

NOTE

COUNTY OF YAKIMA V. CONFEDERATED TRIBES & BANDS OF THE YAKIMA INDIAN NATION: STATE TAXATION AS A MEANS OF DIMINISHING THE TRIBAL LAND BASE

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INTRODUCTION

Chief Justice Marshall observed in 1819 that the power to tax involves the power to destroy.¹ It is precisely this power to tax that the Supreme Court recently held in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*² to be vested in the states.³ By allowing states to impose an ad valorem tax⁴ on fee-patented⁵ lands owned by Indians and, furthermore, to permit foreclosure on such parcels, the Court has given the states power to diminish tribal

1. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 159, 210 (1819).

2. 112 S. Ct. 683 (1992).

3. *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 112 S. Ct. 683, 690-91 (1992).

4. Generally, an ad valorem tax is imposed on the value of property. BLACK'S LAW DICTIONARY 51 (6th ed. 1990). In the context of this case, it is the tax imposed by the County of Yakima on all nonexempted real estate within the county. WASH. REV. CODE §§ 82.45.070, 84.52.030 (1991).

5. "Fee-patented" is a term used to distinguish Indian lands held in fee by an individual Indian from land held in trust by the Federal Government on behalf of Indian tribes or individuals. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 605-19 (Rennard Strickland et al. eds., 1982) [hereinafter HANDBOOK OF FEDERAL INDIAN LAW] (describing Indian interest in tribal lands and defining fee-patent allotment). The "fee" part of the term is indicative of a fee simple absolute title. *Id.* The "patented" part of the term stems from the obsolete federal allotment policy, whereby reservation land was divided into allotments to be held in trust by the Government for a period of 25 years. See *infra* notes 50-54 and accompanying text (describing allotment policy). At the expiration of this trust period, the individual Indian would be given a patent that meant the allottee held the land in fee. See *infra* notes 44-68 and accompanying text (introducing allotment policy under General Allotment (Dawes) Act and manner in which possession of lands evolved from communal holding to individual ownership).

land bases, further eroding what remains of tribal sovereignty⁶ and integrity.

The Federal Government's policy has traditionally been to exclude states from American Indian affairs.⁷ The origins of this policy can be traced to the Commerce Clause of the Constitution⁸ and the Trade and Intercourse Act of 1790.⁹ Through these means, Congress sought to consolidate control of Indian affairs in the Federal Government and to protect the Indian tribes.¹⁰ Judicial opinions from that era also reflected the prevailing notion that state governments should be precluded from involvement in Indian affairs.¹¹

As the country evolved, American Indian affairs became an administrative burden¹² and federal policy began to accommodate shifting attitudes and ideas toward American Indians and their lands.¹³ Congress eventually permitted the states to become more

6. One author has argued that the Supreme Court's decision reflects a "total disregard of tribal sovereignty." See Deborah Jo Borrero, Note, *They Never Kept but One Promise—County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 112 S. Ct. 683 (1992), 67 WASH. L. REV. 937, 951-52 (1992) (stating that Court failed to "accord[] tribal sovereignty proper respect" in its opinion in *County of Yakima*).

7. See generally William C. Canby, Jr., *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1, 2-6 (1987) (presenting historical perspective on state exclusion from power over Indian affairs).

8. U.S. CONST. art. I, § 8, cl. 3 (reserving in Congress exclusive power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"). For an analysis of the Commerce Clause as justification for extensive control over Indian tribes, see generally Robert Laurence, *The Indian Commerce Clause*, 23 ARIZ. L. REV. 203, 223-26 (1981) (citing early Supreme Court cases for support of congressional plenary power over Indian tribes). The Constitution expressly mentions Indians in two other places. These instances both prescribe that "Indians not taxed" are not to be included in apportioning the House of Representatives. U.S. CONST. art. I, § 2, cl. 3; *id.* amend. XIV, § 2. The Constitution does not explicitly address the issue of tribal sovereignty or the question of whether states have the authority to regulate Indian lands.

9. Act of July 22, 1790, ch. 23, 1 Stat. 137 (repealed 1793) (consolidating Indian affairs in Federal Government).

10. See FRANCIS P. PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS 1780-1834* 1-4 (1962) [hereinafter PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS*] (noting that partial reason for consolidating Indian policy in Federal Government and away from states early in U.S. history was that, while some tribes had supported colonists in their struggle in American Revolution against Britain, most supported British forces, and all Indians consequently required protection from white depredations).

11. See, e.g., *The Kansas Indians*, 72 U.S. 737, 756 (1865) (noting that by accepting status of statehood, Kansas ceded power to regulate Indian affairs to Federal Government); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) (holding state laws to be without effect in Indian territory and observing that all intercourse with Indian tribes would henceforth be carried on exclusively by Federal Government).

12. See generally INSTITUTE FOR GOV'T RESEARCH, *THE PROBLEM OF INDIAN ADMINISTRATION* 3 (1928) [hereinafter MERIAM REPORT] (noting failures of federal assimilationist policies); HELEN H. JACKSON, *A CENTURY OF DISHONOR* (1881) (criticizing administration of Indian affairs and accusing Indian Office of corruption).

13. See *infra* notes 29-33 and accompanying text (describing evolution of federal Indian policy). Federal Indian policy has undertaken numerous shifts and turnabouts in U.S. history:

involved in Indian affairs.¹⁴ In some instances, however, states began to exert control over Indians in a manner inconsistent with the special relationship¹⁵ between the United States and Indian tribes. For example, in *Bryan v. Itasca County*,¹⁶ the Supreme Court held that civil jurisdiction grants under Public Law 280 do not allow the State of Minnesota to levy a tax on personal property situated on a reservation.¹⁷ Similarly, in *McClanahan v. Arizona State Tax Commission*,¹⁸ the Court held that states lack the authority to impose a tax on in-

from promotion and preservation of tribal autonomy, to Indian removal and confinement, to allotment and assimilation, to reorganization and promotion of self-government, to termination of trust status, to self-determination. See HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, at 47-204 (documenting history of federal Indian policy). Each shift in federal Indian policy has been a result of changes in political ideology brought about by changes in the public's attitude toward Indians. *Id.* There are numerous sources on the history of federal Indian policy. See generally AMERICANIZING THE AMERICAN INDIANS (Francis P. Prucha ed., 1973) [hereinafter AMERICANIZING THE AMERICAN INDIANS] (collecting writings of Indian reform advocates from 1880-1900); FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 (1989) (discussing U.S. Government's policy toward Indians from 1880-1920, which focused on assimilating Indians into mainstream American culture); INDIANS IN AMERICAN HISTORY (Frederick E. Hoxie ed., 1988) [hereinafter INDIANS IN AMERICAN HISTORY] (recounting major events in U.S. history from American Indian point of view); KENNETH R. PHILP, INDIAN SELF-RULE (1986) (detailing relations between Indians and Federal Government from Franklin Delano Roosevelt to Reagan administrations); PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS, *supra* note 10; FRANCIS P. PRUCHA, THE GREAT FATHER (abridged ed. 1986) [hereinafter PRUCHA, THE GREAT FATHER] (recapping history of relations between Indian tribes and Federal Government); S. LYMAN TYLER, A HISTORY OF INDIAN POLICY (1973) [hereinafter TYLER, A HISTORY OF INDIAN POLICY]; S. LYMAN TYLER, INDIAN AFFAIRS, A STUDY OF THE CHANGES IN POLICY OF THE UNITED STATES TOWARD INDIANS (1964) (analyzing basic themes of U.S. Indian policies and examining principles guiding those policies at different periods in history).

14. See, e.g., Act of June 25, 1948, Pub. L. No. 772, 62 Stat. 827 (current version at 18 U.S.C. § 3243 (1988)) (conferring in State of Kansas criminal jurisdiction over Indian reservations within state); Act of Aug. 15, 1953, Pub. L. No. 280, 67 Stat. 588, as amended by Indian Civil Rights Act, Pub. L. No. 90-284, 82 Stat. 73 (codified in scattered sections of 18, 25, and 28 U.S.C.) (conferring limited criminal and civil jurisdiction in Indian country to specific states); General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 348-349, 354, 381 (1988)) (granting states jurisdiction over certain Indian landholdings). For an introduction to the General Allotment Act and a discussion of the Act's practical effect on Indian reservations, see *infra* notes 44-71 and accompanying text. For an analysis of Public Law 280 and a discussion of its specific grants to the states, see generally Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535 (1975).

15. See, e.g., Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450a(b) (1988) (declaring Congress' "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"); see also *United States v. Kagama*, 118 U.S. 375, 383 (1886) (recognizing that Federal Government and Indian tribes have special trustee/ward relationship). Because of the tension between the Indians and the surrounding local people in the late nineteenth and early twentieth centuries, it became apparent that "the people of the States . . . are often . . . [Indians'] deadliest enemies." *Kagama*, 118 U.S. at 383-84.

16. 426 U.S. 373 (1976).

17. See *Bryan v. Itasca County*, 426 U.S. 373, 377 (1976) (clarifying that previous decisions in *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 165 (1973), and *Moe v. Confederate Salish & Kootenai Tribes*, 425 U.S. 463, 483 (1976), prohibit state imposition of personal property tax, in absence of congressional consent, on Indian-owned items located on trust lands).

18. 411 U.S. 164 (1973).

come earned on a reservation by tribal members residing on that reservation.¹⁹ Furthermore, while upholding state authority to impose a cigarette tax on on-reservation sales by Indians to nonmembers of the tribe, the Supreme Court ruled in *Washington v. Confederated Tribes of the Colville Indian Reservation*²⁰ that a state could not impose the same tax on on-reservation sales to tribal members.²¹ Thus, while state activity in Indian affairs has increased, the Supreme Court has continued to protect tribes from state power by ensuring that states exercise their power in a manner consistent with congressional intent.

This Note examines the Supreme Court's reasoning in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*.²² While the decision is arguably consistent with some prior case law and the strictures of applicable statutes, it conflicts with contemporary federal Indian policy and overlooks methodology previously used by the Court in cases involving state taxation of Indians.²³ The result is that states presently have the ability to diminish existing tribal land bases through taxation.²⁴ Analysis of the Court's decision in light of the shifts in federal policy makes the need for a congressional resolution compelling.²⁵

Part I of this Note introduces the general rules regarding state taxation of Indians and Indian reservations, the Federal Government's systematic process of separating Indians from tribal land bases, and the evolution in federal policy that now emphasizes tribal self-government and self-determination. Part I places these rules in the context of the conflicting policies embedded in the rules of American Indian law. A brief account of the allotment and reorganization policies is also provided and will shed light on the attitudes of the Congresses that enacted the statutes in question. This ac-

19. See *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 165 (1973) (holding that Arizona could not impose personal income tax on reservation Indian whose income results solely from reservation sources).

20. 447 U.S. 134 (1980).

21. See *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-53 (1980) (noting tangentially that states can request Indian retailers to aid in enforcement of tax laws because certain state taxes such as those levied on nontribal members are validly imposed); *Moe v. Confederate Salish & Kootenai Tribes*, 425 U.S. 463, 483 (1976) (declaring that state's interest in collecting sales tax from non-Indians overcomes slight burden on Indian shopkeepers to collect such tax).

22. 112 S. Ct. 683 (1992).

23. See *infra* notes 34-40 and accompanying text (discussing history of Supreme Court cases dealing with state taxation on tribal lands).

24. See *supra* notes 1-6 and accompanying text (arguing that allowing state taxation of Indian lands will erode tribal sovereignty and transfer Indian property to non-Indians through foreclosure actions).

25. See *infra* notes 187-96 and accompanying text (suggesting legislation to alleviate effect of Court's holding in *County of Yakima*).

count will clarify the reasons why the Supreme Court opinion in *County of Yakima* fails to conform with contemporary federal policy.

Part II outlines the Supreme Court's majority opinion and Justice Blackmun's partial concurrence and dissent in *County of Yakima*. The majority undertook a careful statutory interpretation approach in reaching its conclusion in the case. Justice Blackmun's dissent is important because it points out that while the Court employed the correct standard in *County of Yakima*, it failed to apply that standard properly.²⁶

Part III analyzes the General Allotment Act's²⁷ validity in light of the Government's turnabout in American Indian policy. Part III further examines whether the General Allotment Act provision that the Court found pivotal in permitting the taxation of fee-patented lands, as well as state laws imposing a tax on the lands, should be considered preempted by subsequent federal law. The preemption issue was not fully explored by the Court in its opinion. This Note concludes by presenting several solutions that Congress might undertake to counter the harmful effects that *County of Yakima* will have on American Indian tribes.

I. BACKGROUND

European pioneers came across the Atlantic Ocean to the "new world" with visions of taming and settling the vast wilderness that awaited them. Many felt obligated and justified in invading and displacing the resident population to make what they deemed to be better use of the surrounding land.²⁸ Against this backdrop, the Federal Government's Indian policy foundations focused on expediting its dealings with Indians and acquiring the lands that Indians inhabited. Accordingly, much of the Government's policy regarding American Indians centered around land issues, beginning with the early Trade and Intercourse Act²⁹ and spanning the policies of re-

26. *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 112 S. Ct. 683, 694-98 (1992) (Blackmun, J., concurring in part and dissenting in part).

27. General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C.). This Act is also referred to as the Dawes Act. *See infra* notes 41-49 and accompanying text (providing brief history of General Allotment Act and Act's sponsor, Senator Dawes).

28. *See generally* FRANCIS JENNINGS, *THE INVASION OF AMERICA: INDIANS, COLONIALISM AND THE CANT OF CONQUEST* (1975) (presenting historical perspective on attitudes and ideals held by European Americans upon arrival and early settlement of North America).

29. Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137 (expired 1793) (providing that no trading with Indians is permissible without license from U.S. Government). This Act was the first in a series of temporary acts, culminating in the Trade and Intercourse Act of 1834, which were part of the Federal Government's policy of consolidating control of Indian affairs in the Federal Government, away from the states, and to keep peace on the frontiers by protecting Indian tribes from non-Indian depredations. Trade and Intercourse Act of March 1,

moval,³⁰ allotment,³¹ reorganization,³² and self-determination.³³

1793, ch. 19, 1 Stat. 329 (repealed 1796) (readopting licensing requirements of previous Act and providing for methods of enforcement); Trade and Intercourse Act of May 19, 1796, ch. 30, 1 Stat. 469 (expired 1799) (defining boundary line for "Indian territory" and banning citizens from entering territory without permission of U.S. President or state governor); Trade and Intercourse Act of March 3, 1799, ch. 46, 1 Stat. 743 (expired 1802) (redefining Indian territory); Trade and Intercourse Act of March 30, 1802, ch. 13, 2 Stat. 139 (repealed 1834) (same); Trade and Intercourse Act of June 30, 1834, ch. 161, 4 Stat. 729 (codified as amended in scattered sections of 18 and 25 U.S.C.) (redefining boundary and consolidating licensing power in President). See generally HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, at 109-17 (discussing federal Indian policy during Trade and Intercourse Act era). While the Act and its revisions were instituted primarily to regulate commerce between Indians and non-Indians, they also prohibited non-Indian settlement in Indian country, required non-Indians to obtain passports for travel through Indian country, and provided for federal prosecution of Indian offenses committed in state or territorial lands. See Helen A. Gaebler, Comment, *The Legislative Reversal of Duro v. Reina: A First Step Toward Making Rhetoric a Reality*, 1991 WIS. L. REV. 1399, 1405 n.33 (noting that one purpose of Indian Trade and Intercourse Acts was to control all interaction between white settlers and Indian tribes).

30. The policy of "removal" was implemented by treaty and negotiation. See generally HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, at 78-92 (discussing federal removal policy begun after War of 1812 wherein eastern Indian tribes were relocated to western territories in effort to accommodate expanding non-Indian settlement).

31. Many people influential in late nineteenth-century politics sincerely believed they could rescue Indians from their "unorthodox" ways by bestowing on the Indians, via "allotment," the virtue of individual ownership. See generally AMERICANIZING THE AMERICAN INDIANS, *supra* note 13, at 77-145 (compiling writings of Indian policy reformers who believed allotment would "save" Indians). Individual Indians would be given allotments of individual parcels of land that could be farmed. General Allotment Act of 1887, 25 U.S.C. § 331 (1988). Policymakers reasoned that by turning Indians into farmers and surrounding them with homesteaders who might serve as positive role models, the Indians would become instantly "civilized." See generally HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, at 127-38 (discussing assimilationist policy of allotment, which centered on notion that by "civilizing" Indian tribes, Indians would need less land and thus more land would be opened for white settlement); see also *infra* notes 44-68 and accompanying text (introducing allotment policy and its effect on tribal land bases).

32. The "reorganization" policy stemmed from the realization brought about by the Meriam Report that the allotment policy was a failure and required immediate resolution. See MERIAM REPORT, *supra* note 12, at 52-55 (advocating immediate action to help Indians with medical needs and schooling as well as longer-term strategy to improve Indians' lives). Reorganization immediately ended the allotment of reservation lands, indefinitely extended the trust period on existing allotments, and placed all remaining reservation lands in trust. See generally HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, at 144-51 (noting turnabout in federal Indian policy toward reorganization of tribes and promotion of tribal self-government instigated by public reaction to poor conditions prevalent among Indians); see also *infra* notes 70-83 and accompanying text (discussing reorganization policy and its use as means of ending assimilationist allotment policy).

33. The policy of "self-determination" is largely the result of disapproval with the policy of the "termination-era" Congress that sought to end the Indian lands trust relationship in order to alleviate the burden placed by that relationship on the Federal Government. See PHILP, *supra* note 13, at 194-95 (noting congressional desire to stop treating Indian tribes as nations dependent on United States, in order to reduce burden of allocation of federal resources). The policy of termination came to an abrupt halt in 1961 and the Federal Government provided means for preserving and extending the tribal land base. See generally HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, at 180-206 (discussing end of termination era and start of modern policy of tribal self-determination and statutes passed in accordance with that continuing policy).

A. Applicability of State Laws to Tribal Indians on Indian Reservations

Unless expressly provided for by Congress, state laws are generally not applicable to tribal Indians on Indian reservations.³⁴ There is no established per se rule barring state jurisdiction over tribes and tribal members, however.³⁵ Yet, in the specific area of state taxation,³⁶ the Supreme Court has adopted a per se rule that the Indian exemption from state taxation will be removed only when Congress makes its intent "unmistakably clear" to so remove the exemption.³⁷

Evaluation of the permissibility of state jurisdictional assertions over tribal members requires a preemption analysis.³⁸ State law is preempted if it "interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake

34. See *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 170-71 (1973) (citing UNITED STATES DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW 845 (1958), and noting that state jurisdiction generally does not extend to Indian country).

35. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15 (1987) (noting that Supreme Court has not established per se rule forbidding state from exercising jurisdiction over tribes and tribal members absent express consent by Congress).

36. The Supreme Court has distinguished state taxation from other assertions of state jurisdiction. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (distinguishing "special area of state taxation" from general state laws). Taxation laws are regulatory in nature. With respect to the grants of jurisdiction stemming from Public Law 280, see Pub. L. No. 280, ch. 505, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1988)), the Court has held that states may impose criminal laws that are prohibitory in nature, but not civil laws that are regulatory in nature. See *Cabazon Band*, 480 U.S. at 208-10 (limiting scope of state laws applicable to reservation Indians under Public Law 280 to those prohibitory in nature, but concluding that there is no "bright-line rule" for determining whether laws are prohibitory or regulatory in nature); *Bryan v. Itasca County*, 426 U.S. 373, 384-85 (1976) (holding Public Law 280 to be grant of state court jurisdiction over private civil litigation involving reservation Indians, but stating that regulatory civil laws are not applicable to reservation Indians).

37. See *Cabazon Band*, 480 U.S. at 215-16 n.17 (noting that strong presumption of Indian immunity from state taxation gives rise to per se rule requiring showing of unmistakable congressional intent); see also *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764-65 (1985) (noting that Indian tribes are generally exempt from state taxation but that Congress has authority to allow imposition of state taxes on tribes and tribal members). Absent cessation of jurisdiction or other federal statutes allowing it, however, there has been no satisfactory authority for subjecting Indian reservation lands to state taxation. *Mescalero Apache Tribe v. Jones*, 411 U.S. at 148. Thus, there is a presumption of tribal immunity from state tax regulation. However, a state may validly assert its authority over on-reservation activities of nonmembers under certain circumstances and over the on-reservation activities of tribal members in exceptional circumstances. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 n.15 (1983) (citing examples of allowable state regulation of fishing by tribal members and of land within reservation boundaries not belonging to tribe).

The "unmistakably clear" intent rule has been referred to as a "clear statement rule." William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 611-12 (1992) (discussing development and use of "clear statement rule" in constitutional law). Clear statement rules provide that the canons of construction of federal Indian jurisprudence will apply only when congressional intent is unclear. See *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) (holding that "[t]he canon of construction regarding the resolution of ambiguities in favor of Indians . . . [does not] permit disregard of the clearly expressed intent of Congress").

38. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 333-34 (noting requirement for preemption analysis that balances federal and tribal interests against state interests).

are sufficient to justify the assertion of state authority."³⁹ In preemption inquiries, the Supreme Court has chosen to proceed in light of the traditional notions of Indian sovereignty and the goal of promoting Indian self-government, including Congress' "overriding goal" of fostering economic development and tribal self-sufficiency.⁴⁰

B. An Overview of Relevant Federal Indian Policies

1. Assimilation by allotment

The Federal Government's policies of removing Indians from their aboriginal homelands to provide for white settlement and of subsequently confining Indians to reservations⁴¹ met with growing disapproval in the 1870s and 1880s.⁴² Indian advocates began annual meetings working toward Indian policy reform that would answer the "Indian Question."⁴³ These reformers, who tended to be

39. *Id.*

40. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 334-35, for proposition that Indian self-sufficiency and economic development is Congress' overriding goal); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 334-35 (rejecting notion that state jurisdiction over Indians is governed by traditional preemption principles and declaring that, in Indian cases, attention must be paid to general federal and tribal interests as well as to congressional intent to preempt state law); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973) (noting that Indian sovereignty predates that of United States and that treaty agreements must be read with this traditional sovereignty in mind); see also *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987) (noting federal policy favoring tribal self-government and subsequent limitation on state court jurisdiction over tribal activities); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980) (declaring that unique qualities of tribal sovereignty demand different approach to preemption issue than usual federal/state questions).

41. The removal and reservation policies of the Federal Government were successful only to the point that they were able to separate the Indians from the often aggressive actions of frontier settlers. See generally HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, at 78-92, 121-25 (discussing federal policies of removing Indian Nations and confining them to reservations in order to make room for United States expansion westward and to protect Indian lands from encroachment by white settlers).

This Part of the Note is not intended to be a thorough overview of federal Indian policy. Such a presentation is well beyond the scope of this Note, as federal policy has sustained cycles of assimilation and tribal enhancement that developed with changes in American politics and public attitudes towards Indians. The intention of this Part is to present in a concise fashion those aspects of federal Indian policy that are pertinent to the discussion and analysis of *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 111 S. Ct. 683 (1992). For a more thorough introduction to federal Indian policy, see generally ROBERT N. CLINTON ET. AL., *AMERICAN INDIAN LAW* 137-65 (3d ed. 1991) (providing overview of different periods in U.S. Indian policy); DAVID H. GETCHES & CHARLES F. WILKINSON, *FEDERAL INDIAN LAW* 33-160 (1986) (describing legal perspective of different eras of federal Indian policy); see also *supra* note 13 (citing other works that represent excellent resources in study of federal Indian policy).

42. See PRUCHA, *THE GREAT FATHER*, *supra* note 13, at 183-90 (noting Indian resistance to relocation and subsequent public criticism of policy after Federal Government used harsh measures to quell Indian resistance).

43. See AMERICANIZING THE AMERICAN INDIAN, *supra* note 13, at 1-10 (describing genesis of Indian reform movement that led to yearly conferences at Lake Mohonk near New Paltz, New York). The Lake Mohonk Conferences of Friends of the Indian were symposiums

proponents of assimilation,⁴⁴ developed a policy whereby the Indians would receive land allotments issuing from their reservations in severalty.⁴⁵ The "surplus" land, that which had not been allotted, would then be opened to white settlement.⁴⁶ These advocates were successful in gaining the support of Senator Henry L. Dawes of Massachusetts.⁴⁷ Under Dawes' sponsorship, Congress passed the General Allotment (Dawes) Act of 1887⁴⁸ with minimal opposition.⁴⁹

whereby well-meaning and politically influential reformers developed a solution to the "Indian problem," remarkably without input from the Indians themselves. *See id.* at 1 (noting reformers' disinclination to view existing Indian civilization positively and to include Indians in discussions about their own futures). The reformers recognized a common theme to the problem, which consisted of trying to balance the need for land for white settlement with protecting the Indians from encroachment by aggressive white settlers. *See generally id.* (compiling speeches and writings of Indian reform groups, as well as congressional reports relating to issues addressed at Lake Mohonk Conferences). Allotment, education, and the grant of citizenship constituted the means toward achieving the reformers' goal of acculturating and assimilating the Indians into mainstream American society. *See id.* at 6-7 (stating Friends of Indian position that complete Americanization was best solution to Indian question). Some of these Indian reform organizations included the Boston Indian Citizenship Committee, the Women's National Indian Association, and the Indian Rights Association. *Id.* at 4-5. While well-meaning, these reformers were unable to foresee the dire consequences of thrusting a foreign culture and lifestyle upon the Native Americans, people with differing ideas and values. MERIAM REPORT, *supra* note 12, at 3-21 (documenting effects of forced assimilation and acculturation on Indians).

44. *See* HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, at 128-29 (describing assimilation movement as having been led by "zealous humanitarians").

45. LETTER FROM E.A. HAYT, COMMISSIONER OF INDIAN AFFAIRS, TO CARL SCHURZ, SECRETARY OF THE INTERIOR (Jan. 24, 1879), H.R. REP. NO. 165, 45th Cong., 3d Sess. 2-3 (1879), *reprinted in* AMERICANIZING THE AMERICAN INDIANS, *supra* note 13, at 79-82 (urging Secretary of Interior to recommend to Congress proposed general land in severalty legislation providing division of Indian reservations into individual homesteads for individual Indian ownership). Upon learning that Congress passed allotment legislation, one Lake Mohonk speaker proclaimed, "[The Dawes Act] has given us what Archimedes wished for, that he might test the power of his lever to lift the world, and now we have a standing place, an opportunity to test the power of our civilizing influence to lift the Indian." INDIANS IN AMERICAN HISTORY, *supra* note 13, at 213.

46. Carl Schurz, *Recommendation of Land in Severalty*, Report of Nov. 1, 1880, H.R. EXEC. DOC. NO. 1, 46th Cong., 3d Sess. 5-6, 11-13 (1880), *reprinted in* AMERICANIZING THE AMERICAN INDIANS, *supra* note 13, at 84-86 (advocating general allotment law that would protect Indian interests by giving them legal title to lands enforceable in U.S. courts, thereby putting Indians on equal footing with whites). The Secretary of the Interior thought that by selling off the Indian lands "not needed," the dangers of white encroachment would be eliminated and Indians would be placed on an equal footing with their white counterparts. *Id.*

47. *See* AMERICANIZING THE AMERICAN INDIANS, *supra* note 13, at 100 (noting that Senator Dawes was initially reluctant to support general allotment law, but later supported it when he felt Indian land could not be protected otherwise).

48. Ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 348-349, 354, 381 (1988)).

49. While allotment was not a new concept, the General Allotment Act was the first comprehensive allotment plan, incorporating many of the views and ideas held by various legislators. Pre-Act allotments had been used as a means of terminating tribal existence. *See* HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, at 130 (discussing pre-Act allotment plans that often consisted of Indians surrendering claims to tribal lands in return for U.S. citizenship). In earlier plans, tribal existence was terminated once Indian allottees relinquished their interests in tribal lands and became subject to state and federal jurisdiction as citizens. *See, e.g.,* Treaty with the Wyandot Indians, Apr. 1, 1850, U.S.-Wyandot Indians, 9 Stat. 987 (declaring "anxious desire" of Wyandot Indians to trade territory for citizenship); Treaty with

The Act authorized the President to allot parcels of tribal lands to individual Indians.⁵⁰ The patents issued on the allotments were held by the United States in trust for a period of twenty-five years, after which time the land would be held in fee by the allottee upon receipt of the patent.⁵¹ A major reason behind use of the extensive trust period was a perceived need to protect allottees from state laws while they became assimilated into mainstream American culture.⁵² Once the trust period expired,⁵³ the Act subjected the allottees to state criminal and civil laws, including taxation laws.⁵⁴

In 1906, Congress amended section 6 of the General Allotment Act, which subjected Indians holding fee-patented lands to state jurisdiction, by means of the Burke Act.⁵⁵ The Burke Act clarified the important point that the extension of state jurisdiction would be delayed until the trust period had expired.⁵⁶ The Burke Act re-

the Stockbridge Tribe of Indians, Nov. 24, 1848, U.S.-Stockbridge Tribe of Indians, 9 Stat. 955 (agreeing to pay Stockbridge Tribe \$14,504.85 for tribal lands); Act of Mar. 3, 1839, ch. 83, 5 Stat. 349 (allowing for division of tribal lands of Menomonic Indians into individual lots and granting citizenship to tribal members). These pre-Dawes plans were experiments in allotment that would subsequently serve as models for the federal policy of general allotment. See HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, at 130-32 (describing genesis of General Allotment Act in early allotment experiments with specific tribes).

50. General Allotment Act of 1887, ch. 119, § 1, 24 Stat. 388, 388 (codified as amended at 25 U.S.C. § 331 (1988)) (authorizing President to distribute reservation lands to individual Indians in cases where land could be used for agricultural purposes).

51. *Id.* § 5, 24 Stat. at 389-90 (codified as amended at 25 U.S.C. § 348). This section further provides that encumbrances and conveyances are void and authorizes the Secretary of the Interior to negotiate for the purchase of "surplus" lands. *Id.* The purchase money is held by the Treasury of the United States in trust for the tribe. *Id.*

52. Prior experience with the allotment process demonstrated that white traders and land companies rapidly acquired the lands allotted to the Indians, by fraud or otherwise. See HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, at 130 (noting several consequences of pre-Act allotments); see also COMM. ON THE TERRITORIES, H.R. REP. NO. 188, 45th Cong., 3d Sess. 13-26 (1879) (noting failures of allotment experiments by treaties with various Indian tribes).

53. Extension of the trust period beyond the stipulated 25 years was left to the President's discretion. Act of June 21, 1906, ch. 3504, § 1, 34 Stat. 325, 326 (current version at 25 U.S.C. § 391 (1988)).

54. General Allotment Act of 1887, ch. 119, § 6, 24 Stat. at 390 (codified as amended at 25 U.S.C. § 349 (1988)).

55. *Id.*, as amended by Burke Act, ch. 2348, 34 Stat. 182, 182-83 (1906) (current version at 25 U.S.C. § 349 (1988)).

56. *Id.* Section 6 of the General Allotment Act provides in pertinent part:

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, . . . then each and every allottee 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.

25 U.S.C. § 349 (1988). The Burke Act amended section 6 of the General Allotment Act by adding the following:

Provided, That the Secretary of the Interior may, in his [or her] discretion, and he [or she] is authorized, whenever he [or she] 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, or taxation of said land shall be removed . . .

Burke Act, ch. 2348, 34 Stat. 182, 182-83 (1906) (current version at 25 U.S.C. § 349 (1988)) (emphasis added).

flected congressional disapproval of the Supreme Court's holding in *Matter of Heff*.⁵⁷ In *Heff*, the Court held that when an allotment is made and a patent issued, the allottee immediately becomes a U.S. citizen and is therefore no longer subject to federal liquor law restrictions that are aimed exclusively at Indians.⁵⁸ The Court interpreted the General Allotment Act as subjecting allottees to state laws upon issuance of patents, despite the fact that the Federal Government holds the patents in temporary trust.⁵⁹ To remedy the impact of the Court's holding, the Burke Act made the grant of citizenship, and therefore the subjection to state jurisdiction, conditional upon actual receipt of the patent to the allotted land.⁶⁰ While also expressly removing restrictions against "sale, incumbrances, or taxation of said land,"⁶¹ the Burke Act further permitted the Secretary of the Interior to issue patents to competent allottees before the expiration of the twenty-five-year trust period.⁶²

A major consequence of the General Allotment Act was a reduction in Indian landholdings from 138 million acres to 48 million acres.⁶³ The sale of surplus lands not needed for apportionment to tribal members was largely responsible for this loss.⁶⁴ Adding further to the decline in the land base was the fact that allotments fell out of trust when the trust period expired.⁶⁵ When this happened, much of the land was taken from the allottees at forced tax sales and mortgage foreclosures.⁶⁶ Although repudiated by the Indian Reor-

57. 197 U.S. 488 (1905); see *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 112 S. Ct. 683, 691 (1992) (noting that Congress implemented Burke Act to change outcome of Supreme Court decision in *Matter of Heff*).

58. *Matter of Heff*, 197 U.S. 488, 509 (1905) (holding that granting of citizenship to Indian allottee places allottee outside of reach of Congress' policing regulations).

59. *Id.*

60. Burke Act, ch. 2348, 34 Stat. 182, 182-83 (1906) (current version at 25 U.S.C. § 349 (1988)); see also *HANDBOOK OF FEDERAL INDIAN LAW*, *supra* note 5, at 134 (noting that Burke Act delayed state extension of civil and criminal jurisdiction until trust period expired).

61. Burke Act, 34 Stat. at 182-83.

62. *Id.*

63. See *PRUCHA, THE GREAT FATHER*, *supra* note 13, at 305 (noting testimony before congressional committee on proposed legislation to reverse effects of General Allotment Act in which estimated 90 million acres of tribal lands were lost due to sale of surplus lands under allotment process). While the pace of surplus land sales was fairly moderate for the first 15 years under the Act, the rate was drastically increased in 1903 as a result of the Supreme Court's decision in *Lone Wolf v. Hitchcock*. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-66 (1903) (holding that Congress has power to dispose of tribal lands without tribal consent).

64. See *HANDBOOK OF FEDERAL INDIAN LAW*, *supra* note 5, at 138 (noting that of 156 million acres of Indian-held lands in 1881, 60 million were transferred to non-Indians as "surplus" after allotment).

65. See *HANDBOOK OF FEDERAL INDIAN LAW*, *supra* note 5, at 136-38 (noting that Burke Act gave Secretary of Interior power to allow Indians to transfer fee title to allotted land and that by 1934, 27 million acres of allotted land had been sold by Indians).

66. See *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 422 (1989) (noting that nonmembers of Indian tribes acquired substantial portions of allotted lands over time through means such as sale and inheritance); WILLIAM C. CANBY, JR.,

ganization Act of 1934,⁶⁷ the General Allotment Act has never been repealed by Congress and remains good law.⁶⁸ Consequently, the tribal land base has diminished in size and many reservations today are composed of both fee-patented and trust lands, resulting in what is often referred to as a "checkerboard pattern."⁶⁹

2. *Indian reorganization: promotion of tribal self-government and self-determination*

With a new generation of individuals and organizations questioning and reevaluating Indian policy, a national advisory group on Indian affairs recommended a policy change in 1924.⁷⁰ With the publication of the Meriam Report, a study on federal Indian policies' effects on Indians,⁷¹ it became evident that allotment was a complete failure.⁷² The report showed that Indians were not becoming assimilated and acculturated, as was the goal of federal Indian policy at the time.⁷³ Instead, the report disclosed that Indians were living in deplorable conditions; poverty and disease permeated life for a majority of reservation Indians.⁷⁴ The Meriam Report fur-

AMERICAN INDIAN LAW 19-22 (2d ed. 1988) (noting that effects of General Allotment Act on tribal landholdings included tribal dispossession under both legal and illegal means).

67. 25 U.S.C. §§ 461-479 (1988).

68. See 25 U.S.C. §§ 331-334, 339, 341, 348-349, 354, 381 (1988) (containing current version of General Allotment Act). While the General Allotment Act has not been repealed, allotment ended in 1934 with the enactment of the Indian Reorganization Act, 25 U.S.C. §§ 461-479 (1988). See *infra* notes 76-83 and accompanying text (discussing history and purpose of Indian Reorganization Act).

69. See *Brendale*, 492 U.S. at 430 (referring to intermixed trust and fee land ownership on reservations as "checkerboard"). It is precisely this checkerboard effect that has created the difficulties in ascertaining jurisdiction in Indian country. See Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 507-13 (1976) (analyzing criminal jurisdiction difficulties in Indian country that arose as consequence of General Allotment Act and continued federal incursion upon tribal sovereignty).

70. See COMMITTEE OF ONE HUNDRED, *THE INDIAN PROBLEM*, H.R. Misc. Doc. No. 149, 68th Cong., 1st Sess. 1-15 (1924) (criticizing administration of Indian affairs and recommending immediate reassessment and modification of that administration).

71. See MERIAM REPORT, *supra* note 12 (presenting nongovernmental, two-year study of Indian Bureau that examined Indian policy administration and its impact on life of Indians); see also HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, at 144-45 (discussing Meriam Report and its impact on Indian policy). The report documented the deleterious effect of allotment and forced assimilation on reservation Indians. MERIAM REPORT, *supra* note 12, at 21-22.

72. See HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, at 144-45 (noting that Meriam Report, which advocated respect and tolerance for Indian cultures, publicized failed assimilation and acculturation goals of allotment policy).

73. See MERIAM REPORT, *supra* note 12, at 8 (stating that work of Government with regard to education and advancement of Indians had been largely ineffective).

74. See MERIAM REPORT, *supra* note 12, at 308 (finding that living conditions such as overcrowding, lack of sanitary facilities, and poor diet were contributing to Indians' poor health, especially regarding spread and development of diseases such as tuberculosis); see also HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, at 144 (discussing Meriam Report as "a primary catalyst for change" that stressed need for educational programs designed to overcome problems of reservation life).

ther criticized Indian policy administration, finding it to be inefficient, paternalistic, and destructive.⁷⁵ In response to this report and to changing attitudes toward allotment and assimilationist policies, Congress enacted the Indian Reorganization Act of 1934 (IRA).⁷⁶

Reorganization was an attempt, under the aegis of the Commissioner of Indian Affairs, to promote and encourage tribal self-determination, economic development, and cultural plurality.⁷⁷ The IRA prohibited further allotment of tribal lands⁷⁸ and indefinitely extended the period of existing trusts.⁷⁹ Attempting to expand the already greatly diminished tribal land base,⁸⁰ the Act further authorized the Secretary of the Interior to purchase lands on behalf of Indian tribes.⁸¹ The IRA provided that these newly purchased lands would be exempt from state and local taxation⁸² and authorized the appropriation of funds for promoting economic development in Native American communities.⁸³

75. See MERIAM REPORT, *supra* note 12, at 3-51 (criticizing Indian Service for its failure, among other shortcomings, to recognize and remedy problems, appreciate need for added services such as formal education, and provide sufficient health care). The Meriam Report concluded that the administration of Indian policy neither encouraged nor supported Indian self-sufficiency and, accordingly, recommended immediate resolution of this deficiency. *Id.* at 21-22.

76. 25 U.S.C. §§ 461-479 (1988). The Act, also referred to as the Wheeler-Howard Act, was pushed through Congress by the persistence of John Collier, then-commissioner of Indian Affairs. See PRUCHA, THE GREAT FATHER, *supra* note 13, at 316-25 (noting efforts of Commissioner Collier in promoting reorganization legislation).

Interestingly, the IRA did not automatically apply to all reservations. Instead, the Act granted reservations the option of being excluded from its application. 25 U.S.C. § 476 (1988). A reservation would be excluded if, in a special election called by the Secretary of the Interior, a majority of the adult Indians voted for exclusion from the Act. *Id.* Through special referendums from 1934-1936, 181 tribes voted for application of the Act and 77 rejected it. PRUCHA, THE GREAT FATHER, *supra* note 13, at 324 (discussing referendum process for accepting and rejecting application under IRA and detailing specific results). Because of a failure to hold these special referendums, 14 other groups came under the operation of the Act. *Id.*

77. See HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, at 147 (explaining need for reform in Indian policy as reason behind reorganization); PRUCHA, THE GREAT FATHER, *supra* note 13, at 316-25 (noting forces and reasoning behind promotion of Indian reorganization).

78. See 25 U.S.C. § 461 (1988) (providing that "no land of any Indian reservation, created or set apart by treaty or agreement with the Indians . . . shall be allotted in severalty to any Indian").

79. *Id.* § 462 (providing that "[t]he existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress").

80. See PRUCHA, THE GREAT FATHER, *supra* note 13, at 305 (noting testimony regarding Indians' diminishing land base before congressional committee considering legislation reversing general allotment). It has been estimated that Indian tribes lost as much as 90 million of 138 million acres through general allotment. *Id.*

81. See 25 U.S.C. § 465 (1988) (authorizing annual appropriations of up to \$2 million for these purchases).

82. *Id.* Because federal trust lands are exempt from state and local taxation, the General Allotment Act provided that lands purchased to expand tribal land bases would be held in trust by the Federal Government on behalf of the tribes. *Id.*

83. 25 U.S.C. § 470 (1988). The IRA fostered economic development by originally es-

II. COUNTY OF YAKIMA V. CONFEDERATED TRIBES & BANDS OF THE YAKIMA INDIAN NATION

A. Factual Background and Procedural History

In November 1987, Yakima County scheduled a tax foreclosure sale on thirty-seven parcels of fee-patented reservation land owned by thirty-one different tribal members of the Yakima Indian Nation.⁸⁴ The sale was the result of the tribal members' inability to pay the County's ad valorem real estate tax.⁸⁵ In response, the Yakima Nation filed suit in federal district court seeking declaratory judgment and injunctive relief.⁸⁶ The Nation included a second cause of action seeking to halt Yakima County's assessment and collection of an excise tax on the sale of fee-patented lands.⁸⁷

The district court relied predominantly on *Moe v. Confederated Salish & Kootenai Tribes*⁸⁸ in granting summary judgment for the Yakima Nation; the court was unable to find a meaningful distinction between Yakima County's claims and the claims of the State of

establishing a \$10 million revolving fund from which the Secretary of Interior could make loans to tribal corporations. Indian Reorganization Act of 1934, ch. 576, § 10, 48 Stat. 986, 986 (codified as amended at 25 U.S.C. § 470 (1988)). Subsequently, Congress increased the revolving fund to \$20 million. Pub. L. No. 87-250, § 10, 75 Stat. 520, 520 (1961) (codified as amended at 25 U.S.C. § 470 (1988)). The IRA also authorized preferential treatment of qualified Indians for various employment positions in the Indian service and appropriated up to \$250,000 for student loans for study at trade and vocational schools. 25 U.S.C. § 471 (1988).

84. Brief for the Yakima Nation at 9, County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 112 S. Ct. 683 (1992) (Nos. 90-408, 90-577). Though the number of parcels at issue is relatively few for the Yakima, the case holding affects all fee-patented tribal reservation lands that were allotted under the General Allotment Act of 1887. See *supra* notes 50-68 and accompanying text (describing General Allotment Act and its effect on tribal landholdings).

The Yakima Nation occupies a 1.3 million acre reservation in the State of Washington. The Treaty with the Yakimas, June 9, 1855, U.S.-Yakima Nation, 12 Stat. 951, was proclaimed by President James Buchanan on April 18, 1859, and ratified on March 8, 1859. Under the treaty, the Yakima Nation ceded much of their territory to the U.S. Government. Treaty with the Yakimas, art. I, 12 Stat. 951, 951. In return, a reservation was set aside from the ceded land "for the exclusive use and benefit" of the Yakima Nation. *Id.* art. II, 12 Stat. at 952. Presently, about 80% of the reservation land is held in trust by the United States for the Yakima Nation and its members. *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 415 (1989). The remainder is held in fee by the Nation, individual members, and nonmembers. *Id.*; *Washington v. Confederated Bands & Tribes of Yakima Nation*, 439 U.S. 463, 469 (1979) (describing makeup of Yakima reservation).

85. Brief for the Yakima Nation, *supra* note 84, at 9. Approximately one-third of all tribal members owning fee-patented land were at least three years behind on property taxes. *Id.* The applicable state statute requires that real estate taxes be at least three years delinquent before Yakima County can foreclose on the land and sell it at a tax sale to satisfy the indebtedness. WASH. REV. CODE § 84.64.030 (1962 & Supp. 1989) (stipulating necessary requirements for foreclosure).

86. Brief for the Yakima Nation, *supra* note 84, at 9.

87. Brief for the Yakima Nation, *supra* note 84, at 10 (stating that Yakima County had previously refused to recognize that Yakima Nation was immune from real estate excise taxes).

88. 425 U.S. 463 (1976).

Montana in *Moe*.⁸⁹ In that case, the State argued that Congress authorized the imposition of taxes or licensing fees on tribal members' personal property situated within a reservation, on on-reservation cigarette purchases made by tribal members, and on Indians conducting business on reservations.⁹⁰ To support its contention, Montana referred to section 6 of the General Allotment Act, which purports to subject Indians holding fee-patented lands to state jurisdiction.⁹¹ The Supreme Court, noting that the resultant "checker-board jurisdiction"⁹² would conflict with the existing federal statutory scheme of jurisdiction in Indian country,⁹³ held that Montana's interpretation was untenable in light of the "many and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands."⁹⁴ On that basis, the Court declined to sustain the state's taxes and licensing fees.⁹⁵

The U.S. Court of Appeals for the Ninth Circuit affirmed in part, reversed in part, and remanded *County of Yakima* to the district court for further proceedings.⁹⁶ The Ninth Circuit held that the excise tax on the sale of fee-patented land was not permitted and concluded that the balancing test put forth in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*⁹⁷ should be used to determine if the

89. See *Confederated Tribes & Bands of the Yakima Nation v. County of Yakima*, 903 F.2d 1207, 1212-13 (9th Cir. 1990) (discussing unpublished district court opinion that found Yakima County's claims similar to Montana's in *Moe* in that neither governmental entity is allowed to tax fee-patented land, pursuant to § 6 of General Allotment Act), *aff'd and remanded sub nom. County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 112 S. Ct. 683 (1992).

90. *Moe v. Confederate Salish & Kootenai Tribes*, 425 U.S. 463, 477 (1976).

91. *Moe*, 425 U.S. at 477 (noting that Montana relied on General Allotment Act to argue that Congress never intended to withdraw state's taxing jurisdiction); see General Allotment Act of 1887, ch. 119, § 6, 24 Stat. 388, 390 (codified as amended at 25 U.S.C. § 349 (1988)) (subjecting allottees to state civil and criminal jurisdiction upon receipt of patent by allottees). See generally *supra* notes 50-54 (discussing General Allotment Act).

92. This is the colloquial name given to a jurisdictional pattern in which jurisdictional status varies from parcel to parcel. *County of Yakima*, 112 S. Ct. at 690. The pattern often arises in the context of heavily allotted Indian reservations because jurisdiction in Indian country is generally divided among tribal, federal, and state governments. *Id.*

93. *Moe*, 425 U.S. at 478-79.

94. *Id.* at 479. Jurisdiction in Indian country is divided among three sovereigns: tribal, state, and federal governments. Certain disputes or offenses will fall exclusively under the domain of one of the sovereigns, while others may be shared concurrently. See generally, Clinton, *supra* note 69 (detailing complexities of criminal jurisdiction in Indian country).

95. See *Moe*, 425 U.S. at 480-81 (holding that personal property tax on property located within reservation, vendor license fee for selling cigarettes on reservation, and cigarette sales tax as applied to on-reservation sales to Indians are contrary to congressional intent of General Allotment Act).

96. *Confederated Tribes & Bands of the Yakima Nation v. County of Yakima*, 903 F.2d 1207, 1219 (9th Cir. 1990), *aff'd and remanded sub nom. County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 112 S. Ct. 683 (1992).

97. 492 U.S. 408 (1989). The *Brendale* test requires a balancing of the political integrity, economic security, health, and welfare of an Indian tribe against the state interest in imposing

ad valorem tax could be levied.⁹⁸ The circuit court remanded the case to the district court to consider whether the taxes would have a demonstrably negative impact on the political integrity, economic security, or health and welfare of the Yakima Nation.⁹⁹ Both the County of Yakima and the Yakima Nation filed petitions for writs of certiorari that were subsequently granted by the Supreme Court.¹⁰⁰ The Supreme Court consolidated the two cases.¹⁰¹

B. *Opinion of the Supreme Court*

In *County of Yakima*, the Supreme Court decided two taxation issues: first, whether Yakima County could impose an ad valorem tax on Indian-owned, fee-patented reservation lands,¹⁰² and second, whether the County could levy an excise tax on the sale of such lands.¹⁰³ Before explicitly ruling on either of these issues,¹⁰⁴ the Court set forth the principles it would use in reaching its conclusions.¹⁰⁵ The Court presented the arguments made by both parties and concluded that the views of the Yakima Indian Nation, as well as of the United States as amicus curiae supporting the Nation, rested on a misunderstanding of the Court's decision in *Moe* and a misperception of the General Allotment Act's structure.¹⁰⁶

authority over the tribe. *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 431 (1989).

98. *County of Yakima*, 903 F.2d at 1218.

99. *Id.*

100. *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 111 S. Ct. 1680 (1991).

101. *Id.*

102. *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 112 S. Ct. 683, 692-93 (1992).

103. *Id.* at 693-94.

104. The U.S. Solicitor General believed that such taxation was impermissible and filed a brief in support of the Yakima Nation. Brief for United States as Amicus Curiae Supporting Respondent/Cross-Petitioner, *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 112 S. Ct. 683 (1992) (Nos. 90-408, 90-577) [hereinafter Brief for United States as Amicus Curiae]. In the brief, the Solicitor General noted that by enacting the Indian Reorganization Act and other subsequent statutes, Congress chose to preserve reservations as the foundation for affairs, strengthen internal and external tribal relations, promote tribal self-government, and promote economic development in the tribal community. *Id.* at 7-8. The Solicitor General's brief further expressed the opinion that the County's taxes were preempted by contemporary federal statutes and policies. *Id.* at 8. The Solicitor General concluded:

Imposition of the taxes at issue here on land owned by the Yakima Nation or its members would frustrate (and is preempted by) . . . modern statutes and policies, in the same manner as state taxes on other Indian property and activities on reservations. Those taxes are not saved by a vestigial proviso to the General Allotment Act.

Id.

105. See *County of Yakima*, 112 S. Ct. at 687-92 (analyzing previous decision in *Moe* and examining judicial interpretation of General Allotment Act to present principles Court would use in its decision).

106. *Id.* at 690.

1. *The Court's interpretation of Moe v. Confederated Salish & Kootenai Tribes*

The Court held that the specific mention in the Burke Act proviso that immunity from taxation is one of the restrictions removed upon conveyance of a fee patent manifested Congress' clear intent to permit states to tax fee-patented, Indian-owned reservation lands.¹⁰⁷ The Yakima Nation did not vigorously dispute this point.¹⁰⁸ The Nation did challenge whether section 6 of the General Allotment Act, as amended by the Burke Act proviso,¹⁰⁹ remained a valid grant of state taxing authority.¹¹⁰

The Court found the contention by the Yakima Nation that the conferral of taxing authority was no longer valid to be untenable.¹¹¹ In *Moe*, the State of Montana attempted to use section 6 to exercise reservation-wide taxing jurisdiction, including jurisdiction over trust land.¹¹² The Court in *Moe* held reservation-wide jurisdiction impermissible because section 6 only extends state jurisdiction to fee lands.¹¹³ In *Goudy v. Meath*,¹¹⁴ the Court had previously held that state tax laws were among the laws to which an allottee became subject upon expiration of the trust period under section 6 of the General Allotment Act.¹¹⁵ The Court decided in *County of Yakima* that *Goudy* was consistent with the decision reached in *Moe* by virtue of the extent of reach the State was trying to exercise under the Gen-

107. *Id.* at 688 (concurring with Court of Appeals that clear intent is manifested by express mention that taxation immunity would be lifted upon conveyance of allotment).

108. *See id.* at 688 n.2 (stating that Yakima Nation instead objected to taxes on ground that Washington State's constitution only allows taxation of fee-patented lands held by Indians who have terminated their tribal relations). The Court noted that the state's constitutional provision in question merely establishes that Congress has exclusive power and control over Indian and tribal lands within the state. *Id.* Accordingly, the Court reasoned that if Congress permitted the state to tax the land, the constitutional provision would not be violated. *Id.*

109. *Id.* at 691-92; *see supra* notes 55-62 and accompanying text (discussing General Allotment Act, as amended by Burke Act proviso).

110. *County of Yakima*, 112 S. Ct. at 688-89 (discussing and dismissing Federal Government's and Yakima Nation's contention that § 6 is "dead letter" within confines of Indian reservations).

111. *Id.* at 689-92 (examining *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) and *Goudy v. Meath*, 203 U.S. 146 (1906), and finding that Yakima Nation's contention of invalidity of conferral of state taxing authority under Burke Act and General Allotment Act to be unsupported).

112. *See Moe*, 425 U.S. at 477 (describing Montana's contention that Congress never intended to withdraw its taxing jurisdiction). Montana was trying to exercise jurisdiction over fee-patented reservation lands as well as over lands held in trust by the Federal Government. *Id.* at 478.

113. *Id.* (disallowing exercise of state jurisdiction over lands held in trust by Federal Government). Many reservations consist of mixed tracts of fee-patented land and land held in trust by the Federal Government on behalf of the tribe. *See supra* notes 44-66 and accompanying text (discussing allotment policy and its effect of dispossessing tribes of tribal lands).

114. 203 U.S. 146 (1906).

115. *Goudy v. Meath*, 203 U.S. 146, 149 (1906).

eral Allotment Act.¹¹⁶ Thus, the Court declined to find *Moe's* restriction on attempts to exert reservation-wide jurisdiction to be an implicit repeal of section 6 authority.¹¹⁷

2. *Structure of General Allotment Act*

The Court found that the reasoning of the *Goudy* decision did not rest exclusively on a section 6 grant of personal jurisdiction.¹¹⁸ The Court held that it did, however, rest primarily on the section 5¹¹⁹ grant of alienability for allotted lands.¹²⁰ The Court permitted allotment taxation because it reasoned that it would be otherwise "strange" to withdraw the restriction against alienation of the allotment at the expiration of the trust period "while at the same time releasing it from taxation."¹²¹ In *Goudy*, the Court specifically held that when an individual allottee is subjected to all state laws, those laws necessarily include taxation.¹²² The Supreme Court held that the Burke Act proviso expressly subjected prematurely patented land to the implication of section 5 "with respect to patented land generally: subjection to state taxes."¹²³

3. *The ad valorem taxation issue*

The Supreme Court determined that the Court of Appeals' holding, which established that the balancing test in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*¹²⁴ should be used in

116. *County of Yakima*, 112 S. Ct. at 690-92 (stating that Court's decision in *Moe* does not contradict *Goudy* with regard to § 6 of General Allotment Act as grant of personal jurisdiction).

117. *Id.* at 690; see also *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936) (noting that repeals by implication are not favored).

118. *County of Yakima*, 112 S. Ct. at 690.

119. Section 5 of the General Allotment Act provides in pertinent part:

[A]t the expiration of [the trust] period the United States will convey [the allotments] by patent to said Indian . . . in fee, discharged of said trust and free of all charge or incumbrance whatsoever And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void

General Allotment Act of 1887, ch. 119, § 5, 24 Stat. 388, 389-90 (codified as amended at 25 U.S.C. § 348 (1988)).

120. *County of Yakima*, 112 S. Ct. at 690-91 (discussing implications of § 5 of General Allotment Act with respect to lands allotted under Act).

121. *Id.* at 690-91 (noting it would be illogical that allotted land conveyed in fee to allottee should be alienable but not taxable). While it may be "strange" for Congress to have granted alienability without taxability, it appears even more awkward for the Supreme Court to be inferring congressional intent while maintaining that it is applying an "unmistakably clear" intent standard.

122. *Goudy v. Meath*, 203 U.S. 146, 149 (1906) (holding allottees subject to state taxation upon expiration of 25-year trust period under General Allotment Act).

123. *County of Yakima*, 112 S. Ct. at 691.

124. 492 U.S. 408 (1989).

the evaluation of the ad valorem tax's permissibility, was incorrect.¹²⁵ The Court held that the reasoning of *Brendale* was inapplicable to this case¹²⁶ because use of a *Brendale* balancing test would infringe on the Supreme Court's traditional per se rule that state taxation of Indian tribes and tribal members is categorically allowed if Congress has authorized the imposition.¹²⁷ The Court concluded that an interest balancing test would be an improper gauge for determining statutory validity because only Congress may decide whether to preempt state law.¹²⁸

The general rule regarding taxation of reservations is that Congress must make its intent to allow such taxation in "unmistakably clear" terms.¹²⁹ The majority in *County of Yakima* found that congressional intent to permit state taxation of fee-patented reservation land was "unmistakably clear" in the General Allotment Act.¹³⁰ The Court noted that under Washington state law, an ad valorem tax places a burden on the property alone.¹³¹ Liability for the ad valorem tax stems from ownership of realty on the annual assessment date.¹³² Accordingly, the Court held that the ad valorem tax was prima facie valid because it was "taxation of land" within the meaning of the General Allotment Act.¹³³

125. *County of Yakima*, 112 S. Ct. at 692-93 (rejecting *Brendale* balancing test as standard for determining taxation permissibility); see also *supra* note 97 (delineating *Brendale's* balancing test).

126. *County of Yakima*, 112 S. Ct. at 692-93 (noting that *Brendale* involved proposed extension of inherent tribal power, not asserted restrictions on congressionally conferred state power).

127. *Id.* at 693 (citing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 177 (1980) (Rehnquist, J., concurring in part and dissenting in part), which concluded that balancing of interests test is improper for determining validity of statutes because use of that type of test may actually generate results that contradict congressional intent).

128. *Id.* at 693 (citing *Washington*, 447 U.S. at 177, which held that balancing test is reserved for Congress because only Congress may choose whether to preempt state tax law).

129. See *Montana v. Blackfoot Tribe of Indians*, 471 U.S. 759, 765 (1985) (establishing "unmistakably clear" congressional intent standard for evaluating permissibility of state taxation of Indians and reservation lands).

130. *County of Yakima*, 112 S. Ct. at 688.

131. *Id.* at 702 (citing WASH. REV. CODE § 84.60.020 (1989), which specifies state ad valorem tax); *Timber Traders, Inc. v. Johnston*, 548 P.2d 1080, 1083 (Wash. 1976) (en banc) (holding that burden of ad valorem tax is solely on land); *Clizer v. Krauss*, 106 P. 145, 146-47 (Wash. 1910) (concluding that ad valorem tax burden rests on property only).

132. *County of Yakima*, 112 S. Ct. at 692 (citing *Timber Traders*, 548 P.2d at 1083). While the Washington State Supreme Court's interpretation was that the tax burden was on property alone, *Timber Traders*, 548 P.2d at 1083, the fact that it is the individual who must pay the ad valorem tax means that the tax actually burdens the individual. Moreover, the fact that the fee-patented land parcels in question were scheduled to be sold to pay off the taxes because the owners could not afford them, *id.* at 1080, directly contradicts the conclusion that the burden is on the land alone.

133. *County of Yakima*, 112 S. Ct. at 692.

4. *The excise tax issue*

The Supreme Court distinguished a tax on land from a tax on the sale of land.¹³⁴ The Court found that while the General Allotment Act permitted the imposition of a tax on land, it did not permit a tax on land sales.¹³⁵ While subjecting allottees to all state laws might conceivably include the imposition of an excise tax, the Court found the statute ambiguous as to this concept.¹³⁶ Following the canon of construction in Indian jurisprudence that ambiguous statutes should be interpreted in favor of Indians,¹³⁷ the Supreme Court ruled in favor of the tribes on this issue.¹³⁸

C. *Justice Blackmun's Partial Concurrence and Dissent*

Justice Blackmun concurred in the holding that the excise tax could not be imposed on the sale of fee-patented reservation lands.¹³⁹ He dissented, however, with respect to the holding that the County could impose an ad valorem tax on fee-patented land situated on a reservation.¹⁴⁰ Agreeing that the correct standard to use in determining whether the tax may be imposed is the "unmistakably clear" intent standard, Justice Blackmun argued that the tax was impermissible under the standard and that the majority applied the standard incorrectly in three ways.¹⁴¹

First, Justice Blackmun argued that the majority found "unmistakably clear" congressional intent to allow such taxation in an aban-

134. *Id.* at 693-94.

135. *Id.* at 694. The General Allotment Act, as amended by the Burke Act, expressly allows for "taxation of . . . land." 25 U.S.C. § 349 (1988).

136. See *County of Yakima*, 112 S. Ct. at 693 (stating that "taxation of land" may be interpreted as including taxation on proceeds of land or may be interpreted to mean "that though the object of the sale here is land, that does not make land the object of the tax").

137. See *id.* (citing *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)) (establishing that when faced with more than one possible statutory interpretation, statute is to be "construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit"); see also *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930) (holding that unclear treaty provisions are to be interpreted in favor of Indian tribes because Indians are "weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith").

138. *County of Yakima*, 112 S. Ct. at 694. The majority explained that "a lien upon real estate does not convert a tax into a tax upon real estate." *Id.* at 693-94. The majority reasoned further that to hold that a lien on real estate to pay a tax converts the tax into a tax on the real estate would have the effect of validating "all sorts of state taxation of reservation-Indian activities . . . (even the cigarette sales tax disallowed in *Moe*) by merely making the unpaid tax assessable against the taxpayer's fee-patented real estate." *Id.* at 694.

139. *Id.* (Blackmun, J., concurring in part and dissenting in part).

140. *Id.*

141. *Id.* at 694-95 (arguing that Supreme Court majority chose correct standard for issue, but failed to apply standard properly).

doned proviso of the Burke Act,¹⁴² which, by its very terms, applied only to prematurely patented allotments.¹⁴³ Moreover, Blackmun concluded that the proviso's antecedent principal clause, section 6 of the General Allotment Act, was obsolete in light of the IRA.¹⁴⁴

Second, Blackmun said that the majority inferred an "unmistakably clear" intent in section 5 of the General Allotment Act, an otherwise irrelevant statutory section that itself did not mention taxation of fee-patented lands.¹⁴⁵ The majority held that the Burke Act "re-affirmed for 'prematurely' patented land what section 5 of the General Allotment Act implied with respect to patented land generally: subjection to real estate taxes."¹⁴⁶ Justice Blackmun criticized the majority for inferring the existence of "unmistakably clear" congressional intent by drawing on its own intuition and reasoning that the concept of land as alienable and encumberable but not taxable would be "strange."¹⁴⁷

Third, and most important, Justice Blackmun pointed out that the majority assumed that it could give no weight to the numerous complex, intervening statutes that unequivocally reflect a complete

142. See *supra* notes 67-68, *infra* notes 152-53 and accompanying text (noting that Burke and General Allotment Acts, though not repealed, are remnants of abandoned federal policy).

143. *County of Yakima*, 112 S. Ct. at 694 (Blackmun, J., concurring in part and dissenting in part). "Prematurely patented" allotments are those parcels to which a patent was issued to an allottee prior to the expiration of the trust period. See 25 U.S.C. § 349 (1988) (stipulating that Secretary of Interior may use discretion when deciding whether to issue patents in fee simple to "competent" allottees prior to trust period expiration, and that taxation restrictions would be removed on prematurely patented lands once Secretary determined allottees to be competent). This notion of competency is likely a carryover of the paternalistic attitudes evident in earlier Indian law opinions. See, e.g., *United States v. Creek Nation*, 295 U.S. 103, 110 (1935) (referring to relationship of United States to Indian Nations as "guardianship"); *United States v. Kagama*, 118 U.S. 375, 383 (1886) (recognizing that Federal Government and Indian tribes and Nations have special trustee/ward relationship); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (characterizing Indian tribes as "domestic dependent nations" with relationship to Federal Government resembling that of ward to guardian).

144. *County of Yakima*, 112 S. Ct. at 695 (Blackmun, J., concurring in part and dissenting in part) (reasoning that Burke Act's amendment to § 6 of General Allotment Act must, at very least, curtail section's validity as measure of congressional intent). The IRA's principal clause, however, specifically prohibits further allotment of tribal reservations. 25 U.S.C. § 461 (1988). Blackmun's reasoning suggests that Congress may have intended the Burke Act to continue with its effect despite the subsequent enactment of the IRA, but such a possibility should not have been considered to meet the stringent "unmistakably clear" intent standard. *County of Yakima*, 112 S. Ct. at 695 (Blackmun, J., concurring in part and dissenting in part).

145. *County of Yakima*, 112 S. Ct. at 695-96 (Blackmun, J., concurring in part and dissenting in part).

146. *Id.* at 691 (emphasis added).

147. *Id.* at 694 (criticizing majority for inferring congressional intent of statute by reasoning that ramifications of another conceivable interpretation would be "strange"). Justice Blackmun noted that "strangeness" in a statute should be considered ambiguity, and the statute should therefore be construed in favor of the Indians. *Id.* at 695. He further contended that while the majority's conclusion is based on its own logical fiscal theory, the conclusion is ultimately inferred, and Congress has made its agreement with this inferential theory "less than 'unmistakably clear.'" *Id.* at 696.

change in federal Indian policy.¹⁴⁸ Justice Blackmun asserted that the majority misconstrued the nature of federal preemption by inquiring as to whether the Federal Government had repealed its own law.¹⁴⁹ In contrast, Justice Blackmun argued that the more precise issue in the evaluation is whether Congress had preempted state law.¹⁵⁰ Moreover, when state law impedes the execution and accomplishment of the purposes and objectives of Congress, it is preempted.¹⁵¹

III. ANALYSIS OF *COUNTY OF YAKIMA V. CONFEDERATED TRIBES & BANDS OF THE YAKIMA INDIAN NATION*

A. *Preemption? The Validity of the General Allotment and Burke Acts in Light of the Indian Reorganization Act and the Change in Federal Indian Policy*

While the General Allotment and the Burke Acts have never been repealed by Congress, the assimilationist policies behind their enactment have since been relinquished.¹⁵² The Meriam Report was influential in implementing the abandonment of assimilationist policies.¹⁵³ Despite the erosion of the rationale underlying the General

148. *Id.* at 694-95. The majority dismissed as a "great exaggeration" the contention that the permissibility of such state jurisdiction over fee-patented reservation lands would be "manifestly inconsistent with the policies of Indian self-determination and self-governance that lay behind the Indian Reorganization Act and subsequent congressional enactments." *Id.* at 692. The majority went further to say, "In any case, these policy objections do not belong in this forum." *Id.*

149. *See id.* at 695-96 (Blackmun, J., concurring in part and dissenting in part) (criticizing majority for focusing its attention on fact that General Allotment Act was never repealed); *see also id.* at 690-92 (Scalia, J.) (examining General Allotment Act and holding that state taxation authority with respect to Indian-owned fee-patented reservation lands was not terminated by Indian Reorganization Act of 1934 because Congress did not return allotted lands to their preallotted status).

150. *See id.* at 696 (Blackmun, J., concurring in part and dissenting in part) (noting that proper inquiry in all state-Indian jurisdiction cases should be focused on whether Congress has preempted state law and not whether it has repealed its own law); *see also* *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (holding state gambling regulations inapplicable in light of federal approval and promotion of tribally operated gambling enterprises); *Bryan v. Itasca County*, 426 U.S. 373, 376 n.2 (1976) (noting that principle that state taxation of Indian lands is invalid stems from general preemption analysis).

151. *County of Yakima*, 112 S. Ct. at 696-97 (Blackmun, J., concurring in part and dissenting in part) (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941), which denoted as preempted by federal law any state law that obstructs execution and accomplishment of congressional objectives and purposes).

152. The 1920s and 1930s witnessed the Federal Government's departure from the assimilationist policies of the allotment era. *See generally* ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 284-300 (1970) (discussing Government's realization that assimilation policies had failed and examining reform measures resulting from realization); TYLER, A HISTORY OF INDIAN POLICY, *supra* note 13, at 112-50 (discussing findings and recommendations of Meriam Report and presenting Government's abandonment of assimilationist policies and adoption of IRA as efforts to correct damage that assimilationist policies exerted on Indian culture and welfare).

153. *See supra* notes 71-75 and accompanying text (describing Meriam Report); *see also*

Allotment Act, the Court never definitively determined whether the provisions of the Act at issue had been repealed implicitly by subsequent congressional action.¹⁵⁴ While it is true that implicit repeals are not favored as a rule,¹⁵⁵ the grant of authority to the states in section 6 of the Act does not necessarily remain valid. A state can be precluded from taxing Indian lands without the existence of a repeal, express or implied.¹⁵⁶ The inquiry should be whether Congress preempted the state taxation laws involved, rather than whether Congress has repealed the federal statute.¹⁵⁷

The majority misconstrued the nature of federal preemption of state laws that attempt to tax Indians because it confined its inquiry to whether the Federal Government had repealed its own law.¹⁵⁸

supra notes 76-83 and accompanying text (discussing subsequent changes in federal policy, from allotment to reorganization, stemming from publication of Meriam Report).

154. The Court went only so far as to hold that a finding that the section of the General Allotment Act at issue had been repealed was unsupportable because "it is a 'cardinal rule . . . that repeals by implication are not favored.'" *County of Yakima*, 112 S. Ct. at 700 (quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936)). This statement suggests that obsolete laws will not be invalidated by the judiciary but rather must be explicitly repealed by the legislature, despite the existence of subsequently enacted statutory schemes that are in disagreement with older laws.

155. *Posadas*, 296 U.S. at 503 (noting "cardinal rule" disfavoring repeals by implication).
156. *County of Yakima*, 112 S. Ct. at 696 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun agreed with the majority that implied repeals are disfavored. *Id.* He argued, however, that a "repeal" is not necessary to preclude the County from taxing fee-patented lands. *Id.* Justice Blackmun asserted that the proper focus should have been on whether the County's taxation power over the fee-patented lands was preempted by Congress, not whether Congress had repealed its own law. *Id.* (citing *Bryan v. Itasca County*, 426 U.S. 373, 376 n.2 (1976)). The note in *Bryan v. Itasca County* to which Justice Blackmun cited is worth reiterating:

The *McClanahan* principle [that state taxation of Indian lands is impermissible absent congressional consent] derives from a general pre-emption analysis . . . that gives effect to the plenary and exclusive power of the Federal Government to deal with Indian tribes . . . and "to regulate and protect the Indians and their property against interference even by a state" This pre-emption analysis draws support from "the 'backdrop' of the Indian sovereignty doctrine" . . . ; "[t]he policy of leaving Indians free from state jurisdiction and control [that] is deeply rooted in the Nation's history" . . . ; and the extensive federal legislative and administrative regulation of Indian tribes and reservations

Bryan, 426 U.S. at 376 n.2 (citations omitted).

157. *County of Yakima*, 112 S. Ct. at 696 (Blackmun, J., concurring in part and dissenting in part).

158. *See id.* at 689-93 (examining General Allotment Act and holding that state taxation authority with respect to fee-patented Indian lands was not terminated by IRA because Congress chose not to return allotted lands to their preallotted status). The logic behind Congress' failure to return the allotted land to its preallotted status seems fairly clear. First, Indian allottees lost much of the fee-patented land to non-Indians through inheritance, sale, forced tax sales, mortgage foreclosures, and even theft. *See supra* notes 46, 63-66 and accompanying text (explaining ways in which many allotted parcels ended up under non-Indian ownership). Once fee-patented lands were owned by non-Indians, Congress was not likely to return those lands to tribes. Second, immunity from state taxation is a privilege the Federal Government was probably not willing to bestow on non-Indian landowners. Third, many allotments were controlled by land companies that had entered into leasing arrangements, some illegal, with non-Indians. *See HANDBOOK OF FEDERAL INDIAN LAW, supra* note 5, at 137 (noting problems created by land company submarket leasing of allotments). Fourth, Con-

State jurisdiction over Indian affairs is preempted if it conflicts with current federal policy, unless the state interests sufficiently outweigh the federal and tribal interests at stake.¹⁵⁹ In *California v. Cabazon Band of Mission Indians*,¹⁶⁰ the Supreme Court recognized that the federal tradition of immunizing Indians from state taxation is stronger than the state interest in taxing them.¹⁶¹ In *Hines v. Davidowitz*,¹⁶² the Supreme Court held that state law will be considered preempted by federal law only to the extent that it obstructs "the accomplishment and execution of the full purposes and objective of Congress."¹⁶³ With these points in mind, state jurisdiction should be examined to determine whether it will be incompatible with federal or tribal interests.¹⁶⁴

Congress has enacted numerous statutes enhancing Indian self-government and self-determination, as well as statutes countering the destructive and nearly genocidal policies of previous government establishments.¹⁶⁵ Furthermore, Congress has enacted some

gress was probably less concerned with the easier task of halting the allotment process than it was with reversing the damage caused by allotment.

159. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983), for proposition that state jurisdiction is preempted if incompatible with and outweighed by federal and tribal interests). Numerous state courts and agencies have concluded that the imposition of state taxes on Indian-owned fee-patented reservation lands is impermissible. See, e.g., *Battese v. Apache County*, 630 P.2d 1027, 1029-31 (Ariz. 1981) (holding that state is without authority to impose taxes on fee-patented reservation lands owned by Indians); *Cory v. Campbell*, 178 Cal. Rptr. 823, 827-29 (Ct. App. 1981) (holding state to be without power to tax Indian-owned fee-patented lands), *cert. denied*, 459 U.S. 828 (1982); 1985 Op. N.D. Atty. Gen. 37, 37 (1985) (containing North Dakota Attorney General's opinion that Indian land owned in fee is not subject to county real property tax). Neither the majority nor the dissent in *County of Yakima* mentioned these sources, however, even though they were discussed in the United States brief. Brief for United States as Amicus Curiae, *supra* note 104, at 8.

160. 480 U.S. 202 (1987).

161. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987) (noting that tradition of protecting Indians from state taxation outweighs state interest in such taxation).

162. 312 U.S. 52 (1941).

163. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

164. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-36 (1983) (holding that state law is generally preempted if it interferes or conflicts with federal and tribal interests reflected in federal law).

165. See, e.g., Indian Education Act, Pub. L. No. 92-318, 86 Stat. 334 (1972) (codified in scattered sections of 20 U.S.C.) (granting local educational agencies entitlement to financial assistance in meeting educational needs of Indian students); Indian Reorganization Act, 25 U.S.C. §§ 461-479 (1988) (ending allotment and assimilationist policies while promoting tribal self-government and autonomy); Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (1988) (maximizing tribal jurisdiction while minimizing state jurisdiction over adoption and child custody proceedings involving Indian children who are either tribal members or are eligible for tribal membership); Indian Land Consolidation Act, 25 U.S.C. §§ 2201-2211 (1988) (allowing for tribal land consolidation); Tribally Controlled School Act of 1988, 25 U.S.C. §§ 2501-2511 (1988) (authorizing federal grants to Indian tribes operating tribally controlled schools); Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (1988) (establishing comprehensive scheme for controlling bingo and gambling operations in Indian country, and noting "a principle goal of Federal Indian Policy is to promote tribal economic

statutes for the express purpose of expanding tribal land bases.¹⁶⁶ In light of these statutes and the direction of the Government in its management of Indian affairs, it is clear that the federal policy of Indian enhancement conflicts with the state interest in imposing an ad valorem tax on fee-patented lands located on a reservation and owned by tribal members. Because the inquiry should take into consideration the traditional federal notions of tribal sovereignty and the current congressional policy of promoting tribal autonomy, including the “‘overriding goal’ of encouraging tribal self-sufficiency and economic development,”¹⁶⁷ the County’s imposition of the taxes and the foreclosure on such lands directly conflicts with federal law and policy. Thus, the Court should have found the County’s taxation of the Indian land to be preempted.¹⁶⁸

B. “Unmistakably Clear” Intent?

The Court found that Congress evinced its intent to permit state taxation of fee-patented lands by including the word “taxation” in

development, tribal self-sufficiency, and strong tribal government”); Native American Languages Act, 25 U.S.C. §§ 2901-2906 (Supp. II 1990) (finding that “[a] special status is accorded Native Americans in the United States, a status that recognizes distinct cultural and political rights, including the right to continue separate identities”); Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified in scattered sections of 25 U.S.C., 42 U.S.C. § 5601, and 5 U.S.C. § 5331) (providing funding to help curb alcohol and drug abuse in Indian country); Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 13a, 450-450n, 455-458e & 42 U.S.C. § 2004b (1988), amended by 25 U.S.C. §§ 450a-450n (1988) (enhancing tribal governmental control over federally funded programs); Indian Health Care Improvement Act, Pub. L. No. 94-437, 90 Stat. 1400 (1976) (codified in scattered sections of 25 U.S.C.) (providing increased funds for enhancing Indian health care); Indian Financing Act of 1974, Pub. L. No. 93-262, 88 Stat. 77 (codified as amended in scattered sections of 25 U.S.C.) (establishing \$50 million revolving fund providing for loans and grants to Indian businesses, including loan guarantees, insurance for private sector loans, and interest subsidies); Indian Tribal Government Tax Status Act of 1982, Pub. L. No. 97-473, 96 Stat. 2607 (codified in scattered sections of 26 U.S.C.) (giving tribes favorable tax status similar to local and state governments to buttress tribal economic development); see also Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 KAN. L. REV. 713, 713-15 (1986) (presenting notion that nineteenth-century law was instrument of genocide when applied to Native Americans). Strickland specifically attacked the removal and assimilationist policies of the late nineteenth century. Strickland, *supra*, at 720-35. Strickland argued that these policies destroyed much of Indian culture, while claiming many Indian lives in the process. *Id.* at 721.

166. See, e.g., Act of Sept. 4, 1980, Pub. L. No. 96-340, 94 Stat. 1072 (expanding land base of Siletz Tribe); Act of Aug. 4, 1978, Pub. L. No. 95-337, 92 Stat. 455 (authorizing expansion of Fallon Indian reservation); Act of Sept. 21, 1972, Pub. L. No. 94-427, 86 Stat. 719 (providing for expansion of Warm Springs reservation); Act of Dec. 15, 1970, Pub. L. No. 91-550, 84 Stat. 1437 (restoring to Taos Pueblo ownership of Blue Lake, sacred location in Taos culture).

167. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 (1983)).

168. See Bryan v. Itasca County, 426 U.S. 373, 388-89 n.14 (1976) (noting that courts “‘are not obliged in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship’”) (quoting *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 663 (9th Cir. 1975)).

the Burke Act.¹⁶⁹ Importantly, the Burke Act of 1906 applies only to prematurely patented lands.¹⁷⁰ The majority was able to deduce taxability of all fee-patented lands from a preceding section of the General Allotment Act, however, and reasoned that the Burke Act was merely an explicit expression of the same principle.¹⁷¹ While it might indeed be "strange" for Congress to allow allotments to be alienable without being taxable,¹⁷² this uncertainty in the language of the General Allotment Act is ambiguous, not "unmistakably clear."¹⁷³

Because Congress amended the General Allotment Act with the Burke Act, it is hard to imagine that the same Congress would fail to make explicit an intent to tax *all* fee-patented land and instead leave the question of taxation to judicial interpretation and inference. This criticism carries more weight in light of the fact that it was the same Congress that amended section 6 of the General Allotment Act with the Burke Act in an effort to change the outcome of the

169. *County of Yakima*, 112 S. Ct. at 688 (agreeing with lower court in its determination that Congress "manifest[ed] a clear intention to permit the state to tax" fee-patented lands by mentioning that immunity from taxation would be "one of the restrictions that would be removed [from the allotment] upon conveyance in fee").

170. The Burke Act amended the section of the General Allotment Act that calls for allottees to be subject to the civil and criminal laws of the states. 25 U.S.C. § 349 (1988). For text of the Burke Act amendment, see *supra* note 56. Nowhere else in the Act is taxation of fee-patented land mentioned, and the Burke Act expressly discusses premature patenting and the removal of taxation restrictions after the issuance of a premature patent. 25 U.S.C. § 349. Without an exercise of the Secretary of the Interior's discretionary power, as authorized by the Burke Act, allottees would not receive the land in fee until the expiration of the 25-year trust period. See *supra* notes 5, 50-54 and accompanying text (explaining allotment and patenting processes).

171. See *County of Yakima*, 112 S. Ct. at 691 (stating that "it would seem strange" for Congress in § 5 of General Allotment Act to allow Indians to sell allotted lands without subjecting such lands to taxation and concluding that § 5 therefore must render allotted lands subject to taxation). Section 5 of the General Allotment Act provides that the United States shall issue to the allottee a patent in fee which is "free of all charge or incumbrance whatsoever." 25 U.S.C. § 348 (1988). The Court held that this section *implies* that patented lands are subject to real estate taxes. *County of Yakima*, 112 S. Ct. at 691. If this were the case, however, Congress would have had no reason to expressly mention taxation in the Burke Act proviso.

The Court also erred in its ruling that all fee-patented lands are taxable by the state. Section 16 of the IRA provides that the constitutions adopted by tribes organized under the IRA vest the tribes with the power "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe." 25 U.S.C. § 476(e) (1988). This provision, however, is limited to lands owned by tribes with IRA constitutions and does not extend to lands owned by individual members of the tribe. *Id.* Even though the Yakima Indian Nation has a constitution, this argument was unavailable to the Nation because it is not organized under the IRA.

172. See *County of Yakima*, 112 S. Ct. at 691 (concluding that strangeness of allowing alienation of land without its taxability necessitates conclusion that Congress intended all fee-patented lands to be taxable under state schemes).

173. One author has hypothesized that the majority's failure to find ambiguity in the Burke Act resulted from the Court's "total disregard of tribal sovereignty" and its failure to show "respect to tribal sovereignty." See Borrero, *supra* note 5, at 951-52 (arguing that Court failed to acknowledge Burke Act's "seemingly obvious ambiguity" and "denigrated tribal sovereignty" in dismissing Indian self-determination concerns as "a great exaggeration").

Supreme Court's ruling in *Matter of Heff*.¹⁷⁴ In *Heff*, the Court incorrectly inferred that the General Allotment Act subjected allottees to all civil and criminal law upon allotment.¹⁷⁵ The Burke Act made explicit the intention that allottees were not to be subjected to state jurisdiction until they received their patents in fee.¹⁷⁶

C. Canons of Statutory Construction

When faced with numerous possible interpretations of a statute, the canons of construction in Indian jurisprudence instruct that the statute be construed in favor of the Indians.¹⁷⁷ These canons further instruct that ambiguous statutory provisions be interpreted to the benefit of Indians.¹⁷⁸ Relying on the same canons of construction, the majority ruled, ironically, that the proposed excise tax could not be imposed.¹⁷⁹ Under these canons, the statute should not be interpreted as permitting the taxation of all fee-patented allotments, but rather taxation only of prematurely patented lands.¹⁸⁰

IV. RECOMMENDATIONS

The Supreme Court failed to recognize and follow current federal policy in its decision in *County of Yakima*. As a result, the Court has potentially subjected thousands of acres of Indian-owned fee-patented lands to state taxation and thus to the risk of loss through foreclosure proceedings. Procedures are available under the IRA to circumvent the effects of the Court's holding, but such proceedings would prove to be too impractical or undesirable to employ.

The IRA authorizes the Secretary of the Interior to acquire lands by gift to expand the tribal land base.¹⁸¹ Individuals may donate their fee-patented lands to the United States for the Secretary to

174. See *County of Yakima*, 112 S. Ct. at 691 (noting that reason for enactment of Burke proviso was to change outcome of Supreme Court's ruling in *Heff*).

175. Cf. *Matter of Heff*, 197 U.S. 488, 505-09 (1905) (holding allottees subject to state jurisdiction immediately upon delivery of allotment possession).

176. See *County of Yakima*, 112 S. Ct. at 691 (discussing Burke Act as response to *Heff* and explaining that Act made jurisdiction over allottees contingent on allottee's receipt of fee patent, either at end of trust period or at discretion of Secretary of Interior).

177. *Id.* at 693 (citing *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)).

178. *Id.*

179. *Id.* at 693-94.

180. See *supra* notes 169-76 and accompanying text (criticizing Supreme Court for finding "unmistakably clear" intent in Burke Act that all fee-patented lands are taxable when terms of Act apply only to prematurely patented allotments).

181. 25 U.S.C. § 465 (1988). Section 5 of the Indian Reorganization Act states, in pertinent part:

The Secretary of the Interior is authorized, in his [or her] discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations,

place in trust on behalf of Indian tribes.¹⁸² This procedure exempts the lands from state taxation¹⁸³ while allowing individuals to retain possession of the lands. Individuals may be unwilling to give their land away, however, because to do so would mean losing control over the land and making it unavailable for sale or use as collateral for present or future loans.

The IRA also authorizes the appropriation of up to \$2 million each year for the specific purpose of funding land purchases by the Secretary of the Interior to expand the tribal land base.¹⁸⁴ If Congress would appropriate money specifically for the purchase of lands at risk, the newly acquired land would be exempt from state taxation because it will be held in trust upon purchase.¹⁸⁵ Under such a scheme, the tribal land base would be expanded and the individual Indian owners could retain possession of their allotments. The likelihood that Congress will appropriate funds up to or above the \$2 million per year authorized allocation is unfortunately remote, however.¹⁸⁶ Moreover, the net effect of this procedure would be that Indians owning lands at risk would be compensated for the taking of land they would continue to occupy and use, making utilization of this procedure undesirable.

Because procedures under the IRA are undesirable and impractical, Congress should enact legislation that would give fee-patented allotments a nontaxable status. Such legislation should reflect the current federal policy of preserving the tribal land base and promoting tribal self-government and self-determination. The following proposed statute would further this policy: "Any fee-patented allotment issued pursuant to the General Allotment Act of 1887 shall remain exempt from state taxation until such time that the title to said allotment is held by someone other than an 'Indian,' as defined

including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

....

Title to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Id. (emphasis added).

182. *Id.*

183. *Id.*

184. *Id.* Such authorization, however, has never been fully implemented. *Cf.* HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, at 150 (stating that IRA failed to substantially increase tribal landholdings because "Congress failed to appropriate the authorized amounts").

185. *See supra* note 181.

186. *Cf.* Keith White, *Senators Rail Against Indian Funding Proposal*, Gannett News Serv., Feb. 21, 1991, available in LEXIS, Nexis Library, Wires File (reporting comment by Assistant Secretary of Interior for Indian Affairs that Federal Government's budget deficit problems preclude sufficient funding for Indian affairs).

in § 1301(4) of title 25 of the United States Code.”¹⁸⁷ Such a statute appears to be a more cost-effective and practical solution than those available under current statutory schemes.

The proposed statute would legislatively overturn the holding in *County of Yakima*¹⁸⁸ by halting the effects of the Court’s interpretation of the General Allotment Act.¹⁸⁹ The Court in *County of Yakima* interpreted the Burke Act amendment to the General Allotment Act to expressly subject fee-patented reservation lands to state taxation laws.¹⁹⁰ Thus, with the enactment of a statute that exempts from state taxation fee-patented reservation land owned by Indians, tribal land bases would be protected from state taxation and foreclosure proceedings.

The proposed statute, however, does not circumvent any difficulties there might be in ascertaining whether the land in question was in fact allotted under the General Allotment Act. Inquiries will still

187. The proposed statute incorporates the present statutory definition of “Indian.” 25 U.S.C.A. § 1301(4) (West Supp. 1991) (defining “Indian” as “any person who would be subject to the jurisdiction of the United States as an Indian under section 1153 of Title 18 [Major Crimes Act] if that person were to commit an offense listed in that section in Indian country to which that section applies”). The proposed act is therefore fully within the permissible bounds of legislation preferential to Indians. *Cf. Morton v. Mancari*, 417 U.S. 535, 553 n.24, 555 (1974) (noting that Indian preference in hiring at Bureau of Indian Affairs is not racial preference because many persons racially classifiable as Indians are excluded, and therefore preference is not violative of due process). Likewise, the Major Crimes Act, 18 U.S.C. § 1153 (1988), is not applicable to all persons who might be racially classified as Indian. *See, e.g., United States v. Antelope*, 430 U.S. 641, 646 n.7 (1977) (noting limitations on jurisdictional scope of § 1153); *Mancari*, 417 U.S. at 553 n.24 (recognizing that federal criminal jurisdiction does not extend to many persons who can be racially classified as “Indian”); *United States v. Heath*, 509 F.2d 16, 19 (9th Cir. 1974) (finding member of terminated Klamath Indian Nation not “Indian” for jurisdictional purposes under Major Crimes Act, which allows for federal prosecution of Indians for commission of certain enumerated offenses); *United States v. Driver*, 755 F. Supp. 885, 888 (D.S.D. 1991) (holding as not “Indian” for jurisdictional purposes individual who did not enjoy “the benefits of tribal affiliation,” live on reservation, or participate in Indian societal affairs); *St. Cloud v. United States*, 702 F. Supp. 1456, 1466 (D.S.D. 1988) (holding member of terminated Ponca Tribe not subject to prosecution under Major Crimes Act despite fact that his ties to federally recognized Indian tribe normally would qualify him as subject to Act).

188. *See supra* notes 102-51 and accompanying text (presenting Supreme Court’s opinion in *County of Yakima*).

Congress has previously implemented legislation to effectively overrule outcomes of Supreme Court decisions in the field of Indian law. For example, in *Duro v. Reina*, the Supreme Court ruled that tribal inherent sovereignty does not include criminal jurisdiction over nonmember Indians. *Duro v. Reina*, 495 U.S. 676, 688 (1990). Later that year Congress amended the section of the Indian Civil Rights Act defining tribal powers of self-government to include: “the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.” Indian Civil Rights Act § 201(2), 25 U.S.C. § 1301(2) (1988), as amended by Department of Defense Appropriations Act of 1991, § 8077(b), 104 Stat. 1872, 1892 (1990) (emphasis added).

189. *See supra* notes 139-51 and accompanying text (discussing Justice Blackmun’s criticism of Supreme Court’s interpretation of General Allotment Act structure).

190. *See supra* notes 118-23, 130 and accompanying text (presenting Court’s determination that congressional intent to permit state taxation of fee-patented allotments was “unmistakably clear”).

have to be made on a case-by-case basis under either the proposed statute or the existing system, as upheld by the Supreme Court in *County of Yakima*,¹⁹¹ because both rely on knowing whether a given land parcel was allotted under the Act. Difficulties might arise in trying to determine whether the land the state intends to tax was allotted under the Act,¹⁹² or if the title to the land was acquired through homesteading or as "surplus."¹⁹³

The proposed statute, however, would decrease the available tax base in communities where state and local governments previously levied or were planning to levy taxes on Indian-owned fee-patented lands, resulting in lost tax revenues.¹⁹⁴ The amount of revenue generated for the state by taxation of fee-patented allotments will vary from reservation to reservation, depending on factors such as available natural resources, location, and general land quality. Some local governments are presently planning to levy taxes on fee-patented tribal lands. On the White Earth Indian reservation in Minnesota, for example, the County of Mahnomen, located entirely within the reservation, is pursuing avenues to levy property taxes on the White Earth Band of Chippewa's Shooting Star Casino.¹⁹⁵ To counter these attempts, the Band is considering petitioning to have the land converted to trust status.¹⁹⁶ The proposed statute would accelerate certain fee simple landholdings such as the White Earth Band's to a nontaxable status, and the Indian fee-patent holder would continue to have control as well as possession of the allotment.

Additionally, an environment where the land is tax-exempt is

191. See *supra* notes 124-33 and accompanying text (determining ad valorem tax levied on fee-patented lands to be permissible).

192. See HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, at 138 (estimating that two-thirds of 40 million acres of total land allotted went into non-Indian ownership between inception of General Allotment Act in 1887 and enactment of IRA in 1934).

193. See HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, at 138 (noting that 60 million acres of tribal land was sold as surplus land to homesteaders and corporations or was ceded outright).

194. See Brief for United States as Amicus Curiae, *supra* note 104, at 27 (discounting assertion by County of Yakima and its amici that fee-patented lands' immunity from state taxation would be devastating). Only \$10,718.75 in ad valorem taxes were levied against the Yakima Nation in 1987. *Id.* On the other hand, the Federal Government has contributed over \$3 million to Yakima Reservation school districts. *Id.* Policy questions would surely be raised regarding the appropriateness of Indians benefiting from state services such as education if they were not required to pay taxes that finance those services.

195. See Pat Doyle, *Lean-budget Counties Cast Property-tax Eye on Indian Band Casinos*, STAR TRIB., Sept. 19, 1992, at 1A (reporting on Minnesota county's intention to increase tax revenues by imposing tax on casino in accordance with Supreme Court decision in *County of Yakima*). White Earth members paid \$375,000 in property taxes in 1991. *Id.* The chairman of the White Earth Band estimated that the casino alone would produce \$280,000 in annual state property tax revenues for the county. *Id.*

196. *Id.*

more conducive to economic development. An otherwise risky small business venture would have less overhead, thus freeing resources for further investment that would otherwise be paid for taxes. The statute could therefore indirectly promote the economic development of the tribal community, thereby furthering tribal self-determination.

For these reasons, Congress should pursue enacting legislation similar to that proposed by this Note. The proposed statute is more cost-effective and practical than the available solutions under the existing statutory scheme. The existing scheme supplies costly and impractical means whereby fee-patented reservation lands can be placed in trust on behalf of tribes, thus exempting the land from state taxation. The proposed statute, on the other hand, is reflective of current federal policy of preserving the tribal land base and promoting tribal self-determination.

CONCLUSION

In *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, the Supreme Court conferred to the states the power necessary to diminish the tribal land base.¹⁹⁷ By allowing the states to impose an ad valorem tax on fee-patented lands owned by Indians and to further permit foreclosure on such parcels, the Court has given states the power to diminish the tribal land base and thereby contribute to the dissolution of what remains of tribal sovereignty and integrity. Reservation Indians are among the poorest citizens in this country.¹⁹⁸ With suicide and despair on the rise among reservation Indians,¹⁹⁹ land remains one of the few resources that offers hope. By allowing foreclosures on fee-patented lands as a state gov-

197. See *County of Yakima*, 112 S. Ct. at 692-93 (holding that County's ad valorem tax on Indian-owned fee-patented reservation land is permissible); see also *id.* at 698 (Blackmun, J., concurring in part and dissenting in part) (criticizing majority for "justifying further erosions—through tax foreclosure actions as in this case—to the land holdings of the Indian people").

198. See, e.g., WILLIAM BROPHY ET AL., *THE INDIAN: AMERICA'S UNFINISHED BUSINESS* 62 (1966) ("The economic position of the Indians is less favorable than that of any other minority group."); SAR A. LEVITAN & WILLIAM B. JOHNSTON, *INDIAN GIVING: FEDERAL PROGRAMS FOR NATIVE AMERICANS* 11 (1975) ("Indian per capita income is only half of whites. . . . [T]he overall Indian average [income] per year . . . [i]s the lowest among any ethnic group."); President's Message to the Congress on Indian Affairs, PUB. PAPERS 564, 564 (July 8, 1970) ("On virtually every scale of measurement—employment, income, education, health—the condition of Indian people ranks at the bottom."). The 1980 census reported that 29% of reservation Indians were living below the poverty level and that the per capita income for reservation Indians was \$3600. GETCHES & WILKINSON, *supra* note 41, at 8. The Bureau of Indian Affairs reported reservation unemployment at 39% in 1983 and 1984. *Id.*

199. *Youth Study Shows Grim Suicide Rates*, NCAI SENTINEL, May 1992, at 5 (noting University of Minnesota study finding that Indian teens suffer from suicide rate four times higher than other youths).

ernmental remedy for tribal members' inability to pay ad valorem real estate taxes, land is once again being taken away from Indian people. While options are available under present statutory provisions, they would prove impractical in application. Congress should therefore enact legislation that would exempt the land parcels at risk from state taxation. Until Congress chooses to react, thousands of acres of reservation land, as well as the livelihoods of many reservation Indians and tribes, will remain at risk.