"OUR FEDERALISM" IN THE CONTEXT OF FEDERAL COURTS AND TRIBAL COURTS: AN OPEN LETTER TO THE FEDERAL COURTS' TEACHING AND SCHOLARLY COMMUNITY

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Dear Members of the Federal Courts' Teaching and Scholarly Community:

This essay is in the form of an open letter inviting you to review and enlarge the relevant subject matter of your endeavors. A leading treatise offers the following summary of the ken of federal courts' jurisprudence:

> In fashioning the doctrines determining federal court jurisdiction, the Supreme Court repeatedly has focused on two major policy considerations. First, what is the proper role of the federal courts relative to the other branches of the federal government? Second, what is the proper role of federal courts relative to the states and especially to the state courts? . . . Quite often, the disagreement between the majority and the dissent in specific cases is a dispute over the proper allocation of power within the federal government or between the federal and state courts. Without a doubt, every doctrine determining access to the federal courts reflects choices about separation of powers and/or federalism.[1]

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1. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 33 (3d ed. 1999). As Professor Chemerinsky adroitly notes, choices in the context of federalism are often driven by preferences on the substantive issues:

> Without a doubt, a justice's or a commentator's views about the appropriate content of jurisdictional rules often depends on his or her position on the substantive issues involved. A person is more willing to favor restricting federal court jurisdiction in situations where his or her pref-

Although this definition is thoroughly reflected in all the casebooks and practice texts within the field,[2] it is glaringly misleading and incomplete. The failure of federal courts' scholars to identify and discuss the tribal sovereign, particularly tribal courts, seriously restricts, even distorts, the purview of contemporary federalism. This unnecessary restriction, however inadvertent, needs correction in order to promote a more accurate inquiry by the federal courts' teaching and scholarly community—one that is truly comprehensive and reflective of what the Supreme Court and lower federal courts are (or should be) doing in this important area.[3]

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erences are more likely to be achieved in state courts. Conversely, an individual will favor expanding access to the federal courts when it is perceived that those courts will produce better substantive results. Jurisdictional rules often determine the outcome in specific cases; hence, it hardly is surprising that debates over the scope of federal court jurisdiction often turn on views about the appropriate nature of American government and, practically speaking, the best courses of action to achieve the desired outcomes.

Id. at 40.

Unfortunately, Professor Chemerinsky omits the choice of "tribal courts" and, therefore, inadvertently confirms the essential thesis of this "open letter."

2. *See* discussion *infra* note 17 and accompanying text.

3. While it is true that there is a plethora of recent scholarship that describes the changing jurisprudential contours of classic federal-state federalism, almost none of it even mentions federalism in the federal-tribal context. In fact, at least two principal cases in this area, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding that the Eleventh Amendment bars lawsuits by tribes against states for violations of the Indian Gaming Regulatory Act), and *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997) (holding that the Eleventh Amendment bars lawsuits by tribes against states for claims involving submarginal lands), are Indian law cases in which it might be argued that consideration of the tribal sovereign gave way to up-tempo concerns about the new dance of federal-state federalism. This dance obscures the tribal partner, consigning it to wallflower status unnoticed and unremarked upon by (scholarly) chaperones. This then is not a new choreography of respect and inclusion but the old one of insensitivity and exclusion. For a glancing discussion suggesting minimal impact on tribal interests, see Martha A. Field, *The Seminole Case, Federalism, and the Indian Commerce Clause*, 29 ARIZ. ST. L.J. 3 (1997).

This process continues unabated. This is illustrated by cases from the Supreme Court's most recent term. *See, e.g.*, Alden v. Maine, 119 S. Ct. 2240 (1999) (holding that Congress lacks Article I power to subject states to suit in their own courts, thus a state court may, on the grounds of sovereign immunity, refuse to entertain a federal cause of action against the state); College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219 (1999) (holding that Congress lacks Article I power to subject states to trademark actions in federal court); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 119 S. Ct. 2199 (1999) (holding that Congress lacks Article I power to abrogate states' Eleventh Amendment immunity, thus it cannot subject states to pat-

Concern about tribal courts and federalism is not only theoretical but quite practical as well. For example, where the Supreme Court and lower federal courts have examined the status of the tribal sovereign under pragmatic circumstances, they have, for the most part, done so inadequately. These basic practice questions implicate such issues as exhaustion, removal, supplemental and diversity jurisdiction.

The issue of comprehensiveness includes both broad structural questions[4] of the "fit" of tribal courts with the national judiciary and narrow practice questions[5] that need to be examined within the federal courts' community. In addition, there are significant historical, doctrinal, and normative questions relative to the ongoing inquiry concerning the status of tribes and their governmental institutions within our national society. This latter undertaking tracks all the way back to the beginnings of the Republic and the yet-to-be-completed task, not fully comprehended by the Founding Fathers, of identifying the constitutional and legal status of the tribal sovereign.[6] While no answer is on the immediate horizon, the failure of the influential federal courts' community to be aware of, much less involved in, this inquiry and dialogue is not an encouraging sign. It is therefore the primary objective of this essay to lay the foundation for reflection and participation by the federal courts' teaching and scholarly community in these efforts.

In following the outline sketched above, this essay will discuss the broad implications of the overarching theme of "Our Federalism" in the context of the relationship of federal courts to tribal courts. It will also address a series of pragmatic fed-

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ent actions in federal court). *See also* Erwin Chemerinsky, *Permission to Litigate: Sovereign Immunity Lets States Decide Who Can Sue Them*, 85 A.B.A. J. 42 (1999); Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499 (1995); Stephen E. Gottlieb, *The Philosophical Gulf on the Rehnquist Court*, 29 RUTGERS L.J. 1 (1997); Vicki C. Jackson, *Federalism and the Uses of and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180 (1998); Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895 (1996); Dan Schweitzer, Alden, College Savings Bank, *and* Florida Prepaid*: What They Hold and What They Mean to the Future of Federal-State Relations*, 14 NAT'L ENVTL. ENFORCEMENT J. 3 (1999).

4. *See* discussion *infra* Part I.

5. *See* discussion *infra* Part III.

6. *See* FRANK POMMERSHEIM, BRAID OF FEATHERS (1995); *see also* Richard Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617 (1994).

eral practice questions that present themselves in the experiences of practicing law in tribal courts in Indian country[7] and in federal courts, especially in the Eighth, Ninth, and Tenth Circuits. These issues include matters of exhaustion and abstention doctrine; supplemental, removal, and diversity jurisdiction; standards of review, federal common law, and appellate review; and separation of powers. The particular vehicle for the pragmatic inquiry in many instances will be an examination of *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*,[8]

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7. Indian Country is defined in 18 U.S.C. § 1151 (1994) as follows:

> [T]he term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

The term "trust" land refers to tribal land or individual Indian allotments held in "trust" by the federal government as the "owner" of the fee for the benefit of the tribal or individual Indian "beneficiary." *See generally* POMMERSHEIM, *supra* note 6, at 41–46.

8. 133 F.3d 1087 (8th Cir. 1998). In *Hornell Brewing*, the descendants and estate of the famous nineteenth-century Lakota warrior and statesman Crazy Horse brought a civil action challenging Hornell Brewing's use of the Crazy Horse name in manufacturing and distributing Crazy Horse Malt Liquor. *See id.* at 1089. The action was originally filed in Rosebud Sioux Tribal Court, and sought declaratory and injunctive relief as well as money damages and traditional relief in the form of "one (1) braid of tobacco, one (1) four-point Pendelton blanket and one (1) racing horse for each State, Territory or Nation in which said products have been distributed and offered for sale." Estate of Tasunke Witko v. G. Heileman Brewing Co., 23 Indian L. Rptr. 6104, 6106 (Rbd. Sx. Sup. Ct. 1996). The complaint alleged the following causes of action: the knowing and willful tortious interference with customary rights of privacy and respect owed to a decedent and his family, the tortious interference with the right of publicity, and the negligent and intentional infliction of emotional distress on the heirs of the estate through acts of exploitation and defamation. *See id.* The Plaintiff estate also asserted violations of the Lanham Act, 15 U.S.C. § 1125(a) (1994), and the Indian Arts and Crafts Act, 25 U.S.C. § 305(e) (1994). *See Estate of Tasunke Witko*, 23 Indian L. Rptr. at 6106. The defendant manufacturers and distributors moved to dismiss on the grounds that the tribal court did not have jurisdiction over them because their product was not manufactured, distributed or sold on the Rosebud Sioux Reservation or in the State of South Dakota. The motion was granted by the tribal trial judge but reversed by the Rosebud Supreme Court based primarily on a lengthy analysis of long-arm jurisdiction. *See id.* at 6107–13. Note that the author sits as an Associate Justice on this court and participated in this decision. Before there was any trial on the merits, the defendants obtained injunctive relief in federal district court. The district court relied on *Montana v. United States*,

the famous "Crazy Horse Malt Liquor" case, which represents the prototype and exemplar for most of the issues at hand.

I. "OUR FEDERALISM"

A substantial amount of the adversity and difficulty present throughout the history of Indian law stems from the fact that the tribal sovereign is consistently marginalized, if even discussed, in the context of our constitutional democracy.[9] With the increasing prominence and visibility of tribal courts,[10] we are in danger of repeating this harmful process of neglect and indifference unless there is broad and informed scholarly exegesis, insight, and effort that acknowledges and bridges the common themes within the fields of Indian law and federal courts.

A key concept for considering this relationship in the context of tribal courts is the doctrine of "Our Federalism." This staple of federal courts' jurisprudence is grounded in the

> notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the states and their institutions are left free to perform their separate functions in their separate ways. . . . This, perhaps for a lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our

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450 U.S. 544 (1981), which held that tribes do not have regulatory jurisdiction over non-Indian conduct on fee land within the reservation unless there is a consensual agreement or the non-Indian activity affects the "political integrity, economic security or health and welfare of the tribe." *Id.* at 566. Based on *Montana*, the court ruled that the tribal court did not have jurisdiction. This decision was affirmed by the Eighth Circuit largely on the same grounds. *See Hornell Brewing*, 133 F.3d at 1093. Like the district court decision, the Eighth Circuit offered no analysis of the long-arm jurisdiction issue. *See id.* at 1090–94.

9. See the development of these themes in such works as ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW (3rd ed. 1991); FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (Rennard Strickland et al. eds, 3d. ed. Michie Bobbs-Merrill 1982) (1942); DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW (4th ed. 1998); POMMERSHEIM, *supra* note 6; ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT (1990).

10. *See* POMMERSHEIM, *supra* note 6, at 57–136; *see also* Frank Pommersheim, *Tribal Courts and the Federal Judiciary: Opportunities and Challenges for a Constitutional Democracy*, 58 MONT. L. REV. 313 (1997).

> Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism."[11]

This credo of respect and comity is equally apropos as a pertinent doctrine to describe and to guide the "fit" of tribal courts within the federal system. This approach appeared to be the tack of the seminal *National Farmers Union*[12] and *Iowa Mutual*[13] cases of the mid–1980s, with their emphasis on comity, tribal court expertise, and support for tribal court development. Yet, a short ten years later, the Court in *Strate v. A-1 Contractors*[14] appeared to veer sharply away from this model of engagement to one of raw power that made exhaustion of tribal remedies merely "prudential" rather than mandatory. The *Strate* decision completely smothered the tribal judicial voice as irrelevant, particularly when only non-Indians and non-trust land are involved.[15]

The respectful comity model adumbrated in *National Farmers Union* and *Iowa Mutual* appears to have been replaced by what might be called the judicial plenary power

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11. Younger v. Harris, 401 U.S. 37, 44 (1971).

12. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985) (holding that parties must exhaust their tribal court remedies before challenging tribal court jurisdiction in federal court).

13. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987) (finding exhaustion required even in diversity context; federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a full opportunity to determine its own jurisdiction).

14. 520 U.S 438 (1997) (holding that tribal courts do not have jurisdiction over events that only involve non-Indians and take place on state highways running through a reservation). Among the many practical problems with *Strate* is its failure to explain that the exhaustion described in *National Farmers Union* and *Iowa Mutual*, which many commentators and circuits understood to be mandatory, was merely "prudential." Without explanation as to policy or rationale, lower federal courts have less guidance than ever to proceed. Have the policies of comity, respect, and deference articulated in *National Farmers Union* and *Iowa Mutual* been trimmed back or otherwise limited across the board? Or does this "prudential" rule apply when only non-Indians—and no Indians—are involved and the place of the controverted event falls into that swale of Indian country described by *Montana v. United States*, 450 U.S. 544 (1981), and its progeny as "non-trust" land? More problematic yet is whether the one-sided power exhibited in *Strate* is the fist hidden in the velvet glove of *National Farmers Union* and *Iowa Mutual*'s comity and respect. *See also* South Dakota v. Bourland, 508 U.S. 679 (1993) (holding that the Cheyenne River Sioux Tribe does not have civil jurisdiction over non-Indians on "federal taken land" for the Oahe Dam within the exterior boundaries of the Cheyenne River Sioux Reservation).

15. *See Strate*, 520 U.S. at 449–50.

model that is found at the core of the Court's decision in *Strate*. This model simply allows the Court to fashion *ad hoc* decisions about whether a tribal court has jurisdiction from a notion of federal common law that is unconstrained by comity or institutional respect.[16] It should be noted that the Supreme Court has not articulated any model in its jurisprudence about tribal courts, but has merely lurched to and fro. This doctrinal impasse or blind spot needs the benefit of thoughtful and reflective federal courts' scholarship.

Although the doctrine of "Our Federalism" is a cornerstone concern in all federal courts' courses and texts, its application to the relationship between federal courts and tribal courts is uniformly absent from these same texts. Any survey, however cursory, of federal courts' texts and casebooks reveals the complete lack of any discussion of tribal courts within the federal system.[17] The marginalization of tribal courts within the canon of federal courts' textbooks and scholarship only makes it more likely that tribal courts will continue to be marginalized in federal courts' jurisprudence itself. If there is no discussion of tribal courts within the standard federal courts' casebooks, treatises, and federal practice guides, it will be all the more difficult for these courts to achieve legitimacy in practice when they are missing from the textual canon, not discussed in the primary course for aspiring federal judicial law clerks, and are otherwise academically hidden. Thus, although it is true that the role of tribal courts in the federal system is being litigated daily on the frontlines of federal courts' jurisprudence, it is also true that tribal courts remain invisible in the boot camp of legal academia where (future) federal judges and their law clerks receive their basic training. If their basic training is so deficient, is it really surprising that they are so ill-prepared for combat?

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16. *See* Pommersheim, *supra* note 10, at 325; Judith Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 U. KAN. L. REV. 241 (1998); *see also* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L.J. 1 (1999).

17. *See* detailed chart, *infra* at Appendix. Note particularly the second column of the chart, which highlights the routine omission or cursory description of *Iowa Mutual* and *National Farmers Union*, the two leading Supreme Court opinions on tribal courts.

The importance of such issues has *not* gone unnoticed within the federal judiciary itself. Justice O'Connor has spoken publicly about the importance of tribal courts.[18] Further, the Eighth, Ninth and Tenth federal circuits have established standing committees designed to study and improve the relationship between tribal courts and federal courts. As a scholar who has spoken on this topic at various circuit judicial conferences, I can confirm the genuine interest but admitted lack of expertise of the federal judiciary in dealing with these questions. This interest and puzzlement encompasses both broad "Our Federalism" questions of "fit" and the nitty-gritty practice concerns discussed in this essay.

In the context of federal-state notions of "Our Federalism," the underlying issues involve not only the balance of constitutional power, but the national willingness to tolerate or embrace different norms or standards of conduct within the weave of federalism.[19] This is also an issue in the context of tribal courts and federal courts. The emerging structural relationship of tribal courts to federal courts can be examined from the perspective of discerning what is the normative space available to tribal courts to establish standards, both substantive and procedural, that are "different," but nevertheless permissible. Since this structural relationship is being jurisprudentially forged strictly in the federal judicial context of litigation involving non-Indians,[20] the issue of tolerance and difference of-

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18. *See* Hon. Sandra Day O'Connor, Associate Justice, *Lessons from the Third Sovereign: Indian Tribal Courts*, *in* 9 TRIBAL CT. REC. 12 (1996), *reprinted in* 33 TULSA L.J. 1 (1996). Justice O'Connor concludes her essay:

> The role of tribal courts continues to expand, and these courts have an increasingly important role to play in the administration of the laws of our nation. The three sovereigns can learn from each other, and the strengths and weaknesses of the different systems provide models for courts to consider. Whether tribal court, state court, or federal court, we must all strive to make the dispensation of justice in this country as fair, efficient, and as principled as we can.

Id. at 6. Despite this heartening language, Justice O'Connor herself voted against tribal regulatory and/or judicial authority in the *Montana*, *Bourland*, and *Strate* cases. *See supra* notes 8, 14 and accompanying text.

19. *See, e.g.*, Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989).

20. Every major federal case raising issues of tribal court jurisdiction involves non-Indians or non-Indian entities challenging tribal court authority. *See, e.g.*, Montana v. United States, 450 U.S. 544 (1981); *National Farmers Union*, 471 U.S. at 845; *Iowa Mut.*, 480 U.S. at 9; *Bourland*, 508 U.S. at 679; *Strate*, 520 U.S. at 438.

ten butts up very closely to the more prickly and unacknowledged issues of colonialism and racism.[21]

To date, the Supreme Court has been quite inhospitable to permitting difference when non-Indians and non-trust land are involved. *Montana* said no as to non-Indian fee land.[22] *Bourland* said no as to federal taken land.[23] *Strate* said no as to state highways.[24] The well-known *Montana* proviso, of course, holds out potential in regard to "difference" but little seems to pass successfully through its "golden arches" these days.[25] It should be noted that this usually takes place in an *a priori* context that fails to examine the actual or likely tribal standard. This normative question of "difference" has been artfully stated by Professor Judith Resnik, a leading federal courts' scholar:

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21. *See, e.g.*, WILLIAMS, *supra* note 9, at 227–317.

22. *See Montana*, 450 U.S. at 566.

23. *See Bourland*, 508 U.S. at 694.

24. *See Strate*, 520 U.S. at 453. These cases, taken together, have effectively remapped the jurisdictional landscape of Indian country. Prior to these cases, in the absence of any controlling federal statute, there was, essentially, an irrebuttable presumption in favor of tribal civil jurisdiction. *See* Williams v. Lee, 358 U.S. 217, 223 (1959) ("The cases in this Court have consistently guarded the authority of Indian governments over their reservations. . . . If this power is to be taken away from them, it is for Congress to do it."). After these cases, despite the fact that these physical places are still within Indian country, and there are no controlling federal statutes, there is now a strong presumption in favor of state jurisdiction, unless the *Montana* proviso is satisfied. This is the new Indian law cartography.

This remapping does not have much to do with legal reasoning or deference to Congress, but rather with discerning, in the words of Justice Scalia, "what the current state of affairs ought to be . . . ." *See* Frickey, *supra* note 16, at 63 (quoting Justice Scalia's memorandum to Justice Brennan concerning *Duro v. Reina*, 495 U.S. 676 (1990)). And when non-Indians and non-trust land are involved, apparently, it is not difficult to discern who the "ought" favors. *See* discussion of *Duro infra* notes 194–209 and accompanying text.

25. The proviso provides:

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

Montana, 450 U.S. at 565–66 (citations and footnote omitted).

> The claim of sovereignty arises when one group makes a claim to be or to sustain rules different from another. A central question for federal courts' jurisprudence is how much difference between state and national laws the federal government should encourage or tolerate. The relationship between the federal and state governments and the Indian tribes reminds "us" to take claims of difference seriously and to explore the meaning of claimed distinctions between "sovereigns."[26]

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26. Resnik, *supra* note 19, at 701. The trenchant article by this leading federal courts' scholar issued its own challenge:

> The bountiful literature of federal courts' jurisprudence does not, however, consider problems of the relationship between Indian tribes, the federal government, and the states. "We" who teach and write about the federal courts, we who list ourselves as the definers of the domain, speak and write relatively rarely about the federal courts and their relationship to Indian tribes. *Santa Clara Pueblo* and other "Indian tribe" cases are not often found in books about "the" federal courts or in discussions about the problems of multiple sovereigns coexisting in the United States. While there is a wealth of scholarship about Indian tribes, that scholarship is not integrated into federal courts' jurisprudence.
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> This absence of discussion of cases involving Indian tribes is, at one level, odd because these cases are rich in subject matter traditionally found in the federal courts' literature. Questions of power and sovereignty are *the* questions when Indian tribes seek help from the federal courts or try to resist federal decision making. The issues raised are familiar ones: executive and congressional authority; the implementation of Supreme Court decisions by the Executive; the allocation of power between the state and federal courts, and between states, Indian tribes, and the federal government; concepts of attributes and prerogatives of "sovereigns" such as sovereign immunity and exhaustion of remedies; preemption of state or tribal law by federal law; deference and comity; and the federal courts' common law making powers. Given the similarities between the themes of federal court literature and the subject matter of Indian tribe cases, and given the number of Indian tribe cases decided during the relatively recent past, the omission (in casebooks and other federal courts scholarly literature) about the relationship between Indian tribes and the federal courts requires explanation.
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> Recent articles have attempted to understand what Richard Fallon has called the "ideologies of federal courts law"—to explicate the underlying assumptions and aspirations of the discipline. This essay continues that enterprise: to consider why federal courts jurisprudence has not spoken much about Indian tribes when telling the story of the federal courts, and to learn what that silence has to teach. I hope to show what Indian tribes cases have to bring to federal courts' jurisprudence, to what is meant by the concept of state sovereignty and allocation of power between the state and federal governments.

The theme of sovereignty and difference, which is perhaps the essential mantra and narrative inquiry in the field of Indian law, has remained largely uninvestigated elsewhere within the national jurisprudence. From the federal perspective, when the "other" is the state, the differences are likely to be relatively slender because of the similarity of origin and experience. When the "other" is the tribe, the potential for difference is rather large, for there are great differences in origin, culture, and experience. The federal record, however, evinces a tolerance of similarity rather than dissimilarity. The history of the pressures to "civilize" and assimilate Indians provides more than ample support for this description of federal-tribal relations.[27] Despite these enormous pressures, tribal courts continue their struggles to maintain their identities and to resist

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Id. at 676–79 (footnotes omitted).

Professor Resnik's challenge appears to have been largely ignored by her colleagues and caretakers of the canon within the influential federal courts' community. Her ground-breaking article is almost ten years old and nothing has really changed within this prestigious field. I acknowledge my own debt to Professor Resnik's insights that underpin my own "invitation" to members of this august field. The grounds of my "open letter" are more narrow than Professor Resnik's: a plea to consider tribal *courts* and their relationship to federal courts as a rich source to examine contemporary federalism both in matters of policy and practice. Yet this too provides a bridge and gateway to the central difficulty:

> The difficulty of engaging with cases about Indian tribes is exacerbated in the context of federal courts' jurisprudence. Federal Indian law challenges the central premises of "federal courts' ideology." If Richard Fallon is correct that two models, one Nationalist and one Federalist, capture the landscape of much of the debate about the role of the federal courts, what place is there in either model for conquest and violence? While Nationalists and Federalists might disagree about the allocation of power between state and federal government, the shared major premise—for Nationalist and Federalist alike—is of constitutionally justified and limited power. Bringing federal Indian law into the federal courts conversation unsettles some familiar assumptions about restraint upon the United States' legal authority. No act of interpretation and no elaboration of consent theory can explain federal exercise of power and dominion over Indian tribes. Materials about relations between the United States and Indian tribes undermine the central tenets of federal courts' jurisprudence—that the Constitution is the beginning of the analysis for the exercise of all the powers of the federal government, and that, by constitutional interpretation, the federal powers are limited and constrained.

Id. at 697 (footnotes omitted).

27. *See* POMMERSHEIM, *supra* note 6, at 99–103; Resnik, *supra* note 19, at 749.

the ongoing forces of assimilation.[28] This struggle is particularly important given the current federal policy commitment to tribal self-government and self-determination, which seems to recognize, at least rhetorically, the possibility of difference in theory, if not in practice.

For the federalist, the immediate task lies in identifying the best legal norms by which to measure the appropriate level of "tolerance." Historically, this discussion has taken place under the rubric of sovereignty, and is perhaps more accurately tracked within the context of the exploration of difference. As suggested by Professor Resnik:

> From the perspective of the dominant society, the question is how much "subversion" and "invention" should be tolerated and encouraged. At the core of federal courts' jurisprudence is a question that has often gone under the name of "sovereignty" but may more fruitfully be explored in the context of difference. If the word "sovereign" has any meaning in contemporary federal courts' jurisprudence, its meaning comes from a state's or a tribe's ability to maintain different modes from those of the federal government. The United States has often made claims about the richness of its pluralist society—made claims that the loss of state or tribal identity would not only be a loss to states and tribes, but would also harm all citizens because of the benefit of living in a country in which not all are required to follow the same norms.[29]

In the context of Indian law, federal Indian policy has inexorably pressed toward assimilation and has tolerated only minor or "quaint" differences. Some might call this an admirable but incomplete commitment to eradicate the stigma of difference. Yoked to the stigma of difference, however, is the pride that Indian tribal communities take in pre-Columbian sources of cultural continuity and spiritual richness. This pride of difference is at the heart of claims of tribal sovereignty. Neither the legal community nor the dominant community at

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28. *See* Resnik, *supra* note 19, at 750.

29. *Id.* at 751. Of course, this likely richness cannot avoid the problem of potential error or wrongdoing within a community-based separate sovereign such as the tribe. In essence, there is a necessity "to try to understand what animates federal decisions to sustain the power of the other, what prompts decisions to diminish that power, and what criteria should lead us to praise or criticize such decisions." *Id.* at 753.

large fully understands this pride of difference, which tests the vitality of old promises in a diverse society that professes a commitment to both equality and pluralism.[30] Yet, this is an essential ingredient in any emerging "Our Federalism" doctrine involving federal courts and tribal courts.

II. INDIAN LAW JURISPRUDENCE AND ORTHODOX FEDERALISM

Indian law jurisprudence also provides an interesting glimpse of at least one seldom-noticed source of federal-state tension within orthodox federalism. This is the wily, yet jurisprudentially and ethically problematic, practice of some state supreme courts that refuse to follow federal circuit court precedent on matters of federal (Indian) law in order to create a federal-state conflict that greatly enhances the granting of certiorari by the United States Supreme Court. The object, presumably, is to increase the likelihood of Supreme Court review, with the expectation that the current Supreme Court will look favorably on the state's construction of federal Indian law and reverse federal circuit court jurisprudence to the contrary. This is particularly likely in cases referred to as "diminishment" cases,[31] where the central question is whether Congress intended—usually in actions taken in the latter part of the nineteenth or early part of the twentieth century—to reduce the size of the reservation.

The litmus test in these cases is supposedly congressional intent, but the reality is that the outcomes are result-driven, especially by current demographics and land tenure patterns in the affected areas. If current demographics and land tenure patterns greatly favor non-Indians, the likelihood of finding diminishment is extremely high. This empirical predictor is

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30. For a more complete description of the dilemma of difference in Indian law and the respective spheres of stigma and pride, see POMMERSHEIM, *supra* note 6, at 99–103. *See also* Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie*, 31 ARIZ. ST. L.J. 439, 455 (1999) (describing the "two-faces" of Indian law as involving "indigenous 'community' law to heal and restore equilibrium and the 'resistance' component to fend off further federal review and intrusion into tribal sovereignty").

31. *See, e.g.*, South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998); Hagen v. Utah, 510 U.S. 399 (1994); Solem v. Bartlett, 465 U.S. 463 (1984); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425 (1975); *see also* GETCHES ET AL., *supra* note 9, at 439–69.

more reliable than any analytical or doctrinal rubric.[32] Although the Court is not unaware of the problems presented by

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32. For example, see the discussion of current demographics and land tenure patterns in the cases cited *supra* note 31. In *DeCoteau, Rosebud Sioux Tribe, Hagen,* and *Yankton Sioux Tribe*, the Court identifies non-Indian predominance in the affected areas and the state wins. In *Solem*, the Court identifies Indian predominance in the controverted area and the tribe wins. Justice Marshall nervously alludes to this problem in *Solem*:

> Resort to subsequent demographic history is, of course, an unorthodox and potentially unreliable method of statutory interpretation. However, in the area of surplus land Acts, where various factors kept Congress from focusing on the diminishment issue, the technique is a necessary expedient.

Solem, 465 U.S. at 472 n.13 (citation omitted). Note the Supreme Court's discussion of current demographics and land tenure patterns in each of the following cases. For example, in *DeCoteau*, the Court said:

> Within the 1867 boundaries of the Lake Traverse Reservation there reside about 3,000 tribal members and 30,000 non-Indians. About 15% of the land is in the form of "Indian trust allotments"; these are individual land tracts retained by members of the Sisseton-Wahpeton Tribe when the rest of the reservation lands were sold to the United States in 1891. The trust allotments are scattered in a random pattern throughout the 1867 reservation area. The remainder of the reservation land was purchased from the United States by non-Indian settlers after 1891, and is presently inhabited by non-Indians.

DeCoteau, 420 U.S. at 428.

In *Rosebud Sioux Tribe,* the Court said:

> The long-standing assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts of Congress as petitioner urges. We are simply unable to conclude that the intent of the 1904 Act was other than to disestablish.

Rosebud Sioux Tribe, 430 U.S. at 604–605 (citation omitted).

In *Solem,* the Court said:

> The strong tribal presence in the opened area has continued until the present day. Now roughly two-thirds of the Tribe's enrolled members live in the opened area. The seat of tribal government is now located in a town in the opened area, where most important tribal activities take place . . . .
>
> . . . As a result of the small number of homesteaders who settled on the opened lands and the high percentage of tribal members who continue to live in the area, the population of the disputed area is not evenly divided between Indian and non-Indian residents. Under these circumstances, it is impossible to say that the opened areas of the Cheyenne River Sioux Reservation have lost their Indian character.

Solem, 465 U.S. at 480.

In *Hagen,* the Court said:

such an unorthodox approach, it regards it as a necessary expedient.[33]

Two recent cases neatly illustrate this state-created means to end run the doctrine of comity,[34] the Supremacy Clause[35] and principles of collateral estoppel.[36] These cases are *Hagen v.*

> Finally our conclusion that the statutory language and history indicate a congressional intent to diminish is not controverted by the subsequent demographics of the Uintah Valley area. We have recognized that "[w]hen an area is predominately [sic] populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of state and local governments." *Solem*, 465 U.S., at 471-472, n.12. Of the original 2 million acres reserved for Indian occupation, approximately 400,000 were opened for non-Indian settlement in 1905. Almost all of the non-Indians live on the opened lands. The current population of the area is approximately 85 percent non-Indian. 1990 Census of Population and Housing, Summary Population and Housing Characteristics: Utah, 1990 CPH-1-46, Table 17, p. 73. The population of the largest city in the area—Roosevelt City, named for the President who opened the reservation for settlement—is about 93 percent non-Indian. *Id.*, Table 3, p. 13.

Hagen, 510 U.S. at 420–421.

In *Yankton Sioux Tribe*, the Court said:

> Today, fewer than ten percent of the 1858 reservation lands are in Indian hands, non-Indians constitute over two-thirds of the population within the 1858 boundaries, and several municipalities inside those boundaries have been incorporated under South Dakota law. The opening of the tribal casino in 1991 apparently reversed the population trend; the tribal presence in the area has steadily increased in recent years, and the advent of gaming has stimulated the local economy. In addition, some acreage within the 1858 boundaries has reverted to tribal or trust land. . . . Nonetheless, the area remains "predominantly populated by non-Indians with only a few surviving pockets of Indian allotments," and those demographics signify a diminished reservation.

Yankton Sioux Tribe, 522 U.S. at 356–57 (citation omitted). These cases, too, are part of the new (and not-so-new) Indian law cartography. *See supra* notes 22–24 and accompanying text.

33. *See Solem*, 465 U.S. at 472 n.13.

34. *See* CHEMERINSKY, *supra* note 1, at 40 (discussing comity).

35. The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

36. Collateral estoppel may be defined as issue preclusion which prevents a party that litigated an issue (or had a full and fair opportunity to do so) from relitigating that issue against the same party or a party in privity with the first party in a subsequent proceeding. *See infra* notes 63–64 and accompanying text.

Utah[37] and *South Dakota v. Yankton Sioux Tribe*.[38] In each of these cases, the Supreme Court decided that an Indian reservation—the Uintah Indian Reservation in *Hagen* and the Yankton Sioux Reservation in *Yankton Sioux Tribe*—had been diminished by congressional actions taken in 1905 and 1894, respectively.[39] Both of these cases overruled circuit court decisions to the contrary.[40] Both of these cases also involved state supreme court decisions made in derogation of circuit court precedent directly on point.[41] The state supreme court decisions created the necessary conflict with circuit court case law to guarantee Supreme Court review.[42] This approach achieved the desired Supreme Court review and the Supreme Court, in its current states' rights and anti-tribal sovereignty mode, provided the necessary *ad hoc* reasoning to conclude that the reservations were necessarily diminished.[43]

An examination of the relevant state supreme court decisions is illuminating. In *State v. Perank*,[44] the Utah Supreme Court, in a four-to-one decision, interpreted relevant *federal* Indian law statutes, executive orders, and precedent in such a way as to decide that the Uintah Indian Reservation was diminished.[45] The court did so notwithstanding the Tenth Circuit's opposite conclusion in *Ute Indian Tribe v. Utah*.[46] The majority opinion in *Perank* made no reference to the doctrine of comity, the Supremacy Clause, or the principle of collateral estoppel.[47]

In the stinging and lone dissent of Justice Zimmerman there is a sharp rebuke of this tactic:

> I find almost incredible the refusal of the majority of this court to accord comity to a federal court's decision in an area in which the federal government has preeminent authority

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37. 510 U.S. 399 (1994).
38. 522 U.S. 329 (1998).
39. *See Yankton Sioux Tribe*, 522 U.S. at 329; *Hagen*, 510 U.S. at 420.
40. *See Yankton Sioux Tribe*, 522 U.S. at 358; *Hagen*, 510 U.S. at 421.
41. *See Yankton Sioux Tribe*, 522 U.S. at 357; *Hagen*, 510 U.S. at 422.
42. *See, e.g.*, ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 208 (7th ed. 1993).
43. *See Yankton Sioux Tribe*, 522 U.S. at 797; *Hagen*, 510 U.S. at 409.
44. 858 P.2d 927 (Utah 1992).
45. *See id.* at 938.
46. 773 F.2d 1087 (10th Cir. 1985) (en banc) (addressing the precise issue of diminishment addressed by the court in *Perank*), *cert. denied*, 479 U.S. 994 (1986).
47. *See Perank*, 858 P.2d at 927–53.

> and a unique trust responsibility. A majority of this court has given the State of Utah what it has desperately sought for six years—a second shot at persuading the United States Supreme Court to reject the Tenth Circuit's ruling and to give Utah control over a large part of the original reservation. This litigation certainly will not end here, now that there is a square conflict between the entire Tenth Circuit and this court. But this tactical victory for the state comes at an unacceptably high cost to the relationship between the state and federal judiciaries. Moreover, on the merits, I think the majority reaches the wrong result.[48]

As the dissent further noted, this was clearly a "one-sided" proceeding and the "state's counsel acknowledged at oral argument that perhaps the state's real adversary in this case—the Tenth Circuit—was absent."[49] This naked admission by the State did not give the majority the slightest pause in its evident commitment to rule against its federal judicial "adversary" on the federal law question.

In the South Dakota example of *State v. Greger*,[50] the decision was unanimous, thereby leaving no dissent to identify the failure of the court to provide comity, to heed the Supremacy Clause, or to acknowledge the collateral estoppel issue. Yet in order to do so, the South Dakota Supreme Court was forced to completely misstate a holding of a United States Supreme Court case and the holding of one of its *own* precedents to achieve the desired result of creating a conflict with the Eighth Circuit opinion in *Yankton Sioux Tribe v. Southern Missouri Waste Management District*.[51]

None of this takes place within the text of the court's opinion, but rather within the confines of footnote five of the court's opinion.[52] In footnote five, the court stated that "[w]e do not consider ourselves bound . . . by the Eighth Circuit's decision."[53] For this proposition, the South Dakota Supreme Court cited the United States Supreme Court decision of *ASARCO,*

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48. *Id.* at 953–54 (Zimmerman, J., dissenting).

49. *Id.* at 954.

50. 559 N.W.2d 854 (S.D. 1997).

51. 99 F.3d 1439 (8th Cir. 1996), *rev'd,* 522 U.S. 329 (1998). Note that the State of South Dakota intervened and replaced Southern Missouri Waste Management District as the real party in interest. *See id.* at 1442.

52. *See Greger*, 559 N.W.2d at 859 n.5.

53. *Id.*

Inc. v. Kadish,[54] and then stated "[s]urely, it is 'within their power and their proper role [for state courts] to render binding judgments on issues of federal law, subject to review by this Court.'"[55] This observation is both true and unremarkable, but it was *not* made in the context of state courts rendering judgments in the face of contrary circuit court precedent. Rather, it was made in a discussion concluding that state courts are not bound by federal standing requirements.[56] The *ASARCO* case has absolutely nothing to do with the doctrine of comity or the Supremacy Clause.

The South Dakota Supreme Court then continued in footnote five with the following observation: "*But see St. Cloud v. Leapley*, 521 N.W.2d 118, 122 (S.D. 1994) (for purposes of federal criminal jurisdiction, we are bound by federal court interpretations of federal statute[s])."[57] The problem is that *St. Cloud* includes absolutely no indication that it is limited to matters of "federal criminal jurisdiction." In fact, its thoughtful discussion quotes approvingly and at length from other courts in the civil jurisdiction arena:

> However, "with respect to what is essentially, a federal question, we are guided and bound by federal statutes and decisions of the federal courts interpreting those statutes." *Desmarais v. Joy Mfg. Co.*, 130 N.H. 299, 538 A.2d 1218, 1220 (1988) (regarding interpretation of federal ERISA law, and citing 29 U.S.C. §§ 1132, 1144). Other courts have likewise noted that they are "bound by the decisions of the federal courts in their interpretation of a federal statute." *First Nat'l Bank of Ariz. v. Carruth*, 116 Ariz. 482, 569 P.2d 1380, 1381 (App. 1977) (regarding federal venue provisions, and citing 12 U.S.C. § 94) . . . . "Federal decisional law interpreting a federal statute . . . and delineating the rights and obligations thereunder is binding . . . under the Supremacy Clause . . . ." This is *not* to be confused with other situations where we look to federal courts for guidance in interpretation of a state statute that is similar to a federal

54. 490 U.S. 605 (1989).

55. *Greger*, 559 N.W.2d at 859 n.5 (alteration in original) (quoting *ASARCO*, 490 U.S at 620).

56. *See ASARCO*, 490 U.S. at 620.

57. *Greger*, 559 N.W.2d at 859 n.5.

> law—where we are *not* bound by lower federal court interpretations.[58]

Obviously, the Supremacy Clause makes no distinction between civil and criminal law,[59] and the *St. Cloud* opinion makes no attempt to do so notwithstanding the cryptic claim in *Greger* to the contrary. The South Dakota Supreme Court in its apparent rush to create reviewable "conflict" for the United States Supreme Court distorted both United States Supreme Court case law and its own precedent, running roughshod over basic principles of federalism.[60]

These cases provide one final irony. Justice Zimmerman in his dissent in *Perank* points to South Dakota as a model state for its application of comity principles:

> Several state courts have relied on comity principles in deferring to federal court decisions on Indian law questions. *See, e.g., Daly*, 454 N.W.2d at 344; *State v. St. Francis*, 151 Vt. 384, 563 A.2d 249, 253 (1989). Indeed, the South Dakota Supreme Court has gone so far as to overrule one of its cases in recognition of a federal court of appeals' ruling concerning South Dakota's jurisdiction over Indians living within the state. *State v. Spotted Horse*, 462 N.W.2d 463,

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58. St. Cloud v. Leapley, 521 N.W.2d 118, 122 (S.D. 1994), *aff'd sub nom.* St. Cloud v. Class, 550 N.W.2d 70 (S.D. 1996) (citations omitted) (quoting *Ex parte* Gurganus, 603 So.2d 903, 906 (Ala. 1992)).

59. *See* U.S. CONST. art. VI, cl. 2. *See also supra* note 35.

60. In the context of federalism, Judge Zimmerman notes:

> First, comity concerns are heightened here where we are asked to revisit issues of federal law, decided on defensible bases by coordinate federal courts, for the sole purpose of creating a conflict with the federal courts to force Supreme Court review. "Comity between federal and state courts is necessary to prevent scandal from unseemly conflicts of jurisdiction and to promote a decent and orderly administration of justice." Instead of seeking to further the interests of comity—prevention of a direct jurisdictional clash and promotion of the uniform administration of justice—the majority's decision to reach and redecide the merits of the boundary question needlessly upsets a previously settled area of law and achieves the opposite effect. Today's decision encourages litigants to forum shop in the hope of inconsistent decisions, an ill comity seeks to avoid in the federal-state context.

State v. Perank, 858 P.2d 927, 955–56 (Utah 1992) (Zimmerman, J., dissenting) (citations and footnotes omitted).

467 (S.D. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2041, 114 L.Ed. 2d 125 (1991).[61]

Unfortunately, in *Greger*, the South Dakota Supreme Court neglected to cite, much less discuss, either *Daly* or *Spotted Horse* in its jurisprudential haste. In the sometimes curious world of Indian law, none of this appears to have been noticed by the United States Supreme Court.[62]

Oddly enough, despite the complete absence of discussion, each of these cases could have been disposed of routinely on collateral estoppel grounds. In each case, the state previously litigated (and lost) in federal circuit court on the precise issue—diminishment of a particular reservation—that it was vigorously relitigating in state court. This is a classic example of collateral estoppel.[63]

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61. *Id.* at 957. In *Spotted Horse*, the South Dakota Supreme Court, despite its own precedent to the contrary, acknowledged its obligation to follow an Eighth Circuit opinion that held that the state had no jurisdiction over Indians on state highways running through the reservation. 462 N.W.2d at 466–67.

62. In addition, none of this appears to have been raised in any cross-petition for *certiorari* filed by the opposing tribal parties in these cases. It is also worth noting that removal to federal court was not an option in either of these cases. Removal is generally limited to civil cases. *See, e.g.*, 28 U.S.C. § 1441 (1994).

63. Collateral estoppel is defined in Utah as follows: "[C]ollateral estoppel, focusing on issues rather than claims, 'involves two different causes of action and only bars those issues in the second litigation necessarily decided in the first.'" *In re* T.J., 945 P.2d 158, 163 (Utah Ct. App. 1997) (quoting State *ex rel.* Dep't of Soc. Serv. v. Ruscetta, 742 P.2d 114, 116 (Utah Ct. App. 1987)). There are four elements to be met:

> 1. The issue decided in the earlier action must be identical with the one presented in the action at question.
> 2. There was a final judgment on the merits in the earlier action.
> 3. The party against whom the plea is asserted was a party or in privity with a party to the previous adjudication.
> 4. The issue in the first case was competently, fully, and fairly litigated.

Id. at 163.

Collateral estoppel is defined in South Dakota as follows:

> [F]our tests must be met before the doctrine of collateral estoppel may be applied: 1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? 2) Was there a final judgment on the merits? 3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? 4) Did the party against whom the plea is asserted have a full and fair opportunity to litigate the issue in the prior adjudication?

Staab v. Cameron, 351 N.W.2d 463, 465 (S.D. 1984).

All four questions of collateral estoppel can easily be answered in the affirmative in both *Perank* and *Greger*. The precise issue of diminishment was litigated in the prior federal action; there was a final judgment on the merits; the party against whom the judgment is asserted was a party in the prior action; and the party had a full and fair opportunity to litigate the issue in the prior litigation. The state law of both Utah and South Dakota on the issue of collateral estoppel should have precluded the state from relitigating the issue of "diminishment." Federal law should have dictated a similar result.[64]

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64. *See* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 722–30 (5th ed. 1994). Professor Wright also persuasively articulates why state courts must give preclusive effect to federal judgments as a matter of *federal* law as well:

> The suggestion that state courts should be free to disregard the judgments of federal courts is so unthinkable that the rule rejecting any such suggestion has been stated in an unbroken line of cases that do not offer any clear judicial thought or explanation. Many of the cases talk as if § 1738 requires state courts to honor federal judgments, but as was noted at the outset of this discussion, the face of the statute itself makes this conclusion preposterous. Perhaps what these cases are saying is that this is something that Congress would have intended when it enacted § 1738 if only it had thought about it.
>
> There is a better explanation for why state courts are bound. Article III limits the federal judicial power to cases and controversies. To decide a case or controversy implies some binding effect. Proceedings that do not have at least the potential effect of precluding later relitigation of the same claims and issues would constitute something other than the exercise of the judicial power. Once it is accepted that Article III and its implementing legislation have created courts with the power to issue judgments that will have preclusive effects in other litigation, the Supremacy Clause of Article VI mandates that those preclusive effects are binding on state courts.

Id. at 736–37 (footnotes omitted).

III. FEDERAL PRACTICE ISSUES

A. *Exhaustion and Abstention*[65]

The principal federal practice issue generated by the *National Farmers Union* and *Iowa Mutual* cases is that of exhaustion or abstention. The exhaustion doctrine requires litigants to "exhaust" their tribal remedies, including tribal appellate remedies, before invoking federal district court jurisdiction to review the tribal court's assessment of its own jurisdiction.[66] With rare exceptions, at least until recently, exhaustion was thought to be mandatory rather than discretionary.[67]

The requirement of exhaustion is underpinned by policy concerns for comity and a respect for tribal self-government and judicial economy. Specifically, the Court has stated:

> We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. . . . Exhaustion of tribal court remedies, moreover, will encourage tribal

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65. *See generally* POMMERSHEIM, *supra* note 6; Timothy W. Joranko, *Exhaustion of Tribal Remedies in the Lower Courts After* National Farmers Union *and* Iowa Mutual*: Toward a Consistent Treatment of Tribal Courts by the Federal Judicial System*, 78 MINN. L. REV. 259 (1993); Pommersheim, *supra* note 10; Frank Pommersheim, *Tribal Courts: Providers of Justice and Protectors of Sovereignty*, 79 JUDICATURE 110 (1995); Laurie Reynolds, *Adjudication in Indian Country: The Confusing Parameter of Slots, Federal, and Tribal Jurisdiction*, 38 WM. & MARY L. REV. 539 (1997); Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. REV. 1089 (1995); Royster, *supra* note 16; Alex Tallchief Skibine, *Deference Owed Tribal Courts' Jurisdictional Determinations: Towards Co-Existence, Understanding and Respect Between Different Cultural and Judicial Norms*, 24 N.M. L. REV. 191 (1994).

66. *See* National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 853–57 (1985) (discussing exhaustion).

67. *See* Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997) (characterizing exhaustion as a "prudential rule"); *National Farmers Union*, 471 U.S. at 856 n.21 (noting circumstances under which exhaustion would not be required).

> courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.[68]

The exhaustion requirement has become a staple of Indian law practice and scholarship.[69] In addition, it has generated a substantial amount of case law in the various federal circuits.[70] It has drawn no reference or commentary, however, in the federal courts' scholarly community.[71]

The classic analogue to exhaustion in the context of mainstream federalism is the doctrine of abstention, which provides that there are "certain circumstances in which the federal courts must abstain and refuse to decide cases that are properly within their jurisdiction."[72] Specifically, the term "abstention" refers to the judicially-created practice whereby federal courts refrain from deciding certain matters before them, even though all jurisdictional and justiciability requirements are met.[73] Abstention questions arise in at least three distinct situations: to avoid interference with pending state proceedings, to avoid duplicative litigation, and when state law is unclear.[74] The principal doctrinal question involving abstention is whether these judicially-created common law rules are legitimate means of promoting federalism, particularly the protection of state courts, or whether such rules are essentially legislative in nature and violate basic separation of powers doctrine.[75]

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68. *National Farmers Union*, 471 U.S. at 856–57.
69. *See, e.g.*, sources cited *supra* note 65.
70. *See* sources cited *supra* note 65 and cases discussed therein.
71. *See also* discussion *supra* note 26 and accompanying text.
72. CHEMERINSKY, *supra* note 1, at 735.
73. *See id.*
74. *See id.*
75. *See id.* at 736. Specifically:

> The central policy question concerning abstention is whether the Supreme Court was justified in fashioning these doctrines. Long ago, Chief Justice John Marshall wrote: "It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should." Congress created the lower federal courts and specified their jurisdiction. In fact, where Congress desired federal court abstention it enacted particular statutes such as those discussed in the previous chapter—the Anti-Injunction Act, the Tax Injunction Act, and the Johnson Act. As such, it is contended that the Supreme Court acted impermissibly in creating the abstention doctrines. In a recent article,

In the context of tribal courts and federal courts, the Supreme Court has *not* spoken of abstention, but only of exhaustion.[76] The essential principle of the exhaustion doctrine reflects the notion that, pursuant to federal question jurisdiction, there must be an exhaustion of tribal court remedies before there is federal court review of whether there was tribal court jurisdiction in the first instance. The Supreme Court has couched its exhaustion rationale as necessary to support the development of tribal courts, to obtain the benefit of their expertise, and to advance the orderly administration of justice.[77] The exhaustion doctrine was generally thought to be mandatory rather than discretionary, although some exceptions were recognized by lower federal courts.[78]

Exhaustion as articulated in *National Farmers Union* and *Iowa Mutual* was also couched more expansively in terms of respect and comity,[79] but these cases did not make direct reference to abstention principles. Then, most recently, the Court in *Strate* seemed to veer away from these principles, and without much discussion concluded that exhaustion was not mandatory, but merely prudential, especially when only non-Indian activity on non-trust land was involved.[80] In doing so, it seri-

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> Professor Martin Redish forcefully argued that the doctrines are "a judicial usurpation of legislative authority in violation of separation of powers."

Id. (footnotes omitted).

76. *See, e.g.*, Strate v. A-1 Contractors, 520 U.S. 438 (1997); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1986); National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985). It is interesting to note that the converse is not exactly true. In *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608 (1975), the Court noted:

> For regardless of when the Court of Common Pleas' Judgment became final, we believe that a necessary concomitant of *Younger* is that a party in appellee's posture must *exhaust* his state appellate remedies before seeking relief in the District Court, unless he can bring himself within one of the exceptions specified in *Younger*.

Id. (emphasis added). Also noted in *Huffman* is the context of a state trial court civil judgment from which no appeal was taken. *See id.*

77. *See National Farmers Union*, 471 U.S. at 856–57.

78. *See, e.g.*, Blue Legs v. United States Bureau of Indian Affairs, 867 F.2d 1094, 1098 (8th Cir. 1989) (holding that Congress intended federal courts to be the *exclusive* forum for violations of the Resource Conservation and Recovery Act (RCRA) and therefore tribal court exhaustion is *not* required).

79. *See National Farmers Union*, 471 U.S. at 856–57; *Iowa Mut.*, 480 U.S. at 16 n.8.

80. *See Strate*, 520 U.S. at 438.

ously undermined the likelihood of tribal court jurisdiction in such cases.

Although this essay is not the place to discuss the apparent contraction of the exhaustion doctrine, it is the place to raise the question of the relationship, if any, of abstention principles to exhaustion doctrine. Are these principles essentially identical, or at least quite similar, or ultimately quite dissimilar? There is at least one substantive difference, perhaps a critical one. In abstention, the federal court has full subject matter jurisdiction over the dispute, whereas in the tribal court exhaustion situation, the federal court's jurisdiction is limited to the determination of whether the tribal court has jurisdiction, but not (necessarily) over the underlying substantive dispute itself. For example, in the *Crazy Horse* case, the plaintiff's primary causes of action, such as the knowing and willful tortious interference with customary rights of privacy and respect owed to a decedent and his family, the tortious interference with the right of publicity, and the negligent and intentional infliction of emotional distress on the heirs of the Estate through acts of exploitation and defamation provide *no* independent basis for federal jurisdiction.[81]

Another important distinction between abstention and exhaustion might be thought of as follows: abstention is primarily a horizontal doctrine concerned with adjusting the relations between two almost equivalent judicial sovereigns within the context of principles of federalism and Article III of the Constitution.[82] Exhaustion is partially horizontal in its concern with comity, but is also a vertical doctrine concerned with the scope of authority of tribal courts as determined by the federal judiciary. That determination is guided by the slender reed of federal common law rather than any constitutional imperative.[83] While the tension in abstention doctrine might be thought of as involving horizontal nuances, the tension in exhaustion might be thought of as involving wholesale pressure between both the horizontal and the vertical, between rough-hewn emergent

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81. This does not discount the possibility of diversity jurisdiction, but that, of course, would not involve the application of federal substantive law. *See also infra* notes 169–73 and accompanying text for a discussion of why tribal (not state) substantive law should apply.

82. *See* U.S. CONST. art III, §§ 1, 2 (describing the scope of national judicial power and the authority of federal courts).

83. *See National Farmers Union*, 471 U.S. at 850–51.

equality and dominant hierarchy. Again, the *Crazy Horse* case is instructive. The Eighth Circuit, in an almost perfunctory manner, concluded that tribal courts do not have jurisdiction over matters that occur primarily off the reservation, regardless of their effects on the reservation.[84] In doing so, the court failed to offer any analysis of the governing principles of long-arm jurisdiction, but rather relied on the observation that it was "plain that the Breweries' conduct outside the Rosebud Sioux Reservation [did] not fall within the Tribe's inherent sovereign authority."[85] The Eighth Circuit served up a raw vertical conclusion without even a respectful nod to the relevant horizontal analysis about long-arm jurisdiction set out in great detail in the tribal court's appellate opinion.[86]

In addition, federal district courts routinely enjoin tribal court proceedings when reviewing matters of tribal jurisdiction. In these cases, there is, of course, no reference to the Anti-Injunction Act,[87] which forcefully limits the ability of federal courts to enjoin state court proceedings. This is another instance of a respectful strand of federalism that is available to states, but unavailable to tribal courts. As such, it sharpens the vertical and dulls the horizontal nature of the relationship.

Perhaps the most provocative, if not distasteful, description of the exhaustion doctrine is that in its apparent solicitude[88] for tribal courts, it is no more than judicial "affirmative

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84. *See* Hornell Brewing Co. v. Rosebud Sioux Tribal Ct., 133 F.3d 1087, 1093 (8th Cir. 1998).

85. *Id.*

86. *See* Estate of Tasunke Witko v. G. Heileman Brewing Co., 23 Indian L. Rptr. 6104 (Rbd. Sx. Sup. Ct. 1996).

87. 28 U.S.C. § 2283 (1994). "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." *Id.*

88. Justice Stevens' (partial) dissent in *Iowa Mutual* is illustrative of this concern:

> Until today, we have never suggested that an Indian tribe's judicial system is entitled to a greater degree of deference than the judicial system of a sovereign state. Today's opinion, however, requires the federal court to avoid adjudicating the merits of a controversy also pending in tribal court although it could reach those merits if the case instead were pending in state court.

Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 22 (1987).

action."[89] Despite its divisive allusions, this bold assertion does identify the essential quandary: where do tribal courts fit within contemporary federalism and what is the doctrinal justification for the fit? Unfortunately, this quandary has completely eluded the attention of the federal courts' community.

Federal courts' scholars and teachers need to integrate exhaustion within their teaching and exploration of abstention. This is necessary both to acknowledge the legitimacy of tribal courts in the context of this core issue of federalism, as well as to bring the considerable weight of federal courts' scholarly exegesis to bear on the pertinent and unresolved issues. The overarching federal courts' theoretical question posed in this context is whether exhaustion in the tribal-federal context is synonymous with abstention in the state-federal context. A leading federal courts' treatise suggests that abstention, particularly as a judicially-made doctrine, is "defended as the judicial creation of common law rules necessary to serve essential interests, especially the protection of states in the system of federalism."[90]

The underlying policy grounds for abstention, which seek to advance federalism by protecting state judicial interests, is both similar and different from the exhaustion concerns articulated in *National Farmers Union* and *Iowa Mutual*. The similarity draws from the idea of comity and the necessity of some kind of mutual respect. Exhaustion and abstention appear similar because they both require federal courts in some circumstances to defer to the courts of another sovereign, whether state or tribal, and stay their hand. This similarity is governed by the shared policy concern of comity and respect. Yet there remains an important shade of difference. Comity in the exhaustion context moves beyond respect to include a spe-

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89. *See* Symposium, *Dispute Resolution in Indian Country: Does Abstention Make the Heart Grow Fonder?*, 71 N.D. L. REV. 541, 551 (1995) (noting comments by Phil Lear).

90. CHEMERINSKY, *supra* note 1, at 736 (footnotes omitted). These judicially created rules have also been criticized as violative of the separation of powers doctrine. *See also* Martin Redish, *Abstention, Separation of Powers and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984); Michael Wells, *Why Professor Redish Is Wrong About Abstention*, 19 GA. L. REV. 1097 (1985). There are, of course, federal statutes such as the Anti-Injunction Act, 28 U.S.C. § 2283 (1994), the Tax Injunction Act, 28 U.S.C. § 1341 (1994), and the Johnson Act, 28 U.S.C. §§ 1331–1332, 1341–1342, 1345, 1354 (1994) that mandate abstention in some circumstances.

cific commitment to support and advance tribal courts.[91] This additional benevolence is at least implicitly required as a matter of federal policy in order to advance the tribal sovereign, which otherwise would not be as sufficiently or constitutionally protected as the state sovereign.[92]

The doctrines are also quite dissimilar. For example, as noted in *National Farmers Union*, another means of justifying exhaustion is to provide a tribal court whose jurisdiction is being challenged the first crack at the issue and to provide a reviewing federal court with the benefit of its expertise. In addition, federal courts, as a matter of federal common law,[93] determine the parameters of tribal court judicial authority and perform a direct review of the dependent sovereign without any constitutional benchmark similar to the Tenth Amendment in the federal-state context.[94] Such review is seldom permitted in the state-federal context because of the Tenth Amendment. The Tenth Amendment provides the constitutional benchmark for parsing the respective spheres of federal and state authority, and is consequently the touchstone of basic federalism concerns. In the absence of an appropriate constitutional benchmark, federal review of tribal courts' jurisdiction becomes largely extra-constitutional, subject to the unbounded reaches of federal common law.[95]

The Supreme Court recently decided *El Paso Natural Gas Co. v. Neztsosie*,[96] which highlights the issues of exhaustion and tribal jurisdiction over federal causes of action. A review of the Ninth Circuit decision is particularly instructive. In *Neztsosie*, several Navajo plaintiffs filed actions in tribal court against El Paso Natural Gas and other defendants, alleging personal in-

91. *See Iowa Mut.*, 480 U.S. at 14–15 ("Tribal courts play a vital role in tribal self-government and the Federal Government has consistently encouraged their development.").

92. *See* discussion *supra* notes 9–15 and accompanying text.

93. The development and application of federal common law is a somewhat questionable and problematic practice in this area and is discussed *infra* notes 185–90 and accompanying text.

94. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

95. *See* discussion *infra* notes 185–90 and accompanying text.

96. 119 S. Ct. 1430 (1999).

jury and wrongful death based on Navajo common law.[97] In response to these actions, the defendants filed actions in federal court seeking preliminary injunctions to enjoin the Navajo Tribal Court from asserting jurisdiction over the plaintiffs' claims.[98] The defendants asserted that all actions arising from "nuclear incidents" fall within the Price-Anderson Act,[99] and must be litigated in federal court.[100] The district court granted in part, and denied in part, the requests for preliminary relief.[101]

The Ninth Circuit ruled that exhaustion was mandatory and "based on considerations of comity and the long-standing policy of promoting tribal self-government and self-determination."[102] The only potentially applicable exception was that of "express jurisdictional prohibition."[103] The court then went on to examine the Price-Anderson Act to determine whether it contained any "express jurisdictional prohibition" against tribal court jurisdiction and concluded that it did not.[104] Specifically, the court noted that the Price-Anderson Act either recognized concurrent jurisdiction in state courts with a right of removal to federal court or established exclusive federal ju-

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97. *See* El Paso Natural Gas Co. v. Neztsosie, 136 F.3d 610, 612 (9th Cir. 1998), *cert. granted*, 119 S. Ct. 334 (1998), *vacated*, 119 S. Ct. 1430 (1999); *see also* Kerr-McGee Corp. v. Farley, 115 F.3d 1498 (10th Cir. 1997).

98. *See* 42 U.S.C. § 2011 (1994); *Kerr-McGee*, 115 F.3d 1498.

99. 42 U.S.C. § 2011 (1994).

100. *See Neztsosie*, 136 F.3d at 612.

101. *See id.*

102. *Id.* at 614.

103. *See id.* at 615. Specifically:

> An exception to the tribal exhaustion requirement exists where: (1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) tribal court jurisdiction patently would violate express jurisdictional prohibitions; (3) exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction; or (4) no federal grant authorizes tribal governance of nonmembers' conduct on land covered by *Montana's* main rule. In this case, the parties only dispute the applicability of the "express jurisdictional prohibition" exception to tribal court jurisdiction. "A substantial showing must be made by the party seeking to invoke [the 'express jurisdictional prohibition'] exception to the tribal exhaustion rule. Tribal courts rarely lose the first opportunity to determine jurisdiction because of an 'express jurisdictional prohibition.'"

Id. at 614–15 (citations omitted) (alterations in original) (citing *Kerr-McGee*, 115 F.3d at 1052).

104. *See id.* at 617.

risdiction relative to state court jurisdiction, but did not purport to limit potential tribal court jurisdiction.[105]

The court then incisively distinguished the pivotal role of comity in the federal-tribal context:

> As in cases raising comity concerns regarding federal-state jurisdiction, comity concerns in federal-tribal jurisdiction arise out of mutual respect between sovereigns. In the realm of federal-tribal jurisdiction, . . . Congress has expressed an . . . interest in promoting the development of tribal sovereignty. The Supreme Court has recognized this congressional intent and assiduously advocated federal abstention in favor of tribal courts. Thus, even if Price-Anderson preempts *state court* jurisdiction—still an open question in this circuit—there is no express prohibition of *tribal court jurisdiction*.[106]

This thoughtful exegesis demonstrates a persuasive commitment to the continuing vitality of the *National Farmers Union* and *Iowa Mutual* teachings about comity and the respect due tribal courts. The court was not swayed by *Strate*, and properly confined it to situations involving non-Indian activities on non-trust land.[107]

The dissent took a more expansive *Strate* approach, noting that there is an implicit tribal jurisdictional prohibition be-

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105. The court quotes approvingly from the district court opinion in *Kerr-McGee*:

> The Price-Anderson Act does not affirmatively limit tribal court jurisdiction. Although Congress has plenary power to define the jurisdiction of tribal courts, it did not exercise that power when it drafted the Price-Anderson Act. The Act makes no reference to Indians and nothing in the legislative history suggests any intent to render inoperative the established policy promoting tribal self-government.

Id. at 617–18 (citing *Kerr-McGee*, 115 F.3d 1498).

106. *Id.* at 618–19 (citations omitted) (emphasis in original).

107. *See id.* at 618 n.5. Specifically:

> [I]n this case the Navajo Nation retained tribal sovereignty over the land the mining companies occupied, which land was neither open to the public nor controlled or maintained by any entity other than the tribe. The *Strate* Court expressly declined to address cases, like the present one, where the disputed tort involved nonmembers of the tribe and occurred on tribal land. Because this case is distinguishable from *Strate*, we need not consider whether a *Montana* exception applies. It seems indisputable, however, that a claim involving uranium contamination poses a danger to the 'health or welfare of the tribe.'

Id. (citation omitted).

cause there is no federal grant of authority over nonmembers' conduct,[108] but it neglected to consider the territorial component of tribal jurisdiction on tribal land. That is, tribal court jurisdiction is *exclusive* on tribal land unless expressly limited by Congress.[109] While *Neztsosie* may be seen as a narrow case about the intricacies of preemptive federal jurisdiction and exhaustion involving "nuclear" torts under the Price-Anderson Act, it may also be seen as a potential case about the legal competence of tribal courts to entertain federal causes of action involving non-Indians. The larger problem, of course, is whether there is any principled basis for treating tribal courts more favorably or less favorably than state courts in the context of the legal competence to entertain federal causes of action.

Indeed, the Supreme Court's unanimous decision vacating the Ninth Circuit's judgment in *Neztsosie*[110] took the former tack, and announced that, despite the absence of express language in the statute or any legislative history relative to tribal court jurisdiction, tribal court jurisdiction was foreclosed.[111] Although one might argue that the decision was "practical," it certainly was not analytically compelling. Justice Souter's opinion admitted as much with its lighthearted observation

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108. *See id.* at 621 (Kleinfeld, J., dissenting). Specifically, in addressing this issue:

> The Court held in *Strate* that exhaustion in tribal court is not required, where "it is plain that no federal grant of authority provides for tribal governance of nonmembers' conduct."
>
> > When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct . . . covered by the main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. As in criminal proceedings, state or federal courts will be the only forums competent to adjudicate those claims. Therefore, when tribal court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement must give way, for it would serve no purpose other than delay.
>
> The majority has in footnote 5 attempted to limit *Strate* to its facts, as we might with a poorly reasoned decision of our own that had not stood up well over time. We cannot do that with a Supreme Court decision.

Id. (quoting Strate v. A-1 Contractors, 520 U.S. 438, 459 n.14 (1997)) (citations omitted).

109. *See, e.g.*, COHEN, *supra* note 9, at 122–23.

110. El Paso Natural Gas Co. v. Neztsosie, 119 S. Ct. 1430 (1999).

111. *See id.* at 1436–39.

that "now and then silence is not pregnant."[112] Certainly the Supreme Court ought to do better than that.

B. Ancillary, Pendent, and Supplemental Jurisdiction

Ancillary, pendent, and supplemental jurisdiction, while somewhat conceptually distinct,[113] raise the same basic question: when and under what circumstances may or must a federal court, with admitted jurisdiction over a particular cause of action, accept jurisdiction as to related (state) claims that would ordinarily fall beyond the court's jurisdiction. The leading cases in this area all involve state-authorized causes of action.[114]

The analogous question arises in determining whether a federal court with admitted jurisdiction over a particular federal cause of action would also have jurisdiction over related tribal causes of action. Does the same rationale apply? For example, in the *Crazy Horse* case, the Estate of Crazy Horse included two federal causes of action—statutory claims under the

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112. *Id.* at 1439. The Court found, perhaps not implausibly, congressional silence on tribal court jurisdiction a product of likely *inadvertence*. While the decision adhered closely to the particulars of the Price-Anderson Act and its history, the Court recognized the ability of tribal courts as a general matter to decide questions of federal law. Specifically:

> Under normal circumstances, tribal courts, like state courts, can and do decide questions of federal law, and there is no reason to think questions of federal preemption are any different. The situation here is the rare one in which statutory provisions for conversion of state claims to federal ones and removal to federal courts express congressional preference for a federal forum.

Id. at 1438 n.7 (citation omitted).

113. "*Ancillary jurisdiction* referred to the authority of a federal court to hear claims that otherwise would not be within federal jurisdiction because the claims arise from the same set of facts as a case properly before the federal court." CHEMERINSKY, *supra* note 1, at 327. "In other words, under ancillary jurisdiction federal courts were allowed to hear claims that arise from a common nucleus of operative fact—or as it is sometimes phrased, from the same transaction or occurrence—even though there is no other basis for federal jurisdiction." *Id.* at 313. "Pendent jurisdiction was one specific type of ancillary jurisdiction. A federal court plaintiff presenting a federal question also may litigate state law claims that arise from the same facts as the federal law claim." *Id.* at 313–14. Supplemental jurisdiction is the federal statutory term that includes both ancillary and pendent jurisdiction. *See id.* at 317.

114. *See, e.g.*, Hurn v. Oursler, 289 U.S. 238 (1933); Moore v. New York Cotton Exch., 270 U.S. 593 (1926); Siler v. Louisville & Nashville R.R., 213 U.S. 175 (1909); Stewart v. Dunham, 115 U.S. 61 (1885); Freeman v. Howe, 65 U.S. (24 How.) 450 (1860).

Lanham Act[115] and the Indian Arts and Crafts Act[116]—in addition to the tribal law causes of action asserted in its tribal court complaint.[117] Given the Eighth Circuit's dismissal of the tribal court claims, should the Estate now sue directly in federal court on its statutory claims? Would there then be any basis for supplemental jurisdiction over the tribal law causes of action? Or, in a different example, could an individual Indian plaintiff not only sue the tribe and BIA in federal court for alleged RCRA[118] violations as in *Blue Legs v. United States Bureau of Indian Affairs*,[119] but also sue the tribe on a straightforward tort cause of action for negligence and the resulting damages caused by the tribe's illegal dumping activities? Putting aside the issue of tribal sovereign immunity—or assuming

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115. The Estate alleged a cause of action under § 1125(a) of the Lanham Act, which provides:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
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> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a) (1994).

116. Section 305e(c)(1) of the Indian Arts and Crafts Act of 1990 expressly provides:

> (c) Persons who may initiate civil actions
>
> (1) A civil action under subsection (a) of this section may be commenced—
>
> (A) by the Attorney General of the United States upon request of the Secretary of the Interior on behalf of an Indian who is a member of an Indian tribe or on behalf of an Indian tribe or Indian arts and crafts organization; or
>
> (B) by an Indian tribe on behalf of itself, an Indian who is a member of the tribe, or on behalf of an Indian arts and crafts organization.

25 U.S.C. § 305e(c)(1) (1994).

117. *See* Hornell Brewing Co. v. Rosebud Sioux Tribal Ct., 133 F.3d 1087, 1089 (8th Cir. 1998).

118. Resource Conservation and Recovery Act, 42 U.S.C. § 6901–92k (1994).

119. 867 F.2d 1094 (8th Cir. 1989) (finding that Congress intended to abrogate tribal sovereign immunity, thereby allowing the Environmental Protection Agency to sue tribes in federal court for cleanup of reservation dumps).

hypothetically that it is not an issue—the initial answer in both examples might appear to be yes. The underlying federal policy concerns for federal economy clearly would be advanced by such a practice:

> It is extremely desirable for federal courts to have the authority to decide the entire case, including the matters that are not part of federal jurisdiction. Judicial economy is served by having a matter litigated in one court rather than in two or more tribunals. The splitting of lawsuits increases costs of the parties, wastes social resources, and risks inconsistent verdicts from the different courts.[120]

Yet this policy of judicial economy, sound on its face, which also "preserves the attractiveness of the federal forum for litigants,"[121] may well conflict with other federal policy concerns in the context of tribal courts.

The argument against the application of the principle of supplemental jurisdiction to tribal causes of action clearly would focus on the potential for supplemental jurisdiction to be used to circumvent or supplant tribal court jurisdiction. Such application, it could be argued, undermines the federal commitment to tribal courts. As Justice Marshall observed in *Iowa Mutual*: "Unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's ability over reservation affairs."[122]

The relevant federal statute, the Judicial Improvements Act of 1990,[123] represents the first congressional authorization for pendent and ancillary jurisdiction.[124] One important effect of the statute is to make supplemental jurisdiction mandatory

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120. CHEMERINSKY, *supra* note 1, at 327.

121. *Id.*

122. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1987). See *infra* notes 150–68 and accompanying text for full discussion.

123. Pub. L. No. 101-650, § 101-805, 104 Stat. 5089, 5089–5137 (1990).

124. Specifically, it provides:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve joinder or intervention of additional parties.

28 U.S.C. § 1367(a) (1994).

rather than discretionary. The statute by its terms does not specify that such supplemental jurisdiction is limited to *state* causes of action, but rather to all other claims. It is therefore possible to argue that the broad statutory language also encompasses tribally authorized causes of action. The relevant legislative history is sparse, however, and does not include any specific mention of tribal courts.[125]

Although supplemental jurisdiction is mandatory under most circumstances, there are a few statutory exceptions:

> The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if–
>
> 1) the claim raises a novel or complex issue of State law,
>
> 2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> 3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> 4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.[126]

In any given case, depending on the nature of the facts, exception number two is a possibility if the tribal claim "substantially predominates." Exception number four is always applicable where a federal court considers support of tribal court jurisdiction an "extraordinary circumstance" pursuant to Justice Marshall's position in *Iowa Mutual*.[127] Again, the *Crazy Horse* case is instructive. Despite the denial of tribal court jurisdiction, the Eighth Circuit indicated, without elucidation, that the federal district court would have jurisdiction over these claims.[128]

There is, of course, the enigma of parsing the exact meaning of "these claims." Does the term "these claims" include claims based solely on tribal law, even though the tribal court itself does not have jurisdiction over them? This seems unlikely unless a unique kind of supplemental jurisdiction applies. Perhaps "these claims" refers to the federal statutory claims alone. Then again, if the action is pursued in the diver-

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125. *See, e.g.*, H.R. REP. NO. 734-101, at 27–30 (1990).

126. 28 U.S.C. § 1367(c) (1994).

127. *See Iowa Mut.*, 480 U.S. at 21.

128. *See* Hornell Brewing Co. v. Rosebud Sioux Tribal Ct., 133 F.3d 1087, 1093 (8th Cir. 1998).

sity context, perhaps the state law analogues—if they exist—to the tribal law causes of action, in states where the defendant entities are incorporated or do business, would be proper supplemental claims. Clearly, the Eighth Circuit did not want to be in the position of suggesting that there might not be *any* forum with jurisdiction, but it clearly had not thought through some of the potentially nettlesome jurisdictional permutations.

This simple issue presents a recurring dilemma. If tribal courts are to be viewed as being entitled to the same treatment as state courts within the federal system, they should be subject to the supplemental jurisdiction statute. But if, for whatever reasons, they are not so viewed, they should not be subject to the statute, at least not all the time. The most accurate assessment relative to avoiding "direct competition with the tribal courts,"[129] however, may be that, although parity is the goal, it is not the current reality. Moreover, to assume an illusory parity at this time can only harm tribal courts. Once again, analyzing and resolving this garden-variety practice issue leads to important structural concerns about the nature of the current, as well as future, relationship between tribal courts and federal courts.

There are a small number of reported cases in which tribal courts have entertained federal causes of action demonstrating the converse of supplemental jurisdiction. These cases include *United States v. Plainbull*[130] and *Nevada v. Hicks*.[131] These cases view tribal courts as fully competent, in the absence of affirmative congressional legislation to the contrary, to adjudicate federal claims. This respect flows from *National Farmers Union* and *Iowa Mutual* dictates of comity, yet the effects, if any, "of chilly winds" of the plenary common law regime suggested by *Strate* remain to be seen.[132] Most recently, the Court

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129. *Iowa Mut.*, 480 U.S. at 16.

130. 957 F.2d 724 (9th Cir. 1992) (holding that a lawsuit brought by the United States on its own and the tribe's behalf for trespass to tribal lands and grazing fees must first be brought in tribal court, even where no tribal court action is pending).

131. 944 F. Supp. 1455 (D.C. Nev. 1996) (holding that a civil rights and a 42 U.S.C § 1983 lawsuit brought by a tribal member against tribal and state officials in tribal court for actions occurring on the reservation met the requirements of *Montana* despite the presence of federal issues).

132. *See, e.g.*, County of Lewis v. Allen, 163 F.3d 509 (9th Cir. 1998) (concluding that tribal court does not have tribal or federal 42 U.S.C. § 1983 jurisdiction over Idaho state law enforcement officer activities on the reservation pursu-

did explicitly note in *El Paso Gas* that tribal courts can and do decide questions of federal law.[133] In this context, the strictures of federalism, particularly the Supremacy Clause, require tribal courts, like state courts, to enforce federal law as would any federal court.[134]

C. Removal Jurisdiction

Removal jurisdiction seemingly presents an easier problem. Removal jurisdiction is strictly a creature of precisely crafted statutory language.[135] Removal is seen as a necessary procedural mechanism to ensure a *federal* forum for any federally created cause of action in accord with Article III of the United States Constitution. All of the relevant removal stat-

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ant to state-tribal agreement; tribal agreement with state effectively ceded judicial authority similar to highway easement grants by tribe in *Strate v. A-1 Contractors,* 520 U.S. 438).

133. *See* El Paso Natural Gas Co. v. Neztsosie, 119 S. Ct. 1430, 1438 n.7 (1999).

134. *See, e.g.,* Howlett v. Rose, 496 U.S. 356 (1990) (holding that state courts are bound to enforce federal law in federal causes of action except in narrow situations invoking neutral state rules regarding administration of courts). As an interesting aside, it may be noted that the Supremacy Clause itself makes no direct reference to tribal courts or tribal judges ("and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"), though the phrase "Judges in every state" might be parsed to mean not state judges but judges, of whatever kind, *in* every state and that might encompass tribal judges. U.S. CONST., art. VI, cl. 2.

135. *See* 28 U.S.C. § 1441 (1994). There are other removal provisions, such as 28 U.S.C. § 1442 (allowing federal officers to remove suits against them from state to federal court) and 28 U.S.C. § 1443 (allowing removal of certain civil rights cases from state to federal court). The history of removal jurisdiction is unremarkable:

> Although removal jurisdiction is not expressly mentioned in Article III, statutes have authorized removal ever since the Judiciary Act of 1789. The constitutionality of removal jurisdiction was established long ago. Article III defines the matters that federal courts may hear, but it is silent as to the procedures that may be used to initiate federal court jurisdiction. Accordingly, the Supreme Court always has permitted Congress to define such procedures, such as the availability of removal jurisdiction.
>
> The existence of removal jurisdiction reflects the belief that both the plaintiff and the defendant should have the opportunity to benefit from the availability of a federal forum. For example, if a plaintiff sues in his or her home state court, removal by the defendant to a federal court effectuates a primary purpose of diversity jurisdiction in providing a seemingly more neutral forum.

CHEMERINKSY, *supra* note 1, at 322–23.

utes address removal in the state court context only. For example, the primary removal statute, 28 U.S.C. § 1441(a), provides:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a *State* court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.[136]

The plain language of the statute makes no reference to tribal courts and would appear to foreclose removal of a federal claim asserted in tribal court to federal court.

A relevant example in this vein is *Becenti v. Vigil*[137] in which a tribal member brought an action in tribal court against several Bureau of Indian Affairs employees for alleged violations of their trust responsibilities in administering a loan.[138] The federal government filed a petition for removal pursuant to 28 U.S.C. § 1442(a)(1).[139] The removal petition stated that the complaint filed in tribal court sought injunctive and monetary relief against individual defendants for actions taken under color of their office and in performance of their official duties.[140] The case was then removed to federal court and subsequently dismissed on sovereign immunity grounds.[141]

The Tenth Circuit vacated and remanded the case to the Jicarilla Apache Tribal Court on a plain-meaning reading of § 1442(a)(1) as being limited to removal from "a state court."[142] The court noted that federal jurisdiction was circumscribed by Congress and the court could not expand it beyond such mandates.[143] The court went on to note that where Congress has intended to permit removal from courts other than state courts it had expressly said so.[144]

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136. 28 U.S.C. § 1441(a) (1994) (emphasis added).
137. 902 F.2d 777 (10th Cir. 1990).
138. *See id.* at 778.
139. *See id.*
140. *See id.* at 778–79.
141. *See id.*
142. *See id.* at 778.
143. *See id.* at 780–81.
144. *See id.* at 780 (discussing statutory provisions allowing removal from the Superior Court of the District of Columbia and from the District Court for the District of Puerto Rico).

Removal is therefore not available in the tribal court context. Despite this straightforward answer, it raises some intriguing questions. For example, recall the *Crazy Horse* case. The federal statutory claims under the Lanham Act and the Indian Arts and Crafts Act, if not removable, raise an interesting problem of denying the availability of a federal forum for a federal statutory cause of action. Yet it may also be argued that tribal courts, like state courts, are courts of general jurisdiction, and, in the absence of any self-imposed limitations, possess the necessary jurisdiction and competence to hear nonexclusive federal claims.[145] Further, such claims are ultimately subject to direct review by the Supreme Court. This practice would be analogous to those situations where Congress has specifically prohibited the removal of certain federal claims from state court.[146] Note too that although the defendants in the *Crazy Horse* case never attempted to remove, it is interesting to speculate as to what the district court would have done if the defendants had attempted to remove. One possibility is that the court would have denied removal based on a plain-meaning interpretation of the statute, in which case Congress might have been alerted to the potential need to amend the removal statute. Another possibility is that the court would have granted removal in light of the alleged parity with state courts. One final scenario would have the court deny removal and, upon exhaustion, review a claim that tribal courts are not courts of general jurisdiction[147] and require federal authorization to hear federal statutory claims.[148]

In the event that removal was granted, the nonremovable tribal law claims would have presented yet another issue for

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145. *See, e.g.,* CHEMERINSKY, *supra* note 1, at 260–61 for the relevant *state* court discussion.

146. The removal statutes expressly bar removal of actions under the Federal Employer's Liability Act and state workmen's compensation laws. *See* 28 U.S.C. § 1445(c) (1994); Horton v. Liberty Mut. Ins. Co., 367 U.S. 348 (1961).

147. Arguably, however, this is not even a federal question supporting federal jurisdiction, but a matter of tribal law unless one looks again to the vortex of federal common law.

148. The question of whether a tribal court is a court of general jurisdiction for purposes of hearing federal claims is not one that was faced by Congress at the time the Judiciary Act of 1789 was adopted or at any time since. *See* additional discussion *supra* note 110 and accompanying text in which the Supreme Court in the *El Paso* case specifically recognized tribal court authority to decide questions of federal law.

the court to deal with. In this vein, Professor Chemerinsky has noted:

> [Section] 1441(c) serves the same values as supplemental jurisdiction: it allows an entire case to be tried in one forum. If there are claims properly before a federal court, it is more efficient to allow other claims not within federal jurisdiction to be tried at the same time. Section 1441(c) also serves to preserve the attractiveness of the federal forum. If the defendant could remove only part of a case to federal court, but would still have to try the remainder in state court, there would be a strong disincentive to invoking federal jurisdiction. As is true with regard to pendent jurisdiction, under § 1441(c), a federal court has discretion to decide whether it will hear the removed claims that would not independently fit within its jurisdiction.[149]

Does that mean removal of the tribally based claims should be seen as properly supplemental? One possibility is that the removal statute(s) as currently drawn simply reflect the judicial reality at the time of their passage, when tribal courts were either nonexistent or not significant and therefore were not even on the screen in the original removal context. Removal is, therefore, totally improper in the tribal court context. Accordingly, with the growth and development of tribal courts, the removal statutes simply need to be amended to include tribal courts within their purview.

Yet this suggestion may be a little too glib. It is quite possible, for example, to argue that the unique relationship of tribal courts to the federal government requires the kind of deference suggested by Justice Marshall in the *Iowa Mutual* case: "tribal courts play a vital role in tribal self-government . . . and the Federal Government has consistently encouraged their development."[150] This is also related to the Court's sensitivity, as noted above, toward not wanting to engage in "direct competition" with tribal courts. Thus, removal can be seen as antithetical to federal policy supporting tribal court development. This line of reasoning becomes increasingly formidable when it is recalled how the Court in *Iowa Mutual*

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149. CHEMERINSKY, *supra* note 1, at 326.

150. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14–15 (1987) (citation and footnote omitted).

treated diversity jurisdiction in the tribal court context as significantly different than in the off-reservation context.[151]

Once again, a mundane Indian law federal courts' practice issue broaches broader questions about both what is and what ought to be the relationship of tribal courts to federal courts. It becomes a paradoxical refrain that presents a recurring theme of doctrinal choice. This choice might be characterized as between symmetry and asymmetry or parity and difference. Should tribal courts simply be treated as state courts for all federal courts' purposes, or are there reasons, as a matter of policy, structure, or constitutional doctrine, that require a differential or asymmetrical approach in delineating the position of tribal courts within the federal system? At this time or for all time? Or is this a blind evolutionary process without any doctrinal signposts or direction?[152]

It is interesting to note that the issue of removal, or more accurately its apparent non-availability in the tribal court context, was irritatingly noted by Justice Ginsburg in her opinion in *Strate*. She opined without elucidation about the problem of having a non-resident, non-Indian defendant "defend against this commonplace state highway accident claim in an unfamiliar court."[153] This observation was footnoted with the reminder of the availability of removal from state to federal court in the diversity context pursuant to 28 U.S.C. § 1441.[154] Unfortunately, irritation is a poor substitute for informed—much less empathetic—exegesis.

D. Diversity Jurisdiction

Diversity jurisdiction in the context of causes of action that arise on the reservation presents a number of interesting and unique issues. In light of the absence of commentary in the federal courts' scholarly community, however, there would ap-

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151. *See id.* at 15–20; *see also* discussion *infra* notes 155–68 and accompanying text.

152. *See* detailed discussion *supra* Part I.

153. Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997) (footnote omitted).

154. *See id.* at 459 n.13. "Within the federal system, when non-residents are the sole defendants in a suit filed in state court, the defendants ordinarily remove the case to federal court. See 28 U.S.C. § 1441." *Id.* Note however that the "non-resident" in *Strate* was a non-resident of the reservation, but not a non-resident of the state in which the reservation is located. *See* discussion of this diversity problem *infra* notes 155–56 and accompanying text.

pear to be nothing of substance to say. In fact, there is quite a bit to note and comment upon in terms of what the Supreme Court has both said and not said in this area.

In *Iowa Mutual*, where an insurance coverage claim was *pending* in tribal court, the out-of-state corporate defendant insurer brought an original action against the tribal court Indian plaintiff in federal court based on diversity.[155] The Supreme Court rejected the use of diversity in this situation. Building on its decision in *National Farmers Union* to support tribal court development and to provide comity, the Court stated:

> Regardless of the basis of jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a full opportunity to determine its own jurisdiction. In diversity cases, as well as federal-question cases, unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs. . . . Adjudication of such matters by any non-tribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law.[156]

This language of the Supreme Court strongly endorsed a commitment to both respect and advance tribal court jurisdiction. The Court considered it necessary to forego its own diversity jurisdiction in order to avoid improper competition with developing tribal courts.[157] This view of federal diversity jurisdiction as pernicious in the tribal court context contravenes that of the state context, which is premised on the protection against local bias against non-resident defendants.

The Court specifically rejected such potential bias against non-residents in the reservation context: "Petitioner also contends that the policies underlying the grant of diversity jurisdiction—protection against local bias and incompetence—justify the exercise of federal jurisdiction in this case. We have rejected similar attacks on tribal court jurisdiction in the past."[158] Diversity jurisdiction in the state context is necessary

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155. *See Iowa Mut.*, 480 U.S. at 9 (citations omitted).
156. *Id.* at 16.
157. *See id.* at 16–17.
158. *Id.* at 18, 19.

to curb local bias,[159] but it is improper in the reservation context as unfounded and an undue hindrance to the development of tribal courts and the federal policy of supporting tribal self-government.

Again, we see the Court emphasizing a unique brand of judicial comity not only to respect tribal courts, but to advance their development. The means employed in this instance to ef-

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159. The local bias theory for the creation of diversity jurisdiction is not accepted by all commentators:

> The traditional theory is that diversity jurisdiction was intended to protect out-of-state residents from the bias that they might experience, or at least fear that they might face, in state courts. The most famous explanation of this rationale for diversity jurisdiction is Chief Justice John Marshall's statement: "However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states."
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> But some commentators—most notably the late Judge Henry Friendly—challenged this rationale for diversity jurisdiction. Friendly argued that the diversity clause "was not a product of difficulties that had been acutely felt under the Confederation" and that "such information as we are able to gather . . . entirely fails to show the existence of prejudice on the part of the state judges." It should be noted, however, that this argument only partially refutes the traditional explanation for the creation of diversity jurisdiction. Even if prejudice did not actually exist, perhaps prejudice was feared and diversity jurisdiction was established to provide an alternative to state courts, which might be distrusted in diversity cases.
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> Judge Friendly offered an alternative explanation for the authorization for diversity jurisdiction. Judge Friendly argued that there was fear of populist state legislatures adopting antibusiness laws; federal court jurisdiction and the development of federal common law rules provided protection for interstate commerce and business. Friendly wrote that "a careful reading of the arguments of the time will show that the real fear was not of state courts so much as of state legislatures." Additionally, Friendly contended that there was fear that state judges who lacked life tenure would be more likely to be influenced by populist sentiments and be biased against merchants. By this theory, diversity jurisdiction initially was based less on the existence of state court hostility to out-of-staters, and more on the fear of state court hostility to commercial interests.
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> These explanations, of course, are not mutually exclusive; both could have influenced the creation of diversity jurisdiction. Although diversity jurisdiction has existed for 200 years, it remains very controversial.

CHEMERINSKY, *supra* note 1, at 286–87 (footnotes omitted).

fectuate these goals were to extend the *National Farmers Union* 'exhaustion' doctrine to encompass situations involving nominal diversity in the reservation situation.[160] The purpose of exhaustion becomes even broader than the more narrow policy concerns in the federal-state abstention context.[161]

There is also the interesting diversity wrinkle involving removal jurisdiction.[162] Justice Stevens seems to take the position that there is nothing to justify the greater degree of deference accorded to tribal courts in *Iowa Mutual*. His comments, without saying so, highlight the ongoing, but unacknowledged, enigma of fashioning a *place* for tribal courts within the federal system. Note also that the statutory authorization for removal in the federal-state diversity context does not preclude any judicially created deference in the federal-tribal diversity context. In this regard, it is significant to note that, contrary to normal state-federal diversity practice which allows a non-resident defendant in a state court proceeding to routinely remove the action to federal court, there was no attempt in *Iowa Mutual* by the non-resident defendant to remove the tribal court action to federal court in accordance with 28 U.S.C. § 1441(b).[163] As noted above, federal removal statutes by their specific terms

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160. It is this extension of the exhaustion doctrine that caused Justice Stevens, the author of the Court's unanimous opinion in *National Farmers Union*, to part company with the *Iowa Mutual* majority. He viewed this increased deference as unjustified. Specifically:

> Until today, we have never suggested that an Indian tribe's judicial system is entitled to a greater degree of deference than the judicial system of a sovereign State. Today's opinion, however, requires the federal court to avoid adjudicating the merits of a controversy also pending in tribal court although it could reach those merits if the case were pending in state court.

Iowa Mut., 480 U.S. at 22. What Justice Stevens fails to note is that in the diversity context, when an action is filed against a non-resident in state court, the non-resident may remove the action from state court to federal court pursuant to 28 U.S.C. § 1441. However, this mechanism does not appear to allow removal from tribal court. *See also* discussion *supra* note 88 and accompanying text.

161. *See supra* Part III.A.

162. *See supra* Part III.C.

163. The statute provides:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1441(b) (1994).

are limited to transferring *state* court actions to federal court. Therefore, removal was not an option in *Iowa Mutual*. If it were, its availability would clearly evince a congressional policy quite contrary to that taken by the Court in *Iowa Mutual*. Potential removal in the tribal court-federal court context stands as much more than a mere procedural device of convenience to insure the availability of a federal forum, but one freighted with significant substantive impact on the stature and development of tribal courts.

In *Iowa Mutual*, the Supreme Court also weighed in with substantial analysis casting serious doubt upon the availability of diversity jurisdiction in *any* situation involving Indians on the reservation.[164] The Court, despite congressional authority to do so, divined no intent in the general grant of diversity jurisdiction to limit tribal sovereignty.[165] There is at least one diversity permutation not directly covered by the facts of *Iowa Mutual*. While *Iowa Mutual* properly casts severe doubt about the applicability of diversity in *any* Indian country context—particularly when the situs of the controversy is Indian land—does the same rationale apply when *no* action has been filed in tribal court? The answer would appear to be yes.[166] The *Iowa Mutual* rationale is appropriate. Congress has never authorized diversity jurisdiction in the tribal court context.

In an obvious corollary, Congress has never found the predicate "bias" to justify such jurisdiction and the *Iowa Mutual* rule forecloses any attempt to circumvent the tribal forum. This approach is clearly in line with current (congressional) policy to support tribal courts and tribal self-determination. In addition, the diversity statute itself makes no reference to In-

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164. *See* 480 U.S. at 17–18.

165. Specifically:

> Although Congress undoubtedly has the power to limit tribal court jurisdiction, we do not read the general grant of diversity jurisdiction to have implemented such a significant intrusion on tribal sovereignty, any more than we view the grant of federal question jurisdiction, the statutory basis for the intrusion on tribal jurisdiction at issue in *National Farmers Union*, to have done so.

Id. at 17 (footnote omitted).

166. *See, e.g.*, Wellman v. Chevron USA, Inc., 815 F.2d 577 (9th Cir. 1987) (holding that Indian plaintiff must exhaust available tribal remedies before bringing federal diversity case against non-Indian). *But cf.* Stock West Corp. v. Taylor, 942 F.2d 655 (9th Cir. 1991) (holding that exhaustion is not required in a non-diversity lawsuit involving only non-Indians).

dians, and there is nothing in the relevant legislative history suggesting any intent to "render inoperative the policy of promoting tribal self-government."[167] There are other relevant historical facts: tribal courts in the Anglo-American mold did not exist when the original diversity statute was passed in 1789 and Indians did not become state citizens until the latter part of the nineteenth or early part of the twentieth century.[168]

There are other reasons, not mentioned in *Iowa Mutual*, that make diversity jurisdiction, at least as it presently exists, keenly problematic in the tribal court context. Current diversity jurisprudence is grounded in the basic precept that in order for the federal court to have jurisdiction, the underlying cause of action must be cognizable in state court. This is the essential holding of *Erie Railroad v. Tompkins*[169] that "state law is to be used by federal courts in deciding diversity cases."[170] Yet most causes of action arising on the reservation are not cognizable in state court because state courts lack subject matter jurisdiction.[171] If the diversity rationale changed, federal courts would have to apply tribal law as the governing substantive law. Such governing tribal law—particularly in a common law or customary context—might *not* be readily discernible because of the relative youth and/or lack of reported

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167. *Iowa Mut.*, 480 U.S. at 17.

168. *See id.* at 18 ("Congress has amended the diversity statute several times since the development of tribal judicial systems, but it has never expressed any intent to limit the civil jurisdiction of the tribal courts." (footnote omitted)).

169. 304 U.S. 64 (1938). *Erie* overruled *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), which had held that federal courts, in the absence of a state statutory or constitutional provision, or a particular local interest, could fashion federal common law in diversity cases.

170. CHEMERINSKY, *supra* note 1, at 314.

171. State jurisdiction over matters arising in Indian country—particularly when Indians or tribal interests are involved and the events take place on trust land—is virtually nonexistent. *See* Williams v. Lee, 358 U.S. 217 (1959); *see also* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, at 18 ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." (citations omitted)). However, certain states were granted civil and criminal jurisdiction over Indian country by Congress in 1953. *See* Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588. The situation in these states where there is potential state (as well as tribal) civil jurisdiction over matters arising on the reservation presents a wrinkle that further complicates diversity analysis. For a discussion of this Act, see Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535 (1975).

case law in many tribal courts.[172] The identical problem could also be present in the choice of law issues that often arise in diversity cases.[173]

Finally, the applicability of diversity jurisdiction to the reservation context presents the possibility of being discriminatory. In the federal-state context, diversity jurisdiction is available to avoid possible animus against non-residents—"citizens of another state." However, in the tribal-federal context, the class of non-residents includes not only citizens of another state but non-residents of the reservation who are not "citizens of another state"—who live off the reservation but within the state in which the reservation is located.[174] This discriminatory effect would likely raise potential equal protection problems.

All of these reasons—the historical antecedents of diversity jurisdiction, the current federal policy supporting tribal court development, the inapplicability of state law in the *Erie* and *Klaxon* sense, and the potential "discrimination" against in-state but non-reservation residents—reveal both a total absence of congressional intent to apply diversity jurisdiction in the reservation context and the manifold problems, both practical and theoretical, in doing so. In diversity, we again see in microcosm how tribal courts, as they grow and develop, con-

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172. In such situations, federal courts might look to certify questions of tribal law to tribal courts if tribal laws so provide. For example:

> The Court of Appeals may answer questions of law certified to it by an exterior court when requested. The Court of Central Jurisdiction may answer questions of law of the Mille Lacs Band which may be determinative of a cause then pending in the certifying court when there is no controlling precedent in the decisions of the Court of Central Jurisdiction.

MILLE LACS BAND STAT. ANN. tit. 24 § 3001 (1996). Note that this section is similar to section 3 of the Uniform Certification of Questions of Law Act. *See* UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT § 3 (1995), 12 U.L.A. 72 (1996).

Likewise, the Hopi Tribal Code provides that "[t]he Hopi Tribal Court of Appeals shall have jurisdiction to answer questions of Hopi tribal law, including Hopi constitutional law, certified from any tribal, federal or state court or from any tribal, federal, or state administrative agency." Hopi Tribal Code § 1.2.8 (1992).

173. *See, e.g.,* Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) (noting that in diversity cases, federal court must apply state choice of law rules). However, if the cause of action arises on the reservation, wouldn't the federal court have to apply the tribal choice of law rule?

174. *See* Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction,* 31 ARIZ. L. REV. 329, 350–51 (1989).

tinually raise issues about the kind of 'fit' they have or ought to have within the federal system.

In the context of our paradigmatic *Crazy Horse* case, some interesting situations present themselves. Since the Eighth Circuit found there is no tribal court jurisdiction, the door is open to file in federal court based on a theory of diversity.[175] Yet there remains the puzzle of whether the underlying causes of action exist as a matter of tribal law because they occurred on the Rosebud Sioux Reservation, or exist as a matter of state law because they occurred off the reservation where the breweries are incorporated or have their principal place of business. This is not merely academic because the tribal causes of action are grounded in tribal tradition, custom, and common law, and are likely quite different from available state causes of action. The tribal causes of action potentially pose some *Erie*-like problems because they are not matters of state law.

Diversity presumably exists, however, rendering the dispositive issue as one of choice of law: whether to apply tribal or state law.[176] The tribal causes of action are also problematic because they are *not* statutory and there is no reported tribal case law on point. Therefore, it will be virtually impossible for the federal court to discern what tribal law is, much less apply it. This raises the question of the existence of certification procedures within tribal law that would permit the federal court to certify questions relative to such causes of action to the highest court on the reservation.[177] In sum, as highlighted throughout this essay, mundane federal practice questions in the context of tribal courts weave a tangled web that could greatly benefit from the focused attention of the federal courts' community.

E. Standards of Review, Federal Common Law, and "Appellate" Review

In the aftermath of *National Farmers Union* and *Iowa Mutual*, a great deal of federal review of tribal court decisions in-

175. There is also the federal question jurisdiction provided by the Lanham Act, 15 U.S.C. § 1125(a) (1994), and the Indian Arts and Crafts Act, 25 U.S.C. § 305e(c)(1) (1994), as well as the issue of supplemental jurisdiction.

176. Of course, the applicability of *Klaxon* creates its own problems. *See supra* note 173 and accompanying text.

177. *See* MILLE LACS BAND STAT. ANN. tit. 24 § 3001 (1996); *see also supra* text accompanying note 172.

volved issues of the applicable standards of review. After a certain amount of give and take, a consensus among the various circuits emerged: as to tribal court findings of fact, the appropriate standard was clearly erroneous; as to tribal court findings of tribal law, the standard was one of complete deference; and as to tribal court findings of federal law, the standard was *de novo* review.[178] With the exception of federal courts' occasional penchant to completely disregard standards of review and leapfrog to the overarching question of whether tribal courts have jurisdiction, this consensus still holds true.[179] This is exactly what the Eighth Circuit did in the *Crazy Horse* case. Despite findings of fact of the tribal trial court and tribal supreme court regarding 'minimum contacts', the Circuit panel, however, declared the "contention [that there was jurisdiction] specious," and held such tribal court authority was lacking.[180]

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178. *See* Royster, *supra* note 16, at 245.

179. *See id.* at 246–54. Professor Royster's discussion is illuminating:

> When a federal court on post-exhaustion review fails to conscientiously distinguish between these issues of federal law and tribal law, the result is not only doctrinal confusion but serious encroachment upon the proper role of the tribal courts. The prime example is *Arizona Public Service Co. v. Aspaas*, in which the federal court said it was deciding a federal question but in fact relitigated an issue already decided under tribal law.
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> The substantive issue in *Aspaas* was whether the Navajo Preference in Employment Act (NPEA) applied to a lessee's power plant located on tribal trust land. The lessee, Arizona Public Service, claimed that the Navajo Nation had waived its right to regulate employment at the plant under the express terms of the lease documents. The Navajo Labor Relations Board ruled against the lessee, and the Navajo Supreme Court affirmed. On post-exhaustion review, the Navajo Nation argued that the tribal courts had decided, as a matter of tribal law, the meaning of the lease terms between the tribe and its lessee. The federal court, however, expressly rejected the tribe's assertion and stated instead that the issue was the extent to which a tribe "can apply tribal law to regulate the activities of a non-Indian." And that issue, the court held, was a federal question within the jurisdiction of the federal court.
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> The primary problem with the court's approach is that its statement of the federal question issue did not reflect the issue it actually decided. The precise issue the federal court decided was "whether the Navajo Nation has agreed to a valid waiver of such a right" to regulate the lessee's employment practices. The court thus transformed a simple contract interpretation issue—whether the lease documents contained a clear waiver—into a question of federal law.

Id. at 251–52 (footnotes omitted).

180. Hornell Brewing v. Rosebud Sioux Tribal Ct., 133 F.3d 1087, 1093–94 (8th Cir. 1998).

This kind of review departs from any sort of horizontal comity model and appears to embrace a more vertical hierarchical model of dominance. Given the contradictory message of creating respectful standards of review but retaining broad non-statutory powers to determine tribal jurisdiction, it is perhaps not surprising that there is often tension between these horizontal and vertical vectors in federal courts' jurisprudence involving tribal courts. This tension is all the more likely to be exacerbated in light of the Supreme Court's recent turn in *Strate* to temper, if not actually erode, the comity and deferential elements of *National Farmers Union* and *Iowa Mutual*.[181]

In this arena, the process of federal review of state court decision making is remarkably different. First, lower federal courts have no authority to review state court assessments of their own jurisdiction.[182] Second, the Supreme Court may review state court decisions, on a writ of certiorari, only for alleged violations of federal statutory or constitutional law, and is absolutely bound by state interpretations of state law.[183] This process is governed by basic principles of a horizontal federalism that posit a general parity of state and federal courts, particularly as final arbiters of their respective law. Supreme Court review of state court judgments is generally limited to errors in interpreting or applying federal statutory or constitutional law. This distinction has been noted by Professor Clinton:

> If a state court had ruled that it had subject matter jurisdiction over a controversy, the question might be reviewed on direct appeal to the United States Supreme Court if the alleged subject matter jurisdiction defect raised a federal question. Since the final judgment would be accorded full faith and credit, there would be absolutely no possibility of

181. *See supra* text accompanying notes 9–15.

182. Of course, lower federal courts have limited authority to review state court judgments for federal constitutional or statutory error involving petitioners in state custody pursuant to writs of habeas corpus filed upon exhaustion of state remedies and in other rare circumstances. *See* CHEMERINSKY, *supra* note 1, at 855–68.

183. *See* CHEMERINSKY, *supra* note 1, at 618, 621.

> initiating a new action in federal court to attack that ruling.[184]

This lack of symmetry in federal review of state and tribal courts raises basic questions about reviewability in general. On one hand, federal review of state court decisions is limited to situations in which Article III concerns arise, including the necessity of a federal forum for federal questions. On the other hand, federal review of tribal court decisions is not grounded in any constitutional imperative such as Article III, but only in the broad Court-defined litmus of federal common law.[185]

This situation poses some very prickly dilemmas. The most prickly is that the relationship of tribal courts to federal courts is not guided or bound by any constitutional principles, but only by emerging notions of federal common law. Although such an observation is not unusual or unknown within the Indian law scholarly community, it is quite likely to seem somewhat strange, if not unfathomable, within the federal courts' scholarly community.

The definition of federal common law in federal courts' jurisprudence generally is understood as:

> [T]he development of legally binding federal law by the federal courts in the absence of directly controlling constitutional or statutory provisions. Professor Martha Field explains that " 'federal common law' . . . refer[s] to any rule of federal law created by a court . . . when the substance of that rule is not clearly suggested by federal enactments—constitutional or congressional."[186]

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184. Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 150 (1993). In the same context, Professor Royster notes:

> Some scholars call for a similar approach to tribal court decisions: review only on a writ of certiorari to the Supreme Court of the United States on the ground that certiorari review most respects tribal sovereignty. Others argue for the elimination of Supreme Court jurisdiction over Indian law cases, presumably including review of tribal court decisions, and the creation of a federal Indian Court of Appeals.

Royster, *supra* note 16, at 253 n.84 (citations omitted).

185. *See, e.g.*, National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 850–51 (1985).

186. CHEMERINSKY, *supra* note 1, at 349 (alterations in original) (quoting Martha Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890 (1986)); *see also id.* at 332–64.

Such common law has never been understood as a vehicle for authorizing federal review by creating a jurisdictional base for lower federal courts to circumvent the basic precept that they are courts of *limited* jurisdiction. Without much concern for this issue, federal courts have routinely, if not blithely, assumed jurisdiction to review tribal court jurisdiction without any constitutional or statutory mandate to do so. Of course, *National Farmers Union* and *Iowa Mutual* directly authorize this practice, but as Judge Loken of the Eighth Circuit mused, this may not be sufficient to authorize federal *appellate* review of tribal court assertions of jurisdiction.[187] Authorization of federal appellate review is a statutory, not a common law, matter, and the bootstrapping of federal common law both to create federal review and to provide substantive decisional rules potentially creates significant separation of powers issues.[188]

The problem of federal common law in the context of tribal courts is not in fashioning rules to resolve *bounded* disputes, but using federal common law to *set* the boundaries of the courts of the tribal sovereign without any constitutional guidance. This constitutes an exercise of judicial plenary power that leaves tribal courts truly at the whim of the national judicial sovereign. This power is not routinely exercised by the Supreme Court itself, but rather by federal district courts or courts of appeal. Therefore, in many cases, "inferior" federal courts set the boundaries of the tribal judicial sovereign. This almost makes congressional plenary power look like a model of

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187. *See* Duncan Energy v. Three Affiliated Tribes, 27 F.3d 1294, 1302 (8th Cir. 1994) (Loken, J., concurring). Note how Judge Loken escapes his own insight:

> But I do not agree that, in deciding such challenges, we conduct some sort of direct review of the tribal court, considering issues of law de novo and findings of fact under the clearly erroneous standard. "Federal courts. . . . possess only that power authorized by Constitution and statute," *Kokkonen v. Guardian Life Ins. Co.*, [511] U.S. [375, 377], 114 S. Ct. 1673, 1675, 128 L.Ed.2d 391 (1994), and I know of no statute giving the district and circuit courts jurisdiction to review tribal court decisions. *See* 28 U.S.C. §§ 1330–67 (district court jurisdiction), *and* §§ 1291–92 (court of appeals jurisdiction). The Supreme Court has ruled that we have federal question jurisdiction to decide *Montana* exception issues. The district court will ultimately decide those issues, with whatever guidance the tribal court may now provide.

Id. (alteration in original).

188. *See infra* Part III.F.

rectitude and fairness.[189] This is certainly an emerging and quite unattractive paradigm of federal common law, unhinged and without constraint, trampling both federal-tribal federalism and separation of powers concerns in the context of federal government authority in Indian affairs. The reality of this emerging paradigm tracks closer to "Our Colonialism"[190] than to any authentic notion of "Our Federalism." Instead of mutual respect and comity, it suggests one-sided power, disdain, and exploitation.

F. Separation of Powers

The issue of the boundaries of tribal court authority also potentially raises a unique separation of powers question. When federal courts adjudicate the limits of tribal court authority, it is usually assumed that they do so as a matter of federal common law. This is the essential holding of *National Farmers Union*[191] and, although this is disturbingly problematic because of its unboundedness, one presumes that it is subject to paramount federal legislation. Yet the Eighth Cir-

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189. Not really, but because congressional plenary power has existed since *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), it has the appearance of respectability. Yet the scholarly criticism remains extensive. Professor Judith Resnik cites the following authorities:

> See Ball, 1987 Am B Found Res J at 46–59 . . . ; Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U Pa L Rev 195, 197–98, 207–28, 236 ("plenary power" doctrine has been narrowed since the 1930s, but limits on congressional power still unclear); Comment, *Inherent Indian Sovereignty*, 4 Am Indian L Rev 311, 316–20 (1976) (by Jessie D. Green and Susan Work). For debate about the utility for Indian tribes of Congressional "plenary power," see Robert Laurence, *Learning to Live with the Plenary Power of Congress Over the Indian Nations*, 30 Ariz L Rev 413 (1988) (replying to Williams, [*The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*] 1986 Wisc L Rev 219); Robert A. Williams, Jr., *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence*, 30 Ariz L Rev 439 (1988); Robert Laurence, *On the Eurocentric Myopia, the Designated Hitter Rule and "The Actual State of Things,"* 30 Ariz L Rev 459 (1988).

Resnik, *supra* note 19, at 693 n.99; *see also* the critique and sources cited by Robert Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 847 n.20 (1990).

190. *See, e.g.*, Frickey, *supra* note 16.

191. *See* 471 U.S. at 850–51.

cuit recently suggested in *United States v. Weaselhead*[192] that federal judicial determinations of tribal court authority are *constitutional* in nature and not subject to paramount congressional legislation.[193] This decision raises a potentially seismic separation of powers issue in the context of Indian law, as well as highlighting the division of understanding of the role of federal common law in questions of tribal jurisdiction. In *Weaselhead*, the precise issue was whether the post-*Duro v. Reina*[194] legislation,[195] which identified tribal criminal jurisdiction over non-member Indians as emanating from the "inherent power of Indian tribes,"[196] was subject to judicial review for constitu-

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192. 156 F.3d 818 (8th Cir. 1998) (holding that tribal court criminal jurisdiction over nonmember Indians results from congressional delegation of authority rather than inherent tribal sovereignty, and, therefore, such criminal prosecutions in tribal court are subject to double jeopardy provisions of the Fifth Amendment), *rev'd en banc*, 165 F.3d 1209 (8th Cir. 1999). Upon rehearing *en banc*, the order of the district court (rejecting a claim of double jeopardy) was affirmed by an equally divided court (a vote of five-to-five). *See Weaselhead*, 165 F.3d at 1209. The district court had held:

> Upon review and consideration, the court finds and concludes that Pub.L. No. 102-137 accords the judiciary its proper and appropriate scope while preserving sacrosanct notions of congressional power to set the parameters of Indian law, within constitutional confines. Here, where Congress is merely affirming a power that Indian tribes have had from time immemorial, the court should also defer to Congress.

United States v. Weaselhead, 36 F. Supp. 2d 908, 915 (D. Neb. 1997).

In light of the narrow margin to repudiate the panel decision, the separation of powers issue seems likely to remain a continuing manifestation of the doctrinal confusion about the discrete Congressional and judicial functions in Indian law.

There is also the analogous case of *Means v. Northern Cheyenne Tribal Ct.*, 154 F.3d 941 (9th Cir. 1998). The *Means* court opined that the 1990 amendment to the Indian Civil Rights Act, Pub. L. No. 101-511, § 8077(b), 104 Stat. 1856, 1892 (codified as amended at 25 U.S.C. § 1301(2) (1994)), could only be a prospective delegation of tribal "inherent power," rather than a retroactive recognition. "While Congress is always free to amend laws it believes the Supreme Court misinterpreted, it cannot somehow erase the fact that the Court did interpret the prior law." *Means*, 154 F.3d at 946. The error in this analysis is that it fails to recognize that the Court in *Duro* did not interpret prior congressional law, but fashioned a federal common-law rule.

193. *See Weaselhead*, 156 F.3d at 822.

194. 495 U.S. 676 (1990) (holding that tribes do not have criminal jurisdiction over nonmember Indians, but later superseded by 25 U.S.C. § 1301(2)).

195. *See Weaselhead*, 156 F.3d at 823 ("Congress responded to *Duro* by amending the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301–03 (1983 & Supp. 1998). The amendment redefined the statute's definition of 'powers of self-government' to include 'the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.' 25 U.S.C. § 1301(2).") (footnote omitted).

196. *Id.*

tional overreaching.[197] In the original two-to-one decision, the Eighth Circuit held that such federal review was part of its obligation pursuant to *Marbury v. Madison*,[198] and that Congress had exceeded its authority in ascribing tribal criminal jurisdiction over non-member Indians as part of the "inherent power of Indian tribes."[199]

The court held that Congress could delegate this jurisdiction to the tribes but could not recognize it as part of tribal inherent power.[200] In declaring such recognition unconstitutional, the court did not identify any textual source within the Constitution that prevented or proscribed such recognition of tribal authority. That is, of course, the constitutional rub. Although no one can doubt the essential principle of judicial review seminally set forth in *Marbury*, the actual process of judicial review must be tethered to the text of the Constitution.[201]

In *Weaselhead*, the Eighth Circuit majority opinion simply declared that "it was beyond Congress's power to declare existent a sovereignty-based jurisdiction that the Court has declared to be non-existent."[202] No authority was cited for this proposition. And although it is true that the Supreme Court held in *Duro* that tribes—in the absence of any authorizing congressional legislation—did not have inherent criminal jurisdiction over non-member Indians,[203] it cannot be said that this result was constitutionally required. The *Duro* opinion itself makes no reference to the text of the Constitution, but draws its primary authority from the rationale of *Oliphant v. Suquamish Indian Tribe*[204] and dicta in *United States v. Wheeler*[205] that the exercise of such authority by the tribe is simply "inconsistent with [its] dependent status."[206] This "rule" has no constitutional referent. It is therefore a creature of fed-

197. *See id.* at 824.

198. 5 U.S. (1 Cranch) 137 (1803).

199. *Weaselhead*, 156 F.3d at 823 (quoting 25 U.S.C. § 1301(2)); *see id.* at 824.

200. *See id.* at 823–24.

201. *See Marbury*, 5 U.S. (1 Cranch) at 178.

202. *Weaselhead*, 156 F.3d at 824.

203. *See Duro*, 495 U.S. at 679.

204. 435 U.S. 191 (1978) (holding that tribes have no inherent criminal jurisdiction over non-Indians).

205. 435 U.S. 313 (1978) (holding that exercise of inherent tribal criminal jurisdiction over members does not bar federal prosecution under the Double Jeopardy Clause).

206. *Duro*, 495 U.S. at 686.

eral common law. The *Weaselhead* majority also fails to acknowledge the telling holding and teaching of *National Farmers Union* that the basis of federal question jurisdiction to assess the parameters of tribal court authority is neither constitutional nor statutory in nature, but rather is grounded in federal common law.[207]

On the slippery slope of Indian law, it is necessary to make the startling point that since neither *Oliphant* nor *Duro* were grounded in a federal statute or the text of the Constitution, there is only one other legitimate basis in law to support their results. That basis, though not mentioned in either decision, is federal common law.[208] This is the essential point of Judge Arnold's dissent in *Weaselhead*:

> The Constitution is simply silent on the matter and on the related question of inherent Indian sovereignty. These are matters that are to be decided by references to governmental custom and practice and to the general principles of the *jus gentium*.
>
> In other words, the question of what power Indian tribes inherently possess, as the district court recognized, has been a matter of federal common law. As a recent law review article noted, "*Oliphant* and *Duro* were not constitutional decisions, they were founded instead on federal common law." . . . That being the case, Congress has the power to expand and contract the inherent sovereignty that Indian tribes possess because it has legislative authority over federal common law.[209]

Judge Arnold's comments highlight the critical issue of whether assessing the parameters or extent of inherent tribal sovereignty, including tribal judicial authority, is a legislative or judicial function. The panel majority in *Weaselhead* asserted that it is a judicial matter, but cited no provision of the Constitution that would be violated by Congress's recognition of inherent tribal sovereignty to include criminal jurisdiction over non-member Indians. The dissent in *Weaselhead* conceded that judicial authority to assess inherent tribal sovereignty exists as a result of its authority to make federal common law in the *ab-*

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207. *See National Farmers Union*, 471 U.S. at 850–51.

208. *See, e.g.*, L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 853 (1996).

209. *Weaselhead*, 156 F.3d at 825 (Arnold, J., dissenting) (citation omitted).

sence of pertinent congressional action.[210] Yet once Congress enacts legislation relevant to any matter of inherent tribal sovereignty, it necessarily supplants any judicially created federal common law to the contrary.[211]

Thus, the separation of powers question posed in *Weaselhead* centered on locating the constitutional source that recognized the authority to determine inherent tribal sovereignty, and allocated it to either the legislative or judicial branch. Ultimately, however, this is a vain search, because there is no constitutional source that assigns this constitutional duty to either branch. The Constitution is silent on this matter. Therefore, the issue involves a budding, extra-constitutional judicial plenary power[212] clashing against well-worn, but also extra-constitutional, congressional plenary power in Indian affairs. Yet *neither* claimant is cloaked with constitutional raiment. Congressional plenary power in Indian affairs has been recognized at least since *Lone Wolf v. Hitchcock*,[213] but its essential constitutionality has been uniformly questioned by Indian law scholars,[214] if not the federal judiciary itself.

Weaselhead provided a judicial repudiation of congressional plenary power and replaced it with its own kind of plenary power. All of which simply demonstrates the continued Alice in Wonderland-like conceptual distortion that pervades Indian law. An energetic circuit seeks to dethrone the reigning (congressional) king of Indian law plenary power and assume the royal mantle. Of course, tribal courts and Indian people, as the 'subjects' of all this, are nowhere to be seen. This is most curious legal behavior in a constitutional democracy that rests on the central tenets of the consent of the governed and limited authority of the national sovereign.

Tribal courts are likely to continue to be pilloried by these competing arms of the federal sovereign, especially when neither of them admit any *limit* to their authority with respect to tribal courts. Tribal courts stand at the crossroads—proud of their growth and accomplishment—but caught between the

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210. *See id.*
211. *See id.*
212. *See* POMMERSHEIM, *supra* note 6, at 120–21.
213. 187 U.S. 553 (1903) (noting that Congress as part of its plenary power in Indian affairs has the right to abrogate treaties with Indian tribes).
214. *See, e.g.*, sources cited *supra* note 189.
215. *See* POMMERSHEIM, *supra* note 6, at 46–50.

plenary pincers of Congress and federal courts, and without constitutional guarantee, recognition, or solace.[215]

CONCLUSION

Tribal courts are the premier judicial forums in Indian country, but they cannot seem to move ahead or even dispose of the cases—particularly those involving non-Indians and their activities in certain portions of Indian country—that come before them without generating sparks that federal courts increasingly take as their task to contain if not extinguish. This drama—played out in the tiny tribal courthouses that dot Indian country and the district and circuit courts of the Eighth, Ninth, and Tenth Circuits—reveals a plethora of federal courts' issues relative to "Our Federalism": abstention and exhaustion doctrine; supplemental, removal and diversity jurisdiction; standards of review, federal common law, and appellate review; and separation of powers. These issues raise important matters of federal courts' doctrine and practice that intersect with significant Indian law issues concerning tribal sovereignty and the integrity of tribal institutions within the larger questions of the twists of historical development and the national commitment to equity, justice, and pluralism. This unique convergence of law, history, and sovereign identity needs illumination from all quarters, but particularly from the prestigious but unexpectedly mute federal courts' scholarly and teaching community. Without such illumination, federal courts' scholars will continue inadvertently to confirm an emergent "Our Colonialism" that departs extensively from the comity and respect that characterizes the "Our Federalism" at the core of the relationship of federal courts to state courts.

I hope this invitation sufficiently stimulates your teaching, scholarly, and normative concerns to accept its respectful challenges.

Sincerely,

Frank Pommersheim,
Professor of Law

RSVP soon.

APPENDIX

NAME OF BOOK	TREATMENT OF LEADING SUPREME COURT CASES ON TRIBAL COURTS	INDEX	TREATMENT OF OTHER FEDERAL INDIAN LAW ISSUES
I. CASEBOOKS			
1. ROBERT N. CLINTON ET AL., FEDERAL COURTS, THEORY AND PRACTICE (1996).	*Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987): cited p. 633, discussed briefly p. 1340. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985): discussed pp. 382–83, discussed briefly p. 1340.	Indian Civil Rights Act: pp. 786–93. Indian claims against U.S.: pp. 1073–75. Indian lands: pp. 1073–75. Recognition of tribes as political question: pp. 1072–73. Sovereign immunity: pp. 1092–93. Status as domestic for action: pp. 1073, 1092–93. Tribal courts and full faith and credit: pp. 1339–40.	*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978): case pp. 786–93, notes pp. 793–94. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974): case pp. 360–65, notes pp. 365–67. *Chisholm v. Georgia*, 2 U.S. 419 (1793): notes pp. 497–502. No mention of tribal courts.

2. DONALD L. DOERNBURG & C. KEITH WINGATE, FEDERAL COURTS, FEDERALISM AND SEPARATION OF POWERS (1994).	No mention of *National Farmers Union* or *Iowa Mutual*.	No mention of tribal courts.	*Muskrat v. United States*, 219 U.S. 346 (1911): case pp. 17–23. No mention of tribal courts.
DONALD L. DOERNBURG & C. KEITH WINGATE, FEDERAL COURTS, FEDERALISM AND SEPARATION OF POWERS (Supp. 1998).	No mention of *National Farmers Union* or *Iowa Mutual*.	No mention of tribal courts.	*Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. 2028 (1997): case pp. 176–200. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996): case pp. 135–75. *Muskrat*: notes & questions pp. 18–19. *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980): notes p. 19. No mention of tribal courts.

3. RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (4th ed. 1996).	*Iowa Mutual*: footnote p. 1320. *National Farmers Union:* cited p. 935.	No mention of tribal courts.	*Muskrat*: case and notes pp. 115–19.
RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (4th ed. Supp. 1998).	No mention of *National Farmers Union* or *Iowa Mutual.*	No mention of tribal courts.	*Seminole Tribe:* case pp. 62–97. *Coeur d'Alene Tribe*: footnote p. 51; notes pp. 57–58, pp. 60–62; cited p. 94. No mention of tribal courts.
4. HOWARD P. FINK ET AL., FEDERAL COURTS IN THE 21ST CENTURY (Michie 1996).	No mention of *National Farmers Union* or *Iowa Mutual.*	No mention of tribal courts.	No mention of tribal courts.
5. PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS (4th ed. 1998).	No mention of *National Farmers Union* or *Iowa Mutual.*	No mention of tribal courts.	*Coeur d'Alene Tribe*: case pp. 880–88. *Seminole* Tribe: case pp. 852–79, notes pp. 879-80. No mention of tribal courts.

PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS (4th ed. Supp. 1999).	No mention of *National Farmers Union* or *Iowa Mutual*.	No mention of tribal courts.	No mention of tribal courts.
6. CHARLES T. MCCORMICK ET AL., FEDERAL COURTS CASES & MATERIALS (9th ed. 1992).	No mention of *National Farmers Union* or *Iowa Mutual*.	No mention of tribal courts.	No mention of tribal courts.
CHARLES T. MCCORMICK ET AL., FEDERAL COURTS CASES & MATERIALS (Supp. 1998).	*National Farmers Union*: discussed pp. 89–91. *Iowa Mutual*: discussed pp. 89–91.	No mention of tribal courts.	*Seminole Tribe*: cited p. 24; case pp. 56–78.
CHARLES T. MCCORMICK ET AL., FEDERAL COURTS CASES & MATERIALS (Authors' Suggestions 1992).	No mention of *National Farmers Union* or *Iowa Mutual*.	No mention of tribal courts.	No mention of tribal courts.
7. MARTIN H. REDISH & SUZANNA SHERRY, FEDERAL COURTS (4th ed. 1998).	No mention of *National Farmers Union* or *Iowa Mutual*.	No mention of tribal courts.	*Seminole Tribe*: case pp. 382–408. No mention of tribal courts.

MARTIN H. REDISH & SUZANNA SHERRY, FEDERAL COURTS (Teachers' Update 1998).	No mention of *National Farmers Union* or *Iowa Mutual*.	No mention of tribal courts.	*Kiowa Tribe of Okla. v. Manufacturing Technologies*, 118 S. Ct. 1700 (1998): note p. 7. No mention of tribal courts.
8. LOUISE WEINBERG, FEDERAL COURTS: CASES AND COMMENTS ON JUDICIAL FEDERALISM AND JUDICIAL POWER (1994).	No mention of *National Farmers Union* or *Iowa Mutual*.	No mention of tribal courts.	No mention of tribal courts.
LOUISE WEINBERG, FEDERAL COURTS: CASES AND COMMENTS ON JUDICIAL FEDERALISM AND JUDICIAL POWER (Supp. 1998).	No mention of *National Farmers Union* or *Iowa Mutual*.	No mention of tribal courts.	*Seminole Tribe*: case & notes pp. 167–89. *Coeur d'Alene Tribe:* case and notes pp. 192–208. No mention of tribal courts.

II. TREATISES			
1. ERWIN CHEMERINSKY, FEDERAL JURISDICTION (Aspen Law & Business 2nd ed. 1994).	No mention of *National Farmers Union* or *Iowa Mutual*	No mention of tribal courts.	*Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545 (1983): discussed p. 768. *Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578 (1991): discussed briefly pp. 384, 417. *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135 (8th Cir. 1974): discussed briefly p. 385. *Confederated Tribes v. Washington*, 446 F. Supp. 1339, (D. Wash 1978): footnote p. 385. *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 473 (1976): footnote p. 658.

1. CHEMERINSKY, FEDERAL JURISDICTION, cont'd.			*County of Oneida v. Oneida Indian Nation*, 479 U.S. 226 (1985): footnote p. 378. *United States v. Sandoval*, 231 U.S. 28 (1913): footnotes pp. 155, 554. *Sioux Nation*: discussed p. 180.

ERWIN CHEMERINSKY, FEDERAL JURISDICTION, Aspen Law & Business (3d ed. 1999). The third edition, although giving textual treatment to both *Seminole Tribe* and *Coeur d'Alene Tribe*, has dropped five Indian Law cases from the text.	No mention of *National Farmers Union* or *Iowa Mutual*.	No mention of tribal courts.	*San Carlos Apache*: discussed briefly p. 825. *Coeur d'Alene Tribe*: footnotes pp. 389–90, 414; discussed pp. 429–31. *Confederated Salish & Kootenai Tribes*: footnote p. 708. *Muskrat*: discussed p. 51. *Seminole Tribe*: footnotes pp. 389–93, 399, 401–04; discussed pp. 397, 443–46. *Sandoval*: Footnote p. 157.
2. DAVID P. CURRIE, FEDERAL JURISDICTION IN A NUTSHELL (3d ed. 1990).	No mention of *National Farmers Union* or *Iowa Mutual*.	No mention of tribal courts.	No mention of tribal courts.
3. CHARLES ALLEN WRIGHT, FEDERAL COURTS (5th ed. 1994).	No mention of *National Farmers Union* or *Iowa Mutual*.	No mention of tribal courts.	No mention of tribal courts.

III. FEDERAL PRACTICE GUIDES			
1. 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.6 (2d ed. 1984).	No mention of *National Farmers Union* or *Iowa Mutual.*	No mention of tribal courts.	*Santa Clara Pueblo*: footnote 71.
13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3579 (2d ed. 1984).	No mention of *National Farmers Union* or *Iowa Mutual.*	No mention of tribal courts.	*Santa Clara Pueblo:* footnotes 24, 28, 31.
17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4261 (2d ed. 1988).	No mention of *National Farmers Union* or *Iowa Mutual.*	No mention of tribal courts.	*Santa Clara Pueblo*: footnote 25.
19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4516 (2d ed. 1996).	No mention of *National Farmers Union* or *Iowa Mutual.*	No mention of tribal courts.	*Santa Clara Pueblo*: footnote 37.
13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3579 (2d ed. Supp. 1999).	*Iowa Mutual:* footnote 34. *National Farmers Union:* footnote 2.	No mention of tribal courts.	No mention of tribal courts.
13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3561 (2d ed. Supp. 1999).	*National Farmers Union:* footnote 2. No mention of *Iowa Mutual.*	No mention of tribal courts.	No mention of tribal courts.

13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3563 (2d ed. Supp. 1999).	No mention of *Iowa Mutual.* *National Farmers Union*: footnote 40.	No mention of tribal courts.	No mention of tribal courts.
2. 15 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE (Daniel R. Coquillette et al. eds., 3d ed. 1999).	*Iowa Mutual:* discussed section 102.23, footnotes 2–3; section 102.36[5], footnote 16. No mention of *National Farmers Union.*	No mention of tribal courts.	*Santa Clara Pueblo:* section 124.41[2][a], footnote 26.

* Due to the relatively recent decision of *Strate v. A-1 Contractors*, 520 U.S 438 (1997), this decision was not considered for the purposes of this Appendix.