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Tribal Courts: Constitutional Decision Making and An Opportunity for Transformation

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American Indian tribal courts are increasingly recognized as being important forums for the resolution of disputes that arise on reservations.[1] The growth in the stature and responsibility of tribal courts raises questions not only regarding how and what law will be applied in these forums,[2] but also raises questions of a different and more important order. This is especially true at the appellate and constitutional level and includes such questions as what narrative, what interpretive framework, and what aspirations, if any, will permeate these decisions.

Constitutional decision making in tribal courts provides a unique opportunity for the tribes, in the framework of actual cases, to develop a body of indigenous constitutional law. More specifically, this process promises, in part, to illuminate the role sovereignty will play in how tribal societies transform the present by integrating the best of the past with a liberating view of the possibilities of the future.[3] Within this larger context, there are also a number of textual and analytical questions concerning the nature and process of tribal constitutional adjudication. It is issues such as the nature of tribal foundational documents, theories of tribal constitutional adjudication, and the relationship of tribal constitutional decision making to federal and state constitutional processes that are the focus of this essay. Needless to say, all of this must be examined in a context that often provides for the

perilous overview and review authority of Congress and the federal courts.[4] In addition, these issues will be examined in relation to tribal culture and institution building.

TRIBAL CONSTITUTIONS AS FOUNDATIONAL DOCUMENTS AND SOURCES OF MEANING

Tribal court constitutional decision making, like similar judicial decision making in state or federal courts, is *not* the simple utilization of the formula that calls for the application of the appropriate law to the facts, which, in turn, yields a credible decision. A more significant question is the principled direction that such decision making seeks to advance. Without awareness of the policy-making attributes of constitutional decision making, tribal courts are in danger of mimicking the sterile analytical rigor so often recommended to them, but that is often unhinged from the cultural context and vision of tribal communities. With this in mind, it is instructive to review the history and meaning of tribal constitutions and other tribal foundational documents.

It is important to note that in American political and legal culture the United States Constitution is authoritative—indeed supremely authoritative.[5] The authority vested in the Constitution requires controversies to be decided according to it. In addition, the Constitution is viewed as a *text* that is meaningful in the sense of being meaning-ful, full of meaning.[6] These observations serve to highlight some important threshold questions in the area of tribal court constitutional and appellate adjudication.

When examining tribal constitutions, it is not to be presumed that these documents are either supremely authoritative or a text full of meaning. The reason for this is rooted in the origins of most tribal constitutions, as well as the existence of other organic sources of authority, namely treaties, that may have an equal or even more ascendant claim as supremely authoritative and full of meaning. Many tribal constitutions were adopted pursuant to the enabling provisions set forth in the Indian Reorganization Act of 1934[7] (hereinafter IRA). Originally, section 17 of the IRA provided:

> Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid, and approved by the Secretary of Interior. . . . Amend-

ments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.[8]

This almost unlimited approval authority of the Secretary of the Interior has only recently been somewhat narrowed. The Secretary must now exercise his or her authority within forty-five days of the tribal election or the inaction will be considered as approval.[9] More importantly, it must approve any tribal constitution or amendment unless there is a finding "that the proposed Constitution and bylaws or any amendments are contrary to applicable laws."[10]

In light of this overarching secretarial authority, a salient question emerges concerning the quality and authenticity of the tribal constitutions adopted pursuant to the IRA authorizing legislation. These constitutions did *not* come into being as the result of tribal constitutional conventions that might have distilled the wisdom and insights of tribal people and their traditions, but rather from the handiwork of the top-down Bureau of Indian Affairs. Throughout the 1930s when most tribes organized under the IRA, the Department of the Interior prepared model constitutions for tribes.[11] A leading survey of tribal courts noted that, "the boilerplate provisions of this model were adopted by virtually all tribes which voted to organize under that Act. . . . Thus, although the IRA was designed to restore residual powers to tribal sovereignty, the extent and exercise of those powers were determined largely by the Interior Department."[12]

Many of these constitutions provided for an ongoing review authority by the Secretary of the Interior to approve amendments to tribal constitutions, as well as tribal ordinances adopted pursuant to these constitutions. The paternalistic and colonizing agenda of the Bureau of Indian Affairs knew few, if any, bounds. As noted by the Supreme Court, "The BIA had a policy of including provisions for secretarial approval, but that policy was not mandated by Congress."[13]

Indeed, these "model" constitutions omitted at least two hallmark provisions from the "model" United States Constitution, namely the protections of the Bill of Rights and the doctrine of separation of powers. Not coincidentally perhaps, these very omissions are the ones that tribes are most criticized for, when in fact the blame lies elsewhere.[14] Of course, the IRA did not mandate the absence of these protections.

As a result, many tribes were effectively cut off from incorporating important tribal values into their constitutions, as well as shackled with "model" constitutions that blatantly ignored the distinctive and crucial elements that made the United States Constitution the emulative model in

the first instance. It is, therefore, not difficult to understand that tribal constitutions do not, as a rule, occupy within their own communities the same high moral and legal ground as the United States Constitution holds in American legal and political culture.

LAKOTA CONSTITUTIONAL CONCERNS FOR TRIBAL COURTS

In spite of this problematic history, tribes are increasingly adept and conscious of the necessity to seize and to bend their constitutions in order to make them more responsive to a tribally defined understanding of present and future needs and aspirations. For example, a number of tribes, including the Rosebud Sioux Tribe,[15] adopted Bill of Rights amendments to their constitutions before enactment of the Indian Civil Rights Act of 1968[16] mandated such guarantees throughout Indian country.

More recently, the Rosebud Sioux Tribe adopted a constitutional amendment which, on one hand, removed the review authority of the Secretary of the Interior from tribal council legislative decisions.[17] This tribal constitutional provision effectively abolished the Secretary's authority to "interfere" in the duly elected tribal council's exercise of its legislative functions. On the other hand, and even more transformative, the tribe adopted an amendment that explicitly allows for the calling of a tribal constitutional convention. The requirements are:

> Upon receipt of a petition that contains the signatures of at least thirty (30) per cent of the voters in the last tribal election, the Tribal Secretary shall refer the petition to the next Tribal Council meeting which shall call a Tribal Constitution convention to commence within thirty (30) days and to appoint a seven member Tribal Council, to conduct this Convention for the purpose of hearing proposed amendments, and to approve those of which shall be referred to the Secretary of Interior, and upon receipt of them, it shall be the duty of the Secretary of Interior to set an election as described in Section 1 above.[18]

Such actions reflect a deliberate and concerted effort to breathe new life into documents of hierarchy and control.

The Rosebud Sioux Tribe has not yet utilized this provision to call a constitutional convention. However, I have witnessed and participated in numerous conversations with tribal members about the possibility. These conversations are marked by excitement, challenge, and a deep sense of historical and cultural responsibility. The constitutional amendment process "is an important instrument with which the political community can exer-

cise its stewardship over the living tradition. If constitutional adjudication is one occasion for moral discourse and growth, the amendment process is another such occasion."[19]

Such efforts may be complemented by tribal efforts to identify other vital sources of law with which to shape the contours of tribal aspiration. A most likely source here, of course, is treaties. Treaties are significant on a number of different levels. Treaties, at least for many tribes, represent a high point of tribal sovereignty when tribes dealt with the federal government on a true government-to-government basis. Treaties represent the political and legal adjustments between the western march of an expansionary American society and the staunch resistance of established tribal societies.[20]

Treaties not only represent a high point of tribal sovereignty, but are also instrumental in establishing a permanent and constitutional link between the tribes and the federal government:

> The treaties that established reservations did much more. They helped create the enduring and special legal and moral relationship that exists between the federal government and Indian tribes. Treaties also reflect a set of sovereign promises and expectations that continue to be at the heart of defining the modern contours of this relationship.[21]

It is also important to note that many tribes, including the Sioux Tribes of South Dakota, did not view the treaty as mere expedience and the power politics of the day, subject to future accommodation of other emerging national interests. Every treaty was settled with the smoking of the pipe. As noted by Father Peter John Powell, the well-known historian and anthropologist:

> [W]hites, rarely, if ever, have understood the sacredness of the context in which treaties were concluded by Lakota people. . . . "The pipe never fails," my people, the Cheyennes say. For the pipe is the great sacramental, the great sacred means that provides unity between the Creator and the people. Any treaty that was signed was a sacred agreement because it was sealed by the smoking of the pipe. It was not signed by the Chiefs and headmen before the pipe had been passed. Then the smoking of the pipe sealed the treaty, making the agreement holy and binding.
>
> Thus, for the Lakota, the obligations sealed with the smoking of the pipe were sacred obligations.[22]

Treaties are, of course, recognized as the "supreme law of the land" under the United States Constitution's Supremacy Clause[23] and serve as the legal and moral cornerstone for many tribes. Treaties are therefore sufficiently located in tribal law and history to be properly considered "supremely

authoritative" and full of meaning. All of this, however, is subject to potentially debilitating federal review—both legislative and judicial[24]—but it does, nevertheless, identify a potential core of tribal foundations law with which to address contemporary goals and issues.

Treaties and tribal constitutions, when placed side by side, provide a valuable complement and reinforcement to each other as brackets of tribal authority and meaning. Treaties are, in many ways, most suited as the primary legal vector to orient tribal-federal government to government relations. In addition, treaties served to establish and to advance the appropriate legal and diplomatic protocols to maintain tribal territorial and governmental integrity. Tribal constitutions, in turn, are more central to the task of identifying day-to-day values and principles that are vital to developing tribal societies which are committed to the flourishing of individual and communal life within their borders. These parameters are not, of course, mutually exclusive, but rather represent zones of activity and concern with different centers and overlapping common areas.

There are, of course, other potential sources of tribal foundational law such as tradition and custom including, for example, principles that are part of the oral tradition. However, the significant point is the overriding importance of engaging in the on-going process of identifying authoritative legal sources of tribal aspiration in order that tribal court decision making be as meaningful as possible.

THEORIES OF TRIBAL CONSTITUTIONAL ADJUDICATION

Having identified the potentially "supremely authoritative" tribal foundational documents that are most meaningful, the next question is how tribal courts might approach their interpretive function when they encounter tribal foundational law. The two most likely theories of constitutional adjudication that might pertain to tribal constitutional adjudication are of originalism and non-originalism. These theories bracket the broad range of interpretive possibilities, which are also often spoken of somewhat imprecisely, as from conservative to liberal or from "strict" construction to "loose" construction. The important point to emphasize in this area is the issue of choice in adopting an appropriate interpretive strategy that is politically and culturally resonant from the tribal point of view.[25] These terms, in turn, suggest a broad range of interpretive possibilities.

The notion of originalism holds that: [T]o "interpret" the Constitution is to ascertain the original meaning—the beliefs the text was originally understood to symbol-

ize—and then to answer the question of what significance, if any, those beliefs have for the conflict at hand, what those beliefs mean for the conflict at hand, what those beliefs if accepted, require the court to do, if anything, with respect to the conflict at hand.[26]

This describes the prototype of legal analysis: identify the applicable "rule" and apply it to the facts of the case. Admittedly, in the context of originalist constitutional adjudication, the search for the "rule" also includes a search to identify the original meaning or value assigned to the constitutional provision by the framers and ratifiers of the Constitution. This may not always be an easy task and is one which is fraught with its own hermeneutic problems. Yet it is not difficult to view the process as essentially frozen in time, independent of, and potentially cut off from, contemporary reality and political discourse. For many, in fact, this would constitute a good thing.[27]

Non-originalism, on the other hand, does not reject originalism, but simply goes beyond its singular approach. To the non-originalist, the constitutional text is meaningful in its original sense, but it is meaningful in an additional sense in that at least some constitutional provisions signify fundamental aspirations of the American political tradition.[28] A text is not constrained to a singular meaning, and in the case of the constitution, it may be argued that it has grown to include "certain basic, constitutive aspirations or principles or ideals of the American political community and tradition."[29] The best examples here include the free speech, press, and religion provisions of the First Amendment; the due process clause of the Fifth Amendment; and the due process and equal protection clauses of the Fourteenth Amendment.

The originalism approach applied to tribal constitutional adjudication is deeply problematic. Given the colonialist intrusion and presence of the Bureau of Indian Affairs in many tribal constitutions, it hardly makes sense to regard this handiwork as unduly authoritative. Undoubtedly, most provisions in tribal constitutional texts, as with the federal constitution, are reasonable and without substantial controversy.[30] Nevertheless, it is critical that indigenous people, if they are to pursue a true course of liberation and self-determination, identify a foundational text(s) and a theory of constitutional interpretation that enhances this potential development. Non-originalist constitutional theory holds promise in assisting this development. Therefore, one of the major tasks of tribal constitutional adjudication is to identify and to evaluate the fundamental aspirations and ideals of the tribal community.

In the context of tribal court constitutional adjudication, these models raise important questions. While the originalist approach is basically straightforward legal analysis, application of the non-originalist approach is not so easy to identify in the tribal court setting. The aspirational component of the political-legal community, and the tradition that it reflects, emerges over time. Tribal courts are very young. Most were established after the IRA of 1934 and most have become significantly active only within the last fifteen to twenty years. Therefore, this part of the tribal tradition is quite recent in its development. Treaties, however, are significantly older. Tribal culture and tradition, of course, are quite ancient.

This configuration presents some unique challenges. Tribal courts do not, as a general rule, have access to a body of established tribal constitutional precedent that helps to form and to provide guidance to the potential aspirational component of tribal constitutional adjudication. This problem, in turn, is exacerbated by the external Bureau of Indian Affair roots of most tribal constitutions. These items do not in any way constitute an insuperable bar. Rather, these facts suggest a cautionary note that the efforts of the tribal courts will need be both venturesome and circumspect; venturesome, in the sense of identifying the sources of the aspirational components. However, they must also be circumspect in the sense of properly grounding decisions within the matrix of reasonable analytical processes and legal reasoning.[31]

In this regard, the early decisions in Indian law authored by Chief Justice John Marshall are instructive. In the seminal cases of *Johnson v. McIntosh*,[32] *Cherokee Nation v. Georgia*,[33] and *Worcester v. Georgia*,[34] the Supreme Court was confronted with important questions about the rights and status of Indian tribes within a young republic. In these cases, with minimal guidance from the text of the Constitution,[35] Justice Marshall articulated a vision of tribes as possessing a unique position as "domestic dependent nations" and "distinct, independent political communities" within an emerging national federalism.[36] This position was grounded in a recognition of tribal sovereignty that was largely to be independent of state aggression and interference.[37] These nascent doctrines were not grounded in precedent because there was none. Rather, they were fashioned from some combination of political-legal expediency and a certain moral urgency. These views have been seriously vitiated and increasingly attenuated over the years, but they have not been overruled or completely abandoned.[38]

Paradoxically, these early cases also framed a despotic imperialism and racism to justify federal title to Indian land and attendant federal hegemony in Indian affairs. This is most apparent in *Johnson v. McIntosh*, which rested almost entirely on the spurious and self-serving "doctrine of discovery."[39]

This federal hegemony developed without constitutional safeguard or limits and, ultimately, spawned the astounding doctrine of congressional "plenary power" in Indian affairs.[40] This bifurcated, if not fully schizophrenic, approach to tribal sovereignty as either extensive and enduring, or marginal and fleeting, has further complicated the context in which tribal court constitutional adjudication takes place. This federal inconsistency has been exacerbated by the tendency of the federal courts and Congress to approach Indian tribes as little more than legislative objects rather than free-standing constitutional subjects.

In addition, elaboration of the concepts of community and tradition is required to interpret a foundational constitutional text. A functional definition of community describes the concept as a group of persons united principally by their identification of themselves as the present bearers of, and participants in, a tradition. Tradition, in turn, is perhaps best understood as the history or narrative in which the central theme is an aspiration to achieve a particular form of life and to certain projects, goals, and ideals. The central discourse within the tradition is an argument about how that form of life is to be cultivated and revised.[41] The purpose of constitutional and other foundational texts is to charter and mandate the form of life to which a particular community and tradition aspire. The foundational text, therefore, symbolizes the mandate.[42]

These definitions of a foundational text and its community and tradition will seem to many, perhaps, as more pertinent to interpretation in the "sacred" as opposed to any "constitutional" sense. But that is just the point—the analogy to "sacred texts" is very resonant to a "non-originalist" conception of constitutional adjudication.[43] Such texts, whether "sacred" or "constitutional," particularly given their "aspirational" and indeterminate nature, become irrepressible with an "excess of meaning."[44] For example, Justice Harlan in *Poe v. Ullman*[45] spoke of the importance of "approaching the text which is the only commission for our power not in a literalistic way, as if we had a tax statute before us, but as the basic charter of our society, setting out in spare but meaningful terms the principles of government."[46] Such an emphasis on community, tradition, and "sacredness" is also likely to be more resonant with Native American cultures and history.[47]

Yet there is not only this making or creating of meaning and tradition, but its complement of being creatures of that tradition. It is this double yoke of creating and creatureliness—the tension between the dynamic verb and the stately noun—that makes for the essence of the mediation of the past and the present that is at the heart of the acts of interpretation and steward-

ship.[48] This description is certainly well understood within Indian culture and tradition. For example, as noted by Vine Deloria, Jr., and his co-author Clifford Lytle:

> First, there must be a structural reform of tribal governing institutions that is fundamental but also permits a continuity between past and present. . . . Second, some kind of determined and lasting cultural renewal must take place to resolve the question of Indian identity in the modern world; here emotional continuity must be recognized and considered seriously.[49]

The response to these challenges will do much to determine the nature and quality of tribal and reservation life in the immediate future. Tribal court constitutional adjudication will be a significant strand in the braid of that response. Without such tribal constitutional underpinnings, there can be a tragic loss of identity and purpose to the pervasive intrusion of extrinsic legal demands and forces.

As suggested by the late Robert Cover,

> No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.[50]

In part, this insight describes the legacy that tribal courts inherit and must necessarily confront and transform in the process of their development and decision making. The traditional law and narrative of many tribes, and most certainly, the Sioux Tribes of South Dakota, place emphasis on community, cooperation, and relatedness. However, the dominant legal narrative of majoritarian jurisprudence is often rooted in individualism, competition, and autonomy. Therefore, tribal court decision making inevitably confronts the necessity of developing a blend of these values, a transmutation that synthesizes the tension created by these pressures of dominant intrusion from "above" and of culture and tradition from "below."[51]

The dilemma of the Sioux Tribes is not unlike the situation that all tribal institutions face as they seek to navigate between the tradition and roots of their past and the often uncharted frontiers of the present and future. It is important to note the essential fragility of law and legal decisions that are not grounded in a supporting culture and social reality. The law helps to shape the community reality and ideal, as well as, in return, being shaped and informed by it. Tribal court decision making which is unhinged from

this process will surely become irrelevant and even inimical to the achievement of a meaningful tribal future. It is this perspective of law as both tradition and aspiration defining the "world in which we live" that most eloquently illustrates the law's responsibility and meaning within tribal culture at large.

COMMUNITY AND INSTITUTION BUILDING

The law is also about power—the jurisdictional power to render justice and achieve other socially enhancing goals. However, the ability to realize worthy objectives requires more than jurisdiction and power; it requires expertise, resources, and community support. Practitioners and scholars of Indian law are often not cognizant enough of this political and social reality. Theory and practice in Indian law are too often unhinged from the political commitment to institution building which is necessary to make the possibilities of the law meaningful. Any tribal jurisdictional authority confirmed by Congress or the U.S. Supreme Court must, in turn, be complemented by tribal resources and institutions capable of implementing that authority in such a way that the ideals and principles of the law are realized in practice. Without this understanding, much Indian law scholarship is, or is in danger of, becoming a misleading abstraction cut off from the frontiers of significant tribal development. A supportive body of federal Indian law is a necessary, but not sufficient, condition for building a flourishing cultural and institutional future in Indian country. The field of Indian law needs to extend its range, to ground itself in tribal reality, and to avoid the temptation of becoming a thing unto itself—a useless reification.[52]

An important and related caution to heed is the fact that the law in general, and Indian law in particular, cannot be an end in itself. The law does not make things happen, but rather creates a normative space[53] in which to realize and effectuate individual and cultural values. The normative space created by tribal sovereignty validated by federal Indian law stands in need of creative and viable tribal institutions in order to achieve the social and cultural objectives embodied in the law. This latter effort is often a long, unheralded struggle, but it is, arguably, the most important foundation for the future. It is important not to lose sight of the fact that all significant public values are realized through institutions. Better institutions are essential to better lives.[54]

Unfortunately, many in the field of Indian law, including scholarly commentators, often pay insufficient attention to this issue.[55] The result is to create a grossly distorted picture of the relationship of law to sovereignty.

It further obscures the relationship of politics and institution building to law and the realization of significant tribal values. For example, the fact that tribal sovereignty and federal Indian law currently endorse the significance of tribal courts[56] cannot deflect concern from the concomitant necessity for tribal courts to continue to develop their resources, competence, and insights. For it is, after all, both theory and practice, both authority and its implementation, that determine the quality of justice rendered.

This foundational predicate includes the necessity of developing increasing political support and understanding of tribal courts. Institutional support needs to come from all quarters, but particularly from both the Indian and non-Indian communities subject to the authority of tribal courts, including those members of the legal profession who practice before them. For example, on the Rosebud Sioux Reservation, Chief Justice Sherman Marshall[57] holds an annual week-long Tribal Court Open House in which members of the tribal and general public are invited to visit the courthouse and listen to a series of presentations on the policies and procedures of the Tribal Court. The topics of these presentations range from the filling out of forms to the structure and function of the tribal court appellate system. Chief Justice Marshall also makes it a point to visit all the tribal communities to explain the nature and duties of the Tribal Court. This is particularly important, because as Chief Justice Marshall notes,[58] many tribal people do not understand, and have a negative view, of their tribal courts.

In addition, Chief Justice Marshall has organized a group of Indian and non-Indian attorneys, who appear regularly before the Rosebud Sioux Tribal Court, to serve as an advisory group concerning legal practice issues before the court. This group is clearly a precursor to a functioning tribal bar association.[59] Without this kind of understanding and action, tribal sovereignty and federal Indian law are in danger of becoming abstractions disconnected from the reality and challenge of community and institutional life on the reservation. Even worse, tribal sovereignty itself may be threatened by the very failure to establish an adequate base of financial resources and institutional development. For example, at recent hearings of the U.S. House of Representatives Committee on Interior and Insular Affairs in South Dakota, most of the testimony provided about tribal courts focused on how well they are working or not working in their day-to-day operation, rather than on their theoretical or jurisdictional underpinnings. This is the kind of "reality," rightly or wrongly, that is likely to affect Congress rather than any general analysis of federal Indian law.

Much of the problem concerning tribal sovereignty within the national, state, and even many tribal legal communities is the absence of any

foundational web of beliefs about tribal sovereignty. Without this foundational agreement or understanding that tribal sovereignty exists and what its roots and baseline horizons are, the entire field flounders. Tribal sovereignty often seems to be extraordinarily precarious and at risk. For example, the overwhelming membership of the state and federal practicing bar and judiciary have no training in Indian law. Furthermore, since the Indian law presence is only nominal in other parts of the curriculum,[60] most members of the practicing bar and judiciary have no sense of what tribal sovereignty and the principles of self-determination mean. As a result, the legal and constitutional context of tribal sovereignty is not readily apparent. Therefore, almost every instance of discourse on Indian law requires substantial "education" in order to achieve any threshold understanding of the most important concepts within the field. This is an incredibly burdensome but necessary task, which reflects the pervasive ignorance and distortion that permeate the understanding of sovereignty and Indian law doctrine within the national and state legal communities.

This problem is exacerbated because the thrust of tribal sovereignty is often "counter" to the thrust of that of other minority groups within this country. The object of almost all litigation of other minorities in this society is increased access to rights and institutions within the dominant society. This goal is well understood, even if resisted, within the dominant legal and judicial community. However, the object of most, if not all, tribally initiated or defended Indian law litigation is to establish and vindicate a historical, non-assimilated right to an autonomy that seeks to preserve a "measured separatism."[61] This emphasis is not recognized within the national and state legal communities' web of beliefs. Therefore mutuality and dialogue in the context of federal awareness and understanding of tribal court decision making is critical to expand the foundational web of beliefs that federal and state legal communities bring to Indian law matters.

Belief in tribal sovereignty does not, at least to me, mean that tribes always "win." Rather, it means that their basic sovereignty is recognized as permanent, enduring, and located in, and vouchsafed by, the federal constitution. Only when this is accomplished will it be truly possible to determine the specifics of tribal sovereignty in the thick detail and practice of adjudicating individual cases, just as it occurs in the context of state and federal sovereignty.

The absence of any truly constitutionalized understanding of tribal sovereignty is problematic not only at the level of political and legal rhetoric, but more significantly, it is a serious destabilizing force in the day-to-day political, cultural, and institutional life of tribes. Any project,

particularly one that is relative to law and jurisdiction, is subject to unilateral defeasance by Congress or the federal courts.[62] A sovereignty of sufferance, oxymoronic on its face, does not provide an environment conducive to meaningful self-determination or realization.

The process of tribal court constitutional adjudication promises to articulate an emerging vision of tribal sovereignty. It will also, in parallel fashion, advance the ongoing process which recognizes, from the tribal perspective, the authenticity of tribal courts as legitimate and significant tribal institutions. Tribal authenticity is, of course, not a given because tribal courts, like most other tribal institutions, do not have their structural roots in pre-contact, pre-colonial times.[63] This "inside/out" authenticity, in turn, must meet the potential strictures and constraints of judicial and congressional review that are necessary to achieve a complementary "top-down" authenticity. It is the synthesis that results from this delicate passage between these often competing sources of validation that holds the key to a meaningful and flourishing future.

COMPARATIVE HORIZONS

Constitutional decision making in tribal courts can also potentially perform other important functions, in addition to its central task of illuminating the distinctive markers of tribal sovereignty. These functions include delineating the relationship of tribal courts to federal courts, providing tribal interpretations of federal standards, and incorporating international legal norms into tribal jurisprudence. These are all relevant and promising avenues of development for tribal courts.

Congress has failed to address the relationship of tribal courts to federal courts.[64] The United States Constitution is silent on this matter. Therefore, to date, the task of attempting to describe these parameters has largely fallen to the federal courts, especially the U.S. Supreme Court. The Supreme Court has begun this task in the *National Farmers Union Insurance Company v. Crow Tribe of Indians*[65] and *Iowa Mutual Insurance Company v. LaPlante*[66] cases, by staking out some of the territory relevant to review of tribal court assertions of jurisdiction. Both of these decisions make it clear that the Supreme Court expects tribal courts to fully articulate their own view of the scope of tribal jurisdictional authority.[67] Federal review, when it follows, is a *de novo* consideration of the federal question presented by tribal assertions of jurisdiction.[68] Therefore, it is incumbent upon tribal courts, even when direct tribal constitutional questions are not involved, to persuasively

develop convincing legal rationales to support assertions of tribal jurisdiction.

There are intriguing questions about the potential deference to, rather than review of, some tribal court jurisdictional decision making. While it is clear, for example, that federal courts may review tribal court jurisdictional decision making in light of alleged mistakes about the contours of federal law relevant to tribal jurisdiction, it is less clear what a federal court should do when the alleged tribal court mistake is not one of federal law, but rather of tribal law.[69] Here, tribal courts need to articulate the rationale that just as federal courts are bound by the construction of state law of the highest state court, they ought to be similarly bound by the interpretation of tribal law by the highest tribal court. In many instances, tribal constitutional adjudication will come into play only if the tribal court has jurisdiction in the first place. It is therefore necessary for tribal courts to deploy sufficient analytical rigor to maximize the likelihood of success at the jurisdictional level which, in turn, will often open the way to a proper consideration of tribal constitutional law.

Tribal constitutional adjudication may also be fruitfully compared to the growing trend and attention paid to state constitutional adjudication.[70] This growth can be traced to two important developments: state willingness to provide greater civil liberties protections for its citizens than those required by the United States Constitution,[71] and state interest in insulating its decisions from Supreme Court review.[72] These developments have sparked a small but noticeable shift in law school curricula toward developing courses and materials in this area.[73] Similar developments in Indian law would alleviate the tendency to confine Indian law to the margins of the law school curriculum.[74]

These developments suggest similar options for tribes and tribal courts to consider. Although tribes are bound by the Indian Civil Rights Act of 1968, as the states are by the federal Bill of Rights, they would have a free hand to develop their own view of civil rights protection as a matter of tribal constitutional law. This is already true of some tribal constitutions[75] and seems an obvious building block of tribal sovereignty. The question becomes: how do the tribes and tribal courts construe the parameters of basic civil rights guarantees completely apart from any federal mandate, such as the Indian Civil Rights Act of 1968? In addition, tribes need to pursue creative avenues to limit federal court review of tribal court decision making. This raises even broader questions about tribal constitutions and their relationship to state and federal constitutions. The federal constitution is a charter of enumerated powers, while state constitutions are general

limitations on the otherwise wide-ranging sovereign power of the states. "Therefore, the great questions of federal constitutional interpretation involve implied *powers*, whereas the great questions of state constitutional interpretation concern implied *limitations*.[76]

This fundamental difference between state and federal constitutions would seem to be a matter of significant tribal constitutional importance. Little has been written in this area. Obviously, the "plenary power" doctrine suggests limited tribal authority, but that is not quite the question. The initial question is the meaning of a tribal constitutional text as interpreted by the highest tribal appellate court. For example, many tribal constitutions make reference to specific enumerated powers and broad unspecified reserved powers.[77] Is the tribal constitutional text a charter of only limited powers or one of extensive powers with only implied limitations? This issue thus raises the question of the parameters of tribal sovereignty and tribal constitutional authority within the national republic. Thoughtful tribal constitutional exegesis of these issues can play a vital role in resolving questions at the tribal level and inaugurating and contributing important dialogue at the national level.

Tribes and tribal courts are also poised to consider pathbreaking constitutional constructions. While the heart of traditional constitutional "faith" is its commitment to those individual rights vouchsafed in the Bill of Rights, that constellation of aspiration may be inadequate to capture the real essence of a complementary tribal goal to preserve and enhance a set of cultural rights. In this vein, the emerging set of international norms relevant to indigenous people provides a rich benchmark for tribal consideration. These norms include: (1) recognition of the distinctive nature of indigenous peoples' collective rights; (2) the centrality of territorial rights to indigenous survival; (3) the recognition of indigenous peoples' right to self-determining autonomy; and (4) international legal protection of indigenous rights.[78] This international core of indigenous peoples' rights could be constitutionalized directly through the amendment process and/or that process of constitutional interpretation of the relevant tribal constitutional text. All of these steps, taken individually or collectively, offer the potential to advance tribal constitutional foundations and aspirations, as well as enrich the national jurisprudence of pluralism and equality.

FEDERAL CONSTRAINTS AND OPPORTUNITIES

Any opportunity for transformation within tribal court appellate and constitutional decision making faces potential impediments and constraints

from the pervasive federal authority over Indian affairs. These potential limiting factors come from two different sources within the federal government: first, the power of federal courts to review much of tribal court decision making[79] and second, the overarching "plenary power"[80] of Congress in Indian affairs.

The dialectic of these twin forces is, perhaps, best illustrated within the context of the Indian Civil Rights Act of 1968.[81] The act requires all tribal governments, as a matter of federal law, to provide a wide range of rights, drawn largely from the Bill of Rights, to all persons within a reservation. The only remedy specified in the act is the writ of habeas corpus.[82] In *Santa Clara Pueblo v. Martinez*,[83] the Supreme Court held that habeas relief was the exclusive remedy created by the act and it did *not* authorize any implied civil rights cause of action independent of habeas relief.[84] The Court also indicated that one of the effects of its decision was to change the law that tribal courts would have to apply.[85] Thus, under the *Santa Clara* holding, claims not amenable to habeas corpus relief are diverted to tribal court. Decisions of tribal courts in these matters do not appear to be reviewable in federal courts.

This result has provided some controversy. Amending legislation has been introduced in Congress to increase the purview of federal district court reviewing authority of tribal court decisions made under the Indian Civil Rights Act.[86] This pending legislation clearly falls within the wide-ranging plenary authority of Congress in Indian affairs. Yet it epitomizes the tension between pervasive federal review on one hand and respect for tribal sovereignty on the other. This debate further illustrates the deeper question of what the purpose of federal review is in the first place—to encourage law that emanates from another strand in the braid of American pluralism, with review reserved for situations that diverge only markedly from the federal canon? Or is it to insure a similarity of result and assimilation of difference? The answers to these questions are not obvious, but it is important, nevertheless, to consider them.

There is some helpful guidance in the form of lower federal court jurisprudence developed prior to the Supreme Court's *Martinez* decision in 1978. These decisions suggest that federal courts are prepared to envision tribal courts as not having to rotely adhere to the federal definitions of many of the key provisions of the Indian Civil Rights Act of 1968.[87] With the appearance of *Martinez*, this process came to an abrupt halt because most of the cases were no longer amenable to federal court review. Yet these cases provide one possible benchmark for considering that, even when there is federal review, it ought to be flexible with regard to both tribal court

objectives and the resource constraints that affect many tribes. The federal courts need to be informed of tribal objectives and "story" in order that their decision making may be informed and dialogic rather than the product of "imperial" largesse.

The big swipe of Congress' plenary authority seems best left on the sidelines in order to allow this process of localized and narrow judicial review to develop further. Such an approach would encourage, rather than impede, the mutual craft of articulating a sovereignty that proceeds slowly but surely through the process of limited federal review.

This question of federal policy highlights the darker specter of federal courts' acting in a "jurispathic" capacity. This term, originally coined by Robert Cover, means the authority of courts to kill law created by communities.[88] Efforts of tribal courts may be struck down by federal courts as simply too divergent from the majoritarian canon to be tolerated within the federal system.[89] Tribal courts and culture are obviously different from state courts and culture. Therefore, there are real questions of how to understand and to judicially think about this potentially authentic divergence.[90] In many ways, this is the heart of the problem and it goes all the way back to the beginnings of the federal republic. The focal point is the inability to envision and determine how tribal sovereignty and culture are to be integrated within a dynamic federal system. No one knows the answer, but certainly there is a cautionary note that unilateral actions and pronouncements, whether judicial or congressional, do not offer much hope beyond that of assimilation and coercion. Empathy, dialogue, and respect for emerging tribal jurisprudence hold out the most meaningful promise for achieving a future that honors and respects differences rooted in the past, but transfigured in the present, in order to achieve a secure and flourishing future for all.

CONCLUSION

The opportunities and challenges that face tribal courts are manifold and include such things as how and what law will apply. Perhaps more significant are questions related to tribal court appellate and constitutional decision making. These questions include how decisions will be influenced by tribal constitutional texts and theory, as well as tribal aspiration. The processes of law and legal decision making are not "merely a system of rules to be observed, but a world in which we live."[91] The truth of this assertion carries special meaning for Indian tribes and their tribal courts. Indian tribes have struggled from the very beginning of contact with European intruders to preserve their cultures and vindicate their claim of

sovereignty. The law has played a critical role, for better or worse, in this struggle.

This world of law in which we live therefore has a deep and abiding effect on the actions of indigenous, colonized, and developing tribal communities within this republic. This pervasive influence of law needs to be transformed within tribal courts as a means to develop and to communicate tribal constitutional and moral aspirations and to elucidate the legal narrative and foundational thrust of tribal culture and sovereignty.

Tribal constitutional decision making is also vital in that it potentially sheds abstraction in favor of context that is grounded in the flesh and blood of actions and concerns of tribal communities. Such tribal constitutional narrative challenges the dominant canon that there is "only one true version of a story and that there is only one right way to tell it."[92] It is, ultimately, this challenge and the response to it that will likely determine much of the future of Indian law, as well as the quality of tribal life and the integrity of the national commitment to the treaty-based promises of flourishing "measured separatism."

NOTES

1. See *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 US 845 (1985); *Iowa Mutual Insurance Co. v. LaPlante*, 480 US 9 (1987).

2. See Michael Taylor, "Modern Practice in the Tribal Courts," *University of Puget Sound Law Review* 10 (Winter, 1987): 231–75; Frank Pommersheim, "The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay," *New Mexico Law Review* 18 (Winter, 1988): 49–71; Frank Pommersheim, "The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction," *Arizona Law Review* 31 (Number 2, 1989): 329–63.

3. Frank Pommersheim, "Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence," *Wisconsin Law Review* 1992 (Number 1): 411.

4. Obviously, some tribal court decisions are reviewable by federal courts, while tribal authority as a whole is caught within the net of Congress' "plenary authority" in Indian affairs. See *National Farmers Union*, 471 US 845 (1985); *Iowa Mutual*, 480 US 9 (1987); and *Lone Wolf v. Hitchcock*, 187 US 553 (1903).

5. Michael J. Perry, *Morality, Politics, and Law: A Bicentennial Essay* (New York: Oxford University Press, 1988), p. 131. Of course, it is important to note that for African Americans (and other minorities including women) the U.S. Constitution (at least in its original form) may be seen as enshrining majoritarian dominance. See e.g. Thurgood Marshall, "Reflections on the Bicentennial of the United States Constitution," *Harvard Law Review* 101 (November, 1987): 1.

6. Ibid., p. 132.

7. U.S., *United States Code* [hereafter *U.S.C.*] 25 (1990): sec. 461–79. Strictly speaking, this Congressional enabling legislation was not required to "authorize" tribes to adopt tribal constitutions. Tribes clearly retained such authority as part of their sovereignty and reserved powers not explicitly extinguished by Congress. See David H. Getches and Charles F. Wilkinson, *Federal Indian Law: Cases and Materials*, 2d ed. (St. Paul, MN: West Publishing Co., 1986), p. xxv; Felix S. Cohen, *Handbook of Federal Indian Law* (Washington, D.C.: U.S. Department of Interior, 1942) and rev. ed., Rennard Strickland and Charles F. Wilkinson, eds. (Charlottesville, VA: Michie Bobbs-Merrill, 1982), pp. 231–42. As to the numbers themselves, note that

> [D]uring the two year period within which tribes could accept or reject the IRA, 258 elections were held. In these elections, 181 tribes (129,750 Indians) accepted the Act and 77 tribes (86,365 Indians, including 45,000 Navajos) rejected it. The IRA also applies to fourteen groups of Indians who did not hold elections to exclude themselves. Within twelve years, 161 constitutions and 131 corporate charters had been adopted pursuant to the IRA.

Comment, "Tribal Self-Government and the Indian Reorganization Act of 1934," *Michigan Law Review* 70 (April, 1970): 955, 972. Many other non-IRA tribes adopted written constitutions, which are often quite similar to IRA constitutions. Some tribes, such as the Navajo, do not have a written constitution. Ibid., pp. 972–73.

8. U.S., *U.S.C.* 25 (1988): sec. 476.

9. Ibid., 25 (1988): sec. 476(d)(2).

10. Ibid., 25 (1988) sec. 476(c)(3). The term "applicable laws" is defined to mean "any treaty, Executive Order or Act of Congress or any final decision of the Federal courts which are applicable to the tribe, and any other laws which are applicable to the tribe pursuant to an Act of Congress or by any final decision of the Federal Courts." Pub. L. 100–581 (1988): sec. 102(1).

11. Judith Resnik, "Dependent Sovereigns: Indian Tribes, States, and the Federal Courts," *University of Chicago Law Review* 56 (Spring, 1989): 672, 712.

12. Ibid. See also Curtis Berkey, "Implementation of the Indian Reorganization Act," *American Indian Journal* 2 (August, 1976): 2, 4. "In retrospect the Interior Department played a larger role than the tribes in drafting constitutions (p. 4)."

Tribal constitutions "were, in most instances, prepared in advance by the Bureau of Indian Affairs and reflected little, if any, tribal input and retained substantial review authority within the BIA." Frank Pommersheim and Terry Pechota, "Tribal Immunity, Tribal Courts, and the Federal System: Emerging Contours and Frontiers," *South Dakota Law Review* 31 (Summer, 1986): 553, 556.

13. *Kerr-McGee Corp. v. Navajo Tribe*, 471 US 195, 198 (1985).

14. For example, the very impetus for the adoption of the Indian Civil Rights Act of 1968, U.S., *U.S.C.* 25 (1983): sec. 1301–03, came from the federal government's perception and findings concerning the absence of these protections in Indian country. See Donald L. Burnett, Jr., "An Historical Analysis of the 1968

'Indian Civil Rights Act,'" *Harvard Journal on Legislation* 9 (May, 1972): 557–626; Comment, "The Indian Bill of Rights and the Constitutional Status of Tribal Governments," *Harvard Law Review* 82 (April, 1969): 1343–73. Tribal support was less than enthusiastic. See Robert T. Coulter, "Federal Law and Indian Tribal Law: The Right to Civil Counsel and the 1968 Indian Bill of Rights," *Columbia Survey Human Rights Law* 3 (January, 1971): 49–93.

Much of the current critique of tribal courts relates to the separation of powers question. See Pommersheim, "Legitimacy in Tribal Courts," p. 60. This critique continues to surface in almost any discussion of tribal courts with members of the practicing bar in South Dakota. There is little evidence in such conversations about the root of the problem resting with the BIA rather than the tribes.

15. Rosebud Sioux Tribe, Constitution, Art. X (1966). The Article specifically provides:

> Section 1. All members of the tribe and all Indians on the reservation shall enjoy without hindrance freedom of religion, speech, press, assembly, conscience and association.
>
> Section 2. Any Indian on the reservation accused of any offense shall have the right to a speedy and public trial and to be informed of the nature and cause of the accusation, and to be confronted with witnesses against him. Any Indian accused of any offense shall have the right to the assistance of counsel and to demand trial by jury. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
>
> Section 3. No person shall be subject for the same offense to be twice put in jeopardy; nor be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor be denied equal protection of law. [Adopted by Amendment XI, effective May 21, 1966.]

16. U.S., *U.S.C.* 25 (1983): sec. 1301–03.

17. Article XVIII of the Rosebud Sioux Tribe Constitution effectively removed all prior review authority of the BIA to review tribal ordinances enacted by the Tribal Council pursuant to its enumerated and reserved powers set out in Article IV—Powers of the Rosebud Sioux Tribal Council. Rosebud Sioux Tribe, Constitution, Art. XVIII (1985).

18. Rosebud Sioux Tribe, Constitution, Art. IX, sec. 2 (1985). Other kinds of possible tribal constitutional amendments include such things as separation of powers, increased accountability through recall, initiative and referendum provisions, and decentralization with more authority accorded to local communities.

19. Perry, *Morality, Politics, and Law*, p. 142.

20. Frank Pommersheim, "The Reservation as Place: A South Dakota Essay," *South Dakota Law Review* 34 (Issue 2, 1989): 246, 252–53. The quality of those treaty "exchanges" varied significantly. Many tribes were forced to agree to small reservations in regions removed from their aboriginal territories because the federal government had the strong military upper hand. Yet in other cases, particularly involving the Lakota of the Great Sioux Nation in South Dakota, there was a virtual military standoff and the reservations were established in the heart of the traditional Sioux homeland in the Dakota Territory.

21. Ibid., pp. 252–53.

22. Peter John Powell, "The Sacred Treaty," quoted in Roxanne Dunbar Ortiz, *The Great Sioux Nation: Sitting in Judgment on America* (Berkeley, CA: Moon Books, 1977), p. 106.

23. U.S. Const. Art. III, sec. 2.

24. See notes 63–78 and accompanying text.

25. See John H. Garvey and T. Alexander Aleinikoff, *Modern Constitutional Theory*, 2d ed. (St. Paul, MN: West Publishing Co., 1993), for a discussion of the broad range of possibilities such as interpretism/non-interpretism, the role of the text, original intent, neutral principles, and balancing.

26. Perry, *Morality, Politics, and Law*, p. 132.

27. See Robert H. Bork, "The Constitution, Original Intent, and Economic Rights," *San Diego Law Review* 23 (July-August, 1986): 823–32; Edwin Meese III, "Toward a Jurisprudence of Original Intention," *Benchmark* 2 (January-February, 1986): 1–10; and Antonin Scalia, "Originalism: The Lesser Evil," *University of Cincinnati Law Review* 57 (Number 3, 1989): 849–65.

28. Perry, *Morality, Politics, and Law*, p. 133.

29. Ibid.

30. For example, basic legislative authority in the areas of tax and the regulation of land use.

31. See notes 64–78 and accompanying text.

32. *Johnson v. McIntosh*, 21 US 543 (1823).

33. *Cherokee Nation v. Georgia*, 30 US 1 (1831).

34. *Worcester v. Georgia*, 31 US 515 (1832).

35. Indian tribes are only mentioned once in the Constitution, and that is in the Commerce Clause, which states that 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, sec. 8. Indian tribes are implicitly subjects of the treaty making power. U.S., Const., Art. II, sec. 2. Individual Indians are mentioned as "Indians not taxed." U.S., Const., Art. I, sec. 2.

36. *Worcester v. Georgia*, 31 US at 559–63.

37. See sources in notes 33–34.

38. See the cases and discussion in Getches and Wilkinson, *Federal Indian Law*, pp. 269–336, 416–547.

39. See Robert A. Williams, Jr., *The American Indian in Western Legal Thought* (New York: Oxford University Press, 1990), pp. 233–328.

40. See *United States v. Kagama*, 118 US 375 (1886); and especially, *Lone Wolf v. Hitchcock*, 187 US 553 (1903).

41. Perry, *Morality, Politics, and Law*, p. 137.

42. Ibid.

43. Ibid., p. 139.

44. Ibid., p. 137.

45. *Poe v. Ullman*, 367 US 497, 540 (1961), (Harlan, J., dissenting).

46. Ibid., at 540; citing *McCulloch v. Maryland*, 17 US 316 (1819).

47. Pommersheim, "The Reservation as Place," pp. 268–70.

48. Perry, *Morality, Politics, and Law*, p. 138.

49. Vine Deloria, Jr., and Clifford Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* (New York: Pantheon Books, 1984), p. 245.

50. Robert M. Cover, "The Supreme Court, 1982 Term—Forward: Nomos and Narrative," *Harvard Law Review* 97 (November, 1983): 4–5.

51. See Pommersheim, "The Crucible of Sovereignty," p. 333.

52. See Vine Deloria, Jr.'s observations that because federal courts seem to be operating on an *ad hoc* basis, Indian law does not really exist as a theoretical discipline. He said that the study of different disciplines such as culture, religion, education, economics, history, language, and logic all have important lessons for a lawyer looking for new strategies to practice law. "NARF Celebrates Its 20th Anniversary," *NARF Legal Review* 15 (Summer, 1990): 3.

53. See Cover, "Nomos and Narrative," pp. 4–11.

54. Robert N. Bellah et al., *The Good Society* (New York: Knopf, 1991). The authors also point out that "in surveying our present institutions we need to discern what is healthy in them and what needs to be altered, particularly where we have begun to destroy the non-renewable natural and nearly non-renewable human resources upon which all our institutions depend." Ibid., p. 5.

55. For example, no law review article in the past five years discusses tribal sovereignty in the context of local institution building. See also sources cited in notes 2–3.

56. See cases in note 1.

57. Chief Justice Marshall is a bilingual, bicultural member of the Rosebud Sioux Tribe. He is also a 1984 graduate of the University of South Dakota School of Law and a member of the South Dakota Bar.

58. Interview by author with Sherman Marshall, Chief Justice of the Rosebud Sioux Tribal Court, July, 1990.

59. Additional plans include the administration of a tribal bar examination. See generally, Pommersheim, "The Contextual Legitimacy."

60. See Resnik, "Dependent Sovereigns."

61. Charles F. Wilkinson, *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy* (New Haven, CT: Yale University Press, 1987), pp. 14–19. See also Pommersheim, "Reservation as Place," pp. 254–58.

62. See Justice Potter Stewart's declaration that "the sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance." *United States v. Wheeler*, 435 US 323 (1978).

63. "Modern" tribal institutions, such as tribal courts, particularly those that have their origins in the Indian Reorganization Act of 1934, face the problem of

being seen as "the imposition of white man's law and standards." Pommersheim and Pechota, "Tribal Immunity, Tribal Courts," p. 556.

64. Pommersheim, "Crucible of Sovereignty," pp. 360–62.

65. *National Farmers Union Insurance Company v. Crow Tribe of Indians*, 471 US 845 (1985).

66. *Iowa Mutual Insurance Company v. LaPlante*, 480 US 9 (1987).

67. Ibid., at pp. 15–16; *National Farmers Union*, 471 US 856–57 (1985).

68. *National Farmers Union*, 471 US 856–57; see also *FMC v. Shoreline-Bannock Tribes*, 905 F.2d 1311, 1313–14 (9th Cir. 1990), cert. denied, 111 S. Ct. 1404 (1991).

69. Pommersheim, "Crucible of Sovereignty," pp. 354–55, discussing *Twin Cities Const. Co. v. Turtle Mountain Board of Chippewa Indians*, 857 F.2d 1177 (8th Cir. 1988). The alleged mistake of tribal law may or may not involve an alleged mistake of tribal constitutional law. In *Twin Cities*, the alleged mistake of tribal law involved an interpretation of a tribal ordinance.

70. See Robert F. Williams, "State Constitutional Law: Teaching & Scholarship," *Journal of Legal Education* 41 (June, 1991): 243.

71. Ibid., p. 245.

72. Ibid.

73. Ibid., p. 247.

74. For example, any number of seminal Indian law cases such as *Lone Wolf v. Hitchcock*, 187 US 553 (1903) (identifying Congress' unreviewable plenary power in Indian affairs and the unilateral right to abrogate treaties) do not even merit any meaningful attention in standard constitutional law texts.

75. See Rosebud Sioux Constitution, Art. X.

76. Williams, "State Constitutional Law," p. 246.

77. See Appendix A.

78. Robert A. Williams, Jr., "Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World," *Duke Law Journal* 1990 (Number 4): 660, 684–85.

79. See the excellent discussion in Robert N. Clinton's "Tribal Courts and the Federal Union," *Williamette Law Review* 26 (Fall, 1990): 873–97.

80. See *Lone Wolf v. Hitchcock*, 187 US 553 (1903).

81. U.S., *U.S.C.* 25 (1984): sec. 1301–03.

82. Ibid., sec. 1303.

83. *Santa Clara Pueblo v. Martinez*, 436 US 49 (1978).

84. Ibid., pp. 66–67.

85. Ibid., p. 65.

86. See Appendix B.

87. See *Smith v. Confederated Tribes of the Warm Springs Reservation*, 783 F2d 1409 (9th Cir. 1986) where the procedures that tribal courts choose to adopt are not necessarily the same procedures that the federal courts follow; *Tom v. Sutton*, 533 F2d 1101 (9th Cir. 1976) where due process and equal protection

under the Indian Civil Rights Act of 1968 are not necessarily defined in the same way as they are under the Fourteenth Amendment.

88. Cover, "Nomos and Narrative," p. 40.
89. Resnik, "Dependent Sovereigns," pp. 754–56.
90. Ibid., p. 733.
91. Cover, "Nomos and Narrative," p. 5.
92. Kim Lane Schepple, "Forward: Telling Stories," *Michigan Law Review* 87 (August 1989) 2073, 2098.