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# COMPACTS, CONFEDERACIES, AND COMITY: INTERTRIBAL ENFORCEMENT OF TRIBAL COURT ORDERS

STEVEN J. GUNN\*

## INTRODUCTION

Indian tribes and their reservations have been described as America's internal colonies. Since the arrival of Europeans on this continent, Indian people have seen their tribes divided, their lands taken, and their sovereignty diminished. For well over a century, the U.S. Congress has exercised so-called "plenary power" over Indian affairs, enacting legislation, without tribal consent, that has fundamentally altered the nature of tribal landholdings and the organization and powers of tribal governments. In its darkest moments, Congress has abrogated Indian treaties, divided reservations into farm-sized allotments for individual Indians, sold surplus Indian lands to homesteaders, acculturated Indian children in off-reservation boarding schools, suppressed Indian cultural and religious practices, imposed federal and, in some cases, state law on reservations, and terminated altogether the government's recognition of, and trust relationship with, over one-hundred Indian tribes.<sup>1</sup>

Although these policies have given way by and large in the last four decades to an era of "self-determination," in which the political branches of government have sought to strengthen reorganized tribal governments,<sup>2</sup> Indian tribes have continued to lose ground. Their chief nemesis is the Supreme Court, which, through its modern cases, has breathed life into Congress's long-since repudiated policies of allotment and assimilation. In a string of cases dating back to the 1970s, the Court has found Indian reservations to be diminished or disestablished and the inherent powers of tribal governments to be limited, in all but the most extraordinary cases, to tribal members and their activities only.<sup>3</sup> The Court's decisions concerning the nature and scope of tribal governmental authority are particularly damaging, for they eviscerate

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1. Concise histories of these events can be found in ROGER L. NICHOLS, *AMERICAN INDIANS IN U.S. HISTORY* (2003); ANGIE DEBO, *A HISTORY OF THE INDIANS OF THE UNITED STATES* (1970); and WILLIAM T. HAGAN, *AMERICAN INDIANS* (Daniel J. Boorstin ed., 1961). More detailed accounts can be found in *HISTORY OF INDIAN-WHITE RELATIONS* (William C. Sturtevant et al. eds., 1988) and FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* (1984). Thoughtful discussions of federal Indian law and policy can be found, among other places, in FELIX S. COHEN'S *HANDBOOK OF FEDERAL INDIAN LAW* (Rennard Strickland et al. eds., 1982), a complete revision of which is forthcoming, and in the two leading casebooks on federal Indian law: ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM* (4th ed. 2003) and DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* (4th ed. 1998).

2. See, e.g., Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450a-450n (2004).

3. Philip P. Frickey describes and masterfully analyzes these cases in *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 *YALE L.J.* 1 (1999). The cases are also discussed in this Article, *infra*, at notes 113-172 and in the accompanying text.

any notion that tribes have jurisdiction to regulate all persons and activities within their territories. Without full territorial sovereignty, tribes are increasingly unable to enact legislation or to adjudicate disputes concerning the activities of non-tribal members, including non-Indians and Indians who are members of other tribes.

No aspect of tribal governance is immune from the erosion of tribal jurisdiction over nonmembers. Even the authority of tribes to recognize and enforce the orders and judgments of other tribal courts is at stake. Such authority is vital, for it allows tribes to unite in the formation of reciprocal cross-boundary regimes in which the orders of each tribe are given effect within the territories of every other tribe, thus extending the reach of each tribe's judicial power. Ordinarily, in the absence of such efforts, tribal court orders have no legal effect beyond the reservation limits of the issuing court. Yet, the authority of tribes to enforce the orders of other tribal courts is predicated on the adjudicative jurisdiction of the enforcing court over the persons or entities against which enforcement is sought. More often than not, in intertribal cases, enforcement is sought in the courts of one tribe against the member or members of another. Without complete jurisdiction over nonmembers, tribal courts find themselves increasingly unable to enforce the orders of other tribal courts.

This Article examines these issues, and others, and suggests two ways in which tribes can reassert their inherent authority over nonmembers and, in so doing, build the framework for effective intertribal enforcement of tribal court orders. The Article proceeds in five parts. Part I addresses the applicability, or inapplicability, to Indian tribes of the Full Faith and Credit Clause and its implementing legislation, the Full Faith and Credit Act. Part II describes various approaches taken by tribes in the enforcement of foreign orders, including the orders of other tribal courts. Part III describes the limitations imposed by federal law on the ability of tribes fully to enforce the judgments of other tribal courts, namely the diminishment of Indian tribal authority over nonmembers.<sup>4</sup>

The final two parts of the Article suggest two alternate models for the resolution of some, but admittedly not all, of the jurisdictional dilemmas concerning intertribal enforcement of tribal court orders. First, part IV discusses the formation of intertribal governing bodies linking historically united or allied tribes and suggests that such bodies, if formed, would have the potential to broaden the jurisdictional reach of each of their constituent tribal governments, in much the same way that the union of the various states under a single federal government has broadened the reach and enforceability of each state's laws.<sup>5</sup> Second, part V proposes the enactment of intertribal compacts providing for both the reciprocal delegation of tribal jurisdiction between tribes and the reciprocal enforcement of tribal court orders based on principles of comity. The merits of each of these proposals will be addressed.

At the outset, it is worth noting that the focus of this Article, unlike that of the other articles in this symposium edition of the *New Mexico Law Review*, is the enforcement by *tribes* of the court orders and judgments of other *tribes*. To date,

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4. This part also considers the extent to which Congress may authorize tribes to exercise jurisdiction over cross-boundary disputes, and the pitfalls of such an approach.

5. The formation of intertribal governing bodies involves a substantial relinquishment of independence by constituent tribes and is therefore appropriate only in select cases.

little has been written on this subject. Instead, the scholarly debate has centered on the relationships between tribes and states and the legal and political considerations attendant to tribal-state cross-jurisdictional enforcement regimes.<sup>6</sup> This Article's discussion of intertribal enforcement of tribal court orders draws from that debate, but its chief purpose is to address the unique inter-jurisdictional issues facing tribes as they seek to recognize and enforce the judgments of other tribal courts.

## I. THE APPLICABILITY OF FULL FAITH AND CREDIT TO INDIAN TRIBES

Any discussion of the manner in which American Indian tribes may recognize and enforce the court orders and judgments of other sovereigns,<sup>7</sup> including the orders of other tribal governments, must begin with an assessment of the applicability to Indian tribes of the Full Faith and Credit Clause,<sup>8</sup> and its primary implementing legislation, the Full Faith and Credit Act.<sup>9</sup> Together, the Clause and the Act require all states, territories, and possessions of the United States, with few

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6. See, e.g., Melissa L. Tatum, *A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Acts*, 90 KY. L.J. 123 (2001-02); Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. REV. 311 (2000); Robert Laurence, *Symmetry and Asymmetry in Federal Indian Law*, 42 ARIZ. L. REV. 861 (2000); Shelly Grunsted, *Full Faith and Credit: Are Oklahoma Tribal Courts Finally Getting the Respect They Deserve?*, 36 TULSA L.J. 381 (2000); Barbara Ann Atwood, *Identity and Assimilation: Changing Definitions of Tribal Power over Children*, 83 MINN. L. REV. 927 (1999); Robert Laurence, *Full Faith and Credit in Tribal Courts: An Essay on Tribal Sovereignty, Cross-Boundary Reciprocity and the Unlikely Case of Eberhard v. Eberhard*, 28 N.M. L. REV. 19 (1998); 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 (1998); Robert Laurence, *The Off-Reservation Garnishment of an On-Reservation Debt and Related Issues in the Cross-Boundary Enforcement of Money Judgments*, 22 AM. INDIAN L. REV. 355 (1998); 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 (1998); Daina B. Garonzik, *Full Reciprocity for Tribal Courts from a Federal Perspective: A Proposed Amendment to the Full Faith and Credit Act*, 45 EMORY L.J. 723 (1996); P.S. Deloria & Robert Laurence, *Negotiating Tribal-State Full Faith and Credit Agreements: The Topology of the Negotiation and the Merits of the Question*, 28 GA. L. REV. 365 (1994); B.J. Jones, *Tribal Considerations in Comity and Full Faith and Credit*, 68 N.D. L. REV. 689 (1992); Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841 (1990); William V. Vetter, *Of Tribal Courts and "Territories": Is Full Faith and Credit Required?*, 23 CAL. W. L. REV. 219 (1987); Gordon K. Wright, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397 (1985); John T. Moshier, *Comment, Conflicts Between State and Tribal Law: The Application of Full Faith and Credit Legislation to Indian Tribes*, 1981 ARIZ. ST. L.J. 801; Note, *The Application of Full Faith and Credit to Indian Nations*, 20 ARIZ. L. REV. 1064 (1978); Fred L. Ragsdale, *Problems in the Application of Full Faith and Credit for Indian Tribes*, 7 N.M. L. REV. 133 (1977).

7. The principle concern of this Article is the recognition and enforcement between tribes of judicial decrees, not the recognition or respect one tribe may give to the positive laws of another. With respect to judicial decrees, it is worth noting that recognition and enforcement are separate and distinct acts:

The judgment of a foreign state may not be enforced unless it is entitled to recognition. Whether a foreign judgment should be recognized, may be in issue, however, not only in enforcement ...but in other contexts, for example where the defendant seeks to rely on a prior adjudication of a controversy (*res judicata*), or where either side in a litigation seeks to rely on prior determination of an issue of fact or law. A proceeding to enforce a foreign judgment normally takes the form of an action by the judgment creditor to collect a sum due from the judgment debtor under a judgment rendered in another state.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. b (2003).

8. U.S. CONST. art. IV, § 1.

9. Act of May 26, 1790, ch. 11, 1 Stat. 122, amended by Act of March 27, 1804, ch. 56, 2 Stat. 298. The Act is codified as amended at 28 U.S.C. § 1738 (2000). Congress has also exercised its authority to implement the Full Faith and Credit Clause in subsequent legislation, discussed *infra* at notes 30-32.

exceptions, to recognize and enforce as their own the court judgments and orders of every other state, territory, and possession. Simply put, the final judgment of any state, territory, or possession "if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land."<sup>10</sup> If tribes are treated as states, territories, or possessions within the meaning of these laws, they ought to have no discretion in determining whether they ought to enforce the orders of their sister tribal courts. If, however, tribes are not included within the ambit of the federal full faith and credit mandate, they ought to have considerable, if not unlimited, discretion in deciding whether or not, and in what manner, they will enforce sister tribal court judgments.

The Full Faith and Credit Clause of the U.S. Constitution does not, by its terms, apply to Indian tribes. The text of the clause speaks only of states. It provides, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."<sup>11</sup>

The Framers intended the clause to:

alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.<sup>12</sup>

Indian tribes were not included in this constitutional formulation. Indians and Indian tribes are mentioned only three times in the Constitution. Article I gives Congress the power to regulate commerce "with the Indian Tribes,"<sup>13</sup> and further provides that "Indians not taxed" are not to be counted in apportioning seats in the House of Representatives among the states.<sup>14</sup> The Fourteenth Amendment repeats the latter command.<sup>15</sup> Nothing in the Constitution provides that tribes are to be treated as states. Indeed, the Supreme Court has held time and again that Indian tribes are not states.<sup>16</sup> In *Cherokee Nation v. Georgia*, the Court found that "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else."<sup>17</sup> Tribes, the Court held, are neither states of the Union nor foreign nations, but "domestic dependent nations."<sup>18</sup> Tribes are politically

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10. *Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998).

11. U.S. CONST. art. IV, § 1.

12. *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 276-77 (1935); *accord*, *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948) (holding that "[t]he full faith and credit clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation").

13. U.S. CONST. art. I, § 8, cl. 3.

14. U.S. CONST. art. I, § 2, cl. 3.

15. U.S. CONST. amend. XIV, § 2.

16. *See, e.g.*, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *Arizona v. California*, 373 U.S. 546, 597 (1963) ("An Indian Reservation is not a State."); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) ("Tribal reservations are not States....").

17. 30 U.S. (5 Pet.) at 26.

18. *Id.* at 26-27.

dependent, in some sense, on the United States, but not “dependent on,” “subordinate to,”<sup>19</sup> or equal in status to the states.

The Full Faith and Credit Act extends the application of the full faith and credit doctrine to the territories and possessions of the United States. It states in relevant part that:

[t]he records and judicial proceedings of any court of any such State, Territory or Possession...shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.<sup>20</sup>

There is disagreement among the federal, state, and tribal courts as to whether tribes constitute “Territories” within the meaning of the Full Faith and Credit Act. However, as will be seen, the prevailing view is that tribes are not territories, and, therefore, they are not included within the federal full faith and credit mandate.

#### A. Federal Court Views

The U.S. Supreme Court has never squarely addressed the question of whether or not tribes constitute “Territories” under the Full Faith and Credit Act. The Court ruled in the mid-nineteenth century that tribes are territories within the meaning of a federal probate statute<sup>21</sup> but later cited with approval a lower federal court case holding that tribes are not territories within the meaning of a federal extradition statute.<sup>22</sup> When discussing the force of tribal court judgments, the Court has been careful to emphasize the limited reach of its precedents: “Judgments of tribal courts, as to matters properly within their jurisdiction, have been regarded *in some circumstances* as entitled to full faith and credit in other courts.”<sup>23</sup>

The lower federal courts are split as to the applicability of the Full Faith and Credit Act to Indian tribes. In several late nineteenth century cases, the Court of Appeals for the Eighth Circuit held that the judgments of Indian tribes “are on the

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19. *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 154 (1980).

20. 28 U.S.C. § 1738 (2000).

21. *United States ex rel. Mackey v. Cox*, 59 U.S. (18 How.) 100, 102 (1855). The statute in question required the courts of the District of Columbia to recognize letters of administration issued by any state or territory. It stated that:

it shall be unlawful for any person or persons to whom letters testamentary or of administration hath been or may hereafter be granted, by the proper authority in any of the United States or territories thereof, to maintain any suit or action, and to prosecute and recover any claim in the District of Columbia, in the same manner as if the letters of testamentary or administration had been granted...in the said District.

12 Cong. ch. 106, 2 Stat. 755 (1812). It is noteworthy that this statute did not use the term “full faith and credit” and it did not impose a reciprocal requirement on the states or territories to acknowledge the probate letters of the District.

22. *New York ex rel. Kopel v. Bingham*, 211 U.S. 468, 474–75 (1909) (citing *Ex parte Morgan*, 20 F. 298, 305 (W.D. Ark. 1883)). The extradition statute at issue in *Ex parte Morgan* provided that:

[w]henever the executive authority of any state or territory demands any person as a fugitive from justice...it shall be the duty of the executive authority of the state or territory to which such person has fled, to cause him to be arrested and secured...and to cause the fugitive to be delivered....

*Kopel*, 211 U.S. at 472–73 (quoting 18 U.S.C. § 3182).

23. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65–66 n.21 (1978) (citing *Mackey*, 59 U.S. (18 How.) 100) (emphasis added).

same footing with the proceedings and judgments of the courts of the territories of the Union, and are entitled to full faith and credit.”<sup>24</sup> Citing the Eighth Circuit’s precedents, the Court of Appeals for the Fourth Circuit has ruled that Indian tribes are territories within the meaning of a similar statute, the Parental Kidnapping Prevention Act, which requires the courts of the states, territories, and possessions of the United States to give full faith and credit to each other’s custody decrees.<sup>25</sup> However, more recently, the Court of Appeals for the Ninth Circuit held in *Wilson v. Marchington*<sup>26</sup> that Congress did not intend to include Indian tribes within the definition of the terms “territories or possessions,” as used in the Full Faith and Credit Act.<sup>27</sup> Accordingly, federal and state courts need not accord full faith and credit to the judgments of tribal courts. Likewise, tribes need not accord full faith and credit to state court judgments or the judgments of sister tribal courts.<sup>28</sup>

For the Ninth Circuit in *Wilson*, “the decisive factor” was Congress’s “enactment of subsequent statutes which expressly extended full faith and credit to certain tribal proceedings.”<sup>29</sup> Indeed, Congress has adopted seven full faith and credit statutes that expressly include Indian tribes within their coverage: the Indian Child Welfare Act,<sup>30</sup> the Violence Against Women Act,<sup>31</sup> the Federal Full Faith and Credit for Child Support Orders Act,<sup>32</sup> the Indian Land Consolidation Act,<sup>33</sup> the National Indian Forest Resources Management Act,<sup>34</sup> the American Indian Agricultural Resource Management Act,<sup>35</sup> and the Maine Indian Claims Settlement Act.<sup>36</sup> According to the court:

If full faith and credit had already been extended to Indian tribes, enactment of the Indian Land Consolidation Act, the Maine Indian Claims Settlement Act, and

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24. *Mehlin v. Ice*, 56 F. 12, 19 (8th Cir. 1893); *see also* *Exendine v. Pore*, 56 F. 777 (8th Cir. 1893); *Standley v. Roberts*, 59 F. 836 (8th Cir. 1894); *Cornells v. Shannon*, 63 F. 305, 306–07 (8th Cir. 1894); *accord*, *Iron Crow v. Ogallala Sioux Tribe*, 129 F. Supp. 15, 18 (D.S.D. 1955) (finding that “[c]ourts have uniformly held that the decisions of Indian tribal courts, rendered within their jurisdiction, territorial and personal, and according to the forms of law recognized by the tribe, are entitled to full faith and credit”).

25. *In re Larch*, 872 F.2d 66, 68 (4th Cir. 1989). The Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (2000), provides, in relevant part, that “[t]he appropriate authorities of every State shall enforce according to its terms...any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.” 28 U.S.C. § 1738A(a). The Act defines the term “State” to include “a territory or possession of the United States.” 28 U.S.C. § 1738A(b)(8).

26. 127 F.3d 805 (9th Cir. 1997).

27. *Id.* at 809.

28. The district court for the District of New Mexico has affirmed this principle, ruling that “Indian tribes are not states,...territories or possessions within the meaning of Section 1738A, therefore, the Navajo Courts are not required to give full faith and credit to [a] Mescalero Tribal Order.” *Platero v. Platero*, No. 83-0952 (D.N.M. Sept. 22, 1983), *quoted in* *Anderson Petroleum Servs., Inc. v. Chuska Energy & Petroleum Co.*, 4 Navajo Rptr. 187 (Navajo D. Ct. 1983); *infra* note 46.

29. 127 F.3d at 809.

30. 25 U.S.C. § 1911(d) (2000).

31. 18 U.S.C. § 2265 (2000).

32. 28 U.S.C. § 1738B (2000).

33. 25 U.S.C. § 2207 (2000).

34. 25 U.S.C. § 3106 (2000).

35. 25 U.S.C. § 3713 (2000).

36. 25 U.S.C. § 1725(g) (2000). In addition, the Uniform Interstate Family Support Act extends full faith and credit to tribal court alimony and support orders. *See* Official Homepage of National Conference of Commissioners on Uniform State Laws, at <http://www.nccusl.org> (Final Acts and Legislation) (last visited Sept. 5, 2004).

the Indian Child Welfare Act would not have been necessary. Further, the separate listing of territories, possessions and Indian tribes in the Indian Child Welfare Act provides an indication that Congress did not view these terms as synonymous. Thus, we conclude that Congress did not extend full faith and credit to the tribes under 28 U.S.C. § 1738.<sup>37</sup>

In the absence of a federal mandate to apply full faith and credit in Indian country, the Ninth Circuit held that "the enforcement of tribal court judgments in federal court must inevitably rest on the principles of comity."<sup>38</sup> According to the court:

Comity "is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." As a general policy, "comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect." At its core, comity involves a balancing of interests. "It is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."<sup>39</sup>

#### B. State and Tribal Views

The majority of the state and tribal courts that have considered the question have concluded that Indian tribes do not constitute "Territories" or "Possessions" within the meaning of the Full Faith and Credit Act. As for the states, only two—Idaho and New Mexico—have held that the term "Territories," as used in the Full Faith and Credit Act, is "broad enough to include Indian tribes."<sup>40</sup> In these states, the judgments of tribal courts must be accorded full faith and credit by state courts, and vice versa. However, most states decline to accord full faith and credit to tribal court judgments, except when required to do so by federal law.<sup>41</sup> Indeed, a "majority of state courts that have considered the question have opted for comity,"<sup>42</sup> finding that tribes are not territories for the purposes of full faith and credit.<sup>43</sup>

37. 127 F.3d at 809.

38. *Id.*; see also *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136 (9th Cir. 2001).

39. 127 F.3d at 809–10 (quoting *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895); *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971)) (internal citations omitted).

40. *Sheppard v. Sheppard*, 655 P.2d 895, 902 (Idaho 1982); *Jim v. C.I.T. Fin. Servs. Corp.*, 533 P.2d 751, 752 (N.M. 1975) (holding that "the laws of the Navajo Tribe of Indians are entitled by Federal Law, 28 U.S.C. § 1738, to full faith and credit in the courts of New Mexico because the Navajo Nation is a 'territory' within the meaning of that statute"). Similarly, the supreme court of Washington has held that "[t]ribal court decrees are entitled to full faith and credit to the same extent as decrees of sister states." *In re Adoption of Buehl*, 555 P.2d 1334, 1342 (Wash. 1976). The Washington high court has since retreated from that position, adopting a court rule that allows state courts to exercise discretion in deciding whether or not to enforce tribal court judgments. WASH. SUPER. CT. R. 82.5 (adopted 1995).

41. See *supra* notes 30–32 and accompanying text.

42. CLINTON ET AL., *supra* note 1, at 294 (citing *John v. Baker*, 982 P.2d 738 (Alaska 1999)); *Mexican v. Circle Bear*, 370 N.W.2d 737 (S.D. 1985)); see also FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 89 (1995).

43. See, e.g., *Brown v. Babbitt Ford, Inc.*, 571 P.2d 689, 694 (Ariz. Ct. App. 1977) (holding that the "word 'territory' as used in 28 U.S.C. § 1738 was not intended to apply to [Indian tribal governments]"); *Desjarlait v. Desjarlait*, 379 N.W.2d 139, 144 (Minn. Ct. App. 1985) (holding that Full Faith and Credit Clause applies only to states, not tribes); *Lohnes v. Cloud*, 254 N.W.2d 430, 433 (N.D. 1977) (same); *Fredericks v. Edie-Kirschmann Ford*, 462 N.W.2d 164 (N.D. 1990) (same). Numerous states have, by case law, statute, or court rule, expressly adopted comity as their policy for the recognition and enforcement of tribal court decisions. Among these states are Arizona,



Like their state court counterparts, most tribal courts have concluded that the full faith and credit doctrine is not applicable in Indian country. The Navajo Nation Court of Appeals articulated the prevailing tribal view when it stated that Indian tribes "stand beyond the bounds of [the] rule of [full faith and credit], such as it presently exists and governs the constitutional relationships [sic] of the states of the United States."<sup>44</sup> The court stated:

It should not be necessary for this court to remind anyone that Indian nations and tribes were not signatories to the United States Constitution and were not intended to be included within the scope of the mandate of Article IV, Section 1. Nor does Title 28, United States Code, Section 1738, which was written to effectuate the mandate of Article IV, Section 1, provide a clear guide to the relationship between Indian courts.... It is our opinion that 28 U.S.C. 1738 does not purport to govern the relationship between Indian courts. The constitutional provision upon which it is based did not envision Indian courts being in existence nor did the act itself.<sup>45</sup>

Like other tribal courts, the Navajo Nation Court of Appeals has held that full faith and credit is not applicable to the relationship between the tribes and the states or to "the relationship between courts of different Indian Tribes."<sup>46</sup> The practice of according full faith and credit to foreign orders is inconsistent with the Navajo Nation's conception of its own sovereignty and that of other tribes, which sovereignty contemplates "the exclusive jurisdiction of each Indian court over certain matters."<sup>47</sup>

At least one tribal court, however, has stated, albeit in dicta, that Indian tribes are territories within the meaning of the Full Faith and Credit Act. In *Eberhard v. Eberhard*,<sup>48</sup> the Cheyenne River Sioux Tribe Court of Appeals considered the applicability to Indian tribes of the full faith and credit provisions of the Parental Kidnapping Prevention Act (PKPA). Like the U.S. Court of Appeals for the Fourth Circuit, the tribal appellate court found that Indian tribes are included within the Act's coverage, and, as such, they must accord full faith and credit to valid child custody decrees of state courts and other tribal courts.<sup>49</sup> The court based its ruling primarily on its review of the legislative history of the PKPA, which the court found

Connecticut, Michigan, Minnesota, Montana, New Jersey, North Dakota, Oklahoma, Oregon, South Dakota, Washington, Wisconsin, and Wyoming. See Leeds, *supra* note 6, at 338-45.

44. *In re Guardianship of Chewiwí*, 1 Navajo Rptr. 120, 125 (Navajo 1977).

45. *Id.*

46. *Id.* at 121; accord, *Yazza v. Smith*, No. SC-CV-21-99 (Navajo 2001) (applying principles of comity, not full faith and credit, to enforcement of state court order); *Rough Rock Community School v. Navajo Nation*, No. SC-CV-06-94 (Navajo 1996) (same); *Anderson Petroleum Servs., Inc. v. Chuska Energy & Petroleum Co.*, 4 Navajo Rptr. 187 (Navajo D. Ct. 1983) (same); *Husband v. Wife*, No. MPCA-2001-1065 (Mashantucket Ct. App. 2003) (rejecting full faith and credit as mechanism for tribal court enforcement of state court judgments in favor of "the far more flexible construct of 'comity'"); *Smith v. Scott*, No. MPTC-CV-2002-182 (Mashantucket Tribal Ct. 2003) (same). Each of the above decisions is available on Versuslaw at <http://versuslaw.com> (Tribal Courts). *Durango Credit & Collection v. Weaver*, No. 97-CV-13 (So. Ute Tribal Ct. Oct. 17, 1997) (holding that "the 'full faith and credit clause' of the federal Constitution is not applicable to Indian tribes"), cited in Leeds, *supra* note 6, at 318, n.27.

47. *In re Guardianship of Chewiwí*, 1 Navajo Rptr. at 125.

48. 24 Indian L. Rptr. 6059 (Cheyenne River Sioux Tribal Ct. App. 1997). This case is reprinted in part in CLINTON ET AL., *supra* note 1, at 269-83.

49. 24 Indian L. Rptr. at 6066.

evinced a clear congressional intent to include Indian tribes within the Act's coverage.<sup>50</sup> However, the court also expressed its view that, when Congress passed the Full Faith and Credit Act in 1790, it intended to include tribes within the Act's designation of all "courts within the United States and its Territories and Possessions."<sup>51</sup> The court stated:

Congress and the courts have long addressed the question of full faith and credit in an effort to integrate first the states and, later, the tribes, territories, and possessions, into a national union with reciprocal full faith and credit recognition of judgments and laws. In 1790 Congress passed the Full Faith and Credit Act... which [sic] required "courts *within* the United States and its Territories and Possessions" to recognize and enforce the records and judicial proceedings "of any court of such State, Territory, or Possession...." [T]he Supreme Court has long understood references to courts *of* states or territories, as used in such full faith and credit legislation, to mean courts geographically located *within* such states or territories, not as courts created under the sovereign political authority of such states or territories.... It is therefore apparent... that when Congress in full faith and credit legislation refers to courts *of* the states, territories, and possessions, that the reference is to a geographic, rather than a political designation. ... Consequently, since Indian lands are located within states and territories... full faith and credit statutes applicable to courts of the states, territories, or possessions apply to Indian tribes.<sup>52</sup>

As noted above, the views of the *Eberhard* court are in the minority among Indian tribes.<sup>53</sup>

In sum, full faith and credit is the mechanism employed to enforce court orders and judgments between and among the states, territories, and possessions of the United States. The doctrine does not apply to Indian tribes, since tribes are not states and since, under prevailing federal, state, and tribal case law, they are not "Territories," as described in the Full Faith and Credit Act. Instead, various federal, state, and tribal courts have held that, except in those subject matter areas where federal law expressly includes Indian tribes within the full faith and credit mandate,<sup>54</sup> tribes may use comity as the mechanism for enforcing the judgments of foreign courts. Unlike full faith and credit, comity is a discretionary mechanism that prescribes enforcement of foreign orders only in certain circumstances. Based on the nature of the relationships of tribal governments to the federal and state governments, and the nature of intertribal relations, the tribal preference for comity over full faith and credit is both logical and beneficial. It is to that preference that we now turn.

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50. *Id.* at 6062-66.

51. *Id.* at 6064.

52. *Id.* at 6064-65.

53. See Part II, *infra*, for a discussion of the various approaches taken by tribes regarding the recognition and enforcement of foreign orders.

54. See *supra* notes 30-32 and accompanying text.

## II. TRIBAL APPROACHES TO THE ENFORCEMENT OF FOREIGN ORDERS

Indian tribes must confront numerous political and legal issues in determining whether or not to enforce the court orders and judgments of foreign sovereigns, including those of sister tribal governments. Like all sovereigns, tribes must weigh carefully the benefits and costs of any inter-governmental regime providing for the recognition and enforcement of foreign orders. As "self-governing political communities,"<sup>55</sup> Indian tribes are politically independent from the States of the Union and, with few exceptions, from one another. For tribes, the recognition and enforcement of foreign orders involves a diminution of tribal independence and a cession of authority to foreign governments. Naturally, tribes are reluctant to cede any part of their governmental authority, since they have for centuries witnessed the steady erosion of their authority over their territories and their people. Yet, such a cession of authority, if part of a reciprocal inter-governmental enforcement regime, has the potential to expand the reach of tribal court judgments.

There are approximately 562 federally recognized Indian tribes in the continental United States and Alaska.<sup>56</sup> Approximately 275 of these tribes have formal tribal court systems.<sup>57</sup> As the Supreme Court has said, Indian tribal courts are "important mechanisms for protecting significant tribal interests."<sup>58</sup> Among those interests are the preservation of unique "tribal customs and traditions"<sup>59</sup> and the enforcement of unique tribal laws and policies. Among tribal courts:

[t]here is widespread variety in the types of forums, and the law applied in each is distinctly unique to each tribe. Some tribal courts resemble Western-style judiciaries where written laws and rules of court procedure are applied, ... [while] [a]n increasing number of tribes are returning to their traditional means of resolving disputes through the use of peacemaking, elders' councils and sentencing circles.<sup>60</sup>

In addition, because not all tribes share common histories and values, there are considerable variations in the laws and public policies among the various tribes.<sup>61</sup>

55. Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 851 (1985).

56. Bureau of Indian Affairs, Department of the Interior, *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 68 Fed. Reg. 68,180-84 (Dec. 5, 2003). There are 337 federally recognized Indian tribes within the continental United States and 225 within Alaska. *Id.*

57. Nat'l Tribal Justice Resource Ctr., *Tribal Court History* (2002), available at <http://www.tribalresourcecenter.org/tribalcourts/history.asp> (last visited July 10, 2004). For concise histories of Indian tribal courts and descriptions of their role in the administration of justice in Indian country and in the United States, see Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1 (1997); POMMERSHEIM, *supra* note 42, at 57-135; VINE DELORIA, JR., & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 110-38 (1983).

58. *United States v. Wheeler*, 435 U.S. 313, 332 (1978); see also *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987) ("Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development.").

59. *Wheeler*, 435 U.S. at 331.

60. Nat'l Tribal Justice Resource Ctr., *supra* note 57.

61. The U.S. Supreme Court noted in *Duro v. Reina*, 495 U.S. 676 (1990), that "wide variations in customs, art, language, and physical characteristics separate the tribes, and their history has been marked by both intertribal alliances and animosities." *Id.* at 695 (citing COHEN, *supra* note 1; HAROLD E. DRIVER, INDIANS OF NORTH AMERICA (1961); LESLIE SPIER, YUMAN TRIBES OF THE GILA RIVER (1933)).

Under these circumstances, it is not surprising that most tribes have shown a preference for comity over full faith and credit as the mechanism by which they will recognize and enforce the court orders and judgments of other tribes. The "full faith and credit obligation is exacting,"<sup>62</sup> containing no "public policy exception,"<sup>63</sup> but instead ordering "submission—even to hostile policies reflected in the judgment of another [sovereign]...."<sup>64</sup> By contrast, under comity, tribes recognize the judgments of sister tribal courts not as a matter of right but as a matter of respect and cooperation, and only when appropriate.<sup>65</sup> Comity "flows generally from the respect that one sovereign has for the sovereign acts of another,"<sup>66</sup> but that respect, no matter how deep, does not mandate the enforcement of foreign judgments that are offensive to the public policy of the recognizing tribe.<sup>67</sup> This flexibility allows tribes to recognize and enforce certain sister tribal court judgments, while at the same time reserving the right to withhold approval of any order the acceptance of which "would be contrary or prejudicial to the interest of the nation called upon to give it effect."<sup>68</sup> Comity is, in a very real sense, more consistent than full faith and credit with notions of tribal sovereignty and independence.

For tribes, the political ramifications of recognizing and enforcing foreign judgments concerning the rights and responsibilities of their tribal members are manifold. It has been said that issues of full faith and credit and comity in Indian country "might appear at first glance to be a mundane issue having little to do with the grand Indian law concept of tribal sovereignty. But there is nothing mundane about the issue at all; there are important matters of tribal sovereignty involved in the enforcement question."<sup>69</sup>

This is tribal sovereignty in the practical sense that is vitally important to the people who actually live and go about their business on Indian reservations. Enforcement of judgments touches the lives of Indian people directly and immediately: a prevailing plaintiff in a tribal court case often must take his judgment off the reservation. A losing defendant in [an off-reservation] court case finds her wages vanishing, or finds the judgment being enforced against specific property [on the reservation] in ways that would be quite impossible under traditional tribal ways.<sup>70</sup>

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62. *Baker v. Gen. Motors Co.*, 522 U.S. 222, 233 (1998).

63. *Id.*

64. *Id.* (quoting *Estin v. Estin*, 334 U.S. 541, 546 (1948)).

65. *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895) (noting that "'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.").

66. Laurence, *Symmetry and Asymmetry in Federal Indian Law*, *supra* note 6, at 863.

67. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF UNITED STATES § 482 (providing that a court of the United States need not recognize a foreign judgment if it is "repugnant to the public policy of the United States or of the State where recognition is sought").

68. *Wilson*, 127 F.3d at 809 (quoting *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971)).

69. Deloria & Laurence, *supra* note 6, at 368.

70. *Id.*

The following is a brief—and by no means exhaustive—survey of the approaches taken by various Indian tribes in the recognition and enforcement of foreign orders, including those of sister tribes. The survey is drawn from tribal cases, codes, and ordinances that have been published either in print<sup>71</sup> or on the Internet.<sup>72</sup>

#### A. Comity

Among tribes, comity is the preferred mechanism for enforcement of foreign judgments, even those of sister tribal courts. The courts of the Navajo Nation have articulated the prevailing tribal view:

[T]he issue presented when the decision of any state or Indian court is presented to the courts of the Navajo Nation for enforcement is one of comity. Navajo courts will honor and enforce foreign judgments upon consideration of the right of the foreign court to issue the judgment, of the propriety of the proceeding, and of any relevant public policy of the Navajo Nation.<sup>73</sup>

Like the Navajo Nation, most tribes, wishing to safeguard their independence, have eschewed the application of full faith and credit, even as to the judgments of sister tribal courts, and instead have elected to follow the “flexible enforcement-of-judgment regime”<sup>74</sup> of comity, recognizing only those foreign orders that do not offend the recognizing tribe’s public policy.

For example, the courts of the Mashantucket Pequot Tribe have held that foreign judgments should be “evaluated, and where appropriate, recognized through the...flexible construct of ‘comity.’”<sup>75</sup> Under Mashantucket Pequot law, tribal courts “will not extend comity to foreign proceedings when doing so would be contrary to the policies or prejudicial to the interest of the Mashantucket Pequot Tribe.”<sup>76</sup> The courts must exercise their sound discretion to determine if enforcement of a judgment would violate the tribe’s public policy. The Mashantucket appellate court stated:

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71. See, e.g., Indian L. Rptr., vols. 1–31 (Am. Indian Lawyer Training Program 1983–present); Navajo Rptr., vols 1–7 (Judicial Branch of Navajo Nation 1969–1999).

72. Searchable databases of reported tribal court decisions can be found on Westlaw at <http://web2.westlaw.com> (reported decisions from Oklahoma tribes); Versuslaw, *supra* note 46 (reported decisions from sixteen tribes); and the website of the National Tribal Justice Resource Center, *supra* note 57 (reported decisions from seventeen tribes). Searchable databases of tribal constitutions, by-laws, codes, ordinances, and rules of court can be found on the website of the National Tribal Justice Resource Center, *supra* note 57 (constitutions and/or by-laws of seventy-nine tribes, and codes, ordinances, and/or rules of court of forty-four tribes). Non-searchable collections of tribal laws can be found on the website of the National Indian Law Library of the Native American Rights Fund, *available at* <http://www.narf.org/nill/tribaldocs.html> (constitutions and/or by-laws of fifty-three tribes and codes, ordinances, and/or court rules of forty-four tribes) and on the website of the Native American Constitution and Law Digitization Project of the University of Oklahoma Law Library and the National Indian Law Library, *available at* <http://thorpe.ou.edu/> (codes and/or ordinances of seven tribes). Links to the constitutions, codes, and/or court decisions of many tribes can be found on the website of the Tribal Court Clearinghouse, *available at* <http://www.tribal-institute.org>, and on the website of the National Indian Justice Center, *available at* <http://nijc.indian.com>.

73. *In re Guardianship of Chewiwí*, 1 Navajo Rptr. at 125–26.

74. Laurence, *Symmetry and Asymmetry in Federal Indian Law*, *supra* note 6, at 863.

75. *Husband v. Wife*, MPCA-2001-1065 (Mashantucket Pequot App. Ct., Jan. 24, 2003), *available at* Versuslaw, *supra* note 46.

76. *Smith v. Scott*, MPTC-CV-2002-182 (Mashantucket Pequot Tribal. Ct., Apr. 23, 2002), *available at* Versuslaw, *supra* note 46.

Comity is a recognition which one nation extends within its own territory to the legislative, executive, or judicial acts of another. It is not a rule of law, but one of practice, convenience, and expediency. Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation. Rather, it is a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws. Comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect....<sup>77</sup>

Similarly, under the laws of the Oglala Sioux Tribe, the tribal courts "apply the doctrine of comity to the judicial proceedings of all foreign courts in which a final judgment has been issued."<sup>78</sup> Comity is given to a foreign court judgment only if the Oglala courts find:

that the foreign court actually had jurisdiction over both the parties and the subject matter; (2) that the foreign court judgment was not obtained fraudulently; (3) that the foreign court judgment was rendered by a system of law reasonably assuring the requisites of an impartial administration of justice due to notice and hearing were afforded; and (4) [that] the foreign court judgment did not contravene the public policy of the jurisdiction in which it is relied upon.<sup>79</sup>

Numerous other tribes have selected comity as the mechanism by which they may recognize and enforce foreign orders, including those of sister tribal courts.<sup>80</sup> Curiously, many of these tribes purport to give full faith and credit to foreign orders,

77. *Husband v. Wife*, *supra* note 75 (internal citations and quotations omitted).

78. Oglala Sioux Tribal Law & Order Code, ch. 2, § 24.4.1 (1996), available at [http://www.tribalresourcecenter.org/ccfolder/ogla\\_lawandorder2.htm](http://www.tribalresourcecenter.org/ccfolder/ogla_lawandorder2.htm) (last visited July 12, 2004).

79. *Id.* at ch. 2, § 24.4.5.

80. See, e.g., Fort Peck Comprehensive Code of Justice § 312 (2000), available at [http://www.tribalresourcecenter.org/ccfolder/fortpeck\\_justicecode\\_8.htm](http://www.tribalresourcecenter.org/ccfolder/fortpeck_justicecode_8.htm) (last visited July 12, 2004) (providing that the tribal court "may as a matter of comity enforce the judgment of another Tribe, the United States, a state or foreign nation," provided that the tribal court "shall not enforce the judgment of another jurisdiction where evidence establishes that...the judgment is contrary to the public policy of the Tribes"); Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians Tribal Code § 2-5-24 (2002), available at [http://www.tribalresourcecenter.org/ccfolder/coos\\_umpqua\\_siuslaw\\_tribalcode\\_2\\_5.htm](http://www.tribalresourcecenter.org/ccfolder/coos_umpqua_siuslaw_tribalcode_2_5.htm) (last visited July 12, 2004) (providing that, "[i]n the interests of comity, a party in whose favor a state court judgment or the judgment of another tribal court was entered may bring an action for enforcement of the judgment in Tribal Court"); Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians Tribal Code §§ 2-4-1, 2-4-2 (2002), available at [http://www.tribalresourcecenter.org/ccfolder/coos\\_umpqua\\_siuslaw\\_tribalcode\\_2\\_4.htm](http://www.tribalresourcecenter.org/ccfolder/coos_umpqua_siuslaw_tribalcode_2_4.htm) (last visited July 12, 2004) (providing that "[r]ecognition, implementation and enforcement of orders, judgments and/or decrees from courts other than the Tribal Court of the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians (Tribal Court) shall be allowed," provided that, among other things, no "such order, judgment and/or decree is contrary to laws, both written and customary, of the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians"); Laws of the Confederated Salish and Kootenai Tribes, §§ 4-3-204, 4-3-205, available at <http://doc.narf.org/nill/Codes/cskcode/cskciviljudgments.htm> (last visited Sept. 3, 2004) (providing that, "[i]n the interests of comity, a party in whose favor a state court judgment or the judgment of another tribal court was entered may bring an action for enforcement of the judgment in Tribal Court"; tribal court may decline to enforce judgment based on "jurisdictional defects or infringement of the rights of the defendant under the federal Indian Civil Rights Act" in issuing court); Little River Band of Ottawa Indians Regulations, ch. R300, §§ 1.102, 1.103, 1.206 (2001), available at [http://www.tribalresourcecenter.org/ccfolder/littleriver\\_ottawa\\_regulations.htm](http://www.tribalresourcecenter.org/ccfolder/littleriver_ottawa_regulations.htm) (last visited July 12, 2004) (providing that tribal, state, and federal court orders may have "the same full recognition and enforcement" in tribal courts unless the "cause of action on which the judgment is based is repugnant to the public policy or tribal custom of the Tribe"); see also *infra* notes 81-90 and accompanying text.

while at the same time permitting their courts to refuse to recognize or enforce foreign judgments that are offensive to tribal public policy. These tribes use the language of full faith, but the regime their laws describe is that of comity. For example, the laws of the White Earth Band of Chippewa Indians provide that foreign orders, including those of other tribal courts, "may be given full faith and credit in the tribal court," provided that they do not "contravene the public policy of the White Earth Band of Chippewa or interfere with the Band's right to make its own laws and be governed by them."<sup>81</sup> Another tribe, the Poarch Band of Creek Indians, has adopted the Full Faith and Credit Clause as tribal law<sup>82</sup> but still allows tribal judges to exercise discretion in the recognition and enforcement of foreign judgments. The laws of the Poarch Band Creek Indians provide that the "Tribal Judge shall...decide whether to extend full faith and credit to the judgment," and, in so doing, the judge "shall have full and total discretion regarding this matter and shall be guided by the best interests of the Tribes and the parties."<sup>83</sup> Other tribes following similar approaches include the Confederated Tribes of the Grande Ronde Community of Oregon,<sup>84</sup> the Ely Shoshone Tribe,<sup>85</sup> the Bay Mills Indian Community,<sup>86</sup> the Coquille Indian Tribe,<sup>87</sup> and the Eastern Band of Cherokee Indians.<sup>88</sup>

Some tribes require reciprocity before recognizing or enforcing foreign orders under principles of comity. For example, the Coquille Indian Tribe will not enforce an order or judgment of the courts of other tribes, states, or local governments if

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81. White Earth Band of Chippewa Comprehensive Law and Order Manual, Rules of Civil Procedure, Rule XXXIV (1998), available at [http://www.tribalresourcecenter.org/ccfolder/whtearth\\_lawandorder.htm](http://www.tribalresourcecenter.org/ccfolder/whtearth_lawandorder.htm) (last visited July 12, 2004).

82. Poarch Band of Creek Indians Code of Justice §§ 12-1-1, 12-1-2 (1989), available at [http://www.tribalresourcecenter.org/ccfolder/poarch\\_codeofjustice.htm](http://www.tribalresourcecenter.org/ccfolder/poarch_codeofjustice.htm) (last visited July 12, 2004) (providing that tribe "recognizes and adopts Article IV Section I of the Constitution of the United States" and will enforce as a tribal court judgment any "civil judgment from another Tribal, State or Federal Court").

83. *Id.* § 12-1-3.

84. Confederated Tribes of Grande Ronde Community of Oregon, Tribal Court Ordinance § (d)(3) (1994), available at [http://www.tribalresourcecenter.org/ccfolder/grand\\_ronde\\_adoption.htm](http://www.tribalresourcecenter.org/ccfolder/grand_ronde_adoption.htm) (last visited July 12, 2004) (providing that tribal courts "shall give full faith and credit to the orders and judgments of the courts of other tribes, states, and local governments," unless, among other things, "to do so would violate the public policy of the Tribe or would be likely to harm the culture, traditions, or sovereignty of the Tribe").

85. Ely Shoshone Tribe Law and Order Code, tit. I, ch. 1-1, § 1-1-01 (2000), available at [http://www.tribalresourcecenter.org/ccfolder/ely\\_shoshone\\_lawandorder\\_court.htm](http://www.tribalresourcecenter.org/ccfolder/ely_shoshone_lawandorder_court.htm) (last visited July 12, 2004) ("Tribal Court may confer full faith and credit or comity to the judgments and orders of courts of other jurisdictions, as against Tribal members on the Reservation, when the Tribal Court Judge determines that under the circumstances there was no deprivation of fundamental due process and no injustice would result. The Tribe expects the courts of other jurisdictions to confer full faith and credit or comity to the judgments and orders of the Tribal Court.").

86. Bay Mills Indian Community Laws and Codes, Tribal Court Rules, R. 104.1 (2000), available at <http://www.tribalresourcecenter.org/ccfolder/baymillstoc.htm> (last visited July 12, 2004) (providing that orders of state, federal, and tribal courts shall be given full faith and credit in tribal court, provided that, among other things, the orders are not "repugnant to the public policy" of the tribe).

87. Coquille Tribal Code, ch. 610, § 610.200.4, available at [http://www.tribalresourcecenter.org/ccfolder/coquille\\_tribalcourt.htm](http://www.tribalresourcecenter.org/ccfolder/coquille_tribalcourt.htm) (last visited July 12, 2004) (providing that "Tribal Court shall give full faith and credit to the orders and judgments of the courts of other tribes, states, and local governments," unless, among other things, "[t]o do so would violate the public policy of the Tribe or would be likely to harm the culture, traditions or sovereignty of the Tribe").

88. Eastern Band of Cherokee Indians, Cherokee Code, ch. 25, § 25-5(a), (e) (2001), available at <http://www.tribalresourcecenter.org/ccfolder/eccodech25judgment.htm> (last visited July 12, 2004) (providing that "[f]ull faith and credit shall be given to judicial proceedings of all federal Courts, state Courts, and Courts of the federally recognized Indian nations, Tribes, or bands, including Courts of Indian offenses," unless among other things a foreign order "contravene[s] the public policy of the Eastern Band of Cherokee Indians").

"[t]he court in question does not recognize the orders and judgments of the [Coquille] Tribal Court."<sup>89</sup> Other tribes have taken similar approaches.<sup>90</sup> Ordinarily, reciprocity is not required for the enforcement of foreign judgments under modern principles of comity.<sup>91</sup>

### *B. Full Faith and Credit*

Few tribes apply principles of full faith and credit to foreign orders, including those of sister tribes, except when required to do so by federal law in select subject areas. Of those tribes that do apply full faith and credit more broadly, most do so only in respect to orders issued by jurisdictions that reciprocally accord full faith and credit to tribal court orders. Very few tribes apply full faith and credit asymmetrically, that is, without reciprocal respect for their tribal court orders.

Federal law requires tribes to accord full faith and credit to the orders of sister tribal courts and, in some cases, state courts, in several subject matter areas, including Indian child custody, child support, and domestic violence. Most tribes have complied with these federal requirements.

In the case of Indian child custody proceedings, the Indian Child Welfare Act (ICWA) requires tribes to extend full faith and credit to the child custody orders of other Indian tribes, but not to those of the state courts.<sup>92</sup> Many tribes have adopted laws implementing the Act as written, extending full faith and credit to tribal court orders but declining to do so for state orders,<sup>93</sup> while others have elected to go beyond the requirements of the Act and extend full faith and credit to state, as well

89. Coquille Indian Tribal Code, ch. 610, § 610.200, available at [http://www.tribalresourcecenter.org/ccfolder/coquille\\_tribalcourt.htm](http://www.tribalresourcecenter.org/ccfolder/coquille_tribalcourt.htm) (last visited July 12, 2004).

90. See, e.g., Little River Band of Ottawa Indians Regulations, ch. R300, §§ 1.102, 1.103, 1.206 (2001), available at [http://www.tribalresourcecenter.org/ccfolder/littleriver\\_ottawa\\_regulations.htm](http://www.tribalresourcecenter.org/ccfolder/littleriver_ottawa_regulations.htm) (last visited July 12, 2004) (providing that tribal, state, and federal court orders may be recognized and enforced by tribal court, provided that the issuing court "provides reciprocal full recognition and enforcement to the judgments of this Indian Tribe"); Bay Mills Indian Community Laws and Codes, Tribal Court Rules, R. 104.1 (2000), available at <http://www.tribalresourcecenter.org/ccfolder/baymillstoc.htm> (last visited July 12, 2004) (providing that orders of tribal, state, and federal courts may be enforced by tribe if issuing jurisdiction provides for the reciprocal recognition and enforcement of tribe's orders); Eastern Band of Cherokee Indians, Cherokee Code, ch. 25, § 25-5(a) (2001), available at <http://www.tribalresourcecenter.org/ccfolder/ecccdech25judgment.htm> (last visited July 12, 2004) (providing that tribal court may recognize and enforce orders of tribal, state, and federal courts "that extend full faith and credit to judgments and orders of the Eastern Band of Cherokee Court"); Ely Shoshone Tribe Law and Order Code, tit. I, ch. 1-1, § 1-1-01 (2000), available at [http://www.tribalresourcecenter.org/ccfolder/ely\\_shoshone\\_lawandorder\\_court.htm](http://www.tribalresourcecenter.org/ccfolder/ely_shoshone_lawandorder_court.htm) (last visited July 12, 2004) (providing that "[t]he Tribe expects the courts of other jurisdictions to confer full faith and credit or comity to the judgments and orders of the Tribal Court").

91. See, e.g., *Wilson*, 127 F.3d at 812; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 481-82 (2003).

92. 25 U.S.C. § 1911(d) (2000).

93. White Earth Band of Chippewa Comprehensive Law and Order Manual, Child/Family Protection Code, ch. III, § 5 (2000), available at [http://www.tribalresourcecenter.org/ccfolder/whtearth\\_lawandorder.htm](http://www.tribalresourcecenter.org/ccfolder/whtearth_lawandorder.htm) (last visited July 12, 2004) (providing that state court child custody orders "may be recognized" by the tribal court only if the state court properly exercised jurisdiction and provided due process to all parties and "the state court proceeding does not violate the public policies, customs, or common law of the tribe," whereas the child custody orders of other tribes "shall be recognized" if the tribal court properly exercised jurisdiction and afforded due process to all parties); Poarch Band of Creek Indians Code § 10A-2-3(E), available at [http://www.tribalresourcecenter.org/ccfolder/poarch\\_codeofjustice.htm](http://www.tribalresourcecenter.org/ccfolder/poarch_codeofjustice.htm) (last visited July 12, 2004) (same); Statutes of the Grand Traverse Band of Ottawa and Chippewa Indians, tit. 10, ch. 1, § 106 (2002), available at <http://www.tribalresourcecenter.org/ccfolder/travcode10childfameld.htm> (last visited July 12, 2004) (same); Bay Mills Indian Community Laws and Codes, ch. VII, § 705(E) (2000), available at <http://www.tribalresourcecenter.org/ccfolder/bmjjuvenile.htm> (last visited July 12, 2004) (same).



as tribal, custody orders.<sup>94</sup> ICWA does not mandate tribal recognition or enforcement of non-custody orders concerning the welfare of Indian children, such as abuse and neglect findings, and most tribes have refused to extend full faith and credit to such cases.<sup>95</sup>

The Federal Full Faith and Credit for Child Support Orders Act requires tribes to “enforce according to [their] terms [the] child support order[s]”<sup>96</sup> of other tribes, states, territories, and possessions. Most, if not all, tribes comply with this requirement.<sup>97</sup> Similarly, most tribes comply fully with the requirement of the

94. See, e.g., Absentee Shawnee of Oklahoma Juvenile Code, ch. 1, § 108, available at [http://www.tribalresourcecenter.org/ccfolder/absentee\\_shawnee\\_tribalcode\\_juvenile.html](http://www.tribalresourcecenter.org/ccfolder/absentee_shawnee_tribalcode_juvenile.html) (last visited July 12, 2004) (providing that child custody orders of state courts and other tribal courts “shall be recognized and given full faith and credit,” provided the issuing court had personal and subject matter jurisdiction, complied with the Indian Child Welfare Act, and provided due process to all parties); Little River Band of Ottawa Indians Ordinances, ch. 900, § 3.11 (1998), available at [http://www.tribalresourcecenter.org/ccfolder/littleriver\\_ottawa\\_ordinances.htm](http://www.tribalresourcecenter.org/ccfolder/littleriver_ottawa_ordinances.htm) (last visited July 12, 2004) (providing that child custody orders of state courts and other tribal courts “shall be recognized in accordance with Model Rules for Full Faith and Credit and Enforcement of Foreign Court Judgments adopted by the Michigan Indian Judicial Association”); Confederated Tribes of the Grand Ronde Community of Oregon, Tribal Code § 7.17(e) (1996), available at [http://www.tribalresourcecenter.org/ccfolder/grand\\_ronde\\_childwelfare.htm](http://www.tribalresourcecenter.org/ccfolder/grand_ronde_childwelfare.htm) (last visited July 12, 2004) (providing that tribal courts “shall give full faith and credit to State and Tribal child custody orders, where the state and tribe reciprocate in giving full faith and credit to Court Orders of the Grand Ronde Tribal Court, and where such orders are consistent with the public policy of the tribe, the intent of the Indian Child Welfare Act, and the laws and customs of the Tribe”). Some tribes extend full faith and credit to the child custody orders of states if and only if the states comply with the Indian Child Welfare Act and extend full faith and credit to tribal child custody court orders. See, e.g., Mashantucket Pequot Tribal Laws, vol. 1, tit. V, ch. 1, § 3 (2000), available at <http://www.tribalresourcecenter.org/ccfolder/mpequot1.htm> (last visited July 12, 2004) (providing that “[t]he Family Court shall give full faith and credit to the public acts, records and judicial decrees applicable to child custody proceedings of any Court of competent jurisdiction to the same extent that such Court gives full faith and credit to the public acts, records and judicial decrees of the Tribal Court”); see also *id.* at vol. 1, tit. VI, ch. 8, § 2(c) (providing that tribal courts “shall abide by any applicable federal law concerning family and child support, custody and enforcement matters, including, but not limited to, 28 U.S.C. § 1738B, the Full Faith and Credit for Child Support Orders Act”); Coquille Indian Tribal Code, ch. 644, § 644.050, available at [http://www.tribalresourcecenter.org/ccfolder/coquille\\_intergovtalandchildwelfare.htm](http://www.tribalresourcecenter.org/ccfolder/coquille_intergovtalandchildwelfare.htm) (last visited July 12, 2004) (providing that “tribal court shall give full faith and credit to the public acts, records and judicial proceedings applicable to the custody of an Indian child of an Indian tribe, the United States, every state, every territory or possession of the United States and foreign nations to the same extent that such entity gives full faith and credit to the public acts, records and judicial proceedings of the Coquille Tribe”).

95. See, e.g., Nez Perce Tribal Code, ch. 5-1, § 5-1-5, available at [http://www.tribalresourcecenter.org/ccfolder/nez\\_perce\\_tribalcode5.htm](http://www.tribalresourcecenter.org/ccfolder/nez_perce_tribalcode5.htm) (last visited July 12, 2004) (providing that “[s]tate court orders and those issued by other tribal courts involving children over whom the Court could take jurisdiction may be recognized by the Court only after a full independent review of such state or tribal proceedings has determined...the proceedings do not violate the public policies, or common law of the Nez Perce Tribe”); Skokomish Tribal Code, tit. 3, § 3.02.034 (2001), available at [http://www.tribalresourcecenter.org/ccfolder/skokomish\\_tribalcode\\_3.htm](http://www.tribalresourcecenter.org/ccfolder/skokomish_tribalcode_3.htm) (last visited July 12, 2004) (providing that tribal Youth Court “may give recognition to orders issued by a state or another tribal court as a matter of comity (courtesy) if the order does not violate the Indian Child Welfare Act and the Court granting the order had jurisdiction over the case, due process was afforded to all parties, and the order does not violate the public policy of the Skokomish Indian Tribe”).

96. 28 U.S.C. § 1738B (2000).

97. See, e.g., *Hanson v. Grandberry*, No. CV 98-004 (Puyallup Tribal Ct. June 8, 1999), *aff’d*, *Grandberry v. Grandberry*, No. AP 98-004A (Puyallup App. Ct. Oct. 30, 1999) (granting full faith and credit to state court child support order, pursuant to 28 U.S.C. § 1738B); *Tunica-Biloxi Tribe v. Medina*, No. 97-005 (Tunica-Biloxi Tribal Ct. Oct. 6, 1997) (same). Each of the above decisions is available at Versuslaw, *supra* note 46. See also Hopi Parental Responsibility Ordinance § 13, available at [http://www.tribalresourcecenter.org/ccfolder/hopi\\_lawand\\_order\\_parent.htm](http://www.tribalresourcecenter.org/ccfolder/hopi_lawand_order_parent.htm) (last visited July 12, 2004) (providing that “[p]roperly issued court and administrative orders, judgments or decrees of other Indian tribes, states, or federal agencies, that relate to child support enforcement, will be given full faith and credit pursuant to 28 U.S.C. § 1738B”); Absentee Shawnee of Oklahoma Juvenile Code, ch. 1, § 108, available at [http://www.tribalresourcecenter.org/ccfolder/absentee\\_shawnee\\_tribalcode\\_juvenile.html](http://www.tribalresourcecenter.org/ccfolder/absentee_shawnee_tribalcode_juvenile.html) (last visited July 12, 2004) (providing that child support orders of state courts and other tribal courts “shall be recognized

Violence Against Women Act to accord full faith and credit to valid protection orders issued by other tribes and states.<sup>98</sup>

Some tribes apply full faith and credit even when they are not required to do so by specific federal statutes (that is, statutes other than the Full Faith and Credit Act, the applicability of which to tribes is questioned in part I, *supra*). Some do so only in selected subject matter areas, such as marriage,<sup>99</sup> divorce,<sup>100</sup> family relations,<sup>101</sup> and secured transactions,<sup>102</sup> to name a few,<sup>103</sup> while others accord full faith and credit across the board to all valid orders of other tribal and state governments.<sup>104</sup>

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and given full faith and credit," provided the issuing court had personal and subject matter jurisdiction, complied with the Indian Child Welfare Act, and provided due process to all parties).

98. See Nez Perce Tribal Code, ch. 2-2, R. 63(e) (1999), available at [http://www.tribalresourcecenter.org/ccfolder/nez\\_perce\\_tribalcode2.htm](http://www.tribalresourcecenter.org/ccfolder/nez_perce_tribalcode2.htm) (last visited July 12, 2004) (providing that "[a]ny domestic protection order issued...by one State or Indian tribe...shall be accorded full faith and credit by the Nez Perce Tribe and enforced as if it were the order of the Nez Perce Tribe"); Nez Perce Tribal Code, ch. 7-3, § 7-3-6, available at [http://www.tribalresourcecenter.org/ccfolder/nez\\_perce\\_tribalcode7.htm](http://www.tribalresourcecenter.org/ccfolder/nez_perce_tribalcode7.htm) (last visited July 12, 2004) (same); Eastern Band of Cherokee Indians, Cherokee Code, ch. 25, § 25-5(g) (2001), available at <http://www.tribalresourcecenter.org/ccfolder/eccodech25judgment.htm> (last visited July 12, 2004) (providing that "the Eastern Band of Cherokee Court shall give full faith and credit to all Protection Orders" issued in compliance with the Violence Against Women Act); Eastern Band of Cherokee Indians, Cherokee Code, ch. 50B, § 50B-4(d) (2001), available at <http://www.tribalresourcecenter.org/ccfolder/eccodech50bdomviolence.htm> (last visited July 12, 2004) (providing that "[v]alid protective orders that are entered by the courts of another state or Indian Tribe and are consistent with 18 U.S.C. 2265 shall be accorded full faith and credit by the Cherokee Court"); Confederated Tribes of Siletz Indians of Oregon, Tribal Government Operations, Domestic and Family Violence Code, pt. 3, § 12.535 (1999), available at <http://doc.narf.org/nill/Codes/siletzcode/silcode21domandfamviol.htm> (last visited July 12, 2004) (providing that "Tribal Court will afford full faith and credit to the order for protection if the order is consistent with 18 U.S.C. § 2265(b)"). But see Hopi Family Relations Ordinance, § 21.01, available at [http://www.tribalresourcecenter.org/ccfolder/hopi\\_lawandorder\\_family.htm](http://www.tribalresourcecenter.org/ccfolder/hopi_lawandorder_family.htm) (last visited July 13, 2004) (providing that, "[u]pon determining that a foreign court had jurisdiction to enter a protection order, a Hopi Tribal court may issue an order recognizing that protection order and according it comity") (emphasis added).

99. Eastern Band of Cherokee Indians, Cherokee Code, ch. 50, § 50-2 (2000), available at <http://www.tribalresourcecenter.org/ccfolder/eccodech50family.htm> (last visited July 13, 2004) (providing that a "marriage duly solemnized under the laws of North Carolina or any other state or Indian nation shall be given full faith and credit within the Eastern Band's territory").

100. Poarch Band of Creek Indians Code of Justice § 15-1-3, available at [http://www.tribalresourcecenter.org/ccfolder/poarch\\_codeofjustice.htm](http://www.tribalresourcecenter.org/ccfolder/poarch_codeofjustice.htm) (last visited July 13, 2004) (providing that "[p]rior divorce decrees entered by the courts of competent jurisdiction between members of the tribe are hereby given full faith and credit").

101. See, e.g., Mashantucket Pequot Tribal Laws, vol. 1, tit. VI, ch. 8, § 2(b) (2000), available at <http://www.tribalresourcecenter.org/ccfolder/mpequot1.htm> (last visited July 13, 2004) (providing that foreign judgments in family relations matters shall be recognized and enforced by tribal courts "provided that such judgment does not contravene the public policy of the Mashantucket Pequot Tribe").

102. Bay Mills Indian Community Laws and Codes, Secured Transactions Ordinance, § 8 (2000), available at <http://www.tribalresourcecenter.org/ccfolder/bmsecured.htm> (last visited July 13, 2004) (providing that tribal court shall give "full faith and credit to any final order or judgment of any other court of competent jurisdiction" in any action by a secured party).

103. At least one tribe selectively accords full faith and credit to money judgments issued by state courts. See Lower Sioux Community in Minnesota Judicial Code, ch. 2, § 5 (1997), available at [http://www.tribalresourcecenter.org/ccfolder/lower\\_sioux\\_judicialcode1.htm](http://www.tribalresourcecenter.org/ccfolder/lower_sioux_judicialcode1.htm) (last visited July 13, 2004) (providing that "[t]he Tribal Court shall enforce and grant full faith and credit to a final judgment for money damages properly issued by a court of any state or the United States"). Another tribe accords full faith and credit to the decisions of its former C.F.R. (Code of Federal Regulations) court. See Eastern Band of Cherokee Indians, Cherokee Code, ch. 1, § 1-41(g) (2001), available at <http://www.tribalresourcecenter.org/ccfolder/eccodech1civil.htm> (last visited July 13, 2004) (providing that "the Cherokee Court shall give full faith and credit to all judgments and orders entered by the CFR Court that were properly within the jurisdiction of the CFR Court" before transfer of authority from the CFR Court of Indian Offenses to the Cherokee Court pursuant to the Indian Self Determination Act contract between the United States and the Eastern Band of Cherokee Indians).

104. See *infra* notes 105-113 and accompanying text.

Only a few tribes grant full faith and credit to other tribal or state court orders without conditioning that grant on the reciprocal provision of full faith and credit by the issuing tribes and states.<sup>105</sup> Among the tribes with asymmetrical schemes is the Cheyenne River Sioux Tribe, which, in *Eberhard v. Eberhard*,<sup>106</sup> bound itself to the full faith and credit mandate of the PKPA without assurance that other tribes and states would reciprocate.<sup>107</sup> To be clear, though, the aspiration of a reciprocal enforcement regime motivated the *Eberhard* court. The inclusion of Indian tribes within the mandate of federal full faith and credit statutes, the tribal court said, serves to integrate tribes and their courts "into the cooperative federalism framework of the national union."<sup>108</sup> This strengthens, rather than diminishes, tribal sovereignty, for the reciprocal application of full faith and credit by states "to tribal courts and their orders recognizes and enforces the sovereignty of Indian tribes."<sup>109</sup>

These aspirations have been realized in Oklahoma, where the state supreme court has promulgated a rule that "[t]he district courts of the State of Oklahoma shall grant full faith and credit and cause to be enforced any tribal judgment where the tribal court that issued the judgment grants reciprocity to judgments of the courts of the State of Oklahoma...."<sup>110</sup> Several tribes in Oklahoma have followed suit, adopting rules extending full faith and credit to reciprocating state, federal, and tribal courts.<sup>111</sup>

105. See Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin, Tribal Court Rules, R. 4.27.1, available at [http://www.tribalresourcecenter.org/ccfolder/red\\_cliff\\_tribalcode4.htm](http://www.tribalresourcecenter.org/ccfolder/red_cliff_tribalcode4.htm) (last visited July 13, 2004) (providing that tribal court "shall grant full faith and credit to the judicial records, orders and judgments of the courts of the State of Wisconsin and to the acts of other governmental entities of the State of Wisconsin"); Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians, Tribal Code, tit. 2, § 2-5-25 (2003), available at <http://doc.narf.org/nill/Codes/cooscode/coost2rules.htm> (last visited July 13, 2004) (providing that tribal court may decline to enforce state court judgment or judgment of another tribal court only "[i]f the court finds jurisdictional or constitutional defects in the judgment or the record of the state or tribal court proceedings"); Lower Sioux Community in Minnesota, Judicial Code, ch. 2, § 5 (2000), available at <http://doc.narf.org/nill/Codes/lscodet1.htm#courts> (last visited July 13, 2004) (providing that "Tribal Court shall enforce and grant full faith and credit to a final judgment for money damages properly issued by a court of any state or the United States," provided that no "substantial question appears with respect to the jurisdiction of the foreign court and the regularity of the foreign proceedings").

106. 24 Indian L. Rptr. 6059 (Cheyenne River Sioux Tribal Ct. App. 1997); see *supra* notes 48–52 and accompanying text.

107. Indeed, in a separate concurring opinion in *Eberhard*, Chief Justice Pommersheim warned that, despite the tribal court's finding that Congress intended to include tribes within the full faith and credit provisions of the PKPA, "it seems to be highly likely that other courts—federal, state, and tribal—may reach the opposite and *not* unreasonable conclusion that there is insufficient evidence to support such a finding of congressional intent." 24 Indian L. Rptr. at 6068. Pommersheim concluded that "it behooves the Congress itself to clarify its meaning" in the PKPA to avoid confusion and a lack of uniformity in the application of the Act. *Id.*

108. 24 Indian L. Rptr. at 6064.

109. *Id.*

110. Okla. D. Ct. R. 30(A) (codified at OKLA. STAT. tit. 12, ch. 2 app. (1995 Supp.)) (authorized by OKLA. STAT. tit. 12, § 728 (1992 Supp.)).

111. Cherokee Nation Judicial Appeals Tribunal, In the Matter of the Adoption of Standards for Recognition of Judicial Proceedings of Other Sovereigns in the Courts of the Cherokee Nation: Full Faith and Credit, 6 Okla. Trib. 232, 1995 WL 17007140 (May 26, 1995); Supreme Court of the Kickapoo Tribe, In the Matter of the Adoption of Standards for Recognition of Judicial Proceedings of Other Sovereigns in the Courts of the Kickapoo Tribe of Oklahoma: Full Faith and Credit, 6 Okla. Trib. 223, 1994 WL 16006119 (Dec. 5, 1994); Supreme Court of the Muscogee (Creek) Nation, Order Adopting Standards for Recognition of Judicial Proceedings of Other Sovereigns in the Muscogee (Creek) Nation Courts: Full Faith and Credit, 3 Okla. Trib. 211, 1993 WL 831883 (Aug. 4, 1993); see also Dennis W. Arrow, *Oklahoma's Tribal Courts: A Prologue, the First Fifteen Years of the Modern Era, and a Glimpse at the Road Ahead*, 19 OKLA. CITY U. L. REV. 5, 68–69 (1994) ("[A]s of February 1994, seven Oklahoma tribes [the Absentee-Shawnee, Cheyenne-Arapaho, Citizen Band Potawatomi, Iowa, Kaw, Kickapoo, and Sac and

For example, the Cherokee Nation Judicial Appeals Tribunal has adopted the following rule:

Provided that a foreign judgment was not rendered through fraud and the issuing court had subject matter and personal jurisdiction, all courts of the Cherokee Nation shall grant full faith and credit and cause to be enforced therein any foreign judgment, if the Federal, State or Tribal Court that issued such judgment grants reciprocity to judgments of the Cherokee Courts.<sup>112</sup>

The Cherokee Nation and other tribes in Oklahoma voluntarily opted to participate in this fully reciprocal enforcement of judgment regime, and by doing so have extended the reach of their tribal court judgments. Other tribes outside Oklahoma have enacted similar laws.<sup>113</sup>

Thus, while most tribes have opted for the flexible regime of comity, some have elected the more exacting standard of full faith and credit, although most tribes in the latter category have conditioned their grant of full faith and credit on the reciprocal recognition and enforcement of tribal court orders by foreign jurisdictions.

### III. FEDERAL RESTRICTIONS ON TRIBAL ENFORCEMENT OF FOREIGN ORDERS

Unlike most sovereigns, Indian tribes lack jurisdiction over all people and property within their territories.<sup>114</sup> Without full territorial sovereignty, tribes often are unable to enforce foreign orders, even when they wish to do so, since tribal enforcement authority is predicated on adjudicative jurisdiction over person or property against which enforcement is sought. Of particular concern is the erosion

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Fox] 'ha[d] enacted statutes or rules recognizing foreign judgments of certain courts'...[a]nd the Court of Indian Offenses for the Anadarko Area tribes, which serves the Apache, Caddo, Comanche, Delaware, Fort Sill Apache, Kiowa, Pawnee, Ponca, Tonkawa, and Wichita tribes 'has customarily recognized state judgments and is expected to formalize this practice....'" (quoting Report of the Oklahoma Supreme Court Committee to Recommend Standard for Recognition of Judicial Proceedings in Tribal Courts (1994), reprinted in 7 *Sovereignty Symposium*, 4 (Oklahoma Supreme Court et al. eds., 1994) (internal citations omitted).

112. 6 Okla. Trib. 232, 1995 WL 17007140.

113. See, e.g., Mille Lacs Band Stat. Ann. § 2009 (2003), available at <http://doc.narf.org/nill/Codes/mlcode/mltitle24.htm> (last visited July 13, 2004) (providing that "[f]ull faith and credit shall be given to...civil judicial proceeding of all other reservations and all Federal and State jurisdictions that have enacted a full faith and credit provision in their Constitution or Statutes or on a case-by-case basis, have granted full faith and credit to judicial determinations of the Court of Central Jurisdiction" of the Mills Lacs Band of Chippewa Indians); Ho-Chunk Nation Rules of Civil Procedure, Rule 73 (2002), available at [http://www.tribalresourcecenter.org/ccfolder/hochunk\\_civil\\_proc.htm](http://www.tribalresourcecenter.org/ccfolder/hochunk_civil_proc.htm) (last visited July 13, 2004) (providing that tribal courts shall "extend full faith and credit to the judicial records, orders and judgments of the Courts of the State of Wisconsin, the Courts of other states, federal Courts, and other tribal Courts to the same extent the other jurisdiction extends full faith and credit to the judicial records, orders and judgments of this Court"); Stockbridge-Munsee Tribal Law, ch. 1, § 1.37 (2003), available at <http://doc.narf.org/nill/Codes/stockmcode/smlcourt.htm> (last visited July 13, 2004) (providing that orders of other tribal, state, and federal courts shall be entitled to full faith and credit in Stockbridge-Munsee Courts, as long as issuing court "grants full faith and credit to the judicial records, orders and judgments of the courts of the Stockbridge-Munsee Court").

114. In *Duro v. Reina*, the Court noted that tribes "no longer" possess "full territorial sovereignty," which includes "the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens." 495 U.S. at 685. Rather, the Court said, "the retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their own unique customs and social order." *Id.* at 685-86 (citing *Wheeler*, 435 U.S. at 326).

under federal law of tribal jurisdiction over nonmembers, including non-Indians and Indians who are members of other tribes, for it may preclude tribal enforcement of foreign orders against these nonmembers.

In *United States v. Mazurie*, the Supreme Court stated that “surely...Indian tribes within ‘Indian country’ are a good deal more than ‘private, voluntary organizations.’”<sup>115</sup> The Court described tribes as “unique aggregations possessing attributes of sovereignty over both their members and their territory,”<sup>116</sup> noting that Indians “are ‘a separate people’ possessing ‘the power of regulating their internal and social relations.’”<sup>117</sup> However, in the nearly three decades since the Court decided *Mazurie*, it systematically has eroded the governing authority of Indian tribes. Time and again, the Court has held that tribes do not possess full territorial jurisdiction to prosecute, regulate, tax, and adjudicate all activities that occur within their reservations.<sup>118</sup>

#### A. Criminal Jurisdiction

In *Oliphant v. Suquamish Indian Tribe*,<sup>119</sup> the Court held that Indian tribes do not possess the inherent authority to prosecute non-Indians who commit crimes in Indian country. The Court “rested its conclusion...in large part upon ‘the commonly shared presumption of Congress, the Executive Branch, and the lower federal courts,’” that tribes lack such power.<sup>120</sup> The Court ultimately held that tribes had been implicitly divested of this power because its exercise was “inconsistent with their status” as domestic dependent nations.<sup>121</sup> That status and its contours were imposed on tribes by the political branches of the federal government, through treaties and statutes: “[T]he Court held in [*Oliphant*] that the power to prosecute

115. 419 U.S. 544, 557 (1975).

116. *Id.*

117. *Id.* (quoting *United States v. Kagama*, 118 U.S. 375, 381 (1886)).

118. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (holding that, by virtue of their status as domestic dependent nations, Indians tribes do not possess criminal jurisdiction over non-Indians); *Montana v. United States*, 450 U.S. 544 (1981) (invalidating tribal regulation of non-Indian hunting and fishing on non-Indian lands within Indian country, holding that, as a general rule, tribes lack civil jurisdiction over non-Indian conduct on such lands); *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (holding that tribe lacked jurisdiction to zone land held by non-Indians in fee simple within area of reservation opened to non-Indian settlement); *Duro v. Reina*, 495 U.S. 676 (1990) (holding that Indian tribes do not possess criminal jurisdiction over nonmember Indians); *South Dakota v. Bourland*, 508 U.S. 679 (1993) (holding that tribe lacked jurisdiction to regulate non-Indian hunting and fishing on reservation land Congress had taken to build a dam, reservoir, and recreation area); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (holding that tribal court did not have jurisdiction over civil cause of action between non-Indian litigants despite fact that cause of action accrued on reservation); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (holding that tribe did not have jurisdiction to impose occupancy tax on non-Indian residents of hotel on reservation); *Nevada v. Hicks*, 533 U.S. 353 (2001) (holding that tribal court did not have jurisdiction over civil cause of action brought by tribal member against state police officer for unlawful search and seizure, despite fact that search occurred on tribal trust land). For thoughtful discussions of these cases, see Judith V. Royster, *Oliphant and Its Discontents*, 13 KANS. J.L. & PUB. POL’Y 59 (2003); Frickey, *supra* note 3; Robert Laurence, *The Dominant Society’s Judicial Reluctance to Allow Tribal Civil Law to Apply to Non-Indians: Reservation Diminishment, Modern Demography and the Indian Civil Rights Act*, 30 U. RICH. L. REV. 781 (1996); and Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

119. 435 U.S. 191 (1978).

120. *United States v. Lara*, 124 S. Ct. 1628, 1636 (2004) (quoting *Oliphant*, 435 U.S. at 206).

121. 435 U.S. at 208 (citing *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976)).

nonmembers was an aspect of the tribes' external relations and hence part of the tribal sovereignty that was divested by treaties and by Congress."<sup>122</sup>

In *Duro v. Reina*,<sup>123</sup> the Court extended this holding to nonmember Indians, ruling that, under then prevailing federal Indian policy, "the retained sovereignty of the tribe as a political and social organization to govern its own affairs does not include the authority to impose criminal sanctions against a citizen outside its own membership."<sup>124</sup> As it had in *Oliphant*, the Court based its decision, in part, on the prevailing views of the political branches of government that tribes lacked criminal authority over nonmember Indians.<sup>125</sup>

One year after *Duro* was decided, Congress altered the political landscape, restoring the inherent criminal authority of Indian tribes over nonmember Indians through an amendment to the Indian Civil Rights Act.<sup>126</sup> This amendment, commonly referred to as the "*Duro* fix," "recognized and affirmed" that the inherent powers of tribal self-government include the power "to exercise criminal jurisdiction over all Indians," member and nonmember alike.<sup>127</sup>

In *United States v. Lara*, the Court affirmed the constitutionality of the *Duro* fix, holding that "the Constitution authorizes Congress to permit tribes, as an exercise of their inherent tribal authority, to prosecute nonmember Indians."<sup>128</sup> The Court characterized *Oliphant* and *Duro* as "federal common law" decisions.<sup>129</sup> They were not mandated by the Constitution,<sup>130</sup> but rather "reflect[ed] the Court's view of the tribes' retained sovereign status *as of the time* the Court made them."<sup>131</sup> Noting that the federal common law is "subject to the paramount authority of Congress,"<sup>132</sup> the Court held that Congress may, through positive legislative enactments, take actions to "modify or adjust the tribes' status."<sup>133</sup> Through the *Duro* fix, Congress "lift[ed] the restrictions on the tribes' criminal jurisdiction over nonmember Indians"<sup>134</sup> and, in so doing, "chang[ed] the relevant legal circumstances" upon which *Duro* rested.<sup>135</sup> As a result, the Court distinguished *Duro*<sup>136</sup> and held that Indian tribes once again

122. *Lara*, 124 S. Ct. at 1636 (citing *Oliphant*, 435 U.S. at 206). The Court reiterated this holding in *Wheeler*, 435 U.S. at 326, and *Duro v. Reina*, 495 U.S. 676, 686 (1990).

123. *Duro*, 495 U.S. at 686.

124. *Id.* at 679.

125. *Id.* at 689-92.

126. Act of Nov. 5, 1990, § 8077(b)-(c), 104 Stat. 1892-1893 (temporary legislation in effect until Sept. 30, 1991) and Act of Oct. 28, 1991, 105 Stat. 646 (permanent legislation) (codified by 25 U.S.C. 1301(2)).

127. 25 U.S.C. 1301(2).

128. 124 S. Ct. at 1639.

129. *Id.* at 1645 (quoting *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 233-36 (1985)).

130. *Id.* at 1636 (noting that "the Constitution does not dictate the metes and bounds of tribal autonomy").

131. *Id.*

132. *Id.* at 1637 (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981)). In *Milwaukee*, the Court held that where "Congress addresses a question previously governed by a decision rest[ing] on federal common law the need for...lawmaking by federal courts disappears." 451 U.S. at 314.

133. 124 S. Ct. at 1636.

134. *Id.* at 1633.

135. *Id.* at 1636.

136. *Id.* at 1637 ("*Duro*...[is] not determinative because Congress has enacted a new statute, relaxing restrictions on the bounds of the inherent tribal authority that the United States recognizes. And that fact makes all the difference.").

possess the inherent authority to prosecute nonmember Indians for crimes committed in Indian Country.<sup>137</sup>

The *Lara* Court mentioned, but did not "consider," the question of "whether the Constitution's Due Process or Equal Protection Clauses prohibit tribes from prosecuting a nonmember citizen of the United States."<sup>138</sup> Thus, while the Court held that Congress possesses "the constitutional power to enact a statute that modifies tribal power,"<sup>139</sup> it did not decide whether the *Duro* fix itself ran afoul of the Constitution by permitting tribes to prosecute nonmember Indian citizens without affording them "certain constitutional safeguards."<sup>140</sup> The Court noted its "reservations" about the validity of tribal prosecutions of nonmembers, but it found that nonmembers could raise constitutional challenges to future tribal court criminal proceedings, "should they wish to do so," by filing habeas writs in federal district court under the Indian Civil Rights Act.<sup>141</sup> Thus, just as it had in *Oliphant* and *Duro*, the Court in *Lara* suggested that there may be "constitutional limitations" on the ability of Indian tribes to prosecute non-tribal members but stopped short of finding any such violations.<sup>142</sup>

In respect to the Due Process Clause, the Court has stated that it would be "inconsistent with the overriding interests of the National Government"<sup>143</sup> to permit Indian tribes to prosecute non-tribal members in "tribal courts which do not accord the full protections of the Bill of Rights."<sup>144</sup> The Court has long held that the Bill of Rights does not apply to Indian tribal governments,<sup>145</sup> and while the Indian Civil Rights Act (ICRA) imposes on tribal governments "some...guarantees of fair procedure,"<sup>146</sup> it does not incorporate all of the protections under the Bill of Rights. For example, the ICRA contains no guarantee of court appointed counsel for indigent criminal defendants. In light of this and other limitations, the Court has suggested that there may be "constitutional limitations" on the ability of Congress, "through recognition of inherent tribal authority" or otherwise, to "subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right."<sup>147</sup>

Further, the Court has "hesitate[d] to adopt a view of tribal sovereignty" that would permit nonmembers to be tried by "political bodies that do not include them."<sup>148</sup> Nonmembers are "not constituents of the governing Tribe."<sup>149</sup> They do not

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137. *Id.* at 1639. This holding is consistent with the Court's statement in *Wheeler* that, if a tribe were deprived of an aspect of its inherent power "by statute or treaty," Congress could restore the tribe's inherent powers without delegating federal power or transforming the tribe into "an arm of the Federal Government." 435 U.S. at 328 n.28.

138. 124 S. Ct. at 1636.

139. *Id.* at 1638-39.

140. *Id.* at 1638.

141. *Id.* at 1638-39.

142. See *Duro*, 495 U.S. at 693-94.

143. *Colville*, 447 U.S. at 153.

144. *Id.* at 153-54 (summarizing *Oliphant*, 435 U.S. at 208-10; *Wheeler*, 435 U.S. at 326).

145. *Duro*, 495 U.S. at 693 (citing *Talton v. Mayes*, 163 U.S. 376 (1896)).

146. *Id.*

147. *Id.* at 693-94 (citing *Reid v. Covert*, 354 U.S. 1 (1957)).

148. *Id.* at 693.

149. *Colville*, 447 U.S. at 161.

"have a say in tribal affairs or significantly share in tribal disbursements."<sup>150</sup> They cannot "vote, hold office, or serve on a jury under [tribal] authority."<sup>151</sup> They are excluded from the tribal political process and, according to the Court, have not consented in any meaningful sense to the exercise of tribal authority over them. To subject such individuals to tribal authority may offend basic notions of due process and participatory democracy. Noting that the Bill of Rights is not applicable to tribal governments, the Court stated in *Duro*, "This is all the more reason to reject an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system."<sup>152</sup> Highlighting the distinction between tribal members and nonmembers, the Court has said that tribal jurisdiction over members is "justified by the voluntary character of tribal membership and the concomitant right of participation in a tribal government, the authority of which rests on consent."<sup>153</sup>

As for the Equal Protection Clause, the Court has suggested that congressional authorization of tribal power over nonmember Indians, but not over non-Indians, may raise equal protection concerns.<sup>154</sup> Those concerns could be addressed, it seems, by extending tribal power over non-Indians, too.

Thus, while several Justices have made clear their "very substantial concerns over the government's proposition that within the territorial United States a non-constitutional entity can be allowed to try a United States citizen,"<sup>155</sup> the Court has deferred consideration of those concerns until a later date.<sup>156</sup>

### B. Civil Jurisdiction

In *Montana v. United States*,<sup>157</sup> the Court extended to the civil context the principle that tribes have implicitly lost those elements of their inherent authority that are inconsistent with their dependent status.

[T]hrough their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty.... "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe*.... These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is

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150. *Id.*

151. *Duro*, 495 U.S. at 688.

152. *Id.* at 694 (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 172-73 (1982)).

153. *Id.*

154. *See Lara*, 124 S. Ct. at 1638.

155. Oral Argument Transcript at 21, *United States v. Lara*, Supreme Court No. 03-107 (argued Jan. 21, 2004); *see also Lara*, 124 S. Ct. at 1640 (Kennedy, J., concurring); *id.* at 1651 (Souter and Scalia, JJ., dissenting).

156. Although the Court ordinarily accords considerable "deference" to Congress when it legislates in respect to Indian affairs, *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995), that deference is not unlimited. The Court reviews Congress's actions to determine whether they are "'tied rationally to the fulfillment of Congress' unique obligation toward the Indians.'" *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 83-85 (1977) (quoting *Morton v. Mancari*, 417 U.S. 535, 555 (1974)), and its "solemn commitment" to uphold Indian rights. *Mancari*, 417 U.S. at 552. The Court may also review Congress's actions to determine whether they run afoul of the Constitution. For example, in *United States v. Sioux Nation*, 448 U.S. 371 (1980), the Court held that Congress's taking of the Black Hills in South Dakota from the Sioux Nation violated the Fifth Amendment. *Id.* at 423-24.

157. 450 U.S. 544 (1981).



necessarily inconsistent with their freedom independently to *determine their external relations*. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve *only the relations among members of a tribe*. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status."<sup>158</sup>

The *Montana* Court held that as a "general proposition...the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."<sup>159</sup> There are two exceptions to this general proposition:

A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its 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.<sup>160</sup>

However, in the two-plus decades since the Court articulated these principles, it has only once invoked either exception to uphold the tribal exercise of civil regulatory or adjudicative jurisdiction over nonmembers.<sup>161</sup> By contrast, the Court repeatedly has voided tribal actions concerning nonmembers, including regulation of on-reservation hunting and fishing by non-Indians,<sup>162</sup> zoning of on-reservation lands owned in fee by non-Indian lands,<sup>163</sup> on-reservation conduct of state police officers,<sup>164</sup> imposition of hotel occupancy taxes on on-reservation lands,<sup>165</sup> non-Indian hotel patrons, and the adjudication in tribal court of disputes arising in Indian Country, but involving nonmembers.<sup>166</sup> As one scholar had noted, the Court "refuses to say what types of activities by nonmembers...would meet the *Montana* exceptions."<sup>167</sup>

The Court's rationale for finding a divestiture of tribal authority over nonmembers in the civil context mirrors its rationale in the criminal context. The Court is reluctant to subject citizens to the jurisdiction of tribal governments and courts since they are not subject to the constraints imposed by the Bill of Rights. Admittedly, this concern is less pronounced in the civil context than in the criminal context, since "[t]he exercise of criminal jurisdiction subjects a person not only to the adjudicatory power of the tribunal, but also to the prosecuting power of the tribe, and involves a

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158. *Id.* at 563-64 (quoting *Wheeler*, 435 U.S. at 326).

159. *Id.* at 565.

160. *Id.* at 565-66.

161. In *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, the Court held that tribal regulation of non-Indian fee-patented lands in a predominantly Indian-owned "closed area" of reservation was justified, in part, by the "threat to the Closed Area's cultural and spiritual values" posed by proposed non-Indian development projects. 492 U.S. 408, 443 (1989) (Stevens and O'Connor, JJ., in whose judgment Blackmun, Brennan, and Marshall, JJ., concurred) (citing *Montana*, 450 U.S. at 566).

162. See *Montana*, 450 U.S. 544; *Bourland*, 508 U.S. 679.

163. See *Brendale*, 492 U.S. 408.

164. See *Nevada v. Hicks*, 533 U.S. 353 (2001).

165. See *Atkinson Trading Co.*, 532 U.S. 645.

166. See *Strate*, 520 U.S. 438; *Hicks*, 533 U.S. 353.

167. Royster, Oliphant and *Its Discontents*, *supra* note 118, at 64.

far more direct intrusion on personal liberties.”<sup>168</sup> The Court is also reluctant to allow tribes to regulate the conduct of nonmembers who have no right to participate in tribal government. In addition, in the civil context, the Court has a third concern, namely that the federal courts have only limited authority, under current law, to review the final judgments of Indian tribal courts. The federal courts may hear challenges to the subject matter jurisdiction of tribal courts,<sup>169</sup> but they may not review the ultimate dispositions of tribal courts on the merits of the cases before them.<sup>170</sup> Commenting on these concerns, one scholar has noted, “the Court has found it increasingly incongruous that tribes, as entities within the borders of the United States subject to ultimate congressional control, may use the coercive power of government against nonmembers without being subject to all of the basic constitutional limitations and remedies.”<sup>171</sup>

The Court’s dictate in the civil context is clear: the “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.”<sup>172</sup> Thus, under the present concepts of federal Indian law, tribes find themselves increasingly unable to regulate, tax, or adjudicate disputes concerning the activities of non-tribal members in Indian Country.<sup>173</sup>

This raises serious problems for tribes that seek to enforce the orders of other tribes on non-tribal members. Consider the following hypothetical:

*Suppose Jane Baker, a member of Tribe B, is traveling in her car on the reservation of Tribe A when she is struck by another car, driven by John Adams, a member of Tribe A. Baker suffers permanent paralysis as a result of the collision. She sues Adams in the courts of Tribe A, seeking money damages for injuries she sustained as a result of Adams’ negligence.<sup>174</sup> The courts of Tribe A exercise jurisdiction over the case since Baker, the non-tribal member, has consented to the jurisdiction of the court; Adams is a tribal member; and the cause of action accrued on the reservation of Tribe A. The tribal court rules in*

168. *Duro*, 495 U.S. at 688.

169. *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985) (holding that subject matter jurisdiction of Indian tribal courts is a federal question that federal courts may review); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 10 (1987) (same).

170. In the criminal context, the federal courts possess habeas review, in cases of unlawful detention, under ICRA. 25 U.S.C. § 1303 (2000). See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 66 (1978).

171. Frickey, *supra* note 3, at 65.

172. *Montana*, 450 U.S. at 564.

173. Curiously, under current precedents and in view of the *Duro* fix, tribes may possess greater criminal powers over nonmember Indians than they do civil powers.

174. Baker may also be able to sue Adams in state court. This would certainly be the case if the state in which Reservation A is located were a Public Law 280 state, since Public Law 280 grants to states and their courts the power to exercise jurisdiction over “civil causes of action between Indians or to which Indians are parties which arise in...Indian country...to the same extent [the] State has jurisdiction over other civil causes of action.” 25 U.S.C. § 1322(a) (2000); see Act of August 15, 1953 (67 Stat. 588), amended by Civil Rights Act of 1968, tit. IV (82 Stat. 78) (codified by 25 U.S.C. §§ 1321–1326). Even if Public Law 280 were not applicable, the state courts nonetheless may have jurisdiction over Baker’s suit, provided that the exercise of state jurisdiction is not preempted by federal law, see, e.g., *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333, 334 (1983), and does not unlawfully “infringe[] on the right of reservation Indians to make their own laws and be ruled by them.” *Williams v. Lee*, 358 U.S. 217, 220 (1959). Resolution of these questions requires a careful balancing of the relevant tribal, federal, and state interests.

*favor of Baker, awarding her a judgment of \$1,000,000 against Adams. Adams moves to the reservation of Tribe B, in part to evade enforcement of the judgment of tribal court A. Baker seeks enforcement of the judgment in the courts of Tribe B. Absent Adams' consent, the courts of Tribe B likely will not have jurisdiction to enforce the order. Although Baker is a member of Tribe B, Adams is not. The cause of action did not arise out of a consensual relationship between Adams and Baker, or between Adams and Tribe B, and it is unlikely that the underlying car accident, which took place on the reservation of Tribe A, threatened the political integrity, economic security, or health and welfare of Tribe B. (See Table 1.)*

Without the possibility of intertribal enforcement of tribal court judgments, the effect of certain tribal judgments will, as this example illustrates, be severely limited. It is axiomatic that "[n]o legal judgment has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived."<sup>175</sup> If the state in which Tribe B is located does not recognize tribal court tort judgments, either under principles of full faith and credit or comity,<sup>176</sup> Ms. Baker will be unable to enforce the judgment she obtained against Mr. Adams, at least insofar as Adams does not return to the reservation of Tribe A, thereby subjecting himself once again to the jurisdiction of the courts of Tribe A.

### C. Congressional Restoration of Jurisdiction

In *Lara*, the Court held that Congress may, in its exercise of "plenary power" over Indian affairs, "relax restrictions" imposed by the political branches of government on the inherent powers of tribes.<sup>177</sup> Thus, theoretically, Congress has the power to restore to tribes the full powers of sovereignty they once had over all persons and activities within their territories. If it were to do so, and if its actions were to be upheld by the courts, Congress could eliminate the jurisdictional deficits that thwart full intertribal enforcement of tribal court judgments.

However, the prospect of a meaningful restoration by Congress of the territorial jurisdiction of tribes is limited by at least two factors: politics and, potentially, the Constitution. First, Congress appears unwilling, as a political matter, to subject non-Indians, and in the civil context, nonmember Indians, to the full authority of Indian tribal governments. In the quarter century-plus since the Court began unraveling tribal jurisdiction over non-Indians and nonmembers in *Oliphant*, Congress has only once enacted restorative legislation. That legislation, the *Duro* fix, restored only one aspect of the inherent tribal sovereignty the Court found divested by federal law: criminal jurisdiction over nonmember Indians. Congress has not restored the

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175. *Wilson*, 127 F.3d at 807.

176. Several states have no laws or policies addressing the recognition or enforcement of tribal court judgments, apart from the requirements imposed upon them by federal law in select subject matter areas, including child custody, child support, and domestic violence. These states are Arkansas, Colorado, Illinois, Kansas, Missouri, Nevada, North Carolina, Tennessee, Texas, Utah, Vermont, Virginia, and West Virginia. See Leeds, *supra* note 6, at 336-38.

177. *Lara*, 124 S. Ct. at 1631-34. Under current precedents, the contours of tribal self-government are subject to Congress's plenary "control and definition." *Three Affiliated Tribes v. Wold Eng'rs*, 476 U.S. 877, 891 (1986). This power includes the "authority to...modify...the powers of local self-government which the tribes otherwise possess." *Santa Clara Pueblo v. Martinez*, 436 U.S. at 56.

criminal jurisdiction of tribes over non-Indians and it has not restored the full range of civil jurisdiction tribes once possessed over nonmembers.

Table 1

	Tribal Court A	Tribal Court B
Claim	Member of Tribe B Sues Member of Tribe A for Money Damages Arising out of Car Accident on Reservation A	A Moves to Reservation B
		B Seeks Civil Enforcement of Judgment of Tribal Court A against Nonmember A
		A Challenges Jurisdiction of Tribal Court B
Basis for Tribal Court Jurisdiction	Plaintiff, B, Is Nonmember of Tribe A, but Consents to Jurisdiction of Tribal Court A	Plaintiff, B, Is Member of Tribe B
		Defendant, A, Is Nonmember of Tribe B, and Does Not Consent to Jurisdiction of Tribal Court B
	Defendant, A, Is Member of Tribe A	There Is No Consensual Relationship between Nonmember A and Member B
	Cause of Action Accrued on Reservation A	Car Accident on Reservation A Does Not Threaten Political Integrity, Economic Security, or Health and Welfare of Tribe B
Judgment	Tribal Court A Grants Judgment for Money Damages in Favor of Nonmember B against Member A	Tribal Court B Lacks Jurisdiction To Enforce Judgment of Tribal Court A against Nonmember A

Second, as discussed above, the Court has noted that the Constitution may impose limitations on the exercise of jurisdiction by Indian tribes over nonmembers. Tribes are not subject to the Bill of Rights, they do not allow political participation by nonmembers, and the final rulings of their courts cannot be appealed to federal court. Thus, even if Congress were to restore inherent tribal jurisdiction over nonmembers, as it did in the *Duro* fix, its actions may not survive scrutiny in a subsequent constitutional challenge. Thus, without altering fundamentally the nature of Indian tribal governments, and eliminating the traditional independence of tribes

from the mandates of the Constitution, Congress may not be able to authorize the exercise of tribal power over nonmembers, including Indians from other tribes.<sup>178</sup>

Many Indian tribes are reluctant, and justifiably so, to advocate for the continued exercise of plenary power by Congress. The plenary power doctrine is unmoored from the Constitution<sup>179</sup> and offensive to basic principles of tribal sovereignty and self-government.<sup>180</sup> In the area of cross-boundary enforcement of court orders, Congress has often legislated in a manner that requires tribes to enforce the orders of states and other tribes, without regard to public policy concerns that militate against enforcement. Few would argue that tribal solutions are superior to those mandated by Congress.

Tribes are wise to seek alternatives to insulate themselves from future Court decisions finding the ordinary exercise of tribal authority over nonmembers to be unconstitutional, on the one hand, and the negative repercussions of the plenary power doctrine, on the other.

#### IV. INTERTRIBAL GOVERNING BODIES

This part of the article and the next discuss the potential for tribes to create intertribal governing bodies to broaden the jurisdictional reach of each of their tribal governments and to enact intertribal compacts providing for the reciprocal enforcement of tribal court orders based on principles of comity.

178. These constitutional concerns apply with equal force to congressional actions to restore inherent tribal jurisdiction and congressional delegations of federal power to Indian tribes. In *Lara*, the Court noted that, if these concerns were valid, “any prosecution of a nonmember Indian” in tribal court would be invalid, regardless of the source of the tribal court’s power. 124 S. Ct. at 1638. It has been suggested that a delegation of federal power to Indian tribes would create additional “grave constitutional difficulties.” *Id.* at 1643 (Thomas, J., concurring in judgment). In an amicus brief filed in *Lara*, see Brief of Amicus Curiae National Congress of American Indians at 26–29, *United States v. Lara*, 124 S. Ct. 1628 (2004) (No. 03-107), the National Congress of American Indians noted three such difficulties: First, because tribal courts are non-article III courts, any delegation of federal power to them would have to satisfy “Article III’s guarantee of an impartial and independent federal adjudication.” *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 848 (1986). Second, if tribal courts were to exercise federal power delegated by Congress, presumably they would be article I, or legislative, courts. As such, tribal judges would be “inferior Officers” whose appointments would have to “conform to the Appointments Clause of the Constitution.” Brief of Amicus Curiae National Congress of American Indians at 27, *Lara*, (No. 03-107); U.S. CONST. art. II, § 2, cl. 2; see, e.g., *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam) (noting that “any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States’ and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of [article II]”). The Appointments Clause provides that “Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” U.S. CONST. art. II, § 2, cl. 2. Finally, “if Congress converted tribal courts to federal agencies or instrumentalities, the United States would face expanded liability for the torts of tribal courts and prosecutors pursuant to...the Federal Tort Claims Act, 28 U.S.C. § 2675(a).” Brief of Amicus Curiae National Congress of American Indians at 28, *Lara* (No. 03-107).

179. The Supreme Court has stated that Congress’s “broad general powers to legislate in respect to Indian tribes,” *Lara*, 124 S. Ct. at 1633, are “drawn both explicitly and implicitly from the Constitution itself.” *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974) (emphasis added). In *Lara*, the Court identified the Indian Commerce Clause, treaties made between the United States and various tribes, and “preconstitutional powers necessarily inherent in any Federal Government,” as possible sources of Congress’s powers over Indians. *Lara*, 124 S. Ct. at 1634; see also *id.* at 1633–34.

180. In a concurring opinion in *Lara*, Justice Thomas, describing federal Indian policy as “schizophrenic,” 124 S. Ct. at 1644 (Thomas, J., concurring in judgment), expressed his view that “[t]he Federal Government cannot simultaneously claim power to regulate virtually every aspect of the tribes through ordinary domestic legislation and also maintain that the tribes possess anything resembling ‘sovereignty.’” *Id.* at 1648.

### A. The Great Sioux Nation

Indian tribes may be able to overcome the limitations on their jurisdiction over nonmember Indians by forming intertribal confederacies or other intertribal governing bodies. The sixteen modern day tribes of the Great Sioux Nation<sup>181</sup> are attempting to do just that.

The Great Sioux Nation is a confederacy of historically and culturally united tribes.<sup>182</sup> Its members are divided by dialects into three divisions: the *Dakota* (*Santee*), the *Nakota* (*Yankton*), and the *Lakota* (*Teton*). The names *Dakota*, *Nakota*, and *Lakota* mean "considered friends,"<sup>183</sup> and together the three divisions form the "alliance of friends."<sup>184</sup> The bonds between members of the Great Sioux Nation are centuries old.<sup>185</sup>

The historic governing body of the Great Sioux Nation was the *Oceti Sakowin*, or the "Seven Council Fires."<sup>186</sup> Members of all three divisions were represented by their chiefs. The assembly "symbolized the cohesiveness of the Nation."<sup>187</sup>

Throughout the nineteenth and twentieth centuries, the tribes of the Sioux Nation maintained their national unity. Together, the *Lakota*, *Dakota*, and *Nakota* fought the Powder River War and caused the United States to enter the Fort Laramie Treaty of 1868.<sup>188</sup> After the United States took the Black Hills in violation of the Treaty of

181. These tribes, listed alphabetically, are as follows: the Assiniboiné and Sioux Tribes of Fort Peck, the Cheyenne River Sioux Tribe, the Crow Creek Sioux Tribe, the Flandreau Santee Sioux Tribe, the Lower Brulé Sioux Tribe, the Lower Sioux Indian Community, the Oglala Sioux Tribe, the Prairie Island, the Rosebud Sioux Tribe, the Santee Sioux Tribe, the Shakopee Mdewakanton Sioux Community, the Sisseton-Wahpeton Dakota Nation, the Spirit Lake Sioux Tribe, the Standing Rock Sioux Tribe, the Upper Sioux Indian Community, and the Yankton Sioux Tribe.

182. JAMES R. WALKER, *LAKOTA SOCIETY* 15 (Raymond J. DeMallie ed., 1982); see also Herbert T. Hoover, *Sioux Federation*, in *NATIVE AMERICA IN THE TWENTIETH CENTURY: AN ENCYCLOPEDIA* 600 (Mary B. Davis ed., 1994).

183. *Id.* at 14.

184. EDWARD LAZARUS, *BLACK HILLS, WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES, 1775 TO THE PRESENT* 4 (1991).

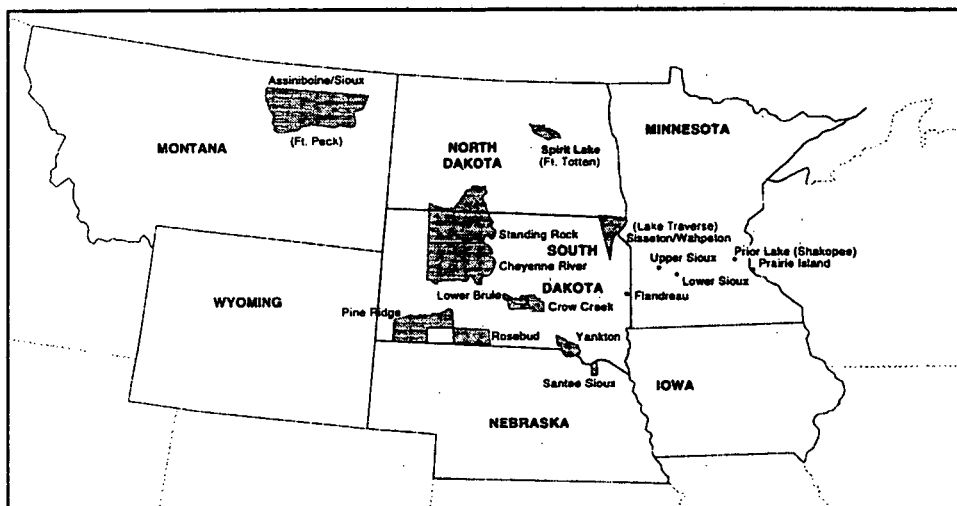
185. SAMUEL W. POND, *THE DAKOTA OR SIOUX IN MINNESOTA AS THEY WERE IN 1834*, at 4 (1986).

186. WALKER, *supra* note 182, at 15. The name *Oceti Sakowin* is a contraction of the phrase *Ocetiyoṭipi Sakowin*, which means "Seven Council Fires." *Id.* The *Dakota*, also known as the *Santee* or *Isanti* ("Stone Knife People"), comprise four of the seven Council Fires: the *Mdewakanton* ("People of Spirit Lake"), the *Sisitonwan* ("People of the Swamp"), the *Wahpekute* ("Leaf Shooters"), and the *Wahpetonwan* ("Dwellers among the Leaves"). *ENCYCLOPEDIA OF NORTH AMERICAN INDIANS* 590 (Frederick E. Hoxie ed., 1996). The *Nakota*, also known as the *Yankton* or *Yanktonai*, comprise two additional Council Fires: the *Ihanktonwan* ("Campers at the End") and the *Ihanktonwanna* ("Little Campers at the End"). *Id.* The *Assiniboinés* ("Cook with Stones"), although not one of the original Seven Council Fires, later became associated with the *Nakota*. *Id.* The *Lakota*, also known as the *Teton* ("People of the Prairie") or *Pte Oyate* ("Buffalo People"), are the Seventh Council Fire, and they, in turn, are comprised of seven subdivisions or bands: the *Hunkpapas* ("Those Who Camp at the Entrance"), the *Itazipcos* ("Without Bows" or "Sans Arcs"), the *Miniconjou* ("Those Who Plant by the Stream"), the *Oglala* ("Scatter One's Own"), the *Oohenumpas* ("Two Boilings" or "Two Kettles"), the *Sichangu* ("Burnt Thighs"), and the *Siha Sapas* ("Black Feet"). *Id.* at 591.

187. ROYAL B. HASSRICK, *THE SIOUX: LIFE AND CUSTOMS OF A WARRIOR SOCIETY* 7 (1964).

188. Treaty with the Sioux-Brulé, Oglala, Miniconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee and Arapaho, 1868, 15 Stat. 635, 635 (1869), reprinted in II CHARLES J. KAPPLER, *INDIAN AFFAIRS: LAWS AND TREATIES* 998 (1904). The Treaty, which was signed by representatives of all three divisions of the Sioux Nation, set aside nearly all of South Dakota west of the Missouri River as the "permanent home" of the Sioux Nation. *Id.* art. 15. That treaty was understood by contemporary observers as one in which "the [U.S.] government ha[d]...negotiated a peace conceding everything demanded by the enemy and exacting nothing in return." *United States v. Sioux Nation*, 448 U.S. at 376 n.4 (quoting D. ROBINSON, *A HISTORY OF THE DAKOTA OR SIOUX INDIANS* 356-81 (1904), reprinted in 2 *SOUTH DAKOTA HISTORICAL COLLECTIONS* (1904)). The United States later intruded the territory of the Sioux Nation in violation of the Treaty of 1868. The Nation gathered at Little

1868,<sup>189</sup> all three divisions of the Sioux Nation fought for redress for over a century, eventually winning the largest Indian claims judgment ever awarded against the United States.<sup>190</sup> The tribes of the Sioux Nation have twice come together to defeat state claims to jurisdiction in Indian country.<sup>191</sup> Although divided on separate reservations<sup>192</sup> (see Map 1<sup>193</sup>), the tribes still function, in a very real sense, as a confederacy.



**Map 1. Contemporary Sioux Reservations in the United States**

Big Horn to defend its people and its lands. Sitting Bull was recognized as the head chief of the encampment at Little Big Horn. Sitting Bull and the Sioux defeated Custer and his army in the so-called "Great Sioux War," and, thereafter, the United States entered an Agreement with "the Sioux Nation of Indians," wherein Congress pledged to "secure to them an orderly government." Act of Feb. 28, 1877 (19 Stat. 254). The Supreme Court later ruled that the form of government pledged to the Sioux Nation was "the highest and best of all—that of self-government." *Ex Parte Crow Dog*, 109 U.S. 556, 568 (1883).

189. In the Act of 1877, the United States took the Black Hills and other Sioux Nation hunting lands. Act of Feb. 28, 1877 (19 Stat. 254).

190. In 1978, Congress authorized the Sioux Nation to sue the United States to determine "whether or not the United States took the Black Hills area from the Sioux Nation in violation of the Fifth amendment of the Constitution...." House Rep. 95-529, 1978 U.S.C.A.A.N. 433; see Pub. L. 95-243, 92 Stat. 153 (1978). In the ensuing litigation, the Supreme Court recognized that, "[f]or over a century now, the Sioux Nation has claimed that the United States unlawfully abrogated" the Treaty of 1868 by taking the Black Hills, and upheld the largest Indian claims judgment ever awarded. *United States v. Sioux Nation*, 448 U.S. at 374. The tribes of the Sioux Nation stand together in refusing this money judgment and continuing to seek the return of the Black Hills. LAZARUS, *supra* note 184, 427-28. The value of the judgment, with interest, now exceeds \$570 million. See Frederic J. Frommer, *Sioux Indians Want Land, Not Millions; Impoverished Tribe Won't Settle for Government Ownership of Black Hills*, WASH. POST, Oct. 14, 2001, at A2.

191. In the 1960s, the tribes of the Sioux Nation united to defeat a South Dakota referendum asserting state jurisdiction over reservations under Public Law 280, *supra* note 174. The Rosebud, Oglala, Standing Rock, and Cheyenne River Sioux tribes preserved that victory when the State sought to assert jurisdiction over state highways running through Indian country. *Rosebud Sioux Tribe v. State of South Dakota*, 900 F.2d 1164 (1990), *cert. denied*, 500 U.S. 915 (1991).

192. The Act of 1889 divided what remained of the Great Sioux Reservation into separate reservations. Act of Mar. 2, 1889 (25 Stat. 888). Lands outside those six reservations were ceded upon consent of two-thirds of the adult males of the "the different bands of the Sioux Nation of Indians." *Id.* § 28.

193. Adapted from *NATIVE AMERICA IN THE TWENTIETH CENTURY*, *supra* note 182, at 600. This map depicts the Yankton Sioux Reservation in South Dakota as it was before the Supreme Court ruled in 1998 that Congress intended to diminish the reservation's boundaries when, in 1894, it enacted legislation authorizing the sale of tribal lands. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); see Act of Aug. 15, 1894 (28 Stat. 286).

In the constitutions of the various Sioux tribes, adopted under the Indian Reorganization Act of 1934<sup>194</sup> and approved by the Secretary of the Interior, the tribes acknowledged that they would continue to meet in their "National Sioux Council."<sup>195</sup> In 1994, various tribes of the Sioux Nation established the Dakota Territory Chairmen's Council (DTCC), an inter-tribal legislative body that serves as the modern day National Sioux Council. Thirteen Sioux tribes have signed onto the charter of the DTCC,<sup>196</sup> as have three non-Sioux tribes.<sup>197</sup> All three divisions of the Sioux Nation are represented in the DTCC. Elected tribal leaders represent their people at Council meetings to discuss and resolve matters of national concern. The DTCC has developed resolutions, compacts, and accords on intertribal issues.

The Sioux tribes have resolved to create a Sioux Nation Supreme Court, which will serve as the highest appellate court for many, if not all, of the constituent tribes of the Sioux Nation.<sup>198</sup> The DTCC has been instrumental in the tribes' efforts to create the court,<sup>199</sup> as has been the *Wakpa Sica* Historical Society.<sup>200</sup> In 2000, Congress passed legislation authorizing the creation of a Sioux Nation Judicial Support Center and Sioux Nation Supreme Court.<sup>201</sup> Among other things, Congress

194. 25 U.S.C. §§ 461-79 (2000) (codifying 48 Stat. 984).

195. See, e.g., CHEYENNE RIVER SIOUX CONST. & BY-LAWS, art. XIII (Dec. 27, 1935).

196. The tribes are as follows: the Cheyenne River Sioux Tribe, the Crow Creek Sioux Tribe, the Flandreau Santee Sioux Tribe, the Lower Sioux Indian Community, the Oglala Sioux Tribe, the Prairie Island Sioux Community, the Rosebud Sioux Tribe, the Shakopee Mdewakanton Sioux Tribe, the Sisseton-Wahpeton Dakota Nation, the Spirit Lake Sioux Tribe (ND), the Standing Rock Sioux Tribe, the Upper Sioux Indian Community (MN), and the Yankton Sioux Tribe. See Dakota Territory Chairmen's Council Charter (on file with author).

197. The tribes are as follows: the Ponca Tribe, the Three Affiliated Tribes (Mandan, Hidatsa, and Arikara) of the Fort Berthold Reservation, and the Turtle Mountain Chippewa. See DTCC Charter, *supra* note 196.

198. The supreme court is designed to address problems created by the division of the Sioux Nation into separate tribes. Although united by tradition, history, culture, and now the DTCC, the various Sioux tribes occupy separate reservations and have separate and distinct legal systems. At present, the tribes lack a judicial forum for resolution of cases and controversies of inter-tribal importance.

199. Pursuant to its charter, the DTCC has the authority to establish such a court: "If the need arises to provide greater uniformity in the application and the enforcement of the acts, resolutions, and compacts of the Dakota Territory Chairmen's Council, the Dakota Territory Chairmen's Council may propose to establish the supreme court of the Dakota Territory." DTCC Charter, *supra* note 196, art. VI, § 3 (on file with author). Ratification by a majority of the individual Sioux tribes in the DTCC is required to establish the supreme court, and only those tribes that ratify the court will be subject to its jurisdiction. *Id.*

200. The *Wakpa Sica* Historical Society has been described as a group of interested and committed local individuals, both Indian and non-Indian, from in and around the Fort Pierre, South Dakota area who have been interested, for almost a decade, in seeking to initiate a project committed to the theme of reconciliation and building on the largely peaceful commercial and cultural exchange of the nineteenth century between Indians and non-Indians within the territory of the Great Sioux Nation.

Frank Pommersheim, *Looking Forward and Looking Back: The Promise and Potential of a Sioux National Judicial Support Center and a Sioux Nation Supreme Court*, 34 ARIZ. ST. L.J. 269, 270 n.2 (2002). For a report of the Society's efforts to aid in the creation of the Sioux Nation Supreme Court, see Frank Pommersheim & John P. LaVelle, *Wakpa Sica Historical Society Reconciliation Place Project: Intermediate Planning and Recommendation Report* (2000), available at [http://www.wakpasica.org/pdf\\_files/2000usd\\_and\\_report.pdf](http://www.wakpasica.org/pdf_files/2000usd_and_report.pdf) (last visited Sept. 5, 2004); Frank Pommersheim & John P. LaVelle, *Wakpa Sica Historical Society Reconciliation Place Project: Intermediate Planning and Development Report for a Sioux Nation Judicial Support Center and Supreme Court* (2002) [hereinafter *Wakpa Sica Intermediate Planning and Development Report*], available at [http://www.wakpasica.org/pdf\\_files/2002\\_usd\\_report\\_summary.pdf](http://www.wakpasica.org/pdf_files/2002_usd_report_summary.pdf) (last visited Sept. 5, 2004); and Frank Pommersheim & John P. LaVelle, *Toward a Great Sioux National Judicial Support Center and Supreme Court: An Interim Planning and Recommendation Report for the Wakpa Sica Historical Society's Reconciliation Place Project*, 17 WICAZO SA REV. 183 (2002).

201. *Wakpa Sica Reconciliation Place, Omnibus Indian Advancement Act of 2000*, Pub. L. No. 106-568, 114 Stat. 2903.



has authorized funding to aid in the "development and operation of the Sioux Nation Tribal Supreme Court,"<sup>202</sup> which will be located on off-reservation tribal trust land in Fort Pierre, South Dakota.<sup>203</sup>

Once formed, the Sioux Nation Supreme Court will serve many important purposes. It will draw upon the historic unity of the Sioux Nation to promote intertribal justice and to resolve issues affecting the entire Sioux Nation.<sup>204</sup> It has been said that the "creation of a Sioux Nation Supreme Court...will add a valuable layer of judicial review and support to the existing tribal judiciaries (including appellate courts) of the participating tribes."<sup>205</sup> The court "seeks to join together historically and culturally connected tribes in a way that is consistent with pre-contact affiliation and relatedness."<sup>206</sup>

Through the creation of the DTCC and Sioux Nation Supreme Court, the constituent tribes of the Sioux Nation are renewing their confederated, national government. If realized, the Sioux national government will expand the jurisdiction of all sixteen modern day Sioux tribes to include all Sioux Indians, regardless of their individual tribal affiliations. All Sioux Indians will be members of the Sioux national government and will have a full right to participate in that government. The inclusion of all Indians within the self-government of the Sioux Nation will provide a basis for all Sioux tribes to exercise jurisdiction over all Sioux Indians.<sup>207</sup>

With renewed jurisdiction over all Sioux Indians, each Sioux tribe will be able to recognize and enforce foreign judgments against Sioux Indians. For example, if in the hypothetical presented in part II.B, *supra*, Adams and Baker were members of sister Sioux tribes, Baker would be able to enforce her \$1,000,000 judgment against Adams in the courts of any Sioux tribe.

The Sioux tribes may utilize full faith and credit or comity to recognize and enforce the judgments of each other's tribal courts. The choice rests with the tribes themselves. Full faith and credit would involve a significant cession of independence and authority by each tribe, while comity would preserve the right of each tribe

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202. *Id.* § 412(a).

203. The land consists of thirteen acres donated by Stanley County, South Dakota, to the Wakpa Sica Historical Society and placed in trust for the Sioux Nation. Frank Pommersheim, *Reconciliation Place Project Will Foster Understanding Between Races*, ARGUS LEADER, Feb. 10, 2002, at 13B. The Sioux Nation Supreme Court will be housed in a 66,000 square-foot complex on this land called the "Wakpa Sica Reconciliation Place." Terry Woster, *Tribes Bless Center for Culture, Justice*, ARGUS LEADER, July 11, 2002, at 1B. The complex will also be home to a cultural center, an interpretive center, and a mediation office. *Id.* The first stage of the project, the cultural center, is scheduled to be completed in 2004. *Id.*

204. According to the DTCC:

The Court will draw upon and maintain the historic unity of the tribes of the Sioux Nation in order to promote inter-tribal justice in today's world and to resolve issues affecting the entire Sioux Nation. The Court will strengthen the competency of the tribal court systems of the constituent tribes and increase public confidence in those courts. It will also provide a forum for conflict resolution between the constituent tribes on issues of inter-tribal importance; establish uniform principles of common law linking traditional customs with modern law in a culturally meaningful way; uniformly apply the legislative enactments, compacts, and accords of the DTCC; and foster inter-tribal collaboration in the creation of laws dealing with issues of inter-tribal importance, such as child custody and domestic violence.

Dakota Territory Chairmen's Council Resolution (1994) (on file with author).

205. Wakpa Sica Intermediate Planning and Development Report, *supra* note 200, at 4-5.

206. *Id.*

207. *Cf. Duro*, 495 U.S. at 694.

to refuse recognition to a sister Sioux tribal court order in the event, unlikely as it might be, that the order offended the public policy of the enforcing tribe. Policy conflicts between tribes could be reduced considerably through enactment of intertribal resolutions expressing common Sioux policy regarding select issues or remedies.<sup>208</sup>

The creation of a confederate government uniting all Sioux tribes involves both the alteration of the governmental structure of each existing tribe and a cession of power by those tribes to the new, confederated tribal authority.<sup>209</sup> Both measures arguably would require the amendment of each tribe's constitution, which in turn may require the approval of the Secretary of the Interior and approval by a majority of adult tribal members voting in tribal referenda.<sup>210</sup> Separate federal recognition of the national, confederate Sioux government may also be required, unless the confederacy can be created by amending the existing constitutions of the sixteen federally recognized Sioux tribes. In the case of the Sioux, one may argue that the national Sioux government has historically been recognized by Congress and the Executive Branch and affirmed by the Judiciary.<sup>211</sup>

### *B. The Minnesota Chippewa Tribe*

The Minnesota Chippewa Tribe is a confederate tribal government similar to that which the Sioux Nation strives to renew and formalize. The Minnesota Chippewa Tribe is a federally recognized Indian tribe<sup>212</sup> that serves as the central governing body for six constituent Chippewa (or Ojibwe<sup>213</sup>) bands. Each band occupies its own reservation and has been separately recognized by the federal government.<sup>214</sup> The

208. Alternately, the tribes could impose full faith and credit selectively, only in respect to those matters over which there is no inter-tribal public policy conflict.

209. The extent of the cession depends on the needs and desires of the confederated tribes.

210. Such requirements have been hallmarks of federal legislation allowing tribes to alter the structures of their governments, *see, e.g.*, Indian Reorganization Act, 25 U.S.C. § 476(a)(1), or to cede tribal jurisdiction to the states, *see, e.g.*, Public Law 280, 25 U.S.C. § 1332. Federal law provides that tribes organized under the Indian Reorganization Act (IRA) may amend their constitutions with the approval of the Secretary of the Interior, by majority vote of adult tribal members, provided that the total vote cast is at least thirty percent of all eligible voters. 25 U.S.C. § 476(a)(1); 25 C.F.R. § 81.7. Federal law also provides that the Secretary of the Interior has the power to approve (or disapprove) amendments to the constitutions of non-IRA tribes. 25 U.S.C. § 2. The requirement of secretarial approval of tribal constitutional amendments has been criticized as a "significant obstacle to true Indian self-determination." Timothy W. Joranko & Mark C. Van Norman, *Indian Self-Determination at Bay: Secretarial Authority to Disapprove Tribal Constitutional Amendments*, 29 GONZ. L. REV. 81, 84 (1993/1994).

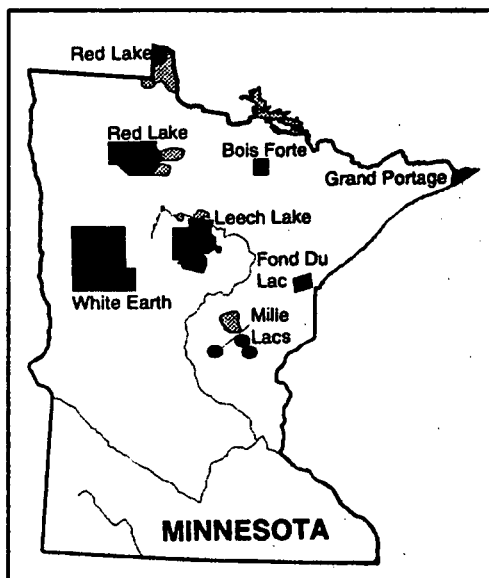
211. All three branches of the federal government have recognized the continuing existence of the Sioux Nation. The Supreme Court did so in *United States v. Sioux Nation*, 448 U.S. 371, and in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). *Id.* at 589. Congress recognized the Sioux Nation in the Treaty of 1868, the Act of 1877, the Act of 1889, and the 1978 legislation authorizing the nation to sue the United States over the taking of the Black Hills. *See supra* notes 188–192 and accompanying text. The executive branch, through the Secretary of the Interior, continues to recognize the existence of a Sioux national government. *See supra* note 195 and accompanying text.

212. Bureau of Indian Affairs, Department of the Interior, *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 68 Fed. Reg. 68,180, 68,182 (Dec. 5, 2003).

213. The name Ojibwe "is generally interpreted as 'To Roast Till Puckered Up,' referring to the puckered seams of moccasins....Chippewa, widely used in treaties and other official documents, is a corruption of the early spellings Ojibway or Otchipwe." Paulette Fairbanks Moulin, *Ojibway in Minnesota*, in *NATIVE AMERICA IN THE TWENTIETH CENTURY: AN ENCYCLOPEDIA* 398 (Mary B. Davis ed., 1994). Today, the names Ojibwe and Chippewa are both used.

214. *Id.*

six member bands are the Bois Forte Band of Chippewa Indians, the Fond du Lac Band, the Grand Portage Chippewa, the Leech Lake Band of Ojibwe, the Mille Lacs Band of Ojibwe, and the White Earth Nation. (See Map 2.<sup>215</sup>) The strength of their union is reflected in the maxim of the Minnesota Chippewa Tribe: "Ni-Mah-Mah-Wi-No-Min," meaning, "We all come together."



**Map 2. Contemporary Chippewa Reservations in Minnesota**

The Minnesota Chippewa Tribe describes its formation, constitution, and powers as follows:

In response to the need for a central Tribal government, the various Bands of Chippewa Indians residing within the Fond du Lac, Grand Portage, Bois Forte, Leech Lake, Mille Lacs, and White Earth Reservations united to form the Minnesota Chippewa Tribe. The Minnesota Chippewa Tribe was established on June 18, 1934. The structure and Constitution adopted for the governance of the Tribe was recognized by the Secretary of the Interior on July 24, 1936, pursuant to the authority granted by the Indian Reorganization Act, 48 Stat. 984. Status as a Tribal Government provides the Minnesota Chippewa Tribe with broad powers, ensuring various immunities for the Tribe and its individual members. Powers include those of self-governance granted by the Indian Reorganization Act. Immunities include the right to be free from State interference within the six member reservations....All governmental powers of the Minnesota Chippewa Tribe are delegated by its Constitution to the Tribal Executive Committee

215. Adapted from *Native America in the Twentieth Century*, *supra* note 182, at 397. The Red Lake Band of Chippewa Indians, the seventh and final Chippewa tribe in Minnesota, is not a member of the Minnesota Chippewa Tribe. *Id.* at 398.

and the respective Reservation Tribal Councils. While the Constitution of the Tribe recognizes the autonomy of the individual reservations over property and other matters solely affecting a single reservation, the Constitution also grants the Tribal Executive Committee broad powers over tribal property and affairs. In essence, each member of the Tribe has dual membership: tribal [in the Minnesota Chippewa Tribe] and reservation [in one of the six constituent bands]. The constitutional distribution of powers reflects this fact.<sup>216</sup>

Under its constitution, the Minnesota Chippewa Tribe has formed a court of appeals, which has jurisdiction over select appeals from the courts of the six bands based on grants of jurisdiction from the bands.

The Minnesota Chippewa Tribe is a "representative group that governs all eligible Minnesota Chippewa Indians."<sup>217</sup> Members of each of the six constituent bands elect representatives to the tribe, which, in turn, is vested with significant authority to govern the affairs of the bands and their members:

The six member reservations of the MCT sought a single consolidated tribal government without relinquishing governance at the local level. Each member reservation elects its own tribal council, generally called a Reservation Business Committee, which governs locally as well as provides representation to the consolidated organization, which is governed by a Tribal Executive Committee. The MCT governing body has the power to administer funds, manage tribal resources, enter into contracts with individuals or organizations, pass laws regulating the use of lands under its jurisdiction, and conduct other business to promote the interests of tribal members.<sup>218</sup>

The existence of an intertribal, national Chippewa government expands the jurisdiction of each constituent Chippewa band to include all Chippewa Indians:

[S]ince the Minnesota Chippewa Tribe governs all the reservations in Minnesota, a Chippewa Indian who is enrolled as a member of the Leech Lake Band would be placed in the same membership category as an enrolled member of the White Earth Band. Under this scenario, all Chippewa Indians who are enrolled at their respective local reservations are in fact members of a larger entity, and as such would be considered "member" Indians for jurisdiction purposes.<sup>219</sup>

This expansion of jurisdiction opens the door for effective intertribal enforcement of tribal court orders against Chippewa band members. As yet, the Chippewa bands have not adopted uniform laws concerning the enforcement of tribal court judgments across reservation borders. For example, the White Earth band employs comity in its enforcement of the judgments of other tribal courts, including other Chippewa

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216. Minnesota Chippewa Tribe, *A Brief History* (2000), available at [http://www.mnchippewatribe.org/a\\_brief\\_history.htm](http://www.mnchippewatribe.org/a_brief_history.htm) (last visited Apr. 29, 2004); see Minn. Chippewa Tribe, Revised Const. & By-Laws (Nov. 6, 1972), available at [http://www.tribalresourcecenter.org/ccfolder/chippewa\\_constandbylaws.htm](http://www.tribalresourcecenter.org/ccfolder/chippewa_constandbylaws.htm) (last visited May 6, 2004).

217. Emmerson H. Ward, *Sovereignty Revisited: The Dilemma with State Jurisdiction over Nonmember Indians in State v. R.M.H.*, 617 N.W.2d 55 (Minn. 2000), 24 HAMLINE L. REV. 251, 283 (2001).

218. Moulin, *supra* note 213, at 398.

219. *Id.*

courts,<sup>220</sup> while the Mille Lacs Band employs full faith and credit.<sup>221</sup> However, the potential exists for the enactment of such uniform laws and the development of a model system for cross-boundary enforcement of tribal court decisions.

### C. Other Intertribal Governing Bodies

Other groups of historically aligned tribes have united in the formation of intertribal governing bodies. Among them are the Haudenosaunee (Iroquois) Confederacy, which traditionally has united the Cayuga, Onondaga, Oneida, Mohawk, Seneca, and Tuscarora Nations in New York State;<sup>222</sup> the Intertribal Council of the Five Civilized Tribes (ICFCT), which unites the Chickasaw, Choctaw, Cherokee, Muscogee (Creek), and Seminole Nations in Oklahoma;<sup>223</sup> and the All Indian Pueblo Council (AIPC) in New Mexico, which unites the nineteen Indian Pueblos in New Mexico.<sup>224</sup>

The extent to which these bodies function as centralized governments for their member tribes varies considerably. For example, the Haudenosaunee Confederacy served for centuries as the centralized government for the Six Iroquois Nations. Historically, each nation retained authority to manage its own affairs, while the Haudenosaunee Grand Council, comprised of representatives from all six nations, legislated on matters of intertribal importance.<sup>225</sup> However, the governments of the Mohawks, Oneidas, and Senecas no longer participate fully in the Grand Council,<sup>226</sup> and increasing factionalism between and among the Six Nations<sup>227</sup> has caused some

220. See *supra* note 81.

221. See *supra* note 113.

222. For detailed descriptions of the Haudenosaunee and its historic and contemporary structure, see Official Homepage of the Haudenosaunee, at <http://sixnations.buffnet.net> (last visited July 12, 2004); Symposium, *Law, Sovereignty, and Tribal Governance: The Iroquois Confederacy*, 46 BUFF. L. REV. 799 (1998); and DONALD A. GRINDE, JR., & BRUCE E. JOHANSEN, *EXEMPLAR OF LIBERTY: NATIVE AMERICA AND THE EVOLUTION OF DEMOCRACY* (1991).

223. The ICFCT was formed in 1949 and continues to function today. See ICFCT, *History of the Inter-tribal Council of the Five Civilized Tribes*, available at <http://www.fivecivilizedtribes.org/itchist.asp> (last visited Sept. 5, 2004).

224. The AIPC, described as an "ancient cooperative body of the Pueblo people," has struggled for centuries to protect the rights of Pueblo Indians from encroachment by non-Indians. See JOE S. SANDO, *PUEBLO NATIONS: EIGHT CENTURIES OF PUEBLO INDIAN HISTORY* 97 (1992). For a brief history of the AIPC, see *id.* at 263.

225. Brian Patterson, *Preserving the Oneida Nation Culture*, 13 ST. THOMAS L. REV. 121, 121 n.1 (2000). The Grand Council continues to address issues of concern to the people of all six nations. See Robert B. Porter, *Building a New Longhouse: The Case for Government Reform within the Six Nations of the Haudenosaunee*, 46 BUFF. L. REV. 805, 883-88 (1998); see also Haudenosaunee Six Nations of Iroquois (Confederacy) of N. Am. v. Niagara Mohawk Power Corp., No. 98-CV-0112E(H), 1999 WL 528822 (W.D.N.Y. 1999) (suit brought by Haudenosaunee to redress alleged violations of Boundary Waters Treaty of 1909).

226. Unlike the Onondaga, Cayuga, and Tuscarora Nations, which "have maintained undivided participation in the Confederacy," the Mohawks, Oneidas, and Senecas have "developed alternative forms of government." Porter, *supra* note 225, at 884. These alternative governments are "not considered part of the Grand Council." *Id.* at 885. They include "the Seneca Nation of Indians, the Mohawk Tribal Council, the People's government of Akwesasne, the Oneida Nation government of Ray Halbritter and Six Nations Band Council at Ohsweken, the Oneida Band Council at Southwold, the elected Mohawk governments at Oka, Deseronto, Gibson, Cornwall Island and Kanawake and Oneida Nation of Wisconsin." *Id.* at 884-85.

227. The fact that the alternative governments of the Mohawks, Oneidas, and Senecas operate outside the Confederacy has "generated considerable friction over the years." *Id.* at 885. Indeed, it has been said that "[f]actionalism, rather than nationalism, has become the defining characteristic of modern Haudenosaunee society." *Id.* at 888-89.

skeptics to question the vitality of the Haudenosaunee Confederacy in its present state.<sup>228</sup>

By contrast, the All Indian Pueblo Council enjoys broad support from its members but has limited legislative authority. Among other things, it has the power to conduct educational campaigns, negotiate with other governments, promote and foster programs for the benefit of the member pueblos, apply for loans and grants, and "do whatever else may be necessary or desirable to promote the general welfare of any or all member-pueblos."<sup>229</sup> But the Council's constitution expressly provides that, "[i]n carrying out these powers, the All Indian Pueblo Council and officers will not interfere with the self-government of any member-pueblo."<sup>230</sup> Thus, it is not at all clear that the Council unites its members under a single, confederated government or that it expands the jurisdictional reach of each pueblo to include the members of every other pueblo. The Council, as presently constituted, does not appear to involve a delegation of jurisdiction or governmental authority from each member pueblo to the central body.

Other tribes *have* delegated their inherent jurisdiction to various intertribal governing bodies. There are several intertribal courts in the United States, including the Intertribal Court of California (ICC),<sup>231</sup> Northern Plains Intertribal Court of Appeals (NPICA),<sup>232</sup> and Southwest Intertribal Court of Appeals (SWITCA),<sup>233</sup> each of which operates through an express delegation of jurisdiction from its member tribes.<sup>234</sup> In addition, various tribes have delegated their own governing authority to

228. Professor Porter has noted that the *Haudenosaunee* Confederacy is "afflicted with...a great degree of division and dysfunction." *Id.* at 890. This has contributed, in Porter's view, to an erosion of traditional *Haudenosaunee* law, the weakening of tribal government, and a loss of sovereignty. *See id.* at 912-26. Porter has proposed substantial reforms to the *Haudenosaunee* government. *See id.* at 936-45.

229. ALL INDIAN PUEBLO COUNCIL CONST. art. IV, § 1(a)-(j), reprinted in SANDO, *supra* note 224, at 265-68.

230. ALL INDIAN PUEBLO COUNCIL CONST. art. IV, § 2, *supra* note 229, at 266.

231. The ICC serves the following nine tribes in California: the Cahto Tribe of Laytonville Rancheria, the Coyote Valley Rancheria, the Dry Creek Rancheria, the Guidiville Indian Rancheria, the Lytton Rancheria, the Pinoleville Indian Reservation, the Redwood Valley Reservation, the Sherwood Valley Rancheria, and the Stewarts Point Rancheria. *See* <http://www.intertribalcourt.indian.com> (last visited July 12, 2004). The court describes itself as one of "limited jurisdiction authorized by an intertribal governing agreement." *Id.* The court "will exercise jurisdiction over cases involving on-reservation housing disputes (eviction cases) and cases involving the welfare of the children of member tribes. The enrolled members of the consortium tribes and other interested parties may also submit cases to the court mediation services for resolution." *Id.*

232. The NPICA serves as an appellate court for the Three Affiliated Tribes of the Fort Berthold Indian Reservation, the Sisseton-Wahpeton Sioux Tribe, and other plains tribes. *See, e.g.,* *Strate v. A-1 Contractors*, 520 U.S. 438, 444 (1997) (noting that respondent appealed unfavorable ruling of Fort Berthold tribal court to NPICA); Sisseton-Wahpeton Sioux Tribe, Codes of Law § 21-02-01 (1998), available at [http://www.tribalresourcecenter.org/ccfolder/sisseton\\_wahpeton\\_codeoflaw21.htm](http://www.tribalresourcecenter.org/ccfolder/sisseton_wahpeton_codeoflaw21.htm) (last visited Sept. 5, 2004) (providing that NPICA shall serve as one of tribe's two appellate courts).

233. The SWITCA serves various tribes in Arizona, Colorado, New Mexico, and Texas. Tribes participate on a voluntary basis, referring cases to the court at their discretion. *See* American Indian Law Center, *Southwest Intertribal Court of Appeals*, available at <http://lawschool.unm.edu/AILC/switca> (About SWITCA) (last visited Sept. 5, 2004). Each participating tribe may use the court as "(1) an independent court of last resort which exercises the appellate powers of the tribe; (2) an independent appellate court which issues advisory opinions, only; or (3) an independent intermediate appellate court from which any party may appeal to a higher court as defined by the joining tribe." AILC, *Southwest Intertribal Court of Appeals*, available at <http://lawschool.unm.edu/AILC/switca> (last visited Sept. 5, 2004).

234. Although not itself a court, the Northwest Intertribal Court System (NICS) is an intertribal organization that provides court services and personnel to the individual tribal courts of its members in the Puget Sound Region of the Pacific Northwest. *See* O'Connor, *supra* note 57 at 4. The member tribes of the NICS (listed alphabetically)

intertribal commissions of their own creation. For example, the Yakama, Umatilla, Nez Perce, and Warm Springs Tribes have delegated their authority to manage their treaty-protected salmon fisheries to the Columbia River Inter-Tribal Fish Commission, an intertribal government organization that consists of the fish and wildlife committees of its member tribes.<sup>235</sup> In the 1980s, the United States, Idaho, Oregon, and Washington granted the Commission primary responsibility for the enforcement of federal, state, and tribal laws governing treaty fisheries and non-Indian fisheries on- and off-reservation, thus significantly "extending the reach of tribal sovereignty."<sup>236</sup>

These intertribal bodies suggest the willingness of tribes to unite for common purposes. For intertribal governments, the whole is often greater than the sum of the parts. That is to say, while such unions may involve a reduction in individual tribal autonomy, they have the potential to enhance the collective sovereignty of the united tribes.

The formation of intertribal governing bodies may prove to be an effective means for tribes to reassert their authority over members of allied and affiliated tribes, thus providing a basis for the enforcement of tribal laws, and tribal court judgments, across reservation boundaries.

## V. INTERTRIBAL RECIPROCITY COMPACTS

In *Duro v. Reina*, the Court held that tribes did not, under then prevailing federal Indian policy, have the inherent authority to prosecute nonmember Indians for crimes committed within their territories.<sup>237</sup> However, the Court was careful to note that "[o]ur decision here also does not address the ability of neighboring tribal governments that share law enforcement concerns to enter into reciprocal agreements giving each jurisdiction over the other's members."<sup>238</sup> For those tribes that do not wish to enter into intertribal governing bodies, reciprocal agreements of the type the Court suggests may be one of the last, best options for Indian tribes to assert and preserve their authority over all Indians within their boundaries.

Such agreements involve the reciprocal delegation between tribes of each tribe's inherent authority over its own members. Despite the limits placed on tribal jurisdiction by Congress and the courts, it has never been doubted that tribes retain broad powers of inherent sovereignty over their own members.<sup>239</sup> Nor can it be

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are as follows: the Confederated Tribes of the Chehalis Reservation (the Chehalis Tribe), the Jamestown S'Klallam Indian Tribe, the Muckleshoot Indian Tribe, the Port Gamble S'Klallam Indian Tribe, the Sauk-Suiattle Indian Tribe, the Shoalwater Bay Indian Tribe, the Skokomish Indian Tribe, the Stillaguamish Indian Tribe, and the Tulalip Indian Tribe. See NICS, *Membership Information*, available at <http://www.nics.ws/membershiplink.html> (last visited July 12, 2004).

235. HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, HONORING NATIONS: TRIBAL GOVERNANCE SUCCESS STORIES 9-10 (2002).

236. *Id.* at 12.

237. *Duro*, 495 U.S. at 691, 694.

238. *Id.* at 697. It is not clear what the Court meant by "neighboring tribal governments," since few reservations adjoin one another. See, e.g., Maps 1 and 2, *supra*. However, there is no reason to believe that non-neighboring tribes cannot enter into agreements concerning the reciprocal delegation of jurisdiction over their members.

239. See, e.g., *Wheeler*, 435 U.S. at 326.

doubted that tribes, like other sovereigns, can, with the consent of their members, delegate those powers to other governments, including other tribal governments.

Intertribal reciprocity compacts may be appropriate for tribes that share common histories and values. For example, each of the sixteen modern day Sioux tribes acknowledges the reciprocal jurisdiction of every other Sioux tribe over its tribal members. As one Rosebud Sioux Tribal Council Representative explained:

There is unanimity among Sioux tribes that members of other Sioux tribes within their territory are subject to tribal self-government, including tribal criminal jurisdiction. Accordingly, just as our sister Sioux tribes respect our tribal self-government authority over their members within the Rosebud Sioux Reservation, we respect the corresponding authority of sister Sioux tribes over our tribal members within their territory.<sup>240</sup>

Other groups of tribes, including those without long histories of kinship, alliances, or unity, have also come together to develop uniform policies regarding the reciprocal, inter-jurisdictional enforcement of tribal court orders. Indeed, in the area of domestic violence, thirteen Sioux tribes and three non-Sioux tribes, including the Turtle Mountain Band of Chippewa Indians,<sup>241</sup> have begun working together to "develop uniform laws and policies for all the tribes regarding the mandatory arrest and prosecution of primary aggressors in domestic violence cases."<sup>242</sup> The tribes have also worked together to develop and implement "a computer network to link all the tribes" in order to assist tribal courts and law enforcement agencies in enforcing protection orders across reservation boundaries.<sup>243</sup> The Sioux and Chippewa were historic enemies, having fought one another for the rich hunting grounds of the northern plains.<sup>244</sup>

Throughout the United States, tribes have united in numerous intertribal councils, associations, and organizations. Many of these coalitions are based on traditional alliances and shared histories, while others are based on geographic proximity or contemporary exigencies. Together they include the Affiliated Tribes of Northwest Indians (ATNI),<sup>245</sup> the Alabama Intertribal Council (AIC),<sup>246</sup> the Alaska Inter-Tribal

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240. Affidavit of Paul Valandra in *Rosebud Sioux Tribe v. Viken*, No. CIV-94-3039 (D.S.D. filed Oct. 3, 1994) (on file with author).

241. The sixteen tribes in question are the member tribes of the Dakota Territory Chairmen's Council, listed *supra* at notes 196 and 197. See Office of Justice Programs, ENSURING PUBLIC SAFETY AND JUSTICE IN RURAL AMERICA 12 (1998), available at <http://www.ojp.usdoj.gov/reports/98Guides/rural/> (last visited Sept. 6, 2004).

242. *Id.*

243. *Id.*

244. Indeed, the name "Sioux," given to the *Lakota*, *Dakota*, and *Nakota* by French fur traders, was derived from the Chippewa name for these Indians, "nadouessiouw," which means "little snakes." ENCYCLOPEDIA OF NORTH AMERICAN INDIANS 590 (Frederick E. Hoxie ed., 1996).

245. The ATNI is a nonprofit organization representing fifty-four northwest tribal governments from Oregon, Idaho, Washington, southeast Alaska, Nevada, Northern California, and Western Montana. See <http://www.atntribes.org> (last visited July 12, 2004).

246. The member tribes of the AIC are as follows: the Cherokees of Northeast Alabama, the Cherokees of Southeast Alabama, the Echota Cherokee Tribe of Alabama, the MaChis Lower Creek Indian Tribe, the Mowa Band of Choctaws, and the Star Clan of Muscogee Creeks. See <http://www.members.aol.com/aicwia/wp3.html> (last visited July 12, 2004).



Council (AIRC),<sup>247</sup> the Council of Energy Resources Tribes (CERT),<sup>248</sup> the Great Lakes Intertribal Council (GLIC),<sup>249</sup> the Intertribal Council of Arizona (ICA),<sup>250</sup> the Intertribal Council of Louisiana (ICL),<sup>251</sup> the Inter-Tribal Council of Michigan (ITCM),<sup>252</sup> the Inter-Tribal Council of Nevada (ITCN),<sup>253</sup> the Midwest Alliance of Sovereign Tribes (MWALST), the Montana-Wyoming Tribal Leaders Council (MWTLC),<sup>254</sup> the National Congress of American Indians (NCAI),<sup>255</sup> the Southern

247. The AIRC is a statewide, tribally governed non-profit organization that advocates on behalf of Alaska Native tribal governments. See <http://www.airc.org/aircaboutus.htm> (last visited July 12, 2004).

248. Founded in 1975, CERT is a tribal organization governed by the elected tribal leadership of forty-eight federally recognized Indian tribes in the United States and four affiliated Canadian bands. Its programs and services include public policy research and advocacy, technical assistance to member tribes, environmental and water quality studies, and educational campaigns. See Official Homepage of CERT, at <http://www.certreearth.com> (last visited July 12, 2004).

249. The GLIC includes twelve member tribes as follows: the Bad River Band of Lake Superior Chippewa Indians, the Forest County Potawatomi Community, the Ho-Chunk Nation, the Lac Courte Oreilles Band of Lake Superior Chippewa Indians, the Lac du Flambeau Band of Lake Superior Chippewa, the Lac Vieux Desert Tribe of Michigan, the Menominee Tribe of Wisconsin, the Red Cliff Band of Lake Superior Chippewa, the St. Croix Chippewa Tribe, the Sokaogon Chippewa Tribe (Mole Lake), and the Stockbridge-Munsee Indians of Wisconsin. See <http://www.glic.org> (last visited July 12, 2004).

250. The ICA, comprised of the chairpersons, presidents, and governors of nineteen tribes in Arizona, provides technical assistance and policy support to member tribes, including the Ak-Chin Indian Community, the Cocopah Indian Tribe, the Colorado River Indian Tribe, the Fort McDowell Yavapai Nation, the Fort Mohave Tribe, the Gila River Indian Community, the Havasupai Tribe, the Hopi Tribe, the Hualapai Tribe, the Kaibab-Paiute Tribe, the Pascua Yaqui Tribe, the Quechan Tribe, the Salt River Pima-Maricopa Indian Community, the San Carlos Apache Tribe, the San Juan Southern Paiute, the Tohono O'odham Nation, the Tonto Apache Tribe, the White Mountain Apache Tribe, the Yavapai-Apache Nation, and the Yavapai-Prescott Indian Tribe. See <http://www.icaonline.com> (last visited July 12, 2004).

251. The member tribes of the ICL include the Chitimacha, the Coushatta, the Jena Band of Choctaw, the Tunica-Biloxi, and the United Houma Nation. See Sarah Sue Goldsmith, *Intertribal Council Assists Member Tribes*, BATON ROUGE ADVOCATE MAGAZINE, June 30, 1996.

252. The ITCM, originally founded in 1966, is a "state chartered 501(c)(3) nonprofit organization consisting of twelve federally recognized tribes in Michigan." ITCM, *Michigan Inter-Tribal Council* (July 19, 2001), available at <http://www.itcmi.org/thehistorytribal11.html> (last visited Sept. 5, 2004). The member tribes are as follows: the Bay Mills Chippewa Indian Community, the Grand Traverse Band of Ottawa and Chippewa Indians, the Hannahville Indian Community, the Nottawaseppi Huron Band of Potawatomi, the Keweenaw Bay Chippewa Indian Community, the Lac Vieux Desert Band of Lake Superior Chippewa Indians, the Little River Bands of Ottawa Indians, the Little Traverse Bay Bands of Odawa Indians, the Match-E-Be-Nash-She-Wish Band of Potawatomi (Gun Lake Tribe), the Pokagon Band of Potawatomi Indians (Potawatomi Indian Nation of Michigan and Indiana), the Saginaw Chippewa Indian Tribe, and the Sault Ste. Marie Tribe of Chippewa Indians. See <http://www.itcmi.org/thehistorytribal.html> (last visited Sept. 5, 2004).

253. The ITCN, founded in 1966, is a nonprofit organization that serves eighteen member reservations and colonies in Nevada. See <http://itcn.org/itcn/itcn.html> (last visited Sept. 5, 2004). Its members are as follows: the Confederated Tribes of the Goshute Reservation, the Duckwater Shoshone Tribe, the Ely Shoshone Tribe, the Fallon Paiute-Shoshone Tribe, the Fort McDermitt Paiute-Shoshone Tribe, the Lovelock Paiute Tribe, the Moapa Paiute Band of the Moapa Indian Reservation, the Pyramid Lake Paiute Tribe, the Reno Sparks Indian Colony, the Shoshone-Paiute Tribes of the Duck Valley Reservation, the Summit Lake Paiute Tribe, the Te-Moak Tribe of Western Shoshone Indians (which includes the Battle Mountain Band, the Elko Band, the South Fork Band, and the Wells Band), the Walker River Paiute Tribe, the Washoe Tribe of Nevada and California (which includes the Carson Community Council, the Dresslerville Community Council, the Stewart Community Council, and the Woodfords Community Council), the Winnemucca Colony, the Yerington Paiute Tribe Colony and Campbell Ranch, and the Yomba Shoshone Tribe. See <http://itcn.org/tribes/tribes.html> (last visited July 12, 2004).

254. The MWTLC serves the following tribes: the Arapaho Business Council, the Blackfeet Tribal Business Council, the Crow Tribal Council, the Fort Belknap Indian Community Council, the Fort Peck Tribal Executive Board, the Little Shell Tribe of Chippewa Indians of Montana, the Northern Cheyenne Tribal Council, the Salish & Kootenai Tribal Council, the Shoshone Business Council, and the Chippewa Cree Business Committee. See <http://tlc.wtp.net> (last visited July 12, 2004).

255. Founded in 1944, NCAI is the largest intertribal organization in the United States. Its membership now stands at over 250 tribes. Its mission is to "inform the public and the federal government on tribal self-government,

California Tribal Chairmen's Association (SCTCA),<sup>256</sup> and the United South and Eastern Tribes (USET).<sup>257</sup> (This list is by no means exhaustive.) These entities may prove to be ready-made coalitions for the creation and implementation of intertribal reciprocity compacts.

Tribal exercise of jurisdiction over nonmember Indians is consistent with the practices of most, if not all, tribes. Traditionally, Indian tribes have "exercised authority over members of other tribes who married into the tribe, were adopted into its families, or otherwise became part of the tribal community voluntarily," as well as "members of other tribes who voluntarily came to visit or to trade."<sup>258</sup> Indeed, when enacting the *Duro* fix, Congress recognized the social bonds between members of different tribes, the high rates of intertribal marriage, and the fact that over thirty percent of the population of many reservations consists of nonmember Indians.<sup>259</sup>

Intertribal reciprocity compacts are an expression of modern intertribal unity. They epitomize the "respect and cooperation among governments...necessary to accommodate the limited jurisdictional reach of [each] government[]." <sup>260</sup> Through such compacts, tribes can grant to one another the power not only to regulate and tax nonmember Indians, but the power to enforce against such nonmembers the judgments and orders of each tribe's courts. In this manner, tribes may circumvent the restrictions imposed by federal law on their ability to enforce foreign tribal court orders against nonmember Indians. For example, in the case of *Adams and Baker*, if the tribes of which they are members had entered into an intertribal reciprocity compact, *Adams* could not evade enforcement of the \$1,000,000 judgment against him by fleeing the jurisdiction of the tribal court that issued the judgment. Rather, the judgment would be enforceable on *Baker's* reservation, and on the reservations of all tribes privy to the reciprocity agreement.

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treaty rights, and a broad range of federal policy issues affecting tribal governments." NCAI Official Homepage, at <http://www.ncai.org/index.asp> (last visited July 12, 2004).

256. SCTCA is a "multi-service non-profit corporation established in 1972 for a consortium of nineteen federally recognized Indian tribes in Southern California." Official Homepage of SCTCA, at <http://www.sctca.net> (last visited July 12, 2004). Among other things, it administers "numerous grant programs for its members and the southern California Indian community." *Id.*

257. The USET includes the following tribes: the Alabama-Coushatta Tribe of Texas, the Aroostook Band of Micmac Indians, the Catawba Indian Nation, the Cayuga Nation, the Chitimacha Tribe of Louisiana, the Coushatta Tribe of Louisiana, the Houlton Band of Maliseet Indians, the Jena Band of Choctaw Indians, the Mashantucket Pequot Tribe, the Mohegan Tribe of Connecticut, the Narragansett Indian Tribe, the Oneida Indian Nation, the Penobscot Indian Nation and the Passamaquoddy Tribes, the Poarch Band of Creek Indians, the St. Regis Band of Mohawk Indians, the Seneca Nation of Indians, the Tunica-Biloxi Tribe of Louisiana, and the Wampanoag Tribe of Gay Head (Aquinnah). See <http://usetinc.org/defaultpage.cfm?ID=18> (last visited July 12, 2004).

258. *The Duro Decision: Criminal Misdemeanor Jurisdiction in Indian Country: Hearing Before the House Comm. on Interior and Insular Affairs*, 102d Cong., 1st Sess. 155 (1991) (statement of Richard Collins, law faculty, University of Colorado).

259. H.R. Rep. 102-61, 1991 U.S.C.C.A.N., 370, 373; see also *id.* at 372 ("[T]ribal governments afford a broad array of rights and privileges to non-tribal members. Non-tribal member Indians own property on Indian reservations, their children attend tribal schools, their families receive health care from tribal hospitals and clinics.").

260. CLINTON ET AL., *supra* note 1, at 267.

Cross-jurisdiction enforcement of judgments may be conducted, at the election of the compacting tribes, according to the principles of full faith and credit or comity.<sup>261</sup>

### CONCLUSION

Indian tribes, generally believed to stand outside the confines of the Full Faith Credit Clause and Act, are, with few exceptions, free to recognize and enforce the judgments of other tribes as they see fit. Most tribes have adopted the flexible enforcement regime of comity, for it allows them to refuse to enforce foreign orders that contravene tribal public policy. This makes sense, given the historic independence of most tribes from one another and the diverse traditions among the 562 federally recognized tribes in this country.

However, as the Supreme Court increasingly confines the reach of tribal governmental authority to tribal members only, the ability of tribes to enforce the judgments of other tribal courts is increasingly called into question. The power of Congress to remedy the divestiture of tribal authority is limited. Indeed, the obstacles to tribal enforcement of foreign judgments against nonmembers, including non-Indians and nonmember Indians, are steep.

Without a fundamental overhaul of federal Indian law, which seems unlikely, tribes must consider creative alternatives to circumvent the limitations imposed by the Court on their jurisdiction over nonmembers. Among these alternatives are the creation of intertribal governing bodies, where appropriate, and the negotiation of intertribal compacts providing for the reciprocal enforcement of tribal court orders based on the principles of comity. Admittedly, these suggestions are partial and incomplete. They provide a basis for reestablishing jurisdiction over nonmember Indians, but they do not help tribes reestablish jurisdiction over non-Indians. Yet, by uniting in these ways, and contorting to accommodate the Court's current jurisprudence, tribes can begin to expand their power and undo the deleterious effects of colonization.

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261. There are numerous models among the states, including the Uniform Child Custody Jurisdiction and Enforcement Act, in which each state implementing the Act has agreed to extend full faith and credit to child custody orders entered by other implementing states. See Official Homepage of National Conference of Commissioners on Uniform State Laws, at <http://www.nccusl.org> (Final Acts and Legislation) (last visited Sept. 5, 2004).