Williams v. Lee (1959) - 50 years later: A Re-assessment of One of the Most Important cases in the Modern-era of Federal Indian Law

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Abstract

It is 50 years since the landmark decision of Williams v. Lee was handed down by Justice Hugo Lafayette Black and the United States Supreme Court. At the time, the case was a watershed event that signified the legal resurgence of Native America in Federal Indian law and in particular, the renaissance of the Indian sovereignty doctrine, inherent tribal sovereignty and the principles of Worcester v. Georgia.¹ There can be no doubt that the eloquently constructed opinion by Hugo Black brought positive news for all Native Americans, especially in light of the process of Termination that was being pursued by Congress and the United States President.² However, against this nascent sense of renewal and hope, the Williams case also began what became an insidious trend in the decision-making process of the U.S. Supreme Court; the weakening of the Indian sovereignty doctrine and some of the key attributes of tribal power; namely civil, criminal and taxation authority.³ Much of the academic literature in the field of Federal Indian law and Native American studies points to the importance of the Williams case as one which strengthened Native American sovereignty but other academics, from the 1990s, have questioned whether the case was an overall success for the authority of Native Americans on their reservations in the complexity of what is Federal Indian law. Although this article will analyze the re-affirmation of the Indian sovereignty doctrine and inherent tribal sovereignty in the Williams opinion, through the use of archival materials from the private papers of U.S. Supreme Court Justices, it will also be the first article in Native American studies to examine behind the scenes discussions and processes used in the Williams case and argue that the weakening of the Indian sovereignty doctrine began in 1959.

Historical Background of Federal Indian Law

Over the course of more than a century, the development of Federal Indian law and the Indian sovereignty doctrine by the United States Supreme Court has not been smooth. From the establishment of the Indian sovereignty doctrine in Worcester v.
The U.S. Supreme Court has placed limitations on the doctrine itself and in turn, eroded the inherent sovereignty of the tribes. The three cases of Johnson v. McIntosh (1823); Cherokee Nation v. Georgia (1831); and Worcester v. Georgia (1832), termed the Marshall trilogy, circumscribed attributes of inherent tribal sovereignty, and in doing so, weakened the influence of the Indian sovereignty doctrine. Despite some negative and positive legal outcomes over the course of 127 years from Worcester to Williams, in 1941 the Indian sovereignty doctrine was re-affirmed in Felix S. Cohen’s seminal work, The Handbook of Federal Indian Law, and subsequently applied by the Supreme Court in Williams v. Lee (1959). Therefore, in 1959 the tribes had the right to tax, enforce both civil and criminal law over reservation lands and the people on these lands, and generally exclude state authority from the reservations. It must be remembered that adherence to the Indian sovereignty doctrine and inherent tribal sovereignty by the U.S. Supreme Court has ebbed and flowed over a century and has depended on the disparate policy eras adopted by the United States Congress and President towards Native America. However, despite the first concrete opinion in favour of Indian sovereignty in more than a century, with its overwhelming language in favour of inherent tribal sovereignty, the public endorsement and reinvigoration of the Indian sovereignty doctrine was not all that it seemed.

The Williams v. Lee (1959) opinion and the Indian Sovereignty Doctrine

There is no question, the Williams opinion revitalised the Indian sovereignty doctrine and the court’s reliance on the territorial sovereignty of the tribes. Therefore, this analysis of one of the major post-Second World War Federal Indian law cases ties in with the dominant position taken by many scholars in Native American studies; a positive outcome for Native America. William C. Canby pointed out that the actions of the Williams court were based on the broad principles of Worcester, which both supported tribal territorial sovereignty and prohibited state law in the reservations, even if the states’ interests were important. This broad interpretation of tribal authority was discussed by Alison Dussias who termed it “geographically-based” authority. Therefore, the Williams decision, as Philip Frickey observed, affirmed the territorial sovereignty of the tribes and the court’s reliance on the Indian sovereignty

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6 Therefore, restrictions placed directly on the Indian sovereignty doctrine limited inherent tribal sovereignty itself.
7 Johnson v. McIntosh, 21 U.S. 543 (1823); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); and Worcester v. Georgia (1832).
9 Ibid.
10 The first policy era was the sovereign to sovereign period (1776-1820s). The second was removal (1830s-1880s). The third was the reservation period (1880s-1930s). The fourth was assimilation and allotment (1880s-1930s). The fifth was the Indian New Deal (1930s-1940s), the sixth was termination (1950s-1970) and the seventh policy era, the tribal self-determination period, began in 1970 and has continued to the present day.
doctrine adhered to the principle that Congress, not the Supreme Court Justices, had authority to diminish tribal authority. In *Conquering the Cultural Frontier*, David H Getches also argued that the Supreme Court relied on tribal sovereignty and the sovereignty doctrine, observing that “In its bellwether Williams decision, the Court vindicated tribal sovereignty in a modern context” and “confirmed the modern Court’s adherence to foundation principles”\(^{13}\) of Federal Indian law. The interpretation of Charles F. Wilkinson also concurred with the renewed application of tribal sovereignty over every person and over all of the lands of the reservation, going as far as to define the *Williams* case as the one that “…opened the modern era of federal Indian law.”\(^ {14} \)

In 1959, the Justices of the Supreme Court had the option to support or discard the Indian sovereignty doctrine in favour of using federal authority to protect the tribes from state law.\(^ {15} \) The facts of the case revolved around a federally approved non-member shop owner on the Navajo reservation who brought an action in the Arizona State Court against a Navajo couple to collect payment for goods sold on credit. The Navajo couple appealed because they thought that the Navajo tribal court had the relevant authority to hear the case. The main question addressed by the U.S. Supreme Court was whether the Navajo or the State of Arizona had authority over the claim of the non-member. The Justices relied on the principles of inherent tribal sovereignty and territorial sovereignty to strike down the opinion, which supported the exercise of state law inside the Navajo reservation, issued by the lower court. Furthermore, in contrast to the position adopted by the federal government, which wanted the Supreme Court to address questions of tribal authority within the parameters of a federal government versus state government framework, the interpretation of the *Williams* court allowed tribal governments to co-exist as a third branch of government alongside state governments and the federal government.

The Supreme Court recognised the importance of addressing the uncertainty of the law in the modern context of post-Second World War America by applying either the Indian sovereignty doctrine or applying the law, which reflected the significant changes in federal policy and Supreme Court case law from the late nineteenth century.\(^ {16} \) As Philip P. Frickey explained, this was the first case “…in a contemporary context in which non-Indians were involved”\(^ {17} \) and the outcome was significant to the future of the tribes and the states. The importance of the *Williams* case to the Navajo and to all Native Americans was observed in a memorandum, “Petitioners [The Navajo] contend that this is the most important Indian case in many years”\(^ {18} \) and “It appears that this question has not been…decided by this Court or by Congress.”\(^ {19} \) In addition, the *Williams* court had to settle conflicting strands of law because as Earl

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\(^ {15} \) *Williams v. Lee*, 217-218.


\(^ {17} \) Ibid., 29.

\(^ {18} \) Box 1201, WOD Papers, “1957 Term No. 811, Williams v. Lee, No.39, Cert to Supreme Court of Arizona,” n. d.

\(^ {19} \) Box 1201, WOD Papers, “1957 Term No. 811.”
Warren noted, “…the law is unsettled.” The contradictory developments in Federal Indian law from the nineteenth century resulted in neither of the two parties being able to “…point to precedents in this Court which are decisive.” Despite the overwhelming divergence in the precedents and case law, the Supreme Court had to rule on the issues and as Justice Charles Evans Whittaker pointed out, “…how to do it.” This conflict was simply between the application of the sovereignty doctrine, pointed out in a memorandum to mean that “state courts have no jurisdiction over a civil action involving an Indian on a reservation unless Congress so authorizes,” and the rationale used by the Arizona Supreme Court (the lower court), which ruled that states had jurisdiction in the reservation unless federal authority existed to prohibit state law. The principle used by the lower court was explained in a memorandum to Earl Warren, “…unless Congress denies such jurisdiction, state courts have jurisdiction in civil suits involving Indians for transactions arising on reservations within the state."

The Navajo, who vehemently disagreed with the ruling of the lower court, wanted the Supreme Court to use the sovereignty doctrine to sanction exclusive tribal authority over non-members and to prohibit state law inside their reservation until Congress legislated to allow state authority into the reservation. This was described in a memorandum as the merits of the “broad attack” and “directed to the contention that state courts lack jurisdiction over suits brought against reservation Indians arising out of transactions taking place on the reservations.” The Navajo wanted tribal sovereignty to prevent state courts from having jurisdiction over suits brought by non-members against reservation tribal members. Furthermore, the Navajo, who wanted the court to clarify the law in their favour, suggested the re-invigoration of the sovereignty doctrine and the annulment of any state law inside the reservation. As a memorandum explained, the tribe was more “concerned with making law [and]…is determined to win on the broad ground that there is no jurisdiction at all in the state courts in any case involving Indians on a reservation.” The exclusion of state law from the reservation was fundamental to the Navajo, as was the principle that explicit Congressional authority was required to allow state authority into the reservation. As the Navajo explained, “the state courts have no jurisdiction over a civil action involving an Indian on a reservation unless Congress so authorises.” Therefore, the Navajo position supported exclusive Navajo authority inside the reservation until it was reversed by Congress.

The legal position of the Navajo also countered the opinion of the Arizona Superior Court, which ruled that state courts had civil authority in the reservation unless Congress, turning the Indian sovereignty doctrine on its head, restricted state power. The lower court relied on the principle derived from Draper v. United States (1896), which held that states had authority to punish crimes committed by one non-Indian on

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21 Ibid., 2.
23 Box 188, EW Papers, “No.39, 1958 Term,” DMC, 2.
24 Ibid., 2.
26 Ibid., 3.
another in the reservation because state power had not been restricted by congressional legislation. The lower court thought it was reasonable to extend this principle into civil law, stating that Congress had not acted to prevent this extension of state law. The lower court interpretation of the law, pointed out in a memorandum to Earl Warren,

“...relied on a general rule…from Draper v. United States…[which] held that a crime committed by a non-Indian on a reservation was to be tried by state, not federal court. Congress has not denied state jurisdiction in the situation. From this case, the Ariz. SC determined that since Congress has never denied jurisdiction in civil suits, the state courts had it.”

The understanding of the lower court was also based on other case law opinions, which applied the very same rationale. This was pointed out to William O. Douglas; “The court below cited some...authorities for the proposition that...state civil law could be applied [sic] to Indians unless Congress prohibits it and Congress has not so [sic] prohibited the application of...Arizona law here.” The U.S. Supreme Court Justices rejected this extension of Draper into a general rule, instead preferring to apply tribal sovereignty.

Moreover, the veto of the Navajo Rehabilitation Bill by President Truman in 1949 was a reason used by the Justices’ to support the principle of tribal sovereignty. Originally, the passage of 1949 bill allowed the states to gain authority in the reservations. A bench memorandum read, “In 1949, Congress passed the Navajo Rehabilitation Bill which provided in part that Navajos on reservations were subject to state laws and that nothing was to be deemed to take away Federal or tribal jurisdiction but that Federal, state and tribal courts were to have concurrent jurisdiction in all cases.” However, President Truman vetoed the part of the bill which allowed state law into the reservation. In doing so, he confirmed the sovereignty of the Navajo and reversed the explicit actions of Congress that allowed state authority into the reservation. As a memorandum explained, the 1949 bill

“...was vetoed by President Truman solely because of this provision concerning jurisdiction. In his veto message the President stated that the bill would "extend State civil and criminal laws and court jurisdiction to the Navajo-Hopi Reservations which are now under Federal and tribal laws and courts." He noted that the Navajo were probably the Indian group least prepared to go out and mingle with their neighbours and be governed by state law. He further stated that it "would be unjust and unwise to compel them [Navajos] to abide by State laws written to fill other needs than theirs," and noted that the Navajos requested a veto for this reason.”

The bill became law in 1950 but it did not contain the provision sanctioning state law inside the Navajo reservation.

30 Box 1201, WOD Papers, "1957 Term No.811."
34 Ibid., 5-6.
In addition, the Supreme Court’s analysis of the historical background to a 1953 act involved the presumption of inherent tribal sovereignty in the reservation. Therefore, in accordance with this idea, tribes retained sovereignty in the reservation until Congress reversed it and allowed state authority into the reservations. A bench memorandum in the Warren Papers explained this position,

“In 1953, Congress undertook some major legislation in this area. It passed a bill giving state courts jurisdiction over civil and criminal matters involving Indians on reservations but it specified the states involved—and Arizona was not included…The legislative history of the bill is most informative. In discussing the bill the House Committee stated: As a practical matter, the enforcement of law and order among the Indians in the Indian Country has been left largely to the Indian groups themselves…This would appear to be persuasive proof of Congress’ intent and understanding of the present state of the law.”

However, with congressional permission, the state still had to legislate to gain control in the reservations. If the State Legislature did not pass a relevant act then the state forfeited an opportunity to gain a foothold in the Navajo reservation. This principle was described in a memorandum; “No action has been taken by the state to comply with the provisions of the 1953 Congressional Act” and therefore “the history should control any general propositions such as implying jurisdiction in the absence of Congressional restriction.” Individual justices supported this presumption regarding the 1953 Act.

Importantly for the Navajo, Chief Justice Earl Warren and Justice William J. Brennan supported the presumption of inherent tribal sovereignty. Without the introduction of state legislation to confirm the actions of Congress, Warren said, “1953 Act gave jurisdiction conditionally – Arizona does not want to carry expense of that change - …goes on tribal forum.” Therefore, Arizona had to be willing to take the burdens of the 1953 act. As Warren pointed out, “…the 1953 statute gives Arizona its chance if it will assume burdens that go with it.” Because the states did not take the responsibilities established by the 1953 Act, Warren believed that the question was one to be answered in favour of the tribes and tribal jurisdiction, “Come out with the Indians.” Brennan concurred with Warren, observing that the court “must get to 1953 Act.” However, the United States government cautioned the Supreme Court against using the principle of inherent tribal sovereignty and the ‘broad attack’ to decide the case.

The opinion of the Supreme Court may have been informed by the pro-Indian interpretations and the compassionate beliefs of a select number of Justices. Hugo Lafayette Black was generally supportive of Native American rights as was William

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34 Ibid., 6-7.
36 Ibid., 8.
37 Box 1201, WOD Papers, “Conference November 21, 1958,” W.O.D.
39 Box I:15, WJB Papers, “Paul Williams and Lorena Williams,” W.J.B.
40 Box 1201, WOD Papers, “Conference November 21, 1958,” W.O.D.
O. Douglas. In a letter to Murray Lincoln, Chief Justice of the Navajo tribe, dated June 14 of 1965, Hugo Black wrote, “You know, I am also sure, the great interest and sympathy I feel for the Tribes that seek to preserve their ways of life.”\footnote{Box 34, Hugo Lafayette Black, Manuscript Division, Library of Congress, Washington, D.C., “Letter from Hugo Black to Murray Lincoln, June 14, 1965.”} This pro-Indian stance from Black may have helped convince wavering justices such as Felix Frankfurter who did not support tribal sovereignty in early November 1958. However, by late November he supported Hugo Black, noting the importance of \textit{Worcester} (1832); “And I duly note your [?] against ‘rites position’…in recalling the \textit{Worcester v. Georgia} affairs.”\footnote{Box 338, HLB Papers, “Memorandum from Felix Frankfurter to Hugo Black, December 23, 1958.”} Hugo Black may have therefore helped with the resurgence of Native American rights in 1959. The position of Chief Justice Earl Warren also seemed to be conciliatory and considered, pointing out in an early Hugo Black draft that “In the middle of page 4, I am wondering if the words, "sufficiently high stage of economic and social development" might not be softened a bit so far as the Indians are concerned by saying "acceptable stage" or "acceptable standard of economic and social development."”\footnote{Box 457, EW Papers, “Memorandum from Earl Warren to Hugo Black, January 5, 1959.”} At Conference, an internal meeting to discuss the case, on November 21, 1958, the court was unanimous and voted to reverse the decision of the lower court, which applied state law rather than tribal sovereignty.\footnote{Box 1201, WOD Papers, “Conference November 21, 1958.”} The interpretations of the individual justices were reflected in the \textit{Williams} opinion authored by Hugo Black.

The unanimous opinion outlined how the sovereignty doctrine had changed from its foundations in \textit{Worcester v Georgia} (1832).\footnote{The ruling in \textit{Worcester v. Georgia} held that the states had no jurisdiction in the reservations and only Congress had the power to remove attributes of tribal sovereignty. The tribe had authority over the reservation and all people in the reservation.} From the outset, Hugo Lafayette Black praised Chief Justice John Marshall’s \textit{Worcester} opinion, terming it “…one of his most courageous and eloquent opinions…”\footnote{Ibid.} and observed its legal importance; “Despite bitter criticism and the defiance of Georgia which refused to obey this Court’s mandate in \textit{Worcester} the broad principles of that decision came to be accepted as law.”\footnote{Ibid.} However, the sovereignty doctrine from \textit{Worcester} to \textit{Williams}, a 127-year period, had been modified by congressional policies and Supreme Court case law. In 1832 the tribes had exclusive authority over the reservations but by 1959 this exclusivity had given way to the application of state law in the reservations only on certain and specialised occasions, described by Hugo Black in the areas where “essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of \textit{Worcester} has remained.”\footnote{Ibid.} Only specific parts of the \textit{Worcester} policy had changed but there was still deference shown by the Supreme Court towards tribal sovereignty, “Thus, suits by Indians against outsiders in state courts have been sanctioned…And state courts have been allowed to try non-Indians who committed crimes against each other on a reservation…But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive.”\footnote{Williams v. Lee, 219-220, cases omitted.} Despite the modifications to \textit{Worcester}, the Indian sovereignty doctrine survived.
In 1959, the Navajo and all Native American tribes retained inherent sovereignty inside the reservation unless Congress withdrew parts of that sovereignty or the Supreme Court limited the legal protections afforded by Worcester. These principles were summed up by the introduction of what has become known as the ‘infringement test’ by the Williams court. It read, “Essentially, 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.”50 In essence, the tribes retained sovereignty in the reservation until either Congress took it away or it was proved that state authority did not infringe on tribal government and only then was state authority applicable inside the reservation. This test was not as strong as the Worcester principle but as William C. Canby observed, “In theory, [the test] at least…precludes state interference with tribal self-government no matter how important the state’s interest may be.”51 Although the test did give rise to the interpretation that state law existed in the reservation until it infringed on tribal government, the Williams court applied the Indian sovereignty doctrine.

The Williams opinion overruled the primary rationale of the lower court, the Arizona Supreme Court,52 and rejected the extension of Draper v. United States (1896) into a general rule to allow state jurisdiction over civil suits in the reservation.53 Alex Tallchief Skibine noted that tribal members were allowed to sue outsiders in state court but it did not follow in Williams that the states had authority in the reservation.54 Instead, tribal sovereignty existed unless it was removed by an explicit act of Congress, described by Philip P. Frickey as a process “which could be dislodged only by agreement or statute, not by judicial decision.”55 Therefore, in the most important part of the opinion, Hugo Black summed up the application of the sovereignty doctrine by the Supreme Court,

“It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it.”56

50 Ibid., 220. This was the Williams infringement test used to determine whether state law was applicable over both tribal members and non-members in the reservation. If congressional legislation did not oust state law then the question was whether state law infringed on the tribe. The infringement test was interpreted in two ways. First, it was read as a test which supported inherent tribal sovereignty and therefore tribes had inherent sovereignty unless attributes of that sovereignty were revoked by an act of Congress. Also, the tribes retained sovereignty in the reservation until it was proved that state action did not affect the tribe. Second, it was read as a test which supported the general presence of state law in the reservation until it was proved that state law infringed on the tribe.

51 Canby, American Indian Law, 243-244.


53 Ibid., 218.


56 Williams v. Lee, 223, cases omitted.
In language reminiscent of Chief Justice John Marshall, the opinion of Hugo Black applied inherent tribal sovereignty inside the reservation where tribal authority was dominant over state law and only Congress had the authority to take it away. As such, William Canby, Jr. believed that the Williams decision relied heavily on Worcester to prevent the application of state law in the reservation and in doing so held that concurrent jurisdiction interfered with tribal government.\textsuperscript{57} This line of thinking adopted by the Supreme Court Justices linked in with the general assessment of the powers of the tribe undertaken by Felix S. Cohen in 1941. In an attempt to reconcile the development of Supreme Court case law and divergent Federal Government policies from 1832, Cohen, in a seminal passage of his work, defined the powers of the tribe as,

“The whole course of judicial decision on the nature of tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, e.g., its power of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.”\textsuperscript{58}

Therefore, the tribes had authority, power and sovereignty, termed inherent sovereignty, over all lands and people within the reservation unless authority was explicitly withdrawn, divested or annulled by a clear and plain act of Congress or by treaty. In addition, Cohen’s definition of tribal powers was a reminder to the United States government and the United States Supreme Court that the tribes had always had inherent sovereignty over lands and people within those lands.

Moreover, the Williams court ruled that tribal authority was concomitant with territorial sovereignty.\textsuperscript{59} Navajo criminal and civil authority was applicable over every person within the reservation, “Today the Navajo Courts of Indian Offences exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants. No Federal Act has given state courts jurisdiction over such controversies.”\textsuperscript{60} Alison Dussias pointed out that the actions of the Supreme Court “treated tribal authority as being geographically-based, referring to the authority of tribal governments over their reservations; the lack of tribal membership of the individual being required to seek redress only in tribal court was irrelevant.”\textsuperscript{61} Philip Frickey agreed, stating that the court “founded on the notion of territorial sovereignty and its corollary, implied consent to governmental authority.”\textsuperscript{62} However, despite the positive nature of the Williams opinion for the Navajo and Native America, the thinking of the Supreme Court Justices within the internal decision

\textsuperscript{57} Canby, American Indian Law.
\textsuperscript{58} Cohen, Handbook of Federal Indian Law, 123.
\textsuperscript{59} Williams v. Lee, 223.
\textsuperscript{60} Ibid., 222.
\textsuperscript{61} Dussias, “Geographically-Based,” 48.
making structures of the *Williams* case considered moving away from the sovereignty doctrine. This represented, what has been termed, “the foundations of the silent revolution”.63

**Williams v. Lee (1959) and the Seeds of the Erosion of the Indian sovereignty Doctrine**

Behind the renaissance of tribal sovereignty established by the Justices involved in the *Williams* case lay the beginning of an idea, which formed the foundations of the erosion of the Indian sovereignty doctrine and inherent tribal sovereignty, what has been termed a “Silent Revolution”.64 The Supreme Court examined the idea of weakening tribal sovereignty by focusing on federal authority as a way to prohibit the application of state law in the reservation. This would have moved the focus of deciding Indian law cases from acknowledging the sovereignty of the tribes to basing decisions on a purely federal versus state basis. The foundations of the silent revolution began with the idea that the states had sovereignty to enter the reservations until it was precluded by an express act of Congress. This assessment of *Williams* takes account of the arguments made by David E. Wilkins and L. Scott Gould and diverges from noted scholars such as David H. Getches, William C. Canby, and Charles Wilkinson.65

The following part of the article builds on the work of two scholars, Wilkins and Gould, who have re-assessed the positive interpretation of *Williams*. However, the arguments of this article diverge from their conclusions by arguing that the Justices strongly considered using federal authority instead of tribal sovereignty to protect the tribes, with support from the private papers of some of the U.S. Supreme Court Justices. Although Wilkins believed that Navajo sovereignty was re-affirmed by the *Williams* court, the language used in the opinion “departed from the *Worcester* ruling of complete state exclusion from Indian country by holding that the states might be allowed to extend their jurisdiction into tribal trust land” of the reservation, unless it did not affect tribal government.66 Therefore, the uncertainty created by the Supreme Court, he argued, “dulled the emphatic *Worcester* holding.”67 L. Scott Gould concurred with the Wilkins opinion that the Supreme Court relied on inherent tribal sovereignty but disagreed over the negative use of Supreme Court language. Gould argued that the circumstances involved in *Williams* weakened the broad language used by the court to re-affirm the Indian sovereignty doctrine, namely an almost exclusive

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64 Ibid. The title “The Silent Revolution” was chosen as it seemed to me to reflect the cultural and ideological changes that took place within the workings of the Supreme Court from 1959 to 2001. The word silent refers not only to the gradual movement of the Supreme Court away from the idea of inherent tribal sovereignty but also to the way the Supreme Court deliberated away from public scrutiny. It was only after analysis of the private papers of the Supreme Court Justices that one sensed a sweeping ideological change within the minds of the justices and the actions of the court as a whole. Between 1959 to 2001, the actions of the Supreme Court Justices turned the Indian sovereignty doctrine on its head. This sweeping and unprecedented change represented a revolution in the way the Supreme Court dealt with Indian sovereignty issues. Equally, the incursion of state law into tribal reservations can also be interpreted as a revolution.
67 Ibid.
Native American population on the reservation and the failure of Arizona to use federally delegated power in the reservation. This forced Gould to conclude, “Williams’s reach was limited, despite its application of the doctrine of inherent sovereignty.” Therefore, in Gould’s opinion, if the reservation population had contained more non-members then the Supreme Court would not have relied on tribal sovereignty and the willingness of the Supreme Court to allow state authority into the reservation fundamentally weakened tribal sovereignty.

Throughout the processes involved in the Williams case, members of the court considered using the principle relied on by the lower court, which held that state law existed in the reservation until it was prohibited by congressional authority. Therefore, congressional silence on the matter was considered to sanction state law in the reservation. This principle relied on one primary factor, the inherent sovereignty of the state inside the reservation. Based against this background, a memorandum to Justice Douglas read, “I do not feel any alarm at requiring Indians to submit to state court jurisdiction in civil suits until Congress decrees otherwise.” This position led Earl Warren to question the role of state authority in the reservation.

The total exclusion of state law over non-members in the reservation was a concern to Chief Justice Earl Warren, particularly the indefinite prohibition of state authority in the reservations. As Warren noted, “don’t want to say never any [state] jurisdiction on the reservations” and “…not for all the way and say…state can’t have any jurisdiction.” This general concern about prohibiting all state law to operate inside the reservation fed into the Justices’ thinking of using only federal authority to decide issues of tribal versus state authority.

Several justices of the Supreme Court mooted using congressional authority to decide the question of state law in the reservation. At Conference on November 21, 1958 Felix Frankfurter wanted to exclusively use federal regulations to prevent state law being applied in the reservation, noting “rely on reg. [sic]…but wont [sic] go further.” This reliance on the federal trader statutes was based on a provision, which encouraged non-members to trade in the reservation at their own risk, “A trader may extend credit to Indians, but such credit will be at the trader’s own risk.” 25 C.F.R. 252.17.

This provision relating to non-members was also explained in a memorandum as “A regulation which applies to respondent (non-member) since he was granted permission to open his store on the reservation states that all credit shall be at the trader’s risk.” Therefore, congressional legislation automatically prohibited non-member action against the tribes because they consented to trade at their own risk inside the reservation. Individual justices such as Felix Frankfurter supported this interpretation of federal authority, stating that the “regulation holds up” as did Earl

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69 Box 1201, WOD Papers, “1957 Term No.811.”
70 Box I:15, WJB Papers, “Paul Williams and Lorena Williams,” W.J.B.
71 Box 1201, WOD Papers, “Conference November 21,” W.O.D.
72 Ibid.
74 Box 1201, WOD Papers, “1957 Term No.811.”
75 Box I:15, WJB Papers, “Paul Williams and Lorena Williams,” W.J.B.; and Box 1201, WOD Papers, “Conference November 21,” W.O.D.
Warren who “Thinks traders do so at own risk.” The federal government also supported the use of federal statutes to prevent the general application of state law in the reservation.

There was conflict between the ideological positions adopted by the federal government and the tribes. A 1958 bench memorandum shows that the federal government wanted the Supreme Court to use congressional authority rather than inherent tribal sovereignty to decide the merits of the case. The position adopted by the federal government, termed the “narrow attack”, was “based upon interpretation of the Federal regulation stating that Indian traders sold on credit at the trader’s own risk. This was asserted to deprive the state court of jurisdiction.” This strategy was in direct conflict with the position adopted by the Navajo, described in a memorandum as “an unusual position” where the tribe “has not pressed the second, limited attack hoping to prevail on the broad ground. However, the govt [sic]…has adopted the narrow attack and urges this Court to reverse on the limited ground without reaching the broad ground pressed by petr. [tribe].” The United States government was concerned with the broad position taken by the Navajo and urged the Supreme Court to rely on federal authority to oust state law from the reservation rather than re-invigorate the sovereignty doctrine; “…the govt [sic] argues that the question of jurisdiction may well depend upon the type of subject matter involved and other factors so that this Court should not lay down a broad rule covering all possible case[s].” Despite this conflict, a memorandum explained that the federal government’s reliance on statutes was a viable way to decide the merits of the case, “Here the federal policy is clearly set forth in the regulation and an argument can be made that a state court may not take jurisdiction of a case in which the plaintiff [non-member] is seeking relief barred by federal law.” Furthermore, the federal government wanted the Supreme Court to use regulations because it was considered stronger than using tribal sovereignty and it fitted in with the historic relationship between the federal government and the tribes. A memorandum read, “Indians are traditionally wards of the Federal govt and this regulation gives the Indians greater protection if it is interpreted as a jurisdictional bar…” This position was also favourable because numerous state courts were applying the rationale that states had jurisdiction in the reservation unless Congress precluded state authority. It was clear that the federal government wanted tribal cases to be analysed and decided within a federal versus state government framework, so that federal law would protect tribal claims.

Importantly, the federal government wanted the court to prevent the re-invigoration of the sovereignty doctrine, based on federal government policy concerns. The government believed that reliance on statutes would prevent broad tribal jurisdiction in the reservation. This position was explained in a memorandum, “the govt argues that the question of jurisdiction may well depend upon the type of subject matter involved and other factors so that this Court should not lay down a broad rule

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76 Box I:15, WJB Papers, “Paul Williams and Lorena Williams.”
78 Ibid., 2.
79 Ibid., 4.
80 Ibid., 5.
81 Ibid., 5.
covering all possible case. [sic]"\(^{83}\) Therefore the “narrow attack” fitted in with the aims of the federal government, described in a memorandum as “…the policy considerations behind the regulations.”\(^{84}\) The position of the federal government was presented to the Supreme Court Justices as the stronger argument, because reliance on tribal sovereignty would not result in “winning the particular case before the Court—which involves $82.”\(^{85}\) Indeed many justices initially relied on the use of federal regulations and openly questioned using exclusive tribal authority in the reservations.

Therefore, after closer inspection of the documents used in the Williams case, it can be explained that the seeds of the erosion of the sovereignty doctrine and inherent tribal sovereignty were planted by arguments from federal government lawyers and actively considered by many of the serving Justices. Indeed, many Justices were initially swayed by the use of federal statutes to prohibit the application of state law inside the reservation. Furthermore, some justices felt comfortable with this idea. Despite the overwhelming success of the published Williams opinion, underneath the surface and within the corridors and offices of the United States Supreme Court, the Justices were acknowledging and considering the erosion of the sovereignty doctrine and inherent tribal sovereignty. In cases involving state versus tribal claims, the movement of the Justices away from inherent tribal sovereignty was primarily based on the use of federal authority, not the sovereignty doctrine, to protect tribes from state law.

**The Legal Fall-out from the Williams v. Lee Decision**

Over the course of the next fourteen years, the Supreme Court, through case law such as Kake v. Egan (1962), Metlakatla Indians v. Egan (1962), Warren Trading Post v. Tax Commission (1965), Kennerly v. District Court of Montana (1971), McClanahan v. Arizona State Tax Comm’n (1973) and Mescalero Apache Tribe v. Jones (1973), definitively moved towards the idea that state law was allowed into the reservations until it was prohibited by federal law.\(^{86}\) Both the Kake and Metlakatla cases revolved exclusively around the ideas of congressional authority as a bar to state law and the Warren Trading Post and Kennerly cases used the idea of congressional authority to prevent the use of state laws inside the reservation. Unfortunately for all of Native America, this idea was applied as a principle in what has been referred to as the “sister taxation cases” of McClanahan and Mescalero Apache Tribe.\(^{87}\) Thurgood Marshall definitively summed up the position of the Supreme Court in a memorandum to Conference in 1973. The memorandum explained the difference between the imposition of state law over tribal members in McClanahan and the imposition of state law over non-members in Kahn v. Arizona State Tax Commission (1973).\(^{88}\) Marshall supported the presumption that states had authority over non-members in the reservation in contrast to McClanahan, pointing out that

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\(^{83}\) Ibid., 8.

\(^{84}\) Ibid.

\(^{85}\) Ibid., 3.


\(^{87}\) Ball, Silent Revolution, 39.

“In **McClanahan**, we held that Arizona lacked jurisdiction to tax the appellant in that case for income earned within the reservation. However, our holding was expressly limited to **Indians** who derived their income from reservation sources. Since appellants here [in Kahn] are non-Indians, **McClanahan** is not controlling. This Court’s prior cases suggest that the State may tax the activity of non-Indians within a reservation except in cases where the federal government has acted to preempt the field.”

The Supreme Court dismissed the **Kahn** case and the original verdict stood. Although William O. Douglas and William J. Brennan dissented, their rationale was based on the exact same interpretation of the case as that of Thurgood Marshall. The **Kahn** memorandum ignored the sovereignty doctrine and the **Williams** case, which supported inherent tribal sovereignty in the reservation, and symbolised the movement of the Supreme Court towards the use of federal authority to protect tribal interests.

In contrast to the ideas of many scholars, this article has argued that the erosion of the Indian sovereignty doctrine and the principles of **Worcester** began in those processes of decision-making adopted by the justices in the **Williams** case of 1959. Indeed, this assumption challenges, among many, the interpretations of Canby, Dussias, Frickey, Getches, and Wilkinson.

Many scholars argue that the change in the philosophy of the Supreme Court away from the sovereignty doctrine began during the 1970s and 1980s. Once again, this article challenges this idea. William C. Canby dated the beginning of the judicial shift of the court to 1973, observing, “The first doctrinal step occurred in a case generally regarded as a victory for the tribes-**McClanahan**...but the analysis contained the seeds of a diminution of tribal power.”

This weakening of tribal authority by the Supreme Court, he argued, reversed the **Worcester** principle, which barred state law inside the reservations unless it was approved by federal authority. Canby explained that the **McClanahan** analysis

“...reversed a previous presumption: that States had no power in Indian country unless some positive reason (or legislation) existed to extend it there. Under the McClanahan approach, State power extended into Indian country unless a positive Federal law or policy excluded it. Thus pre-emption doctrine, as it has been formulated since McClanahan favours the extension of State power into Indian country.”

Jordan Burch agreed with the Canby analysis, stating that “The first major change in the law in regard to tribal sovereignty came in 1973 in McClanahan...” when the Supreme Court used a new presumption where “the state had the authority to act [in

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90 Senate Committee on Indian Affairs, *Rulings of the U.S. Supreme Court as They Affect the Powers and Authorities of the Indian Tribal Governments: Hearing on the Concerns of Recent Decisions of the U.S. Supreme Court and the Future of Indian Tribal Governments in America*, 107th Cong., 2d. sess., 27 February 2002, 45.

91 Ibid., 45-46.

Moreover, a number of scholars have pointed to 1978 as the time when the Supreme Court moved away from the sovereignty doctrine. Peter Maxfield argued that the Supreme Court case of *Oliphant v. Suquamish Tribe* (1978) represented the “foundation[s]” of the Supreme Court’s erosion of tribal sovereignty, stating that “Since 1977, the United States Supreme Court has embarked on a course that has virtually eviscerated the sovereignty of Indian tribes. The beginning of this process can be traced to Oliphant v. Suquamish Indian Tribe...” Joseph William Singer agreed with Maxfield, holding that “…the Supreme Court began a process of attacking tribal sovereignty in 1978.” Thereafter, this process of attacking tribal sovereignty “expanded and deepened.” He also believed that the ideology of the Supreme Court Justices was a form of modern-day conquest, noting that “…the Court’s attack on tribal sovereignty is itself a form of conquest--one that is happening today, not long ago.” In testimony to the Senate Committee on Indian Affairs, John St. Clair, Robert T. Anderson, and Robert Yazzie all agreed that *Oliphant* (1978) began the judicial shift of the court against the presumption of tribal sovereignty. Frank Pommersheim and John P. LaVelle concurred with this interpretation about the limitation of the sovereignty doctrine, adding that 1978 was the year when “the modern Supreme Court began departing dramatically from fundamental principles.”

Other scholars have determined that the Supreme Court changed its way over a period from 1978 to the mid-to-late 1980s. David H. Getches believed that the movement of

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93 Ibid., 966.
98 Ibid., 393.
102 Senate Committee, *Rulings of the U.S. Supreme Court*, 41, 44, 88.
the court away from tribal sovereignty had “…its roots in a series of cases decided between 1978 and 1989.”104 However, these roots, Getches argued, did not develop until 1986 when Williams H. Rehnquist became Chief Justice; “In a spate of cases beginning about the time Rehnquist became Chief Justice in 1986, the Court veered away from the foundations of Indian law.”105 David J. Bloch also interpreted the appointment of William Rehnquist to Chief Justice as an important factor in the limitation of tribal sovereignty, “Since 1978, and especially after Rehnquist became its Chief Justice, the Court has diminished the inherent powers tribes possessed as domestic dependent nations and transferred them to the states at the federal government's expense but without its consent, indeed to the contrary of congressional and executive policy favouring tribal self-determination.”106

This interpretation about the transfer of authority from the tribes to the states was correct, in part. However, the underlying factor of this transfer was the use of congressional authority to determine the scope of tribal sovereignty and state authority. In addition, Robert N. Clinton agreed that the erosion of the sovereignty doctrine progressed with the appointment of Rehnquist, adding that in the 1980s “the decisions of the Supreme Court more frequently countenance expanding state authority in Indian country by limiting the historic scope of tribal authority in Indian country.”107 Furthermore, in Chief Justice Rehnquist and the Indian Cases, Ralph W. Johnson and Berrie Martinis have argued that the factor of Chief Justice William Rehnquist has strongly influenced the way in which the court eroded tribal sovereignty.108

**Conclusion**

The influence of the Williams opinion on modern-day Federal Indian law has been important and still, to this very day, remains an important case underpinned by the Indian sovereignty doctrine and inherent tribal sovereignty. However, underneath the surface of the opinion there were problems about the idea of tribal sovereignty being an independent tool of power to prevent the application of state law inside the reservation. Indeed, the nine Supreme Court Justices involved in the Williams case recognised the merits and were comfortable with the arguments that the use of federal authority and not tribal sovereignty should determine whether state law was applicable inside the reservation. It was these ideas that formed what has been termed a silent revolution and began the movement of the United States Supreme Court away from the use of the Indian sovereignty doctrine towards the use of federal power to defend tribal actions in Federal Indian law.109

104 Getches, “Conquering the Cultural Frontier,” 1595.
109 Ball, “The Silent Revolution.”