RECOGNIZING TRIBAL JUDGMENTS IN FEDERAL COURTS THROUGH THE LENS OF COMITY

INTRODUCTION

In January 2010, on the sparsely populated Uintah and Ouray Reservation in northeastern Utah, a man was charged with assaulting his domestic partner.[1] Little did he know that, because this was his third domestic assault charge, he will not appear before a Ute judge in tribal court. This is his third strike. The full force of a federal recidivist statute strikes him out—for up to five years.[2] His name is Adam Shavanaux and he is a member of the Ute Indian Tribe. Because he is a tribal member and the crimes he committed were on the reservation, his previous convictions were in Ute tribal court. Tribal courts, however, are bound neither by the United States Constitution nor the Bill of Rights[3] and consequently provide different protections than domestic American courts.[4] Tribal members, for example, do not have the right to free legal counsel.[5] This is particularly important to Mr. Shavanaux because he cannot afford an attorney.[6] His two prior misdemeanor domestic assault convictions were made while Mr. Shavanaux was unrepresented.[7] The recidivist statute commands that he be charged in federal court, and his federal public defenders assert that his prior convictions should not be allowed as predicate offenses because they were handed down without the benefit of professional legal representation.[8]

Because tribal courts do not provide the same procedural protections as state and federal courts, there is a debate as to how state and federal courts should handle tribal judgments that come across their dockets. Should tribal judgments be entitled to full faith and credit under the Full Faith and Credit Act[9] or be analyzed using principles of international comity?[10] This Comment argues that tribal judgments should be treated

1. United States v. Shavanaux, 647 F.3d 993, 995 (10th Cir. 2011).

2. Domestic Assault by an Habitual Offender, 18 U.S.C. § 117(a) (2006).

3. The Constitution and Bill of Rights do not apply because Indian tribes were, before the American Republic, viewed as co-equal sovereign states. *See* discussion *infra* Part I.B.

4. *See* discussion *infra* Part I.C.2. Throughout this paper, I will use "American courts" to refer to federal and state courts. This is in contrast to "tribal courts," which do not fall within the same structure.

5. *See* UTE INDIAN R. CRIM. P. 3(1)(b) ("[B]ut no Defendant shall have the right to have appointed professional counsel provided at the Tribe's expense."), *available at* http://www.narf.org/nill/Codes/uteuocode/utebodyt12.htm.

6. *Shavanaux*, 647 F.3d at 996.

7. *Id.*

8. *See id.*

9. Full Faith and Credit Act, 28 U.S.C. § 1738 (2006).

10. *See* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984) (noting that comity is "complex and elusive—[it considers] the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum.").

as foreign judgments and be recognized using international comity principles[11] because the relationship between tribes and American jurisdictions does not mirror the state–federal relationship, which is based on full faith and credit between judgments from different jurisdictions. Although Congress retains ultimate control, tribes have much leeway to exercise their sovereignty in internal affairs.[12] Because they are not fully within the federal framework and are not bound by the same rules as state and federal courts, the principles of international comity are the best means for American courts to recognize tribal judgments.

Part I frames how Indian tribes are treated in the United States. It briefly explores the history of legal relationships with Indian tribes, from equal treatment as sovereign states when Europeans first crossed the Atlantic, through a century of pulling tribes under the federal domain, to eventual federal legislative supremacy over Indian tribes. This Comment also analyzes the circuit split regarding the use of un-counseled tribal convictions to prove predicate offenses. Part II discusses *United States v. Shavanaux*[13] and summarizes Mr. Shavanaux's Fifth Amendment and Sixth Amendment claims. Part III explores the difference between a full faith and credit approach and a comity analysis of tribal judgments, and concludes by finding that international comity principles are more appropriate for Indian tribes. Part IV analyzes *Shavanaux* using the principles of international comity and explores whether the right to counsel is a fundamental due process requirement for the comity analysis.

I. BACKGROUND: THE TRIBAL–FEDERAL RELATIONSHIP

The foundation for understanding *United States v. Shavanaux* comes from understanding the relationship between the federal government and tribal governments. This story is a long and, at times, ugly one.[14] From initial European contact with Native Americans, tribal sovereignty has been chipped away. In the early years of the United States, the federal government began to bring tribes within its administration and under its protection.[15] Now, tribes are neither part of the United States because they still retain many aspects of sovereignty nor are they foreign states because Congress retains ultimate authority over them. This state of limbo creates difficulties when American and tribal legal systems interact.

11. For a thorough discussion of comity, see discussion *infra* Part III.A.1.

12. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

13. 647 F.3d 993 (10th Cir. 2011).

14. *See* Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 841–43 (1990).

15. *See* DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW 7 (2001).

A. United States' Treatment of Indian Tribes

By the time the United States declared independence, there was a well-established framework for dealing with Native American tribes. Spanish theological jurists in the 1600s recognized the sovereignty of Indian tribes and treated them as they would other colonial powers—that is, as sovereign states.[16] This sovereign equality, however, began to erode in the mid-1700s as the British took over some tribal administrative responsibilities.[17] By 1781, the Articles of Confederation asserted that the national government had authority over Indian tribes.[18] The Constitution, however, continued to recognize that Indian tribes are "distinct from the United States"[19] in the express language of the Commerce Clause.[20] Early American interactions with Indian tribes were made through treaties.[21] In 1784, George Washington recommended that a treaty resolving a territorial dispute with the Six Nations be submitted to the same formal ratification process as a treaty with a foreign sovereign.[22] Subsequent peace,[23] trade,[24] and land acquisition[25] treaties began to disfavor tribal interests as the United States pushed westward. Congress eventually ended the practice of making treaties with tribes, but it left tribal sovereignty intact.[26]

After the Constitution was ratified, the limits of tribal sovereignty were predominantly shaped by three Supreme Court decisions, referred to as the "Marshall Trilogy."[27] These cases established that although tribes were not quite foreign states,[28] they were certainly not part of the United States.[29] Chief Justice Marshall noted that because federal and state governments "plainly recognize the Cherokee nation as a [foreign] state . . . the courts are bound by those acts" affirming tribal sovereignty.[30] However, recognizing Indian tribes "as distinct, independent politi-

16. *See* CHARLES WILKINSON, THE AM. INDIAN RES. INST., INDIAN TRIBES AS SOVEREIGN GOVERNMENTS 4 (2d ed. 2004).

17. *See id.*

18. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4 ("The United States in Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians . . . .").

19. *See* WILKINS & LOMAWAIMA, *supra* note 15, at 5.

20. Indian tribes are separate from foreign and domestic states. *See* U.S. CONST. art. I, § 8, cl. 3 ("[The Congress shall have power] [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.").

21. *See* WILKINSON, *supra* note 16, at 4–8.

22. *See id.* at 93.

23. *See, e.g.*, Treaty with the Choctaw, U.S.–Choctaw, Sept. 27, 1830, 7 Stat. 333; WILKINSON, *supra* note 16, at 96–97.

24. *See, e.g.*, Treaty with the Sioux, U.S.–Sioux, Apr. 29, 1868, 15 Stat. 635; WILKINSON, *supra* note 16, at 93–94.

25. *See, e.g.*, Treaty with the Creeks, U.S.–Creek, Aug. 9, 1814, 7 Stat. 120; WILKINSON, *supra* note 16, at 96.

26. 25 U.S.C. § 71 (2006); WILKINSON, *supra* note 16, at 97.

27. *See* WILKINSON, *supra* note 16, at 5.

28. *See* Cherokee Nation v. Georgia, 30 U.S. 1, 16–17 (1831).

29. *See* Worcester v. Georgia, 31 U.S. 515, 559, 561 (1832).

30. "State," in this context, refers to foreign states. *See Cherokee Nation*, 30 U.S. at 16.

cal communities, retaining their original natural rights" does not mean tribal sovereignty is absolute.[31] Tribes are "domestic dependent nations,"[32] "distinct communit[ies] occupying [their] own territory."[33] Although the Court did not determine that tribes are within the federal framework, the extent of tribal sovereignty depends on the will of the federal government.[34]

Given that tribes retain a level of independence, the question becomes how does Congress justify its authority over tribes? The federal government justifies its control over Indian tribes as an inherent "plenary power,"[35] which means that Congress has "full and complete power" to regulate tribal affairs.[36] The source of the plenary power stems[37] from the Indian Commerce Clause,[38] the Treaty Clause,[39] and a principle in international law granting conquerors sovereignty and ownership over conquered land.[40] Although Congress abolished the power to make treaties with Indian tribes in 1871[41] and conquest has lost favor as an acceptable tool for advancing national interests,[42] the Commerce Clause remains as justification for federal supremacy over tribes.[43] Regardless of the original justification, Congress's power is very broadly interpreted.[44]

B. Effect of Congressional Power over Tribes

Until Congress acts to limit tribal authority, Indian nations have many of the powers of a sovereign state.[45] By being brought within the administrative protection of the United States, "Indian tribes have not

31. *Worcester*, 31 U.S. at 559.

32. *Cherokee Nation*, 30 U.S. at 17.

33. *Worcester*, 31 U.S. at 561.

34. *See Cherokee Nation*, 30 U.S. at 17 ("[Tribes'] relation to the Unites States resembles that of a ward to his guardian.").

35. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 397–98 (1986 ed.).

36. *See* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998); STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 59 (3d ed. 2002).

37. *See* PEVAR, *supra* note 36, at 58–59; *see also* United States v. Lara, 541 U.S. 193, 200–04 (2004) (explaining the sources of Congress's plenary power over Indian tribes).

38. U.S. CONST. art. I, § 8, cl. 3 ("[The Congress shall have power] . . . to regulate Commerce . . . with the Indian Tribes . . . .").

39. U.S. CONST. art. II, § 2, cl. 2.

40. *See* Johnson v. M'Intosh, 21 U.S. 543, 589 (1823) ("The title by conquest is acquired and maintained by force. The conqueror prescribes its limits."); *see also* Robert N. Clinton, *Comity & Colonialism: The Federal Courts' Frustration of Tribal Federal Cooperation*, 36 ARIZ. ST. L.J. 1, 26–27 (2004).

41. 25 U.S.C. § 71 (2006); WILKINSON, *supra* note 16, at 97.

42. *See, e.g.*, U.N. Charter art. 2, para. 4 (outlawing the use of force as a tool of foreign policy).

43. *See* Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 257–58 (1992); Morton v. Mancari, 417 U.S. 535, 551–52 (1974).

44. *See* United States v. Lara, 541 U.S. 193, 200–03 (2004) (describing congressional power over tribes); PEVAR, *supra* note 36, at 59.

45. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 n.7 (1978) (discussing federal court decisions which "exempt[] Indian tribes from constitutional provisions addressed specifically to State or Federal Governments"); *see also* Worcester v. Georgia, 31 U.S. 515, 559 (1832); Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

given up their full sovereignty."[46] And because tribes are sovereign states that existed before the Constitution, they "have historically been regarded as unconstrained" by constitutional limitations.[47] Of particular importance to *United States v. Shavanaux* because of Mr. Shavanaux's uncounseled convictions, the Bill of Rights does not apply to Indian tribes.[48] However, Congress's plenary powers allow legislative action to strip tribes of independent authority.[49] As the Court articulated in *Talton v. Mayes*,[50] "all such rights are subject to the supreme legislative authority of the United States."[51]

As an exercise of this plenary power, Congress passed the Indian Civil Rights Act of 1968 (ICRA).[52] ICRA grants Bill of Rights-like protections to tribal members[53] and gives federal courts broad authority to review and overrule tribal decisions that violate ICRA protections.[54] Imposing the Bill of Rights itself was not done because it would not take into account the unique needs of Indian tribes.[55] One right that was not fully exported was the right to counsel—ICRA only guarantees defendants the right to counsel *at their own expense*.[56] Recognizing that requiring tribes to provide public defenders would impose "undue financial hardship," Congress acquiesced to tribal leaders.[57] Some tribes, however, provide counsel for indigent defense[58] or, as Mr. Shavanaux's Ute Tribe does, allow non-lawyer "advocates" to represent defendants.[59] But because tribes are not subject to the Bill of Rights, any measures that are more protective than IRCA are left to the tribe's discretion.[60]

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

47. *Santa Clara Pueblo*, 436 U.S. at 56 ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions . . . .").

48. *See* Talton v. Mayes, 163 U.S. 376, 384–85 (1896).

49. *See Wheeler*, 435 U.S. at 323 ("In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.").

50. 163 U.S. 376 (1896).

51. *Talton*, 163 U.S. at 384.

52. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1303 (2006).

53. *See id.* § 1302.

54. *See* PEVAR, *supra* note 36, at 278. For a discussion of ICRA's legislative history, which emphasizes the federal government's interest in maintaining tribal integrity and self-governance, see Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66–70 (1978).

55. PEVAR, *supra* note 36, at 280 (explaining that full Bill of Rights protections were not conferred because some protections, for example the Establishment Clause, would be detrimental to ICRA's purpose of protecting individual rights while maintaining tribal integrity and identity).

56. 25 U.S.C. § 1302(a)(6).

57. *See* PEVAR, *supra* note 36, at 280, 282.

58. *See* CARRIE E. GARROW & SARAH DEER, TRIBAL CRIMINAL LAW AND PROCEDURE 319–20 (2004).

59. *See* UTE INDIAN R. CRIM. P. 3(1)(b), *available at* http://www.narf.org/nill/Codes/uteuocode/utebodyt12.htm ("The Defendant may . . . be represented by an adult enrolled Tribal member . . . .").

60. *See* Talton v. Mayes, 163 U.S. 376, 384 (1896).

C. Circuit Split on Recognizing Tribal Convictions: Ant v. Spotted Eagle

Various courts have approached the question of whether an un-counseled tribal conviction, obtained in compliance with ICRA, may be used as a predicate offense to prove guilt in a subsequent federal three-strike prosecution. Two schools of thought have arisen. The Ninth Circuit Court of Appeals, in *United States v. Ant*,[61] determined that prior un-counseled convictions could not be used as predicate offenses. The Tenth[62] and Eighth[63] Circuits, however, adopted the Montana Supreme Court's reasoning in *State v. Spotted Eagle*,[64] which allows courts to recognize un-counseled tribal convictions as qualifying predicate offenses.[65] Although not explicitly mentioned, both results, though different in outcome, draw heavily from comity principles. In analyzing whether un-counseled tribal convictions should be recognized, the courts determine whether the conviction meets fundamental due process requirements needed to justify enforcing a judgment from a jurisdiction with different procedural protections.

1. *Ant*: Would the Conviction Be Valid in Federal Court?

On October 27, 1986, the body of a young woman was found on the Northern Cheyenne Indian Reservation in southeastern Montana.[66] Over a month later, authorities went to Francis Floyd Ant's house, interrogated him, and obtained a confession without Ant having been advised of his right to an attorney.[67] After the confession, the police arrested Ant and read him his *Miranda* rights.[68] At his tribal arraignment on charges of assault and battery, Ant pled guilty, again without counsel.[69] Tribes cannot sentence anyone for more than a year in jail[70] and the federal government has concurrent jurisdiction over felonies,[71] so Ant was charged with manslaughter in federal court. At that trial, he sought to suppress his tribal court guilty plea because that evidence was obtained in violation of his *Miranda* rights.[72] The district court denied the motion to suppress

61. 882 F.2d 1389 (9th Cir. 1989).

62. *See Shavanaux*, 647 F.3d at 999.

63. *See* United States v. Cavanaugh, 643 F.3d 592, 605 (8th Cir. 2011) (noting, additionally, that "Supreme Court authority in this area is unclear" and "reasonable decision-makers may differ" in their conclusions and interpretations of the Sixth Amendment).

64. 71 P.3d 1239 (Mont. 2003).

65. *Id.* at 1245.

66. *Ant*, 882 F.2d at 1390.

67. *Id.*

68. *Id.*

69. *Id.* at 1390–91.

70. Tribes can impose a maximum sentence of no more than one year, a $5,000 fine, or both. Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(a)(7) (2006); *see also* COHEN, *supra* note 35, at 769 (enumerating the punishments that an Indian tribe may impose).

71. The Indian Major Crimes Act of 1885 grants the federal government concurrent jurisdiction over major crimes, such as rape, murder, and sexual assault. Indian Major Crimes Act of 1885, 18 U.S.C. § 1153(a) (2006); *see also* COHEN, *supra* note 35, at 742–45, 759 (discussing jurisdictional issues under the Indian Country Crimes Act and Major Crimes Act).

72. *See Ant*, 882 F.2d at 1391.

because "[c]omity and respect for legitimate tribal proceedings requires that this Court not disparage those proceedings by suppressing them from evidence in this case."[73] After Ant was convicted and sentenced to three years and a $50 fine, he appealed.[74]

The Ninth Circuit addressed whether an un-counseled guilty plea in tribal court can be used in a later federal prosecution for a repeat offender statute.[75] The later efficacy of a tribal conviction is predicated on its initial validity.[76] Review of tribal judgments uses a "clearly erroneous" standard,[77] out of respect for judgments issued by a sovereign, competent court.[78] Earlier convictions, even from "proceedings in different jurisdictions," can generally be used.[79] Therefore, to disallow use of the conviction, the court must determine that the conviction was constitutionally deficient.[80]

To do this, the Ninth Circuit asked whether Ant's un-counseled plea would have been accepted in federal court.[81] Stressing that it was not reviewing the tribal conviction, the court merely sought to ensure that evidence on which a federal conviction was predicated comports with the Constitution.[82] For Sixth Amendment challenges, defendants must have access to counsel during all "critical stage[s]" of trial.[83] Therefore, the court concluded, even though the conviction complied with tribal law and ICRA, any procedure that violates the Constitution cannot be used in a later federal court prosecution.[84]

2. *Spotted Eagle*: Respect for Tribal Sovereignty

Like *Ant*, *Spotted Eagle* addressed how courts should deal with un-counseled tribal convictions.[85] In September 2001, a Montana sheriff found Eugene Spotted Eagle slumped against his pickup truck.[86] After failing his field sobriety test, Spotted Eagle was charged with operating a

73. *Id.*
74. *Id.*
75. *See id.*
76. *See id.* at 1391–92.
77. *See id.* at 1392 (citing Chua Han Mow v. United States, 730 F.2d 1308, 1310 (9th Cir. 1984)).
78. *See id.* (citing Smith v. Confederated Tribes of the Warm Springs Reservation of Or., 783 F.2d 1409, 1412 (9th Cir. 1986)).
79. *See id.* at 1392–93.
80. *See id.* at 1393 (citing Elkins v. United States, 364 U.S. 206, 223–24 (1960) (denying the prosecution use of evidence obtained in an unconstitutional manner)).
81. *See id.*
82. *Id.* at 1396 ("[W]e have looked beyond the validity of the tribal conviction itself and have reviewed the actual tribal proceedings to determine if they were in conformity with the Constitutional requirements for federal prosecutions in federal court.").
83. Ant did not have counsel when he entered his guilty plea. Therefore, the court determined, at this "critical stage," Ant's lack of counsel violated the Sixth Amendment. *See id.* at 1393–94 (citing Hamilton v. Alabama, 368 U.S. 52, 53 (1961)).
84. *See id.* at 1396.
85. *See* State v. Spotted Eagle, 71 P.3d 1239, 1240 (Mont. 2003).
86. *Id.* at 1240.

motor vehicle under the influence of alcohol.[87] However, this DUI was Spotted Eagle's fifth conviction—he had been convicted four previous times in Blackfeet tribal court.[88] Under Montana law, the fourth or any subsequent DUI conviction is a felony.[89] Similar to Ant, Spotted Eagle moved to dismiss the felony charge because the four prior tribal convictions were made without Spotted Eagle having counsel.[90] The Montana district court, however, denied the motion noting that "the judicial policy of the State of Montana is to treat Tribal Court judgments with the same deference shown to decisions of foreign nations as a matter of comity"[91] and that Spotted Eagle's prior convictions comported with ICRA and tribal law.[92]

Despite the similar issue of law, the Montana Supreme Court distinguished *Spotted Eagle* from *Ant*.[93] Again, the analysis started with a valid tribal conviction under ICRA and tribal law.[94] The court then analyzed permissible uses of un-counseled conviction in state and federal court. Reiterating the U.S. Supreme Court, the Montana Supreme Court noted that a conviction without counsel is valid so long as the defendant is charged with a misdemeanor and is not sentenced to imprisonment.[95] These convictions continue to be valid when used as predicate offenses for an enhancement statute.[96] What matters is whether the convictions were contemporaneously valid; "there [is] no retroactive right to counsel . . . simply because that conviction may ultimately contribute to imprisonment or felony charges."[97] Noting than Spotted Eagle's conviction in tribal court would be constitutionally invalid because he was sentenced to jail time, the court nonetheless deferred to tribal sovereignty.[98] It matters not that a conviction contravenes the Constitution; principles of comity and respect for tribal self-determination drive recognition of tribal convictions.[99] Despite confirming the unconstitutionality of Spotted Eagle's conviction, were it obtained in state or federal court, the Montana Supreme Court deferred to tribal sovereignty and recognized the uncounseled tribal conviction.[100]

87. *Id.* at 1240–41.
88. *Id.* at 1241.
89. MONT. CODE ANN. § 61-8-734(1) (2011).
90. *Spotted Eagle*, 71 P.3d at 1241.
91. State v. Spotted Eagle, 2002 ML 831, ¶ 13, *aff'd*, 71 P.3d 1239 (Mont. 2003).
92. *See id.* ¶ 15.
93. *Spotted Eagle*, 71 P.3d at 1244 (citing "procedural irregularities" and reliance on an overturned U.S. Supreme Court case as reasons why *Ant* is not persuasive).
94. *See id.* at 1242.
95. *Id.* (citing Scott v. Illinois, 440 U.S. 367, 372–74 (1979)).
96. *See id.* at 1242–43 (citing Nichols v. United States, 511 U.S. 738, 746–47 (1994)).
97. *Id.* at 1243.
98. *See id.* at 1243–44.
99. *See id.* at 1245 (noting that respect for the "quasi–sovereignty" of tribes is consistent with Montana's public policy).
100. *See id.* at 1246.

The Ninth Circuit does not recognize un-counseled tribal convictions if they would not have been valid in an American court.[101] The Eighth and Tenth Circuits, on the other hand, recognize tribal convictions so long as they comport with tribal law.[102] In December 2011, Mr. Shavanaux petitioned the U.S. Supreme Court to review the Tenth Circuit's decision to reverse the dismissal of his federal charge. The Court, however, declined to review Mr. Shavanaux's petition.[103] Consequently, the ambiguity in how tribal judgments should be recognized in American courts will persist.

II. *UNITED STATES V. SHAVANAUX*

A. Facts

In 2010, a Utah federal district court indicted Adam Shavanaux on his third domestic assault charge.[104] Because this was his third time, he was charged with a felony under the federal habitual domestic assault offender statute.[105] Ordinarily, applying an enhancement statute would be *pro forma* if based on prior state court convictions obtained with the full panoply of constitutional protections. However, Mr. Shavanaux is an enrolled member[106] of the Ute Tribe.[107] His first two convictions—in 2006 and 2008—were in Ute Tribal Court.[108] Those convictions were made without an attorney advising Mr. Shavanaux,[109] which is allowed under Ute tribal law.[110] At the time of his hearings, Mr. Shavanaux was indigent and could not afford an attorney.[111] The Ute Tribe does not provide public defenders at the tribe's expense.[112] Nor, as it turns out, do they have to.[113]

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101. *See* United States v. Ant, 882 F.2d 1389, 1396 (9th Cir. 1989).

102. *See* United States v. Cavanaugh, 643 F.3d 592, 605 (8th Cir. 2011); United States v. Shavanaux, 647 F.3d 993, 999 (10th Cir. 2011).

103. Shavanaux v. United States, No. 11-7731, 2012 WL 896004, at *1 (U.S. Mar. 19, 2012).

104. United States v. Shavanaux, No. 2:10 CR 234 TC, 2010 WL 4038839, at *1 (D. Utah Oct. 4, 2010), *rev'd*, 647 F.3d 993 (10th Cir. 2011).

105. Domestic Assault by an Habitual Offender, 18 U.S.C. § 117(a) (2006).

106. To be an "enrolled member" of an Indian tribe usually involves (1) being able to trace one's ancestry to individuals living in what is now the United States before it was discovered by Europeans and (2) recognition as an "Indian" by the tribe or community. Under federal law, tribes are given wide latitude to determine membership. Membership, depending on the tribe, grants a swath of protections while also bringing the individual within the tribe's jurisdiction while on tribal land. *See* COHEN, *supra* note 35, at 171–73.

107. *Shavanaux*, 2010 WL 4038839, at *1.

108. *Id.*

109. *Id.*

110. *See* UTE INDIAN R. CRIM. P. 3(1)(b), *available at* http://www.narf.org/nill/Codes/uteuocode/utebodyt12.htm.

111. *Shavanaux*, 2010 WL 4038839, at *1.

112. UTE INDIAN R. CRIM. P. 3(1)(b) ("[B]ut no Defendant shall have the right to have appointed professional counsel provided at the Tribe's expense.").

113. *See* Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(a)(6) (2006) ("No Indian tribe in exercising powers of self-government shall . . . deny to any person in a criminal proceeding the right to . . . at his own expense to have the assistance of counsel for his defense . . . .").

Because a tribal court handed down the two prior convictions used to enhance Mr. Shavanaux's sentence when he was unrepresented, Mr. Shavanaux challenged his federal conviction as a violation of his Sixth Amendment right to counsel.[114] The district court dismissed Mr. Shavanaux's federal indictment.[115] The court relied primarily on a North Dakota federal district court case, *United States v. Cavanaugh*,[116] which had remarkably similar facts—Mr. Cavanaugh was also charged under the federal recidivist domestic violence statute using two un-counseled convictions in Spirit Lake Tribal Court as the predicate domestic assaults.[117]

Guided by *Cavanaugh*, the Utah federal district court determined that tribal courts are not subject to limits in the Constitution, but rather are governed by the Indian Civil Rights Act.[118] Mr. Shavanaux's tribal court convictions did not violate ICRA because ICRA does not mandate free counsel for indigent defendants.[119] However, problems arise when prosecutors use un-counseled tribal convictions to enhance federal charges. The court declared that the right to counsel is "unique" because the fundamental right to be heard is constitutionally defective if defendants cannot take advantage of that right through counsel.[120] Therefore, the court concluded that un-counseled tribal convictions could not be used as predicate offenses under the federal habitual domestic violence offender statute.[121]

B. On Appeal

The government appealed the Utah federal district court's dismissal of Mr. Shavanaux's indictment.[122] Mr. Shavanaux argued that the dismissal should be upheld because "the Sixth Amendment and the Due Process Clause of the Fifth Amendment . . . forbid reliance on his un-counseled tribal misdemeanor convictions to support a charge under 18 U.S.C. § 117(a)."[123] The court considered each constitutional argument separately and concluded that un-counseled tribal convictions can be used as predicate offenses for a habitual offender statute.[124] In a unanimous three-judge opinion, the Tenth Circuit overruled the district court and remanded Mr. Shavanaux's case.[125]

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114. *See Shavanaux*, 2010 WL 4038839, at *1.
115. *Id.*
116. 680 F. Supp. 2d 1062 (D.N.D. 2009).
117. *Id.* at 1065–66.
118. *Shavanaux*, 2010 WL 4038839 at *1.
119. *Id.*
120. *Id.* at *2 (citing Custis v. United States, 511 U.S. 485, 487 (1994)).
121. *See id.*
122. United States v. Shavanaux, 647 F.3d 993, 995 (10th Cir. 2011).
123. *Id.* at 996.
124. *See id.* at 1002.
125. *Id.*

1. Sixth Amendment

To determine whether the Sixth Amendment[126] right to counsel[127] applied in this case, the Tenth Circuit first "consider[ed] the relationship between Indian tribes and the United States."[128] The court reiterated that neither the Constitution nor the Bill of Rights applies to Indian tribes.[129] "[T]he Bill of Rights does not apply" because Mr. Shavanaux's prior convictions were for violations of tribal law.[130] Because the protections of the Constitution and the Bill of Rights do not apply, the only limits on tribal sovereignty are those few basic protections Congress imposes on tribes.[131] Where Congress has not acted, Indian tribes retain control over aspects of their internal affairs, including enforcing and prosecuting internal criminal laws.[132] Therefore, because his tribal convictions complied with ICRA and Ute law, they "cannot violate the Sixth Amendment" and can be used for prosecution under § 117(a).[133]

2. Fifth Amendment Due Process

The court then asked whether the Due Process Clause of the Fifth Amendment[134] is violated when "prior convictions . . . obtained through procedures which did not *comply* with, but also did not *violate*, the Constitution" are used in subsequent federal prosecutions.[135] The Tenth Circuit first analyzed the history of federal–tribal relations, concluding that tribes share important similarities with foreign countries because the Bill of Rights does not apply to them.[136] Therefore, tribal judgments are enforced according to principles of comity, determinations of which are guided by the Third Restatement of Foreign Relations Law (Third Restatement).[137] According to the Third Restatement, a foreign judgment must not be given force when (1) the foreign tribunal is not impartial or ignores due process procedures *or* (2) the foreign tribunal did not have proper jurisdiction over the defendant.[138] Neither factor was met;[139] therefore, the court concluded that Mr. Shavanaux's tribal court convictions met fundamental due process because they complied with ICRA

126. U.S. CONST. amend. VI.

127. *See* Gideon v. Wainwright, 372 U.S. 335, 343–45 (1963) (holding that the assistance of counsel is protected by the Constitution as a fundamental and necessary right, and that without it, justice cannot be ensured).

128. *Shavanaux*, 647 F.3d at 996.

129. *See id.* at 996–98 (discussing the relationship between the Indian tribes and the United States and explaining that neither the Constitution nor the Bill of Rights applies to Indian tribes).

130. *Id.* at 998.

131. *See id.* at 997 (citing United States v. Wheeler, 435 U.S. 313, 323 (1978)).

132. *See id.* (citing *Wheeler*, 435 U.S. at 326).

133. *Id.* at 998; 18 U.S.C. § 117(a) (2006).

134. U.S. CONST. amend. V.

135. *Shavanaux*, 647 F.3d at 998 (emphasis in original).

136. *See id.*

137. *See id.*; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 (1987) (listing two mandatory and six discretionary bases for non-recognition of foreign judgments).

138. § 482(1).

139. *Shavanaux*, 647 F.3d at 999.

and Ute tribal procedures.[140] Following the logic in *Spotted Eagle*,[141] the Tenth Circuit allowed Mr. Shavanaux's prior tribal convictions because the court determined the tribal convictions did not violate the Fifth Amendment's Due Process Clause.[142]

The Tenth Circuit then bolstered its comity analysis by describing the extent to which federal courts have recognized foreign judgments.[143] It pointed out situations in which federal appellate courts recognized foreign convictions,[144] some of which were obtained without juries.[145] Moreover, federal courts permitted the use of statements made to foreign law enforcement that would have violated the Fourth Amendment.[146] Additionally, evidence obtained abroad is not inadmissible simply because the procedures do not comply with the Constitution.[147] So long as the procedure meets fundamental principles of due process, the Tenth Circuit and the Third Restatement encourage foreign judgments and orders to be admitted under principles of comity.[148]

Mr. Shavanaux also argued § 117[149] violates the equal protection component of the Due Process Clause[150] by singling out "Indians," on racial lines, for prosecution.[151] This claim, however, was dismissed; "Indian" is not used as a racial classification, but rather as a political distinction.[152] This distinction is a voluntary association whereby a tribal community recognizes that an individual meets the criteria for membership.[153] Due to the "unique status of Indians as separate people with their own political institutions," regulation is over a "once-sovereign political

140. *See id.*

141. State v. Spotted Eagle, 71 P.3d 1239, 1245–46 (Mont. 2003) (holding that ICRA treats tribes as sovereign nations, and therefore, the Sixth Amendment does not apply to tribal court proceedings). *See* discussion *supra* Part I.C.2.

142. *Shavanaux*, 647 F.3d at 1000–01; *see also* U.S. CONST. amend. V.

143. *Shavanaux*, 647 F.3d at 1000–01.

144. *See id.* at 1000 (citing United States v. Small, 333 F.3d 425, 428 (3d. Cir. 2003), *rev'd on other grounds by* Small v. United States, 544 U.S. 385 (2005)).

145. *See id.* (citing Unites States v. Kole, 164 F.3d 164, 172 (3d Cir. 1998); United States v. Wilson, 556 F.2d 1177, 1178 (4th Cir. 1977)).

146. *See id.* at 1000–01 (citing, e.g., United States v. Mundt, 508 F.2d. 904, 906 (10th Cir. 1974)).

147. *See, e.g.*, Brennan v. Univ. of Kan., 451 F.2d 1287, 1289–90 (10th Cir. 1971) ("The mere fact that the law of the foreign state differs from the law of the sate in which recognition is sought is not enough to make the foreign law inapplicable.").

148. *See Shavanaux*, 647 F.3d at 1001; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 (1987).

149. 18 U.S.C. § 117 (2006) (granting jurisdiction to federal courts of domestic assaults within "Indian country" with prior convictions in "Indian tribal court").

150. U.S. CONST. amend. V*; see also* Schweiker v. Wilson, 450 U.S. 221, 226 n.6 (1981) ("[T]he Fifth Amendment imposes on the Federal Government the same standard required of state legislation by the Equal Protection Clause of the Fourteenth Amendment.").

151. *Shavanaux*, 647 F.3d at 1001.

152. *See id.* (citing Morton v. Mancari, 417 U.S. 535, 554 n.24 (1974)); COHEN, *supra* note 35, at 171–73.

153. *See* WILKINSON, *supra* note 16, at 30.

communit[y]," not "a racial group."[154] The statute does not facially treat Indians differently; therefore, because Congress's intent to target recidivist domestic abusers is rationally related to the government's legitimate interest in protecting citizens, the statute does not violate the Equal Protection Clause.[155]

III. INTERNATIONAL COMITY OR FULL FAITH AND CREDIT?

This section looks at the two methods for dealing with tribal court judgments: (1) the comity approach, where before a judgment is recognized, courts ensure that fundamental due process rights were protected; or (2) the full faith and credit approach, where American courts recognize tribal judgments as if they were rendered in another American court. Comity, however, is the best approach because it more accurately reflects the nature of tribal status within the United States.[156]

A. How Do Federal Courts Treat Tribal Judgments?

Because of the unique treatment of Indian tribes in American law, difficulties arise when the two legal systems interact. Although Congress retains ultimate legislative authority over tribes,[157] the Supreme Court has "repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government."[158] This, however, does little to answer how tribal judgments should be analyzed. Two schools of thought have arisen in the courts. Some courts, recognizing the unique treatment of Indians within the federal framework, analyze judgments using principles of comity.[159] Other courts, when determining whether to recognize tribal judgments, treat Indian tribes as part of the federal union and use a full faith and credit analysis.[160]

1. International Comity

Despite the "unique circumstances" presented by Indian tribes, "comity . . . affords the best general analytical framework for recognizing tribal judgments."[161] Comity is "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and conven-

154. United States v. Antelope, 430 U.S. 641, 646 (1977) (citations omitted) (internal quotation marks omitted).

155. *See Shavanaux*, 647 F.3d at 1002.

156. *See* Wilson v. Marchington, 127 F.3d 805, 810 (9th Cir. 1997); COHEN, *supra* note 35, at 658–59.

157. *See* Talton v. Mayes, 163 U.S. 376, 384 (1896).

158. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987).

159. *See* Clinton, *supra* note 14, at 904 n.151 (citing a wide array of state and federal cases applying principles of comity).

160. *See id.* at 903–04, 904 n.148 (listing Eighth Circuit case law using a "full faith and credit" analysis).

161. *Marchington*, 127 F.3d at 810.

ience, and to the rights of its own citizens."[162] The effect of a comity analysis is to give foreign judgments force "beyond their proper sphere."[163] It is a discretionary decision that turns on the public policy interests of the court seeking to enforce the judgment.[164] The Tenth Circuit implicitly rejected the full faith and credit approach to tribal judgments[165] and adopted a comity approach.[166]

Comity generally favors recognition and enforcement of foreign judgments.[167] There are limited circumstances when the "balancing of interests" counsel against recognizing foreign judgments.[168] The Third Restatement spells out a framework for deciding when foreign judgments do not merit recognition.[169] The Ninth Circuit articulated a federal court comity analysis[170] by modifying the Third Restatement's test for use when analyzing tribal judgments.[171] Federal courts must *not* recognize judgments if "(1) the tribal court did not have both personal and subject matter jurisdiction; or (2) the defendant was not afforded due process of law."[172] Discretionary factors for non-recognition include the following circumstances: when the judgment (1) was obtained by fraud, (2) conflicts with another enforceable final judgment, (3) conflicts with "the parties' contractual choice of forum," or (4) when recognizing the judgment is inconsistent with the public policy of the jurisdiction where enforcement is sought.[173]

The Ninth Circuit held that "federal courts must neither recognize nor enforce tribal judgments if . . . the defendant was not afforded due process of law."[174] The due process requirements for comity do not require a tribe's "judicial procedures [be] identical to those used in the United States Courts"[175] because comity, ultimately, is a political deci-

162. *Id.* (quoting Hilton v. Guyot, 159 U.S. 113, 164 (1895)) (internal quotation marks omitted).

163. ROBERT PHILLIMORE, 4 COMMENTARIES UPON INTERNATIONAL LAW 8 (T. & J.W. Johnson eds. 1854–61).

164. *See* COHEN, *supra* note 35, at 658–59; PHILLIMORE, *supra* note 163, at 17–18.

165. *Cf.* MacArthur v. San Juan Cnty., 309 F.3d 1216, 1225 (10th Cir. 2002) (refusing to address full faith and credit because the issue was not raised at trial); NLRB v. Pueblo of San Juan, 276 F.3d 1186, 1192 (10th Cir. 2002) (affirming the separation between Indian tribes and the federal government).

166. *See* United States v. Shavanaux, 647 F.3d 993, 998 (10th Cir. 2011) ("Courts analyze the recognition of tribal judgments under principles of comity derived from foreign relations law."); *see also* Burrell v. Armijo, 456 F.3d 1159, 1168 (10th Cir. 2006) (recognizing federal court deference to tribal courts' judgments made within their authority).

167. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 (1987) ("[A] final judgment of a court of a foreign state . . . is entitled to recognition in courts in the United States.").

168. *See* Wilson v. Marchington, 127 F.3d 805, 810 (9th Cir. 1997).

169. § 482 (listing two mandatory and six discretionary bases for non-recognition of foreign judgments).

170. *Wilson*, 127 F.3d 805, 809–11 (9th Cir. 1997).

171. *Id.* at 810.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 811.

sion to give effect to a completely issued judgment.[176] In *Wilson*, the Ninth Circuit adopted[177] the comity factors from an earlier Supreme Court case laying out how foreign judgments should be treated.[178] Under this analysis, due process requires:

> that there has been opportunity for a full and fair trial before an impartial tribunal that conducts the trial upon regular proceedings after proper service or voluntary appearance of the defendant, and that there is no showing of prejudice in the tribal court or in the system of governing laws. Further, as the Restatement (Third) noted, evidence "that the judiciary was dominated by the political branches of government or by an opposing litigant, or that a party was unable to obtain counsel, to secure documents or attendance of witnesses, or to have access to appeal or review, would support a conclusion that the legal system was one whose judgments are not entitled to recognition."[179]

When a comity analysis arises, federal courts weigh these factors to determine whether foreign or tribal judgments should be recognized.[180] In the end, this turns on the due process policy interests most valued by the court.[181]

2. Full Faith and Credit

Alternately, some scholars[182] argue that judgments from Indian tribes should be afforded "full faith and credit" under the Full Faith and Credit Clause.[183] This argument only stands if one accepts that Indian tribes have been brought into the "federal union" because the Full Faith and Credit Clause applies only to *states*.[184] However, Congress extended full faith and credit to judgments of "any State, Territory, or Possession" of the United States.[185] The question, then, is whether Indian tribes are included in this extension. Two arguments are advanced to support tribal inclusion in the federal union: (1) because Federal Courts have never recognized Indian tribes as fully independent under American law, tribes are within the federal union; or (2) congressional acts granting "full faith and credit" to certain aspects of intergovernmental relations are evidence of Congress's universal intent to bring tribes within the federal union.

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176. *See* Hilton v. Guyot, 159 U.S. 113, 164–65 (1895); COHEN, *supra* note 35, at 658–59; PHILLIMORE, *supra* note 163, at 8.

177. *See Wilson*, 127 F.3d at 811.

178. *See Hilton*, 159 U.S. at 202–03.

179. *Wilson*, 127 F.3d at 811 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 cmt. b (1987)).

180. *See Hilton*, 159 U.S. at 164; *Wilson*, 127 F.3d at 810.

181. *See, e.g.*, COHEN, *supra* note 35, at 658–59; PHILLIMORE, *supra* note 163, at 12.

182. *See* Clinton, *supra* note 14 at 936 ("[T]he Article argues that tribal laws and judgments are entitled to full faith and credit under the Full Faith and Credit Act . . . .").

183. U.S. CONST. art. IV, § 1.

184. *See* Clinton, *supra* note 14 at 900.

185. Full Faith and Credit Act, 28 U.S.C. § 1738 (2006).

The first argument turns on a narrow reading of early Supreme Court cases. Because cases addressing tribal sovereignty, including the Marshall Trilogy, never held that tribes are fully independent countries,[186] comity should not apply to tribal decisions.[187] In short, because Indian tribes are *not* foreign countries, they must fall within the federal scheme.[188] However, this line of reasoning ignores the relationship Indian tribes have with the United States and tries to force an independent system into the federal structure. Although the Supreme Court has never treated tribes as completely independent countries, neither the Court nor the Constitution has equated tribes to states.[189] The same cases holding that Indian tribes are not foreign countries also affirm that tribes are not states and retain independence over internal affairs.[190] Courts continue to chip away at this independence by allowing some state regulation on reservations; however, tribes continue to make and enforce their own laws.[191] Even though exactly equating Indian tribes to foreign countries would be inappropriate due to their differences,[192] it is more important that tribes have never been pulled completely into the federal structure and thus retain a measure of independence under the Constitution.

The second argument is that Congress intended to extend full faith and credit to all tribal judgments because Congress passed laws granting full faith and credit to tribal judgments in certain situations.[193] Public Law 280,[194] the Indian Child Welfare Act of 1978,[195] the Maine Indian Claims Settlement Act,[196] and the Indian Land Consolidation Act[197] all provide for full faith and credit for judgments governed by each act. Therefore, proponents argue that a similar "full faith and credit" analogy should be applied to tribes through the Full Faith and Credit Act.[198] The-

186. *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831) (finding that tribes are "domestic dependent nations" whose "relation to the United States resembles that of a ward to his guardian").

187. *See* Clinton, *supra* note 14, at 905 ("Thus, courts enforcing tribal judgments based on notions of comity analogize tribal courts to foreign governments, precisely the analogy the Supreme Court rejected . . . .").

188. *See id.*

189. *See* discussion *supra* Part I.A.

190. *See, e.g.*, Worcester v. Georgia, 31 U.S. 515, 559, 561 (1832).

191. *See* Nevada v. Hicks, 533 U.S. 353, 361–62 (2001).

192. *See* Lindsay Loudon Vest, Comment, *Cross-Border Judgments and the Public Policy Exception: Solving the Foreign Judgment Quandary by Way of Tribal Courts*, 153 U. PA. L. REV. 797, 809–10 (2004).

193. *See* Clinton, *supra* note 14, at 907–08.

194. 28 U.S.C. § 1360(c) (2006) (requiring tribal customs and laws be given "full force and effect" when not inconsistent with state law).

195. 25 U.S.C. § 1911(d) (2006) (requiring that federal, state, and tribal court give "full faith and credit" to tribal judgments regarding child custody proceedings).

196. 25 U.S.C. § 1725(g) (2006) (requiring that "[t]he Passamaquoddy Tribe, the Penobscot Nation, and the State of Maine . . . give full faith and credit to the judicial proceedings of each other").

197. 25 U.S.C. § 2207 (2006) (requiring an administrative agency to give "full faith and credit" to tribal proceedings, pursuant to the statute, regarding land distribution).

198. *See, e.g.*, Clinton, *supra* note 14, at 908.

se statutes, however, reinforce the idea that full faith and credit should be used sparingly. If Congress intended to extend this principle to tribes generally, it would have used its plenary powers to pass a statute compelling *all* tribal judgments be afforded full faith and credit in federal courts.[199] Since Congress did not, the inference is that Congress did not intend the full faith and credit principle to apply universally to Indian tribes.

B. Best Practice: International Comity

Tribal judgments should be analyzed using the principle of comity. Federal courts have afforded tribal judgments full faith and credit since the mid-1800s.[200] However, in 1997 the Ninth Circuit decided *Wilson v. Marchington* and reversed the trend[201] by using a comity analysis.[202] This federal course change, however, did not create a uniform practice among state courts or in subject areas.[203] Every state except New Mexico and Idaho[204] analyze tribal judgments using comity principles.[205] Comity has developed through the common law in some states[206] and has been statutorily mandated in others.[207] Despite the prevalence of analyzing tribal judgments using comity principles,[208] several statutes apply full faith and credit to child custody proceedings,[209] domestic violence protection orders,[210] and child support awards.[211] Regardless of the absence of uniformity, comity is the best approach considering (1) ambiguities in the

199. *See* discussion *supra* Part I.A.

200. *See* Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. REV. 311, 318–22 (2000).

201. *See* Clinton, *supra* note 40, at 40–44 (discussing the specious grounds on which the Ninth Circuit based its decision to use comity, noting the court's cursory distinctions made between Supreme Court and Eighth Circuit precedent and weak historical and statutory support).

202. *See* Leeds, *supra* note 200, at 325–27.

203. *See id.* at 335–36.

204. "Only Idaho and New Mexico afford full faith and credit to tribal courts." *Id.* at 345. *See* Sheppard v. Sheppard, 655 P.2d 895, 902 (Idaho 1982); Jim v. CIT Fin. Servs. Corp., 533 P.2d 751, 752 (N.M. 1975).

205. *See* Kelly Stoner & Richard A. Orona, *Full Faith and Credit, Comity, or Federal Mandate? A Path that Leads to Recognition and Enforcement of Tribal Court Orders, Tribal Protective Orders, and Tribal Child Custody Orders*, 34 N.M. L. REV. 381, 387–88 (2004); *see also* Leeds, *supra* note 200, at 339–45 (stating that Montana, Oregon, Minnesota, Arizona, Connecticut, New Jersey, South Dakota, North Dakota, Michigan, Wyoming, Wisconsin, and Oklahoma use, to varying degrees, a comity analysis).

206. *See* Leeds, *supra* note 200, at 338–39; *see also, e.g.*, Wippert v. Blackfeet Tribe, 654 P.2d 512, 514 (Mont. 1982); Red Fox v. Red Fox, 542 P.2d 918, 920 (Or. Ct. App. 1975).

207. Comity has been mandated either by the state legislature or a judicial rule-making committee. Some states, e.g., Wyoming and Wisconsin, titled their statutes "full faith and credit" although the statutes are more analogous to a comity analysis. *See* Leeds, *supra* note 200, at 341–44; *see also, e.g.*, S.D. CODIFIED LAWS § 1-1-25 (2011); WIS. STAT. ANN. § 806.245 (2011); WYO. STAT. ANN. § 5-1-111 (2011); N.D. R. CT. 7.2.

208. Federal statutes mandating full faith and credit for certain tribal judgments are mirrored by the states. *See* Leeds, *supra* note 200, at 336–37.

209. *See, e.g.*, Indian Child Welfare Act of 1978, 25 U.S.C. § 1911(d) (2006); NEV. REV. STAT. § 62D.200 (2010).

210. *See, e.g.*, Violence Against Women Act, 18 U.S.C. § 2265(a) (2006); NEV. REV. STAT. § 33.090 (2010).

211. *See, e.g.*, Child Support Orders Act, 28 U.S.C. § 1738B (2006).

Full Faith and Credit Act,[212] (2) the framework of federal-tribal relations, and (3) international law.

1. Ambiguities in the Full Faith and Credit Act

The Full Faith and Credit Act facilitates cooperation between courts within the United States by mandating recognition of "records and judicial proceedings."[213] In rejecting the full faith and credit approach, the Ninth Circuit properly focused on the interpretation of the statute's applicability.[214] It concluded that the Act applied only to states; tribes were not intended to fall within the scope of the Full Faith and Credit Act.[215] Much of the scholarly debate has focused around asymmetrical language in the statute:[216] "any court *of* any such State, Territory, or Possession" versus "every court *within* the United States."[217] The former suggests a political delineation, while the latter invokes geography.

Arguments favoring the geographic interpretation, which would include tribes, say it is the "most obvious interpretation . . . [because] this meaning renders co-extensive the phrase used to describe enforcing courts . . . and the phrase employed to describe issuing courts."[218] However, this argument is concerned with reciprocity. It is concerned that the political interpretation would mandate that a court enforce a judgment from a foreign court that would not be required to enforce a judgment were their positions reversed.[219] However, this argument ignores the independence tribal courts enjoy by focusing on reciprocity, which is no longer a comity requirement.[220] The Ninth Circuit, not without controversy, adopted the political interpretation.[221] Under this framework, tribes are not within the scope of the Act, and therefore, tribal judgments are not afforded full faith and credit.

212. *See* 28 U.S.C. § 1738 (2006) (referring to any "State, Territory, or Possession" in applying full faith and credit).

213. *Id.*

214. *See* Wilson v. Marchington, 127 F.3d 805, 810 (9th Cir. 1997); Clinton, *supra* note 40, at 40 ("[T]he Ninth Circuit recognized that the real issue turned not on the constitutional language but the interpretation of the Full Faith and Credit Act.").

215. *Wilson*, 127 F.3d at 808 ("By its terms, the Full Faith and Credit Clause applies only to the states. Nothing in debates of the Constitutional Convention concerning the clause indicates the framers thought the clause would apply to Indian tribes.").

216. *See* Clinton, *supra* note 40, at 26–29.

217. 28 U.S.C. § 1738 (emphasis added).

218. Clinton, *supra* note 40, at 28.

219. *See id.*

220. *See Wilson*, 127 F.3d at 811 (noting the reciprocity for comity has "fallen into disfavor"); Leeds, *supra* note 200, at 326 n.74, 335 (explaining that reciprocity is no longer considered in a comity analysis, although it may be considered for the "'public policy' discretionary exemption").

221. Clinton, *supra* note 40, at 43.

2. Are Tribes Within the Federal Framework?

Recognizing tribal judgments using full faith and credit necessarily requires that tribes be fully within the federal framework.[222] The history of tribal relations and the autonomy tribes continue to enjoy, however, counsel against including them fully within the federal framework.[223] First, the fundamental rules governing the relationship between tribes and the federal government were based on principles of international law, adapted to the needs of the United States.[224] Early interactions with tribes were made through treaties,[225] even though tribes were declared "*domestic* dependent nations."[226] That "phrase placed tribes outside the scope of Article III" while declaring that tribes are still subject to federal authority.[227] The Commerce Clause also demonstrates this separation by treating "Indian Tribes" as distinct entities from states and foreign countries.[228] Tribes also never consented to federal supremacy.[229] Despite Congress's plenary power over Indian affairs, tribes retain a high level of autonomy, especially in internal affairs such as administering justice.[230]

When the Supreme Court articulated the international comity analysis, it defined a *foreign nation* for that analysis.[231] Justice Gray determined that "[n]o sovereign is bound, unless by special compact, to execute within his dominions a judgment rendered by the tribunals of another state."[232] Tribes are not bound by a "special compact" that compels recognition of other jurisdiction's judgments; rather, they have the "authority to execute, within their dominions, judgments rendered by tribunals of other jurisdictions."[233] The Constitution does not apply to Indian tribes[234] because tribal governments are allowed to exercise their autonomy to form whatever kind of government they choose.[235] Additionally, tribes retain jurisdiction over many criminal offenses,[236] have police

222. *See* Leeds, *supra* note 200, at 334–35.

223. *See* HOWARD MEREDITH, MODERN AMERICAN INDIAN TRIBAL GOVERNMENT AND POLITICS 140 (1993).

224. *See, e.g.*, Cherokee Nation v. Hitchcock, 187 U.S. 294, 306–07 (1902); Stephens v. Cherokee Nation, 174 U.S. 445, 486–88 (1899); *see also* COHEN, *supra* note 35, at 156.

225. *See* WILKINS & LOMAWAIMA, *supra* note 15, at 6–8.

226. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831) (emphasis added). This recognizes that although tribes are within the geographic territory of the United States they retain a level of autonomy. *See id.*

227. Leeds, *supra* note 200, at 319.

228. *See* U.S. CONST. art. I, § 8, cl. 3 ("[The Congress shall have power] [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."); WILKINS & LOMAWAIMA, *supra* note 15, at 5.

229. *See* Clinton, *supra* note 14, at 873 (noting that tribes were *de facto* incorporated into the federal union and exist as "distinct peoples and sovereigns *within* the federal union").

230. *See* MEREDITH, *supra* note 223, at 86; *see also* discussion *supra* Part I.B.

231. Hilton v. Guyot, 159 U.S. 113, 166 (1895).

232. *Id.* (quoting HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW § 147 (8th ed. 1866)).

233. Stoner & Orona, *supra* note 205, at 388.

234. *See* Talton v. Mayes, 163 U.S. 376, 385 (1896).

235. *See* PEVAR, *supra* note 36, at 88.

236. *See* GARROW & DEER, *supra* note 58, at 79.

powers, administer justice within their jurisdiction, determine tribal membership and exclusion, can charter business organizations, and have sovereign immunity.[237] Therefore, tribes are best considered "foreign nations," which then requires an international comity analysis when determining whether to give force to a tribal judgment in American court.[238]

3. International Law and Tribal Self-Governance

Principles of international law also support treating Indian tribes as independent, sovereign entities. In 1992, the United States signed[239] the International Covenant on Civil and Political Rights (ICCPR),[240] which guarantees that "[a]ll peoples have the right to self-determination . . . [to] freely determine their political status and freely pursue their economic, social and cultural development."[241] Countries that are party to the ICCPR are obligated to give this guarantee effect,[242] which would require the United States to provide some level of autonomy to tribes.[243] Additionally, in his definitive text on American Indian law, Felix Cohen argued that an emerging custom of international law commands countries to recognize an internal peoples' right to self-determination.[244] Similar to ICCPR's mandate,[245] this custom requires that countries with non-self governing internal populations foster autonomous self-governance.[246] Antonio Cassese, a prominent international legal scholar, tempered the breadth of self-determination by noting that international law does not require governments to do anything other than "not decide the life and future of peoples at their discretion."[247] This mandate is a loose standard, but internal populations must at least be allowed "to express their wishes in matters concerning their condition."[248]

237. *See* WILKINSON, *supra* note 16, at 33–36; *see also* PEVAR, *supra* note 36, at 143–45.

238. *See* Montré D. Carodine, *Political Judging: When Due Process Goes International*, 48 WM. & MARY L. REV. 1159, 1228 (2007); Stoner & Orona, *supra* note 205, at 388. *But see* Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L.J. 403, 420 (2004) (arguing that the ease of travel between reservations and the U.S., the level of cooperation between tribal and state and federal officials, and the reservations' location within contiguous U.S. territory, counsel in favor of treating tribes as within the federal framework).

239. 138 Cong. Rec. S4781–01 (1992).

240. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171.

241. *Id.* art. 1, para. 1; *see also* ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES 101 (1995).

242. International Covenant on Civil and Political Rights, *supra* note 240, art.2.

243. *See* COHEN, *supra* note 35, at 461–65.

244. *See id.* at 473–78. What constitutes a "people" is not agreed upon. However, a workable definition, which Indian tribes would meet, is in the ICCPR's protection of "ethnic, religious or linguistic minorities." International Covenant on Civil and Political Rights, *supra* note 240, art. 27.

245. *Id.* art. 2.

246. *See* COHEN, *supra* note 35, at 475.

247. *See* CASSESE, *supra* note 241, at 128.

248. *Id.*

Although there is no clear framework for how the United States must treat Indian tribes, international law sets basic principles for how countries should act.[249] "Self-determination" does not have specific requirements,[250] but does seem to require that internal peoples have control over their governance.[251] This implies a basic level of autonomy and self-governance.[252] Because of these basic protections in international law, tribes should not be considered an entity of the United State that, absent a statutory command, merit a full faith and credit analysis.

IV. INTERNATIONAL DUE PROCESS REQUIREMENTS FOR COMITY

The Tenth Circuit made a cursory international comity analysis of Ute tribal court procedures using the Third Restatement's mandatory factors.[253] The court concluded that complying with ICRA protects fundamental due process rights.[254] This section does a more thorough comity analysis, taking statutory protections and tribal practices into account. The analysis reveals that Ute tribal practices protected Mr. Shavanaux's fundamental due process rights. Therefore, Mr. Shavanaux's prior tribal convictions were properly used in federal court.

Comity is a balance between "preserv[ing] and respect[ing] foreign nations' sovereignty"[255] and ensuring that American courts only enforce judgments that comport with fundamental due process.[256] American courts must understand this balancing test when deciding whether to recognize a foreign judgment.[257] Because "foreign" tribunals issue judgments, the decision to recognize them has political ramifications.[258] Effectively, by refusing to recognize a judgment, the domestic court says "that a foreign country's judicial and political systems are so fundamentally flawed that they do not provide for impartial tribunals or fair procedures"—an "inherently political" determination.[259] Courts need to be mindful of the external effects and political ramifications a decision may carry, yet their main focus should be on ensuring that the judgment meets standards of due process.

249. *See id.*
250. *See id.*
251. *See id.* at 132.
252. *See id.* at 143–44.
253. *See* United States v. Shavanaux, 647 F.3d 993, 998–1000 (10th Cir. 2011).
254. *See id.* at 998.
255. Stoner & Orona, *supra* note 205, at 388.
256. *See* Wilson v. Marchington, 127 F.3d 805, 810 (9th Cir. 1997).
257. This Comment focuses on court-to-court recognition of judgments; however, "recognition" encompasses many more scenarios. Although outside the scope of the Comment, "recognition" of foreign decrees can include, for example, protection orders, vital statistics and health department records, and judicial orders such as warrants and commitment orders. *See* Leeds, *supra* note 200, at 315–16.
258. *See* Carodine, *supra* note 238, at 1223.
259. *Id.*

A. What Process is Due?

A judgment rendered in a foreign court will not necessarily follow the same procedure as a domestic court—enforcing courts cannot expect an American style of due process.[260] Because enforcing courts must ensure that the initial judgment met basic standards of due process,[261] the analysis requires a fact-intensive case-by-case analysis.[262] The Supreme Court's call for a "fair and impartial" process lays the groundwork for international due process.[263] However, more clarity is needed to determine what process is required.

The fundamental requirements of due process, emphasized by scholars[264] and echoed by the Third Restatement,[265] are (1) adequate notice and (2) fair process. Adequate notice will be satisfied when the foreign tribunal meets even basic standards.[266] This would encompass actual or constructive notice, regardless of how that notice was made.[267] Fair process includes "the opportunity to be heard at a meaningful time and in a meaningful manner."[268] Recognizing that foreign jurisdictions are unlikely to have adopted as complex a due process structure as the United States, Judge Richard Posner wrote "that the foreign procedure [needs to] be '*compatible* with the requirements of due process of law,'" meaning "that the foreign procedures are 'fundamentally fair' and do not offend against 'basic fairness.'"[269] Although there is no exhaustive list of fundamental due process protections, the standard is much less rigorous than the due process generally applied in American courts.[270]

B. An International Comity Analysis for Mr. Shavanaux

Applying the international notion of due process to *Shavanaux* requires an examination of the proceedings in Ute tribal court. The record

260. *See Wilson*, 127 F.3d at 811; Carodine, *supra* note 238, at 1230–31.

261. *See* Hilton v. Guyot, 159 U.S. 113, 205 (1895) ("It must, however, always be kept in mind that it is the paramount duty of the court before which any suit is brought to see to it that the parties have had a fair and impartial trial, before a final decision is rendered against either party."); *Wilson*, 127 F.3d at 811 ("A federal court must also reject a tribal judgment if the defendant was not afforded due process of law.").

262. *See* Carodine, *supra* note 238, at 1231.

263. *See Hilton*, 159 U.S. at 202–03.

264. *See* Carodine, *supra* note 238, at 1225–26.

265. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 (1987) (clarifying due process requirements in the discretionary categories).

266. *See, e.g.*, Int'l Transactions, Ltd. v. Embotelladora Agral Regiomontana, SA de CV, 347 F.3d 589, 594 (5th Cir. 2003) ("Notice is an element of our notion of due process and the United States will not enforce a judgment obtained without the bare minimum requirements of notice.").

267. *Id.* at 594–95.

268. Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (citations omitted) (internal quotation marks omitted).

269. Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000) (Posner, J.) (quoting Ingersoll Milling Mach. Co. v. Granger, 833 F.2d 680, 687–88 (7th Cir. 1987)).

270. *See* Carodine, *supra* note 238, at 1227.

is sparse on what rights Mr. Shavanaux was afforded.[271] However, studying the Ute Tribe's criminal procedure rules,[272] the Indian Civil Rights Act,[273] and general tribal practices should be adequate to get an idea of the process Mr. Shavanaux had. From that, we can glean (1) what sort of notice Mr. Shavanaux was afforded and (2) the due process protections he had.

The notice analysis is rather quick. Mr. Shavanaux neither challenged adequate notice nor is there evidence that his notice was defective.[274] Additionally, the Ute Tribe's criminal procedure rules guarantee adequate notice.[275] With no indication of irregularity, this certainly meets the "bare minimum" standard for notice.

Fairness of process, however, is more challenging because the term is not well defined.[276] There are many basic protections granted to defendants in tribal court.[277] Defendants are given the opportunity to know the charges against them and the basis on which those charges are made.[278] At trial, defendants can use their own testimony or that of witnesses to present their cases.[279] Defendants have the right to cross-examine adverse witnesses.[280] Additionally, defendants are protected from self-incrimination,[281] have the right to a jury trial,[282] and can compel witnesses to appear on their behalf.[283] Tribal courts must afford defendants equal protection of the law and cannot deprive them of liberty without due process.[284] Therefore, absent supervening events, Mr. Shavanaux's tribal convictions should meet the international standards of due process.

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271. *See* United States v. Shavanaux, 647 F.3d 993, 995–96 (10th Cir. 2011) (failing to highlight any procedural detail concerning process afforded to Mr. Shavanaux during Mr. Shavanaux's tribal court hearings).

272. *See generally* UTE INDIAN R. CRIM. P., *available at* http://www.narf.org/nill/Codes/uteuocode/utebodyt12.htm (establishing, for example, that the required notice a criminal defendant must receive before a prosecution of his rights can begin without his presence).

273. *See generally* Indian Civil Rights Act 25 U.S.C. §§ 1301–1303 (2006) (extending, among other rights, the writ of habeas corpus).

274. *See* United States v. Shavanaux, No. 2:10 CR 234 TC, 2010 WL 4038839, at *1 (D. Utah Oct. 4, 2010) (stating Mr. Shavanaux challenged only the use of his un-counseled prior convictions), *rev'd*, 647 F.3d 933 (10th Cir. 2011).

275. *See* UTE INDIAN R. CRIM. P. 3(2), 6, 7 (guaranteeing notice of charges and an arraignment to inform defendant of the nature of the charges).

276. *See* discussion *supra* Part III.C.1.

277. *See* GARROW & DEER, *supra* note 58, at 329–41 (indicating that such basic protections include the right against double jeopardy, the right to a speedy trial, the right to compulsory process, and the right not to testify).

278. *See* UTE INDIAN R. CRIM. P. 5 (requiring that the complaint support the charge with a statement of facts and other specifics).

279. *Id.* 3(3), (5) (allowing defendants to testify on their own behalf and subpoena favorable witnesses).

280. *Id.* 3(4).

281. Indian Civil Rights Act 25 U.S.C. § 1302(a)(4) (2006); UTE INDIAN R. CRIM. P. 3(3); GARROW & DEER, *supra* note 58, at 340.

282. §1302(a)(10); UTE INDIAN R. CRIM. P. 15.

283. UTE INDIAN R. CRIM. P. 3(5); GARROW & DEER, *supra* note 58, at 337–38.

284. § 1302(a)(8).

Mr. Shavanaux contends, however, that the right to counsel is a fundamental component of due process.[285] Therefore, according to Mr. Shavanaux, his tribal court conviction lacked fundamental due process because he was unable to afford counsel and the Ute tribe does not provide counsel for indigent tribal defendants; therefore, his tribal court judgment should not be recognized in federal courts based on a comity analysis.[286]

At first blush, the right to counsel does not fit within the aforementioned framework of "international due process." The Third Restatement tries to clarify "fair process" by stating that being "unable to obtain counsel . . . would support a conclusion that the legal system was one whose judgments are not entitled to recognition."[287] However, only when lack of counsel is "so incompatible with . . . fundamental principles of fairness" should a judgment not be recognized.[288] The Sixth Amendment's right to counsel initially guaranteed the accused merely the right to hire counsel.[289] The right, however, slowly expanded to recognize that counsel is an important protection throughout the criminal process.[290] The Supreme Court, in 1963, determined the right to counsel was so fundamental that states must provide indigent defendants with a lawyer because "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[291] Outside federal and state courts, however, the right to counsel is not absolute. For example, there is no right to counsel for indigent individuals in immigration proceedings.[292] In those cases, individuals are afforded more due process protections only if they can demonstrate the proceedings were fundamentally unfair and there was prejudice.[293] Prejudice is the difficult element to meet; Mr. Shavanaux must show "that there is a reasonable probability

285. *See* United States v. Shavanaux, 647 F.3d 993, 996 (10th Cir. 2011) (discussing Shavanaux's contention that Due Process forbids reliance on his uncounseled misdemeanor convictions to support a charge under 18 U.S.C. §117(a)).

286. *See id.*

287. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 cmt. b (1987).

288. *See id.* (citing United States v. Salim, 855 F.2d 944, 953 (2d Cir. 1988)). *Salim* allowed a French deposition to be used as evidence when it was taken without counsel. This was a violation of U.S. rules but compliant with French procedure, because French procedure was not incompatible with American principles.

289. Scott v. Illinois, 440 U.S. 367, 370 (1979); JAMES J. TOMKOVICZ, THE RIGHT TO ASSISTANCE OF COUNSEL 55 (2002).

290. *See, e.g.*, Johnson v. Zerbst, 304 U.S. 458, 463 (1938) (holding that federal criminal defendants must either have counsel or have waived their right to counsel); Powell v. Alabama, 287 U.S. 45, 71 (1932) (giving defendants "reasonable time and opportunity to secure counsel"); TOMKOVICZ, *supra* note 289, at 55–56.

291. Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963).

292. *See* Immigration and Nationality Act §§ 239(a)(1)(E), 240(b)(4)(A), 8 U.S.C. § 1229(a)(1)(E), 1229a(b)(4)(A) (2005).

293. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1482–84 (2009) (evaluating the claim under the two prongs of the *Strickland* test). Under the facts of *Shavanaux*, the first *Strickland* prong is best seen as a breach of fundamental fairness.

that, *but for* [the fundamental error], the result of the proceeding *would have been* different."[294]

Ultimately, however, this comity analysis turns on the public policy interests of the Tenth Circuit.[295] No court is required to enforce a foreign judgment if the result would offend the court's notions of fairness or policy.[296] Even though Mr. Shavanaux was not represented, his fundamental rights were not impinged because he was not prevented from effectively presenting his case.[297] Given that his predicate convictions were not made in an American court and he must demonstrate prejudice in order to have an opportunity to secure counsel, the Tenth Circuit did not exercise its discretion to refuse to recognize Mr. Shavanaux's tribal court convictions. Therefore, according to the Tenth Circuit, the Ute tribal court judgments were not in conflict with the standards of international due process or the court's policy.

CONCLUSION

Despite the academic justification for the decision, Mr. Shavanaux is likely to be sentenced to several years in federal prison. His federal public defenders made a spirited appeal that the right to counsel is so fundamental that due process is violated when convictions are made without counsel.[298] However, the Tenth Circuit disagreed. The Supreme Court, additionally, refused to review the Tenth Circuit's ruling.[299] Were Mr. Shavanaux's first two convictions made in an American court, they clearly would have been unconstitutional. But in tribal court, tribal law and ICRA sufficiently protect fundamental rights. Because Mr. Shavanaux was convicted on a reservation and not a few miles away in a Utah state court, he had vastly different procedural protections; to those unaccustomed to Indian law, this is a baffling result. However, it is the correct outcome given tribal sovereignty within the federal structure.

United States v. Shavanaux demonstrates that even a routine conviction can raise constitutional questions and invoke international law. A misdemeanor domestic assault conviction from a tiny corner of northeastern Utah forced the Tenth Circuit to analyze how Indian tribes fit within the federal framework laid out in the Constitution and how to recognize their judgments. This unique relationship has never truly been

294. Strickland v. Washington, 466 U.S. 668, 694 (1984) (emphasis added).

295. *See* PHILLIMORE, *supra* note 163, at 12.

296. *See id.* at 14–16 (providing situations when a British court would not enforce valid foreign judgments because the result offends traditional British values, for example, judgments upholding polygamy and slavery).

297. *See* United States v. Shavanaux, 647 F.3d 993, 998 (10th Cir. 2011) (stating that Mr. Shavanaux's tribal court convictions complied with ICRA and were therefore constitutionally sound).

298. *See id.*

299. Shavanaux v. United States, No. 11-7731, 2012 WL 896004, at *1 (U.S. Mar. 19, 2012).

settled—congressional supremacy rules the day,[300] but tribal sovereignty is not a paper tiger guarantee because tribes retain control over much of their internal administration.[301] *Shavanaux* reaffirms this concept. The Tenth Circuit correctly recognized that Indian tribes are not fully within the federal framework.[302] Tribes, consequently, can still protect fundamental due process rights without following the rigorous procedural protections American courts apply. This fits perfectly with the principles of comity—the Tenth Circuit respected tribal sovereignty by recognizing judgments made within the tribe's competent jurisdiction.

Dan St. John[*]

300. *See*, *e.g.*, South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998); PEVAR, *supra* note 36, at 59.

301. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978); Worcester v. Georgia, 31 U.S. 515, 559 (1832); Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831); MEREDITH, *supra* note 223, at 140.

302. *See Shavanaux*, 647 F.3d at 998 ("Although Indian tribes are not foreign states, for the purposes of our analysis they share some important characteristics with foreign states insofar as tribes are sovereigns to whom the Bill of Rights does not apply.").

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