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Tribal Courts and the Federal Judiciary: Opportunities and Challenges for a Constitutional Democracy

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ARTICLES

TRIBAL COURTS AND THE FEDERAL JUDICIARY: OPPORTUNITIES AND CHALLENGES FOR A CONSTITUTIONAL DEMOCRACY*

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Force makes a thing of its victims. There where someone stood a moment ago, stands no one.[1]

— Simone Weil

I. INTRODUCTION

Tribal courts have become an increasingly prominent strand in the braid of Indian law scholarship and practice. A central part of this prominence relates to the developing role of tribal courts as a touchstone of tribal sovereignty and guardian of tribal tradition and custom, as well as their growing contribution to rendering justice and fair play in Indian country. This new found ascendancy has also raised seminal and provocative questions about the relationship, both practically and constitutionally, of tribal courts to federal courts.

The focus of my talk is not on the exciting and important things that tribal courts actually do,[2] which is the topic of the

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1. Simone Weil, *The Iliad: Poem of Force*, *in* Alfred Kazin, *A Genius of the Spiritual Life*, N.Y. REV. OF BOOKS 20, April 18, 1996.

2. *See, e.g.*, FRANK POMMERSHEIM, BRAID OF FEATHERS (1994) [hereinafter POMMERSHEIM, BRAID]; Douglas B. L. Endreson, *The Challenges Facing Tribal Courts Today*, 79 JUDICATURE 142 (1995); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225 (1994); Honorable Robert Yazzie, *Life Comes From It: Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994).

impressive panel that follows my presentation and includes such distinguished tribal judges as the Honorable Carey Vicenti of the Jicarilla Apache Tribal Court and the Honorable Mary Wynne of the Colville Tribal Court, as well as Judge William Canby of the Ninth Circuit. My remarks instead center on the more troubling and nettling questions concerning the structural relationship or "fit" of tribal courts within the federal system.[3] Questions that are nowhere fully addressed, much less answered, in the United States Constitution.

II. CONSTITUTIONAL BACKGROUND

Two major concerns dominate the structure of the United States Constitution: they are the allocation of governmental authority between the federal and state sovereigns and the distribution of federal authority within the executive, legislative, and judicial branches of government. These themes are often described by the terms federalism and the separation of powers.[4] The constitutional objective in these areas is not only to identify the respective zones of authority, but to set boundaries and delineate structural relationships between the federal and state sovereigns as well as among the three branches of the federal government.

Despite the pervasiveness of these concerns in the Constitution, a third sovereign—namely the tribal sovereign—is also present in the Constitution, albeit at the margins and often (partially) hidden from view. The tribal sovereign is explicitly referred to in the Indian commerce clause[5] and implicitly recognized in the treaty making power.[6] It is identified as a signifi-

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3. There are also significant federal practice questions in such areas as abstention and diversity, supplemental, and removal jurisdiction that are of growing impact yet remain largely unexplored in the tribal courts-federal courts context. *See, e.g.*, Frank Pommersheim, *Tribal Courts and Federal Courts: An Introductory Primer*, (forthcoming) (manuscript on file with the author).

4. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 1.5 (2d ed. 1994).

5. The Indian commerce clause provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

6. The Treaty making clause provides: "He [the President] shall have Power, by and with the Advice and Consent of the Senate to make Treaties. . . . " U.S. CONST. art. II, § 2, cl. 2.

The Constitution also states that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2.

The Federal Government entered into over four hundred fifty treaties with Indian tribes. *See, e.g.*, CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES

cant and real sovereign, but largely as a sovereign *outside* the national and state systems.[7] Needless to say, the Constitution does not textually describe any specific relationship of the tribal sovereign to the federal or state sovereign. As the Supreme Court noted early on: "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else."[8]

This early configuration was confronted and parsed by the United States Supreme Court in the Marshall trilogy.[9] In the Marshall trilogy, the Supreme Court, under the leadership of Chief Justice Marshall, set out to answer some basic Indian law questions not easily resolved by reference to the text or history of the Constitution. In *Johnson v. McIntosh*,[10] the Court delineated the broad contours of tribal property rights as being unique, immune from state interference, but generally subject to federal supervision and control.[11] While the decision did find a superior title in the federal government in accordance with the "doctrine of discovery," it also recognized the authority of tribes to transfer title (without federal approval) with the important caveat that purchasers of tribal title could not enforce their title in the courts of the United States.[12] Whether one regards *Johnson* as an inevitable, practical accommodation to political exigencies in the young republic or racist to the core,[13] it clearly kept the

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(1904).

7. Individual Indians were not citizens (identified as "Indians not taxed" in the Constitution) and therefore tribes were wholly made up of individuals who were neither federal nor state citizens. They could not and did not participate in state or federal government. As a result, Indians and tribes had no representation in Congress. All Indians became United States citizens pursuant to the Citizenship Act of 1924. *See* 8 U.S.C. § 1401 (1997) (originally enacted as Act of June 2, 1924, ch. 233, 43 Stat. 253). It is generally assumed that this statute coupled with the Fourteenth Amendment was also sufficient to make individual Indians state citizens.

8. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).

9. The Marshall trilogy consists of Johnson v. McIntosh, 21 U.S. (8 Wheat) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

10. 21 U.S. (8 Wheat) 543 (1823).

11. *See Johnson*, 21 U.S. at 573-574. The Court specifically demurred to the applicability of natural law or, "natural right" principles that would have prevented such a decision in favor of the "discoverers." *Id.*

12. *See id.* at 603.

13. One reading of *Johnson* and the Marshall trilogy as a whole suggests a credible, perhaps even valiant, attempt to stave off an even more vicious colonialism brewing in the other branches of the federal government and the population at large. I myself have endorsed this reading. *See* POMMERSHEIM, BRAID, *supra* note 2, at 40-43; *see also* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381

tribal interest marginalized within the larger society and without fully articulated constitutional status.

In *Cherokee Nation v. Georgia*[14] and *Worcester v. Georgia*,[15] the Court nullified any claim by the states to have authority over matters occurring in Indian country. This was so because as the Court opined there was a unique and exclusive tribal-federal relationship grounded in treaties, tribal sovereignty, and the Indian commerce clause and because tribes were geographically distinct and otherwise outside the common polity.[16] The Court also discerned a relationship of dependence described in the "guardian-ward" analogy as additional grounds for a unique, exclusive tribal-federal relationship.[17] This description

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(1993). Yet, it is also clear that Marshall and the Court refused to follow their own natural law predilections that would have required a finding of full (property) rights in indigenous people, and consequently they set a trajectory of discrimination and animus we have yet to fully recover from. *See* G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 1815-1835, 680-682 (1991).

The Court's formulation in this regard is a quite impeachable tautology:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. . . . However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may; perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.

Johnson, 21 U.S. at 591-592.

14. 30 U.S. (5 Pet.) 1 (1831).

15. 31 U.S. (6 Pet.) 515 (1832).

16. Specifically, the Court described Indian tribes as "domestic dependent nations," *Cherokee Nation*, 30 U.S. at 17, and "distinct independent political communities," *Worcester*, 31 U.S. at 559. Despite these results, Congress moved expeditiously to skewer this legal reality with its removal legislation, which resulted in the enforced relocation of most of the Five Civilized Tribes then residing in the southeastern part of the United States to lands west of the Mississippi in Indian territory and effectively cleared the way for unimpeded non-Indian settlement and state control. *See, e.g.*, FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: INDIAN TRADE AND INTERCOURSE ACTS 1790-1834, 224-48 (1962).

17. Specifically, the Court said:

> Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to

of physical and legal reality became increasingly strained in the latter part of the nineteenth century as the result of significant political and historical changes.

The Marshall trilogy also sought to achieve objectives beyond resolution of the particulars of these cases. These included a blend of establishing federal dominance in Indian affairs, creating order and pragmatism in Indian land transfers, and demonstrating some sense of moral concern for Indians.[18] For most purposes, the element of federal supremacy is key. Tribes were seldom seen as partners or mutually equal sovereigns. Federal supremacy was always a necessary and unalterable given.

Yet the Marshall trilogy—considerations of *realpolitik* aside—is also subject to a more parsimonious reading. This reading is grounded in an understanding of treaties as a cession of some rights to the federal government (*e.g.*, the ability to deal directly with the states) in exchange for federal protection from state encroachment with all other sovereign rights unimpaired.[19] In this view, the Marshall trilogy stands for three principles: recognition of tribal sovereignty and self government, creation of a unique tribal-federal relationship, and exclusion of

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his guardian.

Cherokee Nation, 30 U.S. at 17.

18. *See* DAVID GETCHES ET AL., FEDERAL INDIAN LAW 78 (3rd ed. 1993). As noted, these objectives were achieved at the cost of denying tribes and indigenous people full and equal participation in American society and its legal system. *See supra* notes 9-17 and accompanying text.

19. *See, e.g.*, United States v. Winans, 198 U.S. 371, 381 (1905) (holding that treaties are grants of power from tribes to the U.S. Government with retention of all powers not ceded). See also RUSSELL BARSH & J. YOUNGBLOOD HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 270-89 (1980) for a discussion of this means of treaty interpretation as providing a basis for the doctrine of treaty federalism in which treaties are primarily understood as political compacts between tribes and the federal government. Political compacts designed to transfer tribal authority to deal with the states to the federal government in exchange for protection from state encroachment and the guarantee of self government.

Such an interpretation was recently confirmed in *Seminole Tribe of Florida v. Florida*, in a slightly different context where the Court noted:

> If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the states to the Federal Government then does the Interstate Commerce Clause. This is clear enough from the fact that states still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes.

Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1126 (1996); *see also* McClanahan v. Arizona Tax Commission, 411 U.S. 164, 172 n.7 (1973). The Court observed that "the source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from the federal responsibility for regulating commerce with Indian tribes and for treaty making." *Id.*

state authority in Indian affairs. Obviously, these principles have often been bent and twisted in order to serve national objectives ranging from removal to allotment and assimilation and on to termination, but these unprincipled excesses do not detract from the validity of the core teachings. In fact, these teachings press for renewed effort to narrow the distance—sometimes a chasm—between limiting legal principles in Indian law and federal political reality in Indian affairs.

III. NINETEENTH CENTURY CHANGES

During the nineteenth century—particularly toward its close—a series of political, historical, and even physical changes made the original configuration sketched in the Constitution and explicated in the Marshall trilogy an increasingly inaccurate description and assessment of the tribal sovereign. The completion of western expansion, the end of the treaty making process in 1871,[20] and the resulting loss of tribal governmental power[21] greatly changed the political and social reality inhabited by the tribal sovereign.

The allotment process which began to fully emerge during this time also dramatically changed the physical landscape in Indian country by encouraging significant numbers of non-Indians to become permanent, property owning residents on the reservation.[22] This disastrous process made it increasingly untenable to see Indian country as an area physically and legally separate and apart from the rest of the national republic and polity.

"Manifest destiny" surrounded Indian country and the allotment process penetrated Indian country. More and more non-Indians (and non-Indian entities like states and counties) perme-

20. *See* 25 U.S.C. § 71 (1996) (originally enacted as Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566).

21. *See, e.g.*, POMMERSHEIM, BRAID, *supra* note 2, at 21-23.

22. This process began with the Dawes Severalty Act, 25 U.S.C. §§ 331-58 (1997), which was also known as the General Allotment Act of 1887 and had as its principal goal the breakup of the tribal tradition of communal ownership through the means of providing individual Indians with specific allotments ranging from 80 to 160 acres. The objective was to convert Indians into individual farmers and ranchers and thereby make them readily assimilable into the surrounding non-Indian farming and ranching communities. The policy failed dismally, resulting mainly in the reduction of the nationwide Indian land base from 138 million acres in 1887 to 48 million acres in 1934. For an expanded description, see generally D.S. OTIS, THE DAWES ACT AND ALLOTMENT OF INDIAN LANDS (Francis Paul Prucha ed., 1973), and POMMERSHEIM, BRAID, *supra* note 2, at 221 n.15.

ated the landscape in and around Indian country. These physical processes and the attendant political changes made it increasingly difficult to view Indian country and tribal sovereignty as something "out there" without any role or impact within the daily political and legal life of the nation. The tribal sovereign—considerably weakened—was no longer really outside the national polity, but had been absorbed practically, politically, and even physically into the republic. All of this was effectuated without tribal consent and without any statutory or constitutional authorization or recognition. This seismic historical change, complete with extensive political and social ramifications, did not even create the slightest legal ripple at the time.

The third sovereign—originally understood as being largely outside of, and marginal to, the young republic and poised at the very edge of the U.S. Constitution—was fully incorporated into the national republic without the slightest constitutional recognition or adjustment.[23] It appears like a *fait accompli*. Yet, this constitutional sleepwalking ultimately had to be confronted. And it is my view that this legal reckoning occurred in the 1903 case of *Lone Wolf v. Hitchcock*.[24] Ironically, the opinion in *Lone Wolf* made no mention of this constitutional problem, but blithely went about filling the doctrinal gap created by the movement of history and changed circumstances. This doctrinal gap was the gap created by the perceived inability of treaties and the Indian commerce clause to guarantee enough federal authority to deal with a tribal sovereign *inside* (not outside) the republic and within whose borders there was a significant number of non-Indians and natural resources (including the land itself) of continuing interest and concern to the federal government.

The basic question in *Lone Wolf* was whether Congress could unilaterally abrogate treaties—here the 1867 Treaty between the Kiowa, Comanches, and Apaches and the federal government.[25] The question presented itself in the context of the "need" for federal acquisition of more Indian land in the absence of treaty making or forcible appropriation. The Court readily answered in the affirmative.[26] The doctrinal justification for this extensive authority was the plenary power doctrine.[27] The Court de-

23. Indian people, recall, were not yet United States or state citizens. *See supra* note 7 and accompanying text.

24. 187 U.S. 553 (1903).

25. *See Lone Wolf*, 187 U.S. at 554, 560-62.

26. *See id.* at 568.

27. *See id.* at 565-66.

scribed the doctrine in these terms: "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."[28]

The plenary power doctrine—without any constitutional mooring—ratified the absorption of Indian tribes physically and politically into the national republic and assigned complete authority over this third sovereign to the United States Congress. All of this was accomplished by extraordinary constitutional evasiveness.[29] In other words, the "need" for ongoing federal hegemony trumped any concern or necessity for constitutional integrity. The brutal effect of *Lone Wolf* was both to strip tribes of their constitutional status and to make their sovereignty subject to the unconstrained (and extra-constitutional) authority of the federal government.

Yet the plenary power doctrine—at least at that time—established a "workable" structural (if not constitutional) relationship between the federal and tribal sovereigns. It was, in fact, remarkably simple. Congress had all the power (not even subject to judicial review),[30] and the tribes possessed only that

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28. *Id.* at 565. The decision in *Lone Wolf* quotes and builds on the bold assertion in *United States v. Kagama*:

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United Sates, because it has never been denied, and because it alone can enforce its laws on all the tribes.

United States v. Kagama, 118 U.S. 375, 384-85 (1886). This assertion is not one of constitutional principles, but of an expedient tautology. Someone has to have complete power over Indian tribes (why?) and it has to be the Federal Government because it has always been so (why?).

29. The opinion in *Lone Wolf* makes no attempt to justify its ruling on constitutional grounds. *See also* POMMERSHEIM, BRAID, *supra* note 2, at 47. Note specifically: "As suggested by Professor Robert Clinton: 'In Lockean social compact terms, Indian tribes never entered into or consented to any constitutional social contract by which they agreed to be governed by federal or state authority, rather than by tribal sovereignty.'" *Id.* at 48 (quoting Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 847 (1990) [hereinafter Clinton, *Tribal Courts*]).

30. *See Lone Wolf*, 187 U.S. at 565. The non-judicial reviewability element (as a political question) has subsequently been modified by such cases as Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977), and United States v. Sioux Nation, 448 U.S. 371 (1980) (authorizing judicial review of congressional action in Indian affairs in accordance with the "rational basis" standard, a standard, incidentally, that the Supreme Court has rarely found Congress unable to satisfy). *See., e.g.*, POMMERSHEIM, BRAID, *supra* note 2, at 47.

authority *not* extinguished by Congress. In other words, tribal authority hinged on congressional sufferance rather than any constitutional principles or recognition of durable tribal sovereignty. This extensive congressional authority itself could not be traced to any constitutional provisions. Such a legal regime was (and is) clearly at odds with any Lockean notion of republican government being founded on the premise of limited authority for limited sovereigns.[31] This central axiom of federal constitutionalism was blatantly ignored and transgressed in *Lone Wolf*.

Since tribal governments in the first half of the twentieth century remained weak in their efforts to exercise significant governmental power, particularly power over non-Indians, the plenary power doctrine was not challenged in any meaningful way either practically or legally. This is not surprising. When an (oppressed) sovereign is weak and listless, its legal and constitutional status is seldom noticed or commented upon. Its low energy passes without concern or examination by the dominant system. Yet, when a sovereign becomes more active and robust, the issue of legal status and constitutionality often comes to the fore. Then the question becomes whether its developmental vigor will continue to earn a clean (constitutional) bill of health or whether it will be deemed excessive and constitutionally impaired. This legal diagnosis remains ongoing but without any convincing conceptual etiology in the constitutional sense.[32]

IV. TRIBAL RENASCENCE (1960S-1990S)

The process of tribal government reinvigoration[33] began with the Indian Reorganization Act of 1934,[34] which specifically sought to encourage the formation and development of "modern" tribal governments.[35] This process began to develop a unique momentum by the 1960s. Beginning in the 1960s, often with federal government support and endorsement, many tribal govern-

31. *See, e.g.*, POMMERSHEIM, BRAID, *supra* note 2, at 47-48.

32. *See infra* notes 66-70 and accompanying text.

33. *See* POMMERSHEIM, BRAID, *supra* note 2, at 22-23.

34. *See* 25 U.S.C. §§ 461-479 (1994). Interestingly, the Indian Reorganization Act comports with basic principles of treaty federalism because of its requirement of tribal consent. *See* BARSH & HENDERSON, *supra* note 19, at 276.

35. *See, e.g.*, Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955 (1972). For criticism of the Indian Reorganization Act as being subversive of traditional tribal governments see Russell Barsh, *Another Look at Reorganization: When Will Tribes Have A Choice*, INDIAN TRUTH, No. 247, Oct. 1952, at 4-5, 10-12.

ments began in earnest to ardently (re)assert the rights of self-government and self-determination. In fact, this federal policy period is often referred to as the period of meaningful self-determination.[36] During this period, Congress passed key legislation to advance and support tribal self-determination. Examples of this legislation include the Indian Civil Rights Act of 1968,[37] the Indian Self-Determination and Education Assistance Act of 1978,[38] the Indian Child Welfare Act of 1978,[39] the Indian Tribal Government Tax Status Act of 1982[40] and the Indian Gaming Regulatory Act of 1988.[41]

These statutes were widely perceived in Indian country as supporting and advancing the right of tribal self-government and self-determination.[42] While scholarly criticism of plenary power continued, there was little direct criticism from the tribes and no significant legal challenges to its existence.[43] On balance, or so

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36. *See, e.g.*, ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW 158-64 (3rd ed. 1994) [hereinafter CLINTON, AMERICAN INDIAN LAW].

37. Pub. L. No. 90-284, 82 Stat. 77 (codified as amended at 25 U.S.C. §§ 1301-03 (1994)).

38. Pub. L. No. 95-608, 92 Stat. 3069 (codified as amended at 25 U.S.C. § 1901-63 (1994)).

39. Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. § 450(a) (1994)).

40. Pub. L. No. 97-473, 96 Stat. 2608 (codified as amended at 26 U.S.C. § 7871 (1994)).

41. Pub. L. No. 100-497, 102 Stat. 2467 (codified as amended at 25 U.S.C. §§ 2701-21 (1994)).

42. Perhaps with the exception of the Indian Civil Rights Act of 1968 which is sometimes seen as invading tribal sovereignty. *See, e.g.*, CLINTON, AMERICAN INDIAN LAW, *supra* note 36, at 385-86.

43. Professor Robert Clinton has collected the sweeping scholarly criticism of the plenary power doctrine:

> The illegitimacy of federal assertions of such sweeping unilateral authority frequently is proclaimed in Indian country. Indeed, scholars consistently have questioned the purported doctrine of plenary federal authority over Indians because of the lack of any textual roots for the doctrine in the Constitution, the breadth of its implications, and the lack of any tribal consent to such broad federal authority. Therefore, many commentators have sought out limits on that authority. *E.g.*, Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1 (suggesting lack of textual authority for plenary power); R. BARSH & J. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 257-69 (1980) (suggesting limitations derived from article 1 and the ninth amendment); Robert Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 996-1001 (1981) (suggesting inherent limits in the reach of the Indian commerce clause); Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365 (1989) (arguing for Indian consent as a limitation on federal authority); Robert T. Coulter, *The Denial of Legal Remedies to Indian Nations Under U.S. Law*, *in* NATIONAL LAWYERS GUILD COMMITTEE ON NATIVE AMERICAN STRUGGLES,

it seemed, the plenary power doctrine was being used to assist rather than to harm tribes. And, of course, extensive power is like that; it can be used for good or ill. However, that is not the constitutional view of governmental power. The constitutional view is that because of the potential for abuse, power is to be circumscribed and subject to checks and balances[44]—except in Indian affairs.[45] And yet, perhaps, it is possible to reconcile plenary authority with such basic constitutional postulates if it is understood that plenary power may properly be used to advance tribal self-government and protect tribes from state encroachment in Indian country, but it cannot be used to invade the legitimate spheres of tribal self-government and the integrity of tribal existence. Such a view accords with the basic concepts embedded in the compact theory that is the foundational underpinning of treaty federalism.[46] This understanding does not appear, however, to have permeated current congressional or recent Supreme Court decision making.

Regardless of any conceptual niceties, the resurgence of a weakened sovereign will inevitably challenge any non-constitutional, doctrinal status quo. The only surprise was the unexpected source of the challenge being that created by the rapid development of tribal courts. This forward movement of tribal courts was not fueled by any piece of federal legislation, but rather by local efforts that culminated in several cases being decided by the United States Supreme Court. These cases include *Santa Clara Pueblo v. Martinez*,[47] *National Farmers Union Insurance Co. v. Crow Tribe of Indians*[48] and *Iowa Mutual Insurance Co. v. LaPlante*.[49]

The rise of tribal courts owes much to both these key Su-

RETHINKING INDIAN LAW 103, 106 (1982) ("[T]here is not textual support in the Constitution for the proposition that Congress has plenary authority over Indian nations"); Nell Jessup Newton, *Federal Power over Indians: Its Sources Scope and Limitations*, 132 U. PA. L. REV. 195, 261-67 (1984) (suggesting due process and takings limitations).

Clinton, *Tribal Courts*, *supra* note 29, at 855-56 n.41.

44. *See* DAVID CRUMP, ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW, lxiii-lxiv (2d ed. 1993); Mistretta v. United States, 488 U.S. 361 (1989).

45. *See Lone Wolf*, 187 U.S. at 564.

46. *See supra* notes 18-19 and *infra* notes 74-75 and accompanying text. As suggested by Professor Phil Frickey, plenary power ought not be a congressional sword used against tribes but more of a shield against state regulation of tribes. *See* Frickey, *supra* note 13, at 395.

47. 436 U.S. 49 (1978).

48. 471 U.S. 845 (1985).

49. 480 U.S. 9 (1987).

preme Court decisions and the synergistic growth of tribal court competence and quality of its personnel. Up to and throughout most of the 1970s, very little, if any, significant litigation arising on reservations was brought directly in tribal court. Indeed, almost all of this legal activity was generally brought directly in federal court through such jurisdictional devices as an implied cause of action deriving from the Indian Civil Rights Act of 1968, diversity jurisdiction, or federal questions. Most litigants, both Indian and non-Indian, apparently viewed federal courts as more hospitable and structurally sound than tribal courts.[50]

Regardless of the accuracy of such perceptions, this jurisdictional landscape began to change rapidly and extensively in the late 1970s. In 1978, the Supreme Court decided the seminal case of *Santa Clara Pueblo v. Martinez*, in which a female tribal member challenged the Santa Clara Pueblo's enrollment ordinance that barred enrollment of her children which resulted from her marriage with a non-member, but did not bar enrollment of children resulting from the union of a male tribal member with a non-member.[51] In *Santa Clara Pueblo*, the Court ruled that the Indian Civil Rights Act of 1968 did *not* waive tribal sovereign immunity, did not establish an implied federal cause of action and concluded that the only *federal* remedy available under the statute was the habeas relief established at 25 U.S.C. § 1303.[52] The Court specifically noted that in the context of a cause of action arising under the statute but *not* amenable to habeas relief the effect of its decision was to recognize that:

> Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply. Tribal 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.[53]

As a result of this wide ranging and largely unexpected decision, tribal courts suddenly found themselves thrust into an unexpected centrality as the *sole* local forum available to hear civil rights claims against the tribe arising on the reservation. This included the whole panoply of litigation implicating indi-

50. *See* POMMERSHEIM, BRAID, *supra* note 2, at 66-68.
51. *See Santa Clara Pueblo*, 436 U.S. at 51.
52. *See id.* at 69-70.
53. *Id.* at 65 (citations omitted).

vidual rights in such areas as election disputes, wrongful termination, and discrimination within the context of the ICRA's due process and equal protection guarantees. The result has been the development of a considerable body of tribal court jurisprudence dealing with the issues and themes of individual rights and civil rights.[54]

In the mid-1980s, two additional decisions of the United States Supreme Court further spurred the development of tribal courts as the locus—at least in the first instance—for important civil litigation arising on the reservation. In both *National Farmers Union Ins. Cos. v. Crow Tribe of Indians* and *Iowa Mutual Ins. Co. v. LaPlante*, the Court recognized the importance of tribal courts as the premier local forum. As Justice Marshall wrote in the *Iowa Mutual* case, "[t]ribal courts play a vital role in tribal self-government . . . and the Federal Government has consistently encouraged their development."[55]

In *National Farmers Union*, a tort case originally brought in tribal court by a Crow tribal member against a state school district for injuries that were suffered in a motorcycle accident on the reservation, the Court upheld tribal court jurisdiction and established an analytical framework for challenges to tribal court authority.[56] In its decision, the Court delineated two important principles: First, actions properly brought in tribal court are not subject to *jurisdictional* attack in federal court until there is an exhaustion of tribal remedies; and second, questions about the permissible limits of tribal court jurisdiction are legitimate federal questions under 28 U.S.C. § 1331.[57]

In *Iowa Mutual*, a Blackfoot tribal member brought a tort action in tribal court against a Montana corporate ranch for injuries suffered while in its employ on the reservation.[58] Here, the defendant insurer sought relief in federal court and invoked federal jurisdiction pursuant to the diversity provision set out at 28 U.S.C. § 1332.[59] The Supreme Court ruled that "[r]egardless of the basis of [federal] jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in

54. *See, e.g.*, Douglas B. L. Endreson, *The Challenges Facing Tribal Courts Today*, 79 JUDICATURE 142 (1995) (giving a comprehensive review of tribal court decisionmaking).

55. *Iowa Mutual*, 480 U.S. at 14-15.

56. *See National Farmers Union*, 471 U.S. at 845.

57. *See id.* at 853-54; *see also* Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329, 330 (1989).

58. *See Iowa Mutual*, 480 U.S. at 11.

59. *See id.* at 12-13.

order to give the tribal court 'full opportunity to determine its own jurisdiction.'"[60] This includes any applicable tribal appellate procedures.[61] The Court also stated that tribal authority over activity on reservation lands is an important part of tribal sovereignty. Accordingly, civil jurisdiction over such activities lies presumptively in tribal courts unless affirmatively limited by a specific treaty or federal statute.[62]

V. OLD WINE IN NEW BOTTLES

Despite these progressive developments, the *National Farmers Union* and *Iowa Mutual* cases raised the old question of the extent of the federal power in Indian affairs as they confronted the issue of assessing the extent of federal authority to determine the legitimate ambit of tribal court judicial authority. In these particular situations, the Constitution provided no textual guidance. In addition, since there was no federal statute on point, the classic construct of congressional plenary power was also unavailing. Instead of conceding that tribal sovereignty was unimpaired in the absence of any constitutional or statutory constraint, the Court located definitive controlling authority in the federal common law.[63] The Court reached into the doctrinal-

60. *Id.* at 16.

61. *See id.* at 16-17.

62. *See id.* at 14.

63. The Court noted that there was no claim that any provision of the Constitution or any federal statute limited tribal court civil jurisdiction. Yet, it went on to say that federal question jurisdiction under 28 U.S.C. § 1331 "will support claims founded upon federal common law as well as those of a statutory origin." *National Farmers Union*, 471 U.S. at 850. The Court, however, did not cite a single precedent relevant to tribal court jurisdiction. In fact, the cases cited involved federal statutes or broad taxing questions. The Court, it seems to me, just *assumed* the authority to decide. This is indeed quite remarkable unless one concedes a "brooding (judicial) omnipresence" to determine whether tribes are exercising authority "inconsistent with their dependent status."

Although the Court explicitly rejected the application of the *Oliphant* holding (tribes do not have criminal jurisdiction over non-Indians) on the civil side, it appeared to be more hospitable to its broader assertion:

> But the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court of Appeals recognized, Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers *"inconsistent with their status."*

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978); *see also* United States v. Wheeler, 435 U.S. 313, 323 (1978) which held:

> Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised.

ly questionable notion of federal common law in order to circumscribe the substantive boundaries of tribal court authority.

In *National Farmers Union*, this repository of federal common law was cited without extensive discussion and effectively extended the plenary power doctrine beyond Congress and into the hands of the Supreme Court as the final arbiter of tribal court authority. In a constitutional republic premised on the limited, enumerated authority of the national sovereign, this appears quite surprising. In this light, *National Farmers Union* takes on a potentially much darker hue. In most Indian law scholarship, including my own, *National Farmers Union* is seen as a case strongly supportive of tribal courts as demonstrated by its requirements of exhaustion and comity.[64] And this is obviously so. Yet the darker coloration is to be found in the way the Court claimed for itself the unfettered power to determine the substantive reach of tribal court authority.[65]

As a result, an inherent conflict surfaces and highlights the tension involving the Supreme Court's arbiting, on one hand, the scope of tribal judicial authority, while on the other hand, deciding how much comity and parity that resulting authority is entitled. This is decidedly not the situation in the federal-state context where the Constitution itself determines the appropriate zones of state and federal authority.[66] It is also well beyond *Lone Wolf* which established *congressional* plenary power in Indian affairs.[67] Indeed, the Court failed to heed its own warn-

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> . . . In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

Because the Court in *National Farmers Union* (in contrast to *Oliphant*) did *not* rule against tribal court jurisdiction (it just said it could), much remains to be decided and hangs in the balance. *See infra* notes 65-82 and accompanying text.

64. *See* POMMERSHEIM, BRAID, *supra* note 2, at 50.

65. *See, e.g.*, Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. REV. 1089 (1995).

Unfortunately, this darker view was confirmed by the Supreme Court in its recent decision of Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997). In this unanimous decision, the Court held that tribes do not have judicial or regulatory jurisdiction over non-members for actions that take place on state or federal highways that run through reservations. No federal statute commanded this result, but this did not trouble the Court. It simply created a "bright line" rule without reference to foundational principles, respect for tribal self-government, or concern for limitations on its own authority. *See also infra* notes 80-82 and accompanying text.

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

67. *See Lone Wolf*, 187 U.S. at 565.

ing from *Santa Clara Pueblo* that "Congress' authority over Indian matters is extraordinarily broad; and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained."[68]

From a tribal court perspective, the result in *National Farmers Union* is helpful and endorsing, but it comes at a doctrinal price. That price is the apparent extension of plenary power into the judicial realm. The plenary power doctrine can now be seen as coming in two distinct vintages. There is the classic doctrine of congressional plenary power as established in *Lone Wolf*.[69] Yet even if Congress has not acted—where one would normally presuppose an unimpaired tribal sovereignty—the Court now recognizes a judicial plenary power to parse the limits of tribal court authority based on federal common law. A federal common law that at least heretofore has not been equated with any notion of implied divestiture of tribal authority.[70]

It is extremely important to emphasize that the Court itself did not, and has not, used the term "judicial plenary power" and, in fact, seems quite unaware of the doctrinal watershed it has created. This makes the Court's future pronouncements in this area all the more unpredictable and potentially harmful. Of course, Congress can nip this judicial plenary authority in the bud through the exercise of its own superior plenary power, but regardless of the result, the situation only highlights the accordion view of tribal sovereignty as that which can be squeezed from federal sufferance.[71] A federal sufferance expanded beyond congressional plenary power to include a nascent judicial plenary power. There are, as of yet, no constitutional moorings to hold fast the positive aspects of deference and comity in *National Farmers Union* and *Iowa Mutual*.

As tribal courts have become more prominent, the Court has "discovered" a judicial plenary power grounded in federal com-

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68. *Santa Clara Pueblo*, 436 U.S. at 72 (citing *Lone Wolf*, 187 U.S. at 565). This, of course, contrasts with the broader *Oliphant* language. *See supra* note 63. There is also the unsettling distinction that *Santa Clara Pueblo* involved a tribe and its members, while *Oliphant* involved a tribe and non-Indians. Maybe the Court believes its jurisprudential net of concern is "properly" at its widest when non-Indians are involved. Yet the limiting conceptional rubric remains quite distinct: *Oliphant*, "inconsistent with their dependent status"; *National Farmers Union*, "federal common law." *See supra* note 63.

69. *See Lone Wolf*, 187 U.S. at 565.

70. *See, e.g.*, Reynolds, *supra* note 65 and accompanying text.

71. *See, e.g., Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 788 n.30 (1984) (holding that "all aspects of Indian sovereignty are subject to defeasance by Congress").

mon law to monitor the extent of tribal court judicial authority. This extensive power has been articulated with the self-restraint labels of exhaustion and comity. Yet these silver linings cannot hide the dark cloud that sets the Supreme Court (and lower federal courts) as the final arbiter of tribal court authority. Without a constitutional benchmark like the Tenth Amendment,[72] tribal sovereignty is consistently subject to potential (judicial) defeasance that severely compromises any comity and parity deriving from the emerging federal-tribal judicial relationship. The irony of *National Farmers Union* and *Iowa Mutual* is that they require comity and deference to tribal courts at the expense of both creating and extending judicial plenary power.

VI. CONSTITUTIONAL JOURNEY

It is necessary to maintain deference and comity—and the wholly meritorious tenor of federal respect toward the tribal judiciary—but without the creation of a doctrine that results in a growth of federal judicial power over tribal courts. It seems that what is needed is a constitutional "faith"[73] that recognizes the validity of an autonomous tribal judiciary as the final arbiter of disputes that arise on the reservation unless such matters have been affirmatively limited by actions of Congress that are themselves grounded in recognizable constitutional principles.[74] Given the current doctrinal incoherence and the limitless reach of plenary power, the necessity for both something we might call "plenary restraint" *and* constitutional dialogue in the Indian law context seems particularly appropriate. This "faith" envisions establishing a meaningful relationship between tribal courts and federal courts that is, ultimately, constitutionally rooted and provides the basis for enduring and sound development.

This constitutional "faith" is not a blind faith without historical grounding but rather is rooted in a (re)understanding that treaties are first and foremost "political compacts"—compacts

72. *See supra* note 66 and accompanying text.

73. 'Faith' may seem quite an odd word to use in conjunction with notions of constitutional explication, but it strikes me as wholly appropriate in the effort to recall and recover important foundational understandings relative to the constitutional status of tribal sovereignty and principles of treaty federalism.

74. There is, of course, a kind of doctrinal double bind here. While it may be necessary to look to Congress to limit the exercise of judicial plenary power, this must *not* obscure the fact that congressional plenary power itself is unrestrained and without constitutional justification. *See, e.g., supra* notes 24-31 and accompanying text. See also potential affirmative limitations on plenary power discussed *supra* note 46 and accompanying text.

that provide a kind of mutual "political recognition and a measure of the consensual distribution of powers between tribes and the United States."[75] This recognition was once approved in such cases as *Worcester v. Georgia*,[76] *United States v. Winans*,[77] and even the Indian Commerce Clause itself and contains (now as it did then) the seeds to (re)establish an appropriate legal and political paradigm for a dignified and principled model of federal-tribal relations. Since this paradigm was never adequately recognized, much less constitutionalized, it is not surprising that federal dominance in Indian affairs has increasingly become untethered from any limiting legal principles and evermore characterized by a doctrinal incoherence bordering on conceptual and historical illiteracy.[78]

The point of this constitutional "faith" is to identify a fruitful path in the evolving relationship of tribal courts and federal courts. This path begins in the past with an understanding of mutuality grounded in principles of treaty federalism, then moves to sweep aside the plenary brambles, and finally clears the way to complete a constitutional journey. In other words, this emerging "faith" seeks a way that respects both the aspirations of tribal courts to flourish and a national jurisprudence that regards arbitrary power as constitutionally indefensible. Without such "faith" and conscientious effort, there is little hope for meaningful growth and stability but only the likelihood of a kind of blind and erratic development that potentially exposes tribal courts (and tribes in general) to the "decisive operations of merciless power."[79] The presence of such a "faith" is needed to provide both confident institutional grounding and principled

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75. BARSH & HENDERSON, *supra* note 19, at 270.

76. 31 U.S. (6 Pet.) 575 (1832).

77. 198 U.S. 371 (1905).

78. *See* POMMERSHEIM, BRAID, *supra* note 2, at 46-48. There is also the more decorous observation that "the precedential effect of federal Indian law decisions is often weak." Frickey, *supra* note 13, at 439.

See also David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996), for a trenchant analysis of the Court's abandonment of foundation principles in favor of a new subjectivism. This subjectivism was candidly described by Justice Scalia:

> [O]pinions in this field have not posited an original state of affairs that can subsequently be altered only by explicit legislation, but have rather sought to discern what the current state of affairs ought to be by taking into account all legislation, and the congressional "expectations" that it reflects, down to the present day.

Id. at 1575.

79. Tacitus, *quoted in* SEAMUS HEANEY, CREDITING POETRY 27 (1996).

constitutional assurance.

VIII. CONCLUSION

The terrain I have discussed has few markers except those of *National Farmers Union* and *Iowa Mutual*.[80] The unambiguous message of these cases is the directive to support the development of tribal courts. I think this means—must mean—despite the absence of extensive judicial elaboration—assisting tribal courts in obtaining continuing respect, creating stable structural relationships with federal courts, and achieving parity with state and federal courts within our national judicial system. All of this needs to be pursued and explored within a yet to be adequately identified constitutional framework—a constitutional framework that nevertheless can be discerned within principles of treaty federalism.[81] There are also the less visible but co-ordinate parts of this equation that involve the range and extent of tribal judicial *power* over non-Indians and events that take place on fee land within the reservation.[82] All of these concerns are currently unhinged from any meaningful constitutional idiom or discourse and threaten to permanently extend the plenary power doctrine into the judicial realm. The sum of these developments

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80. Note, however, that this terrain has been severely disturbed by the Court's recent decision in *A-1 Contractors*, 117 S. Ct. 1404. *See supra* note 65 and *infra* note 82 and accompanying text.

81. *See* BARSH & HENDERSON, *supra* note 19, at 279-82.

82. *See, e.g.*, Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294 (8th Cir. 1994); FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311 (9th Cir. 1990); Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997).

The *A-1 Contractors* case is almost paradigmatic. There was a car accident on the Fort Berthold Reservation in North Dakota. It took place on a state highway constructed on a right of way granted by the tribe and involved two non-Indians. There are no controlling federal statutes on point. The sole issue in the case is whether the tribal court has proper jurisdiction over this garden variety tort action. In the absence of any limiting federal statutes, one would assume an unimpaired tribal sovereignty. Yet, the assertion of federal common law may indiscriminately swallow the modest tribal authority claimed in this arena. It is difficult to see how the Court could rule against tribal court jurisdiction unless it relied on such unprincipled declarations as "inconsistent with their status" or misguided attempts to expand Montana v. United States, 450 U.S. 544 (1981), beyond its statutory underpinnings. *See, e.g.*, Strate v. A-1 Contractors, 76 F.3d 930 (8th Cir. 1996) using this very approach. But see Matter of the Estate of Tasunke Witko v. G. Heileman Brewing, Civ. 93-204 (Rosebud Sioux Supreme Court 1996), for a contrary exegesis. (Note in this regard that the author is a member of the Rosebud Sioux Supreme Court.)

Yet, as noted above, *supra* note 65 and accompanying text, this is exactly what the Supreme Court did. The Court's decision highlights its ongoing amnesia in the Indian law arena and reinforces the necessity to return to foundational principles and to identify a constitutional grounding for the future.

reveals a journey—though seldom recognized—of great constitutional and historical import that needs the increased understanding and engagement of all of us within the legal community. Without this consciousness and commitment, there is only likely to be more aimless wandering in an (extra) constitutional wilderness.