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EXHAUSTION OF TRIBAL REMEDIES: EXTOLLING TRIBAL SOVEREIGNTY WHILE EXPANDING FEDERAL JURISDICTION

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In recent years, the importance of Indian tribal courts as an independent legal forum has increased significantly. As the cases brought in tribal courts have grown in both number and complexity, however, new questions regarding the proper jurisdictional boundaries among tribal, state, and federal courts have reached the forefront in Native American law. In National Farmers Union Insurance Cos. v. Crow Tribe of Indians, *the United States Supreme Court first began to grapple with this issue. In that case, the Court announced what has come to be known as the "tribal exhaustion rule," under which federal courts must decline to exercise jurisdiction over matters that fall within tribal jurisdiction until the appropriate tribal remedies have been exhausted.*

In this article, Professor Laurie Reynolds analyzes the development of the tribal exhaustion rule and concludes that the jurisdictional dividing line has been improperly drawn. In her view, the rule in its present form prevents federal courts from hearing some matters involving important federal questions; yet by permitting extensive federal court review of final tribal rulings the rule fails to accord proper deference to tribal determinations. After detailing the shortcomings of the tribal exhaustion doctrine, Professor Reynolds proposes redrawing the boundary lines between federal and tribal jurisdiction. By narrowly interpreting federal question jurisdiction to exclude those cases that can be heard in tribal courts while simultaneously making tribal rulings reviewable in the Supreme Court by writ of certiorari, Professor Reynolds argues that tribal sovereignty can be more effectively protected and further development of tribal judicial systems encouraged without sacrificing litigants' abilities to receive a full and fair hearing of their grievances.

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I. INTRODUCTION

As Native American tribal courts have expanded their jurisdictional reach and enhanced their judicial procedures,[1] disputes over the proper scope of tribal court jurisdiction have increased. With its broad 1985 ruling in *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*,[2] the Supreme Court began its effort to delineate the proper scope of tribal court jurisdiction. In its holding, the *National Farmers* Court established that federal courts must decline to exercise their federal question jurisdiction[3] in many Indian law cases[4] until

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1. With the creation of the Courts of Indian Offenses in the late 1800s, the United States government first imposed non-traditional forms of dispute resolution upon Indian tribes. *See* WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES: EXPERIMENTS IN ACCULTURATION AND CONTROL 104 (1966). These courts, staffed by Indian judges appointed by the reservation agent of the Bureau of Indian Affairs, administered a code established by the Secretary of the Interior. *Id.* at 109. They were frequently mere instrumentalities of the reservation agent, serving only to consolidate his absolute power over the reservation. *Id.* at 173. At the same time, however, the courts did incorporate some elements of the traditional tribal councils. *Id.* at 174. With the passage of the Allotment Act of 1887 and the influx of non-Indian settlers into many reservations, the reservation borders often disappeared, triggering a decline in importance of Indian courts. *Id.* at 141. Subsequently, with the passage of the Indian Reorganization Act in 1934, Congress created a new type of tribal tribunal, referred to generally as "tribal courts." The statute authorized these new entities to draft their own constitutions and tribal codes, subject to the approval of the Secretary of the Interior. *Id.* at 150-51. Both these courts and Courts of Indian Offenses (also referred to as C.F.R. courts) exist today as tribal judicial bodies. The federal cases involving questions of tribal court jurisdiction do not distinguish between the two types of courts.

Approximately 150 tribal courts and 20 Code of Indian Offenses courts currently exist in the United States. *The* Duro *Decision: Criminal Misdemeanor Jurisdiction in Indian Country: Hearing on H.R. 972 Before the House Comm. on Interior & Insular Affairs*, 102d Cong., 1st Sess. 9 (1991) [hereinafter Duro *Hearing*] (statement of Ronal D. Eden, Director, Office of Tribal Services); *Tribal Court Systems and the Indian Civil Rights Act: Hearing Before the Senate Select Comm. on Indian Affairs*, 100th Cong., 2d Sess. 19 (1988) (statement of Donald D. Dupuis, President, National American Indian Court Judges Association).

With the recent passage of the Indian Tribal Justice Act, Pub. L. No. 103-76, 107 Stat. 2004 (1993) (codified at 25 U.S.C. §§ 3601-3631 (Supp. 1994)), which authorizes annual appropriations of more than $50,000,000 over a seven-year period, tribal court systems will undoubtedly increase their workload and expand their jurisdictional scope at a substantially more rapid pace. Central to the passage of this legislation was Congressional recognition that "the lack of available funds [for tribal courts] places severe constraints on the development of tribal justice systems." H.R. Rep. No. 205, 103d. Cong., 1st Sess. 9 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2425, 2430.

2. 471 U.S. 845 (1985).

3. Pursuant to federal statute, the federal district courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

the appropriate tribal remedies have been exhausted.[5] In the subsequent case of *Iowa Mutual Insurance Co. v. LaPlante*,[6] the Court expanded the exhaustion rule to apply to cases brought pursuant to federal diversity jurisdiction.[7] The decision provoked a lone dissent by Justice Stevens, who characterized the majority opinion as embodying the "anomalous suggestion that the sovereignty of an Indian tribe is in some respects greater than that of [a state]."[8]

Predictably, academic commentators have had mixed reactions to the rule. In recent years, writers have described the tribal exhaustion rule as a welcome opportunity for the development of tribal court independence,[9] as an unwarranted intrusion into tribal sovereignty,[10]

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28 U.S.C. § 1331 (1988).

4. Unfortunately, the Supreme Court did not clearly delineate the class of cases to which the tribal exhaustion doctrine applies. Even proponents of the tribal exhaustion doctrine bemoan its lack of clarity. *See, e.g.*, Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329, 335 (1989) [hereinafter Pommersheim, *Crucible of Sovereignty*]. The Court's lack of precision has led to great inconsistency among the lower federal courts. Some courts seem to apply the doctrine to any case involving contact with a Native American, a tribal entity, or a reservation. *See, e.g.*, Stock West Corp. v. Taylor, 964 F.2d 912, 919-20 (9th Cir. 1992) (stating that exhaustion is required in spite of multiple and substantial off-reservation contacts). In contrast, other courts seem to limit the doctrine to "purely internal" tribal affairs. *See, e.g.*, United States *ex rel.* Kishell v. Turtle Mountain Hous. Auth., 816 F.2d 1273, 1276-77 (8th Cir. 1987) (deciding to order tribal exhaustion because the trespass suit at issue was a "purely internal tribal controversy"). *See also infra* notes 88-108 and accompanying text (contrasting the various approaches taken by the lower courts).

5. *National Farmers*, 471 U.S. at 856-57.

6. 480 U.S. 9 (1987).

7. *Id.* at 16-19 ("[T]he exhaustion rule announced in *National Farmers Union* applies here as well.").

8. *Id.* at 22 (Stevens, J., dissenting).

9. Timothy W. Joranko, *Exhaustion of Tribal Remedies in the Lower Courts After* National Farmers Union *and* Iowa Mutual: *Toward a Consistent Treatment of Tribal Courts by the Federal Judicial System*, 78 MINN. L. REV. 259, 286-93 (1993) (arguing for exhaustion "in nearly all cases in which it is requested," on grounds of "clarity and economy" as well as faithfulness to the goals of *Iowa Mutual* and *National Farmers*); Pommersheim, *Crucible of Sovereignty*, *supra* note 4, at 329 (approving of the holdings in *National Farmers* and *Iowa Mutual* for "not just . . . their general recognition of the importance of tribal courts, but more decisively [for] their explicit rules which curb the most prevalent attempts to undermine and circumvent tribal court jurisdiction"); *see also* Frank Pommersheim, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisdiction*, 1992 WIS. L. REV. 411, 412 (referring to the holdings as "seminal"); Michael Taylor, *Modern Practice in the Indian Courts*, 10 U. PUGET SOUND L. REV. 231, 273 (1987) (concluding that *National Farmers* will promote "advances in the responsibilities and competence" of tribal courts).

10. Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonialized Federal Indian Law*, 46 ARK. L. REV. 77, 150 (1993) (describing the exhaustion doctrine as a reflection of "the ultimate colonialist distrust of leaving the final resolution of [causes of action arising on reservations] to tribal governance"); Robert N.

and as a pragmatic accommodation between "Anglo-American procedural and substantive values" and "Indian traditions of dispute resolution."[11] In fact, the tribal exhaustion rule is all of these things. Acclaimed by the Supreme Court as the effectuation of Congress's commitment to a strengthened and more vigorous tribal sovereignty,[12] the doctrine instructs the lower federal courts to allow preliminary tribal court resolution of cases that would otherwise be within their subject matter jurisdiction. At the same time, however, the Court's rule creates serious doubts about the finality of those tribal court decisions. While the Court seemingly enhanced the reach of tribal court jurisdiction by refusing to allow the exercise of federal court jurisdiction in the first instance, it simultaneously expanded the scope of subsequent federal review for litigants disappointed with the tribal court result.[13] With its extremely broad definition of federal question jurisdiction in disputes involving Indians and Indian tribes, the *National Farmers* decision may ultimately bring virtually every tribal court case within the reach of the federal courts.

Although the scope of tribal court jurisdiction has only recently become an important issue of federal law, the tribal exhaustion doctrine was by no means written on a clean slate. Rather, it reflects the convergence of several well-established and long-standing Indian law principles. In the late nineteenth century, the Supreme Court established the still undisturbed rule that, because the tribes exercise inherent sovereignty and are not instrumentalities of the federal government, the constitutional limitations on the exercise of federal powers are inapplicable to tribal actions.[14] The scope of inherent tribal sovereignty, however, has always been limited by two powerful

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Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 879-80 (1990) [hereinafter Clinton, *Legacy of Conquest*].

11. Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1234 (1990). Milner Ball also seems to fall in this "somewhere-in-the-middle" camp. He criticized *National Farmers* for its extension of federal plenary power and affirmation of tribal divestiture over criminal actions against nonmembers, yet recognized that it "at least preserves the civil jurisdictional integrity of tribal courts." Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 3, 20 (1987); *see also infra* note 87.

12. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15 (1987); National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985).

13. Near the end of its opinion in *National Farmers*, the Court noted 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." *National Farmers*, 471 U.S. at 856.

14. Talton v. Mayes, 163 U.S. 376, 384 (1896).

counterpoints: the doctrines of implicit divestiture and plenary federal power.

The theory of implicit divestiture works to invalidate the exercise of any tribal power found by the Court to be inconsistent with the tribe's dependent status.[15] As developed in a series of cases, the fundamental criterion in this analysis is whether the tribal power sought to be asserted would, in the Court's view, "be inconsistent with the overriding interests of the National Government."[16] Although the Court has used the implicit divestiture analysis relatively infrequently, its impact on tribal sovereignty has been profound. Under its aegis, the Court has denied tribal power to transfer property,[17] to enter into commercial or other relations with foreign governments,[18] to exercise criminal jurisdiction over non-Indians[19] and over nonmember Indians,[20] to regulate the hunting and fishing activities of non-Indians who own land within the borders of a reservation,[21] and to exercise zoning power over the property of nonmembers living within the borders of a reservation.[22] Because

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15. *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208-10 (1978).

16. Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 153-54 (1980).

17. *See* Johnson & Graham's Lesee v. M'Intosh, 21 U.S. (8 Wheat.) 543, 587-88 (1823) ("[D]iscovery gave [the United States Government] an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest.").

18. In United States v. Wheeler, 435 U.S. 313, 326 (1978), the Court noted: "[T]he dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations." For an earlier expression of that sentiment, see Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) (describing the "irresistible [federal] power, which excluded [tribes] from intercourse with any other European potentate than the first discoverer").

19. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978).

20. *See* Duro v. Reina, 495 U.S. 676, 679 (1990). Congress overruled the effects of that opinion by amending federal law to provide specifically that tribal courts have misdemeanor jurisdiction over the on-reservation criminal activities of nonmember Indians. Department of Defense Appropriations Act, § 8077, Pub. L. No. 101-511, 104 Stat. 1856 (1990) (codified as amended at 25 U.S.C. § 1301(2)-(4) (Supp. V 1993)).

21. *See* Montana v. United States, 450 U.S. 544, 566-67 (1981).

22. *See* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989). The *Brendale* Court held that the Tribe did not have the power to impose stricter zoning regulations within the "open areas" of the reservation than those promulgated by the county. *Id.* at 428-30 (opinion of White, J.). Approximately half the open area was owned in fee, and access was not restricted to the general public. *Id.* at 415-16 (opinion of White, J.). The Court did, however, uphold the tribe's limited right to regulate land use within the reservation's "closed area." *Id.* at 444-45 (opinion of Stevens, J.). This decision hinged upon the fact that only a small percentage of this area was owned in fee and that the tribe had continuously maintained its power to exclude nonmembers from entering this area. *Id.* (opinion of Stevens, J.).

the doctrine of implicit divestiture works to divest tribal sovereignty primarily in areas "involving the relations between an Indian tribe and nonmembers of the tribe,"[23] its potential relevance for the delineation of tribal court powers is substantial.

Similarly, the doctrine of federal plenary power[24] in Native American affairs was instrumental in establishing Congress's supremacy over the tribes' ability to exercise their retained inherent sovereign powers. As the Supreme Court stated succinctly in *United States v. Wheeler*[25]: "[Tribal sovereignty] exists only at the sufferance of Congress and is subject to complete defeasance."[26] In fact, the

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For a particularly insightful criticism of *Brendale*, see Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991). The author demonstrates that the Supreme Court often treats tribes as sovereigns when the tribes would benefit from being treated as property owners (when, for example, Congress abrogates treaties). *Id.* at 55-56. Conversely, the Court tends to treat tribes as voluntary associations when they would benefit from being treated as sovereigns (most notably when the tribes try to exercise governmental power over non-Indians). *Id.*

23. United States v. Wheeler, 435 U.S. 313, 326 (1978).

24. Although this Article assumes the validity, or at least the continued existence, of the doctrine of plenary federal power, Professors Judith Resnik and Robert Williams have condemned the doctrine as an example of sheer lawless force exerted on a conquered people. They show how it stands alone as a federal power unchecked by constitutional limits and arising from an extra-Constitutional source. *See* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 692-96 (1989); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 258-67. Professor Williams's article sparked a series of exchanges with Professor Robert Laurence. Professor Laurence, while agreeing with many of Williams's descriptions of the federal government's relationship with Indian tribes, nevertheless provided a partial defense of the plenary power doctrine. *See generally* Robert Laurence, *Learning to Live with the Plenary Power of Congress Over the Indian Nations: An Essay in Reaction to Professor Williams's Algebra*, 30 ARIZ. L. REV. 413 (1988) [hereinafter Laurence, *Learning to Live with Plenary Power*] (suggesting that recognizing both plenary power and tribal sovereignty is better than no tribal sovereignty); Robert A. Williams, Jr., *Learning Not to Live with Eurocentric Myopia*, 30 ARIZ. L. REV. 439 (1988) [hereinafter Williams, *Learning Not to Live With Eurocentric Myopia*] (countering that the discovery doctrine and its related plenary power doctrine permanently deny Indians true self-determination); Robert Laurence, *On Eurocentric Myopia, The Designated Hitter Rule and "The Actual State of Things,"* 30 ARIZ. L. REV. 459 (1988) (responding to the criticisms by Professor Williams on a point-by-point basis).

25. 435 U.S. 313 (1978)

26. *Id.* at 323. Scholars have proposed a number of theories on which the Court might protect tribal sovereignty from congressional interference, including the Due Process Clause, *see* Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 261-67 (1984); the Supremacy Clause, *see* Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365, 383-84 (1989), and principles of international law, *see id.* at 370. Professor Collins has also asserted that "the most important structural protection [of tribal sovereignty] is the federal system itself and the allocation of paramount power to the federal government rather than the states."

Court has never held federal legislation in the area of Native American affairs to be beyond the scope of Congress's plenary power.[27]

Of more recent vintage, yet equally important to the development of the tribal exhaustion rule, is the Supreme Court's opinion in *Williams v. Lee*,[28] which held that Arizona's state courts lacked subject matter jurisdiction to hear a suit brought by the non-Indian proprietor of a store on the Navajo Reservation against a Navajo to recover money allegedly owed.[29] Crucial to the Court's holding was its observation 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 govern themselves."[30] Although its opinion did not examine whether a

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Id. at 382.

27. Newton, *supra* note 26, at 195; Ball, *supra* note 11, at 12; Duro, *Hearing*, *supra* note 1, at 126 (Statement of Professor Newton, reaffirming the truth of this assertion as of 1991). In a recent article, Professor David Williams challenged the validity of the plenary power doctrine as it is currently applied, noting that it does not rest on a common understanding of the legitimacy of that power. That is, even though courts may accept the existence of plenary federal power, they should nevertheless find a justification for it that will in turn help shape a model of statutory interpretation in federal Indian law. David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403, 408-416 (1994).

28. 358 U.S. 217 (1959).

29. *Id.* at 223.

30. *Id. Williams v. Lee* also contained language, however, indicating that the decision partially hinged upon implicit federal preemption of state jurisdiction: "No Federal Act has given state courts jurisdiction over such controversies." *Id.* at 222. At the time of the case, applicable federal law, commonly known as Public Law 280, allowed the states to assume civil and criminal jurisdiction over reservation Indians, but required an explicit assumption of jurisdiction on the part of the state. *Id.* Arizona's constitution expressly disclaimed jurisdiction over such matters. *Id.* at 223 n.10.

In McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164 (1973), the Court expressly approved of the modern trend to ignore "platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power." *Id.* at 172. For the *McClanahan* Court, tribal sovereignty was more properly relegated to a "backdrop against which the applicable treaties and federal statutes must be read." *Id.*

Similarly, in White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), the Court appeared to ignore completely the notion that state law could be rendered inapplicable to Indian reservations by the force of inherent tribal sovereignty. *Id.* at 148. Rather, the Court preferred to rely solely on the doctrine of federal preemption to determine the scope of permissible state involvement in tribal and reservation affairs. *See id.* at 148-51. The Court did, however, approve of the *McClanahan* Court's suggestion that the doctrine of tribal sovereignty should affect the preemption determination by lessening the burden needed to find preemption of state law. *Id.* at 143-44. Unlike the application of the preemption doctrine in most other contexts, federal peremption in the Indian law field is readily implied—no express congressional statement is required. *Id.* at 144, 151.

tribal court existed that could exercise jurisdiction over the case,[31] the Court confirmed that tribes possess exclusive subject matter jurisdiction over disputes arising on the reservation and involving significant tribal interests.[32] As a result, *Williams v. Lee* became the catalyst for frequently lengthy and bitter disputes between state and tribal courts over their respective jurisdictions.[33]

The tribal exhaustion doctrine adds a new dimension to the *Williams v. Lee* debate. As described by the Court, the tribal exhaustion doctrine confirms *Williams v. Lee*'s commitment to "the right of reservation Indians to make their own laws and be ruled by them."[34] In a jurisdictional dispute between a state and a tribe, however, *Williams v. Lee*'s determination of exclusive tribal court

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31. The *Williams v. Lee* Court mentioned recent improvements in the Navajo Tribe's legal system and referred to the Navajo Courts of Indian Offenses's broad criminal and civil jurisdiction, but the Court neither expressly cited the tribal jurisdictional ordinance itself nor indicated whether the tribal court in fact had jurisdiction over the matter. *Williams*, 358 U.S. at 222.

32. *Id.* at 223. To underscore the uniqueness of the *Williams v. Lee* Court's holding that the Arizona courts have no subject matter jurisdiction over a contract executed by a Native American and performed on a reservation, the authors of a leading Indian Law casebook ask: "Is there any place in the world, other than Indian country, where Lee's contract could have been executed and yet be beyond the subject matter jurisdiction of the Arizona Superior Courts?" DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW CASES AND MATERIALS 576 (3d ed. 1993). Professor Robert Laurence has similarly noted the "unusual result" in the case, and defended its holding by noting that "[t]he sovereignty of Indian tribes is not only priceless, but especially vulnerable to state intrusions." Robert Laurence, *The Enforcement of Judgments Across Indian Reservation Boundaries: Full Faith and Credit, Comity, and the Indian Civil Rights Act*, 69 OR. L. REV. 589, 619 (1990) [hereinafter Laurence, *Enforcement of Judgments*].

33. For a comprehensive summary of the wide range of issues implicated by state court assertions of jurisdiction in cases involving Native Americans or reservation affairs, see FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 348-80 (Rennard Strickland et al. eds., 1982). *See also* William C. Canby, Jr., *Civil Jurisdiction and the Indian Reservation*, 1973 UTAH L. REV. 206, 227 (describing the "chaos prevailing in the current division of jurisdiction between state and tribal courts"); *see also infra* note 203.

Of course, serious hurdles remain to the enforcement of both a judgment issued by a tribal court against a non-Indian and a judgment issued by a state court against a reservation Indian. For an excellent analysis of the enforcement problem in both contexts, see generally Laurence, *Enforcement of Judgments*, *supra* note 32; Fred L. Ragsdale, Jr., *Problems in the Application of Full Faith and Credit for Indian Tribes*, 7 N.M. L. REV. 133 (1977). Some states, such as New Mexico, appear to hold that tribal court decisions are entitled to full faith and credit. *See* Pommersheim, *Crucible of Sovereignty*, *supra* note 4, at 342, (citing Jim v. CIT Fin. Serv., 533 P.2d 751 (N.M. 1975)). Another possible resolution is a state statutory listing of prerequisites for state recognition of tribal court judgments. *See, e.g.*, S.D. CODIFIED LAWS ANN. § 1-1-25 (1986) (providing that no order of a tribal court in South Dakota may be recognized in state courts except under specifically listed exceptions).

34. *Williams*, 358 U.S. at 220.

jurisdiction renders the tribal court's decision free from subsequent review by a state court.[35] In contrast, the exhaustion rule, which now guides challenges to tribal jurisdiction when raised in federal court, opens the door for subsequent federal review to ensure proper exercise of tribal judicial power. Thus, in its practical effect, the Court's broad definition of federal question jurisdiction has opened the federal courts to many cases involving only a conflicting assertion of state and tribal court jurisdiction.[36]

This Article examines the development and subsequent application of the tribal exhaustion rule to illustrate how the rule situates tribal courts among their more established and more powerful analogues in the state and federal system.[37] Analysis of lower federal court opinions reveals major weaknesses in the exhaustion doctrine and many inconsistencies in its application.[38] This Article argues that the exhaustion doctrine has improperly shifted judicial power in two major ways: in some cases, it expands federal jurisdiction where tribal jurisdiction should be exclusive;[39] in others, it unduly limits federal jurisdiction by forestalling federal court review of cases involving significant federal questions.[40] Based on this argument, the Article suggests a redefinition of federal question jurisdiction in Indian law disputes that better allocates the jurisdictional powers of tribal and federal courts.[41] This redefinition of federal jurisdiction in turn supports the Article's subsequent proposal to eliminate the exhaustion doctrine for cases falling within the redefined and narrowed scope of federal question jurisdiction.[42] Finally, the Article suggests congressional action to provide for Supreme Court review of tribal court decisions by writ of certiorari,[43] thus softening the impact of the Article's earlier proposal to limit

35. *Id.* at 223.

36. *See, e.g.*, Sanders v. Robinson, 864 F.2d 630 (9th Cir. 1988) (child custody dispute); A & A Concrete, Inc. v. White Mountain Apache Tribe, 781 F.2d 1411 (9th Cir. 1986) (breach of contract suit). In a slightly different context, Professor Robert Laurence has noted that "when it comes to cooperation between states and tribes, the federal government can be a meddlesome third party." Laurence, *Enforcement of Judgments*, *supra* note 32, at 685. That criticism seems equally applicable to the Supreme Court's decision in *National Farmers* to expand its general federal question jurisdiction in Native American affairs. *See supra* notes 3-5 and accompanying text.

37. *See infra* notes 46-87 and accompanying text.

38. *See infra* notes 88-193 and accompanying text.

39. *See infra* notes 194-200 and accompanying text.

40. *See infra* notes 201-18 and accompanying text.

41. *See infra* notes 219-98 and accompanying text.

42. *See infra* notes 299-316 and accompanying text.

43. *See infra* notes 317-30 and accompanying text.

post-exhaustion federal court review of tribal court decisions. Although the imposition of ultimate Supreme Court review may not be necessary to check arbitrary treatment of non-Indians[44] or other imagined tribal court abuses of power,[45] it provides a realistic alternative to the federal courts' current power to second guess tribal court decisions in post-exhaustion cases and, more importantly, an opportunity for a fuller expansion of tribal court activities.

II. THE DEVELOPMENT OF THE DOCTRINE OF EXHAUSTION OF TRIBAL REMEDIES

A. *The Indian Civil Rights Act*

With the passage of the Indian Civil Rights Act in 1968,[46] Congress first imposed on tribal governments guarantees of individual liberties similar to those contained in the Bill of Rights.[47] As Indian and non-Indian litigants began to file federal lawsuits alleging

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44. The federal district court's opinion in Little Horn State Bank v. Crow Tribal Court, 690 F. Supp. 919 (D. Mont. 1988), *vacated* 708 F. Supp. 1561 (D. Mont. 1989), is frequently cited as evidence of the need for federal court review of tribal court decisions. See Laurence, *Enforcement of Judgments*, *supra* note 32, at 590-605 for analysis of the *Little Horn* problem. Laurence urges federal statutory reform to authorize federal court review of tribal court decisions under the Indian Civil Rights Act. *Id.* at 601-04.

45. Professor Robert Williams is a vocal opponent of proposals to authorize federal court review of tribal decisions; he attributes these calls for reform to the "legacy of European colonialism and racism" in federal Indian law. Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 276 (1989) [hereinafter Williams, *Documents of Barbarism*]. Professor Robert Clinton has similarly argued that federal review of tribal court decisions is unnecessary, describing tribal court abuses of power as "exceptional" and "episodic" rather than "systematic." *Enforcement of Civil Rights Act: Hearing before the United States Commission on Civil Rights*, 100th Cong., 2d Sess. 78 (1988) (remarks of Professor Robert N. Clinton).

46. 25 U.S.C. §§ 1301-1303 (1982).

47. The Indian Civil Rights Act of 1968 includes protection of the free exercise of religion and freedom of speech, Fourth Amendment-like protection against unreasonable searches and seizures, prohibition of double jeopardy, prohibition of compulsory testimonial self-incrimination, limitations upon the exercise of eminent domain, protection of the right to a speedy and public trial, Eighth Amendment-like protection against cruel and unusual punishment, equal protection and due process of law, and insurance of the right to a jury in certain circumstances. At the same time, however, Congress specifically failed to include several well-established Bill of Rights provisions, including limitations prohibiting government establishment of religion, the guarantee of a republican form of government, a privileges and immunities clause, protection of the right to vote, a guarantee of free counsel to indigent criminal defendants, and protection of the right to a jury in civil trials. 25 U.S.C. § 1302. *See also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62-63, 63 n.14 (1978) (describing differences between the Act and the Constitution).

violations of the Act, the lower courts developed an exhaustion doctrine designed to defer ultimate federal review of these issues.[48] The exhaustion doctrine, articulated in judicial applications of the Indian Civil Rights Act and modeled after the established doctrine of exhaustion of administrative remedies, was flexible and pragmatic in application. A lower court's decision to require exhaustion depended on the circumstances of each case, including consideration of the alleged harm, the possible futility of filing suit in a tribal forum, and the need to preserve and strengthen the sovereign authority of tribal courts.[49] In *Santa Clara Pueblo v. Martinez*,[50] however, the Supreme Court obviated the need for that exhaustion rule by holding that the Indian Civil Rights Act did not create a federal cause of action.[51]

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48. See O'Neal v. Cheyenne River Sioux Tribe, 482 F.2d 1140, 1144 (8th Cir. 1973), in which, after noting that the Indian Civil Rights Act was passed to guarantee constitutional rights to the reservation Indian, the court found that "the realization of this goal is best achieved by maintaining the unique Indian culture and necessarily strengthening tribal governments. From this perspective an exhaustion requirement is consistent with the statute." *Id.* The *Cheyenne River* court cited the Supreme Court's holding in *Williams v. Lee* as establishing the need to preserve the tribal court's authority. *Id.* at 1146. Unlike the exhaustion doctrine apparently envisioned by the Court in *National Farmers*, however, the *Cheyenne River* court described a more flexible exhaustion rule: "[E]xhaustion is not an inflexible requirement. A balancing process is evident; that is weighing the need to preserve the cultural identity of the tribe by strengthening the authority of the tribal courts, against the need to immediately adjudicate alleged deprivations of individual rights." *Id. See also* Schantz v. White Lighting, 502 F.2d 67, 70 n.6 (8th Cir. 1974) (noting that "generally in such Indian civil rights cases there is an exhaustion requirement"); Oliver v. Rosebud Sioux Tribe, 424 F. Supp. 487, 489 (D.S.D. 1977) (holding, after conducting a *Cheyenne River* balancing test, that "exhaustion is particularly appropriate in this case"); McCurdy v. Steele, 353 F. Supp. 629, 636 (D. Utah 1973) (refusing to order exhaustion when tribal court remedies were inadequate); Dodge v. Nakai, 298 F. Supp. 17, 25-26 (D. Ariz. 1968) (holding exhaustion unnecessary because of federal interest in consolidating claims in one law suit). *Cf.* National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985) ("[E]xamination should be conducted in the first instance by the Tribal Court itself.").

49. *See, e.g., Schantz*, 502 F.2d at 70 n.6 (noting that tribal exhaustion might not be required if tribal remedies are nonexistent or inadequate); *Cheyenne River*, 482 F.2d at 1146 (describing balancing test federal courts apply to determine whether exhaustion of tribal remedies is appropriate); *Oliver*, 424 F. Supp. at 489 (applying balancing test).

50. 436 U.S. 49 (1978).

51. *Id.* at 52. Commentators disagree over whether the *Santa Clara* decision was based primarily upon a lack of jurisdiction in the federal court to hear the claim or whether the result was compelled by the Court's determination that the Indian Civil Rights Act did not create an implied right of action. Language in the case supports both positions. At one point in the opinion, for instance, the Court highlighted the tribe's sovereign immunity from suit: "In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the Tribe under the Indian Civil Rights Act are barred by its sovereign immunity from suit." *Id.* at 59. Several pages later, the Court emphasized Congress's failure to articulate a private cause of action under the Act:

In the aftermath of *Santa Clara*, the federal courthouse doors seemed firmly closed to litigants challenging tribal compliance with the Indian Civil Rights Act.[52] In response to the lower courts' faithful application of *Santa Clara*, litigants fashioned a new collateral means of attack in federal court. Rather than attacking the tribal action directly as violative of a specific provision of the Indian Civil Rights Act, litigants began filing federal complaints alleging an absence of tribal power to engage in the challenged activity, thereby

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> Courts must be more than usually hesitant to infer from [Congress's] silence a cause of action that, while serving one legislative purpose, will disserve the other. Creation of a Federal cause of action for the enforcement of rights created in Title I [of the Indian Civil Rights Act], however useful it might be in securing compliance with § 1302, plainly would be at odds with the congressional goal of protecting tribal self-government.

Id. at 64; *see* Kevin J. Worthen, *Shedding New Light on an Old Debate: A Federal Indian Law Perspective on Congressional Authority to Limit Federal Question Jurisdiction*, 75 MINN. L. REV. 65, 88-90 (1990). Worthen admitted that a colorable claim may be made that the *Santa Clara* decision was based on the Court's conclusion that the Indian Civil Rights Act did not impliedly create a private cause of action. *Id.* at 88-89. He ultimately concluded, however, that a close examination of the entire decision, the ensuing results, and subsequent lower federal court and tribal decisions reveals that the Court's ruling was essentially a jurisdictional one that focused on the forum in which the claim may be brought rather than on the type of litigants bringing the action. *Id.* at 89. Worthen based his conclusion in part on the fact that, unlike a typical case denying a litigant access to the courts because of the lack of an implied right of action, the *Santa Clara* Court merely precluded federal forum relief. *Id.* In other words, the Court did not hold that claims arising under the Indian Civil Rights Act could not be brought at all by private litigants, but rather that the federal courts lacked the jurisdiction to adjudicate these claims. In addition, Worthen drew support from the fact that a typical no-implied-right-of-action case will provide that a federal official has the sole power to enforce the statute in question, with the consequence that federal court review of the statute remains undiminished. *Id.* at 90. This was not the result of the *Santa Clara* decision.

52. The sole noteworthy exception was the Tenth Circuit's decision in Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981). In that case, the court confirmed federal court jurisdiction to enter a large damages award against a tribe in a suit brought by non-Indian plaintiffs alleging that tribal action denying her access to her on-reservation property violated the Indian Civil Rights Act. *Id.* at 685. The *Dry Creek Lodge* opinion, however, did not garner widespread support and in fact has been narrowly construed by its own authors. *See, e.g.*, Nero v. Cherokee Nation of Okla., 892 F.2d 1457, 1460 (10th Cir. 1989) (explaining that the *Dry Creek Lodge* exception should be available only "where the dispute does not concern internal tribal issues, the plaintiff is non-Indian, and tribal remedies are unavailable"); *see also* White v. Pueblo of San Juan, 728 F.2d 1307, 1312 (10th Cir. 1984) ("Necessarily the *Dry Creek* opinion must be regarded as requiring narrow interpretation . . . ."); Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation, 673 F.2d 315, 319 n.4 (10th Cir. 1982) (suggesting that *Dry Creek Lodge* exception to tribal sovereign immunity is limited to cases involving "particularly egregious allegations of personal restraint and deprivations of personal rights").

recasting the dispute as jurisdictional in nature.[53] In *National Farmers Union Insurance Cos. v. Crow Tribe of Indians*,[54] the Supreme Court agreed that these jurisdictional challenges did indeed arise under federal law for the purpose of establishing federal question jurisdiction, but instructed the lower courts to stay their hand until the litigants had exhausted their tribal remedies.[55]

B. The Supreme Court Speaks—National Farmers *and* Iowa Mutual

Although the facts underlying *National Farmers* involved routine questions of negligence and liability insurance coverage, the five courts issuing opinions in the case never came close to reaching the merits of the dispute.[56] Leroy Sage, a minor and a member of the Crow Tribe, was injured when a motorcycle struck him in his school parking lot.[57] The school, owned and operated by the State of Montana, was located on fee land[58] within the boundaries of the

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53. *See, e.g.*, Snow v. Quinault Indian Nation, 709 F.2d 1319, 1321 (9th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984).

54. 471 U.S. 845 (1985).

55. *Id.* at 857.

56. Because the defendant insurance company failed to appear, the tribal court simply entered a default judgment in favor of the plaintiff. *Id.* at 848. The defendant then took up the matter in the federal district court. *See* National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 560 F. Supp. 213 (D. Mont. 1983), *rev'd*, 736 F.2d 1320 (9th Cir. 1984), *rev'd*, 471 U.S. 845 (1985). The district court first held that no federal statute or treaty delegated civil jurisdiction over non-Indians to the Crow Tribe. *Id.* at 216. It then held that the Crow Tribe was implicitly divested of its civil jurisdiction over torts committed by non-Indians. *Id.* at 216-17. Upon review, the circuit court of appeals reversed the trial court and dismissed the case upon jurisdictional grounds. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 736 F.2d 1320, 1323 (9th Cir. 1984) ("Neither the constitution nor the Indian Civil Rights Act provides a basis for a federal cause of action. . . . National's complaint must be dismissed for failure to state a claim for federal relief."), *rev'd*, 471 U.S. 845 (1985). The Supreme Court likewise found no occasion to remark upon the merits of the dispute during its formulation of the new exhaustion policy. *National Farmers*, 471 U.S. 845 (1985).

57. *National Farmers*, 471 U.S. at 847.

58. Private, non-Indian ownership in fee of land within Indian reservations came about principally through the operation of the General Allotment Act of 1887, Act of February 8, 1887, Ch. 119, 24 Stat. 388 (codified in scattered sections of 25 U.S.C.). The General Allotment Act, along with other allotment acts of more restricted scope, served ultimately to transfer tribally owned lands into private hands. The allotment acts granted relatively small parcels—generally 40 to 160 acres—to individual Indians. The parcels were initially to be held in trust by the United States for a 25-year period before being transferred outright to the individual Native American.

Most of the land that passed out of trust status was eventually transferred to non-Indians, oftentimes for meager consideration. *See* FELIX S. COHEN, *supra* note 33, at 130. By 1934, when the Indian Reorganization Act, 25 U.S.C. § 462 (1988), put a halt to further allotments and extended in perpetuity the trust period of lands still held by the U.S., huge

Crow Indian Reservation.[59] Sage's guardian filed a complaint in the Crow Tribal Court against the school district, seeking compensation for medical expenses and damages for pain and suffering.[60] Process was served on the Chairman of the School Board, who failed to inform the school district of the pending lawsuit.[61]

The tribal court entered a default judgment against the school district. Several days later, the school district and its insurance company sought relief in federal district court, alleging general federal question jurisdiction over their complaint and challenging the tribal court's power to enter the default judgment.[62] The district court granted a permanent injunction against execution of the default tribal court judgment, stating that the Crow Tribal Court had no subject matter jurisdiction over the underlying tort.[63] The Ninth Circuit reversed the district court and vacated its injunction. The court of appeals concluded that the district court itself lacked subject matter jurisdiction over the school district's complaint and held that challenges to the scope of the tribal court's adjudicatory power did not arise under federal law.[64]

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amounts of land had passed into non-Indian ownership. The allotment acts also provided for the outright sale of unallotted, "surplus" lands. These lands often comprised the lion's share of the reservation. Estimates of the total amount of acreage lost range from approximately 41 million acres, GETCHES ET AL., *supra* note 32, at 191, to more than 90 million acres, COHEN, *supra* note 33, at 614. As a result of Allotment Act policy, land ownership within many reservations resembles a checkerboard today, with non-Indian-owned parcels scattered throughout. The end result is a regulatory nightmare for many tribal governments.

For a sharp critique of Supreme Court opinions concluding that implementation of the Allotment Act resulted in decreased tribal sovereignty, see Singer, *supra* note 22, at 20-30.

59. *National Farmers*, 471 U.S. at 847.

60. *Id.*

61. *Id.*

62. *Id.* at 848.

63. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 560 F. Supp. 213, 217 (D. Mont. 1983), *rev'd*, 736 F.2d 1320 (9th Cir. 1984), *rev'd*, 471 U.S. 845 (1985).

64. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 736 F.2d 1320, 1323 (9th Cir. 1984), *rev'd*, 471 U.S. 845 (1985). The court construed Supreme Court precedent as establishing federal court jurisdiction to resolve disputes over "tribal regulatory jurisdiction" and declined to extend that jurisdiction to "the question whether a tribe has abused its adjudicatory jurisdiction." *Id.* The opinion reveals several bases for this holding: First, the court rejected as "untenable" the assertion that "the tribe's adjudicatory authority must be coextensive with its regulatory authority"; the court stressed that "cases are commonly adjudicated in forums that would lack the authority to regulate the subject matter of the disputes." *Id.* at 1322 n.3. Second, because the creation of a cause of action under federal common law is an "unusual course," and because Congress had already expressed its intent that federal review of alleged abuses of tribal court adjudicatory jurisdiction be limited to petitions for habeas corpus brought under the Indian Civil Rights

The Supreme Court reversed the Ninth Circuit and held that federal subject matter jurisdiction was not lacking.[65] The case raised a federal question, the Court reasoned, because "[t]he question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law."[66] At the same time, however, the Court announced that the school district and its insurance company must first challenge the tribal court's action in the appropriate tribal forum.[67] Only upon exhaustion of tribal court remedies would the federal courts hear a challenge to "either the merits or any question concerning appropriate relief."[68]

Two years after *National Farmers*, the tribal exhaustion rule was reiterated and slightly expanded to encompass diversity cases. In *Iowa Mutual Insurance Co. v. LaPlante*[69] the Court concluded that, although the federal court had jurisdiction over the underlying personal injury dispute pursuant to the diversity statute,[70] deference to tribal courts and general notions of tribal sovereignty again required the federal court to refrain from exercising its jurisdiction until the tribal court had completed its review.[71] In the majority opinion, Justice Marshall articulated the somewhat anomalous position that because the statutory language and legislative history of the diversity statute make no mention of tribal courts, and because tribal courts were nonexistent when diversity jurisdiction was first authorized by Congress, the statute could not be read as intending to permit the intrusion on tribal sovereignty that diversity jurisdiction represents.[72] Notwithstanding Justice Marshall's historical analysis,[73] the holding ultimately confirms the existence of federal

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Act, the court rejected the insurance company's argument that its claim could properly be heard under federal common law. *Id.* at 1322.

65. *National Farmers*, 471 U.S. at 857.

66. *Id.* at 852.

67. *Id.* at 856.

68. *Id.* The Court left the procedural posture of the federal action pending tribal court adjudication to the discretion of the federal courts: "Whether the federal action should be dismissed, or merely held in abeyance pending the development of further Tribal Court proceedings, is a question that should be addressed in the first instance by the District Court." *Id.* at 857.

69. 480 U.S. 9 (1987).

70. 28 U.S.C. § 1332 (1988).

71. *Iowa Mutual*, 480 U.S. at 16.

72. *Id.* at 17-18.

73. *See* Pommersheim, *Crucible of Sovereignty*, *supra* note 4, at 347-51. Citing pre-*Iowa Mutual* cases, Pommersheim first noted that the federal courts have viewed diversity jurisdiction as a method of filling in jurisdictional voids. *Id.* at 348-50. Pommersheim went

statutory diversity jurisdiction;[74] it merely postpones the exercise of that jurisdiction until after the tribal court has resolved the dispute.

Justice Stevens, author of the *National Farmers* opinion, filed the sole dissent in *Iowa Mutual.* In his view, the federal courts should exercise their diversity jurisdiction in all cases in which the statutory prerequisites are met; to refuse to do so, he argued, improperly "requires the federal court to avoid adjudicating the merits of a controversy also pending in tribal court although it could reach those merits if the case instead were pending in state court."[75] That inconsistency, according to Stevens, wrongly elevates the sovereignty of the tribe over the sovereignty of the state.

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on to discuss *Iowa Mutual*'s impact on this practice:

> The Court in *Iowa Mutual* . . . seemed to cast significant doubt about the vitality of the doctrine of diversity jurisdiction as a potential jurisdictional gap-filler when it noted that the diversity statute makes no specific reference to Indians and, in fact, Indians were not even considered state citizens when the statute was adopted in 1789. Application of the diversity doctrine in federal courts today is also clearly at odds with current federal Indian policy supporting tribal court development.

Id. at 350 (citation omitted). Pommersheim concluded with what he perceived to be the greatest flaw in the application of diversity jurisdiction in this context—its potentially discriminatory effects.

> Diversity jurisdiction is premised on the notion that in-state plaintiffs have ready, if not favorable, access to state forums, and diversity jurisdiction allows a non-resident plaintiff access to a more neutral federal forum. But this scheme breaks down in the context of diversity in the tribal court situation because no plaintiff has access to a state forum.

Id. at 350-51 (citation omitted).

Pommersheim's concerns can be assuaged, however, if one merely substitutes "a non-federal forum" in place of "a state forum." In other words, diversity jurisdiction need not be viewed narrowly as only providing a choice between state and federal court. It may instead be viewed more broadly in this context as offering a choice between a federal and a non-federal court. That there is often no state forum available is largely irrelevant, for when a matter is properly cognizable as arising under a tribal court's jurisdiction, that tribal court effectively stands in the stead of the state court.

Justice Stevens, concurring in part and dissenting in part in *Iowa Mutual,* dismissed any question regarding the propriety of diversity jurisdiction in the case by noting that the complaint as filed in the district court failed to "raise any question concerning the jurisdiction of the Blackfeet Tribal Court. For purposes of our decision, it is therefore appropriate to assume that the Tribal Court had concurrent jurisdiction over the dispute." *Iowa Mutual,* 480 U.S. at 20 (Stevens, J., concurring in part and dissenting in part).

74. 480 U.S. at 18-19; *see also id.* at 22 (Stevens, J., concurring in part and dissenting in part) ("I of course agree with the Court's conclusion that the Federal District Court had subject-matter jurisdiction over the case . . . .").

75. *Id.* at 22 (Stevens, J., concurring in part and dissenting in part).

C. *The Policy Underlying the Exhaustion Doctrine*

To date, *National Farmers* and *Iowa Mutual* constitute the Supreme Court's only pronouncements on the tribal exhaustion doctrine.[76] Because they establish new principles of federal Indian law, scrutiny of the opinions might be expected to reveal the underlying concerns that guided the decisions to create the new rules. But the decisions are not especially illuminating.

Somewhat surprisingly, the *National Farmers* Court never indicated that it was embarking on a new course. In fact, the Court devoted only a scant two paragraphs to the justifications for its holding. Broadly defining tribal exhaustion as a rule that allows "the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge,"[77] the Court provided three rationales for the new doctrine. First and foremost, the Court reiterated its recognition of Congressional commitment to the "policy of supporting tribal self-government and self-determination."[78] Second, the Court noted that allowing the tribal court to develop a full record prior to federal court involvement furthered the efficient administration of justice.[79] Finally, the Court suggested that the exhaustion doctrine would enhance the legitimacy of the tribal court system, thereby encouraging the tribal courts to explain their actions to the parties before them and making the benefits of their expertise available to federal courts during post-exhaustion review.[80]

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76. The Court has mentioned the tribal exhaustion cases in only three other Native American cases. In California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), *Iowa Mutual* was cited as support for the proposition that Congress has an "overriding goal of encouraging tribal self-sufficiency and economic development." *Id.* at 216. In Granberry v. Greer, 481 U.S. 129 (1987), a non-Indian habeas corpus case raising questions about the exhaustion of state remedies, the Court referred to the tribal exhaustion doctrine as "an inflexible bar to consideration of the merits of the petition by the federal court," thus suggesting that the doctrine is not subject to discretionary and flexible application for the lower courts. *Id.* at 131. *See infra* notes 88-142 and accompanying text. Finally, in Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989), the plurality emphasized that *National Farmers* and *Iowa Mutual* established only that the tribal courts have the initial power to determine the scope of their own jurisdiction, subject to subsequent federal review. *Id.* at 427 n.10.

77. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985).

78. *Id.*

79. *Id.*

80. *Id.* at 857.

While reaffirming the basic *National Farmers* holding, the *Iowa Mutual* Court elaborated on the justifications for tribal exhaustion.[81] Describing the doctrine's promotion of tribal sovereignty, the Court reasoned that a failure to require exhaustion would place the federal courts in direct competition with tribal courts.[82] Moreover, the *Iowa Mutual* Court noted that tribal appellate court jurisdiction would be completely circumvented if the federal courts heard direct challenges to the tribal trial courts' jurisdictional holdings.[83] The Court took care to reemphasize, however, that the tribal court's holding on its own jurisdiction was ultimately subject to review in the federal district court.[84]

The tenor of Justice Marshall's analysis makes clear that the only alternative to the exhaustion rule considered by the Court was "unconditional access to the federal forum."[85] From that perspective, exhaustion is clearly more respectful of the sovereign powers of the tribes and their courts. By shifting the basis of comparison, however, the potentially destructive effects of the exhaustion rule on tribal sovereignty become apparent. For example, the Ninth Circuit's opinion in *National Farmers* concluded that the federal courts had no subject matter jurisdiction whatsoever to review the tribal court's decision on the scope of its adjudicatory jurisdiction.[86] When compared to that holding, the tribal exhaustion rule represents a significantly more intrusive involvement in tribal court affairs.[87]

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81. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16-20 (1987).

82. *Id.* at 16.

83. *Id.* at 17.

84. *Id.* at 19; *see also National Farmers Union*, 471 U.S. at 856 (emphasizing that tribal court should develop a full record before the merits are addressed by a federal court).

85. *Iowa Mutual*, 480 U.S. at 16.

86. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 736 F.2d 1320, 1323 (1984), *rev'd* 471 U.S. 845 (1985).

87. Commentators disagree about the exhaustion rule's impact upon tribal sovereignty. Some critics concentrate on the rule's obvious benefits. *See, e.g.*, Pommersheim, *Crucible of Sovereignty*, *supra* note 4, at 329 (arguing that the "special force" of the exhaustion rule is its "explicit rules which curb the most prevalent attempts to undermine and circumvent tribal court jurisdiction"); Resnik, *supra* note 24, at 733 (asserting that the tribal exhaustion rule effectively accords tribal courts greater deference than the state courts enjoy since the tribal courts are less likely than the state courts to apply federal law); Frickey, *supra* note 11, at 1234 (noting that by the construction of the exhaustion rule, "the Supreme Court has given tribal courts the chance to show that they can fairly and effectively litigate civil disputes involving non-Indian defendants"); Taylor, *supra* note 9, at 233 (describing *National Farmers* as based on "the federal policy of tribal self-government and self-determination").

Other critics have looked beyond the exhaustion rule's silver lining and focused upon its cloud. *See, e.g.*, Clinton, *Legacy of Conquest*, *supra* note 10, at 150-51.

III. TRIBAL EXHAUSTION AFTER *NATIONAL FARMERS* AND *IOWA MUTUAL*

A. Beyond the Easy Cases

Although the scope and possible applications of the Supreme Court's tribal exhaustion doctrine are still uncertain, a few illuminating beacons have emerged in lower court decisions. The courts have unanimously agreed, for example, that the tribal exhaustion rule applies to lawsuits seeking redress for an alleged breach of contract,[88] tort,[89] or trespass[90] occurring on the reser-

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> [T]he ultimate Federal cause of action that the Court invented in [the exhaustion rule] reflects the ultimate colonialist distrust of leaving the final resolution of such questions to tribal governance. This result is all the more remarkable since the Federal Full Faith and Credit Act seems to require all courts within the United States to give full faith and credit to tribal court judgments. If a state court had ruled that it had subject matter jurisdiction over a controversy, the question might be reviewed on direct appeal to the United States Supreme Court if the alleged subject matter jurisdiction defect raised a federal question. Since the final judgment would be accorded full faith and credit, there would be absolutely no possibility of initiating a new action in federal court to attack that ruling. By contrast, *National Farmers Union* and [*Iowa Mutual*] support wholesale rejection and displacement of tribal court judgments if the federal district court disagrees with tribal adjudication of the scope of tribal subject matter jurisdiction over nonmembers.

Id. (citations omitted); *see also supra* notes 9-11.

88. *See, e.g.*, A & A Concrete, Inc. v. White Mountain Apache Tribe, 781 F.2d 1411, 1413-16 (9th Cir. 1986); Weeks Constr., Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668, 673-74 (8th Cir. 1986). Although the *Weeks* court ruled that it would be improper for the federal court to hear the lawsuit, the court did not order exhaustion of tribal remedies. *Id.* at 672-74, 676. Rather, the *Weeks* court interpreted the tribal exhaustion rule as applying only when a party seeks to challenge the jurisdiction of the tribal court over a case currently pending before that court. *Id.* at 672 n.3. The Seventh Circuit recently endorsed the *Weeks* court's rationale on that issue. Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803, 814-15 (7th Cir.), *cert. denied*, 114 S. Ct. 621 (1993). Although the Supreme Court has not considered this issue, other lower courts have expressly refused to limit the tribal exhaustion rule in that way. As those courts have noted, concerns for tribal sovereignty are equally implicated, regardless of the pendency of a tribal proceeding, any time the federal court is asked to resolve a lawsuit that falls within the scope of tribal court jurisdiction. *See, e.g.*, Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation, 27 F.3d 1294, 1299-1300 (8th Cir. 1994); Texaco, Inc. v. Zah, 5 F.3d 1374, 1375 (10th Cir. 1993); United States v. Plainbull, 957 F.2d 724, 728 (9th Cir. 1992); Crawford v. Genuine Parts Co., 947 F.2d 1405, 1407-08 (9th Cir. 1991); Burlington N.R.R. v. Crow Tribal Council, 940 F.2d 1239, 1246-47 (9th Cir. 1991); United States v. Tsosie, 849 F. Supp. 768, 70-71 (D.N.M. 1994); Cropmate Co. v. Indian Resources Int'l, Inc., 840 F. Supp. 744, 747 n.3 (D. Mont. 1993); Kaul v. Wahquahboshkuk, 838 F. Supp. 515, 517-18 (D. Kan. 1993); Middlemist v. Department of Interior, 824 F. Supp. 940, 944 (D. Mont. 1993).

vation and filed against a tribal entity or Native American defendant. The decided cases have involved lawsuits filed by both Indian[91] and non-Indian[92] plaintiffs; in every case, tribal ordinances authorized the tribal court's exercise of jurisdiction.

Beyond the clear core of tribal exhaustion cases described above, the unanimity of the lower federal courts gives way in their decisions on the addition of off-reservation contacts or interests, the presence of state or federal statutory issues, and challenges to the tribe's ability to regulate the activities of a non-Indian. A review of the cases reveals a broad spectrum of approaches—ranging from a somewhat begrudging acceptance of tribal exhaustion on the one hand, to extreme federal court deference to tribal court proceedings on the other. In fact, these cases parallel the range of state court opinions generated by the Supreme Court's *Williams v. Lee* analysis, in which the Court first began to sketch the boundaries of exclusive tribal court jurisdiction in the context of an encroaching state court system.[93]

Some lower federal courts, seemingly reluctant to apply the Supreme Court's *National Farmers* rule, have ordered exhaustion of tribal remedies only after placing the tribal court on a very short leash. In these cases, the courts have noted their displeasure with the plaintiffs' treatment on the reservation and conditioned their

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89. *See, e.g.*, Whitebird v. Kickapoo Hous. Auth., 751 F. Supp. 928, 930 (D. Kan. 1990); Williams v. Pyramid Lake Paiute Tribe, 625 F. Supp. 1457, 1459 (D. Nev. 1986).

90. *See, e.g.*, United States v. Turtle Mountain Hous. Auth., 816 F.2d 1273, 1275-77 (8th Cir. 1987).

91. *See, e.g.*, Wellman v. Chevron U.S.A., Inc., 815 F.2d 577, 578 (9th Cir. 1987).

92. *See, e.g., A & A Concrete, Inc.*, 781 F.2d 1411 (9th Cir. 1986).

93. *See, e.g.*, Enriquez v. Superior Court, 565 P.2d 522, 523 (Ariz. Ct. App., 1977) (applying *Williams v. Lee* to action, brought by non-Indians against Indians, arising from a car accident on a state highway within a reservation); Little Horn State Bank v. Stops, 555 P.2d 211, 215 (Mont. 1976) (refusing to enjoin enforcement of state court judgment against Native American defendant on the reservation). Noting that the underlying transaction occurred off the reservation, the *Little Horn* court refused to allow the Indians to "retreat to the sanctuary of the reservation for protection." *Id.* at 214. For a persuasive argument that *Little Horn* was wrongly decided, see Laurence, *Enforcement of Judgments*, *supra* note 32, at 594-607; *see also* State *ex rel.* Old Elk v. District Court, 552 P.2d 1394, 1398 (Mont. 1976) (holding that an Indian may not commit a crime off the reservation and then shield himself from criminal enforcement by returning to the reservation) (" 'The myth of Indian sovereignty has pervaded judicial attempts by state courts to deal with contemporary Indian problems. Such rationale must yield to the realities of modern life, both on and off the reservation.' ") (quoting Bad Horse v. Bad Horse, 517 P.2d 893, 897 (Mont. 1974)); Natewa v. Natewa, 499 P.2d 691, 693 (N.M. 1972) (refusing to find exclusive jurisdiction in the tribal court to determine child support obligations) ("Appellant cannot interpose his special status as an Indian as a shield to protect him from obligations that result from his marriage to appellee which had been entered into off the reservation.").

willingness to order exhaustion on the tribal court's compliance with the federal court's own view of proper judicial procedure.[94] In one case, in fact, the federal district court expressly declared that it would reassert its jurisdiction in the case if the tribal court allowed the tribe or the Native American defendant to engage in self-help with regard to the plaintiff's property, or if the tribal court failed to provide at least three days' notice of any order it planned to enforce.[95]

Other courts, though apparently more supportive of the Supreme Court's holdings, have crafted broad exceptions to remove cases from the rule's scope. One court has suggested, for instance, that exhaus-

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94. *See, e.g.*, Tom's Amusement Co. v. Cuthbertson, 816 F. Supp. 403 (W.D.N.C. 1993). In this case, a Georgia corporation sued a non-Indian owner of a gaming establishment on the Cherokee Indian Reservation, alleging a default in payments under a contract to install gaming equipment at the defendant's place of business on the reservation. *Id.* at 404. Although both parties to the dispute were non-Indian, the tribe's ordinance provided that the tribal court " 'shall exercise jurisdiction over all persons, firms, corporations, partnerships or other legal business entities which conduct business on Cherokee trust lands.' " *Id.* at 405 (quoting Rules of Court for the Cherokee Court of Indian Offenses § 1-2(e)). Noting that the contract itself mandated compliance with the tribe's gaming ordinance, and that the defendant held a gaming license issued by the tribe, the court recognized its obligation to adhere to the Supreme Court's rule of deference to the exercise of tribal court jurisdiction. *Id.* at 406. At the same time, though, the court noted its "displeasure" at the plaintiff's situation and treatment. *Id.* at 407. According to the facts as presented to the district court, defendant aparently did not object to the plaintiff's proposal to remove the gaming machines, concededly owned by the plaintiff, yet the defendant continued to assert that the contractual payments due to the plaintiff were illegal under the tribe's gaming ordinance. *Id.* at 406-07. As a result, the court issued a stay of federal court proceedings to allow exhaustion of tribal remedies, but stipulated that it would lift the stay if the defendant or the tribe engaged in "self-help" with regard to plaintiff's gaming machines or if the tribal court failed to provide a minimum of three days' notice to the plaintiff of any action to be taken pursuant to a tribal court order. *Id.* at 407. The court also listed two other situations in which the stay should be lifted: exhaustion of tribal court remedies, or a finding by the tribal court that it does not have or declines to exercise jurisdiction in the case. *Id.*

In Tamiami Partners, Ltd. v. Miccosukee Tribe, 788 F. Supp. 566 (S.D. Fla. 1992), *rev'd on other grounds*, 999 F.2d 503 (11th Cir. 1993), the district court also issued orders staying the federal case, and noting that the stay would be "automatically lifted . . . upon the use of self-help by the Tribe, or upon the provision of less than two business days' notice to Tamiami Partners of impending action pursuant to a Tribal Court order." *Id.* at 570. The Eleventh Circuit's reversal of the district court's orders was based on its conclusion that the underlying complaint had failed to state a federal cause of action. Tamiami Partners, Ltd. v. Miccosukee Tribe, 999 F.2d. 503, 507 (11th Cir, 1993). The court remanded the case to the district court, however, concluding that "We are now aware of facts which suggest that the district court could have jurisdiction if the case arose today." *Id.* at 508.

95. *Tom's Amusement Co.*, 816 F. Supp. at 407. The court also indicated that it would exercise jurisdiction in the case in the event of a tribal court holding of no jurisdiction or upon exhaustion of tribal remedies. *Id.* The court did not, however, specify what the source of its federal court jurisdiction over the contract dispute would be.

tion of tribal remedies is appropriate only when the dispute involves "internal tribal affairs."[96] Another has held that the exhaustion rule is not triggered when the parties raise preliminary jurisdictional questions that cast doubt on the tribe's ability to assert sovereign power in the dispute.[97] Still other courts have created procedural barriers to the exhaustion rule, suggesting that exhaustion is not required when no tribal court proceeding is pending at the time the federal lawsuit is filed.[98]

In contrast to the careful, grudging application of the tribal exhaustion rule by some lower federal courts, others have required exhaustion in almost every case involving a Native American party or tribe. In these more deferential courts, exhaustion is used to allow the tribal court to rule on the scope of the tribe's legislative jurisdiction,[99] to determine whether a tribe's cancellation of a lease violated

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96. *See, e.g.*, Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community, 991 F.2d 458, 463 (8th Cir. 1993) (refusing to require exhaustion because "[t]he only remedies are those created in the [Tribe's nuclear radiation control] ordinance itself, and those remedies are void by virtue of the ordinance's preemption [by the federal Hazardous Materials Transportation Act]. This leaves NSP with nothing to exhaust."); Crawford v. Genuine Parts Co., 947 F.2d 1405, 1407 (9th Cir. 1991) ("[D]eference to tribal courts is not required when the disputed issue is not a 'reservation affair' or did not 'ar[i]se on the reservation' " (quoting Stock West Corp. v. Taylor, 942 F.2d 655, 661 (9th Cir. 1991)) (second alteration in original)); Burlington N.R.R. v. Blackfeet Tribe, 924 F.2d 899, 901 n.2 (9th Cir. 1991) ("Burlington Northern's failure to exhaust is not a bar to jurisdiction .... The complaint presents issues of federal, not tribal, law .... "), *cert. denied*, 112 S. Ct. 3013 (1992); *see also* United States v. Turtle Mountain Hous. Auth., 816 F.2d 1273, 1276 (8th Cir. 1987) (holding that exhaustion is "especially appropriate" here because the "facts tend to demonstrate that this is a purely internal tribal controversy").

97. *See also* United States v. Yakima Tribal Court, 806 F.2d 853, 860-61 (9th Cir. 1986) ("In *National Farmers*, the Court required exhaustion because the tribal court's power to exercise jurisdiction was not 'automatically foreclosed.' Where the tribal court lacks jurisdiction, however, exhaustion is not required." (citation omitted)). Under this approach, any litigant could seemingly avoid exhaustion by appropriately crafting his or her pleadings. *See* Alaska *ex rel.* Yukon Flats Sch. Dist. v. Native Village of Venetie, 856 F.2d 1384, 1388 (9th Cir. 1988).

98. *See, e.g.*, *Blackfeet Tribe*, 924 F.2d at 901 n.2 ("Burlington Northern's failure to exhaust is not a bar to jurisdiction .... [N]o proceeding is pending in any tribal court. ... " (citations omitted)); Weeks Constr., Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668, 672 n.3 (8th Cir. 1986); cases cited *supra* note 93. *Contra* Crawford v. Genuine Parts Co., 947 F.2d 1405, 1407 (9th Cir. 1991) (stating that "[w]hether proceedings are actually pending in the appropriate tribal court is irrelevant" to the federal courts' duty to require exhaustion of tribal court remedies).

99. Justice Scalia, dissenting in Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891 (1993), provided a succinct description of the term: "[Legislative jurisdiction] refers to the authority of a state to make its law applicable to persons or activities and is quite a separate matter from jurisdiction to adjudicate." *Id.* at 2918 (Scalia, J., dissenting) (quotations omitted). In *Iowa Mutual*, the Supreme Court noted that "the Tribe's adjudicative jurisdiction was coextensive with its legislative jurisdiction," thus signaling the

federal law,[100] to send the United States to tribal court in its efforts to enforce federal law against a tribal member,[101] or in any case in

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validity of applying this concept to Indian law. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 12 (1987). Nevertheless, the Court has not yet considered whether cases in which the tribe allegedly lacks legislative jurisdiction should be treated differently than cases in which the parties dispute the tribe's ability to exercise its adjudicatory jurisdiction to resolve the dispute before it. To complicate matters further, the Supreme Court itself and many lower courts use the term "regulatory jurisdiction" instead of "legislative jurisdiction." *E.g.*, South Dakota v. Bourland, 113 S. Ct. 2309, 2315 n.6, 2316 (1993); National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 736 F.2d 1320, 1323 n.4 (9th Cir. 1984), *rev'd*, 471 U.S. 845 (1985).

For an example of a case in which the court ordered exhaustion of tribal remedies in a challenge to the tribe's legislative jurisdiction, see Burlington N.R.R. v. Crow Tribal Council, 940 F.2d 1239, 1245-46 (9th Cir. 1991). In that case, the court ordered exhaustion of tribal court remedies in a challenge to a Crow Tribe ordinance purporting to regulate railroads crossing the reservation. *Id.* at 1240-42, 1245. Basic to the court's analysis was the conclusion that exhaustion was compelled by three policy considerations:

> The policy of tribal self-government and self-determination goes to the heart of this case. Through the challenged ordinance, the Tribe reasserts its commitment to sovereign authority over Reservation affairs. . . .
>
> The practical imperative of judicial efficiency also compels exhaustion of tribal remedies. . . . Here the Tribe itself is in the best position to develop the necessary factual record for disposition on the merits. . . .
>
> Finally, the Supreme Court has recognized that "[e]xhaustion of tribal court remedies . . . will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review."

Id. at 1245-46 (alteration in original) (quoting National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 (1985)); *see also* Middlemist v. Secretary of the U.S. Dep't of Interior, 824 F. Supp. 940, 944 (D. Mont. 1993), *aff'd* 19 F. 3d 1318 (9th Cir. 1994). ("Plaintiffs are suing Tribal officials and seek to invalidate a Tribal ordinance. Unquestionably, this case is a 'reservation affair' which triggers the mandatory exhaustion requirement" (quoting Stock West Corp. v. Taylor, 942 F.2d 655, 661 (9th Cir. 1991)); Kaul v. Wahquahboshkuk, 838 F. Supp. 515, 516-18 (D. Kan. 1993) (requiring exhaustion to allow the tribal court to determine whether the tribe has the power to apply a tribal business license requirement and tax to a non-Indian doing business on the reservation).

100. *See* Superior Oil Co. v. United States, 798 F.2d 1324, 1331 (10th Cir. 1986) (holding that exhaustion of tribal court remedies was required when the tribe effectively terminated Superior Oil's leases by refusing to grant permission to conduct predrilling seismic exploration and remanding to the district court to determine whether the actions of the tribe were motivated by bad faith, in which case exhaustion would not be required).

101. *See* United States v. Plainbull, 957 F.2d 724, 728 (9th Cir. 1992) ("The fact that the Government is attempting to enforce federal law is immaterial. The alleged trespass was to tribal land and considerations of comity require that the tribal courts get the first opportunity to resolve this case."); *see also* United States v. Tsosie, 849 F. Supp. 768, 769 (D.N.M. 1994) (ordering the litigants to tribal court for resolution of a suit brought by the United States on its own behalf and on behalf of a Navajo claimant alleging ownership rights under the General Allotment Act of 1887, notwithstanding the objections of all parties involved in the lawsuit).

which the tribal courts' assertion of jurisdiction is at least "colorable"[102] or "plausible."[103] In one of the more extreme examples of judicial willingness to require exhaustion of tribal remedies, one district court recently ordered the parties to tribal court[104] notwithstanding opposition by the United States and the other two parties to the lawsuit,[105] the fact that the land in dispute was not located on a reservation,[106] and the fact that both Native Americans claiming the land based their claims, respectively, on federal statutory law and an Executive Order.[107] In fairness to the lower federal courts, inconsistent interpretations of the tribal exhaustion doctrine stem not only from the courts' differing attitudes about the competency of tribal courts[108] and the proper delineation of tribal court jurisdiction, but

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102. Stock West Corp. v. Taylor, 964 F.2d 912, 920 (9th Cir. 1992) (en banc). In *Stock West*, the court concluded:

> Whether Colville Tribal law applies to a tort that involved certain acts committed on reservation land and other acts committed outside its territorial jurisdiction to induce another to perform a contract on tribal lands presents a colorable question that must be resolved in the first instance by the Colville Tribal Courts.

Id.

103. *Id.* at 919 (citing A & A Concrete, Inc. v. White Mountain Apache Tribe, 782 F.2d 1411, 1416 (9th Cir. 1986)). The court explained that "[b]y colorable we mean that on the record before us, the assertion of tribal court jurisdiction is plausible and appears to have a valid or genuine basis." *Id. See also* Espil v. Sells, 847 F. Supp. 752, 758 (D. Ariz. 1994) (equating "colorable" and "plausible") (quoting *Stock West*, 964 F.2d at 919); Cropmate Co. v. Indian Resources, Int'l, 840 F. Supp. 744, 747-48 (D. Mont. 1993) (same).

104. United States v. Tsosie, 849 F. Supp. 768, 769 (D.N.M. 1994).

105. *Id.*

106. *Id.*

107. *Id.* at 769-70.

108. Tribal justice systems vary tremendously in size, structure, funding, independence from the tribal council, and in the existence of written constitutions, codes, and procedural rules. Although most systems are underfunded and understaffed, THE INDIAN CIVIL RIGHTS ACT: REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 37-44 (June 1991) [hereinafter INDIAN CIVIL RIGHTS ACT: REPORT], a clear range of sophistication and judicial expertise exists. In 1992, for instance, the courts of the Navajo Nation handled 85,014 cases. *Indian Tribal Justice Act: Hearings on H.R. 1268 Before the Subcomm. on Native American Affairs of the Comm. on Natural Resources*, 103d Cong., 1st Sess. 84 (1993) (testimony of Robert Yazzie, Chief Justice of the Navajo Nation). The Navajo court system includes seven district trial courts, a family court in each district, an appellate court, and a traditional Navajo Peacemaker Court. *Id.* The tribe has a published code and caselaw reporter, and a bar association. INDIAN CIVIL RIGHTS ACT: REPORT, *supra*, at 33. In stark contrast, the Pueblo of Cochiti (population 970) handled 14 cases in 1983 in a traditional forum. The governor of the tribe serves as the judge, applying traditional Pueblo laws and customs, which are orally conveyed to each generation. Informal agreements exist among neighboring pueblos for mutual recognition of judicial decisions and orders. The Pueblo Council hears appeals. *Id.* at 77. Although size and caseload admittedly do not determine the ability of the tribal forum to resolve disputes brought before it, U.S. federal judges are likely to hesitate before consigning a multimillion

from uncertainties created by the Supreme Court's opinions themselves. In the next section, this Article examines the unanswered tribal exhaustion questions and explores possible resolutions.

B. Uncertainties Underlying the Tribal Exhaustion Doctrine

1. When Does the Exhaustion Doctrine Apply?

When the Supreme Court first articulated the tribal exhaustion rule, it provided few hints about when the lower courts should apply it. The *National Farmers* Court described the doctrine as intended to answer "the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind."[109] By "case of this kind," the Supreme Court could have meant that exhaustion is appropriate only in personal injury cases arising on a reservation;[110] in cases in which a tribal court has issued a default judgment and the losing party has failed to appeal that holding through the tribal court system; in cases in which a tribal court has begun proceedings prior to the filing of the federal lawsuit;[111] or, more broadly, in any case in which tribal court adjudicatory jurisdiction is not "automatically foreclosed"[112] either by Congress, by established judicial rule, or by longstanding practice and understanding on the part of the federal government.

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dollar lawsuit whose resolution depends on non-tribal issues to a forum unfamiliar with the underlying legal issues, especially when that forum is not constrained by federal constitutional limitations.

109. National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 855 (1985).

110. In fact, Justice Blackmun's concurring and dissenting opinion in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation* describes the exhaustion rule as requiring that "the issue of jurisdiction over a civil suit brought *against a non-Indian* arising *from a tort* occurring *on reservation land* must be resolved in the tribal courts in the first instance." 492 U.S. 408, 455 n.5 (1989) (opinion of Blackmun, J.) (citing Iowa Mut. Ins. v. LaPlante, 480 U.S. 9, 18 (1987)) (emphasis added).

111. For those courts the exhaustion rule is merely one of timing and will never bar federal review in the absence of a pending tribal proceeding. *See* cases cited *supra* note 98.

112. *See National Farmers*, 471 U.S. at 855 ("[W]e conclude that the answer to the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed, as an extension of *Oliphant* would require." (footnote omitted)). The *National Farmers* Court distinguished Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), on the ground that, in *Oliphant*, the Court found extensive documentation of both the legislative and executive branches' intention to deny tribal courts criminal jurisdiction over non-Indians. *National Farmers*, 471 U.S. at 876. No comparable evidence indicated the government's position on the role of tribal courts in civil disputes between Indians and non-Indians. *Id.*

Predictably, the federal courts have disagreed about when to require tribal exhaustion. Several major areas of disagreement involving both substantive and procedural questions have resulted. For instance, in several cases, federal courts have stated that the exhaustion rule applies only when a tribal judicial proceeding was pending at the time the federal lawsuit was filed;[113] others have concluded that the existence of ongoing tribal proceedings is immaterial and have ordered exhaustion when no tribal suit was pending.[114] Still other courts have avoided application of the exhaustion doctrine by holding it inapplicable to preliminary jurisdictional challenges such as whether the territory at issue remains within Indian country[115] or whether the tribal government is properly exercising sovereign powers.[116] Regarding the type of subject matter amenable to exhaustion, some courts limit the doctrine to "internal tribal controvers[ies];"[117] others order exhaustion for disputes despite the involvement of numerous off-reservation contacts and interests.[118] In *Stock West Corp. v. Taylor*,[119] for example, the

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113. *See* cases cited *supra* note 98.

114. Crawford v. Genuine Parts Co., 947 F.2d 1405, 1407 (9th Cir. 1991) (holding that "[w]hether proceedings are actually pending in the appropriate tribal court is irrelevant" to the federal courts' duty to require exhaustion of tribal court remedies (citation omitted)), *cert. denied*, 112 S. Ct. 1144 (1992).

115. Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387, 1422 (10th Cir. 1990), *cert. denied*, 498 U.S. 1012 (1990). The *Pittsburg & Midway Coal* court remanded the case to the district court to ascertain the extent to which the disputed lands were located within Indian country. *Id.* The court distinguished *National Farmers* and *Iowa Mutual*, concluding that those cases "did not extend to issues where reservation boundaries, in contrast to subject-matter jurisdiction, were at issue, as is the case here." *Id.* It should also be noted, however, that the tribe had not appealed the district court's determination that exhaustion of tribal court remedies was not necessary. *Id.*

116. Alaska v. Native Village of Venetie, 856 F.2d 1384, 1388 (9th Cir. 1988) (holding that the comity required by *National Farmers* and *Iowa Mutual* arises from a tribe's sovereignty and that the federal district court is the proper forum for delineating the scope of that retained sovereignty).

117. United States v. Turtle Mountain Hous. Auth., 816 F.2d 1273, 1276 (8th Cir. 1987) (ordering exhaustion in a trespass suit because the "facts tend to demonstrate that this is a purely internal tribal controversy, which the tribal court is uniquely situated to resolve"); *see also* Crawford v. Genuine Parts Co., 947 F.2d 1405, 1407-08 (9th Cir. 1991) (stating that the exhaustion rule "does not apply when the dispute is not a 'reservation affair' and did not 'arise on the reservation' " (citations omitted)), *cert. denied*, 112 S. Ct. 1174 (1992).

118. *See, e.g.*, Bank of Okla. v. Muscogee Creek Nation, 972 F.2d 1166, 1168 (10th Cir. 1992) (dismissing interpleader filed by bank in a dispute between a tribe and a corporation hired to manage tribal gaming activities and requiring exhaustion of tribal remedies notwithstanding the bank's assertion that all banking activities took place off the reservation); Stock West Corp. v. Taylor, 964 F.2d 912, 919 (9th Cir. 1992) (holding that exhaustion is required, despite the presence of off-reservation contacts, so long as "the assertion of tribal court jurisdiction is plausible and appears to have a valid or genuine

Ninth Circuit ordered exhaustion in a legal malpractice suit brought by a non-Indian corporation against a non-Indian tribal attorney.[120] The basis of the alleged malpractice was a letter written by the attorney and delivered to the corporation at its Portland, Oregon office.[121] The court concluded that tribal jurisdiction was at least "colorable,"[122] and hence required exhaustion under the *National Farmers* rule. In this way, the court noted, the tribal court would have an opportunity to determine "[w]hether Colville Tribal law applies to a tort that involved certain acts committed on reservation land and other acts committed outside its territorial jurisdiction."[123] The holding provoked a sharp dissent, which accused the majority of an unwarranted extension of the Supreme Court's exhaustion rule.[124] In the dissent's view, the unnecessarily broad opinion would require abstention upon the filing of any "[t]alismanic invocation of tribal court jurisdiction."[125] *Stock West* clearly illustrates an unresolved dilemma created by *National Farmers*: in its sketchy pronouncement

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basis" (citation omitted)).

119. 964 F.2d 912 (9th Cir. 1992) (en banc), *aff'g in part and vacating in part*, 737 F. Supp. 601 (D. Or. 1990).

120. *Id.* at 920.

121. *Id.* at 919-20.

122. *Id.* at 920.

123. *Id.*

124. *Id.* at 921-24 (O'Scannlain, J., dissenting).

125. *Id.* at 921. Undoubtedly, the dissent would have preferred to find an exception to exhaustion in line with the Seventh Circuit's approach in Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803, 815 (7th Cir.), *cert. denied*, 114 S. Ct. 621 (1993). The *Altheimer & Grey* court held that exhaustion was inappropriate in a contract dispute between a large Chicago law firm and a manufacturing enterprise wholly owned by the tribe. *Id.* at 815. While conceding that "[i]t is unclear as to how broadly *Iowa Mutual* and *National Farmers* should be read," the court concluded that exhaustion was unnecessary, as "there has been no direct attack on a tribal court's jurisdiction, there is no case pending in tribal court, and the dispute does not concern a tribal ordinance as much as it does state and federal law." *Id.* at 814. In addition, the court's decision was influenced by the Sioux manufacturing corporation's contractual agreement to submit to the venue and jurisdiction of the courts of Illinois. *Id.* at 815; *see also* Bull v. United States Dep't of Hous. & Urban Dev., 15 F.3d 1088, No. 92-35257, 1994 WL 6653, at *4 (9th Cir. Jan. 10, 1994) (unpublished opinion) (noting that a judicial order of tribal exhaustion "does not follow automatically from an assertion of tribal court jurisdiction"). In contrast, one author recently endorsed a broad interpretation of the exhaustion rule, concluding that "fidelity to the Supreme Court's rulings and the principles governing relationships between Indian tribes and the federal government requires federal courts to apply a clear rule of requiring exhaustion in all cases except when an exception that the Supreme Court has set forth applies." Joranko, *supra* note 9, at 261.

of the exhaustion doctrine, the Court gave no hint of its intended scope.

National Farmers and *Iowa Mutual* also offer conflicting suggestions about the applicability of the exhaustion rule when the primary dispute involves an alleged violation of federal law. Although the exhaustion rule was itself created to allow the tribal court to rule on an issue of federal law (whether the tribal court had jurisdiction over the dispute),[126] some courts nevertheless have held that the federal court need not defer to the tribal court for resolution of federal issues. In *Burlington Northern Railroad Co. v. Blackfeet Tribe*,[127] for example, a federal appellate court refused to require a tribal adjudication of the plaintiff's challenge to the tribe's power to tax its on-reservation right of way, noting that "[t]he complaint presents issues of federal, not tribal, law."[128]

In *Blackfeet Tribe*, the court articulated a principled difference between challenges to the scope of a tribal court's adjudicatory power, in which tribal exhaustion would be required, and disputes over a tribe's sovereignty-based regulatory authority or legislative jurisdiction, in which the court found exhaustion inappropriate.[129] That

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126. *See* National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 852 (1985) ("The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under [28 U.S.C.] Sec. 1331.").

127. 924 F.2d 899 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 3013 (1992).

128. *Id.* at 901 n.2. The Ninth Circuit, in a panel opinion later superseded by a rehearing en banc, referred to *Blackfeet Tribe* as "something of an anomaly." Stock West Corp. v. Taylor, 942 F.2d 655, 663 n.7 (9th Cir. 1991), *rev'd in part on rehearing*, 964 F.2d 912 (9th Cir. 1992) (en banc).

Other courts have expressed similar concerns about requiring exhaustion in cases involving questions of federal law. In Duncan Energy v. Three Affiliated Tribes of the Fort Berthold Reservation, 812 F. Supp. 1008 (D.N.D. 1992), *rev'd*, 27 F.3d 1294 (8th Cir. 1994), for instance, a federal district court concluded that exhaustion of tribal remedies was not appropriate in a suit disputing the power of the tribe to impose a particular tax. *Id.* at 1011-12. The court was unwilling to accept "the premise that only the tribal court has the power to determine the extent of the power of the tribal government," especially since "this is not a case where tribal jurisdiction is challenged, but a case where the power of the tribe to excise a severance tax is challenged." *Id.* Concurring in the judgment of the Eighth Circuit to reverse the district court's opinion, Judge Loken expressed considerable hesitation about applying exhaustion to the facts of this case. *Duncan Energy*, 27 F.3d at 1301-03 (Loken, J., concurring); *see also* Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803, 814 (7th Cir.) (noting, as one of several factors arguing against exhaustion, that "the dispute does not concern a tribal ordinance as much as it does state and federal law"), *cert. denied*, 114 S. Ct. 621 (1993); Myrick v. Devils Lake Sioux Mfg. Corp., 718 F. Supp. 753, 755 (D.N.D. 1989) ("The federal claims which form the basis of this lawsuit are properly heard in the federal court.").

129. *Blackfeet Tribe*, 924 F.2d at 901 n.2.

difference, however, is not suggested by the Supreme Court's analysis[130] and in fact was implicitly rejected by the Court's reversal of the Ninth Circuit's *National Farmers* opinion, which had premised its holding on that distinction.[131] Nevertheless, for some courts at least, the distinction between legislative and adjudicatory jurisdiction provides a more satisfactory accommodation of tribal sovereign interests and the federal courts' duty to exercise jurisdiction in cases presenting federal questions.[132] In a similar vein, some courts have avoided tribal exhaustion by holding that it did not apply when the court independently concluded that the tribal court had no jurisdiction over the dispute[133] or when the court found that the tribal ordinance was preempted by federal law.[134] On their face, these cases seem

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130. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 853-56 (1985). Rather than base its decision upon categorical distinctions, the Court took care to demonstrate that the propriety of exhaustion hinges upon the facts of a particular case. *Id.* at 855-56. As an illustration, the Court compared the facts underlying its earlier *Oliphant* decision, in which it denied the tribal courts criminal jurisdiction over non-Indians, *see* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978), with those present in the matter before it. *National Farmers*, 471 U.S. at 853-55. The Court refused to apply the reasoning of *Oliphant*, stating that,

> although Congress's decision to extend the criminal jurisdiction of the federal courts to offenses committed by non-Indians against Indians within Indian Country supported the holding in *Oliphant*, there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation.

Id. at 854. The Court went on to describe the proper approach to deciding whether tribal court jurisdiction is proper in the first instance:

> [T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

Id. at 855-56 (footnotes omitted).

131. *See* National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 736 F.2d 1320, 1323 (1984).

132. *See, e.g.*, Burlington N.R.R. v. Blackfeet Tribe, 924 F.2d 899, 901 n.2 (9th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 3013 (1992); Blue Legs v. United States Bureau of Indian Affairs, 867 F.2d 1094, 1098 (8th Cir. 1989) (interpreting the Resource Conservation and Recovery Act of 1976 as conferring exclusive jurisdiction on federal courts). Similarly, the Seventh Circuit refused to order exhaustion in a dispute involving on-reservation entities, in part because "the dispute does not concern a tribal ordinance as much as it does state and federal law." Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803, 814 (7th Cir.), *cert. denied*, 114 S. Ct. 621 (1993).

133. United States v. Yakima Tribal Court, 806 F.2d 853, 861 (9th Cir. 1986) ("[E]xhaustion . . . [was] pointless because tribal court jurisdiction clearly was foreclosed by the sovereign immunity of the United States." (citation omitted)).

134. Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community, 991 F.2d 458, 463 (8th Cir. 1993) ("The only remedies are those created in

flatly inconsistent with *National Farmers*'s directive that exhaustion is necessary to allow the tribal court to determine the scope of its own jurisdiction.[135]

In direct contrast, other courts have required exhaustion in nearly identical situations. In *Burlington Northern Railroad Co. v. Crow Tribal Council*,[136] for instance, the Ninth Circuit ordered the plaintiff railroad to tribal court to challenge the applicability of the tribe's Common Carrier Ordinance to the railroad's lines passing through the reservation.[137] Similarly, in a challenge to a tribe's sovereign power to enforce a conservation ordinance on lands owned by non-Indians within the borders of the reservation, a Montana district court required exhaustion of tribal remedies.[138] In the "first major tribal tax case to be heard by a tribal court,"[139] a federal district judge refused to exercise jurisdiction over a case filed by several oil companies to challenge the applicability of a tribal severance tax to their operations on land held in trust for tribal members.[140]

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the [Tribal] ordinance itself, and those remedies are void by virtue of the ordinance's preemption [by the federal Hazardous Materials Transportation Act]. This leaves [Northern States Power Co.] with nothing to exhaust.").

135. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856-57 (1985). The Court noted:

> Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. . . . The risks of . . . "procedural nightmare[s]" . . . will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction . . . .

Id. at 856-57 (citation omitted).

136. 940 F.2d 1239 (9th Cir. 1991).

137. *Id.* at 1247. Among other things, the ordinance created a tribal regulatory commission to ensure that the railroad provided "regular service" and "sufficient . . . freight and passenger facilities" on the reservation and to prevent the discontinuation of existing railroad service without the commission's approval. *Id.* at 1241.

138. Middlemist v. Secretary of the U.S. Dep't of Interior, 824 F. Supp. 940, 947 (D. Mont. 1993), *aff'd*, 19 F.3d 1318 (9th Cir. 1994). Similarly, in Kaul v. Wahquahboshkuk, 838 F. Supp. 515, 518 (D. Kan. 1993), the judge ordered tribal exhaustion for a non-Indian plaintiff challenging the tribe's sovereign authority over her on-reservation business.

139. NATIVE AMERICAN RIGHTS FUND, 1993 ANNUAL REPORT 8 [hereinafter NARF 1993 ANNUAL REPORT] (referring to Mustang Fuel Corp. v. Cheyenne Arapaho Tax Comm'n, 18 Indian L. Rep. (Am. Indian Law. Training Program) 6095 (Cheyenne-Arapahoe Dist. Ct., Jan. 31, 1991)).

140. Although the Oklahoma district court order is unpublished, the Native American Rights Fund, representing the tribe in this case, described the procedural history of the case in its annual report. *Id.* In 1991, the Cheyenne Arapaho Tribal Court granted summary judgment in favor of the tribe, Mustang Fuel Corp. v. Cheyenne Arapaho Tax Commission, 18 Indian L. Rep. (Am. Indian Law. Training Program) 6095, 6096 (Cheyenne-Arapaho Dist. Ct., Jan. 31, 1991). The Tribal Supreme Court has heard

The remarkable imprecision of the Supreme Court's announcement that exhaustion of tribal remedies would be required "in a case of this kind"[141] has failed to provide adequate direction on these crucial questions involving the scope of tribal court power.[142] Taken individually, each case presents a defensible stance about the proper accommodation of tribal and federal court power. Viewed together, however, the cases produce uneven and inconsistent applications of what is itself an uncertain principle.

2. The Scope of Post-Exhaustion Review

In both *National Farmers* and *Iowa Mutual*, the Supreme Court referred approvingly to post-exhaustion federal court review of the tribal court decision. The two holdings, however, cast the issue somewhat differently. The *National Farmers* Court suggested broad federal review by emphasizing the value of tribal adjudication and the development of a full tribal court record "before either the merits or any question concerning appropriate relief is addressed [by the federal

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arguments in the oil companies' appeal. NARF 1993 ANNUAL REPORT, *supra* note 138, at 8. It bears noting that the tribal trial court cited exclusively federal cases in its opinion.

Similarly, in Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation, 27 F.3d 1294, 1300-01 (8th Cir. 1994), the Eighth Circuit recently reversed the district court's refusal to order tribal exhaustion in a challenge to a tribal tax and to a tribal employment preference ordinance.

141. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 855 (1985).

142. See KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., 2 ADMINISTRATIVE LAW TREATISE § 15.2 (3d ed. 1994) for a discussion of challenges to agency jurisdiction in the context of exhaustion of administrative remedies. The Davis treatise details the full extent of judicial inconsistency, noting that "the Court's opinions on exhaustion do not form a consistent and coherent pattern," and describing the opinions as "difficult to reconcile." *Id.* at 312. The treatise proposes that a court consider four factors to guide its decision to order exhaustion of administrative remedies:

> (1) the extent of injury to petitioner from requiring exhaustion of administrative remedies, (2) the degree of difficulty of merits issue the court is asked to resolve, (3) the extent to which judicial resolution of merits issue will be aided by agency factfinding or application of expertise, and (4) the extent to which the agency has already completed its factfinding or applied its expertise.

Id. at 315. Some of the lower court tribal exhaustion holdings discussed above actually suggest reasoning similar to the Davis proposal. Several Supreme Court cases have, in one manner or another, similarly avoided the tribal exhaustion rule. *See, e.g.*, Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 425-26 (1989) (noting that whereas a tribe's inherent sovereignty ordinarily grants its tribal courts jurisdiction to hear matters arising on the reservation, this "sovereignty, however, is divested to the extent it is inconsistent with the tribe's dependent status, that is, to the extent it involves a tribe's 'external relations' " (citations omitted)).

court]."[143] For the *National Farmers* Court, then, some type of post-exhaustion review on the merits is clearly contemplated.[144] The potential breadth of that suggested review becomes clearer, however, when placed in the context of the factual dispute at issue in the case. Because the sole federal question in *National Farmers* was whether the tribal court had adjudicatory jurisdiction to hear the underlying personal injury lawsuit, the Court's reference to subsequent review "on the merits" suggests that the jurisdictional bootstrap may open up the entire tribal court resolution of the underlying negligence suit to federal court review. If that was the Supreme Court's intended result, the Court's repeated emphasis of its commitment to tribal sovereignty as a basis for the exhaustion doctrine seems disingenuous at best.

In contrast, the Court's subsequent *Iowa Mutual* opinion suggests that at least some part of the tribal proceedings will have a preclusive effect in subsequent federal court cases: "Unless a federal court determines that the Tribal Court lacked jurisdiction, . . . proper deference to the tribal court system precludes relitigation of issues raised by the [insurance law dispute] and resolved in the Tribal Courts."[145] Even though the *Iowa Mutual* Court appears to require substantially more deference to the tribal court proceedings than the *National Farmers* opinion would mandate,[146] the Court did not define clearly the range of issues entitled to post-exhaustion preclusion; nor did the *Iowa Mutual* Court recognize any inconsistency with its earlier endorsement in *National Farmers* of full federal court post-exhaustion review.

Given these uncertain and somewhat contradictory statements about the scope of post-exhaustion review, inconsistency among the lower federal courts was to be expected for this aspect of the tribal exhaustion rule as well. Considering the courts' general and strongly held commitment to the fullest exercise possible of adjudicatory jurisdiction,[147] it is not surprising that many courts have focused on

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143. *National Farmers*, 471 U.S. at 856.

144. The possible preclusive effect of tribal court decisions is unclear. As one commentator suggested, it will be "great weight, no weight at all, or something in between." Laurence, *Enforcement of Judgments*, *supra* note 32, at 646.

145. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987).

146. *See id.* at 21-22 (Stevens, J., concurring in part and dissenting in part).

147. *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976) ("Abstention from the exercise of Federal jurisdiction is the exception, not the rule."); *see also Iowa Mutual*, 480 U.S. at 22 (Stevens, J., dissenting) ("The mere fact that a case involving the same issue is pending in another court has never been considered a sufficient reason to excuse a federal court from performing its duty 'to adjudicate a controversy properly before it.' " (quoting County of Allegheny v. Frank Mashuda Co.,

National Farmers's reference to post-exhaustion review on the merits rather than on *Iowa Mutual*'s deferential statements about the preclusive effect of tribal court adjudication.[148] The cases suggest that a court's willingness to order exhaustion of tribal remedies often hinges upon its interpretation of the permissible scope of subsequent federal court review. That is, those courts that order exhaustion in the broadest range of circumstances are also those that stress the availability of comprehensive federal court review on the merits.[149] For these courts, the tribal court becomes something akin to a nonbinding factfinder. One court observed that

> [efficiency concerns] also compel exhaustion of tribal remedies before [the plaintiff] resorts to federal district court. Here the Tribe itself is in the best position to develop the necessary factual record for disposition on the merits. Without that tribal record, the federal district court here faced an action based on an uninterpreted tribal ordinance and an obscure factual background.[150]

Similarly, other courts describe the exhaustion doctrine as giving tribal courts the "first crack"[151] or the "first opportunity"[152] to evaluate the factual and legal claims,[153] clearly implying that a "second crack" or "second opportunity" will be made available to the litigants.

To date, only a handful of post-exhaustion challenges have actually been filed in federal court. It is at precisely this point, of

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360 U.S. 185, 188 (1959))).

148. *See, e.g.*, Burlington N.R.R. v. Crow Tribal Council, 940 F.2d 1239, 1246 (9th Cir. 1991) (quoting the expansive federal court review language of *National Farmers*).

149. In *Burlington N.R.R. v. Crow Tribal Council*, for example, the court began with a broad statement of the exhaustion doctrine: "[N]on-Indian defendants *must exhaust tribal court remedies* before seeking relief in federal court, even where defendants allege that proceedings in tribal court exceed tribal sovereign jurisdiction." *Id.* at 1244. The court then reiterated *National Farmers*'s language suggesting expansive federal court review. *Id.* at 1246; *see also* Superior Oil Co. v. United States, 798 F.2d 1324, 1328-29 (10th Cir. 1986) (holding that the federal district court is empowered to review a tribal court decision).

150. *Crow Tribal Council*, 940 F.2d at 1246.

151. Tom's Amusement Co. v. Cuthbertson, 816 F. Supp. 403, 406 (W.D.N.C. 1993) (quoting Stock West Corp. v. Taylor, 942 F.2d 655, 660 (9th Cir. 1991)).

152. *Superior Oil Co.*, 798 F.2d at 1329 (ordering tribal exhaustion in suit alleging that a tribe's cancellation of lease violated federal law; the court noted that "[t]he policy of exhaustion would afford the tribal court the *first opportunity* to evaluate the factual and legal bases for the challenge" (emphasis added)).

153. *Stock West Corp.*, 964 F.2d 920 (stating that whether the challenged statute "protects Mr. Taylor, who is a non-Indian, from suit for his work as counsel for two tribal corporations is a matter that requires an interpretation of legislative intent that should be conducted in the first instance by the . . . tribal courts"); *Superior Oil*, 798 F.2d at 1329.

course, that the courts' vague pre-exhaustion statements about the scope of post-exhaustion review acquires heightened significance. For federal courts trying to implement the Supreme Court's cryptic references to post-exhaustion review, two significant uncertainties always will arise: first, to what types of issues does the *Iowa Mutual* Court's concept of "proper deference" accord tribal court decisions a preclusive effect? And second, what level of review should apply to those tribal court findings for which post-exhaustion review is permissible?

Careful reading of the Supreme Court opinions suggests few guidelines. The *Iowa Mutual* Court's reference to the preclusive effect of the tribal court's decision encompassed only the resolution of the underlying allegation that the insurance company had acted in bad faith in refusing to settle the plaintiff's personal injury claim. Presumably, if the federal court concluded that the tribal court properly exercised adjudicatory jurisdiction over the case, it could not disagree with the tribal court's conclusion that the insurance company did or did not act in bad faith. At a minimum, then, the Supreme Court suggests that tribal courts' factual determinations and applications of tribal law to private disputes are binding on the federal courts. But what about the determination that a fee owner of land within the borders of a reservation is subject to the tribe's shoreline protection ordinance?[154] Or a holding that a tribe's cancellation of a lease did or did not violate federal law?[155] Or perhaps a decision that determines whether a tribal tax can be assessed on oil and gas activities on land allotted to individual Indians within the borders of the reservation?[156] Although the Court provided few hints about when "proper deference to the tribal court system"[157] precludes federal relitigation of an issue, it seems inconceivable that the Court contemplated that a tribal court's interpretation of "the outer boundaries of an Indian tribe's power over non-Indians"[158] would

154. *See* Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Namen, 665 F.2d 951 (9th Cir. 1982).

155. *See* Superior Oil Co. v. United States, 798 F.2d 1324, 1329 (10th Cir. 1986) (ordering exhaustion of tribal remedies for resolution of the allegation).

156. Mustang Fuel Corp. v. Cheyenne Arapaho Tax Comm'n, 18 Indian L. Rep. (Am. Indian Law. Training Program) 6095, 6095 (Cheyenne-Arapaho Dist. Ct. 1991).

157. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987).

158. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 851 (1985).

be unreviewable.[159]

In practice, the few cases involving post-exhaustion review demonstrate that the lower courts may be even less willing than the Supreme Court to attach a preclusive effect to the tribal court ruling. In *Little Horn State Bank v. Crow Tribal Court*,[160] the federal district court issued a permanent injunction prohibiting the enforcement of a tribal court order,[161] noting that the tribal court's "blatantly arbitrary denial of any semblance of due process"[162] had made it "extremely difficult" to follow the Supreme Court's exhaustion policy.[163] Although this case predates the Supreme Court's exhaustion rule and stands alone in its disparaging analogy of tribal court proceedings to a "kangaroo court,"[164] other federal courts have expressed a similar uneasiness and unwillingness to refrain from active review of tribal court proceedings.[165]

In *FMC v. Shoshone-Bannock Tribes*[166] the Ninth Circuit was the first federal appellate court to articulate legal standards for post-exhaustion review.[167] In that case, a non-Indian business operating

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159. *Id.* at 851-53. In the context of parallel state and federal court proceedings, Supreme Court decisions clearly establish that "matters litigated and decided in state court cannot be relitigated in federal court because of collateral estoppel." ERWIN CHEMERINSKY, FEDERAL JURISDICTION 440 (1989) (citing Allen v. McCurry, 449 U.S. 90 (1980)). Professor Chemerinsky criticized the breadth of *Allen*, because the state court defendant in that case had not chosen the state forum and had no ability to remove the case to federal court. *Id.* at 438-39. The Court's language in the tribal exhaustion cases, which in fact anticipated subsequent lower federal court review of tribal court decisions, suggested a quite different judicial attitude about the preclusive effect of tribal court determinations.

160. 690 F. Supp. 919 (D. Mont. 1988).

161. *Id.* at 920.

162. *Id.* at 923.

163. *Id.*

164. *Id.*; *see* Laurence, *Enforcement of Judgments*, *supra* note 32, at 590-609 (comparing *Little Horn* with similar cases involving jurisdictional questions); Williams, *Documents of Barbarism*, *supra* note 45, at 274-75 (criticizing the dominant white society's "totalizing strategy for dealing with tribalism's perceived difference in protecting the rights of those under its jurisdiction" by establishing generalizations about tribal courts as "kangaroo courts" from one isolated incident).

165. *See, e.g.*, Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation, 27 F.3d 1294, 1301-03 (8th Cir. 1994) (Loken, J., concurring) (agreeing that Supreme Court precedent requires a ruling of exhaustion but questioning the wisdom of that result); Espil v. Sells, 847 F. Supp. 752, 755-60 (D.Ariz. 1994) (ordering defendants to exhaust remedies in the Navajo Supreme Court but expressing confusion over the tribal court's conclusions); Tom's Amusement Co. v. Cuthbertson, 816 F. Supp. 403, 407 (W.D.N.C. 1993) (conditioning its order of tribal exhaustion on tribal court compliance with conditions specified by federal district court).

166. 905 F.2d 1311 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991).

167. *Id.* at 1313.

on land owned in fee within the borders of a reservation challenged the applicability of the tribe's Employment Rights Ordinance to its operations.[168] Under this ordinance, all employers are required to apply a hiring preference to Native Americans living on the reservation.[169] The Tribal Appellate Court had affirmed the trial court's order upholding the tribe's jurisdiction to enforce the regulation.[170] Dissatisfied with the outcome, the non-Indian corporation sought relief in federal court. The Ninth Circuit, reversing the district court's holding that the tribal court lacked jurisdiction to enforce the ordinance,[171] remanded the case to the tribal court for resolution of the plaintiff's contention that the ordinance was invalid under the Indian Civil Rights Act.[172] More interesting than its disposition of the merits, perhaps, was the court's announcement of the standards of review applicable to post-exhaustion proceedings in federal court.[173] According to the Ninth Circuit panel, the tribal court's factual determinations should be reviewed on a "clearly erroneous standard," while federal legal questions are to be reviewed de novo.[174] The court did not mention what, if any, standard of review is applicable to tribal court application and interpretation of tribal and state law.[175]

All in all, the scope of post-exhaustion federal court review is extremely uncertain. Although the Supreme Court has acknowledged the need for deference to tribal court decisions,[176] the limited

168. *Id.* at 1312.

169. *Id.*

170. *Id.*

171. *Id.* at 1315. The district court had "reversed" the tribal court, using an "independent review" standard. *Id.* at 1313. However, as one concurring judge has noted in another exhaustion case, the procedural basis for this course of action is by no means obvious. Duncan Energy Co. v. Three Affiliated Tribes of the Bort Berthold Reservation, 27 F.3d 1294 1301-03 (8th Cir. 1994) (Loken, J., concurring). No federal statute currently authorizes federal district court jurisdiction to review tribal court opinions. *See Duncan Energy*, *id.* at 1302 (Loken, J., concurring).

172. *FMC*, 905 F.2d at 1315. Under the Supreme Court's holding in *Santa Clara Pueblo v. Martinez*, federal court review of tribal court application of the Indian Civil Rights Act in civil matters is not available. 436 U.S. 49, 70 (1978). Presumably, those issues will be beyond the scope of post-exhaustion federal court review.

173. *FMC*, 905 F.2d at 1313.

174. *Id.* The Eighth Circuit recently approved of that legal standard for post-exhaustion review. *Duncan Energy*, 27 F.3d at 1300.

175. The Supreme Court of North Dakota has suggested that tribal determinations on issues of tribal law are not open to review in subsequent state court proceedings. Fredericks v. Eide-Kirschmann Ford, Mercury, Lincoln, Inc., 462 N.W.2d 164, 169 (N.D. 1990).

176. *See, e.g.*, Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987).

context in which the statement was made, coupled with the lower federal courts' unwillingness to limit federal review,[177] suggests that relitigation of issues already decided in tribal courts will be the rule rather than the exception. Moreover, the one federal court of appeals to articulate standards of review for tribal court proceedings suggested that even factual determinations made by a tribal court fall within the scope of federal court jurisdiction in a post-exhaustion lawsuit.[178]

3. The Exceptions to Exhaustion—Footnote 21

As if the vagueness of the tribal exhaustion rule were not enough, the *National Farmers* Court qualified its holding in the decision's twenty-first footnote, reminding the lower courts that

> [w]e do not suggest that exhaustion would be required where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.[179]

These stated objections, drawn broadly from the rule of exhaustion of administrative remedies,[180] were clarified slightly in *Iowa Mutual* when the Court stated that the "alleged incompetence of tribal courts" does not fall within one of the exceptions to tribal exhaustion.[181]

Perhaps because many courts have found alternative ways to avoid the exhaustion requirement,[182] footnote twenty-one's exceptions have not received widespread attention from the lower federal courts. And, unfortunately, those cases that do rely on the exceptions frequently misunderstand their scope. In *Superior Oil Co. v. United*

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177. *See, e.g.*, *FMC*, 905 F.2d at 1313; Tom's Amusement Co. v. Cuthbertson, 816 F. Supp. 403, 407 (W.D.N.C. 1993).

178. *FMC*, 905 F.2d at 1313. In a recent article on the tribal exhaustion doctrine the author argues that tribal court interpretations of tribal law should be binding on federal court, with de novo federal court review of federal law questions. Joranko, *supra* note 9, at 297. With respect to tribal court findings of fact, the author argues that the *FMC* court's clearly erroneous standard is inappropriately intrusive on tribal sovereignty. *Id.* at 299-306. Instead, he suggests, the Supreme Court's general rules of issue preclusion should apply to tribal court decisions as well. *Id.* at 302.

179. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 n.21 (1985) (citation omitted).

180. See DAVIS & PIERCE, *supra* note 142, § 15 for general discussion and description of the rule of exhaustion of state administrative remedies.

181. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987).

182. *See supra* notes 113-18 and accompanying text.

States,[183] for example, the Tenth Circuit suggested that if the plaintiff could prove on remand that the tribal council's interpretation of the plaintiff's leases was made in bad faith, the bad faith exception would remove the case from the scope of the exhaustion doctrine.[184] Although *National Farmers*'s footnote twenty-one does not specify whose bad faith is relevant, a logical reading suggests that the Court is concerned with bad faith on the part of the tribal court, not the tribal council.[185] If the bad faith exception can be read to encompass allegations of bad faith on the part of a litigant, the tribal court will thereby be deprived of jurisdiction over the very conduct it would otherwise be asked to prohibit or sanction.[186] Surely the Court did

183. 798 F.2d 1324, 1329 (10th Cir. 1986).

184. *Id.* at 1331.

185. In some instances those two bodies are one and the same. For example, the Constitution of the Santa Clara Pueblo tribe vests judicial authority in the tribal council. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66 n.22 (1978). Thus, Julia Martinez, by virtue of being denied a federal forum, was effectively denied all meaningful review of her claim because the tribal council that passed the ordinance was unlikely to find itself in violation of the Indian Civil Rights Act. *See id.* at 80 (White, J., dissenting). If the tribal council and the tribal judiciary are the same body, the bad faith exception should apply if the tribal council evidences bad faith in asserting jurisdiction. It is precisely in such a case that a litigant needs the protection of a federal forum. However, in *Superior Oil*, a case involving the Navajo Nation, the tribal council and the tribal court were two separate entities. *See* BUREAU OF INDIAN AFFAIRS, BRANCH OF JUDICIAL SERVICES, NATIVE AMERICAN TRIBAL COURT PROFILES 62 (1985). In that case, the bad faith of the tribal legislative officials should not have had any bearing on the application of the exhaustion doctrine.

186. For example, in Little Horn State Bank v. Crow Tribal Court, 690 F. Supp. 919 (D. Mont. 1988), the plaintiff bank sued the tribal court alleging violation of its due process rights under the Indian Civil Rights Act. *Id.* at 921. Prior to its Indian Civil Rights Act lawsuit, the bank had sought enforcement of a state court default judgment in Crow Tribal Court. *Id.* at 923. After waiting for a tribal court decision for two years, plaintiff exercised self-help and repossessed a forklift from the Native American defendants. *Id.* at 920-21. Shortly afterwards, the tribal court ordered the bank to return the forklift; the Native American defendants sought state court enforcement of that tribal court order. *Id.* at 921. Despite the bank's attempts to be heard, the presiding tribal judge allegedly refused to hold a hearing or accept motions. *Id.* The federal district court, agreeing with the bank's allegation that the tribal court's actions were illegal, issued a permanent injunction prohibiting the Crow Tribal Court from enforcing its order. *Id.* at 920. Although the district court opinion found that Little Horn Bank had exhausted its tribal remedies, the bank's allegations, if true, appear sufficient to establish bad faith by a tribal tribunal asserting jurisdiction. *Id.* at 923-24. Of course, a showing of bad faith would not render a federal injunction of a tribal court any less problematic in terms of tribal sovereignty. *Id.* at 923. In a similar case, A & A Concrete, Inc. v. White Mountain Apache Tribe, 781 F.2d 1411, 1417 (9th Cir. 1986), the Ninth Circuit suggested that if the appellants had proved that the tribal court's assertion of jurisdiction was made in bad faith, the federal district court would have been able to enjoin the tribe from enforcing its default judgment. *Id.* at 1417.

not mean to give the litigants themselves the power to determine the scope of the exhaustion rule.[187]

Similarly, although the exception for actions "patently violative of express jurisdictional prohibitions" seems more straightforward, the Court does not clarify *whose* jurisdictional provisions are relevant. Does the Court mean that exhaustion is not required when the tribal jurisdictional code clearly does not allow the tribal court to exercise jurisdiction, or should the inquiry focus on whether the tribal court's assertion of jurisdiction would patently violate federal limits on tribal jurisdiction? The Eighth Circuit in *DeMent v. Oglala Sioux Tribal Court*[188] suggested that the former inquiry is the intended meaning of the exception.[189] In its view, the federal court should analyze tribal law to determine whether tribal court jurisdiction is clearly prohibited.[190] Removing from the tribal court the power to determine whether its code establishes jurisdiction in a particular proceeding, however, runs counter to the Court's observation that the exhaustion doctrine allows tribal courts to provide the "benefit of

187. The same misunderstanding exists with regard to the futility exception. In *Superior Oil* the court assumed that if the Navajo Tribe and individual tribal officials acted in bad faith in withholding consent of assignments of leases and requests for seismic permits, exhaustion of tribal court remedies would be futile within the meaning of footnote 21's exception. Superior Oil Co. v. United States, 798 F.2d 1324, 1331 (10th Cir. 1986). This assumption seems unduly cynical when applied to the Navajo Nation's sophisticated tribal justice system, where an independent judiciary enjoys lifetime tenure. Further, the logic of the *National Farmers* decision, focusing as it does on the importance of allowing a tribal forum to ascertain the scope of its retained sovereignty in the first instance, argues against expanding the footnote 21 exceptions any more than necessary to preserve scarce judicial resources. *See* National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856-57 (1985)

188. 874 F.2d 510, 516-17 (8th Cir. 1989).

189. *Id.* at 516-17.

190. In *DeMent*, a nonmember of the tribe sought a federal writ of habeas corpus to regain custody of his children, who were residing on the reservation with their mother under a tribal court award of custody. *Id.* at 512. Both DeMent and the Eighth Circuit assumed that the "express jurisdictional prohibition" language of footnote 21 referred to tribal law. DeMent argued that, under Article V of the Oglala Sioux Constitution, the tribal court's jurisdiction extended only to members and to nonmembers who consented to its jurisdiction. *Id.* at 516. The tribe argued that § 48 of the tribal code, giving tribal court jurisdiction over child custody disputes in divorce proceedings, expanded its jurisdictional authority. *Id.* at 517. The Eighth Circuit concluded that, under the facts of the case, there was no patent violation of express jurisdictional provisions, and thus the district court had erred in hearing the case. *Id.* at 516. The court reasoned that, because DeMent had entered the reservation on three separate occasions intending to remove the children and had participated in a custody hearing in a tribal court, it was far from clear that DeMent had not consented to jurisdiction within the meaning of Article V of the tribal constitution. *Id.* at 516-17. The court further took note of the possible application of § 48 of the tribal code to the jurisdictional question. *Id.*

their expertise"[191] to the federal court. Surely the interpretation of the tribal code ought to remain within the province of the tribal court; a preferable reading of the "patently violative" exception would construe those words as applying to patent federal law restrictions on the tribal court's exercise of jurisdiction.[192]

Undoubtedly, footnote twenty-one's exceptions were intended to provide the lower courts some flexibility to refuse to order exhaustion in narrowly limited circumstances.[193] Nevertheless, the courts' apparent misunderstanding of the scope of these exceptions casts further doubt on the workability of the exhaustion rule itself.

4. Conflicting Presumptions of Jurisdiction

Although the Supreme Court did not provide significant detail regarding the scope of its tribal exhaustion rule in *National Farmers* or *Iowa Mutual*, the two opinions describe the reach of tribal sovereignty from a strong pro-tribal perspective. In one such passage, the Court even suggested a presumption of tribal jurisdiction: "Civil jurisdiction over [the activities of non-Indians on reservation lands] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute."[194]

When viewed in the context of recent Supreme Court holdings in federal Indian law, that sentence stands in stark contrast to language in the Court's important decision in *Montana v. United States*,[195] in which the Court denied the tribe's ability to regulate the hunting and fishing activities of nonmembers within the borders of the reservation on land owned in fee by nonmembers.[196] In that case, the Court's

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191. *National Farmers*, 471 U.S. at 857.

192. For example, in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), the Supreme Court held that retained tribal sovereignty does not extend to the exercise of criminal jurisdiction over nonmembers. *Id.* at 212. The Court found that not only did early treaty provisions assume that the tribes did not have criminal jurisdiction over non-Indians absent the permission of Congress, but that, historically, "Congress consistently believed this to be the necessary result of its repeated legislative actions." *Id.* at 204. Because federal law had clearly divested tribes of jurisdiction over nonmembers, the tribe's exercise of jurisdiction was "patently violative" of federal jurisdictional prohibitions. *Id.* at 211-12.

193. Similar exceptions to the general rule of exhaustion of state administrative remedies have likewise produced a large body of inconsistent and confusing case law. *See generally* DAVIS & PIERCE, *supra* note 142, §§ 15.5-15.7 (discussing exceptions to exhaustion rule such as the constitutional right exception, waiver exeption, and other "unacknowledged" exceptions).

194. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987).

195. 450 U.S. 544 (1981).

196. *Id.* at 564-67.

presumption was quite different: the Court reviewed case precedent and noted "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[197]

Reconciling these apparently conflicting presumptions about tribal sovereignty is not necessarily difficult; quite simply, the *National Farmers* presumption might be construed as applying to the scope of tribal court adjudicatory jurisdiction—that is, the power of the tribal court to adjudicate the controversy before it. The *Montana* Court's opinion, in contrast, could be described as focusing on the scope of the tribe's regulatory control or legislative jurisdiction over nonmembers. For whatever reason, though, the Supreme Court implicitly rejected the neat distinction made by the Ninth Circuit in its *National Farmers* opinion.[198] Instead, the Court positioned *National Farmers*

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197. *Id.* at 565. With what are commonly called the *Montana* exceptions, the Court did recognize the inherent power of tribes to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribes or its members, through commercial dealing, contracts, leases, or other arrangements" ("the first exception") and to exercise civil authority over the conduct of non-Indians even on fee lands within the 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" ("the second exception"). *Id.* at 565-66.

Although these two exceptions appeared to leave ample room for continued affirmation of retained tribal sovereignty, the Court soon put to rest the hope that it would interpret those exceptions generously. In Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 432 (1989), the Court refused to allow the tribe to exercise zoning powers over non-Indians who owned land within portions of the reservation open to the public. The Court indicated that the second *Montana* exception "should not be understood to vest zoning authority in the tribe." *Id.* at 430 (opinion of White, J.). Rather, the court concluded that any significant tribal interest in activities taking place on fee land within the reservation would be entitled to protection under the Supremacy Clause of the federal Constitution. *Id.* at 431 (opinion of White, J.).

198. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 736 F.2d 1320, 1322 n.3 (9th Cir. 1984), *rev'd*, 471 U.S. 845 (1985).

In fact, the Court's lack of clarity in distinguishing legislative jurisdiction from adjudicatory or subject matter jurisdiction is not unique to federal Indian law. In EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991), for instance, the plaintiff alleged employment discrimination under Title VII of the Civil Rights Act, basing his complaint on actions that allegedly occurred while he was an overseas employee of an American corporation. *Id.* at 246-47. The Supreme Court upheld the lower court's decision to dismiss for lack of subject matter jurisdiction, holding that Congress did not intend to extend the protection of Title VII beyond the territorial borders of the United States. *Id.* at 255-59.

As one of the authors of a preeminent casebook on the conflict of laws has noted, surely the Supreme Court was wrong in its decision that the federal court had no subject matter jurisdiction to hear the lawsuit. The Court had actually concluded that because Title VII only protects individuals employed in the United States, the plaintiff had not pled "an essential element of a Title VII claim." LARRY KRAMER, TEACHER'S MANUAL TO ACCOMPANY CONFLICT OF LAWS, CASES-COMMENTS-QUESTIONS 246 (5th ed. 1993).

within the broader dispute over the scope of tribal power over non-Indians by distinguishing it from a recent case in which the Court had refused to allow tribal courts to exercise criminal jurisdiction over non-Indians.[199] Thus, by obfuscating the debate over the scope of tribal sovereign powers over nonmembers, the exhaustion doctrine has created yet another uncertainty.[200]

5. The "No Forum Problem"[201]

Although the "no forum problem" is not a creature of the exhaustion doctrine, it creates a complication left unaddressed by *National Farmers* and *Iowa Mutual*. The problem exists, for example, when a tribal ordinance fails to extend jurisdiction over the parties or over the cause of action that has come to federal court for relief,[202]

Thus, "[t]he proper disposition should have been to dismiss for failure to state a claim upon which relief can be granted." *Id.*

199. *National Farmers*, 471 U.S. at 854 (distinguishing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)). In Duro v. Reina, 495 U.S. 676 (1990), the *Oliphant* principle was extended to nonmember Indians. The *Duro* Court held that an Indian tribe may not assert criminal jurisdiction over an Indian who is not a tribe member. *Id.* at 679.

200. *See* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989). In that case, the Yakima Nation argued that the presumption of retained tribal sovereignty articulated in *National Farmers* and *Iowa Mutual* supported a broad gloss on tribal regulatory power. *Id.* at 422-23 (opinion of White, J.). The Court found the presumption inapplicable, stating that those cases had addressed only the question of tribal judicial jurisdiction, not tribal regulatory jurisdiction. *Id.* at 427 n.10 (opinion of White, J.). However, that limitation is not at all clear from the cases themselves. In *National Farmers*, for instance, the Court cited United States v. Wheeler, 435 U.S. 313, 326 (1978), for the proposition that "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependant status." *National Farmers*, 471 U.S. at 852 n.14. Similarly, in *Iowa Mutual*, the Court cited Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 n.14 (1982), as support for its assertion that "[b]ecause the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987).

201. *See* Pommersheim, *Crucible of Sovereignty*, *supra* note 4, at 347 (arguing that the "no forum" problem exists when a tribal court determines that "it does not have jurisdiction—judicial or legislative—and accordingly dismisses the case before it and where there is also no basis for state or federal jurisdiction").

202. For example, in Schantz v. White Lightning, 502 F.2d 67 (8th Cir. 1974), a non-Indian plaintiff was faced with a tribal jurisdictional statute that required plaintiffs to be "resident or doing business on the Reservation for at least one year prior to the institution of the proceeding." *Id.* at 69 (citing Code of Justice of the Standing Rock Sioux Tribe, § 1.2(c) (July 1973)). The Eighth Circuit opinion declined to find federal or state subject matter jurisdiction over the controversy, leaving the plaintiffs without a forum. *Id.* at 69-70. The tribal code also limited the tribal court's subject matter jurisdiction over such suits to those in which the amount in controversy did not exceed $300.00. *Id.* at 69 n.2.

or, in more extreme cases, when no tribal court system exists.[203] Presumably, a court would not apply the tribal exhaustion doctrine to send the parties to a nonexistent forum; but by the same token, it is unclear that the absence of a tribal forum should be sufficient to create federal jurisdiction.

In essence, the exhaustion doctrine introduces to the federal courts a problem familiar to state and tribal courts involved in delineating the proper spheres of their respective jurisdiction. In the aftermath of *Williams v. Lee*,[204] state courts wrestled with the "no forum" problem when deciding whether to uphold the assertion of state court subject matter jurisdiction. Some courts found that the absence of a tribal remedy or a tribal forum automatically gives rise to state court jurisdiction;[205] others concluded that the principles of

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Professor Pommersheim has described similar jurisdictional provisions in other tribal ordinances. Pommersheim, *Crucible of Sovereignty*, *supra* note 4, at 338-39 nn.63-68. The Rosebud Sioux Tribal Code, for instance, bars all claims for declaratory relief. *Id.* at 338 n.64. Prior to a 1986 amendment, the Rosebud code foreclosed personal jurisdiction over nonresident defendants. *Id.* at 338 n.65. The Oglala Sioux Tribal Constitution limits its judicial powers to cases involving tribal members "arising under the constitution, bylaws, or ordinances of the Tribe and to other cases in which all parties consent to jurisdiction." *Id.* at 339 n.68. Professor Pommersheim observed that tribal constitutional provisions evincing caution regarding tribal jurisdiction over non-Indians likely "reflect the drafting handiwork of the Bureau of Indian Affairs" but that this approach is "clearly at odds with the current trend toward meaningful self-determination and the support for tribal court authority" reflected in *National Farmers* and *Iowa Mutual*. *Id.* at 339.

203. *See, e.g.*, Chilkat Indian Village v. Johnson, 870 F.2d 1469, 1475 n.11 (9th Cir. 1989). In *Chilkat*, the Village had no tribal courts when it initiated the suit. By the time the Ninth Circuit heard the case, the Chilkat Village Council had authorized a tribal court system, but there was some question as to whether "those courts are actually organized and able to entertain cases." *Id.* As a result, the court decided to enforce the tribal ordinance itself. *Id.* at 1475-76: *see also* Native Village of Tyonek v. Puckett, 957 F.2d 631, 634 (9th Cir. 1992) (concluding that the district court has subject matter jurisdiction to hear Alaska native village's complaint seeking to evict nonmembers from its territory); Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1077 n.3 (9th Cir. 1990) (holding federal jurisdiction proper to entertain a suit brought by an Indian tribe to enforce its ordinance against a non-Indian, noting that tribe had no tribal court); Richardson v. Malone, 762 F. Supp. 1463, 1467 (N.D. Okla. 1991) (concluding that because of the absence of tribal courts and the lack of state court jurisdiction, federal courts would have jurisdiction over case). *See generally* Julie A. Pace, Comment, *Enforcement of Tribal Law in Federal Court: Affirmation of Indian Sovereignty or a Step Backward Towards Assimilation?*, 24 ARIZ. ST. L.J. 435 (1992) (reviewing the extent of tribal, state, and federal civil jurisdiction over Indian reservations and discussing unique situations civil litigants face when seeking an appropriate forum).

204. 358 U.S. 217 (1959).

205. *See, e.g.*, State *ex rel.* Old Elk v. District Court, 552 P.2d 1394, 1398 (Mont. 1976); Wildcatt v. Smith, 316 S.E.2d 870, 879 (N.C. Ct. App. 1984); County of Vilas v. Chapman, 361 N.W.2d 699, 703 (Wis. 1985).

Williams v. Lee preclude state jurisdiction regardless of the unavailability of a tribal forum.[206]

Transposed to the federal courts, the "no forum" problem presents new considerations. Those state courts that accepted jurisdiction in the absence of a tribal remedy or a tribal forum were able to rely on their general subject matter jurisdiction. Federal courts have no such analogue.[207] Under the *National Farmers* definition of federal question jurisdiction,[208] however, the federal courts have broad subject matter jurisdiction over lawsuits involving Native Americans and the tribes. If the absence of a tribal forum makes the exhaustion of tribal remedies impossible, the federal court may resolve the underlying dispute. In yet another context, therefore, the tribal exhaustion doctrine creates the possibility of broad federal jurisdiction over lawsuits that had previously been dismissed for lack of a federal question.[209]

6. Choice of Forum Clauses

In several recent contract disputes involving tribal enterprises, non-Indian parties have relied on "choice of forum" clauses to escape the exercise of tribal jurisdiction.[210] *National Farmers*' clearly left an important question unanswered: Can the parties agree to resolve

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206. *E.g.*, Enriquez v. Superior Court, 565 P.2d 522, 523 (Ariz. Ct. App. 1977) (noting that "the fact that the record here does not disclose whether the Tribal court does in fact provide a forum for the recovery for personal injuries is of no moment"); Schantz v. White Lightning, 231 N.W.2d 812, 816 (N.D. 1975); *accord*, COHEN, *supra* note 33, at 250 n.62.

207. Obviously troubled by that fact, Judge Loken concurred in the Eight Circuit's decision to require exhaustion of tribal remedies, but noted that post-exhaustion review would be unprecedented in view of the fact that " '[f]ederal courts . . . possess only that power authorized by Constitution and statute,' and I know of no statute giving the district and circuit courts jurisdiction to review tribal court decisions." Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation, 27 F.3d 1294, 1302 (8th Cir. 1994) (Loken, J., concurring) (quoting Kokkonen v. Guardian Life Ins. Co., 114 S. Ct. 1673, 1675 (1994)).

208. *See supra* notes 2-5 and accompanying text.

209. *See* cases cited *supra* notes 203-05. *But see* Northwest S.D. Prod. Credit Ass'n v. Smith, 784 F.2d 323, 325-26 (8th Cir. 1986) (holding that mortgagee's suit seeking foreclosure of Indian trust lands did not state federal cause of action, and tribal court had jurisdiction).

210. *See* Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803, 814 (7th Cir.), *cert. denied*, 114 S. Ct. 621 (1993); Nenana Fuel v. Native Village of Venetie, 834 P.2d 1229, 1233 (Alaska 1992) (refusing to order exhaustion because tribal entity had agreed to suit in state court); Fuller v. Blaze Constr. Co., 20 Indian L. Rep. (Am. Indian Law. Training Program) 6011, 6012 (Rosebud Souix Ct. App., Jan. 14, 1993) (remanding to trial court to determine validity of choice of venue provision in contract and to find whether the federal district court would have subject matter jurisdiction or if the court should defer to tribal court jurisdiction).

their disputes in a state or federal forum, even though the tribal court would also have jurisdiction over an eventual lawsuit? In one regard, the answer is straightforward; because choice of forum clauses cannot create jurisdiction,[211] the doctrine of *Williams v. Lee* will determine the legitimacy of state court assertions of jurisdiction.[212] The scope of federal court adjudicatory power, however, is not at all clear.

The validity of a choice of law provision expressly designed to allow the non-Indian parties to avoid suit in tribal court was at issue recently in *Altheimer & Gray v. Sioux Manufacturing Co.*[213] In that case, the Seventh Circuit refused to require the plaintiff, an Illinois law firm, to exhaust its tribal remedies in a suit to collect attorneys' fees allegedly owed by the defendant tribal enterprise.[214] The court found the *National Farmers* exhaustion rule inapplicable for many reasons: the tribal court would have to interpret unfamiliar state law because the contract specified that Illinois law would resolve all disputes; no tribal court proceedings were pending; no tribal ordinance was involved in the lawsuit; and no attack on the tribal court's jurisdiction had been made.[215] More importantly, the court noted that the tribal enterprise had sought "to avoid characterization of the contract as a reservation affair by actively seeking the federal forum."[216] To refuse to enforce the choice of law provision, the court concluded, might have the disastrous effect of making tribal enterprises noncompetitive in regional or national markets, "and the Tribe's efforts to improve the reservation's economy may come to naught."[217]

Choice of law provisions, then, may provide an effective means of counteracting the exhaustion doctrine. Given *National Farmers*'s broad definition of federal jurisdiction, especially when combined with *Iowa Mutual*'s recognition of underlying federal diversity jurisdiction over on-reservation lawsuits, choice of law provisions may remove

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211. *See* Brown v. Washoe Hous. Auth., 835 F.2d 1327, 1328 (10th Cir. 1988) (holding that although the "sue and be sued" clause in the contract supported federal diversity jurisdiction, exhaustion of tribal remedies was required as a matter of comity).

212. In most sophisticated business deals between tribal and nontribal enterprises, however, off-reservation contacts are likely to be significant, thus weakening the claim of exclusive tribal jurisdiction. *See, e.g.*, Padilla v. Pueblo of Acoma, 754 P.2d 845, 850-51 (N.M. 1988) (confirming state court jurisdiction over Native American doing business off the reservation).

213. 983 F.2d 803 (7th Cir.), *cert. denied*, 114 S. Ct. 621 (1993).

214. *Id.* at 814-15.

215. *Id.* at 814.

216. *Id.* at 815.

217. *Id.*

many cases from tribal court. If concern for tribal sovereignty is really the motivating factor behind the exhaustion doctrine, however, perhaps the Seventh Circuit should have allowed the tribal court to determine the validity and scope of the contract's choice of law provision.[218]

IV. A PROPOSAL FOR JUDICIAL ABANDONMENT OF THE TRIBAL EXHAUSTION RULE

Although the most frequently stated justification for tribal exhaustion is to effectuate Congress's strong commitment to tribal sovereignty,[219] careful analysis of the Supreme Court's opinions and of the lower court implementation of those decisions reveals that the reality falls far short of that ideal. Worse yet, the doctrine has unnecessarily complicated at least two aspects of the jurisdictional line-drawing process among the state, tribal, and federal courts. First, by declaring that all disputes over the scope of tribal court jurisdiction are substantial federal questions,[220] the Court has added a new layer to what is often nothing more than a dispute between state and tribal court jurisdiction. And second, the doctrine has been interpreted by some courts as requiring exhaustion so that tribal courts may determine the scope of tribal regulatory power over individuals and territory,[221] even though that dispute is purely a question of federal law. In this section, the Article will analyze these deficiencies in the exhaustion doctrine and ultimately will call for the rule's demise.

A. Tribal Exhaustion and Tribal Sovereignty

On its face, the tribal exhaustion rule promotes tribal sovereignty by establishing that "tribal courts are the primary forums for adjudicating civil disputes on the reservation."[222] It is true that, since *National Farmers* and *Iowa Mutual*, the lower federal courts have refused to exercise federal court jurisdiction to resolve many on-reservation disputes, at least until the tribal court has taken its "first

218. Similar questions have arisen in tribal court. In Fuller v. Blaze Constr. Co., 20 Indian L. Rep. (Am. Indian Law. Training Program) 6011 (Rosebud Souix Ct. App., Jan. 14, 1993), for example, the tribal appellate court remanded a case to the trial court for an opinion on the enforceability of a contract provision that purported to give the defendant the sole power to choose federal court or tribal court for resolution of all legal disputes arising under the contract. *Id.* at 6011-12.

219. *See supra* note 87 and accompanying text.

220. *See supra* notes 54-55 and accompanying text.

221. *See supra* notes 154-59 and accompanying text.

222. Pommersheim, *Crucible of Sovereignty*, *supra* note 4, at 329.

crack"[223] at the matter. The negative implications of these opinions may be less obvious, but they are no less real.

First and foremost, the tribal exhaustion rule has become a jurisdictional bootstrap, creating federal question jurisdiction for many disputes previously found to be outside the purview of the federal courts. Prior to the exhaustion rule, for example, the federal courts routinely dismissed lawsuits brought to resolve on-reservation contract claims,[224] lease disputes,[225] and personal injury cases.[226] Under *National Farmers*'s expansive definition of federal question jurisdiction, however, these cases now present issues that will ultimately be decided by the federal courts. Rather than establishing a barrier to federal court involvement in tribal affairs, then, the exhaustion doctrine in essence opens the federal courthouse door for many disappointed tribal court litigants.

In addition, the tribal exhaustion doctrine suggests that subsequent federal court review will not be limited to jurisdictional questions. As discussed earlier, lower federal courts have generally interpreted *National Farmers* and *Iowa Mutual* as allowing expansive review of the merits of a dispute.[227] It is difficult to argue that tribal sovereignty is enhanced by a rule that treats the decisions of the

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223. Tom's Amusement Co. v. Cuthbertson, 816 F. Supp. 403, 406 (W.D.N.C. 1993) (noting that "[w]here the civil action involves non-Indian parties, concerns incidents which occurred off of the reservation, and will not impact the tribe's authority, there is little reason to require that the tribal court have first crack at the case").

224. Sac & Fox Tribe of Indians v. Apex Constr. Co., 757 F.2d 221, 223 (10th Cir.), *cert. denied*, 474 U.S. 850 (1985); Gila River Indian Community v. Henningson, Durham & Richardson, 626 F.2d 708, 715 (9th Cir. 1980) (denying federal question jurisdiction and noting that to assume jurisdiction would convert the federal court into a "small claims court for all [Indian contract] disputes"), *cert. denied*, 451 U.S. 911 (1981); Mescalero Apache Tribe v. Martinez, 519 F.2d 479, 481 (10th Cir. 1975); Littell v. Nakai, 344 F.2d 486, 488 (9th Cir. 1965), *cert. denied*, 382 U.S. 986 (1966); Blackfeet Tribe v. Wippert, 442 F. Supp. 65, 66 (D. Mont. 1977); Ware v. Richardson, 347 F. Supp. 344, 347 (W.D. Okla. 1972); *see also* Stock West, Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221, 1225 (9th Cir. 1989) (noting that "federal question jurisdiction does not exist merely because an Indian tribe is a party or the case involves a contract with an Indian tribe").

225. Morongo Band of Mission Indians v. California State Bd. of Equalization, 858 F.2d 1376, 1379, 1386 (9th Cir. 1988), *cert. denied sub nom.* Miller v. Morongo Band of Mission Indians, 488 U.S. 1006 (1989); United States *ex rel.* Rollingson v. Blackfeet Tribal Court, 244 F. Supp. 474, 478 (D. Mont. 1965).

226. Schantz v. White Lightning, 502 F.2d 67, 69 (8th Cir. 1974); Meeks v. McAdams, 390 F.2d 650, 651 (10th Cir. 1968); Begay v. Kerr-McGee Corp., 499 F. Supp. 1317, 1322 (D. Ariz. 1980), *aff'd*, 682 F.2d 1311 (9th Cir. 1982).

227. *See supra* notes 160-63 and accompanying text.

tribe's highest judicial body as open to relitigation in the lower federal courts.

B. *Upsetting the* Williams v. Lee *Applecart*

The negative effects of tribal exhaustion extend beyond the immediate context of disputed assertions of federal and tribal jurisdiction. In fact, the doctrine has important implications for determining the proper spheres of state and tribal court jurisdiction as well. In two important ways, the exhaustion doctrine has inserted a layer of unnecessary federal court involvement. First, by converting all challenges to tribal court jurisdiction into federal questions, it provides a federal overlay to what is in reality a jurisdictional dispute between the state and tribal courts, thus creating another forum in which determined litigants may challenge tribal court decisionmaking.[228] Pre-*National Farmers* cases dismissed by the federal courts for lack of federal question jurisdiction would now involve the federal question of the scope of tribal court jurisdiction.[229] Second, the exhaustion doctrine automatically prefers a tribal forum even when state court jurisdiction is proper.

Ever since the Supreme Court's decision in *Williams v. Lee*,[230] the state and tribal courts have strived to delineate the contours of exclusive tribal court jurisdiction.[231] At the same time, as tribes

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228. *See, e.g.*, Sanders v. Robinson, 864 F.2d 630, 631 n.1 (9th Cir. 1988) (referring to the case's "long and tortuous history"), *cert. denied*, 490 U.S. 1110 (1989); Tohono O'Odham Nation v. Schwartz, 837 F. Supp. 1024, 1034 (D. Ariz. 1993); Brown v. Rice, 760 F. Supp. 1459, 1462 (D. Kan. 1991).

229. *See, e.g.*, Gila River Indian Community v. Henningson, Durham & Richardson, 626 F.2d 708, 709, 715 (9th Cir. 1980) (dismissing negligence suit brought by tribe against architectural firm and building contractor.

230. 358 U.S. 217 (1959); *see supra* notes 28-35 and accompanying text.

231. For a detailed description of the evolution of this issue in Montana, see Margery H. Brown & Brenda C. Desmond, *Montana Tribal Courts: Influencing the Development of Contemporary Indian Law*, 52 MONT. L. REV. 211, 250-304 (1991); *see also* Frank Pommersheim, *Tribal-State Relations: Hope for the Future?*, 36 S.D. L. REV. 239, 248-76 (1991) (examining attempts by tribal and state courts to address the nature of the legal relationship between tribes and states). For recent state court discussions of the scope of tribal court authority, see, for example, Tracy v. Superior Court of Maricopa County, 810 P.2d 1030, 1041-46 (Ariz. 1991); Fredericks v. Eide-Kirschmann Ford, Mercury, Lincoln, Inc., 462 N.W.2d 164, 167-71 (N.D. 1990); Mexican v. Circle Bear, 370 N.W.2d 737, 741-42 (S.D. 1985). For state court cases in which the state concluded that *Williams v. Lee* did not oust the state court of jurisdiction, see Paiz v. Hughes, 417 P.2d 51, 52 (N.M. 1966); Alexander v. Cook, 566 P.2d 846, 849 (N.M. Ct. App. 1977) (assuming jurisdiction over a dispute involving tribal land and arising on the reservation because all parties were non-Indians); Rolette County v. Eltobgi, 221 N.W.2d 645, 648 (N.D. 1974) (concluding that state court has jurisdiction to entertain a suit filed by an Indian against a non-Indian).

have entered into increasingly complex business and economic development activities with non-Indian partners, the reach of *Williams v. Lee* has become less clear. In fact, state and federal courts have recognized that in cases involving numerous off-reservation and on-reservation contacts, concurrent state and tribal jurisdiction exists.[232] The court that ultimately exercises jurisdiction, of course, depends on the plaintiff's choice of forum when filing the suit.[233] The tribal exhaustion doctrine, though, ignores the states' interest in adjudicating disputes with numerous off-reservation contacts. By directing the parties to exhaust their tribal remedies, the federal court unnecessarily and automatically prefers the tribal court for resolution of all disputes involving a reservation or tribal contact. Again, this problem derives from the Supreme Court's broad definition of jurisdiction in its tribal exhaustion opinions: with the definition's virtually unlimited reach, the federal courts are now able to channel into tribal courts many cases that under a *Williams v. Lee* analysis would not fall within the tribal courts' exclusive jurisdiction.

C. *Restricting Federal Court Jurisdiction*

In another important way, the tribal exhaustion doctrine may improperly restrict the lower federal courts' general subject matter

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232. In Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989), Justice Blackmun noted "the Court has recognized coextensive state and tribal civil jurisdiction where the exercise of concurrent authority does not do violence to the rights of either sovereign." *Id.* at 466 (opinion of Blackmun, J.); *see, e.g., In re* Custody of K.K.S., 508 N.W.2d 813, 817 (Minn. Ct. App. 1993); C.W. v. D.W., 479 N.W.2d 105, 112 (Neb. 1992); Foundation Reserve Ins. Co. v. Garcia, 734 P.2d 754, 756 (N.M. 1987); Wacondo v. Concha, 873 P.2d 276, 280 (N.M. Ct. App. 1994); Jackson County Child Support Enforcement Agency *ex rel.* Jackson v. Swayney, 352 S.E.2d 413, 419-20 (N.C.), *cert. denied*, 484 U.S. 826 (1987); Harris v. Young, 473 N.W.2d 141, 145-46 (S.D. 1991); Wells v. Wells, 451 N.W.2d 402, 405-06 (S.D. 1990); Sanapaw v. Smith, 335 N.W.2d 425, 430 (Wis. Ct. App. 1983); *see also* White Mountain Apache Tribe v. Smith Plumbing Co., 856 F.2d 1301, 1306 (9th Cir. 1988) (concluding that the state court had jurisdiction when a suit is between non-Indians and "no Indian assets or other property situated in Indian country could be directly affected by [the judgment]"); A-1 Contractors v. Strate, 19 Indian L. Rep. (Am. Indian Law. Training Program) 3163, 3164 (D.N.D., Sept. 16, 1992) (holding that the tribal court had jurisdiction over a tort action arising from an automobile collision on the reservation between two non-Indians); Cowan v. Rosebud Sioux Tribe, 404 F. Supp. 1338, 1341 (D.S.D. 1975) (holding that the tribal court had jurisdiction over the matters of use and regulation of tribal lands); Lewis v. Sac & Fox Tribe of Oklahoma Hous. Auth. No. 78825, 1994 WL 43667, at *3 (Okla. Feb. 9, 1994) (holding that the state court had jurisdiction over a contract action involving land transactions between Indian buyers and state-created Indian housing authorities).

233. *See A-1 Contractors*, 19 Indian L. Rep. (Am. Indian Law. Training Program) at 3164 (referring to the plaintiff's "discretionary choice of forum").

jurisdiction. Although *National Farmers* and *Iowa Mutual* involved disputes over the tribal courts' adjudicatory jurisdiction over personal injury cases, the Court refused to limit its exhaustion rule specifically to that context. That is, with its general assertion that questions of tribal jurisdiction should be resolved initially in tribal courts, the Court suggested that the federal court should defer to the tribal forum on all challenges to tribal power.[234] As a result, lower federal courts have ordered exhaustion of tribal remedies in lawsuits filed in federal court to challenge the ability of a tribe to regulate a non-Indian's shorefront property[235] or to impose a tax on non-Indian businesses within the exterior borders of the reservation.[236]

Ordering exhaustion in this context runs counter to established Supreme Court precedent, both before and after *National Farmers*. In *Montana v. United States*,[237] for instance, the Court did not require the tribal court to provide a preliminary interpretation of the scope of the tribe's power to regulate the hunting and fishing activities of non-Indians on the reservation. Similarly, in *Kerr-McGee Corp. v. Navajo Tribe of Indians*,[238] a case decided in the same term as *National Farmers*, the Court made no mention of tribal exhaustion in a challenge to a tribal tax filed by a non-Indian corporate lessee.[239] Nor did the Court in its post-*National Farmers* decision in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*[240] remand to the tribal court for a determination of whether the tribe's zoning ordinance could apply to non-Indian defendants.[241] Similarly, exhaustion was not an issue in *South Dakota v. Bourland*,[242] in

234. *See supra* notes 3-5 and accompanying text.

235. *E.g.*, Middlemist v. Dep't of Interior, 824 F. Supp. 940, 947 (D. Mont. 1993), *aff'd*, 19 F.3d 1318 (9th Cir.), *cert. denied*, No. 94-42, 1994 WL 372819 (U.S. Oct. 31, 1994).

236. Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation, 27 F.3d 1294, 1299 (8th Cir. 1994). *But see* Texaco, Inc. v. Zah, 5 F.3d 1374, 1378 (10th Cir. 1993) (supporting exhaustion rule but remanding to district court for application of *National Farmers* to determine whether exhaustion of tribal remedies is appropriate in a case involving the applicability of tribal taxes to non-Indians on business activity occurring outside the reservation but within Indian Country).

237. 450 U.S. 544 (1981).

238. 471 U.S. 195 (1985).

239. *Id.* at 196-201. In Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), oil and gas lessees of the Jicarilla Apache Tribe also challenged the ability of the tribe to impose a severance tax on their mineral production. *Id.* at 133, 159. In their federal court challenge as well, no mention was made of the availability of a tribal court forum. Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 539 (10th Cir. 1980), *aff'd*, 455 U.S. 130 (1982).

240. 492 U.S. 408, 432-33 (1989).

241. *Id.*

242. 113 S. Ct. 2309 (1993).

which the Court upheld a challenge filed by the State of South Dakota to the Cheyenne Tribe's attempt to prevent non-Indian hunting on lands not owned by the tribe but located within the borders of the reservation.[243] Rather, in each of these cases, the Court addressed the challenge to the tribe's power over non-Indians on its merits, without mentioning the possibility of preliminary tribal court review.[244]

Moreover, allowing the tribal court to take "first crack" at issues that involve no question of tribal law serves no policy of the exhaustion doctrine.[245] As described by the Supreme Court, the exhaustion principle was designed to further the "orderly administration of justice" by allocating to a forum the resolution of disputes particularly within the scope of that forum's expertise.[246] Though interpretation of state and federal law is certainly within the purview of tribal court jurisdiction,[247] the tribal court can claim no particular or unique expertise in these areas. Applying the exhaustion rule to allow a tribal forum to decide whether the tribe retains its sovereignty to regulate delegates to the tribal forum a purely nontribal and exclusively federal question.

V. REDEFINING FEDERAL QUESTION JURISDICTION OVER TRIBAL MATTERS

A. The Supreme Court's Expansive Definition

Ironically, the tribal exhaustion rule itself became necessary in part because of the Supreme Court's broad definition of federal question jurisdiction. That is, by concluding that the scope of a tribe's adjudicatory and legislative power constituted a federal question, every civil dispute involving a tribal court or other tribal entity was

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243. *Id.* at 2319-21.

244. An Eighth Circuit judge recently made the same observation in a concurrence that described the difficult problems created by the tribal exhaustion doctrine. *See* Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation, 27 F.3d 1294, 1301-03 (8th Cir. 1994) (Loken, J., concurring).

245. For instance, in a case referred by the federal district court to tribal court for resolution of a dispute over the sovereign power of a tribe to impose a tax on non-Indian lessees, the tribal trial court cited federal cases exclusively in its analysis. *See* Mustang Fuel Corp. v. Cheyenne Arapahoe Tax Comm'n, 18 Indian L. Rep. (Am. Indian Law. Training Program) 6095, 6096 (Cheyenne-Arapahoe Dist. Ct., Jan. 31, 1991).

246. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856 (1985).

247. Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803, 814 (7th Cir.), *cert. denied*, 114 S. Ct. 621 (1993).

thereby transmogrified into a federal case.[248] As if to lessen the negative impact of that holding, the Court then added the requirement that all of these newly created federal cases first go through the tribal court system.[249] Thus, the Court first exacerbated the conundrum of federal plenary power by adopting a broad definition of federal question jurisdiction in the context of tribal court affairs, and then, perhaps feeling guilty about the blow it had just dealt to tribal sovereignty, proceeded to defer all of those questions to the tribal forum, while carefully preserving federal jurisdiction for subsequent review. In essence the tribal exhaustion doctrine is needed, not because the Supreme Court gives more weight to the sovereignty of the tribe than to the sovereignty of a state,[250] but rather because the Court has defined federal question jurisdiction so broadly that without exhaustion the federal courts could almost completely usurp the jurisdiction of the tribal courts.

Once the *National Farmers* Court concluded that questions about the scope of tribal adjudicatory jurisdiction in a personal injury suit constituted a federal question,[251] it was then confronted by a number of its own opinions, also involving challenges to the tribe's jurisdiction, that did not require or even mention exhaustion. Of those broad-ranging cases, the Court chose to distinguish only one, *Oliphant v. Suquamish Indian Tribe*.[252] In *Oliphant*, the Court held that tribes do not retain the sovereign power to punish non-Indians who commit criminal acts within the borders of their reservations.[253] Exhaustion was not required in *Oliphant*, the *National Farmers* Court explained, because federal legislation suggested that Congress envisioned exclusive federal prosecution of offenses committed by non-Indians in Indian country;[254] in addition, the Court noted, the federal government had longstanding and firmly-held convictions about the tribes' inability to exercise criminal jurisdiction over non-Indians.[255] Disputes over the proper scope of tribal court ad-

248. *National Farmers*, 471 U.S. at 852.

249. *Id.* at 856-57.

250. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 22 (1987) (Stevens, J., dissenting) (accusing the majority of suggesting that "the sovereignty of an Indian tribe is in some respects greater than that of the State of Montana, for example").

251. *See supra* notes 64-65.

252. 435 U.S. 191 (1978).

253. *Id.* at 212.

254. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 854 (1985).

255. *Id.*

judicatory jurisdiction in civil matters, in contrast, were not "automatically foreclosed" by similar federal policies.[256]

By describing *Oliphant* as an exception to the exhaustion rule because of its particular facts, rather than by concluding that challenges to coercive sovereign regulatory power are fundamentally different from challenges to the propriety of a tribal court forum, the Court unnecessarily equated disputes involving tribal legislative jurisdiction with disputes involving tribal court adjudicatory power.[257] Although the *National Farmers* Court took great pains to show why exhaustion was not required in *Oliphant*, it failed to address similar holdings in other cases. More importantly, though, the Court failed to explain why the two cases should be treated the same for purposes of delineating federal question jurisdiction. In essence, after *National Farmers* any dispute involving a tribe or brought before a tribal court is within the subject matter jurisdiction of the federal courts.[258]

B. The Proper Scope of Federal Question Jurisdiction in Indian Law

1. Distinguishing Adjudicatory Jurisdiction from Legislative Jurisdiction

Although the Supreme Court rejected the distinction between tribal legislative jurisdiction and tribal adjudicatory jurisdiction, the line drawn by the Ninth Circuit in its *National Farmers*[259] panel opinion warrants careful reconsideration. Perhaps because it recognized the broad implications of equating the jurisdictional dispute in *National Farmers* with challenges to tribal regulatory power that had always been the province of the federal courts, the Ninth Circuit held that the facts of *National Farmers* presented no federal

256. *Id.* at 855.

257. Justice Marshall, in his description of the prior proceedings in *Iowa Mutual*, however, did recognize the potential distinction between the scope of a tribe's adjudicative jurisdiction and the scope of its legislative jurisdiction. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 12 (1987). Unfortunately, the remainder of the opinion fails to distinguish between those two types of jurisdiction.

258. In Justice Blackmun's concurring and dissenting opinion in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation* he described *Iowa Mutual* as "holding that the issue of jurisdiction over a civil suit brought against a non-Indian *arising from a tort* occurring on reservation land must be resolved in the tribal courts in the first instance" and thus suggested a possible narrowing interpretation of the scope of exhaustion. 492 U.S. 408, 455 n.5 (1989) (opinion of Blackmun, J.) (emphasis added).

259. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 736 F.2d 1320 (9th Cir. 1984), *rev'd*, 471 U.S. 845 (1985).

question for jurisdictional purposes.[260] Thus, that court in effect left the plaintiff with its tribal remedies and barred federal court involvement in the dispute. As the Ninth Circuit recognized, federal court involvement in tribal jurisdictional disputes had been carefully limited to challenges to the coercive power of the tribe to regulate conduct of particular individuals.[261] *National Farmers*, in contrast, raised a fundamentally different question—the ability of a tribal judicial forum to adjudicate a controversy before it. As the Ninth Circuit noted, a judicial forum frequently applies a law other than its own to a dispute it adjudicates;[262] in that court's view, questions of tribal adjudicatory power are essentially different from questions of tribal regulatory or legislative power.[263]

At this preliminary point the Supreme Court parted ways with the Ninth Circuit: in its *National Farmers* decision, the Supreme Court clearly stated that because the scope of tribal sovereignty is a federal question, all jurisdictional challenges to tribal court adjudicatory power raise a federal question.[264] Though the Supreme Court may have stated that all jurisdictional challenges are indistinguishable, its actual holdings reflect a different reality.

Since the days of Chief Justice John Marshall's famous opinion in *Johnson v. M'Intosh*,[265] the federal courts have exercised jurisdiction over challenges to tribal regulatory power. Indeed, in *Montana v. United States*[266] the Court adopted a very limited view of the scope of that regulatory power, announcing what amounts to a

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260. *Id.* at 1323.

261. *See id.* The Ninth Circuit, reviewing the case law in its own circuit, cited two cases in which it had found federal question jurisdiction to review the permissible scope of tribal regulatory power over non-Indians. *Id.* (citing Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587, 591 (9th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984); Cardin v. De La Cruz, 671 F.2d 363, 365 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982)).

262. *See National Farmers*, 736 F.2d at 1322 n.3. As Judge Fletcher noted, "[c]ases are commonly adjudicated in forums that would lack the authority to regulate the subject matter of the disputes." *Id.*

Moreover, as one concurring judge in a recent Eighth Circuit exhaustion case observed, "the tribal court of course has jurisdiction to enforce a tribal tax or employment law. The federal question here goes to the merits of the case—whether the Tribe has the sovereign power to enact the tax and employment laws being enforced." Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation, 27 F.3d 1294, 1302 (8th Cir. 1994) (Loken, J., concurring).

263. *See National Farmers*, 736 F.2d at 1322.

264. *See* National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 852 (1985).

265. 21 U.S. (8 Wheat.) 543 (1823) (holding that Indian tribes had no power sustainable by courts in the United States to give title to land).

266. 450 U.S. 544 (1981).

presumption that tribal attempts to regulate nonmembers are invalid.[267] Until *National Farmers*, however, the Supreme Court had never considered a challenge to a tribal court's adjudicatory jurisdiction. In that initial consideration, though, the crimped *Montana* view of sovereignty did not surface. Instead, in the articulation of its exhaustion doctrine, the Court adopted a radically different presumption, concluding in *Iowa Mutual Insurance Co. v. LaPlante* that "[c]ivil jurisdiction over [the activities of non-Indians on reservation lands] presumptively lies in the tribal courts."[268]

With that language, the Court created confusion and inconsistency. First, it decided in *National Farmers* that, for purposes of federal question jurisdiction, distinguishing adjudicatory jurisdiction from legislative jurisdiction is improper;[269] simultaneously, the Court articulated a broad presumption in favor of tribal jurisdiction that is fundamentally inconsistent with its earlier statements about the scope of tribal sovereign powers over nonmembers.[270] Although the Supreme Court rejected the Ninth Circuit's distinction between legislative and adjudicatory jurisdiction, the Court's failure to consider fully the implications of its broad jurisdictional rule, coupled with its announcement of a presumption about the scope of tribal jurisdiction that contravenes the holdings of cases decided before and after *National Farmers*, suggests that reconsideration may be possible. In fact, in at least two oblique references in post-*National Farmers* cases, some justices have shown a willingness to distinguish the tribe's adjudicatory jurisdiction from its legislative jurisdiction.

First, in *Iowa Mutual Insurance Cos. v. LaPlante*,[271] which extended the tribal exhaustion rule to apply in diversity cases, the Court observed in a somewhat cursory manner: "Since the Tribe's adjudicative jurisdiction was coextensive with its legislative jurisdic-

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267. *Id.* at 565.

268. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987)

269. *See National Farmers*, 471 U.S. at 851-53.

270. *Iowa Mutual*, 480 U.S. at 18. The plaintiff tribe in *Brendale* relied on the Court's pro-sovereignty statements in *National Farmers* and *Iowa Mutual* to defend the tribe's exercise of regulatory power over non-Indians. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 427 (1989) (opinion of White, J.). Justice White's partial dissent, however, described that reliance as "misplaced" and clarified that the pro-sovereignty language in the exhaustion cases applied only to allow "the tribal courts initially to determine whether they have jurisdiction." *Id.* at 427 n.10 (opinion of White, J.). In his plurality opinion, however, Justice Blackmun asserted that Justice White had "read too little" into the exhaustion cases' pro-sovereignty position. *Id.* at 455 n.5 (opinion of Blackmun, J.).

271. 480 U.S. 9 (1987).

tion, the [tribal] court concluded that it would have jurisdiction over the suit."[272] Although the meaning of that observation is unclear and potentially inconsistent with the Court's references to the breadth of the adjudicatory jurisdiction of the tribal court,[273] it at least stands as evidence that the Court does recognize a difference between the two types of tribal jurisdiction.

More recently, in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*,[274] the Court held, through a curious amalgamation of pluralities, that the tribe retained the sovereign power to zone non-Indian fee lands located in a part of the reservation normally closed to the general public, but that it could not zone the non-Indian fee lands in the reservation's "open" area.[275] In his opinion for three members of the Court, however, Justice Blackmun described the exhaustion cases as requiring "that the issue of *jurisdiction over a civil suit* brought against a non-Indian arising from a tort occurring on reservation land must be resolved in the tribal courts in the first instance."[276] This gloss on the exhaustion rule

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272. *Id.* at 12.

273. In the context of the exhaustion rule, that observation is somewhat puzzling. The *National Farmers* Court ordered exhaustion of tribal remedies to allow the tribal court to resolve a personal injury claim that arose from an accident that occurred on a school located within the borders of the reservation, but not on tribal land. *National Farmers*, 471 U.S. at 847. Established Supreme Court precedent in *Montana* and *Brendale* strongly suggests that the tribe in *National Farmers* lacked regulatory jurisdiction over activities on school property; that is, it appears unlikely that a tribal building code, for example, would apply to the school. *See supra* text accompanying notes 196-200. Nevertheless, the Court implicitly recognized that, given the on-reservation location of the school coupled with the Indian status of the plaintiff, the tribal court forum was the proper place for adjudication of this lawsuit. *See National Farmers*, 471 U.S. at 856. For the *Iowa Mutual* Court to somehow link the scope of a tribe's "adjudicative jurisdiction" to the scope of its "legislative jurisdiction" adds yet another uncertainty to the Court's exhaustion rule.

274. 492 U.S. 408 (1989).

275. *See id.* at 428. Justice White, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, wrote an opinion that would deny the tribe's ability to zone non-Indian property at all locations on the reservation. *Id.* at 428. Justices Blackmun, Brennan, and Marshall believed that the tribe's exercise of zoning power could properly apply to all property within the reservation's exterior boundaries. *Id.* at 465 (opinion of Blackmun, J.). Justices Stevens and O'Connor, the two key swing votes, voted to uphold the tribe's zoning authority over non-Indian property only for land located in the "closed" portion of the reservation. *Id.* at 447 (opinion of Stevens, J.). Thus, Stevens and O'Connor concurred with White's opinion, which voted to deny all tribal zoning authority to non-Indian land, with respect to the "open" portion of the reservation. *Id.* (opinion of Stevens, J.).

276. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 472 U.S. 408, 455 n.5 (1989) (opinion of Blackmun, J.) (emphasis added). Interestingly enough, Justice Blackmun's description of the facts of the exhaustion cases was not quite accurate. The injury in *National Farmers* occurred, not on reservation land, but on land owned by

may indicate that at least some members of the Court do not equate challenges to tribal adjudicatory jurisdiction with challenges to tribal legislative jurisdiction for purposes of delimiting federal court involvement.

In sum, the Court's subsequent statements about different types of tribal jurisdiction and its actual holdings in the legislative jurisdiction cases belie its refusal in *National Farmers* to make that distinction. In fact, the Court has articulated very different starting presumptions about the legitimacy of tribal jurisdiction, which depend exclusively on whether the jurisdiction to be exercised is adjudicatory or legislative. Explicit recognition of the essential difference between the two would be an important first step towards a proper redefinition of federal question jurisdiction in Indian law.[277]

2. Removing Questions of Tribal Adjudicatory Jurisdiction from the Scope of Federal Jurisdiction

The conclusion that adjudicatory jurisdiction is different from legislative or regulatory jurisdiction does not, of course, necessarily dictate that one is a federal question while the other is not. Several important considerations, however, argue in favor of the Ninth Circuit's opinion that challenges to tribal adjudicatory jurisdiction should not constitute a federal question. Among the most immediate practical consequences, perhaps, is the observation that taken to its logical extreme, the expansive *National Farmers* definition of federal

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the State within the borders of the reservation. *National Farmers*, 471 U.S. at 847. Justice White also mentioned the exhaustion cases in his *Brendale* opinion. *Brendale*, 492 U.S. at 426 n.10 (opinion of White, J.). In a footnote, he rejected the tribe's argument that the exhaustion cases were relevant to judicial determination of the scope of retained tribal authority over non-Indians; rather, he limited the import of those cases to the exhaustion rule they establish. *Id.* (opinion of White, J.).

277. In a recent book review of the AMERICAN INDIAN LAW DESKBOOK, a treatise published by a group of Attorneys General from various western states, Professor Joseph Singer highlighted yet another unwelcome result of the Court's failure to distinguish adjudicatory jurisdiction from legislative jurisdiction. Professor Singer criticized the DESKBOOK for citing the legislative jurisdiction line of cases such as *Montana*, *Brendale*, and *Duro v. Reina* as support for a very narrow view of tribal court adjudicatory jurisdiction. Joseph W. Singer, *Remembering What Hurts Us Most: A Critique of the AMERICAN INDIAN LAW DESKBOOK*, 24 N.M. L. REV. 315, 326-27 (1994). In Professor Singer's view, the DESKBOOK authors were advancing their own political agenda by relying on the narrower view of sovereignty put forth in the legislative jurisdiction cases, while ignoring the Court's endorsement of tribal sovereignty as reflected in *National Farmers* and *Iowa Mutual*. *See id.* at 316-17, 325-27. In this way, he suggested, the authors' proposition that "tribes have no power over nonmembers unless the nonmember has entered tribal land or made a contract with the tribe or a tribal member" is somewhat misleading. *Id.* at 328.

question jurisdiction will allow for total federal court review of tribal court proceedings. For example, it would encompass disputes over whether the tribal court retains the sovereign power to award damages for pain and suffering, whether it can apply state law to the facts before it, or whether it can disallow interlocutory appeals. In essence, *National Farmers* raises every aspect of tribal court adjudication to the level of a federal question, and thus preserves the possibility of ultimate federal review in all of those cases. Given that approximately 200 tribes currently have tribal court systems,[278] some of which handle substantial caseloads,[279] the implications of *National Farmers* review for the lower federal courts is significant indeed.

In addition to the sheer practical implications of such enhanced federal oversight of tribal court proceedings, several other concerns argue against the federalization of disputes over tribal adjudicatory jurisdiction. The creation of a judicial system is the exercise of a most essential sovereign function, and the Supreme Court has frequently reiterated its commitment to full tribal sovereignty. Although the federal government has exercised substantial oversight in the development of tribal court systems, no Supreme Court opinion or Congressional enactment suggests that a tribal court is merely an agency of the federal government. In fact, the Supreme Court opinions are quite to the contrary: Since *Ex parte Crow Dog*,[280] the Court has not wavered from its holding that because tribal courts are emanations of inherent tribal sovereignty and not of the federal government, they are not subject to constitutional limits.[281] It is incongruous to hold that although tribal courts are free from the strictures of federal constitutional limits (a principle based on the tribes' precolonial sovereignty[282]), every aspect of their adjudicatory proceedings raises a federal question that can ultimately be reviewed and modified by the federal courts.[283]

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278. INDIAN CIVIL RIGHTS ACT: REPORT, *supra* note 108, at 29.

279. For instance, in 1983 the Navajo Tribal Courts handled 40,406 cases, the Blackfeet Tribal Court 8,158 cases, and the Rosebud Sioux Tribal Court, 6,237 cases. Of course, not all tribal court systems are as extensive in their operations. In the same year, some tribal courts, such as the courts of the Taos Pueblo or the Las Vegas Paiute Tribe, disposed of only a handful of cases. *Id.* at 32.

280. 109 U.S. 556 (1883).

281. *Id.* at 568, 572.

282. The Supreme Court has emphasized the independent origin and extra-Constitutional basis of tribal sovereign powers: "[T]he powers of local self government enjoyed by the [tribe] existed prior to the Constitution." Talton v. Mayes, 163 U.S. 376, 384 (1896).

283. *Ex parte Crow Dog*, 109 U.S. at 572.

Furthermore, even though Congress may possess the plenary power to impose substantial limits on tribal court adjudicatory power, it has studiously avoided legislation in this area. In marked contrast to its frequent and pervasive pronouncements in criminal law, where Congress has extinguished tribal power to exercise jurisdiction over many crimes,[284] Congress has not acted to delineate the proper scope of tribal court jurisdiction in civil cases.[285] Congressional commitment to tribal sovereignty and its failure to restrict tribal court jurisdiction over civil matters argue strongly in favor of removing the intrusive federal court supervision over the scope of tribal adjudicatory power envisioned by *National Farmers*.[286]

Moreover, unlike challenges to a tribe's assertion of its legislative jurisdiction, which are resolved solely by reference to federal law,[287] the scope of tribal court adjudicatory jurisdiction will depend crucially on the tribal court's interpretation of the wording of its own jurisdictional ordinances. Just as the federal courts are powerless to disagree with a state court's interpretation of its own laws, so too should the tribal court be the final arbiter of the scope and meaning of its legislative enactments.[288] To rule otherwise would contravene the

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284. *See* COHEN, *supra* note 33, at 285-307.

285. Most recently, in the Indian Tribal Justice Support Act, the 103rd Congress authorized appropriations upward of $50,000,000 per year for a seven-year period beginning in 1994. Pub. L. No. 103-76 (codified at 25 U.S.C. §§ 3601-3631 (Supp. 1994)). Professor Pommersheim has noted the "interesting[] . . . general absence of federal statutes that deal with the allocation of [tribal court] civil jurisdiction . . . ." Pommersheim, *Crucible of Sovereignty*, *supra* note 4, at 337.

286. National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985).

287. *See supra* notes 263-75 and accompanying text.

288. *See generally* Pommersheim, *Crucible of Sovereignty*, *supra* note 4, at 361 (arguing that tribal sovereignty and self-determination indicate the authority to declare and interpret the law that will govern in a tribal forum); Frank Pommersheim, *A Path Near the Clearing: An Essay on Constitutional Adjudication in Tribal Courts*, 27 GONZ. L. REV. 393, 419 (1991/1992) [hereinafter Pommersheim, *A Path Near the Clearing*] (noting that "it is less clear what a federal court should do when the alleged tribal court mistake is not one of federal law, but rather of tribal law"). For additional discussion, see R.J. Williams Co. v. Fort Belknap Hous. Auth., 719 F.2d 979, 983 (9th Cir. 1983) (noting that "if the dispute itself calls into question the validity or propriety of an act fairly attributable to the tribe as a governmental body," nontribal court adjudication would adversely affect tribal self-government). The Supreme Court's statements about the preclusive nature of tribal court interpretations of tribal law have been ambiguous at best. Admittedly, the Court has stressed that "tribal courts are best qualified to interpret and apply tribal law," Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1987), but its references to post-exhaustion review have not excluded tribal court interpretations of its own laws. *National Farmers*, 471 U.S. at 856 (allowing "a full record to be developed in the Tribal Court before *either the merits or any question concerning appropriate relief* is addressed" (emphasis added)). Understandably, some lower courts have interpreted Supreme Court precedent as allowing post-

essence of the Supreme Court's statements about the origin and independence of tribal judicial power.[289] Converting disputes over tribal adjudicatory power into questions of federal law intrudes on tribal sovereignty without furthering a federal interest.

Finally, as the Ninth Circuit noted in its *National Farmers* opinion, the Supreme Court has recognized that creating a federal common law cause of action is an "unusual course, to be approached cautiously."[290] Although the federal courts have heard challenges to tribal legislative jurisdiction since Chief Justice John Marshall decided *Johnson v. M'Intosh*,[291] *National Farmers* marked the Court's first foray into the scope of tribal adjudicatory jurisdiction.[292] Federal court creation of a common law cause of action is appropriate only in a " 'few and restricted' instances,"[293] when "necessary to protect uniquely federal interests,"[294] or when Congress has delegated lawmaking power to the federal courts.[295] Nothing in the *National Farmers* analysis suggests that the scope of tribal court adjudicatory jurisdiction qualifies as one of those extremely unusual situations. The facts simply do not establish the need for federal court supervision over the development of tribal court jurisdiction,[296] and the Supreme Court should remove those issues from the scope of federal question jurisdiction.

The "defederalization" of challenges to tribal court adjudicatory jurisdiction would recognize the tribal courts' fundamental sovereign

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exhaustion scrutiny of tribal court interpretations of tribal law. *See, e.g.*, Stock West Corp. v. Taylor, 964 F.2d 912, 920 (9th Cir. 1992); Burlington N.R.R. Co. v. Crow Tribal Council, 940 F.2d 1239, 1247 (9th Cir. 1990); Weeks Constr., Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668, 673-74 (8th Cir. 1986).

289. *See Ex parte* Crow Dog, 109 U.S. 556, 572 (1983).

290. *National Farmers*, 736 F.2d at 1323 (citing Milwaukee v. Illinois, 451 U.S. 304, 312-14 (1981)).

291. 21 U.S. 543 (1823).

292. *See National Farmers*, 471 U.S. at 845.

293. Milwaukee v. Illinois, 451 U.S. at 313 (citing Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963)).

294. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964).

295. Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981); *see also* National Audubon Soc'y v. Department of Water, 858 F.2d 1409, 1412-13 (9th Cir. 1988) (holding that there is no federal common law remedy under the Clean Air Act); District of Columbia v. Air Florida, Inc., 750 F.2d 1077, 1085-86 (D.C. Cir. 1984) (refusing to create federal common law public trust doctrine).

296. The Supreme Court and Congress have refused to create federal court jurisdiction over tribal court interpretations of the Indian Civil Rights Act, a federal law that applies selected provisions of the Bill of Rights to tribal governments. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); *Enforcement of the Indian Civil Rights Act: Hearing Before the United States Commission on Civil Rights*, 100th Cong., 2d Sess. 81-82 .

interest in determining the scope of their jurisdictional reach. In addition, it would remove an unnecessary federal overlay to what is frequently nothing other than a dispute between tribal courts and state courts. If, under a *Williams v. Lee* analysis,[297] a court would conclude that either the state or tribal courts could properly adjudicate a case, it is hard to defend federal court intervention to implement a rule that automatically prefers the tribal forum to its state counterpart.[298]

3. Eliminating the Exhaustion Requirement for Challenges to Tribal Legislative Jurisdiction

In contrast to the Court's recent declaration in *National Farmers* that the scope of tribal adjudicatory power is a federal question, longstanding case precedent confirms that challenges to tribal regulatory power are exclusively a question of federal common law. Under well-established principles, the Court's analysis will determine whether the challenged power falls within the scope of retained sovereignty or would be "inconsistent with the dependent status of the tribes."[299] The jurisdiction of the federal court to review challenges to tribal sovereignty is beyond dispute.[300] In fact, the *National Farmers* Court did not suggest that it intended to redirect the challenges to tribal legislative jurisdiction that had been resolved exclusively by the federal courts in cases such as *Montana v. United States*,[301] *Merrion v. Jicarilla Apache Tribe*,[302] and *New Mexico v. Mescalero Apache Tribe*.[303]

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297. *See supra* notes 28-35, 93 and accompanying text.

298. Justice Stevens expressed similar concerns in the Supreme Court's application of the exhaustion rule to cases coming to federal court pursuant to the court's diversity jurisdiction. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 21-22 (1987) (Stevens, J., dissenting).

299. Montana v. United States, 450 U.S. 544, 564 (1981).

300. That review began in Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823), and has continued to the present. In fact, many of the modern cases fail to address the question of federal court subject matter jurisdiction, apparently assuming that it is beyond cavil. *E.g.*, Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Montana v. United States, 450 U.S. 544 (1981).

301. 450 U.S. 544, 566 (1981) (denying tribe's authority to regulate the hunting and fishing activities of non-Indians on fee lands located within the exterior boundaries of the reservation).

302. 455 U.S. 130, 159 (1982) (upholding tribal severance tax imposed on oil and gas removed from tribal lands).

303. 462 U.S. 324, 343 (1983) (invalidating state attempt to impose its laws on hunting and fishing activities on reservation lands).

Moreover, in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*,[304] the first post-*National Farmers* challenge to tribal legislative jurisdiction, the Court did not even consider the tribal exhaustion rule.[305] In *Brendale*, the tribe filed suit in federal district court, seeking a declaratory judgment and an injunction affirming the applicability of its zoning ordinance to two separate tracts of land within the reservation.[306] Owners of these tracts had filed development plans for their properties with the county, but not with the tribe.[307] In light of *National Farmers*'s exhaustion rule and its broad definition of jurisdiction for purposes of federal question cases, it is somewhat curious that none of the three opinions in *Brendale* questioned whether the federal court should have required the tribe to exhaust its tribal remedies before bringing the lawsuit.[308]

The *National Farmers* opinion itself, with its failure to suggest the applicability of exhaustion to its earlier resolutions of disputed assertions of tribal legislative authority, when coupled with the Court's subsequent holding in *Brendale*, leaves the lower federal courts in the quandary of having to decide whether to follow the Supreme Court's stated holding that exhaustion is required in all challenges to tribal jurisdiction or its actual practice, which does not require exhaustion in challenges to the scope of tribal regulatory jurisdiction. The uncertainty created by *National Farmers*, then, lies not in determining whether federal courts have subject matter jurisdiction in these cases, but rather in whether the federal courts should allow preliminary tribal court resolution of the federal questions.[309]

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304. 492 U.S. 408 (1989).

305. *Id.* at 409.

306. *Id.* at 408.

307. *Id.*

308. *Id.* at 409, 411-12. Similarly, the Court made no mention of the tribal exhaustion rule in South Dakota v. Bourland, 113 S. Ct. 2309 (1993), a case filed by the State of South Dakota against officials of the Cheyenne Sioux Tribe to enjoin tribal exclusion of non-Indians from certain lands located within the reservation. Judge Loken of the Eighth Circuit recently wondered about this apparent inconsistency in Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation, 27 F.3d 1294, 1302 (8th Cir. 1994) (Loken, J., concurring) (attributing Supreme Court silence on the exhaustion rule in these cases to the failure of the parties to raise the issue). *But see* United States v. Tsosie, 849 F. Supp. 768, 772 (D.N.M. 1994) (ordering exhaustion of tribal remedies sua sponte, even though all parties to the lawsuit, including the United States and two Native Americans, opposed tribal court involvement).

309. *See supra* notes 94-108 and accompanying text for a review of the inconsistency of lower courts' applications of the exhaustion rule to challenges to tribal legislative jurisdiction.

Although perhaps more consistent with the *National Farmers* exhaustion rule, the benefits of exhaustion in cases involving challenges to a tribe's legislative jurisdiction are unclear. The scope of retained tribal regulatory power is decided solely by reference to federal law; tribal court expertise or familiarity with tribal law will not illuminate subsequent federal court review. In addition, although the stated purpose of the tribal exhaustion rule was to enhance or at least confirm tribal sovereignty, subsequent de novo review[310] of the tribal court's resolution of federal law issues by the federal district court weakens that commitment significantly. The Court should make its verbiage conform to its actual practice: quite simply, the Court should explicitly recognize that federal court resolution of challenges to tribal legislative jurisdiction is proper and need not be deferred unless tribal court proceedings are pending.

Holding that the federal courts should exercise their jurisdiction in disputes over the scope of tribal legislative jurisdiction argues only against requiring exhaustion of tribal remedies in those cases; it does not suggest that the federal courts have exclusive jurisdiction. That is, even if the Court abandons its exhaustion requirement for challenges to the scope of the tribe's regulatory powers, tribal courts would nevertheless retain concurrent jurisdiction over those cases.[311] This unremarkable situation would parallel the concurrent jurisdiction of state courts to decide issues of federal law.[312]

To some proponents of heightened tribal court autonomy, proposing concurrent jurisdiction in federal and tribal courts over

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310. FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311 (9th Cir. 1990), *cert. denied*, 499 U.S. 943 (1991). The FMC court noted that no other court had yet reached this issue. *Id.* at 1313. The court adopted a "deferential, clearly erroneous standard of review for factual questions," *id.*, and a de novo standard of review for federal legal questions, *id.* at 1314; *see also* Joranko, *supra* note 9, at 299-306 (criticizing the *FMC* court's adoption of the clearly erroneous standard); Pommersheim, *A Path Near the Clearing*, *supra* note 288, at 410 (noting that post-exhaustion federal court review of federal question is de novo).

311. In a recent Seventh Circuit case, even though the court refused to order exhaustion, the court recognized that "[a] tribal court, presumably, is as competent to interpret federal law as it is state law." Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803, 814, (7th Cir.), *cert. denied*, 114 S. Ct. 621 (1993).

312. A decision to allow the federal courts to exercise their federal subject matter jurisdiction rather than to defer automatically to the tribal courts would in turn require extension of generally applicable common law doctrines that have shaped the relationship between state and federal courts. For instance, general principles of abstention would restrain the federal courts from taking jurisdiction to hear cases that would interfere inappropriately with ongoing tribal court proceedings. See ERWIN CHEMERINSKY, FEDERAL JURISDICTION 623-55 (1989), for a discussion of the applicability of Younger v. Harris, 401 U.S. 37 (1971), to state civil proceedings.

questions of tribal regulatory jurisdiction undoubtedly seems destructive of tribal sovereignty. This proposal, however, is but one part of a whole: with a redefinition of federal question jurisdiction in Indian law cases to exclude challenges to tribal adjudicatory jurisdiction, the scope of that concurrent jurisdiction is narrowed to questions whose resolutions depend exclusively on federal law. Only for challenges to tribal legislative jurisdiction, then, will the party filing the lawsuit be free to choose the forum. The tribe may seek to enforce its ordinances by proceeding in tribal court;[313] in some instances, however, the tribe may prefer a federal forum, and this option should not be denied.[314] Similarly, under this proposal, individual plaintiffs will be able to exercise a choice of forum for resolution of issues of federal law.[315] Moreover, contractual choice of forum clauses, whose enforceability is suspect under *Iowa Mutual*'s directive to order exhaustion in diversity cases,[316] would be subject to the same judicial limits as their non-Indian counterparts.

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313. *E.g.*, Cheyenne River Sioux Tribe v. Dupree Am. Legion Club, 19 Indian L. Rep. (Am. Indian Law. Training Program) 6097 (Cheyenne River Sioux Ct. App. Apr. 2, 1992); Rosebud Sioux Tribe v. Walsh, 19 Indian L. Rep. 6030 (Rosebud Sioux Tribal Ct., Oct. 22, 1991).

314. For instance, the tribe in Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989), filed suit in federal court to enforce tribal ordinances. Similarly, the United States government in Montana v. United States, 450 U.S. 544 (1981), filed suit on behalf of the Crow Tribe seeking judicial enforcement of the tribe's hunting and fishing regulations on land owned by non-Indians within the borders of the reservation.

315. *See* A-1 Contractors v. Strate, 19 Indian L. Rep. (Am. Indian Law. Training Program) 3163, 3164 (D.N.D., Sept. 16, 1992). Because this proposal allows for concurrent tribal and federal jurisdiction over the redefined and limited scope of federal question jurisdiction, it would argue for adoption of Justice Stevens's partial dissent in *Iowa Mutual*, arguing against application of the exhaustion rule in diversity cases. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 22 (1987) (Stevens, J., concurring in part and dissenting in part).

316. These clauses may be crucial to the ability of the tribe to attract non-Indian enterprises to engage in on-reservation development. As the Seventh Circuit noted: "If contracting parties cannot trust the validity of choice of law and venue provisions, [the tribal enterprise] may well find itself unable to compete and the Tribe's efforts to improve the reservation's economy may come to naught." Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803, 815 (7th Cir.), *cert. denied*, 114 S. Ct. 621 (1993). The stated commitment of the federal government to tribal economic development and self-sufficiency strongly favors allowing tribes to have the same freedom of contract as any non-Indian enterprise: "To refuse enforcement of this routine contract provision would be to undercut the Tribe's self-government and self-determination." *Id.*

VI. THE NEED FOR CERTIORARI REVIEW OF TRIBAL COURT DECISIONS

This Article has proposed a redefinition of federal question jurisdiction, with the goal of eliminating federal court involvement in disputes over the tribal court's scope of adjudicatory power. Although this proposal would admittedly create a body of case law that is currently unreviewable by any court, a well-known Supreme Court case has already established that a large number of tribal court decisions are insulated from federal review. The Supreme Court held in *Santa Clara Pueblo v. Martinez*[317] that the Indian Civil Rights Act did not create a federal cause of action,[318] thereby establishing that tribal court decisions under that Act are absolutely final and unreviewable. Predictably, the case triggered several calls for legislative reform; Congress has introduced bills to grant federal district courts jurisdiction over suits alleging violation of the Indian Civil Rights Act.[319] A more narrowly tailored proposal has suggested not full federal district court jurisdiction to relitigate cases that have gone through the tribal court system, but the creation of certiorari jurisdiction in the Supreme Court over final decisions under the Indian Civil Rights Act by tribal courts.[320] This Article proposes an expansion

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317. 436 U.S. 9 (1978).

318. Professor Kevin Worthen has argued that *Santa Clara* did more than merely fail to find an implied right of action, but instead held that the federal court lacked jurisdiction to hear lawsuits alleging *any* noncompliance with federal law. Worthen, *supra* note 51, at 67. Professor Worthen further argued that such a limitation of federal court jurisdiction is unconstitutional under Article III of the Constitution. *Id.* at 118.

319. *See, e.g.*, S. 2747, 100th Cong., 2d Sess. (1988). In 1989, the bill was modified and reintroduced. S. 517, 101st. Cong., 1st Sess. (1989). For detailed critiques of these legislative efforts, see Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 880-86 (1990); Vicki J. Limas, *Employment Suits Against Indian Tribes: Balancing Sovereign Rights and Civil Rights*, 70 DENV. U. L. REV. 359, 387-89 (1993).

320. This proposal was made by Professor Clinton at hearings held by the United States Commission on Civil Rights. Although Professor Clinton does not believe that federal oversight of tribal enforcement of the Indian Civil Rights Act is necessary, he views the grant of certiorari review as significantly less intrusive on tribal sovereignty than alternative proposals. *Enforcement of the Indian Civil Rights Act: Hearing before the United States Commission on Civil Rights*, 100th Cong., 2d Sess. 81-82 (1988) (remarks of Professor Robert N. Clinton). Professor Clinton elaborated on his position in Clinton, *Tribal Courts*, *supra* note 10, at 902-08. Professor Clinton proposed statutory language to provide for general Supreme Court review by way of writ of certiorari. *Id.* at 893 n.126. In his view, the creation of an intertribal court of appeals would likewise satisfy the demand for review of tribal court opinions rendered under the Indian Civil Rights Act. *Id.* at 892. He sees neither option as ideal. *Id.* at 889-90.

of that certiorari jurisdiction, to encompass not merely tribal court decisions interpreting the Indian Civil Rights Act, but also tribal court rulings that involve any federal question.

Any call for federal judicial supervision over tribal courts undoubtedly provokes claims of unwarranted federal intrusion into the sovereignty of the tribes. This Article's endorsement of general Supreme Court review of tribal court decisions by writ of certiorari will indeed end the current insulation of some tribal court holdings. At the same time, though, this proposal would strike a more careful balance between respect for tribal sovereignty and the overarching principle of judicial review than the current exhaustion doctrine, which treats tribal courts as mere factfinders for the federal courts and subjects their decisions to relitigation in federal district court. Given the realities of the tribes' position in the American political system, total independence of tribal court proceedings is not a currently acceptable alternative.[321] Moreover, complete insulation of tribal court decisions from all federal judicial review will preclude meaningful expansion and enhancement of tribal court powers. Congress and the federal courts, whether they be racist and "myopic"[322] or merely insistent that all judicial forums within the United States conform to their standards of fairness,[323] are unlikely to allow tribal courts to exercise significant coercive power over nonmembers without the check of ultimate federal review. The task, then, is to structure the federal court review in such a way as to maximize tribal independence while ensuring meaningful opportunity for redress of tribal sovereign abuses, be they real or imagined. This Article's proposal to couple certiorari review with significant limitations on federal question jurisdiction and elimination of the

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321. *See* Clinton, *Tribal Courts*, *supra* note 10, at 889; Robert Laurence, *A Memorandum to the Class, in Which the Teacher is Finally Pinned Down and Forced to Divulge His Thoughts on What Indian Law Should Be*, 46 ARK. L. REV. 1, 5-15 (1993); Laurence, *The Enforcement of Judgments*, *supra* note 32, at 599; Laurence, *Learning to Live with Plenary Power*, *supra* note 24, at 422-23.

322. Williams, *Learning Not to Live with Eurocentric Myopia*, *supra* note 24, at 454.

323. Resnik, *supra* note 24, at 747-58, suggested that pressures for federal court review can be interpreted either as anti-tribal and assimilationist or merely as strong support for the pervasive federal enforcements of standards of equality. *See also* Margery H. Brown & Brenda C. Desmond, *Montana Tribal Courts: Influencing the Development of Contemporary Indian Law*, 52 MONT. L. REV. 211, 264 (1991) (describing the Montana courts' "well-intentioned spirit and conventional judicial outlook" as the origin of that court's persistence "in its efforts to assure a forum for the reservation-based claims of its Indian citizens").

tribal exhaustion rule will work toward that admittedly delicate balance.

On the other side of the tribal sovereignty debate, this Article's proposal to limit significantly federal court involvement in tribal court decisionmaking is likely to produce the criticism that review by writ of certiorari is an ineffective check on tribal court abuses. It is true that the Supreme Court accepts only a very small number of cases;[324] presumably, review of tribal court decisions will be similarly limited. Direct federal review, however, would not be the sole factor exerting pressure on the tribal court system; thus, a few additional observations are in order. Numerous incentives, both within and outside the judicial system, currently affect tribal court assertions of jurisdiction. For instance, the Department of the Interior retains the power, in some instances, to disapprove tribal ordinances.[325] Even without that direct approval power, the lure of federal spending undoubtedly affects many tribal decisions.[326] Moreover, many tribes are actively seeking non-Indian partners in economic development projects; the availability of a tribal forum perceived as fair and efficient by outsiders will enhance the marketability of those projects.[327] Finally, and perhaps most importantly, a state court's willingness to enforce tribal court judgments depends crucially on its analysis of the fundamental fairness of the tribal court proceeding.[328]

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324. In 1991, for example, the Supreme Court agreed to hear arguments in 103 out of a total 6,770 cases on its docket. UNITED STATES DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 205 (113th ed. 1993).

325. See Pommersheim, *A Path Near the Clearing*, *supra* note 289, at 394-400 for a discussion of the current scope of federal approval power. Professor Pommersheim notes, for instance, that the Rosebud Sioux Tribe recently amended its constitution to remove the Secretary of the Interior's review power over tribal council legislative enactments. *Id.* at 397.

326. Congress recently passed the Indian Tribal Justice Act, Pub. L. No. 103-176, 107 Stat. 2004 (1993), codified at 25 U.S.C. §§ 3601-3631 (Supp. V 1993), appropriating $58 million annually for the next seven years. Recognizing the inadequate levels of funding under which tribal court systems currently operate, Congress stressed the importance of "tribal government involvement in and commitment to improving tribal justice systems." *Id.* § 3601(9).

327. Similarly, the Seventh Circuit has stressed the need for certainty and predictability for non-Indian parties entering into business ventures on the reservation. Altheimer & Gray v. Souix Mfg. Corp., 983 F.2d 803, 815 (7th Cir.), *cert. denied*, 114 S. Ct. 621 (1993).

328. The state court will also review the propriety of tribal court jurisdiction over the lawsuit to determine whether the tribal court entering the judgment had jurisdiction over both the subject matter and the parties to the lawsuit. In Red Fox v. Hettich, 494 N.W.2d 638 (S.D. 1993), for example, the Supreme Court of South Dakota refused to enforce a tribal court personal injury judgment against a non-Indian defendant and announced a very limited view of tribal court jurisdiction. The South Dakota court ruled that the tribal

Thus, although the addition of review by writ of certiorari will not in itself guarantee that tribal court proceedings comply with the limits Congress has placed on their operations, it would serve an important role as one of several external structural pressures on the workings of the tribal court.

VII. CONCLUSION

The tribal exhaustion doctrine, though touted as evidence of the federal government's enthusiastic endorsement of tribal sovereignty, has actually had several damaging effects on tribal sovereignty. First and foremost, the doctrine expands the definition of federal question jurisdiction to apply to nearly any decision made by a tribe in the exercise of any of its governmental functions. In addition, it allows expansive relitigation and federal court review on the merits of all cases initially deferred by the federal court for exhaustion of tribal court remedies. Simultaneously, the doctrine has improperly reduced the ability of the federal courts to provide a forum for resolution of exclusively federal issues. This Article, sensitive to both the legitimate demands for tribal court autonomy and the fundamental principle of the Supreme Court's ultimate power of judicial review in matters of federal law, has proposed a shift that would reduce the scope of general federal question litigation, but that would also allow for selective review of tribal court proceedings by way of writ of certiorari. The debate over the proper scope of tribal court independence from federal court interference and review is an

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court has the power to adjudicate only those controversies over which it can establish its legislative jurisdiction. *Id.* at 646. Because the court concluded that the tribe has no power to regulate the conduct of non-Indians driving on state highways through the reservation, it concluded that the tribal court is similarly divested of its jurisdiction to hear the lawsuit. *Id.* at 646-47. This crimped view of tribal court adjudicatory jurisdiction probably stems, in large part, from state courts' unwillingness to extend *Williams v. Lee*'s divestment of general state court adjudicatory jurisdiction beyond the specific facts of the case. *Compare* Fredericks v. Eide-Kirschman Ford, 462 N.W.2d 164, 171 (N.D. 1990) (finding a presumption of enforceability of tribal court judgments as a matter of comity); Mexican v. Circle Bear, 3709 N.W.2d 737, 741 (S.D. 1985) (finding that tribal court orders should be recognized in state courts). *See generally*, Laurence, *Enforcement of Judgments*, *supra* note 32, at 651-62 (1990) (arguing that state courts should not give "full faith and credit" to tribal court decisions but should nevertheless honor such judgments in most circumstances).

North Dakota has adopted legislation to govern judicial recognition of some tribal court judgments; state enforcement depends on the tribe's willingness to recognize similar state court judgments and recognizes only tribal judgments rendered by a tribal judge who "is a graduate of an accredited law school and holds a current valid license to practice law in at least one state." N.D. CENT. CODE § 27-01-09 (1991).

ongoing one. As tribal courts enlarge their jurisdictional reach, and as the cases within their jurisdiction grow in number and complexity, the calls for full integration of that court system into the United States's judicial system are likely to continue to grow. This Article has examined the Supreme Court's current answer to that integration dilemma and has argued that it improperly intrudes on tribal sovereign prerogatives. Because complete autonomy and independence from the federal court system is not within the realm of possible or perhaps desirable alternatives,[329] this Article has proposed a solution that would grant more autonomy from federal court interference, recognize legitimate exercises of concurrent federal and tribal jurisdiction, and in some ways place the decisions of final tribal courts on a par with those of their state counterparts. With the threat of frequent federal court interference greatly reduced, tribal courts will be freer to go about their business of conflict resolution and the development of judicial standards.[330]

329. *See, e.g.*, Clinton, *Tribal Courts*, *supra* note 10, at 863 (asserting that the "central problem for federal Indian law during this post-colonial period must be how to decolonize federal Indian law, taking account of, albeit not necessarily validating or justifying, the altered economic realities and political relations that prior colonial Indian law policies and doctrines engendered"); *see also* Robert Laurence, *A Quincentennial Essay on* Martinez v. Santa Clara Pueblo, 28 IDAHO L. REV. 307, 342 (1991-1992) (supporting federal review of some tribal court decisions in recognition of the "actual state of things").

330. The challenge facing tribal courts has been the subject of various law review articles. *See, e.g.*, Frank Pommersheim, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411; Pommersheim, *A Path Near the Clearing*, *supra* note 289; Taylor, *supra* note 9, at 231.