The Case for 'Expanding' the Abstention Doctrine to Account for the Laws and Policies of the American Indian Tribes

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TABLE OF CONTENTS

INTRODUCTION .................................................................................................. 591
I. THE ABSTENTION DOCTRINE AND THE CIRCUMSTANCES TO WHICH IT APPLIES .............................................................................. 596
   A. The Creation and Justification of the Need for an Abstention Doctrine ................................................................................................ 598
      1. The Needless Friction Involving State Policies .............................................. 600
      2. The Encroachment of Federal Courts on the States ..................................... 601
      3. The Need for Efficiency ........................................................................... 602
   B. Evolution of the Abstention Doctrine ............................................................. 603
   C. Abstention Promoting Exclusively Federal Policy Interests ....................... 607
II. THE ROAD TO THE PROBLEM OF CONCURRENT CIVIL JURISDICTION IN INDIAN COUNTRY ........................................................................................................ 610
   A. United States Law Recognizes that Indian Tribes Possess Sovereignty ........ 613
      1. The U.S. Constitution and Congressional Enactments Recognize that Indian Tribes Possess Sovereignty ........................................... 613

* The author is an Assistant Professor of Law at Phoenix School of Law. He holds a J.D. (1990) from the University of Washington School of Law and is the former Solicitor General for the Non-Removable Mille Lacs Band of Ojibwe (1983-1987). This article is dedicated to the memory of my friend (nee gee), Arthur Wesley Gahbow, we win a bi, the former long-serving elected chief of the Non-Removable Mille Lacs Band of Ojibwe, who embraced, inspired, and shared with me his hopes, wishes, desires, and dreams of the a nish in a be on the Mille Lacs Indian Reservation to be sovereign and self-determined. I am profoundly grateful to my friends, Professor Robert Gomulkiewicz, Professor Linda Rusch, and Matthew Sekits, Esq., for their insightful commentary and continued encouragement and support throughout the process of preparing this article. I am also grateful to my colleagues, Professors McKay Cunningham, Stephen Gerst, Michael O'Connor, Keith Swisher, Riaz Tejani, and Ann Woodley, for their inquiries, comments, and thoughtful suggestions as I developed the ideas reflected in this article. I am thankful to Justin Ackerman, Nicholas Darus, and Kendra Allen-Grant for their useful research assistance. In addition, I wish to express my sincere appreciation to the Phoenix School of Law Library Team, comprised of Christy Ryan, Ted McClure, Timothy Saffles, and Alison Ewing, for their helpful research support.

1. By "expanding," the author is referring to a new circumstance for which the abstention doctrine should be recognized and applied.
2. United States Supreme Court Decisions Recognize that Indian Tribes Possess Sovereignty ............................................................... 615
3. The Source of Federal Authority over Indian Affairs ....................... 617

B. Jurisdiction in Indian Country: Congress Authorizes the States to Join the United States and Indian Tribes in Sharing Concurrent Jurisdiction in Indian Country .......................................................... 620


2. Public Law 280 Conferred No Civil Jurisdiction to the States over the Indian Tribes and Did Not Abrogate Sovereign Immunity Possessed by the Indian Tribes as a Matter of Federal Common Law ................................................................. 627

3. United States v. Montana: U.S. Supreme Court Efforts to Protect Nonmembers from the Regulatory and Adjudicatory Jurisdiction of an Indian Tribe ................................................................. 632

4. The Montana Rule Contributes to Jurisdictional Problems in Indian Country ........................................................................ 639

5. The Nation's Domestic Indian Policy: A Useful Policy Framework to Support Application of the Abstention Doctrine in a New Circumstance—Extending Mutual Trust, Confidence, and Respect to the Courts of Indian Tribes .......... 645

C. What Does All This Mean? .............................................................. 649

III. The Need to Expand the Abstention Doctrine ................................. 654
INTRODUCTION

The American judicial system has two separate and independent court systems: the courts of the United States and the courts of the states. Both systems are united under one organic document, the U.S. Constitution. The Constitution sets forth a structure of power sharing between the states and the federal government, commonly known as federalism. This unique judicial framework is largely responsible for the creation of the long-standing general principle that the laws of the United States and the laws of the states can apply to the same persons, property, and contracts. This principle has significant legal consequences because of the potential for conflict between the two parallel court systems. That is, two different sets of courts might have concurrent power over the same people and the same things.

To resolve the conflict, the United States Supreme Court crafted rules grounded not only in the common law doctrine of comity, but also in necessity. The first of
these judicially created schemes involved reaching back into the common law to apply a "first to file" rule.\(^6\) The "first to file" rule provides that the first court to acquire jurisdiction over the person or property shall have the right to exercise its jurisdiction exclusive of any other court.\(^7\) Application of this rule, however, proved to be somewhat challenging and, eventually, the Supreme Court adopted a different approach to create the proper balance of judicial power between the federal courts and the state courts.

Thereafter, the challenging economic times of the 1920s and 1930s resulted in states developing statutory schemes aimed at regulating commercial activities. These new statutes quickly became new sources of judicial conflict\(^8\) because they generally reflected domestic policies and interests specific to the states. Predictably, disputes also arose over the scope and meaning of these statutes, which, in turn, resulted in litigation. The conflict became most apparent when litigants sued in federal courts, based on diversity jurisdiction, to assert or defend perceived rights at the intersection of federal law and state statutes because diversity jurisdiction required the federal courts to interpret and apply state law.\(^9\)

In response to these challenges, in 1941, the Supreme Court created the abstention\(^10\) doctrine in *Railroad Commission v. Pullman Co.*\(^11\) as a means to avoid and thus the parties be without remedy, being liable to a process for contempt in one, if they dare to proceed in the other.

6. The "first to file" rule emanates from the common law. *Carryl*, 61 U.S. (20 How.) at 594. Although a useful doctrine, it seems inadequate to solve conflict problems within the constitutional judicial framework because the Supreme Court later created an abstention doctrine for the very same issues. See *R.R. Comm’n v. Pullman Co.*, 312 U.S. 496 (1941).

7. The fact that two separate sovereigns may exercise personal and subject matter jurisdiction over the same persons, property, and contracts has never created much of a vexing legal issue. See *Carryl*, 61 U.S. (20 How.) at 594 (tracing the roots of the "first to file" rule back to the English common law case of *Payne v. Drewe*, (1804) 102 Eng. Rep. 931 (K.B.); 4 East 523).


9. See, e.g., *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18-19 (1842) (concluding that the Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1652 (2006)), allows federal courts to make independent judgments on state common law matters even if the state courts previously reached those state law issues), *overruled by Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (interpreting the Judiciary Act of 1789 § 34, 1 Stat. at 92, to mean that federal courts are bound by state court interpretations of state law). With respect to interpreting the laws of an American Indian tribe, Congress has neither authorized the U.S. Supreme Court to interpret such laws nor directed the federal courts to be bound by tribal court interpretations of such laws.

10. "The term abstention refers to judicially created rules whereby federal courts may not decide some matters before them even though all jurisdictional and justiciability requirements are met." *Erwin Chemerinsky, Federal Jurisdiction* § 12.1, at 783 (5th ed.)
constitutional rulings. Two years after Pullman, the Court applied the newly created abstention doctrine in Burford v. Sun Oil Co.,¹² and again in the 1959 case Louisiana Power & Light Co. v. City of Thibodaux.¹³ Each case illustrates the tensions at work within the abstention doctrine to avoid federal court litigation challenging state law regulatory schemes. One treatise describes the Court's molding and shaping of the doctrine as reflected in Pullman, Burford, and Thibodaux as representing the Court's effort to keep federal courts from hearing and deciding cases involving "unsettled question[s] of state law."¹⁴ The Court seemed to recognize that the abstention doctrine would need to be flexible and unbounded in order to address the unknown and unknowable factual circumstances in the exercise of concurrent jurisdiction between federal courts and state courts. This visionary approach to the abstention doctrine proved prophetic. The Court returned to the doctrine in the 1971 case Younger v. Harris, this time molding and shaping it to refine the circumstances in which a federal court should intervene in an ongoing state criminal prosecution.¹⁵ Leading scholars and others have written extensively about the abstention doctrine, almost unanimously referring to each case in which the doctrine was applied, from Pullman to Younger, as a distinct and separate abstention doctrine.¹⁶ Yet the Supreme Court never referred to any of those cases using such characterization. By the time the Supreme Court next considered application of the abstention doctrine in Colorado River Water Conservation District v. United States,¹⁷ the Court took up the task of summarizing the doctrine and explaining that it applied in only three exceptional circumstances: (1) "in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law";¹十八 (2) where "there have been

¹². 319 U.S. 315 (1943).
¹⁴. 17A James Wm. Moore, Moore's Federal Practice § 122.01[3], at 122-10 (3d ed. 2011).
¹⁸. Id. at 814 (quoting Cnty. of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 189 (1959)).
presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; and (3) "where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings." After rejecting the application of the doctrine to the facts at issue in Colorado River, the Court nevertheless affirmed the dismissal of a federal lawsuit in favor of parallel litigation in state court. The Court then described a three-factor balancing test to be applied in similar cases, and noted that dismissal is warranted only if the "clearest of justifications" are present.

The origination and evolution of the abstention doctrine illustrates how the Supreme Court has created a workable balance of concurrent federal-state judicial power to accommodate predominant state laws and state policies along with vital federal policy interests. Acknowledging the recent debate among scholars and commentators as to the wisdom of the abstention doctrine, this article advocates in favor of the creation of another circumstance for application of the doctrine—one that acknowledges both the sovereignty of the American Indian tribes and their democratic governments and the inherent conflict arising from three sovereigns exercising concurrent jurisdiction over the same people, property, and contracts. A seemingly vital federal policy interest, as articulated by Congress's Indian policy of self-determination, is recognizing the legislative and judicial authorities within Indian tribes and the important governance role they play in Indian Country to formulate and apply the rule of law and administer justice. Identifying an

19. *Id.* (citing La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959)).
20. *Id.* at 816 (citing *Younger*, 401 U.S. 37, and *Douglas v. City of Jeannette*, 319 U.S. 157 (1943)).
21. *Id.* at 817.
22. *Id.* at 818-21.
24. Generally speaking, the term "Indian Country" refers to all land within an Indian reservation and any other land exterior to an Indian reservation in which there is a history of federal Indian relations. *See* 18 U.S.C. § 1151 (2006). The statute provides as follows:

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

*Id.*
exceptional circumstance to effectuate the nation’s Indian policy through the abstention doctrine presents a unique opportunity to implement effective self-determination for American Indian tribes, as well as government-to-government relations between the Indian tribes, the United States, and the states. Approving a new circumstance for application of the abstention doctrine in Indian Country would provide needed guidance to federal courts (and state courts) to dismiss civil causes

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The statute provides as follows:

(a) Findings respecting historical and special legal relationship, and resultant responsibilities

The Congress, after careful review of the Federal Government’s historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that—

(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.


The executive order provides as follows:

Sec. 2. Fundamental Principles. In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

(a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

(b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

(c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

Exec. Order No. 13,175 § 2, 3 C.F.R. at 305.

26. Abstention is a federal doctrine. See CHEMERINSKY, supra note 10. While state courts are not bound by the federal abstention doctrine, it seems likely that state courts would defer to the national interest because “federal law, federal policy, and federal
of action that encroach on matters better left to the courts of Indian tribes. Such matters include the interpretation of tribal constitutions, statutes, and common law, particularly in the interests of comity. It would also provide a framework to head off the impending conflict between either a federal court or a state court, on one hand, and a tribal court, on the other, by dismissing federal-Indian tribe (and state-Indian tribe) litigation, as well as implement important federal policy interests.

The abstention doctrine has often been applied to determine which sovereign, the United States or a state, is in the best position to exercise jurisdiction to hear and decide civil disputes involving the same persons, property, or contracts. Part I of this article describes the abstention doctrine, the circumstances in which it has been applied, and the federal policies, interests, and practical considerations that are served by its application. Part II examines the attributes of sovereignty possessed by Indian tribes and is comprised of three sections: (1) a discussion of the attributes of the sovereignty possessed by the Indian tribes as a matter of U.S. law; (2) a discussion of U.S. law, Supreme Court precedent, and national domestic Indian policy as pertaining to concurrent civil jurisdiction in Indian Country; and (3) a discussion of what this means with respect to three sovereign entities possessing authority over the same people and the same territory. Given the sovereignty that Indian tribes possess, Part III identifies some areas of submerged concurrent jurisdictional conflict and discusses how the development of another circumstance within the abstention doctrine—one narrowly tailored to the courts of an Indian tribe—could serve as a scheme for the exercise of concurrent civil jurisdiction among the three sovereigns in Indian Country.

I. THE ABSTENTION DOCTRINE AND THE CIRCUMSTANCES TO WHICH IT APPLIES

Noted constitutional scholar Erwin Chemerinsky writes, “The term abstention refers to judicially created rules whereby federal courts may not decide some matters before them even though all jurisdictional and justiciability requirements are met.” The Supreme Court has described the doctrine of abstention as follows:

[A]n extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional

authority are paramount in the conduct of Indian affairs in Indian Country.” Seneca-Cayuga Tribe v. Oklahoma ex rel. Thompson, 874 F.2d 709, 713 (10th Cir. 1989).

27. This article does not address abstention in other contexts where it applies, such as “state nuisance proceedings antecedent to a criminal prosecution,” “collections of state taxes,” or the like. Colo. River, 424 U.S. at 816-17.

circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest.\textsuperscript{29}

The Court has also made clear that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule."\textsuperscript{30} No doubt, federalism concerns between the federal courts and the state courts reflect sound judicial policy and respect for state law by federal courts—a major principle underlying the abstention doctrine. Each circumstance to which the Court has approved application of the doctrine seems to have been created to address a narrow and specific issue in conflict between a federal court and a state court.

Part I briefly describes the creation of the abstention doctrine in \textit{Railroad Commission v. Pullman Co.}\textsuperscript{31} and, thereafter, the cases, \textit{Burford v. Sun Oil Co.}\textsuperscript{32}, \textit{Louisiana Power & Light Co. v. City of Thibodaux},\textsuperscript{33} and \textit{Younger v. Harris},\textsuperscript{34} in which the Court molded and shaped the doctrine to apply in only three distinct circumstances.\textsuperscript{35} Part I also discusses \textit{Colorado River Water Conservation District v. United States}, a case in which the Supreme Court determined that the facts of \textit{Colorado River} did not apply to any of the three recognized circumstances justifying abstention, but nonetheless created an additional circumstance grounded in federal policy and practical considerations in which dismissal of a federal lawsuit in favor of state court adjudication would be proper.\textsuperscript{36} The abstention doctrine represents the Supreme Court's response to resolving conflict between the federal courts and the state courts in concurrent jurisdictional circumstances. At its core, the doctrine serves

\textsuperscript{29} \textit{Colo. River}, 424 U.S. at 813 (quotingCnty. of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188-89 (1959)) (internal quotation mark omitted).

\textsuperscript{30} \textit{Id.}

\textsuperscript{31} 312 U.S. 496 (1941). The Court later characterized \textit{Pullman} as illustrating the first of three exceptional circumstances in which abstention is appropriate: "'cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.'" \textit{Colo. River}, 424 U.S. at 814 (quoting Allegheny, 360 U.S. at 189).

\textsuperscript{32} 319 U.S. 315 (1943).

\textsuperscript{33} 360 U.S. 25 (1959).

\textsuperscript{34} 401 U.S. 37 (1971).

\textsuperscript{35} The Court later cited to \textit{Thibodaux} and \textit{Burford} in recognizing the second of three exceptional circumstances in which abstention is appropriate: "where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." \textit{Colo. River}, 424 U.S. at 814-15. Furthermore, the Court also cited to \textit{Younger} in recognizing the third exceptional circumstance: "absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings." \textit{Id.} at 816.

\textsuperscript{36} \textit{Id.} at 814-17.
to implement the common law notion of comity by establishing guidelines that maintain cooperative and harmonious relationships between these courts.

The Supreme Court's measured evolutionary approach to resolving conflict between the federal courts and the state courts illustrates that the outer perimeter of the abstention doctrine has yet to be reached. The emergence of democratic governments of Indian tribes, whether or not organized under constitutions modeled after the U.S. Constitution and approved by the U.S. Secretary of the Interior pursuant to statutorily delegated authority, presents another exceptional circumstance for applying the abstention doctrine within the context of relations between the federal and state courts and the courts of Indian tribes. The growth and development of courts for the sovereign Indian tribes now presents the nation with a new round of problems, much like the problems that existed in 1941 when the Court decided *Pullman*.

The Court will be asked to determine which of the three sovereign courts should exercise jurisdiction to hear and decide civil disputes arising in Indian Country, a question involving common law notions of comity between sister courts. The Court should reexamine the familiar considerations of comity and judicial policy reflected in the concept of "Our Federalism," and assess whether to merge these considerations with equally compelling federal policy considerations presented by the nation's domestic public policy of Indian self-determination and self-governance. Before moving forward for this analysis, it is appropriate to first establish a foundation by discussing the origins and evolution of the abstention doctrine.

A. The Creation and Justification of the Need for an Abstention Doctrine

The abstention doctrine requires federal courts to abstain from deciding a federal constitutional question "when state law is uncertain and a state court's clarification of state law might make a federal court's constitutional ruling unnecessary." At issue in *Pullman* was a Texas Railroad Commission order that required sleeping cars on trains to be staffed by conductors instead of porters. The Pullman Company and the railroads sought an injunction in federal court, arguing that the Commission's order violated Texas law and the Fourteenth Amendment to the U.S. Constitution. The case had racial implications as the conductors, who were white, had higher rank than

37. See infra note 154.
38. See generally R.R. Comm'n v. Pullman Co., 312 U.S. 496 (1941) (addressing federalism concerns in the relations between the federal and state judiciaries).
39. *Younger*, 401 U.S. at 44.
40. See CHEMERINSKY, supra note 10, § 12.2.1, at 785; see also *Pullman*, 312 U.S. at 501.
41. *Pullman*, 312 U.S. at 497-98.
42. Id. at 498.
the porters, who were black. The porters intervened in the case and also opposed the Commission’s order. The district court found in the railroad’s favor. The U.S. Supreme Court reversed, however, holding that the district court should have abstained from deciding the case until the state court had an opportunity to decide if the action violated state law. Thus, the Court limited the exercise of a federal court’s equity powers when state law was so unclear or undefined that a federal court’s interpretation would be “a forecast rather than a determination.”

Pullman said the “last word on the meaning of [a Texas civil statute], and therefore the last word on the statutory authority of the [Texas] Railroad Commission” belonged neither to the U.S. Supreme Court nor to the federal district court. Instead, it belonged to the Texas Supreme Court. The Court rationalized the need for an abstention doctrine by explaining that “[f]ew public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies . . . .” The Court then noted three examples of potential policy conflicts: (1) those relating to “the enforcement of the criminal law”; (2) “the administration of a specialized scheme for liquidating embarrassed business enterprises”; and (3) “the final authority of a state court to interpret doubtful regulatory laws of the state . . . .” The Court added that “[t]hese cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, ‘exercising a wise discretion,’ restrain their authority because of ‘scrupulous regard for the rightful independence of the state governments’ and for the smooth working of the federal judiciary.” The courts’ use of these equitable powers helps further harmonious relations between state and federal authority without the need for rigorous congressional restriction of those powers. Accordingly, Pullman served as the initial effort to resolve problems of these sorts that had persisted since the formation of the Union. A closer look at these problems follows.

43. Id. at 497.
44. Id. at 497-98.
45. Id. at 498.
46. Id. at 499-500.
47. Id. at 499.
48. Id. at 499-500.
49. Id.
50. Id. at 500.
51. Id.
52. Id.
53. Id. at 500-01.
54. Id. at 501 (quoting Di Giovanni v. Camden Fire Ins. Ass’n, 296 U.S. 64, 73 (1935), and Cavanaugh v. Looney, 248 U.S. 453, 457 (1919)).
1. The Needless Friction Involving State Policies

The friction between federal courts and state policies dates back to the 1793 case of *Chisholm v. Georgia*. In *Chisholm*, the Court held that "when a State, by adopting the Constitution, has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty." In response to this unpopular decision, Congress adopted the Eleventh Amendment to supersede the decision and to restore the sovereign immunity of the states. In short, the Eleventh Amendment attempts to avoid friction with states by protecting states in carrying out their policies in areas that have not been ceded to the federal government.

Subsequent to the ratification of the Eleventh Amendment, friction involving the litigation of state policies in federal court reappeared. In the 1908 case *Ex parte Young*, the Supreme Court addressed whether the Eleventh Amendment prevented federal courts from enjoining a state official from implementing state laws that purportedly violated rights protected by the U.S. Constitution. The Court held that, although Supreme Court precedent prevented the states from being sued in actions for damages, the prohibition did not extend to equitable relief seeking to enjoin state officials in the performance of their official duties.

An additional battle preceding the Court's decision in *Pullman* involved labor disputes. In response to the prevalent misuse of injunctive relief involving labor in federal courts, Congress enacted the Labor Disputes (Norris-LaGuardia) Act in 1932, which was, in part, designed to restrict the extent to which federal courts should intervene in state law and policy matters. Thus, in relevant part, this legislation prohibited federal courts from issuing restraining orders and injunctions unless the courts were in "strict conformity" with the Act.

55. 2 U.S. (2 Dall.) 419 (1793), superseded by constitutional amendment, U.S. Const. amend. XI.
56. Id. at 452 (opinion of Blair, J.).
57. See U.S. Const. amend. XI.
59. Id. at 155-56. Once again, Congress enacted legislation that required *Ex parte Young* type injunctions to be heard and decided only by a special three-judge federal panel. See Act of Mar. 4, 1913, ch. 160, 37 Stat. 1013 (codified as amended at 28 U.S.C. §§ 1253, 2101, 2284 (2006)). The 1913 amendment also required the three-judge district court to stay federal court proceedings, if the same had been done under state law, pending the decision in state court. Id.
2. The Encroachment of Federal Courts on the States

The idea that federal courts should give due regard to the states originates in *The Federalist Papers.* Well-documented Federalist and Founding Father Alexander Hamilton stated, "[T]here is not a syllable in the plan under consideration which directly empowers the national courts to construe the laws according to the spirit of the Constitution, or which gives them any greater latitude in this respect than may be claimed by the courts of every State." Although *Marbury v. Madison* put some of this in doubt, the underlying point can be seen as surviving in *Pullman* abstention. In essence, by abstaining from exercising otherwise permissible federal jurisdiction, the Court implicitly acknowledged that states, as recognized sovereigns, possessed the authority to decide issues arising under the U.S. Constitution. Even though a federal court may eventually overturn a state's decision regarding the interpretation of federal law, the abstention doctrine implements an important U.S. domestic policy of recognizing a state's authority to construe state laws within the context of the Constitution.

In the 1920s and 1930s, the issue of state sovereignty became more pronounced. Although the federal court system had not yet endorsed the abstention doctrine, some recognized that state sovereignty necessitated abstention at times. As the Court in *Matthews v. Rodgers* stated,

> The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it.

In the 1938 case of *Erie Railroad Co. v. Tompkins,* the U.S. Supreme Court considered the encroachment issue once again, this time to revisit its earlier interpretation of section 34 of the Judiciary Act of 1789 in *Swift v. Tyson.* The

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62. See *The Federalist* Nos. 81-82 (Alexander Hamilton).
63. *Id.* No. 81, at 407 (Ian Shapiro ed., 2009).
64. 5 U.S. (1 Cranch) 137 (1803) (holding the U.S. Constitution to be the supreme law of the land and enforceable by the courts against the states).
67. 304 U.S. 64 (1938).
68. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1652 (2006)) ("[T]he laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded"
Swift Court interpreted the word “laws” to exclude state “common law” and commented that federal courts were free to ignore whatever interpretation a state court provided as to state common law and any rights or privileges flowing from that common law. Yet, the Constitution required that the Supreme Court “recognize[] and preserve[] the autonomy and independence of the States—independence in their legislative and independence in their judicial departments.” Accordingly, in Erie, the Court reinterpreted the word “laws” to include state “common law,” thus reasserting state court authority to interpret rights and privileges flowing from common law.

In sum, these cases illustrate the encroachment by the federal courts on the states leading to the creation of the abstention doctrine in Pullman. Further, the cases illustrate how Pullman can be seen as returning power properly belonging to the states under the scheme the Founders intended.

3. The Need for Efficiency

In mandating that the federal district court abstain in Pullman, the Court was attempting to prevent an inefficient battle between the courts and Congress with respect to “the need of rigorous congressional restriction” of the courts’ equitable powers. Whether it was labor controversies or injunctions, the Court thought

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69. 41 U.S. (16 Pet.) 1, 4 (1842), overruled by Erie, 304 U.S. 64.
70. Id. at 18. Specifically, the Swift Court reasoned as follows:

[T]he laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. In all the various cases which have hitherto come before us for decision, this Court have [sic] uniformly supposed, that the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character.

Id.

71. See Erie, 304 U.S. at 71.
72. Id. at 78-79 (quoting Balt. & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 401 (1893)).
73. Id.
74. See Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49 (1923) (discussing recovered legislative history possibly showing that the Judiciary Act of 1789 was intended to include state common law all along); see also The Federalist No. 81, supra note 62.
the constant battle was unnecessarily inefficient. In an effort to end this struggle, the Court created the abstention doctrine.

B. Evolution of the Abstention Doctrine

In *Burford v. Sun Oil Co.*, the U.S. Supreme Court considered a federal due process challenge to the validity of a state administrative agency order. In a Texas statute authorized the Railroad Commission of Texas to exercise general regulatory authority over oil and gas in Texas and, in particular, to implement conservation measures to prevent waste. In addition, the statute set up a judicial review procedure that funneled all reviews of Commission orders into a single state court with particularized expertise in gas and oil issues. Sun Oil brought suit in federal court alleging that the Commission’s order, which granted drilling rights to Burford, violated its due process rights.

The issue before the U.S. Supreme Court was, assuming jurisdiction was proper, whether a federal district court should decline to exercise diversity jurisdiction “as a matter of sound equitable discretion . . . “. In addressing this issue, the Court noted the extensive state regulatory scheme in place with respect to conserving state oil and gas resources, the considerable involvement of the Texas judicial system in resolving issues arising from implementing that scheme, and the confusion that follows when a federal court disagrees with a state court’s interpretation of state law. The Court admonished that the intervention of federal courts in matters involving the interpretation of state law would threaten the success of state policies. Accordingly, it held that under the abstention doctrine, a federal court should dismiss the action if deciding the state law question would interfere with an extensive state regulatory scheme involving matters of significance to the state.

77. *See generally* Commerce Court (Mann-Elkins) Act, ch. 309, § 17, 36 Stat. 539, 557 (1910) (requiring a three-judge federal panel to decide whether injunctive relief was appropriate); *Ex parte Young*, 209 U.S. 123 (1908).
79. *Id.* at 318-24 (citing TEX. STAT. art. 6049c, § 8 (Vernon 1936)).
80. *Id.* at 325-27.
81. *Id.* at 316-17.
82. *Id.* at 318.
83. *Id.* at 326-27.
84. *Id.* at 334.
85. It is noteworthy that Justice Frankfurter dissented from the majority opinion on the ground that diversity jurisdiction existed in this case and that the Court should not have denied a remedy considering the policies underlying diversity jurisdiction. *Id.* at 336-37 (Frankfurter, J., dissenting). Furthermore, the Justice thought that, unlike the undefined state law in *Pullman*, the applicable state law was well defined in this case. *Id.* at 338-41.
86. *Id.* at 318 (majority opinion); *see also* Colo. River Water Conservation Dist. v.
Significantly, Justice Black, writing for the plurality, stated that "[t]hese questions of regulation of the [oil] industry by the state administrative agency... so clearly involve[] basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them." According to the Supreme Court, they reversed and dismissed the case, \textsuperscript{87} directing lower federal courts to dismiss similar actions. Where there is "unclear state law... there is a need to defer to complex state administrative procedures." \textsuperscript{89}

\textit{Burford} abstention thus represents the second circumstance in which a federal court yielded the exercise of otherwise proper jurisdiction to a state court. The Court made clear that, although a federal equity court possesses diversity jurisdiction over a particular matter, it has discretion to "refuse to enforce or protect legal rights" when necessary to protect the "public interest."\textsuperscript{90} The Court noted that Texas state law provided a unified method for the formulation of policy and determination of cases by the Texas Railroad Commission.\textsuperscript{91} Abstention thus can apply where "judicial review... in the state courts is expeditious and adequate."\textsuperscript{92} \textit{Burford} can be seen as an expansion of \textit{Pullman}'s attempt to limit federal court encroachment on matters properly belonging to the states—the primary principle of federalism.\textsuperscript{93} It can also be seen as further addressing the needless friction that was still occurring with respect to federal courts interpreting state policies.\textsuperscript{94}

\footnotesize{United States, 424 U.S. 800, 814-15 (1976) (relying on the facts in \textit{Burford} to illustrate the appropriate application of abstention and stating, "[i]t is enough that exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern").}

\textsuperscript{87}. \textit{Burford}, 319 U.S. at 332.

\textsuperscript{88}. \textit{Id.} at 334.

\textsuperscript{89}. \textit{See} CHEMERINSKY, \textit{supra} note 10, § 12.2.3, at 802.

\textsuperscript{90}. \textit{Burford}, 319 U.S. at 317-18 (quoting United States \textit{ex rel. Greathouse v. Dern}, 289 U.S. 352, 360 (1933)).

\textsuperscript{91}. \textit{Id.} at 333-34.

\textsuperscript{92}. \textit{Id.} at 334. The \textit{Burford} Court added as follows:

Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts. On the other hand, if the state procedure is followed from the Commission to the State Supreme Court, ultimate review of the federal questions is fully preserved here. Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand.

\textit{Id.} (citation omitted)

\textsuperscript{93}. \textit{See id.} at 332.

\textsuperscript{94}. \textit{See id.} at 318 ("[i]t 'is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy.'" (quoting Pennsylvania \textit{v. Williams}, 294 U.S. 176, 185 (1935))).
In *Louisiana Power & Light Co. v. City of Thibodaux*, the City attempted to expropriate the Company's "land, buildings, and equipment" in Louisiana state court.\(^{95}\) In response, the Company removed the case to federal court alleging that Louisiana law prohibited the City's actions.\(^{96}\) The district judge stayed the proceedings until further determination could be made as to the legality of the City's conduct.\(^{97}\) Upon further review, the Fifth Circuit reversed this decision, finding that a stay "was not available in an expropriation proceeding . . ."\(^{98}\) On examination by the U.S. Supreme Court, the issue was whether a federal court should—in the exercise of diversity jurisdiction—construe a state statute that had never been interpreted by the state's supreme court, although the state's attorney general opinion had cast doubt upon the legality of the government's exercise of power under the statute.\(^{99}\)

In an opinion authored by Justice Frankfurter, the Court cited *Pullman* with respect to the "wisdom of staying actions in the federal courts" so as to permit state courts to rule on questions of state law.\(^{100}\) The Court cautioned, "the mere difficulty of state law does not justify a federal court's relinquishment of jurisdiction in favor of state court action."\(^{101}\) Before turning to the merits of the case, the Court commented that prior cases involving abstention "reflect a deeper policy derived from our federalism."\(^{102}\) However, the Court took careful note that the case involved a conflict between interpreting a state statute that had never been construed by the Louisiana Supreme Court and a state attorney general opinion interpreting the same statute.\(^{103}\)

In reversing the Fifth Circuit's decision and reinstating the district court's stay order, the Supreme Court directed the lower federal court to permit the parties an opportunity to seek redress of grievances by means of a state declaratory judgment action, which would be reviewable by the state's highest court.\(^{104}\) In so doing, the


\(^{96}\) *Id.* at 25-26.

\(^{97}\) *Id.* at 26.

\(^{98}\) *Id.*

\(^{99}\) *Id.* at 30.

\(^{100}\) *Id.* at 25, 27 (citing R.R. Comm'n v. Pullman Co., 312 U.S. 496, 499 (1941)).

\(^{101}\) *Id.* at 27-28 (citing Meredith v. Winter Haven, 320 U.S. 228, 236 (1943)). The *Thibodaux* Court added as follows:

But where the issue touched upon the relationship of City to State, or involved the scope of a previously uninterpreted state statute which, if applicable, was of questionable constitutionality, we have required District Courts, and not merely sanctioned an exercise of their discretionary power, to stay their proceedings pending the submission of the state law question to state determination.

*Id.* (citations omitted).

\(^{102}\) *Id.* at 28.

\(^{103}\) *Id.* at 30.

\(^{104}\) *Id.* at 30-31.
Court expressed its expectation that the parties would promptly seek relief in the Louisiana courts, but required the lower court to retain jurisdiction over the matter in case it was otherwise necessary for the “just disposition of the litigation.”

In *Younger v. Harris*, a defendant indicted under a state criminal statute filed an injunction action in federal court. That action sought to enjoin a California district attorney from pursuing an ongoing criminal prosecution in state court. A three-judge federal panel convened to hear the matter and concluded that the California statute, under which the defendant had been indicted, violated the First and Fourteenth Amendments to the U.S. Constitution.

On review, the U.S. Supreme Court began its analysis noting that a federal lawsuit to enjoin an ongoing state prosecution is “a serious matter.” It then turned to a federal statute that prohibited federal court interference with state proceedings and noted that there are only three statutory exceptions to it: where the injunction is (1) “expressly authorized” by a federal statute; (2) necessary to “aid” the federal court’s jurisdiction; or (3) necessary to “protect or effectuate” the court’s judgment. The Court noted that none of these exceptions applied to the case before it.

Noting Congress has “manifested a desire to permit state courts to try state cases free from interference by federal courts,” the Supreme Court ruled that a federal court should not interfere in a state criminal prosecution pending in a state court. The Court explained that this long-standing desire was firmly grounded in equitable principles. It further stated:

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105. *Id.*
107. *Id.* The defendant sought federal jurisdiction based on numerous constitutional claims. *Id.* at 39.
108. Here, a federal statute required the district court to convene a three-judge panel in order enjoin the State. 28 U.S.C. § 2284 (1964) (amended 1984); *Younger*, 401 U.S. at 40.
110. *Id.* at 42. The Court continued: “[P]ersons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs in such cases.” *Id.*
113. *Id.* at 49. The Court added that “a judicial exception to the longstanding policy evidenced by the statute has been made where a person about to be prosecuted in a state court can show that he will, if the proceeding in the state court is not enjoined, suffer irreparable damages.” *Id.* at 43 (citing *Ex parte Young*, 209 U.S. 123, 152 (1908)).
114. *Id.* at 43-44.
The precise reasons for this longstanding public policy against federal court interference with state court proceedings have never been specifically identified but the primary sources of the policy are plain. One is the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.\textsuperscript{116}

The second reason provided by the Court was the common law notion of “comity”—that is, “a proper respect for state functions . . .”\textsuperscript{117} The Court explained that “Our Federalism” represents “a system in which there is sensitivity to the legitimate interests of both State and National Governments,” and that the protection of federal interests will always be done in a way that does “not unduly interfere with legitimate activities of the States.”\textsuperscript{118} It added that this concept occupies an “important place in our Nation’s history and its future.”\textsuperscript{119} While acknowledging that other “unusual situations” could create the possibility for federal intervention in state criminal proceedings, the “possible unconstitutionality” of the state statute at issue in the case “on its face” failed to justify the exercise of federal equitable powers against “good-faith attempts to enforce it.”\textsuperscript{120} Accordingly, the Court reversed the district court’s constitutional ruling invalidating the state statute.\textsuperscript{121}

### C. Abstention Promoting Exclusively Federal Policy Interests

In 1976, the U.S. Supreme Court again considered application of the abstention doctrine in \textit{Colorado River Water Conservation District v. United States}.\textsuperscript{122} In \textit{Colorado River}, the United States sued in federal court claiming reserved water rights on its behalf and on behalf of Indian tribes.\textsuperscript{123} In particular, the dispute surrounded the allocation of limited water resources.\textsuperscript{124} At issue was whether federal law\textsuperscript{125} or Colorado state law\textsuperscript{126} applied to the resolution of competing claims among various

\textsuperscript{116}. \textit{Id.}
\textsuperscript{117}. \textit{Id.} at 44 (“[T]he entire country is made up of a Union of separate state governments, and . . . the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.”).
\textsuperscript{118}. \textit{Id.}
\textsuperscript{119}. \textit{Id.} at 45.
\textsuperscript{120}. \textit{Id.} at 54.
\textsuperscript{121}. \textit{Id.}
\textsuperscript{122}. 424 U.S. 800 (1976).
\textsuperscript{123}. \textit{Id.} at 804-05.
\textsuperscript{124}. \textit{Id.} at 804.
\textsuperscript{125}. \textit{Id.} at 802-03 (construing the McCarran Amendment (McCarran Water Rights Suit Act) § 208(a)-(c), 43 U.S.C. § 666 (1970)).
\textsuperscript{126}. \textit{Id.} at 804-05 (construing \textit{COLO. CONST.} art. XVI, §§ 5-6, and the Water Right
Notably, the comprehensive regulatory and adjudicatory Colorado water allocation scheme at issue in the case was similar to the comprehensive scheme under Texas law regulating gas and oil resources in *Burford*. Yet the abstention doctrine as described in *Burford* was not dispositive in *Colorado River*.

Shortly after the United States commenced suit, one of the defendants, a party to preexisting litigation in a Colorado state court on the same issue, sought permission from the state court to join the United States as a party to the state proceedings. If successful, the motion would have consolidated all issues involving federal reserved water rights under both federal and state law into state court. Later, several defendants and interveners moved the federal court to dismiss the federal action on jurisdictional grounds. Without addressing the jurisdictional issue and instead applying the abstention doctrine, the district court dismissed the action in deference to the state court proceedings. On appeal, the Tenth Circuit reversed, stating that "abstention was inappropriate."

The U.S. Supreme Court's review began with federal law—the McCarran Amendment—which, in relevant part, contained the United States' consent to be joined as a defendant in any state court suit for purposes of adjudicating or administering federal reserved water rights, including water rights reserved to Indian tribes. The Court rejected the United States' argument that its "fiduciary responsibility to protect Indian rights" required express congressional authorization for state court jurisdiction over Indian property and that the McCarran Amendment contained no such authorization. The Court reasoned that the government had "not abdicated any responsibility fully to defend Indian rights in state court, and [that] Indian interests may be satisfactorily protected under regimes of state law." The Court's reasoning is curious in light of Public Law 280 ("P.L. 280"), a statute that, among other things, offered to transfer to the states federal subject matter jurisdiction in water users, including the United States. Notably, the comprehensive regulatory and adjudicatory Colorado water allocation scheme at issue in the case was similar to the comprehensive scheme under Texas law regulating gas and oil resources in *Burford*. Yet the abstention doctrine as described in *Burford* was not dispositive in *Colorado River*.

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128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 800, 810.
135. *Id.* at 812.
136. *Id.*
over civil actions involving Indians. However, P.L. 280 expressly withheld from states any jurisdiction to adjudicate Indian reserved water rights located in Indian Country.

The Court then turned to the issue of the district court's dismissal of the federal action on abstention doctrine grounds and summarily rejected application of the doctrine "in any of its forms." It stated that in "the exercise of federal jurisdiction," abstention is "the exception, not the rule." Further, a federal court may "abdicate" its obligation to decide cases only in "exceptional circumstances" and out of deference to pending state court proceedings. The Court cautioned that a federal court should not dismiss an action "merely because" a state court could hear and decide it. It then summarized three circumstances in which the Court had deemed abstention to be appropriate and determined that the facts before it did not fall within any of the three circumstances.

Nevertheless, the Court affirmed the district court's dismissal of the federal court action in favor of the proceedings in state court. In particular, it recognized certain "principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations" that apply in circumstances of "contemporaneous

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138. See infra note 225; see also 18 U.S.C. § 1162(b) (2006). The statute provides as follows:

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

Id. (emphasis added).
140. Id.
141. Id. at 813, 817.
142. Id. at 813-14 (quoting Ala. Pub. Serv. Comm'n v. S. Ry. Co., 341 U.S. 341, 361 (1951) (Frankfurter, J., concurring in the result)).
143. Id. at 814-16; see supra text accompanying notes 17-20. The Court specifically identified Burford as a case where "[i]t [wa]s enough that exercise of federal review... would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." Colo. River, 424 U.S. at 814.
145. Id. at 821.
exercise of concurrent jurisdictions, either by federal courts or by state and federal courts." These principles are grounded in "considerations of [w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation ..." The Court then applied those principles to conclude that the federal action should be dismissed. Considered together, the Court rejected application of the "first-to-file" rule and identified the following three-factor test that a federal court must apply in determining whether or not the facts of a case present truly exceptional circumstances to dismiss a federal lawsuit in favor of parallel litigation in state court: (1) "the inconvenience of the federal forum"; (2) "the desirability of avoiding piecemeal litigation"; and (3) "the order in which jurisdiction was obtained by the concurrent forums." 

In sum, Colorado River represents a "new" circumstance in which it is appropriate for a federal court to dismiss a lawsuit in favor of parallel litigation in state court. Such a dismissal may be referred to as "abstention-like." Although the Court emphasized that "exceptional circumstances" limit the application of the latest form of "abstention," the circumstances in Pullman, Burford, and Thibodeaux were also limited or exceptional circumstances, all of which served to achieve some constitutional or policy purpose. Thus, the Court's identification of two new policy purposes in Colorado River (judicial economy and sound judicial administration), without foreclosing the possibility of additional limited circumstances in an appropriate case, illustrates that the outer perimeter of the "abstention" doctrine has yet to be reached.

II. THE ROAD TO THE PROBLEM OF CONCURRENT CIVIL JURISDICTION IN INDIAN COUNTRY

The abstention doctrine has its roots in reserved state sovereignty. That is, certain authority was reserved to the states and, out of respect and deference, federal courts should not hear and decide certain issues. Indian tribes also possess attributes of the same sovereignty as a power reserved to the indigenous people who comprise each Indian tribe and who, in turn, delegated a portion of that sovereignty to their

146. Id. at 817.
147. Id. (alteration in original) (quoting Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183 (1952)).
148. Id. at 818-21.
149. Id. at 818.
150. CHEMERINSKY, supra note 10, § 14.2, at 873.
151. Id. § 14.2, at 873-74.
152. See, e.g., U.S. CONST. amend. XI.
153. See Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 472 (1793) (opinion of Jay, C.J.) ("Sovereignty is the right to govern; a nation or State-sovereign is the person or persons in
 EXPANDING THE ABSTENTION DOCTRINE

2011/12]

As a legal construct, the notion of sovereignty possessed by Indian tribes should be essentially no different than that of whom that resides."), superseded by constitutional amendment, U.S. CONST. amend. XI.

154. In 1934, Congress enacted the Indian Reorganization Act ("IRA"), ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (2006)), which encouraged Indian tribes to organize western-style democratic governments. The IRA permits an Indian tribe to organize governments pursuant to federal law. 25 U.S.C. § 476. Section 476(a) provides as follows:

Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when—

(1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and

(2) approved by the Secretary pursuant to subsection (d) of this section.

Id. § 476(a).

The IRA required those Indian tribes that chose to organize a government to adopt a constitution approved by the U.S. Secretary of the Interior. Id. § 476(d). Further, it recognized "all powers vested in an Indian tribe" and provided that the constitution could vest additional powers in the tribe and its government. Id. § 476(e). Section 476(e) provides as follows:

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments.

Id.

The Act also contains two "privileges and immunities" provisions. Id. § 476(f)-(g). Unlike the U.S. Constitution's Article IV Privileges and Immunities Clause, which protects individuals, the IRA's two provisions protect the interests of "federally recognized tribes." Id.; see also Federally Recognized Indian Tribe List Act of 1994 § 102, 25 U.S.C. § 479a(2) (2006) ("The term 'Indian tribe' means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe."); Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 75 Fed. Reg. 60,810 (Sept. 22, 2010) (providing a list of "federally recognized" Indian tribes as of 2010), supplemented by Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 75 Fed. Reg. 66,124, (Oct. 19, 2010). The first IRA privileges and immunities provision reads as follows:

Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.
the states. In other words, the delegation of sovereign authority by indigenous people to the governments they created is no different than what the citizens of each state did in delegating certain sovereign authority to their state governments through the adoption of their respective state constitutions. In each circumstance, the people reserved some sovereign authority.

With respect to internal political relations between indigenous people and their governments, there is no doubt that the sovereignty they possess and exercise is not subject to control or regulation under the U.S. Constitution, as it is silent on these matters. As to external political relations, Indian tribes conducted them with both the colonial governments and, after ratification of the Constitution, with the U.S. government. Part II examines how the U.S. government perceives these external political relations in the context of the United States-Indian political and legal relationship. This occurs through the discussion of three related concepts: (1) the attributes of the sovereignty possessed by the Indian tribes; (2) concurrent civil jurisdiction in Indian Country, including an examination of U.S. law; Supreme


The second of these provisions, also unlike the U.S. Constitution's Fourteenth Amendment Privileges or Immunities Clause, protects federally recognized Indian tribes vis-à-vis each other by declaring void any such existing federal regulations. Id. § 476(g). The second IRA privileges and immunities provision reads as follows:

Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

Id. In essence, these provisions protect inter-tribal political, commercial, and social relations and, accordingly, serve to enhance sovereignty.

Lastly, the IRA provides that each Indian tribe retains its "inherent sovereign powers," notwithstanding any decision to organize a government under the IRA. Id. § 476(h). Specifically, this provision states that

(1) each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section; and

(2) nothing in this Act invalidates any constitution or other governing document adopted by an Indian tribe after June 18, 1934, in accordance with the authority described in paragraph (1).

Id.

155. This section does not focus on the attributes of sovereignty as a matter of tribal law. That issue is best left for another article.

Court decisions,\textsuperscript{157} and national domestic Indian policy,\textsuperscript{158} and (3) the effect the first two concepts have upon the three sovereign entities possessing authority over the same people and the same territory.

\textbf{A. United States Law Recognizes that Indian Tribes Possess Sovereignty}

1. The U.S. Constitution and Congressional Enactments Recognize that Indian Tribes Possess Sovereignty

Indian tribes did not participate in the Constitutional Convention or ratify the Constitution.\textsuperscript{159} Therefore, no Indian tribe voluntarily surrendered any sovereignty to the United States. It is clear that the framers of the U.S. Constitution recognized Indian tribes as separate and distinct sovereign entities because Indians and Indian tribes are referenced twice in Article I. The framers provided first, that Indians should not be counted when determining representatives or apportioning “direct Taxes,”\textsuperscript{160} and second, that Congress shall have power to regulate commerce with them.\textsuperscript{161} The framers also recognized that a third constitutional provision would have implications on the United States’ relationship to Indian tribes. That provision provides that treaties made between the United States and other sovereigns, under the authority of the United States, would be the “supreme Law of the Land.”\textsuperscript{162} Notably, at the time

\begin{itemize}
\item \textsuperscript{158} See \textit{116 Cong. Rec.} 23,131 (1970) (statement of Speaker pro Tempore Thomas Boggs reading a message from President Richard Nixon).
\item \textsuperscript{159} See \textit{Blatchford v. Native Vill. of Noatak}, 501 U.S. 775, 782 (1991).
\item \textsuperscript{160} \textit{U.S. Const.} art. I, § 2, cl. 3. The clause provides as follows:
Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.
\item \textsuperscript{161} \textit{Id.} § 8, cl. 3 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ”).
\item \textsuperscript{162} \textit{Id.} art. VI, cl. 2. The Supremacy Clause provides as follows:
This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
\end{itemize}
the Constitution was drafted, the indigenous people who comprised the respective Indian tribes were not citizens of any state or of the United States. Moreover, the apportionment and Commerce Clause provisions of Article I signify not only the separate and distinct status of indigenous people, but acknowledge the inherent sovereignty possessed by Indian tribes themselves.

Exercising constitutionally delegated power to the President, the United States negotiated and entered into numerous treaties with Indian tribes beginning with the Delaware Indian Tribe in 1778. Treaties with Indian tribes reflect "not a grant of rights to the Indians, but a grant of rights from them..." Congress's policy of treaty making with Indian tribes set the nation on a course of conducting political relations with Indian tribes, recognizing them as distinct and sovereign entities. It was not until 1871, ninety-four years after adoption of the Constitution, that Congress attempted to change the sovereignty status of Indian tribes from independent nations.

Among the laws enacted by the first Congress was legislation that related to the national policy objectives of perpetuating the United States' special relationship with Indian tribes. In enacting the Northwest Territory Ordinance of 1787, Congress passed legislation founded in "justice and humanity" to preserve and protect the

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164. U.S. CONST. art II, § 2, cl. 2.


166. See United States v. Winans, 198 U.S. 371, 381 (1905). In context, the Winans Court stated as follows:

New conditions came into existence, to which [Native] rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted.

Id. (emphasis added).


No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired. Such treaties, and any Executive orders and Acts of Congress under which the rights of any Indian tribe to fish are secured, shall be construed to prohibit (in addition to any other prohibition) the imposition under any law of a State or political subdivision thereof of any tax on any income derived from the exercise of rights to fish secured by such treaty, Executive order, or Act of Congress if section 7873 of title 26 does not permit a like Federal tax to be imposed on such income.

Id. (emphasis added).
"rights and liberty" of Indian people, the first people. Further, the same Congress exercised its Commerce Clause powers by requiring persons engaged in trading with the Indians to acquire a federal license. These enactments and other legislation were the first of many governing the United States' relationship with Indian tribes.

2. United States Supreme Court Decisions Recognize that Indian Tribes Possess Sovereignty

Early in the nation's history, the U.S. Supreme Court considered issues relating to the special political relationship between the United States and Indian tribes. In the 1831 case, Cherokee Nation v. Georgia, the Court declared that Indian tribes are "dependent domestic nations," not "foreign" nations within the meaning of Article III, Section 2, Clause 1 of the U.S. Constitution. One year later, in the 1832 case, Worcester v. Georgia, the Supreme Court took note of early congressional views toward Indian tribes. In Worcester, the Court recognized that an Indian tribe is a "distinct community," cloaked with its own sovereignty, and the source of that

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168. See Northwest Territory Ordinance of 1787 art. III, 1 Stat. 51, 52. In context, the ordinance provided as follows:

The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

169. Trade and Intercourse Act of 1790, ch. 33, § 1, 1 Stat. 137, 137.

170. 30 U.S. (5 Pet.) 1, 17 (1831) ("[Indian tribes] may ... be denominated dependent domestic nations.").

171. Id. at 27 ("But in no sense can [an Indian tribe] be deemed a foreign state, under the judiciary article.").

172. See 31 U.S. (6 Pet.) 515, 549 (1832). Specifically, the Worcester Court stated as follows:

The early journals of congress exhibit the most anxious desire to conciliate the Indian nations. Three Indian departments were established; and commissioners appointed in each, "to treat with the Indians in their respective departments, in the name and on the behalf of the United Colonies, in order to preserve peace and friendship with the said Indians, and to prevent their taking any part in the present commotions."

The most strenuous exertions were made to procure those supplies on which Indian friendships were supposed to depend; and every thing which might excite hostility was avoided.

173. Id. at 559 ("The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed
sovereignty. Instead, the Court acknowledged that the source of the political authority exercised by the governments for the first people is grounded in the sovereignty of the people who comprise the Indian tribes. The Court further echoed congressional thought that Indian tribes preserved their right of self-government.

The U.S. Supreme Court more recently reviewed the principles of Indian tribes' reserved inherent sovereign powers in the 1978 case United States v. Wheeler. In Wheeler, the Court considered the double jeopardy claim of a Navajo Indian that had pled guilty to a misdemeanor offense in a Navajo court. Thereafter, the defendant was indicted by a federal grand jury on a felony offense relating from the same incident. The federal claim rested upon the concept of "dual sovereignty" as between the United States and Indian tribes. Rejecting that claim, the Court noted that cities are not sovereign entities, but an "agency of the State." Similarly, a territorial government does "not act[] as an independent political community like a State," but instead is "an agency of the federal government." The Wheeler Court noted that Indian tribes, however, are "unique aggregations possessing attributes of sovereignty over both their members and their territory . . . ." Although the Court
described Indian tribes' sovereignty as of "unique and limited character," it omitted any discussion as to the source for distinguishing sovereignty of an Indian tribe, as a legal construct, from that of a state. Accordingly, there is little reason to believe that the law recognizes more than one concept of "sovereignty."

While noting that Indian tribes are "no longer possessed of the full attributes of sovereignty," the Wheeler Court described some of the specific attributes of sovereignty not withdrawn by "treaty or statute, or by implication as a necessary result of their dependent status." These attributes included the power to "punish members of the Tribe for violations of tribal law," to regulate "their internal and social relations," "to determine tribe membership," "to regulate domestic relations among tribe members," "to prescribe rules for the inheritance or property," and those additional powers delegated to Indian tribes by Congress.

3. The Source of Federal Authority over Indian Affairs

From the earliest days of the colonial period through the formation of the Union, the nation's laws and policies have consistently recognized the sovereign and independent status of Indian tribes. For the Indian tribes, it likely was a voluntary decision to associate with the United States and, in doing so, most Indian tribes entered into treaties with the United States that were ratified by the U.S. Senate. The one constant throughout this foundational period was that Indian tribes were (and continue to be) distinct independent political communities, which possess attributes of sovereignty and, as separate people, possess the power to regulate their internal relations over their citizens and their territory. Yet, relying on circumstances
existing in the eighteenth and nineteenth century, the Supreme Court continues to characterize the status of Indian tribes under U.S. law as "domestic dependent nations," and maintains an expansive view of federal authority over Indian affairs. While each characterization remains the current state of the law, neither formulation reflects the present-day enlightened federal policy of Indian self-determination and self-governance adopted by Congress and implemented as federal policy by the executive branch.

As illustrated above, the Supreme Court's view of the attributes of sovereignty retained by Indian tribes also, in large part, continues to be shaped by adherence to earlier decisions. These decisions, in turn, are based upon discovery doctrine-based interpretations of treaties between dominant and subordinate sovereigns, as well as purported deference to congressional enactments and the domestic Indian policy agenda set by the executive branch. Nonetheless, the exclusive United States-Indian tribe relationship, formally created at the time of the formation of the Union, endured for almost 200 years—from 1776 to 1952. In 1953, Congress enacted P.L. 280, which effectively invited the states to share jurisdiction in Indian Country. Congress's decision to include the states created a tripartite jurisdictional scheme in Indian Country, which, for the most part, exacerbated an existing jurisdictional quagmire.

Before discussing the legal underpinnings of the current jurisdictional scheme in Indian Country, it is prudent to first identify the source of power the U.S. Supreme Court relied upon to sanction congressional authority to broadly legislate with respect to Indian tribes. This is important because, absent such authority, an attempt at delegation could be constitutionally defective; an issue best left for another article.

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198. See, e.g., Santa Clara Pueblo, 436 U.S. at 72 ("Congress' authority over Indian matters is extraordinarily broad . . . ." (citing Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903))).
199. See infra note 308.
200. See discussion supra Part II.A.2.
201. See infra notes 206 and accompanying text.
202. See, e.g., Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 759-60 (1998). Although the Court has taken the lead in drawing the bounds of "tribal" immunity in U.S. law, the Court has acknowledged that Congress can, subject to constitutional limitations, alter its limits through explicit legislation. See Santa Clara Pueblo, 436 U.S. at 58.
For now, it should be kept in mind that with respect to the special political relationship between the United States and the Indian tribes, the United States enters into treaties only with other sovereign nations. After formation of the Union, Indian tribes agreed to voluntarily associate closely with the United States as is evidenced by the hundreds of treaties that were made pursuant to Article VI, Section 2 of the U.S. Constitution and ratified by Congress.

The U.S. Supreme Court has identified two sources of federal authority over Indian tribes in addition to the constitutional power to regulate commerce with them. One of these sources is a principle of international law, commonly known as the discovery doctrine. The other relies on the trust doctrine, in which the United States undertook an obligation to protect Indians and their property. While a treaty is a compact among sovereigns, and treaties between the United States and Indian tribes are codified in U.S. law, the Court has omitted issues related to collateral legal principles embedded in international law (other than the discovery doctrine) in its discussion of federal authority over Indian tribes. Nor has it referenced contractual obligations imposed on the United States by virtue of the Indian treaties, or the understandings of the people who make up the signatory Indian tribe as illustrated through their language, customs, and values. That is, in U.S. law, a treaty can and

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204. 1 INDIAN AFFAIRS: LAWS AND TREATIES, at v (Charles J. Kappler ed., 1904) (describing how the federal government entered into treaties with Indian tribes until 1871 and later passed laws affecting the treatment of Indian tribes).

205. See, e.g., Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955) ("This position of the Indian has long been rationalized by the legal theory that discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained."); see also U.S. CONST. art. II, § 2, cl. 2; United States v. Lara, 541 U.S. 193, 218 (2004) (Thomas, J., concurring in the judgment) (suggesting that Congress’s enactment of a statute prohibiting the United States from entering into additional treaties with Indian tribes is “constitutionally suspect,” as the Constitution vests the treaty-making power with the President by and with the “Advice and Consent of the Senate” only, and not with Congress acting as a unitary legislative body); see also supra note 162.

206. See supra note 205; see also Johnson v. M’Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823) ("[T]heir rights to complete sovereignty, as independent nations, were necessarily diminished . . . ."). In Johnson, the Court also confirmed the practice of 200 years of American history “that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest.” Id. at 587.

207. See United States v. Kagama, 118 U.S. 375, 382 (1886) ("In the opinions in these cases [the Indian tribes] are spoken of as ‘wards of the nation,’ ‘pupils,’ as local dependent communities.").

208. See The Head Money Cases, 112 U.S. 580, 598 (1884) ("A treaty is primarily a compact between independent nations . . . . [It] is a law of the land as an act of Congress . . . .").

209. Id. at 598-99.
often does regulate the mutual rights of citizens through subsequent congressional enactments.\(^\text{210}\)

**B. Jurisdiction in Indian Country: Congress Authorizes the States to Join the United States and Indian Tribes in Sharing Concurrent Jurisdiction in Indian Country**

This section discusses the tripartite jurisdictional scheme regarding civil matters in Indian Country as between the United States, the Indian tribes, and the newest participant, the states. It begins by discussing Congress's consent to transfer federal subject matter jurisdiction over criminal offenses and civil causes of action to several states. This section also discusses the Supreme Court's decision in *United States v. Montana*.\(^\text{211}\) In *Montana*, the Court established a presumptive rule that Indian tribes have no regulatory or adjudicatory jurisdiction over non-Indians in Indian Country, but recognized two circumstances in which the presumption could be rebutted.\(^\text{212}\)

Neither P.L. 280 nor the Supreme Court's decision in *Montana* reflects the modern day reality in Indian Country. Since Congress enacted P.L. 280 in 1953, Indian tribes have experienced tremendous growth and maturation in their governments, as well as increased commercial activity and social engagements between Indians and non-Indians. Therefore, the potential for judicial conflict among the three sovereigns exercising concurrent jurisdiction over the same people, property, and contracts is significantly increased. Unlike the federal-state judicial relationship unified by one organic document—the U.S. Constitution—the new jurisdictional power-sharing arrangement in Indian Country is devoid of any agreement among the participants. Accordingly, this arrangement lacks direction and structure. Moreover, it is unlike the federal-Indian relationship that has been molded and shaped by treaties, agreements, and federal law in existence for hundreds of years. More likely than not, Congress, in enacting P.L. 280, never considered that the nation's domestic Indian policy of terminating the federal-Indian relationship would reverse course in 1970 and become a policy of conducting government-to-government relations between the United States and the Indian tribes.

Therein lies the conundrum—a jurisdictional quagmire with no applicable organic document or federal law to guide resolution of future disputes and conflicts among the participants. Any piecemeal efforts to resolve this issue before Congress or the Supreme Court have failed due to a lack of vision in designing and implementing a system to balance the jurisdictional authority between three sovereigns. It is as if policy makers and those interpreting the law never conceived at the time that the first people would embrace any desire for self-determination; to

\(^{210}\) *Id.* at 598.


\(^{212}\) *Id.* at 565-66
strive to build strong and stable Indian governments; to become self-sufficient by engaging with non-Indians in commercial matters and social engagements; or to become a participant in the American political and judicial systems even though Indian tribes never surrendered any sovereignty to the United States.

It is clear, however, that since Congress's enactment of P.L. 280 in 1953 and the Supreme Court's consideration of Montana in 1981, governments for Indian tribes across the nation have matured and legislated for the public good with respect to persons and property within their territory, as well as developed judicial systems to fairly and impartially resolve private civil disputes and disputes involving the tribe itself. In order to fully understand this jurisdictional conflict, a close look at P.L. 280 and the Montana decision is in order.

1. Congressional Authorization for State Subject Matter Jurisdiction in Indian Country: Public Law 280

The 1953 congressional authorization, P.L. 280, provided states with the authority to assert civil and criminal jurisdiction over Indian Country.213 That statute divided the states into "mandatory" and "optional" states.214 The term "mandatory" is somewhat of a misnomer as each of these states willingly accepted their new role, while the term "optional" accurately reflects the choice offered by Congress.215 As described below, the exercise of state jurisdiction in Indian Country pursuant to P.L. 280 has complicated an already perplexing jurisdictional scheme and, equally important, created the inter-judicial conflict that exists today.

Congress enacted P.L. 280216 with two objectives in mind: (1) "withdrawal of Federal responsibility for Indian affairs wherever practicable"; and (2) "termination of the subjection of Indians to Federal laws applicable to Indians as such."217 The Senate report218 on the bill under consideration219 suggested that Congress was

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214. See id.
215. See id.
216. Essentially, P.L. 280 required five states to assume criminal and civil jurisdiction in Indian Country and offered the same to the remaining states. See id. As a general rule, state laws are not applicable to Indians on Indian reservations absent express congressional authorization. See, e.g., McClanahan v. State Tax Comm'n, 411 U.S. 164, 170-71 (1973). Public Law 280 represents such congressional authorization.
concerned with authorizing states "to prosecute Indians for most offenses committed on Indian reservations or other Indian country, with limited exceptions." The report noted that, "[i]n many States, tribes are not adequately organized to perform [the] function" of enforcement of law and order. Further, the Senate report identified the solution as "conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility." The report commented that Indians who reside in many states had "reached a stage of acculturation and development" such that extension of state civil jurisdiction was "deemed desirable." One leading scholar summarized the purpose of P.L. 280 as "an attempt at compromise between wholly abandoning the Indians to the states and maintaining them as federally protected wards, subject only to federal or tribal jurisdiction."

The operative legal theory underlying P.L. 280 was not complex. The law transferred to certain states federal subject matter jurisdiction over both criminal "offenses committed by or against Indians" and "civil causes of action between


221. Id. at 6.
222. Id.
223. Id.
224. See Goldberg, supra note 218, at 537.

(a) Each of the States or Territories listed . . . shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory . . . .

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.
Indians or to which Indians are parties that occurred in Indian Country within each state. As enacted, P.L. 280 applied to five specifically identified states, not

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

(d) Notwithstanding subsection (c), at the request of an Indian tribe, and after consultation with and consent by the Attorney General—

(1) sections 1152 and 1153 shall apply in the areas of the Indian country of the Indian tribe; and

(2) jurisdiction over those areas shall be concurrent among the Federal Government, State governments, and, where applicable, tribal governments.

18 U.S.C. § 1162. The U.S. Department of Justice announced its intention to establish "procedures for an Indian tribe whose Indian country is subject to State criminal jurisdiction under Public Law 280 (18 U.S.C. 1162(a)) to request that the United States accept concurrent criminal jurisdiction within the tribe’s Indian country, and for the Attorney General to decide whether to consent to such a request.” Office of the Attorney General; Assumption of Concurrent Federal Criminal Jurisdiction in Certain Areas of Indian Country, 76 Fed. Reg. 76,037, 76,037 (Nov. 28, 2011) (to be codified at 28 C.F.R. pt. 50). The new rule became effective on January 5, 2012. Id.

226. Public Law 280 sec. 4, § 1360(a), 67 Stat. at 589 (codified as amended at 28 U.S.C. § 1360(a) (2006)). The civil provision of P.L. 280, as codified and amended, provides as follows:

(a) Each of the States listed . . . shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State . . . .

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.


228. The five original “mandatory” states were California, Minnesota, Nebraska,
including Alaska, which was added as a mandatory state upon its admission to the union in 1959. 229

The transfer of subject matter jurisdiction from the United States excluded specific authority in four areas, three of which applied to both the criminal and civil provisions of P.L. 280. First, Congress did not consent to the exercise of state authority over the “alienation, encumbrance, or taxation of any real or personal property, including water rights” to which the United States holds legal title in trust for the benefit of an Indian tribe. 230 Second, it did not grant consent to the state to exercise authority to regulate “the use of such [identified] property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation . . . .” 231 Third, Congress did not confer subject matter jurisdiction to states to “adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.” 232 As to these three areas, Congress retained federal jurisdiction. With respect to the fourth exclusion, which applied only to the criminal provision of P.L. 280, Congress prohibited a state from “depriv[ing] any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.” 233 Further, with respect to jurisdiction over federal criminal offenses, Congress later expressly reserved authority for exercising concurrent jurisdiction “among the Federal Government, State governments, and, where applicable, tribal governments.” 234

Two other provisions of P.L. 280 are noteworthy. First, Congress imposed on state courts a requirement to apply any Indian “ordinance or custom” as the controlling rule of decision if that ordinance or custom was “not inconsistent with any applicable civil law of the State.” 235 This, in effect, mandated a full faith and credit-like recognition of an Indian tribe’s law. Second, section 7 236 of the statute authorized

Oregon, and Wisconsin. Public Law 280 sec. 2, § 1162(a), sec. 4, § 1360(a), 67 Stat. at 588-89.


231. Id.

232. Id. sec. 4, § 1360(b), 67 Stat. at 589.

233. Id. sec. 2, § 1162(b), 67 Stat. at 589.


235. Public Law 280 sec. 4, § 1360(c), 67 Stat. at 589 (codified as amended at 28 U.S.C. § 1360(c)).

any other state,” at the state’s discretion, to assume subject matter jurisdiction as to
criminal “offenses,” “civil causes of action,” or both.237 A number of states accepted
this invitation and enacted legislation to assume criminal or civil jurisdiction to some
degree. These were called the “optional states.”238 Although Congress later amended
section 7 to condition any future assumption of jurisdiction by a state on the consent
of the “tribe occupying the particular Indian country,”239 that amendment was
prospective only. Accordingly, it had no effect on subject matter jurisdiction already
assumed by states under section 7.

The enactment of P.L. 280 was met with widespread dissatisfaction by Indians,
Indian tribes, and states.240 In addition, a number of disputes arose regarding the
scope of states’ jurisdiction involving civil actions to which individual Indians were
parties.241 Ultimately, the U.S. Supreme Court entered the murky waters and

237. See supra note 213 and accompanying text. As enacted, P.L. 280’s section 7
provided as follows:

The consent of the United States is hereby given to any other State not having
jurisdiction with respect to criminal offenses or civil causes of action, or with
respect to both, as provided for in this Act, to assume jurisdiction at such time and
in such manner as the people of the State shall, by affirmative legislative action,
obligate and bind the State to assumption thereof.

Public Law 280 § 7, 67 Stat. at 590.

238. See Goldberg, supra note 218, at 546-47 (identifying optional states and the
scope of jurisdiction assumed).


240. See Goldberg, supra note 218, at 544-58 (identifying the Indians’ objections to
Congress’s imposition of state jurisdiction without their consent and the states’ objections
about implementing what is now considered an unfunded federal mandate, although the six
“willing” states should hardly be heard to complain).

241. Id. at 542-44. Thereafter, states and their respective local governments sought to
extend their exercise of civil jurisdiction in Indian Country under P.L. 280 in two ways.
First, a California county sought to impose its zoning ordinance and building code on
“Indian use of Indian trust lands,” or land within an Indian reservation and to which the
United States held legal title in trust for the benefit of that Indian tribe. See Santa Rosa Band
of Indians v. Kings Cnty., 532 F.2d 655, 657-59 (9th Cir. 1975).

The dispute required the Ninth Circuit to construe the phrase in the civil provision of
P.L. 280 regarding “‘civil laws . . . that are of general application to private persons or
private property.” Id. at 659 (quoting 28 U.S.C. § 1360(a) (1970)). To that end, the court
noted that the applicable rule extended civil jurisdiction

over civil causes of action between Indians or to which Indians are parties which
arise [within any Indian country within the state] . . . to the same extent that
[California] . . . has jurisdiction over other civil causes of action, and those civil
laws of such State . . . that are of general application to private persons or private
property shall have the same force and effect within such Indian country as they
have elsewhere within the State . . . .

Id. (alterations in original) (first and second omissions in original) (emphasis added)
decided, without congressional guidance, whether P.L. 280 authorized states to exercise jurisdictional authority over the Indian tribes without their consent.\(^{242}\)

(quoting 28 U.S.C. § 1360(a)). The Ninth Circuit determined that P.L. 280 applied only to the “civil laws of the state, and not to local regulation.” \textit{Id.} at 661. The court explained as follows: “Congress did not contemplate immediate transfer to local governments of civil regulatory control over reservations . . . . A construction of P.L. 280 conferring jurisdiction to local county and municipal governments would significantly undermine, if not destroy, such tribal self-government.” \textit{Id.} at 662.

Second, a Minnesota county levied a personal property tax on an Indian’s mobile home located on lands within an Indian reservation to which the United States held legal title in trust for the benefit of that Indian tribe. See Bryan v. Itasca Cnty., 228 N.W.2d 249, 251 (Minn. 1975), rev’d, 426 U.S. 373 (1976). The county relied on P.L. 280’s provision that state civil laws of general application have the same force and effect on private persons and private property in Indian Country as elsewhere in the state. \textit{Id.} at 256. The Minnesota Supreme Court affirmed the lower court decision that upheld imposition of the tax, reasoning that had Congress intended to “exempt Indians from the state’s revenue laws, . . . it would have expressly done so, as it exempted certain other Indian property” from the reach of state jurisdiction in Section 1360(b). \textit{Id.} at 255. This decision led to the U.S. Supreme Court’s first opportunity to determine the extent to which Congress granted states jurisdiction over Indians in Indian Country. See Bryan, 426 U.S. at 375.

In \textit{Bryan}, the Court also focused on the legislative history underpinning P.L. 280. 426 U.S. at 379-83. While acknowledging that history to be “sparse,” the Court stated that § 1360(a) was “primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes . . . .” \textit{Id.} at 383. Accordingly, the Court rejected the Minnesota Supreme Court’s reasoning interpreting the “general applicability” provision in § 1360(a) and limited the reach of this section to permitting “‘State courts to adjudicate civil controversies’ arising on Indian reservations . . . and the absence of anything remotely resembling an intention to confer general state civil regulatory control over Indian reservations.” \textit{Id.} at 384, 386 (quoting H.R. REP. No. 83-848, at 6 (1953)). In so doing, the Court approved of the Ninth Circuit’s reasoning in \textit{Santa Rosa Band of Indians v. Kings County}, including its reliance on the nation’s domestic Indian policy. \textit{Id.} at 387 388-89 & n.14. The \textit{Bryan} Court explained as follows:

\[\text{[N]othing in its legislative history remotely suggests that Congress meant the Act’s extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than “private, voluntary organizations,”—a possible result if tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory powers, including taxation, of state and local governments. The Act itself refutes such an inference: there is notably absent any conferral of state jurisdiction over the tribes themselves, and § 4(c), 28 U.S.C. § 1360(c), providing for the “full force and effect” of any tribal ordinances or customs “heretofore or hereafter adopted by an Indian tribe . . . if not inconsistent with any applicable civil law of the State,” contemplates the continuing vitality of tribal government.} \textit{Id.} at 388-89 (omission in original) (emphasis added) (footnote omitted) (citation omitted) (quoting 28 U.S.C. § 1360(c), and United States v. Mazurie, 419 U.S. 544, 557 (1975)). It is now clear that the “general applicability” provision of § 1360(a) “authorizes application by
The U.S. Supreme Court's 1976 decision in *Bryan v. Itasca County*, while the correct result, is somewhat shortsighted regarding the larger issue that loomed in the case. The narrow issue presented was whether Itasca County's imposition of a personal property tax on individual Indians exceeded the United States' consent to transfer jurisdiction to Minnesota under P.L. 280—a delegation that implicated the balance of power between Indian tribes and the state. A decision holding that tax authority in Indian Country rested exclusively with the United States and the affected Indian tribes raised an important public interest, not to Minnesota, but to the Indian tribe. That is, whether the tribe had a federally protected right to impose taxes as a means to generate revenue with which to pay for basic public services, such as police, fire, and other public infrastructure development. No doubt such a right would necessarily have the result of freeing the Indian tribes from the shackles of exclusive reliance on federal and state domestic grants and contract assistance as a means to provide support for public services. Moreover, the Court's resolution of the case dodged the need to address the issue of whether Minnesota's attempt to impose a personal property tax infringed on the Indian tribe's sovereign authority to tax personal property belonging to individuals—irrespective of the status of the individual—if the property was located on Indian lands.

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the state courts of their rules of decision” to decide “private legal disputes between reservation Indians, and between Indians and other private citizens . . . .” *Id.* at 383-84.

Congress's consent to transfer federal subject matter jurisdiction to six mandatory states and to those optional states assuming jurisdiction under P.L. 280's section 7 in the 1950s came at a time when the nation's domestic Indian policy was directed at terminating the federal-Indian relationship. *Id.* at 387-88. As the Court explained, “Today's congressional policy toward reservation Indians may less clearly than in 1953 favor their assimilation, but Pub. L. 280 was plainly not meant to effect total assimilation. Public L. 280 was only one of many types of assimilationist legislation under active consideration in 1953.” *Id.* Given Congress's codification of President Nixon's "new" domestic Indian policy, see 116 Cong. Rec. 23,131 (1970) (statement of Speaker pro Tempore Thomas Boggs reading a message from President Richard Nixon), the United States had now embarked on a course of conducting government-to-government relations with Indian tribes, recognizing the right of Indian people to self-determination, and encouraging Indian tribes, among other things, to develop governmental structures, including judicial systems.


244. *Id.* at 375.

245. See *Williams v. Lee*, 358 U.S. 217, 223 (1959) ("There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to
In any event, what emerged from Bryan was a rather narrow proposition: P.L. 280 states, both mandatory states and optional states, lack the United States' consent to impose state income, excise, and other *ad valorem* taxes on Indians who reside on Indian lands in Indian Country. This result sets up the potential for further jurisdictional conflict over tax issues between Indian tribes and the states. In particular, such conflict may predictably arise in difficult economic times when states seek to raise tax revenue from Indian tribes or individual Indians to support state-funded services, or to balance their budgets and thereby avoid Bryan's holding. Such efforts inevitably will result in challenges by affected Indian tribes, as did the challenge in Bryan, and lead to a judicial resolution of state tax authority in Indian Country by judicial fiat instead of congressional enactment. This is patently wrong because it is the "province and duty" of the Supreme Court to interpret the law, as the Court did in Bryan, not to create new tax authority for states absent a congressional mandate.

Thus, after Congress enacted P.L. 280 and the Supreme Court determined that Congress did not grant to the states or intend to grant to them tax authority over the Indian tribes themselves, the issue of the balance of regulatory and adjudicatory power in Indian Country between the United States, the Indian tribes, and the states still remains largely unsettled. The upshot of P.L. 280 is that the federal government extended an invitation to states to essentially take on an unfunded federal mandate of criminal jurisdiction in certain areas of Indian Country. This included the costs of law enforcement, prosecution, and incarceration, as well as diversion and probation services—all of which were formerly exclusive obligations of the federal

govern themselves."); see also McClanahan v. State Tax Comm'n, 411 U.S. 164, 165 (1973) (attempting to reconcile the powers of the states over Indians living within state borders on reservation lands).

In McClanahan, Arizona sought to impose state income taxes on income earned by an Indian exclusively within the Navajo Reservation. 411 U.S. at 165-66. The State claimed that imposing the tax on individuals would not "infringe" on the Navajo Indian Tribe's right to self-government. *Id.* at 179. The Court explained that the "infringement" test from *Williams v. Lee* required assessing the respective interests of the Indian tribe and the State when the State attempted to exercise jurisdiction over non-Indians in Indian Country. *Id.* However, when the State seeks to exercise jurisdiction over Indians in Indian Country, a "preemption" test applies that focuses on treaties and federal statutes. *Id.* at 172-78. Under the preemption test, state law applies in Indian Country only if it does not interfere with Indian government and non-Indians are involved. *Id.* at 170-72.


247. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.")
government. Another component of that invitation is a federal mandate to resolve private civil disputes, even among Indians, utilizing state and local resources, regardless of the "right of the Indians to govern themselves." While some states have approved of the return of P.L. 280's criminal jurisdiction to the federal government (a process known as retrocession), few, if any, states have focused on means to lift the significant financial burden P.L. 280 continues to impose on them.

248. See Williams, 358 U.S. at 223.

249. Black's Law Dictionary defines retrocession as the "act of ceding something back (such as territory or jurisdiction)." BLACK'S LAW DICTIONARY 1432 (9th ed. 2009). For example, federal law authorizes the United States to accept retrocession of all or any criminal or civil jurisdiction accepted by a state under P.L. 280. 25 U.S.C. § 1323 (2006); see also Exec. Order No. 11,435, 3 C.F.R. 142 (1968), reprinted in 25 U.S.C. § 1323 note; Office of the Attorney General; Assumption of Concurrent Federal Criminal Jurisdiction in Certain Areas of Indian Country, 76 Fed. Reg. 76,037, 76,037 (Nov. 28, 2011) (to be codified at 28 C.F.R. pt. 50). Certain states have granted requests from Indian tribes to retrocede criminal jurisdiction and the U.S. Secretary of the Interior has accepted retrocession of criminal or civil jurisdiction on behalf of the United States. For example, Washington granted retrocession to the Tulalip Tribes, see Notice of Acceptance of Retrocession of Jurisdiction for the Tulalip Tribes, Washington, 65 Fed. Reg. 75,948 (Nov. 29, 2000), the Confederated Tribes of the Chehalis Reservation, Quileute Indian Reservation, and the Swinomish Tribal Community, see Confederated Tribes of the Chehalis Reservation, Quileute Indian Reservation and the Swinomish Tribal Community, Washington; Acceptance of Retrocession of Jurisdiction, 54 Fed. Reg. 19,959 (Apr. 25, 1989), and to the Confederated Tribes of the Colville Reservation, see Colville Indian Reservation, Washington; Acceptance of Retrocession of Jurisdiction, 52 Fed. Reg. 8372 (Mar. 9, 1987); Montana granted retrocession to the Confederated Salish and Kootenai Tribes, see Confederated Salish and Kootenai Tribes, Montana; Acceptance of Retrocession of Jurisdiction, 60 Fed. Reg. 33,318 (June 9, 1995); Nebraska granted retrocession to the Santee Sioux Nation, see Notice of Acceptance of Retrocession of Jurisdiction for the Santee Sioux Nation, NE, 71 Fed. Reg. 7994 (Feb. 8, 2006), and to the Winnebago Tribe, see Winnebago Indian Reservation, Nebraska; Acceptance of Retrocession of Jurisdiction, 51 Fed. Reg. 24,234 (July 2, 1986); and Nevada granted retrocession to the Ely Indian Colony, see Ely Indian Colony, NV; Acceptance of Retrocession of Jurisdiction, 53 Fed. Reg. 5837 (Jan. 25, 1988). In addition, Minnesota law authorizes a cross-deputization law enforcement program between a Minnesota county and an Indian tribe, the Non-Removable Mille Lacs Band of Ojibwe. See MINN. STAT. § 626.93 (West 2009). While multiple states have consented to retrocede criminal jurisdiction, the author's research identified no state that has consented to retrocede civil jurisdiction.

Contrarily, since 1953, states have persisted in their efforts to exert regulatory jurisdiction over Indians in Indian Country.\(^\text{251}\)

In the aftermath of the Indian gaming era—beginning in earnest in the late 1980s—a multitude of regulatory and adjudicatory issues and conflicts have surfaced. As anticipated, increased commercial transactions and social activities between Indians and non-Indians typically follow economic development opportunities. Consequently, the stage was set for three different sovereigns, all with jurisdiction over the same persons, property, and contracts, to clash over a myriad of commercial and social disputes arising in Indian Country. There is no easy solution to the problem Congress set in motion by enacting P.L. 280; thus, there is no easy way to consent to state jurisdiction in Indian Country. This is so because, in its haste to pass federal financial obligations with respect to criminal jurisdiction along to the states,\(^\text{252}\) Congress never considered the issue of the balance of power as between the three sovereigns; particularly with respect to civil causes of action involving only Indians and arising on lands subject to the jurisdiction of the Indian tribe.

Nevertheless, the policy did, in fact, shift to one of Indian self-determination.\(^\text{253}\) That shift in policy built off of the federal government’s earlier efforts to encourage Indian tribes to embrace western-style government, to develop sophisticated judicial systems, and to otherwise assist their citizens in becoming self-sufficient.\(^\text{254}\) Thus, the Supreme Court’s question in *Montana v. United States* was whether the Court would embrace this new federal Indian policy and allow the law to develop along the lines of the new unique “special relationship,” or whether it would continue the past Indian tribes (or, likely, the local governments). See *WASH. REV. CODE §§ 37.12.010-150 (2010 & Supp. 2011).* It is curious that Washington’s offer of retrocession back to the federal government is now contingent on consent of the Indian tribe, as well as the local governments. In light of objections to the imposition of P.L. 280 jurisdiction without the consent of the Indian tribes, any Indian tribe that now fails to accept Washington’s offer of retrocession impliedly consents to the continued exercise of such state jurisdiction in Indian Country.


252. See Goldberg, *supra* note 218, at 544; *supra* note 216.


alignment of deciding Indian sovereignty issues narrowly and restrictively under the discovery doctrine, which in effect, seeks to “protect” non-Indians from Indians.\footnote{255}


\textit{Williams v. Lee} involved a non-Indian who used a federal traders’ license to operate a general store located on the Navajo Indian Reservation, and who later brought an action in an Arizona state court to collect a debt for goods sold on credit to a Navajo couple. 358 U.S. at 217-18. At the time, Arizona had not accepted Congress’s offer to assume federal subject matter jurisdiction in the Indian Country of Arizona. \textit{Id.} at 222-23. The Court rejected Arizona’s attempt to exercise jurisdiction over the case on the ground that it would “undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.” \textit{Id.} at 223. The Court stated that “[i]f this power is to be taken away from them, it is for Congress to do it.” \textit{Id.} (citing \textit{Lone Wolf v. Hitchcock}, 187 U.S. 553, 564-66 (1903)). With respect to the non-Indian status of the store operator, the Court dismissively stated as follows: “It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. . . . The cases in this Court have consistently guarded the authority of Indian governments over their reservations.” \textit{Id.}

Second, in \textit{Oliphant v. Suquamish Indian Tribe}, the Court considered whether Indian tribes possessed inherent sovereign authority to punish criminal offenses committed by non-Indians on Indian lands. 435 U.S. at 194-95. The Court described the effort “to exercise criminal jurisdiction over non-Indians” as “a relatively new phenomenon.” \textit{Id.} at 196-97. The Court also added as follows:

We recognize that some Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts. We also acknowledge that with the passage of the Indian Civil Rights Act of 1968, which extends certain basic procedural rights to anyone tried in Indian tribal court, many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared. Finally, we are not unaware of the prevalence of non-Indian crime on today’s reservations which the tribes forcefully argue requires the ability to try non-Indians.

\textit{Id.} at 211-12. Relying on the “inherent limitations on tribal powers” stemming from their “incorporation into the United States,” the Court determined that absent “affirmative delegation of such power by Congress,” Indian tribes lack “criminal jurisdiction over non-Indians.” \textit{Id.} at 208-09 (citing \textit{Johnson v. M’Intosh}, 21 U.S. (8 Wheat.) 543, 574 (1823)).

Third, the Court decided \textit{United States v. Wheeler}, 435 U.S. 313, in the same term that it decided \textit{Oliphant}. In \textit{Wheeler}, the Court considered the double jeopardy claim of a Navajo Indian who had pled guilty in a Navajo court to a misdemeanor offense and thereafter was indicted by a federal grand jury on a felony offense related to the same incident. \textit{Id.} at 314-15. Reversing the Ninth Circuit’s affirmance of the district court’s dismissal of the indictment, the Supreme Court recognized that “Indian tribes have not given up their full
3. United States v. Montana: U.S. Supreme Court Efforts to Protect Nonmembers from the Regulatory and Adjudicatory Jurisdiction of an Indian Tribe

The U.S. Supreme Court describes its decision in United States v. Montana as a “path-marking" case in the area of an Indian tribe’s regulatory and adjudicatory jurisdiction over nonmembers. The Court’s description of Montana as “path-marking" is somewhat curious, particularly given the narrow issues litigated in the district court and reviewed in the court of appeals.

In Montana, the United States brought suit against the State of Montana on behalf of the Crow Indian Tribe. The case presented a straightforward legal issue concerning whether the United States or Montana held title to the bed and banks of the Big Horn River as it flows through the Crow Indian Reservation. A corollary sovereignty” and that the “Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory.” Id. at 323 (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975)). The Court also acknowledged that it was “undisputed that Indian tribes have power to enforce their criminal laws against tribe members.” Id. at 322. The Court added that, “[a]lthough physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain ‘a separate people, with the power of regulating their internal and social relations.”’ Id. (quoting United States v. Kagama, 118 U.S. 375, 381-82 (1886)). In addition, the Court noted that an Indian tribe’s “right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions.” Id. (citing United States v. Antelope, 430 U.S. 641, 643 n.2 (1977)). Indian tribes continue to retain “those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.” Id. at 323.

Notably absent from the Court’s discussions in Williams, Oliphant, and Wheeler is any analysis of the substantive or procedural laws of the affected Indian tribes, or their respective domestic policy interests at stake in the litigation. Also omitted from Oliphant and Wheeler is any reference to the nation’s then nine-year old domestic Indian policy, as codified into law. See infra notes 306-308 and accompanying text. The Court decided Montana v. United States in the backdrop of Wheeler. Thus, Montana presented the Court with another opportunity to consider not only the nation’s “new” domestic Indian policy, but also the law and policy interests of the Crow Tribe, whose law and policy interests had strong participation and support from two agencies within the U.S. Department of the Interior.

257. Montana, 450 U.S. at 549.
258. This case began in the U.S. District Court for the District of Montana as a suit by the United States, in its fiduciary capacity on behalf of the Crow Tribe of Indians, seeking “to quiet title to the bed and banks of the Big Horn River” in Montana. United States v. Montana, 457 F. Supp. 599, 600 (D. Mont. 1978), rev’d, 604 F.2d 1162 (9th Cir. 1979), rev’d, 450 U.S. 544. The Crow Tribe later intervened in the case as an additional plaintiff. Id. at 599. Another issue involved determining whether Montana had “authority to regulate hunting and fishing” by non-Indians “within the exterior boundaries of the Crow Indian Reservation” and whether the state agency charged with enforcing Montana’s hunting and
fishing laws had authority to regulate such activity by non-Indians. *Id.* at 600. The district court adjudicated the case in a bench trial. *Id.*

With respect to "fish and game management," the district court took testimony about a March 27, 1970 inter-governmental agreement between the Crow Tribe and the U.S. Department of the Interior's Bureau of Sports Fisheries and Wildlife, in which the Bureau agreed to provide the Crow Tribe with "technical assistance in the management of fishing resources on the Crow Reservation" and to "stock the waters of the Big Horn River and the Big Horn Canyon Recreation Area." *Id.* at 604. The Tribe later authorized its officers to enter into a second agreement with the Bureau to provide the Tribe with "fish and wildlife" and other services. *Id.* That resolution "directed the Tribal officers to enter the agreement with the Bureau 'for the purpose of providing the Crow Tribe with fish and wildlife and the planting stock required . . . .'" *Id.* (quoting Crow Tribe, Res. 70-51 (Aug. 13, 1970)).

The district court recognized that Montana had been "engaged in an extensive fish-stocking program throughout the waters of the Crow Indian Reservation" since at least 1928. *Id.* at 605. The court also determined that this case turned on whether the United States transferred "beneficial ownership" interest in the bed of the Big Horn River to the Crow Tribe in the treaties of 1851 and 1868, or whether the United States "retained ownership of the bed as public lands which passed to the State of Montana upon its admission to the Union." *Id.* (referencing Treaty with the Crows, U.S.-Crow Tribe, May 7, 1868, 15 Stat. 649, and Treaty of Fort Laramie, U.S.-Sioux Tribe, Sept. 17, 1851, 11 Stat. 749, reprinted in 2 INDIAN AFFAIRS: LAWS AND TREATIES, supra note 204, at 594).

The district court began its analysis by applying two presumptions: first, that treaties are to be "construed in favor of the Indians" and, second, that the United States "does not intend to divest itself of the sovereign rights in navigable waters, and in the soil underneath them, absent the clearest expression of intent to the contrary." *Id.* at 607. The court looked for specific language in the text of the two treaties between the United States and the Crow Tribe concerning title to the bed of the Big Horn River and reserving hunting and fishing rights. *Id.* at 607-08. Article 5 of the Treaty of Fort Laramie provided that the Indian tribes who were parties to that treaty "did not surrender their privileges of hunting and fishing" but "maintained such rights . . . for the purpose of hunting and fishing." *Id.* at 607.

Next, the district court summarily concluded that the retention of hunting and fishing rights carries no right in law, "nor does it grant, the exclusive right to fish." *Id.* at 608. With this legal foundation, the district court then relied upon *Oliphant* and found it "apparent that the State of Montana has exclusive jurisdiction to regulate nonmember hunting and fishing within the exterior boundaries of the Crow Indian Reservation." *Id.* (citing Oliphant v. Suquamish Tribe, 435 U.S. 191, 212 (1978)). Next, the district court relied upon a Ninth Circuit case reviewing the counts in an indictment against non-Indians. *Id.* (citing United States v. Sanford, 547 F.2d 1085, 1086 (9th Cir. 1976)). One of those counts alleged illegal entry onto the Crow Reservation for the purpose of hunting, a violation of a federal statute. *Id.* (referencing 18 U.S.C. § 1165 (1970)). That section of the U.S. Code concerned hunting, trapping, or fishing on Indian lands and provided as follows:

Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined
under this title or imprisoned not more than ninety days, or both, and all game, fish, and peltries in his possession shall be forfeited.

18 U.S.C. § 1165. The district court noted that the Ninth Circuit approved of a Montana Supreme Court interpretation of that statute as only “‘providing a penalty for trespass’” and not demonstrating “‘an attempt by Congress to enter the field of fish and game regulation.’” Montana, 457 F. Supp. at 608 (quoting State v. Danielson, 427 P.2d 689, 691 (Mont. 1967)). The district court also noted that the game killed on the Crow Reservation in Sanford violated Montana fish and game law because that law applied to non-Indians on the reservation. Id. at 608-09 (citing Sanford, 547 F.2d at 1089). Thus, Montana has jurisdiction to enforce its fish and game laws against non-Indians on the Crow Reservation. Id. at 609.

Relying on Oliphant, the district court next determined that the Crow Tribe had no congressional delegation of power to try non-Indians, nor had the tribes reserved such power in either of the treaties. Id. (citing Oliphant, 435 U.S. at 204-08). Furthermore, the Tribe could not preempt state authority by enacting an ordinance incompatible with Montana’s authority. Id. at 610. Thus, the district court rejected efforts by the United States and the Crow Tribe to prove at trial that the Tribe had “continually exercised jurisdiction over hunting and fishing activities on the reservation.” Id. The court added that the jurisdictional landscape reflected that Montana exercised “near exclusive jurisdiction” over non-Indian hunting and fishing on the fee land within the boundaries of the reservation, and that the United States exercised jurisdiction concurrently with Montana as to non-Indian hunting and fishing on the Indian lands within the reservation. Id. Also, the court summarily noted that “[t]he Crow Tribe neither had nor did it exercise jurisdiction over nonmember fishing and hunting activities within the reservation.” Id. The court also noted that the Tribe’s attempt to exercise jurisdiction over non-Indian hunting and fishing within the reservation pursuant to a 1973 Tribal resolution and a 1975 Tribal ordinance was “fatally doomed” by subsequent case law. Id. at 610-11 (referencing Crow Tribe, Ordinance 1 (Apr. 12, 1975), and Crow Tribe, Res. 74-05 (n.d., 1973)).

The district court identified the main issue as who held title to the bed of the Big Horn River, along with a corollary issue regarding whether Montana had jurisdiction to regulate hunting and fishing by non-Indians within the Crow Reservation’s exterior boundaries. Id. at 600. Yet, the court chose to focus on a different question as to whether the Crow Tribe had any jurisdiction to regulate non-Indian hunting and fishing on the Crow Reservation—an issue that does not appear to have been raised by the Tribe’s inter-governmental agreements with the U.S. Department of the Interior. Id. at 607-08, 610-11. Those agreements—as described by the district court—appear to concern only natural-resource management issues, not regulating the conduct of non-Indians. Id. at 602-03. The district court also focused on whether 18 U.S.C. § 1165 reflected a congressional effort to “enter the area of fish and game regulation.” Id. at 609.

Moreover, given the inter-governmental agreements between the United States and the Crow Tribe, it is curious that the district court never considered the intersection of law and policy as between the United States, Montana, and the Crow Tribe with respect to the purposes underlying those agreements. The district court never seemed to address the parties’ interests regarding resource management law and policy. While the district court recognized that the United States and Montana exercised concurrent jurisdiction over unlawful nonmember hunting and fishing on the Crow Reservation, its opinion failed to consider that, criminal jurisdiction notwithstanding, the inter-governmental agreements between the United States and the Crow Tribe represented important federal policy interests—at least on the non-fee lands comprising the Crow Reservation. Id. at 611.
Arguably, such policy interests should have been construed as a partial delegation of federal civil authority to regulate hunting and fishing activities on the Crow Reservation. Instead, the district court confined its analysis to Montana’s policy interests only.

On appeal, the Ninth Circuit identified the issue as “determin[ing] title to the bed of the Big Horn River within the exterior boundaries of the Crow Indian Reservation,” and “resolv[ing] certain questions regarding the authority to regulate the hunting and fishing activities of non-Indians and others not members of the Crow Tribe within the exterior boundaries of the reservation.” Montana, 604 F.2d at 1164. The court then began its analysis with a discussion of Tribal Council Resolution 74-05, which provided as follows:

BE IT ORDAINED . . . that hunting, fishing and trespassing within the exterior boundaries of the Crow Indian Reservation is hereby prohibited and the proper officials of the United States and the Crow Tribe of Indians are hereby directed and authorized to enforce the provisions of this ordinance and any federal statute which would prohibit such hunting and fishing and trespassing, provided, however, that the provisions of this ordinance shall not apply to the members of the Crow Tribe of Indians.

Crow Tribe, Res. 74-05, quoted in Montana, 604 F.2d at 1164 n.4. The resolution also provided for notice to the Montana Fish and Game Department and the U.S. Department of the Interior’s Bureau of Indian Affairs that hunting and fishing on the Crow Reservation was prohibited to anyone other than the members of the Crow Tribe. Id. The resolution purported to prohibit nonmember hunting and fishing on the Crow Reservation and thereby set up a conflict between the Crow Tribe and Montana, which each year authorized hunting and fishing within the Crow Reservation by public notice setting the dates that the season would open and close. Montana, 604 F.2d at 1164-65. Thus, to the Ninth Circuit, it was this conflict that gave rise to the present action. Id. at 1165.

The court of appeals then reversed the district court with respect to the validity of the resolution, determining that under article 5 of the Treaty of Fort Laramie the tribes reserved the “privilege of hunting, fishing, or passing over any of the tracts of country heretofore described,” including the power to exclude “those not members of the tribe from hunting and fishing within the exterior boundaries of the reservation.” Id. at 1165-69 (also granting title to the banks and bed of the Big Horn River with the United States). However, the Ninth Circuit also held that this provision of the resolution, which purported to “proscribe[] hunting and fishing by all, except those who are members of the Crow Tribe,” particularly those who live on fee land within the reservation, exceeded the powers reserved under the treaties and 18 U.S.C. § 1165. Id. at 1167, 1169. The Ninth Circuit—without referencing the federal government’s “new” domestic policy toward Indians—also reasoned that in determining the rights and powers of Indians, the court must account for the fact that “[w]e must . . . live together, a process not enhanced by unbending insistence on supposed legal rights which if found to exist may well yield tainted gains helpful to neither Indians nor non-Indians.” Id. at 1169.

The Ninth Circuit then addressed the issue of whether the Crow Tribe or Montana had the power to regulate non-Indian hunting and fishing within the exterior boundaries of the Crow Reservation. Id. The court began its analysis with the caveat that its holding as to the Crow Tribe’s power to regulate nonmember hunting and fishing within the reservation did not reach the owners of private property. Id. Next, the court acknowledged that, while tribes possess the “‘attributes of sovereignty’” under Wheeler, those “‘[i]nherent powers’” do not extend to exercising criminal jurisdiction over nonmembers under Oliphant. Id. at 1170
issue concerned whether the Crow Tribe had the authority to regulate and enforce hunting and fishing by non-Indians within the exterior boundaries of the Crow Reservation.\(^{259}\)

By the time the case reached the Supreme Court,\(^{260}\) the corollary issue in the lower courts had changed into a major issue of nationwide importance to all federally recognized Indian tribes. In particular, the case expanded from the Crow Tribe's efforts to co-manage natural resources on the Crow Reservation with assistance from the federal government, to the scope of each Indian tribe's civil regulatory and adjudicatory jurisdiction over nonmembers of the tribe.\(^{261}\)

259. \textit{Id}. at 547. Note the differences in how the issue was framed as this case rose from the district court to the court of appeals and then to the Supreme Court. The district court framed the issue as follows:

This case seeks to quiet title to the bed and banks of the Big Horn River. A corollary issue requires a determination of whether the State of Montana has the authority to regulate hunting and fishing within the exterior boundaries of the Crow Indian Reservation by non-Indian persons, since the Crow Tribe purportedly has an exclusive treaty right to reservation hunting and fishing. The final issue is whether the State of Montana . . . is lawfully asserting authority to regulate hunting and fishing by non-Indian persons within the exterior boundaries of the Crow Indian Reservation.

United States v. Montana, 457 F. Supp. 599, 600 (D. Mont. 1978), rev'd, 604 F.2d 1162 (9th Cir. 1979), rev'd, 450 U.S. 544. The court of appeals framed the issue as "determin[ing] title to the bed of the Big Horn River within the exterior boundaries of the Crow Indian Reservation," and "resolv[ing] certain questions regarding the authority to regulate the hunting and fishing activities of non-Indians and others not members of the Crow Tribe within the exterior boundaries of the reservation." \textit{Montana}, 604 F.2d at 1164.

260. The Supreme Court viewed the issues raised very differently. \textit{See Montana}, 450 U.S. at 547 (framing the issue as concerning the "sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians").

261. The Court went to great lengths to make the parties responsible for "expanding" the scope of the case. The Court stated, "[t]hough the parties in this case have raised broad questions about the power of the Tribe to regulate hunting and fishing by non-Indians on the
In tackling the scope of civil jurisdiction possessed by an Indian tribe, the Supreme Court needed to address the issue of balancing public policy concerns involving the natural resource interests of three separate sovereigns over the same territory as applied to Indians and non-Indians alike. The district court, in considering this issue, identified relevant Crow Tribe statutes and also heard testimony with respect to the inter-governmental agreement between the Crow Tribe and the Bureau of Sports Fisheries and Wildlife at the Department of the Interior. Similarly, the court of appeals focused exclusively on Tribal Council Resolution 74-05 and invalidated the portion that purported to exercise criminal jurisdiction over

[Crow Indian] reservation, the regulatory issue before us is a narrow one." Id. at 557 (emphasis added). Recognizing that the issue should be limited, the Court focused on the authority possessed by Montana instead of considering the scope of civil jurisdiction possessed by Indian tribes over non-Indian activity on Indian lands.

The United States brought the action in its fiduciary capacity as trustee for the Crow Indian Tribe, who also intervened. Id. at 549. The Court referenced the complaint four times: (1) "the complaint in this case sought to quiet title only to the bed of the Big Horn River," id. at 550 n.1, (2) "[t]he complaint in this case did not allege that non-Indian hunting and fishing on reservation lands has impaired [any treaty hunting or fishing] privilege," id. at 558 n.6, (3) "[t]he complaint in the District Court did not allege that non-Indian hunting and fishing on fee lands imperil the subsistence or welfare of the Tribe," id. at 566, and (4) "the complaint did not allege that the State has abdicated or abused its responsibility for protecting and managing wildlife, . . . or has imposed less stringent hunting and fishing regulations within the reservation than in other parts of the State," id. at 566 n.16. These references shed light on how the parties to Montana sought to litigate the issues in the case, as well as how the transformation of the issue before the Court would result in a finding of silence in the pleadings as to those issues. Because the issue raised in the government’s pleading likely comported with the issue identified by the district court and the court of appeals, it is not surprising that the Supreme Court found that neither the United States nor the Crow Tribe made allegations of fact aligned with the issue to which the Court granted certiorari.

Before turning to the identified issue, the Court analyzed the primary issue in the lower courts as to who held title to the bed and banks of the Big Horn River. Id. at 550-57. In doing so, it claimed that the respondents’ legal claim “to control hunting and fishing on the reservation” turned on title to the riverbed. Id. at 550-51. The Court made short shrift of the government’s claim to title and ultimately reversed the Ninth Circuit’s decision that title rested with the United States. Id. at 557. Next, the Court rejected the Ninth Circuit’s construction of the Treaty of Fort Laramie and the district court’s reliance on 18 U.S.C. § 1165 as sources of authority for the Crow Tribe’s power to regulate non-Indian hunting and fishing within the Crow Reservation. Id. at 557-63. The Court then turned to the issue of whether the Crow Tribe’s “inherent sovereignty” under principles set out in Wheeler could support the authority purported to exist in Tribal Council Resolution 74-05. Id. at 563-65 (citing United States v. Wheeler, 435 U.S. 313, 326 (1978)).

262. See discussion of the district court’s opinion supra note 258.

nonmembers.\textsuperscript{264} The court of appeals also reversed the district court with respect to whether Montana's authority to regulate hunting and fishing within the exterior boundary of the Crow Reservation was exclusive.\textsuperscript{265} In the alternative, the court of appeals seemed to apply the nation's domestic Indian policy and required the three sovereigns (the United States, Montana, and the Crow Tribe) to work cooperatively towards creating a concurrent jurisdictional natural resource management scheme to apply within the Crow Reservation.\textsuperscript{266}

But the Supreme Court rejected the Ninth Circuit's resolution of the case and, in so doing, failed to consider Congress's Indian policy.\textsuperscript{267} Instead, it created new law—a path-marking case with respect to some forms of civil regulatory and adjudicatory jurisdiction of Indian tribes over nonmembers.\textsuperscript{268} The Court's resolution of the case ignored an important practical reality: management of the natural resources within the boundary of the Crow Reservation included important policy matters for all three sovereigns. Moreover, the Supreme Court's acknowledgement that “Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands,”\textsuperscript{269} presupposes that the Crow Tribe, at the time, possessed policy interests in the natural resource area—that is, it possessed some authority to regulate natural resource activities of nonmembers, even on fee lands within the exterior boundary of the Crow Reservation. The decision also did not consider the possibility of a federal delegation of authority to the Crow Tribe, in which case, the Crow Tribe would stand in the shoes of the United States for purposes of natural resource regulatory and adjudicatory jurisdiction arising within the Crow Reservation boundary.

Even in the absence of a federal delegation of authority to the Crow Tribe, the record before the Court contained testimony regarding inter-governmental agreements between a federal agency and the Crow Tribe.\textsuperscript{270} Those agreements reflected implementation of the nation's then ten-year-old domestic Indian policy advocating that the relationship between the United States and the Indian tribes is a political relationship in which the parties conduct themselves on a government-to-government basis.\textsuperscript{271} One would expect the Court to support inter-governmental agreements between the United States and Indian tribes. Such efforts avoid conflict by entering into co-management covenants to nurture the development of natural resources for the benefit of all people. Instead, the Court created the opportunity for

\begin{itemize}
  \item \textsuperscript{264} \textit{Montana}, 604 F.2d at 1166-69 (construing Crow Tribe, Res. 74-05 (n.d., 1973)).
  \item \textsuperscript{265} \textit{Id.} at 1172; see discussion of the court of appeals' opinion \textit{supra} note 258.
  \item \textsuperscript{266} \textit{Montana}, 604 F.2d at 1172.
  \item \textsuperscript{267} \textit{Montana}, 450 U.S. at 565-66.
  \item \textsuperscript{268} \textit{Id.} at 565.
  \item \textsuperscript{269} \textit{Id.}
  \item \textsuperscript{270} See \textit{supra} note 258.
  \item \textsuperscript{271} See \textit{infra} note 308 and accompanying text.
\end{itemize}
cross-jurisdictional conflict in Indian Country as its decision implicitly acknowledges that the laws of the three sovereigns may apply to the same persons, property, and contracts.

4. The *Montana* Rule Contributes to Jurisdictional Problems in Indian Country

The Court in *Montana* articulated a presumptive rule, commonly known as the "*Montana* rule," providing that "inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." While acknowledging that Indian tribes "retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands," the Court recognized two exceptions to the *Montana* rule. The first exception grants authority to Indian tribes to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." The second exception recognizes that an Indian tribe may also "retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." What might have been designed to be a relatively straightforward test is, nevertheless, a rule not well grounded, and in application, a primary contributor to jurisdictional problems in Indian Country for five primary reasons.

First, the Court based its justification for the *Montana* rule solely on nineteenth-century social relations between Indian tribes and non-Indians. In so doing, the Court disregarded fundamental twentieth- and twenty-first-century economic and social

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272. 450 U.S. at 565 (emphasis added); see also Strate v. A-1 Contractors, 520 U.S. 438, 442 (1997). In *Strate*, the Court's general discussion of *Montana* led it to hold that "as to nonmembers, . . . a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." *Id.* at 453 (discussing *Montana*, 450 U.S. at 565-66). However, this holding (without citation to specific authority) is inconsistent with and differs from the rule that applies to other recognized sovereigns. See, e.g., J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2790 (2011) ("A sovereign's legislative authority to regulate conduct may present considerations different from those presented by its authority to subject a defendant to judgment in its courts."). There is no legitimate reason to believe that the legislative body of the United States, or any state, differs from the legislative body of an Indian tribe. Thus, it seems spurious to establish, without explanation, a different result for regulatory activity by Indian tribes than for other legislative bodies.


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

275. *Id.* at 566 (emphasis added). The Court added in a footnote that "Indian tribes retain rights to river waters necessary to make their reservations livable." *Id.* at 566 n.15 (citing Arizona v. California, 373 U.S. 546, 599-600 (1963)).
transformations in relations between Indian tribes and non-Indians occurring in Indian Country. In particular, with personal jurisdiction cases—those concerning the power of a court to enter and enforce a judgment against a nonresident defendant—the Court has acknowledged historical relations, but then moved past that history and recognized that it is incumbent on the Court to pronounce a forward-looking jurisdictional rule. Without explanation as to why precedent applicable to one sovereign (the states) should not apply to another sovereign (the tribes), the Montana Court saddled the democratically elected constitutional governments of Indian tribes with a rule that is not applicable to any other sovereign in the American political system. Justice requires an explanation as to the Court’s rationale for rejecting historical relations to expand the law of personal jurisdiction for states, but not for Indian tribes. Justice further requires an explanation as to why historical relations should overshadow current political reality in Indian Country where Indian tribes conduct government-to-government relations with the United States and the states. The Court’s inconsistent approach to the same issue without regard to Congress’s Indian policy and political reality leaves little doubt that the presumptive Montana rule and its two exceptions create conflict in Indian Country that is likely to continue. The Court’s decision begs for litigation, encouraging defendants to test the outer parameters of the Montana rule. In that sense, federal and state courts, and particularly the courts of the Indian tribes, are destined to have dockets full of cases arising from consensual relations involving nonmembers and non-Indians in which the court must, sua sponte, raise subject matter jurisdiction as the first issue. For this reason alone, the Court should revisit the Montana rule.

Second, the exceptions to the Montana rule are intriguing for different reasons. Here, each exception seems to be grounded in the law of personal jurisdiction as

276. See, e.g., McGee v. Int’l. Life Ins. Co., 355 U.S. 220, 222-23 (1957). The McGee Court stated as follows:

[A] trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

Id.

277. See, e.g., Hanson v. Denckla, 357 U.S. 235, 253 (1958). The Hanson Court stated as follows:

The application of [the minimum contacts rule] will vary with the quality and nature of the defendant’s activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its
neither exception applies unless one of the involved parties purportedly subject to an Indian tribe’s regulatory or adjudicatory jurisdiction is a “nonmember” of an Indian tribe or a “non-Indian.” The purpose of the first exception to the Montana rule seems to authorize jurisdiction by an Indian tribe with respect to a “nonmember’s” consensual relationship with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. This exception creates conflict, however, in part, because the Indian, who likely never contemplated a jurisdictional battle arising out of a consensual relationship, bears the burden of proof that jurisdiction exists. Further, the conflict may require the Indian tribe, likely a nonparty to the litigation, to intervene in a private civil dispute to protect its interests. Moreover, the very nature of the Montana rule requires the court of an Indian tribe to first resolve three jurisdictional questions before proceeding to the merits of the case: (1) whether the concerned party is a “nonmember ... with the tribe”; (2) whether that nonmember entered into a consensual relationship with the tribe or its members; and (3) whether the cause of action arose on lands subject to the Indian tribe’s jurisdiction. One need only examine the cases arising under the Montana rule’s first exception to glean the scope and depth of the conflict arising from application of the exception in quite ordinary common law contract and tort claims. To make matters even more confounding, consider that once remedies have been exhausted in the court of an Indian tribe, another round of jurisdictional challenges may proceed, laws.


278. The Court’s use of the words “nonmember” and “non-Indian” presents significant distinctions. The word “nonmember” is under-inclusive because it excludes Indians who are enrolled members of federally recognized Indian tribes. The word “non-Indian” is also under-inclusive because it excludes persons who are ethnically and culturally American Indians. The effect of this distinction is to unjustifiably treat enrolled members of federally recognized Indian tribes, and persons who are ethnically and culturally American Indians, as non-Indians instead of Indians, solely for jurisdictional purposes. Moreover, the distinction is curious because it classifies a person who is enrolled as (or ethnically and culturally) an Indian as a non-Indian—not subject to the tribe’s jurisdiction under its “inherent sovereign powers.” Overall, this result is specious in the absence of any citation to evidence in the record that historically such a person, similar to a non-Indian, was not subject to the tribe’s authority. It is also particularly troublesome when one considers that Indians of shared common language, culture, and core beliefs in customs, traditions, and practices likely engaged in extensive patterns of commerce and social relations. In light of the Court’s reliance on historical relations as the foundation to support the Montana rule, it would seem that the Court should have recognized the issue and perceived that reliance on the classification “non-member” would be tenuous, at best.

280. Id.
281. Id.
this time in a federal court. Of course, all of this has the unintended consequence of considerable expense while delaying justice for the parties by requiring the tribal court to, first, resolve the jurisdictional question in a routine common law cause of action arising from a consensual relationship now gone sour. As demonstrated by Plains Commerce Bank v. Long Family Land & Cattle Co. and Strate v. A-I Contractors, litigating jurisdictional issues in Indian Country has proven to be a highly contentious, time-consuming, and costly process in both the tribal courts and, thereafter, the federal courts. If a party’s jurisdictional challenge is successful, the private consensual dispute, more likely than not, could still be resolved in a state court—a result that seems quite contrary to the very purpose for which the first exception was created.

Third, the Court never identified whether the Montana rule and its exceptions present personal or subject matter jurisdiction issues. If the issue is one of personal jurisdiction for a nonmember or a non-Indian, then it is puzzling why the Court did not address whether such individual interests are protected under the Fifth Amendment’s Due Process Clause (as applied to Indian tribes through the Indian Civil Rights Act), and, further, whether such interests are waivable by the nonmember or non-Indian. It is reasonable to think that the involved nonmember or non-Indian could consent to jurisdiction through a variety of activities and conduct, and, therefore, waive the protections afforded to her or him by the Due Process Clause. Such a decision should not be reviewable in federal court under the Iowa Mutual or Farmers Union cases. This result is also justified considering that the Court has recognized the exclusive right of Indian tribes to determine their membership.

One the other hand, if the issue is one of subject matter jurisdiction, then the question is the source of the limitation the Court imposes on the jurisdiction exercised by the Indian tribe. Is that source traceable to Article III, Section 2 of the U.S. Constitution or to a federal statute? If so, is the interest unwaivable by the

284. See, e.g., Plains Commerce Bank, 554 U.S. 316; Strate, 520 U.S. 438.
287. See id.
288. See Iowa Mut., 480 U.S. at 19; Farmers Union, 471 U.S. at 856.
289. United States v. Wheeler, 435 U.S. 313 (1978). This right includes recognizing members for certain localized purposes, such as one who is an “Indian,” intends to live under the jurisdiction of an Indian tribe, and purposefully avails herself or himself of the benefits and protections of the Indian tribe.
nonmember or non-Indian, similar to subject matter jurisdiction in federal court?\textsuperscript{290} The Court’s failure to identify the source of its newly created jurisdictional limitation unnecessarily casts doubt upon the legitimacy of the \textit{Montana} rule, especially when one considers the alternative in light of Congress’s domestic Indian policy.

Furthermore, it is curious as to why the Court ignored the jurisdictional provisions set out in many Indian tribes’ federally approved IRA constitutions (or a statute duly enacted thereunder).\textsuperscript{291} It is reasonable to think that such a provision, which sets out the subject matter jurisdiction of the court of that Indian tribe, would be dispositive to the Court. That is, if duly complied with, the Court should recognize the tribal court’s jurisdiction as proper instead of imposing jurisdictional limitations absent Congressional authorization.\textsuperscript{292}

Fourth, the Court’s embrace of a legal theory grounded in the classification of one’s membership and race or ethnicity to create a presumptive rule (with exceptions) suggests a suspect classification is at work—all without Congressional direction except for the nation’s Indian policy, which the Court ignored. Furthermore, a slightly different type of conflict exists with regard to both exceptions. As to the first exception, the dispositive issue is whether one of the parties to a consensual relationship is a “nonmember” of the Indian tribe exercising regulatory or adjudicatory jurisdiction.\textsuperscript{293} As to the second exception, the issue is whether a “non-Indian” has perpetrated the offending conduct.\textsuperscript{294} With respect to the nonmember classification, the Court did not address whether a person’s classification as nonmember included or excluded American Indians who are “members” of an Indian tribe different than the Indian tribe seeking to exercise regulatory or adjudicatory jurisdiction over the nonmember. As to the race classification, “non-Indian,” the issue is two-fold. First, whether the person is “Indian,” but not of a sufficient blood

\textsuperscript{290} See \textit{Ins. Corp. of Ir., Ltd.}, 456 U.S. at 701-04 (discussing the distinction between subject matter jurisdiction and personal jurisdiction).

\textsuperscript{291} See \textit{supra} note 154 and accompanying text.

\textsuperscript{292} See, e.g., \textit{Kiowa Tribe v. Mfg. Techs., Inc.}, 523 U.S. 751, 759-60 (1998). The \textit{Kiowa} Court stated as follows:

Like foreign sovereign immunity, tribal immunity is a matter of federal law. Although the Court has taken the lead in drawing the bounds of tribal immunity, Congress, subject to constitutional limitations, can alter its limits through explicit legislation. In both fields, Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests. The capacity of the Legislative Branch to address the issue by comprehensive legislation counsels some caution by us in this area. . . . In light of these concerns, we decline to revisit our case law and choose to defer to Congress.

\textit{Id.} (citations omitted).


\textsuperscript{294} \textit{Id.}
quantum to be eligible for enrollment in any Indian tribe. Second, whether a person is recognized within an Indian tribe as “Indian” and, in either case, whether that person is treated as a “non-Indian” for purposes of the second exception. Each question adds unnecessary complications in applying the Montana rule and its exceptions. Further, it is doubtful that any federal or state court is in the best position to address the issue or to review a final decision from the court of an Indian tribe on either matter.

Fifth, the nonmember classification the Court draws upon in the first exception to the Montana rule is inconsistent with the rights recognized and protected by the United States under the privileges and immunities provisions of the Indian Reorganization Act (“IRA”). This inconsistency is most troublesome as applied to federally recognized Indian tribes and nonmember persons who are enrolled members of an Indian tribe. The Montana Court did not address this issue in connection with the IRA and, accordingly, a different type of conflict exists here. In particular, the first exception arguably unlawfully intrudes and infringes upon the rights of Indian tribes as protected from encroachment under the IRA. This is a significant issue given that the IRA provided the basis for, and was relied upon by, the vast majority of Indian tribes to organize democratically-based constitutional governments sanctioned by the U.S. Secretary of the Interior. Thus, the Montana Court’s failure to assess whether reliance on the classification “nonmembers” in the first exception infringes on federally protected rights of commerce and social relations among and between Indians and Indian tribes is an omission.

In sum, the multiple internal and external conflicts presented by the Montana rule and its exceptions pose serious obstacles that counsel in favor of revisiting the merits of Montana and reexamining its underlying legal theories in the context of the nation’s Indian policy. Another issue that should be reconsidered is whether the Court’s reliance on historical relations between Indian tribes and non-Indians is the best approach to resolve vexing cross-jurisdictional issues in Indian Country. The

295. See, e.g., United States v. Antelope, 430 U.S. 641, 646 n.7 (1977) (discussing jurisdictional differences between Indians who are enrolled in a federally recognized Indian tribe and those not enrolled who are racially classified as Indians, but not subject to jurisdiction under the Major Crimes Act, 18 U.S.C. § 1153 (2006)); United States v. Dodge, 538 F.2d 770, 786 (8th Cir. 1976); see also Halbert v. United States, 283 U.S. 753 (1931) (addressing inheritance rights); Vezina v. United States, 245 F. 411 (8th Cir. 1917) (addressing property rights); Sully v. United States, 195 F. 113 (C.C.D.S.D. 1912) (addressing property rights).

296. See Nicole J. Laughlin, Identity Crisis: An Examination of Federal Infringement on Tribal Autonomy to Determine Membership, 30 HAMLIN L. REV. 97 (2007); see also FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 2, at 4 (1941) (discussing both the legal and ethnological uses of the term “Indian”).

297. See discussion of the IRA’s privileges and immunities provisions supra note 154.
next section examines the nation’s Indian policy as a foundation to resolve such conflict.

5. The Nation’s Domestic Indian Policy: A Useful Policy Framework to Support Application of the Abstention Doctrine in a New Circumstance—Extending Mutual Trust, Confidence, and Respect to the Courts of Indian Tribes

From the colonial period through today, domestic Indian policy has dominated the special relationship that exists between the United States and Indian tribes.298 The U.S. Supreme Court has occasionally looked to the nation’s Indian policy as it struggled with difficult questions concerning the status of Indian tribes under U.S. law.299 While many scholars have considered the merits and implications of a national policy that has swung from one extreme to another, mostly to the detriment of Indian tribes,300 the current policy is progressive, forward-looking, and significantly stable—remaining essentially unchanged for the past forty-one years. This section discusses that new policy and its utility as a framework to support application of the abstention doctrine in a new circumstance; one that extends mutual trust, confidence, and respect to the courts of the Indian tribes.

In a 1970 special message to Congress on Indian Affairs, President Richard M. Nixon articulated a “special relationship” between the United States and Indian tribes.301 By that time, the post-IRA termination era that produced laws such as P.L.

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298. See discussion supra Part II.A.3.

299. See, e.g., Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14-15 (1987); see also supra note 202 and accompanying text.


301. See 116 Cong. Rec. 23,131, 23,132 (1970) (statement of Speaker pro Tempore Thomas Boggs reading a message from President Richard Nixon). Specifically, President Nixon stated as follows:

Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, the government has agreed to provide community services such as health, education and public safety, services which would presumably allow Indian communities to enjoy a standard of living comparable to that of other Americans.

This goal, of course, has never been achieved. But the special relationship
280 was over.\textsuperscript{302} In his congressional message, President Nixon referred to the “unique status of Indian tribes” and identified the source of the “special relationship” between Indians and the federal government as emanating from “solemn obligations … entered into by the U.S. government.”\textsuperscript{303} The President looked toward the conceptual principle of self-determination to guide the nation’s domestic Indian policy,\textsuperscript{304} and asked Congress to pass resolutions and legislation to implement it.\textsuperscript{305}

Five years after President Nixon’s dramatic policy shift, Congress charted the nation on a course to a new frontier in the political relations between the United States and Indian tribes by enacting the Indian Self-Determination and Educational Assistance Act,\textsuperscript{306} which codified a policy of Indian self-determination.\textsuperscript{307} Under this self-determination policy, Congress created the conditions for a new era of political relations in which the United States would conduct “government to government” relations with Indian tribes.\textsuperscript{308}

\begin{quote}
between the Indian tribes and the Federal government which arises from these agreements continues to carry immense moral and legal force. To terminate this relationship would be no more appropriate than to terminate the citizenship rights of any other American.
\end{quote}

\textit{Id.} (emphasis added).

302. \textit{Id.} In his message to Congress, President Nixon declared, “The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.” \textit{Id.} Thereafter, the President labeled as “wrong” both the termination era policy and the premises upon which it rested, rejecting them as “morally and legally unacceptable.” \textit{Id.}

303. \textit{Id.} (“But the special relationship between the Indian tribes and the Federal government which arises from these agreements continues to carry immense moral and legal force. To terminate this relationship would be no more appropriate than to terminate the citizenship rights of any other American.”).

304. \textit{Id.} (“Self-determination among the Indian people can and must be encouraged without the threat of eventual termination. In my view, in fact, that is the only way that self-determination can effectively be fostered.”).

305. \textit{Id.} For example, the President stated as follows:

I am asking the Congress to pass a new Concurrent Resolution which would expressly renounce, repudiate and repeal the termination policy as expressed in House Concurrent Resolution 108 of the 83rd Congress. This resolution would explicitly affirm the integrity and right to continued existence of all Indian tribes and Alaska native governments, recognizing that cultural pluralism is a source of national strength.

\textit{Id.}


307. 116 CONG. REC. at 23,132; see also supra note 301.

308. As codified and amended, section 3 of the Indian Self-Determination and Education Assistance Act provides as follows:
Implementation of the new era is partially reflected in executive materials\(^{309}\) that direct federal agencies to implement the nation's domestic Indian policy.\(^{310}\) In addition, the nation's Indian self-determination policy was instrumental in securing President Obama's decision\(^{311}\) on behalf of the United States to support the United

(a) Recognition of obligation of United States

The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) Declaration of commitment

The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

(c) Declaration of national goal

The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.


311. See Press Release, U.S. Dep't of State, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples: Initiatives to Promote the
Nations’ Declaration on the Rights of Indigenous People. It is clear that Congress and the executive branch of the U.S. government recognize Indian tribes as quasi-sovereign dependent domestic nations under U.S. law. It is also clear that retrenchment with respect to the nation’s forty-one-year-old domestic Indian policy is probable, suggesting that Indian tribes are, and will likely remain, an important and permanent part of the American political and legal landscape.

Policy, then, matters—regardless of whether it is “public” policy or “judicial” policy. The Supreme Court looked to policy considerations within the concept of “our federal system” when it created the abstention doctrine in Pullman. There, the Court specifically identified important policy considerations, such as “wise discretion,” “scrupulous regard for the rightful independence [of states],” and “smooth working of the federal judiciary” with respect to the use of the federal courts’ equitable powers. The Court also noted how the federal courts’ consideration of state policies had created “needless friction,” not only between federal courts and the state courts, but the federal courts and Congress. It further acknowledged the “encroachment” by federal courts on the states and expressed disdain for the “battle” between the federal courts and Congress, which it thought was “unnecessarily inefficient.”

Moreover, in considering the balance of power between a federal court and a state court, the Supreme Court once again turned to policy to justify dismissal of a federal lawsuit in favor of a pending state court action in Colorado River.

312. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc A/RES/61/295 (Sept. 13, 2007). On December 16, 2010, the United States joined the vast majority of the world’s sovereigns in recognizing the United Nations Declaration of Rights of Indigenous Peoples. Remarks at the White House Tribal Nations Conference, 2010 DAILY COMP. PRES. DOC. 3 (Dec. 16, 2010). The Declaration recognizes certain rights possessed by indigenous people including, but not limited to, the right of “self-determination,” G.A. Res. 61/295, supra, art. 3, the right to self-governance in “matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions,” id. art. 4, the right “not to be subjected to forced assimilation or destruction of their culture,” id. art. 8, § 1, the right to “maintain and develop their political, economic and social systems or institutions,” id. art. 20, and the right to “determine the responsibilities of individuals to their communities,” id. art. 35.


314. Id. (quoting Di Giovanni v. Camden Fire Ins. Ass’n, 296 U.S. 64, 73 (1935), and Cavanaugh v. Looney, 248 U.S. 453, 457 (1919)); see also discussion supra Part I.

315. Pullman, 312 U.S. at 500; see also discussion supra Part I.

316. See Pullman, 312 U.S. at 500; see also discussion supra Part I.

317. See Pullman, 312 U.S. at 501; see also discussion supra Part I.

Rejecting application of the concept of federalism, the Court embraced—in the context of the exercise of concurrent federal-state jurisdiction—the policy considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation."319

The nation’s domestic Indian policy also provides a useful backdrop to begin considering the application of the abstention doctrine in a new circumstance—one that involves conflict as to which of the three sovereigns should most properly exercise civil jurisdiction involving the same persons (whether Indian or non-Indian), property, or contracts when civil disputes arise in Indian Country. Among the aspects of that policy is encouraging Indian tribes to build strong and stable governments, including courts. In encouraging government development under the policy, it would be cynical to believe that the focus of Congress and the President was Indians, to the exclusion of non-Indians, as that would belie circumstances in existence on virtually every Indian reservation. That is, in the twenty-first century, Indian reservations are comprised of human beings, both Indians and non-Indians alike, who engage in consensual commercial and social activities on a daily basis. As such, it seems reasonable to believe that in articulating this aspect of the nation’s Indian policy, Congress and the President sought to be inclusive, not exclusive, in who should benefit from a strong and stable Indian government. No doubt, the congressional policy underlying P.L. 280 and the judicially created policy reflected in the Montana rule and its exceptions are no longer consistent with the nation’s domestic Indian policy.

C. What Does All This Mean?

_Williams v. Lee_ teaches that a person who engages in activity on lands subject to authority of an Indian tribe is subject to that Indian tribe’s regulatory and adjudicatory authority.320 The Court made clear that P.L. 280 provided the only means for a state to acquire criminal and civil jurisdiction in Indian Country.321 Even in states that accepted the federal government’s offer of civil jurisdiction, states could exercise adjudicatory jurisdiction only over private civil disputes that occurred in Indian County to which Indians were parties.322 _Bryan v. Itasca County_ teaches that the enactment of P.L. 280 did not change that jurisdictional landscape and did not alter the concurrent jurisdictional scheme between the United States and the Indian tribes.323

321. _Id._
323. _Id._
The U.S. Supreme Court's use of the word "nonmembers"\textsuperscript{324} in connection with the \textit{Montana} rule and its first exception impermissibly changed then-existing protections afforded Indian tribes under the privileges and immunities provisions of the IRA.\textsuperscript{325} These provisions were designed to prohibit federal intervention in consensual inter-tribal political, commercial, and social interactions. For purposes of the \textit{Montana} rule, the word "nonmembers" includes persons involved in intra-Indian and inter-Indian affairs, as these persons are either Indian tribes, members of Indian tribes, or Indians who are not enrolled tribal members. Essentially, the Court's \textit{Montana} rule unnecessarily creates federal subject matter jurisdiction in intra-Indian and inter-Indian tribal matters concerning an Indian tribe's jurisdiction among and between Indian tribes and Indians, contrary to the prohibition imposed by the privileges and immunities provisions. Furthermore, the \textit{Montana} rule enhances the potential for cross-jurisdictional conflict in Indian Country subject to P.L. 280. This conflict is particularly pertinent as to an Indian tribe's exercise of its inherent sovereign authority over private civil causes of action involving a person who is an Indian, but not a member of the involved tribe, and a person who is a party to a disputed consensual relationship.\textsuperscript{326} Post \textit{Montana}, an Indian tribe's inherent sovereign authority now extends only over its "members."\textsuperscript{327} The \textit{Montana} rule ignores the importance of the IRA's privileges and immunities provisions, which, if considered by the Court, should have led to the conclusion that, as a matter of congressional mandate, limiting an Indian tribe's sovereign authority to members only was too narrow. The Court impermissibly excluded from an Indian tribe's sovereign authority regulatory and adjudicatory authority over Indians who are members of other federally recognized Indian tribes (or by cultural or social recognition, are domiciled on lands subject to that tribe's jurisdiction), as well as adjudications involving inter-tribal disputes.\textsuperscript{328} In addition, the \textit{Montana} rule posits

\textsuperscript{324} In \textit{Duro v. Reina}, the Supreme Court held that Indian tribes had no criminal jurisdiction over a defendant who was Indian, but not a tribal member. 495 U.S. 676, 679 (1990). Congress later reversed that decision by amending the Indian Civil Rights Act of 1968 ("ICRA") to define the term "Indian" to mean any person who "would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, if that person were to commit an offense listed in that section in Indian country to which that section applies." 25 U.S.C. § 1301(4) (2006). The effect of this amendment expanded the scope of an Indian tribes' criminal jurisdiction to include, in addition to tribal members, nontribal member Indians. Neither Congress nor the Supreme Court has addressed this same issue with respect to whether a nontribal member Indian is subject to an Indian tribe's exercise of inherent sovereign authority in the context of a tribe's civil jurisdiction.

\textsuperscript{325} See discussion of the IRA's privileges and immunities provisions \textit{supra} note 154.


\textsuperscript{327} \textit{Id.} at 564.

\textsuperscript{328} \textit{Id.} at 564-66.
that a federal question is presumptively created by virtue of the ethnicity of a nonmember party subjected to the jurisdiction of an Indian tribe.\textsuperscript{329}

Congress has not legislated clear lines with respect to the exercise of civil jurisdiction by the three sovereigns possessing concurrent jurisdiction over the same persons, property, and contracts in Indian Country. The Supreme Court has stepped in and created federal common law to fill the vacuum, valid only until Congress acts.\textsuperscript{330} Absent such legislation, civil jurisdiction over private civil disputes involving Indians in Indian Country remains unsettled. Furthermore, to the extent a federal court or a state court exercises jurisdiction in this circumstance and the cause of action arises under the constitution or law of the Indian tribe, adjudication necessarily disregards the interests of the Indian tribe to exercise its own civil jurisdiction on the lands subject to its authority. \textit{Pullman,}\textsuperscript{331} \textit{Burford,}\textsuperscript{332} and \textit{Thibodaux} each reflect variations of the same principle: a state court is in the best position to determine rights and privileges arising under that state’s constitution or laws, as well as to construe state common law. That principle applies with equal force to the constitution, laws, and common laws of an Indian tribe. That is, an Indian tribe is in the best position to determine rights and privileges arising under its constitution or laws, as well as to construe the common law of that Indian tribe.

At first glance it would appear that the “full force and effect” provision of P.L. 280 recognizes this principle\textsuperscript{334} and accordingly resolves this issue. It does not for three reasons. First, P.L. 280 is not a grant of jurisdiction to adjudicate private civil disputes involving Indians in a federal court.\textsuperscript{335} Second, § 1360(c) does not apply to

\textsuperscript{329} The Court could have relied on federal question jurisdiction as recognized by Article III, Section 2 of the U.S. Constitution; a reserved-rights clause in the federally approved IRA constitution of an Indian tribe; federal statute; or a political classification rationally designed to implement the nation’s Indian policy. As to this last basis, see \textit{Morton v. Mancari,} 417 U.S. 535, 553-555 (1974) (holding that a federal employment preference for jobs in the federal Indian service is not a prohibited racial preference “[a]s long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, . . . designed to further Indian self-government”).

\textsuperscript{330} Cf. discussion of \textit{Duro supra} note 324.

\textsuperscript{331} R.R. Comm’n v. Pullman Co., 312 U.S. 496 (1941).

\textsuperscript{332} Burford v. Sun Oil Co., 319 U.S. 315 (1943).


\textsuperscript{334} Public Law 280 § 4, 28 U.S.C. § 1360(c) (2006). The “full force and effect” provision reads as follows:

Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

\textit{Id.}

\textsuperscript{335} 28 U.S.C. § 1360(c); see also discussion \textit{supra} Part II.B.1.
an Indian tribe that is geographically located in a non-P.L. 280 state.\textsuperscript{336} Third, in a P.L. 280 jurisdiction, § 1360(c) does not require a state court to recognize the law of an Indian tribe if that law is inconsistent with state law.\textsuperscript{337}

Recognition of the abstention principle as applied to the constitution and laws of an Indian tribe by federal and state courts, while not required by the concept of federalism, is appropriate under the nation’s domestic Indian policy. It is a logical next step on the road toward inviting Indian tribes and their courts into the American judicial family, and the common law is the instrument capable of making that happen until Congress acts. In the absence of a statute, a federal or state court is permitted to look to and apply the common law,\textsuperscript{338} which reflects society’s values as those attributes exist today.\textsuperscript{339} Herein lies the problem created by applying P.L. 280 and the \textit{Montana} decision. Congress enacted P.L. 280 in an era when public policy favored terminating treaty agreements and the fiduciary obligations of the United States to the first people. \textit{Montana}’s general rule is an ethnicity-based application of a judicially created doctrine designed to solve a non-problem in that case.\textsuperscript{340} Recall, \textit{Oliphant} resolved the issue of an Indian tribe’s lack of criminal jurisdiction over non-Indians.\textsuperscript{341} In \textit{Montana}, both the district court and the court of appeals viewed the issue as one of criminal law, not civil law.\textsuperscript{342} As to management of natural resources on the Crow Reservation, the Crow Tribe had executed inter-governmental agreements with federal agencies and those agreements had furthered the United States’ domestic Indian policy interests of fostering government-to-government relations.\textsuperscript{343}

Furthermore, \textit{Montana} predates the explosion of gaming in Indian Country, which has unleashed a tidal wave of commercial activity and social engagement between Indians and non-Indians. With respect to commerce, economic activity in Indian Country grew with the advent of profitable gaming and other commercial

\textsuperscript{336} 28 U.S.C. § 1360(c); see also discussion supra Part II.B.1.
\textsuperscript{337} 28 U.S.C. § 1360(c); see also discussion supra Part II.B.1.
\textsuperscript{338} See Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 850 (1985) (“[I]n order to invoke a federal district court’s jurisdiction under § 1331, it was not essential that the petitioners base their claim on a federal statute or a provision of the Constitution. It was, however, necessary to assert a claim ‘arising under’ federal law.”).
\textsuperscript{339} See Charles Alan Wright & Mary Kay Kane, \textit{Law of Federal Courts} § 60, at 412 (7th ed. 2011) (explaining that federal courts have applied the common law to multiple scenarios, such as tort cases, government contract cases, and maritime cases, among others).
\textsuperscript{340} See supra notes 260-261.
\textsuperscript{341} Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978); see discussion of \textit{Oliphant} supra note 255.
\textsuperscript{343} \textit{Montana}, 457 F. Supp. at 604-05.
activity related to locating and extracting renewable resources from Indian lands. That activity was fueled by the investment of millions of dollars, which, in turn, lead to unprecedented economic growth in Indian Country. Further, commercial interactions between non-Indian investors and Indians resulted in the consummation of business deals worth millions of dollars. No doubt, Indian participation in negotiating these sophisticated transactions brought them into contact with skilled lawyers, accountants, investment bankers, venture capitalists, engineers, and professionals with particularized expertise in various disciplines. When business deals are negotiated, Indians and non-Indians alike focus on dispute resolution issues, including in what jurisdiction, form, and under what law the parties should litigate disputes if they arise. To the extent that the parties agree that disputes should be litigated within the courts of the Indian tribe and under the law of that Indian tribe (or even state law), their negotiated agreement should be enforced since, at the time the agreement was executed, it was the understanding of the parties, as well as what they bargained for. Indeed, that understanding brought a degree of certainty and predictability to those parties and, because the Montana rule is not constitutionally based, the Court should have been more leery of creating a general rule that disturbs the original intent of the parties to a consensual relationship.

In short, under the Montana rule, a nonmember party to a consensual commercial or social relationship now possesses a formidable jurisdictional affirmative defense to enforcement of the bargain in the agreed upon forum. Recall, ultimately it is the plaintiff (or the Indian tribe) that bears the burden of proving that the court of the Indian tribe has jurisdiction to hear and decide the issue involving a private consensual relationship gone bad, as well as power to enter a judgment against a non-Indian party to that same transaction. Although the result of the Court’s decision in Montana reflects an effort to protect non-Indians from Indians, that “protection” serves to modify a basic understanding operational in the commercial world—that commercial agreements as negotiated by the parties will be enforced, unless such agreements are contrary to public policy or subject to other grounds for rescission.

Contract law protects the justifiable expectations of parties who enter into commercial agreements. The law should not operate differently with respect to

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345. To the extent that a hypothetical lawsuit seeking to enforce contractual rights would be docketed in a state court pursuant to P.L. 280, the state court could well find itself adjudicating the scope of an Indian tribe’s jurisdiction unless one of the parties removed the case to federal court with jurisdiction to hear and decide the issues in dispute.

commercial agreements between Indians and Indian tribes, and non-Indians, particularly when they occur in Indian Country. This is the understanding in the commercial world when U.S. companies seek to do business on lands subject to the governance of a different sovereign. Certainty and predictability are important commercial considerations to those making business and investment decisions. Recognizing the importance of predictability in commercial transactions, the Supreme Court noted that predictability includes deciding where to file suit. Today’s reality is that the courts with jurisdiction to hear and decide such commercial disputes are no longer limited to just state or federal courts, but also include the courts of Indian tribes.

III. THE NEED TO EXPAND THE ABSTENTION DOCTRINE

The United States, the states, and the Indian tribes share sovereignty in common. The United States' recognition of the sovereignty of Indian tribes supports decisions by the executive branch to commence and conduct political relations with the Indian tribes. In addition, the attributes of sovereignty possessed by Indian tribes bear strong resemblance to the attributes possessed by the states. Both sovereigns possess the power to legislate with respect to the rights of citizens, interests in personal property, qualifications for elected office, and voting. Equally significant, both the states and the Indian tribes were delegated their powers of government by their citizens through a constitutional, democratic process.

"The time has come," again, to "break decisively with the past and to create the conditions for a new era" in which private civil disputes involving Indians and non-Indians alike, and arising in Indian Country, no longer present inter-judicial jurisdictional conflicts. The common law principle of sovereignty underpins the political relationship among the three entities that exercise some form of civil authority in Indian Country. There is no constitution or other organic document that creates a judicial framework to support the general principle in effect in Indian Country—that the laws of three sovereigns can apply to the same persons, property,

347. See, e.g., First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba, 462 U.S. 611, 621 (1983) (acknowledging the "need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation").

348. See Hertz Corp. v. Friend, 130 S. Ct. 1181, 1193 (2010) ("Predictability also benefits plaintiffs deciding whether to file suit in a state or federal court.").

349. See supra notes 165-167 and accompanying text.

350. See discussion supra Part II.A.


352. See discussion supra Part II.A.
and contracts.\textsuperscript{353} None of the legislatures for any of these sovereigns has enacted legislation to create such a framework.\textsuperscript{354} And, to this day, none of the three sovereigns has executed a compact or other inter-governmental agreement that properly balances the exercise of judicial authority among the three separate and independent systems of courts. Nor has the Supreme Court applied any common law doctrines to resolve the multitude of concurrent jurisdictional conflict issues that now exist and are likely to continue to permeate this tripartite jurisdictional scheme in the future.

Left unresolved, the judicial conflict inherent in a concurrent jurisdictional scheme involving three sovereigns can only lead to an increase in the number and complexity of conflict situations among these sovereigns. Yet this result is neither a foregone conclusion nor a Hobson’s choice with respect to the state of jurisdictional relations in Indian Country. The policies, principles, and practical considerations underlying the abstention doctrine provide a useful starting place to consider how to resolve foreseeable concurrent jurisdictional conflict between federal courts or state courts and the courts of Indian tribes. Recognizing an additional circumstance in which the abstention doctrine could apply shows respect for the court of a different sovereign, promotes judicial efficiency, and presents an opportunity for a closer working relationship, one on equal terms, among all the courts of the American judicial system. Further, it could provide encouragement to, and a much needed opportunity for, the courts of American Indian tribes to grow, mature, and develop within the American judicial system, particularly in civil cases within Indian Country where courts have jurisdiction over both members and nonmembers. Moreover, the lessons learned from the resolution of conflicts between federal and state courts can and should help advance our thinking with respect to applying abstention to cases docketed in the court of an Indian tribe where appropriate.\textsuperscript{355}

Concurrent jurisdictional conflict in Indian Country is a cutting-edge issue that requires, among other things, visionary leadership from the U.S. Supreme Court for three reasons. First, the Court has consistently molded, shaped, and nurtured the development of the law to accommodate changing conditions in politics, commerce, and societal attitudes. Second, the institutions of government within American Indian tribes have seen dramatic growth, maturation, and sophistication over the past half-century. Third, states have moved decisively to build and nurture political and judicial relations with Indian tribes in Indian Country during the same period.\textsuperscript{356}

\textsuperscript{353} See discussion supra Part II.A.


\textsuperscript{355} The research and analysis necessary to develop a working paper on this topic is currently in progress.

\textsuperscript{356} See supra notes 249-250.
Throughout its history, the nation’s Indian policies have changed dramatically with respect to the sovereign Indian tribes. Yet the current Indian self-determination policy has remained constant since 1970. Since that time, tribal governments have come of age by developing modern-style democracies embracing the rule of law. Indian tribes, supported by the United States’ national Indian policy of self-determination and economic self-sufficiency, have also designed modern legislatures and sophisticated executive structures designed to provide services to their constituents. Further, tribal legislators have enacted legislation to strengthen Indian judicial systems that, among other things, recognize the importance of the nation’s “traditional conception of fair play and substantial justice.” Stable government in Indian Country has fostered significant commercial activity and investments, as well as social engagements between Indians and non-Indians. Among the collateral consequences of such interactions, disputes naturally followed and questions as to where to litigate such disputes have abound (federal court, tribal court, or, since 1953, state court).

The newest entity in the mix of Indian Country jurisdiction—the states—has taken a two-fold approach with respect to interactions with American Indian tribes. First, the states have promoted policies of mutually cooperative political relations. Second, they have simultaneously pursued the extension of state jurisdiction into Indian Country—a trend that is likely to persist. At the same time, the Indian tribes have defended their sovereignty interests against encroachment by the states. Acknowledging that each of these two sovereigns possess immunity from suit and, accordingly, cannot be sued without their consent, assertions of jurisdiction are


359. See, e.g., Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, P.C., 476 U.S. 877, 878 (1986) (giving an example of which entity’s law to apply).


361. See United States v. Peters, 9 U.S. (5 Cranch) 115, 139 (1809) (“The state cannot be made a defendant to a suit brought by an individual . . . .”); see also Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 753, 760 (1998) (concluding that Indian tribes possess immunity from suit and only Congress may abrogate that immunity).
likely to be litigated in civil cases involving primarily individual interests, but implicating sovereign interests. However, Congress has not passed legislation in an effort to balance the interest of the Indian tribes, the United States, and the states as to exercising concurrent jurisdiction that preserves and protects the interests of the three sovereigns. Further, the U.S. Supreme Court has not weighed in to create federal common law in the absence of congressional action.

While the abstention doctrine balances the judicial power between the federal and state courts, the principles it espouses can be particularly useful in resolving inter-judicial conflict within Indian Country now that the courts of Indian tribes have emerged to exercise authorities conferred by the constitutions and laws of Indian tribes. The extensive commercial transactions and social interactions among Indians from tribes across America and between Indians and non-Indians in Indian Country, particularly since the 1988 advent of Indian gaming under the Indian Gaming Regulatory Act, undeniably is likely to continue and expand. That development will invariably present the courts with significant litigation. In a jurisdiction subject to P.L. 280, the Indian could commence, in the court of his or her tribe, litigation against a non-Indian or another Indian, whether from the same tribe or not. At the same time, the non-Indian could commence parallel litigation against the Indian in a state court.

Further, under the Montana rule, the Indian tribe bears the burden of proving that the facts giving rise to a dispute with a “nonmember” Indian or a non-Indian satisfies one of the Montana exceptions in order to establish the tribal court possesses jurisdiction to hear and decide the case. No matter the final order or judgment by the court of the Indian tribe, under National Farmers Union Insurance Co. v. Crow Tribe of Indians, a federal question is presented as to whether that court exceeded the “lawful limits of its jurisdiction” if a party seeks judicial review in a federal court. If that review is unsuccessful, no federal statute or judicially created rule

364. Article III, Section 2 of the U.S. Constitution sets out the judicial power of the United States and none of the enumerated circumstances of cases or controversies expressly identifies Indian tribes, their powers of self-government, or judicial review of final orders or judgments from the court of an Indian tribe. Arguably, because Indian tribes accepted Congress’s invitation to form governments under the IRA, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (2006)), Congress may limit the powers of self-government of an Indian tribe organized pursuant to the IRA. It further seems arguable that Congress’s enactment of ICRA, Pub. L. No. 90-284, tits. II-VII, §§ 401-405, 82 Stat. 77, 78-80 (codified at 25 U.S.C. §§ 1321-1325 (2006 & Supp. IV 2010)), constitutes such a limitation. It is an entirely different question, however, as to Congress’s conferral of subject matter jurisdiction to the federal courts with respect to judicial review of powers of self-government actually exercised by an Indian tribe. When Congress did confer such jurisdiction, it authorized only limited review in connection with the remedy of habeas
applies at the intersection of P.L. 280 and Montana to resolve the possible entry of two judgments by two different courts. The exhaustion rule articulated in Farmers Union is not the solution to resolving cross-jurisdictional conflict as Indian tribes are not instrumentalities or agencies created and authorized by federal or state legislation. Furthermore, in addressing conflict issues between the federal and state courts in Pullman, it is noteworthy that the Court relied upon an abstention doctrine, not an exhaustion rule, to resolve the conflict.

Rather than resolving this type of conflict on a piecemeal and ad-hoc basis, as suggested by application of the Montana and exhaustion rules, the abstention doctrine presents a reasonable alternative solution capable of balancing and protecting important interests of each involved sovereign. It would ensure due and proper consideration of the laws and policies of each sovereign in the context of commercial and social relations in the modern era.

Application of the abstention doctrine necessarily raises a host of issues that must be examined with respect to each sovereign. Some of these issues involve how to protect the constitutional rights of persons including, but not limited to, issues of personal jurisdiction and due process. Other issues surround the need for proper judicial review, particularly with respect to claims arising under federal or state law, and the development of Indian substantive law and procedural protections. Still other issues might emanate from the absence of statutory authority to remove a case from one court to another, as well as the standard applicable for remand. Likewise, there are numerous issues currently confronting Indian tribes with no workable solution in sight. For example, what are the constitutionally protected rights of Indians—under the constitution of the Indian tribe—in the federal and state courts, and can these issues be addressed by the current state of diversity jurisdiction? In addition, the question may arise whether an Indian tribe’s public acts, records, and judicial proceedings are entitled to full faith and credit in state and federal courts.

Certainly, the issues the Supreme Court identified as reasons to create the abstention doctrine, and to mold and shape the circumstance to which it applies, are easily recognizable in the tripartite jurisdictional scheme in existence in Indian Country. One need only substitute the name of one jurisdiction for that of another. For example, the “needless friction with state policies” applies with equal rigor if restated as, the “needless friction with Indian law and policies.” Similarly, the issue of constitutional rights may need to be extended to Indian tribes as well. Moreover, the issue of habeas corpus to test unlawful detention. See 25 U.S.C. § 1303 (2006). In light of Congress’s refusal to authorize jurisdiction beyond the remedy of habeas corpus, it is interesting that the Supreme Court in Farmers Union would ignore ICRA and its legislative history, and instead rely on federal common law, which requires the absence of any federal statute, to create a question arising under the laws of the United States. See Illinois v. City of Milwaukee, 406 U.S. 91, 99-102 (1972); see also City of Milwaukee v. Illinois, 451 U.S. 304, 312-13 (1981) (“We have always recognized that federal common law is ‘subject to the paramount authority of Congress.’” (quoting New Jersey v. New York, 283 U.S. 336, 348 (1931))).

of "encroachment on states' rights" is easily applicable when rephrased as, the issue of "encroachment on Indian tribes' rights." Although it is true that the Supreme Court has sometimes applied the doctrines of infringement and preemption, perhaps to address this issue, it seems to be the rare case in which the interest of the Indian tribe prevails over the state's interest. But when these circumstances have arisen, the Court has usually deemed the federal interest to be superior to the state's interest.

It is not uncommon for the Supreme Court to look to federal common law for solutions to vexing jurisdictional issues in Indian Country. First, in Farmers Union, the Court applied federal common law to determine that a federal question is presented when a federal court is asked to decide whether the court of an Indian tribe exceeded its jurisdiction to hear and decide a civil dispute arising in Indian Country. In so doing, the Court ignored the limitations originally set forth in Erie

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366. The Supreme Court has recognized that "[a] federal court's exercise of jurisdiction over matters relating to reservation affairs can also impair the authority of tribal courts . . ." Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15 (1987) (citing Farmers Union, 471 U.S. at 857); see also Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59-60 (1978). The Santa Clara Pueblo Court explained as follows:

[P]roviding a federal forum for issues arising under § 1302 [of ICRA] constitutes an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself. Even in matters involving commercial and domestic relations, we have recognized that "subject[ing] a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves" may "undermine the authority of the tribal court[i] . . . and hence . . . infringe on the right of the Indians to govern themselves." A fortiori, resolution in a foreign forum of intratribal disputes of a more "public" character, such as the one in this case, cannot help but unsettle a tribal government's ability to maintain authority. ld. (third and fourth alterations in original) (omissions in original) (citations omitted) (quoting Fisher v. Dist. Court, 424 U.S. 382, 387-88 (1976), and Williams v. Lee, 358 U.S. 217, 223 (1959)).

Notably, Congress's P.L. 280 authorization to the states to exercise jurisdiction over civil causes of action among Indians, see Public Law 280, ch. 505, sec. 4, § 1360(a), 67 Stat. 588, 589 (1953) (codified as amended at 28 U.S.C. § 1360(a) (2006)), continues to jeopardize the self-governance interests that the Supreme Court sought to protect Indian tribes from.

367. See, e.g., Williams, 358 U.S. at 223; see also supra note 245.

368. See, e.g., McClanahan v. State Tax Comm'n, 411 U.S. 164, 165 (1973); see also supra note 245.

369. Williams, 358 U.S. at 223.


371. 471 U.S. at 850-53.
Railroad Co. v. Tompkins that "[f]ederal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." Nevertheless, the Supreme Court turned to the common law in Farmers Union and required federal courts to either dismiss or hold in abeyance a federal court lawsuit challenging a tribal court's jurisdiction. The Supreme Court relied upon an exhaustion requirement that provided the courts of Indian tribes the first opportunity to "explain to the parties the precise basis for accepting jurisdiction."

It is questionable whether the Rules Enabling Act applies in the context of political relationships between the United States and Indian tribes. Accordingly, that statute provides no congressional authorization to support the Court's development of a new rule of decision, as it does when the issue involves application of state law in federal court. Moreover, while application of an exhaustion rule is sound judicial policy in the context of administrative law or state habeas corpus proceedings, the policies underlying this common law rule are misplaced in the context of implementing the nation's Indian policy of true self-determination, as exhaustion merely delays federal judicial review. The exhaustion rule, as applied by the

373. Farmers Union, 471 U.S. at 856-57.
375. Farmers Union, 471 U.S. at 845.
377. See Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938) (stating that there is a "long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.").
378. Even so, applying an exhaustion rule to delay judicial review in federal court seems sensible only in administrative proceedings or habeas corpus review. Because federal regulations govern the operations of administrative courts in Indian Country, see 25 C.F.R. pt. 11 (2011) (authorizing courts of Indian offenses), it is difficult to apply an exhaustion rule outside this context, as the Supreme Court has done, because neither a court created pursuant to an Indian tribe's inherent sovereign authority, nor the tribe's constitution would be a federal administrative court like a court of Indian offenses. While applying an exhaustion rule shows respect for the decisions of tribal courts by foreclosing judicial review
Supreme Court in Farmers Union, recognized that the "orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed."\(^{379}\) Furthermore, two years later, in Iowa Mutual Insurance Co. v. LaPlante, the Supreme Court extended the exhaustion rule applied in Farmers Union to lawsuits in federal court based on diversity jurisdiction.\(^{380}\) Significantly, the Supreme Court explained the exhaustion rule in Farmers Union as one that "did not deprive the federal courts of subject-matter jurisdiction."\(^{381}\) Notably, relying on "strong federal policy concerns [that] favored resolution in the nonfederal forum," the Supreme Court stated that the exhaustion rule is "analogous to principles of abstention articulated in Colorado River."\(^{382}\)

The abstention doctrine has been applied to resolve conflict between two parallel court systems united under principles of federalism. The policies underlying the abstention doctrine and the circumstances in which the Supreme Court approved application of the doctrine present teachable moments for the doctrine's application in Indian Country where three parallel court systems operate. Such lessons could avoid much of the tortured course that state and federal courts have endured.\(^{383}\) It is reasonable to assess the merits of whether expanding the abstention doctrine provides a useful platform to resolve concurrent jurisdictional conflicts in Indian Country. Even in the absence of limitations imposed by considerations of federalism, the past struggles with the abstention doctrine provide helpful insight in designing the expansion of that doctrine to Indian Country.

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379. Farmers Union, 471 U.S. at 856.
381. Id. at 16 n.8.
382. Id.
383. Leading scholar Suzanna Sherry describes the relationship between federal and state courts as one that "has vexed our jurisprudence for more than two hundred years, and ... continues to evolve." Suzanna Sherry, Judicial Federalism in the Trenches: The Rooker-Feldman Doctrine in Action, 74 NOTRE DAME L. REV. 1085, 1085-86 (1999). Yet, Professor Sherry also recognizes the "exponential growth of federal doctrines designed to simplify complex litigation" and notes that the problem is "especially acute when it interacts with questions of judicial federalism." Id. at 1085.