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NATIVE NATIONS AND THE CONSTITUTION: AN INQUIRY INTO "EXTRA-CONSTITUTIONALITY"

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INTRODUCTION

Federal Indian law is oftentimes characterized as a niche and discrete area of law, but this depiction really misstates the breadth and relevance of the field. Federal Indian law is a horizontal subject: virtually every area of law in the American canon has an "Indian law" component: taxation, water rights, civil and criminal jurisdiction, labor law, and so on. With 567 federally recognized Indian tribes in the United States,[1] which control over 60 million acres in the contiguous forty-eight states alone,[2] Indian tribes are an integral part of the legal fabric of America.

At the same time, American Indians are — metaphorically and literally — outside the standard frame of American law. Since the 1800s, Indian tribes have been characterized as "anomalous" within the U.S.

[*] Professor of Law, UCLA School of Law; Director, Native Nations Law and Policy Center. This Essay drew heavily on conversations at the symposium, The Indigenous Rights Movement: Tribal, Domestic & International Law Dimensions, which took place at the Harvard Law School from October 13–14, 2016. I am particularly indebted to those who participated with me on a panel on this subject and whose incredible insights and experience have enriched the field and my own thinking in this area: Ed Kneedler, Riyaz Kanji, Noah Feldman, and John Dossett. My thanks to Dean Martha Minow and the Harvard Law School for providing generous funding for the conference, and to UCLA School of Law and Dean Jennifer Mnookin for continued research support. Rosemary McClure provided outstanding research assistance, and Kristen Carpenter and Richard Re gave invaluable assistance by reading and commenting on early drafts. Special appreciation to my students at UCLA, Harvard, and beyond, who continue to inspire me.

[1] *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 82 Fed. Reg. 4915 (Jan. 17, 2017).

[2] DAVID. H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 24 (7th ed. 2017) (stating that there are 67.2 million acres of land in the contiguous forty-eight states); *see also* Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 21 (1991) (providing historical numbers for acres under tribal control).

federal system.[3] This unique status has largely been created by centuries of federal law and policy, although deeply embedded tribal values have also played a role. Through treaties, the Constitution, federal statutes, and Supreme Court jurisprudence, the distinct status of tribes as sovereigns has been repeatedly affirmed in both domestic and international law. This history sets a baseline for understanding Indian tribes' historical and continued resistance to integration and assimilation, which contrasts with the story of immigrants as well as those brought to this continent involuntarily as slaves.[4] Engaging with colonial powers — and ultimately, the United States — on a sovereign-to-sovereign basis since first contact, tribes have sought largely to be left alone to govern their own affairs.[5]

Tribes' motivations for safeguarding their differentness are multifaceted, but history shows that commitments to protecting and defending Indian lands, as well as the fight for continued cultural survival, were and remain central motivations. Hundreds of treaties and governmental policies designed — albeit haphazardly and inconsistently — to keep Indian tribes together, protected from encroachment by land-hungry settlers, oftentimes on reservations, further reflect this.[6] So tribes' mediated position — as situated both within and without the United States[7] as "domestic dependent nations"[8] — has been characterized as Indian peoples' desire for "measured separatism."[9]

In the modern era, Indian law cases continue to move through the federal courts at fairly high rates, with a significant number heard at the Supreme Court.[10] But even among advocates with shared com-

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[3] The relation of Indian tribes as preexisting sovereigns situated within the borders of the United States "has always been an anomalous one and of a complex character." United States v. Kagama, 118 U.S. 375, 381 (1886). *See generally* Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1202 n.30 (1996) (mentioning two instances in which the Supreme Court referred to tribes as "domestic dependent nations").

[4] *See generally* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 14 (1987) (discussing the desire of tribes to maintain a "measured separatism" and avoid assimilation).

[5] *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831) (noting that the Cherokee Tribe intended to prove itself, among other things, "capable of managing its own affairs").

[6] Most of the several hundred treaties between the United States and tribes are collected in INDIAN AFFAIRS: LAWS AND TREATIES (Charles J. Kappler ed., AMS Press 1972) (1904–1928). For general background on the American Indian treaty tradition, see generally FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY (1994).

[7] *See* KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 46 (2009).

[8] *Cherokee Nation*, 30 U.S. at 17.

[9] WILKINSON, *supra* note 4, at 14 (coining the phrase "measured separatism" to refer to the desire of tribes to continue to live apart from white society, and to maintain their cultural and political difference).

[10] *See* Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933, 942 (2009).

mitments to tribal rights, there remain unanswered questions about how best to advocate for tribal sovereignty within the larger framework of federal law and the Constitution. At times, arguments for tribal sovereignty and Indian rights focus on ensuring the same fair and equal treatment for tribal governments and Indian people that are otherwise provided in U.S. law.[11] At other times, arguments hinge on — in the words of the late scholar Phil Frickey — Native American exceptionalism.[12]

The tension between formal equality and respect for difference in the Indian law context is more than just a semantic distinction. A capacious understanding of equality — as is presented in the international indigenous rights literature regarding conceptions of equality for indigenous peoples,[13] for example — can perhaps accommodate and reconcile this potential incoherence. But within the framework of U.S. law as understood by the three branches of government, and by the Supreme Court in particular, American law operates more as a blunt instrument. American jurisprudence may not be fully capable of embracing more nuanced conceptions of equality that acknowledge and reify the idea that fair and equal treatment for Indian nations requires specialized understanding and application.[14] And because it appears that the courts — and the Supreme Court in particular — may be reluctant to conceive of Indian rights in this way, it is important to contemplate how federal law does — or ought to — relate to tribal rights.

The puzzle of reconciling federal Indian law with larger American jurisprudence has both internal and external dimensions. That is to say, in some cases, the United States government has used Indian difference to justify abhorrent acts against Indian tribes and Indian people.[15] For example, the Supreme Court has relied on such distinctions

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[11] *See, e.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 288–91 (1955) (holding that the Fifth Amendment does not protect the aboriginal title interests of Native Alaskans); Joseph William Singer, *Reply Double Bind: Indian Nations v. The Supreme Court*, 119 HARV. L. REV. F. 1 (2005) (critiquing that decision as discriminatory and unjust); Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481, 519–27 (1994) [hereinafter Singer, *Well Settled?*] (same).

[12] Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431 (2005) (arguing that federal Indian law is exceptional within the framework of American law).

[13] *See, e.g.*, S. James Anaya, *Keynote Address: Indigenous Peoples and Their Mark on the International Legal System*, 31 AM. INDIAN L. REV. 257 (2007); *cf.* Will Kymlicka, *Theorizing Indigenous Rights*, 49 U. TORONTO L.J. 281 (1999) (reviewing S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (1996)).

[14] *Cf.* Morton v. Mancari, 417 U.S. 535, 551, 553–54 (1974) (holding that a preference for Indians in hiring and promotion at the Bureau of Indian Affairs did not violate the Equal Protection Clause because tribes are political, not racial, entities).

[15] *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (holding that building a road through a site sacred to Native Americans was not a violation of the First Amendment Free Exercise Clause, even though the Court acknowledged that doing so would vir-

to deny First Amendment religious freedoms to American Indians[16] and to hold that tribes were not entitled to compensation under the Fifth Amendment when the U.S. government seized aboriginal title.[17] Understood in this light, theories of racial inferiority around Indianness directly fueled the jurisprudential exceptionalism that deprived Indians and Indian tribes of equal rights under American law.[18]

Ironically, at other times, Indian nations themselves are bound to advance positions that may be harmful to tribes or tribal members as a consequence of adhering to a principle of exceptionalism. For example, because existing jurisdictional structures make American Indians more likely to be criminally prosecuted by the federal rather than state governments,[19] Indians on balance serve longer prison terms than non-Indians for the same crimes.[20] Though these disparities arouse ample criticism on the ground in Indian communities, tribes exist in a double bind, where they must continue to defend a system that produces inequities in order to stave off any further encroachment by state governments.

These and many other scenarios raise pressing concerns. Even in the Indian law cases just decided in the Court's last Term, including *United States v. Bryant*[21] and *Dollar General Corp. v. Mississippi Band of Choctaw Indians (Mississippi Choctaw)*,[22] the question of tribal authority — as applied in civil as well as criminal contexts, as applicable to the rights of Indians and non-Indians, and as largely unconstrained by the U.S. Constitution's Bill of Rights — is knocking at the door of federal Indian law and is demanding to be answered.

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tually destroy their ability to practice their religion); *Tee-Hit-Ton*, 348 U.S. at 272 (holding that the Fifth Amendment Takings Clause did not constitutionally require the payment of just compensation for the taking of aboriginal title); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (holding not only that Congress could unilaterally abrogate a treaty with an Indian tribe, but also that, despite allegations of fraud and deceit, Congress's acts were presumed to be in perfect good faith and were not justiciable by the Supreme Court); *see also* Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners*, 52 UCLA L. REV. 1061 (2005) (critiquing *Lyng* for failing to protect American Indian religious freedom); Singer, *Well Settled?*, *supra* note 11, at 483–85.

16 *Lyng*, 485 U.S. at 447–53; *see also* Angela R. Riley & Kristen A. Carpenter, *Owning* Red*: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 877–78 (detailing various colonial and early American laws and policies meant to target and eradicate Indian religions).

17 *Tee-Hit-Ton*, 348 U.S. at 284–85.

18 *See* Riley & Carpenter, *supra* note 16.

19 *See, e.g.*, United States v. Antelope, 430 U.S. 641 (1977).

20 *See, e.g.*, INDIAN LAW & ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES 119 (2013), http://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf [https://perma.cc/7663-VADY] (emphasizing that federal sentences are, on balance, longer than state sentences; accordingly, due to existing jurisdictional structures, American Indians receive longer sentences than their non-Indian counterparts).

21 136 S. Ct. 1954 (2016).

22 136 S. Ct. 2159 (2016).

So what exactly does it mean for a sovereign to be both within and without the federal system? What is the best way to understand tribes, which are mentioned expressly in the Constitution, and yet largely remain beyond the reach of the Bill of Rights?[23] What is the present and future condition of Indian nations, which seek robust rights of self-determination and self-governance within the contours of American federalism? And how, if at all, are these rights modified when tribes have extensive dealings with non-Indians?

This brief Essay sketches out a few thoughts regarding the past, present, and future of federal Indian law, particularly in relation to the question of whether, and to what extent, Indian tribes are "extraconstitutional."[24] The primary goal of this Essay is to demonstrate how and why the phrase, first used by Justice Kennedy in relation to Indian tribes in 2004,[25] is worth further consideration and may offer insights as to how to think about Indian rights and tribal sovereignty going forward.

As an initial matter, I concede the somewhat provocative nature of the inquiry. It's quite clear that the Constitution contemplates Indian tribes and tribal rights and establishes a structure for federal-tribal relations. At the same time, the Bill of Rights does not apply directly to the tribes via the Constitution (though Congress has addressed this gap through statute). Thus, questions remain as to whether and to what extent tribal governments are constrained by the Bill of Rights or comparable restrictions, and how inherent tribal sovereignty relates to the power of Congress to modify tribal rights.

With such a broad charge, this Essay gives relatively superficial treatment to these questions, but it aspires to spark conversation about Indian law today and contemplate challenges and opportunities for future advocacy in the field. Part I provides a brief and succinct history of federal Indian law, particularly as it pertains to the constitutional status of tribes, carrying this analysis up through the passage of the

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[23] As discussed herein, key components of the Bill of Rights were codified and extended to Indian tribes through the Indian Civil Rights Act of 1968 §§ 201–203, 25 U.S.C. §§ 1301–1303 (2012).

[24] Ed Kneedler, Deputy Solicitor Gen., U.S. Dep't of Justice, Panel Comments at the Harvard Law School Symposium: The Indigenous Rights Movement: Tribal, Domestic & International Law Dimensions (Oct. 14, 2016) (stating that tribes are not "extra-constitutional" and that to describe them in these terms is inaccurate). *See generally* Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015) (providing a detailed historical account of the Indian Commerce Clause and the Framers' understanding of tribes at the country's formation).

[25] United States v. Lara, 541 U.S. 193, 213 (2004) (Kennedy, J., concurring in the judgment) ("[I]t should not be doubted that what Congress has attempted to do is subject American citizens to the authority of an extraconstitutional sovereign to which they had not previously been subject.").

1968 Indian Civil Rights Act[26] (ICRA). In so doing, Part I lays the foundation for understanding the ramifications of tribal exceptionalism in both civil and criminal cases arising in Indian country, with a particular focus on the Supreme Court's immediate post-ICRA examination of these questions. Part II moves into the contemporary cases, focusing in particular on Justice Kennedy and the concerns he continues to raise about tribes' unique and anomalous status, drawing connections to his opinions in cases regarding the application of the Bill of Rights at Guantanamo and in other contexts. Recent cases, particularly those decided in the 2016 Term, illustrate some of the present and future challenges in the field. This Essay concludes by highlighting core tenets, pointing out limiting principles, and touching on some likely future complexities for lawyers practicing Indian law.

I. HOW DID WE GET HERE? INDIANS, TRIBES, AND THE CONSTITUTION

For some of the leading lawyers in the field, characterizing Indian tribes as "extraconstitutional" is misleading and perhaps even inaccurate.[27] In fact, the term was never actually used by the Supreme Court to describe the status of Indian tribes until 2004, when it first appeared in Justice Kennedy's concurring opinion in *United States v. Lara*,[28] an Indian law case that considered the scope of Congress' ability to relax restrictions on tribes' inherent criminal jurisdictional authority.[29] However, even though earlier cases did not use the precise term "extraconstitutional," cases going back to the late nineteenth century make clear that tribal sovereignty "existed prior to the Constitution,"[30] giving rise to the rather common characterization of tribes as both "pre" and "extra" constitutional at various times.[31] Therefore, despite legitimate resistance to the use of the term, the unique history of federal Indian law provides the foundation for further interrogating this characterization.[32]

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[26] Pub. L. No. 90-284, 82 Stat. 73, 77 (1968) (codified as amended in scattered sections of 18 U.S.C., 25 U.S.C. and 42 U.S.C.).

[27] Kneedler, *supra* note 24.

[28] 541 U.S. 193, 213 (2004) (Kennedy, J., concurring in the judgment).

[29] *Id.* at 196 (majority opinion).

[30] Talton v. Mayes, 163 U.S. 376, 384 (1896).

[31] *See id.* at 383.

[32] The leading treatise in the field, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Nell Jessup Newton et al. eds., 2012 ed.), provides an exhaustive examination of federal Indian law, as well as its historical and legal antecedents. Numerous legal scholars in recent years have further interrogated the metes and bounds of tribal sovereignty. *See, e.g.*, Ablavsky, *Beyond the Indian Commerce Clause*, *supra* note 24; Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999 (2014) [hereinafter Ablavsky, *Savage Constitution*]; Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121 (2006); Frickey, *supra* note 12, at 437–38 (ex-

From the point of contact, Europeans encountered hundreds of tribal nations possessing sovereignty over their lands and their people.[33] To facilitate settlement, and often to guarantee tribes' peace and self-governance without interference,[34] treaties served as the primary mechanism to transfer lands from Indians to settlers.[35] The treaty-making authority was eventually constitutionalized in Article II of the U.S. Constitution, which states: "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties."[36] This provision, along with the Supremacy Clause,[37] made treaties the supreme law of the land. Thus, taken together, the Treaty Clause and the Indian Commerce Clause[38] provide two constitutional bases for sovereign-to-sovereign relations between the United States and Indian nations.[39]

In early interactions and spanning until 1871, treaties served as the primary source of regulation between the sovereigns, and the United States ultimately made over three hundred treaties with Indian tribes.[40] By binding themselves together through treaty-making, the United States confirmed the legal and historical understanding of tribes as nations, with inherent sovereignty over lands, territory, and people, an understanding that continues today.[41] This interaction as sovereigns long predated the formation of the United States and the drafting of the U.S. Constitution. Having engaged in numerous wars with colonial forces, tribes were seen as potential military opponents, not wholly unlike foreign powers, at the time of the Constitution's

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plaining the recognition of tribal sovereignty by the United States in the Constitution and Supreme Court jurisprudence); Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109 (2004) (looking at tribal sovereignty from the viewpoint of the Navajo).

33 Angela R. Riley, *The History of Native American Lands and the Supreme Court*, 38 J. SUP. CT. HIST. 369, 369 (2013).

34 *See, e.g.*, Treaty with the Wiandot, Delaware, Chippawa, and Ottawa Nations, art. III, Jan. 21, 1785, 7 Stat. 16, 17 (establishing the boundary line between the United States and the Wiandot and Delaware nations); Treaty with the Delaware Nation, Delaware-U.S., art. II, Sept. 17, 1778, 7 Stat. 13, 13 (committing to "a perpetual peace and friendship" that "shall from henceforth take place, and subsist between the contracting parties aforesaid, through all succeeding generations"); United States v. Winans, 198 U.S. 371, 381 (1905) (confirming the Yakima Nation's right to fish upon the Columbia River as determined by the treaty between the Tribe and the United States).

35 Riley, *supra* note 33, at 369.

36 U.S. CONST. art. II, § 2, cl. 2.

37 *Id.* art. VI, cl. 2.

38 *Id.* art. I, § 8, cl. 3.

39 Carol Tebben, *An American Trifederalism Based upon the Constitutional Status of Tribal Nations*, 5 U. PA. J. CONST. L. 318, 326–27 (2003) (citing Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617, 640 (1994)).

40 WILKINSON, *supra* note 4, at 8, 14.

41 *See* Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1872 (2016); United States v. Lara, 541 U.S. 193 (2004).

drafting.[42] But tribes were largely excluded from the foundational processes that contributed to the country's formation; they were not party to the Constitutional Convention and were never formally brought within the federal framework. In this way, and others discussed herein, tribes are both within and without the Constitution.

At the same time, it is perhaps too sweeping to designate tribes as "extraconstitutional." After all, the Constitution does contemplate Indian tribes. In the Treaty Clause,[43] the Commerce Clause,[44] and through the clause regarding "Indians not taxed,"[45] the Framers clearly recognized tribes' existence and importance to the founding of the country, even if they nevertheless demonstrated some trepidation about the ultimate place of tribes within the framework of the new nation.[46] This ambivalence, of course, ultimately led to the now-famous decision of Chief Justice Marshall in *Cherokee Nation v. Georgia*,[47] in which he ruled out the idea that tribes could be either states or foreign powers.[48] Instead, he indicated that the clearest reading of the Indian Commerce Clause designated tribes as "domestic dependent nations."[49]

For hundreds of years, tribes have been recognized as sovereigns. Policy shifts and corresponding changes in tribal power — exemplified by, for example, the move of Indian affairs from the Department of War to the Department of the Interior[50] — demonstrate migration in terms of how tribes were conceived, contemplated, and perceived by the national government. Nevertheless, although federal intervention has come in ascending and descending waves over time, the idea that Indian nations are free to "make their own laws and be ruled by them"[51] has always been and remains a core tenet of Indian law.[52]

Occurring in parallel to a recognition of tribal sovereignty, however, were development and implementation of policies meant to destroy American Indian tribes. The historical record of atrocities committed by the federal and state governments against American Indians and Indian tribes is a stain on the long history of Indian affairs. A vast body of scholarship has detailed the wrongs committed against Indian people: broken treaties, land dispossession, genocide, disease, bounties placed on Indian "skins," abusive boarding schools, religious persecu-

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42 Ablavsky, *Savage Constitution*, *supra* note 32, at 1037–38.
43 U.S. CONST. art. II, § 2, cl. 2.
44 *Id.* art. I, § 8, cl. 3.
45 *Id.* § 2, cl. 3.
46 *See* Ablavsky, *Savage Constitution*, *supra* note 32, at 1038–50.
47 30 U.S. (5 Pet.) 1 (1831).
48 *Id.* at 17.
49 *Id.*
50 Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1694 n.107 (2012).
51 Williams v. Lee, 358 U.S. 217, 220 (1959).
52 *See Ex parte* Kan-gi-shun-ca (Crow Dog), 109 U.S. 556, 572 (1883).

tion, denial of voting rights, and removal of Indian children from Indian homes (among other things) were all promoted by American law and policy.[53] Thus, the primary relationship through which legal and moral wrongs were committed against Indian people from the point of contact through the modern era has been one between the American government and Indians.

But the 1960s civil rights movement flipped this inquiry on its head. Even though tribes vociferously complained of mistreatment by state and local governments, civil rights mobilization for Indians was redirected to focus on the relationship of individual Indians to tribal governments. With individual rights and civil liberties emerging as paramount considerations in the country, the fact that Indian tribal governments were not — and are not today — directly subject to the constraints of the Bill of Rights via the Constitution incited criticism and examination, both from within and without Indian communities. Ultimately, however, exogenous forces drove change.[54] A key figure in the movement, Senator Sam Ervin of North Carolina, introduced several bills into Congress to create an Indian Bill of Rights. Feeling that success for Indians lay in greater assimilation, individual rights, and private property, Ervin argued that the inapplicability of the Constitution's Bill of Rights to tribes was "alien to popular concepts of American jurisprudence."[55]

After extensive field hearings and testimony, Congress changed the legal landscape, enacting the ICRA in 1968.[56] The ICRA was intended to bind Indian tribal governments to many of the same protections under the Constitution to which state and federal governments are bound. Thus, there was a focus on individual civil rights, including the freedom of religion and freedom of speech, as well as many of the procedural rights guaranteed to defendants in the criminal process.[57] But, even though the language of the ICRA tracks that of the Bill of

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[53] For some of the most salient critiques of the history of Indian affairs, see generally ANGIE DEBO, AND STILL THE WATERS RUN (Univ. of Okla. Press 1984) (1940); VINE DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES (1974); VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS (1969); VINE DELORIA, JR., & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 1–21 (1983); WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR (2010); WINONA LADUKE, ALL OUR RELATIONS: NATIVE STRUGGLES FOR LAND AND LIFE (1999); RENNARD STRICKLAND, TONTO'S REVENGE (1997).

[54] *See generally* Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. ON LEGIS. 557, 571–88 (1972).

[55] John R. Wunder, *The Indian Bill of Rights*, *in* NATIVE AMERICANS AND THE LAW: THE INDIAN BILL OF RIGHTS, 1968, at 2, 5 (John R. Wunder ed., 1996); *see also id.* at 4–5.

[56] Pub. L. No. 90-284, 82 Stat. 73, 77 (1968).

[57] *Hearings on S. 961, S. 962, S. 963, S. 964, S. 965, S. 966, S. 967, S. 968, and S.J. Res. 40 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 89th Cong. 6–9 (1965) [hereinafter *Hearings on Constitutional Rights of the American Indian*].

Rights, it is not identical.[58] Important provisions, such as the prohibition on the establishment of religion, were omitted to ensure traditional tribal governance systems could flourish without risk of reprisal.

Though it is possible Congress enacted the statute on the assumption it would primarily govern the relationship between individual tribal members and their tribal governments, the statute is not limited in this way. Any person subject to the authority of a tribal government — member Indians, nonmember Indians, or even non-Indians — may utilize the statute to bring a civil rights action against a tribal government.[59]

But the ICRA's passage did not fully alleviate concerns regarding the rights of individuals pursuant to the authority of tribal governments.[60] In fact, if anything, the criticism escalated in the decades following the ICRA's enactment, in part because of the Supreme Court's ruling in *Santa Clara Pueblo v. Martinez*,[61] the first case to reach the Supreme Court that challenged the applicability of the ICRA to internal tribal decisions. *Santa Clara Pueblo* arose when a female member of the Santa Clara Pueblo Indian Tribe, Julia Martinez, brought an equal protection claim against her tribal government for maintaining membership rules that discriminated against female members of the Pueblo.[62] The *Santa Clara Pueblo* case caused controversy on two grounds. First, it held that the ICRA did not abrogate tribal sovereign immunity from suit, though the Court did say that tribal officers could be sued in their official capacities.[63] Significantly, the case also held that the ICRA did not provide a federal cause of action for civil rights claims, except in the case of an action for habeas corpus.[64] The Supreme Court's decision affirmed the rights of the Pueblo to determine and maintain its own membership rule.[65] As a tribe that, at the

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58 Santa Clara Pueblo v. Martinez, 436 U.S. 49, 57 & n.8 (1978).

59 *See id.* at 65–66. Many tribal courts have interpreted the ICRA as creating "an implied waiver of [tribal] sovereign immunity in . . . tribal courts" for purposes of ICRA claims. Alex Tallchief Skibine, *Respondent's Brief — Reargument of* Santa Clara Pueblo v. Martinez, 14 KAN. J.L. & PUB. POL'Y 79, 86 (2004).

60 *Cf., e.g.*, Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 901 (2d Cir. 1996) (holding that permanent banishment ordered by the tribal council is a punitive sanction, and as such is a "sufficiently severe potential or actual restraint on liberty" to justify federal habeas review under the ICRA); Quair v. Sisco, 359 F. Supp. 2d 948, 971 (E.D. Cal. 2004) (following *Poodry*, holding that disenrollment and banishment are equivalent to "detention" such that federal habeas review under the ICRA is authorized).

61 436 U.S. 49 (1978).

62 *See id.* at 51.

63 *Id.* at 59. Whether the sovereign immunity of Indian tribes extends to agents and officers in their official capacity versus in their individual capacity is a question that has been and continues to be litigated. *See, e.g.*, Lewis v. Clarke, 135 A.3d 677 (Conn. 2016), *cert. granted*, 137 S. Ct. 31 (2016).

64 *Santa Clara Pueblo*, 436 U.S. at 60–61.

65 *See id.* at 72.

time,[66] decided membership based on patrilineal descendancy, this meant the tribe applied and maintained membership rules that discriminated against the children of women, but not men, who married outside the Pueblo.[67]

From the moment it was decided, it was clear that *Santa Clara Pueblo* was a profoundly impactful case.[68] It upheld the tribal sovereignty of American Indian tribes to exercise a core feature of nationhood: to determine one's own membership.[69] It also made clear that civil rights cases brought in tribal courts against tribal governments would not be subject to federal court review, except in the case of habeas corpus actions.[70] This meant that federal courts did not have the authority to review tribal court decisions on civil rights questions, except to the extent they arose from an action for habeas corpus. This feature of *Santa Clara Pueblo* remains controversial.

Curiously, after oral arguments in *Santa Clara Pueblo*, but before the opinion was issued, the Supreme Court heard oral arguments in the case of *Oliphant v. Suquamish Indian Tribe*.[71] In that case, the Court faced the question whether an Indian nation could exercise criminal jurisdiction over a non-Indian defendant who committed a crime in Indian country and who would receive the protections of the ICRA, including the right to habeas corpus.[72] In fact, it was through the habeas statute that Oliphant got his case into federal court.[73] But none of the reasoning or consequences of *Santa Clara Pueblo* (which was not decided until later that year, in December 1978) appear in the Court's March 1978 decision in *Oliphant*.

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[66] *See* GETCHES ET AL., *supra* note 2, at 440 ("In 2014, the Santa Clara Pueblo Tribal Council repealed the 1939 membership ordinance, 1944 and 1982 membership resolutions, and 'unwritten law' on tribal membership. The Council also enacted a resolution establishing interim membership procedures allowing for persons of mixed parentage previously excluded (such as persons similarly situated to Julia Martinez's children) to be admitted. In 2007, the Council enacted the Non-Member Residence Code. The Code provided that all persons then residing and those who wished to reside on Pueblo lands must apply to be a nonmember resident. The Council began implementation of the Code in 2015." (internal citations omitted)).

[67] *See Santa Clara Pueblo*, 436 U.S. at 52–54.

[68] CATHARINE A. MACKINNON, *Whose Culture? A Case Note on* Martinez v. Santa Clara Pueblo, *in* FEMINISM UNMODIFIED 63 (1987); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 702 (1989); Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 810–13 (2007); Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 497 n.7 (2001); Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1429–30 (2003).

[69] *Santa Clara Pueblo*, 436 U.S. at 72 n.32.

[70] *Id.* at 64–66.

[71] 435 U.S. 191 (1978).

[72] *See id.* at 194–95.

[73] *Id.* at 194.

The *Oliphant* Court ultimately concluded that an Indian tribe could not exercise criminal jurisdiction over a non-Indian.[74] However, its opinion surprisingly did not center on the scope of protections available to individual criminal defendants in the tribal court system as guaranteed under the ICRA, or on tribal power over criminal defendants, but on a theory of implicit divestiture of tribal authority. The Court held that "Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their status.'"[75] Although it's not clear why the Court completely siloed its opinions in the two cases — which reasonably could be understood as intertwined — it's possible that the Court in 1978 was already committed to drawing clear lines and distinctions around a tribe's authority over internal tribal matters that affect only Indians (*Santa Clara Pueblo*) versus those that potentially limit the rights of non-Indians, even when they are in Indian country (*Oliphant*).[76]

In the almost fifty years since *Santa Clara Pueblo*, the Court has continued to take cases that bear on issues critical to the sovereignty of Indian tribes, including security in lands and resources, as well as questions of religious freedom and continued cultural survival. Peering ahead to cases that followed in the subsequent fifty years, some of which are discussed herein, it has become apparent that the issues left open by *Santa Clara Pueblo* continue to shape much of the discourse that occurs in the field today. This is particularly true when tribal power touches the lives, as it increasingly does, of non-Indians. And questions regarding the rights of those subject to the authority of tribal governments — particularly pertaining to civil rights protections — continue to emerge as questions of paramount concern, as seen in the most recent cases to appear on the Court's docket.

II. INDIAN NATIONS AND THE CONSTITUTION: A GLANCE THROUGH JUSTICE KENNEDY'S LENS

The threads of the extraconstitutionality question — or, in nineteenth century phrasing, the ever-pervasive "Indian problem"[77] — are traceable from the earliest interactions between Indian tribes and the emerging nation. But in the last thirty years, Justice Kennedy's opin-

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[74] *Id.* at 195.

[75] *Id.* at 208 (emphasis omitted) (quoting Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976)).

[76] It was of note to the Court that the Suquamish Indian Tribe's reservation was highly allotted, with non-Indians far exceeding the number of Indian residents. *Id.* at 193 n.1.

[77] *See generally* A RACE AT BAY: *NEW YORK TIMES* EDITORIALS ON "THE INDIAN PROBLEM," 1860–1900 (Robert G. Hays ed., 1997); S.F. Tappan, *Our Indian Relations*, 2 ADVOC. PEACE 266 (1870); F.A. Walker, *The Indian Question*, N. AM. REV., Apr. 1873, at 329.

ions and queries during oral arguments in Indian law cases have illuminated a particular concern about tribal authority.[78] From Justice Kennedy's opinion in *Duro v. Reina*[79] to his concurrence in *Lara*,[80] and his questions in oral arguments last Term in *Mississippi Choctaw*,[81] Justice Kennedy's skepticism about the scope of tribal power — largely unconstrained by the Bill of Rights — continues to emerge. His concerns about tribal governments[82] center on a discomfort with the proposition that Congress can subject an American citizen to the authority of a government that is not bound by the U.S. Constitution. These queries have motivated lawyers in the field to more thoughtfully contemplate tribal constitutional exceptionalism, particularly as tribes increasingly impact the lives of nonmembers. It is now apparent that an explanation of tribes as historically, legally, and jurisprudentially exceptional may not be fully responsive to contemporary concerns voiced by the Court.[83]

Justice Kennedy expressly raised questions regarding tribes' constitutional status for the first time in *Duro*. *Duro* focused on the issue of whether an Indian tribe could exercise criminal jurisdiction over a defendant who was Indian but not a member of the prosecuting tribe. Nonmember Indian status can arise in a variety of ways: an Indian may be an enrolled member of another federally recognized tribe (just not the prosecuting tribe); the nonmember Indian may be a descendant of the prosecuting tribe, but fail to meet criteria for enrollment for some reason (for example, by having an insufficient degree of Indian blood); or the nonmember Indian may be indigenous, but from a tribe or nation outside of the United States, such as Canada or Mexico.[84] Nonmember Indians generally do not have voting rights, typically

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[78] There are numerous theories among the Justices for why Indian rights may or may not be robustly upheld by the Court in coming years. Justice Thomas, for example, has argued repeatedly that the Constitution does not give Congress the plenary authority to act in Indian affairs. United States v. Lara, 541 U.S. 193, 214–15, 224–25 (2004) (Thomas, J., concurring); *see also* Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2570–71 (2013) (Thomas, J., concurring). The late Justice Scalia contended that tribal sovereign immunity had developed by accident and should be overturned. Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2045 (2014) (Scalia, J., dissenting). This piece focuses on Justice Kennedy to highlight just one particular strand of argument about the scope and sustainability of tribal authority.

[79] 495 U.S. 676 (1990).

[80] *Lara*, 541 U.S. at 211–14 (Kennedy, J., concurring).

[81] Transcript of Oral Argument at 24–25, Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159 (2016) (No. 13-1496).

[82] *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 750 (2008).

[83] Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173, 201–04 (2014); Frickey, *supra* note 12, at 437–52; Riley, *Indians and Guns*, *supra* note 50, at 1679–83.

[84] *See* Carpenter & Riley, *supra* note 83, at 181 ("Across the world, the concept of 'who is indigenous' remains contested and varied, as do contemporary legal problems and strategies.").

cannot serve on juries, and may also lack access to other avenues of political or cultural participation within tribal life.

Recall that, in *Oliphant*, the Supreme Court held that tribes could not exercise criminal jurisdiction over non-Indians who committed crimes in Indian country. Another sovereign — state or federal, depending on a panoply of complex jurisdictional rules — would be charged with that authority.[85] When the Court delivered its decision in *Oliphant*, it made a virtually unprecedented move in criminal law: it disaggregated geography and jurisdiction. Without the ability to punish crimes that occur in Indian country, Indian tribes were stripped of a core aspect of sovereignty. Accordingly, where "[n]o other sovereign has as great an interest in trying individuals for breaches of the peace as does the sovereign in whose territory the offense occurred," Indian tribes were once again set apart and disempowered.[86] Today, *Oliphant* continues to impact safety and security on Indian reservations. Without tribal jurisdiction over virtually all crimes committed by non-Indians,[87] tribes are deprived of a critical role of a sovereign: to keep tribal members safe. Structural, political, and logistical barriers mean that crimes often go without prosecution in Indian country altogether, contributing to the epidemic of crime now seen on many reservations across the U.S.[88]

Despite the consequences, the Court followed the *Oliphant* reasoning in deciding *Duro*. Writing for the majority, Justice Kennedy reasoned that the tribe could not have criminal jurisdiction over a defendant who was not a tribal member, even if the defendant was Indian.[89] Although *Santa Clara Pueblo* had made clear that the federal courts were available to hear habeas cases arising out of alleged ICRA violations in tribal court, and that many of the protections of the Bill of Rights were extended to tribal court defendants via the ICRA, these protections were insufficient for the Court. Though defendants in tribal court have many of the same protections as defendants criminally prosecuted in federal and state courts, the rights are not identical. For example, although the ICRA protects the right of a criminal defendant in tribal court to have an attorney, it does not require the tribe to pay for counsel for indigent defendants.[90]

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[85] *See generally* Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564 (2016).

[86] Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1, 37 (1993).

[87] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

[88] *See generally* Riley, *supra* note 85; Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709 (2006).

[89] Duro v. Reina, 495 U.S. 676, 679 (1990).

[90] *See* 25 U.S.C. § 1302(a)(6) (2012).

In the majority opinion, Justice Kennedy stated: "Our cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right."[91] Justice Kennedy made clear his skepticism that the federal government could subject citizens of the United States to the authority of a government that is not bound by the Constitution and in which the prosecuted party has no right to influence or impact tribal law.[92] Because nonmember Indians presumably have no greater political rights within tribal nations than non-Indians do, Justice Kennedy reasoned, there were no grounds upon which to distinguish between the two classes of defendants for purposes of tribal jurisdiction.

In addition to being inconsistent with the historical record demonstrating the inherent sovereignty of tribes to regularly exercise criminal jurisdiction over Indians who committed wrongs in their territory — regardless of tribal affiliation — the case raised a whole other set of rather serious practical concerns. The Court's decision created an actual jurisdictional void, one that the Court readily acknowledged.[93] The *Duro* ruling meant that literally no sovereign in existence had criminal jurisdiction over misdemeanor crimes committed by nonmember Indians against other Indians in Indian country.[94] But, despite the consequences of such a ruling on the ground, the Court admonished tribes to seek solutions in Congress or to negotiate with states for expanded criminal jurisdiction rather than modify its ruling.[95] Given long-standing animosities between tribes and states — in addition to a paucity of state resources as well as disincentives to police remote reservation lands where tribal trust land is not subject to state taxation for revenue-raising purposes[96] — going to states was not a desirable or realistic option for tribes.[97]

So, with a push from tribes and advocates, Congress acted quickly to pass the so-called "*Duro* fix" legislation.[98] That statute reversed

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[91] *Duro*, 495 U.S. at 693.

[92] *Id.*

[93] *Id.* at 696; *see also id.* at 704–05 (Brennan, J., dissenting); United States v. Lara, 541 U.S. 193, 231 (2004) (Souter, J., dissenting).

[94] Philip P. Frickey, *Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law*, 38 CONN. L. REV. 649, 660 (2006).

[95] *Duro*, 495 U.S. at 697–98.

[96] Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1426 (1997) (describing how the federal government increased state authority to police reservations but did not remove trust status, preventing states from raising tax revenue to finance this additional policing burden).

[97] *Cf.* United States v. Kagama, 118 U.S. 375, 384 (1886) ("Because of the local ill feeling, the people of the States where [tribes] are found are often [the tribes'] deadliest enemies.").

[98] Only five months after the Supreme Court's decision in *Duro v. Reina*, Congress amended the Indian Civil Rights Act to affirm that the phrase "powers of self-government" "means the in-

Duro by affirming that tribes do, in fact, have inherent — not delegated — criminal jurisdiction over nonmember Indians who commit crimes in Indian country.[99] It affirmed the principle that even though Congress, through its plenary authority over Indian affairs, may have tightened restrictions on tribal criminal jurisdiction over time, it could now loosen them under the same plenary power.[100] But, as one might suspect, the *Duro* fix caused unease both within and without Indian country.[101] The statute left open questions regarding the scope of both tribal and federal power in regards to tribal sovereignty.

These questions arose again in a different frame when the Supreme Court later heard *United States v. Lara*,[102] which tested the constitutionality of the *Duro* fix.[103] Billy Jo Lara had challenged his criminal conviction under the *Duro* fix, primarily on the grounds that Congress did not have the authority to pass the legislation that relaxed restrictions on tribal criminal jurisdiction and made tribal prosecution possible.[104] In essence, then, Lara's case centered on the limitations, if any, on the constitutional power of Congress to legislate in Indian affairs.

Given the long line of Supreme Court precedents leading up to *Lara* confirming that the federal government's authority over Indian affairs is plenary and broad,[105] with only marginal and haphazardly defined limitations,[106] and that treaties with and obligations to Indian tribes could lawfully be shirked,[107] it was disquieting that the Court found only by a narrow 5–4 margin that it was within the authority of Congress to enact the *Duro* fix.[108] And it was here, in Justice Kennedy's concurrence, that he reiterated his reasoning in *Duro*, questioning again the constitutional limits on Congress's authority to submit an

herent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." Department of Defense Appropriations Act of 1991, Pub. L. No. 101-511, sec. 8077(b), § 201(2), 104 Stat. 1856, 1892 (1990) (codified as amended at 25 U.S.C. § 1301 (2012)).

99 *Id.*

100 *See* Nell Jessup Newton, Commentary, *Permanent Legislation to Correct* Duro v. Reina, 17 AM. INDIAN L. REV. 109, 118 (1992) (quoting H.R. REP. NO. 102-261, at 3 (1991) (Conf. Rep.)).

101 *See id.* at 109 (characterizing *Duro* as an extension of the widely condemned *Oliphant* holding).

102 541 U.S. 193 (2004).

103 *Id.* at 193–94.

104 Although Lara did try to raise other issues before the Supreme Court, the Court declined to reach them, as it found the double jeopardy issue dispositive. *Id.* at 207–09.

105 *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

106 The Court backed off such a strong view of the plenary power doctrine when it decided *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977), and *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

107 *Lone Wolf*, 187 U.S. at 566 ("The power exists to abrogate the provisions of an Indian treaty . . . . [I]n a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians.")

108 *Lara*, 541 U.S. at 195; *see also* Frickey, *supra* note 12, at 465.

American citizen to the jurisdiction of an "extraconstitutional" tribal sovereign.[109]

Around the same time Justice Kennedy was forming his views regarding the relationship of Indian tribes to the Constitution, a parallel string of cases brought against the Bush Administration to challenge the detainment of enemy combatants at Guantanamo Bay dovetailed with the Indian law cases. Notably, the same year *Lara* was decided, the Supreme Court handed down its opinion in *Rasul v. Bush*,[110] which provided Guantanamo detainees access to federal courts, even though Guantanamo was not on U.S. soil.[111] Concurring in the Court's judgment, Justice Kennedy noted the "unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay," despite the fact that it was not formally a U.S. territory.[112]

Then, four years after *Lara*, Justice Kennedy continued this line of reasoning in his majority opinion in *Boumediene v. Bush*.[113] There, the Court was presented with the question of whether prisoners at Guantanamo Bay had a right to have their convictions reviewed pursuant to the writ of habeas corpus where there was not a sufficient statutory substitute.[114] In the majority opinion, Justice Kennedy raised the question — reminiscent of his Indian law opinions — of whether the United States could subject enemy combatants at Guantanamo Bay, over which the U.S. exercised de facto sovereignty, to its authority without constitutional protections.[115] Ultimately, the Court concluded that the detainees at Guantanamo Bay were, for all practical purposes, so completely subject to the authority of the United States that they could avail themselves of habeas corpus protections under the U.S. Constitution.[116]

In terms of assessing Justice Kennedy's views about territoriality, sovereignty, and the Constitution as they relate to the field of federal Indian law, *Boumediene* stands as more than merely a footnote. The case is revealing, if not potentially predictive, of Justice Kennedy's discomfort with the logical conclusions following from a formalistic approach to territoriality and sovereignty. *Boumediene* also provides a link between the Court's Indian law jurisprudence and cases involving the scope of the application of the U.S. Constitution and the Bill of Rights in the territories. The distinctions and parallels between terri-

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109 *Lara*, 541 U.S. at 213 (Kennedy, J., concurring in the judgment).
110 542 U.S. 466 (2004).
111 *Id.* at 483–84.
112 *Id.* at 487 (Kennedy, J., concurring in the judgment).
113 553 U.S. 723 (2008).
114 *See id.* at 723–30 (syllabus).
115 *Id.* at 739. Justice Kennedy raised similar concerns in the tribal cases. *See supra* text accompanying notes 91, 109.
116 *Boumediene*, 553 U.S. at 771.

tories acquired by the United States that have never achieved statehood and Indian country have long been queried by scholars.[117]

Perhaps it is unsurprising then that the issue of inherent versus delegated power continues to arise in both contexts and has significant ramifications for tribal sovereignty. In recent years, for example, Congress has sought to address and improve some aspects of Indian country criminal justice. The Tribal Law and Order Act of 2010[118] amended the Indian Civil Rights Act to allow tribes sentencing authority in excess of one-year imprisonment if particular procedural processes and rights are put in place.[119] Then, in 2013, Congress reauthorized the Violence Against Women Act[120] (VAWA) with tribal proviprovisions.[121] Those provisions created a mini-*Oliphant* fix, such that they recognized tribes' inherent authority to criminally prosecute non-Indians who commit acts of domestic violence against Indians in Indian country.[122] Again, because the Bill of Rights does not directly apply to tribal governments, the statute requires that tribes guarantee defendants' rights in line with the Constitution if they choose to exercise this power.[123] Since the completion of the pilot project, more and more tribes have sought to implement VAWA on their reservations.[124] In fact, the push for a full and complete *Oliphant* "fix" has also increased, particularly as evidence mounts that tribes can and do protect the constitutional rights of non-Indian defendants in tribal court, and that such expansions — especially for collateral crimes such as child and elder abuse — are needed to ensure justice and safety for reservation residents.[125] But congressional acts in the field, much like the *Duro* fix, are still likely to be challenged on the grounds that they are delegations of sovereignty, rather than recognitions of inherent powers.

In this light, the most important Indian law case of 2016 may well have been one that is not an Indian law case at all. The Court's 2016 opinion in *Puerto Rico v. Sanchez Valle*[126] emphatically reiterated the

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117 *See, e.g.*, Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 163–250 (2002); RAUSTIALA, *supra* note 7.

118 Pub. L. No. 111-211, tit. II, 124 Stat. 2261 (codified in scattered sections of 25 U.S.C.).

119 *Id.* at sec. 234, § 202, 124 Stat. at 2279–82 (codified as amended at 25 U.S.C. § 1302 (2012)).

120 Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (1994).

121 Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, tit. IX, 127 Stat. 54, 118–26.

122 *Id.* at sec. 904, § 204(b), 127 Stat. at 121–22 (codified as amended at 25 U.S.C. § 1304(b) (Supp. I. 2014)).

123 *See id.*; *see also* Riley, *supra* note 85, at 1592.

124 *See About ITWG*, NAT'L CONGRESS AM. INDIANS, http://www.ncai.org/tribal-vawa/pilot-project-itwg/about-itwg [https://perma.cc/S3VM-VMSC] (listing forty-four tribes as members of a voluntary working group).

125 Riley, *supra* note 85, at 1581–82.

126 136 S. Ct. 1863 (2016).

principle that the sovereignty of tribes is inherent,[127] even though the case did not deal directly with Indian rights.[128] Justice Kagan's majority opinion, joined by Justice Kennedy,[129] affirmed the inherent sovereignty of Indian tribes and distinguished it from that of Puerto Rico, which, according to the Court, enjoyed only delegated authority from the United States.[130] In doing so, the Court reinforced a vision of robust, inherent tribal sovereignty, full and complete except to the extent those rights have been limited or divested by Congress.[131]

Justice Breyer's dissent, joined by Justice Sotomayor, argued that it was inconsistent for the Court to say that the sovereignty of Indian tribes is inherent, but that Puerto Rico's is delegated.[132] Though *Sanchez Valle* is the Court's most robust and definitive statement regarding inherent tribal sovereignty in years, Breyer's powerful dissent presented a countervailing view.[133] One pressing question after *Sanchez Valle* is whether those arguments in dissent have the potential to begin unraveling long-established principles in the field.

All of these threads of inquiry link up together and connect back to the core principle from which this Essay began. That is, the Constitution does not directly apply to Indian tribal governments, and the tribes are bound only by provisions similar to those contained in the Bill of Rights by statute. With *Santa Clara Pueblo* standing as a reminder that federal courts do not have the authority to review civil rights claims arising out of tribal courts, save habeas, claims regarding civil rights in both the criminal and civil contexts continue to confront the Supreme Court. Just this past Term, the Supreme Court considered two cases — *Dollar General Corp. v. Mississippi Band of Choctaw Indians*[134] and *United States v. Bryant*[135] — both of which dealt with the constitutional rights of those under tribal jurisdiction. Both had the potential to reshape the landscape of federal Indian law.

Without question, *Mississippi Choctaw* could have been the most destructive case to tribal sovereignty in more than two decades. But with only eight members, the Court split evenly 4–4, issuing a per curiam opinion upholding the Fifth Circuit ruling, which had gone in

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[127] *Id.* at 1871–72 (discussing tribes' "primeval" or "pre-existing" sovereignty, *id.* at 1872, as similar to the states' "inherent sovereignty" separate from the federal government, *id.* at 1871).

[128] *Id.* at 1868 (identifying double jeopardy issue for prosecutions by Puerto Rico and the United States).

[129] *Id.* at 1867.

[130] *Compare id.* at 1872 (recognizing tribes' "inherent" sovereignty), *with id.* at 1873 (concluding that territories are "not sovereigns distinct from the United States").

[131] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209–12 (1978).

[132] *Sanchez Valle*, 136 S. Ct. at 1884 (Breyer, J., dissenting) ("Indeed, it is difficult to see how we can conclude that the tribes do possess [sovereign] authority but Puerto Rico does not.").

[133] *Id.* at 1879–80.

[134] 136 S. Ct. 2159 (2016).

[135] 136 S. Ct. 1954 (2016).

the tribe's favor.[136] The case arose out of a civil suit following the sexual molestation of an Indian boy on the Mississippi Choctaw reservation by an employee of Dolgencorp.[137] Dolgencorp operated a Dollar General store that sits on trust land of the Mississippi Band of Choctaw Indians; the store was operated under a lease with and a business license issued by the tribe.[138] The store manager, Dale Townsend, agreed to serve as a youth mentor through the tribe's job training program, known as the Youth Opportunity Program (YOP).[139] The YOP attempted to "place young tribe members in short-term, unpaid positions with local businesses for educational purposes."[140] Through this program, Townsend came into contact with John Doe, a thirteen-year-old tribal member, who was assigned to the Dollar General store. Doe alleged that Townsend sexually molested him while he was working at Dollar General.[141] Doe sued Dolgencorp and Townsend in tribal court, seeking punitive damages.[142]

The tribal court, the federal district court, and the Fifth Circuit all upheld tribal civil jurisdiction over the case against Dollar General because Dollar General had — through various means, including opting into the YOP — consented to tribal jurisdiction.[143] But Dollar General appealed the Fifth Circuit decision to the Supreme Court. Given that there was no circuit split in the standard for determining tribal civil jurisdiction — known as the *Montana*[144] test, which links tribal civil adjudicatory and regulatory jurisdiction[145] — one could speculate that the only reason for the Court to take the case was to overturn or narrow its own precedent so as to deprive tribal courts of jurisdiction to hear such cases.

Of course, of utmost importance to the Mississippi Choctaw, as well as other tribes, was the question of how and when non-Indians will be held to account for unlawful actions against Indians in Indian country.[146] After all, following *Oliphant*, tribes have had no criminal juris-

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136 *Dollar Gen. Corp.*, 136 S. Ct. at 2160; Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167, 176–77 (5th Cir. 2014).

137 *Dolgencorp*, 746 F.3d at 169.

138 *Id.*

139 *Id.*

140 *Id.*

141 *Id.*

142 *Id.*

143 *Id.* at 170, 176–77; Dolgencorp Inc. v. Miss. Band of Choctaw Indians, 846 F. Supp. 2d 646, 654 (S.D. Miss. 2011) (affirming the jurisdiction of the tribal court).

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

145 *Id.* at 563–66; *see also* Strate v. A-1 Contractors, 520 U.S. 438 (1997).

146 Brief for Respondents at 2–3, Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159 (2016) (No. 13-1496). Several other tribes filed amicus briefs in support of the Mississippi Choctaw. *See, e.g.*, Brief for the Puyallup Tribe of Indians et al. as Amici Curiae in Support of Respondents, *Dollar Gen. Corp.*, 136 S. Ct. 2159 (No. 13-1496); Brief of Amici Curiae National

diction over non-Indian defendants in Indian country,[147] except for a few small exceptions carved out for domestic violence–related crimes via the VAWA reauthorization.[148] Thus, the tribe had no way — except through civil means — to carry out an essential function of government: protecting tribal members. And, as is often the case, unless the tribe took action, the defendant would likely never be held to account.

Dollar General's briefs at the Supreme Court relied heavily on negative stereotypes about tribal courts. Dollar General argued that tribal courts could not and would not provide a fair forum to nonmembers[149] and that nonmembers are subject to "unwritten set[s] of laws and customs to be determined and applied by the Tribe."[150] Some of the arguments explicitly turned on the persistent issue of whether and to what extent tribal courts must comply with constitutional requirements of due process and other procedural protections. Dollar General argued that "subjecting nonmembers to tribal court jurisdiction risks serious intrusion on [their] individual liberty, given the incomplete guarantee of Due Process protections in that forum."[151] Dollar General went further, arguing that tribal courts do not offer due process and fairness to non-Indians.[152]

Justice Kennedy's questioning in oral argument fell in line with his previous misgivings regarding tribal governments. He continued to emphasize his view that tribes are "nonconstitutional entities"[153] that "are not governed by the Due Process Clause."[154] From Justice Kennedy's perspective, this presents a problem for the Supreme Court in defining the parameters of tribal civil adjudicatory jurisdiction specifically, and tribal sovereignty more generally. As he contended, "[t]he Constitution runs to the people. The people have a right to insist on the Constitution even if Mississippi or the Federal government doesn't care."[155] Harkening back to his majority opinion in *Boumediene*, Justice Kennedy raised his resistance to formalistic application of the

Congress of American Indians, et al., in Support of Respondents, *Dollar Gen. Corp.*, 136 S. Ct. 2159 (No. 13-1496).

147 Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).

148 Riley, *supra* note 85, at 1584–85.

149 Brief for the Petitioners at 8, *Dollar Gen. Corp.*, 136 S. Ct. 2159 (No. 13-1496) (claiming that "[n]onmembers' status as outsiders . . . can give rise to a substantial risk of unfair treatment").

150 Petition for a Writ of Certiorari at 17, *Dollar Gen. Corp.*, 136 S. Ct. 2159 (No. 13-1496).

151 *Id.* at 12.

152 *Id.* at 17 ("The Fifth Circuit's decision opens the tribal courthouse doors wide for members to file lawsuits against non-members for individual tort claims that — until now — had to be brought in state or federal court where nonmembers enjoy constitutional protections.").

153 Transcript of Oral Argument at 43, *Dollar Gen. Corp.*, 136 S. Ct. 2159 (No. 13-1496).

154 *Id.* at 42.

155 *Id.* at 45.

law, particularly if such formalism potentially justifies the inapplicability of constitutional protections.

Although there was never an opinion in *Dollar General*, and the case went out with a whimper, not a bang, it is likely that a similar case will arise in the future. Tribes increasingly seek to exercise their sovereign authority to regulate activities on their reservations, and they may also seek to expand that authority in the absence of the ability to prosecute conduct that otherwise would appropriately be dealt with through the criminal justice system. This could mean more nonmembers find themselves subject to regulation by tribes going forward, putting these issues back squarely within the purview of a Supreme Court that, particularly in light of the recent presidential election, is unlikely to be friendly to Indian rights.

The Court's other critical Indian law decision of 2016, *United States v. Bryant*,[156] also related to the inapplicability of the Constitution to Indian tribes, though this time examining the scope of protections for criminal defendants prosecuted in tribal court.[157] Bryant, a Northern Cheyenne man living on the reservation, had over 100 tribal court convictions, many of which were for domestic violence.[158] On numerous separate occasions, he committed brutal acts. Once, he hit a girlfriend with a beer bottle and tried to strangle her.[159] Another time, he beat a different woman and broke her nose.[160] In another episode, he choked a third woman "until she almost lost consciousness."[161]

Bryant's case at the Supreme Court involved his Sixth Amendment challenge to the application of a federal law that allows a federal prosecution for felony domestic violence if the defendant is a habitual offender[162] — that is, if the defendant has two predicate convictions for domestic violence.[163] Those prior convictions can be from tribal, state, or federal court.[164] The statute was drafted with tribal communities in mind: legislators who urged its passage repeatedly cited both the high rates of domestic violence suffered by Indian women and the unique obstacles faced by law enforcement in curbing these crimes on tribal land.[165]

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156 136 S. Ct. 1954 (2016).
157 *See id.* at 1958–59.
158 *Id.* at 1963.
159 *Id.*
160 *Id.*
161 *Id.*
162 18 U.S.C. § 117 (2012).
163 *Id.* § 117(a).
164 *Id.*
165 United States v. Cavanaugh, 680 F. Supp. 2d 1062, 1076 (D.N.D. 2009) (acknowledging that the offense of domestic assault by a habitual offender "was created, in part, to prevent serious injury or death of American Indian women and to allow tribal court convictions to count for purposes of a federal prosecution, particularly because the Indian Major Crimes Act does not allow

For most of Bryant's previous brutal acts of domestic violence, the tribal court sentenced him to terms of imprisonment, each never exceeding one year because of the ICRA's limitations.[166] The two predicate convictions in Bryant's case arose out of tribal court proceedings in which he was not represented by counsel.[167] Bryant did not dispute that his tribal court convictions complied with the ICRA.[168] Rather, the issue in *Bryant* was whether it is permissible to use uncounseled tribal court convictions — obtained in full compliance with the ICRA — to establish the prior-crimes predicate of the habitual offender statute.[169]

The Supreme Court held unanimously that because Bryant's tribal court convictions did not violate the Sixth Amendment when obtained, they were properly used as predicate offenses for purposes of the habitual offender statute.[170] The Court's opinion suggests that deference should be given to tribal convictions because of Congress's plenary power over Indian tribes. Counsel for the government cited this plenary power to explain at oral argument why tribal convictions, but not foreign convictions, are valid for establishing habitual-offender status.[171] Because Bryant's prosecutions met the baseline level of procedural fairness in tribal court proceedings that Congress implicitly endorsed by drafting the law, the prosecutions were not constitutionally infirm.[172] As Justice Breyer pointed out at oral argument, to hold that Bryant's ICRA-compliant convictions were unconstitutional would essentially be to hold the ICRA unconstitutional.[173] It was one step too far. Moreover, the Court found that federal habeas review of tribal detention offers a meaningful safety valve for tribal convictions.[174]

Bryant was a victory for the United States — and, by extension, for Indian tribes — but this case hints at the potentially troubling consequences of Indian exceptionalism that is experienced both internally and externally. Recall the initial claim that Indian tribes, at times, are compelled to accept unjust treatment in order to adhere to a principle of exceptionalism and sovereignty. The issue that arose in *Bryant*

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federal prosecutors to prosecute domestic violence assaults unless they rise to the level of serious bodily injury or death" (citing 151 CONG. REC. S4873–74 (daily ed. May 10, 2005) (statement of Sen. McCain))); *see also Bryant*, 136 S. Ct. at 1960–61 (making similar observations about the origins of § 117(a) and quoting Senator McCain's comments).

166 *Bryant*, 136 S. Ct. at 1963.

167 *Id.* at 1958.

168 *Id.* at 1959.

169 *Id.*

170 *Id.*

171 Transcript of Oral Argument at 7, *Bryant*, 136 S. Ct. 1954 (No. 15-420).

172 *Bryant*, 136 S. Ct. at 1966 ("Proceedings in compliance with ICRA, Congress determined, and we agree, sufficiently ensure the reliability of tribal-court convictions.").

173 Transcript of Oral Argument at 30, *Bryant*, 136 S. Ct. 1954 (No. 15-420).

174 *Bryant*, 136 S. Ct. at 1966.

highlights this phenomenon. Though the habitual offender statute is designed to help tribes address crimes of domestic violence on the reservation, the resulting system essentially forces often the poorest and most desperate tribes to choose either to let career criminals walk free or to prosecute them with the limited resources at their disposal, which may mean without a lawyer.

Why is this? More than 100 years ago, the United States forced the adversarial system of trial and punishment onto tribes, actively dismantling tribal justice systems.[175] And when Congress passed the ICRA, it didn't include the requirement that tribes pay for counsel for indigent defendants for two reasons. First, with so few American Indian attorneys in the United States at the time, requiring that tribes provide counsel would necessarily allow non-Indians to take a more active role in American Indian tribal courts. But, primarily, the federal government simply didn't want to pay for it, and, at the time, the tribes couldn't.[176] Many still cannot today.

Add this history to the complex jurisdictional framework at play in Indian country.[177] When it comes to the kind of prosecution at issue in *Bryant* — an Indian committing a misdemeanor crime against another Indian in Indian country — the offense is within the exclusive jurisdiction of the tribe.[178] The states can't prosecute. And the only way the federal government can prosecute is if the crime rises to the level of a "major crime" as defined by statute.[179] But, even when felonies are committed on reservations, federal prosecutors rarely bring Indian country domestic violence cases.[180]

As a result, tribes must either let such crimes go completely unpunished or prosecute with the limited resources they have. And in a minority of cases, this means the defendant might not get a lawyer.[181]

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175 *See* Barbara L. Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 MICH. J. RACE & L. 317, 338–42 (2013); Riley, *supra* note 85, at 1608–14.

176 *See Hearings on Constitutional Rights of the American Indian, supra* note 57, at 131 (statement of Marvin J. Sonosky) ("[T]ribes generally do not have the funds to pay for all inclusive features of S. 961. . . . Jury trials, prosecutors, appeals courts, counsel for indigents, all cost money."). At the same time, the Supreme Court has ruled that it is unconstitutional to imprison a defendant without legal representation in federal court since 1938, Johnson v. Zerbst, 304 U.S. 458, 469 (1938), and in state courts since 1963, Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963).

177 *See* Riley, *supra* note 85, at 1575.

178 *See* Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 557 n.281 (1976).

179 *See* Major Crimes Act, 18 U.S.C. § 1153 (2012); Clinton, *supra* note 178, at 536–37.

180 *See* Washburn, *supra* note 88, at 733.

181 Although an exhaustive list of every tribe providing public defenders does not currently exist, a great number of tribes do guarantee free counsel to indigent defendants. *E.g.*, 1 HOPI CODE § 1.6.3 (2012); LAWS OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES, CODIFIED § 1-2-401 (2013); CONFEDERATE TRIBES OF THE UMATILLA RESERVATION CRIM. CODE § 3.28 (2016); GILA RIVER INDIAN COMMUNITY REV. CRIM. CODE § 5.1505 (2013); TULALIP

It's the product of a system foisted upon tribes, and one in which ultimately — whether tribes prosecute or not — Indians pay the price for inadequacies in the system. Either way, Indians lose. It's an arrangement wherein respect for Indian difference has the potential to reify a system that continues to oppress and discriminate against Indian people. It is, in essence, the double bind of extraconstitutionalism.

CONCLUSION

Professor Phil Frickey presciently wrote almost two decades ago that the federal courts had created a "common law for our age of colonialism."[182] Given that the field is not moored in the Constitution — in the sense that Indian rights are not constitutionally protected[183] in the same way that the Constitution guarantees the continued existence of the states and the Union[184] — the Supreme Court in particular has taken the prerogative to build its own body of federal Indian law. This rather "schizophrenic" body of law,[185] whereby the Court decides tenets fundamental to issues of tribal sovereignty at times on a seemingly ad hoc basis, creates enormous leeway for fashioning the field. This makes the composition of the Supreme Court of utmost importance to the future of tribal sovereignty and Indian tribes. Numerous scholars have pointed out the dismal record of tribes at the Court in recent decades.[186] Now with one vacancy on the Court and a President who has publicly criticized Indian tribes (he went up against them in the casino business[187]), the landscape — and the future — of federal Indian law could rapidly shift.

Whatever the ultimate composition of the Court, there is a storm brewing on the horizon. Indian tribes can expect to continue to face legal challenges in a variety of possible cases: tribal justice systems that emulate the Anglo-American model of trial and incarceration, but without all the corresponding constitutional protections, including the

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TRIBAL CODE § 2.05.030 (2015); CRIM. CT., CONFEDERATED TRIBES OF THE UMATILLA RESERVATION, CRIMINAL COURT DIRECTIVE § 1 (2014). For more information on tribal models of the provision of indigent defense, see generally Lindsay Cutler, *Tribal Sovereignty, Tribal Court Legitimacy, and Public Defense*, 63 UCLA L. REV. 1752 (2016).

182 Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 58 (1999).

183 *See generally* FRANK POMMERSHEIM, BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION (2009).

184 U.S. CONST. amend. X.

185 United States v. Lara, 541 U.S. 193, 219 (2004) (Thomas, J., concurring in the judgment).

186 *See, e.g.*, David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 267–68 (2001).

187 Shawn Boburg, *Donald Trump's Long History of Clashes with Native Americans*, WASH. POST (July 25, 2016), https://www.washingtonpost.com/national/donald-trumps-long-history-of-clashes-with-native-americans/2016/07/25/80ea91ca-3d77-11e6-80bc-d06711fd2125_story.html [https://perma.cc/HB9J-TSE7].

right to provided counsel;[188] tribes' assertion of civil adjudicatory authority over non-Indians in tribal courts without federal court review;[189] in questions of inherent versus delegated authority, such as the jurisdiction affirmed by the VAWA provisions;[190] in civil rights battles for both members and nonmembers;[191] in sovereign immunity conflicts, particularly in questions regarding individual officer liability;[192] and in scenarios where Indian difference potentially creates disproportionately negative outcomes for Indian people.[193] Critics from outside Indian country undoubtedly raise these concerns, but some criticisms come from Indian people themselves, who rightfully question whether they are receiving just and fair treatment under American law.[194]

Chief Justice Marshall famously labeled tribes "domestic dependent nations"[195] almost 200 years ago, and confusion about the "Indian problem" remains to this day. Inherent tribal sovereignty continues to serve as a core and unshakeable pillar of Indian law. At the same time, tribes remain under the plenary authority of Congress as a product of the wardship relationship created as a consequence of colonization and through the Indian Commerce Clause.[196] As tribes enter a new era in terms of economic development, expansion of land bases, and efforts to assert greater control over their territory and the people within it, it's essential for lawyers in the field to reiterate and hold fast to the core principles of tribal sovereignty for the next hundred years.

I have sought in this Essay to explicate a more complete and nuanced understanding of "extraconstitutionality" to aid in this endeavor. In this light, Justice Kennedy's reference to Congress's attempts to subject nonmembers to the authority of "extraconstitutional" tribal governments should be analyzed in context. After all, though uniquely

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188 *See, e.g.*, United States v. Bryant, 136 S. Ct. 1954, 1958–59 (2016) (explaining that tribal courts are bound not by the Constitution but by the ICRA, which is not coextensive with the Sixth Amendment).

189 *See, e.g.*, Dolgencorp, Inc. v. Miss. Band of Choctaw Indians, 746 F.3d 167, 171 (5th Cir. 2014) (concluding that tribal court jurisdiction over civil disputes arising from voluntary, consensual relationships between tribes and nonmembers was permitted), *aff'd by an equally divided Court sub nom.* Dollar Gen. Corp. v. Miss. Band of Choctaw Indians, 136 S. Ct. 2159 (2016) (mem.) (per curiam).

190 *Cf.* Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1879–80 (2016) (Breyer, J., dissenting) (reasoning that the sovereignty of Puerto Rico is delegated, as contrasted with the inherent sovereignty of Indian tribes).

191 *See* Gabriel S. Galanda & Ryan D. Dreveskracht, *Curing the Tribal Disenrollment Epidemic: In Search of a Remedy*, 57 ARIZ. L. REV. 383 (2015).

192 *See, e.g.*, Lewis v. Clarke, 135 A.3d 677 (Conn. 2016), *cert. granted*, 137 S. Ct. 31 (2016) (No. 15-1500).

193 *See, e.g.*, United States v. Antelope, 430 U.S. 641 (1977); INDIAN LAW & ORDER COMM'N, *supra* note 20, at 119.

194 *See generally* INDIAN LAW & ORDER COMM'N, *supra* note 20.

195 Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

196 *See* United States v. Kagama, 118 U.S. 375 (1886).

positioned vis-à-vis the Constitution, Indian tribes are irrefutably embedded in the document and are central to the historical and legal foundations of this country.[197] The very identity of America as a nation has developed in relation with and in contrast to American Indians and Indian tribes.[198] America is simply not America without an understanding and accommodation of the place of the more than five hundred Native Nations within it.

Thus, while understanding tribes as unbound by the Constitution's Bill of Rights, it is perhaps time to reframe the narrative and to highlight the rather *unremarkable* aspects of Indian law. In reality, Indian law is no more complex or muddled than any other field of law that requires mastering doctrinal puzzles, considering a long history, and embracing nuance and complexity.[199] For advocates in the field, some of the concerns about tribes' "exceptional" status may be further ameliorated by more forcefully articulating the limiting principles that are inextricably tied up in tribal authority.[200] These limits manifest in the federal government's policing of the scope of inherent tribal sovereignty,[201] the relationship of sovereignty to property,[202] and congressional plenary power, with corresponding baseline protections for those under tribal authority, among others.[203] All of these things together aid in understanding the sovereign nature of Indian tribes, their relation to the Constitution and the federal system, and how to clearly articulate and define tribal rights moving forward.

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197 *See generally* Ablavsky, *supra* note 24.

198 *See generally* Riley & Carpenter, *supra* note 16, at 869–91.

199 *See* Frickey, *supra* note 12, at 435 (arguing against the "seduction of coherence").

200 *See, e.g.*, United States v. Bryant, 136 S. Ct. 1954 (2016) (holding that the ICRA sets a baseline); Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863 (2016) (concluding that sovereignty is inherent, and that Congress may limit it); Montana v. United States, 450 U.S. 544 (1981) (relating sovereignty to property); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (reasoning that habeas was a limited means of reviewing tribal authority).

201 *See, e.g.*, *Sanchez Valle*, 136 S. Ct. at 1867; United States v. Lara, 541 U.S. 193 (2004); United States v. Wheeler, 435 U.S. 313 (1978).

202 *See, e.g.*, 18 U.S.C. § 1151 (2012) (defining Indian country); Williams v. Lee, 358 U.S. 217 (1959); *cf. Montana*, 450 U.S. at 562–63.

203 *See, e.g.*, 25 U.S.C. §§ 1301–1303 (2012); *Santa Clara Pueblo*, 436 U.S. at 49.