

CAN TRIBAL COURTS ISSUE DOMESTIC
RELATIONS ORDERS THAT WILL BE
HONORED BY PENSION PLAN
ADMINISTRATORS UNDER ERISA?

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ABSTRACT—Many members of tribal nations hold assets in pension plans governed by the Employee Retirement Income Security Act (ERISA). When a tribal member with such a plan divorces, the plan must be divided between the former spouses according to a marital-asset division order issued pursuant to state law. A 2011 Department of Labor Advisory Opinion opined that this order must be issued either by a state court or a tribal court in a state that recognizes such orders as state law. This Note argues that this Advisory Opinion is flawed. ERISA simply requires an application of a specific body of law; it says nothing restricting the forum to state courts. Many tribal judiciaries have available to them choice of law statutes, and the marital-asset division orders they issue pursuant to state law should be honored. This is a matter of convenience for the tribal member and a matter of a tribe's sovereignty to order its own internal domestic relations as it sees fit.

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INTRODUCTION

Divorce is common in the United States.¹ A divorcing couple must divide up their marital assets,² including any pension plans.³ While divorce proceedings can present complex legal issues for most divorcees, the issues facing members of the various tribal nations of the United States are especially daunting; this is particularly true when either divorcee has an employee benefit plan governed by the Employee Retirement Income Security Act (ERISA),⁴ a federal law governing pension plans in private industries.⁵ In tribal nations, ERISA is applicable to private employers as well as to some public employers.⁶ While the law does not force an employer to provide a pension plan, if the employer does choose to do so,

¹ See *National Marriage and Divorce Rate Trends*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm (last updated Feb. 19, 2013).

² See, e.g., CAL. FAM. CODE § 2550 (West 2004).

³ See, e.g., *In re Marriage of Brown*, 544 P.2d 561, 562–63 (Cal. 1976) (holding that pension plans are subject to division in divorce proceedings).

⁴ Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001–1461 (2006).

⁵ *Id.* § 1003(a).

⁶ See *id.* (stating that aside from certain exceptions, ERISA applies to “any employee benefit” that is “established or maintained” by an employer or employee organization “engaged in” or “affecting commerce”).

the plan is governed by ERISA.⁷ The process of dividing ERISA-governed pension plans is more complex for tribal members than nontribal citizens because ERISA administrators are instructed not to accept marital-asset division orders issued by tribal courts.⁸ Currently, tribal members must go to state courts for redress.⁹

ERISA contemplates a judicial role in dividing pension plans upon divorce. Section 1056(d)(3)(B)(ii)(II) mandates that the division of the marital assets must be “made pursuant to a State domestic relations law.”¹⁰ ERISA defines “State” as including “any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, and the Canal Zone.”¹¹ Upon first reading, ERISA seems to suggest that administrators of ERISA-governed pension plans cannot accept a tribal court’s marital-asset division order. Indeed, in the absence of case law directly on this issue, a Department of Labor (DOL) Advisory Opinion came to this very conclusion.¹² The opinion is not binding on courts, but until the issue is litigated and a court finds to the contrary, at least some (and likely all) ERISA pension plan administrators will follow this interpretation.¹³ This presents important ramifications for tribal members and the degree of sovereignty tribal nations enjoy. This Note explores these issues, arguing that the current situation, in which ERISA pension plan administrators are instructed not to honor domestic relations orders issued by tribal courts, is antithetical to a large body of jurisprudence dealing with the application of neutral, generally applicable laws to tribal nations. Furthermore, this Note argues that the plain language of ERISA already requires pension plan administrators to honor tribal courts’ marital-asset division orders, so long as the applicable tribal law has a choice of law provision permitting the use of state law where appropriate, and the tribal court applies the state law in issuing the order.

Policy considerations concerning the sovereignty of tribal nations also weigh in favor of requiring ERISA administrators to honor tribal court division orders. The enforceability of the tribal orders is more than a matter

⁷ See *id.*

⁸ See U.S. Dep’t of Labor, Opinion Letter No. 2011-03A (Feb. 2, 2011) [hereinafter Department of Labor 2011 Opinion Letter], available at 2011 WL 585771, at *3.

⁹ See *id.* at *2 (noting that although ERISA only requires a “proper final order of any State authority” that “[f]ederal law . . . does not generally treat Indian tribes as States, or as agencies or instrumentalities of States”). This is problematic because tribal courts traditionally adjudicate the domestic affairs of their members. See Alicia K. Crawford, Comment, *The Evolution of the Applicability of ERISA to Indian Tribes: We May Finally Have Congressional Intent, but It’s Still Flawed*, 34 AM. INDIAN L. REV. 259, 266 (2010).

¹⁰ 29 U.S.C. § 1056(d)(3)(B)(ii)(II).

¹¹ *Id.* § 1002(10).

¹² See Department of Labor 2011 Opinion Letter, *supra* note 8.

¹³ It is unknown to the author the number of pension plan administrators that have followed this Advisory Opinion.

of convenience for tribal members: if ERISA plan administrators cannot honor tribal court domestic relations orders, tribal members seeking marital-asset division upon divorce will be forced to go to state courts to divide pension plans.¹⁴ However, state courts do not have the same understanding of tribal history and customs as tribal courts.¹⁵ Furthermore, removing issues customarily decided by tribal courts to state courts jeopardizes the sovereignty of tribal nations and counteracts current trends in federal policy toward tribal nations.¹⁶

Part I presents a brief overview of ERISA and the Pension Protection Act of 2006,¹⁷ which amended ERISA. Part II examines the applicability of federal legislation to tribal nations. In particular, it reviews the conflicting case law from and between the Supreme Court and circuit courts of appeals. Part III discusses the applicability of ERISA to tribal nations in light of conflicting circuit court jurisprudence and congressional intent. Part IV explores the ambiguity in ERISA's § 1056 regarding whether pension plan administrators are permitted to honor domestic relations orders created by tribal courts. It reviews the DOL's nonbinding Advisory Opinion on the matter and presents a contrasting plain-language argument that allows plan administrators to implement tribal courts' orders. Part V examines the policy considerations that weigh in favor of allowing ERISA administrators to honor tribal court domestic relations orders. Finally, Part VI makes legislative and judicial recommendations to disambiguate the situation.

I. BACKGROUND: ERISA AND THE 2006 AMENDMENT

Congress passed and President Gerald Ford signed the Employee Retirement Income Security Act (ERISA) in 1974.¹⁸ ERISA was enacted after multiple incidents in which employees were unable to collect their pension benefits because private employers had underfunded their pension plans.¹⁹ Although ERISA does not mandate that private employers provide

¹⁴ See Department of Labor 2011 Opinion Letter, *supra* note 8, at *2.

¹⁵ See generally, e.g., Robert Yazzie, *Navajo Peacekeeping: Technology and Traditional Indian Law*, 10 ST. THOMAS L. REV. 95 (1997) (outlining the Navajo peacemaking justice system).

¹⁶ See DENIS BINDER ET AL., FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 242 (Rennard Strickland et al. eds., 1982) (quoting *Santa Rosa Band of Indians v. Kings Cnty.*, 532 F.2d 655, 663 (9th Cir. 1975)).

¹⁷ Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (codified as amended in scattered sections of 29 U.S.C.).

¹⁸ Adam B. Garner, Note, *Protecting the ERISA Whistleblower: The Reach of Section 510 of ERISA*, 80 FORDHAM L. REV. 235, 239 (2011).

¹⁹ See *We Work for the Employees*, L. OFFS. ARCHIBALD J. THOMAS, III, P.A., <http://www.job-rights.com/erisa.htm> (last visited Mar. 30, 2014). See generally James A. Wooten, "The Most Glorious Story of Failure in the Business": *The Studebaker-Packer Corporation and the Origins of ERISA*, 49 BUFF. L. REV. 683 (2001) (discussing how the 1963 Studebaker plant shutdown served as the impetus for the pension reform of the next decade culminating in ERISA).

pension plans, ERISA governs those pension plans that private employers choose to provide.²⁰ The law sets minimum funding levels for pension plans²¹ and requires for the vesting of benefits after a certain period of time.²² It also creates the Pension Benefit Guaranty Corporation (PBGC) to pay pension benefits to employees in the event their employers terminate their plans.²³ ERISA explicitly preempts most state laws relating to pension plans,²⁴ although it does exclude government plans at all levels from its ambit.²⁵

Since enactment in 1974, Congress has amended ERISA numerous times. Particularly relevant to tribal nations is the Pension Protection Act of 2006.²⁶ Generally, the Pension Protection Act requires companies to make higher premium payments to the PBGC when their pension plans are underfunded.²⁷ Of import to tribal nations is a minor change in the definition of “governmental plan.”²⁸ The amendment added language to the definition expressly exempting from ERISA plans “established and maintained by an Indian tribal government” for employees pursuing essential government functions.²⁹ The significance of this amendment will be discussed *infra* in Part III.

II. THE APPLICABILITY OF FEDERAL LAW TO TRIBAL NATIONS

The legal status of tribal nations has long been somewhat amorphous.³⁰ Over the course of United States history, the judiciary’s formulation of the legal relationship between tribal nations and state and federal governments has undergone a substantial change. Courts over time have incrementally recast tribal nations as another local- or state-level jurisdiction,³¹ as opposed to a fully sovereign nation. The changing conception of the legal status of tribal nations complicates the inquiry into the applicability of federal and state law. This Part briefly examines the trajectory of the application of federal legislation to tribal nations.

²⁰ 29 U.S.C. § 1003(a) (2006).

²¹ *Id.* § 1082.

²² *Id.* § 1053.

²³ *Id.* §§ 1301–1381.

²⁴ *Id.* § 1144.

²⁵ *Id.* § 1003(b)(1); *see also* Crawford, *supra* note 9, at 263.

²⁶ Pub. L. No. 109-280, § 906(a), 120 Stat. 780, 1051–52 (codified as amended at 29 U.S.C. § 1002(32)).

²⁷ *Id.* §§ 101–102, 120 Stat. at 784–809 (codified as amended at 29 U.S.C. §§ 1082–1086).

²⁸ 29 U.S.C. § 1002(32).

²⁹ 120 Stat. at 1051 (codified as amended at 29 U.S.C. § 1002(32)); *see also* 29 U.S.C. § 1003(b)(1) (stating that ERISA shall not cover “governmental plan[s]”).

³⁰ *See generally* Robert W. Oliver, *The Legal Status of American Indian Tribes*, 38 OR. L. REV. 193 (1959) (discussing the evolution of the legal status of tribal nations).

³¹ *See, e.g.*, 18 U.S.C. § 2261(a)(1) (1994) (making it a crime to cross state or tribal borders when committing an act of domestic violence).

A. *What Are Tribal Nations, Legally Speaking?*

From the founding of the United States, Native American tribes have been conceived of as unique entities. The United States Constitution gives Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”³² The Constitution thereby distinguishes tribal nations from both foreign nations and American states.

In 1831, in *Cherokee Nation v. Georgia*,³³ the Supreme Court held that it did not have jurisdiction over the case because the Cherokee Nation was neither a foreign nation nor a state.³⁴ Article III of the U.S. Constitution describes the judicial power to decide cases, limiting the power to “Controversies . . . between two or more States[,] . . . between a State and Citizens of another State[,] . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”³⁵ Absent one of these party alignments (or other conditions,³⁶ omitted here, and clearly not applicable to tribal nations), federal courts do not have jurisdiction.³⁷ The Court characterized the Cherokee Nation as a “domestic dependent nation[]” whose “relation to the United States resembles that of a ward to his guardian.”³⁸ It further noted that tribal nations only possess limited features of sovereignty, subject to the “dominion of the United States.”³⁹ Specifically, treaties between the United States and tribal nations set aside tracts of lands within U.S. territory, and sometimes within U.S. states, as “reservations” for Native American tribes.⁴⁰

The level of Native American sovereignty over these reservations has settled somewhere between the complete sovereignty of an independent nation and a state’s plenary power within a smaller sphere of activities.⁴¹ Tribes manage their reservations, but their sovereignty is far from absolute—in fact, it is “subject to complete defeasance”⁴² by Congress.

³² U.S. CONST. art. I, § 8.

³³ 30 U.S. (5 Pet.) 1 (1831).

³⁴ *Id.* at 16–17, 30.

³⁵ U.S. CONST. art. III, § 2.

³⁶ There are other limitations to the judiciary’s power to hear cases. This excerpt is the part relevant to tribal nations.

³⁷ *See* U.S. CONST. art. III, § 2.

³⁸ 30 U.S. (5 Pet.) at 17.

³⁹ *Id.*

⁴⁰ *See, e.g.*, NATIVE AMERICAN TESTIMONY: A CHRONICLE OF INDIAN–WHITE RELATIONS FROM PROPHECY TO THE PRESENT, 1492–2000 (Peter Nabokov ed., Penguin Books rev. ed. 1999) (1978) (discussing the use of treaty making to remove tribal nations from lands desired by the United States).

⁴¹ *See, e.g.*, *NLRB v. Pueblo of San Juan*, 280 F.3d 1278, 1283, 1286 (10th Cir. 2000) (holding that tribal nation had power to adopt law to work ordinance).

⁴² *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985). This statement was fairly well established at this time. Since the mid-1800s, the Court has incrementally extended

Thus, when Congress passes neutral, generally applicable legislation that does not explicitly mention its applicability in tribal nations, the judiciary must interpret whether and the extent to which that legislation should be applied within tribal territory.⁴³ In determining whether federal legislation is applicable in tribal nations, the judiciary is the entity that determines the degree of sovereignty the tribal nation is to enjoy vis-à-vis that legislation's field. So what are tribal nations, legally speaking? The answer depends on the context, and the most that can be said is that they are unique entities, subordinated at times to the will of Congress, and subject to ever-changing constraints according to the popular ideas of the time.

B. *Conflicting Case Law*

The Supreme Court stated in 1921 that “[i]t is thoroughly established that Congress has plenary authority over the Indians and all their tribal relations.”⁴⁴ But the ability of Congress to assert such power does not imply Congress intends all legislation it passes to impinge upon tribal authority.⁴⁵ Currently, some confusion exists in this area of law.⁴⁶ Since 1960, many courts have followed what is known as the *Tuscarora* rule,⁴⁷ but lower courts are increasingly more likely to apply canons of statutory construction embodied in recent Supreme Court cases.

1. *The Tuscarora Rule and Coeur d’Alene Exceptions.*—Despite its modest beginnings, *Federal Power Commission v. Tuscarora Indian Nation*⁴⁸ exerts major influence regarding the applicability of federal statutes to tribal nations. Decided in 1960, its rather mundane holding—that reservation lands held in fee simple by a tribe are not part of a reservation for purposes of the Federal Power Act⁴⁹—belies its subsequent widespread application.⁵⁰ In what has been characterized as “dicta”⁵¹ or

federal and state power over tribal nations, such that by 1980 tribal self-government was thought to depend upon legislative grants. See *Rice v. Rhener*, 463 U.S. 713, 717–20 (1983).

⁴³ E.g., *United States v. Dion*, 476 U.S. 734, 738–39 (1986).

⁴⁴ *Winton v. Amos*, 255 U.S. 373, 391–92 (1921) (citing *Tiger v. W. Inv. Co.*, 221 U.S. 286, 310–16 (1911); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564 (1903)).

⁴⁵ E.g., *Dion*, 476 U.S. at 738 (stating that “presumably such power will be exercised only when circumstances arise which . . . may demand . . . that [Congress] should do so” (quoting *Lone Wolf*, 187 U.S. at 566)).

⁴⁶ For a discussion of this and predictions about future jurisprudence, see Bryan H. Wildenthal, *How the Ninth Circuit Overruled a Century of Supreme Court Indian Jurisprudence—and Has So Far Gotten Away with It*, 2008 MICH. ST. L. REV. 547, 586–90.

⁴⁷ See *Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960).

⁴⁸ *Id.*

⁴⁹ *Id.* at 115. The Federal Power Act provides for, among other things, federal regulation over and administrative coordination for the construction and maintenance of hydroelectric facilities. See 16 U.S.C. § 797 (2012).

⁵⁰ See, e.g., Wildenthal, *supra* note 46, at 551 (discussing the scope of the *Tuscarora* rule).

“likely dictum,”⁵² the Supreme Court called it “well settled” that “a general statute in terms applying to all persons includes Indians and their property interests.”⁵³ The *Tuscarora* rule broke from the traditional canons of statutory construction⁵⁴ in expressing the presumption that a neutral, generally applicable law that is silent as to its applicability to tribal nations is to be applied to such entities. To many observers, this rule embodied a reversal of the existing presumption against applying silent legislation to tribal nations.⁵⁵ Nonetheless, the *Tuscarora* rule was widely cited to support the application of federal legislation to tribal nations, even if doing so diminished tribal sovereignty.⁵⁶

Since *Tuscarora*, the circuit courts have developed three exceptions to the rule, generally referred to as the *Coeur d’Alene* exceptions. In *Donovan v. Coeur d’Alene Tribal Farm*,⁵⁷ a case about the applicability of the Occupational Safety and Health Act (OSHA) to tribal nations, the Ninth Circuit noted three instances in which the *Tuscarora* presumption in favor of application to tribal nations may be reversed.⁵⁸ The first such exception is when “the law touches exclusive rights of self-governance in purely intramural matters.”⁵⁹ While this exception may seem broad, the Ninth Circuit construed “purely intramural matters” fairly narrowly as “conditions of tribal membership, inheritance rules, and domestic relations.”⁶⁰ The Ninth Circuit’s reading did not except tribal commercial activity.⁶¹ In a later case upholding ERISA’s preemption of a tribal pension plan, the same court narrowed the exception to apply “only where the tribe’s decision-making power is usurped.”⁶² Similar arguments that OSHA,⁶³ the National Labor Relations Act (NLRA),⁶⁴ and the Fair Labor

⁵¹ Kristen E. Burge, Comment, *ERISA and Indian Tribes: Alternative Approaches for Respecting Tribal Sovereignty*, 2000 WIS. L. REV. 1291, 1301.

⁵² Crawford, *supra* note 9, at 265.

⁵³ *Tuscarora*, 362 U.S. at 116.

⁵⁴ See discussion *infra* Part II.B.2.

⁵⁵ See, e.g., Bryan H. Wildenthal, *Federal Labor Law, Indian Sovereignty, and the Canons of Construction*, 86 OR. L. REV. 413, 456 (2007) (arguing that *Tuscarora* conflicts with canons of statutory interpretation).

⁵⁶ See, e.g., *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1309 (D.C. Cir. 2007) (noting the NLRB’s observation that *Tuscarora* has been applied in several contexts).

⁵⁷ 751 F.2d 1113 (9th Cir. 1985).

⁵⁸ *Id.* at 1115–16.

⁵⁹ *Id.* at 1116 (internal quotation marks omitted).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683, 685 (9th Cir. 1991).

⁶³ *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996). The court found that congressional safety regulation of a tribally owned construction business did not impinge upon the tribe’s right of self-governance in purely intramural affairs because construction is a commercial, rather than governmental, activity. *Id.* at 180.

Standards Act (FLSA)⁶⁵ fall under this exception have failed. However, the Ninth Circuit refused to apply the Age Discrimination in Employment Act (ADEA) to tribal nations because it “touches on purely internal matters related to the tribe’s self-governance.”⁶⁶

Second, the *Tuscarora* presumption does not apply when “the application of the law to the tribe would abrogate rights guaranteed by Indian treaties.”⁶⁷ Circuit courts have also narrowly construed this exception. The Seventh Circuit stated “[t]he critical issue is whether application of the statute would jeopardize a *right* that is secured by the treaty.”⁶⁸ The traditional view of treaties with tribal nations considered that a “treaty was not a grant of rights *to* the Indians, but a grant of rights *from* them.”⁶⁹ By looking to the treaty for explicit guarantees, the Seventh Circuit’s construction reversed the traditional view: instead of reading silences in the treaty to retain tribal rights for the tribe, courts examine the treaty for express reservations of tribal rights. The absence of such a reservation is interpreted to mean that the federal government has retained the right to regulate in that area. If the courts find expressly granted rights that federal law would abrogate, the legislation cannot be applied to tribal nations.⁷⁰

Third, the *Tuscarora* presumption is reversed when “there is proof by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations.”⁷¹ In practice, it may be difficult to obtain such proof because legislation silent on its applicability to tribal nations will likely not have legislative history considering the issue.⁷² If the legislators had considered the matter, there is a good chance that the outcome of their deliberations, whatever their inclination, would find itself into the final legislation.

In sum, the *Tuscarora* presumption is broad, and its exceptions are narrow. Once the threshold consideration—the statute’s silence with respect to its application to tribal nations—is met, the *Tuscarora*

⁶⁴ NLRB v. Chapa De Indian Health Program, Inc., 316 F.3d 995 (9th Cir. 2003). Here, the court noted that the health organization was only partially funded by the tribe, and employed many individuals who were not tribal members, so the NLRA was applicable. *Id.* at 1000.

⁶⁵ Solis v. Matheson, 563 F.3d 425 (9th Cir. 2009). The court found that, because the tribe had not enacted regulation with respect to wage and hour, it had elected to forgo regulation in this area, and therefore federal legislation did not impinge on the tribe’s right of self-governance. *Id.* at 434.

⁶⁶ EEOC v. Karuk Tribe Hous. Auth., 260 F.3d 1071, 1080 (9th Cir. 2001) (internal quotation marks omitted).

⁶⁷ Donovan v. Coeur d’Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985) (internal quotation marks omitted).

⁶⁸ Smart v. State Farm Ins. Co., 868 F.2d 929, 935 (7th Cir. 1989) (emphasis added).

⁶⁹ United States v. Winans, 198 U.S. 371, 381 (1905) (emphasis added).

⁷⁰ See United States v. White, 508 F.2d 453, 456 (8th Cir. 1974).

⁷¹ *Coeur d’Alene*, 751 F.2d at 1116 (alteration in original) (internal quotation marks omitted).

⁷² Crawford, *supra* note 9, at 267.

presumption is applied. Only if a statute fits into one of three narrow exceptions will a court following *Tuscarora* find that the statute does not apply to tribal nations.

2. *Traditional Canons of Statutory Construction with Respect to Tribes.*—Although numerous lower court decisions have applied the *Tuscarora* rule,⁷³ the Supreme Court has never evaluated it. Juxtaposed with the *Tuscarora* precedents is a competing line of cases which invoke Supreme Court jurisprudence concerning traditional canons of statutory construction.⁷⁴ Three canons are of particular relevance to navigating the inquiry into whether a neutral, generally applicable statute, silent as to its applicability to tribes, is intended to apply to tribal nations.⁷⁵

The first traditional canon demands that if Congress intends to abrogate tribal sovereignty, it must clearly express this intent.⁷⁶ This, in effect, is a presumption against the applicability of legislation to tribal nations unless that legislation expressly states that it is to be so applied.⁷⁷ Notably, this canon directly contradicts the *Tuscarora* presumption in favor of applicability to tribal nations.

The second canon of construction from the Supreme Court is that any ambiguity in a provision of federal legislation must be interpreted in a manner that benefits the tribes.⁷⁸ Two considerations acknowledged in Supreme Court jurisprudence weigh in favor of interpreting legislation this way. First, there is a disparity in power between the federal government and tribal nations.⁷⁹ Application of this canon leads to reading statutes and provisions to have as little impact as possible on tribal nations.⁸⁰ Second, the federal government has trust responsibilities for the tribal nations that it

⁷³ Mainly the Second, Seventh, and Ninth Circuits. *See, e.g.*, *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 181 (2d Cir. 1996) (finding that OSHA was properly applied to a tribally owned construction company); *Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683, 685 (9th Cir. 1991) (determining that ERISA applied to the pension plans of employees of a tribally owned sawmill); *Smart*, 868 F.2d at 935–36 (holding that ERISA applied to a tribal employer and its tribal employees of a reservation health center).

⁷⁴ The Eighth and Tenth Circuits generally invoke these canons. *See, e.g.*, *EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 250–51 (8th Cir. 1993) (finding that ADEA does not apply to employment discrimination within tribal nations); *Donovan v. Navajo Forest Prods. Indus.*, 692 F.2d 709, 711–12 (10th Cir. 1982) (holding OSHA inapplicable to a tribal business in a tribal nation).

⁷⁵ *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999); *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1311 (D.C. Cir. 2007).

⁷⁶ *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 202; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978); *San Manuel Indian Bingo & Casino*, 475 F.3d at 1311.

⁷⁷ This was the prevailing rule before *Tuscarora*. *See supra* note 53 and accompanying text.

⁷⁸ *Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *Bryan v. Itasca Cnty.*, 426 U.S. 373, 390–92 (1976); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 174–76 (1973).

⁷⁹ *See McClanahan*, 411 U.S. at 174 (quoting *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930)).

⁸⁰ *See, e.g., Yakima Indian Nation*, 502 U.S. at 269 (applying the canon to hold that a tax on the sale of tribal land was not allowed under a county's excise tax).

does not have with respect to the states.⁸¹ The exact contours of this responsibility have shifted over time, but generally speaking it imposes a fiduciary duty on the federal government.⁸²

The final canon of construction dictates that ambiguous legislation should be interpreted to further current federal policy goals, as indicated by congressional pronouncements.⁸³ The current federal policy with respect to tribal nations is to promote self-sufficiency and self-determination, so ambiguous statutory language should be read in a way to facilitate those goals.⁸⁴ This canon cuts against application of general statutes to tribal nations because self-sufficiency and self-determination suggest that the tribal nations be governed according to their own statutes, not those of the federal government. On a smaller scale, the canon suggests that courts resolve ambiguities within a statute applicable to tribal nations in such a manner to promote tribal self-sufficiency and self-determination.

The Supreme Court's repeated endorsement of these canons of statutory construction would suggest they are the preferred approach to the issue of applicability of federal legislation to tribal nations; especially so since the Court has yet to endorse the *Tuscarora* presumption as applied in circuit courts.⁸⁵ Whatever the reasons for the Court's silence regarding *Tuscarora*, it has created some doctrinal confusion for lower courts, which are unsure whether to apply *Tuscarora* or the Court-endorsed canons of statutory construction. And this choice is important: *Tuscarora* cuts against tribal autonomy, while the canons of statutory construction promote it. Amidst this doctrinal confusion, it is not surprising that circuit courts disagreed as to whether ERISA properly applies to tribal nations—at least until the 2006 amendment clarified Congress's intent.⁸⁶

⁸¹ *E.g.*, *Cnty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985).

⁸² *See* *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2324–26 (2011) (discussing various conceptions of the trust responsibilities including holding land in trust and fiduciary duties).

⁸³ *See, e.g.*, *Yakima Indian Nation*, 502 U.S. at 275–76 (Blackmun, J., concurring in part and dissenting in part) (discussing interpreting ambiguities in light of congressional policy).

⁸⁴ *See, e.g.*, *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1183 (10th Cir. 2010) (internal quotation marks omitted) (“The broad interpretation of tribal sovereign immunity can trace its origins to Congress’ desire to promote the goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development . . .”).

⁸⁵ *See, e.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) (“Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so.”); *Yakima Indian Nation*, 502 U.S. at 269 (majority opinion) (stating that the canon to construe ambiguities in favor of tribes to be “a principle deeply rooted in this Court’s Indian jurisprudence”); *Oneida Indian Nation*, 470 U.S. at 247 (“[I]t is well established that treaties should be construed liberally in favor of the Indians . . .”).

⁸⁶ Pension Protection Act, Pub. L. No. 109-280, § 906(a), 120 Stat. 780, 1051–52 (2006) (codified as amended at 29 U.S.C. § 1002(32)).

III. ERISA'S APPLICABILITY TO TRIBAL NATIONS

After ERISA's enactment in 1974, there was some confusion among pension plan administrators and courts alike concerning ERISA's applicability to tribal nations. As a general matter, whether a federal law is applicable in tribal nations depends mainly on the evinced intent of Congress.⁸⁷ Because ERISA was silent as to its applicability to tribal nations, the competing case lines discussed *supra* came to different conclusions. Prior to 2006, both the Seventh⁸⁸ and Ninth⁸⁹ Circuits applied the *Tuscarora* rule in holding that ERISA was applicable in tribal nations, whereas a court in the Eastern District of Washington found that tribal nations were included in one of ERISA's exceptions and therefore ERISA did not apply on tribal reservations.⁹⁰ In amending ERISA, the Pension Protection Act of 2006 clarified Congress's intent to make ERISA applicable to tribal nations by explicitly excluding tribal governmental plans from ERISA's ambit.⁹¹ This Part briefly surveys the ERISA landscape before and after the amendment.

Prior to the Pension Protection Act of 2006, the Ninth and Seventh Circuits started with the *Tuscarora* presumption that Congress intended to make ERISA applicable in tribal nations and analyzed ERISA's regulatory target to determine if any of the *Coeur d'Alene* exceptions applied. In *Lumber Industry v. Warm Springs*,⁹² the Warm Springs Indian Reservation passed an ordinance requiring every tribal business enterprise to offer the same level of benefits and plan flexibility to tribal members as those members would receive under the tribal plan.⁹³ The tribal lumber mill stopped making payments to the multi-employer pension plan, as that plan did not meet the ordinance's requirements.⁹⁴ The pension plan sued and lost in the district court.⁹⁵

On appeal, the Ninth Circuit primarily focused on the first *Tuscarora* exception: whether "the law touches exclusive rights of self-governance in purely intramural matters."⁹⁶ The court seemed to narrow the exception,

⁸⁷ See, e.g., *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 202 (holding that Congress must evince clear intent to abrogate treaty rights); *Yakima Indian Nation*, 502 U.S. at 259 (holding that Congress in the Burke Act made clear its intent to permit a state to tax Native American land).

⁸⁸ *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 932–36 (7th Cir. 1989).

⁸⁹ *Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683, 685–86 (9th Cir. 1991).

⁹⁰ *Colville Confederated Tribes v. Somday*, 96 F. Supp. 2d 1120, 1130–35 (E.D. Wash. 2000).

⁹¹ 120 Stat. at 1051–52 (codified as amended at 29 U.S.C. § 1002(32)).

⁹² 939 F.2d 683.

⁹³ *Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 730 F. Supp. 324, 326 (E.D. Cal. 1990), *rev'd*, 939 F.2d 683.

⁹⁴ *Id.*

⁹⁵ *Id.* at 329.

⁹⁶ *Lumber Indus. Pension Fund*, 939 F.2d at 685 (quoting *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985)) (internal quotation marks omitted).

determining that applying ERISA on the Warm Springs Indian Reservation would not “usurp the tribe’s decision-making power,”⁹⁷ nor impinge upon tribal self-government because it did “not encroach on the tribe’s right of self-governance in passing or enforcing”⁹⁸ the ordinance’s requirements. That is, the court thought that ERISA’s funding requirements were a separate issue that did not impinge upon the tribe’s ability to enact minimum pension plan benefit requirements. The court then summarily rejected the remaining two exceptions as inapplicable.⁹⁹

In *Smart v. State Farm Insurance Co.*,¹⁰⁰ decided in 1989, the Seventh Circuit upheld ERISA’s application to tribal nations, writing, “[a] statute of general application will not be applied to an Indian Tribe when the statute threatens the Tribe’s ability to govern its intramural affairs, but not simply whenever it merely affects self-governance as broadly conceived.”¹⁰¹ It concluded that applying ERISA did not affect any positive treaty rights and that it could not find any evidence of congressional intent to exclude tribal nations from the reach of the statute.¹⁰²

In 2006, Congress passed the Pension Protection Act, which substantially amended ERISA. This amendment added to ERISA’s “governmental plan” definition, discussed *supra*, explicitly exempting tribal government pension plans for individuals performing essential government functions.¹⁰³ This language served two functions. First, it exempted certain tribal governmental plans from the reach of ERISA. More importantly, however, it clarified that Congress originally intended ERISA to apply to tribal nations.¹⁰⁴ If ERISA did not apply to them, there would be no reason to amend the statute to include the tribal government exception: such tribal government pension plans would already have been excluded. This comports with *expressio unius est exclusio alterius*, the canon of statutory construction stating that “to express or include one thing implies the exclusion of the other.”¹⁰⁵ Furthermore, if Congress had intended to prohibit wholesale ERISA’s application in tribal territory, it likely would have made a straightforward statement to that effect, rather than leaving ERISA’s exact scope to judicial intuition.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 685–86.

¹⁰⁰ 868 F.2d 929 (7th Cir. 1989).

¹⁰¹ *Id.* at 935.

¹⁰² *Id.* at 936.

¹⁰³ Pension Protection Act, Pub. L. No. 109-280, § 906(a), 120 Stat. 780, 1051 (2006) (codified as amended at 29 U.S.C. § 1002(32)).

¹⁰⁴ Crawford, *supra* note 9, at 279.

¹⁰⁵ BLACK’S LAW DICTIONARY 620 (9th ed. 2009).

To summarize: ERISA appears to generally apply in tribal nations.¹⁰⁶ By ERISA's plain language, it applies to all private employers operating within tribal nations and offering pension plans, whether or not they employ tribal members.¹⁰⁷ By the Pension Plan Act's plain language, when the tribal government or subdivision thereof is the employer, ERISA applies if not all of its employees are predominantly performing essential government functions.¹⁰⁸ And because Congress has plenary power to regulate interstate commerce within the nation's borders, ERISA governs the pension plans of tribal members working in the United States, outside the tribal nation.¹⁰⁹ Because ERISA will be widely in force in tribal nations, it is important to determine the extent to which tribal courts can participate in the important judicial tasks ERISA requires, including issuing marital-asset division orders.

IV. ANALYSIS: WILL ERISA ADMINISTRATORS ACCEPT TRIBAL COURT DOMESTIC RELATIONS ORDERS?

The relationship between ERISA and tribal nations raises important questions regarding the ability of tribal courts to serve as the judicial mediator required by ERISA. In divorce and child support contexts, ERISA predicates a plan administrator's action on the administrator receiving an order "made pursuant to a State domestic relations law."¹¹⁰ While this seems to be a simple phrase, it raises important issues for tribal sovereignty. Given that a particular set of code is considered state law, it is unclear whether a particular judicial identity necessarily inheres within that code. That is, does substantive state law, when applied by an entity not endowed with the power to interpret that law, retain its identity as state law? Or are state courts the sole exercisers of state law?

The DOL concluded in an Advisory Opinion that, according to the definitions in ERISA (as discussed *infra*), a tribal court is not a state court, so tribal court orders are not made pursuant to state law, unless the state has a statute recognizing tribal court orders as being made pursuant to state law.¹¹¹ Based on this Advisory Opinion, the DOL directed plan administrators to not honor the tribal court marital-asset division orders.¹¹² But this conclusion ignored a more plausible interpretation of the ERISA provisions: if a tribal court has available in tribal code a choice of law provision allowing the application of state law, and were to import that state law to divide the marital assets, then the action would have been taken

¹⁰⁶ See Crawford, *supra* note 9, at 279.

¹⁰⁷ See Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1003 (2006).

¹⁰⁸ See Crawford, *supra* note 9, at 278–79.

¹⁰⁹ § 1003(a)(1)–(3).

¹¹⁰ *Id.* § 1056(d)(3)(B)(ii)(II).

¹¹¹ Department of Labor 2011 Opinion Letter, *supra* note 8, at *2–3.

¹¹² *Id.* at *3.

pursuant to state law as required by ERISA. In that instance, plan administrators should treat the tribal court order just as they would an order coming from a state court. Of course, if the tribal nation does not have a choice of law provision to utilize issuing the division order, then plan administrators would be more hard-pressed to accept it, and judicial clarification should be sought.

A. *The United States DOL Advisory Opinion*

Recently, PNM Resources, an extensive energy holding company based in Albuquerque, New Mexico,¹¹³ requested an advisory opinion from the United States DOL, inquiring whether ERISA benefit plan administrators can honor tribal court domestic relations orders for purposes of ERISA.¹¹⁴ PNM Resources employs approximately 2000 people,¹¹⁵ many of whom are members of the twenty-two Native American tribes found in New Mexico.¹¹⁶ Because these tribal members often live in tribal nations and have access to tribal courts, PNM received draft domestic relations orders issued by tribal courts.¹¹⁷ PNM, as a corporation that must comply with ERISA in offering its employee pension benefit plans, sought guidance from the DOL as to whether it could accept tribal court orders issued by the Family Court of the Navajo Nation.¹¹⁸

The DOL's analysis is easily summarized. To begin, the DOL noted that pension plan benefits generally cannot be assigned or alienated.¹¹⁹ However, there are exceptions to this general rule, including assignments pursuant to a qualified domestic relations order.¹²⁰ Pension plan providers must comply with the terms of such an order.¹²¹

Continuing its analysis, the DOL noted that a qualified domestic relations order is defined in ERISA as a domestic relations order "which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the

¹¹³ *Corporate Overview*, PNM RESOURCES, <http://www.pnmresources.com/corporate/corpOverview.cfm> (last visited Mar. 30, 2014).

¹¹⁴ Department of Labor 2011 Opinion Letter, *supra* note 8, at *1.

¹¹⁵ *PNM Resources Inc.*, WALL ST. J., <http://quotes.wsj.com/PNM/company-people> (last visited Mar. 30, 2014).

¹¹⁶ Department of Labor 2011 Opinion Letter, *supra* note 8, at *1. As of 2003, approximately four percent of the then-2600 employees were Native American. News Release, PNM Resources, PNM Once Again Named One of Best U.S. Companies for Minority Employees (July 2, 2003) (on file with the *Northwestern University Law Review*).

¹¹⁷ Department of Labor 2011 Opinion Letter, *supra* note 8, at *1.

¹¹⁸ *Id.*

¹¹⁹ *Id.* (referring to the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 206(d)(1), 88 Stat. 829, 864 (codified at 29 U.S.C. § 1056)).

¹²⁰ § 1056(d)(3)(A) (2006).

¹²¹ *See id.*

benefits payable with respect to a participant under a plan.”¹²² A “domestic relations order,” in turn, is

any judgment, decree, or order (including approval of a property settlement agreement) which—(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and (II) is made pursuant to a State domestic relations law (including a community property law).¹²³

Following the chain of definitions one link further, “State,” as noted *supra*, is defined as “any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, and the Canal Zone.”¹²⁴ Notably, this definition does not include tribal nations.

A pension plan administrator, upon receiving a domestic relations order, must determine whether it is “qualified” pursuant to a State domestic relations law.¹²⁵ Up to this point in the analysis, the Advisory Opinion simply linked the various relevant definitions contained in ERISA. However, the Opinion went on to append an additional requirement, one that the DOL explicitly admitted is not found in the statute. It stated that the qualified domestic relations order made pursuant to state law must be issued “by a State authority with jurisdiction over such matters.”¹²⁶ The DOL justified adding the above clause by reasoning:

A principal purpose of ERISA section 206(d)(3) is to permit the division of marital property on divorce in accordance with the directions of the State authority with jurisdiction to achieve an appropriate disposition of property upon the dissolution of a marriage, as defined under State law. *Nothing in ERISA section 206(d)(3) requires that a domestic relations order be issued by a State court.* Rather, the Department has previously concluded that a division of marital property in accordance with the proper final order of any State authority recognized within the State’s jurisdiction as being empowered to achieve such a division of property pursuant to State domestic relations law (including community property law) would be considered a “judgment, decree, or order” for purposes of ERISA section 206(d)(3)(B)(ii).¹²⁷

Thus, while explicitly noting that ERISA does not require that a domestic relations order be issued by a state court, it in effect appended such a requirement because nothing in the Advisory Opinion’s language actually precludes other sources from being considered a “judgment, decree, or order.”

¹²² Department of Labor 2011 Opinion Letter, *supra* note 8, at *1 (quoting § 1056(d)(3)(B)(i)).

¹²³ *Id.* (quoting § 1056(d)(3)(B)(ii)).

¹²⁴ *Id.* at *2 (quoting § 1002(10)).

¹²⁵ *Id.* (citing § 1056(d)(3)(G)).

¹²⁶ *Id.*

¹²⁷ *Id.* (emphasis added).

Finally, the DOL noted that certain states have laws addressing jurisdictional issues with respect to tribal court domestic relations orders.¹²⁸ For example, an Oregon statute provides, “[a] foreign judgment of a tribal court . . . filed in a circuit court . . . that . . . [is] a domestic relations order as defined in 26 U.S.C. 414(p), is a domestic relations order made pursuant to the domestic relations laws of this state for the purposes of 26 U.S.C. 414(p).”¹²⁹ In accordance with the DOL’s defining clause, it reasoned that in states such as Oregon, the tribal courts’ domestic relations orders would constitute a qualified domestic relations order for purposes of ERISA, because the state had endorsed the tribal court’s jurisdiction.¹³⁰ Because New Mexico did not have such a law, the DOL concluded by stating that it *could not conclude* that a domestic relations order from the Family Court of the Navajo Nation would be a domestic relations order that pension plan administrators could honor under ERISA.¹³¹

DOL advisory opinions purport to only evaluate the facts to which they respond.¹³² Such opinions are not binding on courts, although they may be persuasive to the extent that their reasoning is persuasive.¹³³ But the DOL’s reasoning is not persuasive. This opinion improperly restricted the source of qualified domestic relations orders, and in so doing, stripped tribal courts of the power to adjudicate claims for their own members. While the issue has yet to be heard in state or federal court, once it is, for the reasons discussed *infra* the reasoning should be refuted.

B. Weaknesses in the Advisory Opinion

The main problem with the Advisory Opinion is its addition of the phrase “by a State authority with jurisdiction over such matters.” At first glance, it may seem like this phrase is an innocuous redundancy that does not change anything substantive at all, but rather states the obvious: for a domestic relations order to be valid, it must be issued by a court with the power to do so. Intuitively, it does not seem controversial to say that a domestic relations order drawn up by an aspiring amateur attorney would not qualify as a valid domestic relations order, no matter how closely and accurately the attorney followed the state law regarding domestic relations. An examination of the language of ERISA confirms this: section 206(d)(3)(B)(i)(I) defines “qualified domestic relations order” as a domestic relations order “which *creates* or *recognizes* the existence of an

¹²⁸ *Id.*

¹²⁹ OR. REV. STAT. § 24.115(4) (2011).

¹³⁰ Department of Labor 2011 Opinion Letter, *supra* note 8, at *2.

¹³¹ *Id.* at *3.

¹³² *Advisory Opinions*, U.S. DEP’T OF LAB., <http://www.dol.gov/ebsa/regs/AOs/main.html> (last visited Mar. 30, 2014).

¹³³ *Alexander v. Brigham & Women’s Physicians Org., Inc.*, 513 F.3d 37, 47 (1st Cir. 2008).

alternate payee's *right* to . . . receive . . . benefits."¹³⁴ Thus, ERISA says that one of the requirements for a domestic relations order to be qualified is that it must create or recognize a right. The term "right" implies that there must be a legal consequence *somewhere* to the creation of the domestic relations order,¹³⁵ but the statute does not go so far as to specify *where* exactly that right must be created.

But the phrase added to the Advisory Opinion does more than simply prohibit the backroom, amateur attorney from making a living selling qualified domestic relations orders; it prohibits tribal courts from doing so. In this way it is worse than redundant: it is overly restrictive because courts that should have authority to issue qualified domestic relations orders under the plain language of ERISA are precluded from exercising it. It is a plausible, natural reading of the statute that any court with proper jurisdiction over the individuals seeking the domestic relations order may draw up such an order, pursuant to state law.¹³⁶

What then is the purpose of the word "recognize" in ERISA? Canons of statutory interpretation instruct that words should not be construed such that their inclusion is superfluous.¹³⁷ The Advisory Opinion opined that a state must have a statute that explicitly recognizes the validity of tribal domestic relations orders, thereby bringing them under state law, before ERISA plan administrators can recognize them. This interpretation follows this canon of construction, but it is not the only possibility. It seems at least equally likely that "recognize" was included to allow state laws to acknowledge the validity of domestic relations orders created pursuant to tribal domestic relations law,¹³⁸ or another jurisdiction's native body of law (e.g., another state's law). That is, it imparts to the states the discretion to recognize a tribal-judiciary-created right as state law that otherwise would not be state law. Furthermore, this reading of "recognize" avoids the unnecessarily constrained reading of "create" that the Advisory Opinion advocates, making it the better interpretation.¹³⁹

C. *What Does It Mean to Be Made Pursuant to State Law?*

Even granting that a tribal court may, in some instances, be an appropriate adjudicatory body, ERISA still requires that a "domestic

¹³⁴ 29 U.S.C. § 1056(d)(3)(B) (2006) (emphasis added).

¹³⁵ See BLACK'S LAW DICTIONARY, *supra* note 105, at 1436.

¹³⁶ "[A]ny judgment, decree, or order (including approval of a property settlement agreement) which . . . is made pursuant to a State domestic relations law (including a community property law)." § 1056(d)(3)(B)(ii).

¹³⁷ *E.g.*, *Raven Red Ash Coal Corp. v. Absher*, 149 S.E. 541, 542 (Va. 1929) ("Every part of an act is presumed to be of some effect, and is not to be treated as meaningless unless absolutely necessary.").

¹³⁸ Such as the Oregon statute discussed *supra* at note 129.

¹³⁹ The Opinion constrains "create" by interpreting it to require creation by a particular adjudicatory body.

relations order” be “made pursuant to a State domestic relations law.”¹⁴⁰ The Advisory Opinion correctly asserts that the ERISA definition of “State” does not include tribal nations.¹⁴¹ It follows that a domestic relations order created under a tribal nation’s domestic relations law¹⁴² would not qualify under ERISA, and would therefore force tribal members into state court, unless the state explicitly authorizes the contrary. (For policy reasons, plan administrators should be allowed to recognize domestic relations orders issued by tribal courts as “qualified” under ERISA, but this situation will be discussed *infra* more thoroughly.)

However, many tribal nations’ codes have a choice of law provision allowing tribal courts to employ state law, as opposed to tribal law, in appropriate circumstances.¹⁴³ In such instances, the plain language of ERISA is satisfied because ERISA only requires that the domestic relations order be “made pursuant to a State domestic relations law.”¹⁴⁴ Thus, when a tribal court uses state law, the resulting decision is pursuant to state law as required by ERISA, so ERISA plan administrators should accept these orders.

A counterargument is that a tribal judicial system’s use of state law via a choice of law provision is arguably an incorporation of state law into tribal domestic laws; the law resulting from invoking a choice of law provision to use state law in effect yields tribal law that mimics the substance of state law without actually borrowing its identity.¹⁴⁵ Under this reasoning, it could be said that the result of a tribal court’s application of state law is not a result “pursuant to state law” because the state law ceased to be state law upon incorporation into the tribal judicial system. But this is contrary to the normal understanding of choice of law provisions.¹⁴⁶ Federal courts sitting in diversity are not said to be applying federal law; they are choosing which state law to apply.¹⁴⁷ Furthermore, state courts often apply the laws of other states where substantial portions of the alleged violations

¹⁴⁰ § 1056(d)(3)(B)(ii)(II).

¹⁴¹ Department of Labor 2011 Opinion Letter, *supra* note 8, at *2.

¹⁴² For example, NAVAJO NATION CODE ANN. tit. 9, § 407 (2005) requires a divorce decree issued by a tribal court to end a customary marriage.

¹⁴³ For example, NAVAJO NATION CODE ANN. tit. 7, § 204, discussed *infra* in Part IV.D, allows for the importation of federal law when applicable, and state law when Navajo and federal law are silent on the issue.

¹⁴⁴ 29 U.S.C. § 1056(d)(3)(B)(ii)(II) (2006).

¹⁴⁵ See, e.g., *In re Commitment of Lawrence Lee Jr.*, CA 99-03, at *4 (Rbd. Sx. Tr. Sup. Ct. July 12, 2000) (per curiam), available at <http://sicanguoyatebar.org/wp-content/uploads/2011/05/In-re-Commitment-of-Lawrence-Lee-Jr.-CA-99-031.pdf> (“However, when the trial court applied ‘state’ law principles in the *past* to matters of ‘mental commitment’, those state precepts of law became tribal law.”).

¹⁴⁶ See *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding that a federal court sitting in diversity actions must apply the law of the state, as “[t]here is no federal general common law”).

¹⁴⁷ See *id.*

occurred.¹⁴⁸ With the understanding that a choice of law provision allows a jurisdiction to apply the laws of another jurisdiction, the issue becomes whether a specific statute allows it.

Furthermore, even given that a choice of law provision provides results pursuant to the loaner state's laws, there is still the argument that the tribal court is applying tribal law (by rebranding state law as tribal law), not state law. But this is of no consequence. According to *Black's Law Dictionary*, "pursuant to" means "[i]n compliance with" or "in accordance with."¹⁴⁹ The exact identity of the law is less important than is the content of the law. If the process of decisionmaking and the results of the decision are the same as they would be in a state court applying state law, then it can be said that the tribal court's decision is pursuant to state law.

D. Choice of Law in the Navajo Nation

Tribal courts may or may not have a choice of law provision available to them. The form varies among those that do. The Navajo Nation is one of the largest tribal nations in the United States,¹⁵⁰ and its choice of law provision makes for an interesting study because of its complexity. The Navajo Nation Code¹⁵¹ choice of law provision states:

- A. In all cases the courts of the Navajo Nation shall first apply applicable Navajo Nation statutory laws and regulations to resolve matters in dispute before the courts. The Courts shall utilize Diné bi beenahaz'áanii (Navajo Traditional, Customary, Natural or Common Law) to guide the interpretation of Navajo Nation statutory laws and regulations. The courts shall also utilize Diné bi beenahaz'áanii whenever Navajo Nation statutes or regulations are silent on matters in dispute before the courts.
- B. To determine the appropriate utilization and interpretation of Diné bi beenahaz'áanii, the court shall request, as it deems necessary, advice from Navajo individuals widely recognized as being knowledgeable about Diné bi beenahaz'áanii.
- C. The courts of the Navajo Nation shall apply federal laws or regulations as may be applicable.
- D. Any matters not addressed by Navajo Nation statutory laws and regulations, Diné bi beenahaz'áanii or by applicable federal laws and

¹⁴⁸ See, e.g., *State Farm Mut. Auto. Ins. Co. v. Olsen*, 406 So. 2d 1109, 1111 (Fla. 1981) (discussing the application of Illinois law in Florida state courts).

¹⁴⁹ BLACK'S LAW DICTIONARY, *supra* note 105, at 1356.

¹⁵⁰ Cindy Yurth, *Census: Native Count Jumps by 27 Percent*, NAVAJO TIMES, Jan. 26, 2012, available at <http://navajotimes.com/news/2012/0112/012612census.php>; see Bill Donovan, *Census: Navajo Enrollment Tops 300,000*, NAVAJO TIMES, July 7, 2011, at A1, available at <http://navajotimes.com/news/2011/0711/070711census.php>.

¹⁵¹ The Navajo Nation Code is analogous to federal statutory law. See *MacArthur v. San Juan Cnty.*, 391 F. Supp. 2d 895, 965 (D. Utah 2005).

regulations, may be decided according to comity with reference to the laws of the state in which the matter in dispute may have arisen.¹⁵²

This choice of law provision is similar to those of other tribal nations that direct the court to apply the first applicable code provision found from a list of potentially applicable bodies of law, ordered in descending preference.¹⁵³ A Navajo Nation tribal court must first apply Navajo Nation statutory law, supplemented with Navajo common law, then any applicable federal law, and finally must reference state laws only if it finds the former sources lacking.

The relevant question for purposes of ERISA is whether the Navajo Nation choice of law provision allows tribal courts to issue domestic relations orders pursuant to state law. The answer is unclear and probably depends on the tribal court and the framing of the issue. On the one hand, Navajo Nation common law governs the division of assets upon the dissolution of a marriage.¹⁵⁴ If this is the case, then the Navajo court would not be allowed to invoke the fourth provision and decide the case in comity with state laws. Because the order would be based on tribal law, ERISA's mandate that the domestic relations order be pursuant to state law would not be met, and tribal members would be forced into state court to divide marital assets.

However, a creative and willing tribal court could utilize one of two ways in which its decision could be made pursuant to state law and therefore satisfy ERISA. The first way is with respect to the Navajo Nation common law. Common law is judge-made law. Thus, the court could exercise its common-law-making power and find that the Navajo Nation common law, for cases in which the tribal members will be forced to adjudicate their claims in a foreign court if the Navajo court order does not comply with ERISA, dictates that the court use state substantive law. Such an order would then be pursuant to state law and the plain language of ERISA would be satisfied.

A second approach would require reframing the issue. Because the Navajo Nation Code mandates referencing state law when Navajo Nation law does not speak to the issue,¹⁵⁵ the court could frame the issue not simply as a division of marital assets, but more specifically as the division of marital assets for pension benefit plans governed by ERISA. The Navajo Nation has neither statutory provisions nor common law doctrine that

¹⁵² NAVAJO NATION CODE ANN. tit. 7, § 204 (2005).

¹⁵³ See, e.g., LUMNI NATION CODE tit. 4, § 4.07.010 (2008); SAC AND FOX NATION CODE tit. 9, § 8 (1985).

¹⁵⁴ RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE 179–80 (2009). For a discussion of related topics and court cases, see *id.*

¹⁵⁵ NAVAJO NATION CODE ANN. tit 7, § 204 (2005).

would thus be applicable,¹⁵⁶ and the court could reference state law, issue an order pursuant to it, and again, meet ERISA's plain-language demands. Were a Navajo court to employ either of these approaches, the result would both comply with the directives of the Navajo Nation choice of law provision and produce a result in accordance with the plain language of ERISA.

V. POLICY CONSIDERATIONS

Relevant policy considerations also suggest that tribal nations be allowed to issue qualified domestic relations orders that can be honored by ERISA administrators. Even when tribal nations lack a choice of law provision and therefore do not have the capability to apply state law, tribal courts should still be able to issue domestic relations orders that will be honored by ERISA administrators, because so allowing increases tribal autonomy and continues the tribal courts' role of safeguarding tribal customs and understandings, instead of subordinating them to the ideas of the mainstream American culture and jurisprudence.

A. Increasing Tribal Autonomy

Increasing tribal autonomy is an oft-repeated goal of federal policy.¹⁵⁷ This goal is exemplified by, among other things, allowing tribal gaming ventures.¹⁵⁸ These gaming ventures required many employees,¹⁵⁹ which led to competition for employees,¹⁶⁰ which likely contributed to these tribal gaming ventures offering employee benefit plans, including pension plans.¹⁶¹ The proliferation of these pension plans was a significant factor contributing to ERISA's widespread application across tribal nations, which is—the views of certain courts notwithstanding¹⁶²—arguably an

¹⁵⁶ See NAVAJO NATION CODE ANN. A search for "ERISA" in Navajo court cases reveals no relevant authority. *Tribal Court Decisions Search Results*, PICO SEARCH, <http://www.picosearch.com/cgi-bin/ts.pl?index=130686;query=erisa;SEARCH=Search;opt=ANY> (last visited Apr. 11, 2014).

¹⁵⁷ See, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (noting that an inquiry into the applicability of state bingo regulation is colored by the policy of tribal autonomy); *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1182–83 (10th Cir. 2012) (holding that tribal sovereign immunity was an important part of tribal self-determination).

¹⁵⁸ See *Chukchansi Gold Casino & Resort*, 629 F.3d at 1183; William Buffalo & Kevin J. Wadzinski, *Application of Federal and State Labor and Employment Laws to Indian Tribal Employers*, 25 U. MEM. L. REV. 1365, 1366 (1995).

¹⁵⁹ See Buffalo & Wadzinski, *supra* note 158.

¹⁶⁰ See Burge, *supra* note 51, at 1292 n.5 (giving the example of the Potawatomi Bingo Casino using pension plans to recruit employees).

¹⁶¹ *Id.* at 1291–92 & n.5.

¹⁶² See *Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683, 685 (9th Cir. 1991) (following *Tuscarora* in finding ERISA applicable to a tribally owned sawmill); see also *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 932–36 (7th Cir. 1989) (following *Tuscarora* in finding ERISA applicable to tribal health center employees).

infringement on the autonomy and sovereignty of these tribes. Nonetheless, ERISA's current application to tribal nations is fairly established law because of the Pension Protection Act of 2006 amendments to ERISA.¹⁶³ But ERISA's regulation of private entities within tribal nations does not render moot the federal policy of increasing tribal autonomy, nor the canons of statutory construction repeatedly expounded upon by the Supreme Court.¹⁶⁴ And so the focus of interpretation moves from the macro to the micro: from the issue of wholesale applicability to how best to interpret specific provisions of ERISA.

The main problem with not allowing ERISA administrators to honor tribal courts' domestic relations orders is that it reduces tribal autonomy. Tribal courts are not allowed to interface with a statute that affects many of their tribal members. A tribal member seeking marital-asset division upon divorce is then forced to go to a state court to obtain a domestic relations order that an employer will honor. This presents both jurisdictional and practical problems, both of which function to reduce the role of tribal courts in shaping the domestic relations of their own tribal members, and, in so doing, reduces tribal autonomy.

At a general level, different jurisdictional conditions exist between tribal nations and their host states. In some instances there will be concurrent jurisdiction, in which case the state court of the state of the tribal nation has jurisdiction over disputes between Native Americans about events arising or occurring solely in tribal nations.¹⁶⁵ This will not create jurisdictional difficulties for tribal members seeking division of pension plans issued by tribe-owned corporations, although it still creates practical problems. In other instances, however, the tribal court will have exclusive jurisdiction.¹⁶⁶ This means that the tribal member will not be able to obtain a state court domestic relations order; instead, she will be forced to obtain a tribal court domestic relations order and hope to have it recognized by the ERISA plan administrator.

In the first scenario, the tribal member is incentivized to forego tribal court for state court to ensure that the plan administrator will recognize the court's order as "qualified" under ERISA. To the extent that tribal members seek redress in state court, this approach decreases utilization of tribal courts, concomitantly reduces tribal court influence over tribal members and tribal policy, and thereby reduces tribal autonomy as a whole. In the second instance, the tribal member must find a state court that is

¹⁶³ See Crawford, *supra* note 9, at 279.

¹⁶⁴ See *supra* Part II.B.2 (discussing the canons of construction).

¹⁶⁵ See Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1632–35 (1998).

¹⁶⁶ *Williams v. Lee*, 358 U.S. 217, 223 (1959) ("There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs . . .").

willing and able to certify a domestic relations order from the tribal court,¹⁶⁷ which would allow the ERISA administrator to honor it. This creates a subservient relationship between the two entities, and raises questions about the type of review the state court will perform.

Practically speaking, not allowing tribal members to utilize tribal courts to obtain domestic relations orders for purposes of complying with ERISA means that tribal members are forced to travel to courts to which they may have no substantial connection (other than that the court happens to be in the same state as the reservation) and which may be farther from where they live than their tribal court.¹⁶⁸ This makes it unnecessarily difficult to obtain a domestic relations order that will be honored by ERISA administrators. Certainly, tribal members who work for private employers outside of tribal nations can expect to be somewhat accountable for their activities to the local government of that jurisdiction. However, it seems grossly unfair to say that, by virtue of working outside the reservation, they have consented to adjudicating in state court the division of the property they hold within the tribal nation. Yet this is what the DOL's current reading of ERISA mandates. And while it may be said that by participating in a nontribal pension plan, the tribal member has been given notice of and consented to state court jurisdiction over marital-asset division, this misses the point—that tribal members should not be required to seek redress in state court and that tribal courts should not be stripped of their power to adjudicate the domestic relations of their own tribal members.

B. Cultural and Historical Expertise

Tribal nations have histories separate from the United States and each other. They have different creation myths,¹⁶⁹ different ways of structuring domestic relations,¹⁷⁰ different values,¹⁷¹ and different understandings of the

¹⁶⁷ “Able” meaning the state legislature has endowed the state court to certify tribal court orders. See, e.g., OR. REV. STAT. § 24.115(4) (2011) (“A foreign judgment of a tribal court of a federally recognized Indian tribe that is filed in a circuit court under this section, and that otherwise complies with 26 U.S.C. 414(p) as a domestic relations order as defined in 26 U.S.C. 414(p), is a domestic relations order made pursuant to the domestic relations laws of this state for the purposes of 26 U.S.C. 414(p).”).

¹⁶⁸ See *AZ Courts Locator*, ARIZ. JUD. BRANCH, <http://www.azcourts.gov/AZCourts/AZCourtsLocator.aspx> (last visited Mar. 30, 2014). For a map of the Navajo Nation judicial districts, see *Interactive Map of the Judicial District Courts of the Navajo Nation*, JUD. BRANCH NAVAJO NATION, <http://www.navajocourts.org/indexdistct.htm> (last updated Mar. 4, 2014).

¹⁶⁹ See Harold Carey Jr., *Navajo Creation Story—The First World “Nihodilhil” (Black World)*, NAVAJO PEOPLE CULTURE & HIST. (Mar. 12, 2011), <http://navajopeople.org/blog/navajo-creation-story-the-first-world-nihodilhil-black-world/>.

¹⁷⁰ See Diné Marriage Act of 2005, CAP-29-05 (Apr. 22, 2005), available at <http://www.navajocourts.org/Resolutions/29-05%20Marriage%20Act.pdf> (amending Navajo Nation Code title 9 to prohibit same sex marriage).

¹⁷¹ See *Wisdom of the Elders*, NAVAJOVALUES.COM, <http://www.navajovalues.com/NataniValues/natani/wisdomofelders.htm> (last visited Mar. 30, 2014).

world.¹⁷² These differences create unique obligations among individuals and varied methods for resolving situations in which these obligations are not met. Tribal courts are uniquely endowed with the cultural and historical understanding necessary to resolve these disputes.¹⁷³ Forcing state courts to adjudicate according to customs with which they are not familiar is at best irresponsible,¹⁷⁴ and at worst perpetuates the cultural imperialism and vanishing of Native American traditions that have been ongoing for the last five hundred years.¹⁷⁵ State courts should not issue domestic orders for tribe members whose cultural norms are unique to Native American history, and ERISA administrators must be allowed to recognize tribal orders to permit tribal traditions to continue.

VI. RECOMMENDATIONS

Something needs to change so that tribal courts can issue domestic relations orders that will be honored by ERISA administrators. Whether this is accomplished by altering the language of ERISA to include tribal courts in the definition of entities authorized to issue “qualified” orders or by judicial interpretation, what is paramount is for tribal nations to enjoy autonomy in organizing their domestic relations. This Part offers specific changes that can be made so that tribal courts are able to participate in and shape the domestic relations of their nations while also protecting the cultural norms of the people they govern.¹⁷⁶

A. Potential Legislative Changes

First, Congress could amend the definitions in ERISA. This can be done in one of two ways. Congress could simply change the definition of “domestic relations order” in § 206(d)(3)(B)(ii)(II) from “is made pursuant to a State domestic relations law (including a community property law)”¹⁷⁷ to “is made pursuant to a State domestic relations law (including a community property law or a tribal nation domestic relations law).” This

¹⁷² See *Navajo Cultural History and Legends*, NAVAJOVALUES.COM, <http://www.navajovalues.com/natani/navajovalues.htm> (last visited Mar. 30, 2014).

¹⁷³ See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978) (“[I]ssues likely to arise in a civil context . . . will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts.”). A similar argument may be made for having separate courts for the various immigrant groups residing in the United States. However, such a situation is different from the concerns of federal and state adjudication of tribal relations because the latter implicates sovereignty concerns.

¹⁷⁴ For a discussion of Navajo marital-asset division, see AUSTIN, *supra* note 154.

¹⁷⁵ See, e.g., EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES TO 1648, at 95–100 (Frances Gardiner Davenport ed., 1917) (explaining how the Portuguese and Spanish divided the non-European world via the Treaty of Tordesillas, with the blessing of the Pope, in 1494, thereby devaluing indigenous cultures).

¹⁷⁶ For a discussion regarding tribal courts shaping domestic relations, see AUSTIN, *supra* note 154.

¹⁷⁷ 29 U.S.C. § 1056(d)(3)(B)(ii)(II) (2006).

would explicitly allow tribal nations to apply their own native laws to the division of marital assets, including pension plans.¹⁷⁸

Alternatively, Congress could modify the definition of “state” to include tribal nations.¹⁷⁹ However, this may require a rewording of the definition of “governmental plan” that the Pension Protection Act of 2006 amended.¹⁸⁰ Were “state” redefined to include tribal nations, the current wording of “governmental plan” would exempt all pension plans of the tribal nation from ERISA, not solely the pension plans of individuals employed in pursuit of essential government services.

Expanding the exemption might make sense, especially in light of the federal government’s policy goal to promote tribal autonomy. Furthermore, Congress’s original concern when passing ERISA was to protect workers in private industry from pension plan underfunding.¹⁸¹ But because tribal governments have the power to tax and to spend,¹⁸² the problem of pension plan underfunding is of little concern, irrespective of whether the governmental employee is employed in pursuit of essential governmental services or more traditionally commercial activities, because the tribal government can raise revenue by raising taxes or cutting spending, thereby ensuring adequate funding levels.¹⁸³ This might put tribal nation enterprises pursuing traditionally commercial activities at an advantage compared to nontribal private entities, but in the one area where many tribal governments earn substantial revenue—tribal gaming—this concern is not an issue.¹⁸⁴ Most states do not allow casinos (outside of tribal reservations), so there is little private party competition, in this industry at least, to disadvantage.¹⁸⁵

There are numerous examples of federal statutes that provide for the recognition of certain orders across jurisdictional boundaries. For one, protective orders are to be “accorded full faith and credit by the court of another State, Indian tribe, or territory . . . and enforced by the court and

¹⁷⁸ For example, Navajo common law has two ways of dividing marital assets: equally between the partners, or everything to the woman. AUSTIN, *supra* note 154, at 180.

¹⁷⁹ § 1002(10).

¹⁸⁰ Pub. L. No. 109-280, § 906(a), 120 Stat. 780, 1051 (codified as amended at 29 U.S.C. § 1002(32)).

¹⁸¹ § 1001.

¹⁸² *See, e.g.*, PRAIRIE BAND POTAWATOMI NATION CONST., art. v, § 1.

¹⁸³ Thus, the rationale behind ERISA’s governmental plan exemption should apply here as well. For a discussion on the rationale for this exemption, see *Rose v. Long Island Railroad Pension Plan*, 828 F.2d 910, 913–15 (2d Cir. 1987), *cert. denied*, 485 U.S. 936 (1988).

¹⁸⁴ 2012 *Gaming Revenue Distributed by Region*, NAT’L INDIAN GAMING COMMISSION, <http://www.nigc.gov/Portals/0/NIGC%20Uploads/media/2012%20Gaming%20Revenue%20Distribution%20by%20Region.pdf> (last visited Mar. 30, 2014).

¹⁸⁵ Only seventeen states allow stand-alone non-Indian casinos. *Types of Gaming by State*, AM. GAMING ASS’N, <http://www.americangaming.org/industry-resources/research/fact-sheets/states-gaming> (last visited Mar. 30, 2014).

law enforcement personnel of the other State, Indian tribal government or Territory as if it were the order of the enforcing State or tribe.”¹⁸⁶ It would not be hard to substitute “domestic relations orders” for “protection order”¹⁸⁷ in an analogous statute, and it would be all that is required to make orders issued by tribal courts “qualified” under ERISA.

Changes can be made on the state level as well to recognize tribal court domestic relations orders. As the Advisory Opinion noted,¹⁸⁸ some states have laws that expressly provide for state recognition of tribal domestic relations orders.¹⁸⁹ Such statutes basically incorporate the substance of the tribal court domestic relations order into the laws of the state. States not having such laws should enact them—Oregon’s statute described in the Advisory Opinion is a perfect model. However, such a strategy is by its nature somewhat cumbersome, as each state must individually pass such legislation.

B. Potential Judicial Changes

However, legislation is not the only path by which tribal courts can be enabled to participate in the shaping of this particular sphere of domestic relations within their own tribe. Changes can be made by federal and state courts as well.¹⁹⁰ Federal and state courts can simply interpret “pursuant to a State domestic relations law”¹⁹¹ to require a particular body of law to be used to create the domestic relations order, void of any requirement for a specific adjudicatory body. This has the advantage of allowing courts to account for the policy benefits gained by allowing tribal courts to adjudicate the domestic relations of their members with respect to ERISA-governed pension plans.¹⁹² Compared to the legislative route, however, this possibility has two disadvantages.

First, this strategy requires the tribal nation to have a choice of law provision. Those that do not cannot take advantage of this language, even given a willing court. Therefore, tribal nations that do not have choice of law provisions should enact them. Doing so would give tribal courts more flexibility and increase their ability to serve as a convenient and familiar forum in which tribal members can seek redress.

Second, while a choice of law provision opens the tribal court as a forum for redress for a tribal member with an ERISA-governed pension plan, it does not allow the tribal court to take into account the unique cultural norms and values embodied in its own native law. That is, the court

¹⁸⁶ 18 U.S.C. § 2265 (2006) (footnote omitted).

¹⁸⁷ *Id.*

¹⁸⁸ Department of Labor 2011 Opinion Letter, *supra* note 8, at *2.

¹⁸⁹ *E.g.*, OR. REV. STAT. § 24.115(4) (2011).

¹⁹⁰ *See supra* Part IV.

¹⁹¹ 29 U.S.C. § 1056(d)(3)(B)(ii)(II) (2006).

¹⁹² *See supra* Part V.

simply becomes a convenient forum for the tribal member without actually being a participant in the development and application of tribal law. The law applied would be state law, although there may be room at the margins for the tribal court to imbue the order with the tribe's own cultural values.¹⁹³

Another possible judicial path would entail using the Full Faith and Credit Clause of the United States Constitution¹⁹⁴ and the similarly worded congressional act.¹⁹⁵ Such a route would be a bit more circuitous for a tribal member to navigate, because it would force the tribal member to bring a tribal court domestic relations order to state court to have it recognized.¹⁹⁶ However, it has the upside of allowing the tribal court to apply tribal law instead of state law to the division of the marital assets, thereby maintaining the autonomy of the tribal nation.¹⁹⁷

The Full Faith and Credit Clause states: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."¹⁹⁸ Notably lacking from this clause, however, is any mention of tribal nations. This does not mean that states do not have to afford full faith and credit to the laws of tribal nations.

Evaluating the analogous congressional act changes the picture. Passed in 1804,¹⁹⁹ the Full Faith and Credit Act is basically a statutory version of the Full Faith and Credit Clause, but it includes important variations in language. The relevant part reads: "Such Acts, records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."²⁰⁰ The noteworthy addition to this statute, as compared to the Full Faith and Credit Clause, is that it includes "Territories and

¹⁹³ For example, if state law calls for equitable principles to be used in marital-asset division, it seems possible that when employed by a tribal court, those equitable principles might incorporate tribal notions of equality. New York, for example, uses equitable principles to divide marital assets upon divorce. N.Y. DOM. REL. LAW § 234 (McKinney 2010).

¹⁹⁴ U.S. CONST. art. IV, § 1.

¹⁹⁵ 28 U.S.C. § 1738 (2006).

¹⁹⁶ *See id.* (providing full faith and credit in "every court within the United States," meaning that orders issued by a tribal court should be recognized by state courts, but only if tribal nations are determined to be a "State, Territory, or Possession of the United States").

¹⁹⁷ For example, Navajo common law allows for the woman to retain all assets accumulated by either party during marriage upon divorce, while state law generally does not allow this. AUSTIN, *supra* note 154, at 180.

¹⁹⁸ U.S. CONST. art. IV, § 1.

¹⁹⁹ Act of Mar. 27, 1804, ch. 56, 2 Stat. 298 (codified at 28 U.S.C. § 1738 (2006)). The Act was originally passed in 1790 and the 1804 Act was a slight update. *See* Act of May 26, 1790, ch. 11, 1 Stat. 122 (codified at 28 U.S.C. § 1738).

²⁰⁰ 28 U.S.C. § 1738.

Possessions.” Thus, judicial determinations of the various U.S. territories and possessions enjoy judicial recognition in all other U.S. states, territories, and possessions. The important question becomes, then, whether the various tribal nations are either territories or possessions for the purpose of this statute. While some disagreement exists about this topic,²⁰¹ there is a strong argument that they are one of the two.²⁰²

Craig Smith, in his article *Full Faith and Credit in Cross-Jurisdictional Recognition of Tribal Court Decisions Revisited*, argues that tribal nations constitute territories under the Act.²⁰³ To Smith, the important question is not whether Congress, at the time of passing the Act, thought tribal nations to be territories of the United States, but rather, had Congress been aware of the current status of tribal nations today, would it think of them as territories or possessions?²⁰⁴ To Smith, the response is clearly yes.²⁰⁵ He argues that because tribal nations are territories under this act, tribal courts are clearly entitled to have the outcome of their judicial proceedings honored in state courts.²⁰⁶ Thus, tribal members would need to obtain a tribal domestic relations order, which would need to be recognized by a state court, before potentially being honorable under ERISA.²⁰⁷

Even if one accepts Smith’s argument, the Act merely states that tribal domestic relations orders must be given full faith and credit in state courts. That is, they must be enforceable in state courts. But is this the same as saying that they, in effect, are transformed into state law, as would be required under ERISA in order for pension plan administrators to honor them? On the one hand, it does not seem as though the tribal domestic relations orders are made pursuant to state law simply by virtue of being recognized as a valid order by a state court. Under this reading, pension plan administrators would not be required, or perhaps not even allowed, to honor the tribal court domestic relations orders.

On the other hand, because the Full Faith and Credit Act requires that states and territories honor valid orders originating in other states or territories, it seems paradoxical to say that pension plan administrators cannot honor these orders but that state courts must honor them by the terms of the Act. Furthermore, if the state court finds that the orders are valid and tells the pension plan administrator to fulfill the terms of the

²⁰¹ See Craig Smith, Comment, *Full Faith and Credit in Cross-Jurisdictional Recognition of Tribal Court Decisions Revisited*, 98 CALIF. L. REV. 1393, 1395 (2010).

²⁰² See generally *id.* (arguing that tribal nations should be thought of as territories in the context of the Full Faith and Credit Act).

²⁰³ *Id.* at 1435.

²⁰⁴ *Id.* at 1395.

²⁰⁵ *Id.* at 1396. He analogizes from the unique status of Puerto Rico as explored in *Cordova & Simonpietri Insurance Agency, Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36 (1st Cir. 1981). See Smith, *supra* note 201, at 1426–27.

²⁰⁶ See *id.* at 1428, 1431, 1434–35.

²⁰⁷ See 28 U.S.C. § 1738 (2006).

domestic relations order, the administrator will be put in the position of either complying with the state court or with ERISA, which tells the administrator to alienate only the assets in employee benefit plans based on qualified domestic relations orders made pursuant to state law. The uncertainty surrounding the route a divorcing tribal member must travel in order to get a tribal court's asset division order fulfilled suggests that this method is not the ideal way to apply ERISA to Native American tribes. However, this convoluted path may be necessary unless Congress amends ERISA.

CONCLUSION

The application of federal statutes to tribal nations, when those statutes are silent on the issue, is a confused area of law in need of clarification. However, before clarification can be made, conceptual questions need to be answered. Chief among these is the exact relationship between tribal nations and the United States. Courts and the elected branches of government like to assert the independence and subordination of tribal nations simultaneously.²⁰⁸ The time has come for such fictions and sweeping generalizations²⁰⁹ to be set aside in favor of theoretical clarity. In determining whether ERISA applies to tribal nations, courts have come to agree that congressional intent, not prior treaties or vague platitudes about sovereignty, is paramount. And because Congress's evinced intent was that ERISA should apply to tribal nations, it has been applied in this manner. Slowly, tribal nations are becoming yet another subfederal government.²¹⁰

By writing into law that qualified domestic relations orders must be made pursuant to state law, Congress infringed upon tribal court autonomy, placed state courts in the unenviable position of applying their own values and cultural background to people who do not share them, and forced tribal members to subject themselves yet again to the will of a foreign sovereign.

There are various fixes to this problem—some simple, some convoluted. The simplest fix would be for Congress to amend the definition of domestic relations orders in ERISA so that they can be made pursuant to either tribal law or state law.

However, in the absence of congressional action, there are more convoluted workarounds. For tribal nations that have a choice of law provision, the tribal courts should invoke this provision and utilize state law to draw up their domestic relations orders. Courts should recognize that these orders were drawn up pursuant to state law (and the DOL should revise its Opinion to acknowledge this as well) as the ERISA language

²⁰⁸ See, e.g., *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985).

²⁰⁹ See *id.*

²¹⁰ See *id.* (noting that "Indian tribes possess only a limited sovereignty that is subject to complete defeasance").

mandates and allow employee benefit plan administrators to honor them. Tribal nations that do not have choice of law provisions should enact them. While the tribal courts will not be able to apply their own laws, they at least will be able to provide their members with a convenient and familiar forum in which to adjudicate their claims.

States should pass laws recognizing tribal orders, not just as enforceable under state law, but specifically as part of state law. This will allow pension plan administrators to honor these tribal court orders. It will also permit the tribal courts both to be convenient fora for their members and to apply substantive tribal law.

