
ARTICLE

A COMITY OF ERRORS: WHY *JOHN V. BAKER* IS ONLY A TENTATIVE FIRST STEP IN THE RIGHT DIRECTION

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This Article examines the role of tribal courts in the administration of justice in rural Alaska. This Article begins by describing the relationship between Native tribes in the Lower Forty-Eight and the U.S. government, and continues by contextualizing and comparing this relationship with the relationship between Alaska Native tribes and the State of Alaska. The Article progresses by providing an overview and analysis of the comity solution articulated in the recent John v. Baker decision, and continues by acknowledging that, although the decision is an important step in recognizing tribal sovereignty, it fails to create a coherent partnership between Alaska tribal courts and the Alaska court system. The author concludes by proposing that Alaska's administration of justice would be better served by replacing John v. Baker's comity solution with full faith and credit recognition of tribal court decisions.

I. INTRODUCTION

I have heard talk and talk, but nothing is done. Good words do not last long unless they amount to something.

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I am tired of talk that comes to nothing.

It makes my heart sick when I remember all the good words and broken promises.

There has been too much talking by men who had no right to talk. Too many misrepresentations have been made; too many misunderstandings have come up. . . .

When the white man treats an Indian as they treat each other, then we will have no more wars. We shall all be alike—brothers of one father and one mother, with one sky above us and one government for all.

— Chief Joseph, Nez Perce (1879)¹

Ever since the infancy of this Union, the federal government and the many states have attempted to interpret, understand, and shape their relations with the many tribes that were the original sovereigns of this continent.² Originally, the Founding Fathers sought to treat the Indian tribes as sovereigns over which the federal government held exclusive authority to shape relations with the United States.³ Aside from the few guidelines established in the Constitution,⁴ the Framers gave little thought as to how relations with the Indian tribes might develop.⁵

1. THE WISDOM OF THE GREAT CHIEFS: THE CLASSIC SPEECHES OF RED JACKET, CHIEF JOSEPH AND CHIEF SEATTLE 58-59, 61 (Kent Nerburn ed., 1994).

2. The Native people of this continent have long been considered in our jurisprudence to be self-governing political communities that possess an inherent sovereignty pre-dating the arrival of Europeans. *See Duro v. Reina*, 495 U.S. 676, 685-86 (1990); *Montana v. United States*, 450 U.S. 544, 564 (1981); *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973); *Worcester v. Georgia*, 31 U.S. 515, 580 (1832). With that sovereignty comes the inherent power “to determine what shall be an offense against its authority and to punish such offenses.” *Wheeler*, 435 U.S. at 320 (referring to state and federal sovereignty).

3. *See Iron Crow v. Ogallala Sioux Tribe of the Pine Ridge Reservation*, 129 F. Supp. 15, 19 (D.S.D. 1955):

That the founding fathers regarded Indian tribes as sovereigns is further exemplified by the fact that they dealt with them by treaty, both under the Articles of Confederation, the first one of which was made with the Delaware Nation in 1778 . . . and under the Constitution, the first such treaty being with the Creek Nation in 1790.

4. Indian tribes are only expressly mentioned three times in the Constitution. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 207 (1982 ed.). Article I, section 8 of the United States Constitution grants Congress the authority to “regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” Article I, section 2 originally addressed how representatives and taxes would be apportioned among the states, “excluding Indians not taxed,”

Beginning in the late eighteenth century and continuing for most of the nineteenth century, Congress established that the treaty process would be the exclusive means for developing relationships with the Indian tribes and nations.⁶ As white settlers continued to push westward and demand more access to land and resources, conflicts and treaties between the federal government and the Indian tribes became more frequent. On March 3, 1871, the

and was subsequently modified by the Fourteenth Amendment to exclude any reference to slavery. It retained the portion referring to “Indians not taxed.”

Even with this limited guidance, however, the Constitution recognizes tribal governments as sovereign alongside states, foreign nations and the federal government. See Hon. Daniel K. Inouye, *Tribal Sovereignty and the Administration of Justice in Indian Country*, Remarks at *Civil Jurisdiction of Tribal and State Courts: From Conflicts to Common Ground, A National Conference* (June 30-July 2, 1991), in CONFERENCE PROCEEDINGS REPORT 7 (Linda K. Ridge ed.) [hereinafter “CONFERENCE PROCEEDINGS REPORT”]; see also *Iron Crow*, 129 F. Supp. at 19 (“It would therefore appear that the Constitution not only acknowledges the authority of the federal government with regard to Indian tribes but also recognizes the existence of Indian tribes as political sovereigns.”).

5. See Curtis G. Berkey, *United States—Indian Relations: The Constitutional Basis*, in EXILED IN THE LAND OF THE FREE 190, 224 (Oren R. Lyons & John C. Mohawk eds., 1992) (noting that the Framers were only concerned with ensuring federal supremacy over Indian relations, not with defining the nature of that relationship). One scholar has suggested that the Framers failed to put more consideration into the relationship with Indian tribes because the Framers “almost certainly assumed that tribes would simply die out under the combined weight of capitalism, Christianity, and military power.” CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 103 (1987).

6. See U.S. CONST. art. I, § 10, cl. 1; Act of June 30, 1984, ch. 161, § 12, 4 Stat. 730 (codified at 25 U.S.C. § 177 (1994)). The Act reads as follows:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat [sic] with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of \$1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

As a result, the development of relationships with Indian tribes was entirely vested in the federal government. See *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979); *McClanahan v. State Tax Comm’n of Arizona*, 411 U.S. 164 (1973); *Williams v. Lee*, 358 U.S. 217 (1959); *Worcester v. Georgia*, 31 U.S. 515 (1832).

treaty process ended.⁷ It was only four years prior to the termination of that phase in federal Indian policy that the United States purchased the Alaska territory from the occupying Russian government.⁸ Because of this short time frame, the indigenous peoples of Alaska never entered into any treaties with the United States.⁹ The principles of federal Indian law that developed regarding the tribes of the Lower Forty-Eight seemed inapplicable to the Natives of Alaska.¹⁰

Nothing in the history surrounding the treaty process indicates that Congress or the President considered tribes in Alaska to be

7. See Appropriations Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (2000)); *Antoine v. Washington*, 420 U.S. 194, 201-04 (1975). One commentator has noted that this policy shift was based on the decision of Congress to no longer treat Indian tribes as sovereign nations. See ROBERT D. ARNOLD ET AL., *ALASKA NATIVE LAND CLAIMS* 51 (1978). The decision to terminate the treaty process was not based on a shifting view toward Indian tribes, however, but on increasing inter-institutional jealousy by the House of Representatives over the Senate's exclusive treaty power and its ability to shape federal Indian policy. Also, Congress wanted to end what had been viewed as the intolerable conduct of the Office of Indian Affairs in negotiating false or fraudulent treaties which it intended to ignore or violate. See COHEN, *supra* note 4, at 106-07; FRANCIS PAUL PRUCHA, *AMERICAN INDIAN POLICY IN CRISIS* 67 (1976); LAURENCE F. SCHMECKEBIER, *OFFICE OF INDIAN AFFAIRS* 55-58 (1927). The Act of 1871 did not alter the nature or status of Indian governments; it merely stated that the executive branch would no longer engage in treaties with tribes. See *Contemporary Indian Sovereignty*, in *RETHINKING INDIAN LAW* 109, 115 (National Lawyers Guild Committee on Native American Struggles ed., 1982).

8. See Treaty of Cession, Act of May 28, 1867, 15 Stat. 539. It is important to note for this discussion that the Treaty of Cession declared that Indian tribes of Alaska would be subject to the same laws that applied to the aboriginal tribes throughout the United States. See *id.* art. III.

Even though Congress did not completely terminate the policy of negotiating treaties with Indian tribes until 1871, it foreshadowed this policy shift in 1867, the same year as the purchase of the Alaska territory, by enacting a law that repealed "all laws allowing the President, the Secretary of the Interior, or the commissioner of Indian Affairs to enter into treaties with any Indian tribes." Act of Mar. 25, 1867, ch. 13, § 6, 15 Stat. 7, 9; see also Act of Apr. 10, 1869, ch. 16, § 5, 16 Stat. 13, 40. Although this law was repealed a few months later, the Act signaled the growing dissatisfaction with the House because it excluded Indian affairs from its control. See COHEN, *supra* note 4, at 107.

9. See *John v. Baker*, 982 P.2d 738, 769 (Alaska 1999) (Matthews, C.J., and Compton, J., dissenting); *Atkinson v. Haldane*, 569 P.2d 151, 154 (Alaska 1977); COHEN, *supra* note 4, at 739.

10. See DAVID S. CASE, *THE SPECIAL RELATIONSHIP OF ALASKA NATIVES TO THE FEDERAL GOVERNMENT* 2 (Alaska Native Foundation 1978).

fundamentally distinct from those in the rest of the nation.¹¹ The need for treaties simply did not arise until the first major gold discovery in the new territory, near Juneau, in 1880.¹² This lack of a treaty relationship is the basic legal distinction between the tribes of Alaska and those in the Lower Forty-Eight.¹³ Some have suggested that because Alaska Native villages organized their leadership differently than Lower Forty-Eight tribes, they should not be treated like outside tribes.¹⁴ This oversimplification ignores the reality that tribes in Alaska have always shared the same goals of achieving self-government and enforcing the guarantees on their rights to use their land as do tribes of the Lower Forty-Eight.¹⁵

11. Apparently, the treatment of Alaska Natives was based primarily on their former classification under Russian rule. *See id.*

12. Prior to this time, white settlers did not encroach upon Alaska Native territory to any degree that necessitated an agreement or settlement between Natives and the federal government. *See* ARNOLD ET AL., *supra* note 7, at 66 (observing that without significant movement of white settlers into Alaska, “there was not the same urgency to extinguish Indian title as existed in the American West, [and therefore] there was no need to make treaties with native tribes”); *see also* Moses v. Native Vill. of Mekoryuk, No. 3AN-98-03859 c/w 3AN-97-07291 CI, Decision and Order, 11 (Alaska Super. Ct., Jan. 8, 1999) (noting that “political pressure to dispossess aboriginal lands was not as great as it was in the other . . . states”).

13. Alaska, however, does not have as unique of a history as this distinction might imply. Tribes in several states, particularly California, New Mexico and Oklahoma, also have experiences that distinguish them from the model of the “typical” Indian tribe. *See* Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364, 54,365 (Oct. 21, 1993).

14. *See id.*

15. Regardless of what form of government tribes have chosen, traditional governments and traditional leaders almost uniformly assert the full rights of nationhood: the right to self-government, freedom from intervention, territorial integrity and other essential rights attaching to the status of nationhood. *See International NGO Conference on Discrimination Against Indigenous Populations in the Americas—1977*, 3 AM. INDIAN. J. 1 (Nov. 1977); THOMAS R. BERGER, VILLAGE JOURNEY 120 (1985) (“Like the Creeks, Alaska Natives want to govern themselves, and they also insist on guarantees for their land. It is easy to see a continuity, a coherence, a connectedness in these demands extending in an unbroken line from before Alexander McGillivray’s time to the present.”) Alexander McGillivray was a tribal leader who, along with thirty other Indian leaders, traveled to meet President George Washington in New York to sign a treaty in 1790. Part of the fallacy in the analysis put forth by those seeking to define some arbitrary distinction between Lower Forty-Eight tribes and Alaska tribes based on what form of government they traditionally employed rests in the belief that non-Natives define what it means to be a Native community. *See* WILKINSON, *supra*

Alaska Native groups have endured a long history of legal disparity as a result of this difference. In 1955, the U.S. Supreme Court declared that natural resources taken from Alaska Native lands were not entitled to compensation.¹⁶ The Court commented that case law consistently found that absent some explicit recognition by Congress for some possessory right, no compensation was required when Indian country was taken.¹⁷ The Court added that, as “[e]very American schoolboy knows,” all Indians, including Alaska Natives, were deprived of their lands by being conquered by American troops, not through treaties.¹⁸

Following the passage of the Alaska Native Claims Settlement Act (“ANCSA”) in 1971,¹⁹ courts and commentators were divided about the status of tribal sovereignty or Indian country in Alaska.²⁰

note 5, at 77-78 (noting that the existence and identity of a tribe comes from its own members, not from external authorities).

16. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 288-91 (1955).

17. *See id.* at 277.

18. *Id.* at 289-90 (“Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors’ will that deprived them of their land.”). While originally intended as a personal jab against Felix Cohen, the pre-eminent author on federal Indian law, this unfounded assertion found its way into a significant U.S. Supreme Court case. *See* Eric Kades, *The Dark Side of Efficiency: Johnson v. M’Intosh and the Expropriation of American Indian Lands*, 148 U. PENN. L. REV. 1065, 1129-30 (2000) (noting that Justice Reed’s comments were meant to correct Felix Cohen’s view that lands were purchased or otherwise acquired peacefully from the Natives of this continent); David Wilkins, *Quit-Claiming the Doctrine of Discovery: A Treaty-Based Reappraisal*, 23 OKLA. CITY U. L. REV. 277, 280-81 (1998) (noting that Justice Reed’s comments in the *Tee-Hit-Ton* case contained “one of the most glaring misrepresentations of fact ever uttered by a Supreme Court Justice. There is little in the historical record to corroborate Justice Reed’s contention.”); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 32 (1996) (“Every learned schoolchild would be appalled by this point, for it cannot be defended as accurate, if incomplete. Instead, it is just plain wrong, a mixture of myth and ethnocentrism masquerading as past legal practice.”). Frickey added that “[o]ne of the oddest things about Justice Reed’s dictum is that *Tee-Hit-Ton* involved the taking of aboriginal property interests in Alaska, where no Seventh Cavalry ever waged war upon Natives.” *Id.* at 32 n.11.

19. Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-29 (1994)). This act was passed to resolve disputed land claims with Alaska Natives.

20. *See, e.g., Nenana Fuel Co. v. Native Vill. of Venetie*, 834 P.2d 1229, 1234 (Alaska 1992) (Moore, J., concurring) (observing that “no court has expressly considered whether a Native group which once resided on a federally recognized

Seeking to clarify the issue, the Department of the Interior, and later, Congress declared the inherent sovereignty of tribes in Alaska and their status as federally recognized tribes.²¹ Despite this declaration, state courts continue to deny the sovereign status of tribes in Alaska.²² This deviates substantially from the well-established principle that recognition of tribal governments is a non-justiciable political question that Congress and the executive branch should settle.²³

Prior to its decision in *John v. Baker*,²⁴ the Alaska Supreme Court consistently had rejected the notion of tribal sovereignty in Alaska with the exception of one tribe that occupied reservation lands in the Southeast.²⁵ In *Metlakatla Indian Community, Annette Island Reserve v. Egan*,²⁶ the court held that because of the lack of a treaty relationship between the federal government and Alaska's

reservation in Alaska constitutes a sovereign Indian tribe after the passage of ANCSA"); *Jones v. State*, 936 P.2d 1263, 1265 (Alaska Ct. App. 1997) (noting that while the Indian country statute refers to "Indian allotments," it does not refer to Native Alaska allotments, thus making it unclear as to whether Indian country exists in Alaska); Benjamin W. Thompson, *The De Facto Termination of Alaska Native Sovereignty: An Anomaly in an Era of Self-Determination*, 24 AM. INDIAN L. REV. 421, 443 (2000) (commenting that both Public Law 280 and ANCSA contribute to the elimination of tribal sovereignty in Alaska); Ann Tweedy, *The Liberal Forces Driving the Supreme Court's Divestment and Debasement of Tribal Sovereignty*, 18 BUFFALO PUB. INT. L.J. 147 (2000) (observing that "ANCSA's provisions merely changed the nature of the land title held by Natives; it did not purport to extinguish, or even limit, tribal sovereignty"); Marilyn J. Ward Ford, *Indian Country and Inherent Tribal Authority: Will They Survive ANCSA?*, 14 ALASKA L. REV. 443, 450 (1997).

21. See Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364 (Oct. 21, 1993); Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791 (1994) (codified at 25 U.S.C. § 479a (1994)).

22. See, e.g., *Moses v. Native Vill. of Mekoryuk*, 3AN-97-07291 CI, Decision and Order (Alaska Super. Ct., Jan. 8, 1999) (refusing to recognize the authority of the Secretary of Interior to recognize Alaska Native groups as tribes and opining that the congressional act did not recognize the inherent sovereignty of Alaska's tribes), available at <http://www.alaskabar.org/opinions/42.html>.

23. See *United States v. Sandoval*, 231 U.S. 28, 46 (1913); *United States v. Dewey County*, 14 F.2d 784, 788 (D.S.D. 1926); *Atkinson v. Haldane*, 569 P.2d 151, 162-63 (Alaska 1977).

24. 982 P.2d 738 (Alaska 1999).

25. See *Atkinson*, 569 P.2d at 162 (finding that, "despite its unique history," the Metlakatla Indian Community was entitled to sovereign immunity).

26. 362 P.2d 901 (Alaska 1961), vacated by 369 U.S. 45 (1962).

tribes, “[t]here are not now and never have been tribes of Indians in Alaska as that term is used in federal Indian law.”²⁷

In its 1988 decision *Native Village of Stevens v. Alaska Management & Planning*,²⁸ the court pronounced that most Native groups in Alaska were “not self-governing or in any meaningful sense sovereign.”²⁹ The *Stevens* court added that even if the federal government treats a Native village as a tribe, for example, through implementing a tribal constitution under the Indian Reorganization Act,³⁰ this treatment does not afford a village tribal status.³¹ The dissent noted, however, that it was up to Congress to waive a tribe’s sovereign immunity, not the courts.³²

27. *Id.* at 917-18. The court added that “no permanent reservations have ever been created for Indians in Alaska.” *Id.* at 918. It is clear, then, that the Alaska Supreme Court’s earliest decision on Indian sovereignty in Alaska was based entirely on the State’s lack of both a treaty relationship and reservations.

28. 757 P.2d 32 (Alaska 1988).

29. *See id.* at 34. The Alaska Supreme Court found that this conclusion was supported by its previous decisions in *Atkinson*, 569 P.2d 151 and *Metlakatla Indian Community*, 362 P.2d 901. The court also noted that “the history of the relationship between the federal government and Alaska Natives up to the passage of the Alaska Indian Reorganization Act, 49 Stat. 1250 (1936), indicates that Congress intended that most Alaska Native groups not be treated as sovereigns.” *Stevens*, 757 P.2d at 34. Rather than conducting its own analysis, the court relied primarily on a governor’s task force report in reaching this conclusion. *See id.* at 37-39. It has been noted that the *Stevens* case was the progenitor of an ideological shift in the Alaska Supreme Court. *See* DAVID S. CASE & DAVID VOLUCK, *ALASKA NATIVES AND AMERICAN LAWS* (2d ed. forthcoming 2001) (advance copy on file with author).

30. Act of June 18, 1934, 48 Stat. 9847 (codified at 25 U.S.C. §§ 461-72 (1994)).

31. *See Stevens*, 757 P.2d at 40. This analysis ignored the long-settled notion that recognition of tribes by the federal government is a non-justiciable political question. *See* *United States v. Sandoval*, 231 U.S. 28, 46 (1913); *United States v. Dewey County*, 14 F.2d 784, 788 (8th Cir. 1926); *Atkinson*, 569 P.2d at 162-63.

32. *See Stevens*, 757 P.2d at 43-44 (Rabinowitz, C.J., and Compton, J., dissenting). The dissent added that it was not relevant that Congress never specifically recognized the village as a tribe; what was more relevant was that Congress had never waived the village’s sovereignty. *See id.* at 47; *see also* *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (noting that even though Congress has the power to regulate Indian affairs, local powers of Indian tribes are not necessarily derived from the Constitution). The Court reasoned as follows:

The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. . . . That Congress has in certain ways regulated the manner and extent of the tribal power of self-government does not mean that Congress is the source of that power.

United States v. Wheeler, 435 U.S. 313, 323, 328 (1978).

With the notable exception of Governor Cowper's short-lived order recognizing tribal sovereignty in 1990, the executive branch of Alaska also has a history of refusing to recognize tribal sovereignty.³³ In 1969, the Republican administration was steadfastly opposed to the land settlement and compensation demands that were made during the ANCSA development process.³⁴ As recently as 1991, the State of Alaska refused to recognize Native Alaskan communities as Native American tribes³⁵ and no formal means of communication existed between the two groups.³⁶

This opposition to the exercise of tribal sovereignty in Alaska came to a head in 1986 when the State challenged the authority of the Village of Venetie Tribal Government to tax business activities in which the State was a joint venture partner on land acquired through ANCSA.³⁷ Although the district court found that ANCSA had extinguished Indian country, the Ninth Circuit, utilizing a multi-factor approach, reversed.³⁸ The U.S. Supreme Court rejected the Ninth Circuit's multi-factor and instead implemented a narrower two-factor approach, eventually concluding that lands transferred to Native villages under ANCSA do not constitute Indian country as defined in 18 U.S.C. § 1151(b).³⁹

In 1999, Governor Tony Knowles invited tribal representatives to meet with state cabinet members to negotiate an accord, on a

33. See Administrative Order No. 123, Sept. 10, 1990, <http://www.gov.state.ak.us/admin-orders/123.html>.

34. See Alexander M. Ervin, *The Emergence of Native Alaska Political Capacity, 1959-1971*, MUSK OX J. 19 (1976), available at http://www.alaskool.org/projects/ancsa/ARTICLES/ervin1976/Ervin_MuskOx.htm (last visited Mar. 28, 2001).

35. See Administrative Order No. 125, Aug. 16, 1991, <http://www.gov.state.ak.us/admin-orders/125.html>, whereby Governor Walter J. Hickel declared that Alaska is "one country, one people" and "opposes expansion of tribal governmental powers and the creation of 'Indian Country' in Alaska." This order specifically revoked a previous order issued during Governor Cowper's administration, whereby the State of Alaska recognized the sovereignty of Indian tribes in Alaska and clearly defined the jurisdictional authority of both reservation and non-reservation tribes. See Administrative Order No. 123, *supra* note 33.

36. See State Action Plan Summaries/Recommendations, in CONFERENCE PROCEEDINGS REPORT, *supra* note 4, at 24.

37. See *Alaska v. Native Vill. of Venetie Tribal Gov't.*, 522 U.S. 520, 525 (1998).

38. See *Alaska ex rel. Yukon Flats Sch. Dist. v. Native Vill. of Venetie Tribal Gov't.*, 101 F.3d 1286, 1292-93 (9th Cir. 1996) (holding that a six-factor test should be used to interpret the term "dependent Indian communities" found in 18 U.S.C. § 1151(b)).

39. See *Venetie*, 522 U.S. at 530-32 (noting that the two factors contemplated by Congress include a federal set-aside and federal superintendence).

government-to-government basis, regarding the relationship between tribal governments and state agencies.⁴⁰ In the months that followed the meeting, Governor Knowles and tribal leaders formed the State-Tribal Relations Team,⁴¹ which ultimately led to the State's recognition of the inherent sovereignty of Alaska's tribes.⁴² The State also pledged to follow the federal policy of dealing with Alaska's tribes on a government-to-government basis.⁴³ Despite the State's policy, Alaska's federal congressional delegation opposed such recognition.⁴⁴

It was against this historical backdrop that the Alaska Supreme Court faced its most recent challenge involving the question of tribal sovereignty in Alaska. In *John v. Baker*,⁴⁵ a child custody dispute between two unmarried parents, the court recognized the inherent sovereignty of Alaska's tribes and declared that, despite the *Venetie* decision, tribes could share concurrent jurisdiction over

40. See Don Hunter, *State, Tribes to Negotiate Accord*, ANCHORAGE DAILY NEWS, Dec. 7, 1999, at B1.

41. See Governor Tony Knowles, *State-Tribal Relations Team*, at <http://www.gov.state.ak.us.Strt/index> (last visited Mar. 28, 2001).

42. See Administrative Order No. 186, Sept. 29, 2000, <http://www.gov.state.ak.us/admin-orders/186.html>; see also *infra* note 299 and accompanying text.

43. See *id.*:

I declare that it is the commitment and policy of the State of Alaska, consistent with the Constitutions of the United States and the State of Alaska, to work on a government-to-government basis with Alaska's sovereign Tribes, which deserve the recognition and respect accorded to other governments. . . .

The State recognizes the value in establishing a comprehensive and mutually respectful State-Tribal relations policy in an effort to promote and enhance Tribal self-government, economic development, a clean and healthy environment, and social, cultural, spiritual, and racial diversity.

See also *Government to Government Relations with Native American Tribal Governments*, 59 Fed. Reg. 22,951 (1994):

The United States government has a unique legal relationship with Native American tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions. As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty.

44. See Letter from Frank Murkowski, United States Senator, Ted Stevens, United States Senator, and Don Young, Congressman, to Tony Knowles, Governor, State of Alaska (Sept. 28, 2000) (on file with author) (expressing concern over the "extraordinary implications of the creation of tribal authority and jurisdiction in the State" and requesting that the governor suspend any further administrative action on the issue).

45. 982 P.2d 738 (Alaska 1999).

their members with the State.⁴⁶ The court also declared that when state courts are faced with an existing tribal court decree, they should recognize the tribal court's decision on the basis of comity, not full faith and credit.⁴⁷

This Article provides an overview of the *John v. Baker* decision and assesses its strengths and weaknesses. Part II provides an historical and legal overview of the principles that support tribal sovereignty in Alaska. Part III promises a detailed account of the *John v. Baker* decision. Part IV identifies and analyzes what this author believes are the decision's two key weaknesses and its primary strengths. Part IV also offers some alternatives to the court's decision and provides a vision for the role of tribal courts in the administration of justice in rural Alaska. Specifically, Part IV proposes that, under the modern concept of federalism and its evolution to include tribal governments, the most appropriate doctrine for recognizing tribal court decisions in Alaska is through full faith and credit. Part IV argues that this method of recognition fosters respect and partnership between court systems, something that is sorely lacking in Alaska today. Part IV also suggests that in the absence of full faith and credit recognition, the Alaska Supreme Court needs to solidify the burden of proof required to ignore a tribal court decision and should apply the abstention doctrine to tribal court proceedings. Finally, Part IV argues that as a matter of recognizing inherent sovereignty, tribal courts should have primary jurisdiction in matters affecting internal affairs and domestic relations. Part V concludes by suggesting that the steps taken in *John v. Baker* should be expanded to increase respect for tribal courts.

II. THE FOUNDATION FOR TRIBAL SOVEREIGNTY IN ALASKA: A CENTURY OF RECOGNITION BY CONGRESS

Even though Congress has spoken on the issue, one can never discuss tribal court authority in Alaska without discussing the sovereignty of Alaska's tribes. Unlike its predecessors, the *John v. Baker* court acknowledged the inherent sovereignty of Alaska's tribes. Despite this recognition, tribal sovereignty in Alaska has been challenged and decried by its opponents. Those who oppose tribal sovereignty in Alaska claim that Congress never sought to extend the same sovereign treatment to Alaska Natives as it did in the Lower Forty-Eight. Inherent or retained sovereignty is perhaps the only principle of federal Indian law that has remained intact since Chief Justice Marshall's early pronouncements. It is

46. *See id.* at 759-61.

47. *See id.* at 762-63.

merely the reach of that sovereignty, that is, the jurisdiction over which tribes may assert themselves, that has been limited. As many courts have recognized, Congress may only *limit* that authority; Congress may not grant it.⁴⁸ In addition, those who argue in opposition to tribal sovereignty in Alaska fail to recognize that Congress has been including Alaska Natives within the broader scope of federal Indian legislation for over a hundred years. This section briefly explores the application of these principles in Alaska.

Long before Alaska Natives entered into the discussion, the federal government began to shape and redefine its view regarding the role of Indian tribes in the new Republic. Chief Justice John Marshall made the first judicial attempt to define that relationship with a series of cases known as the “Marshall Trilogy.”⁴⁹ One of the more significant assertions in that series of cases was that Indian tribes were “domestic dependent nations” instead of foreign nations.⁵⁰ Chief Justice Marshall also noted that Indian tribes were “distinct, independent political communities,” and that they did not surrender their original sovereignty to the conquering United States.⁵¹

Quite interestingly, while Chief Justice Marshall was coming to this conclusion, the Russian government, in the Treaty of Cession, concluded that the “dependent” Natives of Alaska would also be subject to Russian laws and requirements.⁵² In the Treaty of Cession, there is a reference to “uncivilized tribes.”⁵³ While some

48. See COHEN, *supra* note 4, at 231 (quoting *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978)):

Perhaps the most basic principle in all Indian law, supported by a host of decisions, is that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather “inherent powers of a limited sovereignty which has never been extinguished.”

49. See *Worcester v. Georgia*, 31 U.S. 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Johnson v. M’Intosh*, 21 U.S. 543 (1823).

50. *Cherokee Nation*, 30 U.S. at 17; see also *Fredericks v. Eide-Kirschmann Ford, Mercury, Lincoln, Inc.*, 462 N.W.2d 164, 167 (N.D. 1990) (“We recognize that there is a difference between a ‘foreign nation’ and an ‘Indian nation’”); *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 72 (1962) (discussing early westward migration and how “the United States began to consider the Indians less as foreign nations and more as a part of our country.”).

51. *Worcester*, 31 U.S. at 559-61.

52. See ARNOLD ET AL., *supra* note 7, at 21.

53. See Act of June 20, 1867, art III, 15 Stat. 539, which reads in pertinent part: Citizenship of inhabitants; Uncivilized tribes. The inhabitants of the ceded territory . . . may return to Russia . . . but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized na-

have suggested that the reference to “uncivilized” meant that tribes in Alaska were not as “civilized” as Lower Forty-Eight tribes,⁵⁴ this was most likely a reflection of the general view of Western governments regarding the sophistication of Indian tribes.⁵⁵

tive tribes, shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens. . . . The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

54. See, e.g., *Metlakatla Indian Cmty., Annette Island Reserve v. Egan*, 362 P.2d 901, 918 (Alaska 1961) (“There was no tribal organization as that term is generally understood”). See generally Donald Craig Mitchell, *Alaska v. Native Village of Venetie: Statutory Construction or Judicial Usurpation? Why History Counts*, 14 ALASKA L. REV. 353 (1997) (providing an historical analysis that enforces this proposition). But see Sybil R. Kiskan, *The Uncertain Legal Status of Alaska Natives After Native Village of Stevens v. Alaska Management & Planning: Exposing the Fallacious Distinctions Between Alaska Natives and Lower 48 Indians*, 31 ARIZ. L. REV. 405, 412-13 (1989) (observing that “even though Alaska Natives originally came under Russian Rule, after the Treaty of Cession, the federal government maintained the same relationship with ‘uncivilized native tribes’ as it did with Lower 48 Indian tribes. Consequently, prior Russian rule does not suggest Alaska Natives be denied sovereign status.”).

55. See F. DE VICTORIA, *DE INDIS ET DE IVRE BELLI RELECTIONES* 160-61 (Nys. trans. 1917) (discussing sixteenth century claims that the native people of the western hemisphere were “unfit to found and administer a lawful State up to the standard required by human and civil claims”); Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 841 (1990) (noting that “Euro-Americans claimed enlarged authority over Indian communities by erroneously suggesting that Indian bands lacked social organization and government”); see also *Montoya v. United States*, 180 U.S. 261 (1901). In *Montoya*, our highly intellectual United States Supreme Court clearly reflected this patronizing and ignorant view of Indian cultures, stating that

[t]he North American Indians do not and never have constituted “nations”. . . . Owing to the natural infirmities of the Indian character, their fiery tempers, impatience of restraint, their mutual jealousies and animosities, their nomadic habits, and lack of mental training, they have as a rule shown a total want of that cohesive force necessary to the making up of a nation in the ordinary sense of the word. As they had no established laws, no recognized method of choosing their sovereigns by inheritance or election, no officers with defined powers, their governments in their original state were nothing more than a temporary submission to an intellectual or physical superior, who in some cases ruled with absolute authority, and in others, was recognized only so long as he was able to dominate the tribe by the qualities which originally enabled him to secure their leadership. In short, the word “nation” as applied to the uncivilized Indians is so much of a misnomer as to be little more than a compliment.

Id. at 265. The Alaska Supreme Court also stated in *Metlakatla Indian Community* that the Metlakatla “adapted quickly to the white man’s way of life and long ago discarded primitive customs which served no useful purpose.” 362 P.2d at 918.

Congress's decision to terminate the treaty process with Indian tribes, in 1871, meant that relations with the many Native groups in Alaska would have to evolve along a different path.⁵⁶ From the beginning, that relationship developed through the enactment of statutes.⁵⁷ For nearly a hundred years, Congress has included Alaska Native groups within the scope of federal legislation designed to shape federal Indian policy. The treatment of Native Alaska tribes with respect to the allotment period is illustrative.⁵⁸ Although the allotment period began for tribes in the Lower Forty-Eight with the enactment of the Dawes Act in 1888,⁵⁹ Congress extended the opportunity to Alaska Natives in 1906⁶⁰ and 1926.⁶¹ While the goals of the allotment acts in Alaska were different from the allotment process in the Lower Forty-Eight,⁶² the resulting effect of individualized Native ownership in land title vastly was similar. The federal government also believed that the goal of the general allotment

56. See *supra* note 7 and accompanying text.

57. As the U.S. Supreme Court noted in *Antoine v. Washington*, the termination of the treaty process in 1871 "meant no more, however, than that after 1871 relations with Indians would be governed by Acts of Congress and not by treaty." 420 U.S. 194, 203 (1975).

58. The allotment process was touted as a means to assimilate Indians into a Western civilization model of land ownership by replacing tribal land ownership with individualized ownership. See Cohen, *supra* note 4, at 128-29.

59. General Allotment Act, ch. 119, 24 Stat. 388 (1887). The premise underlying the Dawes Act was to "civilize" the Indian people and to completely eliminate Indian tribal cultures:

The aim was to do away with tribalism, with communal ownership of land, with concentration of Indians on reservations, with the segregation of Indians from association with good white citizens, with Indian cultural patterns, with Native languages, with Indian religious rites and practices—in short, with anything that deviated from the norms of civilization as practiced and proclaimed by the white reformer's themes.

AMERICANIZING THE AMERICAN INDIAN: WRITINGS BY "FRIENDS OF THE INDIAN" 1880-1900, 7-8 (Francis P. Prucha ed., 1973). For a comprehensive discussion on the allotment policy, see generally DELSO SECKET OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (Francis P. Prucha ed., 1973).

60. See Alaska Native Allotment Act, ch. 2469, 34 Stat. 197 (1906) (formerly codified at 43 U.S.C. §§ 270-1, repealed with savings clause under the Alaska Native Claims Settlement Act, Pub. L. No. 92-203, Sec. 18(a), 85 Stat. 710) (1971). The purpose of the Alaska Native Allotment Act was to extend "to the Natives of Alaska the rights, privileges and benefits conferred by the public land laws upon citizens of the United States." S. DOC. NO. 101, 59th Cong. 1st Sess. (1906).

61. See Alaska Native Townsite Act, ch. 379, 44 Stat. 629-30 (1926) (formerly codified at 43 U.S.C. §§ 730-36, repealed by Act of Oct. 21, 1976, Pub. L. No. 94-579, Title VII, § 703(a), 90 Stat. 2789).

62. See CASE & VOLUCK, *supra* note 29.

process, which was to disrupt tribal relations, could still be applicable to Alaska Natives.⁶³

Following the *Crow Dog* decision⁶⁴ and the enactment of the Major Crimes Act,⁶⁵ the Bureau of Indian Affairs implemented the

63. See S. DOC. NO. 101, *supra* note 59, at 6.

64. *Ex Parte Crow Dog*, 109 U.S. 556 (1883). In the early 1880s, Crow Dog, a Brule Sioux, killed another member of the tribe, Spotted Tail, on what is now the Rosebud Sioux Indian Reservation in South Dakota. See SYDNEY L. HARRING, *CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY* 100-01 (1994). At the time of the killing, the tribe had no formalized court system for the resolution of disputes but employed traditional dispute resolution through tiospayes, or extended families, that respected each other in times of conflict. See *id.* at 104-05. In this case, the tribe invoked custom and practice and resolved the killing by requiring Crow Dog to provide certain necessities for Spotted Tail's family, a restitution designed to restore the loss of Spotted Tail. See *id.* at 105. Despite the tribe's resolution of the dispute, the Dakota territorial government stepped in and prosecuted Crow Dog for murder in territorial court, where he was convicted and sentenced to death. See *Crow Dog*, 109 U.S. at 557. The U.S. Supreme Court reversed the conviction and held that territorial courts of the United States were not vested with jurisdiction over criminal offenses committed by one Indian against another within a reservation. See *id.* at 572. The Court also held that the Fort Laramie Treaty of 1868 did not vest such authority in the federal government. See *id.*

65. Major Crimes Act, ch. 341, 23 Stat. 385 (1885) (codified as amended at 18 U.S.C. § 1153 (1994)). The Major Crimes Act was enacted to fill in a perceived void of criminal justice in Indian country, since, for the most part, the federal government concluded that traditional tribal methods of dispute resolution were inadequate, even "lawless." See Russell Lawrence Barsh & J. Youngblood Henderson, *Tribal Courts, the Model Code, and the Police Idea in American Indian Policy*, in *AMERICAN INDIANS AND THE LAW* 25, 32-39 (Lawrence Rosen ed., 1976) (discussing early colonial and federal views on the lawless nature of Indian tribes and individuals). Contrary to these assertions, however, many tribes have possessed notions of "the Law" and developed their own law enforcement mechanisms long before first contact with Europeans. See Robert N. Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 *ARIZ. L. REV.* 503, 553 (1976); Robert D. Cooter & Wolfgang Fikentscher, *Is There Indian Common Law: The Role of Custom in American Indian Tribal Courts* 20-21 (Boalt Hall Working Paper Series, Working Paper No. 923, 1991) (observing that most traditional Indians believe that their tribe originally had its law or "way," usually beginning with the creation story); see generally K.N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941) (analyzing the laws of the Cheyenne and uncovering their "juristic beauty").

This perception that tribes are lawless eventually worked its way through federal legislation. With the Major Crimes Act, Congress specified that certain offenses committed by one Indian against another in Indian country will be subject to the jurisdiction of the federal or territorial courts. See 18 U.S.C. § 1153 (1994).

“Courts of Indian Offenses” (“CIOs”)⁶⁶ in 1883. These courts were not tribal courts, but agents of assimilation that “followed laws and regulations designed to assimilate the Indian people into both the religious and jurisprudential mainstream of American society.”⁶⁷ One federal court noted that Alaska Natives were in a state of pupillage, “similar to that of a ward to a guardian.”⁶⁸

The period between 1904 and 1934 saw a major shift in federal policy toward Alaska Natives, away from ambivalence and toward incorporation of traditional Indian law principles.⁶⁹ In 1905, Judge Wickersham of the District of Alaska held that the United States had the right and the duty to file suit to prevent non-Natives from acquiring land from Natives, echoing the trust responsibility that had long been owed to tribes in the Lower Forty-Eight.⁷⁰ Since this case was initiated by the United States, it signaled a first and important pronouncement by the federal government to protect Native rights in Alaska.⁷¹ The shift in federal policy was evident in 1932 when the Office of the Solicitor for the Department of the Interior noted the similarity between congressional treatment of Alaska Natives and tribes in the Lower Forty-Eight and opined that under normal federal Indian policy, the same laws should apply to Alaska Natives.⁷²

The constitutionality of Congress’s exercise of authority under the Major Crimes Act was upheld in *United States v. Kagama*, 118 U.S. 375 (1886), where the U.S. Supreme Court ruled that Congress’s authority over Indian tribes was plenary by virtue of their existence within the territorial limits of the United States. *See id.* at 379-81.

66. Known as CIOs or Code of Federal Regulation Courts (CFR Courts). *See* B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457, 470 (1998).

67. *Id.* (citing WILLIAM HAGEN, INDIAN POLICE AND JUDGES 120 (1966)); *cf.* SAMUEL J. BRAKEL, AMERICAN INDIAN TRIBAL COURTS: THE COSTS OF SEPARATE JUSTICE 17 (1978):

[T]he reservation codes are versions of old BIA codes and models that have undergone some localized updatings at the hands of tribal attorneys, regional BIA personnel, and/or professors from nearby universities (non-Indian all) who—occasionally with some input from tribal (Indian) judges or council members—have put together these curious but unquestionably Anglo-American documents.

68. *In re Sah Quah*, 31 F. 327, 329 (D. Alaska 1886); *see also* Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

69. *See* CASE & VOLUCK, *supra* note 29 (manuscript at ch. 1, 10).

70. *See* *United States v. Berrigan*, 2 Alaska 442, 450 (D. Alaska 1905).

71. *See* CASE & VOLUCK, *supra* note 29 (manuscript at ch. 1, 10).

72. *See* ARNOLD ET AL., *supra* note 7, at 84 (quoting Office of the Solicitor, U.S. Dept. of the Interior, *Legal Status of Alaska Natives*, 1932):

In 1934, Congress passed the Indian Reorganization Act⁷³ in an effort to reverse the assimilationist policy behind the allotment process.⁷⁴ The Act gave “[a]ny Indian tribe . . . the right to organize for its common welfare,” the right to adopt an appropriate constitution and bylaws, and the right to acquire a charter of incorporation for the purpose of conducting business.⁷⁵ Congress extended these principles to Native communities in Alaska in 1936 and equated the status of Alaska Natives with Native Americans generally.⁷⁶ The subsequent promulgation of the revised Code of Indian Offenses for Indian tribes expressly recognized the rights of Indian tribes to replace the CIO courts through the adoption of their own codes of laws.⁷⁷ Alaska’s tribes promulgated constitutions and bylaws under the provisions of the Indian Reorganization Act,⁷⁸ which could be accomplished only if Alaska’s tribes were in-

Congress began to directly recognize [Alaska] natives as being, to a very considerable extent at least, under our Government’s guardianship and enacted laws which protected them in the possession of the lands they occupied; made provision for the allotment of lands to them in severalty, similar to those made to the American Indians Not only has Congress in this manner treated these natives as being wards of the Government but they have been repeatedly so recognized by the courts From this it will be seen that these natives are now unquestionably considered and treated as being under the guardianship and protection of the Federal Government, at least to such an extent as to bring them within the spirit, if not within the exact letter, of the laws relative to American Indians

73. 25 U.S.C. §§ 461-79 (1994).

74. See *Fisher v. District Ct.*, 424 U.S. 382, 386 (1976); *Blackfeet Tribe of Indians v. Groff*, 729 F.2d 1185, 1189 (9th Cir. 1982); see also Robert T. Coulter, *A History of Indian Jurisdiction*, in *RETHINKING INDIAN LAW*, *supra* note 7, at 12:

In place of the old policy [of allotment], which had to bring about assimilation, Congress substituted a new and sophisticated program which has had the effect of “buying up” remaining Indian sovereignty by offering limited federal rights and federal economic aid in exchange for the further relinquishment of Indian sovereignty and jurisdiction.

See also 25 U.S.C. § 461 (“No land of any Indian reservation . . . shall be allotted in severalty to any Indian.”).

75. 25 U.S.C. §§ 476(a), 477. The IRA was “specifically intended to encourage Indian tribes to revitalize their self-government.” *Fisher*, 424 U.S. at 387.

76. See 25 U.S.C. § 473(a); COHEN, *supra* note 4, at 751-52.

77. See 25 C.F.R. § 11 (2000).

78. Between 1938 and 1950, the BIA assisted sixty-nine Alaska Native villages in obtaining secretarial approval of IRA constitutions. See REPORT OF THE GOVERNOR’S TASK FORCE ON FEDERAL-STATE-TRIBAL RELATIONS SUBMITTED TO GOVERNOR BILL SHEFFIELD, Feb. 14, 1986, Appendix A [hereinafter TASK FORCE REPORT] (copy on file with author). Seventy-two of Alaska’s tribes now have IRA constitutions. See ALASKA JUDICIAL COUNCIL, A DIRECTORY OF DISPUTE RESOLUTION IN ALASKA OUTSIDE FEDERAL AND STATE COURTS (1999),

herently sovereign entities.⁷⁹ Eventually, “tribal courts” completely replaced the CFR or CIO courts.⁸⁰

Meanwhile, during this period, Congress had been struggling with how to resolve disputed land claims with Alaska Natives. Shortly after the purchase of the Alaska territory in 1867, Congress made several unsuccessful and incomplete attempts to resolve issues concerning land rights among the Alaska Native groups. The Organic Act of 1884⁸¹ claimed to preserve the Indians’ interests in land title,⁸² but only gave the promise of continued use and occupancy to holders of aboriginal rights.⁸³ When Congress enacted a law to organize Alaska as a territory in 1958, it also included provisions designed to protect Native subsistence rights.⁸⁴

available at [http://www.ajc.state.ak.us/ Reports/rjdir99frame.htm](http://www.ajc.state.ak.us/Reports/rjdir99frame.htm) [hereinafter *Dispute Resolution in Alaska*].

79. It has been noted that the power to tax transactions rests not on delegated authority from Congress, but on inherent tribal sovereignty. See *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-54 (1980). The inherent sovereign power of tribal governments also allows tribes to create court systems, whether or not the tribal constitution allows for the creation of tribal court systems. See AMERICAN INDIAN LAWYER TRAINING PROGRAM, INC., MANUAL OF INDIAN LAW E-1, E-2 (1976).

80. See *Hearings on Constitutional Rights of the American Indian Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong. 50-51, 54-55 (1965). Authority for substituting tribal courts for CIO courts can be found in 25 C.F.R. § 11.104 (1975).

81. 23 Stat. 24 (1884).

82. See *id.* § 8:

Provided, that the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.

83. See ARNOLD ET AL., *supra* note 7, at 68.

84. See Alaska Statehood Act § 4, Pub. L. No. 85-508, 72 Stat. 339 (1958):

As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right and title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts [hereinafter called natives] or is held by the United States in trust for said natives; shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation.

In 1971, Congress passed the Alaska Native Claims Settlement Act (“ANCSA”)⁸⁵ primarily as the final resolution to disputed land claims with Alaska Natives; however, its impetus was to clear the way for development of Alaska’s oil resources in Prudhoe Bay.⁸⁶ The enactment of ANCSA followed decades of conflict in Alaska between Natives and non-Natives over land rights, particularly those involving hunting and fishing.⁸⁷ While Alaska Natives may have been consulted before the passage of ANCSA,⁸⁸ their interests ultimately were not represented because no Alaska Native delegation voted in Congress.⁸⁹ As a result, ANCSA failed to resolve many issues, including the nature and reach of tribal jurisdiction.⁹⁰

While ANCSA was labeled a settlement of land claims, its purpose and function was in fact directly in line with the broader congressional policy of terminating the existence of tribes in the United States, under which tribal governments would be destroyed.⁹¹ The principal congressional architect of ANCSA, Senator Henry Jackson of Washington, believed in the absolute assimilation of Alaska Natives and the complete elimination of tribal governments and reservations.⁹² ANCSA specifically terminates all of the reservations in Alaska with the exception of the Metlakatla

85. 43 U.S.C. §§ 1601-29 (1994).

86. See Gigi Beradi, *Natural Resource Policy, Unforgiving Geographies, and Persistent Poverty in Alaska Native Villages*, 38 NAT. RES. J. 85, 91 (1998); Marilyn J. Ward Ford & Robert Rude, *ANCSA: Sovereignty and a Just Settlement of Land Claims or an Act of Deception*, 15 TOURO L. REV. 479, 485-87 (1999).

87. For a history of these conflicts and the development of several influential Native organizations, see generally ARNOLD ET AL., *supra* note 7; Ervin, *supra* note 34; DONALD CRAIG MITCHELL, *SOLD AMERICAN: THE STORY OF ALASKA NATIVES AND THEIR LAND, 1867-1959* (1997); David Abraham Voluck, *First Peoples of the Tongass: Law and the Traditional Subsistence Way of Life*, in THE BOOK OF THE TONGASS 53 (Carolyn Servid & Donald Snow eds., 1999).

88. See BERGER, *supra* note 15, at 23.

89. Cf. *United States ex rel. Mackey v. Coxe*, 59 U.S. 100, 103 (1855) (observing that “whenever congress shall make [laws affecting trade and intercourse with the Cherokee], the Cherokee nation shall be entitled to a delegate in the national legislature”).

90. In fact, early scholarship on ANCSA failed to recognize this shortcoming. See, e.g., Arthur Lazarus, Jr. & W. Richard West, Jr., *The Alaska Native Claims Settlement Act: A Flawed Victory*, in AMERICAN INDIANS AND THE LAW, *supra* note 65, at 138-64 (discussing village eligibility for land selection and money, tax consequences, application of federal securities laws, land selection issues, and problems related to the distribution of funds).

91. For a discussion on the policy of termination, see generally *Bryan v. Itasca County*, 426 U.S. 373 (1976).

92. See BERGER, *supra* note 15, at 20.

Reservation in the Southeast.⁹³ But as the U.S. Supreme Court noted in *Menominee Tribe of Indians v. United States*,⁹⁴ the termination process did not extinguish the existence of tribes or tribal rights.⁹⁵

Subsequent congressional initiatives focused on increasing tribal self-government and self-determination. Congress enacted the Indian Self-Determination and Education Assistance Act of 1975.⁹⁶ The Self-Determination Act required the Bureau of Indian Affairs and the Indian Health Service to contract, upon request, with Indian tribes or “tribal organizations” to provide services and programs to tribal members.⁹⁷ In 1978, Congress enacted the Indian Child Welfare Act (“ICWA”).⁹⁸ With ICWA, Congress sought to “protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.”⁹⁹ Congress defined “Indian tribe” under ICWA to include Alaska Native villages.¹⁰⁰ Other self-determination legislation passed during this period included the Indian Financing Act of 1974¹⁰¹ and the Indian Health Care Improvement Act of 1976.¹⁰² Each of these enactments, and several to come in the next twenty years, included Alaska Native villages within their scope and described those villages as “tribes.”¹⁰³

Seeking to expand tribal self-determination, and faced with the ever-increasing development of tribal court systems in the United States, Congress enacted the Indian Tribal Justice Act¹⁰⁴ in 1993 to fund and strengthen tribal court systems.¹⁰⁵ In passing the Act, Congress found that “tribal justice systems are an essential

93. See 46 U.S.C. § 1618(a) (1994).

94. 391 U.S. 404 (1968).

95. See *id.* at 410; WILKINSON, *supra* note 5, at 75-76.

96. Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 450-58hh (1994)).

97. See 25 U.S.C. § 450(f).

98. Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified as amended at 25 U.S.C. §§ 1901-63 (1994)).

99. 25 U.S.C. § 1902.

100. See *id.* § 1903(8) (referring to those Alaska Native villages listed in 43 U.S.C. § 1602(c)).

101. Pub. L. No. 93-262, 88 Stat. 77 (1974) (codified as amended at 25 U.S.C. §§ 1451-1544 (1994)).

102. Pub. L. No. 94-437, 90 Stat. 1400 (1976) (codified as amended at 25 U.S.C. §§ 1601-38(d) (1994)).

103. See CASE & VOLUCK, *supra* note 29 (manuscript at ch. 10, 27).

104. Pub. L. No. 103-176, 107 Stat. 2004 (1993) (codified as amended at 25 U.S.C. §§ 3601-3631 (1994)).

105. See 25 U.S.C. § 3602-11.

part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments.”¹⁰⁶ Congress also declared that it intended not to interfere with the ability of tribes to dispense justice.¹⁰⁷ Congress included Alaska’s tribes within its scope.¹⁰⁸

The executive branch of the federal government also took several steps during this period to clarify the relationship with Alaska’s tribes under federal Indian policy. Although the first list of federally recognized tribes was published in 1979, it did not include any Alaska Native groups.¹⁰⁹ The 1982 list¹¹⁰ included traditional councils that were identified as tribes in ANCSA,¹¹¹ and those that had been dealt with by the Bureau of Indian Affairs on a government-to-government basis and councils organized under the Indian Reorganization Act.¹¹² These entities were included because they paralleled those entities on the federally recognized list of

106. *Id.* § 3601(5).

107. *See id.* § 3611(d) (requiring that “[n]othing in this chapter shall be deemed or construed to authorize the Office [of Tribal Justice Support] to impose justice standards on Indian tribes”); *see also id.* § 3631(4) (requiring that “[n]othing in this chapter shall be construed to alter in any way *any* tribal traditional dispute resolution forum”) (emphasis added).

108. *See id.* § 3602(3):

The term “Indian tribe” means any Indian tribe, band, nation, pueblo, or other organized group or community, including any Alaska Native entity, which administers justice under its inherent authority or the authority of the United States and which is recognized as eligible for the special programs and services provided by the United States to Indian tribes because of their special status as Indians.

109. *See* Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364 (Oct. 21, 1993). The preamble of the list stated that “[t]he list of eligible Alaskan entities will be published at a later date.” *Id.* (quoting 44 Fed. Reg. 7235, 7235 (Feb. 6, 1979)). This is mostly irrelevant, however, since there is no need for the federal government to expressly recognize a tribe for it to retain most of the attributes of sovereignty. As the U.S. Supreme Court has noted, “[b]ecause the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact.” *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S., 130, 149 n. 14 (1982)); *see also* *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978).

110. *See* Indian Tribal Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 47 Fed. Reg. 5313 (Nov. 24, 1982).

111. 43 U.S.C. § 1602(c) (1994).

112. *See* 25 U.S.C. § 473a (1994) (applying federal Indian law to Alaska).

tribes in the Lower Forty-Eight.¹¹³ Then, in 1988, the list expanded to include Native corporations formed under ANCSA as entities eligible for federal services.¹¹⁴ This sparked confusion and doubt over what constituted a “tribe” in Alaska.

In 1993, Assistant Interior Secretary Ada E. Deer issued a comprehensive list of federally recognized tribes that specifically included 227 Native groups in Alaska, but did not include Native corporations.¹¹⁵ Rather than merely recognizing these tribes as being eligible for federal services, the 1993 list specifically recognized Alaska tribes as having the same status under federal Indian law as those tribes in the Lower Forty-Eight.¹¹⁶ Congress codified the Ada Deer list in 1994.¹¹⁷

III. *JOHN V. BAKER*: MEMBER-BASED JURISDICTION AND THE COMITY SOLUTION

One of the most significant recent developments in Alaska Native law, the *John v. Baker* case, began as a custody dispute between John Baker and Anita John, who were never married but share two children.¹¹⁸ In July 1995, Mr. Baker, a member of the

113. See Indian Tribal Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 58 Fed. Reg. at 54,364.

114. See Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 53 Fed. Reg. 52,829, 52,832 (Dec. 29, 1988). The rules define and describe Native Corporations, as well.

115. See Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 58 Fed. Reg. at 54,364.

116. See *id.* at 54,365-66:

The purpose of the current publication is to publish an Alaska list of entities conforming to the intent of 25 C.F.R. 83.6(b) and to eliminate any doubt as to the Department's intention by expressly and unequivocally acknowledging that the Department has determined that the villages and regional tribes listed below are distinctly Native communities and have the same status as tribes in the contiguous 48 states This list is published to clarify that the villages and regional tribes listed below are not simply eligible for services, or recognized as tribes for certain narrow purposes. Rather, they have the same governmental status as other federally acknowledged Indian tribes by virtue of their status as Indian tribes with a government-to-government relationship with the United States; are entitled to the same protection, immunities, privileges as other acknowledged tribes; have the right, subject to general principles of Federal Indian law, to exercise the same inherent and delegated authorities available to other tribes; and are subject to the same limitations imposed by law on other tribes.

117. See Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791 (codified at 25 U.S.C. § 479a (1994)).

118. See *Baker v. John*, No. 4FA-95-3101 CI, at 1 (Alaska Super. Ct., Apr. 1, 1997) [hereinafter *Baker v. John*, Superior Court Decision].

Northway Village in Alaska,¹¹⁹ filed a petition with the Northway Tribal Court requesting sole custody.¹²⁰ Anita John, a member of the Mentasta Village,¹²¹ consented to the Northway Tribal Court's jurisdiction.¹²²

When the tribal court issued an order granting shared custody to both parties, Mr. Baker filed an identical suit in state court.¹²³ Mr. Baker represented to the court that he was "unaware of any custody proceeding regarding the children, except as provided herein, in Alaska, or in any other jurisdiction."¹²⁴ Although Ms. John moved for dismissal based on the tribal court decision, the Alaska Superior Court Judge in Fairbanks, Ralph R. Beistline, denied her motion.¹²⁵ The court ruled that the Indian Child Welfare Act (ICWA) was inapplicable and that the state court's jurisdiction over the matter was superior to that of the tribe.¹²⁶ The court then granted full legal custody and primary physical custody to Mr. Baker.¹²⁷

In granting the petition for review, the Alaska Supreme Court faced a considerable quandary. It had to balance its previous decisions regarding tribal court jurisdiction under ICWA¹²⁸ with recent federal decisions addressing the issues of tribal sovereignty and ju-

119. Unlike many villages in Alaska, Northway Village is located near a major road system, lying on a spur road from the Alaska Highway near the Canadian border. See *The History of Northway Village*, at <http://arcticculture.about.com/culture/arcticculture/library/communities/bl-NorthwayV.htm> (last visited Feb. 18, 2001).

120. See *John v. Baker*, 982 P.2d 738, 743 (Alaska 1999).

121. Unlike Northway Village, Mentasta Village is a more typical Alaskan village, removed from the limited state road system. It has also been the center of other major legal controversies regarding the self-determination of Alaska Natives. See, e.g., *Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995), *cert. denied*, 517 U.S. 1187 (1996), *reh'g granted en banc*, 216 F.3d 885 (9th Cir. 2000).

122. See *John*, 982 P.2d at 743.

123. See *id.*

124. *Id.*

125. See *Baker v. John*, Superior Court Decision, *supra* note 118.

126. See *John*, 982 P.2d at 743. ICWA requires that state courts give full faith and credit recognition to tribal courts in the proper exercise of their jurisdiction. See 25 U.S.C. § 1911(d) (1994).

127. See *Baker v. John*, Superior Court Decision, *supra* note 118, at 5-7.

128. See *In re F.P.*, 843 P.2d 1214 (Alaska 1992) (holding that the Alaska Native groups were not entitled to treatment as sovereigns and holding that tribal courts lacked jurisdiction over ICWA proceedings); *Native Vill. of Nenana v. State, Dep't of Health & Soc. Servs.*, 722 P.2d 219 (Alaska 1986) (holding that Native village failed to reassume jurisdiction under ICWA and was not entitled to transfer of jurisdiction).

risdiction in Alaska.¹²⁹ In particular, the Alaska Supreme Court needed to determine if tribal courts could exercise jurisdiction over tribal members in the absence of any territorial jurisdiction.

A. Applicability of ICWA and Public Law 280¹³⁰ to the *John v. Baker* Case

To begin its analysis, the Alaska Supreme Court first revisited two previous decisions, *Native Village of Nenana v. State, Department of Health & Social Services*¹³¹ and *In re F.P.*¹³² Both cases dealt with tribal court jurisdiction under ICWA and Public Law 280.¹³³ In *Nenana*, the court examined whether the Village of Nenana had reassumed jurisdiction over child custody proceedings.¹³⁴ The *Nenana* court interpreted the reassumption requirement articulated in

129. See *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998). This decision, which held that land transferred to Alaska Native Corporations under ANCSA was not “Indian country” as defined by statute, has been broadly criticized by Indian law scholars. See, e.g., David M. Blurton, *Canons of Construction, Stare Decisis and Dependent Indian Communities: A Test of Judicial Integrity*, 16 ALASKA L. REV. 37, 48 (1999) (noting that the “Venetie opinion authored by Justice Thomas contains no references to the canons of statutory construction, even though the interpretation of two federal statutes is critical to the decision”); Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 AM. INDIAN L. REV. 21, 35 (2000) (observing that Justice Thomas with his opinion proved that “Rehnquist is not alone in his apparent indifference toward tribal sovereignty interests”); Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie*, 31 ARIZ. ST. L.J. 439, 442-43 (1999) (referring to the *Venetie* decision as an “historically superficial and intellectually deficient” decision that was “devoid of doctrinal substance, lack[ing] congressional authorization, and [in] conflict with federal policy”); Thompson, *supra* note 20, at 452-53 (criticizing the Supreme Court’s deviation from the principle of inherent tribal sovereignty and instead adopting an approach that endorsed federal allocation of power).

130. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. §§ 1321-26 and 28 U.S.C. § 1360 (1994)). Public Law 280 gave to six states (including Alaska) jurisdiction over most crimes and many civil matters throughout Indian country within the borders of the state. See 18 U.S.C. § 1162(a). For a detailed analysis of the statutes, see Carole E. Goldberg-Ambrose, *Public Law 280: State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535 (1975).

131. 722 P.2d 219 (Alaska 1986).

132. 843 P.2d 1214 (Alaska 1992).

133. See *John v. Baker*, 982 P.2d 738, 745 (Alaska 1999).

134. See *Nenana*, 722 P.2d at 221. Under 25 U.S.C. § 1918(a), any Indian tribe that became subject to state jurisdiction under Public Law 280 may try to “reassume” jurisdiction over child custody proceedings by petitioning the Secretary of Interior.

ICWA § 1918 to mean that Public Law 280 vested exclusive jurisdiction over child custody procedures in the state, and tribes could regain jurisdiction only if they petitioned the Secretary of Interior.¹³⁵ The *Nenana* court concluded that the Village of Nenana had not petitioned to reassume jurisdiction and affirmed the superior court's denial of the tribe's petition for transfer of jurisdiction.¹³⁶

In *F.P.*, the Alaska Supreme Court was asked to revisit the *Nenana* holding in light of the Ninth Circuit's decision in *Native Village of Venetie I.R.A. Council v. Alaska*.¹³⁷ The *F.P.* court then reiterated its opinion that, absent a petition by the tribes to reassume jurisdiction, both Public Law 280 and ICWA vested exclusive jurisdiction over child custody proceedings with the State.¹³⁸

Concluding that Public Law 280 and ICWA still shaped the scope of tribal adjudicatory power, the *John v. Baker* court then examined if these statutes were applicable to the case.¹³⁹ The court first noted that Congress stated that ICWA was designed "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families."¹⁴⁰ The court found that the dispute between John Baker and Anita John did not implicate either of these concerns because the children would still remain part of an Indian community.¹⁴¹ The court then concluded that, based on legislative history and decisions by the Bureau of Indian Affairs, ICWA did not apply to this inter-parental custody dispute.¹⁴²

To determine whether Public Law 280 was relevant to the issue at hand, the court examined the implications of the U.S. Supreme Court's recent *Venetie* decision.¹⁴³ The court noted that the *Venetie* decision "undermine[d] the Indian country claims of those Alaska villages, like Northway Village, that occupy ANCSA

135. See *John*, 982 P.2d at 745.

136. See *Nenana*, 722 P.2d at 220-22.

137. 944 F.2d 548 (9th Cir. 1991) [hereinafter *Venetie I*]. The Alaska Supreme Court in *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988), first disputed the Ninth Circuit's conclusion that Alaskan tribes were inherently sovereign.

138. See *In re F.P.*, 843 P.2d 1214, 1215-16 (Alaska 1992).

139. See *John v. Baker*, 982 P.2d at 746-47.

140. *Id.* (quoting 25 U.S.C. § 1902 (1994)).

141. See *id.* at 747.

142. See *id.* at 747 & nn.31-33 (citing H.R. Rep. No. 95-1386, at 23, 31 (1978), reprinted in 1978 U.S.C.C.A.N. 7530, 7546; Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,587 (Nov. 26, 1979)).

143. See *id.* at 747-48 (discussing *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520 (1998)).

lands.”¹⁴⁴ The court concluded that if the Northway Village does not occupy Indian country as a result of the *Venetie* decision, then Public Law 280 had no relevance to the case.¹⁴⁵ The court also declined “to reach the question of whether *Nenana* and its progeny were wrongly decided.”¹⁴⁶

B. Post-*Venetie* Alaska: Endorsing Member-Based Jurisdiction of Tribal Courts

Next, the *John v. Baker* court examined what, in the absence of Indian country in a post-*Venetie* world, could be the basis for tribal sovereignty. Justice Fabe, writing for the majority, focused her analysis on cases discussing member-based sovereignty.¹⁴⁷ The court first noted that despite its previous rulings regarding the lack of inherent sovereignty of Alaska’s tribes,¹⁴⁸ the Secretary of Interior and Congress had since spoken definitively on the issue in the tribes’ favor.¹⁴⁹ The court observed that, while the Solicitor of the Department of Interior, Thomas Sansonetti, evaluated the sovereign status of Alaska’s tribes based on the same historical analysis as found in the *Stevens* decision, he came to a completely opposite conclusion: that Congress and the Interior Department dealt with Alaska’s Natives as through they were “tribes.”¹⁵⁰ The court then concluded that if Congress and the executive branch recognize the sovereignty of Alaska’s tribes, it “must do the same.”¹⁵¹ It cautioned, however, that determining the sovereign status of Northway Village was only part of the picture—it is also important to discern the meaning of “sovereignty” when a tribe has been stripped of Indian country.¹⁵²

144. *Id.* at 748.

145. *See id.*

146. *Id.* As the discussion in this article will show, the *Stevens* case invited judicial review more than any other case. However, the court did not engage in that dialogue at all.

147. Both the majority opinion and the dissenting opinion by Chief Justice Matthews demonstrate that this aspect of the decision created the most tension within the court.

148. *See In re F.P.*, 843 P.2d 1214-15 (Alaska 1992); *Native Vill. of Stevens v. Alaska Mgmt. & Planning*, 757 P.2d 32 (Alaska 1988). The *John v. Baker* majority noted that the *F.P.* decision was premised on the historical analysis set forth in *Stevens*. *See John*, 982 P.2d at 749.

149. *See John*, 982 P.2d at 749-50 (citing Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364 (Oct. 21, 1993)); 25 U.S.C. § 479a (1994).

150. *See John*, 982 P.2d. at 749.

151. *Id.*

152. *See id.* at 750.

The court focused considerable attention on the principles of inherent sovereignty as espoused in *United States v. Wheeler*,¹⁵³ which stressed that a tribe's original sovereignty is retained subject to any limitations placed upon it by Congress.¹⁵⁴ Absent a limiting statute or treaty, a tribe retains those inherently sovereign powers to govern internal affairs and domestic relations.¹⁵⁵ The court observed that its own previous decisions reflected a view that tribes were sovereign, self-governing entities in "all cases where essential tribal relations or rights of Indians are involved."¹⁵⁶ It concluded that it would adopt an approach that assumed tribal sovereignty over internal matters and domestic relations unless otherwise indicated by Congress.¹⁵⁷ Furthermore, the court recognized the applicability of the federal Indian law canons in determining whether federal statutes had deprived Alaska's tribes of this inherent sovereignty.¹⁵⁸

The court then concluded that ANCSA and the subsequent federal statutes regarding tribal sovereignty supported the North-

153. 435 U.S. 313 (1978).

154. *See John*, 982 P.2d at 751 (discussing *Wheeler*, 435 U.S. 313); *see also* *Buster and Jones v. Wright*, 135 F. 947, 950 (8th Cir. 1905):

The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in [sic] act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it. . . . The fact remains nevertheless that every original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by act of Congress or by the contracts of the Creek tribe itself.

155. *See John*, 982 P.2d at 751 (citing *United States v. Wheeler*, 435 U.S. 313, 323-26 (1978); *Montana v. United States*, 450 U.S. 544, 564 (1981)). The majority opinion notes that the dissent would prefer the opposite approach—that tribes are only sovereign inasmuch that their powers are granted by Congress. *See id.* at 751-52 (remarking that the dissent's approach mistakenly relies upon selective language in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973)); *see also* *Talton v. Mayes*, 163 U.S. 376, 382-84 (1896); Emma R. Gross, *The Origins of Self-Determination Ideology and Constitutional Sovereignty*, in *NATIVE AMERICAN SOVEREIGNTY* 125, 139 (John R. Wunder ed., 1996) [hereinafter *NATIVE AMERICAN SOVEREIGNTY*].

156. *John*, 982 P.2d at 751 (discussing *Ollestead v. Native Vill. of Tyonek*, 560 P.2d 31 (Alaska 1977)).

157. *See id.* at 752 & n.83 (citing *In re F.P.*, 843 P.2d 1214, 1219 (Alaska 1992); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Bryan v. Itasca County*, 426 U.S. 373 (1976)).

158. *See id.*

way Tribe's jurisdiction over child custody matters.¹⁵⁹ The court noted that while ANCSA sought to end the "lengthy wardship or trusteeship," it did not seek to strip Alaska's tribes of their sovereign powers.¹⁶⁰ The court added that other legislation, including the Tribe List Act,¹⁶¹ Tribal Justice Act,¹⁶² and the Indian Child Welfare Act,¹⁶³ shows that Congress intended that Alaska's tribes continue to regulate their internal affairs.¹⁶⁴ To do otherwise would render meaningless the language in the Tribe List Act that expressly reserves the right of Alaska's tribes "to exercise the same inherent and delegated authorities available to other tribes."¹⁶⁵

The court also concluded that federal case law interpreting the scope of tribal jurisdiction supported a conclusion that Alaska's tribes could exercise authority over their members. Furthermore, the court opined that federal case law supports a two-tier approach to tribal sovereignty: that tribes exercise authority over their members and their territory.¹⁶⁶ According to the court, the opinion of both the dissent and Mr. Baker that Indian country was a prerequisite to the exercise of sovereign tribal power ignored U.S. Supreme Court decisions emphasizing the role tribal membership played in

159. *See id.* at 753.

160. *Id.* (quoting *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 533 (1998)).

161. Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 479a (1994).

162. Indian Tribal Justice Act, 25 U.S.C. §§ 3601-31 (1994). The court observed that the Tribal Justice Act provides financial support to Indian tribes in order to further the development of tribal justice systems, without making distinctions between those tribes that occupy Indian country and those that do not, while explicitly including Alaska Native villages within its scope. *See John*, 982 P.2d at 754 (citing 25 U.S.C. §§ 3601, 3602(3) (1994)).

163. Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-63 (1994). The court noted that the purpose and structure of ICWA, passed seven years *after* ANCSA, was to increase tribal control over custody decisions involving tribal children, and that such control was essential to continued tribal sovereignty. *See John*, 982 P.2d at 753. The court also observed that Alaska Native villages are explicitly included within ICWA's scope. *See id.* (citing 25 U.S.C. § 1903(8)).

164. *See John*, 982 P.2d at 753.

165. *Id.* (citing Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364, 54,366 (Oct. 21, 1993)).

166. *See John*, 982 P.2d. at 754; *see generally* Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1 (1993) (discussing this two-tier process, noting that the Supreme Court is increasingly moving away from a geography-based approach and toward a membership-based approach to tribal jurisdiction).

determining the scope of tribal authority.¹⁶⁷ The court's analysis¹⁶⁸ focused on several U.S. Supreme Court cases: *Wheeler*,¹⁶⁹ *Montana*,¹⁷⁰ *Duro*,¹⁷¹ *Fisher*,¹⁷² and to a limited degree, *Kiowa*.¹⁷³ The court concluded that these cases support the notion that Alaska's

167. See *John*, 982 P.2d at 755.

168. See *id.* at 755-59.

169. *United States v. Wheeler*, 435 U.S. 313 (1978). The *John* court quoted language from the *Wheeler* decision that discussed the limitations of tribal jurisdiction over non-members. See *John*, 982 P.2d at 755. According to the *Wheeler* Court:

[t]hese limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the *powers of self-government*, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve *only the relations among members of a tribe*. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.

Wheeler, 435 U.S. at 326 (emphasis added).

170. *Montana v. United States*, 450 U.S. 544 (1981). The *John* court noted that the *Montana* decision "reaffirmed the significance of tribal membership and reaffirmed the importance of Native American self-governance." *John*, 982 P.2d at 755. The court noted that inherent tribal powers included "the power to punish tribal offenders, . . . to determine tribal membership, to regulate domestic relations among members, . . . to prescribe rules of inheritance for members" and to "determine rights to custody of a child of divorced parents of the tribe." *Id.* (quoting *Montana*, 450 U.S. at 564 and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 170 (1982)).

171. *Duro v. Reina*, 495 U.S. 676 (1990). The *John* court noted that the *Duro* decision "emphasized the fundamental importance of membership, noting the federal law's consistency 'in describing retained tribal sovereignty . . . in terms of a tribe's power over its members.'" *John*, 982 P.2d at 755 (quoting *Duro*, 495 U.S. at 685).

172. *Fisher v. District Ct.*, 424 U.S. 382 (1976). Despite the dissent's attempt to use *Fisher* to support its conclusions, the majority noted that the *Fisher* decision supported its view on the dual nature of tribal sovereignty. See *John*, 982 P.2d at 756. The *John* court noted that the Supreme Court's opinion in *Fisher* was particularly concerned with how the exercise of state jurisdiction over an internal tribal custody dispute would interfere with the tribe's powers of self-government and the tribal court's legitimacy before its own people. See *id.* (quoting *Fisher*, 424 U.S. at 387-90).

173. *Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, 523 U.S. 751 (1998). The majority opinion in *John* noted that the *Kiowa* decision "reaffirmed the notion that the existence of Indian country is not a dispositive factor in determining jurisdiction" because the Court held that the sovereign immunity of the tribe protected it regardless of whether contracts were formed on or off Indian country. *John*, 982 P.2d at 758 (discussing *Kiowa*, 523 U.S. at 758-59).

tribes could exercise jurisdiction over members even without a territorial base.¹⁷⁴

Despite this holding, the court found that Alaska state courts could exercise concurrent jurisdiction over such matters.¹⁷⁵ “This is so because villages like Northway presumably do not occupy Indian country, and federal law suggests that the only bar to state jurisdiction over Indians and Indian affairs is the presence of Indian country.”¹⁷⁶ The court essentially said that on one hand, Indian country does not matter, but on the other hand, it does. The court added that, outside of Indian country, all disputes within the State’s borders, whether tribal or not, are within the jurisdiction of state courts.¹⁷⁷

The court also noted that other state and federal decisions, along with public policy, supported this outcome in instances where one or both parents do not live on reservation land.¹⁷⁸ In some circumstances, particularly because the state court system is incapable of serving the needs of remote Native villages, the unique tribal systems may be more appropriate to address child custody matters involving tribal members.¹⁷⁹ The court concluded that “[r]ecognizing the ability and power of tribes to resolve internal disputes in their own forums, while preserving the right of access to state courts, can only help in the administration of justice for all.”¹⁸⁰

For the final issue involving the jurisdictional implications of its decision, the Alaska Supreme Court held that tribal law would apply to child custody disputes adjudicated by tribal courts.¹⁸¹ This conclusion was supported by the principle that tribes have the “power to make their own substantive law in internal matters and to enforce that law in their own forums,”¹⁸² and that such principles

174. See *John*, 982 P.2d at 759. The court also noted that at least one federal judge has found that even with the passage of ANCSA, “Congress intended that Native villages retain sovereignty over members even though such sovereignty was ‘without territorial reach.’” See *id.* at 759 n.139 (Fernandez, J., concurring) (quoting *Alaska ex rel. Yukon Flats Sch. Dist. v. Native Vill. of Venetie Tribal Gov’t*, 101 F.3d 1286, 1303 (9th Cir. 1996)).

175. See *id.* at 759.

176. *Id.* (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973)).

177. See *id.* (citing ALASKA STAT. § 22.10.020(a) (LEXIS 2000)).

178. See *id.* at 759-60 (citing *In re Marriage of Skillen*, 956 P.2d 1 (Mont. 1998)).

179. See *id.* The court added that “[b]ecause of this great diversity, barriers of culture, geography, and language combine to create a judicial system that remains foreign and inaccessible to many Alaska Natives.” *Id.*

180. *Id.* at 760.

181. See *id.* at 761.

182. *Id.* (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978)).

enabled tribes to “control their own internal relations, and to preserve their own unique customs and social order.”¹⁸³

C. Choosing Between Full Faith and Credit Recognition and Comity

Once the Alaska Supreme Court determined the nature and scope of tribal sovereignty, it next needed to evaluate to what sort of recognition the tribal court was entitled—full faith and credit recognition or comity.¹⁸⁴ In determining whether to apply full faith and credit recognition or comity to tribal court decisions, the court first observed that, while ICWA required full faith and credit recognition to tribal court decrees,¹⁸⁵ the command was not applicable in this case.¹⁸⁶ “Other than ICWA, no federal or state law suggests that courts should grant full faith and credit to tribal court judgments.”¹⁸⁷ The court noted that the U.S. Constitution’s text and history failed to acknowledge Indian tribes in this context, and that the Full Faith and Credit Act¹⁸⁸ also limited its application to states, territories, and possessions.¹⁸⁹

The court concluded that the most appropriate model for Alaska would be recognition on the basis of comity.¹⁹⁰ The Alaska Supreme Court had not previously adopted a particular standard

183. *Id.* (quoting *Duro v. Reina*, 495 U.S. 676, 685-86 (1990)).

184. The term “comity” means

courtesy; complaisance; respect; a willingness to grant a privilege, not as a matter of right, but out of deference and good will . . . [C]ourts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect.

BLACK’S LAW DICTIONARY 183 (6th ed. 1991). The U.S. Supreme Court has defined comity as “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.” *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). The *Hilton* case provides the guiding principles of comity even today. See *Wilson v. Marchington*, 127 F.3d 805, 810 (9th Cir. 1997).

185. See 25 U.S.C. § 1911(d) (1994) (stating that “[t]he United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe”).

186. See *John*, 982 P.2d at 761-62.

187. *Id.* at 762. As noted *infra* Part IV. A. 1, this is a complete misstatement of the law.

188. Act of Mar. 27, 1804, ch. 56, 2 Stat. 298 (codified as amended at 28 U.S.C. § 1738 (1994)).

189. See *John*, 982 P.2d at 762.

190. See *id.* at 763.

for granting comity.¹⁹¹ In the *John v. Baker* decision, however, the court observed several of the principles underlying comity¹⁹² and appeared to adopt the standards set forth in the Restatement (Third) of Foreign Relations Law of the United States.¹⁹³ The court

191. The Alaska Supreme Court, referring to the “spirit of comity,” decided that courts should give comity to legislative enactments, held that courts will ignore comity in the best interest of the child, and mentioned the aspects of “courtesy and comity.” See *Sullivan v. Alaska Bar Ass’n*, 551 P.2d 531, 540 (Alaska 1976) (Dimond, J., dissenting) (referring to the spirit of comity); *Continental Ins. Cos. v. Bayless & Roberts, Inc.*, 548 P.2d 398, 411 (Alaska 1976) (holding statutory enactments should be given comity); *DeHart v. Layman*, 536 P.2d 789, 790 (Alaska 1975) (holding that courts should ignore comity in the best interest of the child); *Theodore v. State*, 407 P.2d 182, 186 (Alaska 1965) (holding the rule of competent jurisdiction is a rule of comity and courtesy rather than one of prohibition).

192. See *John*, 982 P.2d at 762-64.

193. In concluding that state courts should respect tribal court decisions on the basis of comity, the Alaska Supreme Court cited the *Wilson* case as authority. See *id.* at 763 (citing *Wilson v. Marchington*, 127 F.3d 805, 810 (9th Cir. 1997)). In *Wilson*, the Ninth Circuit adopted two founding principles underlying the comity doctrine. First, the court adopted the U.S. Supreme Court’s due process comity analysis in *Hilton v. Guyot*, 159 U.S. 113 (1895). See *Wilson*, 127 F.3d at 810. The *Hilton* Court stated that

where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.

Wilson, 127 F.3d at 810 n.4 (quoting *Hilton*, 159 U.S. at 202-03). The *Wilson* court then noted that the Restatement (Third) of Foreign Relations Law of the United States (1986) suggested two mandatory and six discretionary grounds for non-recognition of foreign judgments. The Restatement (Third) § 482 provides:

- (1) A court in the United States may not recognize a judgment of the court of a foreign state if:
 - (a) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law; or
 - (b) the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the law of the rendering state and with the rules set forth in § 421.
- (2) A court in the United States need not recognize a judgment of the court of a foreign state if:

also observed that several other states have come to the conclusion that comity is the best model for recognition of tribal court judgments.¹⁹⁴

The court cautioned, however, that circumstances might exist where state recognition of tribal court decisions would be inappropriate. First, the court noted that state courts should not recognize tribal court judgments if the tribal court lacked personal or subject matter jurisdiction.¹⁹⁵ The court added that “[a] requirement that a tribal court possess personal jurisdiction over litigants appearing before it ensures that the tribal court will not be called upon to adjudicate the disputes of parents and children who live far from their tribal villages and have little or no contact with those villages.”¹⁹⁶

Next, the court found that a tribal court decision would not be entitled to recognition if the complaining litigant was denied due process.¹⁹⁷ The court elaborated, noting that, in deciding whether the tribal court complied with due process, reviewing courts should consider whether the litigant had adequate notice and a full and fair opportunity before an impartial tribunal “that conducted the proceedings in a regular fashion.”¹⁹⁸ The court cautioned that this comity analysis did not invite “our courts to deny recognition to tribal judgments based on paternalistic notions of proper proce-

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- (a) the court that rendered the judgment did not have jurisdiction of the subject matter of the action;
 - (b) the defendant did not receive notice of the proceedings in sufficient time to enable him to defend;
 - (c) the judgment was obtained by fraud;
 - (d) the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought;
 - (e) the judgment conflicts with another final judgment that is entitled to recognition; or
 - (f) the proceeding in the foreign country was contrary to an agreement between the parties to submit the controversy on which the judgment is based to another forum.

Wilson, 127 F. 3d at 810 n.5 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 48 (1986)).

194. See *John*, 982 P.2d at 763 n.174. It is important to note that the Alaska Supreme Court cited a Wisconsin case in support of this assertion. See *Custody of Sengstock v. San Carlos Apache Tribe*, 477 N.W.2d 310 (Wis. Ct. App. 1991). The State of Wisconsin has since enacted a statute requiring full faith and credit recognition by state courts of all tribal courts within state boundaries. See WIS. STAT. ANN. § 806.245(1) (West 1994 & Supp. 2000).

195. See *John*, 982 P.2d at 763 (citing *Wilson*, 127 F.2d at 810).

196. *Id.*

197. See *id.* (citing *Wilson*, 127 F.2d at 810).

198. *Id.* (citing *Hilton v. Guyot*, 159 U.S. 113, 202-03 (1895)).

ture,” but that state courts should respect the “cultural differences that influence tribal jurisprudence.”¹⁹⁹ The court added that reviewing state courts should not deny comity recognition on the ground that it would be too difficult to resolve the issue without assuming jurisdiction.²⁰⁰

Finally, the court noted that the comity analysis would permit state courts to deny recognition of a tribal court decree that contravened “the public policy of the United States or the forum state in which recognition is sought.”²⁰¹ The court specifically noted that the dissent’s view, that tribal courts would attempt to circumvent state laws and would issue decisions in violation of state public policy, ignored the meaning of tribal sovereignty and insulted tribal justice systems.²⁰²

The court then remanded the case back to the superior court with some guidance. First, the court noted that while ICWA was inapplicable to the case, it provided the best framework for evaluating whether the tribal court had jurisdiction over the case.²⁰³ Next, the court declined to decide whether due process requires that tribal courts provide for an appellate or review process.²⁰⁴ While noting that authority was split on this issue, the court observed that, although an appellate procedure is required of foreign courts, it is not a due process requirement for state courts.²⁰⁵

IV. FULL FAITH AND CREDIT AND THE UNEQUIVOCAL RECOGNITION OF TRIBES AS JURISPRUDENTIAL PARTNERS IN ALASKA

Many groups, including the Alaska Inter-Tribal Council, have hailed the *John v. Baker* decision as an important step forward for Alaska’s tribes. While this Article agrees that the decision is indeed an important step forward, it must also assert that the step is merely a tentative one. This section examines some of the weaknesses, or faulty premises, underlying *John v. Baker* as well as the strengths of the decision. This section also offers alternatives to the comity solution provided by the Alaska Supreme Court.

199. *Id.* (citing *Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997)).

200. *See id.* at 763-64.

201. *Id.* at 764 (quoting *Wilson*, 127 F.3d at 810).

202. *See id.* at 764 & n.185.

203. *See id.* at 764.

204. *See id.*

205. *See id.* at 764 & nn.188-89.

A. Standing on a Shaky Foundation: The Weaknesses of the *John v. Baker* Decision

It is clear from reading the dialogue, or argument, between the majority and dissenting opinions that there were vast disagreements regarding the nature of Alaska's tribes, their role as members of a judicial family, and their ability to exercise jurisdiction. As a result of these almost bitter differences, the majority most certainly had to walk a fine line.

1. *Full Faith and Credit Recognition of Tribal Court Decisions*. While the majority opinion, for the most part, presented a well-reasoned judicial pronouncement, it came somewhat short in its discussions of full faith and credit recognition of tribal courts. The majority's assertion that "[o]ther than ICWA, no federal or state law suggests that courts should grant full faith and credit to tribal court judgments" was unsupported.²⁰⁶

Federal courts have long held that tribal court decisions are entitled to full faith and credit recognition.²⁰⁷ Congress has similarly required such recognition in numerous circumstances.²⁰⁸ Additionally, several states have enacted statutes requiring either

206. *John*, 982 P.2d at 762.

207. See *Standley v. Roberts*, 59 F. 836, 845 (8th Cir. 1894) (concluding that judgments by tribal courts on cases within their jurisdiction "stand on the same footing with those of the courts of the territories of the Union and are entitled to the same faith and credit"); *Iron Crow v. Ogallala Sioux Tribe*, 129 F.Supp. 15, 21 (W.D.S.D. 1955) ("Courts have uniformly held that the decisions of Indian tribal courts, rendered within their jurisdiction, territorial and personal, and according to the forms of law recognized by the tribe, are entitled to full faith and credit.") (citations omitted).

208. See 18 U.S.C. § 2265 (1994) (domestic violence protective orders); 25 U.S.C. § 1911 (1994) (child custody orders); *id.* § 483a (1994) (management of trust lands); *id.* § 3106(c) (1994) (forest trespass regulation); *id.* § 3713(c) (1994) (Indian agricultural lands trespass); 28 U.S.C. § 1738A (child custody determinations); *id.* § 1738B (1994) (child support orders); *id.* § 1738C (tribes and states need not accord full faith and credit to marriages between homosexual couples). The current version of the Uniform Child Custody Jurisdiction and Enforcement Act (Alaska's remaining portions can be found at ALASKA STAT. §§ 25.30.300-360 (LEXIS 2000)), does not include territorial disputes between a state court and tribal court. See *Desjarlait v. Desjarlait*, 379 N.W.2d 139, 143 (Minn. Ct. App. 1985). The National Conference of Commissioners on Uniform State Laws has suggested amendments to the Act to include tribal court orders. See B.J. Jones, *A Primer on Tribal Court Civil Practice*, at <http://www.court.state.nd.us/Court/Resource/Tribal.htm> (last visited Feb. 20, 2001).

across-the-board full faith and credit recognition²⁰⁹ or have limited that recognition to a particular subject matter.²¹⁰ Other states have extended full faith and credit through judicial decisions.²¹¹ Finally, many states have addressed the issue through modifications to their rules of court,²¹² often after a series of forums consisting of meetings between state and tribal court representatives.²¹³

Whether or not reciprocity is required varies from state to state. Some states require tribal court recognition of state court decisions,²¹⁴ while others do not.²¹⁵ Tribal governments have even

209. See S.D. CODIFIED LAWS § 1-1-25 (MICHIE 1992); WIS. STAT. ANN. § 806.245 (West 1994 & Supp. 2000).

210. See Rules of Procedure for the Enforcement of Tribal Court Civil Judgments, in ARIZ. R. CT. 87; ARK. CODE ANN. § 9-15-302 (Michie 1998) (affecting full faith and credit to domestic abuse protection); MASS. ANN. LAWS ch. 209A, § 1 (Supp. 2000) (allowing protection orders under the federal Violence Against Women Act); N.H. REV. STAT. ANN. § 173-B:13(III) (Supp. 2000) (domestic violence protective orders); N.M. STAT. ANN. § 1-4-5.1 (Supp. 2000) (providing for protection orders in voter registration); *id.* § 40-13-6 (domestic violence protective orders); N.Y. FAMILY LAW § 154-e (2000) (defining “protection order issued by another jurisdiction” to include orders issued by tribal courts); H.B. 1181, 1995 Sess. (Pa. 1996) (providing for recognition of protection orders); S.C. CODE ANN. § 27-16-80(E) (Supp. 2000) (intentional and negligent torts committed on the reservation); VA. CODE ANN. § 16.1-279.1 (Michie Supp. 2000) (affording protection orders).

211. The New Mexico Supreme Court has suggested that the phrase “states, territories, and possessions” includes Indian tribes and that full faith and credit should therefore be applied to tribal court proceedings. See *Jim v. CIT Financial Svcs. Corp.*, 533 P.2d 751, 752 (N.M. 1975). The Washington State Supreme Court relied on the *Jim* decision when holding that where a tribal court is properly exercising its jurisdiction, it is entitled to full faith and credit. See *In re Buehl*, 555 P.2d 1334, 1342 (Wash. 1976). The U.S. Supreme Court has also stated “[j]udgments of tribal courts, as to matters properly within their jurisdiction, have been regarded in some circumstances as entitled to full faith and credit in other courts.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 66 n.21 (1978).

212. See MICH. CT. R. 2.615; N.D. R. CT. 7.2; OKLA. STAT. ANN. tit. 12 § 2, APP. R. 30 (West 2000); WASH. SUP. CT. CIV. R. 82.5; VA. CODE ANN. § 19.2-152.10 (Michie 2000). While the North Dakota rule limits recognition to tribal courts within state boundaries, the other cited rules recognize any court order from a federally recognized tribe. See also WIS. STAT. ANN. § 806.245(1) (West Supp. 2000) (limiting recognition to tribes within the State of Wisconsin).

213. See generally Hon. Michael F. Cavanagh, *Michigan’s Story: State and Tribal Courts Try to Do the Right Thing*, 76 U. DET. MERCY L. REV. 709 (1999).

214. See MICH. CT. R. 2.615; OKLA. STAT. ANN. tit. 12, § 2, App. R. 30; WASH. SUPER. CT. CIV. R. 82.5; WIS. STAT. ANN. § 806.245(1)(e), 806.245(6).

215. For example, the New Mexico Supreme Court has held that the Full Faith and Credit Act extends to tribal courts. See *Jim*, 533 P.2d at 752. However, the Navajo Court of Appeals has held that it will only recognize state court decisions

enacted laws requiring full faith and credit recognition of state court decisions.²¹⁶

As certain as the winters are long in Alaska, federal courts and several states do acknowledge that full faith and credit is the preferred means for recognizing tribal courts. To be fair to the court's analysis, however, it is certainly a mixed and unsettled issue. There is no hard line of cases that clearly points to full faith and credit recognition. Nonetheless, the court could have prepared a more balanced analysis of the policy questions involved. Instead of merely concluding that the law does not require full faith and credit recognition, the court could have invited the Alaska State Legislature to explore the merits of the issue. The court did not, however, examine the merits underlying full faith and credit recognition of tribal courts.

on the basis of comity. See *In re Guardianship of Chewiwi*, 1 Nav. R. 120, 126 (Nav. Ct. App. 1977).

216. See, e.g., 24 MILLE LACS BAND STAT. ANN. § 3001 (West 1996); Order Adopting Standards for Recognition of Judicial Proceedings of Other Sovereigns in the Muskogee (Creek) Nation Courts: Full Faith and Credit, 3 Okla. Trib. Ct. Rep. 211, 214-15, 1993 WL 831883 (Muskogee (Creek) 1993). Some scholars suggest that this reciprocity by tribes is not warranted. See generally Robert Laurence, *Full Faith and Credit in Tribal Courts: An Essay on Tribal Sovereignty, Cross-Boundary Reciprocity and the Unlikely Case of Eberhard v. Eberhard*, 28 N.M. L. REV. 19 (1998).

2. *The Burden of Proof in Evaluating Comity Recognition of Tribal Courts.* While external political pressures may force comity recognition of foreign-country acts,²¹⁷ no such pressure has been placed on Alaska courts to recognize tribal courts. It is often easier for state courts to ignore tribal court decisions than to undertake the difficult task of interpreting and applying unfamiliar tribal law.²¹⁸ It may also be easier for state courts to ignore tribal court decisions out of some underlying, yet mistaken, belief that tribal courts are inherently illegitimate.²¹⁹ Even though the Alaska Supreme Court attempted to preempt this problem by providing instructions on the matter, its instructions were not entirely clear. The recent remand decision by Judge Beistline in *John v. Baker* exemplifies this problem.

On remand, Judge Beistline acknowledged the Alaska Supreme Court's instructions and recognized that "state courts and tribal courts have much to offer one another."²²⁰ Judge Beistline found that the Northway Tribal Court had jurisdiction because the father was a member of the tribe and the children were eligible for membership.²²¹

Judge Beistline concluded, however, that Mr. Baker "did not receive the necessary due process protection required to satisfy the comity doctrine."²²² Following the three factors identified by the Alaska Supreme Court,²²³ Judge Beistline examined the Northway Tribal Court's appellate procedures and concluded that they were adequate. He also concluded that Mr. Baker was given adequate notice of the proceedings.²²⁴

However, Judge Beistline reasoned that due process was not afforded to Mr. Baker because he "was not granted a fair and full opportunity to be heard before an impartial tribunal that con-

217. See James D. Sumner, Jr., *The Full-Faith-and-Credit Clause—Its History and Purpose*, 34 OR. L. REV. 224, 225 (1955).

218. See Gordon K. Wright, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397, 1409 (1985).

219. See NATIONAL AMERICAN INDIAN COURT JUDGES ASSOCIATION, INDIAN COURTS AND THE FUTURE: REPORT OF THE NAICJA LONG RANGE PLANNING PROJECT 80-81 (1978).

220. *Baker v. John*, Order Denying Comity, 4FA-95-3103 (Alaska Super. Ct., Aug. 2000) (on file with author) [hereinafter *Baker v. John*, Remand Decision].

221. See *id.*

222. *Id.*

223. See *John v. Baker*, 982 P.2d 738, 763-64 (Alaska 1999). These factors are presence of an appellate procedure, proper and timely notice of all proceedings, and fair and full opportunity to litigate before an impartial tribunal that conducted its proceedings in a "regular fashion."

224. See *Baker v. John*, Remand Decision, *supra* note 220.

ducted its proceedings in a regular fashion.”²²⁵ Judge Beistline noted what he believed were several irregularities that pointed to favoritism on the part of the court for Ms. John. First, Judge Beistline observed that Judge Titus of the Northway Tribal Court contacted Nora David, the First Chief of Mentasta, to see if Mentasta would like to participate or exercise jurisdiction.²²⁶ Judge Beistline noted that several of the witnesses speaking on behalf of Ms. John were her relatives or people who provided care for the children while they were in Ms. John’s custody.²²⁷ The court also concluded that the proceedings were conducted more like a mediation than an adjudication.²²⁸ Finally, Judge Beistline observed conflicting evidence between the two sides, choosing to resolve the conflict in favor of Mr. Baker.²²⁹

Judge Beistline’s observations are flawed fundamentally for several reasons. First, Judge Beistline chose to read some improper motive behind the communication between the Northway Tribal Court and the First Chief of the Mentasta Council. However, if such communication had been made by a state court judge under the Uniform Child Custody Jurisdiction Act, it would have been seen as commonplace.²³⁰ Second, the remand decision also failed to acknowledge that “[c]omity does not require that a tribe utilize judicial procedures identical to those used in United States courts.”²³¹ Although Judge Beistline parroted the language from the Alaska Supreme Court on this point, he later criticized the Northway Tribal Court for conducting the proceedings in a manner more like a mediation than an adjudication. It is well known that many Native cultures, including some of Alaska’s Native groups,

225. *Id.*

226. *See id.*

227. *See id.*

228. *See id.*

229. *See id.*

230. Former ALASKA STAT. § 25.30.060(d) provided that

[b]efore determining whether to decline or retain jurisdiction the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties.

See also Rogers v. Rogers, 907 P.2d 469, 471 (Alaska 1995) (noting that the “superior court concluded, after speaking with the judge presiding over the Arkansas proceeding, that Arkansas was a more convenient forum for the child custody proceeding”); Crews v. Crews, 769 P.2d 433, 435 (Alaska 1989) (observing that the “purpose of this statute is to avoid jurisdictional competition and ensure that two states do not simultaneously adjudicate the custody of a child”).

231. Wilson v. Marchington, 127 F.3d 805, 811 (9th Cir. 1997).

traditionally prefer mediation-style dispute resolution to our adversarial system.²³²

Judge Beistline's evidentiary decisions seem designed to avoid recognizing the tribal court's decision. Judge Beistline appears to believe that Mr. Baker was deprived of an impartial tribunal because several tribal council members who testified on behalf of Ms. John were relatives. Ms. John and several council members testified that their roles were solely as witnesses, while Mr. Baker asserted that they helped to shape the proceedings.²³³ Judge Beistline resolved the conflict in Mr. Baker's favor based solely on Mr. Baker's testimony, despite the weight of evidence to the contrary as seen in testimony from numerous other witnesses. The court's decision to resolve conflicting evidence based on Mr. Baker's lone assertions is most disturbing since Mr. Baker had previously lied to the court when he asserted that he was "unaware of any custody proceeding regarding the children, except as provided herein, in Alaska, or any other jurisdiction" in the affidavit required under the Uniform Child Custody Jurisdiction Act.²³⁴

It is indeed important for all litigants to be ensured the full protections provided by due process. But any fears about proper due process or equal protection are covered under the Indian Civil Rights Act ("ICRA"),²³⁵ thus removing the need for overzealous judicial paternalism. Furthermore, it may even be entirely inappropriate for state courts to exercise the level of scrutiny shown on remand in light of the U.S. Supreme Court's decision in *Santa Clara Pueblo v. Martinez*,²³⁶ in which the Court held that, through ICRA, Congress intended to limit review of tribal court decisions. Perhaps when the Alaska Supreme Court discusses this issue on round two it should consider placing the burden of proof squarely

232. See generally Robert D. Garrett, *Mediation in Native America*, 49 DISP. RESOL. J. 38 (1994).

233. See *Baker v. John*, Remand Decision, *supra* note 220.

234. *John v. Baker*, 982 P.2d 738, 743 (Alaska 1999).

235. See 25 U.S.C. § 1302 (1994) (providing that "[n]o Indian tribe in exercising powers of self-government shall . . . (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law"); see also RESTATEMENT (SECOND) OF JUDGMENTS § 81 (1980) (requiring a judgment to be valid before it can be given full faith and credit); *id.* § 1 (enumerating standards for valid judgment); RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 92 (1971) (setting forth the standards for a valid judgment).

236. 436 U.S. 49, 66-67 (1978); see also *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1294, 1300 (8th Cir. 1994) (stating that, under ICRA, federal courts should not review the merits of a dispute that is properly within tribal court jurisdiction).

on the objecting party to show, by clear and convincing evidence, that the tribal court's actions violated due process.²³⁷ Under such an approach, courts would begin their analysis with the presumption that a tribal court's decision is valid, certainly the respect deserving of another sovereign.

B. Bright Spots in the Alaska Supreme Court's Decision:
Acknowledging Member-Based Jurisdiction for Tribal Courts
in Alaska

1. *The John v. Baker Decision Vindicated Justice Rabinowitz's Decision in Stevens.* Despite acknowledging federal authority regarding the sovereignty of Alaska's tribes, the Alaska Supreme Court failed either to overrule explicitly or call into question its contrary prior decisions, particularly *Native Village of Stevens v. Alaska Management & Planning*.²³⁸ In *John v. Baker*, the court stated it was "[in]appropriate at this time to reach the question of whether *Nenana* and its progeny were wrongfully decided."²³⁹ That progeny includes *In re F.P.*, in which the Alaska Supreme Court refused to accept the Ninth Circuit's conclusion that tribes in Alaska were sovereign, relying solely on the historical analysis set forth in *Stevens*.²⁴⁰ However, by deferring to congressional and federal executive authority on the issue,²⁴¹ the Alaska Supreme Court finally has recognized what Justice Rabinowitz urged in the *Stevens* decision: that federal recognition and tribal sovereignty are issues best left to the federal government for de-

237. See, e.g., *Gall v. Parker*, 231 F.3d 265, 283-85 (6th Cir. 2000) (noting that when conducting habeas corpus review, principles of comity require federal courts to presume that state court proceedings were legitimate and not to disturb state court findings of historical fact absent "clear and convincing evidence").

238. 757 P.2d 32 (Alaska 1988).

239. *John*, 982 P.2d at 748.

240. *In re F.P.*, 843 P.2d 1214, 1215 (Alaska 1992).

241. See *John*, 982 P.2d at 749 ("If Congress or the Executive Branch recognizes a group of Native Americans as a sovereign tribe, we 'must do the same.'") (citation omitted); see also *Atkinson v. Haldane*, 569 P.2d 151, 163 (Alaska 1977) ("Because of the supremacy of federal law, we are bound to recognize the doctrine of tribal sovereign immunity, even if we were to find valid public policy reasons to hold it inapplicable in this case."). But see Hon. Monroe Gunn McKay, Keynote Address, in CONFERENCE PROCEEDINGS REPORT, *supra* note 4, at 5:

I know it is more common than not for us to hate and resent the asset of territorial control. It asserts itself in the form of sovereign immunity. When sovereign immunity works against us, we think it a terrible thing. On the other hand, when we the states prevail because the federal courts dismiss a claim under the eleventh amendment (state sovereign immunity), we think sovereign immunity is a wonderful thing.

termination. This recognition of federal supremacy on this issue is important as state courts frequently misconstrue the nature and origin of tribal sovereignty.²⁴²

In *Stevens*, the Alaska Supreme Court examined the historical relationship between Alaska's tribes and the federal government and concluded that Congress has never recognized the sovereign status of Alaska's tribes.²⁴³ The court also adopted prior language from the *Metlakatla* decision, stating that there were not "tribes" in Alaska as that term is commonly understood.²⁴⁴ The analysis fails to recognize the distinction between inherent sovereignty and federal recognition. Inherent sovereignty is relevant to understanding the source of a tribe's self-governing powers, while federal recognition relates to whether a tribe is eligible to receive certain types of federal funding.

In his dissent in *Stevens*, Justice Rabinowitz, relying on traditional canons of interpretation that pertain to legislation affecting Indian tribes,²⁴⁵ disagreed with the majority's outcome, concluding instead that Congress had not waived the tribe's sovereign immunity.²⁴⁶ Justice Rabinowitz also disagreed with the court's conclusion that a tribe could not avail itself of sovereign immunity if it had not been expressly recognized by Congress or the executive branch of the federal government.²⁴⁷ He noted that several federal courts, and even the Alaska Supreme Court, had previously rejected this approach.²⁴⁸ Justice Rabinowitz added that the majority's approach flaunted the established principle of inherent tribal

242. See, e.g., *Cohen v. Little Six, Inc.*, 543 N.W.2d 376, 382 (Minn. Ct. App. 1996) (labeling the notion that tribes are sovereign entities as a "ridiculous pretense"). In his dissent, Judge James Randall added that since tribes are within the boundaries of the United States, they cannot be sovereign. See *id.* at 383 (noting that "[o]ur neighbors to the north and south are, in every sense of the word, true sovereign states or sovereign nations. The reason is simple. They are not in the United States.").

243. See *Stevens*, 757 P.2d at 35-40.

244. See *id.* at 35-36 (quoting *Metlakatla Indian Cmty., Annette Island Reserve v. Egan*, 362 P.2d 901, 917-18 (Alaska 1961)).

245. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'") (citation omitted); *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) ("statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.").

246. *Stevens*, 757 P.2d at 43-45 (Rabinowitz, J., dissenting).

247. See *id.* at 45.

248. See *id.* at 45-46 (discussing *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977)).

sovereignty.²⁴⁹ Justice Rabinowitz concluded that while the federal government had never recognized any tribes in Alaska expressly, neither had it denied sovereign immunity expressly.²⁵⁰

While not renouncing the *Stevens* decision explicitly, the Alaska Supreme Court finally has put to rest any serious debate on the issue of tribal sovereignty in Alaska. It solidly built its decision on the principles outlined in *Atkinson v. Haldane*; that is, that courts should defer to the appropriate political branches and the federal government on the question. While put down quietly, the flawed analysis of *Stevens* and *Metlakatla* has been put to sleep at last.

2. *Alaska's Tribes Still Retain Jurisdiction Based on Tribal Membership.* Over a vigorous dissent, the Alaska Supreme Court stated in *John v. Baker* that the *Venetie* decision indicated that Public Law 280 is not relevant to the outcome of the case.²⁵¹ Rather, the court observed, the more relevant approach was to examine the authority a tribal government may exert over its members.²⁵² Contrary to the dissent's selective reading of the law, the principle of inherent tribal sovereignty, when combined with the *Venetie* decision and recent U.S. Supreme Court cases that increasingly move toward member-based sovereignty, requires that tribes in Alaska retain jurisdiction over their members under certain circumstances.

The U.S. Supreme Court has held that Indian tribes retain "attributes of sovereignty over both their members and their territory"²⁵³ and that such sovereignty is "dependent on, and subordi-

249. *See id.* at 46-47.

250. *See id.* at 49.

251. *See John v. Baker*, 982 P.2d 738, 765 (Alaska 1999) (Matthews, C.J., and Compton, J., dissenting). The dissent totals nearly fifty pages of the seventy-six-page opinion, representing what is known to have been a bitter disagreement among the justices over the disposition of the case. In his dissent, Chief Justice Matthews disputes the existence of inherent sovereignty, argues that tribal courts cannot exercise jurisdiction over their members absent a territorial base, asserts that federal executive authority regarding tribal court jurisdiction was irrelevant, claims that the canons of construction do not apply, and argues that allowing tribal courts jurisdiction over nonmembers would be impermissible. This Article only indirectly addresses a few of the points raised in the dissent because it reflects a selective application of federal Indian law principles, promotes a selective reading of history and, as the majority opinion notes, "ignore[s] the fundamental meaning of sovereignty and insult[s] tribal systems of justice to reason that because tribal law is different it is inferior." *Id.* at 764.

252. *See id.* at 748-59.

253. *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

nate to, only the Federal Government, not the States.”²⁵⁴ If we subtract “territory” from that equation, as the *Venetie* court inexplicably has,²⁵⁵ then Alaska’s tribes retain sovereignty over their members.²⁵⁶

As the U.S. Supreme Court noted in *United States v. Wheeler*,²⁵⁷ “Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute.”²⁵⁸ The Court then noted that nothing in the Navajo treaties with the United States or in federal statutes had deprived the tribe of jurisdiction over its members.²⁵⁹ Even though the Court maintained that tribal sovereignty was both a function of territory and membership, it focused its discussion on the connection between sovereignty and membership because a

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

255. The *Venetie* Court did more than declare that Indian country does not exist in these lands, for the impact of its analysis was to declare that tribes were hamstringed in their ability to self-govern. Courts have long held that Indian tribes have the power, absent some treaty provision or act of Congress to the contrary, to enact their own laws for the government of their people, and to establish courts to enforce them. See *Williams v. Lee*, 358 U.S. 217 (1959) (holding that exercise of state jurisdiction would undermine tribal authority over reservation affairs); *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965) (finding tribal courts to be, at least in part, “arms of the federal government”); *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res.*, 231 F.2d 89 (8th Cir. 1956) (holding that the tribe passed on inherent taxation powers). Essentially what the *Venetie* court did was hold that Congress has extinguished the rights of Alaska’s tribes to self-govern without making an explicit finding to support the conclusion.

The outcome of *Venetie* not only flies in the face of logic, but directly contradicts previous Supreme Court pronouncements on the limits of state civil authority over tribes. See, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208 (1987) (noting that, in *Bryan v. Itasca County*, 426 U.S. 373 (1976), “[w]e recognized that a grant to States of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values”); *Morton v. Ruiz*, 415 U.S. 199, 218 (1974) (noting that Congress has consistently treated Alaska Native village land as “on or near a reservation” for the purpose of several federal statutes).

256. In his dissent, Chief Justice Matthews contends that it was impossible for tribes to assert jurisdiction absent a territorial base. However, the dissent ignores Supreme Court case law that distinguishes between jurisdiction over tribal members and jurisdiction over territory. See *John*, 982 P.2d at 782 (Matthews, C.J., and Compton, J., dissenting).

257. 435 U.S. 313 (1978).

258. *Id.* at 323 (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)).

259. See *id.* at 324.

tribal member was involved.²⁶⁰ The *Wheeler* Court also stated that the “right of self-government” included the right to enact laws applicable to tribal members and the right to exercise authority over internal relations.²⁶¹ The Court later asserted in *Duro v. Reina* that “[i]t is undisputed that the tribes retain jurisdiction over their members,” subject to matters over which federal courts might exercise concurrent jurisdiction.²⁶² Thus, *Duro* and *Wheeler* strongly suggest that tribes may exercise jurisdiction over the internal relations of their members in the absence of territorial-based jurisdiction.²⁶³

This conclusion is also supported by *Organized Village of Kake v. Egan*.²⁶⁴ In *Kake*, the U.S. Supreme Court discussed, with approval, a previous case that held that a non-Indian who was accused of murdering another non-Indian on a Montana reservation could be prosecuted only in state courts.²⁶⁵ This analysis reflects a view that it is the membership, or non-membership, of a party that influences the tribe’s ability to exercise jurisdiction, not whether the dispute arose within Indian country. Similarly, *Venetie* would not prohibit a tribal court from prosecuting tribal members for purely tribal offenses.²⁶⁶

For those individuals who willingly submit to the tribal court’s jurisdiction but are not members of the tribe,²⁶⁷ the limited applica-

260. *See id.* at 323-24.

261. *See id.* at 322, 326. *See also* *Chilkat Indian Vill. v. Johnson*, 870 F.2d 1469, 1475-76 (9th Cir. 1989) (noting that attempts to enforce tribal ordinances against tribal members are the “staple of tribal courts”); *Boe v. Fort Belknap Indian Cmty.*, 642 F.2d 276, 279 (9th Cir. 1981).

262. 495 U.S. 676, 681 n.1 (1990).

263. *See Dussias, supra* note 166, at 49.

264. 369 U.S. 60 (1962).

265. *See id.* at 68 (discussing *Draper v. United States*, 164 U.S. 240 (1896)).

266. *See United States v. Wheeler*, 435 U.S. 313, 326 (1978) (noting that this aspect of sovereignty is not surrendered). The *Wheeler* Court added that the surrender of sovereignty occurs only when tribes attempt to assert jurisdiction over non-members.

267. The *John v. Baker* dissent spends considerable time expounding on how distasteful it would be for tribes in Alaska, absent Indian country, to exercise personal jurisdiction over non-members. Under standard rules of civil procedure, however, a court may properly exercise personal jurisdiction over a party that willingly submits itself to the court’s authority. *See* ALASKA STAT. § 09.05.010 (LEXIS 2000) (“The voluntary appearance of the defendant is equivalent to personal service of a copy of the summons and complaint upon the defendant.”); ALASKA R. CIV. P. 12(h)(1); *Kenai Peninsula Borough v. English Bay Vill. Corp.*, 781 P.2d 6, 9 (Alaska 1989) (“A court acquires personal jurisdiction over one who appears without challenging jurisdiction.”). Absent the distasteful application of a

tion of the rationale developed in *Montana v. United States*²⁶⁸ would be warranted. In *Montana*, the U.S. Supreme Court held that a tribe could not exercise jurisdiction over a non-member's activities in Indian country unless certain conditions were met.²⁶⁹ Under the first condition, the Court held that a tribe could exercise jurisdiction over non-members "who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."²⁷⁰ Under the second condition, a tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."²⁷¹

Application of the *Montana* principles is not apparent immediately since they dealt with jurisdiction over fee title land within a reservation. Yet, if these exceptions are based on the principle of inherent sovereignty and tribes are permitted to exercise jurisdiction over non-Indians under these circumstances, then most certainly a tribe should be permitted to exercise jurisdiction over members when the situation affects the "political integrity, the economic security, or the health or welfare of the tribe."²⁷² Even then, an Alaska tribe's ability to exercise some limited forms of jurisdiction over its ANCSA lands may not be as remote a possibility as commentators think. A recent D.C. Circuit opinion regarding the ability of the Pueblo to exercise authority under Environmental

double standard, these principles should apply to tribal courts as well. To analogize to Chief Joseph's comments quoted at the beginning of this Article, justice can be achieved in Alaska only when state courts treat tribes with the respect they give each other.

On a similar note, one of the weakest arguments in opposition to tribal courts exercising jurisdiction over non-members is that such individuals are not allowed to vote, hold office, or serve on a jury in that court. *See, e.g., Duro v. Reina*, 495 U.S. 676, 688 (1990), *superseded by* 25 U.S.C. § 1301(2) (1994). This once again illustrates that the standards change when state or federal courts examine the authority of tribal courts. Under state and federal rules of civil procedure, a non-resident visiting or doing business in another state, if meeting the proper tests, may normally be subject to the jurisdiction of the state he is visiting, although he may not be able to vote, hold office, or sit on a jury. This has been a long-standing foundation of civil jurisdiction for state and federal courts in this country, but the same respect is not granted to tribal courts. If the same limitations were placed on state courts that are on tribal courts in this context, state courts would cry foul.

268. 450 U.S. 544 (1981).

269. *See id.* at 565.

270. *Id.* (citations omitted).

271. *Id.* at 566 (citations omitted).

272. *Id.*

Protection Agency regulations over tribal trust lands in non-reservation areas might have implications in Alaska.²⁷³

The U.S. Supreme Court's recent focus on member-based sovereignty instead of territorial-based sovereignty,²⁷⁴ while detrimental to tribes on reservations with checkerboard jurisdiction, actually works to the advantage of Alaska's tribes.²⁷⁵ These decisions tend to diminish the authority of the tribe over non-members residing within the reservation, but in Alaska, they would allow the tribe effectively to extend its jurisdiction over members in the absence of Indian country or a reservation system. As the concurring opinion in *Cherokee Nation v. Georgia* noted, the powers of self-government rest with the sovereign, not with the land.²⁷⁶

C. Full Faith and Credit as a Mechanism for Furthering Justice in Alaska's Rural Communities

Indian tribes do not exist in a vacuum outside our constitutional framework of federalism.²⁷⁷ Many of the twentieth century's

273. See *Arizona Pub. Serv. Co. v. Environmental Prot. Agency*, 211 F.3d 1280 (D.C. Cir. 2000). The D.C. Circuit reasoned that since the U.S. Supreme Court has found no distinction between "reservation" and "tribal trust lands" with regard to sovereign immunity, it was not improper for the EPA, in promulgating the "Tribal Authority Rule," to allow the Pueblo to propose tribal implementation plans under the Clean Air Act for tribal trust lands outside the reservation. See *id.* at 1294. The court added that when a tribe can demonstrate inherent sovereignty over an area, and an activity would threaten the "health or welfare of the tribe," then it would be appropriate for the tribe to exercise jurisdiction. *Id.* at 1295 (quoting *Montana*, 450 U.S. at 566).

274. See generally Dussias, *supra* note 166.

275. I must emphasize that it is not at all preferential for Alaska's tribes to be stripped of their territorial jurisdiction. Since the Supreme Court has deemed it necessary to eradicate Indian country in Alaska, however, tribes must make use of what remains—assertion of sovereignty over tribal members.

276. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 27 (1831) (Johnson, J., concurring). Justice Johnson made the following analogy:

[The Indians'] condition is something like that of the Israelites, when inhabiting the deserts. Though without land that they can call theirs in the sense of property, their right of personal self government . . . may exist though the land occupied be in fact that of another. The right to expel them may exist in that other, but the alternative of departing and retaining the right of self government may exist in them. And such they certainly do possess; it has never been questioned, nor any attempt made at subjugating them as a people, or restraining their personal liberty except as to their land and trade.

277. See WILKINSON, *supra* note 5, at 103 ("Indian tribes are part of the constitutional structure of government"); Gross, *supra* note 155, at 134 (observing that the American Indian Policy Review Commission viewed tribes as having the same sovereignty as states and local governments); Hon. Sandra Day O'Connor, *Les-*

decisions regarding civil jurisdiction reflect a belief that states and tribes both exist as part of the national court system.²⁷⁸ Tribal courts have long been recognized as important forums for resolving personal disputes of both Indians and non-Indians.²⁷⁹ Tribal courts are also important forums for the preservation of traditional tribal values and are a practical option for many of Alaska's tribes, particularly since the state court system operates mostly in urban areas and hub communities.²⁸⁰ In contrast, most of the more than one hundred tribal courts and councils involved in resolving disputes in Alaska are located in the rural areas.²⁸¹

Courts and scholars alike have made several arguments in support of extending full faith and credit to Indian tribes generally. One of these arguments is based on the Full Faith and Credit Act.²⁸² Proponents of this argument suggest that tribes constitute "territories" for the purpose of the statute.²⁸³ In reference to this

sons from the Third Sovereign: Indian Tribal Courts, 33 TULSA L.J. 1, 1 (1997) ("Today, in the United States, we have three types of sovereign entities—the Federal government, the States, and the Indian tribes."); *see generally* Richard Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617 (1994).

278. *See* Judith Resnik, *Multiple Sovereignties: Indian Tribes, States, and the Federal Government*, 79 JUDICATURE 118, 118-25 (1995).

279. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978); Fisher v. District Ct., 424 U.S. 382, 390 (1976).

280. *See* LISA JAEGER, TRIBAL COURT HANDBOOK 2 (Alicemary Closuit ed., 2d ed. 1991).

281. *See* CASE & VOLUCK, *supra* note 29 (manuscript at ch. 10, 91). The vast majority of dispute resolution among village members is handled by tribal councils, not the courts—Alaska only has twenty-three tribal courts handling disputes outside of tribal councils. *See Dispute Resolution in Alaska*, *supra* note 78, at 1.

282. *See* 28 U.S.C. § 1738 (1994).

283. United States *ex rel* Mackey v. Coxe, 59 U.S. 100, 103 (1856) (noting that despite the differences between Indian territories and territories organized to later become states, there "is no reason why the laws and proceedings of the Cherokee territory, so far as relates to rights claimed under them, should not be placed upon the same footing as other territories in the Union. It is not a foreign, but a domestic territory,—[sic] a territory which originated under our constitution and laws."); Raymond v. Raymond, 83 F. 721, 722 (8th Cir. 1897) (noting that the courts of the Cherokee Nation "are entitled to all the faith and credit accorded to the judgments and decrees of territorial courts"); Sheppard v. Sheppard, 655 P.2d 895, 902 (Idaho 1982) (agreeing with the decisions of previous courts "which have found the phrase 'Territories and Possessions' broad enough to include Indian tribes, at least as they are presently constituted under the laws of the United States"); Jim v. CIT Fin. Servs. Corp., 533 P.2d 751, 752 (N.M. 1975); *In re* Adoption of Buehl v. Anderson, 555 P.2d 1334, 1342 (Wash. 1976). *But see* Brown v. Babbit Ford, Inc.,

argument, the U.S. Supreme Court has observed that tribal courts, when acting properly within their jurisdiction, are under some circumstances entitled to full faith and credit recognition.²⁸⁴ This argument unfortunately seeks to force tribes into an established box. Rather than attempting to shape tribes either into states or territories, courts and Congress should simply recognize tribal governments for what they are: unique members of an evolving federalism.²⁸⁵

Most of the opposition to recognizing tribal courts through application of full faith and credit principles stems from an overly inflexible reading of the Constitution and a lack of awareness about the increasing role that tribal courts are playing in our modern federalism. Those who criticize the extension of full faith and credit to tribal court decisions assert that such recognition is inappropriate because tribal governments were not mentioned specifically in the Full Faith and Credit Clause of Article IV of the U.S. Constitution.²⁸⁶ This argument ignores the increasing treatment by Congress of Indian tribes as governments similar to states,²⁸⁷ and

571 P.2d 689, 694-95 (Ariz. Ct. App. 1977) (tribal decrees entitled to comity but not full faith and credit); *In re Marriage of Red Fox*, 542 P.2d 918 (Or. Ct. App. 1975); Fred L. Ragsdale, *Problems in the Application of Full Faith and Credit for Indian Tribes*, 7 N.M. L. Rev. 133, 135-38 (1977).

284. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 n.21 (1978) (citing *United States ex rel. Mackey v. Coxe*, 59 U.S. 100 (1856)).

285. See Gross, *supra* note 155, at 136 (noting that the constitution recognizes that Indian tribes were to be dealt with as separate political entities, distinct from states or foreign nations); see generally Frank Pommersheim, "Our Federalism" in *the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community*, 71 U. COLO. L. REV. 123 (2000).

286. See U.S. CONST. art IV, §1. These arguments also fail to mention that there was little to no debate over the enactment of the Full Faith and Credit Act which implemented the clause. See Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 5 nn.22-23 (1945). Jackson adds that the members of the Constitutional Convention or the early Congresses "had [little] more than hazy knowledge of the problems they sought to settle or of those which they created by the full faith and credit clause." *Id.* at 6. Even though tribes were not part of the original agreement that created the Full Faith and Credit Clause, they have since evolved as a distinct aspect of our modern federalism. See also Tom LeClaire, *Full Faith and Credit and Tribal Court Judgments*, in COURSE MATERIALS, 24th ANNUAL FEDERAL BAR ASSOCIATION INDIAN LAW CONFERENCE 3 (Apr. 8-9, 1999).

287. See Surface Mining Control and Reclamation Act, 30 U.S.C. § 1235(k) (1994); Federal Water Pollution Control Act, 33 U.S.C. § 1377(a) (1994); Superfund Act, 42 U.S.C. § 9626(a) (1994); Safe Drinking Water Act, 42 U.S.C. §§ 300j-11(a) (1994). See generally Teresa A. Williams, *Pollution and Hazardous Waste on Indian Lands: Do Federal Laws Apply and Who May Enforce Them?*, 17

betrays the purpose behind full faith and credit recognition, which is that the many sovereign members of our federalist structure should exist in cooperation. The Full Faith and Credit Clause was implemented to make each state an integral part of one nation, to establish one country with equal privileges accorded to the citizens of the many states, and to unify the states rather than have the states act as independent nations free to ignore the judicial proceedings of others.²⁸⁸ The argument also ignores the long-standing principle that Indian tribes are not foreign governments, to which comity recognition normally is applied.²⁸⁹

AM. INDIAN L. REV. 269 (1992) (providing further analysis of these provisions and their tribes-as-states provisions). An amendment was introduced in a recent congressional session that would formally include tribes in Endangered Species Act provisions related to recovery efforts and cooperative agreements. See H.R. 2351, 105th Cong. (1998).

288. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 322 (1981) (Stevens, J., concurring) (noting that the purpose of the Full Faith and Credit Clause was “to transform the several States from independent sovereignties into a single, unified Nation”); Sumner, *supra* note 217, at 241-42. Otherwise, the states would coexist in the manner they did under the Articles of Confederation, with each state free to make its own determination as to the validity of judgments from other colonies and only recognizing judgments under the discretionary comity standard. See *id.* at 246.

The concept has an indirect application to the relationship between states and tribes. States and tribes co-exist as part of a federal structure, but they are not “sister states” in the sense imagined by the Constitution, nor are the more than 500 Indian tribes in any way similar to one another. See P.S. Deloria & Robert Laurence, *Negotiating Tribal-State Full Faith and Credit Agreements: The Topology of the Negotiation and the Merits of the Question*, 28 GA. L. REV. 365, 378-79 (1994); see also Daina B. Garonzik, Comment, *Full Reciprocity for Tribal Courts from a Federal Courts Perspective: A Proposed Amendment to the Full Faith and Credit Act*, 45 EMORY L.J. 723, 725 (1996) (“The Full Faith and Credit Clause clearly governs only sister state pronouncements. Yet Congress intended to entitle the decisions of all courts within the federal system to full faith and credit by enacting the Full Faith and Credit Act.”); Resnik, *supra* note 278, at 118 (“[E]quation of states and tribes would be erroneous, for profound differences of history, sociology, and politics exist between the two.”).

289. It is important to note once again that the Alaska Supreme Court relied primarily on the Ninth Circuit’s *Wilson* decision for its analytical approach to applying comity recognition to tribal court decisions. One commentator has noted the fallacy of the *Wilson* analysis as follows:

Wilson does not note nor lend any significance to the procedural safeguards already in place within our federal system. It improperly equates tribes with foreign nations for judgment recognition purposes, ignoring the fact that United States already exhibits controls on the tribal courts process, with the ICRA and guaranteed federal question review under 28 U.S.C. § 1331. Likewise, *Wilson* fails to grasp that the concerns ad-

Those who fear the restrictions on state sovereignty that granting full faith and credit to tribal courts might impose should be reminded of the words of Chief Justice Stone, that “the full faith and credit clause is not an inexorable and unqualified command.”²⁹⁰ Reviewing courts are still permitted to determine whether the originating court had jurisdiction.²⁹¹ The Full Faith and Credit Clause is a statement about how we view the nature of our system of federalism, where each member stands on the ground of mutual respect. If we consider tribal governments as equal partners with states in our federalist structure, then there is no room for comity. The current patchwork system of granting recognition to tribal courts on the basis of comity lacks the predictability and stability offered by full faith and credit recognition and allows state courts to make value judgments about the viability of tribal sovereignty and the validity of tribal courts themselves.²⁹²

Moreover, as a practical matter, full faith and credit recognition of tribes would further justice in rural Alaska by providing a forum of finality for Alaska’s rural litigants. The Alaska Court System has recognized this contribution.²⁹³ Additionally, as dis-

ressed in *Hilton* and the Restatements are already embodied in the federal system.

Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. REV. 311, 338-39 (2000). Federal courts also recognize state court decisions regarding state law on the basis of comity, *see* *Bush v. Gore*, 121 S. Ct. 525, 534, ___ U.S. ___ (2000) (Rehnquist, C.J., and Scalia and Thomas, J.J., concurring), and tribal court decisions, *see* *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15-16 n.8 (1987), but that analogy is highly inappropriate in this context. States by no means have any supremacy over tribal governments, as the Constitution, federal statutes and U.S. Supreme Court decisions consistently show.

290. *Pink v. A.A.A. Highway Express, Inc.*, 314 U.S. 201, 210 (1941).

291. *See* *John v. Baker*, 982 P.2d 738, 763 (Alaska 1999).

292. *See* *LeClaire*, *supra* note 286, at 7. *LeClaire* adds that comity recognition in particular presents several problems: (1) it allows states to evaluate tribal court jurisdiction, usually a function of federal courts; (2) it allows states to determine whether tribal courts have adequate procedures, where Congress is normally the institution that determines the limits of how tribes may exercise their power; (3) it allows states to evaluate the merits of tribal court rulings; (4) it permits states to make value judgments about tribal sovereignty; and (5) it creates the possibility of a double standard, since under current law, states “do not look behind judgments from sister state or federal courts, but insist on doing so regarding tribal courts.” *Id.* at 13-15.

293. *See* *John*, 982 P.2d at 760 n.153 (recommending that state courts “greatly enhance equality in the effective delivery of justice system services by associating or blending [] local resources [like tribal courts] with the formal court system” and noting that “[t]he western justice system is not always the most appropriate

cussed below, ignoring tribal court decisions contributes to a decline in public faith of the legal system in rural Alaska.

D. Recognition of Sovereignty Requires More than Concurrent Jurisdiction over Domestic and Internal Disputes

Congress has increasingly moved toward a policy of tribal self-determination.²⁹⁴ This policy allows a tribe to make its own decisions about internal affairs and government without outside, non-tribal influence.²⁹⁵ It also has been a long-standing principle of law that Indian nations exercise exclusive jurisdiction over the domestic relations of their members.²⁹⁶ In a post-*Venetie* Alaska, it may still be possible and appropriate for tribes to exercise exclusive jurisdiction over such internal matters as tribal membership disputes, tribal elections, ownership of tribal property or other issues that fall solely under the rubric of the internal functions of govern-

model for the problems of many rural areas”) (quoting ALASKA COURT SYSTEM, REPORT OF THE ALASKA SUPREME COURT ADVISORY COMMITTEE ON FAIRNESS AND ACCESS 107-08 (1997)).

294. Tribal self-determination is not merely a congressional construct, but a concept recognized by the nations of the world. *See Declaration on the Granting of Independence to Colonial Countries and Peoples*, U.N. GAOR, 15th Sess., Supp. No. 16, at 66-67, U.N. Doc. A/4684 (1960) (“All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”).

295. Congress outlined this principle in stating the purpose for the Indian-Self Determination Act:

The Congress declares its commitment to the maintenance of the Federal Government’s unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination . . . to effective and meaningful participation by the Indian people[.]

25 U.S.C. § 450a(b) (1994).

296. *See Fisher v. District Ct.*, 424 U.S. 382 (1976); *United States v. Quiver*, 241 U.S. 602 (1916); *In re W.*, No. CP-AN-37-98 (Nav. Fam. Ct., July 21, 1999) (on file with author). “Domestic relations” in this sense refers to family and domestic relations issues, such as child custody, child support, or domestic violence, that are confined to members of one tribe exclusively.

ment.²⁹⁷ Private parties also may be able to consent to exclusive tribal jurisdiction where it otherwise might not be enforceable.²⁹⁸

The Alaska Supreme Court, along with the Governor, recently has taken important steps to improve the condition of Alaska's Indian tribes and respect their rights of self-government, but those steps have not gone far enough. Although the State of Alaska recognized inherent tribal sovereignty in Alaska in Administrative Order 186, it clearly seems to envision the role of tribes in Alaska as municipal or borough governments, not as independent self-governing entities.²⁹⁹ A governor's task force opined that members of the committee drafting portions of ANCSA originally intended to compel Alaska's Native entities to organize as municipal gov-

297. See CASE & VOLUCK, *supra* note 29 (manuscript at ch. 10, 45). While some of Alaska's tribal courts handle alcohol-related offenses, the vast majority of their caseloads involve domestic and child-related issues, along with a small number of cases involving traditional law questions, clan property and artifacts, probate, contracts, and allotments. See *Dispute Resolution in Alaska*, *supra* note 78, at ch. 1, 11.

298. See CASE & VOLUCK, *supra* note 29 (manuscript at ch. 10, 45).

299. For example, Administrative Order 186 seems to focus on what tribal governments can deliver to the citizens of Alaska generally, not what the tribes can contribute to their own people:

The State of Alaska recognizes the important contribution Alaska's Tribes make to the citizens of Alaska. The State of Alaska recognizes that funds generated by the Tribes represent a large positive economic and social impact on the entire state and its citizens. The State of Alaska recognizes and values the revenues and services that Alaska's Tribes contribute to the state's economic and social well-being by virtue of their direct Tribal authority and responsibility for the delivery of social, economic, cultural, and other programs and services.

Administrative Order No. 186, Sept. 29, 2000, available at <http://www.gov.state.ak.us/admin-orders/186.html>.

The Order later states:

The State of Alaska has a long-standing commitment to local self-government that is rooted in the belief that the best and most effective solutions to local problems are those that are conceived locally The State is committed to working with Tribes to further strengthen Alaska's ability to meet the needs of Alaska's communities and families.

Id.

When read in conjunction with the earlier cited language, this excerpt indicates two things: (1) Alaska has failed to recognize the uniqueness and autonomy of Alaska's tribes compared with other local governments or communities in the State; and (2) that the benefit of recognizing tribal governments will not fall on the tribes, through the exercise of self-government and self-determination, but on the State of Alaska, which plans to create more than two hundred "new" local governments that can deal with Alaska's rural problems.

ernments.³⁰⁰ The State's policy also falls short because it fails to respect all jurisdictional issues, particularly exclusive jurisdiction over matters involving internal affairs.³⁰¹

In *John v. Baker*, the Alaska Supreme Court determined that state and tribal courts share concurrent jurisdiction, but there are some cases in which requiring litigants to respond to a tribal court located far from home might be unfair.³⁰² While the court may have been correct in concluding that state and tribal courts share concurrent jurisdiction, it has not guided state courts adequately in the degree of respect that should be given to tribal courts in sharing that jurisdiction.

The spirit underlying full faith and credit recognition is more likely to promote improved relations between the state and tribes than will comity.³⁰³ Tribal courts seek mutual respect and dignity,³⁰⁴ not usurpation of jurisdiction and authority by a state government that is "ever fearful of meaningful sovereignty."³⁰⁵ If the tribes of Alaska are to be recognized as "distinct, independent political communities, retaining their original natural rights' in matters of local self-government,"³⁰⁶ the State of Alaska should be less concerned about encroaching upon the exercise of tribal sovereignty. Perhaps the State and its courts should not rely on the restrictive and adversarial approach to sovereignty that it has in the past.³⁰⁷

300. See TASK FORCE REPORT, *supra* note 78; see also S. REP. NO. 92-405 at 133 (1971) (emphasis in original):

Native villages that are qualified under Alaska law are encouraged by subsection (b) to organize as municipal organizations, which, of course, serve all persons, Natives and non-Natives living within the municipality. To provide specific motivation for villages to organize as municipalities, subsection (b) provides that Village Corporations shall be considered political subdivisions of the State eligible for grants, loans or contracts under Federal law *only if*, and only for so long as, they do not meet the requirements of Alaska State law to incorporate as municipalities.

301. See also JAEGER, *supra* note 280, at 11-12.

302. See 982 P.2d 738, 760-61 (Alaska 1999).

303. See *Sheppard v. Sheppard*, 655 P.2d 895, 902 (Idaho 1982) (referring to improved relations between Idaho state courts and tribal courts).

304. See McKay, *supra* note 241, at 1.

305. Pommersheim, *supra* note 129, at 443 (noting that this fear underlies recent U.S. Supreme Court decisions that have further stripped away tribal sovereignty).

306. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (quoting *Worcester v. Georgia*, 26 U.S. 515, 559 (1832)).

307. See Vine Deloria, Jr., *Self-Determination and the Concept of Sovereignty*, in NATIVE AMERICAN SOVEREIGNTY, *supra* note 155, at 124:

"Sovereignty" is a useful word to describe the process of growth and awareness that characterizes a group of people working toward and achieving maturity. If it is restricted to a legal-political context, then it

In reserving the right to exercise jurisdiction over internal matters between tribal members, the Alaska Supreme Court preserves individual freedom at the expense of tribal self-governance.³⁰⁸ Sovereignty is relatively meaningless when it can be ignored or avoided at the will of another government or a private litigant.³⁰⁹ Tribal courts are the most appropriate means for resolving disputes involving tribal members, and they are the keystone to tribal economic development and self-sufficiency.³¹⁰ Jurisdictional problems in rural Alaska can be solved. It is only through a partnership based on equality, not dominance and subordination.³¹¹

becomes a limiting concept which serves to prevent solutions. The legal-political context is structured in an adversary situation which precludes both understanding and satisfactory resolution of difficulties and should be considered as a last resort, not as a first instance in which human problems and relationships are to be seen.

308. See *Santa Clara Pueblo*, 436 U.S. at 59 (citations omitted).

309. Cf. *Recent Supreme Court Decisions Bring New Confusion to the Law of Indian Sovereignty*, in *RETHINKING INDIAN LAW*, *supra* note 7, at 77 (referring to Congress's plenary power to limit or abolish tribal sovereignty at will).

310. See Hon. Mary T. Wynne, President, National American Indian Court Judges Association, *Testimony on Fiscal Year 2001 Interior Appropriations, Subcommittee on Interior and Related Agencies, House Appropriations Committee*, Apr. 6, 2000; *United States v. Wheeler*, 435 U.S. 313, 331-32 (1978) (citation omitted):

[Tribes] have a significant interest in maintaining orderly relations among their members and in preserving tribal customs and traditions, apart from the federal interest in law and order on the reservation. Tribal laws and procedures are often influenced by tribal custom and can differ greatly from our own. Thus, tribal courts are important mechanisms for protecting significant tribal interests.

See also *Williams v. Lee*, 358 U.S. 217, 223 (1959) (noting that allowing the exercise of state court jurisdiction "would infringe on the right of the Indians to govern themselves"); FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 57 (1995):

Tribal courts constitute the frontline tribal institutions that most often confront issues of self-determination and sovereignty, while at the same time they are charged with providing reliable and equitable adjudication in the many and increasingly diverse matters that come before them. In addition, they constitute a key tribal entity for advancing and protecting the rights of self-government.

311. See Hon. Daniel K. Inouye, *Tribal Sovereignty and the Administration of Justice in Indian Country*, in *CONFERENCE PROCEEDINGS REPORT*, *supra* note 4, at 11. If the state courts are willing to develop an equal partnership with tribal courts and look beyond some of the shortcomings of some tribal court systems, then perhaps true progress and improvement can be made. See Wright, *supra* note 218, at 1417-24 (discussing some of the common problems in developing tribal court systems and suggesting that state courts should help tribal courts achieve reforms); cf. BRAKEL, *supra* note 67, at 1-28 (discussing some common difficulties that tribal court systems face, including shortages in legally trained per-

If we apply the *John* court's analysis of member-based jurisdiction to the logical conclusion, that in the absence of Indian country tribes can still assert jurisdiction over their members, then tribes also should be entitled to primary jurisdiction. This position would be consistent with the State of Alaska's current view of the role of tribal governments within the State. Absent these improvements, tribal courts could be faced with "sore loser" litigants, like Mr. Baker, who go forum-shopping to the state courts when they receive an unfavorable ruling.

Without any avenue for enforcement, tribal court operations will be curtailed severely,³¹² creating problems for Natives and non-Natives alike in rural Alaska. This is particularly true given the increasing role of tribal courts³¹³ and the increasing presence of Alaska Native groups in rural Alaska.³¹⁴ The perception of the people can often shape the credibility of a court system, even with non-Indian courts.³¹⁵ In *John v. Baker*, when the state superior court assumed jurisdiction after the tribal court had already rendered its decision, the people of the tribe lost faith in their court system.³¹⁶ The U.S. Supreme Court warned that stripping tribes of the dispute resolution systems established for their members could "undermine the authority of the tribal courts."³¹⁷ When state courts claim jurisdiction after tribal courts have spoken, this warning may come true.

V. CONCLUSION

Given the long history of anti-Native sentiment that has driven the State of Alaska's policy toward Alaska's tribes, it is no doubt that the *John v. Baker* decision is a hard pill for anti-sovereignty

sonnel, language barriers, insufficient avenues for appellate review, tribal politics, problems in selecting tribal judges, and difficulties in providing judicial training).

312. Cf. JAEGER, *supra* note 280, at 56.

313. See, e.g., Clinton, *supra* note 55, at 843 ("As important sovereigns within the federal union, Indian tribes and their operations impact the daily lives of large numbers of Indians and non-Indians alike.").

314. See generally *Dispute Resolution in Alaska*, *supra* note 78; cf. LeClaire, *supra* note 286, at 1 (noting that one of the reasons full faith and credit recognition for tribal courts has taken on increasing importance is because "tribes and their members no longer live in isolation from American society.").

315. See Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 849 (reflecting that the public vision of a politicized federal judiciary system seems to grow more popular each year).

316. See *Dispute Resolution in Alaska*, *supra* note 78, at ch. 2, 22.

317. *Williams v. Lee*, 358 U.S. 217, 223 (1959).

proponents to swallow. Arguments against tribal sovereignty, however, fail in light of reason, law, and policy. All indigenous people have an inherent right and power to govern, a right that preceded the existence of this Union and its members. Understanding how to place that origin in context, to define the relationship between the many inherent sovereigns and the United States, is where the issue becomes confusing.

Even though the task may be daunting, the State of Alaska can gain more than it loses by fostering a positive relationship with its more than 200 tribes. Part of that process shall and must involve building trust between the state and tribal court systems, as many states have already done by developing specific rules for the recognition of tribal court decisions. It can only be successful, however, if the state legislature becomes involved. The established law limits what the Alaska Supreme Court can accomplish. It will require a forward-thinking legislature to put the principles in place to develop full faith and credit recognition as a reality. As tribes become increasingly recognized as a third sovereign in our federalist system, states and Congress are concluding that the most consistent, fair, and respectful mechanism for recognition of tribal court decisions is through full faith and credit recognition.