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CAUTION, COOPERATIVE AGREEMENTS, AND THE ACTUAL STATE OF THINGS: A REPLY TO PROFESSOR FLETCHER

Ezra Rosser*

I. INTRODUCTION

Tribal governments considering entering into cooperative agreements with federal, state, or local governments ought to maintain a healthy skepticism regarding the non-tribal governments sitting across from them at the negotiating table. I believe that non-tribal governments enter into such negotiations with assumptions and goals that are often antagonistic to tribal interests; perhaps more importantly, a presumption that such governments will not abuse cooperative agreements to the detriment of tribes does not accord with the history of prior treaties and agreements. In a recent article, Michigan State University Professor Matthew L.M. Fletcher presents a very different take on cooperative agreements: he actively encourages tribes to pursue them as a way of getting around the uncertainty of federal Indian law and avoiding a harsh judicial climate.¹ It would be foolish to overly criticize Fletcher's argument, both for self-interested reasons² and, more importantly, because the underlying idea—that tribes can benefit from cooperation—has its own merits. That being said, I do believe that Indian communities would be wise to take Fletcher's one-sided celebration of cooperative agreements with a grain of salt.³

Cooperative agreements between tribes and non-tribal governments in many

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1. Matthew L.M. Fletcher, *Reviving Local Tribal Control in Indian Country*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=879808 (accessed Sept. 15, 2006). The paper posted on SSRN is a longer version of the article published in 53 *Fed. Law.* 38 (Mar.–Apr. 2006); therefore, in the interest of fairness to Fletcher's argument, this response will only reference the more developed version of the paper. All citations are to the version found on SSRN.

2. Fletcher is one of the most prolific writers among pre-tenure Indian law professors. According to a Lexis search, Fletcher has twelve solely authored Indian law articles (in addition to another article he coauthored with his wife and fellow Indian law professor, Wenona T. Singel) that have been published within the last four years. That search does not include many law review publications, such as the one being reviewed in this response. Frankly, as I have noted to my wife, such hard work and dedication is a bit intimidating to a more junior scholar, and, as a general policy, it seems wise for a fellow pre-tenure author to avoid criticizing someone who has maintained such a productive pace.

3. This reply does not use Fletcher's article to incite disagreement; instead, the form of a reply was chosen because his admirable article serves as a convenient foil to help present a more skeptical take on cooperative agreements.

respects are products of “the actual state of things”⁴ (ASOT) and, as such, reflect both the positive and negative aspects of Indian law. Seen positively, tribal use of cooperative agreements to make the best of their at-times precarious place within American federalism represents the “staying power” of tribes and tribal governments described in Professor Charles Wilkinson’s *Blood Struggle*.⁵ This is the perspective presented by Professor Fletcher. Yet, such cooperative agreements can also reflect an all-too-easy assumption that ASOT should (1) inform the background starting points that tribes and non-tribal governments bring with them to negotiations and (2) circumscribe the policy choices available to tribes. As the heated exchange between Professors Robert Williams and Robert Laurence makes clear, the “actual state of things” is a topic to be approached with some trepidation.⁶ However, considering the place of “the actual state of things” helps bring into relief the differing perspectives on tribal powers today and on the tribal lawyers who help define, create, or limit these powers.

Part II of this article briefly presents Fletcher’s argument in favor of cooperative agreements. Part III analyzes the relationship between cooperative agreements and ASOT, using the presentation of ASOT by the two charter members of the Indian law “[f]ight [c]lub” as a way of framing the analysis.⁷ Part IV considers the dangers tribes face when negotiating with non-tribal governments—those internal to the tribe and those reflecting their negotiating counterpart. Finally, the conclusion briefly sketches some principles that will help tribes get the most out of the cooperative agreement process and its outcomes. As I hope will be clear by the end of this article, I share with Fletcher an appreciation for the dynamic potential benefits of cooperative agreements; I am just less optimistic about the goodwill, motives, and trustworthiness of non-tribal governments.

II. FLETCHER’S ARGUMENT IN FAVOR OF COOPERATIVE AGREEMENTS

Fletcher’s article, *Reviving Local Tribal Control in Indian Country*, presents an analysis of tribal cooperative agreements that, while it contains a few cautionary asides, is largely an advocacy piece for such agreements and, implicitly, for the foresight of

4. In *Worcester v. Georgia*, Chief Justice John Marshall introduced the “actual state of things” (ASOT) as a guiding principle of Indian law, Marshall using it to justify superior European rights over land under the principles of the doctrine of discovery. 31 U.S. 515, 560 (1832). For more on the doctrine of discovery, review David H. Getches, Charles F. Wilkinson & Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law* 41–71 (5th ed., West 2005); Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford U. Press 1990).

5. Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* 383 (W.W. Norton & Co. 2005) (asserting that the Indian voice will in some forms endure forever).

6. See Robert Laurence, *Learning to Live with the Plenary Power of Congress over the Indian Nations: An Essay in Reaction to Professor Williams’ Algebra*, 30 Ariz. L. Rev. 413 (1988) [hereinafter Laurence, *Plenary Power*]; Robert Laurence, *On Eurocentric Myopia, the Designated Hitter Rule and “The Actual State of Things,”* 30 Ariz. L. Rev. 459 (1988) [hereinafter Laurence, *Eurocentric Myopia*]; Robert A. Williams, Jr., *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence’s Learning to Live with the Plenary Power of Congress over the Indian Nations*, 30 Ariz. L. Rev. 439 (1988) [hereinafter Williams, *Learning*]; Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence*, 1986 Wis. L. Rev. 219 [hereinafter Williams, *Algebra*].

7. Professor John LaVelle used the Brad Pitt and Edward Norton movie, *Fight Club*, (Fox 1999) (motion picture), as a memorable way of capturing the intensity of the academic back-and-forth contained in the articles in note 6. John P. LaVelle, *Strengthening Tribal Sovereignty through Indian Participation in American Politics: A Reply to Professor Porter*, 10 Kan. J.L. & Pub. Policy 533, 534 (2000).

those negotiating the agreements. Fletcher divides his argument into the following sections:

1. Overview of the Problem of Local Control in Indian Country
2. Federal Indian Law and the Decline of Tribal Bargaining Power
3. "Checkerboard" Jurisdictions
4. The So-Called "Democratic Deficit"
5. The "Tyranny of the Favored Quarter" in Tribal-State Relations
6. Local Tribal Control Favored by Congress and the Executive
7. The Utility of Intergovernmental Negotiation and Agreement
8. Political Barriers to the Intergovernmental Negotiation and Agreement
9. Conclusion

The article begins by describing the "broad array of services and issues" handled by tribal governments⁸ and then, in dramatic fashion, introduces cooperative agreements: "[i]n the midst of the ruins of federal Indian law have arisen intergovernmental negotiation and agreements."⁹

According to Fletcher, cooperative agreements have transformative powers. State, local, and tribal government negotiation often leads to "unique and far-sighted solutions" to shared problems.¹⁰ Moreover, the process of negotiating cooperative agreements leads to continually improving agreements, thus "head[ing] off jurisdictional and political disputes."¹¹ The process and the executives involved *ensure* the best outcome: "[o]ne successful agreement leads to more successful agreements. State and local government and tribal executives have the best view of their own needs in these numerous and disparate areas and can reach the best solutions, far better than the judiciary or even the legislatures."¹² By "working with non-Indian governments," tribal authority can be preserved and expanded, governmental services can be efficiently provided, and non-Indians can be reassured that they will be subjected to laws of the sort they are comfortable with.¹³

The challenges tribes face as a consequence of the U.S. Supreme Court's ad hoc and largely antagonistic treatment of the powers of Indian tribes relative to the Court's preference for non-Indian governments form the substance of sections two through five. As Fletcher describes, the Court has created a "tyranny of the favored quarter," resulting in "states and local governments [having] greater bargaining power over their tribal government neighbors."¹⁴ Checkerboard areas help bring out tensions between tribes

8. Fletcher, *supra* n. 1, at 1.

9. *Id.* at 2.

10. *Id.*

11. *Id.* at 3.

12. *Id.*

13. Fletcher, *supra* n. 1, at 3.

14. *Id.* at 4.

and state or local governments, with regulatory and adjudicatory disputes arising between the governments and the Court intervening to limit tribal powers over nonmembers.¹⁵ Fletcher continues “the Supreme Court has elevated state and local governments and non-Indians over tribal governments,”¹⁶ both by favoring non-tribal governments when state or local governments “conflict or compete with tribal government authority”¹⁷ and by finding implicit divestiture of “numerous and fundamental sovereign powers of Indian tribes.”¹⁸ The Court’s decisions “generate increasing disputes amongst Indian tribes, nonmembers, and state and local governments,” creating inefficiencies in government service delivery and leading to even more “blunt” cutting across tribal powers by the federal judiciary.¹⁹

The pattern of judicial opinions presented in Fletcher’s sections two through five is not the subject of this article. Indeed, most authors in the Indian law community would generally agree his presentation of the Court’s treatment of Indian governmental powers.²⁰ The description of the support that the executive branch and the U.S. Congress have given tribal self-government and local tribal control over reservation affairs, found in section four, is similarly uncontroversial. What is worthy of closer scrutiny is the assertion that tribes can use intergovernmental agreements to “reduce *or eliminate altogether* the uncertainty” created by federal Indian law, exercise “*de facto*” sovereignty over checkerboard areas, and more efficiently provide government services.²¹

In an article spiked with strong statements advocating cooperative agreements, Fletcher highlights the difficulties facing cooperative agreements. For example, despite his belief that a negotiation ending in an agreement “includes all the elements necessary

15. *Id.* at 4–6.

16. *Id.* at 9.

17. *Id.*

18. Fletcher, *supra* n. 1, at 10.

19. *Id.* at 10–11.

20. See e.g. Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie*, 31 Ariz. St. L.J. 439, 442 (1999) (“[C]oncern for history and doctrinal consistency has recently been abandoned in favor of a series of historically superficial and intellectually deficient Supreme Court pronouncements that have both curbed tribal authority and advanced state authority over non-Indians on non-trust land within Indian country.” (footnote omitted)). The uncontroversial nature of Fletcher’s summary is at least partly captured by the long-standing nature of complaints, such as charges of ad hoc decision making in the Court’s treatment of tribal powers. See e.g. Curtis G. Berkey, *Recent Supreme Court Decisions Bring New Confusion to the Law of Indian Sovereignty*, in *Rethinking Indian Law* 77, 79 (Nat’l. Laws. Guild ed., Advocate Press 1982) (“It is apparent that the Court has not carefully constructed a theory of Indian sovereignty nor does it cite rules and principles as controlling precedents The Court’s language regarding Indian sovereignty is perhaps more correctly regarded as mere explanations or justifications of the result, rather than hard and fast rules which the Court feels bound to follow.”).

21. Fletcher, *supra* n. 1, at 14 (emphasis added). In some respects, Fletcher’s argument echoes the implication of a 1996 article that, while predominantly an overview of increasing judicial disfavor of inherent tribal sovereignty, ends by suggesting that tribes seek out cooperative agreements with states. See L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 Colum. L. Rev. 809, 901–02 (1996). Professor L. Scott Gould says that his article does not “propose a panacea” to the limitations on tribal inherent powers; however, by ending the paper with cooperative agreements, there is some implication that these agreements can have a transformative role. *Id.* at 901. Uncertainty regarding judicial outcome can motivate states, as well as tribes, to negotiate cooperative agreements rather than risk adverse, costly judgments. *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 Harv. L. Rev. 922, 933 (1999); Joel H. Mack & Gwyn Goodson Timms, *Cooperative Agreements: Government-to-Government Relations to Foster Reservation Business Development*, 20 Pepp. L. Rev. 1295, 1305–06 (1993).

to meet and resolve the Court's concerns," he acknowledges that "[t]he Court has not yet passed on whether a state or local government can agree to bind its non-Indian constituents to tribal . . . jurisdiction."²² Likewise, he acknowledges the limited success in negotiating and solving ongoing disputes between tribes and neighboring non-Indian governments.²³ As he aptly states, "[t]he long history of animosity and distrust between Indians and non-Indians continues to bar the door toward cooperation."²⁴ Yet, he sweeps these difficulties aside with ease, observing that they are mere "political barriers."²⁵ Fletcher concludes the paper by arguing that, in these times of governmental devolution, tribes ought to seek out intergovernmental agreements because tribes, states, and local governments have much to gain from such agreements.

To Fletcher's credit, his advocacy in *Reviving Local Tribal Control in Indian Country* is not only unflinchingly unapologetic about eagerly accepting negotiated sovereignty as appropriate for tribes,²⁶ but is also consistent with his support of Indian attorneys. Given the leading role Indian lawyers play in negotiating cooperative agreements, how Indian lawyers are seen goes hand-in-hand with how cooperative agreements are seen. He argues "Indian lawyers remain amongst the most progressive, cutting edge lawyers to this day"²⁷ because

Indian lawyers are quick to recognize cultural and political strengths and limitations; they are quick to recognize political and sociological advantages and disadvantages to big picture tribal decisions. Professors Porter and Vicente decry the "concessions" made by these Indian lawyers, but the days of making pie-in-the-sky arguments in federal court—and winning—are behind us.²⁸

What is interesting in Fletcher's description is the lack of qualifiers: Indian lawyers as a class are insightful and bright, and they do a good job making hard decisions that reflect reality rather than the falsely idealized world of academics. The remaining question is whether tribal lawyers, aware as they are of the background limitations on arguments that the judiciary will accept regarding tribal power, should see cooperative agreements as he seems to—as a panacea to the Court's treatment of exercises of tribal power. Put differently, should the approach tribal lawyers take to cooperative agreements include heightened respect to pie-in-the-sky arguments and demonstrate greater concern for the possibility that cooperative agreements might too lightly concede elements of tribal sovereignty?

22. Fletcher, *supra* n. 1, at 15.

23. *Id.* at 16.

24. *Id.* (footnote omitted). In particular, Fletcher describes the relationship problems that come from state and local governments believing that they must compete with tribes for economic development. *Id.* at 16–17.

25. *Id.* at 17.

26. *Negotiated Sovereignty* is the title of a recent book on tribal-state relations. Jeffrey S. Ashley & Secody J. Hubbard, *Negotiated Sovereignty: Working to Improve Tribal-State Relations* (Praeger 2004). The motivation for this reply is not Fletcher's attention to the negotiated aspects of tribal sovereignty; rather, I am concerned that his eagerness to applaud intergovernmental agreements leaves the reader with an unbalanced understanding of such agreements.

27. Matthew L.M. Fletcher, Dibakonigowin: *Indian Lawyer as Abductee*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=820365, at 21 (2006).

28. *Id.*

III. RELATIONSHIP BETWEEN COOPERATIVE AGREEMENTS AND ASOT

The conflict between policies that emphasize realism regarding the relationship between tribes and non-Indian governments and approaches that prioritize ideal forms of this relationship necessarily informs the consideration of whether cooperative agreements should be as stridently advocated as they are by Fletcher. Ultimately, my critique of Fletcher's position might boil down to a different take on how much we agree with Williams' idealism compared with Laurence's willingness to accept greater limitations on tribal sovereignty. While, as I will argue in Part IV, there is more to my reaction than simply my having been taught Indian law by Williams—I seem to find non-Indian governments much less trustworthy—it does seem that Fletcher has an implicitly different perspective on the role that ASOT ought to play in the thinking of Indian policy makers who are considering cooperative agreements.

Laurence has argued that acceptance of Congress' plenary power over Indians coupled with "work to control the exercise of [this power]" helps create a healthier and more stable Indian law.²⁹ Although Laurence observed later that saying he could "live with" plenary power was not the same as actually defending it,³⁰ his article established that he would be understood as defending a perspective on tribal power that allowed for—even *accepted*—the notion that tribal power could rightly be circumscribed as it is through the plenary power doctrine.³¹ The concluding analysis used by Laurence in reaction to Williams' argument,³² which favors a more expansive notion of tribal sovereignty, relies upon ASOT to urge the acceptance of ideas premised on the notion that tribal powers should be viewed through the eyes of a realist.³³

Laurence insists that in Indian law: "[w]e are talking here about 'the actual state of things.'"³⁴ Though he agrees with Williams that "[t]he more modern view is the correct one: war and strength ought not determine legal rights," he stresses that he agrees with Chief Justice Marshall that Indian law must proceed from ASOT.³⁵ Laurence explains that the relationship model advocated by Williams—in which neither Indians nor non-Indians try to "steer the other's vessel"—is a model "that, were we to start from the beginning, would be worthy of pursuit."³⁶ However, he then asserts that, given ASOT, this model is not workable.³⁷ Congressional plenary power is acceptable to Laurence because he feels that the legal system will recognize tribal sovereignty together with plenary power or will "not recognize tribal sovereignty at all."³⁸ This feeling takes

29. Laurence, *Plenary Power*, *supra* n. 6, at 426.

30. Robert Laurence, *Indian-Law Scholarship and Tribal Survival: A Short Essay, Prompted by a Long Footnote*, 27 *Am. Indian L. Rev.* 503, 503 (2002–2003).

31. Laurence, *Plenary Power*, *supra* n. 6. As Laurence observes, he "received no particular outpouring of friendly scholarly support" for this position. Laurence, *supra* n. 30, at 504.

32. Williams, *Algebra*, *supra* n. 6.

33. Laurence, *Plenary Power*, *supra* n. 6, at 435–37.

34. *Id.* at 435 (emphasis in original).

35. *Id.* at 436.

36. *Id.* at 436–37 (using colorful imagery of "aircraft carriers and super-tankers" swamping an Indian canoe to reject Williams' treaty model of the two row wampum in which the Indian canoe and a separate ship for white people travel the same river without interfering with each other).

37. *Id.*

38. Laurence, *Plenary Power*, *supra* n. 6, at 437. Laurence's take-the-good-with-the-bad mentality reflects

ASOT as a starting point, not only for how the past is considered but also for the present powers associated with sovereign tribes.³⁹

The similarity between the thinking of Laurence and Chief Justice Marshall is apparent in *Worcester v. Georgia*,⁴⁰ the decision Laurence highlights at the beginning of his section on ASOT.⁴¹ Though Marshall's opinion obscures the point, the *Worcester* Court made the choice not only to describe the conquest of Indian tribes but also to circumscribe the powers of tribes. Another option was available to Marshall: the past could have been noted and simultaneously a prescriptive judgment entered that affirmatively discontinued the wrongs of the past.⁴² Instead, Marshall accepted ASOT as the proper starting point for understanding Indian rights and by so doing *arguably* helped legitimize the takings of Indian land that characterized the next one hundred years, from the remainder of the treaty period to the end of allotment. In form at least, Laurence's argument mirrors Marshall's: ASOT is the starting point for an understanding of Indian law that justifies limiting tribal sovereignty. Even the *ex ante* hope is the same,⁴³ a hope that miraculously the future will not reflect the past.⁴⁴

Williams' reactionary attack on the idea that ASOT properly constrains tribal sovereignty (by the acceptance of congressional plenary power) is harshly delivered; one can almost imagine Laurence grunting in pain with the escalation of the intensity of the pairing between these members of the fight club.⁴⁵ Williams writes "Professor Laurence is one of those 'things as they are' people I guess. I'm a foolish idealist. I'm a 'things as they've never been' person."⁴⁶ Ouch! Williams punches again and again:

I can only take comfort from the fact that *Uncle Tom's Cabin* was written despite the "actual state of things" (the ASOT), Rosa Parks rode where she damn well wanted to ride despite the ASOT, Cesar Chavez passed around union cards despite the ASOT, Sitting Bull fought the Seventh Cavalry despite the ASOT, the Passamaquodies demanded Maine back despite the ASOT, Cromwell and the Puritans plotted to overthrow a King's divine right and then chopped off his head despite the ASOT, and a bunch of radical exiles from the Norman Yoke got together in Philadelphia in 1776 and declared their independence from an Old World despot despite the ASOT. *They all refused to learn to live with the "actual state of things;" so too, Indian tribal people must refuse to learn to live with the Eurocentric myopia of a vision which cannot see beyond the actual state of things in*

his ability to "support a doctrine whose roots [he] disrespect[s]." *Id.* at 422.

39. See Williams, *Learning*, *supra* n. 6, at 444 (describing Laurence's perspective as being to "build . . . upon the mistakes of the past as we leap forward, full of faith").

40. 31 U.S. 515 (1832).

41. Laurence, *Plenary Power*, *supra* n. 6, at 435.

42. Such, for example, is the form of *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954), which described the wrongs of segregated education and ordered desegregation.

43. See Williams, *Learning*, *supra* n. 6, at 444 (describing Laurence's hope as one which "springs eternal" for a future, improved version of the plenary power).

44. Laurence does not, of course, see this as being miraculous, for though he acknowledges that he is "not much more than four generations beyond John Marshall's Cherokee decisions," he finds "optimism in the history of the Indian Civil Rights Act." Laurence, *Plenary Power*, *supra* n. 6, at 422, 426.

45. In the final return jab of the Williams-Laurence debate, Laurence acknowledges as much: Williams' closing argument made him "squirm" and he was "not entirely comfortable" with the possibility that he might be happy with the status quo. Laurence, *Eurocentric Myopia*, *supra* n. 6, at 460.

46. Williams, *Learning*, *supra* n. 6, at 457.

*Federal Indian law.*⁴⁷

Double ouch! When you consider Williams' earlier observation that both Mahatma Gandhi and Martin Luther King, Jr. did not bow down to ASOT,⁴⁸ it is clear that, after this reaction, a little animosity might develop between Williams and Laurence.⁴⁹ Underlying Williams' idealism is the belief that tribes do not necessarily have to concede elements of their sovereignty simply because of long-standing legal principles or ASOT in the relationship between Indians and non-Indians. Or perhaps more accurately, he believes that tribes should work against an ASOT that urges acceptance of diminished self-determination.⁵⁰

The Williams-Laurence exchange is an Indian law version of the classic conflict between pragmatism and realism on the one hand and revolutionary idealism on the other. As such, it provides an excellent window into considerations of tribal cooperative agreements. While Fletcher does not explicitly pick a side in either *Reviving Local Tribal Control* or *Dibakonigowin*, he ultimately seems to come down on the side of giving pragmatic advice to tribal governments. In advocating cooperative agreements, Fletcher's only explicit mention of ASOT is used purely descriptively to describe what the Court does when considering Indian law cases.⁵¹ By rejecting "pie-in-the-sky arguments," he seems to reveal his own impatience with Williams-esque idealism.⁵² Fletcher's rejection of such arguments echoes the lengthy block quote from Sam Deloria included at the start of *Dibakonigowin*; the quote criticizes "Indian academics who basically yearn for a time which never existed, when Indian sovereignty was like Superman in a universe without kryptonite."⁵³ Fletcher includes this quote without much commentary. However, the final section of the block quote reads as a barely disguised implicit attack, just as pointed as the Williams-Laurence debate, on academics who share some of Williams' views: "we have scholars that want to look over the state of the law and come back and say, 'Hey, we've got unlimited sovereignty, it's just that we've got a screwed up country that won't recognize it.' Well, that's helpful."⁵⁴ Read side by side—one a defense of the role of Indian lawyers, the other an advocacy piece for cooperative agreements—Fletcher's articles urge lawyering on the behalf of tribes within the legal space defined by the ASOT.⁵⁵

47. *Id.* (footnote omitted) (emphasis added).

48. *Id.* at 456–57.

49. Given the heated nature of the exchange, such animosity might even slip over to uninvolved professors who self-identify as being more in agreement with one or the other fight club member.

50. Williams, *Learning*, *supra* n. 6, at 457.

51. Fletcher, *supra* n. 1, at 8.

52. Fletcher, *supra* n. 27, at 21.

53. *Id.* at 3 (quoting Sam Deloria, *Commentary on Nation-Building: The Future of Indian Nations*, 34 *Ariz. St. L.J.* 55, 55 (2002)).

54. *Id.* at 4 (quoting Sam Deloria, *Commentary on Nation-Building: The Future of Indian Nations*, 34 *Ariz. St. L.J.* 55, 56 (2002)). While Williams is not explicitly identified, he is one of the leading intellectuals implicated by Sam Deloria's criticism.

55. This claim is perhaps too incendiary. As Professor Kevin Washburn writes, "[a]cross the wide range of academic commentary on American Indian policy, it is difficult to find any scholar who is fully satisfied with the 'actual state of things' in Indian country today." Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 *Conn. L. Rev.* 777, 782 (2006) (footnote omitted). It is probably more accurate to say that Fletcher seems pragmatically able to accept ASOT.

Cooperative agreements are attractive for Indian law advocates who favor a realistic approach—one acknowledging ASOT—to tribal sovereignty because, as Fletcher highlights, offering a way around a harsh judiciary arguably enables tribal action.⁵⁶ According to Laurence, “[a] jurisprudence that recognizes the ‘actual state of things’ is one less likely to be confined to theoretical obscurity and, I think, more likely to get things done.”⁵⁷ The role of ASOT in cooperative agreements is perhaps best captured by the quote that opens *Negotiated Sovereignty*: “A new policy and institutional framework for state-tribal relations must be developed that is cognizant of previous policy and legal rulings as well as the current reality of Indian self-determination.”⁵⁸ According to this statement, ASOT is a requisite for state-tribal relations that must take into account both prior legal precedent and the current reality.

For the moment, let us consider how cooperative agreements can, given ASOT, provide tribes with an expanded ability to accomplish their goals. Cooperative agreements can (1) help tribes avoid jurisdictional contests with non-Indian governments; (2) provide additional funding for tribal government services and government agencies; and (3) help resolve recurring problems that cross tribal-state boundaries. Jurisdictional disputes limit the effectiveness of criminal and civil regulation. In the best of cases, such disputes make policing and regulation more difficult and costly, while, in the worst, they completely prevent such oversight. Cooperative agreements, on everything from the mundane (e.g., building codes) to the fundamental (e.g., police protection), can limit the problems caused by jurisdictional disputes.⁵⁹ For tribes with limited budgets, cooperative agreements can also bring needed money to deal with the problem being addressed by the agreement and, through provision for overhead expenses, to expand the size of the tribal government. Finally, many challenges faced by tribes—air pollution is a classic example—have by their very nature a cross-border aspect that accordingly warrants a cooperative agreement.⁶⁰ Tribes and non-Indian governments face such cross-border challenges in much the same way that pollution in Arizona can affect Mexico and vice versa. Notice that these potential benefits exist *now*, and, while this article is in response to Fletcher and therefore I am emphasizing the concerns I have with such agreements, I share with Fletcher an

56. Review *supra* notes 14 to 26 and accompanying text. See e.g. Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 Or. L. Rev. 1109, 1172 (2004) (“Unlike states, tribes cannot market tax exemptions in order to lure customers into their jurisdictions. The tax rate in Indian country for non-Indians will therefore always be set at a floor of the state tax rate. On the other hand, the Navajo Nation has approached state governments in order to address the problem of multiple taxation on a government-to-government level. Through tribal and state legislation as well as intergovernmental agreements, the Navajo Nation has been able to mitigate some of the harsher effects of the Supreme Court’s multiple taxation cases.” (footnote omitted)).

57. Laurence, *Eurocentric Myopia*, *supra* n. 6, at 462.

58. Ashley & Hubbard, *supra* n. 26, at 3 (quoting Council of State Governments).

59. See e.g. Ezra Rosser, *Rural Housing and Code Enforcement: Navigating between Values and Housing Types*, 13 Geo. J. Pov. L. & Policy 33 (2006).

60. See Ashley & Hubbard, *supra* n. 26, at 9 (“As public goods, resources such as air and water are shared by all in a geographical area and know no jurisdictional boundaries. Thus, the problem of nonappropriability and a sense of responsibility from one government to another in providing for clean air and water dictate cooperation among governmental jurisdictions.”); Richard A. Du Bey, Mervyn T. Tano & Grant D. Parker, *Protection of the Reservation Environment: Hazardous Waste Management on Indian Lands*, 18 *Envtl. L.* 449, 477–78 (1988) (discussing tribal-state spillover pollution).

awareness *and appreciation* for these benefits.⁶¹

These are all valid reasons to support cooperative agreements; however, Williams' "foolish idealis[m]" cautions against chaining tribal policy to a mechanism whose very power comes from the limitations that ASOT places on other, more independent exercises of tribal sovereignty.⁶² Cooperative agreements implicitly recognize the interests non-Indian governments have in what happens on the reservation. In addition, recognizing these interests in the negotiation process arguably legitimizes them.⁶³ Similarly, while tribes might be able to expand their government through federal grants associated with cooperative agreements, the size and power of tribal governments thus become dependent on the continued willingness of non-Indian governments to negotiate favorably and the existence of such grant streams, raising questions about the appropriateness of advocating such agreements.⁶⁴ Finally, even where cross-border problems might otherwise provide valid motivation for cooperative agreements, agreements negotiated by tribal leaders encouraged to think that idealism is impossible will be negotiated from a wrongly weak position. As a consequence, the resulting agreement is likely to invite undue non-Indian involvement in the life of the reservation under the false assumption that nothing better was possible.

Care is needed to prevent imposing an exaggerated typology of the Williams-Laurence positions upon an analysis of cooperative agreements. An argument can be made that a weak form of Williams' analysis would not in fact be as resistant to cooperative agreements as it is presented in the preceding paragraph. The leaders identified by Williams who changed history by not accepting ASOT managed to do so primarily by resisting ASOT, but at times they doubtlessly did use those aspects of existing norms or laws that furthered their respective causes. To the degree that cooperative agreements represent a creative break with the history of racism and false primacy of European notions of what is right,⁶⁵ Williams is likely to support them.

61. For a more extensive description of the benefits of negotiated solutions, review *Intergovernmental Compacts*, *supra* n. 21, at 929–31.

62. Williams, *Learning*, *supra* n. 6, at 457; *but see* Krakoff, *supra* n. 56, at 1194 (arguing "to act as governments, tribes *must* also constantly negotiate their legal status with the federal government and, at times, state governments" (emphasis added)).

63. These features weigh against blanket statements such as "[c]ooperative agreements, by their very nature as intergovernmental agreements, enhance tribal sovereignty." Mack & Timms, *supra* n. 21, at 1306. Consistent with their unconditional support, the article is primarily a practitioner's guide to making cooperative agreements. *Id.* at 1310–38.

64. Insecurity in funding must be weighed against the non-financial advantageous elements of negotiated agreements: "[e]ven where cooperative agreements prove, on balance, beneficial to tribes, it may be difficult to sustain them if state funding falters, liability issues strain relations, or mutual fear or mistrust make them politically controversial." Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 Conn. L. Rev. 697, 728–29 (2006) (discussing law enforcement agreements). Because "[t]ribes often lack resources to implement a complex regulatory scheme," cooperative agreements whose end result is complexity funded by external grants risk overextending tribes should funding levels diminish. Mack & Timms, *supra* n. 21, at 1301 (noting that lack of resources can limit the ability of tribes to claim interests as legitimate). Similarly, although written in a discussion of the plenary power, Professor Sarah Krakoff's concern raised in the following question is even more applicable where a tribe arguably seeks out such a relationship through cooperative agreements: "[w]hat kind of sovereignty can it be that depends, for its continued existence, on the pleasure of a branch of government of another nation?" Krakoff, *supra* n. 56, at 1119.

65. *See* Williams, *Algebra*, *supra* n. 6, at 274 ("Tribal nations, by a neo-feudalistic grant of 'diminished status' within the dominant culture's political and legal hierarchy, are placed within a highly rationalized and

However, because cooperative agreements are negotiated in the context of a legal system that accepts the diminished sovereignty of tribes, they end up incorporating the weakened position of tribes into the final agreement.⁶⁶ As such, rejecting “pie-in-the-sky” arguments and advocating cooperative agreements do not seem to accord with the strong form of Williams’ approach, which is not so conciliatory toward the overarching legal framework applied to tribes.

Similarly, even if one accepts ASOT as a starting point for Indian tribal leaders, cooperative agreements are perhaps not worthy of the uncritical support Fletcher seems to give them. An ASOT jurisprudence, Laurence argues, can be used “to *promote* change, not to oppose it.”⁶⁷ While so far the focus has been on the close relationship that potentially exists between accepting the role of ASOT and advocating cooperative agreements, Laurence’s statement, by itself, does not argue for or against advocating cooperative agreements. If one believes that there is still a lot of work to be done before “Indian tribes [are] accepted by our nation as something a good deal more than private voluntary organizations,”⁶⁸ then a position discouraging exaggerated reliance on cooperative agreements as a panacea for challenges faced by tribes can be consistent with an acceptance of the role of ASOT. As Laurence observes, “[n]one of this is to suggest that all of us ‘actual state of things’ thinkers will agree on what that ‘state’ is.”⁶⁹ Thus, while Fletcher’s pragmatic vision might argue for cooperative agreements, another ASOT thinker can just as appropriately think that now is a time to hold off on many cooperative agreements and instead believe that tribes should concentrate their energies on other, perhaps more independent governance policies. As was true when considering Williams’ perspective, here too a strong version of Laurence’s defense of ASOT does seem to lean towards one view of cooperative agreements: in the case of Laurence and Fletcher, who favor a realistic and pragmatic approach that incorporates ASOT, cooperative agreements seem worthy of general support.

IV. DANGERS TRIBES FACE WHEN NEGOTIATING WITH NON-TRIBAL GOVERNMENTS

Despite the many benefits to tribes that *can* accompany cooperative agreements, the effects of such agreements on tribal sovereignty suggest that a more conditional approach to cooperative agreements is appropriate. Unconditional approval of tribal

legitimizing framework that concedes limited recognition to the Indian’s self-defining vision. That vision is recognized, however, only as long as the tribes’ desires are consistent with the interests, expressed or implied, of the European-derived vision of the superior sovereign.”)

66. Williams argues that, in order to navigate the game of federal Indian law, tribes are forced to limit the difference between their form of governance and the non-Indian norms:

The winning strategy of this game, therefore, dictates erasing those aspects of difference which might deny an identity with the interests of the absolute sovereign. To win this game defined by European-derived legal discourse, the Indian must make himself a supplement to this discourse’s own lack of fullness, and fulfill its desire for plenitude and transcendence by denying the full presence of his own vision.

Id. at 286 (footnote omitted). Cooperative agreements arguably represent the most developed form of this self-denial, with tribal governments deliberately negotiating the form of their sovereignty with non-Indian governments.

67. Laurence, *Eurocentric Myopia*, *supra* n. 6, at 462 (emphasis in original).

68. *Id.*

69. *Id.*

cooperative agreements must confront the effect cooperative agreements can have on internal tribal priorities and on the involvement of tribal members in fundamental decisions of the tribe, as well as the history of the Indian experience with non-Indian governments. It bears repeating that the purpose of this section is *not* to disparage all cooperative agreements but to cast doubt on Fletcher's claim that cooperative agreements might "eliminate altogether" uncertainty in federal Indian law.⁷⁰

A. *Internal*

Tribal governments with a policy of embracing the benefits of cooperative agreements risk having their tribal priorities determined by non-Indian governments and perhaps elevating decision making of tribal technocrats (including attorneys) above the tribal political process. As Professor Frank Pommersheim correctly notes, for indigenous groups "[n]either [assimilation nor isolation]—in their purist form—is tenable in a modern, interdependent world."⁷¹ While Fletcher undoubtedly agrees with Pommersheim, I am afraid that there will not be sufficient recognition of the possible corruptive effects of these agreements upon tribal governance if tribal leaders accept his overly optimistic stance on cooperative agreements.

In negotiating cooperative agreements, tribes often compromise their sovereign ability to determine tribal priorities. A distinction must be drawn between tribes choosing to assume control of government services that had been provided by the Bureau of Indian Affairs or other government agencies and negotiated cooperative agreements because, when true negotiation is required, tribes do not have a right to non-Indian agreement. In *many* circumstances, the compromises of cooperative agreements may be necessary: Professor Kevin Washburn argues that, in general, though "[m]ilitant and inflexible assertions of tribal sovereignty may be emotionally satisfying . . . a flexible and more practical approach may *sometimes* be useful."⁷²

In some respects, Washburn's advice to tribes mirrors Fletcher's. According to Washburn, tribes should "identify and climb aboard the public policy initiatives today . . . that can also benefit Indian tribes."⁷³ In addition to applying for general applicability grants, hopping aboard Washburn's train will, in practice, often mean negotiating cooperative agreements. Before we conclude that these two professors are giving tribes the same advice, it is important to note that Washburn is careful to highlight the role of tribes in *identifying* beneficial policies and to describe a practical approach as *sometimes* being useful. This difference in the advice given to tribal leaders is important because it preserves the possibility of independent tribal prioritization of policies. If Fletcher's support of cooperative agreements is actually conditional and his paper simply did not contain all of his qualifiers, I agree with it. If that is the case, then this article is not so much a reply as an effort—necessary I believe—to highlight the importance of those qualifiers. I agree that cooperative agreements *can sometimes* be a good strategy

70. Fletcher, *supra* n. 1, at 14. Review *supra* notes 10 to 23 and accompanying text.

71. Pommersheim, *supra* n. 20, at 448–49.

72. Washburn, *supra* n. 55, at 791 (emphasis added).

73. *Id.* at 793.

for tribes to pursue. The practices and experiences of the Navajo Nation with regard to cooperative agreements highlight the problematic elements of these agreements as they affect internal tribal governance.

The Navajo Nation has successfully signed numerous memorandums of understanding on water quality with Arizona, but has been unable to get past jurisdictional disputes with New Mexico and hence has not been able to negotiate similar agreements with New Mexico.⁷⁴ As a result, these agreements cover only part of the Navajo Nation despite the fact that “[u]nlike many of the smaller tribes, the Navajo Nation is a formidable force.”⁷⁵ There are promising signs that the tribal cooperative agreements do reflect tribal priorities and actual cooperation; for example, Professor Jeffrey Ashley and Secody Hubbard report the Navajo Nation “is much more willing to enter into a mutual agreement when they are convinced that it will, in fact, be mutual.”⁷⁶ Thus, “[w]hile many Navajo officials likely believe that the best long-term solutions are clear territorial boundaries and increased funding and autonomy for the Nation to provide its own services, that day is not at hand,”⁷⁷ and tribal officials are pursuing some cooperative strategies in the meantime.

But that is not the end of the story. Navajo tribal members and even attorneys trying to find out what cooperative agreements the tribe has made will have a hard time compiling a list—such a task is hard even for tribal attorneys. Despite the fact that many of the tribe’s cooperative agreements permit non-Indian governments to determine the nature of Navajo government services—for example, deciding the degree to which environmental hazards need to be cleaned up or helping to establish standards applied to the emissions of on-reservation businesses—there is no central database of such agreements. By not having information on such agreements readily available to the public, the Navajo Nation limits the degree to which individual tribal members have a voice in agreeing to or rejecting negotiated agreements. The success the Navajo Nation has had negotiating with Arizona through technocrats⁷⁸ similarly reflects a diminished voice of tribal members, including the expression of that voice through elected representatives. The technocratic strategy of negotiation leads to more finalized agreements: “cooperation (thus coming to terms on the fundamentals of an agreement) is much greater at the lower, technical levels, and . . . discussions tend to disintegrate when they become politicized.”⁷⁹

The mere fact that Indian and non-Indian governments reach agreement should not cloud judgment regarding whether the finalized agreement was a success from a process or practical standpoint. The elevation of technocratic negotiation downplays the relationship between single agreements and the larger questions implicated by such agreements.⁸⁰ This is especially true in the aggregate: seemingly singular agreements

74. Ashley & Hubbard, *supra* n. 26, at 61.

75. *Id.* at 64.

76. *Id.* at 66.

77. Krakoff, *supra* n. 56, at 1147 (footnote omitted).

78. Ashley & Hubbard, *supra* n. 26, at 66.

79. *Id.* at 124.

80. *Id.* (recommending that, “[w]hen possible, negotiations should focus on a single, narrow topic”).

can together span the range of tribal government services. While involvement of politicians may make reaching agreement more of a challenge, perhaps a cautionary and more politicized approach that focuses more on jurisdiction is appropriate when the aggregate effect of such agreements upon tribal governance is significant. Finally, the outcome of cooperative agreements may say much more about non-Indian priorities than tribal interests. Who, for example, is in the driving seat on cooperative tax agreements where the rate agreed upon brings the rate to exactly the off-reservation rate?⁸¹ Along both policy prioritization and political process grounds, there are reasons to resist an exaggerated understanding of the power and promise of cooperative agreements.

B. History

Indian people have no reason to trust non-Indian governments. While it is important to be very careful in making historical claims regarding non-Indian treatment of Indian people,⁸² it is not an exaggeration to describe this treatment as genocide. Professor Rennard Strickland writes:

I want us to address the reality of the American Continents as a sacred site of both the survival and the decimation of a people and their culture. We must face the fact that this hemisphere is the tragic "killing fields" resulting in aboriginal genocide and culturecide. This is the thing not spoken, not acknowledged, not even hinted at in the larger American myth.

The facts are clear and incontrovertible. The introduction to the three-volume history *Violence in America* dramatically describes the magnitude of this human disaster: the near annihilation of the Western hemisphere's Native people during the four centuries following Christopher Columbus' voyages, constitutes the most massive eradication in the history of the world.

The staggering figure of lost lives is projected by major scholars as at least one hundred million people. The current demographic analysis suggests that "as researchers calculate the cause of depopulation, the conclusion that will inevitably be reached is that between 97

81. See Krakoff, *supra* n. 56, at 1173. Krakoff concludes that "regarding dual taxation, the Navajo Nation has reached out to the surrounding states and negotiated with them as a sovereign to achieve a mutually beneficial economic solution." *Id.* at 1199. Yet, as she explained earlier in the same article, "[t]he Navajo Nation's response can only go so far, however. The Court's concurrent taxation cases have virtually eliminated the possibility that tribes could use competitive tax policies to attract non-Indian businesses onto the reservation." *Id.* at 1174 (footnote omitted).

82. The investigation of Professor Ward Churchill, author of *A Little Matter of Genocide: Holocaust and Denial in the Americas 1492 to the Present* (City Lights Bks. 1997), reveals the importance of making sure all claims are properly documented and not exaggerated. See Report of the Investigative Committee of the Standing Committee on Research Misconduct at the University of Colorado at Boulder Concerning Allegations of Academic Misconduct against Professor Ward Churchill, <http://www.colorado.edu/news/reports/churchill/download/WardChurchillReport.pdf> (May 9, 2006); see also John P. LaVelle, *The General Allotment Act "Eligibility" Hoax: Distortions of Law, Policy, and History in Derogation of Indian Tribes*, 14 *Wicazo Sa. Rev.* 251 (1999) (available at <http://lawschool.unm.edu/faculty/lavelle/allotment-act.pdf> (accessed Sept. 15, 2006)); John LaVelle, *Review Essay: Indians Are Us?* 20 *Am. Indian Q.* 109 (1996) (available at <http://lawschool.unm.edu/faculty/lavelle/american-indian-quarterly.pdf> (accessed Sept. 15, 2006)). The Churchill investigation and probable dismissal from a tenured position arguably underscore just how important history is in Indian law: "any attempt to understand federal Indian law must be grounded in a full appreciation of the history of federal Indian policy." Robert N. Clinton, Carole E. Goldberg & Rebecca Tsosie, *American Indian Law: Native Nations and the Federal System* 19 (4th ed., Lexis 2003).

and 98 percent of North and South America's 1492 population was wiped out by post-Columbian holocaust." This means that only two to three percent of the aboriginal population of the Americas survived.⁸³

Similarly, Fletcher states "[t]he genocide perpetrated on Indian people is unprecedented in world history in terms of its continuity."⁸⁴ The relationship between non-Indians and Indians is also defined by at times voluntary, but often forced, land transfers from Indians to non-Indians.⁸⁵

The present role of this ignoble history (albeit a history still being written⁸⁶) in the relationship between Indians and non-Indians cannot be overstated. While it took *Dances with Wolves*⁸⁷ to remind a new generation of Americans of Indian suffering, "[e]very Indian and Indian tribe knows the story of their decimation."⁸⁸ Ashley and Hubbard observe in their book on intergovernmental negotiations that "[o]vercoming this history is not easy!"⁸⁹ And I believe it should not be easy to overcome. Even if the self-determination era is an era in which U.S. policy warrants Indian trust in non-Indian governments—itsself a highly debatable proposition—this period reflects a mere blip on the centuries of mistreatment of Indians at the hands of non-Indian governments. To borrow from Justice William Johnson's concurrence in *Cherokee Nation v. Georgia*,⁹⁰ whether the heightened respect for Indian governments—begun with President Nixon's 1970 Special Message to Congress⁹¹ and continued through successive legislation⁹² and executive orders,⁹³—"can be yet said to have received the consistency which entitles"

83. Rennard Strickland, *Things Not Spoken: The Burial of Native American History, Law and Culture*, 13 St. Thomas L. Rev. 11, 11–12 (2000) (footnotes omitted).

84. Matthew L.M. Fletcher, Sawnowgezewog: "The Indian Problem" and the Lost Art of Survival, 28 Am. Indian L. Rev. 35, 39 (2003–2004) (footnote omitted).

85. The nature of the conquest of Indian land, premised on a claimed European right to land occupied by Indians, is described by Chief Justice John Marshall in *Worcester*, 31 U.S. at 580 (acknowledging "conquest" as the root of U.S. rights over Indian tribes), and in *Cherokee Nation v. Ga.*, 30 U.S. 1, 17 (1831) (defending the doctrine of discovery being incorporated into the U.S. legal structure). Conquest occurred not only through military operations but also through legal structures that transferred land out of tribal hands. See e.g. *Cohen's Handbook of Federal Indian Law* 6 (2005 ed., LexisNexis) (describing the "legal" character of the significant loss of land experienced by Indian tribes); Judith V. Royster, *The Legacy of Allotment*, 27 Ariz. St. L.J. 1, 13–14 (1995) (describing the land loss that resulted from the allotment policy of opening up, after Indians were granted individual allotments, the "surplus lands" to non-Indians).

86. The U.S. Supreme Court's recent decision to deny an Indian tribe the power to reform their reservation through private market purchases within the land area originally reserved, based on a theory of laches, forms the most recent legal mechanism by which the Indian land base has been reduced. *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 202–03 (2005). For reactions to the case, review Amy Borgman, Student Author, *Stamping Out the Embers of Tribal Sovereignty: City of Sherrill v. Oneida Indian Nation and Its Aftermath*, 10 Great Plains Nat. Resources J. 59 (2006); Joseph William Singer, *Nine-Tenths of the Law: Title, Possession and Sacred Obligations*, 38 Conn. L. Rev. 605 (2006).

87. (MGM 1990) (Motion Picture).

88. Strickland, *supra* n. 83, at 13.

89. Ashley & Hubbard, *supra* n. 26, at 121.

90. 30 U.S. 1.

91. Richard Nixon, *Special Message on Indian Affairs*, 1970 Pub. Papers 564–67, 576 (key sections available at <http://www.epa.gov/indian/pdfs/nixon70.pdf> (accessed Sept. 15, 2006)). For more on the self-determination era, review Clinton, Goldberg & Tsosie, *supra* n. 82, at 41–48 (discussing an era of self-determination from 1962 to 1980 and an era of "[g]overnment-to-[g]overnment [r]elations and [d]ecreases in [f]ederal Indian [p]rogram [f]unding" from 1980 to the present).

92. E.g. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975).

93. E.g. Consultation and Coordination with Indian Tribal Governments, Exec. Or. 13175, 65 Fed. Reg.

non-Indian governments to the trust and respect of Indians “is, I conceive, yet to be determined.”⁹⁴

Tribes can negotiate cooperative agreements even when they do not trust the non-Indian governments at the negotiating table; however, the blanket advocacy of such agreements rejects the idea that what Indians really need to negotiate from non-Indians is a “leave-us-alone agreement.”⁹⁵ As argued by the late Professor Vine Deloria, Jr. in his highly influential manifesto, the leave-us-alone agreement has as central components an awareness of the role that caution regarding non-Indians has played in maintaining a unique Indian identity in the face of tremendous non-Indian pressure, as well as an appropriate concern for the harmful effects of non-Indian involvement in Indian life.⁹⁶ As Deloria eloquently explains, the U.S. government, and, by proxy, state governments are not and should not be trusted by Indians:

In looking back at the centuries of broken treaties, it is clear that the United States never intended to keep any of its promises. Like other areas of life, the federal government adapted its policies to the expediency of the moment. . . .

Indian people have become extremely wary of promises made by the federal government. The past has shown them that even the most innocent-looking proposal is often fraught with implications the sum total of which is loss of land.⁹⁷

Much has changed since Deloria wrote these words. However, given the long history of contact—a history that is still being written to the detriment of Indian rights⁹⁸—with non-Indians, the wariness of Indian people continues to be justified.⁹⁹

What troubles me is not that Fletcher does not spend more time bringing out the nature of the history of animosity between Indians and non-Indians; rather, it is that the solution to this history that Fletcher proposes is almost a truism. The way out of the history of animosity Fletcher offers is simple: “[t]hese barriers are political barriers. Nothing stops Indian tribes and non-Indian governments from negotiation and entering

67249 (Nov. 9, 2000) (available at <http://web.em.doe.gov/ftplink/public/exord13175.pdf> (accessed Sept. 15, 2006)). American Indian Executive Orders from 1994 to the present are available at <http://web.em.doe.gov/public/tribal/orders.html> (accessed Sept. 23, 2006).

94. 30 U.S. at 21 (Johnson, J., concurring).

95. Vine Deloria, Jr., *Custer Died for Your Sins: An Indian Manifesto* 27 (repr., U. Okla. Press 1988).

96. Deloria pays particular attention to academics and religious missionaries. *Id.* at 78–124. For more on the role of tradition in maintaining tribal identity among the Navajo, review Ezra Rosser, *This Land Is My Land, This Land Is Your Land: Markets and Institutions for Economic Development on Native American Land*, 47 Ariz. L. Rev. 245, 298 (2005).

97. Deloria, *supra* n. 95, at 48–49.

98. For a recent land taking example, review UN Economic & Social Council, *Prevention of Discrimination and Protection of Indigenous Peoples and Minorities: Indigenous Peoples and Their Relationship to Land* 20–21 (Working Paper E/CN.4/Sub.2/2001/21, June 11, 2001) (detailing the continuing U.S. efforts to take Western Shoshone land and the criticism such efforts have received from international human rights organizations) (available at <http://daccessdds.un.org/doc/UNDOC/GEN/G01/141/79/PDF/G0114179.pdf?OpenElement>).

99. For example, one author argues that New York’s interest in cleaning up hazardous waste on the St. Regis Mohawk reservation “should be viewed with skepticism . . . [and] historical caution.” Peter D. Lepsch, *A Wolf in Sheep’s Clothing: Is New York State’s Move to Cleanup the Akwesasne Reservation an Endeavor to Assert Authority over Indian Tribes?* 8 Alb. L. Envtl. Outlook J. 65, 70 (2002). Lepsch justifies his skepticism by observing that “[t]here are few instances in American jurisprudence when state interests in protecting tribal peoples are wholly benevolent.” *Id.* (footnote omitted).

into agreements.”¹⁰⁰ Unfortunately, it seems to me that political barriers are significant barriers that, considering the history of relations with non-Indians, are difficult to overcome. If we imagine a world without political barriers to tribes, we could imagine our way out most of the challenges facing Indian people and their tribal governments.¹⁰¹

V. CONCLUSION

In navigating their relationships with non-Indian governments, tribal governments must make difficult choices that, in many circumstances, ought to include serious consideration of the costs and benefits of cooperative agreements with non-Indian governments. Both pragmatic necessities based on short-term challenges to tribal governance and visions of a future, richer sovereignty may “require tribes to strive for cooperative agreements with their traditional enemies.”¹⁰² But to get the most out of cooperative agreements, tribes should, to the degree to which they have a choice, focus on those agreement types that best accord with an ambitious understanding of tribal sovereignty. The types of agreement that both Laurence and Williams seem to accept as advantageous for tribes provide a good foundation for beginning to describe the ideal agreement type. With such agreement types—reflecting both a strong version of tribal independence and a simultaneous awareness of the pragmatic necessities tribes face—tribes might confidently pursue cooperative agreements with some hope for a good result despite all the reasons to approach negotiations with skepticism.

The exercise of merely describing a cooperative agreement negotiation experience and extrapolating the type of agreements to be sought is not particularly valuable. Not only would such an effort fail to capture the different needs of different tribes—recognizing these differences is something that, I argued elsewhere, needs to occur to a greater extent in Indian law scholarship¹⁰³—but it would also be hopelessly time-sensitive even for the tribe or tribes whose agreements were being celebrated. To illustrate, a Harvard Law Review Note identifies several “substantive areas . . . ripe to capture many of the benefits of [cooperative agreements] while avoiding its pitfalls.”¹⁰⁴ The Harvard Note holds up agreements regarding alcohol sale agreements, road maintenance, education, and environmental regulation as areas with the potential for beneficial tribal-state agreement.¹⁰⁵ Commentators have advocated adding many other

100. Fletcher, *supra* n. 1, at 17.

101. We could, for example, imagine Congress willing to use, one hundred percent of the time, its plenary power in support of, and not to the detriment of, tribes. Without political barriers, the executive branches might strive to live up to U.S. trust obligations, and, if they failed to do so, political pressure would be brought to bear to ensure that new executives would be found who did seek to create the sort of U.S.-tribal relationship reflective of the dreams of Indian law professors. For an example of one Indian law professor imagining Indian law in a world without political barriers to the realization of Indian goals, review Robert Laurence, *A Memorandum to the Class, in Which the Teacher Is Finally Pinned Down and Forced to Divulge His Thoughts on What Indian Law Should Be*, 46 Ark. L. Rev. 1 (1993).

102. Gould, *supra* n. 21, at 901.

103. Ezra Rosser, *Ambiguity and the Academic: The Dangerous Attraction of Pan-Indian Legal Analysis*, 119 Harv. L. Rev. Forum 141 (2006) (available at <http://www.harvardlawreview.org/forum/issues/119/dec05/rosser.pdf> (accessed Sept. 15, 2006)).

104. *Intergovernmental Compacts*, *supra* n. 21, at 935.

105. *Id.*

substantive areas to this list, including child support,¹⁰⁶ law enforcement and criminal jurisdiction,¹⁰⁷ management of traditional lands,¹⁰⁸ economic development,¹⁰⁹ and even landfill location.¹¹⁰ Despite the many areas where cooperative agreements *may* further tribal policies and be acceptable to even the most tribal-independence-oriented advocate or scholar, tribes should bear in mind this qualifier on cooperative agreements: “[t]he success of negotiated settlements nevertheless depends upon a realization that they are not suitable for all claims [or issues], and do not always ensure equality of bargaining power.”¹¹¹

106. Danelle J. Daugherty, Student Author, *Children Are Sacred: Looking beyond Best Interests of the Child to Establish Effective Tribal-State Cooperative Child Support Advocacy Agreements in South Dakota*, 47 S.D. L. Rev. 282, 307–14 (2002).

107. Emma Garrison, *Baffling Distinctions between Criminal and Regulatory: How Public Law 280 Allows Vague Notions of State Policy to Trump Tribal Sovereignty*, 8 J. Gender, Race & Just. 449, 474–78 (2004).

108. Rebecca Tsosie, *The Conflict between the “Public Trust” and the “Indian Trust” Doctrines: Federal Public Land Policy and Native Nations*, 39 Tulsa L. Rev. 271, 309–10 (2003) (discussing management of non-reservation parklands by a neighboring tribe).

109. Lorie Graham, *Securing Economic Sovereignty through Agreement*, 37 New Eng. L. Rev. 523, 537 (2003) (noting that cooperative agreements “can enhance a tribe’s ability to pursue a more cohesive economic strategy”); *see also* Crystal K. Glendon, Student Author, *A Political Solution for a Legacy under Attack: The Akaka Bill’s Potential Effect on the Kamehameha Schools*, 26 Hawaii L. Rev. 69, 95–96 (2003) (advocating a cooperative agreement to safeguard the revenues from the Kamehameha land trust for the benefit of Native Hawai’ians).

110. Jana L. Walker & Kevin Gover, *Commercial Solid and Hazardous Waste Disposal Projects on Indian Lands*, 10 Yale J. on Reg. 229, 250 (1993) (written by attorneys—Kevin Gover is now a law professor at Arizona State University—who at the time represented the Campo Band of Mission Indians, a tribe seeking to locate a solid waste disposal site on tribal land for waste from Southern California cities); *see also* Dan McGovern, *Excerpts from The Campo Indian Landfill War: The Fight for Gold in California’s Garbage*, 14 Stan. Envtl. L.J. 375, 395–98 (1995) (reporting on the support of the Campos and non-Indian officials for a negotiated agreement).

111. *Intergovernmental Compacts*, *supra* n. 21, at 939.