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## Dispute Resolution in Indian Country: Does Abstention Make the Heart Grow Fonder

### Authors

Patti Alleva, Lynn H. Slade, Laurie Reynolds, Alex Tallchief Skibine, Phillip Wm. Lear, Robert N. Clinton, and Frank Pommersheim

## DISPUTE RESOLUTION IN INDIAN COUNTRY: DOES ABSTENTION MAKE THE HEART GROW FONDER?\*

MS. ALLEVA:<sup>1</sup> I come to this conference, and particularly to this distinguished panel, with great humility as a new student of Indian law. Obvious, I think, to both old and newcomers to the area is that the study of abstention, like a treasure chest key, unlocks a rich collection of questions concerning political autonomy, sovereign prerogative, and cultural identity. In particular, the exploration of when, why, and how the federal courts will or will not defer to tribal court civil adjudications ultimately leads to fundamental issues of power, trust, mutual respect, and self-respect, both at an institutional and individual level.

The United States Supreme Court's exhaustion doctrine—announced in the *National Farmers Union*<sup>2</sup> and *Iowa Mutual*<sup>3</sup> cases—spotlights what one author has called “[t]he uneasy fit between tribal and federal courts.”<sup>4</sup> What some may see in those opinions as the Supreme Court's jurisdictional schizophrenia—that is, its simultaneous deference to tribal court exhaustion and self-determination on the one hand, but its preservation of federal court review or interference on the other—leaves unresolved many questions about the reach and relationship of the judicial systems within the federal union.

Why did the Supreme Court create a separate abstention/exhaustion doctrine for certain tribal and federal court civil actions? What messages does that doctrine send about the unique relationship between federal and tribal governments? Does the doctrine debilitate or legitimate tribal judicial authority? Is there another model that better accommodates the sovereign prerogative of both the federal and tribal courts when, as Mr. Deloria vividly put it yesterday, rights and relationships in one legal system suddenly jump track and end up in another legal system? Should the District Court or the Supreme Court provide the federal review in these cases? What types of questions should be reviewed? Should there be any review at all?

Yesterday's commentators again echo in our ears—has the Supreme Court simply “lost its way” yet another time? Is there a need for

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\* The following are edited proceedings from the North Dakota Law Review Symposium Conference. Held at the University of North Dakota April 21, 1995, this panel discussion is premised on Lynn Slade's article entitled *Dispute Resolution in Indian Country: Harmonizing National Farmers Union, Iowa Mutual, and the Abstention Doctrine in the Federal Courts*, 71 N.D. L. REV. 519 (1995).

1. Patti Alleva, Associate Professor of Law, University of North Dakota School of Law.

2. *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985).

3. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

4. 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, 306 (1993).

Congress to take the current situation in hand and legislate a more comprehensive framework for cross-jurisdictional dialogues? I suspect our eminent panelists will have much to say about these and related issues. I am honored to bring them to you. To open with the main presentation is Lynn Slade from the Modrall, Sperling firm in New Mexico. Following Lynn with commentary, first, is Professor Laurie Reynolds, who is the Director of the Office of Graduate and International Legal Studies at the University of Illinois College of Law, where she teaches Native American law, property, and land use planning. Welcome to the conference, Laurie. The remaining faces and voices are very familiar to us. They are: Professor Alex Skibine from the University of Utah College of Law; Phil Lear from the Salt Lake City firm of Snell & Wilmer; Professor Robert Clinton from the University of Iowa College of Law; and Professor Frank Pommersheim from the University of South Dakota School of Law.

PRESENTATION BY LYNN SLADE

*Dispute Resolution in Indian Country: Harmonizing National Farmers Union, Iowa Mutual, and the Abstention Doctrine in the Federal Courts*

MS. REYNOLDS: Like Mr. Slade and some of the other panelists I, too, am critical of the Supreme Court's tribal exhaustion doctrine. I think, however, that the sources of my criticisms differ significantly from most of the other commenters here. In these comments, I would like to articulate my uneasiness with the doctrine and suggest ways in which I think we might better protect meaningful federal, tribal, and state interests here. And I want to emphasize that I offer these remarks with a well-deserved sense of modesty. I do not presume to have answers. I merely want to make a few tentative suggestions and try to engage you in some of these very difficult legal issues.

I've identified three main weaknesses in the exhaustion doctrine. The first is that the doctrine itself is extremely unclear, and has produced wide-ranging inconsistencies. Litigants can never know when they go into federal court if the Court is going to order exhaustion or not. On the one end of the spectrum you have courts who apply the exhaustion doctrine in a very, very broad manner, as Mr. Slade described. Several courts, in fact, adopt a standard that will require exhaustion irrespective of the wishes of the parties, whether a suit is pending or not in tribal court, so long as the assertion of tribal jurisdiction would be "colorable" or "plausible." At the other end of the spectrum, we have courts

that take a very narrow view of the tribal exhaustion doctrine. They will order it only when a tribal suit is pending or only when the federal court has concluded that the case involves "internal tribal affairs." In fact, one Court refused to order exhaustion when it concluded that the tribal court itself lacked jurisdiction over the case, which is, of course, what the *National Farmers* Court sent the case back to tribal court to do. In some courts I sense a certain reluctance in their application of the tribal exhaustion doctrine. In fact, they seem to place tribal courts on a very short leash, ordering exhaustion but reminding the parties that they will only consent to refrain from exercising their jurisdiction over the case so long as the tribal court basically conforms to the federal court's view of what proper judicial procedures ought to be. I think this inconsistency among the lower courts comes not only from the imprecision of the language of the Supreme Court opinions in *National Farmers* and *Iowa Mutual* themselves, but also my sense is that it comes from varying views among the federal courts as to what they would define probably as the competency or the reliability of the tribal courts. And one thing that I think is generally the case, although there are certainly exceptions, for many lower courts, the more freely they order exhaustion, the more they emphasize the availability of post-exhaustion review back in the federal court system itself.

And that brings me to my second very general criticism of the exhaustion doctrine—it is not at all clear what's going to happen after exhaustion has taken place. The two Supreme Court cases themselves, I think, suggest slightly different results. *National Farmers Union* expressly refers to post-exhaustion review of the merits of the tribal court decision in the federal courts. *Iowa Mutual* seems to suggest a more preclusive effect of the tribal court decision. I think probably the Supreme Court just hopes that the issue will go away, but undoubtedly this issue will work its way up to the Supreme Court again. The Ninth Circuit is the one court that has articulated a post-exhaustion standard of review involving one standard, a clearly erroneous standard, for factual matters and a de novo review for federal law. Now, whether that is ultimately the standard that gains widespread acceptance or not, I think it is clear that the lower courts very vigorously rely on the availability of post-exhaustion review of tribal court decisions. In fact, some of the lower courts refer to the exhaustion doctrine as giving the the tribal court a "first crack" at the matter, clearly suggesting that the second crack is going to be available somewhere else. The one thing that's not clear, though, as a concurring judge in a recent Eighth Circuit opinion indicated, is where the federal jurisdiction is going to come from. There is no federal statute that gives federal district courts jurisdiction to review

or hear appeals from tribal court decisions. So I think there's some jurisdictional problem in the post-exhaustion review as well, although I recognize that most of the federal courts that have dealt with this matter anticipate, as I say, a fairly active post-exhaustion review.

The third and major flaw that I see in the exhaustion doctrine, and I know this is where I part ways with Mr. Slade, is that I think it is based on a stunningly broad definition of federal question jurisdiction. In many ways the exhaustion doctrine is necessary only because the Supreme Court so broadly defined federal question jurisdiction to include really any issue going to the scope of the tribal court's adjudicatory jurisdiction. Although the Ninth Circuit's panel opinion in the *National Farmers Union* case was subsequently reversed by the Supreme Court, I believe that the Ninth Circuit panel really got it right when they chose to dismiss the case of *National Farmers Union* by concluding that matters of tribal adjudicatory power just simply do not state a federal question. The Ninth Circuit made a distinction, which the Supreme Court has yet to embrace, although it has recognized the distinction in several contexts. The Ninth Circuit's opinion distinguished between tribal legislative or regulatory jurisdiction on the one hand, (the coercive power of a sovereign to actually regulate and direct the conduct of people within the scope of its governmental authority), and on the other hand these questions about the adjudicatory authority of the tribal court to hear or resolve a particular dispute. And as the Ninth Circuit panel noted, those two elements are frequently not coterminous; it is very often the case that a forum will decide or resolve a dispute that it has no power to regulate. For that reason, the Ninth Circuit thought that the better way to slice the pie was to say that, on the one hand, these latter issues that are limited to a determination of the scope of the tribal court's adjudicatory jurisdiction simply do not raise a federal question.

Now, I'd like to offer a few reasons why I think that that's a good idea. First of all, I think that this broad definition of federal question jurisdiction really creates a jurisdictional boot strap. It gets the federal courts involved when previously there had been no federal court jurisdiction. In fact, prior to the exhaustion rule many federal courts routinely dismissed lawsuits involving on-reservation contracts, leases, personal injury disputes, by concluding simply that there was no federal interest at stake here. It was not a federal question. All of these cases now, in light of *National Farmers Union* and *Iowa Mutual*, can be recast as a federal question jurisdictional dispute. And I'm reminded of Mr. Deloria's words this morning when he referred to something like a "tug-of-war over jurisdiction for the sake of jurisdiction." It seems to me that in a large respect that's exactly what this federal question

exhaustion of tribal remedies dispute is, because it inserts an unnecessary layer of federal involvement in what is in many cases merely a dispute between tribal and state courts over who should exercise jurisdiction. That is, we now have a federal overlay to the *Williams v. Lee*<sup>5</sup> type of dispute. And I think, in addition, that removing the scope of tribal adjudicatory jurisdiction from our definition of federal question will remove an imbalance that automatically favors tribal court over state court resolution of issues even though in many of these cases I think we would probably agree that no exclusive tribal court jurisdiction exists. Most importantly, I find that the exhaustion of tribal remedies doctrine creates a stark anomaly. It is simply incongruous to hold that, although tribal governments are sovereigns with inherent sovereignty, free from constitutional limitations, nevertheless, every aspect of their adjudicatory jurisdiction creates a federal question that's to be resolved by the federal courts.

Now, as I said, although the Supreme Court has refused to make that distinction between adjudicatory and legislative jurisdiction and instead chose to treat all jurisdiction alike, its actual holdings before and after *National Farmers Union* suggest that the Court does indeed recognize the difference between adjudicatory jurisdiction and regulatory or legislative jurisdiction. *Kerr McGee*,<sup>6</sup> *Brendale*,<sup>7</sup> *South Dakota v. Bourland*,<sup>8</sup> these are all cases in which the Supreme Court directly confronted the claim of an individual as to the legitimacy of tribal sovereign power. And in none of those cases did the Court suggest that exhaustion to a tribal court would be appropriate, even though in all of those cases the issue being litigated fit well within the *National Farmers Union* Court's broad definition of jurisdiction. Thus, the dilemma for the lower courts is to try to figure out whether to do what the Supreme Court says, which is to order exhaustion in a very broad range of cases, (that is, any time "jurisdiction" is involved) or whether to do what the Supreme Court actually does, which is to retain federal question jurisdiction over cases involving tribal regulatory or legislative jurisdiction. I believe that what Supreme Court actually does is a more satisfactory resolution. In my opinion, the courts should retain federal question jurisdiction in cases of tribal regulatory authority. As a result, both the tribal and the federal courts would have concurrent jurisdiction. And at that point I would hop right back on Mr. Slade's train and say

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5. *Williams v. Lee Optical Co.*, 358 U.S. 483 (1954).

6. *Kerr McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985).

7. *Brendale v. Confederated Bands and Tribes of the Yakima Indian Nation*, 492 U.S. 408 (1989).

8. 113 S.Ct. 2309 (1993).

that the doctrines of *Colorado River*<sup>9</sup> and *Younger*<sup>10</sup> abstention are perfectly well-suited to decide the allocation of jurisdiction over these questions.

As one last observation, I realize that whenever there is a proposal to restrict federal court review of tribal decisions, U.S. lawyers instinctively react to that, it can't be, there can't be a body of law out there that involves federal questions that a federal court can't get its hands on. Various proposals have been advanced—including a specialized federal court of appeals, review by writ of certiorari, or even original federal district court jurisdiction. For me personally, certiorari review strikes the best balance between, on the one hand, the perceived need for federal court review of tribal court rulings of federal law and, on the other hand, the interests in preserving tribal sovereignty. It may not be a perfect solution, but in my view it is far preferable to the current federal court micro management of tribal court decisionmaking, which is exactly what is contemplated by the tribal exhaustion doctrine.

MR. SKIBINE: Thank you. Let me just make a couple of comments on the two previous presentations and why I am suspicious about the idea of invoking the federal abstention doctrine. Last year, I published an article in the *New Mexico Law Review* titled "Deference Owed Tribal Court Jurisdictional Determinations: Towards Coexistence, Understanding, and Respect Between Different Cultural and Judicial Norms." Although half of the article deals with exhaustion of tribal court remedies, the main thrust of the article was to present an argument for greater deference to tribal courts' jurisdictional determinations when those determinations are reviewed by federal courts after the tribal court remedies have been exhausted. In order to make the case for greater deference, I proposed an analogy to the administrative law doctrine of exhaustion of administrative remedies and the doctrine of judicial deference towards findings of administrative agencies. I was not advocating that, doctrinally speaking, tribal courts are the same as administrative agencies. They are not. I only proposed a convenient analogy because the policies behind the exhaustion doctrine in administrative law is the same or very similar to the policy behind the exhaustion of tribal remedies doctrine as advanced in *National Farmers*<sup>11</sup> and *Iowa Mutual*.<sup>12</sup>

Thus in administrative law, we speak of a policy of preserving the autonomy and integrity of the agencies. We also speak in terms of

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9. *Colorado River Conservation Dist. v. United States*, 424 U.S. 800 (1976).

10. *Younger v. Harris*, 401 U.S. 37 (1971).

11. *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985).

12. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).



promoting judicial economy by avoiding piecemeal litigation, and allowing the agency to bring its expertise to bear on the particular problems. Similarly, *National Farmers* and *Iowa Mutual* spoke in terms of promoting tribal self-government by preserving the tribal courts' authority over reservation affairs and allowing the tribal courts the first shot at determining their jurisdiction.

It is important to realize that when we are looking at exhaustion of tribal remedies and are trying to compare it to some other legal doctrines, whether it be administrative law, international law, or federal abstention, nothing doctrinally speaking mandates that we adopt one doctrine and reject all others. So the question is: which analogy fits better. The problem in using the federal abstention doctrine is that it fails to take into account the nature of the federal question which created federal jurisdiction under *National Farmers*, which is: Does the tribe have jurisdiction?

The Supreme Court test to determine the existence of tribal jurisdiction under *Montana*<sup>13</sup> will in many cases depend on whether tribal jurisdiction is necessary or vital to tribal self-government. It is because the answer to this question is really more political than legal that it is appropriate for the tribal courts to answer the question first. In effect the answer to these questions depend more on applying the law to the facts than on deciding pure questions of law. This is why there should not only be exhaustion of tribal remedies but why there should also be a certain amount of deference given to those tribal determinations.

The nature of these inquiries is much different than the nature of the inquiry in a *Younger*<sup>14</sup> or *Colorado River*<sup>15</sup> abstention type case. Abstention in federal/state abstention jurisprudence has to do with federalism and the nature of the bargain struck between the states in the Constitution when they agreed to the federal union. The tribes were not part of that contract. As Richard Monette stated this morning, perhaps the tribes should have been part of the bargain and should be brought into the Union on a model similar to that of the states. The fact is, as of now they are still not states because they are not part of the constitutional contract. Therefore notions of federalism are not applicable to the federal-tribal relationship as they are to the federal/state relationship.

I also believe that we cannot compare the tribal exhaustion doctrine with the federal/state abstention doctrine unless we talk about notions of

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13. *Montana v. United States*, 450 U.S. 544 (1981).

14. *Younger v. Harris*, 401 U.S. 37 (1971).

15. *Colorado River Conservation Dist. v. United States*, 424 U.S. 800 (1976).

res judicata and collateral estoppel. These two doctrines prevent a federal court from relitigating issues decided by state courts unless we are dealing with a *Pullman* type abstention. Unless we are willing to apply these two doctrines as well as others governing federal/state relations such as "full faith and credit" to judgments of tribal courts, we should not be speaking in terms of federal/state abstention when we are talking about the tribal exhaustion doctrine.

Finally, I must confess that I really do not follow Mr. Slade's distinction when he says that he sees *National Farmers* as a *Younger* case and *Iowa Mutual* as a *Colorado River* case. An analogy with *Younger* will result in an enormous amount of federal abstention while if a majority of the tribal cases fall under the *Colorado River* model, there will be almost no abstention. I believe that the tribal cases fit in neither category for the following reasons.

*Younger* abstention is appropriate when a party who is being prosecuted under state law is alleging that the state's action is unconstitutional. Even though *Younger* was extended to civil causes of action in *Penzoil*, you still have to allege an unconstitutional action. That is why the *Younger* doctrine has also been termed "our federalism" doctrine. "Our federalism" only refers to the relationship between the federal government and the states, not between the federal government and the tribes. Justice Black has described the *Younger* doctrine in the following terms:

It is a system in which there is sensitivity to the legitimate interests of both state and national government. And in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interest, always endeavors to do so in ways which will not unduly interfere with the legitimate activities of the states.

Although I believe that applying the *Younger* doctrine would be beneficial to tribal courts since it would result in a lot of abstention, I do not believe that it is applicable to tribal cases, which means that as far as Mr. Slade's abstention argument is concerned, we are only left with *Colorado River* types of cases. I believe that comparing tribal cases with *Colorado River* cases would be very detrimental to tribes because it would result in almost no abstention. *Colorado River* abstention is only called for when there are exceptional circumstances. These exceptional circumstances are very hard to obtain. As Professor Reddish once observed, even *Colorado River* was not a *Colorado River* type of case.

Fortunately, *Colorado River* is not applicable to tribal cases either, because in *Colorado River*, the Court was only concerned about judicial

economy. In *National Farmers* and *Iowa Mutual*, however, the Court was also concerned about promoting tribal self-government by preserving the tribal court's authority over reservation affairs.

Finally, let me comment on the thesis just proposed by Professor Reynolds. Before I finish, let me first state that both Ms. Reynolds' and Mr. Slade's papers were extremely well written and researched and it was a pleasure to read them. Every time that a paper challenges one to start thinking about an issue in a different way, it has made a great contribution to the field, which both those papers have done.

The problem that I have with Professor Reynolds' paper is that it is based on a finding that tribal legislative jurisdiction is not co-extensive with and should therefore be treated differently than tribal adjudicatory jurisdiction. While I could be persuaded that she is right, the fact remains that in *Iowa Mutual* and *National Farmers*, the Court rejected that position.

Having said that, on one hand I want to agree with her that questions of adjudicatory jurisdiction should not be a federal question. Why is it not a federal question? Because I believe that whenever a case arises on the reservation, the tribe should always have jurisdiction. Therefore, federal courts should not bother questioning the tribal court's jurisdiction. If there is federal court review, it should only be limited to finding out if the case arose on the reservation. On the other hand, where the war is really being fought is in determining the tribe's regulatory jurisdiction and I do not want to concede the war by abdicating to Ms. Reynolds' position that there should never be exhaustion when the issue is the extent of the tribal legislative jurisdiction.

When dealing with tribal legislative jurisdiction, most of the time, the issue will be decided under the *Montana* test. Under that test, the Court held that the tribes retained their inherent sovereign powers as long as they were necessary to tribal self-government. However, if the case concerned non-members on non-members' fee lands, there is a presumption that the tribe does not have jurisdiction. This presumption can be rebutted, however, if the tribe can prove that the non-member activity will have a direct impact on the political integrity, economy, security, or the health and welfare of the tribe.

I, for one, do not want federal judges deciding this issue before they have heard from the tribal judges. The reason I take this position is that I do not believe that the test is either legal or legitimate. It is a political test. Perhaps the Court knows that and also knows that there really should not be any federal jurisdiction under *National Farmers* to start with. So it struck a compromise. Although it decided to impose federal question jurisdiction to review questions of tribal jurisdiction under the

*Montana* test, it also mandated that federal judges first hear from the Indians on what is, most of the time, a political issue. Thank you.

MR. LEAR: There's a saying in Germany where I lived for six years that cheese should open and close the meal or open and close the "stomach" as they say in literal translation. We have opened and closed this symposium with discussion of exhaustion, or "abstention," if you will—the cheese of this academic experience. But I am veritably choking on the mandatory nature of the doctrine espoused. Neither *National Farmers Union*<sup>16</sup> nor *Iowa Mutual*<sup>17</sup> mandate exhaustion. It is the circuit courts, not the United States Supreme Court, that mandate exhaustion.

So you will find me, if you didn't yesterday, aligning myself with Mr. Slade on this issue. I agree with Mr. Slade that we need direction and that perhaps we have not received that direction from the judiciary. However, I believe that *National Farmers* and *Iowa Mutual* give us more direction than the circuit courts and the lower courts ascribe to them. More to the point, I think the Eighth, Ninth, and Tenth Circuits need a remedial course in reading and comprehension, because I do not feel that the theses we see in the circuit cases and the district court cases, particularly in the Tenth Circuit where Mr. Slade and I practice, follow from the conclusions drawn in *Iowa Mutual*.

However, I get to Mr. Slade's result in a different way. But before I tell you that result; if you haven't guessed it already, I need to address some comments made by the members of this and other panels. I agree with Professor Laurence that a federal removal statute might be helpful. As a practical matter, we've had two hundred years of federalism, and Congress has shown little leadership in clarifying the relationship between federal and tribal courts. I don't think we're going to get much. I was enamored of the removal statute concept yesterday when I heard it. I don't think original thoughts. So I heard it for the first time yesterday. And I wish Congress would provide us with a removal statute. But as a practical matter, I don't think it's going to happen. And I, as a practitioner, representing the natural resources developer on the reservations, need to deal with the here and now, and I don't have a removal statute.

With regard to Tim Joranko, who is not here—and we seem to bash those who aren't here to defend themselves—and to a certain extent with Professor Skibine I disagree with the notion that bright-line tests are helpful in the concurrent jurisdiction setting. As much as I dislike

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16. *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985).

17. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

*Brendale*,<sup>18</sup> I embrace what Justice Stevens said in his opinion, namely, that bright lines are the province of the Court and not the judiciary. Yet usurping that province is precisely what the Ninth and Tenth Circuits are about, as the Eighth Circuit in the recent *Duncan Energy*<sup>19</sup> case reminds us.

With regard to Professor Skibine's administrative model, I need to reject that one also. There is little doubt that our experience with exhaustion comes from our body of federal and state administrative law. Where parallels break down, however, is that in the agency arena it's the agency who has drafted the regulation, it's the agency who has been empowered by statute to regulate a certain province, a certain area of endeavor, and it's the agency that has its own quasi-judicial system to deal with the interpretation of its own laws. The statutory standard of review is whether the agency's decision was arbitrary and capricious. The standard is not a *de novo* standard. And so I'm not comfortable with the administrative law analogy.

Moving now to Sam Deloria, whom, I sense distinctly was my antagonist yesterday, I disagree that a little affirmative action is a healthy thing, until we get our sea legs. If I understood Mr. Deloria correctly, that was precisely what he was advocating. Affirmative action in my opinion is demeaning to an equal dignity doctrine of courts. Rather, I subscribe to a *Worcester v. Georgia* interpretation of the legal relationship between Indian nations and federal governments—one of sovereigns. In pure theory of Indian federal law, the concepts of guardianship, trusteeship, and wardship are inconsistent. I understood Professor Monette yesterday, and Professor Clinton today, to agree that there is inconsistency and that they favor the *Worcester v. Georgia* analysis, as I do. Unfortunately, we have to live with the inconsistency. So, I would say that affirmative action is not a good thing in that context. Also, I disagree with Sam Deloria's statement yesterday that it's all right to force a nonfederal tribal litigant into tribal court. After all, he postulated, they need the experience. It's okay if we force a few of these non-Indian natural resources developers into the tribal system, he continued, where we may have nonlegally trained judges. It's all right because we have the parallel in our federalist system where we have fifty thousand non-legally trained judges. He was referring to justices of the peace. I don't buy that because the justices of the peace are not adjudicating the weightier matters we deal with when we approach

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18. *Brendale v. Confederated Bands and Tribes of the Yakima Indian Nation*, 492 U.S. 408 (1989).

19. *Duncan Energy Co., Inc. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1249 (9th Cir. 1993), *cert. denied*, 115 S. Ct. 779 (1995).

federal questions; those justices of the peace are not dealing with arcane or esoteric doctrines, by and large, that one finds in our own federal or state system. I'm spending all my time challenging the others.

I do agree with Professor Clinton, again getting back to *Worcester v. Georgia*. If one accepts the *Worcester v. Georgia* relationship, legal relationship, of Indian tribe to federal government as sovereign to sovereign—and I do—then I think the model that really works is not abstention, is not administrative law, is not a bright-line test, but is comity under international law. If one, on the other hand, accepts the *Cherokee Nation* postulates from which we infer a trust relationship—and I'm not in any way challenging the fact that we don't believe there is a trust relationship, but I think our practice is broken down under the weight of the theory—then I think you get to abstention. So I arrive at the same place as Mr. Slade. But I get there in a different way.

And let me now give you the thesis that you read in our paper, in the Lear/Miller paper, and that is, why principles of international law really ought to be applied and why they would dignify the tribal courts as opposed to demean them by being applied. The factors in an international choice of law comity context are these: First, what is the link of activity to the sovereigns; that is, the activity that gave rise to the case in controversy? Second, what is the link between the parties and that sovereign? Third, what is the importance of regulation to the particular sovereign that is asked to take jurisdiction? Fourth, what are the justified expectations of the parties? Now, Mr. Deloria suggested yesterday that expectations of the parties shouldn't matter. Not from a practitioner's point of view! And, after all, after we push it through the theoretical sieve, it's those of us lawyers at the end of the line after it's been pushed through the sieve that must deal with what we've pushed through the sieve. My obligation to my client in a natural resources context is to win. On this point Mr. Slade was very articulate yesterday. It is moral and justifiable to seek to win. It's all right to seek the best for your client. And if the best for your client is seeking remedies in one forum over the other, either because you know how that particular judge is going to respond to an issue or because of your familiarity with the rules of that particular forum or the expectation and the remedy that might result or in the findings of fact or in the maintenance of the record or whatever you will—selecting the most advantageous forum is precisely what we should be doing. Forum shopping is what we do every day. It's fine. It's all right. It violates no moral code. And I submit to you that the principles of international law get us there if you accept the sovereign-to-sovereign concept of *Worcester v. Georgia*. Fifth, to what extent does the other sovereign have an interest in regulating the

activity? Sixth, what is the likelihood of conflict with the regulation of another state?

Now, many of those points line up point to point with the *Colorado River* doctrine. So in conclusion I say, if you accept the sovereign-to-sovereign as the accurate characterization of the legal relationship between Indian tribes and the federal government, then international law principles should apply. If you go the other route and fully embrace the dependent-sovereign notion that the tribal courts are really a subset of the federal system and we're within the embrace of the federal system, then I would advocate the *Colorado River* abstention doctrine. Thank you.

MR. CLINTON: I again want to thank the North Dakota Law School and its fine law review staff for inviting me here. It has been a marvelous time and I want to thank all the participants for their wonderful words. It has really been one of the great conferences in which I've had the privilege to participate.

The issue of the *National Farmers Union* abstention doctrine is widely debated and widely misunderstood. In a marvelous article Professor Laurie Reynolds indicates that there has been wide disparity of views and scholarly criticism about the abstention doctrine, with some writers, including some on this panel, applauding the doctrine and some others, including myself, criticizing the doctrine. She marvels at why this wide diversity of response. By the way, while Professor Reynolds is too modest, I think, to give you the citation to her article, please let me give it to you.<sup>20</sup> The reason why I think there's a lot of misunderstanding about the *National Farmers Union* abstention doctrine and the divergence of scholarly approach to the question is that the *National Farmers Union* opinion really addresses two different issues, creating two different doctrines. Some people are applauding one part, while other people are criticizing another part.

What is involved in *National Farmers Union*<sup>21</sup> and in *Iowa Mutual*?<sup>22</sup> These cases basically make two different points. One point involves the primacy of tribal courts in resolving issues. We can call this point, the exhaustion doctrine. The exhaustion doctrine involves giving tribal courts the first crack at decision-making on questions involving the scope of their own jurisdiction. The exhaustion doctrine, however, does not merely involve giving the tribal courts the first opportunity to address such questions. There are other ways to describe it. The

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20. Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 CAR. L. REV. 1089 (1995).

21. *National Farmers Union Insurance Co. v. Crow Tribe*, 471 U.S. 845 (1985).

22. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

exhaustion doctrine is basically about tribal court primacy in resolving cases that arise on tribal reservations. And, of course, Indian law scholars looking at the exhaustion doctrine applaud this part of the doctrine. I too applaud the exhaustion part of the doctrine. That is not the part of *National Farmer's Union* that I have chosen to criticize.

What is the other half of the *National Farmers Union* doctrine? The other half of the doctrine is the part of the opinion that holds (basically out of whole cloth) that there is federal jurisdiction over the *National Farmers Union* claim, even though the Court did not apply its recently formulated *Merrell Dow Pharmaceutical* test<sup>23</sup> or any of the other conventional tests of federal question jurisdiction to arrive at that conclusion. Unlike most recent, conventional federal question jurisdiction cases, the Court did not imply a cause of action from any regulatory statute or constitutional provision. Indeed, in *Santa Clara Pueblo v. Martinez*,<sup>24</sup> a case to which I intend to return later, the Court indicated that it would not lightly imply federal causes of action in the arena of Indian affairs, even in areas governed by federal statute, in part to protect tribal sovereignty. Yet, in *National Farmers Union*, it turned around and made one up out of whole cloth, without even the benefit of a federal statutory or constitutional provision to which to anchor the cause of action. Not only did the Court do that, it also indicated that after the plaintiff had exhausted its tribal court remedies, there was still federal jurisdiction over its claim of lack of tribal jurisdiction and it could come back to the federal courts and relitigate that question anew.

Unlike my friend and colleague in the back of the room (Robert Laurence) who indicated in an earlier panel that he sees the world asymmetrically, I am part of what he describes as the full-court press crowd on the question of full faith and credit. If you try to review a state judgment that fully litigated that court's jurisdiction in a later federal court proceeding filed after the state judgment became final, the federal court will throw out your collateral attack based on the Full Faith and Credit Act.<sup>25</sup> The federal court will advise you that the question of the state court's jurisdiction is *res judicata*. That result will occur even if the state court decision on the jurisdictional question was patently in error. I submit, and always have maintained, that tribal judgments are judgments of the territories within the meaning of the Full Faith and Credit Act, thereby indicating that they are entitled to the same full faith and credit as state judgments. *United States ex rel. Mackey v. Cox*<sup>26</sup> holds that

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23. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986).

24. 436 U.S. 49 (1978).

25. 28 U.S.C. § 1738.

26. 59 U.S. (18 How.) 100 (1856).



tribal courts are courts of territories for a very similar statute and, from this case and other indications of Congressional intent, I have argued that tribal judgments are entitled to full faith and credit after they are final. On this analysis, a federal court has no right to review the jurisdictional question after the tribal judgment becomes final. Congress created no cause of action in that direction. Congress made no exception to the Full Faith and Credit Act. The tribal judgment therefore should be treated as fully final on all issues that were or could have been litigated, including the question of tribal court jurisdiction. As a result, I have criticized *National Farmers Union* and *Iowa Mutual* on the ground that there was absolutely no statutory authorization for federal court review of the tribal court's decision on jurisdiction and that the Supreme Court totally ignored the importance of the Full Faith and Credit Act to its holding.<sup>27</sup> I should add, by the way, that I regard the full faith and credit issue as still open because the Supreme Court failed to address or resolve it in these two opinions. I therefore encourage any tribal advocate to make exactly that argument when any *National Farmers Union*-type case comes back to federal court for review after exhaustion of tribal remedies.

I said earlier that I would return to the *Martinez* case. *Martinez* very nicely makes precisely the point I have been stressing about *National Farmers Union* and *Iowa Mutual*. In *Martinez*, the Court sustained the primacy of tribal adjudication of Indian civil rights issues but did not provide for any federal review when the tribal judgment became final. The judgment of the tribal court was final on those issues. The tribal court had both primary and final jurisdiction over the adjudication of civil Indian Civil Rights Act claims. In fact, if you look at the facts of *National Farmers Union*, the case just as easily could have been brought as a *Martinez*-style case based on a claim of lack of due process in the tribal court proceedings. Why was it not brought in that fashion? Basically, the plaintiff structured the case as an attack on tribal jurisdiction, rather than as a civil rights claim, because it had to create a theory that would get the case into federal court. *Martinez* would have precluded federal review of any civil rights claim. Consequently, what the *National Farmers Union* decision seems to represent is a partial abandonment of what originally was the correct approach of *Martinez*, leaving the matter completely and finally to the tribal forums. It is this abandonment of tribal court finality and the invented assertion of federal

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27. E.g., Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 150 (1993); Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 879-80 (1990).

supervisory authority over tribal court decisions of which I have been highly critical.

I want to move to Mr. Slade's paper because, unlike Professor Royster's paper on which I commented yesterday, there is much with which I disagree in Mr. Slade's paper. I want to particularize my disagreements with Mr. Slade's arguments. Before I do that, however, I want to say right up front that I am very leery of drawing analogies to the state abstention doctrines, as Mr. Slade's paper does. States are constitutionally protected in this union. There is a Tenth Amendment that protects the states. There is not one for the tribes. States are structurally protected in this union. They have formal representation in the Senate. While the Cherokee were once promised Congressional representation<sup>28</sup> and the Delaware Nation also was promised representation,<sup>29</sup> I do not see their delegates sitting in the current Congress. And, as a result, tribal sovereignty is far more fragile than state sovereignty in this union. Like Justice Blackmun, I am prepared to defer to political protections for states, as suggested in the *Garcia* case,<sup>30</sup> but not for tribes because of the lack of that constitutional and structural guarantees within the federal union. So I am wary about such analogies and Mr. Slade's paper is totally based on those analogies.

But, for purposes of argument, I want to concede to Mr. Slade the legitimacy of drawing such analogies. Assuming the propriety of such analogies, I want to offer what I think is an internal critique, rather than an external critique, of the paper. The reason I put Mr. Slade's diagram back on the screen is that you will notice that the basic core of Slade's argument is that there are four, and only four, structured abstention doctrines—*Pullman* abstention,<sup>31</sup> *Burford* abstention,<sup>32</sup> *Younger* abstention,<sup>33</sup> and *Colorado River Water Conservation District* abstention.<sup>34</sup> The basic problem I have with Mr. Slade's paper, which is very well written, very clear and, to my way of thinking, very wrong, is that there are not just four rigid abstention categories, as the paper suggests.

First, a very important category is ignored in the paper. Chief Justice Marshall wrote in *Cohens v. Virginia*<sup>35</sup> that "[i]t is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it *must* take jurisdiction if it should." In short, a federal court

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28. Treaty with the Cherokee Nation, Dec. 29, 1835, art. 7, 7 Stat. 478.

29. Treaty with the Delaware Nation, Sept. 17, 1778, art. VI, 7 Stat. 13.

30. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

31. *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

32. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

33. *Younger v. Harris*, 401 U.S. 37 (1971).

34. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

35. 19 U.S. (6 Wheat.) 264, 404 (1821).

should never exercise jurisdiction which it has not been given, but it should never refrain from exercising jurisdiction which it has been given. If the nation were still to follow this old maxim of Chief Justice Marshall, we would not have any abstention doctrines. But we do. We have abandoned Chief Justice Marshall's notion that a grant of federal court jurisdiction is mandatory. When was the first time that the Supreme Court abandoned this notion? It certainly was not in any of those four types of abstention cases offered by Mr. Slade. Rather, abstention doctrines had emerged as early as the case of *Ex parte Royall*,<sup>36</sup> decided in 1886. I suggest to my students that *Ex parte Royall* was our first abstention doctrine case. Yet, notice that *Ex parte Royall* is not among Mr. Slade's listed abstention doctrines. Now, those law students in the audience who might be taking federal courts or who have taken federal courts might wonder about *Ex Parte Royall*, noting that little attention was paid to the case in your federal courts class. The reason you may not remember the case is that it has since been codified in statute. The current incarnation of *Ex parte Royall* is found in 28 U.S.C. § 2254 (b) and (c). *Ex parte Royall* is the original case establishing the exhaustion requirement for the federal writ of habeas corpus. The exhaustion doctrine for habeas corpus began as a judicially-created abstention doctrine. It remained a judicially-created abstention doctrine until it was codified, if memory serves me right, in the 1948 revision of Title 28.<sup>37</sup>

The reason that I put Mr. Slade's listing of the abstention doctrines back on the board is I want to explore *Ex parte Royall* under the categories offered by Mr. Slade. First, what are the grounds for habeas abstention under *Ex parte Royall*? Initially, under the federal writ of habeas corpus, the cognizable claims involved challenging the jurisdiction of the state court. At the time *Ex parte Royall* was decided that was precisely the function played by the federal writ of habeas—contesting the scope of state court jurisdiction under federal law. Today, to invoke a federal writ of habeas corpus, the petitioner must either challenge the jurisdiction of the state court on federal grounds or challenge on federal grounds the criminal procedure employed by the state courts. The ability to attack a criminal conviction on federal constitutional procedural grounds is a recent development and did not exist at the time that *Ex parte Royall* was decided. Second, to invoke the *Ex parte Royall* doctrine, did there have to be a pending case, as Mr. Slade suggests should be necessary for *National Farmers Union* and *Iowa Mutual*

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36. 117 U.S. 241 (1886).

37. The exhaustion rule was first codified by the Act of June 25, 1948, c. 646, 62 Stat. 967 and has since been amended several times.

*Insurance* abstention? Absolutely not! Those of you who know the habeas corpus exhaustion rule, know it does not make any difference whether there currently is anything pending in state court. The petitioner almost invariably must resort to the state court to exhaust any available state court remedies. And finally, utilizing Mr. Slade's chart, what is the applicable test for *Ex parte Royall* abstention? The test is fundamentally whether the petitioner has already resorted to state court to exhaust available state remedies or whether such resort to state court would be totally futile? There is perhaps one other exception--double jeopardy. In double jeopardy cases, resorting to state court to exhaust available state remedies by completing the state criminal trial would itself violate the federal right the petitioner is asserting. With those narrow exceptions, there is an otherwise unflagging obligation to first resort to state court to exhaust available state remedies. The federal courts still regularly enforce the *Ex parte Royall* abstention doctrine. They just enforce it today pursuant to a federal statute, 28 U.S.C. § 2254.

Thus, the first thing I reject about Mr. Slade's paper is that it misses the closest abstention analogy—*Ex parte Royall*. The closest analogy is habeas corpus exhaustion and that doctrine, like *National Farmers Union* and *Iowa Mutual Insurance*, represents an unflagging obligation to exhaust available remedies in the courts of another sovereign irrespective of whether there is a pending proceeding in the other sovereign's courts at the time of the filing of the federal action. It is an obligation that is rigorously enforced. I know. I litigated habeas cases and I sometimes got thrown out of federal court on exhaustion grounds. The habeas exhaustion doctrine is rigorously enforced no matter how bad or corrupt one might think the state court is. And finally, the habeas corpus exhaustion rule, like the exhaustion rule of *National Farmers Union* and *Iowa Mutual Insurance*, is invoked as a matter of comity irrespective of the existence of pending proceedings in the state courts in order to protect and defer to the sovereignty of another forum.

The second part of Mr. Slade's paper that I want to quarrel with is his premise that there are four rigid abstention categories. The paper asserts that the four abstention categories he offers represent rigid, historical formulations for abstention and one must pigeonhole a case into one of them or abstention is unjustified. I want to submit that abstention has always been an evolving concept. It started with a doctrine he does not have on his chart—*Ex parte Royall*. Abstention doctrines have gradually evolved and changed ever since. Indeed, if you read the very opinion on which he relies, *Colorado River Water Conservation District*, you will see that Justice Brennan's opinion for the Court suggests that at the time of that decision there were only three

existing categories—*Pullman* abstention, *Burford* abstention, and *Younger* abstention. Justice Brennan specifically noted that the *Colorado River Water Conservation District* case did not fit into any of the then existing abstention doctrines. Consequently, the case created a new abstention doctrine, which Mr. Slade labeled as *Colorado River Water Conservation District* abstention. But, if the opinion in *Colorado River Water Conservation District* itself indicates that the Court has authority to create new abstention categories to satisfy comity concerns and if abstention doctrines therefore continually evolve over time, why should not *National Farmers Union* and *Iowa Mutual Insurance* be read as creating new categories on Mr. Slade's chart, just as *Ex parte Royall* represents a different category. The Indian abstention cases therefore represent a unique category which one need not pigeonhole into state abstention analogies, as Mr. Slade's paper has done. Since these two cases constitute a unique category of abstention involving Indian tribes, there are different rules and different exceptions, including the lack of any requirement of a pending action in tribal court.

The references in the opinions in *National Farmers Union* and *Iowa Mutual Insurance* to *Colorado River Water Conservation District* and to *Juidice vs. Vail*,<sup>38</sup> upon which Mr. Slade rests his argument, were cited for very narrow propositions. *Juidice v. Vail* was cited solely to explain the bad faith assertion of jurisdiction exception set forth in a footnote in *National Farmers Union*, and *Colorado River Water Conservation District* was cited only to establish the principle of comity and for nothing more. The opinions in *National Farmers Union* and *Iowa Mutual Insurance* did not purport to suggest that either case could be explained based either on *Juidice* or *Colorado River Water Conservation District*. I therefore think Mr. Slade's argument makes far too much of those passing references, ignoring the possibility, suggested by the opinions, that the Court, instead, was creating a new and unique doctrine about abstention in favor of tribal courts.

I also do not think these cases can be pigeonholed as *Younger* abstention cases very easily, as Mr. Slade suggests. The reason is the history and purposes of *Younger* abstention. The *Younger* doctrine began as an abstention in favor of pending state *criminal* proceedings. The doctrine then gradually evolved to encompass state civil proceedings where there was some significant state regulatory interest. Mr. Slade's paper has cited as paradigm *Younger* cases, the two most controversial of the *Younger* abstention decisions, the *Texaco* case<sup>39</sup> and the *Juidice v.*

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38. 430 U.S. 327 (1977).

39. *Pennzoil Co. v. Texaco, Inc.*, 480 U.S. 1 (1987).

*Vail*.<sup>40</sup> These two cases are controversial because they represent the most marginal applications of the *Younger* abstention. Commentators have criticized both these cases, claiming that they involved no state regulatory interests, as had the prior *Younger* abstention cases. Rather, both cases seemingly involved only private litigation. Treating *National Farmers Union* as a *Younger* case represents one step further removed because the facts of *National Farmers Union* are neither about sovereign regulatory interests nor about state interests in any way. The case involves a classic private tort suit. And as a consequence, even Mr. Slade's argument extends *Younger*.

There are two other specific aspects of the paper I want to very quickly call to your attention because I disagree with both of them. On page 27 of the manuscript Mr. Slade suggests that non-Indians' experience with tribal courts and tribal government is a recent phenomenon. I want to remind Mr. Slade that Reverends Worcester and Butler involved in *Worcester v. Georgia*<sup>41</sup> were not Indians. Worcester and Butler were non-Indians and the decision of the Supreme Court in *Worcester* recognized and vindicated the exclusivity of tribal processes over even non-Indians in Indian country. I also want to remind Mr. Slade that during the late nineteenth century, the so-called Five Civilized Tribes (Cherokee, Choctaw, Chickasaw, Creek, and Seminole) had operating courts that regularly entertained cases involving non-Indians. Many of these cases are referenced in the Eighth Circuit opinions of the time. In short, tribal court involvement with non-Indians is not a recent phenomena, as Mr. Slade suggests. George Santyana once said, "Those who do not remember history are condemned to repeat it." I would suggest this is a worthwhile adage to remember here.

At page 28 of the manuscript, Mr. Slade suggests that *Williams vs. Lee*<sup>42</sup> is not a territorial jurisdiction case. If one carefully examines Justice Black's opinion in *Williams vs. Lee*, you will find considerable focus on the 1868 Treaty with the Navajo and its establishment of exclusive tribal territorial control over the reservation. Indeed, since *Williams v. Lee* involved a non-Indian trader, the case seems to me to stand for the proposition that tribal territorial jurisdiction over civil cases involving non-Indians arising in Indian country is presumed in the absence of some express federal statutory or treaty limitation on tribal authority. As a result, I think that this particular aspect of the paper is simply wrong, as well as another reference on page 28 that suggests

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40. 430 U.S. 327 (1977).

41. 31 U.S. (6 Pet.) 515 (1831).

42. 358 U.S. 217 (1959).

*Williams vs. Lee* invested tribes with new jurisdiction. This comment turns federal Indian law on its head. Tribes are presumed to have inherent sovereign power, except to the extent limited by express or implied federal limitations. Tribes are not granted their authority from the federal government, as Mr. Slade's reference suggests. This doctrine was most recently reaffirmed in *Wheeler v. United States*.<sup>43</sup>

The last point I want to make involves my disagreement not with Mr. Slade's paper but with Laurie Reynolds' excellent and well-researched article. Specifically, I want to address the point she makes about the connection of the *Brendale* case<sup>44</sup> and other like civil regulatory or taxing jurisdiction cases to *National Farmers Union*. She argues that there ought to be federal jurisdiction without the need for exhaustion in cases, such as *Brendale*, that contest tribal regulatory or taxing, rather than adjudicatory, authority. Her argument is based on two points. First, the Supreme Court exercised jurisdiction in cases like *Brendale* and *Bourland*<sup>45</sup> without ever raising any *National Farmers Union* objection. Second, she argues that, unlike cases involving the scope of tribal adjudicatory jurisdiction, cases attacking tribal regulatory jurisdiction present pure questions of federal law involving no need for tribal fact-finding, no special tribal interests, and no need to interpret tribal law. I want to disagree with this argument on three levels. First, some of the cases on which she relies, such as *Brendale*, were initiated in federal court by the tribe, which clearly has the power to waive the primacy of its own courts over the question of the scope of its jurisdiction. Second, *National Farmers Union* suggests both that the federal courts need the tribal court's expertise on the meaning of tribal law and that the federal courts will benefit from the tribal court's articulation of the tribal interests that are involved in the reservation setting. For both purposes, the tribal courts are more expert in ferreting out important questions that must be resolved in order to decide whether and how to address the federal law questions surrounding the scope of tribal court jurisdiction. I would submit that in tribal regulatory or taxing questions there often are preliminary questions of tribal law that must be resolved before reaching the federal law issues. There are questions of tribal constitutional law and sometimes questions of the interpretation of tribal ordinances that must be resolved before reaching the federal legal issues. Often such questions are not purely questions of federal law, as Professor Reynolds suggests. Finally, even if no tribal law questions need be

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43. 435 U.S. 313 (1978).

44. *Brendale v. Confederated Tribes and Bands of the Yakima Reservation*, 492 U.S. 408 (1989).

45. *South Dakota v. Bourland*, 113 S.Ct. 2309 (1993).

resolved in a particular case contesting the tribe's regulatory or taxing power, the federal court will still benefit from a preliminary tribal court articulation of any tribal interests in and the tribal setting for any question of tribal regulatory or taxing jurisdiction. I therefore resist Professor Reynold's notion that federal cases attacking tribal regulatory or taxing jurisdiction involve pure questions of federal law in which exhaustion of tribal remedies should not be required.

One last quick point since I have already overstayed my welcome. Mr. Slade's paper has caught me in a potential interesting inconsistency, as Professor Kevin Worthen of Brigham Young University Law School already had done in a very interesting article.<sup>46</sup> The potential inconsistency arose on account of the different hats I wear, one as a writer and teacher of Indian law and another as a scholar in the federal courts area. I have written a couple of articles on the constitutionally mandatory nature of federal jurisdiction. Citing one of my federal court's articles, Mr. Slade's manuscript suggests that there must be a federal forum available somewhere for an attack on tribal court jurisdiction. It is a mandatory federal jurisdiction argument and I must confess that, yes, I have offered such an analysis of federal jurisdiction. This observation is one that Kevin Worthen made some time ago, and Mr. Slade might want to cite Professor Worthen's article in his paper. Professor Worthen noted the seeming inconsistency between my mandatory jurisdiction position and the results in *Martinez* and *National Farmers Union*, which, as I have already suggested, I support. Ever since Professor Worthen pointed out this seeming inconsistency in my own scholarship, I have pondered whether I am somehow intellectually schizophrenic or, at least, inconsistent. How could I resolve this seeming inconsistency? Let me quickly, very quickly, suggest how I would harmonize my positions. First, as I have already suggested, concluding that the attack on the scope of tribal court jurisdiction involved in *National Farmers Union* constitutes a justiciable federal question represents a considerable, unjustified expansion of federal question jurisdiction. I began by suggesting that this point was the basis of some of my criticism of *National Farmers Union*. At least in the case of the federal writ of habeas corpus and my example of *Ex parte Royall*, there is a federal statutory cause of action that overrides the finality of the state criminal proceeding. No such federal statute supports the *National Farmers Union* decision to create a federal cause of action or to ignore the finality of a tribal court decision. As Mr. Lear has suggested, the

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46. 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 (1990).



relationship between the tribal governments and the federal government constitutes a political relationship. Because it is a political relationship, unless Congress wants it adjudicated in federal court and has clearly so indicated by statute, it should not be adjudicated in federal court. If the relationship should not be adjudicated, it is not a federal question for federal courts. Consequently, for me there is no inconsistency. But maybe you will not buy this explanation because, notwithstanding my criticisms of *National Farmers Union*, the federal courts have been adjudicating such issues of the scope of tribal civil jurisdiction like crazy. If one does not accept that argument, I resort ultimately to a suggestion that Laurie Reynolds makes in her article. I do not think reviewing final judgments of tribal courts in a separate federal proceeding can be sustained because I do believe in full faith and credit. The federal court has a federal statutory obligation under the Full Faith and Credit Act to accord full faith and credit, and therefore finality, to any final tribal court judgment adjudicating the scope of tribal court jurisdiction. I should note that I do not think the same problems are caused by the assertion in the United States Supreme Court of certiorari review jurisdiction from tribal courts on federal questions if such jurisdiction were supported by federal statute, which it currently is not. I previously have suggested that while I did not think that such certiorari review was necessary, it nevertheless does not constitute as great an intrusion on tribal sovereignty as federal district court review. I would be the first to concede that my statement about the lack of need for such review is somewhat inconsistent with my writings about mandatory federal jurisdiction. But I guess I resort to the old adage that "foolish consistency is the hobgoblin of small minds." Thank you.

MS. ALLEVA: Thank you, Bob. We extend apologies to Professor Laurence and to the audience for our going over time, but if you have the fortitude and the interest, please hang on for Frank Pommersheim.

MR. POMMERSHEIM: I just want to make a few overview points and then talk about one doctrine in particular. First, just a historical note to keep in mind that prior to *National Farmers Union*<sup>47</sup> and *Iowa Mutual*<sup>48</sup> and *Santa Clara Pueblo v. Martinez*,<sup>49</sup> there was very little litigation in tribal courts. The federal courts and federal people in general had no interest in what was happening in tribal courts. And so you have the notion only when tribal courts get a certain amount of affirmative authority and they start to exercise that authority do federal

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47. *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985).

48. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987).

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

courts, do practitioners, does Congress really get interested in what tribes are doing. And I think there's a certain irony that the more authority tribes seem to have in the judicial area, the more concern there is about federal courts' oversight or supervision or Congress enacting legislation to put the brakes on that authority. I think that's just one of the dilemmas about tribal sovereignty. When you have it only in the abstract and you're not exercising it, no one cares about it. But when you have it in reality and you start to exercise it, then everyone is interested in it. And I think that that's just the intention, perhaps it's ironic as well, but I think we need to keep that in mind.

Second, one of the things that is being played out, and maybe scholars have a different view or different dilemma than practitioners, is that one of the things that's happening is that perhaps slowly but surely, or perhaps not slowly or perhaps not even surely, is the issue about what ultimately is the relationship of tribal courts to federal courts? We don't know. I don't think we know and neither does the Supreme Court. They didn't articulate that relationship in *National Farmers Union* and *Iowa Mutual*, and I think that's one of the incredible developmental issues that is being played out as we speak. What is or ought to be the relationship of tribal courts to the federal system? As Professor Clinton has suggested in the context of federal and state courts and federal and state government, in general you have a Tenth Amendment to create a constitutional marker for talking about the relationship. But when you're talking about the relationship of tribal courts to federal courts, of tribal government to federal government, you don't have the Tenth Amendment to act as a constitutional benchmark. Maybe, as I suggest, some of our treaties ought to be a kind of constitutional benchmark for orienting discussion between the federal government and tribal government and federal courts and tribal courts.

The last thing that I want to mention before giving a particular example is what Justice Marshall mentioned in one of his leading opinions, where he said, this is a paraphrase, that the federal government has always supported the development of tribal courts. Now, if that's a true statement, that leads to interesting possibilities. What does it mean for the tribal judiciary, for the Supreme Court in particular, to support the development of tribal courts? What kind of development are we talking about? Does that involve deference? Does that involve review? Exactly what is meant by that statement of the federal courts and the federal government always supporting the development of tribal courts? Again, we don't know. And I think one of the things that is happening in this area is that a lot is happening, but we really don't know in what direction it is going. We are in the process both as practitioners and

scholars of trying to figure it out, but I think incredibly large issues relevant to the tribal—federal court relationship are taking place at the same time that these individual cases are being adjudicated both in tribal court and federal court.

Lastly, I think that the tension between the practitioners and the scholars resides in part in the nature of being a practitioner. I think that you want to maximize your options—you want to win. A part of winning is maximizing your options. So if you're going to litigate or potentially have to litigate in tribal court, I think any practitioner, most practitioners also want the option of forum selection. For whatever reasons they often don't want to go to tribal court, they want some options. And so when they see the options in the abstention doctrine and in the diversity doctrine, to take two examples, I think most practitioners want to have those options. I want to suggest where one of those options really doesn't apply, and that's the notion of diversity jurisdiction.

I think diversity jurisdiction is totally inapplicable in context of tribal court litigation. I suggest that for the following reasons: First, is just a historical reason; that when diversity jurisdiction was established, it was basically to avoid perceptions of unfairness in State Courts. And I don't think you can just sort of leapfrog that concern and say that it ought to apply in a reservation context where one of those litigants, one of the parties, would be on the reservation and one would be a resident and a citizen of another state. I think historically it just doesn't work. Second, if you're trying to argue that in the context of diversity jurisdiction in a tribal situation that you would actually apply state law. I think that is totally impossible because one of the premises of diversity jurisdiction is that there is subject matter jurisdiction for the State Court in the first instance. And in the context of a cause of action arising on a reservation there is no state subject matter jurisdiction. So if you try to argue in the context of diversity that a federal court will be applying state law to a transaction that took place on the reservation, I don't think it works. It can't work. Third, I think it creates the problem of discrimination because you would have a third category or a possible litigant in a diversity action that arose completely on a reservation that wouldn't be protected. If the notion of having diversity jurisdiction is to protect against the possible unfairness of the tribal forum against outsiders, nonresidents of that particular state would have access to the federal court because they would have diversity. But what about a nonreservation in-state resident who isn't a resident of the reservation and, therefore, arguably if you're using that analogy should have the opportunity of a different forum but if he or she simply resides off the

reservation but not outside the state, they wouldn't have access to diversity jurisdiction. And they would be, in a sense, stuck and discriminated against because if you simply reside outside the state, you would have access to diversity jurisdiction, but if you live in the state but off the reservation, you wouldn't have access to that possibility.

Now one other possibility is if you can conceive of diversity jurisdiction in the context of yes, you can have diversity jurisdiction in the context of an action that arises on the reservation in which there is concurrent jurisdiction in tribal court but the federal court would not think about applying state law. They would have to apply tribal law. And I don't know if people when they think about diversity jurisdiction ever conceive of diversity jurisdiction in that particular context that, okay, maybe you could have diversity jurisdiction but the federal court would not be applying state law. They would be applying tribal law. And I think that's an interesting possibility, but one problem with that is that in most cases if you apply that notion, the federal court would have an awfully difficult time ferreting out what tribal law is on a particular issue because most tribal courts in terms of their decisional law and even their statutory law are at a very early stage. A good number of cases that are currently being litigated in tribal courts are cases of first impression. And so to me it wouldn't even work practically because in many cases what the federal court would probably have to try to do is certify the questions back to the tribal court to get the tribal court to decide what, in fact, the tribal rule was. So I think if you're going to have diversity at all, it can only be in the context that the federal court has to apply tribal law. And I think this stage in the development of tribal courts it's not a very practical solution. And to me, that's just a quick overview of diversity jurisdiction, which all practitioners know about, and all of a sudden they're confronted with the new situation dealing with tribal court. One of the logical reactions is, well, we want to have diversity in our arsenal as well, but I think upon close scrutiny diversity isn't really appropriate in the tribal court context and even though that cuts down on the options that are available to litigants, I simply think that it isn't available.

Again, I want to thank people for coming.

Since Sam was getting bashed so heavily by Phil, I'll offer Sam a compliment. I really appreciate the way that people were brought together in terms of the various sessions. I think it's very helpful for those of us that write and do other things in the field to meet and hear the arguments of scholars who have somewhat different views, and particularly practitioners who I think sometimes really don't care for us scholars because they have the notion of us just being squirreled away in

our offices writing things. We don't actually have to be out there litigating and worrying about the nitty-gritty on the ground kind of stuff. So I appreciate the views of the people who are actually out there practicing. Thank you.

MR. SLADE: I wish I could think of something I disagreed with that's been said. You know, I can't. I think I want to start with responding to Professor Skibine's comment that he's uncomfortable with *Colorado River*. He thinks it's going to keep all cases in federal court, which ties in in my mind to Professor Clinton's question, why not a sixth category of abstention? And I think the answer is, to Professor Clinton first, is we don't need one and it's not indicated in *Iowa Mutual* and *National Farmers Union*. And to the two of them, *Colorado River*, where it applies, contains all the elasticity that's necessary to address the considerations that Professor Clinton mentioned and that the other speakers have addressed. What are they? Federal policy interests, which includes everything that's discussed in *Iowa Mutual* and *National Farmers Union*. Those are important policy interests. And I'm not arguing that they're not. Second, judicial economy; and, third, the interests of the parties in a speedy, efficient, and reasonable dispute resolution. No sixth category is necessary. And, by the way, there's nothing special about habeas corpus. There are lots of other statutory kinds of abstention like the Tax Injunction Act and the Anti-Injunction Act that I didn't list on the board that exist in the state court situation, federal versus state, that don't exist in the tribal situation and that will have to be addressed. And it's one of the reasons the tax cases are presenting so much difficulty in the Indian area.

Second, what about the question of federal question jurisdiction and *Santa Clara*? *Santa Clara* does not hold that there's no federal question jurisdiction with respect to jurisdictional issues arising in Indian country. It finds no implied right of action under the Indian Civil Rights Act for a cause of action under the Equal Protection Clause of 25 U.S.C. section 1302. That's a simple, straightforward implied right of action as Professor Clinton suggests, but it has been very clear from the *Oneida* cases and others that a federal question is presented with respect to private property rights and the exercise of federal power over non-Indians. And that, it's clear, is a federal question. If all of those federal questions are to go through tribal court without, and we've heard suggestion today there should be no refutation of that decision by a federal court, then I seriously question whether Professor Clinton can square the idea of a mandatory federal jurisdiction of Article 3, Section 2's language that the federal judicial power shall extend to all cases in law and equity arising under the Constitution and laws of the United States

with a doctrine that there should be mandatory abstention in the kinds of cases we're talking about. The federal court has to get a look at those somewhere, and the only place that can happen now is in the federal court under existing statutes.

And, finally, I agree with Professor Pommersheim that we're not talking about what law is to be applied in the federal court. And that's why *Iowa Mutual* is right about diversity jurisdiction. Maybe it's state law. Maybe it's tribal law. And if the notion is that it's impossible for a federal court to figure out tribal law, well, how fair is it to expect a non-Indian litigant to go into tribal court and litigate over that law? Clearly the federal court can be apprised of the contents of tribal law if that's to be the rule of decision, and in many of these cases I submit it should be, and those issues resolved there. The other thing I want to say is I want to congratulate Angie Elsperger and the editorial staff of the North Dakota Law Review on perhaps the best put together conference in terms of getting together a great selection of speakers, providing outstanding support in every stage in the process, and making it a truly enjoyable and rewarding experience for all of us. Thank you.