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Jurisprudence and Recommendations for Tribal Court Authority Due to Imposition of U.S. Limitations

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JURISPRUDENCE AND RECOMMENDATIONS FOR TRIBAL COURT AUTHORITY DUE TO IMPOSITION OF U.S. LIMITATIONS

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I. INTRODUCTION

There are over 570 federally-recognized Tribal Nations in the United States and more than 330 tribal courts serving as the judicial branch

of those nations.[1] Yet, there is little mention of the existence of tribal courts in most mainstream civil procedure courses taught in the over 200 law schools in the United States. To gain any knowledge as to the existence of these courts, law students must take a course on federal Indian law, which is not available in the majority of law schools. In fact, less than twenty law schools offer a series of courses forming an Indian law program.[2] Thus, the invisibility of tribal courts is perpetuated through curriculum omission in mainstream civil procedure courses and rarely remedied through offering a stand-alone course on federal Indian law.[3] Tribal Nations have existed from time immemorial with their own laws, dispute resolution systems, and governing structures. This lack of attention and suppression of information serves only to reinforce colonizing ideas of subsuming tribal governance into the forums set up by the United States.

This article will discuss the history of formal tribal courts as first established to control American Indian populations in the late 1800s.[4] As tools of oppression, the first judicial forums established on American Indian reservations were the Code of Indian Offenses Courts, also known as the C.F.R. Courts (Code of Federal Regulations Courts).[5] The Indian Reorganization Act of 1934 signaled a shift in policy, which provided for the adoption of tribal constitutions.[6] Under the Department of Interior, the Bureau of Indian Affairs personnel developed boilerplate constitutions for adoption by Tribal Nations.[7] These constitutions often included provisions for the establishment of tribal courts.

Through U.S. Supreme Court decisions and federal laws, the criminal and civil jurisdiction of tribal courts has been limited. The U.S.

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‡ This article is dedicated to the tribal sovereignty warriors working in Indian country to keep our Indigenous legal traditions alive and strong. My Dakota name is included. I am a citizen of the Sisseton-Wahpeton Dakota Oyate and have Rosebud Lakota heritage.

[1] *See* Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs, 84 Fed. Reg. 1200 (Feb. 1, 2019) (listing the 573 federally-recognized Tribal Nations); *see also Tribal Courts,* TRIBAL COURT CLEARINGHOUSE, https://www.tribal-institute.org/lists/justice.htm [https://perma.cc/BHX4-FE8G] (providing a directory of tribal courts in the United States).

[2] *See The State of Indian Law at ABA-Accredited Law Schools*, NAT'L NATIVE AM. BAR ASS'N (2019), https://www.nativeamericanbar.org/wp-content/uploads/2019/07/Final-Draft.-State-of-Indian-Law-at-ABA-Accredited-Schools.-May-2019.pdf [https://perma.cc/B6KB-6L2H] (listing sixteen certificate Indian law programs and thirty-one law schools offering more than one Indian law course at ABA-accredited law schools).

[3] *Id.*

[4] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.04[3][c][iv][B], at 266–67 (Nell Jessup Newton ed., 2012) [hereinafter COHEN'S HANDBOOK].

[5] *Id.*

[6] *See generally* Indian Reorganization Act of 1934, Pub. L. No. 73-383, 48 Stat. 984, 25 U.S.C. § 5101 et seq. (originally 25 U.S.C. § 261 et seq.).

[7] *See* Frank Pommersheim, *What Must be Done to Achieve the Vision of the Twenty-First Century Tribal Judiciary*, 7-WTR KAN. J. L. & PUB. POL'Y 8, 12 (1997).

Supreme Court has also opined that the U.S. Congress holds plenary authority over American Indian Tribes.[8] Utilizing this authority, the U.S. Congress has legislated federal criminal jurisdiction as concurrent on all tribal lands with tribal court jurisdiction and has provided a mechanism to delegate federal criminal jurisdiction to state legal systems.[9] In the civil jurisdiction sphere, the U.S. Supreme Court has established processes for federal courts to review tribal civil jurisdiction determinations and for the refiling of cases from tribal courts to federal courts based on the status of civil defendants as non-Indians or non-members.[10]

Following a discussion on the history and function of tribal courts, this article will examine the limitations on tribal court civil jurisdiction set forth in U.S. Supreme Court decisions.[11] Through a critical examination of the U.S. authority and legal basis for review of tribal court determinations or decisions, this article will provide commentary on the ungrounded nature of the assertion of U.S. federal court review over tribal court decision-making.[12] Finally, the article will recommend a government-to-government treaty agreement to set the framework for civil jurisdictional issues arising between Tribal Nations and the United States.[13]

II. QUESTIONING THE LEGAL BASIS FOR THE COURTS OF INDIAN OFFENSES

Legal scholars of federal Indian law divide U.S. Indian policy into distinct periods to allow for a more cohesive understanding of legislative, executive, and judicial actions. However, policies from former eras may arise or continue into a time period viewed on the macro-level as a period characterized by a policy shift. Therefore, the following U.S. Indian policy eras offer an attempt at organizing the various actions of the branches of the

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[8] *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 565–66 (1903); United States v. Kagama, 118 U.S. 375, 380–82 (1886); *see also* Angelique EagleWoman, *Bringing Balance to Mid-North America: Re-Structuring the Sovereign Relationships Between Tribal Nations and the United States*, 41 U. BALT. L. REV. 671, 678 (2012).

> Without identifying any constitutional foundation, federal courts classify the relationship between Tribes and the U.S. government as political, and affirm that the U.S. Congress has 'plenary' authority over Tribes. In the U.S. Constitution, the U.S. Congress has the ability '[t]o regulate Commerce . . . with the Indian tribes' and this one phrase has been stretched into 'plenary' authority over Tribal Nations.

Id.

[9] *See* ANGELIQUE WAMBDI EAGLEWOMAN & STACY L. LEEDS, MASTERING AMERICAN INDIAN LAW 45-63 (2d ed. 2019).

[10] *Id.* at 74–77.

[11] *See infra* Part IV.

[12] *See infra* Part V.

[13] *See infra* Part VI.

U.S. government towards American Indians since the formation of the United States.

A. The Context of Shifting U.S. Indian Policies

U.S. Indian policy has been analogized to a perpetual wave machine[14] or a pendulum swinging between two opposite poles.[15] On the one side, the United States has recognized and engaged with Tribal Nations on a government-to-government level. On the other side, there has been an effort to completely disregard Tribal Nations' authority, withhold federal recognition, and undermine the protection of American Indian people and Tribal governments. The table below illustrates the eras of U.S. Indian policy and the relationship between the two opposing positions.[16]

Government-to-Government Relations	Disregard of Tribal Nation Status
Treaty Era (sovereign-to-sovereign) 1778 to Mid-1800s	
	Removal Era 1800s
Reservation Era 1800s	
	Assimilation/Allotment Era Late 1800s to Early 1900s
Indian Self-Government Era 1930s to 1940s	
	Termination of Tribal Government Status Era 1940s to 1960s
Indian Self-Determination Era Late 1960s to Present	

During the treaty era, the U.S. engaged in negotiations and legal agreements with Tribal Nations to establish peaceful alliances and eventually large

[14] *See* JUDITH V. ROYSTER, MICHAEL C. BLUMM & ELIZABETH ANN KRONK, NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS 51 (3d ed. 2013) ("Like a perpetual wave machine, federal policy has flowed between two poles: the protection of tribal autonomy on the one hand, and the incorporation and assimilation of Indians into the majority society on the other.").
[15] *See* EAGLEWOMAN & LEEDS, *supra* note 9, at 10.
[16] *Id.* at 11–22.

property transfers.[17] As the U.S. sought to expand its territorial jurisdiction and rebuff land title claims by other European-derived governments, U.S. officials entered into treaties as a means to expediently accomplish this result, whereas American Indians engaged in treaty alliances as a form of kinship recognition and shared territoriality.[18]

In a series of three cases commonly referred to as the "Marshall Trilogy," the U.S. Supreme Court, under the authority of Chief Justice John Marshall, fully extinguished tribal ownership of all lands within the territory claimed by the United States, asserting that, as the successor of Great Britain, the U.S. gained superior title through the "doctrine of discovery" to tribal lands.[19] In the second case in the trilogy, the Court opined that the Cherokee Nation and all tribal governments lacked constitutional standing to sue in federal courts.[20] The Court coined the term "domestic dependent nations" when dismissing the lawsuit brought to enforce U.S. treaty rights disregarded by the state of Georgia in seizing tribal reservation lands.[21] The third case in the trilogy established federal preemption over Indian affairs in relation to state laws and recognized that tribal governments existed "as distinct, independent political communities"—although under the jurisdiction of the U.S.[22] These three decisions continue to form the foundation of U.S. property rights and the assertion of jurisdiction over tribal governments and remain good law in the United States.

With the assertion of U.S. jurisdiction on the eastern seaboard, the next policy in Indian affairs was to remove all Tribal Nations to locations west of the Appalachian mountain range and eventually beyond the Mississippi River.[23] The removal era overlapped with the reservation era, in which federal officials and courts recognized the reserved lands as fully under the jurisdiction of Tribal Nations in regard to domestic affairs.[24] The extent of this jurisdiction will be discussed in the sections on criminal and civil jurisdiction below.[25]

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[17] *Id.* at 11–13.
[18] *Id.* at 12.
[19] Johnson v. McIntosh, 21 U.S. 543, 572–74, 584 (1823).
[20] Cherokee Nation v. Georgia, 30 U.S. 1, 13 (1831).
[21] *Id.*
[22] Worcester v. Georgia, 31 U.S. 515, 519 (1832).
[23] *See* Indian Removal Act of May 28, 1830, §§ 2, 7, Pub. L. No. 21-148, 4 Stat. 411 (1830).
[24] The online resource for treaties between Tribal Nations and the U.S. is available through the Oklahoma State University digital collection of editor Charles Kappler, online at: https://dc.library.okstate.edu/digital/collection/kapplers.
[25] *See infra* Sections III.C.1, III.C.2.

B. Courts of Indian Offenses as Assimilation Era Federal Instrumentalities

In the most devastating era of U.S. Indian policy, the assimilation/allotment era, the pendulum swung to social experimentation on Indian children who were placed in mandatory government boarding schools, the dividing up of the reserved land base in violation of treaties, and the appointment and establishment by the United States of Indian agents on reservations who exercised complete control.[26] The U.S. Supreme Court opined in several decisions throughout this era that the U.S. Congress exercised "plenary"—or absolute—authority over tribal peoples and governments.[27] The basis for this assertion was justified by the rationale that the differences between European norms and American Indian norms set up a civilization hierarchy with Europeans "superior" to American Indians.[28] It is during this time period that the federal agency charged with implementing U.S. Indian law and policy, the Bureau of Indian Affairs (BIA), through the Commissioner of Indian Affairs, first authorized the implementation of the Courts of Indian Offenses.[29]

While U.S. Indian agents were exercising judicial power, some Tribal Nations adapted traditional dispute resolution processes to conform to the Euro-American style of formal court systems. In the 1820s, the Cherokee Nation established written tribal laws, a tribal constitution, and tribal courts with exclusive jurisdiction over the tribal territory.[30] By 1898, the United States terminated the Cherokee Nation government, as well as the other governments known as the Five Civilized Tribes (Cherokee, Chickasaw, Choctaw, Muscogee (Creek), and Seminole tribal governments), during the assimilation period of Indian policy.[31]

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[26] *See* Indian General Allotment Act, Pub. L. No. 49-105, 24 Stat. 388 (1887) [repealed].

[27] *See* United States v. Kagama, 118 U.S. 375, 384–85 (1886) ("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 never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes."); *see also* Lonewolf v. Hitchcock, 187 U.S. 553, 565 (1903) ("Plenary authority over tribal relations 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.").

[28] *See* Johnson v. McIntosh, 21 U.S. 543, 590 (1823) ("But the tribes of Indians inhabiting this country were fierce savages whose occupation was war and whose subsistence was drawn chiefly from the forest.").

[29] *See* Gloria Valencia Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 232–37 (1994).

[30] LAWS OF THE CHEROKEE NATION: ADOPTED BY THE COUNCIL AT DIFFERENT PERIODS 11-12 (1852), https://www.loc.gov/law/help/american-indian-consts/PDF/28014183.pdf [https://perma.cc/F8QW-CAVT].

[31] *See* Act of June 28, 1898, Curtis Act, Pub. L. No. 55-517, 30 Stat. 495 (1899).

In his 1882 annual report, U.S. Indian Commissioner, Hiram Price, advocated for Christian missionaries, as teachers, to civilize American Indians in the mandatory schools operated by the Bureau of Indian Affairs.[32] The next year, in his November 1, 1883, annual report, Commissioner Price expressed his feelings against all forms of Indian cultural practices as follows, "[e]very man familiar with Indian life will bear witness to the pernicious influence of these savage rites and heathenish customs."[33] He was particularly vehement about targeting medicine men in tribal communities.[34]

In response, the Secretary of the Interior, Henry Teller, established the Courts of Indian Offenses through Bureau regulations issued on September 22, 1884, and approved a companion legal code.[35] As a civilizing influence, the U.S. Indian agent was empowered to select tribal police officers to form three-judge panels to determine sentences with appeals to the BIA.[36]

The companion legal code, the Code of Indian Offenses, outlawed the spiritual and religious practices of American Indians, punished medicine men, punished parents who resisted their children being taken to boarding schools, and allowed total control by the U.S. Indian agent on reservations backed by military forts at nearby locations. The Code provided as the fourth rule:

> 4th. The "sun-dance," the "scalp-dance," the "war-dance," and all other so-called feasts assimilating thereto, shall be considered "Indian offenses," and any Indian found guilty of being a participant in any one or more of these "offenses" shall, for the first offense committed, be punished by withholding from the person or persons so found guilty by the court his or their rations for a period not exceeding ten days; and if found guilty of any subsequent offense under this rule, shall by punished by withholding his or their rations for a period not less than fifteen days, nor more than thirty days, or by incarceration in the agency prison for a period not exceeding thirty days.[37]

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[32] Francis Paul Prucha, *Extract from the Annual Report of the Commissioner of Indian Affairs October 10, 1882*, in DOCUMENTS OF UNITED STATES POLICY 156 (Univ. of Neb. Press 3rd ed. 2000).
[33] *Id.* at 158.
[34] *Id.* at 159.
[35] THEODORE HAAS, THE INDIAN AND THE LAW-1 6 (1949).
[36] *Id.*
[37] *See Code of Indian Offenses*, OFFICE OF ROBERT N. CLINTON, http://robert-clinton.com/?page_id=289 [https://perma.cc/W8UL-4ZR7]; *see also*, U.S. OFF. OF INDIAN AFF., SEC'Y OF THE INTERIOR, REGUL. OF THE INDIAN DEP'T 89 (The Indian Bureau 1884).

Asserting full federal authority, the U.S. Indian agent could punish "offenders" by withholding their food rations.[38] Further, the sixth rule of the Code provided severe punishment for medicine men.

> 6th. The usual practices of so-called "medicine-men" shall be considered "Indian offenses" cognizable by the Court of Indian Offenses, and whenever it shall be proven to the satisfaction of the court that the influence or practice of a so-called "medicine-man" operates as a hindrance to the civilization of a tribe, or that said "medicine-man" resorts to any artifice or device to keep the Indians under his influence, or shall adopt any means to prevent the attendance of children at the agency schools, or shall use any of the arts of a conjurer to prevent the Indians from abandoning their heathenish rites and customs, he shall be adjudged guilty of an Indian offense, and upon conviction of any one or more of these specified practices, or, any other, in the opinion of the court, of an equally anti-progressive nature, shall be confined in the agency prison for a term not less than ten days, or until such time as he shall produce evidence satisfactory to the court, and approved by the agent, that he will forever abandon all practices styled Indian offenses under this rule.[39]

In the United States, a country with a constitutional provision guaranteeing freedom of religion,[40] the BIA, under the executive branch, enforced legal rules to indefinitely incarcerate practitioners of tribal spiritualities or until the medicine men "forever abandon all practices styled Indian offenses," such as tribal ceremonies.[41] Further, the Code detailed that the courts would have the same civil jurisdiction as a justice of the peace in the surrounding state or territory.[42]

Although named courts, the Courts of Indian Offenses were under the executive branch and did not resemble federal or territorial courts during the contemporaneous period. Rather, they operated as instrumentalities of the assimilation policy. According to the primary federal decision regarding the courts, their creation was justified as authorized by a

[38] U.S. OFF. OF INDIAN AFF., SEC'Y OF THE INTERIOR, REGUL. OF THE INDIAN DEP'T 89 (The Indian Bureau 1884).
[39] *Id.* at 89–90.
[40] *See* U.S. CONST. Amend. I.
[41] U.S. OFF. OF INDIAN AFF., SEC'Y OF THE INTERIOR, REGUL. OF THE INDIAN DEP'T 89–90 (The Indian Bureau 1884).
[42] *See Code of Indian Offenses*, *supra* note 37.

treaty entered into with the Umatilla Indians, as follows in the *United States v. Clapox*[43] decision:

> By this treaty the Umatilla Indians engaged to submit to any rule that might be prescribed by the United States for their government. This obviously includes the power to organize and maintain this Indian court and police, and to specify the acts or conduct concerning which it shall have jurisdiction. This treaty is an "act" or law "relating to Indian affairs," – the affairs of these Indians, and by said section 465[44] the power to prescribe a rule for carrying the same into effect is given to the president, who has exercised the same in this case through the proper instrumentality, - the secretary of the interior.[45]

This interpretation of a bilateral treaty as allowing one government the authority to enact and enforce *any* rule against the other government is in contradiction to the purpose of entering a treaty. This type of revisionist interpretation to provide absolute authority over American Indians was a hallmark of the assimilation period. The Court in *Clapox* further stated that the purpose of these forums was unlike the generally understood function of courts in the United States.[46] The language used to state that conclusion is demeaning to American Indians and undermined the credibility of these forums as legitimate, legal courts. The Court stated:

> These "[C]ourts of Indian [O]ffenses" are not the constitutional courts provided for in section 1, art. 3, Const., which [C]ongress only has the power to "ordain and establish," but mere educational and disciplinary instrumentalities, by which the government of the United States is endeavoring to improve and elevate the condition of these dependent tribes to whom it sustains the relation of guardian. In fact, the reservation itself is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man.[47]

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[43] United States v. Clapox, 35 F. 575 (D. Or. 1888).

[44] Regulations by President, BUREAU OF INDIAN AFFAIRS, P.L. 116-179, 25 U.S.C. § 9 (2020) ("The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.").

[45] *Clapox*, 35 F. at 577.

[46] *See id.*

[47] *Id.*

The challenge to the authority of the Court of Indian Offenses on the Umatilla Reservation originated in the arrest and jailing of an Indian woman for alleged adultery, followed by several men forcibly releasing her from the jail. Not only did the court fail to find a statutory basis for the adultery conviction which it upheld, but the court also stated that the Umatilla woman had committed a crime against the United States to uphold the conviction.[48]

Throughout the years, similar rulings by federal courts have led to distrust and skepticism of courts' abilities to deliver justice for American Indians engaged in federal and state court proceedings. Bending the law to assert authority over American Indians through convoluting and demeaning rationales has often been the norm in federal Indian law decisions.

The Code of Indian Offenses was revised in 1892 under the direction of the Commissioner of Indian Affairs, Thomas J. Morgan, to ameliorate some of the issues in the original set of rules. For example, a process for one-year terms for tribal judges sitting in district courts was set forth, with appeals taken to a full panel of all the judges on the reservation.[49] Also, rather than indefinite incarceration, medicine men faced a sentence of between ten to thirty days for the first offense, and subsequent convictions carried a maximum sentence of up to six months.[50] The revisions incorporated misdemeanors from the surrounding state or territories and called for similar sentencing.[51] The revisions also included a provision on the courts solemnizing marriages, although American Indians performed marriage ceremonies according to traditional customs since time immemorial.[52]

The question of the authority to establish the Courts of Indian Offenses seems to be answered by the colonial mentality of asserting dominance over American Indians based on notions of racial and cultural superiority. The legal machinations used to justify imposing these types of courts outlawing the cultural and spiritual practices of Indigenous populations contradicts the constitutional principles of freedom of religion and basic rights of human existence.

III. TRANSITION TO INDIAN SELF-GOVERNMENT AND MODERN TRIBAL COURTS

[48] *Id.* at 578–79.
[49] Prucha, *supra* note 32, at 185.
[50] *Id.* at 186.
[51] *Id.*
[52] *Id.* at 186–87.

The passage of the 1934 Indian Reorganization Act heralded an end to the worst aspects of the assimilation/allotment era.[53] The first section of the law halted the allotment policy of parceling out the reserved lands of Tribal Nations.[54] Another section authorized the adoption of tribal constitutions and delineated the powers of tribal governments.[55] The BIA developed boilerplate tribal constitutions based on club associations with bylaws as available for adoption by tribal governments.[56] The tribal constitutions did not create the counterbalance of three branches of government similar to the U.S. governmental system. Rather, the governmental power resided in one body, the Tribal Council, as the executive and legislative authority, with oversight of the judicial power.

Even with this less than ideal governance structure, the provisions of the IRA signaled a return to self-government for Tribal Nations and the relaxing of the grip of federal authority by U.S. Indian agents in tribal communities. Tribal peoples existed for thousands of years prior to the formation of the United States and governed their own societies with laws and dispute resolution processes across the Western Hemisphere.[57] The shift in U.S. policy from military control to the recognition of tribal authority to self-govern was heartily embraced by Tribal Nations.

A. The Operation of Tribal Courts

Under the policy of Indian self-government, a majority of Tribal Nations re-established tribal dispute resolution or court systems that provide law and order functions, decision-making for civil matters, and the handling of family law cases.[58] Customary or traditional law may be employed in tribal judicial opinions alongside tribal statutes and other legal sources.[59]

With a majority of tribal governments adopting the BIA-approved constitutional models, Tribal Nations saw a return to former authority and autonomy, away from the U.S. Indian agent system.[60] These self-government era tribal courts replaced the former Courts of Indian Offenses and have the authorization of inherent tribal sovereignty legitimizing the forums.[61]

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[53] 25 U.S.C. §§ 5101–5144.
[54] *Id.* § 5101.
[55] *Id.* § 5123.
[56] *See* EAGLEWOMAN & LEEDS, *supra* note 9, at 69.
[57] *See* Talton v. Mayes, 163 U.S. 376, 384 (1896) (recognizing that the Cherokee Nation and all tribal governments existed prior to the U.S. Constitution and that tribal law governs criminal law process in tribal court proceedings).
[58] *See generally Tribal Court Clearinghouse*, TRIBAL LAW AND POL'Y INST., https://www.tribal-institute.org/ [https://perma.cc/3WFR-ZVTV].
[59] *See generally* MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW (2011).
[60] *See* COHEN'S HANDBOOK, *supra* note 4, at § 4.04[3][a][i], at 256–58.
[61] *Id.* § 4.04[3][c][iv][B], at 265.

Tribal court systems handle both civil and criminal cases for matters impacting the tribal citizenry and government. Tribal courts review Tribal Council actions for conformity with the relevant tribal constitutions, resolve disputes in the commercial realm, and provide remedies in the area of tort law.[62]

Tribal Nations rejecting the boilerplate constitutions had similar opportunities to benefit from the Indian Reorganization Act and assert tribal governmental powers under both the federal law and the re-assertion of tribal sovereignty. The Navajo Nation has not adopted a tribal constitution and operates one of the most well-known tribal court systems in the world. One of the most celebrated aspects of the Navajo Nation's justice system is the reinvigoration of the peacemaking process as an alternative to formal dispute adjudication in tribal district courts. Thus, the Peacemaker Courts represent Indigenous legal principles carried forward into contemporary times to promote cultural norms, lessons, laws, and practices of the Navajo peoples.[63]

For various reasons, a small number of tribal governments have continued to use the Courts of Indian Offenses models, now commonly referred to as "C.F.R. Courts," due to the application of the Code of Federal Regulations as the governing law.[64] Unlike tribal courts, the C.F.R. Courts operate under the authority of the BIA and are circumscribed by the federal regulations on civil and criminal jurisdiction.[65] Some commentators criticize the continued use of C.F.R. Courts as inhibiting the development of tribal law and application of customary law.[66] For those tribal governments unable to devote financial resources to a judicial branch, C.F.R. Courts have the advantage of BIA funding.[67]

Finally, tribal governments rejecting the three models of court systems described above can retain judicial authority in the Tribal Council. The entanglement between politics and judicial neutrality does not make this a best practice in tribal communities. As sovereign entities within territorial boundaries over domestic affairs, Tribal Nations have choices in the structuring of court systems and dispute resolution practices.

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[62] JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 122–33 (2016).

[63] *See* Hon. Robert Yazzie, *"Hozho Nahasdalii" –We Are Now in Good Relations: Navajo Restorative Justice*, 9 ST. THOMAS L. REV. 117, 120–24 (1996).

[64] *See Court of Indian Offenses*, U.S. DEPT. OF THE INTERIOR: INDIAN AFFS., https://www.bia.gov/regional-offices/southern-plains/court-indian-offenses [https://perma.cc/GV8Y-U639].

[65] *See* 25 C.F.R. Part 11.

[66] *See* Gavin Clarkson, *Reclaiming Jurisprudential Sovereignty: A Tribal Judiciary Analysis*, 50 U. KAN. L. REV. 473, 489–90 (2002).

[67] *See* COHEN'S HANDBOOK, *supra* note 4, at § 4.04[3][c][B], at 267.

B. Tribal Appellate Courts

Tribal governments have options in creating the appellate process of tribal courts. The first option enables a tribal government to form an appellate court under its own laws. There are many of these appellate courts, such as the Mashantucket Pequot Court of Appeals, the Seminole Tribe of Florida Appellate Court, the Sisseton-Wahpeton Supreme Court, and the Court of Appeals of the Shakopee Mdewakanton. An appeal of a Navajo Nation district court decision goes to the Navajo Nation Supreme Court, and the Cherokee Nation district court decisions are likewise appealable to the Cherokee Nation Supreme Court.[68]

Another option is for a tribal government to enter into a regional appellate court system. Usually, this will require a formal resolution from each tribal government's Tribal Council accompanied by a fee-sharing agreement to participate. Some examples of these appellate consortiums include the Northern Plains Intertribal Court of Appeals, the Northwest Intertribal Court System, Northern California Tribal Court Coalition, the Intertribal Court of California, and the Southwest Intertribal Court of Appeals.[69]

The Tribal Council, exercising discretionary authority to hear appeals from the tribal district court(s), may also retain jurisdiction over the appellate process.[70] This is not a best practice due to the possible entanglement of political issues with the role of neutral decision-maker. The right of appeal is recognized across the spectrum of appellate court fora for tribal jurisdictions and contemplated by tribal government in mandating the appropriate appeal process.[71]

C. Tribal Court Jurisdiction: Criminal and Civil

The criminal and civil jurisdiction of tribal courts is set forth in the tribal laws establishing the court systems.[72] For most governments, their court systems assert jurisdiction over claims arising from conduct within the government's territory. For example, the government of Greece may apply its laws to the full extent throughout its territorial boundaries, and the Greek courts may resolve any and all criminal and civil cases arising within those same boundaries. In contrast, the U.S. Congress and the U.S. Supreme Court have both sought to restrict the full extent of tribal governmental

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[68] CHEROKEE CONST. art. VIII, § 4, cl. 7.

[69] *See About*, NW. INTERTRIBAL CT. SYS., https://www.nics.ws/about.html [https://perma.cc/CE8R-B5RL]. *See also SWITCA Rep.,* AM. INDIAN LAW CTR., INC., https://www.ailc-inc.org/our-work/switca/ [https://perma.cc/WYW4-EY9G]; EAGLEWOMAN & LEEDS, *supra* note 9, at 72–3.

[70] *See generally Tribal Court Clearinghouse*, *supra* note 58.

[71] *See* EAGLEWOMAN & LEEDS, *supra* note 9, at 72–3.

[72] *See* COHEN'S HANDBOOK, *supra* note 4, at § 4.04[3][c].

authority within the tribal territory. These issues are further discussed below.

1. Criminal Jurisdiction

The starting point for tribal court jurisdiction is the criminal realm because this is the area first intruded upon by federal law—displacing exclusive tribal governmental authority. In 1883, the U.S. Supreme Court decision in *Ex parte Crow Dog* held that criminal activity involving two tribal citizens was not within the jurisdiction of the federal courts.[73] Rather, legally-binding treaties retained criminal jurisdiction for tribal governments.[74] Responding to the outcry of public interest associations and lobbying by the BIA, the U.S. Congress enacted the Major Crimes Act in 1885 to assert federal criminal jurisdiction for enumerated crimes that were considered felonies within Indian reservations and lands when allegedly committed by an Indian person.[75] Formally, the law applied to "Indian country" as defined in the federal criminal code.[76]

As federal laws were enacted in the criminal jurisdiction realm over Native Americans, a complicated scheme was put in place, which has been critically referred to as a criminal jurisdiction maze. U.S. Supreme Court rulings and federal laws have led to the following outcome: crimes committed by an alleged Indian perpetrator in Indian country can be concurrently charged in both tribal and federal courts;[77] crimes committed by an alleged non-Indian perpetrator in Indian country with an Indian victim can be charged federally, but not tribally;[78] and crimes committed by an alleged non-Indian perpetrator in Indian country with a non-Indian victim can be charged by state authorities.[79]

Further, during the termination era of U.S. Indian policy, the federal government, under Public Law 280, delegated criminal authority in Indian country to six mandatory states and allowed other states to opt-in.[80] Those states receiving federal delegations share concurrent criminal authority with tribal courts over alleged Indian perpetrators and are responsible for charging non-Indians in Indian country regardless of the status of the victim.

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[73] 109 U.S. 556 (1883).
[74] *Id.* at 572.
[75] 18 U.S.C. § 1153.
[76] *Id.* § 1151.
[77] *See* U.S. v. Lara, 541 U.S. 193, 210 (2004).
[78] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978).
[79] *See generally* U.S. v. McBratney, 104 U.S. 621 (1882) (holding that states have exclusive jurisdiction over non-Indians who commit crimes against other non-Indians in Indian country).
[80] 18 U.S.C. § 1162.

To further complicate matters, Congress enacted the Indian Civil Rights Act of 1968 (ICRA), severely restraining the criminal sentencing authority of tribal courts.[81] Tribal courts face limitations when exercising criminal jurisdiction. For example, tribal courts can only impose up to a one-year incarceration and/or a fine of up to $5,000 per criminal count, including the most serious felony-level crimes.[82] After public attention was drawn to the lack of federal and state prosecutions and growing criminal activity in Indian country,[83] the 2010 Tribal Law and Order Act (TLOA) was passed and incorporated into the ICRA with mixed reactions.[84] Under the TLOA, certain requirements for tribal courts were set forth, tied to increased criminal sentencing by imposing up to three years of incarceration and/or a fine of $15,000 per count.[85] However, tribal courts were pressured into adhering to state and federal procedures in criminal prosecutions, resulting in trials that carried costly price tags with no additional funding.[86]

Another feature of the TLOA was to allow tribal governments to initiate retrocession of state criminal jurisdiction granted under Public Law 280 and return federal criminal jurisdiction as concurrent in tribal territories.[87] Prior to the 2010 provision, only state governments had the authority to petition for retrocession of criminal jurisdiction in Indian country. A handful of tribal governments have successfully utilized this provision. Pursuant to land claims settlements and specific statutes involving state criminal jurisdiction, federal laws have often contained language providing state criminal, and sometimes civil adjudicatory jurisdiction, for cases involving reservation Indians over the designated tribal territory and should be researched per tribal government to determine proper jurisdiction.[88]

With the limitations on tribal court sentencing, Native American communities must rely on federal and state law enforcement to devote attention, time, and resources to keeping women, children, and all members of the community safe. Unfortunately, this reliance has been a dismal

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[81] 25 U.S.C. §§ 1301–1304.
[82] *Id.* § 1302(a)(7)(B).
[83] *See, e.g.*, AMNESTY INT'L USA, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA (2007), https://www.amnestyusa.org/pdfs/mazeofinjustice.pdf [https://perma.cc/KVZ8-W65Y] (noting the pervasive sexual violence against American Indian and Alaska Native women in the United States).
[84] *See* Jasmine Owens, *"Historic" in A Bad Way: How the Tribal Law and Order Act Continues the American Tradition of Providing Inadequate Protection to American Indian and Alaska Native Rape Victims*, 102 J. CRIM. L. & CRIMINOLOGY 497, 518–21 (2012).
[85] 25 U.S.C. § 1302(b).
[86] *See* EAGLEWOMAN & LEEDS, *supra* note 9, at 49–50.
[87] 18 U.S.C. § 1162(d).
[88] COHEN'S HANDBOOK, *supra* note 4 § 6.04[4], at 578–83.

failure. The passage of the Violence against Women Act in 2013 was an imperfect fix that allowed for the prosecution of special domestic violence offenses in tribal courts where the alleged perpetrator is a non-Indian and the victim is an Indian in Indian country.[89] The special jurisdiction requires congressional renewal—placing the prosecutorial authority subject to political uncertainties.

2. Civil Jurisdiction

The civil jurisdiction of tribal courts is set forth in tribal law as extending throughout the tribal territory. Tribal governments have established courts as forums for any type of civil action based on legislative authority, whether involving commercial disputes, domestic issues, personal injury actions, or governmental administrative matters, to name a few areas. In general, tribal courts follow civil procedure requirements for adjudicative authority based on the federal rules of civil procedure with more emphasis on due process rights than on enforcing strict adherence to procedural standards.

The National Indian Law Library is an online resource that allows for the review of tribal court civil action decisions by examining the reported decisions in the Indian Law Reporter.[90] The National Indian Law Library index has thirty categories for researching tribal court decisions on various topics, including areas from agriculture to cyberspace and employment law to wills and trusts.[91] Through a monthly review of tribal court decisions, an Indian law bulletin is accessible on this website and searchable by topic for new developments in tribal law.[92] A selection of tribal court decisions may also be available through mainstream legal research services. The best source of legal decisions will be locally through contacting the relevant tribal court clerk(s) for precedential decisions and access to tribal court archives.

3. Public Law 280 and Impacts to Tribal Courts

As discussed above, the enactment of Public Law 280 during the termination era of U.S. Indian policy has impacted the operation of tribal courts. Under Public Law 280, specific states received federal delegations of criminal jurisdiction in Indian country. Under the Indian Civil Rights Act of 1968, states opting for the federal delegation of criminal jurisdiction had

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[89] 25 U.S.C. § 1304.

[90] *See Indian Law Reporter: Tribal Court Cases Index*, NAT'L INDIAN LAW LIBR. (Mar. 18, 2015), https://www.narf.org/nill/ilr/ [https://perma.cc/74UV-UYK8].

[91] *Id.*

[92] *Indian Law Bulletins: Tribal Courts*, NAT'L INDIAN LAW LIBR. (Dec. 18, 2019), https://www.narf.org/nill/bulletins/tribal/2019.html [https://perma.cc/7QAX-WUHL].

to obtain tribal consent, and no tribal government provided such approval.[93] With the state exercise of criminal jurisdiction, some tribal governments did not authorize tribal courts to exercise any form of concurrent criminal jurisdiction due to a lack of federal funding.[94] Rather, the tribal courts were exclusively authorized as courts of civil jurisdiction.

Another aspect of the enactment of Public Law 280 was to open the state courts as alternative forums for civil actions involving Indians that arise in tribal territories. This civil law component of Public Law 280 is codified at 28 U.S.C. § 1360 and was initially enacted to apply in the states of Alaska, California, Minnesota (except on the Red Lake Band of Chippewa Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin.[95] The nine states currently operating with optional Public Law 280 jurisdiction are: Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, Utah, and Washington.[96] Civil actions filed in state court must involve at least one Indian party under this federal grant of authority for an action arising within a tribal territory.

Two U.S. Supreme Court cases have interpreted the civil aspects of Public Law 280 and developed the criminal/prohibitory or civil/regulatory test to determine state authority. In *Bryan v. Itasca County*,[97] a case arising in the Public Law 280 mandatory state of Minnesota, the U.S. Supreme Court rejected the state's asserted taxing authority within the Leech Lake

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[93] 25 U.S.C. § 1321(a)(1); *see* EAGLEWOMAN & LEEDS, *supra* note 9, at 21 ("This extension of state jurisdiction over tribal communities did not require tribal consent until 1968. Due to the often strained relationships between state government and tribal governments, the delegation to state authority was often unwelcome from the tribal perspective.").

[94] *See, e.g.,* Jerry Gardner & Ada Pecos Melton, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, TRIBAL COURT CLEARINGHOUSE, http://www.tribal-institute.org/articles/gardner1.htm#12 [https://perma.cc/EX8U-U9R6].

> The federal government, however, viewed Public Law 280 as a license to drop financial and technical support for tribal self-government and tribal governmental institutions in the Public Law 280 states. The Bureau of Indian Affairs (BIA) used it as an excuse for redirecting federal support on a wholesale basis away from Indian Nations in the 'Public Law 280 states' and towards all other Indian Nations. The most striking illustration of this redirected federal support concerns the funding of tribal law enforcement and tribal courts. In many Public Law 280 states, the BIA refused to support tribal law enforcement and tribal courts on the grounds that Public Law 280 made tribal criminal jurisdiction unnecessary.

Id.

[95] 28 U.S.C. § 1360(a).

[96] *See* Carole Goldberg & Heather Valdez Singleton, *Research Priorities: Law Enforcement in Public Law 280 States*, 2 n.4 (2005), https://www.ncjrs.gov/pdffiles1/nij/grants/209926.pdf [https://perma.cc/M7RH-AZRM] (noting that North Dakota required tribal consent to assert jurisdiction but has not gained that consent).

[97] Bryan v. Itasca County, 426 U.S. 373 (1976).

Reservation as unauthorized under the statute.[98] Further, the Court opined that state regulatory authority, such as taxing or imposing state law within Indian country, was not granted in the civil sections of the law.[99] Such a grant of authority would undermine tribal governmental authority, which was not supported in the legislative history or actual wording of the statute.[100] In parsing the statute, the Court applied the Indian canon of construction for treaties, statutes, and regulations enacted for the benefit of Indians as requiring that ambiguous provisions "are to be liberally construed, doubtful expressions being resolved in favor of the Indians."[101] Because the taxing conduct fell within the civil/regulatory sphere of governmental authority, the civil provisions of Public Law 280 did not empower states to override tribal governmental authority.

Likewise, in the U.S. Supreme Court decision, *California v. Cabazon Band of Mission Indians*,[102] the mandatory Public Law 280 state of California asserted authority to shut down a tribal bingo business.[103] The Court considered whether the state regulated similar gambling activities or criminally prohibited such activities.[104] In determining that Public Law 280 jurisdiction only authorized application of criminal law in tribal territories, the Court held that application of the criminal/prohibitory and civil/regulatory test nullified the state's argument that it could assert control over tribal bingo operations as the state regulated comparable gambling activity.[105] Therefore, these two decisions cabin the civil aspect of Public Law 280 to providing state court forums for private civil actions involving an Indian party.

The practical result of the civil provisions of Public Law 280 in the relevant states is to allow a race to the courthouse for litigants when a private cause of action arises in Indian country involving an Indian party.[106] Some tribal governments and states have codified comity principles, others have followed such principles through court decisions, and still, others have not addressed the issue to date.[107] In Public Law 280 states, there is concurrent subject matter jurisdiction for state and tribal courts for private civil actions, except for suits involving the tribal government or its entities as exempted by the doctrine of tribal sovereign immunity.[108]

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[98] *Id.* at 378–79.
[99] *Id.* at 388–89.
[100] *Id.*
[101] *Id.* at 392.
[102] California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).
[103] *Id.* at 207.
[104] *Id.* at 210.
[105] *Id.* at 211–12.
[106] COHEN'S HANDBOOK, *supra* note 4, § 6.04[3][c], at 558.
[107] *See* Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. REV. 311, 336–45 (2000).
[108] *See* Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 785 (2014).

By allowing civil actions involving Indians as private persons that arise in tribal territories to be heard in either state or tribal court, the exercise of state court jurisdiction may be viewed as undermining the activity of tribal courts. Legal jurisprudence is developed by the consideration of issues over time with judicial decisions building on rationales and strengthening bodies of interpretative law. For tribal courts, the incursions allowed by state forums hearing civil cases could work as a detriment to the development of tribal judicial interpretation of tribal law for civil causes of action.

D. Customary/Traditional Law in Tribal Courts

Tribal Nations are pre-constitutional and indigenous to North America. Within these societies, dispute resolution processes were developed and followed to maintain harmony and balance for social functioning. Customary legal principles and norms have been taught through generations based on accounts and stories expressing both socially acceptable behaviors and the disapproval of unacceptable behaviors. Thus, children received this behavioral training early on to shape their understanding of proper ethical, legal, and social standards. In contemporary tribal courts, judges may take judicial notice of customary legal principles, receive expert testimony from qualified cultural knowledge holders, or follow precedent in decisions detailing the appropriate customary law for that particular tribal society. Court decisions and customary legal principles compose the common law of tribal courts.

One of the most prominent traditional customary law practices is found in the Navajo Nation Peacemaker Court and program, which has been the subject of study by legal scholars throughout the world.[109] In explaining the concept of horizontal justice in the Navajo mindset, Chief Justice Emeritus Robert Yazzie distinguishes the Anglo view of vertical justice as the adversarial system with judges as decision-makers through power over the parties.[110]

> Navajo justice is a sophisticated system of egalitarian relationships where group solidarity takes the place of force and coercion. In it, humans are not in ranks or status classifications from top to bottom. Instead, all humans are equals and make decisions as a group. The process – which we call "peacemaking" in English – is a system of

[109] Tom Tso, *The Process of Decision Making in Tribal Courts: A Navajo Jurist's Perspective*, *in* NAVAJO NATION PEACEMAKING: LIVING TRADITIONAL JUSTICE 31 (Marianne O. Nielsen & James V. Zion, eds., 2005).

[110] Robert Yazzie, "*Life Comes From It": Navajo Justice Concepts*, *in* NAVAJO NATION PEACEMAKING: LIVING TRADITIONAL JUSTICE, 43–47 (Marianne O. Nielsen & James W. Zion eds., 2005).

> relationships where there is no need for force, coercion or control. There are no plaintiffs or defendants; no "good guy" or "bad guy." These labels are irrelevant. "Equal justice" and "equality before the law" mean precisely what they say. As Navajos, we do not think of equality as treating people equal *before* the law; they are equal *in* it. Again our Navajo language points this out in practical terms.[111]

Cases are initiated in Peacemaker Court by the parties to the dispute or through referrals by courts, government agencies, or schools.[112] Participating in the peacemaking program is always voluntary.[113] Once the case is filed, a well-respected community peacemaker is assigned; the peacemaker is responsible for gathering interested individuals to facilitate the ceremonial stages of the process.[114] Components of the resolution process include prayers, every person contributing to both speaking and listening, the ability of family members to respond to excuses, teachings by the peacemaker appropriate to the situation, and a closing with a meal.[115]

Tribal governments may codify traditional law, incorporate specific legal processes, or acknowledge adversarial proceedings as applicable law in modern tribal courts. For example, there has been a proliferation of Tribal Healing to Wellness Courts, providing culturally appropriate guidance for those entering the criminal justice system due to substance abuse or mental health issues.[116] Other examples include court processes involving juveniles, such as the Red Lake Band of Chippewa in Minnesota establishing the Abinoojiyag Noojimoo-wigamig or Children's Healing Center, with the mission statement to "[r]ealize a 20% reduction in juvenile delinquency and juvenile recidivism during the next five years by implementing a holistic comprehensive strategic plan."[117] Thus by drawing upon cultural principles, custom, and traditional legal concepts, tribal courts working within tribal communities are reinvigorating the values and standards that provide tribal cohesion.

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[111] *Id.* at 47.

[112] *See Navajo Nation Peacemaking Program*, TRIBAL ACCESS TO JUSTICE INNOVATION, http://www.tribaljustice.org/places/traditional-practices/navajo-nation-peacemaking-program/ [https://perma.cc/EF9G-GMZQ].

[113] *Id.*

[114] *See id.*

[115] James Zion, *The Dynamics of Navajo Peacemaking: Social Psychology of an American Indian Method of Dispute Resolution*, *in* NAVAJO NATION PEACEMAKING: LIVING TRADITIONAL JUSTICE 91–96 (Marianne O. Nielson & James W. Zion eds., 2005).

[116] TRIBAL HEALING TO WELLNESS COURTS, http://wellnesscourts.org/ [https://perma.cc/C3KK-S54D].

[117] *The Children's Healing Center*, RED LAKE NATION, https://www.redlakenation.org/the-childrens-healing-center/ [https://perma.cc/AYD5-NR65].

IV. U.S. SUPREME COURT JURISPRUDENCE REGARDING THE CIVIL JURISDICTION OF TRIBAL COURTS

Tribal Nations have been labeled the third sovereign in the United States along with the federal and state governments.[118] However, tribal governments do not neatly fit within the U.S. constitutional framework. This section notes that the U.S. Supreme Court has inconsistently respected the sovereignty of Tribal Nations. Moreover, the Court has inconsistently followed the current overarching U.S. Indian policy of self-determination since the late 1960s in terms of supporting tribal legislative and adjudicatory authority within tribal territories. As discussed in the section on criminal jurisdiction, the civil jurisdiction of tribal courts has been subject to narrowing by U.S. Supreme Court decisions based on whether the defendant is a non-Indian or a non-member and whether the cause of action is based on federal law. Each of these lines of federal judicial limitations will be discussed in turn.

One of the lasting legacies of the assimilation/allotment era of U.S. Indian policy in the late 1800s through the early 1900s was the allotment of the reserved homelands of Tribal Nations under the 1887 General Allotment Act.[119] This law allowed the U.S. President to declare a reservation open for allotment. Once declared, the local U.S. Indian agent was empowered to assign to individuals and/or heads of households lots of the reservation lands ranging in size from eighty to one-hundred and sixty acres.[120] Following the allotment process, the U.S. Indian agent declared the remaining reservation lands as "surplus," with the U.S. Congress setting the price the U.S. would pay for the surplus.[121] Once within the ownership of the United States, the U.S. President could set land aside for national parks or sell it to individual settlers within the reservation boundaries.[122] By

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[118] *See generally* Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts Remarks*, 33 TULSA L. REV. 1 (1997) (referring to Tribal Nations as the third sovereign).

[119] Law of Feb. 8, 1887, ch. 119, 24 Stat. 388 (repealed 1934); *see also* PRUCHA, *supra* note 32, at 170–73.

[120] PRUCHA, *supra* note 32, at 170.

[121] *See* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 13–14 (1995) (explaining that after the 1903 U.S. Supreme Court decision in *Lonewolf v. Hitchcock* announcing that Congress was not required to obtain tribal consent for Indian affairs multiple federal surplus land acts diminished the reservation land bases).

[122] *See* Angelique EagleWoman, *The Ongoing Traumatic Experience of Genocide for American Indians and Alaska Natives in the United States: The Call to Recognize Full Human Rights as Set Forth in the United Nations Declaration on the Rights of Indigenous Peoples*, 3 AMER. IND. L.J. 424, 437 (2015) ("In reality, this was an illegal, unconsented to land grab from the Tribal Nations, and then a reappropriating of those lands owned by tribal peoples to the ownership of the United States on a might makes right basis.").

implementing this law, the treaties reserving homelands for American Indians were forever violated by the United States.

Reservation lands allotted to tribal peoples were held in trust status by the United States government and were acknowledged as within the tribal jurisdiction. Fee lands are parcels that private parties purchased on a reservation or within a tribal community boundary. Today, fee lands, and the jurisdiction of the fee lands, remain complicated based on the type of jurisdiction asserted. Thus, the labeling of jurisdiction on reservations as a "crazy quilt" of tribal, federal, and state jurisdiction.[123] The reasons for this labeling will become more apparent following the discussion below.

A. The Montana Test for Jurisdiction over Non-Indians or Non-Members on Fee Lands

The 1981 U.S. Supreme Court decision in *Montana v. United States*[124] dealt with an enactment by the Crow Tribal Council to prevent non-Indians from engaging in hunting within the reservation boundaries.[125] The state of Montana disputed the tribal authority and licensed hunting on fee lands within the reservation.[126] First, the Court, relying on federal common law circumscribing tribal criminal jurisdiction over non-Indians, applied the same rationale to tribal civil jurisdiction. "Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[127] Next, the Court set out a test for determining when a tribal government had the power to exercise jurisdiction on fee lands within tribal boundaries over non-members as follows:

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

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[123] *See* Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 234 (1994).
[124] Montana v. U.S., 450 U.S. 544 (1981).
[125] *Id.* at 549 ("Council has passed several resolutions respecting hunting and fishing on the reservation, including Resolution No. 74-05, the occasion for this lawsuit. That resolution prohibits hunting and fishing within the reservation by anyone who is not a member of the Tribe.").
[126] *Id.* at 548–49.
[127] *Id.* at 565.

> or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[128]

Indian law scholars often refer to the two prongs of the test as the consensual relations prong and the direct effects prong. Applying the test to the tribal resolution, the Court opined that the tribal government lacked jurisdiction to regulate hunting on fee lands by non-Indians within the reservation.[129]

1. The Abstention Doctrine for Federal Courts and Exhaustion of Tribal Court Remedies

Following the *Montana* decision, several non-Indian civil defendants invoked federal court authority seeking to override tribal court adjudications. In *National Farmers Union Insurance Companies v. Crow Tribe of Indians,*[130] the defendants pursued an action in federal court to enjoin a lawsuit proceeding in tribal court, which arose from an insurance claim involving a negligence action when a youth was injured in a school parking lot located on the reservation.[131] The U.S. Supreme Court applied 28 U.S.C. § 1331, the statute conferring federal question jurisdiction for "all civil actions arising under the Constitution, laws, or treaties of the United States," and held that this included the common law developed by the Court regarding tribal court jurisdiction.[132] Through this reasoning, the Court upheld federal court jurisdiction to review whether a tribal court has properly asserted its jurisdiction over non-member defendants in civil actions.[133]

This is a strained interpretation of federal subject matter jurisdiction and ungrounded in U.S. Constitution Article III, Section 2's express "arising under" language stating that "the judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ."[134] The decisions or common law of the U.S. Supreme Court is not included in the list for federal question jurisdiction.

In addition, the Court articulated an abstention doctrine for federal courts, requiring them to stay their decision until a civil defendant exhausts tribal remedies—through every level of the tribal court system—prior to making a federal determination on tribal jurisdiction.[135] "Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the

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[128] *Id.* at 565–66.
[129] *Id.* at 566.
[130] Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985).
[131] *Id.* at 847.
[132] *Id.* at 850.
[133] *Id.* at 851–53.
[134] U.S. CONST. art. III, § 2.
[135] 471 U.S. at 857.

parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review."[136]

In a footnote, the Court detailed three exceptions to the requirement of exhaustion of tribal court remedies. First, where the assertion of tribal court jurisdiction stems from an intent to harass or is conducted in bad faith; second, where the action is "patently violative of express jurisdictional prohibitions;" or third, where exhaustion would be futile as depriving a party of an adequate opportunity to challenge the court's jurisdiction.[137]

The issue of federal court jurisdiction to review a tribal court determination of its jurisdiction arose next in a federal diversity of citizenship action. The U.S. Supreme Court held in *Iowa Mutual Insurance Company v. LaPlante*[138] that federal suits brought pursuant to 28 U.S.C. § 1332 under diversity jurisdiction also required abstention by federal courts and exhaustion of tribal remedies. The initiation of the lawsuit in the Blackfeet Tribal Court against the insurance company included a claim for bad faith in failing to settle a personal injury claim; thus, the federal court action was considered premature.[139] "In diversity cases, as well as federal-question cases, unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs."[140]

2. Judicially Created Limitations on the Extent of Tribal Court Adjudicatory Authority

In the final case in this legal thread, the U.S. Supreme Court opined in *Strate v. A-1 Contractors*[141] that tribal courts generally exercised adjudicatory authority to the extent of their legislative authority, rather than territorial authority.[142] *Strate* involved a highway accident within the reservation where a gravel truck struck the vehicle of a widow, who was also a mother of tribal members.[143] The gravel truck was on the reservation due to a contract with a tribal governmental entity to complete landscaping

[136] *Id.*
[137] *Id.* at 856 n.21.
[138] Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987).
[139] *Id.* at 9–10.
[140] *Id.* at 16.
[141] Strate v. A-1 Contractors, 520 U.S. 438 (1997). Justice Ginsberg delivered the majority opinion.
[142] *Id.* at 442.
[143] *Id.* at 443.

work.[144] First, the Court held that the *Montana* test applied and grounded the assertion as follows:

> As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction. Absent congressional direction enlarging tribal-court jurisdiction, we adhere to that understanding. Subject to controlling provisions in treaties and statutes, and the two exceptions identified in *Montana*, the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally "does not extend to the activities of nonmembers of the tribe."[145]

Next, the Court categorized the area of highway where the accident occurred as subject to a state right-of-way, to be fee land for the application of the *Montana* prongs—consensual relations and direct effects.[146] In the decision, the Court states, "[p]etitioners and the United States refer to no treaty or statute authorizing the Three Affiliated Tribes to entertain highway-accident tort suits."[147] The fact that no treaty or statute was relied on should not be surprising as personal injury claims arising out of automobile use were not contemplated when the parties entered into treaties in the 1800s. In reviewing the conduct of the gravel truck driver and his employer, the Court held that neither the consensual relations nor the direct effects prong from *Montana* allowed for tribal court jurisdiction over the vehicular collision.[148]

Through these decisions, the U.S. Supreme Court has announced limitations previously unknown to tribal court authority and sought to base its reasoning on the status of parcels of land within reservation boundaries and circular ideas concerning federal question and diversity of citizenship jurisdiction under the U.S. Constitution. By instituting a process of federal court analysis of cases originating in tribal courts, the U.S. Supreme Court has created disincentives for the filing of lawsuits in tribal courts where the potential for the civil defendant to litigate through every level of the tribal court system and then seek review of the tribal court's jurisdiction in federal court will be extremely costly and inefficient. In addition, tribal courts are being viewed as administrative bodies, forced to explain the grounds for tribal court jurisdiction for the benefit of a federal court down the line that will conduct its own analysis.[149] This type of subsuming tribal courts into federal judicial processes is ungrounded under the U.S. Constitution and will be more fully discussed below.

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[144] *Id.*
[145] *Id.* at 453 (citing Montana v. United States, 450 U.S. 544 (1981)).
[146] *Id.* at 454–56.
[147] *Id.* at 456.
[148] *Id.* at 456–59.
[149] Phillip Allen White, *The Tribal Exhaustion Doctrine: "Just Stay on the Good Roads, and You've Got Nothing to Worry About,"* 22 AM. INDIAN L. REV. 65, 117–19 (1997).

B. U.S. Supreme Court's Barring of Federal Claims in Tribal Courts

The primary U.S. Supreme Court decision on the filing of federal civil claims in a tribal court forum is *Nevada v. Hicks,* arising from a tribal citizen's lawsuit against state officials claiming they unlawfully searched his reservation home and harassed him based on suspicion of illegal hunting on state lands.[150] Floyd Hicks brought claims in the Fallon-Paiute Shoshone Tribal Court against state game wardens and the state of Nevada based on trespass to land and chattels, abuse of process, and violation of civil rights under 42 U.S.C. § 1983, including denial of equal protection, denial of due process, and unreasonable search and seizure.[151] Both the Tribal Court and Tribal Appellate Court upheld tribal jurisdiction over the claims.[152]

The civil defendants then filed an action in federal district court seeking a declaration that the Tribal Court did not have jurisdiction.[153] On appeal, the U.S. Supreme Court relied on the reasoning in the *Strate v. A-1 Contractors* case on limiting the tribal court's authority to adjudicate claims to its narrow interpretation of tribal legislative authority over domestic tribal matters.[154] In other words, the Court found that the tribal government did not have legislative authority to regulate the conduct of state game wardens or the state of Nevada, and thus, the tribal court lacked subject matter jurisdiction over the federal claims.[155]

The Court reviewed Article III of the U.S. Constitution and held that the "historical and constitutional assumption of concurrent state court jurisdiction over federal law cases is completely missing with respect to tribal courts."[156] Relying on the *Strate* decision, the Court posited that tribal courts are not courts of general jurisdiction, but rather have limited adjudicatory authority over non-members to the extent of tribal legislative authority.[157] In Justice Stevens's concurring opinion, he stated that tribal law controls whether tribal courts are courts of general jurisdiction as there is no federal law addressing the issue.[158]

C. The Flip Side: Enforcement of Tribal Orders by Federal Courts

The Ninth, Tenth, and Eleventh Circuits have grappled with the question of whether under U.S. Constitution Article III, Section 2, there is

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[150] Nevada v. Hicks, 533 U.S. 353, 355–56 (2001).
[151] *Id.* at 356–57.
[152] *Id.* at 357.
[153] *Id.*
[154] *Id.* at 376–82.
[155] *See* COHEN'S HANDBOOK, *supra* note 4, at § 7.02[1][a], at 599–600.
[156] *Hicks*, 533 U.S. at 366–67.
[157] *Id.* at 367.
[158] *Id.* at 402–04.

federal question subject matter jurisdiction to enforce a tribal court judgment filed in a U.S. federal court.[159] In 2007, the Tenth Circuit held in *MacArthur v. San Juan County* that a judgment granting relief, including injunctive relief from a Navajo Nation district court, filed in federal court for enforcement was a foreign judgment not entitled to full faith and credit.[160] As a foreign judgment, the Tenth Circuit applied the principles of comity to determine whether the Navajo Nation district court had proper subject matter jurisdiction over the non-member defendants.[161] Further, the Tenth Circuit stated, "[t]he question of the regulatory and adjudicatory authority of the tribes—a question bound up in the decision to enforce a tribal court order—is a matter of federal law giving rise to subject matter jurisdiction under 28 U.S.C. § 1331."[162]

In 2010, the Eleventh Circuit reached a different result in *Miccosukee Tribe v. Kraus-Anderson Constr. Co.*[163] A tribal court entered a judgment for the Tribe in a contract dispute where both parties had agreed to tribal court jurisdiction for dispute resolution.[164] When the defendant construction company failed to satisfy the judgment, the Tribe brought suit in federal court for enforcement.[165] The Eleventh Circuit held "the Tribe has failed to explain the specific prescription of federal common law that enables it to maintain an action to enforce a judgment handed down by a tribal court in a proceeding to which the defendant consented."[166] The court distinguished the federal common law in U.S. Supreme Court decisions where non-members challenged the tribal jurisdiction from the instant case involving a signed contract.[167]

In its analysis, the Eleventh Circuit summarized the U.S. Supreme Court's reasoning in finding federal question jurisdiction to review tribal court jurisdiction as follows: "[i]n sum, *National Farmers* dictates that a dispute over tribal court jurisdiction is considered a dispute over tribal sovereignty, and therefore—like a dispute over tribal sovereignty—is a matter of federal law to which § 1331 applies."[168] The idea that tribal sovereignty presents a federal question seems to completely miss the point that

[159] *See* MacArthur v. San Juan County, 497 F.3d 1057, 1060 (10th Cir. 2007); Coeur d'Alene Tribe v. Hawks, 933 F.3d 1052, 1053 (9th Cir. 2019); Miccosukee Tribe v. Kraus-Anderson Constr. Co., 607 F.3d 1268, 1274 (11th Cir. 2010).
[160] 497 F.3d at 1067 n.5.
[161] *Id.* at 1066–69.
[162] *Id.* at 1066.
[163] *Miccosukee Tribe*, 607 F.3d at 1274.
[164] *Id.* at 1270.
[165] *Id.*
[166] *Id.* at 1274.
[167] *Id.* at 1274–75.
[168] *Id.* at 1275.

sovereignty is governmental authority as determined by the government asserting its sovereignty.

The Ninth Circuit in 2019 addressed the issue of enforcing a tribal court judgment filed in federal court in *Coeur d'Alene Tribe v. Hawks.*[169] The case involved enforcement of a tribal law judgment against non-members for placing a boat garage and other installments on tribal lands, ordering a civil fine, and authorizing the removal of the encroaching items.[170] The Ninth Circuit noted that the action did not involve any claim arising under federal law, the U.S. Constitution, or a treaty of the United States,[171] but went on to find that tribal court jurisdiction had been limited by U.S. Supreme Court decisions in federal common law. This limitation provided a basis for a substantial question of federal law on whether the tribal court had the authority to enter judgment against the non-members.[172]

These decisions illustrate the circular reasoning created by the U.S. Supreme Court's announcement that tribal courts lack civil jurisdiction over non-members except in certain enumerated situations under the *Montana* test. The overreach exhibited in relation to tribal court jurisdiction has made it necessary for federal courts to engage in mental gymnastics to find subject matter jurisdiction to preside over tribal enforcement actions against non-members.

V. QUESTIONING THE LEGAL BASIS FOR FEDERAL COURT REVIEW OF TRIBAL JURISDICTION

The first question to be raised in examining the U.S. Supreme Court decisions limiting tribal court authority is by what authority does the Court oversee tribal court jurisdiction. In *Nevada v. Hicks*, the Court correctly noted that Article III in the U.S. Constitution does not mention tribal governments or tribal courts.[173] The U.S. Constitution under Article 1, Section 8 references tribal governments in relation to Congress: "[t]o regulate commerce with foreign nations, among the several states, and with the Indian Tribes."[174] Tribal Nations are extra-constitutional and are not bound or otherwise within the jurisdiction of the U.S. Constitution.[175] The U.S. Supreme Court acknowledged the Tribal Nations' extra-constitutionality in the 1896 decision of *Talton v. Mayes*, holding that the

[169] Coeur d'Alene Tribe v. Hawks, 933 F.3d 1052, 1053 (9th Cir. 2019).
[170] *Id.* at 1054.
[171] *Id.* at 1055
[172] *Id.* at 1056.
[173] Nevada v. Hicks, 533 U.S. 353, 366–67 (2001).
[174] U.S. CONST. art. I, § 8.
[175] *See* Talton v. Mayes, 163 U.S. 376, 384 (1896).

Fifth Amendment in the U.S. Bill of Rights is inapplicable to tribal governments, as they existed prior to the Constitution.[176]

In justifying the ability of federal courts to review tribal jurisdiction, two federal statutes are used relating to the federal question statute: 28 U.S.C. § 1331[177] and 28 U.S.C. § 1362.[178] Both statutes center on the types of claims brought into federal courts, and neither allows for the federal court to consider the decisions of another court system, namely tribal courts.[179]

The federal question statute does not authorize review of tribal governmental authority or the jurisdiction of federal courts;[180] rather, it is the enactment of the U.S. Constitution's Article III provisions for federal court jurisdiction.[181] In *National Farmers Union Insurance Companies v. Crow Tribe*, the Court engaged in circular reasoning that since the Court's decisions have limited tribal jurisdiction, an analysis of federal common-law is required to determine whether the tribal court is properly applying tribal jurisdiction.[182]

> The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a "federal question" under § 1331. Because petitioners contend that federal law has divested the Tribe of this aspect of sovereignty, it is federal law on which they rely as a basis for the asserted right of freedom from Tribal Court interference. They have, therefore, filed an action "arising under" federal law within the meaning of § 1331. The District Court correctly concluded that a federal court may determine under § 1331 whether a tribal court has exceeded the lawful limits of its jurisdiction.[183]

This reasoning completely fails to acknowledge that tribal governments exist independently and existed prior to the U.S. government and the U.S. judiciary. Tribal governmental laws defining the civil jurisdiction of tribal courts are not derived from federal law and, thus, are not within the federal

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[176] *Id.* ("It follows that as the powers of local self government enjoyed by the Cherokee Nation existed prior to the constitution, they are not operated upon by the fifth amendment, which, as we have said, had for its sole object to control the powers conferred by the constitution on the national government.").
[177] 28 U.S.C. § 1331 (2018).
[178] 28 U.S.C. § 1362 (2018).
[179] *See* 28 U.S.C. § 1331; 28 U.S.C. § 1362.
[180] 28 U.S.C. § 1331.
[181] Likewise, 28 U.S.C. § 1738 (1948) State and Territorial statutes and judicial proceedings; full faith and credit has not been interpreted to include Indian tribes.
[182] Nat'l Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 852–53 (1985).
[183] *Id.*

question jurisdiction of the U.S. federal courts.[184] Similarly, tribal governments are not diverse citizens and have sovereign immunity from suit in federal forums. Thus, the application of 28 U.S.C. § 1332, conferring diversity of citizenship jurisdiction on the federal courts, is also inapplicable contrary to the holding in *Iowa Mutual Insurance Company v. LaPlante.*[185]

The second statute, 28 U.S.C. § 1362, provides that federal courts "have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."[186] This federal law allows federal courts to hear claims brought by tribal governments but does not provide for federal review of cases originating in tribal courts. Rather, the statute clarifies the federal question jurisdiction of 28 U.S.C. § 1331 to expressly include federal question cases brought by tribal governments in federal courts.

The default justification for the U.S. Supreme Court in curtailing tribal sovereign authority to adjudicate civil claims in tribal forums is the judicially announced "plenary power" exercised by the U.S. Congress[187] and the common-law authority exercised by the Court itself.[188] Neither of these announced powers are authorized by the U.S. Constitution or consented to by Tribal Nations. Indian law scholar, Robert Clinton, has aptly explained, "there is no acceptable, historically-derived, textual constitutional explanation for the exercise of any federal authority over Indian tribes without their consent manifested through treaty. . . . [N]either Congress nor the federal courts legitimately can unilaterally adopt binding legal principles for the tribes without their consent."[189]

VI. CONCLUSION AND RECOMMENDATIONS: TWO PATHS FORWARD OR ONE STEP BACK?

[184] *See* 28 U.S.C. § 1331 (2018).
[185] Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18–20 (1987).
[186] 28 U.S.C. § 1362 (2018).
[187] *See* U.S. v. Kagama, 118 U.S. 375, 384–85 (1886) ("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 never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."); *see also*, Lonewolf v. Hitchcock, 187 U.S. 553, 565 (1903) ("Plenary authority over tribal relations . . . 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.").
[188] *See Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 852–53.
[189] Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 115–16 (2002).

During the negotiations at the Treaty of Niagara in 1764, the two rows wampum belt was exchanged, denoting parallel governments in alliance: one row representing the British government and the other representing Indigenous Nations.[190]

> The treaty at Niagara was entered into in July and August of 1764, and was regarded as "the most widely representative gathering of American Indians ever assembled," as approximately two thousand chiefs attended the negotiations. There were over twenty-four Nations gathered with "representative nations as far east as Nova Scotia, and as far west as Mississippi, and as far north as Hudson Bay." It was also possible that representatives from even further afield participated in the treaty as some records indicate that the Cree and Lakota (Sioux) nations were also present at this event.[191]

As Chief Justice John Marshall asserted in *Johnson v. M'Intosh*, the United States, as the successor government to Great Britain, entered into a relationship with the Tribal Nations.[192] Thus, the two paths forward would continue to allow tribal governments, through tribal court systems, to provide dispute resolution in harmony with tribal values, laws, and ideals. The United States, as an ally to Tribal Nations, would restrain impulses to pressure tribal court systems to replicate Anglo-Saxon norms and laws. Rather, as allies on shared lands, the federal and state court systems would respect the legal processes of tribal courts. This may lead to consensual agreements on the issues of adjudicatory authority and an adherence to principles of comity and full faith and credit for tribal court decisions.

A. Current Quagmire of Creating Common Law Doctrine through "Plenary Power"

One step back is for the U.S. government and courts to continue to coerce tribal courts into lesser and lesser authority and eventually seek to subsume these courts in an act of returning to colonization. These colonizing ideas of supplanting Indigenous legal systems with the surrounding European-based systems crop up from time to time and would swing the pendulum of U.S. Indian policy towards the negation of tribal governance. The pseudo-anthropological spectrum of human evolution

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[190] John Borrows, *Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government*, ABORIGINAL AND TREATY RIGHTS IN CANADA: ESSAYS ON LAW, EQUALITY, AND RESPECT FOR DIFFERENCE, 155, 169 (Michael Esh, ed., 1997).
[191] *Id.* at 170.
[192] Johnson v. M'Intosh, 21 U.S. 543, 584 (1823).

with American Indians depicted on the "primitive" end of the spectrum is a relic of a racist, colonizing past, and should be put to rest once and for all.[193]

Through the circular reasoning of plenary authority, the federal courts continue to overreach into tribal jurisdictions by crafting common law doctrine ungrounded in legal authority. The U.S. judiciary is charged with the authority to regulate governmental authority within the bounds of the U.S. Constitution. The entire line of cases surrounding tribal civil jurisdiction is outside those bounds and sets the course of the U.S. Supreme Court on a legislative track, rather than its judicial function.[194]

As discussed above, the difficulties emerging from this overreach include further encroachments into whether tribal courts may entertain federal claims, whether non-members have exhausted tribal remedies before seeking federal court review of tribal jurisdiction, and whether tribal court judgments based on tribal law are enforceable in federal courts depending on the type of defendants involved. Further, a race-based non-Indian/non-member distinction runs counter to U.S. Constitutional protections. Within this quagmire, tribal consent to U.S. Supreme Court review of tribal jurisdiction is completely lacking.[195]

B. Recommendation for Tribal and U.S. Full Faith and Credit Treaty

As noted in the discussion throughout this article, the U.S. federal courts have repeatedly identified the Tribal Nation courts as entering foreign judgments but have also found federal question jurisdiction to review whether Tribal Nation courts have proper adjudicatory authority over non-members. From this conflictual posture arises the need for a solution based on the government-to-government relationship between Tribal Nations and the United States of America. Within the U.S. Department of Justice, the Office of Tribal Justice would be the proper starting point to conduct consultations with Tribal Nations on consensual treaty agreements for full

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[193] An example of this type of discourse is found in American Indian Tribal Courts: The Costs of Separate Justice by Samuel J. Brakel (1978). "The tribal courts do not work well, and necessary improvements would require time and involve many difficulties. To perpetuate them at all runs counter to the evolutionary trends in the Indians' relation to the dominant culture in this country." SAMUEL J. BRAKEL, AMERICAN INDIAN TRIBAL COURTS: THE COSTS OF SEPARATE JUSTICE 103 (1978).

[194] *See* Angelique EagleWoman, *A Constitutional Crisis When the U.S. Supreme Court Acts in a Legislative Manner? An Essay Offering a Perspective on Judicial Activism in Federal Indian Law and Federal Civil Procedure Pleading Standards*, 114 PENN. ST. L. REV. PENN. STATIM 41, 42 (2010) ("Scholars of federal Indian law have pondered how to curb the highest court in the United States from running rampant over Tribal Nations when the court creates new standards, principles and laws out of thin air.").

[195] *See* Matthew Fletcher, *Tribal Consent*, 8 STAN. J. CIV. RTS. & CIV. LIBERTIES 45, 48 (2012) ("Tribal consent to federal statutes, regulations, and cases that decide matters critical to American Indian people and tribes long has been lacking.").

faith and credit of judgments rendered by tribal courts and by federal courts within proper bounds. The treaties' terms could provide clear guidance regarding the extent of tribal jurisdiction and the extent of federal jurisdiction relating to matters when civil jurisdiction implicates: tribal territory, tribal citizens, tribal court jurisdiction, U.S. citizens, and federal court jurisdiction.

Rather than allow the U.S. Supreme Court to whole cloth create common law doctrines extending federal jurisdiction ungrounded in the U.S. Constitution or federal law, the treaty-making authority of the United States would be an appropriate alternative to realign the governmental understandings involving tribal court and federal court jurisdiction vis-à-vis each other.[196] By re-engaging the treaty-making process, the overreach of the federal courts and the uncertainty around enforcement of tribal court judgments in those same courts would be settled through sovereign consent.

As an initial matter in such a treaty process, the United States Supreme Court should abandon the circular reasoning the Court previously used to limit the civil jurisdiction of tribal courts. Tribal civil jurisdiction should extend to the limits of the tribal territorial boundaries and be fairly applicable to all who enter the tribal territory.[197] In recognizing the competency and cultural importance of tribal court jurisprudence, the U.S. government, as a treaty partner, has an obligation to join together with Tribal Nations for the benefit of justice throughout mid-North America.

[196] *See* EagleWoman, *Bringing Balance, supra* note 8, at 704 ("Contemporary treaty-making would most likely center on the areas that have remained controversial as the United States has continued to expand and encroach on Indian Country. Treaty terms regarding the jurisdiction of Tribal Nations within their territories and limits on federal and state jurisdiction over those territories would necessarily be considered.").

[197] *See* G.A. Res. 61/295 (XXXIV), at 24 (Sept. 13, 2007) ("Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.").