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Recommended Citation
Available at: https://digitalcommons.lmu.edu/llr/vol15/iss2/1
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TRIBES AND BEYOND

Thomas C. Mundell*

I. INTRODUCTION

"The condition of the Indians in relation to the United States," wrote Chief Justice John Marshall, "is perhaps unlike that of any other two people in existence." The presence of more than two hundred sovereign governments within the territory of another, more powerful sovereign is indeed an anomaly. The cutting edge of the problem, however, is blunted by the fact that the Indian tribes have not retained their full aboriginal sovereignty. Once separate nations, the tribes were forced by conquest and treaties to give up complete independence in return for the aid and protection of the United States. As the Supreme Court recently noted:

The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

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2. "While they are sovereign for some purposes, it is now clear that Indian reservations do not partake of the full territorial sovereignty of States or foreign countries." Washington v. Confederated Tribes, 447 U.S. 134, 165 (1980) (Brennan, J., concurring in part and dissenting in part).

(1) An Indian tribe possesses, in the first instance, all the powers of any sovereign
The concept of sovereignty developed in Europe during the sixteenth century in response to the emergence of separate European states. From its inception, sovereignty has enjoyed a dual character: it functions as both shield and sword. Sovereignty signifies the power of a state over its subjects and territory as well as the right of the state to be free from interference by other states. It is this latter defensive aspect of sovereignty that prohibits state efforts to encroach upon tribal concerns. The doctrine of tribal sovereignty is based upon this theoretical construct. Assertions of state jurisdiction which unjustifiably infringe upon tribal sovereignty will not survive judicial scrutiny.

Openly anti-assimilationist, the doctrine of tribal sovereignty emphasizes the cultural and social distinctiveness of the Indian tribes. It promotes nationalism and political growth. Perhaps most important, the doctrine of tribal sovereignty invites the federal judiciary to take an active part in fundamental policy formulation. In essence, the Supreme Court should act as a kind of "umpire, protecting Indian or state interests against extreme abuses by the other." This article examines in depth the doctrine of tribal sovereignty as applied to one narrow, but important, aspect of state jurisdiction — taxation.

state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its powers to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.

F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (1941) (footnotes omitted). The concept of implied divestiture of tribal powers enunciated in Wheeler is thus a recent judicial invention. 435 U.S. at 326. According to the Wheeler Court, the tribes have been implicitly divested of several powers: (1) the power to alienate freely tribal land to non-Indians, Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667-68 (1974); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 574 (1823); (2) the power to trade or make treaties with foreign nations, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832); and (3) the power to exercise criminal jurisdiction over non-Indians, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978). See 435 U.S. at 326.


6. This conceptual duality was recognized as early as 1577. See I. DELUPIS, INTERNATIONAL LAW AND THE INDEPENDENT STATE 3 (1974); see also Comment, Tribal Sovereignty and the Supreme Court's 1977-1978 Term, 1978 B.Y.U. L. REV. 911, 912.


8. It is important to keep in mind that this article deals only with Indian immunity from state taxation. Federal taxation of reservation Indians presents entirely different con-
II. A TERRITORIAL FOUNDATION

Early conceptions of tribal sovereignty reflected the doctrinal rigidity of nineteenth century jurisprudence. Chief Justice Marshall articulated a strict, territorial foundation for the doctrine in *Worcester v. Georgia.* The notion was that state laws could not operate within reservation boundaries. The Chief Justice wrote:

The Cherokee nation . . . is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.  

*Worcester* was a criminal case, but the Court soon made clear that the territorial principle upon which the decision rested extended to attempts by the states to exercise civil legislative jurisdiction as well. Thus, shortly after *Worcester,* in *Kansas Indians,* the Supreme Court held that a state could not impose its real property taxes upon reservation lands. Subsequent cases established the general rule that Indians and Indian property (both real and personal) on Indian reservations were exempt from state taxation absent congressional authorization. The converse was also true. Absent congressional conferral of an exemption, Indians and Indian property not on Indian reservations were subject to state taxation.

These principles remain operative today. For example, in *McClanahan v. Arizona Tax Commission,* the Supreme Court held that a state could not tax reservation Indians on income derived solely from reservation sources. And in *Moe v. Confederated Salish & Kootenai Tribes* and *Washington v. Confederated Tribes,* the Court held that a state could not tax an Indian's personal property located on a reservation. In contrast, in *Mescalero Apache Tribe v. Jones,* the Court considered. See *Squire v. Capoeman,* 351 U.S. 1, 6 (1956); *Fry v. United States,* 557 F.2d 646, 647 (9th Cir. 1977); *M. Price, Law and the American Indian* 254-55 (1973).

10. *Id.* at 561.
11. 72 U.S. (5 Wall.) 737 (1866); see *New York Indians,* 72 U.S. (5 Wall.) 761 (1867).
held that a state’s gross receipts tax could lawfully be imposed on a tribal business operated off the reservation.\textsuperscript{18} In short, when only Indians are involved, the sovereignty limitation on state taxing power can safely be defined in terms of strict territorialist principles.\textsuperscript{19}

Once non-Indians enter the picture, however, Marshall’s broad abstraction fails. It is no longer true (if indeed it ever was) that state laws can have no force or effect on Indian reservations.\textsuperscript{20} And if non-Indians are involved, the locus of a transaction or the situs of a piece of property does not ipso facto determine its taxability. In \textit{Moe}, for example, the Supreme Court held that a state could lawfully apply its cigarette sales and excise taxes to sales by tribal retailers to non-Indians even though the sales took place on an Indian reservation.\textsuperscript{21}

The Court’s decision not to adhere to pure territorialist principles in the tax cases involving non-Indians has been the subject of some criticism.\textsuperscript{22} The territorialists argue that territoriality provides a sure, simple, and predictable ground for allocating jurisdiction to tax.\textsuperscript{23}

Actually, it does no such thing. Aside from the difficulty of locating multistage transactions which occur partially on and partially off a reservation, and aside from the problems involved in determining the tax situs of property used or kept both on and off a reservation, reserva-

\textsuperscript{18} The Court in \textit{Mescalero} stated that: Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State. . . . That principle is as relevant to a State’s tax laws as it is to state criminal laws . . . and applies as much to tribal ski resorts as it does to fishing enterprises. \textit{Id.} at 148-49 (citations omitted).

\textsuperscript{19} For a recent case, see \textit{Estate of Johnson}, 125 Cal. App. 3d 1044, 178 Cal. Rptr. 823 (1981), holding that California could not apply its inheritance tax to the estate transfer of reservation realty, pension benefits, and life insurance benefits owned by a reservation Indian and acquired by him during lifetime employment on the reservation.

\textsuperscript{20} \textit{See}, e.g., \textit{New York ex rel. Ray v. Martin}, 326 U.S. 496 (1946) (states may try non-Indians who commit crimes against each other on Indian reservations).

\textsuperscript{21} \textit{425 U.S. at 483; accord} \textit{Washington v. Confederated Tribes}, 447 U.S. 134 (1980). As long ago as 1898 the Supreme Court recognized that a rigid territorialist approach was inappropriate in cases involving state taxation of non-Indians. \textit{See} \textit{Thomas v. Gay}, 169 U.S. 264 (1898) (states may tax a non-Indian’s cattle grazing on reservation lands leased from an Indian tribe).


\textsuperscript{23} According to Professor Barsh: “Territory is a superior rule for resolving conflicts among political subdivisions because it is relatively clear, precise, and objectively ascertainable. It is not subject to judicial construction. Problems arise when legislatures choose as taxable incidents events incapable of accurate location in time or space.” \textit{Barsh, supra note 22, at 56.}
tion boundaries themselves are often uncertain. A great many reservations have been at least partially dismantled and litigation over reservation boundaries is rampant. In addition, bothersome patterns of "checkerboard jurisdiction" exist on many reservations. Thus, there is no guarantee that a pure territorialist approach would either increase certainty or decrease litigation. Moreover, a strict territorialist model carries with it the fatal flaw of unbending rigidity. Adherence to unthinking territorialism in cases involving citizens of more than one sovereign would hinder efforts by the courts to dispose of tax immunity issues through reference to public policy and the competing governmental interests at stake. This consideration is particularly significant in the "special area of state taxation," because of the vast panoply of highly individualized situations in which tax issues arise. The Court has done well to retreat from Chief Justice Marshall's early view.

III. THE SHIFT TO AN INFRINGEMENT STANDARD

The Supreme Court's retreat from the Marshallian view did not signal rejection of the sovereignty principle itself. Rather, it represented a shift from doctrine to realism. The notion seemed to be that tribal sovereignty would bar state jurisdiction only when it made sense for it to do so. That it makes sense for it to do so in cases involving the on-reservation conduct or property of reservation Indians is clear: the confluence of tribal power over Indians and tribal power over reservation territory in such cases strongly implicates the tribe's sovereign interest in freedom from interference. On the other hand, when non-Indians are involved, the impact of state taxes on tribal sovereignty is less obvious and the line between permissible and impermissible intrusions tends to blur. The problem is that once non-Indians enter the

24. See, e.g., United States v. Dupris, 612 F.2d 319 (8th Cir. 1979), vacated, 446 U.S. 980 (1980). Reservation boundary disputes can be incredibly complex; troublesome questions of congressional intent, statutory construction, and statutory compliance are almost invariably involved and the cases tend to present difficult problems of proof, aside from the questions of law. See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). The issues in reservation disestablishment cases are no less intricate. For an illustrative case see Stankey v. Waddell, 256 N.W.2d 117 (N.D. 1977). The problems in this area are further complicated by the fact that not only reservation lands are tax-exempt. Certain allotted lands enjoy a similar status. Compare South Naknek v. Bristol Bay Borough, 466 F. Supp. 870 (D. Alaska 1979) with County of Thurston v. Andrus, 586 F.2d 1212 (8th Cir. 1978), cert. denied, 441 U.S. 952 (1979). For a collection of cases and commentary on the question see id. at 1219-20.


picture, important state policies are implicated. The Supreme Court's response has been to establish a simple predicate to the invalidation of state taxation of non-Indians under the doctrine of tribal sovereignty: the challenged tax must work some actual and substantial interference with the tribal political infrastructure before it will be invalidated.

The seminal case dealing with this issue was *Williams v. Lee*, in which the Court held that Arizona courts did not have jurisdiction over a suit by a non-Indian against a reservation Indian to recover a debt which arose on the reservation. The Court declared that allowing the state to exercise jurisdiction "would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." The Court formulated what has become known as the *Williams* test for determining whether principles of tribal sovereignty will oust state jurisdiction in cases involving non-Indians: "Absent governing Acts of Congress, the question is whether the state action infringe[s] on the right of reservation Indians to make their own laws and be ruled by them." *Williams* was decided in 1959. Since then, the Supreme Court has not used the infringement test to strike down a state tax on persons dealing with reservation Indians. The Court has acknowledged the test in dictum and has applied the standard twice, but it has yet to find a violation.

As might be expected, the Court has not relied on the *Williams* test in cases involving only reservation Indians. The Court has invalidated a number of state taxes imposed on reservation Indians, but the *Williams* standard has never provided the ratio decidendi. Instead, the cases continue to be governed by territorialist principles. Indeed, in *McClanahan v. Arizona Tax Commission*, in which it was held that a state could not tax the reservation income of a reservation Indian, the

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28. *Id.* at 223.
29. *Id.* at 220. The *Williams* Court did not explicitly confine its new test to cases involving only non-Indians, but the Court has since made it clear that the test is so restricted. *See* McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 179 (1973).
Court was careful to point out that not only was the infringement test not being used, it was inapplicable. Justice Marshall wrote for a unanimous Court: "We reject the suggestion that the Williams test was meant to apply in this situation. It must be remembered that cases applying the Williams test have dealt principally with situations involving non-Indians."34

Nonetheless, even in those cases in which the Court has struck down state taxes imposed on non-Indians, it has not embraced the Williams infringement standard. For instance, in Warren Trading Post Co. v. Arizona Tax Commission,35 the Court held that Arizona could not tax a federally licensed Indian trader's income derived from trading with reservation Indians on the reservation. The Warren Trading Post decision, however, rested on federal preemption grounds and the Williams test was ignored. In Central Machinery Co. v. Arizona Tax Commission,36 the Court held that Arizona could not impose its transaction privilege tax on an on-reservation sale of farm machinery by an Arizona corporation to an Indian tribe. Again, the ground for decision was federal preemption and Williams was ignored. And in White Mountain Apache Tribe v. Bracker,37 the Court held that Arizona's motor carrier license tax and use fuel taxes could not be imposed upon a non-Indian corporation which performed logging operations for an Indian tribe on the Indian reservation. The Court acknowledged the Williams test,38 but did not reach the question whether Arizona's taxes infringed on tribal self-government. As in Central Machinery and Warren Trading Post, the Court found instead that the state taxes were preempted by paramount federal law.39 Only in Moe v. Confederated Salish & Kootenai Tribes40 and Washington v. Confederated Tribes41 did the Court actually apply the infringement test, and in both cases the state taxes in question were upheld.42

Williams has not fared much better in the lower courts, although one court has invalidated a state tax using a version of the infringement test.

34. Id. at 179 (citing Organized Village of Kake v. Egan, 369 U.S. 60, 75-76 (1962)) (emphasis added); see Topash v. Commissioner of Revenue, 291 N.W.2d 679, 681 n.2 (Minn. 1980); Barsh, supra note 22, at 16; Craig, supra note 22, at 246.
38. Id. at 142.
39. Id. at 148-51. The Court found that the case was "in all relevant aspects indistinguishable from Warren Trading Post." Id. at 153.
42. See supra text accompanying notes 31-32.
In *Eastern Navajo Industries, Inc. v. Bureau of Revenue,* the New Mexico Court of Appeals held that a corporation, fifty-one percent of which was owned by reservation Indians and forty-nine percent of which was owned by non-Indians, could not be taxed on its gross receipts from the construction of houses on the Navajo reservation. In a confusing opinion, seemingly resting partially on territorialist principles, the court found that imposition of the tax would constitute “a severe burden upon and a hindrance to the self-government of the Navajo tribe.” The court was heavily influenced by the fact that a majority of the taxpayer’s shares were owned by Indians.

The lack of court decisions invalidating state taxes under the *Williams* test makes it difficult to map out the contours of the standard in any positive sense. It is impossible to predict with any assurance the circumstances under which state taxes will be held to infringe impermissibly upon tribal self-government. The decided cases do, however, lend some insight into when state taxes will not run afoul of *Williams.* An outline of the doctrine can thus be sketched, albeit somewhat roughly, by negative implication.

IV. THE REACH OF THE *WILLIAMS* TEST

*McClanahan v. Arizona Tax Commission* made clear that the *Williams* test was not designed to resolve questions of tribal sovereign immunity from state taxation when non-Indians were not involved. Instead, such claims, although rationalized in terms of governmental infringement, continue to be governed as a practical matter by territorialist principles. The bare holding of *McClanahan* was that the state of Arizona could not lawfully apply its state income tax to “reservation Indians with income derived wholly from reservation sources.” Left open was the question whether Indians who resided on the reservation...
but who were not enrolled in the governing tribe were "reservation Indians" and thus exempt from the tax.

This issue was decided by the Supreme Court of Montana in *La Roque v. Montana*.\(^{51}\) After reviewing the relevant United States Supreme Court decisions, the Montana court concluded that territorialist principles governed questions of Indian exemption from state taxation, regardless of tribal affiliation. The "situs of the activity," said the court, "is the primary factor in determining whether state taxation jurisdiction exists, not the status of the individual as enrolled or non-enrolled."\(^{52}\) The court held that the *McClanahan* exemption extended to all Indians residing on the reservation, whether or not enrolled in the governing tribe. Similarly, in *Fox v. Bureau of Revenue*\(^{53}\) the Court of Appeals of New Mexico held that a Comanche Indian who worked and resided on the Navajo reservation in New Mexico was exempt from New Mexico's income tax, even though she was not enrolled as a member of the Navajo tribe. And in *Topash v. Commissioner of Revenue*\(^{54}\) the Supreme Court of Minnesota held that an enrolled member of Washington's Tulalip tribe who lived and worked on the Red Lake Indian reservation in Minnesota was exempt from Minnesota's income tax. In sum, those state courts that have considered the question are in unanimous agreement: "Without exception, it [has been] held that tribal affiliation is of no moment when determining the taxability by states of an Indian on a reservation."\(^{55}\)

Recently, however, the United States Supreme Court ruled to the contrary. In *Washington v. Confederated Tribes*\(^{56}\) the Court held that Washington's sales and cigarette taxes could be applied to on-reservation sales of cigarettes to Indians residing on the reservation but not enrolled in the governing tribe. The Court held that the territorialist principle, which automatically bars state taxation of sales to tribal members, did not apply to those Indians not a part of the formal political unit; they were governed by the *Williams* infringement test, which the Court found was not violated.\(^{57}\)

The Supreme Court's holding seems reasonably in line with its decisions under the equal protection clause. The Court has repeatedly

\(^{52}\) *Id.* at 324, 583 P.2d at 1064.
\(^{54}\) 291 N.W.2d 679 (Minn. 1980).
\(^{56}\) 447 U.S. 134 (1980).
\(^{57}\) *Id.* at 160-61.
emphasized the political as opposed to racial character of the Indian tribes in upholding, against equal protection challenges, congressional enactments favoring Indians.\textsuperscript{58} Indeed, a ruling by the Court that race, rather than tribal membership, was determinative of an Indian's tax liability would have raised serious equal protection questions. Nevertheless, in one respect the \textit{Confederated Tribes} Court may have gone too far. The case does not distinguish between Indians who are enrolled in a tribe other than the governing tribe and Indians who are not members of any tribe at all. The Court's holding would seem to encompass the former as well as the latter.\textsuperscript{59} Yet the political character of any exemption is assured as long as it is restricted to Indians enrolled in some federally recognized tribe. There would appear to be no reason why such an Indian should lose his traditional on-reservation tax immunity merely because he temporarily resides or works on a reservation governed by a tribe not his own. The state acquires no legitimate interest in taxing him simply by virtue of his presence on reservation \textit{A} instead of reservation \textit{B}; both reservations are protected areas within which state authority is narrowly circumscribed. Nor would his relocation necessarily have occasioned any extension to him of state benefits which might justify taxation on a quid pro quo theory. In short, a member of a federally recognized tribe should retain his state tax immunity when he moves from one reservation to another. Moreover, Indians should be able to move freely between reservations without sacrificing important federally protected rights. A contrary rule would unnecessarily impede intertribal commerce and possibly retard reservation development.

Significantly, federal statutes and regulations granting preferential treatment to Indians by virtue of their special status do not generally distinguish between Indians belonging to different tribes; "Indian" is defined as someone of Indian descent who is a member of "a" or "any" federally recognized tribe.\textsuperscript{60} The holding of the Minnesota Supreme Court in \textit{Topash v. Commissioner of Revenue}\textsuperscript{61} — that principles of territorial sovereignty bar state taxation of Indians enrolled in a tribe


\textsuperscript{59} The Court spoke only of "Indians resident on the reservation but not enrolled in the governing Tribe." 447 U.S. at 160. No mention was made of the possible significance of any other tribal affiliations.

\textsuperscript{60} See, e.g., 25 U.S.C. §§ 450(b), 479 (1976); 25 C.F.R. §§ 11.2(o), 20.1(p) (1981); 42 C.F.R. § 36.12(a) (1981). Of course, the fact that the federal government may choose to ignore tribal differences does not, of itself, mean that the states must also.

\textsuperscript{61} 291 N.W.2d 679, 683 (Minn. 1980).
other than the tribe governing the reservation — thus appears to be more nearly consistent with congressional recognition of the Indians' sovereign status than the Supreme Court's sweeping generalization in *Confederated Tribes*. The less protective *Williams* infringement test should be reserved for cases involving either non-Indians or persons of Indian ancestry who lack any formal tribal affiliation.62

V. DEFINING INFRINGEMENT: A LOOK AT WHAT IT IS NOT — AND A GLIMPSE OF WHAT IT MAY BE

Throughout a course of adjudication spanning nearly 100 years, the Indian tribes have persistently argued that the potential economic burden imposed on a tribe by state taxation of non-Indians doing business with the tribe impermissibly infringes upon tribal self-government. This contention has been just as persistently rejected by the courts.63

The issue has arisen under various circumstances, but the result in each case has been the same. In the early case of *Thomas v. Gay*64 the Supreme Court held that a state could tax cattle grazing on lands leased...
by a non-Indian from an Indian tribe. The Court rejected the tribe's argument that tribal sovereignty barred the tax because the rent the tribe could command for the land would be reduced without a tax exemption.65 Similarly, in *Fort Mojave Tribe v. County of San Bernar-dino*,66 the Ninth Circuit held that a county possessory interest tax could validly be imposed on non-Indian lessees of tribal lands even though the net effect of the tax would be to reduce the revenue the tribe could receive from the leases. "Such an indirect economic burden," said the court, "cannot be said to threaten the self-governing ability of the tribe."67 And in *Mescalero Apache Tribe v. O'Cheskey*,68 the Tenth Circuit went one step further. The court upheld New Mexico's gross receipts tax on the income received by non-Indian contractors for work performed for an Indian tribe on a reservation, even though the tribe had contracted to pay any tax that might be imposed on the contractors.69 The court found no interference with tribal self-government.70

The holding of the *Mescalero* case may, at first glance, appear startling. It is clearly at odds with the principles of territorial sovereignty that apply to cases involving only Indians.71 The tax would have been invalid if imposed directly upon the tribe.72 If the tribe had done the

65. *Id.* at 273.
69. The court found that the legal incidence of the tax remained on the contractors, notwithstanding the agreement by the tribe to absorb the cost. The court emphasized that:

[The way [this tax] was handled by the tribe makes it appear that the incidence of the tax was on the Tribe when it was not . . . . The asserted direct "burden" on the Tribe was thus by its own election to indemnify the contractors. The result in this case should not be determined or influenced in any way by such a contractual arrangement.]

*Id.* at 969 (emphasis in original).
70. The court noted that:

The indirect burden [of the tax] is . . . something to be again passed on as the Tribe engages in its resort and other business. It is the indirect consequence of taxes on others which reaches the Mescaleros as do all other costs, levies and taxes on persons with whom they do business. If this is an interference, all such taxes and levies on those doing business with them, the suppliers of such persons, the wholesalers and the manufacturers are likewise an interference. All these taxes affect the money of the Mescaleros the same way, and the money available for other purposes.

71. After *Confederated Tribes*, the *Mescalero* holding may merely conflict with territorial sovereignty principles applicable to cases involving only members of the governing tribe. *See supra* text accompanying notes 56-57.
construction work itself the tax could not have been levied. But, be-
cause the tribe had the work done by non-Indians, the court held that
the tax burden could lawfully be imposed upon it. The result is a dis-
tinction between taxes which are imposed directly upon an Indian tribe
and taxes which are imposed directly upon someone else but which
ultimately become the tribe's burden. The first is impermissible; the
second is permissible — an apparent exaltation of form over substance.

This argument misses the mark. Simply put, it presupposes that
principles of territorial sovereignty govern the transaction, when clearly
they do not. Whenever a tax is imposed upon a non-Indian, the theme
of territorial dominance is inapposite because the state, as well as the
tribe, has an interest in asserting jurisdiction. The tribal sovereignty
doctrine seeks an accommodation between these competing interests
"by providing that the State [can] protect its interest up to the point
where tribal self-government would be affected."73 Concepts of territo-
riality are disregarded: the guidepost is Williams v. Lee.

The gross receipts tax in Mescalero was a cost of doing business
like any other. Like the wages paid by the contractor to his workers,
the sales tax paid on his equipment, and the rising costs of the raw
materials used on the job, the gross receipts tax is something the con-
tractor passes on to the recipients of his services. Costs such as these
are borne by the consumers of every imaginable product or service;
they filter endlessly through society. The federal government suffers
the impact of the state income taxes exacted from those who perform
work for it. The sovereignty of the state governments does not entitle
their employees to an exemption from federal income taxes, while the
nation's county and municipal governments absorb the impact of all
kinds of taxes daily. The economic burden imposed on the Mescaleros
did not constitute interference with their self-government; it merely
represented the cost of a ticket into the marketplace. The price of ad-
mission is the same for governments as it is for anyone else. The Tenth
Circuit's holding was sound.

Thomas involved a personal property tax, Fort Mojave a posses-
sory interest tax, and Mescalero a gross receipts tax. All three cases
held that the economic burden on an Indian tribe resulting from the
imposition of the particular tax in question on a non-Indian did not
constitute an impermissible infringement on tribal self-government.74

73. Id. at 179.
(1981) (state's gross receipts tax upheld as applied to non-Indian contractor who graded and
drained road on Indian reservation, even though indirect burden of tax was on Indian tribe);
A variation on this theme was provided in *Washington v. Confederated Tribes*, in which the Supreme Court held that the application of Washington's sales and excise taxes to on-reservation sales of cigarettes by tribal retailers to non-members of the tribes did not contravene the *Williams* principle. The tribes had established retail smokeshops on their reservations. The smokeshop operators refused to collect state taxes on their cigarette sales to non-Indians. This allowed the tribal smokeshops to undercut their competitors by more than one dollar per carton of cigarettes. As a result, the great majority of the smokeshops' sales were to residents of nearby communities who traveled to the reservations solely to take advantage of the claimed exemption. It was conceded that without a tax exemption the tribes' retail sales to outsiders would cease, and the tribes argued forcefully that the resultant economic impact on their governmental programs would be devastating. The smokeshop revenues were expended by the tribes for "essential governmental services, including programs to combat severe poverty and underdevelopment at the reservations." Nevertheless, the Court, applying *Williams*, found that tribal sovereignty did not bar the tax. The Court noted that "Washington does not infringe the right of reservation Indians to 'make their own laws and be ruled by them' . . . merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they currently are receiving."

The Court's approach is consistent with both sovereignty theory and conventional tax analysis. Taxes are generally not invalidated merely because their otherwise lawful imposition sets off a chain of events that produces an economic burden on someone who is exempt from tax. This principle has been widely followed; it applies to state

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75. 447 U.S. 134 (1980).
76. Id. at 145.
77. Id.
78. Id.
79. Id. at 154.
80. Id.
81. Id. at 156 (quoting Williams v. Lee, 358 U.S. at 220).
82. See White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 159 (1980) (Stevens, J., dissenting): "As a general rule, a tax is not invalid simply because a nonexempt taxpayer may be expected to pass all or part of the cost of the tax through to a person who is exempt from tax." Id.; see also United States v. City of Detroit, 355 U.S. 466, 469 (1958).
and federal governments, as well as to private individuals. There is no reason why it should not apply with equal force to the Indian tribes.

If the economic impact of a state tax, standing alone, will not cause the tax to fail under Williams, what will? The answer may lie in Williams itself. Williams spoke of "the right of reservation Indians to make their own laws and be ruled by them." Thus, a state tax which directly inhibited passage or enforcement of some tribal law might possibly violate Williams.

The most obvious area of potential conflict is with tribal taxing ordinances. Indian tribes enjoy unfettered power to tax non-Indians engaging in economic activity on their reservations. Moreover, "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty . . . ." A tribe's ability to exercise its sovereign taxing power may clearly be impaired if a state taxes the same object or activity. State taxation of enterprises on the reservation puts the Indian tribe in a difficult position: the tribe can choose to impose its own tax and thereby place the on-reservation enterprise at a competitive disadvantage rela-

83. See 447 U.S. 134, 185-86 n.9 (Rehnquist, J., concurring in part and dissenting in part). "[T]he State, through its exercise of taxing authority, can effectively require the Federal Government to forgo revenues which would otherwise be available to it in order to remain competitive as an enterprise." Id. at 186 n.9. The best example is probably United States v. County of Fresno, 429 U.S. 452 (1977), in which the Supreme Court upheld California's possessor use tax on federal employees living in federal housing in the state over the federal government's argument that it would have to absorb the cost itself to remain competitive as a landlord and employer. Id. at 457.

84. But see 447 U.S. at 171-72 n.7 (1980) (Brennan, J., concurring in part and dissenting in part) (suggesting that the relative competitive inequality between state and tribal governments justifies enhanced judicial protection of tribal enterprises from state taxation). Contra id. at 186 n.11 (Rehnquist, J., concurring in part and dissenting in part).

85. 358 U.S. at 220 (emphasis added).


87. 447 U.S. at 152 (emphasis added).

88. As one commentator has stated:

The question that must be asked is: Does a reduction of revenue affect the self-governing ability? An answer by analogy could be if the Treasury Department of the United States suddenly had competition in collection of taxation revenue from another government agency, would that affect Treasury's purpose as the primary collection department for the nation's funds? Yes, of course it would. Although the Treasury Department would still be able to function, it would not have the sole responsibility, and therefore its ability and purpose would be thwarted or reduced. Tribes would be put in much the same position.

Powers, supra note 67, at 233.
tive to off-reservation businesses, or it can choose not to impose its tax and thereby forgo much needed revenues. It is difficult to imagine a clearer case of state interference with tribal self-government.

This argument was considered and rejected by the Ninth Circuit Court of Appeals in Fort Mojave v. County of San Bernardino. At issue in Fort Mojave was a county possessory interest tax on non-Indian lessees of tribal lands. The tribe had its own possessory interest tax and argued that the state's tax violated the Williams test. The court disagreed. The court's rationale that "[t]here is no improper double taxation here at all . . . for the taxes are being imposed by two different and distinct taxing authorities" seems unconvincing. Although the taxes were being imposed by two different and distinct taxing authorities, it was precisely this concurrent taxing jurisdiction that was being challenged. The Ninth Circuit seemed to have completely missed the point. Understandably, Fort Mojave has been criticized. The opinion has never been disapproved, however.

89. This competitive disadvantage could be fatal to reservation development because reservation businesses are already disadvantaged by reason of their location. See 447 U.S. at 169-70 (Brennan, J., concurring in part and dissenting in part); Barsh, supra note 22, at 43-47.

90. Tribal tax bases are small, the income of reservation Indians being only one-fourth the national average. If tribal governments are to survive, they must have tax revenues, and on-reservation enterprises involving non-Indians may be their only realistic source of tax income. See DiPasquale, Natural Resources Taxation, 29 AM. U.L. REV. 281, 283-84 (1980).

91. See 447 U.S. at 169-71 (Brennan, J., concurring in part and dissenting in part); Mescalero Apache Tribe v. O'Cheskey, 625 F.2d 967, 989-90 (10th Cir. 1980) (McKay, J., dissenting); Israel & Smithson, Indian Taxation, Tribal Sovereignty and Economic Development, 49 N.D.L. REV. 267, 281-82 (1973); Note, Balancing the Interests in Taxation of Non-Indian Activities on Indian Lands, 64 IOWA L. REV. 1459, 1501-03 (1979) [hereinafter cited as Note, Taxation of Non-Indian Activities]. Significantly, the Supreme Court has acknowledged the threat that multiple layers of taxation present to Indian self-government. In Bryan v. Itasca County, 426 U.S. 373 (1976), speaking to the question of general civil regulatory control over reservation Indians by state governments, the Court stated:

[S]ince tribal governments are disabled under many state laws from incorporating as local units of government, . . . general regulatory control might relegate tribal governments to a level below that of counties and municipalities, thus, essentially destroying them, particularly if they might raise revenue only after the tax base had been filtered through many governmental layers of taxation.

Id. at 388-89 n.14.

92. 543 F.2d 1253 (9th Cir. 1976), cert. denied, 430 U.S. 983 (1977).

93. Id. at 1257-58.

94. Id.

95. See Note, Taxation of Non-Indian Activities, supra note 91, at 1501 n.265.

96. The continued vitality of the Fort Mojave decision is, nevertheless, now questionable in light of dictum in Bryan v. Itasca County, 426 U.S. 373 (1976), in which the Supreme Court expressed concern that multiple state and tribal taxation could essentially destroy tribal governments by severely diminishing their tax bases. Id. at 388-89 n.14. See Crow Tribe of Indians v. Montana, 650 F.2d 1104 (9th Cir. 1981) (state severance tax which sub-
In *Washington v. Confederated Tribes* the Supreme Court faced the double taxation issue. The case, however, is unsatisfactory authority for several reasons. The Court upheld the application of Washington’s cigarette and sales taxes to on-reservation sales of cigarettes to non-members of the confederated tribes even though the tribes also taxed the transactions. The Court was strongly influenced by a notion that what the tribes were seeking to do — market an exemption from state taxation to outsiders — was not a legitimate business venture. The result might have been different had the case involved something other than purely parasitic activity on the part of the tribes. Equally important in defining the reach of the decision is the fact that only sales taxes — pure revenue raising devices — were at issue. The case says nothing about the preclusive effect of tribal land taxes or activity taxes — taxes which implicate stronger governmental interests. Indeed, the Court was careful to point out that the tribe’s sales taxes served no distributive or regulatory functions, an observation which suggests that if the taxes had been designed to do something other than raise revenue from a tainted business activity the Court might have ruled the other way.

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stantially affects a tribe’s ability to provide governmental services or to regulate the development of tribal resources by impairing the tribe’s ability to levy its own severance tax held invalid). In *Crow Tribe*, the Ninth Circuit reached a result apparently at odds with its *Fort Mojave* decision by employing an interest balancing approach. The court made no effort to distinguish its earlier decision and it is doubtful whether a meaningful distinction can in fact be drawn — at least from a governmental interest perspective.

97. 447 U.S. at 154-59.

98. The Court stated:

> It is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest. . . . What the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation. The Tribes assert the power to create such exemptions by imposing their own taxes or otherwise earning revenues by participating in the reservation enterprises. If this assertion were accepted, the Tribes could impose a nominal tax and open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing custom[ers] from surrounding areas. We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.

Id. at 155.

99. The Court stated: “Although taxes can be used for distributive or regulatory purposes, as well as for raising revenue, we see no nonrevenue purposes to the tribal taxes at issue in these cases. . . . Hence, we perceive no conflict between state and tribal law warranting invalidation of the State’s taxes.” *Id.* at 158-59. *Cf.* Mescalero Apache Tribe v. New Mexico, 630 F.2d 724, 730 (10th Cir. 1980), vacated, 450 U.S. 1036 (1981) (drawing a distinction between tribal ordinances of a purely revenue-raising nature and those which have a regulatory purpose). The court noted that “dual systems of pure taxation are not inherently conflicting. In contrast, dual regulatory schemes . . . necessarily create mutual dislocations.” *Id.* (emphasis in case).
Confederated Tribes thus raises as many questions as it resolves. The problem of state infringement on tribal self-government through dual taxation remains. Perhaps the best solution, not adopted in Confederated Tribes, would be to allow both sovereigns to tax the sales but demand that the state credit against its tax the amount of any tribal taxes that were paid. This would adequately protect the state's fiscal interests, because as long as the state taxed the sales, non-Indians would be unable to exploit the exemption enjoyed by reservation Indians and would locate their purchases independently of tax considerations. Concomitantly, because a credit would eliminate the threat of a double tax burden, the tribes would be able to levy their taxes without placing their on-reservation businesses at a competitive disadvantage relative to off-reservation establishments. A tax credit scheme would thus leave the tribes free to structure their taxing schemes in conformity with their own views of sound policy while assuring the states that they would not be victimized by the presence of "tax havens" within their borders. Significantly, seven members of the Supreme Court have indicated that they see some merit in a tax credit mechanism, and the concept may yet be adopted by the states.

The Court's cryptic reference in Confederated Tribes to the distributive and regulatory functions of taxation raises an interesting issue. Taxation can be a powerful, sophisticated tool for manipulating domestic economic activity. It can be used to encourage desirable activities and discourage undesirable ones. Thus, a decision by a tribe not to tax a particular activity might be just as strongly grounded in a tribal fiscal and social policy as a decision to tax. For example, a tribe might offer tax incentives to industry to induce it to locate on the reservation. State taxation of the industry could, therefore, as a natural disincentive, interfere with tribal self-government to the same extent as state taxation of some activity the tribe had chosen to tax.

100. This approach was considered by the Confederated Tribes Court in connection with its discussion of the tribes' claims that the dual taxation in that case violated the negative implications of the commerce clause as it applies to Indians, U.S. Const. art. I, § 8, cl. 3. The Court declined to apply the remedy because it found insufficient evidence in the record to support a finding that Indian commerce would be significantly reduced by a state tax without a tax credit as opposed to a state tax with a credit. 447 U.S. at 157.

101. See id. at 157, 172, 175. Justices Rehnquist and O'Connor are the only members of the Court who have not expressed an opinion on the matter.

102. See Barsh, supra note 22, at 43-47; Israel & Smithson, supra note 91, at 281-82.

103. Assuming, that is, that state taxation of the latter would interfere with tribal self-government. Compare Fort Mojave v. County of San Bernardino, 543 F.2d 1253 (9th Cir. 1976), cert. denied, 430 U.S. 983 (1977) with Bryan v. Itasca County, 426 U.S. 373, 388-89 n.14 (1976); see supra note 96 and accompanying text.
spoke of the “right of reservation Indians to make their own laws and be ruled by them.” The right (or, more precisely, the power) to make laws necessarily includes the right to refrain from making them. Interference with the latter would seem to be just as pernicious as interference with the former. State taxation should thus be disallowed under Williams whenever it interferes unreasonably with internal tribal fiscal and social policy, regardless of whether it is positively expressed in the form of a tribal taxing ordinance.

Of course, the more sympathetic facts would be those in which the tribe had enacted a comprehensive scheme of tax credits, exemptions, and subsidies analogous to the highly developed Navajo court system which was held in Williams to bar state court jurisdiction over on-reservation transactions between Indians and non-Indians. The tribe's fiscal policies would then be clear and state interference could be easily inferred. But there should be no need for the tribe to tax a particular activity to prevent the state from taxing it, at least as long as the tribe's reasons for not taxing the activity are legitimate.

This “dormant tribal taxing power” limitation has not yet been invoked in an actual case, but it may become important in the future — in the burgeoning area of natural resources development. Many

105. See Israel & Smithson, supra note 91, at 282: The taxing decisions made or left unmade by the governmental entity significantly affect the culture, economic development, and collective goals of the people. Indian tribes must have the ability to make decisions about the quality of life and economic development upon their reservations unfettered by value judgments made by state revenue directors or state legislators. Interference with tribal self-government must be read in the Williams infringement test to comprehend much more than simply competition between the state and the tribe for a particular dollar of revenue. Concurrent taxing power, vested in a state, can be a powerful weapon for the advancement of state interest rather than tribal interests. It is for this reason that state attempts to tax on Indian reservations are arrogant, and potentially genocidal to Indian communities.
107. Indeed, such a scheme would likely satisfy the “distributive and regulatory purposes” element mentioned by the Supreme Court in Confederated Tribes. See supra note 99 and accompanying text.
109. But see Mescalero Apache Tribe v. O'Cheskey, 625 F.2d 967, 989-90 (10th Cir. 1980) (McKay, J., dissenting) (“tribal preemption of state regulatory schemes has clear support”).
110. See Israel, The Reemergence of Tribal Nationalism and its Impact on Reservation Resource Development, 47 U. Colo. L. Rev. 617 (1976): The continuing insistence of states to impose ever larger tax burdens on reservation mineral development, coupled with the increased self-assertiveness of Indian tribes, makes it almost inevitable that a mining venture extracting Indian resources today will be involved in lengthy and complex tax jurisdiction litigation no matter what its ownership and management composition. Given the historical animosity
western Indian reservations contain vast deposits of coal, sulphur, ura-
nium, oil, and natural gas. The tribes, understandably eager to ex-
plot these valuable energy sources, have contracted with non-Indian
companies to undertake mineral development which, in turn, prima fa-
cie legitimates state taxation of the projects. It is feasible that a state
would enact a tax for the express purpose of deterring the development
of natural resources within its borders. As applied to reservation re-
sources, such a tax would conflict directly with tribal development poli-
cies, perhaps exemplified by a tribe's express decision not to tax such
resources. Under the dormant tribal taxing power theory, the state tax
arguably would be invalid as an infringement on tribal self-
government.

Even if a state tax credit were mandated, the tribe could not solve
the problem by enacting a tax of its own. The tribe could attempt to
lay claim to a larger portion of the tax revenues, but it could not pre-
vent the state from forcing a cessation of operations because the state
could simply enact a higher prohibitory tax. Moreover, a tax credit
cannot solve the problem of state taxation designed to curb or deter
reservation activity because, even with a credit, the activity would still
be taxed and thereby discouraged. A tax credit mechanism only has
value as a tribal revenue protecting device. The sole solution to the
problem of regulatory or prohibitory state taxation would appear to be
strict invalidation under the Williams infringement test.

VI. **McClanahan v. Arizona Tax Commission:**
THE BACKDROP PRINCIPLE

Despite its theoretical potency, tribal sovereignty has not been fa-
vored by the Supreme Court as a ground for decision in the Indian tax

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112. *See* id. at 283.
cases. This is not particularly surprising. The concept itself is vague; it is difficult to apply in a principled fashion; and it is inherently anti-assimilationist in nature — characteristics apparently disturbing to some members of the Court. The peculiar shortcomings of the territorialist component have been discussed. The point has been made that territorialism is neither policy-reflective nor easy to apply. The “infringement” strand remains similarly weak: it seems capable of accommodating matters of policy, but it may be more difficult to apply than territorialism. Almost everything a state does will affect an Indian reservation located within its borders. The reservation’s economy cannot be completely independent of the state’s. Questions of infringement are therefore necessarily questions of degree, and predictably difficult to resolve. Moreover, as Professor Barsh has noted:

The infringement test is internally inconsistent and politically paradoxical. When it authorizes a state action, is the Court really saying it will have no adverse impact upon the tribe? Why, then, did the tribe complain in the first place? Barring some extraordinary ignorance on the part of the adversaries, the theory of the remedy is completely at war with the very existence of a dispute. A court cannot please everyone by means of the cute fiction that it will uphold that party whose claim is not adverse to the other’s.

113. See, e.g., Washington v. Confederated Tribes, 447 U.S. 134, 176-90 (1980) (Rehnquist, J., concurring in part and dissenting in part). Even Justice Black, author of the Williams opinion and inventor of the infringement standard, saw assimilation as the ultimate goal of federal policy. In Williams, the Justice wrote:

Congress has followed a policy calculated eventually to make all Indians full-fledged participants in American society. This policy contemplates criminal and civil jurisdiction over Indians by any State ready to assume the burdens that go with it as soon as the educational and economic status of the Indians permits the change without disadvantage to them.


One commentator has suggested that the vagueness of the concept of sovereignty is responsible for the Court’s retreat from the standard. See Chambers, Judicial Enforcement of the Federal Trust Responsibility to Indians, 27 Stan. L. Rev. 1213 (1975).

114. See supra text accompanying notes 22-26.

115. Barsh, supra note 22, at 6. Professor Barsh has been openly critical of the Williams decision itself:

Black’s citations were inaccurate, inapplicable, or misconstrued. His oft-quoted rule that, “absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them,” was his own invention, albeit more or less consistent with the results of prior federal decisions. It had never before appeared as the rule of a case. In fact, Black himself had stated the opposite rule in dictum twelve years earlier in New York ex rel. Ray v. Martin.

Id. (footnotes omitted).
The Supreme Court's antipathy toward tribal sovereignty was formalized in *McClanahan v. Arizona Tax Commission*. The opinion is not remarkable for its holding but rather for its strange and enigmatic rationale and the new characterization it gave, in dictum, to tribal sovereignty. The Court held that Arizona could not tax the reservation income of Navajo Indians who lived on the Navajo reservation, a result perfectly consonant with the territorial conception of tribal sovereignty that governs cases involving only reservation Indians. The Court, however, appeared to disclaim reliance on tribal sovereignty. The Court stated, "[t]he modern cases . . . tend to avoid reliance on platoonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power." The Court undertook an analysis of the Navajo treaty and a few federal statutes and concluded that by imposing its income tax on reservation Indians, Arizona had "interfered with matters which the relevant treaty and statutes leave to the exclusive province of the Federal Government and the Indians themselves."

The Court's language and its emphasis on treaty and statutory construction have led many to conclude that the ratio decidendi of *McClanahan* was federal preemption. It was not. The touchstone for federal preemption of state law under the supremacy clause is federal legislation which either conflicts directly with the state law in question or which constitutes such a pervasive and comprehensive statutory scheme that it occupies the entire field and leaves no room for state law on the subject. The Court's discussion of the Navajo treaty and the federal statutes in *McClanahan* did not focus on either of these elements. The Court acknowledged that "[t]he treaty nowhere explicitly states that the Navajos were to be . . . exempt from state taxes." Moreover, the thrust of the Court's discussion of the relevant federal statutes was not directed toward ascertaining congressional intent to oust state taxing power, but rather toward demonstrating that Congress has never legislated a divestment of tribal immunity from state taxation. Implicit is the assumption that state tax immunity is an aspect of aboriginal sovereignty which the tribe has retained. For example, the

117. See supra text accompanying notes 9-19.
118. 411 U.S. at 172.
119. Id. at 165.
122. 411 U.S. at 174.
Court stated that "Congress' intent to maintain the tax-exempt status of reservation Indians is especially clear in light of the Buck Act . . . which provides comprehensive federal guidance for state taxation of those living within federal areas." Of a similar nature were the Court's discussions of the Arizona Enabling Act and Public Law 280. Nowhere in its opinion did the Court identify any federal legislation of a preemptive character.

Justice Rehnquist's discussion of McClanahan in his Confederated Tribes concurrence is instructive. The Justice stated:

The question presented in [McClanahan] was whether the State of Arizona had jurisdiction to impose a tax on a reservation Indian's income derived solely from reservation sources. The Court first reviewed the "tradition of sovereignty" relevant to this "narrow question" . . . Historically this Court had found Indians to be exempt from taxes on Indian ownership and activity confined to the reservation and not involving non-Indians. . . . With this tradition placing reservation-ownership beyond the jurisdiction of the States, the Court undertook a review of the relevant treaties and statutes to determine whether this tradition of immunity had been altered by Congress. Although no legislation directly provided that Indians were to be immune from state taxation under these circumstances, the enactments reviewed were certainly suggestive of that interpretation. . . . The Court therefore declined to infer a congressional departure from the prior tradition of Indian immunity absent an express provision otherwise. Thus, as this Court's opinion in Bryan v. Itasca County . . . later characterized it, McClanahan established a rule against finding that "ambiguous statutes abolish by implication Indian tax immunities." Thus, the Court's disclaimer notwithstanding, McClanahan is at bottom a sovereignty case. The holding of the case signaled a significant reaffirmation of the territorialist philosophy of Worcester.

123. Id. at 176 (emphasis added).
127. See Werhan, supra note 5, at 17 ("Although the Court had eschewed the high-
What is most striking about *McClanahan*, however, is the extent to which the Court was willing to obfuscate the issue in order to avoid appearing to rely on tribal sovereignty. The consequence has been a confusion which the Court has only recently set straight.

One dictum has proven particularly troublesome. In the course of its preliminary discussion of federal preemption, the *McClanahan* Court stated: “[t]he Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read.” 128 Now, preemption is a creature of congressional intent. What the Court meant in *McClanahan* was that when congressional intent was unclear, the presence or absence of a recognized tradition of Indian sovereignty over the particular subject-matter involved might shed some light on whether Congress intended to preempt state law. 129 The Court did nothing more than make explicit the conceptual tie between the doctrine of tribal sovereignty and the doctrine of federal preemption.

Some courts and commentators, however, have read *McClanahan* differently. 130 It has been suggested that Indian sovereignty no longer provides an independent basis for decision—that sovereignty now exists only as an aspect of federal preemption. 131 In *White Mountain Apache Tribe v. Bracker*, 132 the Supreme Court was careful to dispel this notion. The Court, per Justice Marshall, stated:

[C]ongressional authority and the “semi-independent position” of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority

sounding tones of sovereignty and had embraced, in its judgment, the more practical application of preemption analysis, the results obtained in... *McClanahan*... are precisely the same as that which would follow from *Worcester.*") (footnote omitted). *Cf.* United States v. New Mexico, 590 F.2d 323, 328 (10th Cir. 1978) (“[E]ven though the Navajos who were involved in the *McClanahan* case did not have an express guarantee of freedom or exemption from state taxes in [their] treaty, the concept of sovereignty nevertheless precludes efforts by the state to tax Indians on the reservation.”).

128. 411 U.S. at 172 (emphasis added).
130. *See* Mettler, *supra* note 120, at 117 (footnote omitted):

The *McClanahan* decision... came close to expressly extinguishing the infringement of tribal sovereignty as an independent bar to state jurisdiction by saying that the sovereignty doctrine “is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read.”

TRIBAL SOVEREIGNTY LIMITATION

over tribal reservations and members. First, the exercise of such authority may be preempted by federal law. Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members.133

Yet, even though tribal sovereignty retains separate vitality, it remains disfavored as a ground for decision in tax cases. As McClanahan indicated, the preferred rationale is federal preemption. White Mountain Apache is illustrative. In White Mountain Apache the Supreme Court held that Arizona's motor vehicle license and use fuel taxes were preempted by federal law insofar as the state sought to apply them to a logging company operating on an Indian reservation. The petitioner tribe challenged the taxes on both federal preemption and tribal sovereignty grounds.134 After reaffirming the vitality of the tribal sovereignty limitation on state taxation, the Court ignored it; only the tribe's preemption claim was considered.

The general approach, as reflected in White Mountain Apache and subsequent cases, seems to be this: The court first checks to see whether the state tax has been preempted by federal law, taking care to construe federal enactments "generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence"135 (the "backdrop" concept). If the state tax has been preempted, then the inquiry is concluded. Only if the court determines that the tax has not been preempted does it then check to see whether the tax unlawfully infringes upon tribal sovereignty.136

It should be fairly obvious that under this approach state taxes will seldom be invalidated on tribal sovereignty grounds. Federal legislation in the field of Indian affairs is pervasive. A large number of congressional enactments demonstrate the "firm federal policy of promoting tribal self-sufficiency and economic development,"137 concepts particularly relevant to questions of Indian tax immunity. For

133. Id. at 142-43 (emphasis added).
134. Id. at 138.
135. Id. at 144.
137. 448 U.S. at 143.
example, the purpose of the Indian Reorganization Act\textsuperscript{138} is to "rehabilitate the Indian's economic life and to give him a chance to develop
the initiative destroyed by a century of oppression and paternalism."\textsuperscript{139}
In addition, the Indian Financing Act of 1974\textsuperscript{140} states:

It is hereby declared to be the policy of Congress . . . to help
develop and utilize Indian resources, both physical and
human, to a point where the Indians will fully exercise re-
sponsibility for the utilization and management of their own
resources and where they will enjoy a standard of living from
their own productive efforts comparable to that enjoyed by
non-Indians in neighboring communities.\textsuperscript{141}

Indeed, "[t]he extent of . . . residual Indian sovereignty in the to-
tal absence of federal treaty obligations or legislation is . . . generally
of little more than theoretical importance . . . since in almost all cases
federal treaties and statutes define the boundaries of federal and state
jurisdiction."\textsuperscript{142} Thus, many tax questions in which tribal sovereignty
is implicated can be resolved, with a little judicial legerdemain, on pre-
emption grounds. The partial incorporation of sovereignty into pre-
emption analysis as a backdrop "against which vague or ambiguous
federal enactments must always be measured"\textsuperscript{143} facilitates the process.
Tribal sovereignty may still be alive, but for the moment it does not
appear likely to figure prominently in the tax cases.

VII. THE EMERGENCE OF GOVERNMENTAL INTEREST BALANCING

The Supreme Court's de-emphasis of tribal sovereignty has been
defended on the ground that the Court's approach "maximizes the abil-
ity of States and tribes to determine the scope of their respective au-
thority without resort to adjudication, and maximizes judicial
deferece to the legislative forum."\textsuperscript{144} In point of fact, it does neither.

\begin{itemize}
\item \textsuperscript{138} Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (current version in numerous
sections of 25 U.S.C. §§ 461-479 (1976)).
\item \textsuperscript{139} H.R. REP. No. 1804, 73d Cong., 2d Sess. 6 (1934); \textit{see} Mescalero Apache Tribe v.
\item \textsuperscript{140} 25 U.S.C. §§ 1451-1543 (1974).
\item \textsuperscript{141} \textit{Id.} § 1451; \textit{see} Indian Self-Determination and Education Assistance Act of 1975, 25
U.S.C. §§ 450a-450n, 452, 455-458 (1976); \textit{Gross, Indian Self-Determination and Tribal So-
verignty: An Analysis of Recent Federal Indian Policy, 56 Tex. L. Rev. 1195 (1978)}.
\item \textsuperscript{142} McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.8 (1973); \textit{see} Wash-
ington v. Confederated Tribes, 447 U.S. 134, 177-78 & n.2 (1980) (Rehnquist, J., concur-
ing in part and dissenting in part).
\item \textsuperscript{143} White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980).
\item \textsuperscript{144} Washington v. Confederated Tribes, 447 U.S. 134, 181 (1980) (Rehnquist, J., concur-
ing in part and dissenting in part).
\end{itemize}
The Court has developed a technique for resolving claims of tribal sovereignty and federal preemption that both decreases predictability and maximizes judicial activism. The trend is for the Court to rely no longer solely upon congressional intent to determine the preemptive effect of federal legislation. And the Williams "infringement" test is apparently no longer the sole standard for resolving claims of tribal sovereign immunity from state taxation. Instead, once a colorable claim of tribal sovereignty or federal preemption is advanced, the Court has taken to balancing the respective governmental interests involved.

For example, in Washington v. Confederated Tribes,\textsuperscript{145} the Supreme Court undertook a careful comparison of state and tribal interests en route to holding that the state could lawfully impose its cigarette taxes on sales by tribal retailers to non-Indians. The Court stated:

> The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other . . . . While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services. As we have already noted, Washington's taxes are reasonably designed to prevent the Tribes from marketing their tax exemption to nonmembers who do not receive significant tribal services and who would otherwise purchase their cigarettes outside the reservations.\textsuperscript{146}

The Court held that "the State's interest in taxing these purchasers outweighs any tribal interest that may exist in preventing the State from imposing its taxes."\textsuperscript{147}

In Confederated Tribes, the Court used interest balancing to resolve a sovereignty claim. In White Mountain Apache Tribe v. Bracker,\textsuperscript{148} the Court relied upon interest balancing to sustain a claim of exemption from state taxation on federal preemption grounds. The

\textsuperscript{145} 447 U.S. 134 (1980).
\textsuperscript{146} Id. at 156-57.
\textsuperscript{147} Id. at 161.
\textsuperscript{148} 448 U.S. 136 (1980).
The Court first demonstrated that the territorialist principle which bars state taxation of reservation Indians on a reservation could be rationalized in terms of federal/state interest balancing. The Court stated: "When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." The Court then addressed the issue of non-Indian involvement, noting:

More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

The Court then held that Arizona could not impose its motor vehicle license and use fuel taxes on a non-Indian logging company working for the Navajo tribe on the Navajo reservation. The Court noted that Arizona performed no "governmental functions . . . for those on whom the taxes [fell]." Nor did the taxes serve "a legitimate regulatory interest." The only state interest at stake was a desire to raise revenues. In contrast, a number of federal policies were threatened by the state tax. The balance, therefore, tipped in favor of preemption. The Court said, "[w]e do not believe that respondents' generalized interest in raising revenue is in this context sufficient to permit its proposed intrusion into the federal regulatory scheme with respect to the harvesting and sale of tribal timber."

In Crow Tribe of Indians v. Montana, the Ninth Circuit Court of Appeals used the Confederated Tribes interest balancing approach to

149. Id. at 144.
150. Id. at 144-45.
151. Id. at 150.
152. Id.
153. Id.
154. See id. at 148-50.
155. Id. at 150.
156. 650 F.2d 1104 (9th Cir. 1981).
TRIBAL SOVEREIGNTY LIMITATION

resolve a tribal sovereignty claim. Beneath the Crow reservation in Montana are vast deposits of coal. In an effort to exploit this resource, the Crow Tribe entered into mining leases with and granted prospecting permits to several non-Indian companies. However, Montana imposed a thirty percent severance tax on coal produced in the state and a gross proceeds tax on the sale of coal produced in the state. The state thus appropriated most of the coal's value to itself; between 1975 and 1981, the state's taxes netted it $30 million, while the tribe's royalties amounted to only $8 million. Understandably, the tribe brought suit, seeking injunctive and declaratory relief against imposition of the taxes on the production of the non-Indian mineral leases. The tribe alleged that Montana's taxes impermissibly infringed upon the tribe's ability to govern itself in two ways: (1) by impairing the tribe's ability to levy its own severance tax, and (2) by reducing the royalties the lessees could afford to pay. The tribe contended that the resultant reduction in tribal income "severely impaired the ability of the sovereign Crow Tribe to serve its people through its various programs and governmental services, including but not limited to its vitally important land repurchase program, its tribal cultural and historical program, its tribal educational program and its reservation maintenance services."

The district court dismissed the tribe's complaint for failure to state a claim upon which relief could be granted. The Ninth Circuit reversed. The appellate court first distinguished Confederated Tribes, noting that this was "not a case where the tribe is simply marketing a tax exemption, as where tribes seek to sell tax-free cigarettes to non-Indians." Rather, the subject of the tax was "a component of the reservation land itself." The court noted that, beyond recoupment of

157. Id. at 1107.
159. 650 F.2d at 1107; see Natural Resources Taxation, supra note 111, at 283.
160. 650 F.2d at 1116.
162. 650 F.2d at 1117.
163. Id. In Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981), the United States Supreme Court rejected a constitutional challenge of Montana's severance tax by Montana coal producers and out-of-state utility customers. The Court held that the tax violated neither the commerce clause nor the supremacy clause. On a petition for rehearing
any governmental costs associated with the mining operations, Montana's interest in the coal was slight. In contrast, the tribe's interest in the revenue generated by its own land was strong. The court held that Montana's taxes would fail under the tribal sovereignty doctrine if the tribe could show at trial that "the taxes substantially affect its ability to offer governmental services or its ability to regulate the development of tribal resources, and that the balance of state and tribal interests renders the state's assertion of taxing authority unreasonable."\(^{164}\)

The implications of this interest balancing approach for tribal sovereignty are unclear. It may make tribal sovereignty a more attractive basis for decision than it has been in the past. The flexibility of the approach is apparent, and it seems to provide a principled means of resolving delicate questions of infringement. Perhaps most significantly, the concept of judicial interest balancing is inconsistent with a policy of judicial deference to the legislative branch — the policy that relegated tribal sovereignty to a position of diminished importance among the models for limiting state taxation of Indians in the first place. The availability of an interest balancing approach may encourage the courts to face squarely the many difficult and challenging questions which remain in the area of tribal sovereign immunity from state taxation. Whether the judiciary is equipped for the task is another question.\(^{165}\)

VIII. CONCLUSION

The doctrine of tribal sovereignty reflects most vividly the kaleidoscopic nature of federal Indian policy. Rigidly territorial at its inception, the doctrine has since undergone a startling metamorphosis. Assertions of tribal sovereignty in the face of state taxation are now subject to a flexible, interest balancing analysis. Territorialism remains the touchstone only for cases in which Indians alone are involved.

With this shift in focus has come a decrease in popularity. Federal
preemption has recently become the preferred basis for decision in the Indian tax cases. Only when the question cannot be resolved on pre-emption grounds will the Supreme Court consider assertions of tribal sovereignty. Consequently, many questions remain unanswered. For example, it is well established that the mere economic burden imposed upon a tribe by state taxation of non-Indians will not constitute an unlawful infringement on tribal sovereignty, even when the tribe itself is engaged in the taxed activity; but the law is unclear as to just what will violate the sovereignty standard when non-Indians are involved. Supreme Court dicta indicate that the Court may seek to preserve tribal tax revenues against erosion by state taxation through a system of sovereignty-mandated tax credits. And prohibitory or regulatory state taxation may be held to run afoul of important tribal development policies. But these issues have yet to be properly litigated.

Tribal sovereignty functions as an adjunct to the doctrine of federal preemption, as well as providing an independent ground for decision itself. Its independent efficacy has been questioned of late, but its theoretical framework remains intact, and the Supreme Court’s recent emphasis on governmental interest balancing may breathe new life into the doctrine. Whether this will result in an enhancement or in a dilution of tribal sovereignty remains to be seen.166
