Tribes, Wars, and the Federal Courts: Applying the Myths and the Methods of *Marbury v. Madison* to Tribal Courts’ Criminal Jurisdiction

Judith Resnik

*Yale Law School*

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TRIBES, WARS, AND THE FEDERAL COURTS: Applying the Myths and the Methods of Marbury v. Madison to Tribal Courts’ Criminal Jurisdiction

Judith Resnik†

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ABSTRACT

The thesis of this article is that by examining Federal Indian Law one better understands that the American constitutional project includes many instances in which power is claimed by force and justified by necessity. Yet jurists sit in judgment, requiring an accounting even when they condone or license exercises of such power. Moreover, occasionally, judges object in the name of limited government powers, of obligations to recognize separately-constituted polities, .

† Judith Resnik, Arthur Liman Professor of Law, Yale Law School. All rights reserved. Copyright, 2004. This article is based on a presentation at a panel entitled Indian Tribes and the Federal Courts: The Overlooked Sovereigns in Federal Jurisdiction that was organized by Robert Clinton and Louise Weinberg for the Section on the Federal Courts, held at the annual meeting of the American Association of Law Schools in January of 2004. My thanks to them, my co-panelists, Professors Clinton, Frank Pommersheim, and Catherine Struve from whom I have learned a great deal, to participants at a Yale Law School faculty workshop, to Dennis Curtis, Bruce Ackerman, Alex Aleinikoff, Barbara Atwood, Carole Goldberg, Vicki Jackson, Robert Laurence, Sandy Levinson, Christian McMillen, and Catherine Struve for reading drafts, as well as to Anita Khandelwal for her engaged and able research assistance and to Alison Mackenzie, Bertrall Ross, Jennifer Peresie, and Joseph Blocher for yet additional research help, and to Gene Coakley for always providing generous and substantial help in ferreting out sources.
and of individual rights to equality and liberty. Although lacking much by way of citation to constitutional text, Federal Indian Law represents an example of this genre of federal lawmaking, with its commitment to constitutionalism by judges schooled in the traditions of *Marbury v. Madison*.

The need to bring Federal Indian Law to the fore of the elaboration of American legal doctrine has more urgency in the wake of 9/11, as several lawsuits now challenge the prosecutorial powers of the Executive Branch. Federal Indian Law cases, like these “war cases,” are about whether unlimited authority can be founded in physical power. Decisionmaking in both sets of cases requires elaboration from a Constitution with little direct text and a great deal of Court-based extrapolation. In both kinds of cases, the government is asserting a right to power and challengers plead, in the name of the Constitution, for constraint.

One such example is *United States v. Lara*, in which federal prosecutors charged Billy Jo Lara with a criminal offense after the Spirit Lake Nation of North Dakota had done so and obtained a conviction. In *Lara*, the federal government relied on the “dual sovereignty exception” to double jeopardy, crafted in the 1920s by the Supreme Court to prevent state prosecutions from immunizing individuals from federal enforcement of Prohibition. The *Lara* prosecutors have argued that doctrine ought similarly to permit sequential tribal and federal prosecutions. One legal question is whether the federal prosecution is barred because the tribe’s jurisdictional power is derivative of (rather than separate from) the federal government. Another question is which branch of government -- the Court or Congress -- decides that issue.

Under current doctrine, a further wrinkle is presented because a tribe’s criminal jurisdiction reaches only “Indians” who are its members. That proposition stems from the 1978 Supreme Court decision of *Oliphant v. Suquamish Indian Tribe*, holding that tribal courts had criminal jurisdiction over “Indians” but not over non-Indians. In 1990, in *Duro v. Reina*, the Court further defined the jurisdictional line by concluding that tribal courts had jurisdiction only over their own members. Soon thereafter, Congress intervened by stating that it “recognized and affirmed” tribes’ “inherent power” to exercise misdemeanor criminal jurisdiction over “all Indians.”

How might these questions of tribal criminal jurisdiction and jurisdiction-by-identity be answered? From the perspective of those tribal communities that claim the status of foreign nations subjected to conquest and colonialization, neither the courts or Congress are legally competent to decide. From that vantage point, Federal Indian Law is an illegitimate exercise in power with no source of authority other than physical might. But for those acknowledging the history of conquest yet believing that disentanglement of tribes from the United States is now implausible, the questions are ones to which legal actors in the United States need to respond. Here, I offer ways to reason, in light of constitutional aspirations embodied in *Marbury*, about the exercise of criminal jurisdiction by the tribes and its relationship to litigants’ political affiliations and about federal courts’ exercise of jurisdiction based on distrust of other court systems.

I. CONSTITUTIONALISM AS REASONING ABOUT CONSTRAINT

Because the federal courts are specified by the Constitution, jurisprudence about “The Federal Courts” centers on constitutional interpretation. Indeed, in many courses devoted to the subject matter of

"the Federal Courts," students begin with *Marbury v. Madison*, the iconic statement of judicial review in the name of constitutional supremacy. The presumption for which *Marbury* stands is that the Constitution is the


central referent, establishing the metes and bounds of congressional and executive power and legitimating judicial enforcement of its constraints.\(^4\) *Marbury* also represents a methodology of reasoned exploration of the Constitution’s text, understood through various interpretative lenses (that admit more or less by way of context), to yield answers to the legality of a particular exercise of power.\(^5\) The vision is that through such constitutional exegesis, accompanied by close examination of statutes and aided sometimes by development of federal common law, judgments can be made that qualify as examples of the “rule of law.”

Were the *Marbury* methodology limited to readings of constitutional text, it would not work well when legal questions involve the relationships among the federal government, state governments, and tribes. Start with the textual references in the United States Constitution. The word “Indian” appears three times. Twice, the reference is to the exclusion of Indians from calculations apportioning members of the House of Representatives. The first such reference can be found in Article I, Section 2, from which we learn that “Indians not taxed” did not count when determining the membership of the House of Representatives among the states.\(^6\) The Fourteenth Amendment reiterates the exclusion of “Indians not taxed” for purposes of reapportionment.\(^7\) The other textual mention can be found in Article I, where the Constitution specifies that Congress has the power to

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\(^5\) Whether *Marbury* ought to stand for this proposition is a subject of debate within the constitutional law community. See Levinson, supra note 2.

\(^6\) U.S. Const. art. I, § 2, cl. 3.

\(^7\) U.S. Const. amend. XIV, § 2.
regulate "commerce with the Foreign Nations and among the several states and the Indian tribes." 8

In addition to these specific references either to Indians or to tribes, other parts of the Constitution are sometimes invoked by federal lawmakers as providing a basis for federal power over tribes. Specifically, the constitutional grant of power to Congress to make regulations governing the territories 9 and to make war, 10 and the power of the President, with advice and consent of the Senate to make treaties 11 have been cited as empowering those branches to relate to tribes. 12 Those implied powers, like the express but meager constitutional references, suggest a category called "Indian tribes" outside the conventional political parameters of the United States, at the margins (sometimes physically so, outside or in territories) of the United States rather than as constitutive consenting participants in this constitutional order. 13

Yet, despite these slim references, a large body of United States law -- "Federal Indian Law" -- exists. The puzzle (occasionally expressed explicitly by jurists 14) is how to characterize and understand the many statutes, regulations, and decisions made by federal and state lawmakers that regulate Indian tribes and their members in ways often more intrusive than laws regulating "the several states" and in a fashion unlike relations with other "Foreign nations." The federal codification and pronouncements are aimed at making law by specifying the constraints upon action by persons with various affiliations -- state, tribal, federal, congressional, executive or judicial. But a question exists about whether it is possible to understand governmental claims of authority to be legitimate exercises of power in the Marbury sense.

9. U.S. Const. art. IV, § 3, cl. 2.
10. U.S. Const. art. I, § 8, cl. 11.
14. See, e.g., the majority and dissenting opinions in United States v. Lara, 324 F.3d 635 (8th Cir. 2003) (en banc) cert. granted, 124 S.Ct. 46 (2003), discussed infra notes 47, 205-54 and accompanying text.
From the standpoint of some tribes and commentators, the answer is no. As Robert Clinton put it recently: "the federal government has no legitimate claim to legal supremacy over Indian tribes." Further, as other scholars have developed, sources of law do exist -- such as the Inter-American Charter of Social Guarantees -- that provide bases for legal claims by indigenous peoples against the United States. Objections can also be made to the very category of "Federal Indian Law," because a range of different kinds of lawmaking falls within that rubric. Some cases resemble international law because treaty interpretation is at the center, and in other instances, Congress has specified particular legal regimes that are more or less respectful of tribal autonomy.

Scholars such as Alexander Aleinikoff and Carole Goldberg, distressed about federal domination, have articulated alternative paths that federal law could take to diminish federal oversight. One route is to understand tribes as foreign nations, while another is to find within United States legal principles more respectful of tribal self-governance. Another approach comes from Professor Sarah Cleveland, who aligns Federal Indian Law with other bodies of Supreme Court lawmaking such as immigration law, and places them into what she calls "deconstitutionalized zones." She characterized those zones as governed by Supreme Court insistence that, as

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a nation, the United States has inherent sovereignty to exercise physical and political power over identified subgroups who stand outside the Constitution's protections.\(^{20}\)

My thesis is that walling off Federal Indian Law from mainstream constitutional discourse is a mistake, for it undermines the ability to appreciate the relationship of that body of law to another meaning of *Marbury* -- a commitment that powers not be absolute by virtue of access to courts to make (even unsuccessful) challenges to authority. *Marbury* in this sense is not the case or its many aspects\(^{21}\) but a repeated set of interactions over time between the courts and other branches of this government that evidence an impulse to “do” law, to find law, to try to make law that offers reasons about which organ of government has what quantum of authority over particular sets of actions and thereby to create a legal premise that governmental power has its limits. When Federal Indian Law is included within American constitutional lawmaking, *Marbury* can become less a mythic representation of the lawful rendering of justice and more a contested political moment that has since been reread to stand for a form of social ordering.\(^{22}\)

Thus, while I share Professor Cleveland’s view that Federal Indian Law needs to be understood as interrelated with other areas of American law, I do not see it as “deconstitutionalized” but rather as a genre (like it or not) of constitutional lawmaking in the United States. Similarly, while I agree with Professor Philip Frickey that coherence is hard to find in Federal Indian Law,\(^{23}\) that trait does not make it that peculiar in American law.\(^{24}\) Rather, I

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20. Professor Cleveland traced the roots of doctrines relating to territories, tribes, immigration, and citizenship and attributed the Court's insistence on plenary and inherent powers to a “complex convergence of racial and ascriptivist impulses, imperialist ambitions, and concerns about dual federalism in the domestic sphere. Arguments derived from international law, social contract theory, territoriality, necessity, and the underdevelopment of individual rights” provided doctrinal explanations. *Id.* at 253.


22. See Levinson, *supra* note 2, at 562. As he puts it: "*Marbury* teaches nothing at all about the capacity of law to enhance either good or evil . . . ." *Id.* See also Jack Balkin, *Concurring and Dissenting*, to Levinson, supra note 2, at 38 *Wake Forest L. Rev.* 575, 576 (2003) (discussing the protean nature of *Marbury*, capable of being read "as an exemplar of constitutional protestianism, or popular constitutionalism, or partisan entrenchment, or a constitutional moment, or a constitutional settlement, or what have you").

think that readers of American constitutional law will find Federal Indian Law all too familiar in many respects. In this area, like elsewhere, sometimes a resort to courts is unavailing, in the sense that a particular act of power is upheld despite denunciations (at the time and subsequently) of lawlessness. Sometimes the review is not self-conscious, in the sense that jurists’ comfort in their own entitlement to rule prompts no explanation of their authority to do so. In some instances, the Court defers to another branch of government by pronouncing that it has “plenary powers” about a certain kind of issue, that the question is a “political” one that either remits it to another branch or that renders it inappropriate for judicial review, or that a specific exercise of authority inheres in the nation’s own sovereignty, again putting it beyond judicial scrutiny.

But even when rulings announce the “plenary powers” of Congress or of the President (vis-a-vis Indian tribes, war-making and foreign affairs, and immigration) or when decisions categorize cases as “political,” because it suggests that the occupying power has another country to which to return, see Robert Laurence, Antipodean Reflections on American Indian Law, 20 ARIZ. J. INT’L & COMP. L. 533 (2003).


26. See Baker v. Carr, 369 U.S. 186, 210–17 (1962); see also Cornelia T. L. Pillard & T. Alexander Aleinikoff, Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright, 1998 SUP. CT. REV. 1, 38 (explaining the two meanings of the categorization of a problem as a “political one” by courts, and distinguishing a nineteenth century usage meaning that the matters were ones of policy for another branch from a twentieth century conception that the matters are nonjusticiable).

27. See, e.g., United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (asserting that the foreign affairs power derived from the fact of the United States as a nation-state, and was therefore broader than the constitutional grants of power). See Cleveland, supra note 19, at 1–3, 273–77.


30. See, e.g., Fiallo v. Bell, 430 U.S. 787, 792 (1977) (commenting that “over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens”) (quoting Oceanic Steam Nav. Co. v. Stranahan, 214 U.S. 320, 339 (1909)).

31. See Pillard & Aleinikoff, supra note 26. Justices in some of the Federal Indian Law cases have characterized the subject matter as political. See, e.g., Lone Wolf, 187 U.S. at 568 (“As Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted enactment of this legislation.”). But see Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 84 (1977) (citing Lone Wolf as limited by many instances when
courts have served as a second institution that is structurally distinct from but potentially able to sit in judgment of and to impose limits in the name of law on actions of another branch.\(^{32}\) Moreover, even when judges insist on another branch’s plenary powers, judges nonetheless engage in review. As Justice Brennan once put it, the “power of Congress over Indian affairs may be of a plenary nature; but it is not absolute”\(^{33}\) and “has not deterred this Court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment.”\(^{34}\) And, upon rare occasion, courts decide that a particular exercise of power is illicit.\(^{35}\) In other words, the \textit{Marbury} methodology

\footnotesize

\begin{itemize}
  \item the Court had reviewed congressional action); United States v. Sioux Nation, 448 U.S. 371, 411–16 (1980) (retreating from the concept of tribal issues as under exclusive congressional control without judicial review and citing \textit{Delaware Tribal Business Committee} for that proposition).
  \item \textit{Delaware Tribal Bus. Comm.}, 430 U.S. at 84-85 (using a standard of whether a particular legislative judgment “can be tied rationally to the fulfillment of Congress’ unique obligation toward Indians . . . .,” and citing \textit{Morton v. Mancari}, 417 U.S. 535, 555 (1974); see also Perrin v. United States, 232 U.S. 478, 486 (1914) (reviewing federal legislation and commenting that, when “determining what is reasonably essential to the protection of the Indians, Congress is invested with wide discretion, and its action, unless purely arbitrary, must be accepted and given full effect by the Court”).
  \item In the context of immigration, \textit{Nguyen} v. INS, 533 U.S. 53 (2001), provides another example. As discussed \textit{infra} note 111, \textit{Nguyen} can be criticized for upholding a gender-based classification on citizenship but that judgment comes from judicial engagement with the question rather than deferral to Congress on a matter of immigration. The Court put first the question of the legality of the practice. By upholding it, the Court did not reach the question of whether “the wide deference afforded to Congress in the exercise of its immigration and naturalization power” would suffice to require deference in the face of a conclusion that the provision violated the Equal Protection Clause. 533 U.S. at 72–73. \textit{See also} Pillard & Aleinikoff, \textit{supra} note 26, at 40–53 (using \textit{Miller v. Albright}, the predecessor case to \textit{Nguyen}, as an example of judicial review in immigration law cases).
\end{itemize}
prevents the invariable equation of the term “plenary powers” with the term “absolute power.”

Understanding that United States law is dotted with instances in which *Marbury* undermines unmediated power is particularly important in light of events post-9/11, which have prompted judges and lawyers to focus on a handful of precedents (“war cases”) over the two centuries as guides to what role judges might play in dealing with individuals detained in the wake of 9/11. Many of those detained are posited as “outside” the

36. As Professor Frickey argues, however, that the courts may occasionally intervene does not mean that resort to courts is the most effective means of reorienting the relationship between Indian tribes and the United States. See Frickey, *Coherence in Federal Indian Law*, supra note 13, at 1764 (noting that the Court had “only six times” invalidated federal statutes regulating Indian tribes). Frickey argues that “[l]itigation may rearrange the rafters but it is unlikely to shake its foundations.” *Id.* at 1778; *see also id.* at 1777–84 (advocating a model of negotiation).

37. *See, e.g.*, *Ex parte McCord*, 74 U.S. (7 Wall) 506 (1869) (applying a statute that divested jurisdiction over habeas petitioners and making a broad statement of congressional power “to make exceptions to the appellate jurisdiction” of the Supreme Court); *Ex parte Yerger*, 75 U.S. (8 Wall) 85 (1869) (limiting *McCord* to a specific repealing provision and noting that other habeas routes remained); *Ex parte Milligan*, 71 U.S. (4 Wall) 2, 119 (1866) (granting a habeas petition because a military tribunal lacked authority to try a United States citizen who had lived in Indiana and was alleged to have conspired to aid the Confederacy, on the grounds that it was “the birthright of every American citizen, when charged with a crime, to be tried and punished according to law”). World War II gave rise to the 1942 decision of *Ex parte Quirin*, 317 U.S. 1 (1942). *Quirin* can be read to have limited *Milligan* by upholding a “secret” (in the sense of closed, not in the sense of unknown) trial by a military tribunal of five individuals claimed to be German saboteurs who had landed on the East Coast. The Court did review the merits but permitted the process, even though the federal court system was available and despite the fact that one of the defendants was an American citizen. *Quirin*, 317 U.S. at 46. The Court relied on congressional authorization as well as a Presidential Proclamation of the power to bring charges of violations of the “law of war” against “unlawful combatants” to specially-constituted tribunals, authorized to impose the death penalty. *Id.* at 35. *See generally Boris I. Bittker*, *The World War II German Saboteurs Case and Writs of Certiorari Before Judgment by the Courts of Appeals: A Tale of Nunc Pro Tunc Jurisdiction*, 1997 CONST. COMMENTARY 431.

Other pillars from that era are *Korematsu v. United States*, 323 U.S. 214 (1944), upholding the internment of Japanese-Americans, and *Johnson v. Eisentrager*, 339 U.S. 763 (1950), refusing German nationals, who had been held and tried as enemy prisoners in China and then imprisoned in Germany, review through a writ of habeas corpus challenging their confinement. In an opinion by Justice Jackson, the *Johnson* Court concluded that “the privilege of litigation” does not extend to prisoners who were at no time “within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial, and their punishment were all beyond the territorial jurisdiction of any court of the United States.” 339 U.S. at 777–79.

Constitution, as the Executive Branch argues its unfettered authority. The war cases arise at extraordinary moments, for which some scholars give the Court a "war discount" by reading its opinions to mean less than they say, as marginal rivulets of an otherwise constitutionally-coherent stream. Other scholars see these opinions as evidence that courts cannot be counted upon to uphold civil liberties in times of war, while yet others believe the decisions make appropriate accommodations to emergency needs.

Reading Federal Indian Law alongside the war cases undercuts the ability to write those decisions off as outside mainstream jurisprudence. Rather, Federal Indian Law demonstrates that the United States has a long history of using physical force to exercise its sovereignty over national groups claiming to be independent, and federal judges have been in the business of lawmaking for more than two centuries about when such

39. In some instances, the outsider status is literal, such as the individuals who are detained in Guantanamo. See Gherebi v. Bush, 352 F.3d 1278 (9th Cir. 2003) (holding that individuals labeled "enemy combatants" at a naval base in Cuba can have access to federal courts), petition for cert. filed, 72 U.S.L.W. 3568 (U.S. Mar. 3, 2004) (No. 03-1245); Al-Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), cert. granted sub nom Rasul v. Bush, 124 S.Ct. 534 (2003) (involving twelve Kuwaiti nationals, two from Great Britain, and two from Australia, who challenge detention in Guantanamo, and holding that because they were captured abroad and never present in the United States, no habeas jurisdiction exists). See also Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), cert. granted, 124 S.Ct. 1353 (2004) (holding that without congressional authorization, the President does not have the power to detain a United States citizen as an enemy combatant); Hamdi v. Rumsfeld, 316 F.3d 450, 459 (4th Cir. 2003), cert. granted, 124 S.Ct. 981, (2004) (holding that the scope of the judicial inquiry on a habeas petition brought by an American citizen captured in Afghanistan and brought to the United States was very narrow and that, given the President's designation of Mr. Hamdi as an enemy combatant captured in a "zone of active combat in a foreign country," continued detention was permissible).

40. For example, in Gherebi v. Bush, 352 F.3d 1278, 1299–1300 (9th Cir. 2003), "at oral argument, the government advised" the court "that its position would be the same even if the claims were that it was engaging in acts of torture or that it was summarily executing the detainees. To our knowledge, prior to the current detention of prisoners at Guantanamo, the U.S. government has never before asserted such a grave and startling proposition."


42. See Bruce Ackerman, The Emergency Constitution, 113 YALE L. J. 1029 (2004).


44. As Professor Frickey put it, "we live in a society governed by a constitution that is based on a social contract theory of consent . . . yet made possible only by unilaterally dispossessing Natives of their autonomy and lands. The inconsistencies only become more awkward when the Constitution itself is closely examined, for it provides no textual hint of the plenary power over Indian affairs that Congress has confidently exercised for a century and courts have routinely validated." Frickey, Coherence in Federal Indian Law, supra note 13, at 1765.
authority may be legitimately exercised (again, from the standpoint of American law). Further, several Federal Indian Law cases and the current spate of war cases focus on the relevance of a person’s status (as an Indian, a “non-Indian,” an Indian of a particular tribe, a United States citizen, an alien, or an enemy combatant) to the legality of the exercise of jurisdiction over that person. And in both arenas, claims are often made (and often successfully so) that the plenary power of another organ of government requires special deference. Moreover, in the war cases as in Federal Indian Law, the Constitution’s textual sources are sparse and require substantial extrapolation to apply to contemporary conditions.

Questions about the relevance of an individual’s status and political affiliations to the legitimacy of the exercise of jurisdiction and prosecutorial powers are before the Court in its 2003-2004 term in cases involving both Indian Tribes and detainees in the 9/11 war. The Federal Indian Law issue is whether a federal prosecution can occur after a member of one tribe had been prosecuted criminally by another tribe. In 1922, the Court created the “dual sovereignty exception” to double jeopardy to prevent state prosecutions from immunizing individuals from federal power to enforce Prohibition. In 1978, in Oliphant v. Suquamish Indian Tribe, the Supreme Court held that tribal courts had criminal jurisdiction over “Indians” but that tribes could not exercise that power over non-Indians. In 1990, in Duro v. Reina, the Court held that tribal courts had criminal jurisdiction over their own members but not over other “Indians.” Soon thereafter, Congress intervened by stating that it “recognized and affirmed” tribes’ “inherent power” to exercise misdemeanor criminal jurisdiction over “all Indians.” If the prior Supreme Court precedent holding that tribes had no jurisdiction over non-Indian members is understood as a common law

45. See BREST, LEVINSON, BALKIN & AMAR, supra note 2, at 39-44, 60-61 (discussing, in the context of the Alien Act of 1798 and the Chinese Exclusion Case, the development in United States law of a tradition that linked jurisdictional authority of the state or the federal government to the status of individuals.)

46. Id. at 1161 (describing the Supreme Court as embracing “the notion that power over Indian affairs is an unwritten, inherent power of national sovereignty necessitated by the colonial nature of the United States”).

47. United States v. Lara, 324 F.3d 635 (8th Cir. 2003) (en banc), cert. granted, 124 S. Ct. 46 (2003).


rule, Congress may revise it. On the other hand, if the Court announced a constitutional rule, under current doctrine, Congress has limited means of altering it.53

Thus, the puzzles about how to categorize Federal Indian Law are important sources of instruction, both for their stark assertions of power through conquest and for the occasionally self-conscious efforts to generate law-like regimes to cabin exercises of unfettered power premised on physical force. By grouping together the several pockets of law in which federal courts have deferred to other governmental actors through either the “plenary powers” or the “political question” doctrines, we could focus on the many times that courts issue decisions allocating seemingly unlimited power. We can also see the Court taking power onto itself. Further, we can see that courts often tolerate less protection of liberties of those posited as “foreign.”54 And we can also learn of the frequency with which painful episodes of racial hostility are glossed over, as doctrines develop that appear to be independent of the events that brought them into being.55

But we can also read these cases and learn another lesson: that, trained in the Marbury presumption of constitutional constraint, judges always ask about, sometimes wrestle with, and occasionally even impose limitations on government actors (themselves included) in the name of United States constitutionalism. While the Constitution stops, the activity of making law in a constitutional sense does not. For better and worse, but time and again, jurists doing Federal Indian Law keep trying to assimilate the interaction between federal power and tribes to American constitutional precepts that, somewhere and somehow, boundaries exist on the powers claimed by government.56 By looking at efforts to make a genre of national law about permissible relations to Federal Indian tribes, foundational or proto-

54. See generally Cleveland, supra note 19, at 263 (discussing the role of “nativism” in the Court’s limited protections of immigrants and of members of Indian tribes); Frickey, Coherence in Federal Indian Law, supra note 13, at 1866 n.76.
55. See Edward A. Purcell, Jr., The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History and “Federal Courts,” 81 N.C. L. REV. 1927 (2003). Professor Purcell began by stating: “What is called the ‘law of the federal courts’ has been established through a process that filters, purifies, redesigns, and largely erases decisive historical phenomena -- social conflict, politics, racism, sexism, and of course, change itself.” Id. at 1929. He then argued that Hans v. Louisiana, a major statement of states’ immunity from money damages, was an outgrowth of an agreement during the 1890s to permit “white rule” in the South and the repudiation by states of debt “in exchange for national reconciliation and unity.” Id. at 1927.
constitutional principles emerge out of the practices of jurists working in the shadow and shelter of Marbury. Illuminated are the national commitments to a government structure whose powers are limited by their dispersion and the national insistence that certain practices of explanation will be required of all actors (state, tribal, and federal) within its domain.

Below, in Part II, to help those less familiar with the range of powers exercised over tribes and their members, I provide examples of federal law related to Indian tribes. Parts III, IV, and V probe questions that are framed in terms of jurisdiction (of federal, state, and tribal courts) to understand when national norms displace and when national norms permit variation by either states or tribes. By contrasting the example of a lawsuit (Santa Clara Pueblo v. Martinez\(^\text{57}\)) about the legality of patrilineal rules of a Pueblo with the refusal in Oliphant to permit tribes to exercise low-level criminal jurisdiction over non-Indians, I explore the variation in federal willingness to cede jurisdictional authority to tribes. Further, by linking Oliphant to Supreme Court decisions overseeing state criminal trials in the 1960s, one can see that federal courts sometimes exercise what I call “jurisdiction by distrust.” Part VI considers another example: the dual sovereignty exception to double jeopardy is shaped by distrust of state or tribal prosecutors, judges, and/or juries, for that doctrine permits national law enforcement decisions to trump such local judgments.

Part VII identifies national constitutional premises that ought to flow from this analysis. The history of tribes as political authorities recognized as distinct entities by the United States Constitution and the need for law enforcement ought to shape presumptions in favor of tribal competence to exercise criminal jurisdiction over those allegedly disturbing the peace. Moreover, restricting jurisdiction by identity (no Indian tribal jurisdiction over non-Indians) does not fit current understandings of the United States commitment to the equality of individuals before the law. Thus, as to the specific question about criminal jurisdictional lines delineating Indian from non-Indian and Indians of a particular tribe from other Indians, neither a rule predicated on a defendant’s affiliation as an Indian of any kind or as not an Indian ought to be understood as constitutional, and both the Congress and the Court should be able to revisit statutes and decisions to enable tribes to exercise territorial jurisdiction to prosecute all persons, as do other polities.\(^\text{58}\)

58. Were tribes to so desire, this approach would also require revisiting the divesting of tribal jurisdiction over felonies. For an argument that, whatever the views of any tribe about its own interest in a wider jurisdiction, the Major Crimes Act is an unconstitutional assumption of power, see Warren Stapleton, Indian Country, Federal Justice: Is the Exercise of Federal
Equally important are two other aspects of American constitutionalism: the ability of the national government to create law enforcement regimes that override local judgments by either tribes or states and the insistence on respect for individual liberty whether impinged by either states or tribes. I argue (again from the vantage point of American law, not from that of Indian tribes) that the interest in implementing a national legal regime ought to result in enabling both prosecutors and defendants to turn to national courts. A dual sovereignty exception that gives a prosecutor entry to the federal system after state or tribes have proceeded against criminal defendants should be accompanied by ready access to the writ of habeas corpus to give defendants comparable abilities to invoke national civil liberties protections.

I should note at the outset that, from the perspective of some advocates of tribal autonomy, this call for symmetry will have no appeal, for it bespeaks a willingness to impose that view on tribes and therefore to invade a form of tribal sovereignty. From the perspective of advocates of criminal defendants, this call for symmetry will also be opposed as empowering prosecutors at the expense of individuals. I write from the perspective of federal lawmakers, asking questions about what stance national law ought to take towards entities that, within its domain, have some police powers. In my view, the Supreme Court has taken too much from tribes, unnecessarily divesting them of jurisdictional authority. My approach would enhance tribal powers significantly but with the caveat that, just as nations sometimes condition extradition on compliance with certain norms about defendants' rights, the United States could do so for tribes.

My claim about how national authority ought to be exercised does not entail an argument that the content of national principles derives solely from an insulated federal power, making such decisions ex cathedra. Nor is the claim that national norms are ipse dixit preferable and inflexible. Rather, as I detail below, national legal rules are themselves artifacts of interactions across and among states, tribes, and nations outside the United States. Further, the result of national judicial oversight would not necessarily be that federal judges would routinely divest tribal courts of jurisdiction. Rather, just as federal judges tolerate deviation in state court processes from

*Jurisdiction Under the Major Crimes Act Constitutional?*, 29 Ariz. St. L.J. 337 (1997) (also arguing that tribes would need greater authority to punish and to reach nonmembers).

59. See generally Goldberg, Individual Rights, supra note 18.
60. See infra note 215.
61. See also ALENIKOFF, SEMBLANCES OF SOVEREIGNTY, supra note 18, at 96 (discussing the current Court's treatment of tribes as, "membership organizations--more than private clubs but less than nations--empowered to regulate the conduct of their members and entry onto tribal law but little else."
federal rules, so they might develop a jurisprudence about tribal courts that appreciates different modes of respecting criminal defendants. A federal law of habeas corpus could well take into account that tribal courts do not have to replicate all the means that federal courts use to protect individuals from overreaching governmental powers to accomplish the ends. 62

My point is not a “normative claim about the superiority of the Anglo-American system of democratic majority rule and individual rights over tribal governing systems.” 63 Nor is it founded in a utilitarian assumption that, if tribal courts behave more like federal courts, they will gain power, recognition, or economic well-being. Rather, we should understand that the United States has the capacity to be jurispathic (to employ Robert Cover’s term 64 to capture law’s capacity to destroy) and that such powers ought to be exercised self-consciously in service of norms of equality and dignity of all persons. Yet, even as I support the exercise of federal power, I also hope to undercut the assumption of tribes as uniquely “dependent nations,” 65 as if the United States were itself an “independent nation.” My goal is to deepen the appreciation of the inter-dependencies of all sovereigns. The United States has a serious stake in tribal governments functioning to maintain law and order. Its own dependency on other polities (including tribes, states, and other nations) to engender widespread compliance with the rule of law ought to prompt this country to turn for help to these many other legal regimes on which it has to rely.

In Part VII, I conclude by addressing the anxiety that all implicit but unwritten constitutional positions provoke, for they permit lawmakers (and especially jurists in this form of democracy) the power of articulation. But there is no escape for, as Henry Monaghan explained:

[w]here our understandings of judicial review not affected by the mystique surrounding Marbury v. Madison, it might be more readily recognized that a surprising amount of what passes as authoritative constitutional “interpretation” is best understood as something of a quite different order -- a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various

65. This is Chief Justice Marshall’s famous phrase. See Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).
Federal Indian Law fits within the many instances when the words of the Constitution dictate no outcomes yet courts articulate constitutional principles that need not be understood as the exclusive domain of the courts. Watching the practice of constitutional lawmaking, especially in the area of Federal Indian Law, shows how schooling judges in constitutionalism can impose the constraints of reasoning and explanation about government’s powers. It does not, however, show that such judges will be always (or even often) wise or just, for that part of the constitutional project is still (and always) underway.

II. FEDERAL INDIAN LAW AND THE PROBLEMS OF AUTHORITY

For those less familiar with the many exercises of federal authority over tribes and the legal puzzles that they represent for constitutional lawyers, historical examples are ample. Consider, as one hopes to comply with the rule of law premises of Marbury v. Madison, the following questions. How did the Executive have the power in 1838 to move more than 10,000 members of the Cherokee Nation west, across the Mississippi and out of Georgia? Why did Congress claim a power in 1871 unilaterally to stop treatymaking with tribes? What was the source of congressional power to...
enact the General Allotment Act of 1887, taking lands from tribes and apportioning them to individual members of tribes, expressly in an effort to disable tribal authority by disaggregating property held collectively by tribes. On what authority did Congress, in 1934, enact the Indian Reorganization Act, pursuing a new vision of the desirability of tribal affiliation? In 1968, how did Congress have the power exercised through the Indian Civil Rights of 1968 (ICRA) to require tribes to provide forms of civil rights akin to those that the federal government and states must provide to individuals under the Fourteenth Amendment? Where does authority come from for Congress to enact the Indian Gaming Regulatory Act (IGRA) -- resulting in the Supreme Court decision in Seminole Tribe of Florida v. Florida, holding that Congress could not, under the Indian Commerce Clause, subject states to suits for failure to negotiate with tribes?

Turn to the Executive Branch and its Bureau of Indian Affairs (BIA), one of the first federal agencies. What was the source of the BIA’s

Sovereignty or a Self-Limitation of Contractual Ability?, 5 AM. INDIAN L. REV. 239, 240 (1977) (citing an appropriation act of 1871 with a clause providing that “hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty”). Rice traced the interpretation of these provisions by the Supreme Court, as it elaborated an understanding of a diminished political status of tribes. Id. at 241–43. His view is that Section 71 does not preclude the United States Government from entering into agreements and conventions that recognize the political status of tribes. Id. at 246–47. See also Artichoke Joe's California Grand Casino v. Norton, 353 F.3d 712, 729 (9th Cir. 2003) (citing FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 221–23 (2d ed. 1982) and discussing how the abrogation power prompted the courts to fashion a special canon of construction of statutes in the favor of tribes); Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985).


73. See generally Dalia Tsuk, Pluralisms: The Indian New Deal as a Model, 1 MARGINS 393 (2001).


authority, exercised from the late nineteenth century to the 1950s, to take children from their tribes, place them in special schools often hundreds of miles away, and insist that those children abandon their languages, their names, and the customs of the communities from which they came? How did Congress, in the early part of the twentieth century, have the power to give to the Secretary of the Interior authority over tribal constitutions, such that the BIA disapproved certain provisions and provided advice on “appropriate” provisions? In the 1950s, what legal basis gave the Executive the authority to return to the strategy of delegitimation of tribal identity through policies called “relocation” and “termination”?79

The role of the Supreme Court prompts yet other questions. How does the Court have authority to allocate “plenary powers” over tribes to Congress?80 What are the legal bases of the Court’s commitment at times to

77. The BIA established the first such school in 1879 in Carlisle, Pennsylvania. The express purpose was to “civilize” children through divesting them of their Indian identity and to “Americanize” them. Detailed documentation about all of the boarding schools is not available. By the early 1900s, under thirty existed, and four remain in use today. See Remembering Our Indian School Days: The Boarding School Experience, available at http://www.heard.org/show-exhibit.php?id=6 (last visited Feb. 26, 2004), and Away from Home: American Indian Boarding School Experiences, 1879-2000 16, 60–61 (Margaret L. Archuleta, Brenda J. Child, & K. Tsianina Lomawaima eds.) (Heard Museum, Phoenix, Arizona 2000). That catalogue includes discussion of an exhibit displayed at the Heard Museum that includes a montage of images, mementoes, and recorded voices describing these events.

78. See 25 U.S.c. § 476 (2000) (providing that “[a]ny Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective” upon ratification by the tribe and upon approval by the Secretary of the Interior). The Secretary in turn must act within a specified period of time to approve “unless the Secretary finds that the proposed constitution and bylaws or any amendments are contrary to applicable laws.” Id. See generally Dep’t of Interior, Developing and Reviewing Tribal Constitutions and Amendments: A Handbook for BIA Personnel (1987); Carole Goldberg, Members Only? Designing Citizenship Requirements for Indian Nations, 50 U. Kan. L. Rev. 437 (2002) (arguing that the choice of the term of “membership” stems from the influence of the Bureau of Indian Affairs and proposing theories of tribal citizenship) [hereinafter Goldberg, Members Only?]; Eric Lemont, Overcoming the Politics of Reform: The Study of the Cherokee Nation of Oklahoma Constitutional Convention, 28 Am. Indian L. Rev. 1 (2003) (describing the 1999 constitutional convention of the Cherokee Nation of Oklahoma and its work in revising earlier constitutions).


80. See, e.g., Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903). Lone Wolf has been described by some scholars as the Dred Scott of Federal Indian Law. See Joseph William Singer, Lone Wolf, Or How to Take Property by Calling it a “Mere Change in the Form of Investment,” 38 Tulsa L.J. 37, 37 (2002). See also Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989). The Court in Lone Wolf stated that Congressional powers were not subject to judicial control. 187 U.S. at 565. But the Court has departed from that position in several instances. See supra note 34. See generally Newton, Federal Power over Indians,
the view that ambiguities in federal statutes ought to be construed in favor of "traditional notions of sovereignty and with the federal policy of encouraging tribal independence"? More generally, when the Court "does" federal Indian law, what is it doing? Constitutional interpretation? Federal common law? What presumptions of deference ought it accord to tribal decisionmaking as contrasted to the deference accorded state and federal executive or legislative mandates? And what deference ought Congress accord, in turn, to the Court's pronouncements?

III. DIFFERENCE, ASSIMILATION, AND SOVEREIGNTY

These questions explain in part why, several years ago, I brought Indian tribal law cases into my teaching of "The Federal Courts," a course that has, since the 1950s when the Hart and Wechsler casebook *The Federal Courts and the Federal System* was first published, become a staple of law schools' curriculum. Two questions, today captured by the shorthand of "separation of powers" and "federalism," are central to that course and to many discussions of constitutional law. First, given the constitutional system in the United States with its express commitment to some forms of

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supra note 35.


independence for a judicial branch, how is power allocated and shared among the Judiciary, the Congress, and the Executive? Second, given that we live in a democratic federation, what deference does the judicial branch owe to the judgments of state courts, to other state officials, and to states as litigants when they appear in federal cases?84

The language of "sovereignty" dots the jurisprudence on The Federal Courts.85 Comparable doctrines are found in Federal Indian Law. Shared topics include sovereign immunity,86 the power of the federal courts to make common law,87 comity, and abstention.88 Moreover, with cases like Ward v. Love County89 (addressing the independence of state courts to

84. Although the two questions of separation of powers and federalism are conceptually distinct, in practice they frequently meet. Specifically, the question of the role that the judiciary plays in a federation often depends on interpretation of statutes, hence implicating the concerns going under the heading of separations of powers. And, when the Court is encountering the powers of the Executive and the Congress, the Court has to decide whether to position itself as a spokesperson for states' authority or to leave that role to others. See, e.g., United States v. Morrison, 529 U.S. 598, 617–18 (2000) (relying on concerns about the power of localities when interpreting the reach of the Commerce Clause).

The word "federalism" itself is a relatively new addition to the Supreme Court's vocabulary, used first by Felix Frankfurter in the 1930s. The concern, about what could also be called "states' rights" but which I term "state-regarding" decisions, is a feature of the Constitution. See Judith Resnik, with Joshua Civin, Daphna Renan, & Lara Slachta, Federalisms (manuscript on file with the author).


89. 253 U.S. 17 (1920).
determine issues of state law) and the *Seminole Tribe of Florida v. Florida* decision\(^{90}\) (concluding that the sovereign immunity of states rendered Congress without power under the Commerce Clause to subject states to private or tribal enforcement of federal law), legal questions about Federal Indian tribes already play a significant role within materials read regularly in the (now) traditional Federal Courts’ canon.\(^{91}\)

I also turned to tribal law cases because I hoped that through them, I could engage students in thinking about the conflicts engendered in federations when choices have to be made between state and national powers. The central issue in federations is when to exercise the national “trump” — to insist that whatever subunits of power may have been chartered, a particular decision is outside their ken. Such rulings are of great moment, for they define national norms. Yet, I found when teaching cases, such as *Younger v. Harris*,\(^{92}\) about comity towards the states, that students did not much care whether California exercised its “sovereign” right to prosecute Mr. Harris criminally or the federal courts took over the decisionmaking. The potential “intrusion” into California’s legal processes was hard to grasp, given a federal court located a few blocks from the state’s criminal court. And the urgency of access to the federal system was similarly missing, for the underlying facts (a criminal defendant distributing leaflets promoting the replacement of capitalism with socialism\(^{93}\)) had become too distant from contemporary problems.\(^{94}\)

But upon reading the 1978 decision in *Santa Clara Pueblo v. Martinez*,\(^{95}\) students understood that courts could be agents of culture and norms -- that federal courts could be “jurispathic” (again to borrow Robert Cover’s term\(^{96}\)) in that through federal law, local customs could be displaced, and perhaps destroyed. Julia Martinez, a member of the Santa Clara Pueblo who had married a Navajo man, claimed that the patrilineal rules of the Santa Clara Pueblo were illegal under United States law.\(^{97}\) Having been unsuccessful in efforts to persuade the Pueblo to admit her children as members,\(^{98}\) Julia Martinez and her children brought a claim

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\(^{90}\) 517 U.S. 44 (1996).
\(^{91}\) Both cases are excerpted in HART & WECHSLER, 5TH ED., *supra* note 2, at 793–95 (Ward County), and at 1004–23 (Seminole Tribe).
\(^{92}\) 401 U.S. 37 (1971).
\(^{93}\) At issue was the constitutionality of California’s Criminal Syndicalism Act. *Id.* at 38–39. The argument was that, under the First Amendment, the statute was invalid. *Id.* at 40.
\(^{94}\) Perhaps a new generation of war protesters will make these concerns more salient.
\(^{96}\) Cover, *supra* note 64, at 40.
\(^{97}\) *Santa Clara Pueblo*, 436 U.S. at 49.
\(^{98}\) *Id.* at 53.
under the Indian Civil Rights Act of 1968, a federal law that requires tribes to provide its members with “equal protection of its laws.” The Supreme Court, in an opinion by Justice Thurgood Marshall, held that no cause of action for federal enforcement could be implied.

The decision focused on Indian tribes as “distinct, independent political communities, retaining their original nature rights” of self-governance. If the federal courts exercised jurisdiction over Julia Martinez’ claim that the patrilineal rules of the Santa Clara Pueblo were illegal under United States law, the Santa Clara Pueblo had less freedom to make its own norms about membership. As Justice Marshall explained, “the tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the Federal and State Governments.”

But the tribute to tribal autonomy that the Court claimed to have accomplished by deference to Santa Clara Pueblo’s lineage rules was overstated. For, as an examination of the record and history makes plain, the Pueblo’s patrilineal requirements were not long-standing but relatively recently made in the wake of federal law that gave federal benefits -- dollars for housing and health care to enrolled members of the tribe. Before the 1930s, the Santa Clara Pueblo had no codified rule of membership. Its first rule, enacted after it made a constitution under the Indian Reorganization Act of 1934, made membership open to children of either parent or through tribal decisions. But, in 1939, the Pueblo narrowed its written

100. 25 U.S.C. § 1302(8) (“No Indian tribe in exercising its powers of self government shall . . . deny to any person within its jurisdiction the equal protection of its laws.”).
103. The predicates generally cited for tribal autonomy are cases from the early decades of the United States, when Chief Justice John Marshall concluded that, although European “discovery” precluded tribal authority to interact with nations independently from the United States, tribes retained authority internally, as “domestic dependent nations” under a guardianship in which the United States protected them from states. See Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 573 (1823).
104. 436 U.S. at 71.
107. Resnik, Dependent Sovereigns, supra note 74, at 704–09.
membership opportunities by using a patrilineal rule -- a delineation familiar to those in the United States through English common law and American legislation on citizenship.

Moreover, when the Supreme Court decided *Santa Clara Pueblo v. Martinez* in 1978, United States law itself did not always object to gender-based discrimination. The ability to "let" (I use the term advisedly) the other jurisdiction (tribal or state) have its "own law" came in part from the view that its law was not outside the bounds of toleration. Gender-based decisionmaking was not then (and is still not now) always held to be noxious. The Supreme Court has upheld the legality of a male-only draft and, more recently, a gender-based classification in an immigration statute that required citizen fathers of children born abroad and "out of wedlock" to acknowledge paternity affirmatively before the child reached the age of eighteen, whereas citizen mothers of such children transmitted citizenship differently.

Thus, when the Supreme Court concluded in the *Martinez* case that the Indian Civil Rights Act did not provide an implied cause of action for Ms. Martinez and her children to bring a claim of equal protection and remitted the Martinez family to whatever remedies the Pueblo might provide, the


Court was aware that the tribe might well continue to enforce its patrilineal rule but did not find such an action beyond toleration. Julia Martinez had a right under the ICRA, but her remedy lay outside the federal courts and with tribal decisionmakers. In short, whether the example is a state or a tribal rule potentially divergent from what federal law would require, the exercise of federal power is deferred because of toleration (if not acceptance) of possible deviations (if only for a period of time). When the proposed exercise of power is noxious, however, to a national norm (which is, sometimes, identified as a national norm through that very conflict), courts refuse the risk of a different outcome by a lesser authority.

What was the Court’s authority to act in *Santa Clara Pueblo*? At one level, the question was about the meaning of a statute. Should the Court imply jurisdiction and a cause of action from the Indian Civil Rights Act? There, Congress had explicitly provided tribal members with rights of equal protection but had specified jurisdictional access only through habeas corpus provisions. That question -- implying causes of action -- is one often posed. For example, soon after *Santa Clara Pueblo*, the Court found an implicit cause of action under another federal statute, Title IX, providing for equality of women and men in federally-funded programs relating to schools. But when reasoning about whether to permit federal jurisdiction in *Santa Clara Pueblo*, Justice Marshall focused not only on congressional intent when drafting but also on a broader premise, the inherent sovereignty of tribes which, he argued, required interpreting statutes to preserve all except that which had been affirmatively withdrawn. Thus, the decision is statutory interpretation “plus,” in that the reading of the statute is predicated on a backdrop positing the tribes as political entities distinct from the United States. Indeed, the Court’s reference to “inherent sovereign rights” echoes international law understandings of the rights of separate peoples as well as longstanding common law premises about kinds of authority that inhere in sovereignty.

Through this act of statutory interpretation infused with predicates of what could be understood as constitutional obligations of presumptively

113. In this respect, Julia Martinez was in a position akin to William Marbury, as both were federal rightsholders yet neither could enforce their rights in the federal courts.


117. *Id.* at 60.
limited powers of the federal government vis-a-vis tribes, the Court in Santa Clara Pueblo imposed burdens of explication and clear statements on national powers to divest tribes of authority. The Court’s insistence that “unless and until Congress makes clear its intention to permit additional intrusions on tribal sovereignty” presaged the “clear statement doctrine” in the Court’s recent re-making of the law of state sovereign immunity law, which is yet another arena in which constitutional and common law premises are melded. Further, in both sets of doctrines, the Court invokes congressional power as it creates its own power. In the Santa Clara Pueblo decision, the Court did so by finding that Congress has not met a drafting burden. In some areas of state sovereignty law, the Court does so by finding that a Court-developed rule is of constitutional dimensions and therefore (under currently law) presumed to be unalterable by congressional action.

IV. JURISDICTION BY DISTRUST OF THE “OTHER” COURT SYSTEM

Santa Clara Pueblo has nonetheless become symbolic of the deference paid by the federal courts to the tribes, understood to be a polity authorized to make decisions on the Martinez family’s claim and from which no recourse to federal courts of any level is possible. But another case also decided in 1978 makes plain that federal law is not always (and some believe not often) solicitous of tribal authority. In Oliphant v. Suquamish Indian Tribe, then-Justice Rehnquist held that federal law did not permit

118. The majority adverts to the “extraordinarily broad” powers of Congress “and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained.” Id. at 72.

119. Id.


123. The decision also has practical effects for those seeking to enforce ICRA rights. Decisions of tribal courts are not formally appealable to the federal court system although, as Professor Robert Clinton explains, the federal courts have not always accorded Full Faith and Credit to tribal decisions and non-Indians may be able to bring civil cases into the federal courts for relitigation or halt tribal court processes. See Robert N. Clinton, Comity and Colonialism: The Federal Courts’ Frustration of Tribal−Federal Cooperation, 36 Ariz. St. L.J. 1 (2004) [hereinafter Clinton, Comity].

tribes to exercise low level criminal jurisdiction\textsuperscript{125} -- at the time with punishments of incarceration of not more than six months and of fines of not more than $500\textsuperscript{126} -- over non-Indians. The problem arose because tribal police had sought both state and federal help to ensure order during a local celebration.\textsuperscript{127} Tribal authorities did not prevail, and when Mark Oliphant, who was not a member of the tribe, was allegedly disruptive, Suquamish authorities detained him. Mr. Oliphant succeeded in a pre-trial habeas petition to the federal courts which he brought on the grounds that tribes could not exercise jurisdiction over him.\textsuperscript{128}

In many respects, the holding of \textit{Oliphant} is puzzling. The jurisdictional provision at issue involved only minor forms of criminal conduct.\textsuperscript{129} As federal law now stands, tribal codes have limited power to punish, with penalties akin to misdemeanors in state or federal courts. Moreover, tribal courts have a long history, and today, more than 250

\begin{itemize}
\item \textsuperscript{125}Id. at 209. Another set of cases has developed law about tribal jurisdiction related to civil litigation. \textit{See} Nevada v. Hicks, 533 U.S. 353 (2001) (holding that tribal courts had no jurisdiction over a lawsuit by Floyd Hicks, a tribal police officer, who alleged that the entry into his home on tribal lands by state game wardens violated his rights under tribal law and under Section 1983); \textit{see also} Strate v. A-I Contractors, 520 U.S. 438 (1997); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987); Nat'l Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845 (1985). The earlier cases gave more authority to tribal courts than do the later decisions. Yet other lines of cases deal with tribal authority to regulate fish and wildlife preserves and to tax. \textit{See} Frickey, \textit{Common Law Colonialism}, supra note 13, at 38–55; Braveman, \textit{ supra} note 13, at 87-100.
\item \textsuperscript{126} \textit{See} 25 U.S.C. § 1302(7). In 1986, the limitations were modified to permit one year of imprisonment and a $5,000 fine. \textit{See} Pub. L. No. 99-570, 100 Stat. 3207, § 4217 (1986).
\item \textsuperscript{127} Oliphant v. Schlie, 544 F.2d 1007, 1013 (9th Cir. 1976); \textit{see also} Respondent's Brief at 64–65, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (No. 76-5729), available at 1977 WL 189289 (Nov. 4, 1977) (describing the problems).
\item \textsuperscript{128} \textit{See} 25 U.S.C. § 1303.
Although efforts to have national reporting services publish these court opinions have only recently begun to succeed, the Indian Law Reporter provides copies of many decisions, a web site has been developed to permit a small subset of decisions to be available on line, and another circular, the *Native American Law Report*, is also available. In addition, national association of jurists and a newsletter


As to their history, some tribal courts have indigenous roots while others began through federal involvement in the late nineteenth century. Pursuant to congressional authorization for the Department of Interior to manage “all Indian affairs,” 25 U.S.C. § 2, the Bureau of Indian Affairs created a Code of Indian Tribal Offenses and Courts of Indian Offices resulting in courts described as “CFR Courts,” referring to the Code of Federal Regulations that detailed their authority. See 25 U.S.C. § 1311 (2000) and 26 C.F.R. § 11.11 (2003). Relatively few such courts remain as tribal constitutions have replaced them with institutions specified under their own laws.

131. For some of the difficulties, see Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 Am. Indian L. Rev. 285, 295–96 (1998) [hereinafter Newton, *Tribal Court Praxis*]. My thanks to Catherine Struve for helping us to locate the Westlaw database (OKTRIB-CS) that includes opinions from tribal courts in Oklahoma from 1979 and thereafter.

132. Included are decisions of cases from state, federal, and tribal courts that are relevant to Indian tribes. The Reporter began in 1974. See Indian L. Rep. ii (Jan. 1974) (announcing the service). The inclusion of tribal court decisions began in 1983. See *Introduction*, 10 Indian L. Rep. 6001 (Jan. 1983) (describing the inauguration of a “new section devoted to the publication of selected tribal court and tribal appellate court decisions,” and including in that issue decisions from the Navajo District Court, the Cheyenne River Sioux Tribal Court, and the Squaxin Island Court of Appeals).


disseminates information about tribal rulings. In short, efforts of tribal leaders, law schools, and interested participants, sometimes assisted by state and federal personnel and resources, have produced many legal institutions with systems of law that sometimes share and sometimes diverge from state and federal practices.\textsuperscript{137}

Not only is tribal law enforcement available, but the need for it to reach misbehaving non-Indians stems from federal policies that, during the nineteenth and early twentieth century, aggressively divested tribes of land through allotment and produced a checkerboard ownership pattern in which many non-Indians are fee simple landowners on Indian reservations.\textsuperscript{138} Further, the record of requests for assistance from the Suquamish Nation and the relatively minor punishments available in \textit{Oliphant} might well have been seen as necessary and proper efforts to maintain law and order. By the 1970s, the Supreme Court was increasingly approving anti-crime measures as it constricted habeas remedies for state prisoners.\textsuperscript{139} As Justice Rehnquist explained his approach only a few years thereafter, it

\begin{quote}

is wholly inaccurate to say that a government or a society ought to be primarily measured by the way in which it accords due process of law to its criminal defendants. This is undoubtedly a very important measure; but equally important is the extent to which a society succeeds in vindicating the moral judgments of its members as they are embodied in its criminal laws.\textsuperscript{140}
\end{quote}

Yet, the Court upheld habeas relief, releasing Mark Oliphant from Suquamish authorities on the ground that, because he was not an Indian, the tribe could not decide his alleged injuries to persons or property.

Some scholars explain the case as involving “bad facts.”\textsuperscript{141} The Suquamish Reservation (consisting of more than 7,000 acres that included

\begin{itemize}
\item 136. \textit{See} Tribal Justice Today, \textit{at} http://www.ntjrc.org (the Newsletter of the National Tribal Justice Resource Center).
\item 138. One example comes from \textit{Duro v. Reina}, 495 U.S. 676, 695 (1990), discussed \textit{infra} notes 171-77. At the time of that litigation, about sixty-five percent of the residents on the Salt River Reservation were non-Indians with the remaining thirty-five percent were Indians, not all of whom were members of the Salt River Pima-Maricopa Community.
\item 141. \textit{See} Frickey, \textit{Common Law Colonialism}, \textit{supra} note 13, \textit{at} 36–37 (describing these facts as providing a “horrible test case”).
\end{itemize}
"numerous public highways of the State of Washington, public schools, public utilities, and other facilities"142) was a checkerboard due to allotment policies.143 The Reservation’s population was predominantly non-Indian, a point underscored in the majority’s first footnote describing the “estimated population” of 2928 non-Indians who lived on the reservation along with some fifty tribal members.144 Further, of 127 recognized tribal court systems then exercising criminal jurisdiction, “33 purport[ed] to extend that jurisdiction to non-Indians.”145

Other aspects of the majority opinion suggest a somewhat different explanation -- that the Court did not hold tribal decisionmaking in high esteem and therefore was unwilling to permit “non-Indians” (but willing to permit “Indians”) to be subjected to tribal court processes.146 For example, Justice Rehnquist twice quoted an excerpt from congressional discussion of legislation in 1834 describing a lack “of fixed laws, of competent tribunals of justice” of Indian tribes,147 and he noted that this proposition “should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents.”148 Justice Rehnquist did acknowledge that “many of the dangers that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared.”149 But this perceived improvement did not suffice, even though no “specific discussion of the problem . . . in the

143. As the Court noted, the Tribe had not consented to non-Indian homesteading and the non-Indian ownership derived “primarily [from] the sale of Indian allotments to non-Indians by the Secretary of the Interior.” 435 U.S. at 193 n.1.
144. Id. (citing the district court’s findings of fact). Cf. Vine Deloria, Jr., Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law, 31 ARIZ. L. REV. 203 (1989) (noting the distinctions among kinds of “reservations,” with the Navajo Nation including millions of acres and more than 100,000 residents who were Indians).
145. 435 U.S. at 196.
146. That approach fits the pattern begun during the nineteenth century, when Congress took jurisdiction over crimes committed by non-Indians but excluded crimes against Indians by other Indians. The Oliphant Court did not discuss whether the grant of United States citizenship in 1924 ought to require revisiting of the delineation between Indians and non-Indians. The Court had previously held, in Talton v. Mayes, 163 U.S. 376 (1896), that the Fifth Amendment did not apply to tribal courts, and the Indian Civil Rights Act of 1968 had by statute required aspects of the Bill of Rights to apply but the statute is not identical to the Constitution. That divergence was noted when the Court held in Duro v. Reina, 495 U.S. 676, 693 (1990), that tribal courts did not have jurisdiction over non-member Indians. See discussion infra notes 171-77, 183-208, 247-49 and accompanying text.
148. Id. at 210.
149. Id. at 212 (also noting that “some Indian tribal court systems have become increasingly sophisticated and resemble in many respects their state counterparts”).
volumes of the United States Reports"\(^\text{150}\) had occurred. Rather, the majority reached its conclusion from a mélange of silence (this "unspoken assumption"\(^\text{151}\)) and an eclectic set of sources.

For example, Justice Rehnquist placed special emphasis on an 1878 decision by Judge Issac C. Parker, who commanded that tribes did not have jurisdiction over non-Indians.\(^\text{152}\) In a lengthy footnote, Justice Rehnquist explained that this district judge’s authority over Western territories made him especially well-versed in tribal practices,\(^\text{153}\) winning him "universal esteem" that was demonstrated when the "principal chief of the Choctaws . . . placed a wreath of wild flowers on" Judge Parker’s grave.\(^\text{154}\) Justice Rehnquist noted that Judge Parker’s views "as to the ultimate destiny of the Indian people are not in accord with current thinking on the subject,"\(^\text{155}\) but sought to redeem the judge from his detractors. Relying on a biography (entitled "He Hanged Them High"\(^\text{156}\)) of Judge Parker, the Court argued that he was "thoroughly acquainted with and sympathetic to the Indians and the Indian tribes" subject to his jurisdiction.\(^\text{157}\)

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150. *Id.* at 197.

151. *Id.* at 203 (citing the 1854 Trade and Intercourse Act and the 1885 Major Crimes Act).


153. 435 U.S. at 201 n.10.

154. *Id.* (quoting HOMER CROY, HE HANGED THEM HIGH: AN AUTHENTIC ACCOUNT OF THE FANATICAL JUDGE WHO HANGED EIGHTY-EIGHT MEN (1952)). Despite its title, that book offers a sometimes sympathetic portrait of this "most extraordinary judge the United States has ever known." CROY, at 3. Croy argues that Parker was unwavering in his commitment to law and order and that his efforts helped to create more safety in the territory within his jurisdiction. *Id.* at 4–9; 206–10.

155. 435 U.S. at 201 n.10.

156. This shortened form is how Justice Rehnquist cited it. See *id.*

157. *Id.* Justice Rehnquist later explained that, when clerking on the Supreme Court, he had become interested in Judge Parker, a judge who had been reversed many times because he charged juries to presume that a criminal defendant’s flight was evidence of guilt. See Rehnquist, *Issac Parker, Bill Sikes, and the Rule of Law*, supra note 140, at 486–87 (discussing the references to Parker by John Wigmore in 2 WIGMORE EVIDENCE § 276 115–16, n.3, (3d ed. 1940)). Rehnquist protested one-sided accounts of Parker, detailed the breadth of his criminal jurisdiction, the lack of appeal from his decisions, and how, after appeals were provided, many decisions were reversed "on the basis of what laymen are wont to call 'legal technicalities.'" *Id.* at 487–89.

A different point of view is provided in David B. Kopel, *The Self-Defense Cases: How the United States Supreme Court Confronted a Hanging Judge in the Nineteenth Century and Taught Some Lessons for Jurisprudence in the Twenty-First*, 27 AM. J. CRIM. L. 293 (2000). Kopel described a series of rulings in the late 1880s by the Supreme Court as "a bitter confrontation" with Judge Parker. According to Kopel, drafting errors in legislation of the 1870s resulted in Judge Parker sitting at both the district and circuit levels. His decisions prompted congressional concerns about his "arbitrarrowness." The result was legislation providing for direct appeals to the Supreme Court for federal defendants receiving the death sentence. *Id.*
Oliphant is therefore an example of the exercise of federal jurisdiction by distrust. That claim to power is a longstanding feature of United States law, for many cases involving federal exercise of jurisdiction over state court decisions (on direct review or through habeas proceedings) have records that undermine the Supreme Court's confidence in the fairness of state processes, and sometimes, as in Oliphant, on the basis of the identity of the litigants. In Oliphant, the majority's anxiety about tribal justice is

at 296–98. The Supreme Court reviewed forty-four of Judge Parker's capital sentences and "reversed thirty-one of them." Id. at 298. Kopel analyzed some of these reversals; he identified some of the defendants as "outsiders" (a Pole, Cherokees, a black teenager) and argued that the Court's vindication of their claims of self-defense evidenced its "intense attachment to the right of armed self-defense." Id. at 324–25. Further, after the sentences were reversed, none resulted in another death penalty and, in some, defendants were "entirely innocent." Id. at 326.

A more recent example, on the civil side, is Bird v. Glacier Elec. Coop., 255 F.3d 1136, 1152 (9th Cir. 2001) (reversing the comity accorded to a tribal court decision because, according to the appellate court, the tribal court permitted an improper closing argument, "encouraging the all-Blackfeet tribal jury to impose an impassioned sanction against the managers of the Co-op because of their race"). The Ninth Circuit found that counsel's use of "incendiary racial and nationalistic terms to encourage the all-Blackfeet jury's award against the non-Indian Co-op" to be a denial of due process. Id. That case is helpful in underscoring the relationship between the identity of litigants and assumptions about decisionmaking by juries. As Akhil Amar and Jonathan Marcus have pointed out, double jeopardy rules have been protective of jury decisionmaking, a stance that they questioned in light of concerns about jury selection, pools, and prejudice. See Akhil Amar & Jonathan L. Marcus, Double Jeopardy Law After Rodney King, 95 COLUM. L. REV. 1, 7, 50–59 (1995).

Another example is Ward v. Bd. of Comm'rs of Love County, Okl., 253 U.S. 17 (1920), in which the Court found a way to decide the merits because it was worried, this time about state court hostility toward Indian tribes. Oklahoma had attempted to impose property taxes on land allotted to tribal members despite a federal ruling prohibiting states from doing so. Under an 1898 provision, lands allotted to Indian tribes "shall be nontaxable while the title remains in the original allottee, but not to exceed twenty-one years from [the] date of [the] patent." Curtis Act, 30 Stat. 495, 507, c. 517 (1898). As a condition of the Act of 1906, in which Oklahoma became a state, that obligation was reiterated. The issue of whether those provisions created vested property rights that Congress could not alter was decided in favor of other allottees. See Choate v. Trapp, 224 U.S. 665 (1912). When Coleman J. Ward and dozens of other Choctaw Indians protested the imposition of a tax, they were required by Oklahoma officials to pay the taxes or have their land sold. Ward, 253 U.S. at 20. Subsequently, the Oklahoma Supreme Court held that because the group of Choctaws had paid the taxes "voluntarily" and no provisions existed for repayment, they could not prevail in their efforts to obtain recoupment. Id. at 21–22.

If the question of the voluntariness of the tax was either a question of fact or of state law, then the decision rested on an "independent" ground, and the Supreme Court could not entertain an appeal. As the Court explained, "the county . . . insists that the [Oklahoma] Supreme Court put its judgment entirely on independent nonfederal grounds which were broad enough to sustain the judgment." Id. at 21. But the Court, describing the claimants as "Indians just emerging from a state of dependency and wardship," concluded that neither the county nor the Indians could have assumed the transactions to be voluntary. Id. at 23.
express, whereas in other instances, the reasons for disquietude are not so plainly stated.

One famous example is *Henry v. Mississippi*, the 1965 decision in which the Court held that Aaron Henry could be heard on direct review in the United States Supreme Court despite a possible procedural default that might have constituted an "independent and adequate state ground." The Court remanded the case to the state courts to determine whether Mr. Henry had deliberately failed to make a contemporaneous objection at trial. Today's readers of the majority opinion might not be clear about why the Supreme Court in 1965 was willing to find a way to open a federal courthouse door for Mr. Henry, for the majority decision by Justice Brennan did not detail concerns about the fairness of Mississippi state processes. Rather, the Court explained its ruling as forwarding "harmonious federal-state judicial relations."

But, as was familiar to those learning about this case in the 1960s, Aaron Henry "led the drive for racial equality in Mississippi," he was "in the forefront of every significant boycott, sit-in, protest march, rally, voter registration drive and court case," and he had been arrested dozens of times. Although not discussed by the Supreme Court, the transcript of

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160. 379 U.S. 443 (1965). The legal rule in *Henry* must be read in the context of *Fay v. Noia*, 372 U.S. 391 (1963), which in 1963 had permitted federal habeas review unless a court found that a defendant had deliberately bypassed a procedural opportunity afforded by a state court. As Justice Harlan's dissent in *Henry* makes plain, the majority's formulation in *Henry* was a step toward permitting a similar, lenient standard on direct review. See 379 U.S. at 463-64 (Harlan, J., dissenting) ("The real reason for remanding ... emerges only in the closing pages of the Court's opinion. It is pointed out that even were the contemporaneous-objection rule considered to be an adequate state ground, this would not, under *Fay v. Noia*, preclude consideration of Henry's federal habeas corpus unless it were made to appear that Henry had deliberately waived his federal claim in the state proceedings.").


162. *Id.* at 451.

163. See Bob Gordon, James May, Jack Schlegel & Joan Williams, Colloquium Discussion, *Legal Education Then and Now: Changing Patterns in Legal Training and the Relationship of Law Schools to the World Around Them*, 47 Am. U. L. Rev. 747, 752 (1998). There, Schlegel described his understanding of *Henry* when it was debated in his law school class. Schlegel commented that he had rarely spoken in class but had "screamed out loud, 'The Supreme Court is not going to let Aaron Henry risk his life in a Mississippi jail.'" See also HART & WECHSLER, 5th ed., *supra* note 2, at 560-61.

164. Robert McG. Thomas, Jr., *Aaron Henry, Civil Rights Leader, Dies at 74*, N.Y. Times, May 21, 1997, at D23 (discussing Mr. Henry's role as the head of the Mississippi Freedom Democratic Party delegation to the Democratic National Convention in 1964, and his civil rights work resulting in his store being firebombed once, and his house twice, and noting that Medgar Evers had just dropped Mr. Henry off after a trip when Evers was himself shot). As a
Mr. Henry’s trial included challenges by his lawyers to the composition of the jury (that the State had used its challenges to excuse “every non-white member of the jury” as well as discussion of testimony about attitudes toward “whites” and “negroes,” and suggestions that Mr. Henry had been targeted for prosecution. As his brief argued, the “activities of state authorities, the atmosphere in which the trial was conducted,” and other evidence established that the “state judicial and criminal process has been utilized as a punitive measure, as a deterrent to the exercise of freedom of association and speech and as a means to enforce racial segregation.”

Thus, in both Henry v. Mississippi and Oliphant v. Suquamish, justices relied on national powers of jurisdiction to impose national norms when they had concerns about the “other” court’s treatment of a defendant. Henry represents a limited intervention that remanded the specific case for additional decisionmaking by the state courts. Its legal rule permitting more federal oversight has been cabined and is now the subject of criticism. Further, as noted, the Court has since retreated more generally from oversight of state criminal processes. In contrast, Oliphant stripped tribal courts of jurisdiction and its holding remains, at least for now. In my view, both the retreat from Henry and the decision in Oliphant are misguided, but it is important to understand that both Henry and Oliphant exemplify that this federation embodies a national, but not an unbounded, commitment to a diversity of legal regimes. Both decisions reveal instances when, from the vantage point of United States Supreme Court jurists, sub-

federal district court later explained the case against Mr. Henry and his trial, police had been eager to charge him with crimes, and Henry’s lawyers could not use the water fountain in the segregated courthouse where the trial took place. See Henry v. Williams, 299 F. Supp. 36, 41 (N. D. Miss. 1969).


166. Id. at 15, 21, 35, 36, 43 (transcripts of testimony of witnesses).

167. Id. at 114–138 (transcript of cross examination of witnesses at trial).


169. Upon remand from the United States Supreme Court, the Supreme Court of Mississippi returned the case to the county in which Mr. Henry had been tried. The lower court found no waiver but the Supreme Court of Mississippi reversed and reinstated the conviction. Henry v. State, 202 So.2d 40 (Miss. 1967). Thereafter, the United States Supreme Court denied certiorari, but Mr. Henry pursued federal habeas remedies, resulting in a vacating of the conviction and a renewed opportunity for the state to prosecute. See Henry v. Williams, 299 F. Supp. 36, 50 (N.D. Miss. 1969) (recounting the earlier proceedings and concluding that the state had not overcome the presumption against waiver).

national legal regimes breach other national commitments too fundamental to permit deviation. The federal courts served as the enforcement apparatus of the national trump.

V. JURISDICTION BY POLITICAL AFFILIATION

Return to the role of the exercise of federal jurisdiction in cases filed in Indian tribal courts. For some years after Oliphant, the jurisdictional line for criminal cases appeared to be one dividing “Indian” from non-Indian. But in 1990, in Duro v. Reina, the Court decided otherwise — holding that tribes’ criminal misdemeanor jurisdiction extended only to their own members. The issue arose because the Salt River Pima-Maricopa Indian Community had charged Albert Duro, who was a member of the Torres-Martinez Band of Cahuilla Mission Indians, with illegally firing a weapon. Like Mark Oliphant, Mr. Duro relied on the express grant of jurisdiction in the Indian Civil Rights Act to apply for habeas relief to the federal district court, which granted the writ. But the Ninth Circuit — describing itself as drawing upon case law, tradition, and federal statutes — concluded that Congress had not divested tribal courts of jurisdiction over non-member Indians. The Supreme Court (with Justice Kennedy writing for the majority) reversed by ruling that jurisdiction was not proper because in “the area of criminal enforcement, . . . tribal power does not extend beyond internal relations among members.”

172. For further discussion of tribes’ civil and criminal jurisdiction in relationship to its own members and its limits beyond that, see Nevada v. Hicks, 533 U.S. 353, 375–82 (2001) (Souter, J., concurring, joined by Justices Kennedy and Thomas). Justice Souter explained that, in light of the Court’s rulings, “a tribe’s remaining inherent civil jurisdiction to adjudicate civil claims arising out of acts committed on a reservation depends in the first instance on the character of the individual over whom jurisdiction is claimed, not on the title to the soil on which he acted. . . . It is the membership status of the unconsenting party [to a litigation], not the status of the real property, that counts as the primary jurisdictional fact.” Id. at 381–82.
173. The underlying claim was that Mr. Duro had “shot and killed a 14-year-old boy within the Salt River Reservation boundaries,” and that the victim was a member of the Gila River Indian Tribe of Arizona that occupied another reservation. Duro, 495 U.S. at 679. A federal prosecution had been begun but was then dismissed without prejudice. Id. at 680.
174. Id. at 682.
175. Duro v. Reina, 851 F.2d 1136, 1143 (9th Cir. 1987) (en banc). The appellate court relied on a mix of sources, from the lack of an express divestiture by Congress of jurisdiction to history, custom, and the need for law enforcement. Id. at 1143–46.
176. 495 U.S. at 688.
constitutional guarantees are lacking; Justice Kennedy found that inadequacy fatal when American citizens faced criminal charges.177 The Court’s holding created a difficult situation for many reservations on which different Indian communities had been placed together through decisions of the federal government.178 Further, as the majority and dissenting opinions in Duro had debated, the ruling limiting criminal jurisdiction to members arguably created a “jurisdictional void,” federal law could be read to limit federal criminal authority to acts committed by Indians against non-Indians.179 After protests about the decision from some tribes and from some states,180 Congress responded with a temporary statutory override through an appropriations rider revising the Indian Civil Rights Act’s description of tribal “powers of self-government.”181 Within the year, Congress deleted the sunset provision to its temporary solution.182 Therefore, the statutory statement now in place describes “the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.”183 Congress thereby inscribed in its statute the line implied by Oliphant -- between individuals who were “Indians” and those who were not.

Criminal jurisdiction by political affiliation is not an obvious conclusion under American law. A person from France would be subject to federal or state court jurisdiction if alleged to have committed a criminal act in the United States. Indeed, under some understandings of federal law, a person

177. Id. at 693–94 (citing Reid v. Covert, 354 U.S. 1 (1957)).
179. Compare Justice Kennedy’s majority decision, Duro, 495 U.S. at 676, 683–84, 697–98, with Justice Brennan’s dissent, joined by Justice Marshall, id. at 698, 705. The question involved interpretation of 18 U.S.C. § 1152 (2000), the Indian Country Crimes Act, which provides that general federal criminal jurisdiction does not extend to offenses committed “by one Indian against the person or property of another Indian” on Indian country. See also Editor’s Note, 2 NATIVE AMERICAN L. REP. 20 (Feb. 2003) (discussing a case, Morris v. Tanner, 288 F. Supp. 1133 (D. Mont. 2003), that upheld the exercise of jurisdiction by the Flathead Indian Reservation in Montana over an enrolled member of the Chippewa Tribe from the Leech Lake Reservation in Minnesota, and noting that some 2000 non-members live on the Flathead Reservation, that “[n]either the state nor federal government exercises jurisdiction over regulatory or misdemeanor matters on the reservation [and without] tribal court jurisdiction, these individuals would be beyond the reach of the law.”).
180. See Nell Jessup Newton, Commentary: Permanent Legislation to Correct Duro v. Reina, 17 AM. INDIAN L. REV. 109, 110–112 (1992) (discussing a resolution from the Western Governors Association for congressional study, resolutions by Arizona, Montana, Nevada, and North and South Dakota urging congressional action, and tribal condemnation of the decision) [hereinafter Newton, Permanent Legislation].
182. See Newton, Permanent Legislation, supra note 180, at 114–17.
anywhere, if deemed an "enemy combatant" or engaged in pursuing terrorism, might be subject to national jurisdiction. Further, as Justice Kennedy acknowledged in *Duro*, a "basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign's territory, whether citizen or alien." He concluded, however, that an "implicit divestiture of sovereignty" had occurred limiting tribal authority over all non-members, Indian or not. In contrast, after the congressional amendment of 1990, all "Indians" are subject to prosecution by tribes for misdemeanors committed on tribal lands but "non-Indians" may rely on their non-Indian status as grounds for dismissal.

Setting up these two categories, Indian and non-Indian, prompts questions about what makes someone either an "Indian" or a "non-Indian" and whether the delineation between the two sets coheres. Indian tribes include diverse groups of peoples and communities, living in different areas of the United States, and varying in terms of languages, religions, and customs. As *Duro* illustrates, tribes no longer (if they ever did) occupy areas exclusively populated by individuals from a single tribe and no longer succeed (if they ever tried) in preventing intermarriages.

Yet United States law delineates a single category, "Indian," to denote persons within and descended from the more than 560 tribes now

184. See the Executive's Military Order of November 13, 2001, 66 Fed. Reg. 57833 (Nov. 16, 2001), authorizing, under Sections 2 and 3, the detention of any person whom the President determines "from time to time in writing" is a "member of the organization known as Al Qaeda" or "has engaged in, aided or abetted, or conspired to commit, acts of international terrorism" or harbors such persons. See also Padilla v. Rumsfeld, 352 F. 3d 695 (2d Cir. 2003), cert. granted 124 S.Ct 1353 (2004), (describing the position of the government and reproducing, as Appendix A, at 24, a redacted version of the determination by George Bush that Jose Padilla was, at the time he entered the United States, an "enemy combatant . . . closely associated with Al Qaeda, an international terrorist organization with which the United States is at war," and therefore subject to detention without access to federal judicial review).


186. Id. at 686.

187. See, e.g., Lara Oral Argument, supra note 62, at 5–6 (an exchange between Deputy Solicitor General Edwin S. Kneedler, for the Government, and a Justice about what the definition of an "Indian" is, including the response that statutory requirements have not been strictly construed, such that "someone who is an Indian and has a tribal affiliation and is recognized by the tribe is also regarded as an Indian." See also United States v. Antelope, 430 U.S. 641, 645–46 (1977) (upholding federal jurisdiction over "Indians" despite a challenge that, were the individuals not Indians, they would have been prosecuted under state law and not exposed to convictions for felony-murder, and concluding that "classifications expressly singling out Indian tribes" are constitutionally provided for and "supported by the ensuing history of the Federal Government's relations with Indians.").

188. See Braveman, supra note 13, at 113–17 (arguing that the increasing array of economic activities that tribes engage in, including employing large number of non-members, undercuts the coherence of these categories).
recognized by the federal government.\footnote{See U.S. Dep't. of the Interior, Indian Ancestry-Enrollment in a Federally Recognized Tribe, at http://www/doi.gov/enrollment.html (last visited on Feb. 24, 2004).} Federal statutes and regulations respond to the question of who is an Indian by providing various routes to that status. As the *Santa Clara Pueblo* decision exemplifies,\footnote{See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); see also *Lemont*, supra note 78, at 25-26 (discussing the Cherokee Constitution, which provides citizenship to “any descendant by blood of a Cherokee originally listed on the Dawes Commission Rolls,” and noting that, through intermarriage, those persons numbered more than 200,000 by 1999 with about ninety percent having one quarter “Indian blood or less”); 25 C.F.R. § 5.1 (2003) (providing appointments upon vacancies for positions in the BIA to members of recognized Indian tribes, to “descendants” of those living on Indian reservations in June of 1934, and to “[a]ll others of one-half or more Indian blood of tribes indigenous to the United States”); 25 C.F.R. § 31.1 (2003) (providing that children of “one-fourth or more degree of Indian blood” in certain areas may attend federal schools). See generally Margo S. Brownell, *Note, Who is an Indian? Searching for an Answer to the Question of the Core of Federal Indian Law*, 34 U. MICH. J.L. REFORM 275 (2000-2001). The Supreme Court addressed the BIA preference system in *Morton v. Mancari*, 417 U.S. 535 (1974).} enrolled members of federally-recognized tribes are “Indians,” and enrollment opportunities may depend on lineage or on affiliation to tribes.\footnote{As noted, the idea of “tribal membership” is relevant for many other aspects of Federal Indian Law, and its codification by tribes has at times been influenced by the BIA. See Resnik, *Dependent Sovereigns*, supra note 74, at 719–25; Goldberg, *Members Only?*, supra note 78, at 445–46.} For certain federal statutes,\footnote{See, e.g., 18 U.S.C. §§ 1152, 1153.} being of Indian ancestry without being a member of a tribe or of a federally-recognized tribes suffices.\footnote{For example, under 25 U.S.C. § 1301(4) “Indian” means a person subject to the jurisdiction of the United States as an “Indian” under 18 U.S.C. § 1153, were that person to “commit an offense listed in that section in Indian county to which that section applies.” 18 U.S.C. § 1153, entitled “Offenses committed within Indian country” does not provide much by way of definition, but 25 U.S.C. § 479 (2000), part of the Indian Reorganization Act of 1934, explains that the term “Indian” as used there shall “include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.” That statute also specifies that “Eskimos and other aboriginal peoples of Alaska shall be considered Indians.” Id. See generally Goldberg, *Members Only?*, supra note 78. What is “Indian country” is yet another question. See, e.g., John v. Baker, 982 P.2d 738, 748 (Ala. 1999) (relying on *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998) and discussing “three kinds of Native lands” that qualify, including “Indian reservations under federal jurisdiction, Indian allotments, and ‘dependent Indian communities’”).} Whether one can stop being an “Indian” is less clear.\footnote{See, e.g., *Lara Oral Argument*, supra note 62, at 50–51 (in which a Justice asked about whether one can sever an affiliation and its consequences for criminal prosecution). See also United States v. Antelope, 430 U.S. 641, 646 n.7 (1977) (describing the prosecution as having presented evidence that the defendants were “enrolled members” of a tribe and “not emancipated from tribal relations”).} Tribes in turn are “any tribe, band, or
other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government.\textsuperscript{195} (What powers of self-government are possessed is, of course, the question prompting debate and litigation.)

Yet another question, pending (as I write) before the Supreme Court,\textsuperscript{196} is how to characterize what Congress did when it reversed \textit{Duro v. Reina} and revised the statute to describe tribal “powers of self-government”\textsuperscript{197} to include “the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.”\textsuperscript{198} One possibility is that Congress was \textit{delegating} federal authority to tribes. This interpretation relies on the principle of United States law that Congress has “plenary power” over all matters to do with tribes, and that, when exercising those powers, Congress was either initially insufficiently specific but subsequently clarified its delegation of authority or, alternatively, that in 1990 Congress made a new decision to give more power to tribes. Either the \textit{Duro} Court erred in its 1990 reading of the statute or the \textit{Duro} Court pointed out the limits of what had been provided, but in either event, a few months thereafter, Congress corrected the Court. Such a reading, consistent with Justice Rehnquist’s \textit{Oliphant} decision,\textsuperscript{199} assumes that tribes lost all power over persons others than members at conquest and whatever powers tribes have are the result of affirmative federal government grants.\textsuperscript{200}

But another possibility, akin to the approach taken by Justice Marshall’s decision in \textit{Santa Clara Pueblo},\textsuperscript{201} exists -- that the tribes had the power of misdemeanor prosecution all along, as part of their inherent authority that can be divested only through affirmative acts of Congress.\textsuperscript{202} Under this reading, when Congress revised its statute after \textit{Duro}, Congress was not

\begin{itemize}
  \item \textsuperscript{195} 25 U.S.C. § 1301(1).
  \item \textsuperscript{196} United States v. Lara, 324 F.3d 635 (8th Cir. 2003) (en banc), cert. granted, 124 S. Ct. 46 (2003).
  \item \textsuperscript{197} 25 U.S.C. § 1301.
  \item \textsuperscript{198} 25 U.S.C. § 1301(2).
  \item \textsuperscript{199} Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
  \item \textsuperscript{200} As one Justice put it in the oral argument in United States v. Lara: “[a]s I understand what we held in \textit{Oliphant}, which we followed in \textit{Duro}, was that the very concept of -- of this dependent or subordinate sovereignty that tribes are -- are understood to have, the way we look at Indian issues, is inconsistent with the exercise of tribal jurisdiction over a -- a nonmember. Whether the notion of subordinate or -- or dependent sovereignty is constitutional or common law doesn’t really matter. As long as we’re going to have that concept, that concept is inconsistent with the exercise of the tribe’s own sovereign jurisdiction over -- a non-tribal member.” \textit{Lara Oral Argument, supra note 62, at 9–10.}
  \item \textsuperscript{201} Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).
  \item \textsuperscript{202} This approach is from within American law, in which the operative premise is that Congress has such power. That premise is, of course, contested from outside American law. See \textit{supra} note 15.
\end{itemize}
giving power but rather making plain that, earlier, it had not retracted power and had always recognized that power resided in the tribes to govern “Indians” who misbehaved on their territories.

This interpretation prompts other questions: How long has that power been inherent? And what is meant by the term “inherent”? Should the answer rest on an empirical inquiry into practices from the past? If so, then the historical evidence that tribal criminal jurisdiction predated the United States Constitution\(^{203}\) and was exercised over peoples with different political affiliations (including “non-Indians”) becomes relevant, but so might the interruption and divestiture of some of those powers. Or ought discussion focus on an empirical presentist approach, looking to practices of political communities today? Alternatively, should answers stem from normative views about what ought (because of practicality, or politics, or theories of nationhood) tribal authority be? Again note that all these questions can be readily answered from a standpoint that make illegitimate any responses from federal actors because their powers stem from conquest, not consent. In contrast, my focus is on how those inside that federal authority could reason about what stance to take.

VI. SOURCES OF SOVEREIGNTY, DOUBLE JEOPARDY, AND ASYMMETRY

From within, another problem (one that is familiar to federal constitutional lawyers) exists, about the relationship between the Court and Congress. What Congress will be understood to have done in 1990 when amending the definition of tribal self-government depends in part on what it had the power to do, which in turn requires understanding the legal meaning of the Supreme Court’s rulings in *Oliphant* and *Duro*.\(^{204}\)

Return to the puzzles above about the form of lawmaking undertaken by the Court in *Oliphant* and *Duro*. Was the Court in those cases making constitutional law, interpreting statutes, or developing federal common law (involving either foreign relations, tribal relations, or areas of “special concern”\(^{204}\) to the federal government)? Under current Supreme Court law, if these federal court rulings were exercises in either common law or statutory interpretation, Congress can override them.\(^{205}\) If, however, the

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203. See, e.g., Talton v. Mayes, 163 U.S. 376, 382–84 (1896) (describing tribal powers as not derivative of federal law because they “existed prior to the Constitution;” therefore the Cherokee Nation did not have to use federal constitutional processes such as the grand jury).


Court is explicating the principles of "the position of Indian tribes in our
constitutional structure of government," Congress may have a more
limited role, depending on the standard of judicial review applied by the
Court. The Court could rely on its tradition of special deference to
Congress when tribes are involved, and not impose as exacting a
requirement on congressional involvement in crafting constitutional regimes
as the Court has imposed elsewhere. Or (as lower court judges assumed),
the Court could be more active in superintending congressional
interventions by describing judicial rules as stating constitutional principles
that are unalterable by Congress.

Such questions are not esoteric, for they are the predicates of a conflict
between the Eighth and Ninth Circuits producing a case on the Supreme
Court's docket. In a few federal prosecutions, "Indians" have sought
dismissal on the grounds that, because they were subjected to tribal
prosecution, double jeopardy precluded the second prosecution. That
legal claim stems from yet another artifact of sovereignty law in the United
States. In 1922, the Supreme Court announced that one sovereign's
prosecution of an individual did not preclude a second sovereign from a
prosecution, based on the same acts, against that individual. The
two sovereigns there at issue were the federal government and a state, and the
political backdrop was the lack of interest that some states had in enforcing
Prohibition.

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treaties and statutes are not themselves embodying constitutionally mandated rules. They are the
product of the political branches. They sometimes don't answer precise questions, and this
Court is required to articulate judicial principles as best it can against the backdrop of those
principles." The exchange ended with a focus on the idea that Congress could, as one Justice
suggested, "redefine the term dependent." Id. at 16. That proposition resulted in a line of
questions suggesting that, after a tribal proceeding, Congress could subject any person to a
second trial in a federal court. Id. at 17.

206. See United States v. Weaselhead, 156 F.3d 818, 824 (8th Cir. 1998), vacated, 165 F.3d
1209 (8th Cir. 1999) (en banc).

207. See William W. Buzbee & Robert A. Schapiro, Legislative Record Review, 54 STAN.
L. REV. 87 (2001). Thus, the categorization of Supreme Court lawmaking as either common
law or constitutional law serves, internally, to delineate fields of authority between Congress
and the courts, with revision possible at some junctures but not others.


209. United States v. Lara, 324 F.3d 635 (8th Cir. 2003) (en banc), cert. granted, 124 S.Ct.
46 (2003); United States v. Enas, 255 F.3d 662 (9th Cir. 2001) (en banc), cert. denied, 534 U.S.
1115 (2002).

210. United States v. Lanza, 260 U.S. 377 (1922). The concept was mentioned in case law
from the century before. See Amar & Marcus, supra note 158, at 7.

211. The defendants had pled guilty in Washington state court to misdemeanors and were
fined. Based on those pleas, they sought to have their federal court indictments dismissed. 260
U.S. at 377–79. As the brief for the United States explained, a state could impose a "small fine"
that "would divest the Federal Government of the power to punish the act with a more
To justify the "dual sovereignty exception to double jeopardy" (as it has come to be known), the Court characterized the federal and state governments as "two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory."\(^{212}\) In the exercise of each's sovereignty, each was empowered to determine "what shall be an offense against its peace and dignity."\(^{213}\) The Court later applied the doctrine to permit successive prosecutions by two different states,\(^{214}\) and the breadth of that application has prompted a good deal of criticism.\(^{215}\)

How do tribes fit into this picture? Returning to the 1970s, in the same month that the Court barred prosecution of "non-Indians" in \textit{Oliphant}, the Court ruled on a double jeopardy challenge to a second federal prosecution from a defendant already "convicted in a tribal court of a lesser included offense arising out of the same incident."\(^{216}\) The Navajo Nation had prosecuted one of its members, Anthony Wheeler, for disorderly conduct and contributing to the delinquency of a minor; he received a sentence of about two months in jail.\(^{217}\) A year thereafter, a grand jury returned a substantial and effective penalty." Brief for the United States, United States v. Lanza, 260 U.S. 377 (1922) (No. 39) at 4–5 (microfiche copy on file with the author). State courts could then become "'cities of refuge' . . . from the effective action of the Federal Government." \textit{Id.}\(^{212}\) 260 U.S. at 382.

\(^{213}\) \textit{Id.} As a contemporary critic explained, the idea of a crime as a violation of a sovereign's right to keep the peace was rooted in English common law, as contrasted with continental law's focus on a criminal act as a breach on the offender's duty to obey "cestial commands." See J.A.C. Grant, \textit{The Lanza Rule of Successive Prosecutions}, 32 COLUM. L. REV. 1309, 1317 (1932).


\(^{216}\) United States v. Wheeler, 435 U.S. 313, 314 (1978). \textit{Wheeler} was decided March 22, 1978; \textit{Oliphant} was decided on March 6 of that year.

\(^{217}\) \textit{Wheeler}, 435 U.S. at 315. He was sentenced to fifteen days on one count and sixty on another, to be served concurrently, but the record was unclear about whether he had served time or paid fines. \textit{Id.} at n.2.
federal indictment, charging Mr. Wheeler with statutory rape.\footnote{218}{Id. at 315–16. At the time, the federal statute provided for punishment of a person who had “carnal knowledge of any female” under sixteen years of age who was not the defendant’s wife. \textit{See id.} at 316 n.3.} Both the district and appellate courts concluded that the tribal authority derived from the federal authority and therefore that jeopardy had attached.\footnote{219}{United States v. Wheeler, 545 F.2d 1255, 1257 (9th Cir. 1976).}

In a unanimous decision written by Justice Stewart,\footnote{220}{Justice Brennan did not participate. \textit{Wheeler}, 435 U.S. at 313.} the Supreme Court reversed. The Court first discussed the undesirability of barring federal prosecutions when another sovereign pursues a defendant for a “comparatively minor offense” rather than a “much graver one.”\footnote{221}{435 U.S. at 317–18.} The Court then concluded that two prosecutions were permissible because the “primeval sovereignty” of the Navajo Nation had never been taken away, implicitly or explicitly.\footnote{222}{Id. at 328. To do so, the Court distinguished cases precluding sequential prosecutions in federal territories and in the military from the territories on the ground that tribal criminal jurisdiction over its members did not stem from the same source as did federal prosecutorial powers.}

What was the legal source for the conclusion that the tribes, like states (under \textit{Lanza}), had “inherent sovereignty” stemming from sources other than the national government? No mention is made of the United States Constitution. Rather, the focus is on the Court’s earlier decisions, invoked for the proposition that tribes were distinct political communities, “a separate people, with the power of regulating their internal and social relations.”\footnote{223}{Id. at 322. (quoting United States v. Kagama, 118 U.S. 375, 381–82 (1886)); \textit{see also} Wheeler, 435 U.S. at 328–39 (discussing Talton v. Mayes, 163 U.S. 376 (1896)). The treatise was first published in 1942. \textit{See supra} note 81.} In addition, the Court relied on the 1945 edition of a famous treatise, Felix Cohen’s \textit{Handbook on Federal Indian Law}.\footnote{224}{435 U.S. at 322–23 (referring to page 122 of the treatise).} Summing up, \textit{Wheeler} (citing \textit{Oliphant}) held: “Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.”\footnote{225}{Id. at 323.} \textit{Wheeler} expressly did not address the “interesting question” of whether a tribe that had lost “sovereign power to try tribal criminals” and then regained it by an Act of Congress would “necessarily be an arm of the Federal Government.”\footnote{226}{Id. at 328 n.28.} Instead, \textit{Wheeler} focused on the power of a tribe to prosecute its own members.

\begin{itemize}
\item \footnote{218}{Id. at 315–16. At the time, the federal statute provided for punishment of a person who had “carnal knowledge of any female” under sixteen years of age who was not the defendant’s wife. \textit{See id.} at 316 n.3.}
\item \footnote{219}{United States v. Wheeler, 545 F.2d 1255, 1257 (9th Cir. 1976).}
\item \footnote{220}{Justice Brennan did not participate. \textit{Wheeler}, 435 U.S. at 313.}
\item \footnote{221}{435 U.S. at 317–18.}
\item \footnote{222}{Id. at 328. To do so, the Court distinguished cases precluding sequential prosecutions in federal territories and in the military from the territories on the ground that tribal criminal jurisdiction over its members did not stem from the same source as did federal prosecutorial powers.}
\item \footnote{223}{Id. at 322 (quoting United States v. Kagama, 118 U.S. 375, 381–82 (1886)); \textit{see also} Wheeler, 435 U.S. at 328–39 (discussing Talton v. Mayes, 163 U.S. 376 (1896)). The treatise was first published in 1942. \textit{See supra} note 81.}
\item \footnote{224}{435 U.S. at 322–23 (referring to page 122 of the treatise).}
\item \footnote{225}{Id. at 323.}
\item \footnote{226}{Id. at 328 n.28.}
\end{itemize}
But that “interesting question” has since required answers.\(^2\) Billy Jo Lara, an Indian who lived on tribal lands but was not a member of the Spirit Lake Tribe, assaulted a police officer of the Bureau of Indian Affairs. He was charged with violations of the Spirit Lake Tribal Code.\(^2\) After pleading guilty and receiving a sentence of 155 days in jail, Mr. Lara was indicted by a federal grand jury, also charging him with assaulting a federal officer.\(^2\) At issue was whether Mr. Lara can be prosecuted first by the Spirit Lake Nation for his assaultive behavior on its Reservation and then by the federal government, which has brought the question to the Supreme Court.\(^3\)

Just as in the era of Prohibition, those supportive of either more criminal law enforcement in general or federal power to enforce criminal law can appreciate the utility of the dual sovereignty doctrine. As the Wheeler Court noted, by the early 1970s, tribal courts were handling some 70,000 cases a year,\(^2\) and the volume has grown since then.\(^3\) The potential to layer prosecutions permits the first tier (state or tribal) to do most of the cases without either micro-management from federal prosecutors or ceding jurisdiction, early on, to federal prosecutors.

But to permit a second prosecution by the federal government requires saying something about the genre of law that the Supreme Court’s holdings in *Oliphant* and in *Duro* represent. If Congress delegated jurisdiction to Indian tribes over non-members, then the ultimate source of authority is singular and only one prosecution can occur. If, on the other hand, tribal power to prosecute comes from another source, then the federal prosecution can proceed.

The Eighth Circuit’s en banc majority determined in *United States v. Lara* that the “distinction between a tribe’s inherent and delegated powers is of constitutional magnitude and therefore is a matter ultimately entrusted to


\(^{228}\) United States v. Lara, 324 F.3d 635 (8th Cir. 2003) (en banc), cert. granted, 124 S.Ct. 46 (2003). Included were violence against a police officer, resisting arrest, public intoxication, disobedience of a lawful order of the tribal court, and trespassing. 324 F.3d at 636.

\(^{229}\) *Id.*, see 18 U.S.C. § 111(a)(1) (2000). That statute was amended in 2002 to increase the maximum penalty from three to eight years. See Pub. L. No. 107-273, § 11008(b)(1)(2002). In his federal prosecution, Mr. Lara entered a conditional plea, subject to the ability to appeal the denial of his double jeopardy motion. *Lara*, 324 F.3d at 636–37.


\(^{231}\) United States v. Wheeler, 435 U.S. 332, n.35.

\(^{232}\) See *supra* notes 130-37 and accompanying text.
the Supreme Court.” In contrast, the Ninth Circuit concluded that, although tribal sovereignty has “constitutional implications,” the absence of specific constitutional reference in *Duro* made it a common law decision subject to congressional revision. Four judges on the Eighth Circuit, dissenting from that court’s en banc ruling, agreed. As Judge Morris Arnold writing for the dissenters put it, *Duro* was

based on federal common law, nothing more and nothing less, and . . . Congress [then] exercised its plenary legislative power over federal common law in general and Indian affairs in particular to define the scope of inherent Indian sovereignty. In other words, Congress restored to the tribes a power that they had previously exercised but had lost over the years as a result of Supreme Court decisions.

Can Congress have plenary powers to define the scope of “inherent Indian sovereignty” but also not be the source of that sovereignty? Can the federal government both recognize tribal sovereignty separate from it yet also have power over it? Through what form of law?

The problematic question of sources of sovereignty is not limited to the *Duro/Lara* scenarios. Return to the *Lanza* decision that originated the dual sovereignty exception doctrine in the United States. There, the Court explained its holding by describing state and federal governments as “two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory.” The Court did

234. *United States v. Enas*, 255 F.3d 662, 674–75 (9th Cir. 2001). Cf. *United States v. Long*, 324 F.3d 475 (7th Cir. 2003), cert. denied, 124 S. Ct. 151 (2003) (concluding that the dual sovereignty exception applied to permit a federal prosecution after a member of the Menominee Tribe had been prosecuted by the Menominee Tribe of Wisconsin, which had been subjected to the Menominee Termination Act of 1953 but then had been subsequently “restored” under the Menominee Restoration Act, 25 U.S.C. §§ 903–903f). The court, in a decision written by Judge Wood, distinguished *Enas* because the issue in *Long* was whether “Congress has the power to undo by legislation that which it had accomplished by legislation.” *Id.* at 483. The Seventh Circuit concluded that “Congress had not delegated any power to the Tribe before the Termination Act, and thus there was nothing from Congress that could have been restored. . . . [T]heir retained sovereign rights—though admittedly at the sufferance of Congress—cannot be disregarded.” *Id.* at 482.
235. *Lara*, 324 F.3d at 641 (Morris Sheppard Arnold, J., dissenting, joined by Judges Bowman, Murphy, and Smith). If the Congress had “plenary powers” over the question, then the Supreme Court either misread or wrongly intruded on congressional prerogatives.
236. *Lara* Oral Argument, supra note 62, at 27 (“The attempted reconferral of inherent sovereignty upon the Indian tribes” was a phrase offered by one of the Justices in the oral argument).
238. *Id.* at 382.
not specify the "different sources" from which the power of the two
sovereignties derives.239 While the original thirteen states pre-date the
Constitution, and hence might be conceived as having sovereignty sourced
prior to the creation of the United States, the rest of the states did not.
Moreover, the Constitution could be read as extinguishing one form of state
sovereignty and creating another, derived not from Congress but from the
Constitution that also creates Congress. Through popular sovereignty, "We
the People" generated both federal and state governments within the United
States. Tribes, on the other hand, did not join in making that document but
are understood to be subject to it anyway. Thus, conquest aside for the
moment, tribes have more, rather than less, of a claim to an independent
source of sovereignty than do most states.

But for the Court to reach in Lara a result that permits a federal
prosecution (as the Solicitor General hopes240 so that tribal enforcement
decisions do not trump federal law enforcement decisionmaking241) requires
a significant revision of propositions laid out in Oliphant and in Duro and a
return to the approaches of Santa Clara Pueblo and Wheeler. In the 1978
decision, Justice Rehnquist described many "inherent limitations on tribal
powers that stem" from what he termed their "incorporation into the United
States,"242 and their "submitting to the overriding sovereignty of the United
States,"243 leaving them, absent congressional authorization of more
powers, with only the right to govern "themselves."244 That position
contrasted expressly with a "retained sovereignty" premise, expressed in a
dissent filed by Justice Marshall.245

239. Amar & Marcus, supra note 158, at 6–8 (tracing the doctrine back to earlier Supreme
Court dicta and also arguing the Court’s misunderstanding of English common law, that would
have precluded the repetition).
240. See Brief for Petitioner the United States, at 12, United States v. Lara, cert. granted,
241. Conceptually, were the Court to permit a subsequent federal prosecution, under the
current expansive exception for separate sovereign prosecutions, something that might be called
a "triple sovereignty exception to double jeopardy" could be possible in some instances when
states have power to prosecute as well. As described infra at notes 262-79 and accompanying
text, I suggest that the dual sovereignty exception be narrowed to permit only the federal
government to have the power of bringing a second, subsequent prosecution after state or tribal
authorities have done so.
243. Id. at 210.
244. Id. at 209 (quoting Fletcher v. Peck, 10 U.S (6 Cranch) 87, 147 (1810)).
245. 435 U.S. 212 (Marshall, J., dissenting, joined by Burger, C.J.) (arguing that in "the
absence of an affirmative withdrawal by treaty or statute . . . Indian tribes enjoy as a necessary
aspect of their retained sovereignty the right to try and punish all persons who commit offenses
against tribal law within the reservation").
Further, Justice Kennedy’s approach in *Duro*, shaping tribal authority around conceptions of consent and participation, has a coherence to it. The groups that fall within the legal category “Indian tribes” under United States law are a diverse lot of more than 560 federally recognized tribes. Why should physical presence on the Suquamish Nation (located in the State of Washington) or the Spirit Lake Nation (in North Dakota) subject a member of the Oneida Indian Nation of New York (who lives in the area called the State of New York) to jurisdiction by either the Suquamish or the Spirit Lake Nations but leave a non-Indian New Yorker immune? Moreover, both the member of the Oneida Indian Nation and the New Yorker are citizens of the United States, a status that Justice Kennedy found compelling in *Duro* as he argued that, while the Indian Civil Rights Act provides some measures of protections, “these guarantees are not the equivalent of their constitutional counterparts.” Indeed, as Justice Kennedy explained, federal statutes dealing with tribes “reflect the Government’s treatment of Indians as a single large class with respect to federal jurisdiction and programs.”

In short, if consent, participation, membership, or identity are required for inherent tribal criminal jurisdiction, then congressional grants of jurisdiction over non-Indian members is just that: a grant of new and more jurisdiction than predated that grant. But what are we to make of the turn by the Court to concepts of consent and participation? Are those requirements artifacts of constitutional law, statements of transnational and transcendent principles of the common law, descriptions of historical practices, recognition of customary legal norms, or efforts to parse language in treaties, statutes and Executive Acts? Are the sources of the Supreme

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246. *Duro* v. *Reina*, 495 U.S. 676, 688 (*Duro* is “not a member of the Pima-Maricopa Tribe. . . . Neither he nor other non members . . . may vote, hold office, or serve on a jury.”).

247. This requirement of membership is not absolute. As Justice Brennan commented, aliens do not consent to jurisdiction but are subject to prosecution. See *id.* at 707 (Brennan, J., dissenting); see also L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996) (arguing that theories of sovereignty based on inherent powers or trust arrangements no longer serve and that consent theories have displayed those premises). But see Frickey, *Coherence in Federal Indian Law*, supra note 13, at 1770–71 (arguing that different kinds of consent are in issue -- one a conventional, United States jurisdictional notion that voluntary, even if transitory, presence permits a sovereign to exercise authority over a person, and another political conception of consent that encompasses membership and participation rights in a political collective).

248. *Duro*, 495 U.S. at 693 (noting the lack of an absolute right to counsel if a defendant cannot afford to hire a lawyer).

249. *Id.* at 689–90 (emphasis in the original). Assume, for example, that Canada decided to treat the Oneida Nation in one manner but not the Spirit Lake Nation or the Navajo Nation in the same manner.
Court’s lawmaking any more clear than the sources of sovereignty that it posits?

One way to answer these questions is to turn them into empirical questions through exploring the materials upon which the justices relied when providing their answers. I have quoted liberally to share with readers my quest for authority. As I hope I have made plain, constitutional referents are sparse, and case law citations thick. Instruction is also routinely taken from a host of miscellaneous sources (from individuals such as Judge Isaac Parker and Felix Cohen to documents such as Department of Interior memoranda, congressional legislative history of enacted and not-enacted bills, treaties, and their silences). To return to the distinction I drew above, that one could reason about tribal jurisdiction as an historical empirical problem, an inquiry into present day empirical practices, or as a normative question, the justices have not distinguished among sources or theories to permit a crisp account of their own understanding of how they reached their answers.

Further, the doctrinal confines (that decisions are either common law or constitutional law) that framed the lower court decisions about the double jeopardy problem are too limiting. The consequentialist denomination of a kind of ruling as common law (and therefore congressionally-revisable) as contrasted with constitutional law (and therefore exclusively the domain of the Court) does not capture the landscape of American Supreme Court lawmaking. As the work of many constitutional scholars makes plain, jurists as well as other governmental actors and nongovernmental actors have developed practices, crafted statutes, and made rules that have more weight than that accorded to common law under American traditions but have no claim to a textual basis in the Constitution.

Another way to reason about this problem is to ask what kind of law we want these pronouncements to be. How flexible and readily revisable should be propositions that, for criminal jurisdictional purposes, delineate Indians from non-Indians and non-member Indians from members Indians? Do we have preferences for answers stemming from either courts or Congress? One response to these questions is structural and very much internal to American legal discourse. In conventional constitutional law terms, constitutional rules are to be avoided when possible. This reticence to have federal judges issue constitutional pronouncements stems from preferences for democratic decisionmaking. We even have terms, such as

250. See supra notes 196–203 and accompanying text.
“constitutional avoidance,”252 to mark the importance of that view. Moreover, the same claim about democratic processes underlies criticism of federal judges for making much by way of common law.253

Hesitancy about judge-made constitutional and common law is predicated on the idea that the “people,” organized politically through states, are represented in and by those states and then in Congress, therefore entitling political processes to a form of legitimacy that judicial lawmaking ostensibly lacks. But when groups such as Indian tribes are bringing claims and have no collective representation in either state or national legislatures,254 the preference for legislative rules over court-made rules thins. Absent tribal representation in Congress,255 the ordinary preference for Congress is less compelling. Another kind of answer is therefore needed for the question of how to understand what kind of rule the Indian/non-Indian proposition is and then to decide its legality.

VII. REASONING FROM MARBURY

Return to the premise of Marbury v. Madison that the legitimacy of the United States government rests on its representational character.256 A resulting constitutional precept that flows from that idea is that “Indians” must be treated as a set because, although internally diverse culturally, politically, linguistically, etc., they are all similarly situated vis-a-vis the United States. Ignoring variations by treaty and by territorial authority for the moment, all Indian tribes are subject to governance through conquest, not consent, and individual “Indians” did not gain citizenship in the United States until the twentieth century. Because tribes are not constitutive of the democratic polity that is the United States, the United States must (as a matter of its own internal constitutional obligations to consent-based governance) be as non-intrusive as possible. Moreover, as transnational


255. See ALEINKOFF, supra note 18, at 149–50 (commenting that the idea of tribal representation in Congress has antecedents in early treaties and ought to be explored now to increase the justice of interactions with tribes).

256. See KAHN, supra note 4, at 9.
norms have developed, political groups have rights of recognition, a kind of interest I term “role-dignity,” that acknowledges the existence, powers, and obligations of nations.\(^{257}\) Under that reasoning, \textit{Oliphant} was wrongly decided because the recognition of territorial authority of tribes requires that those who have the power to govern those lands have the right to define “offense[s] against the peace and dignity,”\(^{258}\) regardless of the political identity of the person committing the harm.

That proposition in turn is a feature of American constitutional law not because of a positive statement in the United States Constitution that so commands, but because the nation has had to act that way vis-a-vis other countries and ought to act that way vis-a-vis distinct polities within. Given shared stakes in the rule of law, nations need other governing bodies to be authoritative, and the idea of sovereignty becomes a useful conduit to the creation of entitlements to maintain law and order.\(^{259}\) In honor of these premises, the \textit{Oliphant} “Indian/non-Indian” line was a mistake. \textit{Duro} continued the error of \textit{Oliphant} and so did the congressional “restoration,” for it reached only “Indians.” Therefore, the principle that ought to be of constitutional magnitude (even though not itself stated by the Constitution) is that all tribes can exercise criminal jurisdiction over all persons (whether “Indian” or “non-Indian”) committing crimes on their lands. Were American law to recognize this proposition, several Supreme Court cases and the provisions of federal statutes taking jurisdiction over enumerated “major crimes” would fall.

But another American constitutional premise represented by \textit{Marbury} also operates: of criminal powers sometimes limited to respect individual rights.\(^{260}\) The distinction I draw here is between the coherence of the category of a “tribe” as a political unit and the lack of coherence of the category “member” of a particular tribe or of the idea of an “Indian” when a person is subject to the criminal powers of any government within the United States.\(^{261}\) While tribes ought to have powers to keep the peace and

\(^{257}\) See Resnik & Suk, supra note 85, at 1942–50 (2003).


\(^{259}\) See Cleveland, supra note 19, at 15–25.

\(^{260}\) See Fallon & Meltzer, Constitutional Remedies, supra note 4, at 1778–79 (discussing the principles of \textit{Marbury} to include “a system of constitutional remedies adequate to keep government generally within the bounds of law”). They elaborate on the preconstitutional structure of remedies that explain the lack of detail in the Constitution but that provided the framework for judicial elaboration and hence of constitutional remedies themselves. \textit{Id.} at 1770–91.

\(^{261}\) This approach implicitly raises questions about the intelligibility of the category “Indian” in other areas of law. My focus here is on criminal jurisdiction, providing a context easier than many others. In this article, I do not examine how to resolve the many other instances when the category Indian is used. I do counsel that contextualization will be required.
therefore to reach all persons (whether "Indian" or not) who are disruptive, neither tribes, states, or the national government ought to be able to detain persons unless the detainees have means to object to the legality of their confinements.

Returning again to the *Marbury* premise, the Constitution requires opportunities to ask whether a particular exercise of power is beyond the authority of a particular holder of that power.\(^{262}\) Further, the Constitution puts the national law as supreme and therefore imposes a national trump on state-level decisionmaking. At times, American habeas corpus law has given more substance to this proposition than it does now.\(^{263}\) But even in its much more winnowed form, habeas corpus retains a suggestion that certain decisionmaking must be subject to review.\(^{264}\) From the point of view of American law, the judicial role as arbiter of constitutional boundaries affecting individual liberties applies to subgroups (such as states and tribal courts, as well as to commissions established by the President). The result ought to be doctrines that enable federal courts to review tribal court proceedings. That outcome may be objectionable from perspectives external to United States law,\(^{265}\) but it is essential when measured from internal perspectives.

The argument for why a national override is desirable can be seen in the Supreme Court’s decisions in *Lanza* and *Wheeler*, both of which were straightforward about their concerns when they crafted a dual sovereignty exception to double jeopardy. Both decisions noted that non-federal prosecutorial decisions may be at odds with federal goals. The Court’s as each area is considered. See, e.g., Atwood, *Indian Child Welfare Act*, supra note 17, at 593 (discussing how, "as multiracial categories become more common in law," that Act’s definition of an “Indian child” comes into tension with “the understanding [of] that identity [as] a fluid, contingent construct,” and that state court judges’ resistance to aspects of the Act may flow from contrasting its classifications with the multiple identities of an individual). As Professor Atwood puts it, the “grand narrative” of the past destructive acts “does not fit comfortably onto the circumstances of every Indian child.” *Id.* at 674. Yet, as she argues, “more fluid conceptions of adoption and guardianship” can enable an accommodation that permits preservation of tribal heritages while acknowledging the multiple affiliations of individuals. *Id.* at 675.

\(^{262}\) Marbury is an example of a challenge to executive power, marking it as a font of administrative law. See Fallon, *Marbury and the Constitutional Mind*, supra note 3.


\(^{265}\) Clinton, *Comity*, supra note 123.
doctrine -- when applied to the situation of either a state or tribal prosecution followed by a federal prosecution -- enables state and tribal criminal courts to do most of the criminal law enforcement and ensures federal supremacy by permitting selective re-prosecution by national law enforcement officials. Lanza, when read from this perspective, looks a lot like Oliphant, in that both decisions make plain the jurists’ anxiety about how loyal either states or tribes are to national norms. In both, the goal is to give national law enforcement wide scope.

Assume that one shares a vision of the importance of national norms in criminal law enforcement. Various means are available to express that view. For example, Congress could locate exclusive authority in the federal government to prosecute certain kinds of crimes. State and federal prosecutors could work together in joint task forces that have become increasingly common. Another mechanism is the dual sovereignty exception as I propose to narrow it (to a one-way sequence of either state/federal or tribal/federal prosecutions) that takes the fiction (in the context of states) of a separately sourced sovereign to solve a constitutional problem that emerged during the twentieth century, as state, tribal, and federal legislation generated redundant criminal statutes.

266. That the federal government can prosecute does not require it to do so. Many years ago, the Department of Justice created a policy, popularly known as the “Petite Policy” (after Petite v. United States, 361 U.S. 529 (1960)), providing rules about sequential prosecutions. That policy does not give a defendant enforceable rights. See Rinaldi v. United States, 434 U.S. 22 (1977); “Dual and Successive Prosecution Policy” in III DEPARTMENT OF JUSTICE MANUAL at § 9-2.031 (2d ed. 2002-Supp) (noting that Congress has, in some statutes, prohibited a second prosecution following a state judgment of conviction or an acquittal on the merits). The Manual sets forth three requirements for a second federal prosecution: that the matter involves “a substantial federal interest;” that the federal interest has not been vindicated, and that the government believes that an “unbiased trier of fact” would convict the defendant. Id. Also detailed are the types of prosecutions covered and the stages of prosecution to which the policy applies. Prosecutions in tribal courts are not mentioned.

267. Those concerns may go to the decisions of prosecutors, judges, or juries.

268. Critics from many perspectives have suggested a narrow reach for a second, federal prosecution. See Amar & Marcus, supra note 158, at 26-59 (proposing a limited right of federal reprosecution based on congressional powers to enforce the Fourteenth Amendment); Herman, supra note 215, at 639 (proposing a narrow civil rights reprosecution doctrine).

269. See Prohibition and Double Jeopardy, 8 VIRGINIA LAW REGISTER 740, 745 (1923) (criticizing United States v. Lanza and offering an alternative -- that the Court could have read ratification of the Eighteenth Amendment to have “delegated to the Federal Government all [state] sovereignty rights respecting intoxicating liquors and that Congress alone can enact prohibition laws”). States can also create exclusivity by selective repeal of criminal prohibitions. See Boyle, supra note 215, at 415 n.11 (describing the repeal, by New York State, of its own Prohibition Act to preclude double prosecutions).

At some points, that insight -- of the importance of national norms of criminal law enforcement -- was somewhat symmetrical, in that both prosecutors (via sequential federal prosecutions) and defendants (via direct review in cases such as *Henry v. Mississippi* 271 or through habeas corpus petitions under the umbrella of *Fay v. Noia* 272) could be heard by national courts. Today, however, an asymmetry has emerged, for the Court and Congress have restricted habeas while permitting prosecutors to continue to enable national norms to override state or tribal decisions on how much criminal liability ought to attach, as well as by permitting sequential prosecutions from state to state. 273 Thus, to resolve the *Duro/Lara* problem, I would craft constitutional norms of the possibility of federal oversight within the jurisdiction of “the United States” that state and tribal prosecutors could not avoid.

But I would do so for both prosecutors and defendants by weakening the commitment to finality in criminal convictions from both perspectives. 274 Rather than have federal courts intervene on broader grounds for “non-Indians” than for Indians, I would permit (from norms internal to American law) federal courts to entertain post-conviction habeas petitions predicated on substantive or procedural constitutional guarantees by persons claiming that their detention is unlawful, 275 and I would permit re-prosecution by federal (but not state or tribal) authorities in both instances because of a commitment to opportunities for national overrides of local decisions. Such an approach also helps to challenge the idea of a “them,” as if individuals were either “Indian” or not Indian. 276 The result would be to recognize the political organization constituted by tribes as having criminal jurisdiction over all persons and to recognize that individuals, whatever their lineages

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*Advantages of Federal Prosecution, 46 Hastings L.J. 1095 (1995) (discussing the overlap between state and federal criminal statutes and the increasing redundancy).*

275. This approach also does not mirror the provisions of the Indian Civil Rights Act, which defines a set of rights to be claimed only by tribal members against tribes. See 25 U.S.C. § 1301. But it would also not preclude findings that tribal court processes were fair even if not according the same rights as do federal or state court processes.
276. See *Braveman*, supra note 13, at 115 (commenting that an “either/or conception ignores the possibility that Indians” could both have distinctive identities and not. Moreover, it posits a world of individuals with singular understandings of their heritages, in contrast to the multiplicity of connections now common.). See generally Naomi Mezey, *Erasure and Recognition: The Census, Race, and the National Imagination*, 97 N.W.U. L. Rev. 1701 (2003).
and intersectional identities, as having rights of personal liberty enforceable in federal courts.277

These suggestions do not resolve all the areas in which double jeopardy claims arise, nor do they respond to all the current complexities of tribal court jurisdiction. For example, I do not here explore how the retreat from a special jurisdictional relationship between a tribe and its members for criminal law could affect doctrines of jurisdiction on the civil side.278 Elsewhere, I have proposed that one response to Julia Martinez’s conflict with the Santa Clara Pueblo would be for the federal courts to require that federal benefits for Indian tribal members not hinge on patrilineal rules.279 Moreover, given the diversity across the hundreds of tribes, jurisdictional solutions may not easily be fashioned to respond to the variations while respecting the multiple citizenship affiliations that tribal members may hold, with connections to states, this nation, and one or more tribes. What I hope, however, is to have undermined the presumed logic of the limits of tribal authority to maintain order.

VIII. INTER-DEPENDENT SOVEREIGNTIES

Federal Indian Law is a struggle to fabricate a legal regime in the context of a text-based constitutional discourse when textual dictates are absent. The confusion about how to characterize what the Supreme Court does when ruling on such cases reveals the inadequacy of the current choice set, which attempts to locate these rulings as either constitutional or common law decisions. Constitutional text is not at work, but constitutional principles are, and those principles are not fixed but evolving. The impulse to align the rulings with the Constitution comes in part from the availability (early on in this common law nation) of a Constitution and then from Marbury’s fixation on the Constitution as the central premise of federal lawmaking. As a result, United States jurists have not needed to

277. This regime would not necessarily require that tribal courts provide rights identical to federal courts and therefore would not necessarily overturn the holding of Talton v. Mayes, 163 U.S. 376 (1896), which concluded that rights to indictment by a grand jury did not apply to a person prosecuted by the Cherokee Nation. Some tribal courts have, however, incorporated requirements like those of the Bill of Rights into their own practices. See, e.g., United States v. Red Bird, 287 F.3d 709, 713 (8th Cir. 2002) (discussing the Rosebud Sioux Tribal Constitution’s guarantee of a right to be represented by an attorney and the tribe’s provision of counsel from the tribal public defender officer for indigent defendants).

278. See also Lara Oral Argument, supra note 62, at 23–24 (a Justice suggested that the distinction between citizens of the United States who were or who were not “Indian” was troubling, resulting in the “astonishing proposition” that a ruling upholding the second prosecution would have to apply to non-Indians as well).

develop the common law as a robust source of limitations on arbitrary
government action and have become reluctant, over time, to do so. Because
of a long tradition of turning to the Constitution, jurists in the federal courts
of the United States have not needed the common law as much as have
some jurists in other countries that do not have a written constitution or
have only recently adopted one.

But the fascinating debate that has now come to the fore through
Federal Indian Law about how to categorize Supreme Court rulings ought
not be seen as a peculiar artifact of Federal Indian Law. The under­
specificity at a structural level of the United States Constitution can be seen
in many other arenas. My point is not only about the difficulty of
understanding the import of a mandate, for example, to provide equal
protection of the law or about how to decide when due process must be
accorded, but rather that through Articles I, II, and III, the Constitution
described entities that did not yet exist, and therefore did not address a
multitude of aspects now central to American government.

I opened this Article with a series of questions about why or how either
the Congress, the Courts, or the Executive has power vis-a-vis the tribes. A
similar series of questions can be raised about other aspects of
contemporary government. For example, given Article III's vesting of
judicial power in courts with life-tenured judges, one could readily question
the legitimacy of adjudication within agencies and by bankruptcy and
magistrate judges, all of whom render federal judgments but lack the
constitutionally-stipulated attributes of life tenure and protected salaries.

Developments in the law of state sovereign immunity provide yet another
example, for the Court has constitutionalized that doctrine far beyond the
text of the Eleventh Amendment.

280. See Reva B. Siegel, Equality Talk: Antisubordination and Anticlassification Values in
with the author).

281. See, e.g., Cynthia R. Farina, On Misusing "Revolution" and "Reform: " Procedural

282. For example, Larry Kramer has brought our attention to the role that political parties,
unmentioned in the Constitution, now play. See Larry D. Kramer, Putting the Politics Back into
the Political Safeguards of Federalism, 100 COLUM. L. REV. 215 (2000); see also Fallon &
Meltzer, Constitutional Remedies, supra note 4, at 1804 (discussing the role of change in
constitutional remedies).

283. See supra, Part II.

284. See Judith Resnik, "Uncle Sam Modernizes His Justice": Inventing the District Courts
My point is that constitutive principles that spring only loosely if at all from the text are common elements of constitutional adjudication. Some of those precepts are ones that I admire, while others give me pause. But I do not want to locate them in a "deconstitutionalized zone" but rather acknowledge them to be part and parcel of the American constitutional project. Moreover, even as we may object to or celebrate a particular ruling, we should understand that this form of constitutionalism is essential when dealing with an aged constitution. Federal Indian Law, like the constitutionalism of "federalism" itself, comes from the necessary ongoing process of negotiating and renegotiating what the national sovereignty will and will not tolerate -- matrilineal or patrilineal lines; detention and criminal trials of non-Indians by Indian tribes; detention of citizens or prisoners without access to Article III or other courts or to lawyers.

It would be a mistake, however, to conceive of this project as an artifact of national power alone, as it would be error to assume that the enforcement of constitutional norms is the exclusive province of the courts. When courts err or engage in "underenforcement" of constitutional norms, other branches of government have and should undertake to implement them. Further, precepts that gain constitutional status emerge out of exchanges among states, the branches of the federal government, tribes, and the world beyond. The example of the Santa Clara Pueblo's patrilineal rule is important, for it was intertwined with patriarchal and patrilineal traditions external to the Pueblo and was prompted, at least in part, by federal benefit rules that provided incentives to limit membership. Similarly, the Supreme Court's toleration of the patrilineal rule is itself partially grounded in America's own patriarchal traditions, still extant in the current Court's acceptance of certain sex-based classifications.

285. Almost forty years ago, Alfred Hill focused on four such areas: controversies in which states were parties and cases involving admiralty, international relations, and the propriety interests of the United States. He viewed those issues as appropriate ones for "constitutional preemption," such that federal judges ought to understand themselves as authorized to craft rules of decision that would, because of the Supremacy Clause, preempt state law. See Hill, supra note 66, at 1026–28; 1073–80.

286. Cleveland, supra note 19, at 25.

287. See Pillard & Aleinikoff, supra note 26, at 53–63 (discussing government lawyers' roles when the courts decline to enforce constitutional norms); Post & Siegel, supra note 67 (elaborating on roles played by Congress in understanding the meaning of constitutional guarantees). Vicki Jackson relies on the concept of "proconstitutional behavior" to identify the work of nonjudicial government actors in enforcing constitutional values. Vicki C. Jackson, Proconstitutional Behavior, Political Actors, and Independent Courts: A Comment on Geoffrey Stone's Paper, 2 INCON 368 (forthcoming, 2004) (on file with the author).

288. See supra notes 105-09 and accompanying text.

Furthermore, American constitutional rules are not made exclusively from laws and practices sourced in the United States. Despite claims of insularity, United States lawmaking is part of a shared, transnational process. In a recent essay, I traced the use of the word “dignity” in the Supreme Court’s constitutional jurisprudence. I was drawn to the question because the Court has recently used the concept of state dignity interests as a justification for extending state sovereign immunity. I learned that the Supreme Court had not linked the term “dignity” to its constitutional jurisprudence until the 1940s, when the world was in battles over fascism. Only in the wake of the Universal Declaration of Human Rights did the Supreme Court import the language of “dignity” into its readings of the Fourth, Fifth, Eighth, and Fourteenth Amendments. This example is not idiosyncratic. The very idea that sovereigns can keep the peace is shaped by legal premises widely shared by many countries.

Federal Indian cases mark efforts to try to use law to explain power. The quest for authority external to a particular exercise of power stems from the commitment to constitutionalism exemplified by Marbury. That promise frequently goes unfulfilled, to the distress of many critics of Federal Indian Law. But at times, judges have required explanation and occasionally sought, in the name of law, to impose limitations on congressional and Executive treatment of tribes. Those decisions are signs of hope in a world currently shaken by the capacity of the American government to exercise power rather than use law.

290. Resnik & Suk, supra note 85, at 1934-40.
293. See Frickey, Common Law Colonialism, supra note 13. A modest improvement can be seen in United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003), in which the Court, splitting 5-4, found that an Indian Tribe’s suit (brought under the “Indian Tucker Act,” 28 U.S.C. § § 1491, 1501, for damages of some $14 million against the United States for its failures to maintain buildings on a national historic site held in trust for the tribe) could go forward in the Court of Federal Claims. Justice Souter’s opinion for the Court concluded that, given the express waiver of sovereign immunity, it “is enough, then, that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages.” Id. at 473. Justices Ginsburg and Breyer concurred. Id. at 478. Justice Thomas, joined by the Chief Justice and Justices Scalia and Kennedy, dissented, protesting the “fair inference” rule stated. Id. at 481. They argued that the majority had relied on “common-law trust principles” rather than the statutory provisions. Id. at 482. Cf. United States v. Navajo Nation, 537 U.S. 488 (2003) (also analyzing when tribes may seek damages but concluding that the relevant regulations and statutes did not provide a basis there). In that case, Justice Souter, joined by Justices Stevens and O’Connor, dissented and argued that the Secretary of the Interior’s obligations to approve mineral leases raised a “substantial fiduciary obligation” sufficient to “survive the Government’s motion for summary judgment.” Id. at 514-21.
This is not to romanticize Federal Indian Law, plainly second best from the perspective of those tribal communities that claim the status of foreign nations. From this vantage point, Federal Indian Law is an illegitimate exercise in power with no source of authority other than physical might. Moreover, contemporary doctrine about tribes is also second best from the richer traditions of Federal Indian Law, which at times has come closer to worrying about the legitimacy of its own power. And, other constitutional principles could yet evolve, such as the proposals made by Alexander Aleinikoff to develop political relationships with tribes294 or the proposals by Carole Goldberg to constrain federal intervention when possible.295

But because the history of conquest and ongoing colonialization makes implausible (for me) the disentanglement of tribes from the United States296 my focus is on the development of doctrines of comity to reflect the multiplicity of polities sharing land. Just as the Supreme Court shapes interactions between state and federal courts to take the fact of federation into account, so the Court sometimes attends to tribes as separate political entities -- as “sovereigns” of a sort -- to whom deference is owed. While Supreme Court decisions of recent years are disheartening, some decisions of prior decades productively articulated commitments close to the Marbury v. Madison vision, that power without the possibility of constraint is unavailable in a constitutional democracy.

Many of us have invoked Chief John Marshall’s phrase, “domestic dependent nations,”297 and, often, the referent is to tribes. Today, it is plain that we all live in “domestic dependent nations,” vulnerable to forces also claiming (and sometimes exercising) power in the same space. But a more cheerful thought is to locate all these nations as inter-dependent sovereigns. Return to the question about whether a dual sovereignty exception exists if a tribe prosecutes a non-tribal member and the federal government seeks to prosecute that person again. In United States v. Lara, the Solicitor General of the United States who joined eighteen tribes and eight states (Washington, Arizona, California, Colorado, Michigan, Montana, New Mexico, and Oregon) to argue to the Supreme Court that tribes had more inherent jurisdiction than was previously recognized.298 The states, the

294. ALENIKOFF, supra note 18 at 122–50.
295. See Goldberg, Individual Rights, supra note 18.
296. See, e.g., Frickey, Common Law Colonialism, supra note 13, at 11 (“The United States resulted from a colonial process that cannot be undone at this late date, no matter the normative concerns that might be raised about it.”).
297. Cherokee Nation v. Georgia, 30 U.S. 1, 16–17 (1831)
tribes, and the United States came together because they understand the interdependency of state and federal and tribal systems, that New Mexico (in Santa Clara Pueblo), that Washington and California (in Oliphant and Duro), and that North Dakota (in Lara) are safer and better places for everyone if cooperative networks of law enforcement are worked out. Federal Indian Law often shows the limits of constitutionalism, but it may also show the possibilities of lawmaking to enable dignified interactions among and across inter-dependent sovereigns so as to reflect the hopes for which Marbury v. Madison stands.

while grave constitutional questions were raised by the possibility of subjecting state citizens to tribal jurisdiction, the questions could be avoided through an interpretation that Mr. Lara should have pursued a remedy via habeas corpus rather than by asserting an immunity from federal prosecution. See Brief Amicus Curiae of the States of Idaho, et al., United States v. Lara, 124 S.Ct. 46 (2003) (No. 03-107) at 3, available at 2003 WL 227667447 (Nov. 14, 2003). Were the Court to reach the question, however, this group of states argued that the Court ought not to recognize inherent tribal sovereignty over non-member Indians, for to do so would “lay the doctrinal foundation for incalculable damage in the future to the very fabric of the Constitution.” Id. at 4.

299. See also Judith Resnik, Categorical Federalism: Jurisdiction, Gender, and the Globe, 113 Yale L.J. 619 (2001) (discussing that almost no subject matter was “intrinsically” or categorically not-federal, but rather that what was understood to be “federal” and “state” changed over the eras, and in both directions).