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Indian law[1] both stands apart from and is intertwined with other aspects of United States law. It is strongly influenced by history, ideological fashion, and the constant tension between idealism and pragmatism, altruism and avarice.

One constant aspect of Indian law has been the tension between state and tribal or federal jurisdiction over persons and events in Indian country.[2] In the development of this tripartite relationship, the United States Supreme Court has played a leading role. Despite the fact that over 150 years have passed since the Court's seminal pronouncements,[3] many details of the relationship remain unresolved.

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1. " 'Indian law' refers to the body of jurisprudence created by treaties, statutes, executive orders, court decisions, and administrative action defining and implementing the relationships among the United States, Indian tribes, individuals, and the states. Although tribal laws and state laws sometimes play important roles, Indian law is primarily a body of federal law." F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 1 (1982 ed.) [hereinafter COHEN-1982].

2. "Indian country" is defined in 18 U.S.C. § 1151 (1982) as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
> (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Even though this statute applies only to criminal jurisdiction, its definition has become the standard for "Indian country" in all contexts. *See, e.g.*, DeCoteau v. Dist. County Court, 420 U.S. 425, 427 n.2 (1975); Ute Indian Tribe v. Utah, 521 F. Supp. 1072, 1078 n.13 (D. Utah 1981).

3. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

In 1986, the United States Supreme Court ruled that federal law precluded North Dakota from "disclaiming" jurisdiction over a suit commenced by a tribal government against a non-Indian[4] even though the cause of action arose within an Indian reservation. That ruling was based on the conclusion that because a disclaimer was not authorized by applicable federal statutes, it was pre-empted. That decision in *Three Affiliated Tribes of Fort Berthold Reservation v. Wold*[5] (*US-II*) was the second time the case had come before the Court. The litigation is a point of convergence of a number of Indian law issues relating to the allocation of jurisdiction over persons and events within Indian reservations between state, federal and tribal governments.

It is quite likely that the Supreme Court reached an ideologically desirable result. However, that decision, and the litigation leading to it, may have a significant, and less desirable, impact on the course of Indian law in the future.

While this article discusses only the limited area of Indian law presented by the *Three Tribes* litigation,[6] i.e. a reservation-based civil action by an Indian tribal government against a non-Indian in a state court, it is not merely a critique of the Court's decision. Rather, it is about that one aspect of the tripartite relationship. It traces the development of those issues to the point where they came together, reviews all four decisions[7]

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4. That the non-caucasian peoples who had emigrated to the American continents thousands of years before 1492 became known as "Indians" because of Christopher Columbus' understandable mistake is well known. While there have been suggestions to change that identification to "Amerindian" or "Native American" or some similar "less incorrect" term, "Indian" remains the generally accepted legal and general appellation, and the term used in federal statutes, and therefore will be used here. For similar reasons, the term "white" man is used to denote the later immigrants and their descendants, despite the fact that that term is often used pejoratively, and that many of that group were and are black or brown.

5. 106 S. Ct. 2305 (1986) [hereinafter *US-II*].

6. To simplify the language used and lessen the possibility of confusion, the following conventions will be used in this article:

(1) "Three Tribes" identifies the governmental entity of the Three Affiliated Tribes of the Fort Berthold Reservation, which reservation is located wholly within North Dakota.

(2) The "*Three Tribes* litigation" refers to the entire course of the litigation between the Three Tribes and Wold Engineering, including all four published opinions.

(3) The subject litigation has, to date, produced four reported decisions. Each decision is entitled *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering*. In an attempt to lessen the obvious potential for confusion, the two United States Supreme Court decisions will be referred to as *US-I* (Three Affiliated Tribes of Ft. Berthold Res. v. Wold Eng'g, 467 U.S. 138 (1984)) and *US-II* (Three Affiliated Tribes of Ft. Berthold Res. v. Wold Eng'g, 106 S. Ct. 2305 (1986)), while the two North Dakota Supreme Court decisions will be referred to as *ND-I* (Three Affiliated Tribes of Ft. Berthold Res. v. Wold Eng'g, 321 N.W.2d 510 (N.D. 1982)) and *ND-II* (Three Affiliated Tribes of Ft. Berthold Res. v. Wold Eng'g, 364 N.W.2d 98 (N.D. 1985)). The reader should keep the temporal sequence in mind: *ND-I*, *vacated and remanded* by *US-I*, *on reconsideration*, *ND-II*, *rev'd and remanded*, *US-II*.

It is not unlikely that there will be a *ND-III* and a *US-III*. In *US-II*, the Court declined to rule upon the issue of the Tribes' possible liability on Wold Engineering's counterclaim, either as an offset against any liability on Wold's part or without regard to, or over and above, any such liability. *See US-II*, 106 S. Ct. at 2314, n."*".

7. Three Affiliated Tribes of Ft. Berthold Res. v. Wold Eng'g, 106 S. Ct. 2305 (1986); Three Affiliated Tribes of Ft. Berthold Res. v. Wold Eng'g, 364 N.W.2d 98 (N.D. 1985); Three Affiliated Tribes of Ft. Berthold Res. v. Wold Eng'g, 467 U.S. 138 (1984); Three Affiliated Tribes of Ft. Berthold Res. v. Wold Eng'g, 321 N.W.2d 510 (N.D. 1982).

in the litigation, and speculates about the impact the Court's resolution may have in the future. The first section of the article discusses the development of North Dakota and federal law proceeding the litigation. The second section presents a detailed discussion of the four *Three Tribes* decisions. The third and fourth examine key points of the decisions and their rationale. The final section discusses the possible impact of the decisions in a broader context and suggests a more viable solution to the problem *Three Tribes* presented.

I. A THREE-ARMED BALANCE SCALE - INDIAN, FEDERAL AND STATE INTERESTS

A. A VERY BRIEF HISTORICAL CONTEXT

At the conclusion of the so-called French and Indian Wars, the undesirable results of allowing the American colonies to pursue their respective, competitive, and varying policies caused King George to proclaim that all relations with Indian tribes would be controlled by British officials.[8] Because of the logistic and communications problems involved, as well as previously-established colony-tribal relationships, centralization of the defacto, day-to-day relationship was not successful. During and after the Revolution, the pressure for centralization continued, with the Continental Congress substituted for the deposed British government. The Articles of Confederation gave the Continental Congress the power of "regulating the trade and managing all [the] affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated."[9] The southern states, particularly North Carolina and Georgia, vigorously asserted their rights under the proviso.[10] When the Constitution was drafted, the limitation on federal authority was not carried forward[11] but some states continued to act as if it had been.[12]

Because Indian reservations exist within states and there is interaction across reservation boundaries, the states' interest in exercising jurisdiction is understandable. However, during the nation's early years, general policy pronouncements seemed to preclude any exercise of state jurisdiction within areas set aside as Indian country, regardless of the fact that those lands were within the established boundaries of the state. Time, circumstance, the Constitution and pragmatic influences have resulted in the recognition of the states' authority to exercise jurisdiction over at least some persons and events within the reservations.

Seemingly all of the factors which have influenced the development of Indian law came into play in the *Three Tribes* litigation—history, the

8. *See* Proclamation of 1763, *reprinted at* 3 W. WASHBURN, THE AMERICAN INDIAN AND THE UNITED STATES: A DOCUMENTARY HISTORY 2135 (1973).

9. ARTICLES OF CONFEDERATION art IX, § 4, cl. 3.

10. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

11. *See* U.S. CONST. art. I, § 8, cl. 3.

12. *See, e.g.*, County of Oneida v. Oneida Indian Nation of New York, 105 S. Ct. 1245 (1985).

Constitution, federalism, fickle political winds, ideology—just to name a few. Given the particular factual setting, the result may be the more appropriate one, but the method and language used is difficult and may have an unintended impact on the direction of Indian law. It is also a striking example of the result of imprecision in the use of words and the application of concepts unique to, or uniquely applied in, Indian law.

B. LEGISLATION.

In the early 1950s, Congress was dominated by a pro-assimilationist[13] fervor. Measures initially proposed to resolve particular issues in limited areas, such as the sale of Indian-owned cattle in Montana,[14] the sale of liquor to Indians in Arizona,[15] or criminal jurisdiction, liquor sales and civil litigation jurisdiction in California,[16] evolved into general measures designed to eliminate "discriminatory" laws and merge Indian society into "mainstream America." House Concurrent Resolution 108[17] expressed the policy behind these measures.

> Whereas it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges

13. The label "assimilationist" has been attached to the ideology holding that all persons within the United States should become integrated into a homogenous whole. Since the discovery of the "New World," at least one faction has insisted that the indigenous peoples must adopt European culture, government, religion, and so on. During most of the past 500 years, the only question was the means to be used, not the desired end result. Quite often, those who did not favor some form of assimilation favored annihilation. The allotment acts of the late 19th and early 20th centuries were one application of assimilation ideology. *See, e.g.*, Montana v. United States, 450 U.S. 544, 559 n.9 (1981). Strengthening Indian self-government and self-determination is the theoretical antithesis of assimilation. *See generally* COHEN-1982, *supra* note 1, at 170-75; F. PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT & THE AMERICAN INDIAN, *passim* (1984); B. DE LAS CASAS, HISTORY OF THE INDIES *passim* (A. Collard ed. 1971) (original manuscript ed. c. 1527-60).

14. H.R. 3409, 83d Cong., 1st Sess., *reprinted in* 1953 U.S. CODE CONG. & ADMIN. NEWS 665, 665-66. *See* H.R. REP. No. 268, 83d Cong., 1st Sess. 2 (1953); S. REP. No. 793, 83d Cong., 1st Sess. 4 *reprinted in* 1953 U.S. CODE CONG. & ADMIN. NEWS 2414, 2417 (letter from Asst. Dir., Bureau of the Budget, to Rep. Butler). The bill, as amended to apply generally, was adopted as Act of Aug. 15, 1953, ch. 506, Pub. L. No. 83-281, 67 Stat. 590, *repealed*, Act of July 10, 1957, Pub. L. No. 85-86, 71 Stat. 277.

15. H.R. 1055, 83d Cong., 1st Sess., *reprinted in* 1953 U.S. CODE CONG. & ADMIN. NEWS 660, 660-61. This proposal, amended to be applicable generally, was passed as Act of Aug. 15, 1953, ch. 502, Pub. L. No. 83-277, 67 Stat. 586 (codified, in part, at 18 U.S.C. § 1161 (1982)). That Act also gave the United States' "consent" to Arizona and New Mexico to revise their respective constitutions to eliminate restrictions on sale of liquor to Indians, *id.* at § 3, and repealed § 9 of the Crow Allotment Act of June 4, 1920, to remove a similar restriction. *Id.* at § 4. *See also* H.R. REP. No. 775, 83d Cong., 1st Sess. 2 (1953).

For a discussion of the effect of this Act on state and Indian tribal authority over sale of liquor, see Rice v. Rehner, 463 U.S. 713, 726-35 (1983) and United States v. Mazurie, 419 U.S. 544 (1975).

16. H.R. 1063, 83d Cong., 1st Sess., *reprinted in* 1953 U.S. CODE CONG. & ADMIN. NEWS 663, 663-65 (codified in part at 18 U.S.C. § 1162 (1982)). This measure, as amended to be generally applicable, was eventually passed as Act of Aug. 15, 1953, ch. 505, Pub. L. No. 83-280, 67 Stat. 588, and has become generally known as "Public Law 280" [hereinafter PL280]. *See* H.R. REP. No. 848, 83d Cong., 1st Sess. 5-6 (1953); S. REP. No. 699, 83d Cong., 1st Sess. 5, *reprinted in* 1953 U.S. CODE CONG. & ADMIN. NEWS 2409, 2409-14.

17. H.R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. 332 (1953) (codified at 180 U.S.C. § 1162 (1982) and 28 U.S.C. § 1360 (1982)).

> and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship; and
>
> Whereas the Indians within the territorial limits of the United States should assume their full responsibilities as American citizens . . . .[18]

The bill initially concerning only California was intended to remove federal-law restrictions on that State's exercise of jurisdiction over Indians. That bill, amended to apply generally, was part of the legislative package adopted on August 15, 1953, and has become known in Indian law as "Public Law 280" (PL280).[19] As adopted, PL280 removed federal-law restrictions on the exercise of state jurisdiction over matters involving Indians and arising within Indian reservations in the states of California, Minnesota, Nebraska, Oregon, and Wisconsin[20] (the "mandatory" states). The relevant portion of section four of PL280, concerning civil jurisdiction, states:

> Each of the States . . . shall have jurisdiction over civil causes of action between Indians *or to which Indians are parties* which arise in . . . Indian country . . . to the same extent that such State has jurisdiction over other civil causes of action . . . .[21]

Section seven of PL280, intended to allow other states (the "optional" states) to accomplish the same result, provided:

> The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.[22]

The North Dakota Legislature enacted the jurisdictional legislation authorized by PL280 (codified at North Dakota Century Code Chapter

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18. *Id.* That this expressed the true intent of all members of Congress is unlikely. Easing the burden on the federal budget has been a constant concern. It is also probable that some members of Congress felt that some laws discriminated in favor of Indians and that the time had long passed for the disappearance of Indian tribal society.

19. *See supra* note 16. *See* discussion at Part IV, *infra*.

20. PL280, *supra* note 16, at §§ 2 (criminal), 4 (civil), 67 Stat. 588 (codified at 180 U.S.C. § 1162 (1982) and 28 U.S.C. § 1360 (1982)). Alaska was added in 1958. Act of August 8, 1958, Pub. L. No. 85-615, § 2, 72 Stat. 545 (codified at 18 U.S.C. §§ 1162, 1360 (1982)) (In some mandatory states, particular reservations were exempted from the operation of the Act.).

21. PL280, *supra* note 16, at § 4, 67 Stat. 588 (codified at 28 U.S.C. § 1360 (1982)).

22. PL280, *supra* note 16, at § 7, 67 Stat. 588, 590 (not codified, *see* 18 U.S.C. § 1161 note (1982)), *repealed* Act of Apr. 11, 1968, § 403(b), Pub. L. No. 90-284, Title IV, § 403(b), 82 Stat. 79 (1968) (codified at 25 U.S.C. § 1323 (1982)).

Section six of PL280 gave the states permission to remove any impediments to the assumption of jurisdiction permitted by section seven of PL280. PL280, *supra* note 16, at § 6, 67 Stat. 589 (not codified, *see* 28 U.S.C. § 1360 note (1982)), re-enacted by Act of Apr. 11, 1968, Pub. L. No. 90-284, Title IV, § 404, 82 Stat. 79 (codified at 25 U.S.C. § 1324 (1982)).

27-19 (ch. 27-19)) but, to alleviate concerns of local Indian tribes, included a provision requiring consent of the members of the resident tribe(s) before the measure would be effective on any particular reservation.[23] The substantive portions of that Act essentially reiterate PL280.[24]

Due to increasing tribal opposition to PL280's failure to require tribal participation in a state decision to exercise jurisdiction, part of the Indian Civil Rights Act of 1968 amended PL280 to require tribal consent to future state decisions and to allow reversal of preceding state decisions to exercise jurisdiction.[25]

The language used in those enactments, particularly PL280, is, at best, unfortunate. The legislative histories reveal that either Indian law has significantly developed since 1953, or the draftspersons had a less-than-thorough understanding of Indian law.[26]

The most significant factor to keep in mind when considering PL280 and related court decisions is the abrupt reversal of federal Indian policy after PL280's enactment. Less than ten years after the 1953 flurry of assimilation, federal policy (legislative, administrative and judicial) swung to strong support for tribal self-government.[27] Congressional inconsistency, combined with state and federal court decisions, have caused extreme difficulty in deciding what would initially appear to be a relatively simple issue—whether a state court has jurisdiction over civil action by an Indian tribe against a non-Indian when the cause of action arose on a reservation.

C. PRECEDING NORTH DAKOTA DECISIONS.

The first, and most relevant North Dakota decision came in 1957, over four years after the enactment of PL280. *Vermillion v. Spotted Elk*[28] involved an automobile accident which occurred within the Standing Rock Indian Reservation in North Dakota.[29] The plaintiff and both defendants were enrolled members of the resident tribe and lived on that Reserva-

23. 1963 N.D. Laws ch. 242 (codified at N.D. CENT. CODE § 27-19-02 (1972)) [hereinafter ch. 27-19]. For a detailed history of that legislation, see *ND-II*, *supra* note 6.

24. *Cf.* N.D. CENT. CODE § 27-19-01 (1972) *with* 28 U.S.C. § 1360 (1982).

25. Civil Rights Act of 1968, Pub. L. No. 90-284, Titles II-IV, §§ 401, 402, 403, 82 Stat. 77 (codified at 25 U.S.C. §§ 1321-23 (1982)). Only Title IV of Pub. L. No. 90-284 dealt with the revision of PL280 but, for ease of reference, the amendments made by that Act will hereinafter be referred to as Pub. L. No. 90-284.

26. *See* discussion at Part IV.B., C., *infra*.

27. A cynic might suggest that the real reason underlying the 1950s assimilation policy and that underlying current self-determination policies is the same, i.e. the federal fisc. *See generally* Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535 (1975). Economic self-sufficiency is a strong component of current policy. *See, e.g.*, Indian Financing Act of 1974, Pub. L. No. 93-262, 88 Stat. 77 (codified at 25 U.S.C. §§ 1451-1543 (1982)); Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2204 (1975) (codified in part at 25 U.S.C. §§ 450-450n (1982)). The reversal of policy may, in reality, be a change of means, not ends.

28. 85 N.W.2d 432 (N.D. 1957).

29. Plaintiff's Complaint, para. I, Vermillion v. Spotted Elk, Burleigh County (North Dakota) Dist. Court Cause No. 15330, *reprinted at* Defendants' Brief, app. p. 2, Vermillion v. Spotted Elk, North Dakota Supreme Court Cause No. 7664.

tion. The Indian plaintiff sought relief against the Indian defendants in the state court. The defendants admitted the collision but contended that the state court had no jurisdiction over a civil action between enrolled Indians when the tort alleged occurred within the reservation in which the parties resided.[30] The district court held that it did have jurisdiction but, upon the motion of the State Attorney General,[31] certified the question to the North Dakota Supreme Court.

The Attorney General contended that the North Dakota Enabling Act[32] and section 203 of the North Dakota Constitution[33] reserved to the United States jurisdiction over all civil causes of action between enrolled Indians living on reservations "until the United States has relinquished its jurisdiction and the people of the State have accepted jurisdiction by appropriate legislative action."[34] The court, following a review of a number of cases from other jurisdictions, stated:

> [Indians] are citizens of the United States and residents of the State of North Dakota. Under Section 22 of the [North Dakota] Constitution the courts of the State are open to them. The compact between the United States and the State of North Dakota created by the Enabling Act and the disclaimer in Section 203 of the constitution, have reference to Indian lands. The provisions of the compact cannot be held to be a reservation by the United States of jurisdiction in civil cases not involving lands, between Indians residing on Indian reservations.[35]

The Attorney General also argued that North Dakota was required to comply with PL280 (i.e. "appropriate legislative enactment") before its courts could exercise jurisdiction over reservation Indians.[36] The court responded:

> [PL280 gives] consent to any state not having jurisdiction in civil causes of action to exercise such jurisdiction. The Act can have no application in states where the courts have exercised such jurisdiction under their constitutions and laws without adverse appearance by the United States.[37]

Vermillion does not cite a decision, or identify any other action, in or through which the North Dakota courts had exercised, or were authorized to exercise, jurisdiction over on-reservation Indians or events prior to the *Vermillion* decision or PL280's enactment.

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30. *Vermillion*, 85 N.W.2d at 433.

31. The Attorney General appeared on behalf of the defendants pursuant to the provisions of the North Dakota Unsatisfied Judgment Fund law. *See id.* at 433-34.

32. Enabling Act of Feb. 22, 1889, ch. 108, § 4, cl. 2, 25 Stat. 677.

33. N.D. CONST. art. XVI, § 203, cl. 2.

34. *Vermillion*, 85 N.W.2d at 434.

35. *Id.* at 438.

36. *Id.* at 434-35. Based on the holding of *US-II*, (see Part II.E., *infra*,) (but not its implied approval of *Vermillion*), that contention should have been successful.

37. *Vermillion*, 85 N.W.2d at 435-36. A logical extension of the quoted statement would be that North Dakota officials and courts are free to violate the U.S. Constitution unless and until federal officials take some action to oppose those violations.

Two years after *Vermillion*, the United States Supreme Court held that federal law precluded states from exercising jurisdiction over a reservation-based cause of action in contract against a reservation Indian. In *Williams v. Lee*,[38] the Court held that state exercise of such jurisdiction would infringe upon federally protected tribal self-government and was therefore impermissible. One fundamental consideration in that decision was that the Navajo Tribe, consistent with federal Indian policy, had created a tribal court which had jurisdiction over civil actions against Indians and therefore, the Court held, allowing state courts to exercise similar jurisdiction would undermine the efficacy of the tribal court.[39] After *Williams v. Lee*, the *Vermillion* decision was not "good law," at least where a tribal court with jurisdiction existed.[40]

The year after *Vermillion*, section 203 of the North Dakota Constitution (the "Disclaimer Clause") was amended, granting the legislature authority to "upon such terms and conditions as it shall adopt, provide for the acceptance of such jurisdiction [over lands held by or reserved to Indians] as may be delegated to the state by act of Congress."[41] However, it was not until five years later that the North Dakota Assembly acted to obligate that State to exercise the jurisdiction described in PL280.[42] Chapter 242, 1963 North Dakota Laws, Section 1 provided:

> In accordance with the provisions of Public Law 280 of the 83rd Congress and section 203 of the North Dakota constitution, jurisdiction of the state of North Dakota *shall be extended* over *all civil causes of action which arise on an Indian reservation* upon acceptance by Indian citizens in a manner provided by this chapter. Upon acceptance the jurisdiction of the state shall be to the same extent that the state has jurisdiction over other civil causes of action, and those civil laws of this state that are of general application to private property shall have the same force and effect within such Indian reservation or Indian country as they have elsewhere within this state. (emphasis added).[43]

Four months after the effective date of that Act, the North Dakota Supreme Court had the opportunity to consider its effect.

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38. 358 U.S. 217 (1959).

39. *Id.* at 222-23. The Court stated:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent [originally the plaintiff] is not an Indian. He was on the Reservation and the transaction . . . took place there.

Id. at 223.

40. *See, e.g.*, R.J. Williams Co. v. Fort Belknap Housing Auth., 719 F.2d 979, 983-84 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1985); Enriquez v. Superior Court, 115 Ariz. 342, 565 P.2d 522 (Ct. App. 1977); Millbank Mut. Ins. Co. v. Eagleman, 705 P.2d 1117 (Mont. 1985).

41. N.D. CONST. art. XVI, § 203 (1889) (amended 1958). *See generally In re* Whiteshield, 124 N.W.2d 694 (N.D. 1963).

42. N.D. CENT. CODE § 27-19-02 (1972).

43. *Whiteshield*, 124 N.W.2d at 697 (quoting ch. 27-19, now codified as N.D. CENT. CODE § 27-19-01 (1974)).

In re Whiteshield,[44] was an action by the state to terminate the parental rights of Indian parents to their eight minor children. The parents and children were all enrolled Indians living on trust lands within an Indian reservation.[45] After reviewing *Vermillion*, the court stated that, by amending section 203 of the State Constitution and enacting ch. 27-19:

> [T]he people and the legislature of the State have taken affirmative action which amounts to *a complete disclaimer of jurisdiction over civil causes of action which arise on an Indian reservation*, except upon acceptance by the Indian citizens of the reservation in the manner provided by the legislative enactment. (emphasis added).[46]

The words chosen, particularly "disclaimer of jurisdiction," were perhaps unfortunate. Other than quoting or paraphrasing the provisions of ch. 27-19, *Whiteshield* does not say how its conclusion was reached and does not expressly overrule *Vermillion*. However, it was perhaps at this point that the die was cast and the *ND-I* and *ND-II* decisions foretold.

In 1973, nearly ten years after *Whiteshield*, the North Dakota court was presented a case almost identical to *Vermillion*. In *Gourneau v. Smith*,[47] both parties were enrolled Indians residing on the Turtle Mountain Indian Reservation where the automobile accident occurred. As in *Vermillion*, the Unsatisfied Judgment Fund took over the defense, contending lack of jurisdiction. The court held that ch. 27-19 and Pub. L. 90-284's amendment to PL280 required tribal consent before North Dakota courts could exercise jurisdiction.[48] In response to the plaintiff's contention that she was being denied her due process rights, the court, citing *Williams v. Lee*,[49] pointed out that no person could bring an action against an Indian for an on-reservation tort and that the plaintiff's inability to bring an action in state court was not the result of state action but was, instead, the result of the tribe's failure to consent to state jurisdiction.[50]

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44. 124 N.W.2d 694 (N.D. 1963).

45. *Id.* at 695 (The single reservation is identified as both the "Devils Lake Sioux Indian Reservation" and the "Fort Totten Indian Reservation.").

46. *Id.* at 696.

47. 207 N.W.2d 256 (N.D. 1973).

48. *Id.* at 258. The court stated:

> The Act of Congress [Pub. L. No. 90-284] . . . gives authority to any State not having jurisdiction over civil causes of action between Indians, or to which Indians are parties, which arise in the areas of Indian country situated within such State, to assume, with the consent of the tribe . . . such measure of jurisdiction over any and all civil causes of action . . . as may be determined by such State . . . .
>
> Until the Indians on the reservation act to consent to State jurisdiction, such jurisdiction may not be assumed by the courts of the State of any cause of action arising within the boundaries of the Indian reservation involving Indians.

Id. at 258-59 (citing Kennerly v. District Court, 400 U.S. 256 (1971)).

49. 358 U.S. 217 (1959).

50. The court held:

> The courts of the State of North Dakota are open to all persons. But, as pointed out, Federal law prohibits State courts from assuming jurisdiction of civil causes of action involving Indians which arise on an Indian reservation,

Vermillion was, in the process, overruled.[51] *Gourneau* is a good decision—and interprets PL280 consistently with both its language and relevant United States Supreme Court Decisions.

In *Rolette County v. Eltobgi*[52] the district court dismissed the county's reciprocal enforcement of support action (the defendant non-Indian was an Illinois resident) because the Indian mother and child to whom the state had given support resided on the Turtle Mountain Indian Reservation. The North Dakota Supreme Court reversed because the action was being brought by the county, in its own right, and there was no Indian party to the action. In obvious dicta, the court added:

> Even if we were to hold . . . that the right of the county to sue is derivative from the right of Geraldine Eltobgi [the Indian mother] to sue, the result would be the same. Indians have the right to sue non-Indians in state courts.[53]

In addition to being irrelevant, the court's statement is ambiguous. The Indian mother and child did not reside on the reservation until some time after the state started providing the support which the state was attempting to collect.[54] As a general matter, actions between Indians which do not arise within a reservation are within the jurisdiction of the state, not tribal, courts. The court does not say whether it considered the cause of action as having arisen on or off the reservation. However, the authorities cited in support of its dicta involve actions arising on reservations. In a footnote in *ND-I*, the court dismisses the *Eltobgi* dicta by stating that the Indian right to sue a non-Indian in state court "does not exist where the subject matter of the action arose within the exterior boundaries of a reservation,"[55] thus at least implying that the North Dakota court did not consider the *Eltobgi* cause of action to have arisen on a reservation.

In *Nelson v. Dubois*,[56] the North Dakota court was presented with yet another on-reservation automobile accident involving reservation Indians. The only difference was that the Indian defendant had executed

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> until such time as the Indians of that reservation have consented to such jurisdiction. Thus the courts of the State of North Dakota are open to Indians, if they consent to the courts' jurisdiction as provided by law.

Gourneau, 207 N.W.2d at 259.

51. "We conclude that *Vermillion* no longer states the rule to be applied in determining whether State courts have jurisdiction in a case between Indians arising out of the use of the public highways on an Indian reservation." *Id.* at 258.

52. 221 N.W.2d 645 (N.D. 1974).

53. *Id.* at 648 (citing McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973); Felix v. Patrick, 145 U.S. 317 (1892); Paiz v. Hughes, 76 N.M. 562, 417 P.2d 51 (1966); DEPT. OF INTERIOR, FEDERAL INDIAN LAW 541 (1958)).

For good measure, the Court also noted that allowing this type of action would not infringe upon the tribe's right to make its own laws and be ruled by them (citing Williams v. Lee, 358 U.S. 217 (1959) and Kennerly v. Dist. Court, 400 U.S. 423 (1971)). *Id.*

54. *Elbogti*, 221 N.W.2d at 647.

55. *ND-I*, 321 N.W.2d at 512 n.1. The United States Supreme Court apparently overlooked that footnote and indicated that *Elbogti* was inconsistent with the later decision in United States *ex rel.* Hall v. Hansen, 303 N.W.2d 349 (N.D. 1981), which arose within the Ft. Berthold Reservation. *See US-I*, 467 U.S. at 157 n.15.

56. 232 N.W.2d 54 (N.D. 1975).

a "Consent to Civil Jurisdiction" pursuant to the North Dakota statute allowing individual consent.[57] Based upon Pub. L. 90-284, which requires consent *by tribal plebiscite*, the court held that an individual Indian was not capable of unilaterally conferring jurisdiction on a state court.[58] "Public Law 90-284 applies to the assumption of jurisdiction by any State over any Indian reservation and as to any subject matter. It is difficult to envision a clearer statement of federal preemption."[59]

Presaging a concern of the United States Supreme Court in *US-II*, the North Dakota court noted that its decision would leave the plaintiffs without a remedy because there was no basis for federal jurisdiction and tribal court jurisdiction was limited to cases involving less than $300.00, but: "the solution to this most serious problem lies not with the State. Congress may amend its statutes; Indian tribes may begin to assert their own jurisdiction. This State cannot exercise jurisdiction which it does not possess."[60] The North Dakota court has continued to apply that rationale.[61]

D. THE CONTINUING DEVELOPMENT OF FEDERAL INDIAN LAW

The current formulation of the relationship between Indians and state law was enunciated in *Williams v. Lee*: "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

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57. N.D. CENT. CODE § 27-19-05 (1974).

58. Nelson v. Dubois, 232 N.W.2d 54, 57 (N.D. 1975). That holding was later disavowed in *ND-II*, 364 N.W.2d at 104.

In *Nelson v. Dubois*, it was argued that by incorporating North Dakota's drivers' licensing laws, the Indian tribe involved had "waived" any claim that those laws (which include the Unsatisfied Judgment Fund provisions) "infringed" on tribal self-government and therefore North Dakota courts had "residuary" jurisdiction over that case. Based on United States Supreme Court decisions, the North Dakota court found that the "interference" with tribal self-government was only relevant when there was no governing act of Congress and that Pub. L. No. 90-284 was such an act. *Dubois*, 232 N.W.2d at 56-59 (citing McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973) and Kennerly v. Dist. Court, 400 U.S. 423 (1971)).

59. *Dubois*, 232 N.W.2d at 58. The statement is correct but its implications overly broad because Pub. L. No. 90-284 only applies to actions involving Indians, not all reservation-based actions.

60. *Dubois*, 232 N.W.2d at 59. The one-justice dissent was much more adamant concerning the federal responsibility for the lack of a forum. After noting that the prior North Dakota cases clearly indicated that the issue was controlled by federal Indian law and that the Court of Appeals for the Eighth Circuit, in a case from North Dakota involving an on-reservation automobile accident and the Unsatisfied Judgment Fund (Poitra v. Demarrias, 502 F.2d 23 (8th Cir. 1974)), had essentially "invited" North Dakota to declare and accept "residuary" jurisdiction in such cases, the dissent stated:

> Pending action by the Congress to correct this flagrant injustice, we should accept the invitation of the Eighth Circuit to exercise a "residual jurisdiction" in this case and others like it.
>
> . . . .
>
> Now that the Federal courts have removed the Federal bar to the exercise of a jurisdiction we were always willing to exercise, we should reopen our courts to this kind of case.

Id. at 60-61 (Vogel, J., dissenting).

61. *See, e.g.*, United States *ex rel* Hall v. Hansen, 303 N.W.2d 349 (N.D. 1981) (involving the Ft. Berthold Reservation); Schantz v. White Lightning, 231 N.W.2d 812, 815-16 (N.D. 1975).

be ruled by them."[62] That formulation is usually described as having two separate but related "tests" against which state law is to be measured, the "infringement" test and the "pre-emption" test. The tests are theoretically distinct, however, both are informed by jurisprudential notions of Indian sovereignty which, in turn, is informed by a whole panoply of United States law and jurisprudence.

In a very real sense, Indian law developed, and continues to develop, through an interplay between: (1) the relatively legalistic method of painstakingly examining, interpreting and applying the exact words of treaties and statutes; and (2) the relatively ideological method of implementing policy. The influence of ideology on interpretation, and vice versa, is not always obvious. It does, however, play a significant part in which method of analysis is chosen.

E. THE INFRINGEMENT TEST.

The infringement test is concerned with state interference with tribal authority, i.e., to make and be governed by tribal laws.[63] Its application requires weighing the federal-tribal[64] interest in self-government against possibly competing state interests.[65]

Inherent in the infringement test is the conclusion that the activity involved is within the scope of tribal governmental authority, otherwise there would be nothing upon which state action could infringe. Tribal authority is limited. "[E]xercise 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."[66]

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

63. *See id.* The infringement test has also been labelled "geographical preemption." C. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW, Ch. 4 (1987). That label may be descriptive from the tribal government point of view but implies a greater limitation on state government than is either actual or necessary. State jurisdiction does not stop at the reservation boundary. *See* Part IV, *infra.*

64. Throughout the history of United States' Indian law, the Court has held that the federal government has a particular interest in Indian affairs. *See, e.g.,* Morton v. Mancari, 417 U.S. 535, 554-55 (1974); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). More recently, that interest has been expressed in various policy announcements by federal officials, including Presidents Nixon (*See* Nixon, *Special Message to the Congress on Indian Affairs*, 116 CONG. REC. 23132 (1970), *reprinted at* PUB. PAPERS Richard Nixon, 1970, p. 564 (1971)) and Reagan, (Reagan, *Indian Policy: Statement by the President* (Jan. 24, 1983), 19 WEEKLY COMP. OF PRES. DOC. (Jan-March 1983) 98 (1983)) and Congress (*See, e.g.,* Indian Child Welfare Act, Pub. L. No. 95-608 § 3, 95 Stat. 3069 (1978) (codified at 25 U.S.C. § 1902 (1982)); Indian Health Care Improvement Act, Pub. L. No. 94-437, § 3, 90 Stat. 1401 (1976) (codified at 25 U.S.C. 1602 (1982)); Indian Financing Act of 1974, Pub. L. No. 93-262, § 2, 88 Stat. 77 (codified at 25 U.S.C. § 1451 (1982)).

65. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 156-57 (1980).

66. Montana v. United States, 450 U.S. 544, 564 (1981). The Court expanded upon that limitation, stating:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe

The use of infringement as an independent, separate, basis for invalidating state action is comparatively rare. There are few facets of Indian or state activity where there is no potentially relevant treaty or statute. Rather, the infringement test has been employed when the activity would place a state governmental institution in competition with a tribal institution.[67] Infringement test-type language has also been used in the second step of the pre-emption test, i.e. when examining the various governmental interests involved. For example, in *Fisher v. District Court*,[68] after finding that federal law expressly granted powers of self-government to the Northern Cheyenne Tribe and that the Tribe had created a tribal court with jurisdiction, the Court held that exercise of jurisdiction by Montana would interfere with tribal government.[69]

F. PRE-EMPTION.

On many occasions the United States Supreme Court has stated that applying a pre-emption analysis developed in other legal contexts is insufficient in the Indian law context.[70] It is, however, not unusual for the Court to cite decisions from those other contexts.[71] Because the extent of the federal government's authority with respect to Indian tribes is akin to its authority with respect to foreign relations, the presumptions in favor of federal pre-emption in foreign affairs-related matters[72] are akin to those applied in Indian law cases.

The primary factor involved in Indian law cases, which cannot exist in other contexts, is that the powers of three, not two, theoretically independent governments are involved.[73] Tribal sovereignty adds a third arm to justice's balance scale. But, since Indian sovereignty is itself an

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> or its members, through commercial dealing, contracts, leases or other arrangements. . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 565-66 (citations omitted).

67. *See, e.g., Williams v. Lee*, 358 U.S. at 220.

68. 424 U.S. 382 (1976) (per curiam).

69. *Id.* at 387-88. Based on *Fisher*, Montana courts examine tribal law to determine if exercise of state court jurisdiction has been pre-empted. *See, e.g.*, Milbank Mut. Ins. Co. v. Eagleman, 705 P.2d 1117, 1120 (Mont. 1985); Bad Horse v. Bad Horse, 163 Mont. 445, 517 P.2d 893, 895-96 (1974), *cert. denied*, 419 U.S. 847 (1974).

See also White v. Califano, 437 F. Supp. 543, 547-48 (D.S.D. 1977), *aff'd* 581 F.2d 697 (8th Cir. 1978) (state mental commitment laws); Enriquez v. Superior Court, 115 Ariz. 342, 565 P.2d 522, 523 (1977); Wauneka v. Campbell, 22 Ariz. App. 287, 526 P.2d 1085, 1088 (1974) (motor vehicle safety laws); Hartley v. Baca, 97 N.M. 441, 640 P.2d 941, 943 (Ct. App. 1981); State v. Webster, 114 Wis. 2d 418, 338 N.W.2d 474, 482-83 (1983). *But see* Jackson County *ex rel* Jackson v. Swayney, 319 N.C. 52, 352 S.E.2d 413 (1987) (child support enforcement action against Indian does not infringe, paternity action does infringe).

70. *See, e.g.*, Rice v. Rehner, 463 U.S. 713, 718-19 (1983); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141-43 (1980).

71. *See, e.g., Rice v. Rehner*, 463 U.S. at 718-19 (citing Pennsylvania v. Nelson, 350 U.S. 497, 504 (1956) (concerning anti-sedition legislation)).

72. *See Pennsylvania v. Nelson*, 350 U.S. at 497; Hines v. Davidowitz, 312 U.S. 52 (1941).

73. *Cf.* Rice v. Santa Fe Elevator Co., 331 U.S. 218, 229-31 (1947) (interstate commerce in Illinois) *with* Rice v. Rehner, 463 U.S. 713 (1983) (liquor regulation on the Pala Indian Reservation in California).

expression of federal law and policy, when a non-Indian or state is involved, the federal and Indian interests frequently coincide.[74]

Even though federal authority over interstate commerce and Indian matters stems from a single clause in the United States Constitution,[75] the jurisprudential premises underlying pre-emption in those two settings have evolved differently. Despite erosion, the premise underlying interstate commerce pre-emption is that states are the primary repository of power and the federal government must act within the confines of the limited power delegated by the Constitution.[76] In the Indian law context the initial premise, the primary position of the states, is generally overshadowed if not forgotten.

1. *Development of the General Principle.*

The Indian-federal-state relationship subordinates both tribal[77] and state law to federal law. The pre-emption of state law is a function of the Supremacy Clause.[78] What is perhaps unique in the Indian law setting is that state laws, in addition to being subject to federal legislation, are subordinate to the general principles of federal Indian policy, a large portion of which are developed in court opinions applying policies different from those which the legislation was intended to further.[79]

If states are the general repositories of political sovereignty and jurisdiction, and the federal power to regulate Indian affairs prevails over inconsistent state actions, then federal law can and does "pre-empt" inconsistent state law. The logical major premise of pre-emption is, of course, that both state and federal governments, independently, have authority over a particular matter. If states have *no* authority over a particular subject matter, then any attempt to exercise legislative or judicial authority over that subject matter would be void.[80]

The theory of federal pre-emption of state law did not originate in the Indian law context. The initial Indian law decision applying the pre-

74. *See, e.g.,* California v. Cabazon Band of Mission Indians, 107 S. Ct. 1083 (1987); Kerr-McGee Corp. v. Navajo Tribe, 105 S. Ct. 1900 (1985); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

75. U.S. CONST. art. I, § 8, cl. 3.

76. *See, e.g., Rice v. Santa Fe Elevator Co.,* 331 U.S. at 229-31.

77. *See, e.g.,* United States v. Yakima Tribal Court, 806 F.2d 853, 858 (9th Cir. 1986); United States v. White Mountain Apache Tribe, 784 F.2d 917, 920 (9th Cir. 1986).

78. *See* Hines v. Davidowitz, 312 U.S. 52, 68-69 (1941).

79. *See, e.g.,* Santa Rosa Band of Indian v. Kings County, 532 F.2d 655, 663-64 (9th Cir. 1975), *cert. denied* 429 U.S. 1038. The circuit court stated:

> While we recognize an obligation to follow the congressional intent when construing P.L. 280, we are not obliged in ambiguous instances to strain to implement a policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship. (citation omitted).

Id. But see Montana v. United States, 450 U.S. 544, 559 n.9 (1981) (statutes should be interpreted in light of congressional policy at the time of adoption).

80. Congress may be able to delegate authority to the states but in that situation the question would be whether the state was acting within the scope of the delegated authority, not whether the state action was pre-empted. *See, e.g.,* Rice v. Rehner, 463 U.S. 713 (1983); United States v. Mazurie, 419 U.S. 544 (1975).

emption formulation employed language almost identical to that used in interstate commerce decisions[81] and an interstate commerce decision was cited in support of the Indian law decision.[82] At the same time, the Court acknowledged that the states were not precluded from jurisdiction solely by the fact that the activity took place on an Indian reservation.[83]

In *Warren Trading Post v. Arizona Tax Commission*[84] a federally licensed Indian Trader challenged the imposition of Arizona's gross receipts tax on sales made at his retail store within the Navajo Reservation. The Court held that application of that tax was inconsistent with federal statutes applicable to the Navajo Reservation and therefore pre-empted.[85] To reach that result, the Court reviewed the history of federal legislation governing trade with Indian tribes, starting in 1790,[86] as well as the detailed regulations issued by the Commissioner of Indian Affairs "prescribing in the most minute fashion" who can qualify for a federal traders license and their business methods.[87] The Court concluded that the federal legislation and regulation left no room for imposition of the state tax, the assessment and collection of which would frustrate congressional intent that no burdens except those imposed by Congress should be applied to federal traders.[88] In a footnote, the Court added:

> Moreover, we hold that Indian traders trading on a reservation with reservation Indians are immune from a state tax like Arizona's, not simply because those activities take place on a reservation, but rather because Congress in the exercise of its power granted in Art. I, sec. 8, has undertaken to regulate reservation

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81. *Cf.* Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685, 691 n.18 (1965) ("[T]here is no room for the States to legislate on the subject.") *with* Rice v. Santa Fe Elevator Co., 331 U.S. 218, 230 (1947) ("The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."). *See also* Pennsylvania v. Nelson, 350 U.S. 497, 502-04 (1956).

82. *Warren Trading Post*, 380 U.S. at 692 (citing Rice v. Santa Fe Elevator Co., 331 U.S. 218 (1947)).

83. *Id.* at 691 n.18 (1965) (citing Surplus Trading Co. v. Cook, 281 U.S. 647, 651 (1930)).

84. 380 U.S. 685 (1965).

85. *Id.* at 691-92. The Court expressly declined to consider whether the Arizona tax was also barred by the Indian Commerce Clause. *Id.* at 686.

86. Act of July 22, 1790, ch. 33, 1 Stat. 137.

87. *Warren Trading Post*, 380 U.S. at 688-90.

88. *Id.* at 690-91. The Court stated:

> We think the assessment and collection of this tax would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts. This state tax on gross income would put financial burdens on appellant or the Indians with whom it deals in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner. And since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax.

Id. at 690.

trading in such a comprehensive way that there is no room for the States to legislate on the subject.[89]

Slightly over fifteen years later, the Court issued two opinions on the same day which relied and built upon the *Warren Trading Post* analysis. In *Central Machinery Co. v. Arizona Tax Commission*,[90] the Court held, in a 5-to-4 decision, that federal trader statutes and regulations also pre-empted application of Arizona's gross receipts tax to a single sale made by a non-licensed business to an Indian tribe.[91] On the same day, in *White Mountain Apache Tribe v. Bracker*,[92] (*Bracker*) the Court held application of Arizona's motor carrier license tax and use fuel tax to a non-Indian logging operator working solely within the Fort Apache Reservation was pre-empted by federal statutes and regulations governing the harvesting of Indian timber.[93]

In *Bracker*, the Arizona Court of Appeals had held that the taxes were not pre-empted, relying upon the interstate commerce pre-emption test set forth in *Pennsylvania v. Nelson*.[94] The Court expressly rejected the

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89. *Id.* at 691 n.18. The Court also referred to Rice v. Santa Fe Elevator Co., 331 U.S. 218 (1947), an interstate commerce case, in support of its decision. *Id.* at 691-92.

90. 448 U.S. 160 (1980).

91. Central Machinery Co., an Arizona corporation without a place of business on the reservation, entered into a contract with Gila River Farms, an enterprise of the Gila River Indian Tribe, for the sale of eleven tractors. The sale was solicited on the reservation, the contract executed there and payment made there. Central Machinery was not a licensed Indian trader but the sale was approved, as required, by the Bureau of Indian Affairs. Arizona's "transaction privilege tax" is legally imposed on the seller but, as is normal, Central Machinery added the tax as a separate cost to Gila River Farms. In State v. Central Mach. Co., 121 Ariz. 183, 589 P.2d 426 (1978), the Arizona Supreme Court held the tax validly imposed.

92. 448 U.S. 136 (1980) [hereinafter *Bracker*].

93. Pinetop Logging Co., a non-Indian enterprise of two Arizona corporations, was a contract logger for Fort Apache Timber Co, a White Mountain Apache tribal enterprise. Pinetop's operations were entirely within the Fort Apache Reservation. Arizona assessed a motor carrier license tax (measured by gross receipts) and a fuel use tax on Pinetop with respect to its earnings and operations under that contract. The Arizona Court of Appeals (White Mountain Apache Tribe v. Bracker, 120 Ariz. 282, 585 P.2d 891 (Ct. App. 1978)) found the taxes validly imposed and the Arizona Supreme Court declined review.

94. 350 U.S. 497 (1956). *See Bracker*, 448 U.S. at 141.

In *Pennsylvania v. Nelson*, the Court enunciated a series of pre-emption considerations:

> *First*, "[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."
>
> *Second*, the federal statutes "touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject."
>
> *Third*, enforcement of the state . . . acts presents a serious danger of conflict with the administration of the federal program.

Pennsylvania v. Nelson, 350 U.S. at 502-5 (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (emphasis in original). Summarizing, the Court held:

> Since we find that Congress has occupied the field to the exclusion of parallel state legislation, that the dominant interest of the Federal Government precludes state intervention, and that administration of state Acts would conflict with the operation of the federal plan, we are convinced that the decision of the Supreme Court of Pennsylvania [holding the state act pre-empted by federal law] is unassailable.

Id. at 509. (emphasis in original).

application of interstate commerce pre-emption principles to problems involving Indian tribes.[95] Instead, the Court said:

> The tradition of Indian sovereignty over the reservation and tribal members must inform the determination of whether the exercise of state authority has been pre-empted by operation of federal law.
>
> . . . This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.[96]

That inquiry takes place against the "backdrop" of "traditional notions of Indian self-government."[97]

As in *Warren Trading Post*, the *Bracker* decision reviews, in depth, the congressional and federal administrative regulation of, and participation in, exploitation of tribal timber resources.[98] The conclusion is that "the federal regulatory scheme is so pervasive as to preclude the additional burdens sought to be imposed" by Arizona.[99] Of particular impact was the "overriding federal objective of guaranteeing Indians that they will 'receive . . . the benefits of whatever profit [the forest] is capable of yielding.' "[100] In contrast to this strong federal/tribal interest, the Court noted that the state's interest was merely financial, that it provided no services, and the uses to which the taxes would be put would not benefit either the reservation or the taxpayer.[101]

Development of the pre-emption analysis took another step in the Court's 1982 decision in *Ramah Navajo School Board v. Bureau of Revenue*.[102] In that case, New Mexico was attempting to collect its gross

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95. *Bracker*, 448 U.S. at 143. The Court stated:
> The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law. Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other.

Id..

96. *Id.* at 143-45.
97. *Id.* at 142-43.
98. *Id.* at 145-50.
99. *Id.* at 148.
100. *Id.* at 149 (quoting 25 C.F.R. § 141.3(a)(3) (1979)) (brackets by the Court).
101. *Id.* at 150-52.
> Respondents' argument is reduced to a claim that they may assess taxes on non-Indians engaged in commerce on the reservation whenever there is no express congressional statement to the contrary. That is simply not the law. In a number of cases we have held that state authority over non-Indians acting on tribal reservations is pre-empted even though Congress has offered no explicit statement on that subject. *See Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965); *Williams v. Lee*, 358 U.S. 217 (1958); *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971).

Id. at 150-51. The last-cited case becomes significant in the *US-II* decision.
102. 458 U.S. 832 (1982).

receipts tax from a non-Indian contractor, measured by the contractor's receipts for work done under contract with the Ramah Navajo School Board for the construction of an on-reservation school for Indian children. The Court noted Congress' historic policy of concern for the education of Indians and the more-recent legislation encouraging the participation of Indian communities in the education of their children.[103] However, the legislation under which the tribe became involved in the school's construction consisted primarily of very broad policy statements concerning the enhancement of Indian educational opportunities. It was not detailed regulation of the economics of school construction or detailed regulation of Indian educational standards.

In *Ramah*, to discover the "detailed regulatory scheme" found preemptive in prior cases, the Court turned to regulations issued by the Department of the Interior concerning the implementation of the Indian Self-Determination and Education Assistance Act.[104] Under those regulations, to gain practical experience in governmental administration, Indian tribal organizations are allowed to award and administer school-construction activities and contracts, under a contract with the Department of the Interior's Bureau of Indian Affairs (BIA) and subject to BIA approval and oversight authority.[105] The regulations related only to the execution of a contract between the BIA and the tribe. Also, congressional appropriations (which provided 100 percent federal funding) specifically included amounts for the contested tax (both of which were pointed out by the dissent[106]). Despite these two facts the Court found: "This [federal] regulatory scheme precludes any state tax that 'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.' "[107]

Even though *Ramah* expanded the pre-emption doctrine toward the more rarefied levels of policy (as opposed to the prior levels of express regulation of the precise subject matter), it still relied on pre-emption analyses in non-Indian decisions. However, the referenced decisions did not relate to interstate commerce, but to foreign affairs, where the federal government's authority is more pervasive.[108]

In 1983, the Court applied the pre-emption analysis in another indirectly commercial setting. In *New Mexico v. Mescalero Apache Tribe*[109] (*N.M. v. Mescalero*), the Tribe wished to prevent application of New Mexico's

103. *Id.* at 839-41 (citing the 1868 Treaty between the United States and the Navajo Tribe (15 Stat. 669); the Snyder Act, 25 U.S.C. § 13 (1982); the Indian Reorganization Act (Johnson-O'Malley Act), 25 U.S.C. § 452 (1982); the Indian Financing Act of 1974, 250 U.S.C. § 451 (1982); and the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 (1982 & Supp. III 1985).

104. 25 U.S.C. §§ 13a, 450-50n, 455-57, 458-58a (1982). *Ramah*, 458 U.S. at 840-42. Those regulations were found at 25 C.F.R. § 274.1 (1981).

105. *Ramah*, 458 U.S. at 841.

106. *Id.* at 851-55 (Rehnquist, J., dissenting).

107. *Id.* at 845 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

108. *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52 (1941). Interestingly, *Hines* is a direct predecessor to *Pennsylvania v. Nelson*, whose application had been rejected in *Bracker*. *See Bracker*, 448 U.S. at 141.

109. 462 U.S. 324 (1983).

more restrictive hunting and fishing regulations to non-Indian sportsmen pursuing their hobby within the reservation. There was no history of federal game regulation similar to the federal trader-regulation involved in *Warren Trading Post*, nor the extensive natural-resource-management regulation involved in *Bracker*. As in *Ramah*, the Court looked to policies of contemporary legislation[110] and extensive federal-agency assistance in the Tribe's efforts to ensure long-term tribal income through the enhancement and utilization of on-reservation hunting and fishing resources.[111]

N.M. v. Mescalero stressed the general statements of congressional policy supporting tribal economic self-sufficiency.[112] The Court again noted that "familiar principles of pre-emption" did not limit the possibility of pre-emption when Indian tribes were involved:

> By resting [Indian law] pre-emption analysis principally on a consideration of the nature of the competing interests at stake, our cases have rejected a narrow focus on congressional intent to pre-empt state law as the sole touchstone. They have also rejected the proposition that pre-emption requires "an express congressional statement to that effect." *Bracker*, 448 U.S. at 144. . . . (footnote omitted). State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.[113]

The Court found manifestation of federal interests in the Department of the Interior's approval of related tribal ordinances and the active assistance of various federal agencies. On the other hand, New Mexico was viewed as attempting to control the exploitation of on-reservation resources created by the tribal program. Under those circumstances, the Court found that the state's regulations would be an "interference with the successful accomplishment of the federal purpose" and were therefore pre-empted.[114]

The significant difference between *N.M. v. Mescalero* and the preceding pre-emption cases is that it involved no direct financial impact on programs established or controlled by federal statutes or regulations. Instead, the pre-empted state statute threatened activities which resulted from the exercise of the "inherent sovereignty" of the tribe which were generally supported by broad policy statements rather than governed by detailed federal legislation or regulation. However, the extent of federal agency involvement in the tribal activities remained a significant factor.

Two months after *N.M. v. Mescalero*, the Court again addressed the role of pre-emption in federal-tribal-state relationships. In *Rice v. Rehner*,[115] Rehner, a licensed federal Indian trader on the Pala Reservation, argued

110. Particularly the Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1543 (1982).
111. *N.M. v. Mescalero*, 462 U.S. at 325-30.
112. *Id.* at 335-36.
113. *Id.* at 334.
114. *Id.* at 336. *See also id.* at 336-43.
115. 463 U.S. 713 (1983).

that federal law pre-empts California liquor license regulations; i.e., that 18 U.S.C. § 1161 precludes states from regulating on-reservation liquor transactions. Justice O'Connor, writing for the majority (as in *US-II*), concluded that not only did federal law not pre-empt state regulation but specifically authorized it.[116]

Rice v. Rehner, based on a selection of prior cases, enunciated a two-step analysis: (1) a determination of the "backdrop of tribal sovereignty that will inform [the] pre-emption analysis,"[117] followed by (2) a review of the history of, and the current statutes and regulations on, the subject activity. In this case the subject was Indian sales of liquor to tribal members and persons living elsewhere in the state of California who came onto, and removed their purchases from, the reservation.[118] Because the transfer of liquor to any Indian had been, essentially, prohibited since 1802 and federal legislation (including a number of state enabling acts) had required state participation in that prohibition, the Court found that there was no tradition of tribal sovereignty with respect to liquor regulation. The Court emphasized that the legislative history of the statute under scrutiny shows that both Congress and the Department of the Interior understood that the statute would result in the application of state law to on-reservation liquor sales.[119]

The Indian law pre-emption decisions allow only limited generalization. While the Court often says that pre-emption principles from other contexts cannot be automatically applied in Indian law cases, it often cites "other contexts" cases in support of Indian law decisions. The reluctance to use pre-emption decisions from other contexts has had two results: (1) it makes prediction more difficult in Indian law cases; and (2) it allows significant variation in the amount and type of federal legislation or regulation needed to pre-empt state laws.

At least in theory, as articulated in *Rice v. Rehner*, the degree of certainty needed to support a finding that federal legislation is pre-emptive decreases as the related "tradition of tribal sovereignty" increases. Therefore, in *Rice v. Rehner*, since neither current nor prior legislation supported the freedom of Indian tribes to regulate liquor sales, any congressional action to limit applicability of state liquor laws would have to be very plain to be pre-emptive. In contrast, the significant tribal interest in maintaining tribal culture and stability increases the possibility of pre-emption of state laws which might indirectly interfere with education of Indian children (*Ramah*) or the effective functioning of tribal economic activities (*N.M. v. Mescalero*).[120] As the federal legislative, administrative,

116. *Id.* at 733-35.
117. *Id.* at 720.
118. *Id.* at 725-31.
119. *Id.* at 726-30. The Act involved in *Rice v. Rehner* (Act of Aug. 15, 1953, ch. 502, [Pub. L. No. 83-277], 67 Stat. 586) (codified at 18 U.S.C. § 1161 (1982)) was a part of the legislative package which included, and was approved on the same day as, PL280.
120. The distinction between the "interference with tribal sovereignty" test and the "pre-emption" test has become vague. Under both, the position of the tribe or individual Indian is stronger when the particular activities involved are more closely related to issues and ideas which support the recognition of Indians as "nations" or might directly impact on the prac-

and policy support for particular Indian activities increase in longevity, number, or specificity, the pre-emption analysis will more likely parallel that used in other contexts.[121]

2. *Public Law 280 and Pre-emption.*

With respect to the choice between the infringement test and pre-emption tests, PL280 presents an anomaly. It potentially affects tribal governments, private dealings between individual Indians, and dealings with or between non-Indians. As a result of this unique impact, or possibly merely as a result of the general vagaries of Indian law, PL280 has engendered its own series of "pre-emption" cases.

The first, and the one to which all subsequent cases refer for general principles, is *Kennerly v. District Court.*[122] *Kennerly* involved a state-court action against Indian individuals to collect a debt incurred at a non-Indian establishment within the Blackfeet Reservation—exactly the type of action which *Williams v. Lee*[123] held an impermissible infringement upon tribal sovereignty. However, the Montana courts found that there could be no infringement in *Kennerly* because the Blackfeet Tribal Council had enacted an ordinance providing for concurrent state and tribal court jurisdiction over all suits where the defendant is a member of the Tribe.[124] Thus, the Montana court concluded, state-court jurisdiction did not interfere with, but was actually in furtherance of, tribal self-governance. However, on appeal the Court pointed out that *Williams v. Lee* had an important qualification:

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ticable ability of tribes or Indians to exercise self-government. It has been suggested that the "interference" test is applied when intra-tribal relations are involved while the "pre-emption" test is applied if non-Indians are involved. *See, e.g.,* Yakima Indian Nation v. Whiteside, 617 F. Supp. 735, 745-46 nn.9-11 (E.D. Wash. 1985) *aff'd*, 828 F.2d 529 (9th Cir. 1987). Whether that is a distinction that could or should be made is problematic.

121. While that generalization appears to be contrary to the result in cases such as Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980), it should be remembered that the cigarette-sales programs involved in those cases were not specifically supported by federal legislation, regulation, or agency support. In contrast, the economic activities involved in New Mexico v. Mescalero, 462 U.S. 324 (1983), did have that type of active federal support.

In one sense, it could be argued that the distinction made between the two types of tribal economic activity stifles tribal initiative. Federal programs, and language in *Colville*, 447 U.S. at 154, protect tribal activities which exploit internal tribal resources. The number of tribes which control significant amounts of natural resources, is very small. However, more recent cases have equated tribal administration and the labor of tribal members with tribal natural resources. *See* California v. Cabazon Band of Mission Indians, 107 S. Ct. 1083 (1987).

WILKINSON, *supra* note 63, at n. 117, points out that states do a great deal of marketing their relative tax benefits and regularly use tax benefits to induce business relocations. He goes on to suggest that the policy of restricting Indian tax marketing may be justified by the fact reservations are within states, causing a potential for greater economic disruption.

There is, however, a difference between interstate tax competition and the *Colville* situation because, in *Colville*, 447 U.S. at 146, the tribe was providing no governmental services. Cases such as *Cabazon*, 107 S. Ct. at 1083, indicate that Indian tribes may not be precluded from the interstate tax competition if they offered lower taxes for new businesses, etc., and provide governmental services to the newly relocated industries.

122. 400 U.S. 423 (1971) (per curiam).

123. 358 U.S. 217 (1959).

124. *Kennerly*, 400 U.S. at 425 (citing BLACKFEET TRIBAL LAW & ORDER CODE, ch. 2, § 1).

> [I]n *Williams*, in the process of discussing the general question of state action impinging on the affairs of reservation Indians, [it was] noted that "[e]ssentially, *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." (emphasis added).[125]

PL280 was, the Court found, a "governing act of Congress" at the time the Tribal Council adopted the concurrent jurisdiction ordinance.

The Court rather summarily announced that PL280 was intended by Congress to govern "the extension of state jurisdiction over civil causes of action by or against Indians arising in Indian country"[126] and noted that two requirements of PL280, as amended by the Civil Rights Act of 1968 (affirmative state action and a majority vote of the enrolled members of the reservation) had not been satisfied.[127] Both requirements were found to be important to the congressional scheme: (1) The affirmative state action was included in 1953 to assure the exercise of jurisdiction only where the state was willing to assume the associated responsibilities. (2) The tribal plebescite was included in 1968 to ensure assent by the persons affected.[128]

Two "pre-emption test" type statements were made in *Kennerly* which provide the foundation for subsequent decisions. The first is in a footnote, referring to the civil-jurisdiction section of PL280 as an example of legislation in which Congress has explicitly extended state jurisdiction to reservations. In that footnote, the Court stated:

> For example, § 4 of the Act of August 15, 1953, [Pub. L. 280], 67 Stat. 589, 28 U.S.C. § 1360 (a), extended jurisdiction over civil causes of action arising in Indian country to which Indians are parties to five States. That statute is illustrative of the detailed regulatory scrutiny which Congress has traditionally brought to bear on the extension of state jurisdiction, whether civil or criminal, to actions to which Indians are parties arising in Indian country. . . . Montana was not one of the five States accorded civil or criminal jurisdiction under these sections of the statute.[129]

The second statement is:

> Our conclusion as to the intended governing force of § 7 [state legislative action required] of the 1953 Act is reinforced by the comprehensive and detailed congressional scrutiny manifested in

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125. *Id.* at 426-27 (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)).
126. *Id.* at 427.
127. *Id.* at 427, 429.
128. The dissent contended that the decision itself actually frustrated tribal self-government by limiting the options available with respect to state jurisdiction. *Id.* at 431 (Stewart, J., dissenting). The dissent would have limited the operation of PL280 to permanent extensions of state jurisdiction. *Id.*
129. *Id.* at 424 n.1. The implication is that only the five states specifically included had received the benefit of congressional scrutiny.

> those instances where Congress has undertaken to extend the civil or criminal jurisdictions of certain States to Indian country.[130]

The "comprehensive scrutiny" and "detailed scrutiny" language is similar to language employed in other (not Indian law) pre-emption contexts.[131] While there is a significant question whether the quoted language is an appropriate characterization of Congress' action and consideration of PL280,[132] it has become the touchstone for PL280 cases.

Five years after *Kennerly*, two other cases involving PL280 came before the Court. In the first, *Fisher v. District Court*,[133] the Montana Supreme Court had held that Montana courts had at least concurrent jurisdiction over adoptions of Northern Cheyenne Tribe members by other members, all of whom resided on the reservation. The Montana court reasoned that state courts had exercised that jurisdiction prior to the organization of the Northern Cheyenne Tribe and unilateral tribal ordinances could not affect jurisdiction. That holding is clearly reminiscent of *Kennerly*.

However, the Supreme Court found that the Tribe was organized and exercised authority as a result of congressional policy embodied in the 1934 Indian Reorganization Act[134] which was enacted to encourage such self-government. Consistent with *Williams v. Lee*, the Court held that an exercise of state court jurisdiction would infringe upon powers of self-government conferred upon the tribe.[135] The only mention of PL280 was to note that Montana had not been granted, nor had it enacted legislation to implement, jurisdiction under PL280.[136] There is no intimation that PL280 played a significant role in the *Fisher* decision, despite the fact that both the language of that Act and *Kennerly* could have been used to support the result.[137] *Fisher* rests on application of the infringement test.

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130. *Id.* at 427. The implication, again, is congressional scrutiny was given only to the five mandatory states. In considering the impact or intent of those statements, it should be kept in mind that section 4 of PL280 contains a list of five states which were culled from a larger list and, as to some of those states, particular Indian reservations were exempted from mandatory state jurisdiction. From the detailed nature of section 4, the Court inferred that Congress intended section 7 to be the exclusive method (perhaps as a substitute for its own lack of scrutiny). The legislative history of PL280 does not support that conclusion. *See* Part IV, *infra*.

131. *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52, 71-74 (1941).

132. *See* discussion at Part IV, *infra*.

133. 424 U.S. 382 (1976) (per curiam), *rev'g* State *ex rel* Adoption of Firecrow v. Dist. Court, 167 Mont. 139, 536 P.2d 190 (1975).

134. 25 U.S.C. § 476 (1982) (That Act as a whole is commonly referred to either as the Indian Reorganization Act (I.R.A.) or the Wheeler-Howard Act.).

135. *Williams v. Lee*, 424 U.S. at 387-88.

The implication in *Fisher* that organization under the I.R.A. gave a tribal government broad power to pre-empt state law was disproved in *Colville*, 447 U.S. at 156. *See* White Mountain Apache Tribe v. Arizona Dep't of Game, 649 F.2d 1274, 1281 n.6 (1981). *But see* Yakima Indian Nation v. Whiteside, 617 F. Supp. 735, (E.D. Wash. 1985) (holding enactment of tribal zoning regulations pre-empted similar county regulations) *aff'd*, 828 F. 2d 529 (9th Cir. 1987).

136. *Williams v. Lee*, 424 U.S. at 388. The Court went on to state: "Since the adoption proceeding is appropriately characterized as litigation arising on the Indian reservation, the jurisdiction of the Tribal Court is exclusive." *Id.* at 389.

137. PL280 allows state courts to exercise jurisdiction over civil litigation involving Indians only after compliance with its requirements. The Court may have been dissuaded from

Three months after *Fisher*, the Court directly addressed the pre-emptive effect of PL280 on state civil jurisdiction. In *Bryan v. Itasca County*,[138] the Minnesota court concluded that PL280 granted the state authority to tax Indian-owned personal property located on a reservation. The Supreme Court disagreed.[139] The Court found that Congress' primary concern in enacting PL280 was "the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement."[140] In contrast, the Court noted the "virtual absence" of expressions of congressional policy or intent with respect to the extension of civil jurisdiction.[141] After reviewing the sparse legislative history in some detail, the Court concluded that Congress intended only to remove restrictions on state courts' exercise of jurisdiction over civil litigation involving reservation Indians—not to grant general civil regulatory jurisdiction.[142] A restrictive interpretation of the exact language employed by Congress is the foundation of that decision.[143]

The congressional intent behind PL280 again came before the Court in 1979. In *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*[144] (*Washington v. Yakima Nation*), the tribes contested the procedures used by Washington in accepting PL280's offer of jurisdiction over reservations.[145] The Court's discussion consisted of an examination of the precise language enacted by Congress and of the exact words used by various legislators. While *Washington v. Yakima Nation* was not particularly concerned with the pre-emptive effect of PL280, it re-estab-

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such an approach by the Montana court's conclusion that Montana courts had exercised such jurisdiction prior to enactment of both the Indian Reorganization Act and PL280. *See Fisher*, 424 U.S. at 385.

138. 303 Minn. 395, 228 N.W.2d 249 (1975), *rev'd*, 426 U.S. 373 (1976).

139. Bryan v. Itasca County, 426 U.S. 373 (1976).

140. *Id.* at 379 (citing Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535, 541-42 (1975)).

141. *Id.* at 381.

142. *Id.* at 383-87. The Court placed significant emphasis on the language of the title of the Act and in the opening phrases of the relevant sections concerning jurisdiction over "civil causes of action." *Id.* at 383-84.

143. After *Bryan*, a significant percentage of the decisions involving PL280 concern themselves with whether a particular state law is "civil-regulatory" or "criminal-punitive" in nature. *See, e.g.*, California v. Cabazon Band of Mission Indians, 107 S. Ct. 1083, 1088-89 (1987), *aff'g* 783 F.2d 900 (9th Cir. 1986); Barona Group of Capitan Grande Band, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929; Seminole Tribe of Florida v. Butterworth, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020; Mashantucket Pequot Tribe v. McGuigan, 626 F. Supp. 245 (D. Conn. 1986); Oneida Tribe of Wisconsin v. Wisconsin, 518 F. Supp. 712 (W.D. Wis. 1981).

The artificiality of the distinction made should undermine confidence in the logic of the *Bryan* decision. There is nothing in the sparse legislative history which indicates anyone in Congress contemplated such fine hair-splitting. *Bryan* reaches its conclusion concerning legislative intent while studiously avoiding the obvious tenor of Congress—minutely examining some trees without noticing the forest. The Court also avoided discussing how the final phrase in PL280 section 2 (criminal law provision) could incorporate the whole of state criminal law, statutory and court-made, while the identical language in PL280 section four (civil law provision) referred only to application of decisional law during litigation.

144. 439 U.S. 463 (1979), *reh'g denied*, 440 U.S. 940 (1979).

145. The tribes contended that PL280 required Washington to amend its constitution, which it had not done, and to extend jurisdiction on an all-or-nothing basis, rather than the piecemeal or "checkerboard" basis actually employed. *Id.* at 467.

lished that PL280 was intended to facilitate exercise of state jurisdiction over reservation Indians and that PL280 procedures were mandatory. However, it also held:

> It is well established that Congress, in the exercise of its plenary power over Indian affairs, may restrict the retained sovereign powers of the Indian Tribes. . . . In enacting Chapter 36 [under the authority of PL280], Washington was legislating under explicit authority granted by Congress in the exercise of that federal power.[146]

The Court's enforcement of PL280's procedural requirements makes sense in situations where a state is attempting to exercise jurisdiction over Indian defendants. Since PL280 expressly requires particular state actions, the Court could not reach any other result. In those situations, the Court's reference to the nature of congressional consideration or enactments has only marginal significance. The unequivocal provisions of an enacted statute must be enforced—regardless of the amount of time or consideration spent by the legislature. However, with respect to the principles of pre-emption, as applied in the Indian-law setting when a statute does not provide express guidelines, the comprehensiveness of congressional consideration and amount of detail in statutes and regulations becomes important. The legislative history of PL280 and Pub. L. 90-284's amendments to PL280 does not support a conclusion that Congress gave the subject of civil litigation any significant thought.

II. THE *THREE TRIBES* LITIGATION

When *Three Affiliated Tribes of Fort Berthold Reservation v. Wold* first came before the North Dakota Supreme Court, *Vermillion* had been overruled by the North Dakota Supreme Court and discredited by the United States Supreme Court's decision in *Williams v. Lee*. The North Dakota decisions had established that the only method of exercising state court civil jurisdiction, consistent with controlling state and federal statutes and court decisions, was through compliance with ch. 27-19. The only unique aspects presented by *ND-I* were: (1) the plaintiff was an Indian tribal government[147]; (2) the defendant was a non-Indian; and (3) the Fort Berthold Tribal Code did not grant jurisdiction to the tribal court over a non-consenting non-Indian.

A. THE FACTS.

In 1974, the government of the Three Affiliated Tribes of the Fort Berthold Reservation[148] employed Wold Engineering, P.C., a North Dakota corporation, to design and construct the Four Bears Water System Proj-

146. *Id.* at 501 (citation and footnote omitted).

147. Which, per *Kennerly v. Dist. Court*, (per curiam), could not unilaterally grant jurisdiction over reservation-based civil actions to state courts.

148. The tribes residing on the Fort Berthold Reservation, the Arikara, Gros Ventre and Mandan, are incorporated as a single tribal government under the Indian Reorganization Act. *See* City of New Town v. United States, 454 F.2d 121, 122 n.2 (8th Cir. 1972).

ect, located wholly within the Fort Berthold Reservation.[149] The project was completed in 1977 but did not perform to Three Tribes' satisfaction. The tribal government commenced an action for breach of contract and negligence in the District Court of North Dakota for Ward County.[150] After counterclaiming for the unpaid balance of the contract price, Wold moved to dismiss the action on the ground that the North Dakota court lacked subject-matter jurisdiction over a claim arising in Indian country.[151]

B. NORTH DAKOTA—PART I (*ND-I*).

Upon appeal, Three Tribes argued that the North Dakota courts retained limited "residual jurisdiction" over civil actions arising on reservations, specifically including actions brought by Indians against non-Indians.[152] However, the North Dakota Supreme Court, noting that *Vermillion* had been overruled in *Whiteshield*[153] and the concept of "residual jurisdiction" had been rejected in *Nelson v. Dubois*,[154] found that jurisdiction over Three Tribes' action required prior compliance with ch. 27-19.[155]

Three Tribes also argued that Indians were being denied equal access to the North Dakota courts and their equal protection rights under the North Dakota and United States Constitutions.[156] Three Tribes' formulation of this argument assumed the North Dakota courts would exercise jurisdiction over a non-Indian claim against non-Indian defendants in a controversy arising within a reservation.[157] The North Dakota court, relying on *Gourneau v. Smith*[158] and *Washington v. Confederated Bands and Tribes of Yakima Indian Reservation*,[159] held that there was no denial of such rights because: (1) due to ch. 27-19 state courts had no jurisdiction over any reservation-based cause of action; and (2) North Dakota enacted

149. *US-I*, 467 U.S. at 141.
150. *Id.*; *ND-I*, 321 N.W.2d at 511.
151. *US-I*, 467 U.S. at 142.
152. *ND-I*, 321 N.W.2d at 511.
153. 124 N.W.2d 694 (N.D. 1963).
154. 232 N.W.2d 54 (N.D. 1975).
155. N.D. CENT. CODE § 27-19-01 (1975) extends the jurisdiction of the courts of the State of North Dakota to all civil causes of action which arise on an Indian reservation upon acceptance, by the citizens of that reservation of such jurisdiction in the manner prescribed by § 27-19-02, *i.e.* upon the petition of a majority of the enrolled residents of a reservation who are eighteen years of age or older *or* upon the affirmative vote of a majority of such residents in an election held as provided in that section. *ND-I*, 321 N.W.2d at 511-12.
156. *ND-I*, 321 N.W.2d at 512. Three Tribes argued that their constitutional rights were denied "because non-Indian plaintiffs allegedly have been permitted access to State courts to sue non-Indian defendants over controversies arising within the exterior boundaries of Indian reservations." *Id.*
157. *Id.*
158. 207 N.W.2d 256 (N.D. 1973). In *Gourneau*, the North Dakota court held:
> [P]laintiff is not denied her right to bring such action in the State courts because she is an Indian; she is denied that right because the alleged tort was committed by an Indian on an Indian reservation, and because the Indians on that reservation have not accepted State jurisdiction in the manner provided for such acceptance.

Id. at 259.
159. 439 U.S. 463, 500-01 (1979).

ch. 27-19 under the authority granted by Congress in PL280 and therefore any discrimination was authorized by federal law.[160]

C. UNITED STATES—PART I (*US-I*).

On the first writ of certiorari, the *US-I* majority opinion commences by reviewing the "somewhat erratic course of federal and state law governing North Dakota's jurisdiction over the state's Indian reservations."[161] The federal-law "course" is described as starting with the "general principle that Indian territories were beyond the legislative and judicial jurisdiction of state governments."[162] That principle, the Court said, was reflected in the restrictive provisions of the North Dakota Enabling Act[163] and Constitution.[164] "Federal restrictions on North Dakota's jurisdiction over Indian country, however, were substantially eliminated in 1953 with the enactment of . . . Pub. L. 280."[165]

The "course" of state law, as described by the Court, started with *Vermillion*, which was characterized as taking an "expansive" view of the scope of state-court jurisdiction over Indians, and continued through the amendment of the State Constitution, the enactment of ch. 27-19, the holding in *Whiteshield* that ch. 27-19 "disclaimed" jurisdiction over all actions arising in Indian country, and ended emphasizing that none of the prior state decisions involved an Indian action against a non-Indian.[166]

Before the Supreme Court, Wold contended that: (1) federal law precluded the state court from exercising jurisdiction; and (2) the state court did not have subject matter jurisdiction as a matter of state law. The Court addressed the first contention by examining the two "independent but related barriers" of infringement on tribal self-government and pre-emption by incompatible federal law. Instead of first determining if there was a controlling federal statute (the first step in the *Williams v. Lee* formula), the Court tabled pre-emption consideration and went directly to the infringement test.

The infringement test was fairly easily handled. The Court noted that both state and federal courts had approved the exercise of state-court jurisdiction over Indian actions against non-Indians.[167] The Court then stated:

> 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. The exercise of state jurisdiction is par-

160. *ND-I*, 321 N.W.2d at 512-13.
161. *US-I*, 467 U.S. 138, 140 (1984).
162. *Id.*, (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)).
163. Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676, 677 (also included South Dakota, Montana and Washington).
164. N.D. CONST. art. XVI, § 203.
165. *US-I*, 467 U.S. at 143.
166. *Id.* at 143-45.
167. *Id.* at 148.

> ticularly 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.[168]

The pre-emption issue was less easily handled but its resolution was facilitated by initially focusing on the "federal and tribal interests" involved. Without so saying, the Court agreed with *Vermillion* that the Enabling Act did not prevent the state court from exercising subject matter jurisdiction over actions arising in Indian country.[169] Similarly, PL280 and Pub. L. 90-284 were characterized as generally intended to facilitate state "assumption" of jurisdiction over matters arising in Indian country and finding, rather obviously, that nothing in PL280 "purports to authorize States to disclaim pre-existing jurisdiction."[170] More importantly, without explanation or citation, in a footnote the Court stated: "Pub. L. 280's requirements *simply have no bearing* on jurisdiction lawfully *assumed prior to its enactment.*" (emphasis added).[171]

In response to Wold's contention that North Dakota courts did not have subject matter jurisdiction, the Court initially strongly re-affirmed its own lack of jurisdiction to overrule a state supreme court on matters of state law.[172] Thereafter, the Court went to great lengths to describe how the North Dakota court might have based its state-law decision on an erroneous interpretation of federal law,[173] and therefore the matter should be remanded for reconsideration based on a clearly proper understanding of federal law.[174] The Court buttressed that conclusion with a thinly veiled warning:

> Were we not to give the North Dakota Supreme Court an opportunity to reconsider its conclusions with the proper understanding of federal law, we would be required to decide whether North Dakota has denied petitioner equal protection under the Fourteenth Amendment by excluding it from state courts in a circumstance in which a non-Indian would be allowed to maintain a suit. It is a fundamental rule of judicial restraint, however, that

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168. *Id.* at 148-49. The decision includes the assumption that North Dakota law would allow a non-Indian to sue another non-Indian in state courts concerning a matter arising on the reservation. That assumption is not consistent with N.D. CENT. CODE § 27-19-01 (1975), which requires tribal consent before the state court can exercise jurisdiction over *any* cause of action arising on a reservation, including actions between non-Indians. The quoted statement could be interpreted as being intended as a general one, not as referring specifically to the case before the Court, if it were not for the same misconstruction in the Court's later statement of the potential equal protection issue. *See id.* at 157.

169. *US-I,* 467 U.S. at 149-50.

170. *Id.* at 150-51. The Court's discussion of PL280 was limited to the sections dealing with what a state must do to exercise PL280 jurisdiction. It did not examine what jurisdiction was included in PL280. *Id.*

171. *Id.* at 150 n.11. *But see Fisher, supra* notes 133-36.

172. *US-I,* 467 U.S. at 151-52.

173. *See, e.g.* PL280 *supra* note 16, or Pub. L. No. 90-284 *supra* note 22 (which authorized "disclaimer" of jurisdiction or precluded state jurisdiction absent tribal consent).

174. *US-I* 467 U.S. at 152-57.

this Court will not reach constitutional questions in advance of the necessity of deciding them.[175]

The dissent in *US-I*[176] makes some rather telling points. As Justice Rehnquist points out, the key to the majority opinion is the continuing validity of some portion of *Vermillion*, but both the express holding and the "expansive claim" in *Vermillion* are contrary to federal law.[177] A state court's entertaining a reservation-based action against an Indian is precluded by *Williams v. Lee*. Exercise of jurisdiction over all civil claims not involving title to realty arising in Indian country is precluded without full compliance with PL280.[178]

A second significant point made by the dissent, unanswered by the majority, is that federal law does not require state courts to exercise jurisdiction in an action such as Three Tribes':

> The North Dakota Court [in *Vermillion*] improperly tried to assert jurisdiction over *all* civil actions arising in Indian country, except those involving interests in Indian lands. That attempt hav-

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175. *Id.* at 157. In its concluding remarks, the Court expressed what it was *not* deciding:
> We have made no ruling that Chapter 27-19 has any meaning other than the one assigned to it by the North Dakota Supreme Court. Neither have we decided whether, assuming that the North Dakota Supreme Court adheres to its current interpretation of Chapter 27-19, application of the statute to petitioner will deny petitioner federal equal protection or violate any other federally protected right. Finally, we have intimated no view concerning the state trial court's jurisdiction over respondent's counterclaim should the North Dakota Supreme Court decide that the trial court does have jurisdiction over petitioner's claim.

Id. at 159.

176. *Id.* at 159-66 (Rehnquist, J., dissenting) (joined by Justice Stevens).

177. *Id.* at 160-61.

178. *Id.* The dissent states:
> In short, at the time Chapter 27-19 was passed, four years after *Williams v. Lee*, *Vermillion* was not in any sense good law. The "lawfully assumed jurisdiction," . . . which the Court thinks must have survived both Pub. L. 280 and Chapter 27-19, was in fact unlawfully assumed and therefore invalid. The fact that Chapter 27-19 appears to expand state jurisdiction over Indian country rather than to contract it must be understood, not in light of *Vermillion*, but in light of the intervening, superseding decision of this Court in *Williams v. Lee*. The North Dakota Legislature was effectively starting from "square one" in asserting jurisdiction over civil actions in Indian country when it passed Chapter 27-19.

Id. at 161. The dissent later states:
> If *Vermillion* had been good law, Chapter 27-19 would have been entirely superfluous. Following the passage of Chapter 27-19, therefore, the North Dakota Court could reasonably conclude that the legislature had disclaimed (*i.e.*, renounced any claim to) the jurisdiction wrongfully usurped in *Vermillion* except on the consent of the affected tribes. And the fact that the court concluded that *all* the jurisdiction of *Vermillion* had been disclaimed indicates that, as a matter of state law, the court views the jurisdiction of *Vermillion* as an all-or-nothing, reciprocal proposition. Again, it is irrelevant that our cases would have *permitted* the State to assert one-sided, residual jurisdiction. The State was not obligated to accept the invitation.

Id. at 163 n.3 (emphasis in original).

On the other hand, the North Dakota court need not have construed ch. 27-19 to cover jurisdiction not precluded by federal law (*see* Part V, *infra*). "Extend" in ch. 27-19 could easily have been understood as the equivalent of "exercise" or "expand." The practice of interpretation established in *Kennerly* and *Bryan* no doubt influenced the North Dakota court.

ing failed, there is no indication that North Dakota would have accepted the one-way jurisdiction sought by petitioners in this case, whereby Indians can sue non-Indians but not vice versa. And the fact that our cases would have *permitted* the assumption of such jurisdiction is simply beside the point. Nothing in the Enabling Act, the State Constitution, or Pub. L. 280 compelled North Dakota to grant Indians the right to sue non-Indians in state court in situations where non-Indians could not sue Indians. And it is sheer speculation to suppose that the State would have done so.[179]

At the end of its opinion, the dissent states the potential equal protection issue—but in somewhat different terms than the majority:

> [T]he only federal question presented in this case is whether North Dakota's failure to permit Indians to sue non-Indians in circumstances under which non-Indians could not sue Indians violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.... Petitioner wants to enjoy the full benefits of the state courts as plaintiff without ever running the risk of appearing as defendant. The Equal Protection Clause mandates no such result.[180]

D. NORTH DAKOTA—PART II (*ND-II*).

Upon remand, the North Dakota Supreme Court seemed somewhat irritated. A very brief recitation of the facts is followed by a very long quote from the Supreme Court's opinion and:

> In other words, the [United States Supreme] Court is saying that by exercising jurisdiction in *Vermillion v. Spotted Elk*, ... a case involving a tort action brought by an Indian against another Indian, arising out of an automobile accident which occurred on a highway within the exterior boundaries of an Indian reservation in this state, our state courts acquired jurisdiction which was not affected by the amendments to Public Law 280 ... notwithstanding that Section 1322 required the consent of the tribe occupying the particular Indian country, notwithstanding that in *Williams v. Lee* ... the United States Supreme Court said that the Supreme Court of Arizona had no jurisdiction over an action on a debt arising on the Navajo Reservation, brought by a non-Indian against an Indian couple, and notwithstanding that the reasoning applied in *Vermillion* ... has been criticized as faulty.[181]

In response to the remanding opinion, the North Dakota Supreme Court undertook a detailed review of the legislative history of ch. 27-19. That statute was adopted following extensive hearings by a legislative interim research subcommittee which had concluded, inter alia, that state court jurisdiction would "provide ... a tool for [e]nforcement of contracts

179. *US-I* 467 U.S. at 162-63 (emphasis in original, footnote omitted).
180. *Id.* at 166.
181. *ND-II*, 364 N.W.2d at 100-01.

between Indians and non-Indians."[182] The committee's bill did not require tribal involvement in a state decision to exercise jurisdiction.[183] When it came before the Assembly, the chairman of the study committee requested a hearing be held and Indian tribal chairmen and members of the Indian Affairs Commission be invited to testify. Indian leaders from North Dakota and other states appeared to testify against the bill, "some asserting that civil jurisdiction should not be assumed by the state without a vote of the Indian people."[184] Apparently as a result, the bill was amended to require Indian acceptance before the state could exercise jurisdiction.[185]

> In light of this background and the seeming intent of the Legislature to accommodate the will of the Indian people . . . even to the extent of providing for a means . . . for withdrawing from state civil jurisdiction, and further in keeping with our policy of construing a statute to uphold its constitutionality against either state or federal constitutional attack, we conclude that the Affiliated Tribes in this case may properly bring their action in state court providing they comply with Section 27-19-05 [i.e. similarly to an Indian individual].
>
> . . . .
>
> As neither the act itself nor the legislative history provides for or recognizes any type of "residuary" state jurisdiction, we conclude that the act terminated any such jurisdiction if it did previously exist.[186]

The court then considered whether the state act, construed without regard to PL280 or Pub. L. 90-284, violated the North Dakota or United States Constitutions. After dismissing various possibly-relevant state constitutional provisions as not being violated, and a lengthy review of the cases cited by Three Tribes, the court concluded that any deprivation resulted from Indian, not state, action.[187] The court dismissed the claim

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182. REPORT OF THE NORTH DAKOTA LEGISLATIVE RESEARCH COMMITTEE, THIRTY-EIGHTH LEGISLATIVE ASSEMBLY 36, *quoted at ND-II*, 364 N.W.2d at 102 n.5.

183. *See ND-II*, 364 N.W.2d at 102 n.6.

184. *Id.* at 103 (footnote omitted). Testimony opposing unilateral assumption of state civil jurisdiction is quoted in a footnote. *Id.* at 103 n.7.

185. *Id.* As adopted, the bill required tribal acceptance through a petition signed by the majority of the enrolled residents of the reservation who are over twenty-one years of age (N.D. SESSION LAWS, CH. 242 § 2(1) (1963)) or by affirmative vote of the enrolled members who are over twenty-one voting at an election called for that purpose (*id.* at § 2(2)). Section 5 provided a method for an individual Indian to accept state jurisdiction as to himself and his property. *See ND-II*, 364 N.W.2d at 103 n.8.

The plebescite provision anticipated and fulfilled the requirements of Pub. L. No. 90-284. The individual consent procedure does not meet those requirements.

186. *ND-II*, 364 N.W.2d at 103-04. Allowing the Tribes to bring an action through section 27-19-05 required the North Dakota court to reverse its decision in *Nelson v. Dubois* (discussed *supra*) that Pub. L. No. 90-284 precluded state exercise of jurisdiction upon only the consent of an individual Indian, *i.e.* without a plebescite. *Id.* at 104. The language of section 27-19-05, however, raises the specter of waiver of sovereignty.

187. The court stated:

> In our view, Affiliated [Three Tribes] has not been *deprived* of a protected interest or denied access to state courts because of legislative or judicial action by the state, but rather, to the contrary, jurisdiction has been offered by

that the state statute was "inherently suspect" on the basis of *Washington v. Confederated Bands and Tribes of Yakima Indian Reservation*.[188]

The matter was remanded to the district court for proceedings consistent with the opinion, i.e. to allow the matter to proceed after the tribe complied with ch. 27-19.[189] For good measure (perhaps assuming that the matter would be re-appealed to the United States Supreme Court) the North Dakota Supreme Court summarized:

> [W]e emphasize that we are relying in this case wholly on independent and adequate state grounds. Those grounds are that Chapter 27-19, N.D.C.C., requires and permits the disposition we have made in this case and that our disposition does not offend the state constitution.[190]

Based upon the prior opinion of the United States Supreme Court, the stage was thus set; the Court would have to decide the case either on the basis of the United States Constitution or overrule the state supreme court on the basis of state law.

E. UNITED STATES—PART II (*US-II*).

On the Three Tribes' second petition for certiorari, rather than carrying through with its equal protection analysis, the Court held North Dakota was pre-empted from "disclaiming" jurisdiction.[191]

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the state over all civil causes of action which arise on an Indian reservation upon acceptance by Indian people as provided by law. The *Indian people* have deprived themselves of access to state courts because they have not accepted state jurisdiction in the manner provided for in Chapter 27-19, N.D.C.C.

ND-II, 364 N.W.2d at 106 (emphasis in original).

188. 439 U.S. 463 (1979). The North Dakota court stated:

> Chapter 27-19 does not constitute a restriction against Indian people or individual Indians accepting the jurisdiction of the state judicial system, rather it is a limitation of the state judicial system preventing it from imposing jurisdiction upon the Indian people or individual Indians against their will and without their consent. The statute does not treat them less than equal, it treats them more than equal. In light of the fact that they have demanded this unique treatment, they cannot reasonably complain of it . . . . It would be difficult to contemplate a statute which was fair to all that could protect the Indian more and restrict the Indian less than Chapter 27-19.

ND-II, 364 N.W.2d at 107.

189. *ND-II*, 364 N.W.2d at 108.

190. *Id.* The court included a rather impassioned plea to the Indians to the effect that they would not receive justice until they accept jurisdiction of state courts, as they accepted other benefits of state jurisdiction "and have faith in the judicial system which all other citizens, irrespective of their ancestry, must and do rely upon." *Id.* at 107-08. The court also called for another legislative study commission to resolve the problem because the courts cannot do so on a case-by-case basis and noted that the United States Congress could solve the problems (theoretically without Indian consent) by requiring their acceptance of state jurisdiction or the creation of a federal court with jurisdiction to decide cases arising on Indian reservations. *Id.* at 108.

191. *US-II*, 106 S. Ct. 2305, 2309 (1986).

> Because we believe that North Dakota law is pre-empted insofar as it is applied to disclaim pre-existing jurisdiction over suits by tribal plaintiffs against non-Indians for which there is no other forum, absent the Tribe's waiver of its sovereign immunity and consent to the application of civil law in all cases to which it is a party, we reverse.

Id.

The first hurdle was the fact that the pre-emption issue had not been raised before the North Dakota court.[192] The "weighty presumption against review" under such circumstances was overcome by the Court's assertion that Wold had not challenged consideration of that issue but had "briefed it on the merits"[193] and because this was its second time before the Court.[194]

The Court again created the scene for its decision, summarizing the historical summary in *US-I*:

> Historically, Indian territories were generally deemed beyond the legislative and judicial jurisdiction of the state governments. . . . This restriction was reflected in the federal statute which admitted North Dakota to the union . . . and was embodied in the form of jurisdictional disclaimers in North Dakota's original Constitution. . . . The pre-existing federal restrictions on state jurisdiction over Indian country were largely eliminated, however, in 1953 with Congress' enactment of . . . Pub.L. 280.[195]

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192. *See id.* at 2309.

193. A review of Wold's brief does not disclose support for that statement. The only mention of pre-emption is in a portion discussing sovereign immunity: "Later Federal enactments did not change this State act [adoption of ch. 27-19], nor will it [sic] preempt any jurisdiction assumed under P.L. 280." Resp. Brief at 35, *US-II*, 106 S. Ct. 2305 (1986) (No. 84-1973).

In fact, the Court's procedural situation was more difficult than was discussed and Wold had reason to believe no objection to consideration of pre-emption was necessary. Rule 21.1(a) limits the Court's consideration to issues stated in the Petition for Certiorari. It was not unreasonable for Wold to conclude that a non-raised issue would not be considered. The Court's opinion states that certiorari was granted "to examine petitioner's claims that Chapter 27-19 violates the Federal Constitution and is pre-empted by federal Indian law." *US-II*, 106 S. Ct. at 2309. Three Tribes' Petition for Certiorari did *not* include any contention that PL280 or Pub. L. No. 90-284 pre-empted the North Dakota statute. *See* Pet. for Cert. at p. i, *US-II*, 106 S. Ct. 2305 (1986)(No. 84-1973). That Petition raised only two issues: (1) violation of federal equal protection and due process rights; and (2) "federal Indian policy and decisional law" precluded North Dakota from conditioning the Petitioner's access to state courts upon a waiver of tribal sovereign immunity. *Id.* In Petitioner's Brief, an *additional* issue was proposed, i.e.:

> Whether Congress' enactment of Public Law 90-284, has preempted any authority North Dakota may have had to condition tribal Indians' access to state court, in these circumstances, on a tribal transfer, or cession, to the state of civil jurisdiction over their members or reserved lands.

Pet. Brief at p. i, *US-II*. Even though that issue mentioned pre-emption, it did not mention the pre-emption issue actually considered by the Court. None of the other briefs, including those of the numerous amici, included pre-emption as an issue. The Court makes no attempt to justify why it disregarded Rule 21.1(a) and not only considered, but based its decision on, an issue not mentioned in the Petition for Certiorari.

At a minimum, the Court should have requested briefs and re-argument on the pre-emption issue.

194. The Court said:

> [T]his case has already been sent back to the North Dakota Supreme Court once, and we are reluctant to further burden that court by resolving less than all the federal questions addressed by the parties. Since we have twice had the benefit of the Supreme Court of North Dakota's reasoning on closely aligned issues, we do not believe that our consideration of the federal pre-emption issue is a disservice to that court or to the litigants, or impairs our informed decision on the issue.

US-II, 106 S. Ct. at 2309. The final phrase may have been overly optimistic.

195. *Id.* at 2307 (citing *US-I*, 467 U.S. at 142, which cited Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)).

If the quoted statement is to be understood as precluding all state jurisdiction over

Before it even stated the issue to be considered, the Court set the foundation by again asserting that *Vermillion*: (1) took "an *expansive* view of the scope of state-court jurisdiction over Indians in Indian country"[196]; and (2) confirmed pre-existing jurisdiction rather than establishing a new category.[197]

The introduction having established the elements necessary for its ultimate conclusion, the Court recited the current pre-emption formula: "[W]here a detailed federal regulatory scheme exists and where its general thrust will be impaired by incompatible state action, that state action, without more, may be ruled pre-empted by federal law."[198] The Court essentially assumed the first step by characterizing PL280 as: (1) the "primary expression of federal policy governing the *assumption* by States of civil and criminal jurisdiction over the Indian Nations";[199] and (2) the result of "comprehensive and detailed congressional scrutiny."[200] Both characterizations are questionable.[201] And they are necessary to the Court's conclusion.

Based upon the posited comprehensiveness of PL280, and the declaration that the policy "expressed by" PL280 was to "authorize assumption, not disclaimer, of state jurisdiction over Indian country," the Court concluded that a disclaimer of jurisdiction conflicted with the federal scheme.[202] As described by the Court, PL280 as originally enacted, through

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people and events within Indian reservations, it is inconsistent with, at least, Williams v. Lee, 358 U.S. 217, 218-22 (1959) (also cited in *US-I*, 467 U.S. at 142), and Kake v. Egan, 369 U.S. 60 (1962). Perhaps more importantly, so interpreted that statement is directly contrary to the Court's later adoption of *Vermillion* because *Vermillion* is necessarily based upon the premise that North Dakota is only precluded from exercising jurisdiction over interests in Indian land.

196. *Id.* at 2307 (quoting *US-I*, 467 U.S. at 143-44 (emphasis by the Court)).

197. *Id.* at 2307. The Court stated:

> That part of *Vermillion* that recognized jurisdiction over non-Indians' claims against Indians impermissibly intruded on tribal self-government and thus could not be sustained. But, as this Court in *Three Tribes I* affirmed, North Dakota's recognition of jurisdiction over the claims of Indian plaintiffs against non-Indian defendants was lawful because such jurisdiction did not interfere with the right of tribal Indians to govern themselves and was not subject to Pub. L. 280's procedural requirements since the jurisdiction was lawfully assumed prior to that enactment.

Id. at 2307-08 (citations omitted).

198. *US-II*, at 106 S. Ct. at 2310 (citing Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965)).

199. *Id.* at 2310 (emphasis added).

200. *Id.* (quoting, somewhat out of context, Kennerly v. District Court, 400 U.S. 423, 424 n.1, 427 (1971)).

201. The first is, essentially, a non sequitur and the second is a very loose reading of *Kennerly*, the intended implications of which are disproved in the article cited by the Court in support of its next statement, *i.e.* Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535 (1975). *See* discussion at Part IV, *infra*.

202. *US-II*, 106 S. Ct. at 2310. That conclusion was bolstered with a discussion pointing out that PL280 did not include a provision for "retrocession" of jurisdiction by the states because it was Congress' intent to require states to assume the financial burdens of jurisdiction and:

> Were States permitted to, at their option and at any time, retrocede all or part of the jurisdiction they had assumed and to leave Indians with no recourse

the device of not providing a method for "retrocession," was intended to positively require states to honor their commitment, guaranteeing Indians would not be left without a method of obtaining recourse for civil wrongs.[203]

Not satisfied with that conclusion, the Court stated that when Congress "revisited the question of retrocession in the 1968 Amendments,"[204] it authorized only the retrocession of jurisdiction assumed through PL280.[205] Because the Court had previously enforced the procedural requirements of PL280 "quite stringently," and North Dakota had made no effort to (nor could) comply with the retrocession requirements, the Court concluded that:

> [S]ince North Dakota's disclaimer is not authorized by § 1323(a), it is barred by that section. . . . In sum, because Pub. L. 280 was designed to extend the jurisdiction of the States over Indian country and to encourage State assumption of such jurisdiction, and because Congress specifically considered the issue of retrocession but did not provide for disclaimers of jurisdiction lawfully acquired other than under Pub. L. 280 prior to 1968, we must conclude that such disclaimers cannot be reconciled with the congressional plan embodied in Pub. L. 280 and thus are pre-empted by it.[206]

> for civil wrongs, the congressional plan of gradual but steady assimilation could be disrupted and the divestment of federal dominance nullified.

Id. at 2311. The Court did not note that *Kennerly* had found that the assimilationist purposes of PL280 had been "replaced by a new regulatory scheme" by Pub. L. No. 90-284. *See Kennerly*, 400 U.S. at 428. The more-recent federal policy of preserving self-government by requiring Indian participation in jurisdictional decisions and allowing "retrocession" of jurisdiction was not allowed to interfere with characterizing PL280 as the "most recent" expression of federal policy on the issue.

203. *US-II*, 106 S. Ct. at 2310-11. The Court apparently assumes that some court always has to have jurisdiction of all potential causes of action. In *Fisher*, 424 U.S. at 382, the Court found the possibility of rights without remedies of little moment. There are many ways a state could deny any practicable access to state courts without "retrocession" of jurisdiction, such as by not establishing a courthouse within a reasonable distance of the reservation.

204. *Id.* at 2311. It would appear difficult to "revisit" something not previously "visited."

205. *Id.* Section 403 of the 1968 Amendments (codified at 25 U.S.C. § 1323 (1982)), provides:

> (a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of title 18, section 1360 of title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588) (PL280), as it was in effect prior to its repeal by subsection (b) of this section.
>
> (b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

Pub. L. No. 90-284, Tit. IV, § 403, 82 Stat. 79. The Secretary of the Interior was authorized to accept such retrocessions on behalf of the United States. Exec. Order No. 11,435, 33 Fed. Reg. 17,339 (1968).

206. *US-II*, 106 S. Ct. at 2311. The Court does not identify any legislative history even hinting that Congress may have considered the possibility of states discontinuing exercise of jurisdiction over actions involving Indians which was authorized by some law other than PL280.

The fact that any retrocession would be inconsistent with the policy of PL280, which policy was substantially weakened by, if not destroyed, by Pub. L. No. 90-284 (as held in *Kennerly*), seems to have had little effect.

The discovered legislative reason was, the Court said, because jurisdiction assumed before enactment of PL280 was only lawful to the extent it was consistent with tribal self-government and jurisdiction could be assumed after 1968 only with the consent of the tribe.[207]

Having found ch. 27-19 pre-empted, the Court proceeded to weigh the governmental interests involved, a step frequently taken before the preemption decision is made and most appropriate in instances in which there is no controlling statute (*e.g., N.M. v. Mescalero*). Again, the Court's initial statement of the problem both presupposed the validity of *Vermillion* and prejudiced the resolution:

> Our consideration of the State's interest in disclaiming the preexisting, unconditional jurisdiction extended to tribal Indians suing non-Indian defendants, and in replacing it with an extension of jurisdiction conditioned on the Tribe's waiver of its sovereign immunity and its agreement to the application of state law in all suits to which it is a party, reinforces our conclusion that Chapter 27-19 is inconsistent with federal law. Simply put, the state interest, as presently implemented, is unduly burdensome on the federal and tribal interests.[208]

The Court found the State's interest in those having the benefit of its courts bearing the burdens equally was overridden by the federal interest in protecting tribal sovereignty. That position depends upon a somewhat strained reading of *ND-II*, characterizing the effect of section 27-09-05 as an absolute waiver of tribal sovereignty under any and all conditions.[209]

The Court's discussion of why ch. 27-19 infringes on federal Indian policy, and is therefore void, labels as objectionable the policy, and specific intent, behind PL280—which the Court described as the primary expression of federal policy resulting from comprehensive and detailed congressional scrutiny.[210] The scope of civil jurisdiction contemplated by ch. 27-19 and the relative position of state and tribal law is exactly that actually provided in PL280 and Pub. L. 90-284.

Through this "balancing," the Court arrives at the conclusion that the state's interest does not justify diminution of the federal and tribal interest in preserving tribal sovereignty.[211] Any argument concerning equality for the non-Indian is summarily dismissed:

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207. *US-II*, 106 S. Ct. at 2311. There is nothing in the legislative history to indicate that Congress or the BIA was aware of that formulation for state civil jurisdiction. In fact, at least as stated, that formulation was made by the Court significantly after 1953.

208. *Id.* at 2312. In this, and a number of other places, the opinions in the *Three Tribes* litigation could be used as examples of how to state an issue in a manner guaranteeing only one possible answer.

209. It also assumes that non-Indians have access to state court under similar circumstances.

210. *See US-II*, 106 S. Ct. at 2312-13. Despite the Court's disfavor, those provisions of ch. 27-19 are essentially identical to congressional policy (expressed in both PL280 and Pub. L. No. 90-284), and could have been imposed upon reservations in North Dakota without the Indians' consent between 1953 and 1968.

211. *US-II*, 106 S. Ct. at 2313-15.

> The perceived inequity of permitting the Tribe to recover from a non-Indian for civil wrongs in instances where a non-Indian allegedly[212] may not recover against the Tribe simply must be accepted in view of the overriding federal and tribal interests in these circumstances, much in the same way that the perceived inequity of permitting the United States or North Dakota to sue in cases where they could not be sued as defendants because of their sovereign immunity also must be accepted.[213]

The three-justice[214] dissent refutes the majority opinion on each of its supporting points, but not as extensively as possible.[215]

III. APPLICATION

Of greater significance than the direct result to the parties is the impact the *Three Tribes* opinions may have on the future course of Indian law. The first level of consideration is examination of the decisions themselves. Can their rulings or language be applied to other fact patterns? Do they apply old law or break new ground? Do they make sense? Will the decisions' component parts affect future litigation? Do they provide formulations which can be applied in other contexts?

A. DISTINGUISHABILITY

The first consideration is whether the case is so unique or limited that it can be easily distinguished from future cases. In the course of the various opinions, a number of facts were mentioned which may have an impact on the possible use of the decisions as precedent. The most significant are the identity and posture of the parties.[216]

1. *Tribe as Plaintiff*

The fact that the plaintiff is a tribal government, not an individual Indian, was particularly prominent in the "balancing-of-interests" discussions. In *US-I*, the Court found exercise of state jurisdiction is particularly compatible with tribal autonomy because the action was brought by the tribal government.[217] However, the Court's initial premise was that allowing *"an Indian"* to voluntarily enter state court seeking relief against a non-Indian did not impede tribal self-government.[218] The fact that the

212. This "allegation" is directly supported by the precise holding in Williams v. Lee, 358 U.S. 217 (1965). *See* Part I.F., *supra.*

213. *US-II*, 106 S. Ct. at 2314.

214. Mr. Justice Rehnquist, joined by Messrs. Justices Brennan and Stevens.

215. *US-II*, 106 S. Ct. at 2315-16 (Rehnquist, J., dissenting).

216. The fact that the contract/negligence cause of action arose on an Indian reservation is significant because, if it had been otherwise, none of the issues discussed in the case would have existed. It is generally conceded that causes of action which arise outside Indian country are subject to state law, regardless of the fact that one of the parties may be an Indian. Therefore this entire discussion is applicable only to causes of action arising in Indian country.

217. *US-I*, 467 U.S. at 149.

218. *Id.* at 148-49.

plaintiff in this particular case was the tribal government was presented as a cumulative, not a distinguishing, factor.

The Court acknowledged that *Williams v. Lee* had held that it would infringe on tribal sovereignty to allow a non-Indian to sue an Indian on a reservation-based contract.[219] Apparently the Court does not find it anomalous to allow the same cause of action to be pursued in state court if the plaintiff is an Indian.[220] The disparity is apparently accepted as established Indian law[221] and *US-I* is not therefore remarkable. This result might be explained by the fact that the Courts of Indian Offenses, administratively established by the Department of Interior on a large number of reservations, had civil jurisdiction over non-Indians only with their consent. That limitation was carried forward to the model tribal code prepared by the BIA after adoption of the Indian Reorganization Act in 1934.[222]

US-II, however, provides a complication with its discussion of tribal sovereignty, where a primary factor is the conclusion that the tribal government would have to waive its sovereign immunity to bring suit in North Dakota courts.[223] The balancing-of-interests discussion depends largely upon the sovereign immunity argument,[224] which only applies if a tribal government is involved. Individual Indians, and some tribal organizations,[225] do not enjoy such immunity. If *US-II* only applies to suits by tribal governments, its importance is substantially lessened.[226]

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219. *Id.* at 148.

220. *See Williams v. Lee*, 358 U.S. at 219; *US-I*, 467 U.S. at 148. C. WILKINSON, *supra* note 63, at 211-12, n.112, argues that the policy of encouraging tribal government may have been better served by *US-I* reaching an opposite result:

> In fact, the tribal interest in the adjudication of reservation wrongs was infringed, even if by the tribal council [as in *Kennerly*]. Tribal interests might well have been furthered in the long run by a holding that state courts lack subject matter jurisdiction when Indians sue non-Indians for acts arising in Indian country (just as subject matter jurisdiction is absent in the reverse situation) thus giving even greater legitimacy (and immediacy) to the tribal forum.

That conclusion would, however, raise a second set of problems. *See* National Farmers Union Ins. Co. v. Crow Tribe of Indians, 105 S. Ct. 2447 (1985).

221. *See, e.g.*, McCrea v. Busch, 164 Mont. 442, 524 P.2d 781 (1974). *See also* Canby, *Civil Jurisdiction and the Indian Reservations*, 1973 UTAH L. REV. 206; Comment, *The Subject Matter Jurisdiction of New Mexico District Courts Over Civil Cases Involving Indians*, 15 N.M. L. REV. 76 (1985).

222. *See* 25 C.F.R. § 11.1 (1986) (originally adopted in 1935). *See generally*, W. HAGAN, INDIAN POLICE AND JUDGES (1966).

223. The Court held:

> [T]he North Dakota law is pre-empted insofar as it is applied to disclaim pre-existing jurisdiction over suits by *tribal plaintiffs* against non-Indians for which there is no other forum, *absent the Tribe's waiver of its sovereign immunity and consent to the application of state civil law in all cases to which it is a party.*

US-II, 106 S. Ct. at 2309 (emphasis added).

224. *See id.*, at 2313-14.

225. *Cf.* Parker Drilling Co. v. Metlakatla Indian Community, 451 F. Supp 1127 (D. Alaska 1978); S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community, 138 Ariz. 378, 674 P.2d 1376 (Ct. App. 1983).

226. If so, then a secondary question might be whether a tribe could, as a "purchaser," pursue civil claims originally belonging to individual Indians. If a tribe were to purchase, say for a percentage of the judgment (like an attorney's contingent fee arrangement), an

In *Williams v. Lee*, federal law was found to protect individual Indians from state-court civil actions based on contract. That holding has been interpreted broadly to protect against civil actions generally.[227] The North Dakota statute which the Court said requires a waiver of tribal sovereign immunity is the section the North Dakota Assembly adopted to allow individual Indians to remove federal jurisdictional restraints with respect to themselves.[228] To the extent that section 27-19-05 can be read to require waiver of tribal sovereignty, it can equally be read as requiring an individual Indian to waive any *Williams v. Lee*-type protection. Because the individual Indian is protected against state-court judgments by federal law, the sovereign-immunity logic of *US-II* could be expanded, thereby increasing the significance of that decision.[229]

2. *Existence of Tribal Court*

When the *Three Tribes* litigation commenced, the Fort Berthold Reservation tribal court lacked non-consensual jurisdiction over causes of action against non-Indians.[230] In *US-II* the absence of a tribal court with jurisdiction was a premise of the ruling.[231]

The existence of a tribal court with jurisdiction was also found significant in *Fisher v. District Court*,[232] concerning an intra-tribal adoption.[233]

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individual Indian's cause of action against a non-Indian, could the tribe retain its unique position? If so, tribes could provide a very meaningful service to its members, without the possibility of the members' exposure to potential liability.

227. *See, e.g.*, Jackson County *ex rel* Jackson v. Swayney, 319 N.C. 52, 352 S.E.2d 413 (1987) (paternity action infringes, child support enforcement required by federal law, therefore not infringement); Hartley v. Baca, 97 N.M. 441, 640 P.2d 941 (Ct. App. 1981) (automobile accident); Enriquez v. Superior Court, 115 Ariz. 342, 565 P.2d 522 (Ct. App. 1977) (automobile accident). *Cf.* State v. Webster, 114 Wis. 2d 418, 338 N.W.2d 474 (1983) (traffic regulation).

The fact that *Williams v. Lee* also involved the history of federal regulation of Indian traders, etc., has been relegated to secondary importance.

228. N.D. CENT. CODE. § 27-19-05 (1972) provides:

> An individual Indian may accept state jurisdiction as to himself and his property by executing a statement consenting to and declaring himself and his property to be subject to state civil jurisdiction as herein provided. Such jurisdiction shall become effective on the date of execution of such statement. The statement accepting state jurisdiction shall be filed in the office of the county auditor of the county in which the person resides and when so filed shall be conclusive evidence of acceptance of state civil jurisdiction as provided herein.

The "jurisdiction provided herein" language apparently refers to § 27-19-01 (1975).

Apparently, though it is not mentioned in *ND-II*, the North Dakota Legislature thought some individual Indians may wish to become "assimilated" even though their tribe did not, which is consistent with the policy of the Congress which adopted PL280.

229. Even though an individual Indian might not waive *Williams v. Lee* protection by bringing an action in state court, he would be waiving any objection to compulsory counterclaims to the extent they can be offset against a judgment in the Indian's favor. *See, e.g.*, Annis v. Dewey County Bank, 335 F. Supp. 133 (D.S.D. 1971).

230. *US-II*, 106 S. Ct. at 2309. The Three Tribes' Code was subsequently amended to allow tribal court to exercise jurisdiction over cases such as that asserted in the Three Tribes litigation.

231. *See* quote at note 191, *supra*.

232. 424 U.S. 382 (1976) (per curiam). *See* discussion in text at note 133, *supra*.

233. A tribal ordinance granting the tribal court exclusive jurisdiction over the adoption of tribal members by tribal members had been approved in 1966. *Id.* at 384 & n.5.

In *Fisher*, the Court held that where the tribe had a court with jurisdiction, a state court's exercise of jurisdiction in an intra-tribal adoption would infringe on tribal self-government and was therefore improper.[234] However, the Court also stated: "[E]ven if we assume that the Montana courts properly exercised adoption jurisdiction prior to the organization of the Tribe, a question we do not decide, that jurisdiction has now been pre-empted."[235] That would be the result, the Court said, "even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access."[236] Under *Fisher*, the existence of a tribal court with jurisdiction over the cause of action pre-empts exercise of state court jurisdiction.

One assumption in the *Three Tribes* decisions was that North Dakota had exercised jurisdiction over Indian-plaintiff, non-Indian defendant cases before PL280. Therefore, the *Fisher* dictum would apply and North Dakota jurisdiction would continue so long as no tribal court with jurisdiction existed. However, the *US-II* decision is not based upon, and in fact is inconsistent with, such a conclusion. Instead, the Court raised an apparently significant additional consideration—enforceability of a tribal court judgment:

> [E]ven if the Tribe were to have access to tribal courts to resolve civil controversies with non-Indians, it would be unable to enforce those judgments in state court; thus the Tribe cannot be said to have a meaningful alternative to state adjudication by way of access to other tribunals.[237]

The distinction between *Fisher* and *US-II* is the status of the defendant. In *Fisher* all of the parties were members of the resident tribe and, at least presumably, a tribal court judgment could be "meaningfully" enforced. In *US-II*, the defendant is non-Indian and, again presumably, had no assets within the reservation which a tribal court might attach. Any tribal court judgment would, therefore, have to be enforced in a state court. Any Indian plaintiff suing a non-Indian would be in the same ultimate position as the Three Tribes government, i.e. having to seek enforcement in a state court. Therefore, under *US-II*, the existence of a tribal court with jurisdiction (and *Fisher*) becomes meaningless—at least insofar as actually obtaining redress.[238]

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234. *Id.* at 387.

235. *Id.* at 390. Subsequent state cases have relied upon that statement and held that upon adoption of a tribal ordinance granting tribal court jurisdiction over intra-tribal domestic relations matters state courts are pre-empted from continuing to exercise jurisdiction in those cases. *See, e.g., In re* Limpy, 195 Mont. 314, 636 P.2d 266 (1981); State *ex rel* Stewart v. District Court, 187 Mont. 209, 609 P.2d 290 (1980).

236. *Fisher*, 424 U.S. at 390-91.

237. *US-II*, 106 S. Ct. at 2312. The Court may also have been alluding to the lack of full faith and credit for tribal court judgments. *See* Vetter, *Of Tribal Courts and "Territories": Is Full Faith and Credit Required?*, 23 CAL. W.L. REV. 219 (1987).

238. Even though the Court fails to elaborate on its statement in *US-II*, it is clear that, had the issue been directly presented, the dictum of *Fisher*, at least insofar as non-Indian defendant cases, would have been rejected.

In *Fisher* the Court seemed to accept as fact that the political status of Indians may result in both disabilities and privileges. The *Fisher* statement that Indians may not have

Fisher establishes a clear, easily applied standard. If examination of tribal ordinances shows a tribal court can exercise jurisdiction, state courts are pre-empted.[239] The language in *US-II's* holding supports that interpretation. However, if *US-II's* reasoning is considered, precision and predictability are exchanged for obscurity and uncertainty.[240]

How this portion of *US-II* will be interpreted must await future decisions. Currently popular Indian-law policy at least superficially supports giving substantial weight to the Court's concern for the meaningfulness of tribal remedies. On the other hand, long-standing concern for certainty and predictability favor basing the determination solely on whether tribal ordinances give the tribal court jurisdiction over the type of case presented.

3. *Pre-PL280 Exercise of Jurisdiction by State Court*

A definite possibility for distinguishing future cases results from the Court's emphasis on its conclusion that North Dakota courts had exercised jurisdiction over Indian-plaintiff cases *before* the enactment of PL280.[241] How that distinction might be applied, however, is questionable.

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access to some courts a non-Indian does may have been intended to apply only in the context of that case, even though there is nothing to indicate such a limitation was intended. *Fisher*, 424 U.S. at 392. In the *Fisher* context, a non-Indian wishing to adopt a tribal member could proceed in state court because the tribal ordinance provided for exclusive jurisdiction only when all parties were tribal members. If, however, the Court's statement is applied in any other context, it has to be understood as applying precisely to the Indian-plaintiff, non-Indian-defendant situation because it is only when a non-Indian is a defendant that a non-Indian could have access to state court in a reservation-based action.

239. *See* Wildcat v. Smith, 69 N.C. App. 1, 316 S.E.2d 870, 877-78 (1984) (holding that when a tribe establishes court, state court exercise of jurisdiction infringes on the tribe).

240. What factors must exist before resort to a tribal court with jurisdiction provides a "meaningful alternative" to state court jurisdiction? Is that to be determined on a case-by-case basis or from an examination of tribal law? Is *in personam* jurisdiction, the ability to effect service of process, relevant or is only subject matter jurisdiction relevant? Is the status of a party (non-Indian or Indian) an issue of subject matter jurisdiction or a matter of personal jurisdiction? Are state courts pre-empted if a non-Indian defendant resides or owns property within the reservation but not if he does not? What if the defendant's on-reservation property is or might be inadequate to satisfy a judgment? Does the existence of additional types of remedies in state court make tribal court jurisdiction without meaning? A defendant could be excluded from the reservation. *See, e.g.*, Hardin v. White Mountain Apache Tribe, 761 F.2d 1285 (9th Cir. 1985). That may be meaningful if the defendant had been found guilty of trespassing or the action was to enjoin the defendant's on-reservation actions. It would be less meaningful if a money judgment had been entered against the defendant in a tort or contract action. Who has the burden of proving or deciding the meaningfulness of tribal court jurisdiction? *See* National Farmers Union Ins. Co. v. Crow Tribe of Indians, 105 S. Ct. 2447 (1985).

Basing the determination of whether state court jurisdiction is pre-empted upon the prospects of enforcement of a tribal court judgment reduces pre-emption to a case-by-case, after the trial, situation—certainly not a desirable state of affairs.

241. *See US-I*, 467 U.S. at 150 & n.9. In *US-II*, the Court stated:

> That part of *Vermillion* that recognized jurisdiction over non-Indians' claims against Indians impermissibly intruded on tribal self-government and thus could not be sustained. But, as this Court in *Three Tribes I* affirmed, North Dakota's recognition of jurisdiction over the claims of Indian plaintiffs against non-Indian defendants was lawful because such jurisdiction did not interfere with the right of tribal Indians to govern themselves and was not subject to Pub. L. 280's

The rationale of, and statements in, *US-I* and *US-II* require the conclusion that: (1) if a state had exercised jurisdiction prior to PL280, it could not, at least after enactment of Pub. L. 90-284, discontinue exercise of such jurisdiction; and (2) if a state had not exercised jurisdiction before PL280's enactment, compliance with PL280 is required, even in actions seeking enforcement of tribal court judgments.

Only a handful of states have exercised jurisdiction in Indian-plaintiff, non-Indian defendant cases, before or after enactment of PL280.[242] When read with *Kennerly* and *Fisher*, *US-I* and *US-II* preclude state-court exercise of jurisdiction in cases within the scope of PL280 unless: (1) the courts of that state had exercised jurisdiction *before PL280 was enacted* and continuation of that practice was not otherwise pre-empted by federal Indian law; or (2) the state has strictly complied with PL280's requirements.

The *only* way a state can begin to exercise jurisdiction over civil actions included in PL280 is by legislative assumption of the attendant burden and, after 1968, with the concurrence of the affected tribe. A large number of states do not have significant Indian populations—and even more have no organized Indian tribe or Indian reservation. At least prior to the *Three Tribes* decisions, those states had no reason to adopt PL280 legislation. The question is how broadly those decisions will be applied. The language of the decisions imply no exceptions. Only prior exercise of jurisdiction excuses PL280 compliance. In states which do not satisfy one of those requirements, Indian plaintiffs will be unable to pursue actions in state courts.

Even though the language of the decisions and legislative history sounds all-encompassing, the oft-ignored language of PL280 itself allows a possible distinction. To the mandatory states, PL280 grants jurisdiction over criminal and civil causes of action which arise in "Indian country within" those states.[243] Section seven of PL280 allows *all other* states to exercise the jurisdiction "provided for" the mandatory states,[244] i.e. causes of action arising within Indian country within the state. Therefore the question remains whether PL280 has any effect (1) in states in which there is no Indian country, or (2) with respect to causes of action which arose within Indian country located in another state.

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procedural requirements since the jurisdiction was lawfully assumed prior to that enactment.

US-II, 106 S. Ct. at 2307-08 (citations omitted). *See also id.* at 2312.

The viability of that conclusion is discussed at Part III.A.1., *infra.*

242. However, legal encyclopedias state, as if it were a generally accepted proposition, that Indians have the right to bring reservation-based actions against non-Indians in state courts. *See* 42 C.J.S. *Indians* § 8 (1944); 41 AM. JUR. 2D *Indians* § 20 (1968).

243. PL280, *supra* note 16, at 293 §§ 2, 4.

244. *Id.* at § 7, which provides: "The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, *as provided for in this Act*, to assume jurisdiction . . . ." (emphasis added).

Until the Court determines otherwise, some state courts will have the opportunity to distinguish *US-II* and other PL280 cases on the basis that PL280 does not apply to their state. However, short of construing *US-II* to not mean what it says, i.e. that it applies to all states and all civil actions to which an Indian is a party, such a decision runs the risk that the sweeping language of the Court and PL280's legislative history will result in reversal. If the implications of *US-II* are realized, the effectiveness of tribal court adjudications and the ability of Indians to enforce their rights in areas remote from reservations will be severely hampered.

B. VIABILITY

The second level of examination of the *Three Tribes* decisions concerns their analysis of the case presented. In that respect, the decisions contain a number of problems.

1. *Inattention*

One somewhat non-legalistic factor which may influence future application of *US-I* and *US-II* is that both seem to suffer from the Court's workload, or unearned reliance on the winning party's assertions.

a. Equal Protection.

The most notable instance is *US-I*'s reliance on Three Tribes' allegation that North Dakota courts could exercise jurisdiction over reservation-based actions between non-Indians. Even though early in the opinion the Court quotes the applicable North Dakota statute,[245] the opinion later assumes that non-Indians can pursue reservation-based actions in state court[246] and proceeds to threaten to decide any future review based upon an equal protection formulation which makes the same assumption.[247]

When the case came up the second time, the Court apparently took a closer look and realized no equal protection issue was present. The North Dakota statute expressly precludes its courts from exercising jurisdiction over *any* cause of action arising on a reservation, *regardless of the subject matter or the status or race of the parties*. Overlooking (purposefully or inadvertently) that language, particularly when it is the key language in the state statute under attack, weakens the Court's conclusion.

b. Counterclaim.

Another example crops up in *US-II*. At an un-numbered footnote, that decision states that the effect of Wold's counterclaim had been the subject of discussion during argument but the Court had no occasion to

245. To wit: "all civil causes of action which arise on an Indian reservation," *US-I*, 467 U.S. at 141 (quoting N.D. CENT. CODE § 27-19-01 (1975)).

246. "[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." *US-I*, 467 U.S. at 148-49.

247. "[W]e would be required to decide whether North Dakota has denied petitioner [Three Tribes] equal protection under the Fourteenth Amendment by excluding it from state courts in circumstances in which a non-Indian would be allowed to maintain a suit." *Id.* at 157.

resolve that issue because, in part, "we do not know the extent of the counter-claim asserted by" Wold.[248] The Supreme Court record contained the pleadings filed by the parties with the North Dakota District Court, including Three Tribes' Complaint alleging damages of $425,000 and Wold's Counterclaim for $4,500.[249]

2. *"Disclaimer"*

The *US-I* and *US-II* decisions are founded upon the conclusion that in ch. 27-19 the North Dakota Assembly intended to "disclaim" jurisdiction state courts did and could properly exercise over reservation-based suits by Indian plaintiffs. That conclusion is, itself, built upon three others: (1) That North Dakota courts could, as a matter of state law, exercise jurisdiction over reservation-based Indian-plaintiff suits *before adoption of PL280.* (2) That PL280 did not pre-empt state law with respect to Indian-plaintiff cases. (3) That the North Dakota Assembly took the positive step of withdrawing an otherwise permitted class of cases from those over which state courts could exercise jurisdiction. The term "disclaimer" was adopted as a short-hand for the third conclusion, resulting in an implicit assumption that the first two conclusions had been examined and made—and preventing a critical examination of the third.

The use of "disclaimer" was initiated by the North Dakota Court. In *Whiteshield,* it said that by enacting ch. 27-19 North Dakota "completely disclaim[ed] State jurisdiction over civil causes of action arising on an Indian reservation" without prior Indian acceptance.[250] *US-II* assumes "disclaimer" means that ch. 27-19 was a positive act, i.e. purposefully withdrawing jurisdiction that North Dakota courts could properly exercise at the time of enactment.[251] That presumed positive act is then equated with the term "retrocession" in Pub. L. 90-284. Thus the North Dakota court's use of the term "disclaim" becomes a key factor in the litigation's result.

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248. *US-II,* 106 S. Ct. at 2314 n."*".

249. Joint App., *US-II,* Doc. No. 84-1973, at 3, 6-7.

250. *Whiteshield,* 124 N.W.2d at 698. The North Dakota court continued to use that term in later cases as a shorthand expression for the effect of ch. 27-19.

The use of the term "disclaim" may be a product of its use in the North Dakota Enabling Act (Act of Feb. 22, 1889, ch. 108 § 4 cl. 2, 25 Stat. 677) which "required [North Dakota, South Dakota, Montana and Washington] to 'disclaim all right and title . . . to all land lying within [the State] owned or held by any Indian or Indian tribes' as a condition for admission to the Union." *US-I,* 467 U.S. at 142 (quoting Enabling Act § 4). The effect of "disclaim" in enabling acts has been interpreted narrowly; as merely intended to exempt Indian lands from the general transfer from federal to state control. *See* Village of Kake v. Egan, 369 U.S. 60 (1962); Metlakatla Indian Community v. Egan, 369 U.S. 45 (1962).

In contrast, the effect of "disclaim" with respect to ch. 27-19 is interpreted expansively, which may appear anomalous, but is not. The state-federal relationship, particularly in the earlier years, favored state authority within their borders. However, concerning Indians and their property, the converse is true. Giving ch. 27-19 an encompassing effect within its narrow subject matter promotes minimal state authority over Indians and, on the whole, ch. 27-19 was adopted under express authority from Congress.

251. Justice Rehnquist's dissent in *US-I* interprets the "disclaimer" language somewhat differently. "Following the passage of Chapter 27-19, therefore, the North Dakota court could reasonably conclude that the legislature had disclaimed (*i.e.*, renounced any claim to) the jurisdiction wrongfully usurped in *Vermillion* except on consent of the affected tribes." *US-I,* 467 U.S. at 138 n.3 (Rehnquist, J., dissenting).

Conventional legal principles assume that a legislature is familiar with law existing at the time it drafts a new statute. Because ch. 27-19 was based on a federal law relating to state jurisdiction over reservation-based causes of action, it is reasonable to assume that the Legislature was aware of relevant state and federal statutes and court decisions.[252] Therefore, the question is: What did the North Dakota Legislature do when it enacted ch. 27-19? What effect did that enactment have on the law of North Dakota?

Chapter 27-19 came after amendment of the State Constitution eliminating the disclaimer required by the Enabling Act (as expressly allowed by section six of, and expressly referring to, PL280).[253] The language used by the North Dakota Assembly varies slightly from PL280's. Section four of PL280 uses the phrase:

> jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country.[254]

The ch. 27-19 language is:

> jurisdiction of the state of North Dakota shall be extended over all civil causes of action which arise on an Indian reservation.[255]

Neither *ND-I* nor *ND-II* provides an explanation for why the North Dakota Legislature chose terms different from PL280's. Insofar as the *Three Tribes* litigation is concerned, the difference in geographic area ("Indian country" versus "Indian reservation") is insignificant. The difference in language concerning the causes of action included may be significant, but not in the manner posed in *US-II*.

PL280 grants states jurisdiction over civil actions "involving Indians." The North Dakota act covers all causes of action arising within an Indian reservation. Prior to PL280, state courts could (without violating any federal act or decision) exercise jurisdiction over reservation-based causes of action involving only non-Indians.[256] By "extending" that jurisdiction to *all* reservation-based causes of action, North Dakota added the jurisdiction identified in PL280 to its pre-existing jurisdiction, but conditioned that extension on tribal acceptance—as allowed by PL280 and required by Pub. L. 90-284.

Ch. 27-19 could be interpreted as (1) requiring tribal consent to the exercise of jurisdiction over any cause of action arising on a reservation, or (2) requiring tribal consent to the exercise of jurisdiction over any cause of action included in PL280. The *ND-II* decision appears to adopt the first

252. That assumption is strongly supported by the legislative history recited in *ND-II*, 364 N.W.2d at 101-03 & nn.4, 5.

253. N.D. CONST. art XIII, § 1, as amended in 1958. *See ND-I*, 321 N.W.2d at 511-12.

254. PL280, *supra* note 16, at § 4.

255. N.D. CENT. CODE § 27-19-01 (1975). The proposed North Dakota language was "jurisdiction over all civil causes of action which arise on Indian reservations or in Indian country." S. Bill 30, 38th N.D. Legis. Assembly § 1 (1963) (quoted at *ND-II*, 364 N.W.2d at 102 n.6).

256. *See* discussion at Part IV.A., *infra*.

interpretation, possibly because of state constitutional requirements.[257] However, the United States Supreme Court apparently overlooked the fact that, regardless of which of those interpretations is adopted, PL280 requires state legislation and Pub. L. 90-284 requires tribal consent before the state can exercise jurisdiction over causes of action such as that presented in the *Three Tribes* litigation.

The only interpretation of ch. 27-19 which would allow a conclusion that it restricts any pre-existing non-PL280 jurisdiction is that it also covers causes of action between non-Indians. However, while that interpretation may be required by the State Constitution, jurisdiction over non-Indian plaintiff, non-Indian defendant cases is obviously beyond the scope of PL280 or Pub. L. 90-284. While Three Tribes apparently argued, and the United State Supreme Court assumed,[258] that North Dakota law allows a non-Indian to bring a reservation-based action against another non-Indian, that issue was never decided by the North Dakota Court and is, indeed, inconsistent with ch. 27-19's express language.[259]

Assuming that the North Dakota Legislature was aware of the then-current status of federal and state law, ch. 27-19 can only be considered a "disclaimer" in the sense described in Justice Rehnquist's dissent. In 1963, *Vermillion* had not been overruled by the North Dakota court but

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257. The North Dakota Constitution also has an equal protection requirement. *See* N.D. CONST. art. I, § 22, (quoted at *ND-II*, 364 N.W.2d at 104 n.10). The federal constitution may allow the federal government to enact legislation favorable to, or singling out, Indians and to allow states to enact similar legislation if the power is delegated by Congress. However, that rationale does not apply to state constitutional requirements, i.e. the states have no treaty or fiduciary relationship with Indians or Indian tribes. *See, e.g.*, Washington v. Confederate Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 500-01 (1979), stating: "It is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation . . . that might otherwise be constitutionally offensive. States do not enjoy this same unique relationship with Indians. . . ." *Id.* (quoting Morton v. Mancari, 417 U.S. 535,550-51 (1974)). A state law which discriminated either against or in favor of Indians, whether authorized by Congress or not, might violate *state* equal protection requirements.

While the North Dakota Legislature may not have, the North Dakota court did apparently overlook that distinction and lumped its state equal protection discussion with the federal discussion. *See ND-II*, 364 N.W.2d at 104, 106-07.

258. The assumption was express in *US-I*: "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." *US-I*, 467 U.S. at 148-49. While in *US-II* the Court dropped its threatened equal protection conclusion, the assumption remained implicit in the decision:

> The federal interest in ensuring that all citizens have access to the courts is obviously a weighty one. This Court and many state courts have long recognized 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.

US-II, 106 S. Ct. at 2312 (citing *US-I*, 467 U.S. at 148 & n.7) (other citations omitted). If the assumption was not implicit in *US-II*, the Court would have been required to hold that ch. 27-19's restrictions on reservation-based actions against non-Indians was improper—which, in the end, may have been a better resolution.

259. Whether the North Dakota act violates non-Indian's equal protection rights by not allowing exercise of jurisdiction over reservation-based causes of action under the same circumstances jurisdiction could be exercised over causes of action arising elsewhere was not, and could not be, raised in the *Three Tribes* litigation.

Williams v. Lee had rendered it a nullity. Chapter 27-19 made it clear that *Vermillion* did not state the law of North Dakota, thereby renouncing the improper claim to jurisdiction made in that decision.

3. Vermillion *and PL280*

The second conclusion necessary to the *US-II* (and *US-I*) decision is the North Dakota Supreme Court's decision in *Vermillion v. Spotted Elk*,[260] i.e., that the Enabling Act and State Constitution precluded the North Dakota courts' exercise of jurisdiction over reservation-based causes "which . . . grow out of or have any relation to Indian lands."[261]

As pointedly demonstrated by the *US-I* dissent, and at least tacitly acknowledged by the majority in both *US-I* and *US-II*, the *Vermillion* decision, insofar as it can be construed to allow coercive jurisdiction over Indian defendants, is and was wrong. Though it came after *Vermillion*, *Williams v. Lee* professed not to make new Indian law but to enunciate what had always been, i.e. federal law precludes state courts from exercising jurisdiction over Indian defendants in reservation-based actions. To use *Vermillion* at all, the Court had to (1) ignore its facts and issue; (2) ignore the fact that it had been expressly overruled as not stating the law of North Dakota; (3) overlook its misconstruction of PL280's effect; (4) mold dicta to imply much more than was actually said; and (5) overlook the fact no authority was cited for the proposition it was said to support (i.e., pre-PL280 exercise of coercive jurisdiction over reservation-based causes of action).

What both the majority and dissent in *US-I* and *US-II* overlook is that the reasons given for the holdings in those decisions *require* the conclusion that *Vermillion* is invalid, as a matter of federal law, *with respect to Indian-plaintiff, non-Indian-defendant* cases.

PL280 became law in August, 1953. As held in *Kennerly* and every case discussing its effect (including *US-I* and *US-II*), after PL280's enactment states could exercise jurisdiction over causes of action within PL280's scope only after strict compliance with its requirements.[262] With respect to civil cases, PL280 includes all "civil causes of action between Indians or to which Indians are parties."[263] *US-II* holds, consistently with a long line of cases, that PL280 pre-empts inconsistent state law. Thus, at the time the *Vermillion* decision was rendered, the law it announced had been pre-empted by PL280. The cause of action in *Vermillion* was between enrolled Indian residents of the Standing Rock Indian reservation (clearly within the definition of "Indian country" as used in PL280). The cause of action arose on October 29, 1954,[264] over a year after PL280's

260. 85 N.W.2d 432 (N.D. 1957).
261. *Id.* at 437.
262. *See US-I*, 467 U.S. at 151 n.11; *US-II*, 106 S. Ct. at 2311.
263. PL280, *supra* note 16, at § 4.
264. Complaint, para. I, Vermillion v. Spotted Elk, Burleigh County Dist. Ct. Cause No. § 4 15330, *reprinted* at Defendant's Brief, App. p. 2, Vermillion v. Spotted Elk, North Dakota Supreme Court Cause No. 7664.

enactment and was filed in state court on May 23, 1955, almost two years after PL280's enactment.[265]

Not only did PL280 pre-empt the precise cause of action in *Vermillion*, it pre-empted exercise of state jurisdiction in all cases to which Indians are parties. That necessarily includes the action in *US-I* and *US-II*. *Fisher*[266] teaches that even previously exercised state jurisdiction is pre-empted by PL280. Before *US-I* and *US-II*, there was no indication that PL280 only meant what it said if such a construction would not be adverse to an Indian. Indeed, *Fisher* says the opposite. The problem which the Court attempted to solve by overlooking the infirmities of *Vermillion*, and its own decisions, resulted not from the language used by the North Dakota Assembly, nor from the decisions of the North Dakota Supreme Court but from the language used by Congress in PL280 and the Court's own pronouncements of the meaning of that Act.

IV. "PRE-EMPTIVE" LEGISLATION— STATE CIVIL JURISDICTION AND INDIANS

The legal context in which the *Three Tribes* saga unfolded has been in flux for nearly 500 years. The "proper" relationship between Indians and non-Indians has been debated from the chambers of the Holy Roman Emperor in the 1550s to the chambers of Congress in the 1980s. Though the relationship between state and federal law with respect to Indians has been the subject of dispute since the first Continental Congress, the *Three Tribes* decisions give the development of that relationship only passing notice.[267] However, it is only within a more detailed historical context that PL280, Pub. L. 90-284, or the *Three Tribes* litigation, can be understood.

The truncated "context" employed in *US-I* and *US-II* was: (1) "Historically, Indian territories were generally deemed beyond the legislative and judicial jurisdiction of state government";[268] and (2) "The pre-existing federal restrictions on state jurisdiction over Indian country were largely eliminated . . ." by PL280.[269] It is, perhaps, the emphasis on territory that weakened the analysis at almost every level involved in the *Three Tribes* litigation.

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265. Vermillion v. Spotted Elk, Burleigh County Dist. Ct. Cause No. 15330. Judgment was entered for $750 in favor of the plaintiffs on October 31, 1957, seventeen days after the North Dakota Supreme Court issued its decision.

266. *See* discussion in text at note 133 and Part III.A.2., *supra*.

267. The brief discussion of the development of the state-Indian relationship in those two decisions (about 1 1/2 pages in *US-I*, 467 U.S. at 142-43, and an even shorter summary in *US-II*, 106 S. Ct. at 2307) may not have contributed to the analytical problems those decisions present. However, the failure of the decisions to place themselves in the appropriate context definitely contributed.

268. *US-II*, 106 S. Ct. at 2307 (citing *US-I*, 467 U.S. at 142). Not all of the discussion emphasizing territory is from the 19th Century. *See, e.g.*, C. WILKINSON, *supra* note 63, ch. 4; Craig, *The Indian Tax Cases: A Territorial Analysis*, 9 N.M.L. REV. 221 (1979).

269. *US-II* 106 S. Ct. 2307 (citing *US-I*, 467 U.S. at 143).

A. FUNDAMENTAL RELATIONSHIPS—PRE-PL280

The characterization of pre-PL280 law as "generally" placing "Indian reservations" beyond the legislative and judicial jurisdiction of the states is said to be supported by *Worcester* v. Georgia[270] and *Williams v. Lee*[271] and embodied in the North Dakota Enabling Act.[272] However, the Court also said that the subject matter of the *Three Tribes* litigation[273] and reservation-based causes of action against non-Indians generally,[274] were within the jurisdiction of the North Dakota courts. Those statements are inconsistent on their face.[275]

Even before *Worcester*, the Court had recognized that fundamental state power extended over areas reserved for Indian occupancy; that a state need not have a current right to immediate possession of a particular geographic area before it was capable of exercising legal or governmental (i.e. sovereign) authority within that area.

The 1809 decision in *Fletcher v. Peck*[276] was that the State of Georgia had the power, and jurisdiction, to transfer fee simple interests in land throughout its geographic boundaries despite the fact that occupancy of the land was reserved to Indians and the granted estate could not ripen into possession until the federal government somehow relieved the Indians of that right of occupancy.[277] While decisions such as *Cherokee Nation v. Georgia*[278] and *Worcester* recognize the authority of Indian tribes to operate under their own rules, the basic authority of states to exercise sovereign power throughout their borders was never denied. Twenty-five years after *Worcester*, the Court expressly affirmed the authority of New York to exercise jurisdiction over non-Indians on Indian-occupied lands.[279]

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270. 31 U.S. (6 Pet.) 515 (1832).
271. 358 U.S. 217 (1959).
272. Enabling Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 677.
273. *US-I*, 467 U.S. at 142; *US-II*, 106 S. Ct. at 2308.
274. *US-I*, 467 U.S. at 148-49; *US-II*, 106 S. Ct. at 2308.
275. If read with a prior, relatively thorough, knowledge of Indian law, the opinions can be interpreted as acknowledging that the first statement (that reservations are totally beyond state jurisdiction) does not state the actual situation.
276. 10 U.S. (6 Cranch) 87 (1809).
277. In his dissent in *Fletcher v. Peck*, Justice Johnson made explicit the distinction between the "right of jurisdiction" and the "right of soil."

> [T]he distinction lies between power and interest, the right of jurisdiction and the right of soil.
>
> The right of jurisdiction is essentially connected to, or rather identified with, the national sovereignty. To part with it is to commit a species of political suicide. In fact a power to produce its own annihilation is an absurdity in terms. It is a power as utterly incommunicable to a political as a natural person. But it is not so with with [sic] the interests or property of a nation. Its possessions nationally are in nowise necessary to its political existence; they are entirely accidental, and may be parted with in every respect similarly to those of the individuals who compose the community.

Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 143 (1809) (Johnson, J. dissenting).

Though not frequently articulated, it was the power to freely deal with the "right of soil" that was first removed from (or never recognized as existing in) the powers of the Indian tribes.

278. 30 U.S. (5 Pet.) 1 (1831).
279. New York v. Dibble, 62 U.S. (21 How.) 366 (1858).

The *Fletcher v. Peck* position that the States are the ultimate repositories of territorial authority has not been overruled.

After all of the lands within the United States had been ceded by the Indians, or otherwise freed of Indian occupancy rights, all of the treaties and agreements executed, and reservations subjected to the allotment process, what jurisdiction was left? If they were ever acknowledged as having it, Indian tribes were deprived of the exclusive-geographic component of a "state." Under the Constitution, those geographic attributes rest with the various States. In 1886, the Court noted:

> But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exists within the broad domain of sovereignty but these two.[280]

The Court found that the federal Major Crimes Act[281] "does not interfere with the process of the State courts within the reservation, nor with the operation of State laws upon white people found there."[282]

In *United States v. McBratney*[283] the Court held that Colorado had jurisdiction over the murder, within an Indian reservation, of one white man by another. That ruling was extended by *Draper v. United States*[284] to states whose enabling acts included a restriction on state authority over Indian reservations, and by *New York ex rel. Ray v. Martin*[285] to a state included in the first thirteen.

If not before, at least since *McBratney*, *Kagama* and *Draper*, it has been clear that states have judicial and legislative jurisdiction over causes of action which arise within, and persons present within, Indian reservations.[286] The question is: To what extent does federal Indian law restrict the exercise of state jurisdiction within an Indian reservation? As currently formulated, the test is: "[A]bsent governing Acts of Congress [preemption test], 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 [infringement test]."[287]

Because it had previously decided that PL280 is a governing act of Congress with respect to state judicial jurisdiction, *US-II* focuses on pre-

280. United States v. Kagama, 118 U.S. 375, 379 (1886).
281. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385.
282. *Kagama*, 118 U.S. at 383.
283. 104 U.S. 621 (1881).
284. 164 U.S. 240 (1896).
285. 326 U.S. 496 (1946).
286. *See also, e.g.*, Montana v. United States, 450 U.S. 544 (1981); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1905); Thomas v. Gay, 169 U.S. 264 (1896).
287. Williams v. Lee, 358 U.S. 217, 220 (1959). That statement acknowledges that the sweeping language of *Worcester* should be limited to the subject matter with which the case was dealing, *i.e.* the political relationships between the various peoples involved, not physical territories.

emption. But in its analysis, the verbalized conclusion (based on the truncated "history") that North Dakota did not have jurisdiction over reservation-based causes of action creates problems—particularly because a number of assumptions implicit in the decisions directly contradict that conclusion.

Without acknowledging the need, purpose, or inconsistency, *US-II* begins by establishing that North Dakota's general jurisdiction throughout its geographic boundaries is not limited, in this particular instance, by federal law relating to Indians. That is done, very indirectly, by citing state and federal decisions allowing Indians to pursue actions against non-Indians in state and federal courts.[288] As announced in *US-I*,[289] such state jurisdiction does not *infringe* on tribal self-government interests.[290] However, the Court does not go further to explore the basis for that state jurisdiction. Had it done so, perhaps its decision could have been placed on firmer ground.

Instead of examining the basis for state jurisdiction over reservation-based causes of action in the context of the federal-state relationship, the Court examines only North Dakota state law. It is at this point that *Vermillion* becomes important. *Vermillion* is used to establish, as a matter of *state law*, that North Dakota had and exercised the type of jurisdiction involved. Without establishing that proposition, there would have been nothing for federal law to pre-empt.

Because it used North Dakota law to establish jurisdiction, the Court forced itself into the corner of having to provide a rationale for why that law was not affected by PL280, which the Court had previously said was the controlling federal statute on state civil jurisdiction. This was done by: (1) construing PL280 as intended to facilitate *assumption* of jurisdiction; (2) construing ch. 27-19 as a *disclaimer* of jurisdiction; and (3) assuming that North Dakota courts had exercised jurisdiction *before* PL280's enactment.[290]

> Although any assumption of jurisdiction pursuant to Pub. L. 280 must comply with that statute's procedural requirements, see *Kennerley v. District Court of Montana*, 400 U.S. 423 (1971), Pub. L. 280's requirements *simply have no bearing on jurisdiction lawfully assumed prior to its enactment.*[291]

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288. *US-II*, 106 S. Ct. at 2308 (citing *US-I*, 467 U.S. at 148-49, 151 n.11, which, in turn, cites: McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 173 (1973) (dictum); Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968); Williams v. Lee, 358 U.S. 217, 219 (1959) (dictum); United States v. Calendaria, 271 U.S. 432, 444 (1926); Felix v. Patrick, 145 U.S. 317, 332 (1892); Fellows v. Blacksmith, 60 U.S. (19 How.) 366 (1857); McCrea v. Busch, 164 Mont. 442, 524 P.2d 781 (1974); Paiz v. Hughes, 76 N.M. 562, 417 P.2d 51 (1966); Whiting v. Hoffine, 294 N.W.2d 921, 923-24 (S.D. 1980)).

289. 467 U.S. at 148-49.

290. Focusing on the infringement part of the test of state jurisdiction overlooks the fact that the *Three Tribes* issue is one of pre-emption, i.e. what is the effect of PL280.

291. *US-I*, 467 U.S. at 150-51.

In *US-I*, the Court stated that it did not have the power to revise the North Dakota court's interpretation of state law.[292] But in *US-II* the Court proceeded to conclude that because the North Dakota court interpreted ch. 27-19 as a "disclaimer" of previously exercised jurisdiction, ch. 27-19 conflicted with PL280 as amended by Pub. L. 90-284, and was therefore pre-empted.[293] To reach that conclusion, the Court studiously avoided the words Congress choose to use after " 'comprehensive and detailed . . . scrutiny.' "[295]

Perhaps because of its reluctance to refer to the language of PL280, in *US-II* the Court proceeded to the "balancing" considerations enunciated in *White Mountain Apache v. Bracker*.[296] While it is possible to argue that application of that balancing test was both inappropriate and unnecessary, the Court proceeded to apply it. That discussion, too, avoids consideration of the words used by Congress in PL280.

The only way the Court's "balancing" discussion makes sense is if PL280 is completely removed from consideration. To accomplish that, the Court moved to the "infringement" mode of analysis. In that mode, the Court finds unacceptable ch. 27-19's provision that tribal law is applicable only to the extent it is consistent with state law.[297] That provision, the Court says, infringes on tribal self-government and "simply cannot be reconciled with Congress' jealous regard for Indian self-governance."[298] The strength of that conclusion is seriously undermined by the fact that the "unacceptable" provision (section 27-19-09) is a virtual copy of 28 U.S.C. § 1360(c) as enacted in PL280—and re-enacted in Pub. L. 90-284.[299] If that part of the North Dakota statute infringes on tribal self-government, the infringement is expressly authorized by federal statute.

The second manner in which *US-II* finds that the North Dakota statute infringes on tribal self-government is based upon the assumption that it requires a tribe's waiver of sovereign immunity as a condition of

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292. *Id.* at 151 n.11 (emphasis added).
293. *Id.* at 151-52.
294. *US-II*, 106 S. Ct. at 2310.
295. *Id.* at 2310 (quoting Kennerly v. District Court, 400 U.S. 423, 424 n.1, 427 (1971)).
296. 448 U.S. 136, 144-45 (1980). In that decision, the Court stated:
> More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. *In such cases* we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical notions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

Id. (emphasis added, citations omitted).
297. *US-II*, 106 S. Ct. at 2313.
298. *Id.*
299. The only difference is that N.D. CENT. CODE § 27-19-09 uses "this state" in place of 28 U.S.C. § 1360(c)'s "the state." PL280, *supra* note 16, at § 4(c); Pub. L. No. 90-284 § 402(c) (codified at 25 U.S.C. § 1322(c) (1982)).

access to state court.[300] In that discussion, the Court falls back to the language of PL280, declaring that PL280 has never been read as authorizing state interference with tribal immunity and that Pub. L. 90-284 was enacted because of congressional concern that state actions might (or had) unilaterally interfere with it.[301]

Here, too, the State provisions are a direct product of PL280's removal of restrictions on state jurisdiction. If it is assumed that Congress even considered the issue of tribal immunity, PL280's language requires a conclusion that Congress either intended it to result in abrogation of immunity or assumed it would have no effect on that doctrine. Regardless of which intent is ascribed to Congress, ch. 27-19 should be given the same interpretation. It is abundantly clear that the North Dakota legislature was attempting to adopt the language and intent of PL280—with *added* flexibility favoring Indians.

Because *US-I* said federal law did not preclude North Dakota courts from entertaining reservation-based actions by Indians against non-Indians, the North Dakota court looked to state law to see how that might be accomplished. In its attempt to mold state law into what it had been told federal law was, *ND-II* disavowed its prior conclusion that an individual Indian could not give state courts jurisdiction[302] and then stretched section 27-19-05 to include an Indian tribe within the phrase "individual Indian."[303]

An individual Indian, of course, does not enjoy sovereign immunity. Section 27-19-05's language, designed to allow an individual Indian voluntarily to assume benefits and burdens equal to a non-Indian (as envisioned by the 1953 Congress), was used as a basis for the Court's holding that North Dakota required waiver of immunity. That conclusion is weak on two grounds. First, there is nothing in section 27-19-05 which precludes the application of state exemption laws to individual Indians. Thus, despite its open-ended language, an Indian defendant's property does have state-law protection from levy and execution. There seems little reason why that individual protection could not be equated to tribal immunity, thus avoiding the problem altogether. Second, if federal rules concerning tribal immunity control over 27-19-05, then there is little reason why *Williams v. Lee* would not continue to apply and invalidate the section entirely (as had been previously concluded by the North Dakota Court). That would also have been a simple solution to the waiver of sovereign immunity problem. The Court declined, however, probably because in so doing it would also have to hold that federal law positively requires states to assume jurisdiction over Indian-plaintiff cases—which would directly conflict with PL280 and Pub. L. 90-284.

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300. *US-II*, 106 S. Ct. at 2312-14.

301. *Id.* at 2314.

302. Nelson v. Dubois, 232 N.W.2d 54, 57 (N.D. 1975), *criticized*, *ND-II*, 364 N.W.2d at 104. *See also* Malaterre v. Malaterre, 293 N.W.2d 139 (N.D. 1980). Unfortunately, *Dubois* and *Malaterre* were solidly based on Fisher v. District Court, 424 U.S. 382 (1976), and Pub. L. No. 90-284.

303. *ND-II*, 364 N.W.2d at 57.

In *US-I* and *US-II*, the Court avoided discussing the types of litigation Congress included in PL280, i.e. all reservation-based actions to which an Indian is a party.[304] The major block to considering PL280's language was the Court's prior insistence on its strict interpretation. PL280 unquestionably includes causes of action brought by, as well as against, Indians and the North Dakota decision would have to be sustained. However, a candid examination of PL280 and its legislative history would have allowed the Court to reach the *US-II* result with much less distortion.

B. LEGISLATIVE CONSIDERATION OF PL280

At the core of the difficulty with all four *Three Tribes* decisions and *Vermillion*, lies PL280. At the core of the problem with PL280 lies its characterization as the product of comprehensive, detailed scrutiny by Congress. While it may be accurate with respect to state criminal jurisdiction in the five mandatory states, that characterization does not apply to state civil jurisdiction.

Most of the congressional consideration of the proposals which evolved into PL280 does little to foretell the law's ultimate form. In 1952, H.R. 459 proposed conferring upon all states jurisdiction over criminal offenses involving Indians.[305] However, H.R. 459 preserved federal and tribal jurisdiction, creating a triply-concurrent system.[306] Hearings were held on that proposal concurrently with proposals conferring criminal jurisdiction over Indians upon Montana (H.R. 3235[307]) and California (H.R. 3624[308]). In his initial presentation of the bills at 1952 Hearings, Congressman D'Ewart of Montana, the principal sponsor, proposed amending H.R. 459: (1) to limit its effectiveness to the states of Wisconsin, Minnesota, North Dakota, South Dakota, Montana, Wyoming, Washington and California; and (2) to require a tribal plebescite approving state jurisdiction.[309]

There was a significant difference of opinion between Congressman D'Ewart and the BIA over the most appropriate method of determining which reservations should be included. The BIA opposed reservation plebiscites because it felt that some tribes which did not have adequate law enforcement capabilities would nevertheless vote against state juris-

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304. That language was re-enacted in Pub. L. No. 90-284. Normal rules of statutory construction would require the conclusion that the 1968 Congress examined that language and found it appropriate. That the language was accepted by the assimilationist 1953 Congress and the theoretically pro-self-government 1968 Congress should have strongly suggested the Court's consideration and enforcement of it.

305. H.R. 459, 82d Cong., 1st Sess., *reprinted at State Legal Jurisdiction in Indian Country: Hearings Before Subcomm. on Indian Affairs of House Interior & Insular Affairs Comm. on H.R. 459, H.R. 3235, & H.R. 3624*, at 1, H.R. Serial No. 11, 82d Cong., 1st Sess. (1952) [hereinafter *1952 Hearings*].

306. *1952 Hearings*, *supra* note 304, § 3, at 1. *See also id.* at 33 (testimony of L. A. Sigler, Assoc. Chief Counsel, BIA).

307. H.R. 3235, 82d Cong., 1st Sess. (1952), *reprinted at 1952 Hearings*, *supra* note 304, at 1-2.

308. H.R. 3624, 82d Cong., 1st Sess. (1952), *reprinted at 1952 Hearings*, *supra* note 304, at 2.

309. *1952 Hearings*, *supra* note 304, at 10-11.

diction, thus continuing or exacerbating the lawlessness problem everyone wished to solve.[310] The BIA's counterproposal was language drafted to fit into the format of Title 18, United States Code (federal criminal statutes),[311] and which could be easily amended to add states and exclude particular reservations—after the BIA had the opportunity to review the specific situation with each state and tribe involved.[312] The format of that BIA proposal was almost identical to PL280 section two as finally adopted. Congressman D'Ewart objected to the proposal because it continued, he felt, the "piecemeal" approach and did not allow for tribal participation.[313]

Because the BIA proposal was presented as an alternative to H.R. 3624, that bill, initially providing solely for criminal jurisdiction in California, became the focus of the discussion.[314] In addition to criminal jurisdiction, the BIA proposed substitute to H.R. 3624, in sec. 5, provided:

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310. *See id.* at 25-31 (testimony of Dillon S. Myer, Comm'r of Indian Affairs, giving as an example the Umatilla Reservation in Oregon). As stated by Lewis A. Sigler, Associate Chief Counsel, BIA:

> I think the issue is whether it is better to go to the Indians in advance to obtain their views in consultation and discussion with the tribal leaders and report the results to your committee, or to reverse the process and have this committee pass the legislation which depends for its effectiveness on referendums of the entire Indian population. That process does not cover, by the way, the contingency referred to yesterday that there may be serious lack of law enforcement which the Indians are unwilling to handle and yet which they will refuse to permit the State to handle. I think that leaves a no-man's land.

Id. at 58.

311. During the 1952 hearings, the draftsman of the BIA proposal explained the purpose behind the suggested format. The first paragraph started with "[e]ach of the States listed in the following table shall have jurisdiction." There followed a table with two columns: the left would be a list of states included while the right would list the Indian country within the state included or excluded. Additional states would be added by merely amending the lists. *1952 Hearings, supra* note 304, at 32 (testimony of L. A. Sigler, Assoc. Chief Counsel, BIA).

312. *See id.* at 29-30. That proposal was, in itself, presented as a compromise between the desire to provide general legislation and the then-existing practice of legislating with respect to one state, or even one reservation within a state, following consultation between the state, the affected tribes and the BIA It was, however, more of a change in format rather than substance, from the prior state-by-state legislation.

313. *Id.* at 10-16 (statements of Congressman D'Ewart). While D'Ewart thought approval should come from the individual members of the tribe, the BIA felt the tribal government was the appropriate source. Mr. Sigler, Assoc. Chief Counsel, BIA, testified:

> One final point, and that is on the question of the relationship of the referendum procedure to the process of self-government by the Indians. I would like to express my own opinion that a referendum procedure is not an essential part of the self-government process. It may or may not be. But it very frequently happens that during referendum votes the issue is not thoroughly discussed. It is frequently impossible to get even 20 percent of the Indians to come and vote.
>
> On the contrary, the approach recommended by the Bureau representatives is that the elected tribal representatives, who presumably know more about the business of the tribe than the rank and file, are in a position to discuss the merits of the proposal to subject the Indian reservation to State jurisdiction, and those tribal representatives are speaking for the Indians they represent.

Id. at 57.

314. *See id.* at 29-30 (letter to the Committee by Martin G. White, Acting Ass't Sec. of Interior (title of bill misprinted as "H.R. 3625")).

> The courts of the State of California shall have jurisdiction, under the laws of the State, in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent that the courts of such State have jurisdiction in other civil actions and proceedings.[315]

The testimony showed that was not the first such proposal. Testifying in support of the BIA proposal, representatives of the Mission Indians of Southern California noted a 1950 bill sponsored by Congressman McKinnon of California and supported by the then-Commissioner of Indian Affairs.[316] The 1950 bill included a provision stating:

> All Indians within the State of California shall be subject to the laws of the State . . ., and have access to the courts of the State for the enforcement of their rights and the redress of wrongs to the same extent and in the same manner as any other citizen . . . .[317]

The 1952 testimony revealed significant discussions had taken place over a number of years, in Congress and between the Department of the Interior, various Indian groups, and California officials, concerning removal of federal jurisdictional restraints.[318] Testimony also showed that: (1) about three-fourths of the enrolled members of California Indian tribes lived outside the reservations; and (2) various Indian groups had experienced significant difficulty with state welfare offices and were anxious for federal legislation to obviate those problems, which they felt the BIA proposal would do.[319] The California Indians opposed Congressman D'Ewart's

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315. *Id.* at 30. That section was not in a format, at that time, keyed to Title 28, U.S.C. and there appears to have been no intent to make its expansion to cover more states easily accomplished through simple amendments.

The proposal included, but only with respect to the civil jurisdiction section, the language preventing alienation, encumbrance or taxation of restricted property which eventually appeared with respect to both civil and criminal jurisdiction in PL280.

316. *1952 Hearings, supra* note 304, at 62, 66 (testimony of Purl Willis, delegate of the Mission Indians of Southern California).

317. H.R. 7473, 81st Cong., 2d Sess., as quoted by P. Willis, *1952 Hearings, supra* note 304, at 62.

318. *1952 Hearings, supra* note 304, at 31 (testimony of Dillon S. Myer, Comm'r of Indian Affairs), 67-68 (testimony of P. Willis, representing Mission Indians of Southern California concerning problems with San Diego County officials), 68-71 (opinion of California Attorney General dated Aug. 22, 1951), 101-06 (testimony of F. G. Collett, Exec. Rep., Indians of California, Inc.).

319. Purl Willis, representing the Mission Indians of Southern California testified:

> There are approximately some 20,000 native California Indians. Of this number only about 5,000 or less actually reside on their "reservations" or restricted lands. The remaining some 15,000 or more do not now nor have they ever resided on reservations or restricted lands, but *these Indians live among the general population throughout the State*, most of them owning their own homes. All of these Indian citizens live as individual responsible people, making their living, etc., and asking nor receiving no special favors. They have long ago earned the right to live on equal terms with their fellowmen. And further, many of the men and women included in the 5,000 listed as residing on reservations, make their living off the reservations where they are compelled to go in seeking work. From the record made over the years by the Indian race in California, it must be admitted that these people are just as capable as any other race, not excepting the "best" of the white race.

Id. at 61 (emphasis added).

referendum proposal because of the difficulty, in California, of conducting such an election.[320] However, Indians outside of California supported the referendum proposal, in part because they opposed removal of federal restrictions on the exercise of state jurisdiction.[321]

None of the legislation discussed at the 1952 Hearings passed during that session of Congress. Essentially identical measures were introduced at the next session. Because of the continuing nature of the proposals, congressional consideration during 1953 was limited to closed "mark-up sessions."[322]

The 1953 number for H.R. 3624 was H.R. 1063. The 1953 bill was substantively identical to the BIA's 1952 proposed substitute to H.R. 3624—in the format eventually adopted for PL280, section two (criminal jurisdiction)[323]—but including only California in the list of states, without

320. *See, e.g., id.* at 104-05 (letter from F.G. Collett, Exec. Rep., Indians of California, Inc.). In contrast to Indians in states such as Arizona, Montana and the Dakotas (where the largest Indian populations reside), the Indians in California are scattered in a number of very small reservations, "missions," and "rancherias" throughout much of the state. This circumstance is as much a result of Spanish actions in California as of United States' subsequent actions.

321. *See, e.g., id.* at 82-84 (statement of J. B. Cleveland, Chmn. Colville Business Council), 84-85 (statements of Thomas Yallup, Yakima Indian Tribe and Alex Saluskin, Chmn. Yakima Tribal Council), 87-98 (statement of Frank George, 1st V. Pres., Nat'l Cong. of American Indians, including, *inter alia*, statements of position from the Nooksack Tribe (Washington), Laguna Pueblo (New Mexico), Shoshone-Bannock Tribe (Ft. Hall, Idaho), Northern Cheyenne Tribe (Montana), Minnesota Chippewa Tribe, New Mexico Assoc. of Indian Affairs, Inc.).

322. The "legislative history" created by those "mark-up sessions" has been relied upon in a number of Supreme Court cases. That use severely strains notions of fairness in access to applicable law and takes the current penchant toward reliance on legislative history to almost unreasonable lengths. Transcripts of those sessions are theoretically impossible to obtain. The author found that transcripts were deposited with the National Archives but was informed by that institution that there was a "50-year rule" which prevented distribution without the consent of the Clerk of the House of Representatives. The Clerk of the House of Representatives, in turn, also advised the author of the "50-year" rule and said that no exceptions were allowed. *Despite the Clerk's adamancy, copies are obviously available to selected persons or agencies.*

Transcripts of "unreported" 1953 hearings on proposals concerning removal of restrictions on sales of liquor to Indians, which eventually became 18 U.S.C. § 1161, were produced as Appendices A, B, and C to the Petitioner's Brief on the Merits in Rice v. Rehner, 463 U.S. 713 [S. Ct. Cause No. 82-401] (1983).

Transcripts of "unpublished" 1953 hearings concerning the legislation which became PL280 were produced at Appendix I to the Brief of Appellee Tribe in Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463 [S. Ct. Cause No. 77-388] (1979). These transcripts, as so reproduced, will hereafter be referred to as the *June 1953 PL280 Meeting* and *July 1953 PL280 Meeting*, respectively. The page numbers cited will be those of the transcripts of the hearings, not those of the Appendix.

A transcript of the 1953 PL280 Hearings was also apparently produced by the United States during the briefing of Tonasket v. Washington, 411 U.S. 451 (1973), and a part of that transcript reproduced in an Appendix filed in Bryan v. Itasca County, 426 U.S. 373 [S. Ct. Cause No. 75-5207] (1976). *See Bryan*, 426 U.S. at 381-83 & 383 n.9, *quoting extensively from, and relying heavily upon, that transcript.*

Copies of both the 18 U.S.C. § 1161 hearings and the PL280 hearings, as reproduced in the *Rice v. Rehner* and *Washington v. Yakima Nation* briefs, respectively, are in the author's possession. Copies of the mentioned briefs, except those in *Tonasket v. Washington*, are available in a number of law libraries on microfiche.

323. *See* H.R. REP. No. 848, 83d Cong., 1st Sess. 1 (1953) (PL280 Report). *See also June 1953 PL280 Meeting, supra* note 321, at 2-5.

exception for any reservation. At the committee meeting on June 29, 1953, Harry Sellery, Chief Counsel for the BIA, presented another substitute bill which adopted the BIA-favored format for both the criminal and the civil jurisdiction sections, with the express intention of allowing ease of codification in both Title 18 and Title 28, and ease of amendment when new states were added.[324] With respect to the proposed California civil jurisdiction, Mr. Sellery stated: "the Indians of California have also reached a stage that makes desirable the extension of State civil jurisdiction to the Indian Country in that State."[325] Mr. Sellery did not describe the characteristics of that "stage."[326] Because legislation had been introduced concerning criminal jurisdiction in those states, the BIA recommended that its substitute bill be revised to include, in addition to California, the states of Minnesota (except Red Lake Reservation), Nebraska, Nevada, Oregon (except Warm Springs Reservation), Washington (except, "tentatively," Colville and Yakima Reservations), and Wisconsin (except Menominee Reservation).[327] According to the testimony, other states were not included in that recommendation because no bill had been introduced with respect to them or legislation covering them (such as New York and Kansas) had already passed.[328] The exempted reservations were those represented as having law and order capabilities acceptable to the BIA.

At the June mark-up session, Congressman D'Ewart renewed his effort to obtain a nationally-applicable law.[329] That effort engendered a discussion of the necessity of removing restrictions in some states' enabling acts and constitutions, which the BIA had overlooked in adding states to its most-recent proposal.[330] D'Ewart's effort received Subcommittee approval and a second mark-up session was held on July 15, 1953, at which the Subcommittee's counsel presented a revised draft.[331] The revision included only five states. Nevada was excluded because it would not agree

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324. *June 1953 PL280 Meeting, supra* note 321, at 3-4, 16-17. That identity of format, perhaps inadvertently, created a form of unity between removal of federal restrictions on state criminal jurisdiction and removal of federal restrictions on state civil jurisdiction. Amendment to either the civil or criminal lists without amending the other would require an explanation of why a distinction was being made. During a pro-assimilationist period such as the early 1950s, such explanations would be difficult to make.

The list of states with exemption of selected reservations in the civil jurisdiction section also created at least the appearance that Congress had studied the effect of removing federal restriction on exercise of state civil jurisdiction in those states. However, rather than being the result of congressional scrutiny, the list resulted from copying a format designed for codification, not to meet substantive objectives.

325. *Id.* at 3.

326. The testimony during the 1952 Hearings might support a speculation that California Indians had "reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction." H.R. REP. No. 848, *supra* note 322, at 6. However, an equally, if not more, plausible interpretation is that those Indians had become so dispersed into the general population that no effective tribal institutions were practicable.

327. *Id.* at 17. The Menominee Tribe, along with five other tribes, was scheduled for termination. *See* H.R. REP. No. 848, *supra* note 322, at 4; Act of June 17, 1954, ch. 303, 68 Stat. 250, *repealed by* Pub. L. No. 93-197, 87 Stat. 770 (1973).

328. H.R. REP. No. 848, *supra* note 322, at 17-19.

329. *Id.* at 23.

330. *Id.* at 23-24.

331. *July 1953 PL280 Meeting, supra* note 321.

to assume the cost of law enforcement without federal financial assistance.[332] Washington was excluded because of its constitutional "disclaimer" of jurisdiction over Indian lands.[333] To make it "general" as desired by Congressman D'Ewart, two sections had been added to the BIA-proposed bill. New section six granted federal permission to whatever state constitutional or statutory amendments were necessary to remove enabling act restrictions.[334] New section seven allowed any state to "assume jurisdiction" by legislative action.[335] Those additions frustrated the BIA's attempt to establish reservation-by-reservation scrutiny by taking the BIA and Congress completely out of the process.

As amended, H.R. 1063 was reported out of Committee on July 16, 1953,[336] and passed (without debate) by the House on July 27, 1953.[337] It was subject to no hearings by the Senate Committee on Interior and Insular Affairs, which reported the bill out two days after it was received.[338] It received only brief consideration on the Senate floor before passage on August 1, 1953,[339] and became law on August 15, 1953.

In an obvious understatement, in *Bryan v. Itasca County* the Court said: "In marked contrast [to the discussion of criminal jurisdiction] in the legislative history is the virtual absence of expression of congressional policy or intent respecting section 4's grant of civil jurisdiction to the States."[340] The minor discussion of state civil jurisdiction related to the California Indians, whose situation was remarkably different from the majority of Indians in the United States, particularly those on the larger and more populous reservations. The small, scattered missions and rancherias in California made mixing with the surrounding non-Indian population inevitable. That, together with smaller numbers, also made the creation and economic support of sophisticated (or even adequate) police forces or court systems virtually impossible. As to them, the civil jurisdiction provisions of PL280 may have been required, or at least rational. However, whether it was appropriate for other Indian groups was not the subject of congressional discussion.

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332. Congressman Young from Nevada commented that "only 15 percent of our state is owned by the state and 85 percent is owned by the Federal Government." *July 1953 PL280 Meeting, supra* note 321, at 17.

333. Representative Westland from Washington commented: "I believe the state of Washington was consulted on this matter and they indicated their readiness to take over this jurisdiction as far as criminal and civil was concerned, but they do have a constitution there that requires this amendment in order that they can get at it." *Id.* at 8.

334. *Id.* at 6-11.

335. *Id.* at 8-9, 12. The very brief discussion of this section concerned only the language necessary to enable states to take action to remove any state-law restrictions which had previously be required as a condition of statehood. *Id.* at 8-9. There was no mention of the fact that prior BIA investigation or tribal elections were eliminated as prerequisites to exercise of state jurisdiction.

336. H.R. REP. No. 848, *supra* note 322.

337. 99 CONG. REC. 9,962-63 (1953). *See also* S. REP. No. 699, 83d Cong., 1st Sess. 1 (1953) (the Senate Report is a virtual copy of the House Report).

338. 99 CONG. REC. 10,217 (1953).

339. *Id.* at 10,783-84.

340. Bryan v. Itasca County, 426 U.S. 373, 381 (1976). *See also* Washington v. Confederated Bands & Tribes of Yakima Nation, 439 U.S. 463, 490-93 (1979).

Prior to the mark-up sessions in June and July of 1953, it appears to have been the intent of both the BIA and Congressman D'Ewart to provide some mechanism for allowing a reservation-by-reservation consideration of the advisability of state jurisdiction. Those plans for detailed consideration were victims of the vagaries of the legislative process. The provisions of sections six and seven, which were first presented at the July, 1953, mark-up session and included in PL280, were not given even marginal congressional consideration, much less any degree of "scrutiny."

It is unlikely that the full impact of section seven was given any thought—particularly the fact that it made unilateral state action possible, a result neither Congressman D'Ewart nor the BIA had previously favored. There is nothing in the legislative history concerning either (1) the extent of pre-PL280 state jurisdiction over reservation-based civil actions; or (2) the reasons for choosing the particular language used to identify the types of civil actions to be affected by PL280.

However, one thing did seem to be fully understood. As stated by Congressman D'Ewart, "We are putting these amendments in to take away the federal restrictions."[341]

A second thing fully understood about PL280, and not generally acknowledged in court consideration of it, is that it was a part of a legislative package which also included (1) repeal of federal statutes restricting the sale of liquor to Indians;[342] (2) repeal of federal statutes restricting Indian sale of personal property;[343] and (3) House Concurrent Resolution 108, expressing the sense of Congress concerning termination of Indian tribes and restrictions on Indians.[344] The legislative reports accompanying the legislation make it obvious that PL280 was an important part of the package. The House and Senate Reports on PL280 and Concurrent Resolution 108 each have a "Background History of this Legislation" section. In that section, the congressional program is laid out, in detail, under five headings. The order of the headings in those two reports are different, but the contents are the same.[345] The substance of the statutes approved on August 15, 1953, including PL280, were listed under one of those five headings.

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341. *July 1953 PL280 Meeting, supra* note 321, at 13.

342. H.R. 1055, 83d Cong., 1st Sess. (1953), *adopted as* Act of Aug. 15, 1953, ch. 502, 67 Stat. 586. *See* H.R. REP. No. 775, 83d Cong., 1st Sess. (1953); S. REP. No. 722, 83d Cong., 1st Sess. (1953) (virtual copy of H.R. REP. No. 775).

343. H.R. 3409, 83d Cong., 1st Sess. (1953), *adopted as* Act of Aug. 15, 1953, ch. 506, 67 Stat. 590. *See* H.R. REP. No. 268, 83d Cong., 1st Sess. (1953); S. REP. No. 793, 83d Cong., 1st Sess. (1953) (virtual copy of H.R. REP. No. 268).

344. *See* H.R. REP. No. 841, 83d Cong., 1st Sess. (1953); S. REP. No. 794, 83d Cong., 1st Sess. (1953) (virtual copy of H.R. REP. No. 841).

345. The five headings are:

> 1. Enactment of legislation having as its purpose repeal of existing statutory provisions which set Indians apart from other citizens, thereby abolishing certain restrictions deemed discriminatory.
>
> 2. Enactment of legislation, terminating certain services provided by the Indian Bureau for Indians by transferring responsibility for such services to other governmental or private agencies.
>
> 3. Enactment of legislation provided for withdrawal of individual Indians

C. CONGRESSIONAL INTENT—EVOLUTION OF PL280'S TERMS

Assuming PL280 and Pub. L. 90-284 are ambiguous,[346] the legislative history (not noted in the *Three Tribes* decisions) sheds some light on how the phrasing of those statutes developed. The 1950 proposal was that California Indians "be subject to the laws of the State" *and* "have access to the courts of the State" in the same manner as other citizens.[347] Semantically, the proposal had two parts. The first made Indians subject to state law, without exception. The second removed any doubt about Indians' capacity or standing as plaintiffs in state courts. There is no indication that the draftsman of the 1952 BIA proposal had referred to and consciously departed from the 1950 language. The 1952 proposal was phrased, at least in its initial sentence, as a grant of civil jurisdiction to the state courts.[348] Whether that difference from the 1950 proposal was intended to have a different effect is unknown.

Based upon the language used, it is more likely that the BIA draftsman used the 1950 New York civil jurisdiction act as a model.[349] The operative language of the 1952 proposal and the New York statute are almost identical.[350]

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from Federal responsibility, at the same time removing such individuals from restrictions and disabilities applicable to Indians only.

4. Enactment of legislation terminating Federal responsibility for administering the affairs of Indian tribes within individual States as rapidly as local circumstances will permit.

5. Enactment of legislation terminating Federal responsibility for administering the affairs of individual Indian tribes as rapidly as circumstances will permit.

H.R. REP. No. 794, 83d Cong., 1st Sess. 2-3 (1953) (H. Con. Res. 108); H.R. REP. No. 848, 83d Cong., 1st Sess. 3-5 (1953).

346. The traditional method of statutory interpretation was to examine the words actually used in a statute to determine its meaning. The words were assumed to have their plain and ordinary meaning unless it was fairly obvious that some other definition was intended. It was only upon finding an ambiguity that secondary sources, such as legislative history, were consulted.

The current penchant is to reverse that process. First the "legislative intent" is conjured out of the mass of published (and sometimes unpublished) legislative machinations. The statute's words are then interpreted to fit the discovered intent—not infrequently to the detriment of plain meaning.

347. *See supra* at note 16.

348. *See supra* at notes 316-18.

349. Act of Sept. 13, 1950, ch. 947, 64 Stat. 845 (codified at 25 U.S.C. § 233 (1982)). It is likely that BIA lawyers had easy access to enacted statutes. Even for them, access to proposed but unadopted legislation would be more difficult.

350. The 1950 New York civil jurisdiction statute states:

> The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State . . . .

Act of Sept. 13, 1950, ch. 947, § 1, 64 Stat. 845 (codified at 25 U.S.C. § 233 (1982)).

The 1952 BIA proposal states:

> The courts of the State of California shall have jurisdiction, under the laws of the State, in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent that the courts of such State have jurisdiction in other civil actions and proceedings . . . .

1952 Hearings, supra note 304, at 30. The differences are merely stylistic.

In the BIA substitute proposal at the June 1953 mark-up session, the civil jurisdiction section had been re-drafted to facilitate its inclusion in United States Code, Title 28.[351] Because the language concerning criminal jurisdiction had been previously drafted with a similar purpose in mind, it is not surprising that the re-drafted bill's language concerning criminal and civil jurisdiction was essentially identical. The desire to conform the two provisions to a code format and the sequence of drafting caused that result. The BIA presentation emphasized the parallel treatment of civil and criminal jurisdiction.[352] As approved by the Subcommittee, section two provided:

> (a) *Each of the States listed in the following table shall have jurisdiction over* offenses committed by or against Indians *in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over* offenses committed elsewhere within the State, *and* the criminal *laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State.*[353]

Section four provided:

> (a) *Each of the States listed in the following table shall have jurisdiction over* civil causes of action between Indians or to which Indians are parties which arise *in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over* the other civil causes of action, *and* those civil *laws of such State* that are of general application to private persons or private property *shall have the same force and effect within such Indian country as they have elsewhere within the State.*[354]

The italicized portions are identical. The differences result solely from the fact that the two sections concern different types of litigation. The concentration on uniformity may have created problems of interpretation.

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351. *June 1953 PL280 Meeting, supra* note 321, at 16 (testimony of Harry Sellery, Chief Counsel, BIA).

352. In presenting the re-drafted proposal, the BIA Chief Counsel stated:

> [T]his prototype form we believe will assist in cases of civil and criminal jurisdiction as showing quickly at places in the code where we believe it will be most helpful to attorneys and others what Indian country, if any may be excepted from State civil and criminal jurisdiction.
>
> It may also be observed that there are provisions in the bill which will, we believe, protect the rights of Indian groups without special recognition from the Congress in the form of a treaty, agreement, or statute with respect to hunting, trapping, or fishing or control of licensing and the regulation thereof, and with those protections both on the criminal side and the civil side in the bill it would mark a definite step forward in the inclusion into the general body of the people of the Indians of that particular State with respect to civil and criminal jurisdiction, so that they will be subject to the same laws and the same rules as the other citizens.

June 1953 PL280 Meeting, supra note 321, at 4-5.

353. Act of Aug. 15, 1953, ch. 505, § 2, 67 Stat. 588 (originally codified at 18 U.S.C. § 1162, codified as amended at 25 U.S.C. § 1321 (1982)).

354. *Id.*, § 4, at 589 (originally codified at 28 U.S.C. § 1360, codified as amended at 25 U.S.C. § 1322 (1982)).

D. LEGISLATIVE CONSIDERATION OF PUB. L. 90-284 AMENDMENTS TO PL280

In 1968, PL280 was amended to expressly allow states to exercise less than complete jurisdiction over Indian reservation matters[355] and to allow "retrocession" of all or part of the jurisdiction previously assumed under PL280.[356] That legislation was part of five titles often collectively called the Indian Civil Rights Act (ICRA)[357] and heretofore referred to as Pub. L. 90-284. The ICRA was the result of a seven-year program of the late Senator Sam Ervin of North Carolina, as Chairman of the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary.[358] Senator Ervin's activities and political maneuvering make an instructive text in the congressional process but is beyond the scope of this article.[359]

From 1961 through 1965, Senator Ervin's Subcommittee and its staff made investigations, performed interviews, held hearings,[360] made reports,[361] and prepared an eight-bill, one resolution legislative package.[362] Part of that package, S. 966, revised PL280 in three significant ways. First, it required tribal consent (method unspecified) to any state's "assumption" of either criminal or civil jurisdiction over Indian country.[363] Second,

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355. In 1979, the Court held that state power to exercise jurisdiction piecemeal was implied in PL280. Washington v. Confederated Bands & Tribes of Yakima Indian Reservation, 439 U.S. 463 (1979). The *US-II* position that anything not expressly stated in PL280/Pub. L. No. 90-284 is pre-empted appears inconsistent with *Washington v. Yakima*, and was implicitly rejected in that case.

356. Act of Apr. 11, 1968, Pub. L. No. 90-284, §§ 402, 403, 82 Stat. 77, 79 (codified at 25 U.S.C. §§ 1322, 1323 (1982)). Titles II through VII of Pub. L. No. 90-284 relate to Indians and are codified at 25 U.S.C. §§ 1301-41 (1982). Those titles are often collectively referred to as the "Indian Civil Rights Act" or "ICRA." Of that legislation, sections 401, 402 and 403 are immediately germane to this article. That act has been referred to as *Pub. L. No. 90-284*.

357. *Id.* Title I of Pub. L. No. 90-284 dealt with civil rights generally (nondiscrimination in housing, etc.). Only two sections, in Title II of the Act, deal directly with Indian civil rights (codified at 25 U.S.C. §§ 1302-03 (1982)).

358. Indian-related matters are generally referred to the Senate Select Committee on Indian Affairs.

359. *See* Burnett, *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. ON LEGIS. 557 (1972); Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535 (1975).

360. *Constitutional Rights of the American Indian: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary on S. 961, S. 962, S. 963, S. 964, S. 965, S. 966, S. 967, S. 968, and S.J. Res. 40*, 89th Cong., 1st Sess. (1965) [hereinafter *1965 Hearings*]; *Constitutional Rights of the American Indian: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, Part 1-2*, 87th Cong., 1st Sess. (1961); *Part 3*, 87th Cong., 2d Sess. (1962); *Part 4*, 88th Cong., 1st Sess. (1963) [hereinafter *Const'l Rights Hrgs. Part 1, 2, 3, or 4*].

361. SUBCOMMITTEE ON CONST'L RIGHTS OF SENATE COMM. ON THE JUDICIARY, CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN: SUMMARY REPORT OF HEARINGS AND INVESTIGATIONS, 89th Cong., 2d Sess. (Comm. Print 1966) [hereinafter 1966 SUMM. REPORT]; SUBCOMMITTEE ON CONST'L RIGHTS OF SENATE COMM. ON THE JUDICIARY, CONSTITUTIONAL RIGHTS OF THE AMERICAN INDIAN: SUMMARY REPORT OF HEARINGS AND INVESTIGATIONS, 88th Sess., 2d Sess. (Comm. Print 1964) [hereinafter 1964 SUMM. REPORT].

362. S. 961 through 968, S.J. Res. 40, 89th Cong., 2d Sess. (1965), *reprinted at 1965 Hearings, supra* note 359, at 5-13.

363. S. 966 § 1 (criminal),§ 2 (civil), 89th Cong., 2d Sess. (1965), *reprinted at 1965 Hearings, supra* note 359, at 9-10.

it repealed section seven of PL280 (unilateral state action provision).[364] Third, it authorized the United States to "accept a retrocession" of all or part of the jurisdiction exercised by a mandatory or optional state under PL280.[365] While future assumption of jurisdiction required Indian consent, "retrocession" did not. Any "assumption" or "retrocession" of jurisdiction, could be of less than all, i.e. "piecemeal."

The record of the Subcommittee's 1961 through 1964 hearings consumes over a thousand pages. As intended, the primary focus of those hearings was violations of individual Indian's rights, i.e. those guaranteed vis-a-vis the federal and state governments by the United States Constitution but not guaranteed vis-a-vis tribal governments. Opinion from a number of sources was that where a state had criminal jurisdiction through PL280, local (state) law enforcement was inadequate or nonexistent.[366] It was concluded that Indians were being deprived of their constitutional rights as a result of jurisdictional confusion, inadequate state funding, unfamiliarity of state officers with Indians and tribal conditions, and many other factors.[367]

As expressed in the Subcommittee's 1964 and 1966 Reports, the intent of the proposed amendments to PL280 was to provide flexibility, allowing states and Indian tribes to negotiate the most-acceptable jurisdic-

364. S. 966 § 3(b), *reprinted at 1965 Hearings, supra*, note 359, at 10. That section provided:

> Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

Id.

365. S. 966 § 3(a), *id.* at 10. That section provided:

> The United States is authorized to accept a retrocession by any State of any criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of title 18 of the United States Code, section 1360 of title 28 of the United States Code, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

Id.

366. *See Const'l Rights Hrgs., Parts 1, 2, 3, 4, supra* note 359, *passim.*

367. The Subcommittee's 1964 SUMMARY REPORT states:

> In some of the nine States originally covered by Public Law 280, after unilateral transfer of jurisdiction from Federal to State courts, the already overburdened law enforcement officials were given the added responsibility of patrolling and policing the Indian communities. The lax enforcement resulting from this has given rise to Indian allegations of denial of equal protection of the laws. Some States have claimed that, due to their limited tax base, subsidies should be forthcoming from the Federal Government to assist them in providing adequate law enforcement.
>
> The subcommittee was informed that most States would be willing to assume piecemeal jurisdiction over Indian reservations; however, the wording of Public Law 280 does not expressly provide for such assumption, and this presents a question as to whether jurisdiction must be accepted by the State on a statewide basis. Since the six States that recently assumed jurisdiction over Indians did so on a piecemeal and conditional basis, this problem is of grave current importance, for many Indian citizens are apprehensive about the type of law enforcement and equal protection of the laws which they will receive from the States.

1964 SUMM. REPORT, *supra* note 360, at 13-14.

There were *five* mandatory states under PL280, as enacted. The REPORT's failure to count correctly may tend to lessen the credibility of its other conclusions.

tional structure and, at least impliedly, provide less likelihood of civil rights violations. Accomplishing that intent on a nation-wide scale required the retrocession provision. At that date, before *Washington v. Yakima Nation*, the general opinion was that PL280 created an "all or nothing" situation. Therefore, PL280-mandatory states, and optional states which had adopted PL280-authorized legislation, were given the desired flexibility through the "retrocession" section. For other states, that flexibility was provided by clarifying the provisions allowing "assumption."

After the 1965 hearings, the measures stayed on Senator Ervin's desk until May, 1967, when he introduced redrafted versions.[368] Most of the prior package survived the redrafting process. Added, however, was a requirement that the necessary tribal consent be given through a tribal referendum,[369] as had been desired by Congressman D'Ewart in 1952-53.

The 1967 bills became embroiled in the congressional struggle, amid riots in numerous cities across the country and climaxed by the assassination of Dr. Martin Luther King, Jr., to adopt some civil rights legislation. During legislative action on various civil rights proposals, Senator Ervin attached his Indian constitutional rights measures as Titles II through VI to a civil rights bill which had previously passed the House (H.R. 2516). The Senator also incorporated all of the bills into S. 1843, obtained its separate passage by the Senate, and sent it to the House where strong opposition was expected from the Indian Affairs Subcommittee, including Congressmen Aspinall and Berry who had been members of the House Interior and Insular Affairs Committee when PL280 was originally adopted.

The House Subcommittee on Indian Affairs did hold a hearing on the amended S. 1843, and Congressman Aspinall, Chairman of the full Interior Committee, exercising his prerogative, acted as temporary chairman of the subcommittee and blasted the tactics being used by Senator Ervin.[370] That hearing was held on March 29, 1968, even though the civil rights titles, including the same Indian civil rights provisions, had passed the Senate and been sent back to the House for concurrence over two weeks earlier. As a result of heavy pressure from the administration and the course of events outside the halls of Congress (including United States Marines in full battle gear on guard at the Capitol steps), the civil rights measure was pushed through the House without amendment on April 10, 1967, becoming Public Law 90-284. As one commentator remarked: "In the angry clash of black and white, North and South, Indian law was made."[371]

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368. S. 1843 through 1847 and S.J. Res. 87, 90th Cong., 1st Sess., 113 CONG. REC. 13,473-78 (1967).

369. S. 1845, 90th Cong., 1st Sess., 113 CONG. REC. 13,474 (1967).

370. *See Rights of Members of Indian Tribes: Hearing Before the Subcomm. on Indian Affairs of the House Comm. on Interior & Insular Affairs on H.R. 15419 and Related Bills*, H.R. Serial No. 90-23, 90th Cong., 2d Sess. at 22-23 (1968).

371. Burnett, *supra* note 358, at 614.

With the exception of minor rewording and addition of the referendum provision, the Pub. L. 90-284 provisions concerning state jurisdiction over reservations are combinations of sections two and seven (criminal jurisdiction) and sections four and seven (civil jurisdiction) of PL280. The civil jurisdiction consent provision, codified at 25 U.S.C. sec. 1322, provides:

> The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action *between Indians or to which Indians are parties* which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country . . . to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country . . . as they have elsewhere within that State.[372]

The language adopted in 1953, i.e. "civil causes of action between Indians or to which Indians are parties," survived the years of scrutiny leading to adoption of Pub. L. 90-284 and was continued verbatim.[373]

A significant part of the 1968 enactments, and the one which the Supreme Court held to be a pre-emption by default in *US-II*, provided:

> The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such state pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of his section.[374]

There is nothing in the legislative history of Pub. L. 90-284 explaining the use of the term "retrocession." Both from the general purpose of that provision, i.e. providing flexibility, and the ordinary definition of the word, the reasonable conclusion is that "retrocession" first requires a "cession." As the Court in *US-II* concluded, the only relevant cession of jurisdiction was PL280 and therefore only jurisdiction exercised under PL280 could be retroceded under Pub. L. 90-284.

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372. Act of Apr. 11, 1968, Pub. L. No. 90-284, tit. IV, § 402(a) (codified at 25 U.S.C. § 1322(a) (1982)) (emphasis added).

373. Both Pub. L. No. 90-284 and PL280 use the term "assume" with respect to states not required to exercise jurisdiction. That, too, is probably unfortunate usage because, at least with respect to civil jurisdiction, it implies that states could not previously exercise jurisdiction in any civil action to which an Indian was a party.

374. Act of Apr. 11, 1968, Pub. L. No. 9-0284, tit. IV, § 403, 82 Stat. at 79 (codified at 25 U.S.C. § 1323(a) (1982)).

During the discussion of Pub. L. No. 90-284 on the floor of the House and Senate, there was no mention of the effect of the retrocession provision. *See* United States v. Brown, 334 F. Supp. 536, 541 (D. Neb. 1971).

V. CONCLUSIONS - EFFECT, CAUSE AND POSSIBLE CURE

The United States Supreme Court's *Three Tribes* decisions could be cited for almost any proposition a court wished to reach concerning state jurisdiction over reservation-based civil actions—all that is required is judicious choice between the various presumptions, assumptions, conclusions, and stated reasons. Perhaps, however, the best result would be to limit them to their precise facts—i.e. they do not apply outside North Dakota. However, the decisions do exist and their impact cannot be so cavalierly ignored.

In terms of the application of pre-emption principles in the Indian law setting, *US-II* both proves and disproves the adage that pre-emption principles developed in other fields are not applied. It disproves the adage by adopting a pre-empting-the-field result used in both interstate commerce and foreign-affairs related cases.[375] The pre-eminence of federal interest in foreign affairs matters, recognized in cases such as *Pennsylvania v. Nelson*[376] is similar to federal interests recognized in Indian law matters. In both, the federal government's central position is crucial because of the need for uniformity. In the early days of the nation, the majority of Indian tribes were outside of the effective control of the federal government and, at least from a military standpoint, had to be considered on par with foreign nations. The similarity in treatment is not unreasonable.

The *Three Tribes* decisions prove the adage not in how federal supremacy is applied but in the method of determining what the supreme federal law is. The first Indian law decisions using pre-emption language were not significantly different from interstate commerce cases. Federal legislation was examined to determine its scope and purpose and state law or action was examined to determine if an incompatibility existed. Over the years, the laws have become less important than the general congressional policies they fostered. In *US-II*, however, discovered policy took precedence over statute—and the policy was discovered through a careful selection of the portions of legislation and legislative history to be considered.

Despite the Court's ability to discover otherwise, the purpose of the 1953 Congress was both obvious and express—to force the assimilation of Indians into the general American population; to end federal political and fiscal responsibility. Public Law 280 was a centerpiece. While it did not severe the federal-tribal relationship, in the context of its passage PL280 was most probably understood as retaining only the federal trust responsibility for Indian land and funds. All that was left was for distribution of land to individual Indians and funds to non-governmental trustees.[377] Overlooking the obvious, the Court discovered PL280's

375. Which the Court managed to avoid in Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463 (1979), despite the fact that request was made in *Yakima* but not in *US-II*.

376. *See* Part I.F., *supra*.

377. *See, e.g.*, Klamath Termination Act, Act of Aug. 13, 1954, ch. 732, 68 Stat. 718 (codified at 25 U.S.C. § 564 (1982)).

"policy" by examining a few words of the legislation, commenting on the lack of legislative history showing what that policy was, and then creating an extensive structure from presumed congressional intent.

US-II applied current policy to "discover" the intent of legislation adopted to further directly contradictory policies. While there may be no particular obligation to use heroic efforts to enforce a congressional policy that appears to have been abandoned, Congress has not repealed PL280.[378] Nor has Congress, despite numerous pleas to so do, repealed or repudiated House Concurrent Resolution 108, the assimilationist objective of which PL280 was intended to further.

By construing PL280 through the lens of current policy, *US-II* may ultimately prove detrimental to that policy's realization. PL280 has now been decreed to pre-empt the field of state civil jurisdiction over reservation-based actions involving Indians—as defendants or plaintiffs. Only through compliance with PL280's (as amended) procedural requirements can a state's courts try cases with Indian parties *unless* they had properly and *actually exercised* jurisdiction before August 15, 1953. The effect is to lessen the number of situations in which state courts can entertain jurisdiction of cases with Indian parties. That was not the intent behind PL280 and is not consistent with current policy.[379]

The decision further complicates the question of civil jurisdiction over matters involving Indians. Many states do not have reservations and can not, it seems, comply with PL280's requirements. If PL280 totally occupies the field, those states will never be able to exercise jurisdiction over cases which arise on reservations and involve Indian parties. Similarly, no state would be able to exercise jurisdiction over a case with an Indian party which arose on a reservation in another state, regardless of whether the state had or could adopt PL280-authorized legislation.

In addition, *US-II*'s approach requires consideration of the "meaningfulness" of potential tribal court jurisdiction (as a part of the balancing of state versus Indian interests). That consideration requires not only a state-by-state and reservation-by-reservation analysis, but a case-by-case analysis. If, in a particular instance, tribal jurisdiction could provide an adequate and enforceable remedy, the state court, per *US-II*, would

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378. The relevant substantive provision of PL280 was re-enacted 15 years later as a part of the theoretically pro-tribal-government ICRA.

379. Similarly, the result in *US-II* is not consistent with what little is known of the intent behind the retrocession provision included in Pub. L. No. 90-284. The language of Pub. L. No. 90-284 concerning both the decision to exercise and retrocede state jurisdiction was to provide flexibility, to allow Indian, state and federal government officials to decide on a reservation-by-reservation basis what level of state jurisdiction would be most appropriate (*See* Omaha Tribe of Neb. v. Village of Walthill, 334 F. Supp. 823, *aff'd* 460 F.2d 1327 (8th Cir. 1971), *cert. denied* 409 U.S. 1107.). By limiting the effect of the retrocession provision to the period between 1953 and 1968, *US-II* almost guarantees that no Indian tribe will agree to state assumption of any jurisdiction after 1968.

not have jurisdiction.[380] The same court in the same state in the same type of action may have jurisdiction in another case solely because of the physical location of the defendant's bank accounts. Founding jurisdiction on the inefficacy of another court's remedy is a unique legal concept.

The problems encountered in, and caused by, *US-I* and *US-II* could have been avoided without sacrificing the result. Despite the odds, Indian law does have one constant. Indian law of today is the child of Indian law of yesterday—and yesteryear. Without that context, Indian law is essentially inexplicable; within, it is somewhat less so. The participants in the events which led to the *Three Tribes* litigation, as well as the decisions themselves, seem to have been only tangentially concerned with, or aware of, that constant. In *Warren Trading Post, Oliphant v. Suquamish Indian Tribe,*[381] *Rice v. Rehner*, among many others, the Court has reviewed Indian law history as a yardstick to measure the issues before it. Those decisions recognize and build upon the history of congressional concern with Indian affairs. *Oliphant* and *Rice v. Rehner* conclude that Congress removed, implicitly or explicitly, any power Indian tribes may have had to punish non-Indians for crimes, or independently control liquor distribution within the reservations. In *Warren Trading Post* the Court concluded that Congress continuously controlled commercial relationships between Indian and non-Indian. In *National Farmers Union*, the Court decided congressional attention had not extended to tribal court civil judicial jurisdiction. Perhaps it was a similar, but unstated, conclusion that led the Court to overlook history in its *Three Tribes* decisions.

The Constitution and the Court's decisions concede to states jurisdiction over the subject matter of both criminal and civil litigation arising within their borders, even when those borders encompass an Indian reservation. Without that jurisdiction, states could not try non-Indians for crimes against non-Indians committed on a reservation, or reservation-based contract actions between non-Indians, or reservation-based actions by Indian plaintiffs.

Given that perspective, PL280 and the legislative intent behind it can be understood in a different light. In 1953, Congress' declared desire was to *remove federal restrictions* on state jurisdiction over Indians and Indian reservations. Because there was then (as opposed to post-*US-II*) no federal-law restriction on state-court jurisdiction over Indian-plaintiff cases, PL280 need not have been construed to change the situation. To be sure, the 1953 Congress used the language "civil actions . . . to which Indians are parties," plainly including Indian-plaintiff cases. However, in 1953, Congress did not have the benefit of *Williams v. Lee* or its progeny. Given its desire to remove any doubt concerning the extent of jurisdiction states could exercise, Congress used encompassing language. The

380. And, per *National Farmers Union*, that issue would apparently have to be first presented to the tribal court. Not only would that place a burden on prospective Indian plaintiffs, it would place the tribal court in a difficult dilemma. Under *National Farmers Union*, the tendency would no doubt be for the tribal court to find it had jurisdiction. In contrast, under *US-II*, the tendency would be to find the tribal court's remedy not meaningful.

381. 435 U.S. 191 (1978).

Court's insistence on excruciatingly strict construction of PL280 should not have resulted in losing sight of Congress' basic intent, i.e., removing restrictions. That is particularly true when the language which might have been understood to create the problem was studiously avoided. If the Court in *US-II* had expressly acknowledged the basic problem it confronted (i.e., how to avoid PL280's express inclusion of Indian-plaintiff, non-Indian defendant actions) it may have been able to base its conclusion on solid ground rather than on *Vermillion*.

If the effect of PL280 is properly limited to its express purpose, i.e., eliminating (to the extent of Congress' power) all restrictions on the exercise of state courts' jurisdiction over reservation-based civil matters, the result of *US-II* is retained. North Dakota's ch. 27-19, as construed by the North Dakota Supreme Court, places restrictions on Indian-plaintiff civil cases which did not exist before PL280's enactment. Because PL280 was not intended to add to then-existing restrictions on Indian-plaintiff cases[382] in state courts, that feature of ch. 27-19 is contrary to PL280 and appropriately considered pre-empted.

Not only does the suggested interpretation more closely conform to the enacting Congress' intent, it fosters current Indian law policies. And, equally significant, *Vermillion* is irrelevant and the restrictions on Indian-plaintiff civil actions implied in *US-II* disappear. Indian plaintiffs would be able to bring reservation-based actions against non-Indians in any state, without regard to the state's compliance with PL280—and without having to stretch weak cases like *Vermillion* to such great lengths. Nor would there be any need to undertake the almost impossible task of determining if tribal court jurisdiction would be a "meaningful" alternative.

US-II gives inadequate attention to fundamentals—such as the division of sovereignty between the state and federal governments and the role of history in Indian law. Perhaps that is because the litigation had continued so long; perhaps because of the perceived antipathy between current Indian policy and whatever preceded it. It can only be hoped that its rationales will not cause even further submergence of Indian law by that chimera called policy.

382. Federal law prevented Indian plaintiffs, like non-Indian plaintiffs, from bringing reservation-based civil actions against Indian defendants.