TREATING TRIBES DIFFERENTLY: CIVIL JURISDICTION INSIDE AND OUTSIDE INDIAN COUNTRY

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"HAPPY FAMILIES ARE ALL ALIKE."
LEO TOLSTOY, ANNA KARENINA 1 (1870)

Indian tribes are not all alike. Tribes range in size from tremendous[1] to tiny.[2] Some gaming tribes have per capita incomes that rival the richest towns in the United States[3] while other tribes are some of the poorest communities in the country.[4] Some tribes have adopted tribal court systems that largely mimic those present in the states surrounding them, while others have courts with little or no resemblance to Anglo-American justice systems.[5]

Despite these differences, all tribal courts[6] have (and lack) the same jurisdiction. The Supreme Court has treated all tribal courts as different from state

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[1] The Navajo Nation is the geographically largest reservation in the United States and is the largest by population. *See* Utah Division of Indian Affairs, *available at* http://community.utah.gov/indian_affairs/utah_tribes_today/dine.html (last visited Aug. 29, 2005). The Navajo Nation covers three states with a total land area about the size of West Virginia. *Id.* It has a population of almost 300,000. *Id.*

[2] Sandia Pueblo, just outside Albuquerque, New Mexico, has a total tribal population of about 500. *See* Pueblo of Sandia, http://sandiapueblo.nsn.us (last visited Nov. 17, 2005). Sandia is one of the smaller tribes to run a tribal court system.

[3] The Shakopee Mdewakanton Sioux community, a gaming tribe located just outside Minneapolis/St. Paul had a per capita income over $84,000 in the 2000 census, larger than the per capita income of Greenwich, Connecticut. *Cf.* U.S. CENSUS BUREAU, PROFILE OF SHAKOPEE MDEWAKANTON SIOUX COMMUNITY AND OFF-RESERVATION TRUST LAND, MN, Table DP-3 (2000), *available at* http://censtats.census.gov/data/US/2503680.pdf, *with* U.S. CENSUS BUREAU, PROFILE OF GREENWICH TOWN, FAIRFIELD COUNTY, CT, Table DP-3 (2000), *available at* http://censtats.census.gov/data/CT/0600900133620.pdf.

[4] For instance, the Kickapoo reservation in Texas has a per capita income just over $3,400. *See* U.S. CENSUS BUREAU, PROFILE OF KICKAPOO RESERVATION, TX, Table DP-3 (2000) *available at* http://censtats.census.gov/data/US/2501775.pdf).

[5] *See infra* Section II.

[6] The phrase "tribal courts" encompasses two very different types of institutions. In 1883, the Bureau of Indian Affairs established the Courts of Indian Offenses, usually known as "C.F.R. courts," based on the source of the rules applied. These western-style courts operated with little tribal input. Under the 1934 Indian Reorganization Act, tribes were permitted to establish their own constitutions and court systems, which have begun to displace C.F.R. courts. For purposes of this Article, "tribal courts" will refer to these self-developed institu-

courts, and at the same time, all tribal courts as identical to each other. When considering state courts, a concurrent jurisdiction model reigns, where any state court with personal jurisdiction can hear the dispute.[7] When considering tribal courts, though, an exclusive jurisdiction model usually controls—either the tribe or the state, but not both, can hear the dispute.[8] Judges and commentators have debated extensively about whether tribes are like states, the federal government, or foreign countries. This debate misses the central point that whatever tribes are *like*, they are not all *alike*.

This Article attempts to analyze why, in the current jurisdictional framework, tribes are treated differently from states but not differently from each other.[9] The Supreme Court has focused on two primary differences between state and tribal courts that the Court has used to justify an exclusive rather than concurrent jurisdiction model. First, the Supreme Court has assumed tribal courts are fragile and are threatened by state court concurrent jurisdiction. The Court has suggested that, if given the choice, forum-shopping litigants (particularly non-tribal members) will turn to state courts, undermining tribal court jurisdiction. Second, the Supreme Court has assumed that the non-Indian litigants will generally be disadvantaged in tribal courts, and as such need protection from the exercise of tribal jurisdiction.[10]

These two assumptions concern the nature of tribal courts, and the Court presumes that tribal courts are *all* fundamentally different from state courts in

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tions. For general discussions of the rise and fall of C.F.R. courts, see Elizabeth E. Joh, *Custom, Tribal Court Practice, and Popular Justice*, 25 AM. INDIAN L. REV. 117, 119 (2001); Gloria Valencia Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 236 (1994). While outside the scope of the Article, the C.F.R. courts are another example of the core point here—the treatment of tribes as uniform entities with limited recognition of tribal differences. *See* Nancy Thorington, *Civil and Criminal Jurisdiction over Matters Arising in Indian Country: A Roadmap for Improving Interaction Among Tribal, State, and Federal Governments*, 31 MCGEORGE L. REV. 973, 981 (2000) (pointing toward C.F.R. courts as a mechanism of assimilation and allowing state court intrusion into Indian Country).

[7] *See infra* Part I.A.

[8] *See infra* Part I.B.

[9] Of course, not all Indian law doctrines are applied uniformly. Perhaps the most significant differences among tribes are between Public Law 280 states and non-Public Law 280 states. *See infra*, note 45. A smattering of federal statutes are also tribe-specific. *See* Robert Laurence, *Dominant-Society Law and Tribal Court Adjudication*, 25 N.M. L. REV. 1, 1 n.2 (1995) (citing statutes). Professor Clinton has also argued for contextualization in jurisdictional jurisprudence. *See* Robert N. Clinton, *Reservation Specificity and Indian Adjudication: An Essay on the Importance of Limited Contextualism in Indian Law*, 8 HAMLINE L. REV. 543, 584, 589 (1985). Recently, Professor Prakash has argued that federal plenary power should depend on the history of the specific tribe involved. *See* Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1072 (2004). Despite these authorities, the fact remains that the Supreme Court has never recognized the type of tribal court system in place as a significant factor in deciding jurisdictional issues.

[10] This fear that tribal courts pose a threat to litigants is not limited to the judiciary. In the late 1990s, Senator Slade Gorton made an effort to force tribes to waive sovereign immunity and allow themselves to be sued in state and federal court by linking the waiver to federal funds because he believed tribal courts were not impartial. *See* Neil Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN. L. REV. 285, 285 (1998). Newton notes that one criticism leveled at tribal courts is "that non-Indians, . . . particularly white people, will not get a fair trial in tribal courts." *Id.* at 351.

ways that make concurrent jurisdiction inappropriate. This Article suggests that this assumption is flawed and that the actual nature and texture of the tribal court at issue should shape the scope of tribal jurisdiction. When tribes have in fact established courts that are fundamentally different from state courts, an exclusive jurisdiction model may be appropriate, but when tribes have adopted courts that mimic state courts, tribes should have the option of a concurrent jurisdiction model, with the state and the tribe-sharing jurisdiction over all disputes involving tribal members and non-tribal members alike.

The remainder of the Article is organized as follows: Section I analyzes the key assumptions underlying jurisdictional and choice of law analyses both inside and outside Indian Country.[11] Outside of Indian Country, state courts are generally presumed to treat litigants from outside the jurisdiction fairly and that one state's interests are not threatened if courts from another state resolve disputes within their boundaries. As a result, state courts use a concurrent jurisdiction model and government interests are recognized through a choice-of-law analysis rather than jurisdictional rules. Inside of Indian Country, on the other hand, the Court has presumed that tribal courts treat non-Indian litigants unfairly, and that tribal courts and tribal interests are threatened when state courts exercise authority within tribal boundaries. As a result, tribal and state courts have exclusive jurisdiction and governmental interests must be enforced through jurisdiction, rather than choice-of-law. In treating tribal courts differently from states, but not differently from each other, the Court has implicitly presumed that all tribal courts systems are a threat to non-tribal litigants and are threatened by state court jurisdiction.

Section II examines instances where the Court's concerns have some basis in fact. After a summary overview of current tribal court systems, this Article attempts to identify features of tribal courts that might indicate that they a) might disadvantage non-tribal litigants and b) are threatened by the incursion of concurrent state jurisdiction. It shows that the Supreme Court's decision to treat tribal courts differently from states is partially correct; many tribes do significantly differ from state court systems in ways that make concurrent jurisdiction inappropriate. At the same time, however, the Article shows that the Supreme Court's decisions are partially incorrect. For those tribes that have adopted court systems that are procedurally and substantive similar to state systems, there is no reason for a model of exclusive jurisdiction.

Section III points to one potential reason that the Court has assumed that all Indian tribes are alike. While the primary goal of federal Indian policy has oscillated between separation to assimilation, the lead assumption has always

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[11] The phrase "Indian Country" arises from 18 U.S.C. § 1151, which reads in relevant part:

> [T]he term "Indian Country," as used in this chapter, means (a) all lands within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights of way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way through the same.

While Section 1151 on its face is a criminal statute, the Supreme Court has held that it applies to "questions of civil jurisdiction." DeCoteau v. Dist. County Ct. for the Tenth Jud. Dist., 420 U.S. 425, 427 n.2 (1975).

been that Indians should be treated as foreign and "the other." Such an approach mutually reinforces norms that minimize the differences among tribes and maximize the distinctions between tribes and non-tribal society.

I. DRAWING LINES: THE DIFFERENCES BETWEEN STATE AND TRIBAL COURT JURISDICTION

Jurisdiction in Federal Indian law has traditionally turned first and foremost on whether the act in question occurred in "Indian Country." Three categories of land are, by statute, Indian Country: land within reservations; dependent Indian communities; and Indian allotments to which Indian title has not been extinguished.[12] In general, tribes and the federal government have jurisdiction and authority over lands within Indian Country and the state controls lands outside Indian Country.[13] Whether particular lands are Indian Country has been the subject of much attention from the Supreme Court[14] but fortunately, for purposes of this Article, the intricacies within the definition of Indian Country are not particularly relevant except for one fact. These three categories draw a bright line: land either *is* or *is not* "Indian Country."

The worlds inside and outside this perimeter are very different. Outside the line, the rules can be recited by any first year law student. State courts have no restriction on their subject matter jurisdiction and traditional conflict rules determine which law to apply. Inside the lines, far more complicated doctrines govern and jurisdiction turns on the subject matter, statutes, treaties, and the identity of the parties. For the purposes of this Article, the key difference is the underlying approach.

Outside of Indian Country, lawsuits that cross fora lines are resolved by a *concurrent jurisdiction* approach. Any court is permitted to hear the dispute; choice of law rules determine what law applies. Inside Indian Country, an *exclusive jurisdiction* approach prevails. Either the state or the tribal court is given the sole power to resolve the dispute.[15] This Section will show that this

[12] *See* 18 U.S.C. § 1151 (2000). Note that all land within the reservation boundaries is included under the definition of Indian Country, even if the land is owned by non-Indians in fee simple. *See* Seymour v. Superintendent, 368 U.S. 351 (1962); WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 114 (3d ed.1981). This is a key legal doctrine underlying the Court's opinions from *Montana v. United States*, 450 U.S. 544 (1981), through *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), discussed further, *infra*.

[13] *See, e.g.*, DAVID H. GETCHES et al., CASES AND MATERIALS ON FEDERAL INDIAN LAW 439 (4th Ed. 1998).

[14] The Court has frequently considered the first category, land's reservation status, in the termination context. While Congress can diminish the size of reservations by statute, it must do so explicitly. *See* Mattz v. Arnett, 412 U.S. 481, 504-05 (1973). At the end of the nineteenth and beginning of the twentieth centuries, Congress frequently opened portions of reservations to non-Indian settlement without clearly indicating whether the reservation was to be diminished. The Court has frequently wrestled with the Indian status of this land. *See* Hagen v. Utah, 510 U.S. 399 (1994); Solem v. Bartlett, 465 U.S. 463 (1984); *Decoteau*, 420 U.S. 425. Whether a particular area is a dependent Indian community is also a difficult question, turning on whether the land has been set aside by Congress and whether it remains under federal superintendence. *See* Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 527 (1998).

[15] Some states have attempted to carve out exceptions to the exclusive jurisdiction model. A few state courts have found concurrent jurisdiction over on-reservation actions involving

develops from a difference in assumptions about state and tribal courts. A state court is presumed not to be threatened by another state court which resolves disputes within its boundaries and is also presumed to deal fairly with outsiders. The opposite two assumptions apply when the Supreme Court considers tribal courts.

A. *Jurisdiction Outside the Lines*

In this Section, I provide a brief outline of the jurisdictional and choice of law rules applied in American state courts. The important thing here is that limitations on courts are not usually jurisdictional—state courts are not blanketly prohibited from adjudicating disputes. Instead, conflicts are resolved through choice of law rules respecting other states' interests in the dispute.

1. Jurisdiction

In terms of subject matter jurisdiction, most state courts have what is usually termed *general jurisdiction*.[16] As it has been more accurately described, they have "comprehensive residual subject matter jurisdiction"[17] and are able to hear any cases not specifically designated to another court. Specific designations are typically based on the type of law involved; bankruptcy,[18] antitrust,[19] and patent and copyright law[20] are notable examples. Significantly, the location where the dispute arose does not play any role in determining whether the state court has subject matter jurisdiction. So long as personal jurisdiction exists, state courts can adjudicate disputes arising anywhere in the world (except, as will be discussed later, in Indian Country), and all state courts have *concurrent* subject matter jurisdiction. Similarly, the identity of the parties plays no role.[21] State courts are presumed to deal fairly with individuals not domiciled in the forum.

The only important exception to this is general presumption is diversity jurisdiction. Federal court jurisdiction over cases involving citizens of different states is traditionally understood as a method to protect out-of-state litigants

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non-Indians. *See* B.J. Jones, *Welcoming Tribal Courts Into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457, 509-10 (1998) (collecting cases); John J. Harte, *Validity of a 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, 70 (1997) (same). Public Law 280 states are more likely to try to adopt concurrent jurisdiction. *Id.* Significantly, the Supreme Court has never approved this exercise of concurrent jurisdiction.

[16] *See* 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3522 (2d ed. 1984).

[17] *See* GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE 101 (2d ed. 1994).

[18] *See* 28 U.S.C. § 1334 (2000).

[19] *See* 15 U.S.C. § 15 (2000).

[20] *See* 28 U.S.C. § 1338 (2000).

[21] The only way in which party identity usually matters is personal jurisdiction. Courts always have jurisdiction over domiciliaries, individuals served with process in the jurisdiction, and those individuals who have the necessary contacts with the forum. *See* Burnham v. Super. Ct., 495 U.S. 604 (1990) (service of process); Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945) (minimum contacts); Milliken v. Meyer, 311 U.S. 457 (1940) (domicile).

from biased state courts.[22] This notion of diversity jurisdiction has been heavily criticized by numerous commentators, who argue that the framers' true concern was not the bias of state courts against out-of-state litigants, but instead the bias of democratic, populist state legislatures against commercial interests.[23] Certainly the existence of the amount-in-controversy requirement, present since the Judiciary Act of 1789, strongly supports the view that diversity jurisdiction is more about protecting commercial interests (where the stakes tend to be higher) than out-of-state litigants.[24] Regardless of the motives for the creation of diversity jurisdiction, the important point here is that diversity jurisdiction does not *deny* the state court the ability to hear the case; it *grants* the federal court concurrent jurisdiction. Even diversity jurisdiction, then, falls into the standard American model that assumes concurrent jurisdiction, where either the federal or state court can hear the dispute. What matters is the law the court chooses to apply.[25]

2. *Choice of law*

The rules governing choice of law outside of Indian reservations have transformed dramatically over the last century. During the early twentieth century, choice of law was mechanical and territorial.[26] In tort cases, the law of

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[22] The initial judicial expression of this view is Justice Marshall's opinion in *United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809), *overruled by Louisville, Cincinnati. & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How) 497 (1844).

[23] Justice Frankfurter and Judge Friendly led the charge against this traditional conception of diversity jurisdiction. *See* Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 523 (1928); Henry J. Friendly, *The Historical Basis of Diversity Jurisdiction*, 16 HARV. L. REV. 483, 484, 493, 497-99 (1928). For a general summary of the debate, see Stone Grissom, *Diversity Jurisdiction: An Open Dialogue in Dual Sovereignty*, 24 HAMLINE L. REV. 372, 376 (2001) (summarizing the history over the debate of the motives behind diversity jurisdiction).

[24] The initial amount-in-controversy threshold was $500. Act of Sept. 24, 1789, ch. 20 § 11, 1 Stat. 73, 78. The amount has now risen to $75,000. 28 U.S.C. § 1332(a) (West 2005). The complete diversity requirement also strongly indicates that diversity jurisdiction is not primarily about protecting out-of-state litigants. *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). It makes little sense to imagine that a New Mexico litigant would be protected from a biased Arizona state court simply be having someone from Phoenix on the same side of the *v.*

[25] And indeed, the choice of law rules generally do not vary on whether the state or federal court hears the dispute. In *Klaxon Co. v. Stentor Electric Mfg. Co.*, the Supreme Court extended the *Erie* doctrine to require federal courts sitting in diversity to apply the choice-of-law rules of the states in which they sit. 313 U.S. 487 (1941).

[26] Choice of law rules were initially shaped by Joseph Beale, the reporter for the First Restatement. Beale's rule was simple: "A right having been created by the appropriate law, the recognition of its existence should follow everywhere. Thus an act valid where done cannot be called in question anywhere." EUGENE F. SCOLES & PETER HAY, CONFLICTS OF LAWS, 21 (2000) (citing JOSEPH BEALE, 3 CASES ON THE CONFLICT OF LAWS 517 (1901)). *See also* Slater v. Mexican Nat'l R.R. Co., 194 U.S. 120, 126 (1904) ("[L]aw determines not merely the existence of the obligation, but equally determines its extent."). These notions of territoriality dominated the First Restatement. "[T]erritoriality and vested rights were the twin theoretical pillars of most of the rules drafted by Beale for the First Restatement." *See* SCOLES & HAY, at 21.

the place of the tort governed.[27] In contract cases, the law of the place of the contract controlled.[28] In part as a result of pressure from legal academics, courts began to shift to a more nuanced approach.[29]

The more modern approach abandons the traditional, territorial notions of choice of law and takes a variety of formulations. The first popular approach was the "government interests" method popularized by Brainerd Currie.[30] Under Currie's view, choice of law questions should be resolved by looking at the policy underlying the law. Courts consider whether the transaction at issue in the case and whether the policies underlying the law indicate an interest in having the policies applied.[31] Partially as a result of academic criticism,[32] government interest analysis has been surpassed by the rules of the Second Restatement.[33] Under the Second Restatement, courts are instructed to consider a variety of factors, but the overriding goal is to apply the law of the state of the most significant relationship to the occurrence and the parties.[34]

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[27] The tort rule under the First Restatement was that "[if] a cause of action in tort is created at the place of wrong, a cause of action will be recognized in other states. If no cause of action is created at the place of wrong, no recovery in tort can be had in any other state." RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 384 (1934). This doctrine of *lex loci delicti* began to disappear with the New York case of *Babcock v. Jackson*, 191 N.E.2d 279 (N.Y. 1963). By 1999, forty-one states had abandoned the *lex loci delicti* rule. *See* SCOLES & HAY, *supra* note 26, at 69.

[28] The shift away from the *lex loci contractus* also began in New York. *See* Auten v. Auten, 124 N.E.2d 99 (N.Y. 1954). The rejection of the traditional rule in contract law was slower than in the torts context. *See* SCOLES & HAY, *supra* note 26, at 77. By 1999, though, forty-two states had abandoned the *lex loci* approach. *Id.* at 75.

[29] "It is generally believed that academic commentators have had a greater influence in the development of conflicts law than any other branch of law." SCOLES & HAY, *supra* note 26, at 68. Professors Walter Cook and David Cavers helped lead the charge as early as the 1920s and 1930s although, as noted above, the territorial notions of the First Restatement held sway until the 1950s. *See, e.g.*, David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); Walter Wheeler Cook, *The Logical and Legal Bases of Conflict of Laws*, 33 YALE L.J. 457 (1924). For a more recent academic discussion on the modern edge of choice of law theory, see Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277 (1989).

[30] *See* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 189 (1963) (hereinafter CURRIE, SELECTED ESSAYS); Brainerd Currie, *Comments on* Babcock v. Jackson—*A Recent Development in Conflict of Laws*, 60 COLUM. L. REV. 1233 (1963).

[31] *See* CURRIE, SELECTED ESSAYS, *supra* note 30, at 621. For a general discussion of Currie's approach, *see* SCOLES & HAY, *supra* note 26, at 25-38.

[32] "Currie's theory dominated choice-of-law thinking in the United States for almost three decades. His 'seductive style' of writing 'hypnotized a whole generation of American lawyers.'" SCOLES & HAY, *supra* note 26, at 34 (quoting Harold L. Korn, *The Choice of Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 812 (1983)). For a laundry list of law review articles attacking and defending Currie, see SCOLES & HAY, *supra* note 26, at 34 nn. 47-48.

[33] *See* Symoen Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1261 (1997) (enumerating states adopting Second Restatement). "Today, more than a quarter of a century after its official promulgation, the Restatement appears close to dominating the American methodological landscape." SCOLES & HAY, *supra* note 26, at 67.

[34] *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 152, 156, 196 (1969). The clause requiring the application of the law of the state with the most significant relationship "is one of the most repeated phrases in the entire Restatement." SCOLES & HAY, *supra* note 26, at 62.

The appropriateness of these and other methods of resolving choice of law problems (and even the question of which methods are in fact applied) has been extensively debated.[35] But it is clear that modern choice of law rules have shifted away from a territorial notion to one where the forum analyzes the policies underlying the various state laws it is being encouraged to apply and the connection between those laws and the dispute.[36]

The general assumption is that whatever the interest that the state where the dispute arose has in the case, it can be recognized through choice of law rules. There is no need to strip one court of jurisdiction based on a notion that the government interests of the other state will be damaged if the forum resolves the dispute.

B. Jurisdiction Inside the Lines

The opposite assumption, that there is a need to limit jurisdiction, applies when the dispute arises within Indian Country. While the subject matter jurisdiction/choice of law analysis outside of Indian Country is relatively straightforward, the analysis for Indian Country cases is anything but simplistic. The fundamental point here is that the Supreme Court has held that cases be resolved on a exclusive jurisdiction basis. State or tribal courts either do or do not have the right to hear any given case; the Supreme Court generally presumes that the selected venue will apply its own law.

This Section discusses the two background assumptions about tribal courts that lead the Court to treat Indian law questions as jurisdictional questions rather than choice-of-law questions. In the case of state court jurisdiction in Indian Country, the Court brings a background assumption that the tribe's interests will be threatened by the exercise of state power. In the case of tribal court jurisdiction, the Court brings a background assumption that tribal courts will not treat a non-Indian litigant fairly. As seen above, in the American system the opposite two assumptions apply in state court, where courts are presumed to treat out-of-forum litigants fairly and that a state's interest in the dispute can be exercised through choice of law rules. The differences in disputes inside the

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[35] "[M]any courts prefer a melange of the Second Restatement and interest analysis." Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 21 (1984). In addition to the interest analysis and Second Restatement approaches, courts have available to them the "comparative impairment" method, the "better law" method, the "lex fori" method, or some combination of the above. *See* SCOLES & HAY, *supra* note 26, at 101. "If one had to define the dominant choice-of-law methodology in the United States today, it would have to be called eclecticism." P. John Kozyris & Symeon C. Symeonides, *Choice of Law in the American Courts in 1989: An Overview*, 38 AM. J. COMP. L. 601, 602 (1990).

[36] The only modern methodology to explicitly reject the interest of the non-forum state as a relevant factor in the choice of law decision is the *lex fori* approach popularized by Albert Ehrenzweig. In brief, the *lex fori* approach only looks at the policies underlying the forum law and only applies the law of the non-forum state if forum law either a) indicates an intent to be limited to domestic cases, or b) indicates an intent to import and apply the foreign law. *See, e.g.*, Albert Ehrenzweig, *The Lex Fori Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637 (1960). Absent from the Ehrenzweig approach is "any consideration of the content or policy of the foreign rule that is sought to be applied in the particular case." SCOLES & HAY, *supra* note 26, at 39. However, *lex fori* has not proven popular. No states use it in contract cases, *id.* at 86, and while three states have adopted in tort cases, all three mix it with interest analysis for purpose of ideological cover. *Id.* at 101.

lines must result from a belief that tribal courts are both more vulnerable and less fair than state courts.

1. State Jurisdiction

Whether a state court has jurisdiction over a case turns on two factors: the location of the dispute and the identity of the litigants. If the dispute arises outside of Indian Country, state courts generally have exclusive jurisdiction.[37] For disputes arising in Indian Country, the Court has focused on whether state court jurisdiction would impinge on the ability of tribes "to make their own laws and be ruled by them."[38] The Court's cases focus on whether state court jurisdiction infringes on the tribe's ability to set up courts of its own and resolve disputes.

The type and nature of the alternative tribal forum, however, has not traditionally been viewed as a relevant consideration in whether to grant state court jurisdiction. The Court does not analyze whether concurrent jurisdiction would threaten the system of tribal courts that is actually in place.

The Court's analysis of state court jurisdiction in Indian Country began with *Williams v. Lee*.[39] Hugh Lee, a non-Indian, operated a store on the Navajo Reservation in Arizona, and brought a rather mundane debt action against two tribal members in Arizona state court. The Supreme Court reversed the Arizona Supreme Court's determination that state courts could exercise jurisdiction.[40] The Court noted that states were permitted to hear suits by Indians against non-Indians and states retained criminal jurisdiction when the crime involved non-Indians.[41] The Court explained that the jurisdictional question depends on whether "the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[42] The Court also pointed to Congress's policy of encouraging the development of tribal courts and identified the strength of the Navajo courts as a reason to divest the state of jurisdiction.[43] The Court saw the establishment of state court jurisdiction as a threat to tribal sovereignty and Navajo self-government.[44] The Court concluded that

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[37] *See* CANBY, *supra* note 12 at 165, 210-11. The large exception to exclusive state court jurisdiction to cases arising outside of Indian Country is child custody cases. Under the Indian Child Welfare Act, tribal courts have exclusive jurisdiction over all custody cases involving Indian children residing on or domiciled on reservation land. *See* 25 U.S.C. § 1911(a) (2000). Jurisdiction over Indian children domiciled off-reservation is concurrent, but presumptively tribal. *See* 25 U.S.C. § 1911(b) (2000); Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989). Some state courts have attempted to reclaim jurisdiction over custody cases under the so-called "existing Indian family exception," examining the connection of the tribe to the child and/or the parents in determining whether to cede jurisdiction to the tribal courts. *See* GETCHES, *supra* note 13, at 678-82 (collecting cases).

[38] Williams v. Lee, 358 U.S. 217, 220 (1959).

[39] *Id.* at 217.

[40] *Id.* at 217-18, 223.

[41] *Id.* at 219-20; *see also* General Crimes Act, 18 U.S.C. § 1152 (2000); United States v. McBratney, 104 U.S. 621 (1881).

[42] *Williams*, 358 U.S. at 220.

[43] *Id.* at 222.

[44] *Id.* at 223. The Supreme Court also relied on the fact that Arizona had not accepted civil and criminal jurisdiction in the Navajo Nation under Public Law 280. *Id.* at 222-23. Public Law 280, codified at 18 U.S.C. § 1162(a) (2000) and 28 U.S.C. § 1360 (2000), required

allowing "the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves."[45] This approach, of course, contrasts with the traditional conflicts notion that concurrent jurisdiction does not impose a threat to the courts of the non-forum state; the right of self-government in the traditional context is exercised through choice of law principles, not jurisdictional notions. This difference must necessarily stem from a belief that tribal courts are different from state courts in a way that makes them vulnerable to encroachment if litigants are given the opportunity to choose between a state and tribal forum.

The Supreme Court applied and extended the *Williams* decision in *Fisher v. District Court*.[46] In *Fisher*, the Montana courts had found jurisdiction over a custody dispute involving only tribal members residing on the Northern Cheyenne Reservation.[47] The Supreme Court reversed and concluded that "state-court jurisdiction plainly would interfere with the powers of self-government conferred upon the Northern Cheyenne Tribe and exercised through the tribal court. It would subject . . . reservation Indians to a forum other than the one they have established for themselves."[48] The Court elides the fact that this is common under American law. As discussed above, state courts often adjudicate the rights of out-of-state litigants. The difference the Court sees between state and tribal courts is that tribal courts are threatened by adjudications in other fora. "[The] substantial risk of conflicting adjudications . . . *would cause a corresponding decline in the authority of the Tribal Court*."[49] This fear must necessarily arise from a belief that tribal courts are fundamentally different and more vulnerable to forum shopping litigants than state courts.

Fisher denies states jurisdiction over Indian Country actions where both parties are Indians, and *Williams* covers actions by non-Indians against tribal members.[50] But a different rule applies to actions by members against non-

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California, Minnesota, Nebraska, Oregon, and Wisconsin ("mandatory states") to take limited civil and extensive criminal jurisdiction over matters in Indian Country and gave all other states the option of taking jurisdiction. Congress modified Public Law 280 in 1968 to provide both mandatory and discretionary states the option to retrocede jurisdiction. *See* CANBY, *supra* note 12, at 216; Nancy Thorington, *Civil and Criminal Jurisdiction over Matters Arising in Indian Country: A Roadmap for Improving Interaction Among Tribal, State, and Federal Governments*, 31 MCGEORGE L. REV. 973, 997 (2000).

[45] *Williams*, 358 U.S. at 223.

[46] 424 U.S. 382 (1976) (per curiam).

[47] *Id.* at 383; State *ex rel.* Fiercrow v. Dist. Ct., 536 P. 2d 190 (1975). The lower court actions in Montana show an early example of successful comity between state and tribal courts. The Northern Cheyenne Tribal Court had issued a temporary custody degree and one party initiated adoption proceedings in state court. *See* Fisher, 424 U.S. at 384. The state district court certified a jurisdictional question to the tribal appellate court for a determination of whether a tribal statute granted the state jurisdiction over the dispute. When the tribal court answered the certified question in the negative, the district court dismissed, although it was later overruled by the Montana Supreme Court. *Id.* at 384-85.

[48] *Id.* at 387-88.

[49] *Id.* at 388 (emphasis added). After the adoption of the Indian Civil Rights Act, 25 U.S.C. § 1911 (2000), *Fisher* is no longer good law on the specific issue of jurisdiction over adoptions. *See supra* note 38.

[50] *Williams* speaks solely in terms of jurisdiction over "Indians," and as a result, courts generally did not draw a distinction between Indians who were members of the tribe in

Indians. States generally can take jurisdiction over actions by tribal members against non-members even if the action arises in Indian Country. In *Three Affiliated Tribes v. Wold Engineering*, a North Dakota tribe brought suit against a non-Indian company hired to perform work on the reservation.[51] The North Dakota Supreme Court concluded that it lacked jurisdiction over the dispute.[52] The U.S. Supreme Court reversed, holding that the case presented no threat to tribal interests.[53] The court focused on the fact that the tribe was the plaintiff, rather than the defendant,[54] and the fact that "the tribal court lacked jurisdiction over the claim at the time the suit was instituted."[55] The Court quite reasonably decided that when the tribal court cannot hear the case in any event, the threat to that court from state court jurisdiction is minimal.[56]

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question and non-member Indians. *See* CANBY, *supra* note 12, at 174. More recently, the Supreme Court has departed from this trend. Most notably, the Court held in *Duro v. Reina* that tribes had no criminal jurisdiction over non-member Indians. 495 U.S. 676, 679 (1990). *See generally* United States v. Wheeler, 435 U.S. 313 (1978) (tribes have criminal jurisdiction over tribal members); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (tribes do not have criminal jurisdiction over non-Indians). Congress quickly rejected the holding of *Duro* and granted tribes jurisdiction over non-member Indians living in Indian Country. 25 U.S.C. § 1301(2) (2000). The question remains open for purposes of civil jurisdiction. *See* Nevada v. Hicks, 533 U.S. 353, 358, n.2 (2001); CANBY, *supra* note 12, at 175. I adopt Canby's convention here of speaking about "tribal members" versus "non-Indians" for the purpose of discussion, leaving the status of non-member Indians intentionally unclear. *See id.*

[51] 467 U.S. 138, 141 (1984) (*Three Tribes I*).

[52] Three Affiliate Tribes v. Wold Engineering, 321 N.W.2d 510, 512 (N.D. 1982). The state court's logic, in part, was based on the tribes' lack of consent to state court jurisdiction. *Id.* North Dakota is a "discretionary" state under Public Law 280. *See supra* note 44. Following the enactment of Public Law 280, an amendment to the North Dakota Constitution and a North Dakota state statute appeared to authorize courts to exercise jurisdiction. *See* N.D. CONST. art. VI, § 8; N.D. CENT. CODE § 27-19-01 (1987). The North Dakota Supreme Court, though, read the statute as disclaiming jurisdiction. *See, e.g.*, White Eagle v. Dorgan, 209 N.W. 2d 621, 623 (N.D. 1973).

[53] *See Three Tribes I*, 467 U.S. at 148.

[54] This question of whether it should matter whether the tribe (rather than a tribal member) is a plaintiff is an interesting one; certainly tribal interests are more at stake when the tribal government itself is litigating.

[55] *Id.* at 149.

[56] The subsequent history of *Three Affiliated Tribes* reinforces the conclusion that a primary focus for the Court was the fear that state court jurisdiction pose a threat to the strength and independence of tribal courts. In *Three Tribes I*, the Court was faced with the fact that the North Dakota Supreme Court had disclaimed jurisdiction on state law grounds as well as the notions of federal Indian law descending from *Williams*. The Court remanded to the state court for reconsideration of the state law questions. *See Three Tribes I*, 467 U.S. at 152. The North Dakota Supreme Court again decided that it lacked jurisdiction unless the tribe was willing to waive sovereign immunity and agree to the application of state law in all cases in state court. Three Affiliated Tribes v. Wold Eng'g, P.C., 364 N.W.2d 98, 104 (1985); *see also* N.D. CENT. CODE § 27-19-01. The tribe again sought and was granted certiorari. *See* Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877 (1986) (*Three Tribes II*). *Three Tribes II* concluded that the state's decision that it lacked jurisdiction was preempted by Public Law 280. *Id.* at 888. The Court was particularly critical of the requirement of the sovereign immunity waiver. "By requiring that the Tribe open itself up to the coercive jurisdiction of state court for all matters occurring on the reservation, that statute invites a potentially severe impairment of the authority of the tribal government, its courts, and its laws." *Id.* at 891.

In addition to these cases deciding the substantive issues of jurisdiction, the Supreme Court has also discussed the threats to tribal courts from concurrent jurisdiction in the context of determining the procedure for evaluating jurisdiction. In *Iowa Mutual Ins. Co. v. Laplante*[57] and *National Farmers Union Ins. Co. v. Crow Tribe*,[58] the Court concluded that litigants could not challenge tribal court jurisdiction in federal court in the first instance, but instead must litigate the jurisdictional issue in tribal court. In these so-called exhaustion cases, the Supreme Court adopted an anti-forum shopping rule because such behavior would fundamentally threaten tribal court independence. In *National Farmers Union*, the Court adopted the exhaustion policy in line with the policy "of supporting tribal self-government and self-determination."[59] The Court expanded and reinforced the exhaustion requirement in *Iowa Mutual*, recognizing both that "[t]ribal courts play a vital role in tribal self government. . . . [and a] federal court's exercise of jurisdiction over matters relating to reservation affairs can also impair the authority of tribal courts."[60] Both the substantive rules regarding tribal jurisdiction and the procedural exhaustion requirement demonstrate that the Supreme Court's fear of concurrent jurisdiction arises from a belief that if given the opportunity, litigants will avoid tribal courts in favor of alternative tribunals and as a result undermine tribal authority.[61]

2. *Tribal Jurisdiction*

The Court's concern over the threat to tribal courts from state court jurisdiction is mirrored in the Court's case law regarding tribal jurisdiction. Here the fear is that tribal courts pose a threat to non-tribal litigants. The Court's rulings regarding tribal court civil jurisdiction over non-members stretch over a wide range of subject matters and involve a large variety of jurisdictional tests. The identity of the defendant now plays an increasingly important role in determining whether the tribal court has jurisdiction—tribes now have little or no civil jurisdiction over non-Indian defendants.[62] As will be discussed below, the

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[57] 480 U.S. 9 (1987).

[58] 471 U.S. 845 (1985).

[59] 471 U.S. at 856.

[60] 480 U.S. at 15.

[61] For general discussions of the exhaustion cases, see Dennis W. Arrow, *Oklahoma's Tribal Courts: A Prologue*, 19 OKLA. CITY. U. L. REV. 5, 48, (1994); Julie A. Pace, *Enforcement of Tribal Law in Federal Court: Affirmation of Indian Sovereignty or A Step Backwards Toward Assimilation*, 24 ARIZ. ST. L. J. 435, 465 (1992) (arguing that the fear of forum shopping is a significant reason to prevent federal court application of tribal law); Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329, 360-61 (1989) (discussing the mechanism by which abstention law makes circumvention of tribal courts more difficult).

[62] Absent a specific grant of power of jurisdiction by treaty or statute, tribal courts can exercise jurisdiction over non-members in two limited circumstances, sometimes known as the "Montana" exceptions after *Montana v. United States*, 450 U.S. 544 (1981). The first exception covers "nonmembers who enter consensual relationships with the tribe or its members" while the second "concerns activity that directly affects the tribe's political integrity, economic security, health or welfare." *See* Strate v. A-1 Contractors, 520 U.S. 438, 446 (1997). In *Montana* itself, the Court focused heavily on status of the land itself, pointing out that the tribe was attempting to regulate hunting and fishing on non-Indian fee land and that

Court has made clear that a primary reason for limiting tribal court jurisdiction is out of fear of the consequences for non-Indian litigants if forced to appear in tribal courts.[63]

The Court's most recent decision on the scope of tribal jurisdiction, *Nevada v. Hicks*,[64] emphasized the centrality of the defendant's identity in the jurisdictional analysis.[65] In *Hicks*, the Court faced the question of tribal court jurisdiction over a lawsuit against Nevada state officials arising out of an allegedly illegal search on reservation land.[66] Focusing heavily on the fact that the individuals sued in tribal court were non-members, the Court ruled that the tribal court lacked jurisdiction because the states retain some limited ability to enter reservation land for the purpose of criminal enforcement.[67] The Court rejected Justice O'Connor's concurrence, which urged a more significant place for the Indian Country status of the land in the jurisdictional analysis,[68] noting that "the concurrence's resolution would, for the first time, hold a non-Indian subject to the jurisdiction of a tribal court."[69] Justice Souter's concurrence emphasized the majority's view, essentially abandoning the location of the dispute in favor of a rule based on the Indian status of the defendant.[70]

Hicks sets out that the defendant's non-Indian status is a key and often dispositive fact in the jurisdictional analysis. What motivates this rule? The Court's jurisprudence with respect to tribal civil jurisdiction derives largely

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the activity did not threaten similar conduct by tribal members on Indian Country land. *See* 450 U.S. at 566-67. This shift from a geographic focus to a test based on the identity of the parties involved has received substantial attention. *See infra*, note 65.

[63] Tribes, of course, are not bound by the constitutional limitations of the Equal Protection and Due Process Clauses or the Bill of Rights, which apply only to states and the federal government. *See* U.S. CONST. amends. I-X & XIV; Talton v. Mayes, 163 U.S. 376 (1896). In 1968, Congress passed the Indian Civil Rights Act ("IRCA"), which extended the limitations of many of the Bill of Rights provisions to cover actions of tribal governments. *See* 25 U.S.C. §§ 1301-03 (2000). The Supreme Court has held that Congress has not provided a mechanism for litigants to seek the protection of the provisions of ICRA in federal court and must instead raise the claims in tribal court. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978). For studies of the application of the ICRA in tribal courts, compare Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479, 511 (2000), with Christian M. Freitag, Note, *Putting Martinez to the Test: Tribal Court Disposition of Due Process*, 72 IND. L.J. 831 (1997).

[64] 533 U.S. 353 (2001).

[65] As discussed above, *supra* note 62, this is a substantial shift from the previous approach of *Montana*. Numerous commentators have remarked on the change. *See, e.g.*, Joseph Miller Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 653 (2003) ("[The Court's] focus has not been on tribal interests but on the rights of nonmembers to be free from tribal jurisdiction."); Philip P. Frickey; *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of Lone Wolf*, 38 TULSA L. REV. 5, 28 (2002) (describing *Hicks* as a "radical revision"); Melanie Reed, Note, *Native American Sovereignty Meets a Bend in the Road: Difficulties in Nevada v. Hicks*, 2002 B.Y.U. L. REV. 137, 152 (2002).

[66] Nevada v. Hicks, 533 U.S. 353, 356 (2001).

[67] *Id.* at 363.

[68] *See id.* at 395 (O'Connor, J., concurring).

[69] *Id.* at 374.

[70] *See id.* at 382 (Souter, J., concurring) ("It is the membership status of the uncontesting party, not the status of real property, that counts as the primary jurisdictional fact.").

from the case law analyzing tribal courts' *criminal* jurisdiction. Those cases focus on the fear that tribal courts might abuse non-tribal members. *Hicks* and its precursors rely heavily on the Supreme Court's seminal decision in *Oliphant v. Suquamish Tribe.*[71] In *Oliphant*, the Court held that tribal courts lack criminal jurisdiction over nonmembers. Notably, the Court relied extensively on *Ex parte Crow Dog*,[72] which held that the federal government lacked the ability to try Indians for crimes committed on reservation land against other Indians.[73] *Oliphant* quoted language from *Crow Dog* that it was inappropriate to extend the law of a society

> over aliens and strangers; over the members of a community separated by race [and] tradition, . . . from the authority and power which seeks to impose upon them the restraints of an external and unknown code . . . ; which judges them by a standard made by others and not for them . . . . It 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 . . . .

and concluded that these considerations apply equally to the question of tribal court jurisdiction.[74] In adopting this central focus, the Court expressed concern about the treatment of non-Indians in tribal courts.

The Court reconfirmed this fear of tribal court abuse in *Duro v. Reina.*[75] *Duro* expanded the holding of *Oliphant* and concluded that tribal courts lacked criminal jurisdiction over non-member Indians as well as non-Indians.[76] In holding that the tribal courts could not take jurisdiction over non-members, the Court pointed to the lack of constitutional protections in tribal court (including the right to counsel), in addition to the facts that tribal courts retain their "special nature" and that "they are influenced by the unique customs, languages, and usages of the tribes they serve."[77] The Court also noted that many tribal courts are subject to the control of political authorities.[78]

Justice Souter crystallized these concerns from *Oliphant* and *Duro* in his concurrence in *Hicks*. He emphasized the importance of litigants being able to know the scope of tribal court jurisdiction given the "special nature" of tribal courts.[79] Pointing to the lack of constitutional protections in tribal courts,[80] the

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[71] 435 U.S. 191 (1978). *Montana* imported the core ideas of *Oliphant* wholesale from the criminal to the civil context. "Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565. *Hicks* did the same. *See* 533 U.S. at 359 ("*Oliphant* itself drew no distinctions based on the status of land."). For a criticism of *Oliphant*, see Clinton, *supra* note 9, at 584, 589 (arguing that the *Oliphant* decision should have been contextually limited to reservations with large non-Indian populations).

[72] 109 U.S. 556 (1883).

[73] The specific holding of *Crow Dog* was subsequently overruled by the Major Crimes Act. *See supra*, note 41.

[74] *Oliphant*, 435 U.S. at 210-11 (quoting *Crow Dog*, 109 U.S. at 571) (alteration in original).

[75] 495 U.S. 676 (1990).

[76] *Id.* at 698. Congress quickly rejected the holding of *Duro* and granted tribes jurisdiction over non-member Indians living in Indian Country. *See* 25 U.S.C. § 1301(2) (2000).

[77] *Duro*, 495 U.S. at 693.

[78] *Id.*

[79] *See* Nevada v. Hicks, 533 U.S. 353, 383 (2001) (Souter, J., concurring).

differences in substantive law, and the variety of forms of judicial independence, Justice Souter argued that the reason for stripping the tribal courts of jurisdiction is "the overriding concern that citizens who are not tribal members 'be protected . . . from unwarranted intrusions on their personal liberty.'"[81] This view, along with the Court's opinions in *Oliphant* and *Duro*, show that the real fear is that tribal legal systems will abuse outsiders.[82]

These background assumptions regarding tribal court jurisdiction—believing on one hand that tribal courts are fragile and need to be protected from state courts and on the other that tribal courts are a threat to non-tribal litigants—rest on two basic assumptions. First, that tribal courts are different from state and federal courts in fundamental ways. Second, that tribal courts are homogenous in all important respects. *Duro*, *Oliphant,* and *Hicks* all focus on the non-traditional aspects of tribal courts and the possible consequences on non-tribal litigants.[83] *Williams*, *Fisher*, and *Three Tribes* emphasize the development of tribal courts and the threat posed to them by state court jurisdiction, indicating that they are fragile in a way other courts are not.[84] These fears make little sense if tribal courts are similar to other American courts. As discussed further in the next section, while a large number of tribal courts differ from state courts in ways that make the Court's concerns relevant, many do not and have adopted structures similar to state courts. For these courts, the Indian law jurisdictional rules are less appropriate than traditional choice of law analysis.

II. THE DIFFERENCES AMONG TRIBAL COURTS

As discussed above, the Supreme Court's traditional approach to civil jurisdiction in Indian Country has primarily turned on the location where the dispute originated and the tribal status of the litigants. The Court has been motivated by concerns about the integrity of tribal court and tribal courts' treatment of non-tribal litigants. The structure of the tribal courts that are actually in place has never played a role in the Court's analysis. The Supreme Court has refused to distinguish among tribes in making jurisdictional decisions. Tribal courts are considered formally identical. Not surprisingly, reality is far different.

What characteristics of tribal courts make the Court's concerns relevant? What types of tribal courts might be threatened by concurrent jurisdiction in state courts? What types of tribal courts should be considered too alien to give

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[80] As discussed above, the Indian Civil Rights Act applies some of the constitutional protections in tribal court. *See supra* note 63.

[81] *Hicks*, 533 U.S. at 384 (quoting Oliphant v. Suquamish Tribe, 435 U.S. 191, 210 (1978)).

[82] A similar fear shows up in the Supreme Court's diminishment cases. A recent law review article has argued that the best way to comprehend the Court's diminishment case law is to focus on the Court's concern over having tribal laws apply to non-members. *See* Robert Laurence, *The Dominant Society's Judicial Reluctance to Allow Tribal Civil Law to Apply to Non-Indians: Reservation Diminishment, Modern Demography and the Indian Civil Rights Act*, 30 U. RICH. L. REV. 781, 803 (1996).

[83] *See Hicks*, 533 U.S. at 384 (Souter, J., concurring); Duro v. Reina, 495 U.S. 676, 693 (1990); *Oliphant*, 435 U.S. at 211.

[84] *See Three Tribes I*, 467 U.S. 138, 149 (1984); Fisher v. Dist. Ct., 424 U.S. 382, 382 (1976); Williams v. Lee, 358 U.S. 217, 223 (1959).

them concurrent jurisdiction? From a choice of law perspective, what types of tribal law can state courts plausibly apply? What types of tribal courts can plausibly apply state law?[85]

Not surprisingly, the answers to these questions turn primarily on how similar the tribal courts are to state courts, on both a procedural and a substantive basis. The Court's model of exclusive jurisdiction makes sense when tribes have adopted what I will call *traditional* courts. This model of dispute resolution also varies widely from tribe to tribe, but is often marked by limited codification, unification between judicial and other governmental figures, and an emphasis on mediation and alternative methods of dispute resolution.[86] In addition to these procedural aspects, an important consideration is the use of custom in tribal courts.[87] In traditional courts, custom often trumps other sources of decisional law, including statutes and federal law, in a way that is very dissimilar to the use of common law in state courts.[88] In these types of courts, there is some reason to believe that non-members will be subjected to a system that is foreign and unfamiliar and thus lacks a level playing field.[89] In

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[85] Numerous commentators have focused on the difficulty of non-tribal courts applying tribal law. *See, e.g.*, Katherine C. Pearson, *Departing from the Routine: Application of Indian Tribal Law Under the Federal Tort Claims Act*, 32 ARIZ. ST. L.J. 695, 743 (2000); John J. Harte, *Validity of A 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, 101-02 (1997); John J. Harte, Note, *Civil Procedure—New Mexico State Courts have Concurrent Civil Jurisdiction over Actions Brought By Non Member Indians for Torts Committed on a Reservation*, 25 N.M. L. REV. 97, 107-08 (1995). I believe these commentators make the same mistake as the Court—they assume a model where tribal courts are both all similar to each other and are also fundamentally different from state and federal courts.

[86] *See* Joh, *supra* note 6, at 123-24. Joh points out that the lack of Anglo-American procedures in tribal courts may stem from a variety of social and economic features unrelated to tribal traditions. *Id.* at 124.

[87] The role of custom in tribal courts has received extensive focus in legal scholarship with some authors arguing that the use of custom is fundamental to the survival of tribal courts. *See* Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 230 (1994) ("Using custom is essential for the cultural survival of American Indians as a distinct people and as a governing entity."); Frederic Brandfon, *Tradition and Judicial Review in the American Indian Tribal Court System*, 38 UCLA L. REV. 991, 1009 (1991) ("Only the use of tribal customs as the bases of tribal court decisions will increase the vitality and independence of the tribal courts.").

[88] As discussed further below, some tribal courts have explicitly compared the development of tribal custom as a source of decisional law to the development of the Anglo-American common law. This comparison is most apt in those systems where tribal custom is viewed as something for tribal judges to develop or discover. In those tribal courts where expert opinion is used to determine tribal custom, the comparison to the common law is less correct. In those cases, the use of industry custom is a better analogy, where courts defer to the practices of an industry (often proven by expert opinion) rather than apply the common law rule. *See* Walling v. Portland Terminal Co., 330 U.S. 154 (1947) (Jackson, J., concurring) (arguing for deference to industry custom in application of Fair Labor Standards Act); Ghen v. Rich, 8 Fed. 159, 162 (D. Mass. 1881) (usage in whaling industry overcomes common law rule).

[89] Professor Laurence has argued that the reluctance of the dominant society to allow tribal court jurisdiction over non-members is partly solved by the Indian Civil Rights Act. Laurence, *supra* note 82, at 807 (arguing that ICRA is a "decent" statute in terms of accomplishing the protection of non-tribal members without infringing tribal rights). My approach is

turn, forum-shopping litigants who face a real, significant choice between the fora might undermine tribal court authority.

When, on the other hand, tribes adopt what I will call *western* courts, with codified rules of procedure, independent judicial decision-making, and written opinions, an exclusive jurisdiction model makes little sense and courts should be granted concurrent jurisdiction over disputes both inside and outside Indian Country. In these courts, there is little reason to believe that on the one hand, non-Indian litigants will be at a disadvantage in a dispute arising on- or off-reservation, and on the other hand, that tribal courts will be threatened by the exercise of concurrent jurisdiction by state courts for on-reservation disputes because litigants will face less reason to forum shop.

The following does not purport to be a comprehensive description of all the various tribal court systems in the country or even anything more than a brief survey of the systems discussed. The only goal is to present various tribal court systems with an eye toward those factors that might make concurrent or exclusive jurisdiction more appropriate.

A. Procedure in Tribal Court

When discussing tribal court structures, the Navajo Nation is easiest place to start, mainly because it is the most widely studied tribal court system in the country. The Navajo judiciary, from a structural standpoint, has many similarities to a state system.[90] The Navajo Nation is divided into seven districts operating trial courts with appellate review by the Navajo Supreme Court.[91] Many districts also operate separate family courts.[92] The Navajo Supreme Court publishes written opinions collected in reporters, decides cases after briefing and argument by parties, and relies on prior decisions as precedent.[93]

Despite the structural similarities,[94] the Navajo courts retain a significant focus on applying Navajo traditional law in Navajo courts. Navajo courts are

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more focused on the procedural practices in tribal court than congressional statutes, but I certainly agree that the issues of concurrent jurisdiction should be resolved by looking at what actually happens in tribal courts, rather than with sweeping pronouncements that push all tribes into the same basket.

[90] One important reason for the development of the Navajo Nation tribal court system along the lines of state courts is sheer size. As noted in the introduction, the Navajo Nation is enormous compared to other tribes in the United States. Even if they were interested, smaller tribes may not have the option to adopt similar systems because court structures may not "scale down" effectively to operate in communities with citizens numbering in the hundreds. *See* Robert Laurence, *Symmetry and Asymmetry in Federal Indian Law*, 42 ARIZ. L. REV. 861, 920 (2000) (discussing issues of scale in deciding whether tribes should be treated differently from states).

[91] *See* Bidtah N. Becker & Paul Spruhan, *Profile of the Law of the Navajo Nation*, at 6, *available at* http://tlj.unm.edu/articles/volume_2/navajo/index.php (last visited Nov. 17, 2005). The Navajo Supreme Court was initially known as the Navajo Court of Appeals. Daniel L. Lowery, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience 1969-1992*, 18 AM. INDIAN L. REV. 379, 382 (1993).

[92] Becker & Spruhan, *supra* note 91, at 6.

[93] *See id.*

[94] The Navajo Nation has also created a much more traditional dispute resolution system that operates side-by-side with the more western model. The Navajo Peacemaker Courts are a long-standing, extremely successful method of resolving lawsuits by non-litigative means.

bound to apply uncodified Navajo customary law as a source of precedent.[95] The Navajo Constitution also provides a preference ordering for the use of tribal custom. Tribal custom is subordinated to federal law and when no tribal custom or law applies, Navajo courts are encouraged to examine the law of the appropriate state.[96] The Navajo Supreme Court has explicitly compared the developing use of custom in Navajo courts to the development of the English common law.[97]

The Navajo Supreme Court has noted the difficulty of trying to consistently apply custom in tribal court,[98] and has adopted a procedural approach to custom that is formally rigorous. Custom must be pled in the complaint, with a short statement of the custom and how it entitles the party to relief.[99] A failure to plead custom bars its later introduction.[100] Custom must then be proved through a well-defined system. Navajo law recognizes four ways to prove custom: (1) recorded precedent of Navajo courts; (2) sociological and other scholarly works on the Navajo; (3) judicial notice; and (4) expert opinion.[101] All four of these mechanisms could be applied in a non-tribal court[102] and as the published case law of the Navajo court expands, reliance on the written precedent of the court has become an increasingly important source of custom; courts are bound by notions of *stare decisis*.[103] The Navajo Supreme Court has also adopted procedures for accepting certified questions, including questions of custom.[104] The structural similarities, along with the clear and well-established mechanism for proving custom in Navajo courts, indicate that litigants

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Established in the early 1980s, the Peacemaker Courts are consensual, non-adversarial mechanisms that are designed to apply traditional Navajo practices to resolve disputes. They are facilitated by tribal members trained in Navajo culture. *See generally* Becker & Spruhan, *supra* note 91, at 9; Lowery, *supra* note 91, at 392 (1993); James W. Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. INDIAN L. REV . 89, 92 (1983).

[95] *See* 7 NAVAJO NATION CODE tit. 7, § 204(A) (1995); Becker & Spruhan, *supra* note 91, at 7.

[96] *See* 7 NAVAJO NATION CODE tit. 7, § 204(A).

[97] *See* Dawes v. Yazzie, 5 Navajo Rptr. 161, 165 (Navajo 1987); *see also* Robert Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Court*, 46 AMER. J. COMP. L. 287, 328 (1998) ("The Navajo Supreme Court hears many cases each year argued by lawyers who continually refer back to its past decisions, which are published and stored in an impressive library. The Navajo judges speak about 'Navajo common law' and regard themselves as participating in its elaboration and development.").

[98] *See* Lente v. Notah, 3 Navajo Rptr. 72, 79-80 (Navajo 1982).

[99] *See* J.R. Mueller, *Restoring Harmony Through* Nalyeeh: *Can the Navajo Common Law of Torts be Applied in State and Federal Forums?*, 2 TRIBAL L.J. 1, 12 (2003) *available at* http://tlj.unm.edu/articles/volume_2/mueller/index.php.

[100] Lowery, *supra* note 91, at 392 (1993).

[101] *See In re* Estate of Belone v. Yazzie, 5 Navajo Rptr. 161, 165 (Navajo 1987); Lowery, *supra* note 91, at 392.

[102] The most difficult of these to apply would be judicial notice. While this has been a common method in Navajo courts up until now, "[t]his trend is most likely explained by the failure of parties to present evidence going to the existence of customs, as well as by the efforts of the courts to establish a body of precedential customary law and to encourage the use of that law." Lowery, *supra* note 91, at 396. As Lowery notes, the trend is toward reliance on citing written decisions. *Id.* at 394 n.82.

[103] *Id.*

[104] *See* Mueller, *supra* note 99, at 12.

are unlikely to threaten the Navajo system by forum shopping, because the court system they face in state court is not vastly different. In addition, non-tribal litigants are not disadvantaged in the Navajo system because it is unlikely to be unfamiliar.[105]

The Pueblo of Laguna, on the other hand, has adopted a dispute resolution model that varies substantially from the traditional, western model. It includes what is effectively an exhaustion requirement—litigants who appear before the Tribal Court are asked if they have presented the dispute to the Mayordomos (village elders). If not, the Court will send the dispute back to the village level to be resolved. At the village level, the parties participate in a mediation-type process during which no records are kept of the parties, discussions, or the outcome.[106] This is exactly the sort of dispute resolution mechanism where concurrent state court jurisdiction would pose a substantial threat to Laguna Pueblo's right to "to make their own laws and be ruled by them."[107] Plaintiffs dissatisfied with the village-based system would be strongly tempted to forum shop to state and federal courts. State courts, in turn, would find it difficult if not impossible to apply tribal law.

This system of mixed jurisdiction between the village and tribal court also appears in the Hopi system. The Hopi Constitution links together the self-governing Hopi villages but recognizes them as a primary government body,

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[105] The Navajo Supreme Court has recently faced the question of the treatment of non-tribal litigants in Navajo courts in the criminal context. As discussed above, see *supra* note 77 and accompanying text, the Supreme Court in *Duro v. Reina* held that tribal courts lacked criminal jurisdiction over non-member Indians, but Congress quickly rewrote the Indian Civil Rights Act to reestablish this jurisdiction. The constitutionality of what is sometimes referred to as "the Duro fix" is unclear. *See* Duro v. Reina, 495 U.S. 676 (1990). In *Means v. District Court*, the Navajo Supreme Court concluded that it had criminal jurisdiction over a non-member Indian in part based on his status as hadane, an in-law due to his marriage to a Navajo woman. No. SC-CV-61-98 (Navajo 1999), http://www.tribalresourcecenter.org/opinions/opfolder/1999.NANN.0000013.htm. The Navajo Court concluded that based on Navajo custom, hadane qualify as members for criminal jurisdictional purposes. *Id.* Under this approach, criminal jurisdiction over hadane may survive even if the Duro fix is unconstitutional. For the purposes of this Article, the important aspect of the *Means* decision is not whether the substantive decision is right or wrong, but simply that the procedures of reasoned analysis in a published opinion were very similar to that applied in a state court. There is no reason to believe that Means was disadvantaged in this litigation based on his status as a non-tribal member. For an excellent review of the *Means* case and its implications, see Paul Spruhan, Means v. District Court of the Chinle Judicial District *and the Hadane Doctrine in Navajo Criminal Law*, http://tlj.unm.edu/articles/voume_1/spruhan/index.php (last visited Nov. 17, 2005).

[106] *See* Kim Coco Iwamoto, *Pueblo of Laguna Tribal Government Profile*, http://tlj.unm.edu/articles/volume_2/laguna/index.php (last visited Nov. 17, 2005). Iwamoto notes that some villages are now keeping records of the outcomes of land disputes in order to prevent hearing those disputes multiple times, but even in these cases, the villages do not record the decision making process. *Id.* The resolution outcomes in tort cases at Laguna can also vary substantially from the western models. The offender must admit wrongdoing and promise not to do it again, must apologize to any victim, and must pay damages to the victim and must make the offense up to the community through community service. *See* Cooter & Fikentscher, *supra* note 97, at 324.

[107] Williams v. Lee, 358 U.S. 217, 220 (1959).

not completely subordinate to the tribe.[108] The Constitution recognizes the villages as a fourth branch of government and provides substantial areas of jurisdiction that are exclusively reserved to the village level.[109] Not only would this Hopi structural system make concurrent jurisdiction difficult, the method of using and proving custom in Hopi courts also makes a concurrent jurisdiction model less appropriate. Hopi custom takes precedence over the application of federal and state law.[110] At least in the areas where villages retain jurisdiction, villages play a substantial role in the determination of custom. In *Smith v. James*,[111] the Hopi Court of Appeals endorsed a village-based fact finding procedure for determining custom in a land dispute, requiring a non-adversarial procedure where the village played a substantial role in the selection of the witnesses to testify.[112] The Court noted that, in case involving village customs, the diversity of practices across the various villages will often make a hearing necessary.[113] A non-adversarial, village-based approach to proving custom would be a difficult system for a non-tribal member to litigate in. Similarly, no state court could easily apply the Hopi procedures. As a result, concurrent jurisdiction here would be less likely to be appropriate.

These examples highlight one of the most important structural facets of tribal court systems. One of the most fundamental procedural aspects of western court systems is the existence of an independent judiciary, one that is more or less insulated from political pressures. Tribal courts often vary along this axis.[114] While the Navajo and Hopi nations have set up separate independent

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[108] "The Hopi Constitution currently operates, and is best conceived, as a contract between the specified, self governing villages in 1936." Pat Sekaquaptewa, *Evolving the Hopi Common Law*, 9 KAN. J. L. & PUB. POL'Y 761, 765 (2000). Since Sekaquaptewa's article, the Hopi has adopted a new constitution. *See* HOPI CONST., *available at* http://www.tribalresourcecenter.org/ccfolder/hopi_const.htm (last visited Nov. 17, 2005).

[109] *See* HOPI CONST. art. VII, § 2 (villages have exclusive jurisdiction over family, property, and inheritance issues). Absent the consent of the village, any village determination on these issues is final and cannot be appealed to the tribal court. *Id.* at art. VII, § 2(c).

[110] *See* Sekaquaptewa, *supra* note 108, at 778.

[111] No. 98AP000011 (Hopi 1999), http://www.tribal-institute.org/opinions/1999.NAHT.0000012.htm.

[112] *Id.* at 5. The Court did encourage the use of written follow-up questions from the party. *Id.*

[113] *Id. See also* Sekaquaptewa, *supra* note 108, at 683 (noting that the process of proving custom in Hopi courts "is a complex undertaking").

[114] The reason that this issue is so fundamental is, of course, that it determines who decides cases. The issue of judicial qualifications could be equally important if tribes decided to use these restrictions to mandate that judges be steeped in local tradition and customs. However, while qualifications for judges vary widely, few tribes have used judicial qualifications as a mechanism to limit who decides cases. Navajo judges must meet an age requirement, speak Navajo, be familiar with Navajo customs, and have two years of legal experience. Cooter & Fikentscher, *supra* note 97, at 322. These requirements, though, are among the most restrictive and other tribes have more minimal formal requirements for the judiciary. ("[A]t least half the judges whom we interviewed were not fluent in a native language spoken on the reservation where they preside." *Id.*). The Pueblo of Laguna does not require its tribal judges to be tribal members or even Indian. *See* Iwamoto, *supra* note 106, at 4. To the extent that a tribe expressed a strong desire to have tribal members deciding cases, that fact would also indicate that concurrent jurisdiction was inappropriate.

judiciaries,[115] other tribes have blended the executive and judicial arms, with the tribal council serving as the highest court of appeals.[116] The Pueblo of Laguna is an example of the latter, setting up a Court of Appeals consisting of the Pueblo Governor and the Six Village Representatives.[117] Other tribes completely lack an appellate mechanism.[118] Even when the judiciary is separate from the executive branch, some tribes have a recent history of councilmen exercising control over the judiciary.[119] Tribal court systems that lack an independent judiciary are not good candidates for concurrent jurisdiction; state court jurisdiction likely would threaten the dispute resolution model established by the tribe.[120]

B. Substance in Tribal Court

Substantive law in tribal courts also varies widely. Some tribes have adopted tribal court systems that apply law essentially identical to that in state court.[121] The Pueblo of Laguna, on the other hand, has adopted a constitution that in the first instance provides precedence to Pueblo of Laguna ordinances or customs and only secondarily to federal and state laws and only then when they do not conflict with Pueblo custom.[122] Tribal law requiring resolution of con-

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[115] Cooter & Fikentscher, *supra* note 97, at 317. These judiciaries can be appointed or elected. *Id.*

[116] *Id.*

[117] *See* Iwamoto, *supra* note 106, at 4.

[118] Cooter & Fikentscher, *supra* note 97, at 317 n.115. A number of smaller tribes use the Southwest Intertribal Court of Appeals ("SWITCA"). Initially set up in 1988 by three New Mexico pueblos to hear their appeals, the Court has expanded and now provides a range of options for member tribes, including acting as court of last resort, an intermediate appellate court, or simply providing advisory opinions. *See* http://lawschool.unm.edu/ailc/switca/eligibility.php (last visited Nov. 17, 2005). SWITCA is designed as an "[i]ntertribal collaborative effort" designed to give tribes "the ability to structure the use of the court to fit the needs, concerns, and unique differences of each tribe." *See* Christine Zuni Cruz, *The Southwest Intertribal Court of Appeals*, 24 N.M. L. REV. 309, 313 (1994).

[119] Cooter & Fikentscher, *supra* note 97, at 318 (discussing removal of judges at White Mountain and Warm Springs reservations).

[120] Perhaps as important as an independent judiciary for a concurrent jurisdiction model is a notion that the judge play a role similar to that in state court. In some tribal courts, the procedures can be much less formal with the judge playing a more active role in the resolution of the case, recommending various resolution methods. *See id.* at 326 (discussing interviews where judges report requiring an offender to hug his mother, a consensual resolution of a rape case leading to dismissal of the criminal prosecution, and a court telling the litigants what his decision would be pre-trial in order to produce a settlement). The recusal mechanism can also shape who decides the case; in some tribes judges may step aside to allow more experienced tribal members to resolve cases. *Id.* at 510 (relating a story regarding judicial recusal in a controversial case so that an individual with more experience could decide the matter).

[121] *See* Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 294 & n.38 (1998) (Oneida and Mashantucket Pequot). One reason for the heavy use of state law in the Mashantucket Pequot courts is the presence of large casinos, leading to a substantial quantity of litigation involving non-tribal members. *Id.* at 294.

[122] Iwamoto, *supra* note 106, at 5, (quoting PUEBLO OF LAGUNA LAW AND ORDER CODE, ch. 1, § 4 (1968)).

flicts against federal law would certainly be difficult for a state court to apply and might even run across constitutional difficulties.[123]

In addition to the procedural role of custom discussed above, custom also plays a substantive role. Even where customary law is not immediately present on the face of the codified law of the tribe,[124] custom plays a strong and substantial role in tribal court decision making. The use and presence of customary law should not prevent a concurrent jurisdiction model. The important question is whether custom is used and applied in a way that: a) state courts can also apply customary law when necessary without inducing forum shopping; and b) non-tribal members who end up in tribal courts are not litigating at a disadvantage.[125]

In some situations where custom plays primarily a substantive role, it can be difficult to imagine an out-of-jurisdiction court successfully applying that law if choice of law rules point to tribal law. In part, this stems from having courts act as more than courts. Take, for example, the questions of real property, a classic example where the law of the situs of the property almost invariably controls.[126] Cooter and Fikentscher analyze the mechanisms used to resolve land disputes in the White Mountain Apache Tribe and the Hopi Tribe. At White Mountain, the tribal council acts in a way very similar to a landlord. Tribal members can seek an assignment or lease of any unused tribal land.[127] These leases and assignments appear to be revocable at the will of the council.[128] At the expiration of a lease or the death of the tenant, land escheats to the tribe and does not pass to heirs.[129] It is difficult to envision a non-tribal court effectively applying rules of this type.

Hopi land rules would be equally difficult for a state court to apply. Hopi land use disputes are generally resolved at the tribal village level, not at the council level.[130] All villages have some land that falls under clan control and cannot be transferred by any individual; in many villages, even land allotted to

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[123] Not only might the public policy exception to choice of law rules apply, *see* Loucks v. Standard Oil Co., 120 N.E. 198, 202 (N.Y. 1918); *see also* SCOLES & HAY, *supra* note 25, at 139, but the Supremacy Clause might well bar the application of tribal law in these circumstances. *See* U.S. CONST. art. IV, § 1, cl. 2.

[124] Cooter & Fikentscher, *supra* note 97, at 509-10 (1998) ("The constitution of every tribe we visited, except some Pueblos, follow American models, not Indian tradition . . . . Although tribal constitutions and codes typically recognize custom as a source of law, custom is not apparent on the face of written law.").

[125] Of course, none of this is to imply that custom is somehow a less valid mechanism for resolving cases. "Indians have every right to assert that their law stands on the same footing as the law of the United States and Canada. It is unfortunate that the term 'custom' implies something that is somehow less or of lower degree than law." James W. Zion, *Searching for Indian Common Law*, INDIGENOUS LAW AND THE STATE (B.W. Morse & G.R. Woodman eds., 1988).

[126] *See* SCOLES & HAY, *supra* note 26, at 942.

[127] Cooter and Fikentscher, *supra* note 97, at 519. Assignments are unlimited; leases last for a term of years. *Id.*

[128] *Id.* The authors note that revocation when property has been improved is less likely. *Id.*

[129] *Id.* Leases are renewable but the authors "could not determine the extent to which renewal is automatic in practice." *Id.*

[130] *Id.* at 521. Under the former Hopi Constitution, the Tribal Council and the Tribal Court had concurrent jurisdiction over appeals involving intervillage land disputes. *See* Sekaquaptewa, *supra* note 108, at 768. The new Constitution provides for mediation of intervil-

individuals seems to fall somewhat under the control of the clans.[131] These complicated systems of mixed family/village control of land become additionally complex as non-tribal members marry Hopis.[132] As with the White Mountain Apache land system, it is hard to imagine a state court effectively applying this law.[133]

By contrast, Navajo contract and tort law likely can be applied effectively by state courts. In the contracts context, the Navajo Nation applies rules very similar to Anglo-American common law.[134] On the many of the major issues of contract law, the Navajo Supreme Court has explicitly adopted the same rules that apply in state court.[135] Contract formation is governed by the rules outlined in American Jurisprudence, requiring among other things a meeting of the minds and consideration.[136] Relying on Black's Law Dictionary, the Navajo Supreme Court has also held that ambiguous provisions are construed in light of the intent of the parties.[137] The Navajo Nation has also adopted a

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lage disputes with the Court of Appeals retaining jurisdiction over appeals of the mediator's decision. *See* HOPI CONST. art VII, § IV.

131 Cooter and Fikentscher, *supra* note 124, at 522.

132 *Id.*

133 Indeed, property law is one of the areas where tribal courts have staked out the most significant differences from state courts. Even in the Navajo Nation, perhaps the tribal court system most amenable to a concurrent jurisdiction model, property law is very different from an Anglo-American system. "Private ownership of land, as by fee simple in the Anglo legal system, is unknown in the Navajo Nation . . . . The ownership of the land always remains vested in the Navajo Nation as a whole." Hood v. Bordy, A-CV-07-90, 18 Ind. L. Rep. 6061, 6063 (Navajo 1991), *available at* http://www.tribalresourcecenter.org/opinions/opfolder/1991.NANN.0000005.htm. Individual tribal members can gain legally protected usage rights, though, over particular tracts of land. A variety of factors go into determining the scope of the usage rights, including the length of the individual's use of the land and the extent of improvements made to the land. *See* Lowery, *supra* note 91, at 413. The Navajo courts have also established the notion of family property rights through the "customary trust" doctrine, under which courts supervise the use of family land for all family members. For discussions of the customary trust, see *id.* at 414, and Gloria Valencia Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 254 (1994).

134 "The Navajo tribal courts . . . have adopted an Anglo-American model of transactional (contract, commercial, and consumer) law, with relatively few incorporations of traditional promissory law." Michael D. Lieder, *Navajo Dispute Resolution and Promissory Obligations: Continuity and Change in the Largest Native American Nation*, 18 AM. INDIAN L. REV. 1, 52 (1993). Lieder notes that this adoption of a western model of transactional law is driven in part by a desire to encourage economic relations between Navajos and non-Navajos. *Id.* at 54. For the purposes of this Article, contract law is one of the most important areas to consider since it is perhaps the most likely source of disputes between tribal members and non-tribal members.

135 "The Navajo Courts have adopted almost all of the basic doctrines of Anglo-American contract law." *Id.* at 55. Lieder identifies two important exceptions, both stemming in part from the important of oral speech in Navajo culture. First, the Navajo courts initially rejected the Statute of Frauds in the context of both wills and contracts for the sale of land. Second, the Navajo courts applied a more limited notion of the parol evidence rule in contract interpretations. Decisions on these topics have at least in part been superceded by the adoption of a version of the U.C.C. *Id.* at 58-59.

136 *See Hood,* 18 Ind. L. Rep. at 6062 (citing 17 AM. JUR. 2D *Contracts* § 10 (1964)).

137 *See* Gene v. Hallifax, SC-CV-71-98 (Navajo 2000) (citing BLACK'S LAW DICTIONARY). *Gene* also held that a party must have an "insurable interest" to take out an insurance policy. *Id.*

version of the Uniform Commercial Code,[138] and, in at least one instance, a Navajo District Court has struck down a finance contract as unconscionable.[139] Given this approach, there is little reason to believe that state courts would be unable to apply Navajo contract law.

State courts are also likely to be able to apply Navajo tort law. "Traditional Navajo tort law is based on *nalyeeh*, which is a demand by a victim to be made whole for an injury."[140] Nalyeeh is multi-faceted concept of "restorative justice," which varies significantly from traditional tort law.[141] Despite the differences, nayleeh has been applied in a systematized way in lawsuits by Navajo courts that could also be applied by a non-tribal court. While historically nayleeh provided for symbolic payments, Navajo courts have shifted to a model based on monetary damages.[142] The Navajo courts have also resolved many of the core tort law issues, including double recovery and punitive damages.[143] Given well-established, published tribal law on these issues and the presence of a certification mechanism, there is no reason to believe that state courts cannot effectively apply tribal law in this area and vice versa.[144]

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[138] *See* Navajo U.C.C. (1986); Lowery, *supra* note 92, at 431. The Navajo version does include provisions specifically crafted to conform to Navajo traditions. *See* Lieder, *supra* note 135, at 60 (discussing the exclusion of artists from the definition of "merchant" and the exemption of low-value barter transactions from the U.C.C. provisions).

[139] *See* Capital Loan Corp. v. Platero, 2000 CP-CV-001 (D. Crownpoint 2000).

[140] Robert Yazzie, *Life Comes From It: Navajo Justice Concepts*, 24 N.M. L. REV. 175, 184 (1994). In addition to this restorative aspect of Navajo law, the Honorable Robert Yazzie, Chief Justice of the Navajo Nation, has also emphasized the reparative aspect, designed to bring individuals back into good relations. *See* Robert Yazzie, *"Hozho Nahasdlii,"—We Are Now in Good Relations: Navajo Restorative Justice*, 9 ST. THOM. L. REV. 117, 123 (1997).

[141] Nalyeeh seems to have at least two primary differences from Western tort law. First, Navajo law retains a more equitable focus on restoring the tort victim to the position where they were prior to the injury. "The maxim for nalyeeh is that the must be compensation so there will be no hard feelings." Yazzie, *supra* note 141, at 185. The Navajo Supreme Court has endorsed this view. "Nalyeeh does not carry the same meaning as the adequate award in contemporary personal injury practice. . . . [I]t has a deeper meaning of a demand to 'make right' for an injury and an invitation to negotiate what it will take so that an injured party will have no hard feelings." Benally v. Big A Well Service Co., 23 CS-CV-27-99 (Navajo 2000). Second, Nalyeeh probably includes less focus on causation than western tort law. "In the law of nalyeeh, one who is hurt is not concerned with intent, causation, fault, or negligence." Yazzie, *supra* note 141, at 184. One commentator has pointed to some Navajo court precedent as suggesting that strict liability may exist under Navaho common law for all injuries. *See* Lowery, *supra* note 91, at 428 n.380. Lowery notes, though, that the strict liability system may depend on the use of merely symbolic damages. A Navajo district court has applied a pure comparative fault model in a case involving money damages. *See* Cadman v. Hubbard, 5 Navajo Rptr., 116, 119 (Navajo 1984). *See also* Mueller, *supra* note 99, at 5-6 (discussing Navajo case law applying nalyeeh).

[142] Mueller, *supra* note 99, at 5.

[143] *See* Nez v. Peabody Western Coal Co., 2 Navajo Rptr. 550, 554 (Navajo 1999) (double recovery disfavored); Cadman v. Hubbard, 5 Navajo Rptr. 116, 119 (D. Crownpoint 1984) (adopting comparative fault); Keeswood v. Navajo Tribe, 2 Navajo Rptr. 46 (Navajo 1979) (punitive damages available in cases of actual malice).

[144] One likely way that tribal tort is likely to appear in non-tribal courts is through the Federal Tort Claims Act, which requires the application of the law of the place of the tort in actions against the federal government. *See* 28 U.S.C. § 1346(b)(1) (2000). In 1999, a United States District Judge for the District of New Mexico held that Acoma tribal law

Tribal systems are not easily categorized; there are too many, and they are too diverse. But as this brief overview has shown, the factors that the Supreme Court has considered important—a level playing field for non-members and the survival of tribal court independence are only a concern when the tribe has not adopted a westernized justice system. Where the tribe retains a traditional model of dispute resolution, exclusive jurisdiction may remain appropriate. Where the tribe has adopted a western model, though, state and tribes should be able to exercise concurrent jurisdiction over all disputes, on reservation or off.

III. BREAKING DOWN THE OTHER: TREATING TRIBES DIFFERENTLY

Shifting from a model of exclusive to concurrent jurisdiction would reflect a fundamental change. So far, exclusive jurisdiction has been used as a shield—a shield to protect tribal courts from incursions by state courts and to protect non-tribal members from abuse by tribal courts. Both of these fears rest on two assumptions about tribal courts. It assumes that (a) all tribal courts are fundamentally the same and (b) all tribal courts are fundamentally different from state courts. As discussed above, the first assumption is far from true and the second assumption is true in some cases and not in others. Where tribes have adopted models of dispute resolution that are very different from the traditional Anglo-American model, the exclusive jurisdiction model makes sense.[145] Where tribes, though, have adopted a judicial model that is very similar to state court system, exclusive jurisdiction is an anachronism and tribes should be given the option to change.[146] Where western-style court systems exist, the tribal and state interests in the disputes can be fully resolved through choice of law rules, litigants are unlikely to damage the tribal court system through forum shopping, and the tribes certainly pose no threat to non-tribal litigants, regardless of where the disputes arise. The adoption of Anglo-American systems in tribal courts has been heavily criticized by some academics;[147] decisions about

applied in an FTCA case involving a tort suit against an Indian Health Service hospital operating on Acoma tribal lands. *See* Cheromiah v. United States, 55 F. Supp.2d 1295 (D.N.M. 1999). For a general discussion of *Cheromiah*, see Katherine C. Pearson, *Departing from the Routine: Application of Indian Tribal Law Under the Federal Tort Claims Act*, 32 ARIZ. ST. L.J. 695 (2000).

[145] The argument for applying the same model to tribes as to states is vulnerable to the charge of attempting to force a symmetric treatment of asymmetric entities. As a recent article has argued, the asymmetric treatment of tribes is important as a result of historic and structural factors, even in a world where the Supreme Court seems to be heading toward a strong notion of colorblindness in its equal protection jurisprudence. *See* Laurence, *supra* note 90, at 865. This Article simply argues that when tribes have adopted symmetric structures, symmetric treatment makes sense.

[146] In addition to the consent of tribes, any such change would require congressional action. As one commentator has noted, one of the striking aspects of federal Indian law is how active the Supreme Court has been compared to Congress. *See* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L.J. 1, 63, 84 (1999) (arguing for a more active Congressional role).

[147] *See, e.g.*, Russell Lawrence Barsh, *Putting the Tribe in Tribal Courts: Possible? Desirable?*, 8 KAN. J.L. & PUB. POL. 74, 80 (1999); Christine Zuni Cruz, *Strengthening What Remains*, 7 KAN. J.L. & PUB. POL. 17, 24 (1997); Robert A. Williams, *The Algebra of Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 289 (1986). These and other articles rigorously analyze the

court structures must be left to the individual tribe. Once a tribe has adopted a westernized system, however, there is no reason not to give the tribe the additional option of taking the next step and granting both the state and the tribe concurrent jurisdiction over all disputes, on or off-reservation, involving tribal members and non-members, and resolving tribal and state interests through a choice of law approach rather than a jurisdictional model.[148]

Why has the Supreme Court decided to assume that all tribes are identical? The lineage of the Supreme Court's decision to treat tribes as homogenous is long-standing and tracks the government's treatment of tribes in general. The federal government's treatment of tribes has followed a well-established pattern of oscillating between separation and assimilation.[149] The one consistency has been treating tribes as foreign and incomprehensible and treating Indians as "aliens and strangers . . . members of a community separated by race [and] tradition."[150] This assumption that Indians are "aliens and strangers" has led the Court to consider tribal courts as all different from state courts, but as all the same.[151] Providing the option of concurrent jurisdiction to those tribes that

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debate about the appropriate structure of tribal courts. I certainly do not intend to offer an opinion on that topic. I agree wholeheartedly with the views of Professor Skibine on this subject. "It is not for me to tell tribes how 'tribal' the tribal laws and courts should be and whether they should or should not pursue 'integration' within the United States political system and if so, under what conditions. What I do believe is that the tribes should be the ones deciding . . . ." Alex Tallchief Skibine, *Troublesome Aspects of Western Influences on Tribal Justice Systems and Laws*, 2 TRIBAL L.J. (2003), *available at* http://tlj.unm.edu/articles/volume_1/Skibine/index.php. *But see* Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness—[Re]Incorporating Customs and Traditions into Tribal Law*, 1 TRIBAL L.J. 2 (2000) *available at* http://tlj.unm.edu/articles/volume_1/zuni_cruz/index.php (arguing that "not every sovereign act undertaken by an indigenous nation necessarily promotes the sovereignty of the people . . . . Adoption of western law can create a gap between the adopted law and the people to whom it is applied . . . . In this respect, an Indian nation's government can participate in the alienation of its own people.").

[148] Of course, any such shift would also require a concomitant adoption of full faith and credit requirements, a process which has already begun in many states and tribes. *See* David S. Clark, *State Court Recognition of Tribal Court Judgments: Securing the Blessings of Civilization*, 23 OKLA. CITY U. L. REV. 353, 368-69 (1998); Robert Laurence, *The Enforcement of Judgments Across Indian Reservation Boundaries: Full Faith and Credit, Comity, and the Indian Civil Rights Act*, 69 OR. L. REV. 589, 657-60 (1990). These *de jure* steps toward full faith and credit are impressive but may not be honored when applied in actual cases. *See* Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. REV. 311, 349 (2000).

[149] *See* GETCHES, *supra* note 13, at 41-257; Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481 (1993). Of course, the imposition of external and foreign legal systems did not begin with the American government. Colonial Spanish law required the recognition of Indian legal systems as long as "they were not contrary to the Christian religion." James W. Zion & Robert Yazzie, *Indigenous Law in North American in the Wake of Conquest*, 20 B.C. INT'L & COMP. L. REV. 55, 62 (1997) (quoting WOODROW BORAH, JUSTICE BY INSURANCE 29 (1983). British law also required the recognition of tribal law to the extent they were "compatible with crown sovereignty." Zion & Yazzie, at 65.

[150] *Ex parte* Crow Dog, 109 U.S. 556, 571-72 (1883).

[151] Professor Prakash has argued that the plenary power should vary based on the history of the specific tribe in question and that the failure to do so is based on the fact that tribes have historically been stereotyped. *See* Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1120 (1994).

have adopted Anglo-American court systems would be a first step toward recognizing that tribal courts often differ as much from each other as they do from state courts.[152]

[152] This approach also reflects the most fundamental aspect of a sovereign nation, the right to have the decisions about internal control respected and recognized. "[T]he principle of exclusive jurisdiction over Indian legal controversies in the white man's own courts violates the most basic principles of justice . . . . Under a principle of exclusive jurisdiction, the white man reserves for himself final judgment on how the Indian's vessel will be steered." Robert A. Williams, *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 297 (1986).