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Federal Preemption: A Roadmap for the Application of Tribal Law in State Courts

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FEDERAL PREEMPTION: A ROADMAP FOR THE APPLICATION OF TRIBAL LAW IN STATE COURTS

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Abstract

This article contends that state courts are not necessarily free to apply state law when the courts are exercising concurrent adjudicative jurisdiction with tribal courts. Instead, Indian law principles of preemption direct state courts to apply tribal law in certain cases. A guiding principle emerges from the preemption analysis: if a tribe has legislative jurisdiction over the dispute, tribal law must ordinarily be applied. In these instances, a state's laws, including its choice-of-law rules, are preempted by federal common law because their application interferes with the federal government's and the tribes' interest in promoting tribal self-government, including the tribes' ability to create laws and have those laws applied to disputes over which they have jurisdiction. This article differs in a significant respect from other articles addressing the application of tribal law in state courts. Some commentators have argued that state courts should incorporate tribal law into their traditional choice-of-law analysis. While this argument is certainly viable, it fails to recognize the primacy of tribal law and tribal interests in certain instances. The forum bias inherent in state choice-of-law rules provides limited protection to tribes' sovereignty interest. To the extent that the states' choice-of-law rules can be bypassed, they should be.

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Introduction

Jurisdiction in the tribal context is far from a settled area of law.[1] But while courts and commentators have opined extensively on the respective roles of states and tribes in adjudicating disputes that arise in Indian Country, little attention has been paid to what law should be applied once the proper forum has been selected.[2] This lack of attention has led to a troubling intrusion on tribal sovereignty. Under the current jurisdictional landscape, state courts can and are exercising concurrent adjudicative jurisdiction over suits that could properly be heard in tribal court, and, often without discussion, applying state law to the dispute.[3] State courts improperly presume that the authority to issue an order (adjudicative jurisdiction) brings with it the concomitant authority to apply state law to the dispute (legislative jurisdiction).[4] As a result, tribal jurisdiction (both adjudicative and legislative) and, by extension, tribal sovereignty, is being usurped.

A case heard in New Mexico provides an apt example of this problem. In *Wacondo v. Concha*,[5] two plaintiffs, one a member of the Zia Pueblo and the other a member of the Jemez Pueblo, sued the defendant, a member of the Taos Pueblo, in state court for injuries associated with a shooting on the Jemez Pueblo.[6] The state court determined that it had subject matter jurisdiction over the dispute while also acknowledging that the Jemez tribal court had

1. *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 520 (1832) (describing the limits of state authority in Indian Country); United States v. Wheeler, 435 U.S. 313, 319 (1978) (recognizing the plenary authority of the federal government in Indian Country); Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 336-37 (2008) (defining the limits of tribal jurisdiction); David M. Blurton, *ANCSA Corporation Lands and the Dependent Indian Community Category of Indian Country*, 13 ALASKA L. REV. 211, 227-28 (1996) (describing the shifting policies).

2. Katherine C. Pearson, *Departing from the Routine: Application of Indian Tribal Law Under the Federal Tort Claims Act*, 32 ARIZ. ST. L.J. 695, 725 (2000).

3. *See infra* notes 164-89 and accompanying text.

4. *See infra* notes 164-89 and accompanying text.

5. 873 P.2d 276 (N.M. Ct. App. 1994).

6. *Id.* at 277.

jurisdiction as well.[7] Despite recognizing that both the tribal and state courts had adjudicative jurisdiction, the court gave only passing comment to the applicable law, stating that it does not find that "the provision of a state remedy, in this limited context, will in any way inhibit the right of reservation Indians to make their own laws and be governed by them."[8]

The state court's pronouncement is stunning in both its breadth and its brevity. Not only did the state court determine that it had concurrent adjudicative jurisdiction over a case between Indians that occurred in Indian territory, but it also determined that it had legislative jurisdiction as well, applying state law without discussion.[9] Under this approach, a litigant can avoid both the reach of the tribal court and the application of tribal law simply by filing in state court. But perhaps more importantly, the state court's assumption of jurisdiction severely intrudes on the involved tribe's sovereignty.

The state court's error is understandable given the confused jurisdictional landscape in Indian law and the Supreme Court's apparent mistrust of tribal law.[10] Within the tribal context, the Supreme Court has treated the tribes' legislative jurisdiction and the tribal courts' adjudicative jurisdiction as essentially coterminous.[11] Unfortunately, state courts have followed the Supreme Court's lead by folding the legislative jurisdiction question into the adjudicative jurisdiction question when considering the reach of their own authority.[12] Consequently, state courts have blindly applied state law to cases in which they share adjudicative jurisdiction with tribal courts, failing to consider whether they have the authority to do so. To add to the problem, the Court has cast tribal law as wholly foreign and obscure, implicitly encouraging tribal law to be relegated to tribal courts.[13]

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7. *Id.* at 280 n.3.

8. *Id.* at 280.

9. *Id.*

10. *See* Blurton, *supra* note 1, at 227-28; Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 336-37 (2008); *see also infra* notes 52-81 and accompanying text.

11. *See* Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997).

12. *See infra* notes 190-94 and accompanying text.

13. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210-11 (1978) (quoting *Ex parte* Crow Dog, 109 U.S. 556, 571 (1883) (asserting that non-Indians should not be subject to tribal laws because it would "impose upon them the restraints of an external and unknown code . . . which judges them by a standard made by others, and not for them . . . [and] tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception")).

This article contends that state courts exercising concurrent adjudicative jurisdiction – like the *Waconda* court – lack the authority to apply state law. Instead, Indian law principles of preemption direct state courts to apply tribal law in certain cases.[14] A guiding principle emerges: if a tribe has jurisdiction over the dispute, tribal law must ordinarily be applied. In these instances, a state's laws, including its choice-of-law rules, are preempted by federal common law because their application interferes with the federal government's and the tribes' interest in promoting the tribes' authority to create laws and to have those laws applied to disputes over which they have jurisdiction.[15]

Requiring state courts to apply tribal law is by no means a radical idea. Congress has already created a statutory framework that recognizes that a state court may have adjudicative jurisdiction but lack the authority to apply its own law to the underlying dispute.[16] The Supreme Court has also concluded that there are instances when a state court may be required to apply tribal law.[17] Further, the Supreme Court has recognized that while a state's jurisdiction may at times extend into Indian Country, it is subordinate to the federal government's and tribes' interest in promoting and maintaining tribal self-government.[18]

This contention is nonetheless likely to raise objections. Some commentators have argued that state courts should not apply tribal law.[19] The concerns expressed are based both on practical considerations and concern for the continued vitality of tribal courts and tribal law. To be sure, there are practical difficulties with the application of tribal law by state court judges. Tribal law is not necessarily codified or easily accessible, is often interpreted based on the traditions of the tribe, and tribal judges are sometimes allowed to consult tribal elders as to the laws' meaning – a concept foreign to state court judges.[20] There are historical concerns as well. Some commentators fear that a state court's application of tribal law will perpetuate the assimilation process

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14. *See infra* notes 210-41 and accompanying text.

15. *See infra* notes 210-41 and accompanying text.

16. *See, e.g.*, 28 U.S.C. §§ 1360(a), (c) (2006); 25 U.S.C. §§ 233, 1322(c) (2006); *see also* Nevada v. Hicks, 533 U.S. 353, 374 (2001).

17. *See* Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 890 (1986) (*Wold II*).

18. *See id.*

19. *See, e.g.*, John J. Harte, Comment, *Validity of State Court's Exercise of Concurrent Jurisdiction Over Civil Actions Arising in Indian Country: Application of the Indian Abstention Doctrine in State Court*, 21 AM. INDIAN L. REV. 63, 91 (1997); Christine Zuni, *Strengthening What Remains*, 7 KAN. J.L. & PUB. POL'Y 17, 27 (1997).

20. Harte, *supra* note 19, at 91-92.

and result in laws that reflect the values of the dominant culture and not necessarily those of the affected tribe.[21] Moreover, the state courts' authority to apply tribal law may fuel the argument that tribal courts are unnecessary.[22]

While these concerns are certainly valid, they ignore the reality of the current jurisdictional landscape. The state courts can and are exercising concurrent adjudicative jurisdiction over suits that touch on tribes' sovereignty interest.[23] While this practice allows a litigant to reject the jurisdiction of the tribal courts, it should not allow the litigant to likewise avoid the application of tribal law. If the state courts are free to ignore tribal law, the assertion of tribal sovereignty will be dependent upon a litigant's forum selection. Requiring state courts to apply tribal law will ensure that tribal authority is being recognized even when the tribes' courts are not accessed.

Moreover, many of the practical concerns noted above can be easily overcome. First, tribal laws are not necessarily foreign concepts shrouded in mystery. Many tribes rely on principles of Anglo-American jurisprudence familiar to state courts or have adopted state law to fill gaps in their tribal codes.[24] In other instances, the state courts could certify difficult questions to the tribal courts, allowing tribal judges to aid in the interpretation and application of the tribes' laws.[25] Tribal councils could also codify their customs and traditions to make them more accessible, and tribal courts could more consistently publish their judicial opinions to guide state court judges. And while it is certainly true that state court judges could "anglicize" tribal law, it may also be true that Indian customs and traditions could influence the development of state laws.

Part I sets the stage for the state courts' confusion regarding the application of tribal law in state courts. It first explores the adjudicative and legislative jurisdiction of the state courts outside the tribal context. It then discusses the

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21. *Cf.* Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 577, 579 (2000) (discussing the tribal courts' responsibility to weave cultural values into the law as a consequence of non-Indian court systems replacing tribal values).

22. *See* Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 281 (1997).

23. *See infra* notes 164-89 and accompanying text.

24. Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 315-16 (1998); Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 HOUS. L. REV. 701, 726 (2006).

25. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 653, 654 & n.446 (Nell Jessup Newton et al. eds., LexisNexis 2005) [hereinafter COHEN].

well-established analytical framework employed by state courts to address these two distinct jurisdictional questions.

Next, it examines these same jurisdictional questions in the tribal courts, revealing how the Supreme Court has wrought confusion by collapsing the adjudicative and legislative jurisdictional inquiries. It also highlights the link between tribal jurisdiction and tribal sovereignty to emphasize that when the former is ignored, the latter is usurped. Finally, this section challenges the two widely held beliefs that have influenced Indian jurisdictional law: first, that tribal law is based on foreign concepts that are difficult to ascertain, and second, that tribal courts only apply tribal law to disputes.

Part II describes the wide-ranging circumstances in which a state court and tribal court may share adjudicative jurisdiction. This section distinguishes between a state court's authority to assume jurisdiction by congressional fiat and a state court's assumption of jurisdiction based on a theory of inherent sovereignty, questioning the scope of the latter. It goes on to explore and critique the state courts' failure to consider the scope of their legislative jurisdiction in the absence of a congressional mandate and the effect that the application of state law has on the tribes' sovereignty interest.

Finally, Part III contends that when tribes have legislative jurisdiction, federal law directs state courts to apply tribal law unless Congress has mandated a different outcome. This section discusses the unique preemption analysis present in the Indian law context and argues that state law is preempted by federal common law. Under this rubric, state courts are not free to apply state law – or even their choice-of-law rules – when a tribe's jurisdiction, and thus its sovereignty interest, is implicated.

I. Jurisdiction of State and Tribal Courts

The state courts' failure to apply tribal law is perhaps unsurprising given the warped jurisdictional landscape created in the Indian law context. In theory, the jurisdictional inquiries are the same regardless of whether the parties file in state or tribal court.[26] A court must answer two distinct questions: does it have adjudicative jurisdiction and does it have legislative jurisdiction?[27] In the

26. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 815 (1985) (distinguishing between adjudicative and legislative jurisdiction in the state courts); Nevada v. Hicks, 533 U.S. 353, 373-74 (2001) ("And the second problem is that without *first* determining whether the tribe has regulatory jurisdiction, it is impossible to know which 'immunity defenses' the federal court is supposed to consider. The tribe's law on this subject need not be the same as the State's.").

27. *See Shutts*, 472 U.S at 815-16 (distinguishing between adjudicative and legislative jurisdiction in the state courts).

tribal court context, the Supreme Court has collapsed these two inquiries, setting the stage for the present confusion regarding the scope of the state courts' authority to apply state law to a dispute over which the tribal courts have jurisdiction.[28]

As a general matter, jurisdiction is the authority of a state, tribe, or other governmental body to exercise power over people and property.[29] Jurisdiction can be broken down into legislative jurisdiction (the government's general power to regulate conduct)[30] and adjudicative jurisdiction (the power of a government's court to decide a case or impose an order).[31] Adjudicative jurisdiction can be further categorized into personal jurisdiction (the power of the court to issue a binding judgment against a defendant)[32] and subject matter jurisdiction (the authority of a court to hear a particular issue).[33] These jurisdictional definitions remain constant regardless of whether a party has filed a case in state court, federal court, or tribal court. More importantly, courts have recognized these jurisdictional concepts as independent of one another, each requiring a distinct analysis.[34] Yet, as will be discussed more

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28. *See* Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997) (treating a tribe's legislative and adjudicative jurisdiction as coterminous).

29. Although the relationship among the federal, state, and tribal governments in the United States is not itself dictated by international law, the categories of jurisdiction described therein are analogous to the separation of powers and federalism principles inherent in the United States Constitution, and domestic law is generally construed to conform with international law. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 cmts. a-c (1987). Thus, while the categories of power are the same in the domestic context, the constraints on that power are imposed by constitutional, statutory, and decisional law, rather than international law.

30. *See* Willis L.M. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1587 (1978) (defining legislative jurisdiction as "the power of a state to apply its law to create or affect legal interests").

31. *See* KEVIN M. CLERMONT, CIVIL PROCEDURE: TERRITORIAL JURISDICTION AND VENUE 2 (1999).

32. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (citations omitted).

33. Steel Co. v. Citizens for a Better Am., 523 U.S. 83, 89 (1998).

34. Adjudicatory or judicial jurisdiction is defined as "the power of a state to try a particular action in its courts." McCluney v. Jos. Schlitz Brewing Co., 649 F.2d 578, 581 n.3 (8th Cir.) (emphasis omitted), *aff'd*, 454 U.S. 1071 (1981); *see also* Tallentire v. Offshore Logistics, Inc., 754 F.2d 1274, 1284 n.18 (5th Cir. 1985) (distinguishing legislative jurisdiction from judicial jurisdiction), *cert. granted*, 474 U.S. 816 (1985), *rev'd on other grounds*, 477 U.S. 207 (1986); *In re* "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 690, 707 (E.D.N.Y. 1984) (citing RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 cmt. a (1934) ("Each state has legislative jurisdiction [*i.e.*, power] to determine the legal effect of acts done or events caused within its territory."). Justice Scalia, dissenting in part in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), stressed that legislative jurisdiction "refers to 'the authority of a state to

fully below, these jurisdictional concepts have been blended in the tribal context, creating confusion and wreaking havoc on tribal sovereignty.

A. State Court Jurisdiction

Outside the tribal context, there are few impediments to a state's adjudicative jurisdiction. As to the scope of their adjudicative jurisdiction, state courts are understood to be courts of "general jurisdiction," limited only by state legislative prohibitions,[35] Congress's decision that certain issues belong exclusively in the federal or tribal courts,[36] and by the federal Constitution.[37] As a result of these broad parameters, multiple states may have the authority to hear and issue a binding judgment in the same suit.

A state's legislative jurisdiction outside the tribal context is expansive as well, constrained only by the federal Constitution.[38] While several constitutional provisions have possible relevance to jurisdictional questions, the Due Process Clause and the Full Faith and Credit Clause are the two most frequently cited. Under these provisions, a state must have a significant contact or aggregation of contacts "such that application of its law [is] neither arbitrary nor fundamentally unfair."[39] Essentially, a state must establish an interest in the underlying dispute before it can constitutionally apply its law to the case.[40] As with adjudicative jurisdiction, more than one state may have the authority to regulate the conduct at issue.[41]

Despite the similarities in scope, the Supreme Court has acknowledged that the adjudicative and legislative jurisdictional inquiries are distinct and that the

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make its law applicable to persons or activities,' and is quite a separate matter from 'jurisdiction to adjudicate.'" *Id.* at 813 (Scalia, J., dissenting in part).

35. *See* Howlett v. Rose, 496 U.S. 356, 373 (1990).

36. *See* Tafflin v. Levitt, 493 U.S. 455, 459 (1990) ("This deeply rooted presumption in favor of concurrent state court jurisdiction is, of course, rebutted if Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim.").

37. *See* Asahi Metal Indus. Co. v. Super. Ct. of Cal., 480 U.S. 102, 108 (1987) ("The Due Process Clause of the Fourteenth Amendment limits the power of a state court to exert personal jurisdiction over a nonresident defendant."); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

38. *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 722 (1988) (discussing the Full Faith and Credit Clause); Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981) (discussing the Due Process Clause).

39. *See Allstate*, 449 U.S. at 320.

40. *See id.*

41. *See Sun Oil*, 486 U.S. at 727 ("[B]ut since the legislative jurisdictions of the States overlap, it is frequently the case under the Full Faith and Credit Clause that a court can lawfully apply either the law of one State or the contrary law of another.").

presence of one does not guarantee the existence of the other. In *Phillips Petroleum Co. v. Shutts*, the Court held that while a Kansas state court could adjudicate the underlying dispute, it could not, consistent with the federal Constitution, apply Kansas law.[42] In *Shutts*, three plaintiffs, oil lessors, brought a nationwide class-action suit in Kansas state court against Phillips and other oil lessees for interest on royalty payments allegedly due.[43] While the Court found that Kansas could assert personal jurisdiction over the parties and subject matter jurisdiction over the dispute, it determined that Kansas lacked a constitutionally sufficient interest in all the claims to apply Kansas state law.[44] *Shutts* makes clear that adjudicative and legislative jurisdiction are not coterminous concepts. A state court may have the power to hear a case but lack the authority to apply its law to the dispute.

B. Tribal Court Jurisdiction

Tribal jurisdiction differs from state jurisdiction in four important ways. First, tribes have exclusive jurisdiction over certain disputes between members,[45] but almost no power over non-Indians.[46] Second, a tribe's jurisdiction is subject entirely to congressional control.[47] Third, a tribe's adjudicative and legislative jurisdiction are quite limited.[48] Fourth, a tribe's adjudicative jurisdiction is (currently) coextensive with its legislative jurisdiction; if a tribe cannot regulate a particular activity, the tribal courts are unable to hear a related claim.[49] The Supreme Court has also incorrectly assumed a fifth distinction – that tribal courts do not engage in a choice-of-law analysis and instead will apply tribal law to disputes over which the tribal

42. 472 U.S. 797, 814, 823 (1985) (holding that the court properly asserted personal jurisdiction over the parties and that Kansas could not apply Kansas law to all the transactions at issue in the suit).

43. *Id.* at 799.

44. *Id.* at 814, 823.

45. *Cf.* Fisher v. Dist. Ct. of Sixteenth Jud. Dist. of Mont., 424 U.S. 382, 386 (1976) (*per curiam*).

46. Montana v. United States, 450 U.S. 544, 565 (1981).

47. *Id.* at 545-46.

48. *See, e.g.*, Nevada v. Hicks, 533 U.S. 353, 367 (1997) (rejecting the premise that "tribal courts are courts of 'general jurisdiction'"); Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997); *Montana*, 450 U.S. at 564.

49. *See Hicks*, 533 U.S. at 357-58 (stating that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction").

courts have jurisdiction.[50] In fact, the limits on the tribal courts adjudicative jurisdiction appear to be driven in part by this conclusion.[51]

1. Adjudicative and Legislative Jurisdiction

While the source of tribal powers of self-governance stems from a combination of tribal and federal law, its practical reach is constrained by limits imposed by federal law.[52] Tribal sovereignty does not mimic the sovereignty retained by the states in our federal system of government. According to the Supreme Court, "the sovereignty that the Indian tribes retain is of a unique and limited character . . . and is subject to complete defeasance" by Congress.[53]

Tribal jurisdiction is understood only to encompass what is deemed "necessary to protect tribal self-government or to control internal relations."[54] Based on this understanding, the Supreme Court has recognized that the tribes' inherent sovereignty, and thus their jurisdiction, includes the authority to govern "their members and their territory."[55] As incident to this jurisdiction, the Court has held that tribes have the authority "to punish tribal offenders, . . . to determine tribal membership, regulate domestic relations among tribe members, and to prescribe rules for the inheritance of property."[56] Tribes also have the authority to exclude others from tribal property and to regulate activities on land owned and controlled by the tribe.[57]

As a general rule, however, tribal jurisdiction does not include the power to regulate or adjudicate the conduct of nonmembers of the tribe.[58] In *Montana v. United States*, the Court recognized two exceptions to this general proposition.[59] The first exception recognizes that the tribe may regulate "the

50. *See* Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 337 (2008) (citations omitted); *Hicks*, 533 U.S. at 384 (Souter, J., concurring).

51. The Court is reluctant to subject non-Indians to laws with which they are unfamiliar, thus it limits a tribal court's adjudicative jurisdiction to protect non-Indians from tribal law. *See Plains Commerce Bank*, 554 U.S. at 337 (citations omitted); *Hicks*, 533 U.S. at 384-85 (Souter, J., concurring).

52. *See* Talton v. Mayes, 163 U.S. 376, 380 (1896).

53. United States v. Wheeler, 435 U.S. 313, 323 (1978).

54. Montana v. United States, 450 U.S. 544, 564 (1981).

55. United States v. Mazurie, 419 U.S. 544, 557 (1975) (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832)).

56. *Wheeler*, 435 U.S. at 322 & n.18 (citations omitted).

57. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 425-26 (1989).

58. *Montana*, 450 U.S. at 565.

59. *Id.* at 565-66.

activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[60] The second exception allows a tribe to regulate "the conduct of non-Indians on fee lands within [the] reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[61] The Court has narrowly construed these two exceptions, requiring a close nexus between the disputed conduct and the preservation of the involved tribe's sovereignty interest.[62]

The Supreme Court's recent decision in *Plains Commerce Bank v. Long Family Land & Cattle Co.* provides a potent example of the limitations of the tribes' jurisdictional reach. In *Plains Commerce Bank*, Ronnie and Lila Long, enrolled members of the Cheyenne River Sioux Indian Tribe, complained that Plains Commerce Bank had "discriminated against them by offering the land to non-Indians on terms more favorable than those the bank offered to them."[63] The Longs owned a cattle company located on over two thousand acres of fee land in Indian Country and were struggling to meet their debt obligations to the Bank.[64] They attempted to restructure the debt, deeding their land to the Bank for the cancellation of debt, additional operating loans, and a two-year lease agreement with an option to buy.[65] Unfortunately, the Longs were unable to exercise the option to purchase the property and the Bank sold the land to several nonmembers, but on terms significantly better than what they had offered to the Longs.[66]

The Longs filed suit in tribal court "seeking an injunction to prevent their eviction from the property and to reverse the sale of the land. They asserted a variety of claims, including . . . discrimination."[67] The tribal courts, the federal district court, and the Eighth Circuit Court of Appeals all agreed that the Bank was subject to tribal jurisdiction because it had entered a consensual commercial relationship with the Longs – tribal members who own and operate the Long Company.[68]

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60. *Id.* at 565.
61. *Id.* at 566.
62. *See* Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 334-36 (2008) (citations omitted).
63. *Id.* at 320.
64. *Id.* at 320-21.
65. *Id.* at 321.
66. *Id.* at 322.
67. *Id.*
68. *Id.* at 323.

The Supreme Court reversed, holding that the tribe lacked jurisdiction to hear the Long's discrimination case because the tribe lacked legislative jurisdiction over the Bank's sale of its fee land.[69] The Court did not find that the Bank's consensual relationship with tribal members was sufficient to subject it to tribal regulation. The Court acknowledged that tribal laws "may be fairly imposed on nonmembers" if they consented either explicitly or through their conduct, but went on to note that "[e]ven then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations."[70] Because the Court framed the dispute as one about the Bank's sale of fee-owned land properly in its possession rather than the Bank's course of dealing with the Longs, it did not find that the sale implicated tribal sovereignty and, consequently, tribal jurisdiction was not triggered.[71]

The Court went on to address whether the Bank's conduct implicated the second *Montana* exception by threatening or having "some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[72] The Court described this exception as one where the non-Indian conduct "must 'imperil the subsistence' of the tribal community" or where the assertion of tribal authority "must be necessary to avert catastrophic consequences."[73] The Court then found that while the sale of formerly Indian-owned land might be "disappointing" to the tribe, it was not "catastrophic" to its existence.[74] As a result, the *Montana* exceptions were not met and the tribe was without authority to regulate the Bank's conduct.

While the *Montana* exceptions were created in the context of a case defining the limits of a tribe's legislative jurisdiction, the Court, in *Strate v. A-1 Contractors*, declared that the exceptions apply with equal force to a tribal court's adjudicative jurisdiction.[75] Under this admonition, a tribal court's adjudicative jurisdiction will not exist in the absence of a tribe's legislative

69. *Id.* at 340-41 (citations omitted). The Longs other claims were not before the Court and the Court declined to speculate whether the tribal court could assert jurisdiction over the other claims. *Id.* at 339 & n.2.

70. *Id.* at 337 (citation omitted).

71. *See id.* at 337-38 (citations omitted).

72. Montana v. United States, 450 U.S. 544, 566 (1981).

73. *Plains Commerce Bank*, 554 U.S. at 341 (citation omitted).

74. *Id.*

75. *See* 520 U.S. 438, 453 (1997).

jurisdiction.[76] The Court, however, left open the question whether the tribe's legislative jurisdiction may be broader than its adjudicative jurisdiction.[77]

Consequently, under the Court's jurisprudence, a tribe can assert legislative and adjudicative jurisdiction over nonmembers only when doing so is necessary to preserve the tribe's sovereignty over its members and its property or when assertion of its authority is critical to its very existence.[78] It is only in these narrow circumstances that a tribal court can properly apply tribal law to the dispute.[79] If the tribe's sovereignty is not at issue, the tribe "has no interest" in regulating the conduct in dispute.[80] If the tribe has no legislative jurisdiction, its courts cannot adjudicate the underlying dispute.[81] Under this paradigm, a tribe's jurisdiction – both legislative and adjudicative – is tied to its ability to self-govern, as it is only when its sovereignty is implicated that its jurisdiction is triggered.

2. Tribal Law

Without discussion, both the Supreme Court and scholars have assumed that tribal law is applied to cases heard in tribal court.[82] Indeed, it is this assumption that appears to underlie, at least in part, the limitations on tribal courts' jurisdiction.[83] The Court accepts, without supporting authority, that tribal courts will automatically apply tribal law to disputes involving nonmembers and that the content of tribal law is dramatically different from the laws the litigants would be subject to in state or federal courts.[84] Because nonmembers cannot participate in tribal government and influence the laws

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76. *Id.*

77. *See id.* The Court did not declare that a tribe's legislative and adjudicative jurisdiction were coextensive. Instead, the Court stated that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." This phrasing leaves open the possibility that a tribe's legislative jurisdiction may in fact be broader than its adjudicative authority.

78. *See Plains Commerce Bank*, 554 U.S. at 334-37 (citations omitted).

79. *See id.*

80. *Id.* at 335 ("While tribes generally have no interest in regulating the conduct of nonmembers, then, they may regulate nonmember behavior that implicates tribal governance and internal relations.").

81. *Strate*, 450 U.S. at 453.

82. *See Plains Commerce Bank*, 554 U.S. at 337 (citations omitted) (assuming without discussion that tribal law will be applied if the case is heard in tribal court); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1987); COHEN, *supra* note 25, at 652.

83. *See Plains Commerce Bank*, 554 U.S. at 337 (citations omitted); Nevada v. Hicks, 533 U.S. 353, 385 (2001) (Souter, J., concurring).

84. *See Plains Commerce Bank*, 554 U.S. 337 (citations omitted); *Hicks*, 533 U.S. at 384-85 (Souter, J., concurring).

and regulations that apply in tribal territory, the Court has severely restricted the tribes' jurisdictional reach over nonmembers.[85]

The Court has never entertained the possibility of untangling legislative jurisdiction from adjudicative jurisdiction within the tribal context as it has in the state courts. Instead, the Court wedded the two concepts, allowing its assumptions regarding the application of tribal law, as well as its beliefs about the laws' content, to dictate the existence of the tribes' legislative and adjudicative jurisdiction. The Court's one-dimensional approach fails to recognize the competency of tribal courts to engage in a choice-of-law analysis and similarly fails to explore the contours of tribal law. It also sets the stage for state courts' unwillingness to apply tribal law to disputes in which the state and tribal courts have concurrent jurisdiction.[86] The state courts' resistance to applying tribal law is especially troubling given the Supreme Court's emphasis on the link between tribal sovereignty and tribal jurisdiction. By assuming concurrent adjudicative jurisdiction and ignoring tribal law, the state courts are infringing upon tribal sovereignty.

The Court's decision in *Nevada v. Hicks* provides an example of the assumptions made regarding application of tribal law to an underlying dispute. There, the tribe member brought an action in tribal court alleging that state officials acted improperly when they entered his property to execute a search warrant.[87] He brought "causes of action [that] included trespass to land and chattels, abuse of process," and a § 1983 claim for "violation of [his] civil rights."[88]

Although the issue had originally been presented as one regarding the tribal court's subject matter jurisdiction, the Court limited its discussion to whether the Fallon Paiute-Shoshone Tribes had legislative jurisdiction over the case, noting that if legislative jurisdiction was lacking, adjudicative jurisdiction was as well.[89] Ultimately, the Court held that the assertion of tribal authority was "not essential to tribal self-government or internal relations" and thus the tribe lacked both legislative and adjudicative jurisdiction.[90] The Court's conclusion was based in part on the assumption that the tribal court would apply tribal law

85. *Plains Commerce Bank*, 554 U.S. at 337 (citations omitted).

86. *See infra* notes 190-209 and accompanying text; *see also LaPlante*, 480 U.S. at 16 ("Adjudication of such matters by any nontribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law.").

87. *Hicks*, 533 U.S. at 356.

88. *Id.* at 356-57; *see also* 42 U.S.C. § 1983 (2006).

89. *Hicks*, 533 U.S. at 357-58.

90. *Id.* at 364.

to the dispute.[91] Indeed, the majority identified the relevant issue in dispute as "whether the Tribe's law will apply, not to their own members, but to a narrow category of outsiders."[92]

Justice Souter, joined by Justices Kennedy and Thomas in concurrence, gave voice to the underlying concerns about applying tribal law to nonmembers, noting that tribal courts "differ from other American courts . . . in the substantive law they apply."[93]

> Although some modern tribal courts "mirror American courts" and "are guided by written codes, rules, procedures, and guidelines," tribal law is still frequently unwritten, being based instead "on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices," and is often "handed down orally or by example from one generation to another." The resulting law applicable in tribal courts is a complex "mix of tribal codes and federal, state, and traditional law, which would be unusually difficult for an outsider to sort out."[94]

The *Plains Commerce Bank* Court picked up the concern expressed by the concurrence in *Hicks* when it noted that a tribe's jurisdiction required the consent of the nonmember because nonmembers "have no say in the laws and regulations that govern tribal territory."[95]

The Court's assumptions are not grounded in reality. Like their state court counterparts, tribal judges do engage in a choice-of-law analysis.[96] Tribal courts understand that the jurisdictional issue is distinct from the choice-of-law question.[97] Many tribal codes have explicit choice-of-law rules that contain a hierarchy of laws that must either be applied to a dispute or that offer a list of appropriate persuasive authority in the absence of explicit tribal law.[98] But

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91. *Id.* at 371.

92. *Id.*

93. *Id.* at 384 (Souter, J., concurring).

94. *Id.* at 384-85 (Souter, J., concurring) (citations omitted).

95. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 337 (2008).

96. Many tribal codes provide a choice-of-law hierarchy. *See, e.g.*, CONFEDERATED SALISH AND KOOTENAI TRIBES LAWS CODIFIED § 4-1-104 (2003); SISSETON-WAHPETON TRIBAL CODE § 33-01-1 (1996), *available at* http://www.narf.org/nill/Codes/sissetonwahpeton%20code/swcivilmats.htm.

97. *See* Sells v. Espil, No. A-CV-15-89, ¶ 42 (Navajo Aug. 14, 1990) (VersusLaw) [subscription only] ("The determination that the Navajo court has jurisdiction [] has no bearing on choice of law matters.").

98. *See, e.g.*, CONFEDERATED SALISH AND KOOTENAI TRIBES LAWS CODIFIED § 4-1-104; SISSETON-WAHPETON TRIBAL CODE § 33-01-1.

even in instances where the application of tribal law is mandated by an explicit tribal code provision, tribal courts will still apply state law when appropriate.[99] For example, tribal courts will abide by contractual provisions requiring application of foreign law.[100]

Moreover, tribal law is simply not the foreign concept Justice Souter suggests. The Court fails to even acknowledge that the federal government mandated and approved tribal constitution and code provisions.[101] As a result, many tribal codes mimic the statutory text of state codes.[102] Even tribal courts recognize the influence of state and federal laws on their own laws.[103] As noted by one tribal court, the tribe's "statutes are largely the product of Anglo-European legal thinking and drafting, and they are frequently based upon legislative models found in state and federal legislation. That being the case, state cases and similar statutes may be used in aid of interpretation of a Navajo statute."[104]

Many tribes explicitly adopt state laws to address particular issues and to fill gaps in tribal codes.[105] A quick survey of tribal court opinions reveals that tribal judges cite to state and federal court opinions as persuasive authority in many instances, including disputes exclusively between members.[106] In one

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99. *See* Cedar Unified Sch. Dist. v. Navajo Nation Labor Comm'n, No. SC-CV-53-06, ¶ 25-26 (Navajo Nov. 21, 2007) (VersusLaw) [subscription only] (stating that "Navajo law recognizes the importance of contracts, and this Court applies the principle that words are sacred and never frivolous" when discussing a choice of law provision); Hopi Indian Credit Assoc. v. Thomas, 1 Am. Tribal Law 353, 355 (Hopi Ct. App. 1998) (recognizing the general rule that courts will look to the foreign law selected by the parties).

100. *See Thomas*, 1 Am. Tribal Law at 355 (recognizing the general rule that courts will look to the foreign law selected by the parties).

101. 25 U.S.C. § 476(b) (2006).

102. *See* Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 104-05 (1993); Suzianne D. Painter-Thorne, *One Step Forward, Two Giant Steps Back: How the "Existing Indian Family" Exception (Re)imposes Anglo American Legal Values on American Indian Tribes to the Detriment of Cultural Autonomy*, 33 AM. INDIAN L. REV. 329, 353 (2008-2009).

103. *See Thomas*, 1 Am. Tribal Law at 357 (relying on FED. R. CIV. P. 44.1 for direction on what evidence is relevant to proving a Hopi custom or tradition).

104. Johnson v. Dixon, 4 Navajo Rptr. 108 (Navajo 1983).

105. *See, e.g.*, Colville Confederated Tribes v. Wiley, 22 Indian L. Rep. 6059 (Colville Ct. App. 1995) (discussing the tribal council's decision to adopt Washington state DUI law); *In re* Estate of Komaquaptewa, 4 Am. Tribal Law 432, 437 (Hopi Ct. App. 2002) ("In the absence of Hopi probate code this Court refers to Arizona law.").

106. *See, e.g.*, Colville Confederated Tribes v. Sam, 21 Indian L. Rep. 6040, 6042 (Colville Ct. App. 1994) (looking to federal law for guidance on sentencing); Healy v. Mashantucket Pequot Gaming Enter., No. MPTC-EA-97-132, ¶ 36 (Mashantucket Pequot Tribal Ct. Apr. 8,

case, the Colville Confederated Tribes' Court of Appeals explicitly refused to apply a Washington state statute because the tribal council's choice-of-law code did not allow for it.[107] Although the tribal court discounted reference to state statutory law, it did rely on state and federal common law to shape the substantive and procedural aspects of the matter before the court.[108]

Additionally, scholars have discovered that tribal courts apply Anglo-American concepts, if not state or federal law explicitly, when adjudicating disputes involving nonmembers – the very group the Supreme Court believes needs protection from tribal law. In *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, Dean Newton observed that tribal courts commonly weave Western legal principles into their own customs and norms.[109] Likewise, in his article *Toward a Theory of Intertribal and Intratribal Common Law*, Professor Matthew Fletcher persuasively argues that tribal courts often apply substantive common law that arises out of an Anglo-American legal construct to nonmembers.[110] He observes that "it is unusual to find a tribal court decision involving nonmembers that would depart in a radical manner from the way a state or federal court would decide the case."[111]

That is not to say that tribal law does not reflect tribal values and customs.[112] Tribal courts are careful to assert the tribes' values when necessary and appropriate. In *Naize v. Naize*,[113] the Navajo Supreme Court declined to apply New Mexico state law, instead relying on Navajo traditions to determine an appropriate spousal-maintenance award.[114] Although state law allowed for spousal maintenance to be paid over time, the supreme court reversed a lower court holding that required the husband to supply coal and firewood throughout his former wife's life. The court explained,

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1999) (VersusLaw) [subscription only] (relying on state and federal law definitions of due process).

107. Seymour v. Colville Confederated Tribes, Case No. AP94-004 ¶¶ 36-37 (Colville Ct. App. 1995) (VersusLaw) [subscription only].

108. *Id.* ¶ 37.

109. Newton, *supra* note 24, at 315-16.

110. Fletcher, *supra* note 24, at 726.

111. *Id.*

112. *See, e.g.*, Chitimacha Hous. Auth. v. Martin, No. CV-93-0006, ¶¶ 61, 64 (Chitimacha Ct. App. 1994) (VersusLaw) [subscription only] (citing CHITIMACHA COMPREHENSIVE CODES OF JUSTICE tit. 4, § 501(a)(3)); *In re* Estate of Komaquaptewa, 4 Am. Tribal Law 432, 440 (Hopi Ct. App. 2002).

113. Naize v. Naize, No. SC-CV-16-96 (Navajo May 28, 1997) (VersusLaw) [subscription only].

114. *Id.* ¶¶ 32-33.

> There is a principle of finality in Navajo customary divorce, and the principle of restoring harmony in the community by quickly and finally breaking ties so the community can soon return to normal is one which is common-sense. To permit a former spouse to keep such ties that she or he may be said to be lurking behind the hogan waiting to take a portion of the corn harvest is unthinkable, since each spouse returns to his or her own family after the divorce. Each former spouse should return home after making the break and disturb others no more.[115]

But these values are not impossible to ascertain. Like the Navajo court quoted above, tribal judges will define in their opinions the underlying tribal values that are influencing the interpretation and application of the law.[116] Additionally, some tribal codes will allow for "evidence" of the tribes' traditions and values to be obtained through access to identified tribal elders or other witnesses.[117] Tribal judges will seek to discover relevant customs and traditions through many of the same mechanisms as their state court counterparts. For example, in *Hopi Indian Credit Association v. Thomas*, the Hopi tribal court was required to apply any relevant Hopi custom or

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115. *Id.* ¶ 33; *see also* Navajo Transp. Servs. v. Schroeder, No. SC-CV-44-06 (Navajo Apr. 30, 2007) (VersusLaw) [subscription only]. The Navajo Supreme Court admonished the lower court for blindly applying the personal jurisdiction requirements of the federal courts. The court pointed out that applying the federal standard ignored the clear public policy of the Navajo Nation regarding the sale of liquor and its effects within reservation borders and failed to understand that the Fourteenth Amendment's Due Process Clause does not apply to the tribes. The court instructed the lower court to determine if the long arm statute "is consistent with Navajo concepts of fairness embedded in the Due Process Clause of the Navajo Bill of Rights." The court went on to note that "the Navajo concept of due process is unique, in that it applies concepts of fairness consistent with Navajo values." *Id.* ¶¶ 21, 23.

116. *Naize*, ¶¶ 32-33 (VersusLaw) [subscription only]; *see also* Bennett v. Navajo Bd. of Election Supervisors, No. A-CV-26-90, ¶ 51 (Navajo Dec. 12, 1990) (VersusLaw) [subscription only] (describing the Navajo tradition of political liberty); Halona v. MacDonald, 1 Navajo Rptr. 189, 195 (Navajo 1978).

117. *See, e.g.*, *Martin*, ¶ 64 (VersusLaw) [subscription only] (citing CHITIMACHA COMPREHENSIVE CODES OF JUSTICE tit. 4 § 501(a)(3)) (stating that "the Court may request the testimony, as witnesses of the Court, of persons familiar with such custom and usage"); Hoffman v. Colville Confederated Tribes, 24 Indian L. Rep. 6163, 6172 n.14 (Colville Ct. App. 1997) (citing COLVILLE TRIBAL CODE § 3.4.04) (describing the mechanism for hearing of evidence of customs and traditions); Dawes v. Yazzie (*In re* Estate of Belone), No. A-CV-01-85, ¶¶ 24, 31 (Navajo July 10, 1987) (VersusLaw) [subscription only] (citing NAVAJO TRIBAL CODE § 204(b)); Smith v. James, 2 Am. Tribal Law 319, 322-23 (Hopi Ct. App. 1999).

tradition.[118] The court acknowledged, however, that these concepts are unwritten, making them "more difficult to define or apply."[119] To address this difficulty, the court required the party asserting the application of a tribal custom to "plead and prove its existence and substance."[120] The court adopted the procedures set out in Rule 44.1 of the Federal Rules of Civil Procedure governing the application of foreign law to guide the party's presentation – a procedure not at all unfamiliar to state courts.[121]

As evidenced by the preceding discussion, tribal courts do not blindly apply tribal law to every dispute before them. Like their state court counterparts, tribal courts are guided by choice-of-law rules. Moreover, in many instances, tribal courts apply foreign law directly or allow Anglo-American legal principles to influence their interpretation of tribal law. When uncodified tribal values, customs, or traditions are necessary to the analysis, tribal courts, like state and federal courts, have a mechanism for ascertaining them. Thus, contrary to Justice Souter's concurrence in *Hicks*, tribal laws are neither undecipherable nor wholly foreign to non-Indians, nonmembers, or state court judges.

The Supreme Court's approach to tribes' jurisdiction and its undisguised mistrust of tribal law appears to have influenced how state courts approach jurisdiction when tribal interests are implicated. In the tribal context, state courts have presumed that the existence of adjudicative jurisdiction brings with it legislative jurisdiction and, consequently, the application of state law.[122] State courts have failed to maintain the distinction between adjudicative and legislative jurisdiction that exists outside the tribal context.[123] This approach has been aided by the Supreme Court's treatment of tribal law as not only foreign but of questionable legitimacy.[124] The Court's stated assumptions

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118. 1 Am. Tribal Law 353, 356 (Hopi Ct. App. 1998).

119. *Id.*

120. *Id.* at 357.

121. *Id.*; *see also* FED. R. CIV. P. 44.1 ("A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.").

122. *See infra* notes 190-209 and accompanying text.

123. *See infra* notes 190-209 and accompanying text.

124. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210-11 (1978) (quoting *Ex parte* Crow Dog, 109 U.S. 556, 571 (1883) (asserting that non-Indians should not be subject to tribal laws because it would "impose upon them the restraints of an external and unknown code . . . which judges them by a standard made by others, and not for them . . . [and] tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a

about tribal law are more than just misguided – they are insidious. They serve to undermine and segregate tribal law as "other" and, as a result, provide state courts with implicit permission to ignore it. As the next section reveals, this misguided approach has dangerous consequences when state and tribal courts' jurisdiction overlaps.

II. Concurrent Jurisdiction

Tribal and state court jurisdiction are not mutually exclusive. State courts may have concurrent civil jurisdiction with tribal courts in two contexts: the first is through congressional mandate and the second is through recognition of the overlapping sovereignty of the tribes and the states.[125] In the first instance, Congress accounted for the distinction between adjudicative and legislative jurisdiction, and even sometimes directly addressed choice-of-law questions, both anticipating and, in some instances, mandating the application of tribal law in state courts.[126]

In the absence of congressional direction, however, when state courts have assumed concurrent jurisdiction with tribal courts, they have failed to even question the scope of their legislative jurisdiction.[127] State courts assume that the grant of adjudicative jurisdiction carries with it legislative jurisdiction, ignoring Supreme Court jurisprudence regarding the reach of states' authority into Indian Country.[128] Indian law demands that before applying state substantive law or even state choice-of-law rules, state courts must first determine whether they have such authority, and must subsequently determine whether those laws or rules are preempted by federal Indian law.[129] The preemption question is more than academic – it goes directly to issues of tribal sovereignty.

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different race, according to the law of a social state of which they have an imperfect conception")).

125. *See, e.g.*, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2006), 25 U.S.C. §§ 1321-1326 (2006), 28 U.S.C. § 1360 (2006)) (commonly referred to as Public Law 280); *Wold II*, 476 U.S. 877, 884-85 (1986) (recognizing that North Dakota could assume jurisdiction independent of congressional enactment).

126. *See, e.g.*, 28 U.S.C. §§ 1360(a), (c).

127. *See infra* notes 190-209 and accompanying text.

128. *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332-33 (1983) (citations omitted).

129. *See generally* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980) (discussing preemption as an independent barrier to state jurisdiction).

A. Statutory Grant of Adjudicative and Legislative Jurisdiction

Congress granted state courts concurrent jurisdiction over disputes originating in Indian Country through a variety of statutes, appropriately distinguishing adjudicative jurisdiction from legislative jurisdiction and legislative jurisdiction from choice-of-law inquiries.[130] In each of these statutes, Congress granted state courts adjudicative jurisdiction and, in certain circumstances, legislative jurisdiction, but it did not automatically assume that the state courts could or would apply forum law.[131] Indeed, in some instances Congress mandated the application of tribal law in state courts.[132] Congress did not relegate tribal laws to tribal courts, but instead included them as part of the delivery of justice in the state courts.

Public Law 280, the most prominent of these statutes, provides a potent example of a congressional authorization.[133] It empowers some states to

130. *See, e.g.*, 25 U.S.C. § 233 (2006); 28 U.S.C. §§ 1360(a), (c).

131. *See, e.g.*, 25 U.S.C. § 233; 28 U.S.C. §§ 1360(a), (c).

132. *See, e.g.*, 25 U.S.C. § 233; 28 U.S.C. § 1360(c).

133. While Public Law 280 is among the most comprehensive statutes, it does not provide the only basis for concurrent jurisdiction. Some states have also assumed jurisdiction pursuant to other federal laws or treaty provisions. In separate statutes, Congress granted jurisdiction to New York, Kansas, and North Dakota. *E.g.*, 25 U.S.C. § 232 (2006) (New York); 18 U.S.C. § 3243 (2006) (Kansas); Act of May 31, 1946, ch. 279, 60 Stat. 229 (North Dakota). Congress also granted concurrent civil jurisdiction to Connecticut, Rhode Island, and Maine. *E.g.*, 25 U.S.C. § 233 (Connecticut); 25 U.S.C. § 1708(a) (2006) (Rhode Island); 25 U.S.C. § 1725(a) (2006) (Maine). The Indian Child Welfare Act provides limited jurisdiction to state courts over the adoption and custody of Indian children. *See* 25 U.S.C. §§ 1901-1963 (2006). While the Act provides a placement-priorities list for state courts to follow, the tribes are authorized to override that list and the state courts are directed to apply the tribal law. *Id.* § 1915(c). The Indian Gaming Regulatory Act (IGRA) requires states and tribes to enter compacts to establish the scope and conduct of Indian gaming. 25 U.S.C. §§ 2701-2721 (2006). The law allows the two sovereigns to allocate jurisdiction between the tribe and the state, and to create a choice-of-law rule for disputes not controlled by an IGRA provision. *Id.* § 2710(d)(3)(C); *see also* Diepenbrock v. Merkel, 97 P.3d 1063, 1068 (Kan. Ct. App. 2004) (recognizing that the gaming compact provided the tribe with exclusive jurisdiction over certain disputes). These compacts provide another avenue for state courts to assume jurisdiction over disputes in Indian Country and, in some instances, for the state courts to apply tribal law. *See* Cossey v. Cherokee Nation Enters., 212 P.3d 447, 464-65 (Okla. 2009). Part 8(C) of the compact recognizes that a violation of tribal law could be a basis for suit, implicitly acknowledging that state courts may be required to apply tribal law. Unfortunately, state and tribal governments have not always been careful about identifying a choice-of-law rule. *See* Griffith v. Choctaw Casino of Pocola, 230 P.3d 488, 493 n.17 (Okla. 2009). The choice-of-law issue in IGRA compacts is more far-reaching than simply answering the question of what law should be applied. In instances where the tribe has agreed to the application of state law, some state courts have found that such

assume jurisdiction over criminal and civil cases arising in Indian Country.[134] The law withdrew federal criminal jurisdiction from reservations in six states and authorized those states to assume both criminal and civil jurisdiction over activities occurring in Indian Country.[135] For the remaining states, Public Law 280 established a mechanism to assume the same type of jurisdiction by enacting affirmative legislation accepting authority over reservation Indians.[136]

To date, there are sixteen states that have assumed civil jurisdiction over some or all civil cases arising in Indian Country pursuant to the law.[137] Congress was silent, however, as to the tribes' ability to continue to hear civil cases, and subsequent case law established that tribal courts' jurisdiction remained.[138] As a result, in these states, state and tribal courts share jurisdiction over civil disputes arising in Indian Country, creating a potential conflict-of-law scenario.[139]

Although Public Law 280 granted adjudicative jurisdiction, Congress did not authorize states to automatically apply their own law to the disputes.[140] Public Law 280 contains two potential limitations to the application of state law to a dispute: the absence of state legislative jurisdiction and the existence

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agreement equals a waiver of the tribe's sovereign immunity. *See* Bradley v. Crow Tribe of Indians, 67 P.3d 306, 308, 311-12 (Mont. 2003) (holding that the tribe had waived its sovereign immunity and could be sued in state court by agreeing to state law and to state court jurisdiction in a standard construction-contract provision on choice of law and venue).

134. 18 U.S.C. § 1162(a) (2006); 28 U.S.C. § 1360(a).

135. *See* 18 U.S.C. § 1162(a); 28 U.S.C. § 1360(a).

136. *See* 25 U.S.C. §§ 1321-1322, 1324 (2006). In 1968, Congress made assumptions of jurisdiction subject to Indian consent – something that did not exist in the original statute. Act of Apr. 11, 1968, sec. 401-02, Pub. L. Nos. 90-284, 82 Stat. 78. Only one state (Utah) has assumed such jurisdiction, but as of yet, no tribe in Utah has consented. UTAH CODE ANN. §§ 9-9-201 to -213 (2009).

137. The original and amended statute granted jurisdiction to California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except Warm Springs Reservation), Wisconsin (except Menominee Reservation), and eventually Alaska. 18 U.S.C. § 1162(a); 28 U.S.C. § 1360(a). Ten states then assumed some type of jurisdiction: "Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington." Samuel E. Ennis, Comment, *Reaffirming Indian Tribal Court Criminal Jurisdiction Over Non-Indians: An Argument for a Statutory Abrogation of* Oliphant, 57 UCLA L. REV. 553, 562 n.48 (2009).

138. *See* COHEN, *supra* note 25, at 560-61 (citations omitted) (describing the "nearly unanimous view" that Public Law 280 did not disturb the tribal jurisdiction); *see also* Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1658, 1671 (1998).

139. *See* COHEN, *supra* note 25, at 563-64 (citations omitted).

140. *See* 18 U.S.C. § 1162(a) (providing for adjudicative jurisdiction over criminal conduct); 28 U.S.C. § 1360(a) (providing for adjudicative jurisdiction over civil disputes).

of a non-conflicting tribal law. In § 1360(a), Congress provided a general grant of legislative jurisdiction when it declared that "those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State."[141] The statute has been narrowly construed to grant states the authority to apply state civil laws to "private civil litigation involving reservation Indians in state court," but not to grant general civil regulatory authority.[142] It has been further refined by other federal statutes, such as the Indian Child Welfare Act, that place additional limitations on state regulatory authority.[143]

After the state court determines that it has legislative jurisdiction, a separate question arises regarding what law applies in a civil dispute between private parties. While Congress authorized the application of tribal law in § 1360(a), it addressed separately whether state courts could apply state law. In § 1360(c), Congress required state courts to give full force and effect to tribal ordinances or customs not in conflict with applicable state law when deciding civil disputes.[144] This latter section allows for the application of tribal law in state courts, even though the earlier section allowed for state regulatory jurisdiction to extend into Indian Country.[145]

Congress adhered to several guiding principles in Public Law 280. First, Congress affirmed that, absent congressional authorization, state courts were not free to apply state law to disputes arising in Indian Country.[146] Second, Congress acknowledged that a state's power to hear a dispute (adjudicative jurisdiction) is distinct from its authority to apply the forum's law to the dispute (legislative jurisdiction).[147] Third, Congress recognized that the power to apply state law did not answer the choice-of-law question. As a result,

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141. 28 U.S.C. § 1360(a).

142. Bryan v. Itasca Cnty., 426 U.S. 373, 383-85 & n.10 (1976).

143. *See, e.g.*, 25 U.S.C. §§ 1911(a)-(b), 1915(c) (2006).

144. 25 U.S.C. § 1322(c) (2006); 28 U.S.C. § 1360(c).

145. *See* Estate of Cross, 891 P.2d 26, 29 (Wash. 1995); Gary C. Randall & Katti Telstad, *Community Property Rules or American Indian Tribal Law – Which Prevails?*, 31 IDAHO L. REV. 1071, 1076-77 (1995).

146. In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the Supreme Court made clear that absent congressional authorization, the states lacked authority over the tribes and their land. *Id.* at 595 ("It has been shown that the treaties and laws referred to come within the due exercise of the constitutional powers of the federal government; that they remain in full force, and consequently must be considered as the supreme laws of the land.").

147. *See supra* notes 30-44 and accompanying text (discussing the separate recognition of adjudicative and legislative jurisdiction as well as choice of law).

Congress included an explicit choice-of-law provision where it anticipated that state court judges would ascertain and, when appropriate, utilize the law of the affected tribe.[148] Unfortunately, as discussed below, state courts have not adhered to the same principles when assuming jurisdiction independent of statutory authority.

B. Extra-Statutory Assumption of Adjudicative and Legislative Jurisdiction

1. Adjudicative Jurisdiction

The distinction between adjudicative jurisdiction and legislative jurisdiction disappears when state courts assume concurrent adjudicative jurisdiction in the absence of a specific congressional enactment. Without analysis, state courts have blindly applied state law to disputes arising in Indian Country, never questioning whether they have the authority to do so. But the assumption of legislative jurisdiction and the subsequent application of state law contradict well-established Indian law principles and Supreme Court precedent. State courts ignore the analytical framework, used both in and outside Indian law, that divides the jurisdictional question into two distinct categories: adjudicative and legislative. This analytical deficit and its concomitant effect on tribal sovereignty is exacerbated by the state courts' expansive view of their adjudicative authority.

In *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*,[149] the Supreme Court reaffirmed that states may have adjudicative jurisdiction over certain matters involving tribes and their members independent of congressional enactments.[150] The Court acknowledged that states had assumed concurrent adjudicative jurisdiction over suits by tribal members against non-Indians arising in Indian Country and jurisdiction over suits between Indians arising outside of Indian Country.[151] The Court also reaffirmed, however, that the assertion of state power must be balanced with the federal government's and tribes' interest in promoting tribal self-government.[152]

Conscious of the importance of protecting tribal sovereignty, the *Wold II* Court questioned North Dakota's attempt to conflate adjudicative and

148. *See* 25 U.S.C. § 1322(c); 28 U.S.C. § 1360(c).

149. 467 U.S. 138 (1984) (*Wold I*).

150. *Id.* at 144-45 (describing North Dakota's "expansive view of the scope of state-court jurisdiction over Indians in Indian country" before the enactment of Public Law 280).

151. *Id.* at 148.

152. *Id.* at 148-49; *see also Wold II*, 476 U.S. 877, 890 (1986).

legislative jurisdiction.[153] In *Wold II*, North Dakota had conditioned the tribe's access to the state courts on the tribe's acquiescence to the application of state civil law in all state court civil actions.[154] The Supreme Court rejected this provision, declaring it antithetical to the federal government's and tribe's interest in Indian sovereignty.[155]

> This provision plainly provides that state law will generally control, however, and will merely be supplemented by nonconflicting Indian ordinances or customs, even in cases that arise on the reservation, that involve only Indians, and that concern subjects that are within the jurisdiction of the tribal court. This result simply cannot be reconciled with Congress' jealous regard for Indian self-governance.[156]

The Court concluded that North Dakota could not condition access to state courts on the tribe's waiver of application of its laws.[157] Implicit in the Court's holding is the understanding that state courts may, in some instances, have adjudicative jurisdiction but lack the authority to apply state law to the underlying dispute.

The *Wold II* Court's pronouncement regarding the scope of a state's legislative jurisdiction is hardly groundbreaking. One hundred and fifty years earlier, the Court in *Worcester v. Georgia* held that Georgia did not have the authority to impose its laws within the Cherokee tribal territory in the absence of congressional consent or "the assent of the Cherokees themselves."[158] The Supreme Court's statement was guided by two axioms, both relevant to the current discussion: first, that the Constitution delegated authority over Indian matters to the federal government and not to the states, and second, that tribes have a significant interest in self-government free from state interference.[159]

The Court affirmed these basic principles in *Williams v. Lee*,[160] a case involving a state court's adjudicative jurisdiction over a dispute between a non-Indian and a tribal member that occurred on the reservation.[161] Pursuant to *Williams*, state courts are not free to assume adjudicative jurisdiction absent

153. *Wold II*, 476 U.S. at 890.
154. *Id.* at 889-90.
155. *Id.* at 890.
156. *Id.*
157. *Id.*
158. 31 U.S. (6 Pet.) 515, 561 (1832).
159. *Id.* at 561-62.
160. 358 U.S. 217 (1959).
161. *Id.* at 217-18.

congressional or tribal consent if "the state action infringe[s] on the right of reservation Indians to make their own laws and be ruled by them."[162] While the Court's opinion focuses on the scope of the Arizona state courts' adjudicative jurisdiction, the Court did, in a limited fashion, address the scope of a state's legislative jurisdiction. The Court declared that "the States have no power to regulate the affairs of Indians on a reservation."[163]

State courts have varied in their adherence to these principles. Citing *Wold I* and *Williams*, state courts have assumed adjudicative jurisdiction concurrently with tribal courts in a variety of circumstances, some of which are of questionable validity.[164] For example, although it is generally understood that states lack the authority to adjudicate disputes between Indians that occur in Indian Country, not all state courts have followed this rule. In *Wildcatt v. Smith*,[165] a North Carolina state court asserted jurisdiction over a domestic-relations matter involving two members of the Eastern Band of the Cherokee Indians, both of whom resided on the reservation.[166] Although North Carolina had not assumed jurisdiction over such suits pursuant to Public Law 280, the court still entered a default judgment for child support against the father.[167] The court reasoned that assumption of subject matter jurisdiction did not unduly infringe on the tribe's sovereignty because, at the time the case was decided, the tribe lacked a court system where the dispute could be heard.[168] Underlying this conclusion, of course, was the court's assumption that a Western-style court system was the only appropriate mechanism for resolving the dispute.

State courts have also assumed jurisdiction when the conduct occurred on the reservation between tribal members and nonmember Indians, even though it is far from settled whether state courts have such authority.[169] The case described in the introduction provides an example of this problem. As noted earlier, in *Wacondo*, two Indians from one pueblo sued an Indian from a

162. *Id.* at 220.

163. *Id.*

164. *See* Wacondo v. Concha, 873 P.2d 276, 278 (N.M. Ct. App. 1994).

165. 316 S.E.2d 870 (N.C. Ct. App. 1984).

166. *Id.* at 872, 875.

167. *Id.* at 872, 875, 877-78.

168. *Id.* at 877.

169. After the Supreme Court's decision in *United States v. Lara*, 541 U.S. 193 (2004), it is unclear whether the appropriate jurisdictional rules in Indian Country are guided by the Indian/non-Indian distinction or whether the distinction is between members and nonmembers. *Compare* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 160-61 (1980), *with* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211-12 (1978).

different pueblo in New Mexico state court for injuries that occurred in Indian Country.[170] Citing *Wold I*, the New Mexico state court found that it had subject matter jurisdiction over the dispute, although it was careful to note that it was not suggesting that the Jemez tribal court lacked jurisdiction, but only that the state court was another appropriate forum.[171]

State courts easily find concurrent jurisdiction when the dispute involves a non-Indian or when it includes some off-reservation conduct.[172] To determine if the assumption of jurisdiction is appropriate in these instances, state courts apply the *Williams* "infringement test," asking whether the assumption of jurisdiction would unduly infringe on the tribe's ability to make its own laws and be governed by them.[173] The courts vary in their application of the *Williams* test; some courts properly focus on how state action would affect the tribe,[174] while others seem to focus instead on the states' interests.[175]

For example, in *Maxa v. Yakima Petroleum, Inc.*, the state court was asked to determine whether it had jurisdiction to hear an employment-contract dispute between a tribal enterprise owned and operated on the reservation that also had off-reservation contacts and a non-Indian employee.[176] After

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170. Wacondo v. Concha, 873 P.2d 276, 277 (N.M. Ct. App. 1994).

171. *Id.* at 278, 280 n.3.

172. *See, e.g.*, State Sec., Inc. v. Anderson, 506 P.2d 786, 788 (N.M. 1973) (noting that "[p]owers not reserved to Indians for their exclusive jurisdiction [include] . . . jurisdiction to try suits by Indians against outsiders in state courts"); Langdeau v. Langdeau, 751 N.W.2d 722, 724-30 (S.D. 2008) (acknowledging concurrent state court jurisdiction over divorce proceedings between two enrolled members of the same tribe when one party lives off-reservation and also when one party to the divorce is non-Indian); Rolette Cnty. Soc. Serv. Bd. v. B.E., 697 N.W.2d 333, 335 (N.D. 2005).

173. Garcia v. Gutierrez, 217 P.3d 591, 603 (N.M. 2009); Harris v. Young, 473 N.W.2d 141, 144 (S.D. 1991).

174. Rodriguez v. Wong, 82 P.3d 263, 266-67 (Wash. Ct. App. 2004). At least one state court has adopted a hybrid test that uses the *Montana* exceptions to determine whether the assumption of state court jurisdiction would infringe on tribal sovereignty. In *Rodriguez*, a Washington state court found that it lacked subject matter jurisdiction over an employment dispute involving a non-Indian employee of the Muckleshoot Gaming Commission, a government subdivision of the Muckleshoot Indian Tribe. *Id.* at 265, 267-68. The court reasoned that because the tribal court had jurisdiction over the matter under both exceptions identified in *Montana* and had "exercised its authority to regulate its relationship with its gaming employees, the state courts lacked jurisdiction." *Id.* at 266-67. Under this test, the state courts could only exercise jurisdiction when the tribal court lacked it, essentially removing the possibility of concurrent adjudicative jurisdiction.

175. *See, e.g.*, *Rolette*, 697 N.W.2d at 337; Maxa v. Yakima Petroleum, Inc., 924 P.2d 372, 374-75 (Wash. Ct. App. 1996) (citations omitted).

176. *Maxa*, 924 P.2d at 372-73.

identifying the "infringement test" as the proper vehicle for analyzing the issue, the court focused on the state's interest in protecting parties to contracts.[177] The state court opined that the assumption of jurisdiction over such contracts is not only in the state's interest, but is in the best of interests of both the non-Indian and the tribe.[178]

> When, as here, a dispute does not clearly arise either on or off a reservation, the essential question is whether state assumption of jurisdiction would interfere with reservation self-government. The State has an interest in protecting parties to contracts from arbitrariness in enforcement.[179]

The court's reasoning appears to rest on the premise that tribal courts would be unable or unwilling to protect the parties' contract rights. Presumably, the "protection" offered by the state courts would require not only access to state courts but also application of state laws.

In some instances, state courts simply manufacture jurisdiction. The Oklahoma state courts have found the mere existence of a gaming compact sufficient to confer concurrent jurisdiction, even when the gaming contract itself does not allow for it.[180] In *Griffith v. Choctaw Casino of Pocola*, the Oklahoma Supreme Court was asked to determine whether, under the tribal-gaming compact, the state courts could adjudicate a tort claim between a non-Indian patron and the casino and tribe.[181] Article 9 of the gaming compact stated that "[t]his compact shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction."[182] Despite this language and the lack of clarity regarding the existence of state adjudicative jurisdiction before the compact was created,[183] the court concluded that because the compact had allowed patrons to sue for injuries, the tribe had implicitly consented to suit in state, federal or tribal court.[184] The court reasoned that "[n]othing in the compact provides that patron tort claims are to be adjudicated only in tribal

177. *Id.* at 374.

178. *Id.* at 375.

179. *Id.* at 374 (citations omitted).

180. Griffith v. Choctaw Casino of Pocola, 230 P.3d 488, 493-96 (Okla. 2009); Cossey v. Cherokee Nation Enters., 212 P.3d 447, 453 (Okla. 2009).

181. *Griffith*, 230 P.3d at 489.

182. *Id.* at 496.

183. *Cossey*, 212 P.3d at 453 (acknowledging that Oklahoma had not assumed jurisdiction under Public Law 280).

184. *Griffith*, 230 P.3d at 496.

court. Had that been the intent of the tribes and the state, the simple words 'in tribal court only' could have been included in the compact."[185]

The state courts' willingness to assume concurrent adjudicative jurisdiction is troubling on several fronts. First, given that tribal jurisdiction is so closely tied to the tribes' sovereignty interest, it is hard to imagine that the state courts' assumption of *concurrent* jurisdiction does not, by definition, infringe on the tribes' sovereignty interests.[186] While the Supreme Court has required parties to exhaust their tribal remedies before accessing the federal courts,[187] state courts have not uniformly adopted a similar approach.[188] Second, the effect on tribal sovereignty interests is exacerbated by the state courts' failure to consider and apply tribal law where necessary.[189] Currently, when state courts assume concurrent jurisdiction, they summarily strip the tribes of both the ability to hear the case and to have their law applied to the underlying dispute.

2. Legislative Jurisdiction

As the preceding discussion illustrates, state courts assume concurrent adjudicative jurisdiction in a significant number of circumstances. In these instances, both the tribal and state courts have authority to enter binding judgments against the parties. Because a tribe's adjudicative and legislative jurisdiction are essentially coextensive, tribal law would also be applicable to the underlying dispute.[190] But the converse is not necessarily true; state courts cannot assume that if they have adjudicative jurisdiction, they automatically have legislative jurisdiction.[191] Yet state courts routinely ignore the difference between legislative and adjudicative jurisdiction in the tribal context.[192] The conflation of adjudicative and legislative jurisdiction creates an anomaly in

185. *Id.*

186. *See* Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 340-41 (2008).

187. *E.g.*, Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987); Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985).

188. *See, e.g.*, Meyer & Assocs. v. Coushatta Tribe of La., 992 So.2d 446, 450 (La. 2008); Astorga v. Wing, 118 P.3d 1103, 1106 (Ariz. Ct. App. 2005); Michael Minnis & Assocs. v. Kaw Nation, 90 P.3d 1009, 1014 (Okla. Civ. App. 2003).

189. *See infra* notes 226-31 and accompanying text.

190. Strate v. A-1 Contractors, 520 U.S. 436, 453 (1997).

191. *See infra* notes 226-41 and accompanying text.

192. State Farm Mut. Auto. Ins. Co. v. Roach, 945 So.2d 1160, 1169 (Fla. 2006) (deciding to apply Indiana law in a case properly in Florida court); Black v. Powers, 628 S.E.2d 546, 560 (Va. Ct. App. 2006) (applying the law of the Virgin Islands).

federal Indian law: state courts assume *greater* regulatory power in the absence of congressional mandate than what Congress has provided in the various statutes regulating the relationships between the states and the tribes.[193] While Congress placed limits on the application of state law to disputes arising in Indian Country,[194] state courts acting independently of congressional enactment perceive no similar limitations. In fact, a review of state court cases finds no decision in which the state court assumed concurrent adjudicative jurisdiction but also found that it lacked the authority to apply its laws to the underlying dispute.

While state courts uniformly fail to explore limitations to their legislative jurisdiction, some state courts have at least acknowledged the potential application of tribal law.[195] In *Tempest Recovery Services, Inc. v. Belone*, a creditor repossessed a car located on the reservation and owned by a member of the Navajo tribe.[196] The creditor then brought a breach-of-contract claim in New Mexico state court and the defendant brought a counterclaim for breach of the peace under Navajo law.[197] In contrast to New Mexico law, which allowed a creditor to engage in self-help, Navajo law required a creditor to first obtain permission, either from the debtor or the courts, before repossessing property – something Tempest had failed to do.[198] While the New Mexico Supreme Court concluded that the state court could properly assert jurisdiction over both the plaintiff's claim and the defendant's counterclaim, it remanded to the lower court to consider the choice-of-law question.[199]

Likewise, in *Jim v. CIT Financial Services Corp.*, the New Mexico Supreme Court held that the law governing a contract dispute between a member of Navajo Nation and a nonmember "must be resolved in the same fashion as any other involving contract."[200] The court directed the trial court to examine the

193. *See supra* notes 130-48 and accompanying text (discussing the regulatory and choice-of-law limitations in federal statutes).

194. *See supra* notes 130-48 and accompanying text (discussing the regulatory and choice-of-law limitations in federal statutes).

195. *See, e.g.*, Tempest Recovery Servs., Inc. v. Belone, 74 P.3d 67, 71 (N.M. 2003); Jim v. CIT Fin. Servs. Corp., 553 P.2d 751, 753 (N.M. 1975); Warm Springs Forest Prods. Indus. v. Emp. Benefits Ins. Co., 716 P.2d 740, 741-42 (Or. 1986) (considering tribal law, but concluding that based on all the facts, the parties intended Oregon law to apply); Lewis v. Sac & Fox Tribe of Okla. Hous. Auth., 896 P.2d 503, 512-14 (Okla. 1994) (rejecting an argument that tribal law should apply to resolve the dispute); *see also* Pearson, *supra* note 2, at 717 n.124.

196. *Belone*, 74 P.3d at 68.

197. *Id.*

198. *Id.* at 68-69.

199. *Id.* at 71-72.

200. *Jim*, 533 P.2d at 753.

provisions of the Uniform Commercial Code applicable to secured transactions and choice of law to determine whether Navajo or state law applied to the suit.[201] Significantly, in stating that "[a] forum state need not subordinate its own statutory policy to a conflicting public act of another state,"[202] the court implicitly acknowledged that the public-policy exception may be a basis for rejecting the application of Navajo law.

Some commentators have advocated this approach, encouraging state courts to incorporate tribal law into their choice-of-law analysis. To be sure, a state court's use of its choice-of-law rules at least recognizes the legitimacy of tribal law. The results, however, are far from predictable, and the inherent forum bias of the rules make it unlikely that tribal law will be applied.[203] As the court's statement in *Jim* illustrates, under traditional choice-of-law rules, state courts are still free to apply the forum law, another state's law, or even reject the application of tribal law based on the state's public-policy exception.[204] While a state court's passing reference to tribal law is perhaps better than the state court ignoring tribal law altogether, the traditional choice-of-law analysis gives insufficient weight to the tribal and federal interest at stake in a dispute over which tribal courts have jurisdiction.[205]

But the state court's application of its choice-of-law rules is more problematic than forum bias. State courts assume that there *is* a choice – that is, they assume that state law can be applied to the underlying dispute. State courts have conflated adjudicative jurisdiction with legislative jurisdiction by assuming that the authority to adjudicate the dispute brings with it the absolute

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201. *Id.*

202. *Id.* at 752.

203. Choice of law rules contain immense flexibility and are often forum-biased. *See* Jackie Gardina, *The Perfect Storm: Bankruptcy, Choice of Law, and Same-Sex Marriage*, 86 B.U. L. REV. 881, 898-99 (2006) ("There is no uniform choice of law method currently used by state courts. Instead, courts employ a patchwork of theories developed over the last century to arrive at their decisions. . . . [T]he flexibility inherent in all the methods allow[s] a court to choose a law it deem[s] most appropriate in a given situation even if that mean[s] a court could (and perhaps would) always choose the forum state's law.") (citing LEA BRILMAYER, CONFLICT OF LAWS 77 (2d ed. 1995)). Pursuant to each of these theories, state courts were free to ignore foreign law. BRILMAYER, *supra*, at 77-79. Indeed, the Supreme Court has explicitly stated that there is no constitutional compulsion for "a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate." Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 501 (1939); *see also* Baker v. Gen. Motors Corp., 522 U.S. 222, 233 (1998). Thus, in most instances, a state court's decision to apply foreign law is wholly discretionary.

204. *See Jim*, 533 P.2d at 752.

205. *See* Gardina, *supra* note 203, at 898-900.

authority to apply state law. Congress recognized the distinction in its grant of jurisdiction to state courts over disputes arising in Indian Country in statutes like Public Law 280.[206] The Supreme Court has acknowledged the distinction both inside and outside the tribal context.[207] In *Nevada v. Hicks*, the Court explicitly noted the necessity of first determining legislative jurisdiction.[208] And, outside the tribal context, state courts have properly separated adjudicative jurisdiction from legislative jurisdiction, recognizing that they are distinct analyses.[209] Yet, oddly, when tribal matters are involved, and in the absence of congressional direction – when the state's authority is arguably at its lowest ebb – state courts fail to make this distinction.

III. Preemption: A Framework for Applying Tribal Law in State Courts

When state courts acquire concurrent adjudicative jurisdiction independent of a federal statute, such as through common law or by agreement, this article contends that Supreme Court jurisprudence directs state courts to apply the whole law of the tribe, including tribal choice-of-law provisions. A guiding principle emerges from this proposition: if a tribe has legislative jurisdiction over the dispute, tribal law must ordinarily be applied. In these instances, a state's laws, including its choice-of-law rules, are preempted by federal common law. In short, states lack legislative jurisdiction. Unfortunately, state

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206. *See* 28 U.S.C. § 1360(a) (2006).

207. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 815 (1985) (distinguishing between adjudicative and legislative jurisdiction in the state courts); Nevada v. Hicks, 533 U.S. 353, 373-74 (2001).

208. *Hicks*, 533 U.S. at 373-74 ("And the second problem is that without *first* determining whether the tribe has regulatory jurisdiction, it is impossible to know which 'immunity defenses' the federal court is supposed to consider. The tribe's law on this subject need not be the same as the State's; indeed, the tribe may decide (as did the common law until relatively recently) that there is no immunity defense whatever without a warrant."); *see also* Strate v. A-1 Contractors, 520 U.S. 436 (1997), where the Court clearly separated the concepts of legislative and adjudicative jurisdiction, stating that they "express no view on *the governing law or proper forum* when an accident occurs on a tribal road within a reservation." *Id.* at 442 (emphasis supplied).

209. State *ex rel.* Miller v. Baxter Chrysler Plymouth, 456 N.W.2d 371, 378 (Iowa 1990) ("We note in this regard, however, that subject matter jurisdiction should not be confused with legislative jurisdiction, *i.e.*, whether a state may constitutionally apply the law of the forum in adjudicating the validity of transactions which took place in whole or in part in another jurisdiction, or whether a state's choice of law rules permit application of its laws to a transaction which occurred in whole or in part outside of its borders.") (citation omitted); *see also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985).

courts have simply ignored the preemption analysis when addressing their legislative jurisdiction in private litigation affecting tribes and tribal members.

In *White Mountain Apache Tribe v. Bracker*, the Supreme Court recognized that there are "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members."[210] The first is whether the employment of state law "unlawfully infringe[s] 'on the right of reservation Indians to make their own laws and be ruled by them.'"[211] The second, and the one relevant to the discussion, is when the assertion of such authority is preempted by federal law.[212] State courts appear only to address the first obstacle when considering the scope of their jurisdiction in the civil litigation context, ignoring the possibility that the application of state law to a dispute within the tribes' jurisdiction may be preempted by federal law.

The preemption analysis in the Indian law context is slightly different than the one traditionally employed by the courts.[213] Ordinarily, state law is presumed to apply unless it is established that Congress clearly intended to preempt state law.[214] The opposite presumption is at work in the Indian law context; state jurisdiction in Indian Country is presumed lacking.[215] To overcome the presumption, the state's regulatory interests[216] must be balanced against the federal and tribal interests in promoting tribal sovereignty.[217]

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210. 448 U.S. 136, 142 (1980); *see also Wold II*, 476 U.S. 877, 884 (1986) ("Our cases reveal a 'trend . . . away from the idea of inherent Indian sovereignty as a[n independent] bar to state jurisdiction and toward reliance on federal pre-emption.'") (alteration in original).

211. *Id.* (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)).

212. *Id.*

213. *Bracker*, 448 U.S. at 143 ("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.").

214. *See id.*

215. Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 124-25 (1993).

216. *See Wold II*, 476 U.S. 877, 884 (1986); Nevada v. Hicks, 533 U.S. 353, 362 (2001) ("That is not to say that States may exert the same degree of regulatory authority within a reservation as they do without. To the contrary, . . . [there must be] 'an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those the State, on the other.'").

217. *See Wold II*, 476 U.S. at 884 ("Yet considerations of tribal sovereignty, and the federal interests in promoting Indian self-governance and autonomy, if not of themselves sufficient to 'pre-empt' state regulation, nevertheless form an important backdrop against which the applicable treaties and federal statutes must be read."); *see also* Proclamation No. 7500, 66 Fed. Reg. 57,641 (Nov. 12, 2001) ("We will protect and honor tribal sovereignty and help to stimulate economic development in reservation communities."); Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000) ("[We] recognize[] the right of Indian tribes to self-government and support[] tribal sovereignty and self-determination."); *Bracker*, 448 U.S. at 143

Under this analysis, the Court has recognized that "[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable."[218] While the scope of the state's legislative authority is arguably stronger when non-Indians are involved, the Court nonetheless recognized that there are circumstances in which state law would be preempted.[219]

The Court has preempted a number of state laws that affected non-Indians in Indian Country after determining that the application of state law would impair federal goals articulated in legislation, regulations, and policies.[220] The Court has been especially sensitive to supporting the federal goal of promoting tribal sovereignty.[221] The Court recognized that granting the states concurrent regulatory jurisdiction over hunting and fishing "would empower [states] wholly to supplant tribal regulations" in direct contradiction to the federal interests in promoting tribal self-government.[222]

The Court has similarly relied on the preemption analysis to preclude the application of state law in private civil litigation.[223] As previously discussed, the Court in *Wold II* rejected North Dakota's attempt to premise the tribe's and tribal members' access to state courts on the application of state law to all disputes.[224] Citing *New Mexico v. Mescalero Apache Tribe*, the Court used the preemption analysis to void the North Dakota jurisdictional scheme, reasoning that, in certain instances, the states' interest in applying state law must give way to the tribes' and federal government's interest in promoting tribal self-government.[225]

(there is "a firm federal policy of promoting tribal self-sufficiency and economic development"); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 155 (1980) (noting that federal statutes evidence "varying degrees [of] congressional concern with fostering tribal self-government and economic development"); Queets Band of Indians v. Washington, 765 F.2d 1399, 1407 n.6 (9th Cir. 1985) ("Here, the tribal interests are an outgrowth of the federal policy toward self-determination, self-sufficiency and self-government.").

218. *Bracker*, 448 U.S. at 144.

219. *Id.* at 144-45.

220. *Id.* at 150-51; *see also* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 338-39 (1983).

221. *See Mescalero Apache Tribe*, 462 U.S. at 338-39.

222. *Id.* at 338, 341.

223. *Wold II*, 476 U.S 877, 888 (1986) (finding a North Dakota statute that required application of state law to all disputes involving the tribe or tribal members preempted because it was "unduly burdensome on the federal and tribal interests").

224. *Id.* at 889-90.

225. *Id.* at 890.

Using the preemption analysis, when states claim concurrent adjudicative jurisdiction with tribal courts, there is a strong case to be made that state courts must apply tribal law in a number of circumstances. First, because a tribe's jurisdiction is directly linked to its sovereignty, the tribe's interest in application of its laws is significant when it has jurisdiction over the dispute. As discussed earlier, the Supreme Court has directly linked tribal sovereignty to the scope of the tribes' jurisdiction.[226] Further, the Court recognized that the tribes' jurisdiction and sovereignty interest authorize the regulation of non-Indians in some circumstances.[227] Under its Indian law jurisprudence, the Supreme Court has essentially limited tribal legislative and adjudicative jurisdiction to areas that are necessary to tribal self-government and the control of internal relations.[228] Thus, if the tribes have legislative jurisdiction, the subject is one that is necessarily connected to the tribes' sovereignty interest. It follows that a state interferes with tribal self-government when it attempts to apply state law in an area in which the tribes have legislative jurisdiction.

Second, the federal government's interest in the application of tribal law is also significant. There are a myriad of federal statutes evidencing the federal government's support for tribal sovereignty, including the Indian Reorganization Act, which specifically encouraged the creation of tribal laws.[229] Congress perceived the codification of tribal laws to be an important step to promoting tribal sovereignty, enhancing tribal legitimacy, and enabling tribal self-government.[230] Even in Public Law 280, which expanded state adjudicative jurisdiction in civil cases, Congress mandated the application of tribal law in the state courts in certain instances.[231] A state court's blind application of state law would undermine these express federal goals.

The Court's decision in *Nevada v. Hicks* supports the proposition that if the tribe has legislative jurisdiction, tribal law should be applied to the dispute.[232] The Court in *Hicks* addressed whether a tribal court had jurisdiction over a claim against a state official for conduct on tribal lands.[233] The Supreme Court reversed the tribal and lower federal courts' holdings that the tribal court had jurisdiction, instead holding that the tribe lacked legislative jurisdiction to

226. *See* Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 334 (2008); Montana v. United States, 450 U.S. 544, 565-66 (1981).

227. *Montana*, 450 U.S. at 565-66.

228. *Plains Commerce Bank*, 554 U.S. at 332, 334-35 (citations omitted).

229. 25 U.S.C. §§ 461-479 (2006).

230. *Id.*

231. 28 U.S.C. § 1360(c) (2006).

232. *See* Nevada v. Hicks, 533 U.S. 353, 362 (2001).

233. *Id.* at 356.

regulate state officers' execution of process related to an off-reservation violation of state law because such authority was "not essential to tribal self-government."[234] Because the tribe lacked legislative jurisdiction (the ability to apply its law to the state officials' conduct), it also lacked adjudicatory jurisdiction to hear the suit.[235]

But *Hicks* could have originally brought suit in state court, thus raising the question whether state or tribal law should apply to the dispute.[236] If the tribe had legislative jurisdiction, it would only be because matters of tribal self-government and internal relations were implicated.[237] While the *Hicks* Court recognized that states may exert some regulatory authority within the reservation borders,[238] the Court also acknowledged that the states' authority must yield to the interests of the tribes and federal government in tribal self-government.[239] In *Hicks*, the state's assertion of authority did not impair tribal sovereignty because the tribe lacked legislative jurisdiction.[240] It would follow that if tribal legislative jurisdiction existed, tribal law would apply to the dispute unless the state could establish an overwhelming interest that eclipsed both federal government and tribal interests.

In the private litigation context, any state interest in the dispute is addressed through the assumption of adjudicative jurisdiction. To provide the state court with both adjudicative jurisdiction and the authority to apply its own law would completely eclipse the recognized tribal sovereignty interests. It is also important to emphasize that state interests are implicitly recognized in the content of tribal law. As previously noted, tribal courts have incorporated wide swaths of Anglo-American law into both tribal codes and tribal common law.

A clear rule mandating the application of tribal law would also avoid the consequences of forum shopping. Currently, a litigant can avoid the application of an unattractive tribal law simply by filing in state court. While the availability of concurrent jurisdiction allows a litigant to avoid the reach of the tribal court, it should not allow the litigant to simultaneously avoid the application of tribal law. If state courts were free to ignore tribal law, the

234. *Id.* at 364.

235. *See id.*

236. *See Wold I*, 467 U.S. 138, 148 (1984) ("This Court, however, repeatedly has approved the exercise of jurisdiction by state courts over claims by Indians against non-Indians, even when those claims arose in Indian country.").

237. *Hicks*, 533 U.S. at 359.

238. *Id.* at 361.

239. *Id.* at 362.

240. *Id.* at 364.

assertion of tribal sovereignty would be dependent upon a litigant's forum selection. Requiring state courts to apply tribal law will ensure that tribal authority is being recognized even when the tribes' courts are not accessed.

Finally, allowing state courts to apply state law without limitation when the courts are assuming jurisdiction in the absence of congressional enactment simply defies well-established Indian law principles. Generally, Congress regulates state authority over Indians and Indian Country. Yet, state courts assuming jurisdiction independent of federal statute are adopting a broader view of the scope of their authority than state courts that have authority through statute. States subject to the confines of Public Law 280 must test the application of state law against the mandates of § 1360(c).[241] State courts assuming jurisdiction outside of such enactments are not questioning the application of state law at all. Such hubris ignores not just the preeminence of federal authority in this area, but also fails to acknowledge tribal sovereignty.

Conclusion

To be sure, the analysis provided above assumes that there is tribal law that is readily ascertainable. It encourages tribes to codify existing law and to publish judicial decisions clarifying tribal norms and traditions. While some may view this as advancing the goal of assimilation, it can also be viewed as the advancement of Indian interests in the preservation of their laws, customs, and traditions. State courts are assuming jurisdiction over a wide range of disputes that could also be heard in the tribal courts. As tribal economic development continues and tribes engage in relationships with non-Indians and entities, the state courts will have the authority to assume jurisdiction in an increasing number of cases. If state law is applied in each of these cases, tribal laws will be relegated to disputes in which tribes have exclusive jurisdiction or in which the litigants choose to file in tribal court. It is unlikely that Congress or the Court will limit significantly states' adjudicative authority, but states' legislative authority can be curbed through existing Indian law doctrine. The preemption analysis outlined above provides a mechanism for promoting tribal sovereignty and tribal self-government despite the growing jurisdictional reach of the state courts.

241. 28 U.S.C. § 1360(c) (2006) ("Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.").