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## Foreword

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## FOREWORD

Lenor A. Scheffler<sup>†</sup>

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.<sup>1</sup>

In the quote above from *Worcester v. Georgia*,<sup>2</sup> Chief Justice John Marshall, the fourth Chief Justice of the U.S. Supreme Court, recognized the sovereign status and right of self-governance and self-determination of Indian tribes in the United States. Chief Justice Marshall's opinions in the *Cherokee* cases<sup>3</sup> established the foundations of tribal sovereignty as we know it today. In his book, *What Kind of Nation: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States*, James F. Simon states, "[o]ne of Marshall's most powerful decisions, taking the State of Georgia to task for ignoring the terms of a federal treaty with the Cherokee Indians, was openly defied by the state and criticized by President Jackson."<sup>4</sup> Today, and

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1. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542–43 (1832).

2. *Id.*

3. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester*, 31 U.S. (6 Pet.) at 542–43.

4. JAMES F. SIMON, *WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE A UNITED STATES* 300 (2002).

in recent years, we still encounter the defiance and criticism Chief Justice Marshall faced in the Cherokee cases.

Exercising jurisdiction over people and entities on tribal lands, drafting and revising constitutions, drafting laws, exercising taxing authority, voluntarily pursuing “treatment as a state” under federal laws, retrieving tribal cultural items and human remains, participating in state and local politics, and protecting tribal member women and children are all powers exercised by sovereign governments. Indian tribes in the United States predate the establishment of this country and continue to survive today. Tribal birth rates continue to rise, and there is an increased effort and urgency to preserve tribal languages and culture.

The terms “Indian tribe” and “Indians” have been used to refer to the indigenous people of the United States since Christopher Columbus landed in this hemisphere. These are terms of art still used today by practitioners of federal Indian and tribal law. These terms also appear in treaties, executive orders, and other legal documents relating to the indigenous people of the United States.

Tribes are more complex than most people realize. Our sovereign status, history, experiences, geography, and locations all contribute to our complexity. Having said that, I have met tribal people from around the United States and indigenous people from other parts of the world, and learned there are commonalities among tribal and indigenous people. The commonalities include: poverty, racism, alcohol and chemical abuse, domestic violence, strength of extended families, and importance of spirituality and ceremonies. Thanks to our strength, courage, perseverance, and the love of our ancestors, Indian tribes survive today.

This issue of the *William Mitchell Law Review* is exceptional in the range of Indian law topics that are covered. Additionally, this issue has exciting articles exploring new propositions and thoughts about some of the most important areas of federal Indian and tribal law.

The issue of jurisdiction on tribal lands is complex, challenging, and confusing. To determine jurisdiction on tribal lands, one must determine who the actor or perpetrator is, who the victim or subject of the act is, and on what type of land was the act committed. Determining jurisdiction is further complicated by the involvement of multiple sovereigns at any given time: a tribe, a state, and/or the federal government.

The articles in this issue regarding jurisdiction are important to the dialogue of self-government, self-determination, and the exercise

of sovereignty (i.e. governing activities on a tribe's trust land, and regulating the activities of Indians and non-Indians who come onto a tribe's trust lands).

Ann Tweedy's article regarding sex discrimination under tribal law provides a context for tribal laws, their creation, necessity, and development.

The article by Assistant Professor Keith Richotte regarding the role of tribal constitutions is particularly relevant today. Many tribes are considering constitutional reform for a variety of reasons, including having constitutions that are more culturally appropriate and sensitive, and having constitutions that fit tribes' economic and jurisdictional circumstances now and in the future. This article provides valuable considerations.

The Native American Graves Protection and Repatriation Act<sup>5</sup> is an important federal law that has provided for the return of hundreds of thousands of sacred items, human remains, and other tribal patrimony to Indian tribes. The repatriation of these items and human remains to tribal communities is a part of the healing process of tribal members in the United States. The act is not perfect, but is extremely important and necessary. Professor Steven Joseph Gunn provides an insightful article on this topic.

The article regarding the Clean Water Act<sup>6</sup> in Indian Country by Marren Sanders is an important review of the concept of a tribe receiving "treatment as a state" designation under the Clean Water Act. A number of tribes have found this designation valuable in exercising control over their environment. However, there are challenges to obtaining the designation and maintaining it. Ms. Sander's article will assist practitioners and tribes to understand these challenges.

The article by Paul Banker and Christopher Grgurich, on the *Plains Commerce Bank v. Long*<sup>7</sup> decision, is timely because it sheds light on one of the most recent Indian law cases decided by the United States Supreme Court regarding tribal jurisdiction over non-tribal member defendants, discussing its impact on federal Indian law. The *Plains Commerce Bank* case has interesting facts, as well as interesting twists and turns as the case progressed through the courts.

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5. Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–13 (2006); 18 U.S.C. § 1170 (2006).

6. Clean Water Act of 1977, 33 U.S.C. § 1251 (2006).

7. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709 (2008).

Professor Scott Taylor, a well-regarded Indian tax expert, addresses another important U.S. Supreme Court case, *Carcieri v. Salazar*,<sup>8</sup> and its impact on taxing authority and related issues. This case also has a tremendous impact on economic development in Indian Country, because it impacts whether tribes can put land into a trust. The status of whether a piece of land is trust or fee land dictates which sovereign has taxing authority over the land.

The article by Assistant Professor Sarah Deer, “Relocation Revisited: Sex Trafficking of Native Women in the United States,” is extremely important and discusses a topic that is not widely acknowledged. I have heard anecdotes of Indian women who were forced into prostitution in the logging camps of northern Wisconsin, and to the iron ore and other boat crews in the harbor of Duluth. Discussing this subject, and hopefully understanding it, will change some of these painful stories and begin the healing process.

The article by Dan Lewerenz and Padraic McCoy regarding the “existing Indian family doctrine” and the Indian Child Welfare Act<sup>9</sup> contains a valuable analysis of this judicially created doctrine.

Dennis Puzz, Jr. then provides an insightful article regarding the application of the Indian Child Welfare Act in the State of Wisconsin and the challenges thereof. In addition, Mr. Puzz addresses Public Law 280<sup>10</sup> in this context with a practical perspective.

“Dangerous Gamble: Child Support, Casino Dividends, and the Fate of the Indian Family,” by Assistant Professor Marcia Zug, addresses another facet of the dialogue about tribal dividends or distributions from tribal net gaming revenue and their impact on the legal issues that individual tribal members face. Dividends and distributions from net gaming revenues have created tremendous benefits and serious challenges for individual tribal members and for tribes. This article also examines jurisdiction on tribal land.

Michael Oeser’s article, “Tribal Citizen Participation in State and National Politics: Welcome Wagon or Trojan Horse?,” explores a fascinating proposition. In today’s political environment a sovereign government, like a tribe or a state, needs to speak up on behalf of its citizens who do not have the resources to do so on their own and be heard by Congress, federal agencies, or state agencies. Yet in doing so, such sovereign governments invite state and federal authority into

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8. *Carcieri v. Salazar*, 129 S.Ct. 1058 (2009).

9. Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963 (2006).

10. Act of Aug. 15, 1953, Pub. L. No. 280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2006)).

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their territory. Mr. Oeser asserts that participation in state and federal political processes by tribal governments may undermine the tribes' ability to remain independent, causing a steady erosion of tribal sovereignty.

Finally, the article "Building a Legacy of Hope: Perspectives on Joint Tribal-State Jurisdiction," by Tribal Judge Korey Wahwassuck and District Court Judges John Smith and John Hawkinson, is an excellent example of how collaboration between tribal courts and state courts can benefit both the citizens of Indian Country and the citizens of the State of Minnesota. The state and tribal judiciaries can easily be at odds with each other because of the complexities of jurisdiction. However, both judiciaries are strengthened by this effort.