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INDIAN SOVEREIGNTY: CONFUSION PREVAILS—*California v. Cabazon Band of Mission Indians*, 107 S. Ct. 1083 (1987).

The courts have failed to give the Indian tribes of the United States a straight answer on the boundaries of Indian sovereignty. The predominant issue before the courts is how to balance the disparate interests of the federal government, the states, and the tribes themselves. The courts have battled to balance the interests of each party involved and they have lost. The battle was lost because the courts have not developed a consistent standard that is fair to any of the parties involved.

The most recent Indian law case before the Supreme Court, *California v. Cabazon Band of Mission Indians*,[1] involved the rights of states to regulate gambling on federally recognized Indian reservations. The Court ruled in *Cabazon* that state regulation of tribal gambling operations was not allowed.[2] This Note examines the Court's decision, proposes a more consistent method for application of Public Law 280, and suggests adoption of a new test for Indian law decisions. The balancing test currently used by the Court, which weighs state interests in jurisdiction almost equally against Indian interests, should no longer be used in conjunction with traditional Indian preemption analysis. Instead, Indian preemption analysis should continue to favor tribal interests over state intrusion. Preserving the presumption of Indian sovereignty in federal Indian law will make future opinions more predictable and will contribute to the Indian tribes' efforts to become self-sufficient.

I. BACKGROUND

A. The Rise and Fall of Tribal Sovereignty

Indian tribes occupy a unique position in the United States. They are sovereign nations with inherent powers of self-government.[3] Yet, this tribal sovereignty is dependent on, and subordinate to, the federal government.[4] The Supreme Court's interpretation of tribal sovereignty has gradually changed over the years from a strict rule prohibit-

1. 107 S. Ct. 1083 (1987).
2. *Id.* at 1095.
3. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 231–42 (1982 ed.). The late Felix S. Cohen served with the Department of the Interior and was renowned as an expert in Indian law.
4. Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 154 (1980).

ing state intervention to a more lenient standard that weighs state, tribal, and federal interests.

1. *The Early Cases: "The Wall"*

The early Indian law decisions erected an insurmountable wall between the Indian reservations and the governments of the states. The federal government was the only legislative body with power over the Indians under any circumstances.[5] The states were entirely excluded from dealing with the tribes unless Congress expressly delegated the power to them. This view lasted almost fifty years.[6]

The Court's attitude towards the Indian tribes' legal status was first clearly expressed in 1831 by Chief Justice John Marshall. Marshall's opinions are the basis of jurisdictional law that prohibits the exercise of state power over Indian affairs. In the landmark *Cherokee* case,[7] Justice Marshall described a tribe as "a distinct political society separated from others, capable of managing its own affairs and governing itself."[8] Tribal sovereignty was not complete, however, in that a tribe could not be considered a "foreign state" within the meaning of article III, section 2 of the Constitution.[9] The key phrase that emerged from this case and which remains a cornerstone of Indian law is Marshall's characterization of Indian tribes as "domestic dependent nations."[10]

The next influential Indian decision was *Worcester v. Georgia*,[11] which clarified the "territorial test" that was implied by the *Cherokee* decisions. Justice Marshall again characterized the Indian nations as independent political communities with distinct boundaries within which their authority was exclusive and the laws of Georgia could have no effect.[12]

5. The Constitution enables the President to make treaties, with the consent of the Senate, and Congress is granted the power to "regulate Commerce . . . with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3; art. II, § 2, cl. 2. State laws, on the other hand, had no force in Indian territory. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).

6. Essentially, "the wall" lasted from Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), to United States v. McBratney, 104 U.S. 621 (1882).

7. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). Georgia gave up land claims in reliance upon a federal promise to extinguish Indian title to lands within Georgia, but as time passed the state grew tired of waiting for the federal government to act. Instead, Georgia passed a series of laws that extended state law over the Cherokee territory, invalidated all Cherokee laws, and made it illegal for the Cherokees to act as a government.

8. *Id.* at 16.

9. *Id.* at 17.

10. *Id.*

11. 31 U.S. (6 Pet.) 515 (1832). Two missionaries appealed their arrest for violating a state law requiring non-Indians residing in Indian territory to obtain a license from the state governor.

12. *Id.* at 557, 561.

2. The Change: "The Infringement Test"

In the late 1800's, the courts began to encroach upon "the wall" by formulating tests which would give the states power over the Indians in certain cases. The Court first opened the door to an eventual balancing of competing Indian and state interests by its rulings in *United States v. McBratney*[13] and *Draper v. United States.*[14] In these criminal cases, the Court ruled that Congress could not have intended the total exclusion of state power over completely non-Indian crimes that just happened to take place in Indian country.[15]

The long-term effects of these two decisions have been enormous.[16] Indian law is much more complex as a result.[17] Instead of only determining the location of the event in question, a court now also has to identify the subject matter and the identity of the parties involved in the case.[18]

This change was more clearly articulated nearly fifty years later in a civil case. In *Williams v. Lee,*[19] the Court stated that "absent governing Acts of Congress, the question has always been whether the state action *infringed* on the right of reservation Indians to make their own laws and be governed by them."[20]

With this case, the infringement test was born.[21] Instead of denying the states jurisdiction outright, the courts first determined whether there was an encroachment upon Indian interests.[22] If an Indian interest was jeopardized, the states were barred from acting as they had been in the past.[23] If an interest of the tribes was not being invaded, however, the states could act.[24] The purely geographical

13. 104 U.S. 621 (1882).

14. 164 U.S. 240 (1896).

15. *Id.* at 245–47; *McBratney,* 104 U.S. at 623–24.

16. *See* W. CANBY, AMERICAN INDIAN LAW IN A NUTSHELL, 102–03 (1981).

17. *Id.*

18. *Id.*

19. 358 U.S. 217 (1959). The Court ruled that state courts had no jurisdiction over a civil claim by a non-Indian against an Indian involving a transaction that occurred on an Indian reservation. The actual outcome of the case was consistent with prior holdings in Indian law.

20. *Id.* at 220 (emphasis added).

21. *See, e.g.,* Washington v. Confederated Bands and Tribes of Yakima Indian Nation, 439 U.S. 463, 502 (1979); Fisher v. District Court, 424 U.S. 382, 386–87 (1976); Kennerly v. District Court, 400 U.S. 423 (1971).

22. *See* Canby, *The Status of Indian Tribes in American Law Today,* 62 WASH. L. REV. 1, 5 (1987).

23. *Id.*

24. *Id.*

"territorial test" was destroyed.[25] The infringement test was still strict, but it was no longer absolute.[26]

3. *The Unpredictable 1970's: "Preemption Analysis"*

There was tremendous activity in Indian law during the 1970's.[27] For the first time the states gained a real foothold of significant authority.[28] The Supreme Court adjusted its test for deciding Indian law cases, moving from infringement to preemption analysis.[29] In preemption analysis, state jurisdiction is preempted if it conflicts or is incompatible with federal and tribal interests as reflected in federal law.[30] The dramatic effect of this move was to reduce Indian sovereignty to a "backdrop" against which applicable treaties and federal statutes were to be measured.[31]

Traditional preemption analysis allows Congress to oust all or some state authority in areas where states are able to legislate absent federal authority.[32] Indian preemption analysis differs significantly from the traditional federal preemption doctrine.[33] Under the traditional doctrine, Courts are reluctant to allow federal preemption of state law

25. *See, e.g.,* Williams v. Lee, 358 U.S. 217 (1959); New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946); Arizona *ex rel.* Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969), *cert. denied,* 396 U.S. 1003 (1970).

26. *See, e.g.,* Organized Village of Kake v. Egan, 369 U.S. 60 (1962) (the Court suggested that state jurisdiction could be extended to Indians as well as non-Indians in Indian country if there was no direct interference with tribal government).

27. The Supreme Court issued more Indian decisions than in any other comparable period in the history of the United States. Pelcyger, *Justices and Indians: Back to Basics,* 62 OR. L. REV. 29, 29 (1983).

28. "[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption." McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973); *see also* Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

29. The phrase "preemption analysis" was introduced into Indian law in *McClanahan,* 411 U.S. at 172. The Court held that a state has the power to apply its laws unless preempted by applicable treaties and federal statutes. *Id.*

30. *See id.;* Warren Trading Post v. Arizona State Tax Comm'n, 380 U.S. 685, 688 (1965).

31. *McClanahan,* 411 U.S. at 172. The doctrine of Indian sovereignty was no longer the answer to disputes by itself. The courts relied on the idea of federal preemption instead, and looked to Indian sovereignty as another factor to be considered along with federal statutes and treaties.

32. *See, e.g.,* Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) (the Court struck down a state law regulating oil tankers on Puget Sound); City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) (local ordinance curbing airport noise was invalidated by the court). *See generally* Note, *Preemption as a Preferential Ground: A New Canon of Construction,* 12 STAN. L. REV. 208 (1959).

33. *See* F. COHEN, *supra* note 3, at 270–75.

absent clear congressional intent.[34] In contrast, courts frequently resolve preemption claims involving Indian tribes in favor of the preemption of state law.[35] In Indian law, the federal act that is the basis of the preemption is often extremely general in nature.[36] In examining "infringements" on tribal sovereignty, courts have broadly construed the interests of the tribe.[37] The result has been a heavy presumption against the intrusion of state law onto reservations.[38] A primary reason for this distinction is the historical recognition of Indian tribes as distinct political sovereigns.[39]

Due to the importance of the federal government in every area of Indian law, preemption could be interpreted to mean that whatever interferes with the broad and implicit goal of Indian self-government is an infringement that is preempted by federal law. The Supreme Court, however, did not adopt this view.[40] Instead, the Court attempted to place boundaries on its analysis.[41] In *Oliphant v. Suquamish Indian Tribe,*[42] the Court imposed new limitations on tribal power.[43] Justice Rehnquist wrote that tribes could not exercise powers that were either surrendered by treaty, prohibited by federal statute, or inconsistent with the status of domestic dependent nations.[44] It was this new and largely undefined third category, "inconsistency with [tribal] status,"[45] that made many later decisions unpredictable.[46]

34. Note, *Confusion in the Land of Indian Sovereignty: The Supreme Court Takes a Detour,* 25 ARIZ. L. REV. 1059, 1063 (1983).

35. *Id.;* F. COHEN, *supra* note 3, at 270–75.

36. Since Indian preemption analysis apparently requires no specific legislative expression, decisions have left it doubtful whether the Court has formulated one test or two. Indian preemption analysis can be viewed as a more liberal restatement of "infringement." Barsh, *Is There Any Indian "Law" Left? A Review of the Supreme Court's 1982 Term,* 59 WASH. L. REV. 863, 866–67 (1984).

37. *See, e.g.,* White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (the Court relied on the federal policy of promoting tribal self-sufficiency and economic development); *see also* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 152 (1982) (quoting *White Mountain Apache Tribe*).

38. *See, e.g., White Mountain Apache Tribe,* 448 U.S. at 143–44; *see also* GETCHES & WILKINSON, CASES AND MATERIALS ON FEDERAL INDIAN LAW 335 (1986).

39. The distinction also explains why there has been little cross-citation between Indian preemption cases and other lines of preemption theory.

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

41. *Id.*

42. *Id.*

43. *Id.* at 208.

44. *Id.* at 206–08.

45. *Id.* at 208.

46. *Compare* United States v. Wheeler, 435 U.S. 313 (1978) (tribe's power to punish its own members was not inconsistent with its dependent status), *with* Montana v. United States, 450

4. *The 1980's: The Growing Power of the State*

Over the last few years the proliferation of important Indian law cases has continued.[47] Much of the gray area in Indian law in the 1980's has resulted from jurisdictional disputes involving non-Indians.[48] Preemption analysis still exists, but now it includes a balancing test that puts greater emphasis on state interests than any earlier decisions.[49] The important difference is that for the first time state intrusion might be permitted even when only Indian interests are involved.[50] It is recognized that Indian tribes retain "attributes of sovereignty"[51] but the Court's opinions now focus on the question of preemption rather than tribal sovereignty.[52]

The Court's new focus is illustrated by *Washington v. Confederated Tribes of the Colville Indian Reservation.*[53] Despite the absence of express congressional consent, the Court held that the state of Washington could require tribal smokeshops on reservations to collect state sales tax from their non-Indian customers.[54] The state's interest in collecting sales tax from the non-Indians was deemed sufficient to override the Indians' economic interest in selling less expensive cigarettes on the Indian reservation.[55]

The changing character of Indian law was also dramatically illustrated in *Rice v. Rehner.*[56] The decision ultimately rested on what the Court determined to be "traditional" in Indian life.[57] In allowing the

U.S. 544 (1981) (tribal regulation of non-Indian hunting and fishing on reservation land owned by non-Indians was held inconsistent with tribal status).

47. *See* Barsh, *supra* note 36, at 864.

48. *See, e.g.,* Central Mach. Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980) (Indian trader statutes, as federal law, preempt the application of state tax laws to tractor sales by non-Indians on the reservation); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) (state taxation permitted of non-Indians purchasing cigarettes on reservations).

49. *See, e.g.,* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333 (1983); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980); *Confederated Tribes of Colville Indian Reservation,* 447 U.S. at 153–54.

50. Canby, *supra* note 22, at 12.

51. California v. Cabazon Band of Mission Indians, 107 S. Ct. 1083, 1087 (1987).

52. In *White Mountain Apache Tribe,* the Court held that there were two independent but related barriers to state jurisdiction. 448 U.S. at 142. Regulation by the state could be preempted by federal law or found to infringe unlawfully on the right of the tribes to govern themselves. However, the courts have been relying on the question of preemption rather than tribal sovereignty. *See, e.g.,* Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) (regulation by the state was preempted by federal law, but a backdrop of tribal sovereignty was not mentioned).

53. 447 U.S. 134 (1980).

54. *Id.* at 159.

55. *Id.* at 154.

56. 463 U.S. 713 (1983).

57. *Id.* at 722.

state to impose its tax on liquor consumption, the Court reasoned that such consumption was not a "traditional" Indian activity.[58] The Court also asserted that Congress had always intended joint regulation of liquor on the reservations by Indians and the states.[59]

The power of the state to control Indian gambling has been the topic of considerable debate in recent years.[60] Generally, the federal courts have held that a state cannot regulate gambling on the reservations,[61] although there have been exceptions to this rule.[62] Federal statutes have often been the deciding factor between permitting or prohibiting a state from intervening in Indian gambling activities.[63]

B. Federal Statutes Granting State Jurisdiction

In general, states lack jurisdiction over Indian reservations until it is granted by the federal government.[64] Two federal statutes have an important role in this scheme and in the *Cabazon* decision. Public Law 280[65] transfers federal jurisdiction to the states, and the Organized Crime Control Act[66] converts violations of state gambling laws into federal violations.

1. Public Law 280

Public Law 280 ("PL 280")[67] extends state criminal jurisdiction and

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58. *Id.*

59. *Id.*

60. *See* Comment, *Indian Sovereignty Versus Oklahoma's Gambling Laws,* 20 TULSA L.J. 605 (1985).

61. *See, e.g.,* Barona Group of Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (9th Cir. 1982), *cert. denied,* 461 U.S. 929 (1983); Seminole Tribe v. Butterworth, 658 F.2d 310 (5th Cir. Unit B 1981), *cert. denied,* 455 U.S. 1020 (1982); Langley v. Ryder, 602 F. Supp. 335 (W.D. La. 1985).

62. *See, e.g.,* United States v. Dakota, 796 F.2d 186 (6th Cir. 1986); United States v. Farris, 624 F.2d 890 (9th Cir. 1980), *cert. denied,* 449 U.S. 1111 (1981); Penobscot Nation v. Stilphen, 461 A.2d 478 (Me. 1983), *cert. denied,* 464 U.S. 923 (1984).

63. *See, e.g.,* Seminole Tribe v. Butterworth, 658 F.2d 310 (5th Cir. Unit B 1981) (P.L. 280), *cert. denied,* 455 U.S. 1020 (1982); United States v. Farris, 624 F.2d 890 (9th Cir. 1980) (OCCA), *cert. denied,* 449 U.S. 1111 (1981).

64. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170–71 (1973) (quoting U.S. DEPT. OF THE INTERIOR, FEDERAL INDIAN LAW 845 (1958)).

65. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162; 25 U.S.C. §§ 1321–1326; 28 U.S.C. § 1360 (1982)).

66. 18 U.S.C. § 1955 (1982).

67. Criminal jurisdiction is covered in 18 U.S.C. § 1162(a) (1982), and provides:

> Each of the States . . . shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed . . . to the same extent that such State . . . has jurisdiction over offenses committed elsewhere within the State . . . and the criminal laws of such State . . . shall have the same force and effect within such Indian country as they have elsewhere within the State.

limited civil jurisdiction over Indian tribes in six specified states.[68] PL 280 also provides that any other state could assume such jurisdiction by statute or state constitutional amendment.[69] Tribal consent to state jurisdiction is necessary since the passage of the Indian Civil Rights Act of 1968.[70]

At the time PL 280 was enacted, its primary aim was to address lawlessness on the reservations.[71] Consequently, the provisions for state criminal jurisdiction were the main focus.[72] Very little legislative history exists on the rationale for granting civil jurisdiction to the states.[73] It is likely that the provision for civil jurisdiction was added as an afterthought, a result of the assimilationist policies of the 1950's.[74]

The Supreme Court first interpreted PL 280 in *Bryan v. Itasca County*.[75] The Court ruled that when Indian parties were involved, states were only granted civil jurisdiction over private civil suits between Indians and Indians, and between Indians and non-Indians.[76] The Court reasoned that tribal governments would be destroyed if they were subject to the full spectrum of state and county civil regulations.[77] Based on the division drawn in *Bryan* between the separate criminal and civil sections of PL 280, a distinction was made in later cases between state laws that were civil-regulatory in nature and those

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Civil jurisdiction is covered in 28 U.S.C. § 1360(a) (1982), and provides:

> Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed . . . to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State.

68. The initial states were Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. 18 U.S.C. § 1162(a) (1982); 28 U.S.C. § 1360(a) (1982).

69. Under this provision there has been total or partial assumption of jurisdiction by Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, Utah, and Washington. F. COHEN, *supra* note 3, at 362–63 n.125.

70. 25 U.S.C. §§ 1321–1322, 1326 (1982).

71. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535, 541 (1975).

72. *See* Bryan v. Itasca County, 426 U.S. 373, 380 (1976).

73. *Id.* at 381; Goldberg, *supra* note 71, at 542.

74. Federal policy in the 1950's was aimed at integrating the Indians into white society. *See* Goldberg, *supra* note 71, at 543.

75. 426 U.S. 373 (1976). The case was decided during a period in which federal policy had switched to Indian self-determination. *See* Goldberg, *supra* note 71, at 550.

76. *Bryan*, 426 U.S. at 385.

77. *Id.* at 388.

that were criminal-prohibitory.[78] States were granted jurisdiction over crimes that were classified by the courts as criminal-prohibitory, but they could not enforce state laws on the reservation that were civil-regulatory.[79] A state law is criminal-prohibitory if it involves activities that the state determines are too dangerous, unhealthy, or otherwise detrimental to the general welfare of its citizens.[80] The "shorthand test" developed by the Court is that the law is criminal-prohibitory if the state finds that the activities in question are against public policy.[81]

2. *The Organized Crime Control Act*

The Organized Crime Control Act ("OCCA")[82] makes specific violations of state and local gambling laws violations of federal law. Its application on Indian reservations, like PL 280, is often held to depend on whether a specified activity is criminal-prohibitory in nature or civil-regulatory in nature.[83]

The Ninth and Sixth Circuits came to opposite conclusions on the requirements for application of OCCA. The Ninth Circuit held in *United States v. Farris*[84] that OCCA gave the state of Washington its power to regulate gambling on an Indian reservation because the Indians' gambling activities were against Washington's public policy.[85] Its holding effectively found that the tests for PL 280 and OCCA were coextensive. On the other hand, in *United States v. Dakota,*[86] the Sixth

78. *See* Barona Group of Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185, 1188 (9th Cir. 1982), *cert. denied,* 461 U.S. 929 (1983).

79. *Id.*

80. Oneida Tribe of Indians v. Wisconsin, 518 F. Supp. 712, 720 (W.D. Wis. 1981).

81. *See, e.g.,* Seminole Tribe v. Butterworth, 658 F.2d 310, 314–15 (5th Cir. Unit B 1981) (gambling laws not against public policy, so classified as civil-regulatory and unenforceable on the tribal reservation), *cert. denied,* 455 U.S. 1020 (1982); Oneida Tribe of Indians v. Wisconsin, 518 F. Supp. 712, 718–19 (W.D. Wis. 1981) (bingo not against public policy, making laws civil-regulatory and unenforceable on the reservation).

82. OCCA, 18 U.S.C. § 1955 (1982), provides in pertinent part:

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more that $20,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section—
>
> (1) illegal gambling business means a gambling business which—
>
> (i) is a *violation of the law of a State or political subdivision* in which it is conducted . . . .

(Emphasis added).

83. Cabazon Band of Mission Indians v. Riverside County, 783 F.2d 900, 903 (9th Cir. 1986), *aff'd sub nom.* California v. Cabazon Band of Mission Inidans, 107 S. Ct. 1083 (1987); *Barona,* 694 F.2d at 1190.

84. 624 F.2d 890 (9th Cir. 1980), *cert. denied,* 449 U.S. 1111 (1981).

85. *Id.* at 895–96.

86. 796 F.2d 186 (6th Cir. 1986).

Circuit held that the tests for PL 280 and OCCA were not coextensive.[87] In *Dakota*, Indian gambling did not have to be against public policy to be in violation of OCCA.[88] All that is necessary, the *Dakota* Court held, is a finding that a tribal activity is in "violation of the law of a state."[89] It was the court's view that the exercise of OCCA is an exercise of federal, not state, law, so there is no danger of interfering with tribal sovereignty by enforcing it.[90]

C. *Federal Policy*

The federal government has a trust relationship with the Indians[91] that originates in the Constitution.[92] The Constitution gives Congress the exclusive power to regulate Indian affairs.[93] The relationship between the federal government and the Indians is not just contractual, with each side capable of watching out for its own interests. Indians are in a state of dependency and federal protection is considered necessary.[94]

The protection of the tribes and their members is the principle policy underlying virtually all of Indian law.[95] Federal policy regarding this trust relationship has varied over the years from assimilation to termination to self-determination.[96] The goal has always been Indian self-sufficiency.[97] Only the methods used to achieve self-sufficiency have varied.[98]

Current federal policy is to encourage self-government and eco-

87. *Id.* at 187–88.

88. *Id.* at 188–89.

89. *Id.* at 187.

90. *Id.*

91. *See, e.g.*, St. Paul Intertribal Hous. Bd. v Reynolds, 564 F. Supp. 1408, 1413–14 (D. Minn. 1983).

92. "Congress is authorized to regulate Commerce . . . with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 18 (Indian Commerce Clause). This is the only express grant of federal power over Indians.

93. *Id.*

94. *See* Pelcyger, *supra* note 27, at 46.

95. *Id.* at 45.

96. See F. COHEN, *supra* note 3, at 127–206 for a discussion on the history of federal policy.

97. The government's emphasis has varied from tribal self-sufficiency to individual self-sufficiency. *See generally id;* GETCHES & WILKINSON, *supra* note 38, at 33–160.

98. During the periods of allotment and assimilation (1871–1928) and termination (1945–1961), the government tried to assimilate the Indians into white culture by encouraging them to sell surplus reservation land and by attempting to terminate the federal-tribal trust relationship. During the 1930's and early 1940's the focus was on reorganizing the tribal governments and making them stronger. Since the 1960's, federal policy has been to encourage tribal self-government and economic independence. *See generally* F. COHEN, *supra* note 3, at 127–206; GETCHES & WILKINSON, *supra* note 38, at 33–160.

nomic self-sufficiency on the Indian reservations.[99] President Reagan reiterated the government's stance in his 1983 policy statement: "[R]esponsibilities and resources should be restored to the governments which are closest to the people served. This philosophy applies not only to State and local governments but also to federally recognized . . . tribes."[100]

Federal policy is also reflected in recent legislative action. A federal bill, the Indian Gambling Control Act,[101] has been introduced in Congress in an attempt to address the problem of insufficient supervision over Indian gambling activities.[102] The bill recognizes that tribal gambling activities are a legitimate means of generating revenues, and that the activities help promote the federal goal of economic development and tribal self-sufficiency.[103] The Indian Gambling Control Act would also establish federal standards and regulations for Indian gambling activities.[104] The bill would allow gambling on reservations to continue if conducted by tribal ordinance and approved by the Secretary of the Interior.[105]

II. *CALIFORNIA v. CABAZON BAND OF MISSION INDIANS*

State jurisdiction of Indian gambling was denied in *California v. Cabazon Band of Mission Indians,*[106] but it is difficult to pinpoint with any precision the theoretical basis of the opinion. The case holding is in line with federal policy and Indian law precedent, but it is also tai-

99. *E.g.,* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980) (there is "a firm federal policy of promoting tribal self-sufficiency and economic development"); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 155 (1980) (federal policy is to foster tribal self-government); *accord* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 138 n.5 (1982); *see also* 116 CONG. REC. 23,258 (1970) (statement by President Nixon on Indian Policy).

100. President Reagan, Statement on Indian Policy, 19 WEEKLY COMP. PRES. DOC. 98, 98 (Jan. 24, 1983). There has been some dissent within the Reagan Administration, but this express policy goal has been overriding. For example, the Justice Department proposed an addition to the United States Criminal Code that would have given the states control of Indian gambling. The Secretary of the Interior struck down this move since it was inconsistent with the President's policy statements. *See* DeDominicis, *Betting on Indian Rights,* 3 CAL. LAW. 29, 30 (1983).

101. H.R. 4566, 98th Cong., 1st Sess. (1983) (microfiche at Y 1.4/6:98-(556)). The newest version of this bill is H.R. 1920, 99th Cong., 1st Sess. (1985) (microfiche at Y 1.4/6:99-(145)). The two versions of the bill are virtually identical. An Indian Gaming Control Act was also introduced in the Senate on April 4, 1985. S. 902, 99th Cong., 1st Sess. (1985) (microfiche at Y 1.4/1:99-(83)). The principle difference between the House bill and the Senate bill is that the Senate bill provides for the creation of Indian-controlled Gaming Commissions to supervise Indian gambling enterprises. S. 902, 99th Cong., 1st Sess. § 11 (1985).

102. *See* Comment, *supra* note 60, at 631.

103. H.R. 4566, 98th Cong., 1st Sess. § 2(5) (1983) (microfiche at Y 1.4/6:98-(556)).

104. *Id.* § 3.

105. *Id.* § 6.

106. 107 S. Ct. 1083 (1987).

lored to the specific fact pattern.[107]

A. The Facts

The Cabazon Band and Morongo Band are federally recognized Indian tribes residing on reservations in California.[108] Both tribes operate bingo games for profit on their reservations.[109] In addition, the Cabazon tribe conducts card parlor games for profit.[110] The bingo activities are regulated by federally approved tribal ordinances.[111] Both the card and bingo games are open to the public, and they are played mainly by non-Indians.[112] Jackpots for bingo exceed $250.[113]

These gambling enterprises would violate both local and state ordinances if they were not on Indian reservations.[114] The State of California tried to enforce its regulations under both PL 280 and OCCA.[115] The state asserted that its regulations were "prohibitory" in nature and therefore applicable under PL 280, or in the alternative that Congress had authorized an assertion of state power in the area of gambling through OCCA.[116] Even if Congress had not consented to state regulation of gambling, California claimed that it was still allowed to enforce its laws on the reservation because of the important state interest involved.[117] California does allow some forms of gambling, such as the lottery and bingo games that are operated by charities,[118] but the state feared that completely unregulated, high-stakes gambling on the reservation could lead to an influx of organized crime which could then spill over into the rest of the state.[119]

The gambling enterprises were the tribes' sole source of revenue and principle source of employment.[120] Because the state and county laws in dispute were not expressly permitted by Congress, the Indians

107. *Id.* at 1086–87 (stating case facts).
108. *Id.* at 1086.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. Bingo is not completely prohibited in California, but it can only be operated by certain charities. Profits must be kept in separate accounts and used for charitable purposes, and prizes must be under $250 per game. CAL. PENAL CODE § 326.5 (West Supp. 1987). Card games are prohibited by a local ordinance. *Cabazon,* 107 S. Ct. at 1086.
115. *Cabazon,* 107 S. Ct. at 1087.
116. *Id.* at 1088, 1090.
117. *Id.* at 1094.
118. *Id.* at 1089.
119. *Id.*
120. *Id.* at 1093.

asserted that the state should not be allowed to enforce its laws on the reservations.[121]

The tribes sued Riverside County in federal district court for a declaratory judgment that the county lacked the authority to apply its ordinances inside the reservation.[122] The state intervened.[123] The district court granted the tribe's motion for summary judgment on the grounds that neither the state nor the county had any authority to enforce its gambling laws within the reservation.[124] The Court of Appeals for the Ninth Circuit affirmed.[125] The state and the county appealed, and the Supreme Court postponed jurisdiction to a hearing on the merits.[126]

B. Holding and Rationale

The Supreme Court, in an opinion by Justice White, held that neither the state nor the county had any authority to enforce its gambling laws on the Indian reservation.[127] The Court has repeatedly held that state laws may be applied on Indian reservations if Congress has expressly consented.[128] In this case, however, the Court found that Congress had not consented to an assertion of state power either through PL 280 or OCCA.[129] The Court ruled that since the gambling laws were not against public policy, they were civil-regulatory in nature and unenforceable through PL 280.[130] It declined to rule on OCCA's coverage.[131]

The Court then applied preemption analysis, using a balancing test to make the final determination of whether state interests should override federal and Indian interests.[132] The Court found that under a balancing test, the state's fear of organized crime developing did not outweigh the Indians' economic interests.[133]

Justice Stevens, joined by Justices O'Connor and Scalia, filed a dissent stating that a state may enforce its gambling laws until Congress

121. *Id.* at 1091.
122. *Id.* at 1086–87.
123. *Id.* at 1087.
124. *Id.*
125. Cabazon Band of Mission Indians v. Riverside County, 783 F.2d 900 (9th Cir. 1986), *aff'd sub nom.* California v. Cabazon Band of Mission Indians, 107 S. Ct. 1083 (1987).
126. *Cabazon,* 107 S. Ct. at 1087.
127. *Id.* at 1095.
128. *Id.* at 1087.
129. *Id.*
130. *Id.* at 1089.
131. *Id.* at 1091.
132. Id. at 1091–95.
133. *Id.* at 1095.

exempts Indian gambling from state law and subjects it to federal supervision.[134] He was reluctant to dismiss the state's interest in reducing the growth of organized crime as readily as the majority.[135]

III. ANALYSIS

California v. Cabazon Band of Mission Indians[136] brings together most of the current jurisdictional theories in Indian law.[137] The decision can be viewed as a declaration that states will not be allowed to regulate on Indian reservations absent specific conditions.[138] The opinion offers no assurance, however, that state regulation will not be expanded in future cases with slightly different facts.[139] These propositions must be examined in light of current federal policy and traditional Indian law.

The outcome in *Cabazon* supports Indian self-government, and in many respects the Court's reasoning was based on traditional Indian law.[140] First, the decision did take federal policy on Indian sovereignty into consideration.[141] Second, in accordance with traditional rules of construction in Indian law,[142] ambiguous statutes were construed in favor of the Indians.[143] Finally, the Court seems to have made an attempt to draw a line between unassailable Indian interests and permissible state intrusion.[144]

Nevertheless, there are numerous problems with the Court's opinion. The Court does not squarely address the increasing power of the state to intrude into Indian affairs and its possibly detrimental

134. *Id.*

135. *Id.* at 1097.

136. *Id.* at 1083.

137. These theories are tribal sovereignty; federal preemption analysis; balancing of state, tribal and federal interests; and the statutory civil-regulatory/criminal-prohibitory and public policy tests.

138. *Cabazon*, 107 S. Ct. at 1089–94.

139. *Id.*

140. For example, the Court does mention the need to consider "notions of Indian sovereignty." *Id.* at 1092. This is something the Court has neglected to do in many recent cases. *See, e.g.*, Rice v. Rehner, 463 U.S. 713 (1983); Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

141. *Cabazon*, 107 S. Ct. at 1092–93.

142. "[S]tatutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." Alaska Pac. Fisheries Co. v. United States, 248 U.S. 78, 89 (1918).

143. *Cabazon*, 107 S. Ct. at 1087.

144. *Id.* at 1094–95.

effects.[145] Nor does the Court address the inconsistent pattern of its opinions in recent years.[146] Therefore, the future direction of the Court is still unclear. To eliminate this problem, the Court could tighten the test for application of PL 280, and rid preemption analysis of the current balancing test. These developments would clarify Indian law and reflect federal Indian policy.

A. The Importance of Congressional Consent

The federal courts have the responsibility of interpreting federal laws.[147] This is accomplished by taking legislative intent and federal policy into account in making decisions.[148] However, the courts' application of PL 280 and OCCA often fails in this regard.

1. OCCA's Scope Is Limited

The theories used in prior decisions to deny the application of OCCA are that gambling is not against public policy[149] so the gambling laws are not criminal-prohibitory in nature, and secondly that, because OCCA is a federal law, the states do not have the power to enforce it.[150] The *Cabazon* Court declined to rule on the first theory.[151] Instead, it noted that OCCA's status as a federal law is the very reason the states should not make arrests that, in the absence of OCCA, they could not make.[152] For the same reason, the states should not assume that they are supposed to play a part in enforcing this federal law.[153] California was trying to enforce its regulations through the back door by using a federal statute.[154] Instead, the states

145. The Court only states that there is not "an inflexible *per se* rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent." *Id.* at 1091.

146. For example, the Court abandoned the analysis used in Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980), when deciding Montana v. United States, 450 U.S. 544 (1981). Two weeks later the Court's decision in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), returned to the *Colville* analysis and ignored its reasoning in *Montana*. *See* Pelcyger, *supra* note 27, at 31–32.

147. *See, e.g.*, Harjo v. Kleppe, 420 F. Supp. 1110 (D.D.C. 1976) (court's job is to interpret statutes), *aff'd sub nom.* Harjo v. Andrus, 581 F.2d 949 (D.C. Cir. 1978).

148. *See, e.g.*, Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978) (Congress formulates policies and the courts enforce them).

149. *See, e.g.*, Barona Group of Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185, 1190 (9th Cir. 1982) (gambling not against public policy, so OCCA provisions could not be enforced on the reservation), *cert. denied*, 461 U.S. 929 (1983).

150. California v. Cabazon Band of Mission Indians, 107 S. Ct. 1083, 1090–91 (1987).

151. *Id.* at 1091.

152. *Id.* at 1090–91.

153. *Id.*

154. *Id.*

must still leave enforcement of a federal law to federal officials, even though the regulations covered by OCCA are originally state statutes.[155] Consequently, if the second theory of recognizing OCCA as a federal law is adhered to, the first theory is not even relevant.

Cabazon has made at least one thing clearer. Conduct which cannot be punished under a state law cannot be ruled a violation of that same state law through a different mechanism.[156] Because of the *Cabazon* decision, OCCA should not be relied upon as a basis for state jurisdiction in Indian gambling cases.[157]

2. *The Overly Discretionary Application of PL 280*

The Supreme Court has reduced the test for application of PL 280 to a very flexible "shorthand test"—whether or not the stated activity is against public policy.[158] One of the many weaknesses of this "shorthand test" is that the actions of the state government determine if an activity is against public policy.[159] A conflict of interest occurs between a state's desire to regulate certain Indian activities and its responsibility to avoid infringing on Indian self-government by deferring to federal Indian policy. The result of the "test" is that if an activity falls outside the bounds of desired public policy, then all the principles supporting Indian sovereignty are too easily pushed aside and state jurisdiction is allowed to apply. A more uniform application of federal statutes could be achieved if their use depended upon federal findings rather than individual state policies.

This highly discretionary standard makes future application of PL 280 very tenuous. For example, the *Cabazon* Court ruled in favor of the Indians partly because the state's fear of organized crime was only speculative.[160] The decision might have been different if the Court had found that California prohibited gambling throughout the state. In that case, the Court could have used this as evidence that gambling was against public policy in California. The Court could then have reclassified the law as prohibitory, allowing the state to apply its laws on the reservations. Such a decision would allow the state to termi-

155. *Id.* at 1090.

156. *Id.* at 1090–91; *see also* Comment, *supra* note 60, at 625.

157. In United States v. Farris, 624 F.2d 890 (9th Cir. 1980), *cert. denied,* 449 U.S. 1111 (1981), like *Cabazon,* Washington permitted a limited amount of gambling, and there was no indication of organized crime on the reservation. Nevertheless, gambling was held to be contrary to Washington's public policy, and OCCA could be enforced on the reservation. The *Cabazon* decision appears to overrule this case.

158. *Cabazon,* 107 S. Ct. at 1088.

159. *See, e.g., id.* at 1088–89.

160. *Id.* at 1094.

nate the tribes' only source of revenue, an action which would be directly contrary to federal policy.[161]

In ruling on whether the gambling regulations should apply to the reservations through PL 280, the *Cabazon* Court did concede that a case can be made for classifying the gambling laws as prohibitory.[162] It was enough for the Court, however, that the gambling laws had been ruled regulatory in a prior California decision.[163] The Court was able to avoid fully analyzing whether the state gambling laws were regulatory or prohibitory by finding a rational basis for the lower court's decision.[164] Unfortunately, while the Court's procedure was not incorrect, it did not contribute to any further understanding of the regulatory-prohibitory test.

B. A Balancing Test Threatens Indian Preemption Analysis

By leaving the balancing test between Indian and state interests intact, the *Cabazon* decision did not effectively stop the trend toward increasing state intrusion.[165] Exactly how much importance is attached to state interests has become an increasingly murky subject in

161. During oral argument, counsel for the state claimed, contrary to the state's earlier position, that the tribes are one of the charitable organizations allowed to sponsor bingo games under the statute. Therefore, the Court was not certain whether the state intended to abolish the Indian gambling operations, or only require the tribes to conform to all the statute's requirements. *Id.* at 1086 n.3.

162. The Court uses the decisions in United States v. Marcyes, 557 F.2d 1361 (9th Cir. 1977), and United States v. Farris, 624 F.2d 890 (9th Cir. 1980), *cert. denied,* 449 U.S. 1111 (1981), to illustrate that the lower courts have had no trouble making the distinction between regulatory and prohibitory laws, when instead it should rely on the cases as examples of how discretionary the standard really is. In *Marcyes,* Washington permitted certain fireworks to be sold in the state, and wanted restrictions placed on the fireworks sold on the reservation. The relevant statute in the case was the Assimilative Crimes Act, 18 U.S.C § 13 (1982), made applicable to Indian reservations by 18 U.S.C. § 1152 (1982), which also relies on the regulatory/prohibitory distinction for its application on Indian reservations. The statutes regulating the Indian firework sales were considered prohibitory because the firework sales interfered with the state's attempts to protect its citizens' general welfare. As a result of the statute's classification as prohibitory, the Court allowed state regulation of the firework sales. The Court also found it significant that the fireworks statutes were not primarily licensing laws. These findings could easily be applied to gambling laws, and the *Cabazon* court leaves the door open to this ruling in the future.

163. *Cabazon,* 107 S. Ct. at 1089 (citing Barona Group of Capitan Grande Band of Mission Indians v. Duffy, 694 F.2d 1185 (9th Cir. 1982), *cert. denied,* 461 U.S. 929 (1983)).

164. *Id.*

165. If federal, tribal, and state interests are balanced against each other, without the historically strong presumption in favor of the tribes, then states stand a better chance of prevailing than they did previously. This result is demonstrated by cases such as Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980), and Rice v. Rehner, 463 U.S. 713 (1983).

Indian law.[166] As a result, the strong presumption against state encroachment is receding, and Indian tribes can no longer be sure that the states will not interfere with the tribes' attempts to strengthen their struggling economies.[167] In short, a balancing test that allows for increasing degrees of state intrusion goes against precedent, federal policy, and the preservation of Indian culture.

1. Problems with a Balancing Test in Indian Law

As preemption analysis exists now, the Supreme Court has effectively collapsed the doctrines of preemption, infringement, and non-Indian interests into a single balancing test[168] that is closer to the traditional non-Indian preemption doctrine[169] than conventional Indian preemption analysis.[170] Traditional preemption analysis is inadequate, however, because of the increased emphasis placed on state interests under a balancing test. This focus on state interests is inappropriate here in light of historical notions of Indian sovereignty. But the use of a balancing test was the effect in *Cabazon* when the Court stated that "[s]tate jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interest reflected in federal law, *unless* the state interests at stake are sufficient to justify the assertion of state authority."[171] The additional "state interests" exception coupled with a balancing test takes preemption one step too far, to the point that tribal interests are becoming secondary.[172]

Justice Stevens' dissent demonstrates the extreme direction Indian law could turn if the presumption in favor of the tribes is weakened.

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166. *See, e.g.*, California State Bd. of Equalization v. Chemehuevi Indian Tribe, 474 U.S. 9 (1985) (per curiam) (state cigarette tax applicable to non-Indian purchasers); Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832 (1982) (state tax on construction of reservation schools by a non-Indian company preempted by federal regulation).

167. *See, e.g.*, Moapa Band of Paiute Indians v. United States Dep't of Interior, 747 F.2d 563 (9th Cir. 1984) (tribe enjoined from running houses of prostitution on tribal land in Nevada); United States v. Marcyes, 557 F.2d 1361 (9th Cir. 1977) (state prohibition on the sale of fireworks on reservations upheld); Penobscot Nation v. Stilphen, 461 A.2d 478 (Me. 1983) (state ban on beano games upheld).

168. The test is described as a particularized inquiry into the interests at stake. *See, e.g.*, Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832, 837 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980).

169. *See supra* notes 32–35 and accompanying text.

170. *See* Note, *supra* note 34, at 1064.

171. *Cabazon*, 107 S. Ct. at 1092 (emphasis added).

172. In Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 177 (1980) (Rehnquist, J., concurring and dissenting), Justice Rehnquist wrote in a separate opinion that there was no need for the Court to balance the state and tribal interests, as the question is one of congressional intent. Balancing of interests is not the appropriate test, because it is the very balancing which has been reserved for Congress.

His statement that state laws may be enforced on reservations until Congress exempts the Indian activity from state law[173] is the exact opposite of traditional Indian law analysis. Stevens' policy would allow state laws to apply whenever Congress has not expressly exempted a specific area instead of requiring express congressional consent to an assertion of state power.

In practice, the Supreme Court has indicated that the state's interest must have some regulatory significance related to public welfare,[174] but this does not on its face appear to be a very difficult standard to meet. Unless the federal courts focus on federal policy and the history of Indian law in their analysis, the diverse interests of the state, Indians, and the federal government remain too flexible. Enough ambiguity is left to enable the courts to manipulate the various parties' interests so as to arrive at almost any result.[175]

A desire for the flexibility to fashion solutions to each individual case appears to be behind the Court's use of the balancing test.[176] The problem is that, historically, Indian law has always needed to address the overriding issue of tribal sovereignty. This need is what makes Indian law unique—and unsuitable for a balancing of interests analysis. Judicial decisions have been based on the existence of an independent government allowed to govern its own activities.[177] Because of this uniqueness, a decision on one subject, such as gambling, has a substantial impact on decisions in other important areas of Indian law involving the issue of sovereignty.

2. *Federal Policy Is Being Ignored*

By reducing the strength of the presumption in favor of the tribes, the courts have not effectively implemented federal policy. At the heart of the federal government's policy is its drive to make the Indian tribes self-governing and self-sufficient.[178] The paradox is that as fed-

173. *Cabazon,* 107 S. Ct. at 1095.

174. *See, e.g.,* Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832, 845 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144, 150 (1980); *see also* Barsh, *supra* note 36, at 867. *But see Colville,* 447 U.S. 134 (1980) (state taxation of reservation sales to non-Indians allowed although it apparently served no regulatory purpose and may have deprived the tribe of badly needed revenues).

175. *See* Barsh, *supra* note 36, at 867–68.

176. The Justices rationalize their approach as the "particularization" of their analysis. *White Mountain Apache Tribe,* 448 U.S. at 145; *see also Ramah Navajo School Bd.,* 458 U.S. 832; Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973).

177. *See supra* notes 7–10, 19–20 and accompanying text.

178. For example, current federal policy is illustrated by the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 (1982), as well as the Indian Financing Act of 1974, 25 U.S.C §§ 1451–1543 (1982), which states: "It is hereby declared to be the policy of

eral regulation is reduced, the states are preempted less and less, enabling them to regulate even more.[179] Moreover, to become self-sufficient the tribes must move into innovative and different fields, a task which is already difficult enough with most tribes' limited resources.[180] But as they move into new fields, the Indians again become the target of increased state regulation.[181]

Indian tribes are in a difficult position. Unless the courts continue to enforce the presumption in favor of Indian tribes, the tribes must accept economic development on the states' terms or risk turning off potential developers who do not want to face possible obstacles.[182] Lost in the struggle are potential non-Indian developers and investors who need to know whether state or tribal laws and rules apply to their activities.[183] This goes against express federal policy.[184] The Indians must know what they can rely upon in order to formulate the economic plans that are essential to any realistic hopes of self-sufficiency.

C. The Erosion of Tribal Power

The new approaches to jurisdictional disputes clearly do not protect the tribes from state intrusion as well as earlier theories of Indian analysis.[185] Though *Cabazon* does not expand this activity, there is nothing in the opinion to stop it either. Because the *Cabazon* decision is very specific to its facts, it is difficult to tell from the opinion whether or not Indian analysis used previously will be used again.

1. The Supreme Court's Expansion of State Power: Cabazon *in Light of Previous Decisions*

Rice v. Rehner[186] is an extreme example of decreasing tribal power

Congress . . . 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 . . . ." 25 U.S.C. § 1451 (1982); *accord White Mountain Apache Tribe*, 448 U.S. at 143 n.10.

179. For instance, cigarette sales to non-Indians was one area that was almost completely controlled by the tribes. Federal participation was minimal or absent. Yet, state taxation of the cigarette sales has been allowed in recent years. *See, e.g.*, Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980).

180. The majority of the 81 reservations in California, where the *Cabazon* tribe is located, are in isolated areas without timber, minerals, fish, or game. Many tribes' only resource is their "unique legal status as sovereigns." DeDominicis, *supra* note 100, at 31.

181. *See* Pelcyger, *supra* note 27, at 33.

182. *Id.*

183. *Id.*

184. *See supra* notes 99–100 and accompanying text.

185. For example, "the wall" and the infringement test both placed Indian interests first. *See* Canby, *supra* note 22.

186. *See supra* notes 56–59 and accompanying text.

in the last several years. From the *Cabazon* opinion, it almost appears that the reliance *Rice* placed on the vague theory of "traditional" Indian activity analysis has fallen into disfavor. The Court did not apply the "traditional" analysis to the facts in *Cabazon* in any depth.[187] This is an encouraging sign, since "traditional" analysis is flawed.[188] Major criticisms are that this analysis is overly discretionary, illogical, and that it works against the federal policy of encouraging new economic endeavors for Indians.[189] However, since the *Cabazon* Court did not expressly dismiss "traditional" analysis, this line of reasoning may turn up again.

Washington v. Confederated Tribes of the Colville Indian Reservation[190] is also difficult to reconcile comfortably with *Cabazon*. In *Colville,* the state's interest in taxation was held to be greater than the tribe's need for revenue since the tribe's income was being generated by activities in which it did not have a "significant interest."[191] In contrast, the Indians' revenue-producing interest in *Cabazon* was held to be greater than the state's efforts to curb organized crime simply because the tribe built modern facilities rather than importing products for resale.[192] This evidently gave the Indians the necessary "significant interest" to exempt them from state regulation. Both tribes catered to non-Indians, however, and both were engaged in important revenue-producing activities.

The conclusion that emerges from these cases is that the Court seems to be getting wrapped up in details rather than focusing on the overall federal policy of building up the Indians' economic base. This is apparent when the Court is forced to make distinctions such as that between customers in *Colville* who only drive in, make a purchase, and leave,[193] and those in *Cabazon* who spend more time on the reservation.[194]

2. *The Lack of Predictability in Indian Law*

It is difficult to predict with any assurance what the Court will do next time under slightly different circumstances. A problem in gam-

187. California v. Cabazon Band of Mission Indians, 107 S. Ct. 1083, 1094 (1987).

188. *See, e.g.,* Barsh, *supra* note 36, at 873–76; Canby, *supra* note 22, at 16–19; Note, *supra* note 34.

189. *See, e.g.,* Note, *supra* note 34.

190. *See supra* notes 53–55 and accompanying text.

191. Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 155 (1980).

192. *Cabazon,* 107 S. Ct. at 1093–94.

193. *Id.* at 1094.

194. *Id.*

bling cases, as well as in many Indian law cases, is that the holdings are extremely fact-specific.[195] The decision in *Cabazon* turns on the fact that gambling is not completely prohibited in California and that there is no proof yet of organized crime on the Indian reservations.[196] A change in either one of these facts could have resulted in a different outcome.

This lack of consistency was noted earlier by Justice Rehnquist, who stated that a well-defined body of principles is needed to end the case-by-case litigation which has troubled Indian law for years.[197] Because of the Court's inconsistency, its Indian law decisions lack precedential value.[198]

The *Cabazon* opinion could be taken as a clear message to the states that they will not be allowed to interfere in reservation activities. But the pendulum could just as easily swing back and allow the states to regulate for a different "court rationalized" reason.[199]

D. A Solution

The Supreme Court is faced with a limited number of options in any effort to arrive on stabler ground. It can either return to one of its previous tests, formulate a completely new one, make the standards on a current test more concrete, or defer to the legislature. While the last two options are the most viable, whatever option is used, the Court needs to steer toward two goals. First, the regulatory-prohibitory distinction of PL 280 needs to depend less on the discretion of those states given jurisdiction under the statute. Second, a balancing test should not be part of Indian preemption analysis.

The era of "the wall" in Indian law has passed.[200] Even a strict "infringement test," prohibiting state action if Indian interests are infringed upon in any way, is no longer practical under today's conditions. As the contact between Indians and non-Indians increases, particularly in the competitive economic field, states are going to cite social interests more often in attempting to extend their jurisdiction

195. *See supra* note 176.

196. *Cabazon*, 107 S. Ct. at 1088–89, 1094–95.

197. Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 176 (1980) (Rehnquist, J., concurring and dissenting).

198. Pelcyger, *supra* note 27, at 32.

199. For instance, the courts might use some rationale similar to the theories of "traditional activity" in Rice v. Rehner, 463 U.S. 713 (1983), or "inconsistency with tribal status" in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), to allow state regulation of Indian activities.

200. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980).

into the affairs of the reservation.[201] With the dismissal of the older tests, the courts may have waived the use of a clear-cut, simple formula on which to base their decisions, but they did not replace these tests with one that can be relied upon to obtain consistent results.

1. Standardizing PL 280

In cases involving PL 280, the Court currently decides case by case whether a statute is regulatory in nature or prohibitory in nature. In making its decision, the Court could narrow the reach of PL 280 by using a test that would only allow the application of those state laws that can be described generally as guarding against acts which are *malum in se,* "naturally evil," as adjudged by the sense of a civilized community.[202] As a result, arbitrary distinctions as to whether a regulation is more prohibitory or regulatory would be greatly reduced. The Court could also discontinue the use of the ineffective public policy test.

Standardizing PL 280 would increase clarity and consistency. This result would be of enormous help to the tribes in their efforts to attract investors, make reasonably stable plans for the future, and become economically independent. These steps would also conform with the canons of construction in Indian law, which require ambiguous statutes to be construed in favor of the Indians.[203]

2. A Return to Preemption Analysis Which Emphasizes Indian Interests

To halt the trend toward increasing state intrusion and the fashioning of judicial decisions to meet the situation, a stricter standard is also necessary for cases in which PL 280 is not applicable. A refinement of Indian preemption analysis will implement federal policy by advancing tribal interests. To achieve this result, states must defer to tribal interests unless, one, Congress expressly grants state regulatory powers in a specific area; or two, the state has some extraordinary interest,

201. Lytle, *The Supreme Court, Tribal Sovereignty, and Continuing Problems of State Encroachment into Indian Country,* 8 AM. INDIAN L. REV. 65, 77 (1980).

202. State v. Trent, 122 Or. 444, 259 P. 893, 898 (1927); *see* GETCHES & WILKINSON, *supra* note 38, at 546. The reverse of this solution would be to classify a civil statute as regulatory in nature if it involves any regulation at all. The result would be the same. It would be an easier test to apply and the majority of state laws would be defined as regulatory laws that cannot be enforced on Indian reservations.

203. *See, e.g.,* Bryan v. Itasca County, 426 U.S. 373, 392–93 (1976); Alaska Pac. Fisheries Co. v. United States, 248 U.S. 78, 89 (1918).

rather than just a "sufficient" interest,[204] which justifies an exception to the usual presumption. There should be no balancing per se of state interests against Indian and federal interests. Ignoring the importance of Indian sovereignty as a determining factor in Indian law decisions has only produced confusion.

The key to the new test would be the recognition by the courts that, even in the absence of extensive federal regulation, the burden is firmly placed on the state to prove that state regulation of an Indian activity is necessary to protect a legitimate, identifiable state interest. A state would need to specify exactly what state interest is in danger, and how state intrusion into reservation activities will avert damage to this interest.

The numerous advantages to refining Indian preemption analysis include fewer fact-specific decisions and more predictable outcomes. Recognizing the presumption in favor of the Indians would be in line with federal goals, and would stop the trend toward an equal weighing of state and Indian interests with its accompanying intrusion of state power. This test would also avoid the fundamental conflict caused by basing a decision on the degree of federal regulation in an area while at the same time stressing the importance of promoting Indian self-sufficiency and self-government.

The test is simpler to apply, yet it still contains a safety valve. If the court holds that the state's interest is extraordinary, a state law can be applied as an exception to the general rule. This state law exception would be an adequate safeguard when not connected to a balancing test as an extra means under which to gain state jurisdiction. In the end, by using this method, the presumption in favor of the Indians would be preserved.

3. *An Answer to the Gambling Dispute: The Indian Gambling Control Act*

The best solution to the conflict over gambling is for Congress to take action. The Indian Gambling Control Act mutually benefits both the states and the tribes. The tribes would have definitive standards on which to rely and the states would have some assurance that safeguards against organized crime were being taken. The questions about express Congressional consent to state jurisdiction over gambling would be eliminated. Consequently, in accord with federal policy,

204. In *Cabazon*, the Court noted that state jurisdiction would not be preempted if a state's interests were "sufficient to justify the assertion of state authority." California v. Cabazon Band of Mission Indians, 107 S. Ct. 1083, 1092 (1987).

investors would be more likely to get involved with the tribes since the issue of state jurisdiction over Indian gambling activities would be firmly resolved.

Judicial limitations on tribal sovereignty are debatable, but there is no doubt that Congress has the power to exercise authority over any Indian activities.[205] The federal government's power to regulate Indian affairs is limited only by the constitutional restraints that are applicable to all federal statutes.[206] If it wishes, Congress may completely preempt the regulatory power of both the states and the tribes. Congress has made vague noises in the past about formulating a more specific Indian gambling policy. It is long overdue.

Whether Congress eventually acts or not, the Supreme Court would stop the trend of increasing state power over Indian tribes by returning to basics. The end result would be a welcome reduction of the chaos and confusion caused by the Indian decisions of the 1970's and 1980's.

IV. CONCLUSION

The Supreme Court failed miserably in *California v. Cabazon Band of Mission Indians* to clear up the confusion caused in recent years by an increasing number of conflicting decisions. The inadequacy of *Cabazon* is not in what the Court actually decided, but in what it did not decide. Tribal interests and the federal policies underlying Indian activities are not being given the deference they deserve. The elimination of the current balancing of state interests against Indian interests would remedy this situation. A stricter standard which strengthens the presumption in favor of the Indian tribes, and allows for an exception for extraordinary state interests, should be instituted in its place. In addition, only statutes which are clearly prohibitory in nature should be applied to Indian affairs. Congress should also move forward with the proposed Indian Gambling Control Act. These actions will uphold the tradition of Indian sovereignty against any attacks on its continued existence.

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

206. Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 84 (1977); United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54 (1946).