STATE JURISDICTION TO TAX INDIAN RESERVATION LAND AND ACTIVITIES

I. INTRODUCTION

Chief Justice John Marshall once stated that "the power to tax involves the power to destroy."[1] Considering our nation's long-standing policy of preserving Indian reservation land and fostering Indian economic development,[2] it is not surprising that the Supreme Court has found Indian reservation land and activities exempt from state taxation.[3] Since the turn of the century, the Court has held that American

1. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 327 (1819).

2. *See, e.g.*, Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450a(b) (1988) (stating a congressional commitment to establishing a "meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to Indians to effective and meaningful participation by Indian people"); Indian Financing Act of 1974, 25 U.S.C. § 1451 (1988) (declaring a congressional policy to provide capital to encourage Indians to develop and utilize their physical and human resources and raise their standard of living); President's Statement on Indian Policy, 19 WEEKLY COMP. PRES. DOC. 98 (Jan. 24, 1983) (stating that the Reagan Administration intended to remove obstacles to Indian self-government and encourage development of healthy economies on the reservations).

3. American Indians are not exempt from federal income tax. *See* Superintendent of Five Civilized Tribes v. Commissioner, 295 U.S. 418, 419-20 (1935) (holding that income on funds held in trust for Indians was subject to federal income tax). Congress, however, has elected not to tax some kinds of income. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 203-04 (2d ed. 1988) (noting which income is not subject to taxation). This Note is concerned only with state taxation of American Indians and will not discuss federal taxation. For developments in the field of federal taxation, see generally *id.* at 203-05; FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 265-66 (Five Rings Press 1986) (1942).

In order to adequately discuss state taxation, some history on state jurisdiction over matters other than taxation is necessary. However, the author has included this discussion only as a background to the study of state taxation. The scope of this Note is

Indians are immune from various types of state taxes.[4]

In time, because of beliefs that Indians held an unfair advantage in the market,[5] the Court ameliorated the protection traditionally offered to Indian tribes.[6] The Court developed a series of rules governing when states could impose taxes on tribal activities.[7] Over the past fifteen years, however, the Court has abandoned the tests and has not replaced them with a coherent rule.[8] This indecision has contributed

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limited to state taxation and not other exercises of jurisdiction, such as criminal or civil jurisdiction.

Taxation by local governmental bodies involves the same issues as state taxation. Therefore, despite the fact that this Note speaks only of taxation by the state, the conclusions drawn are equally applicable in the context of taxes imposed by lower-level governments.

4. *See* United States v. Rickert, 188 U.S. 432 (1903) (holding Indians exempt from state taxes on lands held in trust for the Indians, permanent improvements on lands held in trust, and personal property purchased with United States money for the use and benefit of the Indians). *See also* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 215 n.17 (1987) ("[T]he federal tradition of Indian immunity from state taxation is very strong and . . . the state interest in taxation is correspondingly weak.").

5. *See, e.g.*, Steve Dwyer, *Kansas Marketers Face Taxing Ordeal with Indian Reservation*, NAT'L PETROLEUM NEWS, Feb. 1991, at 17 (describing success of three non-Indians who operate gas stations on reservations and are therefore exempt from state tax); John Edwards, *Reservations Lure Commercial Deals*, ARIZ. BUS. GAZETTE, Aug. 2, 1990, at 1 (explaining the attraction of Indian reservations to Real Estate developers); Estelle Lander & John McDonald, *Tax-Exempt Cigarettes Draw Fire*, NEWSDAY, Dec. 20, 1991, at 3 (describing impact on non-Indian merchants of tax exempt cigarette sales within reservation in New York).

6. "The Burger Court has abandoned the traditional zealous protection that the Supreme Court had historically shown for the authority of Indian governments over their reservations." Robert N. Clinton, *State Power over Indian Reservations: A Critical Comment on Burger Court Doctrine*, 26 S.D. L. REV. 434, 445 (1981). The Rehnquist Court seems to be continuing this trend. *See* County of Yakima v. Yakima Indian Nation, 112 S. Ct. 683 (1992) (approving state imposition of ad valorem tax on land patented in fee under the Indian General Allotment Act).

7. *See, e.g.*, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973) (announcing the preemption test and limiting the Indian sovereignty doctrine to "a backdrop against which the applicable treaties and federal statutes must be read"); Williams v. Lee, 358 U.S. 217, 223 (1959) (using an infringement on sovereignty test and holding that the state court should have dismissed a suit by a non-Indian, who operated a store on an Indian reservation, against an Indian customer because "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 right of Indians to govern themselves").

8. *See* Clinton, *supra* note 6, at 439-40 (arguing that the Burger Court has abolished any analytical framework without providing any replacement rationale, "leaving in their wake a turbulent backwater of confusing decisions that necessarily engender not only further litigation but on-going tensions between the states and the Indian tribes").

to growing tensions in some parts of the country between American Indians and the states and their tax-paying citizens.[9]

This Note outlines the history of the Supreme Court's inconsistent approach to the issue of taxing Indians. It then discusses Congress' role in providing tax immunity to the Indians, and the problems encountered with taxation and without taxation. Finally, this Note advocates that the Court adopt a "modernized" preemption analysis to deal with questions regarding the state's ability to impose taxes on Indian reservation land and activities.

II. THE SUPREME COURT'S APPROACH

A. *Case Law Before 1970*

Our nation has long afforded American Indian tribes freedom from state jurisdiction and control.[10] After gaining independence, the federal government feared that the states and individual citizens would deal unfairly with the Indian tribes and, consequently, foster wars with the Indians.[11] Therefore, the federal government assumed exclusive control over relations with the tribes.[12] The Commerce Clause and the treaty-making power of the Constitution are sources of federal authority to control Indian matters.[13]

During the first decades of United States independence, the status of

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9. Such tensions are the result of many factors. Professor Paul J. Hartman has concluded that:

> The on-reservation taxation conflicts between American Indians and the States have not declined in recent years. Sociological, political and economic factors have contributed to the conflict. Sociologically, it has been said that there is a general "lack of understanding by both whites and Indians of one another's cultural differences" . . . The States perpetually seek additional sources of revenue while the need of Indian tribes for economic aid is palpable and critical.

PAUL J. HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION 239-40 (Supp. 1990) [hereinafter HARTMAN SUPPLEMENT] (quoting Clifford M. Lytle, *The Supreme Court, Tribal Sovereignty, and Continuing Problems of State Encroachment into Indian Country*, 8 AM. INDIAN L. REV. 65, 72 (1980)).

For insight on the various positions involved with respect to taxing an Indian reservation, see Pat Doyle, *Lean-budget Counties Cast Property-tax Eye on Indian Band Casinos*, STAR TRIBUNE, Sept. 19, 1992, at 1A.

10. Rice v. Olson, 324 U.S. 786, 789 (1945) ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.").

11. *See* William C. Canby, Jr., *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1, 2 (1987).

12. *Id.*

13. The Constitution provides that Congress shall have the power to "regulate Commerce with the Indian Tribes," U.S. CONST. art. I, § 8, cl. 3, and that the President

Indian nations was unclear and caused dissention between Indian and non-Indian communities.[14] In 1823, the Supreme Court made the first serious attempt to define the rights of Indians. In *Johnson v. McIntosh*,[15] the Court proffered a theory of Indian subservience to the federal government.[16] The Court explained that conquest gave the United States ownership and title to the land, but this title was subject to the continued use and occupancy of the land by the Indians.[17]

The Court expanded its theory of Indian dependency in *Cherokee Nation v. Georgia*.[18] In holding that an Indian tribe was not a foreign state for purposes of invoking the original jurisdiction of the Supreme Court,[19] Chief Justice Marshall described the tribes as "domestic, dependent nations."[20] Although only one other Justice joined Marshall's opinion, four of the six Justices on the Court found that tribes possessed some amount of sovereignty.[21]

One year later, the Court in *Worchester v. Georgia*[22] reversed the conviction of a non-Indian accused of entering Cherokee territory without a state mandated license.[23] The Court identified an Indian nation as a distinct political community and held that, absent congres-

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shall have the power "by and with the Advice and Consent of the Senate, to make treaties." U.S. CONST. art. II, § 2, cl. 2.

14. *See* Clifford M. Lytle, *The Supreme Court, Tribal Sovereignty, and Continuing Problems of State Encroachment into Indian Country*, 8 AM. INDIAN L. REV. 65 (1980) (describing the role the United States Supreme Court has played in protecting Indian nations against state attempts to intrude on tribal sovereignty).

15. 21 U.S. (8 Wheat.) 543 (1823).

16. Lytle, *supra* note 14, at 66.

17. *Johnson*, 21 U.S. at 591 ("[T]he Indians are to be regarded merely as occupants, to be protected . . . while in possession of their lands, but to be deemed incapable of transferring the absolute title to others.").

18. 30 U.S. (5 Pet.) 1 (1831).

19. The Cherokees challenged any attempt by the state of Georgia to extend state law into Indian territory. *Id.* at 2. In order to invoke original jurisdiction in the Supreme Court, the tribe needed to be considered a "foreign state" under Article III, § 2 of the United States Constitution. *Id.* at 15. While the Court agreed that the tribe was a state, it held that the tribe was not a "foreign state." *Id.* at 15, 19.

20. *Id.* at 16.

21. Lytle, *supra* note 14, at 69. Justices Marshall and MacLean held that tribes were "domestic, dependent nations," which means that they possess only limited sovereignty. Justices Thompson and Story found that tribes were sovereign nations. In dissent, Justices Baldwin and Johnson determined that tribes have no sovereignty.

22. 31 U.S. (6 Pet.) 515 (1832).

23. *Id.* at 562.

sional approval, Georgia law had no force on Indian territory.[24] Because the tribes were essentially "sovereigns," only the federal government controlled relations with the Indians.[25] Thus, *Worchester* firmly established the principle that within Indian territory, states have no power, not even over non-Indians.[26]

In addition to granting Indian tribes immunity from state jurisdiction unless explicitly authorized by Congress, the Supreme Court also developed a "canon of construction" for interpreting congressional legislation. In determining whether an act of Congress is an explicit authorization permitting states to assert jurisdiction over the Indian tribes, the legislation is to be construed liberally.[27] Courts are to resolve ambiguities in favor of the Indians.[28] By proscribing state interference in Indian affairs without express congressional authorization, and by adopting a strict canon of construction for interpreting such statutes, the Supreme Court afforded the Indian nations great protection from state taxation.[29] Such absolute protection, however, did not last long.

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24. The Court reasoned:

> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.

Id. at 560-61.

25. *See* Canby, *supra* note 11, at 4 (stating that "*Worchester* leaves little question that in Marshall's view, the tribes were inherently empowered to govern everything that happened within their territories").

26. *Accord* The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867) (rejecting state efforts to impose a land tax on reservation property).

27. Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89 (1918). *See also* Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985).

28. Carpenter v. Shaw, 280 U.S. 363, 366-67 (1930) (finding that, while in general tax exemptions are to be strictly construed, they should be liberally construed for tax exemptions secured by Indians in agreements with the national government). *See also* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973).

At least one commentator believed that the courts had begun a trend of according less deference to this canon of construction. *See* Canby, *supra* note 11, at 19. However, recent cases indicate that this doctrine is as strong as ever. *See, e.g.*, County of Yakima v. Yakima Indian Nation, 112 S. Ct. 683, 693 (1992); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 177 (1989); Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985).

29. *But see* Thomas v. Gay, 169 U.S. 264 (1898) (holding that the Territory of Oklahoma could impose a tax on the cattle of non-Indian lessees of reservation land).

The Court slowly realized that, in certain circumstances, the states needed to exercise jurisdiction over Indian territory. In *United States v. McBratney*[30] and *Draper v. United States*,[31] the Court held that states have criminal jurisdiction over non-Indians when they commit crimes against other non-Indians on reservation territory.[32] These cases initiated a shift in the earlier philosophy of Indian protectionism.[33] No longer did the Court restrict states from asserting jurisdiction absent congressional authorization. Courts recognized that states retained some jurisdiction over Indian territory.

In the often cited, but seldom followed, case of *Goudy v. Meath*,[34] the Court swung to the other side of the pendulum. In *Goudy*, the Court upheld a Washington State Supreme Court decision subjecting an Indian who had been allotted land pursuant to the Indian General Allotment Act of 1887[35] to the same taxes that other state citizens paid.[36] The Court reasoned that once Indians are issued patents in fee to areas of land, they become citizens entitled to all the rights and privileges of the state.[37] Absent a specific statutory exemption, Indians who have the benefit of the law must be subject to state jurisdiction as well.[38] One set of laws to which they become subject is the tax laws.[39]

30. 104 U.S. 621 (1882).

31. 164 U.S. 240 (1896).

32. *Draper*, 164 U.S. at 247; *McBratney*, 104 U.S. at 624. *See also* New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946) (same).

33. *See* Canby, *supra* note 11, at 4-5 (noting the significance of the Court's decisions in *McBratney* and *Draper*).

34. 203 U.S. 146 (1906).

35. According to § 348 of the Indian General Allotment Act of 1887, 25 U.S.C. §§ 331-358 (1988 and Supp. II 1990), reservation land was to be held in trust for the Indians for 25 years. 25 U.S.C. § 348 (1988). After this period of time, the Secretary of the Interior was to allot the land in fee to individual Indians or the tribe itself. *Id.* At this point, the land was freely alienable.

For a more thorough examination of this Act and other Acts dealing with Indian reservation land, *see infra* section III-A of this Note.

36. 203 U.S. at 149.

37. *Id.* Despite having the benefit of many state laws, some state protections necessarily do not cover or only minimally cover reservation property such as police protection and nearby medical facilities.

38. "Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." *Id.* (quoting Matter of Heff, 197 U.S. 488 (1905)).

39. *Id.* In Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989), Cotton Petroleum Corporation protested state severance taxation of oil and gas it produced on land leased from the Jicarilla Apache Tribe. *Id.* at 168-70. The corporation argued that

Goudy represented the Court's experimentation on the other side of the spectrum—subjecting an Indian allottee to all state taxes. After trying both extremes, the Court realized that it had to develop a consistent rule that would protect the Indians from excessive state interference, but would also guarantee to the state a certain amount of control over reservation activities. The Court thus embarked on a series of tests to meet these goals.

The first test with which the Court experimented was the "federal instrumentality" test.[40] This test was based upon the federal government's exemption from state taxation. Because Indian tribes were "instrumentalities" of the federal government, they too were exempt from state taxation.[41] This test was comprehensive and highly protective of Indians. It suggested a partial return to the status of granting Indians absolute immunity from state taxation absent congressional authorization.

One of the first cases in which the Court used the federal instrumentality approach was *United States v. Rickert*.[42] In *Rickert*, the Court held three separate state taxes invalid as applied to Indian tribes.[43] First, the Court found that a state tax on reservation land held in trust for the Indians by the United States was not taxable because this land

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the state's taxes far exceeded the benefits that the state conferred on the reservation and, therefore, violated the Commerce Clause of the United States Constitution. *Id.* at 170. The tribe filed a brief amicus curiae arguing that state taxation interfered with the tribe's ability to raise its own taxes and made leasing on reservation oil and gas leases less desirable. *Id.* The tribe also argued that the state did not provide services commensurate with its taxes. *Id.* The majority of the Court held that state taxes were not limited by the amount of benefits conferred. *Id.* at 185. Thus, even if tribes receive limited services from the state, they may be taxed at any amount, so long as the tax is not discriminatory.

40. *See* Gillespie v. Oklahoma, 257 U.S. 501 (1922) (applying the intergovernmental immunity doctrine to prohibit state taxation of a non-Indian lessee's income derived from the sale of his interest in oil produced on Indian land), *overruled* by Helvering v. Mountain Producers Corp., 303 U.S. 376, 386-87 (1938) (holding that private parties are not exempt from federal tax on income derived from operations under contract or lease with state merely because taxation will have an indirect or remote effect on the tribe). *See also* Jaybird Mining Co. v. Weir, 271 U.S. 609 (1926) (denying state the power to apply a tax on ore extracted by non-Indian mining company which leased mineral rights from Indian land); PAUL J. HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION § 6:10 (1981) (analyzing the concept of federal instrumentalities as a basis for Indian freedom from state taxation).

41. *See Gillespie*, 257 U.S. at 504 (finding lessee to be an instrumentality of the government and therefore non-taxable).

42. 188 U.S. 432 (1903).

43. *Id.* at 435-44.

was an instrumentality of the federal government.[44] Second, the Court ruled that a tax on permanent improvements to the land was invalid because these improvements were "part of the land."[45] Furthermore, the Court held that the state could not tax the personal property of the Indians because that property had been purchased with government money and belonged to the government, though purchased for the use and benefit of the Indians.[46] This case exemplifies the comprehensiveness of the federal instrumentality test. Not surprisingly, the test did not last.[47]

The Court realized that it had to give states some jurisdiction over Indian territory. In 1959, the Court adopted the "infringement on sovereignty" test.[48] In *Williams v. Lee*,[49] the Supreme Court held that a state court erred in not granting a motion for dismissal when a non-Indian, who operated a business on a tribal reservation, sued an Indian for collection of a debt.[50] The Court ruled that only the tribal court had jurisdiction to hear the case.[51] State jurisdiction in this situation, the Court reasoned, would infringe upon the Indians' right to govern themselves.[52] This new test suggested that whenever tribal interests

44. *Id.* at 437. The court explained that just as federally-owned land is exempt from state taxation, that land which the federal government held in trust for the Indian tribes was likewise exempt. *Id.* at 438-39.

45. *Id.* at 442.

46. *Id.* at 443-44.

47. In Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342 (1949), instead of using the instrumentality test, the Court equated Indian tribes with independent contractors performing work for the federal government. *Id. See also* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 150 (1973) (noting the demise of the intergovernmental-immunity doctrine in Indian cases).

48. The Court never referred to this test as the "infringement on sovereignty" test. This nomenclature is exclusively for academic purposes. *See infra* note 60 explaining other references used by this author.

49. 358 U.S. 217 (1959).

50. *Id.* at 223.

51. *Id.*

52. *Id.* While stressing that the non-Indian litigant was "on the Reservation," which would have provided tribal jurisdiction under a territory-oriented *Worchester* test, the *Williams* court seemed most concerned that state jurisdiction would infringe on the tribe's right to "govern themselves." *Id.* Likewise, the Court has held that an Indian tribe, as an entity, cannot be sued unless Congress or the tribe clearly waived immunity. *See also* Oklahoma Tax Comm'n v. Citizen Band of the Potawatomi Indian Tribe of Oklahoma, 111 S. Ct. 905, 909 (1991); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

were affected, the state could not assert jurisdiction.[53]

The Court in *Warren Trading Post v. Arizona Tax Commission*[54] also applied a test that considered the effects of taxation on tribal interests. In this case, the state attempted to impose a two percent tax on the gross income of a trading post that was federally licensed to do business with Indians on the reservation.[55] The Court held that such a tax would frustrate Congress' intent to protect the Indians and to maintain exclusive control over trading with Indians.[56] The tax was therefore declared invalid.[57] The test, as applied, drew a distinction between on-reservation activities and off-reservation activities.[58] Because on-reservation activities presumptively infringed upon the Indians' right to govern themselves more than off-reservation activities, state authority over Indians was more extensive over activities not on the reservation.[59] Although this test gave more authority to the states than the "federal instrumentality" test as well, the Court soon abandoned the "infringement on sovereignty" test. The Burger Court followed by introducing more tests.

B. *Case Law: The Burger Court*

The Burger Court experimented with different approaches to the issue of state taxation over Indian reservation land and activities. The

53. "[A]bsent 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." *Williams*, 358 U.S. at 219. "When tribal interests, broadly viewed, were affected, the state was excluded." Canby, *supra* note 11, at 6.

A trivial economic impact will not necessarily be sufficient to defeat the tax. *See, e.g.*, Fort Mojave Tribe v. County of San Bernardino, 543 F.2d 1253 (9th Cir. 1976) (holding that a state possessory interest tax as applied to lessees of Indian land was indirect and did not threaten tribal self-government and was therefore properly imposed), *cert. denied*, 430 U.S. 983 (1977). *See also* CANBY, *supra* note 3, at 209-14 (outlining state power to tax non-Indians within Indian territory).

54. 380 U.S. 685 (1965).

55. *Id.* at 686. Petitioners only challenged the tax as applied to sales to reservation Indians. *Id.* at 686 n.1.

56. The Court noted that the federal statutes and regulations authorizing the trading post to do business on the reservation indicated a congressional intent to occupy the field and bar state taxes. *Id.* at 690.

57. *Id.* at 691-92. *Cf.* Thomas v. Gay, 169 U.S. 264, 273 (1898) (noting that the impact of imposing an Oklahoma territorial tax on the cattle of non-Indian lessees of reservation land was too remote to be deemed tax on the lands or privileges of the Indians themselves).

58. 380 U.S. at 69 n.14.

59. Organized Village of Kake v. Egan, 369 U.S. 60, 75 (1962).

Court utilized several tests, but within any single opinion these tests were intermingled. The fact that the Court seldom articulated the tests it used contributed to the uncertain nature of the Court's analysis. This led to inconsistent holdings and left the states and tribes without a standard by which to model their conduct. The various tests employed by the Burger Court included the "preemption" test, the "territorial" test, and the "traditional function" test.[60]

McClanahan v. Arizona State Tax Commission[61] marked the shift from the *Williams* "infringement on sovereignty" test to preemption analysis.[62] In *McClanahan*, Arizona sought to impose a personal income tax on an Indian who derived his income solely from reservation sources.[63] The state argued that an individual income tax did not interfere with tribal self-government, and it was therefore permissible under *Williams*.[64] The Court held that the *Williams* test was not meant to apply in this situation because *Williams* only concerned situations involving non-Indians.[65] The Court determined that exemption from tax laws should, as a general rule, be clearly expressed, and any ambiguities should be resolved in favor of the Indians.[66] In this case, Congress manifested a sufficiently clear expression of intent to render the Indians immune from personal income taxes.[67] Preemption analysis, although used inconsistently, is still the basis for many of the

60. The names of the tests—the "territorial" test and the "traditional function" test, as well as the earlier noted "infringement on sovereignty" test, are not found in the literature. They are simply names coined by the author of this Note to help understand the analysis of the Court. The Court has never named the tests it has used, partly because of the ad hoc way in which the Court utilizes these tests.

61. 411 U.S. 164 (1973).

62. *McClanahan* did not reject the *Williams* test, but merely reduced sovereignty to a "backdrop" against which preemption analysis would focus. *Id.* at 169. The author of this Note is unconvinced that, in practice, this distinction carries any meaning. *See supra* notes 48-53 and accompanying text for discussion of the *Williams* test.

63. 411 U.S. at 169.

64. *Id.* at 179.

65. *Id.* The Court reasoned that both the state and the tribe had an interest in asserting jurisdiction when a non-Indian was on reservation property and that the *Williams* test was designed to resolve such disputes between competing interests. *Id.*

Courts still use different tests depending upon whom the state is taxing. *See, e.g.*, Sac and Fox Nation v. Oklahoma Tax Comm'n, 967 F.2d 1425 (10th Cir. 1992) (distinguishing between taxes on tribal members and taxes on nonmembers).

66. 411 U.S. at 174-76. The opinion suggests that express congressional authorization is needed for applying taxes to the Indians in the first place. *See id.* at 170-71, 174, 176.

67. *Id.* at 173, 180, 181. The Court found implied intent not to subject Indians to

Court's decisions.[68]

The same day that the Court introduced the preemption analysis in *McClanahan*, it also utilized a new "territorial" test in *Mescalero Apache Tribe v. Jones*.[69] In *Mescalero*, an Indian tribe was operating a ski resort off the reservation.[70] The state sought to impose a sales and use tax on the ski lifts built by the Indians.[71] Section 5 of the Indian Reorganization Act[72] exempted land and rights in land if acquired in trust for the Indians. Liberally reading this provision, the Court determined that the land fell under Section 5.[73] Therefore, the Court decided that because the ski lifts were permanent improvements, a use tax on the ski lifts was a tax on part of the land and hence invalid as applied to the Indians.[74] Although Section 5 exempted land from taxes, the Court held that the section did not foreclose state taxation of income derived from the land.[75] The Burger Court noted that, unless Congress specifically exempts them, Indians are generally subject to all state taxes when they travel outside reservation boundaries.[76] Con-

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taxation by considering many congressional provisions, including the Arizona Enabling Act and the Buck Act. *Id.* at 174-78.

68. *See, e.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) (holding that oil and gas production on Indian reservations by non-Indian lessees may be subject to non-discriminatory state taxation unless Congress has expressly or impliedly acted to preempt such taxes).

69. 411 U.S. 145 (1973).

70. *Id.* at 146.

71. *Id.* at 146-47.

72. 25 U.S.C. § 465 (1988). For a more thorough examination of this Act and its consequences, see *infra* notes 140-44 and accompanying text.

73. 411 U.S. at 155. Technically, the land for the ski resort was not "acquired in trust" for the tribe. The United States already owned the land. Therefore, it would have been meaningless for the United States to convey the land to itself in trust for the tribe. Instead, the United States leased the land to the tribe. Due to the circumstances, the Court determined that there was no meaningful distinction which would justify excluding this land from § 5 of the Indian Reorganization Act. The Court therefore treated this property as if it were acquired in trust for the use of the tribe. *Id.* at 155 n.11.

74. *Id.* at 158.

75. *Id.* at 157-58.

76. "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." *Id.* at 148-49. *See also* Organized Village of Kake v. Egan, 369 U.S. 60, 75 (1962) ("State authority over Indians is yet more extensive over activities . . . not on any reservation. It has never been doubted that states may punish crimes committed by Indians, even reservation Indians, outside of Indian country."); CANBY, *supra* note 3, at 209 ("Outside of Indian country, every Indian is subject

versely, reservation land and on-reservation activities were not taxable absent explicit authorization from Congress.[77] This reasoning, in essence, constitutes the "territorial" test. Generally, off-reservation land and activities are presumptively taxable, whereas on-reservation land and activities are presumptively nontaxable, and Congress can, with explicit language, defeat either presumption.[78]

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to state jurisdiction and if he or she earns an income or engages in other taxable activity there, the state can impose its tax.").

77. Although it can be considered mere dicta, the most frequently quoted passage from *Mescalero* reads:

> [I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan* . . . lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent.

411 U.S. at 148. The opinion cites *McClanahan* approvingly. In *McClanahan*, although holding that a state could tax unless preempted by congressional intent, the Court also provided language suggesting that "taxation is not permissible absent congressional consent." *Id.* (citing *McClanahan*, 411 U.S. at 164). The fact that *Mescalero* was decided on the same day as *McClanahan* further confuses attempts to interpret the Court's approach. The Court's inconsistency stifled the search for a universal standard.

The *Mescalero* decision, in any event, was consistent with the views of the executive branch:

> State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress.

U.S. DEPT. OF THE INTERIOR, FEDERAL INDIAN LAW 845 (1958). Now that some state laws are applicable to tribal Indians, perhaps the Department of the Interior will follow a different approach.

78. Justice Douglas, writing for the dissent in *Mescalero*, argued that the distinction between acts on-reservation and off-reservation was improper. 411 U.S. at 160-61 (Douglas, J., dissenting in part). Justices Brennan and Stewart joined in Douglas' opinion.

According to this "territorial" test, an Indian who leaves reservation property is subject to state law. However, a non-Indian does not escape state law when entering reservation land. Therefore, a person's presence on reservation land is not the only controlling factor.

The "territorial" test encounters difficulty when applied to motor vehicle use taxes. In Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980), the Court held that a state could not impose such taxes on vehicles used only on reservation property, even if sometimes used outside the reservation. *Id.* at 162 n.29, 163. But determining exactly how much off-reservation use enables the state to impose these taxes is inevitably an arbitrary choice.

The territorial test is not yet dead. *See* Tunica-Biloxi Tribe v. Louisiana, 964 F.2d 1536 (5th Cir. 1992) (approving the imposition of a retail sales tax on off-reservation purchases by tribal members).

The Burger Court entertained yet another test in *Rice v. Rehner*.[79] In this case, California required an Indian trader to procure a state license before she sold liquor for off-premises consumption.[80] The Court determined that because liquor regulation was not a traditional function of tribal self-government, the state could validly impose its regulations.[81] This new test posed the question of whether this particular regulation had traditionally been under Indian control.[82] The three dissenting Justices argued, however, that a "modernized" preemption analysis should apply.[83] Moreover, they argued that the majority's test, contrary to federal policy, discourages Indians from undertaking new enterprises in an effort to become self-supporting. The Court has not used the "traditional function" test since its inception in *Rice*.

Two other tests have been suggested but never adopted by a majority of the Court. The first is a simple balancing test. According to this proposal, the Court would weigh the respective interests of the state, the tribe, and the federal government and determine which interests outweighed the others.[84] This approach was recently rejected in favor

79. 463 U.S. 713 (1983).

80. *Id.* at 715-16.

81. *Id.* at 724-25. Although the court only applied this test in the context of liquor regulation, the rationale applies equally in other contexts. Canby, *supra* note 11, at 19.

Another rationale used by the Court stated that 18 U.S.C. § 1161, which provides that liquor transactions are not subject to prohibition under federal law, authorized such regulation. Respondent Rehner argued that this provision preempted state regulation. The Court found, however, that Congress meant to leave the decision to the states. 463 U.S. at 733-35.

82. This new test can be considered an extension of the "infringement of sovereignty" test employed in Williams v. Lee, 358 U.S. 217 (1959). *See supra* notes 48-53 for discussion of the "infringement of sovereignty" test.

83. 463 U.S. at 738-44 (Blackmun, J., dissenting). Justices Brennan and Marshall joined in the dissent. *See infra* notes 205-13 for an in-depth description of "modernized" preemption analysis.

84. Several sources have proposed that modern preemption analysis involves this sort of balancing. *See, e.g.*, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983) ("State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."); Canby, *supra* note 11, at 12-13 (discussing the Court's use of the balancing approach). But the very act of balancing acknowledges that both the state and the tribe have legitimate interests warranting protection. Canby, *supra* note 11, at 14. This is inconsistent with the principles behind the preemption test. *See* County of Yakima v. Yakima Indian Nation, 112 S. Ct. 683, 692-93 (1992) (refuting the lower court's finding that the tribe had a protectable interest against imposition of a tax).

of seeking congressional intent.[85] The other suggested test was first proposed by Justice Marshall in *White Mountain Apache Tribe v. Bracker*.[86] Under Justice Marshall's test, a state tax on Indian reservation land or activities is considered valid unless (1) congressional legislation explicitly preempts the tax, or (2) the tax would interfere with the tribe's ability to govern itself.[87] This two-factor test incorporates the *McClanahan* preemption test with the *Williams* "infringement on sovereignty" test. Either barrier would be sufficient to prohibit state encroachment.[88]

The intermingling of the different tests has caused much confusion. Nonetheless, several common factors have consistently influenced the Court's decisions in this area. These factors do not amount to a test, but they form the basis for much of the rationale used by the Court. There are three major factors which have influenced the Court on multiple occasions.[89]

The first factor, which influenced particularly the "infringement on sovereignty" test, considers a tribe's ability to impose its own taxes. Because tribes retain some sovereign power, the Court has held that they can justifiably impose their own taxes.[90] However, the tribes were

85. County of Yakima v. Yakima Indian Nation, 112 S. Ct. at 693 ("Either Congress intended to pre-empt the state taxing authority or it did not. Balancing of interests is not the appropriate gauge for determining validity since it is that very balancing which we have reserved to Congress.").

86. 448 U.S. 136 (1980).

87. *Id.* at 142-43.

88. *Id.* at 143.

89. These three factors—tribal taxation, Indians who are not members of the governing tribe, and the checkerboard pattern—have been consistently employed. Many factors have influenced individual decisions in this area, but these three have seemingly been determinative in and of themselves in several situations. Additionally, these three factors have been repeated in a multitude of decisions in this area. *See infra* notes 90-98 and accompanying text describing each factor and providing illustrative cases.

90. Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985) (allowing tribe to impose tax on value of leasehold interests in tribal land without receiving approval from the Secretary of the Interior); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (holding that tribes have inherent power, absent federal divestment, to impose a tax on oil and gas production on tribal land); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152 (1980) (rejecting state's contention that tribes lack the power to impose cigarette taxes on non-tribal purchasers).

The tribe's power to tax derives from their power to exclude non-Indians and "from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction and to defray the cost of providing governmental services . . . ." *Merrion*, 455 U.S. at 137.

still dependent upon the United States and could not perform functions inherently inconsistent with this dependent status.[91] Thus, for example, the tribe had no authority over reservation land when that land was held in fee by non-Indians.[92] Problems arose when a state wanted to impose a tax in addition to a tribal tax. The Court held that the tribe's power to tax did not oust the state's power, for there could be concurrent jurisdiction to tax.[93] This put tribal members at a disad-

91. *See, e.g.*, Montana v. United States, 450 U.S. 544, 564 (1981) (denying tribe authority to regulate fishing and hunting by non-members of the tribe on land not owned by the tribe). *See generally* Canby, *supra* note 11, at 15-16 (describing the limits on tribal power due to their dependent status). Tribes may exercise broad civil jurisdiction over non-Indians on Indian reservation lands. *Merrion*, 455 U.S. at 139; *Washington*, 447 U.S. at 152-53. However, unlike other governmental entities, the tribe's ability to tax non-Indians is subject to constraints. *Merrion*, 455 U.S. at 141. The Secretary of the Interior must approve any taxes applied to non-members of the tribe, and Congress can take away the tribe's authority to tax altogether. *Id.*

The Court has held that a tribe's regulation of relations with non-members of the tribe is inconsistent with the tribe's dependent status. *See* Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 427 (1989) (citing United States v. Wheeler, 435 U.S. 313, 326 (1978)). "It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government." *Montana*, 450 U.S. at 560 n.9. The purpose of the allotment policy was the incorporation of Indians into civilized society, thus eventually taking away their autonomy. *See infra* notes 129-44 and accompanying text for discussion of congressional allotment policy.

92. *Brendale*, 492 U.S. at 425. Likewise, an Indian tribe could not regulate non-Indians unless Congress explicitly gave them this authority. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). Tribes could regulate, however, the activities of non-Indians who entered consensual relationships with the tribe or its members. *Montana*, 450 U.S. at 565; Williams v. Lee, 358 U.S. 217, 223 (1959).

The *Montana* Court held that Indians could regulate the activities of non-members within the reservation only when (1) the non-member entered a consensual relationship with the tribe, or (2) the "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 565-66. *See also Brendale*, 492 U.S. at 428. In *Brendale*, the Court ruled that, in addition to threatening "the political integrity, the economic security, or the health or welfare of the tribe," the threat must be "demonstrably serious." *Id.* at 431. The Court held that the county, not the tribe, had authority to zone the use of land held in fee by non-Indians within the reservation, but that if tribal interests were imperiled by a use, the tribe could seek an injunction in district court. *Id.*

93. "There is no direct conflict between the state and tribal schemes, since each government is free to impose its taxes without ousting the other." Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 158 (1980). Because no consumer will purchase from a store where he or she must pay twice the taxes assessed at other stores, the Court realized that concurrent taxation would lessen or even eliminate tribal commerce with non-members. The Court reasoned, however, that this commerce came into existence only because of the tribe's claimed exemption from state

vantage because they had to pay two separate taxes, whereas non-members were only subject to the state tax. Although a tribal tax has not generally prevented the state from imposing its own taxes, this factor has played a role in individual decisions.

Another factor considered in many of the Court's decisions is the Court's reluctance to immunize from state taxes those Indians who are not members of the tribe.[94] Subjecting Indians who are not members of the governing tribe to taxation in no way violates the principle of tribal self-government.[95] Because non-tribal Indians or Indians belonging to another tribe have no relation to the governing tribe, they are, for practical purposes, equivalent to non-Indians who enter reservation land.[96] Therefore, the Court has permitted states to tax any person who is not a member of the governing tribe.

A third factor is the Court's dislike of tax schemes that create a checkerboard pattern across lands subject to and lands exempt from taxation. The Court, ironically, seeks consistency and attempts to avoid schemes that would subject some plots of land to taxation while exempting adjacent lots.[97] These three factors have affected the ration-

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taxes; therefore, the tribe had no specific right to that commerce. *Id.* at 157. As recently as 1989, the Court permitted concurrent jurisdiction to tax when the exercise of both authorities does "not do violence to the rights of either sovereign." *Brendale*, 492 U.S. at 466 (Blackmun, J., concurring in part and dissenting in part). *See also* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) (finding that the state may impose its own severance tax on minerals despite the tribe's severance tax). *But see Brendale*, 492 U.S. at 440 n.3 (Stevens, J., concurring) (doubting whether there can be concurrent jurisdiction to regulate land use).

94. *Washington*, 447 U.S. at 160-61. *See generally* CANBY, *supra* note 3, at 207-09 (discussing the Court's attempt to distinguish between members and non-members of a given reservation). But one commentator argues that this line-drawing is very awkward:

> The Burger Court's exclusion of nonmember Indians who reside on the reservation . . . shows a particularly profound misunderstanding of the Indian tribal community. . . . Indian communities usually contain many persons, often full-blood Indians, who through marriage, or as a result of parentage of different tribes, are ineligible for formal enrollment as tribal members.

Clinton, *supra* note 6, at 442. Moreover, some tribe members live off the reservation and may still escape state tax laws when they visit the reservation.

95. *Washington*, 447 U.S. at 160-61. Self-government, by definition, involves governance only over those members of the governing tribe. Denying a tribe jurisdiction over Indians affiliated with other tribes or over non-tribal Indians in no way affects the ability of the tribe to govern its members.

96. *Id.* at 161.

97. The Ninth Circuit Court of Appeals in *Brendale* felt that because fee land was scattered in a checkerboard pattern throughout the reservation, to deny the tribe the

ale in many of the Court's opinions. The intertwining of these factors has created a tangled web of standards with which the Burger Court has repeatedly struggled.[98] Would the Rehnquist Court be able to untangle the web and reach a conclusion as to what standard should apply to issues regarding the state taxation of Indian reservation land and activities?

C. *Case Law: The Rehnquist Court*

In recent years, the Supreme Court has not applied a uniform test in all cases involving state taxation of Indian land and affairs. The Court has been narrowing, however, its field of choices. The Court has utilized three different tests, each in separate cases, but all three tests inherently influenced each decision.

In 1987, the Court decided *California v. Cabazon Band of Mission Indians*.[99] In this case, the state of California attempted to impose its bingo regulations on games run by the Cabazon and Morongo Bands of Mission Indians on their reservation land.[100] The Court held that the state could not impose its regulations in the absence of explicit congressional authorization.[101] The Court was unable to find such authorization.[102] Then, because the state regulation dealt with non-Indians, the

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right to zone fee land "would destroy [its] capacity to engage in comprehensive planning." Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside, 828 F.2d 529, 534-35 (9th Cir. 1987), *aff'd sub nom.* Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989). A majority of the Court agreed. *Brendale*, 492 U.S. at 422-25 (plurality opinion). The dissent argued that the Court should not make a distinction between "open" and "closed" areas because this distinction itself would create a checkerboard problem. *Id.* at 463-64 (Blackmun, J., concurring in part and dissenting in part). The Court reiterated its dislike of the checkerboard approach in County of Yakima v. Yakima Indian Nation, 112 S. Ct. 683, 691 (1992).

98. "In essence there appears to be no rigid rule by which to resolve the issue whether a particular state law may properly be applied to an Indian reservation or to members of a tribe." HARTMAN SUPPLEMENT, *supra* note 9, at 251 (citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980)).

99. 480 U.S. 202 (1987).

100. *Id.* at 204-06. This case did not involve a state tax, but rather state regulations. Although general regulations do not always instigate the same issues as the imposition of taxes, the application of the regulations in *Cabazon* involves similar problems, so the Court approached the case in roughly the same manner.

101. *Id.* at 207.

102. The Court found that Pub. L. No. 280, which gave California jurisdiction over Indian country, did not give the state explicit authorization to impose its bingo regulations. *Id.* at 212. Section 2 of this law gave the state broad criminal jurisdiction, but

Court examined whether taxation interfered with federal or tribal interests.[103] The latter query was akin to the balancing test that the Burger Court refused to adopt, and that the Rehnquist Court later repudiated.[104] The Court found that the state's interests were not compelling enough to justify infringing the federal and tribal interests at stake.[105]

In 1989 the Court decided *Cotton Petroleum Corp. v. New Mexico*.[106] In this case, the Jicarilla Apache Tribe leased reservation land to the Cotton Petroleum Corporation for the production of oil and gas.[107] Both the tribe and the state imposed severance taxes on the oil and gas.[108] The Corporation sued the state, claiming that the state was precluded from imposing its tax on oil and gas severed from reserva-

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§ 4's grant of civil jurisdiction was more limited. Section 4 granted jurisdiction over private civil litigation, but did not grant general civil regulatory authority. Bryan v. Itasca County, 426 U.S. 373, 385, 388-90 (1976) (holding that Pub. L. No. 280 did not authorize Minnesota to impose personal property tax on Indian's on-reservation mobile home). *See also Cabazon*, 480 U.S. at 207-08. The court held that since the bingo regulations were more "civil/regulatory" than "criminal/prohibitory," they were not authorized by Pub. L. No. 280. 480 U.S. at 209-10.

103. 480 U.S. at 216. The Court made known that "[s]tate jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *Id.* (quoting New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333-34 (1983)). The use of the term "pre-empted" is confusing since preemption analysis is not utilized by the Court. The repeated careless use of the term "pre-empted" could be responsible for much of the confusion in the Court's decision. The Court likely meant that it would apply a per se rule prohibiting states from intruding in the absence of explicit congressional authorization in the "special area of state taxation." *See id.* at 215 n.17 (quoting Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973)). The Court applied this second query, however, because taxation was not involved in this case. It implied that such a test was appropriate even in tax cases involving sales to non-Indians. *Id.* at 215-16.

104. *See supra* notes 84-85 and accompanying text for discussion of the Burger Court's balancing test. *See also* County of Yakima v. Yakima Indian Nation, 112 U.S. at 693 (criticizing any balancing test).

105. The Court identified important federal and tribal interests of Indian sovereignty, self-government, and encouraging tribal self-sufficiency and economic development. *Id.* at 216. The Court went on to reject the notion that the tribe was merely "marketing an exemption from state gambling laws." *Id.* at 219. It concluded that the state's interest in preventing organized crime from spreading into tribal bingo games would not justify allowing the state to impose its regulations. *Id.* at 220-21.

106. 490 U.S. 163 (1989).

107. *Id.* at 168.

108. *Id.* at 168-69. The Indian Mineral Leasing Act of 1938 permitted tribes to execute mineral leases. *Id.* at 167. The Secretary of the Interior approved the tribe's authority to impose taxes on non-Indian lessees of reservation land. *Id.* Moreover, the

tion land.[109] The Court held that the Corporation was subject to nondiscriminatory state taxation unless Congress preempted the state taxes.[110] Finding no federal law preempting the state's taxes, the Court upheld their application to the Corporation.[111]

Most recently, in 1992, the Court addressed the case of *County of Yakima v. Yakima Indian Nation*.[112] In this case, Yakima County sought to apply its ad valorem tax to reservation land owned by the Yakima Indian Nation or individual members of the tribe and an excise tax on the sales of such land.[113] When the County attempted to foreclose on the properties for which the taxes were past due, the tribe contested the taxes and argued that federal law prohibited them.[114] The Court determined that the County could not impose its taxes unless Congress gave explicit authorization for such taxation.[115] The

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Court had upheld this tribe's power to impose severance taxes on these leases in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

109. 490 U.S. at 170. The Corporation argued that the State could not impose its taxes because it failed to provide services commensurate with the taxes paid. *Id.* The tribe, by amicus curiae, argued that the state taxes interfered with tribal sovereignty. *Id.* At the New Mexico Court of Appeals, the tribe changed its approach, arguing that the state's taxes could not withstand preemption analysis. *Id.* at 172. The tribe conceded that states could regulate the conduct of non-Indians on Indian reservations when such regulation would not interfere with tribal self-government. *Id.* It argued, however, that the state tax interfered with the tribe's ability to raise its own taxes and was therefore an improper interference with tribal self-government. *Id.* at 172.

110. *Id.* at 175-76.

111. *Id.* at 182-83. The Court recognized that preemption analysis included a concern over tribal sovereignty, stating:

> Although determining whether federal legislation has preempted state taxation of lessees of Indian land is primarily an exercise in examining congressional intent, the history of tribal sovereignty serves as a necessary "backdrop" to that process .... As a result, questions of pre-emption in this area are not resolved by reference to standards of pre-emption that have developed in other areas of the law .... Each case "requires a particularized examination of the relevant state, federal, and tribal interests."

Id. at 176 (quoting Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 838 (1982)). Thus, the preemption test incorporates parts of both the "infringement on sovereignty" test and the balancing test into its analysis.

112. 112 S. Ct. 683 (1992). This was a case of profound importance. Sixteen Indian tribes, the Bush Administration, and the Native American Rights Fund provided support for the Yakima Indian Nation, while ten states and counties in four other states sided with Yakima County. *Property Taxes*, USA TODAY, Jan. 15, 1992, at A5.

113. 112 S. Ct. at 687.

114. *Id.*

115. *Id.* at 693. The Court used this same test in Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985). In that case, the state tried to impose taxes on the tribe's

Court found that the ad valorem tax constituted a "taxation of . . . land" under the General Allotment Act and was therefore within congressional authorization.[116] However, the Court struck down the application of the excise tax because it found no authority for such taxes.[117]

In *County of Yakima*, the Court also used language indicative of a preemption analysis.[118] This demonstrates why the Court's opinions have generated so much confusion. The problem is the use of the term "preemption." First, preemption analysis for determining whether a state may impose taxes on Indians is qualitatively different from preemption analysis in other fields of law.[119] In this context, the preemption test includes possible preemption not only by federal legislation, but also preemption by federal policies or interests.[120] Second, the Court uses the term "preemption" to refer to a test which proscribes any state taxes unless expressly authorized by Congress.[121] This is not a preemption test. Under the test utilized in *County of Yakima*, all state taxes are presumptively invalid.[122] Only if Congress expressly au-

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royalty interests from mineral leases. *Id.* at 761. The Court required explicit congressional authorization before it would permit imposition of the tax. *Id.* at 765. Finding no such authorization, the Court forbade Montana from applying its taxes to the Indians. *Id.* at 766-68.

116. 112 S. Ct. at 692-93. But as Justice Blackmun points out in dissent, the explicit congressional authorization that the Court relied on was meant to apply only to land patented prematurely. *Id.* at 694. The Court relied upon language in a proviso added to the Indian General Allotment Act by the Burke Act of 1906, Pub. L. No. 149, 34 Stat. 182, Ch. 2348 (codified at 25 U.S.C. § 349 (1988)). *Id.* at 695. Blackmun argued that "by its terms, the proviso does not remove 'restrictions as to . . . taxation' from all allotted land. It removes restrictions solely from allotted land that happened to be patented in fee 'prematurely,' . . ." *Id.* Although the Court could interpret this to mean Congress intended all land to be subject to taxation, Blackmun stated that this interpretation of intent was far from "unmistakably clear." *Id.* Because Congress' intent was not clear in this matter, Justice Blackmun would have prohibited the ad valorem tax. *Id.* at 694. *See also infra* notes 132-39 and accompanying text analyzing the General Allotment Act and the Burke Act.

117. *Id.* at 693-94.

118. *See id.* at 693.

119. *See supra* note 111 for a quotation from the Court acknowledging the distinctiveness of applying preemption analysis to Indian taxation.

120. *Accord* English v. General Electric Co., 496 U.S. 72 (1990).

121. *See, e.g.*, County of Yakima v. Yakima Indian Nation, 112 S. Ct. 683, 693 (1992); Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 764-66 (1985); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170-71 (1973).

122. *See supra* note 115 and accompanying text for the test used in *County of Yakima*.

thorizes taxation will the state be able to impose its tax. Under traditional preemption analysis, in contrast, all state taxes are presumptively legitimate. A state may impose any nondiscriminatory tax unless Congress has expressly prohibited such taxes or such a tax violates important federal policies or interests.[123] These two tests rest on antithetical presumptions, and the Court's use of the term "preemption" for both has caused much confusion and inconsistency in this field of law.

Accordingly, the Rehnquist Court has alternated between two completely diametric tests, despite labelling both preemption analysis. Because neither the states nor the tribes know which test the Court will apply in a given situation, they cannot model their conduct around any specific standard. This type of ad hoc reasoning not only increases litigation, it also promulgates uncertainty in the law. In order to restore predictability and the integrity of the law, the Court must decide on a standard that can be consistently applied to all situations in which a state attempts to impose a tax on Indian reservation land or activities.

III. LEGISLATIVE AND POLICY ARGUMENTS

A. *Congressional Responses*

The Court stated that a standard for resolving when states may impose taxes on Indian reservation land and activities should come from Congress.[124] Indeed, since the beginning of this century, the Court has looked to Congress to establish such a standard.[125] If Congress did act, it would surely enjoy much deference by the Courts.[126] But Con-

123. *See* Rice v. Rehner, 463 U.S. 713, 738-39 (1983).

124. One commentator interprets cases such as Mescalero Apache Tribe v. Jones, 411 U.S. 145, 154-55 (1973), and Oklahoma Tax Commission v. Texas Co., 336 U.S. 342, 365-366 (1949), as arguing that "the whole ball of wax of tax immunity regarding Indian lands and affairs should properly be controlled by Congress." HARTMAN, *supra* note 40, § 6:10.

125. *See* United States v. Rickert, 188 U.S. 432, 445 (1903) (answering argument that Indians have privileges of citizenship and should therefore be taxed by stating that it is the core of the legislative branch to say where Indians should shoulder that burden).

126. Most Court decisions struggle to find congressional intent and will defer to this intent even when not explicitly stated. As one author noted:

> Congressional power to exempt land from state taxation is limited only by the requirement that the property or function in question be reasonably considered incident to a federal function. So large is the discretion permitted the legislature by the courts in this connection that no case has been found in which the court refused to sustain Congress' power to exempt.

gress has been vague at best in providing guidance on this issue. Our current national policy, as indicated by the legislative and executive branches, is to accept the independent status of the Indian tribes and help foster their independence and development.[127]

During the last half of the nineteenth century, the federal government favored a policy of isolating tribes on reservations.[128] However, late in the nineteenth century, this policy gave way to a policy of allotting lands to individual Indians.[129] Congress, at that time, believed that the proper approach was to assimilate the Indians into civilized society and take away their autonomy.[130] This policy of allotting reservation land to individual tribe members on a tribe by tribe basis failed because the Indians could sell their land to non-Indians in unwise or fraudulent transactions.[131]

Congress responded to this problem by enacting the Indian General Allotment Act of 1887 (also known as the Dawes Act).[132] The Act allowed the President to allot tribal lands to individual Indians without the tribe's consent.[133] According to this Act, every parcel of land that was allotted to an Indian would be held in trust for at least twenty-five years.[134] The Act granted states civil and criminal jurisdiction upon issuance of a patent in fee at the expiration of the trust period.[135] Ad-

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COHEN, *supra* note 3, at 255.

127. *See* Canby, *supra* note 11, at 1 ("[O]ur national Indian policy . . . assumes the permanence of the Indian tribes as self-governing entities, and encourages tribal autonomy and development."). *See also supra* note 2 for a listing of federal statutes and noting the underlying policy toward Indians.

128. CANBY, *supra* note 3, at 17-19 (addressing the national policy toward Indians from 1850 to 1887).

129. *See* County of Yakima v. Yakima Indian Nation, 112 S. Ct. 683, 686 (1992) (noting that the objective of the allotment policy was to "extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into society at large").

130. *Id.*

131. *Id.*

132. Indian General Allotment Act, ch. 119, § 1, 24 Stat. 388 (1887) (current version at 25 U.S.C. §§ 331-358 (1988 & Supp. II 1990)).

133. *Id.* § 331.

134. *Id.* § 348. A proviso permits the President to extend the period of the trust. *Id.* The Act was "designed ultimately to abolish Indian reservations while attempting to bring security and civilization to the Indian." Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 436 (1989) (Stevens, J., concurring).

135. The statute reads in pertinent part: "At the expiration of the trust period and [upon conveyance], . . . each and every allottee shall have the benefit of and be subject to

ditionally, the Burke Act[136] added a proviso that permitted the Secretary of the Interior to issue a patent in fee before the expiration of the trust.[137] Such premature patenting would release the land of any restrictions as to taxation.[138] The Supreme Court recently held that both section 6 of the Dawes Act and the Burke Act proviso express Congress' intent to subject allotted lands to state taxation.[139]

By 1934, Congress rethought its position on the allotment policy. The Indian Reorganization Act of 1934[140] prohibited further allotments[141] and extended already existing trusts indefinitely.[142] This Act did not, however, repeal the Dawes Act or the Burke Act.[143] Congress, thus, returned to the policy of recognizing Indian autonomy, and, instead of trying to assimilate the Indians into civilized society, attempted to foster development and autonomy within the Indian

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the laws, both civil and criminal, of the State or Territory in which they may reside . . . ." 25 U.S.C. § 349 (1988).

136. Burke Act, ch. 2348, 34 Stat. 182 (1906) (codified at 25 U.S.C. § 349 (1988)). *See infra* note 137 for the exact language of the proviso.

137. The proviso reads:

> *Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance [sic], or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent.

25 U.S.C. § 349 (1988). The Court has struggled over whether this provision subjects an allotment to taxation whenever a fee simple is issued or only when a fee is issued prematurely. Compare the opinions of Justices Scalia and Blackmun in County of Yakima v. Yakima Indian Nation, 112 S. Ct. 683, 691, 694 (1992).

138. Upon premature patenting, "all restrictions as to sale, incumbrance [sic], or taxation of said land shall be removed . . . ." 25 U.S.C. § 349 (1988).

139. *County of Yakima*, 112 S. Ct. at 691. Of course, these provisions only granted in rem jurisdiction. Therefore, the state could only impose taxes on the land. *Id.* As the Court pointed out in *County of Yakima*, in rem jurisdiction does not disrupt the tribe's ability to govern themselves. *Id.* at 692.

140. Pub. L. No. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-494 (1988 & Supp. II 1990)).

141. "On and after June 18, 1934, no land of any Indian reservation . . . shall be allotted in severalty to any Indian." 25 U.S.C. § 461 (1988).

142. "The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress." 25 U.S.C. § 462 (1988).

143. *See* County of Yakima v. Yakima Indian Nation, 112 S. Ct. 683, 690-91 (1992) (rejecting any repeal by implication).

tribes.[144]

There has never been a set policy regarding state taxation of Indian reservation land and activities. Arguably, Congress has addressed the issue, but the Courts have refused to recognize these provisions as expressions of congressional intent. In the Buck Act[145] Congress granted states the authority to impose certain taxes within prescribed federal areas. But the courts have interpreted this Act as not applying to Indian reservations.[146]

Before enacting the Wheeler-Howard Act,[147] Congress removed two tax immunity provisions from the final version of the bill.[148] The Supreme Court did not interpret this as congressional intent to subject Indians to state taxes.[149] Furthermore, in 1948[150] Congress arguably expressed its intent that non-Indian owned fee land on reservation property should be included in "Indian country" for purposes of jurisdiction.[151] The Court, however, apparently did not consider this provi-

144. *See supra* note 127 and accompanying text describing our current national Indian policy.

145. Buck Act of 1947, ch. 389, 61 Stat. 644 (codified at 4 U.S.C. §§ 105-110 (1988)).

146. *See, e.g.*, Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 691 n.18 (1965); Your Food Stores, Inc. v. Village of Espanola, 361 P.2d 950, 955-56 (1961). *Cf.* 4 U.S.C. § 109 (1988) (stating that the Act does not reach taxes on Indians).

147. Pub. L. No. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (1988 & Supp. II 1990)). The Wheeler-Howard Act is another name for the Indian Reorganization Act.

148. The predecessor bills of the Wheeler-Howard Act, H.R. 7902, 73rd Cong., 2d Sess. (1934) and S. 2755, 73rd Cong., 2d Sess. (1934), contained provisions such as "Nothing in this Act shall be construed as rendering the property of any Indian community . . . subject to taxation by any State or subdivision thereof . . . ." *Hearings on H.R. 7902 Before the House Committee on Indian Affairs*, 73rd Cong., 2d Sess. 5 (1934) (statements of Mr. John Collier, Commissioner of Indian Affairs), and "[a]s a federal agency, the property of a chartered community is constitutionally exempt from State taxation . . . ." *Id.* at 25. *See also* Mesalero Apache Tribe v. Jones, 411 U.S. 145, 152-53 n.9 (1972) (explaining the legislative history).

149. The Court apparently did not think that Congress' discussions on exempting certain Indian tribes from the Wheeler-Howard Act indicated that Congress generally intended Indians to be subject to the Act. *See, e.g.*, S. REP. No. 1926, 75th Cong., 3d Sess. (1938); PUBLISHED HEARING, H891-1, 76th Cong., 3d Sess. (1940).

150. Pub. L. No. 722, 62 Stat. 757 (codified as amended at 18 U.S.C. § 1151 (1988)).

151. Section 1151 reads: "Except as otherwise provided . . . the term "Indian Country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of a patent . . . ." 18 U.S.C. § 1151 (1988). *See also* Clinton, *supra* note 6, at 443 (noting that this provision suggested the congressional judgment "to include non-

sion an adequate expression of congressional intent. Indeed, in several decisions the Court reached results directly contrary to the provision.[152]

In Public Law 280[153] Congress gave states the option of assuming jurisdiction, both civil and criminal, over Indian reservations within a state.[154] Section 2 of the law granted broad criminal jurisdiction, but the Supreme Court held that section 4's grant of civil jurisdiction did not include a grant of power to tax reservation Indians.[155] The Court found that section 4 granted jurisdiction over private civil litigation, but did not grant to the states general civil authority to regulate the activities of reservation Indians.[156] Thus, Congress has provided several opportunities from which the Court could find congressional intent on the issue of state taxation of reservation land. But until Congress states this intent explicitly, the Court will not give any weight to these provisions.

Within the past twenty years, Congress has passed Acts describing the national policy toward Indian tribes.[157] In the Indian Financing Act of 1974,[158] Congress established a system of providing capital for

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Indian owned fee land located within the exterior boundaries of an Indian reservation within the definition of Indian country for jurisdictional purposes").

152. *See, e.g.*, Montana v. United States, 450 U.S. 544 (1981) (holding that tribes generally do not have inherent tribal authority and that states may therefore exercise jurisdiction over nonmember activities on fee land held by non-Indians within the reservation).

153. 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. §§ 1360-62 (1988)).

154. As originally enacted in 1953, states could assume jurisdiction over the tribe without the tribe's consent. The Indian Civil Rights Act amended this provision in 1968 to require the consent of the tribe before the state could assume jurisdiction over the reservation. 25 U.S.C. §§ 1301-1341 (1988 & Supp. II 1990).

155. Bryan v. Itasca County, 426 U.S. 373, 379-93 (1976).

156. *Id.* at 383-87 (noting that the legislative history of § 4 cannot be read to extend general state civil regulatory authority). *See also* Oklahoma Tax Comm'n v. Citizen Band of the Potawatomi Indian Tribe of Oklahoma, 112 S. Ct. 905 (1991); Rice v. Rehner, 463 U.S. 713 (1983).

157. *See supra* note 127 and accompanying text describing our national Indian policy. Indeed, Congress, late in 1991, designated the year of 1992 as the "Year of the American Indian." 138 CONG. REC. E1519 (daily ed. May 26, 1992) (statement of Hon. Faleomavaega) (noting the enactment of Public Law 102-188 which designates 1992 to the first inhabitants); 137 CONG. REC. H10,988 (daily ed. Nov. 22, 1991) (statement of Rep. Sawyer) (reading Senate Joint Resolution 217 and passing it as a proclamation that 1992 is the Year of the American Indian).

158. Indian Financing Act of 1974, Pub. L. No. 93-262, 88 Stat. 77 (codified as amended at 25 U.S.C. §§ 1451-1544 (1988 & Supp. II 1990)).

the development and utilization of resources on reservation land. This system was designed to promote Indian self-management, while bettering their standard of living.[159] In the 1988 Amendments to the Indian Self-Determination and Education Assistance Act,[160] in addition to providing assistance to the tribes' educational systems, Congress made a broad statement of congressional policy.[161] Neither of these acts, however, gave explicit recognition of congressional intent regarding state taxation of reservation land.[162]

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159. The 1984 Amendments to the Indian Financing Act did not change its basic policy. The Congressional declaration of policy reads:

> It is hereby declared to be the policy of Congress to provide capital on a reimbursable basis to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities.

25 U.S.C. § 1451 (1988).

160. Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, § 101, 102 Stat. 2285 (current version at 25 U.S.C. § 450 (1988)).

161. Congress added § 450a in the 1988 amendments. This section included a lengthy statement on Congress' policy regarding the Indian tribes:

> (a) Recognition of obligation of United States.
>
> The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.
>
> (b) Declaration of commitment.
>
> The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

25 U.S.C. § 450a (1988).

162. Several decisions have interpreted congressional policy as not allowing state taxation of reservation land. *See, e.g.*, Oklahoma Tax Comm'n v. Citizen Band of the Potawatomi Indian Tribe of Okla., 111 S. Ct. 905, 910 (1991) (holding that a state which has not asserted jurisdiction under Pub. L. No. 280 may not tax sales to tribe members, but may tax sales to nonmembers); Williams v. Lee, 358 U.S. 217, 220 (1959) (holding that a state court has no jurisdiction to entertain suits against Indians). Other decisions have interpreted congressional policy to avoid a "checkerboard" approach.

Congress has never specifically addressed the problem of state taxation of Indian reservation land and activities. The legislature is most likely the proper forum for resolving this issue. But because Congress has not manifested any intent as to how to address the issue, the courts have struggled to find congressional intent in laws that only tangentially refer to the problem. The Rehnquist Court has oscillated between three separate tests,[163] each requiring a determination of Congress' intent. These tests, however, are doomed to a life of speculation, inconsistency, and disharmony unless Congress explicitly manifests its true intentions.

B. *Problems with Taxing Indians*

Imposing state taxes on Indian tribes creates several policy problems. One problem is that taxes on reservation land or activities are inconsistent with the concept of tribal sovereignty.[164] States never owned the land that they seek to tax. Moreover, a sovereign cannot govern itself and bolster the economy of its community when it must pay taxes to another sovereign. Granted tribes are not states, but they do possess a measure of sovereignty.[165] Furthermore, federal policy encourages tribal self-government and maintenance of the tribe's own economy.[166] State taxation seems directly at odds with this federal policy.

Additional problems are created because Indian economies are dependent on tax exemptions. On-reservation market participants inevitably suffer because of inconvenient locations. Indian shops must convince potential customers to travel a greater distance than necessary in order to patronize tribal shops. Traditionally, Indians have been able to do this because of state tax exemptions. Indian shops

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See, e.g., Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 479 (1976) (holding various taxes on sales to tribal members invalid).

163. *See supra* notes 118-23 and accompanying text for a summary of the tests used by the Rehnquist Court.

164. This policy argument is based on the theory of immunity from intergovernmental taxation. *See supra* notes 48-53 and accompanying text describing the infringement on sovereignty test.

165. *See supra* notes 18-21 and accompanying text for the Court's findings on Indian sovereignty.

166. *See supra* notes 159, 161 quoting congressional policy. Some courts argue that the more active a role the tribe plays in a given activity, the more significant its interest in keeping that activity free from state regulation. *See* Gila River Indian Community v. Waddell, 967 F.2d 1404, 1410 (9th Cir. 1992).

could provide patrons with a discount because they were immune from state taxation. Subjecting tribes to taxation would remove the incentive for consumers to travel to a reservation to do their business.[167] Imposing state taxes is directly contrary to the federal policy of fostering Indian development and raising their standard of living.[168] Indians are some of the poorest people in the nation.[169] They need protection, not taxes.

Furthermore, subjecting Indians to state taxes places them at an economic disadvantage. Indian retailers are required to pay both tribal and state taxes. With this burden, it is virtually impossible for Indian entrepreneurs to lure customers to the reservation to conduct their business.[170] Faced with this dilemma, many Indians have defied the imposition of taxes on sales to non-Indians.[171] Tax evasion is another

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167. The Supreme Court has recognized the tribes' reliance on tax exemptions. One opinion noted that:

> Indian tobacco dealers make a large majority of their sales to non-Indians—residents of nearby communities who journey to the reservation especially to take advantage of the claimed tribal exemption from the state cigarette and sales taxes .... [T]he Indian retailer's business is to a substantial degree dependent upon his tax-exempt status, and if he loses that status his sales will fall off sharply.

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 145 (1980). However, the Court also recognized that the tribe would not have had the business in the first place but for the claimed tax exemption. The Court found that the state tax did not burden commerce that would exist without respect to the tax exemption. *Id.* at 157.

168. *See supra* notes 159, 161 for statements of federal policy.

169. HARTMAN SUPPLEMENT, *supra* note 9, at 240 n.3.

> The Litany of social problems on many reservations is depressingly familiar .... The unemployment rate on reservations is typically in the range of 40 to 50 percent and on some of the poorer reservations reaches 80 to 90 percent. The lack of jobs and economic opportunity on reservations is a major contributor to the high levels of alcoholism, high suicide rates, sense of helplessness and other deep social problems that afflict all too many tribes. The conditions on reservations more closely resemble a third world undeveloped nation than the mainstream economy and society of the United States.

138 CONG. REC. S2192, S2198 (daily ed. Feb. 25, 1992) (statement of Sen. McCain).

170. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 170-72 (1980) (Brennan, J., concurring in part and dissenting in part) ("Commercial growth . . . can be had only at the expense of tax dollars."). Congress is aware of the problem of "double taxation." *See, e.g.*, 138 CONG. REC. S2198, S2200 (daily ed. Feb. 25, 1992) (inserting into record the statement of Peterson Zah, President of the Navajo Nation) (arguing that "double taxation interferes with [Indians'] ability to encourage economic activity and to develop effective revenue generating tax programs").

171. *Indians Defy Court on Collecting Taxes*, N.Y. TIMES, Feb. 27, 1991, at B6. In addition to the threat of financial ruin, some Indians defy the tax on sales to non-Indians because they do not want to have to ask all customers about their heritage. *Id.*

consequence that state taxation engenders.[172] This problem is especially acute because of the Supreme Court's recent holding that states may not sue tribes to enforce taxes.[173] The foregoing examples demonstrate the many ill consequences that result when Indians are subjected to state taxation.

C. *Problems with not Taxing Indians*

Just as problems arise when states are permitted to tax Indian reservation land and activities, problems exist when Indians are exempt from taxation. Recently, Indians have been exploiting their tax-exempt status. Indians have experimented with new entrepreneurial ventures and have been successful, primarily because on-reservation sites are tax-free.[174] Indians have especially taken advantage of the Indian Gaming Regulatory Act of 1988,[175] which identifies the right of tribes to operate any gambling facilities otherwise permitted by state law.[176]

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172. *Id.*

173. Oklahoma Tax Comm'n v. Citizen Band of the Potawatomi Indian Tribe of Okla., 111 S. Ct. 905, 912 (1991). States may require Indians to collect state taxes because this represents a minimal burden. Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 483 (1976). *See also* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 151 (1980). But states cannot sue in court to enforce the tax. *Oklahoma Tax Comm'n*, 111 S. Ct. at 912. States may, however, seize goods before they reach the Indian shop in order to enforce tax collection. *Washington*, 447 U.S. at 161.

174. *See* Rich Weizel, *State Fights Indians Over Planned Casino at Ledyard Reservation*, N.Y. TIMES, Mar. 24, 1991, at 1. *See also* J. Richard Shaner, *New York marketers decry Indian 'misuse' of sales tax privilege*, NAT'L PETROLEUM NEWS, Vol. 84, No. 5, May, 1992, at 16.

175. Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (codified as amended at 25 U.S.C. §§ 2701-2721 (1988 & Supp. II 1990)).

176. *Id.* § 2701(5). For example, the Mashantucket Pequot Indians are building a $48.5 million, unlimited stakes casino at their Ledyard, Connecticut reservation. Rich Weizel, *State Fights Indians over Planned Casino at Ledyard Reservation*, N.Y. TIMES, March 24, 1991, at 1. States will suffer economically because they cannot tax this mass operation. Furthermore, gambling operations located off-reservation are subject to taxes and can therefore offer less winnings. Patrons will likely stop visiting taxable casinos in favor of the Indian operations. Wayne King, *Atlantic City Shivers at Indians' Casinos to Come*, N.Y. TIMES, May 26, 1991, at B4. The state challenged the legality of this undertaking, but the Supreme Court recently denied review. Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1620 (1991). At least 16 tribes in other states have begun negotiations with state officials for similar gambling operations. King, *supra*, at B4. According to one report, "[a]bout 150 tribes offer bingo games and another 23 offer casino-style operations, bringing in estimated revenues of $750 million to $1.3 billion." Ellen Gamerman, *Indian Gaming Sparks Debate Between Senate Panel and Federal Agency*, STATES NEWS SERVICE, Feb. 5,

Because these operations are located on Indian lands, they are free from state and local taxation, as well as federal taxes on profits.[177]

Moreover, Indian tribes may lease reservation property to non-Indian businesspersons, and these lessees are also exempt from taxation. Retailers can gain an enormous advantage by operating on reservation land.[178] Reservations have thus become extremely attractive commercial sites. This is true especially because, in addition to the tax-exempt status, there is usually much public opposition to new commercial projects in cities.[179] Reservation property is leased for such varied uses as shopping centers, industrial parks, airports, golf courses, indoor rodeo arenas, movie stage sets, a proposed power plant, and even a proposed stadium for the Phoenix Cardinals football team.[180] Such tax exemptions for businesses located on Indian reservations have created hostility between Indians and non-Indians in some areas.[181] Non-Indi-

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1992. One tribe has even proposed a televised high-stakes bingo game in which viewers could play at home. Cass Peterson, *A $50 Million Gamble with Many Reservations: Officials Question Plan to Benefit Indians*, WASH. POST, Nov. 27, 1987, at A25.

Additionally, California has experienced a sudden rise in the number of betting outlets on reservation property. Melvin Durslag, *More Betting is Just Around the Corner*, L.A. TIMES, May 6, 1991, at C3. *But see* Weizel, *supra*, at 1 (noting that Indians argue that the proliferation of Indian-run casinos could actually help a state's economy, for Indian casinos could "lift the state's sagging economy, creating hundreds of jobs and stimulating the tourism industry").

177. *See* 25 U.S.C. § 2703 (1988 and Supp. II 1990) (defining the classes of gaming allowed on Indian lands). Furthermore, some argue that American Indian casinos and gambling operations are very susceptible to infiltration by organized crime. *See, e.g.*, Ellen Gamerman, *supra* note 176.

178. Steve Dwyer, *Kansas Marketers face taxing ordeal with Indian reservation*, NAT'L PETROLEUM NEWS, Feb. 1991, Vol. 83, No. 2, at 17.

179. John Edwards, *Reservations Lure Commercial Deals*, ARIZ. BUS. GAZETTE, Aug. 2, 1990, at 1.

180. *Id.*; *Firm and Indian tribe plan 2,000-Mw plant*, ENGINEERING NEWS-RECORD, Vol. 229, No. 6, Aug. 10, 1992, at 19.

Not only do the city and state lose tax revenues, but the Indians, faced with immediate economic gratification, are destroying their land. Their land has historically been of vital importance to Indian tribes. Whether the federal government should allow Indians to volunteer their land for commercial development is another difficult issue raised by the tribe's tax-exempt status.

181. *Gasoline Retailers Protest Over Taxes*, N.Y. TIMES, July 30, 1992, at B4; Estelle Lander & John McDonald, *Tax-Exempt Cigarettes Draw Fire*, NEWSDAY, Dec. 20, 1991, at 3. The recent clashes concerning taxes on Indians of the Allegheny and Cattaraugus reservations in New York illuminate the extent of violence which is not only possible, but perhaps inevitable. *See, e.g., Rebelling against taxes, Indians block highway, clash with police*, AGENCE FRANCE PRESSE, July 18, 1992; *Stay Allows Indians to Avoid Sales Taxes*, N.Y. L.J., July 21, 1992, at 2; Liz Willen, *Tense calm settles over*

ans have threatened violence, but Indians do not want to negotiate since they enjoy the upper hand.[182] Because of the Indians' exploitation of their tax-exempt status, public interest has heightened in recent years.[183]

States have historically protested Indian exemptions from state taxation because the state feels it is denied a source of revenue. This rationale is of particular importance today, because Indian operations have profoundly increased in both number and size.[184] The state's ability to impose even a few taxes could be a big revenue source.[185]

Furthermore, in today's society, American Indians are citizens of the United States.[186] They can vote, sue in state courts, and receive some state services.[187] They can also hold elective and appointed offices at either the state or local level.[188] With Indians receiving all these benefits from the state, it seems only fair to subject them to the same obligations as citizens of the state. Treating Indians differently does not violate the Due Process or Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution,[189] but it is inequitable

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reservation; Police leave Indian town after clashes, HOUSTON CHRON., July 19, 1992, at A2.

182. Lander & McDonald, *supra* note 181, at 3.

183. Executive and legislative sympathy, however, remains with the Indians. Current policy seems to encourage such use of reservation land. A task force of departmental professionals and officials from the Bureau of Indian Affairs, convened in 1985 by the Secretary of the Interior, recommended that Congress enact legislation to create "enterprise zones" on Indian reservations. The task force also proposed tax incentives for these zones. 138 CONG. REC. S2198-99 (daily ed. Feb. 25, 1992) (statement of Sen. McCain). Congress, at the time of this publication, is considering such legislation. *See, e.g.*, Steve Gerstel, *Senate Approves $35 billion tax bill*, UPI, Sept. 29, 1992; Chet Lunner, *Senators Want Reservations Included in Urban Reform*, GANNETT NEWS SERVICE, May 14, 1992. Likewise, the proposed Indian Employment and Investment Act of 1992 provides for tax credits to Indians. H.R. 5468, 102d Cong., 2d Sess. (1992).

184. *See supra* notes 174-180 and accompanying text noting the expansion of Indian businesses and gambling facilities.

185. Susan Craig, *More Tax Revenues Likely After Supreme Court Ruling*, PUBLIC FINANCE/WASH. WATCH, Mar. 11, 1991, at 4.

186. 8 U.S.C. § 1401(b) (1988) (providing that those persons "born in the United States to a member of an Indian tribe" shall become a U.S. citizen at birth).

187. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 173 (1973).

188. Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 467 (1976).

189. The Court rejected claims that special treatment for Indians discriminated against non-Indians in violation of the Due Process Clause and Equal Protection Clause in *Moe*, 425 U.S. at 479-80 (1976), and Morton v. Mancari, 417 U.S. 535, 552-55 (1974). In each case, the Court reasoned that all Indian laws single out Indians for

to have one group of people enjoy the benefits of state government, yet be free from participation in the maintenance of that government. Thus, several dilemmas develop when Indians are immunized from state taxation.

IV. A PROPOSED STANDARD

The Court has articulated many tests for solving the question of state taxation of Indian reservation land and activities.[190] All these tests have their benefits and their problems. Several states have offered their own solutions,[191] but none of these proposals are superior to a test that is espoused by three Justices.[192] Still, an analysis of the advantages and disadvantages of these state-proposed plans is helpful in understanding how the various interests at stake interact.

Oklahoma suggested that tribal sovereignty be given more limited protection.[193] Specifically, Oklahoma suggested that only the tribal courts and the internal affairs of tribal government be protected by the doctrine of tribal sovereignty.[194] Oklahoma believed that insulating Indian businesses from suits to collect taxes did not further tribal sovereignty.[195] But this approach ignores the fact that the nation's policy is to improve the living conditions and promote the development of the Indian community. Oklahoma's proposal would seriously disadvantage Indian businesses by subjecting them to both state and tribal taxes. Oklahoma's approach does little to protect the tribes' interests. The Supreme Court addressed these arguments and rejected Oklahoma's

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special treatment. If the Court deemed all these laws violations of due process and equal protection an entire title of the United States Code would be invalidated. As long as Congress bases its Indian laws on its unique obligations to the Indians, these laws will not violate the Due Process Clause or the Equal Protection Clause. *Morton*, *supra*, at 552-55.

190. *See supra* section II of this Note.

191. Oklahoma, Nevada, and New York have all proposed standards. Only Oklahoma's proposal has been considered by the Supreme Court. *See infra* notes 193-203 and accompanying text for a description of each of these state proposals.

192. Justices Blackmun, Brennan, and Marshall recommended their own approach in their dissents in Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 193-211 (1989), and Rice v. Rehner, 463 U.S. 713, 735-44 (1983). *See infra* notes 204-213 for analysis on their approach.

193. Oklahoma Tax Comm'n v. Citizen Band of the Potawatomi Indian Tribe of Oklahoma, 111 S. Ct. 905, 909-10 (1991).

194. *Id.*

195. *Id.*

stance.[196]

Nevada has proposed an alternative approach, in which tribes could remain exempt from state taxes provided that they charge taxes at the same rate as the state.[197] This would eliminate any disparity between tribal prices and off-reservation prices, yet the tribe would be able to keep the revenue.[198] The benefits of this plan are that tribal businesses do not have to pay double taxes and the distinction between Indian and non-Indian purchasers would be eliminated. Furthermore, less expensive prices on reservation sites would not disadvantage non-Indian businesses. However, consumers would no longer have any incentive to travel to the reservation to conduct their business. Reservation shops would therefore be unable to compete with the more convenient off-reservation sites. The tribes have not responded favorably to this policy. Only two of the twenty-five tribes in the state have imposed their own taxes pursuant to this regulation.[199] The Supreme Court has not had the opportunity to address this specific proposal.

New York has argued for a hybrid of the Nevada approach.[200] Under New York's standard, Indians could remain immune from state taxes so long as the tribe charged taxes at a specified percentage of the state rate. Under the specific plan proposed by New York, the tribe would be required to collect taxes on cigarettes, gasoline, and diesel fuel at a rate of nine cents less than the state tax per unit.[201] This standard is a compromise, giving tribal shops a small price break in order to lure consumers to the reservation, yet respecting non-Indian

196. *Id.* at 910. Another idea involves providing funds for Indians who desire to start a business off the reservation. After granting initial funds to get the business started, the state could then impose taxes on the business at an equal rate as non-Indian businesses. This system would promote economic development while assimilating the Indian culture into "civilized" society. This system, however, runs counter to the current federal Indian policy of promoting Indian autonomy rather than assimilating the Indians into mainstream society. To the knowledge of this author, no court or commentator has considered this proposition.

197. DAILY REP. FOR EXEC. (BNA), Apr. 19, 1991, at H-2. The Nevada proposal provides that the governing body of the reservation must enact an ordinance to impose an excise tax that is equal to or greater than that excised by the state. *Id.* They must submit a copy of that ordinance to the Nevada Tax Department in order to avoid having the department collect the tax. *Id.*

198. *Id.*

199. *Id.*

200. *See supra* notes 197-99 for a summary of the Nevada proposal.

201. Jeannie H. Cross, *New York goes to war with Indians over Taxes*, UPI, Mar. 7, 1990, *available in* LEXIS, Nexis Library, UPI File.

businesses because many consumers will not make the extra trip to save such a small amount. This proposal may sound appealing, but it is very legislative in character.[202] Additionally, line-drawing for this standard is necessarily very arbitrary. Moreover, the Nevada and New York tests would be applicable only to sales taxes. A different standard would be necessary for income taxes, ad valorem taxes, excise taxes, use taxes, and the like.[203] A system that provided different standards for different taxes would be very complex, especially because some taxes are not easily categorized. The Court should strive to find one standard that applies to all state taxes imposed on Indian reservation land and activities.

Despite these state proposals, the best choice for a standard is one advocated by three Justices.[204] The "modernized" preemption analysis used by the dissent in *Cotton Petroleum Corp. v. New Mexico*[205] and *Rice v. Rehner*[206] is most consistent with all the interests involved. Under this standard, the state may tax Indian reservation land and activities unless that tax is preempted by (1) federal law, or (2) federal policies.[207] Federal policy requires consideration of state, tribal, and

202. Courts decide concrete controversies. The judicial function does not include setting strict standards that necessarily involve political, economic and sociological determinations. Ascertaining what percentage of state tax rates must be applied by Indian tribes involves decisions on how much assistance the tribes should receive, how much of a tax difference is necessary to maintain tribal economies, and how much of a tax difference would lure a specified percentage of potential customers to the reservation to conduct their business. This sort of decision-making is vested in the legislature, not the judiciary.

203. This test, of course, could be applied to other taxes; but the state has no interest in whether the tribe imposes an ad valorem tax on tribal property. Furthermore, application of this test to all taxes would deny the state this entire source of revenue. This test would not allow any state taxes of any kind as long as the tribe taxed at the specified rate. Apart from the invitation of fraud, such as the tribe purporting to tax its members and then returning their money, recent Court decisions demonstrate the policy of permitting the states to impose some taxes. *See, e.g.*, Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 112 S. Ct. 683, 692-94 (1992) (invalidating county's excise tax on sales of fee patented lands held by tribe members but upholding an ad valorem tax).

204. Justices Blackmun, Brennan, and Marshall suggested this method in their dissenting opinions in Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 193-211 (1989), and Rice v. Rehner, 463 U.S. 713, 735-44 (1983).

205. 490 U.S. 163 (1989). This test is loosely based on Marshall's two-part test from White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980). *See supra* notes 86-88 and accompanying text for Marshall's test in *Bracker*.

206. 463 U.S. 713 (1983).

207. 490 U.S. at 193 (Blackmun, J., dissenting). Blackmun says that the court must

federal interests.[208]

The modernized preemtion test best protects all the interests involved.[209] The state interests at stake include (1) protecting major sources of revenue, (2) protecting their citizens' businesses against unfair competition, and (3) even-handed enforcement of their tax laws. This test is consistent with state interests because the state's taxes are presumptively valid. Moreover, the tribe cannot claim that the tax is preempted unless it significantly infringes the tribe's ability to govern itself, thus ensuring that the state's citizens will not be run out of business.[210] The tribal interests at stake include protection of its members' businesses and unhampered governance over tribal members and businesses.[211] The test protects these interests by preempting any tax that would interfere with the tribe's self-government.[212] Likewise, the test recognizes federal policies, such as maintaining the autonomy of the tribes and promoting tribal development. Recognition of these policies serves both tribal and federal interests. Furthermore, this standard is consistent with the Court's direction, albeit circuitous, in recent years.[213] In addition, it allows for Congress to interpose new policies and regulations as the needs of the tribes and the various levels of government change.[214] This "modernized" preemption analysis provides

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first "look to the statutory scheme Congress has established to govern the activity the state seeks to tax in order to see whether the statute itself expresses Congress' views on the question of state taxation." *Id.* The Court must then consider federal policy. *Id. See also* Rice v. Rehner, 463 U.S. 713, 739 (1983) (Blackmun, J., dissenting) (noting that certain areas have been preempted "because federal policy favors leaving Indians free from state control, and because Federal Law is sufficiently comprehensive to bar the states' exercise of authority").

208. 490 U.S. at 204-10.

209. This is a "true" preemption test. *See supra* notes 118-23 and accompanying text discussing the inconsistent use of the term "preemption.".

210. Minor detriments to tribal economy or governing practices should not prevent imposition of the tax. *Accord* Fort Mojave Tribe v. County of San Bernardino, 543 F.2d 1253 (9th Cir. 1976) (holding that a state possessory interest tax as applied to lessees of Indian land has only a trivial impact on the tribe and thus was properly imposed), *cert. denied*, 430 U.S. 983 (1977); Aqua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971) (same), *cert. denied*, 405 U.S. 933 (1972).

211. 490 U.S. at 209-11.

212. *See supra* note 209 and accompany text listing tribal interests.

213. As noted in section II-C of this Note, the Rehnquist Court has oscillated between two antithetical tests, while labelling each a preemption analysis. Apparently, preemption analysis is the preferred test, but the Court has simply misapplied it.

214. The canon of construction holding that ambiguous provisions are to be resolved in favor of the Indians can still thrive. *See supra* text accompanying note 66 for

the most protection for all interests involved.

V. CONCLUSION

The Supreme Court's approach to the issue of state taxation of Indian reservation land and activities has been amazingly inconsistent. This inconsistency has generated uncertainty in the law, hostility toward Indians, and increased litigation. Yet, Congress has provided little help on this divisive issue.[215] This matter is in need of a standard form of analysis that can be applied to all state taxes imposed on reservation land and activities. The "modernized" preemption analysis utilized by Justice Blackmun in his dissents in *Cotton Petroleum Corp. v. New Mexico*[216] and *Rice v. Rehner*[217] offers the most protection to state, tribal, and federal interests and is most consistent with current federal policy.

Any standard, however, would be better than no standard. Once a standard is imposed, litigation will decrease, hostility toward the American Indians will subside, and the law will become more clear. The Supreme Court should strive to achieve these goals. The Court should, once and for all, come to a conclusion as to the proper standard to be implemented in all cases involving the question of whether a state has jurisdiction to tax Indian reservation land and activities.

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this canon. Indeed, some canon of construction is necessary until Congress explicitly states its intent regarding certain taxes.

215. *See supra* Section III-A of this Note analyzing Congress' response.

216. 490 U.S. 163, 193-211 (1989).

217. 463 U.S. 713, 735-44 (1983).

* J.D. 1993, Washington University.