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ADJUDICATION IN INDIAN COUNTRY: THE CONFUSING PARAMETERS OF STATE, FEDERAL, AND TRIBAL JURISDICTION

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I. INTRODUCTION

As a gauge of the strength of the United States government's commitment to the development of a vital and vigorous tribal judicial system, the Supreme Court could hardly appear more positive and unwavering in the language of its decided cases. In *Williams v. Lee*,[1] the Court issued its first modern opinion stressing the importance of tribal courts as the desired mechanism for ensuring tribal self-determination.[2] That 1959 decision held that the Arizona state court system lacked subject matter jurisdiction[3] over a lawsuit brought by a non-Indian reservation trader to collect a debt allegedly owed him by the on-reservation Indian defendants.[4] Recognizing state court jurisdiction, the Court stressed, would "undermine the authority of the tribal courts . . . and hence would infringe on the right of the Indians

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1. 358 U.S. 217 (1959).

2. *See id.* at 223. Placed in its historical context, the opinion seems almost remarkable. *Williams* was decided during the now much-maligned Termination Era when Congress legislated to provide for the gradual disappearance of Indian tribes. *See generally* Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139 (1977) (tracing the historical development of termination policy).

3. Although the Court did not specify in its opinion whether the Arizona court lacked subject matter or personal jurisdiction, commentators agree that the holding was based on the Court's conclusion that the state court lacked subject matter jurisdiction. *See* DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 574-76 (3d ed. 1993). For a discussion of the confusion and imprecision generated by the Court's frequent failure to distinguish between different types of jurisdiction in Indian law cases, see *infra* notes 205-34 and accompanying text.

4. *See Williams*, 358 U.S. at 217-18.

to govern themselves."[5] Nearly three decades later, in *Iowa Mutual Insurance Co. v. LaPlante*,[6] Justice Marshall's opinion took the same pro–tribal court stance, emphasizing that "[c]ivil jurisdiction over [the activities of non-Indians on reservation lands] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute."[7]

In the context of litigated disputes, of course, these sweeping affirmations have been translated into specific jurisdictional holdings. The Supreme Court, as the arbiter of conflicting assertions of state, tribal, and federal power to adjudicate a pending lawsuit, has issued a number of important opinions that have attempted to delineate the borders of each forum's adjudicatory powers.[8] Unfortunately, lower courts have interpreted the Court's decisions allocating adjudicatory jurisdiction over disputes involving Indians or occurring in Indian country[9] as establishing mechanical, identity-based rules of access.[10] Moreover, the Court has created different, and at times contradictory, lines of precedent depending on the competing forums involved: that is, one set of rules applies to determine the legitimacy of state court adjudication, while different considerations shape the contours of federal court jurisdiction.[11] To confuse matters more, the Court's staunch endorsement of tribal court adjudicatory power has been offset somewhat by its expansive definition of federal question jurisdiction in Indian country,[12] and by its increasingly restrictive statements about the scope of tribal governmental power over non-Indians.[13]

In disputes over the bounds of state adjudicatory power, the

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5. *Id.* at 223.
6. 480 U.S. 9 (1987).
7. *Id.* at 18.
8. *See* discussion *infra* Part II.
9. As defined in 18 U.S.C. § 1151 (1994), Indian country includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent." Although the statute defines Indian country for purposes of federal criminal jurisdiction, the Supreme Court also has indicated that the term applies generally "to questions of civil jurisdiction." DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975).
10. *See infra* notes 45-63, 87-105 and accompanying text.
11. *See* discussion *infra* Part II.A-B.
12. *See infra* notes 106-23 and accompanying text.
13. *See infra* notes 204-12 and accompanying text.

Court has held that state courts cannot adjudicate on-reservation disputes involving either a non-Indian plaintiff and an Indian defendant[14] or an Indian plaintiff and Indian defendant;[15] in such situations only tribal court adjudication is permissible. If the plaintiff is a tribe or an individual Indian suing a non-Indian, however, Supreme Court cases suggest that state courts must adjudicate the controversy.[16] In lawsuits involving multiple parties and multifaceted contacts both on and off the reservation, the rules become less clear, and broad swaths of concurrent tribal and state court adjudicatory jurisdiction appear to be emerging.[17] In contrast to the rules developed for state court adjudication, the holdings of several recent cases have instructed federal courts to require that remedies in tribal courts be exhausted in seemingly all lawsuits involving Indians, on-reservation contacts, or a disputed tribal power.[18]

This Article focuses on the rules developed for state and federal courts to determine the scope of their respective adjudicatory jurisdictional powers in lawsuits relating to Indian country.[19]

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14. *See* Williams v. Lee, 358 U.S. 217, 223 (1959).

15. *See* Fisher v. District Court, 424 U.S. 382, 389 (1976) (per curiam).

16. In *Williams*, the Court approved state adjudication of lawsuits "by Indians against outsiders in state courts." *Williams*, 358 U.S. at 219. Moreover, the Court's decisions in *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 148-49 (1984) (*Wold I*), and *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 888-89 (1986) (*Wold II*), strongly suggest that a state court must allow "an Indian to enter its court to seek relief against a non-Indian concerning a claim arising in Indian country." *Wold II*, 476 U.S. at 888; *see infra* notes 64-86 and accompanying text.

17. *See, e.g.*, Wacondo v. Concha, 873 P.2d 276 (N.M. Ct. App. 1994); Chischilly v. General Motors Acceptance Corp., 629 P.2d 340 (N.M. Ct. App. 1980), *rev'd*, 628 P.2d 683 (N.M. 1981); Jackson County *ex rel.* Smoker v. Smoker, 445 S.E.2d 408 (N.C. Ct. App. 1994), *rev'd*, 459 S.E.2d 789 (N.C. 1995); Harris v. Young, 473 N.W.2d 141 (S.D. 1991); McCrea v. Denison, 885 P.2d 856 (Wash. Ct. App. 1994).

18. For a discussion of the Supreme Court's doctrine of exhaustion of tribal remedies, see *infra* notes 106-53 and accompanying text.

19. Although it is beyond the scope of this Article, a growing body of legal scholarship has begun to examine the work of tribal courts and their potential ability to solidify tribal legitimacy and develop appropriate legal norms in Indian country. As writers such as Frank Pommersheim and Gloria Valencia-Weber have argued, the non-Indian legal system must allow tribal courts to exercise the same prerogatives of sovereignty that shaped the federal and state legal systems over the past two centuries. *See* Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar As an Interpretive Community: An Essay*, 18 N.M. L. REV. 49, 49-50 (1988) [hereinafter Pommersheim, *Contextual Legitimacy*];

After reviewing the major Supreme Court decisions in this area, this Article asserts that both the lower courts and the Supreme Court itself have converted erroneously those holdings into per se rules of judicial access that depend on nothing other than the identity of the litigants.[20] The Article then argues that the Court should return to the important guiding principles it articulated in those cases, and that refocusing the inquiry to require careful analysis of relevant tribal interests can produce a more reasoned allocation of adjudicatory jurisdiction. In the process, each court's adjudicatory jurisdictional framework will lose the predictability generated by the current rules, but in exchange, jurisdictional analysis will become more coherent, ensuring a more faithful adherence to well-established judicial doctrines respecting inherent tribal sovereignty and tribal self-determination.

Finally, this Article argues that federal courts should continue the "hands-off" approach endorsed by the Supreme Court in its recent articulation of the doctrine of exhaustion of tribal remedies.[21] With increasing awareness that tribes should have primary responsibility for the scope of their own courts' jurisdiction, the Court has insisted that jurisdictional disputes be resolved, at least initially, by a tribal court. This Article applauds that trend but urges the Court to reconsider the expansive avenues of post–tribal court challenges that it has established in federal courts.[22] Subsequently, this Article proposes that Con-

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Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329, 329 (1989) [hereinafter Pommersheim, *Crucible*]; Frank Pommersheim, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411, 411-13 [hereinafter Pommersheim, *Liberation*]; Frank Pommersheim, *A Path near the Clearing: An Essay on Constitutional Adjudication in Tribal Courts*, 27 GONZ. L. REV. 393, 393-94 (1992) [hereinafter Pommersheim, *Path*]; Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 231-34 (1989); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 225-27 (1994); Fredric Brandfon, Note, *Tradition and Judicial Review in the American Indian Tribal Court System*, 38 UCLA L. REV. 991, 991-92 (1991). Many of the above-cited articles by Professor Pommersheim have recently been reworked and published by the University of California Press as a book, entitled *Braid of Feathers*. *See* FRANK POMMERSHEIM, BRAID OF FEATHERS (1995) [hereinafter POMMERSHEIM, BRAID OF FEATHERS].

20. *See infra* notes 28-105, 107-53 and accompanying text.

21. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987); National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985).

22. *See infra* notes 294-303 and accompanying text.

gress legislate to provide a writ of certiorari from tribal court judgments to ensure consistency between those decisions and federal law.[23] The Article concludes by arguing that rejecting identity-based, per se rules, combined with limiting federal judicial review of tribal court judgments to the writ of certiorari, will better ensure that a firmly established tribal judicial branch will enhance the legitimacy of tribal governments, provide stability in commercial transactions, and offer a fair and efficient forum for adjudicating the rights and liabilities of Indians and non-Indians in Indian country.

II. THE CURRENT ALLOCATION OF ADJUDICATORY JURISDICTION IN INDIAN COUNTRY: A TRIPARTITE CONUNDRUM

A. State Court Adjudicatory Jurisdiction

For state courts, the presence of an Indian or tribal litigant or an on-reservation transaction creates serious questions about the state forum's ability to adjudicate a pending lawsuit. State law principles of general subject matter jurisdiction[24] must yield to the Supreme Court's pronouncements on the scope of state adjudicatory jurisdiction of lawsuits related to Indian affairs. These rules establish two distinct, and at times seemingly inconsistent, lines of cases: one requiring state court adjudicatory jurisdiction in some instances,[25] the other prohibiting state court adjudication in other cases.[26] In addition to these judicial-

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23. *See infra* notes 304-05 and accompanying text.

24. In *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990) (quoting Tafflin v. Levitt, 493 U.S. 455, 458 (1990)), the Court emphasized the states' broad concurrent jurisdiction when it noted that "state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Id.* at 823. Similarly, in *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), the Court described concurrent state adjudicatory jurisdiction as a "common phenomenon in our judicial history," noting that "exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule." *Id.* at 507-08.

The court likewise noted in *Tafflin* that only Congress could rebut the "deeply rooted presumption in favor of concurrent state court jurisdiction." *Tafflin*, 493 U.S. at 459-60.

25. *See* Three Affiliated Tribes v. Wold Eng'g, 476 U.S. 877, 888 (1986) (*Wold II*); Three Affiliated Tribes v. Wold Eng'g, 467 U.S. 138, 148-49 (1984) (*Wold I*).

26. *See* Williams v. Lee, 358 U.S. 217, 223 (1959).

ly created jurisdictional rules, distrust of tribal courts and principles of equal access to state judicial forums may result in a grudging and narrow relinquishment of subject matter jurisdiction over controversies that involve Indians or occur in Indian country.[27]

1. Prohibiting State Court Adjudication: Williams v. Lee[28] *and its Progeny*

The Supreme Court's holding in *Williams* was straightforward but important: the Court held that the Arizona state courts were without jurisdiction to adjudicate a lawsuit filed by a non-Indian trader against an on-reservation Indian couple for a debt allegedly incurred on the reservation.[29] Crucial to the Court's decision were the defendants' status as reservation Indians[30] and the on-reservation location of the transaction.[31] The actual doctrinal basis underlying the holding, however, was somewhat unclear. The Court offered two alternative theories, noting that the assertion of Arizona adjudicatory jurisdiction both infringed impermissibly on retained tribal sovereignty[32] and was preempted by contrary congressional intent.[33]

Placed in its factual context, the Court's holding emerges as a carefully balanced opinion that recognized the reality that, without federal protection, the jurisdictional powers of tribal courts

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27. *See infra* notes 258-73 and accompanying text.

28. 358 U.S. 217 (1959).

29. *See id.* at 223.

30. In what is perhaps the most frequently quoted passage of the *Williams* opinion, the Court stated: "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220.

31. Noting the irrelevance of the non-Indian identity of the plaintiff, the Court stressed: "It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." *Id.* at 223.

32. *See id.* at 218-20.

33. At several junctures in the opinion, the Court referred to congressional intent: "[W]hen Congress has wished the States to exercise this power it has expressly granted them the jurisdiction," *id.* at 221; "Implicit in these treaty terms . . . was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed," *id.* at 221-22; "If this power [over reservation affairs] is to be taken away from [the tribe], it is for Congress to do it." *Id.* at 223.

would remain undeveloped in the shadow of their state court counterparts. Because the limited scope of most tribal ordinances at that time prevented assertion of adjudicatory jurisdiction over unwilling non-Indian defendants,[34] the Court's refusal to establish exclusive tribal adjudicatory jurisdiction over a lawsuit brought by a non-Indian against reservation Indians would have had the practical effect of eliminating tribal court adjudication of most disputes involving non-Indians. In addition, the Court was impressed by the Navajo tribe's "greatly improved . . . legal system" and "better-trained personnel,"[35] and by its courts' ability to exercise jurisdiction over suits by "outsiders against Indian defendants."[36] Moreover, the Court surely must have realized that state courts would be unlikely or unable to decipher and apply tribal law to those disputes for which a choice of law analysis would indicate its appropriateness.[37] Finally, the Court derived a negative inference of congressional intent from the fact that although current federal law provided a mechanism for states to assume broad-ranging jurisdiction over Indian reservations, Arizona had declined to exercise that option.[38]

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34. Only recently have tribes begun to extend the jurisdiction of their courts to nonresidents. *See* POMMERSHEIM, BRAID OF FEATHERS, *supra* note 19, at 87 (noting the recent amendment of Rosebud Sioux Tribal Code to include nonresident defendants). In fact, model ordinances drafted by the Department of the Interior after Congress enacted the Indian Reorganization Act, 25 U.S.C. §§ 461-479 (1994), limited tribal court adjudication to consenting non-Indians. *See* William V. Vetter, *Doing Business with Indians and the Three "S"es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 ARIZ. L. REV. 169, 186 n.102 (1994). Vetter noted that "[m]ore recent tribal code provisions grant the tribal court jurisdiction over all persons within the reservation, regardless of affiliation or identity, and some have long-arm statutes." *Id.* at 186.

35. *Williams*, 358 U.S. at 222.

36. *Id.*

37. In a brief discussion of *Williams*, Professor Laurence has suggested that the Court suspected "that the Arizona state court [would] have [had] difficulty in discovering Navajo law." 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, 617 n.120 (1990). For Laurence, that observation supports the Court's decision to reject state court jurisdiction rather than to require state court application of tribal law. *See id.*

38. That federal law, known as Public Law 280, Act of Aug. 15, 1953, Pub. L. No. 280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (1994) & 28 U.S.C. § 1360 (1994)), required six states to assume broad jurisdiction over criminal law and civil adjudication in Indian country. Other states may choose to assume Public Law

Seventeen years later, in *Fisher v. District Court*,[39] the Supreme Court reiterated and reinforced the *Williams* rule by holding that a Montana state court could not adjudicate an adoption proceeding in which all parties were tribal members and reservation residents. Again, the Court stressed the parties' Indian identity[40] and the on-reservation locus of the dispute[41] as crucial factual underpinnings to its conclusion that tribal court jurisdiction to resolve the adoption dispute was exclusive. Moreover, the Court was impressed by the readiness of the tribal court to adjudicate this controversy; the opinion emphasized the applicable tribal constitution, the tribal ordinance conferring jurisdiction upon a tribal court to adjudicate intratribal adoption proceedings, and the tribal court's advisory opinion to the Montana court in this case.[42] Following the dual strands of analysis present in *Williams*, the Court suggested that the state court's assertion of adjudicatory jurisdiction was invalid because it would both "interfere with the powers of [tribal] self-government"[43] and violate congressional intent.[44]

In the aftermath of *Williams* and *Fisher*, state courts have had ample opportunity to delineate the scope of exclusive tribal court jurisdiction. Perhaps because of the ambiguous analytical basis of the holdings, state courts have seized upon the specific

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280 authority, but that choice is currently conditioned on tribal approval. *See* Indian Civil Rights Act of 1968 §§ 401-402, 25 U.S.C. §§ 1321-1322 (1994). In view of the clear assimilationist stance of the federal policy in force at the time *Williams* was decided, the Court's pro–tribal sovereignty result appears somewhat remarkable. For an insightful critique and analysis of the Supreme Court's interpretations of Public Law 280, see Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1165-68 (1990), and Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535 (1975).

39. 424 U.S. 382 (1976) (per curiam).

40. *See id.* at 386 (noting that "this litigation involves only Indians").

41. *See id.* at 389 ("Since the adoption proceeding is appropriately characterized as litigation arising on the Indian reservation, the jurisdiction of the Tribal Court is exclusive.").

42. *See id.* at 384-88.

43. *Id.* at 387.

44. The Court stressed that "[n]o federal statute sanctions this interference with tribal self-government." Id. at 388. In fact, at the end of the opinion, the Court flatly stated that state adjudicatory jurisdiction over "litigation involving reservation Indians . . . has now been preempted." *Id.* at 390.

facts of the two cases rather than struggle to apply vague notions about the infringement of tribal sovereignty or federal preemption to determine the limits of state court adjudicatory power. As a result, state courts typically refuse to adjudicate disputes involving Indians or reservation affairs only if the defendant is an Indian and if the transaction involves no substantial off-reservation contacts. That is, state courts generally assert jurisdiction over suits brought against a non-Indian defendant even if the transaction arose in Indian country;[45] similarly, many cases hold that state court adjudication is proper in lawsuits filed against an Indian defendant if the facts reveal substantial off-reservation contacts.[46]

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45. *See, e.g.*, Kuykendall v. Tim's Buick, Pontiac, GMC & Toyota, Inc., 719 P.2d 1081 (Ariz. Ct. App. 1985); Lambert v. Ryozik, 886 P.2d 378 (Mont. 1994); McCrea v. Busch, 524 P.2d 781 (Mont. 1974); Paiz v. Hughes, 417 P.2d 51 (N.M. 1966); Foster v. Luce, 850 P.2d 1034 (N.M. Ct. App. 1993); Alexander v. Cook, 566 P.2d 846 (N.M. Ct. App. 1977); Whiting v. Hoffine, 294 N.W.2d 921 (S.D. 1980). For a case in which a state court declined to exercise jurisdiction in a lawsuit brought by an Indian against a non-Indian defendant, see *Neadeau v. American Family Mutual Insurance Co.*, No. C7-93-691, 1993 WL 302127 (Minn. Ct. App. Aug. 10, 1993). In *Neadeau*, an Indian sued her insurance company for coverage of an accident arising on the reservation and involving another Indian, an uninsured motorist. *See id.* at *1. Because of the on-reservation locus of the accident and the Indian status of both parties involved in the accident, the court concluded that state jurisdiction would be improper, even though the defendant insurance company was non-Indian. *See id.* One judge dissented, noting the absence of tribal court jurisdiction to hear the case. *See id.* at *2-*3 (Schumacher, J., dissenting).

46. *See, e.g.*, Smith Plumbing Co. v. Aetna Cas. & Sur. Co., 720 P.2d 499 (Ariz. 1980); Navajo Nation v. MacDonald, 885 P.2d 1104 (Ariz. Ct. App. 1994); Francisco v. State, 541 P.2d 955 (Ariz. Ct. App. 1975), *vacated*, 556 P.2d 1 (Ariz. 1976); Crawford v. Roy, 577 P.2d 392 (Mont. 1978); Padilla v. Pueblo of Acoma, 754 P.2d 845 (N.M. 1988); Foundation Reserve Ins. Co. v. Garcia, 734 P.2d 754 (N.M. 1987); State Sec. Inc., v. Anderson, 506 P.2d 786 (N.M. 1973); Harris v. Young, 473 N.W. 2d 141 (S.D. 1991); Wells v. Wells, 451 N.W.2d 402 (S.D. 1990). A review of the cases reveals some variation among the state courts in their determination whether the standard of "substantial off-reservation contacts" is met. It appears settled, however, that the standard requires more than the "minimum contacts" ordinarily necessary for finding that a state court has personal jurisdiction over an individual. As the Supreme Court of North Dakota observed:

> [W]e note that the infringement test of *Williams v. Lee*, while resembling in some respects a sufficient contacts test for ascertaining personal jurisdiction, is actually a rule for gauging whether a court has subject matter jurisdiction over the action itself. . . . Furthermore, contacts within the state but off the reservation, which might arguably suffice to grant a court personal jurisdiction over an Indian domiciled on a reservation, are

Although this mechanistic interpretation of the intended scope of *Williams* and *Fisher* may comport with the facts of the two cases, it is less obviously faithful to the Supreme Court's emphasis that state court adjudication would interfere with the right of sovereign Indian tribes to "make their own laws and be ruled by them."[47] Consider, for instance, the Arizona Supreme Court's decision in *Smith Plumbing Co. v. Aetna Casualty & Surety Co.*,[48] in which the court held that the state court had jurisdiction to adjudicate a dispute brought by a plumbing company supplier against a tribe's surety in a contract to build low income housing on the reservation.[49] Crucial to the holding in *Smith Plumbing* was the court's conclusion that because the tribe had reached outside reservation boundaries in this transaction, state court adjudication would not infringe on tribal sovereign interests.[50] The dissent, specifically focusing on the infringement language of *Williams*, concluded that because this lawsuit would adjudicate the validity of a tribal governmental act, and because a finding against the insurance company would work as collateral estoppel in a later adjudication between the surety and the tribal obligor, the majority's decision had infringed impermissibly on the core of exclusive tribal court jurisdiction established by the Supreme Court.[51] In the dissent's view, although the case may have involved two non-Indian parties and off-reservation contacts, the proper inquiry into tribal sovereign infringement would require the state court to decline to adjudicate.

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not necessarily sufficient to grant the court subject matter jurisdiction under the infringement test.

Byzewski v. Byzewski, 429 N.W.2d 394, 398 (N.D. 1988) (citations omitted).

Moreover, for most states, assumption of subject matter jurisdiction also assumes applicability of state substantive law to the dispute. *See infra* notes 102-03 and accompanying text.

Some state courts, though noting the existence of subject matter jurisdiction in the state forum, have recognized that considerations of comity might support dismissal of a pending lawsuit. *See, e.g., In re* Custody of K.K.S., 508 N.W.2d 813, 816 (Minn. Ct. App. 1993); *In re* Bertelson, 617 P.2d 121, 126 (Mont. 1980).

47. Williams v. Lee, 358 U.S. 217, 220 (1959).

48. 720 P.2d at 499.

49. *See id.* at 506.

50. *See id.*

51. *See id.* at 508-12 (Feldman, J., dissenting).

Similarly, in *Lewis v. Sac & Fox Tribe of Oklahoma Housing Authority*,[52] the Oklahoma Supreme Court determined that a lower state court had the power to hear a lawsuit brought by individual Indians against a tribal housing authority.[53] The Indian plaintiffs in that case claimed that the housing authority had improperly construed its deed to them as conveying only a surface estate.[54] Because the off-reservation locus of the transaction removed the case from the factual scope of *Williams* and *Fisher*, the court summarily concluded that "there is no infringement upon tribal self-government,"[55] emphasizing that a refusal of state court jurisdiction in this case would be an "excessive self-abnegation of power."[56] As the facts reveal, however, this lawsuit actually did implicate strong tribal interests.[57] First and foremost, the dispute was purely intratribal, and it raised questions about the applicability of tribal law.[58] Under the potentially applicable tribal ordinance, the tribal housing authority must retain title to mineral interests in land that it acquires and must deposit all revenues from the exploitation of those resources into a tribal account.[59] The Oklahoma court, however, viewing the Supreme Court's decisions as establishing only a very narrow range of tribal sovereign interests, relied on general notions of broad state court jurisdiction unless expressly withheld by an act of Congress[60] and concluded that applying state law in a state court was proper.[61]

Although the final holdings that the state courts in Arizona and Oklahoma had jurisdiction to adjudicate the disputes before them may be defensible, the cases can be faulted for their focus on the factual, rather than the analytical, basis of Supreme Court precedent. That is, the courts have converted the Supreme Court's holdings into mechanical rules that establish limited

52. 896 P.2d 503 (Okla. 1994).
53. *See id.* at 512.
54. *See id.* at 515.
55. *Id.* at 508 (emphasis omitted).
56. *Id.* at 509.
57. *See id.* at 505-07.
58. *See id.* at 512-14.
59. *See id.* at 512.
60. *See id.* at 509-12.
61. *See id.*

spheres of exclusive tribal court adjudicatory jurisdiction; any factual deviation from the landmark cases renders the state courts capable of adjudicating disputes related to Indians and Indian country.

The *Williams* core of exclusive tribal court adjudicatory jurisdiction, though never questioned by the modern Supreme Court explicitly, nevertheless has emerged as something of a rarity in current federal Indian law. In recent decisions involving other jurisdictional disputes in Indian law, the Supreme Court has shown an increasing willingness to recognize broad spheres of concurrent jurisdiction between tribal and state governments.[62] For instance, the Court's recent pronouncement that "[s]tates and tribes have concurrent jurisdiction over the same territory,"[63] in addition to weakening general tribal sovereign authority within the reservation, may also signal a trend toward a new approach to tribal jurisdictional disputes, a trend starkly at odds with the *Williams* line of cases.

2. Requiring State Court Adjudication: The Hazy Lines of Wold I *and* II

Prior to its two opinions in *Three Affiliated Tribes v. Wold Engineering*,[64] the only modern Supreme Court reference to state court adjudication of lawsuits brought by Indians in state court had been its somewhat oblique observation in *Williams* that "suits by Indians against outsiders in state courts have been sanctioned."[65] In those cases, the Court observed, "essential tribal relations were not involved and . . . the rights of Indians would not be jeopardized."[66] Subsequently, in its *Wold* holdings, the Supreme Court left no doubt that it strongly endorsed access to state courts for Indians and tribes, notwithstanding the rule in *Williams*, which barred non-Indians from state court

62. *See supra* note 17 and accompanying text.

63. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989).

64. 476 U.S. 877 (1986) (*Wold II*); 467 U.S. 138 (1984) (*Wold I*). For a detailed description of the state and Supreme Court opinions in this litigation, see William V. Vetter, *The Four Decisions in* Three Affiliated Tribes *and Pre-Emption by Policy*, 23 LAND & WATER L. REV. 43 (1988).

65. Williams v. Lee, 358 U.S. 217, 219 (1959).

66. *Id.*

in similar reservation-based claims.

The Court's sweeping language in *Wold I* and *Wold II* belies the narrowness of its actual holdings. Despite repeated reference to judicially created doctrines and general statements about tribal sovereignty,[67] the Supreme Court's holdings actually rest on a precise, and somewhat perplexing, statutory preemption analysis.[68] The underlying dispute in the case involved the attempt by the Fort Berthold Tribes to sue a non-Indian contractor in state court, alleging negligence and breach of contract for work on a reservation water supply system. The Supreme Court of North Dakota had held that state law deprived its courts of subject matter jurisdiction over the dispute.[69] Noting that Public Law 280 authorized wide-ranging state assumption of jurisdiction over Indian country,[70] the court upheld a state statute conditioning North Dakota's acceptance of jurisdiction under that federal law on a tribe's acceptance of jurisdiction and waiver of sovereign immunity in state court.[71] Because the tribe had not agreed to state jurisdiction on those terms, the court reasoned that the state court was without jurisdiction to adjudicate the controversy.[72]

The United States Supreme Court vacated the decision and remanded the case, instructing the state court to reconsider its opinion in light of the Court's elucidation of the federal law prin-

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67. For instance, the Court in *Wold I* noted that "we fail to see how the exercise of state-court jurisdiction in this case would interfere with the right of tribal Indians to govern themselves under their own laws." *Wold I*, 467 U.S. at 148. The Court continued: "As a general matter, tribal self-government is not impeded when a State allows an Indian to enter its courts on equal terms with other persons . . . ." *Id.* at 148-49. Similarly, in *Wold II*, the Court emphasized that state adjudication "did not interfere with the right of tribal Indians to govern themselves." *Wold II*, 476 U.S. at 880. The Court did, however, emphasize the "'trend . . . away from the idea of inherent Indian sovereignty as a[n independent] bar to state jurisdiction and toward reliance on federal pre-emption.'" *Id.* at 884 (quoting Rice v. Rehner, 463 U.S. 713, 718 (1983)).

68. *See Wold II*, 476 U.S. at 883-93; *Wold I*, 467 U.S. at 149-51.

69. *See* Three Affiliated Tribes v. Wold Eng'g, 321 N.W.2d 510, 512 (N.D. 1982), *cert. granted*, 461 U.S. 904 (1983), *vacated*, 467 U.S. 138 (1984).

70. Act of Aug. 15, 1953, Pub. L. No. 280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (1996) & 28 U.S.C. § 1360 (1994)); *see supra* note 38 and accompanying text.

71. *See Wold*, 321 N.W.2d at 512.

72. *See id.*

ciples guiding the controversy.[73] Because the Supreme Court was concerned that the North Dakota court's opinion was based on the erroneous assumption that federal law precluded the state from accepting adjudicatory jurisdiction in the case,[74] the Court remanded for reconsideration of the jurisdictional issue.[75] On remand, the North Dakota court reiterated its earlier holding that North Dakota law precluded state adjudication of the controversy.[76] With the state court opinion now resting squarely on state law grounds, the Supreme Court again reversed, this time holding that federal law preempted the state statute.[77] The majority's curious preemption analysis, which was vigorously criticized in the dissenting opinion of Justices Rehnquist, Brennan and Stevens,[78] seemed to connect unrelated factual observations to reach its conclusion. First, the majority noted that Public Law 280, though providing a means for state assumption of jurisdiction in Indian country, had no effect on lawful preexisting state adjudicatory jurisdiction.[79] Moreover, as the majority observed, amendments to Public Law 280 outlined the proper procedure for subsequent state relinquishment of jurisdiction acquired pursuant to that federal law.[80] At this point, the analysis became somewhat strained—because of the comprehensiveness of Public Law 280's amendments, the Court concluded that those amendments preempted the field of state retrocession of jurisdiction, whether acquired pursuant to Public Law 280 or on the basis of a state's inherent preexisting jurisdiction.[81] Thus, because the federal statute made no provision for state relinquishment of jurisdiction lawfully assumed prior to the enact-

73. *See Wold I*, 467 U.S. at 141.

74. *See id.* at 150-51.

75. *See id.* at 141.

76. *See* Three Affiliated Tribes v. Wold Eng'g, 364 N.W.2d 98, 103-04 (N.D.), *rev'd*, 476 U.S. 877 (1986).

77. *See* Three Affiliated Tribes v. Wold Eng'g, 476 U.S. 877, 887 (1986) (*Wold II*).

78. *See id.* at 893 (Rehnquist, J., dissenting).

79. *See id.* at 882. The scope of that lawfully assumed jurisdiction, however, would seem to be limited by the Court's holdings in *Williams* and *Fisher*, even though those cases were decided after the enactment of Public Law 280. *See Wold I*, 467 U.S. at 160-61 (Rehnquist, J., dissenting).

80. *See Wold II*, 476 U.S. at 886-87.

81. *See id.* at 886.

ment of Public Law 280, the majority concluded that the states had absolutely no power to retrocede or otherwise limit the scope of that preexisting jurisdiction.[82] Because North Dakota had asserted subject matter jurisdiction in pre–Public Law 280 cases involving Indians, the Court concluded that North Dakota must continue to exercise all subject matter jurisdiction not otherwise foreclosed by decisions such as *Williams* and *Fisher*.[83]

As a matter of statutory analysis, the majority opinions in *Wold I* and *Wold II* stand on shaky ground, strained in their reasoning and based on erroneous assumptions about the state law precedents upon which they depend. Although it may be tempting to dismiss the *Wold* holdings as narrowly focused and limited to the precise statutory preemption issue that they specifically decided, such casual treatment would be a mistake. Throughout the opinions, the Court expressed a broad and generalized insistence that Indian tribes and individual Indians be allowed to bring their reservation-based claims to state court. For example, in *Wold I*, the Court noted: "As a general matter, tribal self-government is not impeded when a State allows an Indian to enter its courts on equal terms with other persons to seek relief against a non-Indian concerning a claim arising in Indian country."[84] In *Wold II*, the Court similarly encouraged tribal access to state courts, stating:

> This Court and many state courts have long recognized that Indians share this interest in access to the courts, and that tribal autonomy and self-government are not impeded when a State allows an Indian to enter its court to seek relief against a non-Indian concerning a claim arising in Indian country.[85]

In cases applying the *Wold* holdings, state courts have in fact interpreted the Court's language as requiring state court adjudication of litigation arising on the reservation, so long as an Indian or a tribe files the lawsuit.[86]

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82. *See id.*

83. *See id.* at 886-87.

84. *Wold I*, 467 U.S. at 148-49.

85. *Wold II*, 476 U.S. at 888.

86. *See, e.g.*, Foster v. Luce, 850 P.2d 1034 (N.M. Ct. App. 1993) (holding that state court had jurisdiction over the Indian plaintiff's tort claim involving tortious

3. Williams's *Uneasy Coexistence with* Wold I *and* Wold II

The rules pertaining to state court jurisdiction over litigation that involves Indians or reservation-based incidents have been reduced to a straightforward two-part inquiry. State court jurisdiction is prohibited only if the transaction involves no substantial off-reservation contacts and a non-Indian plaintiff sues an Indian defendant.[87] Under this interpretation, the state courts have wide-ranging adjudicatory powers in Indian-related litigation; if either of the two conditions is not met, state adjudication is proper. This mechanical approach, though perhaps the Supreme Court's intended result, requires no examination of tribal sovereign interests and reduces the Supreme Court's insistence that state adjudication not infringe improperly upon tribal sovereign interests to background noise. In addition, even if the combined effects of *Williams*, which prohibits state court adjudication of on-reservation lawsuits filed by non-Indians, and *Wold*'s apparent requirement of state adjudication when an Indian or tribe initiates the lawsuit[88] raise no problems under the federal Equal Protection Clause,[89] at a minimum it produces

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acts that occurred in part on a reservation); *see also* Wacondo v. Concha, 873 P.2d 276 (N.M. Ct. App. 1994) (holding that federal law does not preempt state court's concurrent jurisdiction over torts committed within the boundaries of one pueblo by a member of another pueblo).

87. *See supra* notes 45-46 and accompanying text.

88. *See supra* note 86 and accompanying text.

89. In a different context, the Supreme Court has upheld classifications based on the Native American status of the affected individuals, stating that the classification was political rather than racial because it applied to individuals on the basis of their membership in a particular tribe. *See* Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974). In *Fisher v. District Court*, 424 U.S. 382 (1976) (per curiam), the Court rejected the argument of the Indian plaintiffs that denial of access to a state judicial forum deprived them of the equal protection of the law. *See id.* at 390-91. The Court noted:

> The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the . . . Tribe under federal law. Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government.

Id. Subsequently, in *Wold I*, the Court declined to decide whether a denial of a state judicial forum to Indian plaintiffs violated federal constitutional law. *See Wold*

widespread disgruntlement among state courts and no doubt enhances the antagonism they feel toward tribal institutions.[90] Moreover, in an extreme case, the *Williams* rule requires detailed and intrusive inquiry to corroborate the Indian status of the party seeking state court adjudication. For example, because state court adjudication of on-reservation disputes is proper only if the plaintiff is an Indian, opposing parties may challenge the court's jurisdiction by questioning whether the plaintiff actually is an Indian.[91]

I, 467 U.S. at 151-52 & n.12. A similar, unresolved question is whether denial of a state judicial forum to non-Indians, when Indian plaintiffs have free access to the same forum, runs afoul of any of those protections.

90. For example, in *Security State Bank v. Pierre*, 511 P.2d 325 (Mont. 1973), the court reluctantly held that, under applicable Supreme Court precedent, its judicial system had no jurisdiction to adjudicate a lawsuit filed by a non-Indian involving a commercial transaction that the plaintiff had entered into with an Indian on the reservation. *See id.* at 326, 329-30. In responding to the plaintiff's arguments that the denial of state jurisdiction produced "a special class of citizens having 'rights' not afforded other citizens of the state while at the same time denying basic constitutional rights to those with whom the Indians create obligations," *id.* at 329, the court simply agreed, noting that under the Supreme Court's "erroneous concept" of exclusive tribal court jurisdiction, "there is little state courts can do to afford the equal protection of our law to both its Indian and nonIndian [sic] citizens." *Id.*

A concurring justice in *Geiger v. Pierce*, 758 P.2d 279 (Mont. 1988), voiced similar frustration: "It seems basically unfair to allow an Indian person to use the state courts so long as that person decides it is to her benefit, but to deny the non-Indian party an equivalent right of access to the same court in [the same] dispute." *Id.* at 282 (Weber, J., specially concurring). Perhaps most frustrating to Justice Weber was that the Indian defendant in *Geiger* did not raise lack of subject matter jurisdiction as a defense until after a judgment was entered against her. *See id.* Recognizing that the majority had correctly noted that "the issue of subject matter jurisdiction may be invoked at any time in the course of a proceeding," *id.* at 281 (quoting *In re* Marriage of Lance, 690 P.2d 979, 981 (Mont. 1984)), Justice Weber complained both that the plaintiff salesman "was constitutionally forbidden from asking the defendant if she was an Indian" at the time of the sale, and that the court itself had no reason to inquire during the trial whether defendant "was an Indian . . . who claimed a lack of subject matter jurisdiction." *Id.* at 282 (Weber, J., specially concurring).

91. In *Sanapaw v. Smith*, 335 N.W.2d 425 (Wis. Ct. App. 1983), for instance, the Indian plaintiff and his tribal employer sought civil damages for an assault and battery occurring on the reservation. The defendant argued that the state court had no jurisdiction to adjudicate the lawsuit because *Williams* and *Fisher* required exclusive tribal court jurisdiction over the dispute. *See id.* The court of appeals reversed the lower court's conclusion that it had subject matter jurisdiction and remanded for a determination of the defendant's "status as either an Indian or a non-Indian for jurisdictional purposes." *Id.* at 429. Moreover, the court also instructed the lower court to consider the defendant's "racial status, habits, and lifestyle . . . [including] a de-

In fairness to the state courts, the Supreme Court appears to endorse the way in which its holdings have been applied; in fact, approving references to the identity-based rules are scattered throughout its opinions. That is, although the cases appear to champion tribal sovereign interests, the fact-based litmus test receives tacit approval in these very same cases. Indicating the limited scope of its newly created rule barring state adjudication, for example, the Court in *Williams* noted pointedly that state courts previously (and apparently properly) had assumed jurisdiction over lawsuits filed by Indian plaintiffs.[92] Moreover, in its decision in *Fisher*, the Court expressly recognized that the scope of state court jurisdiction hinged on the Indian status of the parties.[93] Similarly, the *Wold* opinions specifically accepted the apparent imbalance between *Williams*'s prohibition of state court jurisdiction and the *Wold* cases' insistence that jurisdiction depends on the Indian status of the parties.[94]

Reducing these important holdings to their facts, however, improperly obviates the need for reasoned analysis of tribal sovereign interests and produces rules that are both too broad and too narrow in their sweep. Specifically, the lower courts' interpretations are too narrow because they fail to recognize the possibly important tribal sovereign interests in the adjudication of many lawsuits involving Indian plaintiffs or off-reservation contacts. At the same time, because *Williams* protects a small core

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termination of his residence, since place of residence could be important evidence of whether [the defendant] ha[d] adopted a non-Indian lifestyle." *Id.* at 430.

92. *See* Williams v. Lee, 358 U.S. 217, 219 (1959) ("Thus, suits by Indians against outsiders in state courts have been sanctioned.").

93. *See* Fisher v. District Court, 424 U.S. 382, 387 (1976) (per curiam) ("State-court jurisdiction plainly would interfere with the powers of self-government conferred upon the . . . Tribe . . . . It would subject a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves.").

94. *See* Three Affiliated Tribes v. Wold Eng'g, 476 U.S. 877, 893 (1986) (*Wold II*) ("The perceived inequity of permitting the Tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian allegedly may not recover against the Tribe simply must be accepted in view of the overriding federal and tribal interests in these circumstances . . . ."); Three Affiliated Tribes v. Wold Eng'g, 467 U.S. 138, 148-49 (1984) (*Wold I*) ("As a general matter, tribal self-government is not impeded when a State allows an Indian to enter its courts . . . to seek relief against a non-indian concerning a claim arising in Indian country.").

of exclusive tribal court adjudicatory jurisdiction that encompasses only those cases involving a non-Indian plaintiff and exclusively on-reservation contacts, as cross-reservation transactions become increasingly important to reservation life, the rule applies in a decreasing number of cases. Moreover, the courts' interpretations may be too broad in their apparent conclusions that tribal sovereign interests can be served only by exclusive tribal court jurisdiction.

As the two lines of cases involving state court adjudication of Indian lawsuits merge, the resulting imbalance between *Williams*, which bars non-Indian plaintiffs from state court adjudication of many reservation-based claims,[95] and *Wold*, which insists that Indians and tribes be free to bring a lawsuit involving on-reservation transactions in state court,[96] rests uneasily on the Court's assumption that, while state adjudication of the former class of cases would infringe upon tribal sovereignty, no infringement would occur in the latter class of cases.[97] Upon closer consideration, this distinction simply cannot stand. If the infringement at issue is, as the Court in *Williams* emphasized, "the right of reservation Indians to make their own laws and be ruled by them,"[98] the plaintiff's identity should be irrelevant to determining whether tribal sovereignty is infringed. For example, in an on-reservation traffic accident involving an Indian and a non-Indian, it is difficult to understand how the tribal sovereign interest would be infringed by state court adjudication if the non-Indian brings the lawsuit[99] but not infringed if the In-

95. *See Williams*, 358 U.S. at 223.

96. *See Wold II*, 476 U.S. at 888-89; *Wold I*, 467 U.S. at 148-49.

97. *See supra* note 94.

98. *Williams*, 358 U.S. at 220.

99. *See, e.g.*, Hartley v. Baca, 640 P.2d 941 (N.M. Ct. App. 1981); Nelson v. Dubois, 232 N.W.2d 54 (N.D. 1975); *see also* Geiger v. Pierce, 758 P.2d 279 (Mont. 1988) (holding that a state court cannot adjudicate a lawsuit filed by a non-Indian creditor for a debt allegedly incurred by an Indian at a creditor's office located within the borders of a reservation); Milbank Mut. Ins. Co. v. Eagleman, 705 P.2d 1117 (Mont. 1985) (holding that a state court has no jurisdiction over a civil suit filed against an Indian by a non-Indian insurer for damages occurring on a reservation to an insured vehicle); Kain v. Wilson, 161 N.W.2d 704 (S.D. 1968) (holding that a state court has no power to adjudicate a suit brought by a non-Indian alleging trespass by an Indian defendant on land within the borders of a reservation that is owned by the non-Indian). In all of these transactions, however, the state court

dian is the first to file.[100] Nevertheless, the Supreme Court in its *Wold* opinions explicitly affirmed such an illogical allocation of adjudicatory jurisdiction.[101]

Similarly, some courts automatically ignore potential tribal sovereign interests in lawsuits that display substantial off-reservation contacts. For those courts, the jurisdiction inquiry is tantamount to a choice of law analysis. That is, the presence of substantial off-reservation contacts automatically has a two-pronged result: the state court has adjudicatory jurisdiction, and state law applies to the dispute.[102] In contrast, other courts have assumed adjudicatory jurisdiction over a lawsuit because of substantial off-reservation contacts but nevertheless entertained the possibility that tribal law would apply to resolve the dispute.[103]

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would have adjudicated the dispute if the Indian party had been the plaintiff rather than the defendant. *See* cases cited *infra* note 100.

100. *See, e.g.*, Lambert v. Ryozik, 886 P.2d 378 (Mont. 1994); McCrea v. Busch, 524 P.2d 781 (Mont. 1974); Paiz v. Hughes, 417 P.2d 51 (N.M. 1966). The United States filed an amicus curiae brief in the *Paiz* case urging assertion of state court adjudicatory jurisdiction. *See id.* at 54.

101. In *Wold I*, the Court noted:

> [T]o the extent that [state law] permitted . . . state courts to exercise jurisdiction over claims by non-Indians against Indians or over claims between Indians, it intruded impermissibly on tribal self-governance. . . . This Court, however, repeatedly has approved the exercise of jurisdiction by state courts over claims by Indians against non-Indians, even when those claims arose in Indian country.

467 U.S. at 148 (citations omitted).

102. In *R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983), for instance, a non-Indian contractor sued in federal court to challenge the tribal court's jurisdiction over a lawsuit filed by a tribal housing authority alleging deficiencies in the contractor's performance under a contract. *See id.* at 980-81. The court applied a choice of law analysis to determine whether state subject matter jurisdiction existed. Because the court determined that tribal law might apply to the pending contract dispute, it also concluded that the state court had no jurisdiction to hear the lawsuit. *See id.* at 983. State courts often adopt a similar stance, frequently assuming the applicability of state law if state court jurisdiction is proper. *See, e.g.*, Smith Plumbing Co. v. Aetna Cas. & Sur. Co., 720 P.2d 499, 506 (Ariz. 1986); Jicarilla Apache Tribe v. Board of County Comm'rs, 883 P.2d 136, 144 (N.M. 1994); Padilla v. Pueblo of Acoma, 754 P.2d 845, 850-51 (N.M. 1988); Foundation Reserve Ins. Co. v. Garcia, 734 P.2d 754, 755-56 (N.M. 1987); Boller v. Key Bank, 829 P.2d 260, 263-64 (Wyo. 1992).

103. *See, e.g.*, Chischilly v. General Motors Acceptance Corp., 629 P.2d 340, 342-44 (N.M. Ct. App. 1980) noting that "the usual conflicts of laws rules should be used to determine whose law to apply" and concluding that the law of the situs, the reservation, should apply to the dispute), *rev'd*, 628 P.2d 683 (N.M. 1981); Lewis v. Sac &

Although some have suggested that tribal sovereign interests are better protected by a strict prohibition of state application of tribal law,[104] in many cases that prohibition may actually ignore important tribal interests. As tribes and individual Indians enter into an ever-increasing array of commercial transactions off the reservation and with non-Indians, exclusively on-reservation transactions decrease in frequency and importance. If state courts may freely ignore tribal interests in any dispute displaying off-reservation contacts, the sovereignty that *Williams* so vehemently protected will be reduced to a tiny core of exclusive tribal adjudicatory jurisdiction. Consistency with *Williams*'s insistence on the protection of tribal law-making authority should require state courts to engage in a careful choice of law analysis to determine whether tribal law should apply, notwithstanding the presence of sufficient off-reservation contacts to permit state adjudication of the lawsuit.

Finally, in some ways, the scope of exclusive tribal court adjudicatory power may be too broad. The Court in *Williams* never explained how the mere adjudication of a reservation-based lawsuit in state court would infringe on the sovereign prerogative of the tribal government to exercise its governmental powers over its members and its territories. After all, state courts are fully cognizant and respectful of the sovereignty of other states, the federal government, and even of other countries, yet this respect does not impede state court adjudication of a lawsuit occurring within the borders or under the jurisdiction of the other sovereign. The crucial difference, perhaps, is that state courts have been unable or unwilling to accord to tribal law the same sovereign respect given to the law of other states or countries. As that reality changes, and as states increasingly recognize the force and legitimacy of tribal law,[105] and as tribal courts themselves

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Fox Tribe of Okla. Hous. Auth., 896 P.2d 503, 512-14 (Okla. 1994) (rejecting an argument that tribal law should apply to resolve the dispute); Warm Springs Forest Prods. Indus. v. Employee Benefits Ins. Co., 703 P.2d 1008, 1010-11 (Or. Ct. App. 1985) (rejecting arguments that tribal law should apply to determine the validity of an insurance contract), *aff'd*, 716 P.2d 740 (Or. 1986).

104. *Cf.* Laurence, *supra* note 37, at 617-18 n.120 (questioning state courts' abilities to apply tribal law).

105. *See* Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a*

become more formalized and expansive in their operations, tribal sovereign interests may be adequately protected even in state court adjudication of lawsuits involving Indians and transactions arising on the reservation.

B. Federal Court Jurisdiction

Prior to the Supreme Court's 1985 holding in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*,[106] federal courts frequently had dismissed for lack of a federal question lawsuits involving on-reservation contracts,[107] leases,[108] personal injury,[109] or any purely intratribal conflicts.[110] Stressing that "federal question jurisdiction does not exist merely because

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Decolonized Federal Indian Law, 46 ARK. L. REV. 77, 150 (1993) (asserting that U.S. courts must give full faith and credit to tribal court judgments); P.S. Deloria & Robert Laurence, *Negotiating Tribal-State Full Faith and Credit Agreements: The Topology of the Negotiation and the Merits of the Question*, 28 GA. L. REV. 365, 373-74 (1994) (urging state-tribal cooperation in the cross-enforcement of state and tribal court judgments); Laurence, *supra* note 37, at 648-73 (discussing full faith and credit); Karla Engle, Note, Red Fox v. Hettich: *Does South Dakota's Comity Statute Foster Unwarranted State Court Intrusion into Tribal Jurisdictional Authority over Civil Disputes?*, 38 S.D. L. REV. 706 (1993) (analyzing state court application of the comity statute); Darby L. Hoggatt, Comment, *The Wyoming Tribal Full Faith and Credit Act: Enforcing Tribal Judgments and Protecting Tribal Sovereignty*, 30 LAND & WATER L. REV. 531, 549-57 (1995) (analyzing a Wyoming state statute providing for recognition of tribal court judgments). State courts are beginning to recognize and enforce tribal court judgments in a range of situations. *See, e.g.*, Fredericks v. Eide-Kirschmann Ford, Mercury, Lincoln, Inc., 462 N.W.2d 164 (N.D. 1990) (enforcing tribal court judgment as a matter of comity); One Feather v. O.S.T. Pub. Safety Comm'n, 482 N.W.2d 48, 49-50 (S.D. 1992) (recognizing tribal court order for comity reasons); Mexican v. Circle Bear, 370 N.W.2d 737, 740-42 (S.D. 1985) (recognizing tribal court order solely on basis of comity principles).

106. 471 U.S. 845 (1985).

107. *See, e.g.*, Sac & Fox Tribe of Indians v. Apex Constr. Co., 757 F.2d 221, 223 (10th Cir. 1985); Gila River Indian Community v. Henningson, Durham & Richardson, 626 F.2d 708, 715 (9th Cir. 1980); Jackson v. United States, 485 F. Supp. 1243, 1247-48 (D. Alaska 1980); Blackfeet Tribe v. Wippert, 442 F. Supp. 65, 66-68 (D. Mont. 1977); Ware v. Richardson, 347 F. Supp. 344, 346-47 (W.D. Okla. 1972).

108. *See, e.g.*, United States *ex rel.* Rollingson v. Blackfeet Tribal Court, 244 F. Supp. 474, 476-77 (D. Mont. 1965).

109. *See, e.g.*, Schantz v. White Lightning, 502 F.2d 67, 69 (8th Cir. 1974); Meeks v. McAdams, 390 F.2d 650, 651 (10th Cir. 1968) (per curiam); Begay v. Kerr-McGee Corp., 499 F. Supp. 1317, 1321-23 (D. Ariz. 1980), *aff'd*, 682 F.2d 1311 (9th Cir. 1982).

110. *See, e.g.*, Martinez v. Southern Ute Tribe, 249 F.2d 915, 921 (10th Cir. 1957) (dismissing claim of wrongful denial of membership in Indian tribe for lack of federal question jurisdiction).

an Indian tribe is a party or the case involves a contract with an Indian tribe,"[111] the lower federal courts routinely rejected litigants' attempts to convert the federal court into a "small claims court for all [Indian] disputes."[112] Leaving the dispute over adjudicatory jurisdiction to state and tribal courts, federal courts presumably assumed that the analysis in *Williams v. Lee*[113] would guide the determination of the proper forum.[114] The Supreme Court, in fact, appeared to endorse this "hands-off" approach when it ruled in *Santa Clara Pueblo v. Martinez*[115] that the federal courts had no jurisdiction to hear a civil cause of action brought against an Indian tribe[116] pursuant to the federal Indian Civil Rights Act.[117]

The landscape changed dramatically when the Court announced its astonishingly broad definition of federal question jurisdiction in *National Farmers Union*.[118] In that case, the Court established a greatly enlarged sphere of federal question jurisdiction in Indian law cases when it declared that "[t]he question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under § 1331."[119] Tempering the rule's immediate impact, however, the Supreme Court imposed the requirement that those newly created federal question cases first had to proceed through the tribal court system.[120] Exhaustion of tribal remedies, the Court stressed, would be faithful to Congress's firm commitment to tribal self-government.[121] Two years later, in *Iowa Mutual Insurance Co. v. LaPlante*,[122] the

111. Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989).
112. *Gila River Indian Community*, 626 F.2d at 715.
113. 358 U.S. 217 (1959).
114. *See supra* notes 28-38 and accompanying text.
115. 436 U.S. 49 (1978).
116. *See id.* at 72.
117. 25 U.S.C. §§ 1301-1341 (1994).
118. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 852 (1985).
119. *Id.* at 852.
120. *See id.* at 853-57.
121. *See id.* at 856.
122. 480 U.S. 9 (1987).

Court expanded the rule to apply to cases brought under the diversity statute.[123]

During the decade following the adoption of the tribal exhaustion rule, lower federal courts have struggled to divine its intended scope. Lower court opinions reveal broad disagreement on issues such as the applicability of the exhaustion requirement when no tribal court suit is pending,[124] the relevance of the adequacy of the available tribal remedy,[125] and the scope of postexhaustion review.[126] The disagreement even extends to

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123. *See id.* at 16.

124. *See, e.g.*, Burlington N. R.R. v. Blackfeet Tribe, 924 F.2d 899, 901 n.2 (9th Cir. 1991) (refusing to require exhaustion when no tribal suit was pending); *accord* Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803, 814-15 (7th Cir. 1993); Weeks Constr., Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668, 672 n.3 (8th Cir. 1986); Vance v. Boyd Miss., Inc., 923 F. Supp. 905 (S.D. Miss. 1996). Other courts have ordered exhaustion in the same situation, concluding that concerns for tribal sovereignty are equally implicated, regardless of the pendency of a tribal proceeding, any time the federal court is asked to resolve a lawsuit that falls within the scope of tribal court jurisdiction. *See, e.g.*, Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294, 1299-300 (8th Cir. 1994); Texaco, Inc. v. Zah, 5 F.3d 1374, 1376 (10th Cir. 1993); United States v. Plainbull, 957 F.2d 724, 728 (9th Cir. 1992); Crawford v. Genuine Parts Co., 947 F.2d 1405, 1407-08 (9th Cir. 1991); Burlington N. R.R. v. Crow Tribal Council, 940 F.2d 1239, 1246-47 (9th Cir. 1991); United States v. Tsosie, 849 F. Supp. 768, 771-72 (D.N.M. 1994); Cropmate Co. v. Indian Resources Int'l, Inc., 840 F. Supp. 744, 747 n.3 (D. Mont. 1993); Haul v. Wahquahboshkuk, 838 F. Supp. 515, 517-18 (D. Kan. 1993); Middlemist v. Secretary of the United States Dep't of Interior, 824 F. Supp. 940, 944 (D. Mont. 1993), *aff'd*, 19 F.3d 1318 (9th Cir. 1994).

125. In *Tom's Amusement Co. v. Cuthbertson*, 816 F. Supp. 403 (W.D.N.C. 1993), for instance, the court conditioned its willingness to require exhaustion of tribal remedies on the tribal court's protection of the non-Indian plaintiff from self-help remedies undertaken by the defendant tribe, and on its promise of at least three days notice to the plaintiff before enforcing a tribal court order. *See id.* at 406-07. The federal district court in *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians*, 788 F. Supp. 566 (S.D. Fla. 1992), *rev'd*, 999 F.2d 503 (11th Cir. 1993), issued a similar warning to the tribal court when it ordered the parties to exhaust their tribal remedies. *See id.* at 570.

126. The Supreme Court itself suggested two very different standards in its exhaustion opinions. The *National Farmers Union* opinion appears to have anticipated extensive federal review, insisting on the development of a full tribal court record "before either the merits or any question concerning appropriate relief is addressed [by the federal court]." *National Farmers Union*, 471 U.S. at 856. In its subsequent opinion in *Iowa Mutual*, however, the Court seemed to endorse a far more restrictive role for postexhaustion review in federal court, noting that "proper deference to the tribal court system precludes relitigation of issues raised by the [insurance law dispute] and resolved in the Tribal Courts." *Iowa Mutual*, 480 U.S. at 19. The Ninth Circuit was the first federal appellate court to define standards for postexhaustion

the basic issue of whether the rule applies to all disputes over tribal jurisdiction, broadly defined to include legislative and regulatory jurisdiction, or whether the exhaustion requirement is better understood as applying exclusively to challenges to the scope of a tribal court's adjudicatory jurisdiction.[127]

In spite of the many crucial unresolved questions surrounding the implementation of the tribal exhaustion rule, it is fair to say that most federal courts routinely require exhaustion for a lawsuit involving Indians or on-reservation transactions.[128] The Ninth Circuit, in *Stock West Corp. v. Taylor*,[129] for example, ordered exhaustion of tribal remedies in a case brought by a non-Indian corporation against a non-Indian tribal attorney for legal malpractice, even though the basis of the alleged malpractice was a letter delivered in Portland, Oregon.[130] In the Ninth Circuit's view, the defendant's claim of tribal jurisdiction required exhaustion because the claim was at least "colorable."[131]

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review of tribal court opinions. *See* FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1313 (9th Cir. 1990). In *FMC*, the court stated that the tribal court's factual determinations should be reviewed under a "clearly erroneous" standard, and federal legal questions would receive de novo review. *See id.* at 1313. The Eighth Circuit subsequently endorsed this approach. *See Duncan Energy*, 27 F.3d at 1300. The Tenth Circuit has adopted and applied the *FMC* rule. *See* Mustang Prod. Co. v. Harrison, 94 F.3d 1382, 1384 (10th Cir. 1996).

127. The Ninth Circuit, for instance, has refused to require exhaustion of tribal remedies in a lawsuit challenging tribal power to tax a non-Indian railroad's on-reservation right-of-way, implying that exhaustion was inappropriate in challenges to tribal legislative authority. *See Burlington Northern*, 924 F.2d at 901 n.2, 904-05 (refusing to require tribal exhaustion and resolving the merits of a dispute over tribal legislative power to impose tax on a railroad right-of-way). Other federal courts have expressed concern about the applicability of the exhaustion doctrine to cases involving challenges to the tribe's sovereignty-based regulatory authority. *See, e.g.*, *Duncan Energy*, 27 F.3d at 1301-03 (Loken, J., concurring); *Altheimer & Gray*, 983 F.2d at 814. Moreover, the Supreme Court itself has not ordered exhaustion in various challenges to tribal sovereign power. *See, e.g.*, South Dakota v. Bourland, 508 U.S. 679 (1993); Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989); Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985). In none of these cases did the Court address the appropriateness of tribal exhaustion, even though the cases all arose after the Court's holding in *National Farmers Union*.

128. *See* Burlington N. R.R. v. Crow Tribal Council, 940 F.2d 1239, 1245 (9th Cir. 1991) ("The requirement of exhaustion of tribal remedies is not discretionary; it is mandatory.").

129. 964 F.2d 912 (9th Cir. 1992) (en banc).

130. *See id.* at 914-16, 919-20.

131. *Id.* at 919.

For the dissenting judge, the court's opinion established an unwarranted extension of the Supreme Court's rule, ordering exhaustion of tribal remedies upon any "[t]alismanic invocation of tribal court jurisdiction."[132]

As applied by the lower federal courts, the exhaustion rule stands in stark contrast to the other Supreme Court rules delineating the proper spheres of state and tribal adjudicatory jurisdiction. Application of the identity-based rules derived from *Williams* and from *Wold I* and *Wold II*, in fact, will result in state court assumption of adjudicatory jurisdiction over many cases that the exhaustion rule would consign to the tribal courts.[133] In the Montana Supreme Court's recent decision in *Lambert v. Ryozik*,[134] for instance, the court found that the state court had adjudicatory jurisdiction over a personal injury lawsuit occurring within the exterior boundaries of a reservation and filed by enrolled members of the tribe against non-Indian defendants.[135] Surely, under the Supreme Court's exhaustion rules, that case belonged in tribal court.[136]

Similarly, although the Ninth Circuit in *Stock West*[137] directed a legal malpractice suit involving off- and on-reservation contacts to tribal court, state courts have assumed jurisdiction over nearly identical lawsuits.[138] Although one recent lower federal court case has suggested that the exhaustion doctrine should also apply to limit state adjudication of cases involving Indians or arising on

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132. *Id.* at 921 (O'Scannlain, J., dissenting).

133. *See infra* notes 134-40 and accompanying text; *see also* Richard W. Hughes, *Indian Law*, 18 N.M. L. REV. 403, 450 (1988) ("[The exhaustion doctrine] essentially forces into tribal courts every case that *could* be brought there, whether the court's jurisdiction would be exclusive, under *Williams v. Lee*, or merely concurrent with the state court.").

134. 886 P.2d 378 (Mont. 1994).

135. *See id.* at 380.

136. In fact, the facts in *Lambert* are remarkably similar to the facts of the Court's first exhaustion opinion, in which Indians sued a state school for injuries from an accident that occurred on school grounds, within the borders of a reservation. *See* National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 847 (1985).

137. *See supra* notes 129-31 and accompanying text.

138. *See, e.g.*, Crawford v. Roy, 577 P.2d 392, 394 (Mont. 1978) (holding that the state court has jurisdiction over a debt action filed by non-Indian investigators against an Indian attorney for investigative services performed on and off the reservation).

the reservation,[139] few state courts have declined to exercise adjudicatory jurisdiction to allow tribal court resolution.[140]

Language in Supreme Court opinions appears to endorse this unbalanced allocation of adjudicatory jurisdiction. On the one hand, the Court has stressed that federal court adjudication of on-reservation disputes would "place [the federal forum] in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs."[141] With the Court's exhaustion analysis, the potential infringement then comes from nontribal adjudication rather than from the identity of the parties. On the other hand, the Court's analysis of tribal sovereign infringement is very different when the competing nontribal forum is the state court system. In such contexts, the Court has insisted that state court adjudication of on-reservation disputes, so long as an Indian is the plaintiff, has no negative impact on retained tribal sovereignty: "[T]ribal self-government is not impeded when a State allows an Indian to enter its courts on equal terms with other persons to seek relief against a non-Indian concerning a claim arising in Indian country."[142] As a practical matter, moreover, state courts may hesitate to follow the Supreme Court's exhaustion rules because of the finality that they bring to state adjudication; in contrast to the federal forum, where postexhaustion review clearly is anticipated and sanctioned, state court review of tribal court judgments would be limited to a state court's refusal to enforce a tribal court judgment off the reservation.[143] Whatever the explanation, for po-

139. *See* Bowen v. Doyle, 880 F. Supp. 99, 123-26 (W.D.N.Y. 1995).

140. *See* Klammer v. Lower Sioux Convenience Store, 535 N.W.2d 379, 384 (Minn. Ct. App. 1995) (interpreting the Supreme Court's exhaustion doctrine to apply to state as well as federal court). In a similar vein, the dissenting justice in *Smith Plumbing Co. v. Aetna Casualty & Surety Co.*, 720 P.2d 499 (Ariz. 1986), argued that the Supreme Court's exhaustion rules required the state court to defer to the tribal court. *See id.* at 508 (Feldman, J., dissenting). In fairness to state courts, however, the Supreme Court never has indicated that its exhaustion rule should affect the *Williams* analysis.

141. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1987).

142. Three Affiliated Tribes v. Wold Eng'g, 467 U.S. 138, 148-49 (1984) (*Wold I*); *see also* Three Affiliated Tribes v. Wold Eng'g, 476 U.S. 877, 880 (1986) (*Wold II*) ("[State court] recognition of jurisdiction over the claims of Indian plaintiffs against non-Indian defendants . . . did not interfere with the right of tribal Indians to govern themselves . . . .").

143. *See* Robert B. Porter, Note, *The Jurisdictional Relationship Between the Iro-*

tential litigants, Indian and non-Indian alike, the two starkly contrasting sets of rules present a bewildering and seemingly illogical conundrum.

In addition, the endorsement of broad tribal jurisdiction in the exhaustion opinions stands in clear opposition to the presumption articulated throughout an important line of Supreme Court cases. Specifically, the Court's insistence in exhaustion cases that "[c]ivil jurisdiction over [the activities of non-Indians on reservation lands] presumptively lies in the tribal courts"[144] appears to be flatly inconsistent with the Court's earlier articulation of "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[145] Whatever the proper construction of these two presumptions,[146] the resulting tension creates inconsistency and uncertainty for the lower courts. Moreover, the exhaustion rule itself contains an internal inconsistency: although its rhetoric stresses commitment to tribal self-determination and self-government,[147] its extremely broad definition of federal question jurisdiction, which allows review of every aspect of the tribal court's adjudicatory jurisdiction, ensures extensive federal oversight of tribal court adjudications. Finally, the Court's insistence in its exhaustion cases that "[t]he alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement"[148] contrasts sharply with observations made in the context of state-tribal court jurisdictional disputes. Consider the Court's holdings

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quois and New York: An Analysis of 25 U.S.C. §§ 232, 233, 27 HARV. J. ON LEGIS. 497, 565 (1990).

144. *Iowa Mutual*, 480 U.S. at 18.

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

146. *See* discussion *infra* Part III. For more extensive analysis of this issue, see Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. REV. 1089, 1128-30, 1141-52 (1995) [hereinafter Reynolds, *Exhaustion*], and Laurie Reynolds, *"Jurisdiction" in Federal Indian Law: Confusion, Contradiction, and Supreme Court Precedent* (forthcoming in N.M. L. REV. (1997)) [hereinafter Reynolds, *Jurisdiction*].

147. *See Iowa Mutual*, 480 U.S. at 14 ("We have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government."); *see also* National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985) ("Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination.").

148. *Iowa Mutual*, 480 U.S. at 19.

in the *Wold* cases, in which it ordered the state court to adjudicate a lawsuit filed by an Indian tribe, even though that same dispute, if initiated by a non-Indian plaintiff, would be within the sphere of exclusive tribal court adjudicatory jurisdiction under *Williams*.[149] In those cases, the Court mentioned the lack of a meaningful tribal forum as one of the important practical reasons for requiring state court adjudication.[150] Taken together, the two lines of cases cast substantial doubt on the relevance of a nontribal court's determination whether the tribal court meets some undefined standard of competency before the non-Indian court must relinquish adjudicatory jurisdiction.

Whether the exhaustion doctrine is the dark cloud over tribal sovereignty that some writers have argued,[151] or the silver lining of new and expansive opportunities for initial tribal court adjudication,[152] the fact remains that as a rule of jurisdictional

149. *See supra* notes 28-86 and accompanying text.

150. *See* Three Affiliated Tribes v. Wold Eng'g, 476 U.S. 877, 883 (1986) (*Wold II*) (describing the pending lawsuit between a tribal plaintiff and a non-Indian defendant as one "for which there is no other forum"); *id.* at 889 (noting that "the Tribe cannot be said to have a meaningful alternative to state adjudication"); Three Affiliated Tribes v. Wold Eng'g, 467 U.S. 138, 149 (1984) (*Wold I*) (emphasizing that state adjudication of a claim arising on Indian country is "particularly compatible with tribal autonomy when, as here, the suit is brought by the tribe itself and the tribal court lacked jurisdiction over the claim at the time the suit was instituted").

151. *See, e.g.*, Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 3, 20 (criticizing extension of federal plenary power over tribal court decision making, while recognizing that the exhaustion doctrine "at least preserves the civil jurisdictional integrity of tribal courts"); Clinton, *supra* note 105, at 150-51 (describing the exhaustion doctrine as "the ultimate colonialist distrust of leaving the final resolution of [causes of action arising on reservations] to tribal governance"); Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 879-80 (1990) [hereinafter Clinton, *Tribal Courts*] ("[C]reating a judicially defined exhaustion doctrine to afford some federal court review seemingly ignores traditional rules of finality applicable to the judgments of sovereigns. . ."); Reynolds, *Exhaustion*, *supra* note 146, at 1134-49 ("Although the most frequently stated justification for tribal exhaustion is to effectuate Congress's strong commitment to tribal sovereignty, careful analysis of the Supreme Court's opinions . . . reveals that the reality falls far short of that ideal.") (footnote omitted).

152. *See, e.g.*, Frickey, *supra* note 38, at 1234 (describing the exhaustion doctrine as a pragmatic accommodation between "Anglo-American procedural and substantive values" and "Indian traditions of dispute resolution"); Timothy W. Joranko, *Exhaustion of Tribal Remedies in the Lower Courts After* National Farmers Union *and* Iowa Mutual*: Toward a Consistent Treatment of Tribal Courts by the Federal Judicial System*, 78 MINN. L. REV. 259, 286-93 (1993) (arguing for expansive application of

allocation, the tribal exhaustion doctrine is vaguely defined and confusingly inconsistent. It establishes a new set of rules for federal courts to follow, ignoring long-standing Supreme Court precedent that addresses the scope of tribal court adjudicatory jurisdiction from the perspective of state court encroachment. Most fundamentally, the exhaustion rule requires federal courts to refer many lawsuits to tribal court, even though an identical dispute would be subject to state court jurisdiction under *Williams*.[153] Rules of tribal court adjudicatory jurisdiction should depend upon a theory of tribal court jurisdiction, not on whether a litigant files a lawsuit in federal or state court.

C. Tribal Court Adjudicatory Jurisdiction As Seen Through Nontribal Judicial Lenses

The wide variation among tribal courts precludes broad generalizations about their level of formal organization,[154] the extent

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the exhaustion doctrine); Pommersheim, *Crucible*, *supra* note 19, at 329 (endorsing the rules of tribal exhaustion as a necessary means to "curb the most prevalent attempts to undermine and circumvent tribal court jurisdiction"); Pommersheim, *Liberation*, *supra* note 19, at 412 (describing the exhaustion holdings as "seminal"); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 732 (1989) (describing the exhaustion rule as evidence of the Supreme Court's realization that federal jurisdiction would intrude improperly on tribal sovereignty); Alex Tallchief Skibine, *Deference Owed Tribal Courts' Jurisdictional Determinations: Towards Co-Existence, Understanding and Respect Between Different Cultural and Judicial Norms*, 24 N.M. L. REV. 191, 193 (1994) (arguing for more deferential postexhaustion review by federal courts); Michael Taylor, *Modern Practice in the Indian Courts*, 10 U. PUGET SOUND L. REV. 231, 273 (1987) (applauding the exhaustion rule because it will enhance the competence of tribal courts).

153. *See supra* notes 28-46 and accompanying text; *see also* Reynolds, *Exhaustion*, *supra* note 146, at 1136-37 (analyzing the tensions that exist between *Williams* and the exhaustion doctrine).

154. For example, no California tribe has a functioning court, except for a few small judicial offices that only deal with hunting and fishing regulations. *See Indian Tribal Justice Act: Hearing on S. 521 Before the Senate Comm. on Indian Affairs*, 103d Cong. 148 (1993) [hereinafter *Tribal Justice Hearings*] (statement of Barbara Gonzales-Lyons, Vice Chairman, Tribal Council, Agua Caliente Band of Cahuilla Indians). The Navajo Tribe, however, operates seven district trial courts, a family court in each district, an appellate court, and a traditional Navajo Peacemaker Court. *See Indian Tribal Justice Act: Hearing on H.R. 1268 Before the Subcomm. on Native Am. Affairs of the House Comm. on Natural Resources*, 103d Cong. 84 (1993) (testimony of the Honorable Robert Yazzie, Chief Justice of the Navajo Nation). Moreover, the Navajo tribe has a published code, case law reporter, and a bar association. *See*

of their jurisdictional reach,[155] or their independence from other tribal governmental bodies.[156] Nevertheless, the rules of *Williams*, *Wold*, and *National Farmers Union*, imposed from the outside to determine the scope of tribal court adjudication, apply to all tribal courts. Not surprisingly, perhaps, these allocational rules have in turn led to additional external formulations of the scope of tribal adjudicatory power. Unfortunately, these non-Indian evaluations unnecessarily restrict tribal determinations of the scope of their own jurisdiction.

A 1934 opinion of the Solicitor of the Department of the Interior asserted that "the judicial powers of the tribe are coextensive with its legislative or executive powers."[157] During the time of incipient tribal court development, perhaps that state-

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Tribal Courts Act of 1991 and Report of the U.S. Commission on Civil Rights Entitled "Indian Civil Rights Act": Hearings Before the Senate Select Subcomm. on Indian Affairs, 102d Cong. 232 (1991). Although many tribal courts are organized pursuant to the Indian Reorganization Act, some tribes, such as the Navajo and the Laguna Pueblo, as well as some Alaska villages and Minnesota tribes, maintain traditional justice systems. *See* H.R. REP. NO. 103-205, at 7 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2425, 2427. For a comprehensive summary of the historical development of tribal courts, see POMMERSHEIM, BRAID OF FEATHERS *supra* note 19, at 61-65; Margery H. Brown & Brenda C. Desmond, *Montana Tribal Courts: Influencing the Development of Contemporary Indian Law*, 52 MONT. L. REV. 211, 216-25 (1991); Taylor, *supra* note 152, at 235-38; Valencia-Weber, *supra* note 19, at 232-37.

155. The model ordinances provided to the tribes by the Department of the Interior under the Indian Reorganization Act, 25 U.S.C. §§ 461-479 (1994), provided for tribal court adjudicatory jurisdiction over nonmembers only with that individual's consent. *See* Vetter, *supra* note 34, at 186 n.102. Increasingly, tribal code provisions establish tribal court jurisdiction over all individuals within the borders of the reservation, regardless of tribal affiliation. *See id.* at 186. For instance, the Standing Rock Sioux Tribal Code currently provides:

> The judicial power shall extend to all cases in law and equity arising under the Tribal Constitution, the customs or the laws of the Tribe, and to any case in which the Tribe, a member of the Tribe, an Indian residing on the Reservation or a corporation or entity owned in whole or in substantial part by any Indian shall be a party.

Red Fox v. Hettich, 494 N.W.2d 638, 644 (S.D. 1993) (quoting STANDING ROCK SIOUX TRIBAL CODE § 1-107).

156. The structure of many tribal governments does not include Anglo-American notions of separation of powers. Curiously, the responsibility for the notable absence of this fundamental concept of government lies with the Department of the Interior, which drafted model constitutions for the tribes. *See* Pommersheim, *Path*, *supra* note 19, at 396.

157. 55 I.D. 14, 56 (1934), *reprinted in* DEPARTMENT OF THE INTERIOR, 1 OPINIONS OF THE SOLICITOR 445, 471 (n.d.).

ment could be seen as an expansive view intended to allow the development of a tribal court's jurisdiction to its fullest possible reach.[158] For a modern tribal court seeking to achieve parity with its state court counterparts, however, the statement is profoundly limiting; it necessarily implies that a tribal court cannot adjudicate disputes unless the conduct involved in the dispute is within the scope of the tribe's legislative powers.

Commentators[159] and the Supreme Court[160] itself have cited this proposition, seemingly approving its inherent limitations without explaining its justification. Compounding the negative impact of this limitation, moreover, is the Court's currently restrictive view of tribal legislative powers themselves. Under the line of cases beginning with *Montana v. United States*,[161] the Court has articulated the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[162] If this standard also

158. The issuance of the Solicitor's opinion coincided with the passage of the Indian Reorganization Act of 1934, Pub. L. No. 383, ch. 576, § 1, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (1994)).

159. *See, e.g.*, Richard B. Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479, 514 (1979); Pommersheim, *Crucible*, *supra* note 19, at 334-35.

160. In *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), the Supreme Court observed almost casually that "[s]ince the Tribe's adjudicative jurisdiction was coextensive with its legislative jurisdiction, the [tribal] court concluded that it would have jurisdiction over the suit." *Id.* at 12. From the context of that statement, it is unclear whether the Supreme Court believed that the two spheres of jurisdiction *must* be coterminous, or whether its statement merely stated the facts of the particular case before it. Even more perplexing, though, was the Court's acceptance of the Tribe's assertion of legislative jurisdiction over the conduct giving rise to the lawsuit. *See id.* at 17-18. Given the Supreme Court's restrictive view of the scope of tribal legislative jurisdiction in other opinions, it is extremely unlikely that the Tribe's sovereign powers extend to the activities of non-Indian defendants on fee land within the reservation. *See* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989); Montana v. United States, 450 U.S. 544 (1981).

161. 450 U.S. 544 (1981).

162. *Id.* at 565. In subsequent cases, the Court has reaffirmed this restrictive view of tribal legislative powers. In *South Dakota v. Bourland*, 508 U.S. 679 (1993), for instance, the Court declared "the general rule that an Indian tribe's inherent sovereign powers do not extend to non-Indian activity." *Id.* at 687; *see also* County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 267 (1992) (stressing "the very narrow powers reserved to tribes over the conduct of non-Indians within their reservations"); *Brendale*, 492 U.S. at 431 (plurality opinion of White, J.) (suggesting that tribal legislative powers over non-Indians are limited

applies to tribal adjudicatory powers, tribal courts will be left with the power to adjudicate only those disputes to which tribal substantive law applies.

In recent cases, two federal courts of appeals have expressly adopted this restrictive approach to tribal adjudicatory power. In *A-1 Contractors v. Strate*,[163] the Eighth Circuit held that a tribal court had no jurisdiction to adjudicate a personal injury lawsuit between non-Indians filed in tribal court and that arises out of a traffic accident occurring on a state highway within the exterior borders of the reservation. Notwithstanding the tribal trial and appellate courts' opinions upholding adjudication of the controversy pursuant to the tribe's jurisdictional code,[164] the Eight Circuit opinion reasoned that because the tribe could not apply its substantive law to regulate the behavior of the non-Indian parties, it was likewise powerless to adjudicate the resulting lawsuit.[165] Several months later, the Ninth Circuit squarely adopted the Eighth Circuit's holding and rationale.[166] At least one state supreme court[167] and one tribal court[168] have applied the same analysis.

In contrast, several courts[169] and commentators[170] have argued that the scope of a tribal court's adjudicatory powers should

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to instances in which the non-Indian activity has a "demonstrably serious" impact that "imperil[s]" tribal sovereignty).

163. 76 F.3d 930 (8th Cir.), *cert. granted*, 117 S. Ct. 37 (1996).

164. *See* Fredericks v. Continental W. Ins. Co., 20 Ind. L. Rep. 6009, 6010 (N. Plains Intertr. Ct. App. 1992).

165. Four judges joined vigorous dissents, writing three separate dissenting opinions. *See A-1 Contractors*, 76 F.3d at 941 (Beam, J., dissenting); *id.* at 944 (Gibson, J., dissenting); *id.* at 945 (McMillian, J., dissenting).

166. *See* Yellowstone County v. Pease, 96 F.3d 1169 (9th Cir. 1996).

167. *See* Red Fox v. Hettich, 494 N.W.2d 638 (S.D. 1993).

168. *See* Lefevre v. Mashantucket Pequot Tribe, 23 Ind. L. Rep. 6018 (Mashantucket Pequot Tribal Ct., Gaming Enter. Div. 1992).

169. *See, e.g., In re* Estate of Witko v. G. Heileman Brewing Co., 23 Ind. L. Rep. 6104, 6112 (Rosebud Sioux S. Ct. 1996) (stating that *Montana* analysis should be limited to questions of tribal legislative authority); Pittsburgh & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531, 1540 (10th Cir. 1995) (stressing that tribal adjudicatory power is not subject to the narrow *Montana* limitations).

170. *See* Joseph William Singer, *Publicity Rights and the Conflict of Laws: Tribal Court Jurisdiction and the* Crazy Horse *Case*, 41 S.D. L. REV. 1 (1996); Reynolds, *Exhaustion*, *supra* note 146, at 1128-30, 1141-49. The argument is made more fully in Reynolds, *Jurisdiction*, *supra* note 146.

be determined by application of *Iowa Mutual*'s presumption that "[c]ivil jurisdiction over [the activities of non-Indians on reservation lands] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute."[171] This more expansive approach to tribal adjudicatory powers would remove existing impediments to the tribe's ability to resolve disputes arising on the reservation that involve Indians, or otherwise implicate a valid tribal sovereign interest.

Although the Supreme Court has not spoken directly to this issue,[172] analysis of the exhaustion holdings in *National Farmers Union* and *Iowa Mutual* implicitly confirms the Court's support of broad tribal adjudicatory jurisdiction. Not only does the Court's presumption that "[c]ivil jurisdiction over [the activities of non-Indians on reservation lands] . . . lies in the tribal courts"[173] suggest a view of tribal court adjudicatory power that extends far beyond the limited scope of tribal court legislative power articulated by the current Supreme Court,[174] the actual facts of those cases involve controversies that occurred on non-Indian land within the exterior borders of the reservation.[175] Because recent Court opinions suggest an almost automatic presumption that those activities fall beyond the scope of tribal legislative power,[176] tribal court adjudication of the disputes presumably would require the application of nontribal law. It seems unlikely that the Court would have based its expansive doctrine of exhaustion of tribal remedies and its corollary of presumptively broad tribal adjudicatory jurisdiction on factual

171. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987).

172. When this Article went to press, the Court had not yet issued its opinion in *A-1 Contractors v. Strate*. *See infra* notes 204-34 and accompanying text.

173. *Iowa Mutual*, 480 U.S. at 18.

174. In *Montana v. United States*, 450 U.S. 544 (1981), the Court introduced the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565.

175. *See* National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 847 (1985) (stating that an accident giving rise to the lawsuit occurred on state-owned land within the borders of the reservation); *Iowa Mutual*, 480 U.S. at 11 (noting merely that the accident arose on a highway running through a reservation).

176. In *South Dakota v. Bourland*, 508 U.S. 679 (1993), the Court seemed to be moving toward an automatic prohibition on tribal jurisdiction over non-Indian land within the reservation, concluding that loss of ownership "implies the loss of regulatory jurisdiction over the use of the land by others." *Id.* at 689.

disputes in which the Court ultimately intended to conclude that the tribal courts were powerless to adjudicate.

Hints of a second limitation on the scope of tribal court adjudicatory jurisdiction have emerged in some state court evaluations of the legitimacy of disputed tribal court adjudications. The concept of "territorial jurisdiction," undoubtedly a crucial component of tribal sovereign powers,[177] has been transformed by non-Indian courts into a prerequisite for the exercise of tribal court jurisdiction. For example, according to the South Dakota Supreme Court's analysis in *Red Fox v. Hettich*,[178] tribal courts are powerless to adjudicate disputes arising beyond the scope of their territorial jurisdiction.[179] Although tribes may choose to limit their adjudicatory jurisdiction to causes of action occurring exclusively within their territory, tribal court assumption of the power to adjudicate disputes with off-reservation contacts, for

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177. *See, e.g.*, United States v. Mazurie, 419 U.S. 544, 557 (1975) (describing Indian tribes as "unique aggregations possessing attributes of sovereignty over both their members and their territory") (citing Worcester v. Georgia, 6 Pet. 515, 557, (1832)). The Supreme Court also has emphasized the territorial component of tribal sovereignty in other contexts, noting "the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982) (citing Gibbons v. Ogden, 9 Wheat. 1, 199 (1824)).

178. 494 N.W.2d 638 (S.D. 1993).

179. Curiously, the court adopted the definition of tribal adjudicatory jurisdiction proposed by Professor Pommersheim. *See* Pommersheim, *Crucible*, *supra* note 19, at 335. Professor Pommersheim argues that because the tribe's territorial jurisdiction extends to include non-Indian land within the reservation, its adjudicatory jurisdiction should expand to that same extent. *See id.* at 343-44. The South Dakota court, however, offered the concept of "territorial jurisdiction" as a means of *limiting* tribal court adjudicatory power. *See Red Fox*, 494 N.W.2d at 643. In *Red Fox*, the court refused to enforce a tribal court judgment against a non-Indian defendant. *See id.* at 647. In the tribal court action, the Indian plaintiff sued the non-Indian for damages suffered when the plaintiff struck the defendant's dead horse on a state highway that traversed the reservation. *See id.* at 640.

In a related context, the Supreme Court twice has reserved judgment on the question "whether the Tribe's right to self-governance could operate independently of its territorial jurisdiction to pre-empt [state law]." Oklahoma Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 126 (1993); *see also* Oklahoma Tax Comm'n v. Chickasaw Nation, 115 S. Ct. 2214, 2223 (1995) (declining to address whether a state tax infringed on tribal self-governance). These statements suggest that a tribe's territorial jurisdiction may be relevant to the scope of its legislative jurisdiction, but it is not necessarily relevant to the determination of the boundaries of its adjudicatory jurisdiction.

instance, does not appear to contravene any legitimate federal or state concern about the scope of tribal power.[180] In fact, various state courts have recognized concurrent tribal power to adjudicate controversies arising outside the bounds of the tribe's territory;[181] to do otherwise would limit unnecessarily tribal court adjudication to only those lawsuits falling within the tribal court's sphere of exclusive jurisdiction as established by *Williams* and *Fisher*.

A final component of tribal adjudicatory jurisdiction that has been subjected to heightened scrutiny by nontribal courts is the scope of the tribal court's personal jurisdiction. Both state and federal courts have asserted, without clear doctrinal justification, that establishing the personal jurisdiction of the tribal courts "requires more in the way of minimum contacts than would be sufficient for the citizen of one state to assert personal jurisdiction over the citizen of another state."[182] This pronouncement stands in stark contrast to tribal court holdings of personal jurisdiction over defendants who have established a presence on the reservation that satisfies the Supreme Court's minimum contact holdings.[183]

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180. For instance, the tribal code quoted in *State Securities, Inc. v. Anderson*, 506 P.2d 786 (N.M. 1973), provided that the Navajo court had jurisdiction "over . . . [a]ll civil actions in which the defendant is an Indian and is found within its territorial jurisdiction." *Id.* at 787 (quoting NAHON CODE tit. 7, § 133 (Equity n.d.))

Similarly, the tribal ordinance at issue in *Twin City Construction Co. v. Turtle Mountain Band of Chippewa Indians*, 911 F.2d 137 (8th Cir. 1990), provided that the tribal court had adjudicatory jurisdiction over "[c]ontracts to be performed within the Court's territorial jurisdiction, including contracts to insure any person, property or risk, located within the Court's territorial jurisdiction." *Id.* at 139 (quoting TURTLE MOUNTAIN TRIBAL CODE tit. 2, § 2.0102(1) (1987)). In the latter case, the tribe used the concept of territorial jurisdiction to assert adjudicatory jurisdiction over transactions that involved both on- and off-reservation contacts. Thus, territorial jurisdiction is properly understood as a tool for tribal determination of the scope of its courts' adjudicatory jurisdiction, not as a limitation imposed on tribal court adjudicatory powers by nontribal courts.

181. *See, e.g., In re* Custody of K.K.S., 508 N.W.2d 813, 816 (Minn. Ct. App. 1994); *Anderson*, 506 P.2d at 788; Lewis v. Sac & Fox Tribe of Okla. Hous. Auth., 896 P.2d 503, 509-10 (Okla. 1994); Wells v. Wells, 451 N.W.2d 402, 405 (S.D. 1990).

182. Babbitt Ford, Inc. v. Navajo Indian Tribe, 519 F. Supp. 418, 431 (D. Ariz. 1981), *aff'd in part, rev'd in part*, 710 F.2d 587 (9th Cir. 1983); *see also Babbitt*, 710 F.2d at 598; *Red Fox*, 494 N.W.2d at 645 (recognizing the higher minimum contacts standard necessary for assumption of personal jurisdiction by a tribal court).

183. *See, e.g.*, Pommersheim, *Crucible*, *supra* note 19, at 341 (describing the Rose-

The totality of the externally imposed limitations described above produces the formula adopted by the South Dakota Supreme Court in *Red Fox*: tribal adjudicative authority = territorial jurisdiction + subject matter jurisdiction + personal jurisdiction + legislative jurisdiction.[184] As an implementation of the Supreme Court's ringing endorsement of tribal self-determination, the formula appears unnecessarily restrictive and unjustifiably intrusive. Rather than focusing on the Court's effusive praise of expansive tribal court adjudicatory jurisdiction, the formula superimposed the Court's more restrictive view of tribal legislative jurisdiction, producing a narrowly defined realm of tribal adjudicatory jurisdiction. In so doing, the South Dakota Supreme Court ignored the important sovereign tribal interests of establishing a judicial forum with the same range of adjudicatory authority as non-Indian courts.

As tribal courts continue to expand the reach of their jurisdictional ordinances,[185] challenges to the parameters of the various components of tribal court adjudicatory power increasingly will be brought by those seeking to avoid tribal court adjudication. With but a few hints on which to rely, non-Indian courts should respect the Supreme Court's implicit confirmation of broad tribal court adjudicatory power and recognize that tribal courts, just like their state and federal counterparts, are perfectly competent to adjudicate disputes that fall outside the bounds of their sovereign legislative and territorial jurisdiction.[186]

D. The Gapfillers

Not infrequently, application of one of the rules described above will yield a gap in jurisdictional competence. For instance,

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bud Sioux Tribal Court's application of the Supreme Court's doctrine of minimum contacts to establish personal jurisdiction over a non-Indian defendant).

184. *See Red Fox*, 494 N.W.2d at 642 n.4.

185. A typical modern tribal ordinance grants the tribal court jurisdiction over all causes of action "which arise under the Constitution, laws, or treaties of the [tribe], or which arise within the jurisdiction of the [tribe], or in any transitory action when the defendant may be served within the jurisdiction of the [tribe]." Cole v. Kaw Hous. Auth., 22 Ind. L. Rep. 6092, 6094 (Kaw D. Ct. 1995) (citing KAW NATION LAW AND ORDER CODE ch. VI, § 1).

186. *See supra* notes 172-76 and accompanying text.

although application of the Supreme Court's exhaustion rules would suggest that initial dispute resolution should take place in a tribal court, a tribal court may not exist or, if one does, it may not have jurisdiction over the pending lawsuit. These gaps, known as the "no forum" or the "no law" problem,[187] place non-Indian courts in the difficult situation of having to choose between, on the one hand, a faithful application of precedent that will ultimately deprive the parties of judicial relief or, on the other hand, a pragmatic determination that the provision of a forum for dispute resolution must take precedence over the application of the jurisdictional rules.

Both state and federal courts have confronted this problem, and generalizations are difficult to glean. Some courts steadfastly refuse to alter their analysis of adjudicatory jurisdiction even when confronted with the possibility that no alternative forum exists.[188] For those courts, non-Indian adjudication of the dispute would constitute an impermissible infringement on tribal sovereignty.[189] Moreover, in their analysis, the courts stress that the Supreme Court's guiding rules admit of no exception for gap-filling functions.[190] Although perhaps expressing concern for the possibility that meritorious claims will not be vindicated in a judicial forum, the courts reluctantly conclude that the weight of precedent allows for no other decision.[191]

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187. For an overview of the "no forum" dilemma, see Pommersheim, Crucible, *supra* note 19, at 347-55; Jean Pendleton, Note, Iowa Mutual Insurance Co. v. LaPlante *and Diversity Jurisdiction in Indian Country: What If No Forum Exists?*, 33 S.D. L. REV. 528 (1988).

188. *See, e.g.*, Northwest S.D. Prods. Credit Ass'n v. Smith, 784 F.2d 323 (8th Cir. 1986); Neadeau v. American Family Mut. Ins. Co., No. C7-93-691, 1993 WL 302127 (Minn. Ct. App. Aug. 10, 1993); Chino v. Chino, 561 P.2d 476 (N.M. 1977); Nelson v. Dubois, 232 N.W.2d 54 (N.D. 1975).

189. *See Neadeau*, 1993 WL 302127, at *1 ("To assert jurisdiction in this matter where none has been conferred to the state by Congress would undermine the [tribe's] right of self-governance . . . .").

190. *See Nelson*, 232 N.W.2d at 58-59 ("Federal courts will not accept jurisdiction unless the statutory bases for federal jurisdiction are present."). In some sense, however, the Court's opinions in *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877 (1986) (*Wold II*); 467 U.S. 138 (1984) (*Wold I*), endorse the gap-filling function served by nontribal courts when no tribal forum exists. *See supra* notes 72-84 and accompanying text; *see also Wold II*, 476 U.S. at 883 (requiring state court adjudication of litigation "for which there is no other forum"); *id.* at 889 (noting that the Tribe had no "meaningful alternative to state adjudication").

191. In *Nelson*, 232 N.W.2d at 58, for example, the court held that its state courts

In contrast, other courts that face this dilemma choose to assume adjudicatory jurisdiction. For these courts, the choice between "acknowledging a 'zone of civil lawlessness' or allowing [non-Indian courts] to 'interstitially' fill in the gaps"[192] is guided by the overriding importance of the availability of judicial review for lawsuits grounded properly in common law or statutory provisions.[193] Moreover, these courts conclude that tribal sovereignty cannot be infringed by non-Indian adjudication of a dispute that would otherwise go unresolved.

If all of the current gaps in tribal court adjudicatory jurisdiction could be attributed to a sovereign decision to deny or limit relief, the argument that nontribal court gap-filling infringes on tribal sovereignty would be more compelling.[194] The reality, however, is frequently otherwise. Tribal ordinances may limit their courts' adjudicatory jurisdiction to cases involving only consenting non-Indian defendants, not because the tribe has concluded that lawsuits against other non-Indians are not meritorious, but rather because the tribe's ordinance dates from the days of the Indian Reorganization Act and thus follows the model provided by the Department of the Interior.[195] Similarly, the lack of a formal tribal court system is usually due to inadequate resources and expertise, rather than to a tribal legislative decision that judicial remedies should be unavailable.[196] In contrast, a tribal law that denies or limits pain and suffering damages in personal injury lawsuits clearly does reflect a reasoned governmental decision about the availability of certain types of

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were without jurisdiction to hear the lawsuit but noted that the holding would probably leave the plaintiffs "without a forum in which to redress their injuries." *But see id.* at 59-61 (Vogel, J., dissenting).

192. Richardson v. Malone, 762 F. Supp. 1463, 1469 (N.D. Okla. 1991).

193. *See* Federal Land Bank v. Burris, 790 P.2d 534, 537 (Okla. 1990) (emphasizing that statutes become meaningless if no forum exists in which to adjudicate disputes based on those statutes).

194. Professor Pommersheim has urged that "[f]rom the point of view of tribal sovereignty and tribal self-determination," nontribal courts should not assume a gap-filling function. Pommersheim, Crucible, *supra* note 19, at 353.

195. *See infra* notes 241-48 and accompanying text.

196. For example, in *Chilkat Indian Village v. Johnson*, 870 F.2d 1469, 1475 n.11 (9th Cir. 1989), the Tribe had no tribal courts when the federal lawsuit was initiated. By the time the Ninth Circuit heard the case, however, the tribe had authorized the creation of a tribal court system. *See id.*

relief for activities within the tribe's legislative competence.[197]

For the nontribal court, then, the decision whether to supply state or federal law to fill in the gaps of tribal jurisdiction may raise serious questions about infringement of tribal sovereign prerogatives. Some of these courts, however, decide to adjudicate a controversy that might otherwise be beyond their jurisdictional reach simply because tribal adjudication, although preferable, is unavailable. As tribal courts continue to expand their adjudicatory jurisdiction, the realities of this analysis are likely to change. To retain validity and persuasiveness, the gapfillers, like all other allocational rules, must factor into the analysis the realities of tribal court adjudicatory competence.

E. Summary

Viewed in their totality, the rules that currently allocate adjudicatory jurisdiction among state, federal, and tribal courts represent an accumulation of case holdings spanning almost forty years beginning with the Supreme Court's decision in *Williams*. Unfortunately, however, the cases do not blend together to form a consistent whole. In fact, they create an almost daunting set of inconsistencies: internal inconsistencies;[198] inconsistencies be-

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197. The Mashantucket Pequots of Connecticut, for example, have adopted a law limiting pain and suffering damages to 50% of actual damages. Tribal judges will apply this law to negligence lawsuits that are filed in tribal courts. *See Indian Affairs: How Law Is Born*, ECONOMIST, Apr. 15, 1995, at 27-28.

198. In *Williams v. Lee*, 358 U.S. 217 (1959), for example, the Court invalidated state court jurisdiction over suits brought by non-Indians against Indians for on-reservation causes of action because non-Indian adjudication would infringe impermissibly on tribal sovereignty. *See id.* at 223. What the opinion failed to recognize, however, was that the same tribal sovereign interest would be infringed if the Indian party initiated the lawsuit in the same situation. Instead, the Court stressed in *Williams* that state courts properly have assumed jurisdiction to adjudicate lawsuits filed by Indian plaintiffs. *See id.* at 219. In fact, the Court described the cases brought by Indian plaintiffs as examples of situations in which "essential tribal relations were not involved and where the rights of Indians would not be jeopardized." *Id.*; *see supra* notes 84-102 and accompanying text.

Similarly, the Supreme Court's recently articulated rule of exhaustion of tribal remedies stressed tribal sovereignty in its rhetoric: "We have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government." Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987); *see also* National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985) ("Our cases have often recognized that Congress is committed to a policy of supporting tribal self-gov-

tween different rules of adjudicatory jurisdiction;[199] and inconsistencies with other general Indian jurisdictional rules.[200] Although consistency, symmetry, and uniformity have never been highly valued in the constantly changing field of Indian law,[201]

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ernment and self-determination."). Notwithstanding the vigorous use of pro–tribal sovereignty language, however, the holdings created a stunningly broad definition of federal question jurisdiction to review tribal court holdings. *See supra* notes 106-52 and accompanying text.

199. In their application to a particular dispute, the Supreme Court's rules may be flatly inconsistent with one another. Compare, for instance, the sphere of adjudicatory jurisdiction left to the states in the wake of *Williams* with the scope of initial federal court adjudication established by the exhaustion rules. In the state court cases, *Williams* does not preclude state court adjudication of many lawsuits involving Indians if substantial off-reservation contacts are present. *See Williams*, 358 U.S. at 223; *supra* note 46 and accompanying text. If a similar dispute should make its way into federal court, either through application of the diversity statute, or on the basis of federal question jurisdiction, the tribal exhaustion doctrine dictates that the federal court defer to preliminary tribal court adjudication. Thus, the availability of nontribal adjudication will frequently depend on whether the plaintiff files in a state or federal court. *See supra* notes 128-43 and accompanying text.

A second inconsistency is suggested by comparing the *Wold* cases with the breadth of the exhaustion doctrine. In *Wold II*, the Court emphasized the lack of a "meaningful" tribal forum as one of the important reasons for requiring state court adjudication. *See* Three Affiliated Tribes v. Wold Eng'g, 476 U.S. 877, 888 (1986) (*Wold II*). With that statement, the Court suggested that non-Indian courts may assess whether the tribal court meets some undefined standards of competency before relinquishing adjudicatory jurisdiction. In contrast, the Court's exhaustion holdings specifically remove that question from the scope of judicial analysis: "The alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement . . . ." *Iowa Mutual*, 480 U.S. at 19; *see supra* notes 134-36 and accompanying text.

200. Specifically, the current rules diverge from the Court's apparent recognition of a growing concurrent jurisdiction in Indian country, *see* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) (noting that "states and tribes have concurrent jurisdiction over the same territory"), and the presumption that generally restricts tribal sovereign power to its territorial base. *See supra* notes 134-36 and accompanying text.

Moreover, the judicially created presumption guiding the development of tribal court adjudicatory jurisdiction stands in sharp contrast to the presumption applied to resolve disputes involving all other aspects of tribal jurisdiction. The Supreme Court simply has refused to distinguish adjudicatory jurisdiction from legislative jurisdiction, and its cases articulate two irreconcilable presumptions. *See infra* notes 209-29 and accompanying text.

201. *See, e.g.*, Frickey, *supra* note 38, at 1201-03, 1235-38. In that article, Professor Frickey criticized Justice Stevens for favoring uniformity of legal rules over practical legal reasoning in Indian law cases. *See id.* at 1235. For Professor Frickey, symmetry and uniformity are poor substitutes for the "critical perspective, tradition, and

the current application of the rules presents a package that is held together only by its stated commitment to tribal sovereignty as the guiding principle. So long as the Supreme Court, in the absence of congressional action, continues to build on the existing identity-based rules without crafting an overall vision of the scope of tribal court adjudicatory power, the lines dividing the spheres of tribal, federal, and state court jurisdiction will present unsatisfactory and unresolved contradictions and inconsistencies.

III. IMPEDIMENTS TO A COHERENT THEORY OF TRIBAL COURT ADJUDICATORY JURISDICTION

A. The Supreme Court's Refusal To Distinguish Adjudicatory Jurisdiction[202] from Legislative Jurisdiction[203]

Although the Supreme Court has stated clearly that the scope of tribal court subject matter jurisdiction is itself a federal ques-

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contextual and institutional sensitivity" that infuse practical reasoning. *Id.* According to Professor Frickey, Justice Stevens's adoption of "the Anglo-American preunderstanding of legal uniformity in [Indian law] is especially troubling." *Id.* at 1237.

202. Adjudicatory or judicial jurisdiction is defined as "the power of a state to try a particular action in its courts." McCluney v. Jos. Schlitz Brewing Co., 649 F.2d 578, 581 n.3 (8th Cir.) (emphasis ommitted), *aff'd*, 454 U.S. 1071 (1981); *see also* Tallentire v. Offshore Logistics, Inc., 754 F.2d 1274, 1284 n.18 (5th Cir.) (distinguishing legislative jurisdiction from judicial jurisdiction), *cert. granted*, 474 U.S. 816 (1985), *rev'd on other grounds*, 477 U.S. 207 (1986); *In re* "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 690, 707 (E.D.N.Y. 1984) (citing RESTATEMENT (FIRST) OF CONFLICTS § 377 cmt. a, which notes that "[e]ach state has legislative jurisdiction [i.e., power] to determine the legal effect of facts done or events caused within its territory"). Justice Scalia, dissenting in part in *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), stressed that legislative jurisdiction refers to "'the authority of a state to make its law applicable to persons or activities,' and is quite a separate matter from 'jurisdiction to adjudicate.'" *Id.* at 813 (Scalia, J., dissenting in part) (quoting 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 231 (1987)).

Although the term "adjudicatory jurisdiction" is more common, some use "judicial jurisdiction," *see* POMMERSHEIM, BRAID OF FEATHERS, *supra* note 19, at 83, or "adjudicative jurisdiction," *see* Singer, *supra* note 170, at 27. Adjudicatory jurisdiction is comprised of several component parts: the court must have personal jurisdiction over the parties as well as subject matter jurisdiction over the controversy. *See id.* at 26.

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

tion under the federal jurisdictional statutes,[204] its substantive pronouncements on the general question of tribal jurisdiction have been imprecise and even contradictory. In fact, in two sets of important federal Indian law cases involving challenges to different aspects of tribal jurisdiction, the Court has articulated two very different presumptions about the legitimacy of the tribal powers at issue. In the first line of cases, beginning with *Montana v. United States*,[205] the Court held that a tribe could not apply its ordinance to regulate the hunting and fishing activities of nonmembers within the borders of the reservation on land owned in fee by nonmembers.[206] To explain the lack of tribal sovereign power, the Court established "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[207] Subsequent cases have reiterated and strengthened *Montana*'s presumption of divested sovereign power. In *Brendale v. Confeder-*

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204. *See* National Farmers Union Ins. Cos. v. Crow Tribe of Indiana, 471 U.S. 845, 852 (1985); *supra* note 119 and accompanying text.

205. 450 U.S. 544 (1981).

206. *See id.* at 564-67. The presence of land owned in fee by non-Indians within the borders of many Indian reservations results from the federal government's nineteenth-century attempt to break up reservations. *See* FELIX S. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 612-13 (Rennard Strickland et al. eds., 1982). Under the General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C.), Congress authorized the transfer of land from the tribes to individual Indians, and opened the remaining surplus lands to white settlers. *See* COHEN, *supra*, at 613. By the time that the allotment policy was formally repudiated in 1934 with the passage of the Indian Reorganization Act, Pub. L. No. 383, ch. 576, § 1, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (1994)), huge amounts of tribal land had passed to non-Indian ownership. *See* COHEN, *supra*, at 614. One noted authority has estimated that tribal land losses totaled almost 90 million acres. *See id.* For an excellent review of allotment policy and the negative effects that statute continues to have on tribal sovereignty and self-determination, see Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

207. *Montana*, 450 U.S. at 565. Although the Court denied the exercise of tribal sovereign power in this instance, the opinion suggested the possibility that the tribes could regulate non-Indians on fee lands within the reservation if the activity sought to be regulated "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566. In addition, the Court affirmed the inherent power of tribes to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* at 565.

ated Tribes & Bands of the Yakima Indian Nation,[208] Justice White's plurality opinion denied tribal zoning authority over fee land within the opened portion of the reservation, stating the "governing principle . . . that the tribe has no authority itself . . . to regulate the use of fee land."[209] More recently, in *South Dakota v. Bourland*,[210] the Court seemed to be moving toward a nearly automatic prohibition of the exercise of tribal power over non-Indian land within the reservation, concluding that loss of ownership "implies the loss of regulatory jurisdiction over the use of the land by others."[211] For the current Supreme Court, then, tribal sovereignty will rarely include the ability to regulate non-Indian conduct on lands within the borders of the reservation that are owned in fee by non-Indians.[212]

In contrast to *Montana*'s extremely restrictive view of tribal regulatory power, two contemporaneous Supreme Court decisions articulated a broad presumption in favor of tribal jurisdiction over non-Indians. The Court's important tribal exhaustion decisions, *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*[213] and *Iowa Mutual Insurance Co. v. LaPlante*,[214] upheld the power of a tribal court to adjudicate a controversy brought before it, even though the disputes involved non-Indian conduct on non-Indian land within the reservation. Ignoring the *Montana* Court's presumption of divested tribal jurisdiction in precisely those circumstances, the Court stated in *Iowa Mutual*: "Civil jurisdiction over [the activities of non-Indians on reservation lands] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute."[215]

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208. 492 U.S. 408 (1989).
209. *Id.* at 430.
210. 508 U.S. 679 (1993).
211. *Id.* at 689.
212. As Professor Robert Laurence recently noted, cases like *Bourland* actually involve a judicial determination of reservation diminishment. *See* Robert Laurence, *The Unseemly Nature of Reservation Diminishment by Judicial, As Opposed to Legislative, Fiat and the Ironic Role of the Indian Civil Rights Act in Limiting Both*, 71 N.D. L. REV. 393, 394 (1995). The power to diminish or to terminate a reservation, Professor Laurence emphasized, lies with Congress, not with the Court. *See id.*
213. 471 U.S. 845 (1986); *see supra* notes 106-53 and accompanying text.
214. 480 U.S. 9 (1987).
215. *Id.* at 18.

Although the presumptions articulated in the two sets of cases are facially inconsistent, they can be reconciled by identifying more precisely the jurisdictional question involved. *Montana*, *Brendale*, and *Bourland* all involved challenges to the tribe's regulatory or legislative jurisdiction.[216] *National Farmers Union* and *Iowa Mutual*, in contrast, were disputes over the tribal court's adjudicatory jurisdiction.[217] The Court's failure to distinguish legislative jurisdiction from adjudicatory jurisdiction has unnecessarily confused and obscured the relevant inquiries, making the search for a coherent theory of tribal court adjudicatory power more difficult.[218]

In fairness to the Supreme Court, however, the recent confusion between legislative and adjudicatory jurisdiction is but a continuation of a long series of Indian law opinions in which the Court has dealt with various tribal jurisdictional issues without clarifying the type of jurisdiction at issue. Since the days of *Worcester v. Georgia*,[219] the Court has used the term "jurisdiction" to refer alternatively to the power of a government to regulate behavior[220] and to the power of a court to adjudicate a controversy.[221] In fact, the Court's opinion in *Williams*, the first

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216. *See Bourland*, 508 U.S. at 681; Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 414 (1989); Montana v. United States, 450 U.S. 544, 547 (1981).

217. *See Iowa Mutual*, 480 U.S. at 11-12; *National Farmers Union*, 471 U.S. at 847.

218. In its opinion in the *National Farmers Union* case, the Ninth Circuit distinguished legislative jurisdiction from adjudicatory jurisdiction, stating the unremarkable proposition that "[c]ases are commonly adjudicated in forums that would lack the authority to regulate the subject matter of the disputes." National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 736 F.2d 1320, 1322 n.3 (9th Cir. 1984), *rev'd*, 471 U.S. 845 (1985). The Supreme Court, however, implicitly rejected the court's observation and chose instead to position the *National Farmers Union* debate within the general issue of the scope of tribal power over non-Indians. *See National Farmers Union*, 471 U.S. at 853-56 (distinguishing only between civil and criminal jurisdiction); *supra* notes 202-03.

219. 31 U.S. (6 Pet.) 515 (1832).

220. The Court in *Worcester* stated: "[T]he very passage of this act is an assertion of jurisdiction over the Cherokee nation, and of the rights and powers consequent on jurisdiction." *Id.* at 542.

221. In *Williams v. Lee*, 358 U.S. 217 (1959), for example, the Court refused to allow the state court to adjudicate a controversy involving Indian defendants and arising out of an on-reservation transaction, stating that "to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs." *Id.* at 223.

modern case to articulate the scope of the exclusive adjudicatory jurisdiction of tribal courts, itself relied upon legislative jurisdiction cases[222] and was subsequently quoted by the Court in later legislative jurisdiction cases.[223]

Careful reading of recent Supreme Court decisions, however, suggests that the Court is becoming increasingly aware that issues of tribal legislative jurisdiction should be subject to different guiding principles than issues of tribal adjudicatory jurisdiction. For example, in *Iowa Mutual*, the Court for the first time in an Indian law opinion made the distinction between the two types of jurisdiction by noting that the Blackfeet Tribe's "adjudicative jurisdiction was coextensive with its legislative jurisdiction."[224] Subsequently, in a dispute involving the scope of tribal court sovereign power to regulate land use on fee lands located within the reservation, Justice Blackmun's opinion for three members of the Court noted that the adjudicatory jurisdiction cases were not relevant because they involved "the issue of *jurisdiction over a civil suit* brought against a non-Indian arising from a tort occurring on reservation land."[225] More recently, in *Bourland*, a case

222. The essential basis of *Williams* was the *Worcester* principle that state jurisdiction does not extend into Indian country. *See id.* at 218-19.

223. In *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 165 (1973), for example, the Court invalidated the application of Arizona's income tax to incomes earned from reservation sources by Indians residing on the reservation. It refused to apply *Williams* to the dispute, not because it concluded that *Williams*'s relevance was limited to disputes involving adjudicatory jurisdiction, but because it concluded that "cases applying the *Williams* test have dealt principally with situations involving non-Indians." *Id.* at 179; *see also* Montana v. United States, 450 U.S. 544, 564 (1981) (citing *Williams* for the proposition that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation").

224. Iowa Mut. Ins. Cos. v. LaPlante, 480 U.S. 9, 12 (1987). In reality, the Court's observation is perplexing, especially in light of its *Montana* presumptions. Because the school in *Iowa Mutual* was located on nonreservation land owned in fee but within the borders of the reservation, *Montana*'s presumption against tribal regulatory jurisdiction over non-Indians on fee lands made it extremely unlikely that tribal law would apply to resolve this dispute. *See Montana*, 450 U.S. at 564-65. The Court's assertion that the tribe's adjudicatory powers were coextensive with its regulatory powers, therefore, leads to the conclusion that the tribal court would be unable to adjudicate this lawsuit. It seems unlikely that the Court would have ordered exhaustion of tribal remedies if it were already aware of the tribe's inability to adjudicate the dispute. *See Iowa Mutual*, 480 U.S. at 18-19.

225. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492

in which the Court concluded that loss of tribal ownership of lands within the reservation resulted in a concomitant loss of tribal regulatory jurisdiction over those lands,[226] the Court carefully and repeatedly stressed that the case involved a challenge to the tribe's "regulatory jurisdiction,"[227] "regulatory control,"[228] or "regulatory authority,"[229] thus suggesting that the general term "jurisdiction" may no longer suffice to describe these multifaceted disputes.

Until the Supreme Court more clearly establishes the distinction between legislative and adjudicatory jurisdiction, the lower courts are left with the difficult task of reconciling conflicting presumptions about the scope of tribal powers. In fact, two federal courts of appeals have applied the *Montana* Court's presumptive divestment of tribal sovereignty to disputes involving the scope of tribal court adjudicatory jurisdiction,[230] thus ignoring *Iowa Mutual*'s assertion that tribal courts are presumed to have adjudicatory jurisdiction over suits involving non-Indians on the reservation.[231] One recent federal district court opinion, however, refused to apply the *Montana* test to determine the scope of the tribal court's power to adjudicate a controversy before it.[232] Rather, the court concluded that "*Montana* should be applied only to determine ultimately the validity of the [tribal law] itself," and not to determine conflicting assertions of "tribal court [adjudicatory] jurisdiction over the dispute."[233] A coherent allocation of tribal court adjudicatory jurisdiction, consistent with *Iowa Mutual*'s endorsement of tribal adjudicatory power that extends

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U.S. 408, 455 n.5 (1989) (Blackmun, J., concurring in the judgment in part and dissenting in part) (emphasis added). Similarly, Justice White's opinion in *Brendale* concluded that the protribal presumption of jurisdiction articulated in *National Farmers Union* and *Iowa Mutual* was not relevant to the issue of retained tribal sovereign regulatory power. *See id.* at 427 n.10.

226. *See* South Dakota v. Bourland, 508 U.S. 679, 689 (1993).

227. *Id.* at 685 n.6, 689, 691 n.12, 695.

228. *Id.* at 691, 692, 695, 696.

229. *Id.* at 686, 687 n.8, 691 n.11, 692 n.13, 693, 694.

230. *See* Yellowstone County v. Pease, 96 F.3d 1169 (9th Cir. 1996); A-1 Contractors v. Strate, 76 F.3d 930 (8th Cir.), *cert. granted*, 117 S. Ct. 37 (1996); *supra* notes 163-67 and accompanying text.

231. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 18 (1987).

232. *See* Atkinson Trading Co. v. Navajo Nation, 866 F. Supp. 506 (D.N.M. 1994).

233. *Id.* at 509-10.

beyond the limited scope of tribal legislative jurisdiction, will require clearer Supreme Court guidance and explicit bifurcation of the jurisdiction cases.[234]

B. Extensive Variation Among Tribal Courts

The diversity of tribal courts presents a second serious stumbling block to the articulation and refinement of uniform rules of tribal court adjudicatory jurisdiction. Although some tribal courts have adopted wide-ranging jurisdictional codes and provide a fair and efficient forum for members and nonmembers alike, others exercise extremely limited adjudicatory jurisdiction and are sometimes staffed with individuals having no formal legal training.[235] A brief review of the development of tribal courts will facilitate an understanding of the current situation. The federal government did not concern itself with tribal justice until the 1880s,[236] when the Secretary of the Interior authorized the establishment of the Courts of Indian Offenses on any reservation approved by the Commissioner of Indian Affairs and the appropriate Indian Agent.[237] Despite the lack of statutory authorization,[238] these Indian courts (frequently referred to as "CFR courts" in reference to the federal regulations that guide their operations)[239] exercised sweeping jurisdiction in their efforts to maintain law and order on the reservation and promote "acculturation and assimilation."[240]

Years later, with the Indian Reorganization Act of 1934 (IRA)[241] and a newfound federal commitment to tribal sovereign

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234. That issue is currently before the Supreme Court. *See A-1 Contractors*, 117 S. Ct. 37 (1996); *see also supra* notes 163-65 and accompanying text.

235. *See Tribal Court Systems and Indian Civil Rights Act: Hearing Before the Senate Select Comm. on Indian Affairs*, 100th Cong. 19-20 (1988) [hereinafter *Civil Rights Act Hearings*] (statement of Donald D. Dupuis, President, National American Court Judges Association).

236. *See* H.R. REP. NO. 103-205, at 6 (1993).

237. *See* Pommersheim, *Contextual Legitimacy*, *supra* note 19, at 53.

238. *See id.* at 51.

239. *See* Valencia-Weber, *supra* note 19, at 235.

240. *Id.* at 52; *see* WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES 109-10 (1966) (describing the jurisdiction of the Courts of Indian Offenses); Valencia-Weber, *supra* note 19, at 235-37 (summarizing the history of the Courts of Indian Offenses).

241. Pub. L. No. 383, ch. 576, § 1, 48 Stat. 984 (codified as amended at 25 U.S.C.

governments, Congress provided a statutory mechanism for the establishment of tribal judicial systems that, unlike their CFR predecessors, would be considered emanations of tribal, rather than federal, sovereignty.[242] Despite the pro–tribal sovereignty rhetoric, however, most of the tribes that chose to organize under the IRA received prepackaged constitutions from the Bureau of Indian Affairs (BIA).[243] These model constitutions had no analogue to the Bill of Rights nor a provision ensuring separation of powers in the tribal government.[244] As one commentator has noted: "Not coincidentally perhaps, these very omissions are the ones that tribes are most criticized for, when in fact the blame lies elsewhere."[245] Currently, approximately 150 tribal courts have organized under the IRA and twenty-one CFR courts exist in the United States.[246] A more limited number of tribes, such as the Navajo, refused to organize under the IRA[247] and retained their traditional tribal justice systems.[248]

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§§ 461-479 (1994)).

242. *See* POMMERSHEIM, BRAID OF FEATHERS, *supra* note 19, at 65-66; Brown & Desmond, *supra* note 154, at 218-19; Pommersheim, *Path*, *supra* note 19, at 394-96. Comparing tribal courts to CFR courts, one state supreme court justice described CFR courts as "not . . . created by an Indian sovereignty . . . but . . . administratively created within the structure of the United States." State *ex rel.* Peterson v. District Court, 617 P.2d 1056, 1070 (Wyo. 1980) (Raper, C.J., specially concurring).

243. *See* COHEN, *supra* note 206, at 149-51; Resnik, *supra* note 152, at 712.

244. *See* Pommersheim, *Path*, *supra* note 19, at 396.

245. *Id.* In his article, Professor Pommersheim argues that until tribal governments can revise their constitutions to incorporate important tribal values and "identify other vital sources of law with which to shape the contours of tribal aspiration," *id.* at 398, tribal constitutions will never "occupy within their own communities the same high moral and legal ground as the United States Constitution holds in American legal and political culture." *Id.* at 397.

Another general provision imposed by the BIA has limited greatly the scope of tribal adjudicatory jurisdiction. The personal jurisdiction laws of many tribes narrowly restrict tribal court adjudication of disputes involving non-Indians; for instance, some tribes require that the defendant be a reservation resident, though others require the consent of a non-Indian defendant before assertion of adjudicatory jurisdiction is permissible. *See* Pommersheim, *Crucible*, *supra* note 19, at 338-39; Vetter, *supra* note 34, at 186 & n.104.

246. *See The* Duro *Decision: Criminal Misdemeanor Jurisdiction in Indian Country: Hearing on H.R. 972 Before the House Comm. on Interior & Insular Affairs*, 102d Cong. 9 (1991) [hereinafter Duro *Decision*] (statement of Ronal D. Eden, Director, Office of Tribal Services); *Civil Rights Act Hearings*, *supra* note 235, at 19.

247. *See* Clinton, *supra* note 105, at 128.

248. *See* H.R. REP. NO. 103-205, at 7 (1993). Tribes and native villages in New

Only relatively recently have increasing numbers of tribes begun to take the destiny of their court system into their own hands.[249] The resulting spectrum is extremely diverse: some tribes have no court system at all;[250] some maintain their status as pre-IRA, CFR courts;[251] some operate under the BIA boilerplate provisions;[252] and some are forging ahead to shape tribal court systems to provide efficient dispute resolution procedures and reflect the needs of the community they serve.[253]

Mexico, Alaska, and Minnesota have maintained their traditional tribal forums for resolution of personal disputes at the local level. *See id.*

249. *See, e.g.*, Brown & Desmond, *supra* note 154, at 300-01 (describing the formation of an intertribal appellate court); *id.* at 288-89 (describing the increased scope of exclusive tribal jurisdiction under the Indian Child Welfare Act); Pommersheim, *Crucible*, *supra* note 19, at 346 n.125 (describing the amendment to a tribal constitution that eliminated the requirement that all tribal ordinances be approved by the Secretary of the Interior); Pommersheim, *Path*, *supra* note 19, at 397-98 (describing tribal adoptions of Bill of Rights provisions and expanded assertion of inherent tribal authority).

250. *See, e.g.*, Richardson v. Malone, 762 F. Supp. 1463, 1464 (N.D. Okla. 1991) (noting the absence of an Osage Indian tribal court); Johnson v. Chilkat Indian Village, 457 F. Supp. 384, 388 (D. Alaska 1978) (noting the absence of a Tlingit tribal court system at the time suit was filed). Tribes in California have only a few small courts dealing with hunting and fishing issues. *See Tribal Justice Hearings*, *supra* note 154, at 148.

251. The most recent count suggests that approximately 21 CFR courts operate in the United States. *See* Duro *Decision*, *supra* note 246, at 9. Some tribes treat CFR courts as "interim courts" until they can create their own judicial system. *See* Valencia-Weber, *supra* note 19, at 236. In *State ex rel. Peterson v. District Court*, 617 P.2d 1056 (Wyo. 1980), Chief Justice Raper's concurring opinion highlighted his distress that applicable Supreme Court precedent required the state court to relinquish jurisdiction over the pending lawsuit to the tribal CFR courts. *See id.* at 1070 (Raper, C.J., specially concurring). He called CFR courts "inferior," "intolerable," and "crudely constructed." *Id.* at 1070-72 (Raper, C.J., specially concurring).

252. *See* Resnik, *supra* note 152, at 712-14.

253. As examples of the "growing legitimacy of tribal courts," Professor Pommersheim points to external and internal developments, such as

> the increase of law-trained Indian people within many systems, tribal and constitutional code revision, the nascent development of traditional and customary law, and the continued recognition of tribal courts by the U.S. Supreme Court as viable and important forums for resolution of reservation-based claims involving both Indians and non-Indians.

POMMERSHEIM, BRAID OF FEATHERS, *supra* note 19, at 68 (citation omitted). For all tribal courts, however, lack of adequate funding greatly constricts the range of possible improvements and enhancements. *See* Sandra Lee Nowack, *So That You Will Hear Us: A Native American Leaders' Forum*, 18 AM. INDIAN L. REV. 551, 564-65 (1993) ("The biggest problem for tribal courts from the point of view of a judge is

Despite the variation that exists among tribal courts and the fact that some may be inadequate to meet the dispute resolution needs of the parties before them, the *Williams* rule established a core of exclusive tribal court adjudicatory jurisdiction. Notwithstanding state court grumbling and overt criticism, the Court has remained steadfast in its pronouncements that state court adjudication of many disputes involving Indians and occurring on the reservation would infringe impermissibly on tribal sovereign self-governance rights.[254] Underlying these decisions is perhaps the unstated recognition that, unless the Court insists on a sphere of exclusive tribal court adjudicatory jurisdiction, the tribal courts never will emerge from the shadows cast by their more powerful and more fully developed state and federal analogues.[255] At the same time, however, the Court occasionally has sacrificed its principled commitment to tribal sovereignty to the reality that, in some cases, exclusive tribal court adjudicatory jurisdiction simply is not a meaningful alternative.[256] Thus, the

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the inadequate funding for court operation . . . because of inadequate funding by federal and tribal governments . . . .") (statement of Tribal Judge Arvo Q. Mikkanen). With the recent passage of the Indian Tribal Justice Act, 25 U.S.C. §§ 3601-3631 (1994), Congress declared its commitment to greatly enhanced funding for tribal courts and tribal justice systems. *See id.* § 3601(8). Reality, however, has fallen far short of aspiration. Although the statute promised nearly $60 million per year in federal funding to go to tribal court systems, *see id.* § 3621, the budget included only a $5 million appropriation for fiscal year 1996. *See Department of the Interior and Related Agencies Appropriations for Fiscal Year 1996: Hearings on H.R. 1977 Before a Subcomm. of the Senate Comm. on Appropriations*, 104th Cong. 954 (1996) (testimony of Ada Deer, Assistant Secretary for Indian Affairs).

254. *See supra* notes 39-44, 94 and accompanying text.

255. *See, e.g.*, POMMERSHEIM, BRAID OF FEATHERS, *supra* note 19, at 153 (noting that "[t]he playing field [of state-tribal relationships] has never been level"); Laurence, *supra* note 37, at 619 (arguing that federal court protection of a core of exclusive tribal adjudicatory jurisdiction is justified by the fact that "[t]ribes have been made weak because of past dealings with federal and state governments, which often failed to meet modern standards of justice and fairness"). In fact, congressional recognition of the pervasive encroachment of state adjudication of lawsuits involving the adoption and custody of Indian children led to the passage of the Indian Child Welfare Act of 1978, *see* 25 U.S.C. §§ 1901-1963 (1994), which vests broad exclusive adjudicatory jurisdiction in tribal courts. *See id.* § 1911(a). Under the Act, Congress found that "the States, exercising their recognized jurisdiction over Indian child custody proceedings . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." *Id.* § 1901(5).

256. *See, e.g.*, Three Affiliated Tribes v. Wold Eng'g, 476 U.S. 877, 889 (1986)

Supreme Court's rules allocating adjudicatory jurisdiction have struggled to walk the fine line between recognizing a sphere of exclusive tribal court adjudicatory jurisdiction and appreciating the varying stages of development among those courts. As a result, the framework of jurisdictional rules frequently seems illogical and unpersuasive.[257]

C. State Court Resistance to Exclusive Tribal Court Adjudicatory Jurisdiction

Some of the Supreme Court's most important pronouncements on the scope of adjudicatory jurisdiction in Indian country arose in contexts that reveal both state court reluctance to defer to tribal court jurisdiction and state court resistance to opening its courthouse doors to Indian and tribal plaintiffs.[258] Although it is perhaps accurate to point to state hostility toward Indian tribes as a motivating force in the state court decisions, other factors are undoubtedly at work as well. First and foremost, perhaps, is the fact that state courts generally exercise extremely broad subject matter jurisdiction concurrent with other state, federal, and even international tribunals.[259] In the absence of a federal statute ousting state court subject matter jurisdiction, the reach of that jurisdiction is limited only by the state's own jurisdictional statutes and federal constitutional principles.[260] Moreover, in a different type of Indian jurisdictional dispute, the Supreme Court sent a contrary message to states eager to assert jurisdiction over

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(*Wold II*) (requiring a state court to adjudicate a lawsuit filed by a tribe against a non-Indian and stressing the absence of a "meaningful [tribal] alternative"); *id.* at 883 (noting that the state must adjudicate a controversy "for which there is no other forum"); *see also supra* notes 64-86 and accompanying text (discussing *Wold I* and *Wold II*).

257. *See supra* notes 87-105 and accompanying text.

258. *See, e.g., Wold II*, 476 U.S. at 878; Williams v. Lee, 358 U.S. 217, 218 (1959).

259. *See* Yellow Freight Sys., Inc. v. Donnelly, 494 U.S. 820, 823 (1990) (noting that "state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States").

260. In *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981), for instance, the Court stressed the breadth of concurrent state and federal court subject matter jurisdiction. In that case, the Court began "with the presumption that state courts enjoy concurrent jurisdiction" with federal courts. *Id.* at 478. Limits on the scope of state court subject matter jurisdiction, the Court noted, are "governed in the first instance by state laws." *Id.*

Indian country when it noted that "[s]tates and tribes have concurrent jurisdiction over the same territory."[261] Thus, the rules that deprive state courts of the power to adjudicate many routine cases involving state residents and no question of federal law run counter to the otherwise broad principles of plenary concurrent state jurisdiction.

Consider, for instance, the facts of *Williams*, the Court's first articulation of the principle of exclusive tribal court adjudication. In that case, a non-Indian trader sued Indian defendants over a debt allegedly arising from the on-reservation sale of goods.[262] In holding that the state court had no power to adjudicate that lawsuit, the Court created the anomalous situation that a state court could not adjudicate a contract dispute involving state residents. As noted by the authors of a widely used Indian law casebook, this result is unusual indeed: "Is there any place in the world, other than Indian country, where Lee's contract could have been executed and yet be beyond the subject matter jurisdiction of the Arizona Superior Courts?"[263]

In addition, because the state court's adjudicatory jurisdiction over lawsuits involving Indians appears to depend exclusively on the identity of the parties, state courts are placed in the uncomfortable position of denying judicial access to non-Indian plaintiffs while allowing Indian plaintiffs to file an identical lawsuit. In these situations, the state courts must ignore their oft-repeated commitment to full and equal access to state court forums. One state court, reluctantly refusing to exercise adjudicatory jurisdiction in a lawsuit involving an on-reservation dispute between an Indian and a non-Indian, commented that "there is little state courts can do to afford the equal protection of our law to both its Indian and non-Indian citizens on civil matters arising within the exterior boundaries of an Indian reservation."[264]

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261. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989).

262. *See Williams*, 358 U.S. at 217-18.

263. GETCHES ET AL., *supra* note 3, at 576. Thus, it is not surprising that a state court would characterize theories that would limit state court jurisdiction in lawsuits involving Indians as an example of "excessive self-abnegation of power and a wholesale retreat from judicature." Lewis v. Sac & Fox Tribe of Okla. Hous. Auth., 896 P.2d 503, 509 (Okla. 1994), *cert. denied*, 116 S. Ct. 476 (1995).

264. Security State Bank v. Pierre, 511 P.2d 325, 329 (Mont. 1973); *see also*

Further state court resistance to the relinquishment of subject matter jurisdiction in Indian law is attributable to some state courts' perception that the rules protecting exclusive tribal court adjudicatory jurisdiction may "shield[ ] Indians from obligations incurred off the reservation."[265] Expressing a similar sentiment, the Supreme Court of Montana refused to decline jurisdiction over a lawsuit filed against an Indian who engaged in an off-reservation transaction, noting that Indians "cannot violate [state] laws and then retreat to the sanctuary of the reservation for protection."[266] It is true that Indian litigants have successfully defeated state court jurisdiction by relying on *Williams*'s protection of exclusive tribal court adjudicatory jurisdiction. This strategy, however, is not limited to Indian litigants. A review of the relevant case law reveals numerous non-Indian litigants who have argued successfully that state court adjudication of a lawsuit would violate those same principles of exclusive tribal court jurisdiction.[267] In none of those cases, however, did the state court

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McCrea v. Busch, 524 P.2d 781, 782 (Mont. 1974) (lamenting the "inequitable legal vacuum" created by Supreme Court decisions withdrawing state court adjudicatory jurisdiction in many cases involving on-reservation disputes). Commentators have described this attitude as a "well-intentioned spirit and a conventional judicial outlook" motivated by a desire to provide a forum for all of its citizens, Indian and non-Indian alike. Brown & Desmond, *supra* note 154, at 264. In cases involving Indian plaintiffs, however, the Montana Supreme Court has noted that "an Indian has the same rights as are accorded any other person to invoke the jurisdiction of the state courts to protect his rights in matters not affecting the federal government." State *ex rel.* Iron Bear v. District Court, 512 P.2d 1292, 1295 (Mont. 1973).

265. State Sec., Inc. v. Anderson, 506 P.2d 786, 789 (N.M. 1973). The same court later described the claim of exclusive tribal court jurisdiction as an attempt by the party objecting to state court adjudication to "interpose his special status as an Indian as a shield to protect him from obligations." Lonewolf v. Lonewolf, 657 P.2d 627, 629 (N.M. 1982) (quoting Natewa v. Natewa, 499 P.2d 691, 693 (N.M. 1972)).

266. Little Horn State Bank v. Stops, 555 P.2d 211, 214 (Mont. 1976). This sentiment is not limited to state courts. *See* Richardson v. Malone, 762 F. Supp. 1463, 1469 (N.D. Okla. 1991).

267. *See, e.g.*, Smith Plumbing Co. v. Aetna Cas. & Sur. Co., 720 P.2d 499 (Ariz. 1986) (en banc); Kuykendall v. Tim's Buick, Pontiac, GMC & Toyota, Inc., 719 P.2d 1081 (Ariz. Ct. App. 1985); Neadeau v. American Family Mut. Ins. Co., No. C7-93-691, 1993 WL 302127 (Minn. Ct. App. Aug. 10, 1993); Foster v. Luce, 850 P.2d 1034 (N.M. Ct. App. 1993); Alexander v. Cook, 566 P.2d 846 (N.M. Ct. App. 1977). In fact, the party objecting to state court jurisdiction in the *Wold* cases was a non-Indian corporation. *See* Three Affiliated Tribes v. Wold Eng'g, 476 U.S. 877 (1986) (*Wold II*); Three Affiliated Tribes v. Wold Eng'g, 467 U.S. 138 (1984) (*Wold I*).

chide the non-Indian party for attempting to "retreat to the sanctuary of the reservation."[268]

State courts' resistance to rules denying them otherwise broad subject matter jurisdiction also may be based on the fear that no tribal forum exists or, if one does exist, that it will be inadequate to protect the rights of the non-Indian litigant. In *State ex rel. Peterson v. District Court*,[269] for instance, a concurring justice, though recognizing that the conclusion of exclusive tribal court jurisdiction was dictated by "the cold logic of the law,"[270] nevertheless lamented the "intolerable features of the [tribal court] system."[271]

Commentators confirm a pervasive judicial distrust of tribal court adjudicatory jurisdiction over non-Indians.[272] That distrust may be fueled by the fact that tribal court judgments, regardless of whether state or federal law forms the basis of their opinions, generally are unreviewable by state courts.[273]

Whatever its source, this pervasive judicial resistance to broad tribal court adjudicatory jurisdiction has had a marked effect on the development of rational jurisdictional rules. It has impeded the evolution of a coherent allocation of adjudicatory jurisdiction between state and tribal courts and has forced the Supreme Court to assume the role of arbiter between the two competing tribunals. Confronted with vigorous state court resistance to the effectuation of Congress's strong commitment to the evolution of fuller tribal court adjudicatory power, the Supreme Court's task has been daunting indeed. Not surprisingly, the resulting rules are fraught with inconsistencies.

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268. *Little Horn State Bank*, 555 P.2d at 214.

269. 617 P.2d 1056 (Wyo. 1980).

270. *Id.* at 1070 (Raper, C.J., specially concurring).

271. *Id.* (Raper, C.J., specially concurring)

272. *See, e.g.*, Clinton, *supra* note 105, at 141; Pommersheim, *Crucible*, *supra* note 19, at 356-60. In a similar vein, Professor Judith Resnik has noted that when the rights of non-Indians are involved, judicial "interest in 'tribal sovereignty' wanes." Resnik, *supra* note 152, at 755.

273. State courts, however, may freely refuse to enforce tribal court judgments against non-Indian defendants. *See* Laurence, *supra* note 37, at 648-73. At least one state, New Mexico, appears to hold that tribal court decisions are entitled to full faith and credit. *See* Jim v. CIT Fin. Serv. Corp., 533 P.2d 751 (N.M. 1975).

V. A RETURN TO GUIDING PRINCIPLES

The rules articulated by the Supreme Court to delineate the adjudicatory jurisdiction of state, federal, and tribal courts in Indian country are individualized and disjointed, standing alone better than coalesced. Although each rule may be applied easily on an individual basis, reconciling the body of jurisdictional law is virtually impossible. The Court may not have intended to establish "magical alignment rules";[274] however, both state and federal courts reduce their pronouncements on tribal court adjudication to a checklist that tallies the identities of the parties and the number of off-reservation contacts.

The absence of a more principled judicial inquiry can be attributed in part to the lower courts' resistance to rules that require them to relinquish their adjudicatory jurisdiction, especially when the tribal courts to which they are forced to yield may be considered poor substitutes. Ultimately, the Supreme Court, in the absence of congressional action, must reinfuse the rules with a broader vision of the parameters that should shape tribal court adjudicatory power. At the same time, the Court must be sensitive to "what is, after all, an ongoing relationship"[275] between tribal and non-Indian governments, a relationship marked by continual and often rapid changes from within tribal court systems.[276]

The rules of adjudicatory jurisdiction in Indian country should be shaped by the guiding principles that the Court announced in each of its landmark adjudicatory jurisdiction cases, rather than by the bare facts of those cases. Instead of mechanically applying identity-based rules, courts should refocus the analysis in a particularized and principled determination of the borders of tribal,

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274. Brown & Desmond, *supra* note 154, at 270.

275. Bryan v. Itasca County, 426 U.S. 373, 389 n.14 (1976) (quoting Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 663 (9th Cir. 1975)).

276. In *Krempel v. Prairie Island Indian Community*, 888 F. Supp. 106, 107 (D. Minn. 1995), for instance, the court ordered the litigants to tribal court to exhaust their tribal remedies. Although the tribal court was not operational at the time the lawsuit was removed to federal court, it began to exercise its judicial powers shortly thereafter. *See id.* at 107-08. The court therefore dismissed the lawsuit and insisted that federal policies of encouraging tribal sovereignty required the litigants to pursue their remedies in tribal court. *See id.* at 108.

state, and federal adjudicatory power in a specific dispute. Most importantly, this approach would allow a realistic appraisal of the tribal court involved in the dispute and the tribe's sovereign interest. Of course, the application of broad judicial principles would sacrifice the predictability offered by the current per se rules. Nevertheless, as this Section argues, the proposed particularized approach is more faithful to the important concerns underlying the Court's rules.

A. "To make their own laws and be ruled by them"[277]

The specific holding of *Williams v. Lee* removed from state court jurisdiction the power to adjudicate a lawsuit filed by a non-Indian against Indian defendants residing on the reservation when the cause of action occurred exclusively on the reservation.[278] In one of the most frequently cited passages in federal Indian law, the Court opined that state court adjudication would infringe on "the right of reservation Indians to make their own laws and be ruled by them."[279] On closer reflection, the claim of infringement is somewhat perplexing. Adjudication by a forum other than the tribal court, of course, could protect the sovereign interest emphasized by the Court so long as the nontribal court accurately identified and applied tribal law. The Court's conclusion of infringement, then, assumed either that the state court would not apply tribal law to the on-reservation dispute before it or that it would apply tribal law improperly. Without that underlying assumption, the infringement largely disappears; if a nontribal court faithfully applies tribal law, the tribe and its members still will be able to "make their own laws and be ruled by them."[280]

When *Williams* was decided in 1959, tribal law was largely inaccessible to nontribal courts,[281] and the infringement of tribal sovereignty was inevitable. Nearly forty years later, however, that is no longer the case. A few nontribal courts have in fact applied tribal law, and others have expressed a willingness to do

277. Williams v. Lee, 358 U.S. 217, 220 (1959).
278. *See id.* at 223.
279. *Id.* at 220.
280. *Id.*
281. *See supra* note 37 and accompanying text.

so in appropriate cases.[282] Moreover, a growing number of state courts recognize and enforce tribal court judgments,[283] further ensuring that tribes will be able to make, and be ruled by, their own laws. The continuing expansion and formalization of tribal law, both statutory and judicially created,[284] in conjunction with the increasing sophistication of tribal courts and the recognition of tribal court legitimacy by nontribal forums, suggest, not that the rules of *Williams* should be abandoned now, but rather that the courts must be sensitive to factual developments that one day may make the rules unnecessary.

Ironically, and far more damaging to tribal sovereign interests, the rule of *Williams* has been increasingly applied to frustrate the tribes' abilities to govern themselves. When reduced to an automatic, identity-based access rule, lower courts give no consideration to tribal sovereign interests when the plaintiff is an Indian or when substantial off-reservation contacts are present. In those cases, state adjudicatory jurisdiction is held to be proper automatically, and tribal sovereign interests become irrelevant.[285] As more and more disputes in Indian country involve off-reservation contacts and non-Indian entities, reducing *Williams* to a narrow core of exclusive tribal court jurisdiction renders the case increasingly unimportant to the protection of tribal sovereignty.[286]

Refocusing on the principles of *Williams* and its progeny, rather than limiting the judicial application to its narrow facts, will encourage lower courts to engage in a more thorough evaluation of relevant tribal interests. Assumption of state court adjudicato-

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282. *See, e.g.*, Jim v. CIT Fin. Serv. Corp., 533 P.2d 751 (N.M. 1975); Chischilly v. General Motors Acceptance Corp., 629 P.2d 340 (N.M. Ct. App. 1980), *rev'd*, 628 P.2d 683 (N.M. 1981); Lewis v. Sac & Fox Tribe of Okla. Hous. Auth., 896 P.2d 503 (Okla. 1994), *cert. denied*, 116 S. Ct. 476 (1995).

283. For a comprehensive review of the cross-reservation enforcement of judgments, see Laurence, *supra* note 37; *see also* Deloria & Laurence, *supra* note 105, at 421-51 (proposing guidelines for state-tribal-negotiated solutions to the enforcement of judgments problem).

284. In *Tribal Courts: Custom and Innovative Law*, Professor Gloria Valencia-Weber describes the growth and development of tribal courts, *see* Valencia-Weber, *supra* note 19, at 232-37, and illustrates the importance of custom in tribal court decision making. *See id.* at 250-55; *see also* Taylor, *supra* note 152 (discussing the current status of tribal law).

285. *See* discussion *supra* Part II.A.3.

286. *See id.*

ry jurisdiction should not automatically mean that tribal law is irrelevant to a dispute, just as the law of other states does not become irrelevant merely because adjudicatory jurisdiction is proper in more than one state forum.[287] Until state courts recognize that tribal sovereign interests may compel a choice of tribal law in many lawsuits involving Indian litigants and on-reservation contacts, the sovereignty of Indian tribes will never be fully realized.

B. To Ensure an "effective means of securing relief for civil wrongs"[288]

Coming on the heels of *Williams*, the *Wold* decisions' clearly articulated support for state court adjudication of cases brought by tribes or individual Indians seems confusing indeed. After all, if state court adjudication of an on-reservation dispute between Indians and non-Indians infringes tribal sovereignty when the non-Indian is the plaintiff, those same tribal sovereign interests would seem to be implicated when the Indian party is the plaintiff.[289] Alternatively, if the basis of the *Wold* holdings is that Indian plaintiffs deserve equal access to state judicial forums, we are left to wonder why that access is denied to the non-Indian plaintiff who sues an Indian in an identical on-reservation dispute. The marked contrast between *Wold* and *Williams*, then, is that while *Williams* establishes exclusive tribal court adjudication of a dispute filed by a non-Indian plaintiff, *Wold* essentially allows the Indian plaintiff to choose a state or tribal forum.[290] A closer look at the factual context in which this identity-based dichotomy evolved, however, is illuminating.

Two important factual realities justified the Court's insistence

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287. *See supra* notes 104-05 and accompanying text.

288. Three Affiliated Tribes v. Wold Eng'g, 476 U.S. 877, 889 (1986) (*Wold II*).

289. In *Wold II*, however, the Supreme Court stressed that "tribal autonomy and self-government are not impeded when a State allows an Indian to enter its court to seek relief against a non-Indian concerning a claim arising in Indian country." *Id.* at 888.

290. *See* Three Affiliated Tribes v. Wold Eng'g, 467 U.S. 138, 166 (1984) (Rehnquist, J., dissenting) (*Wold I*) ("Petitioner wants to enjoy the full benefits of the state courts as plaintiff without ever running the risk of appearing as defendant.").

in the *Wold* cases that state courts open their doors to Indian plaintiffs, even though *Williams* forced its non-Indian plaintiff to tribal court. For one thing, as the Court itself stressed, the non-Indian plaintiff in *Williams* had access to the Navajo Courts of Indian Offenses, a judicial system having "broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants."[291] In *Wold*, by contrast, the tribal plaintiffs had no meaningful alternative tribal forum.[292] Moreover, although a tribal court judgment against the Indian defendant in *Williams* would be readily enforceable because of the Indian's reservation status, a tribal court judgment against *Wold*'s non-Indian defendant would have faced numerous barriers to enforcement in the state system.[293] Viewed in this light, the "magical alignment rules" of state and tribal court adjudicatory jurisdiction can be justified, not as creating different rules for Indian and non-Indian litigants, but rather as recognizing the differing realities of the court systems available in both cases. Until tribal courts are fully operational and tribal court judgments are readily recognized by state courts, it is unlikely that all Indian plaintiffs can be said to have a "meaningful alternative" to state court adjudication.

C. To Ensure "proper deference to the tribal court system"

The Supreme Court's exhaustion doctrine is based squarely on its attempt to implement Congress's commitment to "tribal self-government and self-determination."[294] Upon closer inspection, however, a substantial portion of that judicially created doctrine

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291. Williams v. Lee, 358 U.S. 217, 222 (1959).

292. In *Wold II*, the Court concluded that states cannot disclaim jurisdiction "over suits by tribal plaintiffs against non-Indians for which there is no other forum," *Wold II*, 476 U.S. at 883, and stressed that the tribal plaintiff had no "meaningful alternative to state adjudication." *Id.* at 889; *see also Wold I*, 467 U.S. at 141-42 (stating that "[a]t the time the suit was filed, petitioner's tribal court did not have jurisdiction over a claim by an Indian against a non-Indian in the absence of an agreement by the parties").

293. *See Wold II*, 476 U.S. at 889.

294. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985). In *Iowa Mutual*, the Court noted the "federal policy favoring tribal self-government" and stressed that "the Federal Government has consistently encouraged" the development of tribal courts. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987).

is restrictive and detrimental to the development of the tribal court power the Court so frequently lauds. In *National Farmers Union*, the Court first had to determine whether the litigant's challenge to tribal court adjudicatory jurisdiction even fell within the scope of the district court's subject matter jurisdiction.[295] Rejecting the Ninth Circuit's conclusion that this issue did not constitute a federal question,[296] the Supreme Court concluded that all challenges to the scope of tribal jurisdiction were indeed questions "arising under" federal law.[297] With that astonishingly broad definition of federal question jurisdiction, the Court essentially decided that any aspect of any tribal court decision was now reviewable in federal district court.

Though the doctrine of exhaustion of tribal remedies can be criticized for its broad definition of federal question jurisdiction,[298] some writers have welcomed it as a manifestation of the Supreme Court's willingness to give tribal courts some badly needed breathing room[299] in which to develop their own jurisprudence. Respect for tribal court decisions will never exist, the argument goes, until the tribal courts actually are allowed to adjudicate cases. By requiring the federal courts to defer large numbers of lawsuits to tribal forums, then, the exhaustion rule does facilitate the realization of clearly articulated congressional goals of tribal self-government. However, by creating easy avenues of post–tribal court challenges in federal courts,[300] and by

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295. *See National Farmers Union*, 471 U.S. at 852.

296. *See* National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 736 F.2d 1320, 1322-24 (9th Cir. 1984), *rev'd*, 471 U.S. 845 (1985).

297. *See National Farmers Union*, 471 U.S. at 852-53.

298. Although there is substantial variation among federal courts in the application of the exhaustion doctrine, most courts have refused to exercise jurisdiction over a wide range of lawsuits related to or involving Indians, leading one dissenting judge to criticize what he saw as the federal courts' willingness to require exhaustion for any lawsuit involving even the most minimal and "[t]alismanic" connection with Indian affairs. Stock West Corp. v. Taylor, 964 F.2d 912, 921 (9th Cir. 1992) (O'Scannlain, J., dissenting).

299. *See, e.g.*, Pommersheim, *Crucible*, *supra* note 19, at 329 (describing exhaustion doctrine as a judicial attempt to "curb the most prevalent attempts to undermine and circumvent tribal court jurisdiction"); Resnik, *supra* note 152, at 731-32 (praising exhaustion decisions as recognizing the intrusiveness of federal adjudication).

300. Some courts have described the tribal exhaustion doctrine as giving tribal courts the "first crack" at the factual and legal issues in a lawsuit, thus clearly contemplating the availability of a "second crack," presumably by the federal courts. *See*

almost automatically preferring tribal court adjudication over state or federal forums with equally substantial interests in the lawsuit,[301] the exhaustion rule cannot constitute a lasting statement of the scope of adjudicatory competence of tribal courts. Its legitimacy depends on its ability to facilitate tribal court development; as that crucial need is met, the doctrine's persuasiveness will diminish correspondingly. As a practical matter, the Court's extremely broad definition of federal question jurisdiction within the contours of the exhaustion doctrine might be explained by the fact that, under well-established precedent, tribal governmental actions are not subject to federal constitutional review.[302] Moreover, the Court has also held that Congress's decision to impose Bill of Rights-type restrictions on tribal governments did not create a cause of action in federal court.[303] If the exhaustion doctrine had not been based on a broad definition of federal question jurisdiction, a greatly increased number of tribal court decisions involving non-Indians, therefore, would have been immune from

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Tom's Amusement Co. v. Cuthbertson, 816 F. Supp. 403, 406 (W.D.N.C. 1993) (quoting *Stock West*, 942 F.2d at 660); *see also* Superior Oil Co. v. United States, 798 F.2d 1324, 1329 (10th Cir. 1986) (ordering exhaustion of tribal remedies so that tribal court would have the "first opportunity to evaluate the factual and legal bases for the challenge").

301. The Supreme Court's adherence to its own exhaustion rules, however, has been less than exemplary. In several post-*National Farmers Union* cases, the Court resolved challenges to the scope of tribal regulatory power without mentioning the exhaustion doctrine. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985), which was decided the same term as *National Farmers Union*, involved a challenge to the power of a tribe to impose a tax on non-Indian lessees. Similarly, *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), evaluated the legitimacy of tribal regulatory zoning jurisdiction. In *South Dakota v. Bourland*, 508 U.S. 679 (1993), the Court considered the power of a tribe to prevent non-Indian hunters from hunting on lands within the borders of the reservation. In each of these cases, the Court evaluated the legal challenges to the tribe's regulatory power without mentioning the possibility of preliminary tribal court review.

302. In *Talton v. Mayes*, 163 U.S. 376 (1896), the Supreme Court held that the Fifth Amendment's requirement of a grand jury did not apply to the Cherokee nation because the tribe's sovereignty existed independently of the United States Constitution. *See id.* at 383-85. The basis of that holding was reaffirmed in *United States v. Wheeler*, 435 U.S. 313 (1978), in which the Court held that the Double Jeopardy Clause did not apply to prevent federal prosecution after tribal punishment. *See id.* at 328-30. For an analysis of that decision, see Robert Laurence, *Dominant-Society Law and Tribal Court Adjudication*, 25 N.M. L. REV. 1 (1995).

303. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978).

federal court review.

A proposal for reviewing tribal court decisions by writ of certiorari is more respectful of the sovereignty and independence of the tribal court system, yet still cognizant of the need for some ultimate check on the exercise of tribal sovereign powers.[304] This limited review, especially if coupled with a redefinition of federal question jurisdiction in order to exclude the scope of tribal court adjudicatory jurisdiction, would release tribal courts from potentially endless second-guessing of all aspects of their decision making by federal district courts. At the same time, it would ensure that the tribal court system is brought within the federal system of checks and balances. Full development of wide-ranging tribal court powers, especially in lawsuits involving non-Indians, is unlikely to occur without some form of nontribal check on those powers.

For the time being, perhaps, the exhaustion rules appropriately serve the laudable purpose of allowing tribal courts the opportunity to engage in decision making over a wide range of topics that otherwise might be litigated in a nontribal forum. As a permanent demarcation of the adjudicatory jurisdiction of tribal courts, however, the rules are far too expansive in their definition of federal question jurisdiction to facilitate meaningful tribal self-determination.[305] Some federal review of tribal court decision making, however, seems to be an inevitable precondition for the fullest development of those powers.

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304. Others have noted that total independence of tribal court proceedings is not an acceptable alternative. *See* Clinton, *Tribal Courts*, *supra* note 151, at 889; Robert Laurence, *A Memorandum to the Class, in Which the Teacher Is Finally Pinned Down and Forced To Divulge His Thoughts on What Indian Law* Should *Be*, 46 ARK. L. REV. 1, 4-15 (1993). Professor Judith Resnik has observed that pressures for federal court review may stem either from antitribal sentiment or from deeply rooted concerns about enforcement of federal standards of equality. *See* Resnik, *supra* note 152, at 747-58.

305. As postexhaustion challenges to tribal court holdings begin to make their way to federal district court, the scope of federal review of tribal court decisions appears broad and relatively unimpaired by the tribal court opinions rendered in the same litigation. *See supra* notes 124-27 and accompanying text. One federal district court stated that the tribal court's ruling was "helpful" to the federal court's resolution of the issue. Mustang Fuel Corp. v. Hatch, 890 F. Supp. 995, 1000 (W.D. Okla. 1995), *aff'd sub nom.* Mustang Prod. Co. v. Harrison, Nos. 95-6287, 95-6292, 1996 WL 477560 (10th Cir. 1996).

V. CONCLUSION

Although the current set of rules delineating tribal court adjudicatory jurisdiction contains numerous inconsistencies and fails to create a cogent theory of tribal court adjudication, now is not the time for substantial overhaul. In spite of their many shortcomings, these rules currently work, though sometimes illogically and uncomfortably, to allow tribal courts to develop without undue interference or encroachment from nontribal judicial systems. What is needed, however, is a reconceptualization of the Supreme Court's cases, not as mere pronouncements of per se, identity-based rules, but rather as the articulation of fundamental principles that should shape judicial analysis. As the factual assumptions underlying the specific results in *Williams*, *Wold I* and *Wold II*, and *National Farmers Union* change, as tribal courts become more firmly entrenched, and as they receive more widespread recognition from existing judicial forums, the specific results in those cases may become less defensible. When the rules can no longer be justified as necessary measures to protect against nontribal court encroachment, they will begin to fall under the weight of their own illogic and inconsistency. What will remain are the unyielding judicial principles that those cases embody, applying to new factual realities and producing different results, while recognizing that the important constant in tribal court adjudicatory jurisdiction should be the preservation and promotion of tribal court self-determination and development.

This Article has shown the inconsistency and analytical shortcomings of the current set of allocational rules. In response, however, this Article has suggested, not a wholesale rejection of the judicially created parameters of tribal court adjudicatory jurisdiction, but rather a reformulation of the Supreme Court's holdings that will transform their legacy from a series of mechanical, per se rules into a powerful set of guiding principles that should apply on a case-by-case basis to determine the scope of state, federal, and tribal court adjudicatory jurisdiction in Indian law. Recasting the holdings in such a manner is necessary, not only to release the rules from their illogical inconsistency, but also to ensure that the judicial theory will be responsive to the rapid developments of tribal court adjudicatory powers in

the way that will most appropriately realize Congress's oft-stated goal of enhanced tribal court legitimacy for Indians and non-Indians alike.