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## A Tale of Two Sovereigns: Danger and Opportunity in Tribal-State Court Relations

Tonya Kowalski

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# **A TALE OF TWO SOVEREIGNS: DANGER AND OPPORTUNITY IN TRIBAL-STATE COURT RELATIONS**

Tonya Kowalski\*

## ABSTRACT

As the many Native American nations garner economic strength and come into increasing contact with state and local forums, so do the chances that those forums will come face to face with questions of tribal law. The challenges posed by an Anglo-American court answering questions of tribal law present both danger and opportunity. Opportunities come with strengthened inter-sovereign relationships and with the acknowledgement of tribal legal potency by other forums. Dangers inhere in cross-cultural illiteracy and particularly in the temptation to ignore abstention principles and to attack tribal jurisdiction. It may be possible for tribal courts to gain some of the advantages and ameliorate some of the dangers by entering into a variety of cooperative arrangements with state courts. In an arrangement of true parity, these options may also provide avenues for tribal courts to obtain assistance in answering important questions of state law in tribal court cases.

The purpose of this article is to bring together the various options for tribal and state court cooperation for the analysis of tribal law questions. They may include cooperative organizations, abstention, certification, and even formal consultation agreements between particular courts, such as the recent, historic accord between the high courts of New York and New South Wales. The article further concludes that each option has costs and benefits, and that individual tribal nations must each undertake their own cost/benefit analyses to determine which action — or none at all — is the most likely to benefit tribal sovereignty and institutions based on their goals, history, relationships with state and local entities, and even relationships between individual leaders in the state and tribal justice systems.

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\* Associate Professor of Law, Washburn University School of Law; J.D., Duke University School of Law, 1995; B.A., University of Florida, 1992. For their valuable comments, I thank my Washburn Law colleagues, Prof. Eric Jensen of Fordham University School of Law shared the very helpful news of the New York-Australian courts consultation agreement. For their insightful research support, I am also grateful to Creighton Miller, J.D., M.L.I.S., and Katy McMullen, J.D. 2012, Washburn University School of Law.

## INTRODUCTION

*Institutional arrangements are considered sacred in many different cultures. In American Indian communities the sacredness of institutional arrangements is embedded in a broader sacred and moral community. The Great Spirit is the organizer of the universe, and, in American Indian views, human relations are not central to the direction and forces of the universe. Humans are one among many spirit beings in the universe . . . —all the animate and inanimate elements that make up the universe . . . . The Native view of community extends to every spirit being in the universe, as well as to fellow humans and institutional relations. . . . [S]ocial relations and institutions are sacred and require mutual obligations and responsibilities . . . .*

—Duane Champagne<sup>1</sup>

*It was the best of times, it was the worst of times,  
it was the age of wisdom, it was the age of foolishness,  
it was the epoch of belief, it was the epoch of incredulity,  
it was the season of Light, it was the season of Darkness,  
it was the spring of hope, it was the winter of despair,  
we had everything before us, we had nothing before us,  
we were all going direct to heaven, we were all going direct the other way . . . [.]*

—Charles Dickens, *A Tale of Two Cities*<sup>2</sup>

The story of the relationship between American Indian Nations and their surrounding states is a tale of two sovereigns,<sup>3</sup> in many ways these sovereigns are on parallel tracks within a larger, tri-federal system,<sup>4</sup> and in many others they intersect — sometimes on a collision course, sometimes in cooperation. As Tribal and state judges take steps toward greater cooperation, it helps to recognize that Tribal-state<sup>5</sup> relations are rooted in oppression, genocide, and violent conflict over scarce resources: historically, in the form of land for westward expansion, and currently, over jurisdiction and Tribal revenue sources like gaming and taxes. For centuries now, it has been the very worst of times. But in the last two decades, with the advent of Indian gaming and federally mandated programs, there has been a “spring of hope” in the form of increased state-

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1. DUANE CHAMPAGNE, SOCIAL CHANGE AND CULTURAL CONTINUITY AMONG NATIVE NATIONS 11-13 (2007).

2. CHARLES DICKENS, WORKS OF CHARLES DICKENS: A TALE OF TWO CITIES. HARD TIMES FOR THESE TIMES 7 (Globe ed., Cambridge: Riverside Press 1869) (1859).

3. The pendulum-like shifts in federal Indian law make the paradoxes in Dickens’s novel an attractive allusion. See Kyle S. Conway, Student Author, *A Tale of Two Sovereigns: The Implications of Dairyland Greyhound Park, Inc. v. Doyle on Tribal and State Self-Government*, 2007 WIS. L. REV. 1313; Karen Cordry, *A Tale of Two Sovereigns: Will the Bankruptcy Code Survive Seminole?*, No. 5 NORTON BANKR. L. ADVISER 1 (1996); Amanda M. Murphy, Student Author, *A Tale Of Three Sovereigns: The Nebulous Boundaries of the Federal Government, New York State, and the Seneca Nation of Indians Concerning State Taxation of Indian Reservation Cigarette Sales to Non-Indians*, 79 FORDHAM L. REV. 2301 (2011).

4. See generally Carol Tebben, *An American Trifederalism Based upon the Constitutional Status of Tribal Nations*, 5 U. PA. J. CONST. L. 318 (2003).

5. In keeping with an emerging custom within the field, the word *Tribal* is capitalized when referring to Native peoples *as peoples*, as is customary when referring to other ethnic and national groups around the world. It is presented in lower case when referring to contemporary governments and court systems. The word *Indian* is used primarily in its form as a term of art under federal law. At the same time, that practice is not intended in any way to suggest that there exists a predominant pan-Indian culture or ethnicity.

Tribal cooperation in some jurisdictions. It seems that we are poised at a juncture in the story of these two types of sovereigns where the states and Tribes must decide which path to take. Will our courts continue the “deadliest enemies” model<sup>6</sup> bequeathed to them from the violent eras of colonization, dominion, and assimilation, or will they gradually continue to enter a “season of Light?”

The opening lines of Dickens’s classic novel invoke the period surrounding the French Revolution. The two cities were Paris and London, and Dickens’s novel served as a warning to English leaders that their extravagance in class domination could lead to retaliatory upheaval on the part of the masses — perhaps even violent upheaval. The author’s warning is no less valid today. And although, as Professor Matthew Fletcher has noted, the risk to states of continuing the “deadliest enemies” model of state-Tribal relations is no longer armed conflict,<sup>7</sup> the price of grinding poverty, ill health, and threatened cultural institutions within each state’s Tribal communities is no less a threat to state and tribal communities alike.

This article aims to further the understanding — already articulated by Judge David Raasch and others — that the extent to which Tribal-state court relations succeed or fail depends in large part upon individual judges’ ability to understand each other’s philosophical, legal, and historical realities and orientations, and to build relationships of mutual respect and trust.<sup>8</sup> It is not news to most Indigenous communities that harmony — and indeed, all of life — is based upon a strong foundation of relationship ties and mutual responsibilities.<sup>9</sup> But while interpersonal relationship-building may be instinctive for many non-Indian actors in the Anglo-American judicial system, it is often overlooked as a tool for institutional relationship-building by those same actors because it is so de-emphasized in Western legal culture and in American popular culture.

Another purpose of this Article is to bring together a healthy cross-section of options for Tribal and state court cooperation, while at the same time recognizing that the ultimate goal has more to do with using those cooperative instruments as bridges to lasting trust. In that sense, this Article proposes those methods as bridges to a more organic, flexible system of cooperation based upon communication between judges and officials.

As with all issues involving the colonization of Native peoples, the problem of Tribal-state court cooperation cannot be separated from its historical context. This article will proceed by briefly exploring the roots of Tribal-state tensions, and then examining how those tensions continue to express themselves in interactions between judicial systems. The second half of this article will describe opportunities for collaboration and cooperation between tribal and state courts, as well as the risks that remain in engaging — or failing to engage — one another on tense issues like jurisdiction. Finally and most importantly, it will report how pioneering judges like Judge Raasch, former Chief Judge

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6. See generally Matthew L. M. Fletcher, *Retiring the “Deadliest Enemies” Model of Tribal-State Relations*, 43 TULSA L. REV. 73 (2007).

7. *Id.* at 77-80.

8. See Paul Stenzel, *Full Faith and Credit and Cooperation Between State and Tribal Courts: Catching Up to the Law*, 2 J. COURT INNOVATION 225, 226 (2009) (“[T]he application and carrying out of the law is not a mechanical procedure, but relies on shared human understanding and trust.”).

9. CHAMPAGNE, *supra* note 1, at 9-21.

of the Stockbridge-Munsee Band of Mohicans Tribal Court,<sup>10</sup> have discovered that the need for formal structures eventually becomes secondary to the ability to resolve tensions through consensus:

*[M]any people think there has to be legislation or formal agreements, MOUs, MOAs, or protocols. Basically, [it comes down to] the simple thing that you and I are doing now—we're talking. . . . [W]e don't have to agree on everything, but we'll understand everything better and we'll understand each other and we can still work together . . . to respond to the needs of the community or the people we're working with[.]*<sup>11</sup>

#### SOURCES OF TENSION

##### *A Season of Darkness: The Ravages of Colonization*

*After the soldiers had killed all but some little children and babies still tied up in their baskets, the soldiers took them also, and set the camp on fire and threw them into the flames to see them burn alive. I had one baby brother killed there. My sister jumped on father's best horse and ran away. As she ran, the soldiers ran after her; but thanks be to the Good Father in the Spirit-land, my dear sister got away. This almost killed my poor papa. Yet my people kept peaceful. . . .*

—Sarah Winnemucca (Paiute)<sup>12</sup>

In the beginning, Indian-European relations were shrouded in darkness. That darkness continues into the present time in many ways, alongside some gradual enlightenment. Centuries of warfare and genocide<sup>13</sup> against North American Indigenous peoples have left behind many scars and traumas,<sup>14</sup> which will take even more centuries to heal. The sources of historical tension between present-day American Indian nations and neighboring states, which arose primarily from European settlement, have their roots in this violence and trauma, which began with the Conquest model of early exploration

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10. Judge Raash is now a faculty member in the National Judicial College and the Fox Valley Technical College Criminal Justice Center for Innovation. He is Vice President of the Tribal Law and Policy Institute and a past president of the Wisconsin Tribal Judges Association. STOCKBRIDGE-MUNSEE COMMUNITY BAND OF MOHICAN INDIANS, MEET OUR ELDERS: DAVID RAASCH, [http://www.mohican-nsn.gov/Community/Meet\\_Our\\_Elders/raaschdavid.htm](http://www.mohican-nsn.gov/Community/Meet_Our_Elders/raaschdavid.htm) (last visited July 27, 2011).

11. Interview by Aaron Arnold with David Raasch, Judge, Stockbridge-Munsee Tribal Court, Bowler, Wisconsin (Oct. 2009), in 2:2 J. COURT INNOVATION 381, 384-85 (Oct.2009) [hereinafter INTERVIEW].

12. PETER NABOKOV, NATIVE AMERICAN TESTIMONY: A CHRONICLE OF INDIAN-WHITE RELATIONS FROM PROPHECY TO THE PRESENT, 1492-1992 199 (1991) (quoting SARAH WINNEMUCCA, LIFE AMONG THE PAIUTES (1883) (providing her first-person account of a massacre in Dayton, Nevada in 1864-65)).

13. See generally Sarah Deer, *Relocation Revisited: Sex Trafficking of Native Women in the United States*, 36 WM. MITCHELL L. REV. 621, 630, n. 40 (2010) (citing Lindsay Glauner, *The Need for Accountability and Reparation: 1830-1976: The United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans*, 51 DEPAUL L. REV. 911 (2002); Rose Weston, *Facing the Past, Facing the Future: Applying the Truth Commission Model to the Historic Treatment of Native Americans in the United States*, 18 ARIZ. J. INT'L & COMP. L. 1017 (2001)) (arguing that the massacre, forced assimilation, relocation, and other treatment of North American Indigenous peoples constitutes genocide under conventional standards).

14. Maria Yellow Horse Brave Heart & Lemyra M. DeBruyn, *The American Indian Holocaust: Healing Historical Unresolved Grief*, 8 J. NAT'L CENTER FOR AM. INDIAN & ALASKA NATIVE MENTAL HEALTH RES. 60, 75 (1998) (cited by Deer, *supra* note 13, at 630 n. 439).

and settlement. Legally, that model is expressed in the Doctrine of Discovery, which holds — and continues to hold to this day in the United States and throughout most of the colonized world — that Christianized, European sovereigns acquired a superior divine, moral, and legal “future right” in aboriginal lands, including the first right to engage Indigenous peoples for formal land acquisition.<sup>15</sup> In its even darker form, it imbued colonists like Hernando de Soto with a sense of right and duty to forcibly and brutally seize those lands when they did not get their way.<sup>16</sup> Before embarking on a collaborative enterprise, representatives from state jurisdictions must acknowledge the dark underpinnings of state-tribal relations and their counterparts’ justifiable distrust.<sup>17</sup>

In the early years of the Union, hostilities between the states (and their settlers) and the tribes were so great, both in terms of violence and abuses of trade and government, that the founders built an exclusive right to Indian trade and relations into the federal Constitution.<sup>18</sup> Further, a very young United States Supreme Court was forced to step in early on to prevent a Constitutional crisis between Congress and the State of Georgia, holding in *Worcester v. Georgia* that Georgia could not enforce a law preventing “white persons” from living within the Cherokee Nation.<sup>19</sup> Georgia’s effort threatened not only the federal system, but also the very political sovereignty of American Indian nations. As a consequence of the federal government winning the tug-of-war for exclusive control over relations with Indian tribes, state-tribal relationships necessarily became more opposed.<sup>20</sup>

Hostilities were not merely jurisdictional in nature. The reality is that the settlers’ hunger for more territory drove local and national Indian policy, including many well-documented massacres<sup>21</sup> by local residents and by the United States Army. In the testimony of Sarah Winnemucca, quoted above, she describes the brutal murders of her tribe members at Dayton, Nevada, ostensibly over some stolen cattle. Many, many more were killed through intentional neglect by reservation agents who stole the basic food, shelter, and clothing promised to the people by treaty, leaving them to suffer and die

15. Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 5-7 (2005).

16. *Id.* at 7-8 (“A close look at the origins and development of this ‘legal’ doctrine does leave one thinking more of the adage ‘might makes right’ than of the principled development of law in an insular society where all the people share the rights and obligations of the law. In fact, a ‘cynic’ might conclude that the legalistic, international law Doctrine of Discovery was nothing more than an attempt to put a patina of legality on the outright confiscation of almost all the assets of the people of the New World.”).

17. See Ethan Plaut, *Tribal-Agency Confidentiality: A Catch-22 For Sacred Site Management?*, 36 ECOLOGY L.Q. 137, 143 (2009) (noting that distrust resulting from historical tensions play a large role in the tribes’ hesitance to consult with federal agencies regarding projects that will impact sacred sites).

18. ROBERT T. ANDERSON ET AL., *AMERICAN INDIAN LAW: CASES AND COMMENTARY* 31 (West 2d ed. 2010) (explaining that James Madison led the effort behind the Indian Commerce Clause in Article I, Section 8 in order to put an end to state forays into this federal domain).

19. *Worcester v. Georgia*, 31 U.S. 515 (1832) (discussed in ANDERSON ET AL., *supra* note 18, at 62-74).

20. CORNTASSEL & WITMER, *FORCED FEDERALISM: CONTEMPORARY CHALLENGES TO INDIGENOUS NATIONHOOD* 82 (2008).

21. See ROBERT HAYS, *EDITORIALIZING “THE INDIAN PROBLEM”: THE NEW YORK TIMES ON NATIVE AMERICANS, 1860-1900* 207-31 (paperback ed. 2007). Particularly well-known examples are the Sand Creek (Southern Cheyenne Nation), Bear River (Shoshone Nation), and Wounded Knee (Lakota Nation). The brutality of the U.S. “Indian wars” was also quite well-known, and the subject of many editorials at the time, as well as a growing divide over the “Indian problem” between the urban East and the frontier West. See *id.* at 127-69.

from disease, starvation, and exposure.<sup>22</sup>

These atrocities are not mere relics of the wild frontier. Unspeakable suffering resulted from removal policies designed to seize Indian lands by moving the people to distant reservations in unfamiliar territories; newcomers to the field will be familiar with the Cherokee “Trail of Tears” as a prime example. Just as insidious were the forced assimilation policies that wrested Indian children from their families and placed them into boarding schools, in many cases for cultural re-education,<sup>23</sup> forced religious conversion, and the like. On the heels of the assimilation era came the allotment era, in which many reservations were rationed out into parcels to certain Indian citizens, with the “left-over” parcels granted to non-Indian settlers. One of the deeper injuries to result from allotment was the drastic cultural shift from communal to private ownership, causing great damage to Native communities, families, and lifeways.

In recent decades, even on the heels of the tribal self-determination era, which ushered in a resurgence of tribal governments, codification, strengthened sovereignty, and proliferate tribal justice systems, tribal sovereignty continues to come under attack. For the last twenty five to thirty years, the United States Supreme Court has been quite focused upon — and harsh towards — Indian interests, particularly in eroding tribal jurisdiction.<sup>24</sup> In other state and federal courts and legislatures, the results tend to be more mixed. Some, like Oklahoma, have poor records, but others are more encouraging.<sup>25</sup>

This is the soil in which the seeds of tribal-state court collaboration and cooperation must somehow grow.<sup>26</sup> Two main cultural barriers to communication can, if left unattended, prevent meaningful cooperation from taking place, threatening the health of Indigenous communities. First, historical myths and prejudices about Native peoples, which stem from the earliest days of native-colonial conflict form the root of modern, anti-Tribal policies, legislation, and court decisions that threaten to keep Native communities in poverty and marginalization. Philosophically, animosity and distrust stem from the orientation of colonizing powers toward Indigenous peoples as inscrutable “savages.”<sup>27</sup> Arguably, this historical fear and loathing — whether conscious and

22. Cf. NABOKOV, *supra* note 12, at 187-202 (providing firsthand Indian testimony about the atrocities perpetrated by dishonest, and often brutal, reservation agents).

23. There are some exceptions, such as the Chickasaw Nation-run Bloomfield Academy for Girls, and of course the accounts of Indian people who found their educations to be a positive experience helping them to advance in life. See generally AMANDA J. COBB, LISTENING TO OUR GRANDMOTHERS’ STORIES: THE BLOOMFIELD ACADEMY FOR CHICKASAW FEMALES, 1852-1949 (2000). For a great number of others throughout the United States, Canada, and Australia (who modeled their programs after the Americans’), it was a brutal, traumatizing, abusive experience. Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RTS. J. 47, 51-55, 67-70, 72-73 (2008) (providing examples of those abuses).

24. See generally Matthew L.M. Fletcher, *The Supreme Court’s Indian Problem*, 59 HASTINGS L. J. 579, 583-84 (2008).

25. See generally TURTLE TALK BLOG — STATE SUPREME COURT OUTCOMES, <http://turtletalk.wordpress.com/././?s=state+supreme+court+outcomes> (last visited Mar. 4, 2012).

26. See Hope M. Babcock, *A Civic-Republican Vision of “Domestic Dependent Nations” in the Twenty-First Century: Tribal Sovereignty Re-envisioned, Reinvigorated, and Re-empowered*, 2005 UTAH L. REV. 443, 503-9.

27. Cf. Johnson v. McIntosh, 21 U.S. 543, 590 (1823) (“But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to

individually held, or subconscious and collectively held — often results in the devaluation of tribal governments and courts by their Anglo-American counterparts.

Both spiritually and pragmatically, the gulf between Indigenous and Western thinking in our plural society arguably also results from an ideology of scarcity<sup>28</sup> — a type of poverty of thinking that causes conflict over resources. This poverty mentality can be seen in other political issues like immigration, but has a tendency to manifest in current state-Tribal affairs as conflict over gaming, taxation, and other forms of Tribal economic development and survival. One archetype that contributes to this form of conflict and misunderstanding is the “rich Indian” archetype.<sup>29</sup> In order for states and Tribes to enter the best of times, they must explode those myths and create new narratives.

Second, another source of state-Tribal tension is a clash of political philosophies stemming from differing worldviews. From the Euro-American standpoint, state government is a health, safety, and welfare regime designed to keep public order, and sovereignty connotes a mere political subdivision within the larger federal system. From the Native American standpoint, sovereignty is both political and cultural, and government is “interwoven with the social, spiritual, intellectual, and economic aspects of the communities they serve.”<sup>30</sup> For states and their courts to create law that protects, rather than undermines, their neighboring Native communities, their actors must understand comparative state and Tribal sovereignty. They must also contemplate what every chip carved from Tribal sovereignty means to Native peoples in terms of their cultural survival.

To be sure, each party to a relationship bears responsibility for listening to the concerns of the other and to recognizing its right not only to exist, but to benefit from the relationship — to thrive. Because state governments enjoy the vastly greater balance of power within the two-sovereign relationship, they historically have had the least incentive to come to the table with open hearts and minds, even when individual delegates are willing to do so. Furthermore, despite the much greater incentive for Tribes to cooperate with States, their too old wounds may be slow to heal, making it difficult to trust.<sup>31</sup>

### *An Age of Wisdom and Foolishness: Tribal and State Sovereigns Today*

Today, federal law recognizes that Native American nations have a unique brand of sovereignty called the “domestic dependent nation.”<sup>32</sup> Under this federally-created doctrine, the approximately five hundred and sixty-five American Indian nations that are recognized by the United States<sup>33</sup> in a given year are, as a very general matter,

repel by arms every attempt on their independence.”).

28. Mary Christina Wood, *The Politics of Abundance: Towards a Future of Tribal-State Relations*, 83 OR. L. REV. 1331, 1335 (2004).

29. See CORNTASSEL & WITMER, *supra* note 20, at 3.

30. Angelique A. EagleWoman (Wambdi Awanwicake Wastewin), *The Philosophy of Colonization Underlying Taxation Imposed upon Tribal Nations within the United States*, 43 TULSA L. REV. 43, 44 (2007).

31. SUSAN JOHNSON, GOVERNMENT TO GOVERNMENT: MODELS OF COOPERATION BETWEEN STATES AND TRIBES 8 (2d ed. 2009) [hereinafter MODELS OF COOPERATION].

32. See *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

33. See Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of



empowered to self-govern as to intra-tribal affairs within their borders. In criminal matters, tribal courts may prosecute misdemeanors between Indian people. They also legislate for the health, safety, and welfare of their peoples, subject to a morass of often paternalistic federal regulations.<sup>34</sup> Interestingly, the tribes' ability to govern in civil matters affecting their communities becomes frustratingly complex when non-Indian parties (read: parties from the dominant/"superior" culture, race and religion) — are involved.<sup>35</sup>

Most tribal law and Indian law scholars agree that tribal sovereignty stems from an inherent, natural right to self-determination that predates contact with Europeans,<sup>36</sup> and was also validated by Europeans in the early era of government-to-government relations.<sup>37</sup> But in terms of the current legal reality, tribal political sovereigns exist at the sufferance of Congress, under the federal plenary power doctrine. Federal Indian law scholars also tend to agree that the plenary power doctrine is inconsistent with Constitutional history and legal precedent,<sup>38</sup> but that it nonetheless remains the law of the land, as well as the political reality for any foreseeable future. From a historically accurate viewpoint based on the law of treaty, tribes actually should be treated more like inherent sovereigns who ceded powers to the national sovereign only by agreement (and more typically, by sheer coercive force).<sup>39</sup>

In addition to political sovereignty, Native American nations also hold as inalienable a type of natural right to self-determination often known as inherent or cultural sovereignty, which "encompasses the spiritual, emotional, mental, and physical aspects . . ." of Native American lifeways.<sup>40</sup> Indigenous cultural sovereignty has no observable counterpart in modern Western political philosophy, which emphasizes the role of government and society to maximize the destiny of the individual citizen. While it is irresponsible and unrealistic to force generalizations about Native American culture, Native scholars do tend to agree that core distinguishing characteristics include the preeminence of relationship and kinship — among the members of a particular tribe, between Native peoples, and between the people and the natural world, both seen and unseen.<sup>41</sup>

In both comparison and contrast, American political thought views states somewhat paradoxically as either pure political subdivisions of an indivisible national

Indian Affairs, 75 Fed. Register 60810 (2010), available at <http://www.bia.gov/idc/groups/xofa/documents/document/idc012038.pdf> (last accessed June 10, 2011).

34. Cf., e.g., Anna Fleder & Darren J. Ranco, *Tribal Environmental Sovereignty: Culturally Appropriate Protection or Paternalism?* 19 J. NAT. RESOURCES & ENVTL. L. 35 (2005) (describing federal environmental procedures affecting tribes as difficult and "potentially paternalistic" due to their foreign "cultural norms").

35. See, e.g., INTERVIEW, *supra* note 11, at 381 ("The biggest obstacle that I see in tribal courts today is they lack criminal jurisdiction over non-Indians . . .").

36. Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 210 (2001).

37. See generally Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002).

38. *Id.* at 133-34.

39. See generally *id.*

40. Coffey & Tsosie, *supra* note 36, at 210.

41. C.E. MERRIAM, JR., *HISTORY OF THE THEORY OF SOVEREIGNTY SINCE ROUSSEAU* 84-85 (Kitchener ed., Batoche Books 2001) (1900).

sovereign, or as the inherent, original, colonizing sovereigns of what is now the United States, who ratified the Constitution in order to create a limited national government and ceded only limited sovereign powers.<sup>42</sup> Under the latter view, which certainly appears most consistent with U.S. political and legal history,<sup>43</sup> the states retain all unceded sovereign powers within a federal system of divisible sovereign powers.<sup>44</sup> According to conventional understanding, during the Revolutionary period, Anglo-American political philosophy maintained that local control is less prone to the abuses of power.<sup>45</sup> Thus, when states joined the Union, new states retained remaining aspects of the greater, sovereign whole.<sup>46</sup> The Civil War naturally caused a shift in political philosophy away from the idea of divisible sovereignty and toward an indivisible sovereign state in the form of the dominant, national, United States government.<sup>47</sup>

Although it can be dangerous to draw direct parallels between the state and Tribal sovereign experience,<sup>48</sup> some important (albeit highly generalized) analogies and distinctions can help states and tribes understand each other better on a government-to-government basis. First, despite the undeniable reality of federal supremacy, tribes and states may perceive each other on a diplomatic level as general sovereigns with the right to self-determination for their communities.<sup>49</sup> From a second, cultural standpoint, the differences are much more vast: cultural differences between many states and the federal government tend to stem from regional interests and from Civil War era divisions over slavery and race, but still generally participate in the same unifying, Anglo-American legal and political culture. Although the primacy of cultural sovereignty to Tribal self-determination presents a cosmological barrier to communication between citizens of states and Tribes, increased understanding of the concept may help state actors to understand the vast importance of respect for difference in their diplomatic relations.

*An Epoch of Incredulity: State Judicial Encroachment, the Failure of Comity,  
and the “Savage Other” Archetype*

One of the most profound expressions of a sovereign’s power to manage the affairs of its own people is the exercise of civil and criminal jurisdiction. In the past few decades, tribal courts have experienced explosive growth, hearing complex cases and responding to federal pressure to maintain many aspects of Anglo-American

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42. See Judith Resnick, *Multiple Sovereignties: Indian Tribes, States, and the Federal Government*, 79 JUDICATURE 118, 125 (1995).

43. MERRIAM, *supra* note 41, at 84; see also THE FEDERALIST NO. 32 (Alexander Hamilton) (cited by MERRIAM, *supra* note 41, at 84 (States were to “retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States.”)).

44. See MERRIAM, *supra* note 41, at 85.

45. See *id.* at 82.

46. *Id.* at 85.

47. *Id.* at 171-82.

48. Carole Goldberg, *Critique by Comparison in Federal Indian Law*, 82 N.D. L. REV. 719, 727-29 (2006) (warning that while the state comparison instructs that Tribes should share similar sovereign powers, it has also been used detrimentally to impose the doctrine of federal plenary power over Tribes).

49. While the latter view holds the most promise for forging a beneficial state understanding of the Tribes’ analogous inherent sovereignty (and general jurisdiction), it also has negative connotations. Those negative associations stem from the use of the “state’s rights” movement to resist the national sovereign’s anti-racist initiatives during the civil rights era.

jurisprudence, while also “crafting a unique jurisprudence of vision and cultural integrity.”<sup>50</sup> Although there have been both wins and losses for tribal courts, scholars generally agree that the net result is the unfortunate erosion of tribal jurisdiction.<sup>51</sup> Because the pattern of erosion makes so little sense when compared to how jurisdiction is treated within the Anglo-American judicial system, it is difficult to find any unifying theme other than a general misapprehension and distrust of Native American cultures and their legal systems<sup>52</sup> — a byproduct of the archetypal categorization of Native peoples as the “savage Other.”<sup>53</sup> If that sad situation could be remedied through cross-cultural dialogue, we may be able to enter into a new “season of Light” for tribal sovereignty and tribal courts.

To confront the history of Indigenous-European relations requires courage. Only relatively recently have Western nations begun to accept the darker sides of European colonization, including the racist mindset that permitted legally sanctioned physical and cultural genocide to occur around the world.<sup>54</sup> Of course, this type of racism and genocide is not limited to European colonization; it is a part of most colonial conquests in world history.<sup>55</sup> The focus here is on European colonization because it forms some of the deepest hidden roots of the remaining state/tribal divide. At the heart of the colonial mindset — past and present — is an orientation toward conquered peoples that dehumanizes them in order to make their extermination or subjugation morally palatable.<sup>56</sup> Dehumanization and the idea of “uncivilized” peoples as lesser beings form the basis for colonial moral orientations like the doctrines of discovery and manifest destiny.<sup>57</sup> For example, even commentators of the frontier era who criticized U.S. anti-Indian policy obviously did so from a feeling of racial, cultural, and evolutionary superiority. New York Times editorials from the 1800s at once criticize settlers and the government, while referring to Native peoples as “‘red-skins,’ ‘greasy red men,’ ‘lazy,’ ‘shiftless,’ and ‘dusky savages.’”<sup>58</sup> Similarly, the underlying narrative of the federal trust doctrine is one of paternalism toward a lesser race unable to manage its own affairs within “civilized” society.<sup>59</sup>

This dehumanizing rationalization forms the basis for the *us/them* dichotomy

50. Frank Pommersheim, *Tribal Courts: Providers of Justice and Protectors of Sovereignty*, 79 JUDICATURE 110, 112 (1995).

51. See, e.g., Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L.J. 1, 6 (1999).

52. See generally Daan Braveman, *Tribal Sovereignty: Them and Us*, 82 OR. L. REV. 75 (2003).

53. See Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299, 319-20 (2002).

54. See Andrea Smith, *Heteropatriarchy and the Three Pillars of White Supremacy*, in COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY 66, 67-69 (2006) (identifying a dual “Genocide/Colonialism” construct as one of the three primary forms of White supremacy), cited in Terri Nilliasca, *Some Women’s Work: Domestic Work, Class, Race, Heteropatriarchy, and the Limits of Legal Reform*, 16 MICH. J. RACE & L. 377, 385 (2011).

55. PAUL KEAL, EUROPEAN CONQUEST AND THE RIGHTS OF INDIGENOUS PEOPLES: THE MORAL BACKWARDNESS OF INTERNATIONAL SOCIETY 35 (2003).

56. LINDA TUHIWAI SMITH, DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLE 26 (1999).

57. See generally STEVEN T. NEWCOMB, PAGANS IN THE PROMISED LAND: DECODING THE DOCTRINE OF CHRISTIAN DISCOVERY (2008).

58. HAYS, *supra* note 21, at 4.

59. Cf. e.g., Fleder & Ranco, *supra* note 34, at 35.

permeating U.S.-Tribal relations, not to mention other racist legal constructs like the *Dred Scott* decision.<sup>60</sup> Decisions on jurisdiction tend to center around the concept that “‘they’ can exercise some degree of sovereignty only over ‘themselves.’”<sup>61</sup> This narrative is evident as recently as the 2001 Supreme Court decision in *Nevada v. Hicks*,<sup>62</sup> where the Court held that the Fallon Paiute-Shoshone Tribal Court had no jurisdiction over federal civil rights claims by a Tribal citizen against a federal game warden conducting a search and seizure operation.<sup>63</sup> The Court destroyed the presumption that tribes have regulatory control — and thus jurisdiction — over non-member activities on trust lands, instead holding that land ownership is merely one factor to be considered.<sup>64</sup> The Court even went so far as to hold that the Tribe had no inherent interest in non-member activities on its own lands.<sup>65</sup> From the perspective of sovereignty, this is tantamount to telling states that they have no jurisdiction over torts occurring within their boundaries.<sup>66</sup> Because governments should normally enjoy jurisdiction over persons and activities that affect their communities, the only identifiable reason for eroding jurisdiction is the fear of the “savage Other.”<sup>67</sup>

Further evidence of the “savage Other” archetype at work is reflected in outsiders’ fear and mistrust of tribal courts themselves. They have been described as “makeshift,” unfair, and biased.<sup>68</sup> But in fact, Tribal courts are dynamic, diverse, and, in some ways, even superior to Western judicial systems in that they often emphasize restorative justice over retributive, zero-sum outcomes.<sup>69</sup> After all, it is our Tribal communities that have inspired contemporary state and federal initiatives toward alternative dispute resolution, such as mediation and drug court programs.<sup>70</sup> Contemporary tribal programs include traditional practices, Peacemaking Circles, and Healing-to-Wellness courts.<sup>71</sup> At the same time, tribal courts experience great pressure to conform their structures and laws to the Anglo-American system.

Some pressure results from the vestiges of aggressive, assimilation-era programs that promoted boilerplate tribal constitutions, as well as courts that operated as arms of federal policy.<sup>72</sup> As a result, many tribal codes, government branches, and court systems

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60. SIDNEY L. HARRING, CROW DOG’S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 18 (1994).

61. Braveman, *supra* note 52, at 109.

62. 533 U.S. 353 (2001).

63. *Id.* at 356-57.

64. *Id.* at 360.

65. *Id.* at 359.

66. *See id.*

67. *See Braveman, supra* note 52, at 100-2.

68. *See Nell Jessup-Newton, Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 285-89 (1998).

69. *See* NATIONAL INSTITUTE OF JUSTICE, INDIGENOUS JUSTICE SYSTEMS AND TRIBAL SOCIETY (Dec. 3, 2007), <http://www.nij.gov/topics/courts/restorative-justice/perspectives/indigenous-tribal.htm>

70. *See Sandra Day O’Connor, Lessons from the Third Sovereign: Indian Tribal Courts*, 9 TRIBAL CT. REC. 12, 14 (1996).

71. *See* JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 313-15, 317 (2004).

72. *E.g. Jessup-Newton, supra* note 68, at 291 (discussing the Indian Reorganization Act of 1932 and the Courts of Indian Offenses).

mimic those of the surrounding states as a matter of survival,<sup>73</sup> as well as to fill the void left by assimilation programs that attempted to obliterate Indigenous cultural practices. Native American leaders and scholars are now encouraging Tribal communities to consider, where possible, decolonizing their *received* Western law and systems in order to reflect internal values and the customary law of that particular community.<sup>74</sup> As they decolonize, outsiders may feel threatened by difference. Nevertheless, most contemporary tribal law related to business, torts, and other matters affecting non-Indians are very similar to their state counterparts' and are not impenetrable as feared.<sup>75</sup>

To counteract threats to legitimacy, many Native American Nations have developed (and continue to develop) elaborate written codes, court decisions, and constitutions. They also have training programs for the judiciary, advocates, and court staff, as well as an increasing number of law graduates on the bench and in the bar.<sup>76</sup> Understanding occurs most readily where cultural values converge.<sup>77</sup> Where differences manifest, it is important for outside institutions to orient by contemporary political philosophy favoring mindful, engaged pluralism over assimilation,<sup>78</sup> as well as to work at acknowledging and overcoming stereotype and bias.

State communities, like other post-colonial governments around the world, have inherited a collective colonial orientation that includes the "savage Other" construct. While the last decade has seen a proliferation of cooperative initiatives, some hostility remains. An extreme example is the "One Nation" group in Oklahoma. A more common example is anger from some state citizens about Indian gaming and "preferential" treatment. Both tribal and state actors must consider both inherent bias — as well as the willingness to overcome it — when they make decisions affecting Indian country and Native American people. To overcome this bias means to risk trusting that Native American communities and courts are competent to self-govern, as well as to deal fairly with non-members who avail themselves of the benefits of the jurisdiction, such as tourism, doing business, gaming, and so on.<sup>79</sup> For Native communities, it is to risk being betrayed yet again. It is often observed that the best way to increase trust and understanding is to communicate, to visit each other's communities, and to form lasting relationships between individuals. Without communication, the silence is "all too easily filled with gossip, relentless stereotypes, and pernicious emptiness."<sup>80</sup>

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73. *Id.* at 294.

74. *See, e.g.,* Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 241-43 (1994).

75. *Cf. id.* at 262-63.

76. *Id.* at 237-44.

77. *See generally* Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ. L. REV. 911 (2007); *see also* Braveman, *supra* note 52, at 116-17.

78. *Cf. generally* Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CALIF. L. REV. 863 (1993).

79. *See* EVE DARIAN-SMITH, *NEW CAPITALISTS: LAW, POLITICS, AND IDENTITY SURROUNDING CASINO GAMING ON NATIVE AMERICAN LAND* 66 (2004).

80. Frank Pommersheim, *Tribal-State Relations: Hope for the Future?*, 36 S.D. L. REV. 239, 273 (1991).

## A SPRING OF HOPE: OPPORTUNITIES FOR COOPERATION

As the idea of building trust and understanding relates to the courts, the future looks bright in some states. In fact, it may be that some state courts will take the lead in demonstrating respect for tribal jurisdiction.<sup>81</sup> One promising result of recent cooperative movements has been the Civil Jurisdiction in Indian Country Project.<sup>82</sup> There are also a number of related Tribal/State court forums around the country, developed in large part under the same initiative by the National Center for State Courts and National Conference of Chief Justices.<sup>83</sup> For example, in the past decade, a number of states have taken the positive step of including nearby neighboring tribal judiciaries in their judicial councils and trainings. These relationships have developed better grounds for understanding and cooperation, particularly for the recognition of each other's judgments and orders. In a few of those states, such as Wisconsin and Arizona, tribal-state court cooperation has even resulted in formal court rules or statutes for the recognition of judgments or for abstention of state court actions in cases involving significant tribal law questions.<sup>84</sup>

Through its National Tribal Judicial Center, the National Judicial College now holds an annual "Walking on Common Ground" symposium to gather state, tribal, and federal judges in the spirit of cooperation and improved understanding.<sup>85</sup> The symposium is organized around the reality that state courts and Tribal courts are most likely to resolve jurisdictional differences and protect the integrity of their Native communities when they open the lines of communication to establish agreements about comity and full faith and credit for Tribal court judgments; share resources like jails, court personnel, and probation officers; jointly develop legislation that contemplates cooperation on Indian child welfare, taxation, and criminal law enforcement; and promote awareness of Tribal affairs by the state bench and bar.<sup>86</sup>

Yet another fruitful path for opening these intergovernmental and intercultural discussions is the listening conference. In one example, the New York Federal-State-Tribal Courts Forum, in conjunction with several other organizations, "convened state

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81. And by taking the lead in respect for tribal jurisdiction, they shall take the lead in Tribal sovereignty and Tribal communities.

82. Stanley G. Feldman & David L. Withey, *Resolving State-Tribal Jurisdictional Dilemmas*, 79 JUDICATURE 154, 155 (1995). The project began in 1988, when the Coordinating Council of the Association of State Supreme Court Chief Justices became determined to improve jurisdictional relations between the two types of court systems. Ralph W. Johnson & Rachael Paschal, *Preface* to TRIBAL COURT HANDBOOK FOR THE 26 FEDERALLY RECOGNIZED TRIBES IN WASHINGTON STATE (2d ed., Ralph W. Johnson & Rachael Paschal, eds., 1992), available at <http://www.msaj.com/papers/handbook.htm>. By 1990, the project had established "demonstration forums" in Washington, Arizona, and Oklahoma. *Id.* The forums "designed action agendas to address disputed jurisdiction problems, including plans for developing educational programs, informal meetings and working agreements, cross-visitations, exchanges of legal materials, agreements between tribal governments and state executive agencies, state legislation and other approaches resulting from mutual understanding and communication." *Id.*

83. James A. Bransky & Hon. Garfield A. Wood, *The State/Tribal Court Forum: Moving Tribal and State Courts from Conflict to Cooperation*, 72 MICH. BAR J. 420, 421 (1993).

84. See, e.g., ARIZ. STATE TRIBAL CT. CIV. JUDGMENTS RULES, available at [http://www.supreme.state.az.us/stfcf/handouts/rules\\_recognitn\\_tribaljudgments.pdf](http://www.supreme.state.az.us/stfcf/handouts/rules_recognitn_tribaljudgments.pdf).

85. NATIONAL JUDICIAL COLLEGE, WALKING ON COMMON GROUND: COOPERATION, COLLABORATION, COMMUNICATION (2008).

86. *Id.*

and federal judges and court officials in sessions with tribal judges, chiefs, clan mothers, peacemakers, and other representatives from the justice systems of New York's Indian Nations and Tribes, to exchange information and learn about [their] respective concepts of justice."<sup>87</sup>

So far, this discussion has focused primarily on the state courts' *responsibility* to cooperate with Tribal communities. However, the *incentives* to states are also manifold. Court cooperation will reduce jurisdictional disputes.<sup>88</sup> Abstention also will raise esteem for Tribal courts. Moreover, the devolution of many federal programs to local government requires partnership between Tribes, states, and their subdivisions.<sup>89</sup> Also, the more matters that can be handled internally and with cultural sensitivity, the less the burden on the state system, although it must be remembered that it takes time and resources for tribal courts to assume larger roles where in the past there were not resources or legal avenues for the courts to act in certain areas. Decolonizing the legal system is a slow and complex process. Finally, whenever states promote the health and independence of local Tribal communities, they further their own economic well-being. In the last decade, the news from Indian Country is replete with stories about Tribal contributions to local economies, not just through gaming, but through ever-diversifying business interests.<sup>90</sup> These contributions can range in the millions to billions of dollars, and bring new businesses and jobs to the surrounding communities.

#### *Cooperation to Determine Questions of Tribal Law*

Picture this: a state child protection agency files a juvenile dependency action in state court. One of the parents whose rights may be terminated is an enrolled citizen of a neighboring Native American nation. The children are also enrolled tribal citizens. Under the Indian Child Welfare Act ("ICWA"), the tribe may have jurisdiction over the matter in order to ensure that the children's place in their tribal community is properly considered in any termination and placement determinations. Local tribal law must be interpreted on the question of that nation's placement priorities, but the statute contains a troubling ambiguity. Unlike federal court proceedings, this state has no abstention doctrine in place to defer the matter to tribal court, and thus there is no tribal court record available for assistance with determining questions of tribal law. The state court determines that the tribe does not have jurisdiction, and thus refuses to apply ICWA or the tribe's placement preferences.

Every day in the United States, state and federal courts grapple with such interpretations of foreign law without resorting to certification, abstention, or consultation agreements. But there is something different about tribal law, and it does not have to do with the nature of the law itself. At least one scholar has noted reluctance

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87. Marcy L. Kahn, Edward M. Davidowitz, & Joy Beane, *Building Bridges Between Parallel Paths: The First New York Listening Conference for Court Officials and Tribal Representatives*, 78 N.Y. STATE BAR J. 10, 11 (2006).

88. MODELS OF COOPERATION, *supra* note 31, at 3-4.

89. *Id.*, at 5.

90. See, e.g., Josh Lohmer, *Tribes: A New Era*, STATE LEGISLATURES 20, 21 (Feb. 2009); Arun Rath, *A Sovereign (And Successful) Chickasaw Nation*, NPR, <http://www.npr.org/templates/story/story.php?storyId=103348033> (last accessed Mar. 10, 2012).

among Anglo-American courts not just to interpret tribal law, but even to recognize its applicability.<sup>91</sup> This reluctance probably stems in large part from ignorance of tribal law, systems, and methods.

Tribes have governed their people since time immemorial in ways completely foreign to those who came and settled the land. The same could be said for those who brought their ideas of common law and western justice here. Oftentimes, these different and competing ways of “doing justice” create inherent barriers for understanding and acceptance. Many tribal justice systems have courts that very nearly mirror those of states while others hold true to custom and tradition in a world that is moving quickly away from traditional values and mores.<sup>92</sup>

Some courts’ decisions also show a conscious disregard for tribal law and jurisdictions, treating them as lawless, unprofessional, or merely inscrutable.<sup>93</sup> Tribal and state courts may wish to work together to educate each other about their laws and methods, and to form agreements for abstention, certification, or consultation in order to ensure that each other’s ways are properly used and respected.

Between the state and federal courts, there are four alternatives courts currently used to avoid declaring the law of another sovereign: certification, prediction, abstention, or stasis.<sup>94</sup> Stasis simply means that the deciding court will only apply currently accepted doctrines, and will refuse to declare extensions of the law.<sup>95</sup> Under the predictive approach, courts use their best efforts to analyze the approach that the other sovereign’s court would take.<sup>96</sup> Abstention requires a stay while the foreign court decides its questions of law, and certification permits those questions to be answered with a shorter stay and without the need to transfer proceedings to the sister sovereign or to wait for its lengthy progress through the path of appeal.<sup>97</sup> Until now, the focus on tribal-state court relationships has been primarily upon developing respect for tribal jurisdiction in those states where PL-280<sup>98</sup> and other types of concurrent tribal and state jurisdiction<sup>99</sup> do not apply. A few scholars have discussed the applicability of abstention doctrines, certification rules, and choice of law rules to the determination of tribal law in the courts of other sovereigns.

In her article proposing that states consider tribal law as a valid choice of law in cases involving tribal interests, Professor Florey outlines a number of situations in which

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91. Fletcher, *supra* note 24.

92. NATIONAL JUDICIAL COLLEGE, *supra* note 85, at 4.

93. American education, including legal education, bears some responsibility for permitting misinformation, stereotype, and marginalization to persist concerning all matters Native American. That neglect may take generations of faculty and students to change.

94. See Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1461-65 (1997).

95. *Id.* at 1463-64.

96. *Id.* at 1461.

97. *Id.* at 1462.

98. PL-280 is a federal enactment transferring jurisdiction over both criminal and civil tribal matters to state courts in a handful of mostly Western states. In this area of robust tribal courts and lawmaking, the law is considered outdated. Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2006), 25 U.S.C. §§ 1321-1326 (2006), 28 U.S.C. § 1360 (2006)).

99. Kansas has its own statute providing for concurrent jurisdiction. Kansas Act, 18 U.S.C. § 3243 (2006).



tribal law questions have arrived in state, rather than federal, courtrooms.<sup>100</sup> Two cases, one in New Mexico and one in Arizona, involved suits in state court for contract claims and counterclaims arising out of an automobile purchase on state territory, followed by a repossession on tribal land.<sup>101</sup> In one, the New Mexico Supreme Court remanded the case back to the state trial court to determine whether choice of law principles required the application of Navajo Nation statutes.<sup>102</sup> In the other, the Arizona Court of Appeals observed that comity might otherwise call for the application of tribal law, but that the parties had expressly chosen Arizona law to govern any dispute under the terms of their agreement.<sup>103</sup>

Using the South Dakota Supreme Court's decision in *Risse v. Meeks*, Professor Florey describes the unique problems that territorial contacts can raise in choice of law questions in Indian country.<sup>104</sup> In that case, a non-Indian plaintiff sued Oglala Sioux citizens for trespass by cattle, and sought punitive damages for failure to construct a fence.<sup>105</sup> While the trespass occurred on state lands, the missing fence would have been a fixture attached to a tribal allotment.<sup>106</sup> Thus state law would apply to the underlying claims, but tribal law would ostensibly apply to the punitive damages issue. Rather than apply tribal law as a choice-of-law matter, the court decided that it would be more proper to abstain and allow the tribal court to handle it.<sup>107</sup>

Professor Florey also considers the major concerns scholars have raised about the use of tribal law in state courts, concluding that they should not necessarily raise a bar to the practice. First, tribal law scholars voice concern that non-Indian courts may misunderstand tribal law that is based on different cultural norms or legal philosophies.<sup>108</sup> However, many tribal law issues concern matters so internal, such as causes of action purely under the tribal code, that they would never be filed in state court.

Second, given the Supreme Court's drastic erosion of tribal jurisdiction, particularly over non-Indian persons, it is fair to wonder whether it would also restrict the application of tribal law to non-Indians in state court matters.<sup>109</sup> Professor Florey points out that there is no current legal impediment: as long as the choice-of-law methodology satisfies Due Process, it should not matter what jurisdiction's law is being applied: the law of another state, the federal government, a tribe, or a foreign nation in the international sense.<sup>110</sup> Professor Florey notes that although *Strate v. A-I*

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100. Katherine J. Florey, *Choosing Tribal Law: Why State Choice-of-Law Principles Should Apply to Disputes with Tribal Contacts*, 55 AM. U. L. REV. 1627, 1665-71 (2006).

101. See *Tempest Recovery Servs. v. Belone*, 74 P.3d 67 (N.M. 2003); *Brown v. Babbitt Ford, Inc.*, 571 P.2d 689 (Ariz. Ct. App. 1977).

102. *Tempest Recovery*, 74 P.3d at 71.

103. See *Brown*, 571 P.2d at 695.

104. Florey, *supra* note 100, at 1669, citing *Risse v. Meeks*, 585 N.W.2d 875 (S.D. 1998).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 1694.

109. See Florey, *supra* note 100, at 1676-77.

110. See *id.* at 1677-79. The essential due process provisions of the United States Constitution's Bill of Rights apply to Indian nations through the Indian Civil Rights Act, 25 U.S.C. § 1302(8) (2006).

*Contractors*<sup>111</sup> and *Montana v. United States*<sup>112</sup> are tremendously restrictive in terms of tribal jurisdiction, they contain no express ruling that tribal law cannot govern “nonmembers whose conduct has an effect on the well-being of tribes.”<sup>113</sup> The language of PL-280 itself contemplates the application of tribal law as it becomes more prolific over time. It provides that tribal law will be given “full force and effect” in civil causes of action “if not inconsistent with any applicable civil law of the state.”<sup>114</sup> As Florey and others caution, the language sounds very pro-tribal law, but has not been interpreted to a significant degree, and will depend greatly upon whether “inconsistency” with state law is given a broad or narrow reading.<sup>115</sup>

Third, just because PL-280 commands that states have civil, as well as criminal jurisdiction over suits arising in Indian country, this does not mean that those state courts cannot apply tribal law.<sup>116</sup> In *Bryan v. Itasca County*, a case decided in 1976, before the Supreme Court took a more decidedly anti-tribal turn,<sup>117</sup> the Court rejected Minnesota’s attempts to tax a Chippewa reservation resident, holding that PL-280 was designed not to subject tribes to states’ “full panoply of [state] regulatory powers,” but rather merely to provide a forum for “resolving private legal disputes between reservation Indians, and between Indians and other private citizens.”<sup>118</sup>

Similar tribal issues have also arisen in Oregon and in other New Mexico cases. In *Warm Springs Forest Products*, the Oregon Supreme Court, like the Arizona Supreme Court in *Brown*, ultimately decided that the contract terms had selected Oregon law, but the court was willing to address tribal law as the other viable candidate.<sup>119</sup> Two additional New Mexico cases, *Begay* and *Chischilly*, address automobile repossession cases. In consistent decisions from the Court of Appeals and Supreme Court, respectively, it was held that where the vehicle was repossessed on the Navajo Reservation, Navajo law applied,<sup>120</sup> and where it was repossessed off the reservation, Navajo law was inappropriate.<sup>121</sup>

One particularly striking example of tribal law in state court comes from the highly publicized banishment case in the Washington Courts.<sup>122</sup> In that case, two minor citizens of Tlingit community robbed and brutally assaulted a pizza delivery driver in Washington State.<sup>123</sup> At the behest of a tribal elder, the state juvenile court judge was

111. 520 U.S. 438 (1997).

112. 450 U.S. 544 (1981).

113. Florey, *supra* note 100, at 1680.

114. *Id.* at 1683.

115. *Id.*

116. *Id.* at 1680.

117. *See, e.g., Fletcher, supra* note 24.

118. Florey, *supra* note 100, at 1681. *quoting Bryan v. Itasca County*, 426 U.S. 373, 383, 388 (1976).

119. Katherine C. Pearson, *Departing from the Routine: Application of Indian Tribal Law under the Federal Tort Claims Act*, 32 ARIZ. ST. L.J. 695, 717 (2000) (citing *Warm Springs Forest Prods. Indus. v. Employee Benefits Ins.*, 716 P.2d 740 (Or. 1986)).

120. Pearson, *supra* note 119 (citing *Begay v. First Nat’l Bank of Farmington*, 499 P.2d 1005 (N.M. Ct. App. 1972)).

121. Pearson, *supra* note 119, (citing *General Motors Acceptance Corp. v. Chischilly*, 628 P.2d 783 (N.M. 1981)).

122. JENNIFER A. HAMILTON, *INDIGENITY IN THE COURTROOM: LAW, CULTURE, AND THE PRODUCTION OF DIFFERENCE IN NORTH AMERICAN COURTS* 7-23 (2009).

123. *Id.* at 7.

willing to consider the traditional tribal remedy of banishment in an effort to accommodate the tribal court's emphasis on reconciliation.<sup>124</sup> The case was not on appeal from tribal court — only the federal trial courts can hear appeals from tribal court, and even then, the appeals concern federal questions of law and tend to completely defer to tribal courts on interpretations of their purely internal law.<sup>125</sup> Because the case was not on review, it actually represents a very unique and promising experiment in tribal-state court cooperation that resulted in some success but also some failure.<sup>126</sup>

Tribal law questions typically come into federal court by three paths: by diversity or collateral attack of a tribal jurisdiction under the tribal exhaustion doctrine,<sup>127</sup> or through the Federal Tort Claims Act ("FTCA"). Professor Pearson cites two examples from the District of New Mexico. In *Cheromiah v. United States*, the federal trial court was the first to adopt tribal law as the law of the place under the FTCA, and rejected a stricter interpretation that would limit the "law of the place" as requiring state, rather than tribal law.<sup>128</sup> Because the harm in this medical malpractice action occurred at a federally operated Indian Health Service hospital on the Acoma Pueblo's reservation, Acoma Pueblo law applied.<sup>129</sup> In contrast, the same court rejected tribal law as a plausible "law of the place" under the FTCA, but, if federal choice-of-law rules dictated New Mexico choice of law principles, the court conceded that New Mexico's choice of law rules might permit the application of tribal law even if the FTCA itself did not.<sup>130</sup>

In two controversial Ninth Circuit cases, it was recognized that the federal courts could enforce tribal law when a tribe sues a non-Indian under a tribal ordinance.<sup>131</sup> In that situation, the jurisdiction is not based on tribal territory but on the defendant's lack of Indian status.<sup>132</sup> The cases were controversial for a number of reasons, including the problem that their federal question jurisdiction appeared to rest only upon an anticipated defense, and not upon a well-pleaded, federal claim in the complaint itself.<sup>133</sup> Of greater concern for purposes of this article is the potential for erosion of tribal sovereignty and tribal courts.<sup>134</sup>

The preceding examples represent the unusual cases, but a number of contemporary factors promise to bring tribal issues to state and federal forums much more frequently.<sup>135</sup> They include, but are not limited to, tribal economic development,<sup>136</sup> devolution of federal services to the states, tort claims resulting from entertainment and services provided on tribal lands, and the prolific renaissance in tribal

124. *Id.*

125. *Id.*

126. *Id.* at 7-23.

127. Clinton *supra* note 37.

128. Pearson, *supra* note 119 (citing *Cheromiah v. United States*, 55 F. Supp. 2d 1295, 1302 (D.N.M. 1999)).

129. *Id.*

130. *Id.* at 737 (citing *Louis v. United States*, 967 F. Supp. 456 (D.N.M. 1997)).

131. Julie A. Pace, Note, *Enforcement of Tribal Law in Federal Court: Affirmation of Indian Sovereignty or a Step Backward Toward Assimilation?*, 24 ARIZ. ST. L.J. 435, 454-59 (1992).

132. *Id.* at 456 (citing *Chilkat Indian Village v. Johnson*, 870 F.2d 1469, 1474 (9<sup>th</sup> Cir. 1989)).

133. *Id.*

134. *See id.* at 465-67.

135. *E.g.* Florey *supra* note 100, at 1690.

136. *E.g. id.*

codification, written tribal court decisions,<sup>137</sup> and digitization of primary tribal law.<sup>138</sup> Regarding the FTCA claims, Professor Katherine Pearson noted the potential scope of medical malpractice litigation for Indian Health Service treatment in Indian Country (as opposed to non-reservation, urban areas) given that IHS serves about 1.5 million people and has an annual budget over \$2 billion.<sup>139</sup>

A recent development in New York-Australian court relations shows that a third approach is possible: the development of inter-sovereign memorandums of understanding for consultation on foreign law.

Just recently, the New York courts signed an historic memorandum of understanding with the high court in Australia's New South Wales province. Rather than a formal, international variety of certification, panels of judges in each jurisdiction will volunteer non-binding, advisory assessments of their domestic law as a service to the foreign court.

The agreement may face some obstacles to implementation, including the often-ignored federal constitutional prohibition against states' agreements with foreign governments, as well as the constitutional preclusion of judicial branch advisory opinions. Despite these challenges, the path-making agreement is being lauded as a very positive step from a policy standpoint. Because New York is an international center for business law and business disputes resolved in foreign courts often apply New York law as the contractual choice of law, the new consultation system promises to promote consistency and also to save litigants time and money. The state-tribal relationship has similar constitutional restraints but also holds similar promise for increased efficiency, and, much more importantly, increased recognition and respect for tribal courts and the tribal laws they enforce.

#### *Cooperation to Enforce Tribal Court Orders*

Tribal advocates argue strenuously that federal and state courts should apply full faith and credit to tribal court orders rather than mere comity-based principles. Remarkably, however, tribal courts rarely grant full faith and credit to one another, preferring comity instead.<sup>140</sup> Most tribal courts hold the power to view foreign tribal court orders under the more discretionary principles of comity as an important expression of their own tribe's sovereignty.<sup>141</sup> For example, the Navajo Nation Court of Appeals agreed with many federal and state jurisdictions when it held that the federal Full Faith and Credit Act could not have contemplated the recognition of tribal court orders — even by other tribes — because their courts, in the contemporary sense, did not exist at the time of enactment.<sup>142</sup> Professor Steven Gunn suggests that the ongoing federal assault on tribal jurisdiction may have helped to foster an atmosphere in which individual tribes' protection of their own sovereignty has had to become more important

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137. Pearson *supra* note 119, at 706.

138. Florey *supra* note 100, at 1692.

139. Pearson *supra* note 119, at 699-700.

140. Steven J. Gunn, *Compacts, Confederacies, and Comity: Intertribal Enforcement of Tribal Court Orders*, 34 N.M. L. REV. 297, 304 (2004).

141. *See id.*

142. *Id.* at 304 (discussing *In re Guardianship of Chewiwvi*, 1 Navajo Rprt. 120, 125 (Navajo 1977)).

than the cause of tribal sovereignty and courts generally.

For tribes, the recognition and enforcement of foreign orders involves a diminution of tribal independence and a cession of authority to foreign governments. Naturally, tribes are reluctant to cede any part of their governmental authority, since they have for centuries witnessed the steady erosion of their authority over their territories and their people. “Yet, such a cession of authority, if part of a reciprocal inter-governmental enforcement regime, has the potential to expand the reach of tribal court judgments.”<sup>143</sup>

The tribes’ reluctance to engage each other on the level of full faith and credit may also result from cultural and policy differences, much as it does at the federal-international level.<sup>144</sup> The exceptions to the comity preference are some tribes who have entered into reciprocal agreements for full faith and credit.<sup>145</sup> There are a number of instances in Oklahoma, where a state statute also promises full faith and credit to tribes who offer the state reciprocity.<sup>146</sup> Only a rare few are willing to grant full faith and credit in the absence of reciprocity. Among them is the Cheyenne River Sioux Tribe, which has recognized the promise of inter-tribal full faith and credit to enhance tribal sovereignty through strength-in-numbers by increasing the number of other courts that recognize their power and legitimacy.<sup>147</sup>

*Cooperation to Establish Jurisdiction: The Example of Wisconsin’s Teague Protocol*

*If you can dial the phone, you can do this.*<sup>148</sup>

—The Honorable David Raasch

Before 2005, Wisconsin courts experienced profound failures in their ability to serve residents whose legal matters spanned tribal and state jurisdictional lines. Like so many states rich in Native American communities, Wisconsin judges, and judges in neighboring tribal courts, struggled to trust one another’s competency and vied for control over cases. This was particularly so in cases critical to the public health, safety, and welfare, such as criminal and family matters. All of that changed when one tribal court judge and one state court judge started to talk.

In 1995, Judge David Raasch struck up a conversation with two state court judges over, as he put it during the 2011 *Walking on Common Ground Symposium*,<sup>149</sup> coffee and a sweet roll. One of those judges was the Honorable Edward Brunner of Wisconsin’s intermediate appellate court. Judge Raasch was interested in founding a tribal court at the

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143. *Id.* at 306.

144. *See id.* at 306, 308-09.

145. Gunn, *supra* note 140, at 311, 314.

146. *Id.* at 314-15.

147. Eberhard v. Eberhard, 24 INDIAN L. RPTR. 6059, (Cheyenne River Sioux Tribal Ct. App. 1997); Gunn, *supra* note 140, at 314.

148. David Raasch, Judge, Oral Presentation before the National Tribal Judicial Center, Tribal/State/Federal Judicial Symposium (notes on file with author).

149. *Id.*

Stockbridge-Munsee Community, Band of Mohican Indians.<sup>150</sup> He wanted to collaborate with the state court judges to create half-day joint training for judges. That meeting developed over the next several years into a series of joint trainings that were uncharacteristically well attended by the state judges. In early 2000, the Wisconsin Supreme Court invited area tribal court judges to the state judicial conference and even provided some scholarship assistance to attend. In another year, when drastic budget cuts caused the annual state judicial conference to be cancelled, some tribal courts banded together in an extraordinary act of comity to host the conference at tribal expense. As the relationship continued to develop, the federal government offered funding to continue collaborative initiatives. As individual and institutional bonds strengthened, judges began to call one another to confer over appropriate jurisdiction, not unlike the process described in the Uniform Child Custody Jurisdiction Enforcement Act.<sup>151</sup>

Unsurprisingly, it did not take long for the courts' new culture of cooperation to face its first great challenge. *Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians*<sup>152</sup> involved a dispute between a non-Indian employee and his tribal employer. The courts of both sovereigns desired jurisdiction, and each had a significant stake in the outcome. Very likely due to the improved climate of collaboration within the wider judiciary, the Wisconsin appellate courts took the surprising stance that state courts should exercise comity — “in the spirit of cooperation and not competition”<sup>153</sup> — by conferring to determine jurisdiction according to a set of basic principles. The case had multiple appeals and endured for some time. During its lifetime, these basic principles developed into a set of protocols agreed to by the state courts and five Chippewa bands within Wisconsin. They are now famously called the Teague Protocol,<sup>154</sup> and they have attracted significant positive attention in Indian Country. The Protocol includes a number of factors.<sup>155</sup> Its primary, operative provisions call for a

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150. *Id.*

151. UNIF. CHILD CUSTODY JURISDICTION ENFORCEMENT ACT §101, 9 U.L.A. 66 (1999).

152. 665 N.W.2d 899 (Wis. 2003).

153. *Id.* at 918.

154. See generally Bryan Cahill, *Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians: Bringing the Federal Exhaustion Rule of Tribal Remedies Home to Wisconsin Courts*, 2004 WIS. L. REV. 1291.

155. The Protocol is now codified at Wis. Stat. Ann § 801.54 (West, Westlaw through 2011 Act 119) and lists eleven factors:

(a) Whether issues in the action require interpretation of the tribe's laws, including the tribe's constitution, statutes, bylaws, ordinances, resolutions, or case law.

(b) Whether the action involves traditional or cultural matters of the tribe.

(c) Whether the action is one in which the tribe is a party, or whether tribal sovereignty, jurisdiction, or territory is an issue in the action.

(d) The tribal membership status of the parties.

(e) Where the claim arises.

(f) Whether the parties have by contract chosen a forum or the law to be applied in the event of a dispute.

(g) The timing of any motion to transfer, taking into account the parties' and court's expenditure of time and resources, and compliance with any applicable provisions of the circuit court's scheduling orders.

temporary stay and a conference between judges. The judges' deliberations are sealed from the record. The Protocol also contains a creative tie-breaking mechanism not unlike those commonly found in contract clauses for the selection of a neutral arbitrator or mediator. In the event of a tie, the judges choose a third judge to finally decide the matter.

The Teague Protocol is a remarkable example of comity put into practice. As Judge Brunner described it:

Comity is all about respect for the two sovereigns. It's the development of an idea in the spirit of cooperation. And the recognition that each sovereignty has its own laws and those laws are approved by its people. Comity only works if you accept the differences that each sovereign has and their various legal processes. Comity is supposed to respect and allow for these differences. Foremost, it needs to have due regard for the rights of the citizens of each sovereign.<sup>156</sup>

Although the Teague Protocol is coming under increasing scrutiny from three dissenting justices of the Wisconsin Supreme Court,<sup>157</sup> Judge Brunner's outlook demonstrates the potent rewards that flow when members of the dominant society work to overcome the common fears and stereotypes associated with tribal peoples, communities, and courts.

#### *Cooperation Through Tribal Law Abstention Agreements*

A number of tribal and federal Indian law scholars recommend that states develop an exhaustion or abstention doctrine similar to that used in federal courts, and often with some improvements for the added protection of tribal sovereignty.<sup>158</sup> "[T]ribal court judgments far more frequently will be taken to state courts, rather than federal courts for enforcement, given the jurisdictional limitations of the federal courts . . . ."<sup>159</sup> In a

(h) The court in which the action can be decided most expeditiously.

(i) The institutional and administrative interests of each court.

(j) The relative burdens on the parties, including cost, access to and admissibility of evidence, and matters of process, practice, and procedure, including where the action will be heard and decided most promptly.

(k) Any other factors having substantial bearing upon the selection of a convenient, reasonable and fair place of trial.

See also The Honorable Robert A. Blaeser & Andrea L. Martin, *Engendering Tribal Court/State Court Cooperation*, BENCH & BAR OF MINN., Dec. 2006, [http://www.mnbar.org/benchandbar/2006/dec06/tribal\\_court.htm](http://www.mnbar.org/benchandbar/2006/dec06/tribal_court.htm).

156. Tony Anderson, *State, tribal courts sign jurisdictional agreement*, WISLAWJOURNAL.COM, Aug. 2005, <http://wislawjournal.com/2005/08/03/state-tribal-courts-sign-jurisdictional-agreement/> (last visited Mar. 11, 2012).

157. See Matthew L.M. Fletcher, *Wisconsin Supreme Court Narrowly Reaffirms Discretionary Transfer Statute (Former Teague Protocol)*, TURTLE TALK (July 28, 2011), <http://turtletalk.wordpress.com/2011/07/28/wisconsin-supreme-court-narrowly-reaffirms-discretionary-transfer-statute-former-teague-protocol/>.

158. See Pace *supra* note 131, at 468.

159. *Id.* at 61 (noting that a strong argument exists that the principles of comity to be applied to tribal court judgments may actually rightly be a matter of state law, according to the location in which the federal court sits).

handful of non-PL280 states, some courts now emulate the federal example of abstention or exhaustion for tribal law matters to varying degrees. As in the federal arena, these doctrines are promising and often effective. However, they are not always faithfully followed, and do not always result in greater respect for tribal law, sovereignty, or jurisdiction.

In his 2004 article, Professor Robert Clinton exposes the colonial underpinnings underlying the inception of the federal courts' tribal court exhaustion doctrine.<sup>160</sup> In a series of decisions since the mid-1980s, the federal courts have departed from seemingly settled Supreme Court precedent recognizing Indian nations as something akin to U.S. territories for purposes of applying full faith and credit to their court decisions, rather than merely applying principles of comity.<sup>161</sup> Instead, in *National Farmers Union Insurance Cos. v. Crow Tribe*,<sup>162</sup> the United States Supreme Court ignored its own precedent and began the trend of applying only comity-based principles of recognition to tribal court judgments.<sup>163</sup> Under the *National Farmers Union* line of cases, tribal court judgments and some orders are subject to appellate-like review in the federal district courts when a party collaterally attacks tribal court jurisdiction.<sup>164</sup> "In essence, in *National Farmers Union*, the Court invented precisely the kind of collateral attack on a final judgment of another sovereign that the long controversial writ of habeas corpus provisions of 28 U.S.C. §§ 2241 and 2254 authorize for collaterally attacking state criminal convictions."<sup>165</sup>

Even worse, it does so for civil cases — something that would never happen when a state judgment is collaterally attacked. In that situation, the federal court would have to defer to the state court's assessment of its jurisdiction.<sup>166</sup> The Court's departure from a nearly one hundred year old precedent has resulted in a serious demotion, wherein tribal courts are treated more like foreign international governments rather than as unique sovereigns within the larger domestic, federal system.<sup>167</sup> Since the exhaustion doctrine became law, federal courts have tended to treat the review of tribal court judgments under the rubric of standard of review, in quasi-appellate fashion, reviewing legal determinations *de novo*, even when tribal jurisdiction was decided based on tribal law.<sup>168</sup> As Professor Clinton puts it, "[t]he difference in treatment of the judgment speaks volumes about the levels of cooperation and respect, or lack thereof, between federal and tribal courts."<sup>169</sup>

While the question of whether the federal Full Faith and Credit Act applied, versus mere comity, was not squarely presented to the Supreme Court in these earlier cases, the

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160. See generally Robert N. Clinton, *Comity & Colonialism: The Federal Courts' Frustration of Tribal-Federal Cooperation*, 36 ARIZ. ST. L.J. 1 (2004).

161. *Id.* at 30-58.

162. 471 U.S. 845 (1985)

163. Clinton *supra* note 160, at 30-36.

164. *Id.*

165. *Id.* at 31.

166. *Id.* at 32-33.

167. *Id.* at 30-36.

168. *Id.* at 36.

169. *Id.*



Ninth Circuit's contorted opinion in *Wilson v. Marchington*<sup>170</sup> held that only comity applies.<sup>171</sup> In that case, a Blackfeet tribal member sought to enforce a tribal court judgment for damages in federal district court.<sup>172</sup> The district court assented in an order on summary judgment, holding that the federal act demanded full faith and credit for tribal court judgments, given that the Supreme Court had previously recognized the quasi-territorial status of tribes in this area of procedure.<sup>173</sup> Reading several statutes together, the Ninth Circuit noted that while a number of specialized enactments provide full faith and credit for certain types of tribal court judgments, such as those under the Indian Child Welfare Act, the general Full Faith and Credit Act did not.<sup>174</sup> The Court ignored the fact that the Full Faith and Credit Act was enacted in 1790, before the advent of tribal courts.<sup>175</sup> The jurisprudence supporting the federal tribal court exhaustion doctrine evinces the type of xenophobia inherent in much federal jurisprudence concerning Indian nations, such as the illogical notion that tribal courts should not have jurisdiction over non-Indians acting within tribal territory.<sup>176</sup>

The mere fact that a claim arises in Indian Country, involves Indians, or affects a judgment issued by a tribal court does not create federal question jurisdiction. Thus, final tribal judgments legitimately come into federal courts in one of two ways — either the judgment winner in tribal court seeks enforcement of the judgment in federal court, usually based on diversity jurisdiction, or the judgment loser wins the race to the federal courthouse door and challenges the jurisdiction of the tribal court under the federal common law cause of action [for the collateral attack of tribal court judgments] first recognized in *National Farmers Union*.<sup>177</sup>

#### *Cooperation Through Certification of Questions of Law*

Some scholars have offered certification as one vehicle for reducing concerns about the proper application of tribal law in other sovereigns' courts.<sup>178</sup> Certification has been promoted by the Uniform Law Commission and others as a much more efficient way to seek assistance from another sovereign court's jurisdiction in determining questions of law. For example, *Pullman* abstention in the federal courts requires the federal litigation to be delayed while the parties pause — perhaps even for years — to let state law questions play out in the state arena before returning to federal court to finally resolve the dispute.<sup>179</sup> Certification is typically adopted by statute and/or court rule,

170. 127 F.3d 805 (9th Cir. 1997).

171. Clinton, *supra* note 160, at 44.

172. *Id.* at 39-40.

173. *Id.* at 40.

174. Clinton, *supra* note 160, at 42-43.

175. *Id.* at 42.

176. *Id.* at 52, 58.

177. *Id.* at 58.

178. Florey, *supra* note 100, at 1693; *see also* Pearson, *supra* note 119, at 741-72 (arguing that certification remains the best way to recognize a tribe's interest in the litigation). *See* Pearson, *supra* note 119 at 744; Carol Tebben, *Trifederalism in the Aftermath of Teague: The Interaction of State and Tribal Courts in Wisconsin*, 26 AM. INDIAN L. REV. 177, 185 (noting that certification would allow tribes to decide matters that directly affect their own sovereignties); Pace, *supra* note 131, at 467-68.

179. *E.g.* David Roebuck, *A Practical Means for Clarifying State Law*, 18 JUST. SYS. J. 305, 305 (1996); *see also* R.R. Comm'n of Tex. v. Pullman, 61 S.Ct. 643, 645 (1941).

depending on state constitutional requirements.<sup>180</sup> The great majority of states have adopted a certification statute for interaction with the federal courts, many relying on the language of the Uniform Certification of Questions of Law Act (“Uniform Act”).<sup>181</sup> The Uniform Act permits the court receiving a certification request to reformulate the question or even refuse to respond.<sup>182</sup> Courts’ response rates vary, from about ninety percent in the Eleventh Circuit, to just over thirty percent in the Tenth.<sup>183</sup> Even at the lower end of the scale, the response rate is rather high.<sup>184</sup>

One critic of the certification process argues that it unduly favors the federal courts at the expense of the states.<sup>185</sup> Professor Justin Long notes that the system permits federal judges to delegate the dirty work of unraveling sometimes tedious state private law questions, such as insurance regulation, to the state courts rather than reserving certification for truly public questions, such as constitutional interpretation.<sup>186</sup> Professor Long cites persuasive examples of the certification of some rather ordinary questions, as well as unguarded comments from federal judges suggesting offense at a refused question, or that the state judiciary lacks the caliber of the federal judiciary.<sup>187</sup> The most troublesome example may be similar comments made in a Fifth Circuit opinion and from former Chief Justice Rehnquist, each revealing that they view certification as a way for state courts to be of “help” or “aid” to the federal courts.<sup>188</sup> While it is doubtless they were well-meaning, such comments arguably place state courts in an inferior role, even where questions of their own state laws are concerned.<sup>189</sup> Further evidence of an imbalance comes from the fact that in many states, answers to certified questions become binding on state courts, but are often treated as advisory to the federal court deciding the case.<sup>190</sup> In contrast, Professor Cochran’s study of the history of certification in Ohio state and federal courts shows that comity usually results in respect for the state court’s opinion, with only one exception.<sup>191</sup>

In addition to concerns that certification lowers the state courts in the eyes of the federal judiciary, Professor Long notes that the certification model itself belies an outdated notion of dual sovereignty, when cooperative or interactive theories of federalism are more contemporary and thus better accepted.<sup>192</sup> He contends that federal

180. UNIF. CERTIFICATION OF QUESTIONS OF LAW [ACT] [RULE] Prefatory Note (1967).

181. Richard Alan Chase, Note, *A State Court’s Refusal to Answer Certified Questions: Are Inferences Permitted?*, 66 ST. JOHN’S L. REV. 407, 409 (1992). The plain language of the Uniform Act can be found at Roebuck, *supra* note 179, Appendix 2.

182. UNIF. CERTIFICATION OF QUESTIONS OF LAW [ACT] [RULE] §§ 3, 4, (1995).

183. UNIF. CERTIFICATION OF QUESTIONS OF LAW [ACT] [RULE] Prefatory Note (1995).

184. *Id.*

185. See generally Justin R. Long, *Against Certification*, 78 GEO. WASH. L. REV. 114 (2009) (offering several reasons why certification may lower the esteem of state law and courts versus the federal).

186. *Id.* at 128-30.

187. *Id.* at 125-26.

188. *Id.* at 126-27.

189. See *id.* at 125-27.

190. Long, *supra* note 185, at 140.

191. Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. LEGIS. 157, 207-08 (2003).

192. Long, *supra* note 185, at 148-50; see also Clark, *supra* note 94, at 1461-62 (observing that *Erie* described federalism in somewhat exclusive terms, emphasizing that “whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.”

courts should stop viewing state law as something inscrutable, exotic, and thus outside of its purview.<sup>193</sup> He advises federal and state courts to reserve certification only for those rare occasions when no positive state law exists from which the federal court could fashion a cogent analysis.<sup>194</sup> Thus, his conclusion is not necessarily that certification should be abandoned, but that it should be employed only under severe conditions, such as a lack of positive law where no other interpretive methods will suffice, or where the federal court has exclusive jurisdiction and the state court will never likely have an opportunity to address the questions, such as in bankruptcy matters.<sup>195</sup>

Here, what may result in a persuasive argument against certification in the state-federal context might then actually favor tribal courts, whose national governments are indeed separate sovereigns and generally have had to fight very hard to protect and promote their inherent sovereignty in the eyes of the federal government and fifty states. If the criticism is that certification treats state law too much like “foreign law” with unduly mysterious qualities,<sup>196</sup> then certification may have the potential to increase esteem and recognition of the tribes’ quasi-foreign status, regardless of their colonial status as domestic dependent nations.

Application of tribal law may foster a greater sense of cooperation between tribal and state courts, permitting state courts a basic understanding of tribal procedures that may help reduce suspicion and miscommunication when the state court is asked to grant full faith and credit to tribal judgments or stay its proceedings in favor of a related suit in tribal court. Such cooperation is likely to become increasingly important as tribes’ economic well-being becomes more and more dependent on finding fair and efficient ways to resolve cases that span reservation boundaries. Both parties’ interests are served when the judicial system as a whole is able to minimize opportunities for forum-shopping and inconsistent results.<sup>197</sup>

Despite their initial recognition on an international, sovereign-to-sovereign level in the treaty-making era, the crushing reality of colonial, imperial domination has demoted tribes to the status of “domestic dependent nations” by unilateral imposition of United States law.<sup>198</sup> Tribal nations are subject to Congressional plenary power, a loss of jurisdiction in a number of areas, and other forms of federal regulation, sometimes benign, but more often destructive. Nevertheless, the tribes retain political and cultural sovereignty over a wide range of internal legal matters and persons — and should arguably have power over much more.

If it is true that federal courts sometimes have a tendency to treat state law as foreign in the inscrutable and exotic sense, then how foreign must tribal law seem where the cultural differences that lend to varying legal interpretations are not merely regional aspects of the same, dominant, Anglo-American culture, but truly ethnically distinct

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(quoting *Erie Ry. Co. v. Tompkins*, 58 S. Ct. 817, 822 (1938)).

193. Long, *supra* note 185, at 169.

194. *Id.* at 169.

195. *Id.* at 167.

196. *Id.*

197. Florey, *supra* note 100, at 1691; *see also* Long, *supra* note 185, at 153-57.

198. Clinton, *supra* note 160, at n.48 (quoting Chief Justice Marshall in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831)).

communities with views that sometimes — but certainly not always — deviate meaningfully from those of the dominant society? Professor Gloria Valencia-Weber points to the example of differing tort standards used in some tribal jurisdictions. Some tribes have codified a “carelessness” standard that looks like negligence but contains nuanced differences.<sup>199</sup> The legacy of centuries of colonization, assimilation, suppression, removal, and even genocide have led to “centuries of reasons for distrust of ‘federal’ decisions affecting [tribal] members, thus increasing the importance of getting it right.”<sup>200</sup>

On the other hand when considering whether to adopt a certification system, the stakes for tribal courts and the communities they represent are much greater and the hostility from the other two sovereigns infinitely more severe.<sup>201</sup> In states with existing exhaustion and abstention doctrines, the ability to certify questions to tribal courts may very well come to be seen as an easy and inexpensive way around those practices, even when the tribal court has competent jurisdiction and the exercise of that jurisdiction is important to protecting tribal sovereignty. Abstention currently affords tribal courts the most control over how their law will be used in other courts. Under such a scheme, if certification turns the answering court into a helper of the “elite” state or federal court, tribal courts might be relegated to the role of judicial law clerk. And if, as Professor Long argues, some judges truly do take personal offense at another court’s refusal to answer, will a tribal court’s exercise of tribal sovereignty to refuse that question result in even worse hostility?<sup>202</sup> Rather than attempting to make a blanket recommendation, these are questions each tribal nation must address for itself, taking into account such intimate, local factors as the strength of relationships between individual tribal and state court judges, the success of other efforts at cooperation with state agencies, support in the state legislatures for tribal initiatives, and so on.

Under the Uniform Act, states have the power to choose which courts may send questions to their high courts.<sup>203</sup> For example, although the proposed language is generous, some may choose to omit federal trial court questions and accept questions only from the federal circuit courts and Supreme Court.<sup>204</sup> Surprisingly, although the Uniform Act contains optional provisions for certifications from tribal courts, only three states have adopted those provisions: Arizona, Oklahoma, and Maryland.<sup>205</sup> Many of the other states, rich with robust tribal courts, are conspicuously absent, such as New Mexico, Washington, the Dakotas, Michigan, New York, and so on. It is perhaps telling that the largest states in the Union have chosen the most restrictive provisions of the Uniform Act, including California, Illinois, New Jersey, New York, Pennsylvania, and

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199. Valencia-Weber, *supra* note 74, at 255-56; *see also* Florey, *supra* note 100, at 1690 (observing state courts’ lack of understanding of the “cultural and procedural background” of issues in a case).

200. Pearson, *supra* note 119, at 744.

201. *See* Fletcher, *supra* note 6.

202. *See* Long, *supra* note 185, at 125-26.

203. UNIF. CERTIFICATION OF QUESTIONS OF LAW [ACT] [RULE] § 8 (1967).

204. Chase, *supra* note 181, at n.5 (citing Richard Alan Chase, Note, *New York’s Certification Procedure: Was it Worth the Wait?* 63 ST. JOHN’S L. REV. 539, 545 n.26).

205. *See* ARIZ. REV. STAT. § 12-1861 (2002); MD. CODE ANN., CTS. AND JUD. PROC. § 12-603 (West 1996); OKLA. STAT. ANN. tit. 20 § 1601.2 (West 2010).

Texas.<sup>206</sup> A number of jurisdictions also have provisions for intra-jurisdictional certification.<sup>207</sup> For example, federal circuit courts of appeal have the ability “on paper” to certify questions to the United States Supreme Court but have been reluctant to do so because the Supreme Court has been so discouraging of the practice.<sup>208</sup>

Despite initial concerns that the process would prove burdensome or even abusive, at least one survey of the judiciary has determined that judges in both the federal and state systems overwhelmingly feel that state judges are better equipped to interpret complex and novel issues of state law than federal judges.<sup>209</sup> Of the state and federal judges surveyed, one hundred percent felt that federal judges were not more qualified than state judges to determine state law.<sup>210</sup> On the contrary — even among federal judges, eighty five percent of district court judges and ninety percent of circuit court judges felt that the state judges would be more qualified to answer such difficult questions.<sup>211</sup>

Given the aggressive stance that federal courts so often display in matters of jurisdiction, one might presume that the results would be less favorable when it comes to the better qualification of tribal judges to determine tribal law. However, at least in the federal trial and circuit courts, judges faced with tribal court exhaustion issues (not certification, which has not been presented to them as an issue), use language suggesting a strong agreement that the tribal courts are much better qualified to address their own legal issues.<sup>212</sup> The language even goes so far as to show a strong reluctance to even consider tribal legal questions, regardless of their simplicity or complexity, preferring to rely upon the exhaustion doctrine to ensure that tribal courts create a record for review in federal district court.<sup>213</sup>

In the same study, a majority of judges (65%) felt certification was far more economical for the parties and the court than the abstention process.<sup>214</sup> When the judges did express concern, it was not over the nature of the certification process itself, but over the narrower question of whether courts should be permitted to certify questions that only “may” be determinative, as opposed to questions that are already known to be determinative in the underlying case.<sup>215</sup> In addition to efficiency and accuracy, one of the benefits of the certification is to promote federal courts’ respect for state sovereignty.<sup>216</sup>

Judge Bruce Selya of the United States Court of Appeals for the First Circuit has roundly criticized certification and challenged most of its long-unquestioned premises.<sup>217</sup> Calling certification out as a “sacred cow in our modern judicial barnyard,”

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206. Cochran, *supra* note 191, at 167.

207. *Id.* at 171-72 (discussing the Ohio and federal schemes for internal certification).

208. *Id.* at 172.

209. Roebuck, *supra* note 179, at 306, 309-10.

210. *Id.* at 309-10.

211. *Id.* at 310.

212. *Navajo Nation v. Intermountain Steel Bldgs., Inc.*, 42 F. Supp. 2d 1222, 1228 (D. N.M. 1999)

213. *Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985).

214. Roebuck, *supra* note 179, at 308-09.

215. *Id.* at 310-11.

216. Chase, *supra* note 181, at 415-16.

217. See generally Hon. Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .*, 29 SUFFOLK U. L.

Judge Selya notes that certification has not fulfilled its promise of promoting cooperative federalism among the courts.<sup>218</sup> He also characterizes it as a newcomer on the federal judicial scene since it was first pressured upon the Fifth Circuit by the Supreme Court in *Clay v. Sun Insurance Office Ltd.*<sup>219</sup>

Among other criticisms, such as the fact that certified questions do not truly present a full case or controversy, Judge Selya observed that the process itself is not genuinely cooperative and does not truly protect state sovereignty over the determination of state law.<sup>220</sup> First, while the vast majority of states have certification procedures in place for federal courts, less than half have similar procedures for accepting questions from courts in sister states.<sup>221</sup> According to Judge Selya, this disparity shows that certification results from the states' perception that federal courts pose a threat, and that certification will somehow "keep the gorilla caged."<sup>222</sup> But "if the federal judiciary really is regarded as an 800-pound gorilla, certification is exactly the wrong device for keeping the beast at bay."<sup>223</sup> States have no control over what questions are certified — their only control concerns which questions they refuse.<sup>224</sup> Thus it is merely "cooperation by way of the gorilla's benevolence."<sup>225</sup>

Second, Judge Selya points out the obvious flaw that the process is not reciprocal.<sup>226</sup> If it were genuinely cooperative, states would also be able to certify questions to the federal courts.<sup>227</sup> This argument lends credence to Professor Long's critique that federal courts tend to view the certification process as a manner of engaging the state judiciary as their inferiors to do their dirty work.<sup>228</sup> Finally, Judge Selya and Professor Long also agree that state courts are equally important players in the process of enforcing federal law, and that the certification process suggests that neither court should outright engage in developing the laws of the other.<sup>229</sup> Because federalism ensures that neither can dictate the law of the other with finality, the risks are reduced to some loss of consistency — something that is not promised to litigants in the Anglo-American jurisprudential system in any event.<sup>230</sup> Under this system then, certification destroys the reciprocal parity that federal and state courts should enjoy in their ability to decide — or at least predict — questions involving each other's law.<sup>231</sup>

Professor Cochran's study of the Ohio certification experience partly bears out the

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REV. 677 (1995).

218. *Id.* at 678.

219. *Id.* at 680; 363 U.S. 207 (1960).

220. Selya, *supra* note 217, at 682-84.

221. *Id.* at 683.

222. *Id.*

223. *Id.*

224. *Id.*

225. Selya, *supra* note 217, at 683.

226. *Id.* at 684-85.

227. *Id.*

228. Long, *supra* note 185, at 130-31.

229. Selya, *supra* note 217, at 687; *see* Long, *supra* note 185, at 153-54.

230. Selya, *supra* note 217, at 687, 690-91. Judge Selya points out that even if the federal court gets the state law wrong, a litigant in state court might have exactly the same problem when the state's highest court exercises its discretion to deny review. *Id.* at 690-91.

231. Cochran, *supra* note 191, at 159.

critics' concerns that the need for certification is overstated and the risks to law development are too great, at least in the state-federal context.<sup>232</sup> First, the fears of inaccuracy and unreliability in federal court predictions of state law questions are small in comparison to the other types of uncertainty inherent in American courts, which were ably described above by Judge Selya.<sup>233</sup> Professor Cochran agrees that the benefits of federal judicial contributions to state law development far outweigh those risks.<sup>234</sup> Second, the notion that state court judges have a particular expertise in state law that cannot be obtained by federal judges does not seem to have much support in reality, especially considering the political reality that federal judges in a given jurisdiction tend to be promoted from the ranks of state court judges and practitioners.<sup>235</sup>

Finally, the third oft-touted benefit of certification is that it saves time and money for litigants and courts. While this may be true in some instances, the Ohio example shows that delays can still be significant, averaging about one year in that system, and that courts and litigants often opt for other solutions, such as abstention—the very process that certification was designed to ameliorate by providing a more efficient alternative.<sup>236</sup> Professor Cochran recognizes that the process still can play a valuable role in the system, but it is one that should be played even less frequently and with better quality control.<sup>237</sup>

#### *Cooperation Through Memoranda of Understanding*

One of the most recent, powerful trends in relationships between tribes and other domestic governments is the growing trend in tribal consultation requirements. In November 2000, President Clinton issued an executive order mandating every federal agency to consult with tribes on matters having “substantial direct effects” on one or more tribes.<sup>238</sup> In order to ameliorate some of the abuses of the past, the President promulgated the policy to “establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes.”<sup>239</sup>

Even today, advocates for tribal interests consider the policy toothless because it does not require the agencies to actually take tribal responses into consideration;<sup>240</sup> the agencies are only required to follow federal law and policy.<sup>241</sup> Almost exactly nine years

232. *See id.* at 210, 215-16

233. Selya, *supra* note 217, at 690-91.

234. Cochran, *supra* note 191, at 210-13.

235. *Id.* at 213-16.

236. *Id.* at 216-17.

237. *Id.* at 220-21.

238. Exec. Order No. 13175, 65 Fed. Reg. 67249, 67249, 67250 (November 6, 2000).

239. *Id.* at 67249.

240. *But see* Gabriel S. Galanda, *Galanda: The federal Indian consultation right: No paper tiger*, INDIAN COUNTRY TODAY MEDIA NETWORK (Dec. 6, 2010), <http://indiancountrytodaymedianetwork.com/ictarchives/2010/12/06/galanda-the-federal-indian-consultation-right-no-paper-tiger-81452> (observing that President Obama has taken steps to strengthen the enforcement of the consultation requirement in all federal agencies).

241. Derek C. Haskew, *Federal Consultation with Indian Tribes: the Foundation of Enlightened Policy*

later, President Obama signaled a renewed intention to enforce the consultation requirement when he issued a presidential memorandum requiring the head of every federal agency to develop a formal plan for consultation within ninety days, to be followed by annual reports in perpetuity.<sup>242</sup> In the federal regulatory arena, tribal-federal consultation may only consist of a short meeting in which the tribal council is simply notified of the federal government's intended action and given an opportunity to respond.<sup>243</sup> They confer no real rights other than, at times, an expectation of the consultation itself.<sup>244</sup> As such, the process has been fraught with disappointments and other not-so-subtle effects of drastically disproportionate situated power, including anti-Indianism.<sup>245</sup>

The notion of a required tribal consultation is much older than the policies of the Clinton and Obama administrations. It has its roots in the treaty-making era, when the United States and the many Indigenous nations formed agreements on what was at least purported to be an arm's length basis.<sup>246</sup> It has further roots in the centuries-old federal trust responsibility owed by the United States to the tribal nations.<sup>247</sup>

Despite its fame for setting a positive example to jurisdictions around the globe, the historic New York-New South Wales agreement had a very pragmatic genesis. New York is a center of world trade, and many international business contracts include a choice of law clause selecting New York.<sup>248</sup> Those contracts are often litigated in foreign courts, which must interpret and apply New York law as foreign law.<sup>249</sup> In Australia, a question of foreign law is "'a question of fact of a peculiar kind.'"<sup>250</sup> While foreign law determinations are unquestionably "legal" in nature and determined by the court rather than the jury, Australian advocates prove foreign law through a battle of expert witnesses.<sup>251</sup> As a result, proving foreign law tends to become rather expensive and time-consuming.<sup>252</sup> Moreover, some litigants had to resort to using Australian lawyers as witnesses, which led to concerns for accuracy.<sup>253</sup> After New South Wales formed a similar consultation agreement with Singapore's courts, New York and New South Wales reached their accord.<sup>254</sup>

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*Decisions, or Another Badge of Shame?*, 24 AM. INDIAN L. REV. 21, 26-27 (2000), quoting Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 ENVTL. L. 733, 749 (1995).

242. Presidential Memorandum on Tribal Consultation (Nov. 5, 2009), available at <http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president>.

243. Haskew, *supra* note 241, at 23-24.

244. See *id.* at 71-72.

245. *Id.* at 24, 55-59.

246. *Id.* at 29-31.

247. *Id.* at 31.

248. Thomas H. Lee, *State Court to Exchange Guidance With a Foreign One*, N.Y. TIMES, CITY ROOM (Oct. 29, 2010, 1:42 PM), <http://cityroom.blogs.nytimes.com/2010/10/29/state-court-to-exchange-guidance-with-a-foreign-one/>.

249. *Id.*

250. James McComish, *Pleading and Proving Foreign Law in Australia*, 31 MELB. U. L. REV. 400, 415 (2007) quoting *Parkascho v Singh* [1968] P 233, 250 (Austral.).

251. *Id.* at 416.

252. Lee, *supra* note 248.

253. *Id.*

254. *Id.*



## WE HAVE EVERYTHING BEFORE US: CONCLUSIONS

Tribal courts can promote and protect sovereignty by engaging states on a government-to-government basis to determine the best ways to acknowledge and apply each other's law. No one approach is necessarily the best for a single tribe or even a single situation, and all are subject to abuses, particularly where maligned and threatened tribal courts are concerned. The best foundation for a successful collaboration, while lowering the risks to tribal sovereignty, is to form lasting relationships of trust between courts and especially among individual judges and staff. Even when a solution is reached that "looks good on paper" and seems truly to promote comity and esteem for tribal institutions, to what effect those solutions are used will depend on sentiments of trust and respect developed between people.

One of the best vehicles for developing such relationships in a professional context is the state judicial conference, where state, tribal, and federal judges can meet, communicate about shared issues, and educate one another about underlying values, policies, and administrative matters. It is particularly important for the tribal judiciary to meet and be heard in this face-to-face type of contact, as the myths, fears, ignorance, and even disregard of tribal courts run rampant among those who lack information or who believe stereotypes and biased images such as the "rich Indian" stereotype resulting from the gaming explosion.<sup>255</sup> Once those relationships are established, or at least underway, helpful vehicles for judicial cooperation and communication include abstention, certification, and consultation.

As for discrete examples of cooperative arrangements for ascertaining and applying tribal law in the state context, the option that appears to offer the best protection to tribal sovereignty is the development of a tribal court abstention doctrine like the one used at the federal level. An abstention doctrine encourages the proliferation of tribal courts and a rich tribal docket by allowing tribal courts to develop records and to declare their own laws to the states in the process. Where the model should diverge from the federal; however, is in the treatment of abstention as a quasi-appellate process. The federal courts should not be viewed by federal judges or others as part of the path of appeal from a tribal court decision on a tribal law issue, and nor should the state courts. In the Anglo-American aspects of the United States multi-sovereign court system, appeal can be had from a state's high court to the United States Supreme Court on a federal issue, but not a state issue.

Despite the lack of parity between state and federal courts, the same is not true for the review of state law decisions from the United States Supreme Court to a state's highest court. Tribal law decisions should appear under evaluation in state court only as a matter of enforcement under the principles of full faith and credit or comity, or as a matter of collateral attack based on proper jurisdiction. In the latter event, simultaneous actions in state and tribal court should be deferred to the tribal court where tribal legal issues arguably exist, and once the matter resumes in state court, the tribal court's determination of jurisdiction under its own laws should be given the highest deference.

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255. See generally Jeff Comtassel, *Indigenous Governance Amidst the Forced Federalism Era*, KAN. J.L. & PUB. POL'Y (2009).

For those situations where abstention may prove too costly or dilatory, or where no tribal forum is available, the choice between a codified certification procedure or a memorandum of understanding to consult will depend upon how much power each court wishes to obtain, whether the sister court will grant great or total deference to the answering court's statement of its own law, and whether the history of cooperation and trust between sister courts can support a respectful use of those instruments. Certification may offer skeptical state judges an incentive to step into the uneasy new role of selecting and applying tribal law in appropriate cases when it might otherwise be overlooked, out of fear or ignorance, in favor of state law.

On the other hand, the federal lesson shows that unless the certification procedure institutionalizes true reciprocity, both in word and in practice so that tribes may also certify questions to state high courts and have them answered in appropriate cases, tribal courts run the risk that they will be treated as inferior courts. Unilateral certification rules send the message to institutions and to individual judges on both sides of the equation that the certifying court has more prestige and value. In some situations, they also send the message that the answering jurisdiction's very law is not worthy of consideration by the more prestigious court. Of course, the opposite can also be true in the sense that the certifying court sees the value of applying tribal law and in "getting it right."<sup>256</sup>

In situations where a reluctant tribal council, state legislature, or high court does not wish to codify a certification procedure — or to make it reciprocal — or where other constitutional impediments prohibit such an enactment, less formal understandings between courts or even individual judges may help to further the esteem of tribal law and courts over time, and may even lead to more formal arrangements as trust, understanding, and respect grow stronger. As in the New York and New South Wales example, courts may cooperate for the determination of each other's law as foreign law in a relatively advisory process.<sup>257</sup> Of course, the informal, non-binding, advisory nature of this process raises a host of concerns about quality control and public expectations in the validity of those decisions beyond the private litigants. On a purely legal level, tribal and state courts are not always subject to the same types of Article III mandates that prevent the promulgation of advisory opinions by federal courts. But, on a practical level, the concerns behind the Article III prohibition may ring just as true. In some cases, it may be that the best use of consultation agreements is for general education about sources of applicable law and the sharing of primary tribal law materials that might not otherwise be publicly available, rather than the practice of issuing advisory-type opinions.

Where interactions have been particularly hostile in recent past, the consultation agreement may be the much safer option for many tribes for the near future, until understanding and respect have a chance to grow. Because the parties to a memorandum of understanding come to the table without the calcified expectations of a certification model, which is already used extensively around the country and has a preferred structure in the form of the Uniform Act, they arrive at that table with more equal bargaining power. The exchange can be as great or as limited as the parties desire,

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256. Pearson, *supra* note 119, at 744.

257. Lee, *supra* note 248.

subject only to the governing law and political pressures in their respective sovereignties. Ultimately, this may be the much safer, “toe in the water” approach for tribes who may logically fear they have more tangibly to lose in engaging the state than they have to gain. If minimal agreements to educate one another, to meet, and to discuss recurring foreign law issues arriving before their courts are successful, more formal arrangements may later become more attractive — or perhaps even entirely unnecessary except where a binding effect is needed, such as in the recognition of each other’s judgments.

Whatever options are chosen, the stakes for tribal sovereignty and the health of the tribal institutions that express, expand, and strengthen that sovereignty are much higher for tribal nations than for the states. For this practical reason, and despite the unfairness and irony of the situation, it may be more incumbent upon tribal leaders and judges to make the first steps in reaching out to build trust with their state counterparts. As in the example of Judges Raasch and Brunner in Wisconsin, it can start with just two people who are able to connect, form a friendly professional bond, and to exhibit that mutual respect to their peers in the hope of starting a gradual contagion. And regardless of methods chosen, those relationships will ultimately determine (at least initially) the success of the program and whether it will be abused by the state, which undeniably comes to the table with much greater political power.

The perplexing relationships between states, Tribes, and the national government result from the shifting sands of Anglo-American policy toward Native nations. The pendular swings in federal Indian policy have resulted in the paradoxical status of Native nations in the federal system today, alluding to the paradoxes Dickens identified in the French Revolution, another instance of crisis and opportunity in a different time and a different land.<sup>258</sup> The Tribal nations are neither constitutional governments nor completely extra-constitutional. They are neither states nor foreign governments. Their sovereignty is declared by outsiders to be either totally inherent or a purely Congressional invention. Tribes are mostly prohibited by federal law from negotiating with the states, yet must often do so in order to survive. They are simultaneously encouraged by federal policy to determine their own destinies, while finding their sovereignty eroded by the same paternal, and often hostile federal system. The Tribes’ sovereign court systems are at once celebrated as indispensable players in the national judicial system, while their civil and criminal jurisdiction is continually eroded through successive federal decisions.

These paradoxes exist today because while federal policy can be described as taking a more enlightened turn beginning in the 1970s, the reality is that much of the distrust and animosity from earlier eras continues, even in this time of self-determination. Until that distrust and animosity is identified as a *de facto* source of law, it will remain a barrier to effective co-existence. Fortunately, there is great potential for increased understanding and mutual support between state and Tribal governments, encouraging a time of mindful pluralism and the politics of abundance — an “era of enlightenment.”

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258. DICKENS, *supra* note 2.