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**CHICKASAW NATION:
INTERPRETING A BROKEN
STATUTE**

By Erik M. Jensen

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This report discusses last year's decision in *Chickasaw Nation v. United States*, in which the Supreme Court interpreted a provision of the Indian Gaming Regulatory Act that contained contradictory phrases — one suggesting that Indian tribes were exempt from some occupational and excise taxes and one suggesting the contrary. The statute on its face made no sense, and the legislative history was of little help in resolving the ambiguity. Although the statute was clearly broken, the Court concluded that no ambiguity existed and that Congress did not intend to exempt tribes from those various wagering taxes. The author argues that in coming to that conclusion, the Court gave insufficient weight to the Indian canons of construction, which are intended to deal with precisely this sort of ambiguous situation; indeed, the Court downplayed the significance of the time-honored canons. Furthermore, the author argues that the Court incorrectly assumed that Indian tribes, absent express statutory language to the contrary, are routinely subject to generally applicable federal taxes.

Chickasaw Nation v. United States,¹ decided by the Supreme Court in November 2001, dealt with a perversely interesting (or interestingly perverse) question: How should we interpret and apply statutory language, in this case from the Indian Gaming Regulatory Act (IGRA),² that makes no sense whatsoever?

At issue in two consolidated cases (*Choctaw Nation v. United States* was decided with *Chickasaw Nation*) was the liability of American Indian tribes for federal excise and occupational taxes associated with the operation of pull-tab games on their lands. In both cases, the Tenth Circuit had affirmed a district court's entry of summary judgment against the tribes,³ but these weren't easy cases. Indeed, in a decision handed down only three weeks after the Tenth Circuit had ruled in *Chickasaw Nation*, the Federal Circuit came to a different conclusion, holding that tribes are exempt from the taxes.⁴ One would have expected Congress, in enacting IGRA (which facilitated the creation of gambling facilities on tribal lands), to have been clear in delineating tribal tax liabilities, but it had done no such thing.

Instead, in the controlling statutory provision, Congress juxtaposed phrases that can't be reconciled, opening the way for two courts of appeals to interpret the provision in diametric ways. Give weight to one phrase and the tribes appear to be exempt from the taxes, just as states would be. Give weight to the other phrase and the opposite result follows. With their contradictory dictates, the words don't work, and little in the legis-

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¹534 U.S. 84, 122 S. Ct. 528, Doc 2001-29463 (22 original pages), 2001 TNT 229-6 (2001).

²102 Stat. 2467-2486 (1988), 25 U.S.C. sections 2701-2721.

³See *Chickasaw Nation v. United States*, 208 F.3d 871, Doc 2000-10466 (30 original pages), 2000 TNT 69-19 (10th Cir. 2000) (holding that tribe was liable for taxes); *Choctaw Nation v. United States*, 2000 U.S. App. LEXIS 6284, Doc 2000-11703 (4 original pages), 2000 TNT 79-41 (10th Cir. 2000) (unpublished opinion relying on *Chickasaw Nation*).

⁴See *Little Six Inc. v. United States*, 210 F.3d 361, Doc 2000-11835 (9 original pages), 2000 TNT 81-8 (Fed. Cir. 2000), rehearing en banc denied 229 F.3d 1383 (Fed. Cir. 2000) (over three dissents), cert. granted and case remanded for reconsideration 122 S. Ct. 642 (2001). On remand after *Chickasaw Nation*, the Federal Circuit of course held for the United States. 280 F.3d 1371, Doc 2002-4218 (9 original pages), 2002 TNT 34-12 (Fed. Cir. 2002).

lative history or the structure of IGRA helps determine which phrase to honor, and which to discard.

In some respects, lawyers are always complaining about statutes' "making no sense," of course. For example, even if we know what Congress was getting at in drafting an operative provision, perhaps Congress didn't think about the specific situation we have to deal with, and the well-intentioned statute leads to a result we "know" Congress wouldn't have wanted. Or maybe Congress mucked up the statutory language, putting in a "not" where it obviously didn't belong, or cross-referencing "subsection (a)(3)" when it must have meant "(a)(2)." Or maybe different provisions, enacted at different times and with different congressional goals, coexist in tension — something that happens all the time with a complex statutory scheme that has evolved over decades.

What should judicial interpreters do when two simultaneously enacted phrases are irreconcilable?

Cases like those aren't easy to handle, and interpreters won't agree on which interpretive principles should control or how any particular principle ought to apply. But at least we know how to talk about the issues; we know the language to use. The discussion will focus on matters such as plain meaning, the purpose behind the particular provision or provisions, the larger structure in which the provisions reside, and so on, and the goal will be to find a coherent meaning for the relevant statutes.

Some of that happened in *Chickasaw Nation* — five of the seven justices in the majority struggled to discern congressional intent from the legislative history⁵ — but the difficulty was more fundamental. Saying that the statute in *Chickasaw Nation* "makes no sense" isn't hyperbolic. With back-to-back phrases pointing in opposite directions, and with Congress's having left few signals as to which path it intended to follow, the statutory provision had no plain meaning and no clear purpose, and it was part of no otherwise coherent statutory structure that pointed in one interpretive direction. The statute was, quite simply, broken.

Although the situation in *Chickasaw Nation* was unusual, one hopes — with a single statutory provision, enacted at a single time, so clearly botched — it illustrates what must be an increasing problem. There's not much chance that the U.S. Code and state codes will shrink in size and complexity, and the greater the statutory volume, the more likely it is that blatant contradictions will occur.

What should judicial interpreters do when two simultaneously enacted phrases are irreconcilable? One possibility is the judicial equivalent of flipping a

⁵*Chickasaw Nation*, 122 S. Ct. at 533-35. Justices Scalia and Thomas didn't join the part of the opinion discussing legislative history, and the two dissenters, Justices O'Connor and Souter, disagreed with the Court's reading of that history.

coin, with a court's saying (or at least meaning) something like the following: "We don't know what the right answer is (and the legislature obviously didn't know either), but we have to decide, so we'll make a choice as best we can. We're not talking constitutional law here, and, if we've misunderstood what the legislature meant, or would have meant if it had been paying attention, the legislature can clean up the problem for the future. In fact, even if we get it 'right,' in some sense, the legislature should still clean up the statutory language to avoid confusing others."

Coin-flipping may lack intellectual elegance, but it's a perfectly respectable judicial procedure in limited circumstances: when a court must deal with a hopelessly broken statute and it has nothing else to grab ahold of. In ruling against the tribes in *Chickasaw Nation*, the Court (obviously) didn't say it was doing any such thing; it referred to a tax canon, congressional intent, and other plausible justifications for concluding that the tribes were liable for the taxes.⁶ But, to my mind, this was a coin flip, and it wasn't an appropriate case for a coin flip.

I'll argue that the Court had a cleaner way to resolve the dispute in *Chickasaw Nation*, and to do so in a way consistent with existing authority. Because of the American Indian law character of the case, there was a tie-breaking principle, derived from the so-called Indian canons of construction, that should have led to a fairly clear result. And that result was the one promoted by dissenting Justices Sandra Day O'Connor and David H. Souter: Without a congressional statement to the contrary, the tribes should have been exempt from the excise and occupational taxes at issue in the cases.

In Part I, I describe the IGRA language that gave rise to the interpretive problem in *Chickasaw Nation*. In Part II, I introduce the Indian canons of construction, which I'll later argue (in Part IV) should have been used to resolve the dispute. In Part III, I provide an executive summary of the major points made by the majority and the dissenters in *Chickasaw Nation*. Finally, in Part IV, I question whether it was appropriate for the Court to have discounted the significance of the Indian canons in its decision, particularly in a case where, I'll argue, there should have been no presumption that the tribes would be subject to the wagering taxes.

I. The Broken Statutory Provision

Most of the high-profile legal issues that have arisen under IGRA — having to do with the uneasy relationship between states and tribes in regulating gambling in Indian country — aren't relevant for present purposes. What is relevant is one previously obscure passage in IGRA, codified at section 2719(d)(1) of Title 25:

The provisions of [the Internal Revenue Code of 1986] (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering

⁶See *infra* Part III.A.

operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.⁷

This language is definitely of the eyes-glazing-over type. It's legalese at its worst, complete with a "concerning," a "with respect to," a "pursuant to," and the rest of it — all in one sentence.⁸ To figure out who has to do what, we have to read all those mind-numbing provisions in the Internal Revenue Code (sections 1441, 3402(q), etc.), and that's unpleasant. But it's the sort of thing that readers of *Tax Notes* are trained to do, and it can be done. Moreover, taken as a whole, the IGRA passage seems relatively straightforward: Tribes are to be treated the same as states for certain purposes.

This language is definitely of the eyes-glazing-over type. It's legalese at its worst, complete with a 'concerning,' a 'with respect to,' a 'pursuant to,' and the rest of it — all in one sentence.

Sections 1441, 3402(q), 6041, and 6050I all deal with reporting or withholding.⁹ If states have to report and withhold when someone hits a state gambling jackpot (which, in the state context, generally means a lottery winner), then tribes should have to do so, too.¹⁰ If states don't have to report and withhold, then tribes shouldn't have to either. Without getting into nitty-gritty details, we can easily understand the general principle: States and tribes must report and withhold

⁷25 U.S.C. section 2719(d)(1). It's ironic, given the drafting glitch at issue in *Chickasaw Nation*, that the majority's opinion, as set out in the slip version and reprinted by the proprietary services, cited to a nonexistent section 2719(d)(i) of IGRA, rather than to 2719(d)(1). (The dissenting justices simply cited to 2719(d).) I can find no explanation for this except inadvertence. In the Court's defense, I should note that the citation mistake shouldn't cause any substantive confusion (although it wasted a few minutes of *my* time).

⁸Those of you old enough to remember the practice should try diagramming the sentence.

⁹Section 1441 provides, in general, for withholding of tax on certain payments to nonresident aliens. Section 3402(q) provides for withholding on certain gambling winnings. Section 6041 imposes reporting obligations on payors for certain payments exceeding \$600. And section 6050I imposes certain reporting obligations in connection with cash received in amounts greater than \$10,000. Section references are to the Internal Revenue Code of 1986, as amended, except as otherwise noted.

¹⁰Imposing these requirements on states and tribes may be an imposition on sovereign or quasi-sovereign bodies, but the purpose of reporting and withholding is perfectly appropriate: to prevent gambling winners, people like you or me (more likely you), from escaping income tax liability.

for bigger awards in high-risk games, and in some other circumstances as well.¹¹

So far, so good. The problem with the IGRA provision, however — the reason it doesn't work — is the reference to "chapter 35 of such Code," included in the same parenthetical as the cross-referenced reporting and withholding sections. Chapter 35 has nothing to do with reporting and withholding. It imposes taxes on those who conduct certain gambling operations — the chapter is titled "taxes on wagering" — with some specific exemptions, including one for state-conducted lotteries.

Under chapter 35, section 4401 imposes "on any wager authorized under the law of the State in which accepted an excise tax equal to 0.25 percent of the amount of such wager."¹² Section 4402 then generally exempts "state-conducted lotteries" from the excise.¹³ Section 4411 imposes a "special tax of \$500 per year to be paid by each person who is liable for the tax imposed under section 4401,"¹⁴ but, because of section 4402, the occupational tax wouldn't apply to a state that conducts a "state-conducted lottery." Nothing is said in chapter 35 about the liability of American Indian tribes one way or the other.

The two key phrases in IGRA section 2719(d)(1) are thus "chapter 35 of such Code" and "concerning the reporting and withholding of taxes," and the statute is written as if the former were an example of the latter. But it's not. Either the reference to chapter 35 doesn't belong in the parenthetical, or, if it does belong, the phrase "reporting and withholding obligations" is an incomplete description of what the provision applies to. As it is, section 2719(d)(1) is garbled.

All of which leads to the particular question in *Chickasaw Nation*. Since states generally don't have to pay "taxes on wagering" on their lotteries, did Congress mean, by referring to "chapter 35," that tribes should also be exempt from those taxes? (If the reference in IGRA to "chapter 35" means anything at all — which, to be sure, isn't clear — it presumably means that.)¹⁵ Or did Congress intend, with the reference to "reporting and withholding of taxes," to exempt tribes from certain reporting and withholding obligations and nothing else?

¹¹Withholding is required generally for winnings over \$5,000, if "the amount of such proceeds is at least 300 times as large as the amount wagered." Section 3402(q)(3). The statute excepts slot machines, keno, and bingo from the withholding obligations. Section 3402(q)(5).

¹²Section 4401(a)(1).

¹³Section 4402(3).

¹⁴Section 4411(a).

¹⁵Chapter 35 itself contains no mention of American Indian tribes. If tribes are exempt from the obligations under chapter 35, it has to be because of the cross-reference in IGRA. Section 7871 provides for treating Indian tribal governments as states for certain purposes, such as the charitable contribution deduction and specified excise taxes, but none of the listed purposes even arguably applies to wagering operations.

Both possibilities can't be right. By its terms, the statute is contradictory, and the legislative history is of little help in explaining the meaning of the cryptic reference to "chapter 35." Or perhaps it's the reference to "reporting and withholding obligations" that's cryptic; maybe Congress really meant to exempt the tribes from the wagering taxes but botched the rest of the statute. The legislative history doesn't help much with that question either.¹⁶

Not surprisingly, both the tribes and the United States wanted to rewrite the statute to give it coherence, and that led to some pointed exchanges at oral argument. In a reply brief, and then at oral argument, the tribes argued that the nonparenthetical language should be reconceptualized to provide the same treatment for tribes as for states: "concerning (a) the reporting and withholding of taxes with respect to the winnings from gaming or (b) wagering operations."¹⁷ Such a reading, if accepted, would have given the tribes a broad exemption from federal wagering taxes, just like the states for their lotteries.¹⁸ At oral argument, Justice Antonin Scalia responded: "This meaning didn't occur to you till the reply brief? That suggests how implausible it is."¹⁹ In his view, "[t]he Indians' interpretation is strained."²⁰

Strained, yes, but the tribes weren't making up the reference to "chapter 35." It's in the statute, and statutory language generally ought to be treated as if it means something. The government lawyer, who argued that the reference to chapter 35 had no effect on tribal immunity from taxation, was asked by Justice Ruth Bader Ginsburg "to concede that . . . the only way to make sense of the statute is to treat it as if the reference to chapter 35 were not there."²¹ He made the concession, stating that he couldn't provide a good reason for "chapter 35's" being in the parenthetical.²² At bottom, therefore, the government's position was that "chapter 35" should effectively be deleted in read-

ing IGRA section 2719(d)(1),²³ and doing that requires some interpretive straining, too.

So that leaves us with the following situation: The statute contains two phrases that have no apparent way of being reconciled, and one phrase or the other will have to be changed substantially, maybe even disregarded, if anything approaching a coherent meaning is to emerge. What goes and what stays?

II. The American Indian Canons of Construction

One set of interpretive principles with possible relevance in a case like *Chickasaw Nation* is the so-called canons of construction in American Indian law.²⁴ In general, as the Supreme Court put it in 1930, in a somewhat condescending way, "doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith."²⁵

For a circuit court to have rejected the canons in a summary fashion, as the Tenth Circuit did, is almost incomprehensible.

Although the canons were developed to interpret nineteenth-century treaties between the United States and the Indian tribes — the treaties were similar to contracts of adhesion, and they contained decidedly unusual language — the canons have been extended to apply to statutes, executive orders, and regulations as well. The canons are expressed in different terms in different contexts, but, whatever the language used, the canons encompass the following points: "(1) very liberal construction to determine whether Indian rights exist; and (2) very strict construction to determine whether Indian rights are to be abridged or

¹⁶Five members of the majority in *Chickasaw Nation* purported to derive help from the legislative history of IGRA, see *infra* notes 40-42 and accompanying text, but the two dissenters questioned the majority's reading of that history. See *infra* notes 48-49 and accompanying text.

¹⁷See Reply Brief for Petitioners at 8-10, *Chickasaw Nation v. United States*, 122 S. Ct. 528 (2001) (No. 00-507); *Chickasaw Nation*, 122 S. Ct. at 533.

¹⁸Two other interpretational issues can arise under chapter 35: What constitutes a "wager" for purposes of determining whether the excise tax potentially applies, and what constitutes a "lottery" potentially eligible for the exemption for "state-conducted lotteries"? The government conceded in *Chickasaw Nation* that the tribes' pull-tab games were "lotteries" for purposes of the statute, and therefore (depending on the reading of the IGRA provision) potentially eligible for an exemption.

¹⁹Quoted in Carolyn Wright LaFon, "High Court Urged to Adopt 'Strained' Interpretation of Poorly Drafted Statute," *Tax Notes*, Oct. 8, 2001, p. 186, at 187.

²⁰Quoted in *id.*

²¹Transcript of Oral Argument (Oct. 2, 2001), *Chickasaw Nation v. United States*, 122 S. Ct. 528 (2001) (No. 00-507).

²²*Id.*

²³The Tenth Circuit had suggested that the reference to chapter 35 may have been intended to pick up the definitions of "wager" and "lottery" from that chapter. *Chickasaw Nation*, 208 F.3d at 883. In its brief responding to the petition for *certiorari* (and supporting the grant), the government also advanced that interpretation. Brief for the United States on Petition for *Certiorari* at 6, *Chickasaw Nation v. United States*, 122 S. Ct. 528 (2001) (No. 00-507). In its brief on the merits, the United States repeated that interpretation, but seemed to downplay it. Brief for the United States at 14-15, *Chickasaw Nation v. United States*, 122 S. Ct. 528 (2001) (No. 00-507). With the concession at oral argument, the government apparently abandoned the attempt to attach some meaning to the reference.

²⁴I've discussed the canons in these pages before. See Erik M. Jensen, "American Indian Law Meets the Internal Revenue Code: *Warbus v. Commissioner*," *Tax Notes*, Apr. 5, 1999, p. 105 (revised version of article originally published in 74 *North Dakota Law Review* 691 (1998)) [hereinafter Jensen, *Warbus*]; see also Erik M. Jensen, "American Indian Tribes and 401(k) Plans," *Tax Notes*, July 3, 1995, p. 117.

²⁵*Carpenter v. Shaw*, 280 U.S. 363, 367 (1930).

abrogated.”²⁶ This generally means that if there’s doubt about the interpretation of a provision, the doubt should be resolved in favor of the affected tribes.²⁷

The application of the canons may not always be clear, and judges have circumvented the canons by purporting to find no ambiguity in inherently ambiguous documents. Even when that happens, however, judges typically write their opinions as if the canons were being taken seriously²⁸ — as well they should be. The canons are part of the law; they aren’t supposed to be optional, to be applied only by tribe-friendly courts.

In *Chickasaw Nation*, however, the Tenth Circuit in one brief paragraph rejected using the canons of construction as aids in construing IGRA: There was no ambiguity needing resolution, said the court, and therefore no role to be played by the canons.²⁹ Perhaps these weren’t disputes for which the canons were appropriate, as the Supreme Court also ultimately decided. I think both courts were wrong in that determination, as I’ll discuss in Part IV, but at least the Supreme Court grudgingly discussed the relevance of the canons at length.³⁰ For a circuit court to have rejected the canons in a summary fashion, however, as the Tenth Circuit did, is almost incomprehensible.³¹

III. The Supreme Court’s Interpretation

All members of the *Chickasaw Nation* Court agreed that something went wrong in drafting section 2719(d)(1) of IGRA — on that point, no reasonable person could disagree — and that something would therefore have to give in interpreting the statute. In this part

²⁶David H. Getches, *et al.*, *Federal Indian Law: Cases and Materials* 327 (4th ed. 1998).

²⁷I’m willing to go further: If there is significant doubt about whether an ambiguity exists — if there is doubt about whether there is doubt — the canons should be used to resolve that question. It’s consistent with the canons as they have developed to require courts to look for ways to interpret controlling language in favor of an affected tribe or tribal member.

²⁸See, e.g., *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 263 (1992) (applying canons generously to forbid excise tax on sale of fee land within reservation boundaries while generally downplaying effect of canons in concluding that ad valorem tax on those lands was permissible).

²⁹*Chickasaw Nation*, 208 F.3d at 880.

³⁰Given what the Court wound up saying about the canons, however, maybe it would have been better if the Court had ignored them. See *infra* Part IV.A.

³¹It sometimes happens that a court is unaware of the canons and the parties make no effort to educate the court. (Sometimes the parties too are oblivious.) See Jensen, *Warbus*, *supra* note 24 (discussing Tax Court case involving American Indian law issues, in which Special Trial Judge wasn’t advised of canons of construction). But the Tenth Circuit is the second busiest American Indian law circuit in the nation, behind only the Ninth Circuit, and Tenth Circuit judges are used to discussing the canons as a matter of course. Downplaying the canons, as the Tenth Circuit did in *Chickasaw Nation*, couldn’t have been an accident.

of the article, I’ve provided an executive summary of the big points made by the majority and the dissenters. (I’ll try to be balanced in my presentation, but it will become apparent that I think the dissenters came much closer to getting it right.)

A. Majority

The Court concluded that the statute shouldn’t be interpreted to exempt the tribes from the excise and occupational taxes: “We agree with the Tribes that rejecting their argument reduces the phrase ‘including . . . chapter 35) . . .’ to surplusage. Nonetheless, we can find no other reasonable reading of the statute.”³²

The statutory glitch isn’t an ambiguity; it’s a mistake. The statute gives a list of examples of reporting and withholding provisions, and, wrote Justice Stephen G. Breyer, “‘chapter 35’ is simply a bad example — an example that Congress included inadvertently. The presence of a bad example in a statute doesn’t warrant rewriting the remainder of the statute’s language.”³³ While courts ought to try to give effect to each word in a statute “if possible,” they can properly ignore words that are surplusage — and fourth-tier surplusage at that: “a numerical cross-reference in a parenthetical.”³⁴

Parenthetical language isn’t as important as nonparenthetical language. If parenthetical language appears to conflict with another passage in a statute, it’s the parenthetical that should give way. The “language outside the parenthetical is unambiguous,” Justice Breyer wrote.³⁵ It’s only the “reporting and withholding” rules for which there should be tribal-state conformity. The reference to “chapter 35” is merely in an illustrative parenthetical, “hence redundant,”³⁶ with no “independent operative effect.”³⁷ To give “chapter 35” operative effect would require rewriting the statute in the “strained” way urged by the tribes,³⁸ and that would give the statute too broad a sweep.

³²*Chickasaw Nation*, 122 S. Ct. at 532.

³³*Id.* at 533.

³⁴In a passage that will have interpreters shaking their heads in 50 years, Justice Breyer analogized the IGRA passage to an instruction to “Test drive some cars, including Plymouth, Nissan, Chevrolet, Ford, and Kitchenaid.” *Id.*

³⁵*Id.* at 532.

³⁶*Id.* The government made the point in its brief. The reference to “chapter 35.”

is merely one of a series of unexplained cross-references in an illustrative parenthetical. It cannot fairly be said to contradict limitations that inhere in the provision’s central textual command. That is particularly true where the result that petitioners seek is a complete exemption from two federal excise taxes that are wholly unrelated to the reporting and withholding provisions to which Section 2719(d) otherwise refers.

Brief for the United States at 7-8, *Chickasaw Nation v. United States*, 122 S. Ct. 528 (2001) (No. 00-507).

³⁷*Chickasaw Nation*, 122 S. Ct. at 532.

³⁸See *supra* notes 17-20 and accompanying text; *Chickasaw Nation*, 122 S. Ct. at 533.

The legislative history, while incomplete, does help in interpretation.³⁹ Early drafts of what became IGRA specifically provided for tribes to be treated like states for purposes of both tax liability and reporting obligations.⁴⁰ At those earlier times a parenthetical reference to "chapter 35" would have made sense, but then the language that would have explicitly exempted tribes from tax liability was deleted. Extrapolating from the evidence, Justice Breyer concluded that the deletion was intentional — Congress didn't mean to exempt tribes from wagering tax liability⁴¹ — and that the parenthetical reference to chapter 35 survived only because of inadvertence. Breyer didn't know the sequence of events, since drafting was done in closed-door sessions, but "[i]t is far easier to believe that the drafters, having included the entire parenthetical while the word 'taxation' was still part of the bill, unintentionally failed to remove what had become a superfluous numerical cross-reference."⁴²

In interpreting a statutory provision, a court should pay little or no attention to what participants say in later years. In a letter to the Commissioner of Internal Revenue, written three years after IGRA's enactment, Senator Daniel Inouye had stated that "it was the intention of the Congress that the tax treatment of wagers conducted by tribal governments be the same as that for wagers conducted by state governments under Chapter 35."⁴³ Even though Inouye was the self-proclaimed "primary author" of IGRA as chair of the Senate Select Committee on Indian Affairs, Justice Breyer dismissed the letter as reflecting after-the-fact views of one Senator, who didn't explain the evolution of the statutory language.⁴⁴

³⁹Justices Scalia and Thomas didn't sign on to the legislative history discussion.

⁴⁰The original Senate bill provided that

[p]rovisions of the Internal Revenue Code . . . concerning the taxation and the reporting and withholding of taxes with respect to gambling or wagering operations shall apply to Indian gaming operations. . . . the same as they apply to State operations.

S. Rep. No. 555, 100th Cong., 1st Sess. 37 (1987), quoted in *Chickasaw Nation*, 122 S. Ct. at 533.

⁴¹Another possibility, however, is that the reference to "taxation" was deleted because of tribal sensitivity. See *infra* note 44.

⁴²*Chickasaw Nation*, 122 S. Ct. at 534. A contrary interpretation, wrote Justice Breyer, "would read back into the Act the very word 'taxation' that the Senate committee deleted." *Id.*

⁴³Letter from Daniel Inouye to Fred T. Goldberg Jr. (Dec. 12, 1991), reprinted in Petition for Writ of *Certiorari* at app. 112a, 113a, *Chickasaw Nation v. United States*, 122 S. Ct. 528 (2001) (No. 00-507).

⁴⁴See *Chickasaw Nation*, 122 S. Ct. at 534. It may be that we don't know the full legislative history because of turf battles at the time. Kathleen Nilles, tax counsel to Ways and Means from 1990 until 1994 (*i.e.*, after IGRA's enactment), thinks the statute was garbled because of tensions between tax-writing committees and the Senate Committee on Indian Affairs. See LaFon, *supra* note 19, at 188. The reference to "taxation" in the initial Senate version of the bill, see *supra* note 40, may

(Footnote 44 continued in next column.)

A tax canon points to tribal taxability. A longstanding canon of construction in tax law is that exemptions should be narrowly construed: "When Congress enacts a tax exemption, it ordinarily does so explicitly."⁴⁵ Unless Congress makes it clear that a particular tax doesn't apply to a particular legal person who would otherwise be covered by the statute, the tax is deemed to apply. Congress could have exempted American Indian tribes from the chapter 35 taxes, of course, but nothing in IGRA evidenced an express congressional intention to do so.

In light of the above, these weren't close cases to which the American Indian canons should apply. I'll return to the Indian canons later, in Part IV. Suffice it to say for now that the Court concluded that *Chickasaw Nation* and *Choctaw Nation* weren't cases in which it was appropriate to give the tribes the benefit of any doubt. In fact, the Court concluded that these weren't doubtful cases to begin with.

B. The Dissenters

In contrast, dissenting Justices O'Connor and Souter thought that *Chickasaw Nation* and *Choctaw Nation* were precisely the sorts of cases, chock-full of ambiguity, for which the Indian canons were intended. And if the canons applied, with doubts resolved in the tribes' favor, the tribes should have been exempt from the chapter 35 taxes.

Of course there's ambiguity in the IGRA provision. Section 2719(d), wrote Justice O'Connor, "is subject to more than one interpretation"⁴⁶ — that's why there was an issue for Supreme Court review — and, where I come from, that's what ambiguity means.⁴⁷ If so, the Court should have had to meet the ambiguities head on, not pretend that the ambiguities don't exist.

There's ambiguity if only because we don't know which of the two phrases came first and which was intended to have primacy. Justice O'Connor said that the Court made the

have been deleted "in light of the extreme sensitivity of tribal leaders to any suggestion that tribes as governments are subject to tax. . . . Unfortunately, the professional staff of the Senate Finance Committee did not have an opportunity to correct the Indian Affairs Committee's work." J. Christine Harris, "Tribes Might Ask Congress to Clarify Intent, Based on *Chickasaw*," *Tax Notes*, Dec. 3, 2001, p. 1262 (quoting Nilles). For what it's worth (nothing, the Court would say), Nilles has said that

it is obvious to me that [section 2719(d)(1)] was intended to provide the same treatment of tribes and states under the various code provisions relevant to gaming winnings and gaming operations. That is, where states are required to withhold and report on certain types of gambling winnings paid out to patrons, tribal governments have parallel obligations. And, where states are exempt from certain taxes (*e.g.*, states are exempt under a provision of chapter 35 from the federal wagering excise tax), tribes are also exempt.

Quoted in LaFon, *supra* note 19, at 187-88.

⁴⁵*Chickasaw Nation*, 122 S. Ct. at 533.

⁴⁶*Id.* at 536 (O'Connor, J., dissenting).

⁴⁷In our search for ambiguity, it should count for something that two smart justices, with their smart clerks, and a panel of the Federal Circuit thought the statute doesn't mean what the majority concluded it must mean.

legislative history seem more straightforward than it was. IGRA section 2719(d)(1) unquestionably contains a mistake, and we can't tell from the face of the statute, or from the legislative history, whether Congress erred in including the reference to "chapter 35" in the parenthetical, or whether the error was in not broadening the phrase "reporting and withholding of taxes" to encompass an exemption from wagering taxes.⁴⁸ Wrote O'Connor: "If the parenthetical was added after the restriction, one could just as easily characterize the restriction as an unintentional holdover from a previous version of the bill."⁴⁹

The reference to "chapter 35" isn't surplusage. Surplusage can be ignored, but, wrote Justice O'Connor, that's because "[s]urplusage is redundant statutory language."⁵⁰ The reference to "chapter 35" isn't redundant, and it's not appropriate to ignore language just because it complicates matters: "[T]he Court's reading negates language that undeniably bears separate meaning."⁵¹ And, if it has meaning, the language points in the direction of exemption from taxation.

Parenthetical language isn't necessarily subordinate to nonparenthetical language. The dissenters were aware of no canon that requires giving greater weight to language outside a parenthetical than to language inside one. Justice O'Connor wrote, "The importance of statutory language depends not on its punctuation, but on its meaning."⁵²

Congressional policy cuts against the Court's conclusion. Perhaps the dissenters' most telling point, apart from the related argument about the Indian canons of construction, was the congressional policy behind IGRA. As Justice O'Connor wrote, quoting from the statute, "Congress' central purpose in enacting IGRA was 'to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.'"⁵³ Interpreting IGRA section 2719(d)(1) with that purpose in mind points toward tribal exemption from taxes, both because exemption would reduce tribal tax bills and because it would prevent state lotteries from having a competitive advantage.

IV. Why Not the Indian Canons?

With the meaning of IGRA section 2719(d)(1) not at all clear, the skirmishing between the majority and the dissenters, outlined above, should have prepared the

field for the Indian canons of construction.⁵⁴ And if the canons had applied to resolve ambiguities in *Chickasaw Nation*, they might very well have mandated a tribal victory. That's the point of the canons, to serve as a tiebreaker in favor of affected tribes in ambiguous cases.

A. Was There an Ambiguity to Be Resolved?

To avoid giving decisive weight to the canons, the Supreme Court therefore had to decide that *Chickasaw Nation* wasn't a case involving ambiguity, and that's just what the Court did. Despite the garbled statute, the dissents of two members of the Court, and a Federal Circuit decision to the contrary, the majority concluded that "we cannot say that the statute is 'fairly capable' of two interpretations."⁵⁵ That statement boggles my mind, but a conclusion that there's no ambiguity at least provides an explanation, consistent with existing law, as to why the canons weren't to be given weight in *Chickasaw Nation*: no ambiguity, no need for canons.

The Court didn't just stop at the no-ambiguity point, however. It also threw in some gratuitously disparaging comments about the canons, and, for tribal proponents, this may be the most troubling aspect of *Chickasaw Nation*. In the Court's opinion, these central principles of American Indian law were reduced to little more than rules of convenience, which, in these cases, were apparently quite inconvenient.

For example, quoting a case that had nothing to do with American Indian law, Justice Breyer wrote that canons "are not mandatory rules. They are guides that 'need not be conclusive.'"⁵⁶ The canon at issue in the quoted case was *ejusdem generis* — a nice principle, to be sure, but historically of far less importance than the Indian canons.⁵⁷ If the Court thinks that all principles called canons are created equal, perhaps we need to come up with a new term in American Indian law to describe what for decades had been considered *the law*.

The Indian canons can be overcome, Justice Breyer wrote, by "[o]ther circumstances evidencing congressional intent."⁵⁸ In a sense that was true even under the traditional understanding of the canons: If congressional intent can be discerned, there's no reason for the

⁵⁴This was an issue that attracted a great deal of attention, particularly since the Tenth Circuit had essentially ignored the canons. At least six *amicus* briefs were filed on behalf of tribes and tribal corporations urging that effect be given to the canons of construction. And three Connecticut towns (Ledyard, North Stonington, and Preston) that are affected — negatively, they said — by the Foxwoods casino of the Mashantucket Pequot Tribe filed an *amicus* brief arguing, among other things, that the canons had been too broadly applied in the 20th century and that it was inappropriate to apply the canons to discern congressional intent in *Chickasaw Nation*.

⁵⁵22 S. Ct. at 535.

⁵⁶*Id.* (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001)).

⁵⁷And, despite the suggestion that canons "need not be conclusive," the Court in *Circuit City* applied the canon. See *Circuit City*, 532 U.S. at 115.

⁵⁸*Chickasaw Nation*, 122 S. Ct. at 535.

⁴⁸The error might very well have been in adopting "too restrictive a general characterization of the applicable sections." *Chickasaw Nation*, 122 S. Ct. at 536 (O'Connor, J., dissenting).

⁴⁹*Id.* at 537.

⁵⁰*Id.*

⁵¹*Id.*

⁵²*Id.*

⁵³*Chickasaw Nation*, 122 S. Ct. at 537 (O'Connor, J., dissenting) (quoting 25 U.S.C. section 2702(1)).

canons. It's just that *Chickasaw Nation* doesn't seem to have been a case exhibiting those "other circumstances."

Besides, said the Court, the canons were developed to interpret treaties, and they should be given less weight in interpreting statutes. With another canon of construction involved in interpreting IGRA section 2719(d)(1) — the canon requiring narrow construal of exemptions from taxation — there was all the more reason to discount the Indian canons. Facing two canons aimed in different directions, the Court could not "say that the pro-Indian canon is inevitably stronger — particularly where the interpretation of a congressional statute rather than an Indian treaty is at issue."⁵⁹

It's not clear why Justice Breyer badmouthed the canons. One can't help feeling that the Court denigrated the canons' importance because it realized that its no-ambiguity conclusion was difficult to swallow.

All pretty negative. And it's not clear why Justice Breyer badmouthed the canons when he didn't need to. One can't help feeling that the Court denigrated the canons' importance because it realized that its no-ambiguity conclusion was difficult to swallow in *Chickasaw Nation*.

Consider another passage in the majority opinion: "In this instance, to accept as conclusive the canons on which the Tribes rely would produce an interpretation that we conclude would conflict with the intent embodied in the statute Congress wrote."⁶⁰ At one level, as I've already suggested, that statement is unobjectionable: If we know what Congress intended, of course we don't need the canons. But let's remember what "the statute Congress wrote" was. It was the Indian Gaming Regulatory Act, the purpose of which was, in Congress's own words, "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."⁶¹ Tribal self-determination was the overriding goal, and, with that in mind, how can Justice Breyer's certainty about the taxation of tribes be well-founded?

The statute, the incomplete legislative history, the goals of Indian policy — *everything* pointed toward ambiguity, as Justice O'Connor emphasized in dissent: "Because nothing in the text, legislative history, or underlying policies of section 2719(d) clearly resolves the contradiction inherent in the section, it is appropriate

to turn to canons of statutory construction."⁶² And, as O'Connor wrote, "In this case, because Congress has chosen gaming as a means of enabling the Nations to achieve self-sufficiency, the Indian canon rightly dictates that Congress should be presumed to have intended the Nations to receive more, rather than less, revenue from this enterprise."⁶³

My point in this discussion isn't that the tribes should have prevailed because the congressional intent about tribal taxation was clear. Indeed, my point is exactly the opposite. It's because we don't know for sure what Congress was doing (and, for that matter, Congress might not have known what it was doing) that the Indian canons should have been used as a tiebreaker. And the tie was, as Justice O'Connor put it, "between two equally plausible (or, in this case, equally implausible) constructions of a troubled statute. . . . Breaking interpretive ties is one of the least controversial uses of any canon of statutory construction."⁶⁴

B. Dueling Canons: Tax Versus Indian

The majority in *Chickasaw Nation* not only avoided giving weight to the Indian canons; it also effectively concluded that when the tax canon (construing exemptions from taxation narrowly) conflicts with the Indian canons, it's the tax canon that should prevail.⁶⁵ The dissenters challenged that proposition, stating that the "Court has repeatedly held that, when these two canons conflict, the Indian canon predominates."⁶⁶

Any conflict between the canons was more apparent than real in *Chickasaw Nation*; both the majority and the dissenters took the purported tax canon much more seriously than it deserved to be taken. Even if it weren't true that the Indian canons are more important — and of course they are — the tax canon should have been heavily discounted as it applied to Indian tribes.

Whatever the merits of the tax canon in ordinary circumstances, and with ordinary taxpayers, it shouldn't apply to American Indian tribes. *There is no presumption that tribes (as distinguished from tribal members) are subject to otherwise generally applicable federal taxes.* Sometimes they are, sometimes they aren't. Sometimes Congress is specific about tribal tax liability, sometimes it isn't. When Congress isn't specific, it's not necessarily the case that tribes are deemed to be taxable. With the equivocal status of tribes under federal tax law, the *Chickasaw Nation* Court should have questioned whether Congress really intended to impose the wagering taxes on tribes.

It's true that *individual* American Indians are subject to federal taxes unless a specific provision in the Inter-

⁵⁹*Id.* at 535-36.

⁶⁰*Id.* at 535.

⁶¹25 U.S. section 2702(1).

⁶²*Chickasaw Nation*, 122 S. Ct. at 538 (O'Connor, J., dissenting).

⁶³*Id.*

⁶⁴*Id.* at 539 (citing William N. Eskridge Jr., *et al.*, *Legislation and Statutory Interpretation* 341 (3d ed., 2001)).

⁶⁵See *supra* note 59 and accompanying text.

⁶⁶*Chickasaw Nation*, 122 S. Ct. at 538 (O'Connor, J., dissenting).

nal Revenue Code or treaty provides otherwise.⁶⁷ In general, members of federally recognized tribes are taxed like other American citizens.⁶⁸

It's also true that despite their sovereign status, American Indian tribes *could* be taxed. (With each taxing statute we'd have to figure out what sort of entity a tribe is, not necessarily an easy task, but presumably we could do that.)⁶⁹ Tribal proponents don't like it, but it's generally conceded that Congress has virtually unlimited power over American tribes, under the so-called federal plenary power doctrine. That power extends to taxation of the tribes themselves.

But to say that Congress could tax tribes isn't to say that Congress intended to do so in a particular situation. For example, it's taken for granted today that American Indian tribes don't pay federal income taxes, and this exemption generally extends to tribal corporations formed under the Indian Reorganization Act as well.⁷⁰ Someone who reads what the *Chickasaw Nation* majority had to say about exemptions in tax law would assume that Congress must have provided, somewhere in the income tax portions of the Internal Revenue Code, for the exemption of tribes and federally chartered tribal corporations.

Not so. *There is no specific statutory exception for tribes or tribal corporations.*⁷¹ The modern (and now somewhat dated) version of Felix Cohen's *Handbook of American Indian Law* said simply, "Indian tribes are not taxable entities under the income tax provisions of the Internal Revenue Code,"⁷² and then cited not the code, but a 1967 Revenue Ruling (since amplified by a 1994 ruling)⁷³ and a 1941 memorandum from the Interior

Department.⁷⁴ In 1997, Professor Scott Taylor wrote simply, and correctly, "Tribes are generally exempt from federal income tax. The reason for this exemption is not altogether clear."⁷⁵

One can imagine why Congress might have decided that sovereign tribes and their federally chartered corporations ought not to be subject to the income tax, as a matter of first principle, but it's impossible to find language in the Internal Revenue Code that evidences such a decision.⁷⁶ I'm sure that Congress accepts the proposition that a tribe (or federally chartered tribal corporation) isn't a taxable entity under the income tax, but it hasn't said so explicitly. Instead, Congress has merely acquiesced in Internal Revenue Service practice.

The application of other federal taxes to tribes is less clear. For example, the FICA and FUTA statutes don't specifically mention Indian tribes, but the Service takes the position that tribes acting as employers are required to withhold and make contributions to the FICA and FUTA systems.⁷⁷ As Professor Taylor noted, the Service's position on these issues — that the taxes apply unless there's a specific exemption — is the opposite of the position it takes with the income tax.⁷⁸

Section 7871 provides that for some particular excise taxes, tribal governments shall be treated as states,⁷⁹ and the tribes might therefore be exempt from those taxes. Perhaps one can infer from this section that other excise taxes, including those in chapter 35, apply to tribes without limitation. Perhaps one can infer that,

⁶⁷Sometimes specific rules do come into play. For example, section 7873 exempts from gross income the income of individual tribal members, as well as the income of tribes, derived from "fishing-rights related activity," generally treaty-protected or executive-order-protected fishing activity. See Jensen, *Warbus*, *supra* note 24 (discussing section 7873).

⁶⁸See *Squire v. Capoeman*, 351 U.S. 1 (1956).

⁶⁹For example, the Tenth Circuit's opinion in *Chickasaw Nation* contained a lengthy discussion about whether the tribe was a "person" for purposes of the taxes on wagering. See *Chickasaw Nation*, 208 F.3d at 878-80.

⁷⁰See Rev. Rul. 94-16, 1994-1 C.B. 19, *Doc 94-2447*, 94 *TNT* 41-8 ("Neither an unincorporated Indian tribe nor a corporation organized under section 17 of the Indian Reorganization Act of 1934 is subject to federal income tax on its income, regardless of the location of the activities that produced the income.").

⁷¹There's an important distinction between tribal corporations formed under section 17 of the Indian Reorganization Act, which are exempt from federal income taxation, and those formed under state law, which aren't. See Rev. Rul. 94-16, 1994-1 C.B. 19 ("[A] corporation organized by an Indian tribe under state law is subject to federal income tax on its income, regardless of the location of the activities that produced the income.").

⁷²Felix S. Cohen, *Handbook of Federal Indian Law* 390 (1982 ed.) [hereinafter Cohen].

⁷³See Rev. Rul. 67-284, 1967-2 C.B. 55 ("Income tax statutes do not tax Indian tribes. The tribe is not a taxable entity."), amplified by Rev. Rul. 94-16, 1994-1 C.B. 19, quoted in *supra* notes 70-71.

⁷⁴Memo. Sol. Int., May 1, 1941, reprinted in 1 *Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974*, at 1044 (n.d.).

⁷⁵Scott A. Taylor, "An Introduction and Overview of Taxation and Indian Gaming," 29 *Ariz. St. L.J.* 251, 252 (1997).

⁷⁶Maybe, the argument might go, tribes aren't subject to the income tax because they're not "individuals" or "estates or trusts," and maybe they aren't "corporations." (Without attempting a full definition, section 7701(a)(3) simply notes that "[t]he term 'corporation' includes associations, joint-stock companies, and insurance companies.") But even if a tribe itself isn't a corporation, a tribal corporation presumably would be, and such corporations formed under the Indian Reorganization Act have also been deemed to be exempt from the income tax. See Rev. Rul. 81-295, 1981-2 C.B. 15 ("The federally chartered Indian tribal corporation shares the same tax status as the Indian tribe and is not taxable on income from activities carried on within the boundaries of the reservation."), amplified by Rev. Rul. 94-16, 1994-1 C.B. 19 (extending principle to income earned outside the reservation). Treating a tribal corporation as equivalent to the tribe itself clearly isn't mandated by the code's language.

⁷⁷Cohen, *supra* note 72, at 399; see also Ann. 2001-16, 2001-8 IRB 715, *Doc 2001-2897* (3 original pages), 2001 *TNT* 20-7 (providing guidance to tribes on FUTA obligations).

⁷⁸See Taylor, *supra* note 75, at 253-54; see also Robyn L. Robinson, "A Discussion of the Application of FICA and FUTA to Indian Tribes' On-Reservation Activities," 25 *Am. Ind. L. Rev.* 37 (2000/2001) (questioning how the Service can take one position with the income tax and another with FICA and FUTA).

⁷⁹Section 7871(a)(2).

but with the mixed authority, that's all one can say: Perhaps.⁸⁰

I hope that's enough detail to demonstrate that trying to discern a generally applicable congressional intent on the taxation of American Indian tribes is like rooting for the Montreal Expos: It's a way of whiling away the summer, but it's not going to lead to anything. The federal tax treatment of American Indian tribes and their federally chartered corporations isn't nearly as uniform as the Court implied in *Chickasaw Nation*. If a tax "canon" emerges from all of this for tribes — and I'm skeptical that one does — it must be much narrower than what the Court suggested.

Trying to discern a generally applicable congressional intent on the taxation of American Indian tribes is like rooting for the Montreal Expos: It's a way of whiling away the summer, but it's not going to lead to anything.

With this background, it wouldn't have been surprising if Congress, in considering IGRA, had concluded that tribes wouldn't be subject to the chapter 35 taxes on wagering, without specific congressional approval.⁸¹ And given the extraordinary federal policy behind IGRA — to facilitate on-reservation gambling as a means of improving the economic self-sufficiency of tribes — exempting the tribes from the excises and

⁸⁰See also Cohen, *supra* note 72, at 402-403 (discussing unclear application of excise taxes to tribes).

⁸¹I've cited some post-1988 authority, like Revenue Ruling 94-16, in trying to determine what Congress might have been thinking in 1988, but I don't think that's unfair. In general, the later authority is merely an extrapolation of previously existing understandings.

occupational taxes of chapter 35 makes more than a little sense.

V. Conclusion

I began this essay by hinting that *Chickasaw Nation* might help us in deciphering statutes that make no sense, but that's probably too lofty a goal. In an interpretive situation with no American Indian law overtones, it's hard to imagine a generally applicable default rule to apply where statutory language points in two diametric directions and no rule of statutory construction provides a tiebreaker. After a court has emptied the usual bag of tricks (plain meaning, purpose, structure, and so on), it can do little but cope. It must decide one way or the other — the coin flip — while recognizing that Congress has the power to undo any judicial mistake.⁸²

But when tiebreakers based on settled doctrine are available, a court should embrace them. The Court in *Chickasaw Nation* tried to do that with its "tax canon," but it gave more weight to the canon than it could bear. And it pushed to the side a much more clearly applicable tiebreaker, the Indian canons of construction, by adopting a cramped view of when the Indian canons should apply. The Court concluded that *Chickasaw Nation* and *Choctaw Nation* weren't cases for the canons because there was no ambiguity that the canons could help resolve, and, on the facts, that was a bewildering conclusion. I'm willing to go further: That was an almost indefensible conclusion.

⁸²There's no way to force, or even to strongly encourage, Congress to deal with broken statutes. *But see* Ruth Bader Ginsburg, "A Plea for Legislative Review," 60 *S. Cal. L. Rev.* 995, 1011-1017 (1987) (urging method to prompt "a congressional second look," something like a remand to Congress). Given the sensitive political nature of the issues in *Chickasaw Nation*, I doubt that Congress would want to revisit the issues anyway. Changing the IGRA provision would go far beyond what we would consider a "technical correction" in other contexts.