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Winter 1-1-2008

## In a Class by Themselves: A Proposal to Incorporate Tribal Courts into the Federal Court System Without Compromising Their Unique Status As "Domestic Dependent Nations"

R. Stephen McNeill

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# In a Class by Themselves: A Proposal to Incorporate Tribal Courts into the Federal Court System Without Compromising Their Unique Status As "Domestic Dependent Nations"<sup>†</sup>

R. Stephen McNeill\*

## *Table of Contents*

I. Introduction .....	285
II. Tribal Sovereignty and the Development of Modern Indian Policy.....	287
III. Tribal Court Jurisdiction Under Supreme Court Precedent .....	289
A. Modern Tribal Court Criminal Jurisdiction .....	290
1. The Determinative Power of Party Status .....	290
2. Double Jeopardy .....	292
B. Civil Jurisdiction .....	293
1. Party Status .....	293
2. Land Status .....	295
IV. Problems with the Current State of Tribal Jurisdiction.....	297
A. Issues Unique to Tribal Courts and the Role of Tribal Courts in the Federalist System .....	297

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<sup>†</sup> This Note received the 2007 Roy L. Steinheimer Law Review Award for outstanding student note.

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- 1. The Interaction of State and Tribal Courts and Public Law 280 ..... 298
- 2. The Exhaustion Doctrine and Its Effect on the Tribal/Federal Relationship..... 301
- B. Problems in the Criminal Jurisdiction Context ..... 304
- C. Conflict of Laws Concerns ..... 305
  - 1. Which Law Should Apply? ..... 306
  - 2. Problems with Judgment Recognition..... 307
- D. Forum Shopping and Fundamental Fairness Concerns..... 308
- E. Issues of Tribal Sovereignty ..... 309
- V. Potential Solutions That Treat Indian Tribes Like Other Political Entities..... 309
  - A. Treat Indian Tribes Like States ..... 310
  - B. Treat Indian Tribes As Foreign Countries ..... 314
  - C. Treat Indian Tribes As Administrative Agencies..... 316
  - D. Treat Indian Tribes As Federal Territories..... 317
- VI. A Proposal for a More Tailored Solution..... 320
  - A. A Proposal to Modify the Present State of Tribal Court Jurisdiction ..... 320
    - 1. Proposed Changes to Tribal Court Criminal Jurisdiction..... 321
    - 2. A Proposal to Expand Tribal Court Civil Jurisdiction..... 323
      - a. Presumptive Civil Jurisdiction in Tribal Courts..... 323
      - b. Maintaining Some Limits on Tribal Court Civil Jurisdiction..... 324
        - (1) Limits on Supplemental Jurisdiction ..... 324
        - (2) Adjustments to Tribal Sovereign Immunity ..... 325
      - c. Answering the Critics..... 327
    - 3. Adjustments to State and Federal Court Jurisdiction Resulting from Increased Tribal Court Jurisdiction ..... 328
  - B. The Structure of the Proposed Tribal Court System ..... 329
    - 1. A Court for Every Tribe ..... 330
    - 2. Tribal Appellate Courts for Larger Tribes..... 330
    - 3. Creating a New Federal Circuit Court of Appeals..... 331
  - C. Procedural Devices to Control Interactions Between Tribal Courts and Federal and State Courts ..... 332
    - 1. Levels of Review in the CFR Appellate Courts ..... 333

2. Levels of Review in the CAIC ..... 333

3. Conflict of Laws Concerns..... 336

    a. Choice of Law Procedures ..... 337

        (1) Choice of Law in the Tribal Courts..... 337

        (2) Choice of Law in Nontribal Courts ..... 338

    b. Judgment Recognition..... 340

D. Answering Potential Criticisms of the Proposed Solution ..... 343

    1. Assimilation ..... 343

    2. Costs of Implementation ..... 344

VII. Conclusion..... 345

I. Introduction

With the growth of tribal<sup>1</sup> gaming on Native American reservations, the potential for lawsuits between tribal members and non-Indians increases dramatically.<sup>2</sup> Even if the tribes do not operate a casino, the increasing mobility of American culture provides more opportunities for interactions between tribal members and non-Indians. Whether a breach of a construction contract,<sup>3</sup> an alleged assault,<sup>4</sup> or a simple traffic accident in Indian country,<sup>5</sup> the opposing parties must have a judicial forum available to resolve the dispute.

While litigants often have three available judicial forums from which to choose, tribal courts receive much less respect than corresponding state and federal courts.<sup>6</sup> In an attempt to level the playing field, modern congressional policies attempt to promote tribal governments and court systems.<sup>7</sup> Unfortunately, the law concerning the extent of tribal court jurisdiction remains vastly unsettled. In fact,

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1. I use the terms "tribe" and "Indian" as terms of art throughout this Note. These terms are used extensively in Supreme Court cases, congressional statutes, and scholarly works on this subject.

2. See, e.g., Jim Avila et al., *Jackpot or Mistake? Man Sues Over \$1.6M "Jackpot,"* ABC News, Oct. 25, 2007, <http://abcnews.go.com/TheLaw/story?id=3772215> (last visited Feb. 20, 2008) (describing a suit by a non-Indian who allegedly did not receive his casino winnings) (on file with the Washington and Lee Law Review).

3. See generally *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136 (9th Cir. 2001).

4. See generally *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

5. See generally *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997).

6. See Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M.L. REV. 225, 237-44 (1994) (discussing the lack of legitimacy of tribal courts).

7. See *infra* Part II (discussing the development of modern Indian policy).

non-Indians challenge the exercise of tribal court jurisdiction so frequently that the Supreme Court had to develop a procedural mechanism to prevent non-Indians from completely avoiding the available tribal court systems.<sup>8</sup>

Despite federal efforts to promote tribal sovereignty through the increased use of tribal courts, Congress has taken few steps to establish a coherent role for the tribal courts within the federal system.<sup>9</sup> With little guidance from Congress, the Supreme Court has asserted its role in the development of Indian policy, much to the regret of tribal advocates.<sup>10</sup> By drastically limiting the extent of tribal court jurisdiction over non-Indians, the Supreme Court has delivered devastating blows to tribal sovereignty.<sup>11</sup>

Because the current system is highly complex and deeply flawed,<sup>12</sup> Congress needs to assert itself by enacting a statute that comprehensively defines the extent of tribal court jurisdiction. In addition, Congress must define the role of the tribal courts within the federal system.<sup>13</sup> The easiest way for Congress to achieve both of those objectives would be to classify the Indian tribes as some other political entity that already has a set place in the federal system.<sup>14</sup> Indian tribes, however, are not all the same,<sup>15</sup> and a classification that works for one tribe may not work for others. This Note proposes a more flexible solution that attempts to balance tribal sovereignty with the constitutional rights of non-Indians.<sup>16</sup>

Part II of this Note discusses the federal government's changing policies toward Indian tribes and the effect of those policies on tribal sovereignty. Part III discusses the current state of tribal court jurisdiction, as developed by the Supreme Court. Part IV uncovers problems with the current system and

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8. See *infra* Part IV.A.2 (discussing the exhaustion doctrine).

9. See *infra* notes 32–34 and accompanying text (detailing Congress's deference to the Supreme Court in Indian affairs).

10. See Frank Pommersheim, *Tribal Courts and the Federal Judiciary: Opportunities and Challenges for a Constitutional Democracy*, 58 MONT. L. REV. 313, 327–29 (1997) (describing the development of a second strand of plenary power doctrine).

11. See Frank Pommersheim, *Is There a (Little or Not So Little) Constitutional Crisis Developing in Indian Law?*, 5 U. PA. J. CONST. L. 271, 284 (2003) (describing judicial plenary power as "a rogue doctrine used to curb tribal sovereignty").

12. See *infra* Part IV (describing several problems with the modern system of tribal jurisdiction).

13. See *infra* Part IV.A (discussing the relationships between tribal courts and state and federal courts).

14. See *infra* Part V (discussing the benefits and disadvantages to such classifications).

15. Max Minzner, *Treating Tribes Differently: Civil Jurisdiction Inside and Outside Indian Country*, 6 NEV. L.J. 89, 89 (2005).

16. See *infra* note 242 and accompanying text (setting forth the four goals of the proposal).

discusses the need for Congress to address those problems legislatively. Part V examines potential legislative solutions that would be easy to implement but that do not address the problem fully. Finally, Part VI offers a more comprehensive solution that attempts to address the needs and concerns of both the tribes and the United States.

## II. Tribal Sovereignty and the Development of Modern Indian Policy

In *United States v. Kagama*,<sup>17</sup> the Supreme Court established that the federal government has plenary power to control the Indian tribes.<sup>18</sup> Congress alone possesses that power.<sup>19</sup> Although the plenary power doctrine is widely criticized for its questionable constitutionality,<sup>20</sup> Congress has continually relied on this power to regulate Indian affairs.

Unfortunately, congressional policy on Indian affairs has been highly inconsistent. The year after *Kagama*, Congress began the "assimilation period" by passing the General Allotment Act of 1887.<sup>21</sup> By allowing the distribution of tribal lands to individual tribal members, Congress provided a way to expose Indians to the American way of life.<sup>22</sup> The General Allotment Act had the

17. See *United States v. Kagama*, 118 U.S. 375, 384–85 (1886) (holding that the federal government has plenary power over the Indian tribes). In *Kagama*, the Supreme Court considered the validity of Section 9 of the Indian Appropriation Act of 1885. *Id.* at 376. After separating the act into its two components, the Court discussed the constitutional foundation for the passage of the act. *Id.* at 377–79. Next, the Court determined that the United States owned the land, subject to the possession of the Indians. *Id.* at 381–82. Then, the Court determined that its decision in *Ex parte Crow Dog*, 109 U.S. 556 (1883), caused Congress to pass the challenged act in response to the decision. *Kagama*, 118 U.S. at 383. Finally, the Court found that because the Indian tribes were dependent upon the federal government, not the states, for their protection, daily food, and political rights, the federal government had plenary power over the Indian tribes. *Id.* at 383–84. The Court reasoned that plenary power must exist in the federal government for four reasons: (1) "it never has existed anywhere else," (2) "the theatre of its exercise is within the geographical limits of the United States," (3) that power had never been denied, and (4) the federal government "alone can enforce its laws on all the tribes." *Id.* at 384–85.

18. *Id.* at 383–84.

19. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.").

20. See, e.g., Pommersheim, *supra* note 11, at 271–72 n.4 (listing numerous scholarship on the topic).

21. See Act of Feb. 8, 1887, ch. 119, § 6, 24 Stat. 388, 390 (providing citizenship for Indians who adopt a "civilized" life).

22. See *id.* § 5, 24 Stat. at 389 (providing for allotment of tribal lands to individual Indians, who could alienate the land in fee to non-Indians after 25 years). For a great discussion

devastating effect of dividing tribal land into a patchwork of ownership by allowing the distribution of previously community-held tribal lands to individual Indians who later sold the land to non-Indians.<sup>23</sup> At the same time, Supreme Court opinions concerning tribal sovereignty split into two lines of authority, one affirming tribal sovereignty and the other drastically reducing it.<sup>24</sup>

Realizing the General Allotment Act's failure, Congress later repealed it, and now the United States owns all non-allotted tribal lands in trust for the tribes.<sup>25</sup> Beginning in 1934, congressional policy moved toward an approach that focused more on tribal self-governance and independence.<sup>26</sup> Since that time, Congress has recognized that "Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems."<sup>27</sup> To accomplish that goal, Congress has provided funding for the growth of tribal court systems every year since 1993.<sup>28</sup> Even the Executive Branch has announced a set of goals for all executive departments and agencies to follow that "reflect[] respect for the rights of self-government due the sovereign tribal

of the legislative history behind the act, see *Montana v. United States*, 450 U.S. 544, 559 n.9 (1981).

23. See Act of Feb. 8, 1887, § 5, 24 Stat. at 388–89 (providing for allotment of tribal lands to individual Indians, who could alienate the land to non-Indians in fee after 25 years).

24. See Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329, 335–36 (1989) (noting contradictory decisions from this period).

25. See Act of June 18, 1934, ch. 576, §§ 1–2, 48 Stat. 984, 984 ("[H]ereafter, no land of any Indian reservation . . . shall be allotted in severalty to any Indian. The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.").

26. See *id.* §§ 1–2, 9–11, 16, 48 Stat. at 984, 986–87 (providing several major reversals of former policy including ending the allotment process, vesting title in the United States in trust for the Indian tribes, providing funding for Indian education and corporations, and providing a procedure for Tribes to create their own constitutions that vest certain powers in the tribe).

27. Indian Tribal Justice Act, Pub. L. No. 103-176, § 2(4), 107 Stat. 2004, 2004 (1993) (codified as amended at 25 U.S.C. § 3601(4) (2000)).

28. See *id.* § 201, 107 Stat. at 2009 (setting forth the appropriations for base support funding and administrative expense funding for each year from 1994 through 2000); Indian Tribal Justice Technical and Legal Assistance Act of 2000, Pub. L. No. 106-559, § 202, 114 Stat. 2778, 2781–82 (codified as amended at 25 U.S.C. § 3621 (2000)) (extending the annual funding provisions of the Indian Tribal Justice Act through 2007).

governments."<sup>29</sup> Before 1978, decisions of the Supreme Court also recognized the broad inherent sovereignty of the Indian tribes.<sup>30</sup>

Even without strong constitutional support, federal courts "routinely and uniformly" accept that Congress maintains plenary power over the Indian tribes.<sup>31</sup> Fortunately, modern federal policy is much more supportive of tribal governments than in the past. The Supreme Court, however, has nullified the effect of that policy by sharply limiting tribal court jurisdiction.

### *III. Tribal Court Jurisdiction Under Supreme Court Precedent*

Despite Congress's well-established plenary power over Indian affairs, the Supreme Court has developed most of the existing law concerning tribal court jurisdiction. Because Congress has done little to disrupt these decisions, the Supreme Court has almost single-handedly created the modern framework for tribal court jurisdiction, while simultaneously limiting tribal sovereignty.<sup>32</sup> In fact, at least one commentator has noted that the Supreme Court has adopted its own brand of plenary power, which is still inferior to the congressional plenary power.<sup>33</sup> Instead of following the familiar state-court judicial model, the existing framework determines tribal court jurisdiction depending on which classification the parties fall under: "non-Indian, Indian nonmember, and member."<sup>34</sup> While party status remains important in the context of tribal court civil jurisdiction, it normally is a determinative factor for purposes of tribal court criminal jurisdiction.

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29. Memorandum of April 29, 1994 on Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951, 22,951 (May 4, 1994); *see also* Policy on Indian Sovereignty, 61 Fed. Reg. 29,424, 29,425 (June 10, 1996) (laying out the three basic principles of Indian affairs).

30. *See, e.g.*, *Fisher v. District Court*, 424 U.S. 382, 389 (1976) (affirming the exclusive jurisdiction of the tribal court over a tribal adoption proceeding); *Williams v. Lee*, 358 U.S. 217, 220 (1959) ("[A]bsent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."). *But see* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978) ("By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.").

31. Pommersheim, *supra* note 11, at 279.

32. *See id.* at 284 (describing judicial plenary power as "a rogue doctrine used to curb tribal sovereignty").

33. *See* Pommersheim, *supra* note 10, at 327–29 (1997) (describing the development of a second strand of plenary power doctrine).

34. David A. Castleman, Comment, *Personal Jurisdiction in Tribal Courts*, 154 U. PA. L. REV. 1253, 1259 (2006).



### A. Modern Tribal Court Criminal Jurisdiction

As noted above, the extent of tribal court criminal jurisdiction varies greatly depending on the classification of the parties. In fact, tribal courts currently have no jurisdiction over crimes committed by non-Indians. Even worse, specific statutes prevent tribal courts from exercising jurisdiction over some tribal members. This subpart discusses the effect of party status on tribal court criminal jurisdiction more fully below. In addition, this subpart describes the effect of tribal prosecutions on the constitutional protection against double jeopardy.

#### 1. The Determinative Power of Party Status

Generally, "It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members."<sup>35</sup> Specific language in the Indian Country Crimes Act supports that very broad Supreme Court proposition.<sup>36</sup> Despite the general rule, two major pieces of legislation sharply limit the extent of tribal court criminal jurisdiction over tribal members. First, the Major Crimes Act provides a specified list of crimes over which the United States has exclusive jurisdiction.<sup>37</sup> Second, the Indian Civil Rights Act of 1968 (ICRA) limits tribal court sentencing power to a maximum of one year in jail plus a \$5,000 fine.<sup>38</sup> By placing extreme limits on the methods of punishment, Congress has effectively narrowed tribal court criminal jurisdiction over member Indians to crimes that constitute misdemeanors. Thus, while tribal court criminal jurisdiction over tribal members remains relatively broad, statutory limits greatly limit the effectiveness of law enforcement on the reservation.<sup>39</sup>

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35. *United States v. Wheeler*, 435 U.S. 313, 322 (1978).

36. *See* 18 U.S.C. § 1152 (2000) ("This section shall not extend to offenses committed by one Indian against the person or property of another Indian . . .").

37. *See* 18 U.S.C. § 1153 ("Any Indian who commits against the person or property of another Indian or other person any of the following offenses . . . shall be subject to the same law and penalties as all other persons committing any of the above offenses within the exclusive jurisdiction of the United States."). Congress passed this act in response to the Supreme Court's decision in *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883), which found that a federal district court did not have jurisdiction over the Indian defendant who murdered another Indian.

38. Act of Apr. 11, 1968, Pub. L. No. 90-284, § 202(7), 82 Stat. 73, 77, amended by Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 4217, 100 Stat. 3207, 3353 (codified as amended at 25 U.S.C. § 1302(7) (2000)).

39. *See infra* Part IV.B (discussing problems with the current system of tribal court criminal jurisdiction).

Unlike the exercise of tribal court criminal jurisdiction over member Indians, the question of whether tribal courts may exercise criminal jurisdiction over nonmember Indians is more controversial. In fact, jurisdiction over this class of people represents the one area that Congress has disagreed with the Supreme Court's tribal court jurisprudence.<sup>40</sup> Specifically, Congress imposed its will on the Supreme Court by allowing tribal courts to exercise jurisdiction over nonmember Indians in criminal cases.<sup>41</sup> That statute equates tribal court criminal jurisdiction over nonmember Indians with its criminal jurisdiction over tribal members.

Despite the congressional action granting tribal court criminal jurisdiction over both member and nonmember Indians, Congress has yielded to the Supreme Court concerning tribal court criminal jurisdiction over non-Indians. In *Oliphant v. Suquamish Indian Tribe*,<sup>42</sup> the Supreme Court firmly established that "Indian tribes do not have inherent jurisdiction to try and punish non-Indians."<sup>43</sup> While Congress is free to pass legislation providing tribal courts with criminal jurisdiction over non-Indians,<sup>44</sup> it has yet to do so. More importantly, Congress's failure to respond, combined with its actions concerning the other classifications, indicates that it is satisfied with the Supreme Court's conclusion.

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40. Compare *Duro v. Reina*, 495 U.S. 676, 696 (1990) (determining that tribal courts do not have jurisdiction over nonmember Indians), with 25 U.S.C. § 1301(2) (2000) (giving tribal governments criminal jurisdiction over all Indians).

41. See Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b), 104 Stat. 1856, 1892 (amending 25 U.S.C. § 1301(2) to reflect its current language). This Act is known as the "Duro-fix" because Congress passed it to specifically overrule the Supreme Court's holding in *Duro*.

42. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (holding that "Indian tribes do not have inherent jurisdiction to try and punish non-Indians"). In *Oliphant*, the petitioners were non-Indian residents of the Port Madison Reservation charged with various violations of the tribal code. *Id.* at 194. *Oliphant* challenged the tribal court's exercise of criminal jurisdiction over him as a non-Indian. *Id.* The Court reviewed various treaty provisions with other Indian tribes and concluded that "it was apparently assumed that the tribes did not have criminal jurisdiction over non-Indians absent a congressional statute or treaty provision to that effect." *Id.* at 197. Next, the Court discussed a district court opinion that held that "to give an Indian tribal court 'jurisdiction of the person of an offender, such offender must be an Indian.'" *Id.* at 200 (quoting *Ex parte Kenyon*, 14 F. Cas. 353, 355 (W.D. Ark. 1878) (No. 7720)). Finally, the Court noted that because the Indian tribes submitted to the power of the United States, they gave up their power to try non-Indians except in a manner provided by Congress. *Id.* at 210.

43. *Id.* at 212.

44. *Id.*

## 2. Double Jeopardy

With the potential for federal court jurisdiction under the Major Crimes Act, double jeopardy problems may exist when a prosecution of an Indian in federal court follows a tribal court prosecution for a similar offense or, more often, a lesser-included one. For example, a tribal court conviction for contributing to the delinquency of a minor could precede a federal prosecution for statutory rape arising out of the same incident.<sup>45</sup> Under the Dual Sovereign exception to double jeopardy, a federal prosecution does not bar a subsequent state prosecution for the same acts, nor does a state prosecution bar a subsequent federal prosecution.<sup>46</sup> On the other hand, successive prosecutions in federal and territorial courts are not subject to the Dual Sovereign exception because the territorial courts get their power directly from the federal government.<sup>47</sup> Because tribal governments derive some of their power from the federal government, while retaining other inherent powers, the "controlling question . . . is the source of this power to punish tribal offenders: Is it a part of inherent tribal sovereignty, or an aspect of the sovereignty of the Federal Government which has been delegated to the tribes by Congress?"<sup>48</sup>

Fortunately, the Supreme Court answered that question in *United States v. Wheeler*.<sup>49</sup> After deciding that Congress had specifically chosen not to deprive Indian tribes of "their sovereign power to punish offenses against tribal law by members of a tribe,"<sup>50</sup> the Court ruled that trying Wheeler in federal court after his tribal court conviction did not violate the Double Jeopardy Clause.<sup>51</sup> Later,

45. See *United States v. Wheeler*, 435 U.S. 313, 315 (1978) (establishing this fact pattern).

46. See generally *Bartkus v. Illinois*, 359 U.S. 121 (1959).

47. See *Puerto Rico v. Shell Co.*, 302 U.S. 253, 264–66 (1937) ("[Such courts] are creations emanating from the same sovereignty.").

48. *Wheeler*, 435 U.S. at 322.

49. See *United States v. Wheeler*, 435 U.S. 313, 331 (1978) (holding that the dual sovereignty exception "applies to successive tribal and federal prosecutions"). In *Wheeler*, the Court was faced with the question of whether a defendant, who pleaded guilty in tribal court, subsequently could be prosecuted in federal court for a similar offense. *Id.* at 315–16. After discussing precedent on the dual sovereignty exception to double jeopardy, the Court had to determine the source of the power to punish tribal offenders. *Id.* at 317–22. Next, the Court determined that Indian tribes still possess the sovereign power to punish tribal members who violate tribal law because Congress had not specifically withdrawn that power. *Id.* at 323–328. Thus, the federal courts could punish Wheeler under the dual sovereignty exception to double jeopardy. *Id.* at 329–30.

50. *Id.* at 325.

51. *Id.* at 332.

the Supreme Court extended this holding to situations involving nonmembers who were subjected to the tribal court's jurisdiction under the *Duro-fix*.<sup>52</sup>

### B. Civil Jurisdiction

While congressional statutes and *Oliphant* clearly establish the extent of tribal criminal jurisdiction, tribal civil jurisdiction is much more complicated. Because of the lack of statutes in this area, the Supreme Court has been extremely active in laying out the boundaries of tribal court civil jurisdiction. The Court's precedent establishes that a tribal court's civil jurisdiction is somewhat broader than its corresponding criminal jurisdiction.<sup>53</sup> In addition to party status, the status of the land on which the event occurs affects the determination of whether the tribal court can exercise jurisdiction.

#### 1. Party Status

Clearly, Indian tribes have civil jurisdiction over disputes involving only their members.<sup>54</sup> Civil jurisdiction over disputes between tribal members and nonmembers, however, faces substantial limitations.<sup>55</sup> Nonmembers are treated the same as non-Indians for civil jurisdiction purposes because of "an overriding concern that citizens who are not tribal members be 'protected . . . from unwarranted intrusions on their personal liberty.'"<sup>56</sup> For the purposes of

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52. See *United States v. Lara*, 541 U.S. 193, 210 (2004) (holding that the *Duro-fix* was not a delegation of federal power, but rather amounted to an exercise of inherent tribal authority which Congress was authorized to permit to the tribes). For the derivation of the name "*Duro-fix*," see *supra* note 41.

53. See *Montana v. United States*, 450 U.S. 544, 565 (1981) ("Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.").

54. See *Montana*, 450 U.S. at 564 ("[I]n addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." (emphasis added) (citing *United States v. Wheeler*, 435 U.S. 313, 322 n.18 (1978))).

55. See *id.* at 565 (establishing a general proposition that tribal power does not extend to nonmembers).

56. *Nevada v. Hicks*, 533 U.S. 353, 384 (2001) (Souter, J., concurring) (quoting *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978)); *id.* at 377 n.2 (Souter, J., concurring) ("[T]he relevant distinction . . . is between members and nonmembers of the tribe."); see also 25 U.S.C. § 1301(2) (2000) (defining "powers of self-government to include "the inherent power of Indian tribes . . . to exercise *criminal* jurisdiction over *all* Indians" (emphasis added)).

civil jurisdiction, *Montana v. United States*<sup>57</sup> "is the pathmarking case concerning tribal civil authority over nonmembers."<sup>58</sup>

Although *Montana* dealt only with the regulatory jurisdiction of the Indian tribe, the Supreme Court later held that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."<sup>59</sup> In other words, a tribe has civil jurisdiction over nonmembers only if it can apply its laws to them. Thus, if the tribe has regulatory authority over a nonmember, it presumptively has civil jurisdiction in its courts.<sup>60</sup> In practice, however, a tribal court does not have civil jurisdiction over nonmembers unless it can acquire jurisdiction under one or both of the *Montana* exceptions.<sup>61</sup>

The first *Montana* exception allows the tribe to "regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."<sup>62</sup> This exception allows an Indian tribe to impose regulatory taxes on nonmembers, at least when the transaction occurs on trust land.<sup>63</sup>

57. See *Montana v. United States*, 450 U.S. 544, 556–57 (1981) (holding that "title to the bed of the Big Horn River passed to the State of Montana upon its admission into the Union"). In *Montana*, the Supreme Court had to determine whether the Crow Tribe could regulate hunting and fishing by non-Indians on non-Indian lands within the reservation. *Id.* at 547. First, the Court had to determine whether the United States retained title to the land or passed the title to the State upon its admission to the Union. *Id.* at 551. After recognizing the strong presumption against conveyance by the United States, the Court concluded that the title to the Big Horn River passed to the State when it entered the Union. *Id.* at 552–57. Next, the Court overruled the Court of Appeals by failing to find that the right to restrict hunting and fishing by nonmembers did not flow from treaties between the tribe and the United States. *Id.* at 557–59. The Court again overruled the appellate court by determining that 18 U.S.C. § 1165 did not augment the tribes regulatory powers. *Id.* at 561–563. Finally, the Court held that generally, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565. The Court also established two exceptions to the general rule: (1) the tribe may regulate "the activities of nonmembers who enter into consensual relationships with the tribe," and (2) the tribe can "exercise civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 555–56. The regulatory power at issue in the case did not meet either exception, so the exercise of that authority by the tribe was invalid. *Id.* at 566.

58. *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997).

59. *Id.* at 453.

60. See *id.* ("[W]here tribes possess authority to regulate the activities of nonmembers, '[c]ivil jurisdiction over [disputes arising out of] such activities presumptively lies in the tribal courts.'" (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987))).

61. See *Montana*, 450 U.S. at 565–66 (establishing two exceptions to the general rule preventing the tribe from regulating the activities of nonmembers).

62. *Id.* at 565 (citations omitted).

63. Compare *Merrion v. Jicarilla Apache Indian Tribe*, 455 U.S. 130, 137 (1982) (establishing that the tribe has taxing authority over tribal lands leased by nonmembers), with

Additionally, the Ninth Circuit, sitting en banc, recently held that "a nonmember who knowingly enters tribal courts for the purpose of filing suit against a tribal member has . . . entered into a 'consensual relationship' with the tribe within the meaning of *Montana*."<sup>64</sup>

The second *Montana* exception allows the tribe to regulate conduct of nonmembers that "has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."<sup>65</sup> Later, the Supreme Court provided some additional guidance as to what this exception does not cover. For example, a nonmember driving recklessly on a public highway running through a reservation is not enough to trigger this exception.<sup>66</sup> Rather, the tribal court jurisdiction must be "needed to preserve 'the right of reservation Indians to make their own laws and be ruled by them.'"<sup>67</sup> Additionally, Indian tribes do not have authority to regulate state officers who are executing process related to a violation of state law off the reservation.<sup>68</sup>

## 2. Land Status

Until this decade, the type of land on which the event in question occurred was a dispositive factor in determining if a tribe could exercise civil jurisdiction over nonmembers.<sup>69</sup> In fact, *Montana's* second exception specifically authorizes tribal court jurisdiction over "the conduct of non-Indians on *fee*

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Atkinson Trading Co. v. Shirley, 532 U.S. 645, 659 (2001) ("The Navajo Nation's imposition of a tax upon nonmembers on non-Indian fee land within the reservation is . . . presumptively invalid."). For more information on the role of land classification in determining civil jurisdiction, see *infra* Part III.B.2.

64. *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1140 (9th Cir. 2006) (en banc). The dissent notes that the Supreme Court determined that allowing nonmembers access to tribal courts does not fall within the second *Montana* exception. *Id.* at 1143 (Gould, J., dissenting) (citing *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997)).

65. *Montana v. United States*, 450 U.S. 544, 566 (1981).

66. See *Strate v. A-1 Contractors*, 520 U.S. 438, 457–58 (1997) ("[I]f *Montana's* second exception requires no more, the exception would severely shrink the rule.").

67. *Id.* at 459 (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

68. See *Nevada v. Hicks*, 533 U.S. 353, 364 (2001) ("[T]ribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws is not essential to tribal self-government or internal relations . . .").

69. *But see id.* at 360 ("The ownership status of the land . . . is only one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or to control internal relations.'" (quoting *Montana v. United States*, 450 U.S. 544, 564 (1981))).

lands within [the] reservation."<sup>70</sup> Many commentators have discussed this requirement in terms of territorial jurisdiction.<sup>71</sup>

Even if the events occur within Indian country,<sup>72</sup> another land classification plays a key role in determining whether the tribal court may properly exercise jurisdiction. Namely, the court must determine whether the events took place on trust land or non-Indian fee land. The need to distinguish between those types of land came about because of the General Allotment Act of 1887.<sup>73</sup>

Although *Montana* technically applied only to land held as non-Indian fee lands,<sup>74</sup> the Supreme Court struggled with the question of whether the *Montana* analysis would also apply to events involving non-Indians on lands held in trust by the United States.<sup>75</sup> In fact, one combined case created a split opinion in the Supreme Court, in which different combinations of three separate opinions constituted different majorities in each case, and the key factor was the ownership status of the land.<sup>76</sup> In 2001, however, the Supreme Court determined that land status was merely a factor in the jurisdictional framework and that the principles of *Montana* applied, even on Indian fee lands.<sup>77</sup>

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70. *Montana*, 450 U.S. at 566 (emphasis added).

71. See, e.g., Pommersheim, *supra* note 24, at 343–44 (discussing the appropriateness of an inquiry into the territorial jurisdiction of the tribal court); Julia A. Pace, Comment, *Enforcement of Tribal Law in Federal Court: Affirmation of Indian Sovereignty or a Step Backward Towards Assimilation?*, 24 ARIZ. ST. L.J. 435, 438–41 (1992) (explaining how "[d]etermining the geographical boundaries of Indian tribal governments is paramount to determining the extent of tribal civil jurisdiction").

72. See 18 U.S.C. § 1151 (2000) ("'Indian country' . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, . . . (b) all dependent Indian communities within the borders of the United States . . . , and (c) all Indian allotments, the Indian titles to which have not been extinguished . . .").

73. See *supra* notes 21–24 and accompanying text (discussing the problems created by the General Allotment Act).

74. See *Montana v. United States*, 450 U.S. 544, 547 (1981) ("This case concerns the sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation *owned in fee simple by non-Indians*." (emphasis added)).

75. Compare *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (establishing that the tribe has taxing authority over tribal lands leased by nonmembers), with *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001) ("The Navajo Nation's imposition of a tax upon nonmembers on non-Indian fee land within the reservation is . . . presumptively invalid."); see also *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997) (agreeing that "tribes retain considerable control over nonmember conduct on tribal land").

76. See generally *Brendale v. Confederated Tribes & Bands of the Yakima Nation*, 492 U.S. 408 (1989).

77. See *Nevada v. Hicks*, 533 U.S. 353, 360 (2001) (deciding that the ownership status of the land is one factor in the *Montana* analysis). "It may sometimes be a dispositive factor." *Id.* (noting that "the absence of tribal ownership has been virtually conclusive of the absence of

#### IV. Problems with the Current State of Tribal Jurisdiction

Even if a tribal court can exercise jurisdiction over a nonmember, state and federal courts may have concurrent jurisdiction over the case. In those instances, courts must devise a system to determine which court properly should hear the case. While state and federal courts have developed choice of law procedures, as well as numerous other judicial doctrines such as abstention<sup>78</sup> and the *Erie* Doctrine,<sup>79</sup> no such system exists for relationships between tribal and state or tribal and federal courts.<sup>80</sup>

Although the Supreme Court and Congress have addressed some of the problems of fitting tribal courts into the federalist system, their efforts have only further complicated those relationships. After discussing the failed attempts of the Supreme Court and Congress to create a clear relationship between tribal courts and other forums, this Part discusses key problems with the present system. Those problems require a congressional solution rather than a gradual evolution through Supreme Court jurisprudence.<sup>81</sup>

##### A. Issues Unique to Tribal Courts and the Role of Tribal Courts in the Federalist System

Generally, if state or federal courts exercise jurisdiction over Indians, or their lands, in a way that interferes with tribal sovereignty and self-government, that jurisdiction must yield to the tribal court's jurisdiction.<sup>82</sup> Of course, Congress can change the parameters of that general rule at any time using its plenary power over Indian affairs.<sup>83</sup> For example, Congress gave states the option of expanding their jurisdiction to cover Indian affairs with the passage of Public Law 280.<sup>84</sup> Similarly, the Supreme Court, through judicial interpretation of federal statutes, can interpret laws to limit or increase the

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tribal civil jurisdiction").

78. See generally *Younger v. Harris*, 401 U.S. 37 (1971).

79. See generally *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

80. See Minzner, *supra* note 15, at 96 (noting that "the Supreme Court generally presumes that the selected venue will apply its own law").

81. See *infra* Parts V–VI (providing several options for Congress to consider).

82. See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987) (noting that the exercise of state or federal jurisdiction can impair the authority of tribal courts).

83. See *supra* notes 17–20 and accompanying text (detailing the development of the plenary power doctrine).

84. Act of Aug. 15, 1953, ch 505, 67 Stat. 588.



jurisdiction of federal and tribal courts.<sup>85</sup> As a result, the Supreme Court expanded the scope of federal jurisdiction over Indian affairs by creating the exhaustion doctrine.<sup>86</sup>

### 1. *The Interaction of State and Tribal Courts and Public Law 280*

During the early years of the United States, state courts could not exercise jurisdiction over causes of action that arose on the reservation.<sup>87</sup> Instead, the Supreme Court considered congressional plenary power over reservation affairs to be absolute.<sup>88</sup> In fact, federal control over the reservations was so strong that many new states had to disclaim jurisdiction over events arising in Indian country as a condition of statehood.<sup>89</sup>

Despite this history of absolute federal control, state courts eventually began acquiring some jurisdiction over reservation affairs. For example, the Supreme Court held that an Indian tribe can bring suit as a plaintiff in state court.<sup>90</sup> Ultimately, the modern approach developed out of a combination of infringement and preemption type analyses.<sup>91</sup> The Supreme Court announced the modern approach in *Williams v. Lee*: "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed upon the right of reservation Indians to make their own laws and be ruled by them."<sup>92</sup> In other words, state courts can only exercise jurisdiction over reservation affairs if the assumption of jurisdiction is not preempted by federal law and does not infringe upon tribal sovereignty.

85. See Laurie Reynolds, *Adjudication in Indian Country: The Confusing Parameters of State, Federal, and Tribal Jurisdiction*, 38 WM. & MARY L. REV. 539, 561 (1997) ("[T]he Court announced its astonishingly broad definition of federal question jurisdiction in *National Farmers Union v. Crow Tribe*, 471 U.S. 845 (1985).").

86. See *infra* Part IV.A.2 (discussing the exhaustion doctrine and its effect on the tribal court and federal court relationship).

87. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (finding that the laws of Georgia have no force within the Cherokee reservation).

88. See *United States v. Kagama*, 118 U.S. 375, 384 (1886) ("[Indian tribes] owe no allegiance to the states, and receive from them no protection.").

89. See S. REP. NO. 83-699 (1953), as reprinted in 1953 U.S.C.C.A.N. 2409, 2412 (listing eight states with enabling acts disclaiming jurisdiction over reservation territory).

90. See *Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877, 888 (1986) ("[T]ribal autonomy and self-government are not impeded when a State allows an Indian to enter its court to seek relief against a non-Indian concerning a claim arising in Indian country.").

91. See William V. Vetter, *The Four Decisions in Three Affiliated Tribes and Pre-Emption by Policy*, 23 LAND & WATER L. REV. 43, 54 (1988) (establishing the "two separate but related 'tests' against which state law is to be measured").

92. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

Because federal statutes and treaties cover most Indian law, the preemption analysis usually takes precedence over the infringement analysis.<sup>93</sup> As a result, infringement analysis occurs most often in the second step of preemption analysis, which examines the governmental interests involved.<sup>94</sup> Unlike the traditional preemption analysis, preemption in the tribal law context requires the courts to weigh the interests of the tribe against the federal and state interests involved.<sup>95</sup> Additionally, express preemption is not required; instead, the need for certainty of federal preemption varies inversely with the extent of tribal sovereignty at issue.<sup>96</sup> Thus, the greater the infringement of tribal sovereignty by a state court's assumption of jurisdiction, the more likely the court will find such jurisdiction preempted by federal law.

Even with the modern approach to determining whether a state court can exercise jurisdiction over reservation affairs, Public Law 280 exists as an example of an explicit federal delegation of jurisdiction to the state courts. As originally passed, Public Law 280 provided five states with criminal<sup>97</sup> and civil jurisdiction<sup>98</sup> over Indian country within the respective states, with exceptions for a few specific tribes.<sup>99</sup> Those five states, along with Alaska, became known as the "mandatory" states.<sup>100</sup> In addition to providing the mandatory states with jurisdiction, Congress also provided a procedure for the other states to assume jurisdiction over Indian country within their borders.<sup>101</sup> The states that assumed jurisdiction under that provision became known as "optional" states.<sup>102</sup>

93. See Vetter, *supra* note 91, at 55 ("There are few facets of Indian or state activity where there is no potentially relevant treaty or statute.").

94. *Id.*

95. See *id.* at 61 (discussing the differences between routine preemption analysis and preemption in the tribal context); see also *Three Affiliated Tribes*, 476 U.S. at 884 (describing the Supreme Court's formulation of a "comprehensive pre-emption inquiry in the Indian law context").

96. See Vetter, *supra* note 91, at 62 (discussing the theoretical role of tribal sovereignty in tribal preemption cases).

97. Act of Aug. 15, 1953, ch. 505, § 2, 67 Stat. 588, 588 (codified as amended at 18 U.S.C. § 1162 (2000)).

98. *Id.* § 4, 67 Stat. at 589 (codified as amended at 28 U.S.C. § 1360 (2000)).

99. See 18 U.S.C. § 1162 (2000) (listing the specific Indian country affected in each state).

100. Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1657 (1998).

101. See Act of Aug. 15, 1953, § 7, 67 Stat. at 590 (codified as amended at 25 U.S.C. §§ 1321, 1322 (2000)) (authorizing other states to assume jurisdiction over Indian country by adopting affirmative legislation).

102. Jiménez & Song, *supra* note 100, at 1658.

Congress intended Public Law 280 to provide a better method of law enforcement on the reservations<sup>103</sup> and to reduce its financial burden.<sup>104</sup> Nevertheless, Public Law 280 creates additional unintended problems concerning the role of tribal courts in the federal system. First, the statute provides a way for state civil law to preempt tribal law, if they directly conflict.<sup>105</sup> While the Supremacy Clause provides a basis for federal preemption,<sup>106</sup> no such constitutional provision provides a justification for state preemption of tribal law.

Next, the language of Public Law 280 creates significant confusion over just how much jurisdiction the state is entitled to assume. One could read the statute to provide the state courts with general jurisdiction over reservation affairs, which would prevent the tribal courts from ever exercising jurisdiction.<sup>107</sup> That reading, however, is entirely inconsistent with modern federal policy and a better reading would view the statute as a transfer of partial federal jurisdiction.<sup>108</sup> Assuming Public Law 280's purpose simply was to transfer some federal jurisdiction to the states, a further problem arises in determining whether the exhaustion of tribal remedies is required in state courts as well as federal courts. If the statute transfers partial federal jurisdiction to

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103. S. REP. NO. 83-699 (1953), as reprinted in 1953 U.S.C.C.A.N. 2409, 2411-12 ("[T]he enforcement of law and order among the Indians in Indian country has been left largely to the Indian groups themselves. [However,] [i]n many States, tribes are not adequately organized to perform that function . . .").

104. See Jiménez & Song, *supra* note 100, at 1661 (noting the congressional concern over the federal government's mounting costs in fulfilling its trust responsibility). Apparently, Congress also had assimilation in mind when it passed Public Law 280. See *id.* at 1664 ("Public Law 280 contains a strong assimilationist bent and there may be language in the statute's legislative history that could support an assimilationist agenda."); see also Bryan v. Itasca County, 426 U.S. 373, 387-88 (1976) ("Pub.L. 280 was only one of many types of assimilationist legislation under active consideration in 1953.").

105. See Act of Aug. 15, 1953, ch. 505, § 4(c), 67 Stat. 588, 589 (codified as amended at 28 U.S.C. § 1360(c) (2000)) ("Any tribal ordinance or custom . . . adopted by an Indian tribe . . . in the exercise of any authority which it may possess shall, *if not inconsistent with any applicable law of the State*, be given full force and effect in the determination of civil causes of action pursuant to this section." (emphasis added)).

106. See U.S. Const. art. VI, cl. 2 ("This Constitution . . . and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land.").

107. See 18 U.S.C. § 1162(a) (2000) (granting the states with jurisdiction over "offenses committed by or against Indians" in Indian country within the state); 28 U.S.C. § 1360(a) (2000) ("Each of the States . . . shall have jurisdiction over civil causes of action between Indians . . . to the same extent that such State has jurisdiction over other civil causes of action . . ."). *But see* 18 U.S.C. § 1162(b) (providing explicit exceptions to state jurisdiction); 28 U.S.C. § 1360(b) (same).

108. See Jiménez & Song, *supra* note 100, at 1667-78 (providing strong support for a transfer of federal jurisdiction in both the civil and the criminal contexts).

the states, the doctrines formulated under federal law should transfer to those states as well. Exhaustion, however, is a matter of comity, and comity is completely discretionary.<sup>109</sup> Thus, even if the federal courts grant exhaustion as a matter of comity, state court comity considerations could indicate that exhaustion is not required.

While the 1968 amendments to Public Law 280<sup>110</sup> were much more favorable to the tribes than the original statute, they also presented many new problems. First, the tribal consent provision was not retroactive, so any states that had already assumed jurisdiction maintained that jurisdiction without the consent of the tribes.<sup>111</sup> Next, the federal government allowed the states that had assumed jurisdiction to return part, or all, of that jurisdiction to the United States.<sup>112</sup> Besides contradicting the original Act's purpose of reducing federal spending, the retrocession provision allowed the states to manipulate the system by returning "the most costly forms of jurisdiction while retaining those most offensive to the Indians."<sup>113</sup> Even worse, the amendments failed to provide a way for the tribes to initiate the retrocession process if they were dissatisfied with the state's jurisdiction over them.<sup>114</sup> By failing to provide the Indians with a way to initiate the retrocession, Congress ensured the balance of power remained with the states, despite Congress's efforts to give the tribes a role in any future assumptions of jurisdiction.<sup>115</sup>

## 2. *The Exhaustion Doctrine and Its Effect on the Tribal/Federal Relationship*

Prior to 1985, federal courts usually declined to exercise federal jurisdiction over events involving Indians on the reservation for lack of a federal question.<sup>116</sup> Instead, "federal courts presumably assumed that the

109. See Raymond L. Niblock, *Federal Courts, Tribal Courts, and Comity: Developing Tribal Judiciaries and Forum Selection*, 19 U. ARK. LITTLE ROCK L. REV. 219, 221 (1997) ("A federal court confronted with comity concerns is not obligated to consider them.").

110. Act of Apr. 11, 1968, Pub. L. No. 90-284, §§ 201-701, 82 Stat. 73, 77-81.

111. Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535, 551 (1975).

112. See Act of Apr. 11, 1968, § 403, 82 Stat. at 79 (codified at 25 U.S.C. § 1323 (2000)).

113. Goldberg, *supra* note 111, at 559.

114. See *id.* (offering possible reasons why Congress may not have provided a method for Indians to initiate retrocession).

115. See *id.* at 562 (noting that modern Indian policy favors giving the tribes more control over the retrocession process).

116. See, e.g., *Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989) ("[F]ederal question jurisdiction does not exist merely because an

analysis in *Williams v. Lee*<sup>117</sup> would guide the determination of the proper forum."<sup>118</sup> In 1985, however, the Supreme Court established the exhaustion doctrine, which gave federal courts a significant role in the federal relationship with the tribal courts.<sup>119</sup>

In setting up the exhaustion doctrine, the Supreme Court decided that whether a tribal court exceeded the limits of its jurisdiction is a federal question.<sup>120</sup> Before a federal court can hear a case, however, the challenging party must exhaust all available remedies in the tribal forum.<sup>121</sup> Two years later, the Court extended the exhaustion doctrine to apply in diversity cases as well.<sup>122</sup>

Notably, the exhaustion doctrine does not "deprive the federal courts of subject-matter jurisdiction."<sup>123</sup> Rather, "[e]xhaustion is required as a matter of comity";<sup>124</sup> thus, it is not jurisdictional in nature. By retaining subject matter jurisdiction, federal courts serve as an appellate court, at least with regard to the issue of tribal jurisdiction.<sup>125</sup> In practice, however, the exhaustion doctrine functions like the abstention doctrine, mixed with some principles of administrative law and habeas corpus law.<sup>126</sup>

The Court provided three reasons why comity requires the exhaustion of tribal remedies. First, and most significantly, congressional policy favors the

Indian tribe is a party or the case involves a contract with an Indian tribe.").

117. *Williams v. Lee*, 358 U.S. 217, 223 (1959) (finding the state court did not have proper jurisdiction over events arising on the reservation).

118. Reynolds, *supra* note 85, at 561.

119. See *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857 (1985) ("Until petitioners have exhausted the remedies available to them in the Tribal court system, . . . it would be premature for a federal court to consider any relief.").

120. *Id.*

121. See *id.* ("[E]xhaustion is required before such a claim may be entertained by a federal court . . .").

122. See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987) ("Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a 'full opportunity to determine its own jurisdiction.'" (quoting *Nat'l Farmers Union*, 471 U.S. at 857)).

123. *Id.* at 16 n.8.

124. *Id.*

125. See Judith V. Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 U. KAN. L. REV. 241, 254 (1998) (noting the possibility of attacking a tribal court judgment in federal court, even though a similar challenge does not exist for state court judgments).

126. See Melissa L. Koehn, *Civil Jurisdiction: The Boundaries Between Federal and Tribal Courts*, 29 ARIZ. ST. L.J. 705, 720-22 (1997) (demonstrating the Court's "strange mix of abstention, administrative law, and habeas corpus").

development of tribal self-governance.<sup>127</sup> Adherence to that policy means providing the tribal court with the first opportunity to respond to challenges to its jurisdiction.<sup>128</sup> Second, "allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed"<sup>129</sup> best serves judicial efficiency. Finally, exhaustion allows tribal courts to explain their basis for jurisdiction, and other courts can benefit from their expertise in tribal matters.<sup>130</sup>

Since creating the exhaustion doctrine, the Supreme Court has provided little additional guidance on how lower courts should interpret the purposes or exceptions to the doctrine.<sup>131</sup> Instead, the exhaustion requirement created a host of new issues concerning when and how to apply exhaustion, and the lower courts have taken their own approaches to those issues.<sup>132</sup> More importantly, after the exhaustion requirement is satisfied, questions remain as to what level of scrutiny the federal court should apply to the tribal court decision<sup>133</sup> and how extensive that review should be.<sup>134</sup> Any proposed statutory scheme should address these important issues.

Perhaps the biggest problem with exhaustion, however, is what to do when a tribal forum, that rightly has jurisdiction, does not exist.<sup>135</sup> An Indian tribe may not have a tribal court for several reasons. First, the tribe may be unable to afford the costs of running a court system.<sup>136</sup> Further, the tribe may rely on the elected tribal council to determine all disputes between tribal members.<sup>137</sup>

127. See *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856 (1985) (recognizing that "Congress is committed to a policy of supporting tribal self-government and self-determination").

128. *Id.*

129. *Id.*

130. *Id.* at 857.

131. See *id.* at 857 n.21 (listing exceptions to the exhaustion doctrine); see also Koehn, *supra* note 126, at 749–62 (discussing lower court attempts to interpret the three exceptions to exhaustion).

132. See Koehn, *supra* note 126, at 728–48 (discussing several key issues that remain unresolved by the Supreme Court).

133. See Royster, *supra* note 125, at 254–66 (discussing the three-part approach for reviewing tribal court decisions on post-exhaustion review).

134. See *id.* at 266–80 (proposing the extent of federal court review depending on the basis for federal court jurisdiction).

135. See Nancy Thorington, *Civil and Criminal Jurisdiction over Matters Arising in Indian Country: A Roadmap for Improving Interaction Among Tribal, State and Federal Governments*, 31 MCGEORGE L. REV. 973, 1035 (2000) (discussing unfavorable methods of resolving the problem).

136. See Reynolds, *supra* note 85, at 577 (noting that "the lack of a formal tribal court system is usually due to inadequate resources and expertise").

137. See Sandra Day O'Connor, Remarks, *Lessons from the Third Sovereign: Indian*

While such a practice offends the American notion of separation of powers, serious erosions of tribal sovereignty would occur if Congress forced the tribes to create a separate judicial branch.<sup>138</sup> Finally, even if a tribal court exists, the tribal code might only allow the court to exercise jurisdiction over non-Indians if they consent.<sup>139</sup> Whatever the reason, any permanent solution must address situations in which no tribal forum is available to resolve the dispute.

### B. Problems in the Criminal Jurisdiction Context

Because of the limited ability of tribal courts to exercise criminal jurisdiction over non-Indians, most of the problems inherent in the tribal court relationships with state and federal courts concern civil jurisdiction. Some problems, however, do arise in the criminal jurisdiction context. For example, does a violation of tribal law by a parolee constitute a parole violation?<sup>140</sup> In addition, because tribal court judgments fit within the Dual Sovereign exception to double jeopardy, defendants who plead guilty in tribal court may not realize the ramifications of their pleas on later federal prosecutions,<sup>141</sup> especially because many of them do not necessarily have the benefit of counsel.<sup>142</sup> Even worse, the tribal court judge may not know the ramifications, and may therefore be unable to advise the defendant on them.<sup>143</sup> To solve these problems, tribal courts, along with their federal and state counterparts, must develop better communication methods to make this key information readily available.

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*Tribal Courts*, 33 TULSA L.J. 1, 5 (1997) (discussing the need for tribal court independence from the control of the tribal council).

138. See Thorington, *supra* note 135, at 983 (arguing that incorporating certain concepts from American justice systems into tribal court systems would "undermine what is left of the traditional systems").

139. See Reynolds, *supra* note 85, at 577 (noting that such restrictions appear in tribal ordinances that "follow[] the model provided by the Department of the Interior").

140. See B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457, 511 (1998) (recognizing that tribal courts may not be aware of the probationer's status and may not fully advise them as to whether pleading guilty in tribal court may revoke his parole status).

141. See *id.* at 510 ("Few tribal judges would like to be in a position of accepting a plea in tribal court after advising the pro se defendant, erroneously perhaps, that his or her plea will have no impact in federal court.").

142. Compare 25 U.S.C. § 1302 (2000) (containing no right to counsel provision), with U.S. CONST. amend. VI (granting a right to counsel).

143. See Jones, *supra* note 140, at 510 (noting the uncertainty over the admissibility of noncounseled tribal court guilty pleas in federal courts).

Perhaps the biggest problem concerning the present state of tribal court criminal jurisdiction, however, is finding a solution to the growing problem of misdemeanors committed by non-Indians against Indians in Indian country.<sup>144</sup> After *Oliphant v. Suquamish Tribe*, tribal courts cannot exercise jurisdiction over these claims, and the General Crimes Act similarly bars state court jurisdiction over them.<sup>145</sup> Because federal prosecutors have limited resources and spend most of their time investigating more serious crimes, they are unlikely to devote the requisite amount of resources to resolving the problem.<sup>146</sup> While increasing federal funding or expanding either tribal or state court jurisdiction would solve this problem, Congress has done neither,<sup>147</sup> and the situation badly needs a remedy.

### C. Conflict of Laws Concerns

When providing a place for tribal courts in the federal system, Congress should consider the possibility of a conflicts-based approach, similar to those utilized by state courts. While state courts utilize a variety of choice of law doctrines,<sup>148</sup> courts hearing cases between Indians and non-Indians rarely conduct any form of choice of law analysis.<sup>149</sup> Several possible reasons may help to explain why those courts fail to perform a choice of law analysis,<sup>150</sup> but none of them provide a sufficient reason for the continued avoidance of that analysis. This subpart establishes some of the conflicts of law problems, including which law should apply and how to handle judgment enforcement.

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144. See *id.* at 513 (discussing the jurisdictional gap that occurs in those situations).

145. *Id.*

146. *Id.*

147. Public Law 280 was one such attempt, but the confusion over how much jurisdiction the states could assume hindered its usefulness. See *supra* notes 107–09 and accompanying text (describing the jurisdictional confusion resulting from the enactment of Public Law 280).

148. See SYMEON C. SYMEONIDES ET AL., *CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL CASES AND MATERIALS* 302 (2d ed. 2003) (providing a chart summarizing the choice of law methods utilized by each jurisdiction).

149. See 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, 1629 (2006) (“[C]ourts have tended to treat the issues of which forum should hear a case and which law should be applied to it as if they were a single question—simply assuming . . . that the forum in which the case is brought will apply its own law.”).

150. See *id.* at 1676–96 (discussing three objections to applying tribal law in state courts).



### 1. Which Law Should Apply?

The biggest hurdle to applying tribal law in state and federal courts is that much tribal law is unwritten.<sup>151</sup> Many tribal courts rely on tribal customs and ancient traditions to resolve disputes, but tribal constitutions and tribal codes do not always reflect these practices.<sup>152</sup> Because of the lack of a written set of laws, American judges are highly unlikely to apply laws based on tribal custom with the accuracy of the tribal courts.<sup>153</sup> While judges in one state will not know the laws of a foreign state as well as judges in that state, the foreign state has a written code that is similar to the code in the forum state, which may, or may not, be the case if the foreign law is tribal law.<sup>154</sup>

In contrast, many tribal courts have a great deal of familiarity with American laws because their tribal codes follow an American model.<sup>155</sup> Additionally, tribal judges often look to federal and state law to fill in gaps in the tribal code.<sup>156</sup> Applying state or federal law in tribal court, however, raises other more basic problems. Because of a lack of funding, most tribal courts do not have the research capabilities of state and federal courts.<sup>157</sup> Thus, while the foreign law may be written in a way that tribal court judges can easily understand, the judge may be unable to locate a copy of the foreign law or the cases that interpret it.<sup>158</sup> Even if the tribal court has access to the requisite information, many states may not be comfortable with a tribal court applying

151. See *id.* at 1630 (noting that "[i]n some tribes, elders who do not speak English administer tribal law").

152. See O'Connor, *supra* note 137, at 3 ("Tribal court judges frequently are tribal members who seek to infuse cultural values into the process.").

153. See Florey, *supra* note 149, at 1630 ("[T]ribes and their members are generally better off if disputes involving tribal matters are heard in tribal forums.").

154. See Thorington, *supra* note 135, at 982 (noting that some tribes continue to use the model codes and constitutions, while others have developed their own law and order codes).

155. See Jones, *supra* note 140, at 471 ("[M]any of the laws in the old C.F.R. resemble many of the constitutional and statutory provisions contained in modern-day tribal codes.").

156. See Minzner, *supra* note 15, at 106 ("Tribal custom is subordinated to federal law and when no tribal custom or law applies, Navajo courts are encouraged to examine the law of the appropriate state.").

157. See Jones, *supra* note 140, at 476 (listing structural problems faced by modern tribal courts that include funding, organization, and technology).

158. See *id.* (noting "a lack of electronic resources to manage and retrieve court information").

their laws.<sup>159</sup> In addition, applying state or federal law in tribal court may seriously undermine tribal sovereignty.<sup>160</sup>

## 2. Problems with Judgment Recognition

Another choice of law issue that frequently arises in tribal court relationships with other courts is the issue of judgment recognition. This issue is extremely important in the state/tribal context because state courts cannot place liens on Indian property.<sup>161</sup> Assuming a state court can exercise jurisdiction over an Indian, any remedies awarded against the Indian can only come from his or her off-reservation property, unless the tribal courts recognize the judgment.<sup>162</sup> Similarly, if a tribal court enters a judgment against a non-Indian, the damages that the tribal court can award are limited to the on-reservation property of the non-Indian, which is usually minimal.<sup>163</sup> Because the judicial proceedings of Indian tribes are not entitled to full faith and credit under the Constitution,<sup>164</sup> most courts have determined that considerations of comity decide whether the state court must enforce the judgment of the tribal court, and vice versa.<sup>165</sup> In response, commentators have proposed many

159. See Thorington, *supra* note 135, at 983 ("The non-tribal courts view tribal courts as less legitimate because tribal courts are based on different values and assumptions.").

160. See *id.* (noting that familiar American legal doctrines such as free speech "tend[] to undermine what is left of the traditional systems").

161. See *id.* at 1017 ("Even in P.L. 280 states, only the tribe or the federal government can do any act that would result in the encumbrance, alienation or taxation of Indian property." (citing 28 U.S.C.A. § 1360(b) (West 1993))).

162. See Jones, *supra* note 140, at 478 (noting the futility of resolving the jurisdictional conflict if appropriate enforcement mechanisms are not in place).

163. See William V. Vetter, *Of Tribal Courts and "Territories" is Full Faith and Credit Required?*, 23 CAL. W. L. REV. 219, 221 (1987) (noting that, at least for cases involving automobile accidents, nonmembers usually do not own property on the reservation).

164. See U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."); see also 28 U.S.C. § 1738 (2000) (noting that full faith and credit extends to "any State, Territory, or Possession of the Unites States").

165. See, e.g., *Wilson v. Marchington*, 127 F.3d 805, 809–10 (9th Cir. 1997) (concluding that principles of comity govern whether federal courts should recognize and enforce tribal court judgments); *Brown v. Babbit Ford, Inc.*, 571 P.2d 689, 694 (Ariz. Ct. App. 1977) (holding that Arizona courts are not required to give full faith and credit to enactments of a Navajo tribal council); *Lohnes v. Cloud*, 254 N.W.2d 430, 433 (N.D. 1977) (stating that the full faith and credit clause is not applicable to Indian tribes). *But see Sheppard v. Sheppard*, 655 P.2d 895, 901 (Idaho 1982) (determining that tribal adoption decrees are entitled to full faith and credit under 28 U.S.C. § 1738); *Jim v. CIT Fin. Servs. Corp.*, 533 P.2d 751, 752 (N.M. 1975) (finding that the laws of the Navajo Nation are entitled to full faith and credit).

different theories on the appropriate standard by which tribal and state courts should recognize each other's judgments.<sup>166</sup> Whichever method of judgment recognition is chosen, Congress must address whether the solution should be uniform throughout the country, or whether each state should determine its own standard.<sup>167</sup>

#### D. Forum Shopping and Fundamental Fairness Concerns

In addition to the nightmarish problem of fitting tribal courts into the federal system, Congress must address basic issues of fairness when designing a statutory solution to the problem of tribal court jurisdiction. For example, a non-Indian cannot sue an Indian defendant in state court for a dispute arising on the reservation, but an Indian plaintiff can sue a non-Indian in state court for the same violation.<sup>168</sup> Clearly, an Indian plaintiff could choose the most favorable forum, while the non-Indian must bring his action in tribal court, which is most likely not his forum of choice.<sup>169</sup> Another fundamental fairness question arises in situations where a non-Indian is forced to exhaust tribal court remedies despite raising a federal question issue in the original complaint.<sup>170</sup> By requiring the federal court to stay its hand, the exhaustion doctrine gives tribal courts greater deference than similarly situated state courts.<sup>171</sup>

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166. See generally Richard E. Ransom et al., *Recognizing and Enforcing State and Tribal Judgments: A Roundtable Discussion of Law, Policy, and Practice*, 18 AM. INDIAN L. REV. 239 (1993) (discussing several different solutions to the recognition of judgment problem); see also Jones, *supra* note 140, at 483 n.116 (citing a wide sampling of proposed solutions).

167. See Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. REV. 311, 335–46 (2000) (discussing the various approaches taken by state courts).

168. Compare *Williams v. Lee*, 358 U.S. 217, 223 (1959) (concluding that a state cannot exercise jurisdiction over an Indian defendant for an incident arising on the reservation), with *Three Affiliated Tribes v. Wold Eng'g*, 476 U.S. 877, 888 (1986) ("[T]ribal autonomy and self-government are not impeded when a State allows an Indian to enter its court to seek relief against a non-Indian concerning a claim arising in Indian country.").

169. See Minzner, *supra* note 15, at 90 (noting a Supreme Court assumption that non-Indians will be disadvantaged in tribal courts).

170. See Niblock, *supra* note 109, at 239 (raising this question).

171. See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 21 (1987) (Stevens, J., concurring in part and dissenting in part) (noting that federal courts often hear federal question claims despite a pending action in state court).

### *E. Issues of Tribal Sovereignty*

Although the rampant problems with the current system indicate a need for change, any proposition to modify the current state of tribal jurisdiction must also include an analysis of how the proposed changes will affect tribal sovereignty. Because congressional statutes and Supreme Court decisions have greatly eroded tribal sovereignty, Indian culture has lost much of its previous uniqueness.<sup>172</sup> In fact, many tribes had to adopt Anglo-like tribal constitutions to receive federal recognition.<sup>173</sup> Even the ICRA, with its Anglicized notions of individual rights, imposed responsibilities on the tribal courts that were foreign to them.<sup>174</sup> Fortunately, all tribal court systems still maintain some traces of their heritage, and many tribes rely heavily on tribal customs and traditions as a means to enforce laws.<sup>175</sup> While the use of unwritten customs in a court proceeding is foreign to the American adversary process, those customs remain an important part of tribal culture, and they need to be preserved as much as possible.<sup>176</sup>

### *V. Potential Solutions That Treat Indian Tribes Like Other Political Entities*

Because Congress maintains plenary power over the Indian tribes, it can pass any form of legislation it desires to solve the extensive problems with the current system of tribal-federal-state relations. By treating the tribes as states, foreign nations, administrative agencies, or federal territories, Congress could enact sweeping changes with very little effort. Nevertheless, "Indian tribes occupy a unique status under our law,"<sup>177</sup> and treating them like some other

172. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (concluding that Indian tribes cannot criminally punish non-Indians); Jones, *supra* note 140, at 468–69 (discussing the traditional approach to murder cases in tribal systems before the enactment of the Major Crimes Act).

173. See *id.* at 471 ("Not surprisingly, because of the need of the Indian tribes to receive permission from the Department of the Interior to supplant the C.F.R. with their own code, many tribes parroted many of the provisions of law contained in the C.F.R. courts to appease the Department of the Interior.").

174. See *id.* at 474 (listing three ways in which the ICRA "forces Indian tribes to mimic their judicial systems upon state and federal courts").

175. See *id.* at 475 ("[M]any Indian tribes have returned to their indigenous roots and regained a sense of tradition in the dispute resolution practices they currently utilize.").

176. See *id.* at 467 ("Anglo legal system[s] abhor a system of unwritten law based upon customary practice and tradition."); Valencia-Weber, *supra* note 6, at 249 ("Achieving regularity through publication and codification of custom helps legitimate the tribal courts and allay the fears of nonmembers about tribal courts.").

177. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 851 (1985).

entity would most likely destroy any remaining semblance of Indian culture. This Part discusses the feasibility of each of these classifications.

### A. *Treat Indian Tribes Like States*

Because the relationship between states and the federal government is the most refined, the most comprehensive solution that Congress could implement is to treat the Indian tribes like states. Of the four comparisons discussed in this Part, Indian tribes have the most in common with states. For example, both Indian tribes and states are located within the boundaries of the United States and both rely on the federal government for protection, although to different extents. In addition, tribal prosecutions, like their state counterparts, fit within the Dual Sovereign exception to double jeopardy.<sup>178</sup>

Indian tribes also have much to gain by receiving state status. By treating the Indian tribes like states, Congress would implicitly give tribal court judgments full faith and credit in state and federal courts,<sup>179</sup> and tribal courts could avail themselves of the vast array of procedural devices that govern the relationship between federal and state courts, including removal.<sup>180</sup> More importantly, tribal courts would become courts of general jurisdiction,<sup>181</sup> and they would obtain the power to hear claims under § 1983,<sup>182</sup> while also vastly expanding their criminal jurisdiction.<sup>183</sup>

178. See *United States v. Wheeler*, 435 U.S. 313, 332 (1978) (finding that the dual sovereignty exception applies to tribal courts); *Bartkus v. Illinois*, 359 U.S. 121, 137 (1959) (discussing the negative effects associated with barring dual prosecutions in state and federal court).

179. See U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."). While some commentators question the utility of requiring Indian tribes to afford full faith and credit to state court judgments, the tribes could at least benefit from having their judgments entitled to full faith and credit. See Kelly Stoner & Richard A. Orona, *Full Faith and Credit, Comity, or Federal Mandate? A Path that Leads to Recognition and Enforcement of Tribal Court Orders, Tribal Protection Orders, and Tribal Child Custody Orders*, 34 N.M. L. REV. 381, 387 (2004) ("While it would be beneficial for tribes to have their orders given full faith and credit by the states, the price of reciprocity is too taxing and costly for Indian tribes.").

180. Compare 28 U.S.C. § 1441 (2000) (providing for removal from state court to federal district court), with *Nevada v. Hicks*, 533 U.S. 353, 368 (2001) (noting that the removal statute does not apply to Indian tribes).

181. But see *Hicks*, 533 U.S. at 367 ("Tribal courts . . . cannot be courts of general jurisdiction [because] . . . a tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction.").

182. But see *id.* at 369 ("[T]ribal courts cannot entertain § 1983 suits.").

183. But see 18 U.S.C. § 1153 (2000) (denying tribal court jurisdiction over serious offenses between tribal members); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210

In addition to the jurisdictional benefits the tribal courts would receive as state courts, the tribal courts would also benefit from several judicial canons of interpretation afforded to state courts. For example, "Federal courts do not interpret state laws in the first instance."<sup>184</sup> Unfortunately, federal courts do not always give that same respect to tribal law, especially when no tribal court exists to interpret the law.<sup>185</sup> More importantly, federal courts only review state court determinations of subject matter jurisdiction on direct appeal to the Supreme Court.<sup>186</sup> While the exhaustion doctrine allows the tribal court to assess its jurisdiction in the first instance, the federal court still can overrule the tribal court determination.<sup>187</sup> By giving tribal courts the benefit of these canons of interpretation, Congress and the federal courts will give greater respect to the decisions of the tribal courts.

Despite the significant benefits of state status, Indian tribes also have much to lose from the conferral of state status. For instance, Indian tribes currently are not subject to suit in state courts because of tribal sovereign immunity,<sup>188</sup> but states are subject to suit in the courts of sister states.<sup>189</sup> Because the tribes were not present at the Constitutional Convention and have not ratified the Constitution, implying a waiver of their sovereign immunity is patently unfair.<sup>190</sup> Treating tribes like states for immunity purposes also

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(1978) (concluding that Indian tribes do not have criminal jurisdiction over non-Indians). To grant state status to the Indian tribes, Congress must repeal the Major Crimes Act, overrule *Oliphant*, and modify the ICRA to allow harsher sentencing. See Act of Apr. 11, 1968, Pub. L. No. 90-284, § 202(7), 82 Stat. 73, 77, amended by Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 4217, 100 Stat. 3207, 3353 (1986) (codified as amended at 25 U.S.C. § 1302(7) (2000)) (noting the current sentencing power of tribal courts).

184. Pace, *supra* note 71, at 461 (citing *Carroll v. United States*, 923 F.2d 752 (9th Cir. 1991)).

185. See *Chilkat Indian Vill. v. Johnson*, 870 F.2d 1469, 1474 (9th Cir. 1989) (interpreting a tribal ordinance in federal court despite the lack of a tribal court).

186. See *Royster*, *supra* note 125, at 254 (noting the possibility for a collateral attack on tribal court jurisdiction in federal court despite the lack of a comparable proceeding to attack state court determinations).

187. See *id.* ("To that extent, then, the federal district courts act as appellate courts for the tribal judicial decisions.").

188. See *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) ("Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978))).

189. See *Principality of Monaco v. Mississippi*, 292 U.S. 313, 328–29 (1934) (noting that by adopting the Constitution, states mutually waived their sovereign immunity in each other's courts).

190. See *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 782 (1991) ("[I]t would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties.").

presents Eleventh Amendment problems. By subjecting states to suit in tribal courts, Congress effectively would abrogate the state's sovereign immunity, and Congress may not abrogate a state's sovereign immunity using its commerce power.<sup>191</sup>

In addition to the Eleventh Amendment concerns, treating tribes as states raises other constitutional concerns as well, especially under the Fourteenth Amendment.<sup>192</sup> Presently, "Tribes are not states and therefore the Fourteenth Amendment does not apply to them."<sup>193</sup> As a result, many of the protections afforded by the Bill of Rights do not apply to Indian tribes, most importantly, the right to counsel<sup>194</sup> and the right to a jury trial for offenses not punishable by jail time.<sup>195</sup> Even more troubling for a non-Indian defendant, many tribes place tribal membership requirements on jury service, so a jury consisting entirely of Indians tries the non-Indian defendant.<sup>196</sup> While such a practice ordinarily constitutes discrimination based on race, the Supreme Court has noted that "where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due

191. See generally *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

192. See U.S. Const. art. IV, § 3, cl. 1 ("[N]o new State shall be formed or erected within the Jurisdiction of any other State . . . without the Consent of the Legislatures of the States concerned as well as of the Congress."); Rebecca Anita Tsosie, *What Does it Mean to "Build a Nation"? Re-Imagining Indigenous Political Identity in an Era of Self-Determination*, 7 *ASIAN-PAC. L. & POL'Y J.* 38, 53–54 (2006) ("In the United States, the equal citizenship claim is most often raised by non-Indians who are protesting the 'special rights' that Indians enjoy or the ability of tribes to exercise jurisdiction over non-members, which is perceived to violate the 'civil rights' of the non-members.").

193. James A. Poore III, *The Constitution of the United States Applies to Indian Tribes*, 59 *MONT. L. REV.* 51, 74 (1998).

194. See 25 U.S.C. § 1302(6) (2000) (providing for a right to counsel only at the expense of the accused).

195. Compare 25 U.S.C. § 1302(10) (2000) ("No Indian tribe in exercising powers of self-government shall deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons."), with U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." (emphasis added)), and U.S. CONST. amend. VII (providing a right to jury trial in civil cases when the amount in controversy exceeds twenty dollars). Under relevant case law, federal courts do not require jury trials for crimes punishable by less than six months. See *Baldwin v. New York*, 399 U.S. 66, 73–74 (1970) (ruling that a jury is required for offenses "where the possible penalty exceeds six months' imprisonment").

196. See Poore, *supra* note 193, at 77 (noting that such a practice "cannot survive constitutional scrutiny").

process.<sup>197</sup> If the tribe were subject to the Fourteenth Amendment as a state, however, such a provision would clearly be unconstitutional.<sup>198</sup>

Besides the constitutional problems that would result from treating Indian tribes like states, severe erosions of inherent tribal sovereignty would occur. First, tribal courts would fall under the diversity statute, as well as the provisions that allow the removal of actions from state to federal courts.<sup>199</sup> With those procedures available, the federal courts would compete directly with the tribal courts, which would hinder their development.<sup>200</sup> Similarly, if tribes were states, they would be subject to the supplemental jurisdiction statute, which would allow the federal courts to intrude even further on tribal sovereignty by exercising jurisdiction in cases that rightfully belong in tribal court.<sup>201</sup>

Finally, if Congress forced the Indian tribes to adhere to all the requirements of due process and equal protection, tribal courts would face total assimilation into the Anglo-American culture. While some tribal courts are nearly identical to corresponding state courts, many tribal courts still rely heavily on unwritten custom.<sup>202</sup> Because notice is a major concern of due process, tribal courts could not rely on custom unless it was written into the tribal code.<sup>203</sup> Similar concerns arise when tribes merge the judicial and executive branches.<sup>204</sup> In addition, forcing Indian tribes to adhere to the

197. *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

198. *See* *Batson v. Kentucky*, 476 U.S. 79, 97–98 (1986) ("The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race.").

199. *See* Niblock, *supra* note 109, at 236 (noting that in this respect, "tribal courts have a greater scope of power than the state courts").

200. *See* *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987) ("[U]nconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs."); *see also* Frank Pommersheim, "Our Federalism" in *the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community*, 71 U. COLO. L. REV. 123, 162 (2000) ("[R]emoval can be seen as antithetical to federal policy supporting tribal court development.").

201. *See* Pommersheim, *supra* note 200, at 158 (arguing that supplemental jurisdiction, while a simple issue in the federal-state relationship, is not readily applicable to tribal courts).

202. *See* Minzner, *supra* note 15, at 104–05 (discussing the differences between "traditional" and "western" tribal courts).

203. *See* *BMW of N. Am. v. Gore*, 517 U.S. 559, 574 (1996) ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.").

204. *See* Minzner, *supra* note 15, at 109 (arguing for maintaining the current system of exclusive jurisdiction for tribes that do not have independent judiciaries).



American notions of separation of church and state and judicial review "tend[] to undermine what is left of the traditional systems."<sup>205</sup> Thus, at least for Indian tribes with traditional tribal courts, obtaining state status is not desirable.

### B. Treat Indian Tribes As Foreign Countries

In contrast to the loss of sovereignty that would result from a conferral of state status on the Indian tribes, Congress could provide the greatest amount of protection for inherent tribal sovereignty by passing legislation that treats Indian tribes as independent foreign nations. While Indian tribes have not been considered foreign nations for centuries,<sup>206</sup> Congress, using its plenary power, could grant that status to Indian tribes. In fact, the United States entered into many treaties with several different Indian tribes before Congress outlawed that practice in 1871,<sup>207</sup> illustrating the plausibility of this classification. In addition, tribal sovereign immunity is similar to foreign sovereign immunity in that Congress controls both as a matter of federal law.<sup>208</sup>

While treating Indian tribes as independent countries is a plausible solution, modern Indian tribes have little in common with foreign nations. From an international law standpoint, Indian tribes most likely are not sovereign nations.<sup>209</sup> Even so, Indian tribes have much to gain from this classification. For starters, by considering Indian tribes as independent countries, tribal sovereignty would be maximized. Congress need not concern itself with the jurisdiction of tribal courts, nor with the interaction between tribal courts and federal or state courts. Instead, the Indian tribes would have complete discretion to make any laws they wish, and the U.S. courts would recognize tribal judgments based upon considerations of comity, which is the current status quo in most jurisdictions.<sup>210</sup> Because tribal courts would have

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205. Thorington, *supra* note 135, at 983.

206. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 19 (1831) (finding that Indian tribes are not foreign nations because they are not foreign to the United States).

207. See Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71 (2000)) ("[H]ereafter, no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty."). For a list of early treaties between the United States and the Cherokee Nation, see *Worcester v. Georgia*, 31 U.S. 515, 538 (1832).

208. See *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998) ("Like foreign sovereign immunity, tribal immunity is a matter of federal law.").

209. Tsosie, *supra* note 192, at 41 (noting the lack of clarity as to how to classify indigenous people under the attributes of sovereignty posed by international law).

210. See *supra* note 165 and accompanying text (listing holdings from several jurisdictions on how to handle the recognition of tribal judgments).

exclusive jurisdiction over all causes of action within their territory, the tribal courts need not worry about federal and state courts hindering their development.

Even with the advantages of granting foreign nation status to the Indian tribes, Congress is highly unlikely to pass such legislation because it would have to surrender its plenary control as well as its ownership of all Indian lands. Currently, Indians cannot own land outright,<sup>211</sup> and ownership of all land within the territory is a prerequisite to becoming a foreign nation. By granting Indian tribes independence, the United States would be at the mercy of the Indian tribes, who could demand whatever they wanted in exchange for passage through their territory. Even worse, most Indian tribes do not possess the military capabilities to withstand invasion, and their lands would be prime targets for terrorists seeking to threaten the United States. For tribes that have no court system in place, lawlessness would run rampant, and that lawlessness could spill over into neighboring states. Besides, most tribes would struggle to survive if Congress left them to sink or swim on their own.<sup>212</sup>

Aside from the political and practical difficulties associated with treating Indian tribes as independent foreign nations, potential constitutional problems exist as well. For example, the Commerce Clause lists Indian tribes separately from foreign nations, thus providing a constitutional basis for differential treatment.<sup>213</sup> More importantly, if Indian tribes are foreign nations, then tribal membership is inconsistent with U.S. citizenship.<sup>214</sup> Thus, because Indians are citizens of the United States,<sup>215</sup> the tribes to which they belong cannot be classified as foreign nations. Further, considering the current debate over illegal immigration, having independent nations within U.S. borders would pose enormous regulatory problems.<sup>216</sup>

211. See Act of June 18, 1934, ch. 576, § 5, 48 Stat. 984, 985 (codified as amended at 25 U.S.C. § 465 (2000)) ("Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which land is acquired . . .").

212. See Erik M. Jensen, *American Indian Tribes and Secession*, 29 TULSA L.J. 385, 396 (1993) (arguing that most tribes are either too small or not economically self-sufficient enough to secede from the United States).

213. See U.S. CONST. art. I, § 8, cl. 3 (providing Congress with the power "[t]o regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes" (emphasis added)).

214. See *Elk v. Wilkins*, 112 U.S. 94, 102 (1884) (reasoning that a person could not become a citizen of the United States without giving up allegiance to a foreign power).

215. See 8 U.S.C. § 1401(b)(2000) (declaring that Indians born in the United States are citizens at birth).

216. See Tyche Hendricks, *On the Border*, S.F. CHRON., Dec. 26, 2006, at A1, available at 2006 WLNR 22485792 (noting the negative impact of illegal immigration on Indian tribes).

### C. Treat Indian Tribes As Administrative Agencies

While treating Indian tribes as independent foreign nations would most heavily favor the Indian tribes, treating them as administrative agencies would have the opposite effect, heavily favoring the federal government at the expense of tribal sovereignty. If Congress classified Indian tribes as agencies, Congress or the Executive Branch would exercise complete control over the tribes, and very little semblance of tribal sovereignty would remain. Despite the devastating effects on tribal sovereignty, modern tribal courts resemble agencies in many aspects. In fact, at least two current members of the Supreme Court feel that an Indian tribe's authority over nonmembers is similar to the powers of an administrative agency.<sup>217</sup>

Modern tribal courts resemble administrative agencies in several ways. First, the tribal court's jurisdiction is coextensive with the Indian tribe's legislative jurisdiction.<sup>218</sup> Second, the Bureau of Indian Affairs (BIA) appoints some Indian judges if the federal government pays the judge's salary.<sup>219</sup> Third, at least for tribes that do not operate a court system, the Courts of Indian Offenses<sup>220</sup> are federal courts, which the BIA, a federal agency, operates.<sup>221</sup> Finally, and most significantly, the tribal exhaustion requirement bears a stark resemblance to the exhaustion of administrative remedies requirement.<sup>222</sup>

along the Mexican border).

217. See *United States v. Lara*, 541 U.S. 193, 227 (2004) (Souter, J., dissenting) (arguing that the congressional delegation of the power to try nonmembers to the various tribes is akin to the way Congress delegates lawmaking power to administrative agencies). Justice Scalia joined this opinion. *Id.*

218. See *Nevada v. Hicks*, 533 U.S. 353, 367 (2001) ("[A] tribe's inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction."); see also Alfred R. Light, *Sovereignty Myths and Intergovernmental Realities: The Etiquette of Tribal Federalism*, 14 ST. THOMAS L. REV. 373, 392 (2001) (noting that tribal courts are more like agencies than sovereign states in this sense).

219. See *Thorington*, *supra* note 135, at 982 (describing such a scenario for tribes that have adopted model codes).

220. See 25 C.F.R. § 11.100 (2007) (establishing such courts). Commentators often refer to these courts as "CFR courts." Jones, *supra* note 140, at 470.

221. See *Law and Order on Indian Reservations*, 58 Fed. Reg. 54,406, 54,407 (Oct. 21, 1993) ("It is clear . . . that Courts of Indian Offenses are part of the Federal Government." (citing *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 383 (8th Cir. 1987))).

222. See Koehn, *supra* note 126, at 721–22 (comparing statements establishing the tribal exhaustion doctrine with an administrative law treatise); but see Kirsten Matoy Carlson, Note, *Towards Tribal Sovereignty and Judicial Efficiency: Ordering the Defenses of Tribal Sovereign Immunity and Exhaustion of Tribal Remedies*, 101 MICH. L. REV. 569, 585 (2002) (noting that the tribal exhaustion doctrine has no guidelines that establish the level of review, unlike administrative agencies, which are guided by the Administrative Procedure Act).

Despite the similarities between tribal courts and the administrative agencies, enough differences remain to prevent Congress from treating Indian tribes like agencies. Most notably, Indian tribes retain some level of inherent sovereignty.<sup>223</sup> While Congress can eradicate that sovereignty at any time, modern federal policy favors tribal self-determination, and placing tribal courts directly under federal control strongly contradicts that policy.<sup>224</sup> More importantly, until the Supreme Court is "prepared to recognize absolutely independent agencies entirely outside of the Executive Branch with the power to bind the Executive Branch . . . , the tribes cannot be analogized to administrative agencies."<sup>225</sup> Key Supreme Court precedent makes such a result highly unlikely.<sup>226</sup>

#### D. Treat Indian Tribes As Federal Territories

Of the four possibilities discussed in this Note, Indian tribes bear the strongest resemblance to federal territories. For instance, Indian tribes vary widely in size and structure, much like territories do.<sup>227</sup> More importantly, although neither Indian tribes nor territories have direct representatives in Congress, "[t]he continued political existence of both depend on the will of Congress."<sup>228</sup> In addition, custom plays a role in both types of courts, and direct review of local decisions by federal courts threatens cultural identity.<sup>229</sup> Finally, some courts have determined that Indian tribes are the same as territories.<sup>230</sup>

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223. See *United States v. Wheeler*, 435 U.S. 313, 323 (1978) ("[O]ur cases recognize that the Indian tribes have not given up their full sovereignty.").

224. See *supra* notes 27–30 and accompanying text (discussing modern federal Indian policy).

225. *United States v. Lara*, 541 U.S. 193, 216 (2004) (Thomas, J., concurring).

226. See *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (concluding that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment"). An Indian tribe's ability to prosecute tribal members is an essentially executive power. See *infra* notes 239–241 and accompanying text (describing the constitutional problems that would result if tribal governments executed federal prosecutorial powers).

227. See *Vetter*, *supra* note 163, at 237–44 (discussing the differences in various U.S. territories).

228. *Id.* at 270.

229. See James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 752–53 (2004) (discussing problems with direct appellate review of territorial courts in American Samoa).

230. See *Mackey v. Coxe*, 59 U.S. (18 How.) 100, 103 (1855) ("[The Cherokee Nation] is not a foreign, but a domestic territory—a territory which originated under our constitution and laws."); *Sheppard v. Sheppard*, 655 P.2d 895, 902 (Idaho 1982) (agreeing that the phrase

Because of the strong similarities between the two classifications,<sup>231</sup> Congress would most likely prefer this classification system to the other three alternatives discussed in this Part. First, Congress would maintain plenary control over the Indian tribes and their territories, which avoids many of the problems inherent in classifying the Indian tribes as foreign nations. In addition, the current status of the Indians is similar to the status of territorial natives, so tribal culture could be preserved for the most part.<sup>232</sup> More importantly, the United States has a long, well-developed history concerning the treatment of territories to rely upon, and Indians could retain their citizenship status without the constitutional problems associated with granting the Indian tribes state or foreign nation status.

Despite the similarities between Indian tribes and federal territories, a few key differences indicate that this classification would be unsatisfactory.<sup>233</sup> For example, while the full faith and credit statute applies to territories,<sup>234</sup> most courts have held that it does not apply to Indian tribes.<sup>235</sup> Although Congress

"Territories and Possessions" includes Indian tribes); *but see Ex parte Morgan*, 20 F. 298, 306 (W.D. Ark. 1883) ("[The Cherokee Nation] belong[s] to the republic, though [it is] neither a state or territory in it."); *Brown v. Babbit Ford, Inc.*, 571 P.2d 689, 694 (Ariz. Ct. App. 1977) (concluding that an Indian reservation is not a territory for full faith and credit purposes).

231. See Daina B. Garonzik, Comment, *Full Reciprocity for Tribal Courts from a Federal Courts Perspective: A Proposed Amendment to the Full Faith and Credit Act*, 45 EMORY L.J. 723, 749 (1996) (noting many similarities between tribal courts and territorial courts in Guam, the Virgin Islands, and the Northern Mariana Islands).

232. See Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional*, 27 U. HAW. L. REV. 331, 374 (2005) (arguing that the modern approach "allows the insular areas to be full-fledged parts of the United States but, at the same time, recognizes that their cultures are substantially different . . . and allows some latitude in constitutional interpretation for the purpose of accommodating those cultures"). This article is replete with references to culture in American Samoa, many of which are analogous to Indian culture.

233. See Vetter, *supra* note 163, at 272 (arguing against this classification). According to Vetter:

In fact, there appears to be only one factor which opposes a conclusion that Indian tribes are "territories" for purposes of the full faith and credit implementing statutes: the political distinction between the Indian and the remainder of the United States polity. That factor is also the theoretical basis for "Indian law." From a legal theory or ideological point of view, it is the single factor which counsels strongly against, and indeed prevents, a conclusion that Indian tribes are "territories" within section 1738.

*Id.*

234. See 28 U.S.C. § 1738 (2000) (noting that full faith and credit extends to "any State, Territory, or Possession of the United States").

235. See, e.g., *Wilson v. Marchington*, 127 F.3d 805, 809 (9th Cir. 1997) (stating that principles of comity govern whether federal courts should recognize and enforce tribal court judgments); see also Vetter, *supra* note 163, at 249–59 (providing numerous arguments as to

could easily remedy that problem by amending the statute, applying full faith and credit to the tribes would imply that the federal government created the tribal governments, and such an implication is inconsistent with the federal policy of promoting tribal sovereignty.<sup>236</sup>

While Congress could alter the full faith and credit statute to accommodate the Indian tribes without too much damage to tribal sovereignty, a much more serious hurdle remains. The Supreme Court has held that tribal court prosecutions fit within the Dual Sovereignty exception to double jeopardy.<sup>237</sup> Because territorial courts receive all their power from congressional delegation, their prosecutions are the same as federal prosecutions.<sup>238</sup> Thus, treating Indian tribes like territories would eliminate a key aspect of inherent tribal sovereignty in direct violation of modern policy.

Even if Congress could completely disregard inherent tribal sovereignty, Congress would face "grave constitutional difficulties" if it attempted to delegate the power to bring federal prosecutions to the Indian tribes.<sup>239</sup> As Justice Thomas noted, because the power to bring federal prosecutions is a "quintessentially executive power," Congress could not delegate this power to persons that the Executive cannot control.<sup>240</sup> Thus, Congress would have to grant the Executive Branch at least some authority to appoint and remove tribal court judges, which would face strong opposition from the Indian tribes.<sup>241</sup> Such a blatant abuse of tribal sovereignty makes this option no more attractive to the Indian tribes than receiving treatment as administrative agencies, which would suffer from similar constitutional shortcomings.

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why Congress did not intend that 28 U.S.C. § 1738 apply to Indian tribes).

236. See Vetter, *supra* note 163, at 265–67 (arguing that because Indian tribes possess a right to self-government created by a higher power, they do not fit within the traditional theory that full faith and credit only applies to members of the "federal polity"). Full faith and credit, however, offers several advantages to the Indian tribes that may be worth the loss of sovereignty. See Garonzik, *supra* note 231, at 726 (noting that while tribal sovereignty may be diminished by a full faith and credit mandate, tribal courts would gain "a substantial degree of judicial authority").

237. See *supra* Part III.A.2 (discussing the dual sovereign exception for tribal court prosecutions).

238. See *United States v. Wheeler*, 435 U.S. 313, 318 (1978) ("[S]uccessive prosecutions by federal and territorial courts are impermissible because such courts are 'creations emanating from the same sovereignty.'" (quoting *Puerto Rico v. Shell Co.*, 302 U.S. 253, 264 (1937))).

239. *United States v. Lara*, 541 U.S. 193, 216 (2004) (Thomas, J., concurring).

240. *Id.* (Thomas, J., concurring).

241. See *id.* (Thomas, J., concurring) (noting that the President apparently has no control over tribal judges).

## VI. *A Proposal for a More Tailored Solution*

As the above discussion demonstrates, Indian tribes are unlike any other political entity. Thus, to fit tribal courts into the existing system, a more unique solution is necessary. In crafting a solution, Congress should focus on four main goals: (1) maximizing tribal sovereignty, (2) protecting the constitutional rights of non-Indians, (3) protecting Indian culture, and (4) providing a substantial amount of flexibility to better accommodate the various differences among individual Indian tribes.<sup>242</sup> This Part proposes such a solution ("Proposal") by discussing changes to three different areas. First, the Proposal alters the existing jurisdiction of the tribal courts and accommodates the effects of those changes on the federal and state courts. Next, the Proposal establishes a comprehensive structure for the tribal court system to eliminate jurisdictional gaps. Then, the Proposal provides various procedural mechanisms to control the way that tribal courts interact with federal and state courts. Following this discussion, this Part addresses some potential problems created by the Proposal.

### *A. A Proposal to Modify the Present State of Tribal Court Jurisdiction*

As previously noted, the current state of tribal court jurisdiction relies on a mixture of congressional policy and Supreme Court precedent. That mixture has led to a complex system of rules, which often produces unfair or inconsistent results.<sup>243</sup> Because judicial systems should strive for consistency and fairness,<sup>244</sup> Congress, using its plenary power over Indian affairs, should throw out the existing system and create a statutory system that more clearly defines the extent of tribal court jurisdiction. By relying on statutes as a jurisdictional source, Congress can provide a complete solution to the problem instead of allowing the Supreme Court to institute a system piecemeal.<sup>245</sup>

Because tribal court jurisdiction varies depending on the type of jurisdiction at issue, the Proposal affects the jurisdictional system in three ways. First, it addresses needed changes to tribal court criminal jurisdiction. Second,

242. Focusing on these four goals provides incentives for approval by both tribal members and non-Indians.

243. See *supra* note 165 and accompanying text (providing an example of such inconsistent results).

244. See, e.g., Fed. R. Civ. P. 1 ("[The rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.").

245. See Florey, *supra* note 149, at 1633 ("[M]ost of the principles that determine whether a case should be brought in state or tribal court are the result of judicially formulated, fact-specific solutions to the problems presented by individual cases.").

it proposes radical changes to the current state of tribal court civil jurisdiction. Finally, the Proposal describes how changes to tribal court jurisdiction affect the jurisdiction of state and federal courts in these areas.

### 1. Proposed Changes to Tribal Court Criminal Jurisdiction

Currently, tribal courts cannot exercise criminal jurisdiction over non-Indians.<sup>246</sup> In addition, while tribal courts can exercise criminal jurisdiction over Indians, the Major Crimes Act and the ICRA severely limit the extent of that jurisdiction.<sup>247</sup> Because Indian tribes retain some of their inherent sovereignty, however, their prosecutions fit within the Dual Sovereign exception to double jeopardy.<sup>248</sup> As it exists, this system provides very little protection of tribal sovereignty.

To secure the greatest amount of tribal sovereignty, tribal court criminal jurisdiction should be expanded. More specifically, tribal court criminal jurisdiction should extend to all violations of tribal law not covered by the Major Crimes Act. One of the key aspects of sovereignty is a nation's ability to enforce its own laws within its borders.<sup>249</sup> By allowing tribal courts to exercise criminal jurisdiction over all persons who violate its laws, tribal sovereignty would dramatically increase. In addition, by allowing the Indian tribes to enforce their own laws, the burden on federal prosecutors would decrease because they would not need to worry about prosecuting minor crimes that occur in Indian country.<sup>250</sup>

While increasing the extent of tribal court criminal jurisdiction vastly extends tribal sovereignty, Congress should retain the limitations imposed by the Major Crimes Act. Given the seriousness of the crimes listed in the Act, the risk of nonprosecution in federal court is minimal.<sup>251</sup> More importantly, federal courts provide greater constitutional protections than tribal courts are

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246. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978) (finding that Indian tribes do not have criminal jurisdiction over non-Indians).

247. See *supra* notes 37–39 and accompanying text (describing those limits).

248. See *supra* Part III.A.2 (discussing tribal courts and double jeopardy).

249. See *Duro v. Reina*, 495 U.S. 676, 685 (1990) ("A basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens.").

250. See *supra* notes 144–46 (discussing the growing problem of misdemeanors committed by non-Indians against Indians in Indian country).

251. Jones, *supra* note 140, at 513 (implying that federal prosecutors focus more attention on serious crimes).



required to provide.<sup>252</sup> Because criminal defendants receive greater rights than ordinary litigants, tribal courts should not exercise jurisdiction over major crimes unless they are willing to provide the minimum level of protection provided for in the Constitution.<sup>253</sup> For that reason, Congress should include a clause that allows an Indian tribe to exercise full criminal jurisdiction in exchange for adopting full constitutional protections.<sup>254</sup> By allowing the individual Indian tribes to make the ultimate choice, Congress can fully protect non-Indians without intruding on tribal sovereignty and culture.

In a similar manner, Congress should adjust the range of tribal court punishments available under the ICRA to meet constitutional requirements, at least when jurisdiction over nonmembers is at stake. Supreme Court precedent mandates that the right to counsel attaches when a court sentences the defendant to jail time.<sup>255</sup> Because the ICRA allows Indian tribes to imprison criminal defendants up to one year in jail,<sup>256</sup> its protections do not meet the constitutional minimum. Even worse, by expanding tribal court criminal jurisdiction, Congress would provide jurisdiction for a greater variety of crimes, including felonies, which might require even harsher punishment.<sup>257</sup> To balance tribal sovereignty with the civil rights of nonmembers, however, Congress should allow the tribal courts to distribute harsher sentences to members of its own tribe, while limiting the punishment of nonmembers to fines. While that practice appears to violate equal protection, tribal members, who have more rights in Indian country than nonmembers,<sup>258</sup> have waived some of their constitutional protections by joining the tribe.<sup>259</sup> Much like the option of exercising full criminal jurisdiction, Congress also should provide individual Indian tribes with the option to provide greater punishments if it adopts the full protections provided in the Constitution.

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252. See *supra* notes 192–98 and accompanying text (noting the constitutional infirmities in tribal courts).

253. See *infra* notes 303–06 and accompanying text (providing examples of the extra constitutional protections tribal courts could provide).

254. Those rights include larger juries, a right to counsel, and *Miranda* warnings.

255. See *Scott v. Illinois*, 440 U.S. 367, 374 (1979) (holding that counsel is required before a defendant can be sentenced to jail time).

256. 25 U.S.C. § 1302(7) (2000); see also *id.* § 1302(6) (providing for a right to counsel only at the expense of the accused).

257. See *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963) (overruling *Betts v. Brady*, 316 U.S. 455 (1942), which did not require counsel for defendants charged with felonies).

258. See *Poore*, *supra* note 193, at 76 (noting that tribal members enjoy the right to vote in tribal elections, while nonmembers do not).

259. *Id.* at 74.

In sum, Congress should make several changes to the current model of tribal court criminal jurisdiction. First, Congress should allow tribal courts to exercise criminal jurisdiction over non-Indians, subject only to the penalty provisions of the ICRA. Second, Congress should allow each Indian tribe to exercise jurisdiction over all crimes committed by its members within its territory, except for those crimes specifically listed in the Major Crimes Act. Third, Congress should provide each tribe with the option of exercising full criminal jurisdiction over all crimes within its territories if it is willing to adopt the full protections of the Constitution. Finally, Congress should do nothing to upset the current Dual Sovereign exception from double jeopardy that Indian tribes enjoy.<sup>260</sup>

## 2. *A Proposal to Expand Tribal Court Civil Jurisdiction*

### a. *Presumptive Civil Jurisdiction in Tribal Courts*

Civil litigants enjoy fewer special constitutional protections than criminal defendants.<sup>261</sup> Therefore, Congress should do away with the confusing tests of civil jurisdiction created by the Supreme Court and provide tribal courts with full civil jurisdiction over almost all actions that arise within their territory.<sup>262</sup> In addition, Congress should allow Indian tribes to exercise some jurisdiction over events that occur outside of their territory as long as they have a minimum level of contacts with the parties in question.<sup>263</sup> By presuming that most cases involving Indians or their territory originate in the tribal system, Congress could encourage the growth and development of tribal courts<sup>264</sup> while increasing tribal sovereignty.

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260. See *supra* Part III.A.2 (establishing the current treatment of tribal court prosecutions for double jeopardy purposes). This Note provides no opinion on the constitutional permissibility of three consecutive criminal prosecutions by tribal, state, and federal courts.

261. See, e.g., FED. R. EVID. 609(a) (providing a higher standard for impeachment of criminal defendants than other witnesses). More importantly, prosecutors face a higher burden of proof than civil plaintiffs do. See *In re Winship*, 397 U.S. 358, 361 (1970) (noting that the "demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times" (quoting C. MCCORMICK, EVIDENCE § 321 (1954))).

262. See *infra* notes 272–75 and accompanying text (discussing an exception for jurisdiction over foreign parties)

263. See generally *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

264. See Indian Tribal Justice Technical and Legal Assistance Act of 2000, Pub. L. No. 106-559, § 2(7), 114 Stat. 2778, 2778 (codified as amended at 25 U.S.C. § 3651(7) (2000)) (finding that "enhancing tribal court systems and improving access to those systems serves the dual Federal goals of tribal political self-determination and economic self-sufficiency").

In addition, tribal courts, like state courts, also could exercise supplemental jurisdiction over related state and federal claims.<sup>265</sup> Under the current system, litigants often face the prospect of litigating tribal claims in tribal court and similar state or federal claims in their respective courts,<sup>266</sup> but this Proposal eliminates the need for Indian litigants to travel to a distant state or federal court to file a claim when a similar claim exists under tribal law. In addition, addressing all related claims in one court promotes judicial efficiency,<sup>267</sup> while improving tribal court understanding of American law.<sup>268</sup>

*b. Maintaining Some Limits on Tribal Court Civil Jurisdiction*

*(1) Limits on Supplemental Jurisdiction*

Despite improving judicial efficiency, allowing tribal courts to exercise supplemental jurisdiction over state law claims may represent an unconstitutional erosion of state sovereignty.<sup>269</sup> For that reason, tribal courts should refuse to accept supplemental jurisdiction over state law claims when a federal court would not exercise such jurisdiction.<sup>270</sup> While preventing tribal courts from exercising supplemental jurisdiction over these claims limits judicial efficiency, Congress should not give tribal courts greater jurisdiction over state law claims than the federal courts have.<sup>271</sup> Besides, federal court

265. See 28 U.S.C. § 1441(b) (2000) (providing removal of federal claims from state court if the federal court could have exercised original jurisdiction). If state courts could not hear federal claims, this statute would be unnecessary.

266. See Minzner, *supra* note 15, at 96 ("[T]he Supreme Court generally presumes that the selected venue will apply its own law.").

267. See *City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 173 (1997) ("[W]hen deciding whether to exercise supplemental jurisdiction, 'a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity.'" (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988))).

268. When tribal courts apply nontribal law, they must consult relevant statutes and precedent to determine what the law means. As they analyze nontribal law with increasing frequency, they develop a greater familiarity with it.

269. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

270. See 28 U.S.C. § 1367(a) (2000) (requiring the related claims to "form part of the same case or controversy under Article III of the United States Constitution"); see also *id.* § 1367(c) (providing four situations when federal courts may decline supplemental jurisdiction over state law claims).

271. In fact, constitutional limits may prevent Congress from transferring that much jurisdiction from state court to tribal court, but that issue is not relevant to the discussion.

refusal to exercise supplemental jurisdiction over state law claims presents the same efficiency concerns, yet neither the state courts nor the federal courts have become completely overwhelmed by the additional burden.

In addition to the tribal court's limited ability to exercise supplemental jurisdiction over state law claims, tribal courts also should not exercise jurisdiction over foreign parties.<sup>272</sup> Simply put, America's relationships with foreign powers mandates that only federal courts should hear claims involving noncitizens. While state courts routinely exercise jurisdiction over noncitizens, Congress arguably could provide for exclusive federal jurisdiction over these claims under the Constitution.<sup>273</sup> Tribal courts, on the other hand, should not exercise jurisdiction over foreign citizens until the tribal court systems develop more fully.<sup>274</sup> In particular, tribal courts should gain more experience with American laws, which are foreign to them, before expanding their reach to include laws from foreign countries, which may require translations from any number of languages into the native tongue. In addition, the problems tribal courts face in applying American laws would multiply substantially if tribal courts could exercise jurisdiction over foreign parties.<sup>275</sup>

## (2) *Adjustments to Tribal Sovereign Immunity*

Adjusting the extent of tribal sovereign immunity provides Congress with another mechanism to limit the extent of tribal court jurisdiction.<sup>276</sup> In its current form, tribal sovereign immunity is broader than foreign nation sovereign immunity.<sup>277</sup> To remedy that situation, Congress should subject the Indian tribes to an immunity system similar to the one found in the Foreign

272. That is, parties foreign to the United States, such as resident aliens.

273. See U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to . . . Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."); see also 28 U.S.C. § 1441(d) (2000) (allowing a foreign state to remove actions to federal court).

274. See Jones, *supra* note 140, at 476–77 (noting several areas where tribal judges lack the benefits possessed by state and federal judges).

275. See *supra* notes 157–160 and accompanying text (discussing the problems with applying American law in tribal courts).

276. See Carlson, *supra* note 222, at 581 ("[F]ederal courts should hear defenses of tribal sovereign immunity first because sovereign immunity pertains to the court's jurisdiction.").

277. See John W. Borchert, Comment, *Tribal Immunity Through the Lens of the Foreign Sovereign Immunities Act: A Warrant for Codification?*, 13 EMORY INT'L L. REV. 247, 249–50 (1999) (noting that tribal sovereign immunity is broader than the immunity enjoyed by states, municipalities, and foreign nations).

Sovereign Immunities Act (FSIA).<sup>278</sup> Subjecting Indian tribes to this standard remedies some of the existing problems with the current system.<sup>279</sup> In fact, modern tribal immunity doctrine suffers from some of the same flaws that doomed the absolute immunity approach to foreign nation immunity.<sup>280</sup> More importantly, "domestic dependent nations" should not receive greater immunity protection than fully independent sovereigns.<sup>281</sup>

Although applying tribal immunity in the context of the FSIA provides a statutory basis for analyzing tribal immunity, the tribes would actually lose some aspects of their inherent sovereign immunity.<sup>282</sup> Considering the potential for abuse of civil rights under the existing system,<sup>283</sup> a less protective standard of tribal immunity is justifiable. In fact, most foreign nations adhere to a restrictive form of sovereign immunity, like that found in the FSIA, and this Proposal simply holds Indian tribes to the same standard as those nations.<sup>284</sup>

With presumptive jurisdiction in the tribal courts under this Proposal, Congress must abrogate tribal immunity in the tribal courts. Otherwise, the limits on tribal immunity would be meaningless. Because the tribes are not states, however, the Eleventh Amendment does not bar Congress from abrogating tribal immunity.<sup>285</sup> Thus, the restrictions on Congress's authority to abrogate sovereign immunity using its commerce power are inapplicable.<sup>286</sup> In

278. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1604, 1605, 1607 (2000)); *see also* Borchert, *supra* note 277, at 265–66 (indicating the "close nexus between these two areas of law").

279. *See* Borchert, *supra* note 277, at 247–48 (providing an example of egregious behavior by one Indian tribe for which the victim had no remedy because of tribal sovereign immunity).

280. *See id.* at 264 ("Rather than honoring foreign states, absolute immunity gave foreign states an unfair advantage in their business transactions and denied private citizens legal recourse for injuries suffered at the hands of a foreign state.").

281. *See id.* at 278 ("[A] doctrine that shields tribes with immunity, where . . . foreign sovereign counterparts would not be protected, contradicts the principle that tribes should be considered 'dependent sovereigns'").

282. *Compare* *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 513 (1940) (ruling that Indian tribes do not waive sovereign immunity on otherwise immune claims that were pleaded in a counterclaim to an action brought by the tribe), *with* 28 U.S.C. § 1607(b) (2000) (preventing foreign nations from asserting immunity for counterclaims "arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state").

283. *See* Borchert, *supra* note 277, at 247–48 (providing an example of egregious behavior by one Indian tribe for which the victim had no remedy because of tribal sovereign immunity).

284. *See id.* at 264 ("By the 1920s, this theory was the emerging norm of customary international law.").

285. *See* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against *one of the United States* . . . ." (emphasis added)).

286. *See* *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996) (holding that Congress cannot abrogate a state's Eleventh Amendment Immunity using its commerce power).

addition, congressional plenary power, which Congress does not have over foreign sovereigns, provides strong support for the abrogation of tribal immunity in this manner.<sup>287</sup>

*c. Answering the Critics*

Despite the above limitations, some critics adamantly oppose the proposed expansion of tribal court civil jurisdiction.<sup>288</sup> In fact, commentators have argued that subjecting non-Indians to civil jurisdiction in tribal courts may be unconstitutional because some tribal courts do not benefit from the American notion of separation of powers.<sup>289</sup> Theoretically, a non-Indian could not receive a fair and impartial trial in a court that lacks the guarantee of freedom from local control by the tribe. While that argument has some merit, Americans who travel to other countries remain subject to jurisdiction in those countries, yet many countries around the world do not have the complex governmental structure found in the United States.<sup>290</sup> Besides, the proposal requires state and federal courts to enforce any judgment entered against a non-Indian with no property in Indian country.<sup>291</sup> Thus, adequate procedural protections exist to protect non-Indians from unfair treatment in tribal courts.

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287. See *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998) ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.").

288. See Darrel Smith, *America's Surprisingly Diverse Reservations*, <http://www.citizensalliance.org> (follow "Major Issues" hyperlink; then follow "America's Surprisingly Diverse Reservations" hyperlink) (last visited Jan. 28, 2008) ("[U]p to 3,300,000 non-Indians might lose their constitutional protections and the right to vote in the governments that would exercise civil and criminal jurisdiction over them.") (on file with the Washington and Lee Law Review).

289. See Minzner, *supra* note 15, at 109 (arguing for maintaining the current system of exclusive jurisdiction for tribes that do not have independent judiciaries); Thorington, *supra* note 135, at 983 (arguing that incorporating certain concepts from American justice systems into tribal court systems would "undermine what is left of the traditional systems").

290. For example, even Great Britain does not provide for "American-style judicial review." Mark C. Rahdert, *Comparative Constitutional Advocacy*, 56 AM. U. L. REV. 553, 562 (2007).

291. See *infra* Part VI.C.3.b (proposing a method to deal with judgment enforcement).

### 3. *Adjustments to State and Federal Court Jurisdiction Resulting from Increased Tribal Court Jurisdiction*

Although tribal court jurisdiction increases dramatically under this Proposal, state and federal courts must yield some of their existing jurisdiction to the tribal courts for it to work. Because Congress controls the jurisdiction of the federal courts,<sup>292</sup> the changes to their jurisdiction will not cause much uproar. Reducing the jurisdiction of the state courts, however, presents greater challenges. This section discusses the necessary changes to federal and state court jurisdiction below.

With the tribal court exercising presumptive jurisdiction over tribal affairs, federal courts no longer would exercise jurisdiction over these claims. While that action may seem unusual, federal courts currently do not assert jurisdiction over these claims until the litigants exhaust all available tribal remedies.<sup>293</sup> Of course, the exhaustion doctrine eventually allows the federal court to hear the claim because it does not relinquish jurisdiction.<sup>294</sup> Under this Proposal, the federal courts do not retain jurisdiction over the claims; instead, the standards of review on appeal ensure protection of the federal interests at stake.<sup>295</sup>

Like the federal courts, state courts lose some jurisdiction because of the presumption of tribal court jurisdiction over tribal affairs, especially in Public Law 280 states. To promote the growth of tribal court systems, Congress must prevent state courts from exercising jurisdiction over claims that rightly belong in tribal court. If not, state courts would provide direct competition to tribal courts, and with most non-Indians preferring to litigate in familiar American courts, tribal court growth would be stunted.<sup>296</sup> Unfortunately, some Indian tribes do not have the resources to establish adequate tribal court systems,<sup>297</sup> so Congress must provide a way for those tribes to transfer their jurisdiction to state courts, if they desire such a transfer.

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292. See U.S. CONST. art. I, § 8, cl. 9 (giving Congress the power "[t]o constitute Tribunals inferior to the supreme Court").

293. See *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857 (1985) (requiring the federal court to "stay[] its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction").

294. See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n.8 (1987) (noting that the exhaustion rule "did not deprive the federal courts of subject-matter jurisdiction").

295. See *infra* Parts VI.C.1–2 (discussing the standards of review on appeal).

296. See *Minzner, supra* note 15, at 90 ("The Court has suggested that, if given the choice, forum-shopping litigants . . . will turn to state courts, undermining tribal court jurisdiction.").

297. See Shelly Grunsted, *Full Faith and Credit: Are Oklahoma Tribal Courts Finally Getting the Respect They Deserve?*, 36 TULSA L.J. 381, 395 (2000) (implying that adding a mere 100 enforcement cases per year would place severe financial hardship on some tribal courts).

Despite the rampant problems with Public Law 280, it can provide a method to facilitate the transfer of tribal court jurisdiction to state courts. Before that transfer can take place, however, the current statute needs modification. Most importantly, Congress should provide the tribes who lost jurisdiction under this system with a mechanism for reacquiring their jurisdiction.<sup>298</sup> The most feasible solution is to provide for a tribal initiated retrocession, which would allow the various tribes to petition the federal government for a return of their previous jurisdiction.<sup>299</sup> The Indian tribes, however, should file their petition for retrocession within two years of the passage of this proposed amendment. By providing a statute of limitations, Congress could ensure that Indian tribes do not wait in perpetuity to exercise this unilateral option.

After the two-year limit, Public Law 280 should continue to operate in much the same way it does now, with state courts assuming jurisdiction over Indian territory only with the consent of the tribes.<sup>300</sup> The statute, however, should also include a provision that returns the jurisdiction to the tribes with the consent of both the state and the tribe. Including a mutual consent provision provides the tribes and the states with the flexibility to adjust to changing circumstances, while encouraging cooperation between the tribes and the states.

### *B. The Structure of the Proposed Tribal Court System*

To implement the jurisdictional changes discussed above effectively, Congress must develop a tribal court system that provides as much consistency as possible. Given the size and economic disparities among the various Indian tribes, that task will be difficult.<sup>301</sup> For the Proposal to work, Congress must ensure that every tribe has a court system to enforce its laws.

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298. Jiménez & Song, *supra* note 100, at 1693–94 (proposing modifications to the current system).

299. This provision should provide for a return of jurisdiction to the extent requested by the tribe. Thus, the tribes could exercise as much jurisdiction as they were capable of exercising, while allowing the state court to exercise jurisdiction over the remainder. For example, the tribes could opt to exercise full civil jurisdiction, while leaving criminal jurisdiction up to the state.

300. See 25 U.S.C. § 1321(a) (2000) (requiring tribal consent for a state assumption of criminal jurisdiction); *id.* § 1322(a) (requiring tribal consent for a state assumption of civil jurisdiction).

301. See Florey, *supra* note 149, at 1640 (noting that "some tribes are too small or poor to maintain judicial systems").



### 1. A Court for Every Tribe

First, Congress should provide a Court of Indian Offenses (CFR court) for every tribe that does not currently operate a functional tribal court. While most tribes have either a tribal court or a CFR court, some tribes share one CFR court;<sup>302</sup> those tribes should separate and receive their own court, unless they agree to merge and form a unified government. Because CFR courts are federal courts, they are bound by the Constitution,<sup>303</sup> and they provide greater procedural protections than many tribal courts, including the right to counsel,<sup>304</sup> larger juries,<sup>305</sup> and a *Miranda* requirement.<sup>306</sup> Even so, CFR courts have lesser sentencing power than similarly situated tribal courts.<sup>307</sup> As the BIA recognized, these differences are important because they encourage the tribes to adopt their own court systems to change anything they oppose.<sup>308</sup>

### 2. Tribal Appellate Courts for Larger Tribes

Currently, CFR courts shut down when the tribes under their jurisdiction adopt their own court system.<sup>309</sup> Congress, however, should maintain the CFR courts as appellate courts for tribal decisions, at least for larger tribes.<sup>310</sup>

302. See, e.g., 25 C.F.R. § 11.100(a)(12) (2007) (listing numerous Oklahoma tribes that are served by a single CFR court).

303. See Law and Order on Indian Reservations, 58 Fed. Reg. 54,406, 54,408 (Oct. 21, 1993) ("Courts of Indian Offenses, however, are Federal instrumentalities and are bound not only by the ICRA, but by the requirements of the United States Constitution as well.").

304. Compare 25 C.F.R. § 11.205(a) ("No defendant in a criminal proceeding shall be denied the right to counsel."), with 25 U.S.C. § 1302(6) (2000) (providing for a right to counsel only at the expense of the accused).

305. Compare 25 C.F.R. § 11.314(b) (providing for a jury consisting of eight Indian residents), with 25 U.S.C. § 1302(10) (providing a right to a jury of six people).

306. See 25 C.F.R. § 11.303 (providing for *Miranda* rights prior to custodial interrogation).

307. Compare 25 C.F.R. § 11.315 (allowing a maximum sentence of six months imprisonment and a \$500 fine), with 25 U.S.C. § 1302(7) (providing a maximum sentence of one year in jail and a \$5,000 fine).

308. See Law and Order on Indian Reservations, 58 Fed. Reg. at 54,407 ("Indian tribes served by Courts of Indian Offenses are authorized to create their own tribal court systems should they desire to assume additional jurisdiction.").

309. See *id.* (providing several examples of tribes that converted their CFR courts into tribal courts).

310. Congress should develop an estimate of the caseload in the lower tribal courts to determine if an appellate court is necessary. Obviously, most tribal populations are much smaller than state populations, so a reference to state populations is inappropriate. See Ransom et al., *supra* note 166, at 247 (noting that "New York is ten thousand times as big as the San Juan Pueblo" in population terms). But see Bethany R. Berger, *Justice and the Outsider*:

Because appellate courts function differently than trial courts, some of the rules and procedures in the CFR courts would need adjusting. Even so, Congress should retain key differences between the CFR courts and similar tribal appellate courts to encourage the tribes to create a tribal-operated appellate court.<sup>311</sup> While the larger tribes are more likely to have a developed tribal court system in place, Congress should provide a CFR appellate court for any tribe of sufficient size that does not currently operate one. Once the tribes create their own appellate courts, the BIA can eliminate the CFR appellate court.

While this intricate tribal court system is expensive to implement,<sup>312</sup> it provides many benefits. First, because of the extra protection provided by the CFR courts, reviewing federal courts are more likely to recognize the judgments.<sup>313</sup> Second, additional levels of tribal courts require more Indian judges, and the BIA should give Indians first priority when choosing judges for the CFR courts.<sup>314</sup> Third, non-Indian litigants and judges are more likely to respect a system that provides adequate appeal mechanisms because those systems are more familiar and they reduce the possibility of errors.<sup>315</sup> Thus, the tribal courts will become more respected members of the judicial community.<sup>316</sup>

### 3. *Creating a New Federal Circuit Court of Appeals*

Once the intricate tribal court system is in place, Congress needs to provide a system of federal review to ensure that the tribal court did not violate the constitutional rights of the parties. To achieve that goal, Congress should create a new "Court of Appeals for the Indian Circuit (CAIC)" to hear any cases appealed from the highest-level tribal or CFR court.<sup>317</sup> Although this solution

*Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1069 (2005) (noting the largest tribe has over 300,000 members).

311. See *Law and Order on Indian Reservations*, 58 Fed. Reg. 54,406, 54,407 (Oct. 21, 1993) ("Indian tribes served by Courts of Indian Offenses are authorized to create their own tribal court systems should they desire to assume additional jurisdiction.").

312. See *infra* Part VI.D.2 (discussing the costs of the proposed system).

313. See *infra* Part VI.C.3.b (discussing the appropriate standards for judgment recognition).

314. See 25 C.F.R. § 5.1 (2007) (providing for preference in employment within the BIA). This requirement should extend to CFR courts, which the BIA operates.

315. See Minzner, *supra* note 15, at 90 (noting a Supreme Court assumption that non-Indians will be disadvantaged in tribal courts).

316. See O'Connor, *supra* note 137, at 2 (arguing that to gain the respect of the nontribal community, "tribal courts need to be perceived as both fair and principled").

317. For the remainder of this subpart, I will refer to both tribal-run tribal courts and CFR courts as tribal courts.

sounds extreme, Congress has provided for specialized appellate courts in other uniquely federal contexts.<sup>318</sup> Like the other courts of appeals, decisions of the CAIC would be reviewable by the Supreme Court.

In the CAIC, at least half of the judges should be Indians. By requiring participation by Indian judges, Congress can better maintain the balance between tribal sovereignty and constitutional protection. Because the Indian judges are familiar with tribal law and custom, they can provide a tribal viewpoint that is otherwise lacking in traditional federal courts.<sup>319</sup> At the same time, the non-Indian judges are more familiar with the Constitution, and they can better protect the rights of the non-Indian parties. While Congress could save money by providing for appellate review in the existing circuits, those courts may have differing views, forcing the Supreme Court to become more involved on appeal.<sup>320</sup> By providing one unified voice on issues of Indian law, Congress could bring much needed consistency to a field of law full of uncertainty.<sup>321</sup>

### *C. Procedural Devices to Control Interactions Between Tribal Courts and Federal and State Courts*

Although this Proposal nearly eliminates the potential for concurrent jurisdiction between tribal courts and state or federal courts, Congress must enact procedural mechanisms to allow the courts to interact effectively. While some of those procedures are already in place, they are judicial rules that need codification.<sup>322</sup> In addition, Congress has a wide variety of possibilities to choose from to resolve typical conflict of laws concerns.<sup>323</sup> By implementing the Proposal, Congress can provide a mechanism for tribal courts to fit in the American court system, while maintaining the uniqueness of tribal law.

318. For example, Congress created the Federal Circuit Court of Appeals primarily to hear all appeals involving patents. ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, *PATENT LAW AND POLICY: CASES AND MATERIALS* 11 (3d ed. 2002).

319. See O'Connor, *supra* note 137, at 3 ("Tribal court judges frequently are tribal members who seek to infuse cultural values into the process.")

320. See MERGES & DUFFY, *supra* note 318, at 10–11 (describing the wide divergence "as to doctrine and basic attitudes toward patents" that led to the creation of the Federal Circuit as a way to unify patent doctrine).

321. See Reynolds, *supra* note 85, at 602 (arguing that "the current set of rules delineating tribal court adjudicatory jurisdiction contains numerous inconsistencies and fails to create a cogent theory of tribal court adjudication").

322. See *infra* Part VI.C.2 (discussing the standards of appellate review in the CAIC).

323. See *infra* Part VI.C.3 (proposing solutions for tribal court choice of law rules and the recognition of tribal judgments).

### 1. Levels of Review in the CFR Appellate Courts

Assuming Congress finds a need for a tribal appellate court, the solution must address which levels of review will apply in the CFR appellate courts. For the answer, Congress needs to look no further than routine federal law on the subject. As any lawyer knows, federal appellate courts apply different standards of review depending on the procedural posture of the case. Simply put, the CFR courts, as federal courts,<sup>324</sup> should apply the appropriate standard of review to lower court findings of law and fact. Thus, the CFR appellate court could review tribal court findings of law on a *de novo* standard, even though it is not technically a tribal court.<sup>325</sup> If tribal leaders do not like the idea of federal courts reviewing a tribal court application of tribal law, those leaders could enact appropriate legislation to create a new tribal-run appellate court.<sup>326</sup>

### 2. Levels of Review in the CAIC

Because the tribe cannot take over the CAIC, however, appellate review in that court requires a more complex solution. In situations when tribal interests are at stake, federal courts should continue to adhere to the principles of the exhaustion doctrine laid out by the Supreme Court.<sup>327</sup> The codified Proposal, however, should alter the way federal district courts address the issue. Because of the availability of review in the CAIC, federal district courts should dismiss all cases with tribal connections, just like the state courts that do not have consent from the tribes. By funneling all cases with tribal contacts into the new tribal court systems, the tribal courts could develop more rapidly.<sup>328</sup> Just as important, the CAIC would interpret all questions of tribal court jurisdiction, thus providing a uniform view on the extent of tribal court jurisdiction.<sup>329</sup>

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324. See Law and Order on Indian Reservations, 58 Fed. Reg. 54,406, 54,408 (Oct. 21, 1993) ("Courts of Indian Offenses, however, are Federal instrumentalities and are bound not only by the ICRA, but by the requirements of the United States Constitution as well.").

325. See *United States v. Jeffries*, 405 F.3d 682, 684 (8th Cir. 2005) ("We apply *de novo* review to questions of federal law . . .").

326. See Law and Order on Indian Reservations, 58 Fed. Reg. at 54,407 ("Indian tribes served by Courts of Indian Offenses are authorized to create their own tribal court systems should they desire to assume additional jurisdiction.").

327. See *supra* Part IV.A.2 (discussing the exhaustion doctrine).

328. See *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856–57 (1985) (arguing that exhaustion furthers the congressional policy of "supporting tribal self-government and self-determination").

329. This statement is true except, of course, for those rare decisions that would be overturned by the Supreme Court.

Although the Proposal changes the function of the exhaustion doctrine, it maintains the important principles embodied within the doctrine.<sup>330</sup> More importantly, by establishing presumptive jurisdiction in the tribal courts, the Proposal eliminates the existing questions of when to apply exhaustion,<sup>331</sup> but the principles of exhaustion come in concerning the levels of review available in the CAIC. The CAIC, however, should only exercise appellate jurisdiction over claims that otherwise belong in federal court, either by way of federal question jurisdiction<sup>332</sup> or diversity jurisdiction.<sup>333</sup> After granting the appeal, the CAIC should utilize the three-level standard of review currently used by the federal courts in exhaustion cases.<sup>334</sup>

First, federal courts provide full deference to tribal courts on questions of tribal law.<sup>335</sup> That standard of review maintains the highest level of tribal sovereignty because it ensures that tribal courts are the final interpreters of their own laws—"tribal courts are best qualified to interpret and apply tribal law."<sup>336</sup> Under this standard, the new federal court could not overturn any question of tribal law, with the exception of jurisdiction.<sup>337</sup>

Second, while some commentators argue for a more deferential standard of review,<sup>338</sup> federal courts review tribal court findings of fact using a clear error standard.<sup>339</sup> Although state court findings of fact are binding on the federal courts, the full faith and credit statute demands that result.<sup>340</sup> Because

330. Specifically, the Proposal provides a method to satisfy the exhaustion requirement, and the availability of review by the CAIC will eliminate challenges to tribal court jurisdiction in the federal district courts because the CAIC's decisions are entitled to full faith and credit.

331. See Koehn, *supra* note 126, at 728–48 (discussing several key issues presented by the current exhaustion doctrine).

332. See generally 28 U.S.C. § 1331 (2000).

333. See generally *id.* § 1332.

334. See Royster, *supra* note 125, at 254–66 (discussing the three-part approach for reviewing tribal court decisions on post-exhaustion review).

335. *Id.* at 255.

336. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987).

337. See *infra* notes 351–53 and accompanying text (providing a standard of review for questions of tribal court jurisdiction).

338. See Timothy W. Joranko, *Exhaustion of Tribal Remedies in the Lower Courts After National Farmers Union and Iowa Mutual: Toward a Consistent Treatment of Tribal Courts by the Federal Judicial System*, 78 MINN. L. REV. 259, 299–306 (1993) (strongly advocating absolute deference on tribal court findings of fact).

339. See Royster, *supra* note 125, at 261–63 (discussing the advantages and disadvantages of this approach).

340. See Joranko, *supra* note 338, at 301 n.272 (noting that 28 U.S.C. § 1738 binds federal courts to state court findings of fact).

tribal court judgments do not receive full faith and credit under this Proposal,<sup>341</sup> their findings of fact should not receive full faith and credit either. By applying a clear error standard to tribal court findings of fact, the CAIC can avoid the incongruous outcomes that would result with a more stringent standard of review,<sup>342</sup> while maintaining the freedom to overturn tribal courts' findings that are clearly incorrect.

Third, federal courts review tribal court determinations of federal law on a *de novo* standard.<sup>343</sup> While that standard allows inconsistent results in different courts, it is the appropriate standard because "federal courts are the final arbiters of federal law."<sup>344</sup> Even though state court determinations of federal law are only reviewable in the Supreme Court, the Court reviews a state court's decision *de novo*.<sup>345</sup> Similarly, federal appellate courts review federal district court interpretations of state law on a *de novo* basis, so all federal courts apply this standard when reviewing questions of federal law.<sup>346</sup> Because federal courts always use this standard, they should apply this standard of review to tribal court determinations of federal law as well.

While the existing three-tiered system of federal review provides a foundation for appellate review in the CAIC, additional standards are needed. First, what level of review applies to tribal court determinations of state law? Because federal courts review determinations of federal law on a *de novo* standard, they should apply that same level of review to tribal court determinations of state law. In fact, to ensure maximum protection for state sovereignty, the federal court ideally should certify the state law question to the state supreme court,<sup>347</sup> but because federal courts often apply state law when exercising supplemental jurisdiction,<sup>348</sup> *de novo* review in the federal court

341. See *infra* Part VI.C.3.b (advocating for a comity-based approach to recognizing tribal judgments).

342. See Royster, *supra* note 125, at 261–62 (providing an example of the anomalous results that would occur with a higher standard of review).

343. *Id.* at 263.

344. *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314 (9th Cir. 1990).

345. See Royster, *supra* note 125, at 264–65 (indicating that in the rare instances when the Supreme Court grants certiorari, it reviews state court determinations of federal law under a *de novo* standard).

346. See *id.* at 265 ("De novo review on federal law issues previously determined by another court is thus the only standard with which the federal courts are familiar and comfortable.").

347. See, e.g., *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997) (noting the benefits of a certification procedure).

348. See 28 U.S.C. § 1367(a) (2000) (allowing federal courts to exercise jurisdiction over state law claims that are "part of the same case or controversy under Article III").

provides enough protection for the state's interests if certification is unavailable.

The final, and most difficult, problem is determining which level of review should apply to questions of tribal court jurisdiction. As the Supreme Court has recognized, tribal court jurisdiction is a federal question.<sup>349</sup> Tribal codes, however, contain their own jurisdictional provisions,<sup>350</sup> so a tribal advocate could argue that tribal court jurisdiction is a question of tribal law entitled to absolute deference. While this Proposal would create a statutory scheme of tribal court jurisdiction, the statute is a federal one, subject to congressional amendment, so tribal court jurisdiction ultimately remains a matter of federal law. In fact, tribal court jurisdiction often provides the only basis for federal court jurisdiction,<sup>351</sup> and if tribal jurisdiction is not reviewable in federal court, then the CAIC often would not have a basis for jurisdiction.<sup>352</sup> Because the Proposal eliminates state court jurisdiction over tribal affairs, not allowing the federal courts to provide a check on the exercise of tribal jurisdiction would allow the tribal courts to determine their jurisdiction at will, which presents serious potential constitutional problems.<sup>353</sup>

### 3. Conflict of Laws Concerns

In addition to procedural mechanisms that govern appeals through the new tribal court system, this Proposal provides answers to the difficult conflict of laws questions that arise from increased tribal jurisdiction. First, expanding tribal jurisdiction creates situations when tribal courts can exercise jurisdiction outside of their territory, so tribal courts need a system of choice of law rules to decide which law to apply. Worse still, even if the tribal court can exercise jurisdiction over a non-Indian, the court still must rely on state or federal courts

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349. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852 (1985) (determining that a challenge to the exercise of tribal court jurisdiction constitutes a federal question).

350. *See, e.g., Kennerly v. Dist. Ct.*, 400 U.S. 423, 425 (1971) (referencing part of the Blackfeet Tribal Law and Order Code providing for concurrent tribal court jurisdiction).

351. *See WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL* 218–19 (4th ed. 2004) (noting the dramatic increase in federal jurisdiction resulting from the holding in *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985)).

352. Of course, the CAIC could still exercise jurisdiction under the diversity statute or through supplemental jurisdiction in the appropriate circumstances. *See* 28 U.S.C. § 1332 (2000) (providing for diversity jurisdiction); 28 U.S.C. § 1367 (2000) (providing for supplemental jurisdiction).

353. For example, an Indian tribe could exercise criminal jurisdiction over a non-Indian, in violation of the proposed statute. If it did not provide the constitutional protections afforded to all criminal defendants, a constitutional violation of rights would occur.

to enforce its judgments when the non-Indian does not own property within Indian country. This section addresses both choice of law procedures and issues of judgment recognition in more detail below.

*a. Choice of Law Procedures*

With the expansion of tribal jurisdiction provided by this Proposal, new choice of law issues arise in two separate situations. First, tribal courts must develop a set of rules to decide which law applies when it exercises jurisdiction under its long arm statute.<sup>354</sup> Second, in the rare event that a state or federal court exercises jurisdiction over claims involving tribal law,<sup>355</sup> those courts need to decide whether to apply tribal law or forum law.

*(1) Choice of Law in the Tribal Courts*

When a tribal court exercises long arm jurisdiction, a potential choice of law question arises. For example, suppose that a non-Indian has an accident within Indian country, injuring a tribal member. In this situation, the tribal court clearly has jurisdiction under this Proposal because one of the parties is a tribal resident. While the tribal court has jurisdiction, either tribal law or the law of the domicile of the non-Indian could apply.<sup>356</sup> Thus, the tribal court needs a procedure to determine which law should apply.

To provide maximum flexibility and promote tribal sovereignty, Congress should allow the tribes to determine which choice of law system they want to apply.<sup>357</sup> Because of the importance of tribal sovereignty, the interest of the tribal forum will provide a major hurdle to applying nontribal law, no matter which choice of law system the tribe chooses.<sup>358</sup> Besides, even without the added emphasis on tribal sovereignty, most of the choice of law methods

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354. See *supra* note 263 and accompanying text (making this method of jurisdiction available to tribal courts).

355. See *infra* notes 362–65 and accompanying text (discussing several ways for a nontribal court to obtain jurisdiction).

356. See SYMEONIDES ET AL., *supra* note 148, at 3 (describing the basic choice of law inquiry).

357. A discussion of the various choice of law approaches is not within the scope of this Note. For more information on the various approaches, see *id.* at 16–305.

358. See Florey, *supra* note 149, at 1674–75 (noting that using interest analysis or the *Restatement (Second) of Conflicts of Laws* approach allows courts to consider the interests of the tribe separate from the interests of the litigants).



usually favor the forum state.<sup>359</sup> Despite the strong preference for the application of tribal law, some situations mandate a contrary result, and tribal courts must be able to apply nontribal law in order to gain more respect among state and federal courts.<sup>360</sup> Similarly, when the tribal court exercises supplemental jurisdiction over state or federal law claims, the foreign law usually will apply, so the tribal court needs to become familiar with applying both state and federal law.

## (2) *Choice of Law in Nontribal Courts*

Just as tribal courts need to develop choice of law approaches to determine which law to apply, state and federal courts need to consider the option of applying tribal law under their choice of law rules.<sup>361</sup> Although jurisdiction over cases that involve questions of tribal law will normally arise in the tribal courts, state and federal courts can obtain jurisdiction in a variety of ways. The easiest way, perhaps, is for the tribe to consent to state jurisdiction under the modified version of Public Law 280.<sup>362</sup> In addition, many tribal codes, and the CFR courts, do not currently allow the tribal court to exercise jurisdiction over non-Indians without consent.<sup>363</sup> Theoretically, Indian tribes would amend their respective tribal codes with the passage of this Proposal, but if they do not, state or federal courts can exercise jurisdiction in the appropriate cases.<sup>364</sup> Finally, state and federal courts could exercise jurisdiction when the tribal court determines that it does not have jurisdiction over the cause of action. For

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359. See SYMEONIDES ET AL., *supra* note 148, at 172–73 (providing data showing that only four of the forty cases studied did not apply forum law). The one method that does not heavily favor the forum is the so-called "traditional approach" of the *Restatement (First) of Conflicts of Laws*, which tends to focus more on notions of territoriality. See SYMEONIDES ET AL., *supra* note 148, at 19–20 (discussing the territorial nature of the traditional approach).

360. By correctly applying the law from other jurisdictions, tribal judges can demonstrate their legal skills to federal and state judges, who, in turn, are more likely to respect the judgments from tribal courts. See O'Connor, *supra* note 137, at 2 (arguing that to gain the respect of the nontribal community, "tribal courts need to be perceived as both fair and principled").

361. See Florey, *supra* note 149, at 1650 (arguing that states should consider applying tribal law under their choice of law principles).

362. See *supra* notes 298–300 and accompanying text (providing this option).

363. See Florey, *supra* note 149, at 1640–41 (noting that many tribes limit access to their courts to tribe members).

364. Federal courts could exercise jurisdiction under the federal question or diversity statutes. See generally 28 U.S.C. §§ 1331, 1332 (2000). Meanwhile, state courts, as courts of general jurisdiction, could easily acquire jurisdiction if it involves a resident of the state.

example, the tribal court may not have sufficient minimum contacts with the non-Indian to exercise personal jurisdiction over him or her.<sup>365</sup>

Whatever the basis for federal or state jurisdiction, the nontribal court should consider applying tribal law if its choice of law rules dictate such a result. Despite the problems with applying tribal law in nontribal courts,<sup>366</sup> the application of tribal law in state and federal courts promotes tribal sovereignty by deferring to the tribe's wishes.<sup>367</sup> More importantly, the need to apply tribal law in nontribal courts creates a greater demand for documentation of tribal codes and tribal court decisions.<sup>368</sup> While sources of tribal law are currently limited, Congress can provide extra funding to improve the access to tribal law, as well as tribal court access to federal and state law.<sup>369</sup>

As a minor procedural note, most states will need to create an exception to the penal law exception under its choice of law rules.<sup>370</sup> For example, if the tribe has a tribal code, but transfers jurisdiction to the state under Public Law 280, this Proposal requires an application of tribal law.<sup>371</sup> If that law is criminal in nature, however, the penal law exception would apply.<sup>372</sup> To remedy this problem, the grant of jurisdiction should include tribal permission for the state court to enforce tribal criminal law.<sup>373</sup>

365. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) ("Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.").

366. See *id.* at 1676–96 (discussing several potential problems to the application of tribal law in state court).

367. See *id.* at 1691 (noting several advantages of applying tribal law in state courts).

368. See Jones, *supra* note 140, at 476 (noting the "lack of a thorough compilation of tribal court decisions"); Valencia-Weber, *supra* note 6, at 242 ("Because of the recency of many tribal courts, 'much tribal court litigation involves cases in which there is no controlling authority.'" (quoting Frank Pommersheim, *Liberations, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411, 454 (1992))).

369. See Florey, *supra* note 149, at 1692 (noting that many larger tribes maintain well-financed court systems with "Web-searchable libraries of decisions or equivalent resources"). With increased funding, Congress could vastly enlarge the database maintained by the National Tribal Justice Resource Center. See *id.* at 1692 n.341 (providing a link to a database containing "codes, constitutions, by-laws and judicial opinions from more than fifty tribes").

370. See *The Antelope*, 23 U.S. (10 Wheat) 66, 123 (1825) ("The courts of no country execute the penal laws of another . . .").

371. See *supra* notes 298–300 and accompanying text (providing this option).

372. See SYMEONIDES ET AL., *supra* note 148, at 90–95 (discussing the penal law exception).

373. The author makes no guarantees as to the constitutionality of such a contract. At worst, the Supreme Court would find such a grant unconstitutional, and the system would operate as it does currently.

*b. Judgment Recognition*

This Proposal accomplishes very little if tribal courts, state courts, and federal courts do not determine a method for recognizing each other's judgments. Fortunately, this Proposal dramatically simplifies the problem. The CAIC, as a federal court, receives full faith and credit in other American courts.<sup>374</sup> Because the CAIC usually hears appeals from the tribal courts, it can perform a judgment recognition analysis during the appeal to increase efficiency. Even if the parties do not appeal the case to the CAIC, other state and federal courts should utilize the same approach to ensure consistency. Therefore, what approach should the CAIC use?

While commentators have proposed numerous solutions to the problem,<sup>375</sup> no consensus view has yet to develop. Although Congress has provided for full faith and credit to tribal court judgments in some instances,<sup>376</sup> most courts have determined that a comity approach offers the best solution.<sup>377</sup> Finally, one prominent Indian law scholar has proposed a system known as "asymmetry," which represents a comity-based approach in which tribal courts and nontribal courts consider different factors to determine whether recognition is appropriate.<sup>378</sup> Whatever the approach, Congress should implement it in statutory form to ensure a uniform result in all three court systems.<sup>379</sup> Specifically, the chosen approach must take into account issues of tribal sovereignty, or the tribes will rebel against it.

One potential approach to the recognition of tribal court judgments is to grant them full faith and credit.<sup>380</sup> Granting full faith and credit to tribal court

374. See U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and *the Judges in every State shall be bound thereby . . .*" (emphasis added)).

375. See generally Ransom et al., *supra* note 166. Abundant scholarship exists on this topic. For a rather large representative sample, see Robert Laurence, *The Role, if any, for the Federal Courts in the Cross-Boundary Enforcement of Federal, State and Tribal Money Judgments*, 35 TULSA L.J. 1, 3 n.3 (1999).

376. See Leeds, *supra* note 167, at 332–33 (indicating that the Violence Against Women Act, The Indian Child Welfare Act, the Parental Kidnapping Prevention Act, and the Child Support Orders Act require full faith and credit to tribal judgments).

377. See *supra* note 165 (listing several cases that have addressed this issue).

378. See Laurence, *supra* note 375, at 36 (setting forth the various factors for courts to consider under his asymmetric view).

379. See *id.* at 34 ("The rule of recognition for the enforcement of tribal judgments off-reservation or the enforcement of state judgments on-reservation must be a federal rule, binding on state, federal and tribal courts.").

380. See generally Garonzik, *supra* note 231.

judgments provides a higher level of respect for the tribal courts.<sup>381</sup> In addition, as long as jurisdiction is proper, recognition is automatic, so the court's task is easier under this approach.<sup>382</sup> Despite the advantages of a full faith and credit system, forcing tribal courts to extend full faith and credit to nontribal judgments presents several challenges to tribal sovereignty. For example, many tribes view a grant of full faith and credit to state court judgments as "giving up some of their inherent power to the state."<sup>383</sup> From a nontribal court's perspective, forcing the court to give full faith and credit to tribal judgments prevents it from ensuring that the tribal proceeding protected basic standards of due process.<sup>384</sup>

Because Congress has a constitutional duty to protect American citizens from violations of due process, full faith and credit is not currently a viable option. In fact, even the most fervent tribal advocates would not require full faith and credit to judgments from traditional tribal courts, which follow arbitration-like procedures.<sup>385</sup> Indian tribes, however, should have the option to participate in a full faith and credit regime with the consent of the states, assuming the tribal court agrees to provide a minimal level of constitutional protection.<sup>386</sup> By providing a negotiation-based option, Congress serves the dual goals of encouraging tribal-state relations and providing a maximum level of flexibility to allow the tribes to make their own sovereign decisions.

While the full faith and credit approach presents many problems, a comity-based approach offers a more feasible solution. As a doctrinal starting point, the Ninth Circuit has established a detailed comity-based approach to deal with

381. See Valencia-Weber, *supra* note 6, at 237–38 ("If the court's mandates do not seem to require compliance, then the court does not have legitimacy.").

382. See Robert Laurence, *The Convergence of Cross-Boundary Enforcement Theories in American Indian Law: An Attempt to Reconcile Full Faith and Credit, Comity and Asymmetry*, 18 QUINNIPIAC L. REV. 115, 125 (1998) (listing the types of collateral attacks allowed under a full faith and credit approach).

383. Grunsted, *supra* note 297, at 395; see also *id.* at 390–91 (noting that when given the option of accepting full faith and credit at the expense of reciprocating, only fifteen of the thirty-six federally recognized tribes in Oklahoma exercised that option); Stoner & Orona, *supra* note 179, at 387 (arguing that the influx of state influence would "soften the resistance of the Indian tribes to assimilation").

384. See *Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997) ("[T]he tribal court proceedings must afford the defendant the basic tenets of due process or the judgment will not be recognized by the United States.").

385. See Laurence, *supra* note 382, at 147–50 (arguing that strong advocates for full faith and credit would not conclude that traditional tribal courts should receive full faith and credit).

386. See Garonzik, *supra* note 231, at 763–69 (proposing an amendment to the Full Faith and Credit Act that would grant tribal court judgments full faith and credit after meeting certain standards).

the recognition of tribal judgments in federal courts.<sup>387</sup> Although most commentators believe that the court reached the wrong decision in that case, they have been more supportive of the system the court utilized.<sup>388</sup> In fact, Professor Robert Laurence suggests that, with one exception, "the case stands as a fine statement of the application of the principles of comity to our issue."<sup>389</sup> For this reason, a comity-based approach is better suited to resolving the problem of judgment recognition.

The only remaining question is whether the comity approach should require a consideration of the same factors in all three courts or follow Professor Laurence's asymmetrical approach.<sup>390</sup> Considering the important differences between tribal courts and nontribal courts, as well as the variety among the tribal courts themselves, the asymmetrical approach proposed by Professor Laurence provides the best solution to the judgment recognition problem.<sup>391</sup> Laurence's approach best accomplishes the goals of the Proposal advocated in this Note because his approach provides maximum flexibility and protection for tribal sovereignty and culture, while protecting the constitutional rights of non-Indians.

In sum, the CAIC should recognize the judgments of the tribal courts under the Ninth Circuit approach, with Professor Laurence's substitution of the ICRA for the due process requirement.<sup>392</sup> If the CAIC enforces the judgment as a matter of comity, that judgment is entitled to full faith and credit in other federal and state courts.<sup>393</sup> Meanwhile, other federal and state courts must

387. See *Wilson*, 127 F.3d at 810 (providing six exceptions to the general rule of recognition of tribal court judgments).

388. See Laurence, *supra* note 382, at 131–32 (arguing that the second holding in *Wilson* was wrong after approvingly citing the first holding).

389. *Id.* at 131 (arguing for a substitution of the ICRA for the court's due process requirement).

390. See *id.* at 137–38 (providing several reasons to prefer an asymmetrical approach).

391. See Laurence, *supra* note 375, at 36 (setting forth the various factors for courts to consider under his asymmetric view).

392. See Laurence, *supra* note 382, at 131 ("I would add to the Ninth Circuit's *Wilson* analysis explicit reference to the Indian Civil Rights Act, replacing the court's generalized mention of due process."). Because Laurence proposed his solution under the current system, a slight modification is necessary. Notably, if the tribal court enters a judgment against a nonmember, then the due process standard in *Wilson* should apply, but only the lesser ICRA requirements should apply to judgments against tribal members. See *supra* notes 258–59 and accompanying text (explaining why different standards are allowable for tribal members and nontribal members).

393. See *supra* note 374 and accompanying text (providing full faith and credit for judgments of the CAIC); see also Ransom et al., *supra* note 166, at 277 (proposing a "transformer" theory of judgment recognition). By going through the CAIC, this proposal fully implements Chief Justice Ransom's theory, without requiring separate negotiation.

analyze decisions that do not reach the CAIC utilizing the same approach as the CAIC.<sup>394</sup> Finally, tribal courts would not enforce state and federal judgments based on the satisfaction of due process; rather, they would examine the judgment's effect on the tribe to determine whether to grant comity to the judgment.<sup>395</sup>

#### *D. Answering Potential Criticisms of the Proposed Solution*

While this Proposal attempts to solve many of the problems with the current system of tribal court jurisdiction, it is not immune from criticism. Although commentators could raise several arguments in opposition to this Proposal, this subpart address two of the more obvious criticisms. Namely, it dismisses the criticisms of potential assimilation and costs of implementation.

##### *1. Assimilation*

As with any proposal to incorporate Indian tribes into the federal system, this Proposal remains open to criticism on assimilationist grounds. Because this Proposal bases the structure of the tribal court system on state and federal court models, that criticism is not baseless. This Proposal, however, overcomes that criticism because of the extensive advances of tribal sovereignty that it includes. In fact, this Proposal attempts to reconcile the conflicting goals of maintaining Indian culture and of protecting the rights of non-Indians by granting concessions to each side at the expense of the other side.

For example, this Proposal greatly expands tribal court jurisdiction,<sup>396</sup> while providing a federal appellate court to ensure that the tribal court's exercise of jurisdiction was just.<sup>397</sup> Similarly, each tribe has the option to acquire even more jurisdiction if it agrees to provide additional constitutional safeguards.<sup>398</sup> While adopting those safeguards would cause the tribe to become more American, the tribe has the unilateral power to make the decision

394. See *supra* note 379 and accompanying text (noting the need for uniformity through the implementation of a federal statute).

395. See Laurence, *supra* note 375, at 36 (arguing for such a standard because of "the impact that the off-reservation judgment could have on closely held customs and traditions in the small tribal community").

396. *Supra* Part VI.A.

397. See *supra* notes 343, 349–53 and accompanying text (providing for de novo review of tribal court jurisdiction in the CAIC).

398. *Supra* notes 252–54 and accompanying text.

for itself, which is hardly an assimilationist view. In addition, Indian tribes have no obligation to run their appellate court systems the same way that their state and federal counterparts do,<sup>399</sup> and they have the absolute power to determine their own choice of law procedures.<sup>400</sup> Even the CAIC guarantees at least half of its positions to Indian judges, who can ensure that it does not acquire an assimilationist view of tribal issues.<sup>401</sup> Thus, because of the immense autonomy granted to the Indian tribes under this Proposal, any resulting assimilation must come from decisions made by the tribes themselves.

## 2. Costs of Implementation

In addition to raising concerns over potential assimilation, this Proposal requires significant funding for proper implementation. First, Congress must provide a CFR court for every tribe that does not currently have a tribal court.<sup>402</sup> Second, Congress must provide the larger tribes with appellate CFR courts once the tribes operate their own lower tribal courts.<sup>403</sup> Third, this Proposal provides for a new federal circuit court of appeals devoted specifically to the resolution of tribal issues.<sup>404</sup> Finally, Congress needs to provide significant funding increases to allow tribal courts to develop necessary "accouterments of justice."<sup>405</sup>

While these costs are unavoidable, most of them are not as significant as they appear at first glance. For instance, many tribes have at least one level of tribal courts, so they have no need for a new CFR court.<sup>406</sup> In addition, CFR courts are temporary courts, and many tribes will want to create their own courts to avoid the disadvantages of relying on the CFR courts.<sup>407</sup> Although the CAIC is a permanent court that will need continual funding, it will handle all appeals from the tribal court systems, thereby significantly reducing the burden

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399. See *supra* note 326 and accompanying text (noting that the tribes have the option to take control of their appellate courts).

400. *Supra* note 357 and accompanying text.

401. *Supra* note 319 and accompanying text.

402. *Supra* Part VI.B.1.

403. *Supra* Part VI.B.2.

404. *Supra* Part VI.B.3.

405. Jones, *supra* note 140, at 476.

406. See Law and Order on Indian Reservations, 58 Fed. Reg. 54,406, 54,407 (Oct. 21, 1993) (providing several examples of tribes that operate their own tribal courts); see also 25 C.F.R. § 11.100(a) (2007) (listing the fifteen CFR courts throughout the country).

407. See Law and Order on Indian Reservations, 58 Fed. Reg. at 54,406 (declaring the BIA's policy of encouraging tribes to develop their own court systems).

on the federal district courts, which currently hear post-exhaustion appeals.<sup>408</sup> Similarly, the CAIC will conduct any required judgment recognition analysis on appeal,<sup>409</sup> which will significantly reduce the burden on the state courts. Of course, the implementation of this proposal still requires significant expenditures, but recent federal legislation indicates a congressional intent to provide adequate funding to promote the growth of tribal courts.<sup>410</sup>

### VII. Conclusion

The existing system of tribal court jurisdiction is overly complex and produces inconsistent results. Instead of allowing the Supreme Court to continue to address the problems one factual scenario at a time, Congress, using its plenary power over Indian affairs, should take charge and implement a comprehensive statute to firmly establish tribal courts as members of the federal union. In passing such a statute, Congress should attempt to maximize tribal sovereignty, while continuing to protect the individual rights of the American people. Because none of the existing models adequately address these competing goals, a unique new solution is necessary. Hopefully, the Proposal set forth in this Note will provide a foundational starting point toward enacting a comprehensive solution that eliminates most of the problems with the existing system.

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408. See Royster, *supra* note 125, at 254 (noting the possibility of attacking a tribal court judgment in federal court).

409. See *supra* note 374 and accompanying text (providing for judgment recognition analysis during an appeal to improve efficiency).

410. See Indian Tribal Justice Technical and Legal Assistance Act of 2000, Pub. L. No. 106-559, §§ 201–202, 114 Stat. 2778, 2781–82 (codified at 25 U.S.C. §§ 3621, 3681 (2000)) (extending the funding provisions of the Indian Tribal Justice Act while providing additional grants from the attorney general).



