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***841** TRIBAL COURTS AND THE FEDERAL UNION

Robert N. Clinton [FNa]

I. INTRODUCTION

Since first contact with Euro-American society, Indian tribal communities have struggled for recognition of their political autonomy and rights with Euro-American communities that neither understood nor respected the social organization and government of tribal groups. During the sixteenth and seventeenth centuries, some Euro-Americans claimed enlarged authority over Indian communities by erroneously suggesting that Indian bands lacked social organization and government and that Euro-Americans needed to carry the "white man's burden" by imposing the benefits of Christian "civilized" society on the heathens. [FN1] During the eighteenth ***842** and nineteenth centuries, British and American governments sometimes deliberately ignored tribal leaders or consensual forms of government in favor of the appointment of individual, sometimes pliant, chiefs or headmen with whom they could negotiate grievances or large land cessions. [FN2] These governments often were very surprised when their carefully selected leaders failed to secure tribal cooperation for promises that they made. During the nineteenth and early twentieth centuries, tribal communities fended off state, and later federal, efforts to disband their tribal relations by outlawing their tribal governments. [FN3] More recently, during the 1950s, federal policy sought to terminate federal relations with and protection of certain tribal governments on the pretense that such tribes had so advanced toward "civilization" that their special status, and therefore the federal protection of their tribal governments, no longer was thought necessary by Congress. [FN4]

Even when Euro-American policy toward Native American communities sought to protect tribal governments, misunderstanding, lack of communication, and ethnocentric conceptions of political relations produced changes in the very tribal governance such policies sought to protect. For example, when the Indian Reorganization Act of 1934 [FN5] sought to rejuvenate tribal governments, many of which had been seriously impaired by fifty years of attack under the aegis of the allotment policy, [FN6] requirements of majority rule, ***843** one-time popular electoral approval, and federal approval of many tribal actions contained both in the statute and in tribal constitutions and by-laws drafted under its authority significantly altered the structure of many tribal governments and their relationship to the tribal peoples they served. [FN7] Most recently, the federal policy of fostering and protecting government-to-government relations with Indian tribes [FN8] produced new strains and problems. Chief among these problems is the legal relationship between functioning tribal governments, and in particular tribal courts, and the rest of the federal union.This Article is devoted to exploring that relationship with a view to providing perspectives from which a prescriptive model of the appropriate relationship of tribal courts in the federal union can be formulated.

II. INDIAN TRIBES AND THE FEDERAL UNION: COLONIAL

CHANGES IN STRUCTURAL RELATIONSHIPS

Stating the problem of the role of tribal courts in the federal union is relatively simple; finding its solution is more difficult. As important sovereigns within the federal union, Indian tribes and their operations impact on the daily

lives of large numbers of Indians and non-Indians alike. Yet, their existence and role in the federal union is difficult to explain and reconcile with western notions of governmental legitimacy upon which American democracy rests.

American law tends to analyze government legitimacy and the relationship between domestic sovereign units in light of a popular sovereignty, federalist theory developed from natural law jurisprudential roots. [FN9] Two basic components of this theory are important ***844** to analyzing the role of Indian tribes in the federal union. First, federalist theory and natural law thought, derived in great part from the work of John Locke, [FN10] generally viewed consent of the governed through the constitutional social contract as the fountainhead of governmental legitimacy. [FN11] Thus, under Lockean theory, popular consent reflected through the social compact forms the fountainhead for and the touchstone of governmental legitimacy. Second, these theories recognized the importance of dividing and allocating sovereignty, thereby rejecting unitary theories of sovereignty derived from monarchial roots. Such federalist theories first emerged during the transformation of the states from a loose confederation of sovereign polities bound in a "firm league of friendship" under the Articles of Confederation [FN12] to a national government under which the sovereignty of the states was significantly diminished pursuant to the Constitution and the post-Civil War amendments. [FN13] American legal theory, therefore, came to regard ***845** sovereignty as divided and allocated. Nevertheless, strong strains of unitary, indivisible theories of sovereignty, derived from our British monarchial past, often resonate in American legal writing. [FN14] As the Civil War experience vividly demonstrated, American legal theory demands not only divisibility and allocation of sovereignty, but also the existence of some ultimate, supreme authority with power to harmonize and finally resolve legal conflicts and enforce decisions among competing sovereigns within the federal union. The inability of the Continental Congress to implement this role contributed greatly to the framing of the present Constitution, and the failure of some states to respect the supremacy of federal authority under that document ultimately led to the Civil War.

In light of the political and constitutional theory of the federal union, Indian tribal governments and, in particular, Indian tribal courts pose new and difficult problems for the federal union. [FN15] The tribes never formally consented to become part of the Union, and, therefore, the legitimacy of the exercise of federal and state authority over them is frequently questioned. Furthermore, such legitimacy ***846** questions cloud the intergovernmental relationships between the tribal governments, the states, and the federal government.

These problems are new, in part, because of changed thinking about the relationship of Indian tribes to the United States, both in American law and in the self-identifications of Native American communities. Indian tribes began as separate independent nations outside the federal union and were only later involuntarily annexed into the federal union by the colonial action of the federal government during the late nineteenth and early twentieth centuries. In Cherokee Nation v. Georgia, [FN16] Chief Justice Marshall described the Indian tribes as "domestic dependent nations." They were polities located, to be sure, within territory claimed by the United States but, nevertheless, communities that remained a distinctly separate people, a domestic nation. They were domestic nations in the sense that their territories were geographically located within the exterior boundaries of the United States. According to Marshall's opinion, they were dependent in that they had allied themselves with the United States in a fashion that limited their authority independently to make war on or negotiate with foreign nations or alienate their property to whomsoever they chose in a fashion that would be recognized in American courts. Nevertheless, they remained nations -- separate peoples outside of the American polity. This early relationship between Indians and the federal union also was reflected, some might argue, constitutionalized, in the "Indians not taxed" exclusion from the census found in article I, section 2 and echoed in section 2 of the fourteenth amendment. [FN17] Unlike the dehumanizing constitutional provision that originally counted black slaves as only three-fifths of a person, [FN18] the "Indians not taxed" exclusion was not designed for purposes of marginalizing Native Americans. Rather, the provision accurately reflected agreements on the political status of tribal Indians (the so-called "Indians not ***847** taxed") under which tribal Indians were considered simply outside of and separate from the federal union -- a position they coveted and fought vigorously to defend. [FN19] Indians not taxed were not counted as part of the census because, by mutual agreement, they were not part of the American polity. Native Americans maintaining tribal relations owed no political allegiance to the federal union. They were neither citizens nor subjects of the federal government or any states in which they might reside. They were, rather, members and citizens of a different nation -- their tribe -- and were subject to its governance in all matters of tribal affairs. This relationship bound them into a complex web of family, clan, religious, and society relationships that defined Indian tribal allegiance. The status of tribal Indians as persons outside the American polity explains why the early federal Trade and Intercourse Acts generally did not regulate Native American or tribal conduct but, rather, limited their reach to regulating non-Indians who were subject to federal political authority, such as traders, who dealt with Native American communities in myriad ways.

[FN20]

In Lockean social compact terms, Indian tribes never entered into or consented to any constitutional social contract by which they agreed to be governed by federal or state authority, rather than by tribal sovereignty. In Worcester v. Georgia, [FN21] Chief Justice Marshall forcefully conveyed this message. In that case, the Court held that, even though the lands of the Cherokee Nation were physically within the territorial boundaries claimed by Georgia, that state had no lawful jurisdiction over the Cherokee Nation, its members, ***848** and even non-Indians, such as the white missionaries involved in the case who were peaceably residing within Cherokee country with the permission of the Cherokee Nation and the federal government. While explaining the history of political relationship between Euro-American colonial governments and the Indian tribes, Chief Justice Marshall noted: [FN22]

> Certain it is, that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown, to interfere with the internal affairs of the Indians, further than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands, when they were willing to sell, at a price they were willing to take, but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies, but never intruded into the interior of their affairs, nor interfered with their self-government, so far as respected themselves only.

Thus, Marshall concluded: [FN23]

> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States. The act of Georgia, under which [Worcester] was prosecuted, is, consequently void, and the judgment a nullity.

While Chief Justice Marshall and many others of his day regarded Indian tribes as domestic dependent nations outside of the American polity, later historical developments would undermine both Euro-American and Indian perceptions of separate tribal nationhood outside the direct authority of the federal union.

The Worcester case not only held that tribes, their members, their lands, and persons whom they invited to their lands, were not subject to state governance, the case also illustrated the perceived limits on the authority of a sovereign to govern those who owed it no political allegiance. One tactic adopted by Georgia and other states in seeking to annex Indian lands was to outlaw tribal government ***849** and assert political hegemony over Indian lands. [FN24] It was precisely this effort that Worcester held invalid. To protect their own political autonomy and separate peoplehood, many tribes thereafter sought and were guaranteed treaty protection against political incorporation into states or federal territorial governments. Thus, a number of the post-removal treaties explicitly guarantee continued tribal political identity outside of the American polity. These treaties assure that the affected tribes will never be included in or made subject to the laws of any state or federal territory. [FN25] The Treaty of Dancing Rabbit Creek of 1830 with Choctaw [FN26] contained several provisions that illustrated these political relationships. As negotiated, the preamble to the treaty provided:

> Whereas the General Assembly of the State of Mississippi has extended the laws of said State to persons and property within the chartered limits of the same, and the President of the United States has said that he cannot protect the Choctaw people from the operation of these laws; Now therefore that the Choctaw may live under their own laws in peace with the United States and the State of Mississippi they have determined to sell their lands east of the Mississippi and have accordingly agreed to the following articles of treaty.

Unwilling to acknowledge the coercive nature of its removal policy, the Senate separately declined to ratify the preamble to this removal treaty, while approving the removal land cession embodied in the document. Implementing the Choctaw concerns over political autonomy, article 4 of the Treaty of Dancing Rabbit Creek specifically guaranteed that the Choctaw Nation would forever remain outside of the reach of the laws of the federal union:

> The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State; but the U.S. shall forever secure said Choctaw Nation from, and against, all laws except such as from time to time may be enacted in their own ***850** National Councils, not inconsistent with the Constitution, Treaties, and Laws of the

United States; and except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs. But the Choctaws, should this treaty be ratified, express a wish that Congress may grant to the Choctaws the rights of punishing their own laws, any white man who shall come into their nation, and infringe any of their national regulations.

This provision was echoed in later treaties and highlights the thenextant limits of the political hegemony of both the federal union and the Indian tribes. The federal government assured the Choctaws continued political hegemony and autonomy outside the federal union as a separate nation of Indians. They had complete governance of all "persons and property that may be within their limits" except where inconsistent with federal law and policy enacted by Congress "to the extent" that Congress constitutionally exercised power over Indian affairs. [FN27] Since the contemporary conception of the federal union and congressional power over Indian affairs, as reflected by Worcester, limited congressional authority primarily to governing non- Indians who dealt with Native American can communities and who were subject to the power of the federal union, the provisions of article 4, guaranteeing Choctaw political hegemony, did not derogate from federal or state political authority except in one area -- authority over non-Indians who were not citizens of the Choctaw nation, but, rather, subject to the jurisdiction ***851** of the federal union. Even on this subject, article 4 of theTreaty of Dancing Rabbit Creek expressed the Choctaw "wish" to exercise such authority, a desire that was never ultimately given legal sanction by domestic American law. [FN28]

The Choctaw conception of their tribal sovereignty during these negotiations evidently was completely territorial while the position of the federal union was that federal political hegemony derived from either sovereignty over land or authority over their own citizens even in areas of Indian country outside of their direct legislative control. Furthermore, the federal government was unprepared to concede tribal authority over American citizens in Indian country. This clash of perspectives on the legitimate limits of sovereign authority was not finally resolved in the Treaty of Dancing Rabbit Creek and remains the subject of major disagreements between tribal governments on the one hand, and federal and state governments on the other. [FN29]

The importance of concepts of allegiance and citizenship to legal thinking about political relationships during this period is evident when one recalls that it was another infamous decision about citizenship -- Dredd Scott v. Sanford [FN30] -- that contributed to the national polarization over slavery which culminated in the Civil War. While the first sentence of the fourteenth amendment directly overturned the Dredd Scott decision for newly freed blacks and other freed men, no such development immediately occurred for Native Americans, in great part because neither the federal government nor the affected Native American communities immediately desired to extinguish the separate political status of Native American communities and to amalgamate them into what only later would come to be regarded as the American melting pot. In Elk v. Wilkins, [FN31] the Court therefore held that the first sentence of the ***852** fourteenth amendment did not confer federal or state citizenship on Native Americans even when they ceased maintaining tribal relations and took up residence in Euro-American communities, especially since section 2 of the fourteenth amendment continued the "Indians not taxed" exclusion. [FN32] Indeed, as late as 1883, the Supreme Court ruled in Ex parte Crow Dog [FN33] that tribal Indians were not subject to federal prosecution for intra-Indian offenses because they could be punished only by the law of their tribe, a logical reflection of the fact that their political allegiance remained with their tribe and not the American polity.

Beginning in the latter half of the nineteenth century, however, treaties with various tribes began experimenting with allotment programs intended to assimilate Indians into the economic, social and political fabric of the American polity by converting them to Thomas Jefferson's image of the backbone of the American democracy, the yeoman farmer. [FN34] Under these programs, the federal government hoped to convert into horticulturists some of the tribal societies it perceived, sometimes wrongly, as hunter-gatherer communities. More importantly, the nomadic way of life of some of these tribes posed threats to the agricultural land ownership patterns of the encroaching Euro-American settlers. Part of this policy involved an important carrot, at least from the American perspective -- the promise of the amalgamation of tribal Indians into the melting pot of the American polity upon successful completion of their conversion into horticulturists. A few of these early allotment treaties even held out United States citizenship to allottees upon their successful completion of a trust period during which they were ostensibly to acclimate to their new agricultural role as participants in the American economy and polity, although ***853** most stopped short of such political assimilation. [FN35] These initial treaty provisions not only held out amalgamation into American economic life for those tribes that "voluntarily" submitted, they also sometimes affirmatively envisioned the dissolution or restructuring of tribal societies along more individualistic lines. [FN36]

By 1887, when Congress enacted the General Allotment Act, [FN37] federal insistence on tribal consent had become formal ritual, and the federal government undertook affirmative efforts to dissolve tribal polities in favor of incorporating tribal members into both the American economy and polity. Thus, the provisions of the General Allotment Act promised Indian allottees American citizenship at the conclusion of a trust period of federal supervision. [FN38] These provisions represented a concerted federal political attack on tribal ***854** sovereignty. Allotment policies attempted, usually unsuccessfully, to break down tribal societies by substituting both different economic ways of life and new political allegiances. In the Citizenship Act of 1924, [FN39] all pretense or form of tribal or individualIndian consent to political annexation disappeared. All Indians and Alaska natives were made citizens of the United States irrespective of their desires in the matter and irrespective of whether they had ever been allotted tribal land in severalty.

For most Native American communities, then, amalgamation into the American polity was brought about through a grant of American citizenship. These grants of American citizenship were often accompanied by affirmative, albeit unsuccessful, efforts to break down tribal allegiance and to curtail tribal political influence or existence. Most importantly, United States citizenship and the consequent incorporation of Indians into the American polity was involuntarily imposed, often in violation of treaty guarantees to the contrary. Native American governments and tribal courts became part of the federal union through colonial fiat, rather than as the result of any affirmative Lockean social compact by which Native American tribes or their members agreed to enter into the American polity to gain certain benefits and undertake certain legal responsibilities. While the early allotment treaties might arguably suggest that a limited number of tribal communities, faced with catastrophic alterations in their economies caused by encroaching Euro-American settlement, reluctantly undertook major alterations in their economic, but not necessarily political, relationships, most Indian communities were hardly offered any real choice or any choice at all. After the Indian Citizenship Act of 1924, Native American governments and tribal courts in the United States no longer were outside the federal union, as Chief Justice Marshall suggested in Cherokee Nation and Worcester. Irrespective of tribal desires, American law began to treat Native Americans as part of the American polity, subject to federal governance. [FN40] Thus, according to federal legal policies, the remaining tribal governments and their courts became governmental units within the federal union. Indeed, it was during this period of colonial expansion of federal authority that the legal myth of plenary federal power over Indian ***855** affairs emerged to justify the expansion of federal authorityin this area at the expense of the tribes. [FN41]

***856** Accommodation of this altered perception of the legal status of Indian polities with the United States Constitution has proved an enduring and perplexing legal problem. At one level, simplistic readings of that document suggest that the Constitution contemplates the existence of only two sovereign entities -- the United States government and the states. Justice Rehnquist's opinion in Oliphant v. Suquamish Tribe [FN42] echoed this theme. Quoting from the Court's opinion in United States v. Kagama, [FN43] the critical late nineteenth-century case that contributed to legal perceptions of very broad federal colonial power over Indian communities, Chief Justice Rehnquist noted: [FN44]

> Congress extended the jurisdiction of federal courts, in the ***857** Trade and Intercourse Act of 1790, to offenses committed by non-Indians against Indians within Indian country. In doing so, Congress was careful to extend to the non-Indian offender the basic criminal rights that would attach in non- Indian related cases. Under [the tribe's] theory, however, Indian tribes would have been free to try the same non-Indians without these careful proceedings unless Congress affirmatively legislated to the contrary. Such an exercise of jurisdiction over non-Indian citizens of the United States would belie the tribes' forfeiture of full sovereignty in return for the protection of the United States.
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> In summary, [the tribe's] position ignores that "Indians are within the geographic limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exists in the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they ... exist in subordination to one or the other of these. United States v. Kagama, 118 U.S. 375, 379 (1886)."

Yet, the Kagama decision was rendered before the massive change in political realities had fully brought Native American communities, often involuntarily, within the American union. Notwithstanding Rehnquist's reiteration of the late nineteenth-century suggestion that domain of sovereignty within the federal union was exclusively allocated between federal and state authority, the Court plainly rejected the modern implications of this argument in United States v. Wheeler, [FN45] a case argued two days after Oliphant and decided within several days thereafter. In Wheeler, the Court held that subsequent federal prosecution of an offender already prosecuted and punished in tribal

courts did not violate the double jeopardy guarantees of the fifth amendment because tribal authority to punish offenders derived from tribal, rather than federal or state, sovereignty. As Justice Stewart's opinion for a unanimous Court noted, " t he powers of Indian tribes are, in general, 'inherent powers of a limited sovereignty which has never been extinguished." [FN46] ***858** Inexplicably, Rehnquist did not dissent or otherwise note any disagreement in Wheeler with the basic principles of inherent tribal sovereignty announced in that case.

The basic inconsistency between the theories of tribal sovereignty advanced in Oliphant and Wheeler, both decided at the same time, highlights the nature of the theoretical problem of accommodating notions of tribal sovereignty, and therefore the actions of tribal courts, with political theories of the nature of the federal union. Rehnquist's reliance on Kagama in Oliphant reflects the pre-colonial American conceptions of union derived from Lockean theories of social compact and subsequently led to the constitutional ferment that culminated in both the framing of the Constitution and the Civil War. Under this view, the perception emerged that the Constitution was created by the people to assure an indestructible union composed of indestructible states. [FN47] By contrast, the Wheeler opinion reflects a broadened conception of the federal union that recognizes that all sorts of sovereign authorities later came to be associated with the federal union, some of which did not owe the origin of their sovereign powers to either federal or state delegation. Most of these developments came during the late nineteenth- and twentieth-century period of American colonial expansion. During this period, the United States came into possession of or undertook the supervision of the governments of Hawaii, the Philippines, Puerto Rico, and ultimately such diverse political areas as the American Virgin Islands, the Northern Marianas, and Guam. These developments produced a more pluralistic conception of the origin and nature of sovereignty within the federal union. [FN48]

***859** The colonial impulses that produced far-flung American territorial acquisitions in the late nineteenth century occurred in American history at the very same time that federal Indian policy sought to assure colonial expansion over domestic Indian sovereignties. These policies sought to undermine Indian nationhood and to subject Indian communities to allotment and other policies designed to encourage economic and political dependence on the United States, rather than allegiance to Indian polities outside of the sovereign umberlla of the federal union. [FN49] Indeed, the allotment program, Indian citizenship, and the forced amalgamation of sovereign Indian ***860** communities into the American polity through other means (such as coercive boarding schools [FN50]) are best understood as particularly brutal and destructive chapters in late nineteenth- and early twentieth-century American colonial expansion.

While such colonial expansion easily can be condemned from the perspectives of post-colonial doctrines of self-determination that emerged all over the world after World War II, the practical problem for federal Indian law, like the legal problems in many decolonized areas, is how to accommodate the political, economic, and social consequences of the colonial experience with the decay or, at least, amelioration of the colonial impulse that produced such altered realities. While lawyers often are tempted to redress harms by attempting to restore the status quo ante, such complete restoration of the pre-colonial era rarely is realistically possible. Colonization usually results in substantial influxes of the new occupants from the colonizing society, redistributes substantial property in favor of the colonizing authority, destorys or impairs some of the cultures of the colonized peoples, and resturctures the production and trade relationships within the colonized area in ways that defy immediate or long-term restoration of the status quo ante. Even after colonization ends, its residual effects remain and create new realities that must be recognized and addressed by the legal system.

In Indian country, American colonial expansion produced new political, economic, and social realities. No theory of the relationship of Indian tribes to the federal union can easily ignore these changed realities. Prior to the colonial onslaught of the late nineteenth-century allotment policy, the lands of Indian Nations were predominantly inhabited by tribal members. Allotment opened many, but not all, Indian reservations to non-Indian settlement. On allotted reservations, the opening of reservations to non-Indian settlement complicates the process of assuring consent of the governed and erodes some legitimacy from tribal claims of complete and exclusive legal hegemony over areas that traditionally had served as their homelands or to which they had been removed voluntarily or forcibly. [FN51] Not only did late nineteenth- century Indian policies open Indian country to substantial non-Indian settlement, ***861** with an accompanying loss of two-thirds of the tribal land base, [FN52] such colonial policies also substantially individualized Indian property holdings, thereby undermining to some extent the traditional strong sense of Indian community that had been promoted by prior communal tribal land- holding practices. [FN53] During this period, ruthless federal education policies also helped convert the primary language on many reservations away from the native tongue toward English and introduced many aspects of western culture, including Christian religious

traditions. Such cultural colonialism, which some might call cultural genocide, helped destory some tribal languages and certainly ameliorated the distinctiveness of many tribal culturaltraditions. [FN54]

Allotment also continued and accelerated the already-evident pattern of using Euro-American trade and markets to influence and alter Indian economic practices. While early colonial economic activities, such as the extensive fur trade that continued through the early nineteenth century, certainly predate the late nineteenth-century period of massive American colonial expansion, most prior periods had altered economic relations in contexts where Native Americans had realistic opportunities to decline to enter into the proffered trade. While the "better kind of hatchet" [FN55] offered by Euro-American traders often proved irresistible to Indian communities engaged in military and economic struggles with their Indian and non-Indian neighbors, coercion and force were not necessarily ***862** part of most of the early efforts to alter Indian economic practices. By contrast, the late nineteenth-century policy of forcing Indians, particularly those of the plains, away from partial reliance on nomadic hunting and food-gathering activities and toward greater reliance on more sedentary agricultural pursuits forever would move such tribes away from the subsistence and trade economies that helped sustain them and their tribal cultures. It forced economic integration into a cash economy that made them totally dependent on the American, rather than the tribal, economy. These economic changes made Indians more prone to consider their communities part of, rather than allied with, the United States.

Conferring unwanted federal and state citizenship on Native Americans gave political form to this already extant economic transformation. Irrespective of whether Native American communities desired to become part of the American polity, they had done so and came to view themselves in part in that way. While Indians retained their tribal identifications and memberships, they took on an important additional political allegiance. They were no longer only Navajo, Cheyenne, or Sioux; they were also Native Americans -- a term that symbolized not only indigenous racial ancestry but also their tie to the virtues of the American polity. Indians became very proud of their vast contributions to the larger American society from agricultural products, such as corn, yams and tobacco, to modern heroes, like Jim Thorpe or Maria Tall Chief. Indian patriotic fervor is evident from their contributions during both world wars and later conflicts, from the Navajo, Choctaw, Hopi, and Arapaho code talkers [FN56] to Ira Hayes helping raise the flag at Iwo Jima. Indian war veterans' groups exercise considerable social and political influence on many Indian reservations, [FN57] both a modern vestige of the tribal warrior culture and a contemporary illustration of the sense of dual political identity shared by most Native Americans. The partial integration of Native American peoples into the political and economic structure of society also is evidenced by the fact that, since 1980, slightly over half the nation's Native American population, like most of the rest of the population, live outside and away from rural, remote reservations, mostly in large cities. [FN58] ***863** The Native American sense of allegiance to and identification with the tribal community, however, generally continues with even urban Indians often returning to their reservations for tribal celebrations, pow wows, dances, and extensive family visiting. In short, Native American sense of peoplehood and sovereignty remains quite strong, albeit in an altered political, economic, and social environment. The most recent symbol of this incorporation of Native Americans into the federal union is the proposed Smithsonian Museum of the American Indian, whose imminent construction is contemplated on the Mall in Washington, D.C. Many of these altered realities of Native American life and Indian political perceptions of themselves and their communities are legacies of American colonial Indian policies designed to overwhelm the separate tribes and to forcibly integrate them into the American polity through a colonial policy of "divide and conquer," often known as the American melting pot. While products of American colonialism, the changed realities within Indian communities and the altered perceptions of political allegiance and relations engendered by such colonial policies simply cannot be ignored in favor of the status quo ante.

Thus, the central problem for federal Indian law during this post-colonial period must be how to decolonize federal Indian law, taking account of, albeit not necessarily validating or justifying, the altered economic realities and political relations that prior colonial Indian law policies and doctrines engendered. So long as most Native American communities and their members, for many sound economic and political reasons, regard themselves as having a dual political allegiance both as members of their tribe and citizens of the United States, such decolonization must take place in the United States primarily through domestic law, which seeks to accommodate Indian peoplehood and sovereignty within the framework of the American constitutional union. In the absence of the unlikely occasion of a new constitutional convention in which Indian communities are free to decide, as Canadian Indians recently sought to do with some limited success, [FN59] whether they wished to ***864** enter into the American constitutional compact and on what terms, federal Indian law will continue to assess such questions by attempting to justify incorporation of Native American peoples into a constitutional union that they did not help create and of which they

rarely actively sought to become a part. In this environment Lockean social compact theories of governmental legitimacy break down, and courts are left to attempt to balance Native American claims of sovereignty, jurisdiction, and political hegemony over Indian country against the changed realities in Indian country in the post-colonial era.

The jurisdictional [FN60] and boundary [FN61] cases of the past twenty years reflect the awkwardness of this accommodation. In these cases, the Supreme Court constantly has drawn, redrawn, and then remapped anew a problematic, complex, and wavering line of sovereign demarcation between tribal political hegemony and federal and state authority over persons and property in Indian country. [FN62] Since 1959 and the start of the modern ear of Indian litigation, extensive congressional, judicial, and tribal energy has been invested in shaping the negative contours of these political relations -- defining ***865** the limits of federal, state, and tribal power in Indian country, the "thou shalt nots" of jurisdiction and power. Surprisingly little congressional, judicial, or even academic energy has been invested in exploring the positive side of such intergovernmental relationships -- structuring the appropriate mechanisms by which modern sovereign Indian nations should interact with a sovereign federal government or sovereign state governments within the federal union. [FN63] While diplomacy and negotiations historically provided a major vehicle for such structured interaction, sovereign governments and units of government relate to one another at varying levels beyond the negotiating efforts of their leaders.

One microcosm of such political relations is the manner in which the courts of one sovereign government react to the demands, judgments, and laws of other sovereign governments. When the nation of Columbia declined to extradite major drug smugglers to the United States, the American public reaction assumed that American political relations with Columbia were not strong and that Columbia was not showing the requisite respect and level of mutual cooperation between sovereigns required to attack this important international problem. When President Barco of Columbia recently changed that nation's extradition policy, [FN64] mutual cooperation rose dramatically, in part because Columbia courts began to respect the demands of the American government for extradition. Thus, the forms and levels of cooperation between judicial systems of sovereign entities often mirror the political relations between them and help influence the level of political autonomy, cooperation, and respect due to each sovereign.

Analyzing the role of and respect shown tribal courts in a federal union therefore provides a descriptive microcosm of the state of political respect shown between tribal, federal, and state sovereigns and further offers a manageable and focused vehicle for prescriptively discussing the appropriate post-colonial structures for such political relations. This essay is intended to provide an impressionistic review of the role of tribal courts in the federal union ***866** in order to explore this nagging question of decolonization of federal Indian law. The focus of this essay is not on the daily operation of tribal courts where excellent work is being done by others, [FN65] but rather, on the intergovernmental relationships that exist in legal doctrine between tribal courts and the other constituent parts of the federal union -- the federal government and the states.

In modern federal Indian law, questions involving the structural relationship between tribal courts and the federal and state governments have focused primarily on three questions -- (1) review of tribal decisions involving questions of the scope of tribal jurisdiction and compliance of tribal governments through their courts with the civil rights protections mandated under the Indian Civil Rights Act of 1968; [FN66] (2) full faith, and credit or comity for judgments and laws; and (3) extradition. The first question has attracted considerable attention in Indian country because of wellpublicized inquiries by the United States Commission on Civil Rights [FN67] and because of proposed legislation. [FN68] In order to assess the approaches in these two areas, analyzing domestic law models that deal with the positive relations between sovereign governments and governmental units is necessary, particularly at the judicial level.

III. JUDICIAL INTERACTION AMONG SOVEREIGNS:

DESCRIPTIVE MODELS

The legal relationship between tribal, federal, and state courts must be examined in a larger context of the customary level of deference and cooperation than exists at the judicial level between sovereign governments. Such levels of judicial cooperation, involving different units of sovereign governments, [FN69] focus on three questions ***867** -- (1) the existence and degree of judicial cooperation between sovereigns, (2) the extent of judicial deference, if any, owed to the adjudications and laws of another sovereign, especially with respect to matters having some

connection with that sovereign; and (3) the existence, extent, and standard of any judicial review of the judgments, laws, and policies of another sovereign. At the extreme, some sovereign states [FN70] have no cooperative relations and in such context generally provide little, if any, judicial cooperation. Extradition from the United States to Cuba, for example, of one accused of a political or other crime would be virtually impossible in the present climate of sovereign noncooperation, just as various executive orders and agreements have frustrated the efforts of the current government of Iran from seeking judicial return of some frozen assets located in the United States. [FN71] Where cooperation among sovereigns exists, however, it usually is reflected by varying degrees of deference and review afforded under domestic law to the judicial and legislative acts of another government when presented to the ***868** forum. While there may be norms of international conduct that provide certain expectations of cooperation, ultimately the level of such cooperation remains a matter of domestic law. While these levels of deference and review ultimately represent a continuum which varies with the quality of political relations between the affected sovereigns, at least three paradigm models to such government-to-government contact at a judicial level can be delineated in American domestic law.

The first such model, which will be designated the transnational sovereignty model, is used by the federal government to encourage other nations to judicially comply with human rights and other matters of importance to federal foreign policy or international law. For example, in trying to encourage Chile, El Salvador, South Africa, Argentina, or the Soviet Union to respect and protect the civil liberties of its citizens, the federal government has used diplomatic means of negotiations backed by threats of economic, military, and foreign aid sanctions to attempt to cajole respect for civil rights and secure cooperation at the judicial level. Recently, for example, the nation witnessed the federal government's efforts to encourage Columbia to become more cooperative in the extradition of foreign narcotics dealers by promising greater federal governmental assistance, training, and the like. Thus, the transnational sovereignty model respects the sovereignty and autonomy of nations and relies on diplomatic carrots and sticks that represent the coercive currency of modern diplomacy to encourage judicial cooperation with policy objectives deemed important by American and international law. Ultimately, when civil rights issues become an overriding concern, cessation of diplomatic relations theoretically may result, sometimes together with the effective closure of domestic courts for redress of foreign state claims.

At the judicial level, cooperation and respect in the transnational model is expected to be voluntarily undertaken under the regime of the comity doctrine. [FN72] Consistent with the flexibility required to apply international pressure on independent foreign states, the transnational model assumes that the enforcement of foreign judgments and laws represents a deferential sign of cooperation and respect for another sovereign voluntarily undertaken under the compulsion of only domestic law. The transnational model, therefore, recognizes the sovereignty of other countries and the legitimate ***869** limits of national power and seeks cooperation on certain matters of mutual interest, such as human rights protection. While the transnational model permits an enforcing court to review the judicial acts of another sovereign to determine whether they should be afforded comity, [FN73] neither the judgments nor the laws of another state are afforded any substantive review. No effort can be made to overturn them as substantively incorrect, a point so obvious we need to be reminded of it. The inability to overturn the laws of judgments of another foreign sovereign in domestic courts is not merely a concession to the limits of federal military authority; it is an important reflection of the sovereignty and autonomy of the nation in question. Thus, in the transnational model, foreign judgments and laws are taken as given, and the only question for the domestic forum is whether they are entitled to enforcement under doctrines of comity. Likewise, in the criminal sphere, cooperation through extradition constitutes a matter of voluntary cooperation through the adoption and enforcement of bilateral extradition treaties. [FN74]

While the States of the Union also are sovereign, since at least the Reconstruction era, domestic law has adopted a very different model of enforcement of civil rights and other matters of federal concern. Enforcement of state governmental compliance with civil rights guarantees and other matters of federal supremacy has proceeded under the federalism model. Under this model, claimed state judicial violations of federal constitutional guarantees are reviewed not only for purposes of deciding whether to afford them comity (actually, full faith and credit in this context), but also to determine whether they should be overturned, thereby rendering them invalid and unenforceable even in the courts of the sovereign that rendered them. Such federal review occurs in two ways -- by ***870** lower federal courts in criminal cases through the writ of habeas corpus, [FN75] or under writ of certiorari to the Supreme Court. [FN76] While actions of other branches of state government also might be reviewed in federal courts through civil rights actions under 42 U.S.C. section 1983 or similar causes of action, such federal review of state judicial actions generally is precluded under the Younger v. Harris abstention doctrine [FN77] and the Anti-Injunction Act,

[FN78] at least where the state judiciaries have undertaken to determine whether any violation of federal civil rights occurred in the particular case. Furthermore, subject to some exceptions, federal courts will not entertain removal of actions from state courts based on federal preemptive claims of lack of state subject matter jurisdiction. [FN79] The ability of the federal courts to review virtually de novo the nonjudicial actions of state and local governments in actions under 42 U.S.C. section 1983 results principally from the lack of any exhaustion of state administrative and judicial remedies requirement under that provision, [FN80] a logical result of unique Reconstruction era history that produced a Congressional desire to provide a parallel and alternative federal cause of action for such federal constitutional and statutory civil rights claims. Where, however, state judicial enforcement of federal civil liberties has been undertaken, the only federal intrusion on state sovereignty outside the criminal sphere generally is Supreme Court appellate review on writ of certiorari. [FN81] Nevertheless, even where state court judgments on critical questions are reviewed by the courts of another sovereign, substantial deference generally is given to the state court or administrative judgment. In Supreme Court review, state court decisions on state law questions bind the Supreme Court [FN82] and sometimes constitute ***871** an adequate and independent grounds of decision that precludes review by the United States Supreme Court. [FN83] In habeas corpus cases, federal courts must defer to state court findings of fact unless they make certain findings indicating significant problems with the adjudicative process by which the state court arrived at its decision. [FN84] Thus, while the federalism model posits substantial interdependence between federal and state courts, federal review remains limited with substantial legal deference being given to state judicial judgments on federal questions and complete finality afforded state decisions on state law issues.

The third model for relations of governmental bodies emerges from federal court review of civil liberties compliance within the federal government (i.e., within one sovereign), especially compliance by the administrative bureaucracy and other executive branch officials. This model will be designated the administrative model. Under the administrative model, federal courts generally review de novo claimed administrative agency deprivations of constitutional rights. [FN85] While exhaustion of federal administrative remedies generally is required, [FN86] almost no deference is given to administrative agency findings on questions of constitutional rights. Nevertheless, some deference always is given to the administrative findings of agencies in the course of nonconstitutional administrative review, [FN87] although their decisions rarely are subject to direct judicial enforcement ***872** without some review of the substantive and procedural propriety of the decision. [FN88] In short, the administrative model provides only limited deference and no finality to the decisions of administrative agencies. Complete judicial review almost always exists and deference to the administrative decision is nonexistent on constitutional and jurisdictional questions and is more limited on other questions.

These three paradigm models of judicial cooperation, deference, and judicial review represent important benchmarks on a continuum of mutual sovereign respect between governments and governmental units. Under various doctrines illustrated by comity or the act of state doctrine, [FN89] the acts, laws, and policies of foreign sovereign nations are enforced in American courts without significant consideration of the propriety, wisdom, or domestic legal compliance of such sovereign acts. Limitations, of course, exist where the act of the foreign state is radically inconsistent with domestic policy [FN90] or where the procedures by which a judgment was secured do not provide the rudiments of fairness. [FN91] Nevertheless, the substantial deference owed to the acts and judgments of sovereign states generally precludes American courts from inquiring into the compliance of that judgment with domestic policies, procedures, or even constitutional values. [FN92] At the other end of the spectrum, in ***873** the administrative model, some review, albeit a sometimes limited review, of the substantive validity of the act or adjudication of an administrative agency is routinely available prior to judicial enforcement. While some deference generally is given to findings and expertise of the agency in the course of the review, a comparatively more searching inquiry into substantive and procedure conformity to domestic law is undertaken. Indeed, in the administrative model, constitutional and jurisdictional issues are reviewed de novo by the enforcing court with no deference given to such legal determinations.

The restructuring of tribal sovereignty from outside to within the federal union, and the changing role of tribal courts therein, requires the reassessment of how American law has dealt with such questions of cooperation, deference, and review; and whether the solutions are either consistent or appropriate. Indeed, what is ultimately required is the clear delineation of a fourth model -- a tribal model of intergovernmental relations. In the United States, the history of relations with Indian tribes, the treaty promises made to them of political autonomy and noninterference, and the lack of tribal consent to federal or state governance all suggest that the tribal model should lie closer to the transnational model than the federalism model on the continuum described above. Nevertheless, the

de facto incorporation of the tribes into the federal union and the dual allegiance of tribal members in the post-colonial era suggest that the tribal model cannot be and should not involve a pure transnational model. Rather, as distinct peoples and sovereigns within the federal union, tribes must observe certain binding legal obligations with reference to federal and state governments and, conversely, certain legal obligations must be imposed on the federal and state governments to respect and honor the sovereignty of the tribes in the interest of cooperative political union.

IV. REVIEW: TRIBAL DECISIONS IN FEDERAL AND STATE COURTS

An important debate over review of tribal court decisions about civil rights matters, particularly of cases involving the enforcement of statutory bill of rights guarantees secured to all persons against tribal interference by the Indian Civil Rights Act of ***874** 1968 [FN93] and over questions of the scope of tribal court jurisdiction, [FN94] recently has surfaced significant questions about the review of tribal court decisions in federal and state courts. On these two issues, the Supreme Court has charted a remarkably inconsistent course that is difficult to reconcile with any of the proposed models of sovereign relationships described above.

In Santa Clara Pueblo v. Martinez, [FN95] the United States Supreme Court held that no federal cause of action could be implied under the Indian Civil Rights Act of 1968 (ICRA) that would permit federal district courts to entertain civil claims brought under the Indian Civil Rights Act. The Court rested its decision primarily on the view that Congress had not meant to infringe on the fundamental principle of Indian tribal self-government when it enacted the Indian Civil Rights Act, a point that the Court derived from a careful analysis of the legislative history of the ICRA. The Court recognized that in 25 U.S.C. section 1303 [FN96] Congress provided a federal habeas corpus remedy for violations of the Indian Civil Rights Act in criminal cases. This remedy is substantially equivalent to, and possibly more intrusive than, [FN97] the one afforded ***875** against state governments in 28 U.S.C. sections 2241 and 2254. The Supreme Court treated the habeas corpus remedy as the exclusive federal cause of action created under the Indian Civil Rights Act to enforce its provisions in nontribal judicial forums. This decision, therefore, left the primary and generally final responsibility for enforcing the civil rights provisions of the ICRA in civil contexts with tribal governments, often through tribal courts. The Court also recognized that certain tribes lacked separate court structures and such tribes handled resolution of disputes through other tribal governance processes. Thus, the Court noted that " n onjudicial tribal institutions have also been recognized as competent law-applying bodies." [FN98]

Since the decision in Martinez, litigants, occasionally with the cooperation of federal courts, have been adept at advancing creative vehicles to evade the result of that case. In a number of decisions, courts or litigants either have distinguished Martinez or sought to find other vehicles for bringing ICRA claims into the federal courts, such as 42 U.S.C. section 1985(3). [FN99] For the most part, such efforts have proved unsuccessful. [FN100] The one major exception is the doctrine that emerged in the Tenth Circuit in Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes. [FN101] In Dry Creek Lodge, the Tenth Circuit held that a federal district court could entertain a suit against an Indian tribe claiming deprivation of due process of law where the tribe had failed to provide any tribal forum for the resolution of such ICRA issues by restricting tribal court jurisdiction over cases involving non-Indians. As noted by the dissent, the majority opinion badly confused the issue of the tribe's sovereign immunity from suit with the question of whether ***876** any cause of action was created by federal law to civilly enforce the ICRA, which could serve as the basis of federal question jurisdiction. Furthermore, while the opinion purports to distinguish Martinez on the grounds that Indians were involved and a tribal forum was available, it never adequately explains how a judge-made cause of action can be reconciled with the rationale of Martinez which stressed the congressional desire to preserve tribal sovereign autonomy. This decision, nevertheless, suggests that, where tribes fail to provide a forum for the resolution of ICRA claims, federal courts sometimes may intervene notwithstanding Martinez.

As a result of Martinez and its progeny, direct substantive federal review of tribal decisions on civil rights claims raised under the Indian Civil Rights Act exists primarily for criminal cases and possibly a limited range of other cases that can be heard under the habeas corpus remedy provided under 25 U.S.C. section 1303. Thus, most tribal decisions in civil matters affecting civil rights are final and cannot be directly reviewed by any other court of the federal union. The lack of direct federal or state court review of tribal court decisions in the area of civil rights parallels the lack of any provisions for such review on any other question decided by a tribal court that does not fall

within the habeas corpus remedy provided for in section 1303. Consideration of this pattern of intergovernmental relations in light of the models of intersovereign cooperation described above suggests that, for civil liberties questions, the combination of Martinez and the habeas corpus remedy under section 1303 provides a model of intergovernmental cooperation in the review of civil rights and other matters that combines aspects of transnational and federalism models. The transnational model is evident for most noncriminal matters because no direct review exists in the courts of another sovereign to challenge the substantive validity of determinations made by tribal courts. On the other hand, the habeas corpus remedy available under section 1303 to enforce provisions of the ICRA, where the claimant is held in custody, clearly parallels the federalism model of intergovernmental relations, borrowing elements of habeas corpus jurisdiction under 28 U.S.C. section 2254 that trace back to the restructuring of federal-state relations during the Reconstruction period begun by the Habeas Corpus Act of 1867. [FN102] The resulting picture of intergov ***877** ernmental cooperation that emerges from Martinez and its progeny recognizes that Indian tribes are sovereigns with legitimate claims to autonomy and respect that are perhaps closer to foreign nations than to the individual states. While counter- intuitive to some, this status is easily explained when one considers that tribes were not originally part of the federal union either in their own conceptionof allegiance or in the view that the Constitution and the union took of their status. The involuntary incorporation of Indian governments and their people into the federal union that occurred in the late nineteenth and early twentieth century certainly altered patterns of intergovernmental cooperation and relations. [FN103] Nevertheless, this incorporation of Native Americans into the federal union was mostly involuntary and nonconsensual. To federally legislate an extensive system of direct review for tribal actions in this context would violate many fundamental American principles of popular sovereignty based on the consent of the governed. Thus, by default, the legal system has worked out a tenuous accommodation that mandates tribes to provide civil liberties and other protections through the Indian Civil Rights Act but leaves to tribal fora the final resolution of such questions except in the gravest of matters, i.e., where actual liberty is at stake. Thus, in many ways the results of Martinez and its progeny recognize that Indian tribes, while within the federal union, legitimately are less subject to direct federal judicial review than states because of the nonconsensual ***878** manner in which they were forced into the federal union and made subject to involuntary governance by Congress under then prevailing, but subsequently discredited, American constitutional law theories. [FN104]

While federal or state courts rarely can directly review the enforcement of civil rights guarantees or other matters that arise in tribal courts, one recent trend seems inconsistent with the hybrid model of intergovernmental cooperation that emerges from Martinez. The Court's decision in National Farmers Union Ins. Cos. v. Crow Tribe [FN105] holds that federal courts have subject matter jurisdiction over claims attacking the existence of tribal jurisdiction after exhaustion of all available tribal remedies. The National Farmers Union case therefore partially circumvents some of the Martinez limitations by permitting litigants to convert civil rights claims into assertions of lack of tribal court jurisdiction, claims over which National Farmers Union holds the federal court has jurisdiction. In National Farmers Union, the plaintiffs brought suit in federal court to enjoin enforcement of a tribal default judgment. The plaintiffs' fundamental dispute involved a claimed Indian Civil Rights Act violation, an assertion that tribal courts had denied them due process of law by entering judgment against them without any effective notive of the proceedings. Apparently recognizing that federal review of this claim was precluded by Martinez, the plaintiffs sought a federal court injunction against enforcement of the tribal court order on the theory that the tribal court lacked jurisdiction over them and the case. When the case finally reached the Supreme Court, the Court did not resolve the jurisdictional problem. Rather, it ruled, arguably inconsistently with Martinez, that federal jurisdiction existed over a claim that tribal courts lacked subject matter jurisdiction over the case based on federal Indian law. Nevertheless, the Court declined to hear the issue, ruling that the plaintiffs must exhaust all available tribal remedies prior to presenting any such claim to federal court. This judgemade rule was fairly novel. While res judicata and similar finality doctrines have never directly operated in habeas corpus proceedings where the federalism rule of exhaustion of state remedies has ***879** its most significant role, [FN106] such doctrines traditionally do operate in civil adjudication. Prior to National Farmers Union, one therefore might have thought that any tribal court adjudication that addressed and resolved questions of tribal court subject matter jurisdiction would have been preclusive of federal court adjudication. [FN107] Nevertheless, without any significant consideration of such finality problems, questions that lie at the heart of respect for the authority and sovereignty of the courts of another sovereign, the Court created a judge-made exhaustion rule that permits federal judges to directly review the decisions of tribal courts on such important jurisdictional questions. Perhaps the lack of any statutory provision for direct appellate review from tribal courts to the Supreme Court influenced the Court's decision. When state court jurisdiction is called into question, as it frequently is in cases arising in Indian country, any state court determinations of the scope of state jurisdiction are reviewable by the Supreme Court, currently through writ of

certiorari. [FN108] Nevertheless, creating a judicially defined ***880** exhaustion doctrine to afford some federal court review seemingly ignores traditional rules of finality applicable to the judgments of sovereigns and reflects an approach tointergovernmental relations that is inconsistent with the model advanced in Martinez. Thus, National Farmers Union constituted a remarkable feat of judicial governance by a Court not known for its forays into judicial activism. In the LaPlante case, the Court expanded its unprecedented exhaustion rule to cases brought into the federal court on diversity of citizenship jurisdiction, thereby both ignoring and avoiding a very difficult problem under the doctrine of Erie v. Tompkins Railroad Co. [FN109]

Bolstered by a recent controversial inquiry conducted by the United States Commission on Civil Rights into the enforcement of the Indian Civil Rights Act in Indian country, [FN110] supporters of federal ***881** court enforcement of the ICRA against the tribes have turned to Congress to restructure the intergovernmental relationship recognized by Martinez. Senator Hatch has introduced Senate Bill 517 [FN111] to provide federal court review in the district courts with full ***882** and costly rights of appeal within the federal court structure of tribal decisions adjudicating Indian Civil Rights Act claims. Superficially, the Hatch bill would appear to carefully structure the intergovernmental relationship between tribal and federal courts. Drawing on federalism models derived from the writ of habeas corpus provided by 28 U.S.C. section 2254(d), the Hatch bill purports to give deference, albeit not finality, to some tribal factual determinations in Indian Civil Rights Act claims. Strangely, even though the model for the Hatch bill seems to emerge from the same federalism, exhaustion of remedies model recognized by National Farmers Union and LaPlante, the proposed legislation does not extend its more detailed provisions governing the deference owed tribal determinations to cases like National Farmers Union challenging the jurisdiction of the tribal court. Rather, the proposal is limited to claims brought under the Indian Civil Rights Act.

The Hatch bill would amend the Indian Civil Rights Act by adding a new compliance section that ultimately would be codified as 25 U.S.C. section 1304. Subsection 1304(a) would grant federal district courts jurisdiction of civil actions alleging a denial of rights enumerated in Section 1302 of the Act. The subsection also prohibits the defense of sovereign immunity in civil actions brought to enforce compliance with the Indian Civil Rights Act. Subsection 1304(b) provides an individual or the Attorney General with a ***883** right of action in the Federal district courtsfor declaratory, injunctive or other equitable relief, but not for damages, if a tribe fails to comply with the individual's civil rights provided by the Act. This subsection also requires the exhaustion of tribal remedies for individual claims. As a prerequisite to exhaustion of tribal remedies, however, the available tribal remedies must be timely and reasonable under the circumstances so that an individual is protected from dilatory governmental decision-making. Unfortunately, under the proposed statute, enforcement actions initiated by the federal government are not subject to the exhaustion of the tribal remedies requirement. Irrespective of whether the plaintiff is an aggrieved individual or the Attorney General, relief in any enforcement action is strictly limited by subsection 1304(b) to nondamage relief, such as declaratory judgment, an injunction, or other nonmonetary equitable remedies. Equitable relief may be granted against an Indian tribe, tribal organization, or tribal official.

Proposed subsection 1304(c) compels district courts to adopt the findings of fact of tribal courts unless the federal district court makes a determination that one of eight listed irregularities occurred respecting the tribal court's procedures. Upon finding any of the eight described procedural irregularities, the federal court can completely ignore the findings of fact of the tribal forum and can conduct a de novo review of the federal issue without reference to the prior exercise of tribal sovereignty by the tribal court. Those irregularities include failure or inability of the tribal court to render any final resolution of the civil rights question, successful assertion of a sovereign immunity defense by tribal defendants, failure to resolve the merits of the factual dispute in the tribal court, material facts not having been adequately developed, fact-finding procedures used by the tribe that did not adequately afford a fair hearing, failure to afford a full and fair hearing, or findings of fact that are not fairly supported by the record. By far, the most egregious such circumstance contained in the Hatch bill, however, is found in subsection 1304(c)(1), which provides in relevant part:

> In any civil action brought by an aggrieved individual, or by the Attorney General, the Federal district court shall adopt the findings of fact of the tribal court, if such findings have been made, unless the district court determines that:
>
> (1) the tribal court was not fully independent from the tribal legislative or executive authority;

While this proposed legislation seems to accord some limited deference***884** to tribal sovereignty by requiring that tribal fact-finding be presumed correct, the deference is illusory because it is strictly conditioned. The first condition, the requirement of tribal judicial independence, represents a black hole that could and probably would

swallow up the requirement of federal court deference to tribal factfinding. First, some tribes, as noted in the Martinez case, have no established judiciary at all. While the Supreme Court recognized in Martinez that nonjudicial tribal bodies were acceptable sources of the Indian Civil Rights Act enforcement, the Hatch bill seems to ignore that fact by giving deference only to tribal judicial fact-finding. Second, very few of the tribal constitutions or other governing documents or structures contain any concept of separation of powers. Rather, like the United States under the Articles of Confederation or like city manager forms of government today, most tribal governments merely set up a legislative body, usually denominated as the tribal council or the tribal business committee. The tribal council creates the tribal judiciary, appoints the judges, and supervises all aspects of tribal judicial operations, including removal of tribal judges. On some, but by no means all, reservations, this power has been used to control the tribal judiciary or to remove judges who challenged the tribal government. [FN112] Thus, given the distinctive tribal structure of most judiciaries in Indian country, a federal judge who is familiar primarily with federal and state constitutional guarantees of separation of powers and federal assurances of judicial independence will likely consider most of the structural arrangements for tribal judiciaries as providing nonindependent judges, even in those reservations where the tribal council historically has given the tribal judiciary a very long leash. In short, the tribal judicial independence requirement contained in the proposed bill not only tries to impose a new and alien concept of separation of powers on Indian tribal governments, it also threatens to ignore, or at least provide no deference for, their sovereign actions ***885** if they fail to adopt such Anglo-American structural arrangements.

Given the tribal judicial independence requirement contained in the Hatch bill, the proposed legislation, while adopting forms derived from the federalism model, in most cases could and probably would provide complete de novo review of all tribal decisions on Indian Civil Rights Act questions. This standard of review is more like the administrative model traditionally used to review the decisions of coordinate branches of government within the same sovereign than it is like any of the existing American law models for intergovernmental cooperation and review. The simplistic solution proposed in the Hatch legislation, therefore, should be disapproved because it seriously derogates from the respect that American law traditionally has shown to final judgments entered by courts owing their creation to a different sovereign. Even under the federalism model, traditional respect for state sovereign, dictates that the review of most judicial decisions be had in the Supreme Court, the highest court of the nation, rather than in inferior federal courts. [FN113] ***886** In the context of reviewing federal questions first heard in state court, the Supreme Court traditionally has deferred to most of the fact-finding of the state court and has treated state court law determinations of state law as final. Given the fact that the Martinez case and others long have suggested that Indian tribes retain an aboriginal sovereignty that in many ways involves greater autonomy than the sovereignty retained by the states, [FN114] any review of their decisions undertaken by federal courts should at least provide the tribes the same dignity and respect accorded the decisions of state tribunals.

The case for greater Indian autonomy than that accorded the states is quite strong. First, under doctrines of popular sovereignty which the United States awkwardly ignored during its own colonial era, the long-term governance and supervision of the sovereign acts of Indian peoples who were not originally part of the social compact that formed the union can not easily be justified. The Indian tribes and their members never voluntarily entered the union. They do not share the structural guarantees of sovereign autonomy that the Constitution provides in the Senate, Electoral College, and amendment process to states. Extensive review of tribal court decisions, therefore, poses serious theoretical problems of legitimizing such supervision under traditional American conceptions of popular sovereignty. [FN115] The theory of the Constitution is that the people ***887** of the states came together in the Philadelphia Convention and granted the federal government greater power than previously exercised under the Articles. Later states voluntarily entered that social compact. Because the people of the states were the ultimate repository of that sovereignty, their actions could and did limit state sovereignty, although it clearly took the Civil War and myriad jurisdictional legislation of the Reconstruction period [FN116] to fully vindicate such limitations on state sovereignty and autonomy. By contrast, the people of the tribes did not participate in the formation of the federal union and, for the most part, rarely directly and formally consented to the significant late nineteenth- and early twentieth-century colonial developments, including the statutory grant of citizenship, by which they were involuntarily made a part of the federal union. Nevertheless, the colonial inclusion of Indian tribes within the federal union is an accomplished fact accepted by American law and by many, but certainly not all, tribal peoples and their leaders. While federal Indian law must accommodate these changed realities brought about by colonial expansion, in a postcolonial era, it should attempt to do so by honoring to the extent feasible the popular sovereignty notions upon which American governmental legitimacy is based. Based on such notions, tribal autonomy from direct federal and state court review has greater political legitimacy than similar claims made early in our nation's history by state governments. [FN117]

Second, unlike questions of federal-state relations that only constitute matters of domestic organization, the protection of the sovereignty of indigenous peoples within the framework of existing nation states increasingly has become a matter of international legal protection and concern. [FN118] A body of international law has emerged ***888** that recognizes and protects the political autonomy of indigenous peoples who are within the territorial limits and to some extent subject to governance by other powers, usually as a remnant of colonial expansion. While the United States has not signed the most relevant international agreement in this area, International Labor Organization Convention 169, [FN119] and, therefore, is not directly bound by its provisions, the emerging international consensus on the proper treatment of sovereign indigenous peoples reflected in this convention and other international statements should play an important role in American legal thinking on the subject if the nation desires to maintain its leadership on international human rights questions. For example, article 8 of Convention 169 provides:

1. In applying national laws and regulations to the peoples c ncerned, due regard shall be had to their customs or customary laws.
2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.
3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.

Similarly, a draft proposed Universal Declaration of Indigenous Rights [FN120] prepared for the approval of the United Nations General Assembly calls for all nation states to recognize "[t]he right [of indigenous peoples] to participate fully in the political, economic, and ***889** social life of their State and to have their specific character duly reflected in the legal system and in political institutions, including proper regard to and recognition of indigenous laws and customs" and "[t]he collective right to autonomy in matters relating to their internal and local affairs."

However nonconsensual the inclusion of Indian tribes within the union originally was, that process constitutes an accomplished historical and political fact. In American law, Indian tribes never were foreign states [FN121] to which complete deference was owed for their sovereign acts. Even in negotiated treaties, their domestic status resulted in frequent reservations by the United States of right to resist or ignore tribal decisions inconsistent with the Constitution or the laws Congress passed for regulating relations between Indian peoples and the American polity. [FN122] Subsequent Indian citizenship and the inclusion of tribes within the federal union diminish tribal claims to unreviewable finality in their enforcement of federal, rather than tribal, law. Under Martinez, however, external review by a less interested court does not exist in noncustodial matters involving the Indian Civil Rights Act or for the enforcement of many other federal laws when the case originally was heard in a tribal forum. The problem is how to accommodate such review with the sovereignty and autonomy of the tribes and nevertheless provide some assurance that the tribal governments discharge their legal responsibilities as part of the federal union.

Two alternative solutions might be suggested, neither of which ***890** are perfect. One solution might be for the tribes, by collective action and with the cooperation of Congress, [FN123] or less preferably for Congress unilaterally, to create a standing specialized Court of Indian Appeals composed of independent judges formally appointed by the President but selected from and by the tribes. This court would serve as an appeals court of last resort to hear appeals from all tribal courts in matters raising questions under the Indian Civil Rights Act or other federal laws in which the tribal decision was adverse to the federal claim. This proposal loosely echoes the plan for a Court of Indian Affairs, originally proposed by Indian Commissioner John Collier as part of his Indian reorganization scheme but omitted from the Indian Reorganization Act of 1934. [FN124] The ***891** jurisdiction exercised by such a court might parallel the appeals ***892** jurisdiction over federal questions originally given to the Supreme Court to assure federal supremacy over cases first heard in state tribunals. [FN125] The judicial independence of such a court and its supra-tribal nature should ameliorate the concerns of critics of tribal enforcement of the Indian Civil Rights Act who argue that tribal court enforcement of claims made under that Act cannot finally be committed to non-independent judges who sometimes are members of the tribe in question, who have no judicial independence, and who are sometimes pressured or removed from office for enforcing the mandates of federal law. Furthermore, staffing such a specialized court with Native American judges, who are familiar with reservation life and the special legal problems posed by the interface of Indian customary and written federal, state, and tribal law, would obviate the objections of tribal critics of federal court review who fear that federal court

review will ignore special tribal problems and conditions and undermine the sovereignty of the various Indian tribes. While such a specialized national Indian Court of Appeals may be an appealing solution to many of the problems raised by critics of Martinez, this solution is not without difficulty. Indian sovereignty does not exist for Indian people as a whole; rather, it exists for each tribe. A single Indian Court of Appeals would not have the familiarity with the history, traditions, customary law, or conditions of each tribe needed to balance and accommodate its interpretations of the Indian Civil Rights Act or other federal laws with the actual interests or problems faced by the tribe whose decisions are at issue. Nevertheless, it is far more likely that a pan-tribal court composed of Native American judges could perform that delicate role better than a federal district judge who may never have set foot on an Indian reservation and who may have no familiarity with tribal traditions or governance.

***893** Second, if one believed, as the author does not, that the creation of a federal court remedy is essential to enforce federal statutory guarantees involving tribal governance, such as the Indian Civil Rights Act, the sovereignty of Indian tribes and the peculiar history of their relationship to the federal union suggests that the form of federal review afforded and the level of court exercising that review should at least equal that provided to the states. Under prevailing statutes, federal district courts generally do not review the final decisions of state courts. Rather, the remedy for state civil adjudications deemed violative of federal law is Supreme Court review under 28 U.S.C. section 1257. Assuming that some federal judicial oversight of tribal governmental compliance with the Indian Civil Rights Act and other federal mandates is required, the federal court oversight that would most respect the dignity and sovereignty of Indians would be the Supreme Court review. [FN126] Such review would equate the tribal-federal court relationship with the state-federal court relationship by adopting the federalism model of intergovernmental review, rather than the administrative model that practically would result from the Hatch bill. Nevertheless, by increasing federal oversight and providing for some federal judicial ***894** review not presently available under Martinez, even thisproposal, to some extent necessarily, derogates from the existing sovereignty of Indian tribes.

Over the past decade, Congress has amended a number of laws to afford tribal governments the same status as state governments for various federal policy purposes. In the Indian Tribal Tax Status Act, [FN127] Congress amended the Internal Revenue Code to give tribal governments the tax-exempt status and bonding authority enjoyed by state and municipal governments. Congress also amended a number of environmental protection statutes to authorize tribes to submit enforcement plans to assume a role in the planning, management, and enforcement of such environmental regulations in a manner equivalent to that afforded to the states under the legislation. [FN128] Indeed, the provisions of 25 U.S.C. section 1303, containing the federal habeas corpus remedy provided in the Indian Civil Rights Act, are predicated on the federalism model. They afford those detained under tribal authority a remedy substantially equivalent to that provided to those detained under state authority in 28 U.S.C. sections 2241 and 2254. Assuming one believed that serious systematic problems in the enforcement of the Indian Civil rights Act existed in tribal governments throughout Indian country and that leaving final resolution of civil ICRA question to tribal forums inadequately protected on most or all of the nation's Indian reservations, the next logical incremental step in incorporating tribes into the federal union might be to facilitate federal oversight by affording a vehicle for United States Supreme Court review of the final decisions of tribal forums in cases or controversies. This approach would adopt a tribal model substantially equivalent to that provided for review of state court decisions or the decisions of the courts of Puerto Rico under 28 U.S.C. sections 1257 and 1258.

While Martinez generally precludes direct review by federal courts of Indian court judgments for compliance with the Indian Civil Rights Act, Martinez does not mean that federal and state courts are prevented from exercising any review of the fairness, ***895** compliance with constitutional norms, or jurisdiction of thetribal court in such cases. There is one area in which federal and state courts already exercise legitimate review of tribal enforcement of the Indian Civil Rights act. When the judgments or orders of tribal courts or governments are brought into federal or state courts for enforcement under the full faith or credit statute, 28 U.S.C. section 1738, or under doctrines of intergovernmental comity, [FN129] such federal or state courts rightly can and have examined whether the judgment complies with the due process requirements of the Indian Civil Rights Act or whether it was "rendered under a system of law reasonably assuring the requisites of an impartial administration of justice." [FN130] Thus, in cases where tribal laws or judicial proceedings ***896** require extraterritorial enforcement by federal or state courts, review by the enforcing court of tribal compliance with the due process elements of the Indian Civil Rights Act already constitutes a legitimate part of existing law. [FN131]

The present institutional role of federal and state courts in the enforcement of the Indian Civil Rights Act seems to

establish an appropriate allocation of power. It has placed primary responsibility for enforcing the ICRA with tribal governments and has caused tribal institutions to assume greater responsibility for the enforcement of these federally guaranteed civil liberties, [FN132] thereby accounting for much of the recent progress in tribal courts and other forums in developing more sophisticated mechanisms and approaches for dealing with such questions. Undermining the allocation of authority established in Martinez by providing the type of routine administrative model review contemplated by the proposed Hatch legislation would demoralize tribal governments by according ***897** their judgments less deference and respect than due them under either the transnational or the federalism model of intergovernmental relationship and would retard or even set back the productive developments occurring in tribal judiciaries. In short, while isolated abuses of the Indian Civil Rights Act by tribal governments certainly can be found, just as one can cite isolated gross violations of the United States Constitution by federal and state governments, no systematic problem exists with the tribal court remedial structures. Therefore, no general remedy is required. Nevertheless, even if such systematic abuse existed, the remedy should not involve adoption of the administrative review model which would result from the Hatch legislation. Rather, some review model representing a hybrid of the transnational and federalism models would seem more appropriate for the reasons noted above. The Indian Court of Appeals model proposed constitutes precisely such a hybrid approach. This approach involves the tribes in the formation of the Court and recognizes and accommodates the distinct sovereign role of Indian tribes within the federal union. At the very least, popular sovereignty theory, and the involuntary nature of fusion of Indian tribes into the federal union, suggests that any expanded federal review should provide no less dignity and deference for tribal court judgments than provided for state court judgments. This approach would suggest adoption of some form of Supreme Court review of tribal judgments rather than de novo determinations by inferior federal courts, as proposed by the Hatch legislation.

V. FULL FAITH AND CREDIT OR COMITY: A SEARCH FOR APPROPRIATE MODEL

The incorporation of Indian tribes into the union requires that both non- Indian and tribal courts within the union respect one another's judgments and laws. The principles underlying these obligations are evident from the role that full faith and credit doctrine played in structuring the positive relationships between the states and between the federal government and the states. In restructuring the federal union to assure greater cooperation between the states, the framers drew on the principle of full faith and credit to assure that the sovereign states comprising the union would show the requisite mutual respect for one another's judgments and laws. During the Philadelphia Constitutional Convention, the following colloquy indicated the importance the framers placed on assuring ***898** that states were mandated to accord full faith and credit to the judgments of other states in the union, notwithstanding expressed doubts about the obligation of foreign nations to afford such mutual cooperation:

Mr. WILLIAMSON moved to substitute in place [of the draft language of article XVI of the Committee on Detail draft document], the words of the Articles of Confederation on the same subject. [FN133] He did not understand precisely the meaning of the article.

Mr. WILSON & Docr. JOHNSON supposed the meaning to be that Judgments in one State should be the ground of actions in other States, & that acts of the Legislatures should be included, for the sake of Acts of insolvency &c.

Mr. PINKNEY moved to commit art XVI, with the following proposition, "To establish uniform laws upon the subject of bankruptcies, and respecting the damages arising on the protest of foreign bills of exchange."

Mr. GHORUM was for agreeing to the article, and committing the proposition.

Mr. MADISON was for committing both. He wished the Legislature might be authorized to provide for the execution of Judgments in other States, under such regulations as might be expedient. He thought that this might be safely done, and was justified by the nature of the Union.

Mr. RANDOLPH said there was no instance of one nation executing judgments of the Courts of another nation. He moved the following proposition:

"Whenever the act of any State, whether Legislative, Executive or Judiciary shall be attested & exemplified under the seal thereof, such attestation and exemplification, shall be deemed in other States as full proof of the existence of that act -- and its operation shall be binding in every other State, in all cases to which it may relate, and which are within the cognizance and jurisdiction of the State, wherein the said act was done."

On the question for committing Art. XVI with Mr. Pinkney's motion: N.H., no. Mas., no. Ct., ay. N.J., ay. Pa., ay. De., ay. Md., ay. Va., ay. N.C., ay. S.C., ay. Geo., ay.

The motion of Mr. Randolph was also committed name: con:

Mr. Govr. MORRIS moved to commit also the following proposition on the same subject:

***899** "Full faith ought to be given in Each state to the public acts, records, and judicial proceedings of every other

State; and the Legislature shall by general laws, determine the proof and effect of such acts, records, and proceedings." and it was committed nem: contrad: The committee appointed for these references, were Mr. Rutlidge, Mr. Randolph, Mr. Gorham, Mr. Wilson, & Mr. Johnson.

From the deliberations of this committee ultimately emerged the final language of the full faith and credit clause: [FN134]

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other States; And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

The significance of the full faith and credit clause to the federal union is reflected in Randolph's comments. Despite knowing of no instance of the courts of one nation enforcing the judgments rendered by another nation, he nevertheless sought a constitutional clause under which any sovereign act of state, including the judgments of the judiciary, the acts of the legislature, or executive acts, were made "binding in every other State, in all cases to which it may relate." In short, inclusion of sovereign states within the union deprived those states of the sovereign prerogative to decline to recognize or enforce sovereign actions taken by other states within the union. Union impelled both mandatory deference and cooperative enforcement. Furthermore, union required that some authority outside of each sovereign state determine the force due such judgments and enforce these obligations imposed on sovereign states through their inclusion in the union. Thus, under the full faith and credit clause, Congress is afforded the authority to enact legislation to "prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Furthermore, inclusion of the full faith and credit clause within the United States Constitutions makes the obligation to accord full faith and credit to the sovereign acts of other states a federal constitutional issue enforceable by federal courts. [FN135] For members of the federal ***900** union, the decision whether to recognize the sovereign acts of other constituent parts of the union no longer was a matter of sovereign prerogative for each state within the union. The obligation to accord full faith and credit to judgments and laws of other states became a binding federal legal obligation that limited the sovereignty of the states as a result of their membership in the federal union. The clause therefore implemented the concerns that Randolph raised during the Philadelphia Convention. The full faith and credit clause formed an important part of the cement that bonded together the federal union.

Of course, the constitutional full faith and credit clause applies by its terms only to states. Nevertheless, Congress exercised authority granted under article IV and enacted a full faith and credit statute that is far broader than the coverage of the constitutional clause. [FN136] Thus, 28 U.S.C. section 1738 provides:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, 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.

In describing the courts and other governments to which Section 1738 applies, the statute employs two distinct phrases. In referring to the sovereign that rendered the judgment or act to be enforced (the rendering jurisdiction), section 1738 refers to the legislature or courts of "any State, Territory, or Possession." When referring to the forum courts asked to enforce such acts (the enforcing forum), section 1738 refers to "every court within the United States and its ***901** Territories and Possessions." It may be that the statutory references to enforcing forums and rendering jurisdictions, while awkwardly and not consistently drafted, were meant to be coextensive, i.e., to encompass all enforcing and rendering jurisdictions that constitute part of the federal union. Nevertheless, courts and commentators have not construed the statute in this manner. [FN137] Rather, section 1738 has been given a literal reading that creates certain anomalies. For example, federal courts asked to enforce state judgments are bound by section 1738 to accord full faith and credit to such judgments by section 1738. [FN138] By contrast, section 1738, as construed by most commentators, does not directly impose on any state court asked to enforce a federal court judgment any obligation to accord such judgment full faith and credit. [FN139] Rather, it is usually assumed that constitutional supremacy, rather than the statutory language, compels state courts to accord federal court judgments

full faith and credit.

The incorporation of Indian tribes into the federal union has important implications for both the full faith and credit due for tribal judgments and laws, ordinances, and resolutions and for the obligations of tribal courts to afford full faith and credit to the judgments and laws of the states. Prior to their incorporation into the Union, tribes reasonably might have claimed that section 1738 did not apply to them. They might have argued that tribal courts were not courts "within the United States and its Territories and Possessions" in the sense that Indian tribes and their members were not subject to the jurisdiction of the United States, as reflected by decisions such as Cherokee Nation, [FN140] Crow Dog, [FN141] and Elk v. Wilkins. [FN142] Subsequent incorporation of Indian tribes into the federal union makes it quite difficult for both states and tribes to argue that they owe one another no full faith and credit. The obligations of membership in the federal union presume the existence of such federally enforceable obligations. Indeed, assuring the continuity of the federal union requires that the sovereign prerogatives of the constituent components of the union must be limited by imposing a federal binding obligation to respect and accord full faith and credit to the sovereign acts of each sovereign component of the federal union, as Randolph's comments at the Philadelphia Convention make clear. To fully appreciate that obligation, it is necessary to separately explore (1) the obligation of state and federal courts to accord full faith and credit to the judgments of tribal courts and to tribal law, and (2) the obligation of tribal courts to accord full faith and credit to the judgments and laws of the federal and state governments.

A. Federal and State Court Deference to Tribal Judgments and Laws

Federal and state courts that have addressed the recognition and enforcement of tribal judgments and laws generally agree that such sovereign acts of tribal government are entitled to some deference. Unlike state and federal court judgments, which frequently are presented to the courts of other sovereigns for enforcement, tribal judgments rarely are presented to state or federal courts for enforcement. Rather, the question of deference to prior tribal judgments generally arises in a defensive posture where a prior tribal judgments is invoked under the doctrine of res judicata to prevent a federal or state court from redetermining anew the substantive merits of a claim. [FN143]

While federal and state courts generally acknowledge some legal obligation to recognize and defer to tribal court judgments and laws, the opinions are badly divided on the legal theory that requires such deference. Some courts construe the Full Faith and Credit Act, 28 U.S.C. Section 1738, to require such deference as a ***903** matter of federal statutory obligation. [FN144] These courtsinterpret the statutory langauge used to describe rendering jurisdictions -- "of any State, Territory or Possession" -- to include tribal governments. This interpretation is bolstered by the Supreme Court's decision in United States, Use of Mackey v. Coxe. [FN145] The Mackey case raised the question of whether the courts in the District of Columbia were required under a since-repealed federal statute [FN146] to give full faith and credit to an appointment by the courts of the Cherokee Nation of an administrator of the estate of Samuel Mackey. Speaking for the Court, Justice McLean declared: [FN147]

> No question could arise as the validity of the Cherokee law under which letters of administration were granted on the estate of Mackey, and as the power of attorney given by the administrators to Raines seems to have been duly authenticated and proved, a payment to the administrator by the government, would have been a legal payment. The Cherokee country, we think, may be considered a territory of the United States, within the Act of 1812. In no respect can it be considered a foreign state or territory, as it is within our jurisdiction and subject to our laws.

Thus, Justice McLean understood the term 'territory,' as used in that specialized full faith and credit statute, to refer to lands within the exterior boundaries claimed by the United States and subject to ultimate federal authority. The Cherokee Nation was not then an organized federal territory, but rather relied on its tribally formed government. Thus, the Court understood the statutory term 'territory' to refer not only to federally organized territorial governments, but also to include tribal governments of lands claimed by the United States. Without directly citing any statutory predecessors of section 1738, the Circuit Court for the Eighth Circuit, in a series of late nineteenth-century cases, also indicated that federal courts were legally bound to accord full faith ***904** and credit to both the laws and judgments of the tribal governments then operating in the Indian territory. [FN148] One certainly could argue that the territory term employed in section 1738 should be given precisely the same meaning. If so, Indian tribal courts would be treated as courts of a territory within the meaning of that statute, and all courts within the United States would be under a federal statutory command to accord tribal laws and judgments full faith and credit. This result has been suggested by some courts and commentators. [FN149] Indeed, in Santa Clara Pueblo v.

Martinez, the Court stated that " j udgments 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." [FN150]

While some modern courts have recognized the federal statutory obligation to accord tribal judgments and laws full faith and credit, several state courts have concluded that whatever deference is accorded tribal judgments derives solely from doctrines of comity normally applied to relations between foreign sovereigns. [FN151] Notwithstanding Randolph's comments during the Constitutional Convention that sovereign nations did not enforce the judgments of other nations, the modern comity doctrine imposes certain expectations upon sovereigns to enforce foreign judgments. The comity doctrine can be traced to early roots in American law. Its history is detailed in the Supreme Court's decision in Hilton v. Guyot. [FN152] In that case, Justice Gray described the theoretical basis of the doctrine ***905** as follows: [FN153]

No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call "the comity of nations." Although the phrase has been often criticised, no satisfactory substitute has been suggested.

"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.

Thus, courts enforcing tribal judgments based on notions of comity analogize tribal courts to foreign governments, precisely the analogy the Supreme Court rejected in Mackey and in Cherokee Nation v. Georgia. [FN154]

While the comity doctrine reflects notions of international accommodation, the Hilton case clearly points out that the doctrine represents a voluntary sovereign accommodation, rather than a binding legal obligation judicially enforceable by a body superior of the enforcing sovereign. This feature of the comity doctrine appeals to state courts because it leaves them discretion whether to enforce tribal court judgments. Furthermore, unlike the question of the construction and enforcement of section 1738, the comity doctrine does not raise a federal law question that could be appealed from the state court system to the United States Supreme Court. Thus, state courts that employ comity imply that their relationship to tribal courts resembles their relationship to foreign courts. Under the comity doctrine, states theoretically are not bound to enforce tribal judgments but will do so, as a voluntary, but expected, accommodation to a distinct sovereign, when not ***906** contrary to the public policy of the state or notions of procedural fairness.

Those state courts that have rejected full faith and credit as the appropriate legal vehicle for intergovernmental cooperation with tribal judiciaries generally only cite the constitutional clause dealing with full faith and credit among states and completely ignore the existence of an independent federal statutory obligation to accord full faith and credit to the laws and judgments of a broadened class of sovereigns within the federal union. [FN155] Thus, their preference for comity notions generally derives from a failure to acknowledge, let alone analyze, the requirements of 28 U.S.C. section 1738.

While the early treatment of Indian tribes as domestic dependent nations outside the federal union arguably might once have made the comity model of intergovernmental cooperation appropriate, the subsequent de facto incorporation of Indian tribes into the federal union should significantly alter the extent of enforceable legal obligation that state and federal courts have to recognize tribal laws and judgments. Rather than constituting a voluntary accommodation to an independent sovereignty, the responsibility to recognize the judgments and laws of constituent components of the federal union should constitute a federally enforceable legal obligation. [FN156] That was the central objective that Randolph sought during the Constitutional Convention when he argued for inclusion of a constitutional clause that would bind the states to recognize one another's laws and judgments. The subsequent enlargement of the federal union to include territories, possessions, Indian tribes, and the District of Columbia should carry with it a corresponding enforceable forceable federal obligation for each such sovereign subdivision to recognize and enforce the laws and judgments of other sovereigns within the union, as a matter of federal law. In short, to carry forward the thrust of the policy adopted by the framers of article IV, the question of intergovernmental relations within the federal union should constitute a federal law question legally enforceable in federal courts. [FN157] Of course, this analysis was precisely the approach ***907** taken in the Mackey case, which

held that courts of the Indian tribes must be treated as courts of a territory under the analogous 1812 legislation. Similarly, the Eighth Circuit repeatedly assumed that there was a federal legal obligation to accord the tribal acts of the governments of the Indian territory full faith and credit. Furthermore, analogizing modern Indian governments in the United States to portions of the federal union, like states, rather than to foreign nations more comfortably can be reconciled with cases such as Cherokee Nation, holding that American Indian tribes, while nations, do not constitute foreign states within the meaning of article III of the Constitution.

Congressional policy also suggests that full faith and credit, rather than comity, forms the appropriate model for intergovernmental cooperation between tribal governments and the remainder of the federal union. Congress has directly addressed the obligation of state courts to recognize and enforce tribal laws or judgments on at least four occasions, each time imposing full faith and credit obligations. As part of Public Law 280, Congress required state courts hearing cases involving Indians, that arose in Indian country and which were heard in state court under Public Law 280, to give "full force and effect" to tribal laws and customs, where not inconsistent with state law. [FN158] In the 25 U.S.C. section 1911(d), Congress provided as part of the Indian Child Welfare Act of 1978:

> The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

Likewise, in the Maine Indian Claims Settlement Act, Congress provided that "[t]he Passamaquoddy Tribe, the Penobscot Nation, and the State of Maine shall give full faith and credit to the judicial ***908** proceedings of each other." [FN159] Finally, a provision contained in the Indian Land Consolidation Act also provides: [FN160]

> The Secretary in carrying out his responsibility to regulate the descent and distribution of trust lands under section 1 of the Act of June 25, 1910 (36 Stat. 855; 25 U.S.C. 372) as amended, and other laws, shall give full faith and credit to any tribal actions taken pursuant to section 206 of this title [25 U.S.C. § 2205], which provision shall apply only to estates of decedent's whose deaths occur on or after the effective date of tribal ordinances adopted pursuant to this title.

Thus, in the four situations in which Congress directly has addressed the question of intergovernmental recognition of laws and judgments, it has imposed an enforceable federal statutory obligation on the states or the federal government to accord full faith and credit to tribal laws or judgments. By analogy, section 1738 and similar general full faith and credit statutes applicable to territories and possession [FN161] should be construed, and have been construed by some courts, to impose on federal and state courts a general obligation to accord full faith and credit to tribal laws and tribal court judgments. It could be argued that the perceived Congressional need for the four statutes in question suggests that Congress did not perceive section 1738 and similar general statutes to apply to tribal law and judgments. Since Mackey and numerous other federal cases long had suggested the opposite construction, Congress, by enacting these four specialized statutes, may have sought only to clarify an area of law where the critical general statute, 25 U.S.C. section 1738, had not been definitively interpreted with reference to Indian tribes. Thus, section 1738 remains susceptible to the construction advanced here and should be construed to require "every court within the United States and its Territories and Possessions" to give full faith and credit to the laws and judgments of Indian tribes.

B. Tribal Court Obligations to Enforce Federal and State Laws and Judgments

While Indian tribes seek greater recognition for their laws and ***909** judgments in federal and state courts, many tribes balk at the suggestion that tribal courts must recognize and enforce federal or state laws and judgments. The crux of the problem is the fear that any obligation imposed on Indian tribal governments, physically located within states, to respect and enforce judgments rendered in the federal and state courts somehow infringes on tribal sovereignty. The foregoing discussion suggests that this argument is misplaced for two reasons. First, as to judgments, the doctrine of international comity suggests that even between foreign states a legal expectation exists that the judgments of one state rendered after full and fair process will be enforced by other sovereign states when not inconsistent with some fundamental public policy of the enforcing jurisdiction. [FN162] To argue that Indian tribal sovereigns are under no obligation or expectation to recognize and enforce the judgments of another sovereign, whether rendered by federal or state governments or that of a foreign nation, is to argue that tribes are immune not only from the obligations normally imposed by federal law, but also from legal expectations of the

world community. This argument, therefore, poses too many conceptual problems to be accepted. Second, since Indian tribes have been incorporated within the federal union, one of the core responsibilities imposed on constituent components of the federal union was precisely the duty that Randolph sought during the Constitutional Convention -- a "binding" obligation to respectthe laws and judgments of the other sovereign constituent states within the union. If, as argued here, Indian tribes have become sovereign units within the federal union, tribal governments must, as part of the legal glue of that union, be under precisely the same obligation to respect the laws and judgments of federal and state governments that they seek from other members of the federal union for their own laws and ***910** judgments. An asymmetrical rule, that imposes recognition and enforcement obligations on federal and state courts, but not on tribal fora, is not a tenable rule if tribes are to assume their full measure of sovereign respect within the federal union.

Furthermore, many of the same arguments that support the notion that section 1738 imposes federal statutory obligations on federal and state courts to respect tribal judgments operate with even greater strength to suggest the existence of a federal statutory obligation for tribal courts to recognize and enforce in appropriate cases the judgments and laws of federal and state governments. First, the plain language of section 1738, although probably not originally intended to accomplish this result, [FN163] clearly imposes obligations on modern tribal courts. As noted above, in referring to ***911** rendering and enforcing jurisdictions, section 1738 utilizes slightly different phrasings. To describe rendering jurisdictions, i.e., the sovereign entity that created the law or judgment for which recognition and enforcement is sought, section 1738 refers to the laws and judgments of "any State, Territory, or Possession." As discussed above, this language raises the issue of whether the laws and judgments of tribes should be treated as the laws of territories where enforcement is sought in federal or state court. By contrast, in referring to the forums in which enforcement of such laws or judgments is sought, the statute refers to "every court within the United States and its Territories and Possessions." While one possibly might argue that Indian tribal courts are not courts of a territory or possession, it is much more difficult today to sustain the position that an Indian tribal court is not a court within the states, territories, or possessions of the United States. Indeed, the most sensible reading of section 1738 would treat the unfortunately asymmetrical language of the statute as an accident of poor and fairly old statutory drafting. Thus, as argued above, the reference to laws and judgments of the states, territories and possessions of the United States, employed to describe rendering jurisdictions, properly should be read to include all sovereign units, including Indian tribes, within the states, territories, and possessions of the United States. So read, Indian tribal courts are covered by the statute, both as rendering courts and as enforcing courts.

Even if one rejects such a symmetrical reading of the awkward language of section 1738, however, Indian tribal courts remain courts "within the United States and its Territories and Possessions" and therefore subject to plain federal statutory command to enforce the judgments and laws of the states. In the early nineteenth century, Chief Justice Marshall legitimately could conclude that extending the force of federal and state law to Indian country would give such laws "extraterritorial" effect. Thus, prior to their inclusion within the federal union, Indian tribes once were separate peoples within the United States in a territorial sense but not within the United States in any political sense. Tribes were not then part of the federal union nor were their members American citizens with political allegiances to the federal union. American colonial expansion of the late nineteenth and twentieth centuries changed that relationship to the point that tribes are considered within the United States in both a physical and a political sense by all but the most extreme of the Indian nationalists. Few Native American tribal ***912** members, one suspects, would renounce their United States citizenship, their claim to dual political allegiance to the federal government and their tribe, in favor of an exclusive tribal allegiance. Most are and regard themselves as both Indian tribal members and members of a larger American polity. Indian tribes and their courts, therefore, are within the United States today in both a physical and a political sense, leaving virtually no room to argue that they are exempt from legal obligations that section 1738 and other similar statutes impose on all courts within the United States, its territories and possessions.

Second, to the extent that Congress has directly addressed the question of the deference that tribal courts owe to federal, state and tribal court judgments, it has twice adopted the federal statutory full faith and credit model that imposes binding federal statutory obligations on tribes to enforce the laws and judgments of the states or other tribes. In the Indian Child Welfare Act, section 1911(d) [FN164] binds "The United States, every State, every territory or possession of the United States, and every Indian tribe" to respect the laws and judgments of other tribes relating to child custody proceedings. Similarly, in the Maine Indian Claims Settlement Act, [FN165] Congress provided that "[t]he Passamaquoddy Tribe, the Penebscot Nation, and the State of Main shall give full faith and credit to the judicial proceedings of each other." Thus, on at least two statutes, Congress has presumed that the

obligation to accord full faith and credit for tribal laws and judgments constitutes a two-way street. Tribal laws and judgments are accorded full faith and credit; and tribes are obligated to accord the sovereign acts of other tribes, the federal government, and states similar recognition and enforcement.

To suggest that Indian tribes are under a federal statutory obligation to accord state judgments and laws full faith and credit surely is not to suggest, as some tribes fear, that the laws of the state, in which a reservation is located, are fully applicable in Indian country. Neither does this conclusion suggest that judgments rendered by the courts of that state may be enforced by state courts against Indians in Indian country in derogation of tribal laws that provide remedies for the enforcement of judgments. Under prevailing doctrine, the statutory obligation contained in section 1738 to ***913** recognize and enforce the laws and judgments of other members of the federal union is subject to significant limitations, as a leading commentator on the application of this statute in Indian country has pointed out. [FN166] Since federal preemptive doctrines significantly limit the reach of state law in Indian country, [FN167] tribes need only recognize and enforce state laws in those limited situations in which state law legitimately can be applied in Indian country. In general, state law applies in Indian country in only two limited classes of cases. First, where Congress has clearly and specifically applied state law to Indians in Indian country, state law legitimately can be enforced and tribal courts owe such state law full faith and credit under the commands of section 1738. Only two general illustrations of this principle are evident in current law. [FN168] In 25 U.S.C. section 231, Congress made applicable to Indians in Indian country state health, sanitation, quarantine laws, and, with tribal consent by a resolution of the tribal governing body, compulsory school attendance laws. Second, the Court has construed 18 U.S.C. section 1164 to apply both state regulatory and licensing laws regarding the sale of liquor to Indians, as well as non- Indians, selling alcohol in Indian country. [FN169] Beyond these statutes, however, most state laws do not directly apply to Indians in Indian ***914** country, and tribes therefore have no obligation to recognize and enforce such laws. Second, in a considerable number of cases, the Court has held that state laws legitimately can be applied to non-Indians and some non- member Indians in Indian country. [FN170] To the extent that a tribal court legitimately can exercise subject matter and personal jurisdiction over such non-members consistent with both tribal and federal law, such tribes owe an obligation to the states under section 1738 to recognize and enforce such state law, unless tribal law exists in a situation affording the tribe concurrent regulatory authority. The federal obligations imposed by section 1738 and the constitutional full faith and credit clause require a forum to enforce laws of another sovereign only where it has no significant contact with the cause of action. Where, however, the forum has "a significant contact or significant aggregation of contacts, creating state interests, choice of the forum's law over that of another state is neither arbitrary nor fundamentally unfair." [FN171] Thus, tribal concerns that full faith and credit obligations imposed on tribal courts to enforce state laws will undermine tribal sovereignty by eroding the authority of tribes to govern tribal members for their conduct in Indian country or the tribal governance of tribal and individual Indian property in Indian country are not wellfounded. Furthermore, in those areas where the rapidly changing federal Indian law leaves tribal governments the power to regulate non-members for conduct in Indian country, the contacts of the cause of action with the tribe's reservation generally will satisfy the test applied to validate its application of tribal, rather than state, law.

Recognition of foreign judgments in tribal courts poses more complex problems. Under section 1738, such judgments are entitled to the same force and effect "as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." Nevertheless, just as a tribe need not enforce foreign law over a transaction arising in Indian country except where it has no lawful authority to regulate and apply its own law, a tribe need ***915** give state judgments no force or effect if the state or federal court that rendered the judgment lacked jurisdiction. Thus, the preemptive doctrines of federal Indian law that limit the adjudicative power of the states over claims against Indians arising out of Indian country, [FN172] also deprive judgments rendered in violation of such jurisdictional limitations of full force or effect. Outside of Indian country, this limitation on full faith and credit most frequently is applied to judgments rendered in the absence of jurisdiction over the person or property of the defendant. [FN173] The doctrine has been applied, however, to subject matter jurisdictional limitations akin to those that lie at the core of most of the preemption cases rejecting state adjudicatory authority over Indians in Indian country. [FN174] In United States v. United States Fidelity and Guaranty Company, [FN175] the Supreme Court ruled that a prior judgment, rendered by a court lacking subject matter jurisdiction over the defendant due to federal and tribal sovereign immunity, was void, rather than voidable. The judgment, therefore, need not be accorded any res judicata effect and need not be given full faith and credit in any subsequent enforcement proceeding. Justice Reed distinguished United States Fidelity and Guaranty Company from other cases [FN176] in which the Court previously had suggested that judgments rendered in the absence of subject matter jurisdiction were merely voidable on appeal but remained res judicata and entitled to full faith and credit if not overturned on direct review: [FN177]

The failure of officials to seek review cannot give force to this exercise of judicial power. Public policy forbids the suit unless ***916** consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body. Chicot County Drainage District v. Baxter State Bank is inapplicable where the issue is the waiver of immunity.

In the Chicot County case no inflexible rule as to collateral objection in general to judgments was declared. We explicitly limited our examination to the effect of a subsequent invalidation of the applicable jurisdictional statute upon an existing judgment in bankruptcy. To this extent the case definitely extended the area of adjudications that may not be the subject of collateral attack. No examination was made of the susceptibility to such objection of numerous groups of judgments concerning status, extra- territorial action of courts, or strictly jurisdictional and quasi- jurisdictional facts. No solution was attempted of the legal results of a collision between the desirable principle that rights may be adequately vindicated through a single trial of an issue and the sovereign right of immunity from suit. We are of the opinion, however, that without legislative action the doctrine of immunity should prevail.

Given United States Fidelity and Guaranty Company, it appears that in cases affecting Indian tribes and Indian country, judgments rendered in the absence of subject matter jurisdiction or jurisdiction over person or property of Indians in Indian country should be subject to collateral attack in the tribal court and need not be afforded full faith and credit. [FN178]

This discussion suggests that Indian tribes, as "courts within the United States," already are under a federal statutory obligation to accord full faith and credit to state laws and judgments. Furthermore, under either section 1738 or doctrines of federal supremacy, [FN179] tribes also must accord full faith and credit to federal ***917** law and federal court judgments. While tribal governments legitimately are concerned that the imposition of full faith and credit obligations on tribal courts will weaken tribal sovereignty and enlarge the role of state government in Indian country, such fears are not well-grounded. The solution to tribal concerns over the preservation of their sovereignty and autonomy lies not in ignoring the positive obligations of intergovernmental cooperation, but, rather, in recognizing and enforcing the negative aspects of the relationship, i.e., the limitations on state regulatory and adjudicatory authority created by the preemptive doctrines of federal Indian law. Tribes that neglect or reject their positive obligations to enforce federal and state laws and judgments in situations where the foreign sovereign has legitimate regulatory or adjudicatory authority will not likely be afforded much deference for their laws and judgments, notwithstanding the obligations imposed on other sovereigns within the union by the Full Faith and Credit statutes, 28 U.S.C. section 1738.

One area that has been of particular concern to tribal courts in the enforcement of foreign judgments is the remedies that the tribal court must apply in enforcing the judgment. The hypothetical scenario out of which such problems emerge often isquite simple. A tribal member who is domiciled on a reservation enters into a contract, such as a contract for the purchase of an automobile, off the reservation and arranges credit for the purchase through the dealer. Under the credit contract, all payments are due off-reservation and the vehicle is delivered off-reservation. Thereafter, the tribal member defaults on payments and the creditor desires to repossess the vehicle and sue in state court for any deficiency. In this context, the state court has subject matter jurisdiction over the cause of action since it is wholly an off- reservation transaction. While the state court may have some problems with service of process on an Indian debtor if it has not enacted any appropriate long-arm statute specifically applicable to Indian country, [FN180] assume for purposes of this hypothetical that service of process can be made on the debtor when he or she is away from the reservation. Furthermore, to pose the dilemma, assume that state law permits self-help repossession without judicial approval, while tribal law requires a tribal court ***918** order authorizing repossession before any collateral can be seized. The issues posed by this problem are whether state law applies to remedies available both to repossess the vehicle now located in Indian country and to the remedies that must be applied to tribal courts whose assistance is sought in enforcing the judgment, especially if the collateral is worth less than the debt. Strict application of the Full Faith and Credit Act to this problem would suggest a negative response to both questions. First, tribal law, rather than state law, applies to on- reservation repossession of the vehicle, thereby, requiring a judicial order from the tribal court in this hypothetical prior to repossession. Under the reading of section 1738 advanced in this Article, state courts are bound to respect the laws of Indian tribes and accord them full faith and credit unless they have a significant contact with or aggregation of contacts with the transaction separate from the location of the Indian country contact. Because the state could not directly legislate remedial laws for Indians and their property in Indian country because of the preemptive federal law doctrines that protect Indian sovereignty, [FN181] treating the mere physical location of on-reservation property of Indians within the state as such a contact

violates Indian law preemption principles and, therefore, the Full Faith and Credit Act. The failure to consider the implementing Full Faith and Credit legislation as part of the positive intergovernmental relations between Indian tribes and the states constitutes a common oversight. This oversight is precisely what is wrong with some state cases that blithely assume that a state court that has subject matter and personal jurisdiction also necessarily has authority to directly enforce its judgments against Indians in Indian country through state officers, [FN182] thereby bypassing tribal court enforcement of the judgment. The Tenth Circuit in Joe v. Marcum [FN183] held that a state court could not garnish the wages of an Indian earned on a reservation to enforce a valid state court judgment. The court's opinion ***919** took a very similar position without directly citing the Full Faith and Credit Act:

> Garnishment proceedings are indeed ancillary proceedings in the sense that they are an aid of a judgment previously obtained. However, such are independent proceedings in the sense that they are against the judgment debtor's employer, to attach wages held by the employer and due the judgment debtor. The subject matter of the present garnishment proceedings is money held by Utah International and due Joe. Utah International was served on the reservation. The garnishment res is located on the reservation and represents wages due for services rendered by Joe to Utah International on the reservation. Under such circumstances, to uphold the present garnishment would thwart the Navajo policy which does not permit garnishment of wages.

Second, insofar as tribes are concerned that any obligation to accord full faith and credit to valid federal and state judgments would require them to apply state law remedies to enforce judgments such as any deficiency judgment that could emerge in the hypothetical, that concern is misplaced. Under present law, fora asked to enforce foreign state judgments may, consistent with full faith and credit, legitimately utilize their own remedial law, rather than the remedies afforded by the law of the rendering jurisdiction. This approach to full faith and credit consistently has been followed by the Supreme Court. In Crider v. Zurich Insurance Company, [FN184] Justice Douglas' opinion for the Court held "that the State of the enforcing forum may 'supplement' or 'displace' the remedy of the other State, consistently with constitutional requirements." More recently, in Sun Oil Co. v. Wortman, [FN185] Justice Brennan characterized the majority's full faith and credit analysis as "assert ing broadly (albeit in dicta) that States do not violate the Full Faith and Credit Clause by adjudicating out-of-state claims under the forum's own law on, inter alia, remedies, burdens of proof, and burdens of production." [FN186] Thus, when asked to enforce a foreign ***920** judgment, the forum usually can choose its own remedial regime and is not bound to afford the judgment creditor all remedies that would have been available under the law of the rendering state.

It should also be noted that full faith and credit permits a second forum to award supplemental relief where not inconsistent with an earlier judgment entitled to full faith and credit. [FN187] This observation may allay certain tribal concerns about enforcing state court judgments. One example sometimes given why state court judgments should not be entitled to full faith and credit in tribal courts involves legitimate tribal interests in assuring contacts with the children who are eligible for tribal membership or who are tribal members after the divorce of their parents, a tribal interest protected in non-divorce contexts by the Indian Child Welfare Act of 1978. [FN188] For example, assume that a Navajo woman married to a non-Indian lives on the Navajo reservation in Arizona and has one child who is an enrolled member of the tribe. If the marriage breaks up and the husband moves off the reservation with the child prior to filing for dissolution of the marriage, the state courts legitimately might exercise subject matter jurisdiction over dissolution of the marriage and questions of child custody. Tribes legitimately are concerned in this context that state courts will ignore their important interest in continued tribal contact with a child who is a member of or eligible for membership in the tribe. The answer to this problem is twofold. First, in exercising their legislative jurisdiction, tribes might pass ordinances requiring and defining the nature of the continuing tribal contact necessitated in such a situation. Under the provisions of section 1738, as argued above, state courts should be obligated to give full faith and credit to such ***921** tribal laws, particularly where there is no state law directly to the contrary. Second, even if state courts neglect to enforce such tribal laws, tribal courts that can secure jurisdiction over the parties and the controversy may still be able to issue supplemental orders not inconsistent with a prior state court divorce decree that could protect and further this important tribal interest. Thus, conceding that tribal courts are bound to enforce proper state judgments and laws and the federal Full Faith and Credit Act does not mean that the tribes are without authority to vindicate their significant interests.

In short, the full faith and credit clause represents an important part of the glue that bonds together the federal union. As sovereign elements of the federal union, Indian tribal laws and judgments are entitled in federal and state court to full faith and credit under section 1738, and tribal courts have certain federal statutory obligations to afford full faith and credit to the laws and judgments of other sovereign governments within the federal union. These obligations exist, however, only where the other sovereign authority has lawful authority to regulate or adjudicate

consistent with federal preemption doctrines and the protection of Indian tribal sovereignty through treaty and statute. Nevertheless, Indian tribal courts cannot reasonably expect the laws and judgments of their tribe to be honored by federal and state courts if they consistently decline to discharge their federal statutory obligation to provide full faith and credit to the laws and judgments of federal and state governments.

VI. EXTRADITION: RESPECT FOR SOVEREIGN AUTONOMY

The framers of the Constitution not only dealt with interstate cooperation in civil matters through the regime of full faith and credit, they also provided in the same article for cooperation between states within the union in criminal matters through the extradition process. Thus, article IV, section 2 provides that upon demand of the prosecuting state a state to which a persons charged with a crime has fled "shall ... be delivered up, to be removed to the State having Jurisdiction of the Crime." Just as Congress passed section 1738 to implement the full faith and credit clause, Congress also has passed the Extradition Act of 1793 [FN189] to implement this constitutional provision. Like the Full Faith and Credit ***922** Act, the Extradition Act extends the reach of the constitutional clause beyond states to include fugitives to any "District or Territory."

While the language of both the constitutional extradition clause and the Extradition Act of 1793 utilize the mandatory "shall" to describe the duty of state executives to deliver up fugitives, for a considerable period of the nation's history the Court construed the implementing extradition legislation to bar any federal judicial intervention to enforce the mandatory obligations imposed by the constitutional clause. [FN190] Recent decisions, however, ***923** have overturned this construction of the Extradition Act and imposed mandatory obligations on states enforceable by federal courts to render up fugitives under the constitutional extradition clause and the Extradition Act. [FN191] Thus, a parallel construction has emerged between the full faith and credit clause and the extradition clause of article IV of the Constitution and the implementing legislation for each. Both impose mandatory, judicially enforceable obligations on covered sovereigns to recognize the laws, judgments, and extradition demands of other sovereign states within the federal union. Furthermore, in both cases, the implementing legislation broadens the coverage of the constitutional clause to cover territories within the United States, as well as states. Thus, many of the same precedents and arguments that suggest the applicability of the Full Faith and Credit Act to Indian tribes apply with the same force to suggest that states have an obligation to deliver up fugitives on the demand of an Indian tribe and that tribes have the same obligation when demands are made for fugitives for federal or state crimes within the jurisdiction of the demanding jurisdiction. Furthermore, recognition that such extradition obligations exist requires state governments to utilize the extradition procedures of the tribe, rather than entering Indian country to seize alleged fugitives without reference to tribal extradition procedures.

When Indian tribes were outside the federal union and formal treaties were still being negotiated with the tribes, such treaties commonly included extradition provisions, [FN192] as the Supreme Court noted in Ex parte Crow Dog. [FN193] The cessation of treaty-making with Indian tribes in 1871 [FN194] and their subsequent incorporation into the union arguably altered the prior bilateral voluntary cooperation between the federal government and the tribes over extradition ***924** into a federal statutory obligation imposed by the Extradition Act.

The few cases that exist regarding extradition to and from Indian reservations generally address the obligation of state authorities to respect tribal extradition processes, rather than entering Indian country and seizing persons subject to the tribe's authority without first seeking extradition from the tribe. If, as argued above, tribes are considered territories for purposes of the Full Faith and Credit Act, 28 U.S.C. section 1738, the obligation of states to respect and follow tribal procedures for extradition derives in great part from the duties imposed by that legislation to recognize and respect the laws of the territories. Consistent with Mackey, the laws that must be respected include Indian tribal laws, such as extradition procedures. Because states lack subject matter and personal jurisdiction over the conduct of Indians in Indian country on reservations not covered by Public Law 280 or similar congressional grants of state jurisdiction over Indian country, any arrest of an Indian fugitive in Indian country by a state officer violates applicable federal preemption doctrines. The leading case on the extradition question, Arizona ex rel. Merrill v. Turtle, [FN195] holds that, because the state of Arizona may not extend its laws to Indians in Indian country, it may not arrest an Indian fugitive on the Navajo Reservation but, rather, must comply with the provisions of the Navajo extradition procedure. [FN196] At least one other case, however, ***925** suggests that where a tribe has no extradition laws or procedure, the state in which the reservation is located need not apply to the tribe before arresting and removing an Indian fugitive from Indian country. [FN197] While it is difficult under the

preemption doctrine to justify state seizure of an Indian fugitive in Indian country where no tribal extradition ordinance or procedure exists, the lack of a tribal extradition and ordinance may vitiate any full faith and credit obligation that the state has to accord full faith and credit to tribal law. There simply is no tribal law on the subject of extradition to which full faith and credit is due. While it might be argued that a lack of tribal extradition procedures constitutes a sovereign tribal decision not to render up fugitives upon demand, the statutory obligations imposed by the Extradition Act suggest that, as a matter of federal law, a tribe may not make such a decision. A refusal to provide procedures for extradition of fugitives constitutes a violation of the federal statutory obligations imposed on tribes as part of the federal union. This conclusion suggests that tribes do have a federal statutory obligation to extradite fugitives to states and other tribes upon demand where the papers indicate that the demanding sovereign has jurisdiction over the subject matter of the crime, consistent with the Indian law preemption doctrines. Indian reservations cannot become safe havens for fugitives from justice consistent with sovereign obligations that tribes owe to the other units of the federal union as part of that union.

***926** VII. BIA, NEGOTIATIONS, AND FEDERAL OVERSIGHT OF TRIBAL COURTS

In the Martinez decision, [FN198] the United States Supreme Court specifically noted that the Bureau of Indian Affairs (BIA) had some ill- defined role to play in the resolution of Indian Civil Rights Act issues. In footnote 22 of its opinion, the Court noted that 25 U.S.C. section 476 requires tribal constitutions to be approved by the Secretary of the Interior and that some, but not all, of these constitutions also require approval of the Secretary for certain tribal actions. Thus, with reference to these provisions, the Court noted that " i n these instances, persons aggrieved by tribal laws may, in addition to pursuing tribal remedies, be able to seek relief from the Department of the Interior." [FN199]

From its context, the Court's statement evidently suggested that the Bureau should consider the conformity to the Indian Civil Rights Act of a certain limited class of tribal actions "in those instances" where it had the power to approve those actions. In such situations, the Court properly envisioned that the Department of the Interior and the BIA could and should perform a direct remedial role for persons disaffected by the tribal decision who claim that their rights under the ICRA were violated. A direct remedial role, as used here, means that a disaffected party can file and have heard a formal or informal complaint seeking a direct remedy of the particular tribal decision in question. The Secretary of the Interior, for example, must approve tribal constitutions and amendments thereto adopted pursuant to the Indian Reorganization Act (IRA) under the provisions of 28 U.S.C. section 476. Should a tribe hypothetically seek to adopt a tribal constitution excluding female adult members of the tribe from voting in the tribal election, the Secretary could and should justifiably use the power committed under section 476 to decline to approve the amendment based on noncompliance with the equal protection guarantees of 25 U.S.C. section 1302(8). Not all tribes have written constitutions, however, and not all tribal constitutions are recognized by the Secretary under the authority of section 476 because a number of tribal constitutions had been adopted prior to the adoption of section 476. Where federal law imposes no express requirement of Secretarial approval, as in section 476, the Secretary has no valid statutory or ***927** other legal authority to require approval or specific conformity with the Indian Civil Rights Act or similar legislation beyond questions of recognition of the tribe, discussed below. Similarly, the early unamended boilerplate constitutions of several tribes, drafted by agents and employees of the Department of the Interior to implement the Indian Reorganization Act during the 1930s, contain many specific provisions requiring some or all tribal ordinances to be approved by the Secretary. [FN200] For tribal constitutions containing such provisions, the Court's statement in Martinez seems to authorize the Secretary or any designee to consider conformity with the ICRA as one factor in deciding whether to approve any proffered tribal ordinance or resolution requiring secretarial approval. The remedy in such review, however, is limited to the action authorized by law, that is disapproving the tribal constitution, amendment, or ordinance subject to Secretarial review.

Not all tribes, however, have written constitutions and not all tribal constitutions contain such approval requirements. Where neither federal law nor the tribal constitution expressly requires approval of the Secretary for implementation of tribal governmental action, the Supreme Court already has held in Kerr-McGee Corp. v. Navajo Tribe [FN201] that tribal actions are perfectly valid without any intervention by the Secretary. Kerr-McGee, therefore, precludes any direct remedial role for the BIA in reviewing tribal constitutions or ordinances that do not by express federal or tribal law require Secretarial approval. Kerr-McGee, therefore, sub silentio rejected a very old

and very paternalistic line of lower court cases, stretching back at least to Rainbow v. Young, [FN202] suggesting that the Department of the Interior or the BIA derived general oversight or remedial powers with respect to tribal government from either the commitment of management of Indian relations to the Commissioner of Indian Affairs (now the Assistant Secretary for Indian Affairs ***928** in the Department of the Interior), contained in 25 U.S.C. section 2, or from the authorization to the President to make regulations for carrying "any act relating to Indian affairs," contained in 25 U.S.C. section 9. Because none of the tribal constitutions directly provided for secretarial approval of tribal court decisions, the Secretary's direct role in overseeing the decisions of tribal courts is quite limited.

On many reservations, the Department of the Interior and the BIA sometimes in fact perform many tasks not directly assigned them by federal law or tribal constitutions, such as conducting tribal elections. Because neither federal nor tribal law generally require such activities to be conducted and approved by the Department of the Interior, rather than by the tribe, the mere fact that BIA provides such assistance to the tribe, legally or otherwise, does not mean that it has any power to approve or disapprove such actions or to enforce their conformity with the ICRA.

Neither federal law nor tribal constitutions generally require approval of the Secretary for the actions of tribal executive or judicial officers outside of the approval of disposition of trust property through sale, lease, or contract. Thus, the Secretary of the Interior and the BIA play no direct remedial or review role whatsoever over the actions of such tribal governmental officials. In short, because neither federal law nor tribal law have ever provided a direct appeal from the decisions of tribal courts to the Department of the Interior or the BIA, those agencies should exercise no direct remedial oversight of tribal compliance with the ICRA in such individual cases. Federal law does not even provide an appeal to the Department of the Interior or the BIA from the twenty or so federally created Courts of Indian Offenses operating in Indian country by virtue of the federal regulations contained in 25 C.F.R. Pt. 11 (1989). Rather, the appeal provided for in the regulations is within the tribal court structure under 25 C.F.R. sections 11.6 and 11.6C.

In Wheeler v. United States Department of the Interior, [FN203] the Tenth Circuit adopted exactly the same view of the role of the Department of the Interior and the BIA in enforcing the ICRA as the one advanced here. The case involved a challenge to elections in the Cherokee Nation based on claimed voting irregularities. After exhausting tribal remedies, an unsuccessful candidate for Principal ***929** Chief petitioned the BIA to conduct an investigation, to stay certification of the election results, and to freeze all federal funding to the Cherokee Nation pending the outcome of the investigation. After the BIA rejected his requests, he sought judicial review of the federal administrative decision in federal courts. In an excellent and thoughtful opinion, Judge McKay, speaking for a unanimous panel of the United States Court of Appeals for the Tenth Circuit, ruled that the BIA had no authority to enter the relief requested by the plaintiff. The court recognized that there were limited "special situations that require Department action" where the Department by law is expressly authorized "to take an active role in lawmaking, and where the Department may refuse to recognize laws that tribal authorities have passed." [FN204] Nothing in federal or tribal law, however, expressly authorized the BIA to conduct or overturn tribal elections or to exercise any other remedies of the type sought by the plaintiff in Wilson. Consequently, the Tenth Circuit held that "when a tribal forum exists for resolving a tribal election dispute, the Department must respect the tribe's right to self-government and, thus, has no authority to interfere." [FN205]

The lack of any appeal to or other form of direct remedial role for the BIA in a wide variety of situations is not an oversight of federal law. Rather, the lack of any such direct remedial role constitutes a Congressional policy designed to rectify past paternalism and colonialism of federal Indian policy. Making the tribal governments accountable to a paternalistic federal administrative trustee in individual cases would render them mere administrative subdivisions under an administrative model of review. The conceptual inadequacies of such a model are discussed above. The main thrust of the Indian Reorganization Act of 1934 (IRA) [FN206] was to remove the paternalistic impediments to tribal self-government previously imposed by federal policy. In the language of the originally proposed bill, the legislation was intended " t o grant to Indians living ***930** under Federal tutelage the freedom to organize for purposes of local self-government and economic enterprise; ..." [FN207] The congressional hearings on the IRA are clear that the point of the Act was to eliminate the broad discretion that the Department of the Interior and the Office of Indian Affairs had exercised over tribal affairs. Senator Wheeler called the local Indian agent "a czar" whose oversight of tribal actions he sought to eliminate to promote tribal self- government. [FN208] As the sponsor of the legislation, he pointed out that " t his bill * * * seeks to get away from the bureaucratic control

of the Indian Department, and it seeks further to give the Indians the control of their own affairs * * * *." [FN209] Commissioner John Collier, perhaps our greatest Commissioner of Indian Affairs, urged that the point of the legislation was to eliminate the heavy hand of the federal government in the governance of Indian country and to limit the role of the Office of Indian Affairs (now the BIA) to supplying "guardianship services." As Collier put it, he hoped the IRA would contribute to a situation in which the Indian department would "ultimately exist as a purely advisory and special service body like the Department of Agriculture in relationship to American farmers." [FN210]

Any effort by the BIA today to play any larger role in the oversight of enforcement of the Indian Civil Rights Act than that expressly authorized by federal or tribal law, therefore, would contravene the express intent of Congress and the executive in enacting the Indian Reorganization Act. It would enlarge federal oversight and, thereby, diminish tribal sovereignty. Consistent with longstanding federal laws and policy, the Bureau of Indian Affairs's direct remedial role in enforcement against the tribes of the ICRA and other general federal statutes properly is limited at most to those situations in which federal or tribal law expressly require approval of the tribal action and, in those situations, the federal remedy available is limited solely to disapproving the action in question for noncompliance with the ICRA. [FN211]

***931** Where a violation of the rights of any person under the ICRA is found by the BIA or other federal contracting agencies in federally funded programs operated by tribal governments under the authority of the Indian Self-Determination Act of 1975, 25 U.S.C. section 450m, vests the Secretary of the contracting department with the authority, after notice and hearing, to rescind the contract and reassume federal governmental management of the affected program after a determination that the "tribal organization's performance under such contract or grant agreement involves ... the violation of the rights ... of any persons; ...." In such cases, the Secretary "may decline to enter into a new contract or grant agreement and retain control of such program, activity, or service until such time as he is satisfied that the violations of rights ... which necessitated the recision has been corrected." The authority to suspend federal contract and grant funding by the terms of the statute is limited, however, to violations of rights in connection with "performance under such contract or grant agreement." The authority is akin to the requirement that a foreign power account for its use of federal foreign assistance monies. This provision does not authorize the Secretary or the BIA to suspend general program or other funds to any tribe not governed by the contract and grant provisions of the Indian Self-Determination Act or to otherwise provide appeals to disaffected parties from the decisions of tribal courts or other governmental institutions. [FN212] Furthermore, the Act contemplates only a temporary suspension of the contract or grant relationship until the problems respecting civil rights have been corrected. Secretarial decisions to decline to suspend a grant under the authority of section 450m involve a matter "committed to the discretion of the Secretary," and, therefore, are not reviewable in formal administrative proceedings, or by the courts. [FN213]

While the direct remedial role of the Bureau of Indian Affairs in enforcing the provisions of the ICRA and other federal statutory obligations imposed on tribes legally is quite narrow, the Bureau ***932** does have one other more general part to play in cooperation with the Assistant Secretary for Indian Affairs in managing the government-to-government relationship with the tribes. The BIA properly has taken the position that "for purposes of carrying out the government-to-government relationship between the United States and Indian tribes, it is necessary for the Bureau to determine the identity, composition and authority of the tribe's governing body." [FN214] While this power is limited generally to ascertaining the results of tribal political decisions, in rare instances it provides the BIA a role in correcting due process and related violations in connectionwith tribal election disputes. [FN215] A power to refuse to recognize tribal action is not equivalent, however, to BIA power to displace the tribal political process or conduct tribal elections itself where not provided for by federal or tribal law.

Similarly, the BIA can play a role in enforcing the ICRA by cooperating with the Assistant Secretary of Indian Affairs in exercising the power committed to that office by 25 U.S.C. section 2 to manage "all matters arising out of Indian relations." As indicated above, this provision should be interpreted strictly as vesting a very narrow power, not as authorizing any type of general oversight of Indian governmental behavior that would be inconsistent with the purposes and policies of the Indian Reorganization Act. The one role relevant to enforcement of the ICRA that is subsumed within this authority is the power to recognize, or conversely to recommend, that Congress break relations with and derecognize an Indian tribe. Like any sovereign government, the United States government may choose and select the governments with which it will establish or continue to maintain government-to-government relations. Treaties, statutes, executive orders and the like, of course, recognize the governments of the tribal parties and protect

***933** many property, hunting and fishing, water, and political rights of such tribes. In addition, under the authority of 25 U.S.C. section 2, the Secretary of Interior has created regulatory procedures for the recognition of Indian tribes. [FN216] Just as the federal government monitors the human rights record of foreign governments for compliance with fundamental norms of human decency, [FN217] the Department of the Interior and the BIA can monitor the records of compliance of federally recognized Indian tribes with the provisions of the ICRA or other applicable federal statutes. Indeed, the Bureau of Indian Affairs and the Department of the Interior perform roles relative to sovereign Indian tribes that are akin to the role played by the Department of State in dealing with foreign nations. These roles do not, however, authorize the BIA to intervene in any particular case to rectify what it perceives to be a violation of the ICRA. Rather, the power of the BIA in this instance is limited to recommending to Congress such derecognition or, in limited cases, derecognizing the offending tribe itself, a devastating decisions that, like the breach of diplomatic relations with foreign governments, can only be used sparingly and thoughtfully if it is to have any effect. Thus, while the BIA must be prepared to receive complaints of violation of the ICRA from those disaffected by the decisions of tribal governm nt, just as the Department of State receives complaints of human rights abuses from persons disaffected or abused by foreign nations with which the United States maintains diplomatic relations, such complaints should be received pursuant to the Bureau's general information gathering role and do not themselves initiate a remedial process in the individual case.

Derecognition of tribal governments that fail to comply with the ICRA or other appropriate forms of governmental conduct should be treated as a temporary diplomatic solution to a troublesome ***934** problem so that it is not converted into a de facto form of tribal termination. The federal government, therefore, should be prepared to promptly recognize any new government of derecognized tribal government that shows willingness to comply with the requirements of the ICRA. In short, derecognition of tribal governments should be a rare and temporary solution to the problems of government-to-government relations with Indian tribes.

While 25 U.S.C. section 2 delegates authority to the Assistant Secretary for Indian Affairs to manage relations with Indian tribes, and therefore provides adequate authority for the BIA recognition of theretofore unrecognized tribes of the type contemplated by 25 C.F.R. Pt. 83, that authority does not in most instances authorize the Department of the Interior to unilaterally cease government-to-government relations with an Indian tribe the government of which is already recognized by the federal government. Generally, Indian tribes with governing bodies duly recognized by the Secretary of the Interior have treaties and statutes that protect their entitlement to certain federal programs and benefits and which recognize the tribal government in question. The law is quite clear that the executive branch cannot unilaterally abrogate such Indian treaty or statutory rights without a clear and specific authorizing act of Congress evidencing an intent to abrogate or modify the Indian rights in question. [FN218] Thus, while the BIA can unilaterally recognize tribal governments utilizing the authorization delegated in 25 U.S.C. section 9, in most instances its derecognition recommendations would require specific congressional action. Where, however, Congress has never recognized a tribe through treaty or statute, including appropriations legislation, and the tribe's recognition rests exclusively on BIA action, the BIA properly may be able to withdraw the recognition for noncompliance with the ICRA. Where derecognition of a tribal government by Congress or the BIA operates to interfere with or abrogate any property rights, rights to benefit programs, or other water or hunting and fishing rights, the United States may be liable to pay just compensation to the tribe under the fifth amendment takings clause.

Obviously, the BIA also can use its ultimate power to recommend derecognition of tribal governments to negotiate interim solutions ***935** of ICRA or other federal law compliance problems with tribal governments perceived to be persistently violating federal legal obligations. There is a considerable difference, however, between negotiating a resolution of a pattern of abuse of ICRA rights by a tribal government and ordering a remedy in an individual case. Short of exercising its power to recommend derecognition, the role of the BIA primarily should be one of diplomacy with Indian tribes, just as the Department of State utilizes diplomacy to attempt to remedy perceived human rights abuses in foreign nations.

VIII. CONCLUSION

When the federal union was formed, Indian tribes were regarded as separate domestic nations apart from and outside the federal union. Tribal members were not American citizens and owed no allegiance to the federal government. Rather, the tribes were allied with the United States and owed the federal government the duty not to

negotiate with or make war on foreign powers, not to sell their lands in a manner that conflicted with preemptive rights claimed by federal government or the states, and whatever other duties and obligations to which the tribes voluntarily agreed by treaty in the spirit of mutual accommodation and comity.

Late nineteenth-century and twentieth-century American colonialism fundamentally altered these legal relations in favor of the involuntary inclusion of Indian tribes and their members within the federal union. Native Americans were made citizens of the United States, and tribes were made subject to district legislative governance by Congress, rather than diplomatic exchange.

For the past three decades, most Indian litigation over tribal sovereignty has attempted to establish the negative aspects of the changed relationships derived from inclusion of the tribes in the federal union. This undertaking has involved repeated judicial efforts to demarcate the respective spheres of tribal and state sovereign authority in Indian country.

Comparatively little attention, however, has been given to the positive implications for structural intergovernmental cooperation of the inclusion of Indian tribes within the federal union. Relying on the involuntary nature of that colonial decision and its fundamental inconsistency with social compact theories of the federal union, this Article argues that inclusion of tribal governments within the federal union should work only a minimal change from the prior transnational model under which tribal-American intergovernmental***936** cooperation originally was undertaken. Specifically, the Article argues that inclusion of tribes within the federal union may justify the imposition of external review of tribal decisions on federal questions and may impose enforceable federal statutory obligations on federal, state, and tribal courts to respect and enforce the laws, judgments, and extradition demands made by other sovereigns within the federal union. Thus, the Article argues that tribal laws and judgments are entitled to full faith and credit under the Full Faith and Credit Act and that tribal courts are obligated under the same legislation to accord full faith and credit to federal and state laws and judgments in those situations where the rendering jurisdictions have subject matter jurisdiction or authority to regulate the issue. Similarly, the Article argues that both states and tribes are bound by the Extradition Act to honor each other's extradition requests for those accused of crimes over which the demanding sovereign had jurisdiction and that the Full Faith and Credit Act requires state courts to respect and utilize the extradition procedures of tribal courts. Finally, the Article argues for a limited oversight role for the Bureau of Indian Affairs and other similar agencies that deal with Indian tribes, a role that is akin to that undertaken by the Department of State in managing foreign assistance and in negotiating human rights compliance by foreign states. In short, this Article suggests that inclusion of tribal governments within the federal union imposed certain federally enforceable obligations necessary to preservation of the union on both state and tribal authorities and that those obligations must be carefully considered in light of the altered, modern status of Indian tribes as sovereign entities comprising part of the federal union. One important theme of this essay is to encourage dialogue on the importance of developing positive structural relationships between the federal, state, and tribal governments that will support full tribal government participation within the federal union.

[FNa] Wiley B. Rutledge Distinguished Professor of Law, University of Iowa College of Law; J.D., 1971, University of Chicago; B.A., 1968, University of Michigan. This paper was originally prepared for delivery at the 1989 Harvard Indian Law Symposium on October 28, 1989 and is printed in a collection of the papers from that symposium. The author gratefully acknowledges the assistance of Jim Anaya and Nell Jessup Newton, who reviewed earlier drafts of this manuscript and of Scott Morrison, Robin Hulshizer and Charlotte Williams, who provided invaluable research assistance. The views expressed herein, however, are solely those of the author.

[FN1]. See generally F. DE VICTORIA, DE INDES ET DE IURE BELLI REFLECTIONES 160-61 (Nys. trans. 1917) (discussing, but not embracing, sixteenth century claims that the aborigines of the western hemisphere were "unfit to found and administer a lawful State up to the standard required by human and civil claims" and that "in their own interests the sovereigns of Spain might undertake the administration of their country."). William Samuel Johnson was quoted during the eighteenth century as suggesting that "[t]his notion of [Indian tribes] being free States is perfectly ridiculous and absurd. Without Polity, laws etc. there can be no such thing as a State. The Indians had neither in any proper sense of the words." Quoted in J. SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS 434-35 n.109 (1965).

[FN2]. For example, a 1764 plan proposed by the British government for the management of Indian affairs contemplated that tribes would choose a "beloved man" who would be approved by the British agent or superintendent of Indian affairs for that district. Clinton, The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict over the Management of Indian Affairs, 69 BOSTON U. L. REV. 329, 358-59 (1989).

[FN3]. For example, in a number of removal era statutes various southeastern states purported to suspend the operations of tribal governments and the force of tribal laws. See, e.g., Act. of Dec. 20, 1828, COMPILATION OF THE LAWS OF THE STATE OF GEORGIA 198 (1819-1829) (Dawson); Act of Dec. 19, 1829, id. at 198-99. See generally Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560 (1832); Burke, The Cherokee Cases: A Study in Law, Politics, and Morality, 21 STAN. L. REV. 500 (1969); G. FOREMAN, INDIAN REMOVAL (1832).

[FN4]. See generally W. CANBY, AMERICAN INDIAN LAW IN A NUTSHELL 25-28 (2d ed. 1988); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 152-80 (1982 ed.).

[FN5]. Ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. § § 461-79 (1988)).

[FN6]. See generally H. FRITZ, THE MOVEMENT FOR INDIAN ASSIMILATION 1860- 1890 (1963); F. HOXIE, THE FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 (1984); J. KINNEY, A CONTINENT LOST -- A CIVILIZATION WON: INDIAN LAND TENURE IN AMERICA (1937); D. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (F. Prucha ed. 1973); F. PRUCHA, AMERICAN INDIAN POLICY IN CRISIS: CHRISTIAN REFORMERS AND THE INDIAN, 1865-1900 (1976).

[FN7]. For example, as amended, the provisions of section 18 of the Indian Reorganization Act, 25 U.S.C. § § 478, 478a-478b (1988), required a majority vote of those actually voting in a one time tribal election to accept the applicability of the Indian Reorganization Act to a particular reservation. See Barsh, Another Look at Reorganization: When Will Tribes Have a Choice?, INDIAN TRUTH, No. 247, Oct. 1982.

[FN8]. See generally F. COHEN, supra note 4, at 180-206.

[FN9]. See generally G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776- 1787, at 453-63, 532-43, 546-47 (1969).

For an official recommendation from Congress for an altered federalism relationship between the federal government and Indian tribes based on negotiations, consent, and agreement, see SPECIAL COMMITTEE ON INVESTIGATIONS OF THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS, FINAL REPORT AND LEGISLATIVE RECOMMENDATIONS, S. Rep. No. 101-216, 101st Cong., 1st Sess. 24-67 (1989).

[FN10]. See J. LOCKE, OF CIVIL GOVERNMENT, SECOND TREATISE (Gateway ed. 1955).

[FN11]. E.g., THE FEDERALIST No. 22, 146 (A. Hamilton) (J. Cooke ed. 1961): "The fabric of American Empire ought to rest on the solid basis of the consent of the People. The streams of national power ought to flow immediately from that pure original fountainhead of all legitimate authority" (emphasis in original).

Similarly in THE FEDERALIST No. 49 at 339 (J. Madison) (J. Cooke ed. 1961), James Madison wrote:

As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived; it seems strictly consonant to the republican theory, to recur to the same original authority, not only whenever it may be necessary to enlarge, diminish, or new-

model the powers of government, but also whenever any one of the departments may commit encroachments on the chartered authorities of the others.

[FN12]. United States Articles of Confederation, art. III, set forth in DOCUMENTS IN AMERICAN HISTORY 111 (H. Commanger ed., 7th ed. 1963).

[FN13]. During the Civil War, Congress began to significantly enlarge federal jurisdiction. See S. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS (1968). The Reconstruction Congresses adopted at least twelve federal court removal measures. Id. at 147. For the first time, power was given to the lower federal courts to issue writs of habeas corpus on behalf of prisoners detained by state authorities. See Act of Feb. 5, 1867, ch. 27, 14 Stat. 385 (current version at 28 U.S.C. § 2241(c)(3) (1982)); Wiecek, The Reconstruction of Federal Judicial Power 1863-1875, 13 AM. J. LEGAL HIST. 333 (1969). Sensitivity to "states rights" and fear of rivalry with state courts were swept aside by the great impulse of national feeling after the civil war. F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 64-65 (1927). In fact, the Act of Mar. 3, 1875, ch. 137, § 2, 18:3 Stat. 470, 471 (1975), gave the federal courts the vast range of federal question jurisdiction that had lain dormant in the Constitution, thus assuring federal supremacy. See FRANKFURTER & LANDIS, supra at 65. For additional discussion on the expansion of federal jurisdiction by the reconstruction Congress, see H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953).

[FN14]. The split in legal theories evident in the various opinions in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), reflects residual differences in American theories of sovereignty. Chief Justice Marshall's opinion for the majority approaches the question of state jurisdiction in part by inquiring whether the Constitution allocated the management of Indian affairs to federal or state governments. Concluding that "the regulation [of Indian affairs], according to the settled principles of our constitution, are committed exclusively to the government of the Union," id. at 561, Marshall ruled that the State of Georgia could not regulate the activities of non- Indians in Indian country because such matters were exclusively committed to federal management. By contrast, Justice McLean, in his separate concurring opinion, seemed to express a view of sovereignty more consistent with the notions of indivisible sovereignty derived from monarchial roots. He seemed to argue that within a state power could not be permanently shared and allocated:

> At best [the tribes] can enjoy a very limited independence within the boundaries of a state, and such a residence must always subject them to encroachments from the settlements around them; and their existence within a state as a separate and independent community, may seriously embarrass or obstruct the operation of the State laws. If, therefore, it would be inconsistent with the political welfare of the states and the social advance of their citizens, that an independent and permanent power should exist within their limits, this power must give way to the greater power which surrounds, and seek its exercise beyond the sphere of state authority.

Id. at 593-94.

[FN15]. For an excellent essay exploring the importance of consent in American legal thought and the application of those concepts to Indian tribes, see Collins, Indian Consent to American Government, 31 ARIZ. L. REV. 365 (1989).

[FN16]. 30 U.S. (5 Pet.) 1 (1831).

[FN17]. U.S. CONST., art. I, § 2, cl. 3:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons (emphasis supplied).

See also, U.S. CONST., amend. XIV, § 2: "Representatives shall be apportioned among the several States according

to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed" (emphasis added).

[FN18]. U.S. CONST., art. I. § 2.

[FN19]. For example, when given the choice of whether to submit to state law and be absorbed by the states or to remove from their aboriginal homelands, the southeastern tribes initially resisted, but ultimately opted for removal from their homelands rather than loss of political autonomy. Their insistence on political autonomy is reflected in the preamble to the Choctaw removal treaty:

Whereas the General Assembly of the State of Mississippi has extended the laws of said State to persons and property within the chartered limits of the same, and the President of the United States has said that he cannot protect the Choctaw people from the operation of these laws; Now therefore that the Choctaw may live under their own laws in peace with the United States and the State of Mississippi they have determined to sell their lands east of the Mississippi and have accordingly agreed to the following articles of treaty.

Treaty with the Choctaw, Sept. 27, 1830, 7 Stat. 333 (1848).

[FN20]. See generally F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS 1790-1834 (1962); F. PRUCHA, 1 THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 29-177 (1984).

[FN21]. 31 U.S. (6 Pet.) 515 (1832).

[FN22]. Id. at 547.

[FN23]. Id. at 561.

[FN24]. See supra note 3.

[FN25]. E.g., Treaty with the Cherokee, Dec. 29, 1835, art. 5, 7 Stat. 478 (1848) (Treaty of New Echota).

[FN26]. Treaty with the Choctaw, Sept. 27, 1830, 7 Stat. 333 (1848).

[FN27]. While the early legal perceptions of Indian tribal governments regarded them as sovereign entities outside the federal union, from the beginning it was contemplated that events might occur that would voluntarily incorporate some of the tribes into the union as constituent states. For example, article 6 of the Fort Pitt Treaty with the Delaware of Sept. 17, 1778, secured crucial Delaware assistance during the Revolution by promising:

[I]t is further agreed on between the contracting parties should it for the future be found conducive for the mutual interest of both parties to invite any other tribes who have been friends to the interest of the United States, to join the present confederation, and to form a state whereof the Delaware nation shall be the head, and have a representation in Congress: Provided, nothing contained in this article to be considered as conclusive until it meets with approbation of Congress.

Treaty with the Delaware, Sept. 17, 1789, art. VI, 7 Stat. 13 (1848). Later, many proposals were advanced to organize an Indian state under various names from the Indian Territory in what is now eastern Oklahoma. Abel, Proposals for an Indian State, 1778-1878, in 1 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION 89, 94-102 (1907) (discussing proposals for an Indian state). See also H.R. EXEC. DOC. NO. 82, 25th Cong., 2d Sess. 5 (1838); H.R. EXEC. DOC. NO. 99, 25th Cong., 2d Sess. 33-35 (1838) (promises made to

Cherokees made by John Mason, Jr., for a separate state with a delegate in the House of Representatives, in the Treaty of New Echota).

[FN28]. The unfortunate history of the Choctaw effort to assert criminal jurisdiction over non-Indians is detailed in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 197-99 (1978). Notwithstanding the Choctaw effort to assure their jurisdiction over non-Indians in their territory, the United States Attorney General twice ruled during the nineteenth century that the Treaty of Dancing Rabbit Creek and later events did not give the Choctaw any such authority. 7 Op. Att'y Gen. 174 (1855); 2 Op. Att'y Gen. 693 (1834).

[FN29]. E.g., Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 109 S.Ct. 2994 (1989); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Montana v. United States, 450 U.S. 544 (1981); Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978); Duro v. Reina, 851 F.2d 1136 (9th Cir. 1988), rev'd 110 S. Ct. 2053 (1990).

[FN30]. 60 U.S. (19 How.) 393 (1856).

[FN31]. 112 U.S. 94 (1884).

[FN32]. While Elk was undoubtedly correct insofar as it suggested that Indians maintaining tribal relations and allegiance were not citizens of the United States, the failure of Justice Gray's majority opinion to analyze whether Indians, like John Elk, who moved to non-Indian communities, renounced their tribal allegiances and became commingled with the citizens of the state might not constitute citizenship of the United States and the states in which they resided under the first sentence of the fourteenth amendment, is considerably less defensible. Justice Harlan's dissent, however, indicated that Indians who no longer maintained tribal relations were not within the "Indians not taxed" exclusion and therefore should be considered citizens of the United States and of the state in which they resided under the provisions of the first sentence of the fourteenth amendment.

[FN33]. 109 U.S. 556 (1883).

[FN34]. E.g., Treaty with the Kansas Tribe, Oct. 5, 1859, United States- Kansas Tribe, 12 Stat. 1111 (1863).

[FN35]. E.g., Treaty with the Stockbridge and Munsee, Feb. 5, 1856, United States-Stock-bridge-Munsee 11 Stat. 663 (1863); Treaty with the Ottawa and Chippewa, July 31, 1855, United States-Ottawa-Chippewa 11 Stat. 621 (1863).

[FN36]. For example, article 5 of the Treaty with the Ottawa and Chippewa of July 31, 1855, provided:

The tribal organization of said Ottawa and Chippewa Indians, except so far as may be necessary for the purpose of carrying into effect the provisions of this agreement, is hereby dissolved; and if at any time hereafter, further negotiations with the United States, in reference to any matters contained herein, should become necessary, no general convention of the Indians shall be called; but such as reside in the vicinity of any usual place of payment, or those only who are immediately interested in the questions involved, may arrange all matters between themselves and the United States, without the concurrence of other portions of their people, and as fully and conclusively and with the same effect in every respect, as if they were all represented.

[FN37]. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. § § 461-63, 464-65, 466-70, 471- 72, 473, 474-75, 476-78, 479 (1988)).

[FN38]. Id. at § 6:

That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law.

And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who have voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

[FN39]. Act of June 2, 1924, ch. 233, 43 Stat. 253 (1925) (codified at 8 U.S.C. § 140(b) (1982)).

[FN40]. E.g., United States v. Sandoval, 231 U.S. 28 (1913); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); United States v. Kagama, 118 U.S. 375 (1886).

[FN41]. By the time of the Citizenship Act of 1924, the expansion of federal authority into the internal affairs of the tribes and the potential displacement of tribal government had become an accomplished doctrinal fact in American law. The critical case from which the doctrine of plenary federal authority emerged is United States v. Kagama, 118 U.S. 375 (1886). In Kagama, the Court upheld the constitutionality of the federal Major Crimes Act, Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153 (1982)), which for the first time extended the reach of federal law to cover intra-Indian crime and therefore internal tribal affairs. Significantly, in Kagama the Court expressly declined to rely on the one obvious source of Congressional power applicable to Indians, the Indian commerce clause of article I, section 8, clause 3 of the United States Constitution. Furthermore, the Court relied on no treaties under which the affected tribe might have consented to such intrusions into its internal sovereignty. Rather, the Court blithely assumed the existence of federal authority, while ignoring the tribes:

It seems to us that this [Act] is within the competency of Congress. These Indian tribes are the wards of the Nation. They are communities dependent on the United States: dependent largely for their daily food, dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen....

The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it has never existed anywhere else, because the theater of its exercise is within the geographic limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the Tribes.

Id. at 383-85. The Kagama case developed a notion of broad federal authority over Indian tribes because such power "never has existed anywhere else" and in rhetoric reminiscent of the white man's burden analysis often used to justify the imposition of colonial trust authority purported to explain the power as the creation of a federal protectorate over a dependent people. This remarkable decision obviously invoked rhetoric of colonial expansion, rather than the rhetoric of American constitutional discourse. The lack of any textual grounding of this newly discovered trusteeship power is evident on the face of the Kagama opinion through the Court's rejection of any reliance on the Indian commerce clause. The ostensible power vacuum into which the federal government moved in Kagama theretofore had been filled by tribal authority, as the Court had recognized two years earlier in Ex parte Crow Dog, 109 U.S. 556 (1883). Thus, the case represented a colonial displacement of tribal authority in favor of the power of colonial sovereign, the federal government. While Kagama did not use the term 'plenary power' to describe this trusteeship authority, later cases did. E.g., Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) ("Plenary

authority over the tribal relations of Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.").

More recently, the Supreme Court has recognized that the rhetoric of Kagama and its progeny cannot be harmonized with the normal requirement that federal constitutional authority be grounded in textual or structural roots derived from the constitutional document. Thus, in 1973, Justice Marshall declared: "The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making." McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973). One might have thought that abandonment of the colonial pretext of a trusteeship power would have required the Court to recanvass the limitations on federal authority under the textual sources cited by Marshall, suggesting that federal authority reached only the regulation of bilateral affairs ("commerce ... the Indian tribes") and policies arrived at through treaty by mutual consent. Unfortunately, no such reconsideration of the plenary power doctrine has been forthcoming in the cases. For example, five years after Justice Marshall quietly declared an end to the trusteeship power, Justice Stewart wrote in United States v. Wheeler, 435 U.S. 313, 323 (1978): "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance."

The illegitimacy of federal assertions of such sweeping unilateral authority frequently is proclaimed in Indian country. Indeed, scholars consistently have questioned the purported doctrine of plenary federal authority over Indians because of the lack of any textual roots for the doctrine in the Constitution, the breadth of its implications, and the lack of any tribal consent to such broad federal authority. Therefore, many commentators have sought out limits on that authority. E.g., Ball, Constitution, Court, Indian Tribes, 1987 AM. B. FOUND. RES. J., 367-113 (suggesting lack of textual authority for plenary power); R. BARSH & J. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 257-69 (1980) (suggesting limitations derived from article I and the ninth amendment); Clinton, Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self- Government, 33 STAN. L. REV. 979, 996-1001 (1981) (suggesting inherent limits in the reach of the Indian commerce clause); Collins, Indian Consent to American Government, 31 ARIZ. L. REV. 365 (1989) (arguing for Indian consent as a limitation on federal authority); Coulter, The Denial of Legal Remedies to Indian Nations Under U.S. Law, in NATIONAL LAWYERS GUILD COMMITTEE ON NATIVE AMERICAN STRUGGLES, RETHINKING INDIAN LAW 103, 106 (1982) ("[T]here is not textual support in the Constitution for the proposition that Congress has plenary authority over Indian nations."); Newton, Federal Power over Indians: Its Sources, Scope and Limitations, 132 U. PA. L. REV. 195, 261-67 (1984) (suggesting due process and takings limitations);

[FN42]. 435 U.S. 191 (1978).

[FN43]. 118 U.S. 375 (1886).

[FN44]. Oliphant, 435 U.S. at 211 (1978).

[FN45]. 435 U.S. 313 (1978).

[FN46]. 435 U.S. at 322 (quoting F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945)) (emphasis supplied). Elsewhere in his opinion, Justice Stewart noted that no federal treaty or statute purported to delegate the tribal powers of self-government. While such powers were ultimately subject to the supervisory control of the federal government, according to Stewart, their origin lies in aboriginal, rather than federal, sources. As Stewart put it, "the power to punish offenses against tribal law committed by Tribe members, which was part of the Navajos' primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority." Id. at 328.

[FN47]. E.g., E. FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 at 18-24,

231-32, 242 (1988); F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 56-65 (1928); H. Hyman, Reconstruction and Political-Constitutional Institutions: The Popular Expression, in NEW FRONTIERS OF THE AMERICAN RECONSTRUCTION 11-13 (H. Hyman, ed. 1966). This sentiment was nicely summarized in the Court's famous slogan from Texas v. White, 74 U.S. 700, 725 (1868) to the effect that the Constitution contemplates "an indestructible Union composed of indestructible States."

[FN48]. The pluralistic approach to sovereignty in the newly acquired territories could be seen in the Courts' application of the Constitution to the newly acquired territories. The Constitution and the rights guaranteed or protected by the Bill of Rights initially were not applied to the newly acquired territories. Under the Court's approach, the function of the Constitution was to check or limit power conferred on Congress to regulate territories, not to regulate the routine operations of territorial government. Additionally, the only constitutional clauses directly applicable to the territories were those clauses specifically addressing territories. Carino v. The Insular Gov't of the Philippine Islands, 212 U.S. 449 (1909) (property rights of indigenous occupants of the Philippines); Dorr v. United States, 195 U.S. 138 (1904) (right to jury trial in Philippines); Hawaii v. Mankichi, 190 U.S. 197 (1903) (jury trials in Hawaii); Downes v. Bidwell, 182 U.S. 244 (1901) (customs and duties in Puerto Rico).

The justification in these cases for not extending the same constitutional protections to the citizens of these territories appeared to stem from concerns about potential culture shock from the imposition of an alien adversarial process on societies that had not developed with such assumptions. As with Indian cases of the period, these opinions also contain references to the savage or uncivilized nature of the inhabitants of these territories. Thus, the Court concluded that forcing Congress to apply United States constitutional law to its fullest extent might actually work unjust mischief on the inhabitants of these territories.

The dual notions of sovereignty also are evident in the provisions created by Congress to regulate the territories. The inhabitants were citizens of the territory but not citizens of the United States. The territories were allowed to maintain a figurative government totally subject to the whim of Congress. In addition, the territories were subject to whatever regulations Congress dictated without the protection of citizenship. See Act of July 1, 1902, ch. 1369, 32 Stat. 691 (1903) (regulating Philippines); Act of Apr. 12, 1900, ch. 191, 31 Stat. 77 (1901) (regulating Puerto Rico); Joint Resolution of July 7, 1898, No. 55, 30 Stat. 750 (1899) (regulating Hawaii).

Indeed, the overthrow of an indigenous monarchy in Hawaii with tacit federal approval represents the nexus between the late nineteenth-century American development of colonial expansionism and the colonization by the United States of the governments of the indigenous peoples of North America and the western hemisphere. See generally W. ALEXANDER, HISTORY OF THE LATER YEARS OF THE HAWAIIAN MONARCHY AND THE REVOLUTION OF 1893 (1896); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 797-811 (1982 ed.); Houghton, An Argument for Indian Status for Native Hawaiians -- The Discovery of a Lost Tribe, 14 AMER. IND. L. REV. 1 (1989); R. KUYKENDALL & A. DAY, HAWAII: A HISTORY (1948); R. KUYKENDALL, THE HAWAIIAN KINGDOM 1778-1854: FOUNDATION AND TRANSFORMATION (1938); Levy, Native Hawaiian Land Rights, 63 CALIF. L. REV. 848 (1975); S. STEVENS, AMERICAN EXPANSION IN HAWAII 1842-1898 (1945); M. TATE, THE UNITED STATES AND THE HAWAIIAN KINGDOM (1965).

[FN49]. See generally AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE "FRIENDS OF THE INDIAN,""""" 1880-1900 (F. Prucha ed. 1973); F. HOXIE, THE FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS 1880-1920 (1984); F. PRUCHA, THE CHURCHES AND THE INDIAN SCHOOLS 1888-1912 (1979).

[FN50]. F. PRUCHA, THE CHURCHES AND THE INDIAN SCHOOLS 1888-1912 (1979).

[FN51]. E.g., Brendale v. Consolidated Tribes and Bands of the Yakima Indian Nation, 109 S.Ct. 2994 (1989); Montana v. United States, 450 U.S. 544 (1981).

[FN52]. See F. COHEN, supra note 4, at 127-43.

[FN53]. For example, one aspect of the allotment program was to individualize Indian land ownership to meld Indian property-holding into the private property system of the Euro-American communities that surrounded Indians and who were brought onto the reservations through allotment. The Indian internalization of such private property notions is evident in Hodel v. Irving, 481 U.S. 704 (1987), in which Indians successfully challenged the escheat provisions of the Indian Land Consolidation Act, Pub. L. No. 97-459, § 207, 96 Stat. 2515, 2519 (1983) (codified as amended at 25 U.S.C. § 2206 (1988)), under which fractionated heirship interests in land rendered unproductive by the residual effects of the allotment policy escheated to the tribe from which it was originally taken without compensation. Even though traditional Indian land-holding was communal, the Indians in this case obviously had assimilated the Euro-American values of private property and successfully sought to protect their rights against efforts to recommunilize their land holdings.

[FN54]. See supra note 49.

[FN55]. J. REID, A BETTER KIND OF HATCHET: LAW, TRADE, AND DIPLOMACY IN THE CHEROKEE NATION DURING THE EARLY YEARS OF EUROPEAN CONTACT (1976) (Reid's reference to a "better kind of hatchet" is to the gun as a valuable trade good that formed an opening wedge for trade and diplomacy that ultimately made the Cherokee economically dependent on Euro-American, and especially British, trade goods and affected their diplomatic relations with Euro-Americans).

[FN56]. E.g., Bishinik, Apr., 1987, at 8; Bishinik, July, 1989, at 1.

[FN57]. E.g., Fowler, Wind River Reservation Political Process: An Analysis of the Symbols of Consensus, 5 AM. ETHNOLOGIST 748 (1978) (descriptions of the influence of Indian American Legion posts).

[FN58]. While in 1930, only 10% of the Indian population lived in urban areas, by 1980 over 50% lived in urban populations. Snipp & Sandefur, Small Gains for Rural Indians Who Move to Cities, 5 RURAL DEV. PERSPECTIVES 22 (1988).

[FN59]. The Canadian Constitutional Act, 1982, § 35, recognized and affirmed the treaty rights of the aboriginal peoples of Canada (Indian, Inuit and Metis). It also invited aboriginal peoples to participate in discussions respecting "constitutional matters that directly affect the aboriginal peoples of Canada...." Some Indian organizations, including the Constitutional Brotherhood, opposed the additions because they only amount to a third of the Indian objectives. See Hodge, Patriation of the Canadian Constitution: Comparative Federalism in a New Context, 60 WASH. L. REV. 585, 623 (1985). Aboriginal peoples in Canada failed to secure increased autonomy, either as an internal colony or as an eleventh province. Id. For further analysis of the aboriginal peoples' constitutional position in Canada, see Many Fingers, Commentaries: Aboriginal Peoples and the Constitution, 19 ALTA. L. REV. 428 (1981); Sanders, Aboriginal Peoples and the Constitution, 19 ALTA. L. REV. 410 (1981).

[FN60]. E.g., Brendale v. Consolidated Tribes and Bands of the Yakima Indian Nation, 109 S.Ct. 2994 (1989); Rice v. Rehner, 463 U.S. 713 (1983); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); Ramah Navajo School Bd. v. Bureau of Revenue of New Mexico, 458 U.S. 832 (1982); Montana v. United States, 450 U.S. 544 (1981); Central Mach. Co. v. Arizona Tax Comm'n, 448 U.S. 160 (1980); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976); Fisher v. District Court, 424 U.S. 382 (1976); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973); Williams v. Lee, 358 U.S. 217 (1959); see generally, Clinton, State Power Over Indian Reservations: A Critical Comment on Burger Court Doctrine, 26 S.D.L. REV. 434 (1981); C. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW (1987).

[FN61]. E.g., Solem v. Bartlett, 465 U.S. 463 (1984); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425 (1975); Mattz v. Arnett, 412 U.S. 481 (1973); Seymour v. Superintendent, 368 U.S. 351 (1962).

[FN62]. One problem with the Court's approach to the jurisdictional cases it decided over the past 30 years is that the Court very frequently has altered the relevant preemption tests for determining the limits of state jurisdiction from case to case. Indeed, predictability in this area is quite difficult because many of the court's opinions seem to treat the doctrinal questions addressed as if they were questions of first impression, rather than issues calling for application of already extent preemption doctrines.

[FN63]. All persons interested in positive aspects ofintergovernmental relations involving Indian tribes and states owe a debt of gratitude to Sam Deloria, who was among the first to identify the need for such positive cooperation and who worked hard to found the Commission on Tribal-State Cooperation to facilitate dialogue about such questions.

[FN64]. Mourning Latest Victims, Columbia Will Seek to Extradite Drug Figures, N.Y. Times, Aug. 20, 1989, at 14, col. 1; Columbia Presidential Candidate is Slain at Rally, N.Y. Times, Aug. 19, 1989, at 3, col. 1.

[FN65]. E.g., Pommersheim, The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay, 18 N. MEX. L. REV. 49 (1988); Pommersheim, The Reservation as Place: A South Dakota Essay, 34 S.D. L. REV. 246 (1989).

[FN66]. 25 U.S.C. § § 1301-03 (1988).

[FN67]. HEARINGS BEFORE THE UNITED STATES COMMISSION ON CIVIL RIGHTS ON ENFORCEMENT OF THE INDIAN CIVIL RIGHTS ACT (multiple volumes, Rapid City, S.D., July 31-Aug. 12 and Aug. 21, 1986; Washington, D.C., Jan. 28, 1988; Portland, Or., Mar. 31, 1988).

[FN68]. S. 517, 101st Cong., 1st Sess. (1989) [hereinafter Hatch bill].

[FN69]. In this context, the use of the term 'sovereign' should be taken very broadly to refer to more than just national sovereignty. This section is intended to draw comparisons and differences between level of cooperation between foreign nations, the federal government and the states, and separate branches of the same government. For this purpose, each unit asserts some sovereignty derived from the constitutional or statutory source of its power.

[FN70]. In this section, the word 'state' sometimes is used to refer to a sovereign polity, rather than in reference to states of the union. The word 'state' therefore is not used here in its strict international sense. It will not be used only to refer to states composing the family of nations because the term will be applied to tribes as sovereign polities, domestic dependent nations in Chief Justice Marshall's term, without regard to whether they constitute nations among the family of nations, as claimed by some Indian leaders. E.g., Lyons, When You Talk About Client Relationships, You are Talking About the Future of Nations, in NATIONAL LAWYERS GUILD COMMITTEE ON NATIVE AMERICAN STRUGGLES, RETHINKING INDIAN LAW iv (1982). By contrast, both American law and some international law suggested that Indian tribes were not members of the family of nations. E.g., Cayuga Claims Case (Great Britain, on behalf of the Cayuga Indians in Canada v. United States), NIELSON REP. 203, 307 (1927). Because the issue ddressed in this paper is approached as a question of domestic law, the question of whether Indian tribes also represent members of the family of nations must be resolved in a different arena. This is not to suggest that international law does not or should not influence and shape domestic responses to such questions

-- it does and should!

[FN71]. Eleven days after the Iranian seizure of American hostages in Teheran, President Jimmy Carter issued an Executive Order blocking all official Iranian assets in the United States.Exec. Order No. 12,170, 44 Fed. Reg. 65729 (1979), implemented by Iranian Asset Control Regulations, 31 C.F.R. § 535 (1979) and later amendments. See also Blocking Iranian Government Property, 15 WEEKLY COMP. PRES. DOC. 2117 (Nov. 14, 1979) (discussing rationale for Iranian assets freeze); A. LOWENFELD, TRADE CONTROLS FOR POLITICAL ENDS, 544-63 (2d ed. 1983); Note, The U.S.-Iran Accords and the Taking Clause of the Fifth Amendment, 68 VA. L. REV. 1537, 1538-40 (1982). More recently, a similar effort was made to freeze Libyan assets in retaliation for terrorist acts. Exec. Order No. 12543, 51 Fed. Reg. 875 (1986), implemented by Libyan Sanctions Regulations, 31 C.F.R. § 550 (1986).

[FN72]. See generally Hilton v. Guyot, 159 U.S. 113 (1895).

[FN73]. Id.

[FN74]. E.g., Treaty between the United States and Spain for the Extradition of Criminals, May 29, 1970, United States-Spain 22 U.S.T. 738, T.I.A.S. No. 7136; Extradition Treaty between the United States and Greece, May 6, 1931, United States-Greece, 47 Stat. 2185, T.S. No. 855; Treaty of Extradition between the United States and Venezuela, Jan. 19, 1922, United States- Venezuela, 43 Stat. 1968, T.S. No. 675; Treaty between the United States and France for the Extradition of Criminals, Jan. 6, 1909, United States-France, 37 Stat. 1526; Treaty between the United States and Switzerland for the Extradition of Criminals, May 14, 1900, United States-Switzerland, 31 Stat. 1928, T.S. No. 354; see generally Van Cauwenberghe v. Biard, 486 U.S. 517 (1988); Valentine v. United States ex. rel. Neidecker, 299 U.S. 5 (1936); Factor v. Laubenheimer, 290 U.S. 276 (1933); Fernandez v. Phillips, 268 U.S. 311 (1925).

[FN75]. 28 U.S.C. § § 2241, 2254 (1982).

[FN76]. Id. at § 1257.

[FN77]. See Steffel v. Thompson, 415 U.S. 452 (1974); Younger v. Harris, 401 U.S. 37 (1971). See generally E. CHEMERINKSY, FEDERAL JURISDICTION 621-55 (1989).

[FN78]. 28 U.S.C. § 2283 (1989). See generally Mitchum v. Foster, 407 U.S. 225 (1972); Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs, 398 U.S. 281 (1970).

[FN79]. E.g., Oklahoma Tax Comm'n v. Graham, 109 S.Ct. 1519 (1989); but see Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987).

[FN80]. Patsy v. Board of Regents of Fla., 457 U.S. 496 (1982).

[FN81]. 28 U.S.C. § 1257 (1989).

[FN82]. Originally, section 25 of the Judiciary Act of 1789, 1 Stat. 73, 85 (1850) which provided for appeals of

cases to the Supreme Court in which the state court rejected a claim based on the federal constitution, laws or treaties, provided that "no other error shall be assigned or regarded as a ground for reversal in any such case ... than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said [federal] constitution, treaties, statutes, commissions, or authorities in dispute."

[FN83]. E.g., Three Affiliated Tribes v. Wold Eng'g, 467 U.S. 138 (1984); Michigan v. Long, 463 U.S. 1032 (1983).

[FN84]. 28 U.S.C. § 2254(d) (1982). E.g., Miller v. Fenton, 474 U.S. 104 (1985); Rushen v. Spain, 464 U.S. 114 (1983); Maggio v. Fulford, 462 U.S. 111 (1983); Marshall v. Lonberger, 459 U.S. 422 (1983); Sumner v. Mata, 435 U.S. 591 (1982); Sumner v. Mata, 449 U.S. 539 (1981).

[FN85]. Johnson v. Robison, 415 U.S. 361, 367 (1974); Heikkila v. Barber, 345 U.S. 229 (1953); Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947); Crowell v. Benson, 285 U.S. 22, 54-65 (1932); Ng Fung Ho v. White, 259 U.S. 276, 284-85 (1922); Tietjen v. United States Veterans' Admin., 884 F.2d 514 (9th Cir. 1989); Kicking Woman v. Hodel, 878 F.2d 1203 (9th Cir. 1989); Haitian Refugee Center, Inc. v. Nelson, 872 F.2d 1555 (11th Cir. 1989); Rosen v. Walters, 719 F.2d 1422, 1423 (9th Cir. 1983); see generally Note, De Novo Judicial Review of Administrative Agency Factual Determinations Implicating Constitutional Rights, 88 COLUM. L. REV. 1483 (1988); see also Jacobellis v. Ohio, 378 U.S. 184 (1964); Yakus v. United States, 321 U.S. 414 (1944). The Administrative Procedure Act, 5 U.S.C. § 706 (1989), provides in relevant part: "[T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."

[FN86]. McKart v. United States, 395 U.S. 185, 193 (1969).

[FN87]. Under the Administrative Procedure Act, administrative determinations generally will be overturned only if they are arbitrary and capricious. 5 U.S.C. § 706(2)(A) (1988). E.g., Bowen v. Massachusetts, 108 S.Ct. 2722, 2741 n.49 (1988).

[FN88]. E.g., Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Crowell v. Benson, 285 U.S. 22 (1932). Perhaps the only major exception to this statement, the finality of decisions of the Veterans Administration, recently was amended by Congress to provide effective article III judicial review. Pub. L. No. 100-687, 100th Cong., 2d Sess. (1988), amending 38 U.S.C. § 211(a). For a description of the law on review of veteran's claims before enactment of Pub. L. No. 100-687, see Johnson v. Robison, 415 U.S. 361 (1974).

[FN89]. E.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1963) (under act of state doctrine, the "Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government [subject to certain possible limitations]"). See also Restatement (Third) of Foreign Relations Law of the United States § 443 (1987) (act of state doctrine).

[FN90]. E.g., Bradford Elec. Light Co., Inc. v. Clapper, 286 U.S. 145, 163 (1932) (Stone, J., concurring); Bond v. Hume, 243 U.S. 15 (1917); The Kensington, 183 U.S. 263 (1902); Walworth v. Harris, 129 U.S. 355 (1889); see infra note 162.

[FN91]. See generally Hilton v. Guyot, 159 U.S. 113, 202 (1895); Wilkinson v. Manpower, Inc., 531 F.2d 712, 715 (5th Cir. 1976); Kroitoro v. Chase Manhattan Bank, N.A., 522 So 2d 1061 (Fla. Ct. App. 1988); see also Red Fox v. Red Fox, 23 Or. App. 393, 542 P.2d 918 (1975).

[FN92]. E.g., Wilkinson v. Manpower, Inc., 531 F.2d 712, 715 (5th Cir. 1976) ("Mere difference between the law of the forum and that of a foreign state does not prevent enforcement of the foreign law or rights based thereon if such law is not against the public policy of the forum").

[FN93]. Pub. L. No. 90-284, title II, 82 Stat. 77 (1969) (codified as amended at 25 U.S.C. § § 1301-03 (1988)).

[FN94]. See infra note 105.

[FN95]. 436 U.S. 49 (1978). For a very thoughtful survey and analysis of the federal courts problems created by tribal sovereignty, including the problems posed by the Martinez case, see Resnick, Dependent Sovereigns: Indian Tribes, States, and the Federal Courts, 56 U. CHI. L. REV. 671 (1989).

[FN96]. 25 U.S.C. § 1303 (1988): "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." E.g., Necklace v. Tribal Court of Three Affiliated Tribes of the Fort Berthold Reservation, 554 F.2d 845 (8th Cir. 1977).

[FN97]. The decisions construing "custody" for purposes of the remedy available to state prisoners under 28 U.S.C. § § 2241 and 2254 construe that term more narrowly than the federal courts have construed the term 'detention' in 25 U.S.C. § 1303. In particular, monetary fines, a not uncommon form of tribal criminal sentence, are treated as a form of detention authorizing federal habeas under 25 U.S.C. § 1303, e.g., Settler v. Lameer, 419 F.2d 1311 (9th Cir. 1969), while the cases interpreting the custody requirement of 28 U.S.C. § § 2241 and 2254 afford no remedy to state prisoners whose only criminal sentence involves a monetary fine. E.g., Edmunds v. Won Bae Chang, 509 F.2d 39 (9th Cir.), cert. denied, 423 U.S. 825 (1975). Furthermore, some cases under section 1303 have suggested the availability of such relief in child custody cases not covered in the Indian Child Welfare Act, 25 U.S.C. § § 1901-23 (1988). E.g., DeMent v. Oglala Sioux Tribal Court, 874 F.2d 510 (8th Cir. 1989); United States ex rel. Cobell v. Cobell, 503 F.2d 790 (9th Cir. 1974); Wells v. Philbrick, 486 F. Supp. 807 (D. S.D. 1980). But see Weatherwax on behalf of Carlson v. Fairbanks, 619 F. Supp. 294 (D. Mont. 1985).
By contrast, the cases under section 2254 clearly indicate that federal habeas corpus cannot be used to contest child custody questions adjudicated by state forums. E.g., Lehman on behalf of Lehman v. Lycoming, 458 U.S. 502 (1982); Doe v. Doe, 660 F.2d 101 (4th Cir. 1981); Sylvander v. New England Home for Little Wanderers, 584 F.2d 1103 (1st Cir. 1978); Donnelly v. Donnelly, 515 F.2d 129 (1st Cir.), cert. denied, 423 U.S. 998 (1975). But see Larch v. Larch, 872 F.2d 66 (4th Cir. 1989) (sustaining tribal application for writ of habeas corpus to enforce obligations under the Indian Child Welfare Act).

[FN98]. 436 U.S. at 66.

[FN99]. E.g., Runs After v. United States, 766 F.2d 347 (8th Cir. 1985) (section 1985(3) claim rejected); Goodface v. Grassrope, 708 F.2d 335 (8th Cir. 1985) (same); Shortbull v. Looking Elk, 677 F.2d 645 (8th Cir. 1982) (same); Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980); see generally Gover & Laurence, Avoiding Santa Clara Pueblo v. Martinez: The Litigation in Federal Court of Civil Actions Under the Indian Civil Rights Act, 8 HAMLINE L. REV. 497 (1985).

[FN100]. See generally Gover & Laurence, supra note 99.

[FN101]. Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980).

[FN102]. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (1868) (codified at 28 U.S.C. § 2241(c)(3) (1988)). See supra note 13.

[FN103]. For example, as part of the initial thrust of the restructuring under which Indian tribes were involuntarily brought within the federal union, Congress in 1871 altered the manner in which it formally dealt with tribes by outlawing the formal process of treatymaking. 25 U.S.C. § 71 (1988). The initial impetus for this statute involved disputes between the House of Representatives and the Senate (which has sole authority to ratify treaties) over their respective roles in formulating and implementing federal Indian policy. See F. COHEN, supra note 4, at 127-28. Initially, this statute only resulted in a formal change from treaties to formal agreements with the Indian tribes which Congress ratified through the process of statutory enforcement. E.g., Agreement with the Rosebud Sioux, Oct. 4, 1901, 33 Stat. 254 (1905); Agreement with the Crow Tribe, Aug. 14, 1899, 33 Stat. 352. When Congress began to unilaterally alter such agreements during the process of enacting them into law, a subtle but critical change in process began to operate by which Congress undertook to unilaterally legislate the terms of intergovernmental relations for Indian tribes, rather than negotiate with Indian tribes. After Lone Wolf v. Hitchcock, 187 U.S. 553 (1903), approved such unilateral Congressional changes in derogation of prior treaties, even the form of formal tribal agreement virtually disappeared. Thus, the abrogation of Indian treaty-making, the decline of any perceived necessity for tribal consent, and the simultaneous emergence of plenary Congressional authority over Indians as a constitutional doctrine during this period should be seen as part of the larger colonial impetus of this era under the guise of which Indian tribes and their members were often involuntarily made an awkward part of the federal union.

[FN104]. See supra note 41.

[FN105]. 471 U.S. 845 (1985). See also Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987); Stock West, Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221 (9th Cir. 1989).

[FN106]. Fay v. Noia, 372 U.S. 391, 423-24 (1963) (footnotes omitted):

> [T]he familiar principal that res judicata is inapplicable in habeas proceedings ... is really but an instance of the larger principle that void judgments may be collaterally impeached.... So also, the traditional characterization of the writ of habeas corpus as an original (save perhaps when issued by this Court) civil remedy for the enforcement of the right to personal liberty, rather than as a stage of the state criminal proceedings or as an appeal therefrom, emphasizes the independence of the federal habeas proceedings from what has gone before. This is not to say that state criminal judgment resting on a constitutional error is void for all purposes. But conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review.

While res judicata or other principles of finality generally applicable to civil matters do not operate directly in habeas corpus litigation, specialized habeas corpus finality rules have emerged to accommodate the liberty and civil liberties interests protected by the federal writ of habeas corpus with other concerns about judicial efficiency, federalism, comity, and repose in criminal litigation. E.g., Murray v. Carrier, 477 U.S. 478 (1986); Kuhlmann v. Wilson, 477 U.S. 436 (1986); Miller v. Fenton, 474 U.S. 104 (1985); Marshall v. Lonberger, 459 U.S. 422 (1983); Sumner v. Mata, 449 U.S. 539 (1981); Wainwright v. Sykes, 433 U.S. 72 (1977); Sanders v. United States, 373 U.S. 1 (1963); see also 28 U.S.C. § § 2244, 2254(d) (1982).

[FN107]. Jackson v. Irving Trust Co., 311 U.S. 494 (1941); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940); Stoll v. Gottlieb, 305 U.S. 165 (1938); Cutler v. Huston, 158 U.S. 423, 430-31 (1895); Evers v. Watson, 156 U.S. 527, 533 (1895); Des Moines Navigation & Ry. Co. v. Iowa Homestead Co., 123 U.S. 552 (1887); Skillern's Executors v. May's Executor, 10 U.S. (6 Cranch) 267 (1810); but see United States v. United States Fid. & Guar. Co., 309 U.S. 506 (1940); see generally Restatement (Second) of Judgments § 12 (1982).

[FN108]. 28 U.S.C. § 1257 (1988). For illustrations of Supreme Court review of the scope of state court jurisdiction in cases arising in Indian country, under § 1254 albeit before Congress amended it to eliminate all appeals of right, see Fisher v. District Court, 424 U.S. 382 (1976); Williams v. Lee, 358 U.S. 217 (1959).

[FN109]. 304 U.S. 64 (1938). Compare R.J. Williams Co. v. Fort Belknap Housing Auth., 719 F.2d 979, 983 (9th Cir. 1983), cert. denied, 105 S.Ct. 3476 (1985) and Begay v. Karr-McGee Corp., 682 F.2d 1311, 1317 (9th Cir. 1982) and Hot Oil Services, Inc. v. Hall, 366 F.2d 295 (9th Cir. 1966) and Littel v. Nakai, 344 F.2d 486 (9th Cir. 1965) with Weeks Constr., Inc. v. Oglala Sioux Housing Auth., 797 F.2d 668 (8th Cir. 1986) and Poitra v. Demarrias, 502 F.2d 23 (8th Cir. 1974), cert. denied, 421 U.S. 934 (1975). See generally Kutner, Can Federal Courts Remain Open when State Courts are Closed? Eric R. Co. v. Tompkins on the Indian Reservation, 52 N.D.L. REV. 647 (1976).

[FN110]. As a result of critical articles in THE WASHINGTON POST and Minneapolis newspapers, the United States Civil Rights Commission initiated an investigation in 1986 of tribal enforcement of the ICRA in Indian country. There may be reason to suspect that one unarticulated factor contributing to the furor over tribal court civil rights enforcement stemmed in part from the decisions in Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) and Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), holding that tribal governments had taxing and other regulatory authority over non-Indians and other non-members on their reservation. Because non-members cannot participate in tribal governments, some have assumed that leaving the final protection of their civil rights to the tribal government subjects them to arbitrary forms of governmental action without any possibility of political or legal remedy in civil, regulatory, or taxing matters. Unfortunately, this simplistic analysis ignores the fact that very similar consequences flow from the involvement of noncitizens in litigation or business in another state (especially where the amount in controversy is less than the $50,000 threshold for diversity jurisdiction) and certainly occurs when United States business interests or citizens are subjected to the jurisdiction of foreign nations, such as Canada. Thus, the simplistic revolutionary notion of "no taxation without representation," while powerful in American thinking, is in fact subject to substantial exceptions in practice.

Whatever the origins of the Commission investigation, the Commission clearly conducted a controversial probe that lasted from 1986 to the present day. No final report yet has been issued. Field hearings were conducted in Rapid City, Washington, D.C., Flagstaff, and Portland. Initially, the hearings consisted primarily of a parade of horror stories, many of them coming out of the Dakota reservations on the Plains and the Red Lake Reservation in Minnesota. While Clarence Pendleton, the late chair of the Commission, repeatedly disclaimed any pre-set agenda for these hearings, the central focus of these hearings clearly has been the Supreme Court's 1978 decision in Santa Clara Pueblo v. Martinez, holding that no implied federal cause of action existed to enforce the Indian Civil Rights Act in civil cases in federal courts. Of course, the Martinez court noted that violations of the ICRA occurring in criminal cases generally can be redressed in federal courts under the habeas corpus actions provided for in 25 U.S.C. § 1303 (1988). Indeed, the Commissions inclinations may go beyond overturning Martinez. At the Washington, D.C. hearing in which I participated, Commissioner Allen went so far as to suggest that civil liberties and individual rights would be furthered more if tribal sovereignty were ignored or eliminated.

The Commission's hearings generated considerable fear and loathing in Indian country. The Commission's effort to parade the greatest civil liberties horror stories without any initial systematic effort to survey law- abiding tribes generated considerable criticism. This suspicion was bolstered by the fact that the Northwest Tribal Judges Association had to twice invite the Commission to sit in on court hearings in the Pacific Northwest before it got any positive response from the Commission. Tribal pressure finally forced the Commission to send out a more systematic written survey to all federally recognized tribal governments in an effort to secure something more than episodic, anecdotal information. Tribal resistance to and fear of the Commission's efforts was quite strong. Navajo tribal officials, for example, apparently refused to cooperate in the Commission's hearings and the Commission contemplated issuing formal subpoenas compelling Navajo tribal officials to cooperate. This proposal created major questions about tribal sovereign immunity and led to Congressional action imposing a limitation on the Civil Rights Commission appropriations that prevented the Commission from spending any funds on such subpoenas until 60 days after the Commission received a formal legal opinion from the General Accounting Office that indicated that the Commission had authority to issue such subpoenas.

[FN111]. Senate Bill 517 reads:

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That this Act may be cited as the Indian Civil Rights Act Amendments of 1989. Sec. 2. Title II of the Civil Rights Act of 1968 (Public Law 90-284, 25 U.S.C. 1301 et seq. (1988)), commonly called the Indian Civil Rights Act or the Indian Bill of Rights, is amended by adding at the end thereof the following new section:

CIVIL ACTIONS

Sec. 204. (a) Compliance With Section 202. -- Federal district courts shall have jurisdiction of civil rights actions alleging a failure to comply with rights secured by this Act. Sovereign immunity shall not constitute a defense to such an action.

(b) Any aggrieved individual, following the exhaustion of such tribal remedies as may be both timely and reasonable under the circumstances, or the Attorney General on behalf of the United States, may initiate an action in Federal district court for declaratory, injunctive or other equitable relief against an Indian tribe, tribal organization, or official thereof, alleging a failure to comply with rights secured by this Act.

(c) In any civil action brought by an aggrieved individual, or by the Attorney General, the Federal district court shall adopt the findings of fact of the tribal court, if such findings have been made, unless the district court determines that:

(1) the tribal court was not fully independent from the tribal legislative or executive authority;

(2) the tribal court was not authorized to or did not finally determine matters of law and fact;

(3) the tribal court permitted those subject to the Act, on issues of declaratory, injunctive or other equitable relief, to interpose a defense of immunity;

(4) the tribal court failed to resolve the merits of the factual dispute;

(5) the tribal court employed a factfinding procedure not adequate to afford a full and fair hearing;

(6) the tribal court did not adequately develop material facts;

(7) the tribal court failed to provide a full, fair, and adequate hearing; or

(8) the factual determinations of the tribal court are not fairly supported by the record, in which event the district court shall conduct a de novo review of the allegations contained in the complaint.

(d) In any civil actions brought under this Act the Federal court shall, whenever a question of tribal law is at issue, accord due deference to the interpretation of the tribal court of tribal laws and customs.

Senator Hatch's proposed legislation initially was introduced in a different form as S. 2747 in the 100th Congress and has been reintroduced in the 101st Congress as S. 517 and sent to the Judiciary Committee for review.

[FN112]. E.g., Testimony of Former Chief Judge Truedell Guerue, Rosebud Tribal Court in UNITED STATES COMMISSION ON CIVIL RIGHTS, HEARINGS ON ENFORCEMENT OF THE INDIAN CIVIL RIGHTS ACT HELD IN RAPID CITY, SOUTH DAKOTA, JULY 31-AUGUST 1 AND AUGUST 21, 1986 91-92 (describing tribal court pressure and salary manipulation); Testimony of Former Chief Judge Jerry Matthews, Pine Ridge Tribal Court, in id. at 44-45 (describing removal of tribal judges); Testimony of Krista Clark in id. at 30-31 (describing tribal council reversal of tribal court decisions); Ziontz, After Martinez: Indian Civil Rights Under Tribal Government, 12 U.C. DAVIS L. REV. 1 (1979) (describing tribal council manipulation of tribal court jurisdiction).

[FN113]. Significantly, the framers contemplated that inferior federal courts might serve as appellate courts for state tribunals. In THE FEDERALIST No. 82 at 556-57 (A. Hamilton) (J. Cooke ed. 1961), Alexander Hamilton wrote:

[C]ould an appeal be made to lie from the state courts to the subordinate federal judacatories? ... The following considerations countenance the affirmative. The plan of the convention in the first place authorises the national legislature "to constitute tribunals inferior to the supreme court." It declares in the next place that "the JUDICIAL POWER of the United States shall be vested in one supreme court and in such inferior courts as congress shall ordain and establish"; and it then proceeds to enumerate the cases to which this judicial power shall extend. It afterwards divides the jurisdiction of the supreme court into the original and the appellate, but gives no definition of that of the subordinate courts. The only outlines described for them are that they shall be "inferior to the supreme court" and they shall not exceed the specified limits of the federal judiciary. Whether their authority shall be original or appellate or both is not declared. All this seems to be left to the discretion of the legislature. And this being the case, I perceive at present no impediment to the establishment of an appeal from the state courts to the subordinate national tribunals; and many advantages attending the power of doing it may be imagined. It would diminish the motives to the multiplication of federal courts, and would admit of arrangements calculated to contract the appellate jurisdiction of the supreme court. The state tribunals may then be left with a more entire charge of federal causes;

and appeals in most cases in which they may be deemed proper instead of being carried to the supreme court, may be made to lie from the state courts to the district courts of the union.
With the exception of the writ of habeas corpus, and then only in function rather than form, the federal appellate power that Hamilton envisioned over state tribunals has never been given to lower federal courts. Since the enactment of section 25 of the Judiciary Act of 1789, 1 Stat. 73, the major appellate review of state tribunals has been by the United States Supreme Court. See 28 U.S.C. § § 1257, 1258 (1988). Indeed, lower federal courts generally are precluded by the Anti-Injunction Act, 28 U.S.C. § 2283 (1988), from interfering in ongoing state proceedings. Thus, while possibly not constitutionally mandated, the American legal tradition recognizes that the sovereign dignity of the states requires review of state court decisions be made by the highest court in the land, rather than by inferior federal courts.

[FN114]. E.g., Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 170 (1981) ("In many respects, the Indian tribes' sovereignty over their own members is significantly greater than the States' powers over their own citizens. Tribes may enforce discriminatory rules that would be intolerable in a non-Indian community."). See also Ramah Navajo School Bd. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 856-57 (1982) (Justice Rehnquist complaining in dissent that the majority decision on preemption of state taxing authority gave the "Indian Tribe ... greater immunity from state taxes than is enjoyed by the sovereignty of the United States on whom it is dependent.").

[FN115]. The notion that the primary safeguards of state autonomy in the federalist system lie in the structural arrangements of the political process under the Constitution, rather than in active judicial review, dates back to at least Chief Justice Marshall's opinion in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). More recently, the political safeguards of the federalism concept has become associated with Professor Wechsler's famous thesis. Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543 (1954). See also J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175-84 (1980); La Pierre, The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation, 60 WASH. U.L.Q. 779 (1982). This thesis formed the basis of the Court's decision to back away from rigorous judicial enforcement of tenth amendment limitations on Congressional power to regulate integral operations of state and municipal government in Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528 (1985), overruling National League of Cities v. Usery, 426 U.S. 833 (1976).

[FN116]. See supra note 13.

[FN117]. E.g., Hunter v. Martin, 18 Va. (4 Munford) 1 (1813), rev'd sub nom. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

[FN118]. See generally Anaya, Rights of Indigenous Peoples in International Law: Historical and Contemporary Perspectives, 1989 HARVARD INDIAN LAW SYMPOSIUM 147; Alfredsson, International Law, International Organizations, and Indigenous Peoples, 36 J. INT'L AFF. 113, 113-15 (Spring/Summer 1982); Barsh, Current Developments: Indigenous Peoples: An Emerging Object of International Law, 80 AMER. J. OF INT'L LAW 369-73, 377-85 (1986); Clinebell & Thomson, Sovereignty and Self-Determination: The Rights of Native Americans Under International Law, 27 BUFF. L. REV. 669 (1978); Clinebell, The Proper Status of Native Nations Under International Law, NATIONAL LAWYERS GUILD COMMITTEE ON NATIVE AMERICAN STRUGGLES, RETHINKING INDIAN LAW 131 (1982).

[FN119]. International Labor Organization, Indigenous and Tribal Peoples Convention, 1989. This Convention is a modification of International Labor Organization Convention 107, 328 U.N.T.S. 247, adopted in 1957. The earlier convention had considerably more assimilationist provisions, although it still recognized rights of political, economic, and cultural autonomy for indigenous peoples. For a discussion of the revision process for this Convention, see Barsh, Revision of ILO Convention No. 107, 81 AMER. J. INT'L LAW 756 (1988). For

discussions of the implementation of the earlier convention, see, Swepston, The Indian in Latin America: Approaches to Administration, Integration, and Protection, 27 BUFF. L. REV. 715 (1978).

[FN120]. 24 U.N. DOC. E/Cn.4/Sub.2/Annex II (1988) (emphasis added).

[FN121]. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); but see Mohegan Indians v. Connecticut (1743) (unpublished) (Indian tribes within colonies were distinct peoples not subject to English or colonial law, but only law of nations), discussed in J. SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS 422-43 (1950); Clinton, The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict Over the Management of Indian Affairs, 69 BOSTON U. L. REV. 329, 335-36 (1989); Beardsley, The Mohegan Land Controversy, in 3 PAPERS OF THE NEW HAVEN COLONIAL HISTORICAL SOCIETY 205-25 (1882); J.W. DEFOREST, HISTORY OF THE INDIANS IN CONNECTICUT 303-42, 447-64 (1852); B. TRUMBULL, HISTORY OF CONNECTICUT 412, 421-27 (1818).

[FN122]. E.g., Treaty with the Choctaw and Chickasaw, Apr. 28, 1866, art. 8(4), 14 Stat. 769 (1868), agreeing to the creation of a general council in the Indian territory and providing:

No law shall be enacted [by the general assembly] inconsistent with the Constitution of the United States or the laws of Congress or existing treaty stipulations with the United States; nor shall said council legislate upon matters pertaining to the legislative, judicial, or other organization, laws, or customs of the several tribes or nations, except as herein provided for.

See also Treaty with the Creeks, June 14, 1866, art. 10, 14 Stat. 785 (1868); Treaty with the Tabeguache Band of Utes, Oct. 7, 1863, art. 1, 13 Stat. 673 (1866).

[FN123]. The model of sovereign action contemplated here is akin to a federally approved compact among the states. See U.S. CONST. art. I, § 10, cl. 3. The virtue of federal approval of such compacts delegating sovereignty to a collective body is that such compacts thereby are not unilaterally revocable upon the subsequent legislative or executive act of one of the parties without the agreement of the participants. E.g., West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951).

One problem with this proposal relates to whether such a specialized court adopted through the collaborative efforts of tribes and the federal government could be made an article III court, an important question for advocates of mandatory theories of federal jurisdiction. See Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U.L. REV. 205 (1985); Clinton, A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III, 132 U. Pa. L. Rev. 741 (1984); Clinton, A Mandatory Theory of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan, 86 Colum. L. Rev. 1515 (1986); W. Crosskey, Politics and the Constitution in the History of the United States 610-20, 641-74 (1953). Since the proposal contemplates the creation of independent federal courts, preferably with life tenure, through the instrumentality of both the tribes and the federal government, Congressional participation in the structuring and approval of such a super-tribal court of appeals should permit the court to be considered a specialized article III tribunal with limited jurisdiction. If the judges of such a court are selected from and, in great part, by the tribes, the appointment clause of article II, section 2 may pose significant impediments to considering such a court as an article III court or even a federal court. Mistretta v. United States, 109 S.Ct. 647 (1989); Morrison v. Olson, 108 S.Ct. 2597 (1988); Bowsher v. Synar, 106 S.Ct. 3181 (1986); Buckley v. Valeo, 424 U.S. 1 (1976). This difficulty might be remedied if the proposal calls for Presidential appointment from a list of nominees prepared and submitted to the President from the tribes or some nominating commission structured by the tribes.

[FN124]. H.R. 7902, title IV, 73d Cong., 2d Sess. (1934) set forth in 1 HOUSE COMMITTEE ON INDIAN AFFAIRS, HEARINGS ON READJUSTMENT OF INDIAN AFFAIRS, 12-14, 73d Cong., 2d Sess. (1934). This legislation proposed the creation of a Court of Indian Affairs with original jurisdiction over crimes against the United States committed in Indian country, cases in which an Indian tribe was a party, cases arising from Indian commerce, cases arising under tribal law involving nonmembers, and cases involving title to and probates affecting Indian allotments. Such jurisdiction would have displaced the jurisdiction theretofore exercised over many of these

matters by the federal district courts. The Court of Indian affairs also would have been empowered to order removal of any such claim filed in statute or tribal courts. In addition, recognizing the concurrent jurisdiction of tribal courts over such matters, the proposal would have empowered the Court of Indian Affairs to determine appeals from such courts over any case in which it might have exercised original jurisdiction.

Title IV was dropped from the marked-up version of this Depression-era bill after it ran into significant opposition for creating unnecessary and expensive court structures. The objections of Congressman William H. Hastings of Oklahoma, who had served previously as a Cherokee tribal attorney, were typical:

Title IV provides for a court of Indian affairs composed of a chief judge and six associated justices ... To my mind this is unthinkable.

We have State courts in each county throughout the United States and we have Federal courts in every State. Under all the laws and treaties in any case involving the rights of a restricted Indian or his property it may be transferred from a State to a Federal court. I have never heard of any criticism to the effect that a Federal court has not always been sympathetic toward a restricted Indian. It is inconceivable to my mind that Congress could be induced to enact such legislation. There is no necessity for it; it is not beneficial to the restricted Indian in protecting him and his property. It only serves to further prejudice him, not only against the State courts but against the Federal courts.

This would be a great additional expense to the United States and would necessitate the appointment of judges with a salary of $7,500 per annum, additional attorneys, court employees, and the assembling of juries, and the holding of special terms of court where these same cases could be tried either in the State courts or in the Federal courts.... I have not heard of a decision of the Federal court in Oklahoma where it was contended that the rights of the Indians were not fully protected.

2 SENATE COMMITTEE ON INDIAN AFFAIRS, HEARINGS TO GRANT TO INDIANS LIVING UNDER FEDERAL TUTELAGE THE FREEDOM TO ORGANIZE FOR PURPOSES OF LOCAL SELF-GOVERNMENT AND ECONOMIC ENTERPRISE 306-07, 73d Cong., 2d Sess. (1934). Significantly, while Congressman Hastings' assumptions about the availability and adequacy of federal and state courts to redress Indian grievances then may have been partially true of Oklahoma, where tribal reservations were abrogated and tribal governments and laws suspended at the turn of the century, his statements were simply inaccurate as applied to most other areas of Indian country that did not have Oklahoma's unique history.

While some were concerned with the bureaucracy that Indian Commissioner John Collier desired to establish to facilitate self-government in Indian country, some of the tribes generally favored the Court of Indian Affairs proposal. The White Mountain Apache, for example, passed a resolution supporting the legislation, which included the following rather far-sighted observations:

[W]e are in favor of a Court of Indian Affairs to that outlined, if in this Court of Indian Affairs, Indian judges, attorneys, marshalls, deputy marshalls, court reporters, etc., are given equal qualifications to fill the positions created by the establishment of this court, and wherein the minor positions, such as clerks, stenographers, etc., Indians equally qualified will be given preference in filling these positions.

We feel that Indian wards, whether having the right of franchise or not, if otherwise qualified, be permitted to serve on juries, in these courts the same as other qualified nationalities.

In approving the Court of Indian Affairs, we do not wish to have the same construed as meaning that we are dissatisfied with the treatment in Federal court.

In fact, we feel that the Federal court, as a whole, has been very fair with our people. We realize, however, that the work of the Federal court is so voluminous and so extensive, a court handling Indian cases only would have more time to devote to the various complications and intricate problems, and that through this Indian court, Indian claims, and Indian affairs generally may be given more thorough and detailed consideration, which we feel will be beneficial to Indians.

9 HOUSE COMMITTEE ON INDIAN AFFAIRS, HEARINGS ON READJUSTMENT OF INDIAN AFFAIRS, 402-03, 73d Cong., 2d Sess. (1934).

[FN125]. Judiciary Act of 1789, § 25, 1 Stat. 73, 85-86 (1850) (conferring Supreme Court appellate jurisdiction over state cases only where it was claimed that a state law was unconstitutional or that a federal right or immunity was asserted and the state court decision was against the federal claim).

[FN126]. A proposed statutory analog of 28 U.S.C. § 1257 might provide:

Final decrees or judgments rendered by the highest court of any Indian tribe within the United States in which a

decision could be had, may be reviewed by the Supreme Court by writ of certiorari, where the validity of a treaty or statute in the United States is drawn in question or where the validity of a tribal statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, rights, privilege, or immunity is specifically set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States and the decision of the Indian tribal court is adverse to such claim.

While neither § 1257 nor § 1258 of Title 28 currently are limited to cases in which the decision was adverse to the federal claim, as was § 25 of the Judiciary Act of 1789, 1 Stat. 73 (1850), there is no need for going beyond the original scope of Supreme Court review provided § 25 has been asserted with respect to Indian tribes. The focus of most of the complaints about Martinez involve concern that tribal courts will not, cannot, or have not vindicated federal rights provided under the Indian Civil Rights Act, a claimed denial of the supremacy of federal law. To remedy this problem, Supreme Court review is required only where the tribal court decision is adverse to the federal claim. Should a tribal court "over-vindicate" federal rights by construing the rights provided in the Indian Civil Rights Act or other applicable federal law more expansively than the Supreme Court might desire, no question of federal supremacy would be posed, although such constructions might create nonuniformity in the construction of federal law. Since the major articulated concern for a change in present arrangements relates to vindication of federal rights, a supremacy interest, respect for tribal sovereignty suggests that the remedial statute should be no broader than necessary to remedy the perceived problem.

[FN127]. Pub. L. No. 97-473, Title II, 96 Stat. 2607-11 (1984) amending various sections of Title 26.

[FN128]. Pub. L. No. 99-499, 100 Stat. 1615 (1989), amending 42 U.S.C. § 9601(36) (1982) (authorizing Indian tribe to apply, like a state, to carry out enforcement actions under the Superfund legislation); Pub. L. No. 99-339, § 302(b)(1), 100 Stat. 666 (1989), amending 42 U.S.C. § 300f(10) (1982) (Safe Drinking Water Act); see also 33 U.S.C. § 1362(4) (1982) (Federal Water Pollution Control Act).

[FN129]. The cases are badly split on whether federal or state deference to and enforcement of tribal laws and judgments is compelled by doctrines of intergovernmental comity applied to the judgments of foreign governments under the rule of Hilton v. Guyot, 159 U.S. 113 (1895) or whether such intergovernmental cooperation is required by federal law under dictates of 28 U.S.C. § 1738 (1988). While the full faith and credit clause of article VI of the Constitution applies only to judgments and laws of "every other State," the language of § 1738 is intentionally broader and requires "courts within the United States" to accord full faith and credit to acts, records, and judicial proceedings of "any State, Territory, or Possession of the United States."

Over 130 years ago, the Supreme Court interpreted a similarly phrased statute involving recognition of administrators of estates appointed in the territories to cover Indian tribal governments. United States, Use of Mackey v. Coxe, 59 U.S. (18 How.) 100 (1855). Other early cases extended the same principle to tribal judgments in other types of cases. E.g., Hayes v. Barringer, 168 F. 221 (8th Cir. 1909); Buster v. Wright, 135 F. 947 (8th Cir. 1905); Raymond v. Raymond, 83 F. 721 (8th Cir. 1897); Standley v. Roberts, 59 F. 836 (8th Cir. 1894), appeal dismissed, 166 U.S. 1177 (1896).

These venerable cases suggest that § 1738 should be interpreted to require federal and state courts to accord full faith and credit to tribal court proceedings as judgments of a "Territory," and some modern decisions have accepted that approach. E.g., Jim v. CIT Fin. Serv. Corp., 87 N.M. 362, 533 P.2d 751 (1975); see also Lynch v. Olsen, 92 Ariz. 354, 377 P.2d 199 (1962).

Other courts have ignored or rejected this interpretation of § 1738, but still afford deference to tribal court judgments under principles of judicial comity. E.g., Red Fox v. Red Fox, 23 Or. App. 393, 542 P.2d 918 (1975); Begay v. Miller, 70 Ariz. 380, 222 P.2d 624 (1950). For purposes of the point at issue here, the question of whether enforcement of tribal court laws and judicial proceedings is required by § 1738 or intergovernmental comity is irrelevant since a requisite of affording full faith and credit involves assuring that the judgment complied with due process of law, Pennoyer v. Neff, 95 U.S. (5 Otto) 714 (1877), and the principle of intergovernmental comity applied in the United States requires the enforcing court, in this instance federal or state courts, to examine, as the court put it in the Red Fox case, citing Hilton v. Guyot, whether the judgment was rendered "under a system of law reasonably assuring the requisites of an impartial administration of justice...." 23 Or. App. at 398, 542 P.2d at 921.

[FN130]. E.g., Red Fox v. Red Fox, 23 Or. App. 393, 542 P.2d 918 (1975). In Red Fox, the state court afforded comity to a tribal court divorce decree after assuring itself that the procedures used in the tribal court, including in particular the exclusion of one party's retained attorney who was not a member of the tribal bar from representing the party in the proceeding while affording the party the right to representation through a tribal "spokesman" authorized to practice before the tribal courts, comported with the rudiments of fair procedure. The opinion is a little confused because the court stopped short of directly addressing the ICRA claims since the question was then pending in federal district court in pre-Martinez litigation which could not be brought today into federal court. Red Fox v. Red Fox, 564 F.2d 361 (9th Cir. 1977). The Martinez decision, which was based on lack of jurisdiction, does not preclude this type of review of Indian Civil Rights Act compliance by federal or state courts that otherwise have jurisdiction to enforce tribal judgments and must decide whether to accord such judgments full faith and credit or comity cases. While the state court in Red Fox was not forced to resolve the due process and right to counsel questions, the state court could and should have fully disposed of these issues had they not already been pending in a federal forum.

[FN131]. See Ragsdale, Problems in the Application of Full Faith and Credit for Indian Tribes, 7 N.M.L. REV. 133, 149-51 (1977).

[FN132]. E.g., In re Colville Tribal Jail, 13 INDIAN LAW RPTR. 6021 (Colv. Tr. Ct. 1986) (protecting rights against cruel and unusual punishment); Chapoose v. Ute Indian Tribe of the Uintah-Ouray Reservation, 13 INDIAN LAW RPTR. 6023 (Ute Tr. Ct. 1986) (finding denial of due process by vesting power to enforce tribal enrollment ordinance in tribal business committee and withdrawing jurisdiction from tribal courts); United States v. Myers, 12 INDIAN LAW RPTR. 6003 (Hoopa Valley Ct. App. 1984) (protection of accused's speedy trial right); Miller v. Crow Creek Sioux Tribe, 12 INDIAN LAW RPTR. 6008 (Intertribal Ct. App. 1984) (same); United States v. Brooks, 12 INDIAN LAW RPTR. 6021 (Hoopa Valley Ct. App. 1984) (protection of accused's rights against unlawful search and seizure); Turtle Mountain Band of Chippewa Indian v. Parisien, 1 TRIBAL COURT RPTR. § A 95 (1979) (protection of due process right to hearing in dismissal of tribal employee). Indeed, some of these cases, such as the Chapoose case, reflect tremendous tribal judicial heroism in holding that a tribal government that controls the judicial appiontments and tribal court had no authority to curtail that court's power to entertain such ICRA issues, a position even independent article III judges have refrained from taking. See Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869).

[FN133]. Article IV of the Articles of Confederation provided in part: "Full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state."

[FN134]. U.S. CONST. art. IV, § 1.

[FN135]. E.g., Underwriters Nat'l Assur. Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691 (1982); Estin v. Estin, 334 U.S. 541, 546 (1948) (Full Faith and Credit clause "substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns").

[FN136]. The Supreme Court has sustained the power of Congress to expand the coverage and protection of full faith and credit doctrines beyond the states that are directly covered by the constitutional clause. Embry v. Palmer, 107 U.S. 3, 9 (1882).

[FN137]. Compare Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 441 n.9 (3d Cir. 1971), cert. denied, 405 U.S. 1017 (1972) with Williams v. Ocean Transport Lines, Inc., 425 F.2d 1183, 1189 (3d Cir. 1970); see also Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 524 (1931) (full faith and credit clause of art. IV, § 1 not involved where neither of the courts concerned is a state court); Bechtel Corp. v. Western Contracting

Corp., 414 N.W. 2d 130 (Iowa 1987); In re Estate of Fields, 588 S.W.2d 50 (Mo. Ct. App. 1979); Reynolds v. Kessler, 669 S.W.2d 801 (Tex. Ct. App. 1984); 28 U.S.C. § 1963 (1982) (registration of federal judgments for enforcement in other federal courts).

[FN138]. Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985); Migra v. Warren City School Dist. Bd. of Education, 465 U.S. 75 (1984); Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982); Allen v. McCurry, 449 U.S. 90 (1980); Red Fox v. Red Fox, 564 F.2d 361 (9th Cir. 1977).

[FN139]. See supra note 137.

[FN140]. 30 U.S. (5 Pet.) 1 (1831).

[FN141]. 109 U.S. 556 (1883).

[FN142]. 112 U.S. 94 (1884).

[FN143]. E.g., Sheppard v. Sheppard, 104 Idaho 1, 655 P.2d 895 (1982); Desjarlait v. Desjarlait, 379 N.W.2d 139 (Ct. App. Minn. 1985); Red Fox v. Red Fox, 23 Or. App. 393, 542 P.2d 918 (1975).

[FN144]. E.g., Chischilly v. General Motors Acceptance Corp., 96 N.M. 264, 629 P.2d 340 (1980); Jim v. C.I.T. Financial Serv. Corp., 87 N.M. 362, 533 P.2d 751 (1975).

[FN145]. 59 U.S. (18 How.) 100 (1855).

[FN146]. Act of June 24, 1812, c. 106, § 11, 2 Stat. 755 (1850), read in relevant part:
[I]t shall be lawful 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 testamentary or administration had been granted in the District (emphasis supplied).

[FN147]. Supra note 45, at 104.

[FN148]. Raymond v. Raymond, 83 F. 721 (8th Cir. 1897); Cornells v. Shannon, 63 F. 305 (8th Cir. 1894); Standley v. Roberts, 59 F. 836 (8th Cir. 1894), appeal dismissed, 166 U.S. 1177 (1896); Exendine v. Pore, 56 F. 777 (8th Cir. 1893); Mehlin v. Ice, 56 F. 12 (8th Cir. 1893).

[FN149]. See, Ragsdale, Problems in the Application of Full Faith and Credit for Indian Tribes, 7 N.M.L. REV. 133 (1977); Comment, Conflicts Between State and Tribal Law: The Application of Full Faith and Credit Legislation to Indian Tribes, 1981 ARIZ. ST. L. J. 801 (1981).

[FN150]. 436 U.S. at 65-66 n.21, citing inter alia United States, Use of Mackey v. Coxe, 59 U.S. (18 How.) 100 (1856).

[FN151]. E.g., Allen v. Industrial Comm'n, 92 Ariz. 357, 377 P.2d 201 (1962); Begay v. Miller, 70 Ariz. 380, 222 P.2d 624 (1950); Wippert v. Blackfeet Tribe, 201 Mont. 299, 654 P.2d 512 (1982); In re Marriage of Limpy, 195 Mont. 314, 636 P.2d 266 (1981); State ex rel. Stewart v. District Court, 187 Mont. 209, 609 P.2d 290 (1980); Lohnes v. Cloud, 254 N.W.2d 430 (N.D. 1977); Defender v. Zephier, 435 N.W.2d 717 (S.D. 1989); South Dakota ex rel. Joseph v. Redwing, 429 N.W.2d 49 (S.D. 1988); Mexican v. Circle Bear, 370 N.W.2d 737 (S.D. 1985). See also Desjarlait v. Desjarlait, 379 N.W.2d 139 (Ct. App. Minn. 1985).

[FN152]. 159 U.S. 113 (1895).

[FN153]. Id. at 163-64 (footnotes omitted). For a recent canvassing of the comity doctrine by the Supreme Court, see Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522 (1987).

[FN154]. 30 U.S. (5 Pet.) 1 (1831).

[FN155]. E.g., In re Marriage of Red Fox, 23 Or. App. 393, 542 P.2d 918 (1975); Mexican v. Circle Bear, 370 N.W.2d 737 (S.D. 1985).

[FN156]. Compare Estin v. Estin, 334 U.S. 541, 546 (1948) (full faith and credit doctrine "substituted a command for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns"), with Sun Oil Co. v. Wortman, 486 U.S. 717 (1988).

[FN157]. One problem posed by this analysis is that it presumes that it is the policy of full faith and credit that should be carried forward, rather than the framers' original conception of that policy in a union then only composed of sovereign states. Recently, Justice Scalia's opinion in Sun Oil Co., 486 U.S. 717 (1988) strongly suggested that the Full Faith and Credit Clause should be interpreted as the clause would have been understood by the society that adopted the Constitution. This led Justice Brennan, who concurred in the judgment, to suggest that "[t]he Court's technique of avoiding close examination of the relevant interests by wrapping itself in the mantle of tradition is as troublesome as it is conclusory." 486 U.S. 717 at 739 (Brennan, J., concurring).

[FN158]. 28 U.S.C. § 1360(c) (1988).

[FN159]. Pub. L. No. 96-420, § 6(g), 94 Stat. 1793 (1981), amended Pub. L. No. 97-428, § 3, 96 Stat. 2268 (1984), codified at 25 U.S.C. § 1725(g) (1988).

[FN160]. Pub. L. No. 97-459, title II, § 208, 96 Stat. 2519 (1984), codified at 25 U.S.C. § 2207 (1988).

[FN161]. E.g., 28 U.S.C. § § 1738A, 1739 (1988).

[FN162]. E.g., Bradford Elec. Light Co. v. Clapper, 286 U.S. 145, 163 (1932) (Stone, J., concurring); Bond v. Hume, 243 U.S. 15 (1917); The Kensington, 183 U.S. 263 (1902); Hilton v. Guyot, 159 U.S. 113, 164 (1895); Walworth v. Harris, 129 U.S. 355, 364 (1889); Acker v. Levine, 788 F.2d 830 (2d Cir. 1986); Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984); Gadd v. Pearson, 351 F. Supp. 895, 902 (M.D. Fla. 1972); see generally A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW § 56, at 202-03 & n.11 (1967); Maier, Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law,

76 AM. J. INT'L L. 280, 282 (1982); Paulson & Sovern, "Public Policy" in the Conflict of Laws, 56 COLUM. L. REV. 969 (1956); Reese, The Status in this Country of Judgments Rendered Abroad, 50 COLUM. L. REV. 783, 797 (1950); J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC 30, 32-33 (1834); von Mehren & Patterson, Recognition and Enforcement of Foreign Country Judgments in the United States, 6 L. POL'Y IN INT'L BUS. 37 (1974).

[FN163]. Section 1738 was first enacted long before the events which transformed Indian tribes from political communities outside the American polity to sovereignties incorporated within the American polity. It therefore certainly could be argued that, at the time of its enactment, section 1738 did not cover and had little to do with full faith and credit accorded tribal laws and judgments. It might be possible to argue that, without a clear and specific Congressional intention to apply the full faith and credit statute to Indian tribes as required by the maxims of construction generally applicable to statutes affecting Indians, e.g., Solem v. Bartlett, 465 U.S. 463 (1984), tribes are not bound thereby and, possibly, state courts are not bound to provide full faith and credit to tribal laws and judgments.

There are serious problems with this argument. First, the language of the statute, especially the description of enforcing jurisdictions as "every court within the United States and its Territories and Possessions," indicates a congressional intent to be all-inclusive. While Indian tribes might not originally have been within the United States politically, even if they were geographically within lands claimed by the nation their subsequent political inclusion within the Union brought them within the reach of this expansive statute.

Second, as the Court has noted, cannons of construction are not a justification for ignoring the plain language and intent of a statute. Thus, in Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 479 n.22 (1979), the Court noted:

> Although we have stated that the intention to abrogate or modify a treaty is not to be lightly imputed, [Menominee Tribe v. United States, 391 U.S. 404] at 413; Pigeon River Co. v. Cox Co., 291 U.S. 138, 160 [(1934)],... this rule of construction must be applied sensibly. In this context, the argument made by the Tribe is tendentious. The treaty right asserted by the Tribe is jurisdictional. So also is the entire subject-matter of Pub. L. 280. To accept the Tribe's position would be to hold that Congress could not pass a jurisdictional law of general applicability to Indian country unless in doing so it itemized all potentially conflicting treaty rights that it wished to affect. This we decline to do. The intent to abrogate inconsistent treaty rightsis clear enough from the express terms of Pub. L. 280.

Third, acceptance of this argument not only would mean that tribes are not bound under section 1738 to enforce state judgments and recognize non- preempted state law, but also that there is no enforceable federal statutory obligation binding on state courts to afford full faith and credit to tribal judgments and laws, a result not in the best interest of Indian tribes or continuation of their stable political relations within the federal union.

[FN164]. 25 U.S.C. § 1911(d) (1988) (emphasis supplied).

[FN165]. See supra note 159.

[FN166]. Ragsdale, Problems in the Application of Full Faith and Credit for Indian Tribes, 7 N.M.L. REV. 133, 146-49 (1977).

[FN167]. E.g., Brendale v. Consolidated Tribes and Bands of the Yakima Indian Nation, 109 S.Ct. 2994 (1989); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); Rice v. Rehner, 463 U.S. 713 (1983); Ramah Navajo School Bd. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 856 (1982); Montana v. United States, 450 U.S. 544 (1981); Central Mach. Co. v. Ariz. State Tax Comm'n, 448 U.S. 160 (1980); Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980); Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463 (1976); Fisher v. District Court, 424 U.S. 382 (1976); McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164 (1973); Williams v. Lee, 358 U.S. 217 (1959); see generally Clinton, State Power Over Indian Reservations: A Critical Comment on Burger Court Doctrine, 26 S.D.L. REV. 434 (1981); F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW (1987).

[FN168]. One other area in which state law is applied to Indians in Indian country is Pub. L. 280, see 18 U.S.C. § 1162 and 28 U.S.C. § 1360 (1988). State laws were applied to Indians in Indian country in this instance to resolve criminal matters and private civil adjudicatory disputes over which the state courts were given jurisdiction under this legislation. It does not give state law general regulatory authority over Indians in Indian country. See California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987); Bryan v. Itasca County, 426 U.S. 373 (1976). Whether the delegation of authority that permits state law to be enforced against Indian country on Pub. L. No. 280 reservations would also require tribal forums on such reservations to give full faith and credit to such laws, therefore, seems dubious, given the limited purposes of the delegation.

[FN169]. Rice v. Rehner, 463 U.S. 713 (1983).

[FN170]. E.g., Brendale v. Yakima Tribe, 109 S.Ct. 2994 (1989); Montana v. United States, 450 U.S. 544 (1981); Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980).

[FN171]. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985); Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981). See also Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) (full faith and credit obligations not applicable to procedural rules, including statutes of limitations).

[FN172]. E.g., Fisher v. District Court, 424 U.S. 382 (1976); Kennerly v. District Court, 400 U.S. 423 (1971); Williams v. Lee, 358 U.S. 217 (1959).

[FN173]. Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985); Kulko v. Superior Court of California, 436 U.S. 84, 96 n.9 (1978); Shaffer v. Heitner, 433 U.S. 186, 210 (1977); United States ex rel. Halvey v. Halvey, 330 U.S. 610, 614 (1947).

[FN174]. E.g., Durfee v. Duke, 375 U.S. 106, 110 (1963); Fehlhaber v. Fehlhaber, 681 F.2d 1015, 1020 (5th Cir. 1982), cert. denied, 464 U.S. 818 (1983); Raymond v. Raymond, 83 F. 721 (8th Cir. 1897); but see Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982); General Foods v. Massachusetts Dep't of Public Health, 648 F.2d 784, 785-86 (1st Cir. 1981); Sanchez v. Puerto Rico Marine Mgmt., Inc., 593 F. Supp. 787 (D. P.R. 1981). Of course, the question of whether the rendering court had subject matter jurisdiction sometimes can be considered conclusive when that court fully considered the jurisdictional issue and sustained its jurisdiction. Underwriters Nat'l Assur. Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 706 (1982).

[FN175]. 309 U.S. 506, 512-13 (1940).

[FN176]. 309 U.S. at 514. E.g., Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1939).

[FN177]. 309 U.S. at 514-15 (emphasis supplied).

[FN178]. See also Fall v. Eastin, 215 U.S. 1 (1909) (a state may not, by enlarging its own law on the force of its judgments, extend the territorial reach of process over property located beyond its territorial reach).

[FN179]. By its express terms, the supremacy clause of article VI of the United States Constitution does not appear to directly apply to Indian tribes since the clause renders federal law supreme "any Thing in the Constitution or

Laws of any State to the Contrary notwithstanding" (emphasis supplied). Nevertheless, the clear thrust of the Court's decision in Kennerly v. District Court, 400 U.S. 423 (1971) (tribe cannot confer jurisdiction on state courts through tribal ordinance where the ordinance fails to comply with federal law) indicates that tribal law is subject to the superior force of federal law, where applicable. Of course, maxims of construction limit the force of federal law in Indian country and seek to avoid inadvertent denial of Indian rights through general federal statutes. E.g., United States v. Dion, 476 U.S. 734 (1986); United States v. Winnebago Tribe, 542 F.2d 1002 (8th Cir. 1976); see generally Wilkinson & Volkman, Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth" -- How Long a Time is That?, 63 CAL. L. REV. 601 (1972).

[FN180]. See Canby, Civil Jurisdiction and the Indian Reservation, 1973 UTAH L. REV. 206 (suggesting the possibility of such long-arm statutes for Indian country).

[FN181]. E.g., California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Bryan v. Itasca County, 426 U.S. 373 (1976); McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164 (1973).

[FN182]. E.g., Little Horn State Bank v. Stops, 170 Mont. 510, 555 P.2d 211, 212 (1976) cert. denied, Stops v.Little Horn State Bank, 431 U.S. 942 (1977) ("It has been a long standing doctrine that any court having jurisdiction to render a judgment also has the power to enforce that judgment through any order or writ necessary to carry its judgment into effect."). Contrast Francisco v. Arizona State, 113 Ariz. 427, 556 P.2d 1 (1976).

[FN183]. 621 F.2d 358, 362-63 (10th Cir. 1980).

[FN184]. 380 U.S. 39, 20 (1965) (footnotes omitted). See also Carroll v. Lanza, 349 U.S. 408 (1955).

[FN185]. 486 U.S. 717 (1988).

[FN186]. 497 U.S. at 830 (Brennan, J., concurring) (emphasis supplied).
While both Crider and Sun Oil involved cases regarding full faith and credit due to state laws, rather than judgments, they are directly applicable to the hypothetical case. While a judgment adjudicates the liability of the defendant, it does not adjudicate the remedies by which it will be enforced should the defendant decline to pay the judgment. Those remedies require, as the Tenth Circuit pointed out in Joe v. Marcum, 261 F.2d 358 (10th Cir. 1980), further judicial action. Where such further enforcement action is commenced in the same courts that rendered the judgment, the forum naturally applies its own law to remedies available to enforce the judgment. Where, however, enforcement steps are taken, as in the hypothetical, within a different jurisdiction, a new action must be commenced and the enforcing court must decide what law applies to the remedies available to enforce the judgment. Thus, while the remedial question ultimately comes up in the context of the enforcement by tribal courts of the judgments of other courts, it actually involves a question of the full faith and credit due to the remedial law of that jurisdiction. On this point, Crider and Sun Oil clearly suggest that such remedies are procedural and that no full faith and credit is required. The tribe can use its own remedial scheme to provide full faith and credit for the nontribal judgment.

[FN187]. Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980) (supplemental workers' compensation award issued by the District of Columbia did not violate the full faith and credit due to prior Virginia workers' compensation award).

[FN188]. 25 U.S.C. § 1901 et seq. (1988). See Mississippi Band of Choctaw Indians v. Holyfield, 109 S.Ct. 1597

(1989).

[FN189]. 1 Stat. 302 (1850), codified as amended at 18 U.S.C. § 3182 (1988). In its current form the Act provides:

Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear.

The legislation grew out of the refusal by the State of Virginia to extradite three fugitives from Pennsylvania who kidnapped a free black man and sold him into slavery in Virginia. The incident apparently caused two Virginians in the federal government, President George Washington and Attorney General Edmond Randolph, such consternation that Washington personally appeared before Congress to seek legislation obligating the states to extradite fugitives. See generally California v. Superior Court of California, 482 U.S. 400 (1987).

[FN190]. In re Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861) abandoned in Puerto Rico v. Branstad, 483 U.S. 219 (1987). The reason for such early constructions of the law may have been that the roots of the extradition clause and its implementing legislation were inexorably intertwined with the nation's most divisive issue during its first half-century of existence -- slavery. Indeed, the Dennison case involved the attempt to extradite William Largo, a free black from Ohio, to Kentucky to face charges of assisting in the escape of a slave. Governor Dennison of Ohio refused extradition, based on advice from the Attorney General of Ohio, that the extradition obligationdid not apply to the crime in question because it applied only to crimes that were "malum in se by the general judgment and conscience of civilized nations." Id. at 69. After Kentucky sued Governor Dennison by seeking an original writ of mandamus from the Supreme Court. The case was heard by the Court after the southern state representatives already had purported to secede from the union by withdrawing from Congress and a Civil War clearly was an imminent possibility. In these extraordinary circumstances, the Court ruled that, while the constitutional extradition clause was intended to be mandatory: "[T]he right given to 'demand' implies that it is an absolute right; and it follows that there must be a correlative obligation to deliver, without any reference to the character of the crime charged, or to the policy or laws of the State to which the fugitive has fled." Id. at 103.

Nevertheless, the Court could not find any basis for judicial involvement in or enforcement of the obligations created by the constitutional clause. The Court construed the Extradition Act of 1793 by noting "the words 'it shall be the duty' were not used as mandatory and compulsory, but as declaratory of the moral duty," id. at 107, it suggested was imposed by the Constitution. Thus, while the Constitution created a moral duty on the part of Governors to deliver up fugitives, no legally enforceable duty was created. Therefore, Dennison held that "the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; ...." Id. at 107.

[FN191]. Puerto Rico v. Branstad, 483 U.S. 219 (1987) (overruling Kentucky v. Dennison); California v. Superior Court of California, 482 U.S. 400 (1987).

[FN192]. E.g., Treaty with the Sioux, Apr. 29, 1868, art. 1, 15 Stat. 635 (1869); Treaty with the Ute, Mar. 2, 1868, art. 6, 15 Stat. 619 (1869); Treaty with the Six Nations, Nov. 11, 1794, art. VII, 7 Stat. 44 (1848); Treaty with the Cherokee, July 2, 1791, arts. X, XI, 7 Stat. 39 (1848); see generally Ex parte Crow Dog, 109 U.S. 556 (1883).

[FN193]. 109 U.S. 556 (1883).

[FN194]. Act of Mar. 3, 1871, c. 120, § 1, 16 Stat. 566 (1871), codified at 25 U.S.C. § 71 (1988).

[FN195]. 413 F.2d 683 (9th Cir. 1969), cert. denied, 396 U.S. 1003 (1970). But see Fournier v. Roed, 161 N.W.2d 458 (N.D. 1968) (denying state habeas corpus relief because state arrest of an Indian fugitive within the Fort Totten Indian Reservation "did not interfere with the reservation self- government nor impair any right granted or reserved to the petitioner by federal law or treaty." Id. at 467).

[FN196]. Unfortunately, where states ignore their statutory obligations to respect the extradition laws of tribes, prevailing doctrine affords few, if any, remedies. Under the classic rule of Frisbie v. Collins, 342 U.S. 519 (1952), the illegal manner in which a criminal defendant is seized does not vitiate the personal jurisdiction of the forum over the defendant and does not constitute a defense to the criminal prosecution. See also Mahon v. Justice, 127 U.S. 700 (1888); Ker v. Illinois, 119 U.S. 436 (1886); United States ex rel. Lujan v. Gengler, 510 F.2d 62, 65 (2d Cir. 1975), cert. denied, 421 U.S. 1001 (1975); but see United States v. Toscanino, 500 F.2d 267, 274-79 (2d Cir. 1974) (illegal actions that "shocked the conscience" by kidnapping an accused from Uruguay and transporting him to the United States in a deplorable manner could be considered). Furthermore, in Davis v. Muellar, 643 F.2d 521 (8th Cir. 1981) cert. denied, 454 U.S. 892 (1981), the Court of Appeals held that a federal court could not grant habeas corpus relief from the seizure of an Indian defendant on reservation by North Dakota officers in collaboration with tribal police but in derogation of existing tribal extradition ordinances. Relying on the principles of non-interference with ongoing state proceedings reflected in Younger v. Harris, 401 U.S. 37 (1971) and the Anti-Injunction Act, 28 U.S.C. § 2283 (1988), the court concluded that federal relief would be inappropriate. The decision in Davis seems incorrect. The decision in Younger clearly was predicated on the existence of an available state forum, the criminal trial, in which the federal claim presented to a federal court for injunctive relief could alternatively and more efficiently be resolved. Because the Frisbee rule and like rules followed under state law generally preclude criminal defendants from raising in the state criminal case their full faith and credit claim that tribal extradition procedures have been violated, some forum should be available in which state compliance with statutory commands of § 1738 can be tested. A federal forum on habeas corpus represents the logical tribunal to entertain such claims. Furthermore, even the Court's decision in Younger recognized a judicial exception to the commands of the Anti-Injunction Act where irreparable injury is threatened. Younger held that in most criminal cases no irreparable injury is threatened since an adequate remedy exists by raising the federal defense in the state criminal proceedings. Where, as in Davis, the state criminal proceedings will not entertain the claim under Frisbee or its analogues because it constitutes neither a substantive nor procedural defense to the crime nor a legitimate attack on the court's jurisdiction over the accused, the principles of Younger do not apply and irreparable injury is threatened by the ongoing state criminal proceedings.

[FN197]. State ex rel. Old Elk v. District Court, 170 Mont. 208, 552 P.2d 1394 (1976).

[FN198]. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

[FN199]. Id. at 66 n.22 (emphasis supplied).

[FN200]. For an excellent review and critique of the history and scope of such approval requirements, see AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 187-89 (1979). See also Moapa Band of Paiute Indians v. United States Dep't of Interior, 747 F.2d 563, 564-66 (9th Cir. 1984); Oliver v. Udall, 306 F.2d 819 (D.C. Cir. 1962), cert. denied, 572 U.S. 908 (1963). Where such review provisions exist, the courts generally construe them to vest a rather limited authority in the Secretary to review the merits of Indian decisions. Cf, Tooahnippah v. Hickel, 397 U.S. 598 (1970) (authority to approve Indian wills vested only a narrow discretion to decline to approval an irrational testamentary disposition).

[FN201]. 471 U.S. 195 (1985).

[FN202]. 161 F. 835 (8th Cir. 1908).

[FN203]. 811 F.2d 549 (10th Cir. 1987). See also Runs After v. United States, 766 F.2d 347 (8th Cir. 1985); Garreaux v. Andrus, 676 F.2d 1206 (8th Cir. 1982).

[FN204]. 811 F.2d at 551.

[FN205]. Id. at 553. The Tenth Circuit, relying on its much-criticized decision in Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980), reserved, but did not resolve, the question of whether the BIA may have some role to play where no tribal forum existed at all for the presentation of the dispute. In light of the recognition in Martinez that nonjudicial tribal forums were adequate law-enforcing instrumentalities, the Court's reference to lack of any available forum must have meant the lack of any tribal judicial or nonjudicial forum for the resolution of the dispute.

[FN206]. Act of June 18, 1934, ch. 576 § 1, 48 Stat. 984 (1934), codified as amended at 25 U.S.C. § § 461, 462, 463, 464, 465, 466-70, 471-73, 474, 475, 476-78, 479 (1988).

[FN207]. H.R. 7902, 73d Cong., 2d Sess. (1934) and S. 2755, 73d Cong., 2d Sess. (1934).

[FN208]. 73 CONG. REC. 11125 (1934).

[FN209]. Id.

[FN210]. Hearings on H.R. 7902 Before the House Comm. on Indian Affairs, 73d Cong., 2d Sess. 22 (1934).

[FN211]. E.g., Totenhagen v. Area Director, Minneapolis Area Office, BIA, 15 IBIA 105, 14 IND. L. RPTR., 7016 (1987); LeBueau v. Acting Assistant Secretary -- Indian Affairs, 14 IBIA 84, 13 IND. L. RPTR. 7016 (1986); Crooks v. Director, Minneapolis Area Office, BIA, 14 IBIA 181, 13 IND. L. RPTR. 7038 (1986).

[FN212]. E.g., Gillette v. Area Director, Navajo Area Office, BIA, 14 IBIA 71, 13 IND. L. RPTR. 7017 (1986).

[FN213]. Weatherwax on Behalf of Carlson v. Fairbanks, 619 F. Supp. 294 (D. Mont. 1985) (no judicial review of decisions by the Secretary not to suspend or rescind contracts under section 450m); Gillette v. Area Director, Navajo Area Office, BIA, 14 IBIA 71, 13 IND. L. RPTR. 7017 (1986) (the Indian Self-Determination Act does not make parties who benefit from program grants or contracts third-party beneficiaries entitled to enforce duties under the contract or grant with respect to enforcement of rights).

[FN214]. Assistant Secretary -- Indian Affairs decision dated Mar. 8, 1986, at 1, cited in Crooks v. Area Director, Minneapolis Area Office, BIA, 14 IBIA 181, 13 INDIAN L. RPTR 7038, at 7038 (1986); see also LeBueau v. Acting Assistant Secretary of Indian Affairs, 14 IBIA 84, 13 INDIAN L. RPTR. 7016 (1986).

[FN215]. E.g., Totenhagen v. Area Director, Minneapolis Director, BIA, 15 IBIA 105, 14 IND. L. RPTR. 7016 (1987) (reversal of administrative decision to recognize the removal of Chairman of Shakopee Mdewakanton Sioux

Community for failure to give proper notice required by due process and tribal law). In exercising such authority, however, the BIA and the Department of the Interior cannot ignore or displace other federal or tribal laws relative to the structure and functioning of tribal government. Harjo v. Kleppe, 420 F. Supp. 1110 (D. D.C. 1976), aff'd sub nom. Harjo v. Andrus, 581 F.2d 949 (D.C. Cir. 1978); see also Morris v. Watt, 640 F.2d 404 (D.C. Cir. 1981).

[FN216]. 25 C.F.R. pt. 83.

[FN217]. E.g., U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1987 (1987); U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1986 (1986); U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1985 (1985), published as JOINT COMM. PRINT, HOUSE COMM. ON FOREIGN AFFAIRS, AND SENATE COMM. ON FOREIGN RELATIONS, 99th Cong., 2d Sess. (Feb. 1986); U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1983, published as JOINT COMM. PRINT, HOUSE COMM. ON FOREIGN AFFAIRS, AND SENATE COMM. ON FOREIGN RELATIONS, 98th Cong., 2d Sess. (Feb. 1984); U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS FOR 1979, published as JOINT COMM. PRINT, HOUSE COMM. ON FOREIGN AFFAIRS, AND SENATE COMM. ON FOREIGN RELATIONS, 96th Cong. 2d Sess. (Feb., 1980).

[FN218]. E.g., Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919); United States v. Winnebago Tribe, 542 F.2d 1002 (8th Cir. 1976).

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