-Cartwright Act is a by-product of the Federal Highway Act of 1916,<sup>54</sup> which provided for rural road construction, the Hayden-Cartwright Act failed to designate funds for road maintenance and gave rise to the use of fuel taxes, among other taxes, to support such maintenance.<sup>55</sup> Interestingly, courts and commentators alike have opined that it is unclear whether the language of the Hayden-Cartwright Act was intended to address or encroach upon Indian reservations.<sup>56</sup> One such commentator has noted:

Given the limited and often contradictory evidence surrounding the passage and purposes of the Hayden-Cartwright Act, it is impossible to state with any certainty that the Act was designed with the intention of providing the express congressional authorization necessary to enable a state to impose the tax incidence directly on the tribal retailer selling on tribal-owned land within the reservation boundaries.<sup>57</sup>

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53. *Id.*

54. Act of July 11, 1916, ch. 241, 39 Stat. 355, *repealed by* 23 U.S.C. §§ 101, 202, 204, 205 (1999).

55. Karen L. Spinola, *The Road Less Traveled—Implications of the Goodman Oil Decision*, 38 IDAHO L. REV. 637, 646 (2002) (citing Frank C. Moore, *The State's Responsibility for State-Local Action*, Financing Highways Symposium Conducted by the Tax Institute, 72-73 (Nov. 8-9, 1957)).

56. *See Bracker*, 448 U.S. at 151 (“We agree with petitioners that the Hayden-Cartwright Act, which authorizes state taxes ‘on United States military or other reservations,’ was not designed to overcome the otherwise pre-emptive effect of federal regulation of tribal timber. We need not reach the more general question whether the Hayden-Cartwright Act applies to Indian reservations at all.”); *see also* Spinola, 38 IDAHO L. REV. at 646 (“The pertinent question is whether Indian reservations were intended to be included in the phrase ‘military or other reservations.’”).

57. Spinola, 38 IDAHO L. REV. at 655.

### D. The Interest-Balancing Approach

Congressional authority and the semi-autonomous nature of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members.<sup>58</sup> First, federal law may preempt the exercise of such authority.<sup>59</sup> Second, the exercise of such authority may unlawfully infringe “on the right of reservation Indians to make their own laws and be ruled by them.”<sup>60</sup> Thus, courts have sought to balance the federal, state, and tribal interests involved.

Specifically, the interest-balancing test is applied to evaluate claims that state taxes levied on non-Indians should be preempted because they undermine tribal and federal interests.<sup>61</sup> This test,

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58. See *Ramah Navajo School Bd., Inc.*, 458 U.S. at 836-37 (citing *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 165 (1973) and *Warren Trading Post Co. v. Arizona Tax Comm’n*, 380 U.S. 685 (1965)); see also *Nevada v. Hicks*, 533 U.S. 353, 361-62 (2001) (“Our cases make clear that the Indians’ right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation’s border. Though tribes are often referred to as ‘sovereign’ entities, it was ‘long ago’ that the Court departed from Chief Justice Marshall’s view that ‘the laws of [a State] can have no force’ within reservation boundaries. *Worcester*, 6 Peters at 561” (citing *Bracker*, 448 U.S. at 141)). See also *Hicks*, 533 U.S. at 362 (“That is not to say that States may exert the same degree of regulatory authority within a reservation as they do without. To the contrary, the principle that Indians have the right to make their own laws and be governed by them requires ‘an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other.’ *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 156 (1980); see also *id.* at 181 (opinion of Rehnquist, J.)”).

59. See *Bracker*, 448 U.S. at 143 (citing *Warren Trading Post Co.*, 380 U.S. 685; *McClanahan*, 411 U.S. at 165); see also *Bracker*, 448 U.S. at 144 (“When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State’s regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest.”).

60. *Williams v. Lee*, 358 U.S. 217 (1959).

61. See *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176-77 (1989), providing:

[Q]uestions of pre-emption in this area are not resolved by reference to standards of preemption that have developed in other areas of the law, and are not controlled by “mechanical or absolute conceptions of state or tribal sovereignty.” *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). Instead, we have applied a flexible pre-emption analysis sensitive to the particular facts and legislation involved. Each case “requires a particularized examination of the relevant state, federal, and tribal interests.” *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 838 (1982). Moreover, in examining the preemptive force of the relevant federal legislation, we are cognizant of both the broad policies that underlie the legislation and the history of tribal independence in the field at issue. . . . Finally, we note that although state interests must be given weight and courts should be careful not to make

however, applies only where a state asserts authority over the conduct of non-Indians engaging in activity on a reservation.<sup>62</sup>

For example, the Court in *White Mountain Apache Tribe v. Bracker*<sup>63</sup> addressed the question of whether a state should be preempted from collecting otherwise lawful taxes from non-Indians in view of the burden consequently imposed upon a tribe or its members.<sup>64</sup> In *Bracker*, Arizona sought to enforce its fuel-use and vehicle-license taxes against a non-Indian enterprise that contracted with the White Mountain Apache Tribe to harvest timber from reservation lands.<sup>65</sup> There, the Court was called upon to determine whether the taxes formally imposed on non-Indians were preempted.<sup>66</sup> The Court instructed that the analysis should not rely upon “mechanical or absolute conceptions of state or tribal sovereignty, but [calls] for a particularized inquiry into the nature of the state, federal, and tribal interests at stake.”<sup>67</sup> The articulated purpose of this inquiry is to determine “whether in the specific context, the exercise of state authority would violate federal law” or “unlawfully infringe on the right of reservation Indians to make their own laws and be ruled by

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legislative decisions in the absence of congressional action, ambiguities in federal law are, as a rule, resolved in favor of tribal independence.

*Cotton Petroleum Corp.*, 490 U.S. at 176-77.

62. *Bracker*, 448 U.S. at 144-45, stating:

When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. *See Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 480-81 (1976); *McClanahan v. Arizona State Tax Comm'n*. More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law. *Compare Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965) and *Williams v. Lee*, 358 U.S. 217 (1959) with *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976) and *Thomas v. Gay*, 169 U.S. 264 (1898). *Cf. McClanahan v. Arizona State Tax Comm'n*, 411 U.S. at 171; *Mescalero Apache Tribe v. Jones*, 411 U.S. at 148.

*Bracker*, 448 U.S. at 144-45.

63. 448 U.S. 136 (1980).

64. *Bracker*, 448 U.S. at 145-46.

65. *Id.* at 139-40.

66. *Id.* at 137-38.

67. *Id.* at 145.

them.”<sup>68</sup> In *Bracker*, the Court concluded that “the proposed exercise of state authority [was] impermissible” because “it [was] undisputed that the economic burden of the asserted taxes [would] ultimately fall on the Tribe, the Federal Government ha[d] undertaken comprehensive regulation of the harvesting and sale of tribal timber,” and state officials were “unable to justify the taxes except in terms of a generalized interest in raising revenue.”<sup>69</sup> Thus, in *Bracker*, the Court found that the state was not permitted to tax non-Indians where the economic burden of the tax ultimately fell on the tribe.

However, in situations in which a state is asserting its taxing authority off the reservation, a completely different approach, based on the Court’s determination in *Mescalero Apache Tribe v. Jones*<sup>70</sup> has been utilized. Rather than applying the interest-balancing test in those situations, the courts have uniformly permitted the taxation of off-reservation activity, noting that “absent express federal law to the contrary, Indians going beyond reservation boundaries [are] held subject to nondiscriminatory state law otherwise applicable to all citizens of the state.”<sup>71</sup>

#### IV. SUMMARY OF THE COURT’S REASONING

In *Kansas v. Prairie Band Potawatomi Nation*,<sup>72</sup> the Court reversed the decision of the Tenth Circuit<sup>73</sup> and determined that the Kansas motor fuel tax, as applied to the Nation Station’s sale of gasoline and diesel fuel, is a nondiscriminatory tax imposed on an off-reservation transaction between non-Indians.<sup>74</sup> In so holding, the Court rejected the application of the *Bracker*<sup>75</sup> interest-balancing test, noting that the test does not apply to a tax resulting from an alleged off-reservation transaction between non-Indians.<sup>76</sup>

The Court began its analysis by setting forth the legal framework necessary to evaluate the validity of the Kansas fuel tax. The Court prefaced its discussion by noting that the “who” and the

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68. *Id.* at 142.

69. *Id.* at 151.

70. 441 U.S. 145 (1973) (permitting the taxation of the gross receipts of an off-reservation, Indian-owned ski resort).

71. *Mescalero Apache*, 441 U.S. at 148-49.

72. 126 S. Ct. 676 (2005), *reh’g denied*, 2006 U.S. LEXIS 1058 (Jan. 23, 2006).

73. *See id.* at 688 (reversing the judgment of the Court of Appeals).

74. *Id.*

75. *See supra* note 2 and accompanying text.

76. *Prairie III*, 126 S. Ct. at 688.

“where” of the challenged tax have “significant consequences.”<sup>77</sup> Indeed, the Court stated that it had previously “determined that ‘the initial and frequently dispositive question in Indian tax cases . . . is who bears the legal incidence of [the] tax.’”<sup>78</sup> In this regard, the Court was cognizant of the fact that “states are categorically barred from placing the legal incidence of an excise tax ‘on a tribe or on tribal members for sales made inside Indian country’ without congressional authorization.”<sup>79</sup> The Court acknowledged, however, that “even when a state imposes the legal incidence of its tax on a non-Indian seller, the tax may nonetheless be preempted if the transaction giving rise to tax liability occurs on the reservation and the imposition of the tax fails to satisfy the *Bracker* interest-balancing test.”<sup>80</sup>

Applying this legal framework to the Kansas motor fuel tax, the Court determined that the legal incidence of the tax falls on the fuel distributors, rather than on the Tribe.<sup>81</sup> The Court noted that the express language of the statute “specifies that ‘the incidence of [the motor fuel] tax is imposed on the distributor of the first receipt of the motor fuel,’” and is therefore determinative of the issue.<sup>82</sup> Continuing its analysis, the Court reasoned that, notwithstanding the express language of the statute, it would have nevertheless concluded that the legal incidence of the tax falls on the distributor.<sup>83</sup> The Court evaluated section 79-3410(a) of the Kansas statute and found that the “distributor, rather than the retailer . . . is liable to pay the motor fuel tax.”<sup>84</sup> That subsection provides, in relevant part, that “every distributor . . . shall compute and shall pay to the director . . . the

77. *Id.* at 681.

78. *Id.* (citing *Chickasaw Nation*, 515 U.S. at 458).

79. *Prairie III*, 126 S. Ct. at 681 (citing *Chickasaw Nation*, 515 U.S. at 458).

80. *Prairie III*, 126 S. Ct. at 681.

81. *Id.*

82. *Id.* at 682 (citing KAN. STAT. ANN. § 79-3408(c)).

83. *Prairie III*, 126 S. Ct. at 681-82.

84. *Id.* at 682. Section 79-3410(a) provides:

Every distributor, manufacturer, importer, exporter or retailer of motor-vehicle fuels or special fuels, on or before the 25th day of each month, shall render to the director . . . a report certified to be true and correct showing the number of gallons of motor-vehicle fuels or special fuels received by such distributor, manufacturer, importer, exporter or retailer during the preceding calendar month . . . . Every distributor, manufacturer or importer within the time herein fixed for the rendering of such reports, shall compute and shall pay to the director at the director’s office the amount of taxes due to the state on all motor-vehicle fuels or special fuels received by such distributor, manufacturer or importer during the preceding calendar month.

KAN. STAT. ANN. § 79-3410(a).

amount of [motor fuel] taxes due to the state.”<sup>85</sup> While the Court noted that distributors are entitled to pass the cost of the tax downstream,<sup>86</sup> it found that they are not required to do so and dispensed with the issue.<sup>87</sup>

The Tribe argued that the Court must apply the *Bracker* interest-balancing test “irrespective of the identity of the taxpayer . . . because the Kansas motor fuel tax arises as a result of the on-reservation sale and delivery of the motor fuel.”<sup>88</sup> The Tribe found support for its position in section 79-3408(a), which provides that “[a] tax . . . is hereby imposed on the use, sale or delivery of all motor vehicle fuels or special fuels which are used, sold or delivered in this state for any purpose whatsoever.”<sup>89</sup> The Tribe claimed further support in section 79-3408(d), which “permits distributors to obtain deductions from the Kansas motor fuel tax for certain post-receipt transactions, such as the sale or delivery of fuel for export from the state and sale or delivery of fuel to the United States.”<sup>90</sup> The Tribe contended that because this subsection indicates that a final tax liability cannot be determined until after the downstream sale, “the taxable event is actually the distributor’s post-receipt delivery of fuel to retailers, such as the [Nation Station], rather than the distributors’ initial receipt of the fuel.”<sup>91</sup> Finally, and similar to its previous argument, the Tribe maintained its interpretation was consistent with section 79-3417, which permits a refund for destroyed fuel, again focusing on the lack of finality absent a downstream sale.<sup>92</sup>

The Court, however, concluded that a fair interpretation of the Kansas statute, confirms that the Tribe’s interpretation was devoid of merit.<sup>93</sup> The “use, sale or delivery” language pointed to by the Nation, in the Court’s opinion, refers to the sale or delivery of the fuel to the distributor that triggered the tax liability.<sup>94</sup> The Court further opined that sections 79-3408(d) and 79-3417 do not change the nature of the taxable event (*i.e.*, the distributor’s receipt of the fuel), as set forth in the statute, and that this is highlighted by the fact that a distributor

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85. *Prairie III*, 126 S. Ct. at 681-82.

86. KAN. STAT. ANN. § 79-3409.

87. *Prairie III*, 126 S. Ct. at 681.

88. *Id.* at 683.

89. *Id.* at 684.

90. *Id.* at 685.

91. *Id.*

92. *Id.* at 686.

93. *Prairie III*, 126 S. Ct. at 686.

94. *Id.*

must pay the tax even if the fuel is held in inventory and not subsequently resold.<sup>95</sup>

Finding that the incidence of the Kansas motor fuel tax is imposed on the non-Indian distributors and, thus, on activity occurring off the reservation, the Court disagreed with the Tenth Circuit's application of the *Bracker* interest-balancing test.<sup>96</sup> The Court noted that the test in *Bracker* was formulated "to address the 'difficult question' that arises when 'a state asserts authority over the conduct of non-Indians engaging in activity on the reservation.'"<sup>97</sup> Thus, the *Bracker* interest-balancing test "has never been applied where, as here, the state asserts its taxing authority over non-Indians off the reservation."<sup>98</sup> Rather, the Court has only applied the test "where 'the legal incidence of the tax fell on a non-tribal entity engaged in a transaction with tribes or tribal members'" on the reservation.<sup>99</sup> The Court reasoned that "[l]imiting the interest-balancing test exclusively to on-reservation transactions between a nontribal entity and a tribe or tribal member is consistent with . . . Indian tax immunity jurisprudence," which relies "heavily on the doctrine of tribal sovereignty . . . [and confers] state law 'no role to play' within a tribe's territorial boundaries."<sup>100</sup>

By contrast, the Court noted that it has taken a completely different approach with respect to a state asserting its taxing authority off the reservation. In such situations, the Court has not applied the interest-balancing test and has permitted the taxation of the off-reservation activity or business, even if Indian-owned.<sup>101</sup> The Court reasoned that "absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state."<sup>102</sup> Accordingly, the Court found that "[i]f a state may apply a nondiscriminatory tax to Indians who have gone beyond the boundaries of the reservation, then it follows that it may apply a nondiscriminatory tax where, as here, the tax is imposed on non-

95. *Id.*

96. *Id.*

97. *Prairie III*, 126 S. Ct. at 686 (citing *Bracker*, 448 U.S. at 144-45).

98. *Prairie III*, 126 S. Ct. at 686.

99. *Id.* (quoting *Arizona Dep't of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 37 (1999)).

100. *Prairie III*, 126 S. Ct. at 687 (quoting *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123-24 (1993)).

101. *Prairie III*, 126 S. Ct. at 688 (citing *Mescalero Apache*, 441 U.S. 145 (permitting the taxation of the gross receipts of an off-reservation, Indian-owned ski resort)).

102. *Prairie III*, 126 S. Ct. at 688 (quoting *Mescalero Apache*, 441 U.S. at 148-49).

Indians as a result of an off-reservation transaction.”<sup>103</sup> The Court also determined that application of the interest-balancing test to such off-reservation transactions is inconsistent with efforts to establish “bright-line standards” in the context of tax administration. Thus, the application of the *Bracker* test “only clouds” judicial efforts to establish such standards.<sup>104</sup>

Finally, the Court found that the Tribe is not entitled to interest balancing by reason of its claim that the Kansas motor fuel tax and the Tribe’s fuel tax are mutually exclusive.<sup>105</sup> The Court interpreted the Tribe’s claim as “ultimately a complaint about the downstream economic consequences of the Kansas tax.”<sup>106</sup> The Court believed that whether the revenues generated by the Nation Station are deemed to be “profits” or “tax proceeds,” the Nation Station is simply “seek[ing] to increase . . . revenues by purchasing untaxed fuel.”<sup>107</sup> The Court found, however, that decreased revenues could not be invoked as a basis to invalidate the Kansas tax.<sup>108</sup>

In light of the foregoing, the Court held that the Kansas motor fuel tax “is a nondiscriminatory tax imposed on an off-reservation transaction between non-Indians” and, thus, “is valid and poses no affront to the Nation’s sovereignty.”<sup>109</sup>

## V. ANALYSIS

While the Court’s opinion, at first glance, may seem rational in light of binding precedent, the decision impermissibly ignores the importance of Indian sovereignty. In determining whether to apply the *Bracker* interest-balancing test, the Court, ostensibly following its prior decisions, looked to the “who” and the “where” of the challenged tax. However, the Kansas legislature, and, after this opinion, the legislatures of every state in the Union, have grown wise to the malleable requisites analyzed by the Court in determining whether interest-balancing is necessary for tax legislation that impacts Indian sovereignty. The sovereignty of the Tribe, as well as other Indian nations, should not be dependent upon such fragile and tenuous

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103. *Prairie III*, 126 S. Ct. at 688.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Prairie III*, 126 S. Ct. at 688.



elements, which are subject to state manipulation. Instead, the Court should have recognized the apparent avenues of circumvention available to the Kansas legislature with respect to its fuel tax and, therefore, retreated from a hyper-technical application of precedent and employed the *Bracker* interest-balancing test. Indeed, prospectively, courts should, at a minimum, apply the *Bracker* interest-balancing test, irrespective of a tax's legal incidence and notwithstanding whether a tax arises as a result of on-reservation or off-reservation activity. As demonstrated by the Kansas legislature, these indicia are subject to manipulation and are hardly determinative of a tax's ultimate impact.

#### A. *The Court Failed to Distinguish Precedent*

As a preamble to the principal analysis, the doctrine of *stare decisis* does not prohibit the Court from deviating from precedent. *Stare decisis* binds courts only to the actual holdings of the relevant precedential decisions. Issues or questions which are "neither brought to the attention of the court, nor ruled upon, are not to be considered as having been so decided as to constitute precedent."<sup>110</sup> Accordingly, analogous cases may not receive the same treatment if the issues raised in the later case were not specifically decided in the former case.<sup>111</sup> Previously, the Court has not been confronted with a situation in which a state legislature intentionally manipulated a statute to avoid judicial scrutiny and increase tax revenues at the expense of Indians engaged in on-reservation activities. As such, the Court's reliance on a decision such as *Mescalero Apache Tribe v. Jones*,<sup>112</sup> which does not involve intentional manipulation or circumvention of the law, was unfounded.

Moreover, even if the Court were to determine that decisions such as *Mescalero Apache* have *stare decisis* effect, it could have, nevertheless, exercised its discretion to deviate from this line of precedent given the unique circumstances of the case. The Court is not "absolutely bound by *stare decisis*" and may "consider any substantial argument for overruling a previous decision."<sup>113</sup> Indeed, the Court has found that *stare decisis* is not "an inexorable command,"

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110. *Webster v. Fall*, 266 U.S. 507, 511 (1925).

111. 18 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE*, § 134.04(5) (3d ed. 1999).

112. 411 U.S. 145 (1973).

113. 18 MOORE, *supra* note 111, at § 134.02(1)(a).

but rather is a principle of policy that does not have to be applied unyieldingly.<sup>114</sup> Consequently, the Court was free to examine the issues raised by Nation Station from a new perspective, namely with an eye towards potential manipulation and circumvention of the law.

### B. *The Manipulation of the Bracker Prerequisites*

Turning to the principal discussion, the Court wholly failed to recognize the inequities that prevailed in its determination that the *Bracker* interest-balancing test was not implicated by the Kansas motor fuel tax. There is no dispute that when “the legal incidence of a tax . . . rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization.”<sup>115</sup> Nor is there any dispute that the *Bracker* interest-balancing test should be applied when a state imposes the legal incidence of its tax on a non-Indian seller and the transaction gives rise to tax liability which occurs on the reservation. The precedent established by the Court with respect to the Kansas motor fuel tax, however, provides authority for courts to dispense with the *Bracker* test where the malleable prerequisites of the test are not precisely met and, indeed, provides a roadmap for other states to circumvent Indian sovereignty in the name of tax revenue. Such precedent not only raises sovereignty concerns, but also implicitly condones artfully drafted legislation specifically designed to circumvent judicial precedent.

The prerequisites to the application of the *Bracker* test, as noted above, are: (1) that the legal incidence of the state’s tax must focus on a non-Indian seller; and (2) that the transaction must give rise to tax liability that occurs on the reservation. The Kansas legislature, keenly aware of the *Bracker* prerequisites, as well as the Court’s determination in *Chickasaw Nation*,<sup>116</sup> amended its motor fuel tax statute in 2003 to state that “the incidence of this tax is imposed on the distributor.”<sup>117</sup> In *Chickasaw Nation*, the Court determined that “if a State is unable to enforce a tax because the legal incidence of the impost is on Indians or Indian tribes, the State generally is free to

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114. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

115. *Okla. Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995).

116. *See generally Chickasaw Nation*, 515 U.S. 450.

117. *See* KAN. STAT. ANN. § 79-3408(c) (2003 Cum. Supp.); *see also Prairie III*, 126 S. Ct. at 693 (Ginsburg & Kennedy, JJ., dissenting).

amend its law to shift the tax's legal incidence."<sup>118</sup> In this respect, other commentators have stated:

Taking note of the United States Supreme Court's equivocal language in *Chickasaw Nation*, the Kansas Legislature quickly acted to amend the Kansas fuel tax statutes. The Kansas fuel tax has been imposed as broadly as possible on the "use, sale or delivery of all motor vehicle fuels or special fuels which are used, sold or delivered in this State for any purpose whatsoever." The linchpin of the new statutory scheme was the statutory placement of the legal incidence of the fuel tax on the "distributor of the first receipt." This provision, as suggested by the *Chickasaw Nation* court, makes issues of preemption and Indian sovereignty inapplicable to the Kansas fuel tax. The Kansas statutes also place the burden of collecting the tax on fuel distributors. Distributors are, however, given the right to pass the tax on to retailers as part of their selling price.<sup>119</sup>

Thus, the Court's reliance on the legal incidence of the challenged tax and the related locale in which the transaction gives rise to tax liability is conceptually unsound and vulnerable to manipulation.

To this end, the dissent of Justices Ginsburg and Kennedy notes that "Kansas' placement of the legal incidence of the fuel tax is not as clear and certain as the State of Kansas suggests and the Court holds."<sup>120</sup> The dissent argues that while the express language of the statute is clear with respect to the legal incidence of the tax, the same statute "declares initially that the tax 'is hereby imposed on the use, sale or delivery of all motor vehicle fuels . . . used, sold or delivered in this state for any purpose whatsoever,'"<sup>121</sup> and it authorizes distributors to pass on the tax to retailers.<sup>122</sup> In addition, the dissent notes that the statute excludes from taxation several transactions, such as those for exportation from the state, those to the United States, and

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118. *Chickasaw Nation*, 515 U.S. at 460.

119. Luke R. Spellmeier, *A Winning Hand or Time to Fold? State Taxation of Fuel Sales on Kansas Indian Reservations*, 43 WASHBURN L.J. 141, 144-45 (2003).

120. *Prairie III*, 126 S. Ct. at 691 (Ginsburg & Kennedy, JJ., dissenting).

121. *Id.* (quoting KAN. STAT. ANN. § 79-3408(a)).

122. *Id.* (citing KAN. STAT. ANN. §§ 79-3408(c), 79-3408(a), and 79-3409).

lost or destroyed fuel.<sup>123</sup> Accordingly, the dissent concludes that “[t]hese provisions indicate . . . that the Kansas Legislature anticipated that distributors would shift the tax burden further downstream”<sup>124</sup> and, thus, that the Kansas motor fuel tax is “effectively [imposed] only on fuel actually resold by the distributors to an in-state nonexempt purchaser” (*i.e.*, to the tribe or tribal members).<sup>125</sup>

Consequently, the prerequisites to the *Bracker* interest-balancing test lack meaningful substance. These prerequisites are easily manipulated by state legislatures and should not be relied upon to protect the sovereignty of Indian tribes. To do so, particularly in instances in which the relevant statute is specifically amended to circumvent the Indian Commerce clause, would significantly diminish the notion of Indian sovereignty.

### C. An Alternative Approach

The Court, however, had an alternative avenue to analyze the Kansas motor fuel tax, while still staying within the ambit of its settled precedent. Specifically, the Court has recognized elsewhere that the legal incidence inquiry need not be determinative; rather, the practical and real impact must be considered. Indeed, in *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*,<sup>126</sup> the Court, for all intents and purposes, conceded to the susceptibility of the legal incidence inquiry, declining to allow a state to impose tax burdens on Indian-run educational institutions, “even if those burdens [were] imposed indirectly through a tax on a non-Indian contractor for work done on the reservation.”<sup>127</sup> Elaborating on this determination, the Court found that, in some contexts, the legal incidence of the tax falling on a non-Indian is insignificant.<sup>128</sup> What is significant, in the Court’s opinion, is “that the economic burden of the asserted tax would ultimately fall on the Tribe, even though the legal incidence of the tax was on [a] non-Indian . . . .”<sup>129</sup> The Court’s determination in *Ramah Navajo* was further supported by the fact that the “state’s ultimate justification for imposing the tax amount[ed] to nothing more

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123. *Id.* (citing KAN. STAT. ANN. §§ 79-3408(d) and 79-3417).

124. *Prairie III*, 126 S. Ct. 691-92.

125. *Id.* at 691.

126. 458 U.S. 832, 844 (1982).

127. *Id.*

128. *Id.*

129. *Id.*

than a general desire to increase revenues.”<sup>130</sup> Accordingly, the Court’s statement in the *Prairie Band* case, namely that the *Bracker* interest-balancing test “has never been applied where, as here, the state asserts its taxing authority over non-Indians off the reservation,”<sup>131</sup> is not entirely accurate.

Moreover, the facts at issue here are exactly what the *Bracker* interest-balancing test was designed to evaluate. In particular, the inquiry was “designed to determine whether, in the specific context, the exercise of state authority would violate federal law”<sup>132</sup> or “unlawfully infringe ‘on the right of the reservation Indians to make their own laws and be ruled by them.’”<sup>133</sup> In the *Prairie Band* case, the competing interests were, on the one hand, the state’s authority to tax fuel sales at the Nation Station and, on the other, the Tribe’s right to tax the same transaction. As set forth in the dissent of Justices Ginsburg and Kennedy, the Court has previously stated that “the power to tax [is] an essential attribute of Indian sovereignty . . . a necessary instrument of self-government and territorial management,”<sup>134</sup> which “enables a tribal government to raise revenues for its essential services.”<sup>135</sup> The fact that the tribal fuel tax and the state fuel tax are mutually exclusive, *i.e.*, only one can be collected without rendering the Nation Station’s fuel prices uncompetitive, should have signaled to the Court the need for interest-balancing in this case. Thus, going forward, courts should, at a minimum, apply the *Bracker* interest-balancing test regardless of the tax’s legal incidence and notwithstanding the location of the activity that gives rise to the tax.

## VI. CONCLUSION

State taxes are limited in their applicability to Indian tribes by both federal preemption and tribal self-governance, principles of independence which typify our country’s founding. In *Kansas v.*

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130. *Id.* at 845.

131. *Prairie III*, 126 S. Ct. at 686.

132. *Id.* at 690 (citing *Bracker*, 448 U.S. at 145) (Ginsburg & Kennedy, JJ., dissenting).

133. *Prairie III*, 126 S. Ct. at 690 (quoting *Bracker*, 448 U.S. at 142) (Ginsburg & Kennedy, JJ., dissenting).

134. *Prairie III*, 126 S. Ct. at 690 (citing *Merrion v. Jicarilla Apache Tribe*, 445 U.S. 130, 137 (1982)) (Ginsburg & Kennedy, JJ., dissenting).

135. *Prairie III*, 126 S. Ct. at 690 (citing *Merrion*, 445 U.S. at 130) (Ginsburg & Kennedy, JJ., dissenting).

*Prairie Band Potawatomi Nation*,<sup>136</sup> the Court erroneously allowed the State of Kansas to impose a motor fuel tax indirectly on the Nation Station, an on-reservation retailer. Focusing on the technical elements of legal incidence and the location of the activity that gave rise to the tax, the Court allowed the State of Kansas to circumvent and manipulate the law and consequently collect its own revenue at the expense of tribal tax revenues. To properly analyze the Kansas motor fuel tax or, more appropriately, the Kansas legislature's intentional evasion of legal precedent, the Court should have applied the *Bracker* interest-balancing test to the tax. In addition, to preserve Indian sovereignty, courts should prospectively utilize the *Bracker* interest-balancing test irrespective of a tax's legal incidence and notwithstanding whether a tax arises as a result of on-reservation or off-reservation activity, as these indicia are subject to manipulation and are hardly determinative of a tax's ultimate impact.

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136. See *Prairie III*, 126 S. Ct. 676 (2005), *reh'g denied*, 2006 U.S. LEXIS 1058 (Jan. 23, 2006).

