



ARTICLE

The Other American Law

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Abstract. American legal scholarship focuses almost exclusively on federal, state, and local law. However, there are 574 federally recognized tribal governments within the United States, whose laws are largely ignored. This Article brings to the fore the exclusion of tribal governments and their laws from our mainstream conception of “American law” and identifies this exclusion as both an inconsistent omission and a missed opportunity. Tribal law is no less “American law” than federal or state law. It is made, enforced, and followed by American citizens, and tribal governments have a distinct place as subsovereigns within the American system of overlapping sovereigns. Nor is tribal law an unimportant or small part of the American legal landscape, since these 574 legal systems govern millions of Americans and as much land as California. And yet, tribal law is excluded from our shared conception of “American law”—and therefore from our research projects, classrooms, and even conversations. This exclusion perpetuates the othering of Indians and the invisibility of both Indian people and their governments. Tribal governments were previously delegitimized and described as “lawless” in order to legitimize legal theories of conquest. But tribal law is real, and it is time to end its marginalization. Moreover, tribal law is vast, varied, and often innovative. As demonstrated by the three examples in this piece, tribal governments struggle with the same problems that the other American sovereigns face, and their similarities, differences, successes, failures, and innovations can inform other American sovereigns’ work or public law questions more broadly. Omitting tribal law from American legal scholarship is not only a troubling inconsistency; it is a missed opportunity to tap a potentially valuable resource—a disservice to the search for good government ideas. Tribal law belongs in the mainstream study of American law and legal systems. This Article places it there.

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Introduction

Legal scholarship is a subpart of scholarship in general, and one goal of scholarship in general is to improve our knowledge about the world. The larger, non-Indian community simply does not know very much about tribal institutions and law . . . [and if anything] may well conjure up negative images of the system of justice found there.

—Philip P. Frickey¹

In the United States, there is a set of subnational governments through which American citizens exercise representative self-governance. These governments each make and interpret a unique body of American law through their own distinct legal systems. These governments have a set of powers shaped by a complex relationship with the federal government. This Article is about these American governments.

They are not states, local governments, districts, or territories, but something else entirely. These governments are the 574 Indian tribes. American tribal governments experiment with government structures, define rights, adjudicate disputes, develop service programs, and outlaw conduct. They make laws that address everything from the smallest contract disputes to the most important questions of constitutional rights and structure. And it is time we all paid more attention.

Within the United States, there are 574 federally recognized² tribal governments (variously called tribes, nations, bands, pueblos, communities, and Native villages). Yet their experiences receive precious little attention. This Article points out the error of excluding tribal law from our mainstream study of American law and legal systems. Tribal governments are federally recognized governments within—and thus part of—the United States system. Tribal laws are passed by American citizens and govern vast swaths of land and millions of Americans. Tribal law is American law, and as such it ought to occupy an equally prominent place alongside federal, state, and local law.

Beyond pointing out the error—and injustice—of this omission, this Article demonstrates that there is much to gain from embracing tribal law. After hundreds of years of contact, violence, treaty-making, and then existence within the legal, cultural, and geographic boundaries of the United States, Indian tribes are now comingled American sovereigns struggling with similar problems and often playing in the same sandbox of legal ideas as the other

1. Philip P. Frickey, *Address at University of Kansas Conference on Tribal Law and Institutions, February 2, 2008: Tribal Law, Tribal Context, and the Federal Courts*, 18 KAN. J.L. & PUB. POL'Y 24, 32-33 (2008).

2. *About Us*, U.S. BUREAU INDIAN AFFS., <https://perma.cc/AR37-R3YF> (archived Jan. 25, 2021). This project focuses exclusively on federally recognized tribes—and not state-recognized or unrecognized tribes—because they share a more similar place in the American legal framework.

American governments. And yet the governing work, laws, innovations, successes, failures, and reinventions of tribal governments are rarely studied—if not entirely unknown to many. It is time to end the invisibility of this other American law.

Tribal law's invisibility is all the more inexcusable given how far reaching tribal jurisdiction is within the United States. Indian Country is a large part of the United States. It would, perhaps, surprise many Americans to learn that the Navajo Nation governs an area that is approximately the size of West Virginia³ and that its courts adjudicate over 50,000 cases every year.⁴ At least nineteen other tribes each govern an area larger than Rhode Island, and tribal governments collectively control more land than California.⁵ And Native American⁶ people are one of the fastest growing populations, growing at almost four times the rate of the general population.⁷ We are sorely lacking updated data on Indian people, tribal members, and reservation residents.⁸ The U.S. Census Bureau estimates that between 5.7 million⁹ and 6.9 million¹⁰ Americans are American Indian or Alaska Native, and nearly 3 million in that group were enrolled members of a federally recognized tribe as of 2013.¹¹ As of

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3. Navajo Tourism Dep't, *Fact Sheet*, DISCOVER NAVAJO, <https://perma.cc/37WY-RU2Y> (archived Jan. 10, 2021) [hereinafter *Navajo Facts*].
 4. *Courts & Peacemaking in the Navajo Nation: A Public Guide*, JUD. BRANCH NAVAJO NATION, <https://perma.cc/99EB-Z67A> (last updated Jan. 30, 2018).
 5. Reservation and trust-land areas compose 56 million acres, and Alaska Native corporations and villages control 44 million acres, for a total of 100 million acres. NAT'L CONG. OF AM. INDIANS, TRIBAL NATIONS AND THE UNITED STATES: AN INTRODUCTION 10 (2020) [hereinafter NCAI REPORT], <https://perma.cc/9KZG-BABJ>. Another 19 million acres in Oklahoma are likely reservation lands. See McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020) (Roberts, C.J., dissenting).
 6. The terms "Native American" and "Indian" are used interchangeably throughout this paper to reflect the divide in what different members of the group—including scholars—prefer, and also to normalize the common use and presence of both for readers. See Michael Yellow Bird, *What We Want to Be Called: Indigenous Peoples' Perspectives on Racial and Ethnic Identity Labels*, AM. INDIAN Q., Spring 1999, at 1, 3, 7.
 7. NCAI REPORT, *supra* note 5, at 12.
 8. See *Data Disaggregation*, NCAI POL'Y RSCH. CTR., <https://perma.cc/29K6-AKM7> (archived Jan. 10, 2021).
 9. *Selected Population Profile in the United States: Table S0201*, U.S. CENSUS BUREAU, <https://perma.cc/RQQ5-27ZL> (archived Feb. 6, 2021) (providing the American Community Survey 2019 estimate of "American Indian and Alaska Native alone or in combination with one or more other races").
 10. *National Population by Characteristics: 2010-2019*, U.S. CENSUS BUREAU, <https://perma.cc/JK22-S6JV> (archived Jan. 10, 2021) (to locate, click "View the live page" and then click "Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin: April 1, 2010 to July 1, 2019").
 11. *Tribal Population*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://perma.cc/S8D6-Y5MQ> (last updated Dec. 21, 2018).

2017, 1.3 million people lived in Indian Country or on Alaska Native land, including over 628,000 non-Indians.¹² And, as a result of the Supreme Court's recent decision in *McGirt v. Oklahoma*, that number could more than double with the addition of another 1.8 million Oklahomans, only 10% to 15% of whom are Indian.¹³ This is not even counting all the people who live off reservation but are nevertheless impacted by tribal law because they work for or do business with tribes. The Forest County Potawatomi Community in Wisconsin, for example, has only twenty-four non-Indians living on its reservation but employs over 2,200 non-Indians and provides healthcare services in the surrounding community, serving more non-Indians than Indians.¹⁴ Tribal law impacts many Americans.

Tribal governments are just another kind of subnational American government¹⁵—like states that exist as subnational sovereigns whose powers are limited and shaped by federal law—growing in the federal framework's shadow.¹⁶ Ignoring or siloing the laws and experiences that come from tribal governments presents an incomplete and incorrect picture of America and its laws.¹⁷ If American legal scholars want to understand, learn from, and evaluate American law, we must include *all of America's laws*.

12. See *Table B02001*, U.S. CENSUS BUREAU, <https://perma.cc/N5Z2-7U4W> (archived Feb. 6, 2021) (to locate, click “View the live page”; then click “Geo”; then select “American Indian/Alaska Native Area/Hawaiian Home Land”; then select “All AIA/ANA/HHL in United States”) (calculations on file with author); *Table B02010*, U.S. CENSUS BUREAU, <https://perma.cc/SF43-AVWA> (archived Feb. 6, 2021) (calculations on file with author).

13. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020) (Roberts, C.J., dissenting).

14. See DIV. OF INTERGOVERNMENTAL RELS., WIS. DEP'T OF ADMIN., TRIBES OF WISCONSIN 8, 41 (2020), <https://perma.cc/PL3M-FN8W>.

15. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (calling tribes “domestic dependent nations”).

16. Jason P. Hipp, Essay, *Rethinking Rewriting: Tribal Constitutional Amendment and Reform*, 4 COLUM. J. RACE & L. 73, 81 (2013) (examining tribal constitutions as subnational constitutions drafted in the federal framework's shadow or in response to it); Jennifer Hendry & Melissa L. Tatum, *Justice for Native Nations: Insights from Legal Pluralism*, 60 ARIZ. L. REV. 91, 113 (2018) (discussing instances where tribes have strategically adopted parts of U.S. legal culture); *MacDonald v. Redhouse*, 6 Navajo Rptr. 342, 343-46 (1991) (No. A-CV-54-90), 1991 Navajo Sup. LEXIS 11, at *3-12 (relying on federal constitutional law cases as persuasive authority when analyzing a bill-of-attainder issue). Note to readers: In order to increase and facilitate accessibility to the tribal court opinions cited in this Article, I have chosen to deviate from *Bluebook* rules and include case numbers and parallel citations to internet databases where available for reported cases.

17. Scholars have made a similar push recently about state constitutional law. See JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 8, 17 (2018) (suggesting that advocates should challenge state constitutional law more often); SANFORD LEVINSON, FRAMED: AMERICA'S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE 14 (2012) (“[A]ny consideration of American constitutionalism must pay ample attention to America's other fifty
footnote continued on next page”)

The 574 federally recognized tribes are governments composed of American citizens who make and enforce law that governs large swaths of the United States, but we don't readily think of them as American governments or their law as American law. There is no widely accepted definition for American law precisely because it is a changing social construct comprising what both laypeople and scholars agree counts as such.¹⁸ A robust accounting of the boundaries of American law is beyond the scope of this piece. Nevertheless, what we consider to be within the boundaries of American law matters because the term undoubtedly communicates an identity and a legitimacy, dividing those laws that are an accepted part of the United States legal system and culture from those that are not. Generally, we think of the rules that come out of the various halls of United States governments as "American law."¹⁹ Tribal law fits that definition. Tribal governments are integrated into the United States system, fly the United States flag,²⁰ and are subject to federal authority—specifically Congress's plenary power. And yet tribal governments undoubtedly remain outside of our shared conception of American law, largely absent from seminal works on the subject,²¹ Restatements,²² and our law school classrooms. This must be either because laypeople and scholars don't think of tribal governments as *American* governments or because they don't think of tribal governments at all. America has absorbed these governments through conquest, preserved their right to self-government, and asserted plenary power over them—yet it still treats Indian tribes and their people like outsiders.

The current exclusion of tribes is conspicuous and, indeed, no accident. What I have named the *other* American law could also be described as the *othered* American law. The United States has both created its identity and justified its existence in contrast to the Indians it has displaced. The primitive, lawless, or vanishing Indian was a fictitious but politically necessary

constitutions, those of the states." See generally EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS* (2013) (emphasizing undervalued rights in state constitutions).

18. See LAWRENCE M. FRIEDMAN & GRANT M. HAYDEN, *AMERICAN LAW: AN INTRODUCTION*, at x-xi (3d ed. 2017).

19. *Id.* at x.

20. See, e.g., Roberto A. Jackson, *Tribal Education Introduces Space Camp Students at Community Council*, GILA RIVER INDIAN NEWS (Aug. 16, 2019), <https://perma.cc/T9VW-KBDE> (showing a photograph of the American flag on display at a Gila Indian River Community Council Meeting).

21. See FRIEDMAN & HAYDEN, *supra* note 18, at 353 (index showing only one mention of tribal law).

22. See AM. L. INST., *CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 4-11* (rev. ed. 2015), <https://perma.cc/Z2NA-LPGP>.

construct.²³ These old assumptions and portrayals of Indians and their governments have become unseemly with age, looking far more like propaganda than fact. This Article does not argue that we ought to pay attention to tribal law now out of guilt or because of the prior ugliness. Instead, it suggests that this history explains our ignorance and the status quo of excluding tribal governments.

Tribal nations are diverse, and some are very different from other American sovereigns. This, however, does not mean that tribal governments are not now part of the American family of governments or that tribal law does not *belong* within American law. Rather, it means that our conception of American law is too narrow and needs to grow to fit the work and experience of tribal nations, recognizing the reality that the United States is a union of not just fifty states, five territories, and a federal district, but also 574 tribes.

By situating tribal law as American law, this Article breaks with earlier works of tribal law scholarship accepting tribal law as different and separate from American law.²⁴ These works treat tribal law more like an international sovereign's law or as a site for comparative insights on American law.²⁵ Prior works have argued that tribes are underappreciated laboratories for legal innovation and experimentation.²⁶ While this Article also argues that tribes have much to offer if included in the mainstream, it also suggests that tribes

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23. See, e.g., Gregory Ablavsky, "With the Indian Tribes": Race, Citizenship, and Original Constitutional Meanings, 70 STAN. L. REV. 1025, 1040-42, 1042 n.67 (2018); 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, 290.
24. See, e.g., Carole Goldberg, Review Essay, *A Law of Their Own: Native Challenges to American Law*, 25 LAW & SOC. INQUIRY 263, 282 (2000) (book review) (describing recent claims that tribal law should influence federal Indian law to curb the latter's colonial impulses); Robert Odawi Porter, *The Inapplicability of American Law to the Indian Nations*, 89 IOWA L. REV. 1595, 1620 (2004).
25. Tonya Kowalski, *The Forgotten Sovereigns*, 36 FLA. ST. U. L. REV. 765, 769, 789 (2009) (framing American law as impacting tribes and framing tribes as having comparative-law insights for American law); Elizabeth Ann Kronk Warner, *Tribes as Innovative Environmental "Laboratories"*, 86 U. COLO. L. REV. 789, 795 (2015) (arguing that the "combination of tribal law and American law can create a 'synergistic result[]' benefitting both the tribe and the federal government" (footnote omitted) (quoting Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 256 (1994))).
26. See Katherine Florey, *Making It Work: Tribal Innovation, State Reaction, and the Future of Tribes as Regulatory Laboratories*, 92 WASH. L. REV. 713, 718-19 (2017); Elizabeth Ann Kronk Warner, *Justice Brandeis and Indian Country: Lessons from the Tribal Environmental Laboratory*, 47 ARIZ. ST. L.J. 857, 858-59 (2015); Valencia-Weber, *supra* note 25, at 261 ("Indian courts [are] the laboratories for new concepts that can benefit the [Anglo-American] majority judicial system."); Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1729 (2012) (discussing "Indian nations as self-selected laboratories for gun laws").

should not need to prove their value to warrant mainstream attention. Instead, they simply belong in the mainstream, alongside our study of the other governments of the United States, because they are also a part of this nation.

This view rejects a comfort—especially among many Indigenous legal scholars—with characterizing tribal nations as American outsiders, while acknowledging that such comfort is importantly rooted in the former status of tribal nations as politically independent. The “abuses of the past and present [are] too vivid, and the memory of freedom [is] too lasting[,] for many Indians” to simply see themselves as “another domestic minority group” within the United States.²⁷ American identity for American Indian people and tribal nations is understandably complex. The political identities of tribal communities—including whether they see themselves and their laws as American—are internal matters for those communities. But as a matter of federal law, tribal governments are a part of the United States system. The ship has sailed concerning whether the United States, and the scholars that study its laws, can justifiably deny that tribes are a part of the United States. The United States chose conquest, and so unless tribes regain independence, we cannot also deny that the tribes are a part of this nation’s system of government. Tellingly called “domestic” nations even from the early days of Indian law,²⁸ tribal governments are no less the authors of this nation’s laws than any other legally recognized government in the United States.

Part of recognizing tribal law as American law is liberating it from the current place of obscurity it occupies in the legal field. Tribal law is currently lumped with federal Indian law into the field of Indian law. Tribal law is a broad type of American law—like state law—that covers a wide spectrum. Federal Indian law is a kind of federal law that—like federalism—deals with rules of subsovereignty. This incoherent lumping is a disservice to both kinds of law, but it particularly marginalizes tribal law because federal Indian law dominates Indian law as a field. Tribal law is considered a very niche subset of a field that is already quite small.

In some ways, this move coincides with a movement to mainstream federal Indian law. Scholars have argued for decades that “[f]ederal Indian law does not deserve its image as a tiny backwater of law”²⁹ and should instead be given more prominence as a part of federal law that examines legal questions of conquest, race, rights, and subsovereignty—as a part of property law,³⁰

27. VINE DELORIA, JR., *BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE* 2-3 (1974).

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

29. See, e.g., Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 383 (1993).

30. Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 3 (1991) [hereinafter Singer, *Sovereignty*]; Joseph William Singer, *Indian Title: Unraveling the footnote continued on next page*

federal courts,³¹ constitutional law, and broader federal law principles.³² This Article builds on the call to mainstream the legal experience of Indians in the United States. But it also questions the prevailing definition of Indian law and calls for a fundamental restructuring of the field, which currently pays far too little mind to tribal law and is oversaturated with federal Indian law. Federal Indian law is not really *Indian* law. Or, as the legendary Vine Deloria Jr. put it, “what is missing in federal Indian law are the Indians.”³³ Federal Indian law is not the law of Indian people; it is primarily the law of conquest. Though Indians certainly fought for the survival of tribal governments, they were not the architects or primary beneficiaries of federal Indian law. Many see this unique, conquest-focused subset of federal law as a way to include Indians and their laws in legal academia. This is a mistake. Indians and their tribes are the objects of federal Indian law, not its architects. To focus on federal Indian law as a way of including the Indian experience suggests that Indians’ primary contribution to law is not their own laws but instead the laws the United States has come up with to legitimize or shape Indians’ conquest. Tribal governments and Native people are, of course, much more than that.

The laws governing these 574 different and independent sovereigns are a vast, varied, and fruitful area of American law. Tribal governments are American governments that struggle with the same kinds of pressing legal questions that the other American sovereigns face, and tribal governments arrive at solutions with broader applicability. To illustrate this point, this Article presents and explores three tribal law case studies, each of which is an abbreviated example of the kinds of scholarship that are possible and should be common.

First, twelve tribes across the country are challenging a fundamental assumption about criminal procedure and defendants’ rights. Their creative

Racial Context of Property Rights, or How to Stop Engaging in Conquest, 10 ALB. GOV’T L. REV. 1, 9 (2017) [hereinafter Singer, *Indian Title*] (“[A]ll land titles in the United States originate in Indian title.” (emphasis omitted)).

31. Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 701-02 (1989) (arguing that federal Indian law belongs “in federal courts’ jurisprudence” because it involves “[a]nalytically comparable problems” with “vivid insight[s]” for the tolerability, desirability, and sustainability of “subgroup[] . . . self-governance”).
32. See Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1847 (2019); Kowalski, *supra* note 25, at 769 (arguing that including Indian law in general legal curricula serves normative goals of social justice and accuracy).
33. Vine Deloria, Jr., Essay, *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203, 205 (1989); see also Williams, *supra* note 23, at 294 (noting that the current system “force[s] tribal nations to litigate their disputes with the conqueror’s subjects, or the conqueror itself, under the eurocentric vision of justice dispensed by the conqueror’s courts”).

interpretation of familiar language demonstrates that we can use more than just residency to define the “community” of persons for the purposes of the “fair cross section” requirement for an impartial jury. This insight may prove particularly valuable because America remains residentially segregated, and constitutional law recognizes the shortcomings of racially homogenous juries.³⁴

Second, the story of the rise and fall of a charismatic populist leader from the Navajo Nation provides an interesting case study for separation-of-powers scholarship. Without adopting a written constitution, the tribe developed a three-branch system of government with a unitary executive. It did so in direct response to a corruption scandal involving its Tribal Council Chairman exercising too much power over the other branches. The Nation’s governance crisis emphasizes the importance of a variety of independent institutions—insulated from appointment conflicts—in checking executive corruption because, in this instance, democratic elections were unable to discourage corruption. Moreover, the rise of one of those institutions—the Navajo Supreme Court—and the role it took in developing a common law separation-of-powers doctrine based on Navajo Fundamental Law has implications for functionalism and formalism debates.

Finally, the Citizen Potawatomi Nation provides a unique example of institutional design to further democratic representation. Frustrated with low voter turnout resulting from a citizen diaspora, the Nation redesigned its legislative districts to exceed the boundaries of its land base, creating a map based on where its citizens lived. The United States faces a similar problem of low turnout among overseas voters and could implement the Potawatomi model to create a new electoral district with a fascinating demographic mix: highly educated Americans living abroad and active military serving overseas. The resulting district could represent as many as nine Electoral College votes.

Ending the invisibility and marginalization of tribal law and conscientiously engaging with tribes and their law ought to benefit all those involved. Not only is taking a step toward respecting and including tribal law the intellectually consistent response to this omission once it is recognized; it is also a vital step toward ending our part in enabling a dangerous status quo of ignorance. The invisibility of tribal governments has a real cost: It makes bad and harmful law. Congress often writes laws as if there are only two kinds of governments. Tribes are left out, with real consequences for their ability to provide services or even ensure basic health and safety.³⁵ Judges make

34. *See* *Batson v. Kentucky*, 476 U.S. 79, 99 (1986) (“In view of the heterogeneous population of our Nation, . . . the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.”).

35. U.S. COMM’N ON C.R., *BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS* 5-6 (2018), <https://perma.cc/7Z3S-AS7F> (endorsing congressional footnote continued on next page)

assumptions, overgeneralize, or altogether ignore tribal law—even when its relevance is undeniable.³⁶ Tribal law ought to inform federal Indian law, which has suffered from being unmoored from the realities of tribal law, tribal governance, and tribal diversity. The risk is that the rest of America will judge—and may discard—tribal nations before it can fully understand and appreciate what tribes are, what they are doing, and what they have to offer the rest of the country.

This Article proceeds in four parts. Part I offers a brief introduction to contemporary tribal governance. Part II examines and critiques the marginalization of tribal law. As discussed above, colonial rhetoric has permeated American society's view of tribal law as inferior and other, pushing tribal law out of the mainstream and into the niche field of Indian law. Even within Indian law, tribal law is marginalized compared to federal Indian law, but a deeper understanding of tribal law should *inform* federal Indian law, not be overshadowed by it. Part III demonstrates, through the three aforementioned examples, the kinds of insights that tribal law can offer scholars of public law. Finally, Part IV briefly discusses what heeding this call to mainstream tribal law would look like and what the challenges and opportunities might be.

I. Contemporary Tribal Governance

Federal Indian law is about conquest—the diminishment of Indian sovereignty as a matter of federal law. This Article is not about the diminishment of, but rather the exercise of, Indian sovereignty—the laws made by tribes to govern themselves. Yet to understand contemporary tribal governance, one needs at least a basic understanding of the broad strokes of federal Indian law since it determines what tribes can and cannot do.

A. The Scope of Tribal-Government Powers

It is impossible to understand the powers of today's tribal governments without including a bit of history, because tribal powers are *retained powers*. They can only be accurately described as what remains of the original whole. Indian tribes were once the completely independent nations—of varying sizes

funding to address “unmet essential utilities and core infrastructure needs in Indian Country,” which amount to a “civil rights crisis”).

36. See generally Frickey, *supra* note 1, at 31; Matthew L.M. Fletcher, *The Supreme Court's Legal Culture War Against Tribal Law*, 2 INTERCULTURAL HUM. RTS. L. REV. 93, 110, 115 (2007).

and structures—that governed the continent.³⁷ In the earliest days of the United States, tribes were largely military allies or enemies.³⁸ The Bureau of Indian Affairs (BIA) began in the Department of War and remained there until 1849.³⁹ As the United States grew in size and strength, tribal nations became less necessary allies, or less of a threat, and instead became a problem for the expansionist United States. “Indian nations” needed to exist enough to sell land to the United States, but not enough to undermine state and federal sovereignty.⁴⁰ Having lost much of their lands and power, tribes became, as the Supreme Court put it, a “conquered” people, subject to the United States by the laws of conquest.⁴¹

But conquest wasn’t dissolution. The Supreme Court laid the foundations of federal Indian law in the 1800s, holding that “a weaker power does not surrender its independence—its right to *self government*, by associating with a stronger, and taking its protection.”⁴² Indian tribes were no longer independent foreign nations; they were instead “domestic dependent nations.”⁴³ Tribes could no longer conduct foreign relations independently of the United States: Any tribe’s attempt to politically ally with or sell land to other foreign nations would have been an act of “hostility” against the United States, which asserted an exclusive right to “protect[.]” the Indian tribes.⁴⁴ Yet “[a]ll the rights which belong to *self government* [were] recognized as vested in

37. George Washington urged peace treaties with these nations, fearing that further wars with Indians resisting conquest would destabilize the United States. See Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1020-21 (2014); see also Johnson v. M’Intosh, 21 U.S. (8 Wheat.) 543, 547-48 (1823) (noting “[some] Indian tribes or nations . . . were the allies of France in the war” and “were free and independent, owing no allegiance to any foreign power whatever, and holding their lands in absolute property”).

38. See, e.g., Ablavsky, *supra* note 37, at 1019-20, 1019 n.103 (discussing the centrality of the Haudenosaunee (Six Nations) Confederacy to the eighteenth-century military struggles over present-day New York and Ohio and the role the splitting of the Confederacy played in the Revolutionary War).

39. *Bureau of Indian Affairs (BIA)*, U.S. BUREAU INDIAN AFFS., <https://perma.cc/RT92-5PF2> (archived Jan. 10, 2021).

40. See *Johnson*, 21 U.S. (8 Wheat.) at 587-88 (holding that “discovery gave [the United States] an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest,” rather than considering tribes or individual Indians to have absolute title to sell their lands).

41. *Id.* at 589. It was “impossible” to “govern [Indians] as a distinct people” because they were “savages” committed to fighting for “their independence,” making conquest the inevitable “law of the land” that “[c]ould not] be questioned.” *Id.* at 590-91.

42. *United States v. Wheeler*, 435 U.S. 313, 326 (1978) (emphasis added) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832)).

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

44. See *id.* at 17-18; see also *Johnson*, 21 U.S. (8 Wheat.) at 574.

[the Indian tribes].”⁴⁵ This meant that state law had no force within tribal boundaries and that state citizens did not have the right to enter without tribal consent.⁴⁶ Moreover, the Court made clear that since tribal powers of self-government “existed prior to the Constitution,” tribes were not bound by the Constitution.⁴⁷ Most notably, they were not bound by the explicit constitutional limitations on state action found in the Bill of Rights and other amendments.⁴⁸

These early foundations of tribal sovereignty balanced against federal power, and the ostensible consequences of conquest have guided federal Indian law ever since. Broadly speaking, tribal governments still retain all powers that have not been abrogated by treaty,⁴⁹ removed via federal statute,⁵⁰ or lost by virtue of their status as domestic dependent nations. Tribes lost most of their lands through treaties or executive orders,⁵¹ and perhaps the greatest loss of tribal power is the lost geographic reach of tribal law. Lands still within a tribe’s control are collectively referred to as Indian Country.⁵² Federal statutes have generally limited what tribes can do with these remaining lands.⁵³ Though tribes retain jurisdiction over Indians who commit crimes on their land, Congress gave the federal government concurrent jurisdiction to prosecute a set of “major” Indian crimes, as defined under the Major Crimes Act, and exclusive jurisdiction over non-Indian-on-Indian crime.⁵⁴ Congress has also capped all tribal court punishment at a \$15,000 fine or three-year prison sentence per offense.⁵⁵ This makes the federal government the de facto exclusive prosecuting authority for all serious crimes involving Indians because a tribe’s concurrent jurisdiction over all crimes—including those defined in the Major Crimes Act—is subject to these limits.⁵⁶ Finally, the Supreme Court has held that certain powers are “inconsistent” with domestic-

45. *Worcester*, 31 U.S. (6 Pet.) at 580 (McLean, J., concurring) (emphasis added).

46. *See id.* at 561 (majority opinion).

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

48. *Id.*

49. *See, e.g., United States v. Winans*, 198 U.S. 371, 381 (1905) (treaty-rights case).

50. *See, e.g., Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-66 (1903) (congressional-power case).

51. Rebecca Onion & Claudio Saunt, *Interactive Time-Lapse Map Shows How the U.S. Took More Than 1.5 Billion Acres from Native Americans*, SLATE: THE VAULT (June 17, 2014, 11:38 AM), <https://perma.cc/8PVG-XTZR>.

52. “Indian country” is defined by federal statute. *See* 18 U.S.C. § 1151.

53. For example, the Secretary of the Interior still oversees, facilitates, and approves all tribal land sales and purchases. *See* 25 U.S.C. §§ 5102-5105, 5107-5108.

54. *See* 18 U.S.C. §§ 1152-1153 (enumerating offenses).

55. 25 U.S.C. § 1302(a)(7)(C)-(D).

56. *Id.*

dependent-nation status.⁵⁷ This judicial doctrine—known as implicit divestiture—has been widely criticized as an unjustified expansion of the Court’s role.⁵⁸ Implicit divestiture is also how tribes have lost much of their ability to govern non-Indians or nonmembers. The Court has held that “the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”⁵⁹ With one narrow exception, tribes cannot criminally prosecute non-Indians, even for committing crimes against tribal citizens.⁶⁰

Tribes retain broad power to civilly regulate their lands and their members, but “[t]ribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them.”⁶¹ Thus, tribal regulation of, or adjudicatory jurisdiction over,⁶² nonmembers (including taxation⁶³) is “presumptively invalid”⁶⁴ with two exceptions: first, if the nonmember “enter[ed] consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements,” or, second, if the nonmember’s “conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”⁶⁵ In these cases, land ownership is an important if not “dispositive” factor,⁶⁶ as nonmember-owned land is unlikely to host conduct interfering with the heart of tribal sovereignty, and as nonmember

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

58. See Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 157, 160 (2006); 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, 37, 45 (1999); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1595, 1598-99 (1996).

59. *Montana v. United States*, 450 U.S. 544, 565 (1981).

60. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978). As a result of the Violence Against Women Act’s reauthorization in 2013, tribes have special jurisdiction to prosecute non-Indians with certain ties to the prosecuting tribe for crimes of domestic violence, dating violence, and violations of certain protection orders. See Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, §§ 904-905, 127 Stat. 54, 120-24 (codified at 25 U.S.C. § 1304 and 18 U.S.C. § 2265).

61. *Nevada v. Hicks*, 533 U.S. 353, 361 (2001).

62. *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) (explaining that adjudicatory jurisdiction over nonmembers is no broader than regulatory jurisdiction over nonmembers).

63. Though tribes are able to tax members, they rarely do, and instead rely on tribal economic ventures. See Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759, 771-74 (2004).

64. *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 330, 341 (2008) (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001)); see also *Strate*, 520 U.S. at 459.

65. *Montana v. United States*, 450 U.S. 544, 565-66 (1981).

66. *Hicks*, 533 U.S. at 360.

conduct on tribally owned land often involves commercial or other consensual arrangements.⁶⁷

In summary, tribes are limited in the powers they can exercise over non-Indians, but retain almost all of their powers over Indians, especially their citizens.⁶⁸ Except for limits on sentencing authority, tribes have close to full independence to make and enforce laws for their own citizens on tribal land. Furthermore, except for federal laws that clearly apply to tribal governments,⁶⁹ tribes operate independently of federal, state, or local laws. The inherent right to tribal *self-governance* has been consistently and continuously affirmed, leaving tribal governments with the responsibility of making laws that govern everything from their citizens' fundamental rights to mundane matters like garbage pickup. Since the population of Indian Country has, until very recently, been primarily Indian, tribes spend most of their time as broadly powerful sovereigns governing Indians.

B. The Contemporary Practice of Tribal Governance

Collectively, the 574 federally recognized tribal nations govern an area larger than California, and tribal lands include 260 miles of America's international borders.⁷⁰ The largest tribe, the Navajo Nation, governs an area

67. See, e.g., *Plains Com. Bank*, 554 U.S. at 330 (holding that the tribal court lacked jurisdiction over a discrimination claim against Indians concerning the sale of non-Indian owned fee land); *DolgenCorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 169, 173-74 (5th Cir. 2014) (upholding tribal court jurisdiction over a suit involving tortious conduct during an employment-education program for tribal youth at a store located on tribal land, where the corporation consented to tribal court jurisdiction in its lease documents), *aff'd mem. by an equally divided court sub nom. Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016).

68. Different law governs Alaska Native tribes, whose lands are not Indian Country but are rather held by state-chartered tribal corporations. See *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 523, 532 (1998). Alaska Native tribes have similar self-government powers as other tribes, though Alaska state courts generally exercise more concurrent powers. See *John v. Baker*, 982 P.2d 738, 759 (Alaska 1999).

69. There is a circuit split on federal laws of general applicability. Compare *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115-16 (9th Cir. 1985) (concluding that federal laws of general applicability may apply to Indian tribes even if silent on the issue of applicability, but providing three exceptions to this rule), with *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1194-99 (10th Cir. 2002) (en banc) (interpreting a Supreme Court decision on statutes of general applicability as applying only in the context of property rights and as dealing with "issues of ownership, not with questions pertaining to the tribe's sovereign authority to govern the land" (citing *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960))).

70. See NCAI REPORT, *supra* note 5, at 10-11.

the size of West Virginia,⁷¹ while many of the over 100 California tribes have very small land bases and populations.⁷²

These nations represent a great diversity of legal cultures and structures, and they have undergone tremendous constitutional changes over the last 200 years.⁷³ Some nations have written constitutions with branches of government or other institutional structures reminiscent of—and at times directly borrowed from—the United States,⁷⁴ while others maintain precolonial, culturally traditional government structures—even theocratic ones.⁷⁵ This structural diversity is a result of precolonial diversity and the Indian Reorganization Act (IRA) of 1934, which encouraged tribes across the country to adopt fairly formulaic written constitutions.⁷⁶ Initially, 181 tribes accepted the IRA, while 77 rejected it.⁷⁷ The IRA continues to haunt tribal governance. While many tribes kept their IRA constitutions and still more have adopted them, for others, these boilerplate U.S.-style governments didn't fit their communities and therefore lacked legitimacy, support, and effectiveness.⁷⁸ Today, around 60% of tribes have governments based on IRA constitutions.⁷⁹

71. See *Navajo Facts*, *supra* note 3.

72. See Duane Champagne, *Remaking Tribal Constitutions: Meeting the Challenges of Tradition, Colonialism, and Globalization*, in AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS 11, 24 (Eric D. Lemont ed., 2006); NCAI REPORT, *supra* note 5, at 10; FOREST SERV., U.S. DEP'T OF AGRIC., FOREST SERVICE NATIONAL RESOURCE GUIDE TO AMERICAN INDIAN AND ALASKA NATIVE RELATIONS app. C (1997), <https://perma.cc/BCA5-SB3L>.

73. HARVARD PROJECT ON AM. INDIAN ECON. DEV., THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION 1, 18-19 (2008) [hereinafter HARVARD NATIONS]; DUANE CHAMPAGNE, SOCIAL CHANGE AND CULTURAL CONTINUITY AMONG NATIVE NATIONS 67-68 (2007).

74. See HARVARD NATIONS, *supra* note 73, at 19; FELIX S. COHEN, ON THE DRAFTING OF TRIBAL CONSTITUTIONS 32 (David E. Wilkins ed., 2006); NCAI REPORT, *supra* note 5, at 24; Champagne, *supra* note 72, at 18-20.

75. See NCAI REPORT, *supra* note 5, at 24; HARVARD NATIONS, *supra* note 73, at 18. Many of the Pueblo Indian Tribes have religious leaders who appoint their secular political leadership. See, e.g., JOE S. SANDO, PUEBLO NATIONS: EIGHT CENTURIES OF PUEBLO INDIAN HISTORY 13-15 (1992).

76. HARVARD NATIONS, *supra* note 73, at 19; see also ELMER R. RUSCO, A FATEFUL TIME: THE BACKGROUND AND LEGISLATIVE HISTORY OF THE INDIAN REORGANIZATION ACT 301 (2000); Champagne, *supra* note 72, at 18-20 (discussing the general form of these IRA constitutions).

77. THEODORE H. HAAS, U.S. INDIAN SERV., DEP'T OF THE INTERIOR, TEN YEARS OF TRIBAL GOVERNMENT UNDER I.R.A. 3 (1947). Oklahoma and Alaska tribes were not involved in these IRA elections because the IRA was extended to them later through a different process. *Id.* at 2-3.

78. HARVARD NATIONS, *supra* note 73, at 19-20 (contrasting Apache nations that have made IRA constitutions work with Lakota tribes that continue to struggle with political instability); Champagne, *supra* note 72, at 19-20.

79. NCAI REPORT, *supra* note 5, at 24.

Only recently have many tribal governments been able to take over the provision of government services from the federal government. Following the IRA, federal policy was to legally terminate tribes and encourage the relocation and cultural assimilation of tribal citizens.⁸⁰ This sparked a new wave of tribal activism and led tribal leaders to fight for more independence and less federal paternalism.⁸¹ In response, Congress passed the Indian Self-Determination and Education Assistance Act of 1975.⁸² The Act let tribes contract with the federal government to provide the services the federal government had previously provided directly to Indian people.⁸³ This widely utilized program, along with many similar ones that followed in its wake, ushered in a new self-determination era. In just a few decades, tribal self-determination was already proving itself to be a more effective way to strengthen tribal communities. Real median household income for tribes without gaming grew by 33% between 1990 and 2000, far outstripping the 4% growth nationally.⁸⁴ Since per capita federal spending did not increase during this period, research suggests self-determination was behind the economic growth.⁸⁵

The self-determination era is marked not only by tribes taking over government services, but also by an explosion of lawmaking and new government programs. Tribes across the country have passed innovative laws and built effective government programs in a wide variety of areas,⁸⁶ including

80. See Act of Aug. 3, 1956, ch. 930, 70 Stat. 986 (codified as amended at 25 U.S.C. §§ 309, 309a) (offering reservation Indians financial assistance and job training in exchange for moving to large cities with the hopes that doing so would assimilate them); CHARLES WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* 85 (2005); Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 and 28 U.S.C. § 1360) (conferring jurisdiction upon five states over criminal offenses and civil actions occurring on Indian reservations within those states); H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953) (committing Congress to a policy of termination of Indian tribes); Michael C. Walch, Note, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181, 1186 & n.30 (1983) (collecting termination statutes).

81. For an extensive and well-done history of this movement, see generally WILKINSON, *supra* note 80.

82. Pub. L. No. 93-638, 88 Stat. 2203 (codified in scattered sections of 5, 25, 42, and 50 U.S.C.); HARVARD NATIONS, *supra* note 73, at 20-21.

83. See Indian Self-Determination and Educational Assistance Act, §§ 102-103, 88 Stat. at 2206-07 (codified at 25 U.S.C. §§ 5321-5322); HARVARD NATIONS, *supra* note 73, at 21.

84. HARVARD NATIONS, *supra* note 73, at 7-8.

85. *Id.* at 8-9.

86. See also NAT'L CONG. OF AM. INDIANS, *SECURING OUR FUTURES* 11-17 (2013), <https://perma.cc/696Z-6T6D> (highlighting tribal-government initiatives in education, employment law, housing, financial education, food and agriculture, energy, natural resources, and business law).

consumer protection,⁸⁷ child welfare,⁸⁸ criminal justice,⁸⁹ estates,⁹⁰ and environmental law.⁹¹ The sheer number of federally recognized tribes and the broad diversity across tribal institutions, laws, and cultures make the spectrum of topics available for study exciting. And when very different tribes converge on ideas, those ideas may deserve special consideration.

Tribes' decisions are having a growing impact on the country, suggesting we ought to pay attention to find good ideas as much as to sound the alarm if we find bad ones. But the question remains: Why aren't tribal governments already in the mainstream? The next Part explores and criticizes the marginalization of tribal law.

II. The Marginalization of Tribal Law

Tribal law is marginalized both within Indian law and outside of it. Colonial portrayals and rhetoric systemically delegitimized tribal law and shaped public perceptions. Within Indian law, tribal law is overlooked, cast as niche, mistakenly conflated with federal Indian law's exceptionalism, or given less priority. All of this is a mistake. We need a clean break from old, misinformed assumptions, and we need to rethink the field of Indian law and its priorities.

87. For example, the Confederated Tribes of the Umatilla Indian Reservation have a robust Financial Credit and Consumer Protection Program. See Harvard Project on Am. Indian Econ. Dev., Honoring Nations: 2006 Honoree—Homeownership; Financial, Credit & Consumer Protection Program 2-3 (n.d.), <https://perma.cc/T5JA-YR5M>.

88. At least eleven tribal codes with mandatory-reporting provisions designate *all* tribal members as mandatory child-abuse reporters. RACHEL ROSE STARKS, ADRIAN T. SMITH, MARY BETH JÄGER, MIRIAM JORGENSEN & STEPHEN CORNELL, NATIVE NATIONS INST. & NAT'L INDIAN CHILD WELFARE ASS'N, TRIBAL CHILD WELFARE CODES AS SOVEREIGNTY IN ACTION: A GUIDE FOR TRIBAL LEADERS 9-10 (2016).

89. Tribal courts across the country have wellness- or healing-based criminal-justice systems or programs that integrate tribal culture. See, e.g., *All Programs*, TRIBAL ACCESS TO JUST. INNOVATION, <https://perma.cc/GT2Z-F662> (archived Jan. 10, 2021) (collecting fifty different examples of innovative tribal criminal-justice programs); see also Joseph Thomas Flies-Away & Carrie E. Garrow, *Healing to Wellness Courts: Therapeutic Jurisprudence +*, 2013 MICH. ST. L. REV. 403, 409-19. The Muscogee (Creek) Nation created a criminal-reentry initiative for its citizens that has kept recidivism among participants at approximately 5%. *Muscogee Creek Reintegration Program*, TRIBAL ACCESS TO JUST. INNOVATION, <https://perma.cc/M93Y-88EN> (archived Jan. 10, 2021).

90. The Colorado River Indian Tribes' Probate Code exempts important cultural or religious artifacts from its normal intestacy rules, allowing tribal members and their kin to decide how such items should be distributed. COLO. RIVER INDIAN TRIBES PROB. CODE art. I, ch. 5, § 5.515 (2003).

91. The Swinomish tribe has a community-specific climate-change plan. See OFF. OF PLAN. & CMTY. DEV., SWINOMISH INDIAN TRIBAL CMTY., SWINOMISH CLIMATE CHANGE INITIATIVE: CLIMATE ADAPTATION ACTION PLAN (2010), <https://perma.cc/KBX6-YGNZ>.

A. Delegitimizing Tribal Law

The first piece of American legal scholarship about Indians appeared in the *Harvard Law Review* in 1888. The piece, *Indians and the Law* by Austin Abbott, was a call to action. Indians, he argued, desperately needed law.⁹² Though Abbott referred to tribes as “bodies politic” and quoted portions of the Supreme Court case *Cherokee Nation v. Georgia* that affirmed tribal nationhood, he did not concede that tribes had real law or self-governance.⁹³ He described Indian reservations as “immense areas of land within the United States . . . inhabited by a considerable population . . . in a condition of lawlessness.”⁹⁴ Abbott paused to note that since “Indians are increasing in numbers” and “property rights,” we could no longer assume that “time might . . . be trusted to put an end to the shameful condition of lawlessness.”⁹⁵ He then concluded that the Dawes Act would put an end to this “anarch[y]” and bring “civilized justice” by offering American citizenship, civil rights, and allotment of tribal lands.⁹⁶ Tribes may have been governments of some kind, but, according to Abbott, they had no law and little value of their own.

Forty years later, and six years after the Indian Citizenship Act,⁹⁷ Jacob Henry Landman made a case for studying tribal law in the pages of the *Michigan Law Review*, dismissing evolutionary theories that assumed Indians were less evolved, while contradictorily suggesting that scholars study the “primitive man of our day,” the “primitive mind,” and “primitive law” to understand the spread of legal ideas.⁹⁸

As recently as 1971, John Phillip Reid noted in the *New York University Law Review*—seemingly without noticing the dehumanizing undertones—that Europeans who came into contact with the Cherokee and claimed they had no law were wrong; they simply could not see the law right in front of them because they made the mistake of trying to “force primitive facts into current theories” instead of “think[ing] Cherokee.”⁹⁹

Many early studies of tribal law, including both these articles and longer, more famous works—such as Llewellyn and Hoebel’s 1941 book *The Cheyenne Way*—were framed as legal studies of primitive peoples in contrast to the

92. Austin Abbott, *Indians and the Law*, 2 HARV. L. REV. 167, 167 (1888).

93. *Id.* at 167-69.

94. *Id.* at 175.

95. *Id.*

96. *Id.* at 175-76.

97. Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b)).

98. Jacob Henry Landman, *Primitive Law, Evolution, and Sir Henry Sumner Maine*, 28 MICH. L. REV. 404, 408-10, 412 (1930).

99. John Phillip Reid, *The Cherokee Thought: An Apparatus of Primitive Law*, 46 N.Y.U. L. REV. 281, 281-83 (1971).

civilized ways of American law and society.¹⁰⁰ *The Cheyenne Way* was even considered progressive for its time because it celebrated parts of the tribal legal traditions it described,¹⁰¹ thus breaking with the academy's widespread belief that Indians were lawless. However, these works evaluated tribal law with an "evolutionary view" that assumed a "hierarchy of sociocultural systems" and carried an "ethnocentric bias."¹⁰² This assumption that Indians were primitive and hence less worthy or incapable of governing themselves played an important role in American colonialism and predominated the legal academy as much as it did the rest of the country.¹⁰³

Indian history and law scholar Robert Williams explains that these "myths" about Indian people and tribes are central to a "colonizing legal discourse" that strategically utilizes "alienating norms."¹⁰⁴ As he describes, "eurocentric beliefs [are] elevated to the status of . . . universal principle[s]," and thus both tribes' failures to conform to those principles and myths highlighting Indian inadequacies are used to justify disrespecting tribes or denying them "equal status."¹⁰⁵ Historically, othering Indian tribes and deciding they were savage or uncivilized justified taking their resources.¹⁰⁶

Likewise, the myth of the so-called vanishing Indian gave the new inhabitants of the United States both better title and an exclusive claim to modernity.¹⁰⁷ In the mid-nineteenth century, Harvard Law professor and former Governor of Massachusetts Emory Washburn mournfully declared that "nothing but tradition now remains . . . [.] not a drop of [Indian] blood," despite Indian communities living not far from where he spoke.¹⁰⁸

100. See, e.g., K. N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* 1-19, 29 (1941); Robert Redfield, 9 U. CHI. L. REV. 366, 368-69 (1942) (reviewing LLEWELLYN & HOEBEL, *supra*) (comparing the Cheyenne to ancient Hebrews).

101. See Redfield, *supra* note 100, at 368.

102. Ajay K. Mehrotra, Book Note, *Law and the "Other": Karl N. Llewellyn, Cultural Anthropology, and the Legacy of The Cheyenne Way*, 26 LAW & SOC. INQUIRY 741, 758 (2001) (reviewing LLEWELLYN & HOEBEL, *supra* note 100).

103. See generally ROBERT F. BERKHOFER, JR., *THE WHITE MAN'S INDIAN: IMAGES OF THE AMERICAN INDIAN FROM COLUMBUS TO THE PRESENT* (Vintage Books 1979) (1978) (documenting the creation of the "image of the Indian" in America to rationalize or justify policy).

104. Williams, *supra* note 23, at 290-91.

105. *Id.* at 290.

106. See ROBERT A. WILLIAMS, JR., *SAVAGE ANXIETIES: THE INVENTION OF WESTERN CIVILIZATION* 202-15 (2012).

107. See JEAN M. O'BRIEN, *FIRSTING AND LASTING: WRITING INDIANS OUT OF EXISTENCE IN NEW ENGLAND*, at xiii, xv (2010) (stating that "[t]he overwhelming message" of hundreds of New England local history documents from 1820 to 1880 "was that local Indians had disappeared").

108. *Id.* at xi.

Constructions of Indians as extinct, primitive, uncivilized, or doomed to disappear helped alleviate America's moral guilt and replaced it with a sense of morally righteous mourning and inheritance. Philip Deloria's seminal work *Playing Indian* documents this phenomenon throughout American history. Deloria describes how white Americans have mourned the "vanishing Indian" and described themselves as the heirs not only of the land but also of "Indianness."¹⁰⁹ Americans have claimed Indianness by "playing Indian" themselves and constructing an Indian that is simultaneously a savage and a noble creature of the past.¹¹⁰

The belief that Indians were primitives who belonged in the past is so strong that, throughout American history, when non-Indians were confronted with real contemporary Indians, their response was not to question their assumptions but to deny the Indianness of the contemporary Indians.¹¹¹ An 1877 Supreme Court decision offers a vivid example. In *United States v. Joseph*, the Court held that Pueblo Indians were "Indians only in feature" and ultimately too "intelligent," "virtuous," and "civilized" to be an Indian tribe.¹¹² Thirty-six years later, the Court changed its mind when presented with different sources, deciding that in fact the Pueblos were an Indian tribe, "considering their Indian lineage, isolated and communal life, primitive customs and limited civilization."¹¹³ The consequence of erasing and primitivizing Indians is that we forget or dismiss Indians and their contributions, including their law. As described by Linda Tuhiwai Smith, "[o]ne of the supposed characteristics of primitive peoples was that we could not use our minds or intellects . . . [.] invent things, . . . create institutions or history, . . . [or] produce anything of value."¹¹⁴

In addition to the debasing primitivization that tribal nations have suffered, they have also been subject to ethnification and racialization.¹¹⁵

109. PHILIP J. DELORIA, *PLAYING INDIAN* 63-64 (1998).

110. *Id.* at 5-7.

111. See O'BRIEN, *supra* note 107, at xv ("A toxic brew of racial thinking—steeped in their understanding of history and culture—led [non-Indians] to deny the Indianness of Indians. . . . [N]on-Indians convinced themselves that New England Indians had become extinct . . ."); Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 651-52 (2009) (describing protests against Northeast tribes whose "profitable commercial enterprises," "modern governments," and mixed racial status led protestors to question whether the tribes' members were "really Indian").

112. 94 U.S. 614, 616-17 (1877).

113. *United States v. Sandoval*, 231 U.S. 28, 47 (1913).

114. LINDA TUHIWAI SMITH, *DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLES* 25 (1999).

115. See Sebastian Felix Braun, *Building on Native Sovereignty: From Ethnic Membership to National Citizenship*, in *NATIVE AMERICAN NATIONALISM AND NATION RE-BUILDING: PAST AND PRESENT CASES* 29, 39 (Simone Poliandri ed., 2016) (describing the federal footnote continued on next page

While it is fairly rare to encounter a present-day scholar or judge calling tribal nations “primitive,” tribal sovereigns are still raced and othered in a way that serves the same function: to control and limit tribal-government identities and justify wariness of tribal powers. As Bethany Berger describes it, “the basic racist move at work in Indian law and policy is to racialize the tribe, defining tribes as racial groups in order to deny tribes the rights of governments.”¹¹⁶ Tribes did not have a precolonial concept of a pancontinental collective identity. The very idea of an “Indian” is a European invention that suited the political purpose of delegitimizing these sovereigns.¹¹⁷ The requirement that tribal members have some degree of “Indian blood” came not from tribes but from the federal government.¹¹⁸ Like other governments, tribal governments had naturalization processes that allowed them to extend citizenship, including through marriage.¹¹⁹ Nevertheless, the Supreme Court rejected the Cherokee citizenship of William Rogers for jurisdictional purposes since, in its view, he remained a “white man” who could never be an “Indian.”¹²⁰ Though the Court called the Cherokee Nation a “nation,” it did not use the appropriate terminology of naturalization or citizenship, but instead the familial term “adoption.”¹²¹

Likewise, the idea of an Indian “tribe” is a construction of the United States government, which used the word interchangeably with “nation” when doing so suited its interests.¹²² In truth, there are 574 precolonial governments surviving to this day that we ought to call by *the names they call themselves*. The historical and cultural dynamics discussed above either erased tribal law or

government’s “strategy of ethnification”); Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041, 1043 (2012) (describing the racialization of American Indians).

116. Berger, *supra* note 111, at 599.

117. See Carole Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373, 1373-74 (2002).

118. Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 46 (2006).

119. See, e.g., *United States v. Rogers*, 45 U.S. (4 How.) 567, 567-68 (1846) (noting that both the defendant and the victim were white men who had incorporated into the Cherokee Nation and had become citizens from the time they agreed to join the tribe in removal); John Rockwell Snowden, Wayne Tyndall & David Smith, *American Indian Sovereignty and Naturalization: It’s A Race Thing*, 80 NEB. L. REV. 171, 191-200 (2001) (describing the historical naturalization processes of the Maha or Umo^{ho} (Omaha) Nation and the Winnebago tribe).

120. *Rogers*, 45 U.S. (4 How.) at 572-73 (“[A] white man who at mature age is adopted in an Indian tribe does not thereby become an Indian . . .”).

121. *Id.* at 571, 573.

122. See Ablavsky, *supra* note 23, at 1039-42 (stating that, in the Founding era, the term Indian “tribe” was used by some to connote “primitiveness,” “savagery,” “difference,” and “common descent,” while the term Indian “nation” was used to connote “independence” and “equality”).

insisted on seeing it only through the constructed lens that othered, delegitimized, racialized, and dehumanized it, thereby denying it any hope of equal status in America.

The othering of tribes suffused how Indians and tribes were welcomed—or not welcomed—into the United States. Although the Supreme Court clarified in 1831 that tribes were not “foreign nations” but actually “domestic dependent nations,” Indians were still not American citizens.¹²³ Tribal nations were conquered domestic nations *within* the United States, but still not *of it*. They lost their independence and ostensibly gained the protection of a new nation, but not full citizenship in that nation. Even the Fourteenth Amendment did not change the marginalized status of tribal nations and their citizens.¹²⁴ The Court described tribes during this period as “alien, though dependent, power[s]” and Indians as similar to the U.S.-born children of foreign ambassadors.¹²⁵ Citizenship was often exchanged for land or granted as a first step in a process intended to allow for land taking.¹²⁶ Indians wouldn’t gain birthright citizenship in the United States until the Indian Citizenship Act of 1924.¹²⁷

Similar rhetoric describing Indian tribes as a cultural, racial, or political other permeates Supreme Court doctrine from the 1830s to the present day.¹²⁸ The Court handles questions of tribal power over nonmembers as questions about whether a culturally and racially different group should have power over *real Americans* rather than as simple jurisdictional questions about the capacity or powers of the United States’ own subsovereigns. The concern, as the *Oliphant* Court said in 1978, is that non-Indian Americans in tribal court will be “trie[d] . . . not by their peers . . . nor the law of their land, but by . . . a different race.”¹²⁹ Likewise, the *Hicks* Court in 2001 called the non-Indians potentially subject to tribal civil jurisdiction “outsiders,”¹³⁰ and, in concurrence, Justice Souter expressed concern that the mix of tribal, federal, and state law in tribal courts would be “unusually difficult for an outsider to sort out.”¹³¹

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

124. *See Elk v. Wilkins*, 112 U.S. 94, 102 (1884).

125. *Id.*

126. *See* Stephen Kantrowitz, *White Supremacy, Settler Colonialism, and the Two Citizenships of the Fourteenth Amendment*, 10 J. CIV. WAR ERA 29, 31-38, 46 (2020).

127. Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b)).

128. *See* Daan Braveman, *Tribal Sovereignty: Them and Us*, 82 OR. L. REV. 75, 75-77 (2003); *see also* Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts’ Jurisdiction*, 101 CALIF. L. REV. 1499, 1504-05 (2013).

129. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210-11 (1978) (quoting *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883)).

130. *Nevada v. Hicks*, 533 U.S. 353, 371 (2001).

131. *Id.* at 384-85 (Souter, J., concurring).

I include this examination of the long-standing marginalization of Indians in the hope that, after acknowledging these deep-seated delegitimizing constructions that have informed both law and legal discourse, we can reject them. The current omission of tribal law from the mainstream is not because tribal law is inherently unworthy of our attention, but because of this history. As the body of more accurate scholarship on tribal law grows—and as tribes themselves grow in size, governing capacity, and visibility—these old assumptions and their continued influence on how we see and think of tribes become increasingly inappropriate.¹³² They are at best outdated overgeneralizations and at worst dehumanizing propaganda.

Rather than assuming that tribal governments have nothing to offer or are simply too different or small to belong in the mainstream of American law, I propose we do the opposite. We assume that tribal governments are simply governments like any other. We engage with tribal governments and tribal law with minds open to previously impossible ideas and observations.

B. Marginalization Through “Indian Law”

A second-order task is a reckoning within the field of Indian law. There are several dynamics within the field that marginalize tribal law. “Indian law” as a field lumps together two very different kinds of law: “tribal law” and “federal Indian law.” This is the doctrinal equivalent of lumping together “federalism” and all of “state law.” It is also a poor name choice. While both kinds of law have to do with Indians, federal Indian law was made primarily by non-Indians to govern Indians, to legitimize conquest, and to erode tribal sovereignty. Therefore, federal Indian law is more accurately “conquest federalism” than “Indian” law. We would never call the contemporary study of Jim Crow laws or even the Reconstruction Amendments “Black law.”¹³³ The far better candidate for the name “Indian law” is simply and exclusively tribal law—the law made by Indians.¹³⁴ In this section, I explore three ways this

132. Steven Wilf, *The Invention of Legal Primitivism*, 10 THEORETICAL INQUIRIES L. 485, 491 (2009) (arguing that the construction of legal primitivism was part of the “framework of colonialism” and reveals how modern legal theorists saw themselves through contrast).

133. While laws that governed the conduct of Black Americans in the antebellum period were known as “Black Codes,” my point here is that labeling a contemporary subject of study “Indian law” or “Black law” suggests the law came from that group, or at the very least it suggests an agency or some sort of ownership. Thus the named group being merely the object of regulation—particularly oppressive regulation—feels a poor, if not perverse, fit for the term.

134. Created and controlled by non-Indians, federal Indian law was such a paternalistic system that scholars like Bobo Dean remarked that the Indian Self-Determination Act, enacted in 1975, marked Indian participation or “consent of the governed” for the first real time in the enterprise. S. Bobo Dean, *The Consent of the Governed—A New Concept in*
footnote continued on next page

lumping—aside from being intellectually incoherent—contributes to the invisibility of tribal law.

1. Federal Indian law's domination

A recent survey of the field by Grant Christensen and Melissa Tatum, which canvassed 3,334 pieces of Indian law scholarship published between 1985 and 2015, found that the most cited works are generally about federal Indian law.¹³⁵ Tribal law articles, by contrast, are rare.¹³⁶ Federal Indian law's dominance actively undermines tribal law because it casts tribal law as comparatively niche. Federal Indian law presents itself as the part of the field that addresses broader questions, while tribal law is considered narrow, tribally specific, and relevant only to other tribal governments. Christensen and Tatum's survey acknowledges that many excellent pieces of scholarship are seldom cited or considered influential in the field simply because they deal with "niche issues that may affect only one tribe or region"¹³⁷—in other words, because they are about tribal law.

In his survey of the field for articles that address Indian law "on the ground," Matthew Fletcher explains that while some of the "best Indian law articles" are "narrow and deep" because they examine one tribe, they rarely receive "attention from elite reviews, and therefore elite scholars and judges."¹³⁸ Elite reviews are instead drawn to "broad and shallow" works that

Indian Affairs?, 48 N.D. L. REV. 533, 538-39 (1972) (discussing the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (codified in scattered sections of 5, 25, 42, and 50 U.S.C.)).

135. See Grant Christensen & Melissa L. Tatum, *Reading Indian Law: Evaluating Thirty Years of Indian Law Scholarship*, 54 TULSA L. REV. 81, 85, 87, 94-95 (2018).

136. See Matthew L.M. Fletcher, *American Indian Legal Scholarship and the Courts: Heeding Frickey's Call*, 4 CALIF. L. REV. CIR. 1, 16-18 (2013) [hereinafter Fletcher, *American Indian Legal Scholarship and the Courts*]. Articles are rare outside the *American Indian Law Review*, but one pops up every few years or so. See, e.g., Robert A. Williams, Jr., *Linking Arms Together: Multicultural Constitutionalism in a North American Indigenous Vision of Law and Peace*, 82 CALIF. L. REV. 981 (1994); Robert B. Porter, *Building a New Longhouse: The Case for Government Reform Within the Six Nations of the Haudenosaunee*, 46 BUFF. L. REV. 805 (1998); Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1 (1999); Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559 (2001); Justin B. Richland, "What Are You Going to Do with the Village's Knowledge?" *Talking Tradition, Talking Law in Hopi Tribal Court*, 39 LAW & SOC'Y REV. 235 (2005); Matthew L.M. Fletcher, *Tribal Employment Separation: Tribal Law Enigma, Tribal Governance Paradox, and Tribal Court Conundrum*, 38 U. MICH. J.L. REFORM 273 (2005).

137. Christensen & Tatum, *supra* note 135, at 95 & n.74 (citing, for example, articles on the fishing rights of the Wisconsin Chippewa and domestic violence under Navajo common law).

138. Fletcher, *American Indian Legal Scholarship and the Courts*, *supra* note 136, at 2, 16-17.

“put all Indian tribes in the same doctrinal and theoretical boat, . . . have inaccurate representations of Indian country realities, and . . . offer solutions that have little or no chance of being effective.”¹³⁹ This leads to a concerning dissonance between the good scholarship that reflects the reality of the diversity of Native nations and the complexities of tribal law, and scholarship that ignores these factors but nonetheless garners attention.

Tribal law scholars, in turn, often assume that the field is “niche” and has limited relevance, but they needn’t do so. Rarely have scholars placed the experience or insight of tribes outside of this silo and suggested broader implications.¹⁴⁰ There is certainly tribal law scholarship with broader relevance,¹⁴¹ but it often leaves broader implications unaddressed and instead frames the problem as a uniquely Indian problem.¹⁴² If tribal governments are struggling with similar American public law questions, the similarities are usually discussed only to evaluate the influence of federal or state solutions on tribal governments.¹⁴³ Rarely is it suggested, even briefly, that tribal governments’ experiences are relevant to other American sovereigns.¹⁴⁴ This assumption of limited relevance is evident in the audience tribal law

139. *Id.* at 17.

140. Some of these rare articles include Rob Williams’s piece on the multiculturalism in Six Nations constitutionalism and Donna Coker’s piece on Navajo Peacemaking courts’ handling of domestic violence. *See* Williams, *supra* note 136, at 991 n.24; Coker, *supra* note 136, at 4-6.

141. *See infra* note 175, 181-182 (listing articles on the Indian Civil Rights Act (ICRA)).

142. *See generally* Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285 (1997) (illustrating the institutional competency and fairness of tribal courts through a survey of the eighty-five cases published in the 1998 *Indian Law Reporter*).

143. *See, e.g.*, Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889, 914-15, 937 (2003) (examining the complex tensions and challenges of tribes embracing individual rights, and concluding that Anglo-American individual rights pose the greatest threat to tribal revitalization when injected into tribal communities without tribal participation and autonomy).

144. *See, e.g.*, *Developments in the Law—Indian Law*, 129 HARV. L. REV. 1652, 1666-68, 1667 n.49 (2016) (arguing for independent executives in tribal constitutions); *cf.* Patrick M. Garry, Candice J. Spurlin, Jennifer L. Keating & Derek A. Nelsen, *Tribal Incorporation of First Amendment Norms: A Case Study of the Indian Tribes of South Dakota*, 53 S.D. L. REV. 335, 335-36 (2008) (noting that South Dakota tribes’ incorporation of community interests into individual rights “may prove instructive to . . . First Amendment freedoms,” but not fleshing out this observation); Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 577, 656 (2000) (stating that “the non-Native audience” could learn from the “different ways of conceptualizing and healing breaches in family relations”).

scholarship usually identifies: other Indian tribes or potential Indian law practitioners.¹⁴⁵

Angela Riley's seminal work *Good (Native) Governance*¹⁴⁶ is a prime example. The article builds on Riley's earlier work,¹⁴⁷ which discussed how tribes are labeled "illiberal actors" since they are often more comfortable with assigning roles and duties to persons based on immutable status, an idea completely at odds with liberal conceptions of individual rights, though Riley suggests that the unique aspects of Indian sovereignty ought to place them "beyond the bounds of a standard liberalism analysis."¹⁴⁸ Tribal good governance—like tribal sovereignty—must then be outside the traditional norms of liberalism, and thus tribes ought to "reject conventional notions of good governance."¹⁴⁹ Riley therefore concludes that tribes shouldn't be forced to comply with the norms of mainstream "good governance," so she "propose[s], instead, a theory of 'good Native governance.'"¹⁵⁰ I would reframe Riley's piece as documenting how tribal governments are not only *identifying the limits* of conventional notions of good governance but *reinventing* mainstream good governance since it fails to work for them.¹⁵¹

145. See DAVID E. WILKINS, *THE NAVAJO NATION POLITICAL EXPERIENCE*, at xiii (4th ed. 2013) (mentioning the relevance of his work for comparative analysis in U.S. government, politics, and Native studies, but suggesting that the primary audience is Diné people); Robert B. Porter, *Strengthening Tribal Sovereignty Through Government Reform: What Are the Issues?*, 7 KAN. J.L. & PUB. POL'Y, Winter 1997, at 72, 73 (speaking directly to Native nations); Porter, *supra* note 24, at 1618-19 (identifying Indian law scholars as the primary audience for Indian law scholarship, though noting it is used to some extent by "lawyers and non-lawyers working with Indians, as well as Indians themselves"); Pat Sekaquaptewa, *Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking*, 32 AM. INDIAN L. REV. 319, 320 (2008) ("My intended primary audience includes my peers—tribal judges, leaders, council members, and tribal law academics—particularly those who are also stakeholders.").

146. Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049 (2007).

147. *Id.* at 1051.

148. See Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 802, 804, 813 (2007).

149. Riley, *supra* note 146, at 1054.

150. *Id.*

151. Frank Pommersheim's book advocates for a tribe-centered view of Indian law that would produce an "indigenous version of tribal sovereignty." FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 193 (1995).

2. Bleed-over “exceptionalism” from federal Indian law

Indian law is perceived as complicated and different from the rest of American law.¹⁵² Even scholarship that tries to bring Indian law out of obscurity still emphasizes its differences. A giant in the field, Philip Frickey, spent much of his career arguing that “[f]ederal Indian law does not deserve its image as a tiny backwater of law.”¹⁵³ He charted the “exceptionalism” of federal Indian law for violating many federal law norms¹⁵⁴ and argued that it deserved more prominence in public law in spite of¹⁵⁵—or even *because of*—its unique “doctrinal incoherence.”¹⁵⁶

Frickey’s version of federal Indian law has been expanded upon by a new generation of scholars. These scholars argue that federal Indian law is simply a subset of federal law that examines the legal questions of conquest and the particular challenge of a subsovereignty that is not state sovereignty. Joe Singer has argued for placing federal Indian law more prominently in property law.¹⁵⁷ Judith Resnik has suggested its integration into federal courts.¹⁵⁸ And recently, Maggie Blackhawk has argued that federal Indian law is central to constitutional law and has insights for broader federal law principles.¹⁵⁹

I wholeheartedly agree with these scholars that federal Indian law deserves more prominence in federal law. But whether or not they are correct, it implies nothing about tribal law. *Federal* Indian law is supposedly exceptional

152. See, e.g., Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 436, 488 (2005) [hereinafter Frickey, *(Native) American Exceptionalism*]; Philip P. Frickey, *Context and Legitimacy in Federal Indian Law*, 94 MICH. L. REV. 1973, 1974 (1996) (reviewing POMMERSHEIM, *supra* note 151) (explaining that federal Indian law is “sealed off from the public law mainstream” because it is so different). See generally Getches, *supra* note 58, at 1576.

153. Frickey, *supra* note 29, at 383.

154. Frickey, *(Native) American Exceptionalism*, *supra* note 152, at 436, 488 (suggesting that making sense of a federal Indian law rooted in a messy history of constitutionalism and colonialism deserves the “courage of our confusions”); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 49 (1996) (stating that federal Indian law is defined by “collectivist, separatist, and unique legal elements”).

155. See Philip P. Frickey, *Scholarship, Pedagogy, and Federal Indian Law*, 87 MICH. L. REV. 1199, 1214-15 (1989) (reviewing WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* (2d ed. 1988)) (“[E]nhanced scholarly status for federal Indian law is unlikely to develop without a recognition that insights in this area may cast light on some fundamental general problems of American public law”); Frickey, *supra* note 154, at 49 (suggesting that federal Indian law’s “unique legal elements” should not be lost in an attempt to “mainstream” it into constitutional law).

156. Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1754, 1757 (1997).

157. Singer, *Sovereignty*, *supra* note 30, at 3; Singer, *Indian Title*, *supra* note 30, at 9.

158. Resnik, *supra* note 31, at 701-02.

159. Blackhawk, *supra* note 32, at 1795, 1847.

because it violates *federal law* norms and expectations. This exceptionalism in federal law does not make the laws passed by tribal governments similarly exceptional—though many assume it does. The uniqueness of federal Indian law may put tribes in interesting and unexpected situations as sovereigns, but it does not necessarily mean that the substantive law tribes are making to govern themselves must also be so unusual that we can presumptively assume these laws belong outside the mainstream.

3. The deceptive acceptance of federal Indian law

Finally, the existence of an overarching category called “Indian law” allows scholars who are unfamiliar with Indian tribes to engage with the part of Indian law that is most comfortable, familiar, and accessible—federal Indian law—and then walk away content that they have “included Indians.” However, we cannot mistake including federal Indian law for including “Indians” within American law, lest we forget who made this law. Who and what, then, are we really including?

Federal Indian law is not the law *of* Indian people; it is primarily the law of their conquest and the erosion of their tribal sovereignty. Though Native people and tribal governments have undoubtedly fought for and are largely responsible for the survival of tribal governments, they are not the architects or beneficiaries of this law. Indian tribes are the objects far more than the actors in federal Indian law. Indeed, Indian policy was once described as how to deal with the “Indian problem.”¹⁶⁰ Federal Indian law isn’t the law of Indians or by Indians; it’s the law made by non-Indians for Indians, with only recent input from tribal governments as their lobbying efforts have grown more powerful.¹⁶¹ The Court decided long ago that Indian consent was irrelevant, allowing federal Indian law to continue as the work of (almost entirely) white men.¹⁶² The one part of federal Indian law tribes are parties to are treaties, and those are only sporadically upheld. The rest of federal lawmaking involves, at

160. See, e.g., S. COMM. ON LAB. & PUB. WELFARE, *INDIAN EDUCATION: A NATIONAL TRAGEDY—A NATIONAL CHALLENGE*, S. REP. NO. 91-501, at 13-14 (1969) (quoting the House Select Committee on Indian Affairs as offering “the final solution of the Indian problem,” including stricter assimilationist boarding schools and ultimately tribal termination).

161. See Kirsten Matoy Carlson, *Lobbying as a Strategy for Tribal Resilience*, 2018 *BYU L. Rev.* 1159, 1162-63, 1221.

162. See Matthew L.M. Fletcher, *Tribal Consent*, 8 *STAN. J. C.R. & C.L.* 45, 52, 109 (2012) (providing an overview of case law demonstrating that “tribal consent is, for the Supreme Court, of little import”); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 588 (1823) (“Conquest gives a title which the Courts of the conqueror cannot deny”); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 289-90 (1955) (“Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that . . . it was not a sale but the conquerors’ will that deprived them of their land.”).

best, listening to, considering, or consulting with Indians. The result of this status quo is that attempts to diversify the fields of federal law or public law to include Indians do not produce or promote scholarship that actually focuses on or expands our knowledge of the laws or the lived experiences of Native peoples. Instead, much of it is just more papers about the same handful of Supreme Court cases.

Even the best and most innovative works in federal Indian law generally stay in this familiar lane. For example, in a recent piece, Maggie Blackhawk argued that we need a “more inclusive paradigm” in American public law, specifically one that incorporates federal Indian law in how we think about constitutional history and evaluate our constitutional framework.¹⁶³ I agree. But the continued focus on federal Indian law as a way of diversifying legal academia to include the experience of Native people too often elevates or promotes more discussion of John Marshall’s vision of tribal sovereignty, not tribes’ visions. Tribal law is where and how tribes have been quietly exercising and developing their vision of tribal sovereignty.

III. American Public Law Insights from American Tribal Law

Tribal law has had plenty of successes, failures, innovations, reinventions, and everything in between over the last two thousand (and two hundred) years. There are a variety of ways that tribal law can expand or challenge our thinking about American law beyond simply redefining its scope. Tribal laws innovate, maintain precolonial laws, and also borrow, reject, or reinvent federal and state legal ideas or structures. The diversity and vast number of tribal nations mean that there is a lot of different lawmaking happening across Indian Country. The three examples presented in this section knock down the myth of tribal law as primitive or fundamentally too different to be American, and they also demonstrate tribal law’s capacity to provide insights beyond the borders of Indian Country.

The first example, which concerns tribal criminal procedure, illustrates how tribes reinvent legal concepts or challenge old assumptions, thereby expanding the scope of what is assumed to be possible. Twelve tribes around the country are challenging assumptions underlying the Sixth Amendment right to impartial juries. Rather than assuming that the “community” of persons that they must use to assemble their jury pools has to be exclusively composed of reservation residents, these tribes are instead defining “community” more broadly to include non-Indian people with adequate ties to the tribe regardless of where they live.

163. Blackhawk, *supra* note 32, at 1793, 1847.

The second example is a complex case study in government structure and separation-of-powers law and also a fascinating legal history of the rise and fall of a charismatic populist leader who held on to power for decades in the Navajo Nation. The tribe's experience is defined by the intersection of its rejection of both a written constitution and a unitary executive, combined with the reinvigoration of traditional precolonial law: Navajo Fundamental Law. Eventually, the tribe developed a three-branch government with a unitary executive. The importance of independent institutions, the people's continued support for the corrupt leader, and the common law development of separation-of-powers law provide insights for federal separation-of-powers law as well as for our current political moment.

Finally, the Citizen Potawatomi example explores a tribal innovation. The tribe began with a boilerplate constitution handed to it by Oklahoma in the 1930s. After citizens moved away from the reservation and voter turnout plummeted, the Citizen Potawatomi redesigned its legislative districts to exceed the boundaries of its land base and reach all the way to what really mattered: its people.

A note on methodology: I selected examples that illustrate how tribal law can contribute even to a field where it is generally considered difficult to say anything new: federal constitutional law. Within the confines of that subject matter, I chose examples that also illustrate the value of tribal law's diversity and numerosity. Since today's tribal governments—a diverse group of contemporary sovereigns spread all across the country—struggle with many of the same questions that dominate the rest of American public law, it was not difficult to quickly find many examples from different areas of constitutional law.

I also sought to feature examples that showcased different aspects of the diversity of tribal nations, communities, and legal systems. The tribes featured in these examples are diverse in size: One of the smaller tribes included in the first example, the Alabama-Coushatta Tribe of Texas, has around 1,300 tribal members,¹⁶⁴ while the Navajo Nation profiled in the second example is more than 200 times that size.¹⁶⁵ The three examples I chose are also geographically diverse: The tribes represented have lands within the borders of Arizona, Louisiana, Michigan, New Mexico, North Dakota, Oklahoma, Oregon, Texas, Utah, and Washington. And the examples showcase diverse approaches: The first examines a group of tribes making similar legal choices, while the second and third involve an in-depth examination of two tribes' reform efforts that at once are grounded in their unique histories and have insights that transcend

164. *Our History*, ALA.-COUSHATTA TRIBE TEX., <https://perma.cc/P79T-4N73> (archived Jan. 10, 2021).

165. *Navajo Facts*, *supra* note 3.

them. Finally, I made sure that the examples would collectively include a diverse set of tribal laws: new, old, novel, borrowed, reformed, successful, and disastrous. In the following pages, you will see governments using their laws to address the problems facing their people. That these governments are Indian tribes sometimes adds important context or complications, but at their core these examples are simply American public law.

A. The VAWA Tribes' Constitutional-Rights Reinvention

Tribes can make governing choices free from the constraints of the U.S. Constitution. In fact, the case that decided as much concerned precisely the same issue examined here: jury composition. In that case, Bob Talton filed a federal habeas corpus petition to stay his fast-approaching execution.¹⁶⁶ He claimed he was indicted by an inadequate number of jurors under both the U.S. Constitution and the constitution of the prosecuting government: the Cherokee Nation. The Cherokee Nation had previously required only five grand jurors, but it then passed an amendment increasing the number to thirteen in November 1892. Talton was indicted in December 1892 by five grand jurors, empaneled before the new law took effect for the spring term.¹⁶⁷

The Supreme Court held that Talton had no claim in federal court.¹⁶⁸ Talton's alleged murder of another Cherokee citizen on Cherokee land was "an offence against the local laws of the Cherokee nation."¹⁶⁹ The Cherokee Nation was a separate sovereign whose powers "existed prior to the Constitution, [and thus were] not operated upon by the Fifth Amendment."¹⁷⁰ Thus, Talton's issue with the retroactivity of grand jury requirements under Cherokee law was "solely [a] matter[] within the jurisdiction of the courts of that nation."¹⁷¹

Because they were not parties to the Constitution, tribes remain "unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."¹⁷² Congress has the plenary power to impose limits on tribal governments to protect individual rights, but it has largely let tribal governments decide for themselves how to balance their citizens' individual rights and tribal governments' powers.¹⁷³ Even during the

166. *Talton v. Mayes*, 163 U.S. 376, 376-77 (1896) (statement of the case).

167. *Id.* at 377 (statement of the case); *id.* at 378 (majority opinion).

168. *Id.* at 381-82, 384 (majority opinion).

169. *Id.* at 381.

170. *Id.* at 384.

171. *Id.* at 385.

172. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

173. *See id.* at 56-57, 62-64; *see also* Mark D. Rosen, *Evaluating Tribal Courts' Interpretations of the Indian Civil Rights Act*, in *THE INDIAN CIVIL RIGHTS ACT AT FORTY* 275, 282 (Kristen footnote continued on next page)

IRA period, the tribes were not pressured to adopt a Bill of Rights.¹⁷⁴ With this freedom, some tribes have rights frameworks that look nothing like the federal one.¹⁷⁵

1. Federally imposed opportunities to interpret the Constitution

In 1968, Congress found that few tribal constitutions included the rights guaranteed in the federal Constitution.¹⁷⁶ In response, Congress passed the Indian Civil Rights Act (ICRA).¹⁷⁷ ICRA sought to impose “certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment,”¹⁷⁸ but it provided only federal habeas corpus as a remedy.¹⁷⁹ Because tribal courts have sentencing limits¹⁸⁰ and ICRA has a tribal court exhaustion requirement, ICRA cases rarely make it to federal court before the offenders are released.¹⁸¹ Thus, ICRA rights are almost exclusively enforced—and interpreted—in tribal courts.

The Supreme Court and scholars agree that this is as intended, since ICRA was passed to affirm tribal sovereignty as much as to protect individual

A. Carpenter, Matthew L. M. Fletcher & Angela R. Riley eds., 2012) [hereinafter ICRA AT FORTY].

174. See, e.g., COHEN, *supra* note 74, at 76 (offering a bill of rights as an option in guidance to drafters of tribal constitutions); Lindsay G. Robertson, *Foreword to COHEN, supra* note 74, at vii, vii.

175. See, e.g., NAT’L CONG. OF AM. INDIANS, VAWA 2013’S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION (SDVCJ) FIVE-YEAR REPORT 70-72 (2018) [hereinafter VAWA REPORT], <https://perma.cc/77TF-BN8R> (comparing victims’ rights provisions in seventeen tribal codes, one of which is framed as “duties” the government owes victims); Matthew L. M. Fletcher, *Resisting Congress: Free Speech and Tribal Law*, in ICRA AT FORTY, *supra* note 173, at 133, 140 (listing tribes whose constitutions have a free-speech right or protection without a state-action requirement); Garry et al., *supra* note 144, at 335 (examining how “tribal courts have incorporated First Amendment norms” and arguing that “tribal courts have taken a slightly different approach . . . [and] elevated community interest and values”).

176. S. REP. NO. 90-841, at 6-7 (1967).

177. See Civil Rights Act of 1968, Pub. L. No. 90-284, tit. II, 82 Stat. 73, 77-78 (codified as amended at 25 U.S.C. §§ 1301-1304).

178. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57 (1978).

179. *Id.* at 71.

180. 25 U.S.C. § 1302(a)-(b).

181. See Carrie E. Garrow, *Habeas Corpus Petitions in Federal and Tribal Courts: A Search for Individualized Justice*, 24 WM. & MARY BILL RTS. J. 137, 137, 148 (2015) (finding that 50% of ICRA habeas petitions are dismissed for failure to exhaust tribal court remedies and never reappear in federal court); cf. *Developments in the Law—Indian Law, supra* note 144, at 1724 (noting that enhanced tribal sentencing powers under the Tribal Law and Order Act of 2010 increase the likelihood that federal courts will hear habeas petitions).

rights.¹⁸² Consequently, the balancing of the two should happen in tribal courts that are best positioned to interpret the basic language of ICRA uniquely for their communities.¹⁸³ Despite the similarities of ICRA and federal constitutional provisions, federal constitutional precedent does not bind tribal courts' interpretations of ICRA, though many courts rely on it as persuasive authority.¹⁸⁴ Different interpretations of the same language have evolved in tribal courts for the last fifty years.¹⁸⁵ In this way, tribal jurisprudence is particularly noteworthy within the American legal system. Since 1816, constitutional interpretation has been the primary domain of federal courts—not state courts—and ultimate interpretive power rests with the U.S. Supreme Court.¹⁸⁶ The Court justified federal interpretive supremacy by suggesting that without it, different interpretations could develop across the country.¹⁸⁷ Tribal courts prove that the Court was right, putting the flexibility of constitutional rights' language on full display. The diversity of ICRA interpretations has “create[ed] [some] commonality without commanding homogeneity,”¹⁸⁸ creating interesting hybrids of federal and tribal law.¹⁸⁹ A recent example of this type of hybrid tribal law interpretation of federal law is explored in the case study below.

2. The VAWA tribes' creative jury-pool “community” definition

In 2013, Congress's reauthorization of the Violence Against Women Act (VAWA) included a narrow expansion of tribal criminal jurisdiction that allowed tribes to prosecute non-Indians for the first time in over thirty

182. See *Santa Clara Pueblo*, 436 U.S. at 66-67; see also Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1360 (1969); Donald L. Burnett, Jr., *An Historical Analysis of the 1968 “Indian Civil Rights” Act*, 9 HARV. J. ON LEGIS. 557, 589-94 (1972).

183. See *Santa Clara Pueblo*, 436 U.S. at 65-66; *Developments in the Law—Indian Law*, *supra* note 144, at 1722-23 (arguing that even where habeas cases reach federal courts, federal courts ought to defer to the tribe's interpretation of ICRA).

184. Fletcher, *supra* note 175, at 140; *Navajo Nation v. Rodriguez*, 8 Navajo Rptr. 604, 614 (2004) (No. SC-CR-03-04), 2004 Navajo Sup. LEXIS 13, at *10-11 (“While we are not required to apply federal interpretations [of ICRA], we nonetheless consider them in our analysis.”).

185. ICRA creates a “framework” and limits tribal interpretations to those rights which might “fit[] within its terms.” *Developments in the Law—Indian Law*, *supra* note 144, at 1722-23, 1723 n.108.

186. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816).

187. *Id.* (“[T]he constitution . . . would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states.”).

188. Rosen, *supra* note 173, at 276.

189. See Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479, 485-86 (2000).

years.¹⁹⁰ The provision allows tribes to prosecute certain non-Indians who violate qualifying protection orders or commit domestic or dating violence against Indian victims on tribal lands.¹⁹¹ However, when tribes prosecute non-Indian defendants, they are required to guarantee an additional set of rights, including two constitutional rights not previously required for Indian defendants under the ICRA: the right to an attorney and the right to a trial by jury.¹⁹²

Like tribes' ICRA interpretations, tribes' interpretations of VAWA rights vary. Twelve tribes' interpretations of how to ensure that a fair cross section of their "community" is represented in their jury pools reveal a long-unquestioned assumption of federal courts operating under the confines of identical language. The Sixth Amendment guarantees criminal defendants a "trial, by an impartial jury of the State and district wherein the crime shall have been committed."¹⁹³ Federal courts have interpreted this provision to require the jury be selected from "a fair cross section of the community."¹⁹⁴ The jurors selected need not perfectly mirror community demographics,¹⁹⁵ but there is no consensus on how much underrepresentation would violate the Sixth Amendment—or how to measure it.¹⁹⁶ For the exclusion of a "distinctive group" from a jury pool to violate the fair-cross-section requirement, the exclusion must undermine the purposes of the requirement: guarding against the exercise of arbitrary power by entrusting justice to the community, preserving public confidence in fairness, and fostering civic responsibility.¹⁹⁷

VAWA requires tribes to protect non-Indian defendants' right to an "impartial jury" and also incorporates fair-cross-section jurisprudence—with an explicit nod toward racial-balancing concerns—by requiring an "impartial jury that is drawn from sources that . . . reflect a fair cross section of the community and . . . do not systematically exclude any distinctive group in the

190. See Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, §§ 904-905, 127 Stat. 54, 120-24 (codified at 25 U.S.C. § 1304 and 18 U.S.C. § 2265); see also VAWA REPORT, *supra* note 175, at 1.

191. 25 U.S.C. § 1304.

192. *Id.* §§ 1302(a)(10), 1302(c)(1), 1304(d).

193. U.S. CONST. amend. VI.

194. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); see also *Duren v. Missouri*, 439 U.S. 357, 364 (1979) (establishing the test for a prima facie violation of the fair-cross-section requirement).

195. *Taylor*, 419 U.S. at 538.

196. *Berghuis v. Smith*, 559 U.S. 314, 327, 329 (2010) (stating that while *Duren* applies to Sixth Amendment claims, "neither *Duren* nor any other decision of this Court specifies the method or test courts must use to measure the representation of distinctive groups in jury pools").

197. *Lockhart v. McCree*, 476 U.S. 162, 174-75 (1986).

community, including non-Indians.”¹⁹⁸ State and federal courts are bound by the fair-cross-section requirement as a matter of constitutional case law and because the Jury Selection and Service Act of 1968 (JSSA) made it a statutory requirement of federal courts.¹⁹⁹

To comply with the fair-cross-section requirement, most state and federal courts rely on the same assumption: that the “community” is composed of the residents of the judicial district. This assumption suffuses juror source lists and explicit residency requirements. In most states, jury lists are created using a preexisting list of district residents, such as voter-registration rolls or driver’s-license databases.²⁰⁰ The JSSA requires that all federal jury pools are composed of community residents.²⁰¹ Many states have passed their own equivalent residency requirements.²⁰²

But twelve of the eighteen tribes that first implemented VAWA did something unexpected and unprecedented: They included *nonresidents* in their jury pools.²⁰³ Conscious of the impartiality and fair-cross-section requirements, tribes drafted tribal codes to include nonresidents.²⁰⁴ Oddly enough, it was precisely the fair-cross-section requirement that led tribes to think beyond residency.

These tribes were acutely aware of fairness concerns because several Republican lawmakers had opposed VAWA by arguing that non-Indians could not receive a fair trial from an Indian jury. Senator Chuck Grassley, for

198. 25 U.S.C. § 1304(d)(3).

199. See Pub. L. No. 90-274, § 101, 82 Stat. 53, 54 (codified at 28 U.S.C. § 1861) (requiring federal jurors to be “selected at random from a fair cross section of the community in the district or division wherein the court convenes”).

200. Nancy J. King, *Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 712 n.11 (1993).

201. Residency is mentioned throughout the statute, 28 U.S.C. §§ 1861, 1863(b)(2)-(3), and there is an explicit one-year residency requirement, *id.* § 1865(b)(1).

202. *E.g.*, WYO. STAT. ANN. § 1-11-101(a)(i) (2020) (requiring a juror to be “a resident of the state and of the county ninety (90) days before being selected and returned”).

203. See PASCUA YAQUI TRIBAL CODE tit. 3, ch. 2-1, § 160(B) (2015); TULALIP TRIBAL CODES tit. 2, § 2.05.110(1) (2020); WAGANAKISING ODAWA TRIBAL CODE OF L. tit. IX, ch. 7, § 9.706(B)(2) (2020); ALA.-COUSHATTA TRIBE OF TEX. COMPREHENSIVE CODES OF JUST. tit. IV, ch. 1, § 125(D) (2014); SEMINOLE NATION OF OKLA. CODE OF L. tit. 3, ch. 6, § 603(a) (2015); *id.* tit. 7, ch. 1, § 102(d); *id.* tit. 7, ch. 3, § 302(a); SAC & FOX NATION CODE OF L. tit. 6, ch. 6, § 613(d) (2014); *id.* tit. 11, ch. 3, § 302(a); KICKAPOO TRIBE OF OKLA. CRIM. PROCS. ch. 3, § 302(a) (n.d.); KICKAPOO TRIBE OF OKLA. RULES OF CIV. PROC. ch. 6, § 613(d) (1991); NOTTAWASEPPI HURON BAND OF THE POTAWATOMI TRIBAL CODE § 8.20-2 (2020); SISSETON-WAHPETON OYATE CODES OF L. §§ 23-10-02 to -04 (2015); MUSCOGEE (CREEK) NATION CODE tit. 27, ch. 2, § 2-111, app. 1, r. 13 (2010); SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS TRIBAL CODE § 70.126(4) (2016); CHITIMACHA COMPREHENSIVE CODES OF JUST. tit. II, §§ 509-510 (2017).

204. VAWA REPORT, *supra* note 175, at 66, 68.

example, said at a town hall: “Under the laws of our land, you’ve got to have a jury that is a reflection of society as a whole, and on an Indian reservation, it’s going to be made up of Indians, right? So the non-Indian doesn’t get a fair trial.”²⁰⁵ Legal advocates noted there was little difference between Grassley’s concerns and the worries that arise when racial-minority defendants commit crimes in areas that are predominately white and are thus tried by all-white juries, or even when Indians are tried in federal courts for major crimes.²⁰⁶ Yet tribes were still concerned about the legitimacy of their jury verdicts and possible public scrutiny.²⁰⁷

Tribes wanted to include non-Indians, but they did not always have an up-to-date list of their non-Indian residents.²⁰⁸ Assembling such a list could be difficult since tribes’ taxing authority over non-Indians is limited (and rarely exercised) and many tribes lack information about their non-Indian residents.²⁰⁹ Some tribes decided, nonetheless, to compile a list of non-Indian residents by requiring all non-Indians to register with the tribal government.²¹⁰

Other tribes took a different route. There were other groups of non-Indians who had relationships with the tribe and whose names they could easily assemble. The nonresident non-Indians added to jury pools included tribal employees, tribal land lease or housing recipients, or tribal spouses and family.²¹¹ Though not all of these non-Indians lived on tribal land, they commuted to work on tribal land or willingly spent time there through a

205. Jennifer Bendery, *Chuck Grassley on VAWA: Tribal Provision Means “The Non-Indian Doesn’t Get a Fair Trial,”* HUFFPOST (Feb. 21, 2013, 5:33 PM ET), <https://perma.cc/SP3U-ZYXY>.

206. *Id.*; Cynthia Castillo, Special Feature, *Tribal Courts, Non-Indians, and the Right to an Impartial Jury After the 2013 Reauthorization of VAWA*, 39 AM. INDIAN L. REV. 311, 319, 323-25 (2015); Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 758 (2006) (highlighting a similar mismatch in the jury composition for Indians prosecuted for federal crimes, noting those juries are “overinclusive because they include persons who do not live in Indian country and are not routinely subject to federal Indian country jurisdiction”).

207. See Nat’l Cong. of Am. Indians, *Webinar on Developing an Effective and Defensible Jury Plan for Tribal Courts* (2018), <https://perma.cc/36CN-8GFY> (one of several webinars developed by NCAI to help VAWA tribes come up with “defensible” jury plans that included non-Indians, anticipating scrutiny on non-Indian representation).

208. *Id.*; VAWA REPORT, *supra* note 175, at 66.

209. VAWA REPORT, *supra* note 175, at 66.

210. See, e.g., Aaron J. Tohtsoni, *Community Implements VAWA with Ordinances and Grants to Prosecute Offenders*, GILA RIVER INDIAN NEWS (Nov. 2, 2018), <https://perma.cc/4GKZ-3TQF>; Gila River Indian Cmty., *Notice of Requirement: Non-member Resident Registration* (2019), <https://perma.cc/7HUN-HTHH> (publicizing the ordinance that implemented VAWA).

211. VAWA REPORT, *supra* note 175, at 68.

relationship with the tribe or a tribal member.²¹² The tribes had the names of these potential jurors because of their relationship with the tribe or its members—precisely the same relationship that could also give rise to tribal jurisdiction.²¹³

These pools not only reflect a more accurate picture of the community of persons subject to tribal jurisdiction, but they also give this broader community the opportunity for civic participation in tribal justice.²¹⁴ This nonresident approach is in keeping with “the very idea of a jury—‘a body truly representative of the community,’ composed of ‘the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.’”²¹⁵

The tribes’ decisions to think more creatively reveal how much the assumption that the jury pool must be limited by residency has restricted experimentation in the rest of the country. The Sixth Amendment does not mandate residency requirements, and there is no case that explicitly holds that the phrase “of the State and district” *must* mean a jury pool that is composed of *residents* of those districts rather than a pool that is *assembled by those jurisdictions* and that otherwise complies with the Sixth Amendment’s requirement of an “impartial” jury.²¹⁶ While some circuit courts have held that a juror residency requirement is not *unconstitutional*, they have not held that such a requirement is constitutionally mandated.²¹⁷ Cases that have examined

212. See *id.* at 68 (noting that non-Indians in jury pools can include tribal employees, tribal member spouses or family, and voluntary registrants).

213. See 25 U.S.C. § 1304(b)(4)(B).

214. See Richard M. Re, Note, *Re-Justifying the Fair Cross Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury*, 116 YALE L.J. 1568, 1570 (2007) (noting that “two opposing conceptions of the criminal jury’s legitimacy” are the “[d]emographic conceptions”—defining a legitimate jury as one with traits “in proportion to the larger population, such that defendants have a ‘fair possibility’ of being judged by a representative jury”—and the “enfranchisement conception”—emphasizing all persons’ democratic opportunity participate in a jury (quoting *Holland v. Illinois*, 493 U.S. 474, 478 (1990))).

215. *Carter v. Jury Comm’n*, 396 U.S. 320, 330 (1970) (footnote omitted) (first quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940); and then quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)).

216. See *City of Bothell v. Barnhart*, 257 P.3d 648, 651 n.2, 652 (Wash. 2011) (en banc) (holding that drawing jurors from a county outside the one where a crime was committed violated the Washington state constitution, but noting that federal jury requirements have no explicit residency requirement).

217. The Fifth Circuit upheld the one-year-residency requirement in the JSSA on the basis that new voters are not a cognizable class. See *United States v. Perry*, 480 F.2d 147, 148 (5th Cir. 1973) (per curiam); see also *United States v. Maskeny*, 609 F.2d 183, 192 (5th Cir. 1980) (reaffirming *Perry* after *Duren*). The Tenth and Seventh Circuits rejected similar challenges with no discussion. See *United States v. Test*, 550 F.2d 577, 594 (10th Cir. 1977) (footnote continued on next page)

residency requirements in fair-cross-section contexts have, if anything, subtly implied that residency requirements are not required by the Sixth Amendment and seem to suggest that residency requirements are simply a permissible way of meeting the fair-cross-section requirement. The Ninth Circuit said as much in *United States v. Duncan*, where it upheld the federal residency requirement and further described the statutory provision as “an attempt to give effect to the requirement of the Sixth Amendment.”²¹⁸

3. Jury residency requirements in segregated America

There is, of course, nothing unconstitutional about a jury pool composed solely of district residents.²¹⁹ But residency is just one of several plausible ways to define a *community* of persons for jury selection. Residency may not even be the best way to define a “community” for jury selection, considering racial segregation in housing in the United States.²²⁰ For decades, jury scholars have criticized the racial imbalance in jury pools created by residential segregation.²²¹ In searching for solutions to racial imbalances, scholars overwhelmingly focus on the use of strike challenges to shape jury composition²²² and have largely ignored the problem of racially homogenous

1976); *United States v. Gast*, 457 F.2d 141, 142-43 (7th Cir. 1972). The Ninth Circuit rejected similar challenges on rational-basis review. See *United States v. Duncan*, 456 F.2d 1401, 1406 (9th Cir. 1972). The Fifth Circuit also upheld a Florida juror-residency requirement under rational-basis review. *Reed v. Wainwright*, 587 F.2d 260 app. at 264 (5th Cir. 1979) (per curiam).

218. 456 F.2d at 1406; see also *Wainwright*, 587 F.2d at 264 (holding that the residency requirement supported “the nexus between the jury and the community whose laws the jury is duty-bound to uphold”); *Reed v. State*, 292 So. 2d 7, 10 (Fla. 1974) (upholding a one-year residency requirement because having local jurors promoted efficient juror selection and administration, and ensured jurors could consider evidence in light of local circumstances).
219. Claims arguing that residency requirements are unconstitutional would likely be dead in the water given the doctrine’s tolerance for geographically imbalanced or arguably unrepresentative jury pools. See, e.g., *Johnson v. Norris*, 537 F.3d 840, 852 (8th Cir. 2008) (holding that a Black murder defendant’s Sixth Amendment right to a jury selected from a fair cross section of the community was not violated by a change of venue to a county that contained few Black residents).
220. See Aaron Williams & Armand Emamdjomeh, *America Is More Diverse than Ever—But Still Segregated*, WASH. POST (updated May 10, 2018), <https://perma.cc/LE6G-7XPF>.
221. See, e.g., King, *supra* note 200, at 717 & n.31 (“Traditional methods of jury selection . . . [offer] no guarantee that areas with a concentration of Blacks will be sampled . . .” (first alteration in original) (quoting Hiroshi Fukurai, Edgar W. Butler & Richard Krooth, *Cross-Sectional Jury Representation or Systematic Jury Representation? Simple Random and Cluster Sampling Strategies in Jury Selection*, 19 J. CRIM. JUST. 31, 33 (1991))).
222. See, e.g., Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1100 (1994); Leonard L. Cavise, *The Batson Doctrine: The Supreme Court’s Utter Failure to Meet the Challenge of*
footnote continued on next page

jury pools. Some scholars have argued for creatively dividing jury districts or reconfiguring the selection lottery process,²²³ but few have considered expanding the pool itself.²²⁴

The Supreme Court has emphasized time and again that these kinds of decisions about community boundaries are best made at the local level:

Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty.²²⁵

While federal courts must comply with JSSA's use of jury-pool residency requirements, states retain the discretion to define the appropriate community of persons as long as they comply with the Sixth Amendment's impartiality and fairness requirements. Expanding lists to include persons such as the employees within a district might diversify jury pools with precisely the persons who are already part of the community—persons who could find themselves in front of a jury in that district if they committed crimes closer to work than to home.

Despite frequent criticisms of the jury system, states have followed the federal courts and relied on residency in constructing their jury pools, even though they are—as these twelve tribes demonstrate—free to make different choices. By examining these twelve tribes' different interpretations of this single right, we see that tribal laws' differing interpretations provide reinventions or variations on even some of the oldest assumptions in public law jurisprudence.

Discrimination in Jury Selection, 1999 WIS. L. REV. 501, 505; Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 448-49 (1996); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 8-9 (1990); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1656 (1985).

223. See e.g., Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353, 389 (1999) (proposing that juries should be pooled from constructed subdistricts organized around “communities of interest”); Nancy J. King & G. Thomas Munsterman, *Stratified Juror Selection: Cross-Section by Design*, 79 JUDICATURE 273, 274 (1996) (discussing the possibility of strategic sampling to balance out jury-pool lists).

224. See José Felipé Anderson, *Catch Me If You Can! Resolving the Ethical Tragedies in the Brave New World of Jury Selection*, 32 NEW ENG. L. REV. 343, 398-99 (1998) (mentioning efforts to supplement voter rolls with DMV lists of residents in order to find eligible jurors only in passing).

225. *Brown v. Allen*, 344 U.S. 443, 474 (1953).

B. Separation-of-Powers Crisis in the Navajo Nation

Over twenty years ago, Adrian Vermeule suggested that American constitutional law scholars turn their attention to the “large (and largely neglected) body of information” available in “separation-of-powers cases decided by the state courts.”²²⁶ Arguing that the debate on federal separation-of-powers law was exhausted through repeated focus on the same few cases, he suggested that state cases are not only “worthy of study in their own right,” but also that “from the standpoint of federal constitutional law [they] are particularly valuable as data about comparative constitutional law, in particular comparative separation-of-powers law.”²²⁷ These arguments apply equally to tribal law. And this section presents a similar analysis of another American sovereign’s separation-of-powers law, specifically the Navajo Nation’s.

The Navajo Nation offers an illuminating comparison to similar moments of clash, crisis, and evolution between competing branches of the federal government. Some moments are eerily familiar, while others are strikingly different. Although the Navajo (or Diné) people, culture, and aspects of their contemporary politics—including some of the laws they use to this day—are very old, the Navajo Nation is relatively new, existing as a unified state for only the last century.²²⁸ And in this past century the Navajo Nation has undergone tremendous change.

The Navajo Nation is the largest Native nation in the United States, governing an area larger than West Virginia, and is the second most populous, with over 330,000 enrolled members as of 2010.²²⁹ Around half of Navajo tribal members live on the reservation, and another 10% live in nearby border towns.²³⁰ About 175,000 people live on the Navajo reservation,²³¹ around 90% of whom are Indian.²³²

The Navajo Nation is a traditional, isolated, and sparsely populated place.²³³ Navajo is still spoken by at least half of the population and nearly 20%

226. Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 358.

227. *Id.* at 358-59.

228. See WILKINS, *supra* note 145, at 18.

229. See *Navajo Facts*, *supra* note 3; TINA NORRIS, PAULA L. VINES & ELIZABETH M. HOEFFEL, U.S. CENSUS BUREAU, U.S. DEP’T OF COMM., C2010BR-10, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010 CENSUS BRIEFS 17 tbl.7 (2012).

230. NAVAJO EPIDEMIOLOGY CTR., NAVAJO DIV. OF HEALTH, NAVAJO POPULATION PROFILE: 2010 U.S. CENSUS 6 (2013), <https://perma.cc/KWC4-8Q7T>.

231. *Id.* at 36 tbl.1.6.

232. *Id.*

233. The Navajo Nation has only 6.33 people per square mile, compared to the average population density of 345 people per square mile in the United States. *Id.* at 21.

of households claim they do not speak English “very well.”²³⁴ Approximately 40% of the Navajo living on the reservation lack running water, and 10% live without electricity.²³⁵

Navajo Nation is one of the last places in Indian Country where you would expect to see the diffusion of broader American culture or Western legal ideas. And yet, the Navajo Nation has developed a three-branch system of government with a robust separation-of-powers jurisprudence.²³⁶ But it would be a mistake to assume the Navajo copied the United States. Navajo separation-of-powers law simultaneously mirrors and dismisses parts of federal law, but it is also rooted in its own, far-older legal tradition.²³⁷ After providing this legal history, this case study examines three clear structural takeaways regarding independent institutions and offers a lens for viewing Navajo jurisprudence that may be of interest to American constitutional law scholars.

1. The creation of a centralized Navajo government

Though the Diné people share a common culture, they did not have a unified government until about 100 years ago.²³⁸ They were previously organized into local political bands that, on occasion, sent leaders to gather together at a meeting called the Naachid.²³⁹ The United States primarily dealt with Navajo leaders on an individual basis, occasionally signing treaties with groups of leaders, until a violent era of U.S. military campaigns and oppression crippled the Naachid.²⁴⁰ The federal government’s Indian agent and the Secretary of the Interior asserted a tremendous amount of control over the weakened Navajo bands’ governments and even appointed or approved individual band leaders.²⁴¹

Then someone struck oil on Navajo land in 1922.²⁴² Due to an earlier treaty, the United States needed the approval of three-fourths of Navajo adult

234. See JULIE SIEBENS & TIFFANY JULIAN, U.S. CENSUS BUREAU, U.S. DEP’T OF COM., ACSBR/10-10, NATIVE NORTH AMERICAN LANGUAGES SPOKEN AT HOME IN THE UNITED STATES AND PUERTO RICO: 2006-2010, at 2 tbl.1 (2011), <https://perma.cc/7RJE-TF56>; ARIZ. RURAL POL’Y INST., N. ARIZ. UNIV., DEMOGRAPHIC ANALYSIS OF THE NAVAJO NATION USING 2010 CENSUS AND 2010 AMERICAN COMMUNITY SURVEY ESTIMATES app. C, at 59 (n.d.), <https://perma.cc/J8VY-5MQV>.

235. Laurel Morales, *For Many Navajos, Getting Hooked Up to The Power Grid Can Be Life-Changing*, NPR (May 29, 2019, 5:00 AM ET), <https://perma.cc/DA86-MNGE>.

236. See *infra* Part III.B.3.

237. See *infra* Part III.B.4.

238. WILKINS, *supra* note 145, at 5-9, 18.

239. *Id.* at 5-8.

240. *Id.* at 9, 15.

241. *Id.* at 15-16.

242. *Id.* at 18.

men to buy or lease any Navajo land.²⁴³ So the United States, not the Navajo, urgently needed a centralized Navajo government to negotiate with.²⁴⁴ The Secretary of the Interior began working on a centralized Navajo government.²⁴⁵ In 1935, the Navajo Nation rejected an IRA constitution by a narrow margin.²⁴⁶ Nevertheless, some Navajos and John Collier, the architect of the IRA, retained the desire for governmental reform—and a constitution. By 1936, the Navajo Nation began assembling delegates to draft a constitution.²⁴⁷

After a period of confusion and internal division following failed attempts to adopt a Navajo constitution, the Navajo constitutional delegates declared themselves the Tribal Council.²⁴⁸ The resulting “Rules for the Navajo Council,” which were promulgated on July 26, 1938, provided for a seventy-four-member Tribal Council composed of members elected from districts, apportioned by relative population, and a Council Chairman and Vice Chairman elected at large.²⁴⁹ This basic legislative body evolved into the Navajo government of today.²⁵⁰

The Navajo government changed and grew almost immediately in response to demands from its people. Navajo soldiers returning from World War II sparked a need for jobs and a desire for growth.²⁵¹ Coincidentally, the termination policies of the 1950s led to a massive transfer in responsibility and funding from the federal government to the Navajo Nation, as the federal government sought to dismantle its supervision of tribes.²⁵² In 1958, the Navajo Nation replaced federally administered courts with its own judicial branch whose judges have lifetime appointments.²⁵³

As the Navajo Nation central government expanded in size and strength throughout the 1950s and 1960s, it needed not only to function but also to reinforce its legitimacy. Having emerged from the shadow of heavy-handed

243. *Id.*

244. *Id.*

245. *Id.* at 18-20.

246. ROBERT W. YOUNG, A POLITICAL HISTORY OF THE NAVAJO TRIBE 86 (1978).

247. *Id.* at 93-94.

248. *Id.* at 93-94, 107-08.

249. *Id.* at 114-15.

250. See WILKINS, *supra* note 145, at 25.

251. YOUNG, *supra* note 246, at 120-22, 144-45.

252. *Id.* at 123, 144-45.

253. Ezra Rosser, *Displacing the Judiciary: Customary Law and the Threat of a Defensive Tribal Council*, 34 AM. INDIAN L. REV. 379, 384 (2010) (book review); YOUNG, *supra* note 246, at 148; WILKINS, *supra* note 145, at 141-47; *United States v. Wheeler*, 435 U.S. 313, 327 & n.45 (1978).

rule by another sovereign, the Nation had to prove its capacity for independent rule—rule that was truly Navajo rather than colonial.

2. The rise and fall of Chairman MacDonald

Peter MacDonald was very charismatic. And he had a good story. He was with the Navajo Code Talkers in World War II at age fifteen and later became an electrical engineer.²⁵⁴ When elected as Navajo Chairman in 1970, he became the first university-educated Chairman.²⁵⁵ MacDonald won a resounding victory despite corruption allegations tied to a previous Navajo government job, which he successfully portrayed as political smear campaigns.²⁵⁶ MacDonald wielded his instinctive understanding of group identities to appeal to Navajo voters and advocate for Navajo rights, often using an “us versus them” strategy.²⁵⁷ He ran on a bold platform of Navajo nationalism that emphasized traditionalism and self-sufficiency.²⁵⁸

Within a year of taking office, MacDonald began amassing power in an executive branch that had already grown rapidly in prior decades. The executive branch originally comprised only the Tribal Council Vice Chairman and the Tribal Council Chairman, the latter of which presided over council meetings, appointed legislative committee chairs and members, and served as the chair of certain particularly powerful committees.²⁵⁹ But as the Nation rapidly expanded in the 1950s, it built an administrative state.²⁶⁰ By 1959, four departments and three divisions collectively oversaw twenty-three other sections, and all reported to the Chairman.²⁶¹ MacDonald further expanded the Chairman’s power by creating more council standing committees and offices whose appointments he controlled.²⁶² MacDonald won two more terms and expanded his celebrity status, famously riding on and off Navajo land in a fleet of white limousines.²⁶³

254. Sandy Tolan, *Showdown at Window Rock*, N.Y. TIMES MAG. (Nov. 26, 1989), <https://perma.cc/R9RL-LCMD>.

255. WILKINS, *supra* note 145, at 26.

256. PETER IVERSON, *DINÉ: A HISTORY OF THE NAVAJOS* 246-47 (2002).

257. *Id.* at 249.

258. *Id.* at 248.

259. WILKINS, *supra* note 145, at 133-34.

260. *See* YOUNG, *supra* note 246, at 146-51, 160, 166.

261. *Id.* at 160-61.

262. WILKINS, *supra* note 145, at 26.

263. *See* IVERSON, *supra* note 256, at 285; Sandy Tolan, *For a Navajo Leader, Another Chance*, SANTA FE REP., Feb. 25, 1987, at 4; *see also* Tolan, *supra* note 254 (noting MacDonald’s increasing prominence in national Republican Party politics).

MacDonald's second and third terms were embroiled in controversy and a tension with the judiciary that led to MacDonald expanding his control over that branch as well. In 1977, he was tried in Navajo court for mismanaging federal funds, tax evasion, and mail fraud.²⁶⁴ A hung jury acquitted MacDonald, but four Tribal Council members sued to force MacDonald to pay for his defense personally, and they won in the Navajo Nation Appellate Court.²⁶⁵ In 1978, MacDonald created the Supreme Judicial Council, composed of five Tribal Council representatives, two retired appellate justices, and the current Navajo Nation Court of Appeals Chief Justice.²⁶⁶ All were appointed by the Chairman²⁶⁷ except for the Chief Justice, who could only vote in the event of a tie.²⁶⁸ The Supreme Judicial Council had jurisdiction to review only those decisions of the Navajo Nation Courts of Appeals that invalidated Tribal Council resolutions.²⁶⁹

In 1982, Peterson Zah challenged MacDonald's twelve-year "stranglehold" on the Chairmanship, running on a promise of partnering with the Council, reforming tribal government, and prioritizing education.²⁷⁰ Similarly college-educated and charismatic, Zah attacked MacDonald, called out the failure of MacDonald's Navajo nationalism to produce its promised results, and highlighted that ideology's role in alienating the neighboring Hopi Tribe, which had still not signed an important land agreement.²⁷¹ Zah promised an end to the "imperial" executive and promised a new tone in the Chairman's office.²⁷²

After Zah won the 1982 election by 5,000 votes,²⁷³ he immediately cut his own salary and ordered sedans to replace MacDonald's famous fleet of white limousines.²⁷⁴ In 1985, the Nation adopted several government reforms, including the Judicial Reform Act, which revamped and strengthened the

264. WILKINS, *supra* note 145, at 26; IVERSON, *supra* note 256, at 253.

265. IVERSON, *supra* note 256, at 253.

266. *Id.*; WILKINS, *supra* note 145, at 26; *see also* Rosser, *supra* note 253, at 384.

267. IVERSON, *supra* note 256, at 253.

268. RAYMOND D. AUSTIN, *NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE* 31 (2009).

269. *Id.*

270. WILKINS, *supra* note 145, at 26-27.

271. IVERSON, *supra* note 256, at 271-72.

272. *Id.*

273. *Id.* at 272.

274. *Id.* at 285.

judiciary, including creating a Navajo Supreme Court.²⁷⁵ But just as Zah's term neared completion, MacDonald announced he was running again.²⁷⁶

Zah had also failed to reach a deal with the Hopis, and MacDonald and his supporters successfully portrayed Zah's outreach efforts as naïve and weak.²⁷⁷ MacDonald, charismatic and beloved as ever, campaigned on bold promises, like a home for every veteran, job growth, and a college scholarship for all high school graduates.²⁷⁸ MacDonald won the election by a hair, with 50.47% of the vote.²⁷⁹

MacDonald reassumed the Chairmanship in 1987 in grandiose fashion, adorning his executive suite with turquoise inlay tiling and gold-plated toilet fixtures to signify his power.²⁸⁰ MacDonald's short term in office was also filled with corruption. Money rolled in through both corruption payments and illegal campaign contributions, which directly supported his personal lifestyle.²⁸¹

MacDonald's "us versus them" politics had also changed by this time in his political career to a "me and us versus them" mentality.²⁸² He would consistently dismiss criticisms of him as anti-Navajo and often cast things in black or white, with him or against him, with no middle ground.²⁸³ When new allegations of wrongdoing would arise, he continued to say they were smear campaigns from "sore losers" and dismiss media reports of misconduct as biased or attempts to divide the Navajo people.²⁸⁴

One month after retaking the Chairmanship, MacDonald also sought to control the narratives about him by closing the tribe's newspaper, the *Navajo Times Today*.²⁸⁵ Like 95% of tribal newspapers, it was owned by the tribal government at the time.²⁸⁶ But unlike many tribal newspapers, which more so

275. WILKINS, *supra* note 145, at 27; Navajo Nation Tribal Council Res. CD-94-85, § 14 (1985) (codified as amended at NAVAJO NATION CODE ANN. tit. 7, § 201(b) (2010)).

276. *See* WILKINS, *supra* note 145, at 27.

277. IVERSON, *supra* note 256, at 286.

278. Tolan, *supra* note 254.

279. WILKINS, *supra* note 145, at 27.

280. SPECIAL COMM. ON INVESTIGATIONS OF THE S. SELECT COMM. ON INDIAN AFFS., FINAL REPORT AND LEGISLATIVE RECOMMENDATIONS, S. REP. NO. 101-216, at 183-88 (1989).

281. *Id.*

282. IVERSON, *supra* note 256, at 250.

283. *Id.*

284. *Id.* at 293. This view of politics and the media is also apparent in MacDonald's own account of his time as Chairman. *See* PETER MACDONALD & TED SCHWARZ, *THE LAST WARRIOR: PETER MACDONALD AND THE NAVAJO NATION* 252, 288 (Herman J. Viola ed., 1993).

285. WILKINS, *supra* note 145, at 27-28; IVERSON, *supra* note 256, at 287-89.

286. WILKINS, *supra* note 145, at 173.

resembled newsletters, the *Navajo Times Today* exercised journalistic autonomy and criticized the government that owned it.²⁸⁷ When MacDonald won, the paper lambasted MacDonald's "lavish inauguration ceremony."²⁸⁸ MacDonald closed the paper, but many reporters moved to nearby publications and continued to report on Navajo politics.²⁸⁹ One such reporter unearthed a corruption scandal involving the sale of ranch land that ultimately brought MacDonald down.²⁹⁰

Before retaking office, MacDonald had arranged to personally profit from a mark-up on a sale of a large ranch, which he would arrange for Navajo Nation to buy after he took office.²⁹¹ After a newspaper article called attention to the suspicious sale, more and more information started coming out about the corrupt deal. A U.S. Senate inquiry revealed the full scope of MacDonald's corruption.²⁹² Only once the full scope of the corruption finally came to light—after MacDonald's own son testified under immunity before the Senate investigators²⁹³—did enough members of the Tribal Council finally turn on MacDonald.

On February 17, 1989, the Tribal Council voted 49–13 to place MacDonald on involuntary administrative leave.²⁹⁴ MacDonald challenged the suspension in tribal court, strategically filing his suit in the district court where his brother-in-law was the presiding judge.²⁹⁵ His brother-in-law entered an order in MacDonald's favor, leading to the first real test for the newly formed Navajo Nation Supreme Court.²⁹⁶ On March 23, 1989, the Supreme Court issued the first in a series of rulings that would solidify both its power and its independence in the Navajo Nation. The Court dispensed with MacDonald's case on immunity grounds and made clear that the nepotism was a violation of the Nation's judicial-conduct rules and that the district judge had a duty to disqualify himself or else a "writ of prohibition" would issue.²⁹⁷

287. *See id.* at 173-74; IVERSON, *supra* note 256, at 288-89.

288. IVERSON, *supra* note 256, at 289.

289. Tolan, *supra* note 254; WILKINS, *supra* note 145, at 174.

290. Tolan, *supra* note 254 (explaining how Betty Reid, a former *Navajo Times Today* reporter who had closely covered the 1986 election, discovered the fraudulent sale).

291. SPECIAL COMM. ON INVESTIGATIONS OF THE S. SELECT COMM. ON INDIAN AFFS., FINAL REPORT AND LEGISLATIVE RECOMMENDATIONS, S. REP. NO. 101-216, at 184-85 (1989).

292. *See id.* at 195-97.

293. *Id.* at 196; Tolan, *supra* note 254.

294. S. REP. NO. 101-216, at 197; IVERSON, *supra* note 256, at 294.

295. *See* Plummer v. Brown, 6 Navajo Rptr. 88, 88, 93 (1989) (No. A-CV-03-89), 1989 Navajo Sup. LEXIS 7, at *1-2, *13.

296. S. REP. NO. 101-216, at 197.

297. Plummer, 6 Navajo Rptr. at 93-94, 1989 Navajo Sup. LEXIS 7, at *12-13.

The tribal district judge assigned to MacDonald's newly filed case, now cured of the immunity issues, granted a temporary restraining order affirming the Tribal Council's decision to suspend MacDonald.²⁹⁸ In response, MacDonald produced a letter—backdated to before the assignment of the case to that judge—that purported, under MacDonald's authority as Chairman, to remove the judge and to refuse his permanent appointment.²⁹⁹ On April 13, 1989, the Navajo Nation Supreme Court slapped down MacDonald's attempt to undermine the judiciary by removing judges without a recommendation for removal from the Judiciary Committee—the process specified under the Navajo Tribal Code.³⁰⁰ Moreover, it upheld the Council's power to place MacDonald on involuntary administrative leave, because the Council and the Chairman came from the same font of power, and thus the greater body of the Council could limit those powers granted to the Chairman.³⁰¹

Even after he was removed from office, MacDonald called the charges “hogwash,” blaming them on jealous critics willing to “spend[] millions of dollars in an effort to crucify [him]” and to “silence people like [him] who speak out against those who are trying to erode tribal sovereignty.”³⁰² In spite of the evidence, MacDonald's supporters continued to believe and fight for him. His core base included very traditional Navajo people who felt that he understood the old ways more than other leaders and trusted him to preserve the herding lifestyle, which was becoming harder to maintain.³⁰³ One religious leader told a reporter at the time,

Some ask me . . . “Why are you supporting Chairman MacDonald? He's a liar and a thief.” And I say to them, “I know MacDonald. He has done a lot for me.” And they say, “Suppose they put MacDonald in jail?” And I say to them, “If they put him in jail, I will follow him to jail.”³⁰⁴

Indeed, some of MacDonald's supporters would do just that. In March 1989, the Tribal Council appointed an interim Chairman and Vice Chairman, but MacDonald's supporters continued to believe that the government was wrongfully stolen.³⁰⁵ Some of MacDonald's most ardent supporters—including

298. See *MacDonald v. Yazzie*, No. A-CV-08-89, 1989 Navajo Sup. LEXIS 1, at *1 (Mar. 24, 1989); *MACDONALD & SCHWARTZ*, *supra* note 284, at 334.

299. *Navajo Nation v. MacDonald*, 6 Navajo Rptr. 105, 110 (1989) (Nos. A-CV-13-89 & WR-CV-99-89), 1989 Navajo Sup. LEXIS 5, at *13-14.

300. *Id.* at 106, 1989 Navajo Sup. LEXIS 5, at *2-3.

301. *Id.* at 115, 1989 Navajo Sup. LEXIS 5, at *25-26.

302. Tolan, *supra* note 254 (quoting MacDonald).

303. See *IVERSON*, *supra* note 256, at 248; Tolan, *supra* note 254.

304. Tolan, *supra* note 254 (quoting medicine man Dan Chee).

305. *Id.*; *WILKINS*, *supra* note 145, at 222; *MACDONALD & SCHWARTZ*, *supra* note 284, at 333.

some Council members³⁰⁶—physically occupied the Chairman’s office in protest throughout March and April.³⁰⁷ Things continued to escalate until the Navajo police forcibly removed the MacDonald supporters.³⁰⁸

On July 19, MacDonald returned to Navajo carrying a letter purportedly from the U.S. Attorney’s office, declaring that he had been cleared of all charges.³⁰⁹ The next day, MacDonald issued an “executive order” that reinstated his police chief, directed the police chief to “take all action necessary” to rehire the MacDonald-affiliated law-enforcement personnel that had been fired following his removal, and demanded those personnel “assist with the orderly restoration and transition of the administration of the Navajo Government” that very day.³¹⁰ That evening, over 250 MacDonald followers, armed with clubs and lumber, tried to forcibly retake his office.³¹¹ The crowd was also armed with unsigned documents on Navajo Nation stationary authorizing “Citizen’s Arrest” for “Criminal Conspiracy to illegally overthrow the Navajo Tribal government.”³¹² The crowd handcuffed a Navajo police officer and began beating him, at which point another Navajo police officer rushed to his aid.³¹³ When a demonstrator grabbed a weapon and fired at the officer, the Navajo police opened fire, killing that demonstrator and one other and wounding nine.³¹⁴

In the winter of 1989, the Tribal Council set about remedying the structural problems that allowed MacDonald’s rise to power. The Council passed legislation now commonly known as the “Title II Amendments,” which took effect on April 1, 1990.³¹⁵ The law explicitly stated that “[r]ecent controversy . . . demonstrated that the present Navajo Nation Government structure allows too much centralized power without real checks on the exercise of power . . . [and] that this deficiency in the government structure allows for, invites and has resulted in the abuse of power.”³¹⁶ The Nation

306. Tolan, *supra* note 254; MACDONALD & SCHWARTZ, *supra* note 284, at 334.

307. SPECIAL COMM. ON INVESTIGATIONS OF THE S. SELECT COMM. ON INDIAN AFFS., FINAL REPORT AND LEGISLATIVE RECOMMENDATIONS, S. REP. NO. 101-216, at 197, 210 n.68 (1989) (collecting citations to contemporaneous news sources).

308. *Id.*; IVERSON, *supra* note 256, at 294.

309. *See* S. REP. NO. 101-216, at 197.

310. IVERSON, *supra* note 256, at 295.

311. *Id.*; S. REP. NO. 101-216, at 198.

312. IVERSON, *supra* note 256, at 295-96.

313. S. REP. NO. 101-216, at 198.

314. *Id.* at 198, 210 n.69 (collecting citations to contemporaneous news sources).

315. Navajo Nation Tribal Council Res. CD-68-89 (1989) (codified as amended at NAVAJO NATION CODE ANN. tit. 2 (2010)) [hereinafter Navajo Title II Amendments].

316. *Id.*; Charles Morris, Special Feature, *Navajo Nation Council Reforms*, 16 AM. INDIAN L. REV. 613, 613 (1991).

needed a “definition of power and separation of legislative and executive functions.”³¹⁷

The Title II Amendments transformed the Chairman and Vice Chairman into the President and Vice President, now heads of a separate executive branch.³¹⁸ The reform also created the position of Speaker of the Council to disperse some of the Chairman’s legislative responsibilities and create a counterweight to check executive power.³¹⁹ The Speaker presides over the Council and makes legislative-committee appointments.³²⁰ Perhaps most importantly, the legislation separated the powers of the legislative and executive branches.³²¹ The Title II Amendments are widely regarded as a necessary curtailment of executive powers, enacted in direct response to MacDonald’s rise and hold on power.³²²

In the end, the law finally caught up with MacDonald. Over the next few years, he was convicted, along with various allies and followers, on federal charges related to the riot and the corruption.³²³ MacDonald was convicted of several counts of “bribery, instigating a riot, fraud, racketeering, ethics violations, extortion, and conspiracy,” and he was sentenced to fourteen years in federal prison.³²⁴ And in the newly invigorated Navajo courts, MacDonald was tried and convicted of forty-one violations of Navajo Nation criminal law, including bribery, kickbacks, and use of office for personal gain.³²⁵

3. Institutional independence

There is more to MacDonald’s rise, hold on power, and fall. A full history and analysis would take far more than an article, but even this brief account of

317. Navajo Title II Amendments, *supra* note 315; Morris, *supra* note 316, at 613.

318. Navajo Title II Amendments, *supra* note 315; WILKINS, *supra* note 145, at 30.

319. Navajo Title II Amendments, *supra* note 315; WILKINS, *supra* note 145, at 30.

320. Navajo Title II Amendments, *supra* note 315; WILKINS, *supra* note 145, at 30.

321. WILKINS, *supra* note 145, at 30.

322. See, e.g., Off. of Navajo Gov’t Dev. & Comm’n on Navajo Gov’t Dev., PowerPoint Presentation 12 (2012), <https://perma.cc/L73A-YRFG> (describing the 1989 changes as instituting a “Three Branch Government” because there was previously “[t]oo much power vested in [the] Chairman”); Off. of the Navajo Nation President & Vice President v. Navajo Nation Council, 9 Am. Tribal Law 46, 62 (Navajo 2010) (No. SC-CV-02-10), 2010 Navajo Sup. LEXIS 15, at *31-33.

323. *Former Navajo Leader Convicted*, N.Y. TIMES (Nov. 15, 1992), <https://perma.cc/G5LP-EX5Y>.

324. WILKINS, *supra* note 145, at 29; see also Bill Donovan, *The Riot of ‘89*, NAVAJO TIMES (July 16, 2009), <https://perma.cc/5SLW-3B4W>.

325. Navajo Nation v. MacDonald, 6 Navajo Rptr. 432, 432 (1991) (No. A-CR-09-90), 1991 Navajo Sup. LEXIS 18, at *1.

the Navajo Nation offers important lessons about government structure and independent institutions.

First, appointment powers were critical to MacDonald's rise and hold on power. The power imbalance was caused not by an independently powerful executive but instead by his ability to wield power *over the other branches* such that he was insulated from criticism or accountability. MacDonald commanded loyalty among the ranks of the other branches of government by creating bodies he could control and appointing their members. The other branches' inability, unwillingness, or manifest lack of desire to rein in a corrupt executive "spurred the 1989 government reforms that resulted in the present three-branch government with checks and balances."³²⁶

The MacDonald story and subsequent reforms demonstrate the importance of functional checks within separation-of-powers law.³²⁷ In interbranch appointments, the power to check another branch through appointment and removal can easily slide into branches losing precisely the independence needed to hold one another accountable.³²⁸ As Madison said, "each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others."³²⁹

Appointment cases are, of course, familiar in separation-of-powers jurisprudence in federal constitutional law, but the primary focus of these cases is preventing limits on interbranch appointments from interfering with the ability of a branch (usually the executive) to effectively and efficiently do its job.³³⁰ The Navajo experience, by contrast, highlights how interbranch appointments not only frustrate a branch's cohesiveness but also can facilitate corruption. While concern with this kind of cross-branch patronage is explicitly built into the Constitution in the Incompatibility Clause, it is not as prominent a concern within separation-of-powers jurisprudence, although

326. See AUSTIN, *supra* note 268, at 17 (describing the desire for governmental accountability).

327. See THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) ("[T]he constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights.").

328. See Victoria Nourse, *Toward a "Due Foundation" for the Separation of Powers: The Federalist Papers as Political Narrative*, 74 TEX. L. REV. 447, 469 (1996) (describing how the Founding-era Virginia Assembly obtained control of the judiciary and executive "by manipulating the appointment, removal, and salary powers of the members of other departments").

329. THE FEDERALIST NO. 51 (James Madison), *supra* note 327, at 321.

330. See *Myers v. United States*, 272 U.S. 52, 161 (1926); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 625-26 (1935); *Morrison v. Olson*, 487 U.S. 654, 691 (1988); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 513-14 (2010).

some scholars have suggested it ought to be.³³¹ The Navajo example of executive aggrandizement through the appointment powers affirms what scholars have said about the need to recenter questions of branch independence as a structural check against corruption.³³² Learning from the MacDonald example might help us avoid an United States President MacDonald holding onto power through similar aggrandizement, whereby other branches come to fear his disfavor and so avoid criticizing him.

The second observation is that democracy was not a good check on a runaway executive. The Navajo people continued to vote for MacDonald despite corruption allegations from the beginning to end of his tenure. In fact, many people remained enthralled with MacDonald long after his corruption seemed objectively indefensible. MacDonald won the presidential primary in 1990 and had to be disqualified by the Navajo Board of Election Supervisors two days after he was convicted in Navajo courts.³³³ Of course, none of this should surprise scholars, who have long identified populist movements and charismatic leaders like MacDonald as threats to democracy.³³⁴ Even after governmental reforms, MacDonald's core supporters remained a powerful and well-recognized voting bloc while MacDonald sat in prison.³³⁵

Finally, the institutions that eventually brought MacDonald down were an independent press and the Navajo Supreme Court. Though MacDonald closed the only Navajo-specific press, the Nation still benefited from the freedoms afforded to nearby local papers that covered the Nation, employed Navajo writers, and unearthed MacDonald's corruption. The press served as an

331. See Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1056-65 (1994) (discussing the history of the Incompatibility Clause).

332. See Nourse, *supra* note 328, at 512 (explaining that congressional appointment of agency heads “permits one department—the Congress—to exercise a political influence—the influence of patronage—over the members of another department”); Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 669-70, 700 (2000) (critiquing presidential use of agency appointments to install personal loyalists and endorsing institutional constraints on presidential appointment of judges); cf. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 117 (1994) (suggesting that, under *Morrison*, “cross-branch appointments should be permitted only in the narrowest circumstances” if presidential appointment itself is a “conflict of interest” or lacks an important political check).

333. *MacDonald v. Redhouse*, 6 Navajo Rptr. 342, 342 (1991) (No. A-CV-54-90), 1991 Navajo Sup. LEXIS 11, at *1-2.

334. MacDonald fits the mold of Ginsburg and Huq's “charismatic populist” leader, who expounds a privileged and exclusive claim to represent the people no matter what other institutions say, and who engages in other antidemocratic behaviors such as suppressing the media. See TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* 78, 109 (2018).

335. Scott C. Russell & Eric Henderson, *The 1994 Navajo Presidential Election: Analysis of the Election and Results of an Exit Poll*, AM. INDIAN Q., Spring 1999, at 23, 32.

important independent institution, not because they convinced the people, but because their reporting enabled institutions outside MacDonald's reach to bring him to justice: the U.S. Senate and a reformed Navajo court system.

The Navajo Supreme Court that decided the key cases against MacDonald did not include MacDonald appointees. Chief Justice Tso and Associate Justices Bluehorse and Austin were all appointed in 1985 following recommendation by the Tribal Council Judiciary Committee and confirmation by Zah.³³⁶ Though the Navajo judiciary had demonstrated independence and power prior to the MacDonald scandal,³³⁷ the creation of the Navajo Supreme Court under Zah's brief term significantly strengthened the judicial branch and gave it enough independence to affirm the Council's decision to promptly remove MacDonald from power by placing him on leave.³³⁸ Reflecting on these key moments of Navajo Supreme Court strength, former President Zah said that, when reconstructing and strengthening the Navajo Court system, the reformers "thought about that," and it was precisely their hope that the Supreme Court could assume this role.³³⁹

4. Navajo formalism, functionalism, and Fundamental Law

The MacDonald years were only the first of many instances of interbranch conflict that solidified the power and prominence of the Navajo Supreme Court and developed its separation-of-powers jurisprudence. For example, in 2008, President Joe Shirley introduced popular ballot initiatives designed to reduce the size of the Tribal Council from eighty-eight to twenty-four and to create a presidential line-item veto.³⁴⁰ Both initiatives passed with a 64% majority vote.³⁴¹ But the Council refused to accept a reduction in its size, instead invoking a provision of the Navajo Nation Code that the Council argued required a majority vote of the *registered voters* in each of the voting

336. See generally NAVAJO NATION CODE ANN. tit. II, art. 9, § 574(C) (2010); *Navajo Nation Supreme Court Justices*, SUP. CT. NAVAJO NATION, <https://perma.cc/SRV6-35H7> (archived Sept. 12, 2020).

337. See *George v. Navajo Indian Tribe*, 2 Navajo Rptr. 1, 5-6 (1979), 1979 Navajo App. LEXIS 31, at *5 (invalidating a tribal code provision excluding non-Indians from jury service); *Yazzie v. Navajo Tribal Bd. of Election Supervisors*, 1 Navajo Rptr. 213, 217-18 (1978), 1978 Navajo App. LEXIS 17, at *4-5 (per curiam) (rejecting the Tribal Council's apportionment plan in favor of the district court's proposal).

338. See WILKINS, *supra* note 145, at 29.

339. PETERSON ZAH & PETER IVERSON, WE WILL SECURE OUR FUTURE: EMPOWERING THE NAVAJO NATION 147 (2012).

340. WILKINS, *supra* note 145, at xx, 230.

341. *Id.* at 231.

chapters to change the government's structure.³⁴² This dispute between the people, the executive, and the legislature ended up in the Navajo Supreme Court. In the unanimous opinion in *Nelson v. Initiative Committee to Reduce Navajo Nation Council*, the Navajo Supreme Court called that reading of the Navajo Nation Code pure legislative overreach and a practical impossibility, instead interpreting the Code as allowing for the Navajo people to amend their government structure by a simple majority of voters who participated in a given election.³⁴³ While the legislature could limit itself, it could not "limit the Diné when they are attempting to address the structure of their governing system."³⁴⁴

The rise of the Navajo Supreme Court's prominence was also bolstered by the 2002 passage of *Diné bi beenahaz'áanii*, or "Fundamental Law,"³⁴⁵ which officially codified precolonial legal concepts and further reinforced their supremacy jurisprudence.³⁴⁶ Navajo Fundamental Law is broken down into four categories: *Diyin bitsaqdęę' beehaz'áanii'* (Traditional Law), *Diyin Diné'ę bitsaqdęę' beehaz'áanii* (Customary Law), *Nahasdzáán dóó Yádilhil bitsaqdęę beehaz'áanii* (Natural Law), and *Diyin Nohookáá Diné bi beehaz'áanii* (Common Law).³⁴⁷ The Navajo Supreme Court is the final interpreter of Navajo Fundamental Law, as the following case makes abundantly clear.

During the same period as the ballot initiative dispute, President Shirley was accused of corrupt business dealings and was placed on administrative leave by the Tribal Council.³⁴⁸ Shirley sued for reinstatement, and while his case was on appeal, the Tribal Council sought to redefine Navajo Fundamental Law to include Tribal Council enactments, which would make their acts—including removing Shirley—unreviewable by the Navajo courts.³⁴⁹ The decision excerpt below, from the Supreme Court's resolution of Shirley's appeal in *Navajo Nation President v. Navajo Nation Council*, was not only an opportunity for the Navajo Supreme Court to strike down the Council's attempt to redefine Navajo Fundamental Law, but also an opportunity to explain Navajo separation-of-powers law as flowing not from the explicit

342. *Nelson v. Initiative Comm. to Reduce Navajo Nation Council*, 8 Am. Tribal Law 407, 418 (Navajo 2010) (No. SC-CV-03-10), 2010 Navajo Sup. LEXIS 17, at *26-28.

343. *See id.* at 409, 418-19, 2010 Navajo Sup. LEXIS 17, at *1, *26-28.

344. *Id.* at 418, 2010 Navajo Sup. LEXIS 17, at *25-26.

345. NAVAJO NATION CODE ANN. tit. 1, §§ 201-206 (2014).

346. WILKINS, *supra* note 145, at xix-xx, 32.

347. NAVAJO NATION CODE ANN. tit. 1, § 202.

348. *Off. of the Navajo Nation President v. Navajo Nation Council*, 9 Am. Tribal Law 46, 52 (Navajo 2010) (No. SC-CV-02-10), 2010 Navajo Sup. LEXIS 15, at *1-2.

349. *Id.* at 52, 57, 2010 Navajo Sup. LEXIS 15, at *2, *17.

structures or enactments of government, but from the lessons of history and life as embodied in Navajo Fundamental Law.

This appeal concerns a clash between the Executive and Legislative Branches of our government. . . .

[T]he Navajo People have long resisted the imposition of a written Constitution in the mold of the U.S. Constitution. The notion of a piece of writing, even if popularly “enacted” to serve as the higher law, has been anathema to our People for whom *Diné bi beenahaz’áanii*, the Fundamental Laws, are immutable as given to the *Diné* by *Nohookáá Diné’é Diyinii*, the Holy Ones. . . .

We have said before that participatory democracy does not come from the non-Navajo nor does it come from the Council. It comes from a deeper, more profound system of governance: the Navajo People’s traditional communal governance, rooted in the *Diné Life Way*. . . .

This present system was established in 1989 . . . in response to turmoil in the Navajo Nation government (Title II Amendments). At the heart of the turmoil were allegations of self-dealing, fraud, and receipt of kick-backs involving the Council leadership of the Navajo Nation. . . .

The Council made a decision that the Navajo Nation government cannot have concentrated power, and the government was thereby split into branches. . . .

A shared leadership in which each leader performs separate functions in a proper way for the public good is an intrinsic part of our Navajo history. “Separation of functions is a concept that is so deeply-rooted in Navajo culture that it is accepted without question. It is essential to maintaining balance and harmony.” [Navajo Nation Code] §§ 200 *et seq.* acknowledges that our Fundamental Law is the premise for our principles of separation of powers and checks and balances. . . .

[The Court then recounted a Navajo story about how each of four proposed leaders, wolf protector *Mq’iitsoh*, nurturing bluebird *Dólii*, survivalist mountain lion *Náshdóǫ’tsoh*, and spiritual honorable hummingbird *Dah yitííhí*, had different traits their proponents each argued were more valuable, but in the end, each demonstrated their unique value so were all made leaders to work together.] We re-tell this story to emphasize that, since beyond recorded time, the People have understood the separation of functions of leaders. . . .

We have seen in the last few decades what occurs when, instead of thinking of the best interest of the People, one of these components tries to assume a superior position. Our experience in 1989 and our present experience in 2010 shows the extremes of what may occur. . . .

[W]e reject Appellants’ argument that there is no separation of powers on the Navajo Nation.³⁵⁰

350. *Off. of the Navajo Nation President*, 9 Am. Tribal Law at 52, 61-64, 66, 2010 Navajo Sup. LEXIS 15, at *1, *28-29, *31-39, *43 (citation omitted) (quoting *Tuba City Jud. Dist. of the Navajo Nation v. Sloan*, 3 Am. Tribal Law 508, 511 (Navajo 2001) (No. SC-CV-57-97), 2001 Navajo Sup. LEXIS 12, at *6).

The Navajo Supreme Court views its separation-of-powers law consciously in the shadow of the MacDonald years. It also is quite clear that primary guidance on the separation of powers does not come from any written law that delineates boundaries—including the Title II Amendments—but from Navajo Fundamental Law. These two atextual sources of legal guidance—the Nation’s recent experience with government dysfunction under MacDonald and Navajo Fundamental Law—are discussed together. The Navajo Supreme Court relies on both to demonstrate a similar lesson about the values of separate coordinated governance and the dangers of power imbalances.

The context of corruption paired with unwritten guidance as supreme law provides an insight relevant to separation-of-powers debates in American federal constitutional interpretation. The U.S. Supreme Court’s separation-of-powers jurisprudence—and the academics who write about it—sort themselves as formalists and functionalists. Formalists advocate an “approach to separation-of-powers issues grounded in the perceived necessity of maintaining three distinct branches of government (and consequently appearing to draw rather sharp boundaries)”³⁵¹ as laid out in the Constitution, which delegates specific powers to each branch.³⁵² In contrast, functionalists argue for an “approach that stresses [the] core function and relationship” between the branches but otherwise “permits a good deal of flexibility when these attributes are not threatened.”³⁵³ Functionalists believe the Constitution gives each branch a clear purpose but otherwise remains ambiguous enough to allow for flexibility in service of an efficient and functional government.³⁵⁴

It would seem that the Navajo, without a written constitution and with only a basic division of powers set out in Title II, must have a functionalist jurisprudence, since there is no document upon which to base a rigid formalism.³⁵⁵ And yet cases like *Nelson* and *Navajo Nation President* are reminiscent of formalist U.S. Supreme Court decisions striking, if not slapping, down legislation as a clear overreach of enumerated powers.³⁵⁶ There is a general assumption that a functionalist court will *underpolice* the separation of powers.³⁵⁷ We might view the Navajo Supreme Court as a functionalist court

351. Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987).

352. *INS v. Chadha*, 462 U.S. 919, 959 (1983) (“[T]he exercise of power [is] subject to the carefully crafted restraints spelled out in the Constitution.”); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1943 (2011).

353. Strauss, *supra* note 351, at 489.

354. See Manning, *supra* note 352, at 1943.

355. Cf. *Chadha*, 462 U.S. at 951, 958 (stating that “carefully defined limits on the power of each Branch” come from the text of the Constitution).

356. See, e.g., *id.* at 956-59; *Bowsher v. Synar*, 478 U.S. 714, 722-23 (1986).

357. Vermeule, *supra* note 226, at 370.

that bucks this assumption.³⁵⁸ The Navajo Supreme Court is—much like the U.S. Supreme Court—policing relatively strict boundaries between its branches and amassing a tremendous amount of power in the process.

The Navajo Supreme Court's emphasis of Navajo traditions and the MacDonald years also suggests a functionalist rationale for policing firm boundaries: It supports the government's legitimacy.³⁵⁹ Legitimacy is a functionalist rationale for *overprotecting* the boundaries between governmental powers, especially necessary for a new government still proving itself. Moments of interbranch conflict served as opportunities for the Navajo people to judge their new institutions.³⁶⁰ Navajo institutions had to prove themselves to a people deeply skeptical of centralized power, especially power initially imposed by the United States. Following a government crisis and subsequent reforms to government structure, the Navajo courts illustrate one way that legitimacy concerns can shape judicial decisionmaking.

The Navajo Supreme Court's decisions not only illustrate how legitimacy concerns shape judicial decisionmaking, but they are also refreshingly clear in owning up to it. The Navajo Supreme Court acknowledges the elephant in the room: the risk that the people could lose faith in government. While the U.S. Supreme Court may also be motivated by this concern, it does not so explicitly admit it. In *United States v. Nixon*, for example, the Court noted that "public confidence" in the entire "criminal justice" system was at stake, but it declined to comment beyond that on the broader concerns with public confidence in government overall in light of the Nixon corruption scandals.³⁶¹ And in *Bush v. Gore*, the Court resolved a closely contested presidential election with a remarkably flat tone until the end of the opinion, where it noted that despite "vital limits on judicial authority" and "admiration" for democracy, the Court may at times be forced to assume its "unsought responsibility" to resolve constitutional issues.³⁶² The legitimacy elephant is present yet largely unaddressed in U.S. Supreme Court opinions.

The contrast is unsurprising given that the two supreme courts have different relationships to their histories. There is a third element of Navajo

358. Vermeule found that this assumption was likewise not borne out based on his review of state separation-of-powers cases, at least those concerning state judicial power. *See id.*

359. I use the "intuitive" definition of legitimacy recently referred to by Tara Leigh Grove, who described legitimate governments or institutions as those deemed "worthy of respect or obedience." Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2240, 2244 (2019) (book review).

360. *See* David Wilkins, *Governance Within the Navajo Nation: Have Democratic Traditions Taken Hold?*, 17 WICAZO A REV., Spring 2002, at 91, 94, 114-15.

361. 418 U.S. 683, 709 (1974).

362. 531 U.S. 98, 111 (2000) (per curiam).

separation-of-powers jurisprudence that does not fit into functionalism or formalism: Navajo Fundamental Law's relationship with the lessons of recent Navajo history. Navajo Fundamental Law, as described and used by the Navajo Supreme Court, is a different kind of source for decisionmaking. Both formalism and functionalism are tied to the structure of a government and its committed boundaries or evolving needs, respectively.

Navajo Fundamental Law, however, is more closely described as fundamental principles that predate existing government structures and purport to offer insight for Navajo governments that may change and look quite different in another 100 years. Navajo stories preserve broad and timeless lessons. Navajo recent history, including the MacDonald years, echo or become such stories. They serve as real evidence for the Navajo Supreme Court of the necessity of its Fundamental Law principles and the consequences of failing to abide by them. Rather than representing a failure of their government, moments like the MacDonald years are seen as a lesson, part of the growth of the Nation, not in tension with its founding.³⁶³

The Navajo Nation may not be the only place where American law is built upon underlying fundamental principles, whether explicitly or implicitly. There may be similar parts of our legal doctrine that are more than rhetoric or mythology but that carry real fundamental meaning for our law.

C. Citizen Potawatomi Nation's Radical Redistricting

The word "Citizen" in Citizen Potawatomi Nation means something. The tribe was created by a political choice to split off from the other Potawatomi. The Citizen Potawatomi was once part of a confederation of tribes known as the N'swi Ish-Ko-Day-Kawn Anishinabeg O'dish Ko-Day-Kawn.³⁶⁴ This confederacy comprised the Nishnabé (or Anishnabek) Nations of the Potawatomi, Ojibwe, and Odawa, and it controlled nearly 90 million acres in the Great Lakes region of the United States.³⁶⁵ But by the mid-nineteenth

363. See, e.g., *Off. of the Navajo Nation President v. Navajo Nation Council*, 9 Am. Tribal Law 46, 64-65 (Navajo 2010) (No. SC-CV-02-10), 2010 Navajo Sup. LEXIS 15, at *38-40 ("Fundamental Law was established that there should not be concentrated power. . . . We must remind ourselves of this history to come to terms with the modern challenges that face us as a People. Our government, run by human beings, our relatives, is susceptible to internal decay and imperfect government.").

364. See Jerry Fontaine, *I Naw Koo Ni Gay Win N'swi Ish Ko Day Kawn O'Dish Ko Day Kawn Ojibway, Ota'wa and Boodewaadamig Anishinabe* 5 (2009) (M.A. thesis, University of Manitoba) (ProQuest). Fontaine interviewed political leaders fluent in Ojibway, so I trust his translation of "Confederacy" over other descriptions of the political arrangement. *Id.* at 5-6.

365. *Culture*, CITIZEN POTAWATOMI NATION, <https://perma.cc/RGY5-JA6E> (archived Jan. 10, 2021).

century, settlement and treaties had weakened the tribes enough that the United States was able to forcibly remove them.³⁶⁶ On September 4, 1838, through the powers granted to the United States by the Indian Removal Act, mounted militia marched the Potawatomi from northern Indiana to Kansas on what became known as the “Trail of Death.”³⁶⁷ In 1861, the Potawatomi in Kansas were offered a treaty that would require them to stop “living communally” in exchange for granting them U.S. citizenship and private land ownership in Kansas.³⁶⁸ The Potawatomi who signed the treaty became the “Citizen Band,” which eventually ended up with reservation land in present-day Oklahoma.³⁶⁹

Given this history, it is unsurprising how much the Citizen Potawatomi value political citizenship and participation. Their ancestors gave up their homes and prior tribal memberships for them. And having survived relocation by force and by choice several times before, the Nation demonstrated long ago that it could transcend its land base.

1. Reforming legislative districts to reach the people

As a result of the Dust Bowl in the 1930s, the Indian Relocation Act of 1956, and other economic pressures, approximately two-thirds of the Citizen Potawatomi Nation’s citizens moved far from the tribe’s lands in Oklahoma and now live throughout the rest of the United States.³⁷⁰ The Citizen Potawatomi’s original constitution was based on the Oklahoma Indian Welfare Act model constitution³⁷¹ and left all major decisions up to a Council, which comprised all members who resided in Oklahoma, who were over the age of twenty-one, and who showed up to a meeting on the last Thursday in June.³⁷² These meetings were, as described by Chairman John “Rocky” Barrett,

366. *See id.*

367. *Native History: Potawatomi Removed at Gunpoint, Trail of Death Begins*, INDIAN COUNTRY TODAY (Sept. 4, 2014), <https://perma.cc/J65S-SYYZ>.

368. CPN Pub. Info. Off., *The Treaty of 1861 Is CPN Origin Story*, CITIZEN POTAWATOMI NATION (Nov. 16, 2016), <https://perma.cc/X2YL-JCF6>.

369. *Id.*

370. Harvard Project on Am. Indian Econ. Dev., Honoring Nations: 2010 Honoree: Citizen Potawatomi Nation Constitutional Reform; Citizen Potawatomi Nation (n.d.) [hereinafter Harvard Honoring Potawatomi], <https://perma.cc/RJ4N-2257>; Nat’l Cong. of Am. Indians, *Modern Tribal Governments, Constitutions, and Sovereignty: John “Rocky” Barrett*, at 9:42-10:05, YOUTUBE (Sept. 16, 2016), <https://perma.cc/7JKS-EG9C> [hereinafter *Rocky Video*] (to locate, click “View the live page”).

371. *Rocky Video*, *supra* note 370, at 1:45-2:00; *see also* Oklahoma Indian Welfare Act, 25 U.S.C. §§ 5201-5210.

372. *See* CITIZEN POTAWATOMI CONST. of 1938, art. III; *id.* art. VI, § 1; CITIZEN POTAWATOMI BY-LAWS of 1938, art. III.

unproductive and chaotic.³⁷³ The Nation's first constitutional reforms in 1985 redefined its supreme governing body as the entire voting electorate and allowed referenda by ballot.³⁷⁴ This reform crucially allowed the large absentee-voter population to participate for the first time.³⁷⁵

By the turn of the century, the tribe's government was much more functional and the tribe was experiencing rapid economic growth: from contributing \$55 million to the Oklahoma economy in 2001 to contributing almost \$350 million in 2006.³⁷⁶ Still, the Nation struggled with low voter turnout—especially among absentee voters—and a general sense of “apathy” about the Nation's government, as citizens did not feel truly represented.³⁷⁷ The Nation “decided to take the government to the people” and held meetings throughout the United States to solicit input from the large populations of relocated Citizen Potawatomi.³⁷⁸ The result was a decision to completely overhaul the government in order to reengage the Nation's expatriate population.³⁷⁹

The Nation decided that to represent all its citizens, it would include them in an innovative way. In 2007, the Nation adopted a new constitution that included a legislature comprising sixteen legislators.³⁸⁰ Eight of these legislators are chosen from new legislative districts drawn to represent citizens who live outside the state of Oklahoma; five legislators chosen from districts within Oklahoma and three at-large elected executive officials make up the remainder of the legislature.³⁸¹ The tribe recognized that there was a risk that out-of-state constituents would have an incentive to undervalue in-state interests (such as land purchases), so it divided the legislature's weighted representation.³⁸² Although out-of-state citizens make up two-thirds of the

373. *Rocky Video*, *supra* note 370, at 2:00-5:30.

374. *Id.* at 7:50-9:10.

375. *Id.*

376. See HARVARD PROJECT ON AM. INDIAN ECON. DEV., HONORING NATIONS: ALL-STARS PROFILE—CONSTITUTIONAL REFORM CITIZEN POTAWATOMI NATION 5 (2014) [hereinafter ALL-STARS], <https://perma.cc/WK6G-GJ8V>.

377. Harvard Honoring Potawatomi, *supra* note 370, at 2; ALL-STARS, *supra* note 376, at 6.

378. *Rocky Video*, *supra* note 370, at 10:05-:21.

379. In her review of a book on voting rights in Indian Country, Pamela Karlan highlighted this difficult “off-reservation”-citizen-voting issue. She analyzed how it interacts with the “one person, one vote” principle and questions of discrimination between citizens, noting how the Cherokee off-reservation citizens at-large elect two of seventeen legislators. Pamela S. Karlan, *Lightning in the Hand: Indians and Voting Rights*, 120 YALE L.J. 1420, 1450-52 (2011) (reviewing LAUGHLIN McDONALD, AMERICAN INDIANS AND THE FIGHT FOR EQUAL VOTING RIGHTS (2010)).

380. ALL-STARS, *supra* note 376, at 1.

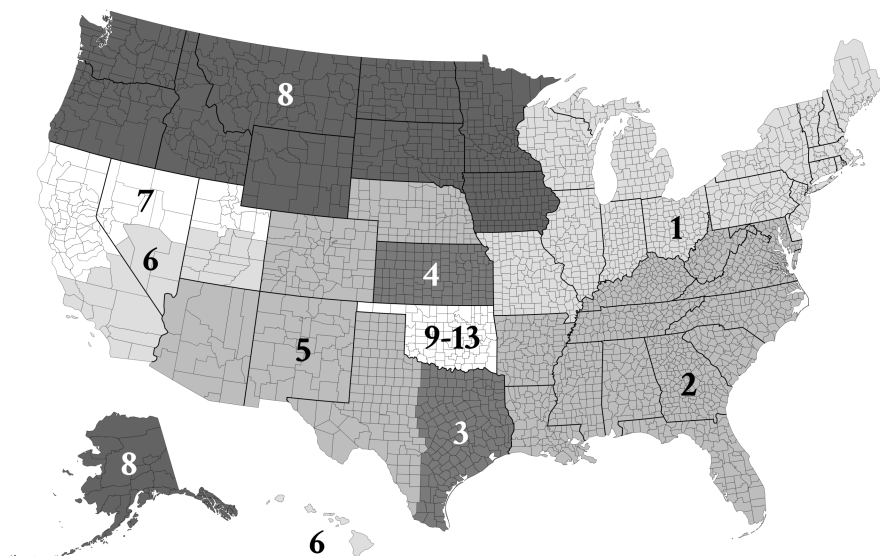
381. CITIZEN POTAWATOMI CONST. art. 7, § 1; *id.* art. 12, §§ 1, 3.

382. *Rocky Video*, *supra* note 370, at 16:10-17:23.

population, they receive only half of the seats in the legislature.³⁸³ Similarly, though executive positions are elected by Nation-wide popular vote, executives must maintain Oklahoma residency.³⁸⁴

Figure

Citizen Potawatomi Nation Legislative Districts as of 2017 Redistricting



Adapted from: CPN Pub. Info. Off., *Population Growth Results in Redistricting for CPN Tribal Legislature*, CITIZEN POTAWATOMI NATION (June 30, 2017), <https://perma.cc/UPP6-P565>.

To facilitate this system, the Citizen Potawatomi legislators hold regional meetings and communicate with their constituents about news and issues impacting their jurisdictions.³⁸⁵ The Nation also conducts regular legislative sessions via publicly accessible videoconference.³⁸⁶ Overall voter participation for the Nation more than doubled as a result of these changes in the structure of the legislature.³⁸⁷ Moreover, the Nation saw significant increases in other

383. *Id.* at 9:42-10:05, 16:10-17:23.

384. *Id.* at 17:00-:15.

385. See CPN Pub. Info. Off., *Population Growth Results in Redistricting for CPN Tribal Legislature*, CITIZEN POTAWATOMI NATION (June 30, 2017), <https://perma.cc/UPP6-P565>.

386. See *id.*; Harvard Honoring Potawatomi, *supra* note 370, at 2.

387. Turnout grew from 1,145 voters to 2,533 voters between 2006 and 2009. ALL-STARS, *supra* note 376, at 9.

forms of civic engagement and cultural participation.³⁸⁸ Voter data from the last decade suggest the increased voter participation has generally held steady, aside from slight dips in years where all candidates ran unopposed.³⁸⁹ Notably, with these reforms, the Nation achieved geographic participation parity, with out-of-state voters composing approximately two thirds of the vote.³⁹⁰ In 2017, Citizen Potawatomi conducted its first ten-year constitutionally mandated redistricting to reflect population growth.³⁹¹

The scope and impact of the Citizen Potawatomi system make it distinctive even compared to international examples of expatriate voting districts. Portugal implemented such a system in 1976, when it reserved two seats in its upper chamber for expatriates.³⁹² France may be the most prominent example, having held eleven districts for its expats since 2008.³⁹³ But representatives from the Citizen Potawatomi's extraterritorial districts make up half of the tribe's legislature.³⁹⁴ Unlike in international cases, extraterritorial-resident citizens are the rule rather than the exception. The Potawatomi redistricting was thus not only a way to increase voter turnout

388. *See id.*

389. Turnout has stayed steady around two thousand since the reforms, except for in 2014 when it was noticeably lower—around 1,500—in an election where only two district elections were not unopposed. *See id.* at 9; *Elections*, CITIZEN POTAWATOMI NATION, <https://perma.cc/4G7R-B23V> (archived Jan. 10, 2021) (to locate, click “View the live page”) (compiling election results from 2012 to 2020) (calculations on file with author). While this seems to be a low percentage of the eligible electorate, nearby local government elections held outside of the November national election cycles also turn out only a few thousand voters. *See, e.g.*, Vicky O. Misa, *Election Day: Ed Bolt Named Shawnee Mayor*, SHAWNEE NEW-STAR (updated June 30, 2020, 10:13 PM CT), <https://perma.cc/7328-4QS6> (noting that the similarly sized, nearby Shawnee had around 5,500 voters turn out for its most recent mayoral election held in June, the same month the Citizen Potawatomi elections are held).

390. *See Elections*, *supra* note 389 (calculations on file with author).

391. CPN Pub. Info. Off., *supra* note 386; CITIZEN POTAWATOMI CONST. art. 12, § 6.

392. Michael Tager, *Expatriates and Elections*, 15 DIASPORA 35, 58 n.2 (2006); Marco Lisi, Ana Maria Belchior, Manuel Abrantes & Joana Azevedo, *Portuguese Emigrants' Political Representation: The Challenges of the External Vote*, in NEW AND OLD ROUTES OF PORTUGUESE EMIGRATION: UNCERTAIN FUTURES AT THE PERIPHERY OF EUROPE 73, 74-81 (Cláudia Pereira & Joana Azevedo eds., 2019).

393. *See* Lizzy Davies, *French Expats Prepare to Vote in Parliamentary Elections*, GUARDIAN (June 1, 2012, 3:27 AM EDT), <https://perma.cc/NAP7-J6BY>.

394. *See* CITIZEN POTAWATOMI CONST. art. 12, § 3; *id.* art. 7, § 1.

and grant more of a voice to extraterritorial citizens;³⁹⁵ it was also a bold statement about what the Citizen Potawatomi Nation is: its people.³⁹⁶

It's an example of a tribal government willing to profoundly reform its government structure to address a problem. This willingness to strip parts of government down to the studs in order to solve problems is an increasingly common theme in Indian Country.³⁹⁷ As Chairman Barrett put it: "If you're not in the constitution-fixing business, you're not in economic development; you're not in self-governance; you're not sovereign."³⁹⁸

2. Creating United States expatriate voting districts

The United States could look to the Citizen Potawatomi example because it too has a problem with voter turnout among citizens living abroad. As of 2016, there were 5.5 million United States citizens living outside the country, and nearly 3 million of them were of voting age.³⁹⁹ That is a total population that is approximately the size of South Carolina⁴⁰⁰ and a voting age population on par with Oklahoma's.⁴⁰¹ The total number of expatriate citizens grew by 23% between 2010 and 2016.⁴⁰²

This large expatriate voting population is demographically interesting; it includes a significant number of military service members and their families, and it is much more educated than the general population of the United States.⁴⁰³ Among the voting-age expatriate population, 54% hold a bachelor's

395. Not fully examined here is the potential for this case, and other tribal cases, to expand on the idea of citizenship. See, e.g., Kim Barry, *Home and Away: The Construction of Citizenship in an Emigration Context*, 81 N.Y.U. L. REV. 11, 58 (2006).

396. See generally Peter J. Spiro, *Perfecting Political Diaspora*, 81 N.Y.U. L. REV. 207 (2006) (explaining that the extension of political rights to nonresidents indicates a changed perspective on the relationship between national membership and physical location).

397. See, e.g., *Introduction to AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS*, *supra* note 72, at 1, 1-3.

398. ALL-STARS, *supra* note 376, at 4.

399. FED. VOTING ASSISTANCE PROGRAM, 2016 OVERSEAS CITIZEN POPULATION ANALYSIS: STUDY FINDINGS—VOLUME 1, at 6 (2018) [hereinafter FVAP 2016 OVERSEAS], <https://perma.cc/D9MV-NZSF>; *Electorate Profile: South Carolina*, U.S. CENSUS BUREAU (Feb. 11, 2016), <https://perma.cc/2FAZ-AACA>.

400. See *Quickfacts: South Carolina*, U.S. CENSUS BUREAU, <https://perma.cc/PJS4-JVCU> (archived Feb. 23, 2021) (2019 population estimate).

401. See *Electorate Profile: Oklahoma*, U.S. CENSUS BUREAU (Feb. 23, 2016), <https://perma.cc/43EQ-NC4Y>.

402. FVAP 2016 OVERSEAS, *supra* note 399, at 3.

403. See FED. VOTING ASSISTANCE PROGRAM, 2018 REPORT TO CONGRESS 3, 45 (2019) [hereinafter FVAP 2018], <https://perma.cc/D9XN-PTB4> (noting that 25% of physical ballot requests received from overseas voters in 2018 were from Uniformed Service members); FED. VOTING ASSISTANCE PROGRAM, THE BIENNIAL OVERSEAS CITIZEN
footnote continued on next page

degree or higher, compared to just 30% of the general population.⁴⁰⁴ And of the current, registered expatriate population, an estimated 80% have at least a bachelor's degree, and 46% have an advanced degree.⁴⁰⁵

Domestically, 72% of eligible voters participated in the 2016 election.⁴⁰⁶ Based on comparisons to similar domestic demographics, around 72% of the 3 million voting-age expatriate citizens should vote.⁴⁰⁷ They do not participate at even half that rate. Or a third. Or a tenth. In 2016, only 6.9% of eligible expatriates voted in the presidential election.⁴⁰⁸

The Department of Defense is tasked with helping these citizens vote, but despite the Department's best efforts, they just don't vote.⁴⁰⁹ The Department can only attribute 30.5 of the 64.9 percentage-point discrepancy in voter participation to the particular obstacles faced by overseas voters (such as difficulties receiving mail in a particular country), which the Department calls the "Obstacles Gap."⁴¹⁰ That still leaves what the Department calls the "Residual Overseas Gap"—34.4 percentage points between actual expat voter turnout and its expected rate of 71.8%.⁴¹¹

This low-turnout problem extends to overseas, active-duty military personnel. Between 26% and 31% of this group voted in 2018.⁴¹² According to a model projecting voter turnout for domestic citizens of similar demographics, these service persons should be voting at approximately double that rate.⁴¹³ Oddly enough, among active military personnel who did not vote, 50% cited lack of interest, selecting, for example, "I did not want to vote" as their justification.⁴¹⁴ And 66% of nonvoting active-duty military personnel indicated the same apathy in 2014.⁴¹⁵

Were the United States to copy the Citizen Potawatomi, it could give expatriates their own district and possibly representatives in Congress. As was the case for the Citizen Potawatomi, an overseas district would be more

POPULATION ANALYSIS: U.S. CITIZENS ABROAD AND THEIR VOTING BEHAVIORS IN 2016, at 4 (2018) [hereinafter FVAP BIENNIAL ANALYSIS], <https://perma.cc/F76V-3ULK>.

404. FVAP 2016 OVERSEAS, *supra* note 399, at 6.

405. FVAP BIENNIAL ANALYSIS, *supra* note 403, at 4.

406. FVAP 2016 OVERSEAS, *supra* note 399, at 1.

407. *Id.* at 9 n.7, 12-14.

408. *Id.* at 1.

409. *See* FVAP 2018, *supra* note 403, at 3-5.

410. FVAP 2016 OVERSEAS, *supra* note 399, at 12-14.

411. *Id.*

412. FVAP 2018, *supra* note 403, at 16.

413. *See id.* at 15-16.

414. *Id.* at 17.

415. *Id.* at 17 fig.4.

representative than forcing this massive population to vote absentee in the last state they lived. In debates on whether to initially extend the vote to overseas citizens, some members of Congress argued that “[t]here is no doubt that the local inhabitants of the [home] district[s] [in which expatriates vote] may not have the same interests as citizens outside the United States.”⁴¹⁶ People develop different interests and identities and likewise have different expectations of their government when they live away from its territorial boundaries. Overseas voters likely have much more common, and vote more in kind, with each other than they do with voters in their last state of residency.⁴¹⁷ Expatriate voters are unified and shaped by the same kinds of geographic and cultural identities that rationalize grouping representative democracy by residency. They are also a unique population. The distinct challenges facing overseas citizens—taxes, access to U.S. services, voting—are (ironically enough) all easily ignored when the voting impact of expatriates is spread across the entire United States.

Lack of representation from active-duty military voters is especially concerning. By deploying members of the military overseas, the United States is effectively disenfranchising them. Why not reconfigure the system such that an overseas deployment means becoming part of a sizable voting bloc of military personnel with a representative uniquely tasked with listening to them and fighting for their needs in Congress? This solution is particularly salient because, as of 2016, the United States had more of its active military personnel serving overseas than any other country in the world.⁴¹⁸

The idea of reconfiguring or expanding Congress is a popular topic these days. Some consider it an outrage that the territories and D.C. lack adequate representation, but this outrage never overcomes the political reality that these new states may be filled with Democrats.⁴¹⁹ But an Overseas State could have

416. See, e.g., COMM. ON RULES & ADMIN., OVERSEAS CITIZENS VOTING RIGHTS ACT OF 1975, S. REP. NO. 94-121, at 2 (1975).

417. See Andreas C. Goldberg & Simon Lanz, *Living Abroad, Voting as If at Home? Electoral Motivations of Expatriates*, MIGRATION STUD. (May 21, 2019), <https://perma.cc/VZU8-ALWS>.

418. Niall McCarthy, *Which Countries Have the Most Active Troops Abroad? [Infographic]*, FORBES (Nov. 20, 2017, 8:43 AM EST), <https://perma.cc/53H4-RMMJ>.

419. See, e.g., Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 GEO. WASH. L. REV. 160, 161-62 (1991); Adam H. Kurland, *Partisan Rhetoric, Constitutional Reality, and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation*, 60 GEO. WASH. L. REV. 475, 475-76 (1992); Jamin B. Raskin, *Is This America? The District of Columbia and the Right to Vote*, 34 HARV. C.R.-C.L. L. REV. 39, 55 n.87 (1999); Andrés L. Córdova, Opinion, *Puerto Rico: Statehood as Equality*, THE HILL (July 3, 2017, 2:30 PM EDT), <https://perma.cc/P2QQ-VJF5>; Note, *Pack the Union: A Proposal to Admit New States for the Purpose of Amending the Constitution to Ensure Equal Representation*, 133 HARV. L. REV. 1049, 1056 (2020).

at least some bipartisan value. Democrats would find appealing an electorate that is highly educated, and Republicans would like that it is heavily military (especially considering that voter participation among military personnel is higher overall than among nonmilitary personnel within the overseas population⁴²⁰). An Overseas State—with presumably the population equivalent of South Carolina—could elect seven Representatives and two Senators, carrying nine electoral college votes.⁴²¹ This transformation of the overseas population—from a status so irrelevant that they don't bother voting into an influential voting bloc—could draw unprecedented participation and new voters for both parties to fight over. The Democratic Party already groups overseas voters together like this by allowing “Democrats Abroad” to operate just like one of the state parties⁴²²—organizing primary elections for citizens living abroad and selecting twenty-one delegates.⁴²³

If the United States ever decided to reconfigure representation for expatriate voting,⁴²⁴ it could look to the Citizen Potawatomi for guidance on doing it in a way that creates buy-in. That is, the United States could “go to the people” as the Citizen Potawatomi did, having town halls throughout the world to determine what lines it should draw and what changes would better engage our citizens living abroad. Perhaps this could include town halls in the United States to determine whether expatriates ought to have equal votes or “one person, one vote” should be set aside in such a restructuring.⁴²⁵ Such a

420. Compare FVAP 2018, *supra* note 403, at 3 (noting a 26% participation rate for overseas active-duty members in 2018), with FED. VOTING ASSISTANCE PROGRAM, U.S. CITIZENS ABROAD AND THEIR VOTING BEHAVIORS IN 2018: OVERSEAS CITIZEN POPULATION ANALYSIS SUMMARY BRIEF 2 (2018), <https://perma.cc/7Q85-QTQQ> (noting a 6.9% voter-turnout rate among all overseas voters in 2016).

421. See *The Electoral College*, NAT'L CONF. ST. LEGISLATURES, <https://perma.cc/D7GY-AYU3> (last updated Nov. 11, 2020).

422. See *2020 Democratic Primary: Democrats Abroad Global Presidential Primary*, DEMOCRATS ABROAD, <https://perma.cc/PXP9-D44T> (archived Jan. 11, 2021).

423. DEMOCRATIC PARTY COMM. ABROAD, DEMOCRATS ABROAD DELEGATE SELECTION PLAN FOR THE 2020 DEMOCRATIC NATIONAL CONVENTION 1, 13-14 (2019), <https://perma.cc/TJU2-RNG5>.

424. Interestingly, Congress passed the Overseas Citizens Voting Rights Act (OCVRA) in 1975 despite concerns that allowing overseas voting might be unconstitutional; Congress expected litigation would resolve the issue, but no such challenge ever came. See Brian C. Kalt, *Unconstitutional but Entrenched: Putting UOCAVA and Voting Rights for Permanent Expatriates on a Sound Constitutional Footing*, 81 BROOK. L. REV. 441, 446-50 (2016) (detailing the history of this debate while discussing OCVRA's amended form); Alan Gura, *Ex-Patriates and Patriots: A Constitutional Examination of the Uniformed and Overseas Citizens Absentee Voting Act*, 6 TEX. REV. L. & POL. 179, 191-93 (2001) (arguing that OCVRA and its amended form remain unconstitutional and collecting Supreme Court cases emphasizing the importance of states' geographic boundaries).

425. Cf. Karlan, *supra* note 379, at 1450-51 (discussing how tribes have been able to set aside “one person, one vote” in their political choices).

strategy would both approach the issue as an electoral-integrity problem and engage the people in the process, thereby creating buy-in for the ultimate design. The Citizen Potawatomi pursued election and redistricting reform based on improving representation instead of calculations based on politics or existing balances of power. Town halls across America where the structure of our elections was *really* up for debate—that would be a sight to see.

IV. The New Era of American Tribal Law

The examples of tribal law explored in the preceding pages have not been included to prove that tribes are uniquely brilliant innovators or that they are always successful at self-governance. While they certainly can be at times, tribal governments struggle and fail just like any other governments do. The point isn't that tribal law is good law. The point is that tribal law exists—and it isn't primitive, or foreign, or concerned exclusively with niche Indian issues. These examples should feel both new and familiar because the study of tribal law is just American public law (as these examples show) or private law (as I'm sure another article could show). Papers about these governments should be seen and read for what they are: criminal law papers, constitutional law papers, election law papers, and so on. They should no longer be ignored or kept separate and on the sidelines.

The examples in this Article only begin to scratch the surface of the broader set of possibilities that can come from incorporating tribal law into American law. Recognizing that tribal law is American law not only expands our scholarship of American law but enriches and complicates our picture of American law and legal institutions. Studying tribal governments can redefine the boundaries of American law, add hundreds of additional laboratories for American governance, and provide dynamic reflections of, or contrasts to, other American sovereigns' laws and legal institutions.

Indian Country is America too. We should stop excluding tribes from our assessments in Restatements and anywhere else we are discussing the full set of laws in the United States. The success or failure of tribal innovation or attempts to incorporate other American sovereigns' laws should inform or complicate what we see as the best practices for American governance. We ought to ask why the Citizen Potawatomi reforms worked, why the Navajo parliamentary system failed, and how those lessons translate (or don't translate) to other institutions.

Likewise, because tribal governments sometimes start with federal or state law language or ideas, their interpretations, innovations, or reinventions are particularly insightful. Tribal law can be a place to explore the utility of other American sovereigns' laws in different contexts. Or, as the VAWA tribes demonstrated, tribal law can complicate our assumptions about how we can—or must—interpret law, including federal constitutional rights. Tribes may

likewise complicate our concept of American legal exceptionalism, as they force us to wrestle with the implications of American governments rejecting even some of our most lauded and cherished legal innovations. Finally, and most obviously, tribal law ought to inform how—or change where—we interpret Indian treaty rights and tribal sovereignty.

Part II of this Article demonstrated why we ought to reject the assumption that tribal law should be ostracized. Part III took a peek behind a door that, once kicked open, might reveal an incredibly fruitful realm not only for more scholars to engage in tribal law but also for cross-sovereign legal research, debate, and discourse. Part IV now addresses readers who are generally convinced that tribal law belongs in the mainstream study of American law and are wondering what the next steps are for the legal academy, their teaching, or their work.

In other words, what can we do to usher in a new era where our collectively shared conception of American law includes and accepts tribal law? This new era involves ending the invisibility of tribal law, normalizing its presence in mainstream legal discourse, expanding the infrastructure needed to study tribal law, and calling for more focus on exploring tribal law. All of this is required *before* we can even begin to collectively synthesize tribal law or provide informed answers to the questions looming in the background of this paper about the future of tribal law, tribal governments, and their powers. I may disappoint some readers by not offering a framework for an entry into either the academic study of tribal law, or for placing tribal law within the rest of the United States government system. That is because I do not believe developing such a framework is possible yet.

A. The Need to Expand Tribal Law Research Infrastructure

For anyone interested in tribal law, the first issue is access. Because tribal governments are largely independent, their laws, projects, and opinions are not tracked by the federal government or any other central agency on even a basic level. When the BIA was heavier-handed with tribes, it kept more records, but since its role has diminished following self-determination, a “vacuum” has formed.⁴²⁶ Even for experts working in tribal law, there is a lot we do not know and—because we have yet to build a reliable and consistent infrastructure—cannot find out easily.⁴²⁷ For example, while we can

426. HARVARD NATIONS, *supra* note 73, at xxi.

427. See Jacob Franchek, Note, *Digitizing Tribal Law: How Codification Projects Such as Tribal Law Online Could Give New Rise to American Indian Sovereignty*, 94 WASH. U. L. REV. 1025, 1026-27 (2017). See generally David E. Selden, *Researching American Indian Tribal Law*, COLO. LAW., Feb. 2014, at 51 (providing a guide on researching tribal law).

confidently say that there are at least 188 tribal courts,⁴²⁸ there may be as many as 400;⁴²⁹ even experts are unsure about the precise number.⁴³⁰ Many tribal legislative and executive documents are made available by a tribe on the tribe's websites, and they come in a wide range of formats, not all of which are easy to navigate.⁴³¹ There have been attempts by universities or other nonprofits to try to collect and centralize tribal codes,⁴³² which have resulted in a patchwork of different resources.⁴³³ The most successful is the National Indian Law Library, which, as of 2014, had approximately 250 tribal-code documents and 480 constitutions available in hard copy, with many also available digitally on its website.⁴³⁴ But even if documents can be found from an indirect source, it is best practice to call the tribe to verify that codes are still current.⁴³⁵ Some tribes are certainly better than others at preserving records of prior versions of laws, legislative history, and other legal documents.⁴³⁶

For tribal court documents specifically, the picture is slightly better, with a series of prior attempts at centralization.⁴³⁷ The National Indian Law Library

428. The Bureau of Justice Statistics last surveyed tribal governments almost twenty years ago, and out of the 314 tribes who responded, about 188 reported that they had some form of justice system in place. STEVEN W. PERRY, BUREAU OF JUST. STATS., U.S. DEP'T OF JUSTICE, NCJ 205332, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, at 3 (2005), <https://perma.cc/49WJ-CCZS>.

429. Bureau of Just. Assistance, Fact Sheet: Coordinated Tribal Assistance Solicitation—Purpose Area #3, at 3 (2015), <https://perma.cc/38QW-9A2W> (noting that since 1999, more than 400 tribes received funding from the Tribal Courts Assistance Program to support tribal court development).

430. Email from Chia Halpern Beetso, Tribal Ct. Specialist, Tribal L. & Pol'y Inst., to author (Nov. 7, 2019, 1:08 PM) (on file with author).

431. The Navajo Nation makes its code available through a series of PDFs for each of the code amendments, which are organized by title and current as of 2014; there are also four PDFs covering an annotated code, which are current as of 2010. This material totals over 4,000 pages. See *Navajo Nation Code*, NAVAJO NATION OFF. LEGIS. SERVS., <https://perma.cc/CAC7-GSF8> (archived Jan. 11, 2021) (to locate, click “View the live page”).

432. See, e.g., Franchek, *supra* note 427, at 1028 (describing a project at the Washington University School of Law to digitize the Oglala Sioux Tribe's codes).

433. See *Researching Tribal Codes and Constitutions*, NAT'L INDIAN L. LIBR., <https://perma.cc/827Y-JTSG> (archived Jan. 11, 2021) (collecting links to a variety of resources).

434. See Selden, *supra* note 427, at 52.

435. Kelly Kunsch, *A Legal Practitioner's Guide to Indian and Tribal Law Research*, 5 AM. INDIAN L.J. 101, 129-30 (2017).

436. Conference Transcript, *Heeding Frickey's Call: Doing Justice in Indian Country*, 37 AM. INDIAN L. REV. 347, 350 (2013) (statement of Matthew L.M. Fletcher) (“The Navajo Tribe is great—they will send you to every single agency that doesn't have that information.”).

437. See *Find Tribal Courts and Court Opinions*, NAT'L INDIAN L. LIBR., <https://perma.cc/4QZ7-82NM> (archived Jan. 11, 2021) (collecting resources).

has those major cases that were briefly, until 2013, included in the Indian Law Reporter.⁴³⁸ VersusLaw, Lexis, Casemaker, and most recently Westlaw have each, at one point or another, tried building databases of tribal court opinions or tribal codes.⁴³⁹ A great deal of tribal court opinions are accessible through a simple search in these databases. However, each database covers only a handful of tribes, and some are subject to paywalls. For example, Westlaw recently expanded its tribal law collection, but those documents are behind a paywall that is prohibitively expensive even for law schools with otherwise excellent access.⁴⁴⁰ Niche indeed.

This is certainly a challenge, but it's also an opportunity. If there is real demand from the academy for centralized, ready access to existing tribal law documents, the market will answer by increasing the availability of such documents. Once the channels are built to start collecting and updating tribal laws, they will be far easier to maintain. Once there is real infrastructure and access, so much more will be possible.

Yet even with the limited access we have, it is possible to quickly and easily access enough tribal court opinions to accomplish one important goal: normalizing tribal law through legal education. Tribal law opinions, executive documents, or codes could provide interesting contrasts with the case law in our existing curriculum, or they could simply complement established case law while exposing students to the existence of tribal sovereigns and their legal systems. An easy way to introduce students to and normalize tribal law would, of course, be to include similar tribal court opinions alongside state common law opinions in the first-year curriculum. Assuming the case method and a preference for short, simple cases that cover basic topics, the following are just a few cases to start with based on a search of common topics in first-year courses using either Lexis's database narrowed to "Tribal" opinions or the Tribal Court Clearinghouse's⁴⁴¹ database: *Civil Procedure*, *Coin v. Mowa*, *Hopi*

438. Selden, *supra* note 427, at 53; Mary Whisner, Univ. of Wash. Sch. of L., Sources of Tribal Court Decisions 2 (2021), <https://perma.cc/8KQ6-XZ88>.

439. Selden, *supra* note 427, at 53; Whisner, *supra* note 438, at 2-3; *Researching Tribal Codes and Constitutions*, *supra* note 433.

440. Email from Sheri Lewis, Dir., D'Angelo L. Libr., Univ. of Chi., to author (Dec. 29, 2019, 5:14 PM) (on file with author); Email from Sheri Lewis, Dir., D'Angelo L. Libr., Univ. of Chi., to author (Dec. 10, 2019, 11:30 AM) (on file with author); Email from William A. Schwesig, Anglo-Am. & Hist. Collections Libr., D'Angelo L. Libr., Univ. of Chi., to author (Dec. 4, 2019, 10:45 AM) (on file with author); Email from M. Constance Fleischer, Rsch. Servs. Libr., D'Angelo L. Libr., Univ. of Chi., to author (Dec. 3, 2019, 4:42 PM) (on file with author).

441. *Tribal Court Decisions*, TRIBAL CT. CLEARINGHOUSE, <https://perma.cc/G8TQ-PZAW> (archived Jan. 11, 2021).

Appellate Court;⁴⁴² Contracts, *Jackson, Inc. v. Tribal Bingo Enterprise of the Eastern Band of Cherokee Indians*, Supreme Court of the Eastern Band of Cherokee Indians;⁴⁴³ Criminal Law, *Amundson v. Colville Confederated Tribes*, Colville Confederated Tribes Court of Appeals;⁴⁴⁴ Torts, *Sullivan v. Mashantucket Pequot Gaming Enterprise*, Mashantucket Pequot Tribal Court;⁴⁴⁵ and Property, *In re Estate of Nelson*, Navajo Nation Court of Appeals.⁴⁴⁶ Moreover, Matthew Fletcher's excellent casebook on tribal law is both useful for anyone interested in teaching an introductory course on the subject and a well-organized and accessible resource of tribal law materials generally.⁴⁴⁷

B. The Prematurity of an Academic Tribal Law Framework

While a framework for an academic approach to tribal law would undoubtedly be useful, developing one is decidedly premature given the vast diversity and many unknowns outlined above. Indeed, it would require making overly broad or uninformed claims about hundreds of governments, or else flattening out the diversity of tribal nations in precisely the same way criticized in this piece. If this Article were a call for the academy to notice, talk about, research, study, and write about state or local law for the first time, an immediate call for a unifying framework that would allow scholars to approach the new topic would surely seem to be a wildly premature ask that would require monumental oversimplifications. So I offer the reader no such framework within these pages.

442. 25 Indian L. Rptr. 6208 (Hopi App. Ct. 1997) (No. AP-005-95), 1997 Hopi App. LEXIS 4 (discussing venue, dismissals for lack of jurisdiction, construing parties' motions, and the importance of standards of review).

443. 3 Cher. Rep. 19 (E. Cherokee Sup. Ct. 2001) (No. CV 98-051), 2001 WL 36239697 (involving anticipatory repudiation and discussing the appropriate damage calculations).

444. 25 Indian L. Rptr. 6178, 6179 (Colville Confederated Tribes Ct. App. 1998) (No. AP97-018), 1998 Colville App. LEXIS 10, at *6-8 (concluding that conspiracy cannot include government actors as persons and that a drug purchaser does not conspire in a distribution crime).

445. 32 Indian L. Rptr. 6128, 6129-30 (Mashantucket Pequot Tribal Ct. 2005) (No. MPTC-CV-2004-126), 2005 Mashantucket Trib. LEXIS 18, at *7-16 (discussing assumption of duty in a slip-and-fall case where the plaintiff's weight complicated the reasonableness inquiry).

446. 1 Navajo Rptr. 162, 163, 166 (1977), 1977 Navajo App. LEXIS 30, at *1, 5 (listing the requisite elements of inter vivos gifts and specifically examining donative intent over a joint tenancy).

447. MATTHEW L.M. FLETCHER, *AMERICAN INDIAN TRIBAL LAW* (2d ed. 2020). Sarah Deer and Justin Richland's book is also an excellent resource, but it focuses more on skimming the surface of tribal diversity and providing context and commentary and so includes fewer materials overall. JUSTIN B. RICHLAND & SARAH DEER, *INTRODUCTION TO TRIBAL LEGAL STUDIES* (3d ed. 2016).

Nor do I offer uniform advice about the best place for someone to start (large tribes, constitutional tribes, and so on) since the answer ought to vary depending on the scholar, teacher, or generally interested person's subject. I will neither oversimplify nor generalize nor prematurely synthesize trends across a group of tribes that is vast, where much is unknown, and where the mistakes of the past make clear that the prescription is less generalization and more contextualization, qualification, and humility.

I can propose, however, that the three things just mentioned—contextualization, qualification, and humility—are good practices, and I recommend them as vital for a new era of studying and accepting tribal law. They are, as I will explain more fully below, key to laying a new foundation, though in truth, they are familiar best practices combined with a constant vigilance informed by the errors of the past.

1. Tribal individuality

Each tribal government is a unique individual sovereign entity. While we may acknowledge tribes' or Indian peoples' similarities or common experiences—with certain colonial powers or federal laws, for example—we should do so only where appropriate and where supported by evidence. “The Indian tribes” is a fictional monolith void of collective meaning. To combat this inaccurate homogenization, we can be more precise both in making claims about tribes and in talking about them generally.

Because there are many different tribal governments, relevant knowledge comes from specific experiences or expertise with particular tribes. In order to stop ourselves from letting anything else—including information about other tribes or assumptions—fill in the gaps in our knowledge, we have to be especially self-aware, reflective, and critical. This means rejecting broad statements and claims about tribal law without equally broad support. It means scrutinizing specificity by asking—as we would in other disciplines—not “What evidence do I have for thinking this about *tribes*?” but “What evidence do I have for thinking this about *this particular tribe*?”

Not only does this demand for accurate and careful claims about tribal governments mean scrutinizing evidence, assumptions, and conclusions, but it also means fixing how we talk about “Indians” or “tribes.” We ought to use these terms more accurately to reflect tribal diversity and combat myths of tribal or Indian uniformity. For example, when using “Indians,” we must keep in mind that the term refers to a continent's worth of people—much like “Europeans”—and only use “tribes” where it would sound appropriate to substitute in the other American subsovereign governments—“states.” If substituting in one term for the other immediately sounds uncomfortably naïve or filled with incorrect assumptions of uniformity, we ought to reframe. For example: “How many tribes are there?” and “Are Indian language groups

similar?” become “How many states are there?” and “Are European language groups similar?” Those are simple enough questions with straightforward enough answers. By contrast, “What are tribal governments like?” and “How much does Indian culture influence tribal dispute resolution?” are difficult to answer since they carry numerous assumptions of uniformity and are otherwise either confused or incorrect. Perform the substitution (“What are state governments like?” or “How much does European culture influence European courts?”), and it’s immediately clear what’s wrong. These are not specific enough questions to answer without parsing what the question is really asking. “*Like*, in what way?” or “European culture isn’t monolithic, so what European country and court do you mean?” would be obvious starting points. Though asking these kinds of questions might seem like a silly or small thing, doing so is a helpful step toward ending the comfortable and powerful homogenization of terms like “Indians” and “tribes”—instead of allowing them to continue flourishing as mischaracterizations pervading both our laws and our legal discourse.

2. The familiar best practices of contextualizing and not overclaiming

As scholars, we need to start by questioning our assumptions about tribes and the sources of our information. These familiar best practices from other fields are all the more necessary because of the long history of poor scholarly practices when it comes to Indians. Assuming that tribal governments are simply governments like any other, we ought to engage with tribal governments and tribal law with an open mind. We cannot assume that all tribal-government experiences, contributions, or legal insights are similarly limited, incompatible, translatable, or valuable. We ought to just assess the specific limitations in any given project based on subject, scope, size, culture, location, or history.

In each of the three examples in Part III above, this Article models this engagement in its approach to the tribes involved and the scope of the examples’ implications. In the first example, without the shared circumstances of opting into VAWA’s provisions, we could not assume that tribes were working with the same legal framework. Nor would we extrapolate that some of the ideas explored by these tribes are potentially relevant to federal law because of the similarities between VAWA’s language and federal constitutional doctrine. Even so, the example minds its limits. Jury trials are rare, so there is very little data on how this experiment is going for these tribes. The example is thus presented not as a proven, effective model for jury construction but instead as a surprising and promising new way of interpreting shared language.

The other two examples in this Article examine just one tribe each, starting with a brief account of the tribe’s history prior to the relevant legal

period. Both examples explore each tribe's experience with structural governmental changes similar to those faced by other American governments, telling unique stories that complicate old assumptions or provoke new ideas. But they certainly do not prove anything about the broader applicability, desirability, or scalability of the government reforms involved.

3. Scholarly humility

Scholars have earned a negative reputation in Indian Country.⁴⁴⁸ Vine Deloria Jr.'s famous Indian manifesto dedicates an entire chapter to scathing commentary on the familiar figure of the hated, mistrusted, and mocked "anthropologist" who comes to Indian communities and sensationally documents errors that misrepresent the community but pass for fact to outsiders.⁴⁴⁹ We must own this history before we can have any hope of doing any better. Humility is the key—truly contextualizing our knowledge, our research, and their limitations. Though difficult, it is vital when working with Indigenous people, laws, or knowledge. As discussed earlier in this Article, prior failures in this regard allowed incorrect and destructive ideas about Indians to permeate the academy and the collective American consciousness for centuries.⁴⁵⁰ Whether because of malevolent intent, presupposed agendas, exploitative methods, or just plain ignorance, there is a consistent academic arrogance behind the bad scholarship and bad blood—scholars were confident in their ability to figure out Indians as subjects with very little involvement, input, or critique from Indian people themselves. Since unbridled arrogance created unbounded disaster, nothing short of unbridled humility is required. Only then can we ever hope to get it right.

If, in this Article, I captured an incomplete version of even some of the tribal histories and laws portrayed in these pages, I welcome the criticism—because it will be an invitation to get it right or to learn from the mistake. Navajo culture, for example, is fiercely guarded, and the Nation's politics are very complex. Despite my best efforts to scrutinize my sources and corroborate my claims, there are things that may be missing. Scholars should also accept the possibility of being told to go away by certain tribal communities who have no interest in collaborating or being studied and who must be able to make that choice freely for themselves.

Gaining the trust of communities sufficiently enough to work with them—not only to build projects or access data but also to accurately

448. See NAT'L CONG. OF AM. INDIANS POL'Y RSCH. CTR. & MONT. STATE UNIV. CTR. FOR NATIVE HEALTH P'SHIPS, "WALK SOFTLY AND LISTEN CAREFULLY": BUILDING RESEARCH RELATIONSHIPS WITH TRIBAL COMMUNITIES 14-15 (2012).

449. See VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 78-100 (1969).

450. See *supra* Part II.A.

understand the tribal context discussed above—may involve swimming upstream due to the history of mistrust. There are resources available with guidance⁴⁵¹ and insights⁴⁵² on how to navigate this process and build relationships.

C. A Federal Indian Law (If We Still Call It That) Informed by Tribal Law

The final questions some readers might have loom largest: Where is the framework for how we ought to think about tribal law, and where is the claim about where it belongs within American law? Since its inception, federal Indian law has struggled with just these questions about where Indian tribes belong in the United States' federal framework. The entire jurisprudence and academic field are attempts to answer these questions and their component parts. I do not have the answers in this Article. But this Article does provide a roadmap for how to get there: tribal law.

Therein lies a monumental and consistent intellectual bankruptcy in federal Indian law: It is missing tribal law. Attempting to answer the questions above without first considering tribal law and understanding tribal governance is as nonsensical as asking what powers states ought to retain without any idea of what states are, what they do, or how they exercise their sovereignty. Scholars and judges must understand tribes before they can answer these questions. The invisibility of tribal law undermines the study and practice of federal Indian law, which—without a robust tribal law foundation—becomes an unmoored study of sovereignty in the abstract, a kind of federalism without foundation.

Phil Frickey alluded to a version of this problem in federal Indian law years ago. He suggested that “[f]ederal Indian law needs a much better, more grounded understanding of tribal law and institutions” because otherwise it “just consists of the federal judiciary engaged in guesswork prone to dissolve into suspicion.”⁴⁵³ These remarks sparked a conference on what the Indian law field could do to respond to this concern,⁴⁵⁴ but the tides have not turned significantly.

451. See generally NAT'L CONG. OF AM. INDIANS POL'Y RSCH. CTR. & MONT. STATE UNIV. CTR. FOR NATIVE HEALTH P'SHIPS, *supra* note 448 (advising on best practices).

452. See Conference Transcript, *Heeding Frickey's Call: Doing Justice in Indian Country*, *supra* note 436 (compiling speeches alluding to the challenges of working with tribes).

453. Frickey, *supra* note 1, at 28-29; see also POMMERSHEIM, *supra* note 151, at 130-31 (noting that “Indian law scholarship is in danger of becoming a misleading abstraction” preoccupied with sovereignty, jurisdiction, and power).

454. See Fletcher, *American Indian Legal Scholarship and the Courts*, *supra* note 136; Conference Transcript, *Heeding Frickey's Call: Doing Justice in Indian Country*, *supra* note 436.

Native nations are different from other American governments and also vastly different from each other. Native sovereignty is not a theoretical concept but a reality: Tribal governments exercise their powers all across the country every day. Scholars too often engage with tribal sovereignty on a solely theoretical level, focusing exclusively on a uniform pantribal concept defined exclusively by federal law. This way of thinking assumes tribes have shared or interchangeable “sovereignty” despite the differences in the tribes’ histories, treaties, exercises of sovereignty, and tribal law definitions of their own authority. These arguments about where tribes belong in the federal framework⁴⁵⁵ do not engage with the diversity of Native nations, the contemporary practice of tribal governance, or potentially competing demands of tribal law. Tellingly, almost all of these works assume there will be a one-size-fits-all answer for tribal governments—a status that will work better for all tribes—and very few contemplate the existence, let alone importance, of a process for each of these sovereign nations to separately consider and agree to status changes.⁴⁵⁶ In my experience working with tribal governments across the country, some describe themselves as peers of the local *county* governments, while others consider themselves closer to *states*, and still others emphasize their status as *nations*. Even the desire for complete political independence—including rejection of United States citizenship—still dominates some tribes to this day.⁴⁵⁷ Different tribes may have vastly different answers to the question of how they can or should fit into the federal framework.

Tribal law scholars have powerfully suggested we pay more attention to tribal governments by making the Brandeisian federalism point that tribes are laboratories whose work is valuable to other sovereigns.⁴⁵⁸ Other sovereigns

455. See, e.g., KOUSLAA T. KESSLER-MATA, *AMERICAN INDIANS AND THE TROUBLE WITH SOVEREIGNTY: STRUCTURING SELF-DETERMINATION THROUGH FEDERALISM* 27, 121-23 (2017) (arguing for including tribes as subnational units in the federal system as a matter of political theory); FRANK POMMERSHEIM, *BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION* 6 (2009) (advocating for a constitutional amendment to place tribes in the federal system but not suggesting tribes could separately navigate or negotiate their new status).

456. Tallchief Skibine’s proposal for a new tribal “compact” or “covenant” with Congress to formally place tribes within the federal system is the closest to an individual sovereign approach because each tribe would separately reject or adopt the compact, but it is still quite far off since he would still have Congress adopt a uniform compact for all the tribes. Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within “Our Federalism”*: *Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667, 669, 691-92, 695 (2006).

457. See, e.g., Joshua Keating, *The Nation That Sits Astride the U.S.–Canada Border*, POLITICO MAG. (July 1, 2018), <https://perma.cc/P6YR-CYQZ>.

458. Katherine Florey’s work explores “what contribution tribal regulation can and should make to the larger patchwork of regulatory innovation among states” and what
footnote continued on next page

are certainly a potential audience for the kinds of tribal law scholarship this piece advocates. But framing tribal law as American law is not a model for how to fit tribes into the federalism framework of regulatory innovation, as Katherine Florey has suggested is needed.⁴⁵⁹ This Article answers none of these looming questions about the place of tribes in the federal system or their relationship to the other sovereigns. The point is that we shouldn't answer them without *first* engaging in a more robust study of tribal law itself. Indian law ought to take a step back and reground itself in the realities of tribal governments.

This comfort with tribal sovereignty in the abstract as opposed to clear understandings of the nitty-gritty of daily tribal governance, simply put, makes bad law. The U.S. Supreme Court has recognized this in its jurisprudence on state sovereignty, which disclaims the Court's institutional capacity to independently discern or deduce the core of state sovereignty. The "integral"- or "traditional"-government-function test for state regulatory immunity was rejected after the Court found it to be "unsound in principle and unworkable in practice," because the Court "ha[s] no license to employ freestanding conceptions of state sovereignty."⁴⁶⁰ And yet the last forty years of Indian law jurisprudence, which created implicit divestiture, is just that: judicial decisionmaking from freestanding conceptions of tribal sovereignty.⁴⁶¹

The Court's test for tribal civil jurisdiction over non-Indians involves just such a freestanding inquiry concerning the core of sovereignty. In *Montana v. United States*, the Court held that while tribes undoubtedly retain the power to govern themselves, when it comes to non-members who do not enter into consensual relationships with the tribe, the tribes' laws only apply in a case where the tribe "retain[s] inherent sovereignty."⁴⁶² It then clarified that a tribe

"mechanisms" might facilitate that contribution. Florey, *supra* note 26, at 720. Elizabeth Ann Kronk Warner's piece suggests, much like Angela Riley's *Indians and Guns*, *supra* note 26, that tribal independence and diversity are assets and that "tribes may in some instances be even better placed than states to experiment with environmental laws in new and innovative ways." Kronk Warner, *supra* note 26, at 858-59; see also RENNARD STRICKLAND, *FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT*, at xiii (1975) ("Cherokees were . . . a laboratory for the 'civilization' dreams of the nineteenth-century policymakers.").

459. Florey points out that "neither the Constitution nor established doctrine provides a ready model of how states and tribes should interact within the realm of regulatory experimentation." Florey, *supra* note 26, at 717.

460. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546, 550 (1985).

461. See *Montana v. United States*, 450 U.S. 544, 563 (1981); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978) ("Indian tribes are prohibited from exercising . . . those powers 'inconsistent with their status.'" (quoting *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976), *rev'd sub nom. Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191)).

462. See 450 U.S. at 564-65.

has “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.”⁴⁶³ Despite the language of this test seeming to rest on questions that go to the heart of a tribe’s sovereignty—suggesting the Court ought to be informed by tribal law and an understanding of tribal governance—the Court regularly decides these cases over a tribe’s objections and without engaging with tribal law. Instead, the Court relies on its own logic to determine whether the regulated conduct fits the Court’s own definition of what is essential to the tribe’s welfare or survival.⁴⁶⁴ Indeed, the Court decided *Montana*—a case about hunting and fishing on reservation land—after simply citing the ordinance, noting its basic function (prohibiting non-Indian fishing), and concluding that nothing in the complaint suggested hunting and fishing threatened tribal “subsistence or welfare.”⁴⁶⁵ The Court confidently stated: “[N]othing in this case suggests that such non-Indian hunting and fishing so threaten the Tribe’s political or economic security as to justify tribal regulation.”⁴⁶⁶

Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, a case involving a tribe’s attempt to zone its reservation lands, likewise illustrates the Court’s failure.⁴⁶⁷ The Court, ostensibly applying the *Montana* test, walked through the history of the Yakima Tribe’s land rights before reaching a divided holding that the tribe’s authority turned on demographics, land ownership, and the tribe’s right to exclude.⁴⁶⁸ The Court certainly did not rely on Yakima law for specifics about what the power to zone means to the tribe, nor—as the dissent pointed out—for the simple notion that zoning is such a fundamental attribute of most local government sovereignty that it is particularly unworkable (if not pointless) to administer incompletely.⁴⁶⁹

By contrast, when the Court decides state sovereignty cases it does so with, at the very least, a basic understanding of a state’s powers and goes into far more detail about how the alleged interference with state sovereignty plays out

463. *Id.* at 565-66.

464. *See Nevada v. Hicks* 533 U.S. 353, 361, 364 (2001) (holding that state officers harming tribal-member property while executing a warrant on tribal land for off-reservation violations of state law do not violate the tribe’s political integrity); *Strate v. A-1 Contractors*, 520 U.S. 438, 442, 452-53 (1997) (holding that auto accidents on tribal highways do not threaten the health or welfare of the tribe).

465. *Montana*, 450 U.S. at 566.

466. *Id.*

467. 492 U.S. 408 (1989); *see also Singer, Sovereignty*, *supra* note 30, at 7 (critiquing *Brendale*).

468. *Brendale*, 492 U.S. at 433-44 (Stevens, J., opinion of the court in part and concurring in part) (plurality opinion).

469. *See id.* at 458 (Blackmun, J., concurring in part and dissenting in part).

for the state and its governing structures. Take, for example, *National Federation of Independent Business v. Sebelius*, a case in which challenges to the Affordable Care Act (ACA) implicated state sovereignty.⁴⁷⁰ The Court began by speaking of “[s]tate sovereignty” as a clear enough concept that it can affirmatively limit federal powers because “the police power[s]” of the states—described as “the facets of governing that touch on citizens’ daily lives [that] are normally administered by smaller governments closer to the governed”—are a clear enough set of powers that belong to the states.⁴⁷¹ This makes sense only because the Justices—and we as readers—are all familiar with this bundle of state powers as citizens of states who know what state governance means in practice. After holding that the ACA’s individual mandate, if characterized as such, would interfere with the states’ police power to regulate,⁴⁷² the Court turned to the ACA’s Medicaid expansion. In this portion of the opinion, Chief Justice Roberts, relying on detailed figures from the states’ budgets, discussed the coercive effect of the ACA as an infringement on the states’ sovereignty.⁴⁷³ Chief Justice Roberts not only displayed a basic awareness of the impact on state law, but also acknowledged the disruption the Court’s ruling could cause to the states’ “intricate statutory and administrative regimes” for Medicaid implementation.⁴⁷⁴ This is not to say that the Court has a robust understanding of state law or rigorously interrogates it, but simply that the mere nod is remarkable by contrast.

Federal Indian law sovereignty opinions are nothing like this. Read Indian sovereignty opinions and you learn a lot about the history of colonialism and about prior Supreme Court cases, which similarly reasoned this way or that about what powers tribes must have, of course, lost due to their conquest.⁴⁷⁵ You learn nothing about what tribal statutory or administrative regimes are at stake, tribal budgets, or the tribes’ frustrated attempts to govern their citizens. We need a better federal Indian law. One that is more principled by being *informed* by tribal law.

470. Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536, 581 (2012) (opinion of Roberts, C.J.).

471. *Id.* at 536.

472. *Id.* at 558–61.

473. *Id.* at 581 (citing footnotes and tables from briefs and state budget reports for this insight).

474. *Id.*

475. *See, e.g., Nevada v. Hicks*, 533 U.S. 353, 358, 364 (2001) (heavily prioritizing state interests over tribal interests in assessing whether a civil tort suit against state officers who served a state warrant on tribal land fit under the *Montana* test).

Conclusion: The Cost of Invisibility

This Article began with a simple, yet transformative, truth: Tribal governments are American governments and thus we should stop excluding their laws from the study of American law. It then discussed and demonstrated how much we might all gain from paying attention to tribal governance. It ends here with another truth, a hard one, and a prediction of what may happen if we continue to ignore tribal law.

Exclusion has powerful consequences. At best, we continue to other something without engaging with it. This othering bizarrely treats Indian governments as conquered but still too foreign to be relevant to, or part of, America. Invisibility breeds ignorance. And ignorance is incredibly dangerous—especially when such ignorance pervades our justice system and can harm the rights of citizens or result in law that rests on inexcusable and dehumanizing errors, with disastrous consequences.

That was *Oliphant*, where the Court stripped tribal governments of the power to prosecute non-Indians, motivated in part by claims about the lawlessness of Indian tribes.⁴⁷⁶ The Court stated that its principle “would have been obvious a century ago when most Indian tribes were characterized by a ‘want of fixed laws [and] of competent tribunals of justice.’”⁴⁷⁷ This bold and broad statement was far from harmless. In rather horrific irony, it helped create the jurisdictional maze that itself promotes a state of lawlessness in Indian Country, where Indian people are easy targets for non-Indian criminals because offenders know that federal prosecution is unlikely and tribes can’t touch them.⁴⁷⁸ In 2003, Indian women became the demographic most likely to be victims of violent crime, with a victimization rate 50% higher than the next highest group: African American men.⁴⁷⁹

We should likewise cringe every time someone with a law degree writes or executes a law that needlessly excludes tribal governments due to simple ignorance. This happens all the time, and the omission of tribal governments has dangerous, unintended consequences.⁴⁸⁰ As described by the U.S. Commission on Civil Rights, this normalized invisibility leads to “[u]nequal

476. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978).

477. *Id.* (alteration in original) (quoting H.R. REP. NO. 23-474, at 18 (1834)).

478. U.S. COMM’N ON C.R., A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 67-68 (2003). <https://perma.cc/EBB9-CM8F>; see also INDIAN L. & ORD. COMM’N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES, at v-ix (2013), <https://perma.cc/89QT-WZ3D> (describing the “jurisdictional maze” in Indian Country that treats Indian people like second-class citizens).

479. U.S. COMM’N ON C.R., *supra* note 478, at 67.

480. See U.S. COMM’N ON C.R., *supra* note 35, at 5.

treatment of tribal governments” by the other American sovereigns, who consistently leave tribes out of funding programs, relationships, enterprises, and even basic data collection.⁴⁸¹ For example, until recently, most tribes were unable to access basic cross-jurisdictional criminal databases because both Congress and the FBI forgot about tribes.⁴⁸² This meant that tribes couldn’t access prior criminal records, protection orders, or warrants from other jurisdictions or input their arrests and criminal records into even the most basic cross-jurisdictional databases.⁴⁸³ As a result, countless persons have likely evaded justice, illegally bought guns, or violated restraining orders on and off reservations across the country because someone—or many people—forgot about tribes.

Finally, there is a risk that invisibility may become erasure. As mentioned in the Introduction, the Supreme Court recently considered whether to uphold the plain text of tribal treaty rights when doing so would make half of Oklahoma Indian Country. At oral argument in *Sharp v. Murphy*,⁴⁸⁴ Oklahoma was able to plant an initial assumption into the minds of the Justices that tribal jurisdiction—tribal law—would derail Oklahoma, without considering what that tribal law is. Justice Breyer asked at the first oral argument, “if we say really this land . . . belongs to the tribe, what happens to all those people? What happens to all those laws?”⁴⁸⁵ The tribe’s attorney responded by emphasizing the limited power tribes hold over non-Indians and fee land.⁴⁸⁶ This strategic response directly countered the opposing side’s argument that tribal rule would “plunge eastern Oklahoma into civil, criminal, and regulatory turmoil” and “drastically change[]” the lives of 1.8 million Oklahomans who would have to deal with the “uncertainty” of tribal law and, possibly, tribal courts.⁴⁸⁷ Indeed, by the time the case was reargued as *McGirt v. Oklahoma*, the attorneys arguing for tribal jurisdiction dedicated an entire section of their brief, titled “The Sky Is Not Falling,” to counter the fearmongering.⁴⁸⁸ In reality, holding

481. See *id.*; *Data Disaggregation*, *supra* note 8.

482. The Tribal Access Program did not begin until 2015 and was the result of holes in access that the federal government learned about at VAWA-implementing tribal meetings. *Tribal Access Program (TAP)*, U.S. DEP’T JUST., <https://perma.cc/DC6H-W6X5> (archived Jan. 11, 2021); VAWA REPORT, *supra* note 175, at 36.

483. VAWA REPORT, *supra* note 175, at 36.

484. Transcript of Oral Argument, *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (No. 17-1107), 2018 WL 6200336.

485. *Id.* at 44.

486. *Id.* at 45-48.

487. Brief for Petitioner at 3, 56, *Sharp*, 140 S. Ct. 2412 (No. 17-1107), 2018 WL 3572365 (quoting interest-group amicus briefs).

488. Brief for Petitioner at 39, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (No. 18-9526), 2020 WL 583959.

that the land belonged to the tribe would simply mean that sometimes different laws would apply. The kinks of transitioning from life regulated completely by Oklahoma to life occasionally regulated by the Muscogee Creek Nation should have been the only question. Instead, the petitioners were able to play into a *fear* of tribal rule, maybe not as “lawless” anymore, but as an unknown. The unknown can be scary. But tribal law is not unknowable.

The victory for tribal jurisdiction in *McGirt* is hopefully as much a rejection of the fear of tribal governance as it is in keeping with the plain text of the law.⁴⁸⁹ Time will tell. Every time a case with large implications like *McGirt* reaches the Supreme Court, many people tied to tribal governments in one way or another are quietly afraid. There is always the fear that the Court will make bad (that is, ill-informed) law. But the great, omnipresent fear is that the Court or Congress will finally do away with tribes. The tragedy—and the injustice—would be that after all these years, and all the blood, ink, and tears spilled, the United States will nonetheless finally do away with Indian tribes, not because it knows what they are like, but because it doesn’t.

489. *See McGirt*, 140 S. Ct. 2452.