Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie

Frank Pommersheim, University of South Dakota School of Law

Available at: https://works.bepress.com/frank_pommersheim/85/
COYOTE PARADOX: Some Indian Law Reflections from the Edge of the Prairie

Frank Pommersheim*

I. INTRODUCTION

The field of Indian law has been beset from its very beginnings by a recurring set of paradoxes, inconsistencies, and divided national and tribal objectives. Prime themes include colonialism astride constitutional democracy, pluralism pitted against assimilation and termination, and tribal sovereignty bristling against trust dependence and state encroachment. These themes and their obvious tensions have always been the grit of Indian law practice and scholarship. Yet recent developments in Indian law, particularly at the United States Supreme Court, threaten this well understood and precarious balance with a new, almost vicious, historical amnesia and doctrinal incoherence. A doctrinal incoherence that spawns

* Professor of Law, University of South Dakota School of Law. The author gratefully thanks the H. Lauren Lewis Faculty Research Fellowship of the University of South Dakota Foundation for a grant to support this research.


Professor Getches detects increasing “subjectivism” in Supreme Court Indian law jurisprudence premised on judicial considerations of “what the current state of affairs ought to be” and he wisely counsels against this trend:

The foundation principles of Indian law demand resistance to the temptation of judicial activism. A return to foundation principles, furthermore, would spare tribes the subjective judgments of courts by requiring congressional action,
unpredictable *ad hoc* decision making with increasing potential to destabilize and to capsize modest tribal efforts and accomplishments in the area of the self-determination that is allegedly at the heart of federal policy in the modern era.

This new jurisprudential onslaught, whether temporary or enduring, and a corresponding congressional inaction suggest the necessity of reviewing some important elements of Indian law thought and development at risk in the new doctrinal regime. At the same time, it is perhaps thoughtful to suggest other angles of vision, both new and old, in order to reclaim a horizon from which it is possible to envision a common and meaningful future. And if it comes to naught, then, simply, to record both these meretricious national developments and encourage Indian country efforts for the historical record.

with the scrutiny of the political process and the tribes' full participation, before modifying their rights as sovereigns. Indian rights do not depend on sympathy for the plight or historical mistreatment of Native Americans. Self-determination for tribes is rooted in ancient laws and treaties, and is protected against incursions except those that Congress deliberately allows. Well-meaning judicial attempts to balance and accommodate interests of Indians and non-Indians not only are inconsistent with the limited role of courts, as sanctioned by the foundation principles of Indian law, but are inevitably culturally charged.

Getches, *supra*, at 1654-55.

Professor Frickey discerns a seismic self-aggrandizing shift in the role of the Supreme Court in Indian law:

In the final analysis, in federal Indian law the Court has given the Congress much more legislative power than the text of the Constitution suggests, then bootstrapped that into a judicially enforceable power to clean up those areas of Indian affairs that Congress has not yet addressed. In establishing the plenary power of Congress over Indian affairs, the Court performed the perhaps disappointing, but nonetheless unsurprising, role of the "court of the conqueror" reflected in *Johnson v. M'Intosh*—it deferred to established patterns and practices designed to centralize the colonial power in the political branches. In aggrandizing to itself a judicially enforceable "dormant" aspect of this power, however, the Court has become an actor imposing its own set of colonial values, not merely an agent of congressional choices. This second step seems remarkable, even given the realities of a colonial society. The Court has transformed itself from the court of the conqueror into the court as the conqueror. [Footnotes omitted.]

Frickey, *supra* at 68.

I have also identified this metastasis of plenary power:

The plenary power doctrine can now be seen as coming in two distinct vintages. There is the classic doctrine of congressional plenary power as established in *Lone Wolf*. Yet even if Congress has not acted—where one would normally presuppose an unimpaired tribal sovereignty—the Court now recognizes a judicial plenary power to parse the limits of tribal court authority based on federal common law. A federal common law that at least heretofore has not been equated with any notion of implied divestiture of tribal authority.

Pommersheim, *supra* at 328 (citations omitted).
Reflections transformed into plaintive yowls from the edge of the northern plains' prairie.

II. THE LANDSCAPE OF INDIAN LAW

The landscape of law in the field of Indian affairs, particularly in the modern era, has largely concerned the competition for and distribution of jurisdictional authority in Indian country among the competing federal, tribal, and state sovereigns. With minimal constitutional guidance, this task has often fallen to the United States Supreme Court. Beginning with the hallowed Marshall trilogy and running to Lone Wolf v. Hitchcock and on through contemporary and ruinous cases like Montana v. United States and Strate v. A-1 Contractors, the Court has undertaken this task of developing doctrinal underpinnings such as the trust relationship and (Congressional) plenary power to establish federal ascendancy, recognition of tribal sovereignty as a significant, if not determinative, source of tribal authority, and until recently, consistently held against state power in Indian country unless explicitly authorized by Congress. Of less concern to the Court and Congress, but not to scholars in the field, has been the issue of boundaries.

3. See, e.g., Getches et al., supra note 1, at 224-55; Pommersheim, supra note 1, at 37-56.
4. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (holding that title to Indian land is held by the 'discoverer' European nation with a remaining right of use and occupancy held by the tribe); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (denominating tribes as neither foreign nations nor states within Art. III of the Constitution, but rather "domestic dependent nations"); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) (finding that Georgia state law has no force and effect in the Cherokee Nation or elsewhere in Indian country as Indian Nations are "distinct, independent political communities").
5. 187 U.S. 553, 564 (1903) (noting that Congress possesses plenary power in Indian affairs and may unilaterally abrogate treaties).
6. 450 U.S. 544, 565 (1981) (stating that tribes do not have regulatory authority over non-Indian activity on fee lands within the reservation unless such activity involves "consensual relations with the tribe or its members" or such "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe").
7. 520 U.S. 438, 459 (1997) (holding that tribes do not have regulatory or adjudicatory authority over non-Indian conduct that takes place on state highways within the reservation; exhaustion of tribal remedies is not required).
8. See, e.g., Getches et al., supra note 1, at 258-683; Pommersheim, supra note 1, at 37-141; Price et al., supra note 1, at 493-666.
and limits, particularly the ongoing question of whether there is any recognizable and enforceable cap to federal authority in Indian affairs.  

These doctrines—whatever their particular merits and limitations—were grounded in some reasonable attempt to understand history and the unique position of the tribal sovereign in a constitutional democracy. This concern for history and doctrinal consistency has recently been abandoned in favor of a series of historically superficial and intellectually deficient Supreme Court pronouncements that have both curbed tribal authority and advanced state authority over non-Indians on non-trust land within Indian country. These new developments—without any congressional authorization—clearly undermine tribal efforts in their homelands and highlight national


The plenary power doctrine is the subject of extensive scholarly criticism and commentary. Professor Judith Resnik cites the following authorities:


See also the critique and sources cited by Robert N. Clinton, Tribal Courts and the Federal Union, 26 WILAMETTE L. REV. 841, 847 (1990).

10. See Alaska v. Native Village of Venetie Tribal Government, 118 S. Ct. 948, 955 (1998) (holding that Alaska Native villages are not "dependent Indian communities" within the meaning of the Indian Country statute, 18 U.S.C. § 1151, and therefore do not possess any governmental authority over non-Indians); South Dakota v. Bourland, 508 U.S. 679, 694 (1993) (finding that the Cheyenne River Sioux Tribe does not have regulatory jurisdiction over non-Indians on federal "taking land" for Oahe Dam within the exterior boundaries of the Cheyenne River Sioux Reservation). See also Strate, 520 U.S. at 1404; Montana, 450 U.S. at 566 (finding that tribes do not have regulatory authority over non-Indian conduct on fee land within the reservation unless there is consensual activity or the non-Indian activity affects "political integrity, the economic security, or the health or welfare of the tribe").
impediments that an unlimited (federal) judicial power shorn of historical understanding or conscience may erect in Indian country.

In light of this recent jurisprudential turn, it is worth recalling that the essence of law concerns power and values. Tribal assertion of jurisdiction seeks recognition of its power to enact and carry out law that strives to realize values that are important to the well being of life on the reservation. Federal law and decision making provide the necessary vehicle for respecting and vouchsafing these efforts. Such legal respect is what most strongly characterizes the value of law in a constitutional democracy. Mutual respect among mutual sovereigns is the essence of republican constitutional governance. Yet that institutional respect—particularly at the Supreme Court—seems to be waning and turning into a rather blithe dismissal of tribal authority over significant non-Indian populations engaged in significant activities on portions of Indian country. This exercise of federal judicial power without respect for the tribal sovereign and without apparent limits threatens the overall institutional integrity and legitimacy of the Supreme Court in Indian law and endangers federal-tribal stability in national Indian affairs.

The current landscape of law in Indian country reflects growing conflict and deepening tension. As tribes go forward ever more resolutely to pursue self-determination, the Supreme Court continues to stifle these attempts, especially when they involve non-Indians. These actions are devoid of doctrinal substance, lack congressional authorization, and conflict with federal policy. On one hand, this constitutes an obvious contradiction; but on the other, it is perhaps no more than federal power ever fearful of meaningful sovereignty. In many ways, current Supreme Court jurisprudence reflects its own inept, if not willful, failure to understand or plumb, much less resolve, the "anomalous" relation and "complex character" of the relationship involving Indian tribes and the United States noted at the very beginning of Indian law jurisprudence.11 One would have thought the Court could do better in its present consideration of these "peculiar and cardinal distinctions"12 in the modern era in terms of providing respect, achieving justice, and identifying the legitimate sphere of tribal sovereignty within a constitutional democracy. Unfortunately, this does not

11. See United States v. Kagama, 118 U.S. 375, 381 (1886). Specifically, "[t]he relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States, has always been an anomalous one and of a complex character." Id.

12. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831) ("But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else.").
seem to be the case. Indeed, the Court seems to have largely abandoned any honest encounter with this doctrinal and ethical challenge.

III. THE ROAD OF CHANGE

The hazardous uncertainty of much current Indian law jurisprudence reveals a certain exhaustion of vocabulary. Key phrases such as tribal sovereignty, meaningful self-determination, and the government-to-government relationship no longer seem to suggest any common, substantive understanding that make mutuality and (incremental) advance possible. This cleft in the conceptual terrain suggests an impending paradigm shift without yet identifying any new paradigm. The revealing insight of the Irish poet, W. B. Yeats, that "[t]hings fall apart; the centre cannot hold"\(^{13}\) appears especially apt. This state of affairs portends the need for and emergence of a new vocabulary and political discourse in Indian country. Such an endeavor is essentially twofold: an internal (re)consideration of the very nature of civic life and self-government on the reservation and an external concern with the nature of the fabric of the sovereign-to-sovereign relationship between the federal government and the tribes. At a number of recent Indian law conferences, while not yet a symposium topic, speakers increasingly allude to this necessity. For example, Greg Bigler, a prominent Indian attorney and tribal judge, spoke of his growing commitment to the study and teaching of Yucchi, his tribal language, not simply as a vehicle of cultural continuity, but as a road to change. In his view, the road to change begins more with words than politics, and more with politics than law. And in searching for new energizing, political theory about civic affairs and self-rule, where better to start than in the indigenous lexicon of thought and philosophy. Mr. Bigler was also quick to note that such endeavors must avoid the pitfall of a debilitating nostalgia. As he trenchantly observed, all societies recognize golden ages in their mythological past. The danger of these constructs lies in

\(^{13}\) William Butler Yeats, *The Second Coming*, in *The Collected Poems of W. B. Yeats* 184 (1956). In the key stanza, the poem reads:

> Turning and turning in the widening gyre
> The falcon cannot hear the falconer;
> Things fall apart; the centre cannot hold,
> Mere anarchy is loosed upon the world
> The blood-dimmed tide is loosed, and everywhere
> The ceremony of innocence is drowned;
> The best lack all conviction, while the worst
> Are full of passionate intensity.
their potential to create an empty longing for something that most likely never was. Their beauty is to suggest an ideal; a ground of aspiration from which to realize important (political) values of the past in a contemporary setting.\textsuperscript{14}

In this vein, it is also pertinent to suggest revisiting \textit{The Road: Indian Tribes and Political Liberty}\textsuperscript{15} with its many prescient insights and exacting historical exegesis into the nature of early native-federal interaction, particularly in reference to an emerging notion of treaty based federalism. The significant theoretical accomplishment of this work was to identify a model of federal-tribal interaction that was grounded in the historical understanding of treaties as creating a basis for an enduring and mutually satisfactory political and legal relationship. For example, treaties serve not only as a recognition of a static tribal sovereignty, but more broadly as a dynamic "form of political recognition and a measure of the consensual distribution of powers between tribes and the United States."\textsuperscript{16} The essence of this understanding is embodied in the notion of "compact" within its core elements of consent of the governed, recognition of a legitimate sphere for limited national power, retention of all other local authority to the tribes, and the right to structure local institutions in the common interest.\textsuperscript{17}

This nascent movement also suggests the need for Indian law scholarship itself to broaden its ken of concern to include matters of political theory and local civic action, to search across other disciplines and fields of study for the sparks of insight and to help fan a native prairie fire of political renovation and renewal throughout Indian country. In this vein, for example, Ed Valandra, former member of the Rosebud Sioux Tribal Council and current doctoral candidate in Indian Studies at the University of Buffalo, has suggested the need for the Lakota tribes in western South Dakota to broaden, rather than constrict, their thinking—in light of current demographic patterns and treaty based claims—about governance and partnership efforts with non-Indians, local governments and the state itself outside the current boundaries of reservations in western South Dakota but within original treaty boundaries. As he has insightfully noted, what may

\begin{footnotesize}
\begin{itemize}
\item[14.] Greg Bigler expressed his views in oral comments at the Tribal Law and Governance Conference held at the University of Kansas School of Law, October 15-16, 1997.
\item[16.] \textit{Id.} at 270
\item[17.] \textit{See} \textit{id.} at 271. For an extension of these themes, see generally ROBERT WILLIAMS JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800 (1997); Richard A. Monette, A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy, 25 U. TOL. L. REV. 617 (1994).
\end{itemize}
\end{footnotesize}
have seemed at one time as either visionary or merely nostalgic may be closer at hand than anyone ever thought. The reality of a growing Indian population outside current reservation boundaries but within original treaty boundaries and a decreasing or static non-Indian population in the same areas creates new possibilities in both practice and in theory. Concomitantly, the Rosebud Sioux Tribe’s Constitution contains an innovative provision authorizing a tribal constitutional convention, which offers an original opportunity to consider tribal constitutional changes to meet these and other contemporary challenges. All of this appears quite paradoxical in light of national adversity, because it suggests advance in light of vigorous federal and state opposition. Yet, perhaps, it is at moments of greatest (external) threat that the most penetrating insights and internal solidarity develop.

These first ripples in the renovation of political and legal thought in Indian country are complemented by the appearance of new scholarship that is taking a close look at the performance and reform of tribal government in light of tribally defined needs and self-assessment. Instructive examples in this area are found in the work of Professors Robert Porter, G. William Rice, Christine Zuni, and Richard Monette among others. Their work

18. See, e.g., Edward C. Valandra, Rethinking Indigenous Underdevelopment in the United States, 12 WICAZO SA REV. 111, 130-32 (1997). I have also had personal conversations with Mr. Valandra in which he developed this theme.

19. Amended Article IX of the Constitution of the Rosebud Sioux Tribe (1985) provides for a potential tribal constitutional convention:

Section 1. This constitution and by-laws may be amended by a majority vote of the qualified voters of the Rosebud Sioux Tribe voting at an election called for that purpose by the Secretary of the Interior, provided that at least thirty (30) per cent of those entitled to vote shall vote in such election; but no amendment shall become effective until it shall have been approved by the Secretary of the Interior. It shall be the duty of the Secretary of the Interior to call an election on any proposed amendment, upon receipt of a written resolution signed by at least three-fourths (3/4) of the membership of the council.

Sec 2. 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 this petition to the next Tribal Council meeting which shall call a Tribal Constitutional convention to commence within thirty (30) days and to appoint a seven-member Tribal Constitutional Task Force, consisting of tribal members outside the Tribal Council, to conduct this Convention for the purpose of hearing proposed amendments and to approve those which shall then be referred to the Secretary of the Interior, and upon receipt of them, it shall be the duty of the Secretary of the Interior to set an election as described in Section 1 above.

ROSEBUD SIOUX TRIBE CONST. art. IX (1985).

addresses such significant themes as separation of powers, tribal government abuse of power, tribal institutional development and federal overreaching. The importance of this work is found not only in its practical insights of identifying ways of improving tribal government, but in its fundamental confidence in tribal institutions and tribal citizens that it reflects and applauds. Essential to this "practical" analysis is the complement of the necessity of tribal vision.  

The actual process for how tribal government reform might take place will be unique for every indigenous nation. Nonetheless, I believe there are a few basic concepts that should be considered before any Indian nation attempts to take up such an effort.

A. Step 1—Redefine the role of tribal government.

B. Step 2—Research historical political behavior and the historic functioning of tribal government.

C. Step 3—Assess the degree to which historical notions of governance still apply.

D. Step 4—Evaluate historical norms for continued viability.

E. Step 5—Be creative when drafting.

F. Step 6—Work deliberately and openly.

G. Step 7—Convince the conservatives that good government is good politics.

H. Step 8—Exercise great patience and listen to the people.

Id. at 93-98.


All of these scholars are tribal members and their efforts may draw from both a special commitment to and a unique understanding of the difficulties and challenges contemporary tribal governments face.

21. Notions of reform need to be rooted in a tribal vision of where it wants to be in the future and how that relates to both its pre-Columbian and immediate past. For example, "[t]he vision of San Xavier is of a community that is tied to its roots in the earth and to its O'odham identity and heritage. The community will follow its own cultural perspective as it makes decisions about its
IV. DECOLONIZATION OF FEDERAL INDIAN LAW

While any discussion of colonialism in contemporary American law may seem increasingly anachronistic in today's mainstream scholarship, it isn't really so. The issue of colonialism and the imposition of dominant "outsider" values as against indigenous "insider" values remains vital and unresolved. Of course, it is more complicated than any mere dichotomy suggests and it consistently involves making hard choices among many shadings along the continuum from "indigenous" to "dominant." Yet a perspective that draws from the wide (non-legal) scholarship on colonialism holds substantial theoretical insight and practical guidance for many tribal governments and their institutions.22 In this area it is important to note that tribal choices are not simply contemporary public policy matters but also have deep historical and cultural foundations. For example, in a discussion of the (de)colonization of India it has been pointed out that, "the roots of the discontent lie deeper, in loneliness, in a sense of isolation, in the destruction of that solidarity which only homogeneous close-knit societies give to their members."23 The march of colonialism leads to the "disintegration of society, to degradation of the deepest human values—affection, loyalty, fraternity, a sense of common purpose—all in the name of progress, identified with order, efficiency, discipline, protection."24 While often flatly denied by the dominant, "democratic" majority, this poisonous course ultimately produces its own antibodies: the demand to be treated as both human and equal. In nation states it takes one of two forms. One response is a kind of aggressive assimilative ethos marked by an awareness of shortcomings, a conviction of backwardness or inadequacy, and an anxiety to learn from the superior culture or nation, so as to emulate it and reach equality... to catch up with, and overtake, to acquire whatever the modern age requires—industrial might, political unification, technological and cultural...
knowledge—until “they” can no longer afford to look down their long noses at “us.”

This is, of course, the classic United States’ model held out to minorities. The second response is a kind of determined isolationism characterized by:

- a desire to leave the unequal contest, and concentrate on one’s own virtues, which one discovers to be vastly superior to the vaunted qualities of the admired or fashionable rival. . . . Our own past, our own heritage contains far finer and richer things than the gimcrack goods of the foreigner—to run after the foreigner is in any case undignified, and treason to our own past; we can recover our spiritual and material health only by returning to the ancient springs which once upon a time, perhaps in some dim, scarcely discernible past, had made us powerful, admired and envied.

Neither of these responses—in their purist form—is tenable in a modern, interdependent world. The former path and its “foreign models expose a society to the danger of breeding apes and parrots, and killing native gifts, or at any rate distorting their proper path of development in the service of alien gods.” Yet in the modern world the competing question is whether

- an ancient culture [is] sufficient to keep a modern people going. The answer—easier said than done—is that the new must be grafted on the old, that is the only alternative to petrification, or the miserable aping of some ill understood original. A nation cannot be treated as an exotic plant for long if it is to grow: it can only grow in the open air, in the public world that is common to all.

In essence, there is need to identify a “difficult middle path, drifting neither to the Scylla of radical modernism, nor to the Charybdis of proud and gloomy traditionalism.” And if this (or any other) tribal path is to be followed, there is the complementary issue of the appropriate means. This is particularly complicated in the American context where neither complete political nor legal independence from the colonial power is possible. The struggle for self-realization and sovereignty is within, not without, the parameters of the dominant system.

These broad terms of encounter help to identify the kinds of ongoing issues that often transcend the legal or political particulars of situations.

---

25. *Id.* at 256.
26. *Id.*
27. *Id.* at 259.
28. *Id.* at 260.
29. *Id.*
encountered by tribal councils or tribal courts. These are the notions of independence and recognition. The struggle for (relative) independence rests on the ability "to speak in one's own voice." This does not mean consistent rejection of the dominant way of law or policy, but only that the window on its not inconsiderable accomplishments becomes a door to enter as an equal. This pursuit of independence and casting off the shackles of dependence requires individual and structural strength of heart and mind:

[F]or without strength there will be no equality, no justice. The equality of all States, great and small, is a piece of idealistic cant. Justice to the weak, given human beings as they are, is rare because it is difficult; and to change human beings so that they will not be as they are is Utopian. One must seek to improve mankind by available means, not by demanding of them unattainable virtue which only the saints can emulate.

The corollary to this pursuit of reasoned independence in Indian country is the idea of recognition. Not the condescending recognition of a "guardian to its ward," but recognition that flows from equality and mutual respect. Recognition grounded in a kind of balanced strength that is a core axiom of our constitutional democracy, but which has never been adequately recognized in, much less extended to, tribal nations. Without such recognition, there cannot be any true national unity or integrity. "Unity must be unity of equals, or at least of the not too unequal. Freedom for the pike is death to the carp."

In such efforts big and small, tribal councils and tribal courts have much to contribute to the ongoing project to decolonize federal Indian law. Tribal court decisions and tribal council legislative initiatives need to continue to develop both sophistication and competence within tribal self-governance in order to achieve an internal coherence and justice in resolving the particulars of any case or legislative determination, and to marshal an eloquent, external call to the larger society to provide meaningful, structural equality and recognition. Understanding both the strictures of colonialism and the indigenous elements of opposition and growth are valuable lenses with which to examine and evaluate the choices that continue to present themselves in

30. Id.; see also infra notes 41-46 and accompanying text.
31. BERLIN, supra note 23, at 263.
32. Id. at 264. Yet Professor Berlin also wisely cautions against the search to identify inexorable laws of history, but rather more modestly encourages the effort to discern patterns (as opposed to predictive "keys") to guide future policy making. See id. at 7-12.
Indian country. For example, Professor Porter has recently articulated a wide-ranging proposal to decolonize federal Indian law.\textsuperscript{33}

This project of decolonization is part of a world-wide effort of indigenous people to reclaim their history and insert it into the changing world context:

The continuing struggles for indigenous survival around the world are united by a number of common themes and concerns. All are part of a global effort to reunite history that has yet to come to grips fully with the legacies of colonialism, racism, and the human rights vision of indigenous tribal peoples in the world today.\textsuperscript{34}

\begin{itemize}
  \item \textit{See} Porter, \textit{supra} note 22, at 988-99. Professor Porter enumerates the following:
    \begin{itemize}
    \item Define All Aspects of the Federal-Tribal Relationship by Agreement
    \item Implement BIA Reform
    \item Repeal Colonial Federal Indian Control Law
      \begin{itemize}
        \item Recognize the Authority of Indian Nations to Exercise Jurisdiction over Crimes Committed by Non-Indians
        \item Recognize the Authority of Indian Nations to Exercise Jurisdiction over Civil Matters Involving Only Non-Indians
        \item Recognize Tribal Sovereignty to Exercise Traditional Justice Methods
        \item Recognize Concurrent Tribal Jurisdiction over Major Crimes
        \item Recognize the Power of Indian Nations and States to Enter into Jurisdictional Compacts
        \item Repeal Public Law 280 and Equivalent Legislation
        \item Repeal the Indian Reorganization Act and Equivalent Legislation
        \item Effectively Repeal the General Allotment Act
        \item Repeal the Indian Civil Rights Act
        \item Repeal the Citizenship Act of 1924
        \item Abandon the Colonial Foundation of Federal Indian Control Law
      \end{itemize}
    \end{itemize}
  \end{itemize}

\textit{Id.} 34. \textit{GETCHES ET AL., supra} note 1, at 975. The importance and problems of reclaiming history have been painfully noted elsewhere in today's world in places like Rwanda and the former Yugoslavia:

So Rwandan history is dangerous. Like all history, it is a record of successive struggles for power, and to a very large extent power consists in the ability to
In the context of tribal legislative initiatives and judicial decisions there is a ripe body of developing international law on indigenous rights that offers the opportunity to make tribal law broader and ever more humane while at the same time asserting vigorous principles to limit federal abuse of its circumscribed authority in federal Indian law. As suggested by Professor Frickey:

[P]roperly understood, plenary power in federal Indian law, like that in immigration law, arose from conceptions of the inherent sovereignty of nations under international law. All nations have inherent authority to control the influx of foreigners. Only those nations created by colonization, however, face the question of inherent power over "foreigners" already present—indigenous peoples. Because international law sanctioned colonization, it also must have had within it a notion that the colonial government that results has inherent authority to engage in relations with indigenous peoples. All this proves, however, is that the United States government should have authority over Indian affairs. In this sense, congressional "plenary" power at most simply means "complete and exclusive"—both internationally vis-à-vis other nations and domestically vis-à-vis the states of the union—but not "absolute" in either sphere. In short, the power over Indian affairs, like all other congressional powers, should be subject to limitation through the judicial process.

Moreover, if international law notions of inherent sovereignty provide the only justification for even this more limited conception of congressional power, it follows that the Constitution is

make others inhabit your story of their reality—even, as is so often the case, when that story is written in their blood.

PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES 48-49 (1998).
I knew little of history as terror, tormentor, and torch. Perhaps the deepest wound of Bosnia was the discovery of the prison that bad or suppressed history can be.

ROGER COHEN, HEARTS GROWN BRUTAL, at xvi (1998).
While the snare of stolen history can fan the flames of violent revenge, it can also connive futility. Balkan history was like that: the tide that swept people aside was often so strong that things just lay where they fell, and people did not have the courage, the conviction, or coherence to pick them up and place them in some kind of order. Fatalism bore down with such force that human striving seemed futile.

Id. at xix.
The indigenous project of decolonization already knows the necessity to avoid these dangers of violent revenge and imposed futility and is charting a course of reclamation and resurgence that is a model of strength and dignity.
inextricably linked to international law on issues of Indian affairs. Thus, the interpretation not only of the existence and nature of congressional power, but of its constitutional limits as well, should be informed by international law, including the evolving component of it concerning the rights of indigenous peoples. On this understanding, the emerging international law concerning the rights of indigenous peoples becomes more than simply a set of externally derived norms that do not bind the United States without its formal consent. Instead, these norms have true linkage to our Constitution and provide a domestic interpretive backdrop for both constitutional interpretation and quasi-constitutional interpretive techniques, such as canons for construing federal Indian treaties and statutes. . . . [I]nternationalizing our understanding of federal Indian law would revive a Constitution now moribund in the field and would provide further legitimacy to interpretive techniques that have long been at the heart of federal Indian law, but that today have less force in the Supreme Court.

The availability of this emerging body of international law on the rights of indigenous peoples provides tribes with the opportunity to "tribalize" international law, to make the global local, and to articulate plausible limits on federal authority in Indian affairs. It is an opportunity that should not be overlooked.

V. THE TWO FACES OF INDIAN LAW

The image of the two faces of Indian law—from "above and below," from "inside and outside"—with one face directed outward to the maelstrom of federal Indian law and the other inward to the "real" Indian law is an

35. Philip P. Frickey, Domesticating Federal Indian Law, 81 MINN. L. REV. 31, 37 (1996); see also Pommersheim, supra note 2, at 319-21 (discussing plenary power as a response to the "absorption" of tribes and Indian country into the national republic).

36. The term "real" Indian law has often been used by Robert Yazzie, Chief Justice of the Navajo Supreme Court, in describing tribal law that has its roots in Navajo tradition and custom. See Hon. Robert Yazzie, "Hozho Nahasdlii"—We Are Now in Good Relations: Navajo Restorative Justice, 9 ST. THOMAS L. REV. 117 (1996); Hon. Robert Yazzie, "Life Comes From It:" Navajo Justice Concepts, 24 N.M. L. REV. 175 (1994). On the relationship of tribal courts to the larger judicial system, see Robert N. Clinton, Tribal Courts and the Federal Union, 26 WILLAMETTE L. REV. 841 (1990); Resnik, supra note 9, at 734-38.

See also Dennis W. Arrow, Oklahoma’s Tribal Courts: A Prologue, The First Fifteen Years of the Modern Era, and a Glimpse at the Road Ahead, 19 OKLA. CITY U. L. REV. 5, 45 (1994) (referring to tribal courts as "real courts, with real subject-matter jurisdiction") (emphasis omitted);
instructive metaphor. This image has increasingly been noted at Indian law conferences as identifying the two almost separable halves of contemporary Indian law in Indian country.

This insight may also be characterized as creating, on the one hand, a necessary force field of resistance to the jurisdictional onslaught of federal Indian law, while, on the other hand, continuing to develop a nourishing community of local “Indian” law to repair rents in the fabric of tribal life. The challenge posed by the “two faces” of Indian law may be highlighted by borrowing an insightful analogy from the field of medicine, where it has recently been noted that there is a perceptible tension in the practice of modern American medicine between the notions of disease and illness.37

In this context, disease constitutes the diagnosis that results from the scientific focus on the body where “disease is reconfigured only as an alteration in biological structure or functioning.”38 Illness, by contrast, focuses on the experience of disease or sickness by the individual and members of the family within their wider social and cultural network. Greatly simplifying, one focuses on the body and one on the soul, one on the part and one on the whole, and the resulting inability to synthesize the two leads to a radical incompleteness.39 The suggestion provided by some to the medical profession is to realize that they are “excellent physicians, but... imperfect healers”40 and to heed the injunction to know thyself by understanding:

[W]e doctors are the ones who might benefit from the ritual of txiv neeb, so that we might call out after that part of our profession’s soul that has been captured by the regime of essential but unfeeling


37. See Sherwin B. Nuland, Doctors and Deities, NEW REPUBLIC, Oct. 13, 1997, at 31. This article is in the nature of a review of the book, The Spirit Catches You and You Fall Down: A Hmong Child, Her American Doctors, and the Collision of Two Cultures (1997), by Anne Fadiqan, that deftly chronicles the inability from both sides to communicate about, much less treat, the disease or illness that gripped three-month-old Lia Lee Kao for all the rest of her days.

38. Nuland, supra note 37, at 31 (quoting ARTHUR KLEINMAN, THE ILLNESS NARRATIVES: SUFFERING, HEALING AND THE HUMAN CONDITION 5-6 (1988)).

39. See id.

40. Id.
science, and beseech it to "come home, come home, come home."

This analogy, however imperfect, is a potent rendering of the two faces of Indian law and a compelling reminder to practitioners and scholars in the field of Indian law that our craft is not only to diagnose the "disease" but to cure the "illness" which is an entirely dialectical and collaborative process that is necessary to advance the possibilities in Indian country. Law, of course, is not medicine, but the call to humility, nuanced understanding, and a reconsideration of the goals of our practice certainly seems worth heeding. Such reflections might also help prevent or narrow the potential rift between the two faces of Indian law—"from below" and "from above," the "inside" and the "outside"—and increasingly what we might call indigenous "community" law to heal and to restore equilibrium and the "resistance" component to fend off further federal review and intrusion into tribal sovereignty. These two faces—given what appears to be growing Supreme Court hostility to tribal court jurisdiction, especially over non-Indians—need to be understood as necessary elements of the same struggle to ensure the availability of as much legal space as possible to enact tribal law (from whatever source) in order to implement important local and tribal values. To ignore either "face" is to risk potential "loss of face." Without successful resistance, there will be diminished legal space for community. Without community, there is no point to resistance; capitulation will be at hand.

It is also necessary to remember that the two faces of Indian law are really necessary parts of a holistic effort to secure meaningful self-determination in a pluralistic (constitutional) republic too often defined as an assimilationist mono-culture dominated by a two (instead of three) sovereign model. The two faces of Indian law constitute opposite sides of the same coin; a coin that is a medium of legal exchange and governance that is necessary to provide a system of law that is reasonable and fair to all individuals and entities who live or otherwise engage in activities on the reservation.

VI. A MODEL OF TRIBAL COURT JURISPRUDENCE

Given the varied challenges that the two "faces" of Indian law as community and resistance pose to tribal institutions, especially tribal courts,
it is worthwhile to consider the contours of a workable model of tribal court jurisprudence with which to respond. Such a model suggests idealized aspiration, not an absolute necessity attainable in every case. It also provides a practical checklist of possibilities for tribal court judges who face the exigency of real, often staggering, caseloads, limited legal resources, and usually no law clerks at all. For these reasons tribal court jurisprudence constitutes a pragmatic yet complex art. This model or paradigm (there may well be others) contains the following parts:

A. Tribal court jurisprudence as craft;
B. Tribal court jurisprudence as culture;
C. Tribal court jurisprudence as narrative;
D. Tribal court jurisprudence as literacy primer;
E. Tribal court jurisprudence as "the extended hand";
F. Tribal court jurisprudence as guide to the standards of review.

Ultimately, these pieces will be stitched together in their unique (tribal) patterns by the hearts and minds of real tribal judges doing their jobs day in and day out with their characteristic hard work and enviable commitment to render justice and fair play to the litigants that come before them.

A. Craft

The field of law invokes certain sets of practices and ways of thinking and speaking that make it a craft. It also constitutes a unique way of identifying and resolving legal disputes. The end product of such dialogue and "translation" is usually a judicial decision that summarizes, weighs, and resolves the competing arguments or claims. The expectation is that the judicial decision will speak at least in part through the language or craft of law. In order to be credible to the law community both on and off the reservation and the larger society in general, tribal court decision making must be convincingly rendered in the craft and analytical practices of legal reasoning. This does not mean that this requirement is preemptive or exclusive of other concerns but only that it is necessary in a fundamental way. It is the yeast for the bread of legal conversation and discourse.

42. A fledgling discussion of this model appears in Frank Pommersheim, What Must Be Done to Achieve the Vision of the Twenty-First Century Tribal Judiciary, KAN. J.L. & PUB. POL’Y 8 (Winter 1997).
43. See id. at 12-13. See also POMMERSHEIM, supra note 1, at 74-79.
B. Culture

The risk of craft standing alone in tribal court jurisprudence is that it will be seen to represent a kind of (dominant) mimicry and it will be perceived as inauthentic and merely imitative. The counterweight to an unhinged craft is the door of culture. Tribal culture provides a context for legal craft to be persuasive because it takes into account tribal history and tradition in the process of legal decision making. Too often legal decision making and the legal system as a whole are seen as a purely formal system of rules and procedures that bear little relationship to the day to day life of people living on the reservation (or elsewhere for that matter). Sensitivity and awareness of (tribal) culture helps to insure that tribal court decision making will not only be analytically sound, but also culturally informed. In many ways, craft and culture are the cornerstones for building a sturdy and enduring tribal court jurisprudence.

C. Narrative

Tribal court decisions both individually and collectively tell a story about law, values, and culture. It is therefore critical for tribal court judges to be aware of the developing narrative or story their jurisprudence tells. How does it, for example, relate to the ongoing struggle to realize sovereignty and to vindicate particular values in unique human circumstances? Attention to narrative allows one to perceive more fully the meaning of tribal court jurisprudence not simply as the interplay of craft and culture but as something that reveals and explains a people to themselves and others. If law is a field of endeavor primarily for the mind and intellect, narrative is a way to the heart. Narrative is critical to tribal self understanding not only in a cultural but in a legal sense as well. This element of narrative in tribal

44. See POMMERSHEIM, supra note 1, at 107, 112-20. Note also the role of language in achieving change: “The importance of these poems of competing discourses lies in the poet’s conviction that the person who owns the language owns the story, and that he who wishes to change the story must first change the language.” HELEN VENDLER, SEAMUS HEANEY 126 (1998).

45. As noted by Professor Frickey, “This tension between uniformity and formalism versus uniqueness and contextualism (is) at the heart of federal Indian law theory.” Frickey, supra note 2, at 70. This tension also presents itself as a challenge in tribal court jurisprudence.
court jurisprudence also connects pointedly with the "story telling" tradition that is central to many tribal traditions.\textsuperscript{46}

\textbf{D. Literacy Primer}

Tribal court jurisprudence needs also to function, where it can, as a basic Indian law literacy primer in several different ways. First, since tribal court decisions often generate significant local tribal interest and discourse, it is helpful if such opinions contain background discussion about the nature of basic principles of Indian law and tribal sovereignty. Such descriptions at their best aid local understanding of important legal and cultural matters in the many cases that generate local interest. Since law—for better or worse—plays such an outsized role in reservation life, any background understanding is particularly advantageous to developing an informed and literate citizenry.\textsuperscript{47}

Second, most recent United States Supreme Court jurisprudence in Indian law relative to tribal courts reaches back no further than \textit{Montana v. United}

\begin{footnotesize}
\begin{enumerate}
\item \textit{See id. See also Pommersheim, supra note 1, at 108-12; Pommersheim, supra note 36, at 37-45. Note also these unique observations concerning narrative and language in the context of many indigenous cultures: The practical knowledge, the moral patterns and social taboos, and indeed the very language or manner of speech of any nonwriting culture maintain themselves primarily through narrative chants, myths, legends, and trickster tales—that is, through the telling of stories.}
\item \textit{DAVID ABRAM, THE SPELL OF THE SENSUOUS 181 (1996).}
\item \textit{The sense of being immersed in a sentient world is preserved in the oral stories and songs of indigenous peoples—in the belief that sensible phenomena are all alive and aware, in the assumption that all things have the capacity of speech. Language, for oral peoples, is not a human invention but a gift of the land itself.}
\item \textit{Id. at 263.}
\item \textit{It is a style of thinking then, that associates truth not with static fact, but with a quality of relationship.}
\item \textit{Id. at 264.}
\item \textit{In contrast to the apparently unlimited, global character of the technologically mediated world, the sensuous world—the world of our direct unmediated interactions—is always local. The sensuous world is the particular ground on which we walk, the air we breath.}
\item \textit{Id. at 266.}
\item \textit{See Frank Pommersheim, Democracy, Citizenship, and Indian Law Literacy: Some Initial Thoughts, 14 T.M. COOLEY L. REV. 457, 467-71 (1997); Pommersheim, supra note 36, at 45; see also infra notes 80-92 and accompanying text.}
\end{enumerate}
\end{footnotesize}
States. As a result, current Supreme Court decisions in Indian law are remarkably truncated with little sense of the roots of tribal sovereignty and the sweep of Indian Law history from the colonial era onward. Again, tribal court jurisprudence can provide a valuable corrective to this pernicious historical and doctrinal amnesia. While there is no guarantee that reviewing federal courts—including the United States Supreme Court—will pay attention or even notice, any opportunity to educate and create dialogue needs to be seized.

Third, tribal courts do not have the luxury of assuming that other judges who read and review their decisions are adequately informed about tribal judicial descriptions of tribal law itself. Tribal courts, wherever possible, have to go that extra mile to explain basic tribal law and values. Without such efforts, it becomes all too easy for federal courts to avoid a genuine engagement with tribal court decisions.

Fourth, in a related but somewhat different vein, tribal court jurisprudence provides the opportunity for tribal courts to explain why some decisions of the Supreme Court and Circuit Courts are wrongly decided from the perspective of the federal courts' own precedents and/or from the tribal court's understanding of its own law. None of this is meant to sound arrogant or presumptuous, yet the Supreme Court does seem to be further and further out of touch with its own historical precedents and its understanding of the law and capabilities of tribal courts. Tribal courts, where they can, need to assist the educable within the federal judiciary.

E. "The Extended Hand"

While the Supreme Court appears to be retreating from its deference and solicitude toward tribal courts, tribal courts ought not reciprocate this indifference or hostility, but remain poised with the "extended hand" of respect and willingness to engage in judicial dialogue. Failure to do so will just instill more, rather than less, federal jurisprudential chill and willingness to ignore rather than engage tribal court decision making.

While such a proposal clearly requires a certain kind of judicial diplomacy that should be mutually shouldered by tribal and federal courts,

48. 450 U.S. 544 (1981). For a significant elucidation of this point, see also Getches, supra note 2, at 1617.

49. See cases cited supra notes 6-7 & 10 and accompanying text; cases cited infra notes 78-82 and accompanying text.
the Supreme Court, whether inadvertently or not, has clearly stepped back from its own authoritative initiatives in this regard that were at the heart of the *National Farmers Union Insurance Cos. v. Crow Tribe of Indians* and *Iowa Mutual Insurance Co. v. LaPlante* cases. Tribal courts ought not to follow suit, and where possible, they should remind federal courts of the Supreme Court's own extended hand in *National Farmers Union* and *Iowa Mutual*.

**F. The Standards of Review**

In the immediate aftermath of *National Farmers Union* and *Iowa Mutual*, one of the primary questions addressed by federal courts was what were the appropriate standards of review for the various kinds of findings a tribal court might make in the course of its own jurisdictional determination. The potential determinations were of three kinds: findings of fact, findings of tribal law and findings of federal law. The consensus about the appropriate standard of review was as follows: tribal findings of fact were entitled to complete deference unless clearly erroneous; findings of tribal law were entitled to complete deference; and findings of federal law were reviewed *de novo*. This is all well and good, but there are instances, perhaps increasingly so in a post-*Strate* world, where lower federal courts may simply leapfrog the particulars of any review to the broad federal question about whether a tribal court has jurisdiction. This potentiality has been astutely pointed out by Professor Royster. As she notes:

Tribal court adjudications involving non-member parties are thus messy affairs. Any given case may raise the issue of whether tribal court jurisdiction is proper as a matter of federal law. It may also raise the issue of whether tribal court jurisdiction over the nonmember is proper as a matter of tribal law, depending upon the wording and reach of tribal constitutional provisions and statutes. In addition, the case may raise the issue of whether tribal


51. 480 U.S. 9, 16 (1987) (holding that exhaustion is required even in a diversity context: "federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a 'full opportunity to determine its own jurisdiction.'").


legislative or executive power over the non-member party is proper as a matter of federal law. . . .

When a federal court on post-exhaustion review fails to conscientiously distinguish between those issues of federal law and tribal law, the result is not only doctrinal confusion but serious encroachment upon the proper role of the tribal courts."54

Tribal courts may seek to reduce the likelihood of such problems in the post-exhaustion review situation by doing two specific things in their opinions. First, tribal court opinions should accurately label their various determinations as such: findings of fact, findings of tribal law and findings of federal law. Second, the opinions can explicitly make reference to Professor Royster's insight that findings of tribal law cannot willy nilly be transmogrified into questions of federal law to permit de novo review that completely ignores a tribal court's interpretation of tribal law. This is a critical point. Failure to hue to this distinction means "tribal court jurisprudence cannot prosper."55

In the confusing, if not chaotic, post-Strate world, tribal courts face even greater responsibilities than ever in seeking to hold federal courts to their proper range of review rather than permitting them to exercise a free ranging de novo approach. If reviewing federal courts encounter tribal court decisions with clear findings and precise indications of the standards of review along with the admonition to "resist the temptation to turn tribal law issues into federal questions,"56 it will provide a helpful guide to federal review and a salutary reminder to federal courts to respect tribal courts and not overstep their boundaries.

To be sure, this model of tribal court jurisprudence is comprehensive and broadly idealistic. Yet in the real world where the stakes are high and tribal resources may be quite limited, it is important to have something to look to for guidance and direction—something that is both functional and aspirational. The fateful consequences that increasingly characterize federal Indian law as the result of an increasingly illegitimate jurisprudential model ought not be reproduced in tribal court decision making.

Any model of tribal court jurisprudence is inevitably carried out by real flesh and blood tribal judges at both the trial and appellate level. It is therefore worth remembering that the competence and engagement of these judges is key to the realization of any of the qualities set out in the model.

54. Royster, supra note 52, at 250-51 (citations omitted).
55. Id. at 254.
56. Id.
My experience with tribal judiciaries throughout Indian country reveals a group of individuals with high levels of talent, commitment, and courage. This is of no small consequence, for there is an important nexus between the character of the judge and the quality of the judicial decision. As noted by Judge Noonan of the United States Court of Appeals for the Ninth Circuit:

The connection is not mechanical. It is that you understand the judge much better if you understand the man. . . . [A]n American appreciation of the truth that the law a judge makes is a projection of values that are inescapably personal—even while the Judge labors to be impartial between the litigants and objective in his framing of the dispositive legal rule. . . .

. . . To see with the judge’s eyes one should know where he comes from, what his experience has been, what his ideals and limits are.57

In this light, the personal qualities of intellect, character, and commitment found in tribal judges are central components of tribal court jurisprudence. Without such individuals, no model of tribal court jurisprudence is sufficient to insure justice and fair play in Indian country.

VII. “JUDICIAL PLENARY POWER” AND TRIBAL COURTS: A NEW TENSION

The emergence of judicial plenary power in the context of tribal courts is significant for two intertwined reasons. First, as I have noted elsewhere this development—yet to be recognized by the Supreme Court itself—establishes a second branch of the federal government with unchecked power in an important area of Indian affairs. This is troubling for the obvious reasons that it is neither constitutionally authorized nor constitutionally limited. Second, the uncontrolled use of this power as demonstrated in Strate v. A-1 Contractors59 threatens a true crisis of legitimacy in the relationship between tribal courts and federal courts.

The decision of the United States Supreme Court in Strate and some of the post-Strate district and circuit court jurisprudence50 suggest not merely

58. See Pommersheim, supra note 2, at 328.
60. See, e.g., Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087 (8th Cir. 1998) (finding that a tribal court has no jurisdiction over events that take place off the reservation
new rules for federal review of tribal court decisions, but rather something much more drastic that is legally (and politically) destabilizing to tribal courts and creates a genuine crisis of federal legitimacy. This something is the erosion of respect and support for tribal courts. Most tribal court judges, Indian law practitioners, and commentators understood National Farmers Union61 and Iowa Mutual62 to have articulated a relationship of respect and comity between tribal courts and federal courts. For example, as Justice Marshall wrote in the Iowa Mutual case, “[t]ribal courts play a vital role in tribal self-government. . . and the Federal Government has consistently encouraged their development.”63 In addition, the Court had noted earlier in National Farmers Union the “[e]xhaustion of tribal court remedies . . . will encourage tribal courts to explain to the parties the precise base 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.”64 These cases moved encouragingly in the direction of comity and respect.

Strate veered sharply away from this positive trajectory. It reduced the exhaustion rule from a seemingly mandatory rule jurisdictional in nature to a merely “prudential” one.65 It also continued the Court’s geographically predatory jurisprudence with its Montana66-like sleight of hand to “align the right of way, for the purpose at hand, with land alienated to non-Indians”67 and concluded by collapsing the distinction between tribal regulatory and adjudicatory jurisdiction, making tribal court jurisdiction to turn in most cases strictly on a Montana analysis. Specifically, the Court stated:

despite any effects on the reservation); County of Lewis v. Allen, 163 F.3d 509 (9th Cir. 1998) (stating that a tribal court has no tribal or federal 42 U.S.C. § 1983 jurisdiction over a state law enforcement officer’s activities on the reservation pursuant to tribal-state agreement; tribal agreement with the state effectively ceded authority similar to the highway easement granted by the tribe in Strate). But see the thoughtful exhaustion analysis in El Paso Natural Gas Co. v. Neztsosie, 136 F.3d 610 (9th Cir.), rev’d, 119 S. Ct. 1430 (1999). This case was recently decided by the United States Supreme Court. In a perfunctory, unanimous opinion, the Court reversed the Ninth Circuit and held that the Price-Anderson Act—despite the absence of any express language—preempted tribal court jurisdiction over “nuclear” torts.

63. Id. at 14.
64. 471 U.S. at 857.
65. See Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997) (“Recognizing that our precedent has been variously interpreted, we reiterate that National Farmers and Iowa Mutual enunciate only an exhaustion requirement, a ‘prudential rule’ . . . based on comity.”) (citations omitted).
67. Strate, 520 U.S. at 456.
When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by Montana's main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct . . . . 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.68

This dramatic turn toward a judicial plenary power and away from any meaningful respect and comity dramatically reveals itself by considering two apt metaphors. One is the fist in the velvet glove where National Farmers Union and Iowa Mutual may be seen as the outstretched velvet glove of respect and comity but finally revealing a Strate fist to deliver a potentially pulverizing (plenary) blow to tribal courts. The other metaphor is that of the Trojan horse.69 The attractive "gift" of National Farmers Union and Iowa Mutual, once accepted, reveals itself not to be about a new mutuality but about the old (conquering) dominance.

For tribal courts, these developments create some quite difficult, perhaps unpalatable, consequences. Strate is very destabilizing in that it suggests increasing non-constitutional, non-congressionally authorized limitations on tribal court authority. Strate therefore makes it more, rather than less, confusing for tribal courts to determine what their powers are. In addition, it includes a large measure of betrayal. National Farmers Union and Iowa Mutual said federal courts would listen; Strate says they don't have to. The "promises" of National Farmers Union and Iowa Mutual appear to have been "broken" in Strate. Although the current Court apparently thinks Indian law jurisprudence begins with Montana, it is worth pointing out that the legacy of "broken promises" that permeates much of Indian-non-Indian history ought not to be thoughtlessly replicated with regard to tribal courts in the modern era.

68. Id. at 459 n.14.
69. The Encyclopædia Britannica explains:

Trojan Horse, huge, hollow wooden horse constructed by the Greeks to gain entrance into Troy during the Trojan War. The horse was built by Epeius, master carpenter and pugilist. The Greeks, pretending to desert the war, sailed to the nearby island of Tenedos, leaving behind Sinon, who persuaded the Trojans that the horse was an offering to Athena that would make Troy impregnable. Despite the warnings of Laocoon and Cassandra (qq.v.), the horse was taken inside. That night warriors emerged from it and opened the city's gates to the returned Greek army. The story is told at length in Book II of the Aeneid and is touched upon in the Odyssey. The term Trojan horse has come to refer to subversion introduced from the outside.

This historical shortsightedness reveals a sad irony that connects *Strate* to the seminal cases of *Cherokee Nation v. Georgia*\(^70\) and *Worcester v. Georgia*\(^71\) in unsettling ways. These early cases were fraught with constitutional crisis. Immediately prior to *Cherokee Nation v. Georgia*, the State of Georgia refused to heed a stay issued by the Supreme Court and hanged an Indian by the name of George Tassel who was convicted in state court for a crime committed in Cherokee country.\(^72\) In addition, the State refused to appear before the Court for oral argument in *Cherokee Nation*. President Jackson indicated his refusal to carry out the mandate of the Court in *Worcester* with the statement, "John Marshall has made his decision; now let him enforce it."\(^73\) The impending crisis of these events was narrowly avoided when time and changing circumstances intervened.\(^74\) Yet the potential crisis turned on both Georgia's perception of the illegitimacy of federal authority in its affairs and the (federal) executive branch's perception of improper judicial authority over its affairs. In each case, the crisis had its roots in the unwillingness to follow an order of the United States Supreme Court that sought a modicum of justice and accountability in Indian affairs.

*Strate* threatens its own crisis of legitimacy in that some tribal court somewhere in Indian country may, at some point, simply balk at complying with a judicial review of its authority that is neither respectful nor circumscribed in any manner. Without authentic comity or deference of any kind and with the bottomless pit of federal common law\(^75\) potentially arrayed...
against tribal courts, one does not see a constitutional democracy at work but rather the old colonialism for a new millennium. There is little to commend adherence to such raw abuse of judicial power. It is, therefore, worth considering that from a tribal court's point of view Strate might not be just one more (adverse) precedent but rather something that threatens the very legitimacy that the federal system asserts in its dealings with tribal courts. Institutional stability between federal courts and tribal courts centers on a balance of respect and power and Strate tips the scales precipitously away from respect towards unfettered power. Strate has definitely created an air of tension in tribal courthouses throughout Indian country.

Strate does not overrule National Farmers Union and Iowa Mutual and, therefore, the mediating forces of district court and circuit court jurisprudence are key. There is much legal space for the lower federal courts to reaffirm the essential holdings of National Farmers Union and Iowa Mutual relative to comity and deference and to curb the expansive and illegitimate reach of Strate. The challenge is real and only time will tell. The early evidence, however, is not overly encouraging.

VIII. "OUR FEDERALISM" IN THE CONTEXT OF FEDERAL COURTS AND TRIBAL COURTS

The fact that the tribal sovereign has often been marginalized or little discussed in the context of our constitutional democracy has, not surprisingly, been the source of much of the difficulty in the history of Indian law. With the recent emergence of the importance of tribal courts, we

absence of congressional action, the federal judiciary may make its assessments only as a matter of federal common law. See id. at 824-25. This case implicates a unique separation of powers issue about which branch of the federal government—Congress or the courts—has the right to determine inherent tribal authority. The case also contains its own “anomaly” by assuming that matters of identifying inherent tribal sovereignty do not need to involve tribal participation. See id. at 822-24.

This decision was vacated and reheard en banc. See United States v. Weaselhead, 165 F.3d 1209, 1209 (8th Cir. 1999). In a 5-5 vote, the court affirmed the order of the district court recognizing Congress' "supremacy" and thereby rejected the panel's decision in favor of judicial "supremacy" in Indian affairs. See id. Yet the circuit court's original decision reveals the extensive cracks (chasms?) in federal Indian law theory.

76. See, e.g., cases discussed supra note 60 and accompanying text.

77. For further discussion of this topic, see Frank Pommersheim, “Our Federalism” in the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community (unpublished manuscript, on file with author).
are in danger of repeating this harmful process of neglect and denigration with respect to this central tribal institution.

A key concept for considering this process in the context of tribal courts is the doctrine of "Our Federalism." This staple of federal court 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 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." The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. 78

This credo of respect and comity is equally apropos as a doctrine to describe and guide the "fit" of tribal courts within the federal system. This approach appeared to be the tack of National Farmers Union79 and Iowa Mutual80 with their emphasis on comity, tribal court expertise, and support for tribal court development.81 Yet in Strate,82 the Court veered sharply away from this model of engagement to one of unvarnished power that made exhaustion of tribal remedies merely prudential rather than jurisdictional and completely smothered the tribal voice as irrelevant.83

This doctrine of "Our Federalism" is a cornerstone concern in all federal courts courses and texts, yet the identical issue involving federal courts and tribal courts is uniformly absent from these same texts. Even a cursory

81 See, e.g., supra notes 57-74 and accompanying text.
83 Id. at 453.
survey of texts and casebooks on the federal courts reveals the complete lack of any discussion of tribal courts within the federal system. The marginalization of tribal courts within the canon of federal courts textbooks and scholarship only makes it more likely that they will continue to be marginalized in federal courts' jurisprudence itself. If there is no discussion of tribal courts within the standard federal courts casebooks, it will be all the more difficult for them to achieve legitimacy in practice when they are missing from the textual canon, not discussed in the primary course for aspiring federal judge law clerks, and otherwise academically well hidden. So while it is true that the role of tribal courts in the federal system is being litigated daily on the frontier of federal courts jurisprudence, it is also true that they remain invisible in the boot camp of legal academia where (future) federal judges and their law clerks receive their basic training. If their basic training is so deficient, is it really so surprising that they are so ill prepared for combat?

The issue of "Our Federalism" in the context of federal courts and tribal courts raises the fundamental overarching question of the structural relationship of tribal courts and federal courts. This is a question of significant historical, jurisprudential, and ethical import that calls out for the attention and engagement of that part of the teaching and scholarly community that is devoted to the study of the role of federal and other courts in our national system of jurisprudence. Without such recognition and interest from the federal courts' teaching and scholarly communities, an unbecoming and dangerous ignorance will continue—an ignorance that creates potentially fertile soil not for a meaningful "Our Federalism" but an ignoble "Our Colonialism."

The importance of such issues has not gone unnoticed within the federal judiciary itself. Justice O'Connor has publicly spoken about the importance of tribal courts and the Eighth, Ninth and Tenth Federal Circuits all have

84. See Pommersheim, supra note 77.
85. The following are simply a broad sampling of interesting and significant cases from the Eighth, Ninth, and Tenth Circuits: El Paso Natural Gas Co. v. Neztsosie, 136 F.3d 610 (9th Cir. 1998), rev'd, 119 S. Ct. 1430 (1999); Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087 (8th Cir. 1998); Burlington Northern R.R. Co. v. Red Wolf, 106 F.3d 868 (9th Cir. 1997), vacated, 118 S. Ct. 37 (1997); Reservation Tel. Coop. v. Three Affiliated Tribes of Fort Berthold, 76 F.3d 181 (8th Cir. 1996); Mustang Prod. Co. v. Harrison, 94 F.3d 1382 (10th Cir. 1996); Arizona Pub. Serv. Co. v. Aspaas, 77 F.3d 1128 (9th Cir. 1995); Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation, 27 F.3d 1294 (8th Cir. 1994); United States v. Plainbull, 957 F.2d 724 (9th Cir. 1992).

The role of tribal courts continues to expand, and these courts have an increasingly important role to play in the administration of the laws of our
established standing committees designed to study and improve the relationship of tribal courts and federal courts. As a scholar who has spoken on this topic at these circuit judicial conferences, I can vouchsafe the genuine interest, but admitted lack of expertise, of the federal judiciary in dealing with these questions.

IX. DEMOCRACY AND INDIAN LAW LITERACY

At the core of any essential exegesis of democracy is the foundational belief that free exchange among informed citizens provides the greatest safeguard against injustice and the most fruitful way to solve political and civic problems. Yet this hallowed model does not seem to have been very effective in understanding and deciding issues relative to either matters of historical injustice to tribes and Indian people or contemporary matters of tribal sovereignty and tribal self-determination.

A primary reason for this enduring failure is not in democracy per se, but in the absence of a critical condition precedent that is necessary for democracy to work. That condition precedent is the requirement of literacy. In order for any exchange of citizens to be meaningful and fruitful, the participants must be literate in the area under discussion. James Madison admonished at the founding of the republic:

> a popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or Tragedy; or perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power knowledge gives.

nation. The three sovereigns can learn from each other, and the strengths and weaknesses of the different systems provide models for courts to consider. Whether tribal court, state court, or federal court, we must all strive to make the dispensation of justice in this country as fair, efficient, and as principled as we can.


87. See supra notes 44-48 and accompanying text; see also POMMERSHEIM, supra note 1, at 156-158; Pommersheim, supra note 47, at 467-71.

This is clearly not the case in Indian affairs; not now and certainly not in the past. For example, here in South Dakota, my experience as a teacher and public speaker continually confirms a startling illiteracy. Students in the public school system, including the university and even the law school, have had almost no instruction on basic Indian law and tribal government matters. Few even know how many reservations there are in the state, much less ever heard of the Fort Laramie Treaty of 1868 or have any concept of the nature and functioning of contemporary tribal government. When the ignorance is so vast, it is not surprising that it is difficult to develop meaningful dialogue on important contemporary tribal government and Indian law matters. This ignorance is not limited to citizens at large but is often just as prevalent within the ranks of state and national officials. Illiteracy blights the fields of democratic harvest.

This structural ignorance is not exactly happenstance but reflects a legacy of racism and marginalization. And while good will of the majority society is necessary (and increasingly present), it is not sufficient to reverse this trend. Since many issues of Indian law and contemporary tribal government do not turn on conventional "minority" status concerning greater, more equitable access to the system but more often turn on preserving the right to a "measured separatism" and self-government free from excessive federal dominance and state intrusion, there is much basic learning that needs to take place before meaningful dialogue ensues. This involves comprehending both the stigma of difference and the pride of difference.  

89. There are nine: Flandreau Santee Sioux Reservation, Yankton Sioux Reservation, Lake Traverse (Sisseton-Wahpeton) Reservation, Lower Brule Sioux Reservation, Crow Creek Sioux Reservation, Pine Ridge Sioux Reservation, Rosebud Sioux Reservation, Cheyenne River Sioux Reservation, and Standing Rock Sioux Reservation.
90. 15 Stat. 649 (1868).
92. See POMMERSHEIM, supra note 1, at 99-103. Specifically:

To construct differences, however, merely begs the question: Are the differences positive or negative? In the context of colonialism or other oppressive forces, the majoritarian society often defines differences as negative. For example, the history of Indian-non-Indian relations is replete with negative labels such as "primitive," "uncivilized," and "inferior" being assigned to Indians. Categorization of this type creates the stigma of difference. Such a label of difference is often the product of the unilateral exercise of dominant power.

The legal treatment of the stigma of difference highlights the overall "dilemma of difference." After we have decided to eradicate the stigma of difference, the question becomes how best to achieve this goal. The stigma of difference may be recreated both by ignoring it and by focusing on it. For example, in the context of bilingual or special education, the question may be how to deal with those defined as different, such as students who do not speak
An obvious question follows and that is, where is this learning to take place? Obviously, it should take place in the schools and there have been modest efforts in places like South Dakota to reconfigure the public school curriculum to get at some of these issues. Yet progress remains relatively glacial. In addition, political parties, churches, bar associations, and civic organizations need to step up their efforts in this area or democracy will continue to fail dramatically in dealing with its first citizens and nations.

A recent example vividly illustrates this problem. I participated in a talking session involving University of South Dakota students and Native American inmates at the Federal Correctional Facility in Yankton, South Dakota. Everyone simply sat in a circle and spoke in turn. The Native American inmates, mostly from South Dakota, explained the importance of Lakota spirituality and its practices within their lives. One student, a non-Indian, who grew up on the Standing Rock Reservation in South Dakota, stated she had learned more in the one-hour “sharing” experience than she had learned her entire life growing up on the Standing Rock Reservation. She said that it shattered all her stereotypes about Native Americans.

Too often the paeans to democracy are little more than occasions for self-congratulation that are shorn of the recognition of the necessity for ongoing hard work to maintain the literate vigilance that undergirds authentic democracy. In Indian affairs, we have had neither the basic literacy nor the accompanying vigilance and this needs to change. Unfortunately, national leadership—whether in the White House, the Congress or the Supreme Court—is far from exemplary in this regard and, therefore, the likely source of necessary efforts will be grassroots action in and around Indian country.

English or who have mental disabilities. As Professor Martha Minow suggests, the problem often becomes “When does treating people differently emphasize their difference and stigmatize and hinder them on that basis, and when does treating people the same become insensitive to their differences and likely to stigmatize or hinder them on that basis?” Solutions to the dilemma of difference cluster around choices between integration and separation, between similar treatment and special treatment, and between government neutrality and government accommodation.

In the context of Indian law, federal Indian policy has inexorably pressed toward assimilation and has tolerated only minor or “quaint” differences. Some might call this an admirable but incomplete commitment to eradicate the stigma of difference. Yoked to the stigma of difference, however, is the pride that Indian tribal communities take in pre-Columbian sources of cultural continuity and spiritual richness. This pride of difference is at the heart of claims of tribal sovereignty. Neither the legal community nor the dominant community at large fully understands this pride of difference, which tests the vitality of “old promises” in a diverse society that professes a commitment to both equality and pluralism.
Related to the issue of democracy and Indian law literacy is the issue of citizenship. Putting aside the history of national citizenship for Indians, there remains the issue of state and tribal citizenship. The question of state citizenship for tribal members residing on the reservation presents yet another puzzling legal and historical set of events. The coming of non-Indians to the reservations in large numbers as a result of the disastrous late nineteenth century allotment policy epitomized by the Dawes Severalty Act eventually resulted in the presence of state electoral practices and government services (such as education and social services) on the reservations. Regardless of the ambiguity of the Fourteenth Amendment's application to Indians, especially in Indian country, it became both


94. 25 U.S.C. §§ 331-34, 339, 341-42, 248-49, 381 (1994). This statute, passed in 1887 and also known as the General Allotment Act of 1887, "was the vehicle through which Congress systematically allotted lands on most Indian reservations—some 41 million acres of former tribal land were allotted. In addition to diminishing the tribal land estate, the Act opened many reservations to extensive settlement by non-Indians, and marked a major turn in Indian law and policy." Getches et al., supra note 1, at 166.

95. The Fourteenth Amendment makes no specific reference to Indians. It reads in full:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for
impractical and "discriminating" (in the due process and equal protection sense) to deny Indian people access to these state "benefits" available in Indian country.

Yet there never was any serious discussion about the implications—positive or negative—of state citizenship for Indians at the national level. There are no federal statutes on point and neither the tribes nor individual Indians were approached to provide "consent." Historical exigencies proceeded apace and just as tribes were physically and legally "absorbed" into the republic without their consent and without express congressional enactment much less constitutional amendment, Indian people became state citizens in a similar manner devoid of national deliberation and tribal consent. This is not to say Indian people should not be, or do not want to be, state citizens but only to note the problematic fact of such important actions that stem not from collaborative, bilateral discussion, but rather exigencies driven by "manifest" ignorance, if not "destiny." This unique situation also has its vociferous present day analogue in the clamor of many non-Indians living on reservations about their exclusion from tribal "citizenship" and participation in the political, electoral life of the tribe. Tribes usually counter with statements that non-Indians were not "invited" to the reservation by the tribal sovereign and to allow non-Indian political participation in such matters as voting and running for tribal office would undermine the unique historical and cultural identity of the tribe. It is contended that inevitably the reservation would end up being little more than a political subdivision of the state. As usual federal causation is primary and overwhelming, but there is no concomitant federal assumption of responsibility. The federal government extended the "invitation" without consent of the host. Tribes were left to absorb the often relentless criticism for a situation they never authorized, much less ratified.

Some tribes are confronting this dilemma and considering some adjustment between what it is to be a tribal member on one hand and a tribal citizen on the other, including whether non-Indians may in some circumstances be eligible for a kind of tribal citizenship wholly distinct from

services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV. See also Pommersheim, supra note 47, at 463-67.

96. See Pommersheim, supra note 2, at 318-21.
tribal membership. The toxic effects of federal political intrusion and causation in Indian country are often left for local clean up and in so going inflict yet another burden on the First Nations. The issue of citizenship, while it obviously raises significant legal questions, perhaps more importantly, also raises lingering, unresolved questions of culture and political history and their relationship to democratic theory. Perhaps it is possible to take the concept of the reservation as a place of "measured separatism" and recast it as a place of "measured togetherness." A place where there is potential for reverse (citizen) "assimilation" with power in the tribe to determine at what level, if any, outsiders might participate in the public civic life of the tribe; to be of service, not to be Indian. Some examples might include service on tribal administrative boards or limited kinds of jury duty. People can work together without confusing their ethnic and cultural identity. This is not a concept that is foreign to many tribes, but rather involves the process of refracting, through the contemporary tribal cultural and political lens, traditional views on the role of some "outsiders," whether based in intermarriage, cultural sensitivity and/or shared expertise.

The "why" of this suggestion is twofold, one global, one local. The global reason has to do with developing a potential strategy to reconfigure what it means to be "rural" in the face of the (pulverizing) assimilative force

97. See Pommersheim, supra note 47, at 463-67. In addition, I have had conversations with Professor Richard Monette, who is working with a number of tribes concerning this issue.

98. Two other examples come to mind. First, most Indian controlled colleges on reservations such as Sinte Gleska University of the Rosebud Sioux Reservation are governed by an all tribal member Board of Directors elected by tribal members, but non-Indian and non-member faculty and students participate fully in the academic and study committees of the school.

Second, the Rosebud Sioux Tribe recently entered into a contract with Bell Farms to establish a huge hog confinement operation on the Rosebud Sioux Reservation. This project was vigorously opposed by significant numbers of tribal people, local non-Indian people, and statewide (and national) environmental groups. This opposition materialized in a lawsuit that temporarily halted the project. Yet, it also posed the question of whether a temporary coalition can mature into something more lasting to maintain a rural, reservation-based way of life committed to both stewardship and (modest) growth.

Another variant on this theme is the vigorous opposition of Russell Means, American Indian Movement cofounder and member of the Oglala Sioux Tribe, to any claim of criminal jurisdiction over him by the Navajo Tribe for his alleged actions on the Navajo Reservation. The Navajo Supreme Court recently ruled it did have criminal jurisdiction over Means, who was married to a Navajo woman and conducted business and other activities on the reservation. Mr. Means was quoted as saying, "I haven't any rights on any reservation in America except my own, so I want to be treated like any other American." SIOUX FALLS ARGUS LEADER, May 15, 1999, at 3D.

None of this is meant to suggest in any way that tribes should mitigate their efforts to reacquire land (held by non-Indians, corporations, state or federal governments) on the reservation to extend and reestablish the land base so central to tribal history and culture. Whenever possible, tribes should accommodate (non-Indian) land sellers looking to leave the reservation. This policy is not inconsistent with a review of the role of non-Indians who choose to remain.
of capitalist globalization (e.g. greed, exploitation of material resources, eroding cultural differences). This presumes, of course, that tribes (and their non-Indian neighbors)99 want to resist or tame rather than blindly embrace globalization and the tyranny of the modern market. Globalization is quite likely the invisible hand of a new colonialism. Of course, economic development in Indian country is necessary to alleviate extensive unemployment and poverty, but the challenge remains to balance the equation with the concerns of culture and stewardship.

The local reason has to do with possible adjustment of the tribal legal landscape in order to advance or maintain tribal legal authority over non-Indians and non-members in the face of their "non-participatory" status. Current Supreme Court jurisprudence is increasingly hostile to tribal authority over non-Indians and non-members involving activities on non-trust land. Limited participation of non-Indians in some aspects of the tribe's public life might mediate that hostility.

The question, then, is essentially about informed and nuanced choice (which is the essence of sovereignty), but it is also important to remember that the failure even to consider an issue can be as fateful as any other course of action. I know from listening to discussion—however tentative—about this and related issues at recent Indian law conferences that it causes genuine and legitimate concern. Yet thinking deeply and openly about such difficult issues has the advantage of avoiding being blindsided by either (or both) the apparently irresistible "impersonal" force of globalization or the increasingly predatory jurisprudence of the Supreme Court.

X. TRICKSTER MAKES THIS WORLD 100

The essence of the Supreme Court’s exegesis in National Farmers Union101 and Iowa Mutual102 on the nature of tribal courts and their relationship to federal courts may be summarized as inviting judicial


Note also the observation that "globalization enriches the consumer in us, but it can also shrink the citizen and the space for individual cultural and political expression." THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION (forthcoming 1999). See also PIERRE BOURDIEU, ACTS OF RESISTANCE: AGAINST THE TYRANNY OF THE MARKET (1998).

100. LEWIS HYDE, TRICKSTER MAKES THIS WORLD (1998).


conversation where tribal courts have the right to speak and federal courts have the duty to listen. Yet no sooner than making this honorable pronouncement, the Court began steadfastly moving away from it. In *South Dakota v. Bourland*, the Court said you do *not* have the right to speak to us concerning lands within the exterior boundaries of the reservation that are taken by the federal government to build a dam. In *Alaska v. Native Village of Venetie Tribal Government*, the Court said to the native villages in Alaska you do *not* have the right to speak to us at all. In *South Dakota v. Yankton Sioux Tribe*, the Court said you do *not* have the right to speak to us about the "diminished" part of the reservation. In *Strate v. A-I Contractors*, the Court said you do *not* have the right to speak to us about what happens on state or federal highways. Indeed, the Court noted, even in circumstances where you have the right to speak, federal courts do *not* have the duty to listen. The exhaustion doctrine was shorn of its mandatory character and became merely prudential in nature.

As dispiriting as all this is—and it is dispiriting—it remains a bedrock truth that the tribal judicial landscape has permanently changed. Regardless of future Supreme Court pronouncements, tribal courts cannot and will not turn back. They have "discovered" (to play on the key word in the jurisprudential linchpin of colonialism as set out in *Johnson v. M'Intosh*) an alphabet and grammar with which to forge a new voice to elucidate the meaning of tribal sovereignty. This emerging voice is an inextricable part of the homelands it seeks to preserve and nourish.

Borrowing some of the insights from the recent book, *Trickster Makes This World* by Lewis Hyde, it is possible to liken tribal courts to "a thief of reapportionment who quit the periphery and moved to the center." A thief whose great "discovery" or theft is that of jurisprudential literacy and the (re)acquisition of a voice that rejects silence. As noted by Professor Hyde in his discussion of the black reformer and activist Frederick Douglass: "In law as in practice, slaves were to stand mute, and plantation culture—like others we have seen—organized itself through spheres of speech and spheres of silence. Slaves were taught that 'a still tongue makes a wise head.'"
In this provocative view, it is often the unsettling work of trickster figures—both imaginary and real—to disturb the structures of oppression "by refusing plantation rules of silence and speaking from and across its external boundaries"\(^{110}\) in such a way as to "dispel its enchantment." This is indeed one way of thinking of the work of tribal courts and it is in the potential role as a dispeller of (dominant) "enchantment" that may explain the growing reluctance of the Supreme Court and many lower federal courts to fully engage with and listen to tribal courts. This desire to deflect or avoid the tribal judicial voice—if indeed that is what is happening—will further expose the arbitrary and demeaning nature of "plantation culture" or as it is increasingly known in Indian law as the perfidious doctrine of "judicial plenary power."\(^{111}\)

XI. INDIAN LAW INQUIRY: A HUMANISTIC ENDEAVOR

Although the field of Indian law is a complex field of law riven with the legacy of colonialism and bleak stretches of American history, it might also be seen as a kind of humanistic inquiry in which American society seeks (yet) to realize the dignity and worth of its First People—including their culture and governing institutions—within a national fabric of meaningful pluralism. Judge Noonan of the Ninth Circuit recently gave an address at the dedication of the new home of the University of Dayton School of Law. In his remarks, he made some observations that are particularly well suited to the current quandary that besets Indian law. He noted that bureaucrats and sometimes even lawyers and courts lack "the sense of proportion, the talent of empathy, and the gift of kindness that must animate all true service to the law."

Recent Indian law decisions, such as *South Dakota v. Bourland*,\(^{113}\) *Strate v. A-1 Contractors*,\(^{114}\) *Alaska v. Native Village of Venetie Tribal Government*,\(^{115}\) and *South Dakota v. Yankton Sioux Tribe*,\(^{116}\) do not reflect any of these qualities. Instead, they recognize no sense of proportion in that

\(^{110}\) Id. at 231.

\(^{111}\) See, e.g., Pommersheim, *supra* note 2, at 326-29.


\(^{113}\) 508 U.S. 679 (1993); see *supra* note 103 and accompanying text.

\(^{114}\) 520 U.S. 438 (1997); see *supra* note 106 and accompanying text.

\(^{115}\) 522 U.S. 520 (1998); see *supra* note 104 and accompanying text.

\(^{116}\) 522 U.S. 329 (1998); see *supra* note 105 and accompanying text.
they simply "take" authority from Indian tribes. They are devoid of empathy for what tribes and native people are seeking to accomplish and they lack basic kindness. Judge Noonan thinks highly of the practice of law because a "bureaucratist does not know the business of humanity is kindness; a lawyer does." In the context of Indian law, the question might be asked whether the Supreme Court knows what the business of humanity is or, as more corrosively noted by Bob Dylan, are we simply witnessing "false hearted judges dying in the webs that they spin"?

In addition to these ethicists of humanity, there are some other insightful observations made by writers and scholars outside Indian law that are particularly resonant within the field. These include, for example, the work of G. K. Chesterton and Leon Wieseltier. Perhaps somewhat unexpectedly, their writing in the spiritual context of grief and death provide unique insights on the role of tradition and custom in law and human affairs. G. K. Chesterton, a British writer of the early twentieth century, who was both a Christian apologist and a bitter opponent of imperialism, noted that tradition was not inimical to democracy but rather that "tradition is only democracy extended through time." More specifically:

Tradition means giving votes to the most obscure of all classes, our ancestors. It is the democracy of the dead. Tradition refuses to submit to the small and arrogant oligarchy of those who merely happen to be walking about. All democrats object to men being disqualified by the accident of birth; tradition objects to their being disqualified by the accident of death.

Leon Wieseltier, writing as a son mourning the death of a parent in the Jewish tradition of the daily recital of the Kaddish, comments in his spiritual journal:

Custom is lovable in a way that law is not. Custom is so unpristine. It has fingerprints all over it. It asserts the reality of practices against the ideality of principles.

The story of law is a story of rationalism. The story of custom is a story of humanism.

. . . .

118. BOB DYLAN, Jokerman, on INFIDELS (Columbia Records 1983).
120. Id.
121. See LEON WIESELTIER, KADDISH (1998).
Custom differs from law also in its vulnerability. Since it lives in the individuals and the communities that practice it, it dies with them, too. Custom may be wiped out.

The preservation of custom is not an anthropological imperative. It is a moral imperative. My parents taught me this. \(^{122}\)

These seemingly disparate writers separated by time, religion, and geography nevertheless converge on the importance of tradition and custom in a way that is quite similar to the vital role tradition and custom plays in the development of law throughout Indian country. \(^{123}\)

Inevitably, the most trenchant observations on contemporary tribal life come from within the Indian community. Sherman Alexie, novelist, poet, screenwriter, cuts through tomes of exegesis with his singular formula: “Survival = Anger x Imagination. Imagination is the only weapon on the reservation.” \(^{124}\) While anger is not necessarily the province of judges and scholars, \(^{125}\) imagination ought to be. When it is in short supply, the manifest injustice of so much of Indian law remains entombed in perfunctory formalism and manipulated precedent and a tyranny of technique threatens to eradicate the humanistic impulse to do the right thing.

Discussions within the Indian law community often hint at despair, and at one recent Indian law symposium, a student asked Susan Williams, a leading Indian water law attorney, about the apparent bleakness within the field. Ms. Williams thought for a moment and then said, “One must have optimism

\(^{122}\) Id. at 506-07.


\(^{124}\) SHERMAN ALEXIE, THE LONE RANGER AND TONTO FISTFIGHT IN HEAVEN 150 (1993). The multi-talented Mr. Alexie also wrote the screenplay for the powerful film SMOKE SIGNALS (1998), which is based on his book and details life on the Coeur d’Alene Reservation in Idaho. In the film, there is also a song written by Mr. Alexie and Jim Boyd entitled Reservation Blues that contains the telling refrain:

\begin{quote}
If you ain’t got choices, what else do you choose?
If you ain’t got choices, you don’t have much to lose.
\end{quote}

Other beautiful and trenchant work by Mr. Alexie includes the poetry of THE BUSINESS OF FANCYDANCING (1992) and the knockout novel, RESERVATION BLUES (1995).

\(^{125}\) Anger may nevertheless be a valuable motivating force for Indian law practitioners in their pursuit of justice and respect for their tribal and individual Indian clients.
beyond all reason." This indeed is the necessary wisdom: imagination and commitment wedded to unshakable hope.

XII. COYOTE PARADOX

The central paradox—and certainly one a trickster figure navigating between two worlds could appreciate—of contemporary Indian law is the strength and elan of tribal efforts in the face of the negative jurisprudence of the Supreme Court. Despite the inimical ethos that permeates much of contemporary Supreme Court Indian law jurisprudence, the efforts of tribes to achieve meaningful self-determination proceed apace. Tribes seemingly grow ever more confident with their accomplishments in developing increasingly competent and sophisticated tribal governing institutions to better serve individuals and communities on the reservation. In the face of continuing dominant resistance—and even here there are positive pockets of change—there is a growing sense in Indian country that federal dominance (and state resistance) in Indian law must and is giving way slowly to a new regime not only in law but in hearts and minds throughout Indian country.

This then is perhaps the new struggling to be born within the shell of the old. The old way of federal ascendancy and federal control needs to give way to partnership, collaboration, and mutual respect. These are paradoxically the ways of old. As noted by Professor Frickey:

So deeply rooted is the faith in adjudication that it may be difficult for many members of the American legal community to imagine any meaningful alternative. Yet, both within Native American communities and in their relationships with European nations and the United States, there has been a rich tradition of sharing values through dialogue and negotiation. The notion that tribes are inextricably linked to the United States government and its people may be a plausible conclusion of law based on precedent, but it is much more clearly proved, as a conclusion of life, by assessing the intertwined histories and practices of Natives and Euro-Americans. The potential contemporary significance of this insight would be hard to overstate.127


Coyote is out there too. As a representative trickster figure, he acts in such a way "that the boundary is where he will be found—sometimes drawing the line, sometimes crossing it, sometimes erasing or moving it, but always there, the god of the threshold in all its forms." Yet ultimately it is real flesh and blood people, committed and engaged, that reflect "imagination in action" with its capacity to "open the road to possible new worlds."