Tribal-State Relations: Hope for the Future?

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TRIBAL-STATE RELATIONS: HOPE FOR THE FUTURE?

FRANK POMMERSHEIM*

I. INTRODUCTION

The nature and texture of tribal-state relations are central elements in the field of Indian law, as well as powerful coordinates in assaying the future of the West—particularly in the critical areas of water and natural resources that are vital to the well being of the region.1 In addition, these relationships often serve as the cutting edge for localized face-to-face contact between Indians and non-Indians and the not infrequent racial animosity that permeates that interaction.2 Despite these facts, not much scholarly effort focuses on these important contours. Rather, the overwhelming volume of law review and related literature continues to concern itself with tribal-federal issues.3

Even within the widely acknowledged agreement that the key questions in Indian law involve questions of tribal regulatory and jurisdictional authority over resources and non-Indians in Indian country,4 the major scholarly attention centers on federal—especially federal judicial—decisionmaking.5 This, of course, makes a good deal of sense given that federal forums6 have been and, if things continue as they have, are likely to continue to be the principal arenas of decision. Yet this (federal) litigation approach has primar-

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2. See, e.g., Protestors Demand Whalen's Resignation, Lakota Times, Sept. 25, 1990, at A1, col. 1 (reported that "Mike Whalen, the state's deputy attorney for Charles Mix County called contemporary Native American culture godless, lawless, hopeless and jobless, and some other things in a speech to the Lake Andes city council September 4 [1990]"); Tellinghuisen Blasts Rosebud Tribal Officials, Lakota Times, April 17, 1990, at 5, col. 3 (editorial); Gale, Divisive System, Sioux Falls Argus Leader, Feb. 13, 1989, at A1 (statement of the recent South Dakota Attorney General, Roger Tellinghuisen, that "Indian reservations are a 'divisive system' of government that have outlived their usefulness"). However, there is also a "positive" side to some South Dakota tribal-state interactions: Native-American Day Builds Understanding, Rapid City Journal, Oct. 8, 1990; Vote Shows Reconciliation is Here to Stay, Lakota Times, Nov. 13, 1990, at A4, col. 1; Bridging the Gap between the Councils, Lakota Times, Nov. 27, 1990, at A1, col. 5 (The Pine Ridge Tribal Council and the Rapid City Common Council exchange visits and engage in discussion of common problems).
3. For example, a recent search of the law review literature for the past four years indicates that of the more than 300 Indian law articles, notes, and comments, less than 10 (or about three percent) focus on issues of tribal-state relations.
5. See supra note 3. Also, a recent search of the law review literature for the past four years indicates that of the more than 300 Indian law articles, notes, and comments, over 270 (or 90%) of them focus on federal concerns, decisions, and issues in the field.
6. For example, in the last ten years, of the 42 Indian law cases adjudicated by the United States Supreme Court, 21 of these cases involved issues of tribal-state authority.
ily yielded a legacy of substantial tribal-state friction and continuing uncertainty, while exacting an exorbitant financial toll on both sides in the process.

There are better, though perhaps less explored, kinds of relationships that might serve as a hallmark for the future of tribal-state relations, and it is time to explore some of them. The dilemmas and pressing issues of contemporary tribal-state relations, however, cannot be properly understood without some examination of the roots of federal-tribal and early tribal-state relationships which helped to establish the foundation on which current paradoxes and problems rest.

After reviewing these foundations and their modern implications, this article will review both conceptually and empirically the nature of the current legal interaction between the tribes and the states. The article will conclude with some public policy analysis and suggestions on how to expand and to advance that interaction and discourse in meaningful ways in the future.

II. THE ROOTS OF THE FEDERAL-TRIBAL RELATIONSHIP

Any description of the parameters of tribal-state relations must include a discussion of the conceptual underpinnings of the federal-tribal relationship. This is necessary because of the extraordinarily dominant role that the federal government has played, and continues to play in Indian affairs generally, and Indian law particularly.7

In examining the federal-tribal relationship, one is struck almost immediately by the absence of any true constitutional benchmark to orient the federal-tribal discourse on sovereignty. Tribes and Indians are only mentioned sporadically in the United States Constitution as not being taxed,8 in the Indian Commerce Clause,9 and implicitly, though not specifically, in the treaty-making clause.10

Here, the federal-state comparison is fruitful. In that relationship, the tenth amendment which provides, in part, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"11 is pivotal in structuring the discourse on federal-state sovereignty. Certainly, many scholars and commentators12 have noted that there have been substantial changes in the alloca-

7. See, e.g., D. Getches & C. Wilkinson, supra note 4, at XXIII-XXX; F. Cohen, supra note 4, at VII-XI.
8. U.S. Const. art. I, § 2, cl.3.
11. U.S. Const. amend. X.
12. As noted by Judith Resnik:

For example, in the Preface to the First Edition of Henry M. Hart's and Herbert's [sic] Wechsler's The Federal Courts and the Federal System xi (Foundation, 1953), the authors described their subject matter as the exploration of a 'legal system that derives from both the Nation and the states as separate sources of authority.' Also reprinted in Paul M. Bator, Paul J. Mishkin, Daniel J. Metzer, and David L. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System XXVII (Foundation, 3rd ed. 1988). The opening epigram in Felix Frankfurter's and Wilber G. Katz's Cases and Other Authorities on Federal Jurisdiction and Procedure (Nat'l Casebook Series, 1931) is from Benjamin R. Curtis. The comment,
tion of authority as the federal government and the attendant federalism have become even more ascendant. Yet there remains a constitutional baseline for that discourse and that is the tenth amendment and the Constitution as a whole.

In fact, a central tenet of federal courts’ jurisprudence (outside Indian affairs) is that the Constitution is the beginning of the analysis for the exercise of all powers of the federal government, and that, by constitutional interpretation, federal powers are limited and constrained. No such guidance is available in demarcating the relationship of Indian tribes to the federal government. That relationship is arguably, in part, pre-constitutional and, in part, extra-constitutional, grounded in three separate, overlapping, and somewhat incompatible doctrines. These doctrines include treaties, the trust relationship, and the plenary power of Congress in Indian affairs. In turn,
these doctrines, were (and are) affected by notions of colonial expansion and dominance, religious missionary zeal, federalism, commitment to the rule of law, and a concern for civil and human rights.\textsuperscript{18}

A. Treaties

Treaties entered into between the federal government and Indian tribes provide the primary doctrinal grounding for the recognition of tribal sovereignty.\textsuperscript{19} These agreements between mutual sovereigns provide the foundational basis for the recognition of a government-to-government relationship. And although treaties may not seem significant in tribal-state relations, they are the bedrock and cornerstone of tribal sovereignty (however defined) which is, of course, a necessary condition that permits and endorses meaningful tribal-state interaction.

Treaties not only provide the legal cornerstone for the tribal-federal government-to-government relationship, but as a result, they become the closest thing to a (federal) constitutional benchmark from which to engage in legal discourse about the nature of tribal sovereignty within a constitutional democracy. Treaties are, or ought to be, the cornerstone for the federal-tribal government-to-government relationship; but more broadly, treaties recognize and embody tribal sovereignty as the basis for a government-to-government relationship with any sovereign, including states. Therefore, treaties need to be seen by states not as peripheral to tribal-state relations, but as the foundation that gives tribal-state relations any analytic coherence in the first instance. Without the firmament of treaties, there is no real legal support for tribal-state interaction on a government-to-government basis. Furthermore, states are bound to respect and honor treaty law under the supremacy clause\textsuperscript{20} of the United States Constitution.

Treaties have not, however, been consistently accorded this constitutional-like status within the United States legal system. Despite the historical fact that treaties are grounded in the federal recognition of tribal nationhood and sovereignty, they have often (but not always) been altered, ignored, or displaced in the service of the pernicious rationale of the “plenary power”\textsuperscript{21} doctrine. In this sense, the plenary power doctrine that often limits the sovereignty contained in treaties is extra-constitutional, in that it finds no justifica-
tion or authorization within the specific confines of the United States Constitution. This doctrine embodies the classic notions that "might makes right" and that the simple declaration (and repetition) that something is legal and constitutional, can convert the mantra into a doctrine, even though there is no legal or constitutional grounding for it in the first instance.\footnote{See infra notes 58-68 and accompanying text.}

The legal significance of treaties is properly denominated in another sense as pre-constitutional, in that treaties between the federal government and other European colonial powers, and Indian tribes were entered into prior to the adoption of the United States Constitution in 1789. And, of course, these treaties were based on the political, military, and cultural "contacts"\footnote{See, e.g., F. Jennings, The Invasion of America 32-42 (1975).} between these mutual sovereigns as they evolved during the period of European invasion and settlement of the Americas. These treaties (as well as others entered into by the United States government) are enshrined in the supremacy clause of the United States Constitution as the "supreme law of the land."\footnote{See supra note 20.}

These conflicting doctrinal interpretations on the nature of treaties continue to hinder the mutual identification of the appropriate outlines for the discussion and understanding of the relationship between federal and tribal sovereignty. This conflict is further coarsened when leavened with the competing, and in some ways contrary concepts, such as the plenary power doctrine and the trust relationship.

Treaties play yet another and complicating role in Indian affairs. Treaties not only recognized tribal sovereignty, but in many cases also contained affirmative obligations on the part of the United States government to provide specific services—usually in the area of health, education, and social services—to Indian tribes.\footnote{See generally C. Wilkinson, supra note 14, at 14-19.} These affirmative duties, which were usually \textit{not} of a fixed duration, help to form part of the basis for a unique, continuing federal legal duty to provide health, education, and social services benefits to Indians. This is not a question of federal largesse, but rather one of a federal \textit{legal obligation}. These treaty based duties are not readily acknowledged by the federal government, and are often erroneously subsumed under the trust relationship.

\section*{B. The Trust Relationship}

The trust relationship between the federal government and Indian tribes, which is also a significant component of the federal-tribal relationship, emerges from early Supreme Court cases, particularly the trilogy of cases in which Chief Justice John Marshall authored the primary opinions.\footnote{Cherokee Nation v. Georgia contained separate concurring opinions by Justices Johnson and Baldwin and a dissent by Justice Thompson. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). Worcester v. Georgia contained a concurring opinion by Justice M'Lean and a dissent by Justice Baldwin. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).} These
cases include *Johnson v. McIntosh*,\(^{27}\) *Cherokee Nation v. Georgia*,\(^ {28}\) and *Worcester v. Georgia*.\(^ {29}\) In these cases, certain mythical phrases and concepts in Indian law were first articulated. They include the doctrine of discovery,\(^ {30}\) the guardian-ward relationship,\(^ {31}\) and the descriptions of Indian tribes as "domestic dependent nations"\(^ {32}\) and "distinct independent political communities."\(^ {33}\) These doctrines and phrases ultimately coalesced into the notion of the trust relationship in which the federal government has a unique fiduciary and managerial responsibility to Indian land and natural resources,\(^ {34}\) as well as ongoing responsibility to provide services in the areas of health, education, and social services.\(^ {35}\)

These foundational cases and their attendant historical gloss serve to identify the primary elements and aspects of the trust relationship. The federal government must act as a fiduciary in the way it manages Indian property.\(^ {36}\) A principal issue then becomes, of course, delineating the particular constitutive elements of the trust relationship. This includes issues ranging from such concerns as what are reasonable rates of return on the investment of tribal trust funds to such issues as whether the trustee may sell tribal property or resources under the rubric of increasing acculturation and ease of moving into the dominant culture, or whether the preservation of the trust corpus as land and natural resources is itself a critical value.\(^ {37}\) Most importantly, the issue arises as to what say, if any, tribes have or should have in any of this.\(^ {38}\)

Despite these unclear and ever-shifting contours, the land/natural resources component of the trust relationship does not often directly affect tribal-state relations. The sale or lease or other potential use of tribal lands and natural resources seldom involves the states directly as potential parties. And

\(^{27}\) 21 U.S. (8 Wheat.) 503 (1823).
\(^{28}\) 30 U.S. (5 Pet.) 1 (1831).
\(^{29}\) 31 U.S. (6 Pet.) 515 (1832).
\(^{30}\) *Johnson*, 21 U.S. at 504-23.
\(^{31}\) *Cherokee Nation*, 30 U.S. at 17.
\(^{32}\) *Id.*
\(^{33}\) *Worcester*, 31 U.S. at 559.

\(^{34}\) See, e.g., Seminole Nation v. United States, 316 U.S. 286 (1942) (breach of government's fiduciary obligation in entrusting tribal funds to tribal representatives who acted improperly). See generally Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975) [hereinafter Chambers]. Note also that there is sharp criticism of the trust relationship doctrine as including so much blatant federal power; in other words, a new way of shuffling the old deck. See Ball, *supra* note 16, at 61-66 for the appropriate sources and discussion. See also Pommersheim I, *supra* note 1, for a cautionary note not about doctrine, right or wrong, but about a place called "home."


\(^{36}\) Seminole Nation, 316 U.S. at 296-97; Chambers, *supra* note 34, at 1247.

\(^{37}\) Chambers, *supra* note 34, at 1234-42.

\(^{38}\) In the reported words of Vine Deloria, Jr.:

'Indian law doesn't really exist as a theoretical discipline. [Deloria] said that the study of different disciplines such as culture, religion, education, economics, history, language and logic all have important lessons for a lawyer looking for new strategies to practice law . . . .'

In his address, Deloria urged attorneys to look outward from the field of law to what is happening in other areas of human experience to find new ways to articulate Indian law.

NARF, *LEGAL REVIEW* 3-4 (Summer 1990). And more specifically the question arises as to how tribes and Indian people—the objects (not often the subjects) of the trust relationship—conceive of its validity and goals.
even if states are involved, the role of the United States government as trustee that must approve any transaction is clear, and involves no significant bar to such a transaction, particularly when the tribe has initiated and/or supports the proposed undertaking.

However, in other areas that involve, or at least potentially involve the trust relationship in the context of tribal-state relations, there are indeed more significant problems. Part of the trust relationship involves the provision of services by the federal government to many Indian tribes in the areas of health, education, and social services. This element of the trust relationship is not grounded in the seminal Supreme Court cases adumbrated above, but instead usually finds its roots in the treaties entered into between tribes and the federal government and other pertinent federal legislation.

These treaties between mutual sovereigns often made reference to the federal government's responsibility to provide teachers, doctors, and annuities in the form of food and supplies. These commitments, largely administered through the Bureau of Indian Affairs and the Indian Health Service, were also not generally of fixed duration and therefore continue as an integral part of the treaty and trust relationships. Two problems predominate here. One is the obvious problem of developing contemporary qualitative and quantitative equivalents for the treaty- and statutory-based commitments in the areas of health, education, and welfare. This problem is essentially resolved pragmatically, if not ethically, by what Congress appropriates—its own self-defining and self-serving solution. Yet this problem has no direct impact on tribal-state relations, except indirectly, where inadequate congressional funding makes tribes potentially more dependent or solicitous of state support.

The second problem directly affects tribal-state relations. The state also has the responsibility to provide health, education, and welfare services to Indian people on Indian reservations as citizens of the state in which their reservation is located. The obvious question obtrudes: What is the relationship between the federal and state duties in these areas? Each government, of course, prefers to position itself as the service provider of last resort.

A classic example of this dilemma can be found in White v. Califano. In that case, which originated on the Pine Ridge Reservation, the primary issue was whether the state of South Dakota had jurisdiction (and the duty) to en-

40. C. Wilkinson, supra note 14, at 84-85.
42. See, e.g., Fort Laramie Treaty of 1868, art. 13, United States-Sioux Nation, 15 Stat. 635, 640 (1868):

The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miler, engineer, farmer, and blacksmiths as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons.

43. Id.
44. Id. at art. 10, 15 Stat. at 638 (clothes and a beneficial appropriation of 10 dollars for each person who "roam[s] and hunt[s]" and 20 dollars for each person who "engages in farming" for a period of 30 years and one pound of meat and flour per day for four years).
tertain an involuntary mental commitment proceeding brought by a tribal member against her sister who was residing on the reservation. The theory of the action was that the South Dakota legislature provided special protection for mentally ill persons. The plaintiff contended that she was seeking the protection for her mentally ill and indigent sister, Florence Red Dog. Because state officials refused to provide the protection on account of Ms. Red Dog's race and place of residence, the plaintiff contended that this violated the equal protection clause of the fourteenth amendment.

The state defended on the ground that it had no jurisdiction over a civil cause of action arising in Indian country against an Indian person. It also claimed that the equal protection analysis must fail because federal law required that Florence Red Dog be treated differently than other South Dakota citizens precisely because she was an Indian person residing in Indian country.

This was, of course, an admitted rarity where a western state, particularly South Dakota, affirmatively disclaimed jurisdiction over a cause of action arising in Indian country because it infringed upon the right of the tribe to make its own laws and be governed by them. The court nevertheless (and quite correctly) upheld this view, and found that the state had no affirmative duty to provide an involuntary commitment proceeding and attendant services to Ms. Red Dog.

In the other part of the lawsuit, the district court found that the federal government, acting through the Indian Health Service, could not abandon Florence Red Dog entirely, and where the state could not act, the federal government would be obligated to act. The federal government's duty to act was found to be grounded in the "unique" trust relationship that exists between the Indian tribes and the federal government. The district court did not perseverate on the origin of the trust relationship, but treated it almost axiomatically as consistent with the federal assumption of responsibility over Indian persons.

The key to the lawsuit was, of course, financial responsibility for the provision of services to Indian people. On one hand, the federal government wanted to be the "residual supplier" of services in order to minimize its financial exposure, while on the other hand, the state was willing to forego the possibility of jurisdiction in order to avoid any financial liability of its own. The district court said the federal government could call itself whatever it

46. Id. at 547.
47. Id. at 546.
48. Id. at 546-47.
49. Id. at 551.
50. Id. at 555.
51. Id.
52. Id. at 556-57.
53. Id. at 553-54.
54. See id. at 546-47.
wanted, but its actual responsibility was primary.\(^5\)

In the aftermath of the lawsuit, a precarious balance has been struck along the following lines. The federal government pays the bills, the state provides the actual services,\(^6\) and the tribes, through their tribal courts, make the necessary commitment decisions.\(^7\) This agreement and lawsuit epitomize some of the tensions in tribal-state relations that are fueled by the inability or the unwillingness of the federal government to clearly establish or accept specific responsibilities attendant upon the trust relationship between itself and Indian tribes.

C. The Plenary Power Doctrine

The plenary power doctrine, in its potentially sweeping and pristine form, is awesome.\(^8\) In addition, as noted by Professor Newton, "[t]he mystique of plenary power has pervaded federal regulation of Indian affairs from the beginning."\(^9\) This extravagant concept was originally expounded by the United States Supreme Court in the case of *Lone Wolf v. Hitchcock.*\(^10\) In *Lone Wolf*, which involved the construction of a treaty between the Kiowa and Comanche Tribes and the federal government, the Court held that Congress could unilaterally abrogate a treaty (here the requirement of approval of three-fourths of the adult male population for future land cessions).\(^11\) Specifically, the Court opined that this was so because "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."\(^12\)

This conception of Congressional power in the field of Indian affairs is quite extraordinary in at least two important aspects. First, the power is denominated as one without limitation, and second, the authority is beyond judicial review. Such absolute notions of power are clearly contrary to any understanding of a constitutional republic grounded in specified and limited powers. It is noteworthy that the Court in *Lone Wolf* did not cite (nor could it) any authority for this astounding proposition. The Court simply converted its perception (which may or may not have been accurate in the first place) of congressional practice into a valid constitutional doctrine without any legal support or analysis.

The doctrine clearly opened the way for a wide ranging and unchecked

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55. *Id.* at 555 ("The federal defendants are free to call themselves ‘residual suppliers’ if that fits in better with their policy statements, but where the state cannot act, they must.").

56. Indian individuals adjudged mentally incompetent are treated as in-patients at the state’s mental hospital which is located off the reservation.

57. See, e.g., REV. CODE OGLALA SIOUX TRIBE § 54.15 (1979) (Commitment to Asylum).

58. See, e.g., *supra* note 17 for the cases and sources cited. But see F. COHEN, *supra* note 4, at 217-20 for a more limited and benign view of plenary power.


60. 187 U.S. 553 (1903); see also *Lone Wolf*’s immediate precursor, *Kagama*, 118 U.S. 375.


62. *Id.* at 565 (emphasis added).
exercise of congressional authority in Indian affairs, which included, for example, the extremes involving the continued unilateral abrogation of treaties, as well as the termination of the federal-tribal relationship of over three hundred tribes. This "plenary power" doctrine has been slightly eroded by recent cases, particularly as to the "political question" component of the doctrine. Both the Delaware Tribal Business Committee and the Sioux Nation cases indicate that acts of Congress in the area of Indian affairs are subject to judicial review and will be reviewed in accordance with the rational basis test. Yet it remains true that no act of Congress in the area of Indian affairs, with two minor exceptions, has ever been set aside or ruled unconstitutional by the Supreme Court. Given the fact that an entire volume of the United States Code deals with Indian legislation, this is no mean feat. The plenary power doctrine has extra-constitutional roots with only a limited accountability that has not been fully recognized or adequately addressed. This doctrine, in turn, has the potential to eclipse from view any meaningful examination or discussion of tribal-state relations.

Despite their obvious importance, these seminal doctrines and policies have had no real constitutional resonance as benchmarks for framing any federal-tribal discourse about the nature of tribal sovereignty. Treaties offer that potential, for they possess the moral and legal foundations to play that role, yet Congress and the federal courts have been unable, or unwilling, to see the vital role of treaties in their true constitutional dimension.

III. Tribal-State Relations: A Cartography of the Past

The legal relationship of tribes to the states has been unclear from the very beginning of the republic. It finds, for example, no elucidation in the United States Constitution, which is the primary national document to allocate authority between sovereigns. There is no constitutional analogy to the

64. For a general discussion of the "termination period," see F. COHEN, supra note 4, at 152-80.
65. 430 U.S. 73.
66. 448 U.S. 371.
67. Delaware Tribal Business, 430 U.S. at 73 (holding that a rational basis test is used for reviewing congressional decisions about the distribution of tribal funds). "The general rule emerging from our decisions ordinarily requires the judiciary to defer to congressional determination of what is the best or most efficient use for which tribal funds should be employed." Id. at 84. But see Sioux Nation which states:
[C]ases, which establish a standard of review for judging the constitutionality of Indian legislation under the Due Process Clause of the Fifth Amendment [a rational basis test], do not provide an apt analogy for resolution of the issue presented here — whether Congress' disposition of tribal property was an exercise of its power of eminent domain or its power of guardianship.
Sioux Nation, 448 U.S. at 413 n.28.
68. Choate v. Trapp, 224 U.S. 665 (1912) (holding that a 1908 federal statute which purported to remove restrictions on alienation and taxation of certain allotments made to members of the Five Civilized Tribes without the payment of just compensation violated the fifth amendment); Hodel v. Irving, 481 U.S. 704 (1987) (holding that a federal statute which provided for escheatment of individual Indian fractional land interest to the tribe without the payment of just compensation violated the fifth amendment).
69. Indian tribes are mentioned only once in the Constitution, and that is in the commerce
tenth amendment,\textsuperscript{70} which establishes a constitutional benchmark for dialogue about the relationship of federal and state sovereignty. Nor can there be found a true description of the state-tribal relationship within any state\textsuperscript{71} or tribal constitution.\textsuperscript{72}

The tribes and states stand as mutual sovereigns which share contiguous physical areas and some common citizens—tribal members who reside on the reservation are both tribal and state citizens, while non-Indian residents of the reservation are state citizens, but not tribal citizens. Nevertheless, the state is often seen by the tribes as relentlessly expansionary in seeking to extend its authority over the reservation and, in the process, to limit the tribe's authority and demean its very existence.\textsuperscript{73}

The doctrines that attempt to describe the origins of tribal-state relations are even more disparate and evanescent than those that undergird the federal-tribal relationship. In addition, they represent several missed doctrinal opportunities. There have been at least two watershed attempts to identify and define the nature of tribal-state relations, but they have only been temporarily and minimally successful before being severely limited by subsequent historical events and legal interpretations.

The earliest attempt to address the nature of tribal-state relations can be found in \textit{Worcester v. Georgia}.\textsuperscript{74} Although the case is central to identifying some of the early contours of federal-tribal relations, perhaps inextricably it also attempts to limn the nature of tribal-state interaction. The Court—particularly Chief Justice Marshall's opinion—proceeds in a straightforward manner. The relationship between the federal government and the tribes is special and unique—one sovereign to another—and exclusive. Justice Marshall's opinion proclaims that "[t]he treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the Union."\textsuperscript{75} This exclusive federal-tribal relationship bars the intrusion of any state authority in Indian country.

\textsuperscript{70} U.S. CONST. amend. X states, in relevant part, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, as to the people." See also \textit{supra} notes 11-13 and accompanying text.

\textsuperscript{71} For example, the South Dakota Constitution contains no provisions that deal with tribal-state relations except to repeat the "disclaimer clause" language of the Enabling Act. Act of Feb. 22, 1889, ch. 180, 25 Stat. 676, 677 (1889). This language states "that we forever disclaim all right and title to . . . all lands lying within said limits owned or held by any Indian or Indian tribes . . . and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . . ." S.D. CONST. art. XXVI, § 18.

\textsuperscript{72} For example, no tribal constitution of the nine tribes in South Dakota contains any provisions that deal with tribal-state relations.

\textsuperscript{73} See, e.g., \textit{supra} note 2 (former South Dakota Attorney General Roger Tellinghuisen's statement that "Indian reservations are a 'divisive system' of government that have outlived their usefulness").

\textsuperscript{74} 31 U.S. (6 Pet.) 515 (1832).

\textsuperscript{75} \textit{Id.} at 557.
In addition, there is the apparent strength of independent tribal sovereignty as its own barrier to state authority:

The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with assent of the Cherokee themselves, or in conformity with treaties, and with acts of congress.\(^{76}\)

The case of United States v. Kagama\(^ {77}\) probably represents the apotheosis of this line of legal thinking, which is premised on federal hegemony in Indian affairs. In that case, which challenged Congress' authority to enact the Major Crimes Act,\(^ {78}\) the court upheld Congress' power, particularly noting its necessity to protect tribes from states:

These Indian tribes are the wards of the nation. They are communities dependent on the United States,—dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen.\(^ {79}\)

It is also unsettling to note that this "duty of protection" is apparently unfettered and clearly presaged the coming of the full-blown plenary power doctrine and its erosion of tribal sovereignty.

Yet this yoked federal and tribal certainty rebuking state authority in Indian country has become vastly diluted and uncertain. Federal-tribal relations are no longer exclusive but have narrowed into the notion of federal preemption\(^ {80}\) declaring that the federal government must affirmatively assert its authority in order to foreclose any potential state claims of authority. This doctrine has become a thin reed in the many areas—particularly in the critical civil regulatory area where federal preemption activity is mostly non-existent. Even when it is nominally applied, federal preemption analysis serves as little more than a balancing test, where tribal sovereignty is relegated to a "background,"\(^ {81}\) from which the Court examines

the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry

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76. Id. at 561.
77. 118 U.S. 375 (1886).
78. Id. at 376.
79. Id. at 383-84 (emphasis in original).
81. Id.
designed to determine whether, in the specific context, the exercise of state authority would violate federal law. 82

The most timely and propitious historical moment in which to examine the contours of tribal-state relations is probably the latter part of the nineteenth century, when many states—particularly in the West—joined the Union. The enabling acts admitting most states to the Union, including South Dakota in 1889, provided Congress with ample opportunity to consider what was to be the relationship of these new states to Indian people and reservations within their borders. Yet the results proved inadequate and short lived. Most enabling acts contained only vague "disclaimer clauses" in which the new states generally agreed that "said Indian land shall remain under the absolute jurisdiction and control of the United States." 83 At the time, such a statement undoubtedly seemed sufficient to address the issue since most reservations were comprised almost entirely of Indian land. States basically had no jurisdiction in Indian country.

However, historical forces and subsequent judicial interpretations have rendered this injunction almost useless. Courts have not found these "disclaimer clauses" 84 particularly significant in dealing with the ravages of the allotment policy, which brought significant numbers of non-Indians to Indian country, and witnessed the passage of vast amounts of tribal land into non-Indian hands. 85 The key contemporary issue of whether the tribe or state has jurisdiction over non-Indians and non-Indian lands slipped away, and tribal-state relations were once again uncoupled from any marker of conceptual unity.

Despite the absence of any readily applicable doctrine for understanding or describing tribal-state relations, there potentially exists a vital zone for creative free-play and mutual governmental respect and advancement. Unfortunately, this has not been the case, or rather it has been the exception to the rule of acrimonious enmity between the tribes and the state. 86

83. See the South Dakota Enabling Act which provides: "[S]aid proposed states do agree and declare that they forever disclaim all right and title... to all lands lying within said limits owned or held by any Indian or Indian tribes... and said lands shall remain under the absolute jurisdiction and control of the Congress of the United States..." Act of February 22, 1889, ch. 180, § 4, 25 Stat. 676-77 (This act covers North Dakota, South Dakota, Montana, and Washington); see also Enabling Act of June 16, 1906, ch. 3335, § 3, 34 Stat. 267, 269 (1905-1907) (Oklahoma); Enabling Act of June 20, 1910, ch. 310, § 2, at 20, 36 Stat. 557, 558-59, 569 (1900-1911) (New Mexico and Arizona); Enabling Act of July 7, 1958, P.L. No. 85-508, § 4, 72 Stat. 339, 339 (1958) (Alaska). Idaho and Wyoming, which were both admitted to statehood in 1890 without prior enabling acts, nevertheless inserted a disclaimer in their state constitutions. See Idaho Const. art. 21, § 19; Wyo. Const. art. 21, § 26.
84. "[T]he presence or absence of specific jurisdictional disclaimers has rarely been dispositive in our consideration of state jurisdiction over Indian affairs or activities on Indian lands." Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545, 562 (1983).
85. During the period 1887-1934, over 90 million acres of land in Indian country went from tribal to non-Indian ownership. See, e.g., Pommersheim I, supra note 1, at 255-56.
86. See infra notes 87-147 and accompanying text.
IV. The Current Contours of Tribal-State Relations

There can be little doubt that tribal-state relations questions are the most significant issues in Indian law today. The bulk of United States Supreme Court litigation of the last decade in Indian law has focused on these issues. A survey of that litigation, complemented with a review of state statutory law that attempts to address matters of tribal-state relations, as well as the results of an empirical survey of state attorneys general concerning the existence of tribal-state cooperative agreements, will provide a valuable thermometer with which to assess the health of present day tribal-state relations.

A. United States Supreme Court Litigation in the Area of Tribal-State Relations

Supreme Court litigation in the area of tribal-state relations has drifted further and further away from the foundational mooring of *Worcester v. Georgia*, 87 out past the abandoned buoys of the infringement and preemption tests88 and into the uncharted seas of the doctrinal incoherence of such recent cases as *Montana v. United States*, 89 *Cotton Petroleum v. New Mexico*, 90 and *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*.91 In *Worcester*, the Supreme Court made it clear that tribal reservations were extraterritorial to states whose borders nominally contained Indian reservations. The decision in *Worcester* resulted in a total exclusion of state authority in Indian country which was based on the twin prongs of tribal sovereignty and federal exclusivity and hegemony in tribal affairs.92

The modern watershed case in tribal-state jurisprudence is often thought to be *Williams v. Lee*.93 In *Williams*, a non-Indian store owner on the Navajo reservation attempted to sue a Navajo defendant in state court for an unsatisfied debt that arose on the reservation.94 On one level, it might have appeared that this case would be disposed of with dispatch by reference to the holding of *Worcester*. The Court did pay homage to the "courageous and eloquent"95 opinion of Chief Justice Marshall, but went on to enumerate the "infringement" test, which holds that "[e]ssentially, absent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."96 The Court readily found the necessary infringement.97

Six years later in 1965, in the case of *Warren Trading Post v. Arizona Tax..."
Commission, the Court faced the quandary of whether the state of Arizona might assert a gross proceeds or sales tax on a non-Indian business engaged in retail trading with Indians on the Navajo Reservation. The Court held in the negative, but did not apply either the Worcester or Williams analyses. Instead, the Court fashioned the preemption test, which holds that Congress possesses the necessary legislative authority to affirmatively control any subject matter area in Indian country, so as to effectively oust any claim of potential state authority on the reservation over Indians and/or non-Indians. The Court, for example, specifically noted that the pertinent federal trading statutes and regulations "seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders."

In each of these cases, the Court noted that the Navajo Reservation was set apart as a "permanent home" for the Navajo Tribe in the Treaty of 1868. The Court acknowledged Navajo powers of self-government, but the concept of tribal sovereignty was clearly not dispositive.

In McClanahan v. Arizona Tax Commission, the Court struck down an attempt by the state of Arizona to collect state income tax on income earned by Navajo Indians within the Navajo Reservation. In so doing, the Court "clarified" the role tribal sovereignty plays in its jurisdictional analysis. The tribal sovereignty recognized in Worcester v. Georgia "has undergone considerable evolution in response to changed circumstances." Specifically,

"[t]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. . . . The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. . . . The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issue in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read."

The Court's most comprehensive synthesis of these diverse strands is found in White Mountain Apache Tribe v. Bracker. In the context of striking down an attempt by the state of Arizona to assert vehicle license and fuel use taxes on a non-Indian corporation doing business with a tribal entity on the White Mountain Apache Reservation, the Court summarized its view of the applicable jurisdictional analysis:

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99. Id. at 685-86.
100. Id. at 691.
101. Id. at 690.
102. Id. at 688; Williams, 358 U.S. at 221.
104. Id. at 165.
105. Id. at 171.
106. Id. at 172.
108. Id. at 137-38.
Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art. 1, § 8, cl. 3. . . . This Congressional authority and the 'semi-independent position' of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. Second, it may unlawfully infringe 'on the right of reservation Indians to make their [sic] own laws and be ruled by them.' The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply ingrained in our jurisprudence that they have provided an important 'backdrop' against which vague or ambiguous federal enactments must always be measured. . . .

. . . This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.109

This comprehensive view has fallen on hard times recently. The Court has apparently discarded this analytic framework in the context of cases involving tribal regulatory authority over non-Indians on non-Indian land within the reservation, as will be seen in the discussion of the Montana110 and Brendale111 cases. In addition, the Bracker test has become so "flexible"112 that it has lost its essential character and utility, as a review of the Cotton Petroleum113 case will amply demonstrate.

In the Cotton Petroleum case, a sequel to Merrion v. Jicarilla Apache Tribe,114 the Supreme Court confronted the issue whether the State of New Mexico could continue to impose its severance taxes on (non-Indian) Cotton Petroleum's production of oil and gas, which was already taxed by the Jicarilla Apache Tribe.115 The Court held that it could.116 The Court noted that questions such as this "are not controlled by 'mechanical or absolute conceptions of state or tribal sovereignty.'" But,

we have applied a flexible pre-emption analysis sensitive to the particular facts and legislation involved. Each case 'requires a particularized examination by the relevant state, federal, and tribal interests.' . . . It bears emphasis that although congressional silence no longer entails a broad-based immunity from taxation for private parties doing business with

109. *Id.* at 142-43, 145 (citations omitted); see also supra notes 80-83 and accompanying text.
110. 450 U.S. 544.
111. 109 S. Ct. 2994.
113. *Id.* at 163.
114. 455 U.S. 130 (1982) (Tribe has the right to assert severance tax against non-Indian corporations engaged in oil and gas extraction on the reservation).
116. *Id.* at 173.
Indian tribes, federal pre-emption is not limited to cases in which Con-
gress has expressly—as impliedly—pre-empted the state activity.\textsuperscript{117}

In a two-tier analysis, the Court found no federal preemption and no un-
due burden on the tribe. The Court arrived at this conclusion despite a con-
trary finding in \textit{Montana v. Blackfeet Tribe of Indians},\textsuperscript{118} and even though the 1938 Indian Mineral Leasing Act no longer expressly permitted state tax-
at\textsuperscript{ion}.\textsuperscript{119} The Court supported its finding by stating that “this is not a case in
which a state has nothing to do with a reservation activity, save tax it. Nor is
this a case in which an unusually large state tax has imposed a substantial
burden on the tribe.”\textsuperscript{120} The Court was also broadly unsympathetic to any
notion that the state’s right to tax would impair the ability of the tribe to carry
out its legal and economic functions free from burdensome state
interference.\textsuperscript{121}

The dissent, written by Justice Blackmun, took the majority sharply to
task, arguing that “[the majority] distorts the legal standard it purports to
apply.”\textsuperscript{122} The dissent vigorously criticized the majority analysis under the
preemption test:

Instead of engaging in a careful examination of state, tribal, and federal
interests required by our precedents, . . . the majority has adopted the
principle of ‘inexorable zero.’ . . . Under the majority’s approach, there is
no preemption unless the States are \textit{entirely} excluded from a sphere of
activity and provide \textit{no} services to the Indians or to the lessees they seek
to tax. That extreme approach is hardly consistent with the ‘flexible’
standard the majority purports to apply.\textsuperscript{123}

All of this is, of course, a long way from \textit{Worcester v. Georgia} and seems to
make that seminal case’s most parsimonious reading of state authority in In-
dian country rather evanescent after all.

In \textit{Montana v. United States} and \textit{Brendale v. Confederated Tribes of the
Yakima Nation}, the Supreme Court appeared to wholly dispense with the pre-
emption/infringement synthesis articulated in \textit{Bracker}. The Court did not
bother to explain why this is appropriate, but simply proceeded in a different
fashion. In \textit{Montana}, the Court faced the issue of whether the Crow Tribe
could regulate the hunting and fishing\textsuperscript{124} of non-Indians on fee lands within
the Crow Reservation.\textsuperscript{125} The Court ruled that it could not.\textsuperscript{126}

The Court’s analysis is fast and, for the most part, heedless of its own
past. For example, \textit{Worcester} is not even cited, much less discussed. The
Court noted that allotment of the Crow Reservation pursuant to the General

\textsuperscript{117} Id. at 175-77 (citations omitted).
\textsuperscript{118} 471 U.S. 759 (1985).
\textsuperscript{119} \textit{Cotton Petroleum}, 490 U.S. at 179.
\textsuperscript{120} Id. at 186.
\textsuperscript{121} Id. at 180-81.
\textsuperscript{122} Id. at 204 (Blackmun, J., dissenting).
\textsuperscript{123} Id. (emphasis in original) (citations omitted).
\textsuperscript{124} \textit{Montana}, 450 U.S. at 547.
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 566-67.
Allotment Act and Crow Allotment Act effectively reduced the tribe's authority over alienated reservation lands, despite the Ft. Laramie Treaty of 1868's guarantee that recognized the Crow Reservation as "set apart for the absolute and undisturbed use and occupation of the Indians herein named..."127 The Court bluntly stated "that treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands. Accordingly, the language of the 1868 treaty provides no support for tribal authority to regulate hunting and fishing on land owned by non-Indians."128

The Court blended this finding that strips the Ft. Laramie Treaty of 1868 as a source of tribal authority over non-Indians, with the notion that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."129 This sweeping generalization was nevertheless limited by a substantial proviso:

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.130

The exact meaning of this analysis by the Court became the subject of intensive debate within the Court in the Brendale case.

In Brendale, the Court confronted the issue whether the Yakima Indian Nation or the County of Yakima (a governmental unit of the State of Washington) has the authority to zone fee lands owned by nonmembers of the tribe located within the boundaries of the Yakima Reservation.131 The Court reached no firm conclusion on the issue but rather generated three separate opinions that seemingly obscured rather than clarified the issue at hand.132

128. Montana, 450 U.S. at 561.
129. Id. at 564.
130. Id. at 565-67 (citations omitted).
132. Id. at 2999, 3009, 3017. Brendale consolidated two cases which addressed the question of who possessed the authority to zone non-member fee land within the boundaries of the Yakima Reservation. Id. at 3002-03. During the course of the litigation, the parties treated the Reservation as having two parts. First, there was the "closed area," so named because it had been closed to the public since 1972, consisting of over 800,000 acres of which only 25,000 were fee land. Second, there was the "open area" that had no restrictions concerning the general public and consisted of approximately fifty percent fee land. Id. at 3000. Zoning power over the two pieces of land were in question. Id. at 3001. No clear majority could be reached on either land parcel. Justice White, joined by the Chief Justice, Justice Scalia, and Justice Kennedy, announced the judgment of the Court concerning the land within the "closed area." Id. at 2999. Justice Stevens, joined by Justice O'Connor, announced the judgment of the Court concerning the land within the "open area."
Justice White’s opinion, which was joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, essentially relied on its reading of Montana that tribes, in the aftermath of the allotment process, presumptively do not have authority over fee lands within the reservation unless there is an express congressional delegation to the contrary.133 This opinion disposed of the Montana exception or proviso with dispatch. The facts at issue demonstrated no consensual agreement between the parties and somewhat amazingly, that second part of the proviso (“threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe”) merely created a potentially “protectable interest” that may be vindicated in federal court and would be binding on the states via the supremacy clause.134

The second opinion, which is authored by Justice Stevens and joined by Justice O’Connor, ultimately opted for a factual examination of the demographics and land tenure patterns within the reservation as a whole or the portion of the reservation at issue. In a graphic metaphor, Justice Stevens identified the question as “whether the owners of a small amount of fee land may bring a pig into the parlor.”135 He answered that question in the negative,136 but also found that if the area in question had lost its “essential character” as Indian land as a result of the allotment process and adverse demographic patterns, the tribe’s legitimate interest in land use regulation was consequently diminished.137

Justice Stevens concluded that “[a]ny difficulty courts may encounter in drawing the line between ‘closed’ and ‘open’ portions of reservations simply reflects that the factual predicate to these cases is itself complicated.”138 Justice Stevens did not find Montana to be an apposite precedent because it involved an alleged discriminatory land use regulation, the state stocked much of the fish and game on the reservation, and the state owned the riverbed of the Big Horn River.139

Justice Blackmun, joined by Justices Brennan and Marshall, authored an opinion concurring in Justice Steven’s decision and dissenting from the decision announced by Justice White. This opinion made a significant attempt to clarify the meaning of Montana within the framework of 150 years of Indian law jurisprudence.140 Justice Blackmun’s effort is laudable, if not completely successful. The opinion honestly and correctly noted that although Montana

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133. Id. at 3006-07.
134. Id. at 3008.
135. Id. at 3014.
136. Id.
137. Id. at 3015.
138. Id. at 3017.
139. Id. at 3015.
140. Id. at 3018.
is an anomaly, it is nevertheless a serviceable precedent. For example, despite having
strangely reversed the otherwise consistent presumption in favor of inherent tribal sovereignty over reservation lands is not [necessarily] to excise the decision from our jurisprudence. Despite the reversed presumption, the plain language of Montana itself expressly preserves substantial tribal authority over non-Indian activity on reservations, including fee lands, and, more particularly, may sensibly be read as recognizing inherent tribal authority to zone fee lands.¹⁴¹

This authority to zone, the opinion stated, is clearly located within the Montana proviso concerning a “significant tribal interest”¹⁴² in that zoning is a “critical aspect of self-government and the ultimate instrument of ‘territorial management.’”¹⁴³

Justice Blackmun’s opinion excoriated the views of both Justice White and Justice Stevens. Justice White was accused of “legal tokenism”¹⁴⁴ and misreading “the Court’s decisions defining the limits of inherent tribal sovereignty,”¹⁴⁵ while Justice Stevens was charged with “disregarding those decisions altogether.”¹⁴⁶ Stay tuned for round two.

The Brendale decision, I think, places the Court at an Indian law jurisprudential crossroads. Whither the issue of tribal sovereignty and tribal jurisdiction over non-Indians on fee lands within the reservation? The doctrinal center no longer seems to hold.¹⁴⁷

B. Empirical Survey of Tribal-State Relations¹⁴⁸

No recent comprehensive compilation or review of tribal-state agree-

¹⁴¹. Id. at 3021.
¹⁴². Id. at 3022.
¹⁴³. Id. at 3022-23.
¹⁴⁴. Id. at 3024.
¹⁴⁵. Id.
¹⁴⁶. Id.
¹⁴⁷. This line of cases is even more paradoxical (if not actually schizophrenic) when compared to the seminal cases of National Farmers Union Insurance Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985) and Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987), which ringingly endorse tribal courts as the primary forums to resolve civil disputes that arise on the reservation. See generally Pommersheim, The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction, 31 Ariz. L. Rev. 331 (1989).
¹⁴⁸. In compiling the data set forth, a letter of inquiry was sent to the attorney general of each state. The letter requested information in three areas: first, whether the state had an established written policy concerning tribal-state relations; second, whether the state had entered into any agreements with any tribes; and finally, the letter requested an evaluation of the current status of tribal-state relations. Twelve states responded to the first request. A second letter was sent to those not responding and six responded to that follow-up letter. All told, responses were received from the following states: Alaska, California, Idaho, Iowa, Kansas, Maine, Minnesota, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Oregon, South Dakota, Texas, Washington and Wisconsin. Pommersheim, Survey of State Attorneys General [hereinafter Pommersheim, Attorneys General Survey] (Individual letters are on file with the University of South Dakota Law Review.). Further agreements were found in various legal periodicals or by information supplied by various organizations. A number of states have a “commission” or “council” on Indian affairs. See, e.g., ALA. CODE § 41-9-708 (Supp. 1990) (Indian Affairs Commission); ARIZ. REV. STAT. ANN. § 41-541 (Supp. 1990) (Commission of Indian Affairs); COLO. REV. STAT. § 24-44-101 (1990) (Indian Affairs Commission); LA. REV. STAT. ANN. tit. 46, § 2302 (West 1982) (Governor’s Commission on Indian Affairs); MASS. GEN. L. ch. 7, § 38 (1988) (Commission on Indian Affairs); MINN. STAT. § 3.922
ments is available and, perhaps, none may be possible. However, through collection and analysis of information from the attorneys general of the states solicited in preparation of this article, and other research, a foundation of the activities between tribes and states can be established from which trends may become evident.

It must be recognized, however, that tribal-state relations are (apparently) not an issue in some states. In a 1988 survey, to which forty attorneys general responded, ten, (or twenty-five percent) of those responding, stated that no significant issue existed as to tribal-state relations. Still, seventy-five percent listed ongoing disputes between the state and tribes and successes they had.

1. National Governmental Organizations Examining Tribal-State Agreements

Some national groups associated with different areas of state government operation have surveyed the existence of tribal-state agreements. Two groups, in particular, have been active in the area. They are the National Conference of State Legislatures and the National Association of Attorneys General.


(Supp. 1991) (Indian Affairs Board); NEV. REV. STAT. § 233A.010 (1990) (Indian Commission); N.M. STAT. ANN. § 28-12-1 (1978) (Commission to preserve Indian Arts and Crafts); N.C. GEN. STAT. § 143B-404 (1990) (Commission of Indian Affairs); OKLA. STAT. tit. 74, § 1201 (Supp. 1991) (Indian Affairs Commission); S.D.C.L. § 1-4-1 (Supp. 1990) (Indian Affairs Commission); TENN. CODE ANN. § 4-34-101 (1985) (Commission of Indian Affairs); TEX. GOV'T CODE ANN. § 461-001 (Vernon 1990) (Indian Commission); UTAH CODE ANN. § 63-36-1 (1989) (Board of Indian Affairs). These entities were not contacted directly, due partially to the limited scope many of these groups possess. See, e.g., CONN. GEN. STAT. § 47-596(b) (Supp. 1990) (limiting the council's purpose to review of regulations concerning Indian Affairs and advice on rule changes); CAL. HEALTH & SAFETY CODE 2050.5 (West 1989); CAL. PUB. RES. CODE §§ 5097.9, 5097.99 (West 1989) (limiting the Native American Heritage Commission to questions concerning Indian remains and religious sites). Within the framework of the survey, I decided that the attorneys general of the states could more aptly and completely answer the questions posed.

149. Some states grant state agencies the ability to enter into agreements with tribes without special approval. See, e.g., IDAHO CODE § 67-4002 (1989) ("Any public agency ... or the state of Idaho ... in entering into agreements with the Indian tribes to transfer of real and personal property and for joint concurrent exercise of powers ... "). See generally IDAHO CODE ch. 40 (1985 & Supp. 1990). Other states provide a framework for entering such agreements. See, e.g., S.D.C.L. § 10-12A-4.1 (1989). The statute states:

Any tax collection agreement entered into pursuant to this chapter shall be binding and effective only after it is approved by the Governor and attorney general of the state of South Dakota. Prior to approval by the Governor and the attorney general, notice of the pending agreement shall be published by the department of revenue in the legal newspaper of the county or counties to be affected by the agreement, not less than two weeks prior to approval. Id. This variance in authority between states increases the difficulties in establishing an exact and completely reliable compilation of agreements.

150. See NATIONAL ASS'N OF ATTORNEYS GENERAL, SUMMARY OF STATE RESPONSES TO INDIAN AFFAIRS INVENTORY (1988) [hereinafter NAAG SUMMARY]. Of those states responding to the survey who stated that no issue existed, three states credited this situation to the absence of any federally recognized tribes in the state. Id. Of course, the claim that no issue may exist does not rule out the existence of some agreements. However, the survey did request that successes in tribal-state relations be listed. Ten state respondents, however, left that part of the survey blank. Id.

151. Id.

152. See, e.g., COMMISSION ON STATE-TRIBAL RELATIONS, STATE-TRIBAL AGREEMENTS: A COMPREHENSIVE STUDY (1981) [hereinafter STATE-TRIBAL RELATIONS: A COMPREHENSIVE STUDY]. (The report was prepared by both the National Conference of State Legislatures and the American Indian Law Center which together administered the Commission on State-Tribal Rela-
In 1981, the National Conference of State Legislatures (NCSL), in conjunction with the American Indian Law Center, prepared a report for the Commission of State-Tribal Relations on existing state-tribal agreements. The report summarized a survey conducted during 1979 and 1980, and sought to document past agreements so as to identify "positive interaction between states and tribes" and provide model solutions used to solve various problems.

More recently, endeavors by the NCSL to examine state-tribal agreements have been more specific. In 1989, the NCSL presented a report on state-tribal transportation agreements as a starting point for addressing possible jurisdictional difficulties in federal routing and emergency response to nuclear waste transportation. In 1990, at the NCSL's annual meeting, a presentation was in the form of a case-study examination of one state's tax agreements with various tribes.

Meanwhile, the National Association of Attorneys General (NAAG) has also monitored the interaction between states and tribes. In 1988, the Association solicited responses from the states concerning unresolved disputes between the states and tribes and what areas the state believed it had been successful in dealing with tribes. Finally, in a recent book dealing with state attorneys' general powers and responsibilities, an entire chapter was

155. See, e.g., NAAG SUMMARY, supra note 150 (survey of individual states requesting information concerning unresolved disputes which may exist between tribes and the states, and listing what successes the states have had in tribal-state issues); STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 163-77 (1990) [hereinafter SAG POWERS AND RESPONSIBILITIES] (Although the book was published by the BNA, the copyright is held jointly with, and the book was edited by the National Association of Attorneys General with a chapter directed to Indian Law which generally discussed some jurisdictional agreements.).

154. The Commission on State-Tribal Relations was administered by the NCSL and the American Indian Law Center, Inc. See STATE TRIBAL RELATIONS: A COMPREHENSIVE STUDY, supra note 152, at iii. The Commission sought to strengthen the alternatives to confrontational relationships by analyzing potential legal and political solutions through agreements and compacts. Id. at 1-2. Subsequent to this research, a handbook was published on tribal-state government relationships. See COMMISSION ON STATE-TRIBAL RELATIONS, AMERICAN INDIAN LAW CENTER, INC., HANDBOOK ON STATE-TRIBAL RELATIONS (1984).

156. See, e.g., TRANSPORTATION AGREEMENTS, supra note 152; Novotny, supra note 152.

157. See, e.g., TRANSPORTATION AGREEMENTS, supra note 152, vol. 14, No. 4, at 1-10.

158. See Novotny, supra note 152.

159. See, e.g., NAAG SUMMARY, supra note 150. Although this survey did not directly address tribal-state agreements, a number of the states listed such agreements as having been successes that they have had with the tribes.
dedicated to the interaction of Indian law with the responsibilities and powers of an attorney general.\textsuperscript{160}

2. 1990 Survey of States' Attorneys General

In conjunction with this article, a letter survey was sent to all fifty state attorneys general.\textsuperscript{161} Information relative to three items was specifically requested. First, the survey asked whether the state possessed any written policy concerning state-tribal relations. Second, the survey asked for the content of any tribal-state agreement and a copy of the agreement. Finally, the attorneys general were asked for their perceptions of the current status of tribal-state relations. The purpose of this survey was to identify current parameters and understandings of state attorneys general as to the condition of tribal-state relations. Tribal perceptions are well known to be essentially cautious and hesitant about the goodwill and motives of the states.

a. States' Written Policies Concerning Tribal-State Relations

Although a number of the responding states indicated that they followed an informal policy,\textsuperscript{162} the majority of states appear to have no written or detailed statutory policy concerning intergovernmental agreements between tribes and the state.\textsuperscript{163} These informal policies exhibit a great diversity ranging from challenging native groups to a general open door policy.\textsuperscript{164} Perhaps the most schizophrenic of these unwritten policies is that of Oregon. The Oregon informal policy was set out as:

Oregon generally has tried to forge cooperative agreements with its

\textsuperscript{160} See, e.g., SAG POWERS AND RESPONSIBILITIES, \textit{supra} note 153.

\textsuperscript{161} The states that responded to the survey are enumerated at \textit{supra} note 148.

\textsuperscript{162} Current "informal" policies varied greatly. Alaska's current policy is to challenge, through litigation, native groups seeking tribal status. See Pommersheim, Attorneys General Survey, \textit{supra} note 148. In Iowa, the governor's office meets with tribal representatives twice a year. \textit{Id}. In Maine, an assistant attorney general is designated to handle issues concerning Indian affairs. \textit{Id}. Some states pointed to existing state statutes which recognize tribes as governmental agencies thus allowing intergovernmental agreements between state agencies and tribal government. See \textit{infra} note 168 and accompanying text. In Nevada, the attorney general maintains an open door policy. \textit{Id}. (state responses on file with the South Dakota Law Review).

\textsuperscript{163} Fourteen out of 18 responses indicated no formal written policy. \textit{Id}. In Wisconsin, Executive Order 31, dated October 13, 1983, by then Governor Earl, works as a foundation of policy. Wis. Exec. Order No. 31 (Oct. 13, 1983). That proclamation provides that state agencies and secretaries seek to cooperate with tribes and seek a "mutual atmosphere of education, understanding and trust" and that state agencies recognize "tribal judicial systems and their decisions." \textit{Id}. In South Dakota, the attorney general pointed to a number of statutes that evidence policy with tribes in certain areas. Pommersheim, Attorneys General Survey, \textit{supra} note 148 (letter from South Dakota Attorney General on file with South Dakota Law Review office). In particular, the South Dakota Attorney General pointed to S.D.C.L. § 1-4-26 as a general policy statement. "It is the policy of the state to consult with a tribal government regarding the conduct of state government programs which have the potential of affecting tribal members on the reservation. [However] [t]his section may not be construed to confer any substantive rights on any party in any litigation or otherwise." S.D.C.L. § 1-4-26 (Supp. 1990).

\textsuperscript{164} See Pommersheim, Attorneys General Survey, \textit{supra} note 148 (letters from Alaska and Nevada Attorneys General offices on file with the South Dakota Law Review). The Nevada Attorney General informally "maintained an open door policy" and "is willing to discuss any subject with any tribe." Meanwhile, while there exists no formal policy in Alaska, the state has "[f]or years . . . challenged the assertions made by various Alaska Native groups that they are tribes." \textit{Id}.

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tribes rather than litigate. Nevertheless, on any given issue, a state agency may decide to take an aggressive position, and if supported by the law, our [the Oregon Attorney General] office will pursue that policy.  

Wisconsin was one of the few states that pointed to a written basis for its policy in tribal-state relations. In 1983, Governor Anthony S. Earl ordered his “administration, state agencies and secretaries to” work in a spirit of cooperation with the goals and aspirations of American Indian tribal Governments, to seek out a mutual atmosphere of education, understanding and trust with the highest level of tribal governmental leaders. AND, FURTHERMORE, all State agencies shall recognize this unique relationship based on treaties and law and shall recognize the tribal judicial systems and their decisions and all those endeavors designed to elevate the social and political living conditions of their citizens to the benefit of all.  

The state of South Dakota has a statute that sets out the state’s general position on tribal-state relations “to consult with a tribal government regarding the conduct of state government programs which have the potential of affecting tribal members on the reservation.” This statement is supplemented by a recent Executive Proclamation by Governor George Mickelson which called for a “statewide effort to develop trust and respect between Indians and non-Indians,” and stating that the “mutuality of interest [between Indians and non-Indians] provides a sound basis for constructive change.”  

165. See id. (letter from Oregon Attorney General’s Office on file with the South Dakota Law Review).  
166. See id. (letter from the Wisconsin Department of Natural Resources stating that the Department used the Executive Order as a basis in formulating policy). In Wisconsin, it appears that agreements and policy are left to the various state agencies to work with the tribes within the respective department’s area. Id. The Executive Order in 1983 by then Governor Anthony Earl appears to be something of a foundation for building agreements through the various agencies. See supra note 163 and accompanying text.  
167. Wis. Exec. Order 31 (Oct. 13, 1983). According to South Dakota Attorney General Roger Tellinghuisen, further statutes exist in South Dakota that articulate policy. See Pommersheim, Attorneys General Survey, supra note 148. For example, he states South Dakota policy can also be found in  
- S.D.C.L. § 1-5-1, concerning the establishment of Native American Days;  
- S.D.C.L. § 1-4-1, concerning the establishment of the South Dakota Indian Affairs Commission;  
- S.D.C.L. § 1-24-1(1), including ‘any Indian tribe’ within the definition of ‘public agency’ for the purpose of the ‘joint exercise of governmental powers’ statute;  
- S.D.C.L. § 42-7A-19.1, pertaining to the sale of lottery products within the reservations;  
- S.D.C.L. § 10-12A-4.1, concerning tax collection agreements with Indian tribes;  
- S.D.C.L. § 1-25, regarding recognition of tribal court orders or judgments;  
- S.D.C.L. § 13-57-3.2, regarding the establishment of a center for Indian studies;  
- S.D.C.L. § 37-7, et seq., regarding labeling of Indian products;  
- S.D.C.L. § 34-20B-14, regarding an exception for the use of peyote when used by Native American churches;  
- S.D.C.L. § 23-24B-1, et seq., regarding extradition with Indian tribes.  

Id. (letter from South Dakota Attorney General on file with the South Dakota Law Review).  
169. See Executive Proclamation, State of South Dakota, Office of the Governor. The Proclamation declared 1990 the “Year of Reconciliation” between state and tribal interests. The Proclamation provides in full that:  
WHEREAS, As the State of South Dakota celebrates the beginning of its second century, we must also remember that statehood was a very sad time for the Native American; and,  
WHEREAS, Two tragic events, the killing of Sitting Bull, on December 15, 1890, and the
This policy clearly positions itself as benign and positive, but it is so general—without specific teeth of any kind—that it risks becoming a mere bromide of good intentions.

In contrast, the state of Washington and all twenty-six federally recognized tribes in Washington state recently entered into a Centennial Accord. The Accord seeks to build confidence in the viability of government-to-government relations and to serve as the foundation for further agreements. The ultimate purpose of the Accord is to improve the delivery of services to all individuals represented by all parties. In reaching this goal of improving the delivery of services, the Accord stresses the importance of communication...
at the agency level, and designates that each party needs to be accountable.\textsuperscript{173} While the Accord recognizes and respects all parties' sovereignty, it also provides that the Accord did not relinquish any rights of the parties. In addition, the parties saw that their collective ability to resolve issues strengthened with the existence of the Accord.\textsuperscript{174}

The Washington Centennial Accord does more than articulate the policy of the state. It actually attempts to rise above the narrow public policy of the state to a unique level of mutual understanding.\textsuperscript{175} Such a negotiated Accord would appear to be the next logical and progressive step in advancing state (and tribal) proclamations of goodwill and reconciliation.

\textbf{b. Tribal-State Agreements}

Tribal-state agreements appear to be as various as governmental problems themselves.\textsuperscript{176} These agreements may be complex and require massive federal intervention\textsuperscript{177} or simply be made between a county and a tribe.\textsuperscript{178} Often litigation precedes an agreement, since litigation may be required to eliminate unknowns and clarify the rights of the tribes and the state.\textsuperscript{179} Furthermore, states and tribes often find themselves in the unenviable position of construing

\begin{itemize}
\item \textsuperscript{173} \textit{Id.} The Accord designated that the governor's chief of staff be accountable to the governor for implementation of the Accord while each tribe was to recognize a system of accountability and "direct their staff to communicate within the spirit of [the] Accord." \textit{Id.}
\item \textsuperscript{174} \textit{Id.} at art. V.
\item \textsuperscript{175} The Centennial Accord reaffirmed the state's position to work together with the tribes, which had previously been set out by gubernatorial proclamation on January 3, 1989. \textit{See id.} at art. III. However, the state still recognizes that state-tribal relations must continue "to evolve as the Supreme Court continues to clarify the law." Pommersheim, Attorneys General Survey, \textit{supra} note 148 (letter from the Washington Attorney General's office on file with the South Dakota Law Review).
\item \textsuperscript{176} In a 1981 study of state-tribal agreements, agreements were documented concerning over 30 subject matter areas including such things as wildlife management, environmental protection, education, social services, taxation, law enforcement and several other areas. \textit{State-Tribal Relations, A Comprehensive Study, supra} note 152.
\item \textsuperscript{177} Although this article focuses on tribal-state agreements, agreements that involve the federal government are properly included within the examination of tribal-state agreements. In light of the trust responsibility that the federal government has toward tribes, excluding agreements that may have some federal party or agency involved would unduly limit the scope of this research, especially those agreements involving water rights. \textit{See, e.g.}, Comment, \textit{The Evolution of a New Comprehensive Plan for Managing Columbia River Anadromous Fish}, 16 \textit{Envir. L.} 705 (1986) [hereinafter Comment, \textit{Managing Columbia}] (the comment tracks the litigation and negotiations between the states of Oregon, Washington, Idaho and the respective tribes in the area where the allocation and development of the proper amount of fish for each party takes place); Folk-Williams, \textit{The Use of Negotiated Agreements to Resolve Water Disputes Involving Indian Rights}, 28 \textit{Nat. Resources J.} 63 (1988) [hereinafter Folk-Williams] (examining the numerous difficulties between states and tribes in resolving tribal and non-tribal water rights).
\item \textsuperscript{178} \textit{See, e.g.,} Cooperative County-Tribal Law Enforcement Agreement, Nov. 14, 1988, Jackson County and Wisconsin Winnebago Business Committee (The agreement sought to "promote the general welfare of county and tribal residents through the common goal of providing better law enforcement."); Cooperative County-Tribal Law Enforcement Agreement, 1988, Shawano County Wisconsin and Stockbridge-Munsee Community of Wisconsin (Agreements had existed between the county and the tribe since 1979. This agreement was a culmination that, with state funding, created a cooperative law enforcement program.). Copies of both agreements are on file with the South Dakota Law Review.
\item \textsuperscript{179} "One reason that the State of Washington and its tribe's Indian citizens have frequently been in court is because no one truly understands exactly what position an Indian tribe occupies within the federal system." \textit{Indian Tribes and Washington State, supra} note 170, at 6. In some situations, litigation may be useful to eliminate unknowns. \textit{Id.} at 10-11.
\end{itemize}
and implementing federal policy and law that was drafted on a national level, and whose specific contours may not be clear at the state and tribal level.

In order to facilitate the process of making agreements, many states have authorized state agencies to reach agreements with tribes or recognized tribal governments as governmental entities for statutory purposes, thus allowing state agencies to negotiate and conclude agreements with the tribal entity. The recognition and authorization for state agencies to enter into agreements with tribes has also been established in some states by executive proclamation. Although these statutes may be general in nature, some statutes allow only certain types of agreements. These statutes alone do not constitute agreements, but their enactment may be a necessary preliminary step that allows governmental departments and agencies that deal with problems on a daily basis, to negotiate with their respective counterparts in tribal government.

In obtaining information from the states and analyzing available data,

180. See, e.g., IDAHO CODE § 67-4002 (1989) (allowing public agencies to enter into agreements with tribes); MONT. CODE ANN. §§ 18-11-101 to 111 (1990); N.M. STAT. ANN. § 11-1-2 (Supp. 1984) (Joint Powers Agreement Act which was amended in 1984 to allow tribes and pueblos to make agreements with state agencies).

181. See Wis. Exec. Order No. 31 (Oct. 13, 1983) (calling for state agencies to meet with tribes on common goals and for state agencies to recognize tribal judicial systems); Oregon Exec. Proclamation (Apr. 10, 1990) (recognizing intergovernmental relationship between tribes and states).


183. Data was compiled and extracted from various legal periodicals cited throughout the survey done in connection with this article and other publications. See supra note 148. Attention was paid to the type of agreement and date of the reported agreement. A water agreement between a state and tribe which was entered into and accepted by a court in place of litigation will undoubtedly be an ongoing and durable agreement, whereas an agreement concerning the running of a program may last only a year. Furthermore, some agreements may address more than one topic area. For example, an agreement allowing a fish run between state and tribal water courses could be, arguably, an environmental agreement, a fishing agreement or an economic development agreement. In these instances, the agreement was placed only under the most direct heading to prevent some agreements from artificially increasing the overall number of agreements.
it was found that the majority of agreements may be broken down into the following subject matter headings:

<table>
<thead>
<tr>
<th>Subject Matter</th>
<th>Number of Agreements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jurisdiction or PL 280 Agreements</td>
<td>5</td>
</tr>
<tr>
<td>Gaming Compacts</td>
<td>12</td>
</tr>
<tr>
<td>Environmental Agreements</td>
<td>13</td>
</tr>
<tr>
<td>Hunting and Fishing</td>
<td>18</td>
</tr>
<tr>
<td>Health and Welfare Programs</td>
<td>17</td>
</tr>
<tr>
<td>Water Agreements</td>
<td>11</td>
</tr>
<tr>
<td>Indian Burial Sites</td>
<td>4</td>
</tr>
<tr>
<td>Law Enforcement</td>
<td>7</td>
</tr>
<tr>
<td>Economic or Taxing Agreements</td>
<td>10</td>
</tr>
<tr>
<td>Education Agreements or Awareness Projects</td>
<td>2</td>
</tr>
</tbody>
</table>

The equity of these agreements is not readily discernible. Most of the agreements appear facially neutral and fair. Many of the agreements promote a tribal interest through a state mechanism. For example, it has been established that tribes possess the exclusive right to tax their members on the reser-

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184. Public Law 280, 67 Stat. 588 (1953). Pursuant to this statute, Congress mandated that certain states accept jurisdiction on reservations, while permitting other states to assume jurisdiction on reservations, if certain conditions were met (both Nebraska and Wisconsin have entered into limited Public Law 280 jurisdiction with two tribes). For example, the Omaha and Winnebago tribes have retroceded their jurisdiction and, in conjunction with this retrocession, have entered into cross-deputization agreements between tribal law enforcement and state patrol. Pommersheim, Attorneys General Survey, supra note 148 (letter from Nebraska Department of Justice, on file with South Dakota Law Review); see also supra note 179. Meanwhile, Maine has a special jurisdiction arrangement with tribes pursuant to the Maine Indian Claims Settlement Act which eliminated litigation between the states and tribes. 25 U.S.C. § 1721 (1983).

185. Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. § 2701 (Supp. 1990)). This statute requires tribes seeking to operate certain gaming activities on the reservation to enter into tribal-state compacts for that purpose. Minnesota currently has compacts with nine tribes, South Dakota with one and California has agreements with two tribes. Both Iowa and Nebraska are in negotiations with tribes.

186. Seven of these agreements exist in Wisconsin alone, while Montana has two, Idaho one, Minnesota two and New Mexico has a statute concerning waste water. See Pommersheim, Attorneys General Survey, supra note 148.

187. Eight states have this type of agreement. Wisconsin has at least 10 agreements in this area, while South Dakota has agreements with at least two separate tribes. See id. (agreements on file with the South Dakota Law Review).

188. Montana has eight agreements with tribes dealing with health and welfare programs. Minnesota has one dealing with child custody. Wisconsin has a Division of Economic Support with a Tribal Affairs Unit from which tribes may solicit state money for federal projects such as day care, substance abuse shelters, and job programs. The structure of the federal funding apparatus for these programs, coming through the state to the tribes, with the program being administered by the tribe, would tend to create a federal process rather than a state-tribal agreement. Such a process itself (federal monies coming through the state to the tribes) is sometimes a source of tribal-state friction, because from the tribal point of view it appears that its sovereignty is subsidiary to state sovereignty. See id. (agreements on file with the South Dakota Law Review).

189. These are more statutory in nature but would undoubtedly require tribal lobbying of a state legislature to pass the state law. See Or. Rev. Stat. § 97.740, § 390.235 (1989).
While the power to tax non-Indians on the reservation is generally concurrent with the state, rather than having numerous reporting systems for businesses, tribes have entered into agreements with states where the state collects all sales taxes or cigarette taxes and remits to the tribes the taxes levied on tribal members on a formula basis. Thus, these tribes exercise their right to tax but use an established state collection mechanism. Other agreements are entered into between states and tribes due to tribes’ established rights in natural resources. For instance, states often seek water agreements with tribes because the tribes have established rights to the water supply, and protracted litigation is extraordinarily expensive and fractious. Also, some agreements may be required by the federal government. For example, under the Federal Indian Gaming Regulatory Act, the federal government must approve most agreements between a tribe and a state in certain areas of gaming activity.

c. Current Relations Between States and Tribes

Of the responses that addressed current relations, replies ranged from “less than amicable” to “very good... cordial and professional.” Most responses placed relations in a middle ground of good working relations to “better than average working relations.”

191. Id.; see also D. Getches & C. Wilkinson, supra note 4, at 479-547.
192. See South Dakota Sales Tax Agreement with Rosebud Sioux Tribe, Dec. 15, 1977. Section 3.1 states: “[T]he Department [of Revenue] will collect on behalf of the Tribe the taxes imposed by the Rosebud Sioux Retail Sales, Service and Use Tax Ordinance and the Rosebud Sioux Tribal Cigarette Tax Ordinance.” Id. at § 3.1. The Department then remits a percentage collected to the tribe. The tribe is allowed access to all records. Id. at §§ 4, 5. The state of South Dakota has similar agreements with the Oglala Sioux Tribe and the Cheyenne River Sioux Tribe. Pommersheim, Attorneys General Survey, supra note 148.
193. See Agreement Relating to the Refundment of Precollected Excise Taxes on Cigarettes and Liquor, July 2, 1986, Minnesota—Mille Lacs Band of Chippewa Indians. The state collects all cigarette taxes, then remits to the tribe an amount arrived at by “multiplying the annual Minnesota per capita consumption of cigarettes times the total population of the reservation times the current tax rate on each package of cigarettes.” Id. at § 1.
194. See also Interlocal Contract, Goshute Tribe Wildlife Management Plan, where State of Nevada Department of Wildlife entered into a contract with the Goshute Indian Reservation to run from Feb. 1, 1987, through May 31, 1992. In the contract, the state is to use its resources to help develop a wildlife management plan for the reservation for a fee. Id.
197. Twelve states responded to the inquiry on the status of current relations while four states ventured no opinion in their response. Pommersheim, Attorneys General Survey, supra note 148.
198. See, e.g., id. (letter from the Alaska Attorney General’s office, on file with the South Dakota Law Review).
199. See, e.g., id. (The letter from the Maine Attorney General’s office states that although the parties “do have disagreements regarding interpretation” of the law “the relationship is cordial and professional.” The letter is on file with the South Dakota Law Review.).
200. See id. (letter from Nebraska Attorney General’s office on file with the South Dakota Law Review).
201. See id. (The letter from Kansas Attorney General’s office states that “we believe that this office has a better than average working relationship with Kansas Native Americans.” Letter on file with the South Dakota Law Review).
The Nevada Attorney General provided an interesting conclusion on why he believed Nevada state-tribal relations are good. The respondent simply cited the lack of litigation between the parties. The Attorney General's office further attributed this lack of litigation to the cohesive land tracts of reservations in Nevada. In Nevada, the reservations contain very little non-Indian fee land. This seems an appropriate conclusion when one examines the high concentration of litigation between tribes and states dealing with jurisdictional and regulatory control over fee land within the reservation.

The cost, combined with the win or lose stress of litigation, may undoubtedly exacerbate the differences between the parties, and enhance the search for viable alternatives. The Washington Centennial Accord, for example, recognized this possibility, but also acknowledged that difficulties may arise in negotiation, and stated that "[w]hile the relationship described by this ACCORD provides increased ability to solve problems, it likely will not result in a resolution of all issues." In fact, sometimes litigation may be perceived as a necessary prerequisite to an agreement.

In addition, it has been noted that "[t]he right to negotiate has to be won by establishing the fact that the parties cannot ignore each other." In complementary fashion, parties need to "continue to work on problems one by one, seeking common ground on perhaps even minor problems, in an effort to build a foundation from which to work further. At the same time, [the state and tribes] must admit that not all problems will be solved by negotiation, and litigation is inevitable." The goal, of course, ought to be to narrow the band of likely areas of litigation, and as part of that process, to increase mutual respect and the ability to solve common problems.

V. TOWARDS A MORE MEANINGFUL FUTURE

Despite the history and contemporary problems that beset tribal-state relations, there does exist a number of ways to advance and reinvigorate the discussions and options relative to this critical area of Indian law. These include exploration of such ideas as sovereignty accords, the development of thoughtful and comprehensive state and tribal public policy relative to state-
tribal relations, significant educational reform, and an increase of state and regional forums to pursue meaningful dialogue.

A. Sovereignty Accords

Tribal-state relations are often caught in a history, particularly in a state like South Dakota, that is perceived (rightly or wrongly) by many tribes as having as its main objective the undermining of the tribe's very existence. The playing field is never level. The principles embedded in a prototype set of negotiated sovereignty accords could go a long way toward ameliorating this declivity.

These accords would involve no waiver or abridgement of any rights by either side, but would simply take the word "respect"—the Governor of South Dakota's own litmus test in the just-completed Year of Reconciliation—and apply it to the legal realm. The quality and texture of tribal-state relations are such that it is necessary for states to demonstrate publicly and in writing that they recognize tribal sovereignty—that is, the right of tribal governments to exist, to endure, and to flourish. Such accords might be seen as establishing an innovative set of new political and diplomatic protocols which might serve as a gateway to a more fulfilling and successful future.

Accords of this nature were entered into in 1989 between the State of Washington and the sovereign tribes of that area. For example, the Washington Centennial Accord provides:

Each party to this Accord respects the sovereignty of the other. The respective sovereignty of the state and each federally recognized tribe provide paramount authority for that party to exist and to govern. The parties share in their relationship particular respect for the values and cultures represented by tribal governments. Further, the parties share a desire for a complete accord between the State of Washington and federally recognized tribes in Washington respecting a full government to government relationship and will work with all state and tribal governments to achieve such an Accord.

Such accords alone, of course, do not solve difficult problems, but they do offer, it seems, a significant opportunity to advance vigorous and fair-minded mutual problem solving. This is a process, it might be added, that is not nearly as expensive as traditional tribal-state litigation. Such accords can do much to establish the necessary predicate to put the state and the tribes on the same emotional and political footing.

209. See supra note 2 (South Dakota's most recent Attorney General stated that "Indian reservations are a 'divisive system' of government that have outlived their usefulness." To the best of this author's knowledge, this statement was never retracted nor subject to criticism by any high ranking South Dakota elected state or federal official.).

210. See, e.g., Centennial Accord, supra note 170, and accompanying text.

211. See text of Governor's Proclamation, supra note 169 and accompanying text. The Year of Reconciliation is currently continuing for the period 1991-92.

212. Centennial Accord, supra note 170, at art. 1, at 1.
B. State Public Policy Concerning Tribes

In the arena of state-tribal relations, there is an acute paucity of state public (not litigious) policy, and therefore, a more responsive and creative public policy needs to be developed. One way, for example, to establish such a process would be for the governor of every western state to appoint a commission of Indian and non-Indian experts from within the state and the reservations to prepare a public report to review the status of tribal-state relations within the particular state. The report would review the history of tribal-state relations, discuss the parameters of current problems, and suggest a range of policy options for the future. 213

Such a report needs also to address important questions about the allocation of authority within state governments in the area of tribal-state relations. The making of such public policy, at least in its broadest sense, is a legislative function. This is so because it is the legislative duty to make law (embodying the attendant values and public policy concerns) which is to be carried out by the executive branch and where contested, interpreted by the judicial branch. However, for example, in a state like South Dakota where there has been little, if any, meaningful legislative activity in tribal-state relations, much of this authority is exercised de facto, if not de jure, in the executive branch, particularly in the attorney general's office. 214 The attorney general's office has no written policy, and perhaps as a result of its "prosecutorial" mentality, tends to litigate things on an ad hoc basis without apparent thought for the implications to the overall character of tribal-state relations. Such a course of action is unlikely to produce amelioration.

Again, a look at the Centennial Accord between the State of Washington and the federally recognized tribes located there is instructive. The Accord, for example, seems particularly sensitive to this pattern, and explicitly directs specific actions within the executive branch:

The chief of staff of the governor of the State of Washington is accountable to the governor for implementation of the Accord. . . . Each director will initiate a procedure within his/her agency by which the government to government policy will be implemented. Among other things, these procedures will require persons responsible for dealing with issues of mutual concern to respect the government to government relationship within which the issue must be addressed. Each agency will establish a documented plan of accountability and may establish more detailed implementation procedures in subsequent agreements between tribes and

213. Such a commission has been in place in South Dakota before. See, e.g., SOUTH DAKOTA TASK FORCE ON INDIAN-STATE GOVERNMENT RELATIONS, 1974 REPORT (June 30, 1974). The Task Force was created in 1973 to study tribal-state governmental relations. Id at 1. The Task Force was appropriated $100,000 for fiscal year 1973 and an additional $40,000 for fiscal year 1974. Id. at 1-2. The Task Force had 18 members, nine of these appointed by the tribes. Id. at 2. The Task Force reviewed staff reports on issues, took testimony, and examined the legal relationship between the parties. Id. at 5-12. The Task Force then proposed solutions to the legislature. Id. at 43-58.

214. See Pommersheim, Attorneys General Survey, supra note 148 (letter from South Dakota Attorney General pp. 2-3, on file with the South Dakota Law Review); see also supra note 169.
the particular agency.215

Similar accountability is directed to tribal officials, providing that “the parties will review and evaluate at the annual meeting the implementation of the government-to-government relationship. A management report will be issued summarizing this evaluation and will include joint strategies and specific agreements to outline tasks, overcome obstacles, and achieve specific goals.”216 All of this points to the necessity, from both a legislative and executive perspective, to specify the working frame for the tribal-state government-to-government relationship, and ongoing review and accountability within that framework. Without these elements, there is too much opportunity for the unbalancing forces of “prosecutorial” zeal, ineffective communication, and the legacy of racism and misunderstanding.

There also needs to be a growing and complementary realization within tribal communities that dialogue and negotiation with the state on (legitimate) issues is not a “sell out” of tribal sovereignty, but rather, part of the contemporary political and legal struggle to define and to achieve a tribal sovereignty that advances the flourishing of tribal life. It is here that there needs to be continuing political discussion within tribal communities and tribal councils to forge a wide-ranging and thoughtful tribal public policy on tribal-state relations, complete with specific goals, objectives, and attendant strategies.

C. Educational Reform

Any effort to advance tribal-state relations in South Dakota and throughout the West needs the underpinning of substantial educational reform if it is to have any longevity and permanence. This is so because of the incredible ignorance that has taken root in the arid historical and political soil that permeates much of the region.217

This blissful and destructive ignorance finds emblematic articulation, for example, in the statement by the recent South Dakota Attorney General that “Indian reservations are a 'divisive system' of government that have outlived their usefulness.”218 This statement, which fails to minimally comprehend the treaty based guarantees of a “measured separatism” to Indian tribes on reservations, strains credulity. The South Dakota Attorney General ought to know something about tribal sovereignty and its comparable parity with state authority.

Yet this reaction is typical. During the ten years I lived and worked on the Rosebud Sioux Reservation as a teacher and a lawyer, non-Indian people were genuinely surprised, if not astounded, by someone’s choice, whether Indian or non-Indian, to live on the reservation. This reaction always puzzled me. Part of it is racism, but ultimately, I think, racism is only a small part of

215. Centennial Accord, supra note 170, at art. IV.
216. Id.
218. See supra note 2.
the response. The larger part of the reaction reflects the institutional and govern-
mental victimization of South Dakota citizens and citizens throughout
most of the West.

This victimization has not been seriously questioned, because most ordinary citizens do not even perceive that they have been victimized. As a result, governmental inertia, or even worse, governmental design in this area goes unchecked. This governmental silence also contributes to the continuing refusal throughout much of the region to confront the dismal history of tribal-state and Indian-non-Indian relations.

It is hard for people, especially the overwhelming number of well-meaning people, to understand life on the reservation when they do not know anything about it. Why don't people in South Dakota and throughout the West know anything about reservation life? The answer lies in the fact that state and local governments simply do not educate their citizens about such things as reservations, treaties, and tribal governments. For example, it is still possible to be educated in South Dakota from kindergarten through college and not learn anything about tribes and reservations, including their past and current situation, their permanent and enduring reality. It is not surprising then that when many South Dakotans become adult citizens they do not even have the baseline concepts and understandings to bring to bear on real tribal-state problems involving such things as water, land, jurisdiction, and the environment. And without an informed citizenry, the political leadership of most states in the West is free to be equally uninformed and misdirected in its responses to these issues.

Beyond the absence of this foundational knowledge about treaties and the permanency of reservations and tribal governments, there is something even more nefarious. Education is so central in our society that it also determines what is authentic, meaningful, and legitimate. Education certifies importance and is the touchstone for civic discourse and problem solving. In the educational void involving tribes and reservations, there is also, then, the implicit message that tribal governments and reservations are not meaningful and legitimate, and therefore they cannot have problems and claims that merit the serious attention of fellow citizens.

This failing in regard to education about treaties and reservations is instructive in other ways. It reflects the inability in South Dakota and much of the West to identify what it is that is unique to the region that needs to be preserved, in order to enhance and to mold a meaningful future. For example, if South Dakota values local and rural life as much as it claims, why is there such a terrific out-migration of the young? One potential reason is that there is very little in their education, particularly at the university level, that teaches students the value and challenge of reclaiming and honoring rural life.

The state of South Dakota and other states throughout the region can no longer blithely exploit their own citizens by depriving them of the opportunity to learn about and to respect historical and contemporary tribal and reserva-
tion reality as an enduring and important presence for the state and region. Without such efforts, there can be little hope for the improvement of tribal-state relations in the West. There will only be a continued, but inexcusable, ignorance and a kind of ugly, educational apartheid.

D. The Development of Forums for Dialogue and Public Policy Making

Endemic to the problems of tribal-state relations is the absence of forums—both formal and informal—in which Indians and non-Indians, and tribal and state officials can come together to discuss important issues. This gulf in communication is all too easily filled with gossip, relentless stereotypes, and pernicious emptiness.

This state of affairs needs to be eradicated, and a variety of means is available to begin the process. Some of these means are implicit in what already has been discussed. Such things as the development of sovereignty accords, the adoption of thoughtful and explicit public policy, and the implementation of educational reforms will all go a long way to bridging the communications gap between both sides. Yet other means are available and ought to be pursued. These include, for example, joint training and workshops for state and tribal employees who work in the same substantive areas, such as law enforcement, tax collection, or game management. In addition, there is a need for state and tribal department heads and policy makers to come together regularly to share their issues and concerns. The payoffs in these situations are not only the improved communication of substance, but the equally, if not more important, appreciation of each other as people who share similar job challenges, rewards, and frustrations.

At the state level, there is probably the need for specific and precise state legislation to insure this kind of cross-communication. In addition, such legislation might mandate the preparation of an annual report for legislative and executive (and public) review that evaluates, with some detail, the nature and quality of tribal-state relations for the year. Such reports, in turn, provide an ongoing record with which to measure the accomplishments and direction of tribal-state relations in an ongoing and consecutive manner.

Perhaps most startling in this area, at least in South Dakota, is that tribal-state relations and Indian issues, in general, play absolutely no role in the lives of the Republican and Democratic parties within the state. Therefore, there is no discourse within the statewide political process about tribal-state relations, and this greatly aggravates and undermines the likelihood for tribal-state issues to be meaningfully addressed within the political and electoral context.

It also permits and even encourages political (and ethical) ignorance of central issues that are pivotal to state and regional well-being. This needs to be changed, and the major political parties need to respond by developing thoughtful and meaningful "planks" within their respective parties. This includes special efforts to reach out to Native Americans within the party sys-
tem and to increase the recruiting of Native Americans to the respective parties. And, in the spirit of interrelatedness, this process can be advanced, in part, by making the parties responsive to the very issues of tribal-state relations and Indian affairs they currently ignore. For example, for all the discussion in 1990 about Reconciliation in South Dakota, neither the Democratic nor the Republican parties made tribal-state relations an issue in the statewide elections of this past year. This process of change will not be easy, but it is absolutely necessary if there is to be any claim for a truly inclusive politics within South Dakota and much of the region.

The notion of an inclusive politics and political discourse within the state of South Dakota and throughout much of the West in Indian affairs also raises the issue of regional (and mutual) discourse on these issues. Many of these questions, particularly in the water and natural resources area, comprehend natural phenomena and ecological boundaries that transcend state and reservation boundaries. And while there is some regional state discourse through, for example, the Western Conference of State Governors, and some regional tribal discourse through, for example, the Council of Energy and Resource Tribes (CERT), there has been no concerted effort to bring both sides together. Such an effort would seem to be an ideal project in the regional context—particularly, perhaps, with an emphasis on developing non-litigative approaches to regional problem solving.

Non-litigative strategies, particularly those that fall under the conceptual rubric of alternative dispute resolution (ADR), are playing a growing role in tribal-state relations. For example, The Western Network, an organization that facilitates environmental and tribal-state negotiations, recently helped form the National Association of Counties Task Force on Indian Affairs as a part of the National Association of Counties (NACo), the representative organization for all county governments throughout the United States. One of the Task Force’s key recommendations was the endorsement of the creation

219. The Western Governors’ Association was established in 1984. Its membership includes Alaska, American Samoa, Arizona, California, Colorado, Guam, Hawaii, Idaho, Kansas, Minnesota, Montana, Nebraska, Nevada, North Dakota, Northern Mariana Islands, Oregon, South Dakota, Utah, Washington and Wyoming. The Western Governors’ Association was established to respond to policy issues identified by the western governors. Within the Association, the issue of tribal-state relations has seen increased examination. The Western Governors’ Association has determined that, especially in rural areas, many problems faced by the states and tribes are the same. 1990 ANNUAL REPORT TO THE WESTERN GOVERNORS’ ASSOCIATION, A NEW ERA FOR STATE-TRIBAL RELATIONS 14 (July 1990). Therefore, the Association has begun projects between state governors, tribal chairmen and interested groups to promote these mutual concerns. Id. at 15-18.

220. The Council of Energy Resources Tribes (CERT), is a group based out of Denver, Colorado, representing tribal interests in energy matters. CERT has worked with the Western Governors’ Association and is developing environmental management projects. Id. at 15-16.

221. See, e.g., F. SANDER, B. PAULSON, L. RAY, G. KESSLER, & G. GRIENER, ALTERNATIVE DISPUTE RESOLUTION: AN ADR PRIMER (1989) (description of these processes which include mediation, negotiation, arbitration, private judging, neutral fact finding, and the use of an ombudsman); see also ABOUREZK, ALTERNATIVE DISPUTE RESOLUTION IN SOUTH DAKOTA’S TRIBAL-STATE CONFLICT: OBSTACLES AND POSSIBILITIES (1990) (University of South Dakota School of Law’s McKusick Law Library collection of student papers) (a thoughtful and insightful review of the history and prospects of alternative dispute resolution in South Dakota and throughout the West).

222. ABOUREZK, supra note 221, at 20-21.
of a County-Tribal Mediation Model.\textsuperscript{223}

In addition, tribal and state courts have undertaken new and noteworthy cooperative efforts. For example,

In response to growing concern over the lack of effective resolution of disputes between state and tribal courts over civil jurisdiction matters, the Conference of Chief Justices (CCJ) established a Committee on Civil Jurisdiction in Indian Country. The significance and complexity of these issues led the committee to recommend that the state judiciaries encourage tribal and state governments to cooperate in resolving jurisdictional problems at tribal, state, and local levels. Subsequently, CCJ endorsed a project, designed by the National Center for State Courts and later funded by the State Justice Institute, that would provide a research basis and model approaches to dispute resolution that tribal and state courts could use cooperatively to resolve disputes in constructive, nonlitigative ways. A 13-member coordinating council composed of state appellate justices, tribal court judges, state trial court judges, federal judges, an Indian and non-Indian attorney, a state court administrator, and legal scholars and consultants guides the project.\textsuperscript{224}

A national conference sponsored by both state and tribal court organizations entitled “Civil Jurisdiction of Tribal and State Courts: From Conflict to Common Ground” will be held this summer. It is also significant to note that Chief Justice Robert Miller of the South Dakota Supreme Court organized a successful Tribal-State Judicial Conference which was held this past spring. In fact, these landmark tribal-state judicial cooperative efforts may develop the most promising model for mutual tribal-state problem solving.

\textbf{VI. CONCLUSION}

Tribal-state relations have floundered conceptually, politically, and economically from the earliest days of this republic. Racism, competition for resources, and ignorance have all exacted tribute from any potential alliance against the real raptors from without the region who plunder both the tribes and the states. Both the tribes and the states need to know that their greatest “enemies” often come from commercial and exploitative interests outside the region.\textsuperscript{225} Each side has to see, or at least explore, the potential for identifying local common ground on which to make a stand.

It is, of course, also true that there are manifold problems that exist between tribes and states, but they are not intractable. In fact, these are problems that often grow and fester in the recesses of inattention and cultural

\textsuperscript{223} Id.
\textsuperscript{225} For example, witness the desire of outsiders to use South Dakota and its reservations as “dumping” grounds in the Lonetree (Edgemont, S.D.) and the Connecticut based RSW, Inc. (Rosebud Sioux Reservation) waste disposal controversies. The metaphor is glaring. “Dances with Garbage”–a headline and story in the \textit{Christian Science Monitor}, graphically captures this problem. This headline is a play on the beautiful and successful Kevin Costner movie, “Dances with Wolves,” made and set in South Dakota. Daschle, \textit{Dances With Garbage}, \textit{Christian Science Monitor}, Feb. 14, 1991 (Vol. 83, No. 56).
and political ignorance. There are exciting and creative ways to move tribal-state relations forward. Yet there is also the concomitant need for mutual goodwill, the timely deployment of resources, and a leadership and citizenry that possess a vision that is committed to an ethical and flourishing future for all that is grounded in reciprocity and synergistic effort.

Part of that process has already started; \textsuperscript{226} let us continue it in a spirit of respect—with forthright, provocative, and civil exchange. Without talk and conversation, there is no hope for the future of tribal-state relations. Yet hope must also encourage the energetic dialogue that animates and gives hope meaning in the first instance.

\textsuperscript{226} See, e.g., \textit{Tribal-State Relations: Hope for the Future}, Symposium (1990) (sponsored by the University of South Dakota School of Law, the Native American Law Student Association, and the Indian Law Committee of the South Dakota Bar Association). This event encouraged and sparked this article in the first instance.