

# IN THEORY, IN PRACTICE: JUDGING STATE JURISDICTION IN INDIAN COUNTRY

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*International relations theory suggests some new ways of thinking about the conflict between states and tribes over jurisdiction in Indian country. Realists portray the struggle as a clash of self-interested political actors, with the most powerful prevailing. Norms-driven theory suggests that perceptions of which legal system satisfies widely accepted standards for fair and effective justice will determine which entity is allowed jurisdiction. Since norms-driven analysis seems more prevalent in Supreme Court decisions, this Article pursues its implications for tribal-state jurisdictional conflicts, finding that federal courts and other decision-makers seem to favor state over tribal jurisdiction because state jurisdiction is perceived to be more likely to deliver fair and effective justice. The Article questions that assumption, challenging some empirical evidence that appears to support it in a civil context and presenting the results of empirical research that indicates that tribal communities view state criminal justice as unfair and ineffective within Indian country.*

## INTRODUCTION

Ever since the early years of the American republic, when Georgia famously set its sights on gold in Cherokee territory,<sup>1</sup> states and Indian nations have been competitors for jurisdiction over Indian country. Empowered by the Constitution of 1787, the federal government has inserted itself into this competition, claiming the position of ultimate authority and arbiter of state-tribal conflicts.<sup>2</sup> Many federal Indian law scholars

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1. See THEDA PERDUE & MICHAEL D. GREEN, *THE CHEROKEE REMOVAL: A BRIEF HISTORY WITH DOCUMENTS* 88–90 (2nd ed. 2005). For background on Georgia's formal efforts in the 1820s to dispossess the Cherokees and remove them from Georgia territory, see *id.* at 71–94.

2. U.S. CONST., art. I, § 8, cl. 3 (asserting federal supremacy over Indian affairs). The United States Supreme Court has upheld Congress's power to determine when state or federal jurisdiction may supplant or coexist with tribal juris-

have analyzed—and bemoaned—the body of Supreme Court doctrine that attempts to rationalize the allocation of jurisdiction among states and tribes, especially where non-tribal members are involved.<sup>3</sup> My aim here is different. I want to see if political theory can be helpful in understanding how this inter-governmental competition operates and how conflicts are and could be resolved.

I find that one important line of political theory, realism, applies in relatively straightforward fashion. Realism suggests that tribes will normally lose out to states, unless tribal interests happen—or can be shown—to converge with distinct federal interests. However, this theory has difficulty explaining some of the tribal successes that defy an interest-convergence analysis. Another important line of political theory, which emphasizes how norms drive political outcomes, has more potential explanatory power, but also requires more extended analysis. I show that the norms typically implicated in tribal-state jurisdictional conflicts incorporate empirical assumptions about the quality of justice dispensed by the two sets of systems. Consequently, I present and critique empirical evidence about the quality of state justice in Indian country, suggesting that state jurisdiction be viewed more critically when Congress or federal courts are asked to choose between the two.

In Part I, I will set out two of the dominant theories used in the study of international relations—realism and norms-driven theory—and show how those theories might be adapted to state-tribal conflicts. Then I will consider how these theories could explain why states have been prevailing in many recent court cases emerging from such conflicts. I emphasize norms-driven theory, because I see its assumptions more obviously reflected in the language of federal court decisions and congressional policy debates regarding tribal-state jurisdictional conflicts. Applying norms-driven theory to tribal-state jurisdic-

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diction in Indian country. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.01 (Nell Jessup Newton et al. eds., 2005) [hereinafter COHEN'S HANDBOOK].

3. See, e.g., FRANK POMMERSHEIM, BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION 211–34 (2009); ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 137–48 (2005) (indicting the Court's "principle[s] of racial discrimination"); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1574 (1996) (charging that Supreme Court decisions in the area of jurisdiction in Indian country have "abandon[ed] entrenched principles of Indian law in favor of an approach that bends tribal sovereignty to fit the Court's perceptions of non-Indian interests").

tional conflicts, one expects that states will succeed in gaining jurisdiction at the expense of tribes if they are widely perceived to be offering justice that more closely adheres to universal standards of fairness and effective administration. In Part II, I will consider whether research—theoretical and empirical—supports the view that states are actually providing a fair and effective system of justice for Indian country. First, I will present and critique recent research suggesting that state civil jurisdiction is at least more effective than tribal jurisdiction in that it promotes improved economic conditions in Indian country. Then I will relate the evidence from my recent study, with Professor Duane Champagne, that indicates some serious deficiencies in the fairness and effectiveness of state criminal jurisdiction in Indian country. I thus conclude that policy decisions based on the blanket assumption that states provide a fairer and more effective administration of justice than tribal governments should be re-evaluated.

#### I. POLITICAL THEORY AND TRIBAL-STATE JURISDICTIONAL CONFLICTS

Although it is rarely used for this purpose, I want to borrow from the political theory of international relations to analyze tribal-state jurisdictional conflicts. I recognize that Indian nations and states are not generally regarded as “nation states” in the international sense.<sup>4</sup> Furthermore, no authoritative international arbiter operates in the way the federal government does concerning tribal-state relations within the United States.<sup>5</sup> Nonetheless, I believe international relations theory suggests useful ways of analyzing tribal-state jurisdictional conflicts. Because Indian tribes and states, like nations around

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4. States of the Union are, of course, units of domestic government in the United States. Indian nations are treated by the United States as “domestic dependent nations” rather than foreign states. *Cherokee Nation v. Georgia*, 30 U.S. 1, 2 (1831). Under the recently passed United Nations Declaration on the Rights of Indigenous Peoples, indigenous peoples are recognized as groups with rights of self-determination. *See* Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/61/L.67 (Oct. 2, 2007). Indigenous self-determination does not include the right of secession from the nation-state within which an indigenous group is located. *Id.* art. 46(1).

5. The extent of federal legal control over intergovernmental relations is contested in the context of Indian affairs as well. *See, e.g.*, POMMERSHEIM, *supra* note 3, at 33–85.

the world, compete for power,<sup>6</sup> this theory can highlight what outcomes would likely occur without the intervention of the federal government. It can thus make the impact of federal intervention on tribal-state relations more salient. Furthermore, even in the international context, where there is no supernational government, nation-state actors are often held accountable to norms and agencies with transnational status, such as those associated with international human rights.<sup>7</sup> Thus, it is possible to compare the appeals that states and tribes make to the federal government with the appeals that international actors make to this transnational apparatus of global norms, principles, and decision-making procedures.

The following Sections examine two principal theories of international relations, and apply them to tribal-state jurisdictional conflicts. In Subsection A, I will consider why the realist theory of international relations is not always a good predictor of outcomes in tribal-state conflicts. Subsection B then argues that the so-called norms-driven approach provides a more appropriate analysis of tribal-state relations in the United States.

#### A. *Realist Theory*

International relations theory is a big tent, encompassing sharply different theoretical approaches.<sup>8</sup> One of these approaches, typically described as realist, conceptualizes international relations as a series of encounters among nation states that are always and only pursuing their own interests.<sup>9</sup> In its most basic form, realist theory posits that outcomes in these encounters are determined by which nation state has the

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6. See DAVID E. WILKINS, *AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM* 100–02 (2nd ed. 2007) [hereinafter *AMERICAN INDIAN POLITICS*]; see also JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* 32–33 (2001) [hereinafter *GREAT POWER POLITICS*] (discussing power conflicts in the international context). Of course, as in international relations, cooperative practices may also emerge as political actors view cooperation as serving their interests. See *AMERICAN INDIAN POLITICS*, *supra*, at 102–08.

7. See Harold Hongju Koh, *Transnational Legal Process*, 75 *NEB. L. REV.* 181, 194 (1996).

8. See, e.g., Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 *AM. J. INT'L LAW* 64 (2006) (surveying many different theoretical approaches to understanding international law); Kal Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, 32 *CASE W. RES. J. INT'L L.* 387, 400–11 (2000) (discussing rationalist, norms-driven, and liberal theories of international relations).

9. See Nathan A. Canestaro, *Realism and Transnationalism: Competing Visions for International Security*, 25 *B.U. INT'L L.J.* 113, 118 (2007).

greatest capacity to impose its interests on others.<sup>10</sup> To the extent international organizations exist, they typically ratify the position of the most powerful.<sup>11</sup>

Applying realist theory to Indian law, states and Indian nations are pursuing competing sets of interests related to control over matters such as natural resources, economic activity, and culture just as international states compete over favorable tariff arrangements, environmental regimes, copyright protections, and access to oil-rich markets.<sup>12</sup> In the tribal-state context, success in this competition would be determined by which government has the greatest power to influence or control the ultimate authority, namely the federal government. According to realist theory, the states should always win when tribal-state jurisdictional conflicts arise. They have more economic resources than Indian nations, and more political clout; under the U.S. Constitution, states are represented in the federal government via the Senate and the Electoral College, while Indian nations are not.<sup>13</sup>

Does realist theory explain the outcome of conflicts between Indian nations and states? Over the course of United States history, states have had notable success. Even after Georgia lost to the Cherokees in the seminal *Worcester v. Georgia*,<sup>14</sup> the Cherokees were forcibly removed from their ancestral lands to the “Indian Territory” west of the Mississippi River, a policy prompted by state political influence.<sup>15</sup> Since the late nineteenth century, states have also secured Supreme Court

10. GREAT POWER POLITICS, *supra* note 6, at 32–33.

11. For a more nuanced account of realist theory, see Steinberg & Zasloff, *supra* note 8, at 71–76.

12. See *supra* note 6 and accompanying text.

13. While it is true that a few states have Indian populations large enough to constitute a “swing vote” (only 6 states have >5% Indian population) and a few very successful gaming tribes have been able to make significant campaign contributions in state elections, this Article does not focus on situations where tribal and state interests converge and cooperation ensues. Rather, the focus is on the far more common conflict situations. See *supra* note 6. Some of the worst conflicts occur in states that have the largest percentage of Indian populations, such as Alaska and South Dakota. See, e.g., THOMAS BIOLSI, DEADLIEST ENEMIES: LAW AND RACE RELATIONS ON AND OFF ROSEBUD RESERVATION (2001); THE HARVARD PROJECT ON AM. INDIAN ECON. DEV., THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION 334 (2008) [hereinafter STATE OF NATIVE NATIONS] (discussing the state of Alaska’s “recalcitrance toward tribal rights of administration and jurisdiction”).

14. 31 U.S. 515, 561 (1832) (holding that a state has no jurisdiction to bar a non-Indian missionary from entering an Indian reservation).

15. COHEN’S HANDBOOK, *supra* note 2, § 1.03[4][a]; Perdue & Green, *supra* note 1, at 121–28.

decisions that have diminished the size of reservations;<sup>16</sup> restricted tribal jurisdiction over nonmembers;<sup>17</sup> and affirmed state jurisdiction over nonmember activities and transactions within Indian country.<sup>18</sup> Since the 1950s, a decade when federal Indian policy was aimed at terminating the special trust relationship between the United States and Native nations,<sup>19</sup> Congress has also passed a series of laws authorizing state jurisdiction in Indian country. The most comprehensive of these is known as Public Law 280, passed in 1953.<sup>20</sup> Public Law 280 required some states, and allowed all others, to impose their criminal laws on reservations and to open their civil courts to suits by and against Indians.<sup>21</sup> Despite Congressional and Presidential repudiation of '50s-era "termination" policy,<sup>22</sup> Congress has continued to authorize state jurisdiction, to a greater or lesser extent, as part of specific acts recognizing

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16. *See, e.g.*, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998).

17. *See, e.g.*, *Montana v. United States*, 450 U.S. 544 (1981).

18. *See, e.g.*, *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980).

19. This trust relationship includes federal obligations to protect tribal property and constraints on the interpretation of federal laws that could adversely affect tribal self-government. For a more complete discussion of the federal trust responsibility, *see* COHEN'S HANDBOOK, *supra* note 2, § 5.04[4]. "Termination" entailed ending federal recognition of tribes as governments, halting not only the federally protected trust status of tribal lands, but also federal services to Indians. *See id.* § 1.06.

20. For the history of enactment of Public Law 280, *see* Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. Rev. 535 (1975).

21. Public Law 280 conferred Indian country jurisdiction upon five states. Alaska was added to that list in 1958. Additionally, the law allowed other states to opt in, and a small number of states chose to do so. In 1968, Public Law 280 was amended to require Indian consent before any future state jurisdiction could be authorized under its terms. No tribe has consented to state jurisdiction under Public Law 280 since that time. For descriptions of the states and tribes affected by Public Law 280, *see* CAROLE GOLDBERG & DUANE CHAMPAGNE, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280, at 7–11 (2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf> [hereinafter PUBLIC LAW 280 STUDY]. Public Law 280 is codified at 18 U.S.C. § 1162 (2006); 25 U.S.C. §§ 1321–26 (2006); and 28 U.S.C. § 1360 (2006). Without such authorization from Congress, Public Law 280 states would have had no civil or criminal jurisdiction over Indians in Indian country. *See* COHEN'S HANDBOOK, *supra* note 2, § 6.04[1]. For discussion of the basis for choosing the six "mandatory" Public Law 280 states, *see infra* notes 104–08 and accompanying text.

22. *See, e.g.*, Richard Nixon, Special Message on Indian Affairs (July 8, 1970), in PUBLIC PAPERS OF THE PRESIDENT OF THE UNITED STATES: RICHARD NIXON 564 (1970); 25 U.S.C. §§ 903–903f (2006) (restoring previously terminated Menominee Tribe to federal recognition).

tribes and settling tribal land claims.<sup>23</sup> All of these results are predictable through application of realist theory.

The surprising news, for realists, is that tribes occasionally win. For example, the Cherokees prevailed in *Worcester*. Additionally, the Supreme Court has upheld exclusive tribal jurisdiction over legal disputes directly implicating tribal members in several twentieth-century decisions.<sup>24</sup> Moreover, a number of federal statutes have supported and extended exclusive tribal jurisdiction, including the Indian Child Welfare Act (“ICWA”)<sup>25</sup> and several federal environmental statutes,<sup>26</sup> displacing state authority. How could that be?

A smart realist would rejoin that these outcomes do not disprove realist theory. Realist theory would characterize the federal government as an actor on this political scene that may have interests of its own, apart from serving as umpire when states and tribes confront one another. On occasion, those interests may overlap with the interests of tribes. Outside of international relations theory, in the realm of critical race theory, Professor Derrick Bell has coined a term for this type of phenomenon: interest convergence.<sup>27</sup> Bell first used this theoretical framework to explain the Supreme Court’s 1954 school desegregation decision, *Brown v. Board of Education*.<sup>28</sup> According to Bell’s interest-convergence theory, even though whites held more power in the United States than African-Americans at the time of *Brown*, the African-Americans’ call for desegregation prevailed because the federal government had an interest in portraying itself to the world as a non-racist society.<sup>29</sup>

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23. See COHEN’S HANDBOOK, *supra* note 2, § 6.04[4] (listing statutes).

24. See, e.g., *Williams v. Lee*, 358 U.S. 217 (1959) (upholding jurisdiction by tribes over civil suits by non-Indians against Indians arising in Indian country); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (upholding jurisdiction by tribes over disputes regarding tribal membership). Frank Pommersheim contends that the Court has been far more likely to acknowledge tribal jurisdiction when the tribe is in the defensive position of fending off state jurisdiction than when the tribe is actively seeking to extend its authority. Frank Pommersheim, *At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty*, 55 S.D. L. REV. 48, 54–55 (2010).

25. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified as amended at 25 U.S.C. §§ 1901–1963 (2006)).

26. See Clean Air Act, 42 U.S.C. § 7601(d)(1)(A) (2006); Clean Water Act, 33 U.S.C. § 1377(e) (2006).

27. See generally Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

28. 347 U.S. 483 (1954).

29. See Bell, *supra* note 27, at 524.

As an application of realist theory, interest convergence can help explain some of the victories Indian nations have experienced in Congress and the Supreme Court. In *Worcester*, for example, conflicts between the northern Republicans (successors to the Federalists) and Jacksonians on the national political scene made it beneficial for the Republicans to support the Cherokees' position.<sup>30</sup> President Andrew Jackson favored Georgia's claims to jurisdiction over Cherokee Territory.<sup>31</sup> The Federalists and their successors in the Republican Party wanted to embarrass and discredit him.<sup>32</sup> As it happened, Chief Justice Marshall and a majority of the Court had been appointed by Federalists.

In the case of environmental legislation, Congress allowed tribes, rather than states, to have control over problems such as air and water pollution, so long as they abide by minimum federal standards.<sup>33</sup> Here, a realist might say that the federal government has an independent interest in preventing states from treating Indian reservations as dumping grounds or enclaves of pollution, given the unavoidable spillover effects and cumulative impacts of such pollution.

Interest convergence partially saves realist theory as a predictor of outcomes in tribal-state jurisdictional conflicts because it allows for occasional tribal victories. But there are some instances of tribes prevailing over the states—ICWA and its interpretation in the United States Supreme Court being a notable example<sup>34</sup>—that interest-convergence theory has difficulty explaining.<sup>35</sup> One might argue that there was interna-

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30. See Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 505–08 (1969).

31. *Id.* at 504.

32. *Id.* at 505–08.

33. See COHEN'S HANDBOOK, *supra* note 2, §§ 10.01–.03.

34. States and tribes contend over which government will control the placement of Indian children in cases of child abuse, neglect, and voluntary adoption. ICWA has largely affirmed exclusive jurisdiction by tribes over on-reservation children and has provided for presumptive transfer to tribes of jurisdiction over off-reservation children. See 25 U.S.C. §§ 1911–1912 (2006). States have tried mightily to limit the applicability of the Act, but the Supreme Court has rebuffed these efforts. See, e.g., *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) (affirming tribal rather than state jurisdiction over an Indian child in the context of a voluntary adoption).

35. For there to be interest convergence, the federal government would need to have had an independent interest in maintaining Indian children in Indian homes. Typically, child welfare (dependency, that is) is not a federal concern at all, and is handled by the states. No such federal interest was articulated in support of passage of the act. There is also no indication of international pressure focused on welfare of indigenous children that would have led the United States to



tional pressure on the United States at the time the Act was passed in the 1970s to change its policy in favor of self-determination. The source of any such pressure at that time is difficult to detect, however, especially pressure focused on child welfare. It took another thirty-five years of political mobilization and lobbying for the international indigenous rights movement to succeed in promoting a United Nations Declaration on the Rights of Indigenous Peoples.<sup>36</sup> There was no federal party standing to benefit in other ways from tribal self-determination as there had been during the struggle between the Cherokees and the state of Georgia. As Charles Wilkinson has noted, the shift in federal policy during the 1970s is most likely traced to protests and tribal lobbying within the United States.<sup>37</sup> But if that is so, interest-convergence or realist theory must explain why the politically weaker side of the conflict, the tribes, prevailed over the states, especially since the states continue to resist those terms of ICWA that enhance Native nations' power at their expense.<sup>38</sup>

Realist theory also encounters difficulty explaining the outcomes of tribal-state jurisdictional conflicts because it has no place for the overriding legal role of an authoritative institution, such as the United States Supreme Court, whose position is somewhat insulated from politics. Designed for the realm of international affairs, realist theory "discounts the role of transnational institutions,"<sup>39</sup> such as international tribunals, because these institutions are partially disconnected from the exercise of nation-state power. Yet these institutions are the closest analogs to the Supreme Court in the tribal-state context because they purport to supersede, or temper, the political actions of nation states. Given that realist theory is largely uninterested in the contents of international judicial proceedings,

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enact ICWA. For an explanation of the conditions leading to enactment of ICWA, see Lorie M. Graham, *"The Past Never Vanishes": A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 23-34 (1998-1999).

36. See *supra* note 4; Robert T. Coulter, *The U.N. Declaration on the Rights of Indigenous Peoples: A Historic Change in International Law*, 45 IDAHO L. REV. 539, 543-46 (2009).

37. See CHARLES WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* xiv-xv (2005) [hereinafter *BLOOD STRUGGLE*].

38. See Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587 (2002) (discussing state resistance to implementation of ICWA); Graham, *supra* note 35, at 35 (same).

39. Robert Knowles, *American Hegemony and the Foreign Affairs Constitution*, 41 ARIZ. ST. L.J. 87, 114 (2009).

anyone seeking to understand the substance of Supreme Court rulings will not gain much from that theory, other than advice to craft legal arguments that appeal to those distinct federal interests that happen to align with those of the tribes. However, as I have already indicated, this interest-convergence approach has limitations in explaining what happens when tribes and states contend over jurisdiction.

It is possible, of course, that despite the examples I have noted, realist theory, combined with interest-convergence analysis, explains most, though not all, outcomes of tribal-state jurisdictional conflicts. If so, the theory would be of considerable predictive value. But any such calculation is beyond the scope of this Article. In the absence of such a calculation, it is sufficient to note that there are enough limitations to realist theory to warrant consideration of alternative theoretical approaches.

### *B. Norms-Driven Theory*

Enter the competing theory, a norms-driven approach to international relations.<sup>40</sup> According to this view, certain norms or values (*e.g.*, personal liberty, government accountability, impartial decision-making) are universal and can influence government behavior.<sup>41</sup> Thus, political conflict is not entirely driven by or reducible to self-interest.<sup>42</sup> Supranational organizations and domestic institutions have a role to play in articulating these ideals and in supporting the state and non-state actors who promote them.<sup>43</sup> From such a perspective, the conflict between states and Indian nations could be viewed as a competition over which one can convince the federal government that it will advance universal values of fair, effective justice and administration more effectively within Indian country.

To test whether a norms-driven theory is the best theoretical fit for tribal-state jurisdictional conflicts, I will first identify the features or elements of those conflicts that norms-driven theorists would emphasize as most significant in determining outcomes. Then I will present examples of congressional legislation and Supreme Court decisions to assess whether those features or elements seem to be influencing the outcomes. As

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40. See Raustiala, *supra* note 8, at 405–09.

41. See, *e.g.*, LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 284 (1995).

42. See Raustiala, *supra* note 8, at 405.

43. *Id.* at 406; Koh, *supra* note 7, at 194.

with realist theory, I do not purport to exhaust all the possible examples; so I cannot test the validity of norms-driven theory in any scientific way. However, based on my experience teaching and writing in the field of Indian law for nearly four decades, norms-driven theory seems to fit the case law and legislative outcomes better than realist theory and therefore seems to have greater predictive value.

A norms-driven theorist would likely focus on the relative effectiveness of states and Indian nations in portraying themselves as upholders of universal ideals of fairness and good government. Norms-driven theorists could argue that their theory best explains the passage of ICWA because norms-driven theory emphasizes the kinds of values that seemed to carry the day in Congress.<sup>44</sup> During ICWA's legislative campaign, tribal advocates hammered home the point that states were removing Indian children from their parents' homes because of negative stereotyping of Indians and ignorance of tribal cultures.<sup>45</sup> The negative stereotyping led to overly harsh judgments of Indian homes and parents, while the ignorance led to mistakes such as interpreting extended kinship care to be child neglect.<sup>46</sup> Once tribal advocates marked state courts as sites of poor governance and tribal courts as places where placement decisions could be made more fairly and accurately, the Indian nations could prevail in their competition with the states.

But how would norms-driven theorists explain the cases and statutes where the states prevail, especially the recent spate of United States Supreme Court decisions denying tribal jurisdiction and affirming state power?<sup>47</sup> Under a norms-driven theory, if states have been prevailing of late, it must be because they have been more effective in the competition over satisfaction of widely shared ideals. They must be viewed as good sources of governance for Indians and non-Indians alike, while tribes are viewed as poor sources of good governance over outsiders.

There is some evidence that the Supreme Court has been analyzing tribal-state jurisdictional conflicts in the way norms-

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44. For description of the tribal-state jurisdictional conflicts associated with Indian child welfare, and the way ICWA resolved them, see *supra* note 34 and accompanying text.

45. See COHEN'S HANDBOOK, *supra* note 2, § 11.01[2].

46. See Graham, *supra* note 35, at 25–30.

47. See *infra* notes 48–54 and accompanying text.

driven theory predicts. Consider, for example, the Supreme Court's 1997 decision in *Strate v. A-1 Contractors*,<sup>48</sup> which denied tribal court jurisdiction to hear a tort claim against a non-Indian arising on a state right-of-way within the reservation.<sup>49</sup> In the course of rejecting tribal jurisdiction, Justice Ginsburg went out of her way to praise the alternative state court forum and to stress the unfairness and unfamiliarity of the tribal court. As the Court observed:

Gisela Fredericks [the plaintiff] may pursue her case against A-1 Contractors and Stockert [the defendants] in the state forum open to all who sustain injuries on North Dakota's highway. Opening the Tribal Court for her optional use is not necessary to protect tribal self-government; and requiring A-1 and Stockert to defend against this commonplace state highway accident claim in an unfamiliar court is not crucial to the political integrity, the economic security, or the health or welfare of the [Three Affiliated Tribes].<sup>50</sup>

Justice Ginsburg also pointed out that fairness is achievable in state court, but not in tribal court, through the option of removal to a more neutral federal court in cases of a defendant sued outside his or her home state.<sup>51</sup>

Justice Souter's concurring opinion in the 2001 case *Nevada v. Hicks*<sup>52</sup> provides another illustration of norms-driven theory at work because it rests on a view of the superiority of state courts over tribal courts. In that opinion, Justice Souter comments that "tribal law is still frequently unwritten, being based instead 'on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices,' and is often 'handed down orally or by example from one generation to another.'" <sup>53</sup> He further describes it as "unusually difficult for an outsider to sort out."<sup>54</sup> The comparison with state courts may be implicit, but it is hard to miss. State law is written and

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48. 520 U.S. 438 (1997).

49. *Id.* at 442.

50. *Id.* at 459 (internal quotation marks and footnotes omitted).

51. *Id.* at 459 n.13. Under 28 U.S.C. § 1441(b) (2006), a citizen of one state who is sued by a citizen of another state may remove the case from state to federal court only if the suit was not brought in the defendant's home state. There is no federal statute authorizing removal of cases from tribal court to federal court, regardless of circumstances.

52. 533 U.S. 353 (2001).

53. *Id.* at 384 (Souter, J., concurring) (quoting Ada Melton, *Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126, 130-31 (1995)).

54. *Id.* at 385.

publicly accessible, which, according to Justice Souter, makes it fairer to outsiders than tribal law, under universally acceptable standards.

Of course, for Native nations, this game looks stacked in a familiar way. The American legal system has a history of asserting its own interests as “universal,” thereby excluding Native worldviews and experience and disregarding the rights of indigenous peoples. Thus, the historic dispossession of Native peoples was justified in the name of universal values of “civilization.”<sup>55</sup> European governments appeared superior to “savage” indigenous peoples according to this assessment and, therefore, deserved to prevail in the competition for land and other resources.<sup>56</sup>

Today’s supposedly universal values are generated through an international human rights system and other international agencies that reflect a wider array of views than those considered in the era of American colonial expansion.<sup>57</sup> As noted above, in 2007, the views of indigenous peoples were incorporated into the international human rights system through the United Nations Declaration on the Rights of Indigenous Peoples.<sup>58</sup> But indigenous peoples still do not fully participate in that system because they lack nation-state status.<sup>59</sup> The United Nations is foremost a body comprised of nation states, and only nation states may vote on matters such as human rights and indigenous rights.<sup>60</sup> Even the more fluid system of international common or customary law relies heavily on the actions of states to establish the content of those customary

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55. See STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* 260–65 (2005) (describing how the nineteenth-century policy of forced allotment of tribal lands, which led to the loss of ninety million acres of Indian land holdings, was justified on the basis of “civilizing” the Indians).

56. See ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 317 (1990).

57. See DAVID WEISSBRODT & CONNIE DE LA VEGA, *INTERNATIONAL HUMAN RIGHTS LAW: AN INTRODUCTION* 4–9 (2007).

58. See *supra* note 4.

59. See Austen L. Parrish, *Changing Territoriality, Fading Sovereignty, and the Development of Indigenous Rights*, 31 *AM. INDIAN L. REV.* 291, 294 n.11 (2006) (“The centrality of states in the international legal system is underscored by the structure of international institutions. Only states are recognized as having standing before the World Court. And only states may be members of the United Nations.”) (internal citations omitted).

60. See WEISSBRODT & DE LA VEGA, *supra* note 57, at 251–67 (describing United Nations bodies concerned with human rights, all of which are comprised exclusively of nation states).

norms.<sup>61</sup> Furthermore, the United States was one of four countries that voted against the Declaration,<sup>62</sup> suggesting that it does not subscribe to the wider vision of human rights incorporated into that document. Thus, it is reasonable for indigenous peoples to challenge norms-driven theory on the basis that the norms it emphasizes are not as universal or definitive as the theory assumes.

A proponent of norms-driven theory would likely respond that the motives or self-delusions of those who deploy the norms are irrelevant. For predictive purposes, all that matters is that decision-makers actually rely on them. Thus, if Congress and the Supreme Court are, in fact, basing their decisions on judgments about the relative fairness and effectiveness of tribal versus state institutions, the norms-driven theory should be sustained.

Of course, even if norms-driven theorists are correct as a predictive matter, it is still possible to challenge whether the Supreme Court has properly analyzed tribal-state jurisdictional conflicts within the framework of that theory. Any such challenge would have to focus on the Court's relative assessment of tribal and state institutions that exercise jurisdiction. With encouragement from the National Congress of American Indians, many scholars have tried to address the critique of tribal courts by using more empirical methods to show that tribal justice systems are fair to outsiders and respect due process as measured according to "universal standards."<sup>63</sup> The Harvard Project on American Indian Economic Development has built an admirable program, Honoring Nations, to profile, celebrate, and publicize instances of good tribal governance in Indian country.<sup>64</sup> For example, it has highlighted well-functioning tribal court systems that incorporate separation of

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61. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103 (1987).

62. Office of the United Nations High Comm'r on Human Rights, *Declaration on the Rights of Indigenous Peoples*, UNITED NATIONS HUMAN RIGHTS, <http://www2.ohchr.org/english/issues/indigenous/declaration.htm> (last visited Aug. 28, 2010).

63. See *Conference Transcript: The New Realism: The Next Generation of Scholarship in Federal Indian Law*, 32 AM. INDIAN L. REV. 1 (2007); Bethany Berger, *Justice and the Outsider: Jurisdiction Over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2005).

64. See *About Honoring Nations*, THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, <http://hpaied.org/honoring-nations/about-honoring-nations> (last visited Aug. 28, 2010).

powers and culturally appropriate dispositions and successful tribal programs for the protection of endangered species.<sup>65</sup>

For purposes of norms-driven theory, however, the case for tribal jurisdiction is not so easy to make. A longstanding feature of federal Indian law is its across-the-board nature. That is, although treaties are Native nation specific, and some congressional acts deal with individual tribes, the courts make federal Indian law wholesale—that is, for all tribes at once.<sup>66</sup> Given the variation among tribal systems and the absence of any oversight apparatus to ensure compliance with minimum standards of fairness and effective administration,<sup>67</sup> empirical evidence cannot easily assuage concerns about tribal court performance in general.

Thus, if the Supreme Court is acting as norms-driven theory would predict, and ruling in tribal-state jurisdictional conflicts based on an assessment that state courts are better at upholding norms of fair and effective justice, then supporters of tribal jurisdiction must do more than establish individual instances of normatively appropriate tribal justice. They must draw into question the fairness and effectiveness of state justice systems, especially where Indian parties and/or victims are involved. Furthermore, any challenge to the norms-driven rationale for upholding state jurisdiction must respond to evidence that is offered to support the superiority of state over tribal justice. I attempt to do both in the following Part.

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65. See generally Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049 (2007).

66. For a description and critique of this practice, see Kevin Gover, *Federal Indian Policy in the Twenty-First Century*, in AMERICAN INDIAN NATIONS: YESTERDAY, TODAY, AND TOMORROW 205–07 (G. Horse Capture, D. Champagne & C. Jackson eds., 2007) (advocating that federal Indian policy be “customized” to individual tribes).

67. Federal habeas corpus is available to review detentions under tribal law for violations of the Indian Civil Rights Act. 25 U.S.C. §§ 1301–1303 (2006). The Indian Civil Rights Act imposes most, but not all, of the provisions of the U.S. Bill of Rights on tribal governments. Otherwise, tribal governments and courts are not bound by the Supremacy Clause of the United States Constitution. See Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002). By contrast, state systems are rendered more uniform by federal control through the Supremacy Clause and the Fourteenth Amendment.

## II. REBUTTING THEORETICAL AND EMPIRICAL ARGUMENTS THAT STATES PROVIDE A MORE FAIR AND EFFECTIVE SYSTEM OF JUSTICE FOR INDIAN COUNTRY

In the remainder of this Article, I will examine the empirical question of greatest concern if a norms-driven theory is applied to tribal-state jurisdictional conflicts: which system of law provides a better system of fair and effective administration of justice?<sup>68</sup> To balance the empirical work on tribal law and justice discussed above, I focus on state justice in Indian country, especially as it affects participants in the civil justice system, Indian victims of crime, and Indian criminal defendants. The opinions in *Strate* and *Hicks*, discussed above, suggest that the Supreme Court judges tribal systems to be biased, inaccessible, or otherwise poorly administered, while it finds state systems to be fundamentally fair.<sup>69</sup> Given the stark contrast that is drawn between these systems, it is important to determine whether the favorable portrait of state jurisdiction in Indian country is empirically accurate. I argue that it is not.

The fact that some, but not all, reservations are subject to state jurisdiction under Public Law 280<sup>70</sup> provides a rich source of empirical study of state jurisdiction. The exercise of state jurisdiction authorized under that statute can be studied in isolation, or in comparison with tribal jurisdiction on reservations where state jurisdiction has not been authorized. In Subsection A, I review a line of recent empirical scholarship arguing specifically for the superiority of state over tribal justice in the civil context. This research advances the view that state justice is more fair and effective, and is thus responsible for higher per capita incomes on reservations where Congress has authorized state jurisdiction. My critique of that research suggests this the case for state over tribal jurisdiction has not been won. In Subsection B, I turn to my own research, conducted

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68. Of course, as an empirical matter it is possible that they both provide fair and effective systems, or at least closely comparable systems. If that is the case, the appropriate legal result, from a norms-driven perspective, could be dictated by other considerations, such as indigenous rights. However, as discussed in the text, the Supreme Court appears to assume that state systems are substantially superior to tribal systems in ways that should affect jurisdiction decisions. See *supra* notes 48–54 and accompanying text.

69. See *id.*

70. See *supra* note 21 and accompanying text. Since 1950, a limited number of other tribes have become subject to state jurisdiction through state- and tribe-specific federal statutes. See COHEN'S HANDBOOK, *supra* note 2, § 6.04[4].



with Professor Duane Champagne, on the quality of state criminal justice under Public Law 280. Our research reveals that reservation residents have substantial concerns about the fairness and effectiveness of state criminal justice in Indian country. Because mistrust of legal institutions breeds lawlessness, the reported concerns of reservation residents are reason alone to re-evaluate state authority in Indian country.

*A. State Civil Jurisdiction in Indian Country: Producing Economic Success through Effective Justice*

One possible way to test the relative fairness and effectiveness of various justice systems is to look at economic outcomes. Some development economists have promoted the view that the best way to achieve economic gains in Indian country, as in other economically depressed areas, is to establish a secure environment for outside economic investment.<sup>71</sup> A key element in any such secure investment environment is a fair and effective justice system that upholds valid agreements.<sup>72</sup> According to this view, if one economically depressed jurisdiction is making greater gains than another, a likely explanation is the superiority of its justice system. In this way, economic success can serve as a rough surrogate for the kinds of values that norms-driven theory treats as important.

Dominic Parker and Professor Terry Anderson recently published the results of an empirical research study that pursues this line of inquiry, comparing economic outcomes under conditions of state and tribal civil jurisdiction in Indian country.<sup>73</sup> The state systems, in their view, clearly came out ahead. Anderson and Parker juxtaposed tribes that had been singled out for state civil jurisdiction under Public Law 280 and other federal statutes with tribes that had been left with exclusive

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71. See, e.g., Stephen Cornell & Joseph P. Kalt, *Sovereignty and Nation-Building: The Development Challenge in Indian Country Today*, 22 AM. INDIAN CULTURE & RES. J. 187, 198 (1998). For a more general discussion of the relationship between legal institutions and economic development, see KEVIN DAVIS & MICHAEL TREBILCOCK, WHAT ROLE DO LEGAL INSTITUTIONS PLAY IN DEVELOPMENT? 32–109 (1999).

72. See Joseph Thomas Flies-Away, Carrie Garrow & Miriam Jorgensen, *Native Nation Courts: Key Players in Nation Rebuilding*, in REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT (M. Jorgensen, ed. 2007).

73. Terry L. Anderson & Dominic P. Parker, *Sovereignty, Credible Commitments, and Economic Prosperity on American Indian Reservations*, 51 J.L. & ECON. 641 (2008).

civil jurisdiction.<sup>74</sup> They then used census data to determine which set of tribes had greater economic success during the period 1969–1999, as measured by growth in per capita income.<sup>75</sup> After testing for the effects of a variety of other variables, they concluded that state jurisdiction accounts for the difference in income growth between the two sets of reservations.<sup>76</sup> Although a system of justice that produces growth in per capita income is not necessarily the system that most closely approximates universal ideals of fairness and effective administration,<sup>77</sup> Anderson and Parker supply an argument for equating the two.<sup>78</sup> In effect, they argue that the reason state courts are able to generate greater per capita income gains for tribal members is that they supply more reliable and consistent justice.<sup>79</sup> Thus, if their research results are accepted, these results would buttress the prediction of norms-driven theory—that states will come out ahead of tribes when jurisdictional conflicts reach courts and Congress—because states provide the superior form of justice.

Should we accept Anderson and Parker's finding that state jurisdiction is the cause of greater economic success in Public Law 280 jurisdictions, as well as their explanation for that finding—namely that state courts fulfill the norm of fair and effective justice more than tribal courts?<sup>80</sup> There are both general reasons for approaching their work with skepticism and particular methodological and legal issues with the research itself.

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74. See *supra* note 21 for discussion of the federal statutes that resulted in some tribes being subject to state jurisdiction and others not.

75. Anderson & Parker, *supra* note 73, at 649. To test the hypothesis that state jurisdiction produces higher per capita income during the 1969–1999 period, Anderson and Parker selected all reservations with Indian populations exceeding 1,000 and divided them between those formally subject to state civil court jurisdiction under Public Law 280 or a similar law and those not subject to state jurisdiction.

76. *Id.* at 657.

77. It is possible, for example, that a justice system biased in favor of certain business investors would greatly enhance business investment at the expense of those who contracted with them. Such a system might enhance per capita income by providing jobs and business revenue but would not necessarily operate in an unbiased manner.

78. Anderson & Parker, *supra* note 73, at 643–48.

79. *Id.* at 647–48.

80. In the interests of full disclosure, I serve as a Justice of the Hualapai Court of Appeals.

### 1. General Grounds for Skepticism

There are three distinct reasons to approach Anderson and Parker's findings with skepticism. First, their study contradicts other scholarly research that has attracted considerable attention and support.<sup>81</sup> In a series of theoretically and empirically grounded studies, Professors Joseph Kalt and Stephen Cornell of the Harvard Project on American Indian Economic Development have argued that economic development is fostered when the federal government relinquishes control over reservation resources and economies to the tribes (and by implication, not to the states).<sup>82</sup> In their view, economic development succeeds when those who make decisions are accountable to those who experience the impact of those decisions—namely, the tribal community.<sup>83</sup> Professors Kalt and Cornell have also contended that an important precondition for tribal economic success is the establishment of sound and legitimate tribal laws and governing structures, so that tribal decision-makers are properly accountable for their actions.<sup>84</sup> In short, their position is that increases in tribal sovereignty can generate increases in economic development and well-being for Indian nations; although they emphasize that, in accordance with norms-driven theory, the quality of tribal legal institutions figures significantly into that outcome.<sup>85</sup>

A second reason for skepticism about Anderson and Parker's claims is that they contradict the federal Indian policy that has prevailed for the past forty years. In 1970, President Richard Nixon formally repudiated the policy of forced Indian assimilation, known as termination that had guided federal action since the end of World War II.<sup>86</sup> Public Law 280 had formed a key component of that policy.<sup>87</sup> Since 1970, Congress

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81. Notably, this opposing research has given rise to a major organization, the Harvard Project on American Indian Economic Development at the John F. Kennedy School of Government at Harvard University. The Ford Foundation has relied on the opposing research to fund a major program that recognizes good governance in Indian country—Honoring Nations, which is housed in the Harvard Project on American Indian Economic Development. See *Overview*, THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, <http://hpaied.org/about-hpaied/overview> (last visited Aug. 28, 2010).

82. See STATE OF NATIVE NATIONS, *supra* note 13, at 126–28.

83. *Id.* at 127.

84. *Id.* at 122–25.

85. *Id.*

86. Nixon, *supra* note 22, at 564.

87. AMERICAN INDIAN POLITICS, *supra* note 6, at 82, 120–21.

has enacted numerous laws relating to topics such as the environment, child welfare, control of natural resources, provision of health care, and education that all recognize the value of increased tribal control over reservation affairs.<sup>88</sup> With rare exceptions, Congress has not expanded the realm of state jurisdiction in Indian country.<sup>89</sup> If Congress were convinced that states provide justice that is substantially fairer and more effective than tribal justice, one would not expect to see this pattern.<sup>90</sup>

Third, skepticism is warranted because Anderson and Parker's notion that state justice is better for Indians than tribal justice goes against the expressed preferences of tribal communities. If state jurisdiction were, in fact, the key to reservation economic success, one might expect reservation residents to welcome state jurisdiction under Public Law 280. Such has not been the case. Originally, Public Law 280 named six mandatory states where all reservations, with a few listed exceptions, would be subject to state jurisdiction.<sup>91</sup> Additionally, it allowed other states to opt for similar jurisdiction.<sup>92</sup> Congress amended Public Law 280 in 1968 so that states were no longer able to opt in without tribal consent.<sup>93</sup> No tribe has given its consent in the four decades since that amendment passed.<sup>94</sup> Also in 1968, Congress, for the first time, authorized states to return their Public Law 280-granted jurisdiction back

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88. See COHEN'S HANDBOOK, *supra* note 2, § 1.07.

89. One notable exception is the Adam Walsh Child Protection and Safety Act, enacted in 2006, which subjected tribes in Public Law 280 jurisdictions to state laws regarding registration of sex offenders. 42 U.S.C. § 16927(a)(2)(A) (2006). See Virginia Davis & Kevin Washburn, *Sex Offender Registration in Indian Country*, 6 OHIO ST. J. CRIM. L. 3, 13–14 (2008).

90. Although it is possible that Congress was containing the expansion of state jurisdiction *in spite of* its conviction that state jurisdiction is superior, there is no such indication in the legislative history. If anything, the history of the 1968 amendments to Public Law 280 indicates that Congress was concerned about problems of unfairness to Indians in state law enforcement and courts. See Carole Goldberg & Duane Champagne, *Searching for an Exit: The Indian Civil Rights Act and Public Law 280*, in FORTY YEARS OF THE INDIAN CIVIL RIGHTS ACT: HISTORY, TRIBAL LAW, & MODERN CHALLENGES (K. Carpenter, M. Fletcher & A. Riley, eds., forthcoming 2010).

91. 18 U.S.C. § 1162(a) (2006); 28 U.S.C. § 1360(a) (2006). The mandatory states are Alaska (except for Metlakatla Indian community on Annette Islands for criminal, but not civil, offenses), California, Minnesota (except Red Lake Reservation), Nebraska, Oregon (except Warm Springs Reservation), and Wisconsin.

92. 25 U.S.C. §§ 1321–1322 (2006).

93. See 25 U.S.C. § 1326 (2006).

94. See PUBLIC LAW 280 STUDY, *supra* note 21, at 7.

to the federal government.<sup>95</sup> Although Indian nations were not given control over this process, they have been in a position to lobby their state legislatures to support this “retrocession” of jurisdiction.<sup>96</sup> Despite the many political hurdles tribes must overcome, thirty-one tribes have successfully prevailed upon their states to retrocede, with seven of those in the “mandatory” states.<sup>97</sup> It is possible, of course, that tribal communities are not acting in their best economic interests in rejecting Public Law 280 or that they are unaware of the positive relationship between state jurisdiction, fair and effective justice, and their own economic advancement. Thus, Anderson and Parker’s claim deserves some sustained attention.

## 2. Methodological and Legal Issues

As an empirical assertion about the relative fairness and effectiveness of state and tribal civil jurisdiction in Indian country, Anderson and Parker’s claim is questionable. There are problems with the underlying research protocol and problems with the analysis or explanation of results insofar as it rests on principles of Indian law.

At the level of research methods, a fundamental difficulty with the study is that it fails to account for the basis on which tribes were granted or denied jurisdiction under Public Law 280. If Congress employed or declined to employ Public Law 280 based, at least in part, on a tribe’s potential for economic success, then the research design will be confounded by selection bias—that is, a bias in assignment that occurs when the groups are chosen so that they differ from each other by one or more factors that may affect the outcome of the study.<sup>98</sup> The very factor that led tribes to be in one jurisdictional condition or another will be what explains the outcome, not the jurisdictional condition itself. Further, if the jurisdictional condition does not explain the results, it cannot serve as the foundation for a claim favoring the superiority of state over tribal justice—a claim that could figure into a norms-driven analysis of tribal-state jurisdictional conflicts.

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95. 25 U.S.C. § 1323 (2006).

96. See PUBLIC LAW 280 STUDY, *supra* note 21, at 412–40 (discussing several case studies of such lobbying).

97. *Id.* at 410–11.

98. See Richard A. Berk, *An Introduction to Sample Selection Bias in Sociological Data*, 48 AM. SOC. REV. 386 (1983).

In fact, Congress allocated most tribes between the state and tribal jurisdiction conditions when it passed Public Law 280, designating six states where the reservations, with a few exceptions, would be subject to state jurisdiction.<sup>99</sup> While other states could opt in, few did so before tribal consent was required in 1968, and most of those pre-1968 states later retroceded their jurisdiction back to the United States.<sup>100</sup> The tribes in a few states and several individual tribes had been targeted for state jurisdiction prior to the passage of Public Law 280.<sup>101</sup> Several individual tribes have been added to the state jurisdiction column since passage of Public Law 280, mainly through federal recognition and land claim settlement statutes that included state jurisdiction as part of a deal that recognized governmental status for the affected tribes.<sup>102</sup> The vast majority of tribes that Anderson and Parker put in the state jurisdiction column, however, are there because of the initial designation in Public Law 280.<sup>103</sup>

For purposes of empirical research, this statutory assignment of tribes to one category or another raises the possibility of selection bias. In other words, if Congress selected the mandatory states and their tribes because these tribes were the most assimilated or because they were otherwise the best positioned to achieve economic success, then that very selection would determine the outcome of higher per capita income and not whether the reservation was subject to state jurisdiction as opposed to tribal jurisdiction. There is, in fact, reason to believe that Congress chose tribes for inclusion and exclusion from Public Law 280 based on their inclination to participate in the market economy and to strive for economic success as measured by per capita income. For example, the tribes that successfully lobbied for exclusion from state jurisdiction under Public Law 280 in the mandatory states—Red Lake in Minnesota, Warm Springs in Oregon, and Menominee in Wisconsin—could be described as among the most resistant to assimilation and economic integration. In the late nineteenth century, Red

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99. See PUBLIC LAW 280 STUDY, *supra* note 21, at 2–11.

100. *Id.* at 10–11 (listing all optional states and current status of affected tribes).

101. See COHEN'S HANDBOOK, *supra* note 2, § 6.04[4] (discussing statutes affecting New York, Kansas, North Dakota, and Iowa).

102. *Id.* § 6.04[4][c] (discussing some of these statutes).

103. Anderson & Parker, *supra* note 73, at 644–45. Moreover, the researchers confined their sample to tribes with reservation populations of 1,000 or greater. *Id.* at 649.

Lake and Menominee had been among the only tribes with large land bases to resist the federal policy of allotment, a policy that had broken up reservations and allocated parcels to individual tribal members.<sup>104</sup> Unlike most other tribes, Warm Springs insisted on collective management rather than per capita distributions to individual tribal members when it received a large land claim settlement in the 1950s.<sup>105</sup> In fact, Public Law 280 was passed in the 1950s as part of a broader federal policy of forced assimilation of tribal members.<sup>106</sup> This termination policy targeted tribes that Congress viewed as best “prepared” for full integration into the market economy and state polities.<sup>107</sup> The Senate Report on Public Law 280 declared that the tribes in the mandatory states “have reached a stage of acculturation and development that makes desirable extension of State civil jurisdiction.”<sup>108</sup>

Anderson and Parker properly tried to exclude alternative explanations for their findings of higher per capita income on reservations subject to state civil jurisdiction. They controlled for different reservations’ natural resource endowments, land tenure, levels of education, geographic remoteness, and economic conditions in counties surrounding the reservation, as well as the percentage of non-Indians on the reservation and the percentage of individuals speaking the native language.<sup>109</sup> What they did not (and almost certainly could not) control for were the effects of characteristics such as “acculturation” that caused tribes to be in the condition of state jurisdiction or tribal jurisdiction in the first place. Education level, percentage of native language speakers, and degree of isolation from non-Indians might be similar variables, but they are not the same thing. The land tenure system (private allotments vs. collective land holding) might be an indicator of acculturation, but it is also not the same thing. Acculturation refers to characteris-

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104. See DAVID R. M. BECK, *THE STRUGGLE FOR SELF-DETERMINATION: HISTORY OF THE MENOMINEE INDIANS SINCE 1854*, at 95–102 (2005); WUB-E-KENIEW, *WE HAVE THE RIGHT TO EXIST: A TRANSLATION OF ABORIGINAL INDIGENOUS THOUGHT* 54–73 (1995).

105. See *BLOOD STRUGGLE*, *supra* note 37, at 273–74.

106. See COHEN’S HANDBOOK, *supra* note 2, § 1.06; *BLOOD STRUGGLE*, *supra* note 37, at 21–22, 53–55.

107. Menominee was one of the tribes subjected to termination, but quickly moved to reverse the process. Congress agreed to restore the Tribe in 1973. BECK, *supra* note 104, at 129–78.

108. S. REP. NO. 83-699, at 5–6 (1953), *reprinted in* 1953 U.S.C.C.A.N. 2409, 2412.

109. Anderson & Parker, *supra* note 73, at 652–53.

tics such as disposition to participate in the market, as opposed to carrying out longstanding ceremonies that might conflict with market participation and affect per capita income.<sup>110</sup> Acculturation might also be associated with a community's willingness to distribute tribal revenues on a per capita basis versus investing in community services and infrastructure, such as language renewal programs.<sup>111</sup>

The possibility of this kind of selection bias makes it extremely difficult to attribute any causal force to state, as opposed to tribal, civil jurisdiction. If state jurisdiction is not the cause of the higher per capita incomes in Public Law 280 jurisdictions, then greater fairness and effectiveness of state civil justice likewise cannot be the explanation for those higher incomes. That is, Anderson and Parker's findings cannot provide support for a norms-driven analysis of tribal-state conflicts that favors state jurisdiction. If the causal claim of their article is not supported, then state jurisdiction is not the cause of higher incomes. If state jurisdiction is not causing higher incomes, there is no basis for arguing that the superiority of state justice is responsible for any such causal effect.

Methodological issues are not the only reason for concern about Anderson and Parker's claim that state civil jurisdiction is preferable to tribal. Their explanation for the connection between state jurisdiction and higher per capita income suffers from a misapprehension of the relevant federal Indian law. This problem is potentially significant because it undermines their explanation for the effect of state jurisdiction. Specifically, if federal Indian law negates any significant difference between investors' access to state and tribal courts, it will be difficult to argue that the superiority of state justice is what is producing higher incomes on reservations subject to state jurisdiction. Thus, it is not possible to use this research to sup-

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110. For example, the Warm Springs Tribe was forced into allotment during the late nineteenth century, but tribal members had not acceded to the underlying goal of allotment—that tribal members would sever their commitments to the collective community and participate in the market economy as individuals. *See supra* note 105 and accompanying text.

111. I am assuming that tribal members who accept the non-Indian culture of individual participation in the market economy would be more interested in maximizing their individual distributions than in investing in cultural programs with no economic payoff. In contrast, tribal members who are more interested in sustaining their distinctive cultures would be more likely to forego per capita distributions that would add to their personal income and direct the funds to cultural programs.



port a norms-driven analysis of tribal-state jurisdictional conflicts.

Careful examination of Anderson and Parker's study reveals that they do rest their explanation for higher reservation incomes on the fact of greater access to civil courts for investors on Public Law 280 reservations. They argue that the reason higher per capita incomes are found among tribes subject to state civil jurisdiction is that state courts are better able to provide a quality of justice that facilitates "credible commitments" by economic actors wanting to transact business on the reservation.<sup>112</sup> They characterize this advantage of state courts as adherence to a "consistent rule of law."<sup>113</sup> Specifically, Anderson and Parker argue that state courts are better positioned than tribal courts to hold tribes and Indians accountable if they fail to abide by the contractual commitments they make.<sup>114</sup> By implication, tribal courts, either in fact or as perceived by outside investors, are too biased and unreliable to dispense proper justice. Implicit in this explanation is the belief that economic actors will in fact have access to state courts if they become entangled in contract disputes with Indians on reservations. The flaw in this explanation is that it does not square with the applicable law on reservations subject to state jurisdiction. That law makes it exceedingly difficult to bring contract disputes with Indians into state courts, regardless of state jurisdiction under Public Law 280 or some similar statute.

The legal doctrines that confound Anderson and Parker's claim relate to the permissibility of lawsuits against tribes in state court. One of these—the doctrine of tribal sovereign immunity—precludes suits against tribes or tribally controlled entities absent clearly expressed tribal or congressional consent.<sup>115</sup> Another relevant doctrine arises from an interpretation of Public Law 280 that allows state civil jurisdiction over individual Indians, but not over tribes or tribally controlled entities.<sup>116</sup> If much of the economic activity in Indian country is carried out by tribes or their tribally controlled enterprises, and suits cannot be brought against tribes in state courts for reasons of tribal sovereign immunity or limitations of Public

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112. Anderson & Parker, *supra* note 73, at 643–48.

113. *Id.* at 642.

114. *Id.* at 647.

115. See COHEN'S HANDBOOK, *supra* note 2, § 7.05[1].

116. See *infra* notes 123–27 and accompanying text.

Law 280 itself, then state courts in Public Law 280 jurisdictions cannot offer themselves as sources of “credible commitments” and the consistent application of the rule of law. In fact, much economic activity on reservations is carried out by tribes or their designated entities and, as indicated above, several different rules of federal Indian law bar suits in state court against tribes, even under Public Law 280.<sup>117</sup>

There are no nationwide quantitative data on the relative proportion of tribal and private economic enterprise in Indian country. Anderson and Parker do not present such data and cannot use such data as the basis for running their regressions to control for other possible explanatory variables. However, it is widely understood that a considerable amount of the economic activity on reservations is tribally controlled.<sup>118</sup> By federal law, Indian country gaming must be a tribal enterprise.<sup>119</sup> Many gaming tribes have used their revenues to invest in other on-reservation businesses, either directly or, more often, through separately chartered corporations that operate as arms of the tribe.<sup>120</sup> Non-gaming tribes, particularly those with natural resources, may enter into leases or joint ventures with private businesses.<sup>121</sup> In the end, however, the reservation-based contracting party is the tribe or a tribal entity. Broad characterizations of economic activity in Indian country also note the rise in individual entrepreneurs who are not protected by sovereign immunity, but this development is relatively recent.<sup>122</sup>

If this characterization of reservation economic activity as mostly tribal in nature is correct, then there are serious legal barriers to state courts providing “credible commitments” to reservation investors. And if state courts cannot make credible commitments to reservation investors any more than tribal courts, there is no ground for viewing state justice as superior to tribal justice for purposes of the norms-driven theory or otherwise. As noted above, there are two reasons why state courts cannot, in fact, provide greater access to justice for reservation investors and, therefore, cannot offer more credible commitments. First, Public Law 280 only opens state civil courts to

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117. Public Law 280 fails to authorize state jurisdiction over tribes as opposed to individual Indians.

118. See STATE OF NATIVE NATIONS, *supra* note 13, at 117–30.

119. Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721 (2006).

120. See STATE OF NATIVE NATIONS, *supra* note 13, at 150–52.

121. See COHEN'S HANDBOOK, *supra* note 2, §§ 17.02[3], 17.02[2][a]–[b].

122. See STATE OF NATIVE NATIONS, *supra* note 13, at 117–18.

suits against individual Indians, not against the tribes themselves. The civil jurisdiction provision of Public Law 280 allows states to hear “civil causes of action between Indians or to which Indians are parties.”<sup>123</sup> This language refers only to individual Indians and does not mention suits against Indian nations. Given the Indian law canons of construction, which require resolution of statutory ambiguities in favor of tribes,<sup>124</sup> the United States Supreme Court has construed the provision as not authorizing suits against the tribes themselves or waiving tribal sovereign immunity.<sup>125</sup> As the Court noted in its 1976 decision *Bryan v. Itasca County, Minnesota*, “there is notably absent [from Public Law 280] any conferral of state jurisdiction over the tribes themselves.”<sup>126</sup> Furthermore, federal Indian law recognizes tribal sovereign immunity, barring suits against tribes in federal or state court absent express congressional abrogation or express waiver by the tribe itself.<sup>127</sup> The Supreme Court has held that Public Law 280 did not abrogate tribal sovereign immunity.<sup>128</sup> For example, in *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Engineering*, the Court stated emphatically: “[w]e have never read Pub. L. 280 to constitute a waiver of tribal sovereign immunity.”<sup>129</sup> The absence of an abrogation of tribal sovereign immunity makes sense in light of the failure of Public Law 280 to authorize state jurisdiction over suits against tribes in the first place.

Thus, even if a tribe could be induced to waive its immunity for suit against it in state court, such a suit would be outside the state court’s jurisdiction under Public Law 280. Anderson and Parker point to a single Minnesota intermediate appellate court case from 1979 to demonstrate the opposite.<sup>130</sup> But that

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123. 28 U.S.C. § 1360(a) (2006).

124. See COHEN’S HANDBOOK, *supra* note 2, § 2.02[1].

125. See *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Eng’g*, 476 U.S. 877, 892 (1986).

126. 426 U.S. 373, 389 (1976).

127. See COHEN’S HANDBOOK, *supra* note 2, § 7.05[1][a].

128. See *supra* note 125.

129. 476 U.S. at 892.

130. Anderson & Parker, *supra* note 73, at 660–61. The case the authors cite, *Duluth Lumber & Plywood Co. v. Delta Development, Inc.*, 281 N.W.2d 377 (Minn. 1979), does not acknowledge the language in Public Law 280 or the language in the Supreme Court’s opinion in *Bryan v. Itasca County, Minnesota*, 426 U.S. 373 (1976), denying state jurisdiction over tribes as opposed to individual Indians. Instead, the *Duluth Lumber* case analyzes the matter of state jurisdiction under the “infringement” test applied in non-Public Law 280 states, and finds in favor of state jurisdiction. *Duluth Lumber*, 281 N.W.2d at 380–83. The court’s application of that test was both inappropriate and improperly executed.

case is opposed by much higher and more recent authority, as discussed above.<sup>131</sup> And even if an individual tribal official were to be sued in state court, the suit would be barred by sovereign or official immunity unless the individual acted outside the scope of her or his authority.<sup>132</sup> Furthermore, the practical difficulty of collecting a large judgment against an individual tribal official would also render state court litigation an unattractive option.

The upshot of these limits on state court power under Public Law 280 is that suits may be brought against Public Law 280 tribes or tribal entities, assuming an appropriate waiver of sovereign immunity, only in a tribal forum.<sup>133</sup> A tribe in a Public Law 280 jurisdiction cannot make a more credible commitment to outside investors based on state-court jurisdiction than a non-Public Law 280 tribe. Thus, Anderson and Parker's explanation for the greater success of tribes subject to state jurisdiction is unsupportable unless they can show that private Indian enterprise is a substantial economic force in Indian country. In the absence of such evidence, a norms-driven analysis of tribal-state jurisdictional conflicts should not treat this research as reason to favor state justice.

A further supposition behind Anderson and Parker's study is that tribes are incapable of making credible commitments to investors in the absence of state jurisdiction. In fact, however, a tribe that wants to make credible commitments to contracting parties has a variety of options, whether it is a tribe governed by Public Law 280 or not. If a contracting party does not trust a tribal court, the tribe can waive its sovereign immunity to arbitration.<sup>134</sup> While this option requires an enforcement mechanism if a tribe refuses to arbitrate or to pay an arbitration award,<sup>135</sup> the role for a tribal court is reduced. Alternatively, a tribe may waive its immunity and engineer its

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131. See *Three Affiliated Tribes*, 476 U.S. at 892; *Bryan*, 426 U.S. at 389.

132. See COHEN'S HANDBOOK, *supra* note 2, § 7.05[1][a].

133. States lack jurisdiction over on-reservation claims against Indians or tribes absent congressional authorization in a statute such as Public Law 280. See COHEN'S HANDBOOK, *supra* note 2, § 6.03[1][a]. Federal courts lack jurisdiction over business disputes arising in Indian country except in the rare instances where the claim arises under federal law. See *id.* § 7.04[1], at 611. Federal jurisdiction based on diversity of citizenship is unavailable because there is no underlying state jurisdiction. See *id.* § 7.04[1].

134. See *C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001).

135. See R. Lance Boldrey & Jason Hanselman, *Proceed with Prudence: Advising Clients Doing Business in Indian Country*, 89 MICH. BAR J. 34, 35 (2010).

contractual agreement so that any resulting breach of contract claim is deemed to arise at least partially off the reservation, thereby triggering state jurisdiction.<sup>136</sup> Thus, it is not at all clear that a Public Law 280 tribe enjoys any advantages over a non-Public Law 280 tribe in the ability to provide the rule of law to outside investors.

Finally, Anderson and Parker's research focuses on a single measure of tribal economic well-being—per capita income<sup>137</sup>—that fails to capture important benefits of economic development on reservations. For example, if a tribe developed a tribal enterprise and used the revenues for early childhood education or a tribal health care facility rather than per capita distributions, per capita income would not rise but community well-being would increase. The Citizen Potawatomi Tribe in Oklahoma does not, in fact, make per capita payments from its gaming revenues, but is considered a very successful tribe. As the Harvard Project on American Indian Economic Development has noted:

[T]here has been stable community support for using earnings from gaming and the numerous other enterprises owned by the nation to fund a much wider and higher-quality array of services to citizens of the nation. Such services range from housing, law enforcement, wellness and health, education, elder care, medical device support, and veterans' affairs.<sup>138</sup>

Anderson and Parker's research has no way of measuring such outcomes or controlling for such differences among tribes.

In sum, the problems with Anderson and Parker's research suggest that something other than the superior quality of state over tribal justice is responsible for the higher per capita incomes in the larger non-Public Law 280 tribes they studied. Furthermore, even if Anderson and Parker are correct about the superiority of state jurisdiction for purposes of enforcing business agreements, it would not follow that state jurisdiction should be promoted at the expense of tribal jurisdiction in In-

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136. States generally have jurisdiction over claims against Indians and tribes arising outside Indian country. See COHEN'S HANDBOOK, *supra* note 2, § 6.01[5]. Although tribes may still assert the defense of sovereign immunity in such lawsuits, any tribal waiver of such immunity can be interpreted and enforced in state court. See *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998).

137. Anderson & Parker, *supra* note 73, at 649.

138. STATE OF NATIVE NATIONS, *supra* note 13, at 155. Oklahoma is a non-Public Law 280 state.

dian country. Tribal courts have long suffered from severe underfunding.<sup>139</sup> While many Indian nations have been strengthening their justice systems through protections for judicial independence,<sup>140</sup> publication of laws and court decisions,<sup>141</sup> and training of court personnel,<sup>142</sup> new resources could accelerate these developments. In the meantime, Anderson and Parker's work should not serve as a justification for favoring state over tribal jurisdiction using a norms-driven analysis.

*B. State Criminal Jurisdiction in Indian Country: A Demonstrated Failure*

Current federal policy decisions regarding Indian country criminal jurisdiction also turn on perceptions of the relative fairness and effectiveness of state versus tribal justice.<sup>143</sup> That is precisely what a norms-driven theorist would predict. In order for these perceptions to be well informed, however, policy makers should know how well state criminal jurisdiction has operated on those reservations where it was introduced through Public Law 280 and related statutes. This Subsection presents evidence from my nationwide study of law enforcement and criminal justice under Public Law 280, a study that calls into question the caliber of criminal justice that states are providing under Public Law 280.

Several related bills introduced during recent sessions of Congress implicate the choice between state and tribal criminal justice. For example, a pressing question has been whether the Tribal Law and Order Act, which became law in July 2010,<sup>144</sup> should include a provision allowing tribes to take control of the process for retroceding state jurisdiction back to the federal

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139. See COHEN'S HANDBOOK, *supra* note 2, § 22.07[1][d][i].

140. For illustrations of such initiatives, see STATE OF NATIVE NATIONS, *supra* note 13, at 45–46.

141. For announcement of a joint initiative of the National Indian Law Library and West Publishing Company to expand access to tribal law, see *NILL & Westlaw Work with Tribes to Improve Access to Tribal Law*, NATIONAL INDIAN LAW LIBRARY BLOG, (Aug. 27, 2009, 12:58) <http://nilllibrary.blogspot.com/2009/08/nill-westlaw-work-with-tribes-to.html>.

142. The United States Department of Justice funds such training and technical assistance efforts through its Tribal Court Assistance Program. See COHEN'S HANDBOOK, *supra* note 2, § 22.07[1][d][ii]; BUREAU OF JUSTICE ASSISTANCE, FACT SHEET: TRIBAL COURT ASSISTANCE PROGRAM (2008), *available at* [http://www.ojp.usdoj.gov/BJA/grant/TCAP\\_Fact\\_Sheet\\_08.pdf](http://www.ojp.usdoj.gov/BJA/grant/TCAP_Fact_Sheet_08.pdf).

143. See *infra* notes 144–48 and accompanying text.

144. Pub. L. No. 111-211 (2010).

government.<sup>145</sup> Such a provision would enlarge the realm of exclusive tribal criminal jurisdiction for Public Law 280 tribes to encompass minor offenses involving only Indians.<sup>146</sup> Because the Senate Committee wanted a bill that would attract unanimous consent, no provision for tribally initiated retrocession was included.<sup>147</sup> Even in an era when tribal self-determination is official federal policy, a proposal to allow tribes to remove themselves from state jurisdiction—i.e., jurisdiction imposed initially without their consent—could not attract sufficient congressional support. Norms-driven international relations theory would suggest that concern over the relative fairness and effectiveness of tribal criminal justice is behind that reluctance. The actual history of federal criminal justice policy in Indian country over the past sixty years, discussed below, supports that explanation.

At the time Congress enacted Public Law 280 in 1953, the superiority of state criminal justice over tribal justice wasn't even questioned.<sup>148</sup> The official rationale for extending state criminal jurisdiction onto reservations was the need to combat "lawlessness" in Indian country,<sup>149</sup> and the only real choice perceived at the time was between two nontribal criminal justice systems: federal and state.<sup>150</sup> In those days, few tribes were actually exercising criminal jurisdiction, though they had various traditional means of discouraging and responding to socially disruptive behavior.<sup>151</sup> While Congress could have ad-

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145. See Nat'l Cong. of Am. Indians Res. PHX-08-049 (2008), available at <https://www.ncai.org/ncai/resolutions/doc/PHX-08-049FINAL.pdf>.

146. See PUBLIC LAW 280 STUDY, *supra* note 21, at 3, 409. Tribes that are not subject to Public Law 280 have exclusive jurisdiction over minor crimes involving only Indians. These non-Public Law 280 tribes share jurisdiction with the federal government in cases of major crimes committed by Indians and minor crimes committed by Indians against non-Indians. In contrast, Public Law 280 tribes share jurisdiction with the state over all criminal offenses committed by Indians, whether major or minor. See COHEN'S HANDBOOK, *supra* note 2, §§ 9.02–9.04.

147. For a discussion of the unanimous consent procedure that has been applied to the Tribal Law and Order Act, see Troy A. Eid, *The Tribal Law and Order Act: An "Aggressive Fight" Worth Winning*, THE FED. LAW., Mar./Apr. 2010, at 34, 39.

148. For the history of enactment of Public Law 280, see Goldberg, *supra* note 20.

149. See CAROLE GOLDBERG-AMBROSE, PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280, at 3–4 (1997) [hereinafter PLANTING TAIL FEATHERS].

150. *Id.*

151. Much of the criminal jurisdiction exercised on reservations at that time was carried out through Federal Courts of Indian Offenses. See AMERICAN INDIAN POLITICS, *supra* note 6, at 153–55. For examples of traditional tribal me-

dressed problems of criminal behavior in Indian country by supporting the development of tribal justice systems, it chose instead to extend state jurisdiction through Public Law 280 and to do so without regard to tribal consent.<sup>152</sup> No one raised the possibility that Congress could be extending an unfair or ineffective criminal justice system into Indian country. The goal was to acclimate Indians to state criminal law and to move toward their full integration into the state legal system—a system assumed to be as suitable for Indian country as it was elsewhere.<sup>153</sup>

From the earliest years of its implementation in Indian country, Public Law 280 provoked protests from tribal leaders and community members. Infringements on tribal sovereignty, stemming from the absence of tribal consent, were a common source of complaint,<sup>154</sup> but protesters also focused on the poor quality and unavailability of state criminal justice.<sup>155</sup> A telling statement came from Wendell Chino, Chairman of the Mescalero Apache Tribe, in 1974: “Public Law 280 . . . is a despicable law. . . . On those reservations where states have assumed jurisdiction under the provisions of Public Law 280, lawlessness and crimes have substantially increased and have become known as no man’s land . . . .”<sup>156</sup>

Current criminal justice theory provides support for these protests, indicating that the assumption of fair and effective state criminal jurisdiction in Indian country should be challenged. One well-accepted premise among leading analysts is that the perceived legitimacy of the criminal justice system is a key determinant of compliance with the law and effective law enforcement.<sup>157</sup> If people mistrust the criminal justice system—either because it is believed to be unfair in its administration or it does not reflect community values—then they are more likely to disregard the legal system and commit crimes.<sup>158</sup> Furthermore, victims are less likely to report offenses and wit-

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thods of social control, see CARRIE E. GARROW & SARAH DEER, TRIBAL CRIMINAL LAW AND PROCEDURE 9–36 (2004); *Ex Parte Crow Dog*, 109 U.S. 556 (1883).

152. See PLANTING TAIL FEATHERS, *supra* note 149, at 3–4.

153. *Id.* at 4–8, 49–50.

154. *Id.* at 52.

155. *Id.*

156. 1 NAT’L AM. INDIAN COURT JUDGES ASS’N, JUSTICE AND THE AMERICAN INDIAN: THE IMPACT OF PUBLIC LAW 280 UPON THE ADMINISTRATION OF CRIMINAL JUSTICE ON INDIAN RESERVATIONS 28 (1974).

157. For an excellent introduction to this literature, see Jeffrey Fagan, *Legitimacy and Criminal Justice: Introduction*, 6 OHIO ST. J. CRIM. L. 123 (2008).

158. *Id.* at 127.



nesses are less likely to come forward and offer their testimony.<sup>159</sup> Under Public Law 280, the system of state jurisdiction in Indian country was imposed on tribes without their consent.<sup>160</sup> For some tribes, Congress was abrogating treaty promises when it unilaterally subjected them to state criminal authority.<sup>161</sup> It would not be surprising if the tribes subjected to state jurisdiction without their consent questioned the legitimacy of the state systems that operate in Indian country on this basis. As indicated above, criminal justice theory suggests that a criminal justice system lacking legitimacy will experience problems of compliance with the law, inadequate reporting, and stymied investigations.

These insights from criminal justice theory find support in an empirical study that Professor Champagne and I conducted for the National Institute of Justice.<sup>162</sup> This study documents the widespread complaints that reservation residents direct toward state systems of criminal justice and the preference they express for tribal systems of law enforcement and criminal courts. It also suggests further grounds for believing there is a problem of legitimacy in Public Law 280 jurisdictions. If state criminal jurisdiction is believed to be operating in an unfair, unresponsive, and discriminatory manner, its legitimacy will be severely undermined, with adverse consequences for compliance with the law, reporting, and investigation.

In brief, we conducted interviews and administered quantitative surveys at seventeen reservations: ten in mandatory Public Law 280 states, two in optional states, two in states that had retroceded jurisdiction back to the United States, one in a state that had been excluded from Public Law 280 from the outset, two in non-Public Law 280 states, and one that straddled a Public Law 280 and a non-Public Law 280 state.<sup>163</sup> Over 350 individuals were interviewed and surveyed, including reservation residents, law enforcement officials, and criminal jus-

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159. See Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in their Communities?* 6 OHIO ST. J. CRIM. L. 231 (2008).

160. PLANTING TAIL FEATHERS, *supra* note 149, at 51–56.

161. See COHEN'S HANDBOOK, *supra* note 2, § 6.04[2]. The treaties promised the tribes that their lands would be set aside for their sole and exclusive use and occupation, which has been interpreted as a guarantee that they would not be subjected to state jurisdiction.

162. The full report of this research is available online. See PUBLIC LAW 280 STUDY, *supra* note 21.

163. *Id.* at 40–41.

tice personnel from each site. Individuals were not chosen randomly but on the basis of their familiarity and affiliation with the criminal justice system. All of the research sites and individual interviews were confidential.

The findings of this study include negative assessments by reservation residents of the fairness and quality of state law enforcement and criminal justice. In fact, across a number of issues, state law enforcement and criminal justice officials believe they are doing a far better job than reservation residents do. These issues include thoroughness of crime investigation, effective communication with tribal communities, and cultural sensitivity. By contrast, in the non-Public Law 280 jurisdictions studied—including the retroceded, excluded, straddler, and non-Public Law 280 tribes—there is far greater convergence between the views of reservation residents and the federal officials who are partially responsible for the law enforcement and criminal justice on those reservations. These ratings by non-Public Law 280 reservation residents and federal officials converge at a point that is just above the ratings that reservation residents give state officials operating under Public Law 280 and far below the ratings that those state officials give themselves. A reasonable inference from this pattern is that the state officials are rating themselves unusually highly. The reservation residents in Public Law 280 jurisdictions do not appear to be unusually harsh in their assessments given that those assessments are not so different from the assessments provided in non-Public Law 280 jurisdictions by the justice system officials themselves as well as by the reservation residents.<sup>164</sup>

Several other results from our Public Law 280 research fill out the reasons for reservation residents' dissatisfaction with state jurisdiction. In particular, when asked to assess law enforcement and criminal justice, substantial numbers of reservation residents in Public Law 280 jurisdictions complained about abuse of authority, prejudicial treatment, and discrimination. Just under half complained that police overstep their authority through excessive use of force, arrests without proper warrants, and discrimination against Indian people.<sup>165</sup> Looking at the state criminal courts, over half of the reservation residents said that cases with Indian victims or defendants are not

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164. *Id.* at 711–23.

165. *Id.* at 144.

treated the same as other cases in the state system, with two-thirds of those going so far as to say that state and county courts are prejudiced against such Indian cases, especially the generally all-white juries.<sup>166</sup> In three out of four measures of fairness—rate of case dispositions, sentencing, and judge and jury responses—most Public Law 280 reservation residents said that they are experiencing unfairness in state court systems. Even Public Law 280 criminal justice workers agreed that judges and juries are responding negatively to Indian cases.<sup>167</sup> Following are some representative statements we obtained from reservation residents in Public Law 280 jurisdictions through our interviews:

I know that there is a feeling in the community that the court is harder on Indian defendants. That they are not necessarily as fair as they should be, or, if there are two parallel cases, the white person gets off, but the Indian person gets prosecuted. I know that there is a very strong feeling within the community that once things get to that court atmosphere, that things are not equal.<sup>168</sup>

I probably shouldn't say this, but there have been times I felt that our people have been discriminated against over there. Simply looking at the penalties applied. They are not comparable very often. If you see the court results, it always seems like the poor Indian pays a heavier penalty.<sup>169</sup>

Reservation residents in non-Public Law 280 states view tribal courts as far less likely to treat Indian victims and defendants disadvantageously.<sup>170</sup>

Not only do fairness concerns contribute to the problem of legitimacy of state criminal justice in Indian country, but state officials' insensitivity to tribal cultures can aggravate the problem. On the quantitative survey, Public Law 280 reservation residents ranked police understanding of reservation cultures significantly lower than did non-Public Law 280 reservation residents.<sup>171</sup> Reservation residents in Public Law 280 jurisdic-

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166. *Id.* at 198–99.

167. *Id.* at 204.

168. *Id.* at 183.

169. *Id.* at 188. For additional statements, see *id.* at 181–204.

170. *Id.* at 190, 196. See also *supra* note 146 (discussing shared federal/tribal jurisdiction in non-Public Law 280 states).

171. PUBLIC LAW 280 STUDY, *supra* note 21, at 154–55.

tions believe that state or county police do not understand their cultures very well, while non-Public Law 280 reservation residents believe that Federal-BIA and tribal police have better than average understanding of their cultures.<sup>172</sup> The interviews yielded similar results. Eighty percent of the reservation residents in Public Law 280 jurisdictions indicated that state or county police do not understand tribal cultures.<sup>173</sup> Approximately three-quarters of both the reservation resident and state/county criminal justice personnel respondents in Public Law 280 jurisdictions stated that state court officials do not understand tribal cultures.<sup>174</sup> One respondent captured many of the concerns in the following response to the question whether state/county police understand tribal cultures:

Probably no. I would say, as a whole, probably not. For example, they might not appreciate family relations and go to somebody for something when it would be pretty clear if you understood the families that it wouldn't be a good place to go. Or they might disrupt some ceremonial activity or not show respect for certain elders in the community. Those are just some examples of how it might manifest itself.<sup>175</sup>

Reservation residents also indicated that tribal police and court personnel have a far better understanding of tribal cultures than state or county officials.<sup>176</sup>

Another way to gauge the problems with unfairness and ineffectiveness in state criminal justice systems operating in Indian country is to look at the tribes that were once subject to Public Law 280 and eventually persuaded their states to retrocede jurisdiction back to the federal government. Were these tribes eager to be rid of Public Law 280 because of problems with receiving fair and effective justice, or were there other reasons for seeking retrocession? Of the over 150 tribes under Public Law 280 jurisdiction in the lower 48 states, only 31 have successfully retroceded since 1968, and only seven of those are from the five "mandatory" Public Law 280 states other than Alaska.<sup>177</sup> There have been no retrocessions by any of the 107

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172. *Id.*

173. *Id.* at 157–58.

174. *Id.* at 218.

175. *Id.* at 160.

176. *Id.* at 158, 218.

177. *Id.* at 410–11.

tribes in California—one of the mandatory states—and none by the more than 235 tribes and Native villages in Alaska.<sup>178</sup>

Two tribes that experienced state retrocession under Public Law 280 were included in our research sample. We also used published research to provide case studies of six other tribes, all but one of which eventually succeeded in securing retrocession. The results provide a severe indictment of state jurisdiction under Public Law 280. While it is possible that these are the most egregious cases of abuse and discrimination—sufficient to motivate and mobilize a tribe to mount a politically difficult and expensive retrocession campaign—it is also possible that these are simply the tribes with the best economic and political resources to resist state jurisdiction.

Reservation residents from the two retroceded tribes in our sample reported that the primary reasons for pursuing retrocession were prejudicial treatment in state courts and poor service.<sup>179</sup> These two complaints parallel the complaints voiced by reservation residents still subject to Public Law 280 about their state court systems. The following are illustrative comments from respondents:

[B]efore retrocession, it was like they had a quota to do. It was getting close to the end of the month, you'd see the two county cop cars roll into town and start trying to pick people up, and fill the jail up, and everything else. It wasn't only just our perception seeing it, we actually got to see it researching all those books and writing everything down [for the retrocession effort].<sup>180</sup>

[The reservation] was a place of fear, especially for women and children, because there was no authority on the reservation . . . . As an Indian person, if you were being attacked in your home, there was no one to call. You could call the sheriff, but you thought twice, and you thought too long about doing that. The sheriff would come in and clean up the murders and the really bad auto accidents and stuff like that, but even though [the reservation] is a relatively small place, smaller than anyplace I worked before, it became a haven for lawless behavior on the streets.<sup>181</sup>

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178. *Id.*

179. *Id.* at 442.

180. *Id.* at 444 (second alteration in original).

181. *Id.* at 443.

The six case studies confirmed our findings that unfair and ineffective administration of state criminal justice prompted tribes to press for retrocession. The Indian nations we studied fought for retrocession because they wanted to make their justice systems more consistent with tribal priorities and values, and because they were receiving inadequate services from state criminal justice systems.<sup>182</sup> Concerns about these inadequate services related to a shortage of police, cultural insensitivity of county law enforcement and criminal justice agencies, discrimination against Indians in the county system, or some combination of the three.<sup>183</sup>

In all of the successful retrocession cases, there seems to be a high level of tribal satisfaction with the results.<sup>184</sup> Not only has tribal sovereignty been enhanced through more active involvement of tribal government in community affairs, but law enforcement has been rendered more accountable to the community and is more trusted to address community concerns.<sup>185</sup> Accordingly, there is more frequent police patrolling and a higher level of community cooperation because law enforcement and the system of criminal justice more closely match the community's values.<sup>186</sup> The ultimate consequence has been a drop in crime in several of the case study tribes.<sup>187</sup> The study also suggests that enhanced economic development is associated with more stable legal institutions.<sup>188</sup>

With respect to criminal justice in Indian country, state jurisdiction suffers from serious problems of legitimacy, due primarily to its imposition without tribal consent. In addition, reservation residents report that state law enforcement and state criminal justice are unfairly administered, culturally insensitive, and of poor quality.<sup>189</sup> These perceptions further fuel legitimacy problems. If federal Indian law court decisions and legislative policies regarding criminal jurisdiction are premised on the fairness and efficacy of state courts, as norms-driven theory predicts, these decisions and policies should be reconsidered in light of the empirical evidence regarding state criminal jurisdiction in Indian country.

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182. *Id.* at 439.

183. *Id.*

184. *Id.* at 440.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 440.

189. *Id.* at 335-39.

## CONCLUSION

International relations theory suggests some new ways of thinking about the conflict between states and tribes over jurisdiction in Indian country. Realists portray the struggle as a clash of self-interested political actors, with the most powerful prevailing. Norms-driven theory suggests that perceptions of which legal system satisfies widely accepted standards for fair and effective justice will determine which entity is allowed jurisdiction. Supreme Court decisions and congressional policy-makers generally appear to analyze tribal-state jurisdictional conflicts from a norms-driven perspective.

Taking the norms-driven theory as its starting point, this Article has examined and rebutted claims that state jurisdiction in Indian country—both civil and criminal—promotes fair and effective justice. On the civil side, the focus has been on research that makes strong claims for the normative superiority of state jurisdiction. That research suffers from some significant flaws, particularly in its account of the applicable federal Indian law. On the criminal side, the focus has been on field research demonstrating that state law enforcement and criminal courts do not function well in Indian country, as measured by the perceptions of Indian populations regarding fairness and quality of service.

Supreme Court and legislative decisions that assume the desirability of state jurisdiction in Indian country should be reexamined in light of the analysis in this Article. Policy-makers and judges have been mistaken in focusing solely on the deficiencies of tribal justice and ignoring the problems with state-administered justice. If jurisdictional allocations are in fact being made on the basis of concerns identified by norms-driven theory—fair and effective justice—then the empirical foundations justifying this granting of state authority in Indian country must be re-evaluated.