

# INDIAN TAX 101



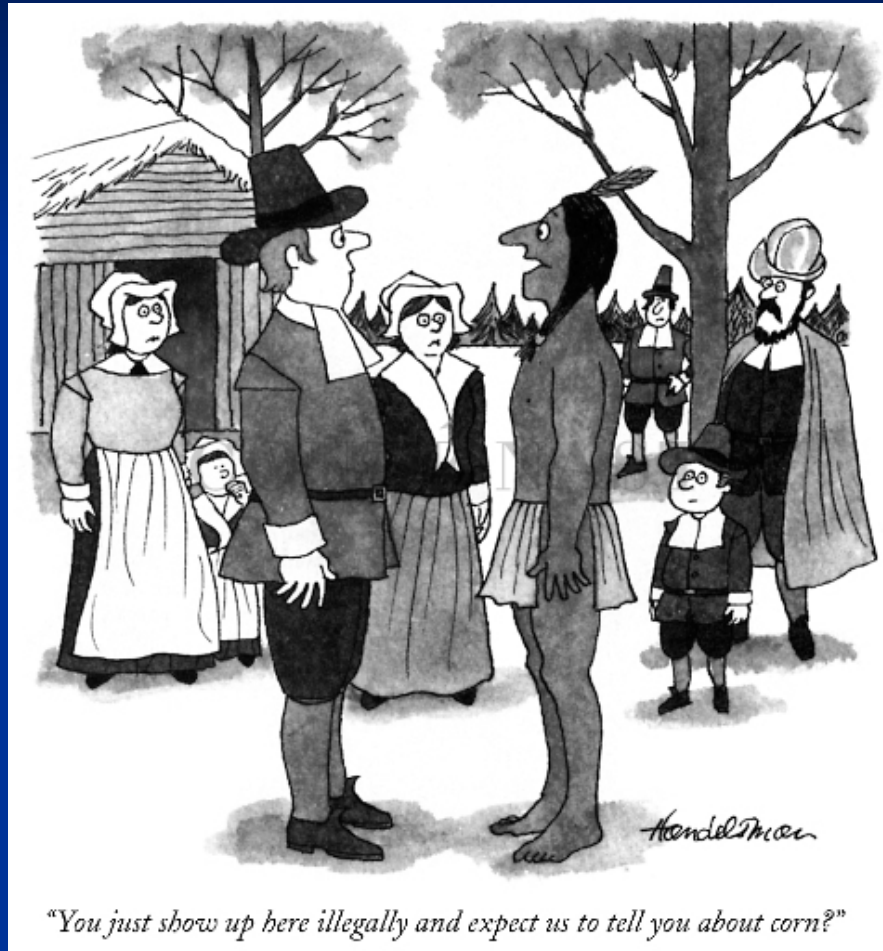
# INTRODUCTION

- Traditional introduction
- My name is Bernice Delorme. I am honored to step into the shoes of Dan Press as the General Counsel for the Council for Tribal Employment Rights.
- Thanks to Lee, CTER Board and Conference organizers
- Taxation is the blood of tribal sovereignty, and TERO is at the forefront of tribal taxation.

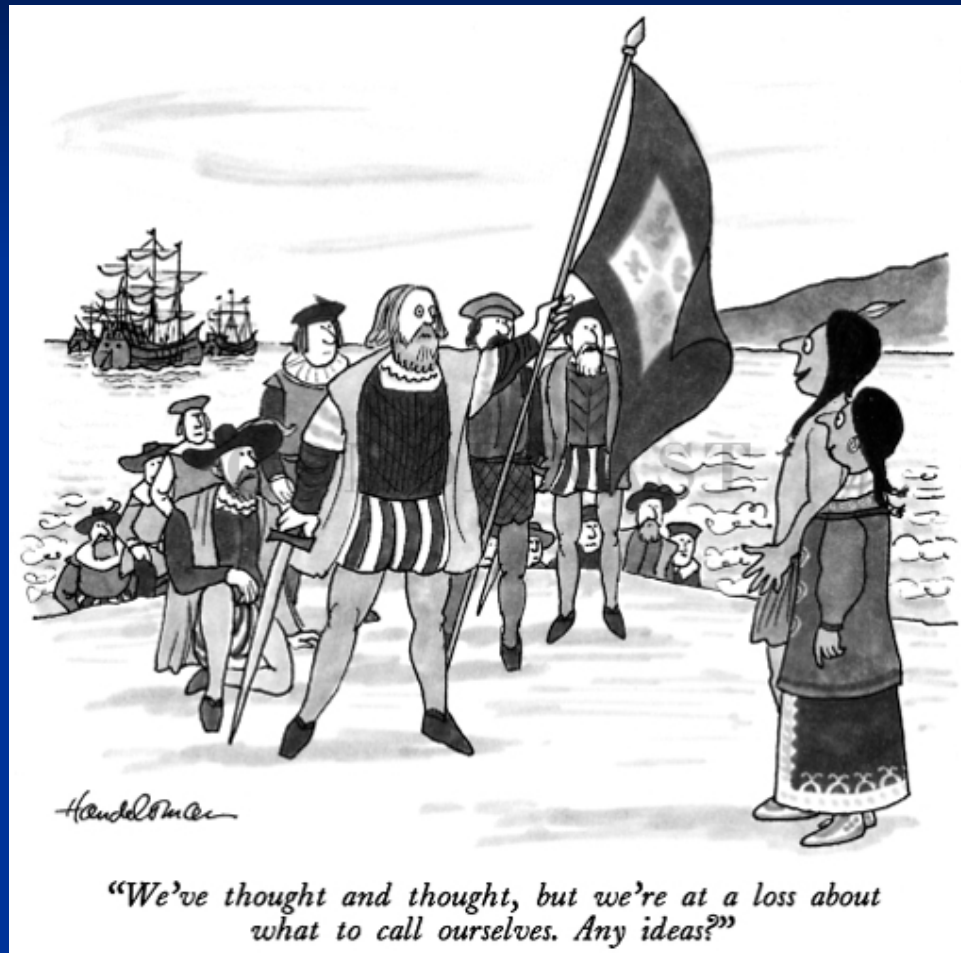
# First Impressions Matter



# Differing Expectations



# THIS NEVER HAPPENED



# The Independent Origin of Tribal Sovereignty

- Most Indian Tribes were independent, self-governing societies long before contact with European nations. *See Stephen Cornell, The Return of the Native American Indian Political Resurgence, 72-76 (Oxford Univ. Press 1988).*
  - ❖ No Unemployment/Underemployment
  - ❖ No Homelessness
  - ❖ No Bankruptcies
  - ❖ No Jails/Debtor's Prison
  - ❖ Freedom of Religion, Speech, Assembly, etc.

# Forms of Tribal Government

- The forms of political order included multi-tribal confederacies, governments based on towns or pueblos, and systems in which authority rested in heads of kinship groups or clans. *See Vine Deloria, Jr. & Clifford M. Lytle, American Indians, American Justice 82-83 (U. Texas Press, 1983).*
- The Iroquois or Haudenosaunee Confederacy is credited as an influential source on the “founding fathers” when the U. S. Constitution was being written. *See Arthur C. Parker, the Constitution of the Five Nations, or the Iroquois Book of the Great Law in William N. Fenton, ed. Parker on the Iroquois (Syracuse Univ. Press, 1968).*





# Absent from the Constitutional Table



# More Conspicuous Absences



# Yet Another Conspicuous Absence

- Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, AND EXCLUDING INDIANS NOT TAXED, three fifths of all other Persons. *U.S. Constitution, Article I, Section 2, Clause 3.*

# Common Features Among Traditional Tribal Governments

- They derived their legitimacy from creation stories/ sacred narratives rather than secular constitutions. *See David E. Wilkins, American Indian Politics and the American Political System, 124-26 (Roman & Littlefield 2002).*
- So political actions were informed by spiritual guidance and directed toward fulfillment of spiritual as well as material goals. *Ibid.*
- Kinship groups and social relationships were the basic units of Native society. *Id.*

# Common Features (continued)

- Power belonged to the community more than to individual leaders.
- Tribal leaders served only so long as they maintained the respect and confidence of the people.
- The principal values that motivated tribal governments were those of responsibility to the community and respect for the place of each individual in the sacred order of things.

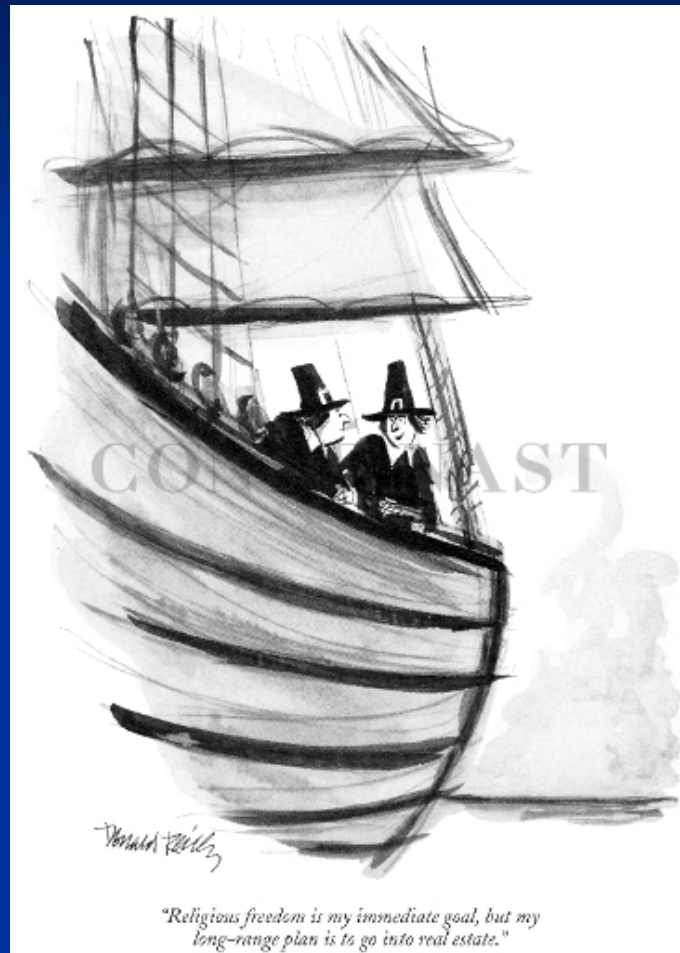
# Common Features (continued)

- An important function of early tribal governments was resolving conflicts and restoring harmony in accordance with these values.
- The legislative function that is the major function of modern tribal councils was less prominent in traditional tribal councils.
- These factors add depth to the consensus decisionmaking process used to govern.

# Pressure to Modernize in 19<sup>th</sup> and 20<sup>th</sup> Centuries

- Outside pressures for transformation of tribal governments came from a perception among the whites about the inferiority of any government that did not look like theirs. *See Indian Self-Rule: First-Hand Accounts of Indian-White Relations from Roosevelt to Reagan 59 (Kenneth R. Philp, ed. Howe Bros 1986).*
- The United States also wanted forms of tribal governance that would facilitate non-indian exploitation of tribal resources.

# EXAMPLE OF EXPLOITATION





# Pressure...continued

- By the 1930s, more than sixty native nations had constitutions or similar documents on file with the Department of Interior. *See David E. Wilkins, American Indian Politics and the American Political System 129 (Rowe & Littlefield Publishers 2002).*
- This was BEFORE the Indian Reorganization Act of 1934, which authorized tribes to reorganize under written constitutions. [theory]

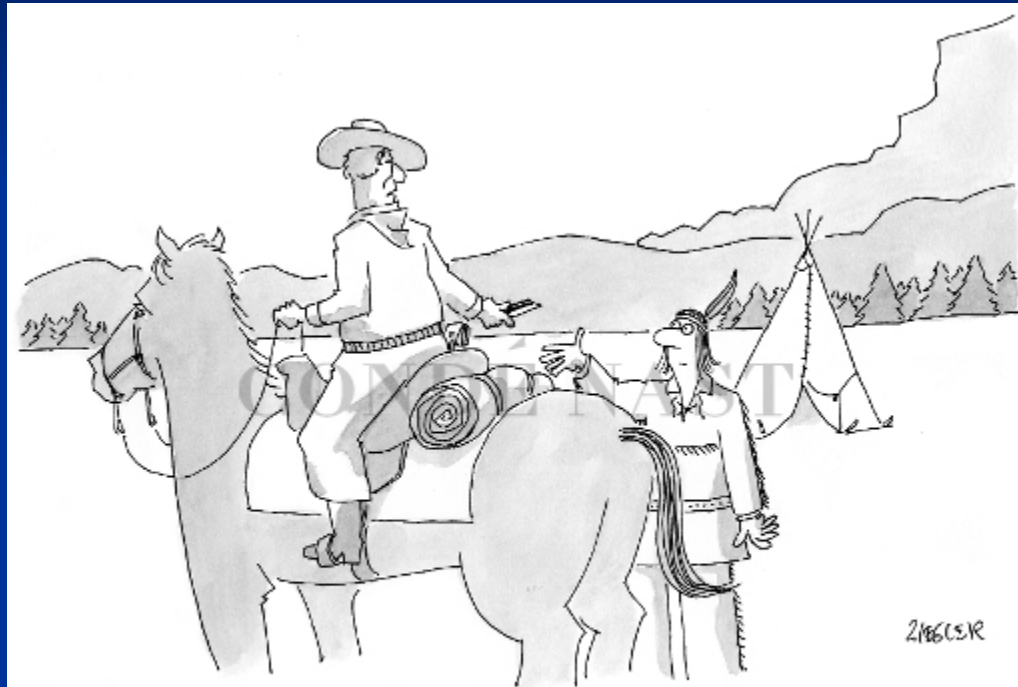
# Origins of Tribal Power to Tax

- Tribes have been the leaders and guardians of the people, air, land and waters of their homelands since time immemorial.
- Pre-contact trade shows tribes brought trade goods when crossing another tribe's territory.
- Post-contact, SMART non-Indians brought trade goods when crossing tribal territories.
- Because the power to tax derives from a tribe's inherent sovereignty federal authorization of tribal taxes is not required.

# Origins...(continued)



# Origins (continued)



*"We'll be paying for the prairie, the forests, and the streams with this credit card, which is just as good as—if not better than—trinkets."*

# Origins...(continued)

- The present right of tribes to govern their members and territories flows from a preexisting sovereignty, limited, but not abolished by their inclusion within the territorial bounds of the United States. *See Cohen's Handbook of Federal Indian Law, 2005 Edition.*
- Tribal powers of self-governance are recognized by the U.S. Constitution, legislation, treaties, judicial decisions and administrative practice. *Ibid.*

# Origins (continued)

- Neither the passage of time nor the apparent assimilation of Native peoples can be interpreted as a diminishment or an abandoning of a tribe's status as a self-governing entity.
- Once recognized as a political body by the United States a tribe retains its sovereignty until Congress acts to divest that sovereignty. *United States v. Long*, 324 F.3d 475, 479-480 (7<sup>th</sup> Cir. 2003).

# Origins (continued)

- The Supreme Court has observed that “Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status. *United States v. Wheeler*, 435 U.S. 313, 323 (1978).
- The power to raise revenue to provide governmental services is crucial to the continued progress of Indian tribes. *Merrion vs. Jicarilla Apache Tribe*, 455 U.S. 130, 137-40 (1982),

# Analyzing Tribal Taxes

- Congress in general has affirmed tribal taxing power, as has the executive branch. *Ibid.*
- The Supreme Court, however, has created certain limitations with respect to taxation of nontribal members on nontribal lands.
- So in analyzing whether a tribal tax may be challenged, tribes have to consider:
  - (1) the status of the person to be taxed – Indian, nonmember Indian, non-Indian.



# Analyzing...(continued)

- (2) the status of the land on which the activity to be taxed is located – fee or trust land.
- (3) whether their Tribal Court has the proper Jurisdiction to hear tax challenges, particularly from non-Indians.
  - The constitutions of some tribes do not take jurisdiction over non-Indians within their boundaries, so their courts are not delegated the power to accept jurisdiction over non-Indians, even if the non-Indians WANT to submit to the jurisdiction of the Tribal Court..
- (4) Whether Congress has preempted the tax.

# Current Law on Tribal Taxation

- Taxation of tribal members is well settled law, with the exception of whether a tribe can tax trust/restricted lands.
  - We know that federal and state governments cannot tax trust land.
  - The remaining open question is whether federal laws making trust lands nontaxable also precludes *tribal taxation*.

# Tribal Taxation of Non-Indians

- Tribal power to tax non-tribal members in Indian Country has long been recognized as one of the aspects of tribal sovereignty. *Morris v. Hitchcock*, 194 U.S. 384 (1904) [Supreme Court upheld a tribal tax imposed on non-Indians grazing cattle on land the non-Indians owned within tribal territory]
- The following year, the 8<sup>th</sup> Circuit rejected a tribal tax challenge again, by non-Indians conducting business on non-Indian lands in Indian Country.

# Taxation of non-Indians (cont'd)

- The court held that “the authority of the tribe to prescribe the terms upon which noncitizens may transact business within its borders ...is a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until agreement of the nation itself or by the superior power of the republic it is taken from it.” *Buster v. Wright*, 135 F 947 (8<sup>th</sup> Cir. 1905).

# Taxation of non-Indians (cont'd)

- THIS WAS THE LAW OF TRIBAL TAXATION UNTIL 1981.
- In *Montana v. United States*, the court held that tribes had no inherent authority to regulate non-Indians on non-Indian fee land within reservation boundaries UNLESS (1) nonmembers engage in “consensual relationships with the tribe or its members through commercial dealing, contracts, leases or other arrangements” or (2) non-Indian

# Taxation of non-Indians (cont'd)

- conduct “threatens or has some direct effect on the political integrity, economic security or health or welfare of the tribe.” *Montana v. United States*, 450 U.S. 544 565-566 (1981).
- This uncertainty in the law appeared to be resolved the next year in *Merrion vs. Jicarilla Apache Tribe*. That case involved a tribal severance tax on oil and gas from tribal lands. Non-Indian lessees objected to the tax, arguing

# Taxation of non-Indians (cont'd)

- that the tribal power to tax non-Indians stemmed solely from the power to exclude and that the tribe had lost that power by entering into leases permitting the lessees to enter the reservation to extract oil and gas from tribal lands. *Merrion vs. Jicarilla Apache Tribe*, 455 U.S. 130, 136-137 (1982).
- The court rejected the argument that the sole source of the tribe's taxing power was the power to exclude. *Ibid.*
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# Taxation of non-Indians (cont'd)

- After reviewing the case law and the positions of the other branches of government, the court held that it chose “not to embrace a new restriction on the extent of the tribal authority to tax.” *Merrion vs. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982).
- The court explained:
  - The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of



# Taxation of non-Indians (cont'd)

- self-governance and territorial management. This power enables a tribal government to raise revenues for its essential services. The power to tax does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead it derives from the tribe's general authority, as a sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." *Ibid.*

# Taxation of non-Indians (cont'd)

- The court reaffirmed this holding in *Kerr-McGee Corporation v. Navajo Tribe*, where the court upheld tribal business activity and possessory interest taxes on non-Indian lessees who leased from the Navajo Nation.
- [The Navajo Tax Commission is the longest standing tribal taxing authority in the country.]
- This line of tax cases shows that the tribal power to tax does not stem from just LAND STATUS.

# Taxation of non-Indians (cont'd)

- *Merrion* cited language from the *Buster* case, stating that “neither the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities...*nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners.*”
- This language signaled that tribal taxation power would be measured by a *different standard* than *Montana*, or would meet a *Montana* exception.

# Taxation of non-Indians (cont'd)

- Then comes *Atkinson Trading Company vs. Shirley*,
- This case involved a hotel occupancy tax imposed by the Navajo Nation, the legal incidence [i.e., the person/entity that ultimately pays the tax] of which fell on the nonmember hotel guests.
- The *Atkinson* court dismissed the earlier court holdings regarding the source and scope of tribal taxing authority as *dicta* [i.e. NOT part of the court's actual decision or holding].

# Taxation of non-Indians (cont'd)

- The court held that *Montana's* “main rule” that tribe’s lack civil authority over the conduct of nonmembers on fee land applied uniformly to all exercises of tribal power.
- Then the Court went on to hold that *neither of Montana's exceptions authorized the tribal tax.*
- As to the “consensual relationship” requirement the tribe argued that by choosing to avail itself

# Taxation of non-Indians (cont'd)

- of tribal services available to businesses on the reservation, (i.e., police, fire, emergency, medical treatment) the on-reservation businesses entered into “consensual relationships” with the tribe.
- The court rejected this argument, and stated that a “consensual relationship” requires an explicit contract with the tribe or its members.
- As to the threat to political integrity/economic security test, the court said the focus must be on

# Taxation of non-Indians (cont'd)

- the actions of the nonmembers, NOT on the need of the tribe for the tax revenue.
- This approach by the court is inconsistent with the body of *tax* law that allows states to tax non-Indians on tribal lands.
- This approach by the court is inconsistent with the existing body of *Indian* law, which has been recognized and supported by ALL branches of government.

# Closing Remarks

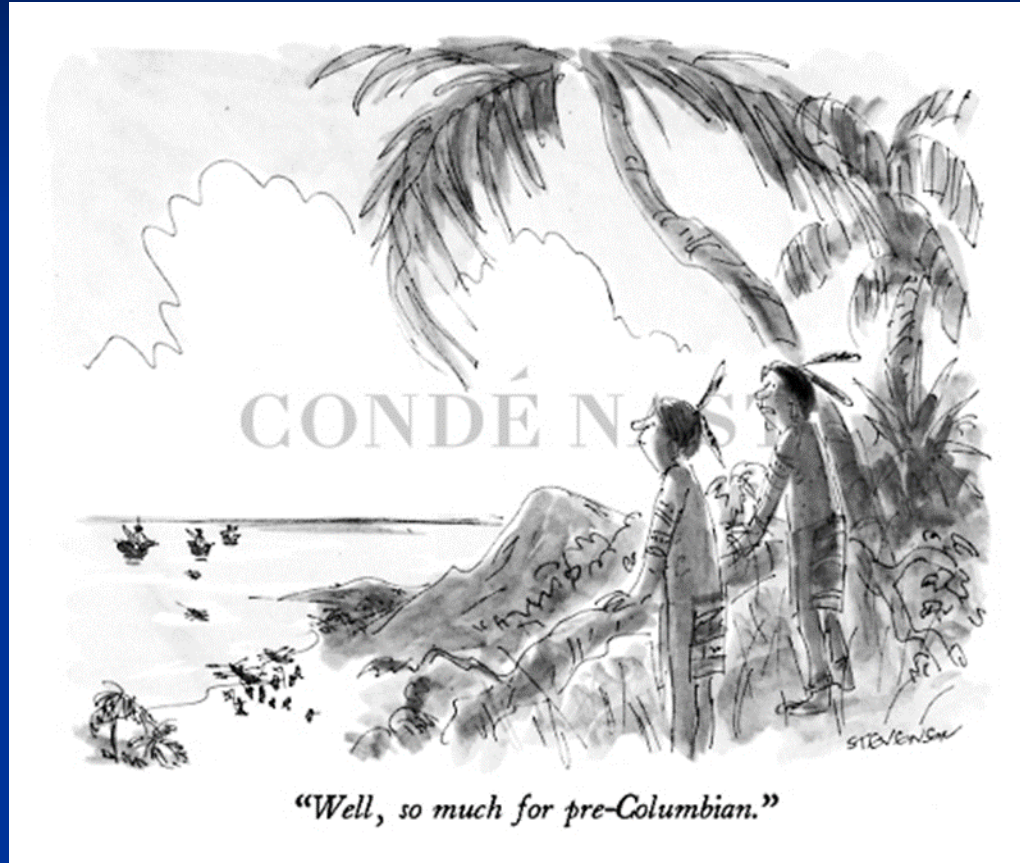
- Remember *Atkinson* DOES NOT apply to tribal taxes that concern commercial relationships between non-Indians and the tribe or its members. *Atkinson Trading Company vs. Shirley*, 532 U.S. 645, 656 (2001).
- The provisions of the U.S. Constitution contained in the Bill of Rights do NOT apply to tribes.



# Closing Remarks

- BUT those provisions have been made applicable to tribes through the Indian Civil Rights Act.
- The provisions most relevant to tribal taxing authority are (1) the requirements that requires tribes to pay just compensation for taking of property [eminent domain] and (2) that tribes not deny any person due process or equal protection of the laws.

# LAST OBSERVATIONS



# LAST OBSERVATIONS



# TURN ABOUT IS FAIR PLAY



# Personal Note

- THE END
- THANK YOU FOR LISTENING!