Tribal Courts and Federal Courts: A Very Preliminary Set of Notes for Federal Courts Teachers

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... Perhaps a good place to start with students is to review the differing constitutional architecture with respect to the federal government and the states, and the federal government and the tribes. The founding fathers gave primary focus to the former and decidedly less (but not none as many suppose) to the latter. The key elements of the federal/state structure that are quite prominent in the constitutional and federal courts canon include the Interstate Commerce Clause, the Full Faith and Credit Clause, the Supremacy Clause, the Tenth Amendment, and the Eleventh Amendment. These benchmarks, whatever their nuanced contours in any era, highlight a primary constitutional theme of federalism. That theme, of

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* This is a highly edited, just the ‘high points’ synopsis of remarks made at the AALS Federal Courts Section Meeting in Atlanta, Georgia on January 4, 2004. The object, as that of my colleagues, was (is) to stimulate more members of the Federal Courts scholarly and teaching community to include materials on tribal courts in their texts, syllabi, and pedagogy. A wider, and much more complete and detailed analysis may be found in Frank Pommersheim, “Our Federalism in the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts’ Teaching and Scholarly Community,” 71 U. COLO. L. REV. 123 (2000).

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1. Congress shall have the 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.

2. “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.” U.S. CONST. art. IV, § 1.

3. “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, cl. 2.

4. “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.

5. “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI.
course, is the (eternal) pursuit of the proper *constitutional* balance between federal and state power.

The Constitution does not speak directly or textually to the relationship between federal courts and state courts. Article III of the Constitution does not create any lower federal courts. It only creates the Supreme Court. In fact, a proposal for the Constitution to expressly create lower federal courts was voted down at the constitutional convention. Art. III authorizes, but does not mandate, the creation of "such inferior Courts as the Congress may from time to time ordain and establish." The first federal district and appeals courts were created by Congress in the Judiciary Act of 1789 and they have been with us ever since.

In the absence of direct constitutional text, it has been the job of Congress and the Supreme Court to fashion a relationship between federal courts and state courts. Taking their cue from the dignified architecture embedded in the Constitution, both Congress and the Supreme Court have generally sought to strike a respectful balance. This goal of respectful balance is perhaps best captured in the well known phrase of "Our Federalism." This staple of federal courts' jurisprudence is grounded in, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for a lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism."

When we shift our attention to the relationship of the federal government to the tribes, and federal courts to tribal courts, a certain obscurity, even ignorance, predominates. There is (or maybe was) an

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6. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.
9. 1 Stat. 73 (1789).
11. This proviso of uncertainty is necessitated by the departure of both Congress and the Supreme Court from their constitutional moorings in the context of Indian law. See, e.g.,
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identifiable constitutional structure between the federal government and the tribes. Those structural elements are (were) the Indian Commerce Clause\(^\text{12}\) and the treaty-making power.\(^\text{13}\)

These constitutional referents have largely been ignored by Congress and the Supreme Court and have given way to notions of ‘plenary’ power in Congress and increasingly in the Supreme Court itself.\(^\text{14}\) To people unfamiliar with the field of Indian law, such observations will likely seem extravagant. Unfortunately, they are not. An extra-constitutional regime is the current core of Indian law.\(^\text{15}\)

The issue of the relationship of tribal courts to federal courts includes both broad structural questions of the “fit” of tribal courts with the national judiciary and narrow practice questions that need to be examined within the federal courts’ community. In addition, there are significant historical, doctrinal, and normative questions relative to the ongoing inquiry concerning the status of tribes and their governmental institutions within our national society. This latter undertaking tracks all the way back to the beginnings of the Republic and the yet-to-be-completed task, not fully comprehended by the Founding Fathers, of identifying the constitutional and legal status of the tribal sovereign.\(^\text{16}\)

While no answer is on the immediate horizon, the failure of the influential federal courts’ community to be aware of, much less involved in, this inquiry and dialogue is not an encouraging sign.

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12. U.S. CONST. art I, § 8, cl. 3.

13. “He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” U.S. CONST. art. II, § 2, cl. 2.

14. See, e.g., Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie*, 31 ARIZ. ST. L.J. 439, 440 (1999). This point—perhaps shocking to people in the federal courts’ teaching and scholarly community—is not meant to discourage interest but rather simply to describe the unique landscape of Indian law.


It is a primary objective of this essay to lay the foundation for reflection and participation by the federal courts' teaching and scholarly community in these efforts. Despite the vast constitutional differences in text and interpretation, tribal courts often confront the very same kinds of issues that federal and state courts do. The catalogue includes matters of the exhaustion and abstention doctrines; supplemental, removal, and diversity jurisdiction; standards of review, federal common law, and appellate review; and separation of powers.  

Given the obvious time (and space) constraints, I have chosen a single example to illustrate both similarities and differences of treatment within the federal/state court and federal/tribal court context. One of the manifestations of “Our Federalism” is the abstention doctrine. Its corollary in Indian law is the exhaustion doctrine. A comparison of these doctrines is instructive. The exhaustion doctrine requires litigants to “exhaust” their tribal remedies, including tribal appellate remedies, before invoking federal district court jurisdiction to review the tribal court’s assessment of its own jurisdiction. With rare exceptions, at least until recently, exhaustion was thought to be mandatory rather than discretionary.

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

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17. See the discussion of these issues in Pommersheim, supra note *, at 144–80.
18. Most of the ensuing exhaustion/abstention discussion comes directly from Pommersheim, supra note *, at 144–54.
We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed.

Exhaustion of tribal court remedies, moreover, will encourage tribal 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.

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

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

23. See, e.g., sources cited supra note 19.
24. See sources cited supra note 19, and cases discussed therein.
25. CHEMERINSKY, supra note 7, at 735.
26. See id.
27. See id.
28. See id. at 736. Specifically:

The central policy question concerning abstention is whether the Supreme Court was justified in fashioning these doctrines. Long ago, Chief Justice John Marshall wrote: “It is most true, that this Court will not take jurisdiction...
In the context of tribal courts and federal courts, the Supreme Court has not spoken of abstention, but only of exhaustion. The essential principle of the exhaustion doctrine reflects the notion that, pursuant to federal question jurisdiction, there must be an exhaustion of tribal court remedies before there is federal court review of whether there was tribal court jurisdiction in the first instance. The Supreme Court has couched its exhaustion rationale as necessary to support the development of tribal courts, to obtain the benefit of their expertise, and to advance the orderly administration of justice.

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

Id. (footnotes omitted).


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

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


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

32. See Iowa Mut., 480 U.S. at 16 n.8; Nat’l Farmers Union, 471 U.S. at 856–57.
In doing so, it seriously undermined the likelihood of tribal court jurisdiction in such cases. Although this essay is not the place to discuss the apparent contraction of the exhaustion doctrine, it is the place to raise the question of the relationship, if any, of abstention principles to exhaustion doctrine. Are these principles essentially identical, or at least quite similar, or ultimately quite dissimilar? There is at least one substantive difference, perhaps a critical one. In abstention, the federal court has full subject matter jurisdiction over the dispute, whereas in the tribal court exhaustion situation, the federal court’s jurisdiction is limited to the determination of whether the tribal court has jurisdiction, but not over the underlying substantive dispute itself. For example, in Strate, the federal district court would not have subject matter jurisdiction over a car accident that took place on a highway running through a reservation in North Dakota involving two North Dakota residents.

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

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

33. See Strate, 520 U.S. at 438.
34. See U.S. Const. art. III (describing the scope of national judicial power and the authority of federal courts).
35. See Nat’l Farmers Union, 471 U.S. at 850–51.
36. 28 U.S.C. § 2283 (2000). “A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.” Id.
sharpens the vertical and dulls the horizontal nature of the relationship. Perhaps the most provocative, if not distasteful, description of the exhaustion doctrine is that in its apparent solicitude for tribal courts, it is no more than judicial "affirmative action." Despite its divisive allusions, this bold assertion does identify the essential quandary: where do tribal courts fit within contemporary federalism and what is the doctrinal justification for the fit? Unfortunately, this quandary has completely eluded the attention of the federal courts' community.

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

The underlying policy grounds for abstention, which seek to advance federalism by protecting state judicial interests, are both similar and different from the exhaustion concerns articulated in National Farmers Union and Iowa Mutual. The similarity draws from the idea of comity and the necessity of some kind of mutual respect. Exhaustion and abstention appear similar because they both require federal courts in some

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

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

Iowa Mut., 480 U.S. at 22.


circumstances to defer to the courts of another sovereign, whether state or tribal, and stay their hand. This similarity is governed by the shared policy concern of comity and respect. Yet there remains an important shade of difference. Comity in the exhaustion context moves beyond respect to include a specific commitment to support and advance tribal courts. This additional benevolence is at least implicitly required as a matter of federal policy in order to advance the tribal sovereign, which otherwise would not be as sufficiently or constitutionally protected as the state sovereign.

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

The Supreme Court decision in El Paso Natural Gas Co. v. Neztsosie highlights the issues of exhaustion and tribal jurisdiction over federal causes of action. A review of the Ninth Circuit decision is particularly instructive. In Neztsosie, several Navajo plaintiffs filed actions in tribal court against El Paso Natural Gas and other defendants, alleging personal injury and wrongful death based on Navajo common law. In response to these actions, the defendants filed actions in federal court seeking preliminary injunctions to enjoin the Navajo Tribal Court from asserting

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


42. The development and application of federal common law is a somewhat questionable and problematic practice in this area and is discussed in Pommersheim, supra note *, at 170–75.

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


45. See El Paso Natural Gas Co. v. Neztsosie, 136 F.3d 610, 612 (9th Cir. 1998).
jurisdiction over the plaintiffs’ claims. The defendants asserted that all actions arising from “nuclear incidents” fall within the Price-Anderson Act, and must be litigated in federal court. The district court granted in part, and denied in part, the requests for preliminary relief.

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

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46. Id.
48. Neztsosie, 136 F.3d at 612.
49. Id.
50. Id. at 614 (citing Nat’l Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985)).
51. Id. at 615. Specifically:
   An exception to the tribal exhaustion requirement exists where: (1) an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith; (2) tribal court jurisdiction patently would violate express jurisdictional prohibitions; (3) exhaustion would be futile because of the lack of an adequate opportunity to challenge the tribal court’s jurisdiction; or (4) no federal grant authorizes tribal governance of nonmembers’ conduct on land covered by Montana’s main rule. In this case, the parties only dispute the applicability of the “express jurisdictional prohibition” exception to tribal court jurisdiction. “A substantial showing must be made by the party seeking to invoke [the ‘express jurisdictional prohibition’] exception to the tribal exhaustion rule. Tribal courts rarely lose the first opportunity to determine jurisdiction because of an ‘express jurisdictional prohibition.’”
52. See id. at 617.
53. The court quotes approvingly from the district court opinion in Kerr-McGee Corp. v. Farley, 115 F.3d 1498, 1502 (10th Cir. 1997)).
The court then incisively distinguished the pivotal role of comity in the federal-tribal context:

As in cases raising comity concerns regarding federal-state jurisdiction, comity concerns in federal-tribal jurisdiction arise out of mutual respect between sovereigns. In the realm of federal-tribal jurisdiction, . . . Congress has expressed an . . . interest in promoting the development of tribal sovereignty. The Supreme Court has recognized this congressional intent and assiduously advocated federal abstention in favor of tribal courts. Thus, even if Price-Anderson preempts state court jurisdiction—still an open question in this circuit—there is no express prohibition of tribal court jurisdiction.\(^{54}\)

This thoughtful exegesis demonstrates a persuasive commitment to the continuing vitality of the National Farmers Union and Iowa Mutual teachings about comity and the respect due tribal courts. The court was not swayed by Strate, and properly confined it to situations involving non-Indian activities on non-trust land.\(^{55}\)

The dissent took a more expansive Strate approach, noting that there is an implicit tribal jurisdictional prohibition because there is no federal grant of authority over nonmembers' conduct,\(^{56}\) but it neglected to consider the

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54. Id. at 618–19 (citations omitted).
55. Id. at 618 n.5. Specifically:
   
   [I]n this case the Navajo Nation retained tribal sovereignty over the land the mining companies occupied, which land was neither open to the public nor controlled or maintained by any entity other than the tribe. The Strate Court expressly declined to address cases, like the present one, where the disputed tort involved nonmembers of the tribe and occurred on tribal land. Because this case is distinguishable from Strate, we need not consider whether a Montana exception applies. It seems indisputable, however, that a claim involving uranium contamination poses a danger to the ‘health or welfare of the tribe.’

Id. (citation omitted).
56. Id. at 621 (Kleinfeld, J., dissenting). Specifically, in addressing this issue:

   The Court held in Strate, that exhaustion in tribal court is not required, where “it is plain that no federal grant of authority provides for tribal governance of nonmembers’ conduct.”

   When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers’ conduct . . . covered by [the] main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. As in criminal proceedings, state or federal courts will be the only forums competent to adjudicate those claims. Therefore, when tribal court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement, must give way, for it would serve no purpose other than delay.
territorial component of tribal jurisdiction on tribal land. That is, tribal
court jurisdiction is exclusive on tribal land unless expressly limited by
Congress.\textsuperscript{57} While Neztsosie may be seen as a narrow case about the
intricacies of preemptive federal jurisdiction and exhaustion involving
“nuclear” torts under the Price-Anderson Act, it may also be seen as a
potential case about the legal competence of tribal courts to entertain federal
causes of action involving non-Indians. The larger problem, of course, is
whether there is any principled basis for treating tribal courts more
favorably or less favorably than state courts in the context of the legal
competence to entertain federal causes of action.

Indeed, the Supreme Court’s unanimous decision vacating the Ninth
Circuit’s judgment in Neztsosie\textsuperscript{58} took the former tack, and announced that,
despite the absence of express language in the statute or any legislative
history relative to tribal court jurisdiction, tribal court jurisdiction was
foreclosed.\textsuperscript{59} Although one might argue that the decision was “practical,” it
certainly was not analytically compelling. Justice Souter’s opinion
admitted as much with its lighthearted observation that “[n]ow and then
silence is not pregnant.”\textsuperscript{60}

More recently, in Nevada v. Hicks,\textsuperscript{51} the Court went even further. It
expressly held that there was no tribal court jurisdiction in a civil case
brought by a tribal member against state officers for alleged due process
and civil rights deprivations that took place at a tribal member’s residence
located on tribal land within the reservation.\textsuperscript{62} In addition, the court held

\begin{quote}
The majority has in footnote 5 attempted to limit Strate to its facts, as we
might with a poorly reasoned decision of our own that had not stood up well
over time. We cannot do that with a Supreme Court decision.
\end{quote}


\textsuperscript{57} See, e.g., FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122–23 (The Michie

\textsuperscript{58} See id. at 481–88.

\textsuperscript{59} Id. at 487. The Court found, perhaps not implausibly, congressional silence on tribal
court jurisdiction a product of likely inadvertence. While the decision adhered closely to the
particulars of the Price-Anderson Act and its history, the Court recognized the ability of tribal
courts as a general matter to decide questions of federal law. Specifically:

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

\textit{Id.} at 485 n.7 (citation omitted).

\textsuperscript{61} 533 U.S. 353 (2001).

\textsuperscript{62} These claims were based on both tribal and federal law. The case is also significant
because it extended the Court’s parsimonious view of tribal court jurisdiction to events that took
that tribal courts do not have authority to adjudicate federal claims based on 42 U.S.C. § 1983 because they are not courts of "general jurisdiction" and there is no federal statute that authorizes such actions.\textsuperscript{63}

Tribal courts are likely to continue to be pilloried by these competing arms of the federal sovereign, especially when neither of them admit any limit to their authority with respect to tribal courts. Tribal courts stand at the crossroads—proud, of their growth and accomplishment—but caught between the plenary powers of Congress and federal courts, and without constitutional guarantee, recognition, or solace.\textsuperscript{64}

The exhaustion doctrine—despite its conceptual flaws—purports to be respectful. That is what the Supreme Court said. But how does it work in reality? How does it look on the ground? Since the doctrine was articulated in 1985, the Supreme Court has decided five subsequent cases about the reach of tribal jurisdiction and has ruled against tribal authority in all five cases.\textsuperscript{65} In fact, Justice Scalia made express reference to the fact that the Supreme Court has yet to hold that a tribal court does have civil jurisdiction over non-Indians.\textsuperscript{66}

All of this pricks some rather radical and disturbing observations. If the exhaustion doctrine is as doctrinally problematic and empirically bankrupt as it seems, why would tribes and tribal courts consider the federal courts place at a tribal member's residence on trust land within the boundaries of the reservation. Previous Supreme Court cases in this area were limited to events that took place on non-trust land within the reservation.

\textsuperscript{63} Id. at 367–68. Justice Scalia's description of why tribal courts are not courts of general jurisdiction is in the vein of an ipse dixit pronouncement descending from above. But see the more detailed and compelling analysis to the contrary in Justice Stevens opinion that concurs in the judgment. Id. at 401–03.

\textsuperscript{64} See POMMERSHEIM, supra note 16, at 46–50.


\textsuperscript{66} Justice Scalia stated:

In National Farmers Union Ins. Cos. v. Crow Tribe, we avoided the question whether tribes may generally adjudicate against nonmembers' claims arising from on-reservation transactions, and we have never held that a tribal court had jurisdiction over a nonmember defendant. Typically, our cases have involved claims brought against tribal defendants. In Strate v. A-1 Contractors, however, we assumed that "where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumably lies in the tribal courts," without distinguishing between non-member plaintiffs and nonmember defendants. Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over nonmember defendants in general.

\textit{Hicks}, 533 U.S. at 358 n.2 (internal citations omitted).
scheme they participate in as legitimate? Indeed, they might not and this might lead teachers and students back to fundamental normative questions concerning respect and the role of tribes and tribal courts within our constitutional democracy.67

67. See, e.g., POMMERSHEIM supra note 16 at 37–56.