

MEMORANDUM

To: Wisconsin State/Federal/Tribal Court Forum

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Subj: Judicial Protocol for Allocating Jurisdiction Between State and Tribal Courts

Date: October 3, 2000

In the recent case of *Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians*¹ a former tribal employee sued the tribe in state court and the tribe subsequently filed an overlapping action in tribal court. Before the state court had concluded its proceedings, the tribal court entered a default judgment in favor of the tribe, at which point the tribe returned to state court seeking recognition and enforcement of the tribal court judgment. The question before the Wisconsin Supreme Court was whether the state court, given these circumstances, must or should recognize this tribal court judgment.

As a threshold matter, the Court determined that the question is not governed either by WIS. STAT. § 806.245, which authorizes state courts to give full faith and credit to tribal judgments and laws, or by the prior-action-pending rule of *Syver v. Hahn*,² which applies to overlapping actions between two state courts.³ Instead, the conflict should have been prevented or resolved by the trial judges as a matter of "judicial allocation of jurisdiction pursuant to principles of comity."⁴ Of particular relevance, the Court "note[d] the existence of the state, tribal and federal court forum, jointly sponsored by this court, the Wisconsin Tribal Judges Association and federal judges from Wisconsin" and observed that "this is a logical forum for the development of protocols governing the exercise of jurisdiction between the state and tribal courts."⁵

To this end, and at the request of Judge Mohr, the following memorandum/proposal is submitted for consideration by the Forum. It is divided into three parts. Part I reviews the

¹612 N.W.2d 709 (Wis. 2000).

²94 N.W.2d 161 (Wis. 1959).

³See *Teague*, 612 N.W.2d at 716-17.

⁴*Id.* at 718.

⁵*Id.* at 718 n.11.

doctrine of full faith and credit, the Wisconsin state-tribal full faith and credit statute, and the *Teague* decision. Part II then summarizes the principle of comity—its meaning, its underlying premises, its operative nature, its common manifestations, and its limits. Finally, Part III sets forth a proposed protocol in *Teague*-like situations, involving common actions filed in both state and tribal court, which will assist courts in preventing or resolving concurrent jurisdictional disputes. Part III also discusses some potential problems arising under the protocol.

I. LEGAL BACKGROUND

"Full faith and credit" ordinarily refers to recognition that the courts of one legal system, by constitutional or statutory mandate, give to the laws and judgments of another legal system. When accorded full faith and credit, these foreign or nonforum laws and judgments become legally enforceable in the first legal system.

With certain limited exceptions, federal law does not clearly require state courts and tribal courts to accord full faith and credit to each other's judgments.⁶ This is because several courts, and in particular the courts of Wisconsin, have held that the federal full faith and credit statute, 28 U.S.C. § 1738, does not apply to the laws or legal proceedings of Indian tribes.⁷ The same conclusion has also been reached in regard to federal and tribal courts.⁸

WIS. STAT. § 806.245 partially fills this void by requiring—if five conditions are met—that state courts give to "[t]he judicial records, orders and judgments of an Indian tribal court in Wisconsin and acts of an Indian tribal legislative body . . . the same full faith and credit"

⁶The exceptions are noted in B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457, 478-79 & nn.84-90 (1998) (citing 18 U.S.C. § 2265, 25 U.S.C. § 1911(d), and 28 U.S.C. §§ 1738A, 1738B), and David S. Clark, *State Court Recognition of Tribal Court Judgments: Securing the Blessings of Civilization*, 23 OKLAHOMA CITY UNIVERSITY LAW REVIEW 353, 367 (1998) (also citing 28 U.S.C. § 1738C).

⁷*See, e.g.*, *Sengstock v. San Carlos Apache Tribe*, 477 N.W.2d 310, 314 (Wis. Ct. App. 1991); *accord* *John v. Baker*, 982 P.2d 738, 761-62 (Alaska 1999), *cert. denied*, 120 S. Ct. 1221 (2000); *Brown v. Babbitt Ford, Inc.*, 571 P.2d 689, 694 (Ariz. Ct. App. 1977); *cf.* *Desjairlait v. Desjairlait*, 379 N.W.2d 139, 144 (Minn. Ct. App. 1985) (interpreting U.S. CONST. art. IV, § 1); *see generally* Clark, *supra* note 6, at 361-63; Jones, *supra* note 6, at 479-81 (discussing cases holding both ways); Fred L. Ragsdale, Jr., *Problems in the Application of Full Faith and Credit for Indian Tribes*, 7 N.M. L. REV. 133, 135-41 (1977) (explaining why "territories" under § 1738 does not include tribes).

⁸*See, e.g.*, *Wilson v. Marchington*, 127 F.3d 805, 807-11 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998); Daina B. Garonzik, Comment, *Full Reciprocity for Tribal Courts from a Federal Court's Perspective: A Proposed Amendment to the Full Faith and Credit Act*, 45 EMORY L.J. 723, 741-44 (1996).

enjoyed by "the acts, records, orders and judgments of any other governmental entity"⁹ The five conditions are that (a) the tribe's legal system is organized under the Indian Reorganization Act, (b) the tribal documents are authenticated, (c) the tribal court is a court of record, (d), the tribal court judgment is a valid judgment, and (e) the tribal court certifies that it grants full faith and credit to the laws and legal proceedings of the state.¹⁰

Section 806.245 functions best when an action is filed in tribal court and, only after the conclusion of that litigation, does a party seek to enforce the resulting judgment in state court. The statute does not address the situation where an action is instituted in both a state and a tribal court and one court reaches judgment first. In particular, § 806.245 does not address whether that judgment must be given full faith and credit in the other court where the case is still pending, and what significance, if any, attaches to the order in which the cases were filed.

It is precisely this statutory shortfall that precipitated the conflict in *Teague*. Mr. Teague initially filed suit in state court (Ashland County Circuit Court) against the defendant Bad River Band of Lake Superior Tribe of Chippewa. The Band, over a year later, filed its own suit in tribal court. The tribal court reached judgment first, holding by default for the Band (Teague failed to appear), and the Band then moved the state court to accord the judgment full faith and credit under § 806.245. The state trial court refused, holding that the tribe wrongfully exercised jurisdiction in light of the prior action pending in its own court. Continuing with this prior action, and based on an arbitration proceeding, the state court then held against the tribe and entered judgment on the merits. The Court of Appeals reversed, refusing to read a prior-action-pending limitation into § 806.245.

The Supreme Court then reversed the Court of Appeals, holding that neither the prior-action-pending rule nor § 806.245, but rather the background principle of comity, should have governed the matter. In particular, the Court "conclude[d] that principles of comity in this situation required the circuit and tribal courts to confer for purposes of jurisdiction allocation prior to proceeding to judgment"¹¹ and that, on remand, a conference should be convened "at which the respective courts will weigh considerations of comity and tribal exhaustion to determine whether the judgments should be reopened for purposes of jurisdiction allocation and retrial."¹²

⁹WIS. STAT. § 806.245(1).

¹⁰*See id.* § 806.245(1)(a)-(e). The full statute is reprinted in Appendix A.

¹¹*Teague*, 612 N.W.2d at 720.

¹²*Id.* at 720-21.

II. THE PRINCIPLE OF COMITY

"Comity" has both narrow and broad meanings. Under the narrow meaning, comity is basically a synonym for full faith and credit when implemented as a matter of judicial discretion rather than statutory or constitutional mandate.¹³ Under the broad meaning, comity is the principle of mutual respect between legal systems, typically implemented through a variety of judicial practices and doctrines, of which the recognition of nonforum judgments is merely one.

In *Teague*, the Wisconsin Supreme Court indicated that, in the absence of statutory direction, potential jurisdictional problems should be prevented and resolved according to this broader principle of comity.¹⁴ Before presenting a protocol based on the principle of comity, the following sections will examine in greater depth the principle itself. This examination is based largely on Wisconsin state law, as well as cases from federal and other state courts, and does not purport to speak for the precedents and practices of the tribal courts.

A. *The Premises of Comity—Respect, Cooperation, and Mutuality*

At the heart of comity is the notion of *respect* for the laws, proceedings, and legal institutions of another system of government, whether state, tribal, federal, or foreign. For the principle of comity to function effectively, this respect must be rooted in a genuine recognition of the sovereignty and sovereign interests of this other governmental system.

For state courts, comity in regard to tribal legal proceedings necessarily entails an understanding that Indian tribes, as sovereigns, possess both inherent and congressionally delegated powers and immunities. For tribal courts, likewise, comity in regard to state legal proceedings entails an understanding that states, as sovereigns, possess popularly and

¹³See, e.g., *Hughes v. Fetter*, 42 N.W.2d 452, 454 (Wis. 1950) ("By virtue of the doctrine of comity, rights acquired under statute enacted or judgment rendered in one state will be given force and effect in another . . ."), *rev'd on other grounds*, 341 U.S. 609 (1951); *Haeuser v. Haeuser*, 548 N.W.2d 535, 539 n.4 (Wis. Ct. App. 1996) ("The doctrine of comity results in the recognition of a decree of a different state not entitled to full faith and credit."); *Sengstock*, 477 N.W.2d at 314 ("Comity is defined as the principle that courts of one state or jurisdiction will give effect to the laws and judicial decisions of another state [or jurisdiction] out of deference and mutual respect." (quoting *Local 913, AFSCME v. Manitowoc County*, 410 N.W.2d 641, 645 (Wis. Ct. App. 1987), *review denied*, 416 N.W.2d 296 (Wis. 1987))).

¹⁴See *Teague*, 612 N.W.2d at 718 (noting that "the law currently provides no protocols for state or tribal courts to follow in this situation"; that "[t]he development of similar protocols between state and tribal courts in Wisconsin is a matter of high priority and should be pursued"; and that, "[u]ntil then, we must rely upon the traditional doctrine of comity").

congressionally delegated powers and immunities. For both courts, furthermore, comity should stem not merely from a respect for power, but also from a respect for the unique structural and substantive features of each legal system. "By giving deference to each other's judgments and orders without any legal requirement to do so, state and tribal courts demonstrate respect for each other's differing processes and jurisdiction."¹⁵

Although this respect is ultimately implemented through specific practices and protocols (discussed below in Section C), it must first be reflected in the general spirit with which each government approaches the other. Two qualities of spirit—*cooperation* and *mutuality*—appear particularly important. First, it is vital that the governments (in this case, the judges) approach the table with a spirit of cooperation rather than one of competition.¹⁶ State and tribal courts should view the task of allocating jurisdiction not as an intergovernmental conflict, in which one court must prevail and the other must lose. Instead, they should see the task in light of their shared purposes—*i.e.*, fairly resolving disputes and "furthering the orderly administration of justice"¹⁷—and with the sense that theirs is ultimately a common venture to which they are both deeply committed.

Second and relatedly, it is important that the judges approach the table with a spirit of mutuality.¹⁸ Mutuality embodies a give-and-take attitude, a good faith willingness to yield jurisdiction in a case that is perhaps better suited for the other's legal system (or that was filed first in the other court) with the understanding that, in the next case, which might be better suited for one's own legal system (or which is filed first in one's own court), the other court will be willing to yield jurisdiction in a similar fashion. Mutuality is not, therefore, a quid-pro-quo

¹⁵Stanley G. Feldman & David L. Withey, *Resolving State-Tribal Jurisdictional Dilemmas*, 79 JUDICATURE 154, 155 (1995).

¹⁶See *Teague*, 612 N.W.2d at 720 ("Requiring such a conference under these circumstances ensures that the issue of jurisdiction allocation, involving as it does an evaluation of principles of comity and tribal exhaustion, will be decided by the courts in an atmosphere of mutual respect and cooperation, rather than by the litigants in the height of adversarial battle. . . . Until more formal protocols are established, such a procedure will avoid competition between courts and the risk of inconsistent results, and will foster the greatest amount of respect between state and tribal courts.").

¹⁷*Id.* at 718-19.

¹⁸See *id.* at 718, 719 n.12, 720 (repeatedly invoking the notion of "*mutual* respect" (emphasis added)).

arrangement, but rather the reasonable expectation that, when two legal systems have respect for one another, they will be willing in some instances to defer to each other's sovereignty.¹⁹

In this sense, mutuality differs from the notion of formal reciprocity (or symmetry), whereby one legal system's obligations to another legal system are unqualifiedly conditioned on reciprocal obligations by that legal system towards the first. An example of reciprocity is the requirement of WIS. STAT. § 806.245(1)(e) that full faith and credit will be accorded to the laws and judgments of a tribal legal system only if the tribal legal system accords full faith and credit to the laws and judgments of the state.²⁰ In contrast to reciprocity, which is strictly a legal requirement, mutuality is a spirit or disposition of deference that rests ultimately on respect, not on statutory mandate. Without this spirit of mutuality, comity simply cannot function.

B. *The Operative Nature of Comity*

So rooted in cooperation and mutual respect, the principle of comity operates in a manner that may differ from typical legal doctrines. For example, comity is not strictly speaking a matter of legal obligation, but instead operates by the voluntary, self-enforced decisions of each court system.²¹ As the Wisconsin Supreme Court has noted, comity is "a rule of practice and not a rule of law" ²² "The doctrine of comity . . . is neither a matter of absolute obligation nor of mere courtesy and good will, but is recognition which one state allows within its territory to legislative, executive or judicial acts of another, having due regard to duty and convenience and to rights of its own citizens."²³

¹⁹See, e.g., B.J. Jones, *Tribal Considerations in Comity and Full Faith and Credit Issues*, 68 N.D. L. REV. 689, 691 (1992) (noting that "most tribes look at the respect and deference states have afforded their institutions in making the decision [to accord comity to state law]").

²⁰This same type of reciprocity is embodied in HO-CHUNK NATION R. CIV. P. 73, which correspondingly "extend[s] full faith and credit to the judicial records, orders and judgements of the courts of the State of Wisconsin . . . to the same extent the other jurisdiction extends full faith and credit to the judicial records, orders and judgements of this Court."

²¹See, e.g., *Isermann v. MBL Life Assurance Corp.*, 605 N.W.2d 210, 215 (Wis. Ct. App. 1999) ("[T]he rule of comity is a 'voluntary decision of one state to defer to the policy of another in an effort to promote uniformity of laws, harmony in their application, and other related principles.'" (quoting *State ex rel. Dykhouse v. Edwards*, 908 S.W.2d 686, 689-90 (Mo. 1995))), review denied, 609 N.W.2d 474 (Wis. 2000).

²²*Teague*, 612 N.W.2d at 719; see also *Sheridan v. Sheridan*, 223 N.W.2d 557, 560 (Wis. 1974).

²³*Hughes*, 42 N.W.2d at 454; see also *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971) ("Comity . . . is not a rule of law, but one of practice,

Unlike an ordinary legal mandate, moreover, the exercise of comity is a matter within the "sound judicial discretion" of the trial court.²⁴ Being discretionary, comity-based decisions tend to be highly contextual, based on the particular facts and circumstances of each case. In turn, a Wisconsin circuit court decision relating to comity is reviewable on appeal for erroneous exercise of discretion,²⁵ which is to say that the decision will be sustained as long as "the trial court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach."²⁶

Finally, implicit in the discretionary label is an understanding that the principle of comity normally applies in the presence, not the absence, of jurisdiction or power.²⁷ In fact, where a court genuinely lacks jurisdiction, its dismissal of the action—whether or not there is a parallel pending action—is a matter of legal obligation, not discretion. Comity, by contrast, entails the discretionary declination of verified jurisdiction entirely out of respect for the sovereignty and integrity of the other court system.

convenience, and expediency. Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation. Rather, it is a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws.", *cert. denied*, 405 U.S. 1017 (1972); Ralph J. Erickstad & James Ganje, *Tribal and State Courts—A New Beginning*, 71 N.D. L. REV. 569, 579 (1995) ("Comity, as opposed to the required recognition of full faith and credit, is premised upon the discretionary recognition of the judgment of a foreign court for the general purposes of encouraging good relations between the two sovereigns.").

²⁴*Teague*, 612 N.W.2d at 719; *see also Sheridan*, 223 N.W.2d at 560.

²⁵*See Teague*, 612 N.W.2d at 719; *see also Daniel-Nordin v. Nordin*, 495 N.W.2d 318 (Wis. 1993) (reviewing a circuit court's decision to defer to the jurisdiction of an Illinois court for erroneous exercise of discretion); *Teresa L. v. Sauk County*, 514 N.W.2d 424 [1993 WL 538272, at *13] (Wis. Ct. App. 1993) (Table) ("This is a discretionary decision, and we review it for an erroneous exercise of discretion."), *review denied*, 515 N.W.2d 717 (Wis. 1994); *cf. City of Brookfield v. Milwaukee Metro Sewerage Dist.*, 491 N.W.2d 484, 491 (Wis. 1992) (stating in the primary jurisdiction context that "[t]he question on appeal is whether the circuit court properly exercised its discretion in retaining jurisdiction").

²⁶*Loy v. Bunderson*, 320 N.W.2d 175, 184 (Wis. 1982). Conversely, "[a]n abuse of discretion may be found where the trial court relied upon factors which are totally irrelevant or immaterial to the type of decision to be made[.]" *Elias v. State*, 286 N.W.2d 559, 561 (Wis. 1980), or "where the exercise of discretion is based on an error of law." *State v. McConnohie*, 334 N.W.2d 903, 908 (Wis. 1983).

²⁷*See, e.g., Sheridan*, 223 N.W.2d at 560 ("[T]he jurisdictional question posed is not whether the Wisconsin court or the Illinois court had jurisdiction, but whether it was a proper exercise of judicial discretion for the Wisconsin court to exercise its jurisdiction."); *Isermann*, 605 N.W.2d at 215; *Wisconsin End-User Gas Ass'n v. Public Serv. Comm'n of Wis.*, 581 N.W.2d 556, 561 (Wis. Ct. App. 1998) (primary jurisdiction), *review denied*, 585 N.W.2d 157 (Wis. 1998).

C. The Manifestations of Comity

As noted, comity is more than simply a recognition of the judgments of a foreign court. Broadly conceptualized, it embodies a variety of practices that manifest respect for the sovereignty and authority of the foreign legal system as a whole. These practices may be formal, *e.g.*, the recognition of judgments, or informal, *e.g.*, a simple telephone call to discuss a possible jurisdictional conflict. Likewise, these practices may be affirmative in nature, *e.g.*, the certification of a legal question to a nonforum court, or negative in nature, *e.g.*, the decision to abstain from the exercise of one's own jurisdiction.

Among the more common practices stemming from comity are: the conferral between judges to resolve a *Teague*-like dual pendency situation, the resulting abstention or declination of jurisdiction by one court in deference to the parallel proceeding, the recognition of judgments or laws in the absence of a codified full-faith-and-credit mandate, the application of nonforum law through choice-of-law principles,²⁸ the certification of questions of law by a court of one system to the high court of another system,²⁹ and the admission *pro hac vice* of nonforum attorneys.³⁰ Additionally, as *Teague* noted, the federal courts have been instructed by the U.S. Supreme Court to abide by a rule of tribal court exhaustion, or exhaustion of tribal court remedies, whereby a federal court in a concurrent jurisdiction situation basically abstains so that the tribal court has the opportunity to determine its own jurisdiction.³¹

²⁸See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 331-32 (3d ed. 1999) ("[C]omity underlies rules calling for the application in certain circumstances of foreign law by municipal courts, an exercise frequently repeated using ordinary municipal choice-of-law principles.").

²⁹See, *e.g.*, Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. REV. 311, 338 & n.158 (2000) (noting states that have "authoriz[ed] state court judges to certify questions to tribal courts in order to determine the applicable tribal law" and proposing that "[t]his mechanism promotes tribal self-governance because it lessens the possibility of an incorrect interpretation of tribal law, and communicates inter-sovereign respect" (citing MD. CODE ANN., CTS. & JUD. PROC. § 12-601 (1998); W. VA. CODE § 51-1A-2, 51-1A-3 (1998))); see generally Jones, *supra* note 6, at 494-95 (discussing the potential for certification between state and tribal courts).

³⁰See, *e.g.*, *Obey v. Halloin*, 612 N.W.2d 361, 365 (Wis. Ct. App. 2000) ("Attorneys admitted *pro hac vice* are permitted to represent clients in this state only as a matter of comity and at the court's discretion."), *review granted*, 616 N.W.2d 114 (Wis. 2000).

³¹See *Teague*, 612 N.W.2d at 715-16, 719 & n.13; see generally *Strate v. A-1 Contractors*, 520 U.S. 438, 448-53 (1997); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16-19 (1987); *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855-57 (1985); Jones, *supra* note 6, at 499-509; Raymond L. Niblock & William C. Plouffe, *Federal Courts, Tribal Courts, and*

These practices can be particularly appropriate in a parallel proceedings situation when the proceedings involve matters that are core to the sovereignty or stability of the other government or legal system. For example, concurrent jurisdiction over matters implicating criminal law, including extradition and habeas corpus review, are often guided by the principle of comity because of the importance of criminal law and jurisdiction to the integrity of the legal system.³² Even absent a parallel proceeding, considerations of comity may lead one court to abstain from exercising its jurisdiction where such exercise would infringe on a core sovereign prerogative such as taxation.³³

D. *The Limits of Comity*

Comity is not without its limits. Implicit in the discretionary nature of comity, in fact, is the understanding that there are circumstances in which courts ought *not* to defer to foreign laws or legal proceedings. Wisconsin courts, for example, have identified several circumstances in which a court should not, or need not, recognize or defer to another jurisdiction's laws, proceedings, judgments, and the like. These circumstances, which effectively define the limits of comity, include: (1) inconsistency between these other laws or proceedings and the "policy or laws of the state [of Wisconsin]";³⁴ (2) potential "prejudic[e] to interests of its citizens";³⁵ (3) potential inconvenience;³⁶ and (4) inconsistency with "good morals and natural justice . . .".³⁷ In short, "rules of comity prohibit according effect to a foreign decree when to do so would be to

Comity: Developing Tribal Judiciaries and Forum Selection, 19 U. ARK. LITTLE ROCK L.J. 219, 228-31 (1997).

³²See, e.g., *Younger v. Harris*, 401 U.S. 37 (1971) (directing federal courts to abstain from exercising jurisdiction over matters implicated in pending criminal proceedings); *State v. Byrge*, 614 N.W.2d 477, 490 n.15 (Wis. 2000) ("In a habeas corpus review, other factors, such as the interests of comity and federalism, also provide reasons for deferring to the factual findings of a state court."); *State ex rel. Ehlers v. Endicott*, 523 N.W.2d 189, 191 (Wis. Ct. App. 1994) (discussing interstate extradition and noting the role of comity), *review denied*, 531 N.W.2d 326 (Wis. 1995).

³³See, e.g., *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 107-11 (1981) (holding that comity generally prohibits a federal suit to enjoin state taxation).

³⁴*Hughes*, 42 N.W.2d at 454; see also *Isermann*, 605 N.W.2d at 215 ("public policy"); *Sengstock*, 477 N.W.2d at 314.

³⁵*Hughes*, 42 N.W.2d at 454; see also *Isermann*, 605 N.W.2d at 215 ("protection of the interests of the state's citizens"); *Sengstock*, 477 N.W.2d at 314.

³⁶See *Isermann*, 605 N.W.2d at 215.

³⁷*Hughes*, 42 N.W.2d at 454; accord *Sengstock*, 477 N.W.2d at 314.

approve a policy contrary to the laws of this state, prejudicial to the interests of its citizens, or against good morals."³⁸

III. A PROTOCOL FOR THE JUDICIAL ALLOCATION OF JURISDICTION

This final Part consists of four sections. Section A examines more closely three specific protocol parameters articulated in *Teague*. Section B then sets forth a proposed protocol. Section C discusses three possible shortcomings of the protocol, while section D addresses the means by which the protocol may be adopted and subsequently revised.

A. Three Specific Parameters from *Teague*

In addition to describing in general terms the principle of the comity, the *Teague* Court specifically articulated three parameters relevant to the task of allocating jurisdiction. First, there must be conferral between the state judge and the tribal judge. "[C]omity . . . require[s] that the circuit court and tribal court confer for purposes of allocating jurisdiction between the two sovereigns" and "such a conference should be convened as soon as either court is aware of the pendency of an action on the same subject matter in the other jurisdiction."³⁹ For illustrative purposes, it cited the conference provisions of WIS. STAT. § 822.06(2)-(4),⁴⁰ and WIS. STAT. § 767.025(1).⁴¹

³⁸Estate of Steffke v. Wisconsin Dep't of Revenue, 222 N.W.2d 628, 632 (Wis. 1974); see also *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984) ("[T]here are limitations to the application of comity. . . . No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum."); *Somportex*, 453 F.2d at 440 ("Comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect.").

³⁹*Teague*, 612 N.W.2d at 720-21.

⁴⁰Section 822.06(2)-(4) provides:

(2) Before hearing the petition in a custody proceeding the court shall examine the pleadings and other information supplied by the parties under § 822.09 and shall consult the child custody registry established under § 822.16 concerning the pendency of proceedings with respect to the child in other states. If the court has reason to believe that proceedings may be pending in another state it shall direct an inquiry to the state court administrator or other appropriate official of the other state.

(3) If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction it shall stay the proceeding and communicate with the court in which the other proceeding is

Second, despite the Court's refusal to read a first-to-file or prior-action-pending rule into § 801.245, it nevertheless indicated that "[o]rdinarily, a court should not exercise jurisdiction over subject matter over which another court of competent jurisdiction has commenced to exercise it"⁴² and that "courts will frequently, in their discretion, grant a stay of the second action pending the outcome of the first."⁴³ Indeed, the Court invoked this principle in the context of discussing "circumstances under which . . . it would be an abuse of discretion to exercise judicial power[.]"⁴⁴ thus implying that a second court's refusal to abstain might very well constitute an erroneous exercise of discretion. Accordingly, however else the protocol is structured and implemented, at the very least it should accord importance to the forum in which the action is filed first.

Third and finally, although comity is clearly the Court's central focus, *Teague* explicitly states that "the issue of jurisdiction allocation . . . involv[es] . . . an evaluation of principles of comity and tribal exhaustion . . ."⁴⁵ As delineated by the U.S. Supreme Court, the tribal court

pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with §§ 822.19 to 822.22. If a court of this state has made a custody decree before being informed of a pending proceeding in a court of another state it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction it shall likewise inform the other court to the end that the issues may be litigated in the more appropriate forum.

(4) The communication between courts called for by sub. (3) or § 822.07(4) may be conducted on the record by telephone conference to which the courts and all counsel are parties.

Section 822.07(4) in turn provides that "[b]efore determining whether to decline or retain jurisdiction the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties."

⁴¹Section 767.025(1) provides, where a petition is filed to modify a family-related judgment in a county other than the county in which the judgment was rendered, that "[i]f a question arises as to which court should exercise jurisdiction, a conference involving both judges, all counsel and guardians ad litem may be convened under § 807.13(3) to resolve the question. The petitioner shall send a copy of any order rendered pursuant to this petition, motion or order to show cause to the clerk of the court in which the original judgment or order was rendered." Section 807.13(3) in turn provides that "[w]henver the applicable statutes or rules so permit, or the court otherwise determines that it is practical to do so, conferences in civil actions and proceedings may be conducted by telephone."

⁴²*Teague*, 612 N.W.2d at 719 (quoting *Brazy v. Brazy*, 92 N.W.2d 738, 742-43 (Wis. 1958)).

⁴³*Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 86 cmt. B (1969)).

⁴⁴*Id.*

⁴⁵*Id.* at 720 (emphasis added).

exhaustion doctrine directs a federal court, confronted with an action also filed in tribal court, not to exercise its jurisdiction until the tribal court has at least determined its own jurisdiction, if not the merits,⁴⁶ except "where an assertion of tribal jurisdiction 'is motivated by a desire to harass or is conducted in bad faith,' or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction."⁴⁷ Although neither *Teague* nor any other Wisconsin case indicates that the tribal exhaustion doctrine governs Wisconsin courts as it does the federal courts,⁴⁸ *Teague* strongly suggests that the spirit of cooperation and mutual respect, embodied in the principle of comity, should lead Wisconsin courts to defer to the prerogative of tribal courts to determine their own jurisdiction and, in some cases, to defer to the exercise of that jurisdiction.⁴⁹

B. A Proposed Protocol

Based on the principle of comity, and taking these three specific parameters into account, the following is a proposed protocol for the discretionary allocation of jurisdiction between state and tribal courts where, as in *Teague*, overlapping actions are filed in both courts.⁵⁰

⁴⁶See *Strate*, 520 U.S. at 448-53; *Iowa Mut.*, 480 U.S. at 16-19; *National Farmers*, 471 U.S. at 855-57.

⁴⁷*National Farmers*, 471 U.S. at 856 n.1 (quoting *Juidice v. Vail*, 430 U.S. 327, 338 (1977)).

⁴⁸Other state courts are not uniform on this point. Compare *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 290-92 (Minn. 1996) (en banc) (apparently assuming that the doctrine does not apply), and *Maxa v. Yakima Petroleum, Inc.*, 924 P.2d 372, 373 (Wash. Ct. App. 1996) (rejecting application of the federal exhaustion rule), *review denied*, 936 P.2d 416 (Wash. 1997), with *Drumm v. Brown*, 716 A.2d 50, 55-56 (Conn. 1998) (holding that "the doctrine of exhaustion of tribal remedies is binding on the courts of this state, superseding the general obligation upon our courts to exercise their jurisdiction . . . and that absent satisfaction of one of a narrow set of exceptions, under the doctrine a nontribal court must abstain when a parallel proceeding is pending before a tribal court"); and see John J. Harte, *Validity of a State Court's Exercise of Concurrent Jurisdiction Over Civil Actions Arising in Indian Country: Application of the Indian Abstention Doctrine in State Court*, 21 AM. INDIAN L. REV. 63, 84-90 (1997) (contending that the tribal court exhaustion doctrine should apply to state courts, though should not be mandatory).

⁴⁹See *Teague*, 612 N.W.2d at 719 & n.13 (citing the tribal court exhaustion doctrine, as employed by federal courts, as an example of an application of the principle of comity).

⁵⁰The protocol is reprinted without annotation in Appendix B.

Sec. 1. Applicability.

(a) Where a state court has reason to believe that a party to an action pending before the state court has filed a separate action in a tribal court, *or* where a tribal court has reason to believe that a party to an action before the tribal court has filed a separate action in a state court, *and*

(b) Where the actions in state and tribal court involve related issues of fact or law such that the resolution of one action could affect the resolution of the other action as a matter of *res judicata* (claim preclusion), collateral estoppel (issue preclusion), or full faith and credit,

Then, before proceeding further in the action pending before it, the court shall make reasonable inquiry of the parties or of the appropriate official of the other court concerning the possible pendency of related proceedings in the other court. If such pendency is verified, the inquiring court shall immediately notify the other court and the parties of the dual pendency and of the need to allocate jurisdiction under this protocol.⁵¹

Sec. 2. Temporary Stay of Proceedings; Exception for Jurisdictional Dismissal.

Upon transmittal and receipt of such notice, each court shall stay the proceedings until a jurisdictional allocation under § 3 has been achieved. However, if either court determines, *sua sponte* or by motion of a party, that it lacks jurisdiction, the court may dismiss the action. The court shall provide notice of the dismissal to the other court.

Sec. 3. Judicial Conference for Allocation of Jurisdiction.

(a) Each court shall solicit from the parties copies of the pleadings from both actions and shall determine the respective dates of filing. The court of the later-filed action ("the second court") shall then contact the court of the earlier-filed action ("the first court") to schedule a conference for purposes of allocating jurisdiction. The conference may be in-person or by telephone.⁵²

⁵¹*See Teague*, 612 N.W.2d at 720 ("[A] conference should be convened as soon as either court is aware of the pendency of an action on the same subject matter in the other jurisdiction.").

⁵²*See* WIS. STAT. § 807.13(3) ("Whenever the applicable statutes or rules so permit, or the court otherwise determines that it is practical to do so, conferences in civil actions and proceedings may be conducted by telephone.").

(1) The second court shall notify the parties of the conference no less than 20 days prior to its scheduled date.

(2) The parties shall be permitted to submit briefs on the issue of jurisdictional allocation. Such briefs shall be submitted to both courts and to all parties no later than 10 days prior to the scheduled date of the conference.

(3) At the request of any party, or at the direction of either court, the conference shall be conducted on the record.⁵³

(b) In conference, the judges should attempt to allocation jurisdiction, leading one court ("the abstaining court") to dismiss or stay indefinitely the proceedings before it. This allocation should be based on consideration of:

(1) The court in which the action was first filed;

*Should not be a party
You are in jurisdiction*

(2) The extent to which the case has proceeded in the first court,⁵⁴

(3) The parties' contractual choice of forum, if any;⁵⁵

⁵³*Cf.* WIS. STAT. § 822.06(4) (providing that communication between state courts in dual pending child custody proceedings "may be conducted on the record by telephone conference to which the courts and all counsel are parties"); WIS. STAT. § 807.13(4) (prescribing various procedural requirements and entitlements for conferences conducted under § 807.13, including notice of and indirect participation in the proceeding).

⁵⁴*Cf., e.g., Drumm*, 716 A.2d at 67 (holding that state courts, applying the exhaustion rule, should generally defer to a pending tribal court proceeding irrespective of the order in which the cases were filed but that "a different conclusion might be necessary where a state court action has proceeded to consideration of the merits before a relevant tribal court action has been filed").

⁵⁵*Cf. Wilson*, 127 F.3d at 810 (holding that "a federal court may, in its discretion, decline to recognize and enforce a tribal judgment" if, among other things, "the judgment is inconsistent with the parties' contractual choice of forum"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(2)(f) (1986) (providing that a court need not recognize a foreign court judgment if "the proceeding in the foreign court was contrary to an agreement between the parties to submit the controversy on which the judgment is based to another forum").

(4) The degree to which the nature of the action implicates the sovereign interests of each legal system,⁵⁶ including but not limited to:

- (A) The subject matter of the litigation;
- (B) The location of material events giving rise to the litigation;⁵⁷
- (C) The identities and potential immunities of the parties,⁵⁸ and
- (D) Whether the law to be applied is predominantly state or tribal.⁵⁹

Wheeler
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⁵⁶See, e.g., *Gavle*, 555 N.W.2d at 291 (noting that "the governing federal principle in determining whether a [state] court should exercise concurrent jurisdiction" is that "the exercise of state court jurisdiction must not 'undermine the authority of the tribal courts over Reservation affairs' nor 'infringe on the right of Indians to govern themselves'" (quoting *Williams v. Lee*, 358 U.S. 217, 223 (1959))), *cert. denied*, 524 U.S. 911 (1998); *Granite Valley Ltd. Partnership v. Jackpot Junction Bingo & Casino*, 559 N.W.2d 135, 137 (Minn. Ct. App. 1997) ("When both a state court and a tribal court have jurisdiction to entertain a dispute involving questions central to the governance of an Indian tribe, the doctrine of comity generally divests state courts of jurisdiction as a matter of federal law if retention of jurisdiction by the state court would interfere with matters of tribal self-government."); and see *Teague*, 612 N.W.2d at 715 (discussing and quoting *Williams*).

⁵⁷See, e.g., *Granite Valley*, 559 N.W.2d at 137-38 (distinguishing a prior case in which the state court "deferred to the tribal court for resolution of jurisdictional and sovereign immunity issues" from the case at hand in which the court properly did not defer to the tribal court insofar as "the basis of the [prior] action . . . was property damage that occurred on the premises of the Indian reservation, whereas this case involves a contract performed off the reservation" (citation omitted)).

⁵⁸In particular, a sovereign immunity defense, whether state or tribal, may be one factor in the jurisdictional allocation analysis. See, e.g., *Gavle*, 555 N.W.2d at 292 (noting cases "in which a state court has been asked to require exhaustion of tribal court remedies when the underlying question to be resolved is whether a tribal business entity may assert the tribe's sovereign immunity"—citing *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989); *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community*, 674 P.2d 1376 (Ariz. Ct. App. 1983); *White Mountain Apache Indian Tribe v. Shelley*, 480 P.2d 654 (Ariz. 1971)—though ultimately holding that "the consideration by Minnesota state courts of whether [a tribal entity] may assert the defense of sovereign immunity does not 'undermine the authority of the tribal courts' nor 'infringe on the ability of Indian tribes to govern themselves'" (quoting *Williams*, 358 U.S. at 223)); *Jones*, *supra* note 6, at 462 n.17 ("Several federal courts have invoked the tribal court exhaustion rule to permit tribal courts to litigate issues surrounding the defense, even when an independent federal statute seemed to authorize the exercise of federal court jurisdiction over the principal cause of action without deferring to tribal courts." (citing *Abdo v. Fort Randall Casino*, 957 F. Supp. 1111, 1114 (D.S.D. 1997); *Davis v. Mille Lacs Band*, No. 5-95-187, slip op. at 3 (D. Minn. Jan. 16, 1996))).

⁵⁹*Cf. Iowa Mut.*, 480 U.S. at 16 (noting that one reason for the prudential rule of tribal court exhaustion is that "tribal courts are best qualified to interpret and apply tribal law"); *Harte*, *supra* note 48, at 91-92 (arguing that tribal law by its nature is not readily susceptible to state

~~See~~ *Unheeler et Comes v. ...*

location of performance

(5) The relative burdens on the parties, including cost, access to and admissibility of evidence, and matters of process, practice, and procedure.⁶⁰

(6) The institutional or administrative interests of each court.⁶¹

In general, the predominant factor should be court in which the action was first filed, respecting the original plaintiff's choice of forum and the first court's jurisdictional

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court application, such that "state courts should dismiss a suit where the application of tribal law presents itself"); Jones, *supra* note 6, at 492-93 & nn.157-61 (observing that "if the resolution of the underlying dispute involves interpretation of the tribal law, there seems to be an emerging consensus among federal courts to defer to tribal courts even if federal court jurisdiction may appropriately lie in a case" (citing *Basil Cook Enter., v. St. Regis Mohawk Tribe*, 117 F.3d 61, 68 (2d Cir. 1997); *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1421-22 (8th Cir. 1996); *Davis v. Mille Lacs Band*, No. 5-95-187, slip op. at 3 (D. Minn. Jan. 16, 1996); *Prescott v. Little Six, Inc.*, 897 F. Supp. 1217, 1223-24 (D. Minn. 1995); *Klammer v. Lower Sioux Convenience Store*, 535 N.W.2d 379, 380-81 (Minn. Ct. App. 1995))); *see generally* Jones, *supra* note 6, at 490-93 (providing examples where tribal and state courts may wish to defer to one another); *Niblock & Plouffe, supra* note 31, at 237-39 (proposing allocation of concurrent jurisdiction between federal and tribal courts on the basis of the location of the event, the parties involved, the limitations on sovereignty, the tribal interests, and the federal interests); *cf. also Daniel-Nordin*, 495 N.W.2d at 325 (indicating in child support case, involving both Wisconsin and Illinois courts, that "[t]he state court having the better access to the relevant factual information would appear to be the court that should retain jurisdiction").

⁶⁰*Cf.* WIS. STAT. § 801.63(3)(b), (d) (providing that "[c]onvenience to the parties and witnesses of trial in this state and in any alternative forum" and "[a]ny other factors having substantial bearing upon the selection of a convenient, reasonable and fair place of trial" should inform a circuit court's discretionary decision to stay proceedings in favor of a trial in a foreign forum).

⁶¹Allowance for consideration of such interests is appropriate given *Teague's* statement that "[t]he scope of comity is determinable as a matter of judicial policy." *Teague*, 612 N.W.2d at 719.

prerogative.⁶² Accordingly, in general, the second court should abstain from the exercise of jurisdiction, either dismissing or staying the proceedings before it.⁶³

(c) A stay rather than a dismissal may be appropriate where there is any doubt about the jurisdiction of the nonabstaining court, the expiration of a statute of limitations, or any other equitable considerations.⁶⁴

Sec. 4. Notice of Jurisdictional Allocation; Objection; Reconsideration.

(a) If the judges agree on a jurisdictional allocation, both parties must be notified by the abstaining court of its decision to stay or dismiss the proceedings before it.

(b) A party objecting to the stay or dismissal may file a motion for reconsideration if and as provided for by the applicable rules of the abstaining court. The motion shall set forth the reasons why the abstaining court should not stay or dismiss, and the moving party shall provide a copy of the motion to all other parties and to the nonabstaining court.

(c) If the abstaining court agrees to reconsider its decision to stay or dismiss, it shall again confer with the nonabstaining court pursuant to the protocol of § 3.

⁶²See *supra* notes 42-44 and accompanying text (discussing *Teague's* emphasis on this factor); see also *Littman v. Littman*, 203 N.W.2d 901, 907 (Wis. 1973) ("The right of a plaintiff to choose his own forum is an important legal right and should not be lightly tampered with. '[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.'" (quoting *Goodwine v. Superior Court of L.A. County*, 407 P.2d 1, 4 (Cal. 1965))); cf. WIS. STAT. § 822.06(1) (in the child custody context, providing that "[a] court of this state shall not exercise its jurisdiction under this chapter if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this chapter, unless the proceeding is stayed by the court of the other state because this state is a more appropriate forum or for other reasons").

⁶³This rule may have particular force where the first court is a tribal court, given *Teague's* reference to tribal exhaustion, insofar as the second action, filed in state court, will likely contain a challenge to the tribal court's jurisdiction. Conversely, where the state court is the first court, it is unlikely that the original plaintiff will even raise the jurisdiction of the tribal court over an action that has yet to be filed, though the plaintiff may subsequently do so.

⁶⁴Cf., e.g., *Drumm*, 716 A.2d at 70 (concluding that "a stay [by the state court] pending further tribal court proceedings is appropriate" and that, "[i]n the event that tribal court proceedings are terminated, or it is determined that the matter is beyond the jurisdiction of the tribal court, these plaintiffs should be free to continue pursuing their remedy in th[e] [state] forum, without regard to any limitations imposed by statutes of limitations, which might constitute a bar in the event the current action is dismissed").

(d) If the motion for reconsideration is denied, the party may seek appellate review if and as provided for by the applicable rules of the abstaining court or of the appropriate appellate court.

Sec. 5. Powers, Rights, and Obligations Unaffected.

Nothing in this protocol is intended to alter, diminish, or expand the jurisdiction of state or tribal courts, the sovereignty of states or tribes, or the rights or obligations of parties under state, tribal, or federal law.

C. *Potential Shortcomings or Problems Under the Protocol*

Addressed in this section are three potential shortcomings of the protocol in its current form. To the extent that these problems cannot be prospectively mitigated by restructuring the protocol, at the very least they should be taken into account when the protocol is implemented.

1. *The Missing Role of Litigants.* Based on the directive of *Teague*, and more fundamentally on the forum's lack of lawmaking authority, this protocol is designed to be initiated and implemented mostly by judges. Its applicability, for example, turns entirely on whether one of the judges has "reason to believe" that there might be dual pendency. Conspicuously absent from the process are the litigants, even though the litigant filing the second suit is in the best position to notify the courts and other litigants of the dual pendency.

Of course, one would think that the litigant filing the first action, when served in the second action, will notify the first court of the second action.⁶⁵ But this is merely an assumption. The more efficient and certain method is to require the litigant filing to second action to apprise both courts at the outset that an overlapping action has in fact been filed. Accordingly, the forum may wish to consider drafting a proposed rule, both for state practice and for practice before each of the tribal courts, that would impose such an obligation on litigants.

2. *Denial of the Right of Court Access to Litigants.* Where the judges concur on a jurisdictional allocation, this allocation may infringe upon the rights of the party that filed the action in the abstaining court. After all, particularly where the abstaining court is also the first court, the allocation would effectively deprive this party of its choice of forum and, depending on the characteristics of the second court, might also deprive this party of certain procedural, evidentiary, and remedial advantages.

⁶⁵To the extent that the second court is a state court, the litigant filing the first action may also file a defensive motion under WIS. STAT. § 802.06(2)(a)(10) alleging that there is "[a]nother action pending between the same parties for the same cause."

The "certain remedy clause" of the Wisconsin Constitution, for example, provides that "[e]very person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character" and that "he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws."⁶⁶ In turn, the Wisconsin Supreme Court has construed this provision as guaranteeing "the right . . . to have access to the courts"⁶⁷ or as "entit[ing] Wisconsin litigants . . . to their day in court."⁶⁸ Even apart from the certain remedy clause, moreover, it has been said that a resident plaintiff "has a legitimate right of access to the Wisconsin courts"⁶⁹ and that the state courts "cannot unduly deny a party access to the judicial system."⁷⁰

Of course, this right of access is not without limits. For instance, it "does not entitle Wisconsin litigants to the exact remedy they desire"⁷¹ nor does it "prevent the legislature from imposing conditions and limitations on a suitor's right to recovery under the laws."⁷² In addition, the Wisconsin Supreme Court has proposed in dictum that where an action has been filed in a Wisconsin court and where "there [is] another action pending in another jurisdiction in which the identical parties and the identical issues were being litigated, it might well be within the inherent power of a Wisconsin court, quite aside from . . . statutory authority . . . , to stay proceedings during the pendency of another action when the judgment therein would in any

⁶⁶WIS. CONST. art. I, § 9.

⁶⁷*Mulder v. Acme-Cleveland Corp.*, 290 N.W.2d 276, 284 (Wis. 1980); *accord* *Vandervelden v. Victoria*, 502 N.W.2d 276, 279-80 (Wis. Ct. App. 1993) ("[S]ec. 9 does . . . guarantees access to the courts to enforce existing rights."), *review denied*, 505 N.W.2d 137 (Wis. 1993), *cert. denied*, 510 U.S. 946 (1993); *Messner v. Briggs & Stratton Corp.*, 353 N.W.2d 363, 366 (Wis. Ct. App. 1984) ("The certain remedy clause provides persons the right of access to the courts to obtain justice based on the law as it exists.").

⁶⁸*Metzger v. Wisconsin Dep't of Taxation*, 150 N.W.2d 431, 436 (Wis. 1967); *accord* *Neuhaus v. Clark County*, 111 N.W.2d 180, 184 (Wis. 1961) ("[Article I, § 9] guarantees every suitor his day in a court of competent jurisdiction . . ."); *State v. Halverson*, 387 N.W.2d 124, 126-27 (Wis. Ct. App. 1986) ("[T]his constitutional provision entitles Wisconsin litigants to their day in court.").

⁶⁹*Littman*, 203 N.W.2d at 907.

⁷⁰*Minniecheske v. Griesbach*, 468 N.W.2d 760, 763 (Wis. Ct. App. 1991), *review denied*, 474 N.W.2d 107 (Wis. 1991).

⁷¹*Metzger*, 150 N.W.2d at 436.

⁷²*Neuhaus*, 111 N.W.2d at 184; *see also* *Metzger*, 150 N.W.2d at 436 ("Under sec. 9, art. I, the legislature may impose reasonable limitations upon the remedies available to parties.").

event be entitled to full faith and credit in the courts of this state[.]”⁷³ thereby implying that such abstention would not unconstitutionally abridge a litigant’s right of access to the Wisconsin court. Relatedly, the Minnesota Court of Appeals has explicitly upheld the relegation of a state litigant’s claim to a tribal court, explaining that the litigant “has not been denied her day in court. Her action was heard and decided by the Indian tribal court. Should she disagree with the tribal court’s determination, she has recourse in either the tribal appellate court or in federal court.”⁷⁴

Based on these cases, it is fair to conclude that, in the abstract, state court abstention in favor of a tribal court proceeding would not violate a litigant’s right of access to state court. In a particular case, however, this generalization may not hold true, especially if the procedural, evidentiary, and remedial dimensions of the tribal adjudication place the litigant at a material disadvantage. Accordingly, one option is for the state court to procure the litigant’s consent, although this may prove difficult in practice. Another is for the state court to stay rather than dismiss its proceedings, leaving the litigant the option of returning to state court should the litigant encounter actual adjudicatory or remedial disadvantages in the tribal court proceedings, although this option may effectively undermine the protocol. A third and final option is for the state court to abstain, let the tribal proceedings run their course, and ultimately rely on WIS. STAT. § 801.245, the full faith and credit statute, as a means of verifying that the litigant was not disadvantaged in the tribal court. Under § 801.245(1)(d), a tribal court judgment must be valid, and under § 801.245(4), validity requires, among other things, that the tribal court had subject matter and personal jurisdiction,⁷⁵ that the judgment was procured without fraud, duress, or coercion,⁷⁶ that it was procured in compliance with tribal court procedures,⁷⁷ and that the tribal court proceedings complied with the Indian Civil Rights Act,⁷⁸ which itself requires the guarantees of equal protection and due process.⁷⁹ This third option has two

⁷³*Littman*, 203 N.W.2d at 908.

⁷⁴*Matsch v. Prairie Is. Indian Community*, 567 N.W.2d 276, 279 (Minn. Ct. App. 1997) (citation omitted) (citing *Bank of Okla. v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1169 (10th Cir. 1992)).

⁷⁵See WIS. STAT. § 801.245(4)(a).

⁷⁶See *id.* § 801.245(4)(d).

⁷⁷See *id.* § 801.245(4)(e).

⁷⁸See *id.* § 801.245(4)(f).

⁷⁹See 25 U.S.C. § 1302(8).

shortcomings, however. The first is simply the potential for inefficiency and wasted resources, both for the courts and the litigants, should the tribal court judgment ultimately be denied full faith and credit. The second is that the Indian Civil Rights Act does not mandate civil jury trials,⁸⁰ while the right to a jury trial is expressly guaranteed both by the Wisconsin Constitution⁸¹ and by statute.⁸²

3. *Inability of Judges to Allocate Jurisdiction.* Compliance with this protocol, and the cooperative allocation of jurisdiction, must ultimately result from the mutual respect that each court system has for one another. As one commentator notes in regard to comity among nations:

Comity, especially in circumstances involving concurrent adjudicatory jurisdiction, is a matter very much left up to the ad hoc discretion of the courts. Insofar as a judge prefers to hear a dispute him or herself and not to defer to a foreign court, comity may provide little help in effectively allocating judicial business. When there is a judicial sentiment that foreign courts are unreliable or that foreign justice or foreign law is unfair, comity breaks down altogether.⁸³

There is, in fact, no effective means either to enforce the protocol or to impose a jurisdictional allocation in relation to both the state and the tribal courts. The appellate courts of each system can only direct the conduct of their own lower courts,⁸⁴ and it is unlikely that a lower federal court possesses either the authority or the interest to get entangled in matters of state-

⁸⁰See *id.* § 1302(10) (requiring jury trials only for certain criminal proceedings).

⁸¹See WIS. CONST. art. I, § 5 ("The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law.").

⁸²See WIS. STAT. § 805.01(1) ("The right of trial by jury as declared in article I, section 5, of the constitution or as given by a statute and the right of trial by the court shall be preserved to the parties inviolate.").

⁸³JANIS, *supra* note 28, at 333.

⁸⁴See *Lemke v. Brooks*, 614 N.W.2d 242, 245 (Minn. Ct. App. 2000) ("Unlike federal courts, state courts do not have jurisdiction to conduct even limited review of tribal court decisions." (citing *Matsch*, 567 N.W.2d at 279)); *Jones*, *supra* note 6, at 492 n.156 (noting that one "distinction between the federal court exhaustion rule and the state court abstention rule may be that the federal courts assume they have the ultimate authority to review tribal court decisions in exhaustion cases, whereas it is unclear under what authority a state court would review anew a case adjudicated through the tribal court").

tribal jurisdictional allocation, particularly where both the state and tribal courts appear to have jurisdiction.⁸⁵

What this means is that the protocol's effectiveness, from beginning to end, is entirely dependent upon the good faith and diligence of each court system. Even then, there may be instances in which a state court and a tribal court cannot reach a consensus on allocation. One long-term possibility for the resolution of such impasses is the creation of a special intersystem appellate court, composed of both state and tribal judges, with authority to issue jurisdictional allocation rulings. These rulings could be binding (if the court were properly empowered under both state and tribal law) or advisory (if it were not so empowered because of political or legal obstacles to such empowerment). Even advisory rulings, however, would probably be sufficient in most instances, particularly if the same elements of cooperation and mutual respect were maintained by the judges involved.

D. The Adoption and Future Revision of the Protocol

One final matter is the means by which this or any similar protocol is to be authoritatively adopted and, in turn, authoritatively revised as future circumstances dictate. To the extent that the protocol is not intended to be codified or established by formal rule, at the very least there must be some explicit consent among the judges or court systems that it is designed to govern. Depending upon the authority of the state and tribal court systems, this might be accomplished by written consent or by order of the participating courts or, if the system is hierarchical (as is the Wisconsin state system), by order of the highest court. Whatever the method of initial authorization, presumably it would also govern future amendments to this or a similar protocol. The modes of ratification and revision, however, are matters best resolved by the forum members and the relevant courts, who are more familiar with their own authority and likely have a better sense of the feasibility of any particular mode.

⁸⁵To the extent that "[n]othing in federal law . . . would preclude a jurisdictional allocation protocol" where both "the state and tribal court can legitimately claim jurisdiction under Public Law 280" this suggests that, in general, a breach of that protocol would likely not give rise to a matter within the jurisdiction of the federal courts. Jones, *supra* note 6, at 490; cf. generally Robert Laurence, *The Role, If Any, for the Federal Courts in the Cross-Boundary Enforcement of Federal, State and Tribal Money Judgments*, 35 TULSA L.J. 1, 28-30 (1999). A federal court can presumably examine the propriety of tribal court jurisdiction as a matter of federal law but will likely be limited to the jurisdictional issue unless there exists an independent basis for federal court jurisdiction over the merits. See generally Judith V. Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 U. KAN. L. REV. 241, 266-80 (1998).

APPENDIX A

Wisconsin State-Tribal Full Faith and Credit Statute

Wis. Stat. § 806.245. Indian tribal documents: full faith and credit

(1) The judicial records, orders and judgments of an Indian tribal court in Wisconsin and acts of an Indian tribal legislative body shall have the same full faith and credit in the courts of this state as do the acts, records, orders and judgments of any other governmental entity, if all of the following conditions are met:

(a) The tribe which creates the tribal court and tribal legislative body is organized under 25 U.S.C. §§ 461 to 479.

(b) The tribal documents are authenticated under sub. (2).

(c) The tribal court is a court of record.

(d) The tribal court judgment offered in evidence is a valid judgment.

(e) The tribal court certifies that it grants full faith and credit to the judicial records, orders and judgments of the courts of this state and to the acts of other governmental entities in this state.

(2) To qualify for admission as evidence in the courts of this state:

(a) Copies of acts of a tribal legislative body shall be authenticated by the certificate of the tribal chairperson and tribal secretary.

(b) Copies of records, orders and judgments of a tribal court shall be authenticated by the attestation of the clerk of the court. The seal, if any, of the court shall be affixed to the attestation.

(3) In determining whether a tribal court is a court of record, the circuit court shall determine that:

(a) The court keeps a permanent record of its proceedings.

(b) Either a transcript or an electronic recording of the proceeding at issue in the tribal court is available.

(c) Final judgments of the court are reviewable by a superior court.

(d) The court has authority to enforce its own orders through contempt proceedings.

(4) In determining whether a tribal court judgment is a valid judgment, the circuit court on its own motion, or on the motion of a party, may examine the tribal court record to assure that:

(a) The tribal court had jurisdiction of the subject matter and over the person named in the judgment.

(b) The judgment is final under the laws of the rendering court.

(c) The judgment is on the merits.

(d) The judgment was procured without fraud, duress or coercion.

(e) The judgment was procured in compliance with procedures required by the rendering court.

(f) The proceedings of the tribal court comply with the Indian civil rights act of 1968 under 25 U.S.C. §§ 1301 to 1341.

(5) No lien or attachment based on a tribal court judgment may be filed, entered in the judgment and lien docket or recorded in this state against the real or personal property of any person unless the judgment has been given full faith and credit by a circuit court under this section.

(6) A foreign protection order, as defined in § 806.247(1)(b), issued by an Indian tribal court in this state shall be accorded full faith and credit under § 806.247.

APPENDIX B

Protocol for the Judicial Allocation of Jurisdiction

Sec. 1. Applicability.

(a) Where a state court has reason to believe that a party to an action pending before the state court has filed a separate action in a tribal court, *or* where a tribal court has reason to believe that a party to an action before the tribal court has filed a separate action in a state court, *and*

(b) Where the actions in state and tribal court involve related issues of fact or law such that the resolution of one action could affect the resolution of the other action as a matter of res judicata (claim preclusion), collateral estoppel (issue preclusion), or full faith and credit,

Then, before proceeding further in the action pending before it, the court shall make reasonable inquiry of the parties or of the appropriate official of the other court concerning the possible pendency of related proceedings in the other court. If such pendency is verified, the inquiring court shall immediately notify the other court and the parties of the dual pendency and of the need to allocate jurisdiction under this protocol.

Sec. 2. Temporary Stay of Proceedings; Exception for Jurisdictional Dismissal.

Upon transmittal and receipt of such notice, each court shall stay the proceedings until a jurisdictional allocation under § 3 has been achieved. However, if either court determines, *sua sponte* or by motion of a party, that it lacks jurisdiction, the court may dismiss the action. The court shall provide notice of the dismissal to the other court.

Sec. 3. Judicial Conference for Allocation of Jurisdiction.

(a) Each court shall solicit from the parties copies of the pleadings from both actions and shall determine the respective dates of filing. The court of the later-filed action ("the second court") shall then contact the court of the earlier-filed action ("the first court") to schedule a conference for purposes of allocating jurisdiction. The conference may be in-person or by telephone.

(1) The second court shall notify the parties of the conference no less than 20 days prior to its scheduled date.

(2) The parties shall be permitted to submit briefs on the issue of jurisdictional allocation. Such briefs shall be submitted to both courts and to all parties no later than 10 days prior to the scheduled date of the conference.

(3) At the request of any party, or at the direction of either court, the conference shall be conducted on the record.

(b) In conference, the judges should attempt to allocation jurisdiction, leading one court ("the abstaining court") to dismiss or stay indefinitely the proceedings before it. This allocation should be based on consideration of:

(1) The court in which the action was first filed;

(2) The extent to which the case has proceeded in the first court;

(3) The parties' contractual choice of forum, if any;

(4) The degree to which the nature of the action implicates the sovereign interests of each legal system, including but not limited to:

- (A) The subject matter of the litigation;
- (B) The location of material events giving rise to the litigation;
- (C) The identities and potential immunities of the parties; and
- (D) Whether the law to be applied is predominantly state or tribal.

(5) The relative burdens on the parties, including cost, access to and admissibility of evidence, and matters of process, practice, and procedure.

(6) The institutional or administrative interests of each court.

In general, the predominant factor should be court in which the action was first filed, respecting the original plaintiff's choice of forum and the first court's jurisdictional prerogative. Accordingly, in general, the second court should abstain from the exercise of jurisdiction, either dismissing or staying the proceedings before it.

(c) A stay rather than a dismissal may be appropriate where there is any doubt about the jurisdiction of the nonabstaining court, the expiration of a statute of limitations, or any other equitable considerations.

Sec. 4. Notice of Jurisdictional Allocation; Objection; Reconsideration.

(a) If the judges agree on a jurisdictional allocation, both parties must be notified by the abstaining court of its decision to stay or dismiss the proceedings before it.

(b) A party objecting to the stay or dismissal may file a motion for reconsideration if and as provided for by the applicable rules of the abstaining court. The motion shall set forth the reasons why the abstaining court should not stay or dismiss, and the moving party shall provide a copy of the motion to all other parties and to the nonabstaining court.

(c) If the abstaining court agrees to reconsider its decision to stay or dismiss, it shall again confer with the nonabstaining court pursuant to the protocol of § 3.

(d) If the motion for reconsideration is denied, the party may seek appellate review if and as provided for by the applicable rules of the abstaining court or of the appropriate appellate court.

Sec. 5. Powers, Rights, and Obligations Unaffected.

Nothing in this protocol is intended to alter, diminish, or expand the jurisdiction of state or tribal courts, the sovereignty of states or tribes, or the rights or obligations of parties under state, tribal, or federal law.

APPENDIX C

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