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DEFINING THE CONTOURS OF THE INFRINGEMENT TEST IN CASES INVOLVING THE STATE TAXATION OF NON-INDIANS A HALF-CENTURY AFTER *WILLIAMS V. LEE*

Nathan Quigley*

I. INTRODUCTION

In 2004, the accounting firm for Atlantic City Coin, a slot machine distributor and lessor, made a small administrative error.¹ The accounting firm mistakenly filed a personal property tax declaration with Ledyard, Connecticut for slot machines leased to the Mashantucket Pequot Tribe.² The Tribe leased the slot machines for use in its palatial and lucrative Foxwoods Resort Casino, located on the Tribe's reservation and within the borders of Ledyard.³ Once Ledyard received the tax declaration, it predictably assessed its property tax against Atlantic City Coin.⁴ This small administrative error ignited a large legal battle over Ledyard's attempt to impose taxes on personal property owned by non-Indians on the Mashantucket Pequot Reservation.

In response to Ledyard's taxing efforts, the Tribe sought declaratory and injunctive relief from the application of the tax in the United States District Court for the District of Connecticut.⁵ In September 2011, after years of litigation, both the Tribe and Ledyard filed cross motions for summary judgment.⁶ In the Tribe's motion, it argued that Ledyard was barred from imposing its personal property tax on the slot machines located on the reservation for three independent reasons.⁷ First, the Tribe argued that the tax was preempted by federal statute.⁸ Second, the Tribe argued that federal and tribal interests preempted the state tax under the *Bracker* interest-balancing test.⁹ Finally, the Tribe argued that the tax unlawfully infringed on its ability to "make [its] own

* J.D. Seattle University School of Law, 2012; B.A., Colby College, 2005. Special thanks to Professor Eric Eberhard, Bree Blackhorse, and Shay Story for their encouragement and advice on this paper.

¹ Mashantucket Pequot Tribe v. Town of Ledyard, 2012 WL 1069342 (D. Conn. Mar. 27, 2012) at 1.

² *Id.*

³ *Id.* at 10. Foxwoods Resort Casino is the largest casino in North America and at one time was the most profitable casino in the United States. See generally BRETT FROMSON, HITTING THE JACKPOT: THE INSIDE STORY OF THE RICHEST INDIAN TRIBE IN HISTORY (2003). Unfortunately for the Tribe, the casino has recently fallen on hard times. See Michael Sokolove, *Foxwoods Casino Is Fighting for Its Life*, N.Y. TIMES MAGAZINE, March 14, 2012, available at http://www.nytimes.com/2012/03/18/magazine/mike-sokolove-foxwood-casinos.html?_r=1 (last visited Nov. 10, 2012).

⁴ Mashantucket Pequot Tribe v. Town of Ledyard, 2012 WL 1069342 (D. Conn. Mar. 27, 2012) at 1.

⁵ *Id.* at 17–18.

⁶ Julianne Hancel, *Ledyard Tax Case Could Set Far-Reaching Precedent*, THE DAY (NEW LONDON), Jan. 24, 2012, available at <http://www.theday.com/article/20120124/NWS01/301249957/-1/NWS> (last visited Nov. 10, 2012).

⁷ Mashantucket Pequot Tribe v. Town of Ledyard, 2012 WL 1069342 (D. Conn. Mar. 27, 2012) at 1.

⁸ *Id.* at 20. Specifically, the Tribe argued that the tax was preempted by the IGRA, S. Rep. No. 100-446, at 5 (1988), and the Indian Trader statutes, 25 U.S.C. §§ 261-264.

⁹ *Id.* at 28.

laws and be ruled by them.”¹⁰ The United States Supreme Court enunciated this basis for limiting state regulation on Indian reservations in the 1959 case of *Williams v. Lee*.¹¹ This principle has become known as the infringement test, and it protects the inherent right of Indian tribes to be self-governing.¹² While the infringement test remains a central principle of Federal Indian law, the United States Supreme Court’s subsequent jurisprudence does not make clear to what extent *Williams v. Lee* still stands as a barrier to state taxation of non-Indians in Indian Country.

In *White Mountain Apache Tribe v. Bracker*,¹³ the Supreme Court stated that the infringement test is an “independent” barrier to state taxation.¹⁴ However, Indian law scholars note that the infringement test is “seldom decisive in the tax context.”¹⁵ For example, Ninth Circuit Judge William C. Canby, Jr. explains that:

Although nearly all [recent cases involving state taxation of non-Indians] depend largely or entirely upon preemption analysis, the rule of *Williams v. Lee*—that the states may not interfere with the right of reservation Indians to make their own laws and be governed by them—has been held to be an *additional, independent limitation on the states’ power to tax*. So stated, the rule would doubtless curb any attempt of the states to tax the sovereign functions of the tribes. Where the tax is upon nonmembers, however, the absolute prohibition of *Williams v. Lee* tends to recede into the background while the courts engage in the balancing of interests called for by the preemption approach that they prefer. When that process results in the preemption of the state tax, the rule of *Williams v. Lee* is sometimes then invoked as additional support for the result.¹⁶

It is difficult to understand why the infringement test is called an “independent barrier” to a state’s authority to tax non-Indians on the reservation when the courts continually decide cases by focusing on preemption with “at most a passing reference to infringement.”¹⁷ Stated another way, how can the infringement test be an independent limitation if it consistently “recede[s] into the background” while courts focus on preemption?¹⁸

¹⁰ *Id.* at 37–38 (citing *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

¹¹ *Williams v. Lee*, 358 U.S. 217 (1959).

¹² STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 133 (3d ed. 2002).

¹³ *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

¹⁴ *Id.* at 142 (“[C]ongressional authority and the ‘semi-independent position’ of Indian tribes has given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be preempted by federal law. Second, it may lawfully infringe ‘on the right of reservation Indians to make their own laws and be ruled by them.’”) (citations omitted).

¹⁵ Erik M. Jensen, *Taxation and Doing Business in Indian Country*, 60 ME. L. REV. 1, 61 (2008).

¹⁶ WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUT SHELL* 304–305 (5th ed. 2009) (internal citations omitted) (emphasis added).

¹⁷ Jensen, *supra* note 15, at 61.

¹⁸ Canby, *supra* note 16, at 304.

Acknowledging this incongruity, the Tenth Circuit recently questioned the continuing validity of the infringement test. In *Muscogee (Creek) Nation v. Pruitt*,¹⁹ the court said that “some have questioned the continued applicability of the infringement barrier . . . Based on the Supreme Court’s repeated mention of the infringement prong, we conclude it is still a necessary part of our analysis.”²⁰ The Tenth Circuit is correct that this area of the law is in need of clarification.

This paper will review the Supreme Court’s cases involving state taxation of non-Indians in Indian Country to define the current contours of the infringement test. Specifically, this paper argues that since *Williams v. Lee* was decided in 1959, the Supreme Court has substantially weakened the power of the infringement test to stand as a barrier to state taxation of non-Indians in Indian Country. To that end, this paper proceeds in four parts. Part II introduces *Williams v. Lee* and then analyzes four Supreme Court cases that have discussed the infringement test: *McClanahan v. State Tax Commission of Arizona*,²¹ *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*,²² *Washington v. Confederated Tribes of the Colville Indian Reservation*,²³ and *White Mountain Apache Tribe v. Bracker*.²⁴ Next, because the infringement test “derived from notions of tribal sovereignty,”²⁵ Part III discusses *Oliphant v. Suquamish Indian Tribe*²⁶ and *Montana v. United States*,²⁷ two cases that drastically changed the limits of tribal sovereignty. Based on the analysis of these cases, Part IV argues that the Supreme Court has substantially weakened the power of the infringement test to shield non-Indians in Indian Country from state taxation. Finally, Part V discusses how the court in *Mashantucket Pequot Tribe v. Town of Ledyard*²⁸ addressed the Tribe’s infringement test argument and offers a brief conclusion.

II. THE COURT’S ENUNCIATION AND SUBSEQUENT DISCUSSION OF THE INFRINGEMENT TEST

A. *Williams v. Lee* (1959)

The Court enunciated the principle that has become known as the infringement test in the landmark case, *Williams v. Lee*.²⁹ *Williams* involved a non-Indian who owned a general store on the Navajo Reservation and sold goods on credit to a tribal member.³⁰ Seeking to collect the debt, the storeowner sued the tribal member in Arizona State court, even though a Navajo tribal court was available to hear the case.³¹

¹⁹ *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159 (10th Cir. 2012).

²⁰ *Id.* at 1171 n.5.

²¹ *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973).

²² *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976).

²³ *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

²⁴ *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 136.

²⁵ Jensen, *supra* note 15, at 61.

²⁶ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

²⁷ *Montana v. United States*, 450 U.S. 544 (1981).

²⁸ *Mashantucket Pequot Tribe v. Town of Ledyard*, 2012 WL 1069342 (D. Conn. Mar. 27, 2012).

²⁹ PEVAR, *supra* note 12, at 133.

³⁰ *Williams v. Lee*, 358 U.S. at 217–18.

³¹ *Id.* at 218.

The storeowner won the case, and the Supreme Court of Arizona affirmed the judgment.³² On appeal, the United States Supreme Court considered whether the Arizona courts had jurisdiction to hear the controversy.³³ The Court held that the Arizona courts could not exercise jurisdiction over the dispute because to do so “would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.”³⁴

In *Williams*, Justice Black cites to *Worcester v. Georgia*,³⁵ calling Chief Justice Marshall’s 1832 opinion “courageous and eloquent.”³⁶ The Court in *Worcester* established the principle that the tribes have inherent sovereignty because they are “distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial.”³⁷ The Court used this principle to invalidate Georgia’s attempts to extend its laws to the Cherokee Reservation.³⁸ Chief Justice Marshall said that the Cherokee nation is a “distinct community, occupying its own territory 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.”³⁹

Many Indian law scholars view *Williams* as faithful to *Worcester*. For example, Professor David H. Getches argues that the *Williams* Court “vindicated tribal sovereignty in a modern context” and “confirmed the modern Court’s adherence to foundation[al] principles [of Federal Indian law].”⁴⁰ However, *Williams* can also be read as a departure from *Worcester*.⁴¹

In *Worcester*, the Court held that, absent an act of Congress or a treaty, state action on Indian reservations was presumptively invalid because of the inherent powers of the tribes.⁴² In contrast, in *Williams*, the Court said that “[e]ssentially, 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.”⁴³ This frames state action as presumptively valid; the holding of *Williams* allows

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 223.

³⁵ *Worcester v. Georgia*, 31 U.S. 515 (1832).

³⁶ *Williams*, 358 U.S. at 219.

³⁷ *Worcester v. Georgia* 31 U.S. at 559. The *Worcester* Court went on to say these original natural rights of Indian tribes are subject to a “single exception” that “excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed.” *Id.* In addition, the Court had previously said that tribes had lost the power to freely alienate their lands. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 569 (1823).

³⁸ *Worcester v. Georgia* 31 U.S. at 561.

³⁹ *Id.*

⁴⁰ David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1589–90 (1996).

⁴¹ See generally Dewi Ioan Ball, *Williams v. Lee (1959)—50 Years Later: A Reassessment of One of the Most Important Cases in the Modern-Era of Federal Indian Law*, 2010 MICH. ST. L. REV. 391 (2010).

⁴² See *Worcester v. Georgia* 31 U.S. at 540.

⁴³ *Williams v. Lee*, 358 U.S. at 220.

state action on the reservation *unless* it infringes on the right of reservation Indians to make their own laws and be ruled by them.⁴⁴ Thus, *Williams* can be viewed as a departure from the principle of expansive inherent tribal sovereignty that could only be modified by Congress. Moreover, it illustrated the Court's willingness to allow state authority on reservations.

Regardless of how faithful the decision in *Williams* was to *Worcester*, *Williams* established a test that assessed the permissibility of state jurisdiction or regulation in Indian Country. The test required courts to consider whether the challenged state action "infringed on the right of reservation Indians to make their own laws and be ruled by them."⁴⁵

B. McClanahan v. State Tax Commission of Arizona (1973)

In *McClanahan*, the Court again considered an attempt by Arizona to impose a tax on the Navajo Reservation.⁴⁶ This time, Arizona sought to tax the earnings of an Indian who resided on the reservation and whose income derived entirely from reservation activities.⁴⁷ In 1967, \$16.20 was withheld from Ms. Rosalind McClanahan's wages to cover her state income tax liability.⁴⁸ At the close of the tax year, Ms. McClanahan filed a protest against the collection of the taxes and filed a claim for a refund of the entire amount.⁴⁹ When the Arizona Department of Revenue failed to respond to her claim, Ms. McClanahan sued in the Arizona courts on behalf of herself and other tribal members.⁵⁰ The court held that the taxation was permissible.⁵¹

On appeal to the United States Supreme Court, Arizona argued that a tax on the income of individual Indians was permissible under *Williams*.⁵² The Court rejected this argument, and said that "[i]t must be remembered that the cases applying the *Williams* test have dealt principally with situations involving non-Indians. . . . The problem posed in this case is completely different."⁵³ Accordingly, the Court reasoned that the infringement test was only intended to apply to attempted exercises of state jurisdiction over non-Indians in Indian Country.⁵⁴

To evaluate state attempts to tax Indians in Indian Country, the Court adopted the preemption analysis as the applicable analytic framework:

⁴⁴ See *id.*

⁴⁵ *Id.*

⁴⁶ *McClanahan v. State Tax Commission of Arizona*, 411 U.S. at 165.

⁴⁷ *Id.*

⁴⁸ *Id.* at 166.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 165.

⁵² *Id.*

⁵³ *Id.* at 179. Professor Jensen points out that this statement is both inaccurate and counterintuitive. Jensen, *supra* note 15, at 62 n.365.

⁵⁴ See *McClanahan v. State Tax Commission of Arizona* 411 U.S. at 179.

[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption. The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. The 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.⁵⁵

In adopting this framework, the Court in *McClanahan* stated that preemption “define[s] the limits of state power.”⁵⁶ This portrays state taxation as presumptively valid until it conflicts with a federal statute or treaty. Thus, similarly to the *Williams* Court, the Court in *McClanahan* showed a willingness to allow state regulation on the reservation. Moreover, in the analysis endorsed by *McClanahan*, tribal sovereignty merely “provides a backdrop” for the reading of federal statutes and treaties and has little force of its own.⁵⁷

Even though the Court in *McClanahan* said that *Williams* did not apply because the appellant was an Indian, the Court’s commentary on *Williams* is important to later decisions. The Court stated that:

The cases applying the *Williams* test have dealt principally with situations involving non-Indians. In these situations, both the tribe and the State could fairly claim an interest in asserting their respective jurisdiction. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.⁵⁸

While this statement accurately described the Court’s decision in *Williams*, in a subsequent decision, the Court cited to this section of *McClanahan* to further increase the states’ power vis-à-vis the tribes in cases applying the infringement test.⁵⁹

C. Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation (1976)

In *Moe*, the Court considered Montana’s imposition of a cigarette tax on sales by on-reservation smoke shops operated by tribal members of the Confederated Salish and Kootenai Tribes.⁶⁰ The State tax applied to both Indian and non-Indian customers, and the State required the tribal retailers to collect the tax.⁶¹ The District Court of Montana upheld the State’s jurisdiction to tax the on-reservation sales of cigarettes to

⁵⁵ *Id.* at 172.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 179.

⁵⁹ See *infra* Part II.D (discussing *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980)).

⁶⁰ *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. at 466–67.

⁶¹ *Id.* at 467.

non-Indians and the requirement that the retailers collect this tax.⁶² However, the district court struck down the tax as applied to tribal members.⁶³

In a unanimous decision authored by Justice Rehnquist, the Court affirmed the lower court, focusing almost entirely on the collection requirement.⁶⁴ The Court simply assumed that the tax was valid as applied to non-Indians.⁶⁵ With respect to the collection requirement, the Court said that the State could require the tribal seller to collect the tax imposed on non-Indians because it was “a minimal burden designed to avoid the likelihood that in its absence non-Indian purchasers from the tribal sellers will avoid payment of a concededly lawful tax.”⁶⁶ The Court called the collection requirement a “minimal burden” and said that “[w]e see nothing in this burden which frustrates tribal self-government [in violation of *Williams*] or runs afoul of any congressional enactments dealing with the affairs of Indians.”⁶⁷ The Court characterized this as a burden on tribal members rather than as a burden on the tribal government.

In the wake of *Moe*, there was support for the proposition that a state can require tribal members to collect state taxes without infringing on a tribe’s right to self-governance. Moreover, the *Moe* Court concluded that a state could cross a reservation boundary to impose a tax on non-Indians. This result played an important role in establishing Justice Rehnquist’s theory of implied divestiture. According to this theory, Indian tribes have impliedly lost certain sovereign powers, such as jurisdiction over non-Indians, due to their incorporation into the United States.⁶⁸ This theory is crucial to understanding the result in this case. The Court was able to conclude that Montana’s tax did not frustrate tribal self-governance because, under the theory of implied divestiture, tribal self-governance was implicated when the State taxed tribal members, but not when the State taxed non-members.⁶⁹

D. Washington v. Confederated Tribes of the Colville Indian Reservation (1980)

In *Colville*, the Court considered Washington’s attempt to tax the cigarette sales of several tribes.⁷⁰ In contrast to the tribes in *Moe*, the tribes challenging the state tax in *Colville* had imposed their own taxing regimes on cigarette sales.⁷¹

The *Colville* Court concluded that the tribes’ tax regimes did not preclude Washington from also levying a tax on the on-reservation sale of cigarettes to non-

⁶² *Id.*

⁶³ *Id.* at 468.

⁶⁴ *See id.* at 481–483.

⁶⁵ *Id.*

⁶⁶ *Id.* at 483.

⁶⁷ *Id.*

⁶⁸ *See infra* Part III; *see also* Mark Trahan, *High Court Could Use an Indian Voice*, SEATTLE POST-INTELLIGENCER, July 9, 2005, available at <http://www.seattlepi.com/local/opinion/article/High-court-could-use-an-indian-voice-1177919.php> (last visited Nov. 10, 2012).

⁶⁹ *See infra* Part IV.

⁷⁰ *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 at 139.

⁷¹ *Id.* at 138.

members.⁷² The Court said that “[w]e do not believe that the principles of Federal Indian law, whether stated in terms of preemption, 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.”⁷³ First, the Court said that the federal statutes do not preempt the Washington sales and cigarette tax.⁷⁴ In addition, the Court said that under *Williams*, the State did “not infringe on 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.”⁷⁵

The Court’s next sentence is perhaps the most troubling because it incorrectly interpreted the Court’s commentary in *McClanahan* discussing *Williams*.⁷⁶ It cited *McClanahan* for the following proposition: “The principle of tribal self-government, grounded in notions of inherent sovereignty and congressional policies, seeks an accommodation between the interests of the Tribes and Federal Government, on the one hand, and those [interests] of the State, on the other.”⁷⁷ This statement foreshadowed what would become the *Bracker* interest-balancing test and infused a consideration of the state’s interest into the Court’s infringement analysis.

However, it is a stretch to find support for this proposition in *McClanahan*. The closest support for the Court’s statement comes from the following portion of *McClanahan*: “The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.”⁷⁸ But instead of considering the state interest involved, this statement says that state jurisdiction would be tolerated only if there was no infringement on tribal self-government. Considering the state’s interest as part of the infringement analysis, as the Court did in *Colville*, is very different than permitting state action unless it infringes on the right of tribal self-government, as the *Williams* test prescribes. For example, under *Williams*, even a very strong state interest would not permit state regulation if it infringed on tribal self-government.⁷⁹ However, the Court in *Colville* posed state interest as a factor in determining when taxation is permissible. *Colville* continued the trend of reducing the importance of tribal sovereignty while increasing the significance of the states’ interest in the Court’s infringement analysis. As Justice Rehnquist noted in his concurrence in *Colville*, “[a]t issue here is not only Indian sovereignty, but also necessarily state sovereignty as well.”⁸⁰

⁷² *Id.* at 155.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 156.

⁷⁶ See *supra* Part II.B.

⁷⁷ *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 156 (emphasis added).

⁷⁸ *McClanahan v. State Tax Commission of Arizona*, 411 U.S. at 179.

⁷⁹ Ball, *supra* note 41, at 401 (citing CANBY, *supra* note 16, at 243–244).

⁸⁰ *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 181 (Rehnquist, J., dissenting).

E. White Mountain Apache Tribe v. Bracker (1980)

Seventeen days after the Court decided *Colville*, the Court issued its decision in *Bracker*.⁸¹ *Bracker* involved Arizona's attempts to impose its motor carrier license tax and motor fuel excise tax on the non-Indian contractors of a tribal timber business operated by the White Mountain Apache Tribe.⁸² The United States Supreme Court held that federal law, specifically the federal government's comprehensive regulation of the harvesting of Indian timber, preempted the state taxes at issue.⁸³

Most courts called upon to analyze the permissibility of the state taxation of non-Indians cite to *Bracker* for the general rules regarding taxation in Indian Country.⁸⁴ In *Bracker*, the Court stated that infringement and preemption are independent barriers to state regulatory authority on the reservation:

Congress has broad power to regulate tribal affairs under the Indian Commerce Clause. This congressional power and the 'semi-independent position' of Indian tribes *have given rise to two independent but related barriers to the assertion of state regulatory authority 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 by tribal members*.⁸⁵

Next, the Court explained how these barriers are related:

[The two barriers] are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important "backdrop," against which vague or ambiguous federal enactments must always be measured.⁸⁶

⁸¹ DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 614 (6th ed. 2011).

⁸² *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 at 137-138.

⁸³ *Id.* at 138.

⁸⁴ See e.g., *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989); *Ramah Navajo School Board Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982).

⁸⁵ *Bracker*, 448 U.S. at 142-143 (emphasis added).

⁸⁶ *Id.* at 143 (emphasis added). This statement is problematic because it describes the role of tribal self-governance as being similar in both the infringement analysis and the preemption analysis. However, the role of tribal sovereignty is considerably different in the two analyses. In the preemption analysis, Indian sovereignty provides a "backdrop" against which the applicable treaties and federal statutes must be read. In contrast, in the infringement analysis, tribal sovereignty is the *focus* of the analysis. This quote from *Bracker* does not modify the infringement analysis, but it does result in considerable confusion. Courts often do not properly appreciate the different role of tribal sovereignty in the two analyses. See, e.g., *Cotton Petroleum*, 490 U.S. at 204.

Although *Bracker* acknowledged that Indian self-government is ultimately subject to the broad power of Congress, as discussed in Part III, the *Bracker* decision has also been limited by the Supreme Court's position that the tribes have implicitly lost certain powers.

III. THE COURT'S IMPOSITION OF NEW LIMITATIONS ON TRIBAL SOVEREIGNTY

The infringement test was "derived from notions of tribal sovereignty."⁸⁷ As a result, a discussion of the contours of the infringement test is not complete without a discussion of two cases that drastically changed the limits of tribal sovereignty: *Oliphant v. Suquamish Indian Tribe* and *Montana v. United States*. These cases severely circumscribed tribal sovereignty, rendering it unrecognizable from the robust sovereignty defined by Chief Justice Marshall, where tribes retained all sovereign powers except the ability to freely alienate their land and have relations with foreign powers.⁸⁸

A. *Oliphant v. Suquamish Indian Tribe* (1978)

In *Oliphant*, the Court considered the scope of tribal criminal jurisdiction over non-Indians. The defendant in this infamous case was Mark David Oliphant, a non-Indian permanent resident of the Port Madison Reservation of the Suquamish Indian Tribe.⁸⁹ At the Suquamish Tribe's annual Chief Seattle Days celebration, Oliphant drunkenly assaulted a tribal police officer.⁹⁰ Oliphant was arrested, and the Suquamish Tribe prepared to prosecute him in tribal court.⁹¹ Oliphant applied for a writ of habeas corpus in federal district court, challenging the Tribe's criminal jurisdiction over him because he was not an Indian.⁹² Subsequently, Oliphant's application was denied by the district court, and the Ninth Circuit affirmed the district court's ruling.⁹³ Both the district court and the Ninth Circuit concluded that preserving law and order within tribal lands was an indispensable attribute of inherent tribal sovereignty.⁹⁴ Specifically, the Ninth Circuit said that "though conquered and dependent, [Indian tribes] retain those powers of autonomous states that are neither inconsistent with their status nor expressly terminated by Congress."⁹⁵ As a result, the Ninth Circuit said, "criminal jurisdiction over anyone committing an offense on the reservation is a 'sine qua non' of such powers."⁹⁶

The Supreme Court reversed the decision, while at the same time inverting the limits of tribal sovereignty as defined by Chief Justice Marshall in *Worcester*. Even

⁸⁷ Jensen, *supra* note 15, at 61.

⁸⁸ See *supra* note 36.

⁸⁹ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. at 194.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 195.

⁹⁵ *Id.* at 196 (citing *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976)).

⁹⁶ *Id.*

though Congress had passed no law restricting a tribe's criminal powers over non-Indians, the Court in *Oliphant* concluded that this power was implicitly lost. After citing to snippets of case law to support his result, Justice Rehnquist stated that the "retained powers [of Indian tribes] are not such that they are limited only by specific restrictions in treaties or congressional enactments."⁹⁷ Moreover, he stated, "Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers inconsistent with their status [as domestic dependent nations]."⁹⁸ These statements are irreconcilable with the Marshall trilogy. Nevertheless, Rehnquist concluded that the Suquamish Tribe, and all other tribes across the country, lacked criminal jurisdiction over non-members.⁹⁹

B. Montana v. United States (1981)

In *Montana*, the Court extended the basic rule of *Oliphant* to civil cases. The Court stated that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."¹⁰⁰ The Court also stated that the "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."¹⁰¹

In *Worcester* the Court said that tribes had power over both Indians and non-Indians on the reservation, unless Congress took that power away. Here, the Court said that tribes only have power over non-members if Congress explicitly grants this power to the tribes. Under the formulation in *Montana*, a state's attempt to exercise regulatory authority over non-Indians does not infringe on the right of tribal self-governance unless it falls under one of the two narrow *Montana* exceptions.¹⁰²

IV. THE CURRENT CONTOURS OF THE INFRINGEMENT TEST

Based on the analysis of the cases discussed in Parts II and III, this Part argues that since *Williams v. Lee* was decided in 1959, the Supreme Court has substantially weakened the power of the infringement test to stand as a barrier to state taxation of non-Indians in Indian Country.

First, the Court has weakened the holding of *Williams* by concluding that state tax collection requirements placed on individual tribal members and state regulation that

⁹⁷ *Id.* at 208.

⁹⁸ *Id.* (citations omitted).

⁹⁹ *Id.*

¹⁰⁰ *Montana v. United States*, 450 U.S. at 564.

¹⁰¹ *Id.* at 565. In *Montana*, the Court carved out two exceptions to this rule. First, the Court said that a tribe may regulate the "activities of non members who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements". *Id.* Second, a tribe may "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565-566.

¹⁰² *Id.* at 565.

indirectly affects tribal governments do not violate the infringement test. In *Williams*, the Court established a test that would invalidate state action that “infringed on the right of reservation Indians to make their own laws and be ruled by them.”¹⁰³ In that case, the act of the Arizona courts exercising jurisdiction over the case of an individual tribal member violated the infringement test because it “undermined the authority of the tribal courts.”¹⁰⁴ The *Williams* opinion recognized that state action aimed at individual tribal members could infringe on the authority of the tribal government. However, in finding that the infringement test did not bar the State’s collection requirement, the Court in *Moe* focused on the fact that Montana’s collection requirement fell on the “Indian proprietor” as opposed to the tribal government.¹⁰⁵ Because the requirement fell on individual tribal members, the Court concluded that the state action did not “frustrate tribal self-government.”¹⁰⁶ Yet, with this result, the Court undercut the authority of the tribal government: the tribal government did not pass the law that required tribal retailers to collect the state tax, and the laws of Montana ruled tribal sellers rather than the laws of their tribe. As a result, in *Moe* the Court takes the position that only state action directed at tribal governments, as opposed to individual tribal members, would be invalidated under the infringement test.

In addition, the Court in *Colville* upheld Washington’s imposition of a tax on tribal cigarette sales even though it had indirect effects on the tribal governments and their attempts to raise revenue. As the dissent noted, the tribes had imposed their own tax on cigarette sales in the hopes of “raising governmental revenues, establishing commercial enterprises, and escap[ing] from a century of oppression and paternalism.”¹⁰⁷ Nevertheless, the majority concluded that the infringement test did not bar Washington from imposing its tax on sales to non-Indians. The Court reasoned that the imposition of the state tax would only indirectly reduce the revenues of the tribal government by putting the tribal retailers, who would be required to collect both state and tribal taxes, at a competitive disadvantage compared to off-reservation retailers. Although economic reality would not permit the tribes to continue to impose their tax on cigarette sales, the Court concluded that this did not infringe on the right of tribal self-governance.¹⁰⁸ Thus, *Moe* and *Colville* illustrate the Court’s willingness to tolerate state regulation or taxation as long as it does not infringe directly on a tribal government.¹⁰⁹

Second, the Court has weakened the holding of *Williams* by introducing a consideration of the state’s interest into the infringement test. As introduced in *Williams*,

¹⁰³ *Williams v. Lee*, 358 U.S. at 220.

¹⁰⁴ *Id.* at 223.

¹⁰⁵ *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. at 483.

¹⁰⁶ *Id.*

¹⁰⁷ *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 169-170. (Brennan, J. concurring in part and dissenting in part).

¹⁰⁸ Justice Thomas would make an even stronger argument. It appears that he believes that the Court’s decisions in *Moe* and *Colville* have effectively invalidated the infringement test as an independent barrier to state taxation. See *Arizona Dept. of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 36 n.2. (1999). *Blaze* also appears to argue that Arizona’s tax infringes on the Tribes’ right to make their own decisions and be governed by them and that this is sufficient, by itself, to preclude application of Arizona’s tax. (“Our decisions upholding state taxes in a variety of on-reservation settings squarely foreclose that argument.”).

¹⁰⁹ *Id.*

the infringement test did not consider the state's interest in determining whether state authority was permissible; even a very strong state interest would not be permitted if state regulation infringed on tribal self-government.¹¹⁰ However, in *Colville*, the Court inserted the state's interest into the infringement analysis. The Court said that "[t]he principle of tribal self-government, grounded in notions of inherent sovereignty and congressional policies, seeks an accommodation between the interests of the Tribes and Federal Government, on the one hand, and those of the State, on the other."¹¹¹

This permitted the Court to conclude that the tribes do not have as significant an interest in protecting their ability to raise revenues for essential governmental programs because the value of the cigarettes was not being generated by on-reservation activities. If the Court were not considering the state's interest, the fact that the tribes were marketing an exemption to state taxation, thus reducing state revenue, would be irrelevant to the infringement analysis. Instead, the Court would have only considered the *tribe's* lost revenue. Although the consideration of the state's interest might be a case-specific holding because of the Court's distaste for individuals who were "flout[ing]"¹¹² their legal obligation to pay state tax, the Court infused a consideration of state interest into an analysis that originally only considered the rights of tribes as limited by Congress.

Finally, the Court has weakened the holding of *Williams* by severely circumscribing tribal sovereignty. The infringement test "derive[s] from notions of tribal sovereignty,"¹¹³ and the permissibility of state action under this test changes when the limits of tribal sovereignty are modified. The current limits of tribal sovereignty are nearly unrecognizable from those defined by Chief Justice Marshall in *Worcester*, where state action in Indian Country was presumptively invalid. First, in *Williams* and *McClanahan*, the Court adopted the view that state taxation or regulation was presumptively valid on the reservation; the Court would only strike it down if it infringed on tribal self-government or if it was preempted. Next, the Court embraced the theory of implied divestiture in *Oliphant* and *Montana* to drastically circumscribe tribal sovereignty. These cases concluded that tribes could only exert authority over non-Indians when Congress *explicitly* granted such authority. By changing the limits of tribal sovereignty so that the tribes could not exert their authority over most non-Indians, the Court ensured less state action would be struck down under the infringement test. Under the definition of tribal sovereignty after *Oliphant* and *Montana*, a state's imposition of taxes or regulation on non-Indians does not infringe on tribal self-government because the tribes have been divested of their authority over non-Indians.

¹¹⁰ See *supra* note 78.

¹¹¹ *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 156. The Court cites *McClanahan* for this definition of the principle of tribal self-government; however, to it is a stretch to find support definition in *McClanahan*. See *supra* Part II.D.

¹¹² *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 151.

¹¹³ Jensen, *supra* note 15, at 61.

V. CONCLUSION

As a result of the weakened state of the infringement test, it is misleading to continue to refer to the test as an independent barrier to state taxation of non-Indians in Indian Country. The Supreme Court's opinions have restricted the ability of the infringement test to invalidate state action to instances in which state action directly encroaches on tribal governments. Perhaps Justice Rehnquist, who was instrumental in limiting tribal sovereignty during his tenure on the Court, explained the continuing importance of the infringement test best. In his dissenting opinion in *Ramah*, Justice Rehnquist said that the infringement test precludes state law only "in those *rare* instances in which the State attempts to interfere with the *residual* sovereignty of a tribe to govern its members."¹¹⁴

In *Mashantucket Tribe of Indians v. Town of Ledyard*, the case described at the beginning of this paper, the Tribe argued that the Town's tax was preempted by statute, was preempted by the *Bracker* interest-balancing test, and impermissibly infringed on the Tribe's right of self-government.¹¹⁵ In the opinion, the court did not respond to the Tribe's infringement argument, but did strike down Ledyard's taxation, finding that it was preempted by statute and under the *Bracker* interest-balancing test.¹¹⁶ It is impossible to know whether the court in *Mashantucket* felt that it did not need to address the Tribe's infringement argument because it had already provided two bases for striking down the tax or because it felt that the infringement test did not stand as a barrier to the tax.

Regardless of why the court in *Mashantucket* did not address the Tribe's infringement argument, the Supreme Court should consider thoughtfully describing the current contours of the infringement test. The Tenth Circuit in *Muscogee* was correct when it said that the Supreme Court "repeated[ly] mention[s]" *Williams v. Lee*;¹¹⁷ however, the Court rarely engages in any analysis of the cases that would illustrate the infringement test's continuing relevance.¹¹⁸ Tribal litigants, like the Mashantucket Pequot Tribe, deserve to know whether they should continue spending precious space in their briefs on an infringement argument when challenging state taxation and regulation on their reservations.

¹¹⁴ *Ramah Navajo School Board v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 848 (1982) (Rehnquist, J., dissenting).

¹¹⁵ *Mashantucket Pequot Tribe v. Town of Ledyard*, 2012 WL 1069342 (D. Conn. Mar. 27, 2012) at 1.

¹¹⁶ *Mashantucket Pequot Tribe v. Town of Ledyard*, 2012 WL 1069342, *7, *9, *12 (D. Conn. Mar. 27, 2012).

¹¹⁷ *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1171 n.5 (10th Cir. 2012).

¹¹⁸ See, e.g., *Wagon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 114 (2005).