SYMMETRY AND ASYMMETRY IN FEDERAL INDIAN LAW

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"It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government."[1]

"In the eyes of government, we are just one race here. It is American."[2]

I. INTRODUCTION

A good part of the complexity and intrigue of federal Indian law is disclosed by the two quotations given above from the Supreme Court of the United States. The first, from *McClanahan v. State Tax Commission of Arizona*,[3] an important Indian law case, embodies the notion, sensible to many of us, that there are reasons that Native Americans are deserving of a separate status under American domestic law, unique unto themselves. All immigrants, whether voluntary or involuntary, came as *individuals* to this land, and it was only after once here that they constituted themselves, or joined, independent and sovereign

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Many people, over a long period of time, were so helpful in the creation of this Article that it is no exaggeration to say that it would never have been written without them. Generally speaking, acknowledgements lie below, at the place in the discussion where their help was most crucial. Errors and infelicities, of course, are my responsibility.

Two acknowledgements, though, are appropriate here at the outset: First to the artist, who provides the essential asymmetry that is the heady zest of my life. And second to Blue Bayou, *requiescat in pace*, who continually reminded me of the essential, orderly balance of existence as it appeared from her quiet equine perspective.

It is the foundational principle of this Article that asymmetry and balance are complementary, not inconsistent, notions.

1. McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 173 (1973).
2. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment).
3. 411 U.S. 164 (1973).

states. Thereafter, they fought for that sovereignty over the land and against the people already residing there. The immigrants might have refused to recognize the claims of the Indians to the New World, or might have insisted on unconditional surrender by the Indians who were already here, but they did not. Instead, the colonial governments, and later the state and federal governments, dealt with the Indian tribes on a government-to-government basis, thus recognizing indigenous sovereignty over the land later claimed by the Europeans, and, still later, by Africans and Asians.[4] In the quotation from *McClanahan*, the Supreme Court cautioned us all not to forget the importance of that long-standing and long-recognized indigenous sovereignty.

The second quotation given above, offered by Justice Scalia writing separately in *Adarand Constructors v. Peña*,[5] embodies the contrary position that we are all in this venture together, irrespective of whence we or our ancestors came. Now, it is unclear whether Justice Scalia would apply his we-are-just-one-race-here-it-is-American rule to Native Americans; *Adarand Constructors* is not an Indian law case. To so apply it would wipe out the entire body of law called federal Indian law. Specifically, Title 25 of the United States Code would have to go, for that title is a set of legislative enactments which, by its existence and its application only to Native Americans, belies the Scalian notion that, in the eyes of the government, all Americans are unmodified Americans. A few are not; a few are considered by the federal government to be *Native* Americans.

The present Article will explore the tension inherent between these two positions. When does *McClanahan* prevail, and when *Adarand Constructors*? When are we all the same, in the eyes of the government, and when are we different? When are the rules the same continent-wide? When are local deviations appropriate? When does the center control? When does local autonomy prevail? These are difficult and important questions in our country, which is both a federal republic and a country in which aboriginal sovereignty is still recognized.[6] Is there a general theory that holds all of this together?

The present Article advances such a theory. It is based on the notions of symmetry and asymmetry.

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4. *See generally* FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY (1994).

5. 515 U.S. at 239.

6. *See generally* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989) (theorizing that the relationship of federalism to state sovereignty replicates in some ways the relationship of federalism to tribal sovereignty). Two colleagues here at the University of Arkansas, Terry Jean Seligmann and Stan Adelman, gave me helpful advice on the structure and substance of this Article, suggesting that these questions be answered earlier than they are. Instead, I ask my readers' indulgence and patience; the answers will unwind slowly. Readers who want some answers now are referred to Professor Resnik's classic article, *supra*, which contains great insight into the complexity of this combination between federalism and tribal sovereignty. Her design is to show that the role played by the federal government's courts with respect to tribal exercise of sovereignty tells us a great deal about the role played by those courts with respect to state exercise of sovereignty. *See id.*

For some time, a debate has been going on amongst a few Indian law scholars about what is known as the "full faith and credit question." That is to say, how should tribal courts receive off-reservation judgments? And how should state and federal courts receive tribal judgments? And how should one tribe receive the judgments of another tribe? As tribal courts have become more active tribunals for non-Indian litigants and as states have become more respectful of the sovereignty of the tribes within their borders, these questions have come to have serious practical implications. Beyond that, though, they are at the heart of the broader question of how the dominant society deals with tribal deviations from its closely held norms, and vice versa. The way one government reacts to the judicial acts of another reveals a great deal about the relations between those governments, hence the heated scholarly debate.[7]

Over the course of this debate, I have been the principal proponent of the so-called "asymmetric" approach to the cross-boundary enforcement problem. According to that model, a tribal court has one set of concerns in its receipt of off-reservation judgments, and hence one set of legal principles should apply. On the other hand, a state court has a different set of concerns when it receives tribal judgments, so a different set of legal principles should apply. Across the reservation border, then, the legal regimes should be asymmetric. Details are found elsewhere.[8]

Constitutional full faith and credit is the prototypical symmetric doctrine, and a larger group of scholars, led by Professor Robert N. Clinton of the University of Iowa, advances the position that the cross-reservation-boundary enforcement problem requires that approach.[9]

Comity, the hallmark of a more flexible enforcement-of-judgment regime, flows generally from the respect that one sovereign has for the sovereign acts of another.[10] Comity may be applied either symmetrically or asymmetrically. As will be discussed below,[11] the question of symmetry becomes a question of retaliation: will one sovereign refuse to enforce the judgments of another sovereign because the other has refused to enforce its judgments? If retaliation holds, then we have symmetric comity, as each jurisdiction recognizes only the judgments of the jurisdictions who reciprocate. If retaliation does not hold, then we have asymmetric comity.

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7. *See generally* Richard E. Ransom et al., *Recognizing and Enforcing State and Tribal Judgments: A Roundtable Discussion of Law, Policy and Practice*, 18 AM. IND. L. REV. 239 (1993).

8. *See* Robert Laurence, *The Convergence of Cross-Boundary Enforcement Theories in American Indian Law: An Attempt to Reconcile Full Faith and Credit, Comity and Asymmetry*, 18 QUIN. L. REV. 115 (1999) (attempting to negotiate a settlement of the controversy).

9. *See, e.g.*, Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841 (1990).

10. *See* Ransom, *supra* note 7, at 250–55 (remarks of Professor Newton).

11. *See infra* note 233 and accompanying text.

Courts are split.[12] Most recently, the Ninth Circuit chose non-retaliatory, asymmetric comity as the federal rule for use in federal courts.[13] Several states, by statute, have adopted a regime of symmetric comity, with retaliation.[14] A recent tribal court opinion opted for symmetric full faith and credit,[15] as did a recent New Mexico case.[16] The future course of the law is uncertain.[17]

This rubric of "symmetry" and "asymmetry" that has become standard in the cross-boundary enforcement problem refers to the mirror images of common parlance. But the ideas of symmetry and asymmetry have broader meanings to physicists, meanings which, I have come to believe, lead to a usefully broader application of the concept to American Indian law. (Of applications beyond the present field, I have only a few pretensions, mentioned below.[18]) In particular, with the proper foundation in the meaning of symmetry, one sees an explanation of the difference between the two quotations given at the outset and sees symmetry in Justice Scalia's remark and asymmetry in Justice Marshall's. This in turn leads to an understanding of when the driving force of American Indian Law should be symmetric and when it should be asymmetric.

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12. *See* Eberhard v. Eberhard, 24 Ind. L. Rep. 6059, 6065 n.3 (Cheyenne River Sioux Ct. App. 1997) (containing an exhaustive collection of the different court opinions on this subject).

13. *See* Wilson v. Marchington, 127 F.3d 805, 807 (9th Cir. 1997).

14. *See, e.g.*, S.D. Codified Laws §1-1-25(2)(b) (Michie 1992).

15. *See Eberhard*, 24 Indian L. Rep. at 6068.

16. *See* Halwood v. Cowboy Auto Sales, Inc., 946 P.2d 1088, 1089 (N.M. 1997).

17. The sporadic, piecemeal progress of the common law might give us, in the end, an asymmetric system. By its nature, symmetry often has to be imposed from above, perhaps by the U.S. Supreme Court, but it is a little difficult to imagine the Supreme Court taking such a case. Under present rules, the Supreme Court cannot take a case in which a tribal court has refused to give full faith and credit to a state court judgment, for there is neither appeal nor *certiorari* from tribal courts to the Supreme Court. Nor, under the implication of *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), could the question reach the Supreme Court indirectly through a federal court attack on a tribal court's determination not to enforce an off-reservation judgment. *See id.*

18. *See infra* notes 52–60 and 80–105.

II. SYMMETRY AND ASYMMETRY IN PHYSICS AND LAW[19]

The familiar mirror-image symmetry across a line, which I will call "left-right" or "bilateral" symmetry, is a special case of the more expansive concept of symmetry in physical science.[20] In physics, a law is symmetric if the law remains unchanged through a transformation, be that transformation spatial, temporal,

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19. As a law professor trying his hand at physics, I follow in the footsteps of giants. *See* Felix S. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238 (1950); Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989); *see also* Donald P. Judges, *Light Beams and Particle Dreams: Rethinking the Individual vs. Group Rights Paradigm in Affirmative Action*, 44 ARK. L. REV. 1006 (1991) (combining law and physics in a thoughtful critique of affirmative action).

As well, this Article must take to heart the rebuke found in this exchange:

> [Jacques] Derrida, referring to Einstein's theory of relativity, wrote in a 1970 scholarly article: "The Einsteinian constant is not a constant, is not a center. It is the very concept of variability. In other words, it is not the concept of some*thing*—of a center starting from which an observer could master the field—but the very concept of the game."
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> Dr. Steven Weinberg, the physics Nobelist, cited the passage in an essay in the *New York Review of Books* several years ago, saying, "I have no idea what this is intended to mean."

James Glanz, *Reconciling Nothingness in the Universe and the Soul*, N.Y. TIMES, Dec. 7, 1999, at F5.

20. Some readers may dislike my attempt here to expand the definition of "symmetry" beyond its usual bounds, whether those bounds are set by everyday use or by accepted lawyer-talk. Others may see this attempt as consistent with modern, or more properly post-modern, tendencies to distort and ultimately destroy the meaning of words. True enough, most people—most legal scholars even—use the word "symmetric" to refer exclusively to bilateral symmetry and the word "asymmetric" to refer to the opposite of same. *See* note 63, *infra*. Still and all, and as will be discussed in the text, scientists use the word more broadly than the rest of us do. Further, it is the thesis of this Article that the broader concept has jurisprudential applications, especially to the field of American Indian law. If this thesis is correct, then it seems unnecessary to use a different word in a legal context to describe the phenomenon physicists describe as broad "symmetry." Any such linguistic change would camouflage the fact that, in both physics and law, bilateral symmetry is but a special case of this broader notion of symmetry. I am reminded in this regard of the first words of what some consider the most important book of the twentieth century:

> An ambiguity, in ordinary speech, means something very pronounced, as a rule witty or deceitful. I propose to use the word in an extended sense, and shall think relevant to my subject any verbal nuance, however slight, which gives room for alternative reactions to the same piece of language. Sometimes, especially in this first chapter, the word may be stretched absurdly far, but it is descriptive because it suggests the analytical mode of approach, and with that I am concerned.

WILLIAM EMPSON, SEVEN TYPES OF AMBIGUITY 1 (3d ed. 1966).

One other point on linguistic choice: For reasons that are entirely stylistic, I prefer the adjectives "symmetric" and "asymmetric" to "symmetrical" and "asymmetrical" and have used the former throughout, except when quoting from those who make the other choice, most notably Dr. Feynman himself.

orientational, or otherwise. As Professor Richard P. Feynman wrote for a popular audience, "That is the sense in which we say that the laws of physics are symmetrical; that there are things we can do to the physical laws, or to our way of representing the physical laws, which make no difference, and leave everything unchanged in its effects."[21]

For example, suppose one observes the effect of gravity close at hand, say in the falling of a leaf from a tree. Suppose one then observes the effect of gravity far away, say in the spinning of a distant galaxy. The law governing the effect of gravity appears to be the same in both instances; hence, it is said that the law of gravity is symmetric through a translation in space.[22] Likewise, physical

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21. RICHARD P. FEYNMAN, THE CHARACTER OF PHYSICAL LAW 78–79 (Modern Library ed., Random House, Inc. 1994) (1965). Richard Feynman is the late physicist, Nobel Prize winner, and Cal Tech professor of physics. Dr. Feynman, one of those rare individuals about whom scientists themselves use the word "genius," *see generally* JAMES GLEICK, GENIUS: THE LIFE AND SCIENCE OF RICHARD FEYNMAN (1993), is almost certainly better known to the non-scientist world after his death than before. Much of his wide popular reputation followed the post-mortem publication of lectures he gave for audiences of both scientists and non-scientists. *See id.*; RICHARD P. FEYNMAN, SIX EASY PIECES: ESSENTIALS OF PHYSICS EXPLAINED BY ITS MOST BRILLIANT TEACHER (1995) [hereinafter SIX EASY PIECES]; RICHARD P. FEYNMAN, SIX NOT-SO-EASY PIECES: EINSTEIN'S RELATIVITY, SYMMETRY AND SPACE-TIME (1997) [hereinafter FEYNMAN, SIX NOT-SO-EASY PIECES]; RICHARD P. FEYNMAN, SIX EASY PIECES: RECORDINGS IN THE CLASSROOM (Helix Books 1994); RICHARD P. FEYNMAN, SIX NOT-SO-EASY PIECES: RECORDINGS IN THE CLASSROOM (Helix Books 1997); RICHARD P. FEYNMAN, THE MEANING OF IT ALL: THOUGHTS OF A CITIZEN-SCIENTIST (1998) (1963 lectures at the University of Washington at Seattle) [hereinafter FEYNMAN, THE MEANING OF IT ALL]; RICHARD P. FEYNMAN, THE PLEASURE OF FINDING THINGS OUT (1999); *see also* RICHARD P. FEYNMAN & RALPH LEIGHTON, "SURELY YOU'RE JOKING, MR. FEYNMAN!": ADVENTURES OF A CURIOUS CHARACTER (Edward Hutchings ed., 1985); RICHARD P. FEYNMAN & RALPH LEIGHTON, "WHAT DO YOU CARE WHAT OTHER PEOPLE THINK?": FURTHER ADVENTURES OF A CURIOUS CHARACTER (1988). *See generally* RICHARD P. FEYNMAN ET. AL., 1–3 THE FEYNMAN LECTURES ON PHYSICS (1964).

On the question of whether Dr. Feynman would approve of this Article's attempts to apply his science to the law, the genius himself once said:

> In talking about the impact of ideas in one field on ideas in another field, one is always apt to make a fool of oneself. In these days of specialization there are too few people who have such a deep understanding of two departments of our knowledge that they do not make fools of themselves in one or the other.

FEYNMAN, THE MEANING OF IT ALL, *supra*, at 3.

22. *See* FEYNMAN, THE CHARACTER OF PHYSICAL LAW, *supra* note 21, at 79–80. To say that the law of gravity "appears" to be the same here as it is there is to suggest that experimental physics dominates over theoretical physics. Aristotle of Stagirus wrote this: "If ever...the facts about bees are fully grasped, then credit must be given rather to observation than to theories, and to theories only if what they affirm agrees with the observed facts." *See* MICHAEL GRANT, THE ANCIENT MEDITERRANEAN 218 (1969). Simon Singh calls experimentation "the ultimate arbiter of truth." Simon Singh, *The Proof Is in the Neutrino*, N.Y. TIMES, June 16, 1998, at A31. He continues, "Sir Arthur Eddington, a formidable experimenter in the early 20th century, called experimentation 'an incorruptible watch-dog.' Max Planck, one of the founders of quantum theory, said, 'An experiment is a

laws are symmetric through a rotation in space, which is to say, rather simply, that a machine works the same way no matter which way you look at it.

Temporal symmetry is a bit more problematic. In the first place, the universe appears to have *begun* at some point, and the scientists do not yet know what laws obtained at that instant and for a tiny length of time thereafter.[23] Furthermore, Feynman disarmingly admitted that he did not know what the laws of physics would be the day after his lecture.[24] But, within those limits, the laws are symmetric through time, or, as Feynman puts it, "a delay in time makes no difference."[25]

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question which science poses to Nature, and a measurement is the recording of Nature's answer.'" *Id.; see also* James Glanz, *Theory, Reality and Skeptical Tourists in Physics Land*, N.Y. TIMES, Feb. 1, 2000, at D5. With his usual succinctness, Feynman wrote, "[O]bservation is the judge." FEYNMAN, THE MEANING OF IT ALL, *supra* note 21, at 5.

Einstein, on the other hand, is famous for having written in 1914: "I do not doubt any more the correctness of the whole system, whether the observation of the solar eclipse succeeds or not." ABRAHAM PAIS, SUBTLE IS THE LORD 303 (1982).

In any event, a theorist would insist that there is much more to gravity than merely the way it "appears" to be working across the universe, and the symmetry of the laws of physics through a spatial transformation can be proved mathematically. *See, e.g.*, ALBERT EINSTEIN, RELATIVITY: THE SPECIAL AND THE GENERAL THEORY (1961) (Robert W. Lawson trans., 1961). Note that in his Preface, Dr. Einstein writes that "[t]he work presumes a standard of education corresponding to that of a university matriculation examination." *Id.* at v. Apparently, a university degree is not what it used to be; the book is quite difficult.

23. *See* JOHN D. BARROW & JOSEPH SILK, THE LEFT HAND OF CREATION: THE ORIGIN AND EVOLUTION OF THE EXPANDING UNIVERSE 62–63 (1983). 1.33×10^{-47} of a second after the creation of the universe is the so-called "Planck moment" before which the laws of physics are shrouded, theoretically forever, in uncertainty. *See id.* The number is determined by combining three universal constants: the gravitational constant, Planck's constant, and the speed of light. *See id. But see* Ford Burkhart, *I.E. Segal, 79, Mathematician Who Disputed the Big Bang*, N.Y. TIMES, Sept. 14, 1998, at B14. Dr. Segal experimented with the idea of a so-called "steady-state" universe that has neither a "Big Bang" beginning nor a "Planck moment" nor, theoretically, an end. *Id.* And, it seems that everywhere one looks, the explanation lies in notions of symmetry, for his obituary notes that "Dr. Segal parted company with almost all mainstream cosmologists in his belief that the universe is not expanding and that the astronomical phenomenon of 'red shift' can be fully explained by his own novel interpretation of principles of mathematical symmetry." *Id.*

24. FEYNMAN, THE CHARACTER OF PHYSICAL LAW, *supra* note 21, at 80. For a contrary example of two who seem to think that they *do* know the laws of the universe as they will be in the future, *see generally* Lawrence M. Krauss and Glenn D. Starkman, *The Fate of Life in the Universe*, 281 SCI. AM. 5 (Nov. 1999).

25. FEYNMAN, THE CHARACTER OF PHYSICAL LAW, *supra* note 21, at 86. The temporal asymmetry of certain laws of physics is apparently an important element of the so-called "Young Earth" school of Biblical creationists, that is to say those who believe the universe was created only about six thousand years ago. *See generally* Jack Hitt, *On Earth As It Is in Heaven: Field Trips with the Apostles of Creation Science*, 293 HARPER'S MAGAZINE, Nov. 1996, at 51. It is difficult to explain our ability to see such a huge, but young, universe; light travels too slowly to reach us across trillions of miles in a few thousand years.

Perhaps most fundamental of all, the laws of physics are symmetric in this broad sense under a uniform velocity in a straight line, this being a restatement of Einstein's famous theory of relativity.[26] Feynman pays special

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Various solutions are offered by the "Young Earthers": the stars are not so far away, the universe was created with the light from those stars already part way here, and so on. *See generally id.* But the most elegant solution is the temporal asymmetry of the speed of light: it used to go faster than it does today. *See* James Glanz, *Science vs. the Bible: Debate Moves to the Cosmos*, N.Y. TIMES, Oct. 10, 1999, at 1; *see generally* Hitt, *supra*, at 51. This solution would be similar to the "Young Earth" solution to the problem of carbon dating, i.e., that Carbon 14 used to decay more quickly than it does now, so present measurements overstate the age of the object analyzed. *See generally* HUGH ROSS, CREATION AND TIME: A BIBLICAL AND SCIENTIFIC PERSPECTIVE ON THE CREATION-DATE CONTROVERSY (1994); D. RUSSELL HUMPHREYS, STARLIGHT AND TIME: SOLVING THE PUZZLE OF DISTANT STARLIGHT IN A YOUNG UNIVERSE (1998).

Of course, there may be a fundamental relationship between the speed of light, the rate of radioactive decay, and the very concept of time. Hence, when the "Young Earth" theorists say that light used to go faster, or that Carbon 14 used to decay more quickly, they may be saying in essence that time used to go more slowly. If a unit of time is defined to be how long it takes for light to travel a certain distance, or how long it takes for a certain isotope to decay, or how long it takes for a certain atom to vibrate, and if those measuring standards are themselves slowing down, then "days" are, in fact, shorter than they used to be. And it has always been one resolution of the apparent tension between the Genesis account of creation and the fact that the Earth *looks* so old, that the Bible's reference to seven "days" is a reference to a much longer period of time than seven days is today. *See, e.g.*, JEROME LAWRENCE & ROBERT E. LEE, INHERIT THE WIND 118–121 (1955).

The idea that the speed of light is asymmetric through time is not to be dismissed out of hand. *See* FEYNMAN, THE PLEASURE OF FINDING THINGS OUT, *supra* note 21, at 199 (discussing Dirac's suggestion that the fundamental constants change over time); Joao Magneijo, *Plan B for the Cosmos*, 284 SCI. AM. 54 (Jan. 2001) (same). Dr. Robert H. Dicke, the late Albert Einstein University Professor of Science at Princeton, had a similar theory with respect to gravity:

> In 1961, Dr. Dicke and his graduate student, Carl H. Brans, proposed that gravity might have two components: one of them the familiar force impelling objects straight down and another, much weaker, component causing objects to shrink or expand. They theorized that one effect of such a force might be a slow weakening of gravity as the universe expanded....If gravity had been stronger in the distant past, [certain globular clusters of stars] could have burned faster and aged more rapidly, they suggested. The theory proved to be unsuccessful, but Dr. Dicke remained a gravity theorist throughout his life.

Walter Sullivan, *Robert Dicke, Noted Physicist, 80, Dies; Gravity Theorist Who Challenged Einstein; 'A Rare Combination,'* N.Y. TIMES, Mar. 5, 1997, at A17.

26. As Dr. Feynman relates, a "theory of relativity," that is to say, the truth that certain laws are symmetric under a uniform motion in a straight line, was first stated by Newton as follows: "The motions of bodies included in a given space are the same among themselves, whether that space is at rest or moves uniformly forward in a straight line." FEYNMAN, SIX NOT-SO-EASY PIECES, *supra* note 21, at 50 (quoting Isaac Newton).

Newton was referring to the laws of mechanics. *See id.* at 51. The tidy symmetry of those laws seemed to disappear when James Clerk Maxwell formulated the laws of electricity, magnetism, and light into one system in the 1860s. *See id* at 52. H.A. Lorentz later showed that Maxwell's equations remained symmetric in the broad sense if they

attention to this kind of symmetry: "The symmetries of translation in space, delay in time, and so on, were not very deep; but the symmetry of uniform velocity in a straight line is more interesting and has all kinds of consequences."[27]

Symmetries such as those just mentioned suggest that all of the physical world is symmetric in this broad sense and that all physical laws that work in one place work throughout all translations. That is not the case. Not all physical laws are symmetric under all translations. For example, many laws are not symmetric as to scale.[28] There is a limit to how small one can build. And as objects grow in size, other things being equal, their weight grows with the third power while the strength of their support grows only with the second power. Hence, large things tend to collapse of their own weight, and horses cannot fly, though 747s can.[29]

As another example of an asymmetry in the laws of physics, there is no theory of relativity for objects moving with constant angular velocity, as there is with objects moving with a constant velocity in a straight line. Thus, laws do not remain the same when things spin; we get dizzy, hurricanes swirl, and water stays in a bucket swung overhead. The theory of linear relativity, based on linear symmetry, means that one cannot tell whether the Earth is moving in a straight line relative to the stars or vice versa. But angular asymmetry means that it is possible to discern that it is the Earth that is rotating, and not the stars spinning overhead.[30]

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underwent certain so-called "Lorentz transformations." *See id.* at 53–54. Einstein, acting on a suggestion by Poincaré, then proved that Newton's laws of mechanics remained symmetric under Lorentz transformations, hence proving that all the laws of mechanics and electromagnetics remain the same during uniform motion in a straight line. *See id.* at 54. It is this result that is now called Einstein's Special Theory of Relativity. *See id.* at 50. The General Theory came later and incorporated the laws of gravity. *See id.*

27. FEYNMAN, THE CHARACTER OF PHYSICAL LAW, *supra* note 21, at 88. For a nice literary allusion to the theory of relativity, *see* PAUL SCOTT, THE TOWERS OF SILENCE 363 (1976).

> [S]he wanted to be enclosed in the world of her private happiness so that she could experience it fully, exist for a while in its tranquil centre which was not a fixed point in space by a moving one gliding across a flat landscape in a long straight line which, in her imagination, was the road to Dibrapur.

Id.

28. *See* FEYNMAN, SIX NOT-SO-EASY PIECES, *supra* note 21, at 27–28 (attributing to Galileo the discovery that laws of physics are not symmetric as to scale).

29. *See generally* STEPHEN BUDIANSKY, THE NATURE OF HOUSES: EXPLORING EQUINE EVOLUTION, INTELLIGENCE, AND BEHAVIOUR (1997) (discussing the various "Side Effects of Bigness," though not including the inability to fly). Mr. Budiansky writes: "As we have seen, large animals suffer many disadvantages, not least of which is gravity." *Id.* at 36.

30. *See* FEYNMAN, THE CHARACTER OF PHYSICAL LAW, *supra* note 21, at 91. A Foucault Pendulum demonstrates the rotation of the Earth. *See id.*

Finally, then, there is the question of symmetry with respect to reflection, that is, familiar left-right, bilateral symmetry.[31] Oddly enough, while this is the most familiar kind of symmetry to laypersons, to physicists bilateral symmetry presents some of the most complex problems.[32] In the first instance, bilateral symmetry deals with the way things *look*, and, as such, is susceptible to different perspectives; we see things differently.

To show the varieties of left-right, or bilateral, symmetry and asymmetry, imagine a formal dinner in the State Dining Room at the White House, and begin with the china: The plate in front of you is probably bilaterally symmetric, or perhaps symmetric about a point, unless it should happen to be the famously asymmetric Herend porcelain from Hungary, with its colorful bugs and birds arranged haphazardly in front of you. Pull back, and the place setting is bilaterally asymmetric: forks on the left, knives and spoons on the right, napkin and crystal in a lopsided arrangement. Pull back. The table itself is likely bilaterally symmetric, with the same number of chairs on both sides. (Or symmetric about the center if the table is round). A quick glance at your fellow guests will show the men clad quite symmetrically in their tuxedos, while women's fashions have always permitted more asymmetry.[33] Pull back and the State Dining Room itself is revealed to be bilaterally asymmetric, with fireplaces on one side, but not the other. Pull back, and the White House itself is largely a symmetric building, that being the Georgian style.[34] Pull back farther, and one sees the largely symmetric

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31. *See generally* HERMANN WEYL, SYMMETRY, 3–40 (7th ed. 1973) (reprinting Dr. Weyl's 1952 lectures at Princeton). The preface to this difficult little book shows the connection between left-right symmetry and the broader notion of symmetry pursued in this Article:

> Starting from the somewhat vague notion of symmetry = harmony of proportions, these four lectures gradually develop first the geometric concept of symmetry in its several forms, as bilateral, translatory, rotational, ornamental and crystallographic symmetry, etc., and finally rise to the general idea underlying all these special forms, namely that of invariance of a configuration of elements under a group of automorphic transformations.

Id. at "Preface and Bibliographical Remarks" (unpaginated).

For a more manageable, but still far-reaching, discussion of mirror images, *see generally* MARTIN GARDNER, THE NEW AMBIDEXTROUS UNIVERSE: SYMMETRY AND ASYMMETRY FROM MIRROR REFLECTIONS TO SUPERSTRINGS (3rd rev. ed. 1990).

32. *See* FEYNMAN, SIX NOT-SO-EASY PIECES, *supra* note 21, at 30-47.

33. *See* Richard Avedon & Rebecca Mead, *Portfolio: Off Kilter*, THE NEW YORKER, June 1, 1998, at 68 (showing asymmetric women's fashions). I am grateful to Jessica Reeves Martin, my erstwhile research assistant and office manager, for providing me with this example.

34. *See* Thomas A. Gaines, *Palladian Footsteps: The Master Architect Left His Mark on Vicenza and Its Environs*, WASH. POST, Jan. 15, 1989, at E2.

An exception to the prevailing symmetry of Georgian architecture is found at Mount Vernon:

> [George Washington's architectural eye] was an unusual eye indeed, for it led Washington to create four asymmetrical façades at a time when symmetry was considered a sign of refinement, particularly in a house

> that aspired to serious pomp. Many of the windows are off center, especially on the west side, and the cupola and the pediment, which in any self-respecting classical house line up, in Washington's don't.

Paul Goldberger, *Why Washington Slept Here*, THE NEW YORKER, Feb. 15, 1999, at 86. Later, Mr. Goldberger—and his guide to Mount Vernon, Allan Greenberg, a District of Columbia architect and architectural author—speculated on the meaning of the asymmetric style, finding that meaning rich:

> [Washington's] taste was conventional; the uses to which Washington put it were not. No one has known quite what to make of the building's lack of symmetry, but Allan Greenberg is sure that it was intentional. "This man planned everything—everything was an aesthetic question to him," he said to me as we walked across the lawn, looking at the strange, off-center features of the west façade. "I can't believe he didn't intend the asymmetry—he would only have had to move four windows." But if Washington wanted the house to be asymmetrical, why? What made this man of relatively routine, upper-class taste break the rules so willingly?
>
> It may have been simply that Washington was being practical—in an American sort of way. He was ambitious but deeply pragmatic, and he gave no indication of being particularly concerned with perfect order. He could be seen as a sort of enlightened C.E.O., one of those types who combine commanding leadership with a tentative but eager aesthetic sense. He had high aims for his house, but he was not obsessed with minutiae, and it may be that to him symmetry fell into the category of a minor detail. Washington wanted Mount Vernon to be a model for others—to be for houses what he wanted his Presidency to be for Presidents. He was less learned than Jefferson but more open to experience: he looked around, he observed, he saw all kinds of things he liked and synthesized them. He did not think about architecture as obsessively as Jefferson did, but he revelled in it. You can see how he must have infuriated Jefferson—this man who didn't study the classics, who probably never thought about Palladio, producing an American icon, by instinct alone.

Id. at 88.

Presidential personalities aside, architects have long known that the eye appreciates some relief from strict symmetry. For example, the oldest building on the campus of the University of Arkansas is a handsome Italianate/Second Empire structure that we call "Old Main." Of the two towers on opposite ends of the building, the one to the north is slightly taller, its lines somewhat more elegant. Tradition has it that the builders, who were Yankees, deviated from the architectural plans to construct this asymmetric homage to their homeland. *See* Thomas Rothrock, *The University of Arkansas's "Old Main,"* 30 ARK. HIST. QUART. 1, 10 (1971). A colleague from the Architecture School prefers to explain the asymmetry in terms of "Victorian Eclecticism." *See generally* SPIRO KOSTOF, A HISTORY OF ARCHITECTURE: SETTINGS AND RITUALS (1985); *see also* THE MICHELIN GREEN GUIDE TO PARIS 63 (1981) ("The Notre-Dame Façade...The facade's overall design is majestic and perfectly balanced. The central portal is taller and wider than the others; that on the left is surmounted by a gable—it was the mediaeval practice to avoid monotony by dissymmetry.").

Dr. Feynman digresses shortly on the relationship between symmetry and architecture in his discussion of a gate in Neiko, Japan, in FEYNMAN, SIX NOT-SO-EASY PIECES, *supra* note 21, at 47.

layout of Washington, D.C.[35] Finally, North America is seen to be nicely asymmetric when viewed from afar.

This tour from one's plate to one's planet, then, shows that we are surrounded by examples of both symmetry and asymmetry, even when one is considering the simple bilateral, visual kind. It also leads us to the broader question of the bilateral symmetry of the universe as a whole, which is of more interest to Feynman and the scientists and, I think, to lawyers and the law.

The laws of gravitation, nuclear decay, and electro-magnetism are bilaterally symmetric, meaning that these laws would survive a mirror-image translation. But most amino acids on earth are "left-handed," making asymmetric, for example, the way light passes through sugar water. Feynman's example regarding bilateral symmetry is for his audience to imagine two clocks, one constructed to be the mirror image of the other. If the clocks are powered by gravity, electricity, magnetism, or nuclear decay, then the mirror-image clock would work the same as the original, except, of course, it would run backwards. But if the original were powered by some mechanism based on the passage of light past amino acids, its mirror-image would not work.[36]

Thus, not all laws are symmetric through all translations. And, while the world and the universe—and the human body—have a certain superficial symmetry,[37] there is plenty of asymmetry around. Supernovae are asymmetric;[38]

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35. *See, e.g.*, Albert C. Moore, Jr., *Westchester Opinion: The Opportunities of Municipal Planning*, N.Y. TIMES, Aug. 26, 1990, at 12WC 28:

> Good urban planning is not new. One of the best American examples of effective urban planning is Pierre Charles L'Enfant's design for our nation's capital. There have been innumerable attempts at disrupting the symmetry of its plan but fortunately none has succeeded. Washington remains one of the most beautiful cities in America because it was pre-planned along strong, well-conceived development guidelines.

Id.; *see also* Roulhac Toledano, *Triangles, Triangles Everywhere: Capitol Hill Is Filled with These Curious "Footnotes to History," and Where L'Enfant's Avenues Intersect, Geometric Chaos (And More Parks) Results*, ROLL CALL, Sept. 20, 1993, *available in* LEXIS, news group file beyond two years.

36. *See* FEYNMAN, SIX NOT-SO-EASY PIECES, *supra* note 21, at 30–32. When Dr. Feynman wrote, it appeared that some evolutionary accident as life evolved on Earth chose left-handed rather than right-handed amino acids for life in this neighborhood, but scientists are no longer sure that the asymmetry caused by this handedness is limited to Earth alone. *See* Malcomb W. Browne, *Cosmic Amino Acids Also Show Left-Handed Bias, Study Says*, N.Y. TIMES, Feb. 14, 1997, at A24; Malcomb W. Browne, *Stellar Hint at Radiation's Role in Life*, N.Y. TIMES, July 31, 1998, at A15.

37. *See* WEYL, *supra* note 31, at 6–8. On the outside, anyway, the body is largely symmetric: two arms, two legs, two eyes, nose in the middle. Dr. Weyl emphasized this kind of symmetry:

> One may ask whether the aesthetic value of symmetry depends on its vital value: Did the artist discover the symmetry with which nature according to some inherent law has endowed its creatures, and then copied and perfected what nature presented but in imperfect realizations; or has the aesthetic value of symmetry an independent source? I am inclined to think with Plato that the mathematical idea is the common

neutrinos are asymmetric.[39] The entire universe was from the beginning asymmetric, or became such soon after creation.[40] Indeed, the law of symmetry itself is asymmetric, as it does not apply everywhere and through all translations. The rules of symmetry have their exceptions, and asymmetry would appear to be an inherent part of the universe.

The question—an important one in physics—thus arises as to whether the universe is *essentially* symmetric or asymmetric. Consider this from Stephen W. Hawking:

> Up to 1956 it was believed that the laws of physics obeyed each of three separate symmetries called C, P, and T. The symmetry C means that the laws are the same for particles and antiparticles. The symmetry P means that the laws are the same for any situation and its mirror image (the mirror image of a particle spinning in a right-handed direction is one spinning in a left-handed direction). The symmetry T means that if you reverse the direction of motion of all particles and antiparticles, the system should go back to what it was at earlier times; in

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> origin of both: the mathematical laws governing nature are the origin of symmetry in nature, the intuitive realization of the idea in the creative artist's mind its origin in art; although I am ready to admit that in the arts the fact of the bilateral symmetry of the human body in its outward appearance has acted as an additional stimulus.

Id.

Our innards, however, are much less symmetric than our "outward appearance": one heart, one liver, one stomach, one spleen, all off-center. Perhaps most tellingly, the brain is asymmetric in a way that some think profoundly affects your ability to read this sentence. *See* ALBERTO MANGUEL, A HISTORY OF READING 35 (1996).

For an explanation of origins of our internal asymmetry, *see* Juan Carlos Izpisúa Belmonte, *How the Body Tells Left from Right*, 280 SCI. AM. 6, June 1999, at 46. Early in his article, Professor Belmonte asks, "Why do our internal organs defy the symmetry of our overall body plan?" *Id.* From the perspective of the present Article, Professor Belmonte presumes too much. Why isn't the question, "Why do our external body parts defy the asymmetry of our overall body plan?" The question of whether asymmetries are departures from a fundamentally symmetric universe—or body of law—or vice versa is the essential, preliminary inquiry.

38. *See* John Noble Wilford, *Titanic Burst of Dying Stars Is Linked to Neutrinos*, N.Y. TIMES, Jan. 24, 1995, at C6.

39. *See* George Johnson, *Elusive Particles Continue to Puzzle Theorists of the Sun*, N.Y. TIMES, June 9, 1998, at B11 (discussing the history of research on neutrinos). The asymmetry of neutrinos was discovered by Maurice Goldhaber and his colleagues at the Brookhaven National Laboratory in 1957. *See id.*

40. *See* BARROW & SILK, *supra* note 23, at 86 fig. 3.4; Malcomb W. Browne, *Fermilab Struggles To Keep Its Edge*, N.Y. TIMES, Dec. 28, 1999, at F1; James Glanz, *Scientist at Work: Steven Weinberg: Physicist Ponders God, Truth and a 'Final Theory,'* N.Y. TIMES, Jan. 25, 2000, at F1.

> other words, the laws are the same in the forward and backward directions of time.[41]

Note that Hawking is using the word "symmetry" in its broader, physical-science sense of a law that remains the same through translation. And, as his mention of 1956 suggests, these very basic symmetries of C, P, and T proved not to be characteristics of our essentially asymmetric universe. Dr. Feynman's appraisal, in the end (and writing before Dr. Hawking), is that the universe is "nearly" symmetric.[42] He continues:

> How is it that nature can be almost symmetrical, but not perfectly symmetrical?...Why is nature so nearly symmetrical? No one has any idea why....[T]he true explanation of the near symmetry of nature [might be] this: that God made the laws only nearly symmetrical so that we should not be jealous of His perfection![43]

III. FROM SCIENCE TO LAW

Some observations, then, as I make the transition from science to law: first, "symmetry" is a broader concept than the bilateral, reflective identity of common understanding, which is the one that we Indian law scholars have been using when analyzing the cross-boundary enforcement problem. Just as bilateral symmetry in physics is a special case of universe-wide, constant-through-translation symmetry, the application, or not, of symmetric, cross-boundary "full faith and credit" is seen to be a special case of the broader question of the "symmetry" of the law in general. That is to say, the broader question is whether any particular piece of domestic law, however grand or commonplace—be it the Double Jeopardy Clause,[44] the freedom from self-incrimination in the Fifth Amendment,[45] or the Full Faith and Credit Clause,[46] or be it the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings,[47] the right to repossess the collateral on the debtor's default,[48] or the right to protect one's homestead from one's creditors[49]—applies everywhere, or only locally.

Justice Scalia's separate opinion in *Adarand Constructors*, then, is seen as a statement of the symmetry of American law in this broader sense, through various "translations," if you will, from one group to another and from one place to another.

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41. STEPHEN W. HAWKING, A BRIEF HISTORY OF TIME: FROM THE BIG BANG TO BLACK HOLES 77 (1988).
42. FEYNMAN, SIX NOT-SO-EASY PIECES, *supra* note 21, at 46.
43. *Id.* at 46–47.
44. *See* U.S. CONST., amend. V.
45. *See id.*
46. *See* U.S. CONST., art. IV, § 1.
47. 11 U.L.A. 1 (1936).
48. *See* Uniform Commercial Code § 9-503 (1972).
49. *See, e.g.*, Ariz. Rev. Stat. § 33-1101 (2000).

My second general observation on the use of this broader meaning of symmetry in the law has to do with the most difficult and profound of the physical world's symmetries: the theory of relativity, that is to say that the laws of physics remain the same whether a body is at rest or in motion at a uniform velocity in a straight line. It is this theory of relativity that leads to the questioning of the accuracy of one's perspective, even to the point of agreement as to what—or when—"now" is. Dr. Feynman explains:

> You see that one of the consequences of the principle of symmetry for uniform velocity in a straight line—*that word "symmetry" means that you cannot tell [whose] view is correct*—is that when I talk about everything that is happening in the world "now," that does not mean anything. If you are moving along at a uniform velocity in a straight line, then the things that happen that appear to you as simultaneous are not the same events as appear simultaneous to me, even though we are passing each other on the instant when I consider the simultaneous event to have happened. We cannot agree what "now" means at a distance. This means a profound transformation of our ideas of space and time, in order to maintain this principle that uniform velocity in a straight line cannot be detected.[50]

As we shall see below, a symmetric legal regime, which requires the result that "you cannot tell whose view is correct," is a difficult one to maintain. When things are done differently on the opposite sides of a border, the people on each side tend to think that their way of doing things is the preferred way; people in their everyday lives find it difficult to accept the notion of equivalence of perspective that symmetry requires, Drs. Einstein and Feynman to the contrary notwithstanding.[51]

My third observation on symmetry and the law has to do with its universal absence. As we have seen, the universe is asymmetric in an essential way, and the fact that asymmetry is an essential and native element of certain physical laws through certain translations somehow points to the legitimacy of asymmetric solutions to complex legal problems, such as the cross-boundary enforcement of state and tribal judgments. If the physical universe can tolerate a little asymmetry, then surely so can the body of the law.

Cardozo thought so. In the famous case of *Jacob & Youngs, Inc. v. Kent*,[52] a contractor departed from the explicit specifications of the project by installing Cohoes pipe instead of Reading pipe. The owner withheld the last

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50. FEYNMAN, THE CHARACTER OF PHYSICAL LAW, *supra* note 21, at 87 (emphasis added).

51. *See, e.g.* Charles Krauthammer, *CNN's Cold War; Twenty-Four Hours of Moral Equivalence*, WASH. POST, Oct. 30, 1998, at A27 ("But 'Cold War's' bias is deep and disturbing. It consists of a relentless attempt to find moral equivalence between the two sides.").

52. 129 N.E. 889 (N.Y. 1921).

installment payment and the contractor sued, offering evidence that the two types of pipe were equivalent in quality. The evidence was excluded by the trial court, and a verdict was directed for the defendant owner. The contractor appealed, the Appellate Division reversed, and the owner appealed to the New York Court of Appeals.

Held: affirmed. And, along the way, Judge Cardozo observed for the majority of the Court of Appeals:

> Those who think more of symmetry and logic in the development of legal rules than of practical adaption to the attainment of a just result will be troubled by a classification where the lines of division are so wavering and blurred. Something, doubtless, may be said on the score of consistency and certainty in favor of a stricter standard. The courts have balanced such considerations against those of equity and fairness, and found the latter to be the weightier.[53]

Note that here Cardozo is using the concept of symmetry in the Feynman sense, for he relates symmetry to "consistency and certainty." That is to say, both speak of symmetric rules as those that remain the same through various translations, not simply the narrower, if more commonly stated, bilateral symmetry of mirror images.

To make this point clearer, allow me a slight digression to compare two bits of asymmetry found in contract law. First, consider the bilateral asymmetry of section 2-207 of the Uniform Commercial Code.[54] This section, well-known to (and rather contemned by) first-year law students, contains the solution to the difficult "battle of the forms" question, where two parties are attempting to contract but are exchanging communications and forms that never precisely match up in their terms. The pre-Code, common law rule was the "mirror image rule." Common law analysis began with an offer; not until a party had made a statement definitive enough to be designated an "offer" could there be any possibility of a contract at all. Next one sought from the other party an "acceptance," and that communication had to take the original "offer" in its entirety; any response to the "offer" that was not an "acceptance" was a rejection. No contract was formed unless the acceptance was the "mirror image" of the offer.[55]

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53. *Id.* at 891. Cardozo wrote many opinions mentioning symmetry, usually with disapproval. *See, e.g.*, Bristol v. Woodward, 167 N.E. 441, 446 (N.Y. 1929); Allegheny College v. National Chantangua County Bank, 159 N.E. 173, 175 (N.Y. 1927); Prager v. New Jersey Fidelity & Plate Glass Ins. Co., 156 N.E. 76, 77 (N.Y. 1927). On the other hand, Cordozo's Supreme Court decisions are more respectful of the notion of symmetry. *See, e.g.*, Palko v. Connecticut., 302 U.S. 319, 328 (1937); Holyoke Water Power Co. v. American Writing Paper Co., 300 U.S. 324, 340 (1937).

54. U.C.C. § 2-207 (1989).

55. *See* Steiner v. Mobil Oil Corp., 569 P.2d 751 (Cal. 1977) (stating the traditional mirror image rule); RESTATEMENT (SECOND) OF CONTRACTS § 59, cmt. a (1979) and Reporter's Note.

Hence, the so-called "mirror-image" rule was, despite its name, bilaterally asymmetric: The rules were different for offers and acceptances, and the control of the contract was entirely in the hands of the offeror.

Section 2-207 loosened the strictness of the old rule, but continued its essential bilateral asymmetry. We do not interpret the contract merely by treating the communications of the offeror (the left, if you will), as having the same weight as those of the offeree (the right). There remain places where the advantage and ultimate control over the contract still go to the offeror over the offeree.

For instance, if the seller's offer contains an indemnity clause and the buyer makes a "definite and seasonable expression of acceptance," while remaining silent on indemnity, the clause is part of the contract. On the other hand, if the buyer makes the offer and is silent on indemnity, and the seller places the indemnity clause in the acceptance, then the clause is not part of the contract, but a mere proposal for addition to the contract.[56] In some cases, this counter-proposal will be deemed accepted by the original offeror.[57] The statutory allowance of this deeming of acceptance is a step by the U.C.C. drafters in the direction of symmetry, but the statute remains asymmetric in those circumstances where this deeming does not apply.[58]

This is classic bilateral asymmetry across the "line" that divides offers from acceptances, where parties on opposite sides are treated differently by the law. This is the narrow kind of asymmetry that has been much debated in the cross-boundary enforcement problem.

Now consider the broader asymmetry of promissory estoppel as set out by the Restatement of Contracts. The rule of section 90 of the First Restatement is a symmetric one in the broad sense of the word; it requires reliance by all promisees before the estoppel attaches.[59] Section 90 of the Second Restatement is asymmetric in this broad sense, removing the necessity of any specific reliance upon the promise when the promisee is a charity.[60] This is asymmetry in the Feynman-Cardozo sense, for it takes a rule that otherwise would apply universally

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56. *See, e.g.*, Brown Machine, Inc. v. Hercules, Inc., 770 S.W.2d 416 (Mo. App. 1989).

57. *See* U.C.C. § 2-207(2) (1989).

58. The assymmetry of § 2-207 may soon be replaced by a fully symmetric offer and acceptance regime that gives no advantage to the offeror. *See* THE AMERICAN LAW INSTITUTE, UNIFORM COMMERCIAL CODE [NEW] REVISED ARTICLE 2, SALES §§ 2-206–07 (Apr. 14, 2000 Discussion Draft); *see also* Empire Gas Corp. v. American Bakeries Co., 840 F.2d 1333 (7th Cir. 1988) (interpreting § 2-306 of the U.C.C. in a bilaterally asymmetric way).

59. *See* RESTATEMENT OF CONTRACTS § 90 (1932).

60. *See* RESTATEMENT (SECOND) OF THE LAW, CONTRACTS, § 90(2) (1979). *But see* Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111 (1991) (arguing that if one looks not at the "conventional wisdom," embodied in what scholars *say* is the law of promissory estoppel, but at what judges actually *do* in promissory estoppel cases, one finds that actual reliance may not always be an element of estoppel, and there may, in fact, be an asymmetric exception for charities even under the First Restatement).

to all promisees, and makes an exception for one particular "locale," that is to say, charities. This is the more generalized asymmetry that I wish to explore in the present Article.

Before leaving Cardozo and contract law, note that, in the quotation from *Jacob & Youngs*, he related the asymmetry that he found appropriate there to "balance." It is here that law requires more than does science. Professor Feynman seeks to explain how the world works, to describe what Lawrence Durrell called "the shape of nature."[61] He does not judge what the laws of physics *should* be, or whether it is somehow "inappropriate" that there is no law of relativity, say, for objects moving with constant angular velocity. Judge Cardozo, however, *constructs* the law; he does not just describe it.[62] Construction of the law requires that he, and we, judge its balance, and in *Jacob & Youngs* the balance between certainty and fairness led to an asymmetric rule.

Because of the usually too-narrow focus that we lawyers have on symmetry as only bilateral symmetry, there is some tendency for legal writers to equate symmetry with balance. Most mentions of asymmetry in the law reviews are in general derogation of the idea; asymmetry is nearly always represented as a shortfall from a more even-handed, that is to say, bilaterally symmetric, equality or balance. Professor Roberta Kevelson's rejection of an asymmetric balance in the following passage is typical, if a little post-modern:

> What happens in all economic transactions, as it happens in transactions of meaning of all kinds, is that a transformation and permutation of value occurs, and therefore brings about an increase in the amount of value. This increase of value *destroys any notion of a symmetry or balance* in significant transfers of value or in transactions with respect to any system of signs in any universe of discourse. Asymmetrical structural evolution

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61. LAWRENCE DURRELL, CLEA 119 (1961).

62. The clarity of this distinction between scientists and lawyers seems to break down on occasion, in both directions. *See, e.g.*, Malcolm W. Browne, *Essay: Room in the Universe for Ancient Beliefs and Modern Physics*, N.Y. TIMES, June 9, 1998, at F4 ("Many physicists, who regard 'beautiful' ideas in physics as more likely to be true than ugly ones, regard sterile neutrinos as aesthetically inelegant and therefore improbable.").

As an example of this phenomenon, Dr. John Bahcall of the Institute for Advanced Study at Princeton was quoted in a companion article to Mr. Browne's, as saying, when describing a certain theory of solar mechanics, "The MSW effect is a beautiful idea....It would seem like a cosmic mistake if nature did not use this solution." George Johnson, *Elusive Particles Continue to Puzzle Theorists of the Sun*, N.Y. TIMES, June 9, 1998, at F1.

In the other direction, too, this standard characterization of the difference between scientists discovering their laws and judges making ours is subject to dispute, at least by those who feel that the task of the common law judge is to "unearth" the law, not to make it. *See* The Federalist Society, *Who Are We?* (visited Nov. 28, 2000) <http://www.fed-soc.org/who.htm>. Adherents to the principles of the Federalist Society may be among those who would disagree with the statement in the text, for one of those principles reads "that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be." *Id.* It is unclear to me if and to what extent the Federalist Society intends that principle to apply to the ordinary workings of common law courts.

> requires that value always increases in the direction of its development.[63]

Even an equation of balance with traditional bilateral symmetry is too simple. Granted, Hermann Weyl's demanding little book on the subject begins like this:

> If I am not mistaken the word *symmetry* is used in our everyday language in two meanings. In the one sense symmetric means something like well-proportioned, well-balanced, and symmetry denotes that sort of concordance of several parts by which they integrate into a whole. *Beauty* is bound up with symmetry. Thus Polykleitos, who wrote a book on proportion and whom the ancients praised for harmonious perfection of his sculptures, uses the word, and Duer follows him in setting down a canon of proportions for the human figure. In this sense the idea is by no means restricted to spatial objects; the synonym "harmony" points more toward its acoustical and musical than its geometric applications. *Ebenmass* is a good German equivalent for the Greek symmetry; for like this it carries also the connotation of "middle measure," the mean toward which the virtuous should strive in their actions according to Aristotle's Nicomachean Ethics, and which Galen in *De temeramentis* describes as that state of mind which is equally removed from both extremes: [untranslated Greek passage omitted].

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63. Roberta Kevelson, Transfer, Transaction, *Asymmetry: Junctures Between Law and Economics from the Fish-Eye Lens of Semiotics*, 42 SYRACUSE L. REV. 7, 17 (1991) (Kevelson's emphasis removed; mine added); *see also* Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317, 318 (1992) ("This asymmetry—abstract powers, but particular rights—shows the authoritarian bias in the emerging pattern of Supreme Court decisions."); Richard McKenna, *Paradox, Asymmetry, and Switcheroos: Approaching Constitutional Law from an Unexpected Angle*, 23 J. MARSHALL L. REV. 333, 345 (1990) ("[T]he Court's half century of asymmetry consciously left such parties as the providers of rental housing vulnerable to confiscatory regulation, and then chose not to recognize the actuality of confiscatory regulation and its consequences."); Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 9 n. 23 (1990) ("The present analysis indicates that unless the set of disputes on appeal is symmetric around the legal standard, further development of the legal standard may be inadvertently biased.").

There are a few admirers of asymmetry in the legal universe. Professor Friedman of the University of Michigan is the foremost. *See* Richard D. Friedman, *Anchors and Flotsam: Is Evidence Law "Adrift"?*, 107 YALE L.J. 1921 (1998); Richard D. Friedman, *An Asymmetrical Approach to the Problem of Premptories?*, 28 CRIM. L. BULL. 507 (1992); Richard D. Friedman, *Comment: Character Impeachment Evidence: The Asymmetrical Interaction between Personality and Situation*, 43 DUKE L.J. 816 (1994). At several junctures, Professor Friedman has provided me with helpful direction. *See also* Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755 (1992); Ivo Welch, *Why Is Bank Debt Senior?: A Theory of Asymmetry and Claim Priority Based on Influence Costs*, 10 REV. OF FIN. STUDIES 1203 (1997) (appearing to be supportive of the notions of asymmetry, but a very difficult piece).

> The image of the balance provides a natural link to the second sense in which the word symmetry is used in modern times: *bilateral symmetry*, the symmetry of left and right, which is so conspicuous in the structure of the higher animals, especially the human body.[64]

I prefer Cardozo's interpretation to Weyl's; the judge understands that symmetry and logic can displace equity, fairness, and justice. In fact, asymmetry in the broad sense of departures from universal uniformity is at times essential for balance. For example, Leonard Bernstein, discussing one of Beethoven's "early drafts" of his Fifth Symphony, said: "It is so symmetrical that it seems static. It doesn't seem to want to go anywhere. That is fatal at the outset of a symphonic journey."[65]

And Dr. Weyl may agree. Discussing symmetry in art, he writes:

> For in contrast to the orient, occidental art, like life itself, is inclined to mitigate, to loosen, to modify, even to break strict symmetry. But seldom is asymmetry merely the absence of symmetry. Even in asymmetric designs one feels symmetry as the norm from which one deviates under the influence of forces of non-formal character.[66]

Justice Thurgood Marshall's quotation from *McClanahan v. State Tax Comm'n of Ariz.*, given at the outset, is just such a statement, establishing asymmetry in Indian law as something that "must always be remembered."[67] Justice Marshall seems to consider tribal sovereignty, in Dr. Weyl's words, as a deviation from the norm of symmetry, and, at the same time, as something more than merely the absence of symmetry.[68] It is a counter-statement to Justice Scalia on strict symmetry and nation-wide uniformity. *McClanahan* is now seen to be

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64. WEYL, *supra* note 31, at 3–4. Dr. Feynman, with his usual gift for straightforward exposition, translated Dr. Weyl's definition of "symmetry" this way: "Professor Weyl, the mathematician, gave an excellent definition of symmetry, which is that a thing is symmetrical if there is something that you can do to it so that after you have finished doing it it looks the same as it did before." FEYNMAN, THE CHARACTER OF PHYSICAL LAW, *supra* note 21, at 78 (footnote omitted).

65. LEONARD BERNSTEIN, *Leonard Bernstein talks about the first movement of Symphony No. 5, on* LEONARD BERNSTEIN CONDUCTS BEETHOVEN: SYMPHONY NO. 5 (Sony Records 1956, reissued 1992).

66. WEYL, *supra* note 31, at 13. Dr. Weyl's mention of oriental art may, in fact, be a bit Eurocentric itself; compare the statement of Gail Martin, a dealer in African Art, who is quoted as liking the art of the Mbuti Pygmies because "it isn't symmetrical, but it's balanced." Wendy Moonan, *Antiques: Collectors Go Hunting for Tapas*, N.Y. TIMES, July 10, 1998, at E2.

67. 411 U.S. 164, 172 (1978).

68. It is interesting to note in this regard that Justice Marshall's acceptance of an asymmetric regime of American Indian law appears to balk at its most extreme expression of asymmetry, the trust responsibility of the United States toward the Indian nations. *See* United States v. Mitchell, 445 U.S. 535 (1980); Robert Laurence, *Thurgood Marshall's Indian Law Opinions*, 27 HOW. L. J. 3, 88–89 (1983).

both a description of the essential asymmetry of Indian law and a statement of asymmetry that provides its own justification. Indian law, Thurgood Marshall is saying, is asymmetric, and the antiquity of the tribes justifies this departure from Scalian symmetry.

My analogical model, then, is the physical world where symmetry means more than mirror image reflection. Rather, it describes the congruity of laws from one place to another, from one time to another, from one size to another, through this translation and that one. And it is the on-again, off-again nature of physical symmetry that makes the model most useful as a legal analogy. I shall turn in a moment specifically to American Indian law, to show its fundamentally asymmetric nature.

But first let me address a question sure to have occurred to some readers: is there less here than meets the eye? The law is, of course, fundamentally asymmetric in this broad sense. Many laws do not apply uniformly across the country in every locale; there are federal rules that apply only in Montana;[69] there are federal rules that apply only in certain extremely remote geographical areas.[70] Many laws do not apply uniformly to all people; there are rules that apply only to children;[71] there are rules that apply only to charities;[72] there are parking rules that apply only to handicapped people.[73] There are rules that apply only to real persons and not to corporations;[74] there are rules that apply only to insolvents.[75] Many laws vary according to scale; smaller employers are treated differently from larger employers;[76] only in the Senate are small and large states treated alike;[77] the more common rule is one of asymmetry based on size and clout.[78] Many rules vary over time, and it is only the strictest of originalists who insist that the Constitution means exactly today what it meant in 1789.[79]

It is true enough, then, that the law has huge gaps in its symmetry, where the lawmakers decide that certain places or certain groups of persons or certain

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69. *See, e.g.*, 50 C.F.R. § 17.84(g)(9)(iii) (1999) (experimental re-introduction of the black-footed ferret).

70. *See, e.g.*, 18 U.S.C. § 922(s)(1)(F)(iii) (1994) (federal gun-control legislation).

71. *See, e.g.*, Ark. Code Ann. §§ 6-18-201–224 (1999) (compulsory school attendance).

72. *See, e.g.*, Ark. Code Ann. § 18-44-504 (1987 & Supp. 1999) (mechanics' liens as applied to charities).

73. *See, e.g.*, Ark. Code Ann. §§ 27-15-301–315 (1987 & Supp. 1999) (regulations of handicapped parking registration).

74. *See, e.g.*, 11 U.S.C. § 109(e) (1994 & Supp. IV 1998) (Chapter 13 bankruptcy is available only to "individuals").

75. *See, e.g.*, Uniform Fraudulent Transfers Act § 5(a), 7A(II) U.L.A. 330 (1984) (gifts by insolvents are fraudulent).

76. *See, e.g.*, 42 U.S.C. § 2000e(b) (1994) (exempting companies with fewer than 25 employees from federal employment discrimination legislation).

77. *See* U.S. CONST., art. I, § 3.

78. *See* U.S. CONST., art. 1, § 2.

79. *See generally, e.g.*, Robert H. Bork, *Federalist Society Symposium*, 13 J. L. & POL. 513 (1997).

kinds of business enterprises require different rules from the rest. And most often there is nothing to this asymmetry that rather mundane and not particularly difficult equal protection analysis can't handle.

As I will show below, American Indian law is profoundly asymmetric and, I believe, the analogy from the physical sciences is helpful in explaining some rather intricate problems. But, even outside of American Indian Law, and notwithstanding the handiness of standard equal protection analysis, I believe the rubric can be helpful. Take, for example, the state of the law regarding the free exercise of religion.

Employment Division v. Smith[80] can be seen as a case advancing the interests of symmetry in the law. In that case, Smith and Black were fired from their jobs with a private organization because they ingested peyote as a sacramental drug in the Native American Church.[81] The state of Oregon then denied Smith and Black unemployment compensation, finding that such drug use was work-related "misconduct."[82] They appealed the denial. The Supreme Court took the case twice,[83] and in the second case upheld the denial of the benefit in the face of a First Amendment challenge.[84] The saving grace of the Oregon peyote statute at issue in *Smith* was its symmetry: the state's ban on peyote use applies across the state, in every locale, against every person (with exceptions for medical prescriptions[85]) and, most importantly, to both religious and non-religious purposes.[86] In classic but sensible dicta, Justice Scalia wrote for the Court:

> It would be true, we think (though no case of ours has involved the point), that a State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only because they are engaged in for religious reasons, or only because of the religious belief that they display.[87]

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah[88] showed that *Smith* has teeth. There, the city attempted to control the practices of an unpopular church by prohibiting the ritual sacrifice of animals, with exceptions for the slaughtering of such animals if they were "specifically raised for food purposes."[89] Thousands of animals were killed in the city every day, and the prosecutor was only worried about ceremonial killings? This suggests an asymmetry of *application*, as opposed to theory, with respect to religion that *Smith* will not tolerate. At one point in his opinion, Justice Kennedy made an explicit move to

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80. 494 U.S. 872 (1990).
81. *See id.* at 874.
82. *Id.* at 875 (stating that the work-relatedness was because Smith and Black were drug counselors in their employment).
83. *See id.*; Employment Div. v. Smith, 485 U.S. 660 (1988).
84. *See Smith*, 494 U.S. at 890.
85. *See id.* at 874 (citing Or. Rev. Stat. § 475.992(4) (1987)).
86. *See id.* at 882.
87. *Id.* at 877.
88. 508 U.S. 520 (1993).
89. *See id.* at 527–28 (quoting Ordinance 87–52 of the City of Hialeah, Florida).

link the concepts of First Amendment free exercise with Fourteenth Amendment equal protection, that is to say, to tie the First Amendment expressly to the notion of symmetry.[90] This section of the opinion, however, did not garner a majority of the Court and was not part of the holding.[91] Nevertheless, the Court held the city's ordinances to violate the principle of symmetry present in *Smith*.[92] Justice Kennedy wrote:

> Our review confirms that the laws in question were enacted by officials who did not understand, failed to perceive or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom. The challenged laws had an impermissible object; and in all events *the principle of general applicability* was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs.[93]

Yet, Professor Stephen Carter worries that *Smith* contains a fundamental asymmetry: that the lawmakers will only apply a law symmetrically to ban a religion's sacrament if the religion is an off-beat one.[94] Do Christians, Jews, and Muslims need fear, Professor Carter seems to wonder, an act of a legislature criminalizing their religious practices? Snake handlers, peyote eaters, entrail eviscerators, and the like do. Hence, *Smith*'s insistence on the symmetry of Oregon's criminal laws is an insistence on superficial symmetry, denying protection only in those cases where it is needed.[95]

Justice Scalia has been frank in his appraisal of the likelihood that off-beat religions would be treated differently from mainstream ones in the political arena. In *City of Hialeah*, he was one of those who refused to go along with Justice Kennedy's attempt to tie the First Amendment to the Fourteenth.[96] And in *Smith* he conceded the point:

> It may fairly be said that leaving accommodation [for religious practices by making exceptions to otherwise uniform laws] to the political process will place at a relative disadvantage those religious practices not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all law against the centrality of all religious beliefs.[97]

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90. *See id.* at 540–42.
91. *See id.* at 523 n.†.
92. *See id.* at 524.
93. *Id.* (emphasis added).
94. *See* Stephen L. Carter, *The Free Exercise Thereof*, 38 WM. & MARY L. REV. 1627, 1629 (1997).
95. *See id.*
96. *See City of Hialeah*, 508 U.S. at 523 n.†.
97. Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

This statement—almost disarming in its honesty—plainly subordinates the religious freedoms of out-of-the-mainstream practitioners and is thereby most disturbing to those who care about American Indian religions. Professor Carter makes special mention of the application of such asymmetric free exercise analysis in *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[98] which, like *Smith*, dealt with Indian religion:

> For example, in [*Lyng*] when the Court allowed the Forest Service to open to logging and road building lands that three Indian tribes held sacred, the Justices explained, with evident sincerity, that this result was neutral toward the religion of the tribes. But the effect of the logging, as even the Court conceded, was to devastate the tribes' religious traditions, which would hardly seem neutral from the point of view of the Native American believer. A member of one of the tribes surely would find the *Lyng* decision a horrific interference with religious freedom; and the fact on which the Court relied, that the destruction of the tribes' religion was accidental rather than intentional, would be scant comfort.[99]

The difference between the Court's insistence in *Smith*, *Lyng*, and *City of Hialeah* on at least superficial symmetry in the application of law, on the one hand, and Professor Carter's belief that the same cases show the Court's tolerance for a more basic asymmetry, on the other, suggests that whether a law is symmetric in its application really depends upon how one states the question or draws the boundaries within which symmetry is sought.[100] For example, consider the case of the headgear of military chaplains, specifically the question of whether an orthodox Jewish chaplin may wear a yarmulke instead of, or in addition to, the usual "cover," and note how the quality of the symmetry changes with one's frame of reference. From the military's perspective, there exists a symmetric rule of headgear. Well, of course, it is not universally symmetric even within the military: men and women wear different hats; officers and enlisted personnel wear different hats; sailors' gear is different from soldiers'. But still, the military would insist that the dress code is largely symmetric in its application—that's why the outfit is

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98. 485 U.S. 439 (1988).

99. Carter, *supra* note 94, at 1627–28.

100. Many helpful discussions about symmetry were had around the conference table at the American Indian Law Center in Albuquerque, during the summer of 1998, when I was teaching a short course in the Center's Pre-Law Summer Institute and, with the support of the University of Arkansas, working on this Article. P.S. Deloria, Director of the Center, emphatically made the point about the presence or absence of symmetry depending on one's frame of reference. Toby Grossman, Senior Staff Attorney at the Center offered the yarmulke hypothetical based on *Goldman v. Weinberger*, 475 U.S. 503 (1986), discussed just below. Heidi Nesbit, Administrative Director of the Center, made the telling point about why we use the word "uniform" to describe what soldiers wear. Discussion at the American Indian Law Center (July 1998). I am grateful for all of these discussions, for Sam Deloria's usual insight in particular, and for much support that I have received from the Center over the years.

called a "uniform"—and there is no room for individual asymmetries in headgear based on the individual predilections of individual soldiers, even when those predilections are based on religious beliefs.

From the perspective of the chaplin, however, the symmetries seem to run in the other direction. In the first instance, a yarmulke might well be seen not as "headgear" at all, but a religious accoutrement, akin to a cross worn around the neck. Hence, the Jewish chaplin might argue for symmetry with respect to these accoutrements, even at the risk of asymmetry with respect to the "uniform."

Even conceding the yarmulke as "headgear," the Jewish chaplin would urge a court to look more broadly, and off the military reservation, for a different sense of symmetry. At first glance, the underlying principles are wildly asymmetric, for religions famously disagree about head and footwear in their places of worship: men take off their hats in a Christian church, but leave their shoes on. They do the opposite in a mosque. Both hat and shoes come off in a Buddhist temple. Both stay on in a Jewish synagogue. Different rules may, or may not, apply to women and children. Hats and shoes are unimportant in many American Indian religions, but hair length and aspects of dress may be important.

The internal religious rule, then, is asymmetric. The secular rule, though, is symmetric: one can wear whatever hat one thinks is appropriate under the circumstances. Hence, the military rabbi sees the issue as one of the broad symmetry of the wear-any-hat-or-none-at-all rule, and from this point of view, it is the military that is arguing for an asymmetric non-application of the rule for soldiers.

This most basic kind of perspective-based symmetry is seen quite vividly when one considers the Golden Rule.[101] The Rule, which some would call, I suppose, the most fundamental of all rules, has essential bilateral symmetry: one is to do what one would have others do. Serious Christians, in turn, would argue beyond this simple bilateral symmetry for symmetry in the broad sense, that is to say, for the Rule's universal applicability. In fact, as the essence of the Golden Rule is found in many religions, perhaps there is a universal symmetry to it.[102]

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101. *See Matthew* 7:12 ("So whatever you wish that men would do to you, do so to them; for this is the law and the prophets."); *Levitius* 19:18 ("Love your neighbor as yourself.").

102. *See* Rodney J. Blackman, *There is There There: Defending the Defenseless with Procedural Natural Law*, 37 ARIZ. L. REV. 285 (1987).

> In Islam [the Golden Rule is expressed:] "Seek for mankind that of which you are desirous for yourself." In the Hindu Mahabharata: "Do not to others what ye do not wish Done to yourself." In the Pali canon of Buddhism it states: "Make thine own self the measure of the others, And so abstain from causing hurt to them." In Confucianism, "What you do not want done to yourself, do not do to others."

Id. at 316 (citing H.T.D. ROST, THE GOLDEN RULE (1986)). It is worth noting that none of the religions listed is indigenous to North America. Regarding the universality of religion in general, *see* VINE DELORIA, JR., GOD IS RED: A NATIVE VIEW OF RELIGION (1994). Professor Deloria writes:

But how does the Rule apply across cultural asymmetries? What happens when what I wish to be done to me is different from what others wish to have done to them? The boys in their pickups who drive along the pleasant country road in front of my house and toss their beer cans into my yard are in perfect compliance with the Golden Rule as they understand it. I would prefer them to keep their cans in their pickups, but the Rule does not require that they do unto me as I would have them do unto me. Likewise, if I refrain from tossing my cans into their yards, that's all right with them, but is not required by the Golden Rule.[103]

So, is the concept of symmetry nothing more than one's perspective on the question of whether one's self or someone else is out of step? That would, honestly, render the symmetry-based analysis rather trivial and unuseful for analytical purposes. But it turns out that the physicists face a similar problem in their theories of symmetry and asymmetry. Take, for example, the symmetry of the laws of physics through a spatial transformation, characterized by Feynman as saying that a machine will work the same here as it will over there. As he points

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> It is in the conception of the community that Indian tribal religions have an edge on Christianity. Most tribal religions make no pretense as to their universality or exclusiveness. They came to the Indian community in the distant past and have always been in the community as a distinct social and cultural force. They integrate the respective communities as particular people chosen for particular religious knowledge and experiences.

Id. at 210.

In the rubric of the present Article, Professor Deloria can be interpreted as saying that, unlike the claims of many religions—most notably the three monotheistic religions of the Middle East—indigenous North American religions are not symmetric in the broad sense, and, instead, apply only to specific locales. In a small, homogeneous community, governed by a uniform set of closely held customs and traditions, the Golden Rule would appear to go without saying.

103. Some of jurisprudential difficulties with the Golden Rule are dealt with by Professor Blackman:

> The sadist who beats the masochist could respond to the critic, "[B]ut I enjoy being beaten (being the masochist) just as I enjoy beating (being the sadist)." If the recipient were, in fact, not a maso-sadist, then this response of the sado-masochist, while satisfying the Golden Rule, would not satisfy the recipient.

See Blackman, *supra* note 102, at 316 n. 107. I think that my littering example is both less dramatic and more difficult than Professor Blackman's.

My University of Arkansas colleague Milton Copeland, a very careful student of both the secular and the sacred law, made this point to me during a useful and enjoyable conversation about the jurisprudence of the Golden Rule: if I am to do unto others as I would have them do unto me, then part of what I would have them do unto me is to apply the Golden Rule back in the other direction. Thus the Golden Rule would tend to loop back upon itself, cautioning both sides to appreciate the other's view of trash disposal and landscaping. Discussion with Milton Copeland (Sept. 1999). This kind of ecclesiastical *renvoi* would serve to smooth out the differences across the cultural asymmetry that I am discussing here, resulting, one supposes, in the boys being a little more concerned about my notions of outdoor tidiness and I, in turn, being a little less upset about the odd beer can tossed into my yard.

out, the question quickly becomes, what exactly has to be relocated "over there"? If a machine is moved so that it now occupies the same space as a wall, it obviously will not work the same way, or at all. If a pendulum-driven clock is moved into earth orbit, it will stop.

The physicist's answer is that symmetry is proved if the machine, and everything else needed for its operation, is also moved. As Feynman wrote:

> If we do an experiment in a certain region, and then build another apparatus at another place in space (or move the original one over) then, whatever went on in one apparatus, in a certain order in time, will occur in the same way if we have arranged the same condition, with all due attention to the restrictions that we mentioned before: that all of those features of the environment which make it not behave the same way have also been moved over....[104]

In this sense, then, Chaplin Goldman's dispute with the military becomes a question of whether "those features of the environment which make [the rule] not behave the same way have also been moved over."

The Court held for the military, consistent with many other rules that apply or do not apply to the military in a way that is broadly asymmetric from the civilian rules.[105] If you like, the "features of the environment" justified, in the Court's opinion, the military's exception from the otherwise symmetric wear-any-hat-or-none-at-all rule. Similarly, prisons, junior high schools, and mental hospitals are pockets of asymmetry within the country.

It is the concern of this Article, of course, to determine whether and when Indian reservations will be similar pockets of asymmetry. I begin with a re-examination of one of the foundations of modern Indian law, the case in which Justice Thurgood Marshall justified asymmetry, *McClanahan v. State Tax Comm'n of Ariz.*[106]

IV. THE PLATONIC NATURE OF TRIBAL SOVEREIGNTY

Reconsider *McClanahan*. The State of Arizona levied an income tax on Rosalind McClanahan's reservation income. She objected and filed a class action against the practice. The state Appellate Court refused to certify the class and rejected her individual complaint on the grounds that the tax was on her, not her tribe.[107] Hence, the lower court held, the tax did not run afoul of the rule of

104. FEYNMAN, SIX NOT-SO-EASY PIECES, *supra* note 21, at 24–25.
105. Goldman v. Weinberger, 475 U.S. 503 (1986).
106. 411 U.S. 164 (1973).
107. McClanahan v. State Tax Comm'n, 484 P.2d 221 (Ariz. App. 1971), *rev'd*, 411 U.S. 164 (1973).

Williams v. Lee,[108] which holds that states may not "infringe[] on the right of reservation Indians to make their own laws and be ruled by them."[109]

The Supreme Court reversed.[110] Justice Marshall's opinion for the unanimous Court had four parts. Part I recited the facts and procedural history of the case.[111] Part II briefly recounted the development of American Indian law from its early days, finding that principles of federal preemption, not tribal sovereignty, controlled the case.[112] Part III applied those principles and found that the Arizona taxation scheme was preempted by federal statutes and treaties applicable to the Navajos.[113] Part IV responded directly to Arizona's defense based on the lack of infringement on tribal sovereignty when the state taxes an individual Indian.[114]

Part II is the best-remembered part of the opinion, for it is here that Justice Marshall seemed to deprecate the sovereignty-based principles of Indian law in a famous quotation:

> Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. [Citations omitted.] The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and look instead to the applicable treaties and statutes which define the limits of state power.[115]

Professor Clinton sees in this famous passage the Supreme Court's preference for the Supremacy Clause over the Dormant Commerce Clause, a preference, that is to say, for preemption over infringement.[116] But from our present perspective, the passage can be seen more generally as a preference for symmetry over asymmetry.

Federal preemption of state authority is a symmetric legal theory, as it applies irrespective of the field of discussion. Federal environmental law preempts state environmental law;[117] federal labor law preempts state labor law;[118] federal Indian law preempts state Indian law.[119] This is what the Supremacy Clause of the Constitution says;[120] it is the difference between a federal republic and a

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108. 358 U.S. 217 (1959).
109. *Id.* at 220.
110. *McClanahan*, 411 U.S. at 164.
111. *Id.* at 165–67.
112. *Id.* at 167–73.
113. *Id.* at 173–79.
114. *Id.* at 179–81.
115. *Id.* at 172.
116. Robert N. Clinton, *The Dormant Commerce Clause*, 27 CONN. L. REV. 1055, 1195 (1995).
117. *See, e.g.*, City of Milwaukee v. Illinois and Michigan, 451 U.S. 304 (1981).
118. *See, e.g.*, Anderson v. Anderson, 404 A.2d 275 (Md. 1979).
119. *See, e.g.*, McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164 (1973).
120. U.S. CONST., art. VI, cl. 2.

"commonwealth of independent states."[121] It is what *Worcester v. Georgia*[122] said. It is what the nullification crisis, and ultimately the Civil War,[123] were all about; it is what the integration of Little Rock Central High School was all about, which proved that not everything was settled by the Civil War.[124]

Without using the "symmetry" rubric, Professor Clinton nevertheless shows the same preference of symmetry over asymmetry: "If the language of *McClanahan*...meant only to suggest a preference for preemption analyses over dormant Commerce Clause analyses, the opinion would have brought the dormant Indian Commerce Clause *into line with* the role played by the dormant foreign and interstate Commerce Clause."[125]

To "bring one doctrine into line" with another doctrine, of course, is to make the law symmetric in the broad sense. And Professor Clinton would likely approve not only of the Court's preference for preemption, but also of the translation of this preference into the language of symmetry. Professor Clinton is a symmetricist in the Full Faith and Credit debate, and it is entirely consistent with the thesis of his *Connecticut Law Review* article that the Indian Commerce Clause of the Constitution be treated by the courts symmetrically to the rest of Article I, section 8, clause 3, including the general preference by the Court for preemption as a way of solving conflicts between state and federal law.

To observe that federal preemption of state authority is a symmetric legal doctrine is not to suggest that its application is straightforward or that the outcome is determined. A symmetric theory is not necessarily a less complex or sophisticated one; it is just one that applies universally through a variety of translations. Stars revolving in a galaxy do not behave the same as juggling-balls tossed in the air; it is only that the same symmetric law of gravity applies to both situations. Juggling-balls do not come down at all if the juggler is in orbit, but this is not because the law of gravity does not apply there, but because it does.

Indeed, Justice Marshall's opinion in *McClanahan* shows quite clearly that the Court does not believe the application of the preemption doctrine in Indian law to be identical to the application of the preemption doctrine in other fields. "The Indian sovereignty doctrine is relevant then, not because it provides a

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121. *See The End of the Soviet Union; Text of Accords by Former Soviet Republics Setting up a Commonwealth*, N.Y. TIMES, Dec. 23, 1991, at A10. The Commonwealth of Independent States, you may recall, was the successor government to the defunct Union of Soviet Socialist Republics. Under the present rubric, the earlier government was a very symmetric federalism with tight central control, while the later was an asymmetric one with so little central cohesion that it has essentially disappeared from existence.

122. 31 U.S. (6 Pet.) 515 (1832).

123. *See, e.g.*, GEOFFERY C. WARD ET AL., THE CIVIL WAR: AN ILLUSTRATED HISTORY (1990).

124. *See* Cooper v. Aaron, 358 U.S. 1 (1958).

125. Clinton, *supra* note 116, at 1195 (Clinton's emphasis removed; mine added).

definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read."[126]

Part III of the opinion, then, applied the otherwise symmetric principles of federal preemption of state power against the sovereignty-doctrine "backdrop." The "applicable treaties and federal statutes" were read quite carefully to avoid trampling on the principles of tribal sovereignty, and Arizona's power to tax McClanahan falls to the Supremacy Clause. Not quite left behind, then, but relegated to Part IV of the opinion and surely minimized in importance, was the "platonic notion" of tribal sovereignty.

The word "notion" is too minimizing, but "platonic" is not. What is the "platonic," or theoretical, nature of tribal sovereignty? As we have seen above, it is a classic asymmetric doctrine, anti-Scalian in its import, applicable only to one group of people, applicable only in one place in the books, applicable only at a few places on the ground. In fact, the essence of this asymmetry is found in the next sentence after the one just quoted, which is the sentence given at the outset of this Article: "It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government."[127]

McClanahan prefers the symmetry of federal preemption over the asymmetry of tribal sovereignty, and this preference may, in fact, be sensible on the facts of that case. To relate the Navajo Tribe's ancient sovereignty to Arizona's ability to tax Ms. McClanahan's income is surely much more difficult than to find that ability preempted by federal law. The entire question of the application of state law on Indian reservations is one that relates more closely to the domination of federal law over state law—that is to say, to preemption—than to the antiquity of the Navajo Nation when compared to the state of Arizona.

But note that *McClanahan* does not render tribal sovereignty irrelevant to this, or to other, Indian law inquiries. Indeed, it is not irrelevant to the preemption inquiry; it remains a "backdrop" against which to apply the usual preemption rules. Thus, while stating a preference for symmetry over asymmetry, *McClanahan* is really a hybrid of the two. Tribal sovereignty influences, but does not resolve, the analysis, and the symmetric preemption theory sensibly dominates the question of the on-reservation application of state law.

That leaves the platonic, and asymmetric, nature of tribal sovereignty to be applied in other cases, cases that go more directly to the heart of what it means to be a tribe, cases that involve the power and status of the tribe, cases that explore the differences between tribes and the dominant society. It is exactly because of these differences that the concept of asymmetry is such a crucial one to American Indian law.

Indian law is necessarily about difference: Those ancient sovereignties are with us still, and they do some things differently from the way things are

126. McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 172 (1973).
127. *Id.*

commonly done in the dominant society. True, they do not do everything differently, and often what differences do exist are minor. Even when the differences are major, they are rarely malignant. But occasionally there will be major differences of substance between the old American ways of the tribe and the new American ways of the immigrants, differences that matter to both the tribe and the dominant society.

United States v. Ant[128] shows a tribe as a modern functioning government prosecuting a transgressor with a procedural mixture of the dominant society's ways and the tribe's different ways.[129] In the case, and prior to a federal prosecution for assault and battery, Ant gave an uncounselled confession to the tribal police and an uncounselled guilty plea before the tribal court, and was convicted of the tribal crime alleged. These departures from dominant-society law are proper: the United States Constitution does not bind tribal activity, under the doctrine of *Talton v. Mayes*.[130] And the applicable federal statute, the Indian Civil Rights Act (ICRA), does not require the tribe to provide legal counsel to criminal defendants, though there is a right to counsel at one's own expense.[131] While Ant was not Mirandized, there is no indication that he was denied any ICRA guarantee, so his tribal conviction should, and did, stand.

A second prosecution ensued in federal court, where the issue was whether the uncounselled confession and plea were admissible to aid the federal prosecutor's case.[132] The clash, then, was between the off-reservation symmetry of the constitutional protection against self-incrimination and the asymmetry of tribal sovereignty. Stated in the other direction, the clash is between a respect for tribal ways, embodied in the *McClanahan* quotation, and the ability of Native Americans, like all Americans, to be free from incarceration caused by their own uncounselled words, consistent with the *Adarand Constructors* quotation.

The majority of the Ninth Circuit panel in *Ant* held that respect for tribal ways did not impel the federal court to accept Ant's uncounselled words before the tribal authorities.[133] Thus, the federal prosecution was made to go on without the confession and plea, and, presumably, Ant went free.[134] The dissenting judge thought otherwise and would have respected tribal sovereignty and tribal ways even to the extent of sending the tribal member to federal prison.[135]

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128. 882 F.2d 1389 (9th Cir. 1989).
129. *See generally id.*
130. 163 U.S. 376 (1896).
131. *See* 25 U.S.C. §§ 1301-03 (1994).
132. There is no double jeopardy difficulty in the federal prosecution even though Ant had suffered an earlier tribal prosecution because of the doctrine of *United States v. Wheeler*, 435 U.S. 313 (1978). The tribe and the United States being separate and distinct sovereignties, the dual sovereignty doctrine of constitutional double jeopardy jurisprudence applied and permitted both prosecutions. *Id.* at 1090.
133. *Ant*, 882 F.2d at 1396.
134. *See id.*
135. *See id.* at 1396–98 (O'Scannlain, J., dissenting).

Ant shows a relatively young off-reservation society more protective of the rights of criminal defendants than the older tribal society. Of course, the disjunction could be in the other direction. I have written elsewhere of the situation where a tribe might well be more protective of defendants' rights when the issue is the application of the double jeopardy protections of the Constitution and the ICRA.[136] This issue could have arisen in *Ant* had the tribal court determined that, either under tribal law or the ICRA, Ant could not be prosecuted there because he had been, or likely would be, prosecuted in federal court.

If *Ant* is a case consistent with the asymmetric nature of tribal sovereignty and the *McClanahan* quotation given above, then *Tracy v. Superior Court of Maricopa County*[137] is a case that harkens to symmetry and the *Adarand Constructors* quotation. Tracy's testimony was deemed relevant to the tribal prosecution of former Navajo Council Chairman Peter MacDonald, Sr., so the tribe sought to compel Tracy's attendance at MacDonald's trial. The Tribe enacted a version of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings (UASAWWSCP),[138] and tribal court orders were issued to compel Tracy and others to appear in Window Rock Tribal District Court. The Arizona state judge received these tribal orders, found them valid under the state's version of the UASAWWSCP,[139] and ordered Tracy to appear to testify. Tracy then resisted by seeking "special action"—essentially mandamus[140]—against the state trial judge. The Arizona Supreme Court held against him in the published opinion.[141]

The gravamen of Tracy's request for protection from tribal process was that he was potentially subject to federal criminal liability and that he wished not to incriminate himself before the tribal court, nor to raise the likelihood that he would become liable in civil damages to the tribe. (Tracy was not subject to tribal prosecution under the doctrine of *Oliphant v. Suquamish Indian Tribe.*[142]) Furthermore, Tracy thought that his freedom from self-incrimination under the ICRA was not identical to that under the U.S. Constitution. In a long opinion from a court divided 3-2, these concerns did not carry the day.

First, the Arizona Supreme Court held that the Navajo Tribe is a "state" as that term is used in Arizona's version of the UASAWWSCP.[143] It is certainly counter-intuitive to hold an Indian tribe to be a state. The Navajo Nation's historical origins are buried in antiquity. Nor is it a state of the Union for almost any other purpose, important or trivial, including either a seat in Congress or a star

136. *See* Robert Laurence, *Dominant-Society Law and Tribal Court Adjudication*, 25 N.M. L. REV. 1 (1995).

137. 810 P.2d 1030 (Ariz. 1991) (*en banc*).

138. 17 Navajo Trib. Code §§ 1970–74 (1978). The Uniform Act itself appears at 9 U.L.A. 86 (1936).

139. ARIZ. REV. CODE §§ 13-4091–96 (1989 & Supp. 2000)

140. *See Tracy*, 810 P.2d at 1032, n.1.

141. *See id.* at 1030.

142. 435 U.S. 191 (1978) (holding that tribes do not have criminal jurisdiction over non-Indians).

143. *See Tracy*, 810 P.2d at 1039.

on the flag. There is some authority for the proposition that a tribe can be a "state" for some purposes.[144] Included here would be the estimable scholarship of Professor Clinton, who again is seen to be on the side of symmetry.[145] The Arizona Supreme Court carefully set out the technical arguments for Navajo "statehood" in a lengthy part of the *Tracy* opinion. At the heart of the proposition, though, and technicalities aside, one finds more than a hint of uniformity, symmetry, *Adarand Constructors*, and of the continent-wide sameness of the law.

Tracy's principal argument was one of difference: "[T]he privilege against self-incrimination offered by the ICRA provides protection inferior to that of the United States and Arizona Constitutions."[146] This is a position with which I agree, though I think the word "different" is better than "inferior"; "less than" might be a good compromise, as *Ant* shows. Citing the ICRA, the Arizona Supreme Court thought that "when testifying in tribal court, Tracy will enjoy a federally imposed privilege against self-incrimination that is substantially coextensive with the fifth amendment privilege."[147]

Thus, and unlike *Ant*, where asymmetry and the differences between tribal law and dominant-society law were at the forefront, in *Tracy*, the sameness of the two sets of laws was controlling. First, the Navajo Tribal Council enacted the UASAWWSCP, a Uniform Act of such procedural crypticness, not to mention titular expanse, that it is remarkable even to the most conventionally trained of dominant-society proceduralists. Second, the Arizona Supreme Court declared the Navajo Tribe to be a "state." Third, that court declared the protections of the ICRA to be identical to the U.S. Constitution on scant authority and without analysis.[148]

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144. *See* John S. Harbison, *The Downstream People: Treating Indian Tribes As States Under the Clean Water Act*, 71 N.D. L. REV. 473 (1995).

145. *See* Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841 (1990).

146. *See Tracy*, 810 P.2d at 1047.

147. *See id.* at 1048.

148. *Id.* at 1047–48. There is little support for this holding. None of the cases cited by the Arizona Supreme Court interprets the self-incrimination clause of the ICRA; the court was reasoning by analogy. More importantly, none of these cases has anything that even remotely approaches analysis; all state the result without explanation. *See, e.g.*, *Tracy*, 810 P.2d at 1048 (citing United States v. Strong, 778 F.2d 1393, 1397 (1985)).

The Arizona Supreme Court majority wrote: "The [self-incrimination] language [of the ICRA] duplicates that of the federal constitution and clearly could not be interpreted to provide any lesser protection." *Tracy*, 810 P.2d at 1048. The single word "clearly" seems a particularly inappropriate form of legal analysis from a court that had just spent eleven pages of the Pacific Reporter holding that the word "state" includes within its meaning the Navajo Tribe. *See id.* at 1035–45. It ought not to be beyond the understanding of such a court that the ICRA's admonition that "no Indian tribe in exercising powers of self-government shall...compel any person in a criminal case to be a witness against himself," 25 U.S.C. § 1302(4) (1994), might mean something other than what similar words mean in the Constitution. *See* U.S. CONST. amend. V.

A similar conclusion, with a similar lack of analysis is found in *Red Fox v. Hettich*, 494 N.W. 2d 638, 645 (S.D. 1993) (holding that "the same due process standards which

In *Ant* and *Tracy*, federal and state courts were struggling with what to make of Native American governmental deviations from dominant-society norms, such deviations being an ordinary part of North American life, especially in the West. This is the same struggle that one sees in the tension between the two quotations given at the outset of this Article. Only tribal law presents such deviations, because American Indians are the only ethnic group recognized by American law as having their own governments; this is the essence of Justice Marshall's *McClanahan* quotation. "It must always be remembered...." All other Americans must participate as individuals in the government of the dominant society; this is the essence of Justice Scalia's *Adarand Constructors* quotation. "We are just one race here...."

Tracy interpreted the UASAWWSCP and the ICRA to permit of no tribal deviations from dominant-society norms. This was no bargain for the Navajo Tribe, even if it could go forward with the prosecution of its former Chairman. Mr. Tracy, on the other hand, was treated more or less like every other American, Indian or non-Indian, consistent with Justice Scalia's *Adarand Constructors* concurrence. *Ant*, on the other hand, acknowledged that such tribal deviations exist, but found that the doctrine of tribal sovereignty does not require the federal courts to ignore the fact that different rules obtain when the prosecution is in federal court. The tribe's lead was not followed, and Mr. Ant finally went free, having first been prosecuted by a tribe in a way that no non-Indian American could have been.

In this instance, I prefer *Ant* to *Tracy*. And, more generally, I prefer the asymmetry of *McClanahan* to the symmetry of *Adarand Constructors*. But, as modern physics and the whole of *McClanahan* shows, one can have both. Perhaps one *must* have both. Asymmetry should be the rule when tribal sovereignty and *McClanahan*'s memories of tribal antiquity require it. And even when symmetry and *Adarand Constructors* dominate, asymmetric tribal sovereignty—as seen in *McClanahan*'s Part III—still influences the analysis. Symmetry is a centralizing notion: our present rules here must be the rules there, and then, and with respect to those. Asymmetry is localizing; it disrupts the homogeneity of being and the smoothness of relations, and makes affairs more complicated, and sometimes, though not always, more interesting. Federal republics, of their nature, are asymmetric at the local level, except where the center controls.[149]

One of the interesting things about studying the law in the early twenty-first century is to watch the Supreme Court re-shape the law of federalism, thereby re-structuring the relationship between the central government and the states, or, as the conservative federalists would have it, to re-establish the intended structure. One of the cases in that re-structuring, *Seminole Tribe of Florida v. Florida*,[150] was

govern state court assertions of jurisdiction over non-resident defendants apply to tribal courts").

149. *See generally* Resnik, *Dependent Sovereigns*, *supra* note 6; *see also* Robert Laurence, *Civil Procedure in Low Earth Orbit: Science Fiction, American Indians and Federal Courts*, 24 N.M. L. REV. 265 (1994).

150. 517 U.S. 44 (1996).

an Indian law case, of course, but it seems destined to be a much more important case on the re-structuring of "Our Federalism" than it will ever be on Indian law. That is to say, the true conflict in *Seminole Tribe* was between the federal courts and the state of Florida over the question of whether the state could be sued by *anyone* in federal court; the plaintiff just happened to be a tribe in that case. The Court held for the state against the power of the federal court, and against the power of Congress to require the state to submit to federal judicial authority. The tribe, which likely did not want to negotiate with the state of Florida anyway, was almost a bystander to the scrap.

Seminole Tribe and other cases re-working the parameters of "Our Federalism" have had some impact on my Indian law writings. I am often characterized as one of the few defenders of what is known as the "plenary power" of Congress over Indian affairs, at least if conceding that I can "live with" the plenary power amounts to the defending of it, which it doesn't.[151] As one part of my argument that the plenary power over Indians can be lived with, I have pointed out, usually citing *Katzanbach v. McClung*,[152] that Congress has essentially had plenary power over the states under the Commerce Clause. The Court's recent re-working of the Commerce Clause, for instance in *United States v. Lopez*[153] striking the Gun-Free School Zones Act,[154] or in *Printz v. United States*[155] striking a key provision of the Brady Handgun Violence Prevention Act,[156] shows that it is no longer fair, if it ever was, to claim that Congress's power over the states is "plenary" in the sense that I think the word should be used, i.e., "without subject matter restriction."

A question that the Court will have to face sooner or later, assuming that it continues to reinterpret the center to control the provinces under the Interstate Commerce Clause, is whether it should concomitantly reinterpret the Indian Commerce Clause, restricting its reach to something approaching a fair definition of "commerce." It is commonly said that the Court has never stricken a congressional statute affecting Indians as being beyond the reach of the Indian Commerce Clause. Even if not literally true, the statement is virtually true, and that clause has been used to uphold, for example, the enactment of a criminal code for Indian country[157] and the enactment of what is essentially a Bill of Rights for Indians before their own governments.[158] The Court cannot, or should not, long

151. *See generally* Robert Laurence, *Learning to Live with the Plenary Power of Congress over the Indian Nations: An Essay in Reaction to Professor Williams' "Algebra,"* 30 ARIZ. L. REV. 413 (1988).

152. 379 U.S. 294 (1964).

153. 514 U.S. 549 (1995).

154. 18 U.S.C. § 922(q)(1) (1994, Supp II 1996, Supp. III 1997 & Supp IV 1998).

155. 521 U.S. 898 (1997).

156. 18 U.S.C. § 922(s)(2) (1994).

157. *See* United States v. Kagama, 118 U.S. 375 (1886) (upholding the constitutionality of the Major Crimes Act, 18 U.S.C. § 1153 (1994)).

158. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (accepting the validity of the Indian Civil Rights Act, 25 U.S.C. § 1301-03 (1994)).

ignore the issue of whether these congressional enactments, whose state analogues would clearly fall under the Interstate Commerce Clause, can stand.[159]

It is true enough that there are federalism concerns at issue in the interpretation of the Interstate Commerce Clause that do not exist in the interpretation of the Indian Commerce Clause. In addition, Indian tribes do not benefit from the protection of the Eleventh Amendment as the states do. In the opposite direction, there are concerns of ancient sovereignty in the interpretation of the Indian Commerce Clause that do not exist in the interpretation of the Interstate Commerce Clause. Hence, one should expect the law as it is derived under these two clauses to be asymmetric, and not in lock-step.

Seminole Tribe is not a case that cuts back on the reach of the Indian Commerce Clause. The congressional enactment in that case fell, not because it was outside the reach of the Indian Commerce Clause, but because it ran afoul of the Eleventh Amendment, which chronologically overrides the body of the Constitution, including the Indian Commerce Clause. It would have been cruel irony indeed if the Court had chosen, after all these years, to cut back on the Indian Commerce Clause by striking a statute enacted for the benefit of Indian tribes, but we are spared for now that irony.

The universe, we have seen, has both fundamentally symmetric and fundamentally asymmetric aspects. And the law—American Indian law in particular—must have both as well. *McClanahan* shows how both symmetry and asymmetry may work together. There are times when symmetry and the interests of the center predominate, and times when asymmetry and the interests of the provinces do. The questions for a federal republic, broadly defined, are where and when and how if at all the center controls. I will now turn to the application of the notions of symmetry to some precise areas of American Indian law.

V. THE BROAD ASYMMETRIES OF *TALTON V. MAYES*, THE INDIAN CIVIL RIGHTS ACT, *OLIPHANT V. SUQUAMISH INDIAN TRIBE*, AND *SANTA CLARA PUEBLO V. MARTINEZ*

As is well known, the history of administration and congressional policy toward Indians has oscillated dramatically between periods of separation and assimilation.[160] Occasionally the separation was in the nature of free-will segregation, where the Indians were permitted just to go away and do as they pleased, as long as they left the Europeans alone. More commonly the separation

159. As with the Interstate Commerce Clause, the Indian Commerce Clause has both active and dormant components. *See* Clinton, *supra* note 116, at 1059–60. The active clauses grant constitutional power to Congress over the respective subject matters; the dormant clauses limit the states' ability to legislate in the same fields even when Congress has not. *See id.* Thus a cutting back on the reach of the dormant Indian Commerce Clause might well result in the states' having greater latitude in applying their laws on-reservation.

160. *See generally* GETCHES ET AL., FEDERAL INDIAN LAW 41–257 (1998) (summarizing the administrative and congressional policies).

was in the nature of strong-armed removal of the Indians from lands coveted by the whites. "Ethnic cleansing" would be the modern term.

Occasionally, too, the efforts at assimilation were good-faith attempts by the dominant society, or parts thereof, to merge the Indians into the whole body politic for the ultimate good of the alloy being concocted in the melting pot. More commonly it was an attempt to make the Indians disappear by replacing their languages with English, their religions with Christianity, their blankets with manufactured clothes, their moccasins with heeled shoes, their long hair with our shorter styles, their diets with our diets, their laws with our laws. "Cultural annihilation" would be the modern term.

From the perspective of the current discussion, during the periods of separation, asymmetry was the prevailing rule. The idea was that there would be places on the continent where Indian, not white, customs and rules would apply, be those areas everywhere west of the Appalachians, initially, the area west of the Mississippi, later, the Indian Territory still later, or relatively small reservations eventually.

And on the other hand, as we have seen, assimilation is in the nature of symmetry, broadly defined, and of uniformity, where we are all in this together, all bound by the same rules. The periods of separation harken ahead to Justice Marshall's *McClanahan* quotation; the periods of assimilation to Justice Scalia's *Adarand Constructors* quotation.

Instead of recounting the details of that history, well known or not,[161] let me instead show how the federal Indian law that came from the courts, rather than the other branches, has been fairly consistently asymmetric. One might begin almost anywhere along the line, but let us begin with *Talton v. Mayes*.[162]

Late in the nineteenth century, one Bob Talton, a Cherokee Indian, was indicted for murder by a Cherokee Nation grand jury composed of fewer members than required of federal grand juries.[163] Talton petitioned for a writ of habeas corpus in the federal district court arguing that such an indictment violated the Fifth Amendment of the United States Constitution.[164] The Supreme Court held that the Fifth Amendment binds only the federal government, and the Cherokee Nation is not the federal government.[165] Petition denied;[166] Bob Talton was hanged.[167]

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161. *See* Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481 (1994) (suggesting that this history is not well-enough known or remembered); Aviam Soifer, *Objects in the Mirror Are Closer Than They Appear*, 28 GA. L. REV. 533 (1994) (same).

162. 163 U.S. 376 (1896).

163. *See id.* at 377.

164. *See id.*

165. *See id.* at 382–83.

166. *See id.* at 385.

167. *See* JEFFREY BURTON, INDIAN TERRITORY AND THE UNITED STATES, 1866–1906: COURTS, GOVERNMENT, AND THE MOVEMENT FOR OKLAHOMA STATEHOOD 201 (1995).

These grounds are eminently sensible.[168] As a matter of undisputed fact, the Cherokee Nation is a government older than the United States federal government. It is not, and never will be, a violation of the federal Constitution for a tribal government to act.[169] Even later, when the Fourteenth Amendment came to be seen as an avenue for the application of the Bill of Rights to the states, *Talton* still held forth, for the Fourteenth Amendment requires "state action" and the tribes are not "states," and, in fact, are governments older than the states.[170]

It is important to refute, at this point, the too-common cocktail-party adage that "the Constitution does not apply to Indians." Were this true, of course, the result would represent the most significant asymmetry of all: that certain citizens of the United States are without our most profound protections against the actions of our governments.[171] But it is not true. Indians are "persons" under the

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I thank my colleague Morton Gitelman for bringing my attention to this obscure, but interesting, book.

168. James A. Poore III and Erik M. Jensen have been debating the wisdom of *Talton v. Mayes*, and its implications, of late in the Montana Law Review. *See* James A. Poore III, *The Constitution of the United States Applies to Indian Tribes*, 59 MONT. L. REV. 51 (1998); Erik M. Jensen, *The Continuing Vitality of Tribal Sovereignty Under the Constitution*, 60 MONT. L. REV. 3 (1999); James A. Poore III, *The Constitution of the United States Applies to Indian Tribes: A Reply to Professor Jensen*, 60 MONT. L. REV. 17 (1999); Erik M. Jensen, *The End (of This Discussion) of Tribal Sovereignty*, 60 MONT. L. REV. 35 (1999). Much of this debate is phrased in terms of "logic," but from the present perspective, it might better be seen as a debate over symmetry. Much of Mr. Poore's "logic" seems founded on what he sees as the inherent symmetry of the law. *See* James A. Poore III, *The Constitution of the United States Applies to Indian Tribes: A Reply to Professor Jensen*, 60 MONT. L. REV. 17, 29 (1999) (suggesting geographical symmetry by writing, "[T]hese statutes provided constitutional protections for citizens of the United States on every foot of American soil." (quoting Logan v. United States, 144 U.S. 263, 295 (1893)). There is no more important idea to take away from this Article than that logic does not determine the choice between symmetry and asymmetry, and, in particular, that symmetry is not inherently more logical than asymmetry.

169. *See generally Talton*, 163 U.S. 376. Which is not quite to say that the Constitution has no application in Indian country. For example, the Thirteenth Amendment prohibits private slavery and would prohibit it, if found, on an Indian reservation. *See* In re San Quah, 31 F. 327 (D. Alaska 1886). In *Talton*, the Court noted that tribes are subject to the "general provisions" of the Constitution. *Talton*, 163 U.S. at 384.

170. *See Talton*, 163 U.S. at 376. *But see Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965), in which the Ninth Circuit went to tortuous lengths to show a *de facto* connection between the Gros Ventre tribe and the federal government so that the court could apply the U.S. Constitution to tribal activity under some kind of "federal instrumentality" rationale. *Id.* at 376–79.

171. It has never been precisely held by the Supreme Court that Indians are citizens of the United States by birth, a result that would appear to be required by the first section of the Fourteenth Amendment. *But see* Elk v. Wilkins, 112 U.S. 94 (1884). The theoretical difficulty would appear to be the "Indians not taxed" provision of the second section of the same Amendment. *See* U.S. CONST. amend. XIV, § 2. I think it unlikely that a modern court would ever reach such a theoretical result. In any event, the theory was mooted by the passage of the Citizenship Act of 1924. *See* 8 U.S.C. § 1401(b) (1994).

Fourteenth Amendment and have the rights of persons under the Constitution. But those rights are by their natures only rights against those certain governments bound by the Constitution, to wit the states and federal governments, under *Talton v. Mayes*. When one—Indian or non-Indian—stands before a state or federal government, one can stand behind the shield of the Constitution. But when one—Indian or non-Indian—stands before a tribal government, this constitutional shield cannot be used, not because of the identity of the individual, but because of the identity of the government.

There is one small hesitancy to saying that Indians standing before the federal government have all the constitutional rights of non-Indians, a hesitancy that flows from the cases of *United States v. Antelope*[172] and *Morton v. Mancari*.[173]

There are some especially erudite tribal advocates who argue that the Citizenship Act was an oppressive edict and an invasion of tribal sovereignty and prerogative. *See Federal Court Review of Tribal Courts Rulings in Actions Arising Under Indian Civil Rights Act: Hearing Before the Senate Select Committee on Indian Affairs*, 102d Cong. 72 (1991) (written statement by Mark C. Van Norman) ("Tribal members did not become citizens until the 1920s when Congress *unilaterally* naturalized 'Indians born within the territorial limits of the United States.'").

Senator Daschle, Democrat of South Dakota responded:

> Second, your comment on page 7 that "Congress unilaterally naturalized Indians born within the territorial limits of the United States" implies that were Indians today given a choice of renouncing their citizenship, they would do so. There is no doubt in my mind that some might, but I would have to believe, given the tremendous patriotism that I witness when I go onto reservations, the willingness on the part of Indian men, in particular, every time the United States finds itself in a war to respond to the needs of the United States. In fact, it appears that the Indians are the first to respond in greater per capita numbers than the general population. And so I think their pride and their citizenship and their patriotism ought not be questioned. I doubt very much that it was a unilateral action even though, certainly, when the Congress acts it is unilateral in the sense that it, alone, has the responsibility for making law. So I question that as well.

Id. at 20. I believe that Senator Daschle's statement would be received very well on most Indian reservations and by most Indians.

For a recent statement of the colonial nature of the Citizenship Act of 1924, see Robert B. Porter, *A Proposal to the Hanodaganyas to Decolonize Federal Indian Control Law*, 31 U. MICH. J. L. REF. 899, 998 (1998). For the even stronger claim that the Citizenship Act is "genocidal," see Robert B. Porter, *The Demise of the Ongewehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107 (1999).

For the statement of a theory that seems to justify these critics' outcries against the Citizenship Act, see Poore, *The Constitution of the United States Applies to Indian Tribes*, supra note 168, at 51 (setting forth the novel theory that the holding of *Talton v. Mayes* does not survive the enactment of the Citizenship Act). In a follow-up article, Mr. Poore argues that *Talton* was decided incorrectly, *see* James A. Poore, *The Constitution of the United States Applies to Indian Tribes: A Reply to Professor Jensen*, 60 MONT. L. REV. 17 (1999).

172. 430 U.S. 641 (1977).

173. 417 U.S. 535 (1974).

These cases suggest that the equal protection clause implicit in the Fifth Amendment applies differently to Indians and non-Indians. Because this hesitancy represents a potential asymmetry in the application of the Fifth Amendment, some discussion is in order.

Antelope killed a non-Indian, on-reservation, without malice aforethought, while committing another felony.[174] In his prosecution for murder in federal court under the Major Crimes Act,[175] he mounted the following equal protection argument: suppose every single fact about the case remained the same except for my being an Indian. Suppose, that is, that I were white. My crime would have been white-on-white and, under the doctrine of *United States v. McBratney*,[176] I would have been prosecuted in Idaho state court. Idaho has no felony murder rule, so my prosecution there would have been for burglary and manslaughter, not murder.[177] It is a violation of my Fifth Amendment right to equal protection for the crime I am charged with (and the forum of my prosecution) to turn on my race.[178]

The Supreme Court rejected this argument, holding that the different result that Antelope alluded to did not turn on his race, but on his membership in a federally recognized Indian tribe.[179] This, in turn, is political, not racial, discrimination and is permitted by the unique political status of the tribe itself.

Compare *Morton v. Mancari*, the Supreme Court's first affirmative action case, hence a precursor to *Adarand Constructors*. White employees of the Bureau of Indian Affairs brought suit against the Secretary of the Interior alleging violations of their Fifth Amendment rights.[180] Their complaint was that the hiring and promotion policies of the Bureau, which favored Indians over non-Indians, denied them the equal protection of the law.[181] The Court upheld the Bureau's hiring practices.[182] Once again, the Court held that politics, more than race, was involved, as the Bureau of Indian Affairs was the precise governmental agency that dealt with and served the tribes.[183]

Antelope and *Mancari* are, of course, prime examples of asymmetry in American Indian law, with the advantage working in opposite directions from an Indian perspective. In the former, the individual Indian was impaired by the statute while in the latter, some Indians, not parties to the case, were given an advantage by the statute or regulation. In either case, it is the thesis of the present discussion, and of Justice Marshall's *McClanahan* quotation, that any such asymmetry needs

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174. *See Antelope*, 430 U.S. at 642.
175. *See* 18 U.S.C. § 1153 (1994).
176. 104 U.S. 621 (1881).
177. *See Antelope*, 430 U.S. at 644.
178. *See id.*
179. *See id.*
180. *See* Morton v. Mancari, 417 U.S. 535, 537 (1974).
181. *See id.*
182. *See id.* at 555.
183. *See id.* at 543, 554.

to be justified, if at all, by reference to the principal reason for asymmetry in Indian law, that is to say to the ancient sovereign status of these Indian tribes.

Under this test, *Antelope* is difficult to explain, for why is it to the sovereign advantage of the Coeur d'Alene Indian Tribe for one of its members to be prosecuted in federal court as opposed to state court? *Mancari*, on the other hand, is justifiable if, but only if, one accepts the notion, explicit in the Court's opinion, that the Bureau of Indian Affairs is something more than merely another bureaucratic arm of the federal government to which the Fifth Amendment should apply symmetrically and in its full force. If the Bureau is equally an arm of the sovereign tribes, representing a unique arrangement among the various North American governments, then an asymmetric application of the Fifth Amendment might be justified. If the Bureau of Indian Affairs is equivalent to the National Parks Service, then asymmetry is not justified and legality of affirmative action within the two should be treated the same.[184]

Pulling together *Talton v. Mayes*, *United States v. Antelope*, and *Morton v. Mancari*, the result is this: *Talton* is correct and gives an essential asymmetry of North American life, that the Constitution of the United States does not bind the activity of American Indian tribes, which are governments older than the United States and which were not parties to the document. In *Antelope* and *Mancari*, on the other hand, the United States itself was the governmental actor and the Constitution's equal protection clauses did apply. That application should, in turn, be symmetric, unless asymmetry is justified by the presence of sovereign interests, which are not present in *Antelope* but may, or may not, be in *Mancari*, depending on one's view of the status of the Bureau of Indian Affairs.

How tolerable is the essential, asymmetric *Talton* result? Logically, it makes sense, as we have seen; most succinctly stated, when a tribe acts there is neither "state action" nor "federal action" in the constitutional meaning of the phrase, hence no application of the Fourteenth or Fifth Amendments.[185] But logic

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184. This discussion leaves aside another application of the notion of symmetry. As should by now be clear, the question of whether, American Indians aside, affirmative action is permissible under the Constitution becomes a question of whether the Fifth or Fourteenth Amendments should be applied symmetrically, irrespective of the intent of the legislative body. Take a commonly seen example: a blue, wheelchair-marked, "Handicapped Permit Only" parking spot, which stands empty while I search elsewhere in the lot, is nothing more than an asymmetric exception to otherwise symmetric parking rules, justified, one supposes, by the difficulty that some drivers have in walking, once parked. Most of us have come to accept the propriety of such affirmative action, even if we sometimes complain and at other times cheat. Here, of course, the government is favoring those with physical handicaps.

Asymmetries in the opposite direction would be suspicious, though perhaps not illegal. That is to say, different constitutional questions may arise if the government intends to discriminate *against* the physically infirm; for a famous example, recall the long staircase that awaited immigrants at Ellis Island. The affirmative action question thus becomes whether an asymmetry intended to give an advantage to an otherwise disadvantaged group should be treated differently from an asymmetry otherwise intended.

185. Mr. Poore attempts to refute this proposition in his article. *See generally* Poore, *The Constitution of the United States Applies to Indian Tribes*, *supra* note 168,

may not be enough to justify the asymmetry. Even on policy grounds it is justifiable, if one envisions an Indian tribe as being an insular entity, composed of and affecting the lives of only its own members. If that were the case, then *Talton*'s asymmetry could be largely ignored by the non-members, who would never be affected by it. But reservation boundaries are permeable, and what of cross-border traffic, be it intermarriages, interstate highways, or cross-boundary commercial dealings? Again, if one envisions a tribe as effectively a foreign nation, then the asymmetry affects the boundary crossers, but it becomes an asymmetry that we have all learned to tolerate. When one is in Singapore, the laws of Singapore apply, even if one is non-Singaporean. Ask Michael Fay.[186]

But *Talton* comes after *Cherokee Nation v. Georgia*,[187] which held that, at least under the domestic law of the United States, the Cherokee Nation is *not* a foreign nation, so again the question becomes the tolerability of *Talton*'s result: will the American dominant society accept the fact that there are within its territory pockets of non-constitutional asymmetry?

The question seems to have been largely unaddressed during various eras when it was the common assumption that Indian reservations were places where only Indians went, or when it was assumed that sooner or later Indians would just disappear into the dominant society, or when it was the case that Indian tribes as governments did little that affected the lives of either Indians or non-Indians.[188]

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mostly on the discredited theory of *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965), that the tribes are federal instrumentalities. The attempt is unpersuasive. *See supra* note 170.

186. Names, once familiar, fade in our memories. Michael Fay is the American teenager who, while living in Singapore, ran afoul of local authorities by spray-painting a Mercedes Benz with graffiti. *See* Philip Shenon, *U.S. Youth in Singapore Loses Appeal on Flogging*, N.Y. TIMES, Apr. 1, 1994, at A5. His sentence was a caning, potentially to the point of unconsciousness, then expulsion from the country. *See* Phillip Shenon, *Singapore Journal; A Flogging Sentence Brings a Cry of Pain in the U.S.*, N.Y. TIMES, Mar. 16, 1994, at A4.

In spite of Mr. Shenon's title, opinion here was quite sharply split between those opposed to the penalty and those who supported it. *Compare* Charles Krauthammer, *U.S. Would Do Well to Learn from Singapore*, THE CINCINNATI ENQUIRER, Apr. 13, 1994, at A7, and Rt. Rev. Montgomery Griffith-Mair, *Letter, Maybe We Could Learn Something from Singapore*, WASH. TIMES, Mar. 26, 1994, at D2, *with* William Safire, *President Doormat*, N.Y. TIMES, May 19, 1994, at A25. Our government protested, but Mr. Fay was still whipped and sent home. *See Singapore Canes U.S. Teen; Clinton Notes Displeasure*, WALL ST. J., May 6, 1994, at A10.

187. 30 U.S. (5 Pet.) 1 (1831).

188. *See generally* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 47–144 (R. Strickland ed., 1982). Mr. Poore argues that if Congress once attempted to terminate a tribe, then a reversal of policy manifests an attempt to re-create the tribe, now as a federal instrumentality to which the Constitution applies. *See* Poore, *The Constitution of the United States Applies to Indian Tribes, supra* note 168, at 69–74. This result seems unnecessary and of little use except to those who advocate the continued deterioration of tribal governments during an era when public attitudes no longer support their destruction. It seems rather that Congress, having seen the error of its ways, can simply reverse its legislative course and reinstate, not the prior tribal government, but Congress's *recognition*

Eventually, however, all of these eras came to an end, and in 1968, for a variety of political reasons, Congress turned its attention to the asymmetry of *Talton* and passed the Indian Civil Rights Act ("ICRA").[189]

If the question presented by *Talton* was the asymmetric application of the United States Constitution within the United States,[190] the first suggested answer, unsurprisingly, was the symmetric one: the earliest version of the ICRA merely applied the Bill of Rights and the Fourteenth Amendment to Indian tribal governments, that is to say, it was a direct overruling of *Talton*.[191] In the end, however, and as a result of the effective advocacy by the tribes themselves, Congress chose an asymmetric solution to the asymmetric problem represented by *Talton*. The ICRA, as enacted, departs from the language of the Constitution at certain key places; thus, for example, one does not have the right to keep and bear

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of the prior government. The distinction is a crucial one, but not difficult to understand: after years of refusing to recognize the sovereignty of Croatia, the United States did so in the early 1990s. *See* David Binder, *U.S. Recognizes 3 Yugoslav Republics as Independent*, N.Y. TIMES, Apr. 8, 1992, at A10. Who would suggest that that recognition meant that Croatia is now a federal instrumentality to which the U.S. Constitution applies?

189. *See* 25 U.S.C. §§ 1301-03 (1994).

190. It occurs to me that this is the time to stress an important distinction: of course there are many entities within the United States to which the United States Constitution does not apply. It does not apply to actions taken by General Motors, the Environmental Defense Fund, the Southern Baptist Convention, or the Boy Scouts of America. The Constitution only applies to actions of the state or federal governments, or to entities so closely related to these governments—for example, municipalities—that they ought to be considered a state or federal government. The crucial asymmetry, then, is that Indian tribes, unlike the entities just mentioned, are governments, and they are the only governments within the borders of the United States to which the Constitution does not apply.

It is interesting to note that Chief Justice Rehnquist once questioned this theory, and wondered publicly whether the rationale of *Talton* should be restated to say not that tribes are governments to which the Fifth Amendment does not apply, but that tribes are not governments at all:

> But if because only the National and State Governments exercise *true sovereignty*, and are therefore subject to the commands of the Fourteenth Amendment, I cannot believe that Indian tribal courts are nonetheless free to exercise their jurisdiction in a manner prohibited by the decisions of this Court, and that a litigant who is the subject of such an exercise of jurisdiction has nowhere at all to turn for relief from a conceded excess.

National Farmers Union Ins. Co. v. Crow Tribe of Indians, 468 U.S. 1315, 1318 (1984) (emphasis added).

As best I know, this "true sovereignty" theory has never advanced beyond the in-chambers opinion just quoted, nor has it been accepted by the Court itself. Then-Justice Rehnquist, sitting as Circuit Justice in *National Farmers Union*, stayed the decision of the Ninth Circuit. *See id.* at 1316. The full Court then held that federal jurisdiction exists to test whether tribal jurisdiction exists, but that the federal courts should abstain from addressing the question until the tribal court does so. *See* National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985).

191. *See* RENNARD STRICKLAND ET AL., FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 666-67 (1982 ed.) (recounting the history of the ICRA).

arms on an Indian reservation, and tribal gun-control ordinances need withstand less scrutiny than off-reservation ordinances.[192] Even where the ICRA uses the Constitution's language, the words take on a different import; thus, for example, the right to counsel in a tribal criminal proceeding does not mean the right to a law-school-trained attorney provided at the tribe's expense,[193] and equal protection in a tribal election may not mean one-person-one-vote.[194]

For ten years after the passage of the ICRA there was a flurry of litigation in the federal courts, mostly by Indians suing their own tribes over what might best be called political disputes: membership rules, voting rules, reservation districting, and the like.[195] Then, in 1978, two cases were decided by the Supreme Court that changed the impact of the ICRA and changed the shape and symmetry of Indian law.

The first of these cases, *Oliphant v. Suquamish Indian Tribe*,[196] was not an ICRA case, but it should have been. Mark Oliphant, a non-Indian resident of the Suquamish reservation, assaulted a tribal police officer during a tribal celebration called "Chief Seattle Days."[197] Following his arrest by the tribal authorities, he petitioned for habeas corpus in federal district court.[198]

Section 1303 of the ICRA clearly allows for such a petition,[199] and § 1302 clearly regulates the tribal proceedings about which Mark Oliphant complained.[200] Nevertheless, the Court saw the question not as a statutory one under the ICRA, but as a common law question, under what it called the "unspoken assumption" of the three branches of government that tribes are, and have been, without criminal jurisdiction over non-Indians.[201] Then-Justice Rehnquist wrote for the Court that "by submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."[202]

The Court did not explain why Suquamish conformity with the ICRA was not precisely the "manner acceptable to Congress." Under the terms of the ICRA, implemented by the ICRA's habeas corpus provision, Mark Oliphant could have argued that the tribe had committed an unlawful search and seizure of

192. *See* 25 U.S.C. § 1302 (1994 & Supp. IV 1999) (containing no analogue to the Second Amendment).

193. *See* 25 U.S.C. § 1302(6) (1994 & Supp. IV 1999).

194. *See* White Eagle v. One Feather, 478 F.2d 1311 (8th Cir. 1973) (holding that the ICRA did in fact require the one-person, one-vote rule, but showing that the rule may not apply to all tribal elections).

195. *See* COHEN, *supra* note 191, at 667–70.

196. 435 U.S. 191 (1978).

197. *Id.* at 194.

198. *See id.*

199. *See* 25 U.S.C. § 1303 (1994 & Supp. IV 1999).

200. *See* 25 U.S.C. § 1302 (1994 & Supp. IV 1999).

201. *See Oliphant*, 435 U.S. at 203.

202. *Id.* at 210.

evidence,[203] put him twice in jeopardy[204] or compelled him to testify against himself,[205] denied him a speedy and public trial where he was informed of the nature and cause of the accusation,[206] denied him the right to confront witnesses,[207] denied him compulsory process to obtain his own witnesses,[208] denied him reasonable bail,[209] or denied him equal protection or due process of law.[210]

Admittedly, he would have had to supply his own attorney, and furthermore, none of these Constitution-like protections would necessarily have been interpreted exactly as they are under the Constitution. But the point is that the ICRA would seem to be precisely the "manner acceptable to Congress." These asymmetries of the ICRA—that is to say the way in which the statute applies to tribes somewhat differently from the way the Constitution applies to the states and the federal government—are caused by congressional statute-writing. But rather than follow the statute, the Court applied its own common law and removed from the tribe the power to prosecute Mark Oliphant at all, never mind whether the tribe followed the precise mandates of the ICRA.

Whatever this preference of the common law over statutory law says about the role the Court sees for itself in establishing Indian law—and one is reminded here of the Federalist Society's admonition "that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be"[211]—the one thing that *Oliphant* did for Indian law was to make it more asymmetric. Just as the rules on- and off-reservation became asymmetric under *Talton*, now the federal rules on-reservation were to become asymmetric, depending upon whether the one against whom the tribe was acting was Indian or non-Indian.

Is the asymmetry of *Oliphant* justifiable? Not under the thesis of the present discussion. *McClanahan*'s justification of asymmetry based on the antiquity of the tribal governments does not support, in itself, a special protection for non-members. This is shown most clearly by the Court's extension of *Oliphant* in *Duro v. Reina*.[212] In *Duro* the Court held that, under the common law rule of *Oliphant*, a tribe did not have criminal jurisdiction over Indians who were not members of the prosecuting tribe, thus making the asymmetry one based on tribal membership, not race. (*Duro* was later statutorily reversed by Congress.[213])

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203. *See* 25 U.S.C. § 1302(2) (1994 & Supp. IV 1999).
204. *See* 25 U.S.C. § 1303(3) (1994 & Supp. IV 1999).
205. *See* 25 U.S.C. § 1303(4) (1994 & Supp. IV 1999).
206. *See* 25 U.S.C. § 1303(6) (1994 & Supp. IV 1999).
207. *See id.*
208. *See id.*
209. *See* 25 U.S.C. § 1302(7) (1994 & Supp. IV 1999).
210. *See* 25 U.S.C. § 1302(8) (1994 & Supp. IV 1999).
211. *See* Federalist Society, *supra* note 62.
212. 495 U.S. 676 (1990).
213. *See* Department of Defense Appropriations for Fiscal Year 1991, Pub. L. No. 101-511, 8077(b)-(d), 104 Stat. at 1894, *codified at* 25 U.S.C. § 1301(1)(2) (1994) (overturning *Duro*). *See generally* Phillip S. Deloria & Nell J. Newton, *The Criminal Jurisdiction of Tribal Courts over Non-Member Indians: An Examination of the Basic*

Now, can *Duro*'s membership-based asymmetry be justified by *McClanahan*? Surely not. In fact, *McClanahan* requires just the opposite. A Court that had remembered, as Justice Marshall cautioned, that "the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government,"[214] would have realized that the tribes had been exercising jurisdiction over the members of other tribes since time immemorial. If *Duro* falls to *McClanahan*, then so, too, does *Oliphant*. Although tribal jurisdiction over non-Indians is merely historical, not pre-historical, it is still of substantially greater antiquity than the common law of the United States of America, as the first European residents of Roanoke Island might attest

But, if the asymmetry of *Oliphant* falls to *McClanahan*, does the ICRA suffer the same fate? No, because it is the thesis of the present discussion that *McClanahan* controls only the course of the judge-made common law. Congress's ability to legislate with respect to Indian affairs is usually called "plenary" and attacked as such.[215] *McClanahan* itself is a statute-based case, and nowhere calls into question the legitimacy of the very federal statutes which, in the end, pre-empted Arizona's ability to tax McClanahan's income. My desire here is not to overturn the entire plenary power of Congress; I famously can live with it.[216] Congress's ability to enact broad, asymmetric legislation applying only to Indians is questioned only by theorists and scholars; Title 25 of the United States Code stands as a monument to the reality.

The second 1978 case that disrupted the workings of the ICRA and made Indian law more asymmetric was *Santa Clara Pueblo v. Martinez*.[217] Julia Martinez and her daughter Audrey had sued their own tribe in federal court over the application of its gender-based membership rule to Audrey, depriving her of

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Framework of Inherent Tribal Sovereignty Before and After Duro v. Reina, 38 FED. BAR NEWS & J. 70 (1991); Nell Jessup Newton, *Permanent Legislation to Correct* Duro v. Reina, 17 AM. INDIAN L. REV. 109 (1992).

The impact of the so-called *Duro*-fix was tested in a case involving the prosecution of Robert Lee Weaselhead in federal court, he having previously been convicted in tribal court for the same criminal acts. *See* United States v. Weaselhead, 36 F. Supp. 2d 908 (D. Neb. 1997). A panel of the Eighth Circuit reversed and remanded. *See* United States v. Weaselhead, 156 F.3d 818 (8th Cir. 1998), *vacated*, 1998 U.S. App. LEXIS 30874 (8th Cir. Dec. 4, 1998) (decision without published opinion). On re-hearing *en banc*, the 8th Circuit affirmed on equal division. *See* United States v. Weaselhead, 165 F.3d 1209 (8th Cir. 1999). Weaselhead moved to dismiss the federal indictment on double jeopardy grounds, arguing that the *Duro*-fix overrode the *Wheeler* rule and made the tribal prosecution essentially a federal prosecution. *See Weaselhead*, 36 F. Supp. 2d 909. The District Court denied the motion. *See id.*

214. McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 172 (1973).

215. *See generally, e.g.*, Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, (1986).

216. *See* Robert Laurence, *Learning to Live with the Plenary Power of Congress over the Indian Nations: An Essay in Reaction to Professor Williams' "Algebra"*, 30 ARIZ. L. REV. 413 (1988).

217. 436 U.S. 49 (1978).

tribal membership because her father was Navajo. If her father had been Santa Claran and her mother Navajo, Audrey would have been a member of the tribe.[218] *Talton*, of course, had made the U.S. Constitution unavailable as grounds to attack the tribal ordinance, so the Martinezes' attack was necessarily based on the equal protection clause of the ICRA.[219] The federal district court in New Mexico held for the tribe,[220] and the Tenth Circuit reversed.[221]

The Supreme Court reversed both lower courts on jurisdictional grounds.[222] The ICRA, the Court held, created no civil cause of action that could be sued upon in federal court.[223] Of course, the explicit federal habeas corpus jurisdiction of § 1303 was not affected by *Martinez*, so there we have yet another asymmetry surrounding the ICRA: tribal criminal jurisdiction, which, under *Oliphant* can be directed only at Indians, is subject to federal court collateral review, but tribal civil jurisdiction, is not. Furthermore, *Martinez* largely reinstated the asymmetry of *Talton* to the civil side of tribal court jurisdiction. True enough, the Court thought that the ICRA still applied to restrict tribal activities and could be enforced in tribal courts,[224] but without either direct or collateral review of tribal court decisions, nor even tribal judges necessarily sworn to uphold federal law,[225] there is little remedy against a tribal court deciding the opposite.

This, then, is the broad asymmetry of tribes as governments under federal law: as governments, they are thought susceptible to limitations on their powers; as "domestic dependent nations," they are thought susceptible to limitation by the dominant sovereign. But that dominant sovereign's organic document, by its own terms and the holding of *Talton v. Mayes*, does not work to limit the dependent governments, thereby setting them apart from the other governments on our part of the continent. The ICRA, as written by Congress, substituted statutory language for a good part of the Bill of Rights, thereby rendering *Talton*'s holding largely academic. But, the ICRA, as construed and used by the Supreme Court in the 1978 cases—or not used, in the case of *Oliphant*—decreased substantially the impact of the ICRA: *Oliphant* removed non-Indians from the tribal criminal process, irrespective of ICRA compliance, and *Martinez* removed Indians and non-Indians alike from the federal civil process. This marginalization of the ICRA, then, returns *Talton* to its position as the essential establishment of the broad asymmetry of Indian law.

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218. *See id.* at 52 n.2 (setting out the membership ordinance of the Santa Clara Pueblo)

219. 25 U.S.C. § 1302(8) (1994).

220. *See* Martinez v. Santa Clara Pueblo, 402 F.Supp. 5 (D. N.M. 1975).

221. *See* Martinez v. Santa Clara Pueblo, 540 F.2d 1039 (10th Cir. 1976).

222. *See* Martinez v. Santa Clara Pueblo, 436 U.S. 49 (1978).

223. *See id.* at 52–53.

224. *See id.* at 65.

225. State judges are required by the Federal Constitution to take an oath to support that document, U.S. CONST. art. VI, cl. 3, but the Constitution does not mention tribal judges.

VI. THE BILATERAL ASYMMETRY OF THE CROSS-BOUNDARY-ENFORCEMENT PROBLEM

It is in the question of the cross-reservation-boundary enforcement of civil judgments that the ICRA comes back into play, and asymmetrically at that. Imagine a civil suit by an Indian against a non-Indian in tribal court. The cause of action is not irrelevant, but relegate that issue to the margin for a moment, and assume a cause of action in contract.[226] Judgment is for the plaintiff, but the defendant does not pay voluntarily and has no on-reservation property reachable by tribal process. The plaintiff, then, presents the tribal judgment to a state court for enforcement under state law against off-reservation process. What result?

Three solutions are given in the literature to this well-discussed problem.[227] The essentials are these: some scholars and some courts prefer a "full faith and credit" regime, in which the state court must enforce the tribal judgment with little inquiry beyond the question of whether the tribe had jurisdiction originally to hear the case and enter the judgment.[228] Other scholars and courts prefer a "comity" regime, in which the state is not bound by any federal command to enforce the tribal judgment, but may do so if it seems appropriate, within broad discretionary limits.[229]

For reasons set out in detail elsewhere,[230] I do not believe that full faith and credit either does or should apply to cross-reservation-boundary cases, nor do I believe that the principles of foreign-country comity are appropriately applied, nor do I believe that each state should be allowed by federal law to determine on its own what to do. In fact, these beliefs have been set out so completely elsewhere

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226. The relevance of the cause of action goes to the underlying subject matter jurisdiction of the tribal court. Under the common law principles of the Supreme Court, set out in the next section of this Article, tribal courts are unable to adjudicate some matters if the defendant is a non-Indian, most notably, some torts. *See* Strate v. A-1 Contractors, 520 U.S. 438 (1997). If the tribal court was without subject matter jurisdiction as a matter of federal law, then the tribal court judgment is unenforceable off-reservation under both federal and state law. *See* Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997). I have presumed a contract cause of action here because contract claims are appropriately brought in tribal court against non-Indians under the doctrine of *Montana v. United States*, 450 U.S. 544 (1981). *See infra* note 258 and accompanying text.

227. *See generally* Ransom, *supra*, note 7.

228. *See generally* Halwood v. Cowboy Auto Sales, Inc., 946 P.2d 1088 (N.M. 1997); Eberhard v. Eberhard, 24 Ind. L. Rep. 6059 (Cheyenne River Sioux 1997); Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841 (1990); Daina B. Garonzik, *Comment: Full Reciprocity for Tribal Courts from a Federal Courts Perspective: A Proposed Amendment to the Full Faith and Credit Act*, 45 EMORY L.J. 723 (1996).

229. *See* Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997); Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465 (1998).

230. *See, e.g.*, Robert Laurence, *The Bothersome Need for Asymmetry in Any Federally Dictated Rule of Recognition for the Enforcement of Money Judgments Across Indian Reservation Boundaries*, 27 CONN. L. REV. 979 (1995).

that it would tax the patience of familiar readers to spend much time on the cross-boundary-enforcement issue here. It needs only to be brought into the general thesis of the present discussion.

Suppose I am right that the linchpin of all of Indian law is the on-and-off nature of symmetric notions of the dominant society's federalism, and that departures from these symmetric notions are justified by the ancient sovereignty of the tribes. Then common-law asymmetry is justifiable, if at all, only if important matters of tribal sovereignty are implicated in the otherwise mundane issue of the cross-boundary enforcement of judgments. I believe they are. My sharpest criticism—too sharp, some would say—of *Eberhard v. Eberhard*,[231] the recent cross-boundary-enforcement case of the Court of Appeals of the Cheyenne River Sioux Tribe, was of its determination that the application of a federal full faith and credit regime to the tribe did not diminish the tribe's sovereignty.[232]

When one government recognizes the judgment of another government, it is subordinating its sovereign right to determine the merits of a controversy to that of another sovereign. Even more so, it is agreeing to send its law enforcement officers out to do the bidding of that other sovereign. It is not for nothing that the word "enforce" comes from the word "force"; it is sheriffs who enforce civil judgments, and they do not leave their pistols behind when they do so. It is far from trivial for a government to use its police power to enforce another government's judgment.

If a government chooses for itself to enforce another government's judgment, that is an exercise of sovereignty, even as the government decides to subordinate its sovereignty to the other in the particular case. Such is a comity regime, where the subordination is done out of respect for the fellow sovereign, perhaps with the hope, perhaps even with the expectation, that the fellow sovereign will reciprocate. A fully reciprocal system, where each sovereign voluntarily subordinates itself to the other, would create a bilateral symmetry across the borders, and that symmetry would be completely consistent with the exercise of sovereignty by all the governments.

The flip side of reciprocity is retaliation, where one government determines not to enforce the other government's judgments unless the other enforces its judgments. Dr. Robert A. Leflar, a leading conflicts scholar, argued against such retaliation on the grounds that it adds a cost to the system—real and symbolic—and does little to advance the interests of the enforcement of judgments.[233] Thus, the purest kind of comity regime is where a court receiving a

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231. 24 Ind. L. Rep. 6059 (Cheyenne River Sioux 1997).

232. *See generally* Robert Laurence, *Full Faith and Credit in Tribal Courts: An Essay on Tribal Sovereignty, Cross-Boundary Reciprocity and the Unlikely Case of* Eberhard v. Eberhard, 28 N.M. L. REV. 19 (1998).

233. Dr. Leflar writes:

> The doctrine of retaliation, said to be based on comity or reciprocity, was, however, set out by the United States Supreme Court in *Hilton v. Guyot*, to deny recognition to the judgment of a foreign court if the law of the country where the judgment was rendered would not give res

judgment expresses its respect for the court issuing the judgment by voluntarily enforcing it, without worrying about in which situations the issuing court will enforce its judgments. This would be an asymmetric system, representing a full advancement of the sovereignty of both governments.

Full faith and credit is, by its nature, a regime that is imposed on a government, not one that it voluntarily adopts. Full faith and credit requires that the receiving jurisdiction must enforce the judgment that originated outside its jurisdiction for reasons that override its own self-centered, which is to say, local, appraisal of the worthiness of the judgment. Among the several states, it is thought to make great federalist sense that in two constitutional instances Florida and North Dakota are equals: in the Senate and in the Full Faith and Credit Clause.[234]

Full faith and credit is also, by its nature, a symmetric doctrine in the broad sense, that is to say it tends to smooth out the diversity of the states, to advance the interests of uniformity, and to assure that, at least within certain limits, the same law applies everywhere. Hence, under the *McClanahan* model advanced by this Article, a federally imposed full faith and credit regime is an infringement on tribal sovereignty in the name of nation-wide symmetry. As such, it is an inappropriate imposition by the courts, though a carefully studied legislative enactment would be constitutional. On the other hand, a comity regime has much more room for sovereign latitude and hence is less objectionable. A comity regime without the possibility of collateral attack in federal court on a tribe's refusal to give recognition to a state court judgment, such as we have now, is unobjectionable.[235]

The cross-boundary asymmetry of a comity regime without retaliation is thus seen to be consistent with *McClanahan* and the broader notions of symmetry and asymmetry set out above. A comity regime imposed on the states and tribes by the federal courts may at first glance seem a contradiction in terms, as comity is generally thought to be a purely voluntary sovereign act. However, such an

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> judicata effect to a corresponding American judgment. The doctrine has received scant approval from commentators and is not binding on state courts. It has no appreciable tendency to induce a change in the foreign nation's law. Most state courts reject the doctrine of retaliation, while others have sought to limit it narrowly by applying it only when judgment in the first case was for the plaintiff, so that a later action is barred if the prior foreign suit went in favor of the defendant therein.

ROBERT A. LEFLAR ET AL., AMERICAN CONFLICTS LAW 250 (4th ed. 1986) (citing Kurt H. Nadelmann, *Comment: Reprisals Against American Judgments?*, 65 HARV. L. REV. 1184 (1952)).

234. The Full Faith and Credit Clause is found in art. IV, § 1 and is implemented by 28 U.S.C. § 1738 (1994 & Supp. IV 1999). Equality of the states in the Senate is found in U.S. CONST., art. I, § 3, cl. 1, which provision is made unamendable by art. V, cl. 1.

235. The absence of a federal collateral attack on a tribal court's determination not to enforce a state judgment is a result of *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 52 (1978), which denied a federal forum for ICRA complaints. No attack other than one based on the ICRA has ever been proposed.

imposition is appropriate, as the asymmetry flows mostly from different courts deciding different cases differently.

Justice Frankfurter once wrote, "The fact is that throughout our history the courts of a State and the federal courts sitting in that State were deemed to be 'courts of a common country.'"[236] As always, when Indian tribal courts are added to the calculus, the question becomes more interesting and the answer more complex. Historically, the question of whether tribal courts are, or were to be, "courts of a common country" is a difficult one.[237] Practically speaking today, the answer goes something like this: "Yes, they are. Partly. Sort of. Well, not exactly." It is in the equivocation that the heart of American federalism and its relationship to the tribes lies.[238]

Asymmetric comity is also consistent with a more basic asymmetry that is seen to exist when one studies the subject matter jurisdiction of tribal and state courts, and it is to that topic that I now turn.

VII. THE BROAD ASYMMETRIES OF *WILLIAMS V. LEE*, *WOLD ENGINEERING V. THREE AFFILIATED TRIBES*, *MONTANA V. UNITED STATES*, AND *STRATE V. A-1 CONTRACTORS*

The subject matter jurisdiction of tribal courts is set by federal law, and, when it comes to reservation-related matters, so is that of state courts. (Of course, either may limit the reach of its own jurisdiction under its own local law. For the remainder of this discussion I will suppose we are talking about tribes and states that wish to reach cases which test the limits of the federal subject-matter rules.) Unsurprisingly by now, the federal common law system that has evolved is an asymmetric one: there are federal restrictions on the reach of tribal jurisdiction and there are federal restrictions on the reach of state jurisdiction, and the two sets of restrictions are not mirror images. To see if this asymmetry is justified, first a description of the asymmetry itself is in order.

Williams v. Lee[239] was a debtor-creditor case. The debt arose on the Navajo reservation, with the Williamses, who are Navajos, the debtors, and Lee, a non-Indian, the creditor. Upon the Williamses' default, Lee sued in Arizona state court, which granted the relief and was affirmed on appeal.[240] The United States

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236. *See* Kennecott Copper Corp. v. State Tax Comm'n., 327 U.S. 573, 581 (1946) (Frankfurter, J. dissenting) (quoting Minneapolis & St. Louis R. Co. v. Bombolis, 241 U.S. 211, 222 (1916)).

237. *See* Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841 (1990).

238. *See generally* Resnik, *Dependent Sovereigns*, *supra* note 6.

239. 358 U.S. 217 (1959).

240. *See* Williams v. Lee, 83 Ariz. 241, 319 P.2d 998 (1958) (affirming the judgment but reversing the lower court on an issue of the pre-judgment seizure of the Williamses' sheep), *rev'd* 358 U.S. 217 (1959).

Supreme Court reversed on the grounds that the Arizona courts did not have subject matter jurisdiction to hear the case.[241]

At first glance, *Williams* would appear to be a run-of-the-mill conflicts-of-law case. While there are always the questions of personal jurisdiction and whether Arizona could reach the Williamses under its long-arm statute, there would seem to be little in the way of a question of whether an Arizona court had subject matter jurisdiction over the suit by one of its citizens over a contract entered into by that citizen.[242]

The choice of law for the Arizona court would have been the harder question, with the choice to apply Navajo law being one possibility.[243] Perhaps, because the transaction arose in Indian country, there might have been a federal choice of law rule, requiring the use of tribal law by the state courts. The Supreme Court of Arizona, however, did not see the case as involving choice of law and never questioned the application of Arizona debtor-creditor law to the case.[244]

The United States Supreme Court saw the case as one of state subject matter jurisdiction, not state or federalized choice of law. In the process the court established its so-called "infringement" test, arguably the most famous pronouncement of an Indian law principle of the twentieth century: "[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[245]

Some years later, *McClanahan*, a tax case, subordinated this infringement test to the primary inquiry of whether federal law pre-empted state law, leaving two inquiries when determining whether a state may regulate reservation activity.[246] With respect, though, to the exertion of adjudicatory jurisdiction by a state over a suit brought by a non-Indian against an Indian regarding an on-reservation transaction, *Williams* appears to have settled the matter against state court jurisdiction.

The Supreme Court's determination that *Williams* was a subject matter jurisdiction case, and not a conflicts case, set the Court on a course in which the

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241. *See* Williams v. Lee, 358 U.S. 217 (1959).

242. *See, e.g.*, Ruby v. United States Sugar Cos., S.A., 56 Ariz. 535, 109 P.2d 845 (1941). The court stated that:

> Contracts for the payment of money are generally held to be transitory, and an action may be brought thereon in any court which has jurisdiction of actions of that nature and where proper service can be obtained upon the defendant. There can be no question that the superior court of the state of Arizona, in and for Santa Cruz county, had general jurisdiction of actions such as the present one [involving a contract entered into in the State of California and to be performed in the Republic of Mexico].

Id. at 540, 847.

243. *See, e.g.*, Prudential Ins. Co. v. O'Grady, 97 Ariz. 9, 396 P.2d 246 (1964).

244. *See* Williams v. Lee, 83 Ariz. 241, 319 P.2d 998 (1958).

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

246. *See supra* notes 107–127 and accompanying text.

reach of state adjudicatory power over reservation transactions became a question of federal common law. Furthermore, the question of state power implicates the question of tribal power, for the *Williams* Court saw the denial of state adjudicatory power as protective of the tribal court's ability to enforce its own law on the reservation.[247] To some conflicts scholars, the Supreme Court's *Williams* holding denying state jurisdiction in the name of protecting tribal jurisdiction might seem an artificial sheltering of tribal courts under federal protection: federal paternalism, perhaps, at its most gratuitous.[248] To a tribal advocate, however, it has become almost unquestioned that *Williams* represents the high point in the twentieth century of Supreme Court respect for tribal sovereignty. To the pragmatist at least, *Williams* was the Court's protection of a precious remnant of ancient governmental authority against the efforts of the other branches of government to destroy it. *Williams*, after all, was decided in 1959, while Congress and the Executive were pursuing the misguided "termination" policy, the aim of which was to end tribal government as it had existed from the beginning.[249]

I will return in the next section to the question of whether *Williams v. Lee* should have been decided as a conflicts case. I will also return to the question from the previous section of whether full faith and credit or comity is the appropriate cross-boundary enforcement regime. I find the two questions to be related, the relationship being grounded in principles of symmetry and asymmetry. And, I will make the remarkable suggestion that the much-honored protection of tribal court jurisdiction found in *Williams* be only temporary. First, though, it is necessary to complete the discussion of the asymmetry of tribal court and state court jurisdiction under federal law.

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247. *See Williams*, 358 U.S. at 223. Earlier in the opinion, the court wrote, "The Tribe itself has in recent years greatly improved its legal system through increased expenditures and better-trained personnel. Today the Navajo Courts of Indian Offenses exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants." *Id.* at 222.

248. *Cf.* Phillip W. Lear & Blake D. Miller, *Exhaustion of Tribal Court Remedies: Rejecting Bright Line Rules and Affirmative Action*, 71 N.D. L. REV. 277 (1995) (arguing against federal jurisdictional values protective of tribal court jurisdiction). This observation was first made to me in June of 1983, with his usual ability to go directly to the crux of such matters, by Professor Mario E. Occhialino, Jr. of the University of New Mexico, and it is a comment that I have been trying for many years to respond to with some semblance of intellectual rigor. To some extent, the present Article is the latest attempt and, as such, I owe its inception to Ted Occhialino, even as I doubt that he will be entirely satisfied with my lengthy answer.

Interestingly enough, Dr. Robert A. Leflar, the great conflicts scholar, did not see *Williams v. Lee* as a conflicts case. One of the first conversations I ever had with Dr. Leflar in November of 1981, soon after I arrived as a Visiting Assistant Professor at his University of Arkansas, concerned the conflicts and choice-of-law implications of *Williams*. He seemed entirely comfortable with the Supreme Court's approach to the case as one of subject matter jurisdiction. I am confident that Dr. Leflar would not be entirely satisfied with the present effort; he was always suspicious of attempts to turn my field into a branch of his.

249. *SEE* DAVID GETCHES ET AL., FEDERAL INDIAN LAW 204–23 (4th ed. 1998).

The flip-side of *Williams* was presented to the Court some years later in the *Wold Engineering* cases.[250] Wold Engineering, P.C., contracted with the Three Affiliated Tribes of the Fort Berthold Reservation to design and install a water-supply system on the reservation.[251] When the system did not perform as the tribes intended, the tribes sued Wold in North Dakota state court, alleging negligence and breach of contract.[252] Wold counterclaimed for the unpaid purchase price. The state courts found that they had no jurisdiction over the case and dismissed.[253]

The Supreme Court reversed and remanded, holding that the North Dakota Supreme Court's determination had been influenced by a misconception of federal law.[254] On remand, the state supreme court held that it was not permitted to take jurisdiction over the case under state law,[255] and again the tribe appealed. Again the Supreme Court reversed, this time holding that federal law prohibited such a state disclaimer of jurisdiction.[256]

The *Wold* cases contain much discussion of *Williams*, with the Court holding rather sensibly that it could hardly infringe on the tribes' rights of self-determination to allow the tribes themselves to sue in state court. The Court did not discuss, however, the asymmetry that is created by *Williams* and *Wold* together. The closest the Court came was in one hesitant footnote:

> The extent to which respondent's [Wold's] counterclaim may be used not only to defeat or reduce petitioner's [Tribe's] recovery, but also to fix the Tribe's affirmative liability has been the subject of some discussion in this case....We have no occasion to resolve this issue because the case comes to us before trial and we do not know the extent of the counterclaim asserted by respondent.[257]

Wold's counterclaim is of more importance than merely as a means of reducing the tribes' liability. The counterclaim would appear to be barred by *Williams*; it is a claim brought in state court by a non-Indian against an Indian over an on-reservation transaction. It would have demonstrated very nicely the asymmetry of the law for the Court to have recognized that it might be requiring the North Dakota courts to take the tribes' claim-in-chief at the same time that its precedents required the state court to dismiss the counterclaim.

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250. Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C., 467 U.S. 138 (1984) [hereinafter *Wold I*]; Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C., 476 U.S. 877 (1986) [hereinafter *Wold II*].

251. *See Wold II*, 476 U.S. at 877.

252. *See id.*

253. *See* Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C., 321 N.W.2d 510 (N.D. 1982).

254. *See Wold I*, 467 U.S. at 151.

255. *See* Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C., 364 N.W.2d 98 (N.D. 1985).

256. *See Wold II*, 476 U.S. at 887.

257. *Id.* at 891 n.*.

Is this stark asymmetry acceptable? Yes, under the principles advanced by this Article, though a better system awaits discussion below, one that is related to the question of cross-boundary enforcement. The *Williams-Wold* asymmetry is acceptable because its ultimate aim is to guard that part of a tribe's sovereignty that is represented by its judicial system. It was thought in *Williams* that for the state to accept jurisdiction over on-reservation disputes brought against Indians would substantially diminish the importance of tribal courts and of the tribal law they employ. To permit the tribe to sue off-reservation threatens no such diminishment; in fact, to prohibit those suits threatens an unpleasant denial of access to state courts by Indians. *Williams* and *Wold* are uneasy bed-fellows, the uneasiness caused, as we shall see below, by the absence of a sensible (and asymmetric) cross-boundary enforcement system.

A second asymmetry regarding subject matter jurisdiction concerns the question of what cases are appropriately brought in tribal court. Given the course of the present discussion, it will come as no surprise that, even though the question of tribal court jurisdiction appears to be the mirror image of the question of state court jurisdiction, the rules as formulated by the Supreme Court are not the same. The asymmetry here, however, is based on the merits of the underlying law suit and the race of the defendant.

Following *Oliphant*'s removal of the tribes' criminal jurisdiction over non-Indians, it was necessary for the Court to turn its attention to the issue of civil adjudicatory jurisdiction. In *United States v. Montana*,[258] the Court dealt not with adjudicatory, but regulatory jurisdiction: the ability of the Crow Tribe to regulate hunting and fishing on-reservation, on non-Indian fee land. In holding that the tribe did not have that power, the Court set out what are now called the two "*Montana* exceptions"; exceptions, that is, to the general rule that tribes lack power over non-Indians on non-Indian fee land. The Court said:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. [Citations omitted.] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. [Citations omitted.][259]

At first glance, the first of these *Montana* exceptions seems to go not to subject matter jurisdiction, but to personal jurisdiction and the defendant's "minimum contacts" with the tribe. However, the courts have treated both exceptions as matters of subject matter jurisdiction, unwaivable by the parties. Thus, contracts and other commercial transaction cases are within a tribal court's subject matter jurisdiction if those contracts were entered into between non-

258. 450 U.S. 544 (1981).
259. *Id.* at 565–66.

Indians and the tribe or its members, though there is no precise Supreme Court holding on such a case.

Tort cases are more difficult, torts lying nicely between crimes, with tribal jurisdiction prohibited by *Oliphant*, and contracts, with tribal jurisdiction permitted by *Montana*. *Strate v. A-1 Contractors*[260] held that tribal courts do not have adjudicatory jurisdiction over a tort committed by a non-Indian against a non-Indian on a state highway easement within the reservation. The Court might have been analogizing to white-on-white torts from white-on-white crimes, which have long been held to be within state, not tribal or federal, jurisdiction.[261] Even white-with-white contract disputes are not literally within the first *Montana* exception, given above.

As of now, it is not known if the Court will limit the reach of *Strate* only to highway easement cases or to all tort suits brought against non-Indians in tribal court.[262] Nor is it known if the Court will extend the *Strate* holding to white-on-Indian torts, as the Ninth Circuit unfortunately did recently in *Wilson v. Marchington*.[263] If *Strate* is read expansively and all tort jurisdiction is lost, the next issue will concern products liability cases, lying as they do nicely between contract and tort.

The limitations on tribal court jurisdiction found in *Montana* and *Strate* are founded on *Oliphant* and its "unspoken assumption" that tribes lack certain kinds of jurisdiction, and on its common law diminishments of tribal sovereignty through judicial, not congressional, action. These limitations are therefore not supportable under the thesis of this Article, for they do not advance, but retard, the ancient sovereignty of the tribes. It is one thing to say that Congress, under its plenary power, may make such a retardation. It is another thing for a court, applying a common law whose heart lies in *McClanahan*, to accomplish such a result.

Oliphant, *Montana*, and *Strate* are often enough attacked in the law reviews so that I need not add to that literature here, except to note that they create an asymmetry with respect to the jurisdiction of tribal courts that is not justifiable by the present thesis. More important is the relationship between the asymmetry that I advocate with respect to cross-boundary enforcement issues and the asymmetry inherent in *Williams*, *Wold Engineering*, *Montana*, and *Strate*, and it is to that relationship that I now turn.

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260. 520 U.S. 438 (1997).

261. *See* United States v. McBratney, 104 U.S. 621 (1881).

262. *See* Phillip Allen White, *Comment: The Tribal Exhaustion Doctrine: "Just Stay on the Good Roads, and You've Got Nothing to Worry About,"* 22 AM. IND. L. REV. 65, 163–70 (1997) (referring, in the quoted words of the title, to Justice Scalia's reaction to the *Strate* holding).

263. 127 F.3d 805 (9th Cir. 1997).

VIII. THE RELATIONSHIP BETWEEN THE BILATERAL SYMMETRY OF FULL FAITH AND CREDIT AND THE BROAD ASYMMETRY OF SUBJECT MATTER JURISDICTION

Suppose for the purposes of discussion that there are real differences in both substance and procedure between a tribe's law and that of the surrounding dominant society. For example, on the substantive side, suppose that a tribe has evolved different standards from the surrounding states concerning the ability of the adversely affected party to rescind a contract following a unilateral mistake of fact. To be even more precise, suppose that the state follows section 153 of the Restatement (Second) of Contracts.[264] Thus, in the case of unilateral mistake, the adversely affected party can avoid the contract if, among other requirements, "the effect of the mistake is such that enforcement of the contract would be unconscionable." Suppose on the other hand that in consumer contracts where the buyer is an Indian the tribe allows a "cooling off" period of reasonable length in which the contract may be rescinded without an explicit showing of unconscionability.

Furthermore, for an example on the procedural side, suppose the tribe has a traditional "peacemaking" system, which requires the parties to submit to arbitration before tribal elders and if the elders find that one party is not partaking of arbitration in good faith, judgment may be entered for the other party. Suppose that the state, on the other hand, requires arbitration only for small claims and that either party may force a full trial by refusing to arbitrate.[265]

It should not be the desire of federal Indian law to eliminate differences such as these.[266] Smoothing out the rough edges is in order, at least for those of us

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264. RESTATEMENT (SECOND) OF CONTRACTS § 153 (1979) (noting when a mistake of one party will make a contract voidable).

265. *See* Minneapolis & S.L.R. Co. v. Bombolis, 241 U.S. 211 (1916) (holding that the state is not bound by the Seventh Amendment of the U.S. Constitution and thus need not provide a civil plaintiff with a jury trial). The tribe is not required to provide a plaintiff with a civil trial under the ICRA, which contains no Seventh Amendment analog. *See* 25 U.S.C. §1302 (1994).

266. I am speaking, again, of federal common law here. Should Congress determine that more uniformity is needed in cross-boundary adjudication, it could amend the ICRA to add a Seventh Amendment analog, or, for that matter, to add a mandatory arbitration requirement. Under present principles governing the plenary power, such would be constitutional. Under the new federalist principles of cases such as *Lopez* and *Printz*, Congress might be restrained in its interference with state process, unless it acted to prohibit or require arbitration only in cases implicating reservation activity. *Cf.* United States v. Morrison, 529 U.S. 598, 600 (2000) (striking key provisions of the Violence Against Women Act, 42 U.S.C. § 13981). Even in the latter situation, the *Seminole Tribe* case cautions that interests of state sovereignty in our federalist system might predominate over the plenary power of Congress under the Indian Commerce Clause. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 47 (1996) (striking key provisions of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721 (1994, Supp. III 1997 & Supp. IV 1998). Again, however, note that in *Seminole Tribe*, Florida had the undeniable advantage of the Eleventh

who accept the propriety of the ICRA, which imposes dominant-society precepts on tribal government. But there is a propriety, as well, to cases such as *Williams v. Lee*, which require the states to accept the existence of tribal societies within them, and which accept the notion that those tribal societies will make different choices from those made by the states. The new century, then, should offer a continuation of the present system where there are real differences between on- and off-reservation law; differences supervised, but not destroyed, by federal legislative and judicial action.

In such a system, the symmetry of full faith and credit requires the asymmetry of *Williams* and *Wold Engineering*. Tribal civil process is more fragile than is off-reservation process, just as, more generally, tribal governments are more fragile than state governments. Tribal governments are old, yes, and with that age comes an enduring inertia. But they have been subjected to domination by the European influences, which have periodically tried to rub them out, and in any case have overwhelmed them. The differences between the state and tribal ways, presumptively worth preserving, could be destroyed by a fully symmetric system.

The initial oddness of the result that the Three Affiliated Tribes could sue Wold Engineering in North Dakota state court, but that Lee could not sue Williams in Arizona state court, seemed to threaten the sensibility of an asymmetric system. Even more so, the fact that Wold Engineering could be susceptible to suit by the tribe but was unable to counterclaim under *Williams* seems to be asymmetry run amok. However, the asymmetry of *Williams* and *Wold Engineering* is caused, to some extent, by the continued viability of the full faith and credit option and the symmetry that it threatens.

The juxtaposition of the results in *Williams* and *Wold Engineering* only becomes sensible if one accepts the premise that tribal law and tribal process are fragile and need federal preservation, and if one recognizes the relationship between the subject matter of the courts and the full faith and credit inquiry. Without the protection that *Williams* and *Wold Engineering* gave to tribal law and process, and with a symmetric full faith and credit regime in place, then the tribe's determination, in the examples given above, to depart from off-reservation ways could be destroyed without *Williams* and *Wold Engineering*. Litigants with on-reservation claims could rush off-reservation to sue under the more familiar state laws and use tribal process merely to enforce the state judgments under full faith and credit.[267] The only role for tribal officers to play, then, would be for the tribal judge to rubber-stamp the state judgment and for the tribal sheriff to run out and seize the defendant's property.

Suppose instead, however, that there were a federally mandated system of asymmetric comity in place. In such a system, I believe that *Williams* and *Strate* could go, and a symmetric version of *Wold Engineering* could become the rule.

Amendment, which is irrelevant to the present hypothetical. *See supra* note 150 and accompanying text.

267. *See* Lear & Miller, *supra* note 248, at 314 (remarks of P.S. Deloria, responding to presentation of the paper).

This is a bold proposal, so firmly is *Williams* set in contemporary Indian-law jurisprudence, and so welcome is the new *Strate* rule by non-Indians who do business on the reservation. It is a re-working of two of the principal foundations of asymmetry in place today. The fact, though, that tribal advocates so admire the asymmetry of *Williams* and so dislike the asymmetry of *Strate* suggests that some re-working might be necessary.

Without *Williams* and *Strate*, and without full faith and credit, the system would work like this: law suits could be brought anywhere that the parties could be reached by a court's civil process. Long-arm statutes, of course, would have to meet the due process standards of the Constitution, in the case of the state, and of the ICRA, in the case of the tribe. Assuming that proper personal jurisdiction could be established, Indian cases would be treated like other conflicts cases. The court taking jurisdiction would decide the choice of law question—perhaps a federalized choice of law question, because reservation transactions are involved—but there would be no federal bar to the taking of the case. Judgments would be entered, which would be enforceable under the law of the court rendering the verdict like any other judgment; that is to say that the sheriff—tribal or state—would be sent out to seize whatever property is non-exempt and within that sheriff's jurisdiction.

If the defendant's property lay off-reservation, then tribal power would not reach it; if the defendant's property lay on-reservation, then state power would not reach it.[268] In those cases, the judgment would have to cross the reservation boundary and be presented to another jurisdiction, which would be required to enforce it, or not, under an asymmetric federal comity regime. The tribe, as the receiving jurisdiction, could inspect an off-reservation judgment for broad consistency with tribal law. The tribe could use its own procedure to make that determination, opting for "peacemaking" if it chose, and perhaps requiring post-judgment arbitration. In the end, the tribe would apply its own exemption laws and use its own personnel to enforce the judgment against property within its jurisdiction.

A state, as the receiving jurisdiction, could inspect a tribal judgment for ICRA compliance, but not for conformity with state substantive law. The state would use its own post-judgment enforcement process, including, perhaps, its version of the Uniform Enforcement of Foreign Judgments Act, and would use its own exemption laws and other procedures in the enforcement process.

Under this system, the ultimate protection of tribal and state process would be the respective government's power over the property within its jurisdiction. The ultimate protection of defendants' rights would be their ability to keep their property within the jurisdiction where they feel most comfortable. Of course, many whites live on-reservation, and many Indians must do business off-

268. *See* Bradley v. Deloria, 587 N.W.2d 591, 592–93 (S.D. 1998); *see generally* Robert Laurence, *The Off-Reservation Garnishment of an On-Reservation Debt and Related Issues in the Cross-Boundary Enforcement of Money Judgments*, 22 AM. IND. L. REV. 355 (1998).

reservation. This reality, however, does not make the system of civil justice unfair and is a tolerable incidence of the presence of the tribes among us.

I now turn to a rather small aspect of the actual administration of justice, the word "small" used advisedly.

IX. ASYMMETRIES OF SCALE AND TRIBES AS VERY SMALL GOVERNMENTS

The fact that not all laws of physics remain constant through changes of scale is one of the more interesting examples of asymmetry in the physical world, both in general and to Dr. Feynman in particular.[269] It is also an asymmetry that is enticing to students of the law, especially to students of American Indian law. Navajos and Cherokees aside, all tribes are small; most tribes are *very* small. A jurisprudence of asymmetry that accepts the propriety of different rules of governing for large and small governments is one that would have a ready application to American Indian tribes.

Sadly, this jurisprudence has not been rigorously developed as yet and will not be here. Rather, I present some initial thoughts about how very small communities govern themselves, and how members of larger communities react to the asymmetries that are apparent. The thoughts are presented informally, much more informally that one expects to read on the pages of the *Arizona Law Review.* Much work is left to be done, by the readers of this Article, one hopes, as well as the writer. Perhaps these informal thoughts, suggestive as they are of further applications of asymmetry to the law, will lead to the needed exposition of this new jurisprudence of the very small.[270]

I begin with three stories:

1. I am sitting under the Caribbean sun, sipping a beer and swatting flies at a place called Union.[271] Union Island is the last island in the chain called the Grenadines, which make up the southern part of the country of St. Vincent and the Grenadines, and lies about thirty miles from the national capital. Nearby to the south of Union Island lies the international frontier with Grenada. Union Island's population is about 4000 people. Across the street there is what might best be described as a "fuss." Some shouting, some counter-shouting, some signs and

269. *See* RICHARD P. FEYNMAN, *There's Plenty of Room at the Bottom, in* THE PLEASURE OF FINDING THINGS OUT, *supra* note 21, at 119–39. Feynman had a great interest in the very small. In 1959, he delivered a lecture entitled "Plenty of Room at the Bottom," in which he offered two $1000 prizes—no small sum in 1959—from his own funds, one for the construction of a very small but operational motor and one for the reproduction of a very small printed page. *See id.* at 138–39.

270. My initial explorations of this topic were advanced by the input of Professors Steven Neuse, Margaret F. Reid, and Will Miller of the University of Arkansas Political Science Department, with whom I have had interesting discussions dealing with governmental ethics in very small communities.

271. *Cf. Extra Police Sent to Stem Revolt on Caribbean Island*, WASH. POST, Dec. 7, 1979, at A27 (describing a Union Island Revolution some years after the visit described in the text).

placards, and a few on-lookers. I inquire of a companion, who says that a few Union Islanders have just declared independence from St. Vincent and the Grenadines.

2. I am sitting in a hotel conference room, listening to a panel of experts discuss tribal courts.[272] The coffee is bad, the room is stuffy, and mostly I am trying to figure out who is it that chooses the carpet for hotel conference rooms. The lesson from the podium touches on separation of powers, with a not-unsubtle reminder that judicial independence from the other branches of government is the hallmark of North American enlightenment.

3. I am sitting around the conference table at the American Indian Law Center in Albuquerque.[273] The discussion is, as always, wide-ranging, but the coffee, if you want to know the truth, is still only so-so. What is being reported this day is a conversation had with a tribal judge regarding the *ex parte* communications between judges and litigants in her court. That judge's response to an offered *ex parte* is this: "Look, we can have this conversation, but if we do, I'll have to recuse myself. And when I recuse myself, I'll tell my fellow judges I did it because you forced me to talk the case over outside the presence of your opponent."

The thread that runs through these three stories involves the special problems of very small governments. First comes the cautionary tale from the Caribbean: one need not be dismissive of the grievances of the Union Islanders to observe that there must be some lower limit to the size of a community below which full nationhood is not a viable concept. For many, the nation of St. Vincent and the Grenadines itself tests that limit; for many more Union Island would. The basic point is one of broad asymmetry: in government, as in physics, the rules do not stay the same through a reduction in scale, and some governments may be too small to operate at all.

More to the point, when a government does exist at or near that lower limit, it will behave differently from its larger neighbors. An analogy from the physical world regards tiny airplanes, which do not behave as 747s do;[274] Dr.

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272. The conference I am thinking of here was the 23d annual Federal Bar Association Indian Law Conference in Albuquerque, Apr. 2–3, 1998, and the speaker was Hon. Diana E. Murphy of the Eighth Circuit Court of Appeals, but it could have been any one of a dozen such conferences and two dozen such speakers. My implied critique here is not of Judge Murphy herself, but of the generic form of the civics lesson she was giving that day in New Mexico.

273. I have mentioned this conference table in several law review articles, including this one, *see supra* note 100. The particular day that I am recalling in the text occurred sometime in July, 1998.

274. *See* Warren E. Leary, *Tiny Spies to Take Off for War and Rescue*, N.Y. TIMES, Nov. 18, 1997, at B9 ("'Nothing about making micro air vehicles ["MAVs"] is going to be easy,' said Dr. William R. Davis, manager of the MAV program at the Massachusetts Institute of Technology's Lincoln Laboratory. 'With planes this small, all the rules change and everything becomes challenging.'"); *see also* Alex Salkever, *Scientists Now Build Machines One Molecule at a Time*, THE CHRISTIAN SCI. MONITOR, Sept. 10, 1999, at 2.

Feynman's example was a tiny cathedral built of match sticks, which, if expanded to full size, would collapse under its own weight.[275] Similarly, very small governments do not work the same as larger ones, and should not be expected to.

This leads to Judge Murphy's separation-of-powers lesson, duplicated dozens of times a year as those in-the-know from the dominant society remind tribal officials that a government works best which has three separate branches of government: a legislative branch, an executive branch, and a judicial branch, each independent of influence from the others.

However, there is the civics-lesson version of separation of powers and then there is the on-the-ground reality of separation of powers. Regarding the former, one thinks first of Day One of eighth-grade civics class and of the textbook's images of the Supreme Court, the Capitol, and the White House, sitting at the corners of the American constitutional triangle. The actual sight is indeed an impressive one, and the separation of powers can almost be felt as one walks across First Street in Washington, D.C., from the Supreme Court to the Capitol.

The small-town reality is different, and always has been. As one of many examples, consider the governmental structure of Madison County, Arkansas, the county where I live. Of course, the judiciary, the executive, and the legislative council all occupy the same building in Huntsville. But the difference between Huntsville, Arkansas, and the District of Columbia is more than merely architectural. The chief executive officer of the county, by constitutional command, is the County Judge, who is largely in charge of county road and park maintenance and other such matters of administrative concern.[276] However, the Judge is called a "judge" because he or she also has a substantial judicial function to perform. In particular, in the absence of the circuit court judge, the county judge may issue writs of habeas corpus, and in the absence of the chancellor, may issue civil injunctions.[277]

While many tribes have formal constitutions which set up elaborate systems for the separation of governmental powers, the reality for most tribes will be more like Madison County, Arkansas, than Washington, D.C. The tribal Attorney General may share office space with the tribal judge or may communicate across a hallway. The tribal chairman may be related to the tribal judge, or to a tribal council member, or both. Informality, on the one hand, or personal enmity, on the other, may reign in ways truly unique to very small communities.

Likewise, in very small communities, the closeness of family and friendships cannot be denied. Jurors will often know the litigants,[278] and judges

275. *See* FEYNMAN, SIX NOT-SO-EASY PIECES, *supra* note 21, at 27.

276. *See* ARK. CONST. art. VII, § 37 and amend. 55, § 33.

277. *See* ARK. CODE ANN. § 14-14-1002 (1987).

278. I was presented recently with a real-life example of this when I was called to jury duty in my very small rural county during May and June of 1999. The judge, during his explanation of the jury-selection process to the jury pool, turned his attention to the question of whether we could serve on juries when we knew the parties to the case being

will likely run into litigants every day at the market. This brings me to the third story given above: What is one to make of the question of how a tribal judge should respond to being *ex parte*'d by a litigant at the grocery? I think that the situation must be given careful inspection. Two of the principles of tribal law-making are implicated, because both the judge's position in the on-reservation community and the legitimacy of his or her judgments may be in the balance. Because the scalar asymmetries of very small governments are so plainly implicated by the hypothetical *ex parte* communication, I will now turn my attention to what I think the judge's attitude should be and why.

The entire notion of the undesirability of *ex parte* communications is similar to the notion of the desirability of the separation of powers. They are both things about which tribal officials are regularly lectured to, often by an off-reservation expert who delivers the lecture with civics-book clarity, not to say pedantry. The dominant society, tribal officials are told, abhors *ex parte* communications and honors the separation of powers. But, the civics books are usually written in the abstract, or about large societies, like states or the United States as a whole. As Madison County residents know, separation of powers does not work so well in small and very small communities off-reservation, or at least we do not worry so much about deviations from what the civics books say is required. The problem is that the experts know this so well that they forget they know it when they are lecturing to Indian governments about off-reservation separation-of-powers enlightenment.

Mightn't the same thing be true with respect to *ex parte* communications? Shouldn't we re-think from first principles just exactly how tribal judges ought to deal with *ex parte* communications and why? Here are my principles:

First, the fundamental responsibility of a judge, any judge, is to be fair and to be perceived as being fair by those appearing before him or her. Now, it is off-reservation dogma that it is inherently unfair in favor of the party doing the *ex parte*'ing for the judge to talk over the case without the other party being present. (Again, I'm curious about how that works in very small off-reservation communities, but put that question aside for now.) But note how it is also off-reservation dogma that there is no inherent unfairness when one party can afford to hire a $500/hour lawyer while the other party is stuck with a legal services lawyer. It seems to me that a tribal judge might well come out differently on those two questions, or at least decide that it in fact balances the fairness for the party without the fancy lawyer to have a bit of time alone with the judge.

My second principle is that sometimes, but not always, it is of preeminent importance how the tribal judicial process is perceived off-reservation. The most obvious case would be where the tribal prosecutor is *ex parte*'ing the judge, a

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litigated or their lawyers. Noting that so many people in our small community know each other, the judge admonished us of the special responsibility to be fair when and if we were called to sit on a trial involving someone we know. In a larger community, such a difficult responsibility can be largely avoided by careful selection of a jury of strangers.

conviction follows, and the defendant seeks habeas corpus in federal court.[279] Will the *ex parte* communication spoil the conviction? Maybe. The question, of course, is under the ICRA, and it could be that such a communication would cause a federal court to release the prisoner.[280]

On the civil side, the question becomes one of full faith and credit. Suppose the tribal judge is *ex parte*'d by the plaintiff, who prevails. Should that judgment be enforced off-reservation? As shown above,[281] the symmetrists would say "yes," under Full Faith and Credit. I would let the state court judge decide whether the *ex parte*'ing violated the ICRA and decline enforcement if it did. But I would hope that that state judge would not just read the anti-*ex parte* chapter in the civics book and decide to apply it blindly to the tribe under the ICRA. Rather, as with all ICRA questions, the judge should balance the right of the defendant to a fair civil trial, as measured by the dominant-society norms found in the ICRA, against the tribe's sovereign right both to preserve long-standing custom and tradition and to respond to the pressures of modern governmental evolution.

In addition to the formal off-reservation matters of habeas corpus and full faith and credit, there is the more informal question of off-reservation perceptions, something that most tribal officials, in my experience, are savvy enough to realize must be acknowledged. One of the most common stereotypes of tribal judicial process is that defendants from off-reservation get pretty seriously *ex parte*'d there. I am not sure of the objective reality, but I would not be surprised if there was a measure of truth to the stereotype.[282] After all, it is known and accepted off-reservation that there is a sizable home-court advantage in many small communities, and it would not be surprising if part of that advantage would be a wink and a nod at a little harmless *ex parte*'ing down at the Elk's Club. Foes of tribal process love to hear stories of *ex parte*'ing—and there are some horrendous ones for sure—and those foes will contrast them against the purity of off-reservation dogma, never mind whether the dogma is an accurate portrayal of small-town practice. As always, it is my fear that if the tribal practice deviates too much from off-reservation practice, then federal courts will be that much more

279. *See* 25 U.S.C. § 1303 (1994) (providing for federal habeas corpus review of tribal court convictions).

280. *Cf.* Laurence, *Dominant-Society Law and Tribal Court Adjudication*, *supra* note 136, at 15–20 (discussing judge-jury *ex parte* communications, as opposed to judge-prosecutor *ex parte* communications, and arguing that, given the state of the constitutional law, it should not be a *per se* ICRA violation for the judge to talk the case over with the jury outside the presence of the lawyers.)

281. *See supra* note 234.

282. *See generally* Jesse C. Trentadue, *Tribal Court Jurisdiction over Collection Suits by Local Merchants and Lenders: An Obstacle to Credit for Reservation Indians?*, 13 AM. INDIAN L. REV. 1 (1987).

tempted to narrow *Montana v. United States*[283] and hold the tribe's jurisdiction to be only over members.[284]

All that said, what's a judge to do? The adoption of the bright-line civics-book rule might make sense, and I wouldn't second-guess a tribal—or any small-community—judge who decided to do it that way. It might be valid, on the other hand, to experiment with the idea of a formal *ex parte* process, maybe especially in the so-called "peacemaker" situation. It is fairly common off-reservation practice for mediators to meet with the parties alone, in an "alternative dispute resolution" setting.[285] As it is becoming increasingly common to point out, what is "alternative" to the dominant society may be quite ordinary in a tribal community, and few eyebrows may be raised at a tribal judge playing the role as a mediator.[286] As Professor Robert Porter observes, in some tribal proceedings the judge may well be an interested observer, known by all parties and with a pre-existing familiarity with the case.[287] A judgment rendered by such a judge might hold up well on-reservation, though its off-reservation enforcement may be more problematic.[288]

There is much work yet to be done on the asymmetries of scale and the difficulties inherent in running very small governments.[289] These difficulties are

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283. 450 U.S. 544 (1981).

284. *See* Robert Laurence, *The Dominant Society's Judicial Reluctance to Allow Tribal Civil Law to Apply to Non-Indians: Reservation Diminishment, Modern Demography and the Indian Civil Rights Act*, 30 U. RICH. L. REV. 781 (1996).

285. *See* MARK D. BENNETT & MICHELE S.G. HERMANN, THE ART OF MEDIATION 123 (1996) (discussing what is called a "caucus," which in the mediation process "is a separate meeting between the mediators and one of the parties").

286. *See, e.g.*, Gloria Valencia-Weber & Christine Zuni, *Domestic Violence and Tribal Protection of Indigenous Women in the United States*, 69 ST. JOHN'S L. REV. 69 (1995).

287. *See generally* Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COL. HUMAN RTS. L. REV. 235 (1997).

288. *See* Robert Laurence, *The Convergence of Cross-Boundary Enforcement Theories in American Indian Law: An Attempt to Reconcile Full Faith and Credit, Comity and Asymmetry*, 18 QUIN. L. REV. 115 (1999) (discussing on- and off-reservation enforcement issues).

289. A similar problem arises in the non-Indian situation regarding so-called "positional conflicts," that is to say, whether a lawyer may advance a position with respect to one client that is contrary to the position that must be taken with respect to a different client.

The American Bar Associations Ethics Committee has promulgated an opinion setting forth quite strict rules with respect to these conflicts. *See* A.B.A. Formal Op. 93-377 (October 16, 1993). This opinion seems to be based upon the possibility of removing a positional conflict by making sure that one is trying the different issues before different trial judges, and thus has its best application in places large enough to have many judges. *See id.* Small-town practitioners, however, may well spend most of their time litigating before relatively few judges. All bankruptcy cases, for example, in Arkansas are litigated before the same three bankruptcy judges. *See* 28 U.S.C. § 152 (1994, Supp. II 1996, Supp. III 1997

especially important to Indian tribes, most of which are small, and some of which are so small as to test the limits of governmental size. Conflicts of interest, nepotism, *ex parte* communications, unseparated powers, and so on, which would be intolerable in larger governments, are unavoidable aspects of modern tribal government.

Many, perhaps most, of these issues of governing on a very small scale are purely internal concerns, and critically important to the tribe as such. For example, consider a small tribe's use, or not, of the judicial-review doctrine of the venerated *Marbury v. Madison*,[290] venerated, that is to say, off-reservation.[291] The purity of the separation-of-powers found there—that the Supreme Court may and must have the final word on the constitutional propriety of enactments of the legislature—may not translate so well to a very small tribal community. Constitutional crisis lurks behind every issue in which a tribal court is tempted to declare a tribal council's enactment invalid. It is easy enough for us to smile now at the naïve early-American charm of Andrew Jackson's oft-quoted observation following *Worcester v. Georgia*[292] that "John Marshall has made his law; now let him enforce it,"[293] but it is more serious to contemplate what such a statement might mean today in a tribal context. Even in Jackson's day, the threat to the young nation was real; John Quincy Adams is quoted as saying, "The ship is about to founder."[294] Scalar asymmetry suggests that the crisis provoked by a *Marbury*-like pronouncement in a tribal community might be of an entirely different order of magnitude.[295]

& Supp. IV 1998). Again, the point is that there is a scalar asymmetry at work that the Formal Opinion does not acknowledge.

290. 5 U.S. (1 Cranch) 137 (1803).

291. And, occasionally, on-reservation. The Cheyenne River Sioux Tribal Court wrote admiringly of *Marbury v. Madison* in *Clement v. LeCompte*, 22 Indian L. Rep. 6111, 6117 (Cheyenne River Sioux 1994).

292. 31 U.S. (6 Pet.) 515 (1832).

293. *See* Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics and Morality*, 21 STAN. L. REV. 500, 525 (1969). The story may be apocryphal, but see Anton-Hermann Chroust, *Did President Jackson Actually Threaten the Supreme Court of the United States with Nonenforcement of Its Injunction Against the State of Georgia?*, 4 AM. J. LEGAL HIST. 76 (1960) (dealing briefly with the question whether Jackson threatened nonenforcement even before *Cherokee Nation v. Georgia*).

294. 3 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 544 (1919).

295. Consider, for example, that the Cherokee Tribal Council not long ago set about to impeach the tribe's highest court. *See* Sam Howe Verhovek, *Cherokee Nation Facing a Crisis Involving Its Tribal Constitution*, N.Y. TIMES, July 6, 1997, at 1:

> Chief Byrd dismissed 15 of the marshals who came to search his office, a move that soon led the tribe's highest court to issue an arrest warrant for the Chief, accusing him of obstruction of justice. The Chief then got a bare majority of the 15-member tribal council, the rough equivalent of Congress, to impeach all three justices. In a predawn raid last month, the Chief's newly hired security force took back the tribe's courthouse from the dismissed marshals who had camped there, guarding the financial documents.

Id.

Even the extent to which a tribal community might accept with equanimity the declaration by a court that particular legislative action is invalid may reflect the intrusion of off-reservation norms into tribal affairs. Justice Robert H. Jackson is famous for having observed, "We are not final because we are infallible, but we are infallible only because we are final."[296] However, from the perspective of a small tribe that favors unhurried discussion and cautious consensus-building over certain and unequivocal finality, the establishment of a court as the conclusive and hence infallible arbiter of on-reservation controversies may be an imported concept.

Most of these issues of governing on a very small scale are purely internal concerns. For example, similar to the judicial-review question, a small tribe's solution of a nepotism issue may implicate, first and last, that community's comfort with doing governmental business with those to whom one is related. Likewise, the informal resolution of internal disputes by interested mediators rather than disinterested judges may be wholly internal in its impact. Likewise, a governmental structure with powers more intertwined than separate may make sense to the community. Of course, in situations like these, one community might feel much more comfortable with a particular solution than another one does, or one community might be forced by its small size to tolerate more nepotism, informality, or intertwining than a larger community would.

In certain cross-boundary situations, however, it comes to matter how one community reacts to another community's resolution of these issues. The most obvious situation in which cross-boundary concerns are inextricably linked with internal concerns is when a judicial determination by one community needs enforcement by using the processes of another community, and leads us back to the full faith and credit issue, discussed above.[297] But beyond cross-boundary enforcement, also implicated are such matters as federal oversight of tribal contracting, state willingness to negotiate with tribal officials, the application of federal criminal statutes to tribal resource management, and even the very decision by the federal government to recognize, or not, a tribe's government. With respect to all of these matters and many others, a much larger state or federal government may be attentive to a very small tribe's ways of doing business.

This attentiveness is not illegitimate, but it must be tempered with a recognition of the asymmetries of scale: small entities do not work according to the same rules that large ones do. Occasionally these departures from what seems to be the symmetric off-reservation norm will appear to be so dramatic as to justify the off-reservation government's determination not to recognize the tribe's way of doing business. More commonly, and with a measure of cross-cultural awareness, off-reservation decision-makers may come to appreciate that the asymmetries are tolerable, and justified by Justice Marshall's *McClanahan* observation.

Take the *Oliphant* case. The Suquamish Tribe is one of those very small tribes in which the asymmetries of scale are likely to be most dramatic: on the

296. *See* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J. concurring).
297. *See supra* text accompanying notes 233–234 & 280.

7276 acre Suquamish Reservation there lived, at the time of the litigation, fifty tribal members and almost three thousand non-Indians.[298] The tribal process that Mark Oliphant faced, then, was likely to be different, in fairly substantial ways, from tribal process in the state of Washington, a community of several million people. Informal questions about the size of the jury pool, for example, were being raised at the time of the litigation. In fact, Vine Deloria, Jr., the well-known Sioux author whose credentials as a tribal advocate are unquestioned, once wrote of *Oliphant* that "[s]urely, here was an instance of a doctrine run amok," the doctrine of reference being that of tribal sovereignty.[299]

From the perspectives of the present Article, the question of these scalar asymmetries collapses into the questions of all reservation asymmetries: if they exist, are they tolerable to the dominant society under *McClanahan*'s reasoning? That tolerability is, in turn, a function of the degree to which cross-boundary interests are implicated. As should by now be evident, I believe them to be tolerable, to the extent that they are within the bounds set by Congress in the ICRA.

All of this brings us back to Judge Murphy's separation-of-powers civics lesson and its application to very small communities. One can hardly object to some friendly advice given by a respected off-reservation judge, but neither should one object to a tribe's determination that the same rules cannot apply in a community so small. As Dr. Feynman relates, when Galileo discovered that the laws of nature varied according to scale, he considered the discovery to be of such major importance that he published his results in a book entitled "On Two New Sciences."[300] Perhaps we await the discovery of a new political theory on the governance of very small communities. In the meantime, the scalar asymmetry of the law means that different rules will apply across reservation boundaries, and the law should not require that these differences either be destroyed or that they be ignored.

As the final example of the application of the broad notions of symmetry and asymmetry, I will now consider the topic of Indian treaties and, in particular, the question of whether their meanings should vary over time.

X. TEMPORAL ASYMMETRY, ORIGINALISM, AND INDIAN TREATY INTERPRETATION

In one sense, the recognition of Indian treaties is an entirely asymmetric doctrine: no other group of American citizens has entered into treaties with the United States. True enough, Indian treaties are not specifically enumerated as such in the Constitution, so there is a symmetry as to treaty recognition, if one

298. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 193 n.1 (1978).

299. *See* Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203, 215 (1989).

300. FEYNMAN, SIX NOT-SO-EASY PIECES, *supra* note 21, at 27–28.

compares Indian tribes to foreign states.[301] And there are those who argue that the rules of the construction and abrogation of Indian treaties should be symmetric across the field of both domestic and international law.[302] However, international law is beyond the scope of the present Article; I am discussing symmetry and asymmetry within American domestic law, and within that body Indian treaties are unique.[303]

Thus, one could say that the rules for the construction and abrogation of Indian treaties must be asymmetric and applicable only to Indian treaties, because only Indian tribes as treaty-making entities exist within the confines of the United States. Indeed, one of the principal asymmetries of American Indian law is that tribes and their members are protected by treaty rights as the rest of us are not.[304] These rights are unambiguously "extra" rights, not shared by the society at large, be they rights to hunt and fish, rights to kill otherwise protected animals, rights to be free from taxation, or entitlements to education. As such, there are undoubtedly times when members of the dominant society take umbrage, forgetting, perhaps, the deal that was originally struck and the price the tribes paid for these "extra" rights.[305]

So, the existence and continued recognition of Indian treaties is the classic case of a rule that does not apply everywhere on the continent, nor to all people. Notwithstanding Justice Scalia's position in *Adarand Constructors*, this broad asymmetry exists and is explained by Justice Marshall's insistence in *McClanahan* that we not forget the antiquity of the tribes. Important ramifications of that antiquity are both the original determination to make treaties with the Indian nations and the present determination to recognize the continuing validity of those treaties. Francis Paul Prucha, discussing Congress's decision to end

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301. Treaties are mentioned three times in the Constitution: U.S. CONST. art. II, § 2, cl.2; art. III, § 2, cl.1; and art. VI, cl.2. The first treaty between the United States and an Indian Tribe was with the Delawares. *See* 7 Stat. 13 (Sept. 17, 1778). The first treaty ratified under the Constitution was with the Wyandots, Delawares, Ottawas, Chippewas, Potawatomis, and Sac. *See* 7 Stat. 28 (Jan. 9, 1789). The last treaty was with the Nez Perce. *See* 15 Stat. 693 (Aug. 13, 1868). Treaty-making ended March 3, 1871. *See* 16 Stat. 567 (Mar. 3, 1871). *See generally* FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 289–310 (1994).

States are not allowed to enter into treaties, U.S. CONST. art. I, § 10, cl.1.

302. *See, e.g.*, Martin A. Geer, *Foreigners in Their Own Land: Cultural Land and Transnational Corporations—Emergent International Rights and Wrongs*, 38 VA. J. INT'L L. 331 (1998); Mike Townsend, *Note: Congressional Abrogation of Indian Treaties: Reevaluation and Reform*, 98 YALE L.J. 793 (1989).

303. The uniqueness of Indian treaties is emphasized by Professor Prucha's title: "American Indian Treaties: The History of a Political Anomaly." *See supra* note 301 and the quotation given *infra*, text at note 306.

304. It is Supreme Court doctrine that individual Indians may cloak themselves in the protection of their tribe's treaty rights. *See* United States v. Dion, 476 U.S. 734, 338 n.4 (1986).

305. *See, e.g.*, Colleen O'Connor, *"Open Season" on Indians*, NEWSWEEK, Sept. 30, 1985, at 35. *Compare* United States v. Sioux Nation, 448 U.S. 371 (1980) (recognizing the tribe's claim for damages before the Claims Court on account of a treaty abrogation).

treaty-making in 1871, notes the enduring effect of the initial asymmetry of Indian treaty-making:

> It was a momentous act—the change in Indian policy that it brought was neither as sudden nor as complete at its advocates had hoped for at the time and as many histories and other students of Indian affairs have assumed in our own day. The anomaly simply took a new twist: tribes were no longer to be considered sovereign political entities with whom the federal governments would make treaties, but at the same time the old treaties that recognized such sovereignty were still to be in effect. The history of Indian treaties, therefore, did not end in 1871.[306]

A second treaty-based asymmetry might present itself in the question of the rules of construction of Indian treaties. It is Indian law dogma that those treaties are to be interpreted to the advantage of the tribes as the weaker parties, who were usually bargaining in a language other than their own.[307] I leave to others the continuing question of how those domestic rules of construction compare, and should compare, to the rules of construction of international treaties.

Notwithstanding these asymmetries, among Indian treaties themselves the rules of construction are largely symmetric; few have suggested, for example, that treaties with the Navajos, say, should be construed under a different set of rules from the set used to construe treaties with the Senecas. Thus we can see at least one broad symmetry of the law as it is applied to one treaty or another.

Now, consider the question of symmetry, or not, through a different translation, this one a translation in time: suppose circumstances change from the time of the execution of the treaty and its enforcement. Do the rules of construction change with the circumstances? In particular, should a treaty be read so as to protect the Indians' right to hunt a now-endangered species?

This problem is an especially sensitive one, and an especially good one for discussion in the present Article. It is sensitive because of its high profile. Environmental laws in general, and endangered species protection in particular, get people's attention. And just as some are outraged by the extraordinary lengths that Congress has gone to protect species from destruction,[308] so are others outraged by the idea that Indians might be able to hunt a species to extinction.[309]

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306. Prucha, *supra* note 301, at 310.

307. The classic work on treaty interpretation is Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long As Water Flows or Grass Grows upon the Earth"—How Long a Time Is That?*, 63 CAL. L. REV. 601 (1975).

308. *See, e.g.*, Jonathan H. Adler, *ESA's Dubious Track Record After 25 Years*, WASH. TIMES, Dec. 28, 1998, at A17.

309. Consider Justice Douglas's famous dictum that "[t]he police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets." Department of Game v. Puyallup Tribe, 414 U.S. 44, 49 (1973). It is always worth noting when referring to this quotation that there was absolutely nothing to

And the problem is especially apropos of the present discussion because endangered species protection seems so scientifically unobjectionable. With the weight of science behind the protection of endangered species, it seems inconceivable to some that Indian hunting should be exempted from the rules in the name of asymmetry or anything else.

However, the discussion above of the concept of symmetry in physics shows that science itself is often equivocal; it is only superficially that symmetry seems to be the norm of the universe. And, as set out in detail elsewhere,[310] this is even truer in the realm of the biological sciences, germane to the endangered species question. "Species," itself, is a slippery concept,[311] much slipperier than "symmetry," and determinations of which species are endangered, which are to be protected, and how, are as much political determinations as scientific ones.

Professor E.O. Wilson's recent work *Consilience* advances the proposition that all knowledge can be unified: "Consilience is the key to unification."[312] At first glance, this "consilience" seems to support my view that it is impossible to separate "pure" scientific determinations from "pure" political ones.[313] His first example in fact involves the intertwining of environmental policy, ethics, biology, and social science.[314] A longer quotation, however, shows that Professor Wilson argues in the direction of common agreement, based on science, which would seem to exclude much of what is commonly called "politics":

> To ask if consilience can be gained in the innermost domains of the circles [where the four inquiries of policy, ethics, biology, and social science meet], such that sound judgment will flow easily from one discipline to another, is equivalent to asking whether, in the gathering of disciplines, specialists can ever reach agreement on a common body of abstract principles and evidentiary proof. I think they can. Trust in consilience is the

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suggest that the Puyallups were, were intending to, or were threatening to "pursue the last living steelhead" anywhere.

310. *See generally* Robert Laurence, *The Abrogation of Indian Treaties by Federal Statutes Protective of the Environment*, 31 NAT. RES. J. 859 (1991).

311. *See* THEODOSIUS GRIGORIEVICH DOBZHANSKY ET AL., EVOLUTION 230 (1977) ("The concept of biological species is based upon gene exchange by means of sexual reproduction between populations belonging to the same species, and the absence or rarity of such exchange between populations belonging to different species.").

312. E.O. WILSON, CONSILIENCE: THE UNITY OF KNOWLEDGE 8 (1998). A more complete definition of Professor Wilson's key term is that "[t]he central idea of the consilience world view is that all tangible phenomena, from the birth of stars to the workings of social institutions, are based on material processes that are ultimately reducible, however long and tortuous the sequences, to the laws of physics." *Id.* at 266. Sharp criticism of CONSILIENCE: THE UNITY OF KNOWLEDGE—the concept and the book—is found in WENDELL BERRY, LIFE IS A MIRACLE: AN ESSAY AGAINST MODERN SUPERSTITION (2000).

313. *See* Laurence; *The Abrogation of Indian Treaties*, *supra* note 310, at 871–77.

314. WILSON, *supra* note 312, at 8–11.

> foundation of the natural sciences. For the material world at least, the momentum is overwhelmingly toward conceptual unity.[315]

Consilience is a challenging work, and I am far from certain that I understand all that is there. Allow me to react this way: ten years ago, a student comment quoted Dr. Wilson as testifying before Congress to the effect that the loss of genetic and species diversity through the destruction of natural habitats is a worse event to contemplate than "energy depletion, economic collapse, limited nuclear war or conquest by a totalitarian government," his theory being that species loss is irreversible.[316] Today, such a statement would more accurately be called a "political" one than a "scientific" one and, as such would likely be embraced by different governments with different degrees of enthusiasm. If *Consilience* envisions a day when such a statement becomes provable in a unified sense and is no longer subject to political, as distinguished from scientific, debate, then I doubt that I shall see that day. I suspect that during the time that is left for me to see, the interpretation of Indian treaties will involve matters about which people will legitimately disagree and which require policy choices, not scientific proof, *Consilience* to the contrary notwithstanding.

So, here I am on the side of symmetry, and I think that the rules of construction that applied initially should apply throughout the life of the treaty, notwithstanding that the circumstances may have changed, up to and including the now-endangered status of a formerly prolific animal. Many of these "changed circumstances" will be changes in the dominant society's attitudes towards Indians, the hunting rights protected by the treaty, and the animals that are on the one hand hunted by the Indians and on the other protected by the environmental laws.

In the case of endangered species, for example, two observations are common and relevant: first, it is customary to note that the attitudes of many toward the protection of endangered species have as much to do with the nobility of the beast as anything else: bald eagles and Florida panthers are deemed by many to worthier of protection than spiders and bugs.[317] Second, it is almost always the actions of the dominant society, not the Indians, that result in a threat to a species' continued existence.

Such changing attitudes regarding protection-worthiness and such changing circumstances regarding how many members of a particular species exist should not be taken into account when interpreting an old Indian treaty. Justice Marshall's *McClanahan* quotation does not contain a justification for any such

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315. *Id.* at 10.

316. *See* Council on Environmental Quality, 16th Annual Report (1985), at 273, quoted in John C. Beiers, *Comment: The International Applicability of Section 7 of the Endangered Species Act of 1973*, 29 SANTA CLARA L. REV. 171, 174 n.12 (1989).

317. *See* Dave Hughes, *3-Inch Beetles, All 58 of Them, Bug City Budget; Fort Smith Pays Nearly $9000 a Year to Tag Endangered Insect*, THE ARKANSAS DEMOCRAT-GAZETTE, Oct. 26, 1996, at 1B; Stephen Kellert, *Social and Perceptual Factors in Endangered Species Management*, 49 J. WILDLIFE MGMT. 528 (1985).

temporal asymmetry in the application of the rules of treaty construction. The antiquity of the tribes and their ages-old claim to sovereignty do not justify a modern departure from an earlier interpretation of a treaty due to the changed attitudes or changed circumstances. Such a departure, if it is to come at all, must be justified on its own grounds and not by a re-interpretation of the rights protected by the treaty.

Judicial channels are not the best to find such justification, nor to express these changed attitudes and circumstances; the better channel is legislative. Indian treaties can be abrogated by the United States acting alone, should Congress, after due deliberation, determine to do so,[318] with the attendant consequences before the Claims Court.[319] If a federal or state court re-interprets a treaty because a protected hunting right threatens an animal now cherished by the dominant society, the Indians are denied both the chance to lobby Congress and their claim for money damages for the abrogation.[320] Symmetry should hold here, and a treaty right to hunt Florida panthers should remain a treaty right to hunt Florida panthers even after the whites have killed off most of the panthers, until Congress deems that the national interest requires the explicit abrogation of the treaty.[321]

XI. CONCLUSION

Symmetry, it appears, is a rich concept in both law and science. Writing about it here has put me in the company of geniuses: Einstein and Cardozo, Feynman and Llewellyn, Galileo, Washington, and Beethoven. Many beyond those themselves might wonder whether I have put their work to good use; whether I have abused the metaphor;[322] whether I have distorted the science to make it fit the law, or distorted the law to make it fit the science.

There can be no question, though, about the tension that exists in Indian law, as well as other areas of the law; tensions captured nicely by the juxtaposition of the quotations of Justices Marshall and Scalia. Perhaps my assignment to them of the theories of asymmetry and symmetry, respectively, would not seem to fit, even to the two of them. Surely Justice Marshall did not think that all asymmetries

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318. *See* United States v. Dion, 476 U.S. 734 (1986). The *Dion* test for finding that Congress has abrogated an Indian treaty without explicitly saying that the treaty was abrogated is this: "What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Id.* at 739–40.

319. Regarding liability before the Claims Court for the abrogation of an Indian treaty, see United States v. Sioux Nation, 448 U.S. 371 (1980).

320. *See, e.g.*, United States v. Billie, 667 F.Supp. 1485 (S.D. Fla. 1987); State v. Billie, 497 So. 2d 889 (Fla. App. 1986).

321. This sentence places me in the camp of those who dislike the square holding of United States v. Dion, 476 U.S. 734 (1986). *Dion* held that Congress abrogated the treaty right of the Yankton Sioux Tribe by passing the Bald Eagle Protection Act, 16 U.S.C. §§ 668–668d, without explicitly saying that the treaty was being abrogated. *See id.* at 738.

322. I am mindful of the metaphor about metaphors: they are like wheelbarrows, tending to break down if made to carry too great a load.

toward the tribes could be justified in the name of the tribes' antiquity.[323] And just as surely, Justice Scalia does not think the concept of the government's symmetric neutrality destroys all of Indian law, or, at least, he has never said so.

Still and all, and as Professor Resnik has shown so well,[324] there is more at stake in Indian law than the theoretical legal status and continued actual existence of the tribes themselves, as if that weren't enough. The structure of Indian law tells us a lot about the structure of federalism, and, in this Article's rubric, federalism requires both symmetry and asymmetry. The question is when the interests of uniformity and broad symmetry need to override the interests of diversity, local autonomy and asymmetry, and what the tests shall be for the validity and legitimacy of that overriding.

I return in the end, then, not only to Marshall and Scalia, but to Feynman and Cardozo and Wilson. Feynman sought to describe and explain the universe he saw, while Cardozo sought to justify the law he was crafting. Wilson's "consilience" appears to offer, in the end, a conflation of the two: the laws of science, and most basically the laws of physics, govern our genetic makeup and the workings of our brains. Hence, these laws ultimately govern all of the brain's workings, including the creation of law itself.[325] Cardozo's choice of an asymmetric rule in *Jacob & Youngs, Inc. v. Kent*, seen from this perspective, is merely the workings of the asymmetric rules of physics, embodied in the mechanical and asymmetric operation of Benjamin Cardozo's brain.[326]

I balk at the conflation, but the metaphor is attractive. It is enough for me that the law is *like* the science, not that it *is* science. The propriety of an asymmetric legal regime is in keeping with the asymmetry of the universe, and perhaps the most useful aspect of this broad notion of asymmetry is that it explains the separation of Indian law from Justice Scalia's overly facile *Adarand Constructors* characterization. Even for those who accept that characterization as the symmetric norm of American law—and not all do—even for them, the asymmetry of Indian law is established and justified by *McClanahan*.

In the end, the continued recognition by American law of the existence of the tribes *is* enough. The asymmetric nature of the law is suggested, if not caused, by the asymmetric nature of the universe. Indian law is different because it must be different, and it must be different because of the antiquity of the tribes. "It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government."[327]

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323. *See* United States v. Mitchell, 445 U.S. 535 (1980); *supra* note 68.
324. *See* Resnik, *Dependent Sovereigns*, *supra* note 6.
325. *See* WILSON, *supra* note 312, at 125–63, and especially at 127.
326. *See supra* note 37.
327. *See* McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 172 (1973).