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THE WISCONSIN WAY FORWARD WITH COMITY:
A LEGAL TERM FOR RESPECT

James Botsford and Paul Stenzel*

INTRODUCTION

Over the last twenty years, tribal and state courts in Wisconsin have enjoyed remarkable progress in coordinating two overlapping yet distinct legal systems in order to better serve their constituents. The story is a complicated and fascinating one consisting of many elements that go well beyond the development of the law. It is beyond the law where we try to go, at least in part, with this article. The cases and statutes only tell part of the story. What about the state and tribal judges shooting baskets in a driveway and discussing how to best allocate cases between them where their jurisdiction overlaps? What is the history of the institutions that have grown up? What about the leaders? What other extra legal elements contributed to state-tribal judicial cooperation and comity, particularly against a backdrop of often-contentious state-tribal conflict?

Another purpose of this article is to chronicle the recreation of the tribal justice systems in Wisconsin in the modern era and show how a mutuality of respect and comity\(^1\) between the tribal and state judiciaries has evolved in ways that have enhanced them both. The ongoing result is the improvement of government-to-government

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1. Hilton v. Guyot, 159 U.S. 113, 143 (1895) ("Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation . . . .")
relationships and better access to justice for those using the courts.

This article is divided into five parts: first, an overview of Wisconsin’s tribes, where we briefly survey the legal landscape; second, a history of the 1990s when the Wisconsin Tribal Judges Association was born and the seeds of comity took root; third, the Bad River Band v. Teague case, the landmark decision that raised consciousness about coordinating tribal and state court efforts; fourth, an examination of section 801.54 of the Wisconsin Statutes, which allows state trial courts to use discretion and transfer cases to tribal court on the basis of comity; and fifth, conclusions and observations.

As we compiled, assessed, and digested all of our information, we noticed several themes. We mention them now so you can watch for them and draw some of your own conclusions along the way: first, Public Law 280 (“P.L. 280”) forced the tribes and the states to deal with each other in ways non-P.L. 280 states and tribes may not always encounter; second, two key institutions that allowed the development of trust and relationships are the Wisconsin Tribal Judges Association and the State-Tribal Justice Forum; third, the necessity of that indefinable quality in people where, when confronted with a choice between maintaining the status quo or taking a risk to improve things for everyone, they choose the latter and then, graciously, the other side reciprocates (one might call this faith); and fourth, the importance and expansion of comity between the state and tribes. Comity is a flexible term that embodies many aspects of human relations including trust, leadership, courage, honesty, perseverance and wisdom.

One final introductory thought: the importance of comity to this story cannot be overstated. Even among lawyers, there is some confusion about the difference between “full faith and credit” and “comity.” This is understandable because the effect of both is the same, that is the enforcement of, inter alia, the judgments and legislation of one sovereign by another sovereign. The difference between the two arises not so much from the effect, but from the how and the why. Full faith and credit is a constitutional principle requiring states to enforce fully the judgments and orders of other states.2 Full faith and credit may also be imposed by statute.3 This idea is so core to American politics that it actually predates the American Constitution.4 However, American full faith and credit applies to relations between the states and is not generally applicable in tribe-state relations.5

Comity is the principle of international law by which a sovereign gives deference to the judgments of another due to mutual respect. Because comity is based on reciprocal courtesy rather than a legal mandate, it must be negotiated and agreed to by the sovereigns. In some cases, one sovereign will take unilateral action in enforcing the judgments of the other. Most often, the two sovereigns will determine together under what circumstances they will honor the will of the other. Because of the close

4. ARTICLES OF CONFEDERATION of 1781, art. IV, para. 3 (“Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State.”).
relationships between the state and tribal judiciaries in Wisconsin, the principles of comity as applied here provide a national model for how states and tribes can work together for the betterment of both.

PART I — OVERVIEW OF WISCONSIN’S TRIBES

The eleven federally recognized tribes in Wisconsin are a mixture of different peoples, some closely related, some not. Some tribes’ stories say they come from around Wisconsin; others got here through the cultural chaos of contact with the Europeans. All of them share stories of disruption and devastation from those times.

With our larger purpose in mind of exploring the arc of tribal-state relations, we shall skip over earlier judicial histories that have been described elsewhere6 and pick up the story in 1953 with the passage of P.L. 280.7 Wisconsin was one of five states8 in which this experiment was initially imposed (as an unfunded mandate).9 Ten tribes in Wisconsin were all made subject to P.L. 280, a law that is still in effect today and that shapes the tribal-state judicial relations in Wisconsin. The eleventh tribe, the Menominee, was initially exempt from P.L. 280,10 but within two years they were officially terminated ending their federal recognition as a tribe. Fortunately, the Menominee’s federal recognition was eventually restored, and they retained their exemption from P.L. 280.11

Federal attitudes toward Indians have gone through numerous formal policy phases, most of them brutal and embarrassing in hindsight.12 The stated federal Indian policy in effect in 1953 was known unabashedly as “the Termination Era.”13 During this period (1953 – 1961), the United States government’s stated intention was to get out of

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9. See Jiménez & Song, supra note 7, at 1657 (“These states received no federal subsidies to ease the financial burden of their new responsibilities, were precluded from taxing reservation lands to raise their own revenues, and received jurisdiction without tribal consent.”).
10. See Stephen J. Herzberg, The Menominee Indians: Termination to Restoration, 6 AM. INDIAN L. REV. 143, 161 (1978) (arguing that although Congress cited the highly acclaimed Menominee law and order system and the tribe’s desire for autonomy, the Menominee were primarily exempt from P.L. 280 because Congress was aware of the tribes impending termination).
the Indian business. P.L. 280 essentially said to the state of Wisconsin and the other ten tribes, “[w]e hereby give to the state our jurisdictional authority toward Indians on those ten reservations.” Much has been written about P.L. 280, but in a nut-shell it meant that the state courts and state law enforcement now had jurisdiction over crimes committed by Indians on the reservations, as well as civil jurisdiction in adjudicatory (non-regulatory) civil cases. The previous federal Indian policies were all dismal failures (as this one was doomed to be), and the U.S. simply wanted to end its complicated relationship with tribes.

The biggest complications were perhaps the treaties — formal, solemn promises of the United States. In the words of U.S. Senator Daniel Inouye:

As a member of the United States Senate, it does not please me at all to know that of the 800 treaties that were signed by Indian nations and the president of the United States, the Senate of the United States refused to act upon 430 of them. They just filed it away (although we insisted that the Indians live up to their agreements). And we ratified 370 of the treaties, but sadly, I must tell you that of the 370 treaties that the United States Senate ratified, the United States government violated provisions in every one of them.

During the Termination Era, the Menominee Nation suffered uniquely in Wisconsin. It was the only tribe in the state that the U.S. literally terminated its relationship with by declaring that, as far as the U.S. was concerned, the Menominees were no longer a federally recognized tribal government, but were instead to be restructured essentially as a corporation. This story has been well told elsewhere. For our purposes, the important thing to note is that just as the mythical phoenix rises from the ashes, so too did the Menominee Nation, regaining its federal recognition. Because they were initially exempt from P.L. 280, in 1972, the Menominees were restored to a government-to-government relationship with the U.S. without the then anachronistic onus of P.L. 280.

By the 1960s, the Termination policy had been discredited as a cruel and abysmal failure, and President Richard Nixon declared the new federal Indian policy to be one of “self-determination.” Every president since Nixon has reaffirmed the self-

14. Some mark the beginning of the Termination Era at 1953 when Congress formally stated its policy goal as the following: “as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship” and terminated several tribes including the Menominee in Wisconsin. H.R. Con. Res. 108, 83d Cong., 67 Stat. B122 (1953); see, e.g., PEVAR, supra note 12, at 11.

15. See, e.g., CAROLE GOLDBERG-AMBROSE, PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280 (1997); see also, e.g., Jiménez & Song, supra note 7.


18. See, e.g., Herzberg, supra note 10, at 170 n.127.


20. See Special Message to the Congress on Indian Affairs, 212 PUB. PAPERS 564 (July 8, 1970) (stating that the termination policies were a failure and adopting a policy of self-determination); see also Douglas B.L.
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determination policy. However, not all the damage of the Termination Era was undone. Although the Menominees were restored, the other ten tribes remain subject to P.L. 280.

Prior to 1953, the federal government and tribes had shared or “concurrent” jurisdictional authority in Indian country.\(^{21}\) It is a fundamental principle of common sense that you can only give away that which is yours. So when the federal government granted its jurisdictional powers over Indians to the state in 1953, it did not alter the inherent and ongoing jurisdictional power of the tribes.\(^{22}\)

Although the tribes maintained concurrent jurisdiction with the states under P.L. 280, as a practical matter the effect of transferring federal jurisdiction (responsibility) to the state was huge; The U.S. stopped providing funds for law enforcement and judicial services on those P.L. 280 reservations. Although the federal contributions to tribes had been meager, if they occurred at all, the tribes themselves in those days did not have the resources (or in some cases the government structure) to sustain police and courts. Though they had latent jurisdiction, the states (and their counties) became, in effect, the only game in town.

In fact, during those hard decades of the mid-twentieth century, there were many people — Indian and non-Indian — who grew up thinking only the state had police and court power on the reservations.

But with the Indian civil rights movement and all the awakenings that came with it, Native people began to dust off those old treaties and laws and re-examine tribal authority. And that is what, in significant measure, led to the modern tribal courts of today. There were then and remain today great obstacles. For example, the Indian Reorganization Act (“IRA”) Constitutions were imposed on the tribes in the 1930s and many remain substantially in place today.\(^{23}\) They are a modeled but muddled version of the U.S. government structures and an awkward fit in tribal communities. Furthermore, neither the federal government nor the states want to fund the tribal courts in P.L. 280 states, even today as those courts continue to grow and take on increasing importance in Indian Country.

Nevertheless, the tribal courts in P.L. 280 states have grown and evolved exponentially in recent decades. They have grown to understand what concurrent jurisdiction means and educated the state judiciary as to what concurrent jurisdiction means. Thankfully, there have been some enlightened and supportive state court judges who have been creative and cooperative in helping these underfunded tribal courts get established and grow.

Ironically, the contentious and sometimes violent challenges to tribal rights in the 1970s and 1980s contributed to the growth of tribal courts in this region of the country.

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\(^{21}\) Goldberg-Ambrose, supra note 15, at 243.

\(^{22}\) See, e.g., TTEA v. Ysleta Del Sur Pueblo, 181 F.3d 676, 685 (5th Cir. 1999); Native Vill. of Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 562 (9th Cir. 1991); Criminal Jurisdiction on the Seminole Reservations in Florida, 85 Interior Dec. 433 (D.O.I. 1978); Jiménez & Song, supra note 7, at 1635.

\(^{23}\) Indian Reorganization Act of 1934, 25 U.S.C. §§ 476-77 (2006); see also PEVAR, supra note 12, at 89-91 (describing how the Secretary of the Interior provided a model constitution for the tribes to adopt under the IRA).
As the Ojibway tribes in the Great Lakes region began exercising their treaty-based off-reservation hunting, fishing, and gathering rights (especially spearfishing), it became apparent to those tribes that they were going to have to exercise more judicial authority in enforcing those rights and responsibilities. Successful litigation against the state was destined to result in expanded tribal court activity in the area of conservation and natural resources cases — including the jurisdictional complexities those cases often involved.

It was the implementation of the decision in Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt that brought this into sharp focus. Tribes wanted not only to exercise their treaty rights, they wanted to police them too.

In that context, several tribes in Wisconsin and Michigan came together to form the short-lived Great Lakes Tribal Judges Association ("GLTJA") in the mid 1980s. When the Wisconsin Tribal Judges Association ("WTJA") was formed in 1991, GLTJA went into a dormancy from which it has not since emerged.

PART 2 — COOPERATION ERA, THE 1990S

The Cooperation Era in Wisconsin began in 1991 when the trial court judges from seven of the eleven federally recognized tribes in Wisconsin joined together and, with the help of Wisconsin Judicare, created the WTJA. In the following years, the other four tribes created or expanded their judiciaries, and now all eleven tribal judiciaries in Wisconsin participate as members in the WTJA. First, it was focused on intertribal judicial cooperation, and later, it expanded into cooperation with the state.

Some specific circumstances regarding the needs of and resources available to the tribal courts led to the creation of the WTJA. The first key factor was the growth of each of the tribal courts within their own jurisdictions. Throughout the last quarter of the twentieth century, tribes in Wisconsin and elsewhere began exercising an increasing amount of their inherent jurisdictional powers, which included the expansion of services and responsibilities of the tribal courts. As the tribal courts grew and their caseloads expanded, it became painfully clear that the availability of legal representation for individuals in those courts was not keeping pace with the need. This necessity would later mother the birth of the WTJA.

Another factor involved both the strengths and the limitations of Wisconsin Judicare. Wisconsin Judicare provides legal aid to Wisconsin’s northern thirty-three counties and eleven federally recognized Indian tribes. Although Judicare has an Indian Law Office ("ILO") devoted exclusively to working with tribes and their members, the ILO is modestly funded and has never had the capacity to provide legal representation for a significant percentage of cases in the tribal courts in Wisconsin. Among the ILO’s strengths is the ability to be responsive to the requests of tribal courts in creatively designing initiatives that improve access to justice in Indian Country. ILO’s weaknesses

24. See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 760 F.2d 177 (7th Cir. 1985); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341 (7th Cir. 1983); Wisconsin v. Baker, 698 F.2d 1323 (7th Cir. 1983).

25. Voigt, 700 F.2d at 363, 365 (holding that each treaty included “cession of land and a reservation of usufructuary rights on the ceded land by those Indians relinquishing their territory” and unless the tribes specifically gave up a right in the treaty, the tribe retained that right).
include the lack of adequate funding and a geographic limitation mandated by funding sources that require that services be provided to clients only in Wisconsin.

These factors and circumstances became significant in the creation of the WTJA in 1991. The tribal judges met that year with the ILO to explore ways to increase representation for individuals on a daily basis in the tribal courts. From those discussions emerged a federal grant application to the Administration for Native Americans ("ANA") to fund the training of lay advocates in the basic skills of legal representation. The lay advocates would be individuals from the various tribes who received substantial training involving tribal law, legal writing, and courtroom skills.

The ANA was very interested in funding this proposal. However, there was a key sticking point: the recipient of the grant had to be an Indian organization, and the area served had to be limited to a single state, in this case Wisconsin. The tribal judges and the Judicare attorneys then asked the ANA if the "Wisconsin Tribal Judges Association" would be an appropriate grant recipient. When the ANA indicated that would indeed be just the kind of recipient they would fund, the judges and Judicare got together and created the WTJA — and the ANA then funded the lay advocate project!

Birthed from the clever idea of creating the association as a way of establishing eligibility for an outside grant in order to provide access to justice in their courts, the Wisconsin Tribal Judges Association has gone on to be a hundred things. It is a forum through which the tribal judiciaries provide in-house training to its members. It is a source for finding pro-tem trial judges and appellate panels. It is a unified voice in representing tribal court interests to the state judiciary and legislature as well as the federal legislature. It is a sponsor and host for convening continuing judicial education seminars for state and tribal judges. In addition, it is many other things as well, including, very significantly, a model looked to by other state and tribal judiciaries in other parts of the country. 26

The WTJA is a membership organization consisting of the judges from all eleven federally recognized tribes in Wisconsin. It is governed by Articles of Incorporation and by-laws. Although each court has one vote under the by-laws, as a practical matter nearly all decision making is done by consensus. The WTJA meets four times per year on a rotating basis for a two-day meeting. One day is devoted to a topic of in-house judicial training and one day for a business meeting and (weather and agenda permitting) perhaps a round of golf. 27

The bringing together of tribal and state court judges for the purposes of judicial education and getting acquainted began by serendipity. In 1996, by coincidence, both the Stockbridge-Munsee Tribe and the Forest County Potawatomi Tribe were prepared to open their modern tribal courts for the first time. Each of them, unbeknownst to the other, called Judicare's Indian Law Office with essentially the same request: we are about to open our court, and we would very much like to get off on a good footing with the local state courts. We want to meet with the local state court judges, have a

27. It seems ironic that European descendants and indigenous descendants would socially bond over a game born in Scotland.
discussion about what we intend to do, and hopefully, design a mutually beneficial judicial relationship where we do not compete or step on each other’s jurisdictional toes, and thereby avoid some of the difficult relationships seen in other locales.

Judicare brought the two new tribal courts together. It was quickly determined that, since they both shared the same idea and were both in the same part of the state, it made sense to do something together. From that came the plan of a day-long seminar sponsored by both courts, with state court judges from seven surrounding counties invited. Through the Office of State Courts, Judicare arranged for the state court judges to receive continuing judicial education credits and, significantly, that Office asked for evaluations from the attendees at the end of the day.

Judicare coordinated the materials and the elements of training, including bringing in as a featured presenter attorney Craig Dorsay from Oregon who was nationally recognized as an expert in Indian law and had argued an Indian law case before the U.S. Supreme Court. The training was a success; the food was good, and perhaps most importantly, the evaluations were remarkable. There had been considerable trepidation (perhaps on all sides) going into this, but the state court judges wrote on their evaluations things such as the following: “This was very helpful and well-presented, we need more of this” and “I had no idea that Indian law was so complex and tribal courts were so important.” From that particular day and those particular comments grew an on-going series of formal and informal state and tribal judicial seminars that have put many of the judges on a first name basis.

PART 3 — TEAGUE v. BAD RIVER BAND: BAD FACTS MADE GOOD LAW.

State and tribal judges were not the only ones wrestling with overlapping jurisdiction and trying to figure out how it all fits together. The users of the courts were as well. There were a lot of good feelings and pats on the backs as state and tribal judges slowly gained trust and learned about each other’s systems. The gate crashers were the litigants who often have no interest in cordial relations, but in winning. Those two worlds collided in Teague v. Bad River Band.28

Civil transfers29 between state and tribal courts have been around for decades,30 but landed in earnest in Wisconsin with the dispute between Jerry Teague, a non-Indian, and the Bad River Band of Lake Superior Chippewa Indians. That case started in 1995 and resulted in two Wisconsin Supreme Court opinions.31

In 1995, Mr. Teague, a non-Indian, separated from employment as casino manager of the Bad River Tribe’s casino.32 He brought suit in Ashland County Circuit Court
seeking to enforce the arbitration clause of his employment contract. The Tribe subsequently sued in Bad River Tribal Court to have the employment contract declared null and void as it had never been ratified by the Tribal Council or approved by the Bureau of Indian Affairs.

Under P.L. 280, Wisconsin courts have concurrent civil adjudicatory jurisdiction along with tribal courts. Wisconsin is unusual in that it is one of only six states, known as Public Law 280 states, in which the state has full criminal and partial civil jurisdiction within Indian Country. There was not much dispute in the Teague case that both the tribal and state courts could exercise jurisdiction. The problem was that they both did.

Teague filed first in state court seeking to compel the Tribe to participate in arbitration. The Tribe resisted, but the trial court found the Tribe must participate. After that ruling but before arbitration, the Tribe sought a declaratory ruling in Bad River Tribal Court that Teague’s contract with the Band was null and void because it had not been approved by the Bureau of Indian Affairs as required under tribal law.

The parallel litigation grinded forward for years. Mr. Teague acknowledged personal service of the Band’s complaint and participated in discovery, but he refused to participate further in the tribal court proceedings. Each court eventually reached differing results. Based on the arbitration award, the Wisconsin trial court entered judgment in favor of Mr. Teague for $390,199.42. The tribal court found the employment contract void and entered judgment in favor of the Tribe.

The Tribe then moved for the state trial court to grant full faith and credit to the tribal court judgment. That motion was denied based on the prior action pending rule on the grounds that the action had been filed in circuit court first. The Tribe appealed, and the court of appeals reversed, holding that the tribe properly had jurisdiction over the dispute.

Mr. Teague appealed, and the Wisconsin Supreme Court held that the prior action pending rule did not apply as an Indian tribal court is the court of an independent sovereign. The court nevertheless reversed, ruling that when parallel state and tribal court cases exist, state court judges must confer with their tribal court counterparts to determine the proper allocation of jurisdiction in order to avoid races to the courthouse.

33. Id.
34. Id. at 712.
35. 28 U.S.C. § 1360(a) (2006); see also Bryan v. Itasca Cnty., Minn., 426 U.S. 373 (1976) (holding that P.L. 280’s extension of civil jurisdiction to the states did not include the power to tax).
36. § 1360(a) (Wisconsin (excluding Menominee), Oregon, California, Alaska, Nebraska, and Minnesota).
38. Teague, 612 N.W.2d at 713.
39. Id.
40. Id.
41. Id.
42. The prior-action-pending rule is legalese for winning the “race to the courthouse.” See Syver v. Hahn, 94 N.W.2d 161, 164 (Wis. 1959).
43. Teague, 612 N.W.2d at 713.
45. Teague, 612 N.W.2d at 717.
We are faced, then, with the unfortunate choice of ratifying either a "race to the courthouse" or a "race to judgment," a situation the legislature appears not to have contemplated in the enactment of Wis. Stat. § 806.245. Either choice would produce undesirable and unreasonable results, which we presume the legislature did not intend to encourage by the adoption of the tribal full faith and credit statute. On one hand, awarding exclusive jurisdiction to the winner of the race to the courthouse (Teague) puts litigants rather than courts in charge of a sensitive jurisdictional question and deprives the respective courts of the opportunity to weigh considerations of comity. On the other hand, granting full faith and credit to the winner of the race to judgment (the Band) promotes competition between state and tribal courts, wastes judicial resources, and creates an adversarial atmosphere.

This, ultimately, is not a question of full faith and credit under the statute but of judicial allocation of jurisdiction pursuant to principles of comity.

We conclude that comity in this situation required that the circuit court and tribal court confer for purposes of allocating jurisdiction between the two sovereigns.46

The court specifically noted that precedent for requiring conferences for the purpose of allocating jurisdiction already existed in the family law field in cases where interstate jurisdictional conflict exists.47

On remand, the circuit court judge and tribal judge held a conference on the record with both parties.48 The circuit court judge and tribal judge could not agree on how to allocate jurisdiction.49 The circuit court again concluded that maintaining jurisdiction in state court was appropriate, noting that the action had first been filed in state court, that the law to be applied was predominantly Wisconsin law, and that the parties' contractual choice of forum was state court.50 The Tribe appealed to the Wisconsin Court of Appeals which certified the appeal to the supreme court.

The supreme court affirmed its earlier take on the case: comity was the key issue, not full faith and credit. Since the trial judges at the state and tribal courts could not agree, the supreme court would have to take on the issue itself. The court created thirteen factors to help state and tribal courts determine which court should proceed:51

1. Where the action was first filed and the extent to which the case has

46. Id. at 717-19 (internal footnotes and citations omitted).
47. Id. at 719-20.
49. Id.
50. Id.
proceeded in the first court.

2. The parties’ and courts’ expenditures of time and resources in each court and the extent to which the parties have complied with any applicable provisions of either court’s scheduling orders.

3. The relative burdens on the parties, including cost, access to and admissibility of evidence and matters of process, practice, and procedure, including whether the action will be decided most expeditiously in tribal or state court.

4. Whether the nature of the action implicates tribal sovereignty, including but not limited to the following:
   a. The subject matter of the litigation.
   b. The identities and potential immunities of the parties.

5. Whether the issues in the case require application and interpretation of a tribe’s law or state law.

6. Whether the case involves traditional or cultural matters of the tribe.

7. Whether the location of material events giving rise to the litigation is on tribal or state land.

8. The relative institutional or administrative interests of each court.

9. The tribal membership status of the parties.

10. The parties’ choice by contract, if any, of a forum in the event of dispute.

11. The parties’ choice by contract, if any, of the law to be applied in the event of a dispute.

12. Whether each court has jurisdiction over the dispute and the parties and has determined its own jurisdiction.

13. Whether either jurisdiction has entered a final judgment that conflicts with another judgment that is entitled to recognition.

Applying those factors, the court said it was a difficult decision, but that the factors favored tribal court jurisdiction.52 The factors read like a codification of principles

52. Id. at 919.
drawn from a variety of areas including comity, venue, jurisdiction and equity. The court drew the factors from a several sources, including an historic agreement between Wisconsin’s Tenth Judicial Administrative District and four Chippewa tribal courts in the northwest part of the state. The court then turned to the issue of whether the tribal court judgment was entitled to full faith and credit under Wisconsin Statute section 806.245. The court concluded that the principles of comity required enforcement of the tribal court judgment and remanded the case for dismissal of the complaint.

It is a credit to the state and tribal judges involved that the case strengthened, rather than derailed, state-tribal judicial relations. Most judges did not skip a beat. If anything, Teague presented an opportunity for everyone to roll up their sleeves and work on an issue.

The case has slowly achieved landmark status in the state. Two federal court cases have cited it favorably. The Wisconsin Supreme Court cited the case as a model for interjurisdictional cooperation. In the wake of the case, Wisconsin Supreme Court Chief Justice Abrahamson revived the State-Tribal Justice Forum.

There had been a few attempts at state and tribal judges working groups convening since the 1980s, but each time, they had been relatively sporadic and short-lived. But Chief Justice Abrahamson had a growing interest in Indian law and culture. She had chaired the Committee on Jurisdiction in Indian Country of the Conference of Chief Justices of State Supreme Courts and had been instrumentally supportive in developing the national Common Ground symposia (the first two of which were held in Wisconsin, hosted by the Oneida Nation and keynoted by the Chief Justice).

The State-Tribal Justice Forum is a joint committee of state and tribal court representatives established by Chief Justice Abrahamson in 2005 to promote and sustain communication, education, and cooperation among tribal and state court systems. The committee consists of five circuit court judges, five tribal judges, one tribal attorney, one legislative liaison, one district court administrator, and the director of state courts.

53. Id. at 918 n.15.
55. Teague, 665 N.W.2d at 919; Wis. Stat. § 806.245 (2012) (“(1) The judicial records, orders and judgments of an Indian tribal court in Wisconsin and acts of an Indian tribal legislative body shall have the same full faith and credit in the courts of this state as do the acts, records, orders and judgments of any other governmental entity, if all of the following conditions are met: (a) The tribe which creates the tribal court and tribal legislative body is organized under 25 USC 461 to 479. (b) The tribal documents are authenticated under sub. (2). (c) The tribal court is a court of record. (d) The tribal court judgment offered in evidence is a valid judgment. (e) The tribal court certifies that it grants full faith and credit to the judicial records, orders and judgments of the courts of this state and to the acts of other governmental entities in this state.”).
56. Teague, 665 N.W.2d at 920.
59. Wis. S. Ct. Order 07-11, In the matter of the petition to create a rule governing the discretionary transfer of cases to tribal courts, 2008 WI 114, n.2 (issued July 31, 2008, eff. Jan. 1, 2009).
The Forum meets two to four times a year to confer and address interjurisdictional and other issues.

Several factors are responsible for this incarnation of the Forum being sustainable and successful. One of them stems from the commitment of the Chief Justice in structuring the Forum to include active support from state court staff. Another was her charge to the Forum in 2005 to make its work “beyond rhetoric,” and to foster cooperative and creative enthusiasm of the Forum members. And a final and important element to the sustainable success of the Forum is the fact that it is the WTJA that appoints the five tribal court judges. The existence of the WTJA creates a simple and comprehensive way to involve tribal courts. It is in some ways comparable to the Office of State Courts and provides a way to do things without the chaos of too many individual judges. They are good examples of representative democracies.

Another of the many byproducts of the *Teague* litigation was the development of tribal-state protocols in which state and tribal judges in various parts of the state agreed on detailed written procedures on how parallel cases subject to the concurrent jurisdiction of each court would be handled.

The development of the protocols was another incremental step in building positive tribal-state relations. In the first Wisconsin Supreme Court *Teague* opinion, the Court recognized that the dispute was not one of full faith and credit but rather one “of judicial allocation of jurisdiction pursuant to principles of comity.” The Court then noted that there are no protocols for state and tribal courts to follow in this situation. The Court then wrote:

> Similar problems exist between the courts of different states, and in this context, states have in some areas of the law developed procedures to follow in cases of jurisdictional conflict, where two sovereigns have jurisdiction over the same matter. See, e.g., Uniform Child Custody Jurisdiction Act, Wis. Stat. ch. 822; Wis. Stat. § 767.025(1). The development of similar protocols between state and tribal courts in Wisconsin is a matter of high priority and should be pursued.

The Court included a footnote about the March 1999 gathering of tribal, state and federal judges where historical relations between tribes and states were discussed saying, “[w]e believe that this is a logical forum for the development of protocols governing the exercise of jurisdiction between the state and tribal courts.” The meeting mentioned by the Court was one in a series commonly known as “Walking on Common Ground.”

Wisconsin’s Tenth Administrative District took up the call. After extensive

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61. *Id.* at 718 (describing the main difference between full faith and credit and comity is that the former is mandatory while the latter is a matter of respect and discretion).
62. *Id.*
63. *Id.* (emphasis added) (citations omitted).
64. *Id.* at 718 n.11.
66. For purposes of administering the court system statewide, Wisconsin is divided into ten geographic districts. The Tenth District comprises thirteen counties in the northwest portion of the state. Each district has a chief judge who is one of the circuit court judges sitting in that district. The map of the districts is available at http://www.wicourts.gov/courts/circuit/map.htm (last visited August 19, 2011).
negotiations and drafting, in 2001, the five Chippewa tribes in the northwest part of Wisconsin signed the protocols with the Tenth Administrative District. There are four tribes in the Tenth District: the Bad River Band of Lake Superior Chippewa, the Red Cliff Band of Lake Superior Chippewa, the St. Croix Chippewa and Lac Courte Oreilles Band of Lake Superior Chippewa. All four signed the protocol as well as the Chief Judge of the Tenth Administrative District.

The protocol provides a detailed procedure which the state and tribal courts are to use if a Teague-type situation arises, that is parallel litigation between the same parties in both systems. If the judges cannot agree, a third judge is selected at random from a pool of state and tribal judges.

The Ninth Administrative District followed suit in July 2005 with an agreement between it and the five tribal courts therein: the Stockbridge-Munsee Community, the Sokaogon Band of Lake Superior Chippewa, the Lac du Flambeau Band of Lake Superior Chippewa, the Forest County Potawatomi, and the Bad River Band of Lake Superior Chippewa.

Teague’s influence extends beyond Indian law. In In re Jane E.P., the court confronted an interstate guardianship transfer that had nothing to do with Indian tribes or Indians. In that case, the family of an incompetent forty-seven year old woman, Jane, wanted to move her from a nursing home in Galena, Illinois to Grant County, Wisconsin, where most of the family resided. The Grant County Department of Social Services applied in the Wisconsin courts for a guardianship and a protective placement at a nursing home in Grant County. Jane’s sister served as her guardian. The court dismissed because Wisconsin Statute section 55.06(3)(c) requires the proposed ward to be a resident of the county where the filing took place. The court of appeals reversed finding Wisconsin Statute section 55.06(3)(c) to be an unconstitutional impediment to interstate travel. Citing to Teague, the Wisconsin Supreme Court reversed the court of appeals finding the issue to be one of comity.

The court then used Teague as a blueprint for articulating and applying a list of factors courts should use in deciding issues of comity in the context of interstate transfer of guardianship cases saying, “[t]he hallmarks of these standards are communication and notice.” The broader principles of the Teague case informed the way the court viewed the guardianship issue: “Courts must work together in respect and cooperation to further the dignity of the judicial system and to promote the orderly administration of justice. Accordingly, as in Teague, we set forth standards for Wisconsin courts to follow when confronted with interstate guardianships.”

That the Wisconsin Supreme Court would borrow from an Indian law case and

67. Tribal/State Protocol, supra note 54.
68. Id.
69. Copies of the Ninth District Protocol may be obtained from the District Court Administrator, Susan Byrns, (715) 842-3872, 2100 Stewart Avenue, Suite 310, Wausau, WI 54401.
70. In re Jane E.P., 700 N.W.2d 863 (Wis. 2005).
71. Id. at 871, 876.
72. Id. at 871.
73. Id.
74. Id.
apply it in a different context is a testament to the influence and sound reasoning of the *Teague* decision and its principles. It is easy to think of many examples where a concept or doctrine applied from another area of the law to an Indian law problem ends up in disaster for tribes.\(^7\) It is heartening to see a general principle (comity) applied positively in a tribal context and then cited for further positive use later.

The Wisconsin Supreme Court’s commitment to respect and cooperation has been a strong link in the chain of tribal-state advancement. That cooperation is of course a two-way street and is made of the human elements of comity discussed earlier: mutual respect, trust, pragmatism and fairness.

The *Teague* case has also enjoyed recognition and influence beyond Wisconsin. In *Van Aernam v. Nenno*,\(^7\) Kenneth Van Aernam, a member of the Seneca Nation of Indians in Western New York sued a New York state court judge seeking to enjoin him from exercising jurisdiction over Van Aernam’s wife’s\(^7\) attempt to maintain a divorce action in New York state court. Van Aernam had already obtained a divorce judgment in the Seneca Nation’s Peacemaker Court prior to Mrs. Van Aernam filing in state court.\(^7\)

In New York, state courts possess concurrent civil jurisdiction on Indian Reservations similar to Public Law 280 states.\(^7\) Mr. Van Aernam was two days away from a contempt hearing in state court when he filed the federal action.

The procedural issue was whether the federal court was going to enjoin the state court judge from exercising jurisdiction over Mrs. Van Aernam. The federal court found there was concurrent jurisdiction between the state and tribe.\(^8\) The Court articulated the regular test for injunctive relief:

> According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.\(^8\)

The court quickly dispensed with factors one, two, and four and reasoned the issue came down to the ultimate question of “whether the tribal court or the state court should be allowed to proceed to judgment where both courts have recognized concurrent jurisdiction over the subject matter of the cases presented to them.”\(^82\) Courts of equity,

\(^7\) Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (holding that eleventh amendment sovereign immunity invalidates Tribes’ right to sue under IGRA, thereby greatly reducing their bargaining power for gaming compacts); Emp’t Div. v. Smith, 494 U.S. 872 (1990) (holding that states can deny unemployment benefits to peyote users even though use was for religious purposes; state may but is not required to accommodate drug use).

\(^7\) *Van Aernam v. Nenno*, No. 06-CV-0053C(F), 2006 WL 1644691 (W.D.N.Y. June 9, 2006).

\(^7\) Id.


\(^8\) *Van Aernam*, 2006 WL 1644691, at *10.

\(^8\) Id. at *6.

\(^8\) Id.
the court continued, have solved this question as a matter of comity. The best example is the Teague case. The federal court then applied the thirteen Teague factors in order to determine the outcome based on the third factor of the injunctive relief test. Most factors weighed in favor of the tribal court or were neutral.

When considering the implication of sovereignty, the court noted the intervention by the Seneca Nation and its wish to preserve its authority over the actions of non-Indians on reservation lands. The court then cited the lesser-used passages from LaPlante, Montana, and Santa Clara Pueblo as support for Indian tribal court jurisdiction over non-Indians. One cannot help but wonder if the context of the case — a federal judge deciding the judicial forum for a divorce — has the salutary effect of causing the judge to see the case from a more neutral or tribe-friendly angle than when tribal non-judicial resources or power are at stake.

The factors tipped in favor of the tribal court and the judge enjoined the state court from any further proceedings.

Later the same year, domestic discontent apparently contagious, the same court confronted similar but slightly different facts in Parry v. Haendiges. The court applied Teague and ruled against enjoining the state court. The timing and circumstances were such that the application of the Teague factors led the court to conclude the balancing of equities favored state court jurisdiction.

Both Van Aernam and Parry involved domestic relations, an area traditionally viewed as within a tribe’s jurisdiction, and distinguishable from the employment issues in Teague.

PART 4 — DISCRETIONARY TRANSFER RULE – REFINING TEAGUE FOR EVERYDAY USE.

a. History and Origin

The State-Tribal Justice Forum had been revived by Chief Justice Abrahamson and in the wake of the Teague case, it became clear that it was the right idea at the right time. Looking to move beyond rhetoric and get something done, the Forum looked at Teague and the so-called Teague Protocols and saw the next step. At a meeting of the Forum, while acknowledging the significance of the Teague process, the judges agreed it was too formal and cumbersome to work on a routine basis. What the state and the tribal courts needed was a way to determine the best venue without having parties pay filing fees in a second court system and invoke a protracted, though useful when needed, process. In other words, it should not be necessary to create a crisis of competing actions in order to

83. Id.
84. Id.
85. Id. at *9.
91. Id. at 97.
92. Id. at 96-97.
determine the best court to hear a particular case.

The Forum realized the more common occurrence involves two parties, often pro se, who in some cases had not considered or may not even be aware their case could be heard in tribal court. In other cases, state judges realized the case simply belonged in tribal court but absent a parallel case in tribal court, state judges felt a bit hamstrung as to how to handle it. Some simply changed venue.93 Other judges simply dismissed the state court action with the expectation the matter would be re-filed in tribal court. Others did neither as they were uncertain of their authority.

These uncertainties led the Forum to seek the creation of a state statute which permits state judges to transfer a case to tribal court on the state court’s own motion, or the motion of the parties, without a parallel action pending in tribal court. The statute was less formal, less expensive, less confrontational, and more common-sense based.

b. Petition 7-11

In July 2007, after several months in the making, the State-Tribal Justice Forum filed a petition with the Wisconsin Supreme Court asking it to exercise its rule-making power94 to create a section of the state statutes that would give state courts the power to make discretionary transfers of cases to tribal court. The original petition was short and to the point: give state trial judges the power to transfer cases from state to tribal courts. The Forum indicated it had unanimous support among its members and had submitted the document for review with various stakeholders including the Wisconsin Tribal Judges Association, the Committee of Chief Judges, the Wisconsin Joint Legislative Council’s Special Committee on State-Tribal Relations and the State Bar of Wisconsin Indian Law Section.95

The supreme court sought written comments and scheduled a public hearing for January 8, 2008.96 The court received ten written comments, none in opposition. The public hearing went in somewhat unexpected directions. Various concerns were raised by the justices including the scope of tribal court jurisdiction as limited by federal law, the right (or lack thereof) to jury trials and certain defenses in tribal court, the role of the legislature, and the mechanics of the transfers.97

After the hearing, the court sought further comment and shared three questions: 1) under what circumstances is jurisdiction concurrent between tribal and state courts? 2) is there a right under the United States or Wisconsin constitution to have a case heard in state court rather than tribal court? 3) how does the proposed rule impact the application of Wis. Stat. § 806.245 (full faith and credit)?

The comments came back and the court met again in administrative conference,
open to the public. The court reviewed the responses after which more drafting and revisions occurred. In a major change from the original submission, the court added a provision to the rule that if the case is transferred to tribal court, the state trial court will issue a stay and retain jurisdiction for five years, and that the trial court, upon motion and notice to the parties, can modify the stay in the interests of justice. After five years, the case is automatically dismissed. After several drafts, the final version was agreed upon and effective January 1, 2010.

The essence of the statute is to permit a state judge to apply the Teague factors without a need for a parallel action in tribal court. The issue can be raised by a party or the court on its own motion and the transfer can only occur after notice and a hearing on the record. The transfer decision is appealable as of right.

Many questions remain. The standard for modifying the stay, in the interests of justice, gives a trial court judge plenty of discretion. At worst, tribal judges fear litigants will go running back to state court when a ruling on the merits goes against them. At best, the language leaves the door open for state courts to undermine tribal court jurisdiction. Without further modification of the statute, it is the “respect” aspect of comity that will ultimately have to answer these concerns.

Furthermore, in order to address some justices’ legal concerns about a case leaving the state system, the Court added the following comment, which is not a part of the statutory text:

The purpose of this rule is to enable circuit courts to transfer civil actions to tribal courts in Wisconsin as efficiently as possible where appropriate. In considering the factors under sub[section] (2), the circuit court shall give particular weight to the constitutional rights of the litigants and their rights to assert all available claims and defenses.

These changes were viewed as compromises in order to secure four out of seven votes of the justices necessary for majority. The comment is particularly nettlesome. Although it lacks the force of law because it is positioned as a comment, it creates a fear in state judges that they misapply the rule if they transfer to a tribal court that does not allow all substantive state law claims and defenses. Given that tribal courts are the “third sovereign,” the comment could be viewed as potentially poisoning the legislation by removing its usefulness and vitality for fear of not giving constitutional rights enough weight. It is the “trust” aspect of comity that may ultimately answer these concerns.

98. Wis. Stat. § 801.54(3) (2010).
99. Id.
100. Id.
101. Id. § 801.54(2).
102. Id. § 801.54(4).
103. Id. § 801.54, cmt.
105. Although a slightly different context, federal courts have used tribal court criminal convictions to establish a defendant’s habitual offender status where the conviction complied with the ICRA, 25 U.S.C. § 1302 (2006), but the defendant did not have a right to counsel. See United States v. Shavanaux, 647 F.3d 993 (10th Cir. 2011). The Court noted several instances where foreign convictions were accepted for various uses as long as the conviction comported with United States’ notions of “fundamental fairness.” Id. at 1000.
Of course, the reality of the day-to-day warp and woof in state trial courts, where (often) pro se litigants are disputing how to share their parenting rights, is much different. Lofty notions of constitutional rights rarely come into play. Litigants want courts to act fairly and promptly. Troubling because it is subversive and vague, the comment has likely served its purpose by soothing one or more justices’ fears with the recognition, gained by experience, that trial judges are not easily paralyzed with indecision.

However, the compromise did not soothe some of the justices. Justice Roggensack, joined by two other justices, issued a strong dissent. The dissent listed four concerns:

(1) Rule 801.54 is inadequate and misleading in regard to addressing tribal court concurrent subject matter jurisdiction, which jurisdiction is extremely limited in scope when nonmembers are parties to the action; (2) Rule 801.54 impermissibly alters the substantive rights of tribal members, as well as nonmembers, contrary to the provisions of Wisconsin Statute § 751.12(1) (2005-06), which limits the court’s rule-making power; (3) Rule 801.54 undermines federal and state constitutional and statutory rights of litigants; and (4) a majority of the court has pushed this rule-change through before the end of the 2007-08 term of the court, even though the court has been presented with no information about the substantive rights and civil procedures that are available in tribal courts.106

The objections do not hold up well under more careful consideration. The first concern is over the “extremely” limited jurisdiction of tribal courts over non-members. Whether tribal court jurisdiction is limited in the extreme depends on context and perspective. It may be limited when compared to state courts, which generally do not have to concern themselves with whether litigants are Indian, non-Indians or non-member Indians when determining their own subject matter jurisdiction.

In the area of civil jurisdiction over non-members, tribal courts’ jurisdiction over non-members is limited by the so-called two Montana exceptions: 1) “consensual relationships” and 2) those nonmember activities which directly affect the tribe’s “political integrity, the economic security, or the health or welfare.”108 The Montana exceptions are informed by Santa Clara and other cases that describe tribal jurisdiction

Similarly, the Tenth Circuit and other courts have permitted the use at trial of statements made to foreign law enforcement, even though Miranda warnings were not given, absent substantial participation by agents of the United States. See United States v. Conway, 57 F.3d 1081 (10th Cir. 1995) (unpublished); United States v. Mundt, 508 F.2d 904, 906 (10th Cir. 1974); United States v. Welch, 455 F.2d 211, 213 (2d Cir. 1972); United States v. Chavarria, 443 F.2d 904, 905 (9th Cir. 1971); United States v. Nagelberg, 434 F.2d 585, 587 n.1 (2d Cir. 1970).

as being strongest when the tribe's internal relations are affected.\footnote{109} While tribes and practitioners of Indian law lament the steady erosion of tribal jurisdiction over reservation activities without any doctrinal or constitutional basis,\footnote{110} the remaining areas of jurisdiction still cover a large swath of cases over non-members.

The two largest circumstances on any reservation conferring significant jurisdiction over non-members are employment and domestic relations. With the advent of gaming, tribes employ a significant number of non-members.\footnote{111} Employment is a consensual relationship, which would confer tribal court jurisdiction over nonmembers.\footnote{112} The second circumstance is the number of non-members, who by marriage or other family arrangements, live on reservations. State courts have deferred to tribal court jurisdiction over nonmembers in certain family situations.\footnote{113} To say tribal court jurisdiction is limited lacks objectivity. On larger reservations, there could be thousands of non-Indians over which, through employment or family arrangements, tribal courts have a colorable claim of jurisdiction. In state courts nationwide in 2008, family law cases made up approximately twelve percent of all non-traffic civil cases.\footnote{114}

The second objection by the dissent is that the creation of Wisconsin Statute section 801.54 exceeds the court’s rule making authority because it goes beyond procedure and alters the substantive rights of litigants. In one way or another, procedure always shapes the merits.\footnote{115} However, the dissent claims that the rule alters litigants’ substantive rights because tribal law is different from state law.\footnote{116} The dissent’s claim is undermined by similar Wisconsin statutes enacted by the court.

Wisconsin Statute section 801.63 permits state courts to defer jurisdiction to any other court outside the state of Wisconsin, which on its face includes courts of other countries.\footnote{117} Section 801.63 arguably goes further than Wisconsin Statute section 801.54.

\begin{itemize}
    \item \footnote{109} Tribes possess the inherent power “necessary to protect tribal self-government [and] to control internal relations.” \textit{Id.} at 564. This includes the inherent power to “determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members.” \textit{Id.}
    \item \footnote{111} See \textit{Employment Opportunities, Oneida Tribe Indians Wisconsin}, http://www.oneidanation.org/humanresources/employment.aspx (last visited April 8, 2012).
    \item \footnote{112} Indeed the Teague case involved an employment dispute between Jerry Teague, a non-Indian, and the Tribe. Jurisdiction over Mr. Teague was not an issue in the litigation. Teague v. Bad River Band of Chippewa Indians, 665 N.W.2d 899 (Wis. 2003).
    \item \footnote{113} See, e.g., Kelly v. Kelly, 759 N.W.2d 721 (N.D. 2009) (State court granted non-Indian husband a divorce but lacked jurisdiction over the incidents of marriage); see also Byzewski v. Byzewski, 429 N.W.2d 394 (N.D. 1988).
    \item \footnote{115} Hanna v. Plumer, 380 U.S. 460, 464-65 (1965) (“Undoubtedly, most alterations of the rules of practice and procedure may and often do affect the rights of litigants. Congress’ prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights.”) (citations omitted).
    \item \footnote{116} Wis. S. Ct. Order 07-11, In the matter of the petition to create a rule governing the discretionary transfer of cases to tribal courts, 2008 WI 114, ¶¶ 1, 15-18 (issued July 31, 2008, eff. Jan. 1, 2009) (Roggensack, J., dissenting).
    \item \footnote{117} Wis. Stat. § 801.63 (2010).
\end{itemize}
by permitting state courts to subject litigants to courts outside the United States which are completely outside control of the U.S. Congress or U.S. Supreme Court. The Wisconsin Supreme Court enacted Wisconsin Statute section 801.63 in 1975. In the ensuing years, no appellate decision examining the statute has considered whether the Court exceeded its authority by creating section 801.63. The dissent's third critique is that section 801.54 impermissibly undermines litigants' state and federal constitutional and statutory rights. This objection is faulty but does raise important issues. It is true that litigants’ rights in tribal court in some cases will be somewhat different than in other jurisdictions. As the dissent notes, the United States constitution is not binding on tribal courts. Although the Indian Civil Rights Act (“ICRA”) imposes most of the limitations of the Bill of Rights on tribes, federal court remedies are limited to habeas relief, and not all of the Bill of Rights’ guarantees are contained in the ICRA. Tribal courts, for example, are not bound by the Establishment Clause, nor are they required to provide counsel to an indigent criminal defendant.

Nevertheless, the dissent’s protest is softened by four points: 1) tribal court judges care about doing substantial justice between the parties even if the substantive laws in a jurisdiction might be different. In a comprehensive study of the largest tribal court system in the United States, the Navajo Nation Court System, there was no significant difference in outcomes for members and non-members. 2) Tribes and their courts are subject to the plenary power of Congress, which over the decades has not shown any shyness in legislating on tribal rights. 3) to the chagrin of tribal practitioners, under Wisconsin Statute section 801.54, the circuit court is not completely transferring the case. Rather the circuit court retains jurisdiction for five years. During that time, it can alter the stay or take any other action as the interests of justice require; 4) the scrutiny on tribal courts by outsiders and their own communities serve as an important check on the decisions of tribal judges.

Furthermore, at least with respect to Indians occasionally losing access to state court, the Supreme Court has stated:

> [E]ven if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government.

One could argue that the occasional denial of a non-Indian to state courts,

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118. See, e.g., Helgeland v. Wis. Municipalities, 745 N.W.2d 1 (Wis. 2008); Dept of Admin. v. WERC, 280 N.W.2d 150 (Wis. 1979); State v. Cockrell, 741 N.W.2d 267 (Wis. Ct. App. 2007).
119. Wis. S. Ct. Order 07-11, In the matter of the petition to create a rule governing the discretionary transfer of cases to tribal courts, 2008 WI 114, ¶ 18 (issued July 31, 2008, eff. Jan. 1, 2009) (Roggensack, J., dissenting) (citing Talton v. Mayes, 163 U.S. 376, 382-83 (1896)).
121. Id.
124. Wis. STAT. § 801.54(3) (2010).
assuming the Tribe has jurisdiction, is also justified in the interest of furthering Indian self-government.

There is one more response that is less legal and more human. Tribal judges care about doing justice to the parties just as much as their state counterparts. During the public hearing, it was difficult for some tribal judges to listen to some of the questions from the dissenters because the unspoken assumption seemed to be that if a case goes to tribal court, there was a real risk that nonmembers would not receive a fair shake or would be at a disadvantage against a member of the Tribe.126

The dissenters’ fourth complaint is factual rather than legal: the dissent objects to the rule because it claims no information was presented about Wisconsin tribal courts’ civil procedures or substantive rights. This may be true, but it rings hollow because with the Petition pending for almost a full year, those materials could have been easily obtained. Many of the Tribes in Wisconsin make their laws and rules of civil procedure available over the Internet.127 Within a few minutes from any computer at the Supreme Court, the dissenters could have reviewed many tribes’ laws.

Moreover, the dissent seems to imply a lack of faith in the state’s own trial court judges. Since the transfer is discretionary, is it not fairly safe to assume that a local state court judge will have an informed opinion on the fairness and efficacy of the local tribal court, and if the judge transfers a case to tribal court, it is because it seems prudent and responsible?

c. Amendment for Family Law

Almost as soon as it was effective on January 1, 2009, the Wisconsin Department of Families and Children (“DCF”) requested an amendment to Wisconsin Statute section 801.54. The statute’s requirement of having a hearing on the record was unwieldy where transfer of hundreds, if not thousands, of post-judgment child support cases from state to tribal court were being contemplated.128 DCF wrote to the Court129 and requested the Court amend the statute to permit a state court to make transfers without a hearing on the record after a negative notice to both parties. By negative notice, the DCF was proposing that the county child support agency would send written notice to the parties of the proposed transfer to tribal court. If neither objected, no hearing is held, and the case is

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126. Although during one exchange with Judge White-Fish of the Forest County Potawatomi over jury trials, Judge White-Fish humorously pointed out that, at least in Forest County Potawatomi Tribal Court, it is not necessarily an advantage to have your family members on the jury, the implication being they may be harder on their own tribal and family members. For audio of the Public Hearing, January 8, 2008, see WISCONSIN COURT SYSTEM, http://www.wicourts.gov/scrules/0711.htm (last visited August 19, 2011).


128. In 1997, under the amendments to Title IV of the Social Security Act, 42 U.S.C. §§ 601-619 (2006), federally recognized Indian tribes were made eligible to receive IV-D funding to establish their own child support agencies. Up until the amendments, tribes could only receive IV-D funding if the state agreed to share its IV-D funds. Tribes have started applying for and receiving these funds. The Lac du Flambeau, Menominee, Forest County Potawatomi and Oneida Tribes all have successfully established tribal IV-D agencies.

transferred to tribal court. The negative notice amendment only applies to the transfer of post-judgment child support, custody or placement provisions.\(^{130}\)

The Wisconsin Supreme Court did not hold a public hearing, but examined the issue at its administrative conferences on March 9 and May 1, 2009.\(^{131}\) The Court modified the amendment to require a threshold determination of concurrent jurisdiction.\(^{132}\)

The amendment drew criticism again from the dissenters from of the original rule.\(^{133}\) The dissenters essentially repeated their original claims, showing a fixation with tribes’ allegedly limited jurisdiction over non-members.\(^{134}\) The dissent seemed to discount state trial courts’ ability to apply the law to the facts by claiming it “is not a simple matter for a circuit court to determine” whether one of the two Montana exceptions will apply.\(^{135}\) The dissent continues that the statute is “completely inadequate in addressing this major obstacle to the exercise of tribal court jurisdiction.”\(^{136}\) As discussed above, the family and employment contexts fit squarely into Montana’s exceptions and represent potentially large pools of non-member litigants over which tribal courts have subject matter and personal jurisdiction. In fact, a Wisconsin appellate court recently affirmed tribal court jurisdiction under Montana’s first exception.\(^{137}\)

It is noteworthy that again the dissenting Justices seemed to evince a curious distrust of their own state trial court judges to determine if it makes sense to transfer a case to tribal court. It is also worth noting that during the hearings on this rule, the dissenting Justices, while very concerned about non-Indians getting fair treatment in tribal court, did not seem nearly as concerned about Indians getting the same.

The last chapter up to the writing of this article occurred on July 1, 2011. The original order effective January 1, 2009, called for a two year review. The court held a public hearing on October 18, 2010, at which time some verbal and written comments were offered. The justices reviewed all the comments, and a majority concluded the rule was working properly without any major concerns. By a 4-3 vote, the court kept the rule in place without further amendment and scheduled the next review in five years.\(^{138}\)

\(d. \text{Kroner v. Oneida Seven Generations}\)\(^{139}\)

On June 1, 2011, the Wisconsin Court of Appeals decided the first appellate case reviewing application of Wisconsin Statute section 801.54. In Kroner, John Kroner was

\(^{130}\) Id.

\(^{131}\) Wis. S. Ct. Order 07-11A, In the matter of the petition to create a rule governing the discretionary transfer of cases to tribal courts, 2009 WI 63 (issued July 1, 2009, eff July 1, 2009).

\(^{132}\) Wis. Stat. § 801.54(2m) (2010).

\(^{133}\) Wis. S. Ct. Order 07-11A, In the matter of the petition to create a rule governing the discretionary transfer of cases to tribal courts, 2009 WI 63, ¶ 1-26 (issued July 1, 2009, eff July 1, 2009).

\(^{134}\) Id. ¶s 15-21 (Roggensack, J., dissenting).

\(^{135}\) Id. ¶ 21.

\(^{136}\) Id.

\(^{137}\) Id.


\(^{139}\) Kroner, 2011 WL 2135681.
the Chief Executive Officer for Oneida Seven Generations Corporation, a tribally chartered corporation of which the sole shareholder is the Oneida Tribe of Indians of Wisconsin. Kroner’s employment was terminated in 2008, and he sued Oneida Seven Generations Corporation in Brown County circuit court. Oneida Seven Generations filed various motions to dismiss. At a hearing on the motions, two months after the effective date of Wisconsin Statute section 801.54, the circuit court reserved ruling on the motions and suggested the parties should consider having the matter transferred to the Oneida Tribal Judicial System. The parties conducted discovery and the case languished a bit. Fourteen months later, Oneida Seven Generations filed a motion for discretionary transfer under Wisconsin Statute section 801.54. The circuit court ruled in favor of the transfer, and Kroner appealed.

In affirming, the appellate court confronted two issues: 1) did the state and tribal courts have concurrent jurisdiction over the case and 2) did the state court properly apply the factors listed in Wisconsin Statute section 801.54(2)(a)-(k)?

On the first issue, the court reasoned that Kroner’s voluntary employment on tribal lands, with a corporation, which is owned and controlled by the Tribe, met the first Montana exception. That exception permits tribal court jurisdiction over non-members “who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”

On the second issue, the Court reviewed the relevant factors, established in Teague and then codified in Wisconsin Statute section 801.54, used to determine whether to transfer a case. Nearly all weighed in favor of Oneida Seven Generations or were neutral. The trial court relied heavily on the first factor, which states: “[w]hether issues in the action require interpretation of the tribe’s laws, including the tribe’s constitution, statutes, bylaws, ordinances, resolutions, or case law.” The trial court stated this was the “critical issue,” and that it believed the Oneida tribal court was “far better equipped” to “interpret Oneida Nation rules, documents, legislation [and] tribal policies.”

The court of appeals found the second factor, the presence of cultural issues, to be of minimal importance, though Oneida Seven Generations argued Kroner’s race weighed in favor of tribal court jurisdiction because Kroner “asserted his termination may have been related to his status as a non-member of the tribe.” Oneida Seven Generation’s argument turned the factor on its head and raised many more questions including: is the state court or tribal court better situated to determine the issue of alleged racial bias against a non-member?

On the one hand, nonmembers probably feel there is some “home court” bias

140. Id. at *1.
141. See Wis. S. Ct. Order 07-11, In the matter of the petition to create a rule governing the discretionary transfer of cases to tribal courts, 2008 WI 114 (issued July 31, 2008, eff. Jan. 1, 2009).
143. Id. at *2.
144. Id. at *4.
147. Kroner, 2011 WL 2135681, at *6 (quoting from trial court transcript) (internal quotation marks omitted).
148. Id.
against them in tribal court. Tribal litigants likely feel the same way in state court. One argument in favor of tribal court jurisdiction is that tribal judges are more likely to know the norms and mores of how nonmembers are treated under tribal law. After all, tribes are likely more familiar with the legal preferences in favor of tribal members under tribal and federal law. The suspicion of outsiders is that because tribes are small, their kinship ties will override legal obligations to outsiders. There is no evidence that tribal courts are more susceptible to this than state or federal courts. It is the “fairness” aspect of comity that may ultimately answer these concerns.

**PART 5 — WHY IS THIS WORKING?**

When people are brought together by necessity they can make things happen. P.L. 280 created that necessity. The state and the tribes all, over time, acknowledged a responsibility and no one wanted to walk away from it. That meant they had to make it work. One tribal judge has noted that both state and tribal courts view things differently when you substitute the word “responsibility” for “jurisdiction.”

There are people on the tribal side who would like to see the state and its counties gone from the reservations, so tribal justice could evolve in a more indigenous way. There are people on the state side who would like to see the tribes stop struggling to create their own justice systems and simply buy into the established state system. All these people give impetus to those who are committed to making both systems collaboratively better by staying on the high ground of mutual respect.

One statewide system of justice might be simpler, but it is not going to happen. One collective tribal system for all the reservations might be simpler, but that is not going to happen either. We are very fortunate in Wisconsin to have some courageous state and tribal judicial leaders who do not cling to simplistic theoretical solutions, but rather seem to enjoy the challenges of working through the maze of rights and responsibilities.

There are some key structural elements that have gotten us this far. The first is that Wisconsin is one of the few states with a full faith and credit statute between state and tribal courts. A tribal court decision will receive full faith and credit if:

1. the tribe is organized under the Indian Reorganization Act;
2. the judgment is authenticated;
3. the tribal court is a court of record;
4. the judgment is a valid judgment; and
5. the tribal court certifies that it grants full faith and credit to the judgments of Wisconsin state courts and to the acts of other Wisconsin government entities.

Beyond its practical usefulness, the statute is an important signal from the Wisconsin legislature: it affirms the important of reciprocity for both jurisdictions, and is one more support for comity.

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151. See WIS. STAT. ANN. § 806.245 (West 2010).

Another of the key elements is the WTJA. Having that single representative tribal entity gave the state somewhere to go to engage the conversation and untangle some of the ambiguities. Dealing with eleven different sovereigns, each with their own constitutions, laws, customs, politics and local issues, is a formidable obstacle. The WTJA provides a workable forum for discussion of mutual interests.

It is important to note that the WTJA's priority, in its creation and continued existence, is to serve the needs of tribes and tribal courts. It is successful because of its organic tribal essence. It did not arise to serve the interests of the state or even to be a convenient communication vehicle for state-tribal relations, though it has been extremely valuable in that role. The WTJA mission and function is driven by tribal judges and their concerns, wants and needs. The fidelity to core tribal issues makes it sustainable and a success when interfacing with the state judges.

One important aspect of comity as it applies to the discretionary transfer of cases is that it takes two to transfer. When a state court (examining such issues as concurrent jurisdiction, convenience and pragmatism) determines it is a good idea to transfer a case to a tribal court — that is only half of the equation. It is then up to the tribal court (examining such issues as concurrent jurisdiction, convenience and pragmatism) to determine whether or not to accept the case.

The State-Tribal Judicial Forum is another key element. Here, credit goes to Chief Justice Shirley Abrahamson for her foresight and her style. She nudged this current incarnation of the Forum into a reconstituted existence by appointing a good mix of state court judges and a few others with expertise and interest. She also took advantage of the existence of the WTJA and asked them to appoint a number of tribal judges equal to the number of state judges. From common sense comes common ground. Mutual respect is a common element of both common sense and common ground.

The Forum's value also comes from the relationships that are formed. It is not news that when an issue or problem arises, a person is going to be more likely to pick up the phone and call someone the person already knows. The Forum helps comity because by working together on issues of mutual concern, the state and tribal judges get to know each other and build the trust, wisdom and courage to call on each other in a critical moment. Those relationships allow the judges to find the middle ground of comity between obligation and courtesy.

From these structures have come numerous cumulatively significant gatherings. There have been five WTJA-sponsored continuing legal education seminars designed for state court judges on themes such as P.L. 280 Jurisdiction and the Indian Child Welfare Act. For these the State Supreme Court has granted state court judges continuing judicial education credits to attend. There have also been two "roundtables" or "crackerbarrels" designed to be less formal than the seminars, wherein state and tribal judges have an opportunity to meet with their regional counterparts.

The Annual State Court Judicial Conference now routinely contains a session or more on tribal/state judicial relations and tribal judges are routinely invited to attend and participate. Also emerging out of these structures have been two national "Walking On Common Ground" conferences held here in Wisconsin. These have been promoted by Chief Justice Abrahamson and hosted by the Oneida Nation. They have featured topics
of interest to tribal, state and federal courts, and have now become a “road show” by convening elsewhere nationally and more recently have taken on a regional emphasis to enhance their one-on-one practical value.

While these key structural elements have made much of what has happened possible, it is the people involved who have made them successful. Indeed, it is the people involved who made the structural elements come together in the first place.

What makes all this work locally, on the common ground, is the mutual respect and collegiality of the players. The Teague decision came from a lack of collegiality and mutual respect. The supreme court then, in its decision, insisted on it, even mapping out how to get there. From that grew the Teague Protocols. State and tribal judges coming together regionally to find common solutions... or at least procedures. From that emerged the Discretionary Transfer Rule growing out of those kinds of local circumstances that by their nature incline people to work together — if you have the right people. Fortunately, we have found for the most part the right people here and they have stepped forward. The result is perhaps not yet a well-paved interstate highway, but it is a clearly marked road for those of us walking on common ground... and it has lanes running in both directions.