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Reviving Local Tribal Control in Indian Country

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Progressive tribes, states, and local governments traverse the jurisdictional wasteland of Indian country by negotiating their conflicts into intergovernmental agreements. Reticent states and local governments have sought refuge in the federal courts because the Supreme Court's Indian cases tend to value state interests over tribal interests, despite the fact that Congress chose to restore local control of Indian country to Indian tribes in passing the Indian Reorganization Act and the various Self-Determination Acts. The successes of public safety, taxation, environmental, and commercial intergovernmental cooperation should not be so underestimated.

By Matthew L.M. Fletcher

Legal scholars have long debated centralized, regionalized, and localized government, but none have done so with the 562 federally recognized Indian tribes in mind. Indian tribes range in demographic and territorial size from larger than some Eastern states to smaller than the Vatican, but the tribes are all sovereign entities with the authority to govern themselves. Indian tribes, as sovereigns vested with inherent authority, operate on numerous levels analogous to national, state, and local governments. For example, Indian tribes administer federal government programs under the various self-determination acts, negotiate compacts with state governments, engage in multimillion-dollar business activities, and regulate municipal activities such as garbage pickup and snow-plowing roads. No other level of American government handles such a broad array of services and issues. On any given month, tribal officials and professionals might testify before Congress, negotiate a tax agreement with a state treasurer, and conclude a local law enforcement cross-deputization agreement with a local county police commission.

Indian tribes retain the sovereign authority necessary to provide for local self-government, a remnant of the federal government's policy of "measured separatism" that was in effect during the treaty era. Today, express congressional and executive branch policies favor tribal self-determination. Despite this support from the federal policy-making branches of government, Indian tribes face obstacles in exercising governmental authority. Although Indian tribal governments continue to acquire greater capacity to govern and to serve their constituencies, the Supreme Court is more wary of allowing the enforcement of tribal law against nonmembers. The Court has noted concerns about the lack of consent to being governed by tribal governments within which nonmembers might have little or no right to political participation; T. Alexander Aleinikoff has referred to this as a "democratic deficit."[1] Moreover, the Court implied that the "checkerboarding" of jurisdiction within Indian country leads it to conclude that the most pragmatic way to resolve jurisdictional disputes is to extend state jurisdiction to tribal lands. As a result, state and local governments — and their non-Indian constituents — are the "favored quarter," to borrow a real estate term. Federal courts have upheld these interests over the interests of Indian tribes in a large majority of the cases. In December 2005, the Supreme Court decided in favor of the state of Kansas and ruled that it may tax a non-Indian fuel distributor whose fuel was to be sold by an on-reservation gas station owned by the Prairie Band Potawatomi Nation, even where the tax would be paid downstream by the nation.

In the midst of the ruins of federal Indian law, intergovernmental negotiation and agreements have arisen. More and more states, local governments, and Indian tribes are sitting down to discuss their differences, often reaching unique and farsighted solutions. In the last few years alone, Indian tribes in Michigan have concluded agreements with the state of Michigan over economic development and shared water resources. Intergovernmental agreements also cross national borders; for instance, Indian tribes from the United States and the First Nations from Canada executed the Tribal and First Nations Great Lakes Water Accord on Nov. 23, 2004. As state and local and tribal officials learn to communicate and to cooperate with each other, the opportunities for negotiating agreements that head off jurisdictional and political disputes increase. As a result, one successful agreement leads to more successful agreements. State and local government and tribal executives have the best view of their own needs in these numerous and disparate areas and can reach the best solutions — far better than the judiciary or even legislatures can reach.

This article argues that working with non-Indian governments to build cooperation will allow Indian tribes to expand their ability to self-govern, while meeting the needs of non-Indian governments that are frustrated by the limited application of state law in Indian country. Intergovernmental agreement — a pillar of a strategy championed by those who advocate tearing down the "tyranny of the favored quarter" in metropolitan areas[2] — offers enormous potential to improve the efficient provision of local and regional governmental services, to preserve and expand the authority of tribal governments, and to reduce the concerns of non-Indians that they might be subject to a tribal government that enacts laws that are, according to Justice Souter, "unusually difficult for an outsider to sort out."[3]

Federal Indian Law and the Decline of Tribal Bargaining Power

The jurisprudence of federal Indian law in the modern

The Rochester Panel, Utah. Photo by Lawrence R. Baca.

era has done little to resolve long-term disputes between Indian tribes, nonmembers, and state and local governments, but it has done even less to pave the way toward finding long-term solutions for all disputes in this field. Philip Frickey has suggested that the Supreme Court's attitude is that "Congress has failed to step in and fix a myriad of festering local problems by eliminating tribal authority."[4] As a result, the Court is left to "jerry-rig[] a ruthlessly pragmatic blend of federal Indian law with general American law." The Court's solutions to disputes between tribes and state governments are ad hoc, with little or no regard for the future. For example, the underlying taxation dispute in *Wagnon v. Prairie Band Potawatomi Nation* arose after the state of Kansas refused to renew an intergovernmental tax agreement.[5] In the dissent, Justice Ginsburg reminded the Court that entering into intergovernmental agreements was "the most beneficial means to resolve conflicts of this order." Tipping the scales toward the interests of the state governments, according to Justice Ginsburg, "casts ... a cloud" over the potential of intergovernmental agreements to resolve disputes between tribes and state governments.

States have less reason to negotiate with tribes if they believe the Court values their interests over tribal interests as a preliminary matter. In fact, Indian tribes and tribal members complained that state officers behaved in a cavalier fashion in Indian Country after the Court's decision in *Nevada v. Hicks*, which held that tribal courts had no jurisdiction over state officials. After state officers raided a smoke shop that was located on tribal trust land and was owned and operated by the Narragansett Indian Tribe, Professor Robert N. Clinton has noted that "[w]hat the Court is doing is creating a climate which gave the Rhode Island officials the belief that they could do what they did, which is not a healthy development."[6] It is in cases like these that the tyranny of the favored quarter arises, whereby states and local governments have greater bargaining power over their tribal government neighbors.

"Checkerboard" Jurisdictions

The Court's entrance into the field of making federal policy in Indian law has both cemented and worsened the condition known as "checkerboard" jurisdiction. Territorial boundaries between Indian tribes and state and local governments are critical to maintaining jurisdictional consistency and comprehension. Because the U.S. Supreme Court held in *Worcester v. Georgia* — one of the landmark "Cherokee cases" — that state law has "no force" within Indian country, clear territorial lines between state and tribal authority have become critical.[7] For many tribes, the

line between state territory and Indian country often was apparent: in many instances, Indian country consisted of reservations created by treaty that included detailed legal descriptions of where the reservation began and ended. This was consistent with a critical purpose of many early treaties — what Charles Wilkinson called "measured separatism."[8] On occasion, the U.S. military guarded the reservation's boundaries, placing fences on the border to keep non-Indians out while keeping the Indians in.

The boundaries of reservations were not always well preserved. The dispossession of Indian lands began long ago, blurring the territorial boundaries necessary to maintain efficient jurisdictional lines. This history included non-Indian trespassers squatting on Indian lands, non-Indians and their government agents defrauding Indians out of their lands, and using dozens of other illegal methods to take Indian lands. The "allotment era," which began as express congressional policy in 1887, opened up Indian lands for settlement, resulting in the diminishment or even disestablishment of Indian reservations. Indian landholdings declined by 90 million acres during the era of allotment. In many reservations, Indians became demographic minorities within their own lands, in terms of both population and land ownership.

Allotment led to the major portion of the checkerboard pattern of land ownership and territory in Indian country. The dispossession of Indian lands occurred in piecemeal fashion. Some land parcels remained in the hands of Indians or tribal governments, while others were transferred to non-Indians and non-Indian governments. Jurisdictional morass was inevitable, as were disputes over regulatory and adjudicatory authority. As Justice Blackmun argued in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, which cemented the checkerboarding of the Yakima Indian reservations, "This, in practice, will be nothing short of a nightmare, nullifying the efforts of both sovereigns to segregate incompatible land uses and exacerbating the already considerable tensions that exist between local and tribal governments in many parts of the [n]ation about the best use of reservation lands."[9]

In acting as a policy-maker, the Supreme Court has also intervened in areas once considered internal tribal affairs — the governance of all peoples located within Indian country by Indian tribes. The Court, in particular, has limited the authority of Indian tribes to regulate the activities of nonmembers, either in terms of criminal law or civil regulatory law. At the same time, the Court has curtailed the authority of tribal courts to hear civil cases in which a nonmember is a defendant.

The So-Called Democratic Deficit

Aleinikoff has argued that, "[i]f there is an organized principle that dominates the legal landscape [of federal Indian law] today, it is the concept of membership." Alex Tallchief Skibine agrees, noting that "the Court's general focus on protecting individual rights, its concern that such rights are not considered or protected by the Congress, as well as its belief that such rights would not be protected by the tribes since non-members cannot vote in tribal elections."[10] Both scholars identify *Duro v. Reina* as a case in which the Court expressed this concern.[11] In that case, the Court wrote that it would "hesitate" to permit nonmember Indians to be prosecuted by "political bodies that do not include them." Aleinikoff concludes that the Court appears to rely on the fact that tribal membership is consensual.

Justice Kennedy's views most exemplify this point. As he stated in a September 2005 *New Yorker* interview, "We have a legal identity; and our self-definition as a nation is bound up with the Constitution. ... There is also the constitution with a small 'c,' the sum total of customs and mores of the community. ... The closer the big 'C' and the small 'c,' the better off you are as a society." The question of where Indian tribes, which are "extraconstitutional" entities, fit into the notion of the "big C" and the "small c" appears to trouble the Court. Justice Kennedy, in particular, subscribes to the view that nonmembers never consented to tribal government authority in the same way that they consented to the authority of the state and federal government.[12] Philip Frickey has suggested that Justice Kennedy's solution would be to "bring [American] civil religion to Indian country" — or, in other words, to bring state and local government law and jurisdiction to Indian lands. In fact, the Court asserted in recent dicta in *Nevada v. Hicks* that there is a presumption that state law applies in Indian country. However, the Court is also confounded by these issues; as Joseph Singer has argued, "Much as the Court would like to limit sovereignty entirely, it is neither equipped nor inclined to erase tribal sovereignty entirely."[13]

The so-called democratic deficit problem is an illusion. To borrow an old analogy, a resident and citizen of Colorado who defaults on a loan in Utah may be subject to the legal processes of Utah, even though he or she is not a citizen of that state. The Court focuses on the possibility that the Colorado resident has legal status sufficient to some day acquire citizenship in Utah, in contrast to a non-Indian, who might not have that status. But at the time the Colorado citizen's loan is adjudicated, the person is not a citizen of Utah. Moreover, should the Colorado citizen move to Utah and become a citizen of Utah, the change in status could not alter the result of the Utah courts' adjudication of the loan at issue.

The Tyranny of the Favored Quarter in Tribal-State Relations

Perhaps the most fitting example of what has been called the tyranny of the favored quarter in tribal-state relations is the Yaqui village of Guadalupe, located well within the metropolitan areas of southwestern Phoenix and surrounded by wealthy suburbs of Mesa, Tempe, and Chandler, Arizona. The Yaqui residents of Guadalupe are poor and often require governmental assistance for their housing, health care, and jobs, even though elite country clubs, golf courses, and shopping centers are located less than a mile away from the village. Despite the tribe's poverty, when the Pascua Yaqui Tribe of Arizona purchased land in Guadalupe for the purpose of developing

housing for needy tribal members, major newspapers published false allegations that the tribe had purchased the land in hopes of opening another casino. The community has since received federal funding for a new housing project conditioned on voters' approval of a local property tax exemption. However, opposition from members of Arizona's congressional delegation, in part generated by fears of an Indian gaming enterprise, makes it unlikely that the tribe will be able to take its land in Guadalupe into trust.

It is in cases such as these that the contours of federal Indian law as articulated by the Supreme Court began to assist state and local governments in their desire to control Indian country. Much of federal Indian law jurisprudence, unlike most other fields, has been created by the Supreme Court, which then uses that jurisprudence to rein in tribal exercises of inherent authority. As Chief Justice Marshall stated in *Worcester v. Georgia*, the Court keeps in mind "the actual state of things," not federal Indian policy as expressed by Congress and the executive branch. The Court, in effect, makes policy for itself. When it comes to federal Indian law, the Supreme Court is by far the busiest policy-maker of the three branches of the federal government. Given the relative conservatism of the Court as an institution and of the members of the Court, Indian tribes are not favored parties in its rulings.

There are two fronts on which the Supreme Court has elevated state and local governments and non-Indians over tribal governments. First, the Court tends to vote in favor of state and local government authorities when those authorities conflict or compete with the authority of tribal governments. This is not surprising, given the Rehnquist Court's tendency to rule in favor of states rights in other areas, such as cases involving the Eleventh Amendment and the Interstate Commerce Clause. The Court's recent dicta that there is a presumption that state law now applies within Indian country is an unspoken reversal of previous Supreme Court precedent, relying on the much-criticized 1958 version of Felix S. Cohen's *Handbook of Federal Indian Law*.[14] Congress has sometimes passed legislation in this area, for example, when it extended state courts' criminal and civil jurisdiction to Indian country enclaves in certain states, but it has never extended state law to Indian reservations in a pronouncement as broad as the one made by the Supreme Court.

The second front on which the Supreme Court has shown its predilection to favor state and local governments was revealed in very first Indian case the Court heard — *Johnson v. M'Intosh* — in which the Court introduced an unusual constitutional doctrine known as "implicit divestiture."[15] In *Johnson*, the Court held that Indian tribes, by virtue of the mere presence of non-Indian sovereigns in the area, no longer had the authority to transfer the rights to their lands to anyone except the sovereign, which in that case was the United States. For decades, the Court had refrained from expanding the areas of tribal sovereign authority that had been implicitly divested, but in more recent cases, the Court has held that Indian tribes have been implicitly divested of authority to prosecute nonmembers, most of their authority to tax nonmembers, and most of their authority to assume civil adjudicatory jurisdiction over nonmembers. Without congressional approval or tribal consent, the Court has asserted the authority to divest numerous and fundamental sovereign powers of Indian tribes.

With the Court's unprecedented detour into national policy-making in the guise of federal Indian law, the Court has created a "favored quarter" by elevating state and local governments above tribal governments in almost every area of conflict or competition. As a general matter of national demographics and political fact, Indian country does not receive funding for public infrastructure projects that neighboring states and local communities receive; and much of Indian country does not have a tax base or a source of stable governmental revenues. As a result, state and local governments have local powers over Indian reservations sufficient to force Indian tribes into a state of weakness and dependence.

All these factors generate increasing disputes between Indian tribes, nonmembers, and state and local governments; and the areas of conflict are as diverse as the activities in which each government engages. As part of the Harvard Project on American Indian Economic Development, Stephen Cornell and Jonathan Taylor have noted that states and Indian tribes "have locked horns over hazardous and nuclear waste, wildlife management, foster care, off-reservation fishing, gaming compacts, taxation of all kinds, auto licensing, policing, and other issues — in sum, over nearly every facet of tribal life."[16] These conflicts tend to result in litigation in federal court.

When the federal judiciary decides these conflicts, its decisions cut with a blunt instrument, relying on a relative lack of relevant precedential authority. The precedent the Supreme Court generates in one discrete dispute applies to all state governments and Indian tribes, restricting other governments' ability to negotiate on a blank slate. And even though the Court seems to acknowledge that its decisions in the Indian cases have created legal gray areas that are rife with dispute, some justices have implied that "the Court, not Congress, should have the *final* say about some matters."[17]

Moreover, the expansion of state authority into Indian country, coupled with the diminishment of recognized tribal authority, has created inefficiencies — and sometimes a void — in the provision of government services to both Indians and non-Indians residing on or near Indian country. For the most part, state and local governments often have no interest in expanding their provision of governmental services to residents of Indian country. Moreover, the jurisdictional morass of federal Indian law discourages state and local governments from even approaching Indian country. The best historical example that highlights these problems was the enactment and implementation of Public Law 280,[18] which authorized certain states to extend their civil and criminal jurisdiction into Indian country. However, because Congress did not provide any funds to assist the states in meeting the new burdens on their governments, the result was increased

jurisdictional confusion and inefficiency of government activities across the board.

Now that, in some respects, the Supreme Court has begun the process of expanding state and local government authority into Indian Country, such problems loom large. In some ways, state and local governments located near Indian reservations are free riders, garnering the benefit of tribal economic development through increased property taxes and pinching tribal contractors off the reservation for taxes.

Local Tribal Control Favored by Congress and the Executive Branch

In contrast to the Supreme Court's decisions, actions taken by the federal policy-making branches of government have long supported the tribe's local control over reservation affairs. In 1934, Congress enacted the Indian Reorganization Act (IRA) in part to further tribal self-government and local tribal control.[19] Commentators have focused on the autocratic control exercised by the Bureau of Indian Affairs over Indian people as a critical piece of the legislative history. However, it does not appear that Congress meant to wrest away control and authority over Indian affairs from the federal government only to turn everything over to the states. The legislative history suggests that "the IRA sought to set up tribal governments for the 'functional and tribal organization of the Indians so as to make the Indians the principal agents in their own economic and racial salvation.'"[20] The IRA did not diminish the inherent local powers of Indian tribes that the Court recognized in prior cases such as *Talton v. Mayes*.[21] Local control was a critical element of the purposes underlying passage of the IRA.

On occasion, different Supreme Court opinions have noted the importance of local control as found in the IRA and in the inherent authority of tribal sovereigns. In *Morton v. Mancari*, Justice Blackmun's majority opinion quoted a letter from President Franklin D. Roosevelt endorsing the IRA by lauding its intent to "extend to the Indian the fundamental rights of political liberty and local self-government."[22] Moreover, the Court quoted legislative history evidencing that the kind of services that the Bureau of Indian Affairs provides — services that Congress intended Indian tribes to provide themselves — were "comparable to local municipal and county services, since they are dealing with purely local Indian problems." In *Santa Clara Pueblo v. Martinez*, Justice Marshall, writing for the majority, quoted the language in *Talton v. Mayes* affirming the inherent local authority of Indian tribes.[23] Justice Blackmun's concurring opinion in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, joined by Justices Brennan and Marshall, argued that Indian tribes, as local governments, should have the authority to zone reservation lands, a power fundamental for local governmental authority.

In *Merrion v. Jicarilla Apache Tribe*, Justice Marshall, again writing for the majority, quoted the influential 1934 solicitor's opinion entitled *Powers of Indian Tribes*, which stated that

> Over tribal lands, *the tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty.* But over all the lands of the reservation, whether owned by the tribe, by members thereof, or by outsiders, the tribe has the sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business, provided only such determination is consistent with applicable [f]ederal laws and does not infringe any vested rights of persons now occupying reservation lands under lawful authority.[24]

The ruling in *Merrion* is perhaps the Court's strongest statement that Indian tribes are not only the "domestic dependent nations" they were labeled in *Worcester*, but also the "local governments." Congressional acts following passage of the IRA affirm that the intent and continued policy of Congress — at least since 1970 — is to promote and preserve local self-government of Indian tribes. Kevin Washburn has proposed that, in the future, Indian tribes should piggyback onto congressional legislation in other areas, as they did in the mid-1990s with legislation relating to block grants for community development.[25]

The Utility of Intergovernmental Negotiation and Agreement

The Supreme Court is aware of the mess created by the federal Indian law jurisprudence. In cases prior to its decision in *Wagnon*, the Court noted that negotiation and agreement between Indian tribes and state and local governments might be an alternative to resolving disputes through litigation. Unfortunately, it appears that states such as Kansas and Rhode Island believe that tribal-state relations are like a prisoner's dilemma, where trust and respect are in short supply and cordial relations give way to the notion that the first sovereign to blink loses everything. However, other states, such as Michigan, and numerous local jurisdictions deal with the local tribes with an eye toward mutual advantage.

There are significant mutual advantages to intergovernmental compromise. The key advantages for Indian tribes in entering into intergovernmental agreements are reducing or eliminating the uncertainty that federal Indian law brings into every commercial transaction, every regulated activity on public and private property, and most criminal actions. Moreover, these agreements improve tribal sovereignty by allowing tribes to exercise a de facto form of sovereignty over checkerboarded lands.[26] The key advantages for states and local governments that come from entering into compacts with Indian tribes are the same. The advantages to the members and residents of Indian country include more efficient and beneficial provision of governmental services and improved business opportunities.

Intergovernmental agreements tend to reduce the confusion and uncertainty of checkerboarded jurisdictional maps by blending state and local jurisdiction lines with Indian country lines. For example, the effect of intergovernmental agreements related to law enforcement at the

Flathead Indian Reservation has been to make a checkerboarded reservation "almost a non-issue with governmental agencies."[27] Another example is the "agreement area" concept developed in the tax agreements reached between Michigan and Indian tribes, whereby any dispute arising on lands in which the tribe and the state disagree in Indian country will be treated as Indian country for purposes of the agreement.

The Supreme Court has not yet ruled on whether a state or local government can agree to bind its non-Indian constituents to tribal civil regulatory or adjudicatory jurisdiction, but local citizens' political participation in local government suggests that there would be a very strong argument in favor of it. Local government offers the opportunity for citizens to increase their political participation in government. A negotiation between Indian tribes and local governments resulting in an agreement reflecting the interests of both the tribe and the local government includes all the elements necessary to meet and resolve the Court's concerns. Nonmembers are represented by the local government, nonmembers may comment on the negotiation and the agreement before final execution, and local residents may drive the negotiations in important ways. Finally, because an agreement requires consent, local non-Indians have an opportunity to participate in negotiations between Indian tribes and local governments (and even states). A local government, like a tribe, should be able to enter into an agreement to which its residents will be bound. Any concerns the Court has about political participation and consent should be allayed.

Political Barriers to Intergovernmental Negotiations and Agreements

Despite the effort expended by Indian tribes and non-Indian governments to negotiate and resolve intergovernmental disputes, the overall success of these attempts has been slow. The long history of animosity and distrust between Indians and non-Indians continues to bar the door to cooperation. According to some commentators, "the adversarial perceptions held by federal, state, and tribal governments have been pervasive in Indian/non-Indian relations."[28] For example, little progress has been made in California, despite the presence of explicit authorization from the California Assembly to enter into cooperative agreements with Indian tribes on environmental issues. As two researchers have stated, "Often, even if the state agency or agency member wants to have a cooperative relationship with the tribes, they may be forced into confrontation."[29]

Groups or individuals opposing tribal development use California environmental laws against Indian tribes as "de facto zoning laws to stop development." When a California agency's non-Indian constituents use California law against Indian tribes "like a sledgehammer," it becomes difficult for agencies and Indian tribes to develop the trust and experience necessary to generate positive working relationships. In Montana (and in Western states in general), researchers have identified a "cowboy mentality" among non-Indian property owners, accompanied by a political view that Indian tribes are not "legitimate" governing bodies.[30] Constant adversarial relationships hinder — and sometimes preclude — reaching intergovernmental agreements.

State and local governments may view Indian tribes as competitors in a small economic market or for a small tax base. For example, state and local governments objected to a plan proposed by the Campo Band of Kumeyaay Indians to begin a landfill project, viewing them as competition in the area of solid waste management, until the tribe promised that its revenues from the landfill would go to tribal government programs and to tribal members only. As Gloria Valencia-Weber wrote 10 years ago, many state governments have attempted to "legitimate their state regulation, coupled with taxation, in an effort to change the size and status of Indian lands so that state power can overcome tribal governance."[31] And, according to Cornell and Taylor, many states hold the view that the economic development that Indian tribes create is equivalent to a loss in tax and other revenues for states — a zero-sum game. These states argue that these costs are "lost revenues as tribes capture dollars from non-Indian vendors, reduce state tax revenues, or otherwise move dollars into tribal hands, or in increased state burdens as reservations export pollution, social problems, or some other cost to the surrounding region." States are also concerned about the perception that tribal businesses have unfair competitive advantages over Indian tribes. Some states argue that approving tribal regulatory control enables tribes to force a "race to the bottom," allowing for lax regulation that will draw businesses into Indian country.[32]

These barriers are political barriers, but they should not stop Indian tribes and non-Indian governments from negotiating and entering into agreements, because intergovernmental agreements bring benefits for all parties. Competition declines as cooperation improves.

Conclusion

Justice Brandeis declared: "Denial of the right to experiment may be fraught with serious consequences to the [n]ation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[33]

The United States is heading toward greater devolution of governmental authority to state and local entities. This trend will significantly transfer a great deal of decision-making power from the federal government to the states. Intergovernmental agreements can be more comprehensive than litigation, providing a basis for avoiding future disputes in a wide variety of areas relating to the provision of governmental services and allowing the parties to pursue limited federal grants and funds in a cooperative manner. In addition, there are advantages to intergovernmental negotiation and agreement for the sovereignty of Indian tribes, because "any agreement — including even the agreement to talk — is an exercise of sovereignty."[34] Finally, in the words of Frank Pommersheim, "Both the tribes and the states need to know that their greatest 'ene-

mies' come from commercial and exploitative interests outside the region. Each side has to see, or at least explore, the potential for identifying *local* common ground on which to make a stand."[35] **TFL**

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[12]*See United States v. Lara*, 541 U.S. 193, 213 (2004) (Kennedy, J., concurring).

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[14]*See Nevada v. Hicks* at 361 (quoting U.S. Dept. of Interior, FEDERAL INDIAN LAW 510 & n. 1 (1958)); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at xi (Nell Jessup Newton, ed. 3rd ed. 2005) ("Where Cohen sees the tribes as sovereign peoples, entitled to self-government and responsible for their own destinies, the 1958 edition tends to see them as thorns in the side of the American system of government.").

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[16]Stephen Cornell and Jonathan B. Taylor, Harvard Project on American Indian Economic Development, *Sovereignty, Devolution, and the Future of Tribal-State Relations* at 2 (June 2000).

[17]Frickey, *supra* note 4, at 460 (emphasis in original).

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[29]Ashley and Hubbard, *supra* note 26, at 49.

[30]*Id.*

[31]Gloria Valencia-Weber, *Shrinking Indian Country: A State Offensive to Divest Tribal Sovereignty*, 27 CONN. L. REV. 1281, 1281 (1995).

[32]John V. Orth, *"The Race to the Bottom": Competition of Law of Property*, 9 GREEN BAG 2D 47, 47–48 (2005).

[33]*New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[34]P.S. Deloria and Robert Laurence, *Negotiating Tribal-State Full Faith and Credit Agreements: The Topology of the Negotiation and the Merits of the Question*, 20 GA. L. REV. 365, 391 (1994).

[35]Frank Pommersheim, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 161 (1995) (emphasis in original).

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