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CHICKASAW NATION:
INTERPRETING A BROKEN STATUTE

By Erik M. Jensen

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-

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(g), 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...

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5Chickasaw 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.

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. 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 6050(a) all deal with reporting or withholding.8 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.9 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 for bigger awards in high-risk games, and in some other circumstances as well.10

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.”11 Section 4402 then generally exempts “state-conducted lotteries” from the excise.12 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,”13 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.)14 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?

Footnotes:
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)(1) 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 $500. And section 6050(a) 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.
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(1).
14Section 4411(1).
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 recontextualized 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 reading 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 deliberately 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 5-10, 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.


20Quoted in id.


22Id.

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.


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 seriously 28 — 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 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 — in 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.


27 I’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.

28 See, 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.

30 Given 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.

31 It 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.

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

33 Id. at 533.

34 In 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 inhered 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. at 528 (2001) (No. 00-507).

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

38 See supra notes 17-20 and accompanying text; Chickasaw Nation, 122 S. Ct. at 533.
The legislative history, while incomplete, does help in interpretation. Early drafts of what became IGRA specifically provided for tribes to be treated like states for purposes of both tax liability and reporting obligations. 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 liability — 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.”

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.” 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.

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.” 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” — that’s why there was an issue for Supreme Court review — and, where I come from, that’s what ambiguity means. 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).

O’Connor 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 gambling 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.

Chickasaw Nation, 122 S. Ct. at 533.

Id. at 536 (O’Connor, J., dissenting).

In 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.

Note 44

The 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.


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

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.


See 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 41, may

(Footnote 44 continued in next column.)
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 canons that require 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

footnotes:

48 "The 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 Chickasaw Nation, 122 S. Ct. at 537 (O'Connor, J., dissenting) (quoting 28 U.S. section 2702(1)).

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 dissent 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

53 "This 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.
54 122 S. Ct. at 535.
55 Id. (quoting Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115 (2001)).
56 "And, 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.
57 Chickasaw Nation, 122 S. Ct. at 535.
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.” 60

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.” 61 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.” 62 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.” 63 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.” 64

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.” 65

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. 66 The dissenters challenged that proposition, stating that the “Court has repeatedly held that, when these two canons conflict, the Indian canon predominates.” 67

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

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.) 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. 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. 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," and then cited not the code, but a 1967 Revenue Ruling (since amplified by a 1994 ruling) and a 1941 memorandum from the Interior Department. 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."

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. 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. 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.

Section 7871 provides that for some particular excise taxes, tribal governments shall be treated as states, 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,

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67 Sometimes specific rules do come into play. For example, section 7871 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 7871).


69 For 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.

70 See Rev. Rul. 94-16, 1994-1 C.B. 15, 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.").

71 There'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.").


73 See Rev. Rul. 67-284, 1967-2 C.B. 55 ("Income tax statutes do not tax Indian tribes. The tribe is not a taxable entity.").

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

75 See 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).

76Section 7871(a)(2).
but with the mixed authority, that’s all one can say: Perhaps.  

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.

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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. 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 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.

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.

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

I’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 latter authority is merely an extrapolation of previously existing understandings.

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82 There’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.