# ARIZONA APPELLATE DECISIONS 1980-81: Part II

## CONTENTS

# I. BONDS

## A. TAX INCREMENT FINANCING: CONSTITUTIONALITY IN LIGHT OF ARIZONA VOTER APPROVAL REQUIREMENTS

A common provision in state constitutions is the requirement of voter approval before a political subdivision[1] may become indebted in excess of defined limitations.[2] Frequently, courts have been called upon to decide whether particular bond issues fall within these limitations.[3] The courts have generally held that bond issues which do not commit any portion of a political subdivision's general tax revenues are exempt from debt limitation provisions.[4] Bond issues where the bond obligations are payable out of special funds are an example of bond issues which may not require prior voter approval under the debt limitation provisions.[5]

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1. Throughout the text of this Casenote, the term "political subdivision" will be interchanged with the term "municipality." The constitutional and statutory provisions discussed in this Casenote each use different terms. ARIZ. CONST. art. IX, § 8 uses the words "county, city, town, school district, or other municipal corporation"; *id.* art. VII, § 13 uses the phrase "political subdivision"; and ARIZ. REV. STAT. ANN. § 36-1481 (Supp. 1980-81) uses the term "municipality." For purposes of this Casenote, however, there is no distinction.

2. *See, e.g.*, Ariz. Const. art. IX, § 8; KY. CONST. § 157; WASH. CONST. art. VIII, § 6. For the text of Arizona's debt limitation provision, see note 6 *infra*.

3. *See, e.g.*, City of Phoenix v. Phoenix Civic Auditorium & Convention Center Ass'n, 99 Ariz. 270, 408 P.2d 818 (1965); Switzer v. City of Phoenix, 86 Ariz. 121, 341 P.2d 427 (1959); Guthrie v. City of Mesa, 47 Ariz. 336, 56 P.2d 655 (1936); Richards v. City of Muscatine, 237 N.W.2d 48 (Iowa 1975); Miller v. Covington Dev. Auth., 539 S.W.2d 1 (Ky. 1976); Tribe v. Salt Lake City Corp., 540 P.2d 499 (Utah 1975); State *ex rel.* Wash. State Fin. Comm. v. Martin, 62 Wash. 2d 645, 384 P.2d 833 (1963).

4. *See, e.g.*, City of Phoenix v. Phoenix Civic Auditorium & Convention Center Ass'n, 99 Ariz. 270, 286-89, 408 P.2d 818, 829-30 (1965); Guthrie v. City of Mesa, 47 Ariz. 336, 339-44, 56 P.2d 655, 656-58 (1936); Richards v. City of Muscatine, 237 N.W.2d 48, 64 (Iowa 1975); Tribe v. Salt Lake City Corp., 540 P.2d 499, 503 (Utah 1975); State *ex rel.* Wash. State Fin. Comm. v. Martin, 62 Wash. 2d 645, 652-63, 384 P.2d 833, 838-44 (1963). The courts have also held that bond issues not committing any part of a political subdivision's general revenues are exempt from the voter approval requirement of article VII, § 13 of the Arizona Constitution. *See* Tucson Transit Auth., Inc. v. Nelson, 107 Ariz. 246, 251, 485 P.2d 816, 821 (1971); City of Tucson v. Corbin, 128 Ariz. 83, 87-88, 623 P.2d 1239, 1243-44 (Ct. App. 1980).

5. *See* City of Phoenix v. Phoenix Civic Auditorium & Convention Center Ass'n, 99 Ariz. 270, 286-89, 408 P.2d 818, 829-30 (1965) (long-term lease obligation payable from general fund is distinguishable from obligation payable from special fund not obtained from general taxes and therefore constitutes debt within the constitutional limitation); Switzer v. City of Phoenix, 86 Ariz. 121, 124, 341 P.2d 427, 428 (1959) (weight of authority holds that obligations payable from special funds are not debts within the meaning of constitutional debt limitations); Guthrie v. City of Mesa, 47 Ariz. 336, 339-44, 56 P.2d 655, 656-58 (1936) (income of utility which has not been pledged for payment of other indebtedness may be placed into a special fund for payment of bonds and such bonds will not constitute indebtedness within the constitutional debt limitation provisions); Richards v. City of Muscatine, 237 N.W.2d 48, 64 (Iowa 1975) (bonds payable solely out of a fund created by a special assessment do not create a debt within the meaning of the constitution); Miller v. Covington Dev. Auth., 539 S.W.2d 1, 5 (Ky. 1976) (bond issues payable from ad valorem taxes cannot be placed in the special fund category and thus constitute debts under the constitutional debt limitation provisions); State *ex rel.* Wash. State Fin. Comm. v. Mar-

In addition to its debt limitation provision,[6] the Arizona Constitution requires that all real property taxpayers who are qualified electors of the political subdivision affected by a proposed bond issue have the opportunity to vote whether to issue such bonds.[7] In contrast to the debt limitation provision, this voter approval requirement applies regardless of the amount of indebtedness.[8] In the recent case of *City of Tucson v. Corbin*,[9] the Arizona Court of Appeals held that tax increment bonds issued under Arizona's Slum Clearance and Redevelopment Law[10] were a form of debt that affected the political subdivision within which the redevelopment was planned.[11] Therefore, under Arizona's Constitution, issuance of the bonds required prior voter approval.[12] Since Arizona's Slum Clearance and Redevelopment Law did not require such prior voter approval,[13] it was held to be unconstitutional.[14]

This Casenote will first discuss tax increment financing (TIF) and the attempted usage of TIF under Arizona's Slum Clearance and Redevelopment Law. The next section will present the constitutional challenges to

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tin, 62 Wash. 2d 645, 652-63, 384 P.2d 833, 838-44 (1963) ("creation of a special fund alone, from which an obligation would be paid, does not make the obligation any less a state debt if it is promised that general taxes are to go into the fund"). The courts have also used the special fund doctrine to determine if a bond obligation requires voter approval under article VII, § 13 of the Arizona Constitution. *See* Tucson Transit Auth., Inc. v. Nelson, 107 Ariz. 246, 248, 485 P.2d 816, 818 (1971) (bonds payable from special funds for which the issuing municipality assumes no liability do not require prior electorate approval); Arizona State Highway Comm'n v. Nelson, 105 Ariz. 76, 81-82, 459 P.2d 509, 514-15 (1969) (highway right of way bonds which pledge only the revenues of the State Highway Fund as security are special fund obligations and are not subject to constitutional voter approval requirements); City of Globe v. Willis, 16 Ariz. 378, 383, 146 P. 544, 546 (1915) (bonds payable from special fund funded by real property owners benefitting from sewer improvements where the city was exempt from liability do not require voter approval); City of Tucson v. Corbin, 128 Ariz. 83, 87-88, 623 P.2d 1239, 1243-44 (Ct. App. 1980).

6. ARIZ. CONST. art. IX, § 8. The text of this provision provides that:

> No county, city, town, school district, or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding six per centum of the taxable property in such county, city, town, school district, or other municipal corporation, without the assent of a majority of the property taxpayers, who must also in all respects be qualified electors, therein voting at an election provided by law to be held for that purpose, the value of the taxable property therein to be ascertained by the last assessment for State and county purposes, previous to incurring such indebtedness . . . .

7. *Id.* art. VII, § 13. This section provides, "Questions upon bond issues or special assessments shall be submitted to the vote of real property taxpayers, who shall also in all respects be qualified electors of this State, and of the political subdivisions thereof *affected* by such question." (emphasis added).

8. *See id.*

9. 128 Ariz. 83, 623 P.2d 1239 (Ct. App. 1980).

10. ARIZ. REV. STAT. ANN. §§ 36-1471 to 1491 (1974 & Supp. 1980-81).

11. 128 Ariz. at 88, 623 P.2d at 1244.

12. *See* ARIZ. CONST. art. VII, § 13; text & note 7 *supra*.

13. ARIZ. REV. STAT. ANN. § 36-1481(B) (Supp. 1980-81) provides:

> The bonds . . . of the municipality issued pursuant to . . . this section are not a general obligation or general debt of the municipality, the state or any of its political subdivisions, and none of these entities is generally liable for them, nor in any event shall the bonds . . . give rise to a general obligation or liability of the municipality, the state or any of its political subdivisions, or a charge against their general credit or taxing powers, or be payable from any funds or properties other than those . . . specifically described in . . . this section and those bonds . . . shall so state on their face. Bonds issued under this section shall not constitute an indebtedness within the meaning of any constitutional or statutory debt limitation or restriction.

14. City of Tucson v. Corbin, 128 Ariz. at 88, 623 P.2d at 1244.

Arizona's TIF statutes and the appellate court's treatment of those challenges in *City of Tucson v. Corbin*. The *Tucson* opinion will then be analyzed and compared with decisions in other states on similar issues. Finally, this Casenote will examine the future of TIF in Arizona in light of the *Tucson* decision.

*Tax Increment Financing in Arizona*

It is generally recognized that TIF originated in California in 1952.[15] In that year, California's Community Redevelopment law[16] was ratified by an amendment to the state constitution.[17] Since 1952, at least twenty-one other states have passed legislation authorizing the use of TIF.[18] Arizona first allowed TIF as a method of financing slum clearance and redevelopment bonds in 1977.[19] Although the original statute allowing TIF included a repealer effective July 2, 1979,[20] TIF became a permanent part of the law upon amendment in 1978.[21]

Under Arizona's TIF statute, a political subdivision could undertake redevelopment of a slum or blighted area and finance the redevelopment by tax increment bonds issued without prior voter approval.[22] In theory, the redevelopment would cause property values in the redeveloped area to increase, creating a sufficient increase in ad valorem taxes[23] to pay for the redevelopment costs.[24]

A TIF plan typically works as follows. Each year ad valorem taxes are assessed upon the redeveloped property at the normal rate for its cur-

15. *See id.* at 89, 623 P.2d at 1245; Note, *Urban Redevelopment: Utilization of Tax Increment Financing*, 19 WASHBURN L.J. 536, 543 (1980).

16. CAL. HEALTH & SAFETY CODE §§ 33.000 to 33.817 (West 1973 & Supp. 1981).

17. CAL. CONST. art. XIII, § 19 (1952, repealed 1974) (current version at art. XVI, § 16).

18. Note, *supra* note 15, at 543 n.65; *see, e.g.*, ARIZ. REV. STAT. ANN. § 36-1488.01 (Supp. 1980-81); KAN. STAT. ANN. § 12-1770 to 1780 (Supp. 1980); UTAH CODE ANN. § 11-19-29 (Supp. 1979).

19. *See* 1977 Ariz. Sess. Laws ch. 139, §§ 1-5 (codified at ARIZ. REV. STAT. ANN. §§ 36-1481 & 1488.01 (Supp. 1980-81)).

20. 1977 Ariz. Sess. Laws ch. 139, § 4 provided that ARIZ. REV. STAT. ANN. § 36-1488.01 was to be repealed effective July 1, 1979.

21. 1978 Ariz. Sess. Laws ch. 91, § 8; *see* note 19 *supra*. The TIF laws were amended to remove the repealer in response to the Arizona Supreme Court's refusal to hear the City of Tucson's Petition for Special Action, No. 13637, filed October 10, 1977. City of Tucson v. Babbitt, No. 13637 (Ariz. Sup. Ct., filed March 2, 1978). The court stated that since the TIF statutes were to be repealed by law as of July 1, 1979, there could be no justiciable controversy as to the statutes. *Id.* Subsequent to the removal of the repealer, the City of Tucson refiled its complaint for special action with the Superior Court of Pima County. Brief for Appellant at 1, City of Tucson v. Corbin, 128 Ariz. 83, 623 P.2d 1239 (Ct. App. 1980). City of Tucson v. Corbin represents the final disposition of the city's complaint. *Id.*

22. See note 13 *supra*.

23. Ad valorem taxes are assessments "against property at a certain rate upon its value." Powell v. Gleason, 50 Ariz. 542, 547, 74 P.2d 47, 50 (1937). They are "invariably based upon ownership of property, and [are] payable regardless of whether [the property is] used or not, although . . . the value may vary in accordance with such factor." *Id.* Ad valorem taxes are to be distinguished from excise taxes and income taxes. *Id.* In Arizona, ad valorem taxes are assessed by authority of ARIZ. CONST. art. IX, § 2(6).

24. *See generally* City of Tucson v. Corbin, 128 Ariz. at 86, 623 P.2d at 1242; Davidson, *Tax Increment Financing as a Tool for Community Redevelopment*, 56 U. DET. J. URB. L. 405, 408-11 (1978); Note, *supra* note 15, at 537-40.

rent valuation.[25] Once the taxes are collected, however, only the amount attributable to the value of the property as last assessed prior to approval of the redevelopment plan is paid into the municipality's general fund.[26] In this way, proponents of TIF claim, a redevelopment area will still pay the same amount of property taxes into the general fund as it would have paid had the redevelopment not taken place.[27] The excess amounts, attributable to the increase in assessed value, are placed into a special fund which is used to pay the principal and interest on the bonds issued to finance the project.[28] Thus, under the TIF financing scheme, a redevelopment project would be self-supporting and would not create a liability for the municipality.[29] On the contrary, the theory is that the municipality will reap an eventual benefit since after the bonds are repaid, the entire amount of the increased ad valorem taxes will go into the general fund.[30]

In addition to being self-supporting, TIF is intended to serve the common goal of increasing property values so that a previously blighted or slum area may eventually shoulder its burden of city finances.[31] In Arizona, TIF also attempts to avoid the restriction of municipal debt limitations placed upon most debts under the Arizona Constitution[32] and to avoid the delay of obtaining voter approval before a redevelopment project can commence.[33]

Shortly after passage of Arizona's TIF statutes in 1977,[34] the Tucson City Council passed a resolution declaring a portion of Tucson to be a

25. City of Tucson v. Corbin, 128 Ariz. at 86, 623 P.2d at 1242. Note that all real property taxpayers within the same tax district, whether inside or outside the project area, continue to be assessed taxes at the same rate. TIF has no direct affect on the rates established by the taxing district. Davidson, *supra* note 24, at 412.

26. ARIZ. REV. STAT. ANN. § 36-1488.01(B)(1) (Supp. 1980-81); *see* City of Tucson v. Corbin, 128 Ariz. at 131, 623 P.2d at 1242.

27. Tribe v. Salt Lake City Corp., 540 P.2d 499, 505-06 (Utah 1975) (Crockett, J., concurring).

28. City of Tucson v. Corbin, 128 Ariz. at 86, 623 P.2d at 1242. ARIZ. REV. STAT. ANN. § 36-1488.01(B)(2) (Supp. 198-81) provides:

> That portion of the levied taxes each year in excess of [the amount levied on the base valuation] shall be paid into a special fund of the municipality to pay the principal of and interest on . . . indebtedness, incurred by such municipality to finance . . . such redevelopment project. Unless and until the total assessed valuation of the taxable property in a redevelopment project area exceeds the total assessed value of the taxable property in such project area as [last assessed prior to the redevelopment] . . . all of the taxes levied and collected upon the taxable property in such redevelopment project area shall be paid into the funds of the respective taxing agencies. When such . . . indebtedness . . . and interest thereon, have been paid, all monies thereafter received from taxes upon the taxable property in such redevelopment project area shall be paid into the funds of the respective taxing agencies as taxes on all other property are paid.

29. See authorities cited in note 24 *supra*.

30. City of Tucson v. Corbin, 128 Ariz. at 86, 623 P.2d at 1242; *see* ARIZ. REV. STAT. ANN. § 36-1488.01(B)(2) (Supp. 1980-81) (reproduced at note 28 *supra*).

31. City of Tucson of Corbin, 128 Ariz. at 86, 623 P.2d at 1242; Tribe v. Salt Lake City Corp., 540 P.2d 499, 505-06 (Utah 1975) (Crockett, J., concurring); *see* ARIZ. REV. STAT. ANN. § 36-1473 (1974); Davidson, *supra* note 24, at 408.

32. ARIZ. REV. STAT. ANN. § 36-1481(B) (Supp. 1980-81) provides in part, "Bonds issued under this section shall not constitute an indebtedness within the meaning of any constitutional or statutory debt limitation or restriction." *See* ARIZ. CONST. art. IX, § 8; *id.* art. VII, § 13.

33. *See* ARIZ. REV. STAT. ANN. § 36-1481(B) (Supp. 1980-81); Davidson, *supra* note 24, at 408. For additional advantages and disadvantages of TIF, *see* Note, *supra* note 15, at 540-43.

34. See text & notes 19-21 supra.

slum area and authorizing the preparation of a redevelopment plan.[35] This undertaking was entitled the Pueblo West Redevelopment Project.[36] Later in 1977, two additional resolutions were passed. The first adopted the redevelopment plan for the Pueblo West Redevelopment Project.[37] The second authorized the issuance of City of Tucson Pueblo West Redevelopment Project Tax Allocation Bonds (tax increment bonds) not to exceed an aggregate amount of $1,500,000.[38] The proposed bond issue was then submitted to the state attorney general for certification.[39] The attorney general, however, refused to certify the bonds, citing twelve reasons for his refusal.[40] The city of Tucson then filed a complaint for special

35. Tucson, Ariz., City Council Resolution No. 10313 (Sep. 6, 1977); Appellant's Brief at 5, City of Tucson v. Corbin, 128 Ariz. 83, 623 P.2d 1239 (Ct. App. 1980).

36. Tucson, Ariz., City Council Resolution No. 10342 (Oct. 10, 1977).

37. *Id.*

38. *Id.* No. 10347 (Oct. 10, 1977).

39. Letter from Frederick S. Dean, Tucson City Attorney, to Bruce E. Babbitt, Attorney General, State of Arizona (Oct. 31, 1977) (on file at the Arizona Law Review). ARIZ. REV. STAT. ANN. § 36-1484 (1974) provides that bonds issued under § 36-1481 may be submitted to the attorney general for certification. If bonds are not submitted for certification, they remain subject to challenge after their issuance.

40. Letter from Bruce E. Babbitt, Attorney General, to Frederick S. Dean (Feb. 17, 1978) (on file at the Arizona Law Review); Brief for Appellant, Appendix G, City of Tucson v. Corbin, 128 Ariz. 83, 623 P.2d 1239 (Ct. App. 1980). The attorney general listed the following twelve reasons:

1. The bonds . . . have been authorized by the City without an election by the affected taxing agencies, in violation of Ariz. Const. Art. 7, § 13.

2. The adoption of the redevelopment plan and the authorization of the issuance of the bonds contravene the provisions of Ariz. Const. Art. 9, § 1, that taxes be levied for public purposes, and Art. 9, § 7, which prohibits the lending of credit of a political subdivision . . . .

3. The title of the Act is violative of Ariz. Const. Art. 4, pt. 2, § 13.

4. The Act cannot be valid unless other unrelated sections in Arizona Revised Statutes are deemed amended. For instance, such sections include, but are not limited to, A.R.S. §§ 42-301, et seq.; 15-445; 15-1201, et seq. (e.g. § 15-1202.06); 15-1327; 15-1236; 15-1237 and 35-458. Such revising, not even by reference, but by implication, violates Ariz. Const. Art. 4, pt. 2, § 14 or, in the alternative, Ariz. Const. Art. 9, § 9, or, in the alternative, Ariz. Const. Art. 9, § 3 (which requires that the object of a tax shall be stated) or any combination thereof.

5. The Act results in the surrender, suspension or contracting away of the power of taxation, in violation of Ariz. Const. Art. 9, § 1.

6. The Act results in non-uniform taxation, in violation of Ariz. Const. Art. 9, § 1.

7. The Act impairs the contractual obligations of the overlapping taxing agencies with holders of their outstanding general obligation bonds, in violation of Ariz. Const. Art. 2, § 25 and U.S. Const. Art. I, § 10, cl. 1.

8. The authorization of the issuance of bonds for a term not to exceed ten years is not permitted under the Act by virtue of the repealer provision (Laws 1977, Ch. 139 § 4).

9. The Act violates Ariz. Const. Art. 9, § 6, which requires that local improvements be made either by special assessment or special taxation of the property benefitted. . . .

10. The Act creates an obligation of the state, in violation of Ariz. Const. Art. 9, § 5, in excess of $350,000, by virtue of the state's implied promise not to remove the right of the City and overlapping taxing agencies to levy ad valorem property taxes or, in the alternative, by virtue of the implied requirement that, if the statutes on levy of ad valorem taxes are repealed as to political subdivisions such as the taxing agencies in question, payment of the bonds will have to be provided for by other means so that the bond holders' contract will not be impaired.

11. Pursuant to A.R.S. § 36-1488.01.E, a municipality may retroactively amend a redevelopment plan to include property tax increment provisions with the allocation of tax revenues as provided in A.R.S. § 36-1488.01.B, based upon the assessed valuation of the taxable property within the redevelopment project area as of the date of original adoption of the redevelopment plan. Accordingly, A.R.S. § 36-1488.01.E unconstitutionally delegates to a municipality the power to reduce the constitutional debt limita-

action in the Superior Court of Pima County.[41] *City of Tucson v. Corbin* was to become the first judicial test of Arizona's TIF statute under the Arizona Constitution.[42]

In *Tucson*, the trial court ruled that the bonds were invalid since the statutes providing for TIF were unconstitutional.[43] The court held the statutes unconstitutional because they authorized the creation of a municipal bond indebtedness without meeting the voter approval requirement contained in Arizona's Constitution.[44] Although the court discussed only one other issue,[45] it found for the attorney general on each of the twelve issues presented in order to facilitate the appeal.[46] The city of Tucson then brought its case to the Arizona Court of Appeals.[47]

*Constitutional Challenge to TIF Under Arizona Law*

Of the twelve issues cited by the attorney general, ten are constitutional in nature.[48] The court of appeals, however, reached only the first issue—whether the tax increment bonds authorized by the city constitute debts within the meaning of the Arizona Constitution and therefore require prior voter approval under article VII, section 13.[49] In order to decide whether these bonds constituted such debt, the *Tucson* court first had to determine whether the real property taxpayers of the political subdivision encompassing the Pueblo West Redevelopment Project area would be "affected" by issuance of the proposed bonds.[50]

Prior Arizona cases have used the distinction between "revenue" or "special fund" bonds and "general obligation" bonds in determining whether a particular bond issue "affected" a municipality.[51] A revenue or

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tions of counties and school districts by reducing the assessed valuation with respect to which such debt limitations are computed.

12. Section 5.03(b) of the Bond Resolution permits certain portions of the tax allocation revenues to be used for purposes other than those specified in the Act, in violation of the provisions of the Act, and requires that tax allocation reserves in excess of that required for annual debt service be imposed for future years' debt service or used for purposes other than debt, or both, in violation of A.R.S. § 36-1488.01.B.2.

*Id.*

41. City of Tucson v. Corbin, 128 Ariz. at 86, 623 P.2d at 1242. The complaint requested a court order directing the attorney general to certify issuance of the bonds. *Id.*

42. The attempted use of TIF in Tucson occurred shortly after inception of the statutes. See text & notes 19-21 *supra*. There are no other recorded cases in Arizona dealing with the TIF statutes.

43. City of Tucson v. LaSota, No. 176308 at 3-4 (Ariz. Super. Ct., Pima County, Feb. 26, 1980).

44. *Id.* The court found that the statutes violated the Arizona Constitution, article VII, § 13. *Id.* For the text of this provision see note 7 *supra*.

45. Slip op. at 3-4. In addition to finding that the statutes created a debt without the voter approval required by Arizona Constitution article VII, § 13, the superior court found that a "new tax" was created in violation of Arizona Constitution article IX, §§ 3, 6, and 9, and art. IV, pt. 2, § 13. *Id.* See text & notes 133-35 *infra*.

46. Slip op. at 4.

47. *See* City of Tucson v. Corbin, 128 Ariz. 83, 623 P.2d 1239 (Ct. App. 1980).

48. See note 39 *supra*. In other jurisdictions there have been four primary challenges to TIF schemes: (1) equal protection; (2) due process; (3) delegation; and (4) debt limitation and voter approval. *See* Davidson, *supra* note 24, at 430-39; Note, *supra* note 15, at 545-49.

49. City of Tucson v. Corbin, 128 Ariz. at 86-87, 623 P.2d at 1242-43.

50. *Id.*; *see* text & note 7 *supra*.

51. See cases cited in note 5 *supra*.

special fund bond is a bond payable from revenues of an independent revenue producing asset.[52] As its name implies, a general obligation bond is payable from the general funds of a municipality.[53] Revenue and general obligation bonds are distinguished in order to identify bonds which create a liability for the issuing municipality.[54] If a municipality incurs no liability for payment of a bond issue, the municipality and its real property taxpayers are not "affected."[55] On the other hand, if a bond issue does become a direct charge against a municipality's general funds, the real property taxpayers are affected.[56] In that case, under the Arizona Constitution the voters must have the opportunity to decide whether the bonds should be issued by the municipality.[57] Bonds determined to be payable only out of special funds, and not out of a municipality's general funds, are therefore revenue bonds and do not require voter approval before they may be issued.[58]

In passing Arizona's TIF statute, the legislature clearly intended that TIF bonds would not be categorized as general obligation bonds,[59] and that the bonds would not require voter approval prior to their issuance.[60] In *Tucson*, the attorney general nevertheless contended that the proposed tax increment bonds fell somewhere between those bonds clearly considered revenue or special fund bonds and those clearly considered general obligation bonds.[61] This contention arose because, while the bond issue was to be paid from general ad valorem tax revenues, the city was not required to make a specific tax levy to satisfy the bond obligations.[62] If the incremental tax revenues were not sufficient to repay the bonds, the bond holders could not compel the city to levy additional taxes or provide another source of repayment.[63]

On appeal, the city of Tucson argued that obligations payable from a

52. *Id.*
53. *Id.*
54. *See* City of Globe v. Willis, 16 Ariz. 378, 382, 146 P. 544, 545 (1915).
55. *Id.*
56. *Id.* at 383, 146 P. at 546.
57. *Id.*; ARIZ. CONST. art. VII, § 13.
58. *See generally* Guthrie v. City of Mesa, 47 Ariz. 336, 56 P.2d 655 (1936); City of Globe v. Willis, 16 Ariz. 378, 146 P. 544 (1915). These two cases established the "special fund doctrine" in Arizona. In *City of Globe*, a special assessment was made on the real property owners benefited by a new sewer system to repay the bonds issued to finance the system. *Id.* at 383, 146 P. at 546. The court held that since the bond issue and the special assessment were neither a direct charge against the municipality nor an increase in the amount of its indebtedness, the bonds did not "affect" the municipality under article VII, § 13 of the Arizona Constitution. *Id.* at 382, 146 P. at 545. The *City of Globe* court termed the money collected pursuant to the special assessment to be a "special fund." *Id.* at 383, 146 P. at 546.

In *Guthrie*, bonds were issued by the City of Mesa to improve its water and sewer systems. 47 Ariz. at 337-38, 56 P.2d at 655-56. The funds to repay the bonds were to come "wholly and exclusively" from revenues of the city's water plant and system. *Id.* The court held that since the bonds were not repayable out of general taxes levied on the property of the city, but rather from a "special fund" established from revenues of the water system, the bond obligations did not constitute "indebtedness" under Arizona Constitution article IX § 8. *Id.* at 340-41, 56 P.2d at 657.

59. *See* ARIZ. REV. STAT. ANN. § 36-1481(B) (Supp. 1980-81).
60. *See id.*
61. Brief for Appellee at 3.
62. *Id.*
63. *Id.*

special fund that neither directly nor indirectly constitute a charge against the credit of a municipality are not "debts" of that municipality.[64] If the obligations are not debts, they cannot "affect" the municipality under the Arizona Constitution.[65] The city also noted that both the TIF statutes and the proposed bond issue state that bonds issued thereunder do not constitute a general obligation or debt of the municipality, or a charge against its general credit or taxing powers.[66]

Even though the TIF statutes provide that tax increment bonds do not violate the provisions of article VII, section 13 of the Arizona Constitution,[67] the *Tucson* court reasoned that, in light of the constitutional challenge, the statutory language was not controlling.[68] Instead, the court chose a substance-over-form approach to the question of constitutionality[69] and analyzed the tax increment bonds to see if they actually "affected" the political subdivision encompassing the project.[70]

In pursuing this line of inquiry, the *Tucson* court first examined *City of Phoenix v. Phoenix Civic Auditorium and Convention Center Ass'n*,[71] in which the Arizona Supreme Court decided a similar constitutional issue. In that case, a non-profit association was formed to build an auditorium on city property and lease it to the city for a period of thirty-five years.[72] At the end of the thirty-five-year lease, the auditorium was to become the sole property of the city.[73] The lease payments to the non-profit association were calculated to be approximately equal to the association's expenses, and all the operating profits from the auditorium were to go to the city.[74]

The primary issue in *City of Phoenix* was whether a lease obligation incurred by the city of Phoenix constituted a debt for purposes of article IX, section 8 of the Arizona Constitution.[75] That section of the constitution provides that municipalities may not become "indebted" for an amount exceeding four per cent of the taxable property in the district without the approval of a majority of the taxpayers qualified to vote therein.[76]

The *City of Phoenix* court held that the lease agreement amounted to "nothing more than a purchase agreement"[77] and therefore constituted a

64. Brief for Appellant at 13.

65. *Id.*

66. *Id.* at 13-14; *see* ARIZ. REV. STAT. ANN. § 36-1481(B) (Supp. 1980-81).

67. ARIZ. REV. STAT. ANN. § 36-1481(B) (Supp. 1980-81). The TIF statutes do not expressly mention article VII, § 13 of the Arizona Constitution, but do state that TIF bonds do not constitute indebtedness within the meaning of any constitutional restriction. *Id.*

68. 128 Ariz. at 87, 623 P.2d at 1243 (*quoting* City of Phoenix v. Phoenix Civic Auditorium & Convention Center Ass'n, 99 Ariz. 270, 289, 408 P.2d 818, 831 (1965)).

69. 128 Ariz. at 87, 623 P.2d at 1243. The *Tucson* court took this approach despite the traditional deference given to legislative enactments. *Id.* at 88, 623 P.2d at 1244. In City of Phoenix v. Phoenix Civic Auditorium & Convention Center Ass'n, 99 Ariz. 270, 408 P.2d 818 (1965), however, there was no legislative act at issue.

70. 128 Ariz. at 87, 623 P.2d at 1243.

71. 99 Ariz. 270, 408 P.2d 818 (1965).

72. *Id.* at 289, 408 P.2d at 831.

73. *Id.* at 287, 408 P.2d at 830.

74. *Id.* at 279, 408 P.2d at 824.

75. *Id.*

76. ARIZ. CONST. art. IX, § 8.

77. 99 Ariz. at 287, 408 P.2d at 830.

binding obligation upon the city.[78] Since the lease payments were to be paid from general funds, the obligation did not fall under the special fund exception.[79] More importantly, the court held in denying a rehearing that if the lease were amended to preclude the use of ad valorem taxes for repayment of any rents due under the lease, the lease would not be in violation of the constitutional debt limitations.[80] Thus, *City of Phoenix* implied that an obligation payable out of ad valorem taxes constitutes indebtedness under article IX, section 8 of the Arizona Constitution.[81]

In *Tucson*, the city interpreted *City of Phoenix* as requiring a finding of debt only where the obligation to repay the bonds represented a commitment by the issuing body to levy ad valorem taxes for repayment of the bonds.[82] Since the city in *Tucson* was not required to levy ad valorem taxes,[83] the city reasoned that the tax increment bonds did not constitute debts within the meaning of article VII, section 13 of the Arizona Constitution.[84] The only obligation incurred by the city in *Tucson* was to collect and pay over ad valorem tax increments, if any, resulting from the redevelopment.[85]

The *Tucson* court, without expressly noting the difference in constitutional provisions at issue in *Tucson* and *City of Phoenix*, disagreed with the city's argument.[86] Relying on the *City of Phoenix* ruling, the court held that since the tax increment bonds in *Tucson* were to be repaid from ad valorem taxes, the bond issue "affected" the municipality and thus required prior voter approval under the Arizona Constitution.[87] It made no difference to the court that a portion of the incremental ad valorem taxes

78. *Id.*

79. *Id.* at 286, 408 P.2d at 829; see text & notes 5 & 58 *supra*.

80. City of Phoenix v. Phoenix Civic Auditorium & Convention Center Ass'n, 100 Ariz. 101, 104, 412 P.2d 43, 44 (1966). Citing Switzer v. City of Phoenix, 86 Ariz. 121, 124, 341 P.2d 427, 428 (1959), the *Phoenix* court suggested that if the repayments were to come from "fees, penalties, or excise taxes," the lease would not be subject to the constitutional debt limitations. 100 Ariz. at 103, 412 P.2d at 44; see note 98 *infra*.

81. *See* 100 Ariz. at 104, 412 P.2d at 44.

82. Brief for Appellant at 21.

83. *Id.*

84. *Id.*

85. *Id.*

86. City of Tucson v. Corbin, 128 Ariz. at 87, 623 P.2d at 1243. The constitutional provision at issue in *Tucson* was article VII, § 13, *id.* at 86-87, 623 P.2d at 1242-43, and the provision at issue in *City of Phoenix* was article IX, section 8. 99 Ariz. at 279, 408 P.2d at 824.

87. 128 Ariz. at 87, 623 P.2d at 1243; *see* ARIZ. CONST. art. VII, § 13. A simple example provides further support for the court's holding that tax increment bonds "affect" a municipality. Assume that in year one (the year prior to a planned redevelopment) the total assessed valuations of the properties, one within and one without the project, are $100 each. Assume also that due to inflation all property values will increase by 10% in year two, even if the redevelopment does not take place. Also assume a 10% rate of ad valorem taxation. In year two, if the TIF bonds are not issued, $22 ($110 current valuation × 10% tax rate × 2 properties, 1 inside and 1 outside proposed TIF area) will be placed into the general fund. However, if the bonds are issued, only $21 ([$110 current valuation for property outside TIF area × 10% tax rate] + [$100 frozen base valuation for property in TIF area × 10%tax rate]) will be placed into the general fund. To the extent that the municipality needs more than $21 in the general fund, the tax rate will have to be increased and the outside taxpayers will have to shoulder a disproportionate share of the general fund burden. In other words, there will no longer be an equal division of the general fund burden between the property taxpayers within and without the development area. This example shows that in the event the property would have increased in value without the redevelopment, the outside taxpayers will be "affected" by having to assume an increased general fund tax burden.

obtained under TIF were to be put into a special fund.[88] The *Tucson* court held simply that if ad valorem taxes were used, the "special fund" doctrine of *City of Globe v. Willis*[89] and *Guthrie v. City of Mesa*[90] would not apply.[91]

In support of its holding, the *Tucson* court quoted from a Washington case previously relied upon by the Arizona Supreme Court.[92] In *State ex rel. Washington State Finance Committee v. Martin*,[93] the Washington Supreme Court stated that the true test of the special fund doctrine is what goes into the fund rather than what comes out of it.[94] If any part of the fund is provided from general taxes, such as ad valorem taxes, then any bonds payable out of the fund are debts of the state.[95] In *Arizona State Highway Commission v. Nelson*,[96] the Arizona Supreme Court agreed with the reasoning in *Martin*, stating that in order to constitute a special fund, the source of the fund must be distinct from the state's general revenues.[97]

The Washington Supreme Court's test of the special fund doctrine in *Martin* is consistent with the Arizona Supreme Court's holding in *City of Phoenix*.[98] In each case, the court interpreted the meaning of a debt for purposes of state constitutional debt limitations,[99] and in each case, the determining factor was the source of payments going into a special fund.[100]

In further support of this "source of payments" doctrine, the *Tucson* court cited holdings from both Kentucky and Iowa.[101] In *Miller v. Covington Development Authority*,[102] the Kentucky Supreme Court faced the issue of whether tax increment bonds secured by ad valorem taxes were

88. 128 Ariz. at 87, 623 P.2d at 1243.
89. 16 Ariz. 378, 146 P. 544 (1915); *see* text & note 58 *supra*.
90. 47 Ariz. 336, 56 P.2d 655 (1963); *see* text & note 58 *supra*.
91. 128 Ariz. at 87, 623 P.2d at 1243.
92. *Id.* at 87-88, 623 P.2d at 1243-44.
93. 62 Wash. 2d 645, 384 P.2d 833 (1963).
94. *Id.* at 661, 384 P.2d at 842.
95. *Id.*
96. 105 Ariz. 76, 459 P.2d 509 (1969).
97. *Id.* at 80, 459 P.2d at 513.
98. See text & notes 77-81, 95-96 *supra*; text & notes 99-100 *infra*. Although *Martin* and *City of Phoenix* are consistent in their treatment of ad valorem taxes, discrepancy exists in their treatment of excise taxes. In *City of Phoenix*, the Arizona court held that if the lease payments were paid from excise taxes, the lease would not be in violation of the debt limitation provisions of the constitution. 100 Ariz. at 103-04, 412 P.2d at 43-44. In *Martin*, however, the Washington court held that if the state agreed to provide any part of a fund from excise taxes, the related securities would constitute debts of the state. 62 Wash. 2d at 661, 384 P.2d at 842. In so stating, the *Martin* court overturned a prior Washington case, Gruen v. State Tax Comm'n, 35 Wash. 2d 1, 211 P.2d 651 (1949), which had earlier held that bonds funded by excise taxes were not debts under the Washington Constitution. 62 Wash. 2d at 663, 384 P.2d at 844.

*Gruen* was cited in *City of Phoenix*, 100 Ariz. at 103, 402 P.2d at 44. Since *Gruen* had been overruled prior to the decision in *City of Phoenix*, however, the holding in *City of Phoenix* is weakened as far as it concerns the use of excise taxes. The *City of Phoenix* holding is not totally without merit, however. In *Martin*, the *Gruen* case was overruled only insofar as there was a promise by the state to levy the excise taxes. 62 Wash. 2d at 660, 384 P.2d at 842. Consistent with this holding, *City of Phoenix* qualified its allowance of the use of excise taxes upon their being voluntary contributions by the state (as opposed to promissory). 100 Ariz. at 103, 412 P.2d at 44.

99. See text & notes 1, 75-76 *supra*.
100. See text & notes 95-96 *supra*.
101. 128 Ariz. at 88, 623 P.2d at 1244, *citing* Miller v. Covington Dev. Auth., 539 S.W.2d (Ky. 1976), and Richards v. City of Muscatine, 237 N.W.2d 48 (Iowa 1975).
102. 539 S.W.2d 1 (Ky. 1976).

subject to debt limitation provisions of the state constitution.[103] The Kentucky Constitution states that no municipality may become indebted for an amount exceeding its annual income and revenue without the assent of two-thirds of the voters.[104] The *Miller* court held that tax increment bonds similar to those contemplated in Arizona were debts within the meaning of Kentucky's state constitutional debt limitation provision.[105] The court further stated that ad valorem taxes could not be placed in the special fund category and that any obligation payable from such taxes is a debt subject to constitutional limitation.[106]

In *Richards v. City of Muscatine*,[107] the Iowa Supreme Court was similarly called upon to define "indebtedness" within the meaning of the state's constitutional debt limitation provision.[108] The Iowa Constitution provides that a municipality may not become indebted for an amount exceeding five percent of the value of the property within its boundaries.[109] Iowa's TIF statutes, however, provide that bonds secured by ad valorem tax increments do not constitute a debt within the meaning of the state constitution.[110] The *Richards* court held that the pledge of any part of Iowa's ad valorem taxes created a debt for purposes of its constitutional debt limitation.[111] The court reasoned that a city's credit rating depends on its ability to levy general taxes.[112] Thus, where the incremental ad valorem taxes used to finance the bonds were not the result of a special assessment or the result of operating revenues from the redevelopment itself, the city's general taxes had been pledged and its credit affected.[113] Consequently, the Iowa statute's contrary expression was held invalid.[114]

*Critical Analysis of* City of Tucson v. Corbin

The primary cases relied upon by the Arizona Court of Appeals in *City of Tucson v. Corbin* did not involve the provision of the Arizona Constitution which was at issue in that case.[115] The Arizona cases that have

103. *Id.* at 5.
104. KY. CONST. § 157.
105. 539 S.W.2d at 5. The tax increment bonds in *Miller* were similar in that they were payable out of the increase in ad valorem taxes collected as a result of the redevelopment. *Compare* ARIZ. REV. STAT. ANN. §§ 36-1481 to 1488.01 (Supp. 1980-81) *with* KY. REV. STAT. ANN. §§ 99.750-.770 (Supp. 1980).
106. 539 S.W.2d at 5. The *Miller* court stated that "[t]he ad valorem tax is the one tax that is mandatory. . . . It is a tax the city has no option to discontinue, and is the ultimate resource of its fiscal integrity. Any obligation that is payable from it is a debt within the meaning of Const. § 157." *Id.*
107. 237 N.W.2d 48 (Iowa 1975).
108. *Id.* at 63-64.
109. IOWA CONST. art. XI, § 3.
110. IOWA CODE ANN. § 403.9(2) (West 1976) provides in part, "Bonds issued under this section shall not constitute an indebtedness within the meaning of any constitutional or statutory debt limitation or restriction . . . ."
111. 237 N.W.2d at 64.
112. *Id.*
113. *Id.*
114. *Id.*
115. *See* City of Phoenix v. Phoenix Civic Auditorium & Convention Center Ass'n, 99 Ariz. 270, 408 P.2d 818 (1965); Richards v. City of Muscatine, 237 N.W.2d 48, 64 (Iowa 1975); Miller v. Covington Dev. Auth., 539 S.W.2d 1 (Ky. 1976); State *ex rel.* Washington State Fin. Comm. v. Martin, 62 Wash. 2d 645, 384 P.2d 833 (1963).

interpreted the voter approval requirement of article VII, section 13,[116] however, have used the same distinction between general obligation bonds and revenue bonds as have the cases interpreting the debt limitation provision of article IX, section 8.[117] Further, the Arizona Supreme Court, in *Ackerman v. Boyd*,[118] held that the two constitutional provisions must be read together and are essentially identical.[119] There are, however, two important distinctions. The debt limitation provision applies to all types of indebtedness and applies only when the debt exceeds six percent of the taxable property within the district.[120] The provision at issue in *Tucson*, however, applies only to bond issues and special assessments, and applies regardless of the amount of indebtedness.[121] Because bond issues are included under both provisions, the *Tucson* court appears justified in equating the interpretation of "affected" under article VII, section 13 with the interpretation of "indebtedness" under article IX, section 8.

Although the weight of authority is in agreement with the holding in *Tucson*, there is at least one state court opinion which supports a contrary holding.[122] In *Tribe v. Salt Lake City Corp.*,[123] the Utah Supreme Court held that tax increment bonds issued under its Neighborhood Development Act[124] did not constitute indebtedness under its state constitutional debt limitation provisions.[125] The court reasoned that since the bonds were secured only by revenues from the operation of the facility and the incremental ad valorem taxes collected, there could be no city debt created in violation of the state constitution.[126] The *Tribe* majority, however, did not discuss the constitutional debt limitation issue in depth. The majority apparently merely accepted the language of the statutes to the effect that tax increment bonds are not a debt or obligation of the community.[127] For

116. See note 7 *supra*.

117. *See* cases cited in note 5 *supra*.

118. 74 Ariz. 77, 244 P.2d 351 (1952).

119. *Id.* at 82, 244 P.2d at 355.

120. ARIZ. CONST. art. IX, § 8; see text & note 6 *supra*. Another example of indebtedness included under this provision is a type of long-term lease obligations. *See* City of Phoenix v. Phoenix Civic Auditorium & Convention Center Ass'n, 99 Ariz. 270, 408 P.2d 818 (1965); text & notes 77-79 *supra*.

121. ARIZ. CONST. art. VII, § 13; see text & note 7 *supra*.

122. Tribe v. Salt Lake City Corp., 540 P.2d 499, 503 (Utah 1975). Note, however, that the *Tucson* court found "no authority which dictates a different conclusion." 128 Ariz. at 89, 623 P.2d at 1245.

123. 540 P.2d 499 (Utah 1975).

124. UTAH CODE ANN. § 11-19-29 (Supp. 1979).

125. 540 P.2d at 503; *see* UTAH CONST. art. XIV, §§ 3-4; *id.* art. VI, § 29.

126. 540 P.2d at 503.

127. *See id.* In addition, *Tribe* appears weak for other reasons. It cites no authority, contains a strong dissenting opinion, and does not really consider the complexity of the issue as brought out in *Tucson* and other similar cases. *See id.* at 503, 507-15. The concurring and dissenting opinions provide better insight into the issue of whether tax increment bonds constitute "debt". *See id.* at 505-15. The concurring judge, using a practical point of view, stated that the TIF scheme was equitable since only excess taxes which would not otherwise have been collected were pledged. *Id.* at 505-06 (Crockett, J., concurring). He reasoned that as long as the assessed valuation of the development property in the base year, and not the amount of taxes levied in the base year, is used to determine future increments, the tax increments will represent only the taxes levied on the incremental increase in valuation. *Id.* On the other hand, the dissenting justice thought that the decision was a "$15,000,000 rip-off" of money rightfully belonging to the general fund of Salt Lake City. *Id.* at 507 (Henriod, C.J., dissenting). In addition, he claimed that issuing and selling

this reason, the *Tribe* case offers little support for the city's position in *Tucson*.

*Future of TIF in Arizona*

As a result of the *Tucson* decision, tax increment financing cannot be used in Arizona absent prior voter approval. Even in the event that voter approval is obtained pursuant to article VII, section 13 of the Arizona Constitution, the court's ruling in *Tucson* leaves unanswered many additional issues raised by the attorney general.[128] Many of these issues could be avoided by amendments to the statutes.[129] Five of these issues, however, are not so easily avoided and pose a serious challenge to the availability of TIF even if prior voter approval were required.[130]

The first such issue is that TIF violates the uniformity provision of article IX, section 1 of the Arizona Constitution, since the incremental tax would be levied only on property in the project area.[131] Since this section of the constitution provides for no exceptions,[132] obtaining voter approval would not eliminate the issue. The second issue is that TIF creates a "new tax" in violation of the Arizona Constitution.[133] The trial court specifically ruled against the city on this issue,[134] leaving Arizona proponents of TIF with an unfavorable ruling to overcome if TIF is attempted again. The third and fourth issues are that TIF results in the surrender, suspension, or contracting away of the state's power of taxation in violation of article IX, section 1,[135] and in an impairment of contract insofar as it affects the rights of existing general obligation bondholders of the taxing

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the bonds implicated the good name, reputation, financial standing, and credit rating of the city; consequently, the city would have to pay higher interest rates on its future obligations. *Id.* at 507-08.

128. See text & notes 40 & 44-45 *supra*.

129. *See* issues 2-4, 8, & 11-12, note 40 *supra*.

130. *See* issues 5-7 & 9-10, note 40 *supra*.

131. *See* issue 6, note 40 *supra*; note 132 *infra*. It may be argued, however, that the test of article IX, section 1 is whether TIF discriminates between those taxpayers within the project area and those without it. Under this test there is no discrimination in *Tucson* since both groups of taxpayers will still pay the same rate of tax on the assessed values of their property and their property valuations will still be determined in the same manner. Brief for Appellant at 42-45, City of Tucson v. Corbin, 128 Ariz. 83, 623 P.2d 1239 (Ct. App. 1980).

132. ARIZ. CONST. art. IX, § 1 states, "All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax, and shall be levied and collected for public purposes only."

133. *See* ARIZ. CONST. art. IX, §§ 3, 6 & 9, and art. IV, part 2, § 13; *see* issues 4 & 9, note 40 *supra*. The attorney general argued that a "new tax" is created under the TIF scheme because there are essentially two different taxes being levied and collected; one for purposes of the general fund, and the second for purposes of the special fund. Brief for Appellee at 20-21. The city, however, argued that TIF merely provides for an allocation of an existing tax, as opposed to the creation of a "new tax." Brief for Appellant at 28.

134. City of Tucson v. LaSota, No. 176308 at 3-4 (Ariz. Super. Ct., Pima County, Feb. 26, 1980).

135. *See* issue 5, note 40 *supra*. The city argued that the "taxing agencies have no inherent power of taxation or right to receive tax revenues, but derive such power solely by reason of [legislative] delegation of authority. Within the limits prescribed by the Constitution, the Legislature is free in the exercise of its legislative authority to expand, contract, or alter the power of taxation delegated to such political subdivisions of the State or, as contemplated under the Act, to temporarily apportion tax revenues among such political subdivisions." Brief for Appellant at 38.

agencies.[136] The fifth of the remaining significant issues is that the TIF bonds create a debt of the state in violation of article IX, section 5 of the Arizona Constitution.[137] Although this section of the constitution is similar to the "local debt limitation" applicable to municipal corporations,[138] it does not provide for exceptions upon voter approval as does article IX, section 8 of the Arizona Constitution.[139] Because of these unresolved issues, the possibility that TIF will ever become a useful tool in Arizona is clouded. As the Arizona Supreme Court in *City of Phoenix* has stated, a constitutional amendment appears to be the only satisfactory remedy.[140]

A constitutional amendment permitting TIF will not automatically assure its success, however. For example, in California, a state with such an amendment, the effectiveness of TIF has been reduced by voter trends limiting the amounts by which property taxes can increase each year.[141] Such upward adjustments are the key factor which allows tax increment financed projects to be self-supporting.[142] Without such upward adjustments, few proposed developments will survive.[143] This trend merely adds to the probability that TIF will never become a useful method of financing in Arizona.

*Conclusion*

As a result of the *Tucson* decision, tax increment financing cannot be used without voter approval in Arizona. The court's rationale in holding that tax increment bonds "affect" a municipality so as to require voter approval under the Arizona Constitution appears consistent with prior Arizona case law and with the majority view in other states. *Tucson*'s reasoning that real property taxpayers should have the opportunity to approve or disapprove of any major expenditure from ad valorem taxes is sound from a policy standpoint as well. Due to the remaining issues left unanswered by the court, however, it appears unlikely that any attempt will be made to conform the TIF laws to satisfy the ruling in *Tucson*.

*W. Gary Hull*

136. *See* issue 7, note 40 *supra*. The city argued, however, that since the holders of general obligation bonds of the city can compel the city to levy taxes for repayment of their bonds, their rights have in no way been affected. Brief for Appellant at 45-46.

137. *See* issue 10, note 40 *supra*. In response to this claim, the city argued that the bonds do not constitute a debt of the state since the bonds clearly state that if the incremental taxes collected are insufficient to pay the bonds, the bondholders have no recourse against the state and cannot require that taxes be levied to pay the bonds. Brief for Appellant at 57-60.

138. *Compare* ARIZ. CONST. art. IX, § 8 *with id.* § 5. Article IX, § 5 provides that the state cannot contract debts to meet expenses not otherwise provided for in excess of $350,000.

139. See note 138 *supra*.

140. 99 Ariz. at 293, 408 P.2d at 834. *See* CAL. CONST. art. XVI, § 16.

141. *See* Note, *The Impact of Proposition 13 on Tax Increment Financing: An Unconstitutional Impairment of Contract?*, 53 S. CAL. L. REV. 283, 283-309 (1979).

142. *Id.*

143. *Id.*

# II. CIVIL PROCEDURE

## A. THE EXERCISE OF PERSONAL JURISDICTION OVER A NON-RESIDENT DEFENDANT BY ARIZONA COURTS

Ever since the United States Supreme Court decision of *International Shoe v. Washington*,[1] courts have grappled with what constitutes "minimum contacts"[2] for the constitutional exercise of personal jurisdiction. In *World-Wide Volkswagen Corp. v. Woodson*,[3] the Supreme Court attempted to define the "minimum contacts" requirement more clearly by finding that: (1) jurisdiction will not be based on isolated or fortuitous occurrences;[4] (2) there must be certain affiliating circumstances whereby the defendant has established "minimum contacts" with the forum state;[5] and (3) the foreseeability critical to due process analysis is whether the defendant could foresee he would have to defend suit in the forum state.[6]

*Northern Propane v. Kipps*[7] is the first Arizona case to consider the meaning of "minimum contacts" since the *World-Wide Volkswagen* decision. In *Northern Propane*, the plaintiffs were injured when the propane tanks of a motor home exploded.[8] The tanks had been filled in Michigan at a Northern Propane Gas Company outlet by a company employee.[9] The employee was told by the Michigan residents driving the motor home that it would be driven to Arizona.[10] While the motor home was parked at a camp site in Arizona, an explosion occurred, injuring the Michigan residents and an Arizona resident.[11]

The plaintiffs filed suit in Arizona, alleging that the cause of the explosion and of their injuries was the Northern Propane Company employee's negligence in overfilling one of the propane tanks.[12] Northern Propane moved to dismiss on the ground that the Arizona court did not

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1. 326 U.S. 310 (1945).
2. In *International Shoe* the court stated:
[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."
*Id.* at 316.
3. 444 U.S. 286 (1980).
4. *Id.* at 295.
5. *Id.*
6. *Id.* at 297.
7. 127 Ariz. 522, 622 P.2d 469 (1980).
8. *Id.* at 524, 622 P.2d at 471.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*

have personal jurisdiction over them.[13] The superior court denied the motion to dismiss[14] and Northern Propane appealed by special action.[15]

The court of appeals reversed the ruling of the superior court and ordered the complaint dismissed for lack of personal jurisdiction over the defendant.[16] The Arizona Supreme Court vacated the court of appeals decision and held that Northern Propane's "conduct and connection" with the state of Arizona was not sufficient for the defendant to reasonably anticipate it would be subject to suit in Arizona.[17] Although it was foreseeable that an injury might occur in Arizona, this alone did not show that the defendant had engaged in the requisite purposeful activity in the state.[18] The court also overruled the decision in a prior Arizona case, *Phillips v. Anchor Hocking Glass*,[19] to the extent *Phillips* is inconsistent with *World-Wide Volkswagen*.[20]

This Casenote will focus on what a plaintiff must now show to establish that sufficient "minimum contacts" exist for the exercise of personal jurisdiction in Arizona over a non-resident defendant. First, the development of the concept of "minimum contacts" will be reviewed and *World-Wide Volkswagen*'s impact on personal jurisdiction will be outlined. An analysis of the Arizona Supreme Court's application of *World-Wide Volkswagen* in *Northern Propane v. Kipps* will follow. Finally, those principles set out by the court in *Phillips v. Anchor Hocking Glass* that have been overruled by *Northern Propane* will be discussed.

*The Development of the Concept of Minimum Contacts*

Traditionally, the law of personal jurisdiction was based upon the territorial concept of state sovereignty, which precluded bringing an action against a defendant who could not personally be served within the territorial limits of the state.[21] The United States Supreme Court constitutionalized this concept as part of the due process clause and held that only judgments against defendants who had been served personally in the forum state would be given full faith and credit.[22] As corporations expanded

13. *Id.*; *see* ARIZ. R. CIV. P. 12(b)(2).
14. 127 Ariz. at 524, 622 P.2d at 471.
15. *Id.*
16. Northern Propane Gas Co. v. Kipps, 127 Ariz. 538, 540, 622 P.2d 485, 487 (Ct. App. 1980).
17. Northern Propane Gas Co. v. Kipps, 127 Ariz. 522, 526, 622 P.2d 469, 473 (1980).
18. *Id.*
19. 100 Ariz. 251, 413 P.2d 732 (1966).
20. Northern Propane Gas Co. v. Kipps, 127 Ariz. 522, 527, 622 P.2d 469, 474 (1980).
21. 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1064, at 206-07, § 1066, at 217 (1969); *see* Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 252-58, for a discussion of the territorial concept of jurisdiction in England and its influence upon American courts. *See also* Justice Johnson's dissent in Mills v. Duryee, 11 U.S. 481, 485 (1813), in which he articulated the territoriality principle later adopted in Pennoyer v. Neff, 95 U.S. 714 (1877).
22. Pennoyer v. Neff, 95 U.S. 714, 727 (1877). The issue in *Pennoyer* revolved around an Oregon judgment which allowed the transfer of title at a sheriff's sale of the plaintiff's land in Oregon. *Id.* at 719. Notice had been given by publication in Oregon while the plaintiff was living outside the state. *Id.* The United States Supreme Court found that there was no personal jurisdiction because constructive service on a non-resident defendant does not meet the requirements of the due process clause. *Id.* at 727. Therefore, the Oregon judgment was invalid even in Ore-

beyond the states in which they were incorporated, however, it became necessary for courts to expand their jurisdiction to gain power over foreign corporations.[23]

Several theories developed as a basis for exercising personal jurisdiction,[24] all of which eventually merged into a single test: whether a foreign corporation was "doing business" within the state.[25] The bare conclusion by the court, however, that a corporation was or was not "doing business" provided no coherent rationale for a reliable theory of personal jurisdiction.[26]

While the reach of foreign corporations was expanding, the economy became increasingly industrialized; transportation improved and the population became quite mobile.[27] This required the United States Supreme Court to take a more realistic view of personal jurisdiction and to provide

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gon. *Id.* at 732-33. For a discussion of *Pennoyer*, *see* Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts from Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569, 573 (1958).

23. It would have been both unjust and unfair to restrict suits against corporations to the single jurisdiction in which they were incorporated when it was apparent corporations were not going to restrict their business in the same manner. In addition, while suits could not be brought against corporations outside the state of their incorporation, the corporation, on the other hand, was allowed to bring suits outside the state of its incorporation. 4 C. WRIGHT & A. MILLER, *supra* note 21, § 1066, at 218; Kurland, *supra* note 22, at 578.

24. The "consent" theory deemed a foreign corporation to have consented to a state's power to exercise jurisdiction over it if it was transacting business within the state. *See* 4 C. WRIGHT & A. MILLER, *supra* note 21, at 220. This constituted "implied" or "imputed" consent. The Supreme Court upheld the "consent" theory, both implied and express, in St. Clair v. Cox, 106 U.S. 350, 356 (1882). For a discussion of implied consent, *see* Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 96 (1917); Bagdon v. Philadelphia & Reading Coal & Iron Co., 217 N.Y. 432, 437, 111 N.E. 1075, 1076 (1916). Other states coerced "consent" by requiring that a foreign corporation have an agent in the state upon whom service could be made as a prerequisite to engaging in business in that state. Kurland, *supra* note 22, at 578; 4 C. WRIGHT & A. MILLER, *supra* note 21, § 1066, at 219. This constituted "true" consent. For a discussion of the fictional nature of "true consent," *see* Smolik v. Philadelphia & Reading Co., 222 F. 148, 151 (S.D.N.Y. 1915).

The "presence" theory required scrutinizing the extent of a corporation's activities within the state attempting to assert jurisdiction. 4 C. WRIGHT & A. MILLER, *supra* note 21, § 1066, at 221. A corporation was "present" and thus amenable to process if it was found to be doing a certain level of business within the state. *Id.*; *see* Kurland, *supra* note 22, at 582-83. *See generally* Philadelphia & Reading R.R. v. McKibbin, 243 U.S. 264 (1917). Judge Hand wrote in Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2d Cir. 1930), that there had to be "some continuous dealings in the state of the forum" before a corporation could be deemed "present" and required to defend away from home. He pointed out that "presence" was only a shorthand way of estimating the inconveniences to the defendant of being required to appear in a foreign forum. *Id.*

25. 4 C. WRIGHT & A. MILLER, *supra* note 21, § 1066, at 223; Kurland, *supra* note 22, at 584. *See* Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141-42 (2d Cir. 1930), for a review of what constituted "doing business." If a forum corporation was "doing business" in the state, it had "impliedly consented" to jurisdiction or was "present." Kurland, *supra* note 22, at 584. Gradually, the concept of "doing business" became the prevailing test of jurisdiction. 4 C. WRIGHT & A. MILLER, *supra* note 21, § 1066, at 223; *see* Rothschild, *Jurisdiction of Foreign Corporations In Personam*, 17 VA. L. REV. 129 (1930), for an early discussion of "doing business."

26. Kurland, *supra* note 22, at 585. The decision by a court that a corporation was "doing business" provided a conclusion of law without accompanying reason. One had to hark back to the "consent" or "presence" theories for reasoning. These theories, however, had been abandoned by the courts in favor of the "doing business" test. *Id.* The "doing business" test was also inadequate because, although a foreign corporation might be "doing business" for some purposes, it was not for others. Consequently, in some actions a foreign corporation would be immune from service of process, yet in other actions it would be subject to service of process in accordance with due process. *See* Rothschild, *supra* note 25, at 133, for examples and discussion of such cases.

27. 4 C. WRIGHT & A. MILLER, *supra* note 21, § 1067, at 224.

defendants with some means of predicting when they would be subject to the jurisdiction of a particular state's courts. It is against this backdrop that the important decision in *International Shoe v. Washington*[28] arose.[29]

In *International Shoe*, the Supreme Court imposed constitutional due process requirements on a state court's exercise of personal jurisdiction. The Court held that due process requires a foreign defendant to have certain "minimum contacts" with the forum state so that "traditional notions of fair play and substantial justice" will not be offended by compelling defense of the suit.[30] Thus, the state court's judgment was not binding against a corporate defendant that had no "contacts, ties, or relations" with the state.[31]

"Minimum contacts" can be found only by examining the nature and quality of a defendant corporation's activities within a state.[32] The Supreme Court did not intend to impose a "mechanical" or "quantitative" analysis like the earlier "doing business" test.[33] What suffices as "minimum contacts" must be determined on a case-by-case basis.[34] It was clear even at the time of *International Shoe*, however, that if a corporation carried on continuous and systematic activities within a state it would be subject to the state's jurisdiction for any liabilities arising therefrom.[35]

The Court expanded the concept of "minimum contacts" even further in *McGee v. International Life Insurance*.[36] In *McGee*, the Court held that the sale of a single life insurance policy by a non-resident defendant to a California resident constituted sufficient contact for the exercise of jurisdiction by the California courts.[37] *McGee* stands for the proposition that a state may exercise jurisdiction over a defendant who intentionally per-

28. 326 U.S. 310 (1945).

29. Kurland, *supra* note 22, at 586.

30. 326 U.S. at 316. In *International Shoe* the Court dismissed the "consent" and "presence" theories as mere fictions. *Id.* at 316-18. The term "presence" had only been a tool by which the courts could evaluate whether the activities of a corporate agent within a state were such that they could be deemed to satisfy due process requirements. Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2d Cir. 1930).

31. 326 U.S. at 319.

32. *Id.*

33. *Id.*

34. 4 C. WRIGHT & A. MILLER, *supra* note 21, § 1067, at 233.

35. International Shoe v. Washington, 326 U.S. 310, 317 (1945); 4 C. WRIGHT & A. MILLER, *supra* note 21, § 1067, at 225-26. In Perkins v. Benguet Mining Co., 342 U.S. 437, 446 (1952), the Court made it easier to exercise jurisdiction over a non-resident corporation. The defendant in *Perkins* owned mines in the Phillipines and temporarily carried on a continuous and systematic, but limited, part of its business in Ohio. *Id.* at 438. The corporation was served in an in personam action filed in Ohio state court by a non-resident. *Id.* The cause of action did not arise in Ohio and did not relate to the corporation's activities there. *Id.* at 437. The Court held that a corporation that carries on continuous and systematic activities within a state is subject to state court jurisdiction not only for a cause of action arising from those activities, but also for a cause of action arising out of the corporation's activities outside of the state. *Id.* at 446.

36. 355 U.S. 220, 223 (1957); see Comment, *Long-Arm and Quasi In Rem Jurisdiction and the Fundamental Test of Fairness*, 69 MICH. L. REV. 300, 306 (1970).

37. McGee v. International Life Ins., 355 U.S. 220, 223 (1957). The defendant, a Texas corporation, offered to insure the plaintiff's son, a California resident, and upon acceptance the defendant mailed an insurance certificate to California. *Id.* at 221. The plaintiff's son paid premiums by mail from California to the defendant's Texas office. *Id.* at 221-22. After the death of her son the plaintiff sought to collect on the life insurance policy, but the defendant refused to pay. *Id.* at 222.

forms a single act within the state as long as the cause of action is related to that act.[38] *McGee* is thus a prime example of the Supreme Court's deference to the state court's exercise of jurisdiction over non-resident defendants.[39] The contact in *McGee* was more tenuous than in any previous cases in which jurisdiction had been exercised.[40]

The court's decision in *Hanson v. Denckla*,[41] however, signalled a retreat from non-interference and emphasized the continuing vitality of due process concerns in personal jurisdiction.[42] In *Hanson*, the Court held that "minimum contacts" do not exist unless a defendant has "purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws."[43] Consideration of the nature and quality of a defendant's activity is important in determining if the test has been met.[44]

In *Hanson*, the Supreme Court found no purposeful activity by the defendant trust company, which had not solicited any business nor completed any acts or transactions within the forum state.[45] The Court contrasted *Hanson* with the facts of *McGee*, observing that the non-resident defendant in the latter case had *intentionally* solicited a contract with the California resident.[46] The Court emphasized that a plaintiff's unilateral activity with a non-resident defendant, as was the case in *Hanson*, does not create a relationship that will satisfy the "minimum contacts" requirement to bring a non-resident defendant into a forum state court.[47]

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38. RESTATEMENT (SECOND) CONFLICT OF LAWS § 37, at 161 (1969); Casenote, *In Personam Jurisdiction Over Nonresident Manufacturers in Product Liability Actions*, 63 MICH. L. REV. 1028, 1030 (1965); *cf.* Hanson v. Denckla, 357 U.S. 235, 253 (1958) (a plaintiff's unilateral act does not constitute "minimum contacts").

39. Kurland, *supra* note 22, at 610.

40. *Id.* at 607.

41. 357 U.S. 235 (1958).

42. *See id.* at 250; Kurland, *supra* note 22, at 623.

43. 357 U.S. at 253.

44. *Id.*; *compare* text & note 32 *supra*.

45. 357 U.S. at 251.

46. *Id.* at 251-52; 4 C. WRIGHT & A. MILLER, *supra* note 21, § 1067, at 239. In *Hanson*, the only contact by the defendant trust company with Florida, the state seeking to assert jurisdiction, was through correspondence with a trust company customer who had moved from Pennsylvania to Florida. 357 U.S. at 251-52. This contact was inadequate to support jurisdiction. *Id.* at 252. The Court applied the *Hanson v. Denckla* test in Kulko v. Superior Court, 436 U.S. 84 (1978). In *Kulko*, a custody action, the plaintiff attempted to have her husband, a resident of New York, brought before a California court after he sent their child from New York to California to live with the plaintiff. *Id.* at 87-88. The California Supreme Court had granted jurisdiction based on the fact that the defendant had actively and fully consented to his daughter living in California for the school year. *Id.* at 89. The United States Supreme Court reversed on the basis that a father's acquiescence to his daughter's desire to attend school where her mother was living could not be construed as "purposefully availing himself" of the benefits and protections of California's laws. *Id.* at 94. The single act of sending the child to California, by which the defendant received no privileges or benefits from that state, was not enough contact for the defendant to reasonably anticipate being brought before a California court. *Id.* at 97. Since this case involved personal, domestic relations and was not one in which the defendant sought a commercial benefit from soliciting business in California, *Kulko* can also be distinguished from the holding in *McGee*. *Id.* at 97.

47. 357 U.S. at 253.

World-Wide Volkswagen's *Impact on Personal Jurisdiction*

The United States Supreme Court in *World-Wide Volkswagen v. Woodson*[48] again considered what "minimum contacts" means to state-court jurisdiction. The plaintiffs brought a products liability action against World-Wide Volkswagen and its retail dealer, Seaway.[49] World-Wide did business in three northeastern states, while Seaway, which obtained an inventory of automobiles from World-Wide, was incorporated and did business in New York.[50] The plaintiffs purchased a car from Seaway and then left the state for Arizona.[51] As they passed through Oklahoma, the car was involved in an accident and the plaintiffs were injured.[52] Suit was filed in Oklahoma state court.[53]

The Supreme Court of Oklahoma found that the Oklahoma courts had the power to exercise personal jurisdiction over the defendants under the Oklahoma Long Arm Statue.[54] The Oklahoma court acknowledged that there was no evidence that the defendants had any contact with the state other than the plaintiff's automobile.[55] The court reasoned, however, that personal jurisdiction should lie in Oklahoma because automobiles are inherently mobile by design and the defendant could foresee the possible use of the plaintiff's car in Oklahoma.[56]

The United States Supreme Court reversed the Oklahoma Supreme Court and concluded that foreseeability alone will not satisfy the due process "minimum contacts" requirement for state court jurisdiction over an absent defendant.[57] The Supreme Court rejected the inherent mobility theory and found that automobiles are to be treated as any other chattel.[58] Thus, the fact that an automobile is inherently mobile and may cause in-

48. 444 U.S. 286 (1980).

49. *Id.* at 288. The automobile's manufacturer, Audi NSU Auto Union Aktiengesellschaft, and its importer, Volkswagen of America, Inc., were also joined as defendants. *Id.*

50. *Id.* at 288-89.

51. *Id.* at 288.

52. *Id.*

53. *Id.*

54. Oklahoma's Long Arm Statute provides that a court may exercise personal jurisdiction over a defendant who "regularly does business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state. . . ." OKLA. STAT. tit. 12, § 1701.03(a)(4) (1961); *see* World-Wide Volkswagen v. Woodson, 444 U.S. 286, 290 (1980). The Supreme Court of Oklahoma found that the trial court had been justified in exercising jurisdiction under the long-arm statute because the defendants derived substantial revenue from their product's use from time to time in Oklahoma. World-Wide Volkswagen Corp. v. Woodson, 585 P.2d 351, 354 (Okla. 1978).

55. 444 U.S. at 289-90.

56. 585 P.2d at 354.

57. 444 U.S. at 295.

58. *Id.* at 296-97 n.11. The inherent mobility theory had been rejected in several state court decisions. *See, e.g.*, Granite States Volkswagen v. District Court, 177 Colo. 42, 45, 492 P.2d 624, 626 (1972); Tilley v. Keller Truck, 200 Kan. 641, 649, 438 P.2d 128, 133 (1968); Pellegrini v. Sachs & Sons, 522 P.2d 704, 707 (Utah 1974). The Supreme Court cited these cases as contrary to the ruling by the Oklahoma Supreme Court. 444 U.S. at 291 n.9. The Oklahoma Supreme Court decision, however, was not itself without precedent. *See* Tyson v. Whitaker & Sons, 407 A.2d 1, 7 (Me. 1979).

Likewise, the Supreme Court dismissed the argument that jurisdiction may be based on a "dangerous instrumentality" concept. 444 U.S. at 296-97 n.11. The "dangerous instrumentality" concept is not relevant to a discussion of personal jurisdiction, but rather bears on substantive principles of tort law. *Id.*

jury in any state through which it travels would not support jurisdiction over a non-resident retailer given the facts in *World-Wide Volkswagen*.[59]

After *World-Wide*, foreseeability is relevant only as a factor in deciding whether a defendant's conduct and connection with a state are sufficient for the defendant to anticipate defending a suit in that state.[60] Foreseeability alone that a product could be used and cause injury in the forum state thus is not the criterion for exercising personal jurisdiction. Almost every time a manufacturer sells a product, the product's presence anywhere in the United States could be regarded as foreseeable.[61] The mere presence of the product in the state cannot meaningfully constitute a sufficient contact to warrant compelling the seller to defend suit in that state.[62]

The Supreme Court did draw a distinction, however, between products that have inadvertently arrived in a state and caused injury and those that have been introduced into the stream of commerce and then cause injury in a state.[63] A state may exercise jurisdiction over a manufacturer who seeks to serve, directly or indirectly, markets in various states with the expectation that the product will be purchased there.[64] When a manufac-

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59. 444 U.S. at 296-97 n.11.

60. *Id.* at 297; see text & notes 43-47 *supra*. Restricting the use of foreseeability as a criterion for the exercise of personal jurisdiction protects a seller of goods from being subject to a wide scope of accountability. *See* Comment, *Federalism, Due Process, and Minimum Contacts: World-Wide Volkswagen Corp. v. Woodson*, 80 COLUM. L. REV. 1341, 1357 (1980). Often the movement of a product after it is sold at retail has nothing to do with any purposeful activity by the retailer, but is adventitious, usually uncontrollable, and does not benefit the retailer. Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk*, 58 N.C. L. REV. 407, 426 (1980). The concept of "minimum contacts" protects defendants from litigating in distant or inconvenient forums simply because a product migrates there. 444 U.S. at 292. As a consequence of the doctrine of "minimum contacts", the importance of state lines in the exercise of state court jurisdiction has been reaffirmed. *Id.* at 293; see text & note 42 *supra*. The maintenance of a suit against a defendant must be such that "traditional notions of fair play and substantial justice" are not offended. 444 U.S. at 292; see text & note 30 *supra*.

61. Phillips v. Anchor Hocking Glass Co., 100 Ariz. 251, 259, 413 P.2d 732, 737 (1966); Ford Motor Co. v. Atwood Machine Co., 392 So. 2d 1305, 1312-13 (Fla. 1981); *see* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 296 (1980).

62. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

63. *Id.* at 297-98.

64. *Id.* The Court attempted to distinguish *World-Wide* from Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). *Gray* was a case in which a corporation delivered its products into the stream of commerce with the expectation that they would be purchased in another state. 444 U.S. at 298. However, the record in *Gray* may not have supported the Illinois court's exercise of jurisdiction. In *Gray*, the defendant's only contact with the forum state, Illinois, was that a product manufactured in Ohio was incorporated into a hot water heater in Pennsylvania, which was sold in the course of commerce to an Illinois consumer. 22 Ill. 2d at 438, 176 N.E.2d at 764. The record was silent as to whether the defendant had any other contact with Illinois. One commentator has concluded that the United States Supreme Court approved the Illinois appellate court's construction of a record that actually did not exist. Sorg, *World-Wide Volkswagen: Has the United States Supreme Court Taken the Illinois Civil Practice Act Section 17-1(b) Out of the Gray Zone?* 1980 S. ILL. U. L.J. 137, 143 (1980).

Justice Brennan points out in his dissent in *World-Wide* that the manufacturer in *Gray* had no more control as to where its product might end up than did World-Wide. 444 U.S. at 307 n.12 (Brennan, J., dissenting). The majority opinion's attempt to make a distinction between national manufacturers and local retailers is sound, however, even though *Gray* does not serve that purpose. Comment, *supra* note 60, at 1357.

The Supreme Court stresses the inequities of subjecting small local businesses to suits in distant states when a product has only caused a fortuitous injury there. *Id.* at 1358. Requiring

turer introduces his product into interstate commerce it is foreseeable that his product might cause injury anywhere. By his own volition, the manufacturer's actions constitute a "minimum contact" when an injury occurs, and the manufacturer should anticipate being brought into court in the forum state.[65] Defendant World-Wide Volkswagen, however, had not attempted to serve markets outside a limited retail area. World-Wide could not therefore be subject to jurisdiction in Oklahoma despite the unilateral activity of one of its customers.[66]

After *World-Wide*, jurisdiction also will not be based on an isolated occurrence within a state or upon a single contact with a state which is merely fortuitous in nature.[67] There must be certain affiliating circumstances indicating that a defendant has purposefully availed himself of the law of a forum state before that state may exercise its jurisdiction.[68] These include, for example, doing business in the state, shipping or selling any products to the state, employing an agent who will receive process in the state, and using advertising or the media to reach the market in the state.[69] By requiring that a defendant purposefully avail himself of the privileges of the forum state, the court insures that the defendant is afforded notice that he will be subject to jurisdiction in a foreign state. This allows conduct to be shaped accordingly.[70]

Although the Supreme Court's due process analysis of jurisdiction emphasizes the burden upon the defendant,[71] in appropriate cases other relevant factors will also be considered.[72] These include the state's interest in litigating the dispute,[73] the plaintiff's interest in obtaining convenient

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defense in distant states is unfair because the purpose of local businesses is not to affect other markets but to serve the local community. *Id.* at 1360. A national or multistate manufacturer, on the other hand, has attempted to disseminate his products in many states and should be subject to jurisdiction wherever his products have been sold and caused injury. *Id.*; Ford Motor Co. v. Awood Machine Co., 392 So. 2d 1305, 1311-13 (Fla. 1981).

65. Comment, *supra* note 60, at 1360; Comment, *supra* note 36, at 313.

66. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 298; see text & note 47 *supra*.

67. 444 U.S. at 295.

68. *Id.*

69. *Id.* There was no showing by the plaintiffs in *World-Wide* that any other vehicle sold by the defendants had entered Oklahoma. *Id.* In addition, the defendants had not closed any sales in Oklahoma, had not availed themselves of the privileges and benefits of that state's laws, and had not solicited business there. *Id.* World-Wide had not sought to serve the Oklahoma market either directly or indirectly. *Id.*

70. *Id.* at 297. A defendant may buy insurance, pass expected costs on to consumers, or decide not to do business in certain states. *Id.*

71. Kulko v. Superior Court, 436 U.S. 86, 91, 97 (1978); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980). *Contra*, Woods, *Pennoyer's Demise: Personal Jurisdiction after Shaffer and Kulko and a Modest Prediction Regarding World-Wide Volkswagen Corp. v. Woodson*, 20 ARIZ. L. REV. 861 (1978). Professor Woods does not consider the primary inquiry to be the burden upon the defendant. He propose a three-step analysis which includes a progressive determination of (1) whether the forum has a sufficient governmental interest to decide the fairness of the assertion of jurisdiction; (2) whether the defendant had fair notice of defending against the type of litigation brought in the forum; and (3) an examination of certain fairness factors. *Id.* at 881-82.

72. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 292; *see* text & notes 102-04 *infra*.

73. In Rhoads v. Harvey Publications, 124 Ariz. 406, 408, 604 P.2d 670, 672 (Ct. App. 1979), the court noted Arizona's governmental interest in a fraud action after determining that the nonresident defendant had purposeful contacts with the state of Arizona. *Contra*, Tyson v. Whitaker & Sons, 407 A.2d 1, 4 (Me. 1979), in which the court's first step in a due process analysis was

and effective relief,[74] and the judicial system's interest in efficiently resolving controversies.[75] None of these factors may be considered, however, unless a defendant initially has some contacts, ties, or relations with the forum state.[76]

## *The* Northern Propane v. Kipps *Decision*

The exercise of state-court jurisdiction requires a two-step analysis, one statutory, the other constitutional.[77] Arizona's Long Arm Statute[78] provides that jurisdiction may be exercised over a non-resident corporate defendant "doing business in this state, or . . . which has caused an event to occur in this state out of which the claim which is the subject of the complaint arose. . . ."[79] The Arizona courts, like the courts in other jurisdictions,[80] have construed the Arizona Long Arm Statute to provide the fullest jurisdiction permitted by the United States Constitution.[81]

Perhaps for this reason,[82] the Arizona Supreme Court only briefly mentioned the state long arm statute[83] and did not engage in any statutory analysis. Instead, the court went directly to the constitutional question.[84] Thus, Arizona's Long Arm Statute remains intact after *Northern Propane*.[85]

Even if a state may exercise jurisdiction over a non-resident defendant under its long arm statute, it must still be determined whether it is constitutional to do so.[86] A defendant who is doing business or causes an event to occur in Arizona is only subject to personal jurisdiction if "minimum

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whether Maine had a legitimate governmental interest in the subject matter of the action. *See also* Woods, *supra* note 71, at 881-82, for the analysis the *Tyson* court followed.

74. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 292.

75. *Id.*

76. *Id.* at 294.

77. First, the court must determine whether the defendant "caused an event to occur in Arizona out of which the claim which is the subject mater of the complaint arose." Maloof v. Raper Sales, Inc., 113 Ariz. 485, 487, 557 P.2d 522, 524 (1976); Rhoads v. Harvey Publications, Inc., 124 Ariz. 406, 408, 604 P.2d 670, 672 (Ct. App. 1979); see text & notes 78-79 *infra*. Then the court must find that the exercise of personal jurisdiction over the defendant is consistent with the requirements of the due process clause of the fourteenth amendment. Maloof v. Raper Sales, Inc., 113 Ariz. at 487, 557 P.2d at 524; Phillips v. Anchor Hocking Glass, 100 Ariz. 251, 254, 413 P.2d 732, 733-34 (1966); Rhoads v. Harvey Publications, Inc., 124 Ariz. at 408, 604 P.2d at 672; *see* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 290 (1980).

78. ARIZ. R. CIV. P. 4(e)(2).

79. *Id.*

80. *See* World-Wide Volkswagen v. Woodson, 444 U.S. 286, 290 & n.8 (1980) (Oklahoma law); Tyson v. Whitaker & Sons, 407 A.2d 1, 3 (Me. 1979) (citing cases from New Jersey, New York, Tennessee, and Utah).

81. *E.g.*, Maloof v. Raper Sales, Inc., 113 Ariz. 485, 487, 557 P.2d 522, 524 (1976); Phillips v. Anchor Hocking Glass Co., 100 Ariz. 251, 254, 413 P.2d 732, 733-34 (1966); Rhoads v. Harvey Publications, Inc., 124 Ariz. 406, 408, 604 P.2d 670, 672 (Ct. App. 1979).

82. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 290 (1980).

83. Northern Propane Gas Co. v. Kipps, 127 Ariz. 522, 525, 622 P.2d 469, 472 (1980).

84. *Id.* at 525, 622 P.2d at 472. The court may have been anxious to reach the constitutional question so it could overrule Phillips v. Anchor Hocking Glass Co., 100 Ariz. 251, 413 P.2d 732 (1966). There should have been some discussion of whether Northern Propane had "caused an event to occur" in this state. *See* ARIZ. R. CIV. P. 4(e)(2).

85. 127 Ariz. at 527, 622 P.2d at 474.

86. See text & note 77-79 *supra*.

contacts" between the defendant and the state have been established.[87] In *Northern Propane* the court concluded that sufficient "minimum contacts" did not exist between Northern Propane and the state of Arizona for the constitutional exercise of personal jurisdiction in Arizona.[88]

The plaintiffs argued that the court had jurisdiction because a motor home is inherently mobile and, therefore, an injury in Arizona was foreseeable.[89] The plaintiffs also contended that the defendants engaged in purposeful activity in Arizona, giving rise to jurisdiction in Arizona, because the defendant was informed that the motor home was going to Arizona.[90]

The Arizona Supreme Court, however, followed the precedent set by *World-Wide Volkswagen*. First, the mere fact that a motor home might travel from Michigan to Arizona and cause injury does not mean the defendants had any connection with Arizona or had conducted business within Arizona.[91] *World-Wide Volkswagen* held that jurisdiction may not be predicated upon a vehicle's inherent mobility even though an injury in a distant forum is foreseeable.[92] Foreseeability is relevant only if a de-

87. 127 Ariz. at 527, 622 P.2d at 477; Phillips v. Anchor Hocking Glass Co., 100 Ariz. 251, 254, 413 P.2d 732, 734 (1966); *see* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980).

88. 127 Ariz. at 527, 622 P.2d at 474.

89. *Id.* at 526, 622 P.2d at 473. In addition, the plaintiffs asserted that jurisdiction could be based on the fact that the motor home was a "dangerous instrumentality". *Id.* at 526, 622 P.2d at 473-74. It is clear after *World-Wide Volkswagen*, however, that the "dangerous instrumentality" argument has nothing to do with personal jurisdiction. 444 U.S. at 296-97 n.11; Northern Propane Gas Co. v. Kipps, 127 Ariz. at 526-27, 622 P.2d at 473-74; see text & note 58 *supra*.

90. 127 Ariz. at 526, 622 P.2d at 471. In their brief to the court of appeals, the plaintiffs argued that the foreseeability in *Northern Propane* was distinguishable from the forseeability addressed in *World-Wide* because in *Northern Propane* a hazard was made specifically known to the defendants when they were informed the mobile home would be driven to Arizona. *See* Plaintiff's Brief at 8.

The plaintiffs also alleged that because propane gas becomes explosive due to temperature changes, and the defendants knew or should have known this, the defendants were negligent in selling the gas. *Id.* This basis for liability differs from the strict liability claims in *World-Wide*, and allegedly provided another basis for distinguishing *Northern Propane*. *Id.* Personal jurisdiction, however, does not depend upon the nature of the action but upon whether "minimum contacts" exist. Comment, *supra* note 36, at 309. The plaintiffs relied on *Gray* for the proposition that a state court may exercise jurisdiction over a negligent out-of-state defendant. *See* Plaintiff's Brief at 4. The jurisdiction in *Gray*, however, although wrongly exercised, was based upon substantial contacts, not upon negligence. Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 438, 176 N.E.2d 761, 764 (1961); Sorg, *supra* note 64, at 143-44. No Supreme Court decision has based personal jurisdiction on the nature of the action; instead, all of the cases discuss "minimum contacts" as the basis for jurisdiction. *See* International Shoe v. Washington, 326 U.S. 310, 316 (1945) (taxation); Hanson v. Denckla, 357 U.S. 235, 251 (1958) (trusts); Kulko v. Superior Court, 436 U.S. 84, 92 (1978) (custody); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) (products liability), all basing their holdings on whether "minimum contacts" existed.

91. *See* 127 Ariz. at 526, 622 P.2d at 473.

92. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980). Other state courts have rejected the "inherent mobility" and "dangerous instrumentality" theories as well. Prior to *World-Wide Volkswagen*, the Utah Supreme Court had responded to the "inherent mobility" and "dangerous instrumentality" arguments in Pellegrini v. Sachs & Sons, 522 P.2d 704, 707 (Utah 1974). The plaintiff, a California resident, bought a car from the defendant, a California retailer. *Id.* at 705. Shortly thereafter, the plaintiff moved to Utah where she was injured in a collision allegedly caused by defects in the car. *Id.* The court concluded that although it is foreseeable that a product will travel into another state and cause harm, this alone does not constitute "minimum contacts". *Id.* at 707. The court made an important distinction between manufacturers and deal-

fendant has sufficient connections with the forum state of such a nature that he should anticipate being brought into court if his product causes an injury there.[93]

In addition, the Arizona Supreme Court concluded that a defendant being informed that a product will be taken to another state should not subject the defendant to that state's jurisdiction unless the defendant has purposefully put the product into the stream of commerce.[94] The unilateral activity of a plaintiff should not be interpreted as activity of the defendant in seeking to serve directly or indirectly the markets of that state.[95] The Arizona Supreme Court's ruling on this aspect of the case is in accord with several other state supreme court decisions which were decided after *Hanson v. Denckla*.[96]

In *Northern Propane*, it was necessary for the plaintiffs to show some constitutionally significant connection between the defendants and Arizona. The evidence, however, showed that Northern Propane did no business in Arizona, had no offices, records, accounts, sales persons, or agents here, and did no selling or distributing in Arizona.[97] Therefore, none of

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ers in determining whether jurisdiction could be based solely upon the ground that a product sold elsewhere by a dealer might be brought into a state and cause harm. *Id.* The bulk of a dealers duties, the court noted, are discharged in the state where he sells his product, and usually a dealer does not go into another state to take advantage of its laws. *Id.* Therefore, the mere presence of a dealers product in another state does not in and of itself constitute a "minimum contact". *Id.* at 708. The defendant must engage in some purposeful contact with the state before jurisdiction may be exercised. *Id.*

In Granite States Volkswagen, Inc. v. District Court, 177 Colo. 42, 492 P.2d 624 (1972), the court concluded that it would violate due process to subject the defendant to the jurisdiction of another state simply because an automobile is mobile and might eventually be used there. *Id.* at 45, 492 P.2d at 625.

93. 127 Ariz. at 526, 622 P.2d at 473. If forseeability were the only criterion used in determining "minimum contacts," a retailer could be subject to personal jurisdiction anywhere in the country even though he had no purposeful contacts with the other states. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 296 (1980). It is foreseeable that any product could go from one state to another, especially in businesses such as gas stations or tire outlets. *See* 127 Ariz. at 526, 622 P.2d at 473; text & notes 60-62 *supra*.

94. 127 Ariz. at 526, 622 P.2d at 473; *see* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 297-98; text & note 63 *supra*.

95. 444 U.S. at 298.

96. See Granite States Volkswagen, Inc. v. District Court, 177 Colo. 42, 45, 492 P.2d 624, 626 (1972). The Colorado court also found that the defendants had done nothing to "purposefully avail" themselves of the benefits or obligations of Colorado law even though the plaintiff had told the defendant she intended to use the car in that state. *Id.* The court found that the plaintiff's intent to use the product in another state does not meet the *Hanson v. Denckla* test which requires voluntary action by a defendant calculated to have an effect in the forum state. *Id.* at 45, 492 P.2d at 625-26; Currie, *The Growth of the Long Arm*, 1963 U. ILL. L.F. 533, 549. The defendant's knowledge did not change the local character of the defendant's business. 177 Colo. at 45, 492 P.2d at 626.

Likewise, in Tilley v. Keller Truck & Implement Corp., 200 Kan. 641, 438 P.2d 128 (1968), the Kansas Supreme Court found that it would offend "traditional notions of fair play and substantial justice" to exert in personam jurisdiction over the defendant simply because a manager of a corporation knew, or had reason to know, the plaintiff was going to use the product in another state. *Id.* at 649, 438 P.2d at 134. Therefore, the court concluded that the defendant had not submitted itself to in personam jurisdiction in Kansas. *Id. See generally* Oliver v. American Motors, 70 Wash. 2d 875, 425 P.2d 647 (1967).

97. 127 Ariz. at 524, 622 P.2d at 471. The plaintiffs and the defendants disagreed over the kind of business Northern Propane conducted and its actual contacts with Arizona. The plaintiffs alleged that Northern Propane was a multistate distributor of propane gas doing business in 25 states, including New Mexico, Texas, and Michigan. *See* Plaintiff's Brief in the Court of Appeals,

the affiliating circumstances required by *World-Wide Volkswagen* as evidence of "minimum contacts" existed for the exercise of jurisdiction by Arizona.[98]

*The Effect of* Northern Propane v. Kipps *and* World-Wide Volkswagen *on Prior Arizona Law*

Before *World-Wide Volkswagen*, Arizona's law on personal jurisdiction was controlled by the Arizona Supreme Court decision in *Phillips v. Anchor Hocking Glass Co.*[99] In *Phillips*, the court concluded that to satisfy the traditional notions of fair play and substantial justice, the court should consider not only what is fair to the defendant but what is fair to both parties.[100] The *Phillips* court had enumerated three factors the trial court should consider in determining whether it is fair to exercise jurisdiction over a non-resident defendant.[101] The factors to be considered were: (1) the nature and size of the manufacturer's business; (2) the economic independence of the plaintiff; and (3) the nature of the cause of action, including the applicable law and the practical matters of trial.[102]

*Northern Propane* overrules *Phillips* in its emphasis upon the above factors in determining whether it is fair to exercise jurisdiction over a non-resident defendant whose product has caused an injury in the state.[103] After *World-Wide Volkswagen*, factors such as a plaintiff's economic condition and the state's interest or the plaintiff's interest in local litigation may not be considered until there is a showing of "minimum contacts".[104] Absent any contacts, ties, or relations with the forum state, a state cannot exercise jurisdiction despite the state's interest or the inconveniences to the plaintiff.[105]

The court in *Phillips* had attempted to fashion a rule which allowed jurisdiction to be exercised even if a product should arrive in the state fortuitously.[106] The United States Supreme Court in *World-Wide Volkswagen*, however, has ruled that isolated occurrences within a state which are fortuitous in nature will not subject a defendant to the forum state's

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at 2. Northern Propane admitted it was a multistate distributor of propane gas but denied distributing in 25 states. *See* Defendant's Brief at 2. The defendant did have an interest in pipelines in several states, including New Mexico, where it buys gas for use in the eastern and mid-western United States. *See id.* Unless the defendants had "minimum contacts" with Arizona, however, it should not matter if they did business with every other state in the union. On the other hand, if it can be said that the defendants purposefully put its products into the stream of commerce, then it must defend in any state where that product caused injury. *See* Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 442-43, 176 N.E.2d 761, 766 (1961); text & notes 65-66 *supra*.

98. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980).

99. 100 Ariz. 251, 413 P.2d 732 (1966).

100. *Id.* at 255, 413 P.2d at 734.

101. *Id.* at 260, 413 P.2d at 738.

102. *Id.*

103. 127 Ariz. at 527, 622 P.2d at 474; *see* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 294.

104. 127 Ariz. at 527, 622 P.2d at 474; see text & notes 71-76 *supra*.

105. 127 Ariz. at 527, 622 P.2d at 474; *see* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 294.

106. 100 Ariz. at 256, 413 P.2d at 735; Comment, *supra* note 36, at 308-09.

jurisdiction.[107] The language of *Hanson v. Denckla* that a defendant must purposefully avail itself of the forum state was thus read literally in *World-Wide Volkswagen*.[108] Therefore, the Arizona Supreme Court was incorrect in *Phillips* when it refused to construe the "purposefully availing" test of *Hanson v. Denckla* as applying to defendants in negligence actions.[109] Consequently, there are no constitutional distinctions between an action in negligence, where it cannot be said a defendant considers the laws of another state before acting, and an action in products liability, where a defendant may deliver his product into the stream of commerce.[110] Both require a showing of "minimum contacts" prior to exercise of jurisdiction.[111]

*Conclusion*

In *Northern Propane Co. v. Kipps* the Arizona Supreme Court followed the analysis and holding of *World-Wide Volkswagen Corp. v. Woodson*. Foreseeability alone will not subject a defendant to suit in a foreign state without certain "minimum contacts". If a defendant purposefully avails himself of the benefits and obligations of a foreign state, he has established "minimum contacts" with that state. An isolated contact with a state, however, will not subject a defendant to suit in that state.

Although there is no precise formula for determining when "minimum contacts" will exist, it is clear that courts will examine the affiliating circumstances surrounding the defendant's relationship with the state in which the plaintiff files suit. This case-by-case examination allows the court to preserve in each case "traditional notions of fair play and substantial justice". Defendants will not be unduly burdened when they have had no opportunity to guard against the risk of being brought before a court in a foreign state. Thus, for the time being, the expansion of interstate commerce has still not erased the lines of the individual states. The courts continue to guard against the disappearance of state sovereignty by limiting a state's power to exercise personal jurisdiction over non-residents who have caused injury within the state, but who do not have sufficient "minimum contacts" with the state.

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107. 444 U.S. at 295; see text & notes 67-70 *supra*.

108. 444 U.S. at 297.

109. Comment, *supra* note 36, at 308-09. The court in Maloof v. Raper Sales, Inc., 113 Ariz. 485, 488, 557 P.2d 522, 525 (1976), reiterated its position in *Phillips* that the "purposefully availing" requirement of *Hanson* is improper and unreasonable, especially in cases of tortious and negligent conduct. However, Manufacturer's Lease Plans, Inc. v. Alverson Draughon College, 115 Ariz. 358, 360, 565 P.2d 864, 866 (1977), limited the non-application of the *Hanson* test to negligence suits and distinguished the case as one concerning the intentional, purposeful act of entering into a contract. Woods, *supra* note 71, at 879.

110. Comment, *supra* note 36, at 308-09; see note 90 *supra*.

111. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980).

# III. CRIMINAL LAW

## A. NUNCHAKUS AND THE RIGHT TO BEAR ARMS IN ARIZONA

The Arizona Constitution provides in its declaration of rights: "The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired. . . ."[1] The Arizona Court of Appeals recently considered this constitutional guarantee in *State v. Swanton*.[2] In *Swanton*, the defendant was convicted of possessing a nunchaku,[3] which is a "prohibited weapon"[4] in Arizona. Although a nunchaku may be possessed in connection with legal "exhibitions, demonstrations, contests, or athletic events,"[5] this exception did not apply to Swanton.[6]

In April, 1979, a Tucson police officer was called to the scene of a family dispute, where a woman told him that Swanton had hit her.[7] Later, the officer stopped Swanton in his truck.[8] Acting on a tip from the woman,

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1. ARIZ. CONST. art. 2, § 26. This section continues: "but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men."

2. — Ariz. —, 629 P.2d 98 (Ct. App. 1981).

3. The nunchaku is a martial arts weapon that originated in Southeast Asia. "Its form recalls a small agricultural flail: two sticks of wood, about a foot long, hinged end to end by a short cord so as to allow freedom of swivel." Commonwealth v. Adams, 245 Pa. Super. Ct., 431, 433, 369 A.2d 479, 480, 481 (1976). Use of the nunchaku has become increasingly popular in the United States. *Id.*

4. It is a crime in Arizona to knowingly possess "a prohibited weapon." ARIZ. REV. STAT. ANN. § 13-3102(A)(3) (Supp. 1980-81). Prohibited weapons include bombs, grenades, mines, rockets, silencers for firearms, automatic firearms, "sawed-off" shotguns and rifles, and the nunchaku. *Id.* § 13-3106(6).

ARIZ. REV. STAT. ANN. § 13-3101(6)(e) (1978) specifies as a certain class of prohibited weapon any "instrument, including a nunchaku, that consists of two or more sticks, clubs, bars or rods to be used as handles, connected by a rope, cord, wire or chain, in the design of a weapon used in connection with the practice of a system of self defense."

New York and Rhode Island have flatly banned the possession of nunchakus. N.Y. PENAL LAW § 265.00-.14 & § 265.01 (McKinney 1974); R.I. GEN. LAWS § 11-47-42 (Supp. 1980). California also bans the possession of nunchakus, with an exemption similar to the one in Arizona. CAL. PENAL CODE §§ 12020, 12029 (West Supp. 1981). These legislatures were apparently reacting to the popularity of the nunchaku among illegal aliens and street gangs. *See* Note, *Criminal Law—Weapons—Prohibition of Karate Instruments*, 45 TENN. L. REV. 758, 759 (1978).

5. ARIZ. REV. STAT. ANN. § 13-3102(H) (Supp. 1980-81) states that § 13-3102(A)(3) "shall not apply to a weapon described in Section 13-3101, paragraph 5, subdivision (f), if such weapon is possessed for the purpose of preparing for, conducting or participating in lawful exhibitions, demonstrations, contests, or athletic events involving the use of such weapons." There is, however, no paragraph 5, subdivision (f). The court of appeals accepted the explanation in the 1980 Reviser's Note that the reference probably is to paragraph 6, subdivision (e), which defines the nunchaku as a prohibited weapon. *Id.* § 13-3102, *Reviser's Note*; State v. Swanton, — Ariz. —, 629 P.2d 98 (Ct. App. 1981). California has a similar exception for martial arts' instruction and classes. CAL. PENAL CODE § 12020(b)(2) & (3) (West Supp. 1981). Oregon forbids the offensive use of a nunchaku against any person. OR. REV. STAT. § 166.220 (1977).

6. — Ariz. at —, 629 P.2d at 99.

7. Apellant's Opening Brief at 2, State v. Swanton, — Ariz. —, 629 P.2d 98 (Ct. App. 1981).

8. *Id.*

the officer found a nunchaku belonging to Swanton under the truck's front seat.[9] The officer seized the nunchaku and arrested Swanton for possessing a "prohibited weapon."[10] The trial judge sentenced Swanton to two years of unsupervised probation.[11]

On appeal, Swanton challenged his conviction on three grounds. He contended that statutes outlawing possession of nunchakus were unconstitutionally vague;[12] that the second amendment to the United States Constitution granted him the right to possess a nunchaku;[13] and that article 2, section 26 of the Arizona Constitution guaranteed the right to possess such a weapon.[14] The court of appeals dismissed all three contentions.[15] It held that statutes prohibiting possession of nunchakus were not void for vagueness.[16] The court further held that the right to keep and bear arms as found in the United States Constitution did not apply to the states.[17] The court found also that the term "arms" as used in the Arizona Constitution meant "such arms as are recognized in civilized warfare and not those used by a ruffian, brawler or assassin."[18] The court thus concluded that nunchakus were not "arms" under the Arizona Constitution.[19]

This Casenote focuses on the guarantee of the right to bear arms in the Arizona Constitution. The vagueness[20] and second amendment[21] chal-

9. *Id.* at 2, 3.
10. *Id.* at 3; *see* ARIZ. REV. STAT. ANN. § 13-3102(A)(3) (Supp. 1980-81) and § 13-3101(6)(e) (1977).
11. Appellant's Opening Brief at 2.
12. *Id.*
13. — Ariz. at —, 629 P.2d at 99.
14. *Id.*
15. *Id.*
16. *Id.* at —, 629 P.2d at 98.
17. *Id.* at —, 629 P.2d at 99.
18. *Id.*
19. *Id.* The court's definition of "arms" is quoted directly from the Oklahoma case of *Ex parte* Thomas, 1 Okla. Crim. 210, 215, 97 P. 260, 265 (1908). There, Thomas was convicted of carrying a concealed pistol. *Id.* at 210, 97 P. at 260. The Oklahoma Constitution guaranteed the right to bear arms, but added the qualification that "nothing herein contained shall prevent the Legislature from regulating the carrying of weapons." OKLA. CONST. art. 2, § 26. The Oklahoma court held that the "arms" protected were those of the militia, such as "guns of every kind, swords, bayonets, horseman's pistols, etc." 1 Okla. Crim. at 213, 97 P. at 263. The decision was grounded on cases from states with constitutions allowing legislative regulation of arms "to prevent crime" (TEX. CONST. art. 1, § 23); that referred to the "common defense" (TENN. CONST. art. 1, § 26); that guaranteed the right to "the people" and spoke of "standing armies" (KAN. CONST., *Bill of Rights*, § 4); that declared the right to bear arms a right of all "people" (GA. CONST. art. 1, para. 22). 1 Okla. Crim. at 212-14, 97 P. at 262-64. *Ex parte Thomas* and the Oklahoma Constitution are simply not apposite to article 2, § 26 of the Arizona Constitution. *See* notes 46 & 168 *infra*.
20. The *Swanton* court followed Arizona precedent in dismissing the vagueness challenge. In State *ex rel* Williams v. City Court, 21 Ariz. App. 318, 519 P.2d 71 (1974), Williams was charged with carrying a concealed switchblade. *Id.* at 319, 519 P.2d at 72. He claimed that § 13-911 of the Arizona Criminal Code defined "weapon" in an unconstitutionally vague manner. *Id.* The court of appeals held the statute adequate and supported judicial deference to the legislature's difficult task in this area. *Id.* at 319, 320, 519 P.2d at 72, 73. ARIZ. REV. STAT. ANN. § 13-911(A) (1970), under which Williams was convicted, provided in pertinent part: " 'Weapon' as used in this article means anything readily capable of lethal use and possessed under circumstances not manifestly appropriate for lawful uses which it may have." This statute is the direct predecessor of the statute at issue in *Swanton*, ARIZ. REV. STAT. ANN. § 13-3102 (Supp. 1980-81). *See id.* Historical Note (1978).

Vagueness challenges to weapons legislation have fared no better in other jurisdictions. *See* People v. McFadden, 31 Mich. App. 512, 516, 188 N.W.2d 141, 144 (1971) (statute governing licensing of concealed weapons was held not void for vagueness); Runo v. State, 556 S.W.2d 808,

lenges will not be considered. A definition of the term "arms" in article 2, section 26 of the Arizona Constitution will be proposed to encompass any weapon reasonably suited for personal defense, including the nunchaku. This Casenote concludes that the *Swanton* decision is unjustified and that the statutes upon which it is based are an unconstitutional infringement of the Arizona right to bear arms.

## CONSTRUCTION OF ARTICLE 2, SECTION 26 OF THE ARIZONA CONSTITUTION

Swanton contended that the Arizona Constitution guaranteed him the right to possess a nunchaku since it is a weapon reasonably adapted for personal defense.[22] Article 2, section 26, however, does not specify what arms the individual citizen has the right to bear "in defense of himself."[23] Therefore, the scope of the provision must be construed.

### *Language of the Provision*

When construing a constitutional provision, the language used must be taken and understood in its ordinary, natural, and obvious meaning.[24] Section 26 provides that "the individual citizen" has a nonimpairable right

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810 (Tex. Crim. App. 1977) (statute prohibiting possession of a firearm by certain types of convicted felons upheld against a vagueness challenge). *See also* State v. Tucker, 28 Or. App. 29, 558 P.2d 1244 (1977), overruling a void for vagueness challenge in a case involving nunchakus. The *Tucker* decision is discussed and the vagueness doctrine is elaborated in Note, *supra* note 4.

21. The second amendment to the United States Constitution states: "A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. In United States v. Cruikshank, 92 U.S. 542 (1876), the United States Supreme Court delineated the limited nature of this right:

> This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second Amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress.

*Id.* at 553. Therefore, whatever rights exist to bear arms depend upon local legislation. Cases v. United States, 131 F.2d 916, 921 (1st Cir. 1941). "That amendment applies only to the Federal Government and does not restrict state action." Harris v. State, 83 Nev. 404, 406, 432 P.2d 929, 930 (1967). *See generally* Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment*, 2 HASTINGS CONST. L.Q. 961 (1975).

22. Appellant's Reply Brief at 7, State v. Swanton, — Ariz. —, 629 P.2d 98 (Ct. App. 1981). By its very nature, the nunchaku is only dangerous at very short distances and clearly could cause "serious bodily injury" if wielded by an expert. Commonwealth v. Adams, 245 Pa. Super. Ct. 431, 434, 369 A.2d 479, 481 (1976). It can be used offensively, but so can a "golfclub or a baseball bat." *Id.* at 436, 369 A.2d at 482. It is well suited to personal defense, much more so than a revolver, because the harmful range is more confined. Appellant's Reply Brief at 7.

23. The court of appeals stated that the term "arms" as used in the constitutional provision means "arms as are recognized in civilized warfare and not those used by a ruffian, brawler or assassin." — Ariz. at —, 629 P.2d at 99. But war is not civilized. *See* S. FREUD, THOUGHTS FOR THE TIMES ON WAR AND DEATH (1915); I. KANT, *Conclusion*, THE SCIENCE OF RIGHT (1778). If the court meant to say "conventional" weapons of war, it ignored the horrible variety in today's military arsenals, including fragmentation grenades, flame-throwers, napalm, nerve gas, and biological agents. *See* STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, ANTI-PERSONNEL WEAPONS 107, 125-33, 229, 236, 247 (1978). The "ruffian, brawler or assassin," however, would presumably prefer a pistol or knife to a martial arts device that is only effective in the hands of an expert. *See* note 22 *supra*.

24. *See* County of Apache v. Southwest Lumber Mills, Inc., 92 Ariz. 323, 327, 376 P.2d 854, 856 (1962); Valley Nat'l Bank v. First Nat'l Bank, 83 Ariz. 286, 294, 320 P.2d 689, 694 (1958).

to bear "arms" in defense of self.[25] An ordinary and accepted definition of "arms" is, "Weapons offensive or defensive; anything that a man strikes or hurts with."[26] A nunchaku therefore seems to fit easily within the common definition of "arms."

Unfortunately, a simple equation of "arms" with "weapons" is not a satisfactory answer.[27] "Arms" and "weapons" are not strictly synonymous: "arms" may properly be considered a subset of weapons.[28] The United States Constitution, however, as well as many state constitutions seem to equate militia weaponry with the subset of weapons known as "arms."[29] Apart from the absurdity of suggesting that the individual citizen should defend himself solely with the highly destructive weapons of the militia, the words of section 26 neither explicitly nor implicitly infer such a militaristic definition.[30] Indeed, section 26 implicitly precludes such a meaning for "arms," since a militaristic definition of the term might end the ability of the citizen to obtain "arms" short of raiding the local armory.[31] Or, having obtained militia weapons, the citizen might be able

25. *See* text & note 1 *supra*.

26. BLACK'S LAW DICTIONARY 87 (2d ed. 1910). "Weapons offensive or defensive." BURRILL'S LAW DICTIONARY 126 (2d ed. 1870). "Anything that a man wears for his defense, or takes in his hands, or uses in his anger, to cast at or strike at another." UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE 307 (1898). These definitions of "arms" were contemporaneous to the Constitutional Convention of 1910 and thus should shed some light on what the delegates understood.

27. If it were, that would be the end of this inquiry, for the citizen would have the unquestioned right to possess any weapon, no matter how destructive.

28. Devices that are weapons (such as poison gas, cannon, and bombs), but which are so destructive as to totally surpass the needs of personal defense are clearly not "arms." *See* State v. Kerner, 181 N.C. 574, 576, 107 S.E. 222, 224 (1921). However, it is indisputable that every "arm" is a weapon under the definition advanced by the Arizona Court of Appeals: "The term "weapon" itself indicates that it is for offense or defense of a person, *i.e.*, that it is designed to be used in destroying, defeating, or injuring an enemy, such as a gun or sword." State *ex rel.* Williams v. City Court, 21 Ariz. App. 318, 319, 519 P.2d 71, 72 (1974). For a more complete discussion of *Williams*, see note 20 *supra*.

29. United States v. Miller, 307 U.S. 174 (1939), held that the second amendment related solely to the militia and its arms. "With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted with that end in view." *Id.* at 178.

Many state constitutions equate arms with weapons of the militia. *See* Fife v. State, 31 Ark. 455 (1876), in which Fife was convicted of carrying a pistol, and Andrews v. State, 50 Tenn. (3 Heisk.) 165 (1871), which also involved the carrying of pistols. In both cases the respective courts ruled that only weapons of the soldier were protected by the state constitutional guarantees. 31 Ark. at 458; 50 Tenn. (3 Heisk.) at 179. Other state cases consistent with *Fife* and *Andrews* are State v. Rupp, 282 N.W.2d 125, 130 (Iowa 1979); Commonwealth v. Davis, 369 Mass. 886, 888, 343 N.E.2d 847, 849 (1976).

30. ARIZ. CONST. art. 2, § 26 mentions nothing about the militia or any collective right. The right is specifically guaranteed to the individual citizen. Delegates Crutchfield, Morgan, and Connelly, who formed the Committee on Preamble and Declaration of Rights that sponsored section 26, probably did not consider any esoteric or anachronistic definitions of "arms." The men were, respectively, a minister, a stockman, and a locomotive engineer. Bakken, *The Arizona Constitutional Convention of 1910*, 1978 ARIZ. ST. L.J. 1, 28, 29.

Even if the words of article 2, section 26 are seen as ambiguous, the Arizona courts generally resolve every doubt in favor of a right or liberty. *See* Stone v. Stidham, 96 Ariz. 235, 238, 393 P.2d 923, 926 (1964). Article 2, section 26 is obviously designed to safeguard the liberty, and very life, of the individual citizen. *See* ARIZ. CONST. art. 2, § 26. Therefore, any possible doubt should be resolved in favor of a broad definition of the right and hence, of "arms."

31. Most arms of "civilized warfare" have been banned to the individual citizen by statute. *See* ARIZ. REV. STAT. ANN. § 13-3101(6) (1978); note 4 *supra*. Hence, if the only weapons protected are those of "civilized warfare," yet most such weapons are specifically banned by the legislature, the citizen is effectively left without weapons to protect himself.

to assert a protected right to possess devices deadly beyond any reasonable needs of self-defense.[32]

A more suitable definition of "arms" under the Arizona constitutional provision would be "weapons reasonably suited to personal defense."[33] This means those weapons that could effectively incapacitate an attacker or attackers without needlessly endangering innocent bystanders or property.[34] Many militia weapons, such as the cannon, automatic rifle, hand-grenade, and flame-thrower[35] far exceed any requirements of personal defense and could place an entire neighborhood in jeopardy if ever used.[36]

The recent Oregon case of *State v. Kessler*[37] lends support to the definition of "arms" as solely weapons reasonably suited to personal defense. In *Kessler*, the defendant was convicted of possessing a club.[38] The Oregon Supreme Court held that modern militia weapons were not "arms" as the Oregon constitutional framers understood the term.[39] The court concluded that the framers defined "arms" as weapons used for personal defense,[40] not as weapons of "advanced warfare."[41] Weapons far exceeding the needs of personal protection were thus never intended to be classified as "arms."[42] The nunchaku, like the hand-held club in *Kessler*, appears to come within this conception of "arms" and possession would thus be protected under the Oregon Constitution.[43]

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32. *See* note 28 *supra*.

33. ARIZ. CONST. art. 2, § 26 speaks solely of arms possession "in defense of himself," implying protection only for weapons of personal defense.

34. *See* note 28 *supra*.

35. *See* note 23 *supra*.

36. *See* note 28 *supra*.

37. 289 Or. 359, 614 P.2d 94 (1980).

38. *Id.* at —, 614 P.2d at 100. Possession was in contravention of OR. REV. STAT. § 166.510 (1977). 289 Or. at —, 614 P.2d at 100.

39. *Id.* at —, 614 P.2d at 99.

> These advanced weapons of modern warfare have never been intended for personal possession and protection. When the constitutional drafters referred to an individual's "right to bear arms," the arms used by the militia and for personal protection were basically the same weapons. Modern weapons used exclusively by the military are not "arms" which are commonly possessed by individuals for defense, therefore, the term "arms" in the constitution does not include such weapons.

*Id.*

40. *Id.* at —, 614 P.2d at 100. Based on its historical analysis, the Oregon Supreme Court concluded that "the drafters intended arms to include the hand-carried weapons commonly used by individuals for personal defense. The club is an effective, hand-carried weapon which cannot logically be excluded from this term." *Id.*

41. *Id.* at —, 614 P.2d at 99; *see* note 39 *supra*.

42. 289 Or. at —, 614 P.2d at 99.

43. The Oregon constitutional provision in *Kessler* guaranteed the right to bear arms to the people "for the defence [*sic*] of themselves, and the State. . . ." OR. CONST. art. 1, § 27. The Oregon court thus concluded that "arms" under that provision "would include weapons commonly used for either purpose, even if a particular weapon is unlikely to be used as a militia weapon." 289 Or. at —, 614 P.2d at 99. The Arizona Constitution makes it even clearer that "arms" means weapons of personal defense, since article 2, § 26 refers to the individual citizen in "defense of himself." ARIZ. CONST. art. 2, § 26.

Analogous to the hand-carried club in *Kessler*, the hand-carried nunchaku cannot logically be excluded from the term "arms" as used in article 2, section 26 of the Arizona Constitution. *See* text & notes 3, 22, 39, & 40 *supra*.

*Intent of the Arizona Framers and Ratifiers*

In interpreting the Arizona Constitution, the Arizona courts endeavor to implement the intent of the framers.[44] Records of the Constitutional Convention are given great weight in this respect.[45] During the 1910 Constitutional Convention, attempts were made to destroy or greatly circumscribe the right to bear arms.[46] All of these efforts met vigorous opposition and ultimately failed.[47] This suggests that the framers envisioned a broad guarantee of the right to bear arms which would also seem to require a broad definition of what arms are permissible.[48]

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44. *See* Garvey v. Trew, 64 Ariz. 342, 354, 170 P.2d 845, 853, *cert. denied*, 329 U.S. 784 (1946); Laird v. Sims, 16 Ariz. 521, 524, 147 P. 738, 739 (1915).

45. *See* Desert Waters, Inc. v. Superior Court, 91 Ariz. 163, 168, 370 P.2d 652, 655 (1962); Ward v. Stevens, 86 Ariz. 222, 229, 344 P.2d 491, 495 (1959).

46. At the 1910 Constitutional Convention, ARIZ.CONST. art. 2, § 26 began as section 32 of Substitute Proposition No. 94. SUBSTITUTE PROPOSITION No. 94, Weinberger Collection (unpublished manuscript, Special Collections, University of Arizona Library, Tucson). Section 32 of Substitute Proposition No. 94 was identical in all respects to section 26 of article 2, which was adopted as part of the Arizona Constitution. *Id.*

Efforts to alter or strike section 32 took place on November 25, 1910:

*Mr. Chairman*: "Are there any objections or corrections?"

*Mr. Baker*: "Mr. Chairmanm [*sic*] I kvoe [*sic*] to strike out all of section 32. I never in all my life found it necessary to carry a six shooter and I have passed through nearly all the scenes and experiences of this wild and unsettled country. Carrying arms is dangerous. It is a very dangerous thing to oneself and to ones [*sic*] associates and should not be permitted under any circumstances. I have seen lives lost and innocent blood spilled just through the carrying of arms. Concealed weapons, under ones [*sic*] coat or shirt. A most dangerous and vile act a practice that should never be permitted except in times of war and never in peace. Think of it carrying a six shooter ot [*sic*] a knife or some other terrible arm of defense and then in a moment of heated pasion [*sic*] using that weapon, I do not believe in it and I move to strike out that section."

*Mr. Webb*: "I second that motion, for I agree with the gentleman from Maricopa County that it is a pernicious thing and should not be included in this bill. I too have in all my experiences have never seen the time when it was necessary to carry concealed weapons except in times of Indian troubles, and I have seen many and varied experiences, such as in Cow Camps and many other vocations which some might deem it necessary to come armed but I did not nor do I believe it necessary to do so now. We are no longer a frontier country and if we did not need arms in the early days of pioneering this country we do not now and I second that motion."

*Mr. Crutchfield*: "I move to amend by inserting after the word "impaired" in line 9, page 7 the following words "But the legislature shall have the right to regulate the wearing of arms to prevent crime." [*sic*]

*Mr. Baker*: "That is alright [*sic*] and I second that motion."

*Mr. Parsons*: "Mr. Chairman, I move to amend by striking out all of section 32 and substitute the following in lieu therefore: "The people shall have the right to bear arms for their safety and defense, but the legislature shall regulate the exercise of this right by law." [*sic*]

COMPLETE VERBATIM REPORT OF THE ARIZONA CONSTITUTIONAL CONVENTION, Friday evening session, Nov. 25, 1910 [unpaginated manuscript hereinafter cited by date and session as VERBATIM REPORT]. *See* also MINUTES OF THE CONSTITUTIONAL CONVENTION OF THE TERRITORY OF ARIZONA 297 (1910) [hereinafter MINUTES].

47. Every proposal to amend or strike section 32 was defeated. VERBATIM REPORT, *supra* note 46, Friday evening session, Nov. 25, 1910; MINUTES, *supra* note 46, at 297. Later attempts to table the entire declaration of rights were soundly defeated. VERBATIM REPORT, *supra* note 46, Tuesday morning session, Nov. 29, 1910; MINUTES, *supra* note 46, at 298.

48. The drafters denied attempts to give the legislature the express unrestricted power to regulate the wearing of arms in general. *See* notes 46 & 47 *supra*. This serves as an indication that the framers wanted few legislative restrictions on the right to bear arms.

Language used by the framers in discussing section 32 is revealing. The framers used "arms" and "weapons" interchangeably, apparently regarding them as having the same meanings. *Id.*

As a further guide to interpretation, Arizona courts evaluate the surrounding circumstances[49] and ideas prevailing at adoption[50] as well as the history of legislation extant when the constitutional provision was enacted.[51] In 1910, Arizona was a booming territory where many individuals carried weapons.[52] The idea was common that a person had the right to carry a weapon for self-defense.[53] In addition, the 1901 Revised Statutes of Arizona, which were in force when the constitution was adopted, permitted the open possession of any weapon for immediate self-defense "on one's own premises or place of business" or under other enumerated conditions.[54] No weapon was expressly prohibited under the 1901 statutes or any earlier Arizona laws.[55] These conditions indicate existence of a traditionally expansive view on the possession of weapons.

*Constitutional Harmony*

When explicating the Arizona Constitution, care must be taken to regard the document as a whole[56] and to give harmonious force and effect to all provisions.[57] Article 2, section 26 appears to grant an unrestricted right to bear arms in self-defense.[58] The territorial statutes, however, did place at least some qualifications on that right.[59] Since those statutes were reiterated by the new constitution,[60] a harmonious interpretation would be that the State of Arizona could reasonably regulate arms, but not so as to pro-

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Delegate Baker's remarks indicate that he understood "arms" under section 32 as allowing the possession of a six-shooter, "a knife or *some other terrible arm of defense*." *Id.* (Emphasis added).

49. *See* Ruth v. Industrial Comm'n, 107 Ariz. 572, 575, 490 P.2d 828, 831 (1971); Greenlee County v. Laine, 20 Ariz. 296, 299, 300, 180 P. 151, 153 (1919).

50. *See* Maricopa County Water Conservation Dist. No. 1 v. Southwest Cotton Co., 39 Ariz. 65, 77, 4 P.2d 369, 374, (1931), *modified and rehearing denied*, 39 Ariz. 367, 7 P.2d 254 (1932).

51. *See* Desert Waters, Inc. v. Superior Court, 91 Ariz. 163, 168, 370 P.2d 652, 655 (1962).

52. F. LOCKWOOD, PIONEER DAYS IN ARIZONA 262 (1932); R. WYLLYS, ARIZONA: THE HISTORY OF A FRONTIER STATE 295 (1950).

53. F. LOCKWOOD, *supra* note 52, at 262; 2 J. MCCLINTOCK, ARIZONA 491 (1916).

54. ARIZ. REV. STAT. PENAL CODE tit. XI, § 386 (1901). Section 382 of the 1901 Penal Code made it unlawful to carry *concealed* the following assortment of both everyday and unusual weapons: "any pistol or other firearm, dirk, dagger, slung-shot, sword-cane, spear, brass knuckles, or other knuckles of metal, bowie-knife or any kind of knife or weapon, except a pocket-knife, not manufactured and used for the purpose of offense and defense." Although most of these weapons were not generally allowed in settlements, exceptions to the rule were so broad as to swallow that stricture. *See id.* §§ 386-88 & 390. Under those exceptions, for instance, a person could carry these arms when in reasonable fear of an imminent, unlawful attack, when traveling, or "on one's own premises or place of business." *Id.* § 386.

55. *See id.* tit. X, §§ 342, 362, 381-92; *id.* tit. XIII, § 427; *id.* tit. X, §§ 661-63; *id.* tit. XIII, § 730 (1887); COMPL. LAWS TERR. ARIZ. ch. 10, paras. 365-66, 397-400, ch. 21, paras. 1264-70 (1877); *id.* p. 96, §§ 1-5, pp. 98-99, §§ 1-4 (1871); THE HOWELL CODE OF THE ARIZONA TERRITORY ch. 10, §§ 116, 129-30, ch. 11, §§ 36, 45-47 (1865).

Even if legislative history before 1910 supported the proposition that the Teritorial legislators wanted to protect militia weaponry only, the right to bear arms was explicitly made individual and completely separate from any duty of state defense in 1910. Any suggestion that the framers merely routinely adopted the right to bear arms provision of the Washington Constitution is dispelled by a reading of the debate over adoption of that provision. *See* notes 46-48 *supra*.

56. *See* Kilpatrick v. Superior Court, 105 Ariz. 413, 419, 466 P.2d 18, 24 (1970); State v. Osborne, 14 Ariz. 185, 204, 125 P. 884, 892 (1912).

57. *See* Corporation Comm'n v. Pacific Greyhound Lines, 54 Ariz. 159, 170, 94 P.2d 443, 447 (1939); McBride v. Kerby, 32 Ariz. 515, 521, 260 P. 435, 437 (1927).

58. ARIZ. CONST. art. 2, § 26. *See* text & notes 1, 26, & 33 *supra*.

59. *See* notes 54 & 55 *supra*.

60. ARIZ. CONST. art. 22, § 2 provides in pertinent part: "All laws of the Territory of Arizona

hibit any weapon reasonably suited to personal defense.[61] In other words, the legislature could not restrict a right so severely as to eliminate its existence by narrowly defining what arms were protected or permissible.[62]

## SIMILAR STATE CONSTITUTIONAL PROVISIONS

Judicial interpretations by states with similar constitutional guarantees are useful in understanding the scope of Arizona's right to bear arms provision.[63] Of the thirty-four other states that safeguard the right to bear arms in one form or another,[64] five have guarantees similar to the one in Arizona's constitution.[65] They are Colorado, Mississippi, Missouri, Montana, and Washington.[66] While no case from these states precisely defines

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now in force, not repugnant to this Constitution, shall remain in force as laws of the State of Arizona until they expire by their own limitations or are altered or repealed by law . . . ."

61. *See* text & notes 27-43 *supra*.

62. The right to bear arms has been called "one of the fundamental principles, upon which rests the great fabric of civil liberty. . . ." Nunn v. State, 1 Ga. 243, 249 (1846). "The constitutional right is a very valuable one. We would not disparage it." Haile v. State, 38 Ark. 564, 566-67 (1882).

As with other rights, the right to bear arms is subject to reasonable regulation. *See* People v. Blue, 190 Colo. 95, 103, 544 P.2d 385, 390 (1975). However, a "statute which, under the pretence [*sic*] of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence [*sic*], would be clearly unconstitutional." State v. Reid, 1 Ala. 612, 616-17 (1840).

63. *See* Faires v. Frohmiller, 49 Ariz. 366, 372, 67 P.2d 470, 472 (1937).

64. *See* Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 CATH. U. L. REV. 53, 78 (1966).

65. To be classified as "similar," these provisions met four criteria: First, the beneficiary of the guarantee is singular. Second, the right is disjunctive. It gives the individual the right to bear arms either in defense of himself *or* of the state; the choice is left to the individual. Third, major purposes of the guarantee are self-defense or resistance to tyranny. "If the purpose is either self-defense or deterrence of oppression, the right seems to protect private possession of weapons, since only through private possession can those purposes be fulfilled." Note, *The Impact of State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation*, 38 U. CHI. L. REV. 185, 195 (1970). The fourth criterion is that the provision does not closely resemble either of the proposed amended versions of ARIZ. CONST. art. 2, § 26 that were rejected by the Constitutional Convention of 1910. If the delegates had intended a guarantee similar to those amendments, they would have adopted one of them. Since they did not, state provisions similar to the rejected amendments are not particularly useful as interpretive guides. *See* VERBATIM REPORT, *supra* note 46, Friday evening session, Nov. 25, 1910.

"State court opinions concerning the right to bear arms rarely refer to the specific language of their constitutions, and they often cite the provisions and courts decisions of other states without noting differences in language and emphasis." Note, *supra*, at 193. The use of the above four criteria will help ensure that only truly relevant provisions, with their concommitant judicial interpretations, are heavily relied upon in construing the Arizona constitutional provision.

66. *See* MO. CONST. art. I, § 23, formerly art. 2, § 17 (1875, amended 1945), which states: "That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons."

MONT. CONST. art. 2, § 12, formerly art. 3, § 13 (1889, amended 1972), states:

> The right of any person to keep or bear arms in defense of his own home, person and property or in aid of the civil power when thereto legally summoned, shall not be called in question, but nothing herein contained shall be held to permit the carrying of concealed weapons.

MISS. CONST. art. 3, § 12, formerly art. 1, § 15 (1869, amended 1890), art. 1, § 23 (1832, amended 1869), and art. 1, § 23 (1817, amended 1832), states: "The right of every citizen to keep and bear arms in defense of his home, person or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons."

COLO. CONST. art. 2, § 13 states: "The right of no person to keep and bear arms in defense of

"arms," some cases strongly suggest a broad definition of arms as weapons reasonably suited to personal defense.[67]

Because article 2, section 26 was taken directly from the Constitution of the State of Washington,[68] the construction placed on it by the Washington Supreme Court is persuasive.[69] In the 1907 case of *State v. Gohl*,[70] the Washington court observed in dicta that the right to bear arms was not absolute and could be reasonably regulated.[71] The court equated the right to bear arms with the freedoms of speech and press and implied that regulation could go only so far as the banning of concealed weapons.[72]

In *State v. Tully*,[73] the Washington court held constitutional certain firearms regulations that banned the possession of a pistol by a person convicted of a violent crime.[74] The regulations also stated that no one could carry a pistol concealed on the person or in a vehicle, "except in his place of abode or fixed place of business," without a proper license.[75] Although *Tully* was approved in *State v. Krantz*,[76] no Washington case has ever suggested that an ordinary citizen could be absolutely prohibited from possessing a weapon reasonably suited to personal defense.[77]

The Missouri Supreme Court in *State v. Wilforth*[78] held that a law prohibiting the wearing of arms in a place of worship could constitutionally go only so far as to ban the bearing of concealed arms.[79] In *State v.*

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his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons."

*See also* note 68 *infra* for the text of the Washington provision.

67. *See* text & notes 99, 104, 110, 132, 140 *infra*.

68. WASH. CONST. art. 1, § 24 is identical to ARIZ. CONST. art. 2, § 26, which is the verbatim descendant of Substitute Proposition No. 94, section 32, which was first introduced at the Constitutional Convention on October 25, 1910. VERBATIM REPORT, *supra* note 46, Tuesday morning session, Oct. 25, 1910. This is no coincidence, since most of the Arizona declaration of rights was taken from the Washington Bill of Rights. *Id.*, Friday morning session, Nov. 25, 1910.

69. In Arizona Eastern R.R. Co. v. Hinton, 20 Ariz. 266, 179 P. 963 (1919), the Arizona Supreme Court held that when Arizona adopted a provision of the Constitution of the State of Washington after a certain construction was placed on it by the supreme court of that state, that construction would be persuasive, if not binding, on the Supreme Court of Arizona if the construction were reasonable. *Id.* at 268, 179 P. at 963.

70. 46 Wash. 408, 90 P. 259 (1907).

71. *Id.* at 410, 90 P. at 260.

72. *Id.* The court noted that the prohibition on the carrying of concealed weapons had been held valid in every state except Kentucky. *Id.* The case was decided on other grounds, however. *Id.* at 411, 90 P. at 260.

73. 198 Wash. 605, 89 P.2d 517 (1939).

74. *Id.* at 606, 89 P.2d at 518.

75. *Id.* at 606-07, 89 P.2d at 518.

76. 24 Wash. 2d 350, 353, 164 P.2d 453, 454 (1945).

77. See text & notes 33-36 *supra* for definitional guidelines of a weapon reasonably suited to personal defense.

78. 74 Mo. 528, 531 (1881). The court noted:

> We do not desire to be understood as maintaining that in regulating the manner of bearing arms the authority of the legislature has no other limit than its own discretion. A statute which, under the pretense of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for purposes of defense, would be clearly unconstitutional.

*Id.*

See note 66 *supra* for the text of the Missouri constitutional provision.

79. State v. Wilforth, 74 Mo. 528, 531 (1881).

*Keet*,[80] the Missouri court added that no exception would be made to the prohibition against concealed weapons in the Missouri Constitution even for weapons carried to repel an imminent attack.[81] The *Keet* opinion noted with approval an Idaho case[82] holding that, though concealed weapons could be prohibited, the open carrying of any deadly weapon was protected.[83]

In the Missouri case *State v. White*,[84] defendant White was roused from sleep by violent knocking at his door.[85] He went into the street and brandished a shotgun at several police officers who had stopped an auto near White's house in an unrelated incident.[86] The Missouri Supreme Court upheld White's conviction for exhibiting a weapon in a "rude, angry, or threatening manner."[87] The court reasoned that the Missouri Constitution guaranteed the right to bear arms only for defensive purposes, not for aggression.[88] It is not until a citizen ceases to act in a defensive manner, the court added, that "his right to bear arms may be taken away or limited by reasonable regulations."[89]

A later Missouri case, *State v. Plassard*,[90] involved a defendant convicted of feloniously exhibiting a deadly weapon, a charge similar to that in *White*. In *Plassard*, the defendant was a life tenant who displayed and fired his .22 rifle to frighten off some apparent trespassers.[91] One of the "trespassers" turned out to be a deputy constable, and Plassard was arrested.[92] The Missouri Supreme Court held that Plassard had the right to show at trial that he was the rightful possessor of the land.[93] Once Plassard proved that he was rightfully in possession, if "he was defending his home and property he had a constitutional right to bear arms."[94]

The 1975 case of *Taylor v. McNeal*[95] also sheds light on how the Missouri Supreme Court might define "arms" under the Missouri Constitu-

80. 269 Mo. 206, 190 S.W. 573 (1916).
81. *Id.* at 214, 190 S.W. at 576.
82. *In re* Brickey, 8 Idaho 597, 70 P. 609 (1902).
83. *Id.*, *cited in* State v. Keet, 269 Mo. at 213, 190 S.W. at 575.
84. 299 Mo. 599, 253 S.W. 724 (1923).
85. *Id.* at 605, 253 S.W. at 726.
86. *Id.*
87. *Id.* at 613, 253 S.W. at 729. This was a violation of MO. REV. STAT. § 3275 (1919), providing that if any person should "in the presence of one or more persons, exhibit any such weapon in a rude, angry, or threatening manner . . . he shall, upon conviction, be punished. . . ." 229 Mo. at 607, 253 S.W. at 726.
88. 299 Mo. at 607-08, 253 S.W. at 727. Speaking of the Missouri constitutional provision, the court said:

> Its purpose is to deny to the Legislature the power to take away the right of the citizen to resist aggression, force, and wrong at the hands of another. By no possible construction can that section of the Constitution be held to guarantee to the citizen the right to keep and bear arms for the purpose of his own aggression, wrong or assault upon the person or property of another. The right of the citizen to keep and bear arms for his own protection or in aid of the civil power, when thereto legally summoned, is the only right guaranteed to the citizen.

89. *Id.* at 608, 253 S.W. at 727.
90. 355 Mo. 90, 195 S.W.2d 495 (1946).
91. *Id.* at 92, 195 S.W.2d at 496.
92. *Id.*
93. *Id.* at 94, 195 S.W.2d at 497.
94. *Id.*
95. 523 S.W.2d 148 (Mo. 1975).

tion. Unlike the criminal charges involved in the other cases, *Taylor* was a replevin action.[96] Taylor sought replevin against police officers who retained two pistols and some ammunition clips seized during a prior family disturbance.[97] The Missouri Supreme Court ultimately held that possession of a concealable firearm in one's home is guaranteed by the constitution, although the wearing of concealed arms may be prohibited.[98] "Arms" under the Missouri Constitution would therefore seem to mean any concealable weapon reasonably suited to personal defense.[99]

The Montana Supreme Court seems to accept as a broad definition of "arms" those weapons suited to defense of person and property. In *Butte Miners' Union v. City of Butte*,[100] the Miners' Union sued the city of Butte for damages to the Union Hall caused by riots touched off by a union parade held in June, 1914.[101] Some union members at the hall apparently triggered the destruction of the union hall by firing into the crowd.[102] The Montana Supreme Court upheld the miners' right to store "firearms, ammunition, and explosives" at the meeting hall if it was necessary for "preserving the lives of its members and the protection of its property."[103] Although the court did not expressly define "arms," it implicitly equated permissible weapons with those necessary for defense of self or property.[104]

In *State v. Hodge*,[105] the Montana Supreme Court focused on the intent behind the constitutional protection of bearing arms. Hodge was a "sheep man" who confronted a "cattle man" named Thrasher over range rights.[106] During the altercation, Hodge waved a six-shooter in the air and used "opprobrious" language.[107] Hodge was convicted of intent to assault, but the trial judge granted a new trial, apparently on the basis that there was insufficient evidence to sustain the conviction.[108] The Montana Supreme Court held that an intent to assault may not be inferred merely because a person is armed.[109] The court also apparently equated a constitutionally protected "arm" with "deadly weapon," which can be an extremely expansive definition.[110]

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96. *Id.* at 150.

97. *Id.* at 149, 150.

98. *Id.*

99. Since most firearms are concealable, the Missouri court's definition of protected arms may be very broad.

100. 58 Mont. 391, 194 P. 149 (1920). See note 66, *supra* for the text of the Montana constitutional provision.

101. 58 Mont. at 397-98, 194 P. at 150. The rioters caused $93,000 in damage to the hall. *Id.*

102. *Id.* at 398-99, 194 P. at 150.

103. *Id.* at 403, 194 P. at 151.

104. See text & notes 33-36 *supra*.

105. 84 Mont. 24, 273 P. 1049 (1929).

106. *Id.* at 28, 29, 273 P. at 1049.

107. *Id.*

108. *Id.* at 27, 32, 273 P. at 1049, 1051.

109. *Id.* at 30, 31, 273 P. at 1049, 1050.

110. *Id.* The court added that "[a] man has a right to bear a deadly weapon upon the open road if he conceal it not, and he has a right to bear it upon his own premises even if he conceal it." *Id.* at 30, 273 P. at 1049. The court justified these statements by referring to the state constitutional guarantee of the right to bear arms. *Id.*

In *State v. Rathbone*,[111] the Montana Supreme Court dealt with a situation in which Rathbone killed an elk that had damaged his ranch property.[112] Rathbone was convicted for the crime of killing an elk out of season.[113] The Montana Supreme Court overturned the conviction, holding that the right to bear arms provision enunciated "natural, fundamental and inalienable rights enjoyed by and guaranteed to every person residing within the State of Montana."[114] The court added that these rights are "absolute and self-executing in so far as they limit the power of the legislature."[115] Such a holding suggests that narrowing the definition of "arms" would be an impermissible exercise of legislative power.[116]

The Montana Supreme Court in *State v. Nickerson*[117] affirmed the principle that the state constitution forbids the legislature from prohibiting the bearing of arms intended for self-defense.[118] Nickerson operated a one-man timber operation in the forests of northern Montana.[119] After quarrels with a neighbor, the neighbor and a police officer unexpectedly entered Nickerson's cabin, whereupon Nickerson pointed a revolver in their direction.[120] The Montana Supreme Court dismissed the assault charges against Nickerson by relying equally on the right of self-defense and the right to bear arms as found in the state constitution.[121]

While upholding restrictions on concealed weapons, the Mississippi Supreme Court has refused to go further in curbing the right to bear arms in construing its state constitutional guarantee. In *McGuirk v. State*,[122] although the court held that concealed weapons could be carried, this could only be done if in accordance with a statute allowing such conduct while "traveling or setting out on a journey."[123] Later, in *Wilson v. State*,[124] where the defendant was carrying a concealed pistol, the court disallowed a vague self-defense theory as justification for bearing concealed arms.[125] The Mississippi cases thus disclose a strong judicial tendency to liberally interpret the right to bear arms and to broadly define what arms are permissible.[126]

In *People v. Nakamura*,[127] the Colorado Supreme Court considered a

111. 110 Mont. 225, 100 P.2d 86 (1940).
112. *Id.* at 232, 235, 100 P.2d at 88, 89.
113. *Id.* at 232, 100 P.2d at 88.
114. *Id.* at 237, 100 P.2d at 90.
115. *Id.*
116. By the court's reasoning, any legislative attempt to overly narrow the scope of the right to bear arms by restrictively defining "arms" would arguably be void *ab initio*. *Id.*
117. 126 Mont. 157, 247 P.2d 188 (1952).
118. *Id.* at 166-67, 247 P.2d at 193.
119. *Id.* at 159, 247 P.2d at 189.
120. *Id.* at 160-61, 247 P.2d at 189-90.
121. *Id.* at 166, 168, 247 P.2d at 192, 193.
122. 64 Miss. 209, 1 So. 103 (1887). See note 66 *supra* for the text of the Mississippi constitutional provision.
123. 64 Miss. at 212, 1 So. at 104.
124. 81 Miss. 404, 33 So. 171 (1902).
125. *Id.* at 405, 33 So. at 172.
126. A narrow definition of "arms" would seem to inherently restrict the right to bear arms. *See* note 79 *supra*.
127. 99 Colo. 262, 62 P.2d 246 (1936). *See* note 66 *supra* for the text of the Colorado constitutional provision.

law that made it illegal "for any unnaturalized foreign-born resident, within this state, to either own or be possessed of a shotgun or rifle of any make, or a pistol or firearm of any kind."[128] The law ostensibly was passed to protect wild game within the state.[129] The court held that the legislature could not disarm any class of persons or deprive them of the right to bear arms guaranteed in the Colorado Constitution.[130] Noting that the Colorado Constitution guaranteed the right to self-protection, the court added that "[t]he guaranty thus extended is meaningless if any person is denied the right to possess arms for such protection."[131] Further, the court strongly implied that even an alien has the full right to possess "a veritable armory of weapons, or at least . . . an ample supply for defense."[132] This seems to equate any weapon reasonably suited to defense with "arms" under the Colorado Constitution.[133]

The Colorado courts have also held that a municipal ordinance preventing citizens from possessing weapons for the purpose of self-defense was an overbroad encroachment on the right to bear arms.[134] Similarly, in *People v. Ford*,[135] the Colorado Supreme Court declared that the possession of a weapon by a convicted felon could not be made illegal if the purpose of possession was defense of home, person or property.[136] The Colorado court has observed elsewhere that if defense is not the reason for possession, prohibition of possession of arms by a felon is clearly within the state's police powers,[137] but only if the person is a felon.[138] By these cases, the Colorado courts have indicated that citizens have a very broad right to bear arms, which apparently can be substantially abrogated only upon loss of citizenship.[139] An overly restrictive definition of "arms" would seem to conflict with that broad right.[140]

In summary, the cases from states with constitutional provisions similar to the provision in Arizona's constitution agree in two overall respects. First, the right to bear arms is recognized as broad and important.[141] Second, reasonable regulation of that right is permissible.[142] Regulation of the right to bear arms has been held reasonable in three areas. First, the

128. 99 Colo. at 263-64, 62 P.2d at 246.
129. *Id.*
130. *Id.* at 264, 62 P.2d at 247. The court added that "arms that may be used in defense of person or property" may not be denied to unnaturalized foreign-born residents. *Id.*
131. *Id.*
132. *Id.* at 267, 62 P.2d at 248.
133. *Id.* at 265, 62 P.2d at 247. The court speaks of a "gun, or the means ordinarily employed" in the utilization of the right to bear arms. *id.* The "means ordinarily employed" seems to indicate almost any weapon suited to the task of self-defense.
134. City of Lakewood v. Pillow, 180 Colo. 20, 23, 501 P.2d 744, 745 (1972). The Colorado Supreme Court stated that "[e]ven though the governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.*
135. 193 Colo. 459, 568 P.2d 26 (1977).
136. *Id.* at 462, 568 P.2d at 28.
137. People v. Blue, 190 Colo. 95, 103, 544 P.2d 385, 391 (1975).
138. *Id.*
139. See text & notes 135-38 *supra*.
140. See notes 78 & 126 *supra*.
141. See text & notes 72, 83, 94, 98, 110, 114, 118, 126, 130, 134 & 139 *supra*.
142. See text & notes 62, 71, 72 & 89 *supra*.

courts have almost universally held that the bearing of concealed weapons may be restricted or banned.[143] Second, weapons may generally be prohibited to persons who have forfeited the full rights of citizenship by commission of a felony or crime of violence.[144] Finally, possession for nondefensive purposes is not protected and may be interdicted.[145]

Emphasis placed on the inviolability of the right to bear arms when personal defense is the goal of possession[146] lends support to the idea that "arms" should be defined as weapons reasonably suited to personal defense.[147] The conclusion is enhanced by intimations about the meaning of arms in the cases from other states.[148] Before *Swanton*, Arizona cases seem to have been in agreement with decisions from these other states.[149]

## THE RIGHT TO BEAR ARMS IN ARIZONA

The most important judicial theme running through the pre-*Swanton* Arizona cases discussing the right to bear arms is that the legislature may deny the right to those who have been convicted of certain crimes.[150] In *State v. Noel*,[151] the court of appeals upheld a statute that denied to any person who had been convicted of a violent crime the right to possess a pistol unless he had been pardoned or had regained full status as a citizen.[152] The court in that case did not explicitly state that it was relying on article 2, section 26.[153] In *State v. Rascon*,[154] however, the Arizona Supreme Court cited *Noel* for the proposition that such statutes do not infringe upon the constitutional right of a person to keep and bear arms.[155] These cases seem based on the fact that the right is specifically guaranteed to citizens, and that when citizenship ends so does the right.[156]

In *State v. Harmon*,[157] the defendant had been convicted of a burglary and sentenced to the Arizona State Prison.[158] After his release, Harmon registered to vote, obtained hunting licenses, and bought various firearms.[159] He apparently thought that he was once again a full citizen.[160]

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143. See text & notes 72, 98 & 123 *supra*.
144. See text & notes 74, 135-38 *supra*.
145. See text & notes 88-89, 109, 118, 125 & 136 *supra*.
146. See text & notes 78, 88-89, 94, 103, 110 & 136 *supra*.
147. See text & notes 37-40 *supra*.
148. See text and notes 99, 104, 110 & 133 *supra*.
149. *See* text & notes 150-65 *infra*.
150. Another common theme is that the courts recognize the difficulty that the legislature has in defining terms in this field. See note 20 *supra*.
151. 3 Ariz. App. 313, 414 P.2d 162 (1966).
152. *Id.* at 316, 414 P.2d at 165.
153. The court merely noted that simlar statutes denying the right to bear arms to convicted felons have "been upheld in decisions of the federal courts, as well as in state courts." *Id.* at 315, 414 P.2d at 166. Article 2, § 26 was nowhere mentioned in *Noel*.
154. 110 Ariz. 338, 519 P.2d 37 (1974).
155. *Id.* at 339, 519 P.2d at 38.
156. In State v. Noel, 3 Ariz. App. 313, 414 P.2d 162 (1966), the court listed some of the many rights enjoyed by citizens that are lost to a convicted felon. *Id.* at 315, 414 P.2d at 164. By implication, the right to bear arms guaranteed in Arizona to the "individual citizen" would also be lost upon conviction for a felony.
157. 25 Ariz. App. 137, 541 P.2d 600 (1975).
158. *Id.* at 138, 541 P.2d at 601.
159. *Id.*
160. *Id.* at 139, 541 P.2d at 602.

When arrested in 1972 on suspicion of armed robbery, he possessed a pistol.[161] An Arizona statute denied him the right to possess a pistol until he had regained "full status as a citizen."[162] The court of appeals held that the mere exercise of the rights of a citizen do not confer the full status of a citizen necessary to invoke protection of the right to bear arms under the Arizona Constitution.[163]

Before the *Swanton* decision, the Arizona courts had allowed abrogation of the right to bear arms only for those persons who had lost their citizenship through felony convictions.[164] By placing the right to bear arms with other vital rights of a citizen, such as the right to vote, the Arizona courts had evinced great respect for article 2, section 26.[165] There are no intimations in these earlier cases that the Arizona judiciary would inhibit full citizens in the exercise of the right to bear arms by narrowly defining what arms could be borne. *Swanton* marks a change in direction for the Arizona courts on this issue.

State v. Swanton

In *Swanton*, the Arizona Court of Appeals defined "arms" under article 2 of the Arizona Constitution as "such arms as are recognized in civilized warfare and not those used by a ruffian, brawler or assassin."[166] The court then concluded that nunchakus are not "arms" within the meaning of the Arizona Constitution.[167] In defining constitutionally permissible weaponry, however, the court relied solely on cases from states with constitutional provisions quite unlike article 2, section 26.[168] The court did not discuss cases from jurisdictions with similar constitutional gurantees which suggest that "arms" be more broadly defined as those weapons reasonably suited to personal defense.[169]

The absence of Arizona cases defining "arms" in article 2, section 26 shifts the focus of attention to the provision itself. The language of section 26 suggests a very broad definition of "arms."[170] This seems acceptable from what is known of intent on behalf of the framers and ratifiers.[171]

161. *Id.* at 138, 541 P.2d at 601.
162. ARIZ. REV. STAT. ANN. § 13-919(A) (1970).
163. 25 Ariz. App. at 138, 139, 541 P.2d at 601, 602.
164. See text & notes 150-63 *supra*.
165. See text & note 166.
166. — Ariz. at —, 629 P.2d at 99.
167. *Id.*
168. *Id.* The Arizona court cited cases from four states. In *Ex parte* Thomas, 1 Okla. Crim. 210, 97 P. 260 (1908), the Oklahoma constitutional guarantee in question mirrored the amendments to the Arizona right to bear arms provision that were defeated at the 1910 convention. See note 46 *supra*, for the text of those amendments, and note 19 *supra*, for additional comments on *Ex parte* Thomas. The same is true of the Georgia constitutional right, which is also collective. Strickland v. State, 137 Ga. 1, 2, 72 S.E. 260, 261 (1911). The constitutional protection in the Arkansas Constitution is collective and also ties the right in with the "common defense." Fife v. State, 31 Ark. 455, 458 (1876). In State v. Kerner, 181 N.C. 574, 575, 107 S.E. 222, 223 (1921), North Carolina's constitutional guarantee refers to the people, not to individuals.
169. See text & notes 63-149 *supra*.
170. See text & notes 24-43 *supra*.
171. See text & notes 44-55 *supra*.

Cases from states with similar provisions also seem to justify a definition of "arms" much broader than the one adopted by the court of appeals.[172] Thus, the court's definition seems solely based on conclusory statements from apparently unrelated cases,[173] without a proper analysis of constitutional content.[174]

*Conclusion*

The Arizona Constitution guarantees to the individual citizen the right to bear arms for self-defense. The *Swanton* court held that "arms" under the Arizona Constitution meant weapons recognized in civilized warfare. The traditional sources of constitutional construction, however, suggest that "arms" should be defined much more broadly to encompass those weapons reasonably suited to personal defense. Such an interpretation is supported by evidence of intent by the framers and ratifiers, by the language of article 2, section 26, and by a consideration of the Arizona Constitution in its entirety. Moreover, case law from states with constitutional provisions similar to Arizona's provision construe broadly the right to bear arms. The term "arms" should therefore be broadly defined.

In *Swanton*, the Arizona Court of Appeals has endorsed a severe legislative curtailment of a clear constitutional right. As a result, a citizen could be denied the right to possess adequate, inexpensive weapons for self-defense merely because they are not recognized in "civilized warfare." Alternatively, a citizen might purchase a more lethal civilized-warfare weapon, not already expressly prohibited by statute, which could inflict far greater damage than a short-range, non-conventional weapon like the nunchaku. The ultimate consequences of *Swanton* are as unclear as the analysis used to justify it.

*David L. Abney*

172. See text & notes 63-149 *supra*.

173. See text & note 168 *supra*.

174. Legislative prohibitions of weapons deserve respectful judicial treatment. The words of the Oregon Supreme Court are apt:

> We are not unmindful that there is current controversy over the wisdom of a right to bear arms, and that the original motivation for such a provision might not seem compelling if debated as a new issue. Our task, however, in construing a constitutional provision is to respect the principles given the status of constitutional guarantees and limitations by the drafters; it is not to abandon these principles when this fits the needs of the moment.

State v. Kessler, 289 Or. 359, —, 614 P.2d 94, 95 (1980).

# IV. CRIMINAL PROCEDURE

## A. THE SPEEDY TRIAL ACT: AN EXCEPTION TO THE FINAL JUDGMENT RULE?

The "final judgment rule" is the foundation of federal appellate jurisdiction.[1] The rule requires that a decision be final before it can be appealed.[2] Basic to common law procedure,[3] and a part of American federal procedure since the First Judiciary Act of 1789,[4] the rule is intended to serve judicial efficiency and effectiveness.[5] However, numerous situations have been recognized in which justice or efficiency are better served by a departure from the final judgment rule.[6] Exceptions have been created by statute,[7] by rules of court,[8] and by case law.[9] Such exceptions have been

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1. 9 J. MOORE, FEDERAL PRACTICE ¶ 110.06 (2d ed. 1980); Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607, 608 (1975).

2. 28 U.S.C. § 1291 (1977) provides in pertinent part: "The courts of appeals shall have jurisdiction of appeals from all final decision of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." *Cf. id.* § 1257 (giving the Supreme Court jurisdiction to review final judgments from state courts). Largely because additional devices are available for interlocutory review within the federal judiciary, interpretation of finality under § 1257 does not control the question of what constitutes a final decision under § 1291. 9 J. MOORE, *supra* note 1, ¶ 110.10, at 137. This Casenote is restricted to the interpretation of § 1291.

3. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 544 (1939).

4. DiBella v. United States, 369 U.S. 121, 124 (1962); First Judiciary Act §§ 21, 22, 25, 1 Stat. 73, 83, 84, 85 (1789); Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 351 (1961).

5. *See* LaBuy v. Howes Leather Co., 352 U.S. 249, 268 (1957) (Brennan, J., dissenting); Note, *supra* note 1, at 609; Note, *supra* note 4, at 351-52.

6. *See* Lawyers' Conference Committee on Federal Courts and the Judiciary, *The Finality Rule: A Proposal for Change*, 19 JUDGES J. 33, 35 (1980) [hereinafter Lawyers' Conference].

7. *See* 28 U.S.C. § 1292(a) 1-4 (1977) (enumerating specific appealable interlocutory orders in civil actions); *id.* § 1292(b) (the Interlocutory Appeals Act of 1958, giving district court judges discretion in civil cases to designate appealable interlocutory orders, and the courts of appeals discretion to hear them).

For statutory exceptions to the final judgment rule in criminal cases, *see id.* § 3147 (giving the defendant the right to appeal decisions concerning bail); *id.* § 3731 (giving the government the right to appeal certain suppression orders and the right to appeal dismissal of an indictment or arraignment).

8. FED. R. CIV. P. 54(b) permits a judge in a multiparty suit to certify that decisions with reference to particular parties are final, although litigation of the entire case is incomplete.

9. The judicial interpretations of prejudgment decisions as final for purposes of appeal fall into three major categories: (1) The *Cohen* or collateral order doctrine, derived from Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949), *see* text & notes 20-21, 27 *infra*; (2) The *Forgay*, or hardship doctrine, derived from Forgay v. Conrad, 47 U.S. (6 How.) 201 (1848) (allowing immediate appeal of orders to surrender property or money to an adverse party); and the death knell doctrine (allowing appeal from an order that is not technically final but that would make continuation of the case impossible). *See* Lawyers' Conference, *supra* note 6, at 35-36. While statutory exceptions to the final judgment rule permit interlocutory appeal, interpretive exceptions are technically not exceptions to the rule, but are interpretations of certain kinds of decisions as "final." *See id.* at 36; Note, *supra* note 4, at 364.

far more common in civil than in criminal contexts.[10] In criminal procedure, the interests of both the defendant and the public in a speedy trial buttress more rigid adherence to the final judgment rule.[11]

In 1977, the United States Supreme Court for the first time made a significant inroad into the rule of finality in a criminal case. In *Abney v. United States*,[12] the Court held that a refusal to dismiss on double jeopardy grounds was an appealable final decision, although the trial was not complete.[13] Since that time, federal courts have actively considered the question of finality in criminal cases.[14]

In *United States v. Mehrmanesh*,[15] the Ninth Circuit Court of Appeals was presented with the question of whether a prejudgment order which denied a Speedy Trial Act[16] claim was final for purposes of appeal. The *Mehrmanesh* defendants were arrested and charged with importing and possessing heroin.[17] The government brought the indictment well beyond the statutory limits of the Speedy Trial Act, but the trial judge refused to dismiss.[18] The appeals court held that it was without jurisdiction to consider the appeal because a refusal to dismiss on Speedy Trial Act grounds was not a final decision.[19]

This Casenote will explicate the *Cohen*[20] collateral order doctrine, the major doctrine used in civil cases to identify exceptions to the final judgment rule.[21] It will then discuss how the Supreme Court applied this civil doctrine to criminal cases, creating the *Cohen-Abney* principles.[22] Further, it will discuss Ninth Circuit use of these principles to carve out significant new exceptions to the final judgment rule. Turning to the *Mehrmanesh* decision, this Casenote will first consider the purposes and relevant provisions of the Speedy Trial Act, and then discuss how the court used the *Cohen-Abney* principles to reject appeal of a Speedy Trial Act claim.

### *Judicial Expansion of Exceptions to the Final Judgment Rule*

Section 1291[23] gives federal appellate courts jurisdiction over appeals from final decisions only. Courts have interpreted the words "final deci-

10. DiBella v. United States, 369 U.S. 121, 126 (1962). Most of the statutory exceptions to the rule have been in civil actions. *See id.*; statutes cited in note 7 *supra*. All of the interpretive doctrines making departures from the rule have been created for civil actions. *See* Lawyers' Conference, *supra* note 6, at 36-37; doctrines listed in note 9 *supra*.

11. DiBella v. United States, 369 U.S. 121, 126 (1962).

12. 431 U.S. 651 (1977).

13. *Id.* at 662.

14. *See* cases cited in notes 78, 83, 106, 111, 119, 126, 130 *infra*. While courts in other circuits are also considering the question of finality in criminal cases, this casenote is largely restricted to a consideration of Supreme Court and Ninth Circuit cases.

15. 652 F.2d 776 (9th Cir. 1981).

16. 18 U.S.C. § 3152 to 3156, 3162 to 3174, 28 U.S.C. § 604 (1976 & Supp. 1979); see text & notes 134-50 *infra*.

17. 652 F.2d at 768.

18. *Id.*

19. *Id.*

20. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).

21. Lawyers' Conference, *supra* note 6, at 36.

22. *See* Abney v. United States, 431 U.S. 651, 657-63 (1977); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546-47 (1949).

23. 28 U.S.C. § 1291 (1977).

sion" to include a great variety of prejudgment decisions.[24] A number of different interpretive doctrines have been developed to treat prejudgment orders as sufficiently final for purposes of appeal,[25] resulting in what courts and commentators have considered a somewhat confusing assortment of ad hoc departures from the strict final judgment rule.[26] The *Cohen* collateral order doctrine, derived from *Cohen v. Beneficial Industrial Loan Corp.*, has been the main device of the courts for treating prejudgment orders as final in order to avoid hardship.[27]

The *Cohen* doctrine permits appeal from a decision on a matter not essential to the merits of a case if the decision is effectively final and threatens irreparable hardship if appeal is forced to await the end of litigation.[28] It is a loose, flexible, and practical doctrine, aimed at preventing hardship.[29] Widely applied in civil procedure,[30] the doctrine offers a general

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24. *See* cases cited in note 30 *infra* for a range of prejudgment decisions that have been determined by some courts to be final under *Cohen*. *Cohen* is applied both to accept and to reject the early appealability of similar orders. On the issue of appealability of orders requiring a party to bear expenses of compiling lists of class members, *see* Judd v. First Fed. Sav. & Loan Ass'n, 559 F.2d 820, 822-23 (7th Cir. 1979) (determining that an order requiring the plaintiff to prepare its own list of class members rather than use the defendant's computer could be effectively reviewed on appeal from a final judgment); Sanders v. Levy, 558 F.2d 636, 638 (2d Cir. 1976) (accepting appeal from an order that directed a defendant to bear the expense of compiling a list of class members). With respect to an order refusing to disqualify an attorney, *see* P. Stone, Inc. v. Koppers Corp., 631 F.2d 24, 24-26 (3d Cir. 1980) (holding the order not appealable); SEC v. Sloan, 535 F.2d 679, 681 (2d Cir. 1976) (holding the order appealable), *cert. denied*, 430 U.S. 966 (1977). Other doctrines cited in note 9 *supra* are also used to interpret a variety of types of decisions as final. *See, e.g.*, Sekaquaptewa v. Macdonald, 575 F.2d 239, 242-43 (9th Cir. 1978) (holding that a prejudgment order directing a partition of Indian lands was final either under the *Forgay* doctrine or under a pragmatic approach); Thomas v. Heffernan, 473 F.2d 478, 481-82 (2d Cir.) (accepting early appealability of a declaratory judgment under the death knell doctrine, although the suit had also requested injunctive relief), *vacated on other grounds*, 418 U.S. 908 (1974); Ortiz v. Hernandez Colon, 511 F.2d 1080, 1082 (1st Cir. 1975) (On facts similar to *Thomas*, the First Circuit denied jurisdiction over early appeal, saying that "none of the recognized exceptions apply."); Peterson v. Nadler, 452 F.2d 754, 756 (8th Cir. 1971) (holding that an order staying a case until the plaintiff got out of prison in perhaps a dozen years was final under the death knell doctrine).

25. See note 9 *supra*.

26. Lawyers' Conference, *supra* note 6, at 35. As early as the nineteenth century, the Supreme Court observed that cases dealing with finality "are not altogether harmonious." *Id.* at 38 n.26, *citing* McGourkey v. Toledo & Ohio Cent. R.R. Co., 146 U..S. 536, 545 (1892). In 1974, the Court said, "No verbal formula yet devised can explain finality decisions with unerring accuracy or provide an utterly reliable guide for the future." Eisen v. Carlisle & Jacquelin, 417 U..S. 156, 170 (1974). The Third Circuit observed, "In short, the opinions of the Supreme Court on the subject of the final judgment rule do not contain clear guidance. . . . Although there are some cases supporting a generous attitude to appealability, they . . . coexist uneasily with precedents urging a stricter interpretation of finality." Bachowski v. Usery, 545 F.2d 363, 370 (3d Cir. 1976).

27. Lawyers' Conference, *supra* note 6, at 36.

28. 337 U.S. at 546-47. *See also* Swift & Co. Packers v. Compania Caribe, 339 U.S. 684, 688-89 (1950).

29. 9 J. MOORE, *supra* note 1, ¶ 110.10, at 130-37. Moore argues that the doctrine, which arose when the final judgment rule was far more inflexible, has been partially replaced by statutory and other developments, and is now too flexibile.

30. *Cohen* has been applied to ascertain the finality of a variety of types of prejudgment orders. *See, e.g.*, Roberts v. United States Dist. Court, 339 U.S. 844, 845 (1950) (order denying a motion to proceed in forma pauperis); Eisen v. Carlisle & Jacquelin, 370 F.2d 119, 120 (2d Cir. 1966) (order determining whether an action may be maintained as a class action), *cert. denied*, 386 U.S. 1035 (1967); United States v. Wood, 295 F.2d 772, 777-78 (5th Cir. 1961) (order respecting a temporary restraining order), *cert. denied*, 369 U.S. 850 (1962); Chabot v. National Sec. & Research Corp., 290 F.2d 657, 658-59 (2d Cir. 1961) (an order concerning prejudgment security); Koster & Wyeth v. Massey, 262 F.2d 60, 62 (9th Cir. 1958) (order holding a plaintiff liable for the costs of attached property); MacAlister v. Guterma, 263 F.2d 65, 67 (2d Cir. 1958) (consolidation

formula for determining finality for purposes of appeal, and thus is also applicable to criminal cases.[31]

The *Cohen* case was a 1949 stockholder's derivative suit brought in federal court on diversity jurisdiction.[32] While New Jersey law required that stockholders post security for expenses of the defendant corporation, federal law did not.[33] The district court ruled that no security was required.[34] *Beneficial* immediately appealed, and the court of appeals reversed.[35] The Supreme Court granted review, and held that the decision was sufficiently final to permit appeal.[36]

The *Cohen* opinion offered a number of justifications for permitting appeal of the security order.[37] Courts have selected from *Cohen* the criteria that appear most essential for determining appealability, although the elements and emphases vary from case to case. In other words, what is called the "*Cohen* doctrine" is less a doctrine than a set of guidelines by which courts may mitigate the hardship of the finality rule.

To be appealable under *Cohen*, a decision must be complete and conclusive, not merely tentative.[38] In order to be complete, it must be collateral to or separable from the main issue,[39] not simply a step toward a final judgment into which it will merge.[40] To be appealable before judgment, a decision must threaten irreparable harm, that is, it must engage an important right that will be lost if review awaits the end of litigation.[41] In addition, the right must be too important to be denied review.[42] Some courts consider a *Cohen* appeal available only in a situation where the court can finally resolve a basic and unsettled question,[43] in the manner that the *Cohen* court finally resolved a "serious and unsettled" question of federal

order); Harmar Drive-In Theatre, Inc. v. Warner Bros. Pictures, 239 F.2d 555, 556 (2d Cir. 1956) (order for disqualification of counsel), *cert. denied*, 355 U.S. 824 (1957).

31. *See, e.g.*, Abney v. United States, 431 U.S. 651, 657-62 (1977) (accepting appeal under *Cohen* of a prejudgment order refusing to dismiss on double jeopardy grounds); DiBella v. United States, 369 U.S. 121, 126-29 (1962) (applying *Cohen* to deny early appeal of a pretrial suppression order); Stack v. Boyle, 342 U.S. 1, 6 (1951) (accepting appeal of a denial of bail under *Cohen*).

32. 337 U.S. at 543.

33. *Id.*

34. *Id.* at 545.

35. *Id.* at 546. *See also* Beneficial Indus. Loan Corp. v. Smith, 170 F.2d 44, 51 (3d Cir. 1948).

36. 337 U.S. at 546.

37. See text & notes 38-45 *infra*.

38. *Id.* For a case emphasizing in part the importance of lack of tentativeness, *see* Western Elec. v. Milgo Elec. Corp., 568 F.2d 1203, 1207 (5th Cir), *cert. denied*, 439 U.S.. 895 (1978).

39. *Id. See also* Swift & Co. Packers v. Compania Caribe, 339 U.S. 684, 689 (1950).

40. 337 U.S. at 546. *See also* Abney v. United States, 431 U.S. 651, 658 (1977).

41. 337 U.S. at 546. Swift & Co. Packers v. Compania Caribe, 339 U.S. 684, 689 (1950), emphasizes the importance of permitting early appeal if later appeal would be only an "empty rite."

42. 337 U.S. at 546. For a case denying appeal on the grounds that the grievance is not sufficiently important, *see* West v. Zurhorst, 425 F.2d 919, 921 (2d Cir. 1970). United States v. Lansdown, 460 F.2d 164, 171 (4th Cir. 1972), also treated sufficient importance of the right threatened to be an essential criterion of a *Cohen* appeal.

43. *See* United States v. Garner, 632 F.2d 758, 762 (9th Cir. 1980), *cert. denied*, 450 U.S.. 923 (1981); Donlon Indus., Inc.. v. Forte, 402 F.2d 935, 937 (2d Cir. 1968); Weight Watchers of Phila. Inc. v. Weight Watchers Int'l Inc., 455 F.2d 770, 773 (2d Cir. 1972). According to Moore, early appeal should be permitted under *Cohen* only when an issue has an importance beyond its significance to the individual litigants. 9 J. MOORE, *supra* note 1, ¶ 110.10, at 134.

jurisdiction.[44] Finally, and perhaps most important, the *Cohen* court emphasized that the finality rule must be given a "practical, rather than a technical construction."[45]

The *Cohen* criteria clearly leave room for much flexibility in interpretation.[46] It has been observed that the requirements are not completely clear, and that courts have shown various degrees of strictness in applying them.[47]

*Supreme Court Application of* Cohen *to Criminal Cases*

In criminal procedure, application of *Cohen* has been far more circumscribed. In 1953, *Cohen* was first applied to a criminal case by the Supreme Court in *Stack v. Boyle*.[48] In *Stack*, the Court held that an order unlawfully denying bail prior to trial was an appealable final decision.[49] Because the order denying bail could be reviewed without halting the main trial, immediate appeal was found not to undercut the purposes of finality.[50] The decision in *Stack v. Boyle* was therefore not considered a threat to the solidity of the final judgment rule in criminal cases.[51]

Ten years later in *DiBella v. United States*,[52] the Court rejected the prejudgment appealability of orders relating to pretrial suppression motions.[53] The Court reasoned that suppression motions, although deriving from separate pretrial hearings, are not severable from the case on the merits.[54]

It was not until twenty-five years after *Stack* that the Supreme Court applied *Cohen* to effect a major departure from the strictness of the finality rule in criminal cases. In 1977, in *Abney v. United States*,[55] the Court held that denial of a defendant's motion to dismiss on double jeopardy grounds was an appealable final decision.[56] The Court selected three criteria from the *Cohen* decision as essential: (1) completeness; (2) separability from

44. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. at 547.

45. *Id.* at 546.

46. For example, the criterion of separability from the merits of the case has at least three possible interpretations supported by language in *Cohen*: conceptual distinctness, lack of factual overlap, and failure to merge in a final judgment. *See id.* Orders from which appeal is sought in criminal cases are normally separable in that they are conceptually distinct from the question of guilt or innocence, but they do merge in the final judgment in that they are grounds for overturning a conviction. This is true, for example, of an order refusing to dismiss on double jeopardy grounds. *See* Abney v. United States, 431 U.S. 651, 660 (1977); text & note 70 *infra*. This is also true of an order refusing to dismiss on speedy trial grounds, *see generally* United States v. Macdonald, 435 U.S. 850 (1978); and, logically, of orders involving any other claims of right that provide grounds for acquittal.

47. Lawyers' Conference, *supra* note 6, at 36.

48. Stack v. Boyle, 342 U.S. 1 (1951).

49. *Id.* at 6.

50. *Id.* at 12 (Jackson, J., concurring). (Justice Jackson was author of the *Cohen* decision).

51. United States v. Alessi, 544 F.2d 1139, 1145 (2d Cir.), *cert. denied*, 429 U.S. 960 (1976).

52. 369 U.S. 121 (1962).

53. *Id.* at 131.

54. *Id.* at 127. In the much quoted words of Justice Frankfurter, the Court determined that such orders were not "fairly severable" from the "larger litigious context." *Id.*, *citing* Swift & Co. v. Compania Caribe, 339 U.S. 684, 689 (1949).

55. 431 U.S. 651 (1977).

56. *Id.* at 662. U.S. CONST. amend. V provides in part, "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ."

the case on the merits; and (3) the threat of harm to an important right.[57] The *Abney* court reasoned, first, that the refusal to dismiss completely disposed of the issue of whether the defendant had to go to trial.[58] Second, it found that the double jeopardy claim made "no challenge" to the cause of action, and so was separable from the main case.[59] Finally, it determined that the refusal to dismiss threatened the irreparable harm of facing trial a second time.[60]

Absent from the *Abney* opinion are the *Cohen* emphasis on practical construction[61] and the *Cohen* suggestion that early appeal is permissible only to resolve finally a "serious and unsettled question."[62] While *Cohen* had addressed an unsettled question of law, a double jeopardy question must instead be resolved on the facts of each particular case.[63] The Court noted that this could lead to an increased number of early appeals,[64] but reasoned that the right against double jeopardy is so fundamental that it is worth protection even at the cost of some dilatory appeals.[65]

The element of the *Abney* decision most important for understanding subsequent case law is the holding that the irreparable harm threatened is the harm of facing trial.[66] The Court reasoned that the double jeopardy guarantee protects against the "strain, public embarassment and expense" of undergoing a second trial for the same offense.[67] These are interests "wholly unrelated" to subsequent conviction.[68] Because undergoing trial is itself the threatened injury, appeal from a rejected claim of double jeopardy must be immediate in order to prevent the second trial.[69]

The *Abney* Court acknowledged that "one aspect" of the right against double jeopardy is a guarantee against conviction after a previous prosecution for the same offense.[70] It conceded that this aspect of the right can be "fully vindicated" on appeal following final judgment,[71] because the

57. 431 U.S. at 658.
58. *Id.* at 659.
59. In United States v. Lansdown, 460 F.2d 164 (4th Cir. 1972), a precursor of *Abney*, the court had observed that a double jeopardy claim is often not separable from the main trial when facts underlying both charges may be the same, and the facts underlying the second charge will come out at the main trial. *Id.* at 178 n.8. The court had limited its result to exclude cases requiring a factual analysis, *id.*, while the later *Abney* decision took a broader view of separability. *See* 431 U.S. at 659.
60. 431 U.S. at 661-62.
61. 337 U.S. at 546; see text & note 47 *supra*.
62. 337 U.S. at 547; see text & notes 45-46 *supra*.
63. 9 J. MOORE, *supra* note 1, ¶ 110.10, at 34, observed prior to the *Abney* decision that the Supreme Court, in applying *Cohen* to the denial of bail in *Stack*, had ignored the "unsettled question" of law criterion, and had opened the door to early appeals where the court can decide only the merits of a particular case. *Cohen* application to orders respecting disqualification of counsel and leave to proceed in forma pauperis also involves decisions on the merits of a particular case. *See* C. WRIGHT, A. MILLER & E. COOPER, 15 FEDERAL PRACTICE AND PROCEDURE § 3911, at 473, 496-97 (1976).
64. 431 U.S. at 662 n.8.
65. *Id.* at 662.
66. *See id.* at 661-62.
67. *Id.* at 661.
68. *Id.*
69. *Id.* at 662.
70. *Id.* at 660.
71. *Id.*

double jeopardy claim could be grounds for overturning a conviction.[72] However, because the double jeopardy right also protects against a second trial itself, early appeal must be permitted.[73]

The distinction between a "right not to be tried"[74] and a guarantee against conviction following trial is at the core of the *Abney* decision. Although this distinction has proved to be elusive, it is basic to the criminal cases following *Abney*.[75] It is also basic to the *Mehrmanesh* decision, which turns on the question of whether the Speedy Trial Act protects against facing trial itself, or merely against being convicted after a Speedy Trial Act violation.[76]

Following *Abney*, courts have analogized from the right against double jeopardy to other constitutional guarantees which appear to involve a right to be free from prosecution. The threat of irreparable harm alleged in these cases is the threat of facing trial.[77] In *Helstoski v. Meanor*,[78] the Supreme Court drew an analogy between the right to be free from double jeopardy and the immunity of a congressional representative from prosecution for legislative words or acts,[79] as protected by the speech or debate clause.[80] Like the double jeopardy protection, the court held, the speech or debate clause was intended to protect against the burden of defending an action in court.[81] Thus, a claim of congressional immunity from prosecution may be appealed before trial.[82]

In the highly publicized case of *United States v. MacDonald*,[83] the Supreme Court rejected the analogy between the right against double jeopardy and the constitutional right to a speedy trial.[84] MacDonald, a doctor in the armed forces, was accused of murdering his wife and children.[85] The army eventually dropped the charges, but some years later civilian authorities charged MacDonald with the murders.[86] The trial court refused to dismiss, rejecting MacDonald's claim that his right to a speedy trial was violated, and MacDonald appealed.[87]

The *MacDonald* Court found that application of the *Cohen-Abney*

72. To the extent that double jeopardy could be grounds for acquittal or for overturning a conviction, the order refusing to dismiss on double jeopardy grounds merges in the final judgment, and is not then separable from the case on the merits. *See* United States v. Alessi, 544 F.2d 1139, 1145 (2d Cir.), *cert. denied*, 429 U.S. 960 (1976).

73. 431 U.S. at 661-62.

74. *Id.* at 660-62.

75. See text & notes 100-02, 120-24, 127-29, 172-81, 188-93 *infra*.

76. United States v. Mehrmanesh, 652 F.2d 766, 769-70 (9th Cir. 1981).

77. *See* text & notes 78-81, 106-18 *infra*.

78. 442 U.S. 500 (1979).

79. *Id.* at 506-08.

80. *Id.* at 501, 503. The speech or debate clause provides that "for any Speech or Debate in either House, they [the Senators and Representatives] shall not be questioned in any other Place." U.S. CONST. art I, § 6, cl. 1.

81. 442 U.S. at 507-08.

82. See discussion of the double jeopardy protection against trial at text & notes 66-69 *supra*.

83. 435 U.S. 850 (1978).

84. *Id.* at 858-63. The sixth amendment provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." U.S. CONST. amend. VI.

85. 435 U.S. at 851.

86. *Id.* at 851-52.

87. *Id.* at 852.

principles did not warrant early appeal.[88] The constitutional speedy trial claim did not meet the first two *Abney* criteria,[89] since the pretrial order was neither complete nor severable from the main issue at trial.[90] The Court stated that the speedy trial right basically protects the ability to conduct a defense.[91] According to the Court, the essence of a speedy trial claim is that delay creates prejudice to the defense.[92] Prejudice occurs through dimming of memories, loss of witnesses, or any number of other events that hamper presentation of an adequate defense.[93]

Since prejudice is manifested in events at trial, a constitutional speedy trial claim could never be independent of events at trial, and thus may not be appealed until trial is complete and prejudice can be assessed.[94] Although application of the first two *Abney* criteria was sufficient to determine the result in *MacDonald*, the Court added that the third *Abney* criterion was not met[95] since proceeding with trial does not threaten irreparable harm.[96] According to the Court, the constitutional violation consists only in pretrial delay,[97] and so is complete before trial.[98] Although the violation may be manifested in the course of trial, "proceeding with trial does not [itself] cause or compound the deprivation."[99] In the foregoing argument the court made a rather technical distinction between the injury of delay in bringing an accused to trial, and the injury of undergoing trial after such delay. The Court acknowledged the "superficial attraction"[100] of the argument that the sixth amendment protects against undergoing a delayed trial, in the same manner that the double jeopardy clause protects against undergoing a second trial.[101] Nevertheless, it concluded that the sixth amendment is offended only by pretrial delay, and offers no protection against the delayed trial itself.[102]

Unlike the *Abney* Court, the *MacDonald* Court buttressed its result by strong practical policy considerations.[103] It pointed out that since there is always a period between arrest and trial, "any defendant" could make a speedy trial claim.[104] To permit early appeal would be to open a new ave-

88. *Id.* at 856-57.
89. *Id.* at 859.
90. *Id.* at 858-60.
91. *Id.* The *MacDonald* court cited Barker v. Wingo, 407 U.S. 514, 532 (1972), as establishing that the most serious prejudicial effect of delay is its effect on the ability of a defendant to prepare his case. 435 U.S. at 858. *Barker* also pointed out that delay may aid the defense at the expense of the prosecution, indicating that there is a public interest in a speedy trial independent of the interest of the accused. 407 U.S. at 520-21.
92. 435 U.S. at 860. "The essence of a defendant's Sixth Amendment claim in the usual case is that the passage of time has frustrated his ability to establish his innocence of the crime charged." *Id.*
93. Barker v. Wingo, 407 U.S. 514, 521 (1972).
94. 435 U.S. at 859-60.
95. *Id.* at 860-61.
96. *Id.*
97. *Id.* at 861.
98. *Id.*
99. *Id.*
100. *Id.* at 860.
101. *Id.*
102. *Id.* at 860-61.
103. *Id.* at 861-63.
104. *Id.* at 862-63.

nue through which defendants could pursue delay, subverting the policy of finality and thwarting the public interest in speedy trials.[105]

*Ninth Circuit Application of* Cohen-Abney *Principles*

Since *Abney*, the Ninth Circuit, like the Supreme Court, has been faced with a variety of claims for early appeal in criminal cases. In *United States v. Griffin*,[106] the court extended the reasoning of *Abney* to a vindictive prosecution claim and accepted early appeal.[107] Analogizing to the guarantee against double jeopardy, the court found that freedom from vindictive prosecution involves a right to be free from undergoing trial, not merely a right against conviction.[108] The due process guarantee against vindictive prosecution, the court emphasized, protects against the strain, embarrassment, and expense of undergoing trial, interests that would be sacrificed if review were postponed until after judgment.[109] The court also found that the order refusing to dismiss on grounds of vindictive prosecution was complete and was severable from events at trial, thus meeting the other two *Abney* criteria for early appeal.[110]

Following *Griffin*, the Ninth Circuit has expressed increasing ambivalence about granting early appeal. In *United States v. Wilson*,[111] it reluctantly extended the *Griffin* rationale to a claim of selective prosecution.[112] While stating that there was no difference between selective and vindictive prosecution sufficient to warrant different treatment,[113] the majority made it clear that practical considerations would have mandated a contrary result.[114] Noting that *Abney* and *Griffin* have been followed by "promiscuous resort" to interlocutory appeals, many of which are frivolous,[115] the court observed that even summary disposition adds weeks of delay, frustrating speedy trial policy.[116] While suggesting that the Ninth Circuit reconsider the *Griffin* result on practical grounds,[117] the court adhered to the logic of *Griffin* permitting early appeal.[118]

A different approach was taken by another Ninth Circuit panel in *United States v. Garner*.[119] The *Garner* court eschewed the purely logical

105. *Id.*
106. 617 F.2d 1342 (9th Cir. 1980).
107. *Id.* at 1345. Vindictive prosecution takes place when the government brings a second prosecution in retaliation for the exercise of some legal right by the defendant in an original prosecution. United States v. Wilson, 639 F.2d 500, 506 (9th Cir. 1981) (Real, J., concurring).
108. 617 F.2d at 1345.
109. *Id.* at 1346.
110. *Id.* at 1345.
111. 639 F.2d 500 (9th Cir. 1981).
112. *Id.* at 501-02. "Selective prosecution challenges arise when a defendant alleges that he is being prosecuted *initially* for having exercised a constitutional right." *Id.* at 502.
113. *Id.* Judge Real asserted that there was a substantial difference between selective and vindictive prosecution, in that selective prosecution involved submitting to only one trial, not two. *Id.* at 506 (Real, J., concurring).
114. *Id.* at 502 n.1.
115. *Id.* The court in *MacDonald* had earlier expressed the fear that early appeal would be used as a delaying tactic. *See* 435 U.S. at 862-63.
116. 639 F.2d at 502 n.1.
117. *Id.*
118. *Id.* at 502.
119. 632 F.2d 758 (9th Cir. 1980).

approach taken in *Wilson* and decided on the basis of "pragmatic considerations"[120] to deny early appeal of a claim of grand jury irregularity.[121] The court observed that the constitutional guarantee against being "held to answer" for a crime unless indicted by a grand jury[122] could be interpreted as a guarantee against having to stand trial unless indicted by a properly functioning grand jury.[123] However, like the *MacDonald* court, the *Garner* court acknowledged the "superficial attractiveness" of this interpretation,[124] but feared that interlocutory appeal of a claim so generally available would "create nothing short of chaos."[125]

The Ninth Circuit cases display the predicament recently faced by the *Mehrmanesh* court. On the one hand, the courts wish to maintain an effective policy of finality.[126] But on the other hand, adherence to the *Abney* logic could lead to a vast expansion of early appeal.[127] Any right whose violation would be cause for dismissal of a criminal case might plausibly be interpreted as a right against having to face trial. Both the *Wilson* court's laments[128] and the *Garner* court's reliance on purely practical considerations[129] demonstrate the difficulty of drawing logical and convincing distinctions between rights that protect a defendant against facing trial at all and rights that can be vindicated by acquittal.

## United States v. Mehrmanesh *and the Speedy Trial Act*

In *United States v. Mehrmanesh*, the Ninth Circuit recently was faced

120. *Id.* at 765.

121. *Id.*

122. *Id.* The fifth amendment provides in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ." U.S. CONST. amend. V.

123. 632 F.2d at 765.

124. *Id.* For a similar phrase concerning superficial attractiveness, *see* Macdonald v. United States, 435 U.S. 850, 860 (1978).

125. 632 F.2d at 766. The *Garner* court observed that the Third Circuit has also rejected early appeal of a claim of grand jury irregularity. *Id.*, *citing In re* Grand Jury Proceedings, 632 F.2d 1033, 1038-39 (3d Cir. 1980).

126. United States v. Wilson, 639 F.2d 500, 502 n.1 (9th Cir. 1981); United States v. Garner, 632 F.2d 758, 765-66 (9th Cir.. 1980), *cert. denied*, 450 U.S. 923 (1981).

The Ninth Circuit has refused immediate appeal of other claims in criminal cases that did not involve issues as problematic as those in *Griffin*, *Wilson*, and *Garner*. *See, e.g.*, United States v. Layton, 645 F.2d 21, 21 (9th Cir. 1981) (holding that an order refusing to change venue is not an appealable final decision); United States v. Powell, 632 F.2d 754, 758 (9th Cir. 1980) (refusing early appeal of a collateral estoppel claim because the issue was related to the course of trial); United States v. Carnes, 618 F.2d 68, 69-70 (9th Cir) (rejecting the early appealability of a motion to dismiss made after a hung jury necessitated setting a new trial, stating that a second trial following a jury disagreement does not normally give rise to a claim of double jeopardy), *cert. denied*, 447 U.S. 929 (1980); *In re* Fendler, 597 F.2d 1314, 1315-16 (9th Cir. 1979) (refusing early appeal of an order denying a petition to conduct a voir dire of grand jurors to ascertain bias, holding that the rights asserted would not be irreparably lost, as they could be claimed following an indictment or a conviction).

127. This fear was expressed cogently by Justice Friendly in a bid for attention while *Abney* was before the Supreme Court. In United States v. Alessi, 544 F..2d 1139 (2d Cir.), *cert. denied*, 429 U.S. 960 (1976), he wrote: "We have little doubt that . . . once *Cohen* is construed to have created a 'right not to be tried' exception to the final decision rule in criminal cases, it will be hard to limit the claims for review which counsel will advance." 544 F.2d at 1152. His prediction has proved accurate.

128. *See* United States v. Wilson, 631 F.2d at 502 n.1.

129. *See* United States v. Garner, 632 F.2d at 765.

with the task of distinguishing between a right that protects against facing trial and a right that can be vindicated after judgment.[130] The defendant's claim was that denial of a motion to dismiss on grounds of a Speedy Trial Act[131] violation is an appealable final decision under the *Cohen-Abney* principles.[132] This claim rested on the assertion that the Speedy Trial Act guarantees a right not to have to face trial after illegal delay.[133] An understanding of the Speedy Trial Act thus illuminates the analysis in the *Mehrmanesh* decision.

The Speedy Trial Act[134] was enacted by Congress in 1974 to help solve the serious problem of trial delay.[135] Its purposes were both prevention of crime and protection of the rights of the accused.[136] The act sets specific time limits permissible between arrest, indictment, arraignment, and trial.[137] If the time limits are not met, the defendant has the right to obtain dismissal.[138] In order to ease implementation, the time limits and sanctions were to be phased in over a number of years.[139]

The Act was intended to accomplish several specific purposes. First, the Act was a crime prevention measure. It was envisioned that speeding prosecution in order to reduce the length of time defendants were out on bail would reduce crime committed by bailed defendants.[140] The Act was intended, then, to effectuate the public interest in speedy criminal prosecutions.[141] Speedy prosecution was viewed as an alternative to preventive detention, which was thought to be unconstitutional.[142]

Second, as the *Mehrmanesh* court later pointed out,[143] the Act was intended to protect interests of defendants which were left unprotected by the constitutional speedy trial guarantee as interpreted in *Barker v. Wingo*.[144] In *Barker*, the Court held that the right to a speedy trial is fundamentally a protection against the deleterious effects of the passage of

130. 652 F.2d 766 (9th Cir. 1981).

131. Speedy Trial Act of 1974, 18 U.S.C. §§ 3152-3156, 3161-3174, 28 U.S.C. § 604 (1976 & Supp. 1979).

132. Brief for Appellant, Petition for Rehearing and Suggestion of Appropriateness for Rehearing En Banc, at 6.

133. *Id.* at 6-7; 652 F.2d at 769-70.

134. 18 U.S.C. §§ 3152-3156, 3161-3174, 28 U.S.C. § 604 (1976 & Supp. 1979).

135. *See* Frase, *The Speedy Trial Act of 1974*, 43 U. CHI. L. REV. 667, 669 (1976).

136. *See* A. PARTRIDGE, LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974 11 (1980). (This work was published by the Federal Judicial Center to assist federal judges in carrying out the Speedy Trial Act. Publication by the Center indicates that the work is regarded as "responsible and valuable," although any policy recommendations reflect only the views of the author. *Id.* at i).

137. 18 U.S.C. §§ 3161-3163 (1976 & Supp. 1979). Though the Act sets specific time limits, it also permits judges to exclude time for certain kinds of good reasons. *Id.* § 3161(h).

138. *Id.* § 3162(a)(1) (1976). In 1979 the Act was amended to postpone the sanction of dismissal for one year, until July 1, 1980. Speedy Trial Act Amendments of 1979, Pub. L. No. 96-43, § 6, 93 Stat. 327 (1979); 18 U.S.C. § 3163(c) (Supp. 1979).

139. A. PARTRIDGE, *supra* note 136, at 18-20; Frase, *supra* note 135, at 672.

140. Frase, *supra* note 135, at 673; Misner, *District Court Compliance with the Speedy Trial Act of 1974*, 1977 ARIZ. ST. L.J. 1, 2.

141. Frase, *supra* note 135, at 668, 674.

142. A. PARTRIDGE, *supra* note 136, at 13; Frase, *supra* note 135, at 673.

143. United States v. Mehrmanesh, 652 F.2d 766, 769 (9th Cir. 1981).

144. 407 U.S. 514 (1972).

time on the defendant's ability to present an effective defense.[145]

This focus means that a deprivation can only be assessed after trial, after all the other injuries of delay have occurred—the injuries of anxiety to the defendant and family, and of damage to reputation, employment, finances and liberty. The constitution, as interpreted by *Barker*, then, does not protect against these harms, and does not give to the accused any pretrial means to enforce the right to a speedy trial.[146] The Act was designed to protect against these harms, identified in earlier cases, but left unprotected by *Barker*.[147]

The enforcement mechanism of the Act[148] is the right to dismissal by the defendant. As the enforcement mechanism, dismissal serves both purposes of the Act—while it protects against injuries to the defendant, it also effectuates the public[149] purpose of the Act, inspiring a speedy prosecution regardless of the individual wishes of the prosecutor or defendant.[150]

## United States v. Mehrmanesh: *Application of* Cohen-Abney *Principles to Reject Early Appeal of a Speedy Trial Act Claim*

In *United States v. Mehrmanesh*,[151] the district court was confronted with a question about implementation deadlines of the Speedy Trial Act. The defendants were charged with importing and possessing heroin.[152] They were arrested in March, 1980,[153] before the July 1, 1980 date when dismissal sanctions of the Speedy Trial Act were scheduled to go into effect.[154] Indictments were not brought until July 9, far beyond the statutory time limits, and well after the July 1 dismissal implementation date.[155] The government did not dispute that it had exceeded the time limits of the act, but argued that the sanction of dismissal was not applicable.[156] The

145. *Id.* at 532. *Barker* set up criteria for assessment of a constitutional speedy trial violation as a balance of four factors: delay sufficiently lengthy to be presumptively prejudicial, reasons for delay, defendant's assertion of his right, and prejudice to the defendant. *Id.* at 530. Prejudice includes harms of pretrial incarceration and anxiety of the accused, but the most serious form of prejudice is impairment of the defense, as that "skews the fairness of the entire system." *Id.* at 532.

146. *Barker* had contradicted without overruling a case decided the previous year, United States v. Marion, 404 U.S. 307, 320 (1971) (stating that the major evils the speedy trial guarantee protected against were evils of public obloquy, anxiety, and the like, rather than impairment of the defense). 407 U.S. at 532.

147. United States v. Mehrmanesh, 652 F.2d at 769. The court noted that the House Report cited United States v. Marion, 404 U.S. 307, 320 (1971), emphasizing the "magnitude of disabilities" a defendant suffers from delay, only one of which is the inability to defend himself. 652 F.2d at 769, *citing* H.R. REP. NO. 93-1508, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7401, 7408.

148. *See* Frase, *supra* note 135, at 669, 671.

149. *Id.* at 669.

150. A. PARTRIDGE, *supra* note 136, at 34.

151. 652 F.2d 766 (1981).

152. *Id.* at 768.

153. *Id.*

154. *See* 18 U.S.C. § 3163(c) (Supp. 1979); text & note 138 *supra*.

155. 652 F.2d at 768. The statutory time permitted between arrest and indictment is 30 days. *Id.* In this case there were an additional 47 days of excluded time. Brief for Appellant, Petition for Rehearing and Suggestion of Appropriateness for Rehearing En Banc, at 3.

156. 652 F.2d at 768. The dismissal sanction was to apply to all cases begun by arrest or summons and all informations or indictments filed on or after July 1, 1980. 18 U.S.C. § 3163(c) (Supp. 1979). The question was whether the date of arrest or indictment took priority.

district court agreed and refused to dismiss, and the defendants appealed.[157] The court of appeals found that the order refusing to dismiss for a Speedy Trial Act violation was not a final decision under the *Cohen-Abney* principles,[158] and that therefore the court was without jurisdiction to consider the appeal.[159]

Because the Supreme Court had applied *Abney* to deny early appeal of a constitutional speedy trial claim,[160] the *Mehrmanesh* court first compared the speedy trial rights under the Act with those guaranteed by the constitution.[161] The court sought to ascertain whether the rationale expressed in *MacDonald* for refusing early appeal of the constitutional claim was applicable to the Speedy Trial Act claim.[162]

The court concluded that the Act and the sixth amendment protect substantially different interests.[163] The constitutional right as interpreted in *Barker* and *MacDonald* basically protects against prejudice to the defense.[164] By contrast, the Act was explicitly designed to protect the emotional, financial, and other interests left unprotected by *Barker*.[165] To serve these interests, the court pointed out, the Act sought to ensure that defendants be brought to trial quickly, within swift time limits that operate "like a statute of limitations."[166] The object of the automatic time limits was to end trial delay without any necessity to demonstrate prejudice.[167] Because a constitutional claim arising from a pretrial order revolves around prejudice to the defendant, the claim must await trial for an assessment of the prejudicial effects delay may have had.[168] By contrast, the court concluded, a pretrial order rejecting a Speedy Trial Act claim based on a mere computation of days: (1) would be a complete disposition of the claim, and (2) would be fully separable from issues at trial.[169] It would therefore meet the first two *Abney* criteria of a final appealable order.[170]

Because the order refusing to dismiss for a Speedy Trial Act violation met the first two *Abney* criteria of appealability, the decision against early appeal rested entirely upon the third criterion, the question of whether trial threatens irreparable harm.[171] The court found that the order did not threaten irreparable harm to an important right because the Speedy Trial

157. 652 F.2d at 768.
158. *Id.* at 768-69.
159. *Id.* at 768.
160. *See* United States v. MacDonald, 435 U.S. 850, 855-61 (1978); text & notes 83-105 *supra*.
161. 652 F.2d at 768-69.
162. *Id.*
163. *Id.* at 764.
164. *Id.* at 769; see text & notes 91-93, 144-47 *supra*.
165. 652 F.2d at 769; see text & notes 143-47 *supra*.
166. 652 F.2d at 769.
167. *Id.*
168. *Id. See also* text & notes 91-94, 145-46 *supra* for discussion of the centrality of prejudice to the constitutional speedy trial right.
169. 652 F.2d at 769. The court noted that some Speedy Trial Act claims will probably involve not a mere computation of days, but judicial discretion in excluding time, and that such claims would not meet the *Abney* criteria of completeness and separability. *Id.* at 770.
170. *Id.* at 769.
171. *Id.*

Act established no right not to go to trial.[172] The reasoning here followed *MacDonald*.[173] The injury, according to the court, consisted of pretrial delay only.[174] The Act does not protect against undergoing prosecution following delay.[175] Paraphrasing *MacDonald*,[176] the court stated that "proceeding with trial then does not compound the harm at which the statute is aimed."[177]

This irreparable harm distinction is the most technical and difficult point of the *Mehrmanesh* decision. The court acknowledged on the one hand that the Act was intended to protect against emotional and financial harms of delay.[178] Yet the financial and emotional toll of unreasonable delay is certainly continued and even increased by trial. But on the other hand, the court stated that the harm toward which the Act is aimed is not compounded by trial.[179] Apparently, the court is distinguishing, although somewhat unclearly, between strict violation of the Act and the injurious consequences flowing from violation of the Act. The Act is violated only by pretrial delay, so the violation itself is not exacerbated by trial.[180] Although the injuries resulting from violation may indeed be compounded by trial, the Act does not protect against them. In sum, the court rests appealability on the moment of technical violation, rather than on the policy of avoiding the harms at which the statute is aimed.[181]

In her dissent, Judge Fletcher disagreed with the majority on precisely this point.[182] She observed that the *MacDonald* focus on prejudice at trial makes use of the *MacDonald* rationale entirely inapt.[183] The Act, she reasoned, sought to ensure that no delayed trial would be held[184] by specifically aiming its sanctions against delay itself. Therefore, it envisioned a right against having to face trial after illegal delay.[185] This right, enforceable by dismissal, must be vindicated by appeal before trial, or it will be lost.[186] Judge Fletcher correctly pointed out that if a defendant must proceed with trial, the injuries Congress intended to eliminate through the Act will have taken place, and cannot be repaired by an appeal following judgment.[187]

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172. *Id.* at 769-70.
173. *Id*; *see* 435 U.S. at 860-61; text & notes 96-99 *supra*.
174. 652 F.2d at 769.
175. *Id.* at 769-70.
176. 435 U.S. at 861; see text & notes 97-102 *supra*, 180 *infra*.
177. 652 F.2d at 769-70.
178. *Id.* at 769.
179. *Id.* at 769-70.
180. The original statement by the Court in *MacDonald* was that proceeding with trial "does not cause or compound the deprivation," rather than that it does not compound the harm. 435 U.S. at 861. *Compare* 652 F.2d at 769-70. The term "deprivation" appears to have been carefully selected to refer to the technical violation of right, rather than to harm, as understood in the popular sense.
181. 652 F.2d at 769-70.
182. *Id.* at 772-73 (Fletcher, J., dissenting).
183. *Id.* at 772.
184. *Id.*
185. *Id.* at 772-73.
186. *Id.* at 773.
187. *Id.* The defendants alternatively requested a writ of mandamus. *Id.* at 768. The majority denied the writ on the grounds that the trial court had not made a clear and indisputable

The majority came to the most practical conclusion, and the one most consistent with the policy of limiting early appeal in criminal cases to only a few exceptional types of claims. However, it rested its conclusion on a thin foundation. The result depends on the technical distinction between deprivation of the right itself and the injurious consequences deriving from deprivation of the right.[188] The court concluded, rather artificially, that pretrial injuries of delay are protected against, while the same kinds of injuries occurring during trial are not.[189]

Technical distinctions of the sort made by the *Mehrmanesh* court may be intrinsic to the use of *Cohen* in criminal cases in situations where a pretrial order is effectively complete and separable from the main issue, and the dispositive question for appeal is whether irreparable harm is threatened. Unlike civil cases, in which a wide variety of hardships may be claimed,[190] the practical hardships faced in criminal cases are nearly always the same: the hardships of trial and conviction.[191] An analysis of hardship, then, does not lead to distinctions among claims to determine which are appealable. Such distinctions can only be drawn on the basis of a philosophical analysis of the rights themselves, and of whether they guarantee against facing trial. It is extremely difficult to draw these fine distinctions in a realistic or convincing manner. Arguably, almost any right whose deprivation would be the basis for dismissal is also a right against standing trial.[192] But this position would effectively end the final judgment rule in criminal cases.[193] Therefore, if courts make the question of irreparable harm dispositive, they may be forced to resort to the use of highly abstract and technical distinctions in order to limit early appeal.

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mistake. *Id.* at 770. Judge Fletcher disagreed. *Id.* at 773-74 (Fletcher, J., dissenting). The majority suggested that mandamus would be appropriate in the case of a clear computational error, *id.* at 770, and noted, in addition, that the district court continues to have discretion to dismiss an indictment on grounds of delay. *Id.* at 771.

188. See text & notes at 178-81 *supra*.

189. *See* 652 F.2d at 769, noting that the defendant suffers from "severe emotional and financial strain when forced to undergo a non-speedy trial," but one paragraph later asserting that it is delay and not the [nonspeedy] trial "that is the target of the Act." *Id.*; see text & notes 174-81 *supra*.

190. See cases cited in text & notes 24 & 30 *supra*.

191. Only a very few of the claims in criminal cases where defendants requested early appeal on *Cohen* or *Abney* grounds have involved claims of hardship other than that of facing trial. *See* Stack v. Boyle, 342 U.S. 1, 4-6 (where the harm was pretrial incarceration without bail); United States v. Powers, 622 F.2d 317, 320-21 (8th Cir.) (where the harm alleged was the possible bodily harm to the defendant if trial were open and former criminal associates learned of the testimony), *cert. denied*, 449 U.S. 837 (1980).

192. *See* United States v. Alessi, 544 F.2d 1139, 1145-52 (2d Cir), *cert. denied*, 429 U.S. 960 (1976); text & note 127 *supra*.

193. *See* United States v. Alessi, 544 F.2d 1139, 1152 (2d Cir.), *cert. denied*, 429 U.S. 960 (1976). Judge Friendly's argument in *Alessi* is that the Constitution does not guarantee appeal, and that therefore the status of a right as constitutionally protected does not guarantee appeal. Appeal and the condition that appeal follow final judgment are based on statute; just as the constitutional status of a right does not guarantee appeal, it also does not create a right to prejudgment appeal. 544 F.2d at 1150-51, *citing* Gilmore v. United States, 264 F.2d 44, 46-47 (5th Cir.), *cert. denied*, 359 U.S. 994 (1959). Judge Friendly expressed the fear that the logic of permitting early appeal on the basis of a right not to face trial was too expansive. 544 F.2d at 1151-52. He noted that the early cases permitting such appeal have not been limited to their facts, but instead have led to an expansion of early appeals, materializing the government's fears of an "alarming spectre." *Id.* at 1151-52.

The *Mehrmanesh* court took the route of relying on such abstruse distinctions since its result depends exclusively on the distinction between a right against facing trial and a right that can be vindicated by acquittal.[194] The opinion would have been more convincing and its precedential value enhanced if it had been strengthened with additional considerations. The *Cohen* and *Abney* opinions offer other routes to the rejection of early appeal.

One such route is practicality. The *Cohen* opinion insists on the necessity of a practical reading of finality.[195] The *Mehrmanesh* court could have reasoned, in a manner consistent with *Cohen*,[196] *MacDonald*,[197] and *Garner*,[198] that Speedy Trial Act claims would be available to vast numbers of defendants. Any time a judge exercising discretion under the Act[199] permitted an extension of a time deadline, a defendant could claim the extension was unreasonable. Early appeal could then be used to create delay in the manner described by the *Wilson* court.[200] A practical reading of "finality" would not permit a claim so generally available to be treated as "final" for purposes of appeal.[201]

Further, adherence to precedent would justify a conclusion that the statutory right to a speedy trial is not sufficiently basic to warrant exceptional treatment of early appeal. *Abney* was predicated on the need to protect fully a fundamental constitutional right,[202] as was *Helstoski*[203] following it. Additional rights which have been held by the Ninth Circuit to embrace a guarantee against standing trial are fifth amendment due process rights.[204] Although the Speedy Trial Act is intended to "put teeth into"[205] the constitutional guarantee, it creates statutory, not constitutional, protections. Further, the Act is intended to serve public interests. The right to dismissal is not just a personal right, but is also a means to ensure speedy trials in the public interest.[206] Early appeal, though offering fuller protection to the accused, would significantly undermine some of the purposes of the Act by inviting new forms of delay.[207]

The decision that the *Mehrmanesh* claim was not appealable depended on an interpretation of the purposes of the statute.[208] The court

194. 652 F.2d at 769; *see* text & notes 171-77 *supra*.
195. 337 U.S. at 546; see text & note 45 *supra*.
196. *See* 337 U.S. at 546; text & note 45 *supra*.
197. *See* 435 U.S. at 860-63; text & notes 103-05 *supra*.
198. *See* 632 F.2d at 765-66; text & notes 120, 125 *supra*.
199. *See, e.g.*, 18 U.S.C. § 3161(h)(8)(A) (1976).
200. 639 F.2d at 502 n.1.
201. The *Cohen* court explicitly points out that only in a "small class" of cases is early appeal permissible. 337 U.S. at 546.
202. *See* 431 U.S. at 660-62; text & notes 55, 62, 63 *supra*.
203. *See* 442 U.S. at 507-08.
204. *See* United States v. Griffin, 617 F.2d 1342, 1345-46 (9th Cir.) (due process right against vindictive prosecution), *cert. denied*, 449 U.S. 863 (1980); United States v. Wilson, 639 F.2d 500, 501-02 (9th Cir. 1981) (due process right against selective prosecution).
205. United States v. Mehrmanesh, 652 F.2d at 769.
206. The analogous argument is made by the *MacDonald* court with respect to early appeal undermining the public interest in the constitutional speedy trial guarantee. United States v. MacDonald, 435 U.S. at 861-82.
207. See text & notes 141, 148-50 *supra*.
208. 652 F.2d at 769-70.

could also have looked for specific statutory intent with respect to appeal, and could have inferred congressional intent to disallow early appeal. Because the final judgment rule is fundamental in criminal procedure,[209] Congress would most probably have assumed that the Act would be enforced without early appeals. The final judgment rule is statutory,[210] and Congress has previously provided statutory exceptions to it in criminal procedure.[211] Therefore, from congresional silence, the court might reasonably have inferred that Congress judged early appeal to be unnecessary for carrying out the purposes of the Act.[212]

*Conclusion*

The final judgment rule is basic to American appellate procedure. In 1977, in *Abney v. United States*, the United States Supreme Court for the first time made a significant exception to the rule in a criminal case. Applying the *Cohen* doctrine previously used in civil cases, the Court held that a prejudgment decision was sufficiently final for purposes of appeal when it was complete, peripheral to the main issue at trial, and threatened the loss of an important right if appeal had to await final judgment.

Subsequently, courts have been faced with an increasing flow of claims involving diverse rights said to protect against standing trial. Because any right whose violation would lead to dismissal or acquittal might plausibly be considered a right not to face trial, there are no clear logical limits against extending early appeal to all such rights. The courts are faced with the dilemma of applying the expansive logic of *Abney* and yet preserving the final judgment rule as the effective rule in criminal procedure.

In *United States v. Mehrmanesh*, the Ninth Circuit Court of Appeals held that a ruling on a Speedy Trial Act claim was not sufficiently final for purposes of early appeal. Although the order was separable and complete, the *Mehrmanesh* court held that the Speedy Trial Act did not guarantee a right against having to stand trial. Although the *Mehrmanesh* opinion is a reaffirmation of the policy of finality, its reasoning is strained and logically evasive. The court could have reaffirmed the policy of finality more effectively had it based its result less on the elusive distinction among rights suggested by *Abney*, and more on the harmful practical effects of permitting early appeal of such a potentially widespread claim. Read with other recent Ninth Circuit cases dealing with finality in criminal procedure, the *Mehrmanesh* opinion indicates that the court is searching for rationales

209. See text & notes 1, 2, 10-11 *supra*.

210. See text & note 2 *supra*.

211. See text & note 7 *supra*.

212. Following this reasoning does not deny the accuracy of Judge Fletcher's observation, 652 F.2d at 769-70 (Fletcher, J., dissenting), that some of the interests Congress sought to protect might be sacrificed if appeal awaits final judgment. See text & note 187 *supra*. But the lack of statutory provision for early appeal probably indicates that Congress did not consider a general allowance of early appeal necessary for carrying out the purposes of the Act.

that will limit the expansive effects of the logic of *Abney* and restrict early appeal in criminal cases.

*Ellen M. W. Sewell*

# V. INDIAN LAW

## A. THE EXTENSION OF ARIZONA'S WORKMEN'S COMPENSATION ACT TO THE NAVAJO RESERVATION: AN UNJUSTIFIED INFRINGEMENT OF SOVEREIGNTY?

Arizona's Workmen's Compensation Act provides mandatory employer-provided insurance for work-related accidents for virtually every employee within the state.[1] Tort remedies are precluded from consideration and the state Industrial Commission has exclusive jurisdiction over any disputes that may arise.[2] Congress passed 40 U.S.C. section 290 in order to extend the jurisdiction of state workers' compensation laws to federally owned land within a state.[3] In *Johnson v. Kerr-McGee Oil Industries*,[4] the Arizona Court of Appeals considered whether section 290 operates to extend the Arizona Workmen's Compensation Act to the Navajo Indian Reservation in Arizona.[5]

The dispute in *Johnson* stemmed from the employment of Chester Johnson, a Navajo Indian, at a uranium mine operated by Kerr-McGee, on the Navajo Reservation.[6] Johnson died of lung cancer at the age of forty, allegedly caused by the inhalation of dust containing particles known as "radon daughters."[7] Johnson's widow brought an action in state court against Kerr-McGee for wrongful death.[8] The Arizona Court of Appeals, however, found that section 290 mandates the application of state workers' compensation laws and regulations to Indian tribes[9] and that such an application does not violate the rights guaranteed by the Treaty of 1868 between the United States and the Navajo Nation.[10] Because the employee was subject to the state Workmen's Compensation Act, the common law tort remedy of wrongful death was unavailable.[11]

This Casenote will examine the validity of the application of a state workers' compensation act to an Indian reservation pursuant to a federal statute. First, the historical context of the doctrine of Indian tribal sovereignty will be reviewed. With the sovereignty doctrine as background, the legitimacy of the court's holding that section 290 mandates the extension

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1. ARIZ. REV. STAT. ANN. § 23-901 *et seq.* (1971 & Supp. 1980-81).
2. *Id.* §§ 23-1022, 23-921.
3. 40 U.S.C. § 290 (1976); see note 18 *infra*.
4. — Ariz. —, 631 P.2d 548 (1981), *cert. denied*, 102 S. Ct. 560 (1981).
5. *Id.* at —, 631 P.2d at 549.
6. *Id.*
7. *Id.*; Begay v. Kerr-McGee Corp., 499 F. Supp. 1317, 1320 (D. Ariz. 1980).
8. — Ariz. at —, 631 P.2d at 550.
9. *Id.* at —, 631 P.2d at 551.
10. *Id.*; *see* Navajo Treaty of June 1, 1868, 15 Stat. 667.
11. — Ariz. at —, 631 P.2d at 549.

of a state's workers' compensation act to an Indian reservation will be considered. Finally, it shall be determined whether the state has a legitimate interest in extending its workers' compensation act to an Indian reservation, and, if so, whether such an extension is forbidden because it infringes upon the sovereignty of the Indian tribe.

*Historical Antecedents*

Since European settlers began to conquer American Indian nations and dispossess the Indians of their lands, the status of Indian tribes as political entities has been precarious.[12] That status was defined by the United States Supreme Court in *Worcester v. Georgia*.[13]

In *Worcester*, the Court held that the laws of Georgia could not extend onto the reservation of the Cherokee Nation by virtue of treaties and the unique political status of Indian nations.[14] The notion of tribal sovereignty as first enunciated in *Worcester* has remained more or less intact to the present day and was recently summarized by the United States Supreme Court in *United States v. Wheeler*.[15] In *Wheeler*, the Court stated:

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to its complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.[16]

Thus, the Arizona Workmen's Compensation Act can apply to Indians working on the Navajo Reservation if Congress has so legislated.[17]

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12. The relationship between Indian nations and European nations—and later the United States—has long troubled legal scholars. *See generally* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 200 n.10, 206-12 (1978); Organized Village of Kake v. Eagan, 369 U.S. 60, 71-74 (1962); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 542-45, 561 (1832); Robertson, *A New Constitutional Approach to the Doctrine of Tribal Sovereignty*, 6 AM. INDIAN L. REV. 371 (1980).

13. 31 U.S. (6 Pet.) 515 (1832).

14. *Id.* at 530. Chief Justice Marshall wrote that, pursuant to the treaties between the United States and the Cherokee Nation, "the United States of America acknowledge that the said Cherokee nation to be a sovereign nation, authorized to govern themselves, and all persons who have settled within their territory, free from any right of legislative interference by the several states. . . ." *Id.*

15. 435 U.S. 313 (1978).

16. *Id.* at 323. *See also* McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 168-69 (1973); Williams v. Lee, 358 U.S. 217, 218-20 (1959).

17. See text & note 16 *supra*. Recent laws enacted by Congress to extend state jurisdiction to Indian reservation lands include Public Law 280. 18 U.S.C. § 1162, 28 U.S.C. 1360 (1976); see text & note 51 *infra*. That law extends the civil and criminal jurisdiction of certain states over specified Indian reservations. 18 U.S.C. § 1162, 28 U.S.C. 1360 (1976); see text & note 51 *infra*. Arizona does not fall within Public Law 280 because Arizona has not amended its constitution as required by the Act. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 178 (1973); see text & note 51 *infra*. Laws that have been passed which do interfere with tribal sovereignty have generally been narrowly construed to keep any interference with tribal sovereignty to a minimum. For example, the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302 (1976), was narrowly construed by the United States Supreme Court in Santa Clara Pueblo v. Martinez, 436 U.S. 49, 69-70, 72 (1978). There the Court held that the Indian Civil Rights Act, which imposes certain substantive and procedural guidelines upon Indian tribes to protect the civil rights of tribal members, did not allow a challenge to tribal membership laws to be heard in federal court except in cases of habeas corpus actions expressly mentioned in the Act. *Id.* at 69-70, 72. *See* Comment,

*Congressional Action*

In 1936, Congress passed section 290 to close a gap in workers' compensation coverage.[18] It was passed in response to *Murray v. Garrick & Co.*,[19] a 1934 United States Supreme Court decision involving a person working for a private contractor on federal land. The Court held that state workers' compensation laws did not apply to land ceded to or acquired by the Federal Government prior to the passing of a state workers' compensation act.[20] Murray, a worker at a naval yard, was left without coverage.[21] Section 290 provided that states could apply their state workers' compensation laws to all land owned or held by the federal government within state boundaries.[22]

On its face, section 290 appears to apply state workers' compensation statutes to the Navajo Reservation because the Reservation is land owned by the United States and held in trust for the Navajo Nation.[23] Because of the unique relationship between Indian Tribes and the Federal Government, however, it has become well established that acts of Congress, which would abrogate treaty rights if applied to Indian Reservations, will not extend jurisdiction to Indian lands unless Congress clearly expresses an intent to do so.[24]

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*Santa Clara Pueblo v. Martinez: Tribal Sovereignty and the Indian Civil Rights Act of 1968*, 33 ARK. L. REV. 399, 400, 420 (1979); note 24 *infra*.

18. 40 U.S.C. § 290 (1976) provides in relevant part:

> [E]ach of the several states is charged with the enforcement of and requiring compliance with the State workmen's compensation laws of said States and with the enforcement of and requiring compliance with the orders, decisions, and awards of said constituted authority to apply such laws to all land and premises owned or held by the United States of America by deed or cession, by purchase or otherwise, which is within the exterior boundaries of any state.

19. 291 U.S. 315 (1934); S. REP. No. 2294, 74th Cong., 2d Sess. 1-2 (1936). That report urges the passage of § 290 because of uncertainties created by *Murray* in state workers' compensation coverage for workers on federal lands. *Id.* Indian reservations were not considered.

20. 291 U.S. at 319-20.

21. *Id.* at 318-20.

22. 40 U.S.C. § 290 (1976); see note 18 *supra*.

23. Reservation lands are owned by the United States and held in trust for Indian Tribes. *See* Johnson v. Kerr-McGee, — Ariz. —, —, 631 P.2d 548, at 549 (1981).

24. Santa Clara v. Martinez, 436 U.S. 49, 59 (1978) (only those remedies expressly granted in the Indian Civil Rights Act are available to those bringing claims under the Act). *See* Bryan v. Itasca County, 426 U.S. 373, 381 (1976) (the Court found significant "the total absence of mention or discussion" in the legislative history of Public Law 280 of any authorization to extend state taxing power to an Indian Reservation); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 170-71 (1973), *quoting* DEP'T OF INTERIOR, FEDERAL INDIAN LAW 845 (1958) ("State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply."); Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685, 691 (1965) (Congress had not "intended to leave to the State the privilege of levying this [income] tax."); Williams v. Lee, 358 U.S. 217, 221-22 (1959) (a state may not extend its jurisdiction over an Indian reservation unless Congress has unambiguously granted the state that power); Elk v. Wilkins, 112 U.S. 94, 99-100 (1884) ("General acts of Congress [do] not apply to Indians, unless so expressed as to clearly manifest an intention to include them").

*Santa Clara* is especially noteworthy because it dealt with an assertion of federal authority. In that case, the United States Supreme Court refused to allow an Indian to challenge a tribal membership regulation in Federal District Court, even when that regulation allegedly violated her civil rights as defined by the Indian Civil Rights Act. 436 U.S. 49, 51-52 (1978); *see* note 51 *infra*. That Act guaranteed that Indians would not be subject to the authority of a tribal government when that Indian's civil rights would be violated. 25 U.S.C. §§ 1322-1328 (1976). The Court rationalized that the Act only expressly granted relief in situations where a writ of habeas corpus

Whether such intent was shown by Congress with regard to section 290 was previously considered by the Arizona Supreme Court in *Swatzell v. Industrial Commission*.[25] In *Swatzell*, a non-Indian employee was injured while working on the reservation.[26] The Arizona court held that section 290 did not apply to the Navajo Reservation, as Congress did not "clearly manifest an intention to include Indian activities within its operation."[27] The *Swatzell* court's conclusion is well supported because it is clear from the language of section 290 and the accompanying Senate Committee Report[28] that Indians were not contemplated to be included within the provisions of the Act.[29] Neither the Act nor the Senate Committee Report contain any language indicating that the Act is to apply to Indian activities.[30]

In *Johnson v. Kerr-McGee*, the Arizona court decided that section 290 applied to the reservation because the *Swatzell* holding had been effectively overturned by the United States Supreme Court[31] in *Federal Power Commission v. Tuscarora Indian Nation*.[32] The *Johnson* court[33] relied on the *Tuscarora* ruling that "a general statute in terms applying to all persons includes Indians and their property interests."[34] A careful reading of *Tuscarora* reveals, however, that the decision does not affect the validity of the *Swatzell* and *Johnson* holdings.[35] *Tuscarora* involved the Federal

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was available. 436 U.S. at 70. Because the specific wording of the Act did not allow for non-habeas challenges, none could be entertained. *Id.* This holding of the Court serves to limit the effectiveness of the Act in guaranteeing the civil rights of members of an Indian Tribe. *See* note 17 *supra*. The Court justified its holding on the reasoning that to allow the district court to entertain such challenges to the proceedings of Indian governments would emasculate the sovereignty of Indian Nations. 436 U.S. at 59. Thus, in the absence of an express manifestation to the contrary, the apparent intent of a congressional act will fall before the superior interest of tribal sovereignty even if the act were to extend federal jurisdiction.

25. 78 Ariz. 149, 277 P.2d 244 (1954).

26. *Id.* at 150-51, 277 P.2d at 245-46.

27. *Id.* at 154, 277 P.2d at 248. In addition, the court found that the Navajo tribal sawmill was not subject to the state Workmen's Compensation Act because it was an instrumentality of the United States. *Id.* at 153, 277 P.2d at 247. The court also reasoned that a contractor not within the mandatory provisions of the Workmen's Compensation Act may voluntarily elect to provide the workers' compensation insurance for its employees, *id.* at 154, but that the Industrial Commission had no jurisdiction to adjudicate the claim of an employer not required to comply with the Act. *Id.*

This holding is supported by the logic of Kennerly v. District Court, 400 U.S. 423 (1971). In *Kennerly*, the tribe had voted to become subject to state jurisdiction. *Id.* at 427. The Court stated, however, that "[t]he unilateral action of the Tribal Council was insufficient to vest Montana with jurisdiction. . . ." *Id.*; *see* McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 180 (1973), where the Court relies upon *Kennerly*: "If Montana may not assume jurisdiction over the Blackfeet by simple legislation even when the Tribe itself agrees to be bound by state law, it surely follows that Arizona may not assume such jurisdiction in the absence of tribal agreement."

28. *See* S. REP. No. 2294, 74th Cong., 2d Sess. 1-2 (1936).

29. Congress was concerned that *Murray*, *see* text & note 19 *supra*, had created a gap in workers' compensation coverage for some workers on some federal enclaves such as naval yards and national forests. S. REP. No. 2294, 74th Cong., 2d Sess. 1-2 (1936). Section 290 served to close that gap, and in so doing provided workers' compensation coverage to those workers previously left unprotected. *Id.*

30. S. REP. No. 2294, 74th Cong., 2d Sess. 1-2 (1936).

31. — Ariz. —, —, 631 P.2d 548, 551 (1981).

32. 362 U.S. 99 (1960).

33. — Ariz. at —, 631 P.2d at 551.

34. 362 U.S. at 116.

35. See text & notes 38-48 *supra*.

Power Act,[36] authorizing the Federal Power Commission, through its licensee, the Power Authority of the State of New York, to condemn certain lands in upstate New York for a reservoir, including fee lands held by the Tuscarora Nation.[37] Although the Act did not specifically mention the Indian lands, the *Tuscarora* Court decided that the Act applied to the Indian property involved for two reasons. Each reason distinguishes *Tuscarora* from *Johnson*.

First, the land needed for a reservoir was not, as in *Johnson*,[38] owned by the United States and held in trust for the Tuscarora Nation.[39] Rather, the land was held in fee by the tribe, which purchased it in 1809.[40] The lands, therefore, were not subject to the constraints of sovereignty usually embodied in reservation lands.[41] In addition, since the land had not been reserved for the Indians by treaty, the federal action at issue could not violate the Indians' treaty right.[42]

Second, while *Johnson* concerned the extension of state regulation to Indian country,[43] *Tuscarora* concerned an extension of federal regulation.[44] In concluding that the regulation did apply to Indian country, the Court relied on previous cases where it applied federal jurisdiction and federal taxation to Indians and Indian lands[45] because Congress had passed a general statute.[46] This conclusion, however, is distinguishable

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36. 16 U.S.C. §§ 791(a), 792, 797(e) (1976).

37. 362 U.S. 99 at 105.

38. — Ariz. —, —, 631 P.2d 548, 551 (1981).

39. 362 U.S. at 115. "[T]he lands involved are owned in fee simple by the Tuscarora Indian Nation and no 'interest' in them is 'owned by the United States. . . .' " *Id.*

40. *Id.* at 106 n.10.

41. See text & notes 12-17 *supra*. *But cf.* Montana v. United States, 49 U.S.L.W. 4296 (1981), where the United States Supreme Court reasoned that, "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct . . . has some direct effect on the political integrity, the economic security, or health or welfare of the tribe." *Id.* at 4302.

This affirmation of an Indian tribe's regulation of fee lands makes the reliance on *Tuscarora* by the Johnson court questionable because *Montana* implies that, in certain circumstances, a state may no longer extend its jurisdiction onto Indian lands, even if they are fee lands.

42. 362 U.S. at 123. "[T]he lands in question are not subject to any treaty between the United States and the Tuscaroras." *Id.*

43. — Ariz. at —, 631 P.2d at 549.

44. 362 U.S. at 100.

45. *Id.* at 116-21.

46. *Id.* at 116, *quoting* Chateau v. Burnet, 283 U.S. 691, 694 (1931), which states, "The intent of Congress was to levy the tax with respect to all residents of the United States and upon all sorts of income." Also, the *Tuscarora* Court relied on Oklahoma Tax Comm'n v. United States, 319 U.S. 598 (1943). 362 U.S. at 116. *Oklahoma* held that Indians living on lands not exempt from state taxation were subject to a state inheritance tax. 319 U.S. at 610-11. The land was seen to be taxable because such a tax did not violate Indian treaty rights. *See id.* at 603. This was primarily because the tribe had become sufficiently assimilated into white society so that it did not exist as a separate political entity. "They are actually citizens of the state with little to distinguish them from other citizens. . . ." *Id.* The *Oklahoma* Court reasoned that the condition in *Worcester*, text & notes 12-13 *supra*, of "separate political entities with all the rights of independent status [is] a condition which has not existed for many years in the State of Oklahoma." 319 U.S. at 602; *accord*, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 171 (1973) ("the [*Worcester*] doctrine has not been rigidly applied in cases where Indians have . . . become assimilated into the general community."). The ruling of *McClanahan* implies that, because the Court did apply the *Worcester* doctrine by refusing to extend state taxing power to the reservation, the Navajos have not become so assimilated.

It should be noted that the reliance in *Tuscarora* on tax cases reflects the dominance of tax

from those cases requiring express legislative intent for the extension of state regulatory authority over Indian country.[47] As a result, *Tuscarora* does not abrogate the rule established by the Arizona Supreme Court in *Swatzell*.[48]

That *Tuscarora* did not serve to extend state jurisdiction over Indian lands when Congress has not expressly authorized an extension is reflected by the subsequent Supreme Court decision in *Bryan v. Itasca County*.[49] *Bryan* involved an attempt by Minnesota to levy a state and local property tax against an Indian on Indian land[50] pursuant to Public Law 280, a statute granting limited civil and criminal jurisdiction over Indian reservations to certain states.[51] The Court rejected the argument that Public Law 280 conferred the authority upon the State of Minnesota to tax reservation property. Rather, the Court held that since Congress had not expressly manifested such an intention, no such authority had been conferred upon the state.[52] The crucial lesson to be gleaned from *Bryan* is not whether a particular tax applies to a reservation, but that the omission of the express intent of Congress to extend state power over reservation lands means that the power cannot be so extended.[53]

In summary, section 290 can only extend state workers' compensation

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issues in challenges to assertions of state authority over Indian reservations. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141-42 (1980); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 165 (1973); Oklahoma Tax Comm'n v. United States, 319 U.S. 598, 602 (1943). The principles which have guided the Court in determining the attributes and rights of Indian sovereignty with respect to taxation are undoubtedly equally applicable to other fields of governmental authority.

47. *See* Santa Clara v. Martinez, 436 U.S. 49, 59 (1978); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 170-71 (1973); Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685, 691 (1965); Elk v. Williams, 112 U.S. 94, 99-100 (1884). See text & note 24 *supra*.

48. See text & notes 25-27 *supra*.

49. 426 U.S. 373 (1976).

50. *Id.* at 375.

51. 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1976). *See generally* Comment, *Public Law 280: The Status of State Legal Jurisdiction Over Indian Tribes After Washington v. Confederated Bands and Tribes of the Yakima Indian Reservation*, 15 GONZAGA L. REV. 133 (1979). The statute expressly authorized certain states, not including Arizona, to extend criminal "jurisdiction over offenses committed by or against Indians in Indian Country," 18 U.S.C. § 1162 (1976), and "civil jurisdiction in actions to which Indians are parties." 28 U.S.C. § 1360 (1976). Specifically, criminal and civil laws of general application of certain states "shall have the same force and effect within such Indian Country as they have elsewhere in the state." 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1976).

Arizona was given the option of coming within this law if it followed the criteria of Section 6 of Public Law 280:

> [T]he consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act.

*Id.* ARIZ. CONST. art. 20, § 4 states in part, "The people inhabiting this State do agree and declare that they forever disclaim all right and title to . . . all lands lying within said boundaries owned or held by any Indian or Indian tribes."

The Court in *McClanahan* stated that Arizona had not yet complied with Public Law 280. "In the absence of compliance with 25 U.S.C § 1322(a), the Arizona court can exercise neither civil nor criminal jurisdiction over reservation Indians." 411 U.S. at 178. *See also* The Indian Civil Rights Act of April 11, 1968, 25 U.S.C. §§ 1322-26 (1976), which requires the consent of an Indian tribe that may be affected by Public Law 280.

52. 426 U.S. at 373.

53. *Id.* at 381. The Court stated:

> This omission [of the power to tax in Pub. L. 280] has significance in the application of the canons of construction applicable to statutes affecting Indian immunities, as some

jurisdiction over Indian lands in violation of a treaty when Congress has expressed such an intent. Congress, however, has not expressed such an intent in the present case.[54] In addition, no other law enacted by Congress, including Public Law 280, has extended such jurisdiction. Thus, the existence of the Arizona Workmen's Compensation Act should not operate to prevent the plaintiff in *Johnson* from bringing an action for wrongful death.

*Infringement of Sovereignty*

Even absent express congressional authorization for the extension of a state law to an Indian reservation, a state may extend its own laws to a reservation provided that the state has a valid interest to protect.[55] In addition, the imposition of state jurisdiction cannot be pre-empted by federal law and cannot infringe upon tribal sovereignty in violation of treaty rights.[56] The following portion of this Casenote will first examine the treaty bases of the restraints upon state power that are present in *Johnson v. Kerr-McGee*. It will then demonstrate that the application of Arizona's workers' compensation law to the Navajo Reservation would be contrary to the treaty-guaranteed limitations upon state power.

*Treaty Implications*

The treaties between the Indian tribes and the United States help delineate the extent to which the Indian nations have retained their original sovereignty.[57] Unless a treaty or federal statute expressly removes an attribute of sovereignty, it is retained.[58] The Supreme Court has determined what constitutes tribal sovereignty in cases where states have attempted to levy taxes upon Indians and Indian lands.[59] The Court has generally based the core of its reasoning in these cases upon the relevant treaties

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mention would normally be expected if such a sweeping change in the status of tribal government and reservation Indians had been contemplated by Congress.

54. The *Johnson* court also erred when it stated, "the Workmen's Compensation Act does not conflict with tribal rights under the treaty." — Ariz. at —, 631 P.2d at 551. To support this supposition the court referred to Navajo Tribe v. NLRB, 288 F.2d 162 (D.C. Cir.), *aff'd*, 366 U.S. 928 (1961). In *Navajo Tribe*, the Navajo Tribal Council tried to block a union election among Indians living and working upon the reservation. 288 F.2d at 163. The Council contended that its sovereignty rights served to preclude the NLRB from conducting such union elections on the reservation, especially because the National Labor Relations Act did not expressly include Indians within its jurisdiction. *Id.* at 164. The United States Supreme Court affirmed the holding of the circuit court that the NLRB had authority to conduct the union elections, even absent express mention of Indian tribes. 366 U.S. at 928. The circuit court reasoned that acts of general jurisdiction apply to Indians as well as non-Indians.

*Navajo Tribe*, however, involves a federal authority, while *Johnson* involves a state authority. Therefore, *Navajo Tribe* has no real bearing on the issue of whether an extension of a state's workers' compensation act to an Indian reservation in violation of treaty rights, without express consent by Congress, is permissible.

55. See text & note 79 *infra*.

56. See text & note 75 *infra*.

57. See text & notes 13-16 *supra*.

58. See text & notes 15-16 *supra*. Such an express abrogation of sovereignty is not present in *Johnson*. See text & note 19 *supra*.

59. *See generally* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141-42 (1980); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172-73 (1973); Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685, 686-87 (1965).

between the United States and the Indian nations.[60]

For example, in *Warren Trading Post v. Arizona Tax Commission*,[61] the Court refused to permit Arizona to levy a state sales tax on sales to Indians on the Navajo Reservation.[62] The Court reasoned that the tax would infringe on sovereign rights created by the Treaty of 1868, which served to guarantee the Navajos freedom from state interference in deference to a dominant federal control.[63] While *Johnson* may not involve an issue of dominant federal control,[64] *Warren Trading Post* does indicate that the Court will look to relevant treaties when determining the limits of state power over an Indian reservation.

The Court again addressed the issue of the limits of a state's power over Indian lands in *McClanahan v. Arizona State Tax Commission*.[65] In *McClanahan*, Arizona attempted to impose a state income tax on an Indian living and working on the Navajo reservation. The Court looked to the Treaty of 1868 and held that the taxation was improper.[66] While the treaty did not explicitly state that "the Navajos were to be free from state law,"[67] the Court reaffirmed the presumption that any ambiguities in an Indian treaty should be resolved in favor of the Indian tribe.[68] When treaties were signed between the United States and the tribes, the Indians were "weak and defenseless" people who depended upon he protection and good faith of the United States.[69] This canon of construction, combined with a consideration of the semi-independent status of Indian nations, led the Court to affirm that the Navajo treaty precludes the extension of state law to the Navajo Reservation.[70]

### *Infringement of Sovereignty in* Johnson

The preclusion of the extension of state law to the Navajo Reservation

60. The *McClanahan* Court, for example, concluded, "The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power." 411 U.S. at 172. "When the relevant treaty and statutes are read with this tradition of sovereignty in mind, we think it clear that Arizona has exceeded its lawful authority by attempting to tax appellant." *Id.* at 173.

61. 380 U.S. 685 (1965).

62. *Id.* at 686.

63. *Id.* at 686-87. For a discussion of the principle of preemption, or the necessity of states to defer to dominant federal control on Indian reservations, see note 75 *infra*.

64. See note 75 *infra*.

65. 411 U.S. 164 (1973).

66. *Id.* at 175, 181.

67. *Id.* at 174.

68. *Id.*, *following* Carpenter v. Shaw, 280 U.S. 363, 367 (1930). While *McClanahan* was decided ultimately on a preemption analysis which may not be applicable to *Johnson*, see note 75 *infra*, it is nevertheless crucial to *Johnson* because of the Court's reliance on the treaty and the Court's liberal interpretation of the treaty.

69. 411 U.S. at 174, *quoting* Carpenter v. Shaw, 280 U.S. 363, 367 (1930).

70. 411 U.S. at 174-75.

> [I]t cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the Navajos and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision. It is thus unsurprising that *this Court has interpreted the Navajo treaty to preclude extension of state law—including state tax law—to Indians on the Navajo Reservation*.

*Id.* (emphasis added).

is not, however, absolute. If a state has a legitimate interest in extending its jurisdiction over Indian lands, then it may do so,[71] provided that certain conditions are met.

These conditions were summarized in *White Mountain Apache Tribe v. Bracker*.[72] There, the Supreme Court considered whether Arizona could impose use and fuel taxes upon non-Indian contractors working on the reservation.[73] The Court decided that there existed two independent bars to state jurisdiction, federal preemption and infringement of sovereignty.[74] While *Bracker* relied on the preemption doctrine[75] to invalidate the taxes sought to be imposed, the infringement doctrine is the test applicable in *Johnson*.[76]

The infringement bar cited in *Bracker* was first enunciated in *Williams v. Lee*,[77] where Arizona attempted to exercise its civil jurisdiction over a reservation Indian for collection of a debt owed by the Indian to a non-

71. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 150 (1980) (the state has not "been able to identify a legitimate regulatory interest served by the taxes they seek to impose"); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 179 (1973) (absent a state interest in extending its jurisdiction, a state cannot claim that such an extension is permissible). Whether any legitimate state interest exists for the state to impose its workers' compensation laws onto the reservation is questionable. While the Court has not set forth any guidelines for determining what constitutes such a legitimate interest, the Arizona constitutional disclaimer to all right and interest in Indian lands may be compelling evidence that no interest can exist. *See* ARIZ. CONST. art. 20, § 4.

72. 448 U.S. 136 (1980).

73. *Id.* at 137.

74. *Id.* at 142. The Court stated:

> [There exist] two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. [citations omitted]. Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." Williams v. Lee, 358 U.S. 217, 220 (1959).

*Id. See also* Kake Village v. Egan, 369 U.S. 60, 75 (1961) ("on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law").

75. The Court refused to allow the imposition of the tax because the timber industry on the reservation is heavily regulated by the government. 448 U.S. at 145. *See also* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 179-80 (1973) (Arizona preempted from imposing income taxes on the Navajo Reservation); Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685, 686-87 (1965) (Arizona preempted from regulating or taxing trade on the reservation).

*Warren Trading Post* held that, "the Federal Government had been permitting the Indians largely to govern themselves, free from state interference,and had exercised through statutes and treaties a sweeping and dominant control over persons who wished to trade with Indians and Indian Tribes." 380 U.S. at 686-87. The *Warren* Court pointed to the myriad of federal regulations that controlled trade with the Indian tribes as evidence that the state governments had been preempted from performing any regulatory duties on the reservation. "Congress has, since the creation of the Navajo reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities. *Id.* at 690-91.

The Court in *McClanahan* held that the state could not extend its income tax levy to the reservation because of federal preemption. The Indian's economic activity "is totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves." 411 U.S. at 179-80.

Although it is conceivable that the extensive federal regulation of the mining industry might serve as a similar preemption of state authority in *Johnson*, there are no persuasive arguments that workers' compensation has been preempted by federal law. *See generally* Appellant's Opening Brief at 17-19, Johnson v. Kerr-McGee, — Ariz. —, 631 P.2d 548 (1981).

76. *See* note 75 *supra*; text & notes 76-89 *infra*.

77. 358 U.S. 218 (1959). *See also* text & note 24 *supra*.

Indian. The Court recognized that the *Worcester* principle[78] of forbidding any extension of state authority onto Indian reservations without congressional authority no longer applied where "essential tribal relations were not involved and where rights of Indians would not be jeopardized."[79] The Court, however, did not give a free hand to the states to impose jurisdiction over Indian lands. Rather, the Court emphasized that a state could not infringe "on the right of reservation Indians to make their own laws and be ruled by them."[80]

Exactly what constitutes an infringement on Indian sovereignty was explained in *Montana v. United States*.[81] There the Supreme Court considered whether an Indian Tribe could regulate the fishing by non-Indians on land that was not Indian controlled.[82] In considering arguments by the tribe that its sovereignty was at stake, the Court stated that the essential elements of tribal sovereignty consisted of protecting the political independence, economic security, or health and welfare of the tribe.[83] Thus, if a state cannot infringe upon tribal sovereignty, and if tribal sovereignty consists of the elements listed in *Montana*, a state cannot apply any laws or regulations to an Indian reservation that would interfere with a tribe's political or economic independence and security.

The Navajo Tribal Code contains laws and regulations that concern the political integrity, economic security, and health and welfare of the

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78. 358 U.S. at 219-20; see text & notes 14-17 *supra*. *See also* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980), where the Court reiterates the modification of *Worcester*: "Long ago the Court departed from Mr. Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries." *See* text & note 75 *supra*.

79. 358 U.S. at 220.

> [A]bsent governing Acts of Congress the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. [citations omitted]
>
> Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation.

*Id.*

80. *Id. But see* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1970). *McClanahan* seemed to lessen the impact of this test when the Court stated, "The trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption." *Id.* at 172. However, the Court did say that the *Williams* test would be applicable if both the state and the tribe had a legitimate interest in asserting its jurisdiction. *Id.* at 179. Furthermore, the Court in White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980), considered the *Williams* test as a viable and independent bar to state jurisdiction. *Id.*; *see* text & notes 73-75 *supra*.

81. 49 U.S.L.W. 4296 (1981).

82. *Id.* at 4298.

83. *Id.* at 4302; *see* note 41 *supra*.

In contrast to the language of *Montana*, the *Johnson* court seems to be under the impression that if a state attempts to regulate the economic security, health, or welfare of a tribe it is not interfering with the tribe's self-government. — Ariz. —, —, 631 P.2d 448, 551 (1981). The court mentions, for example, the myriad of benefits derived from the workers' compensation laws to support the proposition that the Navajo's right to self-government has not been abrogated. *Id.* The connection between benefits and self-government is not explained. Certainly the court cannot be implying that because various benefits in themselves (such as providing security for the members of an employee's family) do not abrogate tribal self-government, the entire workers' compensation law cannot affect such self-government. One function of government is to confer whatever benefits it wishes upon the governed. If one government forcibly imposes the benefits of its laws upon the citizens of another sovereign entity, there would be a clear infringement upon the potential for self-government by the recipients of those benefits.

tribe.[84] The Code also contains extensive provisions protecting the health and welfare of its tribal members, including a recently enacted workers' compensation statute.[85] In addition, regulation of employee-employer relationships relates directly to a tribe's control over the economic security, health, and welfare of its members.[86] This is especially true in a case such as *Johnson*, where the issue concerns compensation of a tribal member for the work-related health impairment of her spouse.[87] Consequently, there can be little doubt that such regulation is within a tribe's jurisdiction and not the state's so long as *Montana*'s definition of sovereignty remains intact and the *Williams* proscription against interference with sovereignty is followed.

Finally, it may be argued that *Johnson* concerns only an individual's interest and not one of the tribe. Thus, there can be no infringement upon tribal sovereignty. This argument was addressed by the Supreme Court in *McClanahan*.[88] The Court rejected the argument, stating that infringement upon the interests of a single tribal member could constitute infringement upon tribal interests.[89] Therefore, the interest of the plaintiff in being made whole is an interest protected by the doctrine of tribal sovereignty. Consequently, Arizona cannot extend its state workers' compensation law to the Navajo Reservation.[90]

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84. *See generally* NAVAJO TRIBAL CODE (1977) [hereinafter N.T.C.].

85. 15 N.T.C. §§ 1001-49 (1977 & Supp. 1979-80). The Tribal Code provides that Indians working for non-Indian contractors on the reservation may be covered by this law if a contract between the tribe and the contractor so stipulates. *Id.* § 1002. Otherwise, there is no provision for workers' compensation under these circumstances. While this provision was enacted after the injury alleged in *Johnson*, it helps delineate an area in which the tribe has a necessary and vital interest, employer-employee relationships. All Navajo law, moreover, cannot be found within the confines of the Code. "The reason is the Navajo people have for centuries governed themselves by unwritten customs and traditions." *Id.*, Preface (1977). The implication is that relationships, such as between employer and employee, may be governed by Navajo law and custom even though not found within the Code. Thus, the interest of a tribe in protecting such relationships cannot be denied merely because at one time the Code did not address such a concern. For a discussion of interests in treaties, *see* Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time is That?*" 63 CAL. L. REV. 601, 604-05, 617-20 (1975).

86. In Muller v. Oregon, 208 U.S. 412 (1908), the United States Supreme Court upheld a law passed by Oregon which prohibited the employment of women in certain industries for more than ten hours per day. *Id.* at 416-17. The Court held that it was within the police power of a state to so regulate the employment of its citizens. *Id.* at 418-21, 423. In Bunting v. Oregon, 243 U.S. 426 (1917), the United States Supreme Court upheld the constitutionality of a state statute which generally limited the employment of workers to ten hours a day unless overtime wages were paid. *Id.* at 436. The Court reasoned that the law was a valid exercise of the police power of a state designed to protect the health of its workers. *Id.* at 434-35. Thus, it is clear that a state may regulate the employment of its citizens in order to protect their health and safety. If states may exercise sovereignty in such a manner, then surely an Indian tribe has the same right to protect the health and welfare of its members through the regulation of employment relationships.

87. See note 86 *supra*.

88. 441 U.S. 161, 179 (1970). The *McClanahan* Court was "far from convinced" that the infringement upon an individual Indian would not affect the whole tribe. *Id.* In addition, the Court decided that even if the *Williams* test did apply, it need not consider whether tribal sovereignty as a whole is violated, but only whether the rights of any member of the reservation had been violated. *Id.* at 181.

89. *Id.* at 181.

90. One final rationale used to support the assertion that a state workers' compensation law should be applied to the Navajo Reservation is found in a federal case similar to *Johnson*, Begay v. Kerr-McGee Corp., 499 F. Supp. 1325 (D. Ariz. 1980). In that case, it was held that "when

*Conclusion*

The *Johnson* court held that the Arizona Workmen's Compensation Act applies to Indians working for non-Indian contractors on the Navajo reservation. In addition, the court held that, since the Arizona Industrial Commission has exclusive jurisdiction over such disputes, claims for compensation may not be brought before a state court. This holding raises troubling implications for, and appears to be inconsistent with, established doctrines of Indian law.

It is not at all certain that section 290, which extends state workers' compensation protection to workers' employed by private contractors on federal lands, applies to Indian Reservations. The Court has long held that treaty-retained rights can only be divested by congressional acts which expressly apply to Indian lands. Section 290 does not expressly apply to Indian lands. Furthermore, the *Johnson* court's reliance on *Tuscarora* for the proposition that all acts of Congress apply to Indian reservations is misplaced because *Tuscarora* extended state rather than federal jurisdiction over Indian lands held in fee and not protected by any treaty.

A state that has a legitimate interest in extending its jurisdiction over an Indian reservation may do so, so long as tribal sovereignty is not infringed. The Supreme Court, however, has defined tribal sovereignty to include matters affecting the political integrity, health, or welfare of a tribe. A state therefore cannot interfere with a tribe's own jurisdiction over such matters. Thus, since Indian nations have traditionally enjoyed a unique degree of sovereignty that the Supreme Court has consistently protected, the Arizona Court of Appeals in *Johnson* erroneously held that Arizona could extend the jurisdiction of the Industrial Commission to reservation lands of the Navajo Nation. That sovereignty cannot be divested by the whim of a state government.

*James S. Burling*

## B. *UNITED STATES V. WASHINGTON II*:[1] TOWARD A JUDICIAL STANDARD OF TRIBAL STATUS

A major question in federal Indian law concerns the attributes that an Indian group must possess to be considered a sovereign Indian tribe enti-

Indian plaintiffs invoke the jurisdiction of the state courts they are bound by the laws of the forum." *Id.* at 1326. The problem in *Johnson*, as raised in *Begay*, is which jurisdiction's laws should be applied to the issues being litigated.

Arizona recognizes the validity of Navajo tribal law. *See In re* Lynch's Estate, 92 Ariz. 354, 357, 377 P.2d 199, 201 (1962). Arizona has also followed the Restatement of Conflict of Laws in the past to apply Arizona law to one aspect of a case while applying another state's law to another aspect of the same case. *See* Schwartz v. Schwartz, 103 Ariz. 562, 566, 447 P.2d 254, 258 (1968). Thus, there should be no impediment in allowing a wrongful death action instead of workers' compensation.

1. 641 F.2d 1368 (9th Cir. 1981). For the purpose of this Casenote, this case will be designated as *Washington II* to distinguish it from earlier litigation concerning claims to the same

tled to partake in a special relationship[2] with the United States government.[3] Congress, through various treaties and statutes,[4] has established relations with many tribes and has directed the executive branch to carry out the obligations and duties of the United States government to these tribes.[5] The Bureau of Indian Affairs (BIA) of the Department of the Interior has explicitly recognized a "government to government" relationship between the United States and nearly 280 American Indian tribes.[6] Nevertheless, about 100 Indian groups, each asserting tribal status with attendant obligations owed to them by the United States, have not been so recognized by the BIA.[7]

In general, the federal judiciary has deferred to the executive and legislative branches of the government in matters concerning Indian affairs.[8] However, several recent cases involving "unrecognized tribes" have put at issue before the judiciary the necessary and sufficient characteristics that an Indian group must possess to be considered a tribe in order to enjoy the rights conferred by treaties and statutes.[9] The Ninth Circuit recently considered the question of tribal status in *United States v. Washington II*.[10] The court stated that "tribal status is preserved if some defining characteristic of the original tribe persists in an evolving tribal community."[11]

This Casenote discusses the Ninth Circuit standard of tribal status. To this end, the procedural history and facts underlying *United States v. Washington II* will be outlined within the context of the complicated controversy over Indian fishing rights in the Pacific Northwest. Second, the standards of tribal status enunciated by other federal courts will be ex-

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treaty rights brought on behalf of other Indian tribes. *See* United States v. Washington, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

2. "The relation of the Indian tribes living within the borders of United States. . .[is] an anomalous one and of a complex character." United States v. Kagama, 118 U.S. 375, 381 (1886), *cited with approval in* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 173 (1973). The special relationship includes notions of tribal sovereignty. Williams v. Lee, 358 U.S. 217, 223 (1959). It also implies the guardian-ward relationship first enunciated in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 555 (1832).

3. Montoya v. United States, 180 U.S. 261, 266 (1901). *See generally* United States v. Washington II, 641 F.2d 1368 (9th Cir. 1981); Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979); 25 C.F.R. § 54 (1980); St. Clair & Lee, *Defense of Nonintercourse Act Claims: The Requirement of Tribal Existence*, 31 ME. L. REV. 91 (1979); Casenote, *The Unilateral Termination of Tribal Status: Mashpee Tribe v. New Seabury Corp.*, 31 ME. L. REV. 153 (1979).

4. *See* 25 U.S.C. (1976) (entitled "Indians"); C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES (2d ed. 1904). Congressional power is derived from U.S. CONST. art. I, § 8, cl. 3; *id.* art. II, § 2, cl. 2.

5. 25 U.S.C. § 2 (1976) provides that "[t]he Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations." *See also id.* §§ 11, 13.

6. 45 Fed. Reg. 27, 828-30 (1980).

7. D. GETCHES, D. ROSENFELT & C. WILKINSON, CASES AND MATERIALS ON FEDERAL INDIAN LAW 5 (1979); 1 AMERICAN INDIAN POLICY REVIEW COMM'N, FINAL REPORT 476-79 (1977).

8. Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903); United States v. Kagama, 118 U.S. 375, 383 (1886). *See generally* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 81-91 (1971).

9. *See, e.g.*, United States v. Washington II, 641 F.2d 1368, 1371 (9th Cir. 1981); Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 581-82 (1st Cir. 1979); Stillaguamish Tribe of Indians v. Kleppe, 3 Indian L. Rep. g-171 (1976).

10. 641 F.2d 1368 (9th Cir. 1981).

11. *Id.* at 1372-73.

amined. Third, the constituent elements of the federal court standards will be critiqued using historical and anthropological data from the Pacific Northwest. Finally, it will be argued that the standard used by the Ninth Circuit poses a major impediment for Indian groups seeking to satisfy the heavy burden of proof necessary to gain tribal status.

*Tribal Status as a Prerequisite for Asserting Fishing Rights Under Treaties*

In 1965 members of several Northwest Indian tribes and officials of the State of Washington clashed over salmon fishing rights.[12] This dispute inaugurated litigation concerning the right of state officials to regulate Indian fishing.[13] The United States government pursued the treaty-based fishing right claims on behalf of federally recognized tribes but did not assert the claims of several unrecognized "tribes."[14] The fishing rights of the recognized tribes were vindicated in *United States v. Washington I*.[15] This decision, however, did not apply to the unrecognized tribes because their tribal status was not established.[16] The unrecognized tribes subsequently intervened, seeking rights under the treaties.[17]

In *United States v. Washington II*,[18] the question of tribal status was resolved against five intervenor tribes: Duwamish, Samish, Snohomish, Snoqualmie, and Steilacoom.[19] Although the members of these tribes were descendants of treaty signatories,[20] their ancestors had not gone to live on reservations.[21] The members of the intervenor tribes had continued to live among non-Indians and had not been federally recognized.[22]

12. Jorgensen, *A Century of Political Economic Effects on American Indian Society, 1880-1980*, J. ETHNIC STUD. 1, 31 (1978).

13. Puyallup Tribe of Indians v. Department of Game, 391 U.S. 392, 399 (1968) (allowing the state to regulate some aspects of Indian fishing in the interest of conservation). For a general discussion of the controversy and its historical roots, *see generally* AMERICAN FRIENDS SERVICE COMM., UNCOMMON CONTROVERSY: FISHING RIGHTS OF THE MUCKLESHOOT, PUYALLUP, AND NISQUALLY INDIANS (1970).

14. United States v. Washington I, 520 F.2d 676, 682 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). The treaties involved were the Treaty of Medicine Creek, 10 Stat. 1132 (signed December 26, 1854; ratified March 3, 1855), and the Treaty of Point Elliot, 12 Stat. 927 (signed January 22, 1855; ratified March 8, 1859; proclaimed April 11, 1859). *See* United States v. Washington II, 641 F.2d at 1370 n.1.

For a discussion of the distinction between recognized and unrecognized tribes, *see* authorities cited in note 7 *supra*. "During the early 1960's, administrators began distinguishing between 'recognized' and 'nonrecognized' tribes. Federal contacts had been broken off or never initiated with many tribes. Decisions had often been made, not by Congress, but in an ad hoc fashion by administrators." D. GETCHES, *supra* note 7, at 238. In essence, nonrecognition indicates that the United States government denies that the Indian group is a tribe and refuses to deal with such groups as tribes.

15. 520 F.2d 676 (9th Cir. 1975).

16. The treaty fishing rights of some 20 tribes (not including the intervenors in *Washington II*) were substantially affirmed in Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 662 n.2, *modified on other grounds*, 444 U.S. 816 (1979).

17. Order Referring Treaty Tribal Status Issues to Master for Hearing, Clerk's Record at 24, United States v. Washington II, 641 F.2d 1368 (9th Cir. 1981).

18. 641 F.2d 1368 (9th Cir. 1981).

19. *Id.* at 1374.

20. *Id.* at 1370.

21. *Id.* The reservations were found to have been inadequately small, *id.*, far from native territory, and often included members of groups on hostile terms. United States v. Washington II, 476 F. Supp. 1101, 1102 (W.D. Wash. 1979), *aff'd on other grounds*, 641 F.2d 1368 (9th Cir. 1981).

22. 641 F.2d at 1370-71.

The district court held that "[o]nly tribes recognized as Indian political bodies by the United States may possess and exercise tribal fishing rights secured by the treaties of the United States."[23]

Upon review, the Ninth Circuit found this conclusion of law to be clearly erroneous.[24] The court held that maintenance of an organized tribal structure, not federal recognition, was the essential element necessary for the vesting of treaty rights.[25] The district court, however, had listed and discussed several additional considerations for determining whether the intervenors formed the requisite tribal communal units capable of exercising treaty rights. These factors included, (1) the extent of Indian ancestry and upbringing in an Indian community;[26] (2) the extent of tribal control over members' lives;[27] (3) the members' participation in tribal affairs;[28] (4) the extent of tribal political control over a specific territory;[29] and (5) the historical continuity of each of the preceding factors.[30] Using these factors, the Ninth Circuit sustained the district court's finding that the intervenors lacked political and cultural cohesion.[31] Thus, noting that the intervenor tribes had the burden of proving tribal existence, the court rejected the proposition that because the intervenors were descendants of treaty signatories, their continuing existence as a tribal unit should be presumed.[32]

Judge Canby dissented in *Washington II*.[33] He argued that application of the proper legal standard required new determinations of fact[34] and that some of the factors listed by the district court were largely functions of federal recognition.[35] An examination of other federal court cases which

23. United States v. Washington II, 476 F. Supp. 1101, 1111 (W.D. Wash. 1979), *aff'd on other grounds*, 641 F.2d 1368 (9th Cir. 1981).

24. 641 F.2d at 1371.

25. *Id.* at 1372. "We have defined a single necessary and sufficient condition for the exercise of treaty rights by a group of Indians descended from a treaty signatory: the group must have maintained an organized tribal structure." *Id.* This standard was first enunciated in United States v. Washington I, 520 F.2d at 693.

26. 641 F.2d at 1372; see text & notes 74-81, 100-07 *infra*.

27. 641 F.2d at 1372; see text & notes 118-39 *infra*.

28. 641 F.2d at 1372; see text & notes 108-17 *infra*.

29. 641 F.2d at 1372; see text & notes 82-93 *infra*.

30. 641 F.2d at 1372; see text & notes 140-50 *infra*. Specifically, the factors used by the district court to determine tribal status were:

(1) the extent to which the group's members are persons of Indian ancestry who live and were brought up in an Indian society or community,
(2) the extent of Indian governmental control over their lives and activities,
(3) the extent and nature of the members' participation in tribal affairs,
(4) the extent to which the group exercises political control over a specific territory,
(5) the historical continuity of the foregoing factors, and
(6) the extent of express acknowledgement of such political status by . . . federal authorities . . . .

641 F.2d at 1372. The Ninth Circuit explicitly rejected the sixth factor listed above. *Id.* at 1371; see text & note 25 *supra*.

31. 641 F.2d at 1374.

32. *Id.*

33. *Id.* at 1374-76 (Canby, J., dissenting).

34. *Id.* at 1376.

35. *Id.* at 1375. "Two of the six factors—the extent of Indian governmental control over members' lives and the extent of political control over a specific territory—are largely functions of federal recognition. . . ." *Id.* See text & notes 25-30 *supra*.

have addressed the issue of tribal status will illuminate Judge Canby's position and provide a prelude to the discussion of the elements used by federal courts to determine tribal status.

*Tribal Status and Recognition in Other Federal Courts*

In the nineteenth century, the Supreme Court decided two cases in which the status of Indian groups was at issue.[36] In these cases the Court gave weight to both the extent of tribal organization and whether the Indian group was recognized by the government as a tribe.[37] Thus, in these early decisions federal recognition was a necessary, if not sufficient condition for assertion of tribal rights.[38]

In 1901 the Court again addressed the issue of tribal status in *Montoya v. United States*.[39] Montoya claimed damages for depredations committed by certain Apaches.[40] Under a congressional act, the United States agreed to adjudicate claims for property destroyed by Indians of any "band, tribe or nation in amity with the United States."[41] Thus, the status of the claim rested, in part, on whether the Apaches involved in the depredation constituted either a tribe or a band.[42] The Court, however, defined both terms (tribe and band) without any reference to the factor of federal recognition.[43] Rather, a tribe was defined as "a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."[44]

The *Montoya* definition has become a threshold requirement for Indians asserting claims to certain rights[45] and the government in asserting plenary power over Indian tribes.[46] For example, in *United States v. Candelaria*[47] the government claimed that certain Pueblo Indians of New Mexico were wards of the government and that their lands were therefore

36. *See* Eastern Band of Cherokee Indians v. United States, 117 U.S. 288, 309 (1886) (right to share in common property of the Cherokee Nation denied); The Kansas Indians, 72 U.S. 737, 754-55 (1866) (maintenance of tribal organization bars state's attempt to tax property of tribal members).

37. In Eastern Band of Cherokee Indians v. United States, 117 U.S. 288 (1886), the Court stated, "The Cherokees in North Carolina dissolved their connection with their Nation . . . and they have had no separate political organization since. Whatever union they have had among themselves has been merely a social or business one. . . . [T]hey have never been recognized as a separate Nation by the United States." *Id.* at 309. In The Kansas Indians, 72 U.S. 737 (1866), the Court stated, "If the tribal organization of the Shawnees is preserved intact, and recognized by the Political Department of the Government as existing, then they are a 'people distinct from others,' . . . to be governed exclusively by the Government of the Union." *Id.* at 755.

38. *See also* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832), where the Court speaks of "the relations established between the United States and the Cherokee nation" with which the state of Georgia may not interfere. *Id.*

39. 180 U.S. 261 (1901).

40. *Id.*

41. *Id.* at 263-64.

42. *Id.* at 264.

43. *See id.* at 266.

44. *Id.*

45. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 581-82 (1st Cir. 1979). *See also* Joint Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 377 (1st Cir. 1975).

46. United States v. Candelaria, 271 U.S. 432, 441-42 (1926).

47. 271 U.S. 432 (1926).

protected by certain congressional acts.[48] The Court found that the Pueblo Indians fit the *Montoya* definition of a tribe and thus sustained the government's contention.[49] In addition, the Court noted that the government had long had a course of dealing with the Pueblo Indians amounting to a de facto federal recognition.[50]

Recently, in *Joint Tribal Council of Passamaquoddy v. Morton*,[51] the First Circuit faced the question of Indian land claims arising under the Nonintercourse Act.[52] Unlike the Pueblo Indians, the Passamaquoddy had no history of dealings with the United States government.[53] Both parties stipulated, however, that the "Passamaquoddy Tribe is a tribe in both the racial and cultural sense."[54] The First Circuit held that nothing in the Nonintercourse Act suggested that a "bona fide tribe not otherwise federally recognized" could be excluded from a "trust relationship" with the United States for the purposes of the Act.[55]

Following the success of the Passamaquoddy in pursuing land claims in Maine, the Mashpee of Massachusetts, in *Mashpee Tribe v. New Seabury Corp.*,[56] asserted land claims under the same theory—existence of a trust relationship with the United States government under the Nonintercourse Act.[57] The defendants in *Mashpee* denied, however, that the Mashpee constituted a tribe and thereby put the question of tribal status in issue.[58] The district court adopted the *Montoya* definition of a tribe[59] and the jury found that the Mashpee no longer conformed to that definition because the tribe had voluntarily become assimilated into non-Indian society.[60] The First Circuit affirmed the finding of "voluntary assimilation" and thus held that, because the Mashpee were no longer a tribe, the United States was not obligated to protect their lands under the Nonintercourse Act.[61]

*Mashpee* indicates the continued vitality of the *Montoya* definition.[62] While the court in *Washington II* did not explicitly cite the Montoya definition as authority,[63] the factors enumerated by the district court[64] and

48. *Id.* at 437.
49. *Id.* at 442-44.
50. "[B]y a uniform course of action beginning as early as 1854 and continued up to the present time, the legislative and executive branches of the Government have regarded and treated the Pueblos of New Mexico as dependent communities entitled to its protection, like other Indian tribes. . . ." *Id.* at 439-40, *citing* United States v. Sandoval, 231 U.S. 28, 45-47 (1913).
51. 528 F.2d 370 (1st Cir. 1975).
52. *Id.* at 372. The Nonintercourse Act states, in relevant part, "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177 (1976).
53. 528 F.2d at 374.
54. *Id.* at 377 n.7.
55. *Id.* at 377.
56. 592 F.2d 575 (1st Cir. 1979).
57. *Id.* at 579.
58. *Id.*
59. *Id.* at 581-82; see text & notes 39-44 *supra*.
60. 592 F.2d at 581-88.
61. *Id.* at 590, 594.
62. See text & notes 39-44, 59 *supra*.
63. Instead, the court discussed the loose political structure of many Indian groups designated as tribes. United States v. Washington II, 641 F.2d 1368, 1373 n.6 (9th Cir. 1981). The court did, however, cite to *Mashpee*. *Id.* at 1373 n.7. The court also cited a casenote concerning

used by the Ninth Circuit in determining tribal status[65] closely parallel the factors in *Montoya*.[66] Because neither the district court nor the Ninth Circuit cited any authority for the factors used in determining the tribal status of the intervenors,[67] in analyzing the *Washington II* opinion it is instructive to consider the factors of the *Montoya* definition, their relation to the factors used by the Ninth Circuit, and the empirical data that correspond to each factor.

*Important Factors in Determining Whether an Indian Group Attains Tribal Status*

This section explores the elements used to define tribal status in *Montoya* and their implicit correlates used in *Washington II*. These elements include (1) ancestry;[68] (2) political control over territory;[69] (3) the concept of community;[70] and (4) control over the lives of tribal members.[71] It will be argued that the first two elements should be given little, if any, weight in determining tribal status.[72] The appropriate factors are the last two, which concern the nature of tribal culture and political organization.[73]

1. *Ancestry*

The unique relationship between the federal government and Indian tribes is founded on political, not racial, considerations.[74] Moreover, tribes may set their own requirements for enrollment of tribal members.[75] His-

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*Mashpee*. *Id*. at 1373. *See* Casenote, *supra* note 3. The implication is that the Ninth Circuit had knowledge of the *Montoya* definition, although the court did not explicitly acknowledge that the factors they enumerate closely parallel the elements of the *Montoya* definition. *Compare* the factors listed in *Washington II*, 641 F.2d at 1372 *with* the *Montoya* definition, 180 U.S. at 266. *See* text & notes 23-30, 39-44 *supra*.

64. 476 F. Supp. 1101, 1110 (W.D. Wash. 1979).

65. 641 F.2d at 1372; see note 30 *supra*.

66. *Compare* United States v. Washington II, 641 F.2d 1368, 1372 (9th Cir. 1981) *with* Montoya v. United States, 180 U.S. 261, 266 (1901).

67. *See* 476 F. Supp. at 1110; 641 F.2d at 1372.

68. See text & notes 26, 30 *supra*; 74-81 *infra*.

69. See text & notes 29, 30 *supra*; 82-93 *infra*.

70. See text & notes 26, 28, 30 *supra*; 100-17 *infra*.

71. See text & notes 27, 30 *supra*; 118-39 *infra*.

72. See text & notes 74-93 *infra*.

73. See text & notes 100-39 *infra*.

74. In Puget Sound Gillnetters Ass'n v. United States District Court, 573 F.2d 1123, 1129-30 (9th Cir. 1978), *modified on other grounds sub nom*. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658 (1979), the court stated:

> We have noted that the appellants argue that the district court's actions violate equal protection. The allocation [of the right to take fish] is not an allocation among an indistinguishable mass of citizens but between two groups of persons each claiming undivided half interests in a quasi-cotenancy. Each of the co-owners, the state and the tribe, is a quasi-sovereign, and the distinction between their members is thus political rather than racial. Ethnic origin is relevant only to the degree it happens to define tribal, and therefore political, status.

573 F.2d at 1129-30.

75. Thompson v. United States, 122 Ct. Cl. 348, 359 (1952).

> Individual Indians or small groups of Indians move from time to time from one place to another and become affiliated with other tribes, bands or groups of Indians, and when the tribe, band or group presenting the claim is willing to admit and accept such Indians as members of its group, no jurisdictional question arises. Adoption of Indians into a tribe or band has long been recognized.

torically, many federally recognized tribes have included a high proportion of individuals of mixed ethnic heritage, and these members have sometimes been prominent in the governing of tribal affairs.[76] In isolation, then, the degree of Indian ancestry of enrolled tribal members should not have bearing on whether the group constitutes a tribe.

Nevertheless, the district court in *Washington II* carefully scrutinized the populations of the intervenor Coast Salish tribes and found that many members had only a small proportion of Indian ancestry.[77] Although never explicitly stated, these findings seemed to weigh heavily against the intervenors.[78] In aboriginal times, however, Coast Salish tribes frequently preferred to marry across tribal lines,[79] and these marriages served important economic and political functions.[80] Thus, it could be argued that marriages between members of the intervenor tribes and the new (white) settlers in the area perpetuated aboriginal patterns.[81]

### 2. *Political Control Over Territory*

In *Montoya*, the Supreme Court did not explicitly require that a tribe exert political control over territory, although this factor might be implied from the requirements that a tribe inhabit a territory and have a government or leadership.[82] The *Washington II* courts, however, did list this as a factor in determining tribal status, although no authority for this proposition was explicitly cited.[83] Indeed, little emphasis was given this factor in the Ninth Circuit opinion.[84] This de-emphasis seems appropriate in light of the particular facts in *Washington II* which indicate the irrelevancy of

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*Id.* *See* Martinez v. Southern Ute Tribe, 249 F.2d 915, 920 (10th Cir. 1957).

76. *See* T. PERDUE, *Cherokee Planters: The Development of Plantation Slavery Before Removal*, in THE CHEROKEE INDIAN NATION: A TROUBLED HISTORY 110, 110-28 (1979). In 1835, 17% of all Georgia Cherokees, but 78% of Cherokee slaveholders, had some white ancestry. *Id.* at 117. "Slaveholders controlled the government of the Cherokee Nation partly because they had created it, but also because their wealth situation gained the respect of fellow tribesmen and enabled them to deal more effectively with whites." *Id.*

77. 476 F. Supp. 1101, 1105-08, 1110 (W.D. Wash. 1979). "The Duwamish constitution requires members to be persons of Indian blood only, and descendent of the Duwamish Tribe. . . . The tribe has consistently interpreted this as not requiring full-blood Indian. . . , and most members are less than that." *Id.* at 1105. "The intervenor Samish Tribe's constitution provides . . . no requirement of specific minimum blood quantum either as to Samish blood in particular or Indian blood in general. . . . The Intervenor's membership roll contains 549 persons many of whom are of only 1/16th degree Indian blood. Two have only 1/32nd Samish blood." *Id.* at 1106.

78. 641 F.2d at 1373. "The appellants' members are descended from treaty tribes, but they have intermarried with non-Indians and many are of mixed blood." *Id.* The court noted that many members of recognized tribes had mixed ancestry but concluded that they lived in distinctively Indian communities. *Id.* at 1373-74. These facts were taken as some evidence of a lack of cultural cohesion within the intervenor tribes. *Id.* at 1374.

79. H. HAEBERLIN & E. GUNTHER, THE INDIANS OF PUGET SOUND 50-55 (1930).

80. *Id.* at 50; Suttles, *Affinal Ties, Subsistence, and Prestige among the Coast Salish*, 62 AM. ANTHROPOLOGIST 296, 297 (1960).

81. H. HAEBERLIN & E. GUNTHER, *supra* note 79, at 7, state, "The situation that existed in aboriginal conditions in regard to residence still holds, namely that with tribal exogamy and patrilocal residence there is considerable heterogeneity in every community." *Id.*

82. *See* 180 U.S. at 266. The Court mentions, but does not discuss, the factor of territoriality.

83. 476 F. Supp. at 1110; 641 F.2d at 1372.

84. 641 F.2d at 1372. Although the court lists political control over territory as a consideration, it never explicitly addresses this issue. Rather, it seems to confound this factor with residence and community relationships.

this factor in a case involving off-reservation fishing rights guaranteed by treaty.[85]

The treaties negotiated with the tribes of western Washington in the 1850s provided, in part, that the tribes cede political control over most of their territory in exchange for reservations of land and the right to take fish at customary locations.[86] The reservations were too small, far from traditional territory, and were frequently inhabited by Indian groups unfriendly to one another.[87] Moreover, in subsequent years, the United States government sought to break up the reservations and destroy tribal relations.[88] The intervenors argued that these actions by the government "should not be allowed to divest them of their treaty rights."[89] The treaty right to take fish does not depend on political control over the locations from which fish are taken.[90] Such control was ceded to the federal government pursuant to the treaties.[91] As Judge Canby observed in his dissent, political control over a specific territory in this case is largely a function of federal recognition.[92] Therefore, like ancestry,[93] political control over territory should have little bearing on determining tribal status.

### 3. *Community*

The third factor in the *Montoya* definition of a tribe is that the group be "united in a community."[94] In the nineteenth century the concept of community encompassed notions of shared ideology as well as common residence among a group of people.[95] The modern definition of community is likewise multifaceted.[96] Thus, the factor of community implies several of the other elements of the *Montoya* definition.[97]

Two factors mentioned in *Washington II*—residence in an Indian community and participation in tribal culture[98]—can be considered spe-

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85. See text & notes 86-92 *infra*.

86. *See* United States v. Washington I, 520 F.2d at 682-83, where the court discussed the treaties negotiated by Governor Stevens with the tribes of western Washington.

87. United States v. Washington II, 476 F.Supp. at 1102.

88. *Id.* at 1103.

89. 641 F.2d at 1372.

90. United States v. Winans, 198 U.S. 371, 384 (1905). "[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." *Id.* at 381. Specifically, in *Winans*, the Indians reserved an easement in order to exercise their treaty right to take fish at traditional locations away from the reservations. *Id.* at 384.

91. *Id.* at 384; *see* Treaty of Medicine Creek, 10 Stat. 1132 (signed December 26, 1854; ratified March 3, 1855); Treaty of Point Elliot, 12 Stat. 927 (signed January 22, 1855; ratified March 8, 1859; proclaimed April 11, 1859).

92. 641 F.2d at 1375 (Canby, J., dissenting).

93. See text & notes 74-81 *supra*.

94. 180 U.S. at 266.

95. *See* R. NISBET, THE SOCIOLOGICAL TRADITION 47-106 (1966), for a discussion of the concept of community among 19th century social thinkers.

96. WEBSTER'S NEW WORLD DICTIONARY 296 (1964). There, "community" is defined in part as "1. people living in the same district, city, etc. under the same laws. . . . 4. a group of people living together and having interests, work, etc. in common. . . . 6. ownership or participation in common. . . . 7. similarity, likeness." *Id.*

97. Note that the dictionary definition, see note 96 *supra*, includes aspects of governance and control over territory which are distinct elements in the *Montoya* definition. *See* 180 U.S. at 266.

98. See factors (1) & (3), note 30 *supra*.

cific aspects of community unity and tribal organization.[99] The relative importance of these two factors in aboriginal Salish society deserve particular attention.

*A. Common Residence.* The residential bonds of community are perhaps the easiest to measure.[100] The nature of residential patterns should be assessed with reference to tribal organization at the time of the treaties.[101] Thus, the residential patterns of the intervenor tribes as they existed at the time of the treaty negotiations require examination.

In the mid-1800s, Salish residential patterns were quite flexible and were designed for the efficient seasonal exploitation of natural resources.[102] During winter, people congregated at large villages near salmon fishing sites.[103] In the summer, families dispersed to live with different families near other sources of food.[104] Residential and social relationships thus fluctuated with the seasons and no set of neighbors took precedence over another in social relationships.[105] Moreover, aboriginal Salish settlement patterns were influenced by distinctions between families based on social status.[106] Hence, the mere fact that members of the five intervenor tribes are today not residentially segregated from whites and do not all live together in a distinctly tribal unit should not be used to infer a loss or abandonment of aboriginal tribal organization.[107]

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99. *See* M. SAHLINS, TRIBESMEN 14-20 (1968). Sahlins states that "the strength of a tribe is generally in homestead and hamlet, the smallest groups and narrowest spheres. Here . . . social interaction is greatest and cooperation most intense. . . . But more than a scheme of social relations, it is an organization of culture." *Id.* at 16.

100. *See* 1 METHODS AND MATERIALS OF DEMOGRAPHY 262 (1973).

The *Washington II* district court found that the Duwamish "have no common bond of residence." 476 F.Supp. at 1105. The Ninth Circuit commented that the members of the intervenor tribes "have not settled in distinctively Indian residential areas." 641 F.2d at 1374.

Common residence is also an important consideration for the BIA petitions for establishing federal recognition of an Indian tribe. 25 C.F.R. § 54.7(b)(1980).

101. *See* United States v. Washington II, 641 F.2d at 1373. This logically follows from the proposition that tribes need not acquire characteristics they did not possess at treaty times.

102. H. HAEBERLIN & E. GUNTHER, *supra* note 79, at 15-19; Smith, *The Coast Salish of Puget Sound*, 43 AM. ANTHROPOLOGIST 197, 200-01 (1941). "It is quite clear that the unit of organization among the Coast Salish was a relatively small, named group identified with certain living quarters. . . . More important from the standpoint of tribal organization, however, is the relation between the local unit and land use." *Id.*

103. *Id.* at 201.

104. *Id.*

> When the units dispersed, families went in opposite directions and at clamming grounds and berry and root fields often joined families from units which belonged to *other* extended villages. Socially, these people who met during the summer were as closely knit as were those of the contiguous winter quarters of the extended village.

*Id.* (emphasis in original). The Ninth Circuit apparently recognized this feature of Salish social organization in United States v. Washington I, 520 F.2d at 682, when it stated: "Their fish oriented culture required them to be nomadic, moving from one fishing spot to another as the runs varied with the seasons." *Id.*

105. Smith, *supra* note 102, at 201. "[P]eople who met during the summer were as closely knit as were those of the contiguous winter quarters of the extended village." *Id.*

106. *See* Suttles, *Private Knowledge, Morality, and Social Class Among the Coast Salish*, 60 AM. ANTHROPOLOGIST 497, 498 (1958). "[T]here was a division of residence between upper-class and lower-class people." *Id.*

107. *See* The Kansas Indians, 72 U.S. (5 Wall.) 737,755 (1866) (despite the fact that the Shawnees were living in close proximity to citizens of Kansas, they maintained their special relationship with the United States government). *See also* Casenote, *supra* note 3, at 160-62.

*B. Participation in Tribal Affairs.* In *Washington II*, the appellees stressed the minimal extent of participation by the intervenors in tribal activities.[108] While cultural participation is a reliable indicator of cultural cohesion, the appellees' argument equates cultural participation with communal activities. Participation in a culture, however, implies something aside from attendance at large social gatherings.[109] Of greater importance in the continuity and the integration of a culture is the widespread sharing of cultural values.[110]

For example, child rearing practices are a mechanism for instilling cultural ideology.[111] Societies with little organized government rely on ideology transmitted across generations as a means of social control.[112] Moral sanctions were an especially important means of social control among the Salish.[113] Children were admonished not to misbehave lest they be labeled as "low class."[114] It has been convincingly argued that this type of moral training among the Salish contributed to social control.[115]

While the court in *Washington II* rightly considered the factor of the participation of members of the intervenor tribes in tribal culture, it misconstrued the concept as referring only to public gatherings. The courts should be wary of imputing a lack of cultural cohesion among an Indian group without adducing facts directly relevant to the values shared by members of that group. Moral training is at the core of cultural values.[116] Although the processes by which such values are learned are difficult to study empirically, these processes may be far more indicative of cultural cohesion than outward manifestations of culture such as public events.[117]

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108. "The primary activity in which these tribes engage as a group is the annual meeting of members." Brief for the Federal Appellees at 22, United States v. Washington II, 641 F.2d 1368 (9th Cir. 1981). "Typical 'tribal' activities are potlucks and picnics." Brief of Appellees of the State of Washington at 22.

109. Culture has been defined as "the idea in common." H. BARNETT, INNOVATION: THE BASIS OF CULTURE CHANGE 12 (1953). Barnett stresses the importance of shared concepts and values in the integration of society. *Id.* at 39-95. *See also* R. REDFIELD, THE LITTLE COMMUNITY 81-95 (1967) (shared ethos and world view are fundamental aspects of community). Some anthropologists emphasize the importance of ritual rather than ideology in the integration of society, but they do not deny that culture has an important non-behavioral component. *See, e.g.*, M. GLUCKMAN, POLITICS, LAW AND RITUAL IN TRIBAL SOCIETY 250-303 (1965); V. TURNER, THE RITUAL PROCESS (1969); A. WALLACE, RELIGION: AN ANTHROPOLOGICAL VIEW 102-67 (1966). Moreover, "shared behavior" connotes an "underlying consistency and unity" in a "value system shared by all tribal members . . . thereby giving uniformity to behavior." J. STEWARD, THEORY OF CULTURE CHANGE 45 (1972). Impliedly, shared behavior need not be expressed in large and frequent gatherings as suggested by the appellees. See text and note 108 *supra*.

110. See note 109 *supra*; text & notes 111-17 *infra*.

111. J. WHITING & I. CHILD, CHILD TRAINING AND PERSONALITY 220-21 (1953) (conformity with cultural rules is primarily ensured by processes of socialization, particularly child rearing practices).

112. M. SAHLINS, *supra* note 99, at 96-97 (discussing the importance of religious ideology as a constraint on behavior in tribal society).

113. Suttles, *supra* note 106, at 501-02.

114. *Id.*

115. *Id.* at 502. "[T]he theory that knowledge of good behavior was restricted to the upper class made a contribution to social control. . . ." *Id.*

116. J. WHITING & I. CHILD, *supra* note 111, at 306-13.

117. *Id.* at 39-105 (an extensive discussion of methodological problems).

### 4. *Governmental Control Over Tribal Members*

The central element of the Ninth Circuit's standard for determining tribal status[118] appears to be the extent of tribal authority over tribal members.[119] The policy of the United States in negotiating treaties with Indian tribes was founded on the notion that the tribes were governmental bodies.[120] This policy was confirmed by the Supreme Court in *Worcester v. Georgia*[121] where, in 1832, the Court held that Indian nations were "distinct, independent political communities."[122] More recent cases continue to stress the paramount importance of governmental authority as an element of tribal status.[123] These cases also show, as Judge Canby argued in his dissent in *Washington II*, that governmental control over tribal members is often a function of federal recognition.[124]

The Supreme Court has emphasized the permanency of political organization in its definition of a tribe.[125] In *Mashpee*, the First Circuit found that "unbroken continuity in leadership" was a key element in determining tribal status.[126] These judicial concepts of "permanence" and "continuity", however, may not be well-suited for the analysis of aboriginal tribal political relations in western North America.[127]

While little is known about the political relations among the 60 to 120 Puget Sound villages in aboriginal times,[128] it appears that political organization was rather loose[129]—not unlike the temporary and shifting social

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118. See text & note 11 *supra*.

119. 641 F.2d at 1373.

120. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 20 (1831).

121. 31 U.S. (6 Pet.) 515 (1832) (holding that a state may not interfere in the internal matters of Indian tribe that is a ward of the federal government).

122. *Id.* at 559. This view was reiterated in The Kansas Indians, 72 U.S. (5 Wall.) 737, 755-56 (1886). In that case the Supreme Court stated:

> If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a "people distinct from others," capable of making treaties, separated from the jurisdiction of Kansas. . . . The Treaty of 1854 left the Shawnee a united tribe. . . . Ever since this their tribal organization has remained as it was before. They have elective chiefs and an elective council. . . with powers regulated by custom . . . by which they punish offenses, adjust differences, and exercise a general oversight over the affairs of the nation. This people have their own customs and laws by which they are governed. Because some of those customs have been abandoned . . . does not tend to prove that their tribal organization is not preserved. . . . Their machinery of government, though simple, is adapted to their intelligence and wants. . . .

*Id.*

123. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170-73 (1973); Williams v. Lee, 358 U.S. 217, 223 (1959).

124. 641 F.2d at 1375 (Canby, J., dissenting).

125. See Conners v. United States, 180 U.S. 271, 275 (1901). *Conners* draws a distinction between tribes and bands of Indians. "The word 'band' implies an inferior and less permanent organization." *Id.*

126. 592 F.2d at 583-85.

127. *See generally* H. DRIVER, INDIANS OF NORTH AMERICA 287-308 (2d ed. 1969); M. FRIED, THE EVOLUTION OF POLITICAL SOCIETY 154-74 (1967).

128. Smith, *supra* note 102, at 203.

129. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658, 664 n.5, *modified on other grounds*, 444 U.S. 816 (1979). Indeed, the record shows that the territorial officials who negotiated the treaties on behalf of the United States took the initiative in aggregating certain loose bands into designated tribes and even appointed many of the chiefs who signed the treaties. 443 U.S. at 664 n.5.

organization reflected in settlement patterns.[130] Indeed, the Coast Salish who granted a high degree of autonomy to extended families[131] probably resembled the Great Basin Shoshoni in many aspects of political organization.[132] In the Great Basin, leadership was temporary and specific to different economic tasks.[133] Families dissatisfied with local leaders could shift residence and political allegiance with relative ease.[134]

The Ninth Circuit standard of tribal status stresses preservation of some defining characteristic of the original tribe.[135] The factor of control over tribal members' lives is important in meeting the standard.[136] Aboriginal political organization, however, was rather loose.[137] Therefore, contemporary looseness in tribal control over members' lives should not vitiate tribal status.[138] Judge Canby's dissent is in large part due to the court's failure in *Washington II* to carefully and explicitly attend to the factor of political control over members' lives.[139]

*Historical Continuity of Tribal Organization in an Evolving Community*

In *Washington II* the Ninth Circuit required, at a minimum, that a tribe demonstrate "continuous informal cultural influence" over the lives of tribal members in order to establish tribal status.[140] In so doing, the court discussed two competing propositions. On the one hand, a tribe need not acquire characteristics that it did not possess at treaty times.[141] On the other hand, changes in tribal organization attributable to influences of the dominant, non-Indian do not terminate tribal status.[142] In other words, to maintain their status as a tribe in order to exercise treaty rights, an Indian group must simply survive as a distinct community.[143] Complete assimilation, whether voluntary or not, was held to be the antithesis of such survival.[144] The key to the Ninth Circuit's discussion of historical continuity is thus the concept of assimilation. Unfortunately, this concept is never clearly defined nor explicitly considered in *Washington II*.[145]

The concept of "assimilation" has been the subject of much criticism and debate in the social sciences.[146] Perhaps it is best to view assimilation

130. See text & notes 102-05 *supra*.
131. P. DRUCKER, INDIANS OF THE NORTHWEST COAST 123 (1963).
132. H. DRIVER, *supra* note 127, at 289, 294.
133. J. STEWARD, BASIN-PLATEAU ABORIGINAL SOCIOPOLITICAL GROUPS 247 (1938).
134. *Id.*
135. 641 F.2d at 1372-73.
136. *Id.* at 1372, 1373.
137. See text & notes 106-13 *supra*.
138. This follows logically from the Court's position that "[a] structure that never existed cannot be 'maintained.'" 641 F.2d at 1373.
139. *Id.* at 1376 (Canby, J., dissenting).
140. *Id.* at 1373.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. Jorgensen, *Indians and the Metropolis*, in THE AMERICAN INDIAN IN URBAN SOCIETY 68 (1971). The author discusses acculturation, a concept closely associated with assimilation, as follows:

The acculturation framework provides a rather euphoric way to think and talk about

as a complex set of social processes that can be treated as distinct variables.[147] Hence, different features of a tribe may change over time in different ways or at different rates.[148] For example, some tribes remain a distinct community in a social and cultural sense despite generations of intermarriage and the loss of control over a specific homeland.[149] What *Washington II* does not clarify is whether complete assimilation refers to some degree of change in all the elements of tribal status[150] or a complete transformation of but a single element. Thus, the Ninth Circuit's analysis fails to correctly account for social processes of change.

*Burden of Proof*

The preceding sections have shown that the factors of the *Montoya* definition of a tribe and the implicit derivation of these factors used by the court in *Washington II* lack clarity and specificity.[151] *Washington II* adds to the confusion by obscuring the level of evidence necessary to satisfy each element and, therefore, to satisfy the single standard of the persistence of tribal status.[152] In some respects the intervenor tribes may have been required to demonstrate features of tribal organization that never existed—despite the court's insistence that tribes should not be required to do this.[153] For instance, it is unclear how the intervenor tribes could establish sufficient control over the lives of their members[154] if their aboriginal as well as their contemporary social organization was extremely loose and flexible.[155]

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what has happened to American Indians since contact. It assumes that before white contact Indians were "underdeveloped" and avoids analysis of why Indians are as they are today. Because this framework assumes that Indians will eventually become fully integrated into the United States polity, economy and society just like whites, it is also meaningless. No matter what the condition of Indian society is when analyzed by the anthropologist, it is always somewhere along the acculturation path, headed toward full acculturation. Because acculturation explains everything, it explains nothing.

*Id.* A forceful argument has also been made against the "uncritical acceptance of the basic assumption that assimilation to dominant ways is inevitable." Spicer, *Introduction*, in PLURAL SOCIETY IN THE SOUTHWEST 7 (1972). Spicer notes that some Indian groups, such as the Navajo, have selected features of various cultural traditions to forge new and integrated cultures. *Id.* at 17.

At root, the problem with the Ninth Circuit's use of the concept of "assimilation" is that it glosses over the enormous complexity of social change and assumes a simple undirectional march from "aboriginal tribal organization" to "full integration" (assimilation). 641 F.2d at 1373. This is consistent with 19th century judicial thinking. *See* The Kansas Indians, 72 U.S. (5 Wall.) 737, 755-56 (1866). It is not consistent with 20th century social realities and contemporary attempts by social scientists to understand the position of American Indians in United States society. See text & notes 125-27 *infra*.

147. M. GORDON, ASSIMILATION IN AMERICAN LIFE 70-83 (1964). Seven variables or dimensions of assimilation have been identified: (1) acculturation; (2) structural assimilation; (3) marital amalgamation; (4) identificational assimilation; (5) growth of an absence of prejudice and (6) discrimination in the society; and (7) civic assimilation. *Id.* at 70-71.

148. *See* E. SPICER, *Types of Contact and Processes of Change*, in PERSPECTIVES IN AMERICAN INDIAN CULTURE CHANGE 542-43 (1961).

149. The Yaqui provide such an example. *See* E. SPICER, *Yaqui*, in PERSPECTIVES IN AMERICAN INDIAN CULTURE CHANGE 77-91 (1961).

150. *See* 641 F.2d at 1373. *See also* note 30 *supra*.

151. These factors are discussed in text & notes 25-30, 82-139 *supra*.

152. *See* 641 F.2d at 1372-73.

153. *Id.* at 1373.

154. *See id.* at 1372. See factor (2), note 30 *supra*.

155. See text & notes 94-139 *supra*.

In addition, in *Washington II* the intervenor tribes had the burden of proving they had not assimilated.[156] The court required a showing of uninterrupted tribal status over a period of 125 years.[157] Courts, however, have long recognized the difficulty of fact-finding concerning remote historical events.[158] The burden would seem to be even greater when placed upon a people with a primarily oral tradition.[159] In such societies, there may be neither little attention to historical detail nor analytic efforts directed at understanding the nature of the indigenous social order.[160]

The burden borne by the intervenors in *Washington II* was substantially heavier than that borne by the Indians in *Mashpee*.[161] The Mashpee merely had to show that their assimilation was involuntary.[162] The *Washington II* court explicitly rejected the distinction between voluntary and involuntary assimilation—noting, correctly, that the result of both processes is essentially the same.[163] The elimination of the distinction, however, also eliminates the First Circuit's rationale for placing the burden of proof on the group asserting status as a tribe.[164]

In *Mashpee* there was no date at which the parties could agree that the Mashpee were a tribe.[165] In *Washington II*, it was admitted by all that the intervenors were descended from tribal members who represented the tribes at the signing of the treaties.[166] Nevertheless, the intervenors did not benefit from any presumption of continuing existence as tribes.[167]

A final aspect of this case remains puzzling. The intervenor tribes attempted to establish a tribal treaty right to fish that had long been dor-

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156. 641 F.2d at 1374.

157. *Id.* at 1370, 1374.

158. *See* BLACK'S LAW DICTIONARY 1259 (5th ed. 1979).

159. *See generally* Goody & Watt, *The Consequences of Literacy*, in LANGUAGE AND SOCIAL CONTEXT 311-57 (1972); note 135 *infra*.

160. Goody and Watt, *supra* note 159, at 352.

> In oral societies the cultural tradition is transmitted almost entirely by face-to-face communication; and changes in its content are accompanied by the homeostatic process of forgetting or transforming those parts of the tradition that cease to be either necessary or relevant. Literate societies, on the other hand, cannot discard, absorb, or transmute the past in the same way.

*Id.* Goody and Watt add that writing is an addition rather than an alternative to an oral tradition, and thus "the relationship between the written and the oral traditions must be regarded as a major problem in Western cultures." *Id.* at 353. The conflict in *Washington II* and the difficulty of Indians generally in asserting treaty rights would seem to bear this out. The French anthropologist, Levi-Strauss, characterizes tribal thinking as placing emphasis on systems of classification and asserts that there is a "fundamental antipathy between history and systems of classification." C. LEVI-STRAUSS, THE SAVAGE MIND 232 (1966). Tribes often mingle the past with the present in a "mythical history." *Id.* at 236. Literacy and historical archives thus represent a sharp break with the tribal view of fact retention and analysis. *Id.* at 242.

161. *See* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 589 (1st Cir. 1979): "[P]laintiff had an advantage because evidence of coercion from outside the community a century ago is more likely to be available today than is evidence of the state of mind of the individuals who changed their lifestyles." *Id.*

162. *Id.*

163. 641 F.2d at 1373.

164. See note 161 *supra*.

165. *See* 592 F.2d at 579 (jury findings indicating that the Mashpee Tribe did not exist in 1790, 1869, or 1870, but did exist as a tribe in 1834 and 1842).

166. 641 F.2d at 1370.

167. *Id.* at 1374.

mant due to illegal interferences by Washington residents and officials.[168] The canons of treaty construction used by federal courts construe treaty terms in favor of Indians.[169] These canons have been applied to interpret the language of the treaties that the ancestors of the intervenor tribes signed when rights under these treaties were asserted by recognized tribes.[170] Given this, it seems anomalous that such a heavy burden of proof of tribal status of an admittedly Indian group should be imposed.

*Conclusion*

The Ninth Circuit's standard for determining tribal status for the exercise of treaty rights gives little guidance to lower courts faced with the question of the tribal status of an unrecognized tribe. The constituent elements of the standard have vague parameters. As Judge Canby implied in his dissent, some elements may be more important than others in determining tribal status. Application of proper legal standards thus required new determinations of fact by a trial court in order to properly assess the weight to be given specific factors in historical perspective.[171]

*Eric Henderson*

## C. FEDERAL PREEMPTION IN INDIAN LAW: AN ANALYSIS OF *WHITE MOUNTAIN APACHE TRIBE V. BRACKER* AND *CENTRAL MACHINERY V. ARIZONA STATE TAX COMMISSION*

The constitutional doctrine of preemption allows the federal government to override state law in areas where federal law "occup[ies] the field."[1] This power arises primarily from the supremacy clause of the Constitution.[2] While there is no rigid rule, preemption generally occurs when a state statute either conflicts with or obstructs the accomplishment of the purposes and objectives of a federal statute.[3] Recent Supreme Court

168. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 668-69 (1979). See especially *id.* at 669 n.14.

169. United States v. Winans, 198 U.S. 371, 380-81 (1905). *See generally* Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows Upon the Earth"—How Long a Time Is That?* 63 CAL. L. REV. 601 (1975).

170. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 674-81 (1979).

171. 641 F.2d at 1376 (Canby, J., dissenting).

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

2. U.S. CONST. art. VI, cl. 2. In addition, the commerce clause, U.S. CONST. art. 1, § 8, provides the source of preemptive power when interstate commerce is involved. *E.g.*, Maurer v. Hamilton, 309 U.S. 598, 603-05 (1940).

3. Hines v. Davidowitz, 312 U.S. 52, 67-68 (1941). In this case, Justice Black commented:

> There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning or purpose of every act of Congress. . . . Our primary function is to determine whether. . . [this] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. . . .

*Id.* (citation omitted).

decisions have construed the preemption doctrine in a limited fashion.[4] Specifically, the Burger Court has stated that when confronted with a question of federal preemption of a state statute, the validity of the state statute will be presumed.[5] This presumption fails, however, when state statutes conflict with federal regulatory law concerning Indians.[6] It is the sovereign nature of Indian tribes that defines their relationship to the federal government and plays a major role in reversing this presumption.[7]

As early as 1832 the Supreme Court, in *Worcester v. Georgia*,[8] recognized the special status Indians enjoy and held that the Cherokee tribe had complete sovereignty within the territory of its reservation.[9] The Court further held that this sovereignty could not be impaired or encumbered by state law.[10] Thus, early interpretation of Indian sovereignty created an absolute preclusion of state regulation and jurisdiction within the Indian reservation.[11]

The years following *Worcester* have witnessed a modification in the Court's view of the relationship between Indian tribes and states.[12] The

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4. *See, e.g.*, Exxon Corp. v. Governor of Md., 437 U.S. 117, 124-28 (1978); Malone v. White Motor Co., 435 U.S. 497, 504-05 (1978); New York State Dep't of Social Serv. v. Dublino, 413 U.S. 405, 412-13 (1973).

5. New York State Dep't of Social Serv. v. Dublino, 413 U.S. 405, 413 (1973). There, Justice Powell said:

> If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.

*Id.*, *quoting* Schwartz v. Texas, 344 U.S. 199, 202-03 (1952). For discussion of the recent development of the preemption doctrine, *see generally* Bratton, *The Preemption Doctrine: Shifting Perspective on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975).

6. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980). Justice Marshall commented, "The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of preemption that have emerged in other areas of the law." *Id.* Furthermore, the Court in McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 174 (1973), stated that "doubtful expressions are to be resolved in favor of the weak and defenseless people who are wards of the nation, dependent upon its protection and good faith." *Id.*, *quoting* Carpenter v. Shaw, 280 U.S. 363, 367 (1930).

7. *See generally* McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1972), where the Supreme Court said:

> The Indian sovereignty doctrine is relevant . . . because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own government.

*Id.* at 172. For a discussion of Indian sovereignty, *see generally* D. GETCHES, D. ROSENFELT & C. WILKINSON, CASES AND MATERIALS OF FEDERAL INDIAN LAW XVII-XXV (1979).

8. 31 U.S. (6 Pet.) 515 (1832).

9. *Id.* at 520. Chief Justice John Marshall stated:

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

*Id.*

10. *Id.* at 561-62.

11. *Id.*

12. *E.g.*, Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 157 (1980) (tribal tax does not preempt state cigarette tax); Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 481-83 (1976) (reservation stores must collect state tax from non-Indians); New York

Court has recognized the valid interests of the state in regulating the actions of non-Indians on the reservations where essential tribal relations or Indian rights are not jeopardized.[13] These recognized interests include limited criminal jurisdiction when only non-Indians are involved,[14] and the ability to tax purchases by non-Indians at reservation stores.[15]

Recently, the Supreme Court was faced with a struggle between state regulatory taxes and the federal government's relationship with Indian tribes. In *White Mountain Apache Tribe v. Bracker*[16] and *Central Machinery v. Arizona Tax Commission*,[17] Arizona's motor vehicle[18] and use fuel taxes,[19] and Arizona's business privilege tax,[20] respectively, were assessed against non-Indians in their dealings on the reservation. The Court held that these state taxes were preempted by federal regulations in both instances.[21]

The Court relied on a prior case, *Warren Trading Post v. Arizona Tax Commission*,[22] which held that the application of the state business privilege tax to an on-reservation trading post making sales to Indians was preempted by federal law.[23] In *Warren Trading Post*, the Court isolated four factors which combined to effect this preemption: the extent of federal regulation; lack of state responsibility for the activity; the burdening effect of the tax on the individual regulated; and Congress's intent to protect the

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*ex rel.* Ray v. Martin, 326 U.S. 496, 497-501 (1945) (murder of one non-Indian by another on reservation is within state jurisdiction).

13. Williams v. Lee, 358 U.S. 217, 219 (1959).

14. New York *ex rel.* Ray v. Martin, 326 U.S. 496, 497-501 (1945).

15. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155-57 (1980); Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 481-82 (1976).

16. 448 U.S. 136 (1980).

17. 448 U.S. 160 (1980).

18. ARIZ. REV. STAT. ANN. § 40-641(A)(1) (1974); see text & notes 27, 29 *infra*.

19. ARIZ. REV. STAT. ANN. § 28-1552 (1976); see text & notes 28, 29 *infra*.

20. ARIZ. REV. STAT. ANN. § 42-1361 (Supp. 1973); see text & notes 40-45, 127-37 *infra*.

21. Central Mach. v. Arizona Tax Comm'n, 448 U.S. 160, 165 (1980); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 138 (1980). In *Bracker*, the Court also discussed the infringement test. *Id.* at 142-43. This test is exemplified by Williams v. Lee, 358 U.S. 217 (1959). There, the Court held that allowing state jurisdiction over a suit by a non-Indian merchant doing business on the reservation against an Indian customer for an unpaid debt would undermine the authority of the tribal courts. *Id.* at 210. The Court said, "[A]bsent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.*

The viability of this test is in question after Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980). In *Colville*, the Court held that even a "particularly severe" effect on tribal income which was used for essential government services and anti-poverty programs was insufficient to show infringement on tribal self-government. *Id.* at 154. The Court did not depend upon an infringement analysis in making its decision in *Bracker*, and the infringement test is beyond the scope of this Casenote. However, it should be noted that the *Bracker* Court stated that the infringement test remains a separate measure of the validity of state regulation in Indian country. *Id.* at 143. For discussion of the infringement test, *see generally* Lynaugh, *Developing Theories of State Jurisidiction Over Indians: The Predominance of the Preemption Analysis*, 38 MONT. L. REV. 63 (1977); Note, *State Taxation of Business Conducted on Indian Reservations*, 34 TAX LAW. 462 (1980). For a discussion of the infringement test and state court jurisdiction over civil controversies involving Indians, *see generally* Note, *State Jurisdiction over Indians as a Subject of Federal Common Law: The Infringement-Preemption Test*, 21 ARIZ. L. REV. 85 (1979).

22. 380 U.S. 685 (1965).

23. *Id.* at 689-92.

Indians from unfair prices.[24] In both *Bracker* and *Central Machinery* it was the purported presence of these four factors emphasized in *Warren Trading Post* that was considered dispositive of finding federal preemption.[25]

This Casenote will examine *Bracker* and *Central Machinery* in light of the Court's reliance on the *Warren Trading Post* analysis. First, the factual backgrounds of *Bracker* and *Central Machinery* and a brief outline of the facts in *Warren Trading Post* will be presented. Next, the four point *Warren Trading Post* analysis and its applicability to the respective fact situations will be discussed. The nature and purpose of the specific taxes sought to be applied will then be contrasted in light of the use of a preemption analysis. Finally, this Casenote will discuss possible precedential ramifications of the misapplication of the preemption analysis in *Central Machinery*.[26]

## BACKGROUND

### White Mountain Apache Tribe v. Bracker

In *Bracker*, the state of Arizona sought to tax Pinetop Logging Company (Pinetop), a non-Indian enterprise consisting of two non-Indian corporations operating solely on the Fort Apache Reservation.[27] The taxes at issue were a motor carrier license tax assessed upon gross receipts[28] and a fuel tax assessed according to fuel use on state roads.[29] Both taxes were designed to compensate the state for a disproportionate use of its highways by motor carriers.[30]

Pinetop contracted with the Fort Apache Timber Company (FATCO), a corporation organized by the tribe with the approval of the Secretary of the Interior,[31] to perform logging and hauling operations on the reservation in conjunction with the tribe's timber operations.[32] Tribal timber, under federal law, is not owned by the tribes, but rather is owned by the United States.[33] FATCO was therefore contractually required to

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24. *Id.* at 690-91.

25. Bracker, 448 U.S. 136, 152-53 (1980); Central Machinery, 448 U.S. 160, 164 (1980).

26. For another view of *Central Machinery see* Casenote, *Tribal Sovereignty and the States' Power to Tax Indians*, 22 ARIZ. L. REV. 249, 261 (1980).

27. 448 U.S. 136, 137-38 (1980).

28. ARIZ. REV. STAT. ANN. § 40-641(A)(1) (1974). The statute provides in relevant part:

> Every common motor carrier of property and every contract motor carrier of property shall pay to the state, on or before the twenty-fifth day of each month, a license tax of two and one-half percent of the gross receipts from the carrier's operations within the state for the preceding calendar month. . . .

29. *Id.* § 28-1552 (1976). The statute provides in relevant part: "For the purpose of partially compensating the state for the use of its highways, an excise tax is imposed at the rate of eight cents per gallon upon use fuel used in the propulsion of a motor vehicle on any highway within this state. . . ."

30. Campbell v. Commonwealth Plan, 101 Ariz. 554, 557, 422 P.2d 118, 121 (1966) (purpose of A.R.S. § 40-641 is to collect revenues from those whose businesses involve inordinate use of public highways); ARIZ. REV. STAT. ANN. § 28-1552 (1976) (tax imposed to compensate "the state for use of its highways").

31. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 139 (1980).

32. *Id.* at 139 n.3 (logging and hauling of timber).

33. *Id.* at 138-39; 25 U.S.C. §§ 406, 407 (1963 & Supp. 1980).

perform the timber operations in accordance with strict federal regulations.[34]

These regulations are based substantially on the congressional determination that practices contributing to a sustained yield serve the best interests of the Indian owners by maintaining a constant supply of timber.[35] Moreover, these regulations cover a wide range of activities.[36] In fact, the Bureau of Indian Affairs (BIA) "exercises literally daily supervision"[37] over all aspects of the tribe's timber operations. In addition, administrative expenses incurred by the federal government in this supervision are deducted from the proceeds of timber sales before these proceeds are made available to the Indians.[38]

In light of this high level of federal involvement, the Court found the federal regulatory scheme so pervasive that the additional burden of state taxes sought to be imposed was precluded.[39] Thus, relying on *Warren Trading Post*, the Court denied the power of the state to tax where there were no concomitant regulatory responsibilities.[40]

### Central Machinery v. Arizona Tax Commission

In *Central Machinery*, the Supreme Court again used the federal preemption test to prohibit the imposition of a state tax on proceeds derived from a transaction occurring on an Indian reservation.[41] The tax, a transaction privilege tax, was imposed upon Central Machinery Company (CMC) against proceeds derived from its sale of tractors to Gila River Farms.[42] CMC was a corporation chartered by and doing business in the state of Arizona.[43] Gila River Farms consisted of an enterprise of the Gila River Indian Tribe which conducts farming operations within the Gila River Indian Reservation.[44] The tax was to be assessed against the seller

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34. 448 U.S. at 147-48; 25 C.F.R. §§ 141-141.23, 141.6 (1980).

35. 25 U.S.C. § 406 (1963 & Supp. 1980).

36. 448 U.S. at 147. The Court stated:

> [F]or example, they restrict clear cutting; establish comprehensive guidelines for the sale of timber; regulate the advertising of timber sales; specify the manner in which bids may be accepted and rejected; discribe the circumstances in which contracts may be entered into; require the approval of all contracts by the Secretary; call for timber cutting permits to be approved by the Secretary, specify fire protective measures; and provide a board of administrative appeals.

*Id.* (citations omitted).

37. *Id.*

38. *Id.* at 146.

39. *Id.* at 148.

40. *Id.* at 152.

41. Central Mach. v. Arizona Tax Comm'n, 448 U.S. 160, 161 (1980). The tax was imposed pursuant to ARIZ. REV. STAT. ANN. §§ 42-1309, 42-1312, & 42-1361 (1980). Section 42-1312 provides:

> The tax imposed by subsection A of § 42-1309 shall be levied and collected at an amount equal to two percent of the gross proceeds of sales or gross income from the business of every person engaging or continuing within this state in the business of selling any tangible personal property whatever at retail. . . .

42. 448 U.S. at 161. CMC sold 11 tractors to Gila River Farms. *Id.* The tax in question amounted to $2,916.62. *Id.* at 162.

43. *Id.* at 161.

44. *Id.*

of the goods, not the purchaser.[45] The sale was solicited and executed on the reservation.[46]

Because the entire transaction took place on the reservation, CMC claimed that federal law regulating Indian trading preempted the state's authority to tax the transaction.[47] Federal law requires that an Indian trader be licensed,[48] and "habitually reside on the reservation."[49] In addition, itinerant peddlers may be "considered as traders" for licensing purposes.[50] CMC, however, was not licensed pursuant to the Indian Trader statutes, nor did it have a permanent place of business on the reservation.[51]

When the contract was drawn up, CMC listed the amount of the "transaction privilege" tax as a separate item, adding it to the price of the tractors and thereby passing this expense directly on to the Indian purchasers.[52] CMC stipulated that it would remit any tax refund to Gila River Farms.[53] The transaction at issue was subject to BIA approval for expenditure of tribal funds,[54] but at no time was CMC required to submit to any licensing procedures.[55] Despite the fact that CMC had no license and no place of business on the reservation, the Court found that the existence of the Indian Trader statutes preempted regulation of the transaction.[56] Thus, relying on *Warren Trading Post*, the Court held the state tax invalid.[57]

*Bracker* and *Central Machinery* demonstrate that the Supreme Court views *Warren Trading Post* as the dispositive case on the subject of federal preemption of state regulation of transactions on Indian reservations. In light of this reliance, this Casenote will present the analysis used in *Warren Trading Post*, and then apply that analysis to the facts of both *Bracker* and *Central Machinery*.

## *WARREN TRADING POST* ANALYSIS

The Warren Trading Post was operated by a licensed Indian trader on the Navajo reservation.[58] The state sought to impose a two percent tax on the gross proceeds received from sales.[59] In determining whether the state

45. *Id.* at 162; Arizona Tax Comm'n v. Garrett, 79 Ariz. 389, 391, 291 P.2d 208, 209 (1955). For a discussion of the analysis in *Garrett*, see text & notes 129-34 *infra*.

46. 448 U.S. at 161.

47. *Id.* at 162. The claimant asserted preemption by virtue of 25 U.S.C. §§ 261 -264 (1963); see text & notes 106-12 *infra*.

48. 25 U.S.C. § 262 (1963).

49. 25 C.F.R. § 251.14 (1981).

50. *Id.* § 251.9(b).

51. 448 U.S. at 161.

52. *Id.* at 162.

53. *Id.* at 162 n.2.

54. *Id.* at 165 n.4.

55. *Id.* at 168 (Stewart, J., dissenting in *Central Mach.* and concurring in *Bracker*).

56. *Id.* at 165. Read literally, the Court seems to say that the mere existence of such statutes, enforced or not, prevents a state from exercising a legitimate, recognized interest. See text & notes 156-65 *infra*.

57. 448 U.S. at 163-64.

58. Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685, 685-86 (1965).

59. *Id.* at 685. The state sought to impose taxation pursuant to ARIZ. REV. STAT. ANN. §§ 42-1309, 42-1312 (1980).

tax could be validly imposed, the Court made four findings.[60] First, the Court found that the relevant federal regulations were so pervasive as to preclude the state from "imposing additional burdens."[61] Second, the Court stated that congressional policy promoting tribal self-government relieved Arizona of all regulatory responsibilities.[62] Third, the Court found that the assessment and collection of these taxes would impose burdens beyond those envisioned by Congress for Indian traders.[63] Finally, the Court found that this state tax would disturb Congress's plan that Indians be protected from prices deemed unfair and unreasonable.[64]

Utilizing these four factors, the Court found the state taxation to be preempted by federal law.[65] The *Bracker* and *Central Machinery* cases provided the Court with the opportunity to apply these factors.

*Extent of Federal Regulation Leaves No Room for State Law*

In *Bracker*, Pinetop's activities were extensively federally regulated.[66] The BIA decided the amount and location of timber to be cut, the equipment and roads to be used, the size of the timber and the weight of the loads to be transported.[67] This regulation amounted literally to "day-to-day supervision" by the BIA.[68] In addition, fees were set and business expenses allocated by the government to be paid from tribal revenues generated by the logging operations.[69] The decreases in revenue which would result from the imposition of the use fuel and motor carrier taxes, the Court found, would impair the ability of the tribe and its contractors to pay these federally required expenses.[70] Thus in *Bracker*, because both the timber operation and the resulting revenues were heavily federally regulated, little, indeed no, room remained for state regulation.

In *Central Machinery*, on the other hand, the only actual federal involvement was the approval by the BIA of the contract of sale and its price.[71] The Court nevertheless cited to federal statutes and regulations governing licensed Indian traders.[72] CMC, however, was not required to become a licensed Indian trader merely to make a single approved sale.[73]

60. 380 U.S. at 690-91.
61. *Id.* at 690.
62. *Id.*
63. *Id.* at 691.
64. *Id.*
65. *Id.* at 690-92.
66. See text & notes 26-39 *supra*.
67. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145-47 (1980).
68. *Id.* at 145.
69. *Id.* at 146-47, 150. In addition, there were federally mandated expenditures designed to "ensure the continued productivity of the forest." *Id.* at 150. The Secretary takes these expenses into consideration at the time the contract is written. *Id.* at 149, *citing* 25 U.S.C.A. §§ 406 to 407 (1963 & Supp. 1980).
70. 448 U.S. at 150.
71. *Id.* at 173 (Stewart, J., dissenting in *Central Mach.* and concurring in *Bracker*). This approval included the cost of the very tax at issue.
72. *Id.* at 163-65. 25 U.S.C. § 262 (1963) (Indian traders subject to authority of Commissioner), *Id.* § 263 (President may prohibit any article from being introduced into Indian lands), *Id.* § 264 (provides for penalties for trading outside of authority of statute), *Id.* § 261 (Commissioner may promulgate regulations). These regulations are found in 25 C.F.R. § 251 (1981).
73. 448 U.S. at 171. It was the government itself, through its administrative policies, that

Yet the Court, both in *Bracker*, where the federal regulation was well cataloged,[74] and in *Central Machinery*, where even the applicability of the Indian trader statutes is questioned,[75] cited *Warren Trading Post* to support the proposition that the burden of federal regulation left no room for state regulation.[76]

*State Relieved of Regulatory Burdens*

In *Warren Trading Post*, the Court stated that federal legislation, by placing all duties and responsibilities concerning the affairs of reservation Indians upon the federal government, denied Arizona any justification for levying its business privilege tax.[77] This analysis was expanded in *Bracker* when the Court pointed out that the state was unable to specify any services provided or regulatory functions performed that could justify the imposition of any taxes upon activities occurring within the reservation on BIA or tribal roads.[78] The roads in question had been built, maintained and policed by the federal government, the tribe, and the contractors.[79] Thus, in *Bracker*, as in *Warren Trading Post*, the activity sought to be taxed took place entirely within areas subject to the jurisdiction of the tribe or the federal government.[80] In addition, the activity was one for which the state had no responsibility for regulation or supervision.[81]

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determined that CMC was not subject to the rigors of the Indian trader statutes. *Id.* In discussing this proposition, the appellant stated:

> Administrative practice in enforcement of the Indian trading laws falls into three categories. The type of administrative supervision depends on the nature of the transaction involved and the degree to which the transaction would otherwise be unsupervised. First, resident merchants who deal regularly with individual reservation Indians are licensed after a rigorous application process requiring detailed information about the applicant and the type of business to be established. 25 C.F.R. 251.9(a), 252.5. Approval of the Commissioner of Indian Affairs in Washington is required for these licenses. Second, the local superintendent is authorized to give a license or permit to "itinerant peddlers" to trade with Indians on a reservation. 25 C.F.R. 251.9(b). This trade is of a more limited character, and the degree of supervision is correspondingly more limited. Third, trade with Indian tribes is subject to federal approval through direct supervision of the expenditure of tribal funds. No formal license is required, because transactions involving tribal funds are required to be supervised by statute.

Brief for Appellant at 11-12. While appellant points out that tribal expenditures must have BIA approval, he fails to cite any instance where the instant transaction was subject to the strictures of the Indian trader statutes, the statutes which the Court held preempted the state tax power. *See id.*

74. 448 U.S. at 146-48; see text & notes 26-39 *supra*.

75. 448 U.S. at 171 (Powell, J., dissenting in *Central Mach.* and concurring in *Bracker*); note 71 *supra*; see text & notes 40-57 *supra*.

76. White Mountain Apache Tribe v. Bracker, 448 U.S. at 152; Central Mach. v. Arizona State Tax Comm'n, 448 U.S. at 166, *citing* Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685, 690 (1965) ("[the regulations] show that Congress has taken the business of Indian trading so fully in hand that no room remains for laws imposing additional burdens upon traders").

77. 380 U.S. 685, 691 (1965).

78. 448 U.S. at 148-50.

79. *Id.* at 150.

80. *Id.*

81. Pinetop conceded its liability for taxes attributable to use of state highways within the reservation which are supported by state funds. *Id.* at 154 n.2, *citing* paragraph XIII of Complaint. Thus, even though Pinetop's activities on state roads were as highly regulated as those on tribal, BIA, and private roads, the petitioner conceded that the state's regulatory interest in state roads superceded its own interest in avoiding taxation. Compare this with *Central Machinery*, where CMC's activity was not actually federally regulated, see text & notes 41-57 *supra*, and the

In *Central Machinery*, however, the activity taxed was the privilege of doing business in Arizona.[82] CMC did not consider itself totally exempt from the transaction privilege tax; it merely sought exemption of a single transaction.[83] The tax is used to provide state services from which CMC presumably derives benefit at taxpayer expense.[84] This indeed *is* a case, as described in *Bracker*, "in which the State seeks to assess taxes in return for government functions it performs for those on whom the taxes fall."[85] Consequently, the state's regulatory responsibilities have not been relieved.[86] Hence, another prong of the *Warren* analysis for preemption was incorrectly applied by the *Central Machinery* Court.

*Collection of the Tax Would Impose Burdens Beyond Those Envisioned by Congress in Regulating the Activity*

As noted in *Bracker*, congressional regulation of timber operations on Indian reservations is so extensive that Congress directs or authorizes nearly all timber-related activity.[87] Indeed, Pinetop's contract with FATCO incorporates these statutes and regulations into its provisions.[88] It is no surprise, then, that the *Bracker* Court decided that Congress had occupied the field of logging operations on the reservation to an extent which precluded the imposition of additional burdens by the state.[89]

Indian traders are heavily regulated so that the Indians with whom they deal can be protected.[90] As a consequence, the Supreme Court has held that the regulations embodied in the Indian trader statutes occupy the field of reservation trading to the exclusion of state regulation.[91]

If CMC's transaction was contained within this field, little question would remain that Congress, by enacting the Indian trader statutes, wished no additional burdens to inure to the traders. A review of cases dealing with the Indian trader statutes, however, shows several exceptions to the rule of federal preemption. For instance, in *Moe v. Confederated Salish and Kootenai Tribes*,[92] the Supreme Court considered whether a cigarette sales tax could be imposed upon non-Indian purchasers of cigarettes at

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state had a statute for regulating CMC's activity pursuant to ARIZ. REV. STAT. ANN. §§ 42-1309, 1361 (1980).

82. See text & notes 40-45 *supra*. The taxation was imposed pursuant to ARIZ. REV. STAT. ANN. § 42-1309 (1980).

83. 448 U.S. at 162.

84. *Id.* at 169.

85. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 150 (1980). This differs from *Bracker*, where the state could show no legitimate regulatory justification to impose the taxes sought. *Id.*

86. *See id.*

87. 25 U.S.C. § 407 (1963 & Supp. 1980); 25 C.F.R. §§ 141-43 (1980); *see* text & notes 26-39 *supra*.

88. 448 U.S. at 148.

89. *Id.* at 151 n.15.

90. 25 U.S.C. §§ 261-64 (1963 & Supp. 1980).

91. Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685, 690 (1965) ("Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders"); *see* 25 U.S.C. § 261-64 (1963 & Supp. 1980).

92. 425 U.S. 463 (1976).

reservation stores.[93] The Court held that while taxing sales to Indians conflicted with congressional grants of immunity and with *Warren Trading Post*, it was impermissible that non-Indian purchasers be allowed to avoid this tax merely by shopping at reservation stores.[94] The Court called this a wholesale violation of the law.[95] The sales tax in *Moe*, like the "transaction privilege tax" in *Central Machinery*, was determined as a matter of state law to fall only upon the non-Indian participant in the sale.[96] This legal incidence of the tax precluded any interference with the purpose of federal regulations, and hence the tax was upheld.[97]

*Washington v. Confederated Tribes of the Colville Indian Reservation*[98] provides another illustration of this principle. In *Colville*, the Court dealt with a cigarette tax similar to that imposed in *Moe*.[99] The tribes, however, asserted that a tribal tax, levied with the approval of the federal government, preempted the imposition of the state sales tax on non-Indian purchasers.[100] The Court rejected this claim, saying that even the tribes' own interest in raising revenue by levying taxes did not preempt the state's power to tax non-Indian state residents.[101] In addition, the Court stated that mere federal approval, absent a greater showing of congressional intent, did not raise the tribes' taxing power to the point where it preempted legitimate state interests.[102]

The results reached in *Colville* and *Moe* bear directly on the situation in *Central Machinery*.[103] CMC's sale to Gila River Farms was administratively approved by the BIA,[104] as are all expenditures of tribal funds.[105] However, application of the Indian trader licensing procedure was admin-

93. *Id.* at 481-82.

94. *Id.* at 482.

95. *Id.* The Court said that since nonpayment of the tax is a misdemeanor by the consumer, the Indian seller gets his competitive edge by causing the law to be broken. *Id.*

96. *Id.* For discussion of relevance of the legal incidence of the tax, see text & notes 127-52 *infra*.

97. 425 U.S. at 482. The Court said, "Our conclusion that assessment and collection of the tax 'would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations' does not apply to the instant case." *Id., citing* Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685, 691 (1965).

98. 447 U.S. 134 (1980).

99. *Id.* at 139. In *Colville*, the state sought to impose a state tax on the sale of cigarettes on the reservation, the incidence of which fell upon the ultimate consumer. *Id.* at 141-42. In *Moe*, the Montana cigarette tax was also statutorily defined to fall on the purchaser. 425 U.S. 463, 482 (1976).

100. 447 U.S. at 154.

101. *Id.* at 157.

102. *Id.* at 156-57.

103. While the legal incidence of the tax in *Central Machinery* falls on CMC itself, it is conceded that an economic burden falls upon the Indian purchasers. 448 U.S. at 162. Of course, all of CMC's business expenses, including this tax, are in some way passed on to its customers. However, even when economic impact on Indian tribes is "particularly severe," the Court has held, in *Colville*, that the legal incidence of the tax is still controlling. 447 U.S. at 151 & n.27. In *Colville*, for example, the tribes anticipated lost revenues of over a quarter of a million dollars annually. *Id.* at 144.

104. 448 U.S. at 165 n.4.

105. 25 U.S.C. §§ 81-88 (1963 & Supp. 1980).

istratively deemed not to apply here.[106] Protection of the Indians from unfair prices, the goal of the Indian trader statutes,[107] was apparently considered to be effectuated by BIA approval of the contract price.

In fact, it is also not at all clear from the Indian trader statutes[108] and their accompanying regulations[109] that CMC could have been licensed as an Indian trader. The regulations require that licensees be habitual residents of the reservation.[110] The statutes and regulations do not address the situation of off-reservation businesses making a single sale.[111] Itinerant peddlers are only "considered as traders" for purposes of licensing,[112] and these regulations were promulgated after the Supreme Court's decision in *Warren Trading Post*.[113] Consequently, the *Warren Trading Post* Court could not have considered this situation. In fact, the Court in *Warren Trading Post* specifically limited its holding to licensed, on-reservation traders making sales to reservation Indians.[114]

Furthermore, federal regulations specifically (1) limit trade to the location specified in the license;[115] (2) require the trader to submit business records for federal inspection upon request;[116] and (3) restrict trade to the licensee only.[117] Since traders are also required to have good character[118] and to be bonded,[119] these requirements lead to the conclusion that these statutes and regulations were intended to protect Indians in situations where the licensee has an ongoing relationship with the tribe in which each individual transaction cannot be monitored. This is obviously not the case in *Central Machinery*. Therefore, while the field of Indian trading may be sufficiently occupied by federal regulation to preempt the application of an otherwise valid state law, the transaction between CMC and Gila River Farms cannot be included in that field.

### *Disturbance of the Statutory Plan that Congress Set Up to Protect Indians from Excessive Financial Burdens*

The comprehensive regulation of timber operations in *Bracker*[120] determined not only how timber was to be harvested,[121] but also how a portion of the proceeds were to be expended in implementing the "sustained

106. 448 U.S. at 171 (Powell, J., dissenting in *Central Mach.* and concurring in *Bracker*); Brief for Appellant at 11, 12, 13 & 12 n.30; see text & note 71 *supra*.
107. 25 U.S.C. §§ 261-64 (1963 & Supp. 1980).
108. *Id.*
109. 25 C.F.R. § 251 (1981).
110. *Id.* § 251.14.
111. *Id.* §§ 261-64 (1963 & Supp. 1980); *id.* § 251 (1980).
112. *Id.* § 251.9(b) (1981).
113. Central Mach. v. Arizona Tax Comm'n, 448 U.S. 160, 171 n.1 (Powell, J., dissenting in *Central Mach.* and concurring in *Bracker*); *see* 30 Fed. Reg. 8, 267 (1965), *codified in* 25 C.F.R. § 251.9(b) (1981).
114. 380 U.S. 685, 691-92 (1965).
115. 25 C.F.R. § 251.14 (1981).
116. *Id.* § 251.22.
117. *Id.* § 251.14.
118. 25 U.S.C. 26 (1963 & Supp. 1980).
119. 25 C.F.R. § 251.14 (1981).
120. For full discussion, see text & notes 26-39 *supra*.
121. 448 U.S. at 147.

yield" program.[122] To the extent that Arizona's use fuel and motor carrier license taxes endanger these proceeds, they interfere with the statutory plan set up by Congress to protect the Indians.[123] The *Bracker* Court found that the imposition of the state taxes increased costs and impeded the federal management of Indian timber operations through decreased profits.[124]

In *Central Machinery*, the government's primary concern was that the Indians be protected from fraud and unfair prices.[125] The Court, however, incorrectly analyzed the transaction between CMC and Gila River Farms as having been regulated by the Indian trader statutes.[126] Because CMC's transaction was not subject to the Indian trader statutes, it is not possible for the taxing of CMC's business to frustrate the purposes of these statutes. This proposition is particularly clear in light of CMC's own claim that the licensing procedure was unnecessary because the administrative approval was sufficient protection.[127] Pursuant to this approval, the BIA considered the price of the tractors, including that part specifically designated as tax,[128] to be fair and reasonable. This fulfills rather than impedes the statutory plan set up by Congress to protect the Indians from unreasonable prices.

In addition to misapplying the four prong *Warren Trading Post* test to the transaction between CMC and Gila River Farms, the Court in *Central Machinery* also misrepresented the nature and application of the tax which the state sought to impose.[129] The following section discusses the character and legal incidence of the tax, and how these combine to preclude a finding of preemption.

### THE NATURE OF THE TAXES WHICH THE STATE SOUGHT TO IMPOSE

The tax which Arizona sought to impose in *Central Machinery* was a transaction privilege tax levied on businesses for the privilege of doing business in Arizona.[130] This tax is assessed on the amount of "gross sales or gross income" received by a business.[131]

In *Arizona Tax Commission v. Garrett*,[132] the Arizona Supreme Court defined the nature and application of this transaction privilege tax. *Garrett* involved an Arizona corporation engaged in the business of selling its products to the United States government.[133] The Garrett Corporation

122. *Id.* at 149-50.
123. *Id.*
124. *Id.*
125. 448 U.S. at 163.
126. See text & notes 87-116 *supra*.
127. Brief for Appellant at 12-13.
128. 448 U.S. 160, 161-62 (1980).
129. *See id.* at 161, where the Court said, "This case presents the question whether a state may *tax the sale* of farm machinery to an Indian tribe when the sale took place on an Indian reservation and was made by a corporation that did not reside on the reservation and was not licensed to trade with Indians." (emphasis added).
130. ARIZ. REV. STAT. ANN. § 42-1309 (1980).
131. *Id.* § 42-1312.
132. 79 Ariz. 389, 291 P.2d 208 (1955).
133. *Id.* at 390, 291 P.2d at 208-09.

protested the application of the Arizona business privilege tax because it claimed that the tax was in effect a sales tax and therefore violated the federal government's immunity from state taxation.[134] The Arizona Supreme Court held that it was not a sales tax, but rather a tax on the privilege of doing business in Arizona.[135] Specifically, the court held that the legal incidence of the tax was on the seller, and therefore the state was not taxing the federal government.[136] Thus, the court found no violation of the government's immunity from state taxation.[137]

The United States Supreme Court has held that a state's determination of the legal incidence of a state tax is determinative of the issue in federal courts.[138] Therefore, Arizona's finding that the legal incidence of the transaction privilege tax is upon the seller,[139] as the Supreme Court acknowledged in *Central Machinery*,[140] refutes the claim that the tax places a burden on the Indians or interferes with federal regulation.

This point is further illustrated by *Mescalero Apache Tribe v. O'Cheskey*.[141] In *Mescalero*, New Mexico sought to impose a business privilege tax[142] on a non-Indian contractor for that portion of gross receipts earned on the Mescalero Apache Reservation.[143] In an action challenging the imposition of this tax on work done on the reservation, the Tenth Circuit Court of Appeals recognized the determinative effect of a state court's finding as to the legal incidence of a state tax upon the federal courts.[144] Since New Mexico courts had previously held that the incidence of this tax fell on the contractor,[145] the Tenth Circuit found that federal

134. *Id.* This immunity was first expressed in McCulloch v. Maryland, 117 U.S. (4 Wheat.) 316 (1819).

135. 79 Ariz. at 392, 291 P.2d at 209.

136. *Id.* at 391, 291 P.2d at 209. The court added:

> In conclusion we hold: (1) that the Act does not impose a tax upon the purchaser nor upon sales, but rather places a tax upon the seller for the privilege of engaging in business and fixes the gross income from sales as the base for computing the tax; (2) that the Act makes the tax the direct obligation of the retailer and not that of the consumer; (3) that there is no statutory authority for the retailer attempting to constitute himself a mere collector or agent of the state for the purpose of receiving same and transmitting it to the commission; (4) that the terms 'gross proceeds of sales' or 'gross income from the business' upon which the tax is based includes any and all sums received, regardless of whether or not the retailer separately bills to his customers the privilege tax he is passing on to them, and whether or not he segregates the amounts thus received.

*Id.* (citations omitted), *quoting* State Tax Comm'n v. Quebedeaux Chevrolet, 71 Ariz. 280, 289, 226 P.2d 549, 555 (1951).

137. 79 Ariz. at 396, 291 P.2d at 212.

138. *See* Gurley v. Rhoden, 421 U.S. 200, 208 (1975); American Oil Co. v. Neill, 380 U.S. 451, 455-56 (1965). *But see* First Agricultural Nat'l Bank v. State Tax Comm'n, 392 U.S. 339, 347 (1968) (in cases of immunity, the Supreme Court is not bound by a state court's determination of the legal incidence of a tax).

139. 79 Ariz. at 391, 291 P.2d at 209.

140. 448 U.S. at 162. In *Bracker*, the tax was assessed against Pinetop, the non-Indian participant in the transaction. However, Pinetop was contractually bound by the federal regulations involved and its activities were heavily supervised. *Id*. at 147-48. See text & notes 26-39 *supra*.

141. 625 F.2d 967 (10th Cir. 1980).

142. N.M. STAT. ANN. § 7-9-3(F), (K), § 7-9-4 (1978).

143. 625 F.2d at 969.

144. *Id.* at 968-69. The court stated, "The incidence of this tax cannot be different here just because Indians are involved. The tax is the same, the incidence remains the same, and it is clearly on the contractor." *Id.* at 969.

145. United States v. New Mexico, 581 F.2d 803, 805-06 (10th Cir. 1978).

preemption could not apply as there was no tax on the Indians.[146]

The Tenth Circuit recognized that, though the legal incidence of the tax was on the contractors, a financial burden was passed on to the Indians for whom services were performed.[147] The court held, however, that legal incidence must be the determinative factor as the indirect burden was dispersed and uncertain.[148] In so doing, the court correctly identified that the only relevant parties were the State of New Mexico and the contractor.[149]

*Moe v. Confederated Salish and Kootenai Tribes*[150] presents an analogous situation. In *Moe*, the Supreme Court affirmed a district court determination that the legal incidence of a cigarette tax fell upon the non-Indian consumer.[151] This was binding even when the seller was subject to comprehensive government regulation.[152] Yet this precedent in *Moe*, directly on point because it involved taxation of non-Indians on Indian reservations, was not followed by the Court in *Central Machinery*. Rather, the Court wrongly referred to the privilege tax as a sales tax imposed on the sale of farm machinery to the tribe.[153]

It is true, as the Court asserted, that the tax sought to be imposed in *Central Machinery* was "precisely the same tax at issue" in *Warren Trading Post*.[154] In *Warren Trading Post*, however, the taxing power of the state was not denied because of the type of tax imposed. Rather, the activity in question—being a licensed Indian trader on the reservation—was so heavily regulated that "no room remain[ed] for state laws imposing additional burdens on traders."[155]

In *Central Machinery*, however, not only were CMC's transactions not subjected to the comprehensive federal regulation of the Indian trader statutes,[156] but it is seriously questionable whether they could have been sub-

146. 625 F.2d at 970.
147. *Id.* at 969.
148. *Id.* at 970. The court stated:
> An indirect burden obviously is initially on the one for whom the services are performed—thus on the Tribe or the Government. However, it is equally apparent that this indirect burden is again passed on to the users of the resort and again by them. The tax becomes dispersed. There is no way of telling where the ultimate economic burden falls. This is the reason why the initial incidence of the tax must be the determintive factor. It is the only significant matter for our consideration.

*Id.*
149. *Id.* at 969. The court stated:
> At the outset it might be well to state what this case is *not* about. It is not about the power to tax Indian lands, nor the income of Indians on such lands. These issues have long been settled, and the state has disclaimed that it has any such rights. The case is also not about Indian lands generally. Instead, we are only concerned with a state privilege tax on a contractor engaged in business in New Mexico with the measure of such tax to include construction of [*sic*] the lands set apart for the Mescaleros. The case is also not about an indemnity agreement whereby the Mescaleros undertook to indemnify the contractors for the tax.

*Id.*
150. 425 U.S. 463 (1976).
151. *Id.* at 482.
152. *Id.*
153. 448 U.S. at 161.
154. *Id.* at 163.
155. Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. at 690.
156. 448 U.S. at 161, 168 (Stewart, J., dissenting).

ject to this regulation.[157] Thus, the Court relied on superficial similarities between *Central Machinery* and *Warren Trading Post* to carry the *Warren Trading Post* decision far beyond its facts.[158]

## PRECEDENTIAL RAMIFICATIONS OF THE *CENTRAL MACHINERY* COURT'S MISAPPLICATION OF *WARREN TRADING POST*

In *Central Machinery*, the Court said that it was irrelevant that the Indian trader statutes had not been invoked.[159] Rather, the Court stated that "the existence of the Indian trader statutes . . . [, and not their administration,] . . . preempts the field of transactions with Indians occurring on reservations."[160]

In essence, the Court is saying that since CMC "*could* have been subjected to regulation"[161] it does not matter if "in fact it was not."[162] This statement seems to implicitly overrule previous decisions allowing states to collect cigarette taxes from non-Indian purchasers.[163] In *Moe*, the Court held that if the tax falls on the non-Indian purchaser it is not preempted, even though the transaction itself is regulated.[164] In *Colville*, the Court expanded this rationale by saying that even though the tribe itself, with federal approval, taxes a regulated transaction, a state's interest in collecting its tax is not preempted.[165]

If the holding in *Central Machinery* is given "a sweep as broad as [its] language,"[166] it would seem to say that in any instance where Congress has enacted comprehensive regulations regarding Indians, state law is preempted.[167] One need only look at the table of contents of Title 25 of the United States Code[168] and of the Code of Federal Regulations to see that

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157. *Id.* at 171 (Powell, J., dissenting in *Central Mach.* and concurring in *Bracker*). Justice Powell stated:

> Although "any person" desiring to sell goods to Indians inside a reservation must secure federal approval, see 25 U.S.C. §§ 262, 264, the federal regulations—and the facts of this case—show that a person who makes a single approved sale need not become a fully regulated Indian trader.

*Id.*

158. *Id.* at 171-72. Justice Powell stated:

> The Court today is too much persuaded by the superficial similarity between Warren Trading Post and Central Machinery. . . . Since Warren Trading Post involved a resident trader subject to the complete range of federal regulation, the Court had no occasion to consider whether federal regulation also preempts state taxation of a seller who enters a reservation to make a single transaction.

*Id.*

159. *Id.* at 164-65. The Court, however, did not discuss the possibility that the statutes were inapplicable. *Id.*

160. *Id.* at 165.

161. *Id.* at 167 (Stewart, J., dissenting in *Central Mach.* and concurring in *Bracker*).

162. *Id.*

163. *See generally* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976). See text & notes 89-99 *supra*.

164. 425 U.S. at 481-82.

165. 447 U.S. at 156.

166. Central Mach. v. Arizona Tax Comm'n, 448 U.S. 160, 166 (1980).

167. *See id.* at 165. There, the Court stated that "it is the existence of the trader statutes, then, and not their administration, that pre-empts the field of transactions with Indians occurring on reservations." *Id.*

168. Among the topics covered in Title 25 are Agreements with Indians, Education, Rights of

this comes perilously close to reestablishing the practice of absolute preclusion of state regulation expounded in *Worcester v. Georgia*.[169]

*Conclusion*

The broad generalizations used by the Court in *Central Machinery* only serve to confuse the vexing area of Indian law. The Court's insistence on declaring the central facts of the case to be irrelevant stands in stark contrast to its minute recital of the facts in *Bracker*. In addition, the Court has added to this confusion by its refusal to follow established precedent by declaring that the legal incidence of the tax assessed in *Central Machinery*, which it admitted fell on the seller, was irrelevant to the decision. Read narrowly, this holding conflicts with *Moe* and *Colville*. Read broadly, it summons a return to *Worcester*.

*Mary Jean Trail*

## D. INDIAN GAMBLING ON RESERVATIONS: ORGANIZED CRIME OR ASSIMILATIVE CRIME?

On October 15, 1970, Congress created a new weapon to be used in the fight against organized crime. Section 1955 of the Organized Crime Control Act[1] made it a federal crime to operate a large scale gambling business in violation of state law. Although clearly intended to reach the heart of organized crime,[2] in application one aspect of the act has proven to be ambiguous. In defining the federal crime in terms of state law, Congress left unclear whether the Act was meant to apply to Indians on reservations where state law generally does not apply.[3]

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Way, Irrigation, and the B.I.A. For a discussion of Congress' plenary power of Indians, *see generally* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 89-90 (1945).

169. 31 U.S. (6 Pet.) 515, 520 (1832); see text & note 9 *supra*. Although *Worcester* was decided on the basis of Indian tribal sovereignty and not on the basis of preemptive federal regulation, the analogy is still apt, as the ability of the states to exercise their legitimate interests over activities of non-Indians on the reservations is similarly precluded.

1. 18 U.S.C. § 1955 (1970). The Act provides in relevant part:

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section—
>
> (1) "illegal gambling business" means a gambling business which—
>
> (i) is a violation of the law of a State or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

2. *See* Iannelli v. United States, 420 U.S. 770, 786-88 (1975); United States v. Grezo, 566 F.2d 854, 859 (2d Cir. 1977); United States v. Sacco, 491 F.2d 995, 998 (9th Cir. 1974).

3. Indian reservations were not mentioned in the Act itself or in the congressional hearings. *See* 18 U.S.C. § 1955 (1970); *Organized Crime Control: Hearings on S.30 Before Subcomm. No. 5 of the Comm. on the Judiciary*, 91st Cong., 2d Sess. 27 (1970); SECTION ANALYSIS, REPORT ON THE

In mid-1978, four Puyallup Indians and five non-Indians were convicted under the Act for operating an illegal gambling business.[4] The defendants operated three casinos without license from the Washington State Gambling Commission.[5] The enterprises, conducted on the Puyallup Indian Reservation, involved both Indian and non-Indian clientele.[6] Two casinos offered poker and blackjack while the third provided dice games as well.[7] The operation of these games on non-Indian land clearly would have violated Washington statutes.[8]

After conviction, the defendants' appeals were consolidated in *United States v. Farris*.[9] The Puyallup defendants claimed that even if federal courts had jurisdiction in the matter, the Indians were not guilty of any violation of section 1955.[10] The literal language of the statute required a "violation of the law of a State," and the Puyallups argued that they were not guilty of any state law violation.[11] They also claimed that since section 1955 contains reference to state gambling laws which generally are not applicable to Indians on their reservations, it was unconstitutionally vague as applied to them.[12] Such vagueness, they argued, violates due process of law by allowing a defendant to be convicted without notice as to what conduct transgresses the statute.[13] The defendants buttressed their due process claim by pointing out the paradox of using a law designed to aid in enforcement of state law against defendants to whom state law does not apply.[14] They contended that there was no evidence of any infiltration of organized crime, the evil sought to be eradicated by the law.[15] Thus, they

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ORGANIZED CRIME CONTROL ACT OF 1970, H.R. REP. NO. 1549, Comm. on the Judiciary, 91st Cong., 2d Sess. 52-55 (1970).

4. United States v. Farris, 624 F.2d 890, 892-93 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981).

5. Brief for Appellee at 10.

6. 624 F.2d at 893.

7. *Id.*

8. WASH. REV. CODE § 9.46 (1973) declares that Washington policy is "to restrain all persons from seeking profit from professional gambling activities" because of "the close relationship between professional gambling and organized crime." *Id.* § 9.46.010. Certain gambling activities are authorized, *id.* § 9.46.030, licensed, *id.* §§ 9.46.285, 9.46.295, taxed, *id.* §§ 9.46.110, 9.46.115, 9.46.270, and regulated, *id.* §§ 9.46.120, 9.46.130, 9.46.285, including bingo, raffles, amusement games, card games, and lotteries for which no valuable consideration was paid. *Id.* § 9.46.020. Professional gambling is outlawed as a felony. *Id.* § 9.46.220.

9. 624 F.2d 890 (9th Cir. 1980).

10. *Id.* at 894. The defendants also argued that they were not subject to the jurisdiction of the federal courts without express congressional conferral of such jurisdiction. Brief for Appellant Farris at 10, *citing* Menominee Tribe v. United States, 391 U.S. 404 (1968) and Antoine v. Washington, 420 U.S. 194 (1975). The defendants contrasted the Organized Crime Control Act with 15 U.S.C. § 1175 (1951), which specifically prohibits the introduction or possession of gambling devices on an Indian reservation, and pointed out that Congress must have been at least presumptively aware of § 1175 when it passed § 1955. Brief for Appellant Farris at 11-13. Some of the defendants also claimed that Washington's gambling laws were regulatory rather than prohibitive in nature, and that state regulatory laws may not be applied to the reservation absent express congressional enactment. Brief for Appellant Turnipseed at 24-26. These claims were summarily dismissed by the court. 624 F.2d at 896-97.

11. 624 F.2d at 894-95.

12. Brief for Appellant Farris at 20-21; *see* 624 F.2d at 897.

13. *See* 624 F.2d at 897.

14. Brief for Appellant Turnipseed at 20.

15. 624 F.2d at 8974; Brief for Appellant Farris at 19-20; Brief for Appellant Turnipseed at 11.

argued, fundamental fairness required that the Indian defendants not be held criminally liable under section 1955.[16]

The Ninth Circuit Court of Appeals was not convinced. The three judge panel affirmed all the convictions,[17] although none of the judges could agree on the appropriate reasoning for the result and one dissented in part.[18] Judge Choy, writing for the court, reasoned that section 1955 applied to the Indians as a general law of the United States.[19] Although Washington's gambling laws were unenforceable against the Indian defendants on their reservations,[20] the acts of the Indians violated the state policy against gambling.[21] Thus, the Indian defendants were within the section 1955 requirement that the act be a "violation of the law of a State . . . in which it is conducted."[22] In an aside, Judge Choy noted that even in the absence of section 1955, Washington's gambling laws could be federally applied to the defendants under the Assimilative Crimes Act.[23] The court also held that section 1955 is neither void for vagueness[24] nor a violation of fundamental fairness.[25]

Judge Kennedy concurred separately, stressing that the gambling business taken as a whole was "a violation of state law" chiefly because the non-Indian defendants were subject to state prosecution.[26] He left unanswered whether such an operation might be prosecuted under section 1955

16. Brief for Appellant Farris at 21, *citing* United States v. Bass, 404 U.S. 336, 348 (1971) (where a criminal statute is ambiguous; doubts are resolved in favor of the defendant); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) (a statute violates due process when men of common intelligence must guess at its meaning).

17. 624 F.2d at 892.

18. *Id.* at 898-99 (Browning, J., concurring in part and dissenting in part).

19. *Id.* at 893. In general, federal laws "apply with equal force to Indians on reservations." *Id.*

20. *Id.* at 895. In 1963, Washington enacted WASH. REV. CODE § 37.12.010 (1964), asserting complete civil and criminal jurisdiction over non-Indians on Indian lands and limited jurisdiction over Indians on the reservation unless tribal consent was given for state assumption of complete jurisdiction. 624 F.2d at 895. Without such consent, jurisdiction over the Indians was limited to eight specific areas, not including gambling. *Id.* The Puyallups have never consented to any state jurisdiction. *Id.* at 895 n.2. The Washington legislature passed § 37 under authority of the Act of Aug. 15, 1953, Pub. L. No. 83-280, § 7, 67 Stat. 588 ("Public Law 280") (current version at 25 U.S.C. § 1321(a) (1968)), which gave federal consent for states to assume jurisdiction, by appropriate legislation, over Indian country. WASH. REV. CODE § 37.12.010 (1964). See text & notes 61-67 *infra*.

Washington's partial assumption of jurisdiction over Indian lands was upheld in Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 495-99 (1979). Although article 26, clause 2 of Washington's Constitution provided for congressional jurisdiction over Indian lands, the people of Washington could consent to state assumption of jurisdiction over Indian lands by act of the legislature without amending the constitution. State v. Paul, 53 Wash. 2d 789, 791-94, 337 P.2d 33, 35-37, *appeal dismissed*, 361 U.S. 898 (1959).

21. 624 F.2d at 895.

22. *Id.*; 18 U.S.C. § 1955 (1970).

23. 624 F.2d at 897. The Assimilative Crimes Act, derived from 30 Stat. 717 (1898) (currently codified at 18 U.S.C. § 13 (1948)), now provides:

> Whoever within or upon [a federal enclave] is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

24. 624 F.2d at 897.

25. *Id.*

26. *Id.* at 899-900 (Kennedy, J., concurring).

if it were operated exclusively by Indians on a reservation.[27]

Concurring in part and dissenting in part, Judge Browning agreed that the non-Indian defendants were correctly convicted under section 1955.[28] The Indian defendants, however, should not have been prosecuted under the statute.[29] Judge Browning insisted that conduct not punishable by state law could not violate state law.[30] To rule otherwise would be inconsistent with "notions of notice and fairness," especially since there was no showing of any congressional intent to convict persons innocent under state law merely because they acted with persons guilty of a state crime.[31]

This Casenote will first explore the development of federal Indian policy and the current policy trend. The Organized Crime Control Act and the Assimilative Crimes Act will be examined to determine their applicability to the situation in *Farris*. Finally, the *Farris* decision will be critically reviewed in light of existing federal policy and legislation.

*Variations in Federal Indian Policy*

Congress maintains plenary power to regulate contacts with the Indians.[32] In the absence of express federal legislation to the contrary, reservation Indians have sovereignty in regulating intramural affairs.[33] From its first session, however, the legislature's exercise of its plenary authority over reservation Indians has vacillated.[34]

In the years prior to 1815, the Indians negotiated treaties with the government with some measure of power and retained control over their own affairs.[35] Between 1815 and 1871 the United States negotiated treaties with the Indian tribes generally for the purpose of removing tribes from areas chosen for new white settlements. Even so, the government still recognized the Indian tribes' authority over their own affairs.[36] In 1832, the United States Supreme Court held, in *Worcester v. Georgia*,[37] that Georgia's attempts to extend its laws to the Cherokee Indian lands was a usur-

27. *Id.* at 900.
28. *Id.* at 898 (Browning, J., concurring in part and dissenting in part).
29. *Id.* at 898-99.
30. *Id.* at 898.
31. *Id.* at 898-99.
32. U.S. CONST. art. 1, § 8, cl. 3 authorizes Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." In United States v. Kagama, 118 U.S. 375 (1886), the United States Supreme Court also found congressional plenary power over Indians to result from the dependency of the tribes on the United States. Both treaties and Federal protection stemming from those treaties called for such a power to exist over the Indian people. *Id.* at 383-84. Such power was again recognized in United States v. Sandoval, 231 U.S. 28 (1913), which relied on the duty of a civilized nation to protect the dependent Indian tribes. *Id.* at 45-46.
33. United States v. Wheeler, 435 U.S. 313, 323, 327-28 (1978).
34. *See generally* D. GETCHES, D. ROSENFELT & C. WILKINSON, CASES AND MATERIAL ON FEDERAL INDIAN LAW 29-119 (1979) [hereinafter D. GETCHES].
35. At this time, tribes were free to enter into treaties with either the British or the Americans. *See* Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows Upon the Earth"—How Long a Time is That?*, 63 CAL. L. REV. 601, 608-09 (1975).
36. *Id.* at 608-10.
37. 31 U.S. (6 Pet.) 515 (1832).

pation of the tribe's authority.[38] Similarly, in *Ex parte Crow Dog*,[39] the Court held that, absent federal legislation to the contrary, jurisdiction over intra-Indian affairs was exclusively tribal.[40]

In 1885, however, Congress responded to the *Crow Dog* decision by passing the Major Crimes Act.[41] This Act subjected Indian defendants accused of certain enumerated crimes against fellow Indians on a reservation to exclusive federal jurisdiction.[42] Such a policy against Indian self-government quickly developed into a policy of assimilation.[43] The goal of this assimilation policy was to absorb the Indians into the dominant white society.[44] For instance, under authority of the General Allotment Act of 1887,[45] various tribal lands were to be broken up and apportioned to Indian families or individuals, thus destroying the historical basis of tribal life—community-owned property.[46] Patents in fee issued to the allotees were held in trust by the government for twenty-five years to insure that the land was not quickly alienated or encumbered by the allotee.[47]

Federal Indian policy shifted when the Indian Reorganization Act of 1934 repudiated the General Allotment Act policies[48] and gave tribes the right to organize and adopt their own constitutions.[49] The 1934 Act further strengthened tribal control by a provision forbidding alienation of Indian-held land except to the tribe itself.[50] In a new twist, the Act gave tribes the opportunity to choose whether this reorganization would apply to them.[51]

In 1948, Congress expressly extended federal enclave laws[52] to Indian

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38. *Id.* at 561.

39. 109 U.S. 556 (1883).

40. *Id.* at 568. The Court recognized that self-government was among the greatest of the acts of civilization brought to the Indians by the American government. *Id.* At the time *Crow Dog* was decided, the Trade and Intercourse Act granted federal jurisdiction over offenses committed by non-Indians against Indians within Indian country. 4 Stat. 733 (1790).

41. The Major Crimes Act, 23 Stat. 385 (1885) (codified at 18 U.S.C. § 1153 (1976)), provided for federal jurisdiction over seven enumerated crimes. The Act now provides:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping, rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and larceny within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

42. *See id.*

43. *See* D. GETCHES, *supra* note 34, at 69-79.

44. *See id.*

45. 24 Stat. 388 (1887) (current version at 25 U.S.C. §§ 331-58 (1963)).

46. *Id.* For a discussion of the allotment policy, *see generally* D. GETCHES, *supra* note 34, at 69-73, *quoting History of the Allotment Policy, Hearings on H.R. 7902 Before the House Subcomm. on Indian Affairs*, 73d Cong., 2d Sess., 428-29 (1934).

47. *See* D. GETCHES, *supra* note 34, at 69.

48. *See* 25 U.S.C. § 461 *et seq.* (1934). For a discussion concerning the results of this Act, *see* Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 955-79 (1972).

49. 25 U.S.C. § 476 (1934).

50. *Id.* § 464.

51. *Id.* § 478.

52. Federal enclaves are those lands "reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof. . . ." 18 U.S.C. § 7 (1948).

country through the passage of the General Crimes Act.[53] This Act specifically recognized tribal self-government in intramural affairs by its exceptions. Federal enclave laws were not to extend to "offenses committed by one Indian against the person or property of another Indian."[54] Nor was the law to extend to those situations where the Indian committing an offense in Indian country had already been punished under tribal law[55] or where the tribe had exclusive jurisdiction over the offense by treaty stipulation.[56] If a crime in Indian country did not fall within these three exceptions, federal enclave laws would generally be applicable.[57] Still, the General Crimes Act did not impinge upon the tribe's authority over tribal matters.

In 1949, however, the direction of federal Indian policy once again reversed. The Hoover Commission issued a report again advocating assimilation of the Indian people into the dominant culture.[58] This policy was adopted by Congress in a resolution advocating termination of the Indian tribes.[59] Following its passage, over one hundred tribes were officially terminated.[60]

The 1953 passage of Public Law 83-280[61] (Public Law 280) was the next development in assimilationist policy.[62] Responding to a perceived breakdown of law enforcement on many of the Indian reservations and seeking to save funds,[63] Congress granted five states outright jurisdiction over reservation Indians[64] and allowed any state to assume jurisdiction

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53. *Id.* § 1152, providing:

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

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *See generally* COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, INDIAN AFFAIRS: A REPORT TO CONGRESS (1949).

59. H.R. Con. Res. 108 (1953). For an analysis of H.R. Con. Res. 108, *see generally* G. ORFIELD, A STUDY OF THE TERMINATION POLICY (1966), *reprinted in* STAFF OF SUBCOMM. ON INDIAN EDUCATION OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 91st Const., 1st Sess., 4 THE EDUCATION OF AMERICAN INDIANS 674-90 (Comm. Reprint 1970).

60. *E.g.*, 68 Stat. 250 (Termination of Menominee Tribe, 1954, effective 1961); 68 Stat. 718 (Termination of Klamath Tribe, 1954, effective 1961); 68 Stat. 724 (Termination of 61 tribes and bands of Western Oregon); 68 Stat. 768 (Termination of Alabama-Coushatta Tribe, 1954, effective 1956).

61. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (current version at 25 U.S.C. § 132(a) (1968)).

62. *See* Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. L. REV. 535, 540-50 (1975).

63. *Id.* at 541.

64. Pub. L. No. 83-280, 67 Stat. 588 (1953) (current version at 18 U.S.C. § 1162 (1958) (criminal jurisdiction granted) and 28 U.S.C. § 1360 (1958) (civil jurisdiction granted)). California, Minnesota, Nebraska, Oregon, and Wisconsin were granted immediate jurisdiction over offenses committed by or against Indians in Indian country described in the Act. *Id.*

over reservations within its boundaries "by affirmative legislative action."[65]

The congressional policy of assimilation reflected by Public Law 280 came to an end in 1968.[66] In that year, the Indian Bill of Rights, enacted as part of the Indian Civil Rights Act,[67] amended Public Law 280 to require tribal consent for any future assertions of jurisdiction over Indian country.[68] Although tribal consent was now required before states could impose jurisdiction on the reservations,[69] states which had already exercised jurisdiction retained it unless they chose to retrocede jurisdiction.[70] This event marked an overall congressional shift in Indian policy away from assimilation[71] and back toward recognition of tribal self-government.[72]

In 1970, President Nixon voiced his support for broad tribal authority.[73] The President rejected termination as a viable goal for the Indian nations and called for the repudiation of the congressional policy advocating termination.[74] The policy recognizing tribal self-government was further supported by the United States Supreme Court in *Bryan v. Itasca County*.[75] In *Bryan*, the Court limited application of Public Law 280 by holding that it did not authorize any state to levy a tax on the personal property of a reservation Indian.[76] In a footnote, the Court recognized with approval the change in federal Indian policy toward tribal self-government.[77]

Currently, then, federal policy supports tribal sovereignty in the regulation of intramural affairs.[78] In the law enforcement area, for crimes be-

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65. *Id.*

66. Goldberg, *supra* note 62, at 550.

67. An Act of April 11, 1968, Pub. L. No. 90-284, 82 Stat. 76 (codified at 25 U.S.C. § 1301 *et seq.* (1968)).

68. 25 U.S.C. § 1326 (1963).

69. *Id.*

70. *Id.* § 1323.

71. The Bill of Rights was not the only legislation refuting the anti-assimilation policy. *See e.g., id.* § 1451 *et seq.* (1974) (Indian Financing Act of 1974); *id.* § 450 *et seq.* (1975) (Indian Self-Determination and Education Assistance Act of 1975).

72. The Bill of Rights, however, was viewed by many tribes as an incursion into tribal sovereignty because it defined constitutional rights of Indians. The provisions, similar to the Bill of Rights in the Federal Constitution, were seen by many Indians as another attempt to shape the tribes into the image of white government. *See* Coulter, *Federal Law and Indian Tribal Law: The Right to Civil Counsel and the 1968 Indian Bill of Rights*, 3 COLUM. SURVEY OF HUMAN RIGHTS L. 49, 50 (1970-71). *See also* Comment, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1359-60 (1969).

73. Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. Doc. No. 363, 91st Cong., 2d Sess. (1970), *reprinted in* 6 PUB. PAPERS, pt. 2, at 894-905 (1970).

74. *Id.*

75. 426 U.S. 373 (1976).

76. *Id.* at 375, 378.

77. *Id.* at 388 n.14. Citing Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 663 (9th Cir. 1975), the *Bryan* court stated, "[C]ourts 'are not obligated 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.'" 426 U.S. at 388 n.14.

78. Contemporary case law, while allowing for certain state interests, has generally favored tribal self-government. *See, e.g.*, United States v. Wheeler, 435 U.S. 313 (1978). "It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members. Although

tween Indians and non-Indians committed on Indian reservations in states which have not invoked Public Law 280 jurisdiction, the federal government generally has jurisdiction through the General Crimes Act.[79] The crimes subject to the Act are defined according to federal law.[80] One such law, however, that may greatly affect Indian tribal sovereignty is the Assimilative Crimes Act.[81]

*The Assimilative Crimes Act*

The Assimilative Crimes Act essentially transforms the laws of a state into federal law for the purpose of providing a set of legal restraints for federal enclaves.[82] Thus, when no federal law specifically addresses a particular crime, the state law will be applied through the Assimilative Crimes Act to any individual on a federal enclave within the boundaries of that state.[83] The Act was not meant to override policies promoted by congressional enactment or administrative orders, but to fill in the gaps in federal enclave law.[84]

In *Williams v. United States*,[85] the United States Supreme Court indicated that the Assimilative Crimes Act applies to Indian reservations through application of the General Crimes Act.[86] Although Williams was prosecuted for a crime committed on an Indian reservation, he did not dispute application of the Assimilative Crimes Act to Indian reservations

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physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain 'a separate people, with the power of regulating their internal and social relations'." *Id.* at 322, *quoting* United States v. Kagama, 118 U.S. 375, 381-82 (1886); United States v. Mazurie, 419 U.S. 544, 557 (1975) (identifying Indian tribes as "entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life"); Williams v. Lee, 358 U.S. 217, 220 (1959) ("[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."). *But see* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208-12 (1978) (tribal self-government does not extend to criminal jurisdiction over non-Indian defendants).

79. 18 U.S.C. § 1152 (1948); see note 53 *supra* for the text of this Act.

80. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 523 (1976).

81. 18 U.S.C. § 13 (1948); see note 53 *supra* for the text of this Act.

82. 18 U.S.C. § 13 (1948).

83. *Id.*

84. *See* Western Union Tel. Co. v. Chiles, 214 U.S. 274, 278 (1909); United States v. Butler, 541 F.2d 730, 733-34 (8th Cir. 1976); Air Terminal Serv. v. Rentzel, 81 F. Supp. 611, 612 (E.D. Va. 1949).

85. 327 U.S. 711 (1946). Williams, a white man, was convicted of having performed sexual intercourse with an unmarried Indian girl between the ages of 16 and 18. *Id.* at 713. The federal statutory rape law required proof that the girl involved was under 16 years old at the time of the act. *Id.* at 715. The Arizona law defined the crime of statutory rape as "sexual intercourse with a girl under 18 years of age." *Id.* at 716, *citing* Ariz. Code Ann. § 43-4901 (1939). The penalty for the offense was also greater under Arizona law than under the federal statute. 372 U.S. at 717. Thus, the issue was whether the Assimilative Crimes Act made the more stringent Arizona definitions and penalties for the crime applicable to Arizona Indian reservations. *Id.* The Court held that it did not. *Id.* The Federal Criminal Code's definition of statutory rape was not to be altered by application of the Arizona law through the Assimilative Crimes Act. *Id.* Rather, the Assimilative Crimes Act was to be used to "fill in gaps in the Federal Criminal Code where no action of Congress [had] been taken to define the missing offenses." *Id.* at 719.

86. *Id.* at 713; *see* 25 U.S.C. § 217 (1940) (amended, 18 U.S.C. § 1152 (1948)); note 53 *supra* (text of the current Act).

through the General Crimes Act.[87] The Court noted this concession and added that the Assimilative Crimes Act applied to the reservations along with a number of other sections of the Federal Criminal Code.[88] Although the legislative history of the Assimilative Crimes Act and the General Crimes Act indicates that the former was not intended to apply to Indian reservations,[89] the *Williams* decision is considered to have decided the question in favor of application.[90]

*Exceptions to the Assimilative Crimes Act*

Since the Assimilative Crimes Act is applicable to Indian reservations only through the General Crimes Act, it is subject to the latter's exceptions.[91] Thus, intra-Indian offenses will not be subject to the Assimilative Crimes Act[92] because the General Crimes Act excepts intra-Indian matters from its coverage.[93] The Indians in *Farris*, however, had non-Indian partners and served non-Indian clientele.[94] Thus, it is likely that a simple application of the Washington gambling statute through the Assimilative Crimes Act to the Puyallup defendants would have sufficiently protected the reservation from gambling operations.[95]

A situation similar to *Farris* arose in *United States v. Sosseur*.[96] In *Sosseur*, the Seventh Circuit affirmed the conviction of an Indian operating gambling devices on the reservation.[97] The conviction was based upon the application of Wisconsin anti-gambling laws, through the Assimilative Crimes and the General Crimes Acts, to the Indians even though the tribe had authorized and licensed such gambling.[98] The court read the exceptions to the General Crimes Act narrowly, viewing the defendant's gambling activity as stimulating non-Indian violations of the state anti-

87. 327 U.S. at 713.

88. *Id.* The Court refused to sustain Williams' conviction under either the federal "rape" statute, 18 U.S.C. § 458 (1889), or the federal statute proscribing "assault with intent to commit rape," *id.* § 455. 327 U.S. at 715.

89. For a discussion of the legislative history of the Assimilative Crimes Act, *see* Clinton, *supra* note 80, at 532 n.134.

90. *Id.* at 532-34.

91. *Id.* at 533.

92. This exception would be inapplicable in *Farris* if the involvement of non-Indian clientele in the operation qualifies them as victims. In that case, both Indians and non-Indians were involved. See D. GETCHES, *supra* note 34, at 387-88.

93. 18 U.S.C. § 1152 (1948). Crimes committed on Indian lands by non-Indians against non-Indian victims are subject to state jurisdiction. *E.g.*, United States v. Wheeler, 435 U.S. 313, 324-25 n.21 (1978); United States v. Antelope, 430 U.S. 641, 643 n.2 (1977); New York *ex rel.* Ray v. Martin, 326 U.S. 496, 500 (1946). *See also* Williams v. United States, 327 U.S. 711, 714 (1946).

94. 624 F.2d at 893.

95. The Assimilative Crimes Act would not be applicable to the non-Indian defendants since they were subject to prosecution under 18 U.S.C. § 1955 (1970). The Assimilative Crimes Act does not apply when "the precise acts upon which the conviction depends have been made penal by the laws of Congress. . . ." Williams v. United States, 327 U.S. 711, 717 (1946).

96. 181 F.2d 873 (7th Cir. 1950).

97. *Id.* at 876.

98. *Id.* at 874. The trend toward recognizing tribal authority must be considered in determining whether the Assimilative Crimes Act will apply state gambling laws to the Indian reservations. Gambling laws generally reflect social and moral choices, exactly the sort of subject matter still remaining with the tribal governments. If such a subject is not within the tribe's jurisdiction, the basis for tribal government could be irreparably impaired. For a discussion of this theory, *see* Clinton, *supra* note 80, at 535-36. "To allow the states, through the Act, to make moral judgments

gambling law.[99] Thus, the court held, state law enforcement was undermined by the defendant's offering of slot machines to the public.[100]

The court in *Farris* referred approvingly to the *Sossuer* decision and indicated that the Assimilative Crimes Act applied to reservation gambling.[101] If the Assimilative Crimes Act does apply to gambling operations on an Indian reservation, one wonders why the defendants in *Farris* were not prosecuted under that Act. Farris argued that the Organized Crime Control Act provides a much weaker basis for prosecution.[102] First, the Act does not specifically mention Indians or federal enclaves.[103] Second, the reasonable construction of the words "a violation of the law of a state" must be disregarded if section 1955 is to be used to prosecute defendants such as the Puyallups in *Farris*.[104] Prosecution of the Indian defendants under the Assimilative Crimes Act also would have avoided the problem

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for the tribes, undermines the purpose for continuing reservation policy—permitting the Indian tribes to maintain their own separate, evolving, cultural traditions and government." *Id.* at 536.

The *Sosseur* court's application of the state's gambling laws to the Indians through the Assimilative Crimes Act ignores both the purpose of the intra-Indian exception to the General Crimes Act (to promote tribal self-government) and the purpose of the Assimilative Crimes Act (to fill the voids in criminal law for areas under exclusive jurisdiction of the United States). The court's narrow reading of § 1152, that the crime was not within the intra-Indian exception, is contrary to United States v. Quiver, 241 U.S. 602, 605-06 (1916) (applying the predecessor of § 1152). *See* Clinton, *supra* note 80, at 535-36 n.151. Furthermore, it "ignored . . . the purpose of that clause to further Indian self-government over internal matters occurring on Indian lands." *Id.* Consensual crimes do not involve the biracial interaction to which the General Crimes Act was meant to apply. *Id.* at 535-36.

In United States v. Quiver, 241 U.S. 602 (1916), the Court dismissed the government's argument that since adultery technically was not "an offense by one Indian against the person or property of another Indian," it was not within the exception to the predecessor statute of § 1152. The Court found that reason required the statute's words to include such a consensual offense. *Id.* at 605-06. This reasoning was based on the recognition of a congressional policy

> that the relations of the Indians among themselves—the conduct of one toward the other—is to be controlled by the customs and laws of the tribe, save when Congress expressly or clearly directs otherwise. . . . Besides, the enumeration in the acts of 1885 and 1903 . . . of certain offenses as applicable to Indians in the reservations, carries with it some implication of a purpose to exclude others.

*Id.* at 605. *See also* Clinton, *supra* note 80, at 535-36.

The approach of the *Quiver* Court may be applied to gambling laws on a reservation. It may be argued, however, that *Quiver* is distinguishable from *Sosseur* since Congress has determined that gambling is not a victimless crime in 18 U.S.C. § 1955 (1970). Some courts have argued that large-scale gambling affects interstate commerce to such an extent that a showing of the effect on commerce of a particular gambling operation is unnecessary in a prosecution under that statute. *See* United States v. Werbrouck, 589 F.2d 273, 275 (7th Cir.), *cert. denied*, 440 U.S. 962 (1978); United States v. Meese, 479 F.2d 41, 42-43 (8th Cir. 1973). Still, if an Indian tribe may regulate gambling on the reservation as an aspect of its self-government, the void which the Assimilative Crimes Act was designed to fill will no longer exist. Rather, the policy behind applying the Assimilative Crimes Act to cultural or moral regulation such as gambling laws would interfere with fundamental tribal self-government. The Puyallup Tribe had in fact enacted a tribal code regulating and taxing gambling operations. The code, promulgated shortly after the arrest of the defendants in *Farris*, was rejected by the Department of the Interior as violative of state gambling laws. Brief for Appellee at 19. When a state can effectively prohibit most types of gambling on a reservation, the tribe loses both the opportunity to determine for itself the types of regulations it desires and the opportunity to tax those operations it chooses to license.

99. 181 F.2d at 876.
100. *Id.*
101. 624 F.2d at 897.
102. *See* Brief for Appellant Farris at 19-21.
103. *See* 18 U.S.C. § 1955 (1970).
104. 624 F.2d at 898 (Browning, J., concurring in part and dissenting in part).

of fair notice created by these ambiguities in the Organized Crime Control Act. This is especially true in light of the previous conviction of Indians under the Assimilative Crimes Act in *Sosseur*.[105] Unless the federal prosecutor was seeking to expand the number of statutes at its disposal in prosecuting on-reservation gambling,[106] the purpose for prosecuting the Indian defendants under section 1955 is unclear.

### *18 U.S.C. § 1955—A Weapon Against Organized Crime*

The purpose of the Organized Crime Control Act was not to shut down every gambling operation in existence.[107] Rather, the Act was passed in an effort to reach the lifeblood of organized crime.[108] Section 1955 was presented to the House of Representatives as part of title VIII, entitled "Syndicated Gambling."[109] Explaining the need for crime control legislation to the House Committee on the Judiciary, Senator John L. McClellan urged the congressmen to consider the devastating effects that the mafia had on the economy through syndicated gambling operations and the crime that such operations funded.[110] The purpose of title VIII was to expand federal jurisdiction to reach syndicated gambling and its lifeblood, the corruption of local officials.[111]

Most cases that have applied section 1955 have dealt with the size of the gambling operation[112] and the participation required for prosecution under the Act.[113] It is far from clear that Congress intended to apply state gambling laws to Indian reservations when it passed the Organized Crime Control Act.[114] Decisions concerning application of section 1955 to reservation Indians are conspicuously absent. In fact, *Farris* is the first attempt to prosecute reservation Indians as well as non-Indians under the Act.

In *Farris*, the government argued that Washington's definition of illegal gambling was incorporated into the Act by the phrase making "a gambling business which is a violation of the law of a State . . . in which it is conducted" a federal crime.[115] The prosecuting attorney argued that even

105. *See* text & notes 96-100 *supra*.

106. This is unlikely, however, since the Assimilative Crimes Act only applies when the act in question is "not made penal by any laws of Congress." 18 U.S.C. § 13 (1948).

107. H.R. REP. No. 1549, 91st Cong., 2d Sess. 53 (1970).

108. *Organized Crime Control*, *supra* note 3, at 78-93 (testimony of Senators McCullough, Poff, and McClellan).

109. *Id.* at 38.

110. *Id.* at 86-88 (testimony of Senator McClellan).

111. H.R. REP. No. 1549, *supra* note 107, at 53.

112. *E.g.*, United States v. Reeder, 614 F.2d 1179, 1182 (8th Cir. 1980); United States v. Bourg, 598 F.2d 445, 448 (5th Cir. 1979); United States v. Kekich, 590 F.2d 750, 751 (8th Cir. 1979).

113. *E.g.*, United States v. Reeder, 614 F.2d 1179, 1182 (8th Cir. 1980); United States v. DiMuro, 540 F.2d 503, 508 (1st Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); United States v. Leon, 534 F.2d 667, 676 (6th Cir. 1976); United States v. Brick, 502 F.2d 219, 225 (8th Cir. 1974).

114. In the subcommittee hearings on the Organized Crime Control Act, Will R. Wilson, Assistant Attorney General in charge of the Criminal Division, expressed the opinion that the law adopted the state definition of the crime. *Organized Crime Control*, *supra* note 3, at 191-92, 192. This opinion was in response to a question concerning choice of state law in a multistate gambling operation. *Id.* The question whether such state law might be applied to someone not subject to the law was not raised. *See id.*

115. Brief for Appellee at 24-26, United States v. Farris, 624 F.2d 890 (9th Cir. 1980). Such an extension of state jurisdiction to determine crimes on an Indian reservation is, at best, imaginative.

though Washington law did not apply to the reservation Indians, the state definition of gambling should still apply in order to effectuate the purpose of the Act: to prevent gambling and thereby prevent the spread of organized crime.[116] The prosecutor further contended that Congress did not specifically consider Indians in hearings on the Act, and concluded therefore that Congress could not have intended to treat Indians differently from anyone else.[117] Arguing that Congress does not need to specifically refer to Indians in legislation in order for it to apply to Indian country, the prosecution claimed that the general laws of the United States apply everywhere in the United States regardless of the situs of the act.[118]

The prosecution's logic in *Farris* has serious flaws. First, the purpose of the Organized Crime Control Act is to help the states enforce their gambling statutes.[119] Particularly, Congress worried about the organized crime figure who could pay off state law enforcement officials.[120] As the next section of this Casenote will illustrate, application of section 1955 in *Farris* achieves neither of these goals.

*Washington's Choice to Limit Jurisdiction*

Under the authority of Public Law 280, the state of Washington chose to assert complete criminal jurisdiction over non-Indians on Indian land.[121] As for the Indians on reservations, however, Washington limited its jurisdiction to eight subject matter areas (not including gambling), unless a particular tribe requested the state to assume jurisdiction.[122] The Puyallup Indians have never made such a request.[123] Since Washington chose not to exercise criminal jurisdiction over reservation Indians in gambling matters, the application to the Indians of a statute designed to help states enforce their laws seems pointless.

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Generally, when Congress chooses to give jurisdiction over Indian tribes to a state, it does so clearly and unambiguously. *See, e.g.*, Act of June 8, 1940, ch. 276, 54 Stat. 249 (current version at 18 U.S.C. § 3243 (1948)), in which Congress authorized the State of Kansas to assume criminal jurisdiction over Indian country within its boundaries "to the same extent as its courts have jurisdiction over offenses committed elsewhere in the state in accordance with the laws of the state." Criminal jurisdiction over particular Indian reservations was granted in a similar manner to California, Act of Oct. 5, 1949, ch. 604, 63 Stat. 705; Iowa, Act of June 30, 1948, ch. 759, 62 Stat. 1161; and North Dakota, Act of May 31, 1946, ch. 279, 60 Stat. 229. These ad hoc jurisdictional grants were limited and were the result of the Bureau of Indian Affairs conferring with the particular state and tribes involves. *See* Goldberg, *supra* note 62, at 540.

116. Brief for Appellee at 28.

117. *Id.* at 15.

118. *Id.* at 10-15, *citing* United States v. Wheeler, 435 U.S. 313, 330 n.30 (1978); United States v. Butler, 541 F.2d 730 (8th Cir. 1976); United States v. Big Crow, 523 F.2d 955 (8th Cir. 1975), *cert. denied*, 424 U.S. 920 (1976); Stone v. United States, 506 F.2d 561 (8th Cir. 1974), *cert. denied*, 420 U.S. 978 (1975); Walks on Top v. United States, 372 F.2d 422 (9th Cir.), *cert. denied*, 389 U.S. 879 (1967); Head v. Hunter, 141 F.2d 449 (10th Cir. 1944).

119. *Organized Crime Control, supra* note 3, at 105; United States v. Farris, 624 F.2d 890, 898 (9th Cir. 1980) (Browning, J., concurring in part and dissenting in part), *cert. denied*, 449 U.S. 1111 (1981).

120. *Organized Crime Control, supra* note 3, at 88, 89, 105; United States v. Farris, 624 F.2d 890, 898 (9th Cir. 1980) (Browning, J., concurring in part and dissenting in part), *cert. denied*, 449 U.S. 1111 (1981).

121. *See* note 20 *supra*.

122. *Id.*

123. *Id.*

The legislative history of section 1955 reveals no congressional intent to punish violations of a state's gambling policy that do not violate state law.[124] As Judge Browning pointed out in his dissent in *Farris*, the purpose of rooting out corrupt law enforcement agents would not be served by prosecuting individuals who were not reached by state law.[125] Such individuals would be unlikely to pay off state officials who could not arrest them.

Judge Kennedy insisted in his concurrence, however, that since the non-Indian partners were subject to state prosecution, the entire gambling operation was within the terms of section 1955.[126] Thus, the statute applied to the Indian partners as well.[127] The statute, however, expressly relies on violations of state law.[128] Because the Indians were innocent under state law, prosecuting them under the gambling statute was a violation of due process.[129] As Judge Browning correctly pointed out in *Farris*, the Indian defendants were being required to "answer under Section 1955 for the crimes of their associates."[130]

In addition, a presumption that Congress intended to act in a manner consistent with the nation's fiduciary obligations weighs against application of section 1955 to the Puyallups in *Farris*.[131] This presumption requires that statutory ambiguities affecting internal tribal government powers be resolved in favor of the Indians.[132] The Ninth Circuit explained this principle in *Santa Rosa Band of Indians v. Kings County*.[133] The presumption arises from the federal government's fiduciary duty to insure that the Indian tribes are treated in a manner that discharges the nation's obligations to them.[134] This "interpretive device" is used to effectuate a trust status toward the Indians and the protection such a trust implies.[135]

Congress has acknowledged this trust relationship by using express legislation whenever it has restricted tribal self-government and jurisdiction.[136] Examples of such express legislation are the Major Crimes Act[137] and 15 U.S.C. § 1175,[138] both of which make specific acts done on a reser-

124. United States v. Farris, 624 F.2d 890, 898 (9th Cir. 1980) (Browning, J., concurring in part and dissenting in part), *cert. denied*, 449 U.S. 1111 (1981).

125. *Id.* at 899.

126. *Id.* (Kennedy, J., concurring).

127. *Id.*

128. 18 U.S.C. § 1955 (1970).

129. *See* note 16 *supra*.

130. 624 F.2d at 899 (Browning, J., concurring in part and dissenting in part).

131. Brief for Appellant Farris at 16-18.

132. Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 660 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977).

133. 532 F.2d 655 (9th Cir. 1975). *See also* Seminole Nation v. United States, 316 U.S. 286, 297 (1942); United States v. Kagama, 118 U.S. 375, 383-84 (1886); Beecher v. Wetherby, 95 U.S. 517, 525 (1877); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 12 (1831).

134. Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 660 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977).

135. 532 F.2d at 660-62.

136. *See* Arizona *ex rel.* Merrill v. Tuttle, 413 F.2d 683, 684 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970); *Ex parte* Crow Dog, 109 U.S. 556, 572 (1883); Groundhog v. Keeler, 442 F.2d 674, 678 (10th Cir. 1971).

137. 18 U.S.C. § 1153 (1948); see note 41 *supra*.

138. 15 U.S.C. § 1175 (1951) prohibits the introduction or possession of gambling devices on

vation federal crimes. Furthermore, the recent trend in federal Indian policy has been toward tribal self-government.[139] Thus, current policy weighs in favor of not extending section 1955 to the Puyallup Indians.

*Conclusion*

The Indian defendants in *United States v. Farris* should not have been convicted under section 1955. The Organized Crime Control Act was not intended to apply to gambling on an Indian reservation not reached by state law. The federal policies of aiding in local law enforcement efforts, protecting interstate commerce, and preventing infiltration of organized crime into illegal gambling operations are not served by such an application. Nor is the policy goal of tribal self-determination in social and moral issues served by this conviction.

Perhaps the defendants could have been prosecuted under the Assimilative Crimes Act. The Assimilative Crimes Act explicitly incorporates state law, while the Organized Crime Control Act does not. The Assimilative Crimes Act, an enclave law, is applicable to Indian country by virtue of the General Crimes Act. On the other hand, the Organized Crime Control Act is applicable only where a gambling operation is conducted "in violation of the law of a state," a much more ambiguous definition. There was no reason to stretch the terms of the gambling act in order to prosecute the Indian defendants in *Farris*.

*Christine Guzman*

an Indian reservation. Since no gambling devices, such as slot machines, were used in the casinos operated by the *Farris* defendants, this section is not applicable to *Farris*. 624 F.2d at 896.

139. See text & notes 73-78.

# VI. SALES

## A. *BASELINE LIQUORS V. CIRCLE K CORP.*: CHALLENGES TO THE CONSTITUTIONALITY OF THE ARIZONA UNFAIR SALES ACT

By enacting the Unfair Sales Act[1] in 1939, Arizona became one of a large number of states[2] to pass legislation prohibiting the practice of selling items below cost for the purpose of injuring competitors.[3] The constitutionality of certain provisions of these acts has been challenged repeatedly both in Arizona and in other jurisdictions. Recently, the Arizona Court of Appeals upheld the constitutionality of the Arizona Unfair Sales Act in *Baseline Liquors v. Circle K Corp.*[4]

Baseline Liquors (Baseline) brought suit against a large number of Maricopa County liquor retailers[5] on behalf of itself and others who own and operate Series 9[6] liquor licenses.[7] The complaint alleged that since July, 1977, Circle K and other named defendants had advertised, offered to sell, and sold liquor, beer, and wine at a price less than "cost to the retailer" in violation of the Arizona Unfair Sales Act.[8] It also alleged that such activities had reduced competition, unreasonably restrained trade, and tended to create a monopoly.[9]

Several of the defendants filed motions to dismiss, contending that the Arizona Unfair Sales Act is unconstitutional.[10] The trial court agreed and dismissed the complaint, and Baseline appealed.[11] The Arizona Court of Appeals reversed and remanded,[12] declaring that based on the evidence

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1. ARIZ. REV. STAT. ANN. §§ 44-1461 to 1466 (1967 & Supp. 1980-81).
2. For a compilation of state laws on trade regulation, including sales below cost statutes, *see* 4 TRADE REG. REP. (CCH) ¶¶ 30,201-35,585.
3. *See* ARIZ. REV. STAT. ANN. § 44-1464 (1967).
4. — Ariz. —, 630 P.2d 38 (Ct. App. 1981).
5. The defendants were Circle K Corp.; Farmers Produce Co., Inc., d/b/a Farmers Quality Discount Liquor Stores; Bach T. Schlecht, d/b/a Economy Liquors; Bashas' Markets, Inc.; Neb's Markets; Duppa Vila Liquors, Inc.; Skagg's Drug Centers, Inc.; Smitty's Super-Value, Inc.; Furr's Inc.; Safeway Stores, Inc.; A.J. Bayless Markets, Inc.; and Super X Drugs Corporation. *Id.*
6. Series 9 Liquor Licenses are defined in ARIZ. REV. STAT. ANN. § 4-209(B)(9) (1974 & Supp. 1980-81) as "[o]ff-sale retailer's license to sell all spiritous liquors . . . ." ARIZ. REV. STAT. ANN. § 4-101(12) (Supp. 1980-81) defines "off-sale retailer" as

> any person operating a bona fide regularly established retail liquor store selling spiritous liquors, wines and beer, and any established retail store selling commodities other than spiritous liquors and engaged in the sale of spiritous liquors only in the original package, to be taken away from the premises of the retailer and to be consumed off the premises.

7. — Ariz. at —, 630 P.2d at 38.
8. *Id.* at —, 630 P.2d at 40; *see* ARIZ. REV. STAT. ANN. § 44-1461(A)(1) (1967).
9. — Ariz. at —, 630 P.2d at 40. The relief requested included both compensatory and punitive damages, and an injunction prohibiting violation of the act. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at —, 630 P.2d at 41.

before it,[13] the Act is neither unconstitutional nor a price-fixing statute in violation of the Sherman Act.[14]

This Casenote will first survey the history, format, and declared purposes of various state unfair sales acts. The opinion in *Baseline Liquors* will be presented, with analysis of the court's interpretation of the Arizona Unfair Sales Act in light of decisions in other states that have ruled on the constitutionality of analogous provisions.[15]

*History of Unfair Sales Acts*

Statutes frequently designated as unfair sales acts directed at retailers and wholesalers who sell below cost have been enacted in a number of jurisdictions.[16] The primary purpose of these acts is the protection of citizens through the prevention and elimination of below cost sales as an unfair method of competition.[17] In general, the statutes declare it unlawful for a wholesaler or retailer to advertise, offer to sell, or sell products at less than cost with the purpose, intent, or effect of injuring a competitor or destroying competition.[18] These sales are often referred to as "loss leader sales."[19] They are assumed to play "on the gullibility of customers by leading them to expect what generally is not true, namely, that a store which offers such an amazing bargain is full of other such bargains."[20]

Statutory violation of an unfair sales act requires the elements of a sale below cost as defined in the statute, with the purpose, intent, or effect of injuring competitors.[21] The statutes prescribe various methods to determine the first element—sale below cost.[22] The second element, intent to

13. The court of appeals had a limited record before it because the appeal was taken directly from the motion to dismiss granted by the trial court. *Id.* at —, 630 P.2d at 42.

14. *Id.* at —, 630 P.2d at 44-45.

15. Sherman Act challenges are beyond the scope of this Casenote.

16. For a discussion of the various state acts, *see* 2 TRADE REG. REP. (CCH) ¶¶ 6601-6860. *See also* ARIZ. REV. STAT. ANN. §§ 44-1461 to 1466 (1967 & Supp. 1980-81).

17. *See* ARIZ. REV. STAT. ANN. § 44-1462 (1967). A below cost sale "causes commercial dislocations, misleads the consumer, works back against the farmer, directly burdens and obstructs commerce, and diverts business from dealers who maintain a fair price policy." *Id. See also* CAL. BUS. & PROF. CODE § 17001 (West 1964); MONT. REV. CODES ANN. § 30-14-201 (1979).

18. *See* ARIZ. REV. STAT. ANN. § 44-1464 (1967); KAN. STAT. § 365.030 (1975). *See also* Goodrich, *Minnesota Price Discrimination and Sales-Below-Cost Statutes: Should They Be Repealed, Amended or Left Alone*? 5 WM. MITCHELL L. REV. 1, 91-92 (1979), for a list of the "purpose," "intent," or "effect" wording of the various statutes.

19. Baseline Liquors v. Circle K Corp., — Ariz. —, 630 P.2d 38, 40 (Ct. App. 1981). BLACK'S LAW DICTIONARY 852 (5th ed. 1979) defines "loss leader" as an "[i]tem sold by a merchant at a very low price and sometimes below cost in order to attract people to store [*sic*] with the hope they will buy additional items on which a profit will be made."

The Arizona Unfair Sales Act states that "the practice of selling certain items of merchandise below cost in order to attract patronage is generally a form of deceptive advertising . . . ." ARIZ. REV. STAT. ANN. § 44-1462 (1967). *See also id.* § 44-1464 ("intent or effect of inducing the purchase of other merchandise").

20. Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, Inc., 360 U.S. 334, 340 (1959). *But see* Note, *Meeting Competition Exception to Sales Below Cost Prohibition, 42* WASH. L. REV. 945, 949 (1967) (criticizing the assumption that sales below cost play on the customer's gullibility).

21. *See, e.g.*, ARIZ. REV. STAT. ANN. § 44-1466 (Supp. 1980-81); N.D. CENT. CODE ANN. § 51-10-05 (Supp. 1979); PA. STAT. ANN. tit. 73, § 214 (Purdon 1971).

22. ARIZ. REV. STAT. ANN. § 44-1461(1) (1967), defines cost to the retailer as:

> the invoice . . . or the replacement cost . . . , whichever is lower, less all trade discounts except customary discounts for cash, to which shall be added: . . . (c) a markup to

injure competitors, may often be presumed from a sale made below cost.[23] Certain sales below cost are excepted from coverage under the acts,[24] and a sale which falls into one of the excepted categories is considered not to have been made with the proscribed intent.[25]

The definitions and proscriptions contained in unfair sales acts have led to challenges in Arizona and other jurisdictions, among them that the act itself is an invalid exercise of police power;[26] that it fails to require an element of intent;[27] that it is impermissibly vague in defining "cost";[28] that it violates the equal protection clause of the fourteenth amendment;[29] that it is a price-fixing act;[30] that it contains presumptions which unconstitutionally alter the burden of proof;[31] and that it burdens interstate commerce.[32] The results of these challenges have varied.

*Challenges to the Arizona Unfair Sales Act*

Arizona appellate courts have ruled on the constitutionality of the Ar-

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cover the proportionate part of the cost of doing business, which markup, in the absence of proof of a lesser cost, shall be twelve per cent of the cost to the retailer as defined in this section . . . .

*Compare* COLO. REV. STAT. ANN. § 6-2-105(3) (1973), in which cost of doing business includes without limitation certain specified expenses such as labor, salaries of officers, rent, interest, depreciation, selling cost, maintenance, delivery costs, credit losses, licenses, taxes, insurance, and advertising. CAL. BUS. AND PROF. CODE § 17029 (West 1964) closely parallels the Colorado statute, but § 17026 adds that "in absence of proof of cost of doing business a markup of 6 percent on such invoice or replacement cost shall be prima facie proof of such cost of doing business." *Id.* § 17026 (1964 & Supp. 1981).

23. *See* ARIZ. REV. STAT. ANN. § 44-1466(B) (Supp. 1980-81), stating that "[p]roof of any advertising, offer to sell or sale by any retailer or wholesaler in contravention of the policy of this article is prima facie evidence of a violation of this article." *See also* CAL. BUS. AND PROF. CODE § 17071 (West 1964); MINN. STAT. ANN. § 325D.08 (1981).

24. Exceptions in ARIZ. REV. STAT. ANN. § 44-1463 (1967) are typical: merchandise sold in bona fide clearance sales; perishable, imperfect, damaged, or discontinued merchandise; merchandise sold in a final business liquidation; merchandise sold to a charity or on contract to the government; merchandise sold acting under court order; merchandise sold in a good faith effort to meet competition.

25. *See* State v. Consumers Warehouse Market, 183 Kan. 502, 510, 329 P.2d 638, 645 (1958); Cohen v. Frey & Son, Inc., 197 Md. 586, 590, 80 A.2d 267, 269 (1951); State v. Sears, 4 Wash. 2d 200, 217, 103 P.2d 337, 345 (1940).

26. *See* State v. Walgreen Drug Co., 57 Ariz. 308, 310, 113 P.2d 650, 652 (1941); People v. Kahn, 19 Cal. App. 2d 758, 764, 60 P.2d 596, 599 (1936); State v. Sears, 4 Wash. 2d 200, 204, 103 P.2d 337, 340 (1940).

27. *See* State v. Walgreen Drug Co., 57 Ariz. 308, 312, 113 P.2d 650, 652 (1941); People v. Kahn, 19 Cal. App. 2d 758, 763, 60 P.2d 596, 598 (1936); Hill v. Kusy, 150 Neb. 653, 656-57, 35 N.W.2d 594, 596 (1949).

28. *See* State v. Walgreen Drug Co., 57 Ariz. 308, 311-12, 113 P.2d 650, 652 (1941); Associated Merchants v. Ormesher, 107 Mont. 530, 548-49, 86 P.2d 1031, 1036 (1939); State v. Sears, 4 Wash. 2d 200, 210, 103 P.2d 337, 342 (1940).

29. *See* People v. Gordon, 105 Cal. App. 2d 711, 720, 234 P.2d 287, 293 (1951); Serrer v. Cigarette Serv. Co., 148 Ohio St. 519, 522, 76 N.E.2d 91, 93 (1947); State v. Sears, 4 Wash. 2d 200, 208, 103 P.2d 337, 341 (1940).

30. *See* Dikeou v. Food Distrib. Ass'n, 107 Colo. 38, 50, 108 P.2d 529, 534 (1940); Louisiana Wholesale Distrib. Ass'n v. Rosenzweig, 214 La. 2, 7, 36 So.2d 403, 405 (1948); State v. Sears, 4 Wash. 2d 200, 218, 103 P.2d 337, 345 (1940).

31. *See* Great Atl. and Pac. Tea Co. v. Ervin, 23 F. Supp. 70, 82 (D. Minn. 1938); Wiley v. Sampson-Ripley Co., 151 Me. 400, 404-05, 120 A.2d 289, 291 (1956); State v. Ross, 259 Wis. 379, 385, 48 N.W.2d 460, 463-64 (1951).

32. *See* People v. Gordon, 105 Cal. App. 2d 711, 717, 234 P.2d 287, 291 (1951); Rust v. Griggs, 172 Tenn. 565, 576, 113 S.W.2d 733, 737 (1938).

izona Unfair Sales Act on two occasions. In *State v. Walgreen Drug Co.*,[33] the Arizona Supreme Court upheld the constitutionality of the legislative adoption of the Act[34] and also considered the element of intent[35] and the definition of cost contained in the Act.[36] In *Baseline Liquors v. Circle K Corp.*,[37] the Arizona Court of Appeals again considered constitutional challenges based on the element of intent[38] and the definition of cost,[39] as well as challenges of arbitrariness, vagueness,[40] and price-fixing.[41]

The first challenge to the constitutionality of the Arizona Unfair Sales Act was made in 1941 in *Walgreen Drug Co.*[42] The state had sought an injunction to restrain the defendant from selling below cost as defined in the Act.[43] The defendant argued that the Act was invalid as beyond the legislature's power to fix prices,[44] that the definition of cost was vague,[45] and that the statute did not include the element of intent to engage in unfair competition.[46] The court held that the general economic policy and purposes underlying the adoption of the Arizona Unfair Sales Act are fully within the scope of the state legislature's power.[47] Further, the court concluded that, read as a whole, the Act requires criminal intent as an essential ingredient of a violation.[48] The court also found that part of the definition of "bona fide cost" was indefinite and uncertain, and was thus unconstitutional.[49] In stating that the statute is not subject to review unless it is "arbitrary, discriminatory or demonstrably irrelevant to the policy the Legislature is free to adopt,"[50] the *Walgreen* court set the standard of review for the challenges in *Baseline Liquors*.[51]

### *The* Baseline Liquors *Opinion*

Circle K did not contest the legitimacy of the state interests sought to be protected by the Unfair Sales Act, and conceded the constitutionality of its enactment.[52] Instead, it contended that the Act is arbitrary,[53] vague,[54]

33. 57 Ariz. 308, 113 P.2d 650 (1941).
34. *Id.* at 313-14, 113 P.2d at 653.
35. *Id.* at 317, 113 P.2d at 654-55.
36. *Id.* at 315, 113 P.2d at 653-54.
37. — Ariz. —, 630 P.2d 38 (Ct. App. 1981).
38. *Id.* at —, 630 P.2d at 44.
39. *Id.* at —, 630 P.2d at 43-44.
40. *Id.* at —, 630 P.2d at 41-43.
41. *Id.* at —, 630 P.2d at 45.
42. 57 Ariz. 308, 113 P.2d 650 (1941).
43. *Id.* at 310, 113 P.2d at 651-52.
44. *Id.* at 311-12, 113 P.2d at 652.
45. *Id.*
46. *Id.* at 312, 113 P.2d at 652.
47. *Id.* at 314, 113 P.2d at 653. The court relied heavily on Nebbia v. New York, 291 U.S. 502 (1934), to reach its holding. 57 Ariz. at 312-14, 113 P.2d at 652-53.
48. 57 Ariz. at 317, 113 P.2d at 655.
49. *Id.* at 315, 317, 113 P.2d at 653-54. The unconstitutional phrase does not appear in the 1956 Code. *See* ARIZ. REV. STAT. ANN. § 44-1461(A)(3) (1956).
50. 57 Ariz. at 314, 113 P.2d at 653, *quoting* Nebbia v. New York, 291 U.S. 502, 539 (1934).
51. *See* Baseline Liquors v. Circle K Corp., — Ariz. at —, 630 P.2d at 41.
52. *Id.* at —, 630 P.2d at 41.
53. *Id.*
54. *Id.* at —, 630 P.2d at 43.

and violative of due process.[55] As a standard for determining arbitrariness, the court stated that the test is "whether the legislative enactment is reasonably related to a legitimate state interest."[56] The court summarily found that the Act on its face meets the foregoing test.[57] It then went on to consider arguments that certain provisions are unconstitutional.

*Arbitrariness and Vagueness*

Circle K's first argument asserted the arbitrariness of a provision in the Arizona Unfair Sales Act which defines cost to the retailer as invoice or replacement cost plus a twelve percent markup to cover the cost of doing business.[58] Circle K argued that the twelve percent markup provision is unconstitutionally arbitrary because it ignores economies achieved by any one particular retailer,[59] and that if a retailer operates economically with costs below twelve percent of invoice or replacement cost, he is nevertheless required to use a twelve percent markup and is unable to pass cost savings on to the customer.[60]

The court found inapposite the cases cited by Circle K in which similar provisions of the Ohio and Maryland Acts had been held unconstitutionally arbitrary.[61] After focusing on significant differences noted by the Ohio and Maryland courts between regular and cash-and-carry operators who were nevertheless treated similarly under the Ohio and Maryland Acts,[62] the Arizona court noted that similar distinctions between the class of retailers represented by Baseline and those represented by Circle K had not been argued.[63] Accordingly, in the absence of any support in the record, the court dismissed the argument.[64] However, effective presentation of these differences may well have warranted a different conclusion.

While it is true that the differences between the merchants in the Ohio and Maryland cases were between service and cash-and-carry wholesalers,[65] this alone should not merit dismissal of an analogy to the classes of retailers represented in *Baseline Liquors*. The Maryland and Ohio cases

55. *Id.* at —, 630 P.2d at 44.

56. *Id.* at —, 630 P.2d at 41. Other courts have used the same or similar tests. *See* Associated Merchants v. Ormesher, 107 Mont. 530, 546, 86 P.2d 1031, 1034-35 (1939) (reasonably designed to accomplish the purpose sought to be achieved); Drink v. Babcock, 77 N.M. 277, 280, 421 P.2d 798, 800 (1966) (reasonable relation to a proper legislative purpose).

57. — Ariz. at —, 630 P.2d at 42.

58. *Id.* at —, 630 P.2d at 41. *See* ARIZ. REV. STAT. ANN. § 44-1461(A)(1)(c) (1967); note 22 *supra*, for the text of the statute.

59. — Ariz. at —, 630 P.2d at 41.

60. *Id.*

61. *Id.* at —, 630 P.2d at 42; *see* Cohen v. Frey & Son, Inc., 197 Md. 586, 80 A.2d 267 (1951); Serrer v. Cigarette Serv. Co., 148 Ohio St. 519, 76 N.E.2d 91 (1947). The Maryland statute is similar to the Arizona statute in that both provide a fixed markup in the absence of proof of a lesser cost. *Compare* ARIZ. REV. STAT. ANN. § 44-1461(A)(1)(c) (1967) *with* MD. COM. LAW ANN. § 11-401 (1975).

62. — Ariz. at —, 630 P.2d at 42.

63. *Id.*

64. *Id.*

65. A service wholesaler is one who employs salesmen, extends credit, and delivers. Cohen v. Frey & Son, Inc., 197 Md. 586, 591-92, 80 A.2d 267, 270 (1951); Serrer v. Cigarette Serv. Co., 148 Ohio St. 519, 520, 76 N.E.2d 91, 92 (1947). A cash-and-carry wholesaler is one whose customers purchase merchandise for cash at the wholesaler's place of business. *Id.*

focused not so much on the types of merchants involved as on the fact that the statute imposed an arbitrary markup formula that ignored actual costs to the merchants.[66] The Maryland court found the statute arbitrary because, although the defendant might be selling below cost as defined in the statute, the sales were not below his real cost.[67] For similar reasons, the Ohio court found the statute created discrimination in favor of one wholesaler over another.[68]

The Maryland Act and the Arizona Act are similar.[69] Given a factual record setting out the differences between the class of retailers represented by Baseline and those represented by Circle K, and a showing that the Arizona Act discriminates between those two classes, the Arizona court might agree with the Maryland court and hold that the statute is arbitrary.

The *Baseline Liquors* court buttressed its finding that the twelve percent markup is not arbitrary by pointing out the existence of the provision in the Unfair Sales Act[70] that permits the retailer to sell at a price lower than the twelve percent markup upon proving that his costs of doing business are less than the twelve percent.[71] Absent proof of this lesser cost, however, a retailer must price his goods at the fixed twelve percent markup.[72] In finding this provision to be an acceptable alternative, the court rejected Circle K's argument that an accurate determination of cost of doing business attributable to each item is, as a practical matter, impossible to make.[73] The court agreed with the reasoning of a Colorado case[74] and a Utah case[75] that had held that only a good faith application of reasonable accounting methods is required in order to show that the cost of doing business is less than the twelve percent markup.[76] If this is demonstrated, the merchant may mark up at his true cost of doing business rather than the twelve percent.[77]

Despite the court's willingness to apply a good faith test of reasonable accounting methods, even a good faith attempt may be difficult to make if it requires that a rational relation must exist between the cost of doing

66. *See* Cohen v. Frey & Son, Inc. 197 Md. at 609, 80 A.2d at 278; Serrer v. Cigarette Serv. Co., 148 Ohio St. at 522, 76 N.E.2d at 93.

67. Cohen v. Frey & Son, Inc., 197 Md. at 609, 80 A.2d at 278.

68. Serrer v. Cigarette Serv. Co., 148 Ohio St. at 522, 76 N.E.2d at 93.

69. See note 61 *infra*. *Compare* ARIZ. REV. STAT. ANN. § 44-1463 (1967) *with* MD. COM. LAW ANN. § 11-402 (1975) (exceptions to sales below cost); *and* ARIZ. REV. STAT. ANN. § 44-1466(B) (Supp. 1980-81) *with* MD. COM. LAW ANN. § 11-404(b) (1975) (prima facie evidence provision).

70. ARIZ. REV. STAT. ANN. § 44-1461(A)(1)(c) (1967).

71. — Ariz. at —, 630 P.2d at 42.

72. ARIZ. REV. STAT. ANN. § 44-1461(A)(1)(c) (1967).

73. — Ariz. at —, 630 P.2d at 42.

74. Flank Oil v. Tennessee Gas Transmission Co., 141 Colo. 554, 349 P.2d 1005 (1960).

75. Trade Comm'n v. Skaggs Drug Centers, Inc., 21 Utah 2d 431, 446 P.2d 958 (1968).

76. — Ariz. at —, 630 P.2d at 43.

77. *Id.* The leading case on the issue of allocating costs is State v. Langley, 53 Wyo. 332, 84 P.2d 767 (1938). There, the Wyoming Supreme Court stated that the actual cost of doing business attributable to any particular item is purely a question of fact. *Id.* at —, 84 P.2d at 779. If a particular method of determining cost is not unreasonable, and does not disclose an intentional evasion of the law, that method should be accepted as correct since all the statute requires is that the merchant act in good faith. *Id.*

business and the price of individual articles sold.[78] Particular difficulties are presented by efforts to allocate such items as a manager's salary or the cost of maintaining a parking lot to the price of each item sold.[79] The problem is compounded by differences in turnover time for each particular item.[80] Theoretically, the longer an item remains unsold, the higher the cost of maintaining that item on the shelf.[81] Thus, a merchant strictly following the statute should increase his price, since his costs of doing business attributable to that item would be rising the longer the item remained unsold.[82]

The foregoing difficulty may be partially resolved by an advance estimate of the cost of doing business attributable to an item that reflects the merchant's projected estimate of turnover time of the item.[83] But if in fact his turnover time is more rapid than projected, sales may be made at an unnecessarily high price. If, on the other hand, the item remains unsold for a period longer than projected, sales could be made below their actual cost because cost may have risen higher than the original projection as the item remained unsold. While it is true that different turnover times for a particular stock of items could balance each other out so that a projected average cost could be fixed, the same is not true for an item whose entire stock is sold either unexpectedly quickly or unexpectedly slowly. In any event, individual cost assessment such as this could be unwieldy and expensive.[84]

The Colorado case of *Dikeou v. Food Distributors Association*[85] illustrates some further potential difficulties that a merchant who seeks to utilize the alternative lesser cost provision may encounter.[86] In *Dikeou*, the defendant was sued for violation of the Colorado Unfair Practices Act.[87] In attempting to prove his actual cost of doing business, he introduced a survey specifically prepared for the case by his accountant.[88] The survey included a theoretical allocation of costs between departments that did not actually exist on the defendant's books.[89]

The *Dikeou* court rejected the defendant's survey as an approximate

78. *See* Clark, *Statutory Restrictions on Selling Below Cost*, 11 VAND. L. REV. 105, 122 (1957); LaRue, *Pitfalls for Price Competitors: State and Federal Restrictions on Below Cost or Unreasonably Low Prices*, 15 CASE W. RES. L. REV. 35, 65 (1963), asserting that there is little basis in fact for the assumption that businessmen have detailed knowledge of the costs of doing business attributable to each item. *See also* Borden Co. v. Thomason, 353 S.W.2d 735, 747-49 (Mo. 1962), containing extensive testimony as to the difficulty of calculating cost.

79. Clark, *supra* note 78, at 122.

80. *See* Note, *Constitutionality of Statutes Prohibiting Sales at Less than Cost*, 47 YALE L.J. 1201, 1205 n.27 (1938).

81. Comment, *Regulation of Business—Sales-Below-Cost Statutes—The Elements of Violation and the Defense of Meeting Competition*, 58 MICH. L. REV. 905, 914 (1960).

82. Note, note 80 *supra*. It is unclear at what point a merchant would be permitted to sell the item under ARIZ. REV. STAT. ANN. § 44-1463(1) (1967) as a bona fide clearance sale.

83. *See* Note, *The Iowa Cigarette Sales Act: A Recent Model of State Price Regulation*, 35 IOWA L. REV. 440, 458 (1950).

84. Comment, *supra* note 81, at 914.

85. 107 Colo. 38, 108 P.2d 529 (1940).

86. *Dikeou* did not involve a "lesser cost" provision, but it illustrates the difficulty of proving cost.

87. *Id.* at 39, 108 P.2d at 530.

88. The court pointed out that he was a registered accountant, but not a Certified Public Accountant. *Id.* at 43, 108 P.2d at 532.

89. *Id.* at 44, 108 P.2d at 532.

cost arrived at by a reasonable rule.[90] Because the accountant did not prepare the survey according to accepted accounting practices and did not reflect an allocation actually recorded on the defendant's books, the court held that the accounting was not made in good faith.[91] While the defendant in *Dikeou* may indeed have used unreasonably sloppy accounting practices, the decision does demonstrate that a merchant must be prepared in advance to combat charges of violating an unfair sales act. The accounting method he chooses must be uniform and in accordance with accepted accounting practices, and not merely an afterthought prepared for trial.

In addition to demonstrating the reasonableness of his accounting method, the Arizona retailer who wishes to sell at less than the twelve percent markup by allocating his costs to each item sold must also show that his costs are bona fide costs.[92] The Arizona Unfair Sales Act contains two potentially conflicting definitions of cost. The first portion of the statute defines cost to the retailer as including the twelve percent markup "in absence of proof of a lesser cost."[93] Later, the statute defines cost broadly as "bona fide" costs.[94] The *Baseline Liquors* court rejected Circle K's argument that these apparently differing definitions make the statute vague and imprecise.[95] It reconciled them by finding that the former provides a technical definition of cost, while the latter requires merely that such costs be non-fraudulent.[96]

The argument regarding the conflicting definitions is more fully set forth in Circle K's pending petition to the United States Supreme Court for a writ of certiorari.[97] The petitioners contend that reliance by the Arizona court on a Utah case[98] and a Colorado case[99] to reject the vagueness challenge to the "proof of a lesser cost" provision was misplaced because the statutes at issue in those cases do not impose criminal sanctions as does the Arizona Act.[100] Thus, they argue that the Arizona Act must be judged by a higher standard than was used by the Utah and Colorado courts to determine if the statute is vague.[101] The higher standard is warranted, they assert, because a statute providing for criminal sanctions must be specific enough for a retailer to know in advance whether his actions constitute a violation.[102] The Arizona statute purportedly does not provide

90. *Id.* at 47, 108 P.2d at 533.
91. *Id.*
92. ARIZ. REV. STAT. ANN. § 44-1461(A)(3) (1967).
93. *Id.* § 44-1461(A)(1).
94. *Id.* § 44-1461(A)(3).
95. — Ariz. at —, 630 P.2d at 43-44.
96. *Id.* at —, 630 P.2d at 44.
97. Appellants' Petition for Writ of Certiorari to the United States Supreme Court, at 1. The petitioners for the writ include Skaggs Drugs Centers, Inc.; Super X Drugs Corp.; Safeway Stores, Inc.; Neb's Markets; Bach T. Schlecht, d/b/a Economy Liquors; and Smitty's Super-Value, Inc.
98. Trade Comm'n v. Skaggs Drug Centers, Inc., 21 Utah 2d 431, 446 P.2d 958 (1968).
99. Flank Oil v. Tennessee Gas Transmission Co., 141 Colo. 554, 349 P.2d 1005 (1960).
100. Appellants' Petition for Writ of Certiorari, at 9. *See* ARIZ. REV. STAT. ANN. § 44-1466 (Supp. 1980-81).
101. Appellants' Petition for Writ of Certiorari, at 9.
102. *Id.* at 9-10.

sufficient specificity for a retailer to know which costs will be considered "bona fide."

The problem with this argument is that the original case which set the standard of reasonableness in determining cost was *State v. Langley*.[103] *Langley* was a criminal case holding that if a particular method of determining cost is not unreasonable it should be accepted as correct.[104] This case was at least indirectly presented to the *Baseline Liquors* court since both the Utah and Colorado cases relied on by that court cite the *Langley* decision.[105] Thus, precedent supports the reasonableness standard against challenges of vagueness in both the civil and criminal contexts.

*Criminal Intent*

In addition to vagueness and arbitrariness challenges, Circle K argued that the Act violates due process requirements by failing to require sufficient criminal intent.[106] The statute provides that liability arises from sales below cost with the "intent or effect" of injuring a competitor.[107] The Arizona Supreme Court in *Walgreen* had held earlier that despite its disjunctive phrasing, the Act implied that the element of intent is essential to a violation.[108] Circle K's argument was that the *Baseline Liquors* court was not bound by the prior holding because, subsequent to *Walgreen*, the legislature had re-enacted the Unfair Sales Act retaining the "intent or effect" language.[109] The court rejected this argument and followed *Walgreen*, holding that intent is required for a violation.[110]

Circle K further attacked the intent provisions of the Act by arguing that it unconstitutionally places the burden of proving lack of intent on the defendant.[111] The statute provides that evidence of a sale below cost is prima facie evidence of a violation of the Act.[112] Because the statute also requires that there be intent to injure a competitor,[113] it was argued that the burden to prove lack of this intent necessarily shifted to the defendant.[114] Without analysis, the court stated that the statute does not unconstitutionally alter the burden of proof, but merely acts as an evidentiary presumption.[115] Courts in other jurisdictions faced with a challenge to the

103. 53 Wyo. 332, 84 P.2d 767 (1938).
104. See notes 74-75 *supra*.
105. *See* 21 Utah 2d at 440 n.15, 446 P.2d at 964 n.15; 141 Colo. at 566, 349 P.2d at 1012.
106. — Ariz. at —, 630 P.2d at 44.
107. ARIZ. REV. STAT. ANN. § 44-1464 (1967).
108. 57 Ariz. 308, 317, 113 P.2d 650, 655 (1941). For a criticism of this holding, *see* Note, *Constitutionality of No-Sales-Below Cost Statutes*, 36 ILL. L. REV. 682 (1942).
109. — Ariz. at —, 630 P.2d at 44.
110. *Id.* No legislative history was cited by Circle K in support of this argument. *Cf.* Hill v. Kusy, 153 Neb. 653, 657, 35 N.W.2d 594, 596 (1949) (court declared that the words "intent" and "effect" mean practically the same thing). The Nebraska Act was later declared unconstitutional on other grounds. *See* Blue Flame Gas Ass'n v. McCook Pub. Power Dist., 186 Neb. 735, 739, 186 N.W.2d 498, 500 (1971). It was ultimately repealed in 1972. 1972 Nebraska Laws, Legislative Bill No. 1410 § 3.
111. — Ariz. at —, 630 P.2d at 44.
112. ARIZ. REV. STAT. ANN. § 44-1466(B) (1967 & Supp. 1980-81).
113. *Id.* § 44-1464 (1967).
114. — Ariz. at —, 630 P.2d at 44.
115. *Id.*

constitutionality of statutory provisions providing for prima facie proof of intent are divided on the issue, with a number of cases holding that proof of intent cannot be presumed from a sale below cost.[116]

One of the ways a retailer can rebut the presumption of intent to injure a competitor is to make use of the defenses contained in the Act.[117] One of these defenses provides that a merchant is not in violation if he sells below cost in a good faith effort to meet competition.[118] Because of this defense, sales below cost statutes discriminate against only the most efficient distributor, with whom other merchants must compete by selling below cost in order to meet the low costs achieved by the efficient distributor's effort. His competitors, assuming they act in good faith, are permitted by the Act to meet his price, while he is left with the burden of keeping detailed records to be produced in court if one of his competitors cannot meet his price and accuses him of selling below cost. Consequently, the Act works a hardship on the consumer in that it encourages an efficient distributor to cut costs only to the twelve percent markup in order to avoid the threat of liability under the Act.

*Conclusion*

In *Baseline Liquors v. Circle K Corp.*, the Arizona Court of Appeals addressed most of the issues decided by other courts in cases concerning unfair sales acts. In the absence of an adequate record showing discrimination, the court refused to accept as controlling two cases from other jurisdictions that found discrimination against efficient retailers, and instead held that the Arizona statute is not unconstitutionally arbitrary in ignoring various economies achieved by efficient retailers. With regard to difficulties in proving a lesser cost, the court followed decisions from other jurisdictions and held that the statute merely requires a cost figure arrived at by good faith application of reasonable accounting methods, despite arguments that this is an unconstitutionally vague standard. The provision that costs must be bona fide costs was held not to be in conflict with other portions of the Act.

The court followed the holding of the Arizona Supreme Court in *Wal-*

116. *Compare* Oil Well Co. v. Alabama State Dep't of Revenue, 350 F. Supp. 416, 419 (M.D. Ala. 1971), *aff'd*, 468 F.2d 1398 (5th Cir. 1972) (because of difficulty in proving subjective intent, it may be presumed from the objective act of a sale below cost) *and* People v. Pay Less Drug, 25 Cal. 2d 108, 113-14, 153 P.2d 9, 12-13 (1944) (following the establishment of the presumption, defendant must then go forward with the evidence) *and* McIntire v. Borofsky, 95 N.H. 174, 177, 59 A.2d 471, 473 (1948) (holding that prima facie evidence provision is valid because there is a rational relationship between the fact to be proven and the fact presumed) *with* Mott's Super Markets, Inc. v. Frassinelli, 25 Conn. Supp. 160, 163, 199 A.2d 16, 17 (1964) (holding the presumption unconstitutional) *and* Wiley v. Sampson-Ripley Co., 151 Me. 400, 404, 120 A.2d 289, 291 (1956) (holding the presumption unconstitutional in both civil and criminal cases). *See also* Perkins v. King Scoopers, 122 Colo. 263, 270, 221 P.2d 343, 346 (1950) (holding that intent could not be conclusively presumed). The *Perkins* court also held that a defendant must be permitted to rebut the presumption using more than the limited defenses contained in the Act in order to show his real intent. *Id.*

117. *See* text & note 25 *supra*.

118. ARIZ. REV. STAT. ANN. § 44-1463(7) (1967).

*green* and found that the statute requires criminal intent. A provision which creates a presumption of intent to injure competitors does not unconstitutionally shift the burden of proof to the defendant. In addition, the court rejected a challenge that the statute violates the Sherman Act. The decision, as the court repeatedly noted, was made in the absence of a complete trial record. Consequently, several arguments were insufficiently developed. Perhaps a complete record before the court might dictate a different result, but with the presumption of constitutionality of legislative enactments, this seems unlikely.

*Denise M. Bainton*