University of Chicago Legal Forum

Volume 2001 | Issue 1 Article 18

Tribal Court Jurisdiction in Dissolution-Based Custody Proceedings

Lesley M. Wexler
Lesley.Wexler@chicagounbound.edu

Tribal Court Jurisdiction in Dissolution-Based Custody Proceedings

Lesley M. Wexler[†]

With the rise of non-Indian[1] populations on reservations[2] and movement of families on and off reservations,[3] courts must increasingly resolve jurisdictional disputes between states and tribes.[4] Over 70 percent of American Indians marry outside of their tribes, to either members of another tribe or members of another race.[5] As a result, more than 50 percent of Indian children have a non-Indian parent.[6] When these mixed relationships

---

† B.A. 1998, University of Michigan; J.D. Candidate 2002, University of Chicago.

1 This Comment uses the term "Indian" to refer to a person who is either a member of or eligible for membership in a federally recognized tribe. This term refers to the relevant legally-defined category of people but is not meant to convey a normative judgment about their legal status, nor does it properly describe the ethnic background of Native Americans. See B.J. Jones, *The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Courts*, 73 ND L Rev 395, 395 n 2 (1997) (explaining the terms "Indians" and "Native Americans").

2 See Department of the Interior, *Statistical Abstracts: American Indian, Eskimo, Aleut Population*, available online at <http://www.doi.gov/nrl/StatAbst/TribalPop.pdf> (visited Apr 4, 2001) [on file with U Chi Legal F] (showing that in 1990, 46 percent of residents on highly populated reservation and trust lands were neither American Indians, Eskimos, nor Aleuts).

3 See U.S. Bureau of the Census, *American Indian Heritage Month*, available online at <http://www.census.gov/Press-Release/www/1999/cb99ff14.html> (last modified Oct 21, 1999) [on file with U Chi Legal F] ("In 1997, about one-quarter of the nation's American Indian, Eskimo, and Aleut households had moved during the preceding year.").

4 See generally Nancy Thorington, *Civil and Criminal Jurisdiction over Matters Arising in Indian Country: A Roadmap for Improving Interaction Among Tribal, State and Federal Government*, 31 McGeorge L Rev 973, 976 (2000) (making a related point that "because the tribal, federal and state systems exist in a world of mass communication and transportation, the number of controversies . . . that cross borders will only increase").

5 See U.S. Census Bureau, *Census of Population and Housing*, Table 2, Race of Couples (1990), available online at <http://www.census.gov/population/socdemo/race/interractab2.txt> (visited Dec 12, 2001) [on file with the U Chi Legal F] (stating that almost 75 percent of marriages involving Indians are interracial).

6 See U.S. Census Bureau, *Census of Population and Housing*, Table 4, Race of Child by Race of Householder and of Spouse or Partner (1990), available online at <http://www.census.gov/population/socdemo/race/interractab4.txt> (visited Mar 31, 2001) [on file with the U Chi Legal F] (showing that 54 percent of Indian children have a parent of a different race).

fail,[7] parents may contest jurisdiction over the custody proceedings that follow.

Child custody battles between divorced or separated parents, known as "dissolution-based"[8] proceedings, present a thorny jurisdictional issue. Battles over jurisdiction prolong custody disputes while state and tribal courts engage in lengthy and fact-intensive inquiries as to which court should hear the case. Delaying resolution of the placement and visitation arrangements hurts children, who often face uncertain and contested living arrangements in the interim.[9] Furthermore, precluding tribal adjudication of child custody proceedings may threaten the well-being of the child and the longevity of the tribe. If state courts favor non-reservation or non-Indian placement, then children and tribes risk losing vital contacts with each other.

For example, the recent case of *In re Marriage of Skillen*[10] presented a complex intersection of reservation[11] residence and tribal membership. Both the mother and child lived on a reservation, while the father resided off the reservation.[12] Both the mother and child were enrolled members of the Fort Peck Tribe; the father was a non-Indian.[13] The ensuing custody battle real-

---

[7] See Indian Health Service Steering Committee, et al, *The State of Native American Youth Health*, available online at <http://www.cyfc.umn.edu/Diversity/nativeamer.html> (visited Mar 31, 2001) [on file with the U Chi Legal F] ("Native teenagers live in a variety of family constellations; less than half of study participants live with two parents."). The total Indian population approaches two million. See U.S. Census Bureau, *Census of Population, "Characteristics of American Indians by Tribe and Language,"* Table 2, Selected Social and Economic Characteristics for the 25 Largest American Indian Populations (1990), available online at <http://www.census.gov/population/socdemo/race/indian/ailang2.txt> (visited Dec 13, 2001) [on file with the U Chi Legal F]. Thus, the number of potential custody disputes is quite high.

[8] This Comment will treat divorcing parents and separating parents who were never married as equivalent. They both engage in "dissolution-based" custody proceedings. See *John v Baker*, 982 P2d 738, 747 (Alaska 1999) (contending that courts should treat separation and divorce as equivalents under the Indian Child Welfare Act).

[9] See Uniform Child Custody Jurisdiction Act ("UCCJA") § 1, 9(IA) Uniform Laws Annotated ("ULA") 271 (1999):

> The general purposes of this Act are to . . . (1) avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being; . . .(4) discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child.

[10] 956 P2d 1 (Mont 1998).

[11] For the purposes of this Comment, "reservation" and "Indian country" will be used interchangeably.

[12] See *Skillen*, 956 P2d at 4–5.

[13] See id at 4.

ized the possibilities of delay and confusion inherent in jurisdictional disputes. The father obtained joint custody in a state district court proceeding that established him as the primary residential custodian.[14] Seeking a custody order from the Fort Peck Tribal Court, the mother also petitioned to dismiss the district court's enforcement of the original custody order for lack of subject matter jurisdiction.[15] Other cases present similarly complex combinations of membership and residence.

Unlike most child custody cases involving Indians, no explicit federal legislation governs dissolution-based proceedings. Instead, judges must decide whether uniform state jurisdictional statutes govern, or whether those statutes are trumped by sovereignty principles enshrined in Supreme Court doctrine and the Indian Child Welfare Act ("ICWA").[16] Judges must also address whether dissolution-based custody proceedings involving either non-tribal members or tribal members domiciled or residing[17] outside of Indian country fall within the internal affairs of the tribe. Courts need a consistent approach to help answer these questions in a way that responds to both state and Indian interests.

Part I of this Comment discusses the principles and limitations of Indian sovereignty and the non-infringement doctrine. Part II demonstrates why uniform child custody jurisdiction statutes are inadequate to properly assign jurisdiction in dissolution-based custody disputes. It also deals with the struggle of whether to assign exclusive or concurrent jurisdiction in these cases. Part III of this Comment explores the ICWA to explain the harms that result from both jurisdictional uncertainty and the potential biases of state courts in making jurisdictional and placement decisions.

Finally, in Part IV, this Comment sets up a comprehensive framework for determining when tribal courts ought to exercise jurisdiction over dissolution-based child custody proceedings. Tribal jurisdiction should be exclusive if: (1) all relevant parties are enrolled tribal members residing or domiciled in Indian country; or (2) the child and at least one parent are enrolled tribal members, and the child is residing or domiciled in Indian coun-

---

[14] Id at 5.

[15] Id.

[16] Indian Child Welfare Act of 1978, Pub L No 95-608, 92 Stat 3069, codified at 25 USC §§ 1901–63 (1994).

[17] While domicile and residence are distinct concepts, some courts in child custody cases view either one as sufficient to establish jurisdiction in a particular court.

try. On the other hand, tribal and state jurisdiction should be concurrent when the child and at least one parent are enrolled tribal members, but the child is not residing or domiciled in Indian country. Here, state courts should use comity-based deference advocated by Indian law scholar Barbara Atwood[18] which weighs relevant factors including the child's personal relationship with each of the parents, the child's assimilation into tribal life, and the parent's ties to the tribe and length of residence on and off the reservation.[19] Finally, state jurisdiction should be exclusive if: (1) the tribe has been divested of its inherent sovereignty; or (2) the tribal code precludes exercise of jurisdiction.

I. SOVEREIGNTY AND THE NON-INFRINGEMENT DOCTRINE

In order to understand the current problems courts face in adjudicating child custody disputes involving Indian children, some background in basic principles of Indian sovereignty is necessary. The sovereignty principles articulated by the Supreme Court were eventually refined into the non-infringement doctrine, which courts should use to guide child custody cases.

A. Basic Principles of Sovereignty: A "Geography-Plus" Approach

According to noted Indian law scholar Felix Cohen, three basic principles underlie most judicial decisions on the source and nature of Indian tribal powers.[20] First, Indian tribes possess the

---

[18] See Barbara Ann Atwood, *Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity*, 36 UCLA L Rev 1051, 1099–1107 (1989) (presenting guidelines for resolving jurisdictional disputes).

[19] This flexible, fact-based inquiry was developed in *Application of Bertelson*, 617 P2d 121 (Mont 1980). When balancing state and tribal interests in a custody dispute where a child lived with her grandparents on a reservation and the mother lived off the reservation, the court decided that:

> The trial court should also inquire into the following factual and legal matters which may affect a determination of which is the better forum to ascertain the best interest of the child: the existence of tribal law or tribal customs relating to child care and custody in cases of this sort; the nature of the child's personal relationship with her grandparents and with her mother; the child's assimilation into and adjustment to life in the tribe and on the reservation; the mother's ethnic and cultural background and membership in or ties to the Chippewa Cree Tribe or any other tribe; the length of the child's residence both on and off the reservation; the domicile and residence of the child's father and the child's personal relationship with her father.

Id at 130.

[20] Felix S. Cohen, *Handbook of Federal Indian Law* 123 (Dept of Interior 1941).

powers of sovereign states.[21] Second, tribes are subject to the legislative power of the United States.[22] While the creation of the United States clearly terminated the external powers of Indian sovereignty, like the ability to conduct treaties with foreign nations, neither conquest nor the Congress divested the Indians of their internal powers of sovereignty.[23] Internal powers include determining tribal membership,[24] regulating domestic relations among tribe members,[25] and prescribing inheritance rules.[26] Finally, while treaties or express congressional legislation may qualify or divest these internal powers, absent such action, "full powers of internal sovereignty are vested in the Indian tribes and their duly constituted organs of government."[27]

The Supreme Court explicitly upheld these fundamental principles of Indian sovereignty in *The Cherokee Cases: Cherokee Nation v Georgia*[28] and *Worcester v Georgia*.[29] In *Cherokee Nation*, Chief Justice Marshall recognized the sovereignty of Indian tribes, stating that the Cherokee were "a distinct political society . . . capable of managing its own affairs and governing itself"[30] and had an "unquestioned right to the lands they occupy."[31] Here, Justice Marshall linked sovereignty with geography, acknowledging the importance of land to self-government.[32] *Worcester* further developed this relationship when the Court struck down state statutes that prohibited Cherokees from enacting laws and condemned tribal courts as unconstitutional.[33] In so doing, the

---

[21] Id. See *Worcester v Georgia*, 31 US (6 Peters) 515, 559–60 (1832) (noting that the tribes are not "wholly distinct nations within whose boundaries the laws of [a state] can have no force"). See also *New Mexico v Mescalero Apache Tribe*, 462 US 324, 331 (1983) (citation and internal quotation omitted).

[22] Cohen, *Handbook of Federal Indian Law* at 123 (cited in note 20) ("Conquest renders the tribe subject to the legislative power of the United States.").

[23] See id ("Conquest . . . does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government.").

[24] See generally *Cherokee Intermarriage Cases*, 203 US 76, 95 (1906); *Roff v Burney*, 168 US 218, 222–23 (1897).

[25] See *Fisher v District Court*, 424 US 382, 387–89 (1976).

[26] See *Jones v Meehan*, 175 US 1, 29–32 (1899); *Mackey v Coxe*, 59 US 100, 102–04 (1855).

[27] Cohen, *Handbook of Federal Indian Law* at 123 (cited in note 20).

[28] 30 US (5 Peters) 1 (1831).

[29] 31 US (6 Peters) 515 (1832).

[30] *Cherokee Nation*, 30 US (5 Peters) at 16.

[31] Id at 17.

[32] Id.

[33] See *Worcester*, 31 US (6 Peters) at 560 ("The Cherokee nation, then, is a distinct community, occupying its own territory, with the boundaries accurately described, in which the laws of Georgia can have no force . . . but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress.").

Worcester Court explained that only Congress could abridge tribal sovereignty,[34] and the concurrence emphasized the role of geography as sufficient for the exercise of sovereign authority.[35] Subsequent decisions drew from these basic concepts in determining the scope of tribal jurisdiction.[36]

B. Non-Infringement Doctrine

The non-infringement doctrine, announced in *Williams v Lee*,[37] drew on the fundamental principles of tribal sovereignty enshrined in *Worcester* and *Cherokee Nation*. The non-infringement doctrine set up a test to determine when states have legitimate adjudicatory and regulatory civil authority over Indian matters: "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."[38] The *Williams* Court held that a state court could not assert civil jurisdiction over a case involving a non-Indian respondent who wanted to collect a debt contracted on an Indian reservation.[39] *Williams* explicitly recognized that Indian tribes possess inherent sovereignty that only congressional action can divest.[40] *Williams* further argued that while tribes generally maintained inherent tribal sovereignty over civil actions arising

---

[34] See id at 561. ("They 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."). Thus, the Congress and the federal courts may redefine and restrict tribal sovereignty. See David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 Cal L Rev 1573, 1582 (1996) (expressing the concern that *Worcester* allows courts to narrow the scope of tribal sovereignty).

[35] See *Worcester*, 31 US (6 Peters) at 591 (McLean concurring) ("A state claims the right of sovereignty, commensurate with her territory . . . . [I]t would violate the solemn compacts with the Indians, without cause, to dispossess them of rights which they possess by nature, and have been uniformly acknowledged by the federal government.").

[36] See *Iowa Mutual Insurance Co v LaPlante*, 480 US 9, 20 (1987) (Marshall) (reiterating the importance to tribal sovereignty of civil jurisdiction over the activities of non-Indians on reservation lands to tribal sovereignty, and reaffirming the pro-Indian background presumption); *National Farmer's Union Insurance Cos v Crow Tribes of Indians*, 471 US 845, 855–56 (1985) (confirming that tribal court jurisdiction over non-Indians is part of inherent tribal sovereignty and that divestiture requires congressional action). "Civil jurisdiction over such activities [of non-Indians on reservation lands] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mutual Insurance Co*, 480 US at 18.

[37] 358 US 217 (1959).

[38] Id at 220.

[39] See id at 223 ("It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.").

[40] See id at 220.

on their land, states possessed authority to act on reservation matters when they did not infringe on that sovereignty.[41] In setting up this distinction, the Court reinscribed *The Cherokee Cases*'s distinction between internal and external affairs.

In assigning jurisdiction over internal affairs, *Williams* relied on a geographic notion of sovereignty;[42] sovereignty stemmed from land ownership.[43] Unlike criminal jurisdiction, where tribal membership is determinative,[44] *Williams* established geography as a relevant factor for purposes of civil jurisdiction.[45] For example, the Court specifically applied the non-infringement test to reservation Indians: "Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation."[46]

Furthermore, the Court decisively eliminated membership as necessary to the exercise of tribal authority.[47] The Court noted: "It is immaterial that the respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there."[48] While explaining that membership was not a necessary prerequisite to the exercise of tribal jurisdiction,[49] the Court did not clearly eliminate membership as sufficient to establish tribal jurisdiction. A "geography-plus" reading of *Williams* and other Supreme Court cases on sovereignty contends that geography is sufficient to establish jurisdiction, but the right of tribes to gov-

---

[41] *Williams*, 358 US at 220 (noting, for example, that state courts may try non-Indians for committing crimes against each other, even if the relevant actions took place on reservation land).

[42] See Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U Pitt L Rev 1, 49 (1993) (contending that "*Williams* employed a geographically-based meaning of 'internal' and 'external'").

[43] See L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millenium*, 96 Colum L Rev 809, 823 (1996) ("The Court implicitly acknowledge[d] the inherent rights of tribes as being largely coextensive with their territory."). See also Dussias, 55 U Pitt L Rev at 48 (cited in note 42) ("The [*Williams*] Court treated tribal authority as being geographically-based.").

[44] See *Duro v Reina*, 495 US 676, 693 (1990) ("[I]n the criminal sphere membership marks the bounds of tribal authority.").

[45] *Williams*, 358 US at 219 ("[T]his Court has modified these principles where essential tribal relations were not involved . . . but the basic policy of Worcester has remained.").

[46] Id at 220.

[47] Id at 223.

[48] Id.

[49] *Williams*, 358 US at 223.

ern their own internal affairs may extend outside of Indian country.[50]

The Supreme Court substantially narrowed the *Williams* non-infringement test in a case involving a regulatory matter. In *Montana v United States*,[51] the Court denied the authority of the Crow Tribe to regulate the hunting and fishing of non-Indians on reservation land owned by non-Indians.[52] The Court held that, absent "express congressional authorization," a tribe's power to exercise its sovereignty over non-Indians only extends to "what is necessary to protect tribal self-government or to control internal relations."[53] Thus, *Montana* reversed the background presumption that tribes possess absolute civil jurisdiction over actions arising on their lands.[54] Changing the background rule decreased the ability of tribes to exercise jurisdiction over non-Indians.

Yet, at the same time, the Court confirmed that tribal courts still hold some inherent sovereign authority over the actions of non-Indians.[55] *Montana* set up two important exceptions to the new background rule of state jurisdiction over non-Indian actions arising on reservations. First, tribes maintain jurisdiction over non-Indians when a non-Indian enters a consensual commercial relationship with the tribe.[56] Second, tribes may exercise exclusive jurisdiction if a non-Indian's conduct on a reservation

---

[50] While this Comment presumes that the geography-plus interpretation of Supreme Court rulings dealing with the civil jurisdiction of tribes is accurate, other interpretive inferences are possible. Many scholars argue that the Court relied instead on views of sovereignty based solely on geography or membership. For a discussion of these alternative views, see generally Dussias, 55 U Pitt L Rev at 43–58 (cited in note 42) (concluding that the Supreme Court, "although providing for initial tribal court determination of tribal jurisdiction in civil cases, has not itself affirmed the existence of tribal court civil jurisdiction over all cases arising within the boundaries of the reservation, and thus has not explicitly accepted a wholly geographically-based approach to tribal court civil jurisdiction").

[51] 450 US 544 (1981).

[52] See id at 566–67.

[53] Id at 564.

[54] See Gloria Valencia-Weber, *Shrinking Indian Country: A State Offensive to Divest Tribal Sovereignty*, 27 Conn L Rev 1281, 1285 (1995) ("*Montana* . . . shifted the burden from the state to the tribe to show authorization from Congress, the non-Indians' consent, or endangerment of the tribe's critical interests in government, economic security, and social welfare.").

[55] See *Montana*, 450 US at 566 ("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.").

[56] See id at 565 ("A tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."). See also *Strate v A-1 Contractors*, 520 US 438, 456 (1997) (reiterating that the first exception relating to consensual relationships is explicitly commercial).

"threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[57]

The Court has subsequently construed the "internal affairs" exception narrowly. In *Brendale v Confederated Tribes & Bands of the Yakima Indian Nation*,[58] Justice White argued that tribal authority need not extend to all conduct that threatens or affects the tribe's political integrity or welfare.[59] Instead, "[t]he impact must be *demonstrably serious* and must *imperil* the political integrity, the economic security, or the health and welfare of the tribe."[60] *Strate v A-1 Contractors*[61] affirmed this limited construction; it reiterated that a "tribe's inherent power does not reach beyond what is necessary to protect tribal self-government or to control internal relations."[62] More importantly, the *Strate* Court failed to distinguish between civil adjudicatory authority and regulatory authority. Thus, even if the *Montana* rule once applied only in regulatory cases, it now seems applicable to tribal civil jurisdiction over the conduct of non-Indians on Indian lands, even when such cases involve adjudicatory matters.[63]

A geography-plus interpretation of these cases concludes that Indian tribes possess sovereign adjudicatory authority outside of Indian country.[64] The geography-plus approach stems from the fundamental principles of Indian law that Indian tribes possess the powers of a sovereign state and, absent congressional legislation to limit those powers, tribes maintain all sovereignty not divested by conquest.

---

[57] *Montana*, 450 US at 566.

[58] 492 US 408 (1989).

[59] See id at 429 (White) (plurality) ("This indicates to us that a tribe's authority need not extend to all conduct that 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe', but instead depends on the circumstances.").

[60] Id at 431 (emphasis added).

[61] 520 US 438 (1997).

[62] Id at 459, citing *Montana*, 450 US at 564 (brackets and quotation marks omitted).

[63] See Aaron S. Duck, Note, *Indians: Modern Tribal Jurisdiction over Non-Indian Parties: The Supreme Court Takes Another Bite Out of Tribal Sovereignty in* Strate v. A-1 Contractors, 51 Okla L Rev 727, 740 (1998) ("The Supreme Court simply failed to recognize the differences between civil adjudicatory authority and regulatory or legislative authority.").

[64] See *Merrion v Jicarilla Apache Tribe*, 455 US 130, 152, 158 (1982) (holding that the tribe maintained tax power over village gas transported off the reservation for sale, even if it did not exercise that power, as long as Congress had not divested it); *United States v Wheeler*, 435 US 313, 322 (1978) ("The powers of Indian tribes are, in general, *inherent powers of a limited sovereignty which has never been extinguished.*") (internal quotation marks omitted).

C. Applying the Non-Infringement Doctrine to Child Custody Cases

Both case law and tribal testimony confirm that family-related matters, including child custody, fall within the internal affairs of the tribes. In *Fisher v District Court*,[65] the Supreme Court used the non-infringement doctrine to grant exclusive jurisdiction to tribal courts over adoption proceedings arising on the reservation and "involv[ing] only Indians."[66] In that instance, the tribal court found that a resident tribal member had neglected her child, and consequently awarded the child to another tribal member.[67] The biological mother initiated an adoption proceeding in a Montana district court.[68] The district court dismissed for lack of subject-matter jurisdiction,[69] but the Montana Supreme Court overturned this dismissal.[70] The United States Supreme Court decided that the action was "litigation arising on the Indian reservation."[71]

In applying the non-infringement test, the Court emphasized that it was to determine jurisdiction by using a geography-based notion of sovereignty because the relevant parties resided on the reservation.[72] The fact that all the litigants were tribal members only heightened the bar to infringement.[73] The Court also made clear that even though the marriage or the divorce occurred off the reservation, those events were tangential to proceedings that determine the permanent status of the litigants.[74]

---

65 424 US 382 (1976).

66 Id at 386, 389 ("Since the adoption proceeding is appropriately characterized as litigation arising on the Indian reservation, the jurisdiction of the Tribal Court is exclusive.").

67 Id at 383.

68 Id at 383–84.

69 *Fisher*, 424 US at 384.

70 Id at 385.

71 Id at 389.

72 See id at 389 & n 14.

73 See *Fisher*, 424 US at 386, quoting *Williams*, 358 US at 220:

> In litigation between Indians and non-Indians arising out of conduct on an Indian reservation, resolution of conflicts between the jurisdiction of state and tribal courts has depended, absent a governing Act of Congress, on "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." Since this litigation involves only Indians, at least the same standard must be met before the state courts may exercise jurisdiction.

74 See *Fisher*, 424 US at 389.

While the Court decided *Fisher* prior to *Montana* and *Strate*, it seems clear that the case falls within *Montana*'s internal affairs exception. As the *Fisher* Court explained:

> State-court jurisdiction plainly would interfere with the powers of self-government conferred upon the Northern Cheyenne Tribe and exercised through the Tribal Court. It would subject a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves . . . it would create a substantial risk of conflicting adjudications affecting the custody of the child and would cause a corresponding decline in the authority of the Tribal Court.[75]

Although the case only involved reservation Indians, its emphasis on self-government and tribal-court authority could extend to cases where the child resided off the reservation. Although the tribal interest might be less pronounced in those instances, land need not define the boundaries of tribal jurisdiction. Instead, while *Fisher* supports the contention that land is a prerequisite to the exclusive exercise of jurisdiction, a geography-plus interpretation still allows membership to establish concurrent jurisdiction.

DeCoteau v District County Court[76] furthered the geography-based interpretation of the non-infringement test. Here, an enrolled member of the Sisseton-Wahpeton Tribe contested the jurisdictional power of the state court to assign her children, also members of the tribe, to foster homes.[77] All relevant parties agreed that if the acts took place in Indian country, the state courts had no jurisdiction.[78] This agreement demonstrated the emerging consensus about the importance of land to the exercise of Indian sovereignty.

Finally, in *John v Baker*,[79] the Alaska Supreme Court adopted the geography-plus approach. In that case, the parents and children lived in Northway Village, an Indian community that was not part of Indian country, until the time of the parents' separation.[80] The mother, Ms. John, then moved to Mentsats Vil-

---

[75] Id at 387–88.

[76] 420 US 425 (1975).

[77] Id at 428–29.

[78] Id at 427 ("The parties agree that the state courts did not have jurisdiction if these lands are 'Indian country.'").

[79] 982 P2d 738 (Alaska 1999), cert denied, 2000 US Lexis 1434.

[80] Id at 743.

lage, a different Indian community, and the parents shared custody of their two children.[81] The father, Mr. Baker, filed for sole custody in the Northway tribal court, and Ms. John consented to tribal jurisdiction.[82] When the tribal court granted shared custody, Mr. Baker then initiated a separate action in state court.[83] The superior court denied Ms. John's motion to dismiss the action, eventually granting Mr. Baker primary custody.[84]

Reversing the Superior Court's decision, the Alaska Supreme Court held that tribes retain all fundamental aspects of sovereignty not specifically divested by Congress.[85] *John* noted that Indian sovereignty stems from tribal governance, which predates the nation's founding.[86] Included within these inherent sovereign powers are "internal functions involving tribal membership and domestic affairs."[87] Thus, in interpreting *Montana*'s internal affairs exception to the non-infringement doctrine, the *John* majority maintained that land ownership was not a prerequisite to the protection of tribal self-government and the control of internal relations.[88]

Some argue that *Williams* offers little guidance in determining jurisdiction, because it does not clarify whether courts determine infringement on the nature of the civil dispute or on residence.[89] The geography-plus interpretation of *Williams* employed in *John*, however, accounts for the relevance of both factors. *Fisher* establishes that residence is necessary for exclusive jurisdiction.[90] Given the nature of child custody disputes, the interest of the tribe in regulating this matter is not vitiated just because the members have chosen to move off the reservation.[91]

Tribes themselves clearly view their power to adjudicate cases involving children as a vital aspect of sovereignty. The Na-

---

[81] Id.

[82] Id.

[83] See *John*, 982 P2d at 743.

[84] Id at 743–44.

[85] Id at 751.

[86] Id ("We begin our analysis . . . with the established principle under federal law that 'Indian tribes retain those fundamental attributes of sovereignty . . . which have not been divested by Congress. . . . [T]his starting point stems from the fact that tribal governance predates the founding of our nation.'").

[87] *John*, 982 P2d at 751 (citations omitted).

[88] See id at 752. See also *Montana*, 450 US at 564.

[89] See Atwood, 36 UCLA L Rev at 1071 (cited in note 18) ("The '*Williams* test,' although now routinely applied to determine the propriety of state court jurisdiction over disputes involving Indians, provides little concrete guidance.").

[90] 424 US at 389–90 n 14 (concluding that since all relevant parties resided on the reservation, the adoption arose there and thus, tribal jurisdiction was exclusive).

[91] Atwood, 36 UCLA L Rev at 1080 (cited in note 18).

vajo Supreme Court stated that "[t]here is no resource more vital to the continued existence and integrity of the Navajo Nation than our children. Consequently, we have a special duty to ensure their protection and well-being."[92] Given these factors, the non-infringement doctrine takes on special force in the child custody context.

D. Limitations on Sovereignty

The non-infringement doctrine provides a useful framework with which to evaluate child custody cases, but there are notable limitations on the internal powers of Indian tribes. Courts and scholars agree that treaties or express congressional legislation may qualify or divest the internal powers of a tribe.[93] This could result in exclusive state court jurisdiction over child custody cases. For instance, in *DeCoteau*, the Supreme Court established that the loss of reservation status is an important limitation on the application of the non-infringement doctrine. *DeCoteau* held that state courts had jurisdiction over foster care proceedings on non-Indian lands within previous reservation borders, even though all the affected parties were enrolled members of a tribe.[94] In this instance, tribes had exercised their power under the Allotment Act[95] to sell unalloted lands to non-Indians.[96] As the Indians no longer possessed control over the relevant land, the Court concluded that they had instituted voluntary divestiture.[97] Whether voluntary or involuntary, divestiture renders many potential child custody jurisdictional disputes obsolete.

The scope of divestiture of a tribe's adjudicative authority is often uncertain. Public Law 53-280 ("PL-280"),[98] passed in 1953, required certain states[99] and allowed others[100] to assume civil ju-

---

[92] Barbara Ann Atwood, *Identity and Assimilation: Changing Definitions of Tribal Power Over Children*, 83 Minn L Rev 927, 941 (1990), citing *In re Custody of S.R.T.*, 18 Indian L Rptr 6158, 6160 (Navajo Sup Ct 1991).

[93] See Part I A.

[94] See *DeCoteau*, 420 US at 444–47, 449.

[95] Indian General Allotment Act, 24 Stat 388 (1887), codified at 25 USC § 348 (2001).

[96] *DeCoteau*, 420 US at 444–47, 449.

[97] See id at 446 ("[B]ecause the tribe and the Government were satisfied that retention of allotments would provide an adequate fulcrum for tribal affairs . . . exclusive tribal and federal jurisdiction [would be] limited to the retained allotments.").

[98] Act of Aug 15, 1953, Pub L No 53-280, ch 505, 67 Stat 588, codified at 18 USC § 1162 (2001).

[99] These states are California, Minnesota, Nebraska, Oregon, and Wisconsin. Act of Aug 8, 1958, Pub L No 85-615, § 2, 62 Stat 545, codified at 18 USC § 1162 (2001).

risdiction over affairs arising in Indian country.[101] PL-280 only applies to jurisdiction over claims arising in Indian country, which the statute defines as Indian reservations under federal jurisdiction, Indian allotments, and dependent Indian communities.[102] The plain language of the text makes the geographic limitation clear: "Each of the States . . . shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country."[103] Thus, a court has determined that lands held by Indians but not located in Indian country, such as land received under the Alaska Native Claims Settlement Act ("ANCSA"),[104] are outside the scope of PL-280.[105]

Disagreement exists as to whether PL-280 grants states exclusive jurisdiction or dictates that they share it if exclusive tribal jurisdiction previously existed.[106] The Supreme Court has explicitly declined to rule on the matter.[107] One lower court viewed the provision as merely granting states concurrent jurisdiction,[108] while other courts have interpreted PL-280 as a divestiture statute in the area of child custody.[109] This latter interpretation gives meaning to a "reassumption clause" in the ICWA which permits any tribe subject to state jurisdiction under PL-280 to petition the Secretary of the Interior to reassume jurisdiction

---

100 Alaska chose to adopt PL-280. Act of Aug 8, 1958, Pub L No 85-615, § 2, 72 Stat 545, codified at 18 USC § 1162 (2001). Montana chose not to adopt PL-280. See *Skillen*, 956 P2d at 6.

101 See 18 USC § 1162 (2001).

102 See 18 USC § 1151 (1994).

103 28 USC § 1360(a) (1994).

104 43 USC § 1601 (1994).

105 See *John*, 982 P2d at 748 ("The Supreme Court held . . . that a village occupying ANCSA lands does not qualify for the 'dependent community' definition of Indian country. . . . If Northway Village does not occupy Indian country . . . . then PL-280 has no direct relevance.").

106 See David H. Getches, Charles F. Wilkinson, and Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law* 570 (West 3d ed 1993) ("Potential concurrent jurisdiction of the tribal courts under Public Law 280 has not been conclusively litigated.").

107 See *Washington v Confederated Bands and Tribes of the Yakima Indian Nation*, 439 US 463, 488 n 32 (1979) ("This issue, however, is not within the scope of our order noting probable jurisdiction, . . . and we do not decide it here.").

108 See, for example, *Native Village of Venetie IRA Council v Alaska*, 944 F2d 548, 562 (9th Cir 1991).

109 See, for example, *Matter of F.P.*, 843 P2d 1214, 1215–16 (Alaska 1992) (determining that PL-280 granted states exclusive jurisdiction over child custody matters); *Native Village of Nenana v State Department of Health & Social Services*, 722 P2d 219, 220 (Alaska 1986) (holding that a tribe cannot petition for transfer jurisdiction under the ICWA until the Secretary of the Interior approved its petition to reassume jurisdiction, because PL-280 divested the tribe of civil adjudicatory authority).

over child custody proceedings.[110] The implication is that absent a petition, tribes lack any jurisdiction over child custody proceedings.[111] On the other hand, interpreting PL-280 as a divestiture statute leads to the anomalous outcome that state jurisdiction over reservation land may be exclusive, while tribal courts may have jurisdiction over certain land outside Indian country.

It is beyond the scope of this Comment to resolve the disagreement about whether PL-280 should be read as a divestiture statute in the area of child custody disputes. How courts read PL-280, however, affects the sovereign status of many tribes. If PL-280 divests tribes of even concurrent jurisdiction, then tribal courts in Indian country in PL-280 states cannot hear child custody disputes.

II. RELEVANT UNIFORM JURISDICTIONAL STATUTES AND THEIR SHORTCOMINGS

To resolve dissolution-based custody disputes over Indian children, judges often look to existing jurisdictional statutes such as the Uniform Child Custody Jurisdiction Act ("UCCJA") and the Parental Kidnapping Prevention Act ("PKPA").[112] These statutes balance various interests: the best interests of the child; the importance of residence and domicile; and the need for prompt resolution of child custody matters. Yet none of these statutes adequately resolves the jurisdiction for dissolution-based custody proceedings involving Indian children.

A. Uniform Child Custody Jurisdiction Act

Scholars drafted the UCCJA[113] to deter parents from forum shopping by moving their children to new states, and to prevent relitigation of custody matters.[114] All fifty states adopted the UCCJA,[115] which uses four different jurisdictional tests: home

---

110 See 25 USC § 1918(a) (1994).

111 See *F.P.*, 843 P2d at 1215–16.

112 See, for example, *Baker v John*, 982 P2d 738 (Mont 1998).

113 9(IA) ULA 270 (1999).

114 See Kelly Gaines Stoner, *The Uniform Child Custody Jurisdiction & Enforcement Act (UCCJEA)—A Metamorphosis of the Uniform Child Custody Jurisdiction Act (UCCJA)*, 75 ND L Rev 301, 301 (1999).

115 Uniform Law Commissioners, *Introductions & Adoptions of Uniform Acts: A Few Facts About . . . The Uniform Child Custody Jurisdiction and Enforcement Act*, available online at <http://www.nccusl/org/uniformact_factsheets/uniformacts-fs-uccjea.htm> (visited Mar 20, 2001) [on file with the U Chi Legal F].

state, significant connection, emergency, and vacuum.[116] While the text of the statute fails to clearly prioritize one of these standards, in practice courts favor granting jurisdiction to the "home state" of the child.[117] The UCCJA defines the "home state" as "[t]he state in which the child immediately preceding the time involved lived with his parents, [or] a parent . . . for at least 6 consecutive months."[118] Thus, the jurisdictional inquiry often focuses on the residence of the child, to the exclusion of other factors.

The PKPA[119] provides enforcement authority for certain aspects of the UCCJA. Like the UCCJA, the PKPA is also designed to prevent child snatching for the purposes of forum shopping.[120] Additionally, the PKPA attempts to isolate continuing jurisdiction in the court that can more readily determine the best interests of the child.[121] Unlike the UCCJA, however, an effective preference for the home state clearly emerges in the text of the

---

116 UCCJA § 3, 9(IA) ULA 307–08 (1999) (brackets in original):

> (a) A court of this State which is competent to decide Child custody matters has jurisdiction to make a Child custody determination by initial or modification decree if:
>
> (1) this State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within 6 moths before commencement of the proceeding and the child is absent from this State because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as his parent continues to live in this State; or
>
> (2) it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or
>
> (3) the child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected [or dependent]; or
>
> (4)(i) it appears that no other State would have jurisdiction under prerequisites substantially in accordance with paragraphs (1),(2), or (3), or another state has declined to exercise jurisdiction on that ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

117 This preference may have emerged from a comment to the UCCJA. UCCJA § 3 comment, 9(IA) ULA 308 (1999) ("In the first place, a court in the child's home state has jurisdiction.").

118 UCCJA § 2, 9(IA) ULA 286 (1999).

119 28 USC § 1738A (1994).

120 Act of Dec 28, 1980, Pub L No 96-611, § 7, 94 Stat 3568 (noting that one of the purposes of the PKPA was to "deter interstate abductions and other unilateral removals of children undertaken to obtain custody and visitation awards").

121 28 USC § 1738A(c).

PKPA.[122] The PKPA gives continuing jurisdiction to the court that originally determines the issue of custody, requiring that other states give the original determination full faith and credit.[123] Thus, states following the UCCJA favor home state jurisdiction, since the PKPA imposes a duty on sister states to enforce judgments consistent with the UCCJA and PKPA. In effect, the PKPA grants exclusive jurisdiction to the original court. Thus, the PKPA helps focus the jurisdictional priorities of the UCCJA toward the home state.

The UCCJA applies to jurisdictional conflicts between states; the definition of "state" generally includes any state, territory, or possession of the United States, the Commonwealth of Puerto Rico, and the District of Columbia.[124] The UCCJA does not address whether tribes should be considered states, and courts have not reached a consensus on this issue. While some courts have analogized Indian tribes to "territories" within the meaning of the UCCJA[125] and to "states" within the meaning of the PKPA,[126] others have refused to extend these statutes to tribes.[127]

Tools of statutory interpretation cut in both directions on this question. Application of the "expresio unius, exclusio adierus" maxim would treat all omissions as deliberate exclusions.[128] In addition, subsequent statutes like the Uniform Child Custody

---

122 Id.

123 28 USC § 1738A(d):

> The jurisdiction of a court of a State which has made a child custody determination or visitation consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child of any contestant.

124 UCCJA § 2(10), 9(IA) ULA 287 (1999).

125 See *Martinez v Superior Court*, 731 P2d 1244, 1247 (Ariz Ct App 1987) (holding that in a custody dispute between one Indian parent and one non-Indian parent, Indian tribes are states within the meaning of the UCCJA). See also *Day v Montana Dept of Social and Rehabilitation Servs, Child Support Enforcement Div*, 900 P2d 296, 299 (Mont 1995) ("As regards child support orders issued in Indian tribal courts, Indian tribes are deemed to be 'States,' 28 USC § 1738 B(b).").

126 See *In re Larch*, 872 F2d 66, 68 (4th Cir 1989) (holding that the Cherokee tribe is a state for the purposes of the PKPA).

127 See *Desjarlait v Desjarlait*, 379 NW2d 139, 143 (Minn Ct App 1985) ("[T]he UCCJA does not apply to jurisdictional disputes between a state court and a tribal court."); *Malaterre v Malaterre*, 293 NW2d 139, 144 (ND 1980) (refusing to resolve a child custody issue between a tribal court and a state court on the basis of the UCCJA because the UCCJA involves disputes between states. The court viewed the tribe as a "dependent sovereign or quasi sovereign").

128 See Norman J. Singer, 2A *Sutherland Statutory Construction* § 47.23 (West 6th ed 2000).

Jurisdiction Enforcement Act ("UCCJEA")[129] might demonstrate congressional belief that the UCCJA's silence required a specific legislative remedy.[130] On the other hand, a canon of construction dictates that when ambiguity exists in statutes affecting the rights of Indians, courts should construe those statutes in favor of Indians.[131] Judges could decide excluding "tribes" from the statutory definitions would harm Indian rights, thus construing the provisions to include tribes.

Even if state courts adopted a uniform interpretation to give tribal custody determinations full faith and credit under the UCCJA, tribal courts would still have to act in accordance with the jurisdictional mandates of that state to take advantage of its protections. Tribal submission to state law precludes them from exercising jurisdiction to the full extent that constitutional law and treaties permit.[132] The UCCJA fails to even acknowledge the sovereignty concerns inherent in tribal governance over custody affairs, let alone meaningfully distinguish them from generic state interests in custody litigation. Instead, the purpose of the UCCJA is merely to help guarantee that child custody litigation "take[s] place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available."[133] Courts are supposed to decline jurisdiction "when the child and his family have a closer connection with another state."[134] Thus, an Indian child who resides outside Indian country would not be subject to tribal jurisdiction.

In summary, the UCCJA currently presents tribes with a Hobson's choice. Tribal courts can either protect their decisions with full faith and credit, or they can have jurisdiction over nonresidents, but they cannot have both. The UCCJA thus fails to accommodate tribal interests in their children, and, ultimately, in their own survival as distinct political and ethnic groups.

---

129 9(IA) ULA 655 (1999).

130 See Stoner, 75 ND L Rev at 301 (cited in note 114) (contending that ambiguity about the recognition of tribal court custody orders was one of the factors motivating the drafting of the UCCJEA).

131 See *Montana v Blackfeet Tribe*, 471 US 759, 766 (1985) ("[S]tatutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit."). See also *Northern Cheyenne Tribe v Hollowbreast*, 425 US 649, 655 n 7 (1976) (utilizing the canon that "statutes passed for the benefit of the Indians are to be liberally construed and all doubts are to be resolved in their favor").

132 For a discussion of the limits of tribal jurisdiction, see Parts I A and I B.

133 UCCJA § 1(a)(3), 9(IA) ULA 271 (1999).

134 UCCJA § 7(b), 9(IA) ULA 498 (1999).

B. Uniform Child Custody Jurisdiction and Enforcement Act

In order to remedy the jurisdictional loopholes and ambiguities of the UCCJA, over twenty states have enacted the UCCJEA.[135] Several more state legislatures will soon debate its enactment.[136] The UCCJEA alters the UCCJA by "giving jurisdictional priority and exclusive continuing jurisdiction to the home state."[137] This harmonizes the UCCJEA with other custody statutes like the PKPA, which in turn increases the likelihood that custody orders in compliance with the UCCJEA will receive full faith and credit in other states.[138] If a child has not lived in a home state for the six months prior to the custody proceedings, the UCCJEA provides backstop mechanisms to determine jurisdiction: significant connection; more appropriate forum; and vacuum jurisdiction.[139]

The UCCJEA also specifically addresses how states should handle custody orders granted by tribal courts. First, the UCCJEA clearly excludes from its scope all proceedings directly governed by the ICWA.[140] Second, the statute explicitly gives the states the option to extend the UCCJEA to Indian tribes.[141] If a state enacts this provision, it must then treat tribes as sister states.[142] This requires consenting states to enforce all tribal decrees arising from custody proceedings that substantially conform to the UCCJEA requirements.[143] Some states have adopted the optional tribal provision.[144] A few states have either rejected the

---

[135] UCCJEA § 305, 9(IA) ULA 692–93 (1999). See Uniform Law Commissioners, *Introductions & Adoptions of Uniform Acts: A Few Facts About . . . The Uniform Child Custody Jurisdiction and Enforcement Act*, available online at <http://www.nccusl.org/uniformact_factsheets/uniformacts-fs-uccjea.htm> (visited Mar 20, 2001) [on file with the U Chi Legal F] (listing the twenty-two states that have adopted the UCCJEA).

[136] See id (listing thirteen states where legislators have introduced the UCCJEA in 2001).

[137] Stoner, 75 ND L Rev at 305 (cited in note 114).

[138] See id.

[139] See Joan Zorza, *The UCCJEA: What It Is and How Does It Affect Battered Women in Child Custody Disputes*, 27 Fordham Urban L J 909, 916–17 (2000) (discussing the various forms of jurisdiction under the UCCJEA).

[140] See UCCJEA § 104, 9(IA) ULA 661 (1999).

[141] See UCCJEA § 104(a), 9(IA) ULA 661 (1999). See also Atwood, 83 Minn L Rev at 927–28, 954–57 (cited in note 92).

[142] See UCCJEA § 104(b), 9(IA) ULA 661 (1999) ("A court of this state shall treat a tribe as if it were a State of the United States for the purpose of applying [the jurisdiction and recognition of the Act.]").

[143] UCCJEA § 104, 9(IA) ULA 661 (1999).

[144] For example, both North Carolina and North Dakota have adopted the optional provision on tribes. See Institute of Government, *North Carolina Legislation 1999: Children and Families*, available online at <http://www.iog.unc.edu/pubs/nclegis/nclegis99/

UCCJEA wholesale, or specifically declined to enact the optional provision that speaks to tribes and tribal decrees.[145] These states still face the decision of whether to apply the UCCJA to tribal courts.

Importantly, the UCCJEA does not purport to legislate custody jurisdiction for tribal courts.[146] Like states, tribes may reject application of the UCCJEA.[147] Thus, tribes once again may face a difficult decision. While compliance with the UCCJEA guarantees that states will grant full faith and credit to tribal decrees, it also means that tribes cannot exercise jurisdiction beyond what the UCCJEA permits. For example, if a child possesses meaningful tribal ties but lives five minutes outside of the reservation, that child would be subject to dissolution-based custody proceedings in state court under the UCCJEA. Yet if tribes refuse to enact the UCCJEA, tribal courts run the risk that some state courts will decide not to enforce any tribal custody decrees.[148] For example, if a child and one parent live on a reservation and the other parent lives off the reservation, the tribe has little assurance that the state court will respect a custody order issued by the tribal court.

Unfortunately, the UCCJEA also fails to resolve many of the hard jurisdictional questions in relation to tribal custody decrees not governed by ICWA. First, no clear standards govern the state courts' determination of when tribes are in "substantial conformity with the jurisdictional standards."[149] Thus under the UCCJEA, tribes may find it difficult to demonstrate that they

---

Chfin04.htm> (visited Apr 4, 2001) [on file with the U Chi Legal F] (discussing North Carolina law); B.J. Jones, *A Primer on Tribal Court Civil Practice*, available online at <http://www.court.state.nd.us/Court/Resource/Tribal.htm#N_26> (visited Apr 4, 2001) [on file with the U Chi Legal F] (discussing North Dakota law).

[145] Alaska Stat § 25.30.300 et seq (Lexis 1998); *News . . . from the Assembly Judiciary Committee*, available online at <http://assembly.state.ny.us/Updates/Judiciary/summ2000.html> (visited Nov 11, 2001) [on file with U Chi Legal F] ("Last year, the UCCJEA was vetoed by the [New York] Governor despite strong support for the proposed law from bar associations, the Academy of Matrimonial Lawyers, academics and domestic violence advocates.").

[146] See UCCJEA § 104(c) & comment, 9(IA) ULA 661 (1999).

[147] See B.J. Jones, *A Primer on Tribal Court Civil Practice*, available online at <http://www.court.state.nd.us/Court/Resource/Tribal.htm#N_26> (visited Apr 4, 2001) [on file with U Chi Legal F] ("[In North Dakota,] three of the tribal codes, Turtle Mountain, Spirit Lake and Three Affiliated Tribes, have general provisions regarding the recognition of foreign judgments. Standing Rock apparently has no provision in its code but has recognized foreign judgments if those foreign jurisdictions recognize its court orders.").

[148] See Atwood, 83 Minn L Rev at 956 (cited in note 92) ("Indian tribes who do not choose to so 'Anglicize' their tribal codes run the risk that Anglo-American courts will view their custody decrees as lacking in legal force. The carrot of recognition is attained through the stick of assimilation.").

[149] UCCJEA § 104(c), 9(IA) ULA 661 (1999).

exercised proper jurisdictional authority.[150] As a result, many tribes with codes that grant tribal jurisdiction over any custody proceeding when at least one parent is enrolled in the tribe and the child is eligible for tribal membership[151] may feel compelled to limit their jurisdictional reach to exactly what is allowed in the UCCJEA.

The emphasis on the home state also suggests that the UCCJEA overlooks some unique concerns of Indians. Many state governments are successfully decreasing the area of land over which Indians may govern.[152] Yet the UCCJEA fails to accommodate membership-based sovereignty, and instead relies purely on geography.[153] If states and tribes bind themselves to a geographical determination of "home state" at the same time that states actively reduce what comprises Indian "home states," adopting the UCCJEA commits tribes to increasing future jurisdictional losses over child custody proceedings.

Another problem arises when children split their time between homes both on and off a reservation. If there is no clear home state, or the home state has declined jurisdiction, a state with "significant connection jurisdiction" may adjudicate the child custody proceedings.[154] Yet both a tribe and a state might possess significant connections. No clear way to arbitrate between the two currently exists. Evidence from the ICWA suggests that a state court would likely choose its own state as the "state" with the most significant contacts.[155]

These issues suggest that, like the UCCJA, the premises and provisions of the UCCJEA hold little promise of either resolving

---

[150] See Christine M. Metteer, *A Law Unto Itself: The Indian Child Welfare Act as Inapplicable and Inappropriate to the Transracial/Race Matching Adoption Controversy*, 38 Brandeis L J 47, 86 (2000) (contending that the UCCJEA undercuts the tribe's ability to protect its cultural identity).

[151] See Atwood, 83 Minn L Rev at 968 n 174 (cited in note 92) (listing a variety of tribal code provisions that predicate jurisdiction on tribal enrollment rather than prioritizing residence or domicile).

[152] See Getches, 84 Cal L Rev at 1584 (cited in note 34) ("More damaging to tribal sovereignty than direct abrogation of governmental authority has been the tribes' loss of land."). See also Valencia-Weber, 27 Conn L Rev at 1281 (cited in note 54) ("Contemporary practices of some state governments attempt to shrink Indian country—the land over which American Indian tribes govern—as a way of divesting or voiding tribal sovereignty.").

[153] See Atwood, 83 Minn L Rev at 957 (cited in note 92) (contending that a tribal decree "based solely on tribal membership . . . would not qualify for enforcement under the act").

[154] See UCCJEA § 201(a)(2)(A), 9(IA) ULA 671 (1999).

[155] See Part III.

jurisdiction in favor of tribes or accommodating meaningful tribal sovereignty.

III. ICWA: INDIAN CHILDREN AND TRIBAL PERPETUATION

In 1978, Congress passed the ICWA to protect Indian children from being removed from Indian reservations and placed in non-Indian homes by the state.[156] Congress also hoped thereby to promote the sovereignty and security of Indian tribes.[157] The ICWA embodies several principles relevant to dissolution-based custody hearings: the importance of Indian children to continued tribal survival, the relevance of tribal adjudication to tribal sovereignty, and the necessity of unbiased proceedings to the best interests of children.[158] These concerns provide reasons for state courts to respect tribes' interests in self-perpetuation; tribes possess an interest in self-perpetuation that the people of an individual state lack as a mere demographic entity. In short, tribes are different and Congress recognized that by passing the ICWA. While the ICWA itself does not govern dissolution-based proceedings, its principles strengthen the foundation for an approach to dissolution-based hearings that turns on principles of sovereignty.

A. Mandates

The ICWA expanded the role of tribal courts in custody proceedings in order to remedy the state courts' inadequate consideration of the tribal heritage of Indian children in the course of their best interests determination.[159] Under the ICWA, tribal

---

156 See Jose Monsivais, *A Glimmer of Hope: A Proposal To Keep the Indian Child Welfare Act of 1978 Intact*, 22 Am Indian L Rev 1, 1 (1997) (contending that the ICWA "was enacted by Congress for the purpose of assisting parents, Indian custodians, and Indian tribes in protecting Indian children from removal and placement by state agencies and courts, into non-Indian homes").

157 See 25 USC § 1902 (1994) ("The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families.").

158 See 25 USC § 1901(3) (1994) ("there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children").

159 See 25 USC § 1901:

> [T]he Congress finds-
>
> (4) That an alarmingly high percentage of Indian families are [sic] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such

courts possess exclusive jurisdiction over children who are residents or domiciliaries of a reservation: "An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law."[160] The text exempts dissolution-based proceedings from its purview.[161] Tribal and state courts share concurrent jurisdiction when Indian children reside off reservations; moreover, absent good cause, state courts must grant parental or tribal petitions for transfer to tribal courts.[162] As a result of these jurisdictional mandates, tribal courts adjudicate cases under the ICWA's authority.[163] States must accord all ICWA-based tribal custody proceedings full faith and credit.[164]

B. Purposes

The ICWA attempted to remedy three interrelated problems: the harm done to children through custody proceedings in state court; the demographic devastation wreaked on tribes through the widespread removal of Indian children; and the disrespect states show for tribal sovereignty when they deny tribal adjudication of custody proceedings. The jurisdictional mandates of the ICWA stem from the presumption that tribal courts are both generally better suited than state courts to protect the best interests of Indian children and are more concerned with tribal survival and sovereignty.

---

children are [sic] placed in non-Indian foster and adoptive homes and institutions; and

(5) That the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

160 25 USC § 1911(a) (1994).

161 See Part III C.

162 See 25 USC § 1911(b) (requiring, upon petition by either parent, the transfer to tribal court of any state court proceeding for the "foster care placement of, or termination of parental rights to, an Indian child" not domiciled or residing on the reservation unless a parent or the tribe objects, or the state court finds good cause to deny the transfer).

163 See Monsivais, 22 Am Indian L Rev at 34 (cited in note 156) (contending that the ICWA provides "a much needed legal basis for those trying to preserve the culture of our indigenous peoples").

164 See 25 USC § 1911(d) ("The United States, every State . . . and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to . . . any other entity.").

First, when considering the ICWA, Congress recognized that state courts and social workers were unwilling or unable to accurately assess certain factors relevant to Indian culture when making custody determinations. These factors include the value of an Indian approach to child rearing; the need for continued tribal affiliation; and the relative unimportance of high family income.[165] For example, Congress noted that Indian parents often rely on extended family members to provide supervision. What mainstream America might perceive as abandonment and neglect,[166] Indians view as a way to build family ties.[167] Similarly, many Indians employ unconventional disciplinary methods that rely on shaming and cautionary tales rather than conventional discipline methods.[168] Social workers lack the knowledge of Indian social, cultural and normative values necessary to accurately assess whether the behavior of a child or parent is abnormal by Indian standards.[169] Chief Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians, explained, "[m]any . . . who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way."[170]

Congress further acknowledged that since state judges and social workers generally misunderstand tribal conditions and Indian child rearing practices,[171] they have found many tribal members unsuitable care providers[172] and have removed children from Indian homes in instances when a tribal court would not have

---

165 See Establishing Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families and for Other Purposes, HR Rep No 95-1386, 95th Cong, 2d Sess 10 (1978), reprinted in 1978 USCCAN 7530, 7532–33 (suggesting that state courts are institutionally incapable of accounting for the best interests of Indian children).

166 See Indian Child Welfare Program, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93d Cong, 2d Sess, 18 (1974) (quoting Mr William Byler, executive director of the AAIA) (lamenting that social workers ignorant of Indian family life considered "leaving the child with persons outside the nuclear family as neglect and thus grounds for terminating parental rights").

167 Id at 4 (quoting Mr William Byler, executive director of the AAIA) ("[S]tate welfare agents may consider the children to be running wild. They assume neglect. In many cases, it may simply be another perspective on child-rearing, placing a great deal of responsibility on the child for his own behavior and, in fact, an effective way of raising children.").

168 See id.

169 See id.

170 *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30, 35 (1989), quoting Hearings on S 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong, 2d Sess 191–92 (1978).

171 See 25 USC § 1901(5) (noting that the states "have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families").

172 See HR Rep No 95-1386 at 12 (cited in note 165).

done so.[173] These off-reservation and non-Indian placements reduce or eliminate the children's tribal ties.[174] Unfortunately, as the ICWA recognized, this widespread removal had devastating effects on children.[175] Removal from Native American environments has caused children difficulty both in coping with non-tribal living arrangements and in developing viable Indian identities.[176]

The ICWA also recognized that tribal survival depends on the tribe's continued contacts with child members.[177] In his ICWA testimony, Chief Isaac made this connection very explicit: "Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People."[178] Thus, if Indian children failed to form a meaningful Indian identity, custody proceedings would continue the tribal decimation perpetrated by colonialism, governmental conflict, and state-sanctioned neglect.

Finally, the ICWA indicated that promoting Indian sovereignty militates in favor of tribes adjudicating child custody proceedings. As Chief Isaac further exhorted, "[p]robably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships."[179] Echoing this sentiment, one court contended that "there can be no greater threat to 'essential tribal relations,' and no greater infringement on the right of the . . . Crow Tribe to govern themselves [sic] than to interfere with tribal control over the custody of their [sic] children."[180]

---

173 See 25 USC § 1901(4).

174 Monsivais, 22 Am Indian L Rev at 7 (cited in note 156) ("Indian children in non-Indian homes are not raised as Indians.").

175 See 25 USC § 1902 (1994) (stating that ICWA established minimum standards for removing Indian children from their families in order to "protect the best interests of Indian children").

176 See Indian Child Welfare Program, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93d Cong, 2d Sess, 46 (1974) (statement of Joseph Westermeyer, Department of Psychiatry at the University of Minnesota).

177 See 25 USC § 1901(3) ("[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.").

178 *Holyfield*, 490 US at 34, quoting Hearings on S 1214 before Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong, 2d Sess 193 (1978).

179 Id.

180 See *Wakefield v Little Light*, 347 A2d 228, 237–38 (Md Ct App 1975).

C. Applying ICWA to Dissolution-Based Custody Proceedings

While the ICWA governs the determination of jurisdiction in most Indian child custody cases, it specifically exempts child custody proceedings arising from divorce.[181] Courts have interpreted this exclusion to include proceedings that involve the separation of unmarried parents as well.[182] The plain meaning of the statute,[183] its legislative history,[184] and subsequent governmental statements[185] all support these exemptions. ICWA's principles play an important role in dissolution-based custody determinations.

Courts have acknowledged that dissolution-based decrees are explicitly excluded from the ICWA, but disagreement has emerged about the relevance of ICWA's principles and purposes to such proceedings. Relying on formalist principles, one line of reasoning refuses to apply ICWA-based policy arguments to divorce-related child custody cases.[186] Proponents of this view claim that applying the principles of ICWA to an area that Congress specifically excluded from the statute's purview renders the exception meaningless. Instead, courts should strive to give all legislative provisions meaning when possible.[187] Thus, they argue, the exclusion demonstrates that Congress deliberately limited the extrapolation of ICWA's principles.[188]

---

181 See 25 USC § 1903(1) ("Such term . . . shall not include a placement based . . . upon an award, in a divorce proceeding, of custody to one of the parents.").

182 See *John*, 982 P2d at 747 (contending that legislative history "suggests that Congress intended the divorce exception to apply to any parental custody dispute"); *Walksalong v Mackey*, 549 NW2d 384, 387 (Neb 1996) ("[T]he Indian Child Welfare Act is inapplicable to this case, as this matter involves a custody dispute between parents in which one of the parents has physical custody of the child.").

183 *John*, 982 P2d at 784 ("Congress explicitly excluded from ICWA's coverage divorce proceedings").

184 See 25 USC § 1902. A letter from then Assistant Secretary of the Interior Gerrard stated, "We believe that custody proceedings held pursuant to a divorce decree . . . should be excepted from the definition of the term 'placement.' We believe that the protections provided by this act are not needed in proceedings between parents." HR Rep No 95-1386 at 31 (cited in note 165).

185 See Guidelines for State Courts; Indian Child Custody Proceedings, § B.3(b), 44 Fed Reg 67,584, 67,587 (1979) ("Child custody disputes arising in the context of divorce . . . are not covered by the Act so long as custody is awarded to one of the parents.").

186 See *DeMent v Oglala Sioux Tribal Court*, 874 F2d 510, 514 (8th Cir 1989) (holding that ICWA did not grant exclusive tribal jurisdiction in child custody proceedings arising from divorce); *In re Custody of Sengstock*, 477 NW2d 310, 312 (Wis Ct App 1991) (holding that ICWA does not apply to intrafamily disputes).

187 *See Dunn v Commodity Futures Trading Commission*, 519 US 465, 472 (1997) (recalling the "doctrine that legislative enactments should not be construed to render their provisions mere surplusage").

188 *Catholic Social Services, Inc v C.A.A.*, 783 P2d 1159, 1160 (Alaska 1989):

An opposing line of reasoning looks to the policy rationales and assumptions of the ICWA when determining jurisdiction in dissolution-based custody disputes. The concerns about the best interest of children, tribal survival, and tribal sovereignty all significantly implicate dissolution-based custody proceedings. Although these courts clearly concede that ICWA does not directly govern such cases, they deem the purposes enshrined in the legislation relevant to these determinations.[189] Jurisdictional uncertainty causes delays in resolving the child's placement. Parents dissatisfied with the outcome in either state or tribal court often petition other courts to assume jurisdiction.[190] Such forum shopping upsets the stability of interim custodial arrangements. The uncertainty surrounding the enforceability of tribal custody decrees creates a related possibility for delay.

Potential biases of state courts also directly affect children subject to dissolution-based custody proceedings. At least two types of discrimination may exist. State courts that systematically misunderstand Indian child rearing may be likely to grant sole or primary custody to a non-Indian parent. Courts may also prefer to award custody to a parent residing off a reservation based on misperceptions of tribal culture and reservation life.[191] Biases against reservation environments and in favor of non-Indian parenting methods hurts children's self-identity and emotional well-being as they lose ties to the tribes.[192] Instances of these forms of discrimination may rise as Indians increasingly

---

> The provisions of the Act which give tribes the right to notice of certain proceedings and not to others, define the scope of tribal rights. The Act strikes a balance between the sometimes conflicting interests of Indian parents, Indian children, and their tribes. We are unable to say that the fact that Congress stopped short of granting tribes the right to notice in voluntary termination proceedings is fundamentally unfair.

189 *Skillen*, 956 P2d at 11 ("Regardless of its literal non-application to the facts before us, we cannot ignore the fact that the ICWA 'evinces an emphatic federal policy of protecting the tribal role in proceedings involving Indian children.'"), quoting Atwood, 36 UCLA L Rev at 1062 (cited in note 18); *John*, 982 P2d at 754 ("Although the custody dispute at the center of this case falls outside ICWA's scope, Congress's purpose in enacting ICWA reveals its intent that Alaska Native villages retain their power to adjudicate child custody disputes.").

190 See Atwood, 36 UCLA L Rev at 1052 (cited in note 18).

191 See 25 USC § 1901(5) ("States . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian Communities and families.").

192 See Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 Iowa L Rev 585, 602 (1994) ("The hearing testimony identified Euro-American cultural bias as the underlying cause of danger to Native American families and culture.").

marry outside of their tribes and as Indian children and their parents often spend significant time off the reservation land.[193]

While one could argue that Indian parents who voluntarily marry outside their tribe and/or decide to move off reservation land have chosen to devalue their Indian heritage, this observation fails to recognize that many Indians move because of a lack of land or economic opportunity rather than to distance themselves from the tribe.[194] While there may be some Indian parents who try to game the court system by living an assimilated life on State land but want what they perceive as the preference of tribal courts, it is still true that state courts are systemically unattuned to the interests of Indian children.

IV. RESOLVING DISSOLUTION-BASED CUSTODY PROCEEDINGS

State legislatures, tribes, and judges must balance competing concerns when adjudicating dissolution-based custody disputes. The UCCJA, UCCJEA, and PKPA seek to deter child snatching through a bright-line jurisdictional rule that favors the home state.[195] These statutes, along with the ICWA, also attempt to reduce the risks of delay and conflicting judgments that arise from jurisdictional ambiguity.[196] The ICWA also raises separate concerns of tribal sovereignty and tribal survival.[197] Finally, one must also account for the best interests of children, a theme that runs throughout family law and these jurisdictional statutes.

The following framework tries to coherently accommodate these concerns, discussing the possible jurisdictional conflicts in turn. In laying out the possible permutations of geography and tribal membership, this Comment employs the non-infringement doctrine to help resolve some of these complicated disputes. While it is impossible to perfectly accommodate all of the relevant interests, the non-infringement doctrine provides a basis from which

---

193 See notes 2, 5, and 6 and accompanying text.

194 Justin P. Orr, *The Dream Fulfilled = Economic Justice*, Kansas City Star (Jan 14, 2001) available online at <http://www.kcstar.com/king/2001stories/korr.html>, (visited Nov 11, 2001) [on file with the U Chi Legal F].

Many tribes exist under an excruciatingly complex system of tribal-owned, leased and privately held land ownership, defying any organized approach to financially viable economic development. Most capital-based interests have chosen to step around these complexities. Today, about 70 percent of Native Americans live off reservation lands, a direct result of the lack of economic opportunity on reservations.

195 See Part II.

196 See Parts II and III.

197 See Part III B.

to understand the preference for sovereignty over a more rule-bound approach or the application of the UCCJEA to tribes.

A. When All Relevant Parties Are Tribal Members Residing in Indian Country, Tribal Jurisdiction Is Exclusive

The exclusivity of tribal jurisdiction, when all parties are tribal members living in Indian country, is relatively uncontroversial.[198] This consensus likely arises from *Fisher*, which firmly established that a tribal court exercises exclusive jurisdiction over an adoption proceeding when all the relevant parties are tribal members residing on a reservation. In this instance the application of the non-infringement doctrine is easy; state involvement would clearly interfere with the ability of Indians to make and be governed by their own rules. More broadly speaking, in the absence of an explicit grant of congressional authority to the states, tribes maintain their sovereignty over internal affairs.[199] One need not determine if internal affairs require both land and membership sovereignty or if one is sufficient, because tribal members residing in Indian country clearly meet both criteria. When tribal membership and reservation residence are coterminous, it seems clear that there is no state interest. Reliance on the non-infringement doctrine and adoption of the UCCJEA both yield the same outcome.

B. When the Child and One Parent Are Enrolled Tribal Members and the Child Resides in Indian Country, Tribal Jurisdiction Is Exclusive

The Montana Supreme Court recently adjudicated a case where the child and her mother were enrolled tribal members residing on a reservation while the father lived off the reservation. *Skillen* announced general guidelines to determine when tribal courts possess exclusive and concurrent jurisdiction over

---

[198] See *In re Marriage of Wellman*, 852 P2d 559, 562 (Mont 1993) (granting exclusive tribal court jurisdiction where the state has not asserted authority under PL-280); *In re Marriage of Limpy*, 636 P2d 266, 268–69 (Mont 1981) (deferring to tribal court's finding of exclusive jurisdiction); *Stewart v District Court*, 609 P2d 290, 292 (Mont 1980) (abstaining to the tribal court on comity grounds). See also *Fisher*, 424 US at 389 (characterizing an adoption between tribal members who reside on a reservation as "litigation arising on the Indian reservation"); *Whyte v District Court*, 346 P2d 1012, 1014–15 (Colo 1959) (holding that state courts have no jurisdiction over divorce actions arising between tribal members residing on the reservation).

[199] See Part I B.

dissolution-based custody cases.[200] The court crafted a rule of exclusive tribal court jurisdiction whenever a dispute arises involving an Indian child and at least one Indian parent, both of whom reside on the reservation. The court determined that the residence and tribal affiliation of the non-custodial parent were irrelevant.[201] The court's reasoning helps illuminate when relevant sovereignty and policy concerns suggest that tribal jurisdiction should be exclusive.

1. Non-Infringement doctrine.

In order to prevail under the non-infringement doctrine, tribes must show that: (1) they have not been divested of general authority by an act of Congress or a treaty; (2) the issue they wish to regulate or adjudicate falls within internal affairs; and (3) the case is properly characterized as arising on the reservation.[202] Establishing the tribe's inherent sovereignty is often an easy showing. For example, in *Skillen*, it was clear that Fort Peck Indian Tribe maintained its inherent sovereignty.[203] This reservation is located in Montana, which chose not to unilaterally assume jurisdiction under PL-280.[204] No other federal law clearly preempted either state or tribal assumption of jurisdiction.[205] In other instances, courts may have more difficult determinations involving the construction of treaties or congressional statutes.

Next, courts must determine whether dissolution-based custody falls within the internal affairs exception established in *Montana*. The *Skillen* court concluded that in an adjudicatory situation, "civil jurisdiction over all activity on Indian land is generally presumed to rest in the tribal court."[206] While acknowledging that the dispute before it involved the interests of a non-

---

200 956 P2d at 18 (Mont 1998).

201 Id at 16–17:

> We decline here to undermine the tribe's position as a sovereign entity with the suggestion that merely because a resident Indian child also has significant off-reservation contacts through his non-Indian parent, its authority to exercise jurisdiction in domestic matters over its members who reside on Indian land is put in jeopardy.

202 See Part I B.

203 956 P2d at 15.

204 See id at 6.

205 See id ("Congress has in recent years legislated in the area of child custody and specifically Indian child custody. Those federal acts, however, do not govern these facts, nor do they operate presumptively to preempt state authority in favor of the tribe's authority . . . Montana has not assumed jurisdiction . . . pursuant to P.L.-280.").

206 Id at 14.

member as well as members, the court reasoned that tribal sovereignty had to include a tribe's "right, within its own boundaries and membership, to provide for the care and upbringing of its young, a *sine qua non* to the preservation of its identity."[207] Thus, *Skillen* relied on the fundamental principles elucidated in *Worcester* and the early *Williams* progeny. It determined that state jurisdiction over custody proceedings of a child domiciled on a reservation "presents a threat in terms of the tribe's ability to be self-governing or to control its internal relations."[208]

Finally, courts must decide whether to employ a notion of sovereignty based on geography or membership in order to characterize the action as arising on the reservation. The majority and the dissent in *Skillen* fundamentally disagreed not only about the background rule *Williams* established but also how to interpret it in the wake of *Montana* and *Strate*. Consequently, the judges took notably different approaches to whether the relevant activity arose on the reservation.

The *Skillen* majority used a geography-based notion of sovereignty. Thus, to determine whether the custody litigation arises on the reservation, the court asked whether the child and one parent were residents on the reservation prior to the initiation of the dissolution proceedings. The court formulated its principle for this determination of residence establishing sovereignty in clear terms: "State jurisdiction would threaten the tribe's political integrity and welfare, even though another party to the dispute is a non-Indian who resides off the Reservation."[209]

Employing a notion of sovereignty based on "membership plus geography," the dissent argued that if one of the parents is neither a tribal member nor a resident on a reservation, states and tribes ought to share concurrent jurisdiction.[210] In distinguishing *Fisher*, the dissent argued that the custody dispute did not arise solely on the reservation because a non-Indian was a party to the custody proceeding.[211] Thus, the internal affairs exception to *Montana* no longer applied, rendering the non-infringement doctrine irrelevant.

---

[207] *Skillen*, 956 P2d at 16, quoting *Application of Bertelson*, 617 P2d 121, 129 (Mont 1980).

[208] *Skillen*, 956 P2d at 7.

[209] Id at 17.

[210] See id at 20 (Nelson dissenting) ("The express exclusion of divorce proceedings from the ICWA's coverage illustrates Congress's intent that state and tribal courts should share concurrent jurisdiction over Indian child custody proceedings arising within a divorce proceeding between an Indian parent and a non-Indian parent.").

[211] *Skillen*, 956 P2d at 24 (Nelson dissenting).

The divorce cases on which the dissent relied do not address the unique sovereignty concerns implicated in child custody cases. The dissent cited *In re Marriage of Wellman*,[212] which suggested that concurrent jurisdiction in a divorce action between two reservation-based Indians does not interfere with tribal government.[213] The dissent also relied on *Wells v Wells*,[214] which concluded that that concurrent jurisdiction exists unless the divorce only "involves two tribal members residing on the reservation."[215] Yet dissolution-based custody cases present tribal concerns distinct from those involved in divorce alone. As the *Skillen* majority explained, "especially when Indian children reside on the reservation, they represent the single most critical resource to the tribe's ability to maintain its identity and to determine its future as a self-governing entity."[216] In a divorce, the tribe itself does not face the prospect of losing contacts with a tribal member. In a child custody dispute, however, the state court could remove the child from the reservation or give primary custody to a non-Indian parent.

2. The use of policy principles.

The principles enshrined in the UCCJA, the UCCJEA, and the PKPA all support the need for exclusive jurisdiction. First, the uniform jurisdictional statutes demonstrate that exclusive jurisdiction deters child-snatching and avoids jurisdictional competition and conflict by creating bright-line rules favoring the home state.[217] While these statutes do not clearly apply to Indians,[218] the *Skillen* majority merely used them as evidence of the benefits of exclusive jurisdiction, rather than as support for tribal jurisdiction.[219] The preference for rules over standards in particular circumstances drove the decision in *Skillen*. The majority presented a bright-line rule for determining jurisdiction when the child resides on the reservation, and a multi-factor, standard-

---

212 852 P2d 559 (Mont 1993).

213 Id at 562 ("[N]o precedent suggests . . . that exercise of concurrent jurisdiction by a state district court interferes with tribal self-government."), cited in *Skillen*, 956 P2d at 20 (Nelson dissenting).

214 451 NW2d 402 (SD 1989).

215 Id at 405 ("[W]ithout a proper tribal court divorce, the state court is merely exercising its own concurrent jurisdiction over the marriage of one of its domiciliaries.").

216 956 P2d at 16.

217 See Part II.

218 See id.

219 956 P2d at 8–11.

driven inquiry to employ when the child is a non-resident.[220] The dissent preferred the use of more flexible standards in both instances.[221]

Under both exclusive and concurrent modes of jurisdiction, courts address "the best interest of the child."[222] Under the geography-based sovereignty rule, however, a court immediately decides that it is in the best interest of the child to narrow the potential for jurisdictional disputes and does so in favor of the tribe.[223] Under the regime of the *Skillen* dissent, the court determines whether to exercise that jurisdiction and then employs the "best interests of the child" standard.[224] Yet, as one commentator suggests, courts have used the best interests standard subjectively to prevent jurisdictional transfers to tribal courts.[225] State courts may distrust tribal courts and their placements.[226] Thus, with concurrent jurisdiction, there is a high risk of error costs.

The ICWA shows that Congress recognized that tribal sovereignty concerns are greater when the child resides on rather than off the reservation. In such cases, the child's relationship with the tribe is concrete enough to justify a application of a rule rather than a standard.[227] The legislative history of the ICWA provides compelling evidence that: (1) state courts fail to recognize that

---

220 See id at 17–18.

221 See id at 28 (Nelson dissenting) ("Recognition of concurrent jurisdiction would allow us to follow the more flexible inquiry described in *Bertelson* in all interparental child custody disputes involving Native American children.") (citations omitted).

222 See Jones, 73 ND L Rev at 423–24 (cited in note 1) ("State court judges have been indoctrinated, however, to believe that every decision they make in a proceeding involving a child must be done in the best interest of that child, and view proceedings involving Indian children no differently.").

223 *Skillen*, 956 P2d at 15 ("We reiterate here that the best interests of the child should be the predominant factor in the determination of which court should have jurisdiction in a matter that involves an Indian child. We further assert that . . . we must presume that the tribal court has jurisdiction.").

224 Id at 23 (Nelson dissenting):

> I disagree that the best interests of the child standard should be used as the controlling principle to determine whether a court possesses subject matter jurisdiction over a child custody case as a matter of law. Rather, only after concluding that it possesses subject matter jurisdiction should a court use the best interests of the child standard as a controlling principle to determine whether to exercise that jurisdiction.

225 See Jones, 73 ND L Rev at 398 (cited in note 1) ("Courts that have adopted the best interests standard are thus able to question the ability of tribal courts and social service agencies to effectively provide for the best interest of Indian children, turning the Congressional presumption in favor of tribal court decision-making on its head.").

226 See Carriere, 79 Iowa L Rev at 648 (cited in note 192) ("The deep distrust that state courts feel for tribal courts sounds as the leitmotif in their examinations of good cause.").

227 See Part III.

tribal residence is often in the best interest of children currently residing on Indian lands; (2) tribal court determinations better promote the best interests of Indian children; and (3) tribal courts are able to make fair determinations.[228] These determinations that "jurisdiction is destiny" in Indian child custody cases highlight the applicability of the "internal affairs" exception to *Montana* in these cases. Recognition that state courts are comparatively ill-suited to protect the needs of resident Indian children shows that state court adjudication "threaten(s) or directly affect(s) the tribe's political integrity, economic security, health or welfare."[229]

While the ICWA clearly excludes dissolution-based custody proceedings, applying the ICWA's principles to jurisdictional determinations adapts the principles of the ICWA to today's changed circumstances. The concerns about tribal sovereignty and tribal contacts for children of divorce mirror the concerns of the ICWA. The dissent in *Skillen* argued that the dissolution-based exclusion "illustrates Congress' intent that state and tribal courts should share concurrent jurisdiction over Indian child custody proceedings arising within a divorce proceeding between an Indian parent and a non-Indian parent."[230] The sparse legislative history on the exception, however, merely evidences a congressional belief that children subject to divorces would not be removed from both parents and placed into an unfamiliar non-native home.[231] Marriage outside the tribe and the geographical diminishment of Indian country currently present the same threat to tribal sovereignty and survival that adoption and foster care once did.

Moreover, even if the exclusion is a purposeful one, courts are still the proper actors to define the contours of sovereignty.[232] While the uniform jurisdictional statutes suggest the benefits of

---

228 See id.

229 *Montana*, 490 US at 566.

230 *Skillen*, 956 P2d at 20 (Nelson dissenting).

231 HR Rep No 95-1386 at 31 (cited in note 165) (letter from Assistant Secretary of the Interior, Forrest J. Gerrard) ("We believe that custody proceedings held pursuant to a divorce decree . . . should be excepted from the definition of the term 'placement.' We believe that the protections provided by this act are not needed in proceedings between parents.").

232 See Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 Yale L J 1, 7 (1999) ("[I]n these cases the congressional intent is unstated . . . the outcomes turn on judicial presumption . . . concerning the question whether tribes are sovereigns or merely membership organizations. Thus, it is the Court, not Congress, that has exercised front-line responsibility for the vast erosion of tribal sovereignty.").

exclusive jurisdiction, and the ICWA demonstrates the need for tribal jurisdiction, the non-infringement doctrine alone is enough to dictate exclusive tribal jurisdiction.[233] Finally, because both uniform jurisdictional statutes and the non-infringement doctrine are geography-based approaches, they both would support exclusive tribal jurisdiction when the child resides on a reservation.

3. Objections to exclusive jurisdiction.

Possible objections might be made to exclusive tribal jurisdiction when a parent is not a tribal member or does not reside on a reservation. First, when the ICWA was enacted, some objected that the grant of exclusive jurisdiction constituted a violation of the equal protection rights of non-Indians. They argued that subjecting non-Indians to automatic tribal court jurisdiction is a policy of race discrimination in favor of Indians. Yet, the Court has indicated that favoring tribal jurisdiction is not impermissible racial discrimination.[234] Even if one of the parents is not eligible for tribal membership, the tribal court may constitutionally exercise jurisdiction. *Fisher* makes this clear in stating, "[t]he exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribes under federal law."[235] In this instance, the membership of the child triggers recognition of the tribe's sovereign interest; the state does not make a racial classification.

Moreover, the imposition on the non-Indian parent is justified based on the individual's consensual familial relations with a tribal member. As Barbara Atwood compellingly argues, "by parenting a child with a tribal member, the non-Indian should be on notice that the tribe may ultimately assert its inherent authority over the resulting family."[236] While one could argue that, conversely, the Indian ought to be on notice that the state could assert its jurisdiction, the location of the child's residence ought to be an obvious possible source of jurisdiction.

As for the jurisdictionally-relevant ties between the non-tribal parent and the reservation, personal jurisdiction is no longer a prerequisite to judicial action in many child custody pro-

---

233 See Part I C.

234 *United States v Antelope*, 430 US 641, 646 (1977) ("[F]ederal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as 'a separate people' with their own political institutions.").

235 424 US at 390–91.

236 Atwood, 36 UCLA L Rev at 1105 (cited in note 18).

ceedings. While it is beyond the scope of this Comment to fully address the power to compel the non-tribal parent to comply with such orders if he or she has no minimum contacts with the reservation, "the clear consensus today is that personal jurisdiction over the absent parent is not essential to a court's power to issue a binding decree in child custody cases."[237] Many scholars argue that in child custody cases, personal jurisdiction over parents is simply irrelevant.[238] Even if personal jurisdiction were a significant consideration, it seems likely that the non-resident parent would have substantial connections with the reservation if the child resides or is domiciled on it. While these contacts will not always be sufficient, personal jurisdiction would probably prevent the exercise of exclusive jurisdiction in only a handful of cases at best.

C. When the Child Is an Enrolled Tribal Member Not Residing in Indian Country, Tribal and State Jurisdiction Are Concurrent

The UCCJEA and the geography-plus interpretation of sovereignty differ in how they treat children residing off reservations. Under the UCCJEA, if a home state can be established, it is determinative for purposes of jurisdiction.[239] Thus, if a child resides in an Indian community but not on Indian land, state courts have jurisdiction over dissolution-based custody hearings. Yet under geography-plus based sovereignty, states and tribal courts share concurrent jurisdiction over a non-resident child. While concurrent jurisdiction is subject to problems of bias, subjective inquiries, and potential jurisdictional competition, its flexible approach to overlapping concerns of sovereignty presents the better solution to assigning jurisdiction.

---

237 Id at 1065–66 & n 65.

238 See, for example, Anthony A. Dorland, Note, *Civil Procedure—Orders for Child Protection and Nonresident Defendants: The UCCJA Applies and Minimum Contacts Are Unnecessary*, 25 Wm Mitchell L Rev 965, 976 (1999) (arguing that the UCCJA provides a clear exception to personal jurisdiction); Rhonda Wasserman, *Parents, Partners, and Personal Jurisdiction*, 1995 U Ill L Rev 813, 815 ("[The State] can adjudicate child custody disputes as long as it is the child's 'home state,' regardless of whether the child or either parent is domiciled there or whether it has in personam jurisdiction over the parents.") (citations omitted).

239 See Part II B.

1. Sovereignty interest.

While tribal sovereignty may be implicated most strongly by matters arising in Indian country that involve tribal members, many of the concerns that drive the non-infringement doctrine are present in off-reservation custody disputes as well. If one accepts the geography-plus notion of sovereignty over approaches that focus solely on geography or membership, tribal court jurisdiction exists independently of territory.[240] This jurisdiction is limited to instances that affect tribal authority and the right to self-government.[241]

The relevance of this variable opens the objection that even if one of the parents is not a tribal member, under the geography-plus model, the membership of the child remains relevant to determining jurisdiction.[242] If the custody proceeding does not arise in Indian country, then the dispute does not interfere with the tribe's internal affairs or self government.[243] Both the *John* court and the ICWA support the focus on the membership of the child in determining jurisdiction.[244] Moreover, as explained above, personal jurisdiction is not required in child custody disputes.[245] Because the residence of the parents is not determinative and because custody disputes may affect the internal affairs of a tribe, tribal courts should have jurisdiction.

Unlike cases where the child resides on the reservation, in these instances the state also has a substantial interest in the best interests of the child. Federal law indicates that the only barrier to state jurisdiction over Indians and their affairs is Indian country.[246] Thus, the mere establishment of a tribe's sovereign interest does not dictate exclusive jurisdiction. Policy considerations help resolve jurisdictional disputes between competing sovereigns.

---

240 See *John*, 982 P2d at 752 ("The [Supreme] Court has not focused on tribal court as determinative of tribal sovereignty.").

241 See Part I B.

242 See *John*, 982 P2d at 759 ("A tribe's inherent sovereignty to adjudicate internal domestic custody matters depends on the membership . . . of the child. Such a focus on the tribal affiliation of the children is consistent with federal statutes such as ICWA.").

243 See id at 780 (Matthews dissenting) ("The United States Supreme Court has never held . . . that a tribe's inherent sovereignty, in and of itself, independent of Indian country, can be the basis for tribal adjudicatory authority.") (citations omitted).

244 See Part I A.

245 See Part IV B 3.

246 See *John*, 982 P2d at 759 ("[F]ederal law suggests that the only bar to state jurisdiction over Indians and Indian affairs is the presence of Indian country."), citing *Mescalero Apache Tribe v Jones*, 411 US 145, 148–49 (1973).

2. Policy principles.

The concern for the best interest of the child, the importance of tribal ties to children, and the potential of state court bias support a measured presumption in favor of tribal jurisdiction.[247] In similar non-dissolution based custody cases, the ICWA supports concurrent jurisdiction and focuses on membership and tribal ties in non-resident cases. The rationales underlying the ICWA apply here: Indian children whose tribal ties are reduced or eliminated as a result of divorce implicate tribal survival in ways similar to off-reservation adoption and foster care placements governed by the ICWA. Similarly, state court bias or misperceptions regarding Indian practices of child rearing may undermine their ability to accurately assess the best interests of the child.

Under a comity-based approach, neither tribes nor states have to transfer jurisdiction but both may do so as they see fit. The factors developed in *Application of Bertelson*[248]—which include the child's ethnic and cultural identity, relevant tribal customs, and the child's relationship with both parents and with the tribe[249]—guide state and tribal courts trying to assign jurisdiction based on the child's best interests.[250] Thus, state courts would likely assert jurisdiction over a child who possesses no contacts to the tribe and is wholly assimilated into non-Indian society, and would likely transfer jurisdiction over a child who is an active member of an Indian community.

Of course, there are still hard cases where the *Bertelson* factors fail to conclusively favor a particular court. Comity-based

---

247 See Atwood, 83 Minn L Rev at 966 (cited in note 92):

> A tribal court's consideration of culture and tradition in its judicial decision making may make state courts reluctant to respect the tribal court's ruling where non-Indian interests are at stake. Anglo-American judges, who can often misunderstand the meaning of tribal identity, may fear that the foreign concept of tribalism will override the best interests of the child.

248 617 P2d 121 (Mont 1980).

249 See id at 130.

250 Several cases suggest that states and tribal courts share concurrent jurisdiction over Indian children when the children reside off the reservation. See *John*, 982 P2d at 765 ("Tribal courts in Alaska have jurisdiction to adjudicate custody disputes involving tribal members. This jurisdiction is concurrent with that of the state courts."); *Skillen*, 956 P2d at 18 ("[W]e hold that when an Indian child resides off the reservation, the state court and tribal court share concurrent jurisdiction."); *Bertelson*, 617 P2d at 129–30 ("[T]o properly consider tribal interests in child custody that go beyond reservation boundaries, the best means to arrive at a considered decision as to whether a state court should accept or decline jurisdiction is to balance the state interests in taking jurisdiction against the tribal interest in assuming jurisdiction.").

deference sacrifices the clarity of geography-only rules and opens the door for possibly harmful judicial discretion. Under the UCCJEA, once state or tribal courts determine the child's residence, the judicial inquiry is over. Comity-based deference requires judges to engage in a much more subjective inquiry about the child's relationship with each parent, the tribe, Indian culture, and the reservation. Some courts, mistrustful of the other judicial system or of the other culture, may abuse these factors to maintain jurisdiction. On balance, however, this seems preferable to mandating a geography-only approach which is totally insensitive to the concerns outlined in the ICWA and *Bertelson* and when the residence of a child outside of Indian country may be especially uninformative. That residence decision might be a result of continued federal government diminishment of Indian country rather than a decision to distance the child from tribal authority.[251] While not all decisions to move off reservation land are the result of explicit federal action, it is certainly not clear that moving off the reservation is evidence of a desire to distance oneself and one's child from the tribe's jurisdictional reach and cultural influence.

D. Relinquishment of Tribal Authority: State Jurisdiction Is Exclusive

If an Indian tribe has been divested of its sovereign authority, either by consent or by PL-280, state courts should have exclusive jurisdiction over dissolution-based proceedings. While it is beyond the scope of this Comment to explore whether PL-280 is properly interpreted as a divestiture statute, if a tribe is properly divested by statute, then state courts must exercise exclusive jurisdiction.[252] This outcome coheres well with the non-infringement doctrine. If the exercise of jurisdiction stems from the tribe's sovereign authority, once the tribe loses sovereignty, it should lose adjudicatory powers as well.

Similarly, if the tribal code explicitly precludes exercising jurisdiction, then states possess exclusive jurisdiction. Many tribes have tried to adapt their tribal codes, either to conform

---

[251] For a general discussion of the federal diminishment of criminal and civil jurisdiction of Indian tribes, see Thorington, 31 McGeorge L Rev at 977–1042, 987 (cited in note 4) ("In addition to cutbacks in federal funding, recent Supreme Court decisions demonstrate a shift away from acknowledging any existing inherent tribal sovereignty.").

[252] See discussion in Part I D.

with the UCCJA[253] or to limit jurisdiction to cases involving only tribal members residing on the reservation.[254] This reluctance to assert civil jurisdiction is not constitutionally mandated,[255] and these tribes could change their codes to assert jurisdiction if they so desired.

CONCLUSION

Dissolution-based child custody cases provide state courts and legislatures with an opportunity to respect tribal sovereignty through recognition of tribal court jurisdiction. State legislatures and individual tribes should decline to enact the optional provision of the UCCJEA which extends its mandates to cases involving Indian children. Instead, state courts should be left to apply the non-infringement doctrine in dissolution-based cases. While the non-infringement doctrine will not always result in tribal court jurisdiction, it provides a principled way to balance the interests of children, parents, tribes, and states.

---

253 See Atwood, 83 Minn L Rev at 974 (cited in note 92) ("In a few tribes, the process of assimilation is evident in the formal laws governing child custody jurisdiction. In these tribes, the family codes have been drafted to reflect the prevailing jurisdictional model.").

254 Id at 973 ("Several tribal codes include a geographic tie to the reservation by a parent or child as a prerequisite to the exercise of custody jurisdiction.").

255 See Parts I A and I B.