State Jurisdiction Over Indians As A Subject of Federal Common Law: The Infringement-Preemption Test

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Indian tribal governments are becoming increasingly active: tribal councils are enacting a growing body of legislation governing the reservation,[1] and tribal enterprises have been authorized to provide many of the programs previously provided by the federal government.[2] The United States Supreme Court has recognized that in certain instances tribal court jurisdiction is exclusive and may be exercised free of traditional constitutional constraints.[3] This encouragement of stronger and more active tribal governments has led to conflicts between tribal and state courts where both claim jurisdiction.[4]

It is axiomatic that before a court can properly adjudicate a controversy it must have subject matter jurisdiction over the cause of action and personal jurisdiction over the parties.[5] If the court has subject matter and personal jurisdiction but the case involves a foreign element, for example, one of the parties is from another jurisdiction or the cause of action arises in another jurisdiction, the court must decide whether to apply its own law or the law of the foreign jurisdiction.[6]

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1. *See* D. GETCHES, D. ROSENFELT & C. WILKINSON, FEDERAL INDIAN LAW 300-24 (1979) [hereinafter cited as D. GETCHES].

2. The Indian Self-Determinaton and Education Assistance Act, 25 U.S.C. §§ 450a-450n (1976), provides for Indian takeover of programs formerly operated by the Bureau of Indian Affairs as a step in promoting increased Indian self-government. *See id.* at § 450a(6).

3. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). After examining the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1976), which requires tribes to provide equal protection of their laws, *id.* § 1302(8), the Court ruled that matters of tribal membership were an aspect of inherent tribal sovereignty which, under the Act, must be left to the exclusive jurisdiction of the tribe. 436 U.S. at 72.

4. *See, e.g.*, Fisher v. District Court, 424 U.S. 382 (1976); Enriquez v. Superior Court, 115 Ariz. 342, 565 P.2d 522 (Ct. App. 1977); Red Fox v. Red Fox, 23 Or. App. 393, 542 P.2d 918 (1975).

5. *See* R. CRAMPTON, D. CURRIE, H. KAY, CONFLICT OF LAWS 500-01 (2d ed. 1975) [hereinafter cited as R. CRAMPTON]; M. GREEN, BASIC CIVIL PROCEDURE 11-13 (1972).

6. *See, e.g.*, Wells v. Simonds Abrasive, 345 U.S. 514 (1953) (whether the court should apply the forum's statute of limitations or that of the state where the injury occurred); Hurtado v. Superior Court, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974) (whether the court should apply the California rule of damages where the injury was to Mexican nationals involved in an accident

In the area of Indian law, however, the extensive exercise of federal power and the unique history of federal Indian relations has resulted in a complex system for defining the proper scope of state jurisdiction.[7] For instance, the assertion of subject matter jurisdiction by a state court may be preempted by federal law,[8] or may be precluded when it infringes upon tribal sovereignty.[9] Also, where a state court has subject matter jurisdiction over a case involving Indians, the permissibility of applying its own substantive law again depends upon whether the state's law is federally preempted or is an infringement on tribal sovereignty.[10] Although the state courts are increasingly faced with challenges to their jurisdiction and to the application of their laws,[11] they have not been provided with any clear guidelines to enable them to determine whether their exercise of jurisdiction or application of their substantive law is appropriate.[12]

This Note will outline the extent of state court jurisdiction over civil controversies involving Indians absent conferral of jurisdiction by Congress. Supreme Court cases restricting the exercise of jurisdiction will be examined. During the course of this examination, the two tests for determining the propriety of a state court's exercise of jurisdiction—preemption and infringement—will be explored. It will be shown that, absent a congressional conferral of jurisdiction, both the subject matter and the choice of law jurisdiction is given a restrictive interpretation by the federal courts. Public Law Number 83-280 [P.L. 280] will then be examined as illustrative of a congressional conferral of general civil jurisdiction to the states.[13] Specifically, the scope of state jurisdiction

in California); Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972) (whether the New York court should recognize Ontario guest statute where injury was to Ontario guest involved in an accident with a New York driver in New York).

7. *See* D. GETCHES, *supra* note 1, at 388-89.

8. Fisher v. District Court, 424 U.S. 382, 390 (1976).

9. Williams v. Lee, 358 U.S. 217, 223 (1959).

10. *See* Confederated Tribes of Colville v. Washington, 446 F. Supp. 1339 (E.D. Wash. 1978), *appeal filed*, 47 U.S.L.W. 3115 (1978). In *Colville*, the court found that the state's statutory scheme was preempted by a tribal statute on the same subject matter.

11. *See, e.g.*, Fisher v. District Court, 424 U.S. 382, 389-90 (1976) (state jurisdiction over adoption proceedings involving Indians held invalid as an infringement on tribal self-government and alternatively as preempted by federal policy); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 165 (1973) (state tax on reservation Indian's income preempted by federal treaty and statutes); White v. Califano, 437 F. Supp. 543, 548-49, 558 (D.S.D. 1977), *aff'd*, 581 F.2d 697 (8th Cir. 1978) (state lacked jurisdiction for involuntary commitment of Indian living on reservation both by reason of tribal sovereignty and federal preemption).

12. This lack of clarity has been the result of changed circumstances since the early Indian cases, the developing use of preemption analysis, the changed status of individual Indians vis-à-vis the states, and a changing interpretation of the concept of tribal sovereignty. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 167-72 (1973). "Substantive law" as used in this Note means the state court's decisional law as well as the pronouncements of the state's legislative body.

13. Pub. L. No. 83-280, 67 Stat. 588 (codified at 18 U.S.C. § 1162 (1976); 25 U.S.C. §§ 1321-1326 (1976); 28 U.S.C. § 1360 (1976)), is the most extensive conferral of state court jurisdiction and will be examined as illustrative of the analysis employed to determine the proper scope of congressionally conferred state court jurisdiction. For the text of P.L. 83-280, see note 166 *infra*. Although P.L. 280 also grants general criminal jurisdiction to the states, this Note will examine

under P.L. 280 will be explored in light of *Bryan v. Itasca County*.[14] It will be shown that the same policies that favor restricting state subject matter jurisdiction absent congressional conferral of jurisdiction should also apply to restrict the state court's choice of law when exercising jurisdiction assumed under P.L. 280. Finally, it will be argued that the state court's choice of law decision when adjudicating a controversy under its P.L. 280 jurisdiction should be guided by federal Indian policy.

I. STATE JURISDICTION OVER INDIANS AND INDIAN LANDS IN THE ABSENCE OF A CONGRESSIONAL CONFERRAL OF JURISDICTION

The issue of state jurisdiction involves the resolution of three questions.[15] First, does the state court have jurisdiction over the parties (personal jurisdiction)? Second, does the state court have jurisdiction over the issues presented in the case (subject matter jurisdiction)? Finally, if the state court has personal jurisdiction and subject matter jurisdiction, does it also have the power to apply the state's law (substantive and remedial jurisdiction)?

In the ordinary civil case involving Indians, the choice of forum will be between the state or tribal court. As a general rule, the state courts have jurisdiction over a civil action brought by individual Indians to the same extent as suits brought by other state citizens.[16] Tribal courts have general jurisdiction over suits initiated by tribal members against other tribal members or actions brought by non-Indians against tribal members arising out of transactions occurring on the reservation.[17] Conflicts arise when the state assumes jurisdiction over transactions occurring on tribal land, an area of concurrent jurisdiction, and that assumption of jurisdiction is challenged as affecting tribal relations.[18] The validity of the state's assumption of jurisdiction depends upon whether assertion of jurisdiction either infringes on tribal self-government or is preempted by congressional statute or policy.[19]

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only the civil aspects of the statute.

14. 426 U.S. 373 (1976).

15. *See* D. GETCHES, *supra* note 1, at 389.

16. *See, e.g.*, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 173 (1973); Felix v. Patrick, 145 U.S. 317, 332 (1892); Bad Horse v. Bad Horse, 163 Mont. 445, 450, 517 P.2d 893, 895, *cert. denied*, 419 U.S. 847 (1974). The states may not, however, adjudicate matters affecting Indian property subject to restrictions because of its trust status under federal law or matters affecting tribal relations. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 378-81 (1971 reprint of 1942 ed.).

17. F. COHEN, *supra* note 16, at 382.

18. *See, e.g.*, Fisher v. District Court, 424 U.S. 382, 383-84 (1976); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 165 (1973); Williams v. Lee, 358 U.S. 217, 217-18 (1959).

19. *See* text & notes 120-36 *infra*.

Assuming the state court validly obtains jurisdiction, the infringement-preemption test again applies to the state court's choice of law decision.[20] Where application of the state's decisional law would infringe upon tribal sovereignty or has been preempted, the state court must apply a different rule of decision or refuse to exercise jurisdiction.[21] The situation is similar to that of a federal court in a diversity action. There the federal court has jurisdiction to hear the case, but generally it may not apply federal decisional law; rather, the federal court must apply the state's law.[22]

Federal Preemption as a Bar to State Court Jurisdiction Over Cases Involving Indians.

A state court's subject matter jurisdiction and the power to apply its substantive law may be federally preempted.[23] Congress' power to preempt state legislative and judicial action derives from the supremacy clause of the United States Constitution.[24] Thus, federal regulations override conflicting state regulations.[25] The preemption doctrine further provides that when Congress acts pursuant to a plenary power it may prohibit parallel state action.[26] The former is referred to as the conflict ground of preemption and the latter as occupation or preemption of the field.[27] The purpose of preemption is to avoid conflicting regulation of conduct by various official bodies having authority over the subject matter.[28]

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20. *See* Natewa v. Natewa, 84 N.M. 69, 70, 499 P.2d 691, 692 (1972). *See also* Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973).

21. *Cf.* Enriquez v. Superior Court, 115 Ariz. 342, 565 P.2d 522 (Ct. App. 1977). The Arizona Court of Appeals in *Enriquez* held that the right to decide what conduct on the reservation will give rise to civil liability was part of the tribe's right of self-government. The court therefore refused to allow the state courts to exercise jurisdiction to apply the state's tort law. *Id.* at 343, 565 P.2d at 523.

22. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

23. *See* Fisher v. District Court, 424 U.S. 382, 389 (1976) (subject matter jurisdiction); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 180-81 (1973) (substantive law).

24. U.S. CONST. art. VI, cl. 2, provides:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

25. *See, e.g.*, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963); McDermott v. Wisconsin, 228 U.S. 115, 132 (1913); Savage v. Jones, 225 U.S. 501, 533 (1912); J. NOWACK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 267 (1978) [hereinafter J. NOWACK]; L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-24, 377-78 (1978).

26. *See, e.g.*, Jones v. Rath Packing Co., 430 U.S. 519, 525-26 (1977); City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638-39 (1973); Nash v. Florida Indus. Comm'n, 389 U.S. 235, 238-40 (1967). *See* L. TRIBE, *supra* note 25, at 378-79.

27. *See* J. NOWACK, *supra* note 25, at 267-70. Both the occupation and conflict theories of preemption apply to Indian affairs cases. *See* text & notes 57-83 (occupation cases) and 84-118 (conflict cases) *infra.*

28. *See* Amalgamated Ass'n v. Lockridge, 404 U.S. 274, 285-86 (1971). *See also* J. NOWACK, *supra* note 25, at 268; Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the*

In Indian affairs cases, the preemption doctrine has been applied to avoid conflicting regulation of Indian conduct by federal, state, or tribal authorities.[29] The Supreme Court has consistently followed a policy of preemption in cases involving state assertions of jurisdiction over Indian tribes and lands.[30] To the extent that tribes exercise their power of self-government and to the extent that Congress has legislated in a particular area, state subject matter and state substantive law jurisdiction are restricted.[31] The development of the preemption doctrine, both in Indian case law as well as in other areas of the law, and how that doctrine operates to restrict state exercises of jurisdiction, will now be discussed.

Development of the Preemption Doctrine

Congress has the power to regulate commerce with the Indian tribes under the commerce clause[32] and the power to appropriate money for Indian programs under the general welfare clause.[33] These are not, however, the sole sources of congressional power. Congress also derives power over Indian tribes from its ultimate ownership of reservation land and from its power to implement, by legislation, treaties entered into by the President and the Senate.[34] The extensive scope of congressional power over Indian affairs has been repeatedly described as plenary.[35] The result of this extensive power has been strict limitations on the extension of state power into the area of Indian affairs.[36]

Historically, Congress maintained that federal power was exclu-

Burger Court, 75 COLUM. L. REV. 623, 624 (1975); Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 224-25 (1959).

29. For example, in Warren Trading Post v. Arizona State Tax Comm'n, 380 U.S. 685 (1965), Arizona's sales tax was invalidated because it conflicted with extensive federal trading regulations. *Id.* at 686. In Fisher v. District Court, 424 U.S. 382, 383-84, 390-91 (1976), the tribal court assumed exclusive jurisdiction of adoptions where all parties were tribal members thereby preempting state adoption jurisdiction.

30. *See* Antoine v. Washington, 420 U.S. 194, 204-06 (1975); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).

31. *See* United States v. Mazurie, 419 U.S. 544, 547-48, 556-59 (1975); Warren v. Arizona State Tax Comm'n, 380 U.S. 685, 686, 688-90 (1965).

32. U.S. CONST. art. I, § 8, cl. 3. "The Congress shall have the power . . . to regulate Commerce with foreign Nations, and among the several states and with the Indian Tribes." *Id.* This provision and art. I, § 2, cl. 3 are the only constitutional provisions where the term "Indians" is expressly used.

33. U.S. CONST. art. I, § 8, cl. 1. "The Congress shall have Power to . . . provide for the . . . general welfare of the United States."

34. *See* F. COHEN, *supra* note 16, at 89-90.

35. United States v. Mazurie, 419 U.S. 544, 555-56 (1975); Board of Comm'rs v. Seber, 318 U.S. 705, 716 (1943); Stephens v. Cherokee Nation, 174 U.S. 445, 478 (1889). Cohen states that the commerce power together with the treaty-making power gives Congress a "much broader" power over commerce with Indians than commerce between states. F. COHEN, *supra* note 16, at 91.

36. *See* Warren v. Arizona State Tax Comm'n, 380 U.S. 685, 690-92 (1965).

sive of state power on Indian reservations.[37] This theory was formulated during the time when relations with the Indian tribes were implemented through the treaty-making power.[38] The principle underlying this historical treatment was that Indian tribes were separate sovereign nations,[39] and that the power to regulate intercourse between the United States and other nations was vested in the government of the United States to the exclusion of the state governments.[40] The Supreme Court recognized that Indian tribes possessed an inherent sovereignty, which included the power to make treaties with another sovereign.[41]

In 1871, the practice of conducting relations with Indian tribes through treaties was ended.[42] The Indian treaties made up to that time and which remain in effect, however, continue to be an important element of the law applicable to the Indian tribes because, to the extent they are not superseded by a subsequent act of Congress, they remain the supreme law of the United States.[43]

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37. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557, 561 (1832).

38. Until 1871 the United States continued to make treaties with the Indian tribes. In that year the power to make treaties with the tribes was terminated by Congress. Act of March 3, 1871, 16 Stat. 566 (codified at 25 U.S.C. § 71 (1976)).

39. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-61 (1832).

40. *See id.* at 561.

41. *Id.* at 539. The Indian tribes were not, however, regarded as "foreign states" and their power to make treaties was limited to those made with the United States. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). *See also* Canby, *Civil Jurisdiction and the Indian Reservation*, 1973 UTAH L. REV. 206, 207.

42. *See* Williams v. Lee, 358 U.S. 217, 221-23 (1959).

43. *See* U.S. CONST. art VI, cl. 2. *See* note 24 *supra*. The continuing viability of these treaties is demonstrated by the fact that the Supreme Court continually looks to treaties to resolve conflicts concerning the current status of tribes. *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206-08 (1978); Antoine v. Washington, 420 U.S. 194, 200-02 (1975); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 173-74 (1973). After 1871 Congress utilized statutes, rather than treaties, in its relations with Indian tribes. *See* Note, *The Extension of County Jurisdiction Over Indian Reservations in California: Public Law 280 and the Ninth Circuit*, 25 HAST. L. REV. 1451, 1463-64 (1974). The concept of exclusive federal jurisdiction with the consequence that state law could have no force on Indian territory began to deteriorate after 1871. Chief Justice Marshall had said in *Worcester v. Georgia* that, "[t]he treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States; and provide that all intercourse with them shall be carried on exclusively by the government of the Union." 31 U.S. at 557. Since congressional policy at the time was to assimilate Indians into white society and to phase out the role of the United States government, it is not surprising that the Supreme Court allowed these extensions of state jurisdiction over Indian lands. The Dawes Act, 24 Stat. 388 (1887) (codified at 25 U.S.C. §§ 331-358 (1976)), provided that Indian land was to be allotted to individual Indians for farming. The goal of this legislation was to make the Indians self-sufficient as farmers and end the government's role in protecting and supervising the Indian reservations. *See* Canby, *supra* note 41, at 210; Clinton, *Development of Criminal Jurisdiction over Indian Lands: The Historical Perspective*, 17 ARIZ. L. REV. 951, 966 (1975). The failure of the Dawes Act led to the enactment of the Indian Reorganization Act, 48 Stat. 284 (1934). F. COHEN, *supra* note 16, at 210-16. See "Service of Process on Indian Reservations: A Return to Pennoyer v. Neff," 18 ARIZ. L. REV. 741, 742 (1976). By 1881, however, the Court held that, in the absence of an express jurisdictional disclaimer, the state of Colorado would have jurisdiction over criminal offenses committed by a non-Indian against another non-Indian even though the crime was committed on an Indian reservation. United States v. McBratney, 104 U.S. 621, 624 (1881). Congress, in the Enabling Acts admitting certain states into the Union, had required that the state disclaim jurisdiction over Indian reservations, that jursidiction to remain exclusively in Congress. Draper v.

The preemption doctrine has developed extensively in commerce cases[44] and the development of the doctrine in the realm of Indian law has paralleled that in the commerce cases.[45] The Supreme Court, in early commerce cases, described the exercise of Congress' power as being inherently exclusive.[46] The Court used this same language in proscribing state assertions of jurisdiction over Indians in the earlier Indian affairs cases.[47] Under this view of the commerce clause, when Congress acted there could be no concurrent state jurisdiction either with reference to interstate commerce or in conducting relations with Indian tribes.[48] Action of Congress taken pursuant to its commerce power has been described as "occupying the field."[49] The court's role when confronted with an occupation case was to determine whether the state law obstructed the accomplishment of the congressional purpose.[50] If so, the state's action would be held invalid.[51]

In later cases, the Court began to look beyond the mere scope of the congressional enactment to whether Congress intended to preempt state jurisdiction in that field.[52] The role of courts in determining

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United States, 164 U.S. 240 (1896), extended the *McBratney* holding by construing the disclaimers as not applying to offenses committed by a non-Indian against another non-Indian on the reservation. *Id.* at 246-47. *See also* Canby, *supra* note 41, at 209-10. Canby cited *McBratney* and *Draper* as cases that destroyed the *Worcester* notion that states had no jurisdiction over Indian territory. After these cases, states had some jurisdiction over Indian land, if only over non-Indians on that land. *Id.* at 210.

44. *See, e.g.*, Great Atlantic & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 380-81 (1976); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 319-21 (1851); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210 (1824). *See also* Engdahl, *Preemptive Capability of Federal Power*, 45 U. COLO. L. REV. 51, 52 (1973).

45. *See* text & notes 85-154 *infra*. The reason for the analogous development is that the commerce clause, U.S. CONST. art. I, § 8, cl. 3, is one of the main sources of Indian law. *See* F. COHEN, *supra* note 16, at 91-92.

46. *See, e.g.*, Missouri Pac. R.R. v. Stroud, 267 U.S. 404, 408 (1925); Charleston W.C. Ry. v. Varnville Furniture Co., 237 U.S. 597, 604 (1915); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210 (1824). *See also* Engdahl, *supra* note 44, at 53.

47. *See, e.g.*, United States v. Kagama, 118 U.S. 375, 379-80 (1886); The Kansas Indians, 72 U.S. (5 Wall.) 737, 755-57 (1866); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).

48. *See* Engdahl, *supra* note 44, at 53.

49. *See* Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

50. *See* J. NOWACK, *supra* note 25, at 268.

51. *See, e.g.*, Swift & Co. v. Wickham, 382 U.S. 111, 120 (1965); Public Util. Comm'n v. United States, 355 U.S. 534, 544 (1958); Henderson v. Mayor of New York, 92 U.S. 259, 273 (1875).

52. *See* New York State Dept. of Social Services v. Dublino, 413 U.S. 411, 414-18 (1973); Goldstein v. California, 412 U.S. 556, 559-60 (1973); J. NOWACK, *supra* note 25, at 68-70. Engdahl designates three separate situations in which Congress exercises its preemptive power over state law. *See* Engdahl, *supra* note 44, at 57-63. The first is where Congress enacts legislation to achieve an end within the scope of a power enumerated in the Constitution. *See id.* at 57. Where Congress is exercising its legislative power to achieve a goal of a constitutionally delegated power, Congress has the power to preempt state regulations that interfere with either congressional legislation or the goals it seeks to achieve. The enumerated powers of Congress are those contained in art. I, § 8 of the Constitution. *Id.* The second is where Congress enacts legislation, not to achieve a specifically enumerated power, but to achieve an object that is entrusted to Congress by implication through the necessary and proper clause. *See id.* at 62-63. Engdahl says, however, that an enactment pursuant to the necessary and proper clause is only valid to the extent that it is an appropriate means to achieve an object within the enumerated powers. *Id.* at 63. The third situation is where Congress exercises an enumerated power to achieve an end that is extraneous to the

whether Congress has the ability to preempt a given state regulation is to determine, preliminarily, whether the congressional enactment falls within the powers granted to the federal government by the Constitution.[53] Once a court determines that Congress is acting pursuant to an enumerated power, the Court will then determine whether a challenged state regulation interferes with the end Congress is seeking to achieve or the means employed to achieve that end. If so, the state regulation will be preempted.[54]

Where Congress is exercising its power under the necessary and proper clause, however, Congress determines whether the means are appropriate to achieve an end within its enumerated powers.[55] The courts in this situation will only look to whether a "rational basis" exists for the congressional enactment.[56] To determine whether the above described analysis can be appropriately applied to cases involving state assertions of jurisdiction over Indians, an examination will now be made of Supreme Court cases where such assertions of jurisdiction have been tested.

1. *The Occupation Cases*

One of the earliest cases to test the validity of a state's exercise of jurisdiction over an Indian reservation under the occupation rationale was *Worcester v. Georgia*.[57] The *Worcester* Court found that the laws of Georgia could have no effect within the boundaries of the Cherokee reservation since they would interfere with the United States' relationship with the tribe.[58] Chief Justice Marshall found that when the Constitution was formed, the whole power of regulating Indians was vested

ends entrusted to the national government. *See id.* at 63-67. This would be the situation where a particular regulation of Congress has numerous consequences, for example, federal taxation imposed as a deterrent to gambling, *see* Marchetti v. United States, 390 U.S. 39, 59-61 (1968), or transactions in drugs, *see* Minor v. United States, 396 U.S. 87, 98 n. 13 (1969). So long as Congress is exercising its power to achieve an end within the scope of its enumerated functions, extraneous consequences are irrelevant to the constitutionality of Congress' action. Engdahl, *supra* note 44, at 67.

In the first two situations a state regulation will be preempted by the federal regulation if it interferes with the accomplishment of the congressional objective. In the third situation, however, Congress cannot preempt a state regulation that tends to frustrate an objective outside the scope of those powers entrusted to Congress by art. I, § 8 of the Constitution. *See id.* at 69.

53. *See* Engdahl, *supra* note 44, at 79.

54. *See* Castle v. Hayes Freight Lines, 348 U.S. 61, 63-64 (1954).

55. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819); Engdahl, *supra* note 44, at 80.

56. *See* Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964); *see also* Morton v. Mancari, 417 U.S. 535, 555 (1974).

57. 31 U.S. (6 Pet.) 515 (1832).

58. *Id.* at 561. "[The laws of Georgia] interfere forcibly with the relations established between the United States and the Cherokee Nation, the regulation of which, according to the settled principles of our Constitution, are committed exclusively to the government of the Union." *Id.*

in Congress.[59] Thus, the restriction which had existed in the Articles of Confederation that the exercise of the national legislative power must not interfere with or violate a state's legislative power was removed.[60] Marshall's view that Congress' power to regulate intercourse with the Indians was exclusive is consistent with his construction of the commerce clause in cases involving interstate commerce.[61]

Although there is language in *Worcester* speaking of the Indian tribes as distinct, independent nations capable of self-government,[62] the Court based its decision on constitutional preemption.[63] Marshall construed the treaties between the United States and the Cherokee nation as a recognition by the United States of the Cherokees' right to self-government.[64] He then read this right of self-government as an implied

59. *Id.* at 559.

60. *See id.* at 558-59. *Worcester* followed an earlier case in which Marshall apparently accepted the argument that in regulating commerce with the Indians, Congress' power was exclusive and interference by the states would not be allowed. In Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), the tribe argued that the power of Congress was exclusive and forbade any interference by the states. *Id.* at 7. Marshall, in dicta, appeared to accept this argument: "[T]he United States shall have the sole and exclusive right of regulating the trade with the Cherokees." *Id.* at 17.

61. In three cases, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824), Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 446-49 (1827), and Willson v. Black-Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 250-51 (1829), Marshall laid down his conception of the commerce power as being exclusive in Congress. *See* F. FRANKFURTER, THE COMMERCE CLAUSE 14-28 (1964 ed.). But Marshall left room for the exercise of state police power in certain circumstances. See Willson v. Black-Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 251 (1829). In *Black-Bird Creek*, Marshall found that the action of the state, building a dam across a marshy stream, did not interfere with the commerce clause in its "dormant" state; the regulation was an exercise of "police" power rather than commence power. *See* 27 U.S. (2 Pet.) at 252.

62. *See* 31 U.S. (6 Pet.) at 559.

63. *Id.* at 561-62. *Worcester* involved a challenge to laws of the state of Georgia which made it a crime for any white person to reside on the Cherokee Nation without a license from the governor of Georgia. *See id.* at 523. Worcester was convicted of violating these laws. *See id.* at 531. Worcester argued unsuccessfully in the state court that Georgia could not constitutionally impose its laws on the Cherokee Nation. *See id.* Worcester then appealed his case to the United States Supreme Court. *See id.* at 532. In order to establish jurisdiction in the United States Supreme Court, Worcester had to show that his appeal fell within the provisions of § 25 of the Judiciary Act of 1789 because that statute enumerated the cases in which a final judgment of a state court could be reviewed by the United States Supreme Court. *See id.* at 541. To fit within § 25, Worcester had to show that the laws of Georgia were "repugnant to the Constitution, treaties or laws of the United States." *See id.* Thus, a mere showing that the laws of Georgia interfered with the sovereignty of the Cherokee Nation would be insufficient to ground jurisdiction in the Supreme Court. *See id.* at 561. As the Court stated:

> If the objection to the system of legislation, lately adopted by the legislature of Georgia, in relation to the Cherokee nation, was confined to its extra-territorial operation, the objection, though complete, so far as respected mere right, would give this court no power over the subject. But it goes much further. If the review which has been taken be correct, and we think it is, the acts of Georgia are repugnant to the constitution, laws, and treaties of the United States.

Id. However, showing that the burden on sovereignty imposed by Georgia's laws violated the established relationship between the Cherokees and the United States was sufficient to ground jurisdiction in the Supreme Court to declare Georgia's law invalid. "The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States. The act of the state of Georgia, under which the plaintiff in error was prosecuted, is consequently void, and the judgment a nullity." *Id.*

64. *See id.* at 549-57.

term of the treaties. Marshall thus created a federal common law right of self-government for the Cherokees which could not be interfered with without impairing the treaty.[65] The supremacy clause would invalidate any such state legislation.[66] This accounts for Justice Black's statement in *Williams v. Lee* that "essentially, absent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[67]

The test for the validity of an application of state law to a controversy involving an Indian is thus a bifurcated one. First, it must be ascertained whether there is an applicable congressional enactment. If so, a determination must be made as to whether that enactment preempts state law. If it does, the state enactment is voided. If it does not, or if there is no congressional enactment, the question of whether the state's action infringes upon the tribe's right to self-government must be resolved.[68]

Cases following *Worcester* carried forward the interpretation of the commerce power of the national government as being "inherently exclusive." The Supreme Court held that the federal power to interpret treaties could not be interfered with by any individual or state.[69] If an act of Congress regulated intercourse with the Indians, even though it might possess many of the attributes of the state police power, the congressional statute would govern to the exclusion of the state rule.[70] The Court rejected arguments that Congress could only regulate Indians when they were living in tribes and that Congress could not constitutionally interfere with the police power of the states.[71] The Court held that to accept this argument would make the state law the supreme law of the land in violation of the Constitution.[72]

In *The Kansas Indians*,[73] the Supreme Court used the same "inher-

65. *See id.* at 561. *Cf.* Banco Nacional de Cuba v. Sabbatino, 376 U.S 398, 425-27 (1964) (international relations is an area that cannot be interfered with by state authority and is, therefore, to be governed solely by federal common law).

66. *See* Castle v. Hayes Freight Lines, 348 U.S. 61, 63-64 (1954).

67. 358 U.S. 217, 220 (1959).

68. *See* text & notes 119-65 *infra*.

69. *See* Lattimer's Lessee v. Poteet, 39 U.S. (14 Pet.) 4, 14 (1840).

70. *See* United States v. Holliday, 70 U.S. (3 Wall.) 407, 416-19 (1865). The Court during this period also applied a similar preemption doctrine to the governmental activities of the Indians. In Mackey v. Coxe, 59 U.S. (18 How.) 100 (1855), the Court admitted that the power of government within the Cherokee Nation was guaranteed to the Indians by treaty, subject to the condition that laws enacted by the Cherokee government not be inconsistent with the Constitution or laws of Congress. *Id.* at 102. The Court stated: "their [Cherokee's] laws shall be consistent with the Constitution of the United States, and acts of Congress which regulate trade and intercourse with the Indians." *Id.* at 103. This language indicates that the Court recognized the commerce clause as a major source of the power of Congress to preempt Indian legislation.

71. United States v. Holliday, 70 U.S. (3 Wall.) 407, 410 (1865).

72. *Id.* at 419.

73. 72 U.S. (5 Wall.) 737 (1866).

ently exclusive" theory of preemption, but did not rely on the commerce power of Congress. Rather, the Court relied upon the treaty power, holding that so long as the tribe maintained its tribal organization and its treaty-making capability, it would remain under the exclusive jurisdiction of Congress and the state could not interfere.[74] Thus, the Court need not rely solely on Congress' commerce clause power as a basis for finding congressional preemption of a state regulation of Indians.[75] In none of these early cases did the Court rely on notions of "inherent Indian sovereignty"; rather, it looked to whether Congress had acted under a constitutional grant of authority so as to exclude state regulation over the subject matter at issue.[76]

In *McClanahan v. Arizona State Tax Commission*,[77] the state of Arizona attempted to apply the state's individual income tax to reservation income earned by a Navajo. The Arizona Court of Appeals upheld this assertion of jurisdiction and the Arizona Supreme Court denied review.[78] The United States Supreme Court reversed,[79] finding that Arizona had exceeded its lawful authority.[80] The *McClanahan* Court stated the current policy of the Supreme Court of analyzing assertions of state jurisdiction under a theory of federal preemption.[81] The source of the federal government's preemptive authority, according to the *McClanahan* Court, is derived from the treaty-making power and the congressional responsibility for regulating commerce with In-

74. *Id.* at 755.

75. The statute overturned in *The Kansas Indians* was a tax on lands that had been allotted to and were owned in fee by individual Indians. The Court, nonetheless, ruled that so long as the political department of government recognized the existence of the tribal organization, the government of the Union over the Indians would be exclusive. *Id.* The Court further held that the Indians' submission to some of the laws of the state did not alter the result—the jurisdiction of the United States was still exclusive. *Id.* at 758-59. *See also* The New York Indians, 72 U.S. (5 Wall.) 761, 771-72 (1866). In testing whether the state law was preempted in a treaty situation, the Court in Best v. Polk, 85 U.S. (18 Wall.) 112 (1873), looked to the intention of the parties to the treaty and tried to give effect to the treaty in accordance with those intentions. *Id.* at 115-16. The Court has also admitted that there are situations where state jurisdiction can extend over a reservation when that jurisdiction is not excluded by treaty but that even in such a situation the Indians on the reservation might still be exempt from process. *See* Langford v. Monteith, 102 U.S. 145, 147 (1880). The Court stated that Congress, in admitting a state into the Union or in forming a territorial government, had undoubted authority to exclude the operation of the state or territorial government within federal or reserved Indian land. *See id.* at 146. The Court added that, in the absence of a treaty expressly excluding the extension of state or territorial jurisdiction, the state would have jurisdiction over the Indian land with the restriction that jurisdiction not extend to Indians. *Id.* at 147.

76. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973). Justice Marshall indicated that the trend was away from notions of inherent Indian sovereignty, *id.*, but examination of early cases demonstrates that the notion was never the chief ground of reliance. See discussion of cases in text & notes 32-66 *supra*.

77. 14 Ariz. App. 452, 454, 484 P.2d 221, 223 (1971), *rev'd*, 411 U.S. 164 (1973).

78. *Id.*

79. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 173 (1973).

80. *Id.*

81. *See id.* at 171-72.

dian tribes.[82] The Court, after examining the relevant treaty and congressional legislation, determined that application of Arizona's tax would interfere with matters left to the exclusive powers of the federal government and the Indians themselves.[83] This is traditional preemption analysis and makes clear the infringement-preemption dichotomy. Where Congress has exercised its authority in the area over which the state seeks to assert jurisdiction, the state's action will be preempted and the federal court need not rely on infringement analysis. Although occupation cases constitute a significant body of preemption case law, the courts have also looked to whether the state jurisdiction was in actual conflict with congressional statutes or treaties.

2. *The Conflict Cases*

As early as 1858, in *New York v. Dibble*,[84] the Court recognized that the state police power could have application to Indian lands.[85] The state statute at issue in the case, however, was one the Court found operated to the benefit of the Indians by protecting their lands from intrusion by white settlers.[86] The Court expressly found that the statute was in conflict with no law of Congress nor any treaty and thus was not preempted.[87] The Court recognized, however, the state's right to exercise its police power to preserve peace and protect the Indians.[88]

In *Organized Village of Kake v. Egan*,[89] the Court held that off-reservation fishing rights could be regulated by the state because there was no congressional intent to forbid such regulation.[90] The Court also found that there could be no infringement claim because the regulated activity was not on a reservation.[91] With respect to off-reservation activities, the question is not whether the state's action infringes upon tribal self-government but whether that action impairs a right granted or reserved by federal law.[92] In other words, the Court looks to whether assumption of state jurisdiction conflicts with federal law. For example, in *Antoine v. Washington*,[93] the Supreme Court held that the supremacy clause prohibited Washington's game and fish laws from

82. *Id.* at 172 n.7.
83. *Id.* at 79-80.
84. 62 U.S. (21 How.) 366 (1858).
85. *Id.* at 370.
86. *Id.* at 370-71.
87. *See id.* at 370.
88. *Id.* This case is consistent with the view of federalism and the commerce clause that a state law will only be overturned when an explicit conflict with a congressional enactment is shown. *See* F. FRANKFURTER, *supra* note 61, at 50-55.
89. 369 U.S. 60 (1962).
90. *See id.* at 64-65.
91. *Id.* at 75-76.
92. *See id.* at 75-76.
93. 420 U.S. 194 (1975).

being applied to Indians because they conflicted with congressional legislation ratifying an executive agreement.[94]

In *Warren Trading Post v. Arizona Tax Commission*,[95] the Court overturned a state tax imposed on a reservation trading post because it was inconsistent with federal statutes applicable to Indians.[96] Looking to the extensive regulatory scheme set up by Congress, the Court found that allowing the state tax could disrupt the federal statutory plan.[97] Furthermore, the Court found no congressional intent to allow the state to impose the tax.[98]

In *Mescalero Apache Tribe v. Jones*,[99] a companion case to *McClanahan*, however, the Court recognized that states generally do have authority to regulate off-reservation Indian activities absent express federal law forbidding state regulation.[100] The challenged regulation was a tax on the gross receipts of a tribal ski resort. The Court examined the congressional legislation to determine whether the state's tax had been prohibited.[101] The Court held that there was nothing in the history or terms of the Indian Reorganization Act[102] to bar state taxation of an off-reservation enterprise.[103]

Analysis of the foregoing cases reveals that if state regulations interfere with congressional policy when Congress is exercising its plenary authority over Indian affairs, state regulation will be preempted under the supremacy clause. As will be seen, this preemption analysis will at times control the state court's choice of law when exercising P.L. 280 jurisdiction.[104] The preemption doctrine will at times require that the state court apply the tribe's substantive law in civil litigation if that court is to properly exercise its congressionally conferred jurisdiction.

II. THE INFRINGEMENT TEST AS A BAR TO STATE COURT JURISDICTION OVER CASES INVOLVING INDIANS.

Indian tribes have been recognized as having the powers of self-

94. *Id.* at 205.
95. 380 U.S. 685 (1965).
96. *Id.* at 686.
97. *See id.* at 690-91.
98. *Id.* at 691. An alternative ground for preempting the state's tax was that Congress had occupied the field pursuant to its commerce power. *See id.* at 691 n.18.
99. 411 U.S. 145 (1973).
100. *Id.* at 148-49.
101. *See id.* at 150-54. In *Mescalero*, the Court looked to the relevant treaty and statutes to determine whether the state's action in taxing an Indian enterprise off the reservation was inconsistent with congressional policy. *Id.* at 148-54. The Court rejected the notion of inherent exclusivity of congressional jurisdiction, *id.* at 147, and looked instead to the intent of Congress to ascertain whether state law should be preempted. *Id.* at 150-52.
102. 25 U.S.C. §§ 461-479 (1976).
103. 411 U.S. at 157-58. The Court also refused to grant the tribe an exemption from taxation based on the doctrine of intergovernmental immunity. *Id.* at 155.
104. *See* text & notes 171-80 *infra*.

government derived from their status as "distinct, independent, political communities."[105] "The Indian tribes have the inherent power to define conditions of tribal membership, to regulate domestic relations of members, to prescribe rules of inheritance, to levy taxes, to regulate property within the jurisdiction of the tribe, to control the conduct of members by municipal legislation, and to administer justice."[106] The tribes have these powers not through grants of power by Congress but as vestiges of their inherent powers as sovereign nations.[107] By conquest, the tribal powers of external sovereignty, for example the power to make treaties with foreign governments, were extinguished.[108] However, the Indian tribes retain complete power of internal self-government subject only to treaties and express legislation of Congress.[109] Congress, by statute, recognized the power of Indian tribes to organize to protect their general welfare and to enact a constitution and by-laws.[110] The Indian tribes actively exercise this power of self-government through regulating commercial activity, establishing licensing requirements for various commercial activities, and regulating land use on the reservation, including the management and development of natural resources.[111]

In civil jurisdiction matters, where jurisdiction is not expressly given to the state by congressional statute, a tribe has jurisdiction over non-Indians.[112] This jurisdiction has been exercised in Indian taxation of non-Indian property used in connection with a business conducted with Indians,[113] in tribal imposition of a requirement of a liquor license,[114] and in regulation of business transacted by non-Indians

105. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832). *See also* F. COHEN, *supra* note 16, at 122.

106. F. COHEN, *supra* note 16, at 122; *see* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-58 (1978).

107. F. COHEN, *supra* note 16, at 122. *See also* United States v. Wheeler, 435 U.S. 313, 322 (1978); "Double Jeopardy and Successive Prosecutions by Tribal and Federal Courts," 19 ARIZ. L. REV. 638, 647-51 (1977).

108. "Powers of Indian Tribes," 55 Interior Dec. 14, 22 (1934).

109. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 173 (1973); F. COHEN, *supra* note 16, at 123.

110. Indian Reorganization Act of 1934, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-479 (1976)). *See also* Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 95-96 (8th Cir. 1956).

111. AMERICAN INDIAN POLICY REVIEW COMMISSION, REPORT ON TRIBAL GOVERNMENT, TASK FORCE TWO: TRIBAL GOVERNMENT 27 (Comm. Print 1976) (hereinafter cited as REPORT ON TRIBAL GOVERNMENT).

112. *See* United States v. Mazurie, 419 U.S. 544, 557-59 (1974). *See also* J. Will, Environmental Protection of Indian Lands and Application of N.E.P.A., Institute on Indian Lands and Application of N.E.P.A., Institute on Indian Land Development, Paper 8, at 17 (Rocky Mt. Min. L. Fdn., 1976).

113. Morris v. Hitchcock, 21 App. D.C. 565, 593 (1903), *aff'd*, 194 U.S. 384 (1904). The tribal taxing power is not subject to constitutional restraints imposed on the exercise of state and federal taxing power by the fifth and fourteenth amendment due process clauses. *See* Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89, 98-99 (8th Cir. 1956); F. COHEN, *supra* note 16, at 143.

114. United States v. Mazurie, 419 U.S. 544, 546-49 (1975). The Court upheld a tribal ordinance requiring that a liquor salesman, who operated a bar within the reservation boundaries but

within the Indian reservation.[115]

Since tribal sovereignty is limited only by treaty or by express congressional statutory limitation,[116] these sources must be consulted to determine whether the tribal judicial or legislative jurisdiction has been restricted. Thus far, the only significant restriction placed on tribal judicial jurisdiction has been upon its adjudication of criminal matters.[117] To the extent tribal powers are exercised pursuant to congressional delegation or congressional policy, the tribes have the power to preempt conflicting state regulations.[118]

Since Indian tribes possess these inherent powers of self-government, whether the assertion of state jurisdiction without congressional authorization is appropriate depends in part upon whether the state court's action infringes on the tribe's right of self-government.[119] State jurisdiction over matters affecting Indians can only be exercised where Congress has specifically delegated the power to the states[120] or where there is no interference with the right of tribal self-government.[121] The "infringement" test is the proper standard for determining the validity of a state court's assumption of jurisdiction absent a congressional conferral of jurisdiction.[122]

The "infringement" test was first enunciated by the Supreme Court in *Williams v. Lee*.[123] In *Williams*, the issue was whether a non-Indian trader who operated a general store on the Navajo Indian reservation could bring an action in state court to collect a bill owed him by Indians who lived on the reservation and who had purchased goods on credit.[124] Justice Black enunciated a test for judging the extent of permissible state jurisdiction: "Essentially, absent governing Acts of Con-

on privately owned land, be required to obtain a tribal liquor license even though he was licensed by the state.

115. Buster v. Wright, 135 F. 947, 950 (8th Cir. 1905).

116. *See* F. COHEN, *supra* note 16, at 122.

117. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978) (tribe denied the power to prosecute non-Indians for offenses committed on the reservation).

118. *See* Fisher v. District Court, 424 U.S. 382, 390 (1976); United States v. Mazurie, 419 U.S. 544, 546 (1975). *See also* Major Crimes Act, 18 U.S.C. § 1153 (1976).

119. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170-71 (1973). The infringement test as applied to state subject matter jurisdiction has been chiefly limited to state exercises of jurisdiction over non-Indians on Indian land because, generally, absent congressional authorization, states have no jurisdiction over Indians on tribal land. *See id.* at 171; Williams v. Lee, 358 U.S. 217, 220-21 (1959).

120. F. COHEN, *supra* note 16, at 379; "Powers of Indian Tribes," 55 Interior Dec. 14, 22 (1934).

121. *See* Williams v. Lee, 358 U.S. 217, 220 (1959). *See also* F. COHEN, *supra* note 16, at 379-81; Note, *Sovereignty, Citizenship and the Indian*, 15 ARIZ. L. REV. 973, 974 (1973).

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

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

124. *Id.* at 217-18. Justice Black, as a preface to his opinion, stated that the *Williams* test was in response to modifications made to the principles of *Worcester v. Georgia* in cases "where essential tribal relations were not involved and where the rights of Indians would not be jeopardized." *Id.* at 219.

gress, 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."[125] Justice Black concluded that allowing assumption of jurisdiction by the Arizona court over a suit by a non-Indian against an Indian for a debt incurred on the reservation would undermine the authority of the tribal courts and thereby impermissibly interfere with the Navajos' right of self-government.[126] However, had there been no tribal forum for adjudication of the controversy in *Williams*, the state court would not have infringed on the tribe's right of self-government by providing a forum.[127] *Williams* is the clearest example of the "infringement" test applied in the context of testing whether the state court has subject matter jurisdiction.[128]

The *Williams* infringement test has been limited primarily to attempted exercises of jurisdiction over non-Indians[129] because in such situations both the state and the tribe have an interest in asserting jurisdiction.[130] However, in *Fisher v. District Court*,[131] the Supreme Court applied the infringement test to an attempted exercise of subject matter jurisdiction by a Montana district court over an adoption proceeding where all the parties involved were Indians and all the relevant events had taken place on the Indian reservation.[132] The Court found that Montana's exercise of jurisdiction was not sanctioned by federal statute and would plainly interfere with tribal self-government.[133] Refusal to allow state exercise of jurisdicition in this situation is understandable because the tribe's interest is great, the state's interest is minimal, and the interference with tribal court functions is substantial.[134]

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125. *Id.* at 220.
126. *Id.* at 223.
127. The Court emphasized that the Navajo tribe had a functioning court system, *id.* at 221-22, and that exercise of state jurisdiction would undermine the authority of those courts. *Id.* at 223.
128. The infringment test then, is a federal judicially created doctrine which defines the proper tribal-state jurisdictional relationship absent congressional legislation. It is a "principle formulated by federal judicial law" thought by the Supreme Court to be necessary to protect the unique federal-tribal relationship. *Cf.* Banco Nacional de Cuba v. Sabittino, 376 U.S. 398, 426 (1964) (the act of state doctrine is a unique creation of the federal judiciary for the purpose of protecting federal interests in the area of foreign affairs).
129. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 179 (1973). *See also* United States v. Mazurie, 419 U.S. 544, 556-58 (1974); Organized Village of Kake v. Egan, 369 U.S. 60, 74-76 (1962).
130. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. at 179.
131. 424 U.S. 382 (1976).
132. *See id.* at 387-88.
133. *See id.* In *Fisher*, the Court said that "at least the same standard" as that enunciated in *Williams* must be met where the litigation involved only Indians. *Id.* at 386. The Court also found that exercise of jurisdiction by the Montana court was preempted because the Cheyenne tribal court had, pursuant to congressional statute and in furtherance of Congress' policy, assumed exclusive jurisidiction over adoptions. *Id.* at 390.
134. *See id.* at 387-88.

Analysis of State Court Jurisdiction by Reference to Status of Party and Locus of Transaction

The propriety of a state court's exercise of jurisdiction is influenced by whether the parties to the litigation are Indian or non-Indian and whether the transaction underlying the cause of action occurred on or off the reservation.[135] There are seven possible combinations of parties and loci of transaction that affect a court's determination of jurisdiction over actions involving Indians.[136]

Although tribal jurisdictional statutes generally have refused to confer jurisdiction on tribal courts where an Indian plaintiff sues a non-Indian defendant for a transaction that occurred on the reservation,[137] they are not prevented from doing so if their tribal councils undertake such jurisdiction.[138] There is no constitutional or congressional prohibition preventing them from assuming such jurisdiction.[139] The state court would also have jurisdiction to hear a case where the plaintiff is an Indian, the defendant a non-Indian, and the transaction took place on a reservation.[140] In this situation, the state is merely providing a forum for the Indian plaintiff; there is no interference with tribal self-government because the tribe has no governmental interest in protecting non-Indian defendants.

Where an Indian plaintiff sues an Indian defendant for an on-reservation transaction, an exercise of state jurisdiction would clearly constitute an infringement on tribal self-government, at least in the case where the tribe has a functioning judicial system.[141] In this situation, all the relevant contacts are on the reservation and only the tribe has an interest in adjudicating the controversy.[142] Here, where the

135. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 119-21 (1942). The location of the transaction and the status of the parties determine whether there are sufficient non-Indian questions involved to justify the assertion of state juridiction. *Id.*

136. The various combinations of parties and location are: (1) Indian plaintiff, non-Indian defendant, on-reservation transaction; (2) Indian plaintiff, Indian defendant, on-reservation transaction; (3) non-Indian plaintiff, Indian defendant, on-reservation; (4) non-Indian plaintiff, non-Indian defendant, on-reservation; (5) Indian plaintiff, Indian defendant, off-reservation; (6) Indian plaintiff, non-Indian defendant, off-reservation; or (7) non-Indian plaintiff, Indian defendant, off-reservation.

137. *See* 3 NAVAJO TRIBAL CODE tit. 7, § 253(2) (1978); Canby, *supra* note 41, at 223.

138. *See* Canby, *supra* note 41, at 221.

139. *See id.*

140. *See, e.g.*, Felix v. Patrick, 145 U.S. 317, 332 (1892); Harrison v. Laveen, 67 Ariz. 337, 347, 196 P.2d 456, 462 (1948); Paiz v. Hughes, 76 N.M. 562, 564-66, 417 P.2d 51, 53-54 (1966). *See also* Canby, *supra* note 41, at 221.

141. *See, e.g.*, Fisher v. District Court, 424 U.S. 382, 386 (1976); Whyte v. District Court, 140 Colo. 334, 338-39, 346 P.2d 1012, 1014, *cert. denied*, 363 U.S. 829 (1960); Gourneau v. Smith, 207 N.W.2d 256, 258-59 (N.D. 1973). "Since this litigation involves only Indians, at least the same standard [as *Williams v. Lee*] must be met before the state courts may exercise jurisdiction." Fisher v. District Court, 424 U.S. at 386. *But see* State *ex. rel.* Iron Bear v. District Court, 162 Mont. 335, 340-41, 512 P.2d 1292, 1297-99 (1973) (state jurisdiction over divorce proceeding between two reservation Indians upheld).

142. *See* cases cited in note 141 *supra.*

threat of interference with tribal self-government is greatest, a tribe may, in certain situations, make its jurisdiction exclusive over a certain subject matter.[143] This was the case in *Fisher v. District Court*,[144] where the tribe, by statute promulgated pursuant to congressional policy, assumed exclusive jurisdiction over adoptions.[145]

A non-Indian plaintiff suing an Indian defendant over an on-reservation transaction is the situation presented in *Williams v. Lee*,[146] and in such a case the infringement test applies in full force. In *Williams*, the Court held that jurisdiction would lie in the tribal court after finding that the transaction occurred on the reservation, between parties living on the reservation and where the tribe had a functioning judiciary.[147]

A New Mexico case, *Alexander v. Cook*,[148] involved a non-Indian plaintiff suing a non-Indian defendant for a cause of action arising out of a busines transaction on an Indian reservation. The New Mexico Supreme Court, analogizing to cases allowing state taxation of non-Indians,[149] held that the state court's exercise of jurisdiction did not infringe on tribal self-government nor was it preempted.[150] This is a logical result because in a case where none of the parties are Indians the tribal court has little interest in adjudicating the controversy.

Where an Indian plaintiff sues an Indian defendant for an off-reservation transaction, there would be concurrent jurisdiction.[151] The state would have an interest because the transaction occurred within its jurisdiction, and the tribe would have an interest because a tribal member, or members, is involved.

Where the parties to the litigation are an Indian and a non-Indian and the transaction occurred off the reservation, the interest of the tribe in adjudicating the matter would necessarily be small and the possibility of interference with tribal self-government negligible. The state court could therefore properly exercise exclusive jurisdiction.[152]

The foregoing analysis would change if there is no available tribal

143. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65-66 (1978); Fisher v. District Court, 424 U.S. 382, 384-85 (1976).
144. 424 U.S. 382 (1976).
145. *See id.* at 384 nn. 5 & 6.
146. 358 U.S. 217. *See also* Enriquez v. Superior Court, 115 Ariz. 342, 565 P.2d 522 (1977).
147. 358 U.S. at 222-23.
148. 90 N.M. 598, 566 P.2d 846 (1977).
149. *See id.* at 601-02, 566 P.2d at 848.
150. *Id.* at 602, 566 P.2d at 848-49.
151. *See* Fisher v. District Court, 424 U.S. 382 (1976); Bad Horse v. Bad Horse, 163 Mont. 445, 450-51, 517 P.2d 893, 895-96 (1974).
152. In general, an Indian can sue in any state court of competent jurisdiction for wrongs committed to his person or property off the reservation. F. COHEN, *supra* note 135, at 94-98. "In matters not affecting either the Federal Government or the tribal relations, an Indian has the same status to sue and be sued in state courts as any other citizen." *Id.* at 379. *See also* Harrison v. Laveen, 67 Ariz. 337, 347, 196 P.2d 456, 462 (1948) (*citing* F. COHEN, *supra* note 135, at 379).

forum. In such a situation, state court cognizance of a case, even in the situation where all parties are Indian and the transaction occurred on an Indian reservation, would not infringe upon tribal self-government because the tribe is not exercising its power.[153] The infringement test as it relates to subject matter jurisdiction should be resolved by reference to whether the tribe has assumed jurisdiction over the subject matter. Assumption of jurisdiction evidences tribal interest in the subject matter. Tribal interest in the subject matter, in turn, determines the extent of intrusion on the proper functioning of the tribal institution caused by state assumption of jurisdiction.[154]

The same infringement test that is applied to determine the appropriateness of subject matter jurisdiction[155] is applied to test the validity of application of state substantive law to Indian reservations. Explicit in Justice Black's infringement test is that Congress has always assumed that the states have no power to regulate the affairs of Indians on a reservation.[156] The rule governing the applicability of state law is: "State laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law."[157] Thus, the "infringement" test in both the subject matter jurisdiction and choice of law contexts relates to Indian sovereignty.[158] For example, in applying the "infringement" test to choice of law problems, it has been held that application of a state's civil commitment law would infringe on tribal sovereignty,[159] and that application of its substantive tort law to a cause of action which arose on an Indian reservation would infringe on the tribe's right to decide what conduct will give rise to civil liability.[160]

153. *See* Williams v. Lee, 358 U.S. 217, 222 (1959). In *Williams*, the Court adverted to the development of the Navajo tribal court system in holding that Arizona's exercise of jurisdiction would infringe on tribal self-government by undermining the authority of the tribal courts. *Id.* at 222-23.

154. *See id.* at 221-23. *See also* Wakefield v. Little Light, 276 Md. 333, 346-51, 347 A.2d 228, 236-39 (1975) (applying an interest analysis to a state-tribal jurisdictional dispute).

155. The infringement test is "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." Williams v. Lee, 358 U.S. 217, 220 (1959).

156. *Id.*

157. Mescalero Apache Tribe v. Jones, 411 U.S. 147, 148 (1973); Organized Village of Kake v. Egan, 369 U.S. 60, 75 (1962). However, in certain special areas — taxation of Indian lands or income — the state cannot impose its laws without congressional consent. Mescalero Apache Tribe v. Jones, 411 U.S. at 148. This is because Congress, by statute and regulation, has consistently protected the tax exempt status of reservation Indians. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 176 (1973).

158. *See* White v. Califano, 437 F. Supp. 543, 548 (D.S.D. 1977), *aff'd*, 581 F.2d 697 (8th Cir. 1978). In *White v. Califano*, the issue was whether the state could involuntarily commit a reservation Indian to a mental institution. *Id.* at 547. Resolution of this issue turned on whether application of the state's civil commitment law infringed on tribal self-government or was federally preempted. *Id.* at 548. The Court held that the procedure of involuntary commitment was inconsistent with the tribe's sovereignty and thus outside the state's power. *Id.* at 549-50.

159. *See* White v. Califano, 437 F. Supp. 543, 550 (1977), *aff'd*, 581 F.2d 697 (8th Cir. 1978).

160. Enriquez v. Superior Court, 115 Ariz. 342, 343, 565 P.2d 522, 523 (1977). In *Enriquez*, the issue was whether an action for injuries sustained in an automobile accident on an Indian reserva-

The "infringement" test in the choice of law context, however, is apparently becoming of lesser significance. Because federal legislation in the area of Indian affairs is extensive,[161] courts will often be able to rely on federal preemption as the ground for disallowing application of the state's law, Indian sovereignty being only a background element.[162] In addition, a court reviewing the propriety of the application of state law can also rely on the preemption rationale where a tribal ordinance, passed pursuant to federal authority, conflicts with state law.[163] Finally, many of the elements of sovereignty captured by the "infringement" test may be guaranteed in applicable treaties and statutes.[164]

It has been shown that the effect of the infringement-preemption test is to restrict state court jurisdiction. However, Congress can also confer jurisdiction on state courts. The effect of the infringement-preemption test where Congress has conferred jurisdiction will now be discussed in the context of P.L. 280, which is the most extensive jurisdictional grant Congress has made to state courts.

III. PREEMPTION-INFRINGEMENT ANALYSIS APPLIED TO PUBLIC LAW 280

Public Law 280[165] is a congressional delegation of criminal and civil jurisdiction over Indian reservations to five states.[166] The act also

tion could be brought by non-Indians in state court. *Id.* The Arizona Court of Appeals held that the right to decide what conduct will give rise to civil liability on an Indian reservation was included in the tribe's right of self-government. *Id.* at 343, 565 P.2d at 523. In McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973), the Supreme Court implied that a state tax that was preempted by federal legislation might also infringe upon tribal sovereignty. See *id.* at 179. "In fact we are far from convinced that when a state imposes taxes upon reservation members without their consent, its action can be reconciled with tribal self-determination." *Id.*

161. Some notion of the scope of the federal regulation of Indian affairs can be inferred from the fact that an entire volume of the United States Code is devoted to federal statutes involving Indians. *See generally* 25 U.S.C. (1976).

162. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 158-59 (1973).

163. *See* United States v. Mazurie, 419 U.S. 544, 556-58 (1975).

164. *See* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172-75; Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-58 (1973). It is well settled that a federal treaty is the supreme law of the land, *see* Hines v. Davidowitz, 312 U.S. 52, 62-63 (1941), and that the provisions of a treaty will preempt state law which is inconsistent with or impairs the policy of a treaty or which conflicts with the terms of a treaty. *See* United States v. Pink, 315 U.S. 203, 230-31 (1942). In United States v. Washington, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976), the court held that the state of Washington could not impose on Indians fishing regulations that were in conflict with treaties in force between the United States and the Indian nations. *Id.* at 684-85. Similarly, in Sac & Fox Tribe v. Licklider, 576 F.2d 145, 150 (8th Cir. 1978), the court held that although the state had initial police power to regulate fishing, that power could be preempted by federal treaty. *Id.* In Mescalero Apache Tribe v. O'Cheskey, 439 F. Supp. 1063, 1066-67 (D.N.M. 1977), the court ruled that the United States' treaty with the Mescalero Apaches preempted extension of the state's tax law to the Indians, *id.*, although non-Indians working within the reservation could be taxed. *Id.* at 1072-73.

165. Act of August 15, 1953, 67 Stat. 588.

166. This Note addresses only the civil aspects of P.L. 280. *See* Act of August 15, 1953, 67 Stat. 588 (codified at 18 U.S.C. § 1162; 25 U.S.C. §§ 1321-1326; 28 U.S.C. § 1360 (1976)). P.L. 280 provides in part:

provides a general section to allow states not specifically listed to as-

§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

(a) Each of the States listed . . . 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 of Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing, or the control, licensing, or regulation thereof.

§ 1360. State civil jurisdiction in actions to which Indians are parties

(a) Each of the States listed . . . 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 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 . . . .

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

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

. . . .

Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

Sec. 7. 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.

Section 7 of the Act was repealed by the Indian Civil Rights Act, 25 U.S.C. § 1323(b) (1976), but the repeal did not affect cessions of jurisdiction made prior to the repeal. For an analysis of P.L.

sume jurisdiction over Indian country[167] under certain specified conditions.[168]

Although the legislative history behind P.L. 280 is limited, the primary motivation of Congress in passing the statute was to implement law and order on certain Indian reservations not having adequate tribal law enforcement.[169] The assumption behind passage of the act was that the condition of lawlessness on or near Indian reservations would cease upon implementation of state jurisdiction and state provision of law enforcement services.[170]

In *Bryan v. Itasca County*,[171] the Court held that P.L. 280 did not confer jurisdiction upon the state to impose a personal property tax on property located within a reservation.[172] The Court determined that P.L. 280 was enacted to permit courts of the five states to hear civil actions between Indians or actions between Indians and non-Indians arising on reservations.[173] This portion of the Court's opinion related to the state's subject matter jurisdiction. Because there was a statute conferring jurisdiction, there was no infringement or preemption obstacle to the imposition of subject matter jurisdiction.[174] With respect to "state law jurisdiction," the *Bryan* Court stated that P.L. 280 only authorizes state courts to apply their rules of decision in disputes brought under the conferred jurisdiction.[175] Given the *Bryan* Court's construction of P.L. 280, a question still exists as to how the infringement-preemption analysis operates to limit the state's jurisdiction under the statute.

280, see Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. REV. 535 (1975).

167. *See* note 166 *supra*, § 7. Section 7 was repealed by the Indian Civil Rights Act, 25 U.S.C. § 1323(b) (1976), but a provision was placed in that act which allowed assumption of P.L. 280 jurisdiction with the consent of the affected tribe. *See id.* § 1321(a).

168. The Act provided in § 6 that its provisions will not become effective until the states assuming jurisdiction have properly amended their statutes or constitutions to remove any impediments to assuming jurisdiction. *See* note 166 *supra*.

169. Bryan v. Itasca County, 426 U.S. 373, 380 (1976). *See* Goldberg, *supra* note 166, at 541-42; REPORT ON TRIBAL GOVERNMENT, *supra* note 111, at 15.

170. *See* Bryan v. Itasca County, 426 U.S. 373, 379-80 (1976); [1953] U.S. CODE CONG. & AD. NEWS 2411, 2411-12.

171. 426 U.S. 373 (1976).

172. *Id.* at 377-79.

173. *Id* at 383.

> Piecing together as best we can the sparce legislative history of § 4 of P.L. 280, subsection (a) seems to have been intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes . . . .

Id.

174. *See id. Cf.* Williams v. Lee, 358 U.S. 217, 222-23 (1959) (Arizona had no subject matter jurisdiction in suit brought by non-Indians against Indian because the state had failed to comply with P.L. 280).

175. *See* 426 U.S. at 384.

The Role of the State Court When Congress Confers Jurisdiction

When Congress confers jurisdiction on a state court that otherwise would not be competent to hear the case, the state court is obliged to follow the federal policy of the act conferring jurisdiction.[176] This obligation stems from the supremacy clause of the Constitution.[177] If a particular state law conflicts with the policy of the act giving jurisdiction, the state's law must give way.[178] In addition, where states have jurisdiction over causes of action created by federal law,[179] the state court must apply the substantive rules developed in the federal courts rather than its own law.[180]

Public Law 280 was not enacted to destroy the Indian-federal relationship or to destroy tribal self-government.[181] In order for a state to properly exercise its P.L. 280 jurisdiction, its exercise should be guided by the federal common law,[182] which includes the preemption-infringement test.[183] The purpose of federal common law is to implement the federal constitution and statutes and the policies underlying them.[184] The federal policy intended to be implemented in Indian affairs cases is the protection of the proper jurisdictional roles of the state, tribal, and federal authorities. This policy can best be accomplished by resolving the issue of the role of tribes vis-à-vis the states and the federal government by resort to federal law rather than state law.[185] Just as foreign policy is a matter for the federal rather than state government to determine,[186] so too Indian policy is a matter for federal determination.[187]

176. *See* Mondou v. New York, N.H. & H.R.R., 223 U.S. 1, 57 (1911).

177. *See* Miles v. Illinois Central R.R., 315 U.S. 698, 703-04 (1942).

178. California v. Taylor, 355 U.S. 553, 559-61 (1957).

179. Federally created cause of action situations are analogous to the P.L. 280 situation because in both the state court would lack jurisdiction but for a congressional enactment.

180. *See* C. WRIGHT, LAW OF FEDERAL COURTS § 45, at 196 (3d ed. 1976).

181. See Bryan v. Itasca County, 426 U.S. 373, 388-89, 391-92 (1976).

182. "Federal common law" is the body of decisional law created by the federal courts in construing the federal constitution and congressional statutes and in providing law in areas where resort to state law is not appropriate, for example, controversies between states about inter-state streams. See C. WRIGHT, *supra* note 180, § 60, at 279.

183. *See* text & notes 111-15 *supra*. *See also* Testa v. Katt, 330 U.S. 386, 392-93 (1947). In Indian affairs, a large body of the controlling law is federal common law. The whole notion of tribes as dependent sovereign nations and the infringement test which developed therefrom is a product of judicial law-making. *See, e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 596, 603-04 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16-20 (1831); and Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 542, 553-57, 559-61 (1832), which established the status of Indian tribes as a matter of federal common law.

184. *See* D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 471-72 (1942) (Jackson, J., concurring); C. WRIGHT, *supra* note 180, § 60, at 279.

185. *Cf.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964). In *Sabbatino*, the Court held that the act of state doctrine required that federal rather than state law be applied so that the proper role of the United States vis-à-vis foreign governments could be maintained. "[A]n issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law." *Id.*

186. *See* Zschernig v. Miller, 389 U.S. 429, 437-38 (1968).

187. *See* United States v. Kagama, 118 U.S. 375, 379-80, 383-85 (1886).

Thus, state courts in exercising their P.L. 280 jurisdiction must look to federal law to ascertain the particular federal Indian affairs policy which exercise of state jurisdiction is intended to implement.[188]

The Proper Role of State Courts Exercising P.L. 280 Jurisdiction in Light of Federal Common Law

The state courts must exercise their conferred jurisdiction so as not to impede the current congressional policy that Indians exercise self-government.[189] State courts can achieve this purpose within the framework of the infringement-preemption tests. If the tribe in question does not have a forum for Indian grievances, there is no problem with preemption[190] or infringement.[191] As tribal institutions develop, however, and begin to take over provision of law and order functions as well as provide civil forums, the state jurisdiction should contract to allow for the exercise of tribal self-government.

If the tribe does have a competent forum, then the state and tribal courts will exercise concurrent jurisdiction.[192] The exercise of concurrent jurisdiction raises no problems so long as the tribal and state substantive laws are not at odds;[193] it merely provides an alternative forum.

Where a state does exercise concurrent jurisdiction, pursuant to P.L. 280, it is compelled to apply tribal customs or ordinances only to the extent that those laws are not in conflict with any applicable civil

188. *Cf.* Zschernig v. Miller, 389 U.S. 429, 440-41 (1968) (where state laws interfere with the nation's foreign policy or conflict with a treaty, they must bow to the superior federal policy).

189. *See* Indian Financing Act of 1974, Pub. L. No. 93-262, 88 Stat. 77 (codified in scattered sections of 25 U.S.C.). *See also* Bryan v. Itasca County, 426 U.S. 373, 386 (1976); Fisher v. District Court, 424 U.S. 382, 386, 391 (1976). An expansive interpetation of P.L. 280 jurisdiction, that all the state's civil laws extend to the reservation, is consistent with a policy of eliminating Indian self-government and Indian self-determination. *See generally* Bryan v. Itasca County, 426 U.S. 373 (1976). For the proper tribal role to be maintained in states where P.L. 280 applies, the law must be strictly construed. A strict construction of P.L. 280 is in keeping with the federal policy that statutes meant to benefit the Indians should be construed to achieve that purpose. *See* Bryan v. Itasca County, 426 U.S. at 392.

190. There is no preemption because providing forums to Indian plaintiffs who had access to no tribal forum is exactly the situation Congress had in mind in enacting P.L. 280 and therefore, there is no conflict with congressional policy. *See* Bryan v. Itasca County, 426 U.S. 373, 383-84 (1976).

191. There is no infringement on tribal self-government because the tribe is not exercising its right to self-government. *See* Williams v. Lee, 358 U.S. 217, 221-23 (1959).

192. This situation would be a variant of the situation presented in Williams v. Lee, 358 U.S. 217 (1959). The tribal court would be a competent forum, *see id.* at 221-22, yet mere exercise of jurisdiction by the state court would not constitute an infringement because of the congressional conferral of jurisdiction in P.L. 280. However, to protect tribal self-government, a qualitative examination of the state's exercise of jurisdiction would have to be made, *see* text & notes 193-200 *infra*, to ensure that the tribe's self-governing capability was protected. This could be accomplished by the state court taking account of the Indian substantive law in its choice of law decision. *Id.*

193. An analogous situation is the diversity jurisdiction of federal courts. The state's right to establish its own substantive law is not interfered with because the federal court also applies that law. *See* C. WRIGHT, *supra* note 180, § 66, at 254.

law of the state.[194] This provision of P.L. 280 can arguably be construed, however, to mean only that the state is not required to adjudicate a substantive cause of action where the state does not have an analogous cause of action.[195] In such a case the plaintiff, unless the state court consented to apply the tribal rule, would be unable to bring his action in state court.[196] The plaintiff would still have a forum in tribal court and refusal of the state court to hear the action would be consistent with both policies of P.L. 280—that forums be provided and that tribal self-government be encouraged. If the state law which conflicts with the tribal rule is a matter of substantive defense, the state court should apply the tribal rule or dismiss the action. Application of the state's rule should be preempted in this situation either as frustrating self-government[197] or as in conflict with statutory[198] and treaty provisions affirming the Indians' right of self-government.[199] Finally, tribal laws might in some circumstances act to preempt state jurisdiction.[200]

Under the above described conception of P.L. 280 jurisdiction, the role of the state courts would decrease as tribal governmental activity increased. This diminished role of state courts would be consistent with Congress' provision in the Indian Civil Rights Act for states to retrocede jurisdiction assumed under P.L. 280.[201] When the conditions that motivated Congress to enact P.L. 280 are no longer extant, then continued state jurisdiction would no longer be required.[202]

If the states fail to exercise their jurisdiction consistent with federal policy, those exercises of jurisdiction will, as in *Bryan*, continue to be nullified by the federal courts. It is for the federal authorities to define

194. See 28 U.S.C. § 1360(c) (1976).

195. *Cf.* Note, *Utilization of State Courts to Enforce Federal Penal and Criminal Statutes: Development in Judicial Federalism*, 60 HARV. L. REV. 966, 971 (1971) ("If the federal cause of action has no parallel in the experience of the state court, it may perhaps still be refused"). *See also In re* Adoption of Doe, 89 N.M. 606, 555 P.2d 906 (1976), where the New Mexico Supreme Court held that full faith and credit, which the court assumed applied to tribal laws, did not require recognition of a tribal custom where that custom was opposed to New Mexico's public policy. *Id.* at 613-14, 555 P.2d at 913-14.

196. Note, *supra* note 195, at 971.

197. If tribal self-government has been assured by congressional legislation, see note 188 *supra*, as well as having been read into treaties as a matter of federal common law, see text & note 65 *supra*, then interference by a state with that self-government could be upset as preempted by the congressional scheme of legislation or as an infringement on treaty guaranteed sovereignty. *See* text & notes 64-67 *supra*.

198. *See* note 189 *supra*.

199. *Cf.* United States v. Mazurie, 419 U.S. 544, 554-56 (1975) (affirming the application of a tribal liquor ordinance to a non-Indian where Congress had delegated that power to the tribal authorities).

200. *See* Fisher v. District Court, 424 U.S. 382, 390 (1976). In *Fisher*, the tribal ordinance was found to deprive the state of jurisdiction because it implemented an overriding federal policy. *Id.*

201. *See* 25 U.S.C. § 1323 (1976).

202. As stated earlier, P.L. 280 was passed to provide law enforcement services and civil forums for reservation Indians. If the tribe takes over provision of these functions, there is no longer a necessity for the state to provide them.

the role of the tribal governments vis-à-vis the states, and it is for those authorities to determine the permissible extent of state jurisdiction. In order to implement the federal Indian policy of tribal self-government, the state courts should strive to exercise their jurisdiction in a way that does not frustrate tribal self-government.

CONCLUSION

The federal courts have developed a federal common law of Indian affairs to define the proper relationship between state and tribal governments. This common law has developed the infringement-preemption test to determine the validity of state court assumption of subject matter jurisdiction over reservation Indians and to determine the applicability of state law to reservation Indians. The infringement-preemption test is designed to ensure that the state can protect its legitimate interests, yet at the same time, promote Indian self-government.

Public Law 280 confers civil jurisdiction on certain states to ameliorate the lack of civil forums for Indians on reservations in those states. This law should be construed consistently with the current federal Indian policy, obligating the state courts conferred with this jurisdiction to follow the federal common law of Indian affairs. By doing so, the congressional goals of providing forums for reservation Indian litigants and concomitantly promoting Indian self-government can be accomplished.