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The Tribal Exhaustion Doctrine: "Just Stay on the Good Roads, and You've Got Nothing to Worry About"

Phillip Allen White

COMMENTS

THE TRIBAL EXHAUSTION DOCTRINE: "JUST STAY ON THE GOOD ROADS, AND YOU'VE GOT NOTHING TO WORRY ABOUT"*

*Phillip Allen White***

> *Indian Law is a law for Indians, intended to control them, and not a law of Indians. If you look between the pages of Felix Cohen's text . . . or any other major work on Indian affairs law, you see that (1) it is not written or made by Indians; (2) it does not speak to tribal traditions; and (3) it advocates barriers to tribal governments and traditional ways.*[1]
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> *The Muses care so little for geography.*[2]

The title promises a discussion of the tribal exhaustion doctrine. But in the spirit of full disclosure, this is also about territorial sovereignty and jurisdictional authority. For in the end, the tribal exhaustion doctrine is not much more than a poor surrogate for a more principled view of territorial sovereignty. Indeed, if tribes were merely afforded a reasonable equivalent to the geographically-defined scope of subject matter jurisdiction enjoyed by states, there would be no need for anything like an exhaustion doctrine. Instead, we have a circumstance in which virtually any tribal controversy involving a non-Indian can be, after some measure of appropriate procedures are followed, transformed into a federal dispute.[3] In those cases, the focus is not the parties and the

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*This is Supreme Court Justice Antonin Scalia's advice regarding the way in which one might cross an American Indian reservation relatively free from worry about being haled into tribal court. *See* Steve Lash, *Justices Map Alternate Route for Determining Tribal Court Jurisdiction in Non-Indians' Personal Injury Suits*, WEST'S LEGAL NEWS, Jan. 8, 1997, at 14,191, *available in* 1997 WL 4267.

**J.D. candidate, The University of Montana School of Law; B.A., 1995, Montana State University. The author cannot adequately express his gratitude to the faculty, staff, and to his classmates at the University of Montana School of Law for the best introduction to the study of law for which anyone could ever hope. Special thanks to fellow University of Montana law student Danna Jackson, and to University of Montana School of Law Professors Cynthia Ford, David Aronofsy, Greg Munro, Ray Cross, and Kathleen Magone for the inspiration they have provided (whether they knew it or not). Professor Darrel Bratton of the University of San Diego School of Law deserves no small credit. Finally, this article is dedicated to my children, Tony, Kris, and Jessica, for all their love and patience.

First-prize winner, 1996-97 *American Indian Law Review* Writing Competition.

1. Robert Yazzie, *Law School as a Journey*, 46 ARK. L. REV. 271, 271-72 (1993).
2. OSCAR WILDE, *Sententiae*, *in* A CRITIC IN PALL MALL 48 (1919).
3. *See* National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 560 F. Supp 213 (D.

dispute they must resolve. Rather, the focus becomes a frustrating argument between the tribal court, fervently guarding whatever it is that remains of tribal sovereignty, and a non-Indian party, who argues just as zealously that such a thing as tribal sovereignty has probably not existed since sometime in the fifteenth or sixteenth century.[4]

Mont. 1983), *rev'd*, 736 F.2d 1320 (9th Cir. 1984) (while a challenge to tribal court jurisdiction presents a federal question under 28 U.S.C. § 1331 which may ultimately allow relitigation of the dispute in federal court, the disappointed party must nevertheless exhaust all available tribal remedies before coming to federal court) *rev'd*, 471 U.S. 845, 857 (1985).

4. As Indian law moves into the twenty-first century, Professor Barsh suggests that "[t]erritorial integrity and economic self-determination are points on which federal decisions and international norms conflict most sharply." Russel Lawrence Barsh, *Felix S. Cohen's Handbook of Federal Indian Law, 1982 Edition*, 57 WASH. L. REV. 799, 805 (1982) (book review). In the generally accepted view, all United States land titles ultimately rest on the "doctrine of discovery" — the notion that British explorers established a monopoly on the purchase of native lands. *Id.* (citing FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 487-89 (Rennard Strickland et al. eds., 1982)) [hereinafter COHEN, 1982 ED.].

Originally, the notion of a so-called "naked" title subject to unextinguished native "occupancy" rights, was "little more than a convenient conceptual handle used to describe the coexisting interests of natives and colonists." Barsh, *supra*, at 805-06 (citations omitted). But by the end of the nineteenth century, the discovery doctrine had become a primary source of Congress's power to confiscate tribal territories "at pleasure." *Id.* at 806; *see also* United States v. Santa Fe Pac. R.R., 314 U.S. 339, 347 (1941) (relying upon "the exclusive right of the United States to extinguish Indian title [that] has never been doubted"). Compensation under the Fifth Amendment was required only if the claiming tribe's aboriginal right to the soil had been legally recognized prior to the confiscation. Barsh, *supra*, at 806 (citing Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 288-89 (1955)). "The revised *Handbook*," writes Professor Barsh, "embraces these principles uncritically." *Id.* (citing COHEN, 1982 ED., *supra*, at 491).

But while the United States clings tenaciously to the notion of terra nullius — i.e., that the "first settler" could claim "empty lands" — this particular species of "legal fiction" has been soundly criticized by the International Court of Justice. *Id.* (citing Western Sahara, 1975 I.C.J. 6 (advisory opinion, May 22, 1975) (where two member states each claimed lands still occupied by unorganized tribal peoples, both claims vitiated on the ground that neither state had acquired the aboriginal rights by acceptable bilateral means)). Thus, notes Professor Barsh, United States Indian law

> contravenes modern international legal norms on at least three points: (1) tribes have not been permitted to choose their political status by democratic means; (2) tribes' exercise of self-government can be limited or abolished unilaterally by Congress; and (3) tribal territory can be disposed of unilaterally by Congress, even to the point of rendering tribes incapable of subsisting without foreign aid.

Id. But if, as the 1982 *Handbook* implies, tribes:

> derive their political character from their original status as states and peoples, then Congress has no legitimate authority to intervene in their affairs except as provided expressly by treaty. On the contrary, Congress has an affirmative duty to afford tribes an opportunity to chart their own destiny. This is not a duty of trusteeship or protection, but one of noninterference.

Id. Thus, the 1982 *Handbook's* contention that U.S. Indian policy is somehow in harmony with modern international law is "puzzling." *Id.* Plenary power is nothing more than a "nineteenth-century doctrine injected into a twentieth-century situation, and it flows from a discredited and antiquated morality" that can never be reconciled with notions of

On the other hand, we do not see many cases brought by reasonable persons contesting the authority of the United States within its own territory.[5] Nor are many cases filed by parties arguing that, upon crossing from Montana into Idaho, they ought to still be governed by the traffic laws of Montana.[6] Still, somehow, we cannot seem to get past the idea that the boundaries of Indian reservations are fundamentally different.[7]

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self-determination. *Id.* at 806-07 (citation omitted).

5. Indeed, the authority of the United States government in this regard is virtually absolute. *See, e.g.*, Torres v. Commonwealth of Puerto Rico, 442 U.S. 465, 472-73 (1979) ("The authority of the United States to search the baggage of arriving international travelers is based on its inherent sovereign authority to protect its territorial integrity. By reason of that authority, it is entitled to require that whoever seeks entry must establish the right to enter and to bring into the country whatever he may carry."); *see also* United States v. Ramsey, 431 U.S. 606, 616-17 (1977); (acknowledging a "plenary" customs power much broader than the state's authority to search and seize under the Fourth Amendment); Almeida-Sanchez v. United States, 413 U.S. 266, 272-73 (1973) (approving automobile searches at "functional equivalents" of the border based on the undoubted power of the federal government to exclude aliens from the country, and to effectuate "routine inspections and searches of individuals or conveyances seeking to cross our borders"); Carroll v. United States, 267 U.S. 132, 154 (1925) (travelers may be stopped "in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in").

6. And since, at this writing, there is no specified speed limit in Montana, it could prove an enticing proposition. *See also* Allstate Ins. Co. v. Hague, 449 U.S. 302, 339 n.5 (1981) (Powell, J., dissenting) ("The State does have an interest in the safety of motorists who use its roads. This interest . . . extends to all nonresident motorists on its highways."); *cf.* Wagner v. State, 889 P.2d 1189, 1190 (Mont. 1995) ("Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.") (citing Kleppe v. New Mexico, 426 U.S. 529 (1976)).

7. This, of course, was not always the case. Once upon a time, the boundaries of Indian country were seen as being much like the boundaries of any modern State. Just as California cannot independently enter a treaty with Mexico, an Indian tribe could not enter alliances with foreign nations. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). And just as Montana's adjudicatory and regulatory powers are concurrent with her borders, so too were an Indian tribe's. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832) ("[T]he several Indian nations [are] as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.").

For an especially well-reasoned and researched commentary on the historical aspects of tribal court jurisdiction, see SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW AND THE UNITED STATES LAW IN THE NINETEENTH CENTURY (1994). In part, Harring's work suggests a fascinating proposition — that, while Anglo law has carefully kept its treatment of African-Americans and Native Americans far apart, case law that predates even the so-called seminal Cherokee cases, illustrates that much erosion of Indian legal rights was precipitated by Southern concerns over what effect sovereign Indian nations like the Cherokee might have on states' rights generally, and on the future of slavery in particular. If that is really the case, these two seemingly distinctly American tragedies may in fact be much more the result of one ill-intended policy than is generally believed.

Just how different they are is the crux of a case in which the United States Supreme Court is expected to render a decision by the summer of 1997. That case — *Strate v. A-1 Contractors*[8] — is an exhaustion case of the most egregious kind. In 1991, the plaintiffs in that case sued in tribal court, which found that it had jurisdiction under the tribal code, as well as under general principles of tribal sovereignty.[9] The defendants appealed to the Northern Plains Intertribal Court of Appeals, which affirmed and remanded the case to the tribal court for trial on the merits.[10] But rather than return to tribal court, the defendants went to federal district court, seeking injunctive and declaratory relief prohibiting further action against them in tribal court.[11] And as is far too common, the ensuing federal court challenge to the tribal court's jurisdiction has completely muddled the underlying issue: the simple adjudication of a straightforward tort case. If the parties ever return to the real issue here, it will have been nearly seven years since this injury occurred.

For all those reasons, the Supreme Court's pending decision in *A-1 Contractors* may determine nothing less than whether the tribal exhaustion doctrine adds anything to the notion of tribal self-governance and self determination, or whether it is simply a procedural exercise.[12] In that sense, *A-1 Contractors* is poised precariously at the apex of nearly thirty years of jurisdictional wrangling.[13] The Supreme Court has finally been moved from its decade-long silence regarding tribal sovereignty vis-à-vis civil adjudicatory

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8. CV-N-A1-92-24, 1992 WL 696330 (D.N.D. Sept. 16, 1992), *aff'd*, No. 92-3359, 1994 WL 666051 (8th Cir. Nov. 29, 1994), *rev'd en banc*, 76 F.3d 930 (8th Cir. 1996), *aff'd*, 117 S. Ct. 1404 (1997). This article was completed and submitted after oral arguments before the Supreme Court in *A-1 Contractors*, but before the Supreme Court rendered judgement. In the interest of fair play, I have not altered the body of the document in response to the Court's subsequent action. I do, however, claim the liberty of appending an epilogue to the original article. *See infra* notes 461-73 and accompanying text.

9. Strate v. A-1 Contractors, 76 F.3d 930 (8th Cir. 1996) (en banc), *aff'd*, 117 S. Ct. 1404 (1997) (citing Fredericks v. Continental Western Ins. Co., No. 5-91-A04-150, slip op. at 1.24(d) (Fort Berthold Tribal Ct. Sept. 4, 1991).

10. Strate v. A-1 Contractors, 76 F.3d 930, 933 (8th Cir. 1996) (en banc), *aff'd*, 117 S. Ct. 1404 (1997).

11. *Id.*

12. As disappointing as such a holding would prove, it would not be unprecedented. In 1980, after a decade of contentious and emotionally charged litigation below, the Supreme Court finally held that the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1994), was nothing more than just that sort of limited procedural requirement. In Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980) (per curiam), the Court held that "[i]n the present litigation there is no doubt that HUD considered the environmental consequences of its decision to redesignate the proposed site for low-income housing. NEPA requires no more." *Id.* at 228.

13. The conventional view is that the tribal exhaustion doctrine is a jurisprudential experiment scarcely a decade old — dating from the Supreme Court's edict in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985). This article is dedicated, in part, to illuminating the far older history of that doctrine.

power — moved in part by a growing rift between the Eighth and Ninth Circuits,[14] and probably as much by the rancor of lower courts forced to deal with that split as well.[15] Still, the rather unusual procedural posture in *Strate v. A-1 Contractors* — the primary plaintiff and all defendants in the underlying tribal court action are non-Indians[16] — may only result in a decision that merely adds a bit of definition to the contours of tribal adjudicatory jurisdiction. But the decision may also prove to be the most significant pronouncement on tribal court authority by the United States since *National Farmers Union.*[17] For

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14. *See infra* notes 309-427.

15. *See, e.g., infra* note 400.

16. The Honorable William Strate, named defendant in the federal action, is an associate tribal judge of the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation. Judge Strate is named in this challenge to his court's jurisdiction along with the tribe itself, as well as with the tribal court plaintiffs: Benedict, Kenneth, Paul, Hans Christian, Jeb, and Gisela Fredericks. While Gisela Fredericks, the injured party, is not a tribal member, her five adult children who are named in the complaint are members. *See* Strate v. A-1 Contractors, No. CV-N-A1-92-24, 1992 WL 696330, at *1 (D.N.D Sept. 16, 1992), *aff'd*, No. (2-3359, 1994 WL 666051 (8th Cir. Nov. 29, 1994), *rev'd en banc*, 76 F.3d 930 (8th Cir. 1996), *aff'd*, 117 S. Ct. 1404 (1997).

It ought also be noted at the outset, however, just how value-loaded the innocuous-sounding term "member" can be. Professor Dussias notes that the Court habitually uses the term "member" rather than "citizen" when discussing Indians. *See* Allison M. Dussias, *Geographically-based and Membership-based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1, 93 (1993). Professor Barsh points out that the term "'Member' generally refers to one of the individuals composing a society or association, or a kinship or sociological unit, while 'citizen' generally refers to a member of a state." *Id.* Thus, using the sociological term "member" when referring to Indians may proactively impair tribal sovereignty. *Id.* Moreover, voluntary associations may govern members, but generally have no authority over nonmembers. *Id.*; *see also* Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 55-56 (1991) (arguing that the Supreme Court often treats tribes as sovereigns when the tribes would benefit far more from being treated as property owners, and often treats tribes as voluntary associations when they would benefit instead from being treated as sovereigns). *But see* United States v. Mazurie, 419 U.S. 544, 557 (1975) ("Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations . . . .'").

17. 471 U.S. 845 (1984). If the number of amici weighing in on a case is any gauge, *A-1 Contractors* is surely significant. Four amicus briefs have been filed supporting the tortfeasor respondents and urging the Court to deny tribal court authority over non-Indians absent consent:

(1) the State of Montana (joined by Arizona, California, Colorado, Idaho, Massachusetts, Mississippi, Nevada, New York, South Dakota, Utah, Washington, Wisconsin and Wyoming), *see* Amicus Brief of the State of Montana et al., Strate v. A-1 Contractors, 117 S. Ct. (1997) (No. 95-1872), *available in* 1996 WL 709324 (arguing that since tribal courts are not restrained by the Federal Constitution, jurisdiction is the "only" restraint on tribal courts, and that the sweeping territorial view of tribal jurisdiction urged by the petitioners would "radically reshape traditional notions of state sovereignty");

(2) the Council of State Governments (joined by the National Conference of State Legislatures, National Governors' Association, National Association of Counties, U.S. Conference of Mayors, International City/County Management Association, and the National League of Cities, *see* Amicus Brief of the Council of State Governments et al., *A-1 Contractors* (No. 95-1872), *available in* 1996 WL 709325 (arguing that basing tribal jurisdiction on such a tenuous "but for"

if the worst happens — if the significant federal judicial "bootstrap"[18] established in *National Farmers Union* is finally melded together with the severe view of implicit divestiture set out in *Montana v. United States*,[19] the

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causation arising from a consensual contactee's travel on a highway would "sweep into tribal court any cause of action based on the contractor's mere presence");

(3) Lake County, Montana, joined by the Flathead Joint Board of Control of the Mission, Flathead, and Jocko Valley Irrigation Districts, *see* Amicus Brief of Lake County, Montana et al., *A-1 Contractors* (No. 95-1872), *available in* 1996 WL 709326 (asserting the interests of irrigators on the Flathead Indian Reservation, which has a very significant proportion of non-Indian landowners, and arguing that tribes are not analogous to states because they "have no constitutional standing as sovereigns, lack any constitutional constraints in governing, and, as a result of their status within the United States, exercise limited, quasi-sovereign powers over internal matters subject to the plenary power of Congress");

(4) the American Trucking Associations, Inc., the American Automobile Association, and Burlington Northern Railroad Company, *see* Amicus Brief of the American Trucking Association et al., *A-1 Contractors* (No. 95-1872), *available in* 1996 WL 711202 (arguing that excessive damage awards and "serious" due process and equal protection problems may interfere with interstate commerce via the highways and railroads that cross Indian reservations).

Coincidentally, the Burlington Northern Railroad Co. is presently pursuing appeals in a tribal court judgement totaling $250 million, awarded to five plaintiffs for injuries arising from a train-crossing accident in 1993 on the Crow Indian Reservation. *See* Red Wolf v. Burlington N. R.R. Co., Civil Case No. 94-31 (Crow Tribal Ct. 1996).

Four amicus briefs have been filed supporting the tribal petitioners:

(1) the United States, *see* Amicus Brief of the United States, *A-1 Contractors* (No. 95-1872), *available in* 1996 WL 666742 (arguing for deferral of challenges to the appropriateness of remedy until tribal procedures are exhausted);

(2) the Assiniboine and Sioux Tribes of the Fort Peck Reservation, Confederated Tribes of the Colville Reservation, Ho-Chunk Nation, St. Croix Band of Chippewa Indians and Standing Rock Sioux Tribe, *see* Amicus Brief of the Assinibone and Sioux Tribes of the Fort Peck Reservation, et al., *A-1 Contractor* (No. 95-1872), *available in* 1996 WL 658760 (arguing that the authority of a sovereign to adjudicate civil disputes involving persons who enter their reservations to reside, do business, or even to visit, and which arise within that sovereign's territory, is essential);

(3) the Shakopee Midewakanton Sioux (Dakota) Community, Sisseton-Wahpeton Sioux Tribe, Spirit Lake Sioux Tribe and Red Lake Band of Chippewa, *see* Amicus Brief of the Shakopee Midewakanton Sioux (Dakota) Community, et al., *A-1 Contractors* (No. 95-1872), *available in* 1996 WL 658737 (arguing that tribes have a legitimate interest in accidents occurring on reservations because "[u]nsafe conduct such as negligent driving has the potential to damage property on the reservation or cause injury or death" — activities which "threaten[] and has a direct effect on the health and welfare of the tribe");

(4) the Northern Plains Tribal Judges Association, *see* Amicus Brief of the Northern Plains Tribal Judges Association, *A-1 Contractors* (No. 95-1872), *available in* 1996 WL 658740 (urging reversal on the ground that not doing so would eviscerate tribal court authority and "invite jurisdictional chaos into Indian country and defeat important tribal and federal interests").

18. *See* Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. REV. 1089, 1135 (1995) ("First and foremost, the tribal exhaustion rule has become a jurisdictional bootstrap, creating federal question jurisdiction for many disputes previously found to be outside the purview of the federal courts.").

19. 450 U.S. 544, 565-66 (1981) (holding that the bed of the Little Big Horn River became the property of the State of Montana upon admittance to the Union and the Crow Tribe had no

result may be a significant chilling of tribal civil adjudicatory activity.

Generally, this article will defer to the many exhaustive studies that chronicle the exhaustion doctrine in the years following *National Farmers Union* — but with one important exception. Because almost all miss one crucial point: the very source of the exhaustion doctrine is grounded in a prudential mind set that was probably not all that concerned with preserving tribal sovereignty, tribal self-government, or tribal self determination.[20] This article will examine the fountainhead of the exhaustion doctrine as it is found in the annals of habeas corpus as well as in judicial review of administrative agency actions. The first section is devoted to that theory, and to the resulting tensions that continue to plague the tribal exhaustion doctrine. The second section briefly surveys the exhaustion doctrine as it was eventually made mandatory upon lower federal courts by the Supreme Court. The final section discusses present-day developments of the rule (including a discussion of the pending Supreme Court decision in *Strate v. A-1 Contractors*), critiques the exhaustion doctrine — ever mindful, of course, that virtually all tribal adjudicative authority now exists solely at the sufferance of Congress and a benevolent Supreme Court[21] — and ultimately suggests alternatives that might better promote the proclaimed goals of tribal self-government and self determination.

I. Exhaustion Conceived

A. Preliminary Observations on Tribal Sovereignty

A venerable legal maxim teaches that "hard cases make bad law."[22] Surely, few cases are as hard as those in which one sovereign presumes to assert its authority over the citizens of another. Sovereignty has been described as the

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power to regulate non-Indian hunting and fishing in that watercourse).

20. In fairness, the legal actors involved did often seem to have a well-intended concern for *individual* Indians.

21. *See, e.g.*, Littell v. Nakai, 344 F.2d 486 (9th Cir. 1965) (tribal jurisdiction may be altered by express declaration of Congress); *see also* Nell Jessup Newton, *In the U.S. Supreme Court: Tribal Court Jurisdiction Over Personal Injury Actions Between Non-Indians*, WEST'S LEGAL NEWS, Dec. 30, 1996, at 13,812, *available in* 1996 WL 738536 (suggesting that even though the respondents in Strate v. A-1 Contractors stop short of calling for outright reversal of the exhaustion doctrine and thus tribal court jurisdiction over non-Indians, it would "not be surprising if some of the conservative members of the Court do not press them on this point").

22. Supreme Court Justice John Harlan's actual quote was: "take care for the general good of the community, that hard cases do not make bad law." United States v. Clark, 96 U.S. 37, 49 (1878) (Harlan, J., dissenting). Justice Harlan apparently gleaned the phrase from East India Co. v. Paul, 13 Eng. Rep. 811, 821 (P.C. 1849). But another jurist notes that this akin to saying that "[h]ard thinking is bad for the brain." Pennsylvania v. Gregory, 406 A.2d 539, 542 (Pa. Super. Ct. 1989) (Hester, J., dissenting). Judge Hester believes that hard cases, when faced up to, can require a court to rethink the law and perhaps even to state the case more clearly. *Id.* Insofar as a lot of "hard" cases have left their imprint on the topic at hand, this article argues that Judge Hester's proposition has yet to yield much fruit.

hallmark of any "culturally distinct people within defined territorial limits . . . connot[ing] legal competence . . . [and] the power of a people to make governmental arrangements to protect and limit personal liberty by social control."[23] And a "basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory, whether citizens or aliens."[24]

In essence, then, *Strate v. A-1 Contractors* merely continues an extraordinary struggle by Indian tribes for legal self-determination — sovereignty, in other words — a struggle that includes mileposts like *Williams v. Lee*,[25] a 1959

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23. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW 54-55 (1987).

24. Duro v. Reina, 495 U.S. 676, 685 (1990).

25. 358 U.S. 217 (1959). Justice Black, writing for the majority, stated the proposition eloquently:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there . . . . The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it.

Id. at 223 (quoting Lone Wolf v. Hitchcock, 187 U.S. 553, 564-66 (1903)). This language seems all the more remarkable in light of the Court's writings just a few years earlier. In one case, the Court seemed to dismiss the continued validity of the old treaties, stating that

> [e]very American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.

Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 289-90 (1955).

Still, deference to tribal courts did not come without a whole new set of problems. Under the *Williams* doctrine, state courts were, from time to time, faced with the "no forum" problem — of deciding how to proceed in the absence of a tribal forum. *See* Reynolds, *supra* note 18, at 1131. Some courts believed that under such circumstance, jurisdiction reverted automatically to the state court. *Id.* (citing State *ex rel.* Old Elk v. District Court, 552 P.2d 1394, 1398 (Mont. 1976); Wildcatt v. Smith, 316 S.E.2d 870, 879 (N.C. Ct. App. 1984); County of Vilas v. Chapman, 361 N.W.2d 699, 703 (Wis. 1985)). Other courts maintained strict adherence to *Williams* and abstained from asserting jurisdiction even where no tribal forum seemed available. *Id.* at 1131-32 (citing Enriquez v. Superior Court, 565 P.2d 522, 523 (Ariz. Ct. App. 1977) ("The fact that the record here does not disclose whether the tribal court does in fact provide a forum for the recovery for personal injuries is of no moment."); Schantz v. White Lightning, 231 N.W.2d 812, 816 (N.D. 1975); *accord* COHEN, 1982 ED., *supra* note 4, at 250 & n.62; William C. Canby, Jr., *Civil Jurisdiction and the Indian Reservation*, 1973 UTAH L. REV. 206, 227 (describing the "chaos prevailing in the current division of jurisdiction between state and tribal courts")).

Finally, some courts simply decline to follow *Williams* in every circumstance. *See, e.g.*, Alexander v. Cook, 566 P.2d 846 (N.M. Ct. App. 1977) (asserting jurisdiction over a dispute involving tribal land on the reservation where all parties before the court were non-Indians); Little Horn State Bank v. Stops, 555 P.2d 211 (Mont. 1976) (refusing to enjoin enforcement of state

Supreme Court holding that the non-Indian owner of a trading post located in Indian country[26] could take legal action against a Navajo couple who owed him money — but only in Navajo Tribal Court. And while it is certain that few mainstream Americans note such legal developments, the implications often lie closer to home than many might think. For not only does Indian law affect Indians who live on and off reservations, it also affects non-Indians living on or near the reservations.[27] Modern federal Indian law may even influence non-Indians who merely engage in consensual relationships with a tribe or its members through commercial dealings, contracts, or leases.[28] Likewise, Indian law may bear upon non-Indians whose conduct is deemed a threat or significant influence upon a tribe's political integrity, economic security, health or

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court judgement against Indian defendant on the reservation); *Old Elk*, 552 P.2d at 1398 (holding that an Indian may not commit a crime off the reservation and then retreat to the reservation to escape culpability); Bad Horse v. Bad Horse, 517 P.2d 893, 897 (Mont. 1974) ("The myth of Indian sovereignty has pervaded judicial attempts by state courts to deal with contemporary Indian problems [and s]uch rationale must yield to the realities of modern life, both on and off the reservation"); Natewa v. Natewa, 499 P.2d 691, 693 (N.M. 1972) (refusing to find exclusive jurisdiction in the tribal court to determine child support obligations on ground that an appellant "cannot interpose his special status as an Indian as a shield to protect him from obligations that result from his marriage to appellee which had been entered into off the reservation"); *accord* Rolette County v. Eltobgi, 221 N.W.2d 645 (N.D. 1974); Paiz v. Hughes, 417 P.2d 51, 52 (N.M. 1966).

Finally, there is mounting evidence that state courts can (erroneously) be seduced by the federal exhaustion doctrine. *See, e.g.*, Klammer v. Lower Sioux Convenience Store, 535 N.W.2d 379 (Minn. Ct. App. 1995) (adopting the posture of federal courts facing tribal assertions of jurisdiction and holding that as a matter of comity and in the interest of supporting the role of the tribal court as part of a tribe's self-governance of reservation affairs, a non-Indian plaintiff must exhaust tribal remedies and allow the tribal court to address the question of its own jurisdiction and of sovereign immunity in the first instance; but apparently anticipating an opportunity for subsequent appellate review of the tribal court's ruling).

26. This term was apparently coined for use in King George III's Royal Proclamation Act of 1763, which addressed matters of colonial government and settlement. *See* Wilkinson, *supra* note 23, at 89. As a legal term of art, Indian country is presently defined by 18 U.S.C. § 1151 (1994) ("[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 all rights-of-way running through the reservation, (b) all dependant 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 same."). Adoption of this criminal code definition to civil matters was sanctioned in DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975).

27. *See* Cynthia Ford, *Integrating Indian Law Into a Traditional Civil Procedure Course*, 46 SYRACUSE L. REV. 1243, 1249 (1996) (asserting the need for the inclusion of some Indian law in the basic first-year Civil Procedures course, and setting out a plan for accomplishing that goal). Having attended the University of Montana School of Law — and taken first-year Civil Procedures with Professor Ford — this observer wholeheartedly supports her recommendations. Indeed, her introductory lectures on Indian law did much to animate this project.

28. *See* Montana v. United States, 450 U.S. 544, 565-66 (1981).

welfare.[29] Oddly enough, the truly glaring ambiguity regarding the influence of Indian law upon non-Indians is the one that, to the cursory observer, probably makes the least sense intuitively: that it is altogether unsettled whether a non-Indian's mere presence on an Indian reservation gives rise to the tribe's authority over that person. Nevertheless, because of the evolution of Indian law, and because of the increasing interaction between Indians and non-Indians, "the potential impact of Indian law throughout the country is enormous."[30]

B. A Brief Comment on the State of Federal Indian Law in Our Time

For nearly a century preceding *Williams*, the prevailing view was that both the federal government and the states were superior to the tribes.[31] Indeed,

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29. *Id.*

30. Ford, *supra* note 27, at 1249-50. Professor Ford also points out that this escalating interaction is not just a phenomena of the western states. *Id.* (citing Robert A. Williams, *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989)).

31. *See, e.g.*, United States v. Kagama, 118 U.S. 375, 379 (1886) ("But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the government of the United States, or of the States of the Union. There exists within the broad domain of sovereignty but these two."). In the wake of such precedent, state law now has an enormous impact in Indian country. Professor Laurence thinks this may even be the "thorniest" problems of modern-day Indian law, Robert Laurence, *A Memorandum to the Class, in Which the Teacher Is Finally Pinned Down and Forced to Divulge His Thoughts on What Indian Law Should Be*, 46 ARK. L. REV. 1, 21 (1993) [hereinafter Laurence, *Memorandum*], essentially the result of assimilationist policies such as allotment which brought large numbers of non-Indians onto the reservations, and most with no purpose there having anything to do with their Indian neighbors. This was a marked change from the era predating allotment, when reservations were fairly homogeneous territories with clearly defined boundaries and where most non-Indians were present expressly to engage in some form of intercourse with the Indian inhabitants. *See* Wilkinson, *supra* note 23, at 88. The primary engine of that change was the General Allotment Act of 1887. *See* Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341-342, 348-349, 354, 381 (1994)). A primary thrust of allotment was the destruction of tribalism itself. President Theodore Roosevelt thought of allotment as a "mighty pulverizing engine to break up the tribal mass . . . [acting] directly upon the family and the individual." *See* Wilkinson, *supra* note 23, at 4 & n.69.

The operation of allotment lay in the transfer of tribal lands into private hands — to both Indians as well as to non-Indians in the form of "surplus" lands. And it did accomplish that quite well: under that "civilizing" program, Indian land holdings were reduced from 138 million acres in 1887 to 52 million acres by the time allotment was ended by the Indian Reorganization Act of 1934. *See* Wilkinson, *supra* note 23, at 8-9.; *cf.* COHEN, 1982 ED., *supra* note 4, at 614. Most of the allotted land that eventually passed out of trust status ended up in non-Indian hands — often at a fraction of its value due to "fraud, sharp dealing, mortgage foreclosures, and tax sales." Wilkinson, *supra* note 23, at 20 & n.71.

The resulting checkerboard land ownership pattern on many reservations is a primary cause of the "regulatory nightmare" that many modern tribal governments must now deal with. *See* Reynolds, *supra* note 18, at 1135 n.58. And largely due to the presence of large non-Indian populations on modern reservations, state and local governments now provide much of the civic infrastructure: schools, police and fire protection, and social services.

At any rate, as non-Indians moved onto reservations, so too did state law. And as Professor

Supreme Court decisions of the late nineteenth century made clear that the law viewed tribal sovereignty as little more than an historical anomaly.[32] One observer goes so far as to suggest that the only force standing between such views and the reality of "modern" Indian law was "remarkable" legal scholarship and tenacity of Felix S. Cohen, who worked diligently to preserve the doctrine of tribal sovereignty so that it could be resuscitated by cases like *Williams v. Lee*.[33]

Laurence notes, "[t]he sovereignty of Indian tribes is not only priceless, but especially vulnerable to state intrusions." Robert Laurence, *The Enforcement of Judgments Across Indian Reservation Boundaries: Full Faith and Credit, Comity, and the Indian Civil Rights Act*, 69 OR. L. REV. 589, 619 (1990) [hereinafter Laurence, *Enforcement*]. Indeed, the subject of this article — of virtually the entire argument about when and if a tribe retains civil jurisdiction over any non-Indian — arises from this most fundamental controversy.

32. *See, e.g.*, Montoya v. United States 180 U.S. 261, 350 (1901). In *Montoya*, the Court clearly set out its view of the Indian culture, stating:

> The North American Indians do not and never have constituted "nations" . . . . Owing to the natural infirmities of the Indian character, their fiery tempers, impatience of restraint, their mutual jealousies and animosities, their nomadic habits, and lack of mental training, they have as a rule shown a total want of that cohesive force necessary to the making up of a nation in the ordinary sense of the word. As they had no established laws, no recognized method of choosing their sovereigns by inheritance or election, no officers with defined powers, their governments in their original state were nothing more than a temporary submission to an intellectual or physical superior, who in some cases ruled with absolute authority, and, in others, was recognized only so long as he was able to dominate the tribe by the qualities which originally enabled him to secure their leadership. In short, the word "nation" as applied to the uncivilized Indians is as much of a misnomer as to be little more than a compliment.

Id. at 265. But for an alternative — and more deferential — treatment of "traditional" Indian law, highly recommended is KARL N. LLEWELLYN & EDWARD ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (3rd ed. 1973).

33. *See* Wilkinson, *supra* note 23, at 57-58. During the 1940s, when Cohen, a respected legal scholar in several areas of law, first wrote on the subject, the relative dearth of scholarly writings on Indian law certainly helped elevate the status of the truly comprehensive *Handbook*. *Id.* at 58. That it was published under the aegis of the Department of the Interior certainly added credibility as well. *Id.* Cohen argued that tribal sovereignty is "[p]erhaps the most basic principle of all Indian law." FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 122 (Univ. of N.M. photo. reprint 1971) (1942) [hereinafter COHEN, 1942 ED.]. The powers that are lawfully vested in an Indian tribe are general powers. *Id.* Those powers were not delegated to the tribes by Congress. *Id.* Rather, they are the inherent powers of a "*limited sovereignty that has never been extinguished.*" *Id.* And while those sovereign powers have been limited and qualified in certain respects — preventing treaties with foreign nations, for example — the balance of those powers providing for the internal sovereignty over a tribe's internal relations remain intact. *Id.*

Some observers are less generous towards Cohen, however. *See, e.g.*, Barsh, *supra* note 4. Professor Barsh asserts that Cohen's views on sovereignty were really an uncredited paraphrase of Lord Mansfield's two-century-old comments on the political status of conquered peoples — an obsolete imperial British doctrine superimposed on contemporary American problems. *Id.* at 801 n.6 (citing Campbell v. Hall, 98 Eng. Rep. 1045, 1047-48 (K.B. 1774) (criticizing the conquest doctrine, long considered, along with the status of "infidels," as a legal basis for common law colonial slavery); *see also* Rex v. Vaughan, 98 Eng. Rep. 308, 311 (K.B. 1769) (Lord Mansfield's discussion of the political status of conquered peoples in Jamaica); Anon.

But neither were federal and state judiciaries transformed by the Williams decision into a unified body of support for tribal sovereignty. For while it is unlikely that a foreign nation would ground a jurisdictional discussion in the primitive origins of Anglo-American courts — on medieval notions of dispute resolution that depended primarily upon divine guidance and elicited wagers of law,[34] and that encouraged trial by physical combat and ordeal[35] — the United States Ninth Circuit Court of Appeals undertook the cultural equivalent of just such an inquiry six years after *Williams*. In that respect, *Colliflower v. Garland*[36] is a virtual chronicle of one court's struggle to adjust to the new

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Memorandum, 2 P. Wms. 75, 24 Eng. Rep. 646 (Ch. 1722) (discussing Barbados, which being "found" and settled rather than conquered, required some different rationale to explain its legal relationship to the Crown); Dutton v. Howell, 1 Eng. Rep. 17 (H.L. 1693).

34. A wager at law was an assurance that a party would "make his law" — that she would take an oath before God in open court refuting an alleged debt. Moreover, the accused would produce eleven neighbors ("compurgators") who would avow upon oath that they believed in their consciences that the affiant was telling the truth. BLACK'S LAW DICTIONARY 1579 (7th ed. 1995). The real value of the practice was probably that it showed that the oath-taker had good standing in the community. Author's notes of a lecture in *Pretrial Advocacy* presented by Greg Munro, Law Professor at the University of Montana School of Law, Missoula, Mont. (Fall 1995) [hereinafter Munro].

Of course, while a foreign nation might not invoke such memories, that does not deter private citizens from suggesting the nefarious origins of any given court when it suits their purposes. For instance, while commenting on the jury's murder verdict in the so-called au pair trial of Louise Woodward, British legal expert Stephen Jakobi remarked, "Massachusetts, home to the witch-hunt — we have a lot of problems here." Terry McCarthy, *A Stunning Verdict*, TIME, Nov. 10, 1997, at 68.

35. This was generally known as the *Judicium Dei* or "judgement of God." Such "trials" were a hallmark of early Saxon and English law. *See* Munro, *supra* note 34. Whether an ordeal was by fire or water, the key to exculpation was divine intervention. *Id.* If the ordeal was by fire, the accused was forced to handle a red-hot iron, or to walk barefoot and blindfolded over nine red-hot plowshares laid lengthwise at unequal distances. BLACK'S LAW DICTIONARY 850 (7th ed. 1995). The hot-water ordeal consisted of plunging the accused's arm up to the elbow in boiling water. *Id.* Common to the heat-related ordeals was that innocence was established if the "trial" produced no evidence of injury. *Id.* The final form — ordeal by cold-water — was reserved primarily for lower ranking citizens. *Id.* (citation omitted). The suspect was thrown into a pond or river of cold water. *Id.* If she floated without attempting to swim, she was deemed guilty. *Id.* If she sank, she was deemed innocent. *Id.* Either "verdict," no doubt, proved detrimental to the accused's health and well-being.

Most of these practices were ended in 1215 by decree of the Fourth Lateran Council. Subsequent "improvements" over the next several centuries included the development of the lay jury system. However, for several centuries the court could openly coerce a jury under threat of fine or imprisonment. Munro, *supra* note 34 (citing Bushell's Case, 124 Eng. Rep. 1006, 1007 (C.P. 1670) (wherein the Chief Justice of the Common Pleas stated, in ordering the immediate discharge of a juror who had been jailed by a trial judge for bringing in a verdict of not guilty, that "(t)he writ of habeas corpus is now the most usual remedy by which a man is restored again to his liberty, if he have been against law deprived of it")). Early juries often heard several cases before being allowed to retire. *Id.* Jurors were also frequently forbidden food or drink until they reached a verdict. *Id.*

36. 342 F.2d 369 (9th Cir. 1965).

legal landscape that *Williams* helped to create:[37] a case that arose in 1963 when

37. Note that *Williams* is significantly different from *Colliflower* in that the latter involved a criminal action. Nevertheless, the ongoing ebb and flow regarding the policy of tribal jurisdiction over non-Indians is actually one of the few constants of federal Indian law. Most treaties reserved tribal criminal jurisdiction over non-Indians found within Indian country. But in 1882, the Supreme Court upheld state court criminal jurisdiction over the murder of one non-Indian by another non-Indian in Indian country, even though Congress had never granted such authority to the States. *See* McBratney v. United States, 104 U.S. 621 (1881). The Court justified that holding on the ground that Colorado had entered the Union on an "equal footing with the original States in all respects whatever." *Id.* at 624. And while subsequent cases vitiated the "equal footing" rationale, *see, e.g.*, United States v. Winans, 198 U.S. 371, 382-84 (1905), the Court steadfastly refused to reconsider *McBratney*. Wilkinson, *supra* note 23, at 88 & n.4 (citing New York *ex rel.* Ray v. Martin, 326 U.S. 496, 501 (1946) ("[N]o emphasis has been placed on whether state or United States courts should try white offenders for conduct which happened to take place upon an Indian reservation, but which did not directly affect the Indians.")).

Two years after *McBratney*, the Court refused to recognize federal jurisdiction in a murder case against an Indian perpetrator and Indian decedent. *See Ex parte* Crow Dog, 109 U.S. 556 (1883). The matter was thus the exclusive province of the tribal courts. *Id.* But while *Crow Dog* seemed a major victory for tribal sovereignty, Congress granted exclusive criminal jurisdiction over non-Indians and Indians in Indian country to the United States government in 1885. *See* Indian Country Crimes Act, 18 U.S.C. § 1152 (1994).

This jurisdictional "evolution" continued with Congress's enactment of Public Law 280. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (§ 7 repealed and reenacted as amended 1968) (codified as amended at 18 U.S.C. § 1162 (1994), 25 U.S.C. §§ 1321-1326 (1994), 28 U.S.C. §§ 1360 (1994)). Originally, Public Law 280 permitted certain enumerated states to unilaterally assert civil and criminal jurisdiction over Indian tribes. As amended by the Indian Civil Rights Act of 1968, tribal consent became a prerequisite to such a jurisdictional assertion by a state. *See* 25 U.S.C. §§ 1321-1326 (1994). Not surprisingly, Public Law 280 was widely resented by many Indian peoples. *See* Wilkinson, *supra* note 23, at 49 & n.80.

In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court again struck down the tribes' criminal jurisdiction over non-Indians, even if the infraction occurs on a reservation and even if an analogous argument of "lack of consent" to jurisdiction by a non-resident citizen in a state court — or even by a citizen of another nation such as Panama's ex-President Manuel Noriega — would be patently absurd. The Supreme Court later extended that holding to divest tribal courts of criminal subject matter jurisdiction over nonmember Indians in what Professor Clinton calls a "masterpiece at bringing together deeply felt national political rhetoric to justify a fundamentally paternalistic conception of limited tribal governance." Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonialized Federal Indian Law*, 46 ARK. L. REV. 77, 151 (1993) (citing Duro v. Reina, 495 U.S. 676 (1990)) [hereinafter Clinton, *Redressing the Legacy*].

Congress has since overridden *Duro* by expressly granting jurisdiction over non-member Indians to tribal governments. *See* Department of Defense Appropriations Act, Pub. L. No. 101-511, 104 Stat. 1856 (1990) (codified as amended at 25 U.S.C. § 1301(2)-(4) (1994)). Professor Laurence notes that in effecting that cure, Congress, aware of Justice Kennedy's opinion that congressional recognition of tribal jurisdiction could ultimately lead to subjecting the tribes to the "constraints of the Constitution," *see Duro*, 110 U.S. at 2060-61, "tried hard to make sure that it was not *delegating* jurisdiction to the tribes, but was rather *acknowledging* it — precisely so that constitutional restrictions would not attach." Laurence, *Memorandum*, *supra* note 31, at 12 (emphasis added). The effectiveness of that aspect of Congress's so-called "*Duro*-fix" has yet to be fully tested in subsequent litigation. Most important in the context of this article, of course, is that *Duro* has no civil corollary. *See* Ford, *supra* note 27, at 1249 n.22.

Madeline Colliflower, a Gros Ventre[38] Indian from northern Montana's Fort Belknap Indian Reservation, appeared in federal district court to request a writ of habeas corpus.[39] That writ was required, Ms. Colliflower argued, because Sheriff Garland of Blaine County, Montana, acting under order of the Fort Belknap Court of Indian Offenses, had wrongly arrested and imprisoned her.[40] These acts allegedly violated her constitutional rights to counsel, to trial, and to be confronted by any witnesses against her.[41] The federal district court

38. The Gros Ventre are one of the 11 tribes that now consider Montana their permanent home. WILLIAM L. BRYAN, JR., MONTANA'S INDIANS YESTERDAY AND TODAY 4 (1985). Those 11 tribes reside on seven reservations that make up nine percent of Montana's land area. *Id.* at 6. Some tribes, like the Gros Ventre, share a reservation with one or more tribes who were once traditional enemies. *Id.* at 30-31. Others, such as the Little Shell Band, who were essentially in the wrong place at the wrong time — that is, when reservations were created — have no reservation at all. *Id.* at 98-99.

39. *Colliflower*, 342 F.2d at 370-71.

40. The Secretary of the Interior authorized Courts of Indian Offenses in 1883 and directed the Commissioner of Indian Affairs to adopt both substantive and procedural regulations to be applied in the courts. The Courts of Indian Offenses are often called CFR courts because the Code of Federal Regulations contains their governing rules and procedures. Margery H. Brown & Brenda C. Desmond, *Montana Tribal Courts: Influencing the Development of Contemporary Indian Law*, 52 MONT. L. REV. 211, 217 & n.8 (1991) (citing 25 C.F.R. §§ 11.1-.98 (1991)). Although Congress never expressly authorized the CFR courts, some find congressional authorization in the 1921 Snyder Act ("the employment of . . . Indian police, Indian judges") and in the continuing appropriations Congress made for the courts. *Id.* at 217 (citing Snyder Act, ch. 115, 42 Stat. 208 (1921) (codified at 25 U.S.C. § 13 (1988)). CFR court judges were chosen by the reservation's Indian agent (forerunner of today's BIA Superintendent), and these judges were generally tribal members. *Id.* at 217-18. But these courts were notably Anglo-American in character. *Id.* at 218. Many Indian people denied their legitimacy. *Id.* Nevertheless, Courts of Indian Offenses were influential until the mid-twentieth century. *Id.* at 218 & n.23 (citing BROOKINGS INST., INST. FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION 772, 769-73 (Lewis Meriam ed. 1928); Robert T. Coulter, *Federal Law and Indian Tribal Law: The Right to Civil Counsel and the 1968 Indian Bill of Rights*, 3 COLUM. HUM. RTS. L. REV. 49, 64 (1970-71) ("Formal tribal courts with written codes, though products of the Indian subjugation during the nineteenth century, have become part and parcel of Indian self-government today")).

The Indian Reorganization Act of 1934 (IRA), ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-479 (1994) (also known as the Wheeler-Howard Act for its sponsors, Sen. Burton K. Wheeler of Montana and Rep. Edgar Howard of Nebraska), was intended to revitalize tribal governments. *But see* Brown & Desmond, *supra*, at 218 n.25 (discussing "other," perhaps unintended, effects of the act). When a tribe adopted a constitution and codes of law, the tribe's court changed from a Court of Indian Offenses, or CFR court — a federal instrumentality — to a tribal court, an institution of tribal self-government. *Id.* at 218-19 (citing United States v. Red Lake Band of Chippew Indians, 827 F.2d 380 (8th Cir. 1987)). Most tribes have made that transition — only 21 of the approximately 200 total tribal and Alaska Native courts were CFR courts by 1991. Brown & Desmond, *supra*, at 219 n.31-32 (citing *Hearings on H.R. 972 Before the House Comm. on Interior and Insular Affairs*, 102d Cong. (Apr. 11, 1991) (statement of Ronald Eden, Director, Office of Tribal Services, Bureau of Indian Affairs).

41. *Colliflower*, 342 F.2d at 371.

concluded that it had no jurisdiction and denied the petition.[42]

On appeal, the Ninth Circuit court devoted much of its opinion to its version of the history of the tribal judicial fora.[43] Circuit Court Judge Duniway, writing for the panel, pointed out that these Indian courts were neither the kind of court provided for in the Constitution, nor the kind that only Congress has the power to "ordain and establish."[44] Instead, they were

> a tentative and somewhat crude attempt to break up superstitious practices, brutalizing dances, plural marriages and kindred evils, and to provide an Indian tribunal which, under the guidance of the agent, could take cognizance of crimes, misdemeanors and disputes among Indians, and by which they could be taught to respect law and obtain some rudimentary knowledge of legal processes. Notwithstanding their imperfections and primitive character these so-called Courts [were] a great benefit to the Indians and of material assistance to the agents.[45]

And, according to Judge Duniway, this essential nature of the Fort Belknap Tribal Court persisted even after enactment of the IRA.

The judge considered the notion of tribal sovereignty as well. However, because treaties were broken, lands were taken by force, and because the United States imposed new, more restrictive treaties on Indians who were confined in ever smaller reservations — often far from their original homes — Indians had been reduced to the status of wards, dependant on the United States not just for their daily food, but for all their "political rights."[46] Arising from the tribes' "weakness and helplessness" — largely the result of their dealings with the federal government — was a federal "duty of protection."[47] Plenary power over the "remnants of a race once powerful" was therefore justified by that duty to protect.[48] And that power must reside in the federal government simply because "it never has existed anywhere else, the theatre of its exercise is within the geographical limits of the United States, it has never been denied, and because [the federal government] alone can enforce its [own] laws on all the tribes."[49] In short, Chief Justice Marshall's notion of the Indian reservation as a distinct nation, exempt from the law of the territory in which it was situated, had "yielded to closer analysis when confronted, in the course of subsequent developments, with diverse concrete situations."[50] Therefore, unless forbidden

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42. *Id.* at 370.
43. *Id.* at 371-73.
44. *Id.* at 373 (quoting United States v. Clapox, 35 F. 575 (D. Ore. 1888); U.S. CONST. art. I, § 3).
45. *Id.*
46. *Id.* at 375 (citing United States v. Kagama, 118 U.S. 375, 381-85 (1886)).
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 376 (citing Organized Village of Kake v. Egan, 369 U.S. 60, 72 (1962) (striking

by federal law, Judge Duniway concluded that the reservations were presumed subject to the jurisdiction of the surrounding state or territory.[51]

The tribal court countered that it had exclusive jurisdiction over Indian offenses because it was, not a court of a state or of the nation, but that of a separate sovereign to which the federal Constitution did not apply. The Ninth Circuit court, however, discounted that claim, concluding that

> [I]n spite of the theory that for some purposes an Indian tribe is an independent sovereignty, we think that, in the light of their history, it is pure fiction to say that the Indian courts functioning in the Fort Belknap Indian community are not in part, at least, arms of the federal government.[52]

In Judge Duniway's view, what was dispositive was that the tribal court was still governed by an administrative body.[53] Therefore, the Fort Belknap Tribal Court was nothing more than a creation of the federal Executive, imposed upon the Indian community. The tribal court was still, at least in part, controlled by the United States government.[54] Since the tribal court was akin to a federal agency, a federal court would logically have jurisdiction to probe that court's detention of Ms. Colliflower.[55] That, Judge Duniway openly admitted, might not have been the situation one hundred years before.[56] But in light of the mere "vestige of sovereignty" that the Gros Ventre Tribe retained, the district court was ordered to reconsider Ms. Colliflower's application.[57]

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down the authority of the Secretary of the Interior to authorize fishing in a manner contrary to state law by Tlingit Indians)).

51. *Id.* (citations omitted).

52. *Id.* at 378-79.

53. *Id.* at 373 (citing H. REP. NO. 2503, 82nd Cong. tbl. I at 48 (1953)).

54. *Id.* at 379.

55. *Id.*

56. *Id.*

57. *Id.* The Ninth Circuit's notion that Fort Belknap's tribal court was more an administrative agency than court of law has not escaped notice by other observers. Professor Skibine of the University of Utah notes that in *Colliflower*, the Ninth Court held tribal courts were "indeed like administrative tribunals." *See* 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, 193 n.11 (1994). But Professor Skibine concludes — apparently on the ground that tribal court review is not now governed by the Administrative Procedures Act — that the Ninth Circuit's novel view must have died shortly thereafter. *Id.*

Professor Clinton reaches a similar conclusion, but on different grounds. *See* Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 857 (1990) [hereinafter Clinton, *Tribal Courts*] (stating that tribal courts are not of the transnational sovereignty, federalism or administrative models; rather, they should be accorded a new category — a "tribal model of intergovernmental relations"). Yet another observer believes that the courts have effectively created a new branch of the federal judiciary in which tribal courts have assumed a role of federal court "adjuncts," similar to tax, military or territorial courts. *See*

C. Indian Civil Rights Act of 1968

Had the federal courts' seeming reluctance to embrace the deference to tribal courts mandated by *Williams v. Lee* existed in a political vacuum, the Supreme Court's attempt to bolster the tribal judiciary might have been in vain. But at about the same time as the Ninth Circuit was deciding *Colliflower*, proponents of federally-promulgated Indian civil rights were preparing an ambitious legislative program.

In 1968, Congress enacted the Indian Civil Rights Act (ICRA).[58] The ICRA responded to Supreme Court decisions holding that the United States Constitution and the federal Bill of Rights were inapplicable on Indian reservations,[59] and to allegations of tribal abuse of individual Indians.[60] Congress set out an abridged version of the Bill of Rights along with protections gleaned from the Fourteenth Amendment,[61] and provided a writ of habeas

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Phillip J. Smith, *National Farmers Union and Its Progeny: Does It Create a New Federal Court System*, 14 AM. INDIAN LAW REV. 333, 348-49 (1989).

Finally, Professor Reynolds sets out what is perhaps the most comprehensive critique to date of the interface between post-*National Farmers Union* exhaustion cases and the existing body of administrative review law. *See* Reynolds, *supra* note 18, at 1119 (citing 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 15.2 (3d ed. 1994) (discussing challenges to agency jurisdiction in the context of exhaustion of administrative remedies and specifically addressing judicial inconsistency evident in that body of law)). Indeed, it appears that *National Farmers Union*'s infamous twenty-first footnote was drawn from the rules pertaining to exhaustion of administrative remedies. *See* National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 n.21 (1985) (carving out exceptions to the exhaustion requirement where a jurisdictional assertion is motivated by a desire to harass or is conducted in bad faith, where the action violates express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction).

58. Pub. L. No. 90-284, Title II, § 202, Apr. 11, 1968, 82 Stat. 77 (codified as amended at 25 U.S.C. § 1301 (1994)). In fact, however, an interest in individual Indian civil rights had been evident since at least 1961. *See, e.g., Constitutional Rights of the American Indian: Hearings Pursuant to S. Res. 53 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 87th Cong. (1961).

59. *See* Talton v. Mayes, 163 U.S. 376, 384 (1896) (holding that the Fifth and Fourteenth Amendments did not compel the tribe to employ a grand jury in tribal prosecutions because the "powers of local self-government enjoyed by the Cherokee Nation existed prior to the [federal] Constitution"); *see also* Native American Church v. Navajo Tribal Council, 272 F.2d 131, 134-35 (10th Cir. 1959) (stating that Indian tribes "have a status higher than that of the states," and that the First Amendment has no effect upon an Indian nation).

60. *See, e.g.*, United States *ex rel.* Rollingson v. Blackfeet Tribal Court of the Blackfeet Indian Reservation, 244 F. Supp. 474, 478 (D. Mont. 1965) ("A failure to comply with the requirements of due process in many tribal and Indian courts has been disclosed in recent congressional investigations and has resulted in corrective legislation now pending in Congress.").

61. Pursuant to 25 U.S.C. § 1302 (1994). The statute states:

> No Indian tribe in exercising powers of self-government shall:
>
> (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
>
> (2) violate the right of the people to be secure in their persons, houses, papers,

corpus for "any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."[62]

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and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

Id. It must be noted however, that the Navajo Nation Council enacted its own Bill of Rights even before Congress enacted the ICRA. *See* Navajo Tribal Council Resolution No. CO-63-67 (Oct. 9, 1967) (codified as amended at NAVAJO NATION CODE tit. 1, §§ 1-9 (Equity 1995)). Due process had, by 1968, been a part of Navajo tribal law for nearly a decade. *See* Navajo Tribal Council Resolution No. CJA-18-60 (Jan. 22, 1960) (codified as amended at NAVAJO NATION CODE tit. 16, §§ 1401-1403 (Equity 1995)). The Navajo Bill of Rights is described as "more expansive and protective of individual rights than either the ICRA or the Bill of Rights within the United States Constitution." *See Hearings on Section 329, H.R. 3662 Before the Senate Committee on Indian Affairs Concerning Civil Jurisdiction Within Indian Country* 104th Cong. (Sept. 24, 1996), *available in* 1996 WL 10831410 (unpaginated) (testimony of Herb Yazzie, Attorney General of the Navajo Nation). The Navajo Nation Bill of Rights extends to freedom of speech, freedom of religious expression, freedom of the press, NAVAJO NATION CODE tit. 1, § 4 (Equity 1995), the right to assemble peaceably and petition the government for redress, *id.*, the right to be free from unreasonable searches and seizures, *id.* § 5, the right to keep and bear arms, *id.* § 6, the right to counsel and the right to trial by jury, *id.* § 7, the right to be free from double jeopardy and the right to be free from self incrimination, *id.* § 8, the right to be protected from cruel and unusual punishment and excessive bail and fines, *id.* § 9, the right to due process of law and to equal rights and protection under the laws to all persons, irrespective of gender, *id.* § 3, and the protection of private property rights. Navajo, *id.* § 8. These rights apply to all persons, irrespective of race, Indian nation affiliation, gender or religion — even to the extent that nonmember citizens of the Navajo Nation may even serve on civil juries in Navajo tribal courts.

62. 25 U.S.C. § 1303 (1994). Congress settled on this less intrusive remedy over an earlier proposal that federal courts would review de novo all convictions obtained in tribal courts. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 69 & n.24 (1978). During hearings held in 1965, even those who agreed generally with the intent of the review provision believed that de novo review would impose unmanageable financial burdens on tribal governments, needlessly displace tribal courts, and deprive those courts of all appellate jurisdiction. Enactment of review by writ of habeas corpus was urged in the alternative. *Id.* (citation omitted).

More important to the subject of this article was that Congress considered and rejected

Congress intended the ICRA to "secur[e] for the American Indian the broad constitutional rights afforded to other Americans," and by that to "protect individual Indians from arbitrary and unjust actions of tribal governments."[63] Thus, the ICRA set up a tension between two "distinct and competing purposes" — between protecting tribal members against excesses of the tribe, and promoting the "well-established federal policy of 'furthering Indian self-government.'"[64] The Act's final language was thought to be tailored to "fit the unique political, cultural, and economic needs of tribal governments."[65] Other facets of the ICRA seem to manifest varying degrees of Congress's intent to protect tribal self-government.[66]

But the ICRA is perhaps most significant to the exhaustion doctrine because of the dramatic way it opened the federal courthouse doors to a new class of civil litigant. And for nearly a decade, parties — whether Indian or non-Indian — who wished to avoid tribal courts and governments, found that invocation of the ICRA might permit a full hearing on the merits in a federal district court.

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proposals for federal review of alleged violations of the Act arising in a civil context. *Id.* at 67. Initial proposals required the Attorney General to "receive and investigate" complaints of deprivations of an Indian's statutory or constitutional rights, and to prosecute such cases accordingly. *Id.* at 67-68 & n.25 (citing S. 963, 89th Cong. (1965)). This proposal, while it might have had a screening effect on frivolous or vexatious lawsuits, was nevertheless bitterly opposed by several tribes, and was subsequently dropped from the final version. *Id.* Also rejected was the Interior Department's proposal that would have authorized that Department to adjudicate civil complaints concerning tribal actions, with review in the district courts from final decisions of the agency. *Id.* at 68 & n.26 (citation omitted).

63. *Martinez*, 436 U.S. at 61 (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)). President Johnson also urged congress to pass the ICRA as part of a legislative and administrative program intended to further tribal "self-determination," "self-help," and "self-development." *Id.* at 62 & n.11 (citing 114 CONG. REC. 5518, 5520 (1968)).

64. *Id.* at 62.

65. *Id.* at 62-63 & n.13 (citations omitted). In light of those considerations, the ICRA did not prohibit the establishment of religion, nor did it require jury trials in civil cases or appointment of counsel for indigents in criminal cases. *Id.* at 63-65.

66. *See, e.g.*, 25 U.S.C. §§ 1321-1326 (1994). Some supporters have hailed this as the most important part of the Act. *Santa Clara Pueblo*, 436 U.S. at 63 & n.15. When *Colliflower* was decided, the formulation of Public Law 280 did authorize certain states to assume civil and criminal jurisdiction over reservation Indians, but only upon an explicit assumption of that jurisdiction by the state. Title III of the ICRA amended Public Law 280 to require prior consent of a tribe before a state could assert civil or criminal jurisdiction in Indian country. *See* 25 U.S.C. § 1323(b) (1994).

Title II of the ICRA provided for "educational classes for the training of judges of courts of Indian offenses." *See id.* § 1311(4). Courts of Indian offenses were also created to administer criminal justice for those tribes lacking their own criminal courts. *See generally* WILLIAM HAGAN, INDIAN POLICE AND JUDGES 104-25 (1966).

D. Tribal Exhaustion Unfurled: Dodge v. Nakai[67]

The first reported federal case arising under ICRA originated on the Navajo Indian Reservation. This case also probed the nexus between ICRA's new statutory scheme, and the Ninth Circuit's discovery in *Colliflower* regarding the striking similarities between review of tribal courts and review of mere administrative bodies. And when the dust finally settled, one federal district court judge's ideas presaged a significant shift in the federal judiciary's view of tribal courts.

In this case that arose just a few months following the ICRA's enactment, Judge Walter Early Craig wrote at length "in an effort to reveal some of the problems concerning the jurisdiction of the federal courts inherent in the . . . [Indian Civil Rights] Act," and also about the extent to which that Act required that his court depart from "long established principles and policies."[68] The

67. 298 F. Supp. 17 (D. Ariz. 1968).

68. *Id.* at 26. It appears that previously, federal judges had proven fairly reluctant to assert jurisdiction when a tribal forum existed. *See, e.g.*, Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967) (holding that, in suit brought to invalidate tribal election held to amend the tribal constitution and bylaws and to poll the tribal membership for this collective opinion as to disposition of certain pending tribal claim awards, the federal court was without jurisdiction, because the IRA only provides the authority and procedures whereby an Indian tribe may organize and adopt a constitution and bylaws — it does not create federal jurisdiction; the instant action arose out of plaintiffs' membership in the Chippewa Tribe of Indians rather than out of the federal constitution or laws); Prairie Band of the Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364 (10th Cir. 1966) (holding that a suit involving an attempt by some tribal members to restrict distribution of federal award monies to only those descendants of tribe as it existed at time of the underlying treaty was a private suit concerning tribal membership in which the federal court would not interfere); Littell v. Nakai, 344 F.2d 486 (9th Cir. 1965) (holding that, in action by tribe's general counsel against Chairman of Navajo Tribal Council to enjoin alleged interference with performance of retainer contract, no federal question or diversity jurisdiction existed where the substance of the controversy centered upon construction of the retainer contract rather than upon the statutory basis of that contract; while exclusive tribal jurisdiction may be altered by express congressional action, absent such alteration, the tribal courts had exclusive jurisdiction); Martinez v. Southern Ute Tribe of Southern Ute Reservation, 249 F.2d 915 (9th Cir. 1957) (holding that, where daughter of a full-blooded tribal member instituted federal action alleging wrongful denial of membership and benefits of membership, the complaint did not present a federal question under 28 U.S.C. § 1331); United States *ex rel.* Rollingson v. Blackfeet Tribal Court of the Blackfeet Indian Reservation, 244 F. Supp. 474 (D. Mont. 1965) (holding that a non-Indian lessee's allegation that ejectment from the reservation by the Blackfeet Tribal Court was a taking of property without due process of law and equal protection of law in violation of Fourteenth Amendment did not create a controversy arising under the Constitution, laws, or treaties of United States, and that the controversy was an internal matter of the Blackfeet Indian Tribe and could be determined solely in the Blackfeet Tribal Court). *But see* Oglala Sioux Tribe of the Pine Ridge Reservation v. Barta, 146 F. Supp. 917 (D.S.D. 1956) (holding that, in action by tribe for collection of tax levied by tribe upon nonmembers leasing tribal land, in view of fact that Oglala Sioux Tribe functions under provisions of IRA and federal statute, the district court had jurisdiction as a controversy arising under the Constitution, laws or treaties of the United States).

underlying controversy arose when Theodore Mitchell, executive director of Dinebeiina Nahiilna Be Agaditahe, Inc. (DNA),[69] was excluded from the reservation by order of the Advisory Committee of the Navajo Tribal Council.[70] The plaintiffs filed suit in federal court, alleging violations of the United States Constitution and various acts of Congress.[71] The thrust of the plaintiffs' jurisdictional argument was that *Colliflower*[72] had fundamentally altered the nature of tribal "quasi-sovereignty"[73] — in effect, that *Worcester*[74] and

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69. DNA was, and remains, a part of the legal services corporation that was originally formed under the Office of Economic Opportunity. Although conservative-led funding cutbacks continue to plague the legal services program, Congress' recent aim of eliminating the programs through funding cutoffs seems to have stalled. Instead of the draconian cuts scheduled for this year and next, Congress has actually increased funding by approximately one and one-half percent. James E. Cohen, Directing Attorney of California Indian Legal Services, Remarks Before the NALSA Chapter at the University of San Diego School of Law (Nov. 13, 1996).

70. *Dodge*, 298 F. Supp. at 20.

71. *Id.* Although Mitchell was not a member of the Navajo tribe, the suit was also brought on behalf of a class of DNA's Navajo clients, DNA itself, and eight Navajo members of DNA's board of directors. The plaintiffs' allegations included claims arising under:

(1) 28 U.S.C.A. § 1651(a)-(b) (West 1968) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law. An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.") (Judge Craig dismissed this claim for lack of jurisdiction.);

(2) *Id.* § 1361 (stating that the district courts "shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff");

(3) *Id.* § 1343(1) (stating that the district courts shall have original jurisdiction of civil actions based upon acts done in furtherance of any conspiracy mentioned in 42 U.S.C. § 1985);

(4) *Id.* § 1343(4) (stating that the district courts shall have original jurisdiction over "any civil action authorized by law to be commenced by any person . . . under any Act of Congress providing for the protection of civil rights").

The jurisdictional allegation that would prove the most significant to future actions was the claim under 28 U.S.C. § 1331 (conferring original jurisdiction on the district courts for actions arising under the Constitution, laws, or treaties of the United States where the matter in controversy exceeds in value the sum of $10,000). In assessing this claim, Judge Craig drew the broadest possible conclusion — that "[a] case in law or equity . . . may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either." *Dodge*, 298 F. Supp. at 21 (quoting Cohens v. Commonwealth of Virginia, 19 U.S. (6 Wheat.) 264, 378 (1821) (Marshall, C.J.)).

The plaintiffs also alleged various constitutional claims. All were dismissed, except as against defendant BIA Superintendent Holmes, who, Judge Craig concluded, was amenable to suit under the First, Fourth, Fifth, and Sixth Amendments in his capacity as an agent of the United States. *Dodge*, 298 F. Supp. at 22-23.

72. Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965).

73. The prefix "quasi" *might* be read here as pejorative. *See, e.g.*, BLACK'S LAW DICTIONARY 1245 (6th ed. 1990) (stating that the term "quasi" indicates "mere appearance or want of reality or having some resemblance to a given thing").

In practice, courts and commentators have applied the term to Indian tribes and nations. *See, e.g.*, United States v. Wheeler, 435 U.S. 313, 322-23 (1978) (stating that upon their incorporation within the United States, the Indian tribes yielded some sovereign powers; Congress, through the

Kagama[75] were no longer good law.[76] Judge Craig agreed that the Ninth Circuit had "expressed some doubt" about that proposition, but that it had not directly challenged notions of tribal sovereignty.[77] Rather, Judge Craig noted

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exercise of plenary power has removed other sovereign powers; and the result is a state of quasi sovereignty, unique and limited in its character, existing only at the sufferance of Congress, and subject to complete defeasance); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (holding that although Congress has the power to authorize civil rights actions to redress all constitutional violations, it elected instead to honor the quasi sovereignty of the Indian nations; because the culture and structure of the tribes differ greatly from those of state and federal governments, the tribes are in the best position to evaluate their members' rights in accordance with tribal custom; thus, while section 1302 of the ICRA establishes guidelines for tribal forums to follow, it does not authorize suits to enforce those guidelines other than by writ of habeas corpus); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512 (1940) (recognizing the quasi sovereignty of Indian nations in holding that they possessed the sovereign exemption from suits); Equal Employment Opportunity Comm'n v. Fond du Lac Heavy Equip. & Const. Co., Inc. 986 F.2d 246 (8th Cir. 1993) (stating that inherent in quasi sovereignty of the Fond du Lac Band of Lake Superior Chippewa is the tribe's power to make its own substantive law in internal matters and to enforce that law in the tribe's own forums); Cheyenne River Sioux Tribe v. Andrus, 566 F.2d 1085 (8th Cir. 1977) (stating that the powers of quasi sovereignty inhere in an Indian tribe due to its unique position within the federal system); Maryland Casualty Co. v. Citizens Nat'l Bank, 361 F.2d 517 (5th Cir.), *cert. denied*, 385 U.S. 918 (1966) ("Indian nations, as an attribute of their quasi-sovereignty, are immune from suit, either in the federal or state courts, without Congressional authorization.") (citations omitted); Shubert Const. Co., Inc. v. Seminole Tribal Housing Authority, 490 F. Supp. 1008, 1010 (S.D. Fla. 1980) (stating that Congress, in formulating the ICRA, chose to honor the quasi sovereignty of the Indian nations); Robert T. Coulter, *Federal Law and Indian Tribal Law: The Right to Civil Counsel and the 1968 Indian Bill of Rights*, 3 COLUM. HUM. RTS. L. REV. 49 (1970-71) (stating that prior to the ICRA, the civil liberties of the Indians in relation to their tribal governments was uncertain in view of the fact that tribal governments possessed a measure of quasi-sovereignty and were not directly subject to the Constitutional Bill of Rights).

However, the term has also been applied to territorial possessions as well as the states proper. *See, e.g.*, People of Puerto Rico v. Shell Co., 302 U.S. 253, 261-62 (1937) (stating that Puerto Rico has the full power of local self-determination, the power of taxation, the power to enact and enforce laws all with an autonomy similar to that of the states — i.e., many of the attributes of quasi sovereignty possessed by the states — "[a]nd, so far as local matters are concerned, as we have already shown in respect of the continental territories, legislative powers were conferred nearly, if not quite, as extensive as those exercised by the state legislatures"); Ruiz Alicea v. United States, 180 F.2d 870, 872 (1st Cir. 1950) (stating that the territory of Puerto Rico possesses many of the attributes of quasi sovereignty possessed by the states); *see also* Garcia v. San Antonio Metro. Trans. Auth., 469 U.S. 528, 542 (1985) (stating that states enjoy "quasi sovereignty"); Ohio v. Helvering, 292 U.S. 360, 369 (1934) ("When a state enters the market place seeking customers it divests itself of its quasi sovereignty, pro tanto, and takes on the character of a trader."); State of Ohio *ex rel.* Fisher v. Louis Trauth Dairy, Inc., 856 F. Supp. 1229, 1234 (S.D. Ohio 1994) (stating that states enjoy a "quasi sovereignty").

74. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

75. United States v. Kagama, 118 U.S. 375 (1886). In *Kagama*, the Court upheld the federal prosecution of crimes committed by Indians as set out in the Indian Country Crimes Act, ch. 341, § 9, 223 Stat. 385 (currently codified at 18 U.S.C. 1153 (1994)).

76. *Dodge*, 298 F. Supp. at 22-23.

77. *Id.* at 22-23.

the Ninth Circuit had carefully distinguished Ms. Colliflower's case from the facts in cases like *Kagama*.[78] Judge Craig could not accept the plaintiffs' contention that Colliflower provided new authority for federal court jurisdiction to review the defendants' conduct in light of the federal Bill of Rights.[79] Only if the implicated tribal institutions functioned as an arm of the federal government would Colliflower compel such a conclusion.[80] But if that were the case, there would not be merely an "inroad on Navajo tribal sovereignty, it would end it."[81] Rather, Judge Craig believed that

> [I]n the face of those decisions holding that the internal and social affairs of the Navajo tribe were exclusively within the jurisdiction of whatever tribal government existed, subject only to action on the part of Congress, this Court declines to now decide that these affairs have always been subject to adjudication in this Court as controversies arising under the Constitution of the United States . . . .[82]

In assessing the defendants' contention that the ICRA only protected the rights of Indians against excesses of their own tribal governments, Judge Craig agreed that the legislative history supported a view that non-Indians could invoke the ICRA's protections.[83] That, in turn, established pendent federal jurisdiction.[84] Nevertheless, Judge Craig noted that Mitchell's otherwise valid claim still did not vest the federal court with subject matter jurisdiction: federal jurisdiction failed because the plaintiffs had never presented their claims to the Navajo Tribal Court.[85]

Judge Craig noted — and without citing any precedent to support that decision — that there was an implied prerequisite to invocation of ICRA claims in federal court. Under that implied condition precedent, a plaintiff must first exhaust remedies available within the tribal framework.[86] Reasoning that several factors militated in favor of such a requirement, Judge Craig focused on the "'strong Congressional policy to vest . . . Tribal Government[s] with responsibility for their own affairs.'"[87] Clearly, the ICRA seemed to place the

78. *Id.* at 23.
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.* (citations omitted).
83. *Id.* at 24-25.
84. *Id.* (citing 28 U.S.C. § 1343(4) (1994) ("The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote")).
85. *Id.* at 25.
86. *Id.*
87. *Id.*

primary responsibility for the vindication of rights allegedly violated by a tribal government upon the tribe's own courts.[88] Moreover, Judge Craig believed that the federal courts' imposition of that responsibility might well enhance the development of an "independent" Indian judiciary, and help reconcile the ICRA with federal policy.[89] He was also concerned about intervening in "local" conflicts.[90] Finally, an overarching consideration was the judge's recognition that, while the instant case was "spectacular" in its allegations, it would also establish a rule that would affect future cases.[91]

Nevertheless, Judge Craig also felt that several factors argued against an implication of such a condition precedent in this case. First, not all these defendants were amenable to suit in the Navajo Tribal Court.[92] Second, Judge Craig believed that Congress was "greatly concerned" with untoward dismissals of civil actions from the federal district courts where individuals sought redress under the ICRA.[93] Finally, the need for (federal) judicial economy could not be ignored: establishing a broad exhaustion requirement in all ICRA cases would probably result in a multiplicity of federal lawsuits.[94]

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88. *Id.* It should be noted that tribal courts of the *Dodge* era were not the equal of present-day tribal courts. While there is probably no definitive and objective study of that subject, a frequently cited contemporary article did offer a glimpse into the prevailing view — albeit from the "outside." *See* Note, *Indian Bill of Rights*, 82 HARV. L. REV. 1343, 1344-45, 1371 (1969) (discussing the less than ideal conditions in the tribal justice system — conditions largely attributed to a lack of finances and education — including defendants denied legal counsel, revocations of membership rights, takings of private property for public use, and ejectment of non-Indians from reservations for posing a perceived threat to a tribe's cultural practices).

89. *Dodge*, 298 F. Supp. at 25 (citing Williams v. Lee, 358 U.S. 217, 222 (1959)).

90. *Id.* It is unclear, however, what Judge Craig might have considered a *non-local* case. Perhaps, however, he was using the term "local" in the same way that some courts refer to "internal" tribal affairs. *See, e.g.*, United States *ex rel.* Kishell v. Turtle Mountain Hous. Auth., 816 F.2d 1273, 1276-77 (8th Cir. 1987) (ordering tribal exhaustion where a trespass suit involved a "purely internal tribal controversy").

91. *Dodge*, 298 F. Supp. at 25.

92. *Id.* at 25-26.

93. *Id.* at 26. Indeed, the tension between concerns for individual rights and tribal sovereignty seems to be the fundamental controversy that exhaustion addressed after Congress enacted the ICRA. While any legitimate sovereign government seeks to meet the needs of its citizens by" protecting law and order, the environment, and economic interests", governmental actions may also cause disputes over the scope of a government's power, "the exercise of that power and the rights of individuals . . . ." *Tribal Sovereign Immunity Hearings Before the Senate Committee on Indian Affairs* (Sept. 24, 1996) (statement of Douglas B.L. Endreson). Endreson suggests that it falls upon the doctrine of sovereign immunity to protect such a government's right to decide "in its own courts, or by actions of its legislature, or through other institutions of its government . . . how to address and resolve these disputes." *Dodge*, 298 F. Supp. at 25. Moreover, that applies to all government, whether federal, tribal, or state. *Id.*

94. *Dodge*, 298 F. Supp. at 25. For instance, Judge Craig noted that in this case, upon dismissal from federal court: (1) two defendants would be entitled to dismissal insofar as the complaint relied upon 28 U.S.C. § 1361, but they would remain subject to federal action insofar as the complaint relied upon the treaty with the Navajo tribe; (2) another defendant would remain liable to federal action on all grounds applicable to him; and (3) should the Navajo Tribal Court

Attempting to balance these conflicting considerations, Judge Craig held that the ICRA claims were ripe for adjudication, despite the plaintiffs' failure to seek redress in Navajo Tribal Court.[95] For while Judge Craig would have required that these plaintiffs exhaust available tribal remedies under some other set of circumstances, the "proper utilization of the resources of the federal courts" outweighed any policy that favored vesting the Navajo Tribal Government with responsibility for their own affairs, or of fostering an independent Indian judiciary, or even of reconciling the ICRA with recognized federal policy.[96]

But in the end, one can only wonder whether the Ninth Circuit's decision in *Colliflower* — a decision that melded together habeas review and something a lot like an analogue to judicial review of an administrative determination — might have inspired Judge Craig's ideas regarding exhaustion. It was, after all, well-settled law that hopeful litigants were required to exhaust administrative remedies before applying for judicial review.[97] And when read together with the exhaustion requirement found in virtually every common-garden variety of habeas corpus action — not coincidentally, the only remedy expressly set out in the ICRA — might not Judge Craig have extracted this "implied condition precedent" from those existing bodies of law? An exhaustion requirement would plausibly give effect to the legislative intent that seemed to underlay the ICRA. That such a policy might ultimately lighten the federal docket — at least under more favorable circumstances — would have been equally appealing. But whatever the impetus, any remedy that seemed to further a worthy public policy, and which also supported the economical use of a busy federal judiciary, would not likely go unnoticed.

E. An Inchoate Exhaustion Doctrine

Still, Judge Craig's invention did not gain immediate acceptance. Nor did other courts discover such an implied condition within the ICRA: cases decided in the years immediately after *Dodge* noted no such exhaustion requirement.[98]

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decide in favor of any of the defendants, the plaintiffs would still be entitled to return to federal court to relitigate the matter. And since the claims against all the defendants involved essentially the same factual allegations, the district court would either have to postpone the trial on the issues properly before it, or hear much of the same evidence repeatedly. *Id.*

95. *Id.*

96. *Id.* at 26.

97. *See infra* notes 275-97 and accompanying text.

98. *See, e.g.*, Luxon v. Rosebud Sioux Tribe of South Dakota, 455 F.2d 698 (8th Cir. 1972) (reversing a district court's holding that it had no power to hear a dispute in the absence of express congressional authority conferring jurisdiction, where Rosebud Sioux tribal member claimed that she should be permitted to run for tribal office because she met all qualifications except that she was an employee of Public Health Service); Settler v. Yakima Tribal Ct., 419 F.2d 486 (9th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970) (stating that federal courts may limit the exclusive authority of an Indian tribe to regulate Indian fishing if such regulations are so summary or arbitrary as to "shock the conscience"); Seneca Constitutional Rights Organization v. George, 348 F. Supp. 48 (W.D.N.Y. 1972) (denying relief, in suit by Indian rights organization

Nevertheless, when the federal courts did eventually discover the exhaustion rule, it became a powerful tool — albeit one that might cut for or against federal jurisdiction.[99]

Ultimately, the courts that picked up on the exhaustion argument did so in response to increasingly frequent allegations of voting rights violations in tribal elections or to charges of wrongful denial of tribal membership rights.[100] And

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seeking equitable relief and monetary damages against officials of the Seneca Nation of Indians for alleged damages arising from negotiations over factory site on the reservation, on the grounds that it was unlikely that those plaintiffs would prevail on the merits of their claim); Loncassion v. Leekity, 334 F. Supp. 370 (D.N.M. 1971) (asserting jurisdiction under 28 U.S.C. § 1331(a) on the "federal question" concerning the rights created under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1994), in civil action where Zuni tribal member instituted negligence action arising from shooting by a tribal police officer); Solomon v. LaRose, 335 F. Supp. 715 (D. Neb. 1971) (holding that, where the alleged refusal to seat tribal elected members to the tribal council was not based on provisions of the Winnebago constitution, the action was an enforceable civil action in the federal court under 25 U.S.C. § 1302(8) and 28 U.S.C. § 1343(4)); Spotted Eagle v. Blackfeet Tribe of Indians, 301 F. Supp. 85 (D. Mont. 1969) (asserting pendent jurisdiction under 28 U.S.C. § 1343(4), in complaint stating a claim under the ICRA, where members brought action to enjoin use of Blackfeet tribal jail and to require tribal judges to grant the same rights that state and federal court defendants enjoy).

99. *See, e.g.*, O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140, 1146 (8th Cir. 1973) (stating that *Dodge* and its progeny suggest that exhaustion is not an "inflexible requirement", and that a reviewing court must balance strengthening the tribal courts — and through that, preservation of the tribe's cultural identity — against the needs of individual litigants).

100. In 1986, the U.S. Civil Rights Commission undertook an extensive review of the tribal justice system and of the guarantee of civil rights for those subject to it. David Phelps, *U.S. Panel Begins Review of Indian Judiciary*, STAR-TRIBUNE (Minneapolis-St. Paul), Feb. 12, 1986, at 3A, *available at* 1986 WL 4762370. The study was called "long overdue" by the commission staff and commission chairman Clarence Pendleton, who expressed concern over the lack of activity in this area by the Senate Select Committee on Indian Affairs. *Civil Rights Commission Hears Testimony from Indian Affairs Official Ross Swimmer, Others (U.S. Commission on Civil Rights)*, PR NEWSWIRE, Jan. 29, 1988, *available in* Westlaw, ALLNEWSPLUS File [hereinafter *Commission Hears Testimony*]. Chairman Pendleton noted that 1988 committee hearings held on the subject of ICRA enforcement were the first such hearings in the twenty year history of the Act, and were apparently "thrown together . . . in 10 days." *Id.* The chairman bemoaned the fact that the Senate did not receive testimony from disparate points of view, and especially from Indians who have alleged tribal violations of their individual rights. *Id.* In a background memo, staff set out alleged complaints that tribal courts ignored the rights of the accused, meted out justice unevenly and were inordinately subject to tribal political pressures. *Id.* According to the commission's staff, the Red Lake Reservation in Minnesota was "one of the many reservations where Indians complain that they are denied basic civil rights, including the rights to lawyers, bail and jury trials." *Id.* The view from outside the reservation in this regard can be exceedingly harsh. For example, R. Dennis Ickes, a former Deputy Undersecretary of the Department of the Interior, stated that while Congress intended to confer specific rights upon individual Indians with the ICRA, the Supreme Court subverted that goal in 1978 with its *Santa Clara Pueblo* decision. *See Commission Hears Testimony, supra.* Swimmer likened the reservations under the ICRA to the "Gaza Strip," completely without "enforcement mechanism, according to the Supreme Court." *Id.*

Nevertheless, Joseph Myers, a lawyer who directed a 1977 study of tribal courts for the American Indian Lawyer Training Program and also the Executive Director of the National Indian

while some courts had long avoided that class of controversy out of deference to tribal sovereignty,[101] the federal courts must have been sensitized by the civil rights struggles of the 1960s generally and by the federal voting rights cases in particular.[102] Moreover, the early cases epitomized a fundamental tension underlying virtually every jurisdictional dispute. For while many federal judges seemed sensitive to the benefits of deferring to the tribal institutions,[103] they also harbored a strong sense of duty to the parties deemed to be properly before them.[104] Thus, in cases where an evolving policy favoring the evolution

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Justice Center, has said that most of the nation's 144 tribal court systems work well — that "[a]lthough many tribal courts are functioning admirably on limited resources, lack of support and vacillating policies over the years have created overall needs of staggering proportions." *But see* Phelps, *supra*. Myers reported that problems exist only on a few reservations, including Red Lake in Minnesota and Rosebud and Cheyenne River in South Dakota. *Id.* Myers was critical of recent "sensationalism" in the *Minneapolis Star and Tribune* and the *Washington Post* in highlighting those problems. *Id.*

101. *See, e.g.*, Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967) (action to invalidate tribal election and to poll tribal membership arose out of plaintiffs' tribal membership rather than upon the federal constitution or laws; no federal question jurisdiction existed under 28 U.S.C. § 1331); Prairie Band of the Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364 (10th Cir. 1966), *cert. denied*, 385 U.S. 831 (1966) (action alleging that attempt by some Indians to restrict distribution of monetary award to certain tribal descendants was a private suit concerning tribal membership in which the federal district court had no jurisdiction); Martinez v. Southern Ute Tribe of Southern Ute Reservation, 249 F.2d 915 (9th Cir. 1957), *cert. denied*, 356 U.S. 960 (1958) (action by daughter of tribal member alleging wrongful denial of membership raised no claim arising under or requiring interpretation or construction of constitution, laws or treaties of the United States; the federal district court had no jurisdiction); Patterson v. Council of Seneca Nation, 157 N.E. 734 (N.Y. Ct. App. 1927).

102. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962) (a complaint alleging that a state apportionment statute deprived plaintiffs of equal protection under the Fourteenth Amendment presented a justiciable constitutional cause of action rather than nonjusticiable political question; the political question restriction is applicable only to issues arising between the branches of government, not between the federal and state governments). Some believe, however, that *Baker* may have ultimately led to the Court's reevaluation of the political question doctrine in order to diminish the resulting "friction" between the branches of the federal government. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 133 (3d ed. 1996).

103. In *Dodge*, the court noted that an exhaustion rule would further a "strong Congressional policy to vest Navajo Tribal Government with responsibility for their own affairs." Dodge v. Nakai, 298 F. Supp. 17, 25 (D. Ariz. 1968) (quoting Littell v. Nakai, 344 F.2d 486, 489 (9th Cir. 1965). Such a requirement would place primary responsibility for the vindication of rights allegedly violated by tribal governmental agencies upon the tribe's own courts. *Id.* Imposing that responsibility might also enhance the development of an "independent Indian judiciary." *Id.*

104. Chief Justice Marshall set out this view early in the nation's history. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution"). This view has been remarkably persistent. *See, e.g.*, Iowa Mut. Ins. Cos. v. LaPlante, 480 U.S. 9, 22 (1987) (Stevens, J., dissenting) ("The mere fact that a case involving the same issue is pending in another court has never been considered a sufficient reason to excuse a federal court from performing its duty 'to adjudicate a controversy properly before it'") (quoting County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188 (1959)); Colorado

of an inchoate Indian judiciary conflicted with their traditional duty, federal judges were reluctant to relinquish jurisdiction — and especially so when the allegations brought against the tribal governments appeared to have merit. Federal judges increasingly agreed to wade into the political thicket of cases brought by an Indian against another Indian — cases that went to the very heart of self-government, self determination, and tribal sovereignty. For better or worse, these were the very cases that would firmly establish the tribal exhaustion doctrine in its original incarnation.

In *McCurdy v. Steele*,[105] a fairly typical case of the genre, brought plaintiffs embroiled in an intratribal dispute to federal court. These members sought "official" recognition as the rightfully-elected governing Business Council of the Goshute Tribe.[106] Their complaint alleged that the tribe's election board had refused to certify winners in a tribal election.[107] The plaintiffs had already appealed to various BIA officials, but such an appeal could not be considered until the election board certified the winning candidates.[108] District Court Judge Aldon Anderson reasoned that "the Indian Civil Rights Act is properly considered in the context of federal concern for Indian self-government and cultural autonomy: Its guarantees of individual rights should, where possible, be harmonized with tribal cultural and governmental autonomy."[109] However, the judge also believed that those guarantees "might be adapted to the Indians through the application of general rules of fairness rather than strict rules of

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River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976) ("Abstention from the exercise of Federal jurisdiction is the exception, not the rule"); Willcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1909) ("When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied") (citations omitted); Chicot County v. Sherwood, 148 U.S. 529, 534 (1893) ("'[T]he courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction.'") (citations omitted).

Nevertheless, the Court has not been altogether adamant about this requirement. *See, e.g.*, Quackenbush v. Allstate Ins. Co., 116 S. Ct. 1712, 1721-22 (1996) ("Though we have thus located the power to abstain in the historic discretion exercised by federal courts sitting in equity, we have not treated abstention as a 'technical rule of equity procedure' . . . . Rather, we have recognized that the authority of a federal court to abstain from exercising its jurisdiction extends to all cases in which the court has discretion to grant or deny relief.") (internal citation omitted).

105. 353 F. Supp. 629 (D. Utah 1973), *rev'd*, 506 F.2d 653 (10th Cir. 1974). "Whether or not write-in candidates should be permitted to run at the election of the Business Council would seem to be a question well within internal tribal matters, political matters, and upon which the Goshute Tribe should make a decision before intervention by the federal courts." *McCurdy*, 506 F.2d at 656.

106. *McCurdy*, 353 F. Supp. at 632.

107. *Id.*

108. *Id.*

109. *Id.* at 633.

procedure."[110]

The defendant tribe responded with, inter alia, Judge Craig's exhaustion "condition precedent" (although without citing Dodge or any other authority for that matter).[111] Even if the district court had jurisdiction under the ICRA, the tribe contended, the federal proceeding was inappropriate since the plaintiffs had not exhausted tribal remedies. Judge Anderson agreed that an exhaustion requirement seemed consistent with "the apparent congressional intention, reflected in the [ICRA], to preserve the integrity of tribal governmental structure."[112] But since there was no Goshute judge empowered to hear such a case, and since the matter would likely then come before the defendant business council itself, Judge Anderson considered the available tribal remedies wholly inadequate.[113] Under those circumstances, the judge would not order exhaustion.[114] Instead — and despite his concern for "tribal cultural and governmental autonomy" — Judge Anderson decided to adjudicate the claims before him, although "in light of tribal practices and circumstances."[115] Equity would be served, the judge assured the parties, because "[e]ssential fairness in the tribal context, not procedural punctiliousness, [was] the standard against which the disputed actions must be measured."[116]

This reappearance of exhaustion was especially significant because, with *McCurdy*, the exhaustion idea finally found a firm toehold.[117] Moreover, the timing was prodigious. In the 1970s, a veritable deluge of cases alleging tribal election and membership abuses was on the horizon.[118] But the courts did not

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110. *Id.* at 633 n.5 (citation omitted).

111. *Id.* at 636.

112. *Id.*

113. *Id.* Judge Anderson did note, however, that the tribe regularly referred penal matters to a Shoshone judge. *Id.*

114. *Id.* Judge Anderson apparently found no Indian law precedent for that conclusion. Instead, he looked to the increasingly ubiquitous ground of administrative and habeas review. *Id.* (citing Carter v. Stanton, 405 U.S. 669, 670-71 (1972) (failure to exhaust administrative remedies does not bar federal declaratory and injunctive relief brought by plaintiffs contending that state welfare regulation governing eligibility for Aid to Dependent Children contravenes the Fourteenth Amendment and Social Security Act); Houghton v. Shafer, 392 U.S. 639, 640 (1968) (exhaustion of state administrative remedies not required in habeas corpus action brought by state prisoner under Civil Rights Act)).

115. *Id.* at 640.

116. *Id.*

117. Note too that as this district court was deciding *McCurdy*, the Supreme Court seemed to validate Judge Anderson's sentiments, but in a very different kind of controversy. In McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164 (1973) (striking down a state income tax where the income was earned on the reservation by a member residing on the reservation), Justice Marshall, writing for a unanimous court, seemed to discount "platonic notions of Indian sovereignty and . . . looked instead to the applicable treaties and statutes which define the limits of state power." *Id.* at 172. Under that view, tribal sovereignty was now but a "backdrop against which the applicable treaties and federal statutes must be read." *Id.*

118. *See, e.g.*, Rosebud Sioux Tribe of South Dakota v. Ed Driving Hawk, 534 F.2d 98, 101

restrict the exhaustion rule to only overtly political controversies. As the tribes continued to recover from the effects of allotment, and then termination, federal courts invoked the exhaustion doctrine broadly, in a range of disputes that mirrored the increasing complexity of legal disputes arising in Indian country. Besides discussing exhaustion in most cases brought by Indians against non-Indians, the courts also required exhaustion in cases brought by non-Indians against Indians,[119] in property disputes,[120] personal injury suits,[121] contractual

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(8th Cir. 1976) (alleged winners of tribal election not required to exhaust tribal remedies; that requirement is not an "iron-clad" condition precedent); Two Hawk v. Rosebud Sioux Tribe, 404 F. Supp. 1327, 1332 (8th Cir. 1976) (candidate for tribal presidency had already exhausted tribal remedies since the tribal council had ruled, the council refused to waive tribal immunity to permit the tribal court to hear the issue, and the appellate court was not functioning). Wounded Head v. Tribal Council of the Oglala Sioux Tribe of the Pine Ridge Reservation, 507 F.2d 1079 (8th Cir. 1975) (exhaustion not discussed); Means v. Wilson, 522 F.2d 833 (8th Cir. 1975), *cert. denied*, 424 U.S. 958 (1976) (contestants of election for council presidency made every reasonable attempt to exhaust their tribal remedies); Daly v. United States, 483 F.2d 700, 702 (8th Cir. 1973) (in action alleging that the Crow Creek Sioux Tribe's election procedures violated the one-man, one-vote principle, the exhaustion requirement was met upon plaintiff's claimed that there were no tribal remedies available; the district court was justified in designing an elaborate apportionment plan and vacating six council seats, but it was ultimately the tribe's responsibility to design an acceptable apportionment plan and election rules); Oliver v. Rosebud Sioux Tribe, 424 F. Supp 487 (D.S.D. 1977); Pomani v. Crow Creek Sioux Tribe, 418 F. Supp 166 (D.S.D. 1976); Brunette v. Dann, 417 F. Supp. 1382 (D. Idaho 1976) (ineffectiveness and futility cannot excuse failure to exhaust remedies where a party deliberately bypassed tribal remedies); Williams v. Sisseton-Wahpeton Sioux Tribal Council, 387 F. Supp. 1194 (D.S.D. 1975) (exhaustion deemed futile in action to enjoin implementation of tribal election results); White v. Tribal Council, Red Lake Band of Chippewa Indians, 383 F. Supp. 810 (D. Minn. 1974) (exhaustion ordered).

Federal courts seemed capable of extending this logic to incredible lengths. For example, in Jacobson v. Forest County Potawatomi Community, 389 F. Supp. 994 (E.D. Wis. 1974), the plaintiff (a female Indian community member) challenged the constitutionality of provisions of the tribal constitution and bylaws which, inter alia, excluded women from holding office in the tribal council. The district court held that she should have sought a constitutional amendment as part of the obligation to exhaust tribal remedies.

119. *See, e.g.*, Hickey v. Crow Creek Hous. Auth., 379 F. Supp. 1002, 1003 (D.S.D. 1974) (a non-Indian well-driller was barred from asserting an ICRA claim where the underlying dispute was purely contractual, the defendant housing authority had contractually consented to suit in the Navajo Tribal Court, and the plaintiff had failed to exhaust available tribal remedies).

120. *See, e.g.*, Dry Creek Lodge, Inc. v. United States, 515 F.2d 926 (10th Cir. 1975) (exhaustion of tribal remedies ordered by the district court — then virtually ignored — in suit by non-Indians to gain access across Indian lands to recently built resort lodge); Johnson v. Lower Elwha Tribal Community of the Lower Elwha Indian Reservation, Wash. 484 F.2d 200, 202 (9th Cir. 1973) (exhaustion considered but deemed unnecessary in suit by Indian claiming that he was denied due process on cancellation of his assignment of reservation land where no tribal court existed and neither the tribe's constitution nor its by-laws gave express consent for the tribe or its members to sue and be sued in any court system); O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140, 1143-46 (8th Cir. 1973) ("It is apparent from a reading of *Dodge* and *McCurdy* that an exhaustion requirement has generally been recognized"; the district court's dismissal for want of exhaustion of tribal remedies was legitimate, but if the tribal court did not reach the merits of the controversy, the federal court could hear and decide the case with finality); Cowan v. Rosebud Sioux Tribe, 404 F. Supp. 1338, 1341 (D.S.D 1975) (upholding tribal court

disputes,[122] wrongful employment termination,[123] and child custody cases.[124]

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jurisdiction over tribe's suit against non-Indian lessee of tribal land); Clark v. The Land and Forestry Comm. of the Cheyenne River Sioux Tribal Council, 380 F. Supp. 201 (D.S.D. 1974) (in a dispute over a grazing permit, plaintiff failed to exhaust several tribal remedies; refusing to become a "general clearing house" for tribal cases, the court set out a test for waiving exhaustion — that judicial waiver of the exhaustion requirement should only be considered in "extreme" circumstances such as (1) when the requirement would work irrevocable and immediate harm to the individual, (2) when the individual's claim would be severely diminished; or (3) where a proper tribal forum does not exist). *But see* Conroy v. Conroy, 575 F.2d 175, 177 (8th Cir. 1978) (the federal courts do not act as appellate tribunals for tribal divorce courts, and they lack any general power to review and oversee the tribal Courts in their resolution of questions concerning the authority and power of tribal Courts themselves; exhaustion not discussed).

121. *See, e.g.*, Lohnes v. Cloud, 366 F. Supp. 619, 623 (D.N.D. 1973) (exhaustion required in suit brought by one tribe member against another to recover for damages resulting from an automobile accident that occurred within the boundaries of the reservation). *But see* Schantz v. White Lightning, 502 F.2d 67 (8th Cir. 1974) (exhaustion of tribal remedies not required where tribal remedies are apparently non-existent or, at best, inadequate). However, *Schantz* may be exceptional because the non-Indian plaintiff was faced with a tribal jurisdictional statute that required plaintiffs to be "resident or doing business on the Reservation for at least one year prior to the institution of the proceeding." *Id.* at 69 (citing Code of Justice of the Standing Rock Sioux Tribe, § 1.2[c] (July 1973)). The code also limited the tribal court's subject matter jurisdiction to actions with less than $300.00 in controversy. *Id.* at 69 n.2. *Schantz* thus illustrates what Professor Pommersheim terms the "no forum problem." *See* Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329, 347 & n.4 (1989). That problem exists when a tribal court determines that it does not have jurisdiction, but where there is no basis for state or federal jurisdiction as well. *Id.* Professor Pommersheim believes that such problems are primarily the result of tribal constitutional provisions that are overprotective of non-Indians — provisions that "reflect the drafting handiwork of the Bureau of Indian Affairs." *Id.* at 339.

122. *See, e.g., Hickey*, 379 F. Supp. at 1003 (barring suit by non-Indian well-driller where the dispute underlying the ICRA claim was purely contractual).

123. *See, e.g.*, Janis v. Wilson, 521 F.2d 724 (8th Cir. 1975) (exhaustion is a matter of comity, not an inflexible requirement and the exhaustion of "futile" remedies is not required, but the district court erred by reaching merits of the suit without determining whether requirement of exhaustion of tribal administrative and judicial remedies had been met); Takes Gun v. Crow Tribe of Indians, 448 F. Supp. 1222 (D. Mont. 1978) (exhaustion only applies to ICRA claims when it appears that a meaningful tribal remedy exists; where the tribe had not adopted a law and order code but rather was served by a Court of Indian Offenses, the tribal court did not have subject matter jurisdiction and no affirmative attempt at exhaustion was required).

124. *See, e.g.*, United States *ex. rel.* Cobell v. Cobell, 503 F.2d 790 (9th Cir. 1974), *cert. denied*, 421 U.S. 999 (1975) (exhaustion was applicable, but it did not preclude a father lacking meaningful tribal remedies from petitioning for writ of habeas corpus in an attempt to regain custody of his children). Note, however, that the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. § 1915 (1994), now gives tribal courts exclusive subject matter jurisdiction in custody cases that may result in the termination of the Indian parental rights. *See id.* §§ 1903, 1911. The Act also establishes presumptive priority in tribal court in adoption and foster-care proceedings. *Id.* §§ 1915(a)-(c).

According to one commentator, the ICWA was largely a response to an untenable situation during the 1970s wherein the adoption rate for Indian children was as high as eight times the national average, and where up to ninety percent of Indian children were placed in non-Indian homes. Directing Attorney of California Indian Legal Services James E. Cohen, Remarks Before

There was really but one common thread connecting all these kinds of actions: there were no procedural or substantive limits placed on the federal courts by either Congress or the Supreme Court.[125] But that all changed in 1978 when the Supreme Court finally drew a line. Whether or not that was a line drawn in the sand, is probably still open to debate.

F. Santa Clara Pueblo: The Eye of the Storm

The 1977 term of the United States Supreme Court was a milestone in federal Indian law. In *Oliphant v. Suquamish Indian Tribe*,[126] the majority opinion worked to undermine tribal sovereignty — suggesting instead that tribal authority had always been grounded in federal delegation.[127] Holding that an

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the NALSA Chapter of the University of San Diego School of Law (Nov. 13, 1996). This situation was virtually decimating some tribes during the 1970s. *Id.* The Act expressly recognizes the interest of the child's community, in addition to the interests of her immediate family in custody decisions. However, the Act also vests jurisdiction with the states out of deference to those courts' long-standing involvement in family law matters. *Id.* Unforeseen, however, was the present-day backlash by states against federal meddling in state matters. *Id.* Thus, many state courts now find exceptions to the ICWA where the parties are "urbanized" Indians who did not reside on a reservation. *Id.* The California Appellate Courts, for instance, are split on that question. *Id.*

Recently, Congress attempted to write just such an exception into an amendment of the ICWA, but that move was blocked largely by the efforts of Sen. John McCain (R-Ariz.), chairman of the Senate Committee on Indian Affairs. *Id.* Senator McCain has been widely recognized as a friend to tribal sovereignty and Indian programs generally. *See, e.g.*, Jim Myers, *Nickles Gives Up Chance for Post On Indian Affairs*, TULSA TRIB., Dec. 6, 1996, at A1 (quoting Dora Young, principal chief of the Sac and Fox Nation of Oklahoma). As Senator McCain prepared to move on from this post, there were very real fears that he would be succeeded by Sen. Slade Gorton (R.-Wash.). However, as of this writing, it seems likely that Sen. Ben Nighthorse Campbell (R.-Colo.), a member of the Northern Cheyenne Tribe of Montana, will assume the chair. *See Campbell Will Head Indian Committee*, ROCKY MOUNTAIN NEWS, Dec. 9, 1996, at A-23. This is all a result of Senator Gorton's decision to bypass Indian Affairs in favor of chairmanship of an aviation subcommittee where he can influence issues affecting the Seattle-based Boeing Corp. *Id.* Senator Campbell's appointment has been well received by a number of Indian leaders. *Id.*

125. Several guidelines were suggested by the lower federal courts, however. *See, e.g.*, *O'Neal*, 432 F.2d at 1143-46 (setting out a three-part test: that in assessing any exhaustion question, a court should ask (1) what, if any, tribal remedies existed? (2) should an exhaustion requirement generally be applied in cases such as this? and (3) if exhaustion is generally required, is it appropriate to require exhaustion in this case?) (if the tribal court does not reach the merits of the controversy, the federal court may hear and decide the case with finality); *Takes Gun*, 448 F. Supp. at 1227 (upon allegation of failure to exhaust, the burden of proving exhaustion falls upon the plaintiff); Clark v. The Land & Forestry Comm'n of the Cheyenne River Sioux Tribal Council, 380 F. Supp. 201 (D.S.D. 1974) (exhaustion should only be considered in "extreme" circumstances such as (1) when the requirement would work irrevocable and immediate harm to the individual, (2) when the individual's claim would be severely diminished; or (3) where a proper tribal forum does not exist).

126. 435 U.S. 191 (1978)

127. *See* Wilkinson, *supra* note 23, at 6; *see also supra* note 37 (discussing the potential danger of *Oliphant* and its progeny to tribal sovereignty).

Indian tribe lacked jurisdiction over non-Indians for criminal offenses committed on its reservation, Justice Rehnquist resurrected language from an early-nineteenth-century concurring opinion that sought to limit tribal sovereignty by prohibiting tribes from "governing every person within their limits except themselves."[128] *Oliphant*, suggests one observer, marked the "historic low ebb" of the tribal sovereignty doctrine.[129]

But just sixteen days later, the Court seemed to reverse course. In *United States v. Wheeler*,[130] Justice Stewart's opinion set out an argument favoring a view of tribal sovereignty as an inherent power that predated the Union, rather than as *Oliphant's* purported delegated grant of authority.[131] In holding that successive prosecutions of an Indian defendant in tribal and federal court were not barred by the Fifth Amendment's prohibition of double jeopardy, Wheeler became the first Supreme Court opinion grounded in inherent tribal sovereignty since *Talton v. Mayes*.[132]

Then, in *Santa Clara Pueblo v. Martinez*,[133] the Court turned its attention towards the ICRA. Holding that the only judicial remedy available under the ICRA was the writ of habeas corpus,[134] Justice Marshall wrote that the "[c]reation of a federal cause of action for the enforcement of rights . . . however useful it might be in securing compliance . . . plainly would be at odds with the congressional goal of protecting tribal self-government."[135] And since the culture and structure of the tribes differs so greatly from those of the state and federal governments, the tribes were best able to evaluate their own members' rights, in light of their own tribal customs.[136]

Santa Clara Pueblo's effect was especially dramatic in disposing of those cases that persisted in challenging tribal election and governance procedures in judicial forums. While before *Santa Clara Pueblo*, allegations of election abuse would have been cognisable in the federal courts after appropriate tribal remedies were exhausted, *Santa Clara Pueblo* ended that practice.[137] As one

128. *Oliphant*, 435 U.S. at 209 (emphasis by the Court) (citing Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 147 (1810) (Johnson, J., concurring)).

129. *See* Wilkinson, *supra* note 23, at 61.

130. 435 U.S. 313 (1978).

131. *Id.*

132. 163 U.S. 376, 384 (1896) (the Fifth and Fourteenth Amendments did not compel the tribe to employ a grand jury in tribal prosecutions because the "powers of local self-government enjoyed by the Cherokee Nation existed prior to the [federal] Constitution . . . ."); *see also* Wilkinson, *supra* note 23, at 61.

133. 436 U.S. 49 (1978).

134. *Id.*; *see* 25 U.S.C. § 1303 (1994).

135. *Martinez*, 436 U.S. at 64.

136. *Id.* at 71.

137. *See, e.g.*, Learned v. Cheyenne-Arapaho Tribe, 596 F. Supp. 537 (W.D. Okla. 1984) (the federal court does not have jurisdiction over ICRA claims brought by an Indian who was an unsuccessful candidate for election to tribal committee and who alleged irregularities in the election process); Sahmaunt v. Horse, 593 F. Supp. 162 (W.D. Okla. 1984) (the district court

Sac & Fox tribal judge described the post-*Santa Clara Pueblo* legal landscape:

> [I]n the evolution of tribal governments as sovereign governments, the tribal judicial forums must be the paramount mechanism for the enforcement of the substantive provisions of the Indian Civil Rights Act. As Tribal constitutions and governing documents become increasingly important, and as tribal forums take on unprecedented responsibilities, the tribe's own protection of individuals' liberties and rights that may be violated by the tribe itself must be assigned a high priority.[138]

After *Santa Clara Pueblo*, the nascent tribal exhaustion doctrine effectively disappeared along with the attendant federal cause of action grounded in the ICRA — even if attacks on tribal governments continued virtually unabated.[139] But in civil cases that did not arise under the ICRA, Judge Craig's implied condition held no sway.[140] And even as the notion of tribal exhaustion

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lacked jurisdiction in action brought under the ICRA where the dispute was an intertribal dispute involving only Indian parties and where there was no showing that tribal remedies were unavailable); McCormick v. Election Committee, 1 Okla. Trib. 8, 12 (Sac & Fox C.I.O. 1980).

138. *McCormick*, 1 Okla. Trib. at 19-20.

139. A 1977 study of tribal courts for the American Indian Lawyer Training Program reported that "[although many tribal courts are functioning admirably on limited resources, lack of support and vacillating policies over the years have created overall needs of staggering proportions." Phelps, *supra* note 100, at 3A, *available in* 1986 WL 4762370, at *5. Between 1978 and 1988, the civil rights division of the Justice Department received about 45 complaints about tribal justice. *Id.* For example, in 1981 on the Rosebud Reservation in South Dakota, a tribal judge was suspended by the council and jailed after granting a petition to postpone an election based on claims that candidates tried to buy votes with liquor and food. *Id.* And as late as 1986, Justice Department attorney James Schermerhorn said that "[w]hile sufficient anecdotal evidence exists to suspect noncompliance with the ICRA is a problem on some reservations, we lack a comprehensive . . . understanding of how the ICRA is implemented by tribal governments." *Id.*

140. *See supra* note 98 and accompanying text; *see also* Cardin v. De La Cruz, 671 F.2d 363, 365 (9th Cir.1982), *cert. denied*, 459 U.S. 967 (1983) (federal court had jurisdiction under 28 U.S.C. § 1331; noting that, as in *Oliphant*, the governing principles were drawn from the federal common law, the federal district court had jurisdiction over a suit in which a non-Indian contested the Quinault Indian Tribe's building, health and safety regulations); Swift Transp. Inc. v. John, 546 F. Supp. 1185 (D. Ariz. 1982) (a civil defendant was entitled to declaratory and injunctive relief against Indian officials who asserted jurisdiction over a tort claim arising from an automobile accident on a U.S. highway that passed through the Navajo Indian Reservation; a question of whether the Navajo Indian Tribal Court had jurisdiction over the non-Indian plaintiff presented a federal question within the ambit of 28 U.S.C. § 1331); United Nuclear Corp. v. Clark, 584 F. Supp. 107 (D.D.C. 1984); UNC Resources, Inc. v. Benally, 514 F. Supp. 358, 359-61 (D.N.M. 1981) (the federal court had jurisdiction because of the federal question presented; "[t]he power to try and to assess civil penalties is the power to invade other liberties which the United States has an interest in protecting for its citizens against 'unwarranted intrusions'"; whether it was a factor that the Navajo Tribal Court may have evolved into a "sophisticated" tribunal "resembl[ing] in many respects [its] state counterparts" was a consideration reserved for

withered, the Supreme Court handed down several more landmark Indian law decisions. *Washington v. Confederated Bands of the Yakima Nation*[141] upheld the State of Washington's assertions of partial jurisdiction over a reservation under the optional formulation of Public Law 280. The following year, *Washington v. Confederated Tribes of the Colville Indian Reservation*[142] upheld a state sales tax for on-reservation sales to nonmembers. *Merrion v. Jicarilla Apache Tribe*[143] seemed to suggest an even broader view of tribal sovereignty — that "[n]onmembers who lawfully enter tribal lands remain subject to the tribe's power . . . to place conditions on entry, on continuous presence, or on reservation conduct . . . a nonmember who enters the jurisdiction of the tribe remains subject to the risk that the tribe will later exercise its sovereign power."[144]

It was, however, a landmark 1981 case that may prove to have the most impact on tribal sovereignty in the modern era. In *Montana v. United States*,[145] the Supreme Court set out a general rule disfavoring tribal legislative jurisdiction over nonmembers, and two exceptions that might redeem tribal jurisdiction in some instances. But while, on its facts, *Montana* addressed only tribal regulatory power,[146] the case soon spilled over into challenges to tribal

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Congress to weigh in "deciding whether Indian tribes should finally be authorized to try non-Indians").

141. 439 U.S. 463 (1979).

142. 447 U.S. 134 (1980).

143. 455 U.S. 130 (1982).

144. *Id.* at 144.

145. 450 U.S. 544 (1981). Under *Montana*, a tribe lacks regulatory jurisdiction over non-Indians on non-Indian owned fee land unless that authority was delegated to the tribe: (1) by Congress through statute, (2) by the President with advice and consent of the Senate through a treaty, or (3) where that power has been retained by the tribe as an element of inherent sovereignty even after the tribe became a quasi-sovereign. The third circumstance — the source of the important *Montana* exceptions — states that to qualify as an element of inherent sovereignty, civil jurisdiction over the actions of non-Indians on non-Indian fee land depends upon either (1) the non-Indian having entered into a consensual relationship with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements; or (2) the non-Indian's conduct being a threat or having a direct effect on the political integrity, economic security, or the health or welfare of the tribe. *Id.*

146. After 15 years of contradictory opinions in the lower courts regarding the breadth of the limits to inherent tribal sovereignty set forth in *Montana*, we may finally be on the verge of a binding answer to this crucial question. In A-1 Contractors v. Strate, 76 F.3d 930 (8th Cir. 1996) (en banc), *aff'd*, 117 S. Ct. 1404 (1997), the Supreme Court decided to consider whether the Eighth Circuit Court of Appeals erred in applying *Montana* to determine whether implicit divestiture can extinguish tribal adjudicatory jurisdiction over a civil tort action between two non-Indians arising on a state highway crossing Indian trust land within an Indian reservation. *See* United States Supreme Court Petitioner's Brief at *1, 1996 WL 656356. If *Montana* is held to be applicable, the Court will then decide whether the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation has civil jurisdiction over a personal injury claim brought by a non-Indian resident of the Reservation with strong ties to the tribe, against a non-Indian contractor that had a subcontract with the tribe's corporation to perform work on the

adjudicatory jurisdiction.[147] When taken together with the federal courts' growing reliance on section 1331 federal question jurisdiction as a basis for hearing reservation-based lawsuits, a reanimated tribal exhaustion doctrine seemed unavoidable.

II. Exhaustion Revisited

A. National Farmers Union Insurance Cos. v. Crow Tribe of Indians[148]

In hindsight — and especially considering the muddled state of federal and tribal jurisdiction after *Montana* — it was probably not that remarkable when a defendant in a tribal court controversy came to federal district court in 1983, seeking an injunction to stave off the Crow Tribal Court's enforcement of a default judgement, in a case that had already become a "procedural nightmare."[149] The underlying controversy arose a year earlier when a Crow Indian student at Lodge Grass Elementary School was struck by a motorcyclist in the school's parking lot.[150] Lodge Grass Elementary was within the exterior boundaries of the Crow Reservation, but on land owned by the State of Montana.[151] The child suffered a broken leg. Sage's guardian brought suit

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Reservation. The plaintiff in *Strate* seeks to recover for damages suffered in an automobile accident on a state highway on a federal right-of-way crossing Indian trust land on the Reservation. *Id.*

147. *See, e.g.*, National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 560 F. Supp 213 (D. Mont. 1983), *rev'd*, 736 F.2d 1320 (9th Cir. 1984), *rev'd*, 471 U.S. 845, 852 n.12 (1985) (citing *Montana* in a challenge to tribal court jurisdiction); *see also* State v. Hicks, 944 F. Supp. 1455, 1464 (D. Nev. 1996) (resolution of challenges to tribal court jurisdiction "requires an examination of the nature and applicability of the Supreme Court's holding in *Montana*.")

The fundamental difference between regulatory and adjudicative jurisdiction has proven to be a vexatious problem, however. *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting) ("[Legislative jurisdiction] refers to the authority of a state to make its law applicable to persons or activities and is quite a separate matter from jurisdiction to adjudicate"). *But see* Yellowstone County v. Pease, 96 F.3d 1169 (9th Cir. 1996) (expressing skepticism about the existence of any meaningful difference between adjudicatory and regulatory jurisdiction).

Professor Reynolds notes that the Court has yet to consider whether exhaustion should apply where the tribe allegedly lacks legislative jurisdiction rather than adjudicatory jurisdiction. Reynolds, *supra* note 18, at 1110 & n.99. By failing to draw the distinction between the tribal powers *Montana* and *National Farmers Union* were each meant to address, the *National Farmers Court* only succeeded in creating yet another jurisdictional uncertainty. *Id.* at 1129-30. This issue is further muddled because the Court, along with many lower courts, uses the term "regulatory jurisdiction" when they really seem to mean "legislative jurisdiction." *Id.* (citing South Dakota v. Bourland, 508 U.S. 769, 685-86, n.6 (1993); National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 736 F.2d 1320, 1323 n.4 (9th Cir. 1984)).

148. 560 F. Supp 213 (D. Mont. 1983), *rev'd*, 736 F.2d 1320 (9th Cir. 1984), *rev'd*, 471 U.S. 845 (1985).

149. *National Farmers Union*, 471 U.S. at 853.

150. *National Farmers Union*, 560 F. Supp at 214.

151. *Id.* at 213.

against the school district in tribal court, requesting $150,000 for pain and suffering, and $3000 for medical expenses. Process was served by Mr. Dexter Falls Down on Mr. Wesley Falls Down, the latter being the School Board Chairman for Lodge Grass School District No. 27.[152] But Wesley Falls Down apparently did not notify anyone that suit had been brought.[153] Therefore, no one notified National Farmers Union Insurance Company (the school district's insurer) and no investigation or defense was raised. Twenty-one days later, default judgement was entered in tribal court.[154] But when the insurer was finally notified, it did not seek its remedy in the Crow courts.[155] Rather, the company filed suit in federal court.[156]

In adjudging the claims before him, District Court Judge James Battin[157] first noted that the plaintiff initially claimed a violation of section 1302 of the ICRA.[158] Based on settled law, wrote Judge Battin, that his court "may" have been without jurisdiction on those grounds.[159] But because he believed that the tribal court did not have jurisdiction over the tort claim between Leroy Sage and the School district in the first instance, there was no need to pursue that allegation.[160] Nevertheless, *Montana* had provided a new basis of the federal

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152. *Id.* at 214.

153. *Id.*

154. *Id.*

155. Note that under tribal law, a party could move to set aside a default judgement at any time within 30 days. Crow Tribal Court Rule of Civil Procedure 17(d).

156. *National Farmers Union*, 560 F. Supp. at 214.

157. Judge Battin, who figured prominently in a number of important Indian law cases, died on September 27, 1996. James Battin served as Montana's representative in Congress, and was, along with Bob Dole, one of 1961's congressional "freshmen." Judge Battin became President Nixon's first appointment to the federal bench in 1969. *See* Lorna Thackeray, *Former Congressman Judge Battin Dies After a Long Career: Cancer Ends Judge Battin's Long Fruitful Career*, BILLINGS GAZETTE (Billings, Mont.), Sept. 28, 1996, at 1A.

In addition to *National Farmers Union*, Judge Battin's controversial decision in *Montana v. United States*, 450 U.S. 544 (1981), was also upheld by the Supreme Court. The judge heard a series of controversial cases concerning coal leases on the Northern Cheyenne Indian Reservation. The thrust of those cases was that the Interior Department both ignored the social and economic interests of the tribes, and also realized far below market value for the leases. The net result of the coal lease cases was the Interior Department's reassessment of its procedures and policies, and ultimately, Interior Secretary James Watt's resignation. *See* James Coates, *Court Cooling Watt's Massive "Fire Sale" of Western Coal*, SEATTLE TIMES, June 16, 1985, at A-17. Despite the fact that the Supreme Court upheld Judge Battin in these landmark cases, he often expressed his concern over the Court's "vacillations" regarding Indian law. *See Judge Battin Dies*, *supra*, at A-2.

158. *National Farmers Union*, 560 F. Supp at 215. Section 1302 sets out, inter alia, due process and equal protection requirements. *See* 25 U.S.C. § 1302(8) (1994).

159. *National Farmers Union*, 560 F. Supp. at 215 (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe, 634 F.2d 474 (9th Cir. 1980); R.J. Williams Co. v. Fort Belknap Hous. Auth., 509 F. Supp. 933 (D. Mont. 1981)).

160. *Id.*

common law.[161] Focusing on Justice Stewart's implicit divestiture [162]

161. *Id.* at 216-18 (citing Montana v. United States, 450 U.S. 544 (1981)).

162. Implicit divestiture invalidates any exercise of tribal power deemed inconsistent with the tribe's domestic dependent status. *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208-10 (1978). The Supreme Court has invoked implicit divestiture infrequently — but with profound effect — when a tribe has sought to assert authority "'inconsistent with the overriding interests of the National Government.'" Reynolds, *supra* note 18, at 1093 (quoting Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 153-54 (1980)). The doctrine has been used to deny a tribe's power to transfer property, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 587-88 (1823) ("[D]iscovery gave [the United States Government] an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest"), to engage in relations with foreign governments, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) (describing the "irresistible [federal] power, which excluded [tribes] from intercourse with any other European potentate than the first discoverer"), and to exercise criminal jurisdiction over non-Indians and non-member Indians. *See* Reynolds, *supra* note 18, at 1093 (citing respectively Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) and Duro v. Reina, 495 U.S. 676, 679 (1990)).

In *Montana*, implicit divestiture prevented the Crow Tribe from regulating hunting and fishing by non-Indian landowners within the borders of the Crow Reservation. The Court applied that formulation of implicit divestiture at the decade's end in one of the Court's more convoluted opinions to deny the Yakima Nation zoning power over property lying within the so-called "open areas" of its reservation. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 428-30 (1989).

In three consolidated cases, a deeply divided Supreme Court considered whether the Yakima Indian Nation could exercise zoning authority over fee lands owned by nonmembers located within the boundaries of the Yakima Reservation. *Id.* at 414. The parties to the litigation, as well as the district court and the court of appeals, treated the reservation as if it were effectively divided into two parts: a "closed" and an "open" area. One petitioner, Philip Brendale, part Indian but not a member of the Yakima Nation, had sought a development permit from the County of Yakima to develop fee land located within the "closed" part of the Yakima Reser-vation — largely pristine forest land off-limits to the general public since 1972. *Id.* at 415-17. Another petitioner, Stanley Wilkinson, sought similar permits from the County of Yakima for land located in the reservation's "open" area — primarily rangeland, agricultural land, and developed residential and commercial land. *Id.* at 415-19. The developments were impermissible under the Yakima Nation's land-use ordinance. *Id.* at 418. The Yakima Nation filed separate actions in federal district court seeking declaratory judgements and injunctions upholding its right to impose its zoning and land use laws on fee land owned by non-Indians within reservation. *Id.* at 419.

The district court held that the Yakima Nation had exclusive zoning authority over the Brendale property. Yakima Indian Nation v. Whiteside, 617 F. Supp. 735, 744, 747 (E.D. Wash. 1985), *aff'd in part, rev'd in part*, 828 F.2d 529 (9th Cir. 1987), *rev'd*, 492 U.S. 408 (1989). That court concluded, however, that the tribe had no authority over the Wilkinson property. *Id.* at 758. Relying on *Montana*, the district court found no evidence of any consensual relationship between the Yakima Nation and Wilkinson or Brendale. *Id.* at 757. But upon detailed findings of fact, the court concluded that Brendale's proposed development posed a threat to the political integrity, the economic security and the health and welfare of the Yakima Nation. *Id.* at 744.

On appeal, the Ninth Circuit consolidated the cases and affirmed as to the Brendale property but reversed as to the Wilkinson property. Yakima Indian Nation v. Whiteside, 828 F.2d 529 (9th Cir. 1987), *rev'd*, 492 U.S. 408 (1989). The court concluded that zoning ordinances by their very nature attempt "to protect against the damage caused by uncontrolled development, which can affect all of the residents and land of the reservation." *Id.* at 534. Zoning ordinances are within the police power of local governments precisely because they promote the health and welfare of

the community. Land-use planning is a "major goal" of zoning regulations. Because fee land is scattered throughout the reservation in a checkerboard pattern, denying the Yakima Nation the right to zone that land would destroy its "capacity to engage in comprehensive planning, so fundamental to a zoning scheme." *Id.* at 536. The matter was remanded to the district court for findings of fact on the respective interests of the Yakima Nation and Yakima County in regulating the Wilkinson property. *Id.*

Justice White, joined by Chief Justice Rehnquist, Justice Scalia and Justice Kennedy, formed a plurality with Justice Stevens and Justice O'Connor with respect to the Wilkinson property, reversing the judgement of the court of appeals. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 432 (1989). Justice White believed that *Montana* and *Wheeler* supported the principle that where a tribe's treaty power to exclude nonmembers of the tribe from its lands has been abrogated, subsequent civil jurisdiction over nonmembers must be affirmatively delegated by Congress. *Id.* at 426-28. Justice Stevens, joined by Justice O'Connor, formed a plurality with Chief Justice Rehnquist, Justice Blackmun, Justice Brennan, Justice Marshall, Justice Scalia and Justice Kennedy to affirm the judgement of the court of appeals as to the Brendale property. *Id.* at 432-33. Justice White dissented as to the Brendale judgement, while Justice Blackmun, joined by Justice Brennan and Justice Marshall, filed a dissent in the Wilkinson judgement. *Id.* at 448 (Blackmun, J., dissenting). Justice Blackmun argued that Justice White's reading of *Montana's* "general principle" ignores the settled presumption in favor of tribal civil jurisdiction over nonmember conduct on a reservation. *Id.* at 450-51 (citing Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) ("Civil jurisdiction over . . . activities [of non-Indians] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute")). *See also* Singer, *supra* note 16, at 55-56 (arguing that the Supreme Court often treats tribes as sovereigns when the tribes would benefit far more from being treated as property owners, and often treats tribes as voluntary associations when they would benefit instead from being treated as sovereigns).

Professor Cross of the University of Montana School of Law notes that the doctrine of implicit divestiture is little more than a "pastiche of a few, scattered historical sources" — of early treaties, a later-revoked United States Attorney General's opinion regarding tribal criminal jurisdiction over non-Indians, and one mistaken lower court opinion that misinterpreted a territorial statute. *See* Raymond Cross, *When Brendale Met Chevron: The Role of the Federal Courts in the Construction of an Indian Environmental Law*, 1 GREATER N. CENT. NAT. RESOURCES J. 1, 25-26 (1996) (citations omitted). Nevertheless, this "doctrine" allowed Justice Rehnquist, writing for the majority in *Oliphant*, to convince himself and the majority of the Court that "the contemporary exercise of criminal jurisdiction over non-Indians would be inconsistent with their historical status as 'domestic dependent nations.'" *Id.*

As for the doctrine of federal plenary power, the Court has found this concept far easier to define. It is quite simply that "[Tribal sovereignty] exists only at the sufferance of Congress and is subject to complete defeasance." United States v. Wheeler, 435 U.S. 313, 323 (1978). *See also* Reynolds, *supra* note 18, at 1094-95 (assuming the validity — or at minimum, the continued existence, of — the doctrine of plenary federal power); *see also* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989); Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365, 383-84 (1989) (arguing that the most important structural protection of tribal sovereignty is the allocation of paramount power to the federal government rather than to the states); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219 [hereinafter Williams, *Indian Jurisprudence*]; Robert A. Williams, Jr., *Learning Not to Live with Eurocentric Myopia*, 30 ARIZ. L. REV. 439 (1988) [hereinafter Williams, *Eurocentric Myopia*] (asserting that the plenary power doctrine works to deny Indians true self-determination); Robert Laurence, *On Eurocentric Myopia, the Designated Hitter Rule and "The Actual State of Things"*, 30 ARIZ. L. REV. 459 (1988)

argument from *Montana*, Judge Battin ruled that his court had federal question jurisdiction to decide whether the tribal court had exceeded the lawful limits of its jurisdiction.[163] By merely contesting the scope of a tribal court's civil jurisdiction over a non-Indian, the plaintiff, believed Judge Battin, had adequately stated a section 1331 federal question.[164] And the proper gauge of that question was *United States v. Montana*.[165] Under that test, Judge Battin decided that the tribal court had no jurisdiction[166] — that tribal interests were not threatened by eliminating tribal jurisdiction to try this single tort.[167] Nor was civil jurisdiction over a tort committed by a non-Indian necessary to protect tribal self-government, economic security or the health and welfare of the tribe.[168] As consolation, however, Judge Battin noted that even though the Crow courts did not have jurisdiction over this case, young Leroy Sage would not be left without a forum: the state courts of Montana should be both willing and able to hear the case.[169]

The court of appeals reversed Judge Battin's ruling and vacated the injunction.[170] Rejecting any notion of *Montana's* applicability, Judge Fletcher delivered the panel's divided decision. In the Ninth Circuit's view, while under *Montana*, a challenge to the tribe's regulatory jurisdiction does present a federal question, an assertion of adjudicatory jurisdiction should not.[171] Judge Fletcher found the notion that a tribe's adjudicatory authority "must be coextensive with its regulatory authority" to be "untenable."[172] On the contrary, he noted that "cases are commonly adjudicated in forums that would lack the authority to regulate the subject matter of the disputes."[173] In short, the Crow Tribal Court

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[hereinafter Laurence, *Eurocentric Myopia*); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 195 (1984) (noting that the Supreme Court has never held federal legislation in the area of Native American affairs to be beyond the scope of Congress' plenary power and proposing a theory of protection for tribal sovereignty from congressional interference based on the Due Process Clause). *But see generally* Robert Laurence, *Learning to Live with the Plenary Power of Congress Over the Indian Nations: An Essay in Reaction to Professor Williams's Algebra*, 30 ARIZ. L. REV. 413 (1988) [hereinafter Laurence, *Algebra*] (arguing that plenary power with tribal sovereignty is better than no tribal sovereignty at all).

163. *National Farmers Union*, 560 F. Supp at 215 (citing 28 U.S.C. § 1331).

164. *Id.*

165. *Id.* at 215-16.

166. *Id.*

167. *Id.* at 217.

168. *Id.*

169. *Id.* at 217-18 (citing Montana Supreme Court cases for the proposition that a district court of Montana should not be reluctant to take jurisdiction over this tort claim simply because there is an Indian plaintiff).

170. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 736 F.2d 1320, 1323 (9th Cir. 1984), *rev'd*, 471 U.S. 845 (1985).

171. *Id.* at 1323.

172. *Id.* at 1322 n.3.

173. *Id.*

did have subject matter jurisdiction. Recalling Congress's intentions towards the tribes as expressed in the ICRA, and as interpreted by the Court in *Santa Clara Pueblo*, the panel also declined to adopt Judge Battin's notion that this action was grounded in the federal common law.[174] At bottom, the proper forum for determining tribal court jurisdiction — at least in the first instance — was the tribal court itself.[175]

Writing separately, Judge Eugene Wright rejected the majority's view that there was a fundamental difference between regulatory and adjudicatory jurisdiction, at least for purposes of grounding a cause of action in the federal common law.[176] But Judge Wright, recognizing the common policy ground he shared with the majority, raised a procedural issue virtually forgotten since *Santa Clara Pueblo* — that the plaintiffs ought to exhaust available tribal remedies before seeking relief in the federal courts.[177] Here, the Crow Tribal

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174. *Id.* at 1323.

175. *Id.* at 1324. The Ninth Circuit court did not, however, provide a clear procedural framework along with its reversal. Instead, it alluded to the possibility that young Sage might seek to enforce his default judgement in Montana District Court. Of course, National Farmers Union Insurance Company could always raise the jurisdictional argument again in collateral action. *Id.* at 1324 n.6.

176. *Id.* at 1324-25, (Wright, J., dissenting in part and concurring in the result).

177. *Id.* at 1324-26. On occasion in those years lying between *Santa Clara Pueblo* and *National Farmers Union*, federal courts did on occasion return to the exhaustion rule. *See, e.g.*, Superior Oil Co. v. United States, 605 F. Supp. 674, 679 (D. Utah 1985) ("[E]xhaustion of tribal remedies is [not just] a prerequisite to federal jurisdiction, but instead [requires] that tribal remedies, if existent, are exclusive"); Citizens League for Civil Rights, Inc. v. Baker, 464 F. Supp. 1389, 1391 (W. D. Wis. 1978) (a complaint by nonmember of Indian Band who owned property on and around reservation brought action against tribal governing board under the ICRA failed to state a claim because the complaint failed to allege exhaustion of tribal remedies). But far more common were cases where courts found reason to avoid any exhaustion requirement. *See, e.g.*, A & A Concrete, Inc. v. White Mountain Apache Tribe, 676 F.2d 1330, 1333 (9th Cir. 1982) (where company sued tribe and county sheriff under various Civil Rights Acts alleging conspiracy to put the company out of business, the court of appeals refused to consider exhaustion since the district court did not rule on these issues, and they were not briefed on appeal); White v. Pueblo of San Juan, 728 F.2d 1307 (10th Cir. 1984) (tribal court had exclusive jurisdiction in suit brought under the ICRA by non-Indian plaintiffs who, without seeking relief from Indian tribal council, alleged that the tribe by intimidation compelled plaintiffs to sell their property within the exterior boundaries of the reservation to the tribe); Local IV-302 Int'l Woodworkers Union of Am. v. Menominee Tribal Enter.'s, 595 F. Supp. 859 (E.D. Wis. 1984) (noting an exhaustion component to jurisdiction in enjoinment action by union alleging tribal enterprise's failure to honor terms of a collective bargaining agreement, but not reaching that issue where the alleged wrongs were actually committed by the tribal court, and where the district court lacked personal jurisdiction over tribal enterprise); Swift Transp. Inc. v. John, 546 F. Supp. 1185, 1194 n.7 (D. Ariz. 1982) (ordering permanent injunction against tribal court in suit by motor vehicle operator and his employer seeking declaration that the tribal court lacked jurisdiction in civil action arising out of motor vehicle accident that occurred on a U.S. highway on the reservation, and noting that "[u]nder the circumstances of this case, the Court will decline defendants' request to abstain from ruling on the issues in the case and to require plaintiffs to exhaust their tribal remedies."); Kenai Oil and Gas, Inc. v. Department of the Interior, 522 F.

Court never had an opportunity to rule on the challenge to its jurisdiction. And provisions for just such a challenge were expressly set out in the Crow Tribal Code.[178] Judge Wright did not, however, suggest that the tribal court be made the "first and last arbiter of its own jurisdiction."[179] Setting out the hypothetical of a tribal court asserting jurisdiction in a case brought by a non-Indian against a non-Indian arising outside a reservation's boundaries, the judge worried that under the majority's holding, only a lack of seizable property within the reservation boundaries would limit the tribe's jurisdiction.[180]

Supp. 521, 530-31 (D. Utah 1981) (noting in suit by lessees to oil and gas mining leases on Indian tribal land seeking order directing approval of certain communitization agreements that "[t]he rule prior to Santa Clara . . . requir[ed] that a plaintiff exhaust tribal remedies before bringing a federal action under the Indian Civil Rights Act," but concluding that post-*Santa Clara Pueblo*, federal jurisdiction would exist only if no tribal remedy exists); Wells v. Philbrick, 486 F. Supp. 807 (D.S.D. 1980) (in a suit by an Indian involving a child custody dispute brought against tribal council alleging bad faith refusal to appoint judges to the tribal appeals court, the court held exhaustion inapposite where the only remedy available to vindicate rights under the ICRA is habeas corpus); Johnson v. Frederick, 467 F. Supp. 956 (D.N.D. 1979) (complaint by incarcerated Indian alleging that tribal judge and social workers on reservation had violated his constitutional rights by denying him visits and correspondence with his children; failed to state cause of action against either tribal judge or social workers where the exclusive federal remedy under the ICRA is a habeas; all other enforcement actions must be brought in the tribal courts). *See also* Johnson v. Chilkat Indian Village, 457 F. Supp. 384, 388-89 (D. Alaska 1978) (dismissing action brought by a Tlingit Indian against individuals who had prevented her from removing culturally significant artifacts from village where village council, which had not consented to the action, noting similarity of reasoning to cases that required exhaustion of tribal remedies under the ICRA).

178. *National Farmers Union*, 736 F.2d at 1324-26.

179. *Id.* at 1325.

180. *Id.* at 1325-26. In the real world, of course, Indian tribes are subject to many restraints. First and foremost, tribal courts must comply with their tribes' own constitutions and codes. *See* United States Supreme Court Amicus Brief of the Northern Plains Tribal Judges Association in Support of Petitioners, (1996 WL 658740). They must also comply with federal statutes and court decisions governing the extent of a tribal court's civil jurisdiction. *Id.* (citing National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985) (the extent to which a tribal court may exercise civil jurisdiction over non-Indians is a question of federal law)). Tribal courts must also consider state statutory and case law because, in many circumstances, tribal decisions require collateral enforcement in state court to have any effect. *Id.* (citing S.D. Codified Laws Ann. § 1-1-25 (allowing South Dakota courts to consider enforcing tribal court orders — but only upon petitioning party's establishment by clear and convincing evidence that: (1) the tribal court had both subject matter and personal jurisdiction, (2) the judgment was not fraudulently obtained, nor was it obtained without due process, (3) the judgment complies with the laws, ordinances and regulations of the jurisdiction from which it was obtained; and (4) the judgment does not contravene the public policy of the state of South Dakota); North Dakota Supreme Court Rule 7.2 (requiring North Dakota courts to award full faith and credit to tribal court orders provided certain circumstances are met)).

In light of his fears regarding unrestrained tribal courts, the exhaustion rule Judge Wright contemplated seems to have been far narrower than the rule decreed by the Supreme Court. *See National Farmers Union*, 471 U.S. at 857 (restricting exhaustion to challenges to a tribal court's assertion of jurisdiction over non-Indian defendants). Indeed, Judge Wright's version closely

The Supreme Court granted certiorari and reinstated the injunction.[181] Writing for a unanimous Court, Justice Stevens cobbled together Judge Battin's conclusions regarding federal question jurisdiction,[182] the Ninth Circuit's formulation regarding just who ought to determine that jurisdiction — at least in the first instance[183] — and Judge Wright's suggested exhaustion requirement.[184] The result was a decision that, on balance, seemed to raise more questions than it answered.[185]

Under the Supreme Court's variant on exhaustion, a party raising a challenge to a tribal court's jurisdiction must first do so in the appropriate tribal forum.[186]

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tracked the rule set out in the earlier line of cases. *See, e.g.*, Two Hawk v. Rosebud Sioux Tribe, 404 F. Supp. 1327, 1332 (D.S.D. 1975) ("Thus, the general exhaustion requirement allows the tribe to complete, within the tribal system of government, an ongoing process of deciding an issue initially, and deciding that issue again on rehearing or on appeal, and allows the tribe to reach a final decision without premature intrusion by outside authority").

181. *National Farmers Union*, 471 U.S. at 857.

182. *Id.* at 852. According to Justice Stevens, the question of whether an Indian tribe "retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law." *Id.*

183. *Id.* at 853-55. Rejecting National Farmers's argument that a logical extension of *Oliphant* would render "exhaustion as a matter of comity . . . manifestly inappropriate," the Supreme Court adopted Judge Wright's view, holding that "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *Id.* at 855-56.

184. *Id.* at 856-57.

185. Professor Reynolds poses a number of troubling questions. For instance, when Justice Stevens discussed the application of the rule in a "case of this kind," did he mean that exhaustion is appropriate only in personal injury cases arising on a reservation? *See* Reynolds, *supra* note 18, at 1122. Or in cases in which a tribal court has issued a default judgement and the losing party has failed to appeal that holding through the tribal court system? *Id.* Did the Court mean to affect only cases in which a tribal court has begun proceedings prior to the filing of the federal lawsuit? *Id.* Or any case in which tribal court adjudicatory jurisdiction is not "automatically foreclosed" by Congress, by established judicial rule, or by the federal government's longstanding practice and understanding? *Id.* And what was the qualitative standard of review contemplated under Justice Stevens's "further judicial review" comment? *Id.* (citing *National Farmers Union*, 451 U.S. at 856-57). Finally — and arguably, of utmost significance — did the Court mean to articulate a difference between challenges to tribal adjudicatory and tribal regulatory authority? *Id.*

> Taken individually, each case [decided after *National Farmers Union*] presents a defensible stance about the proper accommodation of tribal and federal court power. Viewed together, however, the cases produce uneven and inconsistent applications of what is itself an uncertain principle.

Id. at 1118-19.

186. *National Farmers Union*, 481 U.S. at 856. The tribal court's first duty is to determine: (1) whether it is empowered by tribal law to hear this particular kind of case; and (2) whether its judicial authority is limited by federal law. State v. Hicks, 944 F. Supp. 1455 (D. Nev. 1996). If a party who would challenge tribal jurisdiction jumps the procedural "gun" and institutes federal action before the tribal court has had an opportunity to render that decision, the federal

Only then would a federal court hear a challenge to "either the merits or any question concerning appropriate relief."[187] In Justice Stevens's view, that rule would realize several goals. First and foremost, it would breathe life into Congress's oft-expressed commitment to tribal self-government and self-determination. Exhaustion would also help ensure the orderly administration of justice in the federal courts by first allowing the tribal court to develop a full record.[188] It also lowered the risk of future "procedural nightmares" by requiring that a federal court stay its hand until the tribal court could determine its own jurisdiction and to rectify its own errors. The rule would encourage the tribal court to explain why it believes the action is cognisable in its own forum.[189] Finally, exhaustion would ultimately provide other courts with the benefit of the tribal courts' expertise in the event of further judicial review.[190] For all those reasons, the Court reversed the Ninth Circuit's decision pending the defendants' exhaustion of remedies in the Crow tribal courts.[191] In the interim, the Court noted that "it would be premature for a federal court to consider any relief."[192]

Leroy Sage's claim was soon tested under this new version of exhaustion, and the tribal court responded comprehensively to the doctrine as set out by the Supreme Court.[193] The Crow trial court carefully analyzed the Crow Treaty of 1868, various statutes and patents relating to the allotment and alienation of

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court may either dismiss the challenge outright, or merely hold it in abeyance. *National Farmers Union*, 471 U.S. at 857. *That* question would still be addressed in the first instance by the *federal* courts. *Id.*

187. *National Farmers Union*, 451 U.S. at 856.

188. *Id.* at 856-57.

189. *Id.*

190. *See* Brown & Desmond, *supra* note 40, at 249-50 (citing *National Farmers Union*, 451 U.S. at 856-57). When viewed together with the Court's "develop a full record" discourse, this seems to drive home the idea that Justice Stevens contemplated further federal judicial review as a matter of course. Presumably, a reviewing *tribal* appellate court would not need the expertise of the court below to explain the tribal law. Justice Stevens also set out several cautionary guidelines — outright exceptions to the exhaustion rule to be applied where the exercise of tribal jurisdiction is meant to "harass" or is "conducted in bad faith," where an action is "patently violative of express jurisdictional prohibitions," or where "exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *Id.* at 856 n.21. To date, these exceptions have not received much attention. Professor Reynolds suggests this may be because courts have found other ways to avoid the exhaustion requirement. *See* Reynolds, *supra* note 18, at 1125. Moreover, courts that have relied on the exceptions "frequently misunderstand their scope." *Id.*

191. *National Farmers Union*, 451 U.S. at 857.

192. *Id.* As noted, the Supreme Court left it to the district court's discretion whether the federal action should be "dismissed, or merely held in abeyance pending the development of further Tribal Court proceedings." *Id.* But clearly, the Court's language anticipates that subsequent relief of some kind would probably be appropriate.

193. *See* Brown & Desmond, *supra* note 40, at 250 n.203 (citing Sage v. Lodge Grass Sch. Dist. No. 27, Civ. No. 82-287 (Crow Tribal Ct. Sept. 12, 1985).

tribal lands, and federal support for the Lodge Grass School.[194] The tribal court considered the tribe's interests in the student body, the governing board, and public services provided to the school. Still, nowhere in that analysis did the tribal court find any suggestion of "alteration, divestment, or diminishment of tribal sovereignty over civil actions arising from the conduct of the Defendant committed inside the Crow reservation against a tribal member."[195] Finally, the tribal court took a special umbrage with Judge Battin's opinion that an injury to one of the tribe's children was not related to the tribe's "essential interest in [its] health, welfare and safety."[196]

Failing in the trial court, the school district sought relief in the Crow Court of Appeals, again raising jurisdictional and procedural challenges.[197] That court affirmed the tribal court's ruling, and elaborated on the issues of territorial, subject matter, and personal jurisdiction.[198] The thrust of the appellate court's ruling was that the school district's property had never been removed from reservation status.[199] The appellate court also pointed to consensual transactions between the Crow Tribe and the Lodge Grass School District,[200] and the tribe's interest in its health, welfare and economic security as dispositive factors under *Montana*.[201] Finally, the Crow Court of Appeals distinguished adjudicatory jurisdiction from regulatory power, holding that the former was not limited to only those areas in which governmental regulation was permissible.[202]

B. Iowa Mutual Insurance Co. v. LaPlante[203]

The Supreme Court spoke again on the exhaustion/jurisdictional nexus two years later, when the question arose whether exhaustion should be required when federal jurisdiction was grounded in diversity of citizenship.[204] Edward

194. *Id.*

195. *Id.*

196. *Id.* at 6.

197. *See* Sage v. Lodge Grass Sch. Dist. No. 27, 13 Indian L. Rep. 6035 (Crow Ct. App. 1986).

198. *Id.*

199. *Id.* at 6037 (citing Solem v. Bartlett, 465 U.S. 463 (1984) (reservations were not diminished by allotment; emphasizing strong continued tribal presence after "opening" of reservation)).

200. *Id.* at 6038-39.

201. *Id.* at 6039.

202. *Id.* at 6040 (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978)).

203. 480 U.S. 9 (1987).

204. Although the Court had not yet addressed the federal diversity-tribal court nexus, the issue had been extensively litigated below. In R.J. Williams Co. v. Fort Belknap Hous. Auth., 719 F.2d 979 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1985), the Ninth Circuit court summarized its position. From a conceptual base grounded in Williams v. Lee, the court noted that federal diversity adjudication in a matter where a tribal court had exclusive jurisdiction would be no different than the state court's action in Williams v. Lee. *See R.J. Williams Co.*, 719 F.2d at 983. And the Ninth Circuit believed that tribal courts were "generally the exclusive forum for

LaPlante, a member of the Blackfeet Indian Tribe, was employed by a Montana corporation operating the Wellman Ranch.[205] The ranch was within the Blackfeet Indian Reservation, and the ranch's owners were also tribal members residing on the Blackfeet Reservation in northern Montana. Iowa Mutual Insurance Company was the ranch's insurer. After Mr. LaPlante was injured in a cattle truck accident on the reservation, agents representing Iowa Mutual were repeatedly unsuccessful in their attempts to settle the claim.[206] LaPlante ultimately filed a complaint in the Blackfeet Tribal Court, seeking damages against Iowa Mutual and its agent for bad-faith refusal to settle.[207]

After two separate pleas for dismissal in tribal court, Iowa Mutual filed suit in federal district court, seeking declaratory judgement that the tribal court had no jurisdiction in the matter, as well as injunction barring further tribal court proceedings.[208] The complaint alleged section 1332 diversity of citizenship, as well as section 1331 federal question jurisdiction.[209] The district court dismissed the suit, and appeal followed. However, *National Farmers Union* was decided while appeal was pending, and the Ninth Circuit remanded the case to district court. The district court, in turn, dismissed without prejudice pending exhaustion of tribal court remedies.[210] The Ninth Circuit affirmed but also reserved significant power, noting that "[w]e merely permit the tribal court to initially determine its own jurisdiction. The tribal court's determination can be

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the adjudication of disputes affecting the interests of both Indians and non-Indians which arise on the reservation." *Id.* Since a federal court sitting in diversity operates as an adjunct to the state court, both courts are barred from acting by the same policy towards Indian tribes. *Id.* (citing Littell v. Nakai, 344 F.2d at 489, 489 (9th Cir. 1965)). However, the Ninth Circuit also recognized that a tribal court could decide to not assert its jurisdiction. *Id.* at 984. Tribal jurisdiction might also be absent where the tribe's constitution or bylaws simply do not provide for it. *Id.* In such cases, it would be untenable to suggest that the federal court sitting in diversity is divested of jurisdiction. *Id.*; *accord* Begay v. Kerr-McGee Corp., 682 F.2d 1311, 1317 (9th Cir. 1982) ("It would be inappropriate to permit a federal court to exercise its diversity jurisdiction over a state-law controversy which *Williams v. Lee* prohibits the state courts from entertaining").

205. *Iowa Mutual*, 480 U.S. at 11.

206. *Id.*

207. *Id.*

208. *Id.* at 12.

209. *Id.* at 12-13.

210. *Id.* Iowa Mutual also requested a declaration by the district court that it had no duty to defend or indemnify the Wellmans or the Wellman Ranch based on the substantive content of the applicable insurance policies. *Id.* The district court dismissed that action for lack of subject matter jurisdiction as well, noting that a Montana state court would lack subject matter jurisdiction over the same suit if it were brought by a domestic insurance company. *Id.* (relying on R.J. Williams Co. v. Fort Belknap Hous. Auth., 719 F.2d 979 (9th Cir. 1983)). Because federal courts sitting in diversity operate solely as adjuncts to the state court system, there was no federal jurisdiction in Montana. *Id.* (citing Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949)); *accord* Milbank Mut. Ins. Co. v. Eagleman, 705 P.2d 1117 (Mont. 1985) (Montana state courts lack subject-matter jurisdiction over suit between Indian and non-Indian arising out of on-reservation conduct). Unless the tribe decided to *not* exercise its exclusive jurisdiction, the district court was precluded from asserting jurisdiction. *Iowa Mutual*, 480 U.S. at 13.

reviewed later "with the benefit of tribal court expertise in such matters."[211]

On review, the Supreme Court extended *National Farmers Union's* exhaustion requirement to cases arising under federal diversity. While the same policy considerations that animated *National Farmers Union* required deference to the tribal court and to the Blackfeet Tribe proper,[212] Justice Marshall's reasoning centered on the fact that tribal courts were nonexistent when Congress first vested diversity jurisdiction in the federal courts. Since the statutory language and legislative history of the diversity statute did not mention tribal courts, wrote Justice Marshall, Congress could not have intended that particular intrusion on tribal sovereignty.[213] Nevertheless, *Iowa Mutual* ultimately affirmed the availability of federal diversity jurisdiction in cases arising in tribal court.[214] But just as *National Farmers Union* merely held federal action in abeyance until after a tribe's court system is finished adjudicating a dispute, *Iowa Mutual* only defers the defendant's ultimate removal of the controversy to federal court. It does not preclude it.[215]

Still, Justice Stevens, author of the *National Farmers Union* opinion, thought the *Iowa Mutual* majority went too far. Rather, he believed that a federal court ought to exercise its diversity jurisdiction in every case that meets the statutory requirements. Justice Marshall's "anomalous" position, wrote Justice Stevens, required a federal court to step aside when an action was pending in tribal court — even though it could reach the merits of the very same case if originally brought in a state court.[216] That would imply that the "sovereignty of an Indian tribe is in some respects greater than that of [a state]."[217]

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211. *See Iowa Mutual*, 480 U.S. at 13..

212. *Id.* at 9, 16. Justice Marshall explained that "[e]xhaustion is required as a matter of comity, not as a jurisdictional prerequisite." *Id.* at 16 n.8. Likening that requirement to principles of abstention set out in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 819 (1976), Justice Marshall explained that even where there is concurrent jurisdiction in both the state and federal courts, federal courts should stay their hand out of deference to state courts "in certain circumstances."

213. *Id.* at 17-18 (citing 28 U.S.C. § 1332). *But see* Reynolds, *supra* note 18, at 1103 & n.73 (1995) (citing Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329, 347-51 (1989), to support her proposition that Justice Marshall's historical analysis may cast doubt on the continued vitality of the role diversity jurisdiction plays as a jurisdictional "gap-filler").

214. *Iowa Mutual*, 480 U.S. at 18-19.

215. *Id.*

216. *Id.*

217. *Id.* Perhaps the more significant distinction, however, is, as Professor Clinton points out, that when a state court rules that it has subject matter jurisdiction over a controversy, the matter can be reviewed on direct appeal to the United States Supreme Court if the alleged jurisdictional defect raises a federal question. *See* Clinton, *Tribal Courts*, *supra* note 57, at 150-51 (describing the exhaustion doctrine as a reflection of "the ultimate colonialist distrust of leaving the final resolution of [causes of action arising on reservations] to tribal governance"). Thereafter, full faith and credit principles operate to prohibit a new action in federal court.

But the applicability of full faith and credit for tribal court judgements itself remains

unresolved. In *Wilson v. Marchington*, 934 F. Supp. 1187 (D. Mont. 1996), *rev'd*, No. 96-35145, 1997 WL 583704 (9th Cir. Sept. 23, 1997), the district court struggled with this most basic question. Ultimately, Chief Judge Hatfield decided that, earlier Supreme Court language that seemed to support full faith and credit notwithstanding. *Id.* at 1193 (citing Holden v. Joy, 84 U.S. (17 Wall.) 211, 247 (1872); United States *ex rel.* Mackey v. Coxe, 59 U.S. (18 How.) 100, 103 (1856) (a Blackfeet Tribal Court judgement was enforceable only under the principle of comity)). But since the judge concluded that his court was without jurisdiction to order enforcement under the full faith and credit statute, the more "perplexing" question was where he might find jurisdictional authority for invoking comity principles. *Id.* at 1190. Ultimately, he settled on the notion that "an action prosecuted for the purpose of seeking recognition and enforcement of a judgment entered by an Indian tribal court presents a 'federal question' within the meaning of 28 U.S.C. § 1331." *Id.* at 1192.

Nevertheless, under either *National Farmers Union* or *Iowa Mutual*, the Court's willingness to displace tribal court judgements allows a federal district judge to nullify the final judgement of an Indian tribe's highest courts by merely taking issue with the tribal court's view of its own subject matter jurisdiction. *But see* Conference of Western Attorneys General, AMERICAN INDIAN LAW DESKBOOK (1993). The editors note that *National Farmers Union* and *Iowa Mutual* actually address discrete concerns — that the *exhaustion* doctrine set out in *National Farmers Union* is "grounded in respect for the right of one court to resolve questions of its jurisdiction without interference from another court," while the *deferral* doctrine set out in *Iowa Mutual* is grounded more in the "substantive notion that tribal courts, not federal courts, should be the arbiters of tribal law." *Id.* at 126. The editors suggest that the failure to grasp this distinction has led to confusion over these two disparate issues. *See also* Joseph Singer, *Remembering What Hurts Us Most: A Critique of the American Indian Law Deskbook*, 24 N.M. L. REV. 315, 325-27 (1994) (criticizing the DESKBOOK for advancing the editors' political agenda by focusing inordinately on the narrow view of sovereignty presented in the legislative authority cases while ignoring the Court's endorsement of tribal sovereignty as reflected in *National Farmers* and *Iowa Mutual*").

These ambiguities are not helped at all by the disagreement regarding adjudicatory versus regulatory jurisdiction, which is especially apparent when one lays *Iowa Mutual*, 480 U.S. at 18 (suggesting a presumption of tribal jurisdiction in noting that "[c]ivil jurisdiction over [the activities of non-Indians on reservation lands] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute") alongside Montana v. United States, 450 U.S. 544, 565-66 (1981) (affirming "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" except in certain narrowly prescribed exceptions). However, Professor Reynolds suggests that these seemingly contradictory holdings are reconcilable. Reynolds, *supra* note 18, at 1135. One must simply construe *National Farmers Union* and *Iowa Mutual* as cases that decided tribal court adjudicatory jurisdiction, while *Montana* and Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 432 (1989) (refusing to allow the tribal zoning power over non-Indians who owned fee land in certain portions of the reservation), are focused upon the tribe's regulatory jurisdiction over non-members. *Id.* In *Brendale*, the tribe argued that *National Farmers Union* and *Iowa Mutual* supported broad tribal regulatory and adjudicatory jurisdiction. *Id.* at 422-23. Justice White was unconvinced. *Id.* at 427 n.10. But then, the Court had already declined to make out that very distinction when it reviewed the Ninth Circuit's *National Farmers Union* opinion. *See* National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 736 F.2d 1320, 1322 n.3 (9th Cir. 1984), *rev'd*, 471 U.S. 845 (1985). Instead, the Court "positioned *National Farmers* within the broader dispute over the scope of tribal power" by distinguishing it from *Oliphant* instead of *Montana*. *See* Reynolds, *supra* note 18, at 1129-30 (citing *National Farmers Union*, 471 U.S. at 854).

III. Habeas Corpus and Judicial Review of Administrative Actions

While a concept not openly discussed in the reported cases, there is a common thread here nevertheless. From the Ninth Circuit's view of tribal courts in Madeline Colliflower's habeas corpus action, to the attempts made by some federal courts to afford some measure of deference to tribal courts, to rigorous application of the ICRA during the 1970s by federal judges in cases that ranged from disputed grazing rights to fundamental rights claims regarding tribal governance, the results seem to have been informed by a long-recognized rule — that by drawing from judicial review in habeas and administrative actions, an exhaustion doctrine evolved that interjected a dubious tension into the tribal-federal-state jurisdictional mix.

A. Habeas Corpus

The essence of habeas corpus is an attack by an individual in custody upon the legality of that custody.[218] The traditional function of the writ is to obtain release from allegedly illegal custody.[219] Although English common law provided several forms of habeas corpus by the end of the 16th century, the most important, and the one referred to by the simple term habeas corpus, was habeas corpus ad subjiciendum:[220] the "Great Writ."[221] Upon achieving independence, Americans incorporated the writ of habeas corpus into the Suspension Clause of their new Constitution,[222] and it was included in the first grant of jurisdiction to the federal courts.[223]

The form of habeas corpus referred to here is a means of challenging physical confinement by executive direction,[224] by court order,[225] or by a private party.[226] Traditionally, however, judicial review was quite limited.[227] The reviewing court confined its inquiry to determining only whether the committing court had jurisdiction in the matter.[228] But the writ has since evolved into a much broader remedy — available to challenge any allegedly unlawful confinement, even when imposed by a court of competent

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218. Preiser v. Rodriguez, 411 U.S. 475, 484 (1973).

219. *Id.*

220. Fay v. Noia, 372 U.S. 391, 399 n.5 (1963).

221. *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 95 (1807).

222. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it").

223. Act of Sept. 24, 1789, ch. 20, 1 Stat. 81-82.

224. *See, e.g.*, Parisi v. Davidson, 405 U.S. 34 (1972); *Ex parte* Milligan, 77 U.S. (4 Wall.) 2 (1866); *Ex parte* Wells, 59 U.S. (18 How.) 307 (1856).

225. *See, e.g.*, *Fay*, 372 U.S. at 391; Bushell's Case, 124 Eng. Rep. 1006 (1670).

226. *See, e.g.*, Ford v. Ford, 371 U.S. 187 (1962); Rex v. Clarkson, 93 Eng. Rep. 625 (K.B. 1721).

227. Preiser v. Rodriguez, 411 U.S. 475, 485 (1973).

228. *See, e.g.*, *Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830); *Ex parte* Kearney, 20 U.S. (7 Wheat.) 38 (1822).

jurisdiction.[229] Thus, federal habeas corpus review can now be invoked to challenge an allegedly defective indictment,[230] alleged confinement in the wrong institution,[231] alleged denial of constitutional rights at trial,[232] alleged unlawful detention by the military,[233] allegedly unlawful revocation of parole and subsequent unlawful reincarceration,[234] or even an allegedly invalid guilty plea.[235] Nor is the modern view of habeas corpus — described by Justice Stewart as a "logical extension of the traditional meaning and purpose of habeas corpus"[236] — restricted only to instances of physical restraint. Thus, an individual released post-conviction on bail or on her own recognizance is now considered the kind of custody contemplated by the federal habeas corpus statute.[237] A parolee is considered confined as well.[238] And once habeas corpus jurisdiction has attached, it is not defeated by the prisoner's subsequent release.[239]

Relief available to a reviewing judge under habeas corpus is similarly broad: it is not limited to immediate release from illegal custody, but may address future confinement and obtain future releases as well.[240] Courts believe this is in keeping with the intent of the federal habeas corpus statute which does not deny the federal courts power to fashion appropriate relief other than immediate release. Therefore, shortening the length of confinement as well as outright discharge from confinement lies within the "core of habeas corpus."[241] In short, since 1874, the habeas corpus statute has directed the courts to learn the facts and dispose of the case summarily, "as law and justice require."[242]

The "specific" nature of the federal habeas corpus statute[243] is preemptory

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229. *Preiser*, 411 U.S. at 485 (citing Fay v. Noia, 372 U.S. 391, 405-09 & n.17 (1963); Waley v. Johnston, 316 U.S. 101 (1942); Moore v. Dempsey, 261 U.S. 86 (1923); *Ex parte* Wilson, 114 U.S. 417 (1885); *Ex parte* Siebold, 100 U.S. 371 (1880) (challenging custody on ground that the statute under which prisoner was convicted was unconstitutional); *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1874)).

230. *See, e.g.*, *Ex parte* Royall, 117 U.S. 241 (1886).

231. *See, e.g.*, Humphrey v. Cady, 405 U.S. 504 (1972); *In re* Bonner, 151 U.S. 242 (1894).

232. *See, e.g.*, Johnson v. Zerbst, 304 U.S. 458 (1938).

233. *See, e.g.*, Parisi v. Davidson, 405 U.S. 34 (1972).

234. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471 (1972).

235. *See, e.g.*, Von Moltke v. Gillies, 332 U.S. 708 (1948).

236. Preiser v. Rodriguez, 411 U.S. 475, 486 (1973).

237. *Id.* (citing Hensley v. Municipal Court, 411 U.S. 345 (1973)).

238. *See, e.g.*, Jones v. Cunningham, 371 U.S. 236 (1963).

239. *See, e.g.*, Carafas v. LaVallee, 391 U.S. 234 (1968).

240. Peyton v. Rowe, 391 U.S. 54 (1968) (a prisoner may invoke habeas corpus to attack the second of two consecutive sentences while still serving the first).

241. *Preiser*, 411 U.S. at 487.

242. *Id.* at 66-67 (citing Rev. Stat. § 761 (1874), *superseded by* 28 U.S.C. § 2243; *cf.* Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973); Walker v. Wainwright, 390 U.S. 335 (1968); Carafas v. LaVallee, 391 U.S. 234, 239 (1968)).

243. 28 U.S.C. § 2254(b) (1994).

when confronted by a "general" statute such as the Civil Rights Act.[244] Thus, where it is held applicable, habeas corpus is considered an exclusive remedy.[245] And since 1886, such a determination has led to the requirement that a state prisoner challenging his conviction must first exhaust all available state remedies.[246] This policy is essentially an attempt to "avoid the unnecessary friction between the federal and state court systems that would result if a lower federal court upset a state court conviction without first giving the state court system an opportunity to correct its own constitutional errors."[247] In the alternative, giving state courts the first crack at remedying their own mistakes may simply avoid "the unseemly spectacle of federal district courts trying the regularity of proceedings had in courts of coordinate jurisdiction."[248] Whichever the case, the exhaustion requirement now applies to state administrative actions at least as much as it does to state judiciaries.[249] That view is "rooted in considerations of federal-state comity"[250] — in "proper respect for state functions" that has as much relevance to state administrative agencies as it has for state judicial actions.[251]

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244. 42 U.S.C. § 1983 (1994).

245. *Preiser*, 411 U.S. at 489.

246. *See Ex parte* Royall, 117 U.S. 241, 251 (1886) ("The injunction to hear the case summarily, and thereupon 'to dispose of the party as law and justice require' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the constitution.'").

Interestingly, however, when transferred to the tribal setting, the exhaustion requirement is not always zealously prosecuted. *See, e.g.*, Necklace v. Tribal Court of the Three Affiliated Tribes of the Fort Berthold Reservation, 554 F.2d 845 (8th Cir. 1977). In that case, an Indian woman confined in a state hospital pursuant to tribal court order petitioned the federal district court for habeas corpus under the ICRA, 25 U.S.C. § 1303. *Id.* The petition was dismissed for failure to exhaust state remedies. *Id.* An appeal followed. *Id.* The tribe argued that the dismissal may be sustained on the theory that Necklace must also exhaust her tribal remedies. *Id.* The Eighth Circuit Court held that exhaustion of state remedies was inapposite where the petitioner was not in custody pursuant to the judgement of a State court. *Id.* Nor was comity at issue since North Dakota's role was limited to providing facilities for her confinement. *Id.* While, "as a matter of comity . . . tribal remedies must ordinarily be exhausted before a claim is asserted in federal court under the Indian Civil Rights Act; however, the requirement is not an inflexible one. *Id.* (citing Rosebud Sioux Tribe of South Dakota v. Driving Hawk, 534 F.2d 98, 101 (8th Cir. 1976); Janis v. Wilson, 521 F.2d 724, 726-27 (8th Cir. 1975); O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140, 1144-48 (8th Cir. 1973)). While there appeared to be informal procedures available in the tribal courts, the laws of the Three Affiliated Tribes contained no formal habeas corpus procedure. *Id.* Under those circumstances, petitioner was not required to exhaust tribal remedies. *Id.*

247. *Preiser*, 411 U.S. at 490 (citing Fay v. Noia, 372 U.S. 391, 419-20 (1963)).

248. Honorable John J. Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 172-73 (1948).

249. *Preiser*, 411 U.S. at 491.

250. *Id.*

251. Younger v. Harris, 401 U.S. 37, 44 (1971); *cf.* Braden v. 30th Judicial Circuit Court

Such purported ideals of deference notwithstanding, the federal writ of habeas corpus has always been a controversial and emotion-ridden subject.[252] And in spite of the beneficial impact on applicants truly deprived of fundamental constitutional rights, the writ of habeas corpus may be

> [t]he most controversial and friction-producing issue in the relation between the federal courts and the states . . . . Commentators are critical of its present scope, federal judges are unhappy at the burden of thousands of mostly frivolous petitions, [and] state courts resent having their decisions reexamined by a single federal district judge . . . .[253]

Even in a time when the scope of the writ was very narrowly confined, there were protests against "the prostitution of the writ of habeas corpus, under which the decisions of the State courts are subjected to the superintendence of the Federal judges."[254] Under the modern, more expansive interpretation of the Fourteenth Amendment, habeas corpus is often viewed as an affront to state sensibilities when a "single federal judge can order discharge of a prisoner whose conviction has been affirmed by the highest court of a state."[255]

B. Judicial Review of Administrative Actions

Like the writ of habeas corpus, the exhaustion of administrative remedies doctrine is essentially a judicial creation.[256] The common law still controls many applications of the doctrine, and in the United States, Justice Holmes set out the nascent view of this rule at the turn of the twentieth century — that

> before the courts can be called upon, the preliminary sifting process provided by the statutes must be gone through with . . . and any attempt to disregard and override the provisions of the statutes and the rules of the Department, and to swamp the courts by a resort to them in the first instance, must fail.[257]

In time, however, Justice Holmes's view gave way to discretionary and, often

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of Kentucky, 410 U.S. 484 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).

252. 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: JURIS. 2D, at ch. 12, § 4261 (1988).

253. *Id.*

254. Note, *Federal Abuses of the Writ of Habeas Corpus*, 25 AM. L. REV. 149, 153 (1898).

255. Charles Desmond, *Federal Habeas Corpus Review of State Court Convictions*, 50 GEO. L.J. 755 (1962). Chief Judge Desmond of the New York Court of Appeals wrote that the attitude toward habeas corpus of state judges and law officers ranges "from rage and horror to dignified regret." *Id.*

256. Major William T. Barto, *Judicial Review of Military Administrative Decisions After Darby v. Cisneros*, 1994 SEP. ARMY LAW. 3, 7 & n.65.

257. United States v. Sing Tuck, 194 U.S. 161, 166 (1904) (denying relief to an applicant barred from the United States who sought a writ of habeas corpus because he had not exhausted all available administrative appeals prior to filing suit).

uneven applications of the doctrine.[258] Thus, in *McKart v. United States*,[259] the Supreme Court again affirmed the importance of the exhaustion doctrine in the administrative setting. However, Justice Marshall's majority opinion went beyond simple adherence. Instead, he announced an exhaustion balancing test: that in determining whether or not to require exhaustion, the governmental interests supporting the exhaustion requirement must be weighed against the burden on the individual.[260] One observer notes that *McKart* "captures the fundamental inconsistency in the judicial application of the exhaustion doctrine; the opinion begins by reaffirming the vitality of the doctrine but subsequently finds a basis for not applying it in the instant case."[261] Over time, the situation has become such that in determining when administrative exhaustion will be required, "[n]o simple principle governs, unless it is that judicial discretion governs."[262]

C. A Most Insidious Transference[263]

The various doctrines requiring exhaustion — whether administrative, habeas-grounded, or tribal — do offer obvious advantages to any overloaded court. The exhaustion doctrine undeniably promotes judicial economy (at least for the court in the procedural posture to impose the obligation). Under any exhaustion regime, some number of controversies will be resolved without any extrinsic judicial intervention at all.[264] Exhaustion also reduces the likelihood of piecemeal and interlocutory appeals.[265] It facilitates judicial review by enhancing the prospect that the record produced by the administrative process will be useful and complete.[266] Exhaustion might enhance an agency's effectiveness by encouraging adherence to that agency's own appeal

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258. A number of exceptions to the general rule requiring exhaustion of administrative remedies has produced a "large body of inconsistent and confusing case law." *See* Reynolds, *supra* note 18, at 1128 & n.193 (citing KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., 2 ADMINISTRATIVE LAW TREATISE §§ 15.5-15.7 (3d ed. 1994)). Those exceptions include the constitutional right exception, waiver exception, and other "unacknowledged" exceptions. *Id.*

259. 395 U.S. 185, 193 (1969).

260. *Id.* at 197.

261. Barto, *supra* note 256, at 5.

262. *Id.* (quoting Kenneth C. Davis, ADMINISTRATIVE LAW OF THE EIGHTIES § 26.1 at 434 (1989)).

263. Any Freudian reference is unintended.

264. *See, e.g.*, *McKart*, 395 U.S. at 195 ("Certain practical notions of judicial efficiency come into play as well. A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene."); *see also* Barto, *supra* note 256, at 4.

265. Barto, *supra* note 256, at 4.

266. *Compare McKart*, 395 U.S. at 194-95 ("Particularly, judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record") *with* National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 (1985) ("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").

procedures.[267] Finally, exhaustion allows a reviewing judge to mollify concerns that her court is about to run roughshod over "separation of powers" and agency autonomy considerations.[268] The justifying logic may lie in allowing "an administrative agency to perform functions within its special competence,"[269] and in affording the reviewed body the chance to discover and correct its own errors.[270]

Still, there are real dangers inherent in unacknowledged transference of these principles to the adjudicatory environment. Unlike administrative agencies (and federal courts for that matter), state and tribal courts usually enjoy general subject matter jurisdiction. The competence of such courts does not lie in some specialized expertise with which they might focus the issues, or to serve as a fact-finding agency for the convenience of federal district courts. In other words, there is a clear rationale to awaiting the outcome of an administrative decision that does transfer well to the adjudicative functionings of a quasi-sovereign. For example, if a federal court requires a state court's expertise on a point of state law, it does not urge that court to decide the matter — intending all the while to retry the controversy with the knowledge gained through the state court's futile exercise. Instead, the federal court may simply call a jurisprudential "time out" and then ask that state's courts what they would do under the same circumstances.[271]

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267. *But compare McKart*, 395 U.S. at 195 ("[F]requent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures") *with* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15 (1987) ("A federal court's exercise of jurisdiction over matters relating to reservation affairs can also impair the authority of tribal courts").

268. *See, e.g.*, Preiser v. Rodriguez, 411 U.S. 475, 489 (1973) ("[T]he reason why only habeas corpus can be used to challenge a state prisoner's underlying conviction is the strong policy requiring exhaustion of state remedies in that situation — to avoid the unnecessary friction between the federal and other court systems that would result if a lower federal court upset a state court conviction without first giving the state court system an opportunity to correct its own constitutional errors").

269. *Compare* Parisi v. Davidson, 405 U.S. 34, 37 (1972) *with National Farmers Union*, 471 U.S. at 857 ("Exhaustion of tribal court remedies . . . will encourage tribal 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").

270. *Compare McKart*, 395 U.S. at 195 ("[N]otions of administrative autonomy require that the agency be given a chance to discover and correct its own errors.") *with National Farmers Union*, 471 U.S. at 856-57 ("The risks of the kind of 'procedural nightmare' that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to . . . rectify any errors it may have made").

271. *See, e.g.*, Mont. R. App. P. 44(a) Certification of questions of law (allowing the Montana Supreme Court to answer a certified question pertaining to Montana law to which there is a substantial ground for difference of opinion in an action pending in a United States court and where adjudication by the supreme court of Montana will materially advance ultimate termination of the federal litigation); Mich. Ct. R. 7.305(B)(1) ("When a federal court or state appellate court considers a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent, the court may on its own initiative or that of an interested party certify

Moreover, the Supreme Court itself has beat a steady retreat from strict application of administrative exhaustion rules. And in *Darby v. Cisneros*,[272] the Court "virtually eliminated the requirement of administrative exhaustion for those . . . seeking judicial review of agency action under the Administrative Procedure Act."[273] And so we are faced with something of an anomaly: that while the federal courts seem to have extracted an entire body of procedural law from the rules governing judicial review of administrative decisions and habeas review, and then applied those rules in the tribal adjudicative setting, they have simultaneously relaxed those requirements markedly in the parent settings.

Still, some observers argue in favor of adapting something like administrative review rules to the tribal court setting.[274] Indeed, in this post-*Chevron*[275] era of expansive deference to administrative agency decisions, the notion is undeniably seductive. But in what would amount to a tail-wagging-the-dog arrangement, to adopt the whole of the administrative review regime simply because the exhaustion rule was spawned there seems unconstructive at best, destructive at worst. And there is yet another black fly in the chardonnay[276] — such a shift might just unravel what little is left of tribal sovereignty.[277]

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the question to the Michigan Supreme Court"); N.D. R. App. P. 47(a) (allowing the North Dakota Supreme Court to answer questions of law certified to it by the Supreme Court of the United States, a court of appeals of the United States, a United States district court, or the highest appellate court or the intermediate court of any other state).

272. 509 U.S. 137 (1993).

273. Barto, *supra* note 256, at 3.

274. *See, e.g.*, Skibine, *supra* note 57, at 194-95 (upon finding a "striking similarity" between the reasons behind the exhaustion rule in both administrative and tribal venues, arguing that the "exhaustion requirements in federal Indian law should generally conform to the principles set out in administrative law," grounded in the tribal courts' "expertise in determining whether control of a certain activity is essential to tribal self-government"); *see also* Wilkinson, *supra* note 23, at 114-15 (suggesting liberal federal post-exhaustion review on an "arbitrary and capricious standard" modeled on the Administrative Procedure Act).

275. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865 (1984) (asserting that policy choices are best left to the political branches of the government rather than the courts — that "[i]n contrast [to judicial interpretation], an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments").

276. *See* ALANIS MORISSETTE, *Ironic, on* JAGGED LITTLE PILL (Maverick/Reprise Records 1995).

277. Consider the discussion of the "*Duro*-fix" at *supra* note 37. In dicta, Justice Kennedy noted that Congressional recognition of tribal jurisdiction could only come by delegation from Congress — "subject to the constraints of the Constitution." *See* Laurence, *Memorandum*, *supra* note 31, at 12 (quoting Duro v. Reina, 110 U.S. at 2060-61). Congress' care in addressing that prospect when it overturned *Duro* notwithstanding, Professor Laurence hypothesizes that a litigant challenging tribal jurisdiction before an unsympathetic Supreme Court on federal grounds, and in objection to the theocratic nature of that tribal government, could "certainly destroy these tribal theocracies that are very much older than the Constitution itself." *Id.* Then consider the implications of an open embrace of the double-edged sword of *Chevron* — of agency deference grounded so thoroughly in notions of authority delegated by Congress. In would be small consolation to have won a lot of small battles only to discover that the war — the quest for

In short, while the *National Farmers Union* Court failed to note the exhaustion doctrine's full history, it did recognize the policy rationales that always animated that history. Exhaustion was, after all, always aimed at ordering the administration of justice in the federal courts.[278] Thus, while virtually every federal court confronted with a challenge to tribal jurisdiction expressed some sentiment regarding support for the sovereignty, self-determination and self government of the tribes, a close reading of the pre-*Santa Clara Pueblo* cases makes clear that the overriding concern was, often as not, the economical use of the federal courts — even at the expense of tribal sovereignty.[279] It is also now clear that there was always an unacknowledged nexus between the tribal exhaustion doctrine, and habeas and administrative review — a procedural posture that never places the reviewer and the reviewed on an equal footing. So in the end, Justice Marshall seemed to have the best perspective — that in light of the inherent difficulty of balancing the policy benefits and drawbacks of any exhaustion scheme, Congress is simply better qualified than the courts to deal with these problems.[280]

IV. Exhaustion's Progeny

One United States Attorney claims that of ninety-eight "final" tribal court judgements challenged in federal court, all ninety-eight challenges have failed.[281] And hearing that statistic, one could reasonably ask, "So what's the problem?"

The short answer is, of course, that this statistic evidences ninety-eight

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sovereignty — is already lost.

278. *Compare* McKart v. United States, 395 U.S. 185, 195 (1969) (a defendant's failure to exhaust administrative remedies after failing to report for induction into the armed forces did not bar a challenge to validity of his classification as a defense to his criminal prosecution; nevertheless, the Court noted that "practical notions of judicial efficiency come into play . . . . A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene.") *with* Clark v. The Land and Forestry Committee of the Cheyenne River Sioux Tribal Council, 380 F. Supp. 201 (D.S.D. 1974) (because it anticipated a great surge in the number of civil actions arising on the reservations, the court refused to become a general clearing house for tribal cases).

See also Brown & Desmond, *supra* note 13, at 249-50 (citing *National Farmers Union*, 451 U.S. at 856-57). The Court's "develop a full record" discourse seems to drive home the idea that Justice Stevens contemplated further federal judicial review as a matter of course. Certainly a reviewing *tribal* appellate court would not need the expertise of the court below to explain the tribal law.

279. *See, e.g.*, Dodge v. Nakai, 298 F. Supp. 17 (D. Ariz. 1968), where the court made its concern for the federal docket abundantly clear.

280. *See The Supreme Court, 1981 Term: II. Federal Jurisdiction and Procedure: 2. The Exhaustion Doctrine in Section 1983 Actions*, 96 HARV. L. REV. 207, 210 (1982) (citing Patsy v. Board of Regents, 457 U.S. 496, 513 (1982)).

281. *See* Ford, *supra* note 27, at 1278 (citing Mr. Herbert Becker, Esq., Assistant U.S. Attorney General, Address at the University of Montana School of Law (Feb. 15, 1996)).

inchoate or fully-realized affronts to tribal sovereignty. It also stands for ninety-eight disappointed appellants, ninety-eight actions where seemingly vindicated plaintiffs had to defend a judgement in yet another forum, ninety-eight federal actions in an already overburdened system, and ninety-eight actions requiring that tribal governments expend scarce legal resources to defend their own jurisdictional powers.[282]

The record, however, is probably not even as harmonious as the government's attorney suggests — even if many courts have tried to follow the tribal exhaustion doctrine.[283] The reason may simply be that "inconsistent interpretations of the tribal exhaustion doctrine stem not only from the courts' differing attitudes about the competency of tribal courts . . . and the proper delineation of tribal court jurisdiction, but from uncertainties created by the Supreme Court's opinions themselves."[284] Accordingly, a federal court seeking guidance will find conflicting and crosscutting rulings based on myriad substantive and procedural rules, as well as in exceptions to those rules. Thus, courts generally hold that exhaustion of tribal remedies is inapposite when the dispute does not involve internal tribal affairs[285] or where a party raises a

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282. One of the few consistencies in exhaustion cases is that tribes, tribal courts or tribal court officials are usually named as co-defendants in federal challenges to tribal court jurisdiction. *See, e.g.*, National Farmers Union, Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985) (naming the Crow Tribe as defendant); A-1 Contractors v. Strate, 76 F.3d 930, 939 (8th Cir. 1996) (en banc), *aff'd*, 117 S. Ct. 1404 (1997) (naming Tribal Court Judge William Strate, as well as the tribe itself); State v. Hicks, 944 F. Supp. 1455 (1996) (naming the Tribal Court of the Fallon Paiute-Shoshone Tribes, as well as Tribal Judge Joseph Van Walraven).

Another common feature is that after *National Farmers Union*, jurisdiction is no longer a side-show — it is often the main event. Under the Supreme Court's exhaustion rule, federal actions are filed precisely for the purpose of challenging a tribe's adjudicative authority. And in yet another affront to tribal sovereignty, in order to defend its jurisdiction before the federal court, a tribe must first waive its sovereign immunity. *See, e.g., A-1 Contractors*, 76 F.3d at 933; *Hicks*, 944 F. Supp. at 1459. *But see* Yellowstone County v. Pease, 96 F.3d 1169, 1172 (9th Cir. 1996) (refusing to reach the issue of tribal sovereignty on the ground that the tribal court was not an indispensable party to the proceedings).

283. Professor Reynolds observes that uncertainties concerning the scope and application of the Supreme Court's exhaustion doctrine notwithstanding, there are "illuminating beacons" within the lower court decisions. *See* Reynolds, *supra* note 18, at 1107-08. The reported cases unanimously hold that the tribal exhaustion rule adheres where a tribal ordinance authorizes a tribal court's exercise of jurisdiction in actions arising on the reservation and filed by either an Indian or non-Indian plaintiff against a tribal entity or Indian defendant for alleged breaches of contract, or for actions alleging damage in tort or in trespass. *Id.* at 1107-08 nn.88-92.

284. *Id.* at 1112-13 (internal citations omitted).

285. *Id.* at 1109-10 n.96 (citing Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community, 991 F.2d 458, 463 (8th Cir. 1993) (refusing to require exhaustion where the sole tribal remedies were those created in the tribe's own nuclear radiation control ordinance, and where those remedies were preempted by the federal Hazardous Materials Transportation Act — leaving Northern States Power with nothing to exhaust); Crawford v. Genuine Parts Co., 947 F.2d 1405, 1407 (9th Cir. 1991) (exhaustion not required when the disputed issue is not a "reservation affair" or did not "ar[i]se on the reservation" (quoting Stock West Corp. v. Taylor, 942 F.2d 655, 661 (9th Cir. 1991)); Burlington N.R.R. v. Blackfeet Tribe,

preliminary challenge to the tribe's jurisdictional power.[286] Nor is the rule deemed absolute when the parties have contractually drafted around the issue.[287] And some federal courts find no ground for exhaustion when no tribal court proceeding is pending.[288] On the other hand, some courts would require exhaustion to allow the tribal court to rule not only on its own jurisdiction, but on the scope of the tribe's regulatory power as well.[289] Some courts will even order exhaustion when a tribal court's claimed jurisdiction seems simply "colorable" or "plausible."[290] But policy-driven concerns for tribal self-

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924 F.2d 899, 901 n.2 (9th Cir. 1991) (B.N.'s failure to exhaust was no bar to jurisdiction where the complaint presented only issues of federal rather than tribal law), *cert. denied*, 112 S. Ct. 3013 (1992). *Cf.* United States v. Turtle Mountain Hous. Auth., 816 F.2d 1273, 1276 (8th Cir. 1987) (exhaustion "especially appropriate" where the facts alleged a purely internal tribal controversy)).

286. *See* Reynolds, *supra* note 18, at 1110 & n.97 (citing United States v. Yakima Tribal Court, 806 F.2d 853, 860-61 (9th Cir. 1986) ("In *National Farmers*, the Court required exhaustion because the tribal court's power to exercise jurisdiction was 'not automatically foreclosed.' Where the tribal court lacks jurisdiction, however, exhaustion is not required." (citation omitted)). Professor Reynolds notes that under this approach, virtually any astute litigant could seemingly avoid the exhaustion requirement through careful drafting. *Id.* at 1110 (citing Alaska *ex rel.* Yukon Flats Sch. Dist. v. Native Village of Venetie, 856 F.2d 1384, 1388 (9th Cir. 1988)).

287. *See, e.g.*, Nenana Fuel v. Native Village of Venetie, 834 P.2d 1229, 1233 (Alaska 1992) (refusing to order exhaustion where tribal entity agreed to be sued in state court)

288. *See, e.g.*, Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803, 814-15 (7th Cir.), *cert. denied*, 510 U.S. 1019 (1993) (endorsing the *Weeks* view that tribal exhaustion is required only in challenges to jurisdiction of a pending tribal court case); *Blackfeet Tribe*, 924 F.2d at 901 n.2 (B.N.'s failure to exhaust did not bar jurisdiction where no proceeding was pending in any tribal court); Weeks Constr., Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668, 672 n.3 (8th Cir. 1986). *Contra* Crawford v. Genuine Parts Co., 947 F.2d 1405, 1407 (9th Cir. 1991) (finding it irrelevant whether proceedings are actually pending in tribal court in determining the federal courts' duty to require exhaustion).

289. *See* Reynolds, *supra* note 18, at 1110 & n.99 (citing Burlington N.R.R. Co. v. Crow Tribal Council, 940 F.2d 1239, 1240-42, 1245 (9th Cir. 1991) (ordering exhaustion in a challenge to a tribal ordinance purporting to regulate railroads crossing the reservation)); *see also* Middlemist v. Secretary of the U.S. Dep't of Interior, 824 F. Supp. 940, 944 (D. Mont. 1993), *aff'd* 19 F. 3d 1318 (9th Cir. 1994) (requiring exhaustion in suit seeking to invalidate a tribal ordinance where the matter was unquestionably a "reservation affair"); Kaul v. Wahquahboshkuk, 838 F. Supp. 515, 516-18 (D. Kan. 1993) (requiring exhaustion to allow the tribal court to determine the tribe's taxing and licensing authority over a non-Indian conducting business on the reservation).

290. *See* Reynolds, *supra* note 18, at 1111-12 nn.102-03 (citing Stock West Corp. v. Taylor, 964 F.2d 912, 919-20 (9th Cir. 1992) (en banc) ("By colorable we mean that on the record before us, the assertion of tribal court jurisdiction is plausible and appears to have a valid or genuine basis. . . . Whether Colville Tribal law applies to a tort that involved certain acts committed on reservation land and other acts committed outside its territorial jurisdiction to induce another to perform a contract on tribal lands presents a colorable question that must be resolved in the first instance by the Colville Tribal Courts . . . ."). *Stock West* may be especially significant since it is one of the few cases that involves non-Indians as both plaintiff and defendant. In that case, an Oregon corporation brought an action in federal district court against a tribal attorney, also a non-Indian, alleging the attorney committed malpractice in drafting an opinion letter. The district court dismissed the action on the ground that the opinion letter involved tribal concerns and that

governance and self determination notwithstanding, every federal court is finally faced with the realization that it is inextricably caught in a kind of jurisdictional feedback loop — of the three-pronged requirement to honor tribal sovereignty, the needs of litigants rightly before the court, and to most economically allocate the federal forum resource. In that regard, one observer argues that ironically, the tribal exhaustion rule itself became necessary in part because of the Supreme Court's broad definition of federal question jurisdiction. That is, by concluding that the scope of a tribe's adjudicatory and legislative power constituted a federal question, every civil dispute involving a tribal court or other tribal entity was thereby transmogrified into a federal case. As if to lessen the negative impact of that holding, the Court then added the requirement that all of these newly created federal cases first go through the tribal court system.

Thus, the Court first exacerbated the conundrum of federal plenary power by adopting a broad definition of federal question jurisdiction in the context of tribal court affairs, and then, perhaps feeling guilty about the blow it had just dealt to tribal sovereignty, proceeded to defer all of those questions to the tribal forum, while carefully preserving federal jurisdiction for subsequent review. In essence the tribal exhaustion doctrine is needed, not because the Supreme Court gives more weight to the sovereignty of the tribe than to the sovereignty of a state, but rather because the Court has defined federal question jurisdiction so broadly that without exhaustion the federal courts could almost completely usurp the jurisdiction of the tribal courts.[291]

If that view is correct — and it seems to be — the modern formulation of the tribal exhaustion doctrine only adds insult to the rule's ignominious origins. Furthermore, a general confusion left in the doctrine's wake seems to be spilling over into the state courts. For while *Williams v. Lee* still appears to be good law, a state appellate court recently asserted that its obligation to restrict tribal matters to adjudication within the tribal justice system is grounded in matters of comity rather than in its own curtailed subject matter jurisdiction under *Williams*.[292] Compounding all this, of course, is the proposition set out at

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the corporation should first exhaust tribal remedies. The Ninth Circuit, en banc, affirmed, determining that the corporation's non-Indian status did not preclude tribal civil jurisdiction. *Stock West Corp.*, 964 F.2d at 918; *see also* Espil v. Sells, 847 F. Supp. 752, 758 (D. Ariz. 1994) (equating "colorable" and "plausible") (quoting *Stock West*, 964 F.2d at 919).

291. Reynolds, *supra* note 18, at 1139-40 & nn.248-50 (internal citations omitted).

292. *See* Klammer v. Lower Sioux Convenience Store, 535 N.W.2d 379 (Minn. Ct. App. 1995) (as a matter of comity, allowing a non-Indian customer unconditional access to state court in action against a tribal business would undermine the role of the tribal court which, in turn, is vital to the tribe's self-governance of reservation of affairs; the non-Indian plaintiff must exhaust tribal remedies and allow the tribal court to address the question of its own jurisdiction and of sovereign immunity in the first instance). The Minnesota court's rather disconcerting language also suggests that it anticipates a kind of subsequent "appellate" review not unlike that asserted by federal district courts under the federal exhaustion doctrine. *Id.* at 384; *see also* Maxa v. Yakima Petroleum, Inc., 924 P.2d 372 (Wash. Ct. App. 1996) (the state court's assumption of jurisdiction would not interfere with tribal self-government and the state's civil jurisdiction is not

length above — that the actual origin of the tribal exhaustion doctrine is itself an affront to the very principles that the doctrine claims to support. And looming over the entire proceeding is the Supreme Court's mandate, its forthcoming ruling in *A-1 Contractors*, and *A-1 Contractor's* Ninth Circuit contrary, *Hinshaw v. Mahler*.[293] Accordingly, *A-1 Contractors* and *Hinshaw* must be surveyed in some depth.

A. Hinshaw v. Mahler

Christian Mahler was struck and killed by an automobile while riding his motorcycle on U.S. Highway 93 on the Flathead Indian Reservation.[294] The driver, Lynette Hinshaw, was not an enrolled member of the Confederated Salish and Kootenai Tribes, but she did live within the boundaries of the Flathead Reservation.[295] Nor was Christian Mahler an enrolled tribal member, although he too was a reservation resident. However, Christian's mother, Gloria Mahler (with whom Christian resided) was an enrolled member.[296] The Mahler's filed an action for damages for wrongful death and a survivorship in

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expressly preempted by the federal requirement that courts abstain or dismiss when a tribal court asserts civil jurisdiction).

293. 42 F.3d 1178 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 485 (1994). It ought to be noted that the Ninth Circuit's more recent decision in Yellowstone County v. Pease, 96 F.3d 1169, 1175 (9th Cir. 1996) (citing the en banc opinion in *A-1 Contractors* with approval and rejecting the notion that *Montana* and its progeny are limited to cases involving fee lands owned by non-Indians), *cert. denied*, 117 S. Ct. 1691 (1997), seems to directly contradict *Hinshaw*. But *Pease* carefully distinguished *Hinshaw* from *A-1 Contractors*, calling *Hinshaw* consistent with *Montana* on the ground that *Hinshaw* in "no way supports the Tribe's adjudicatory/regulatory distinction." *Id.* at 1175. *Hinshaw* also differed from *A-1 Contractors* inasmuch as the tribal court plaintiff in *Hinshaw* was a tribal member residing on the reservation. *Id.* at 1176 (citing *Hinshaw*, 42 F.3d at 1180). The *Hinshaw* court, wrote the *Pease* court, implicitly concluded that state and tribal authorities coupled with the tortfeasor's "specific contacts" with the reservation created the requisite "tribal interest" under *Montana*. *Id.* Thus, tribal ordinances and Montana state court decisions explicitly provided that the tribe had concurrent jurisdiction with the state over an automobile accident on public roads on the reservation. *Id.* (citing *Hinshaw*, 42 F.3d at 1180). The Crow Tribe did not "enjoy specific authority to exercise jurisdiction over the propriety of a county's property tax scheme." *Id.* Furthermore, the non-Indian here (i.e., Yellowstone County, Montana) "neither resided on the reservation nor violated an enforceable tribal ordinance." *Id.*

At rock bottom then, it appears that *Pease* preserves for the Ninth Circuit the notion that, at least in some circumstances, non-Indians may still be held liable in tribal court for torts committed on an Indian Reservation. Unfortunately, *Pease* does not tell us whether the perceived "specific contact" in *Hinshaw* was the tortfeasor's residency on the Flathead Indian Reservation, or her act of negligently causing the death of the (non-member) son of a tribal member in an auto accident occurring on the reservation.

294. *Hinshaw*, 42 F.3d at 1179-80.

295. *Id.* at 1180.

296. *Id.* It should be noted that this seemingly convoluted fact pattern regarding residency, kinship and membership is not at all unusual. Indeed, as tribal bloodlines are increasingly diluted and intermixed, the Supreme Court's continued reticence regarding a geographic view of tribal court jurisdiction only promises to become more problematic.

tribal court, and the tribal court accepted jurisdiction because the accident occurred on the reservation and because Gloria Mahler was an enrolled member.[297] The Mahlers prevailed at trial, and the tribal appellate court affirmed. Ms. Hinshaw filed a complaint in federal district court, and that court concurred in the tribal courts' finding of jurisdiction.[298]

The Ninth Circuit Court of Appeals affirmed.[299] Writing for the panel, Judge Hug set out a detailed analysis of the tribal court's subject matter and personal jurisdiction in both the wrongful death and in the survivorship claims. In Judge Hug's view, *Montana* stands for the proposition that the "Tribes have not surrendered their authority to exercise jurisdiction over civil actions involving nonmembers."[300] Moreover, the wrongful death controversy clearly fell within the tribe's Law and Order Code.[301] The tribes' jurisdiction had not been limited by treaty or statute.[302] Nor had the tribes given up their authority to exercise jurisdiction over such actions.[303] Ms. Hinshaw's claim that only the State of Montana had subject matter jurisdiction over the survivorship action also failed.[304] Additionally, the tribal court's finding of personal jurisdiction

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297. *Hinshaw*, 42 F.3d at 1180.

298. *Id.*

299. *Id.* at 1181. *But see* A-1 Contractors v. Strate, 76 F.3d 930, 939 (8th Cir. 1996) (en banc), *aff'd*, 117 S. Ct. 1404 (1997) ("To the extent that *Hinshaw* supports the appellees' arguments that tribal courts have jurisdiction over a tort claim arising between two non-Indians on a highway running through an Indian reservation, we respectfully decline to follow it. Such a broad interpretation of civil tribal jurisdiction is, we believe, inconsistent with *Montana*").

300. *Hinshaw*, 42 F.3d at 1180 (citing Montana v. United States, 450 U.S. 544, 565-66 (1981) (tribe retains civil authority over matters affecting the tribe) (parenthetical as cited by the court)).

301. *Id.* On the Flathead Reservation, there is concurrent jurisdiction over certain civil matters occurring on the reservation between the tribal court and tribal government. *Id.* (citing Tribal Ordinance 40-A (Revised) (May 5, 1965); TRIBAL LAW & ORDER CODE ch. 1, §§ 2-3 (1985)). The code also governs the operation of motor vehicles on public roads, and provides that all jurisdiction not expressly transferred remains with the tribes. *Id.* "The accident occurred within the boundaries of the reservation." *Id.* Gloria Mahler, Kenneth Mahler, and Hinshaw all resided on the reservation and were thus "found" on the reservation. *Id.* (citing TRIBAL LAW & ORDER CODE ch. II, § 1(2)(a)(1) & (2)(b) (1985)). "Hinshaw owned, used, and possessed a motor vehicle within the reservation." *Id.* (citing § 1(2)(a)(2)(ii)). "Hinshaw's actions injured Gloria Mahler, a tribal member." *Id.* (citing § 1(2)(a)(2)(iv)); *see also* Larivee v. Morigeau, 602 P.2d 563, 566-71 (Mont. 1979) (jurisdiction over torts arising from automobile accidents on the Flathead Reservation is concurrent between the state and the tribes), *cert. denied*, 445 U.S. 964 (1980).

302. *Hinshaw*, 42 F.3d at 1180.

303. *Id.*

304. *Id.* While the tribal court does not share concurrent probate jurisdiction with the state, the Mahlers' tort action for personal injuries had nothing to do with administration of the estate. *Id.* (citations omitted). In Montana state court, a party wishing to bring both a wrongful death claim and a survivorship claim must initiate a separate action unrelated to the probate action. *Id.* at 1180-81 (citing *In re* Estate of Pegg, 680 P.2d 316, 322 (Mont. 1984) (wrongful death claim is not part of decedent's estate); MONT. CODE ANN. §§ 27-1-513, 27-1-501(2) (1992) (a wrongful death claim and a survivorship claim must be combined in one legal action and brought in a representative capacity)). Thus, initiation of the state probate action did not initiate a concurrent

survived Ms. Hinshaw's challenge under the "minimum contacts" test as set out in *International Shoe*.[305] Judge Hug agreed with the tribal appellate court — that simply by living on the reservation, Ms. Hinshaw had "purposefully availed herself of the privilege of conducting activities in the forum."[306] Since this claim arose out of Ms. Hinshaw's forum-related activities, the tribal court's exercise of jurisdiction was reasonable because tribes have a "special interest in exercising jurisdiction over those who have committed tortious acts within the reservation."[307] Finally, the tribal court's interpretation of tribal law was binding on a federal court in the Ninth Circuit.[308]

B. A-1 Contractors v. Strate[309]

The Eighth Circuit's most recent statement on the reach of the tribal courts arose from remarkably similar circumstances to those in *Hinshaw*. In 1990, Ms. Gisela Fredericks was involved in an automobile accident with a gravel truck that was being driven by Lyle Stockert and that was owned by A-1 Contractors.[310] A-1 Contractors, a domestic North Dakota corporation, was under contract with a tribally owned corporation.[311] The accident occurred on North Dakota State Highway 8, within the exterior boundaries of the Fort Berthold Reservation. Ms. Fredericks was not an enrolled member of the tribes,[312] but she owned property on the reservation. However, her deceased husband was an enrolled member, as were her five children.[313] Mr. Stockert's

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tort action in state court. *Id.* at 1181. Absent some citation to authority showing that the tribal court does not have jurisdiction over the survivorship claim, the court believed that "to hold otherwise would, in the words of the district court, 'undermin[e] the authority of the Tribal Court to hear the wrongful death claim by effectively chilling Gloria Mahler's right to proceed in Tribal Court for that claim.'" *Id.* (quoting the district court's unreported opinion).

305. *Id.* (citing International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

306. *Id.* (citations omitted).

307. *Id.*

308. *Id.* at 1180 (citing Sanders v. Robinson, 864 F.2d 630, 633 (9th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989)). Judge Hug did not, however, discuss what that might mean in light of the fact that "[t]he question whether an Indian tribe retains the power to compel a non-Indian . . . to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under § 1331." National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 852 (1985).

309. 76 F.3d 930 (8th Cir. 1996) (en banc), *aff'd*, 117 S. Ct. 1404 (1997).

310. A-1 Contractors v. Strate, CV-N-A1-92-24, 1992 WL 696330 at *1 (D.N.D. Sept. 16, 1992), *reh'g granted*, No. 92-3359, 1994 WL 666051 (8th Cir. Nov. 29, 1994), *rev'd en banc*, 76 F. 3d 930 (8th Cir. 1996), *aff'd*, 117 S. Ct. 1404 (1997).

311. *Id.* The Eighth Circuit suggests a factual dispute on this point: "There is no proof (as opposed to allegations) that we can find in the record to support the district court's finding of fact that A-1 was in performance of the contract at the time of the accident. The district court made its fact-findings based on the pleadings in this case, not upon the evidence." *See* A-1 Contractors v. Strate, 76 F.3d 930, 932 (8th Cir. 1996) (en banc), *aff'd*, 117 S. Ct. 1404 (1997).

312. The Fort Berthold Indian Reservation is shared by the Three Affiliated Tribes: the Mandan, Hidatsa, and Arikara. All are federally recognized and organized under the IRA.

313. *A-1 Contractors*, 1992 WL 696330, at *1, *reh'g granted*, No. 92-3359, 1994 WL

residency was not discussed, but he was clearly not a tribal member.[314]

Ms. Fredericks suffered extensive injuries, for which she and her five children brought an action in the courts of the Three Affiliated Tribes. The tribal court found personal and subject matter jurisdiction under the tribal code.[315] Both the tribal court and the Northern Plains Intertribal Court of Appeals agreed that since a "tort committed on the reservation, in the course of a performance of a contract with the tribe, has a direct effect on the welfare of the tribe," the second exception to *Montana* was satisfied.[316]

666051 (8th Cir. Nov. 29, 1994), *rev'd en banc*, 76 F.3d 930 (8th Cir. 1996), *aff'd*, 117 S. Ct. 1404 (1997).

314. *Id.*

315. *Id.*; *see also* Fredericks v. Continental Western Ins. Co., No. 5-91-A04-150, slip op. at 1.24(d) (Fort Berthold Tribal Ct. Sept. 4, 1991). The tribal Judge based this decision on Ms. Fredericks' residency on the Fort Berthold Reservation, and on the reasoning that A-1 Contractors voluntarily entered upon and transacted business within the territorial boundaries of the reservation. A-1 Contractors failed to identify any federal law, treaty provision or provisions of the United States Constitution which would preclude exercise of jurisdiction by the tribal court. *A-1 Contractors*, 1992 WL 696330, at *1. The applicable tribal statutes included:

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION TRIBAL CODE ch. 1, § 3(3.2) (1980) ("Jurisdiction — Territorial"). "The jurisdiction of the court shall extend to any and all lands and territory within the Reservation boundaries, including all easements, fee patented lands, rights of way; and over land outside the Reservation boundaries held in trust for tribal members or the tribe." *Id.*

Id. ch. 1, § 3(3.3) ("Jurisdiction — Personal"). "Subject to any limitations or restrictions imposed by the constitution or the laws of the United States, the Court shall have civil and criminal jurisdiction over all persons who reside, enter, or transact business within the territorial boundaries of the reservation; provided that criminal jurisdiction over non-Indians shall extend as permitted by case law." *Id.*

Id. ch. 1, § 3(3.5) ("Jurisdiction — Subject Matter"). "The Court shall have jurisdiction over all civil causes of action arising within the exterior boundaries of the Reservation, and over all criminal offenses which are enumerated in this Code, and which are committed within the exterior boundaries of the Reservation." *Id.*

Id. ch. 2, § 3(f) ("Long Arm Statute").

> Any person subject to the jurisdiction of the tribal court during any of the following acts:
>
> 1) The transaction of any business of the Reservation;
>
> 2) The commission of any act which results in accrual of a tort action within the Reservation;
>
> 3) The ownership, use or possession of any property, or any interest therein, situated within the Reservation.

Id.

316. *A-1 Contractors*, 1992 WL 696330 at *3. The exceptions to implicit divestiture as set out in *Montana* are: (1) a tribe may regulate, through taxation and licensing, activities of non-Indians who enter consensual relationships with the tribe and its members; and (2) the tribe may "retain inherent power to exercise civil authority over the conduct of non- Indians on fee lands within its reservation when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Montana v. United States, 450 U.S. 544, 565-66 (1981). This all assumes, of course, that *Montana* actually applies to tribal adjudicative jurisdiction.

Like the National Farmers Insurance Company of a decade earlier, these defendants decided they preferred their chances in federal court. So rather than return to tribal court for trial, they filed an action in federal court, seeking declaratory judgement that the tribal court did not have subject matter jurisdiction and to enjoin further proceedings in that forum.[317] District Court Judge Conmy concluded that *A-1 Contractors* had complied with the exhaustion requirement pursuant to the rule in *National Farmers Union*.[318]

On *A-1 Contractors's* summary judgement motion, Judge Conmy found the purported factual dispute regarding whether or not Ms. Fredericks lived on the reservation — an issue *A-1 Contractors* first raised in federal court — to be "irrelevant to the issue of whether the tribe retains jurisdiction over a dispute between two non-Indians."[319] If the tribal court could properly assert jurisdiction over *A-1 Contractors* as a nonresident, the same analysis should apply to the tribal court's jurisdiction over Ms. Fredericks.[320] Moreover, the residency issue had no bearing on either the tribe's contention that tribal jurisdiction is primarily a geographic territory, or *A-1 Contractors's* principal argument that tribal jurisdiction only lies if at least one party is a tribal member.[321] In Judge Conmy's opinion, more significant was the Supreme Court's mandate set out in *Iowa Mutual* that in the interest of tribal sovereignty, civil jurisdiction presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.[322]

Nevertheless, A-1 Contractors contended that *Montana* precluded tribal court jurisdiction over this personal injury action because there was no consensual relationship between itself and Ms. Fredericks, and because the alleged tort arising between non-Indians did not have a direct effect on the health or welfare of the tribe.[323] Conversely, the tribal defendants distinguished this case on the ground that *Montana* applies only in disputes arising out of non-Indian fee lands, while the instant dispute involved an accident that occurred on the

317. *A-1 Contractors*, 1992 WL 696330, at *2.

318. *Id.* Of course, the federal court's most preliminary conclusion points to one of the biggest problems with the exhaustion rule. While most observers would not view A-1 Contractors' preliminary challenge to the tribal court's jurisdiction as constituting exhaustion of tribal remedies — indeed, in the seminal cases, the Supreme Court remanded the matters to tribal court for full trial and appeal within the tribal courts — the entire controversy being heard in the federal courts in this case seems to have ignored that aspect of the rule altogether.

319. *Id.* at *2.

320. *Id.*

321. *Id.*

322. *Id.* at *3 (citing Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987); National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 855 (1985) (refusing to extend *Oliphant* to a case involving tribal civil jurisdiction)); *cf.* Duro v. Reina, 495 U.S. 676 (1990) (citing *Montana*) (tribal civil jurisdiction over non-Indians typically arises in cases of property ownership within the reservation or "consensual relationships with the tribe or its members through commercial dealing, contracts or other arrangements.").

323. *A-1 Contractors*, 1992 WL 696330, at *4.

reservation.[324] Even if *Montana* applied, the tribe argued, both prongs of *Montana* were met.[325] That *A-1 Contractors* was performing under a contract with the reservation satisfied the first prong, while the serious nature of the alleged tort satisfied the second.[326]

Noting the absence of any Supreme Court ruling on the issue of tribal civil jurisdiction over two non-Indian parties, Judge Conmy adopted the Ninth Circuit's holding in Stock West.[327] Personal jurisdiction over Fredericks, Stockert, and A-1 Contractors was clearly warranted under the tribal code: Ms. Fredericks properly chose the tribal forum, Stockert entered the reservation and then committed a tort there. A-1 Contractors knowingly entered the Reservation and transacted business.[328] The code also provided subject matter jurisdiction over the tort action.[329] At the bottom of it, Judge Conmy believed that tribal courts clearly have civil jurisdiction over non-Indians unless specifically limited by treaty or federal statute.[330] While tribal jurisdiction was not exclusive, it was properly invoked here by Ms. Fredericks' choice of forum.[331]

The defendants appealed, and a divided Eighth Circuit panel affirmed.[332] The majority rejected *A-1 Contractor's* argument that the tribal court's jurisdiction was limited by the implicit divestiture holdings set out in *Montana*, *Wheeler*, and *Brendale*.[333] Those cases, wrote Judge McMillan, stand for the proposition that while Indian tribes possess attributes of sovereignty over both their members and their territory, they have lost a great deal of that sovereignty through their original incorporation into the United States and through the operation of various treaties and statutes.[334] But they also stand for the view that "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."[335] Judge McMillan believed that the "general divestiture of tribal civil

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324. *Id.*

325. *Id.*

326. *Id.* A-1 Contractors agreed by contract to be bound by the tribal building codes, employment rights codes and "the laws regulations and directives of applicable governing authorities." *Id.*

327. *Id.* (citing Stock West Corp. v. Taylor, 964 F.2d 912, 918 (9th Cir. 1992) (en banc) (where a non-Indian owned corporation brought an action in federal district court against a non-Indian tribal attorney, tribal civil jurisdiction was not precluded)).

328. *Id.* at *5.

329. *Id.*

330. *Id.* (citing Iowa Mutual v. LaPlante, 480 U.S. 9 (1987)).

331. *Id.*

332. *See* A-1 Contractors v. Strate, No. 92-3359, 1994 WL 666051 (8th Cir. Nov. 29, 1994), *rev'd en banc*, 76 F.3d 930 (8th Cir. 1996), *aff'd*, 117 S. Ct. 1404 (1997).

333. *Id.* at *3.

334. *Id.* (quoting *Montana*, 450 U.S. at 563; *Wheeler*, 435 U.S. at 323).

335. *Id.* (quoting *Montana*, 450 U.S. at 565). The tribe may retain the inherent sovereign power to "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." *Id.* The tribe may also retain the inherent power to

jurisdiction over the activities of non-Indians recognized in *Montana* is applicable only to fee lands owned by non-Indians."[336] Thus, the district court correctly found tribal court jurisdiction where the alleged tort occurring on the reservation had a direct effect on the welfare of the tribe. Under those circumstances, tribal court jurisdiction is presumed and exists "unless affirmatively limited by a specific treaty provision or federal statute."[337] And, alternatively, even if *Montana* did apply, both the first and second *Montana* exceptions were well-met under these facts.[338] Ultimately, Judge McMillan

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"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." *Id.* (quoting *Montana*, 450 U.S. at 566).

336. *Id.* at *4 (citing South Dakota v. Bourland, 113 S. Ct. 2309, 2316-17 (1993) (tribe could not regulate activities of non-tribal members on non-Indian fee lands on reservation, that is, land taken for dam project and then opened for public use as recreation area); Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 430-31 (1989) (the issue was "whether, and to what extent, the tribe has a protectible interest in what activities are taking place on fee land within the reservation and, if it has such an interest, how it may be protected. . . . [that] "in the special circumstances of checkerboard ownership of lands within a reservation, the tribe has an interest under federal law, defined in terms of the impact of the challenged uses [of fee land] on the political integrity, economic security, or the health or welfare of the tribe"); United States *ex rel.* Morongo Band of Mission Indians v. Rose, 34 F.3d 901, 906 (9th Cir. 1994) (*Montana* exceptions are "relevant only after the court concludes that there has been a general divestiture of tribal authority over non-Indians by alienation of the land"); Stock West Corp. v. Taylor, 964 F.2d at 920 (tortious acts committed on reservation land, business transactions commenced on tribal lands gave rise to tribal jurisdiction)). *But see* Red Fox v. Hettich, 494 N.W.2d 638, 645-47 (S.D. 1993) (a plaintiff failed to establish tribal court had jurisdiction over tort claim which occurred on state highway within reservation).

337. *A-1 Contractors*, 1994 WL 666051, at *3 (quoting Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 14, 18 (1987) ("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.") (citing *Montana*, 450 U.S. at 565-66)); *see also* Washington v. Confederated Tribes, 447 U.S. 134, 152-53 (1980) (tribes may tax transactions occurring on tribal trust lands); Fisher v. District Court, 424 U.S. 382, 387-89 (1976); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982) (a tribe may impose taxes on business operated by non-Indians on basis of tribe's inherent sovereign authority to control economic activity within its jurisdiction); Williams v. Lee, 358 U.S. at 223 (state court did not have jurisdiction over civil suit by non-Indian against Indian where cause of action arose on reservation). Finally, "[b]ecause the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." *A-1 Contractors*, 1994 WL 666051, at *4-5 (quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. at 149 n. 14).

338. *A-1 Contractors*, 1994 WL 666051, at *4. Under the first *Montana* exception, there was a voluntary consensual relationship between A-1 Contractors and the tribe within the subcontract between the tribal corporation, LCM Corp., and A-1 Contractors for work to be performed solely on the reservation. *Id.* Under the second *Montana* exception, the alleged tort committed on the reservation directly affected the economic security and health and general welfare of the tribe. *Id.* Moreover, "territorial control is a fundamental component of inherent tribal sovereignty." *Id.* at *5. And under federal law, rights-of-way are part of "Indian country." *Id.* (citing 18 U.S.C. § 1151 ("Indian country" includes "all land within the limits of any reservation under the

believed that "the tribe, like a state, has an important and legitimate interest in protecting the health and safety of its members and residents on the roads and highways on the reservation."[339] And a tribe, "like a state, also has an important and legitimate interest in affording those who have been injured in accidents on those roads and highways with a judicial remedy."[340] Since "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians,"[341] and since refusing to recognize that interest would have a "demonstrably serious, adverse effect on the political integrity of the tribe,"[342] the district court was correct in reserving resolution on the merits for the tribal court.

In response, Judge David Hansen filed an outspoken dissent.[343] He believed that the majority's opinion was grounded in a theory of "tribal territorial jurisdiction wholly unsupported by authority."[344] Rather, Judge Hansen believed that *Montana* controls — that a tribal interest must be involved to justify any tribal court jurisdiction over non-Indians.[345] In Judge Hansen's opinion, *Montana* stands for the much broader proposition that a tribe's jurisdiction over non-Indian parties does not extend beyond what is "necessary to protect tribal self-government or to control internal relations."[346] Anything more would be "inconsistent with the dependent status of tribes, and so cannot survive without express Congressional delegation."[347] Judge Hansen believed the majority's view of *Montana* and *Brendale* as cases involving only a tribe's authority over non-Indians activities on non-Indian owned fee land to be "artificial."[348] Judge Hansen took special exception to the majority's reliance on the "concept that Indian tribes retain unfettered territorial civil jurisdiction

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jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation")).

339. *Id.* at *6.

340. *Id.*

341. *Id.* (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978)).

342. *Id.*

343. *Id.* at *6-10 (Hansen, J., dissenting).

344. *Id.*

345. *Id.* at *6.

346. *Id.* (quoting *Montana*, 450 U.S. at 564).

347. *Id.*

348. *Id.* at *7. Judge Hansen believed that *Brendale* "expressly adopted the *Montana* rationale without further qualification." *Id.* (citing *Brendale*, 492 U.S. at 426-27). Judge Hansen also felt that a number of other cases have relied on *Montana* for guidance in civil jurisdictional issues arising in non-fee land disputes. *Id.* (citing Stock West Corp. v. Taylor, 964 F.2d 912, 918-19 (9th Cir. 1992) (en banc) (quoting *Montana* in a non-fee land jurisdictional dispute); FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1314 (9th Cir. 1990) (citing *Montana* in non-fee land case as "the leading case on tribal civil jurisdiction over non-Indians"); Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida, 999 F.2d 503, 508 n.11 (11th Cir. 1993) (citing *Montana* in recognizing that tribal courts have power to exercise civil jurisdiction in conflicts affecting the interests of Indians on Indian lands)).

unless that jurisdiction has been affirmatively limited by federal law" — a near "statehood-like" status grounded in "isolated language" found in *Iowa Mutual*, *Merrion v. Jicarilla Apache Tribe*, and *Williams v. Lee*.[349] Rather, Judge Hansen believed that *Iowa Mutual* must be read alongside *Montana*.[350] Likewise, *Merrion* and *Williams* depend upon *Montana* for their correct interpretation.[351] Finally, Judge Hansen advanced a questionably-reasoned conclusion from Cohen's *Handbook* — that "[t]ribal courts probably lack jurisdiction over civil cases involving only non-Indians in most situations, since it would be difficult to establish any direct impact on Indians or their property."[352] The resulting meld of these various authorities, according to Judge Hansen, would be one "comprehensive and integrated" rule.[353] That rule would require that there must first exist a "valid tribal interest" before a tribal court may exercise civil adjudicatory jurisdiction over any non-Indian or nonmember.[354] If a valid tribal interest is established, a presumption in favor of tribal court jurisdiction arises unless it is affirmatively limited by federal law.[355]

Applying that rule to the present case, Judge Hansen believed that no tribal

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349. *Id.* at *7-8. Judge Hansen was also unimpressed with counsel for the tribal defendants who stated in oral argument that the tribe wants "'to have jurisdiction over things that happen on the reservation,' including things that involve non-Indians, because 'that's what sovereign governments do, they control things that happen within their territory.'" *Id.*

350. *Id.* at *9. For instance, Judge Hansen believes that when Justice Marshall stated that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty," he was implicitly referring to the kinds of activities set out in the *Montana* exceptions. *Id.* Likewise, when Justice Marshall wrote that "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute," he actually meant that the tribe's civil jurisdiction over non-Indians arises by virtue of the non-Indian's activities as defined by *Montana*. *Id.*

351. *Id.* Judge Hansen posits that in *Williams*, the plaintiff, a storekeeper on the Navajo Reservation who sued his Indian customers for an alleged breach of contract that occurred on the reservation, was engaged in a "consensual agreement" that "fits squarely" with *Montana*. However, insofar as *Williams* involved a private transaction between the storekeeper and individual tribal members — not with the tribe itself as Judge Hansen would require — this supposed distinction between *Williams* and *A-1 Contractors* is non-obvious. As in *Williams*, the injured party here was an individual. In the alternative, Judge Hansen may be implicitly accepting the tribe's contention that an injury to a member of the tribal community is in some sense an injury to the tribe itself. If so, this entire line of reasoning seems suspect.

352. *A-1 Contractors*, 1994 WL 666051 at *9 (quoting COHEN, 1982 ED., *supra* note 4, at 342-43). But note that while purporting to address civil jurisdiction, the *Handbook's* editors cite only a law review article that principally addressed criminal jurisdiction, Richard Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479, 479-508 (1979), and *United States v. McBratney*, 104 U.S. 621 (1882), a century-old criminal jurisdiction case that upheld state criminal jurisdiction over an Indian country crime committed by a non-Indian against a non-Indian victim.

353. *A-1 Contractors*, 1994 WL 666051, at *9.

354. *Id.*

355. *Id.*

interest supported the tribal court's jurisdiction. This "run-of-the-mill" automobile accident on a North Dakota state highway implicated no "consensual relationship" within the meaning of *Montana*. The issue was not A-1 Contractor's contract with the tribe. Nor was it Lyle Stockert's employment with A-1. Those relationships, wrote Judge Hansen, had nothing to do with this simple personal injury tort claim.[356] Since Gisela Fredericks was not a party to the tribe's contract with A-1, the tribe was a "stranger" to the accident.[357] For the same reason, Judge Hansen believed that Ms. Fredericks' injury had nothing to do with the tribe's political integrity and welfare, nor with its ability to govern its own affairs or protect its own people's rights under tribal laws and customs — i.e., the subject of the second *Montana* exception.[358] Rather, it concerned only the conduct of non-Indians and nonmembers, and the tribe's "self-asserted ability to exercise plenary judicial authority over a decidedly nontribal matter."[359]

But of course, having disposed of Justice Marshall's troubling language in *Iowa Mutual* — that "[c]ivil jurisdiction . . . presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute"[360] — Judge Hansen would leave it solely in the hands of the federal judiciary to adjudge the proper scope of tribal jurisdiction under *National Farmers Union's* somewhat less restrictive language.[361] Nevertheless, Judge Hansen believed that the "principled approach" of *Montana* guarantees the tribe's ability to govern itself because the tribal courts will still have jurisdiction any time a tribal interest is established.[362]

A-1 Contractors and Lyle Stockert next requested rehearing en banc.[363] The panel opinion was vacated, and Judge Hansen's dissent in the panel decision formed the basis of the en banc judgement.[364] However, Judge Hansen

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356. *Id.*

357. *Id.*

358. *Id.* at *10.

359. *Id.*

360. Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987).

361. *See* National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 (1985) ("Our conclusions that § 1331 encompasses the federal question whether a tribal court has exceeded the lawful limits of its jurisdiction, and that exhaustion is required before such a claim may be entertained by a federal court, require that we reverse the judgment of the Court of Appeals. Until petitioners have exhausted the remedies available to them in the Tribal Court system . . . it would be premature for a federal court to consider any relief.").

362. *A-1 Contractors*, 1994 WL 666051, at *10.

363. A-1 Contractors v. Strate, 76 F.3d 930, 932 (8th Cir. 1996) (en banc), *aff'd*, 117 S. Ct. 1404 (1997).

364. The general rule for granting rehearing is set out in Rule 35 of the Federal Rules of Appellate Procedure. Under that rule, a majority of the circuit judges in regular active service may order that an appeal be reheard en banc. Fed. R. App. P. 35(a). However, such a rehearing is not favored. *Id.* Ordinarily, such a request will not be granted except when consideration by the full court is necessary to secure or maintain uniformity of its decisions, Fed. R. App. P. 35(a)(1), or when a question of exceptional importance is raised. Fed. R. App. P. 35(a)(2).

narrowed his attention somewhat, focusing on the district court's decision that "the tribe had full geographical/territorial jurisdiction over this dispute."[365] Under that view, the crucial point that so many courts have apparently been missing is that "*Montana* specifically extended the general principles underlying *Oliphant* to civil [adjudicatory] jurisdiction."[366] Seemingly then, all those courts that have recognized a principled difference between regulatory and adjudicatory jurisdiction under the *Montana* formulation have simply been wrong. Never mind that this is a contention upon which the Supreme Court itself remains divided,[367] and upon which there is no consensus among the

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The Eighth Circuit takes an even sterner view of such requests. *See* 8th Cir. R. 35A. The local rule further restricts the general rule, requiring that a suggestion for rehearing en banc "should be filed only when the attention of the entire court must be directed to an issue of grave constitutional dimension or exceptional public importance, or to an opinion that directly conflicts with Supreme Court or Eighth Circuit precedent." 8th Cir. R. 35A(a). Mere assertions of error in the determination of state or federal law, in the facts of the case, or in the application of precedent to the facts of the case are matters for panel rehearing, but not for rehearing en banc. Unless the case meets the "rigid standards" of Fed. R. App. P. 35(a), the duty of counsel is discharged without suggesting such a rehearing. *Id.* Rehearing en banc may also be requested by a judge who was a member of the panel that rendered the prior decision, 8th Cir. R. 35A(b), but that was not alleged here. *See A-1 Contractors*, 76 F.3d at 932.

In light of the gravity afforded such a procedure in the Eighth Circuit, one might have expected an explanation of the ground upon which this case met such a strict standard. None is provided. The closest the court comes is its observation that "[i]n our view, the appellees' reading of this isolated language from *Iowa Mutual* is unnecessarily broad and conflicts with the principles of *Montana*." *A-1 Contractors*, 76 F.3d at 936.

Those voting in favor of A-1 Contractors's position included Chief Circuit Judge Richard Arnold, and Judges Morris Arnold, Pasco Bowman, George Fagg, James Loken, Frank Magill, Roger Wollman, and David Hansen, who authored the majority opinion. Judge Arlen Beam filed a concurring and dissenting opinion in which Judges Floyd Gibson, Theodore McMillan, and Diana Murphy joined. Judge Gibson filed a dissenting opinion in which Judges McMillan, Beam and Murphy joined. Finally, Judge McMillan filed a dissenting opinion in which Judges Gibson, Beam, and Murphy joined.

365. *A-1 Contractors*, 76 F.3d at 938 ("While the distinction [between adjudicatory and regulatory jurisdiction] the appellees propose appears in some commentaries, the distinction does not appear explicitly, or even implicitly, anywhere in the case law.") (citing Dussias, *supra* note 16, at 43-78). *But see infra* notes 147, 367, 466 (citing case law that does draw just such a distinction).

366. *A-1 Contractors*, 76 F.3d at 934 (citing *Montana*, 450 U.S. at 565 ("Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe") (footnote omitted)). However, *Montana* did not extend the full impact of *Oliphant* to the civil adjudication question. *Id.* That would have "completely prohibited civil jurisdiction over nonmembers." *Id.* Instead, the Court set out the *Montana* exceptions under which a tribe may still exercise civil jurisdiction over nonmembers. *Id.* (citing *Montana*, 450 U.S. at 565-66). This reading of the cases, instructs Judge Hansen, explains the apparent discrepancy between *Oliphant*, *Montana*, and *National Farmers Union*. *Id.* at 937. Thus, *National Farmers Union*'s statement that civil tribal jurisdiction over nonmembers is not foreclosed by *Oliphant* is "perfectly consistent with *Montana*, which provides for broader tribal jurisdiction over non-Indians than does *Oliphant*." *Id.*

367. *See, e.g.*, California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987)

lower courts.[368] And, reasoned Judge Hansen, even if *Montana* does draw the

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(recognizing a distinction between tribal adjudicatory and regulatory jurisdiction); Bryan v. Itasca County 426 U.S. 373, 385-86 (1976) (interpreting § 4 [of Public Law 280] to grant States jurisdiction over private civil litigation involving reservation Indians in state court, but not to grant general civil regulatory authority; noting that "Public Law 280 relates primarily to the application of state civil and criminal law in court proceedings, and has no bearing on [regulatory] programs set up by the States to assist economic and environmental development in Indian territory") (quoting *Hearing Before the Subcomm. on Indian Affairs of the House Comm. on Interior & Insular Affairs*, 90th Cong. 136 (1968) (testimony of Sen. Sam Ervin, principal sponsor of Title IV)); Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 456 n.6 (1989) (Blackmun, J., dissenting) ("Indeed, the only citations that I have found of *Montana*'s rule governing tribal sovereignty appear in the dissent to our decision upholding tribal taxing authority over non-Indians in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 171 (1982), and in a dissent from the denial of certiorari in a case where the Court of Appeals upheld tribal civil jurisdiction over non-Indians. City of Polson v. Confederated Salish & Kootenai Tribes, 459 U.S. 977 (1982)."); *see also* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting) ("[Legislative jurisdiction] refers to the authority of a state to make its law applicable to persons or activities and is quite a separate matter from jurisdiction to adjudicate.").

368. *See, e.g.*, National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 736 F.2d 1320, 1324 (9th Cir. 1984), *rev'd*, 471 U.S. 845 (1985) (Wright, J., dissenting) ("The distinction between adjudication and regulation may have some application in this area of law. Adjudicatory jurisdiction is often broader than regulatory jurisdiction, because a forum's authority to adjudicate a controversy does not depend on its authority to regulate the underlying subject matter. . . . But this distinction goes to the merits. It involves the propriety of the tribal court's assertion of jurisdiction. It does not affect the existence of a federal question."); State v. Hicks, 944 F. Supp. 1455, 1465 (1996) ("Because *Montana*, *Brendale*, and *Bourland* involved challenges to a tribe's power to regulate, and *National Farmers* and *Iowa Mutual* involved challenges to a tribe's power to adjudicate tort claims against a non-member, the different formulations of the 'general rule' may be a result of the Supreme Court's implicit recognition of a principled distinction between tribal adjudicatory jurisdiction and tribal regulatory jurisdiction"); Lyon v. Amoco Prod. Co., 923 P.2d 350, 353 (Colo. Ct. App. 1996) ("In the absence of controlling federal law, such as a specific treaty provision or a federal statute, tribal courts presumptively have jurisdiction over disputes involving Indians and non-Indians in the territory known as 'Indian country.' This includes all land within the limits of any Indian reservation under the jurisdiction of the United States government."). *But see, e.g.*, Yellowstone County v. Pease, 96 F.3d 1169, 1175 (9th Cir. 1996) (citing the en banc opinion in *A-1 Contractors* with approval, noting that *Montana* as the leading case on tribal civil jurisdiction over non-Indians, and holding that under *Montana*, the Crow Tribe lacked authority since a valid tribal interest must be at issue before tribal court could exercise any civil adjudicatory or regulatory jurisdiction); Stock West Corp. v. Taylor, 964 F.2d 912, 918-19 (9th Cir. 1992); FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1314 (9th Cir. 1990) (calling *Montana* the "leading case on tribal civil jurisdiction over non-Indians"); Sanders v. Robinson, 864 F.2d 630, 632 (9th Cir. 1988); Wilson v. Marchington, 934 F. Supp. 1176, 1181 (D. Mont. 1995) *rev'd*, No. 96-35145, 1997 WL 583704 (9th Cir. Sept. 23, 1997) (where member of Blackfeet Indian Tribe sought recognition and registration of tribal judgment against non-Indian truck driver, the tribal court had subject matter jurisdiction notwithstanding the fact that "tribal adjudicatory jurisdiction, like tribal regulatory jurisdiction, emanates from a tribe's retained inherent authority"; *Montana* did not intend a distinction between a tribe's regulatory jurisdiction and adjudicatory jurisdiction.) (citing AMERICAN INDIAN LAW DESKBOOK 131 (1993); Red Fox v. Hettich, 494 N.W.2d 638, 642 (S.D. 1993) (in collateral action by tribal member tribe to gain enforcement of tribal court tort judgement against nonmember for damages that resulted

suggested distinction between regulatory jurisdiction and adjudicatory jurisdiction, he believed that any such distinction here would be "illusory."[369] Thus, a tribal court trying this suit would have virtually limitless power to decide what substantive law applies — defining the "legal relationship and the respective duties of the parties on reservation roads and highways."[370] In that case, a tribal court rendering such a decision would in effect be "regulating the legal conduct of drivers on the roads and highways that traverse the reservation."[371]

Strate's dissenting opinions illustrate just how much disagreement exists over this issue. For example, Judge Beam concurred in the majority's "comprehensive and integrated" rule.[372] Nevertheless, he dissented from the court's implication

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after member struck nonmember's dead horse on a state highway within the reservation, holding that "without legislative authority to regulate Hettich's conduct, the tribal court [had] no case [to] adjudicate"); *see also* Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Florida, 999 F.2d 503, 508 n.11 (11th Cir. 1993) (citing *Montana* in finding that tribal courts have power to exercise civil jurisdiction over Indians on Indian lands).

In *Red Fox*, the court went on to set out a "mathematical" analysis of the jurisdiction dilemma. *Red Fox*, 494 N.W.2d at 642 n.4. To wit, a tribal court's adjudicative authority = judicial jurisdiction + legislative jurisdiction. This is further broken down:

1) Judicial jurisdiction = territorial jurisdiction + subject matter jurisdiction + personal jurisdiction. Legislative jurisdiction = *Montana*'s regulatory authority.

2) Therefore: (A tribal court's adjudicative authority) = (territorial jurisdiction + subject matter jurisdiction + personal jurisdiction) + (*Montana*'s regulatory authority).

According to the South Dakota Supreme Court, the important thing to remember is that if any part of this equation is missing, and regardless of what else exists, it still equals something less than a tribal court's adjudicative authority. (And this court's algebra almost makes one miss a good old-fashioned "subjective" analysis under *Montana*).

369. *A-1 Contractors*, 76 F.3d at 938.

370. *Id.*

371. *Id.* Judge Hansen did, however, recognize the legitimacy of tribal law in a general sense. He noted that the Three Affiliated Tribes "exercise their sovereignty under a federally approved constitution adopted pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479." *Id.* at 933 n.2. The Three Affiliated Tribes have also adopted a tribal code which "outlines civil court jurisdiction within the exterior boundaries of the reservation and which, in the absence of federal law to the contrary, imposes tribal law and custom, not North Dakota statute or common law, as controlling precedent for torts occurring within the reservation." *Id.* at 943 (Beam, J., concurring and dissenting) (citing TRIBAL CODE OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION ch. 1, § 2 (1980); *see also* COHEN, 1982 ED., *supra* note 4, at 334-35).

In an attempt to foreclose any remaining arguments, Judge Hansen did note that if the court, arguendo, did apply a regulatory-adjudicatory distinction, the fact that the case involves a tribal court's civil jurisdiction over an accident involving non-Indians, *Montana*'s principles applied to this "open question of inherent authority to exercise civil adjudicatory jurisdiction" would render the same result. *Id.* at 938.

372. *Id.* at 941 (Beam, J., concurring and dissenting) (citing *A-1 Contractors*, 76 F.3d at 938-39 ("[A] valid tribal interest must be at issue before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember, but once the tribal interest is established, a presumption arises that tribal courts have jurisdiction over the non-Indian or nonmember unless that jurisdiction is affirmatively limited by federal law")).

that a tribal court can have no jurisdiction in a civil case unless an Indian or a member of the tribe is involved.[373] Such a view, wrote Judge Beam, "appears to be a free-floating theory wholly detached from geographic reality"[374] — and a view contrary to *Brendale*, *Iowa Mutual*, *National Farmers Union*, and particularly to *Montana*.[375] Recognizing that, "[h]istorically, the connection of Indians to the land has shaped the course of Indian law,"[376] and that many of the modern cases are similarly supportive of the geographic view,[377] Judge Beam believed that *Montana's* exceptions must be applied on a "case-by-case" basis, ever mindful of the geographic component of tribal court jurisdiction.[378] Moreover, by oversimplifying *Montana's* focus on tribal membership, Judge Beam believed that the majority's reliance on North Dakota's state court jurisdiction exposed Ms. Fredericks to the risk of no forum at all.[379]

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373. *Id.* (Beam, J., concurring and dissenting).

374. *Id.*

375. *Id.*

376. *Id.* at 942 (citing Williams v. Lee, 358 U.S. 217, 223 (1959) ("It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there"); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832) (recognizing Indian nations as "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States")). For a comprehensive discussion of this land-based/jurisdictional nexus, see Harring, *supra* note 7.

377. *A-1 Contractors*, 76 F.3d at 942 (Beam, J., concurring and dissenting) (citing *Brendale*, 492 U.S. at 429 (requiring a case-by-case approach to deciding whether *Montana*'s second exception confers tribal regulatory jurisdiction); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (exploring a tribe's historic power to exclude others from tribal lands); United States v. Mazurie, 419 U.S. 544, 557 (1975) (noting that the Court's own cases had consistently recognized that Indian tribes retain "attributes of sovereignty over both their members and their territory")).

378. *Id.* at 942 (Beam, J., concurring and dissenting) (citing *Montana*, 450 U.S. at 563-65 (Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory and retaining inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands)).

379. *Id.* at 943 (Beam, J., concurring and dissenting). First, the majority's characterization of the effect of Public Law 280, 28 U.S.C. § 1360, in this case was incorrect. *Id.* North Dakota elected to assume civil jurisdiction under Public Law 280 before the 1968 amendments restricting its application to only Indians were adopted. *Id.* However, the state voluntarily conditioned its jurisdiction upon consent of the tribes. *Id.* (citing N.D. Cent. Code § 27-19-01 (1991)). The Three Affiliated Tribes did not consent. *Id.* (citing Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g I, 467 U.S. 138 (1984)). Thus, North Dakota has no jurisdiction over the Fort Berthold Reservation under Public Law 280. *Id.*

Second, *Williams v. Lee* still limits state court jurisdiction over causes of action arising in Indian country. *Id.* While, absent federal jurisdiction, state courts may exercise jurisdiction over some civil actions, *Williams*'s "infringement" test depends upon "whether the state action infringe[s] on the right of reservation Indians to make their own laws and be ruled by them." *Id.* (quoting *Williams*, 358 U.S. at 220). Valid state court jurisdiction may not be disclaimed absent another forum in which to bring an action. *Id.* (citing Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g II, 476 U.S. 877 (1986)). Moreover, state courts generally have subject matter jurisdiction over suits by non-Indians against non-Indians, even in actions arising

Judge McMillan — author of the panel decision overruled by the Eighth Circuit en banc — agreed with Judge Beam's analysis regarding the importance of geography and territory in issues of tribal sovereignty.[380] But he also expanded on notions of the tribal court's subject matter jurisdiction over this action between non-Indians. First and foremost, the tribal code established personal and subject matter jurisdiction and specifies the application of tribal law and custom.[381] That, when taken together with the longstanding presumption in favor of inherent tribal sovereignty,[382] *Montana's* applicability

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in Indian country, so long as Indian interests are not affected. *A-1 Contractors*, 76 F.3d at 943 (citing COHEN, 1982 ED., *supra* note 4, at 352) ("The scope of preemption of state laws in Indian country generally does not extend to matters having no direct effect on Indians, tribes, their property, or federal activities. In these situations, state courts have their normal jurisdiction over non-Indians and their property, both in criminal and civil cases."); *see also* Sandra Hansen, *Survey of Civil Jurisdiction in Indian Country 1990*, 16 AM. INDIAN L. REV. 319, 346 (1991). Nevertheless, where, as in this case, a tribe has adopted a tribal code outlining civil court jurisdiction within the exterior boundaries of the reservation and which imposes tribal law and custom rather than North Dakota statutory or common law as controlling precedent for torts occurring within the reservation, *id.* (citing TRIBAL CODE OF THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION ch. 1, § 2 (1980)), the ability of a North Dakota state court to provide a forum still must turn upon whether state jurisdiction would infringe upon the tribe's right to self government). *A-1 Contractors*, 76 F.3d at 943.

380. *A-1 Contractors*, 76 F.3d at 945 (McMillian, J., dissenting).

381. *Id.* Significant here is that rights-of-way such as the highway where the subject accident occurred are considered to be part of Indian country under 18 U.S.C. § 1151 (1994) ("Indian country" includes "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"). Section 1151, a criminal statute, has long been accepted as applicable to civil matters as well. *See* DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975).

382. *A-1 Contractors*, 76 F.3d at 946 (maintaining the principled conviction that there is presumptive tribal jurisdiction over the activities of non-members, and relying primarily on *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) ("Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute."); Hinshaw v. Mahler, 42 F.3d 1178, 1180-81 (9th Cir.) (the Flathead Tribal Court properly asserted jurisdiction in wrongful death and survivorship action brought by tribal member on behalf of non-member child against non-member who allegedly caused the child's death in automobile accident on the reservation), *cert. denied*, 115 S. Ct. 485 (1994)). Judge McMillian also cited *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980) (emphasizing that "there is a significant geographical component to tribal sovereignty," and that state authority over non-Indians acting on a tribal reservation were preempted); *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (Indian tribes possess "inherent powers of a limited sovereignty which has never been extinguished") (citing COHEN, 1942 ED., *supra* note 33, at 122); *United States v. Mazurie*, 419 U.S. 544, 557 (1975) ("Indian tribes retain 'attributes of sovereignty over both their members and their territory' to the extent that sovereignty has not been withdrawn by federal statute or treaty"); and Dussias, *supra* note 16. *A-1 Contractors*, 76 F.3d at 946.

Thus, Indian tribes still possess those aspects of sovereignty not expressly withdrawn by treaty or statute, or implicitly withdrawn as a "necessary result" of their "dependent status." *A-1 Contractors*, 76 F.3d at 946 (McMillan, J., dissenting) (citing *Wheeler*, 435 U.S. at 323). *Cf.* Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 153-54 (implicit

"only to issues involving fee lands,"[383] the correct view of the tribal exhaustion rule,[384] the ambiguity of Cohen's *Handbook of Federal Indian Law* regarding the subject of civil jurisdiction,[385] and the irrelevance of concurrent state court

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divestiture of inherent sovereignty is only necessary "where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights"). Conversely, mere silence on the issue means that the tribe's inherent sovereignty remains intact. *A-1 Contractors*, 76 F.3d at 946-47 (McMillian, J., dissenting) (citing Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 n.14 (1982)).

383. Judge McMillian distinguished *Montana*, *Brendale*, and *Bourland* on the fact that all those cases clearly involved tribal regulatory actions on lands conveyed in fee to non-Indians, or former trust and fee lands taken by the United States. *A-1 Contractors*, 76 F.3d at 947 (McMillian, J., dissenting). Particularly, in *Montana* where the competing regulatory authorities were the Crow Tribe and the State of Montana, the Court expressly framed the issue in terms of "the sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians." *Id.* (quoting *Montana*, 450 U.S. at 547). Thus, Judge McMillian would apply *Montana* and its derivative exceptions "only to fee lands owned by non-tribal members." *Id.* at 947 (McMillian, J., dissenting). Judge McMillian also relied on *Bourland*, 508 U.S. at 687-89, 695-97 (holding that where a tribe endeavored to regulate non-Indian hunting and fishing on lands taken by the United States for a flood control project, Congress, in enacting the flood control legislation, had abrogated the tribe's right to exclude non-Indians, but remanding for further consideration of whether the tribe retained inherent sovereignty to regulate non-Indian hunting and fishing in the taken area under the two *Montana* exceptions). Judge McMillian discussed Justice Blackmun's dissent in *Bourland* and focused on his contention that "the tribe had the authority to regulate non-Indian hunting and fishing in the taken area because the relevant statutes did not affirmatively abrogate either the tribe's treaty rights or inherent tribal sovereignty." *Id.* at 948; *see also Brendale*, 492 U.S. at 430 (the issue at controversy was, within the scope of the second *Montana* exception, "whether, and to what extent, the tribe has a protectible interest in what activities are taking place on fee land within the reservation and, if it has such an interest, how it may be protected"); *see also* United States *ex rel.* Morongo Band of Mission Indians v. Rose, 34 F.3d 901, 906 (9th Cir. 1994) (*Montana* exceptions are "relevant only after the court concludes that there has been a general divestiture of tribal authority over non-Indians by alienation of the land").

384. Judge McMillan notes that *National Farmers Union* not only requires exhaustion of tribal remedies, but it implicitly acknowledges tribal court jurisdiction over non-Indian defendants in civil actions as well. *A-1 Contractors*, 76 F.3d at 949. And *Iowa Mutual* not only reaffirmed the exhaustion rule established in *National Farmers Union*, it also expressly stated that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty" and that "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Id.* (citing *Iowa Mutual*, 480 U.S. at 18). This, wrote Judge McMillian, is an "affirmative recognition that tribal court civil jurisdiction over reservation-based tort actions against non-Indians is part of inherent tribal sovereignty." *Id.* To hold otherwise would vitiate any exhaustion rationale, and consequently, any need for tribal courts to evaluate challenges to their jurisdiction in the first instance. *Id.* Under the majority's view, tribal courts would "never have jurisdiction." *Id.*

385. *A-1 Contractors*, 76 F.3d at 949 ("The landmark treatise does not definitively resolve this issue"). While Judge McMillan correctly notes that Cohen's *Handbook* seems, at best, contradictory on the subject of tribal civil jurisdiction, more interesting is the possible source of

that treatise's contradictions.

Interior Department Solicitor Felix Cohen, writes Professor Barsh, brought "order and light into what Justice Frankfurter called the 'mish-mash' of Indian affairs law." Barsh, *supra* note 4, at 799. Originally published by the Interior Department as a guide for Indian Bureau employees, Cohen's *Handbook* quickly took on the trappings of undisputed authority. *Id.*; *cf.* Wilkinson, *supra* note 23, at 57-59. The treatise "attracted almost biblical reverence," and Cohen became something of a "Prosser in a rather arcane sub-discipline." Barsh, *supra* note 4, at 799. But, observes Professor Barsh, treatises like Cohen's *Handbook* can

> jeopardize critical thinking when they reconcile what judges have said and rationalize complexity into neat rules. This danger is greatest where the intellectual turf is truly perplexing, the subject political, and the bench and bar relatively unmotivated and ignorant. In such instances treatises become more than scholarly summaries. They become the law.

Id. Moreover, Cohen was a "man with a mission." *Id.* at 800. His was a "fervent confidence in the watchdog role of law in democracy, and a faith that lawyers could lead Indians out of political bondage." *Id.* That confidence was grounded in Cohen's belief in the New Deal proposition that "reason and enlightened central planning could remake and improve the social order." *Id.* And the law, like any other instrument of human progress, "worked best if well understood and properly used." *Id.*

Nevertheless, Cohen's faith in the forward evolution of the law seems a bit misplaced. When the Roosevelt Administration's dedication to rebuilding tribal institutions, *see, e.g.*, Indian Reorganization Act of 1934, Ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-479 (1994)), gave way to President Eisenhower's termination policy, *see, e.g.*, Act of August 13, 1954, ch. 732, 68 Stat. 718 (codified at 25 U.S.C. § 564 (1994)) (terminating Oregon's Klamath Tribe); *see also* Laurence, *Memorandum*, *supra* note 31, at 4 & n.10 (ascribing personal responsibility for termination to President Eisenhower), the *Handbook* became a "political pawn." Barsh, *supra* note 4, at 801. The treatise was purged of troubling references to tribal sovereignty and reissued in 1958. *Id.* Then, when the pendulum swung back in the late 1960s, yet another edition of the *Handbook* was commissioned — a version which "predictably restore[ed] the conceptual framework of the 1941 original." *Id.*

But, writes Professor Barsh, "much has happened in the world since 1941, and the new edition seems unaware of it all." *Id.* Where the United States was once a "paragon of human rights" with arguably enlightened aboriginal policies, the Universal Declaration of Human Rights announced a new era of international law. *Id.* (citing G.A. Res. 217A(III), U.N. Doc. A/777 (1948). When viewed in light of the evolving international standard, "U.S. Indian administration is woefully archaic, a throwback to an earlier era in the struggle for human dignity," *Id.* at 802.

Just as "Blackstone's opus became a conceptual straightjacket once its novelty had passed, rooting nineteenth-century English law in the morality and political dogma of the eighteenth century." *Id.* (noting that early American lawyers fought bitterly to "extirpate Blackstone from the literature because of its great power to perpetuate implicitly monarchist thinking under the guise of neutral common-law rules"); *see also* Morton Horwitz, *The Transformation of American Law 1780-1860* 44, 114-19 (1977) (noting that Blackstone's comments on property law were compelling and elegant, but entirely inappropriate in a new nation that lacked a landed peerage and ancient manorial titles), Cohen's *Handbook* may be

> destined to be admired by scholars as an historical milestone, but quickly surpassed in practice by more progressive thinking. Like the *Commentaries*, the *Handbook* may be viewed by coming generations as more of an excuse for the status quo of its time than a contribution to the growth of the living law.

Barsh, *supra* note 4, at 802. The 1982 *Handbook*, argues Professor Barsh, "begs the fundamental political and moral issue: the *legitimacy* of federal power to limit tribal sovereignty." *Id.* at 803. The editors multiply their error, suggests Professor Barsh, by assigning full responsibility to Chief

Justice John Marshall for the notion that "all Indian tribes are dependent nations in regard to the United States, rendering such provisions legally unnecessary." *Id.* at 804 (quoting COHEN, 1982 ED., *supra* note 4, at 65 n.37). The *Handbook's* editors cite Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831), for this "sweeping proposition but refer to no particular page at which it is to be found. Nor could they, for the Supreme Court said no such thing." *Id.* In fact, the Cherokee Nation had expressly accepted U.S. protection by treaty. That the Cherokee treaty, and not the Cherokees' race, was the source of the relationship was confirmed by Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 546-47, 553-54 (1832). Significantly, the entire "accepted political theory and international law concerning dominance of weaker by stronger nations" is an eighteenth- and nineteenth-century view of protectorates or dependencies grounded in consent — not nature, race, or status. *Id.* at 803 (citing H. WHEATON, ELEMENTS OF INTERNATIONAL LAW §§ 33-34 (1866), *reprinted in* CLASSICS OF INTERNATIONAL LAW 44-45 (J. Scott ed. 1936). Thus, writes Professor Barsh, the

> revised *Handbook* perpetuates the most invidious conceit of nineteenth-century European imperialism, that brown nations necessarily and inevitably come under the suzerainty of white nations. Documents of consent are immaterial; for their own good the poor savages are to consent.

Id. at 804. Professor Barsh also takes the *Handbook's* editors to task for failing to forthrightly address the trust relationship, *id.* at 808-09 (arguing that under authority derived from cases like Merrion v. Jicarilla Apache Tribe, 102 S. Ct. 894 (1982), Interior Department officials may "*balance* tribal interests with the interests of non-members" and gauge tribal actions against "'national policies'" — a view that renders "'trusteeship' meaningless except as an excuse for unbridled federal discretion at both the legislative and executive levels"), implicit divestiture, *id.* at 809-10 (the 1982 *Handbook*, which cites implicit divestiture as one of Indian law's "basic principles," promises to do for that concept what Cohen singlehandedly did for plenary power) (citing COHEN, 1982 ED., *supra* note 8, at 231-32, 244-45), and plenary power itself, *id.* at 810 ("'Plenary power' was a fairly novel idea in Felix Cohen's time, and his 1942 *Handbook* played a large role in establishing it").

Finally, it should be noted that Professor Wilkinson, Cohen's "heir apparent," *see supra* note 23, and Managing Editor of the 1982 *Handbook*, seems to have a clear predilection for justifications that deny tribal jurisdiction over non-Indians. In what is probably his most comprehensive treatment of the subject of Indian law, *see* Wilkinson, *supra* note 23, at 21-23, Professor Wilkinson devotes much attention to the settled interests of good-faith non-Indian settlers who took land on the reservations during the allotment era. But in his even-handed approach — obviously grounded in a deeply held regard for tribal sovereignty — Professor Wilkinson fairly concludes that

> [t]hese expectations cannot harden automatically into a right to be free of all tribal laws. The tribes had expectations, too, and they were merged into treaties and treaty substitutes that protected historic tribal government prerogatives within reservation boundaries. Yet neither can the expectations of the non-Indian residents, themselves premised upon open invitations tracing to federal law, fairly be ignored. The recurrent, essential task for the judiciary in Indian law has been to construct a reconciliation of the laws to which the two sets of expectations trace.

Id. at 23; *see also supra* note 33 (discussing the unacknowledged source of Felix Cohen's view of tribal sovereignty); *supra* note 352 (discussing the *Handbook's* anomalous citation to criminal law authority for the proposition at tribal court civil adjudicatory jurisdiction generally will not lie). At bottom then, citations such as those by Judges Hansen and McMillan that adopt the *Handbook's* analyses (albeit while drawing from different notations and applying widely divergent interpretations), it may simply be time for an entirely new *Handbook* from the "ground up." But it may also be that, in an area of law as necessarily dynamic and rapidly evolving as is the Indian

jurisdiction in determining the validity of tribal court jurisdiction,[386] Judge McMillan would have held in favor of tribal jurisdiction. Moreover, even should *Montana* properly apply to such analyses, the result should almost always favor tribal jurisdiction. Simply providing a forum for reservation-based injuries — even where both parties are non-Indian — satisfies both *Montana* exceptions.[387]

Finally, Judge Floyd R. Gibson dissented, expressing "dismay" at the majority's "unduly narrow view of 'limited sovereignty.'"[388] Such a "limited sovereignty" as was contemplated by the majority, wrote Judge Gibson, is, "in fact, no real sovereignty at all."[389] But regardless of whether sovereignty is viewed through the filter of inherent authority under *Iowa Mutual*,[390] or residual tribal interests under *Montana*,[391] Judge Gibson believed that the "power to adjudicate everyday disputes occurring within a nation's own territory is among the most basic and indispensable manifestations of sovereign power."[392] Nearly two centuries ago, Chief Justice Marshall set out that proposition in no uncertain terms — that

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law, a purported restatement like the *Handbook*, expedient as it may be for the harried or the inexperienced, is simply out of place at best — and counterproductive at its worst.

386. The existence of state court jurisdiction does not preclude tribal court jurisdiction. *A-1 Contractors*, 76 F.3d at 950 (McMillian J., dissenting) (citing Hinshaw v. Mahler, 42 F.3d at 1180 (approving tribal jurisdiction where concurrent state and tribal jurisdiction existed)). However, the inverse is not automatic: existence of tribal court jurisdiction may well preclude state court jurisdiction under Williams v. Lee, 358 U.S. 217 (1959). *Id.* This is particularly the case, wrote Judge McMillian, where a tribe has "established tribal courts and . . . a tribal code which provides for personal jurisdiction over non-Indians, subject matter jurisdiction over torts arising on the reservation, and application of tribal law." *Id.* In such cases, a tribe's attempt to assert its civil authority over the conduct of non-Indians on the reservation is usually upheld. *Id.* (citing *Williams*, 358 U.S. at 223 ("[T]he exercise of state jurisdiction [under the circumstances] would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves"); City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554, 558 (8th Cir. 1993) (rejecting the "narrow" definition of Indian country set out in 18 U.S.C. §§ 1154, 1156, and applying 18 U.S.C. § 1151 to find that the "geographic scope of state and tribal authority extends to a reservation's four corners" where non-Indian liquor sellers on fee lands within Indian reservation sought to enjoin tribal enforcement of liquor control and business license ordinances), *cert. denied*, 114 S. Ct. 2741 (1994); *cf.* Cowan v. Rosebud Sioux Tribe, 404 F. Supp. 1338, 1341 (D.S.D. 1975) (finding concurrent state and tribal jurisdiction where non-Indian lessee of tribal land sought to escape tribal court jurisdiction, but rejecting notion that such concurrent jurisdiction "necessarily preclude[s] tribal jurisdiction" in matter concerning regulation of tribal lands).

387. *A-1 Contractors*, 76 F.3d at 950-51 (McMillian, J., dissenting); *see also* Brown & Desmond, *supra* note 40, at 250-51 n.206 (quoting Sage v. Lodge Grass Sch. Dist. No. 27, Civ. No. 82-287 (Crow Tribal Ct. Sept. 12, 1985)) ("[T]he establishment of a court system to resolve civil disputes is 'an inherent and an essential attribute of Indian sovereignty.'").

388. *A-1 Contractors*, 76 F.3d at 944 (Gibson, J., dissenting).

389. *Id.*

390. 480 U.S. 9 (1987).

391. 450 U.S. 544 (1981)).

392. *A-1 Contractors*, 76 F.3d at 944 (Gibson, J., dissenting).

> [n]o government ought to be so defective in its organization, as not to contain within itself, the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of justice are the means most usually employed; and it is reasonable to expect, that a government should repose on its own courts, rather than on others.[393]

Anything less, suggested Judge Gibson, "interferes with the tribe's ability to manage its affairs by compromising its ability to deal with non-tribe members who happen to wreak havoc on tribal land."[394]

Furthermore, Judge Gibson was unconvinced that *Montana* has any "relevance outside the narrow context of a tribe's ability to regulate fee lands owned by non-Indians."[395] And if, for the sake of argument, *Montana* is controlling, this case still implicated tribal interests as defined under either of the *Montana* exceptions.[396] Besides the tribe's obvious interest in adjudicating disputes within its territory, Judge Gibson also believed that the case met the "consensual relationship" test set out as the first *Montana* exception.[397]

C. Oliphant's Other Shoe?

The Supreme Court has granted certiorari in *Strate*, agreeing to entertain two questions.[398] First, did the court of appeals err in applying the rule of *Montana* — that the inherent sovereign civil regulatory jurisdiction of Indian tribes over the activities of non-Indians has been generally divested as to lands alienated from Indian title by Congress, to a question of tribal adjudicatory jurisdiction over a civil tort action between two non-Indians arising on a state highway crossing Indian trust land within an Indian reservation, rather than applying *Iowa Mutual's* rule that tribes have retained their civil jurisdiction over non-Indian conduct on Indian land unless that jurisdiction has been expressly

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393. *Id.* (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 387-88 (1821)).

394. *Id.*

395. *Id.* at 944 and n.1 (citing *Montana*, 450 U.S. at 557-67). *See also, Iowa Mutual*, 480 U.S. 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. Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence is that the sovereign power remains intact).

396. *A-1 Contractors*, 76 F.3d at 944.

397. *Id.* Judge Gibson believed that A-1 Contractors's subcontract to perform work on the reservation was on all fours with the "consensual commercial contacts with the tribe" exception set out in *Montana*. *Id.* (citing *Montana*, 450 U.S. at 565-66). That subcontract was the *sine qua non* of the controversy: without it, the accident would never have occurred. *Id.* at 944-45. Finally, Judge Gibson convincingly disposed of the majority's focus on the claim that there was no proof to support the district court's finding of fact that A-1 Contractors was performing its contract when the accident occurred. *Id.* at 945.

398. Strate v. A-1 Contractors, 117 S. Ct. 37 (1996); *see infra* text accompanying notes 462-75.

limited by Congress? Second, and assuming, arguendo, that the *Montana* rule applies, does the Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation have civil jurisdiction over a personal injury claim brought by a non-Indian resident of the Reservation with strong ties to the tribe, against a non-Indian contractor that had a subcontract with the tribe's corporation to perform work on the Reservation, to recover for damages suffered in an automobile accident on a state highway on a federal right-of-way crossing Indian trust land on the Reservation?[399]

But even as we await the Supreme Court's judgment, *A-1 Contractors* has already created quite a stir. Some courts have used *A-1 Contractors* to support a limiting view of tribal jurisdiction.[400] Other courts seem to see *A-1*

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399. United States Supreme Court Petitioner's Brief at *i (1996 WL 656356).

400. *See, e.g.*, Yellowstone County v. Pease, 96 F.3d 1169, 1175 (9th Cir. 1996) (citing with approval the Tenth Circuit's en banc opinion in *A-1 Contractors*, then proceeding to analyze — and abrogate — Crow Tribal Court jurisdiction under the *Montana* rule where Pease, a tribal member landowner, challenged Yellowstone County's authority to collect state property taxes on fee land within the reservation); Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 180 (2d Cir. 1996) (citing *A-1 Contractors* and *Montana* for the proposition that "[l]imitations on tribal authority are particularly acute where non- Indians are concerned . . . The Supreme Court has recognized that tribal 'inherent sovereign powers . . . do not extend to the activities of nonmembers of the tribe'"); Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 880 (2d Cir. 1996) (tribes have a recognized power to "adjudicate civil disputes arising on their territory (with certain limitations on the power to exercise jurisdiction over non-Indians)") (citing *A-1 Contractors* and *Montana*)).

Even before the Tenth Circuit issued its en banc decision, however, *A-1 Contractors* was influencing other federal decisions. In *Wilson v. Marchington*, 934 F. Supp. 1176, 1181 (D. Mont. 1995), *rev'd*, No. 96-35145, 1997 WL 583704 (9th Cir. Sept. 23, 1997) (citing the *Montana* factors as the correct basis for determining the Blackfeet Tribe's adjudicatory jurisdiction over a non-Indian defendant in personal injury suit in Blackfeet Tribal Court and holding that "when an Indian tribe invokes its inherent sovereignty as the basis of its authority over non-Indians on non-Indian fee lands, there is a presumption against tribal authority"), Chief Judge Hatfield justified his view that the principles articulated in *Montana* are applicable to challenges to a tribe's adjudicatory jurisdiction because "tribal adjudicatory jurisdiction, like tribal regulatory jurisdiction, emanates from a tribe's retained inherent authority." *Id.* (citing AMERICAN INDIAN LAW DESKBOOK 131 (1993); Michael J. Dale, *Tribal Court Jurisdiction Over Reservation- Based Claims: The Long Walk to the Courthouse*, 66 OR. L. REV. 753, 796-98 (1987)). Judge Hatfield adopted Judge Hansen's "well-reasoned" (and *Montana* grounded) dissent in the vacated panel decision in A-1 Contractors v. Strate. But in doing so, the judge was forced to confront his own circuit's recent opinion in a very similar case. *See Wilson*, 934 F. Supp. at 1186 (citing Hinshaw v. Mahler, 42 F.3d 1178 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 485 (1994)). *Hinshaw* also concerned an action against a non-member residing on the Flathead Indian Reservation, seeking damages resulting from the death of another non-member who was killed in a traffic accident within the exterior boundaries of the reservation. *Id.* The Ninth Circuit ultimately upheld the tribal court's assertion of jurisdiction. *Id.* Judge Hatfield grudgingly accepted that holding, assuming that the *Hinshaw* court must have found implicitly that the Hinshaw' contacts with the Flathead Indian Reservation constituted the requisite "tribal interest" under the *Montana* exceptions. *Id.* at 1187. "To hold otherwise," wrote Judge Hatfield, "would require turning a blind eye towards the development of tribal sovereignty as articulated by the Supreme Court." *Id.* Accordingly, Judge Hatfield affirmed the Blackfeet Tribal Court's assertion of jurisdiction in

Contractors as support for a more benign view.[401] Still other courts approve of *A-1 Contractors's* approach, but have upheld tribal jurisdiction nevertheless.[402] And as is so common within the treacherous eddies and back currents of federal Indian law, similar reasoning has found its way into Executive Branch decision making.[403] But most troubling of all — and despite the important interests at stake in *A-1 Contractors* — it now appears quite likely that the Court may again dodge the jurisdictional bullet completely.[404]

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the case at bar. *Id.*

401. *See, e.g.*, Gaming Corp. Of America v. Dorsey & Whitney, 88 F.3d 536, 550 (8th Cir. 1996) (*A-1 Contractors* affirms that tribes have a "recognized interest in connection with parties who have explicit consensual dealings with it).

402. *See, e.g.*, State v. Hicks, 944 F. Supp. 1455, 1466 (D. Nev. 1996) (jurisdictional challenge to tribal court by a state game warden acting in his official capacity, noting that "[i]f the rule in *A-1 Contractors* is now indeed the law of the Ninth Circuit, it certainly provides a helpful framework). The court, nevertheless, recognized a "principled distinction between tribal adjudicatory jurisdiction and tribal regulatory jurisdiction." *Id.* at 1465.

403. *See* Cross, *supra* note 162, at 24-25. While not implicating *A-1 Contractors*, the EPA has nevertheless justified its rule-making decisions regarding tribes-as-state status under section 518(e) of the Clean Water Act on the same *Montana* rule factors that animate *A-1 Contractors*. Professor Cross suggests that the EPA has put its entire Indian environmental policy at risk in the bargain. *Id.*

404. This "vexing question," understates one commentator, "may have an easy answer." *See* Lash, *supra* note *. During oral arguments on January 7, 1997, Justice Souter focused, not on the contours of tribal adjudicatory power, but on what he termed a "a simple highway rule." *Id.* Under such a rule, if an injury occurs on a "state" road, then state courts should have jurisdiction. *Id.* Conversely, tribal courts would have authority over tribal roads. *Id.* Justice Souter's reasoning turned on his view that drivers should be able to depend upon a uniform body of law state highways — uniformity that would be upset if all of a sudden the rules changed by driving through a reservation on that thoroughfare. *Id.*

Justice Breyer expanded on Justice Souter's reasoning, suggesting that adjudicatory jurisdiction should flow naturally from a determination of whose law applies. "If it's the tribal law, go to the tribal court," Justice Breyer said. "If it's North Dakota law, go to North Dakota court." *Id.* Of course, this would simply rephrase the jurisdictional question — substituting challenges to a tribe's adjudicatory with challenges to its regulatory jurisdiction. And under the Court's current view of tribal regulatory authority — *Montana*, as well as its progeny *Brendale* and *Bourland*, grew out of just such challenges to tribal regulatory authority — there seems little doubt that the gradual shift already evident in the circuits would quickly turn into a veritable stampede for the tribal courthouse exits.

At any rate, attorneys for the tribal court and for the United States attempted to explain that the answer is not that easy — that a state highway, although regulated largely by the state, is nevertheless still on the reservation. *Id.* Melody McCoy, representing the tribal court, argued that, just as states settle conflicts between nonresidents arising within their borders, a tribe must be able to resolve disputes arising within the reservation's boundaries — even when they arise between non-members. *Id.* But the Court was apparently unmoved by this geographic view of tribal sovereignty. *Id.* Justice Ginsburg reiterated that the instant controversy occurred on a state road which was "on" the reservation but not a "part" of the reservation. *Id.* Under the "most basic choice-of-law" principle, Justice Ginsburg suggested that courts trying to resolve a civil dispute would rely on the law governing the site where the accident occurred — in this case North Dakota Highway 8. *Id.*

D. Beyond Exhaustion: Towards an Integrated Territorial View of Tribal Sovereignty

So what have we learned so far, poised as we are on the eve of a potentially monumental Supreme Court decision? Sadly, it seems, very little. We do know that many judges and advocates, concerned more with the rights and settled interests of individuals, than with the far older interests of Indian tribes, would likely opt to establish jurisdictional rules that blunt the scant deference the tribal exhaustion doctrine now concedes. Those actors would lay down bright lines — lines that would surely dissuade tribal courts from asserting jurisdiction in the face of almost certain reversal in federal court. We also know that another group — the clear minority, judging from the trend in federal appellate decisions — would urge a broader view of tribal sovereignty and greater deference towards the tribes' rights vis-à-vis self determination and self-government.

But these two factions share one unfortunate trait: each seems to possess a remarkably myopic view of the issues — a hair-splitting vision grounded in the judicially-framed dispute over whether cases like *Montana*, *Brendale*, and *Bourland* have so changed the face of the legal landscape that little tribal sovereignty survives.[405] What is too often missing is any discussion

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When asked by Justice Souter whether she had any doubt whether a North Dakota court might choose to apply tribal law in this controversy, Ms. McCoy admitted that the tribe had no substantive law governing this particular personal injury case. *Id.* The Assistant U.S. Solicitor General, Jonathan E. Nuechterlein, then played the exhaustion card, arguing that the tribal court, rather than its state counterpart, should decide in the "first instance" whether the tribe's interest in the case warrants tribal jurisdiction. *Id.* Nuechterlein suggested that, at least in this case, the tribe does have such a "particularized interest." *Id.* In response, Chief Justice Rehnquist appeared to favor state court jurisdiction. *Id.*

Patrick J. Ward, Counsel of Record for both A-1 Contractors and Lyle Stockert, stressed that, here, the tribal court lacks jurisdiction because the essence of tribal sovereignty is the authority to regulate the behavior of its members. *Id.* And even, noted Ward, where a tribe does have an interest in resolving disputes between nonmembers, "that interest can adequately be presented in state court" — presumably because, as he asserted, the state courthouse was closer to this accident site than the tribal court was. *Id.* According to Ward, the state's jurisdiction follows its highway "into the reservation." *Id.* Holding otherwise would be unfair to non-residents, who would have no notice that an accident on the state highway would result in their being haled into tribal court.

The Chief Justice thereupon suggested that the same could be said for motorists who drive across state lines. Ward responded that, while motorists generally understand the concept that state laws differ, they should not realize or expect such a difference when they enter a reservation. Quickly seizing on the absurdity of that proposition, Justice O'Connor replied, "You're just defending the ignorant." Justice Breyer restated the Chief Justice's comment regarding interstate drivers, and Justice Antonin Scalia offered some (hopefully) tongue-in-cheek advice for motorists who do not want to end up in tribal court — that you should "[j]ust stay on the good roads, and you've got nothing to worry about." *Id.*

405. My experiences thus far in law school suggest a likely wellspring of that species of myopia. But we will not start down that particular path when the light at the end of the tunnel is just becoming visible.

about what ought to be the proper scope of tribal sovereignty. And in one respect, that should not be surprising: such debates are probably the rightful business of political bodies rather than of courts of law. But the absence of that debate is still significant where, as in the case of tribal sovereignty, Congress is so often spectacularly silent.[406]

No matter whatever else the Eighth Circuit has accomplished, *A-1 Contractors* has nicely framed the issue of tribal adjudicatory jurisdiction in matters involving non-Indians. Simply put, it is either that: (1) simply because the *Montana* decision is discussed in both *National Farmers Union* and *Iowa Mutual*, the Court must have meant to bring tribal court jurisdiction within the ambit of the *Montana* rule;[407] or (2) geography matters.[408]

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406. *See, e.g.*, Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987) (citing with approval *Williams*, 358 U.S. at 220 ("[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them"). Primarily because of congressional silence, the Supreme Court has set out what would appear to be a clear rule — that because "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty . . . [c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." *Id.* at 18 (citing *Montana*, 450 U.S. at 565-66); *see also* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 n.14 (1982) ("Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact").

Clearly, Congress is not incapable of addressing these troubling issues. A modern example of a federal statute that expressly limits tribal authority over the activities of non-Indians on reservation lands is Public Law 98-290, 98 Stat. 201 (codified at 25 U.S.C. § 668 (1994)). Enacted in 1984, the statute was intended to resolve uncertainty over the boundaries of the Southern Ute Indian Reservation and the status of unrestricted land on the reservation. Recognizing that certain land within the reservation is owned in fee simple by non-Indians, the statute specifically limited the tribe's jurisdiction over those non-Indians on their fee lands. It provides that "[s]uch territorial jurisdiction as the Southern Ute Indian Tribe has over persons other than Indians and the property of such persons shall be limited to Indian trust lands within the reservation." 25 U.S.C. § 668 4(a) (1994). Furthermore, "[a]ny person who is not an Indian and the property of any such person shall be subject to the jurisdiction of the United States under section 1152 of title 18, United States Code, only on Indian trust land. Id. § 668 4(b).

407. *See* A-1 Contractors v. Strate, 76 F.3d 930, 936 (8th Cir. 1996) (en banc), *aff'd*, 117 S. Ct. 1404 (1997) ("When the Court observes in *Iowa Mutual* that '[t]ribal authority over the *activities* of non-Indians on reservation lands is an important part of tribal sovereignty,' 480 U.S. at 18, the Court cites *Montana* and thus is referring to the types of activities, like consensual contractual relationships . . . that give rise to tribal authority over non-Indians under *Montana*. Likewise, when the Court goes on to say '[c]ivil jurisdiction over *such activities* presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute,' *Id.* (emphasis added), the Court again is referring to a tribe's civil jurisdiction over tribal-based activities that exists under *Montana*"). Judge Hansen then proceeded to set out a remarkable paradox. In 1985, the "Court in *National Farmers Union* stated that 'the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed, as an extension of *Oliphant* would require.'" *Id.* (citing *National Farmers Union*, 471 U.S. at 855). That fact notwithstanding, Judge Hansen believed that, when, in 1981, the Court set out the *Montana* rule, it preemptively vitiated its own subsequent language in *National Farmers Union*. Thus, "[t]he appellees [in *A-1 Contractors*]

And perhaps nowhere as in matters of sovereignty do notions of territory and geography sit so squarely. The wholly geographic notion of extraterritorial rights, for example, can be traced as far back as the thirteenth century B.C., when Egypt granted permission to the merchants of Tyre to establish factories on the Nile, to live under their own laws, and to freely practice their own religion.[409] During the pre-Christian era of the Roman Empire on through the Dark and Middle Ages, many foreigners lived under their own laws in Egypt, Rome, the Byzantine Empire, the Latin kingdoms of the Levant, and China.[410] "While the origins of this extraterritorial jurisdiction may have differed in each country, the notion that law was for the benefit of the citizens of a country and its advantages not for foreigners appears to have been an important factor."[411] In the 15th century, with the Turkish conquest of the Byzantine Empire and the subsequent establishment of the Ottoman Empire, political relations between Christian Europe and the Near East were substantially altered. Nevertheless, in 1535 Francis I of France negotiated a treaty with Turkey providing, inter alia, French criminal and civil jurisdiction over French subjects in Byzantium. In 1830, the United States negotiated similar treaties with the Turks.[412] However, the emergence of the European nation-state and the simultaneous development of notions regarding absolute territorial sovereignty significantly changed the operation of extraterritorial rights.[413] Under that evolving view, sovereigns granted foreigners access to the advantages of local law, and sovereignty came to mean the exercise of sovereignty over all residents within the borders of the state.[414] Thus, longstanding customs such as extraterritorial consular jurisdiction largely died out among "Christian nations" in the eighteenth and nineteenth centuries.[415] Nevertheless, a new justification was found for such

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fail[ed] to recognize the fact that *Montana* specifically extended the general principles underlying *Oliphant* to civil jurisdiction." *Id.* at 937 (citing *Montana*, 450 U.S. at 565 ("Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe")). Therefore, according to Judge Hansen, "when *National Farmers Union* states that civil tribal jurisdiction over nonmembers is not foreclosed by *Oliphant*, that observation is perfectly consistent with *Montana*, which provides for broader tribal jurisdiction over non-Indians than does *Oliphant*." *Id.*

408. *Id.* at 941 (Beam, J., dissenting and concurring) ("The concept of 'tribal interest' as advanced by the court appears to be a free-floating theory wholly detached from geographic reality except in a most attenuated way.").

409. Reid v. Covert, 354 U.S. 1, 58 (1957).

410. *Id.* at 58-59.

411. *Id.* at 59.

412. *Id.*

413. *Id.* at 60.

414. *Id.*

415. *Id.*

jurisdiction in "those countries whose systems of justice were considered inferior," such as in Moslem and Far Eastern countries.[416]

The point, of course, is that the United States Government has long understood the geographic nature of sovereignty — that, in the course of negotiating treaties with sovereigns, a desire to retain extraterritorial jurisdiction over its own citizens requires express agreement. Clearly, the United States understood these rules in the late nineteenth century, when it was still in the practice of negotiating treaties with the Indian nations.[417] That neither negotiators, nor the Senate sitting in confirmation, typically demanded extraterritorial jurisdiction over non-Indians ought to at least give pause to present-day critics of tribal adjudicatory jurisdiction.

That view always underlies the seminal federal Indian law cases as well. In *Worcester v. Georgia*,[418] Chief Justice Marshall noted that the state

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416. *Id.*; *see also* John Quincy Adams, JUBILEE OF THE CONSTITUTION 73. Speaking on the occasion of the 50th anniversary of the inauguration of George Washington, ex-President Adams expressed his thoughts on "non-Christian" nations of the world — that

> [t]he Declaration of Independence recognized the European law of nations, as practiced among Christian nations, to be that by which they considered themselves bound, and of which they claimed the rights. This system is founded upon the principle, that the state of nature between men and between nations, is a state of peace. But there was a Mahometan law of nations, which considered the state of nature as a state of war — an Asiatic law of nations, which excluded all foreigners from admission within the territories of the state . . . . With all these different communities, the relations of the United States were from the time when they had become an independent nation, variously modified according to the operation of those various laws. It was the purpose of the Constitution of the United States to *establish justice* over them all.

Id. at 73. Until 1842, China asserted control over all foreigners within its territory. *Reid*, 354 U.S. at 60. But because of the Opium War, Great Britain and the United States negotiated treaties that obtained extraterritorial rights over their citizens via consular offices. *Id.* Writing to Secretary of State Calhoun, the United States representative to China explained that "I entered China with the formed *general* conviction that the United States ought not to concede to any foreign state, under any circumstances, jurisdiction over the life and liberty of a citizen of the United States, unless that foreign state be of our own family of nations, in a word, a Christian state." *Id.* A 1903 treaty reiterated that sentiment — that

> [t]he Government of China having expressed a strong desire to reform its judicial system and to bring it into accord with that of Western nations, the United States agrees to give every assistance to such reform and will also be prepared to relinquish extraterritorial rights when satisfied that the state of the Chinese laws, the arrangements for their administration, and other considerations warrant it in doing so.

Id. at 60-61. While Commodore Perry's first treaty with Japan did not include any exercise of judicial powers by United States officials over American citizens, a subsequent treaty did. *Id.* at 61. That claim to extraterritorial jurisdiction was finally abandoned in 1894, when Japan — even though still a "non-Christian" nation came to occupy the same status as Christian nations. *Id.*

417. Treaty-making was unilaterally terminated by Congress in 1871 in a rider to the Indian Appropriations Act, ch. 120, 16 Stat. 566 (1871) (codified at 25 U.S.C. § 71 (1994)).

418. 31 U.S. (6 Pet.) 515 (1832).

legislation at issue improperly interfered with relations between the United States and the Cherokee Nation — relations that the Constitution entrusted exclusively to the federal government, and with treaties

> which mark[ed] out the boundary that separate[d] the Cherokee country from Georgia; guaranty[ing] to them all the land within their boundary; solemnly pledg[ing] the faith of the United States to restrain their citizens from trespassing on it; and recogniz[ing] the pre-existing power of the [Cherokee] nation to govern itself.[419]

In the Chief Justice's view, the offensive Georgia legislation was clearly "extra-territorial."[420] And to Justice McLean, the geographic nature of sovereignty was even more significant — that

> [a] state claims the right of sovereignty, commensurate with her territory; as the United States claim[[421]] it, in their proper sphere, to the extent of the federal limits. This right or power, in some cases, may be exercised, but not in others. Should a hostile force invade the country, at its most remote boundary, it would become the duty of the general government to expel the invaders. But it would violate the solemn compacts with the Indians, without cause, to dispossess them of rights which they possess by nature, and have been uniformly acknowledged by the federal government.[422]

In the modern era, however, the Court's dedication to territorial sovereignty has clearly waned. *Oliphant* certainly suggests a rejection of the geographic view. Nevertheless, many of the modern decisions refuse to discard territorial sovereignty outright. Indeed, "[t]he Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty."[423] In *Williams v. Lee*,[424] the dispositive issue was the plaintiff non-Indian storekeeper's mere presence on the reservation, not

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419. *Id.* at 561-62.

420. *Id.* at 561.

421. This is no misspelling. As the wonderful Civil War historian Shelby Foote has noted, in the years before the rebellion, it was quite normal for people to say "the United States are." Only after the war did the usage take the form of "the United States is." For what it's worth, that minor semantical difference dramatically illustrates a monumental shift in thinking regarding state sovereignty.

422. *Worcester*, 31 U.S. (6 Pet.) at 591 (McLean, J., concurring); *see also* Jane M. Smith, *Republicanism, Imperialism, and Sovereignty: A History of the Doctrine of Tribal Sovereignty*, 37 BUFF. L. REV. 527, 547 (1988-89) (equating Justice McLean's view of sovereignty with de facto control of territory).

423. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980).

424. 358 U.S. 217 (1959).

tribal membership. In *Merrion v. Jicarilla Apache*[425] — decided less than a year after *Montana* — the Court warned that "[n]onmembers who lawfully enter tribal lands remain subject to the tribe's power . . . to place conditions on entry, on continued presence, or on reservation conduct . . . [a] nonmember who enters the jurisdiction of the tribe remains subject to the risk that the tribe will later exercise its sovereign power."[426] In the end, however, the significance of territorial sovereignty may be most important in terms of concerns over the settled interests of non-Indians, who, for whatever reason, find themselves in Indian country. For as Judge Pregerson noted a few years back, these claims can be — morally, at least — quite weak.

> It may well be that non-Indians who acquired land inside the reservation never expected to be subjected to regulation by the Indians. But likewise the Indians themselves never expected, when the Hell Gate Treaty set aside the Flathead Reservation "for the[ir] exclusive use and benefit" and barred non-Indians from living there without Indian assent, that reservation land opened without their consent to non-Indians would be removed from their jurisdiction. The Indians' expectations rest on the explicit guarantees of a treaty signed by the President and Secretary of State and ratified by the Senate. The non-Indians' expectations rest not on explicit statutory language, but on what is presumed to have been the intent underlying the allotment acts — a policy of destroying tribal government to assimilate the Indians into American society. It is difficult to see why there should be an overriding federal interest in vindicating only the latter expectations . . . .[427]

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425. 455 U.S. 130, 144 (1982).

426. *Id.* at 144-45. But we must be ever-mindful of just what the Court means when it uses a term like "tribal land." For while a discussion on the subject of state jurisdiction would rarely implicate only State-owned property in describing a State's territorial reach, it seems quite probable that "tribal land" here means something less — perhaps "tribally owned land, or trust land, or land not held in fee simple by anyone but a tribal member."

427. Confederated Salish and Kootenai Tribes of Flathead Reservation v. Namen, 665 F.2d 951, 964 (9th Cir. 1982). Professor Wilkinson suggests a possible source of this (sometimes surprising) recurring theme — that

> [i]t is far more complicated than a sense of guilt or obligation, emotions frequently associated with Indian policy. Somehow, these old negotiations — typically conducted in but a few days on hot, dry plains between midlevel federal bureaucrats and seemingly ragtag Indian leaders — are tremendously evocative. Real promises were made on those plains, and the Senate of the United States approved them, making them real laws. My sense is that most judges cannot shake that. Their training, experience, and, finally, their humanity — all of the things that blend into the rule of law — brought them up short when it came to signing opinions that would have obliterated those promises.

And when the courts depart from this logic, they quickly find themselves entangled in an intractable jurisprudential thicket. In short, the fiction that geography is somehow severable from sovereignty is an illusion peculiar to federal Indian law.[428]

E. Observations and Suggestions

Clearly, there seem to be (at least) three major interests at stake in any possible improvement upon the Hovenkamp cites, demonstrating that Scalia the "textualist" makes a strong appeal to tradition while ignoring the text of our Eleventh Amendment tribal exhaustion doctrine. First and foremost is the issue of tribal sovereignty. Second is the matter of the civil rights of all individuals that are subject to that sovereignty[429] — although arguably, that issue might logically be collapsed into the first.[430] Finally, there are the

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Wilkinson, *supra* note 23, at 121-22.

428. For an exhaustive and enlightening discussion of the geography-Indian law connexion, *see generally* Dussias, *supra* note 16.

429. This, in fact, seems to be the issue that animated the pre-*National Farmers Union* formulation of the exhaustion doctrine. In response to the Supreme Court's holding in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (the ICRA does not create a federal cause of action and the only remedy available under the ICRA is the writ of habeas corpus), there have been several attempts to effect legislative reform. *See, e.g.*, S. 2747, 100th Cong. (1988) (granting federal district courts jurisdiction over suits alleging violation of the Indian Civil Rights Act.), revised and reintroduced as S. 517, 101st. Cong. (1989).

In a similar vein, Professor Laurence has argued that tribal governments ought to have the power to "do what governments do" — to "exercise power over people, not all of whom consent to the precise exercise of the power." Laurence, *Memorandum*, *supra* note 31, at 14. He would permit jurisdiction over Indians and non-Indians in both civil and criminal cases. *Id.* However, Professor Laurence would also allow review of that power by the "dominant sovereign" (presumably in U.S. district court) in light of the tribes' limited sovereignty and their [physical] proximity. *Id.* Professor Laurence proposes that such review would be effected through habeas corpus in criminal cases, *id.* (citing 25 U.S.C. § 1303), and through collateral attack in civil matters, *id.* (citing 25 U.S.C. § 1302; 28 U.S.C. § 1983). Professor Laurence does qualify his suggestion, however, asserting that such review should be carried out with a great "amount of deference to tribal tradition" and to the tribes' interest in "modern evolution." *Id.*

Professor Clinton has proposed a seemingly less invasive remedy — of statutorily-created certiorari jurisdiction in the United States Supreme Court over final tribal court decisions under the ICRA in lieu of any proposal for federal district court jurisdiction to relitigate post-exhaustion cases. *See Enforcement of the Indian Civil Rights Act: Hearing Before the United States Comm'n on Civil Rights*, 100th Cong. 81-82 (1988) [hereinafter *ICRA Enforcement Hearing*] (remarks of Professor Robert N. Clinton). In the alternative, Professor Clinton has suggested that an Intertribal Court of Appeals would also satisfy demands for review of ICRA cases already tried in the tribal courts. Clinton, *Tribal Courts*, *supra* note 57, at 892.

Finally, Professor Reynolds suggests an expansion of Professor Clinton's suggested certiorari jurisdiction to "encompass not merely tribal court decisions interpreting the Indian Civil Rights Act, but also tribal court rulings that involve any federal question." *See* Reynolds, *supra* note 18, 1153-54.

430. The notion of admitting the existence of tribal sovereignty and then proceeding to a discussion of individual rights within that sovereign jurisdiction couched in terms culled from the

so-called settled expectations of non-Indians in Indian country[431] — even if a sea change in that respect would not be altogether unprecedented.[432]

At any rate, enlightened opinions range from qualified approval of the tribal exhaustion doctrine,[433] to a kind of resigned acceptance of the status quo,[434] to calls for a roots-up rethinking of the entire rule.[435] As a

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United States Constitution seems, at best, odd. Consider the idea of how France would react to suggestions that it entertain a discussion of the rights of its citizens premised on the rights set out in the United States Constitution.

431. As already discussed, this issue was crucial to the development of the *National Farmers Union-Iowa Mutual* formulation of the tribal exhaustion doctrine. Given the import Anglo-American jurisprudence places on upholding settled interests in property, it seems highly unlikely that any solution that does not adequately address the interests of non-Indians in Indian country will ever receive widespread acceptance. In *Arizona v. California*, 460 U.S. 605 (1983), the Court stated that proposition in no uncertain terms, noting that

> [i]n no context is this more true than with respect to rights in real property. Abraham Lincoln once described with scorn those who sat in the basements of courthouses combing property records to upset established titles. Our reports are replete with reaffirmations that questions affecting titles to land, once decided, should no longer be considered open.

Id. at 620. For an enlightening discussion of some of the expectations of non-Indians in Indian country, see Wilkinson, *supra* note 23, at 19-23.

432. *See, e.g.*, County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) (irrespective of claims of statutes of limitation or abatement, a 1795 transaction that purported to transfer approximately 100,000 acres in upstate New York was invalid where the requisite federal approval was not obtained). Professor Wilkinson notes that in that case, Arlinda Locklear, a "brilliant oral advocate" and the first Indian woman to argue before the Court, "stood alone at the Bar and marshaled a congeries of law, history, and morality" in an ultimately successful struggle to counteract nearly two centuries of inequity. Wilkinson, *supra* note 23, at 41; *see also* Confederated Salish & Kootenai Tribes of Flathead Reservation v. Namen, 665 F.2d 951, 964 (9th Cir. 1982); Laurence, *Memorandum*, *supra* note 31, at 14 (suggesting that legitimate expectations of those who have not "granted" consent to be so governed notwithstanding, that tribal courts ought to be vested with jurisdiction over Indians and non-Indians in both civil *and* criminal cases).

433. *See, e.g.*, Skibine, *supra* note 57, at 194-95, 222 (upon finding "striking similarity" between the reasons behind the exhaustion rule in both administrative and tribal venues, arguing that the "exhaustion requirements in federal Indian law should generally conform to the principles set out in administrative law," and grounded in the tribal courts' "expertise in determining whether control of a certain activity is essential to tribal self-government"); Wilkinson, *supra* note 23, at 114-15 (suggesting liberal federal post-exhaustion review on an "arbitrary and capricious standard" modeled on the Administrative Procedure Act, and characterizing the exhaustion doctrine as a "major step toward meeting the legitimate interests of non-Indians"). *But see* discussion of the troubling sovereignty ramification of such a policy at *supra* notes 57, 256-62 and accompanying text.

434. *See, e.g.*, 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, 286-93 (1993) (describing the doctrine as an opportunity for the development of the tribal courts); Laurence, *Memorandum*, *supra* note 31, at 13-14 (arguing against the jurisdictionally restrictive results in *Montana* and *Brendale* but supporting federal court review of "complaints about the exercise of that civil jurisdiction"); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic*

second-year law student and self-taught novitiate in Indian law, I will not be so arrogant as to propose a proper solution to the current state of affairs.[436] However, certain consistent themes do begin to emerge from a review of the decided cases and academic observations.

First, the exhaustion doctrine clearly reverberates beyond the federal and tribal courthouses. Although the state courts often become lost in the fray once a defendant files a challenge to tribal jurisdiction in federal court, these controversies are really jurisdictional disputes between state and tribal

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Nature of Federal Indian Law, 78 CAL. L. REV. 1137, 1234 (1990) (characterizing the doctrine as a happy melding of "Anglo-American procedural and substantive values" and "Indian traditions of dispute resolution" that give tribal courts the chance to "show that they can fairly and effectively litigate civil disputes involving non-Indian defendants"); Pommersheim, *supra* note 121, at 329 (approving of *National Farmers Union* and *Iowa Mutual* for their recognition of the importance of the tribal courts, and for their "special force" — their explicit rules that "curb the most prevalent attempts to undermine and circumvent tribal court jurisdiction"); Laurence, *Algebra*, *supra* note 162, at 422 (suggesting that plenary power with some tribal sovereignty is better than no tribal sovereignty at all).

435. *See, e.g.*, Phillip Wm. Lear & Blake D. Miller, *Exhaustion of Tribal Remedies: Rejecting Bright-Line Rules and Affirmative Action*, 71 N.D. L. REV. 277, 278-79 (1995) (arguing that "[b]right-line tests result from tortured reading of the seminal cases by federal district and appellate courts," that "protectionist attitudes favoring mandatory exhaustion . . . debase any notion of equal dignity of [tribal] courts," and which result in "nothing less than affirmative action for tribal courts"); David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403, 408-416 (1994) (challenging the courts to find a workable justification for federal plenary power that will help shape a model of statutory interpretation in federal Indian law); Clinton, *Redressing the Legacy*, *supra* note 37, at 150 (calling the tribal exhaustion doctrine a reflection of "the ultimate colonialist distrust of leaving the final resolution of such questions to tribal governance . . . all the more remarkable since the federal Full Faith and Credit Act, [28 U.S.C. § 1738 (1988)], seems to require all courts within the United States to give full faith and credit to tribal court judgments"); Resnik, *supra* note 162, at 692-96 (generally condemning the plenary federal power doctrine); Collins, *supra* note 162, at 370, 382-84 (suggesting that tribal sovereignty may be protected from Congressional interference through principles of international law as well as through the Supremacy Clause, but noting that the most important structural protection of tribal sovereignty is the allocation of paramount power to the federal government rather than to the states); Robert A. Williams Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 276 (1989) (calling proposals for authorization of federal court review of tribal decisions the "legacy of European racism and imperialism"); Williams, *Indian Jurisprudence*, *supra* note 162, at 258-67 (characterizing plenary federal power as a lawless force exerted on a conquered people); Williams, *Eurocentric Myopia*, *supra* note 162, at 439 (arguing that the discovery and plenary power doctrines deny Indians true self-determination); *see also* Newton, *supra* note 162, at 261-67 (suggesting that tribal sovereignty may be protected from Congressional interference through the Due Process Clause); *See generally ICRA Enforcement Hearing*, *supra* note 429, at 77, 80 (remarks of Professor Robert N. Clinton) (stating that federal review of tribal court decisions is unnecessary since tribal court abuses of power are "episodic" exceptions to the norm).

436. I also expect to be labelled naive, overly idealistic, simplistic, and/or unrealistic. That is, I reckon, the luxury of quasi ignorance.

courts.[437] When *National Farmers Union* expressly converted all such disputes into section 1331 federal questions, it also interposed an "unnecessary . . . federal overlay" in those disputes.[438] So in effect, *National Farmers Union* simply provided another avenue by which litigants might challenge tribal courts.[439] And the *National Farmers Union/Iowa Mutual* formulation, for a time at least, seemed to create an automatic preference for the tribal forum when state court jurisdiction might be proper.[440]

Second, the altogether muddled relationship between tribal regulatory/legislative jurisdiction and adjudicatory jurisdiction needs to be settled with clarity and finality. Assuming, for a moment, the validity of the existing plenary federal framework, the former seems likely to remain a fixture of federal law. Accordingly, the federal courts have been exercising jurisdiction over challenges to tribal regulatory authority under notions of tribal "quasi-sovereignty" since the early nineteenth century.[441] Conversely,

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437. *Cf.* Reynolds, *supra* note 18, at 1136.

438. *Id.*

439. *Id.*

440. *Id.* Professor Reynolds documents the ongoing post-*Williams v. Lee* struggle between the state and tribal courts to "delineate the contours of exclusive tribal court jurisdiction." *Id.* (citing Margery H. Brown & Brenda C. Desmond, *Montana Tribal Courts: Influencing the Development of Contemporary Indian Law*, 52 MONT. L. REV. 211, 250-304 (1991) (describing the evolution of state and tribal court jurisdiction in Montana)); Frank R. Pommersheim, *Tribal-State Relations: Hope for the Future?*, 36 S.D. L. REV. 239, 248-76 (1991) (examining attempts by tribal and state courts to address the nature of the legal relationship between tribes and states)). Moreover, the once-bright *Williams v. Lee* line has become blurred by the rise of tribal business activities conducted with non-Indian, non-reservation based partners. REYNOLDS, *supra* note 18, at 1137. In such cases, there may be a good case for finding concurrent state and tribal jurisdiction. *See, e.g.*, Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 466 (1989) (opinion of Blackmun, J.) ("[T]he Court has recognized coextensive state and tribal civil jurisdiction where the exercise of concurrent authority does not do violence to the rights of either sovereign"); *see also* White Mountain Apache Tribe v. Smith Plumbing Co., 856 F.2d 1301, 1306 (9th Cir. 1988) (the state court properly asserted jurisdiction in a suit between non-Indians where "no Indian assets or other property situated in Indian country could be directly affected"). *Cf.* Cowan v. Rosebud Sioux Tribe, 404 F. Supp. 1338 (D.S.D. 1975) (the tribal court had jurisdiction in controversy concerning the regulation of tribal land). Finally, Professor Reynolds argues that the tribal exhaustion doctrine ignores a legitimate state interest in adjudicating disputes involving significant off-reservation contacts — that under the exhaustion doctrine's "virtually unlimited reach, the federal courts are now able to channel into tribal courts many cases that under a Williams v. Lee analysis would not fall within the tribal courts' exclusive jurisdiction." Reynolds, *supra* note 18, at 1137.

441. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (Indian tribes had no power to confer title to land); *see also* South Dakota v. Bourland, 508 U.S. 679 (1993) (striking down the tribe's purported power to regulate non-Indian hunting on non-tribal lands located within the reservation's borders); Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (the tribe had no regulatory power over land use in the "opened" area of its reservation); Montana v. United States, 450 U.S. 544, 565 (1981) (denying the Crow Tribe's power to regulate hunting and fishing by nonmembers within the borders of the reservation on

the Supreme Court has long recognized that the tribal courts are an essential element of the tribes' inherent sovereignty. Moreover, they are an element not subject to the United States Constitution.[442] In that respect, *Iowa Mutual's* recognition that civil jurisdiction over non-Indians on reservation lands "presumptively lies in the tribal courts" was simply a continuation of that long-standing policy.[443] And "[j]ust as the federal courts are powerless to disagree with a state court's interpretation of its own laws, so too should the tribal court be the final arbiter of the scope and meaning of its legislative enactments."[444] Professor Reynolds argues convincingly that the logical outcome of this line of reasoning should be the complete removal of challenges to tribal adjudicatory power from federal question jurisdiction, while simultaneously eliminating the tribal exhaustion rule in federal court challenges to tribal regulatory power.[445]

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fee land owned by nonmembers in light of the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe").

442. *See, e.g.*, Talton v. Mayes, 163 U.S. 376 (1896) (Indian tribe was not constrained by grand jury requirement since tribal powers existed before the Constitution, or the Fifth and Fourteenth Amendments).

443. Iowa Mutual v. LaPlante, 480 U.S. 9, 18 (1987). Professor Singer discusses the detrimental results of the failure to distinguish adjudicatory jurisdiction from legislative jurisdiction, noting that the AMERICAN INDIAN LAW DESKBOOK's citation to the legislative jurisdiction cases such as *Montana* and *Brendale* to support the editors' narrow view of tribal court adjudicatory jurisdiction, is, at best, misleading. *See* Singer, *supra* note 217, at 324-25.

Professor Singer's assertions certainly seem borne out in a recent case heard in Montana's federal district court. *See* Wilson v. Marchington, 934 F. Supp. 1176 (D. Mont. 1995), *rev'd*, No. 96-35145, 1997 WL 583704 (9th Cir. Sept. 23, 1997). Chief Judge Hatfield followed the DESKBOOK's recommendations and applied *Montana* to conclude that "when an Indian tribe invokes its inherent sovereignty as the basis of its authority over non-Indians on non-Indian fee lands, there is a presumption against tribal authority." *Id.* at 1181. *But see* State v. Hicks, 944 F. Supp. 1455, 1466 (D. Nev. 1996) (citing *A-1 Contractors* with approval but recognizing a principled distinction between tribal adjudicatory and legislative authority under *Montana*).

Professor Reynolds goes so far as to suggest that the root cause of this confusion may lie in *National Farmers Union* itself. *See* Reynolds, *supra* note 18, at 1140-41 (citing *National Farmers Union*, 471 U.S. at 854). In *National Farmers Union*, Justice Stevens, in attempting to explain why exhaustion had not been an issue previously, chose to distinguish Leroy Sage's case from the criminal action in *Oliphant*. *National Farmers Union*, 471 U.S. at 854 (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)). Exhaustion was not at issue in *Oliphant* because federal legislation seemed to reserve exclusive criminal over non-Indians in Indian country to the federal courts. Thus, absent any hint of tribal jurisdiction, exhaustion would have been pointless. Tribal court adjudicatory jurisdiction in civil matters, however, was not "automatically foreclosed." *Id.* at 855. But in drawing that distinction, Justice Stevens "unnecessarily equated disputes involving tribal legislative jurisdiction with disputes involving tribal court adjudicatory power." Reynolds, *supra* note 18, at 1141.

444. *See* Reynolds, *supra* note 18, at 1147.

445. *Id.* at 1149-52. In such cases, the tribal courts would retain concurrent jurisdiction in an analogue to the "unremarkable" situation wherein state courts retain concurrent jurisdiction to decide issues of federal law. *Id.* Professor Reynolds notes, however, that this would in turn require extension of the common law doctrines that govern the relationship between state and

Third, because this result would create a class of cases unreviewable under any existing formulation,[446] Professor Reynolds argues for expansion of the Supreme Court's certiorari jurisdiction to include not just ICRA actions, but any tribal court decision that involves a federal question.[447] While this suggestion is not ideal — it would, at minimum, still impinge upon tribal sovereignty — such a change would at least end the untenable circumstance under the current rule where a tribal court may be relegated to the role of little more than fact-finder for a federal district court.[448] It would also be a pragmatic recognition that, given the tribes' political status within the federal scheme, an autonomous tribal justice system is not currently a viable option.[449]

Finally, Professor Reynolds suggests that the limited number of cases the Court accepts on certiorari would support claims that only certiorari review would be an inadequate deterrent to abuses of adjudicatory power. But her

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federal courts. *Id.*

446. Essentially an expansion of the rule set out in *Santa Clara Pueblo* — that tribal court decisions under the ICRA are final and unreviewable.

447. *See*, Reynolds, *supra* note 18, at 1153-56. Presumably, this suggestion builds upon her earlier suggestion that challenges to tribal court adjudicatory jurisdiction should no longer pose a federal question under section 1331.

448. *Id.*

449. *Id.* Professor Reynolds observes that, regardless of the underlying motivation, neither Congress nor the federal courts are apt to allow any significant expansion of tribal court jurisdiction over non-Indians absent some form of subsequent federal review.

Perhaps even more importantly, an unrestrained tribal judiciary might discourage at least some business development between Indian and non-Indian enterprises. (This does not necessarily suggest any racist motivation, but rather only recognizes the inherent desire of many business people to conduct their affairs in a familiar and somewhat predictable environment). The Seventh Circuit addressed this problem in a recent case between an Illinois law firm and its tribal client. *See* Altheimer & Gray v. Sioux Manufacturing Corp., 983 F.2d 803 (7th Cir. 1993), *cert. denied*, 510 U.S. 1019 (1993). In light of a choice of law provision expressly designed to avoid the tribal forum, the Seventh Circuit upheld the provision and refused to order exhaustion of tribal remedies. *Id.* at 814. Exhaustion was held inappropriate because the tribal court would have had to interpret Illinois law, because no tribal court proceedings were pending, and because no tribal ordinance was challenged. *Id.* Moreover, the Seventh Circuit believed that refusing to enforce the explicit choice of law provision in this contract could result in disadvantaging a tribes' economic activities in regional or national markets, and thus, "the Tribe's efforts to improve the reservation's economy may come to naught." *Id.* at 815.

But read with just a slightly different intonation, of course, this is simply another case of paternalistic tutelage — of a federal court instructing a tribe in what it ought to do for its own good. Presumably, the tribal court would be cognizant of these factors even without the Seventh Circuit's instruction. Professor Reynolds similarly notes that "[i]f concern for tribal sovereignty is really the motivating factor behind the exhaustion doctrine . . . perhaps the Seventh Circuit should have allowed the tribal court to determine the validity and scope of the contract's choice of law provision." Reynolds, *supra* note 18, at 1134 (citing Fuller v. Blaze Constr. Co., 20 Indian L. Rep. (Am. Indian Law. Training Program) 6011, 6011-12 (Rosebud Sioux Ct. App., Jan. 14, 1993) (remanding to the tribal court for an opinion on the enforceability of a contract provision that purported to give the defendant unrestricted power to choose the federal or tribal forum)).

appraisal — essentially that Supreme Court review would not operate in a political vacuum — is less than satisfying. Professor Reynolds essentially suggests a carrot-and-stick approach — that ongoing Interior Department supervision, together with the tribes' desire to continue receiving federal monies and to placate potential non-Indian business contacts, and the need to obtain collateral enforcement of tribal court judgements in state court would all operate as effective checks on tribal court abuses.[450] In light of those comments, mention of a few other possibilities seems apropos.

First and foremost, funding of tribal justice systems ought not to be tied to subjective expectations of competence and "fairness" based on Anglo-American notions of due process.[451] As sovereigns, the tribes have an inherent right to apply their own brand of substantive and procedural law.[452] And tribal court competence can only be hindered by denial of adequate funding for tribal court training and operations.[453] In other words,

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450. Reynolds, *supra* note 18, at 1155-56.

451. *Cf.* State v. Hicks, 944 F. Supp. 1455, 1467 & n.22 (D. Nev. 1996) (accepting that some tribal councils act as appellate bodies and as executive decision makers, and that tribal court proceedings may "vary substantially from what practitioners have come to expect in federal courts").

452. *Cf.* Hilton v. Guyot, 159 U.S. 113, 204-05 (1895) (The mere fact the procedures employed by a foreign court do not embody the same safeguards recognized as inherent in the Due Process Clause of the United States Constitution is not, in and of itself, "a sufficient ground for impeaching the foreign judgment").

453. In 1993, Congress acted to support the tribal justice system by enacting the Indian Tribal Justice Act, Pub. L. No. 103-76, 107 Stat. 2004 (1993) (codified at 25 U.S.C. §§ 3601-3631 (1994)). This Act was, in part, a response to calls for federal court review of tribal court decisions. *Statement Before the Senate Committee on Indian Affairs on Tribal Sovereign Immunity, available in* 1996 WL 10831369 (Sept. 24, 1996) [hereinafter *Endreson Statement*] (statement of Douglas B.L. Endreson of the law firm of Sonosky, Chambers, Sachse & Endreson). The Act expressed strong support for the tribal judiciary by providing resources and funding essential to the development of tribal justice systems. *Id.* It also reaffirmed Congress' goal that "Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems" and that "tribal government involvement in and commitment to improving tribal Justice systems is essential to the accomplishment of the goals of this Act." *Id.* (citing 25 U.S.C. § 3601(4)). The Indian Tribal Justice Act authorizes appropriations of $58.4 million annually over a seven-year period — with $50 million to be used for the basic operations of tribal judicial systems — in the expectation that tribal court systems will be increasing their workload and expanding their jurisdictional scope at a substantially more rapid pace. *Id.* Moreover, Congress recognized that "the lack of available funds places severe constraints on the development of tribal justice systems." Reynolds, *supra* note 18, at 1157 & n.1 (citing H.R. REP. No. 205, 103d. Cong. 9 (1993), reprinted in 1993 U.S.C.C.A.N. 2425, 2430). However, the Indian Tribal Justice Act notwithstanding, funding for tribal courts has, in fact, declined. *Endreson Statement, supra,* at n.32 and accompanying text. The amount actually expended for tribal judicial systems in Fiscal Year 1996 was $10.443 million — $4 million less than in FY 1995. *Id.* Ninth Circuit Court of Appeals Judge Canby has testified that the current funding scheme for tribal courts is at crisis stage, and that "[a] collapse of the tribal court system for lack of resources would be a major judicial disaster, not just for the tribes and their courts, but for our whole system of civil and criminal justice." *Oversight Hearing on the Indian Tribal Justice Act*

while more money alone would provide no guarantee that tribal courts would equal the expectations of every federal or state court judge — or even of most Indian and non-Indian defendants — the absence of adequate funding can virtually assure that they never will.

Nor should the specter of denied enforcement of tribal court judgements be an available "stick" with which state and federal courts can impose their own standards on tribal governments. In light of the unique status of Indian tribes within the federal scheme,[454] it is "imperative, not only that a uniform body of law develop in relation to the recognition and enforcement of civil judgments rendered in the various tribal courts, but that issues relating to the recognition and enforcement of the judgments be resolved in accordance with federal law."[455] Accordingly, it might be time that Congress brings tribal court judgements within federal full faith and credit.[456]

Before the Senate Comm. on Indian Affairs, 103rd Cong., 1995 WL 457394, at *14 (Aug. 2, 1995) (statement of the Hon. William C. Canby, Jr., Judge, United States Court of Appeals for the Ninth Circuit).

454. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 851 (1985).

455. Wilson v. Marchington, 934 F. Supp. 1187, 1191-92 (D. Mont. 1996), *rev'd*, No. 96-35145, 1997 WL 583704 (9th Cir. Sept. 23, 1997).

456. *See also* Clinton, *Tribal Courts*, *supra* note 57 (arguing that existing policy bolsters the negative aspects of tribal-governmental relations while doing little to foster positive developments, and urging adoption of an inter-governmental relationship modeled upon international law ideals — but applying full faith and credit rather than mere comity); Clinton, *Redressing the Legacy*, *supra* note 37, at 150 ("[T]he federal Full Faith and Credit Act [28 U.S.C. § 1738 (1988)] seems to require all courts within the United States to give full faith and credit to tribal court judgments"); AMERICAN INDIAN LAWYER TRAINING PROGRAM, INC., MANUAL OF INDIAN LAW E-8 n.22 (1976) (citing COHEN, 1942 ED., *supra* note 33, at 145 and cases for the proposition that several states seem to recognize full faith and credit for tribal court judgements).

Full faith and credit can be a two-edged sword however. While it would certainly ensure a tribal court the ability to enforce its judgements, it would also require reciprocity. Hence, a tribal court might find itself obliged to enforce the order of a distant court with no cognisance of a tribal member's cultural, social or economic circumstances. Professor Laurence seems to share that concern. *See, e.g.*, Laurence, *Enforcement*, *supra* note 31, at 685-86 (arguing that bilateral full faith and credit would be too rigid and would sweep too broadly). But under similar grants of flexibility, the courts have long been permitted to determine the existence and extent of a tribal court's jurisdiction based on "a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." *National Farmers Union*, 471 U.S. at 855-56. Moreover, Professor Laurence's vision relies, I fear, too much on negotiations between state and tribal governments that would be predicated on a "mutual desire to create a system that does the job, and the mutual respect for differences that drives comity and makes it work." Laurence, *Enforcement*, *supra* note 31, at 686-87. It appears that jurisdictional jockeying in both adjudicatory and regulatory controversies seems simply too ingrained to trust in that kind of optimistic view. *Cf.* Cross, *supra* note 162 (discussing the State of Montana's recent challenge to the EPA's approval of the Confederated Salish and Kootenai Tribe's application for treatment as a state for purposes of enforcing portions of the Clean Water Act).

Of course, some pretty dicey situations could arise where a court refuses to honor a tribal

court's judgement on a showing that the tribal forum is biased, incompetent or otherwise unfit. *See, e.g.*, Hilton v. Guyot, 159 U.S. 113, 202 (1895) (authorizing refusal to recognize a foreign judgement where the domestic court is convinced that there was no opportunity for a full, fair and impartial trial before a court of competent jurisdiction upon "regular" proceedings). While it would be nice to hold unqualifiedly that all tribal forums are equal in that respect, the reality is that they are not yet so.

Mindful of the foregoing, I would add to the full faith and credit recommendation, a three-pronged approach: (1) ensuring that tribal justice systems receive the funding they need to carry out their missions; (2) tribes at least considering the benefits of permitting non-Indians to sit on juries that concern non-Indian issues or parties; and (3) expanding the role of intertribal courts of appeal.

The first prong has been discussed at length. The second — more inclusive juries — would surely appeal to those who worry most about impartiality and due process issues. Of all the possible contributions citizens can make to governance, jury participation is widely considered a most vital barrier to governmental arbitrariness.

> The institution of the jury . . . places the real direction of society in the hands of the governed, or of a portion of the governed, and not in that of the government. . . . He who punishes the criminal is . . . the real master of society. . . . All the sovereigns who have chosen to govern by their own authority, and to direct society instead of obeying its directions, have destroyed or enfeebled the institution of the jury.

ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 282-83 (1948 ed.). Few (politically possible) developments would do as much to mitigate nonmembers' concerns. This would, of course, have to be decided by each tribe individually. However, there is a model in place — nonmember citizens of the Navajo Nation already serve on civil juries in Navajo Tribal Courts. *See Hearings on Section 329, H.R. 3662 Before the Senate Committee on Indian Affairs Concerning Civil Jurisdiction Within Indian Country*, 1993 WL 10831410 (Testimony of Herb Yazzie, Attorney General of the Navajo Nation).

An expanded intertribal appellate body — modeled on the existing regional intertribal courts of appeal or on international adjudicative tribunals — might serve to certify tribal courts under the amended Full Faith and Credit Act. It could also serve as a clearinghouse for tribal court training programs, and provide a rich source of caselaw for the *Indian Law Reporter*. Perhaps that body could provide intermediate review, situated between the tribal courts and the Supreme Court under something like Professor Reynolds's proposal for broadened certiorari jurisdiction. The only stumbling blocks would seem to be how a consensus would be reached on funding, staffing and appointing judges to such a body. The process, however, could itself prove a enriching experience for those involved.

There is one other potential problem. A shift such as described here could precipitate another significant challenge to tribal court jurisdiction — this time under the federal diversity statute. *See* 28 U.S.C. § 1332 (1994). Professor Pommersheim notes that diversity jurisdiction is essentially a method of filling in jurisdictional voids as well as a means of assuring litigants a neutral forum. *See* Pommersheim, *supra* note 121, at 348-51. He worries, however, that application of the diversity doctrine in federal courts today "is also clearly at odds with current federal Indian policy supporting tribal court development." *Id.* at 350. Professor Pommersheim believes the biggest problem with diversity is that it "breaks down in the context of diversity in the tribal court situation because no plaintiff has access to a state forum." *Id.* at 350-51 (citation omitted). Professor Reynolds suggests, however, that these concerns can be addressed simply by substituting the term "a non-federal forum" in place of "a state forum." *See* Reynolds, *supra* note 18, at 1103. By viewing diversity more broadly — as a choice between not just a state and federal court, but also as between a federal and a "non-federal" court — the fact that there might be no available state forum is irrelevant. *Id.* In cases where a matter is properly cognizable in

tribal court, the tribal court simply "stands in the stead of the state court." *Id.*

Currently, individual Indians are considered citizens of their home states, and are subject to the same diversity rules as non-Indians. *See, e.g.*, Begay v. Kerr-McGee Corp., 682 F.2d 1311 (9th Cir. 1982) (where each Indian plaintiff was citizen of different state from each defendant mining company, the individual Indians properly invoked the district court's diversity jurisdiction in action alleging that Indian uranium miners were exposed to substantial amounts of radiation, causing lung cancer and other severe radiation-related injuries and death); Schantz v. White Lightning, 502 F.2d 67 (8th Cir. 1974) (Federal diversity jurisdiction did not exist in action arising out of accident on Indian reservation where the defendant Indians were members of tribes located in North Dakota and the non-Indian plaintiffs were also residents of North Dakota). *Cf.* Romanella v. Hayward, 933 F. Supp. 163 (D. Conn. 1996) (where cashier of tribal casino who was a citizen of Rhode Island brought personal injury suit against Mashantucket Pequot Tribal Nation after falling in an off-reservation tribally owned parking lot, the tribal officials were citizens of Connecticut but the Indian Nation was not a citizen of any state for purposes of diversity jurisdiction). However, tribes are generally not considered citizens of a state except unless incorporated under either the IRA or tribal law. *See, e.g.*, Oneida Indian Nation of New York State v. Oneida County, 464 F.2d 916 (2d Cir. 1972), *cert. granted*, 412 U.S. 927, *rev'd on other grounds*, 414 U.S. 661 (1974) (where the Oneida Indian Nation brought action in federal court against two New York counties to challenge an eighteenth century sale of tribal lands under the Indian Non-Intercourse Act, the nation was not a citizen of a state different from New York for purposes of diversity jurisdiction under statute conferring jurisdiction in actions between citizens of different states); Whiteco Metrocom Div. of Whiteco Industries, Inc. v. Yankton Sioux Tribe, 902 F. Supp. 199 (D.S.D. 1995) (the district court lacked diversity jurisdiction in action arising from alleged breach of contract where the tribe was not incorporated under the IRA and was therefore not citizen of any state for purpose of diversity jurisdiction); Snowbird Const. Co., Inc. v. United States, 666 F. Supp. 1437 (D. Idaho 1987) (an incorporated tribal housing authority with its principal place of business in Nevada was citizen of Nevada for diversity purposes); R. C. Hedreen Co. v. Crow Tribal Hous. Auth., 521 F. Supp. 599 (D. Mont. 1981) (a defendant tribal housing authority, established as a corporate entity pursuant to a tribal ordinance, was a citizen of the state of Montana for diversity purposes even though the Indian tribe itself was not considered a citizen of Montana or of any other state; it was not the tribe which was being sued, but the housing authority established by the tribe as a legal entity susceptible to suit on its contracts in any court of competent jurisdiction). *Cf.* Enterprise Elec. Co. v. Blackfeet Tribe of Indians, 353 F. Supp. 991, 992 (D. Mont. 1973); *accord* Gaines v. Ski Apache, 8 F.3d 726 (10th Cir. 1993) (fact that an Indian tribe's constitution referred to tribe as being "in the nature of a non-profit corporation" did not establish the tribe or its ski resort as a corporation for purposes of diversity jurisdiction with respect to plaintiff's suit for injuries received when he was struck in back of his head by chairlift at ski resort); R. J. Williams Co. v. Fort Belknap Hous. Auth., 509 F. Supp. 933 (D. Mont. 1981) (the diversity statute does not confer federal jurisdiction over a tribe or tribal court). *But see* Gaines v. Ski Apache, 8 F.3d 726, 729 (10th Cir. 1993) (a tribe may charter a corporation pursuant to its own tribal laws, and such a corporation will be considered a citizen of a state for purposes of diversity jurisdiction) (citing Stock West, Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221, 1223 n.3, 1226 (9th Cir. 1989)).

Thus, it seems plausible that statutory full faith and credit for tribal courts could lead to well-argued calls for treating tribes as states for purposes of removal to federal court. There is no great logical chasm between recognition that under some circumstances an Indian tribe is not a citizen of any state, to a recognition of Indian tribes as *quasi-foreign* states for purposes of diversity jurisdiction. And as Professor Singer notes, the Supreme Court very often treats tribes as sovereigns when the tribes would benefit more from being treated as property owners, but often treats tribes as voluntary associations when they would benefit instead from being treated as sovereigns. Singer, *supra* note 16, at 55-56. Even under the current formulation of the diversity

Conclusion

Out of the political turmoil and social unrest of the 1960s, two significant developments occurred in the federal Indian law. The Supreme Court, through *Williams v. Lee's* progeny, reasserted the long-dormant concept of tribal sovereignty. Later in that decade, Congress, in an attempt to ensure the civil rights of individual Indian people, enacted the Indian Civil Rights Act of 1968. And through the complexities of Anglo-American law and jurisdictional wrangling, these two grand movements transmogrified into what we now know as the tribal exhaustion doctrine.

This article has argued that this tribal exhaustion doctrine was largely derived from existing legal rules that governed the review of inferior forums in administrative and habeas corpus actions. Perhaps in part due to the less than candid approach regarding both process and goals, the result is an often confused and inconsistent body of law. Moreover, this view of tribal courts at once demeans the tribal courts and, more significantly, could lead to a serious erosion of tribal sovereignty generally.[457] Finally, the tribal exhaustion doctrine has afforded Congress enough breathing room that it could ignore serious problems concerning the Indian justice system — problems caused both by the doctrine itself, as well as by insufficient funding.

Ultimately, the question goes beyond merely whether the body of decisions that have resulted from the tribal exhaustion doctrine have been correct or even just: rather, it goes to the essential question of whether that body of law accords the proper respect to modern tribal governments. In light of Congress's clear responsibility to ensure that respect, it is time for a long-overdue legislative response to this unsettled state of affairs. The fundamental interests of the tribes and of individual Indian peoples issues are likely just too complex for adequate treatment under common law principles.[458] There are also settled interests of non-Indian landowners and residents of Indian reservations to consider.[459] Even an unwary tourist's

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statute, the result could be removal to federal court of virtually any controversy between a reservation resident and nonresident — and even where the parties are residents of the same state, and even of the same county! That, in turn, could interpose federal involvement in tribal court proceedings far beyond the impact *National Farmers Union* has ever had. Moreover, since that argument would be grounded in territorial sovereignty, it might prove even more difficult to counter. Finally, since a federal court sitting in diversity (absent contractual agreements to the contrary) must apply the substantive law of the forum "state" — and since it is fairly inconceivable that federal district courts will be established on reservations any time soon — non-Indians would enjoy yet another advantage.

457. *See supra* notes 37, 277.

458. *Cf.* Wilkinson, *supra* note 23, at 118-19 (noting that when courts justly act to rectify individual abuses, all tribes' rights are necessarily implicated).

459. Nevertheless, maintenance of the status quo should not be held out as justification for

simple act of traveling through Indian country on a federal or state highway might result in their very real and immediate interest in the scope of tribal jurisdiction. Unfortunately, simply staying on the "good roads" is no solution.[460] And if the Supreme Court again avoids the important questions in its forthcoming decision in *A-1 Contractors*, it seems clear that only when Congress addresses this problem forthrightly and clearly can the tribal courts finally "go about their business of conflict resolution and the development of judicial standards."[461]

Epilogue

As this article goes to press in the fall of 1997 — almost a year after the preceding material was researched and written — the landscape of federal Indian law has indeed changed significantly. On April 28, 1997, the Supreme Court handed down its unanimous decision in *Strate v. A-1 Contractors*,[462] and the result could hardly be more disturbing. In a plainly-worded opinion, Justice Ginsburg has made one thing quite clear: this Court does not cotton to tribal courts passing judgement on non-Indians merely because of those persons' presence or acts within reservation boundaries. Indeed, it is as if much of the federal Indian law has been time-warped to a time predating *National Farmers Union*.[463] In the process, the

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inaction in this area. It is, after all, "a peculiar virtue of our system of law that the process of inclusion and exclusion, so often employed in developing a rule, is not allowed to end with its enunciation and that an expression in an opinion yields later to the impact of facts unforeseen." Jaybird Mining Co. v. Weir, 271 U.S. 609, 619 (1926) (Brandeis, J., dissenting).

460. *See supra* note *.

461. Reynolds, *supra* note 18, at 1157.

462. 117 S. Ct. 1404, 1407-08 (1997) (when an accident occurs on a portion of a public highway maintained by the state under a federally granted right-of-way over Indian reservation land, the resulting civil action falls within state or federal regulatory and adjudicatory governance; pursuant to the general rule and the two exceptions set out in Montana v. United States, 450 U.S. 544 (1981), tribal courts presumptively may not entertain claims against nonmembers in such cases).

As an added bonus — an unexpected prize in the cereal box as it were — the Court also seems to suggest a brand new algebra for determining jurisdiction. Henceforth — and territorial borders notwithstanding — the proximity of the situs of a claim to a courthouse may actually be relevant. *Strate*, 117 S. Ct. at 1409 n.4. Thus, a party engaged in an accident on, say, the Idaho side of Lolo Pass on U.S. Highway 12, ought to be able to — purely for the sake of convenience, mind you — file their case in Montana District Court in Missoula. I have driven that highway many times, and I know for a fact that the Missoula County Courthouse is much closer to this hypothetical accident than any Idaho courthouse. And if one of the parties raises a jurisdictional objection? Why, simply cite *Strate*'s truly novel Convenience Doctrine (and pray for the best).

463. District Court Judge Battin has once again — this time posthumously — been vindicated by the Supreme Court. His belief that *Montana* is the proper measure of tribal civil adjudicatory jurisdiction has finally found purchase. *Compare* National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 560 F. Supp 213, 215-16 (D. Mont. 1983) *with Strate*, 117 S. Ct. at 1411 ("The Court's recognition in *National Farmers* that tribal courts have more extensive

Court has resoundingly clarified many ambiguities attending the exhaustion doctrine. Indeed, it appears that, while not expressly overruling *National Farmers Union* and *Iowa Mutual*, the *Strate* Court has not only clarified what the exhaustion doctrine means, it has surgically eviscerated that doctrine in the bargain.[464]

Still, it lies beyond the scope and timing of this article to fully examine the implications of the Supreme Court's unfortunate new stance. Indeed, it seems quite likely that others will write more than enough about *Strate* in the coming months. Still, I feel compelled to note *Strate's* most worrisome implications. First, the *Strate* Court has sided with an expanding roster of federal jurists who would place tribal adjudicative jurisdiction over nonmembers within the same outer contours as tribal regulatory jurisdiction.[465] Second — and building on the first proposition — this

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jurisdiction in civil matters than in criminal proceedings, and of the need to inspect relevant statutes, treaties, and other materials, does not limit *Montana*'s instruction . . . . In sum, we do not extract from *National Farmers* anything more than a prudential exhaustion rule, in deference to the capacity of tribal courts 'to explain to the parties the precise basis for accepting [or rejecting] jurisdiction'").

Furthermore, to justify its current stance, the Court has dusted off notions rarely seen since the pre-*National Farmers Union* exhaustion cases. *Compare* Necklace v. Tribal Court of the Three Affiliated Tribes of the Fort Berthold Reservation, 554 F.2d 845 (8th Cir. 1977) (while, as a matter of comity, tribal remedies must ordinarily be exhausted before a claim is asserted in federal court, that is not an inflexible requirement); Janis v. Wilson, 521 F.2d 724, 727 (8th Cir. 1975) (exhaustion is a matter of comity, not an inflexible requirement; exhaustion of "futile" remedies is not required); O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140, 1146 (8th Cir. 1973) (exhaustion is not an "inflexible requirement"; a reviewing court must balance strengthening the tribal courts, and through that, preservation of the tribe's cultural identity, against the needs of individual litigants), *with Strate*, 117 S. Ct. at 1411 n.7 ("[E]xhaustion is not an unyielding requirement").

464. A cynic might argue that the Court carefully left *National Farmers Union* intact to ensure that no question arises about the power of federal district courts to review tribal court decisions as a federal question within the ambit of 28 U.S.C. § 1331 (1994).

465. In addition to the Tenth Circuit court's en banc ruling in *A-1 Contractors, see, e.g.*, Yellowstone County v. Pease, 96 F.3d 1169 (9th Cir. 1996) (expressing skepticism about the existence of any meaningful difference between adjudicatory and regulatory jurisdiction); State v. Hicks, 944 F. Supp. 1455, 1464 (D. Nev. 1996) (resolution of challenges to tribal court jurisdiction "requires an examination of the nature and applicability of the Supreme Court's holding in *Montana*."); National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 560 F.Supp 213 (D. Mont. 1983), *rev'd*, 736 F.2d 1320 (9th Cir. 1984), *rev'd*, 471 U.S. 845, 852 n.12 (1985) (citing *Montana* as relevant to an analysis of tribal court jurisdiction); Wilson v. Marchington, 934 F. Supp. 1176, 1181 (D. Mont. 1995), *rev'd*, No. 96-35145, 1997 WL 583704 (9th Cir. Sept. 23, 1997) (where member of Blackfeet Indian Tribe sought recognition and registration of tribal judgement against non-Indian truck driver, the tribal court had subject matter jurisdiction notwithstanding the fact that "tribal adjudicatory jurisdiction, like tribal regulatory jurisdiction, emanates from a tribe's retained inherent authority"; *Montana* did not intend a distinction between a tribe's regulatory jurisdiction and adjudicatory jurisdiction.) (citing *American Indian Law Deskbook* 131 (1993); Red Fox v. Hettich, 494 N.W.2d 638, 642 (S.D. 1993) (in collateral action by tribal member tribe to gain enforcement of tribal court tort judgement against nonmember for

Court implies that *Montana always* governed not just tribal regulatory authority over nonmembers, but tribal civil adjudicative jurisdiction as well. Third — and in spite of *Iowa Mutual's* clear preference for tribal jurisdiction[466] — *Strate* teaches us that the exhaustion rule set out in *National Farmers Union* and *Iowa Mutual* is far from any "unyielding requirement."[467] Rather, exhaustion is just a prudential speed-bump on the road to federal or state court: nothing more than a nod in passing to the tribal court which, at best, can only explain the basis of its own jurisdictional ruling.[468] Finally, *Strate* purports to offer itself up as a clear example of what the *National Farmers Court* was thinking of when it discussed the inapplicability of exhaustion where a jurisdictional assertion is motivated by a desire to harass, or is conducted in bad faith, where the action violates express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court's jurisdiction.[469]

In other words, in condoning the very kind of jurisdictional end run to federal court that precipitated both *National Farmers Union* and *Iowa Mutual*, the Court sends a new and clear message to all non-Indian defendants in tribal civil actions. Relying on *Strate*, a good-faith claim in

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damages that resulted after member struck nonmember's dead horse on a state highway within the reservation, holding that "without legislative authority to regulate Hettich's conduct, the tribal court [had] no case [to] adjudicate"). But see California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (recognizing a distinction between tribal adjudicatory and regulatory jurisdiction); National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 736 F.2d 1320, 1323 (9th Cir. 1984), *rev'd*, 471 U.S. 845, 857 (1985) (suggesting that under *Montana*, a challenge to the tribe's regulatory jurisdiction presents a federal question, while an assertion of adjudicatory jurisdiction should not). See also Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting) ("[Legislative jurisdiction] refers to the authority of a state to make its law applicable to persons or activities and is quite a separate matter from jurisdiction to adjudicate "); Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 456 n.6 (1989) (Blackmun, J., dissenting) ("Indeed, the only citations that I have found of *Montana's* rule governing tribal sovereignty appear in the dissent to our decision upholding tribal taxing authority over non-Indians in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 171 (1982), and in a dissent from the denial of certiorari in a case where the Court of Appeals upheld tribal civil jurisdiction over non-Indians"). What we do not know is how Justice Scalia would reconcile his earlier opinions on this subject in non-Indian law cases. *See supra* notes 147, 367, 466.

466. *Strate*, 117 S. Ct. at 1412 (quoting Iowa Mutual Ins. Cos. v. La Plante, 480 U.S. 9, 18 (1987)) ("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. But in *Iowa Mutual*, the Court refused to hold that even a specific federal statute — the federal diversity statute found at 28 U.S.C. § 1332 (1994) — was sufficient justification to wrest away the Blackfeet Tribal Court's jurisdiction over the nonmember defendants.

467. *Strate*, 117 S. Ct at 1411 n.7.

468. *Id.* at 1411.

469. *Id.* at 1416 n.14 (citing National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 n.21 (1985)).

federal court that *Montana* would preclude tribal court jurisdiction will probably be enough to condone federal court review of the tribal court's preliminary jurisdictional ruling. Nor will there be any reason to await full trial and appeal in the tribal justice system: any federal district court may now unashamedly sit as a quasi-appellate court over tribal courts of first impression. If the unhappy defendant can find a property-based peg like the one in *Strate* from which to hang her case, in the end, not only will the tribal appellate court never see her case, the tribal trial court can probably kiss the action goodbye as well.[470] For *Strate*, more than anything, effectively and efficiently provides a ready tool with which to preempt full hearing in tribal court in any case involving anyone other than a tribal member plaintiff and a tribal member defendant.[471]

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470. In addition to recasting the tribal court jurisdictional question in terms of *Montana*, *see infra* note 463, and narrowing the definition of Indian country in civil actions, *see infra* note 477, the Court has apparently disposed of a long-standing belief that rights-of-way on Indian reservations do not generally abrogate tribal property interests in that land. *Compare* Strate v. A-1 Contractors, 117 S. Ct. 1404, 1414 (1997) (when a state highway right-of-way is open to the public, the highway's traffic is subject to state control, the Tribe has consented to the State's use of the property, the Tribe has received payment for use of the property, the Tribe has retained no gatekeeping right, and the property is maintained as part of the State's highway, the Tribes cannot assert a landowner's right to occupy and exclude, and the land is, for purposes of analyzing tribal court jurisdiction, the same as land alienated to non-Indians), *with* United States v. Soldana, 246 U.S. 530, 532-33 (1918) (where criminal defendants sought to escape charges for introducing intoxicating liquor onto the Crow Indian Reservation on ground that railroad station constructed on railroad right-of-way at Crow Agency was not in Indian country, it was "clear that it was not the purpose of Congress to extinguish the title of the Indians in the land comprised within the right of way" — that such a reading would have divided the reservation in two, and "rendered it much more difficult, if not impossible, to afford that protection to the Indians which the provisions quoted were designed to insure"); Hinshaw v. Mahler, 42 F.3d 1178 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 485 (1994) (Flathead Tribal Court had subject matter jurisdiction over claim between tribal nonmembers arising on U.S. highway passing through the reservation); Wilson v. Marchington, 934 F. Supp. 1176 (D. Mont. 1995), (Blackfeet Tribal Court had subject matter jurisdiction over claim between tribal nonmember and member arising on U.S. highway passing through the Blackfeet Indian Reservation), *rev'd*, No. 96-35145, 1997 WL 583704 (9th Cir. Sept. 23, 1997); Burlington N. R. Co. v. Blackfeet Tribe of the Blackfeet Indian Reservation, 701 F. Supp 1493, 1503 (D. Mont. 1988) (Tribes retained beneficial title to the land comprising railroad right-of-way on the Fort Peck Indian Reservation, and thus the "territorial component essential to the valid exercise of the Tribes' taxing authority is satisfied"), *aff'd in part*, 924 F.2d 899 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992); Burlington N. R.R. Co. v. Montana Dep't of Pub. Serv. Regulation, Pub. Serv. Comm'n, 720 P.2d 267, 269 (Mont. 1986) (rejecting B.N.'s assertions that its interest in the right-of-way on the Crow Reservation was in the nature of a fee interest, and reaffirming the Crow Tribe's property interest in the land underlying the right-of-way); Wyoming *ex rel.* Peterson v. District Court, 617 P.2d 1056 (Wyo. 1980) (action between owner of horse and owner of truck damaged in collision with the horse was within exclusive jurisdiction of tribal court even though the accident occurred on U.S. highway passing through the reservation). *But see* Burlington N. R.R. Co. v. Red Wolf, 106 F.3d 868 (9th Cir.), *vacated*, 118 S. Ct. 37 (1997) (reserving review of tribal court jurisdiction until after exhaustion of tribal remedies).

471. It has not taken long at all for *Strate* to make an impression. In *Wilson v. Marchington*,

No. 96-35145, 1997 WL 583704 (9th Cir. Sept. 23, 1997), the Ninth Circuit's newest jurist, the Hon. Sidney Thomas of Billings, Montana, wrote at length about the notions of 'full faith and credit' and 'comity.' *Id.* at *1-6. Judge Thomas concluded that comity should apply when a plaintiff seeks to enforce a tribal court judgement in a collateral action in federal court. *Id.* at *1. Moreover, a grant of comity should be contingent upon mandatory factors (lack of personal and subject matter jurisdiction; lack of due process), *id.* at *4, and discretionary factors (fraud; conflict with another final judgment also entitled to recognition; inconsistency with the parties' contractual choice of forum; offence to public policy). *Id.* In the case at bar, where the tortfeasor was a nonmember, the accident occurred on a state highway, and there was no statute or treaty authorizing the tribe to govern the conduct of nonmembers on that highway, Ms. Wilson's claim failed for lack of tribal court subject matter jurisdiction. *Id.* at *7 (citing Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997)).

In another emotionally charged case, the Supreme Court has hinted strongly that its 'good roads' rule ought to be extended to railroad rights-of-way as well. In *Burlington N. R.R. Co. v. Red Wolf*, 106 F.3d 868 (9th Cir.), *vacated*, 118 S. Ct. 37 (1997), the heirs of two tribal members killed by a Burlington Northern Railroad (BN) train at a crossing on the reservation were awarded $250 million by a jury in Crow Tribal Court. *Id.* at 869. BN sought relief from the Crow trial court, and also in the Crow Court of Appeals. *Id.* Without waiting for a final ruling from the appellate court, BN obtained temporary restraint in federal court enjoining enforcement of the tribal court judgment. *Id.* Tribal proceedings became stalled by Burlington Northern's activities in federal court, and the federal district court then granted BN a preliminary injunction against execution or enforcement of the tribal court judgment, intending to "maintain[ ] the status quo and preserv[e] the court's jurisdiction should future federal litigation occur in this matter." *Id.* The judgement creditors appealed to the Ninth Circuit from the preliminary injunction. *Id.*

Writing for a divided Ninth Circuit panel, Judge Eugene A. Wright, a principal architect of the *National Farmers* exhaustion rule, *see supra* note 177 and accompanying text, applied a straightforward exhaustion analysis, ordered the district court to dissolve the preliminary injunction, and to either dismiss this action without prejudice or stay BN's action until after exhaustion of tribal court remedies. *Id.* at 871.

Circuit Judge Andrew Kleinfeld of Fairbanks, Alaska, considered a "prominent conservative[ ]" on a court generally viewed as among the nation's most liberal, *see* David G. Savage, *Getting the High Court's Attention: Liberal-leaning 9th Circuit Is Often Reversed*, A.B.A. J., Nov. 1997, at 47, authored a stinging dissent. *See Red Wolf*, 106 F.3d at 871 (Kleinfeld, Judge, dissenting). Judge Kleinfeld took exception to the Crow court's lack of accountability to the United States Constitution, *id.*, and implied that there was inadequate due process in the Crow court system — that "[h]ad Burlington Northern lost its case in a court of a foreign country which did not accord due process, the judgment would not be enforceable in the United States." *Id.* (citing Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1410 (9th Cir.1995); Hilton v. Guyot, 159 U.S. 113, 205-06 (1895). Judge Kleinfeld went on to express his concerns about what comity or full faith and credit might require in a collateral enforcement action outside the reservation, *Red Wolf*, 106 F.3d at 871 (Kleinfeld, Judge, dissenting) (citing WILLIAM C. CANBY, AMERICAN INDIAN LAW 155-56 (1981); COHEN, 1942 ED., *supra* note 33, at 145, and about what might result should the tribe tear up BN's tracks and sell them for scrap to satisfy some portion of the $250 million judgement. *Red Wolf*, 106 F.3d at 871 (Kleinfeld, Judge, dissenting). Judge Kleinfeld was also disturbed by his understanding of the case below — that the accident occurred at a well-marked crossing, that there had been no accident at that crossing for fifty years, that the train was not speeding, and that both decedents were apparently intoxicated. *Id.* at 872. And even if BN was negligent, reasoned Judge Kleinfeld, the jury award far exceeded the "reasonable" $500,000 verdict estimated by an "experienced" personal injury lawyer on BN's behalf. *Id.* But Judge Kleinfeld seemed most offended by the "wave the bloody shirt" tone of the trial itself, *id.*, evidenced by the purported — albeit uncredited — transcript of Judge Ron Arneson's address in the Crow

language to the jury panel before voir dire. *Id.* That address, reproduced as incoherent pidgin English, suggested that the jury was to ensure redress not just for this accident, but for the "bodies scattered along the railway." *Id.* Moreover, the inference was that the verdict was based as much on the jurors' blood relatedness to the decedents as it was to BN's legal culpability. *Id.*

To justify his view that BN should have been afforded a federal remedy, Judge Kleinfeld suggested that exhaustion was in fact complete, or in the alternative, that exhaustion in this case would be futile. *Id.* at 872-873 (citing National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 856 n. 21 (1985) ("We do not suggest that exhaustion would be required where . . . exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction."). Judge Kleinfeld also argued that, even if there was a genuine difference of opinion between the district court and the circuit court on the exhaustion issue, the district court's application of that "correctly recognized legal principle" could be reversed only for abuse of discretion. *Red Wolf*, 106 F.3d at 873 (Kleinfeld, Judge, dissenting). The district court's decision was not subject to review de novo. *Id.* (citing Gregorio T. v. Wilson, 59 F.3d 1002, 1004 (9th Cir. 1995); Sports Form, Inc. v. United Press Int'l, 686 F.2d 750, 752 (9th Cir. 1982)). Finally, the judge came full-circle to the notion of the tribe ripping up BN's tracks — worrying about "a very great public interest" in the potential interference with interstate commerce. *Red Wolf*, 106 F.3d at 873 (Kleinfeld, Judge, dissenting).

With all due respect to Judge Kleinfeld, however, it must be noted that there are other opinions about what happened in the Crow Tribal Court. The plaintiffs' attorney, John C. Holt of Great Falls, Montana, reports that the jury considered a number of factors in reaching its verdicts. First, plaintiffs alleged that the railroad negligently maintained a dangerous crossing, in violation of an 1889 agreement which gave railroads the right to operate on Crow lands in exchange for the promise to "operate trains with due regard for the rights of Indians." *Crash History Boosts Plaintiffs' Case in Wrongful Death Trial*, INSIDE LITIG., Mar. 1996, at 4. Because of a narrow crossing which dipped significantly on one side, and an approach which required vehicles to approach at a severe angle, the driver of the ill-fated auto ran off the timber crossing and became stuck on the tracks. *Id.* The crossing allegedly violated all national safety standards. *Id.* As a result, there had been 25 crossing crashes and 17 fatalities at the same site in the previous nine years. *Id.* Nevertheless, *Red Wolf* was the first claim filed against a railroad for an injury or death in the area. *Id.* at 5.

Second, Hoyt refuted the defense's suggestions that the decedents were intoxicated. *Id.* The blood samples, said Hoyt, were not tested for eight or nine months. *Id.* at 4. When they were tested, initial results showed one victim's blood alcohol level to be 6 — a "level which could not sustain life." *Id.* Faced with these problematic test results, BN tried, unsuccessfully to link the blood alcohol data to the decedent's alleged "drinking problem." *Id.*

Third, Hoyt presented evidence that the train crew made no attempt to stop or slow the train before it struck the vehicle — even though the crew could have seen the car almost a quarter mile from the crossing. *Id.* One BN employee testified he had seen the car stuck on the crossing, with rocks flying up, and the car rising and settling as if trying to move. *Id.* Nevertheless, the crew failed, in contravention of state and federal law, to sound the train's horn, ring its bell, or to apply the emergency brake. *Id.* at 4-5. BN employees only made matters worse by exhibiting contempt for Indians. *Id.* at 5. When the BN superintendent was asked at deposition whether the railroad showed "due regard" for Indians, he stated that whether the railroad sounded its whistles was not the point: The railroad showed due regard "to everyone it ran over everywhere." *Id.*

Finally, Hoyt suggests that "the constant deception of Burlington Northern attorneys was more than any jury could handle." *Id.* Lead counsel for the railroad claimed to be from Billings, Montana when he was really from Seattle, Washington. *Id.* BN's attorney also told the jury that there would be a conductor from the train sitting at the defense counsel's table to act as BN's representative. *Id.* The conductor did not, however, appear in court until after the plaintiffs had presented their case. *Id.* Evidence later showed that BN had never asked the conductor to appear

In the process, the Supreme Court's own tribal exhaustion doctrine — a doctrine which is the disingenuous result of anything but deference to tribal courts — is finally revealed to be the empty husk many always suspected it to be. Short of congressional action, it seems virtually assured that tribal courts will soon find themselves facing a swelling tide of expensive and distractive preemptive actions in federal courts. And after an excruciatingly long wait, it seems just as clear that the "other shoe" that *Oliphant*[472] left so perilously poised has finally dropped. For what *Oliphant* did to divest tribal courts of criminal jurisdiction within their territories, *Strate v. A-1 Contractors* has now resoundingly achieved in the civil arena. At minimum, *Strate* seems to promise a windfall of filing fees for state courts.[473] At worst, *Strate's* inevitable chilling effect may mark the beginning of the end for tribal courts: while a plaintiff may have a sincere desire to bring their action in tribal court, no reasonable person is going to seek unnecessarily protracted jurisdictional disputes, the need for dual filings to protect a cause of action from expired State statutes of limitation, and interminably delayed remedies.

As interactions between Indians and non-Indians increase in number and in complexity, and as non-Indian populations within Indian country flourish,[474] it is now clearer than ever before that only Congress — by finally stepping up to the plate and putting some legislative teeth into its

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in court. *Id.* BN also had a Native American sit at the defense counsel's table — allegedly to translate — even though there was no non-English testimony presented. *Id.*

Regardless of which of these versions comes nearer the truth, the Supreme Court has remanded *Red Wolf* to the Ninth Circuit with instructions to reconsider in light of *Strate v. A-1 Contractors.* Burlington N. R.R. Co. v. Red Wolf, 106 F.3d 868 (9th Cir.), *vacated,* 118 S. Ct. 37 (1997). Thus it now seems all too likely that these plaintiffs will soon find themselves, four years after the deaths of their kin, with an unenforceable tribal court judgement — the rip-up-the-tracks scenario notwithstanding — and facing a new trial in either state or federal court.

472. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (striking down tribal criminal jurisdiction over non-Indians).

473. Fortunately for Ms.Fredericks, she had the foresight to file a redundant lawsuit in the North Dakota state courts "to protect her rights against the running of the State's six-year statute of limitations." *Strate,* 117 S. Ct. at 1409 n.4 (citing Reply Brief 6 n.2). After *Strate,* it would probably amount to legal malpractice to *not* counsel such a filing.

474. Far too typical is the Flathead Indian Reservation in Montana. In 1984, the reservation's population totaled 19,750. Bryan, *supra* note 38, at 120-21. Of that number, only 3,271 were members of the Salish and Kootenai tribes. *Id.* Moreover, about one-half of the reservation's land was then owned by non-Indians. *Id.* A similar situation then existed on the Ft. Peck Reservation, where, in 1983, only about 5,000 of the reservation's 9,898 residents were members of the Assiniboine, Yanktoni Sioux and Sisseton Wahpeton Sioux Tribes. *Id.*

oft-asserted desire to support tribal self-government and self determination — can save the tribal justice system from gradual devolution into an insignificant forum for petty internecine disputes.[475] The Muses, it seems, would be pleased.

475. For example, a clear statutory definition of just what constitutes tribal civil adjudicatory jurisdiction would be good. Of course — and as already suggested several times above — tribal criminal jurisdiction based on territorial sovereignty would be even better. But one fantasy at a time.

Collaterally, a clear exclusion of tribal jurisdiction as a section 1331 federal question is necessary. State courts are never subject to such challenges in the lower federal courts, and neither should the sovereign courts of recognized Indian tribes be.

Finally, Justice Ginsburg's opinion in *Strate* raises a relatively novel issue that up till now had not caused much trouble. *See Strate*, 117 S. Ct. at 1413 & n.9. It was once fairly well settled that the term Indian country for purposes of civil jurisdiction was that definition provided for criminal jurisdiction. *See, e.g.*, City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554, 558 (8th Cir. 1993) ("By specifically referring to the broad definition of Indian country in § 1151 . . . the Court in *Rice* also made clear that the geographic scope of state and tribal authority extends to a reservation's four corners. The appellees' reliance on the narrow definition of Indian country in §§ 1154(c) and 1156 is simply misplaced. . . . [T]he narrow definition of Indian country contained in §§ 1154(c) and 1156 applies only to the reach of those federal criminal liability statutes, and the broad definition in § 1151 applies to all other sections in the chapter"); Ute Indian Tribe v. State of Utah, 935 F. Supp. 1473, 1486 & n.23 (D. Utah 1996) ("As the Tenth Circuit has recently observed, 'both the Supreme Court and this Court have concluded § 1151 defines Indian country for both civil and criminal jurisdiction purposes.'") (citing Pittsburg & Midway Coal Mining Co. v. Watchman, 52 F.3d 1531, 1540-1541 & n. 10 (10th Cir. 1995). However, Justice Ginsburg now suggests that a few other statutes may also be invoked when it suits the litigant's purposes. Thus, 18 U.S.C. §§ 1154(c), 1156 (1994) (defining Indian country for purposes of dispensation and possession of intoxicants as not including rights-of-way running through a reservation) now seem to provide general purpose alternative definitions of Indian country.