THE INDIAN COMMERCE CLAUSE

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I. INTRODUCTION

Few issues in Indian law raise more interest than whether and to what extent the states are able to regulate activities on Indian reservations.[1] States seek to tax sales occurring on reservations,[2] to tax the use of automobiles on and off the reservation,[3] and to enforce their hunting and fishing laws on reservations.[4] Private individuals seek to have state

1. *See generally* Barsh, *The Omen: Three Affiliated Tribes v. Moe and the Future of Tribal Self-Government*, 5 AM. INDIAN L. REV. 1 (1977); Barsh, *Issues in Federal, State, and Tribal Taxation of Reservation Wealth: A Survey and Economic Critique*, 54 WASH. L. REV. 531 (1979); Canby, *Civil Jurisdiction and the Indian Reservation*, UTAH L. REV. 206 (1973); Note, *Administrative Law: Self-Determination and the Consent Power: The Role of Government in Indian Decisions*, 5 AM. INDIAN L. REV. 195 (197); Note, *Indian Rights—What's Left?*, 41 U. PITT. L. REV. 75 (1979).

2. *See* Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976).

3. *See* United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); *cf.* Bryan v. Itasca County, 426 U.S. 373 (1976) (involving an attempt by a county government to impose a personal property tax on a mobile home on Indian reservation land). *See also* Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980), in which the state's motor vehicle, mobile home, camper, and travel trailer taxes were found invalid as applied to vehicles used on and off Indian reservations. The court noted, however, "Washington may well be free to levy a tax on the use outside the reservation of Indian-owned vehicles." *Id.* at 163.

4. Montana v. United States, 101 S. Ct. 1245 (1981) (tribes are without jurisdiction to regulate non-Indians hunting on non-Indian land on the reservation), *rev'g* United States v. Montana, 604 F.2d 1162 (9th Cir. 1979); Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Comm', 588 F.2d 75 (4th Cir. 1978) (North Carolina may not enforce state fishing regulations against Indians fishing in streams within an Indian reservation); Mescalero Apache Tribe v. New Mexico, 5 Indian L. Rep. F-160 (D.N.M. 1978), *aff'd*, 7 Indian L. Rep. 2098 (10th Cir. 1980) (the State of New Mexico has no authority to enforce any of its hunting and fishing regulations on an Indian reservation); White Mountain Apache Tribe v. Arizona, 5 Ind. L. Rep. F-167 (D. Ariz. 1978) (maintenance of overlapping jurisdiction of state and tribal law as to non-Indian on-reservation hunting and fishing does not infringe on tribal interest in self-government).

officers serve process[5] and execute judgments[6] on reservations. Arrests are made by state officers on reservations.[7] Child custody[8] and divorce actions[9] involving reservation Indians are brought in state courts. State tribunals are also sought for torts committed on reservations.[10]

The Supreme Court has decided several cases involving this issue and, therefore, some situations are clear. State courts have no jurisdiction to adjudicate controversies arising from an on-reservation transaction between an Indian and a non-Indian.[11] Nor may a state court adjudicate an adoption proceeding involving Indian parents, would-be parents, and child, all of whom reside on a reservation.[12] The state may not tax reservation sales to Indians,[13] income derived from reservation sources,[14] or property used solely on the reservation.[15] The state may tax sales made on the reservation to non-Indians if the state tax

5. *See* Great Am. Ins. Co. v. Brown, 86 N.M. 336, 524 P.2d 199 (1974) (process may be served in order for subrogated insurer to recover for automobile property damage); State Sec. v. Anderson, 84 N.M. 629, 506 P.2d 786 (1973) (on-reservation service of process is proper in a case concerning a contract entered into off the reservation). *But see* Francisco v. State, 113 Ariz. 427, 556 P.2d 1 (1976) (no on-reservation service of process). *See generally* Little Horn State Bank v. Stops, 170 Mont. 510, 555 P.2d 211 (1976), *cert. denied*, 431 U.S. 924 (1978); State v. District Court, 170 Mont. 208, 552 P.2d 1394 (1976).

6. *See* Little Horn State Bank v. Stops, 170 Mont. 510, 555 P.2d 211 (1976), *cert. denied*, 431 U.S. 924 (1978). The Montana Supreme Court held that "state action, in the form of a writ of execution to enforce a judgment rendered on a transaction arising outside the reservation" does not interfere with an Indian tribe's right to self-government. *Id.* at 514-15, 555 P.2d at 213. *See also* Francisco v. State, 113 Ariz. 427, 556 P.2d 1 (1976).

7. Davis v. O'Keefe, 283 N.W.2d 73, 74 (N.D. 1979); Fournier v. Roed, 161 N.W.2d 458 (N.D. 1968).

8. *See* Fisher v. District Court, 424 U.S. 382 (1976) (United States Supreme Court reversed the Montana Supreme Court which had held that a state court had jurisdiction over adoption proceedings in which all parties were members of the same Indian tribe and reservation); Wisconsin Potowatomies v. Houston, 393 F. Supp. 719 (W.D. Mich. 1973); *In re* Adoption of Doe, 89 N.M. 606, 555 P.2d 906 (Ct. App. 1976) (New Mexico Court of Appeals supported state adoption decree over an Indian tradition of giving custody of a child to the grandparent); Duckhead v. Anderson, 27 Wash. 2d 649, 555 P.2d 1334 (1976). *But cf.* Wakefield v. Little Light, 276 Md. 333, 347 A.2d 228 (Ct. App. 1975) (holding that jurisdiction in Indian child custody cases is determined on the basis of the child's domicile; in this case the Indian reservation court had jurisdiction). *See also* the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.* (Supp. 1980).

9. *Compare* Bad Horse v. Bad Horse, 163 Mont. 445, 517 P.2d 893, *cert. denied*, 419 U.S. 847 (1974) (state court jurisdiction exists to hear a divorce action between Indians of different tribes and reservations where failure to do so would leave one of the parties without remedy) *with* Whyte v. District Court, 140 Colo. 334, 346 P.2d 1012 (1959), *cert. denied*, 363 U.S. 829 (1960) (state court is without jurisdiction to hear a divorce action between two Indians of the same tribe and reservation).

10. *See, e.g.*, Poitra v. Demarrias, 369 F. Supp. 257 (D.N.D.), *rev'd.* 502 F.2d 23 (8th Cir. 1974); Lohnes v. Cloud, 254 N.W.2d 432 (N.D. 1977); Nelson v. DuBois, 232 N.W.2d 54 (N.D. 1975); Schantz v. White Lightning, 231 N.W.2d 812 (N.D. 1975); Vermillion v. Spotted Elk, 85 N.W.2d 432 (N.D. 1957), *overruled in* Gourneau v. Smith, 207 N.W.2d 256 (N.D. 1973).

11. Williams v. Lee, 358 U.S. 217, 223 (1959); *cf.* Kennerly v. District Court, 400 U.S. 423, 426-30 (1971). (Court held that a state court could not take jurisdiction over a reservation transaction even if the tribal council of the reservation purported to give the state courts such jurisdiction since federal law does not allow state jurisdiction over civil actions unless a majority of adult Indians enrolled within the affected area vote to accept such jurisdiction. See note 239 *infra*).

12. Fisher v. District Court, 424 U.S. 382, 387-88 (1976).

13. Moe v. Confederated Salish and Kootenai Tribes, 425 U.S 463, 480 (1976); Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 691-92 (1965).

14. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 165 (1973).

15. Bryan v. Itasca County, 426 U.S. 373, 390 (1976).

burdens the non-Indian buyer rather than the seller.[16] Furthermore, the state may require the Indian seller to collect for the state any proper tax levied against on-reservation sales to non-Indians.[17]

Recently, the Supreme Court decided three cases in which state regulation of reservation activities was challenged.[18] These decisions, like the older cases, make clear the treatment of precise fact patterns but do little to further the evolution of a unified analytical framework. The three cases reach contrary results, and the later two decisions do not cite the earlier one.[19]

Perhaps a hypothetical will bring into focus the issues at hand: Hypothesize an off-reservation tort committed by an Indian against the person or property of a non-Indian—a traffic accident will do. We will assume state court subject matter jurisdiction, an assumption which has apparently given no court trouble. Assume, however, that by the time the plaintiff had commenced a suit in state court, the defendant has returned to the reservation. Plaintiff, pursuant to state statute, has a process server enter into the reservation and serve the defendant with the summons and complaint. Defendant now appears specially in state court and argues that service was improper and hence the court lacks in personam jurisdiction. What result?

The answer, this article proposes, may be found by applying the Indian commerce clause, which is analogous to the interstate commerce clause.

An interstate commerce clause approach to Indian law questions is not an altogether outlandish notion. Article I, section 8, clause 3 of the Constitution does, after all, mention Indians: "The Congress shall have Power . . . To regulate commerce with foreign nations, and among the several states, and *with the Indian Tribes*."[20] Furthermore, it is not uncommon for the courts to cite the Indian commerce clause in

16. Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 150-51 (1980); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 481-82 (1976).

17. Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 483 (1976).

18. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Central Mach. Co. v. Arizona State Tax Comm., 448 U.S. 160 (1980); Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980).

19. This statement is somewhat of an oversimplification as in the three cases there are six tribes, two states, and ten separate taxes at issue. The cases will be discussed in much greater detail below, but generally *Colville* upheld the state regulation while *Bracker* and *Central Mach.* found it impermissible. Six justices apparently found the cases indistinguishable, as only Justices Burger, White, and Blackmun were in all three majorities. The only references to *Colville* in the two later cases are found in Justice Stewart's dissent in *Central Mach.*, 148 U.S. at 167, and in Justice Powell's opinion dissenting in *Central Mach.* and concurring in *Bracker*, 448 U.S. at 173.

20. U.S. CONST. art. I, § 8, cl. 3 (emphasis added). Few other references to Indians are found in the Constitution. *See* art. I, § 2, cl. 3; amend. XIV, § 2; *cf.* art. II, § 2, cl. 2 (presidential power to make treaties); art. III, § 2, cl. 1 (judicial power extends to cases arising under treaties); art. VI, cl. 2 (treaties are the supreme law of the land).

cases involving state interference with reservation activities.[21] Yet, it would be overly glib merely to cite the commerce clause and then to proceed to analyze the question as if it were an interstate commerce clause question.

This is especially true given the Supreme Court's recent admonition in *White Mountain Apache Tribe v. Bracker*[22] that "there is no rigid rule by which to resolve the question whether a particuar state law may be applied to an Indian reservation or to tribal members."[23] As will become clear in the discussion below, however, the analogy proposed here is by no means a "rigid rule". The interstate commerce clause requires the weighing of countervailing interests; so too does the Indian commerce clause. Nor are the Indian and interstate commerce clauses rigidly parallel; they accomplish different purposes through similar, yet different, means. The admonition of *Bracker*, as well as the warning that "[g]eneralizations on this subject have become . . . treacherous,"[24] serve not to preclude the analogy proposed here but rather to raise a certain skepticism of it.

Part II of this article is an overview of the Supreme Court's analysis of the interstate commerce clause. Part III attempts to overcome the skepticism mentioned above by explaining and justifying the analogy between Indian and interstate commerce. Part IV will return to the hypothetical posed and suggest a solution based on the proposed analysis.

II. THE INTERSTATE COMMERCE CLAUSE

South Carolina State Highway Department v. Barnwell Brothers[25] is neither the most recent Supreme Court case interpreting the commerce clause nor the most cited. It does, however, provide in dicta a four-part scheme useful in analyzing cases under the commerce clause.

Four inquiries are required under *Barnwell Brothers*: (1) Whether the state regulation discriminates against interstate commerce;[26] (2) whether the state regulation conflicts with congressional legislation;[27]

21. *See, e.g.*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980); Washington v. Confederated Tribes, 447 U.S. 134, 154-55 (1980); United States v. Antelope, 430 U.S. 641, 645 n.6 (1977); Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685, 686 (1965).

22. 448 U.S. 136 (1980).

23. *Id.* at 142.

24. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973).

25. 303 U.S. 177 (1938).

26. *Id.* at 189 ("[S]o long as the state action does not discriminate, the burden [on interstate commerce] is one which the Constitution permits").

27. *Id.* at 189-90 ("Congress . . . may determine whether the burdens imposed . . . by state regulation, otherwise permissible, are too great, and may, by legislation, . . . curtail to some extent the state's regulatory power").

(3) whether the state acted "within its province";[28] and (4) whether the regulation is appropriately related to the desired ends.[29]

It is not the purpose of this article to explore the interstate commerce clause in depth; that has been done elsewhere.[30] But if the Court's view of the interstate commerce clause does indeed shed valuable light on cases involving state-tribal conflicts, then it must be demonstrated that language from *Barnwell Brothers*, a relatively obscure 1938 case, embodies that view. To so demonstrate, each of the four elements of the *Barnwell Brothers* analysis will be examined.

A. *Discrimination*

As befits dicta, the Supreme Court's statement of the antidiscrimination component of the commerce clause is somewhat overdrawn. Not every burden on interstate commerce improperly discriminates. In *Parker v. Brown*,[31] for example, California legislated a marketing program for the 1940 raisin crop which restricted competition and maintained prices.[32] Ninety-five percent of the raisins affected were destined for interstate marketing.[33] Despite this heavy burden on interstate commerce,[34] the program was upheld, and in so doing the Court discussed discrimination:

[T]here are many subjects and transactions of local concern not

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28. *Id.* at 190 ("In the absence of such legislation, the judicial function, under the commerce clause . . . stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province").

29. *Id.* at 189-90 ("whether the means of regulation chosen are reasonably adapted to the end sought"). The usefulness of the *Barnwell Bros.* formulation lies in its comprehensiveness, not its uniqueness. Language from many other Supreme Court opinions restates part or all of these inquiries. *E.g.*, Hughes v. Oklahoma, 441 U.S. 322, 329 (1979) ("The Commerce Clause has accordingly been interpreted by the Court not only as an authorization for Congressional action, but, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation"); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden on such commerce is clearly excessive in relation to the tentative local benefits").

30. *See* Blumstein, *Some Intersections of the Negative Commerce Clause and the New Federalism: The Case of Discriminatory State Income Tax Treatment of Out-of-State Tax Exempt Bonds*, 31 VAND. L. REV. 473 (1978); Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 YALE L.J. 219 (1957); Maltz, *The Burger Court, the Regulation of Interstate Transportation and the Concept of Local Concern: The Jurisprudence of Categories*, 46 TENN. L. REV. 406 (1979); Maltz, *The Burger Court, the Commerce Clause and the Problems of Differential Treatment*, 54 IND. L.J. 165 (1979); Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125 (1979). *See generally* F. FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WHITE (1937); J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK OF CONSTITUTIONAL LAW, 243-67 (1978); (hereinafter cited as J. NOWAK); L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 319-413 (1978).

31. 317 U.S. 341 (1943).

32. *Id.* at 346.

33. *Id.* at 345.

34. *Id.* at 359. The Court stated, "Since 95 per cent of the crop is marketed in interstate commerce, the program may be taken to have a substantial effect on commerce, in placing restrictions on the sales and marketing of a product to buyers who *eventually* sell and ship it in interstate commerce." *Id.* (emphasis added).

> themselves interstate commerce or a part of its operations which are within the regulatory and taxing power of the states, so long as state action serves local ends and does not discriminate against the commerce, even though the exercise of those powers may materially affect it.[35]

Likewise, in *Breard v. Alexandria*,[36] a local ordinance that placed a heavy burden on interstate commerce was found not to be unduly discriminatory. There, the city of Alexandria, Louisiana, ordained that door-to-door visits by "solicitors, peddlers, hawkers, itinerant merchants or transient vendors" were a nuisance and punishable as a misdemeanor.[37] The Court acknowledged that transient sellers are at a disadvantage vis-a-vis local sellers, who gain marketing advantage from the location of their street investments in their stock,[38] but held that a "regulation that leaves out-of-state sellers on the same basis as local sellers cannot be invalid for that reason."[39]

Some state regulations have been found to be discriminatory.[40] A leading example is *Dean Milk Co. v. Madison*[41] where a city ordinance effectively limited milk sales to local processors. The Court acknowledged that the subject of the legislation was a matter of local concern,[42] but concluded:

> In thus executing an economic barrier protecting a major local industry against competition from without the state, Madison plainly discriminates against interstate commerce. [Footnote omitted] This it

35. 317 U.S. at 360. *See* text & notes 91-111 *infra* for a discussion of the "within its province" element described in *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 189-90; see text & notes 112-132 for a discussion of the minimum rational basis element of *Barnwell Bros.*, 303 U.S. at 189-90.

36. 341 U.S. 622 (1951).

37. *Id.* at 624.

38. *Id.* at 639.

39. *Id.* at 638. Justices Vinson and Douglas dissented. "Lack of discrimination on its face has not heretofore been regarded as sufficient to sustain an ordinance without inquiry into its practical effects upon interstate commerce." *Id.* at 647, *citing* Dean Milk Co. v. Madison, 340 U.S. 349 (1951).

40. *See* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) (milk purchased at prices below New York's minimum could not be sold in New York); Minnesota v. Barber, 136 U.S. 313 (1890) (Minnesota inspection prior to slaughter required for Minnesota meat sale); Guy v. Baltimore, 100 U.S. 434 (1880) (higher wharfage rates for vessels laden with non-Maryland goods); Hannibal & St. Joseph R.R. Co. v. Husen, 95 U.S. 465 (1877) (cattle from Texas, Mexico or Indian lands may be imported into Missouri only during specified months). *But cf.* Mintz v. Baldwin, 289 U.S. 346 (1933) (New York law requiring out-of-state cattle to be inspected and certified free of Bang's disease upheld, with no inquiry as to whether there was a similar inspection requirement imposed on in-state cattle). More recent, if somewhat less obvious, discrimination cases include Boston Stock Exch. v. Tax Comm'n, 429 U.S. 318 (1977) (nonresidents of New York obtained a 50% tax reduction on New York sales of stock), and Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366 (1976) (importation of milk permitted only from states permitting the importation of Mississippi milk). *See also* Philadelphia v. New Jersey, 437 U.S. 617 (1978); Exxon Corp. v. Maryland, 437 U.S. 117 (1978); Hunt v. Washington State Apple Comm'n, 432 U.S. 333 (1977); Maltz, *supra* note 30 (criticism of inconsistent results).

41. 340 U.S. 349 (1951).

42. *Id.* at 353. *See also* text & notes 91-111 *infra*.

> cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable non-discriminatory alternatives, adequate to conserve legitimate local interests, are available.[43]

Two points must be made. First, in the omitted footnote the Court stated, "It is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interestate commerce."[44] Thus, discrimination against interstate commerce need be neither express nor theoretically precise in order to be improper.[45] Second, discrimination may be allowed if reasonable nondiscriminatory alternatives do not exist. This second point will be discussed in greater detail below,[46] but the *Dean Milk* Court found "reasonable and adequate alternatives . . . available."[47]

The justification for a constitutional prohibition of discriminatory regulation is not difficult to find: "The very object of investing [the Commerce] power in the General Government was to insure [the required] uniformity against discriminating state legislation."[48] Furthermore, discriminatory regulation is considered especially suspicious because out-of-state merchants do not have access to the in-state political processes which might check burdensome regulation. As the Court observed in *Barnwell Brothers*, "The fact that [the highway regulations] affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse."[49]

The existence of an antidiscriminatory component of the commerce clause is thus not nearly so debatable as its application. Surely, the Court in *Parker*, *Breard*, and *Dean Milk* inquired whether interstate commerce had been unduly burdened. Not only is this inquiry difficult to answer, but, as we shall see, the burden on interstate commerce is one aspect of the balancing required "within its province" test,

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43. 340 U.S. at 354 (footnote omitted).

44. *Id.* at 354 n.4.

45. It could be argued that the discrimination in *Dean Milk* was precise, *i.e.*, precisely drafted by a locality to preserve a local market. The discrimination was not precisely against interstate commerce, however, since it affected milk from both Sheboygan, Wisconsin and Cheboygan, Michigan. *Id.* at 351 n.2. The point the Court makes is that characterizing the ordinance as clumsily discriminatory is not to say that it is not discriminatory.

46. *See* text & notes 112-134 *infra*.

47. 340 U.S. at 354. Justices Black, Douglas, and Minton dissented on this point, finding such availability immaterial, *id.* at 358, and the ordinance itself nondiscriminatory, *id.* at 357.

48. Welton v. Missouri, 91 U.S. 225, 280 (1876). The Court also commented on this in *Barnwell Bros.*: "The Commerce Clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method." 303 U.S. at 185. *See also* Brown, *supra* note 30, at 223-24.

49. 303 U.S. at 198. *See also* J. NOWAK, *supra* note 30, at 249; L. TRIBE, *supra* note 30, at 327.

the third component of *Barnwell Brothers*.[50] The cases that employ the discrimination rubric should be viewed as efforts to uncover subtle as opposed to rare express discrimination. Such subtle discrimination often takes the form of unfair burdens on interstate commerce, and hence the issue of discrimination and burden become intertwined. Intertwined, however, is not to say identical, and the Court can be expected to continue to use the language of discrimination in striking down subtle state tariffs on interstate goods.[51]

B. *The Supremacy Clause and Preemption*

The second[52] of the four *Barnwell Brothers* requirements, that the

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50. See text & notes 92-111, *infra*.

51. *See* Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977), an example of subtle discrimination found unconstitutional. New York had earlier imposed a tax on securities transactions that was assessed if any of five events occurred in the state. *Id.* at 320-22; *see* N.Y. TAX LAW § 270 (McKinney 1966). It appears that this tax so discouraged New York sales where the sale was the only New York event that the New York Stock Exchange threatened to relocate out of state. 429 U.S. at 323-24, 328. In response to this threat, New York enacted § 270-a of its Tax Code which effected a fifty percent tax reduction when a nonresident participated in a New York sale of stock. N.Y. TAX LAW § 270-a (McKinney 1966). Several non-New York stock exchanges mounted a commerce clause challenge to § 270-a. Even though on the surface § 270-a appears to encourage interstate commerce, the Supreme Court found the "nonresident reduction" unconstitutional. 429 U.S. at 318. The securities transfer tax without the nonresident reduction was neutral with respect to interstate commerce since it applied to residents and nonresidents alike. *Id.* at 330. This neutrality, the Court found, was upset by § 270-a. *Id.* That section put the nonresident purchaser of stock to be delivered in New York to an unconstitutional choice: He or she might buy on a New York exchange and receive the nonresident reduction or buy on an out-of-state exchange and pay the full measure of the New York tax. The Court concluded:

> The obvious effect of the tax is to extend financial advantage to sales on the New York exchanges at the expense of the regional exchanges. Rather than 'compensating' New York for a supposed competitive disadvantage resulting from [the earlier tax], the amendment forecloses tax-neutral decisions and creates both an advantage for the exchanges in New York and a discriminatory burden on commerce to its sister States.

Id. at 331.

The only real disagreement one might have with Mr. Justice White and the unanimous Court is with the word "obvious." The discrimination in *Boston Stock Exchange* is actually rather subtle, but, as the Court found, it is nonetheless discriminatory and forbidden by the commerce clause.

52. There are those who think that the commerce clause inquiry should not proceed beyond the discrimination question. In 1948, Justice Rutledge wrote:

> It is enough for me to sustain the tax . . . that it is one clearly within the state's power . . .; it is non-discriminatory, that is, places no greater burden upon interstate commerce than the state places upon competing intrastate commerce of like character; is duly apportioned . . . and cannot be repeated by any other state.

Memphis Natural Gas Co. v. Stone, 335 U.S 80, 96-97 (1948) (Rutledge, J., concurring).

Mr. Justice Douglas would add the "supremacy" inquiry, discussed at text & notes 53-89, *infra*. "My view has been that courts should intervene only where the state legislation discriminated against interstate commerce or was out of harmony with laws which Congress had enacted." Southern Pac. Co. v. Arizona, 325 U.S. 761, 795 (1945) (Douglas, J., dissenting). *See also* Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 177 (Rehnquist, J., dissenting), discussed in detail at notes 284-301, *infra*.

Professor Brown comments:

> [T]his formulation is inadequate to perceive and to appraise the interests involved in the impact and operation of some of our more common taxes, whatever their intrinsic merit and inevitable appeal, equality and egalitarianism are not the passwords to solution of the problems of maintaining an open economy in a federal system.

Brown, *supra* note 30, at 225.

state regulation not conflict with congressional legislation, requires a more complete discussion, both because it is an area of more difficulty and more comment[53] and because it is an area of considerable interest in Indian law. The supremacy clause of the United States Constitution reads, "This Constitution, and the Law of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[54]

When congressional and state legislation conflict, the federal rule, if constitutional, prevails.[55] But federal and state regulations are rarely exactly contradictory,[56] and it is acknowledged by the Court[57] and by several writers[58] that application of the supremacy clause is difficult in the absence of such contradiction. Several analytical models have been suggested, but the present discussion provides a poor opportunity to criticize these models or to propose a new and better model. For our purposes, it will suffice to discover some similarities that run through the cases and writings so that preemption in general may be understood and Indian preemption may be contrasted.[59]

As a first generalization, it seems clear that the Court stands ready to use the supremacy clause to invalidate state regulation even in the absence of expressly inconsistent federal regulation. A subtle conflict between state and federal requirements will often suffice to spring the supremacy clause trap.[60] Although the language of the Court has varied, it appears that in practice the Court will look beyond the language of the state and federal rules to find occasion for preemption.[61]

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53. *See* J. NOWAK, *supra* note 30, at 267-70; L. TRIBE, *supra* note 30, at 376-404; Freeman, *Dynamic Federalism and the Concept of Preemption*, 21 DE PAUL L. REV. 630 (1972); Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975); Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959); Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363 (1978).

54. U.S. CONST. art. VI, cl. 2.

55. *Id.*

56. *But see* Note, *Preemption Analysis*, *supra* note 53, at 364, 366-69, and cases cited therein.

57. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). "In every such case, the act of Congress . . . is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it." *Id.* at 92-93. *See also* Jones v. Rath Packing Co., 430 U.S. 519 (1977); Free v. Bland, 369 U.S. 663 (1962); Hines v. Davidowitz, 312 U.S. 52 (1941).

58. *See* J. NOWAK, *supra* note 30, at 367-70; L. TRIBE, *supra* note 30, at 376-404.

59. *See*, Note, *Shifting Perspectives*, *supra* note 53, at 624.

60. *See, e.g.*, Franklin Nat'l Bank v. New York, 347 U.S. 373, 378-79 (1954) (state restrictions on advertising invalid as inconsistent with federal law governing operation of national banks); Hill v. Florida, 325 U.S. 538, 543-44 (1945) (state union legislation law invalidated as conflicting with National Labor Relations Act).

61. Hines v. Davidowitz, 312 U.S. 52 (1941). "This Court, in considering the validity of state laws in light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violations; curtailment; and interference." *Id.* at 67. The Court used the word "obstacle" in the *Hines* case. *Id. See also* Hirsch, *supra* note 53, at 526; Note, *Shifting Perspectives*, *supra* note 53, at 626.

In fact, the Court has on occasion stricken state regulation in the clear absence of conflicting federal regulation; herein lies the doctrine of federal "occupation of the field." As Justice Douglas stated in *Rice v. Santa Fe Elevator Corp.*:[62]

> The scheme of federal regulation may be so pervasive as to make reasonable the inference the Congress left no room for the States to supplement it . . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject . . . . Likewise, the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose. . . . Or the state policy may produce a result inconsistent with the objective of the federal statute . . . . It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the policy power of the states undisturbed except as the state and federal regulation collide.[63]

This "perplexing question" is made no easier by the Court's shifting standard for finding occupation of the field.[64] One author identifies two eras of judicial reaction to the occupation question and one that is impending.[65] Another author attempts to reconcile the conflicting opinions by focusing on the protection afforded by the state law in question.[66] Under either approach, it appears that occupation of the field is still a judicial option that may be used to strike down state regulation in the proper instance even in the absence of express congressional intent to do so.[67]

A second generalization from the preemption cases is that the Court is becoming increasingly hesitant, at least in the interstate commerce field, to strike down state laws under the supremacy clause. In theory, the supremacy clause remains an obstacle to state regulation even when Congress has not clearly spoken, but in practice the Court is

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62. 331 U.S. 218 (1947).

63. *Id.* at 230-31 (citations omitted). The Court cites *Barnwell Bros.* as an example of its "perplexing question."

64. Note, *Shifting Perspectives*, *supra* note 53, at 625-27, 633-36, 642-46. "The traditional technique of deriving law by reconciling decisions is not entirely appropriate in this context. . . . Beyond the aspects unique to the individual case, internal consistency among the preemption cases as a whole is prevented by the co-existence of fundamentally different approaches to the doctrine." *Id.* at 642 n.10; *accord*, J. NOWAK, *supra* note 30, at 268; L. TRIBE, *supra* note 30, at 377. *Cf.* Deutsch, *Precedent and Adjudication*, 83 YALE L.J. 1153 (1974) (Professor Deutsch uses a preemption case, Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963), to make his jurisprudential point).

65. Note, *Shifting Perspectives*, *supra* note 53, at 625-40; *accord*, J. NOWAK, *supra* note 30, at 268-310.

66. Note, *Preemption Analysis*, *supra* note 53, at 625-40.

67. *See* Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 639-40 (1973) (federal regulation of aviation preempts local flight curfews).

moving in the direction of increased deference to state regulation.[68]

Consider, for example, *Florida Lime and Avocado Growers v. Paul*.[69] In that case, suit was brought challenging a California statute[70] that measured the maturity of avocados by oil content and prohibited the sale or transportation in California of fruit containing less than 8% oil. Challenge was made under the supremacy clause on the ground that the California statute must give way to regulations regarding avocado maturity promulgated pursuant to the Federal Agricultural Adjustment Act.[71] After the three judge federal district court held that the federal regulation presented no impediment to the enforcement of the California statute, both parties appealed.[72]

The Supreme Court held in a 5-4 decision that the California statute survived the supremacy clause attack.[73] "[T]here is neither such actual conflict between the two schemes of regulation that both cannot stand in the same area, nor evidence of a congressional design to preempt the field."[74] In so holding, the Court outlined the careful scrutiny that is appropriate when a supremacy clause challenge is made to a state regulation:

> The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.[75]

The dissent of Mr. Justice White seems to agree, at least broadly, with the major premise made here—that the Court should defer to state regulation.[76] "We would hesitate to strike down the California statute

68. This point is convincingly made in Note, *Shifting Perspectives*, *supra* note 53, at 639-54. *Cf.*, J. NOWAK, *supra* note 30 at 270, (citing Goldstein v. California, 412 U.S. 546 (1973)) ("In recent decisions the Supreme Court has refused to presume or infer intent. The traditional approach to preemption, criticized as allowing judicial second guessing of Congressional purposes, has, in effect, been rejected."); New York State Dept. of Social Serv. v. Dublino, 413 U.S. 405 (1973) (same). *See also* L. TRIBE, *supra* note 30, at 384 ("federal occupation of the field will not be lightly inferred . . . ," referring to Florida Lime and Avocado Growers, 373 U.S. 132 (1963), discussed at text & notes 69-81 *infra*).

69. 373 U.S. 132 (1963).

70. CAL. AGRIC. CODE § 792 (Deering 1950) (renumbered CAL. AGRIC. CODE §§ 44951-44953 (West 1967); repealed, 1974).

71. 373 U.S. at 134, n.2; *see* 7 U.S.C. § 608c (1976). Challenges were also made based on the commerce clause and equal protection clause. The former will be discussed at text and notes 94-111, *infra*.

72. 373 U.S. at 136. The state officials appealed on jurisdictional grounds and lost. *Id.*

73. *Id.* at 141.

74. *Id.* The district court, however, was reversed on the grounds that the record was insufficient to determine whether the statute was prohibited by the commerce clause itself. *Id.* at 136-37. This issue raises questions which will be discussed at text & notes 91-111 *infra*.

75. 373 U.S. at 412, *citing* Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960). The Court found that neither of the two alternative tests were met. 373 U.S. at 143-52.

76. 373 U.S. at 159-78 (White, J., dissenting). Mr. Justice White was joined by Justices Black, Douglas, and Clark.

if the state regulation touched a phase of the subject matter not reached by the federal law and a claim was nevertheless made that such complementary state regulation is preempted, compare *Campbell v. Hussey* . . . with *Savage v. Jones*."[77]

The dissent, however, found "central and unavoidable"[78] the fact that an average of 6.4% of Florida avocados are mature under the federal rules but immature and, therefore, unmarketable under the California test, a test the Secretary of Agriculture found unsatisfactory.[79] Hence, the dissent would hold that "the state law has erected a substantial barrier to the accomplishment of congressional objectives."[80]

The lesson of *Florida Avocado*[81] is thus our second generalization: that the Court in its application of the preemption doctrine is in a period of deference to state regulatory schemes.

The third generalization is that the object of the regulation bears a substantial impact on the Court's reaction to potential supremacy clause issues. This can be seen by reference to some of the cases already cited. For example, the *Florida Avocado* Court, perhaps resorting to rhetoric rather than reason, stated, "The maturity of avocados seems to be an inherently unlikely candidate for exclusive federal regulation."[82] In balancing "exclusive federal regulation" against permissible state regulation, the Court found that "the maturing of avocados is a subject matter of the kind this Court has traditionally regarded as properly within the scope of State superintendence. Specifically, the supervision of the readying of foodstuffs for market has always been deemed a matter of peculiarly local concern."[83]

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77. *Id.* at 166 (White, J., dissenting). In *Campbell*, the Court found that the Federal Tobacco Inspection Act, 49 Stat. 731 (1935) (current version at 7 U.S.C. § 511 (1976)), preempted a Georgia tobacco inspection act. 368 U.S. 297, 302 (1961). In *Savage*, the Court held that the Federal Food, Drug, and Cosmetic Act, 34 Stat. 768 (1906) (codified in scattered sections of 21 U.S.C. (1972)), did not preempt an Indiana agricultural inspection act. 225 U.S. 501, 538 (1912). One author explains the different results historically. Note, *Shifting Perspectives*, *supra* note 53, at 627 n.27 (*Savage*); *Id.* at 639 n.107 (*Campbell*). *See also* 373 U.S. at 177 n.19.

78. 373 U.S. at 166 (White, J., dissenting). The majority, which does not mention the 6.4% figure, states that "the evidence in the record concerning the actual effect of the California maturity test upon Florida avocados is sketchy at best." *Id.* at 136 n.3.

79. *Id.* at 162.

80. *Id.* at 166.

81. Note, *Preemption Analysis*, *supra* note 53, refers to this case as *Florida Lime*, perhaps the technically correct short form, but confusing, not to mention less palatable. Holy guacamole!

82. 373 U.S. at 142. In dissent, Mr. Justice White stated:

> The maturity regulations are not peripheral aspects of the federal scheme. . . . On the contrary, in the Department of Agriculture order which preceeded issuance of the avocado regulations, it was found that the marketing of immature avocados was one of the principal problems, if not the principal problem, faced by the industry and that these regulations should be adopted to solve this problem which was demoralizing the industry.

Id. at 173-74 (White, J., dissenting).

83. *Id.* at 144. *See* Note, *Preemption Analysis*, *supra* note 53 (the object of the state regulation bears a substantial relationship to the preemption decision).

Hence, in the absence of express federal-state legislative contradiction, preemption analysis requires a determination of whether the subject regulated is one that admits more easily of state or federal regulation. Regulations dealing with health, safety, or general welfare are the most common examples of the former.[84] "Regulations demanding exclusive federal regulation in order to achieve uniformity vital to National interests"[85] are the most obvious examples of the latter.[86]

A fourth and final generalization which appears to unify the supremacy clause cases is that a preemption ground is to be preferred to other constitutional bases for invalidating state regulation.[87] This preference is not hard to understand. Preemption analysis requires careful statutory construction to determine if contradictory regulation exists, if Congress intended to occupy the field, if the subject matter requires national uniformity and if the regulation concerns areas of vital state concern.[88] An erring court may be set straight regarding any of these inquiries by an Act of Congress. Because Congress may overrule a court's supremacy clause decision, those decisions are not woven into the constitutional fabric, and the costs of incorrect decision are lower than in other constitutional areas.[89]

C. *"Within Its Province" (herein of the Dormant Commerce Clause)*

The language used in *Barnwell Brothers* implies that certain state actions are "without the state's province" and thus per se unconstitutional regardless of the existence or nonexistence of discrimination or conflicting federal legislation. This is the so-called "dormant commerce clause"[90] or, more grandly, the negative implications of the com-

84. *See, e.g.*, Uphaus v. Wyman, 360 U.S. 72, 80-81 (1959) (state prosecution of sedition against the state upheld); Plumley v. Massachusetts, 155 U.S. 461, 478-79 (1894) (prohibition of the importation of artificially colored margarine upheld); *cf.* Pennsylvania v. Nelson, 350 U.S. 497, 505-10 (1956) (state prosecution of sedition against the United States was found preempted by federal law); Mauer v. Hamilton, 309 U.S. 598, 617 (1940) (state law preventing "car over cab" trailers upheld).

85. Florida Lime and Avocado Growers v. Paul, 373 U.S. 132, 144 (1963).

86. *See, e.g.*, Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) (state regulation of oil tanker safety features invalidated); Minnesota v. Northern States Power Co., 405 U.S. 1035 (1972), *aff'g* 477 F.2d 1143 (8th Cir. 1971) (state regulation of nuclear power plant emissions invalidated). Factors other than the need for national uniformity may account for the finding of preemption in these cases. *See* Note, *Preemption Analysis*, *supra* note 53, at 380-81.

87. *See* Note, *Preemption as a Preferential Ground:*, 12 STAN. L. REV. 208 (1959) and cases cited therein.

88. See notes 52-86, *supra*.

89. As will be seen at text & notes 92-111 *infra*, the commerce clause itself has a "dormant" force which invalidates state law. Should the Court decide that a certain state regulation falls not as inconsisent with federal statute but as "without the state's province" under the commerce clause itself, Congress could overrule the Court by enacting the challenged regulation as national law. Thus, it is not entirely accurate to say that Congress may only correct an erring Court deciding a supremacy clause question. See, however, note 91 *infra*. *See also* J. NOWAK, *supra* note 30, at 136-37, 141, 151, 249-50.

90. See G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW, 256-343 (1980).

merce clause. The constitutional directive placing certain actions affecting commerce within the province of Congress places certain actions outside the province of the states.[91]

Although interesting, the history of the dormant commerce clause is sadly beyond the scope of this article.[92] In essence, inquiry in this area has evolved into a balance between a state's legitimate police power over matters of health, safety, and similar local concerns on the one hand, and, on the other, a perceived constitutional policy to keep interstate commerce free from unreasonable burdens and, in some instances, the need for national uniformity. The existence of such a balancing test is relatively easy to document;[93] but its operation is more difficult to describe. As with other balancing tests, the Court's inspection of the factual record greatly influences the direction in which the scale tips. Beyond this case-by-case analysis, however, and beyond the labels of historical commerce clause adjudication,[94] the cases indicate some theorems for this branch of commerce clause analysis.

In the first place, it appears that a state policy giving an economic advantage to in-state residents carries little weight under the "within its province" test. In *Baldwin v. G.A.F. Seelig, Inc.*,[95] for example, the Court considered an attempt by New York to protect its dairy farmers by placing a minimum price on the sale of milk in the state. In furtherance of this plan, the state forbade the in-state sale of milk purchased out-of-state at a price below the New York minimum.[96] The Court struck down this aspect of the plan:

> If New York in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of

91. This is, of course, another application of the supremacy clause, with the Constitution itself, rather than congressional legislation, being supreme.

92. For a history of the dormant commerce clause, *see generally* F. FRANKFURTER, *supra* note 30; J. NOWAK, *supra* note 30, at 243-52; F. RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE (1937); L.TRIBE, *supra* note 30, at 321-28; Brown, *The Open Economy, Justice Frankfurter and the Position of the Judiciary*, 67 YALE L.J. 219 (1957); Tushnet, *Rethinking the Dormant Commerce Clause*, WIS. L. REV. 125 (1979); *see also* Madison, *The Federalist Nos.* 41-42.

93. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) ("Occasionally the Court has candidly undertaken a balancing approach in resolving these issues.") (citing Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945)). The *Pike* Court further states that "more frequently [the court] has spoken in terms of 'direct' and 'indirect' effects and burdens." 397 U.S. at 142, (citing Shafer v. Farmers Grain Co., 268 U.S. 189 (1925)). *See also* L. TRIBE, *supra* note 30, at 326 ("the regulatory burden imposed on interstate commerce, and any discrimination against it, are outweighed by the state interest in enforcing the regulation," (citing Southern Pac. Co. v. Arizona, 325 U.S. at 770-71); Cities Service Co. v. Peerless Oil and Gas Co., 340 U.S. 179, 186-87 (1950)).

Interestingly enough, *Barnwell Bros.* appears to reject a judicial balancing test, characterizing balancing as a legislative function. 303 U.S. at 189-90. *See also* Maltz, *supra* note 30, at 409. It is clear, however, that a balancing test has evolved and that the *Barnwell Bros.* Court's restriction of a state's activity to "its province" provides a precursor to the balance and a legitimate rubric for it.

94. Most presentations of the dormant commerce clause cases are organized around subject matter areas. *See* G. GUNTHER, *supra* note 90, at 297-343.

95. 294 U.S. 511 (1935).

96. *Id.* at 519.

> Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.[97]

It is helpful to distinguish the two aspects of the New York scheme at issue in *Baldwin*: (1) the price floor on milk sold in the state; and (2) the prohibition of importation of cheap out-of-state milk. The former was constitutionally permissible[98] while the latter, with its tariff-like effect, was stricken.[99] The distinction appears to be between the legitimate nondiscriminatory aiding of the local economy and the impermissible economic measure that captures for one state an otherwise interstate market. This distinction finds support in other cases as well.[100]

A second theorem of "within its province" jurisprudence, actually a corollary to the earlier theorem, is that state regulation protecting noneconomic social interests and personal rights will be presumed valid under the commerce clause. In *Breard v. City of Alexandria*,[101] for example, the city had enacted a so-called Green River[102] ordinance restricting the activity of door-to-door salesmen. The Court upheld the statute against, *inter alia*,[103] a dormant commerce clause attack, saying:

> To the city falls the duty of protecting its citizens against the practices deemed subversive of privacy and of quiet. A householder depends for protection on his city board rather than churlishly guarding his entrances with orders forbidding the entrance of solicitors. . . . When there is a reasonable basis for legislation to protect the social, as distinguished from the economic, welfare of a community, it is not for this court because of the Commerce Clause, to deny

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97. *Id.* at 522. The Court went on to reject the argument that "the end to be served by the Milk Control Act is something more than the economic welfare of the farmers." *Id.* at 522-24.

It is difficult to quote from *Baldwin* without reciting Justice Cardozo's characterization of the Milk Control Act: "The importer in [the Act's] view may keep his milk or drink it, but sell it he may not." *Id.* at 521.

98. This issue was not directly addressed in *Baldwin*, *but see* Milk Control Bd. v. Eisenberg Farm Prods., 306 U.S. 346 (1939) (milk dealers were required to pay a minimum price to producers, even for milk destined for interstate shipment).

99. 294 U.S. at 521, 526.

100. *Compare* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) *and* Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964) *and* H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949) *with* Milk Control Bd. v. Eisenberg Farm Prods., 306 U.S. 346 (1939) *and* Parker v. Brown, 317 U.S. 341 (1943) *and* Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976). *But cf.* Henneford v. Silas Mason, Inc., 300 U.S. 577 (1937) (Washington's use tax is valid as applied to chattels purchased out-of-state) which appears inconsistent with *Baldwin*. *Henneford* indicates that a neat rephrasing of the issue in terms other than economic interest may aid the state in winning the balancing test. *See also* L. TRIBE, *supra* note 30, at 359 n.28 and cases cited therein.

101. 341 U.S. 622 (1951).

102. *See* Town of Green River v. Fuller Brush Co., 65 F.2d 112 (10th Cir. 1933); Town of Green River v. Burger, 50 Wyo. 52, 58 P.2d 456 (1936), *appeal dismissed*, 300 U.S. 638 (1937).

103. First amendment (Breard was a magazine salesman) and due process arguments were also made and rejected. 341 U.S. at 629-33, 641-42.

the exercise locally of the sovereign power of Louisiana.[104]

Mr. Justice Black made the same point in dissent in *Southern Pacific Co. v. Arizona*.[105] In that case, the state law limited the length of railroad trains, which Southern Pacific challenged under the dormant commerce clause.[106] The Court found the regulation not rationally related to the permissible state goal of the safe operation of trains and hence invalid.[107] Black disagreed on the rationality of this relationship[108] and then commented:

> When we finally get down to the gist of what the Court decides, it is this: Even though more railroad employees will be injured by "slack action" movements on long trains than on short trains, there must be no regulation of this danger in the absence of "uniform regulations." . . . [All of the reasons to require uniformity] boil down to the same thing, and that is that running shorter trains would increase the cost of railroad operations.[109]

Black did not approve of economic concerns having weight sufficient to overcome safety concerns; the majority did not disagree. In the first place, the Court found the relation between train length and safety to be "at most slight and dubious."[110] Secondly, the need for uniformity was of enormous significance for the Court.[111] In light of these two factors, *Southern Pacific* cannot be said to reject the proposition that state regulation protecting social interests will be presumed valid.

Thus, the third *Barnwell Bros.* inquiry requires the Court to balance in order to protect the policy of free interstate commerce embodied in the commerce clause. The states will be permitted, in the absence of conflicting federal legislation, to burden interstate commerce to some extent to protect legitimate local interests. But a burden that is too great, that conflicts with paramount national interests, or that seeks to capture an economic market will be invalid under the commerce clause operating on its own force.

D. *The Means-Ends Relationship*

The final inquiry is one of the rationality of the state's choice of

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104. *Id.* at 640, *citing* Kovacs v. Cooper, 336 U.S. 77 (1949); United States v. Caroline Prods. Co., 304 U.S. 144 (1938).

105. 325 U.S. 761 (1945).

106. *Id.* at 763, 769.

107. *Id.* at 781. See text & notes 111-132 *infra* for a discussion of minimum rational basis. The Court in *Southern Pacific* also held that the state had acted without its province since train length was a subject that required national uniformity. 325 U.S. at 771.

108. 325 U.S. at 784-86 (Black, J., dissenting).

109. *Id.* at 793.

110. *Id.* at 779.

111. *Id.* at 771. "[I]f the length of trains is to be regulated at all, national uniformity in the regulation adopted, such as only Congress can prescribe, is practically indispensible to the operation of an efficient and economical national railway system." *Id.*

means. The *Barnwell Brothers* formulation of this requirement was that the "means of regulation chosen are reasonably adapted to the end sought."[112] As in other areas of the law where the Court employs the "rational basis" test,[113] there are few instances where that test cannot be met. For example, the Court in *Milk Control Board v. Eisenburg Farm Products*[114] found the Pennsylvania price regulations to be "appropriate means to the ends in view."[115] In *Barnwell Brothers* itself, after acknowledging that "reasonableness, wisdom and propriety are not for the determination of Courts, but for the legislative body,"[116] the Court inspected the record and found "adequate support for the legislative judgment."[117]

The minimal scrutiny given legislative reasoning under the rational basis test does not invariably result in deference to the state law, however. The Court's inability to find the appropriate relation between means and ends in *Southern Pacific Co. v. Arizona* has already been noted.[118] In *Bibb v. Navajo Freight Lines, Inc.*,[119] the Court dealt with the validity of an Illinois regulation requiring the use of a certain mud flap on trucks operated in that state. In holding the regulation invalid under the commerce clause, the Court considered the relation between the legislative means and the policy end.[120]

The *Bibb* Court, however, blurred the distinction between the third and fourth *Barnwell Bros.* inquiries, i.e., between the "within its province" test and the means-ends relationship. Quoting *Southern Pacific*, the Court set this standard:

> Unless we can conclude on the whole record that "the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it" . . . we must uphold the statute.[121]

This is grafting "effectiveness" onto the "within its province" balance,

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112. 303 U.S. at 190.

113. *See* J. NOWAK, *supra* note 30, at 517-686; L. TRIBE, *supra* note 30, at 991-1135; Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

114. 306 U.S. 346 (1939).

115. *Id.* at 352. *See also* Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829) ("Measures *calculated* to produce [the legitimate state objectives of protecting health and maintaining property values], provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states." *Id.* at 251 (emphasis added)).

116. 303 U.S. at 191.

117. *Id.* at 192. The court embarked on the inspection of the record in order to determine if "facts judicially known or proved preclude" the possibility that the legislative judgment is supported by facts known to the legislature. *Id.* at 179.

118. *See* text and notes 106-111 *supra*.

119. 359 U.S. 520 (1959).

120. *Id.* at 528-29.

121. *Id.* at 524.

but it apparently does not make the means-ends relationship less important. In *Bibb*, "it was 'conclusively shown that the [mud flap required by Illinois] possesses no advantages over the conventional . . . mud flap,' "[122] and the Court used this determination to invalidate the Illinois requirement.[123]

An important criterion in the determination of rationality is the availability of means that will serve the same ends while being less restrictive of interstate commerce.[124] For instance, in *Dean Milk Co. v. City of Madison*,[125] the Court hypothesized various less restrictive and therefore preferable alternatives to the challenged milk inspection regulation.[126] The recent case of *Hughes v. Oklahoma* is similar.[127] Oklahoma law forbade the exportation of more than 36 natural, as opposed to hatchery, minnows.[128] Hughes was convicted of violating the criminal portion of this regulatory scheme.[129] His dormant commerce clause defense was rejected by the Oklahoma Court of Criminal Appeals[130] on the basis of *Geer v. Connecticut*,[131] in which the Supreme Court sustained a statute limiting the exploration of game birds from Connecticut.

The Supreme Court reversed, overruling *Geer*.[132] Speaking to the requirement in question, the Court said, "Far from choosing the least discriminatory alternative, Oklahoma has chosen to 'conserve' its minnows in the way that most overtly discriminates against interstate commerce. . . . Section 4-115(B) is certainly not a 'last ditch' attempt at conservation after non-discriminatory alternatives have proven unfeasible."[133]

Unlike the *Dean Milk* Court, the *Hughes* Court does not hypothesize what the less discriminatory alternatives might be. In fact, the Court was satisfied with the finding that it is merely "likely" that some

122. *Id.* at 525, quoting Navajo Freight Lines, Inc. v. Bibb, 159 F. Supp. 385, 388 (S.D. Ill. 1958).

123. 359 U.S. at 528-29.

124. Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 353 (1977); Pike v. Bruce Church Co., 397 U.S. 137, 142 (1970).

125. 340 U.S. 349 (1951).

126. *Id.* at 354-55:

> It appears that reasonable and adequate alternatives are available. If the City of Madison prefers to rely upon its own officials for inspection of distant milk sources such inspection is readily open to it without hardship for it could charge the actual and reasonable cost of such inspection to the importing producers and processors . . . . Moreover . . . [the Court here offers other suggestions to the Madison lawmakers.]

127. 441 U.S. 322 (1979).

128. OKLA. STAT. tit. 29, § 4115(B) (Supp. 1978).

129. 441 U.S. at 325.

130. Hughes v. State, 572 P.2d 573 (Okla. Crim. App. 1977).

131. 161 U.S. 519 (1896).

132. 441 U.S. at 325.

133. *Id.* at 337-38.

nondiscriminatory alternative exists.[134] It is thus clear that this fourth *Barnwell Brothers* inquiry creates another rubric under which courts may strike down legislative means which, while related to legitimate ends, burden or discriminate against commerce inconsistently with the demands of the dormant interstate commerce clause.

This completes the overview of the interstate commerce clause as formulated in *Barnwell Brothers*. We may now turn our attention to the Indian commerce clause and attempt to make what we can of its constitutional proximity to the interstate commerce clause.

III. THE INDIAN COMMERCE CLAUSE

The Warren Trading Post is a federal licensed retail trading business operating on the Navajo Reservation in Arizona. That state attempted to levy its gross receipts tax on the trading post. In the germinal *Warren Trading Post Co. v. Arizona Tax Commission*,[135] the Supreme Court held such a tax invalid as applied to a reservation trading post.[136] The language used by the Court in that case strongly suggests the commerce clause analysis discussed above:

> Since we hold that this state tax cannot be imposed consistently with federal statutes applicable to the Indians on the Navajo Reservation, we find it unnecessary to consider whether the tax is also barred by that part of the Commerce Clause giving Congress power to regulate commerce with the Indian tribes.[137]

As the quotation indicates, the Court in *Warren Trading Post* found it unnecessary to proceed beyond the supremacy issue.[138] But the clear import of the Court's statement, albeit dictum, is that the dormant Indian commerce clause stands ready to invalidate offensive state regulation even in the absence of preempting congressional activity.[139]

It was in this dictum that the Court, more clearly than ever before, suggested that the *Barnwell Brothers* analysis outlined above might aid in interpreting Indian law cases. This theory recently received more support in *Washington v. Confederated Tribes of the Colville Reservation*[140] when the Court addressed the tribes' three pronged argument that "the state taxes are (1) preempted by federal statutes; (2) inconsistent with the principle of tribal self-government; and (3) invalid under

134. *Id.* at 336.
135. 380 U.S. 685 (1965).
136. *Id.* at 686. In White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), the Court extended *Warren Trading Post* to a situation where the business was neither federally-licensed nor on-reservation. *See id.* at 152-53.
137. 380 U.S. at 686.
138. *Id.*
139. In fact, the occasion has already presented itself. *See* Williams v. Lee, 358 U.S. 217 (1959), discussed in detail at text and notes 318-347 *infra*.
140. 447 U.S. 134 (1980).

'negative implications' of the Indian Commerce Clause."[141] But neither the Court nor the commentators have dealt carefully with the implications of this parallel analysis nor, indeed, with the question of whether it makes sense to build the law of state-tribal relationships on the foundation of the commerce clause. Therefore, before analogizing the interstate and Indian commerce clauses—before, that is, discussing the four *Barnwell Brothers* elements in an Indian law context—our discussion must turn to a justification of that analogy. Are the three arguments in *Colville* pieces of a unified whole, or are they merely three clever but essentially individual arguments?

A. *The Plenary Power of Congress and Its Roots in the Commerce Clause*

It is difficult to begin a discussion of the relationship between Indian tribes and state governments without a look at *Worcester v. Georgia*.[142] Worcester, a missionary, was indicted for violating a series of Georgia laws imposed on those who entered the Cherokee reservation.[143] He appealed to the United States Supreme Court, arguing that the Georgia laws were without effect in Indian Country.[144] The Court agreed[145] and ordered Worcester released.[146]

One place to which Chief Justice John Marshall turned to justify the result in *Worcester* was the commerce clause. "[The Constitution] confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and *with the Indian tribes*. These powers comprehend all that is required for the regulation of our intercourse with the Indians."[147]

Here, then, is an early statement construing the Indian commerce clause, and the construction given is that it authorizes an exercise of a

141. *Id.* at 154-55. The relevance of the second argument to the *Barnwell Bros.* analysis will be shown in text and notes 348-361 *infra*.

142. 31 U.S. (6 Pet.) 515 (1832).

143. *Id.* at 529.

144. *Id.* at 534.

145. *Id.* at 561. There remains a controversy, lively if not raging, as to the precise meaning of *Worcester*: whether the case was or should have been decided simply on preemption grounds or rather on some independent, non-supremacy, constitutional basis. This debate is seen in AMERICAN INDIAN POLICY REVIEW COMM'N, FINAL REPORT (1977). *Compare* the majority's view, *id.* at 54-55 and 99-101 (characterizing *Worcester* as a constitutional case, based on tribal sovereignty), *with* the minority's view, *id.* at 577 (characterizing the case as one based on preemption).

A pleasing benefit of the *Barnwell Bros.* analysis is that this debate is made, for the most part, academic. That analysis relieves the tension between the positions cited above by accommodating both; *Worcester* becomes important as a preemption case *and* as a "within its province" case.

146. 31 U.S. at 562. The entire historical context of *Worcester* and its precursor, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), is explored in fascinating detail in Burke, *The Cherokee Cases: A Study in Law, Politics and Morality*, 21 STAN. L. REV. 500 (1969).

147. 31 U.S. at 559 (emphasis in the original).

plenary power by Congress over the Indian tribes. This construction finds support today in both Court opinion and Congressional legislation. For example, in *McClanahan v. Arizona Tax Commission*,[148] the Court concluded that the commerce clause and the treaty-making power accounted for federal authority over the tribes.[149] And Congress, in enacting the Indian Child Welfare Act,[150] made the specific finding that the commerce clause "and other constitutional authority"[151] are the sources of its plenary power.[152]

Some confusion[153] exists, however, over the exact source of this power. This is both because alternative sources have been suggested[154] and because the commerce clause has not always reached as far as it does now.[155]

For example, there is *United States v. Kagama*,[156] the case most often cited for the proposition that congressional power is indeed plenary. In an earlier case,[157] Crow Dog had killed Spotted Tail on the Sioux reservation and was prosecuted in federal court for murder. The Supreme Court found there was no federal jurisdiction to support this prosecution and released Crow Dog.[158] In the process of granting Crow Dog's petition for a writ of habeas corpus, the Court invited Congress to legislate a different result,[159] and Congress responded shortly thereafter with the Major Crimes Act.[160] Kagama and another were subsequently indicted for murder under the new Act. In *Kagama*, the Court, not surprisingly considering its *Crow Dog* suggestion three years

148. 411 U.S. 164 (1973).

149. *Id.* at 172 n.7, *citing* Williams v. Lee, 358 U.S. 217, 219 n.4 (1959); Perrin v. United States, 232 U.S. 478, 482 (1914). *See also* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 152 (1980).

150. Pub. L. No. 95-608, 92 Stat. 3069, codified at 25 U.S.C. §§ 1901-1963 (Supp. III 1979).

151. 25 U.S.C. § 1901(1) (Supp. III 1979). This additional authority is not identified. As discussed in note 20, *supra*, the Constitution, outside the commerce clause, makes only incidental references to Indians.

152. It is indicative of the present federal Indian policy that the exercise of Congressional power in this Act is so extraordinarily deferential to and protective of Indian self-determination. *See, e.g.*, 25 U.S.C. § 1911(a) (giving tribes exclusive jurisdiction over custody proceedings involving Indian children); id. § 1911(b) (mandating the transfer of such cases from state courts to tribal courts); *id.* § 1911(d) (extending full faith and credit protection to some Indian tribal judgments); and *id.* § 1918(a) (working a partial revocation of Pub. L. No. 280, 67 Stat. 588 (1953)).

153. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 172 n.7 (1973).

154. *E.g.*, United States v. Antelope, 430 U.S. 641, 647 n.8 (1977) (the federal guardianship of the Indian tribes); McClanahan v. Arizona Tax Comm'n, 411 U.S. at 172 n.7 (the treaty-making power); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 543 (1832) (natural law); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 544 (1823) (conquest).

155. *But see* Comment, *The Indian Battle for Self-Determination*, 58 CAL. L. REV. 445, 449 n.28 (1970).

156. 118 U.S. 375 (1886).

157. *Ex parte* Crow Dog, 109 U.S. 556 (1883).

158. *Id.* at 572.

159. "To justify such a departure [from the rule imposed by treaties, statutes and cases] requires a clear expression of Congress, and that we have not been able to find." *Id.* at 572.

160. Act of March 3, 1885, ch. 341, § 9, 23 Stat. 385 (current version at 18 U.S.C. § 1153 (1976)).

earlier, held the Act constitutional.[161] The Court, however, was not ready to read the commerce clause broadly enough to support the congressional power to enact a criminal code for Indian country.[162] Instead the Court chose to base its decision on the dependent status of the Indian tribes,[163] their course of dealing with the United States,[164] and, perhaps, on the need for uniformity in relations with the tribes.[165]

It is not surprising that in 1886 the Court took a narrow view of the limits of the Indian commerce clause, for the same was true under the interstate commerce clause.[166] In fact, the Court began to broaden its view of the Indian commerce clause well before the same development of the interstate commerce clause. For example, in *United States v. Sandoval*,[167] the Court upheld a criminal statute with respect to liquor traffic with specific reference to the Indian commerce clause.[168]

This expansion of the Indian commerce clause has continued, and recently the Supreme Court effectively overruled the part of *Kagama* that found the clause too narrow to support the Major Crimes Act. In *United States v. John*,[169] the defendant, a Mississippi Choctaw, had been convicted of assault[170] in both state and federal court,[171] and the

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161. United States v. Kagama, 118 U.S. 375, 383 (1886).

162. *Id.* at 378. The Court stated:

> The mention of Indians in the Constitution which has received most attention is that found in the clause which gives Congress "power to regulate commerce with foreign nations and among the several states, and with Indian tribes."
>
> This clause is relied on in the argument in the present case, the proposition being that the statute under consideration is a regulation of commerce with the Indian tribes. But we think it would be a very strained construction of this clause, that a system of criminal laws for Indians . . . without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.

Id.

163. *Id.* at 384.

164. *Id.*

165. *Id.*, *citing* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). *See also* Williams v. Lee, 358 U.S. 217, 219 n.4 (1959).

166. The commerce clause as a basis for congressional legislation, *i.e.*, the "active", as opposed to "dormant" commerce clause, was narrowly construed until well into the twentieth century. *See* Carter v. Carter Coal, 298 U.S. 238 (1936); G. GUNTHER, *supra* note 90, at 113-212.

167. 231 U.S. 28 (1913).

168. *Id.* at 45.

169. 437 U.S. 634 (1978).

170. *Id.* at 636. The federal indictment was for assault with intent to kill in violation of the Major Crimes Act, 25 U.S.C. § 1583 (1976). The federal conviction was for simple assault, an offense not enumerated in the Major Crimes Act, but one for which the defendant was entitled to an instruction under the doctrine of Keeble v. United States, 412 U.S. 205 (1973). *See* 437 U.S. at 636 n.3. The state indictment and conviction were for aggravated assault in violation of MISS. CODE ANN. § 97-3-7(2) Supp. 1977).

The alignment of the parties before the Supreme Court appears to be John and the United States arguing for reversal of both courts below and reinstatement of the federal assault conviction. Mississippi argued against federal jurisdiction and for reinstatement of the state conviction. John's principal issue on his appeal, having to do with the *Keeble* rule, is unrelated to our topic. In any case, it was not addressed by the circuit court and was abandoned before the Supreme Court.

171. 437 U.S. at 636-37. The federal court conviction was reversed by the circuit court and the goverment appealed. *Id.* at 637. *United States v. John* from the Fifth Circuit and *John v. Mississippi*, the appeal from the state conviction, were consolidated before the Supreme Court.

question was whether the Major Crimes Act applied to the Choctaw reservation. In holding that it does, the Supreme Court found the Indian commerce clause sufficient, if not entirely necessary,[172] to support application of the Act to this reservation.[173] Likewise, the Indian Child Welfare Act[174] embodies the modern Congressional view of the breadth of the commerce clause which is also inconsistent with *Kagama*'s nineteenth century jurisprudence.

This recognition of the commerce clause roots for Congress' plenary power is important, for it provides the essential link between the commerce clause and the restrictions on state activity on reservations. The very reason that state activity is restricted is that the constitutional assignment of plenary power to Congress by the Indian commerce clause should be read to imply a constitutional barrier to state activity in the same area. Analogizing to the above analysis, this constitutional barrier should exist not only when the state enactment conflicts with specific federal statutes,[175] but in those other areas where the commerce clause of its own force governs.[176]

Thus, we see the early development of the precept that Congress is possessed of plenary power over the Indian tribes, as well as the early recognition of the commerce clause roots for this power. Furthermore, we see the understandable and precedented broadening of the interpretation of "commerce" to include nearly all aspects of the relationship between the United States and the Indian tribes. With respect both to interstate and to Indian commerce, then, we have constitutional assignment of plenary power to Congress, a modern broadening of the understanding of the word "commerce", and a corresponding limitation on state activities in these areas. The completion of the analogy by showing that interstate commerce clause analysis explains the Indian-state cases follows directly.

172. The Court finds statutory, *id.* at 648-650, as well as constitutional reasons to support its result. It further rejects an argument based upon treaty. *Id.* at 653.

173. *Id.* at 652.

174. *See* text & notes 150-152, *supra*.

175. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) and Central Mach. Co. v. Arizona State Tax Comm., 448 U.S. 160 (1980), are recent examples of cases finding state law invalid under the supremacy clause.

176. Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980), Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976), and Williams v. Lee, 358 U.S. 217 (1959) recognize some component beyond supremacy as an element of Indian commerce clause analysis.

B. *The* Barnwell Brothers *Analysis as Applied to State Regulation of Indian Activity*

1. Discrimination Against Indian Commerce and Indian Equal Protection[177]

As noted above, the commerce clause does not invalidate every state imposed burden on interstate commerce.[178] So too are some burdens on Indian commerce permissible. For example, in *Moe v. Confederated Salish and Kootenai Tribes*[179] and *Washington v. Confederated Tribes of the Colville Reservation*,[180] the Supreme Court held that a state-wide cigarette tax could be imposed on non-reservation sales by Indians to non-Indians.

Instead, the first step in the *Barnwell Brothers* analysis requires invalidation of regulations that expressly discriminate against interstate commerce[181] or unduly burden it.[182] No Indian cases are found that employ this rubric to prohibit state activities on Indian reservations.[183] In fact, the recent *Colville* case expressly rejects such an argument in upholding the validity of the state's cigarette taxation scheme.[184] That case involved a conflict between the state tax on cigarette sales, essentially identical to that found valid in *Moe*, and the tribal tax on the same sales.[185] While recognizing that the commerce clause "may"[186] have an antidiscrimination component, the Court found it inapplicable since the Washington tax was "applied in a non-discriminatory manner to all transactions within the state."[187] Concerning the obvious burden the tax places on Indian commerce,[188] the Court in an uncited but clear reference to *Moe* found the burden existed only because the tribe was

177. Several aspects of this topic, although not the commerce clause connection made here, are explored in depth in Johnson & Crystal, *Indians and Equal Protection*, 54 WASH. L. REV. 587 (1979).

178. *See* text & notes 31-49, *supra*.

179. 425 U.S. 463, 482 (1976).

180. 447 U.S. 134, 153-55 (1980).

181. Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

182. Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959).

183. There is, however, dicta to this effect: "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to *non-discriminatory* state law otherwise applicable to all citizens of the State." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973) (emphasis added). The statute enforced there was non-discriminatory. *Cf.* Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 469 n.9 (1976): "The Tribe has from the beginning disclaimed any immunity from [the] non-discriminatory vehicle registration fee."

184. 447 U.S. at 157.

185. *Id.* at 138.

186. *Id.* at 156-57.

187. *Id.* at 157.

188. Cigarette sales to non-Indians occur on the reservation only to the extent that the non-Indians can be attracted to the reservation. The attraction in *Colville* was that reservation cigarettes cost approximately $1.00 less per carton as a result of the exemption from the challenged tax. If the tax were valid, on- and off-reservation cigarettes would cost the same and the reservation trade would dry up. *See id.* at 145.

attempting to market a tax exemption to non-Indians.[189] The argument that the tribe's tax exemption is justified because to remove it would burden commerce created by the exemption is indeed circular, and the Court rightly rejected it.

The *Colville* Court next turned to the question of whether the state must give a credit against its tax for the tribal tax paid. The effect of such a credit would be to make the price of cigarettes the same on and off the reservation; the absence of the credit would result in reservation cigarettes costing between 20 to 50 cents more per carton, depending on the tribal tax.[190] The Court found the tribes unable to show "that business at the smokeshops would be significantly reduced by a state tax without credit as compared to a state tax with a credit."[191]

The rationale behind this conclusion is that since allowing the state tax would "dry up" the trade, to impose the greater burden of double taxation would do no further harm.[192] Whatever the merits of this common sense rationale, it ignores the fact that, given the validity of the tribal tax,[193] the state tax without the credit overtly discriminates against Indian commerce. Such discrimination has always been found per se unconstitutional under the interstate commerce clause.[194] That the Court was willing to tolerate such discrimination must be seen as a severe setback to the strength of the Indian commerce clause.[195]

This is not to say, however, that the antidiscrimination component of the Indian commerce clause is without viability. This aspect of the commerce clause might evolve into a constitutional protection that will fill the void left by the Supreme Court's interpretation of the equal protection clause as it affects Indians.

Consider, for example, the plight of Antelope, who was responsible for the death of a white woman living on the Coeur d'Alene Indian Reservation in Idaho. Antelope was at the time burglarizing the woman's house; therefore, when his prosecution was brought in federal court under the Major Crimes Act,[196] it was for murder.[197] To this

189. *Id.* at 156-57 ("although the result of these taxes will be to lessen or eliminate tribal commerce with non-members, that market existed in the first place only because of a claimed exemption from these very taxes"); *cf. Moe*, 425 U.S. at 482.

190. 447 U.S. at 156-57.

191. *Id.*

192. *Id.* at 155-57.

193. The tribal tax was found valid. *Id.* at 151-52.

194. See text and notes 31-49, *supra*.

195. The Court's discussion is phrased, however, in terms of the tribes' inability to prove a burden, thus at least leaving open the possibility of relief if it can be shown that the double taxation does in fact drive away non-Indian business. Furthermore, as will be developed below, *see* text & notes 305-315 *infra*, *Colville* and *Moe* may be destined to be read strictly as cigarette taxation cases with little applicability to other fact situations.

196. 18 U.S.C. § 1153 (1976).

197. 18 U.S.C. § 1111(a) (1976) contains a felony-murder rule applicable in federal prosecutions.

prosecution, Antelope mounted an appealing equal protection argument: if Antelope were white, his prosecution would be in state court because his victim was white.[198] The prosecution in Idaho would have been for a lesser crime because that state had no felony-murder rule.[199] Therefore, but for his race, Antelope would be prosecuted for a lesser crime.

In *United States v. Antelope*,[200] a unanimous Supreme Court rejected this argument and found the federal statutory scheme justified.[201] Citing the commerce clause, the Court reasoned that since the Constitution expressly singles out Indians for special federal government treatment, the Major Crimes Act did not create an impermissible racial classification.[202] The Court also quoted with approval language from other cases holding that federal classifications relating to Indians are not racial, but political, having to do with membership in a quasi-sovereign Indian tribe.[203]

Antelope and *Morton v. Mancari*,[204] upholding a federal hiring preference for Indians in the Bureau of Indian Affairs, might be limited to construction of the equal protection component of the fifth amendment. Other Supreme Court cases, however, extend this argument to the fourteenth amendment as well, and therein lies the link between equal protection, discrimination, and state regulation of Indian activity.

It is quite common for state court decisions upholding the application of state law to reservation activity to do so partly on equal protection grounds. For example, in *Firecrow v. District Court*,[205] the Montana Supreme Court held that the state courts had jurisdiction to adjudicate the adoption of an Indian child by Indian would-be parents over the objection of Indian natural parents.[206] The decision of the Montana court was based partly on the Montana equal protection clause.[207] The Supreme Court reversed, noting that "[t]he exclusive ju-

198. *See* United States v. Antelope, 430 U.S. 641, 644 n.4 (1977). *See also* New York v. Martin, 326 U.S. 496 (1946); Draper v. United States, 164 U.S. 240 (1896); United State v. McBratney, 104 U.S. 621 (1881).

199. United States v. Antelope, 430 U.S. 641, 644 n.5 (1977), *citing* IDAHO CODE § 18-4003 (Supp. 1976). Current Idaho law has expanded the definition of first degree murder to include "murder committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, kidnapping or mayhem." IDAHO CODE § 18-4003(d) (1979).

200. 430 U.S. 641 (1977).

201. *Id.* at 650. *See also* Gray v. United States, 394 F.2d 96 (9th Cir. 1968); Note, *Red, White, and Gray: Equal Protection and the American Indian*, 21 STAN. L. REV. 1236 (1969).

202. 430 U.S. at 645 n.6.

203. *Id.* at 645-46, *citing* Fisher v. District court, 424 U.S. 382 (1976) (*per curiam*) and Morton v. Mancari, 417 U.S. 535 (1974).

204. 417 U.S. 535 (1974).

205. 167 Mont. 139, 536 P.2d 190 (1975) *rev'd per curiam sub nom.* Fisher v. District Court, 424 U.S. 382 (1976).

206. *Id.* at 141, 536 P.2d at 193. This issue has since been preempted by the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (Supp. III 1979).

207. 167 Mont. at 143, 536 P.2d at 193. The Court stated:

risdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law."[208]

Other Supreme Court cases are similar,[209] and, on occasion, state courts reach the same result.[210] Some state decisions that have not been reviewed by the Supreme Court, however, leave the faulty equal protection analysis on the books.[211] These cases will not withstand careful analysis under the *Antelope* rationale; equal protection jurisprudence seems set on the course of limited protection for Indians.[212]

The present state of Indian equal protection is this: Some state courts tend to read equal protection broadly to permit states to enforce their laws uniformly across the state, including Indian reservations. The Supreme Court has responded by invalidating this imposition of state law on reservations, and in the process has read the equal protection clause narrowly and refused to find racial discrimination. The question thus becomes whether a state might legislate in a discriminatory manner with respect to Indians and then validate the discrimination by reference to this limited equal protection analysis. It is here that the antidiscrimination aspect of the Indian commerce clause becomes useful.

Consider the case of *Lohnes v. Cloud*.[213] Plaintiff was injured by defendant on the Fort Totten Reservation in North Dakota.[214] Both parties were enrolled members of the Devil's Lake Sioux tribe which occupies that reservation.[215] Lohnes sued Cloud first in state court and then in federal court, but both suits were dismissed for lack of subject matter jurisdiction in conformity with settled North Dakota law.[216]

> Being citizens of the state of Montana, [the adoptive parents and the child] are entitled to the equal protection of the laws. Art. II, Section 4, 1972 Montana Constitution. Petitioners are entitled to the use of Montana's court system on a par with other Montana citizens regardless of the fact that they are enrolled members of an Indian tribe and reside within the exterior boundaries of that Indian reservation.

Id.

208. Fisher v. District Court, 424 U.S. 382, 390 (1976) (*per curiam*).

209. *See generally* Kennerly v. District Court, 400 U.S. 423 (1971) (*per curiam*); Brough v. Appawora, 553 P.2d 934 (Utah 1976), *vacated*, 431 U.S. 901 (1977).

210. *See* Gourneau v. Smith, 207 N.W.2d 256, 259 (N.D. 1973).

211. *See, e.g.*, Bad Horse v. Bad Horse, 163 Mont. 443, 517 P.2d 893, *cert. denied*, 419 U.S. 847 (1974); Paiz v. Hughes, 76 N.M. 562, 417 P.2d 51 (1966) (citing cases).

212. That the equal protection clause is not completely foreclosed as a protection for Indians is shown by the issue left open in *Antelope*: "whether Indians tried in federal court [may be] subjected to differing penalties and burdens of proof from those applicable to non-Indians charged with the same offense." 430 U.S. at 649 n.11. *See generally* Johnson & Crystal, *supra* note 177.

213. 254 N.W.2d 430 (N.D. 1977).

214. *Id.* at 431.

215. *Id.*

216. *See* Schantz v. White Lightning, 502 F.2d 67 (8th Cir. 1974); Gourneau v. Smith, 207 N.W.2d 256 (N.D. 1973). The law was sufficiently clear to make one wonder why Lohnes went to the trouble of filing these two lawsuits. Perhaps the attorney wished to make a record of exhaustion of process for later proceedings.

Suit was thence brought in tribal court where Lohnes recovered judgment for $10,000.[217]

Cloud, however, was judgment proof and Lohnes therefore proceeded against the state's Unsatisfied Judgment Fund.[218] In conformity with the statutory scheme, Lohnes filed his tribal court judgment with the state court in the county in which the reservation lies.[219] The court dismissed the application and the North Dakota Supreme Court affirmed.[220] The Unsatisfied Judgment Fund Statute, ambiguous on its face,[221] was construed to apply only to judgments obtained from North Dakota state courts.[222]

The North Dakota Supreme Court specifically addressed Lohnes's equal protection argument. Citing *Antelope*, the Court found the issue "clearly settled" against the plaintiff.[223] Furthermore, the Court refused to limit the reach of *Antelope* to jurisdiction cases: "the plaintiff is not denied a share of the Fund because of race but because the judgment does not meet the requirements of the Unsatisfied Judgment Fund."[224]

Justice Vogel dissented with enthusiasm, attempting to prevent the existence of a wrong without a remedy.[225] Among other grounds, he

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217. 254 N.W.2d at 431.

218. *Id.*

219. The North Dakota Unsatisfied Judgment Fund Statute is set out in part in note 221 *infra*.

220. 254 N.W.2d at 435.

221. N.D. CENT. CODE § 39-17-03 (1979) provides:

> Where any person who is a resident of this state recovers *in any court in this state* a judgment for an amount exceeding three hundred dollars in an action for damages resulting from bodily injury to, or the death of, any person occasioned by, or arising out of, the ownership, maintenance, operation or use of a motor vehicle by a judgment debtor in this state, upon such judgment becoming final, such judgment creditor may, in accordance with the provisions of this chapter, apply to the judge of *the district court in which such judgment was rendered*, upon notice to the attorney general, for an order directing payment of the judgment out of said fund (emphasis added).

222. 254 N.W.2d at 432. An interesting question, apparently not raised by Lohnes and addressed only tangentially by the court, is whether the tribal court judgment could have been converted into a state judgment before making claim against the fund. The North Dakota version of the Uniform Enforcement of Foreign Judgments Act, N.D. CENT. CODE §§ 28-20.1-01 *et seq.* (1974), defines a foreign judgment as "any judgment, decree, or order . . . of any . . . court which is entitled to full faith and credit in this state." *Id.* § 28-20.1-01. Such a judgment is entitled to recognition by the state courts merely by filing as required. *Id.* § 28-01.1-02.

The question of whether an Indian court judgment is entitled to full faith and credit under the U.S. CONST. art. IV, § 1, or under federal statute, 28 U.S.C. § 1738 (1976), is undecided by the Supreme Court. There is a division of authority among the states. *Compare* Red Fox and Red Fox, 23 Or. App. 393, 398 n.5, 542 P.2d 918, 920 n.5 (1975) (no full faith and credit, citing only the Constitution; but principles of comity apply) *with* Jim v. C.I.T. Financial Serv. Corp., 87 N.M. 362, 363, 533 P.2d 751, 752 (1975) (the Navajo Nation is a "territory" within the meaning of 28 U.S.C. § 1738 and thus its laws are entitled to full faith and credit). *See* D. GETCHES, D. ROSENFELT & C. WILKERSON, FEDERAL INDIAN LAW 327-28 (1979). *See generally*, Ragsdale, *Problems in the Application of Full Faith and Credit for Indian Tribes*, 7 N.M. L. REV. 133 (1977).

223. 254 N.W.2d at 434.

224. *Id.*

225. *Id.* at 435-38 (Vogel, J., dissenting). *See also* Nelson v. Dubois, 232 N.W.2d 54 (N.D. 1975) (Vogel, J., dissenting).

pointed to the equal protection problem:[226] Although all citizens are required to contribute to the Unsatisfied Judgment Fund, the impact of the majority's decision is that Indians have a substantially smaller chance of ever recovering against the Fund. But Justice Vogel was unable to cite authority which would stand in the face of the majority's citation of *Antelope*.

The missing citation is to the commerce clause and *Barnwell Brothers*. The construction that the majority in *Lohnes v. Cloud* puts on the Unsatisfied Judgment Fund discriminates against Indian commerce because persons who travel in or through Indian reservations are more likely to be forced to obtain tribal court judgments than those who do not. This discrimination is undue since all licensed drivers, Indian and non-Indian alike, contribute to the fund. Thus, discrimination against Indian commerce is prohibited by the antidiscrimination component of the Indian Commerce clause although not by the *Antelope*-constricted equal protection clause.

It should be remembered that *Antelope* itself, in construing the equal protection component of the fifth amendment, cites the commerce clause as authority for its conclusion.[227] This emphasizes that the two constitutional antidiscrimination provisions must stand together. *Antelope* construes equal protection in such a way that discrimination against or in favor of Indians is not racial discrimination. At the same time, the *Barnwell Brothers* analogy forbids the states from discriminating against Indian commerce. The combination saves the special jurisdictional rules to be developed below[228] while prohibiting the states from discriminating against Indians.

2. Supremacy, Preemption and Federal Occupation of the Field

a. The supremacy clause as it applies to Indian law[229]

As is true in any other field, state regulation of Indian reservation activity may not run afoul of express federal legislation, nor may it interfere with the operation of federal law in a field that Congress has "occupied."[230] Indian cases in which this principle was applied arose

226. 254 N.W.2d at 437 (Vogel, J., dissenting). Other of my colleague's grounds for dissent are less persuasive: that tribal courts as arms of the federal government are entitled to full faith and credit (*but see* United States v. Wheeler, 435 U.S. 313 (1978), decided after *Lohnes v. Cloud*), and the existence of "residual jurisdiction in state courts" (*but cf.* Fisher v. District Court, 424 U.S. 382 (1976) (the state court decision based on residual jurisdiction is reversed)).

227. 430 U.S. at 645 n.6.

228. See text & notes 358-361 *infra*.

229. A handy although perhaps dated discussion of this topic is found in D. GETCHES, D. ROSENFELT & C. WILKINSON, *supra* note 222, at 295-99. *See also* Note, *State Jurisdiction over Indians As a Subject of Federal Common Law: The Infringement-Preemption Test*, 21 ARIZ. L. REV. 85, 87-97 (1979).

230. *See* text & notes 52-87 *supra*.

early.[231]

Worcester v. Georgia can be read as a supremacy clause case. The state laws challenged in *Worcester* required a missionary to obtain a license from the state to reside on the Indian reservation and to swear to support and defend the constitution and laws of Georgia.[232] These laws were challenged in Worcester's plea as repugnant to the treaties between the United States and the Cherokee Nation and to the federal Trade and Intercourse Acts.[233] Chief Justice John Marshall responded with a multi-faceted opinion which appears at several points to rest squarely on the supremacy of federal treaties and statutes.[234]

In several recent decisions, the Supreme Court has more clearly relied on the supremacy clause. The Court in *Warren Trading Post v. Arizona Tax Commission*[235] expressly found it unnecessary to go beyond the supremacy inquiry[236] because of the "comprehensive congressional plan . . . to regulate Indian trade and traders and to have Indian tribes on reservations govern themselves."[237] In *Kennerly v. District Court*,[238] the Supreme Court found that assumption of jurisdiction by the state over a suit on a debt was preempted by Public Law 280.[239] In

231. *See* Worchester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); text & notes 142-147 *supra*.

232. 31 U.S. (6 Pet.) at 523. These laws were part of a sweeping legislative scheme which would have essentially abolished the reservation. *See generally* M. ROGIN, FATHERS AND CHILDREN: ANDREW JACKSON AND THE SUBJUGATION OF THE AMERICAN INDIAN (1975); Burke, *supra* note 146.

233. 31 U.S. (6 Pet.) at 538, 540. The plea also raised the dormant commerce clause issue, discussed at text and notes 315-374, *infra*.

234. *See* 31 U.S. (6 Pet.) at 557.

235. 380 U.S. 685 (1965).

236. *Id.* at 686.

237. *Id. See also id.* at 687 nn.3&4. The Court subsequently refused to limit the precedential value of *Warren Trading Post* to cases involving Indian traders, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973), and removed any requirement that the tax exempt party have a principal place of business on the reservation, Central Mach. Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980).

238. 400 U.S. 423 (1971) (*per curiam*).

239. *Id.* at 427; *see* Act of August 15, 1953, Pub. L. No. 280, 67 Stat. 590 (codified at 18 U.S.C. § 1162 (1976), 25 U.S.C. §§ 1321-26 (1976), and 28 U.S.C. § 1360 (1976)). The Act, one of enormous significance in Indian law (*see* Washington v. Yakima Indian Nation, 439 U.S. 463 (1979); Bryan v. Itasca County, 426 U.S. 373 (1976); Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. REV. 535 (1975)), required some states, and allowed others, to assume civil and criminal jurisdiction over Indian country. In *Kennerly*, the tribal council consented to jurisdiction. 400 U.S. at 429. The Court held that Public Law 280 contemplated consent through a vote of the majority of the members, however, which was not present here. *Id.*

There is some difficulty with this holding. If Public Law 280 is in fact a preempting act of Congress, then it would seem that all questions of state jurisdiction over Indian reservation activity would be answered simply by looking to see if the state has assumed jurisdiction according to the terms of that act. Yet it is clear that the analysis used by the Supreme Court is not this simple. Indeed, the famous *Williams v. Lee*, 358 U.S. 217 (1959), discussed in detail at text & notes 318-337, *infra*, which established the test to be used when supremacy analysis is not sufficient to answer the question, involved a state's assumption of jurisdiction over a suit on a debt where the state had not assumed jurisdiction under Public Law 280.

The *per curiam* opinion in *Kennerly* does not explain why Public Law 280 answers the question in *Kennerly* but not in *Williams*. The Court merely cited *Williams* and continued, "[w]ith regard to the particular question of the extension of state jurisdiction over civil causes of action by

two recent cases, *White Mountain Apache Tribe v. Bracker*[240] and *Central Machinery Co. v. Arizona State Tax Commission*,[241] the Court has stricken state motor vehicle, fuel, and sales taxes applied to reservation activities on supremacy grounds.[242]

Organized Village of Kake v. Egan[243] is a case in which preemption analysis was used, but the state regulation was upheld.[244] The plaintiffs in that case had received permits from the Corp of Engineers, the Forest Service, and the Secretary of the Interior to operate salmon traps in violation of state law.[245] The state seized the traps and arrested the operators; thereafter, an injunction against enforcement of the state laws was sought in the interim United States district court.[246] The Supreme Court affirmed the denial of the injunction, finding no direct conflict between the state and federal laws because "Congress has neither authorized the use of fish traps at Kake and Angoon nor empowered the Secretary of the Interior to do so."[247]

The parameters of the supremacy/preemption doctrine were brought most clearly to the forefront, and made in fact the primary

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or against Indians arising in Indian country, there was, *at the time of the tribal council resolution*, a 'governing act of Congress,' i.e. [Public Law 280]." 400 U.S. at 427 (emphasis added) (quoting *Williams*). Apparently the earlier Court did not find it to have the same supreme value as did *Kennerly*, because the *Williams* court continued its analysis to determine whether "absent governing Acts of Congress" the state jurisdiction could stand. *Id.*

The resolution of this conflict between *Williams* and *Kennerly* is not apparent. Perhaps *Kennerly* is limited to the emphasized language in the quotation above. That is to say, perhaps the recent amendment to Public Law 280 requiring that the tribe's consent to assumption of jurisdiction by the state be embodied in a general election, 25 U.S.C. § 1326 (1976), is preempting an act of Congress, but the more general language of Public Law 280 is not. The alternative to this explanation, that *Kennerly* overruled *Williams*, is unsavory. Indeed, *Williams* is too much embedded in the foundation of Indian law to be attacked at this late date as wrongly decided. *See* text & notes 318-337 *infra*. Such an attack is made, however, in AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT, 590-92 (1977) (separate dissenting view of Congressman Lloyd Meeds). (It should, perhaps, be noted, that Congressman Meeds has prefigured at least one other important development in Indian law. *See id.* at 583-590 and compare *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978) (tribes are without jurisdiction to try non-Indians)). *See also* Little Horn State Bank v. Stops, 170 Mont. 510, 555 P.2d 211 (1976) (discussed at notes 418-419 *infra*).

240. 448 U.S. 136 (1980).

241. 448 U.S. 160 (1980).

242. *Id.* at 152 (vehicle and fuel taxes); *Id.* at 165-66 (sales tax).

243. 369 U.S. 60 (1962).

244. *Id.* at 76. The Organized Village of Kake and its co-plaintiff, Angoon Community Association, are incorporated communities of Alaskan Tlinglet Indians who are wholly without reservations. While its clear that *Egan* should not be extended to a reservation situation, *see* McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 176 n.15, 180 n.20, the Court's analysis provides valuable insight into Indian preemption.

245. 369 U.S. at 61.

246. *Id.* at 62.

247. *Id.* at 76. The Court found that the permit from the Secretary of the Interior did not and could not conflict with state law because the Secretary was without authority to grant an immunity to state law. *Id.* at 62. Likewise, the Alaska Statehood Act of July 7, 1958 Pub. L. No. 85-508 (codified at 48 U.S.C. ch. 2 (1976)), granted no such authority, 369 U.S. at 62-63, and "[n]o other source of authority appears available." *Id.* at 62.

The remainder of the opinion, characterized by some writers as "confused", D. GETCHES, D. ROSENBLATT & C. WILKERSON, *supra* note 222 at 281, concerns the issue of whether the state law might be enforced absent conflicting federal regulation. See text and notes 315-374, *infra*.

inquiry in this area of Indian law,[248] in *McClanahan v. Arizona Tax Commission*.[249] McClanahan, an enrolled resident Navajo, brought an action to recover money withheld from her reservation-earned wages for state income taxes.[250] The Arizona courts refused relief,[251] but the Supreme Court reversed.[252] After reviewing the history and evolution of state-Indian reservation interaction, the Court summarized, "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."[253] In testing the Arizona income tax against the applicable treaties and statutes—the 1868 treaty with the Navajo Nation,[254] the Arizona Enabling Act,[255] the Buck Act,[256] and Public Law 280[257]—the Court held that "[w]hen Arizona's contentions are measured against these statutory imperatives, they are simply untenable."[258]

b. Indian and non-Indian supremacy compared

The Court's approach to the supremacy clause question in *McClanahan* illuminates the similarities and differences between Indian

248. "[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." McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 172 (1973).

249. 411 U.S. 164 (1973).

250. *Id.* at 166.

251. 14 Ariz. App. 452, 484 P.2d 221 (1971).

252. 411 U.S. at 164.

253. *Id.* at 172. At this point, the Court added a footnote:

> The extent of federal pre-emption and residual Indian sovereignty in the total absence of federal treaty obligatons or legislation is therefore now something of a moot question. . . . The question is generally of little more than theoretical importance, however, since in almost all cases federal treaties and statutes define the boundaries of federal and state jurisdiction.

Id. at 172 n.8 (citations omitted). The extent to which this note means that the analysis ends with the supremacy question will be discussed at text and notes 286-288 *infra*. Compare this footnote with Mr. Justice Douglas' view of interstate commerce analysis quoted at note 52 *supra*.

254. Treaty, United States-Navajo Tribe, June 1, 1868, 15 Stat. 668. The Court, following the usual canons of construction, construed the doubtful expressions in this treaty in favor of the Indian parties thereto. 411 U.S. at 174. *Compare* Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: As Long as water flows or grass grows upon the earth'—How Long a Time is That?*, 63 CAL. L. REV. 601 (1975), *with* Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) *and* DeCoteau v. District County Court, 420 U.S. 425 (1975) (canons are restated but applied more harshly than previously). *See also* Carpenter v. Shaw, 280 U.S. 363 (1930).

255. Act of June 20, 1910, ch. 310, § 20, 36 Stat. 557.

256. 4 U.S.C. §§ 105-110 (1976).

257. 25 U.S.C. § 1322(a) (1976). See note 239 *supra*.

258. 411 U.S. at 179. Arizona's contention, referred to in the quotation, was principally that the *Williams* infringement test does not prohibit the state taxation. The *Williams* test, alluded to in note 239, *supra*, and discussed in detail at text & notes 318-347, *infra*, is a dormant commerce clause inquiry and, as should be clear from the previous discussion, text & notes 90-111, *supra*, is not an alternative to supremacy analysis, or a counter to it, but the next step to be taken when supremacy fails to decide the case. Thus, Arizona's use of *Williams* was misguided, and the Court's response was dictum. Nevertheless, and notwithstanding the Court's footnote 8, see note 253 *supra*, the Court provided useful insight into the *Williams* test by that response. *See* discussion in notes 352-354 *infra*.

and non-Indian preemption problems.[259] In the first place, preemption is seen to be a preferred ground of decision.[260] Rather than dealing with the "platonic,"[261] controversial,[262] and slippery[263] doctrine of tribal sovereignty, the Court deals with the more familiar and precedent-filled areas of supremacy, preemption, and statutory construction. This is not to say that the tribal sovereignty doctrine has no viability or that it has no impact on the supremacy inquiry; in fact, it is clear that it has both.[264] Rather, as with difficult constitutional questions, the Court exhibits an understandable eagerness to avoid difficult sovereignty questions in favor of supremacy grounds for the invalidation of state law.

The *McClanahan* approach to supremacy is also similar to non-Indian analysis in the willingness of the Court to strike state legislation even in the absence of direct conflict with the federal law. As the Court concedes, for example, "The treaty nowhere explicitly states that the Navajos were to be freed from state tax or exempt from state taxes."[265] In construing the Arizona Enabling Act, the Court stated, "It is true, of course, that exemption from tax laws should, as a general rule, be clearly expressed. But we have in the past construed language far more ambiguous then this as providing a tax exemption for Indians."[266] And again, construing the Buck Act:

> While the Buck Act itself cannot be read as an affirmative grant of tax-exempt status to reservation Indians, it should be obvious the Congress would not have jealously protected the immunity of reservation Indians from state income taxes had it thought that the States had residual power to impose such taxes in any event.[267]

Finally, with regard to Public Law 280, the Court admitted, "the Act cannot be read as expressly conferring tax immunity upon Indians."[268] These quotations provide clear evidence that the *McClanahan* Court

259. The Court has recently cautioned, "The unique historical origins or [sic.] tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of preemption that have emerged in other areas of the law." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980). This statement emphasizes the differences between the two branches of supremacy analysis, based on tribal sovereignty, to be discussed at text and notes 281-314, *infra*. To the extent that I find similarities in the two branches, I may be accused of concentrating on what the Court does rather than on what it says.

260. *See* text and note 87 *supra*.

261. 411 U.S. at 172.

262. *Compare* FINAL REPORT, *supra* note 239, at 99-103, *with id.* (dissenting views of Congressman Meed) at 573-82.

263. *See* Mettler, *A Unified Theory of Indian Tribal Sovereignty*, 30 HASTINGS L.J. 89 (1978).

264. Indian tribes have recently been found to have sufficient sovereignty to allow dual prosecutions by tribal and federal authorities, in the face of a double jeopardy challenge, United States v. Wheeler, 435 U.S. 313 (1978), and to support tribal sovereign immunity, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). The impact of sovereignty on preemption analysis is forthrightly acknowledged by the court in White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980).

265. 411 U.S. at 174.

266. *Id.* at 176.

267. *Id.* at 177.

268. *Id.* at 178.

found no direct conflict between the Federal and Arizona laws. Thus, the Court went beyond express conflict with Congressional legislation to invalidate the Arizona income tax.

This leads to the third similarity to non-Indian supremacy clause analysis: the deference to Congressional "occupation of a field."[269] The clearest indication that the Court views the field of Indian taxation as occupied in its entirety by Congressional legislation[270] comes in its discussion of Public Law 280 in *McClanahan*. The opinion notes, and the appellee apparently conceded, that Arizona was without jurisdiction to enforce, either criminally or civilly, the tax liability sought to be imposed in *McClanahan*.[271] The Court's comment that this finding would "seem to dispose of the case"[272] can be read as an indication that the state may not enter a field addressed by Congressional legislation when that entry is of such puzzling impact and effectiveness.

As noted above with reference to supremacy analysis under the interstate commerce clause,[273] the subject matter of the regulation bears an important relationship to the Court's view of preemption. Here, too, the Indian cases are consistent, as evidenced by *McClanahan*. The subject matter, of course, is activity on Indian reservations and, as the Court notes, "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history."[274]

It is not difficult to find reasons in the cases justifying the designation of Indian law as a subject especially befitting of federal control and thus especially subject to supremacy clause analysis. There is the unique status of Indian tribes as distinct communities,[275] the traditional jealousies that exist between the states and the tribes,[276] the need for

269. *See* discussion at text & notes 63-67 *supra*.

270. There is a suggestion in *McClanahan* that Congress has occupied the entire field of Indian law, leaving no room for state regulation. 411 U.S. at 172, n.8; *see* note 253 *supra*. *See also* Kansas Indians, 72 U.S. (5 Wall.) 737, 755 (1866) ("If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others,' capable of making treaties, separated from the jurisdiction of Kansas, and *to be governed exclusively by the government of the Union*. If under the control of Congress, from necessity there can be no divided authority." (emphasis added). These suggestions, pregnant though they may be when read in isolation, do not state the law in light of later cases which have carefully inspected federal legislation for conflict with state law. *See, e.g.*, Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976); Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973). *See* text & notes 362-367, *infra*.

271. 411 U.S. at 178-79. *But cf.*, Little Horn State Bank v. Stops, 170 Mont. 510, 555 P.2d 211 (service of process and execution of judgment on a reservation is proper if there is subject matter jurisdiction in the state court), *cert. denied*, 431 U.S. 924 (1977). *Contra*, Francisco v. State, 113 Ariz. 427, 556 P.2d 1 (1976). The question of the propriety of on-reservation service of process posed here but unanswered by the Supreme Court, is discussed in more detail in Part IV, *infra*.

272. 411 U.S. at 179.

273. See text & notes 82-86, *supra*.

274. 411 U.S. at 168, *quoting* Rice v. Olson, 324 U.S. 786 (1945).

275. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832).

276. United States v. Kagama, 118 U.S. 375, 384 (1886).

uniformity in the treatment of Indians,[277] the role of the United States as guardian for the Indian tribes,[278] and the constitutional designation of the Indian tribes as requiring federal attention.[279] There are few fields as exclusively federal and hence as appropriately the subject of supremacy clause analysis as Indian law.[280]

In fact, this multirationalized conclusion leads directly to the principal distinction between Indian and non-Indian supremacy analysis. Unlike other areas of the law, there appears to be no principle of deference to state enactment in the area of Indian law.[281]

The occasions on which the Court has upheld state regulation of Indians in the face of a supremacy challenge are rare. In *Ray v. Martin*,[282] the Court permitted the state prosecution of a non-Indian for the on-reservation murder of another non-Indian in the face of a federal statute that, on its face, permits no such exception.[283] In *Colorado River Water Conservation District v. United States*,[284] the Court ordered federal district court abstention in a suit over Indian and non-Indian water rights when a parallel suit had been commenced in state court.[285] And recently, in *Washington v. Confederated Tribes of the Colville Reservation*,[286] the Court upheld a state cigarette tax in the face of a similar tribal tax and supremacy arguments based upon several federal statutes.[287] Yet these are the exceptions that prove the rule. The results of

277. *Id.*

278. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

279. U.S. CONST. art. I, § 8, cl. 3; *see* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973); Williams v. Lee, 358 U.S. 217, 219 n.4 (1959); Perrin v. United States, 232 U.S. 478, 484 (1914); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

280. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. at 172 n.8, discussed at text & notes 253 *supra*, 362-367 *infra*.

281. *See* text and notes 68-81 *supra*.

282. 326 U.S. 496 (1946).

283. *Id.* at 501. The statute reads:

> Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

18 U.S.C. § 1152 (1976). *See also* Draper v. United States, 164 U.S. 240 (1896); United States v. McBratney, 104 U.S. 621 (1881).

284. 424 U.S. 800 (1976).

285. *Id.* at 818. The normal abstention doctrines, *see* Younger v. Harris, 401 U.S. 37 (1971), Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), were found not to be applicable. 424 U.S. at 814, 816. Although this case can be explained as one narrowly construing a federal statute rather than one narrowly applying the supremacy analysis, it does represent a deviation from the normal approach when congressionally mandated federal jurisdiction clashes with state jurisdiction.

286. 447 U.S. 134 (1980).

287. *Id.* at 155-56. The Court discussed the Indian Reorganization Act, 25 U.S.C. §§ 461 *et seq.*, the Indian Self-Determination and Educational Assistance Act, Act of January 4, 1975, 88

the great bulk of cases exhibit deference to federal law.[288] The normal rule of deference to state regulation appears to obtain only when a supremacy challenge is brought to off-reservation regulation. The *Mescalero Apache Tribe v. Jones*[289] decision for example, upheld New Mexico's gross receipts tax on a tribal business operating off-reservation on Forest Service land. The Court noted, "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."[290] The Court proceeded to find the New Mexico Enabling Act[291] and the Indian Reorganization Act[292] consistent with the tax. When the *Mescalero* analysis is placed along side *McClanahan*, the conclusion must be that federal regulation is construed broadly and state law is presumed invalid with respect to on-reservation activity, while the opposite is true of off-reservation activity.

These two cases not only point up the differences between the analysis of on- and off-reservation cases but also supply the reason for the differences. *McClanahan* justified the deviation from the usual supremacy rule of deference to state law by noting the importance of Indian tribal sovereignty. After characterizing sovereignty as a "platonic notion,"[293] the unanimous Court stated, "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.[294] A clearer statement that a different approach to supremacy questions is appropriate in Indian law cases and that the sovereignty of the tribe justifies that difference cannot be found.

Why is the result different when the sovereign tribe leaves the reservation? *Mescalero* is not as clear as *McClanahan* on this point. Part of the reason is stare decisis,[295] but most of the Court's discussion is of

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Stat. 2203 (codified in scattered sections of 5, 25, 42 U.S.C.; the Indian traders statute, 25 U.S.C. §§ 261-264; the Washington Enabling Act, 25 Stat. 676; and the relevant treaties, 12 Stat. 927, 939, 951.

288. *See, e.g.*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Central Mach. Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980); Bryan v. Itasca County, 426 U.S. 373 (1976); Fisher v. District Court, 424 U.S. 382 (1976); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Kennerly v. District Court, 400 U.S. 423 (1971); Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965); Williams v. Lee, 358 U.S. 217 (1959).

289. 411 U.S. 145 (1973).

290. *Id.* at 149 (emphasis added).

291. 36 Stat. 557. *See also* N.M. CONST. art. 21, § 2.

292. 25 U.S.C. § 465 (1976).

293. 411 U.S. at 172.

294. *Id.*

295. Following the statement quoted in the text at note 290 *supra*, the Court continued:

> See e.g., Puyallup Tribe v. Department of Game, 391 U.S. 392, 398 (1968); Organized Village of Kake [v. Egan, 369 U.S. 60] at 75-76, Tulee v. Washington, 315 U.S. 681, 683

the intergovernmental-immunity doctrine, a non-Indian concept in current disfavor.[296] In short, it appears that off the reservation Indian governments are treated like other governments. At that point, the old *Kagama* dictum that there are only two sovereigns in our federal system[297] requires that the status of the tribal government be relegated to third place, and the traditional Supreme Court deference to nondiscrimnatory state regulation again comes into play.

Washington v. Confederated Tribes of the Colville Reservation[298] is also distinguishable from the mainstream of the supremacy cases. Its seriatum citation of federal statutes that do not expressly preempt the state cigarette tax mirrors the *McClanahan* listing discussed above.[299] When the three 1980 Indian taxation cases are viewed together, however, *Colville* is seen to be an aberration, a justifiable one given the facts of that case.

That *Colville* does not represent a long term deviation from *McClanahan*'s supremacy analysis is shown by *White Mountain Apache Tribe v. Bracker*[300] and *Central Machinery Co. v. Arizona State Tax Commission*,[301] decided after *Colville* in the 1980 term. These later cases are clearly supremacy clause cases[302] which cite *McClanahan* and *Warren Trading Post* throughout and which demonstrate the same tendency to find federal preemption. *Central Machinery*, in holding that the preemption analysis of *Warren Trading Post* is restricted neither to licensed Indian traders nor to businesses permanently situated on a reservation,[303] is especially deferential to federal law. In discussing the unlicensed nature of the appellant, the Court said only, "It is the existence of the Indian trader statutes, then, and not their administration, that preempts the field of transactions with Indians occurring on reservations."[304] The *Bracker* and *Central Machinery* opinions are clearly consistent with, and in fact extensions of, the *Warren Trading Post-Mc-*

(1942); Shaw v. Gibson-Zahniser Oil Corp., 276 U.S. 575 (1928); Ward v. Race Horse, 163 U.S. 504 (1896). That principle is as relevant to a State's tax laws as it is to state criminal laws, see Ward v. Race Horse, supra, at 516, and applies as much to tribal ski resorts as it does to fishing enterprises. See Organized Village of Kake, supra.

411 U.S. at 149.

296. 411 U.S. at 149-55.

297. 118 U.S. 375, 381-82 (1886).

298. 447 U.S. 134 (1980).

299. *Compare id.* at 154-55 *with* 411 U.S. at 174-78, discussed at text & notes 265-268 *supra*.

300. 448 U.S. 136 (1980).

301. 448 U.S. 160 (1980).

302. *See* Bracker, 448 U.S. at 148 and Central Mach., 448 U.S. at 163-64.

303. *Id.* at 164-65.

304. *Id.* at 165. Four Justices dissented, arguing that Federal regulation of off-reservation business was not comprehensive and that the State's purpose in taxing the appellant was legitimate. *Id.* at 168-69 (Stewart, Powell, Rehnquist, and Stevens, JJ., dissenting). *See also* 448 U.S. at 173 (Powell, J., concurring in *Bracker* and dissenting in *Central Mach.*).

Clanahan line of cases exhibiting marked deference to federal occupation of the field.

What, then, justifies the *Colville* aberration? That case, like its predecessor *Moe v. Confederated Salish & Kootenai Tribes*, involved a state's attempt to tax the on-reservation sale of cigarettes by Indians to non-Indians. As the Court indicated in *Moe*[305] and in *Colville*,[306] and as the dissent noted in *Central Machinery*,[307] the state was attempting to tax a "resource" not native to the reservation. The tribes were marketing not cigarettes so much as a tax exemption on "economic value created off the reservation."[308] As with its discrimination argument,[309] the tribe's supremacy argument was unpersuasive.

But it is the situation itself which is unusual, and after the issue of reservation smokeshops was apparently finally laid to rest in *Colville*, the Court returned to its usual analysis in *Bracker* and *Central Machinery*. *Moe* and *Colville* can be limited to their facts and when so limited, the line of preemption cases from *Warren Trading Post* through *Central Machinery* demonstrates that the supremacy clause indeed has a more substantial impact in Indian law then in other fields of jurisprudence.

A final issue remains to be resolved: whether tribal enactment of competing legislation has a preemptive effect on state legislation.[310] The Court's opinion in *Colville* does not bode well for the development of a strong tribal preemption doctrine.[311] In a short passage, the Court found no direct conflict between state and tribal taxation of the same sales, no interference by the state with tribal sovereignty, and no conflict with a congressional policy.[312]

Tribal preemption must be distinguished from preemption under the supremacy clause. The former doctrine is not a direct application of the supremacy clause, which does not mention tribal law. For the supremacy clause to reach this situation, the tribal enactment would have to be connected to a congressional delegation of legislative power.[313] The argument that there was such a connection was made and rejected in *Colville*.[314]

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305. 425 U.S. 463.
306. 447 U.S. at 134.
307. 448 U.S. at 170 n.3 (Stewart, J., dissenting).
308. *Id.*
309. *See* text & note 189 *supra*.
310. The question is explored in fair depth in Comment, *Tribal Preemption*, 54 WASH. L. REV. 633 (1979), written before *Colville* was decided.
311. The Court notes the argument that the state taxes in *Colville* "somehow" conflict with the tribes' taxes, but is not "detained" by it. 447 U.S. at 158-59.
312. *Id.*
313. *Cf.* United States v. Mazurie, 419 U.S. 544, 557 (1975) (tribes have sovereignty sufficient to support delegation of Congressional rule-making power). *But cf.* United States v. Wheeler, 435 U.S. 313, 328 (1978) (tribes are not arms of the federal government).
314. 447 U.S. at 158-59.

The doctrine of tribal preemption should probably be seen not as a true supremacy doctrine but as an aspect of the policy embodied in the commerce clause that Indians may "make their own laws and be ruled by them." This policy will be explored in the next section.

3. "Within its province" and the dormant Indian commerce clause

a. The *Williams* infringement test

Although *Warren Trading Post*[315] suggested the existence of a dormant aspect of the Indian commerce clause beyond the supremacy inquiry,[316] the holding of that case was based squarely on congressional preemption.[317] Thus, we must look elsewhere for confirmation of this step in the *Barnwell Brothers* analysis. The search need not go far. Six years before *Warren Trading Post*, the Court in *Williams v. Lee*[318] had said 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."[319] *Williams v. Lee* thus recognizes the legitimacy of the inquiry beyond supremacy and propounds the famous infringement test to be applied in making the inquiry.

The most noteworthy thing about the infringement test is how little guidance it gives to courts trying to apply it. The unanimous Court in *Williams v. Lee* glibly reached the conclusion that "[t]here can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the rights of the Indians to govern themselves."[320] There was no discussion of exactly what it is about the exercise of jurisdiction over a debt arising on the reservation that is so intrusive into reservation affairs.[321]

This type of conclusory application of the infringement test is typical of the cases. In *Organized Village of Kake v. Egan*,[322] a nonreservation situation, the Court's analysis consists simply of the statement that "[s]tate regulation of off-reservation fishing certainly does not infringe on treaty-protected reservation self-government, the factor found deci-

315. 380 U.S. 685 (1965).
316. See text & note 137 *supra*.
317. 380 U.S. at 691.
318. 358 U.S. 217 (1959).
319. *Id.* at 220.
320. *Id.* at 223. The few short sentences that follow this citation do not expand on the Court's reasoning but, instead, hold that the fact that Lee is a non-Indian is unimportant. *Id.*
321. Any such discussion would have been dictum since the Arizona court included no discussion of the choice of law question in its opinion. Nor did the Court discuss the effect of a state court determination to apply Navajo law under the doctrine of *lex loci contractus*. *See* Williams v. Lee, 83 Ariz. 241, 319 P.2d 998 (1958).
322. 369 U.S. 60 (1962).

sive in *Williams v. Lee*."[323] Likewise, in testing the state's ability to require Indian retailers to collect a valid tax from non-Indian buyers in *Moe v. Confederated Salish and Kootenai Tribes*,[324] the Court merely stated, "We see nothing in this burden which frustrates tribal self-government, see *Williams v. Lee*."[325] Other cases are similar in their paucity of discussion of the infringement test.[326]

The analytical framework missing from the *Williams* infringement test is supplied by the *Barnwell Brothers* analogy. Once it is recognized that the *Williams* test is whether a state has acted "within its province", and is therefore a dormant commerce clause inquiry, one may look to the more substantial body of law under the interstate commerce clause for analytical guidance.[327]

As seen above,[328] dormant interstate commerce clause analysis involves a balancing of the state's traditional and legitimate health, safety, and other local concerns on the one hand, and the need for burden-free interstate commerce and nationally uniform standards on the other. The *Williams* test adds yet another factor onto the side of the balance that tips toward the invalidity of the state regulation: the tribe's platonic sovereignty and the corresponding federal policy of self-determination for these semiautonomous groups.[329]

This link between the *Williams* "infringement" text and the *Barnwell Brothers* "within its province" test leads to some observations worthy of attention. First, the addition of the self-determination factor requiring the protection of the Indians' right "to make their own laws and be ruled by them"[330] probably should be seen as tipping the scale towards invalidity of the state regulation.[331] In other words, the dor-

323. *Id.* at 75-76.

324. 425 U.S. 463 (1976).

325. *Id.* at 483.

326. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 179 (1973) ("[w]e are far from convinced that when a state imposes taxes upon reservation members without their consent, its action can be reconciled with tribal self-determination"). As discussed at text & notes 348-355 *infra*, the Court went on to narrow the application of the *Williams* test to cases involving non-Indians; hence, this language from *McClanahan* is dictum. *See also* Fort Mojave Tribe v. County, 543 F.2d 1253, 1258 (9th Cir. 1976) ("We hold that the uncertain economic burden here imposed on the tribe's ability to levy a tax does not interefere with their [sic] right of self-government.").

327. This link between Indian law and interstate commerce law is specifically rejected by Mr. Justice Rehnquist in concurrence and dissent in Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 177 (1980). He states, "I see no need for this Court to balance the state and tribal interests in enacting particular forms of taxation in order to determine their validity. Absent discrimination, the question is only one of congressional intent." *Id.* The majority undertook the balancing advocated by this article and found the state tax valid. See text and note 340 *infra*.

328. *See* text & notes 90-111 *supra*.

329. *See* Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 156-57 (1980); *id.* at 168-69 nn.3&4 (Brennan, J., concurring and dissenting).

330. 358 U.S. at 220.

331. In *Williams*, Mr. Justice Black spoke of a congressional "*assumption* that the States have no power to regulate the affairs of Indians on a reservation." *Id.* (emphasis added). *Accord*,

mant Indian commerce clause presumes the invalidity of state regulation of reservation activity, and the burden is on the state to justify the intrusion into Indian activity.[332]

Second, the question of economics arises. It will be remembered that the Court has generally given little weight to the state's economic concerns when balancing under the interstate commerce clause.[333] What, now, of the tribe's economic concerns? Some courts have suggested that the *Williams* test contemplates the tribe's right to be free of state infringement of its economic self-development. The issue in *Santa Rosa Band v. Kings County*[334] was whether Public Law 280 permitted the county to apply its zoning ordinance and building code to the band's reservation.[335] Without citing *Williams*, the Ninth Circuit used an infringement test to determine the reach of that federal statute.[336] A major part of the court's infringement analysis was that the state regulation would interefere with the tribe's self-development.[337] *Santa Rosa Band* was distinguished in *Fort Mojave Tribe v. County of San Bernardino*,[338] where the issue was the validity of a county tax on a non-Indian lessee of reservation property. Once again, the court wove the tribe's economic self-determination into the *Williams* calculus, but here the burden on Indian commerce was "uncertain" and not dispositive of the issue.[339]

Most recently, in *Washington v. Confederated Tribes of the Colville Reservation*,[340] the Supreme Court considered the economic impact of

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United States v. Kagama, 118 U.S. 375, 381-82 (1886) ("[Indian tribes] were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations, . . . with the power of regulation of their internal and social relations and thus far not brought under the laws of the Union or of the states within those limits they resided"). The Court's statement in *Kagama* was quoted with approval in *McClanahan*. 411 U.S. at 173.

There is language in the Colville case to the contrary: "we find that the Tribes have failed to demonstrate that business at the smoke shops would be significantly reduced." 134 U.S. at 157. This burden on the tribes is mentioned during the discussion of the discriminatory aspects of the state's tax (that part of the decision has been previously criticized, see text & notes 190-195 *supra*), however, and not in the discussion of the *Williams* balancing test.

332. The equation in this paragraph of "balancing" and "presuming" deserves some comment. In his treatise on the conflict of laws, Weintraub describes what he calls "result oriented" rules. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS, 208-09 (1971). The *Williams* infringement test may be such a rule, orienting the result toward the protection of Indian self-determination. On balancing as a judicial device, *see generally* Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 (1963); Gunther, *In Search of Judicial Quality on a Changing Court: the Case of Justice Powell*, 24 STAN. L. REV. 1001 (1972).

333. See text & notes 95-100 *supra*.

334. 532 F.2d 655 (9th Cir. 1975).

335. *Id.* at 657.

336. *Id.* at 660-63. The court justified this method of statutory interpretation by finding a consistent congressional policy to foster tribal self-government. *Id.*

337. *Id.* at 663. *Accord*, Eastern Band of Cherokee Indians v. North Carolina Wildlife Comm'n, 588 F.2d 75, 78 (4th Cir. 1978).

338. 543 F.2d 1253 (9th Cir. 1976).

339. *Id.* at 1244 n.2.

340. 447 U.S. 134 (1980).

the challenged cigarette tax in making the *Williams* infringement inquiry. As the Court noted, "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."[341] The *Colville* decision was that the state tax did not infringe upon tribal rights of self-government because the tribe's competitive advantage, so easily destroyed by the state tax, was created initially only by the purported tax exemption. This conclusion is sensible, supports the results in both *Santa Rosa Band* and *Fort Mojave Tribe*, and should be limited to tribal attempts to market tax exemptions. Outside that unusual, inequitable, and now moot factual pattern, the language of *Colville* should require as part of the *Williams* test an inquiry into the tribe's legitimate economic concerns.

Williams should also require an inspection of the tribe's conflicting legislative scheme, if any.[342] The *Colville* Court was probably correct in deciding on those facts that the state tax justifiably interfered with the tribe's attempt to market the tax exemption. A contrary result would have suggested that the state's abolition of the cigarette tax would likewise interfere with the tribe's legislation. The language of that case should not be read too broadly, however. The Court suggested that, in the case of taxes with distributive or regulatory functions, a conflicting state tax might well be invalid as "contraven[ing] the principle of tribal self-government."[343]

A third observation that follows from the *Williams-Barnwell Brothers* link is that the need for national uniformity, an element of the *Barnwell Brothers* balance, also finds a place on the dormant Indian commerce clause scale. As reservations are scattered throughout the states and in some cases spread across state boundaries,[344] "commerce" with the Indian tribes presents problems similar to commerce between the states, requiring in at least some cases national uniformity.

Consider the *Fort Mojave Tribe* case. Of the three states in which the tribe's reservation lies, only California imposed a possessory interest tax on non-Indian lessees of reservation land.[345] While noting that "development of the California section of the reservation may be slowed" thereby,[346] the court upheld the state tax, finding the state in-

341. *Id.* at 156-57.
342. See text & notes 310-314 *supra*.
343. 447 U.S. at 158-59.
344. The Navajo reservation, for example, lies in Arizona, New Mexico and Utah. The Fort Mojave reservation lies in California, Nevada and Arizona. The Ute Mountain reservation lies in Colorado and New Mexico, and the Standing Rock reservation lies in North and South Dakota.
345. 543 F.2d at 1255.
346. *Id.*

terference with reservation activity "much less serious" than in *Williams*.[347] In *Fort Mojave Tribe*, the Ninth Circuit, consistently with the thesis of this article, applied both the supremacy and infringement tests. Yet the fact that the infringement test was not considered an aspect of a unified commerce clause inquiry is telling. Viewed from the perspective of the *Barnwell* "within its province" test, the result might have been different. The legitimacy of the facts on the state's side of the balance is conceded; taxation of leaseholds and revenue raising in general are areas of traditional state power. The other side of the balance, however, contains not only the protection given by the *Williams* test to tribal self-government, embellished by the *Santa Rosa Band* decision's concern for economic self-development, but also the need for national, or at least reservation-wide uniformity. It is entirely unclear whether a reservation established by the federal government to lie in several states should be regulated differently by those states. Had the Ninth Circuit added this inquiry to its calculus in its consideration of the California law, the result might well have been different.

b. Variations on the theme

In the years since 1959, the Supreme Court has not applied the *Williams* test consistently to all cases of state regulation of Indian activity. Thus, the strength of the dormant Indian commerce clause varies with the situation. What activity is "within [a state's] province" depends on the facts of each case, so that the theoretically simple *Barnwell Brothers* balance becomes more complicated in Indian law.

The first hint that *Williams* did not answer all the questions came in 1962 in *Organized Village of Kake v. Egan*.[348] Mr. Justice Frankfurter rephrased the *Williams* test in a way sure to please advocates of state regulation: "[E]ven on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law."[349] This rephrasing at the very least removes the presumption of invalidity discussed above.[350] But *Kake* involved Indians possessed of neither a reservation nor treaty rights, and it is clear that the decision must be restricted to such a situation, which is rare outside of Alaska. As the

347. *Id.* at 1258. The determinative factor was apparently that the tax was imposed on the non-Indian lessee and not the Indian lessor. *Cf.* Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) (in both cases the Court preserved a cigarette sales tax which burdened the non-Indian buyer rather than the Indian seller).

348. 369 U.S. 60 (1962).

349. *Id.* at 75. This statement in the *Kake* case was later cited with approval by the Court in Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973), an off reservation case. *See* text & notes 356 & 357 *infra*.

350. See text & note 331 *supra*.

Court said in *McClanahan*, "But [the holding of *Kake*] came in the context of a decision concerning the fishing rights of *non-reservation* Indians. . . . It did not purport to provide guidelines for the exercise of state authority in areas set aside by treaty for the exclusive use and control of Indians."[351]

Not only did *McClanahan* narrow the application of the *Kake* version of the "within its province" test, but it reread *Williams* to apply it to less than all state regulation cases. Arizona in *Williams* had argued that its tax on McClanahan's income did not violate the infringement test and hence was valid.[352] The Court "reject[ed] the suggestion that the *Williams* test was meant to apply to this situation"[353] and then narrowed the application of the *Williams* infringement test to situations involving non-Indians such as Lee, the white trader.[354] In a situation involving only Indians, the Court restricted the legislative province of the state to nearly nothing.[355]

Mescalero Apache Tribe v. Jones,[356] decided the same day as *McClanahan*, adds yet another variation to the dormant commerce clause analysis. That case involved New Mexico's application of a gross receipts tax to a tribal business operated off the reservation. Relying in part on *Kake*, the Court found, "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State."[357]

Williams, *Kake*, *McClanahan*, and *Mescalero* approach the dormant commerce clause question from different vantage points, allowing a categorization of the cases. Depending on the facts, the province of the state is defined differently, as follows:

(1) The strictest test is the *McClanahan* rule that in situations involving only Indians and only reservation activity, and most notably in "the special area of state taxation",[358] the state's province is defined by federal statute. Without federal approval, the state acts "without its province."

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351. 411 U.S. at 176 n.15 (emphasis in original). *See also id.* at 180 n.20.

352. *See* 83 Ariz. 241, 319 P.2d 998.

353. 441 U.S. at 179. This quotation comes late in the Court's opinion and is probably dictum since the tax had already been found to be invalid under the supremacy analysis. See text & notes 229-314 *supra*.

354. 411 U.S. at 179.

355. *Id.* at 179-80.

356. 411 U.S. 145 (1973).

357. *Id.* at 148-49. The word "generally" makes it impossible to say whether there remains a dormant commerce clause inquiry with respect to off-reservation activity. It is clear from the statement that the other *Barnwell Bros.* inquiries remain.

358. *Id.* at 148. The *Mescalero* decision contains a brief explanation of *McClanahan* at this point.

(2) The *Williams* test applies to reservation activity involving both Indians and non-Indians. In such situations, the state acts without its province if it "infringes upon the rights of the Indians to make their own laws and be ruled by them."[359]

(3) With respect to reservation Indians engaging in activities off the reservation, *Mescalero* substantially enlarges a state's province. In fact, the clear import of the language quoted above[360] is that in this situation the commerce clause inquiry extends no further than an analysis of discrimination and supremacy. In other words, as *McClanahan* reduced the state's province to practically nothing in Indian-Indian reservation activities, *Mescalero* expands the province to practically everything in off-reservation activities.

(4) Finally, there is *Kake v. Egan*. In situations involving nonreservation Indians state activity is presumed valid, although some kind of infringement inquiry is applicable. Why should this test be stricter than in the *Mescalero* situation? Perhaps because Indians without reservations are nonetheless entitled to some aspects of the right of self-determination in their dealings with the state. A reservation tribe has a protective enclave in which the rights of its members are greater than the rights of members of the non-reservation tribes, but the choice to go beyond the reservation makes them more vulnerable than their unprotected counterparts.

Despite this categorical confusion in Indian commerce clause analysis, lacking to a large extent under a *Barnwell Brothers* analysis,[361] one can see the underlying consistency between the dormant commerce clause analysis in the two areas. It is reasonable that there should be such consistency since in both areas the Court is dealing with state regulation of localized interests in a situation in which the Constitution creates a federal responsibility of supervision. Indeed, it would have been surprising had the Court not found itself on parallel courses in the two areas.

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359. 358 U.S. at 220; *see* text & notes 330-332 *supra*. The cigarette taxation cases, *Moe* and *Colville*, are members of this class of cases which apply the *Williams* test less liberally than other cases do. As mentioned above, the treatment is probably deserved given the characteristics of the cigarette tax. See note 189 *supra*.

The line between situations (1) and (2) is not always as clear at it might be. The Court does not explain why the interests of the taxing authority in *McClanahan* are not non-Indian interests requiring application of the *Williams* test. Apparently the Court is speaking of private activities: in *Williams* between the white creditor and the Indian debtor; in *McClanahan* between the Indian employee and the on-reservation employer (whose race is not disclosed). This is a reasonable distinction since the public rights of the state will always be involved—by the state court system in *Williams* and by the Tax Commission in *McClanahan*.

360. See text at note 357 *supra*.

361. Several writers, however, have undertaken a categorization of interstate commerce cases. *See, e.g.*, G. GUNTHER, *supra* note 90, at 297-328; J. NOWAK, *supra* note 30, at 243-66; L. TRIBE, *supra* note 30, at 232-44, 319-69.

Some troublesome language in the opinions, however, suggests that the Indian commerce clause, unlike its interstate counterpart, has no negative implications. Before proceeding to the next step in the *Barnwell Brothers* analysis we must therefore turn our attention to the margin.

c. Two footnotes

In footnote eight of *McClanahan*, the Supreme Court suggested that it is purely academic to inquire beyond supremacy "since in almost all cases federal treaties and statutes define the boundaries of federal and state jurisdiction."[362] This suggestion that there is, practically speaking, no dormant commerce clause need not be read broadly. The statement is subtended to the Court's explanation of why tribal sovereignty no longer is used to explain the invalidity of state law. Thus footnote eight is not directly on point with the Indian commerce clause, which is a constitutional assignment of federal authority not dependent upon the concept of tribal sovereignty.

Furthermore, the footnote's statement is just not true. For example, federal statutes and treaties do not help much in determining whether a state has jurisdiction to adjudicate a suit by a non-Indian against an Indian over a reservation tort.[363] Nor do these sources aid in deciding whether there is state power to serve process on the reservation.[364] Nor, as the *Colville* case recognized, do federal statutes provide all the answers, even in taxation cases.[365]

Footnote eight is less troublesome when read in the context of the facts of that case. Involved there was taxation, an area in which federal statutes and treaties are most encompassing.[366] This reading is consistent with *Mescalero*'s explanation of *McClanahan* as a case in the "special area of state taxation."[367]

More troublesome is footnote 17 in *Moe v. Confederated Salish and Kootenai Tribes*:

> "It is thus clear that the basis for the invalidity of these taxing measures, which we have found to be inconsistent with existing federal statutes, is the Supremacy Clause, U.S. Const., Art. VI, Cl. 2; and not any automatic exemptions 'as a matter of constitutional law' either under the Commerce clause or the intergovernmental immunity doc-

362. 411 U.S. at 172 n.8.
363. See note 10 *supra*.
364. See notes 5-6 *supra*.
365. Washington v. Confederated Tribe of the Colville Reservation, 447 U.S. 134, 147-59 (1980).
366. *See* Indian Reorganization Act, ch. 576, § 5, 48 Stat. 985 (1934) (current version at 25 U.S.C. § 465 (1976)); Treaty with the Navajo Indians, June 1, 1868, 15 Stat. 667.
367. 411 U.S. at 148.

trine as laid down originally in M'Culloch v. Maryland."[368]

Once again, however, this footnote is not the rejection of the negative implications of the commerce clause that it might appear to be at first blush.

In the first place, the footnote can be read as nothing more than a recognition that dormant commerce clause analysis is appropriate only in those instances in which supremacy does not invalidate the regulation. This recognition is consistent with *Barnwell Brothers* and the thesis of this article. Secondly, *Moe* involves state taxation,[369] that "special area" of *McClanahan* and *Mescalero*.

Perhaps more importantly, the context in which footnote 17 was written limits its application, for the footnote goes on to address a point of federal jurisdiction. The tribes in *Moe* had sought to convene a three judge district court, entitling them to a direct appeal to the Supreme Court.[370] As the law stood at the time *Moe* was brought, however, the tribes were entitled to a direct appeal only if their challenge to the state statute was on some basis other than supremacy.[371] The court found supremacy to be the reason for invalidity but held that the tribes were entitled to the special court "because at the outset the Tribe's attack asserted the unconstitutionality of these statutes under the Commerce Clause, a not-insubstantial claim since *Mescalero* and *McClanahan* had not yet been decided."[372]

The issue involved in footnote 17 was thus whether the plaintiffs were entitled to a direct appeal to the Supreme Court from a federal district court. The Court's dislike for such appeals is legend and justified. It is also moot, as the statutory circumstances for three judge courts are now very rare.[373] Given these circumstances, this essentially jurisdictional statement should not be read as rejecting the potential of a dormant Indian commerce clause. *McClanahan* and *Mescalero* did not reject the concept: There is no longer a need to reject it for the sake of a managable Supreme Court docket; and in fact the *Moe* decision

368. 425 U.S. at 481 n.17.

369. *Id. Moe* involved a sweeping attack by the tribes on Montana's personal property and cigarette taxes. At the point in the opinion at which footnote 17 appears, the Court holds invalid the state tax on personal property located on the reservation, a vendor license fee applied to Indian businesses on the reservation, and a cigarette tax applied to reservation sales by one Indian to another Indian. *Id.* The cigarette sales tax was later found valid as applied to a non-Indian buyer. *Id.* at 483. The Court's holding that the Indian seller may be required to collect this valid tax will be discussed at text and notes 375-386 *infra*.

370. 28 U.S.C. § 1253 (1976).

371. *See* Swift & Co. v. Wickham, 382 U.S. 111 (1965); 28 U.S.C. § 2281 (1970) (repealed 1976, Pub. L. 94-318, §§ 94-318, §§ 1, 2, 90 Stat. 1119).

372. 425 U.S. at 481 n.17.

373. *See* 28 U.S.C. § 2281 (1970) (repealed 1976, Pub. L. 94-318 §§ 1, 2, 90 Stat. 1119). *See also* 28 U.S.C. § 2284 (1976), for those narrow situations in which three judge courts are still required.

itself proceeds to use it, as will be seen in the next section.[374]

4. Means-ends relationship and less intrusive alternatives

Given that state regulation of Indian activity has rarely survived both supremacy and infringement analysis, it is not surprising that there have been scant occasions for the Court to deal with the appropriate means-ends relationship of state regulation. Some discussion of this requirement can be found, however.

As has already been noted,[375] the Court in *Moe v. Confederated Salish and Kootenai Tribes*[376] invalidated, on supremacy grounds, many of the taxes imposed by the state.[377] One tax, however, survived the supremacy hurdle[378] and with cursory analysis was found not to be offensive to tribal self-determination.[379] This tax was one on the sale of cigarettes by an Indian merchant to a non-Indian buyer.[380] Following its validation of this tax, the Court turned briefly to inspect the legitimacy of the requirement that the Indian merchant collect the tax for the state. This requirement was found to be minimally burdensome to the Indians and reasonably related to the enforcement of a valid tax.[381]

374. This view finds support in Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980). In addressing the same jurisdictional issue that was discussed in footnote 17 of *Moe*, the Court states, "We think the [appellee] reads too much into [footnote 17]." *Id.* at 147. Jurisdiction is upheld because "[n]either *Mescalero* nor *McClanahan* 'inescapably render[s] the [Tribes' Commerce Clause] claims frivolous' because neither holds that clause wholly without force in situations like the present." *Id.* at 148, *quoting* Goosby v. Osser, 409 U.S. 512 (1973).

375. See note 369 *supra*.

376. 425 U.S. 463 (1976).

377. *Id.* at 475-81.

378. *Id.* at 483. In *Moe*, the Court distinguished *Warren Trading Post* as follows: "Our conclusion in Warren that assessment or collection of that tax 'would to a substantial extent frustrate the evident congressional purpose of insuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations,' [380 U.S. at 691] does not apply to the instant case." 425 U.S. at 482. The apparent distinction is that in *Warren* the trading was done with Indians while the tax under discussion in *Moe* was on trading with non-Indians.

379. 425 U.S. at 483. The tribe argued that the tax on cigarette sales by Indians to non-Indians was a tax on the Indian retailer causing "a measurable out of pocket loss." *Id.* at 481. This argument is seen to be a dormant commerce clause argument, adopting the *Santa Rosa Band* view of economic self-determination. See text & notes 333-339 *supra*. The Court rejected this argument based on the fact that, under Montana law, the burden of the tax is conclusively presumed to be on the non-Indian buyer. 425 U.S. at 481-82.

The Court intimates, both in *Moe* and in the recent *Colville* ruling, that the question of who bears the burden of the tax is one solely of state and not federal law. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 151-52 (1980); 425 U.S. at 483. The District Court reached the opposite conclusion in the *Colville* case. Confederated Tribes of the Indian Reservation v. Washington, 446 F. Supp. 1339, 1352 (1978). In *Moe*, the Court went on to reject, without identifying it as such, the Tribe's economic self-determination argument by noting that economic advantage flowed to the Tribe only to the extent that the non-Indian buyers were willing to violate the law by withholding the tax due. 425 U.S. at 482.

380. 425 U.S. at 483.

381. *Id.* Regarding this state regulation of Indian reservations, the Court undertook the *Barnwell Bros.* analysis in one sentence: "We see nothing in this burden which frustrates tribal self-government, see *Williams v. Lee* . . . or runs afoul of any congressional enactment dealing with the affairs of reservation Indians." *Id.* There was no question that the requirement was nondiscriminatory.

This result is reasonable. The tax on non-Indian purchasers having been held valid, there are few effective collection methods other than collection by the seller. A contrary holding on this point would have required the state either to forego a valid tax because of the impossibility of collection—an outcome that the commerce clause does not require—or to operate customs-like inspection stations at the boundaries of reservations to discover and tax unstamped cigarettes.

Admittedly, the state might have been required to choose between these two alternatives but for the fact that the Court found the collection requirement to be minimally burdensome. The fourth step in the *Barnwell Brothers* analysis does not require that the state choose the theoretically best method of regulation but only that it not bypass an effective and less burdensome or less discriminatory alternative.[382] Given the circumstances of the *Moe* case, no such alternative collection scheme is obvious.[383]

Organized Village of Kake v. Egan[384] is another case where the Court permitted state regulation of Indian activity, in this instance the outlawing of fish traps for use on Alaskan coastal rivers. The court upheld the ban on traps as a valid conservation measure.[385] Although there is no discussion in the Court's opinion of alternative measures, the mention of the "migratory habits of salmon"[386] hints at a consideration of the appropriateness of the measure. Mr. Justice Douglas in his separate opinion, however, speaks at length of the evils of fish traps and hence of the legitimacy of such a ban.[387]

In conclusion, while there has been only limited discussion of a reasonable means-ends connection under the Indian commerce clause, there are indications of the viability of that inquiry. An occasion for its use will be seen in the next section.

IV. THE INDIAN COMMERCE CLAUSE APPLIED: SERVICE OF PROCESS AND RELATED ACTIVITIES ON AN INDIAN RESERVATION[388]

Recall the hypothetical problem set out earlier in this article: an

382. 303 U.S. at 190, 192.

383. In Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980), the Court held that the burden of proof lies with the Tribe to show that the state's means are not "reasonably necessary" to accomplish the legitimate end of collecting the valid tax. *Id.* at 157-58. The District court found no evidence of either reasonableness or unreasonableness, so the Supreme Court held the recordkeeping requirements valid. *Id.*

384. 369 U.S. 60 (1962).

385. *Id.* at 76.

386. *Id.*

387. *Id.* (Douglas, J., dissenting).

388. *See generally* Canby, *Civil Jurisdiction and the Indian Reservation*, 1973 UTAH L. REV. 206 (1973).

off-reservation traffic accident, an Indian defendant, a non-Indian plaintiff, and service of process on the reservation under a state statute. How should a court address the defendant's challenge to the application of the service statute on the reservation?

The Supreme Court has never directly addressed the question,[389] and the state and lower federal courts are divided.[390] An analysis under the Indian commerce clause outlined in this article follows.

A. *Discrimination*

A state service of process statute might deal with service on a reservation in one of several ways:

a. *The statute might apply uniformly across the state, including reservations*. Such a law would not discriminate against Indian commerce on its face, and it is difficult to see how it would unduly burden Indian commerce.[391] Therefore, this law would survive the first *Barnwell*

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389. The closest the Court has come to this question is the following dictum from McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973):

> [A] startling aspect of this case is that appellee apparently concedes that, in the absence of compliance with 25 U.S.C. § 1322(a) [Public Law 280], the Arizona courts can exercise neither civil nor criminal jurisdiction over reservation Indians. Brief for Appellee 24-26 [footnote omitted]. But the appellee nowhere explains how, without such jurisdiction, the State's tax may either be imposed or collected.

Id. at 178.

The omitted footnote reads, "In light of our prior cases, appellee has no choice but to make this concession. *See, e.g.*, Kennerly v. District Court, 400 U.S. 423 (1971); States [sic] v. Kagama, 118 U.S. 375 (1886)." 411 U.S. at 178 n.10. This passage is somewhat cryptic. If the court is suggesting that Public Law 280 answers the question under discussion in the text, then it probably proves too much. *See* note 239 *supra*. In any event, the state courts have not viewed *Kennerly* as having answered the question. *See generally* Bad Horse v. Bad Horse, 163 Mont. 445, 517 P.2d 893 (1975). *See also* Langford v. Monteith, 102 U.S. (12 Otto) 145, 147 (1880) ("Where no [clause excluding state jurisdiction] is found in a treaty with Indians . . ., the lands held by them are a part of the territory and subject to its jurisdiction, so that process may run there, however, the Indians themselves may be exempt from that jurisdiction").

390. *Compare* Little Horn State Bank v. Stops, 170 Mont. 510, 514-15, 555 P.2d 211, 213 (1976) (levy and execution may be had) *and* Bad Horse v. Bad Horse, 163 Mont. 445, 450, 517 P.2d 893, 897 (1974) (process may be served) *and* State Sec., Inc. v. Anderson, 84 N.M. 629, 632, 506 P.2d 786, 789 (1973) (process may be served) *and* Fournier v. Roed, 161 N.W.2d 458, 467 (N.D. 1968) (reservation arrest is appropriate for off-reservation crime) *with* Joe v. Marcum, 621 F.2d 358 (10th Cir. 1980) (garnishment on the reservation impermissible) *and* U.S. v. Tri-County Bank, 415 F. Supp. 858, 868-69 (D.S.D. 1976) (no enforcement of secured party's rights, dictum) *and* Annis v. Dewey County Bank, 335 F. Supp. 133, 136 (D.S.D. 1971) (no execution on the reservation) *and* Francisco v. State, 113 Ariz. 427, 431, 556 P.2d 1, 5 (1976) (process may not be served) *and* Martin v. Juvenile Court, 177 Colo. 261, 262, 493 P.2d 1093, 1094 (1972) (process may not be served).

391. It is difficult to hypothesize a uniform state service statute that burdens Indian commerce in the same way as, say, the Illinois mudflap regulation in Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959) (see text & notes 102-104 *supra*). This difficulty arises from the fact that most reservations lie within one state, and, hence, any burden on Indian commerce will be uniform. The situation might be different given a reservation lying in more than one state, or given a statute that treated different reservations differently. See text and notes 270-272 *supra*.

The better explanation of the difficulty, however, is probably that the interstate commerce clause analysis is parallel, not identical, to Indian commerce clause analysis. The inclusion of both Indian and interstate commerce in the same clause of the Constitution shows that the problems are similar, not coincidental: with respect to Indians, the fear is discriminatory or non-

Brothers inquiry.

b. *The statute might prohibit service on an Indian reservation.* Here we have a statute that discriminates on its face. But is the discrimination in favor of, or against, the Indian tribes, and does it make any difference?

One view might be that since the statute is facially discriminatory, it is prohibited by the Indian commerce clause. Such a ruling would be unfortunate since the discrimination question should not be dispositive. Commerce clause analysis must be seen as four discrete but interdependent inquiries. Discrimination is not only the first inquiry, it is later reinforced as an aspect of the "within its province" balance and the means-ends relationship. Thus, the antidiscrimination component must be read consistently with the infringement test and other parts of the *Barnwell Brothers* analysis that recognize Indian tribal sovereignty and the right to self-government. The discrimination here does not threaten those protected interests, and it would be a schizophrenic commerce clause which would invalidate this statute while protecting tribal self-government.[392]

The argument might be made that a statute such as this does effectively discriminate against commerce with the Indian tribes since non-Indian dealers will be less likely to transact business with Indians if deprived of the protection of service of process. This argument appears to go to the soundness of the legislative choice rather than the constitutional legitimacy of the enactment. In this case, the argument is especially weak because, as we shall see,[393] it may well be that a statute such as this is required for the state to remain "within its province."

c. *The statute might prohibit an Indian plaintiff from serving process on a defendant.* This situation is not directly on point with the original hypothetical; nonetheless, it is an interesting one with which to deal. The situation is analogous to cases dealing with provision of state services such as education,[394] welfare,[395] and the franchise,[396] in most of which Indians are found entitled to such services as a matter of state law.

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uniform treatment of the quasi-sovereign groups within the state, while with respect to interstate commerce, the fear is local protectionism damaging the Union.

392. An analogy might be made to a state regulation that favors interstate commerce. The discrimination is clear, but the statute should not fall to this component of the commerce clause.

393. See text & notes 423-432 *infra*.

394. *See* Piper v. Big Pine School Dist., 193 Cal. 664, 226 P. 926 (1924); Grant v. Michaels, 94 Mont. 452, 23 P.2d 266 (1933); Crawford v. School Dist. No. 7, 68 Or. 388, 137 P. 216 (1913).

395. *See* Acosta v. San Diego County, 126 Cal. App. 2d 455, 272 P.2d 92 (1954). *But cf.* White v. Califano, 437 F. Supp. 543 (D.S.D. 1977), *aff'd*, 581 F.2d 697 (8th Cir. 1978) (State is without jurisdiction to commit an Indian involuntarily to the state mental health facility).

396. *See* Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456 (1948); Prince v. Board of Educ., 88 N.M. 548, 543 P.2d 1176 (1975).

The commerce clause analysis would conclude that Indians may not be the subject of such discrimination. Here, as in situation (b), above, the statute is clearly discriminatory; but unlike (b), that discrimination is not reinforced by any of the other *Barnwell Bros.* tests. Thus, regardless of the unsure impact of the equal protection clause,[397] such a statute would not be constitutionally permissible.[398]

d. *The statute might provide that members of a tribe may serve process on a defendant only if that tribe affords reciprocal rights on the reservation to non-Indian plaintiffs against Indian defendants.* Mississippi's analogous regulation governing the production and sale of milk read, "Milk and milk products from . . . [another state] may be sold in . . . Mississippi . . . provided . . . that the regulatory agency [of the other State that] has jurisdiction accepts Grade A milk and milk products produced and processed in Mississippi on a reciprocal basis."[399] This regulation was attacked in *Great Atlantic & Pacific Tea Co. v. Cottrell*[400] by a Louisiana milk producer on the basis of the interstate commerce clause (Louisiana not having executed such a reciprocal agreement).[401] The unanimous Supreme Court agreed that the regulation was unconstitutional.[402] The Court found the case indistinguishable from *Dean Milk Co. v. Madison*,[403] a case which had much to say about the antidiscrimination component of the commerce clause. In *Cottrell*, Mississippi was found to have chosen a scheme too discriminatory against interstate commerce to withstand constitutional inspection.

Perhaps the hypothesized service of process statute is distinguishable from the invalid milk control regulation. The interests served by both are legitimate: health and the protection of injured citizens. In *Cottrell*, however, the Court found that the health interest could be protected without discriminating against interstate commerce, for example by Mississippi's inspection of Louisiana milk producers.[404] By contrast, the state's interest in securing the advantages of service to its citizens is more difficult to protect. The state could, of course, adopt the tribal service statute, if any, as its own law if it was found to be adequate.[405] In the face of an inadequate or missing tribal statute,

397. See text & notes 196-227, *supra*.

398. *See* Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 156-57 (1980).

399. Regulation Governing the Production and Sale of Milk and Milk Products in Mississippi, § 11 (1967) (quoted in Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 367 (1976)).

400. 424 U.S. 366 (1976).

401. *Id.* at 368.

402. *Id.*

403. 340 U.S. 349 (1951), discussed at text & notes 34-39 *supra*.

404. 424 U.S. at 377.

405. See discussion at note 433 *infra*.

however, the state might be forced to turn to the hypothesized statute as the only effective way to accomplish its goal.

Should a court determine that the reciprocal service of process statute survives the discrimination test under the commerce clause, the disadvantaged Indian plaintiff would have to fall back on an equal protection attack. The validity of the statute under this constitutional provision is an inquiry beyond the scope of this presentation,[406] but a court might well conclude that the Indian plaintiffs are "not [prohibited from serving process] because they are of the Indian race, but because they were enrolled members of the . . . tribe."[407]

In summary, the most likely service of process statute, discussed in (a), above, would survive the first *Barnwell Brothers* inquiry, as would the statute most protective of Indian self-determination discussed in (b). The antidiscrimination component would strike only statutes that directly and unreasonably discriminate against Indian commerce.

B. *Preemption*

The federal statute most readily applicable to this area is Public Law 280, and its effect is not to preempt state law, but to confirm it. In fact, as the Supreme Court said in *Bryan v. Itasca County*,[408] "the primary intent of § 4 [of Public Law 280] was to grant jurisdiction over private civil litigation involving reservation Indians in state court."[409] This language should be sufficient to validate the service of process statute of those states that have properly assumed jurisdiction under Public Law 280[410] since Congress is unlikely to have granted jurisdic-

406. *See* Johnson & Crystal, *supra* note 177.
407. U.S. v. Antelope, 430 U.S. 641, 646 (1977).
408. 426 U.S. 373 (1976).
409. *Id.* at 385. 28 U.S.C. § 1360(a) (1976), § 4 of Public Law 280, reads as follows:
Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of Indian country affected	
Alaska	All Indian country within the State
California	All Indian country within the State
Minnesota	All Indian country within the State except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State except the Warm Springs Reservation
Wisconsin	All Indian country within the State.

410. *See* note 409 *supra* for a list of the 'mandatory' Public Law 280 states. Washington, Idaho, and Iowa have assumed jurisdiction over some subject areas, and service with respect to these areas would be appropriate. *See* WASH. REV. CODE ANN. § 37.12.010 (1963 & Supp. 1980); IDAHO CODE § 67-5101 (1973); IOWA CODE ANN. § 1.12 (West Supp. 190). Nevada, Utah, and North Dakota have assumed jurisdiction to the extent that tribes consent. *See* NEV. REV. STAT. § 41.430 (1979); UTAH CODE ANN. § 63-36-9 (1978); N.D. CENT. CODE § 27-19-01 (1974 & Supp.

tion to those states while denying them the right to serve process.

With respect to those states that have not assumed jurisdiction pursuant to Public Law 280, there is authority in *Kennerly v. District Court*[411] for the theory that the statute has negative implications as well as the positive ones just discussed. The theory is that Congress has enacted a scheme that represents the only method whereby the states may gain jurisdiction over the Indian reservation and a state not conforming to that scheme may not exercise jurisdiction.[412] As suggested above,[413] there is some danger of reading *Kennerly* so broadly that it proves too much; but perhaps in the essentially jurisdictional area of services of process that case does indeed require that preemption be found.

This appears to be the holding of at least two cases. In a case involving service of process on the Papago reservation, the Supreme Court of Arizona held "If the state has failed to take the requisite steps to confer upon itself jurisdiction under [Pub. L. 280, as amended], then, based on the holding in *Kennerly*, the state must be held to be without jurisdiction."[414] And in a case involving execution of judgment on the Cheyenne River Sioux Reservation, the South Dakota district court cited *Kennerly* to demonstrate that tribal and state actions were insufficient to confer jurisdiction on the state.[415] These arguments are not well answered in the post-*Kennerly* cases finding the service proper. For example, in *State Securities, Inc. v. Anderson*,[416] the New Mexico Supreme Court does not cite *Kennerly*.[417] *Little Horn State Bank v. Stops*[418] mentions the case only briefly and without discussion of its impact.[419]

If Public Law 280 is found not to be preempting in this negative sense, the argument that service is impermissible under the supremacy clause becomes weaker. As recognized in *Francisco*, the enabling acts of the western states are not strong evidence of Congressional preemp-

1979). New York has civil jurisdiction over its reservations pursuant to federal statute. *See* Pub. L. No. 785, ch. 947, 64 Stat. 845 (1950).

411. 400 U.S. 423 (1971).

412. *Id.* at 428-30. *See also* the dictum in *McClanahan* cited in note 389 *supra*.

413. See note 239 *supra*.

414. Francisco v. State, 113 Ariz. 427, 431, 556 P.2d 1, 5 (1976).

415. Annis v. Dewey County Bank, 335 F. Supp. 133, 135 (D.S.D. 1971).

416. 84 N.M. 629, 506 P.2d 786 (1973).

417. The dissent, however, does cite *Kennerly*. *Id.* at 636, 506 P.2d at 793.

418. 170 Mont. 510, 555 P.2d 211 (1976).

419. *Id.* at 514, 555 P.2d at 213. The Montana Supreme Court suggested that *Kennerly* overruled *Williams v. Lee*, see note 239 *supra*, only to be overruled in turn by *McClanahan*. The Court read *Kennerly*, *Williams*, and Security State Bank v. Pierre, 162 Mont. 298, 511 P.2d 325 (1973), to apply only to cases of non-members transacting business on the reservation. 170 Mont. at 515, 555 P.2d at 214. The "business" referred to in *Stops* was transacted off the reservation. *Id.* at 511, 555 P.2d at 211.

tion.[420] The treaties of some tribes may be preemptive of state rights to serve process, but these old documents are unlikely to speak directly to services of process,[421] and their vague language is an invitation to strained construction. In short, the best argument for invalidity of the state service statute under the supremacy clause is that under the *Kennerly* rationale a state may not acquire jurisdiction without abiding by Public Law 280. If this argument is unpersuasive, then a court must move to the third of the *Barnwell Brothers* inquiries.

C. "Within its province"

Because our hypothetical involves private activity between an Indian and a non-Indian, the *Williams* infringement balancing test is the appropriate inquiry.[422] On the state's side of the scale goes its legitimate interest in allowing a plaintiff with a valid cause of action to obtain jurisdiction over the defendant.[423] On the other side are the considerations of uniformity, burdens on commerce, and infringement of tribal self-government.

Service of process does not strike one as an area where national uniformity is required. Nor does the ability to serve process on a reservation Indian for an off-reservation tort burden Indian commerce even in its broadest meaning. The inquiry narrows, then, to whether state service outweighs the Indians' right to make their own laws and be ruled by them.

Two factors seem relevant. First, has the tribe enacted its own service statute? If so, it may represent a tribal expression of the way process ought to be served on the reservation. Perhaps service by mail is inappropriate on a very isolated reservation. Perhaps the tribe feels that service ought always to be accomplished by a public official, rather than by private parties as allowed by many state statutes.[424] A tribal service statute embodying such considerations would provide strong evidence of interference with the tribe's right of self-determination.[425]

420. 113 Ariz. at 430, 556 P.2d at 4. *See, e.g.*, Arizona Enabling Act, Pub. L. No. 219, ch. 310, § 20, 36 Stat. 569 (1910); New Mexico Enabling Act, Pub. L. No. 219, ch. 310, § 1, 36 Stat. 557 (1910); Oklahoma Enabling Act, Pub. L. No. 234, ch. 3335, § 1, 34 Stat. 267 (1906); Enabling Act for North Dakota, South Dakota, Montana and Washington, Act of February 22, 1889 ch. 180, § 1, 25 Stat. 676 (1889).

421. *Cf.* 113 Ariz. at 430, 556 P.2d at 4 (construing executive order of President Wilson establishing the Papago reservation).

422. *See* text & note 359, *supra*.

423. Most states have long arm statutes which allow the state to gain personal jurisdiction over a tort defendant wherever located. *See, e.g.*, N.D.R. CIV. P. 4(b)(2)(c). Summons must be served personally on such a defendant if within the state. N.D.R. CIV. P. 4(d)(2); F.R. CIV. P. 4(d)(1). If the defendant is not found in the state, it is common for the state to allow service to be made as if the defendant were in the state, or by the law of the other state or by mail. *See, e.g.*, N.D.R. CIV. P. 4(d)(3).

424. *See* OKLA. STAT. ANN. tit. 12, § 158.1 (West Supp. 1979).

425. The closest the Supreme Court has come to discussing such a conflict between tribal and

Second, there is an important distinction between pre-litigation service of process on the one hand and pre- or post-judgment attachment or execution on the other. While arguably service of process is only minimally intrusive into tribal affairs and justified in view of the off-reservation tort, the execution of a state court judgment on reservation property presents an entirely different situation. The concept of turning a personal judgment into a lien on realty or personalty may be foreign to the Indian culture, and such an event may be seen as much more intrusive into reservation affairs than mere service of process.

The slippery slope between service and execution is reflected in the cases. In *Bad Horse v. Bad Horse*,[426] the Montana Supreme Court allowed a writ of execution to issue because it found that service of process had been proper.[427] The South Dakota district court in *Annis v. Dewey County Bank*,[428] however, recognized no difference between the two intrusions and prohibited execution.[429]

Perhaps a court could make a reasoned distinction between the two intrusions and permit service while prohibiting execution. That would result in a judgment being enforceable only off the reservation.[430] Such a result, labeled "absurd" and "illogical" by one court,[431] is unlikely, and service of process and execution will probably stand or fall together.[432]

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state regulation of the same subject is in Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980), in which both the tribe and the state taxed the same cigarette sales. The Court found that the tribal tax did not preempt the state tax even though the taxing ordinances were approved by federal authorities. *Id.* at 154-55. Nor did the existence of the tribal tax cause the *Williams* balance to favor the tribe. *Id.* at 156-57. The purpose of a service of process statute, however, might well fit within the Court's description of "distributive or regulatory purposes", *id.* at 158, in which case the conflict would represent a threat to tribal self-government.

Consider, for example, the question of service by mail. Suppose the state allows such service but the tribe does not. It can perhaps be shown that the tribe has chosen not to permit service by mail in order to avoid possible injustice due to irregular mail delivery. Such a regulatory purpose should be given considerable weight, under *Colville*. *Cf.* Joe v. Marcum, 621 F.2d 358 (10th Cir. 1980) (the court prohibited garnishment of on-reservation income pursuant to an off-reservation judgment in the face of a tribal code which did not permit garnishment).

426. 163 Mont. 445, 517 P.2d 893, *cert. denied*, 419 U.S. 847 (1974).

427. *Id.* at 452, 517 P.2d at 897; *accord*, Little Horn State Bank v. Stops, 170 Mont. 510, 555 P.2d 211 (1976).

428. 335 F. Supp. 133 (D.S.D. 1971).

429. *Id.* at 136.

430. The existence of off-reservation property would make quasi-in-rem jurisdiction available in the proper case and hence make personal jurisdiction less important. *See* Shaffer v. Heitner, 433 U.S. 186 (1977).

431. Little Horn State Bank v. Stops, 170 Mont. 510, 517, 555 P.2d 211, 215 (1976).

432. No case is found in which a court allowed service but prohibited execution. *But see* Joe v. Marcum, 621 F.2d 358 (10th Cir. 1980), in which U.S. Life had sued Joe in New Mexico court on an off-reservation debt. Service was apparently made under New Mexico law, although this is not clear from the opinion. *See* State Securities, Inc. v. Anderson, 84 N.M. 629, 506 P.2d 789 (1973). Default judgment was entered for U.S. Life, which caused a writ of garnishment to issue under New Mexico law to Joe's reservation employer.

Joe then brought suit in federal court under 28 U.S.C. § 1343 and 42 U.S.C. § 1983 to enjoin the state judge from issuing the writ. Unlike the federal defendant in *Annis v. Dewey County Bank*, 335 F. Supp. 133 (D.S.D. 1971), U.S. Life did not intervene and counterclaim on its default

D. *Means-ends Relationship*

Here again, the existence of a tribal service statute might be telling. Given the general state acceptance of service by any disinterested party, the state might require a plaintiff to use the tribal service scheme to accomplish service for the state litigation. This would seem to give proper deference both to the state interest in providing a forum and to the tribal interest in self-determination.[433]

Francisco v. State[434] specifically recognized the appropriateness of requiring a litigant to conform to tribal law. "We . . . note that service of process could have validly been effected through the Papago Indian authorities who are vested with the power to serve process pursuant to tribal law."[435] This suggestion makes good sense and is justified by the *Barnwell Brothers* requirement that a state employ less burdensome or intrusive alternatives when available.

V. CONCLUSION

In summary, if there is a tribal service statute, even a nondiscriminatory state service statute should be invalid. The existence of the tribal scheme makes the state statute vulnerable on supremacy grounds, renders it more intrusive upon tribal self-determination, and provides a less intrusive means of accomplishing the legitimate state purpose.

If there is no tribal service statute, the state law may still be preempted by Public Law 280 and *Kennerly*. This *in personam* jurisdiction application of *Kennerly* is more appropriate than its more sweeping application to all problems.

If Public Law 280 is found to have fewer negative implications than *Kennerly* suggests, then the state law may well be valid since treaties and enabling acts can be read to permit service of process, the mere service of a summons is not very intrusive into reservation life which

judgment. The district court's summary judgment for Joe was affirmed by the Tenth Circuit. 621 F.2d at 359.

One additional factor is relevant when considering execution of judgment: the ability of a state court judgment to be enforced in tribal court. The extent to which that option is available is unclear and rests upon a construction of 28 U.S.C. § 1738 (1976), the federal full faith and credit statute. The statute arguably applies to tribal courts, and some state courts have so suggested. *See* Jim v. C.I.T. Fin. Serv., 87 N.M. 362, 533 P.2d 751 (1975). A state court judgment will be enforced if the tribal court construes the statute to bind it and, at present, the tribal court construction of the federal statute will be final, as no appeal into the federal system is allowed. *See* Ragsdale, *Problems in the Application of Full Faith and Credit for Indian Tribes*, 7 N.M.L. REV. 133 (1977). Of course, a tribal court might enforce the state judgment through the doctrine of comity. *Cf. In re* Fox, 23 Or. App. 393, 542 P.2d 918 (1975) (an Indian residing on one reservation was subject to the divorce decree of the tribal court of another under the doctrine of comity).

433. *Cf.* N.D.R. Civ. P. 4(d)(3)(B) ("Service upon any person subject to the personal jurisdiction of the courts of this state may be made outside the state: . . . in the manner prescribed by the law of the place in which the service is made").

434. 113 Ariz. 427, 556 P.2d 1 (1976).

435. *Id.* at 428 n.1, 556 P.2d at 2 n.1.

has already been disrupted by an off-reservation tort, and no handy alternative is available to the plaintiff. Nevertheless, a court should be wary of extending this reasoning too quickly to the execution of the state-obtained judgment on the reservation.

Analogies between Indian and non-Indian areas of the law are inherently suspect. Indian tribes are *sui generis* and this might truly be one of those areas in which all generalities are wrong. Furthermore, the problems discussed in this article are perhaps not best handled by litigation. When the rights and powers of self-governing entities are at stake, a conference table seems more fitting than a courtroom. Still, states and tribes act independently; suits are brought, and courts must determine when a state may legitimately regulate Indian activity. It is the thesis of this article that there is something to be gained by looking at the commerce clause as a single constitutional provision, atacking similar though different problems, with parallel analyses.