

HARVARD LAW REVIEW

ARTICLES

(NATIVE) AMERICAN EXCEPTIONALISM
IN FEDERAL PUBLIC LAW*Philip P. Frickey*

TABLE OF CONTENTS

I. INTRODUCTION: AMERICAN EXCEPTIONALISM, NATION-BUILDING, AND NATIONS SUBORDINATED	433
II. EXCEPTIONALISM IN FOUNDATIONAL FEDERAL INDIAN LAW	437
A. <i>Tribes as Domestic Dependent Nations</i>	437
B. <i>Exclusion of State Authority</i>	438
C. <i>Reserved Rights and Canons of Interpretation</i>	439
D. <i>Unilateral Congressional Power over Indian Affairs?</i>	440
1. Constitutional Text and Early Precedents	440
2. Late-Nineteenth-Century Developments: End of Treatymaking, Rise of Congressional Plenary Power	441
3. Exceptionalism as a Mediating Device	443
III. THE MODERN ERA: FROM CONGRESSIONAL PLENARY POWER TO A COMMON LAW OF COLONIALISM	443
A. <i>Continuing, but Evolving, Exceptionalism in Congressional Plenary Power, in Judicial Canonical Constraints, in Exclusion of State Authority, and in Tribal Sovereignty</i>	445
1. Congressional Plenary Power, Canonical Judicial Interpretation, and Occasional Constitutional Innovation	445
2. Continued General Exclusion of State Law	448
3. Continued Support for Tribal Authority	450
4. Summary: Continuities in the Exceptionalist Model of Federal Indian Law	451
B. <i>The Model Frays: The Rise of a Common Law of Colonialism</i>	452
1. Reservation Diminishment	452
2. State Authority over Nonmembers in Indian Country	454
3. Tribal Authority over Nonmembers in Indian Country	457
IV. <i>DURO</i> , THE <i>DURO FIX</i> , AND <i>LARA</i> : JUDICIAL SUPREMACY CONFRONTS INDIAN LAW EXCEPTIONALISM	460
A. <i>Duro v. Reina: Slouching Toward Judicial Supremacy</i>	460
B. <i>The "Duro Fix" and the Majority Opinion in Lara</i>	463

C. <i>Kennedy the Mystic: Deep Constitutional Structure, Consent of the Governed, and Judicial Supremacy</i>	465
D. <i>Souter the Alchemist: Turning Common Law into Constitutional Law</i>	468
E. <i>Thomas the Skeptic: What's an Honest Formalist To Do in Federal Indian Law?</i>	470
V. THE COURAGE OF OUR CONFUSIONS: RECONSIDERING INDIAN LAW	
EXCEPTIONALISM IN THE TWENTY-FIRST CENTURY	472
A. <i>Doctrinal Vectors</i>	472
1. Reconsidering Congressional Plenary Power and the Common Law of Colonialism	473
2. Reconsidering Citizenship and Tribal Sovereignty	477
3. Reconsidering State Authority	482
B. <i>Institutions at Crossroads</i>	483
C. <i>Exceptionalism as Normativity</i>	487
VI. CONCLUSION	489

(NATIVE) AMERICAN EXCEPTIONALISM IN FEDERAL PUBLIC LAW

*Philip P. Frickey**

In this Article, Professor Philip Frickey argues that in federal Indian law, the rule of law serves remarkably divergent purposes, justifying colonialism in the pursuit of constitutionalism. Because of its roots in this antinomy, federal Indian law has been remarkably incoherent. The Supreme Court has been increasingly troubled by not only the incoherence inside the field, but also the extent to which its doctrines deviate from general principles of American law. In fact, frustration with the intractability of the issues has recently led several Justices to propose that the Court should have not only the first say on sensitive issues, but the final say as well. These proposals trigger “the seduction of coherence,” the lawyerly urge to ameliorate inconsistent policy implications. Professor Frickey contends that these questions cannot be resolved without recognition of the exceptionalism of federal Indian law. The solution is to recognize the “courage of our confusions” rather than embrace the alternative — some smaller certainty that imposes artificial coherence at the expense of the exceptional doctrinal, institutional, and normative features of the field. Professor Frickey concludes that the Supreme Court is the institution least able to generate a satisfactory, dialogic integration of our colonial roots with our constitutional framework and thus needs to stand aside.

[T]he time has come to reexamine the premises and logic of our tribal sovereignty cases. . . . [U]ntil we begin to analyze these questions honestly and rigorously, the confusion . . . will continue to haunt our cases.

— Justice Clarence Thomas¹

It is easy enough to praise [people] for the courage of their convictions. I wish I could teach [them] the courage of their confusions. . . . Yes, I am confused, but I will prefer the larger confusion to the smaller certainty.

— John Ciardi²

I. INTRODUCTION: AMERICAN EXCEPTIONALISM, NATION-BUILDING, AND NATIONS SUBORDINATED

*D*emocracy in America³ is a canonical source of American exceptionalism — the view that America can be understood only by

* Alexander F. and May T. Morrison Professor of Law, University of California at Berkeley (Boalt Hall). Bethany Berger, Riyaz Kanji, Kevin Washburn, and John Yoo provided helpful comments on an earlier draft.

¹ United States v. Lara, 124 S. Ct. 1628, 1641, 1648 (2004) (Thomas, J., concurring in the judgment). These two sentences bookend Justice Thomas’s opinion.

² John Ciardi, *Manner of Speaking*, SATURDAY REV., June 2, 1962, at 9, 9.

³ 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Phillips Bradley ed., Francis Bowen rev., Vintage Books 1990) (Henry Reeve trans., 1835) (1835).

appreciating its singular origins and evolution.⁴ De Tocqueville perceived exceptionalism in the creation of a constitutional system based on personal liberty, popular sovereignty, and the rule of law.⁵ He also saw the dark side of this nation-building, however: “The expulsion of the Indians often takes place at the present day in a regular and, as it were, a legal manner,” involving “great evils . . . [that] appear to me to be irremediable.”⁶

Thus, de Tocqueville recognized that America is a constitutional democracy built through the legalized coercion of colonialism. The rule of law did double work, providing the glue holding the republic together while legitimating the displacement of indigenous institutions to make room for it. As he wrote:

The Spaniards were unable to exterminate the Indian race by those unparalleled atrocities which brand them with indelible shame, nor did they succeed even in wholly depriving it of its rights; but the Americans of the United States have accomplished this twofold purpose with singular felicity, tranquilly, legally, philanthropically, without shedding blood, and without violating a single great principle of morality in the eyes of the world. It is impossible to destroy men with more respect for the laws of humanity.⁷

For de Tocqueville, a commitment to liberty, egalitarianism, individualism, populism, and laissez-faire made America exceptional.⁸ These values are largely consistent with the constitutional democracy that was built on top of the colonial process, but patently incongruent with the colonization buried underneath. It is unsurprising, then, that federal Indian law — the law governing the historical and ongoing colonial process underpinning the United States — is itself a largely overlooked, little-understood paradox.

Because of its roots in antinomy, it is equally unsurprising that federal Indian law has been remarkably incoherent as well.⁹ Commentators have complained that, “[m]ore than any other field of public law,

⁴ See, e.g., SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* 13 (1996); Byron E. Shafer, *American Exceptionalism*, 2 ANN. REV. POL. SCI. 445, 446–48 (1999) (noting that de Tocqueville was an early proponent of “the notion that the United States was born in, and continues to embody, qualitative differences from other nations”).

⁵ On the last, he wrote that “[w]ithin these limits the power vested in the American courts of justice of pronouncing a statute to be unconstitutional forms one of the most powerful barriers that have ever been devised against the tyranny of political assemblies.” 1 DE TOCQUEVILLE, *supra* note 3, at 103.

⁶ *Id.* at 340, 342.

⁷ *Id.* at 355 (footnote omitted).

⁸ LIPSET, *supra* note 4, at 19.

⁹ For an essay situating this incoherence in Lacanian theory, see M.M. Slaughter, *American Indian Tribes: “Not as Belonging to but as Existing Within,”* 11 LAW & CRITIQUE 25 (2000).

federal Indian law is characterized by doctrinal incoherence”¹⁰ and amounts to “a rudderless exercise in judicial subjectivism,”¹¹ that the Supreme Court has a “bifurcated, if not fully schizophrenic, approach to tribal sovereignty,”¹² and that the Court has created “an almost daunting set of inconsistencies” in assigning adjudicatory jurisdiction.¹³ Even the Chief Justice of the North Dakota Supreme Court recently said that, “in matters involving jurisdiction on Indian reservations, we often are unable to know what the law is until the United States Supreme Court tells us what it is.”¹⁴

Several Justices have heard the message.¹⁵ Indeed, just last year Justice Thomas stated that “the time has come to reexamine the premises and logic of our tribal sovereignty cases” and that “much of the confusion reflected in our precedent arises from . . . largely incompatible and doubtful assumptions.”¹⁶ Justice Thomas went on to assert that “federal Indian law is at odds with itself” and “until we begin to analyze these questions honestly and rigorously, the confusion . . . will continue to haunt our cases.”¹⁷

These complaints trigger “the seduction of coherence” — an urge that “resonates to the form of learning that many jurists experienced from their early days in law school. Yet it is dangerous, as well, because [often] there is a choice of principles with which to cohere.”¹⁸ If

¹⁰ Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1754 (1997).

¹¹ David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1576 (1996).

¹² Frank Pommersheim, *A Path Near the Clearing: An Essay on Constitutional Adjudication in Tribal Courts*, 27 GONZ. L. REV. 393, 403 (1991/1992).

¹³ Laurie Reynolds, *Adjudication in Indian Country: The Confusing Parameters of State, Federal, and Tribal Jurisdiction*, 38 WM. & MARY L. REV. 539, 578 (1997). The quotations in this paragraph were compiled originally in Blake A. Watson, *The Thrust and Parry of Federal Indian Law*, 23 U. DAYTON L. REV. 437, 439 (1998).

¹⁴ *Winer v. Penny Enters., Inc.*, 674 N.W.2d 9, 18 (N.D. 2004) (Vande Walle, C.J., concurring specially).

¹⁵ Justice Souter has acknowledged the confusion several times. In one instance, he wrote that “[p]etitioners are certainly correct that ‘[t]ribal adjudicatory jurisdiction over non-members is . . . ill-defined,’ since this Court’s own pronouncements on the issue have pointed in seemingly opposite directions.” *Nevada v. Hicks*, 533 U.S. 353, 376 (2001) (Souter, J., joined by Kennedy & Thomas, JJ., concurring) (second alteration in original) (quoting the reply brief for petitioners). In another case, he said that “to see coherence in the various manifestations of the general law of tribal jurisdiction over non-Indians,” the Court needed to elevate one precedent to governing status. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001) (Souter, J., joined by Kennedy & Thomas, JJ., concurring); see also *United States v. Lara*, 124 S. Ct. 1628, 1650 (2004) (Souter, J., joined by Scalia, J., dissenting) (noting that tribal jurisdiction is “an area peculiarly susceptible to confusion”).

¹⁶ *Lara*, 124 S. Ct. at 1641–42 (Thomas, J., concurring in the judgment).

¹⁷ *Id.* at 1648.

¹⁸ Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691, 698 (2000).

incoherence can be ameliorated in a variety of ways that have inconsistent policy implications, resolving this incoherence becomes not just a methodological challenge, but also an ideological struggle.

In this Article, I suggest that the Supreme Court has been increasingly troubled by not only the incoherence inside the field, but also the extent to which its doctrines deviate from general principles of American law. In attempting to fix the internal incoherence by imposing external principles, the Court has engaged in aggressive institutional and doctrinal revisionism, essentially displacing Congress as the federal agent with front-line responsibility for federal Indian policy. Frustration with the intractability of the issues has recently led several Justices to propose that the Court should have not only the first say on sensitive issues, but the final say as well. For the first time since the Marshall Court, the Justices are debating deep and thorny questions about the nature of federal Indian law.

I contend that the emerging discussion cannot successfully address these questions without a deeper doctrinal, institutional, and normative analysis that recognizes the exceptionalism of the field. Federal Indian law has been confused for reasons that are significantly more fundamental than precedential inconsistency. In this field, as de Tocqueville understood, the rule of law serves remarkably divergent purposes, justifying colonialism in the pursuit of constitutionalism. It should come as no surprise, therefore, that the rule of law cannot be easily harmonized across the colonial-constitutional divide.

At the most basic level, tribes have never been brought into the United States through formal means, such as by a constitutional amendment incorporating them into the federal-state design. For a time, the Supreme Court ignored the fact that tribes sit largely outside the constitutional framework by assuming that Congress had plenary power over Indian affairs, despite no evident basis for it in constitutional text. In recent years, the Court has injected itself into Indian affairs despite having an even more inferior constitutional pedigree than Congress has. One result has been serious confrontation between congressional and judicial functions in federal Indian law. But the more fundamental problem is that, without an interrogation of the immense normative problems of a constitutional system created by colonialism, the answers generated by the Court are doomed to reflect a ruthless pragmatism inconsistent with even the modest respect for tribal prerogatives that traditional federal Indian law sometimes reflected in appreciation of our colonial past. At bottom, we have every right to be confused about both the internal incoherence of Indian law and the asymmetry between that body of doctrine and its external analogs.

In the next Part, I present the exceptionalist framework of federal Indian law developed by the Supreme Court in the nineteenth and early twentieth centuries. Part III turns to recent decades, in which

the foundational framework held together for a time but then crumbled under a judicial impetus to render the field more coherent both internally and with external principles of public law. Part IV turns to the current debate, in which virtually every basic principle of Indian law is under scrutiny. Part V argues that the debate should be addressed by having the courage to admit our larger confusions about the place of federal Indian law in public law, rather than by embracing the alternative — some smaller certainty that imposes artificial coherence at the expense of the exceptional doctrinal, institutional, and normative features of the field. My conclusion is that the Supreme Court is the institution least able to undertake either approach — the coercion of an artificial coherence or the generation of a more satisfactory, dialogic integration of our colonial roots with our constitutional framework — and thus needs to stand aside.

II. EXCEPTIONALISM IN FOUNDATIONAL FEDERAL INDIAN LAW

In the nineteenth century, the Supreme Court established foundational principles of federal constitutional and common law concerning Indian affairs. More than three hundred years after the first colonial encounter, tribes retained a variety of important interests, including novel property rights and a unique kind of sovereignty.

A. *Tribes as Domestic Dependent Nations*

In the Court's first extended discussion of the legal status of Indian tribes, Chief Justice Marshall in *Cherokee Nation v. Georgia*¹⁹ acknowledged that "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence."²⁰ On the one hand, an Indian tribe is "a state, . . . a distinct political society, separated from others, capable of managing its own affairs and governing itself."²¹ The United States had recognized this status, having entered into numerous treaties with tribes and having enacted legislation consistent with this understanding. On the other hand, even though tribes and the United States were "nations" that owed no common allegiance, tribes were not "foreign" nations because of "peculiar and cardinal distinctions which exist no where else."²² The tribes were within the boundaries of, were viewed by foreign nations as subject to the authority of, and had entered into treaties in which they acknowledged being under the protection of, the United

¹⁹ 30 U.S. (5 Pet.) 1 (1831).

²⁰ *Id.* at 16.

²¹ *Id.*

²² *Id.*

States. In light of these characteristics, the Court called tribes “domestic dependent nations . . . in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.”²³

Although “domestic dependent nation” may sound more like an oxymoron than a plausible legal concept, the Constitution supports viewing tribes as both domestic and sovereign, even if it does not clearly support the idea of dependence. By authorizing Congress to regulate commerce “with foreign Nations, and among the several States, and with the Indian Tribes,”²⁴ the Constitution places tribes in the same category as acknowledged sovereigns and recognizes that tribes are sovereigns distinct from the United States but nonetheless suggests that they are not foreign nations.²⁵ The Constitution also indicates the separateness of tribes by specifying that “Indians not taxed” — unassimilated tribal Indians, a term that applies to no one today²⁶ — are not counted for apportionment of the House of Representatives.²⁷ The federal government’s repeated treaty-making with tribes also demonstrated an understanding of tribes as separate sovereigns.

B. *Exclusion of State Authority*

In *Worcester v. Georgia*,²⁸ Chief Justice Marshall held that the federal-tribal relationship precluded any state role in Indian affairs. The conclusion flowed in part from a comparison of how the Articles of Confederation and the Constitution allocated authority over Indian affairs. Under the Articles, states could declare war if “some nation of Indians” planned to invade and there was inadequate time to consult Congress.²⁹ The Articles also opaquely provided that Congress would “have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated.”³⁰ In contrast, Chief Justice Marshall noted, the Constitution

confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not lim-

²³ *Id.* at 17.

²⁴ U.S. CONST. art. I, § 8, cl. 3.

²⁵ See *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

²⁶ See FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 389 (Rennard Strickland ed., 1982) [hereinafter HANDBOOK OF FEDERAL INDIAN LAW].

²⁷ U.S. CONST. art. I, § 2, cl. 3; *id.* amend. XIV, § 2.

²⁸ 31 U.S. (6 Pet.) 515 (1832).

²⁹ ARTICLES OF CONFEDERATION art. VI, para. 5 (U.S. 1781).

³⁰ *Id.* art. IX, para. 4.

ited by any restrictions on their free actions. The shackles imposed on this power, in the confederation, are discarded.³¹

It followed that Georgia's attempt to exercise authority over the Cherokee reservation violated federal law:

[T]he acts of Georgia are repugnant to the constitution, laws, and treaties of the United States.

They interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the union.³²

C. *Reserved Rights and Canons of Interpretation*

The Marshall Court treated tribes as full sovereigns before their "discovery" by Europeans.³³ Tribes lost important rights simply by contact with Europeans,³⁴ but nonetheless, Chief Justice Marshall contemplated that the federal government would ordinarily extinguish tribal interests through negotiation.³⁵ Thus, a treaty usually involved a tribal cession of preexisting rights (especially to land and related rights such as water, fishing, hunting, and gathering) and a reservation of all that had not been ceded away (again, especially land — hence the term "Indian reservation").³⁶ Treaties, therefore, did not ordinarily involve tribal surrender of all rights in return for federal largesse.³⁷

This "reserved rights" understanding of the treaty-making process had important implications for treaty interpretation. The treaties involved in *Worcester* contained several clauses that could have been read as representing a complete cession of Cherokee sovereignty.³⁸ Chief Justice Marshall acknowledged that a tribe could surrender its sovereignty by treaty but found it highly implausible that a tribe would do so.³⁹ He articulated powerful canons of interpretation to protect tribes from inadvertent cessions of important rights.

³¹ *Worcester*, 31 U.S. (6 Pet.) at 559 (emphasis omitted). Chief Justice Marshall could have added that the Constitution forbids states from making treaties. See U.S. CONST. art. I, § 10, cl. 1.

³² *Worcester*, 31 U.S. (6 Pet.) at 561.

³³ See *id.* at 559.

³⁴ See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 574 (1823) (stating that, upon discovery, tribes could enter into treaties only with the discovering European nation and that legal title to Indian lands shifted to the discovering nation).

³⁵ See *Worcester*, 31 U.S. (6 Pet.) at 547.

³⁶ See *id.* at 556.

³⁷ These understandings are relatively clear in *Worcester*, see *id.*, and are explicit in *United States v. Winans*, 198 U.S. 371 (1905), an important later case, see *id.* at 381.

³⁸ See *Worcester*, 31 U.S. (6 Pet.) at 552–54.

³⁹ See *id.* at 552–53.

The fundamental rule is that a treaty should be interpreted as the tribe would have understood it.⁴⁰ This canon follows from the reserved-rights theory, for it asks what rights the Indians intended to cede, not what allocation of interests federal negotiators intended or treaty language suggested. Chief Justice Marshall emphasized that the treaty was negotiated and written in a language foreign to the Indians, who could not be expected to understand nuance.⁴¹ He also presumed that the treaty's purpose was to establish a peaceful relationship between sovereigns, not to "annihilat[e] the political existence of one of the parties."⁴² The power of this approach was substantial: a tribe could be held to have abdicated its sovereignty only if that result had "been openly avowed" in the treaty.⁴³

The reserved-rights theory and the canons associated with it have profound implications for the nature as well as the scope of tribal authority. Because tribal sovereignty is understood as being retained from a tribe's inherent, preconstitutional sovereignty rather than consisting of delegated power, the exercise of this sovereignty does not entail any federal or state action that would trigger the Constitution. Accordingly, in *Talton v. Mayes*,⁴⁴ the Court concluded that the Constitution did not apply when a tribe criminally prosecuted one of its members.⁴⁵

D. Unilateral Congressional Power over Indian Affairs?

1. *Constitutional Text and Early Precedents.* — *Worcester* held that the states had no power to deal with tribes and suggested that Congress and the President had only limited authority to do so. The Constitution empowers Congress to regulate commerce and to make war and peace with the tribes, and it authorizes the President and Senate to make treaties with them. The Constitution has no clause like the one in the Articles of Confederation that provided Congress the authority of "managing all affairs with the Indians" subject to vague limits protecting state power.⁴⁶ Moreover, even the Articles spoke of "managing all the affairs *with* the Indians," not "managing all the affairs *of* the Indians."

⁴⁰ See *id.* at 553–54.

⁴¹ See *id.* at 552.

⁴² *Id.* at 554.

⁴³ *Id.* I have examined Chief Justice Marshall's canonical approach to treaty interpretation elsewhere. See Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

⁴⁴ 163 U.S. 376 (1896).

⁴⁵ See *id.* at 384.

⁴⁶ See *Worcester*, 31 U.S. (6 Pet.) at 559 ("[The listed] powers comprehend all that is required for the regulation of our intercourse with the Indians.").

Despite the seeming clarity of the constitutional text, the early cases were murky concerning the nature and extent of congressional power over Indian affairs. *Cherokee Nation* had stated that the tribes “were in a state of pupilage,” in a relationship that “resembles that of a ward to his guardian.” Yet *Worcester* stressed that “a weaker power does not surrender its independence — its right to self government, by associating with a stronger, and taking its protection.”⁴⁷ The question of how the Court might reconcile wardship with dependent sovereignty was left hanging for decades.

2. *Late-Nineteenth-Century Developments: End of Treaty-making, Rise of Congressional Plenary Power.* — In 1871, Congress ended treaty-making with tribes⁴⁸ to placate the House of Representatives, which of course has no role in the treaty process. Since then, the federal government and tribes have often negotiated agreements, which become federal law through bicameral approval and presidential signature. Although the abandonment of treaty-making was a matter of internal congressional politics, the symbolism of the action cut against the notion of tribes as sovereigns.

In the next three decades, the Court attempted to reconcile federal authority and tribal sovereignty in ways that underlined the exceptionalism of federal Indian law. As noted above, in *Talton v. Mayes*, it concluded that tribal prosecution of intratribal crimes was an aspect of retained, preconstitutional authority. *Talton* is squarely consistent with the notion of tribes as self-governing sovereigns. But in two earlier decisions, the Court also considered whether federal criminal law could apply to intratribal crimes — a unilateral intervention into tribal self-government. In the first case, the Court construed a treaty and an agreement as not containing sufficiently clear authorization for the application of federal criminal statutes to intratribal offenses.⁴⁹ In reaction, Congress enacted the Major Crimes Act,⁵⁰ clearly extending federal jurisdiction to serious crimes committed by Indians on reservations.

The second decision, *United States v. Kagama*,⁵¹ considered the constitutionality of the Major Crimes Act. Consistent with the limited conception of “commerce” then in vogue, the Indian Commerce Clause could not support federal criminalization of an intratribal, non-economic offense.⁵² Lacking a conventional constitutional foundation

⁴⁷ *Id.* at 561.

⁴⁸ See Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71 (2000)).

⁴⁹ See *Ex parte Crow Dog*, 109 U.S. 556, 567–72 (1883).

⁵⁰ Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153 (2000)).

⁵¹ 118 U.S. 375 (1886).

⁵² See *id.* at 378–79.

for the statute, the Court reverted to the exceptionalism of federal Indian law⁵³ and upheld the statute by reliance on the wardship notion.

Cherokee Nation had said that the tribal-federal relationship “resembles that of a ward to its guardian.” The Court in *Kagama* converted this simile into fact: “These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights.”⁵⁴ If tribes had fallen into such a powerless condition, however, one might expect them to be subject to the local police power (contra *Worcester*), like other persons within the boundaries of a state. The Court rejected that conclusion, again for exceptional contextual reasons: “They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.”⁵⁵

Upholding federal power almost by default, the Court made no effort to tie its conclusions to constitutional text. Instead, it concluded:

From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. . . .

. . . .

The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.⁵⁶

Following *Kagama*, the Court more clearly specified the extraordinary congressional power over Indian affairs. In *Lone Wolf v. Hitchcock*,⁵⁷ it refused to review the congressional abrogation of an Indian treaty and the taking of tribal land (some of which was distributed to members, the rest opened to non-Indians with the tribe receiving some compensation). The Court stated that “[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one,

⁵³ “The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character.” *Id.* at 381.

⁵⁴ *Id.* at 383–84.

⁵⁵ *Id.* at 384.

⁵⁶ *Id.* at 384–85.

⁵⁷ 187 U.S. 553 (1903).

not subject to be controlled by the judicial department of the government.”⁵⁸

3. *Exceptionalism as a Mediating Device.* — In the final analysis, the Court’s approach to federal Indian law in the nineteenth century was exceptionalist in every detail. The Court created a unique legal category of “domestic dependent nation,” a government outside the constitutional structure that retained elements of preexisting, aboriginal sovereignty. States could not intrude upon these separate sovereigns, even though the tribes occupied lands within state borders. On the one hand, the Court delineated a constitutional regime that treated tribes as completely subordinated to Congress and provided virtually no meaningful protections for domestic dependent nations. This harsh vision of colonialism was inconsistent with both textualist constitutional interpretation and any normatively attractive recognition of indigenous humanity. Yet on the other hand, the Court sometimes took action that suggested that the federal judiciary could be called upon for at least a modicum of protection of tribal interests. By aggressively reading Indian treaties to protect against all but clear tribal cessions, the Court appeared to be moderating the positivist and normative deficits existing at the constitutional level by providing a legalistic, more normatively attractive approach at the subconstitutional level of treaty interpretation. As the next Part demonstrates, this exceptional model of constitutional deference and subconstitutional interpretive aggressiveness continued into the twentieth century but has now eroded.

III. THE MODERN ERA: FROM CONGRESSIONAL PLenary POWER TO A COMMON LAW OF COLONIALISM

Federal Indian policy in the twentieth century swung radically between assimilation and respect for tribal sovereignty. At the turn of the century, the federal government was pursuing an assimilative policy of land allotment, as *Lone Wolf* illustrated.⁵⁹ Some Indians received American citizenship through allotment, and in 1924 Congress conferred citizenship on the remainder.⁶⁰ Following the loss of a sub-

⁵⁸ *Id.* at 565. As many commentators have pointed out, the plenary power doctrine was never justified by reference to constitutional text and is in great tension with the notion that Congress possesses only enumerated powers. See, e.g., Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31 (1996); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984); Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069 (2004).

⁵⁹ On the allotment policy and its contemporary effects, see generally Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

⁶⁰ See Indian Citizenship Act of 1924, Pub. L. No. 68-175, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (2000)).

stantial amount of Indian land as the result of allotment,⁶¹ Congress abandoned the policy. In 1934, the Indian Reorganization Act⁶² replaced allotment and assimilation with renewed support for tribal self-governance.⁶³ But following World War II, assimilation swung back into favor. During the 1950s, Congress embarked upon a draconian policy of terminating the sovereignty of some Indian tribes.⁶⁴ Congress also adopted Public Law 280,⁶⁵ requiring several states, and authorizing others, to exercise jurisdiction in Indian country.⁶⁶

Support for these assimilative policies eroded quickly. In 1970, President Nixon proclaimed that the executive branch would work for greater tribal self-government,⁶⁷ and that policy remains the professed federal approach today. Congress enacted the Indian Civil Rights Act of 1968⁶⁸ (ICRA), which, in belated reaction to the holding in *Talton v. Mayes* that the Constitution does not apply to exercises of retained tribal sovereignty, imposes many constitutional limitations upon tribes by statute.⁶⁹ Although this aspect of ICRA has assimilative features, the statute also bolstered tribal independence by amending Public Law 280 to require tribal agreement for any future state assumptions of jurisdiction.⁷⁰

Professor Charles Wilkinson has suggested that in the courts, by contrast, the “modern era” of Indian law began earlier, as the Justices started issuing opinions in 1959 that were anything but assimilationist in orientation.⁷¹ Using that date as a rough marker, section A of this Part explores how the exceptionalism of foundational federal Indian law remained robust for a time. Section B then turns to the erosion of this approach, beginning in the early 1970s.

⁶¹ See HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 26, at 138.

⁶² Pub. L. No. 73-383, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C.A. §§ 461-479 (West 2001 & Supp. 2005)).

⁶³ The Act curtailed allotment and restricted other forms of alienation of tribal land, provided for new acquisitions of tribal land, established opportunities for tribal incorporation and self-governance, and extended financial credit to tribes for these purposes. See HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 26, at 147-51.

⁶⁴ See generally H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953).

⁶⁵ Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2000) and 28 U.S.C. § 1360 (2000)).

⁶⁶ See *id.* “Indian country” includes all areas within the boundaries of an Indian reservation, all dependent Indian communities, and all Indian trust allotments. 18 U.S.C. § 1151.

⁶⁷ See MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING RECOMMENDATIONS FOR INDIAN POLICY, H.R. DOC. NO. 91-363 (1970).

⁶⁸ Pub. L. No. 90-284, tits. II-VII, 82 Stat. 73, 77-81 (codified as amended in scattered sections of 18 and 25 U.S.C.).

⁶⁹ See *id.* § 202, 82 Stat. at 77-78 (codified as amended at 25 U.S.C. § 1302 (2000)).

⁷⁰ See *id.* tit. IV, 82 Stat. at 78-80 (codified at 25 U.S.C. §§ 1321-1326).

⁷¹ See CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 1 (1987).

A. *Continuing, but Evolving, Exceptionalism in Congressional Plenary Power, in Judicial Canonical Constraints, in Exclusion of State Authority, and in Tribal Sovereignty*

1. *Congressional Plenary Power, Canonical Judicial Interpretation, and Occasional Constitutional Innovation.* — The extreme oscillations in federal policy resulted from a consensus in the federal branches that, following *Kagama* and *Lone Wolf*, Congress possessed a plenary power over Indian affairs. The judicial role was not one of complete restraint, however. Consistent with Chief Justice Marshall's approach to treaty interpretation in *Worcester*, the Court coupled its deference as a constitutional matter with aggressive decisionmaking at the subconstitutional level.⁷² For example, the Court has long interpreted Indian treaties as reserving expansive off-reservation water and fishing rights if it seemed inconceivable that the tribes would have thought they were losing those rights when they ceded the lands associated with them.⁷³ The Court also brought the Indian law canons into the realm of statutory, as well as treaty, interpretation. Illustratively, after the termination era had effectively ended, the Court interpreted a termination statute so narrowly as to defang it of some assimilative features.⁷⁴ So, too, after federal policy abandoned assimilation and returned to Indian sovereignty, the Court interpreted Public Law 280 narrowly, as failing to authorize states to apply civil laws, like tax laws, to Indians in Indian country.⁷⁵ The decisions in both cases run against the ordinary meaning of statutory text and likely original congressional intent,⁷⁶ illuminating just how much difference the canons made.

The Court sometimes explicitly justifies its narrow interpretation of federal statutes invading tribal prerogatives as reflecting the appropriate judicial role in light of both the plenary power of Congress and the contemporary federal policy of tribal sovereignty. A paradigmatic example is *Santa Clara Pueblo v. Martinez*.⁷⁷ Under the tribe's patrilineal membership rule, the children of Ms. Martinez, a tribal member, were not eligible for membership because their father was a nonmem-

⁷² See generally Frickey, *supra* note 43, at 429–32. The Court's approach is similar to other judicial efforts to protect "underenforced" norms in public law by statutory interpretation. See Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CAL. L. REV. 397 (2005).

⁷³ See, e.g., *Winters v. United States*, 207 U.S. 564, 576 (1908); *Winans v. United States*, 198 U.S. 371, 380–82 (1905).

⁷⁴ See *Menominee Tribe v. United States*, 391 U.S. 404, 410–12 (1968) (holding that a termination statute did not abrogate preexisting treaty rights).

⁷⁵ See *Bryan v. Itasca County*, 426 U.S. 373, 383–93 (1976).

⁷⁶ See Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1166–68 (1990).

⁷⁷ 436 U.S. 49 (1978).

ber.⁷⁸ She challenged the rule as violating the equal protection guarantee of ICRA.⁷⁹ The Court understood that membership decisions were at the core of tribal self-government⁸⁰ and invoked the Indian law canons to construe ICRA narrowly. The statute requires tribes to respect a variety of rights but provides only one express remedy in federal court for violations: habeas corpus.⁸¹ In light of the canons, the Court held that habeas corpus was the only federal judicial remedy for an ICRA violation.⁸² The Court explicitly articulated how canonical interpretation mediated congressional authority and tribal autonomy:

Although Congress clearly has power to authorize civil actions against tribal officers, and has done so with respect to habeas corpus relief . . . , a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.⁸³

In addition to tempering the plenary power doctrine by applying canons of statutory interpretation, the Court eroded the doctrine somewhat as a matter of constitutional law. In reviewing congressional action, however, the Court preserved Indian law's exceptionalism by crafting standards in light of the unique aspects of tribal status. For example, the Court's first affirmative action case involved a classification benefiting Indians. In *Morton v. Mancari*,⁸⁴ non-Indian employees of the Bureau of Indian Affairs (BIA) challenged the agency's employment preference for qualified Indians.⁸⁵ Four years before famously addressing the constitutionality of government affirmative action,⁸⁶ and five years before generally considering affirmative action in employment under Title VII of the 1964 Civil Rights Act,⁸⁷ the Court faced both challenges in the arcane area of Indian law. It is unsurpris-

⁷⁸ *Id.* at 51.

⁷⁹ *Id.*; see also 25 U.S.C. § 1302(8) (2000).

⁸⁰ See *Santa Clara Pueblo*, 436 U.S. at 72 n.32.

⁸¹ See 25 U.S.C. § 1303.

⁸² See *Santa Clara Pueblo*, 436 U.S. at 51–52.

⁸³ *Id.* at 60; see also *id.* at 72 (“As we have repeatedly emphasized, Congress’ authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained. Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of [ICRA], in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions. But unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that [ICRA] does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.” (citation omitted)).

⁸⁴ 417 U.S. 535 (1974).

⁸⁵ *Id.* at 537.

⁸⁶ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

⁸⁷ *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

ing that the Court took the route of exceptionalism, saying nothing relevant to the conflicts that were to come.

In *Mancari*, the unanimous Court upheld the constitutionality of the preference, concluding that it was political rather than racial in nature.⁸⁸ Emphasizing the exceptionalism of federal Indian law at every turn, the Court wrote:

Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.⁸⁹

The Court in *Mancari* did review the statute before upholding it. Thus, it implicitly abandoned the nonjusticiability approach taken in *Lone Wolf* to congressional power over Indian affairs. To be sure, it did not apply the “strict scrutiny” standard generally applied to classifications based on race.⁹⁰ Instead, the Court continued along the lines of Indian law exceptionalism by crafting a unique form of rational basis review: “As long as the special treatment [of Indians] can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed.”⁹¹

Six years later, in *United States v. Sioux Nation*,⁹² the Court explicitly rejected the notion that congressional exercises of authority over Indian affairs were conclusively presumed to be in good faith and were therefore nonjusticiable.⁹³ Accordingly, it held that even Congress cannot take treaty-protected reservation land without subjecting

⁸⁸ See 417 U.S. at 553–54 & n.24. The Court noted that the classification benefited members of a political entity, a tribe, not members of a racial group. *Id.* at 553 n.24. The political nature of the classification is subject to qualification, however. Membership in a federally recognized tribe was a necessary but not sufficient condition to qualify for the preference; another requirement was that the person had to have at least one-quarter Indian blood. See Frickey, *supra* note 10, at 1762.

Mancari also found no violation of Title VII, concluding that the statute had not impliedly repealed the longstanding statutory employment preference for Indians at the BIA. See 417 U.S. at 545–51.

⁸⁹ *Mancari*, 417 U.S. at 552.

⁹⁰ See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

⁹¹ *Mancari*, 417 U.S. at 555. The Court, quoting *Mancari*, also applied a relaxed standard of review in *United States v. Antelope*, 430 U.S. 641 (1977), and in *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977). The usual form of rational basis review will uphold a government classification so long as any plausible facts can be imagined that would make the classification rational. See, e.g., *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 109–10 (1949).

⁹² 448 U.S. 371 (1980).

⁹³ See *id.* at 412–16.

the action to judicial review.⁹⁴ If the action involved offsetting benefits to the tribe such that a trustee in good faith could have concluded that the deal was for the tribe's benefit, Congress had violated no obligation.⁹⁵ If the congressional action failed to meet this standard, however, it was an act of eminent domain and thus subject to the just compensation requirement of the Fifth Amendment.⁹⁶ This standard of review, too, is exceptionalist: other property owners get just compensation whenever land is taken, without an inquiry concerning whether the government has acted in good faith by providing offsetting benefits.⁹⁷

In summary, the exceptionalism of foundational Indian law on the question of congressional power continued into the modern era. Although the Court abandoned the notion of nonjusticiability of claims involving congressional power, it repeatedly reaffirmed that Congress had the authority to do virtually anything it wanted to do in the area of Indian affairs. The most important form of judicial checking was a remarkable aggressiveness in applying the Indian law canons of interpretation to mold federal statutes to accommodate tribal independence. In every respect, although the details of the doctrine of congressional plenary power had changed somewhat, the exceptionalism of the doctrine remained.

2. *Continued General Exclusion of State Law.* — As an aspect of the plenary power/canonical interpretation model, the Court generally maintained the *Worcester* approach of keeping state authority out of Indian country unless Congress had plainly decided to the contrary. Consider *Williams v. Lee*,⁹⁸ which held that a state court lacked jurisdiction to hear a case brought by a non-Indian operating a store on a reservation against an Indian family for allegedly failing to pay for goods sold on credit.⁹⁹ The Court stated that, “absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.”¹⁰⁰ Although the Court emphasized that Arizona had not availed itself of Public Law 280 by opting into civil jurisdiction in Indian country,¹⁰¹ the decision turned more on the question of

⁹⁴ See *id.* at 415–16.

⁹⁵ See *id.* at 415.

⁹⁶ See *id.* In this same era, the Court recognized an ambiguous fiduciary obligation of the federal executive branch in managing Indian trust assets, the breach of which could sometimes subject the federal government to liability. See *United States v. Mitchell*, 463 U.S. 206 (1983).

⁹⁷ See Nell Jessup Newton, *The Judicial Role in Fifth Amendment Takings of Indian Land: An Analysis of the Sioux Nation Rule*, 61 OR. L. REV. 245, 261 (1982).

⁹⁸ 358 U.S. 217 (1959).

⁹⁹ See *id.* at 217–18, 223.

¹⁰⁰ *Id.* at 220.

¹⁰¹ See *id.* at 221 & n.6.

infringement of tribal self-government. The Court concluded that state jurisdiction would “undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.”¹⁰²

Williams is a paradigmatic example of Indian law exceptionalism. Ordinarily, a transitory cause of action like that involved in the case may be brought anywhere the defendant can be served.¹⁰³ Not so when the cause of action arose in Indian country and the defendant was a tribal member. Moreover, because no federal jurisdiction would have existed over this cause of action, the tribal court ended up with exclusive jurisdiction. In addition, by forbidding the state court to hear the case, the Court implicitly assumed that the state court would wrongly refuse to apply tribal law or would be incompetent in doing so.¹⁰⁴ Ordinarily, however, that issue is a choice-of-law question, not a jurisdictional one.

During this period, the Court also found state law precluded even when its application might not infringe tribal self-government. *McClanahan v. Arizona State Tax Commission*¹⁰⁵ held that states may not apply their individual income tax to income earned on a reservation by a reservation Indian.¹⁰⁶ *Bryan v. Itasca County*¹⁰⁷ made clear that even Public Law 280 states cannot tax reservation Indians for reservation affairs, because Congress had not clearly expressed an intent in that statute to overturn the *McClanahan* rule.¹⁰⁸ Because multiple tax burdens — federal, state, sometimes local — are common in America, these state taxes could not easily be said to infringe the tribe’s authority to impose its own taxes. Nonetheless, the *Bryan* Court assumed that, absent clear congressional authorization, application of the state tax would improperly intrude upon the federal-tribal authority over reservation affairs.¹⁰⁹

¹⁰² *Id.* at 223.

¹⁰³ *See, e.g.,* *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990) (Scalia, J., plurality opinion) (holding that personal jurisdiction obtained by service of process on a person voluntarily present in the jurisdiction satisfies the requirements of the Due Process Clause).

¹⁰⁴ *See, e.g., Williams*, 358 U.S. at 220 (“[T]he question [is] whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.”).

¹⁰⁵ 411 U.S. 164 (1973).

¹⁰⁶ *See id.* at 165.

¹⁰⁷ 426 U.S. 373 (1976).

¹⁰⁸ *See id.* at 377–79.

¹⁰⁹ *See id.* at 392–93.

3. *Continued Support for Tribal Authority.* — As noted above, the principle of tribal self-government was a justification for excluding state law from Indian country and for narrowly construing federal statutes and treaties that might undercut tribal authority. The Court reaffirmed tribal sovereignty in a more positive vein as well. In *United States v. Wheeler*,¹¹⁰ a tribal member who had pleaded guilty to violating tribal criminal law was then prosecuted by the federal government for the same acts.¹¹¹ Based on *Talton v. Mayes*, the Court concluded that the tribe had acted with its retained sovereignty.¹¹² Accordingly, the Court found no double jeopardy violation because the later federal prosecution was by a separate sovereign.¹¹³ The Court understood congressional plenary power and retained tribal authority to be consistent concepts.¹¹⁴

The Court expressed little concern regarding the scope of tribal authority even when tribal law applied to nonmembers. For example, federal law forbids the sale of alcoholic beverages in Indian country unless the vendor has complied with both state and tribal law.¹¹⁵ In *United States v. Mazurie*,¹¹⁶ the Court upheld the federal prosecution of non-Indians who had operated a bar in defiance of a tribe's refusal to license it.¹¹⁷ The Court rejected the argument that Congress violated the nondelegation doctrine by authorizing a tribe to make federal law governing nonmembers.¹¹⁸ Although delegation of federal law-making authority to a private entity might raise serious constitutional questions, tribes "are a good deal more than 'private, voluntary organizations.'"¹¹⁹ Because tribes possess "attributes of sovereignty over both their members and their territory," they have "independent authority over the subject matter" and therefore are acceptable recipients of a delegation of federal authority.¹²⁰ In addressing whether tribal regulation of nonmembers was unfair, the Court simply quoted *Williams* for the proposition that voluntary presence on the reservation and transactions with Indians there were sufficient to implicate tribal

¹¹⁰ 435 U.S. 313 (1978).

¹¹¹ See *id.* at 314–16.

¹¹² See *id.* at 328–29.

¹¹³ See *id.* at 329–30.

¹¹⁴ See *id.* at 323 ("The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers.").

¹¹⁵ See 18 U.S.C. §§ 1154, 1161 (2000).

¹¹⁶ 419 U.S. 544 (1975).

¹¹⁷ See *id.* at 545–49.

¹¹⁸ See *id.* at 556–58.

¹¹⁹ *Id.* at 556–57 (quoting *United States v. Mazurie*, 487 F.2d 14, 19 (10th Cir. 1973)).

¹²⁰ *Id.* at 557.

sovereignty; any question of fairness was for Congress, not the Court.¹²¹

4. *Summary: Continuities in the Exceptionalist Model of Federal Indian Law.* — Federal Indian law circa 1975, when *Mazurie* was decided, was similar in many respects to the state of the field at the turn of the century. At every opportunity, the Court acknowledged that Congress had plenary power over Indian affairs. To be sure, by that era the Court had imposed some exceptional side constraints on this authority, no longer considering exercises of it to be political questions, subjecting those exercises to an exceptionally phrased rational basis test, and protecting some Indian land against uncompensated takings (with a standard not found anywhere else in eminent domain law). Although the Court made few important inroads on congressional plenary power at the constitutional level, it did aggressively apply canons of interpretation to limit exercises of that power at the subconstitutional level. Meanwhile, the Court maintained barriers to the application of state law in Indian country and continued to understand tribes as sovereigns, even when non-Indians were left subject to tribal law. Federal Indian law thus remained an exceptional mix of judicial deference to ongoing, normatively dubious colonial power and judicial imposition of side constraints attempting to make Congress's use of that authority more difficult.

One could argue that, like a camel, this plenary power/canonical interpretation model of Indian law was homely, even mean-spirited at times, but often functional in providing at least some protection for tribes while leaving the ultimate responsibility to Congress.¹²² Under

¹²¹ See *id.* at 557–58. The quoted language from *Williams* is as follows:

It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it.

Williams v. Lee, 358 U.S. 217, 223 (1959) (citation omitted).

¹²² See, e.g., Frickey, *supra* note 10, at 1764–67; Robert Laurence, *Don't Think of a Hippopotamus: An Essay on First-Year Contracts, Earthquake Prediction, Gun Control in Baghdad, the Indian Civil Rights Act, the Clean Water Act, and Justice Thomas's Separate Opinion in United States v. Lara*, 40 TULSA L. REV. 137, 151–53 (2004). Obviously, the normative assumption here is that colonialism was dubious from the start and remains even more so five hundred years later. Debating that assumption is for another day and another place. For those doubtful of the assumption, however, consider that the two major justifications that the Court itself identified for the European pretense of the colonial power to displace indigenous peoples unilaterally — the duty and privilege of Christianizing and civilizing the heathens, and the natural law notion that (European) persons cramped together on insufficient land for manufacturing and agriculture have the privilege of displacing (non-European) others who are not using their lands to the highest and best uses (as viewed from a European perspective) — would not pass the “laugh test” today and were even understood to be questionable in the early nineteenth century. See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542–43 (1832) (implying dubiety of European colonial pretensions, which Chief Justice Marshall termed “difficult to comprehend”); *Johnson v. M'Intosh*, 21 U.S. (8

this model, American authority over Indian affairs was lodged at the national level, surely a more appropriate place for it than with the fifty states. Tribes had developed increasing sophistication in lobbying Congress, which became more responsive to tribal concerns and therefore less prone to raw colonialism.¹²³ The federal courts had no final say on these matters, but kept Congress (by aggressive canonical interpretation) and the states (by a strong presumption against any jurisdictional role) in check, while assuming tribes would exercise principled authority over all persons found within reservation borders.

Writing of this era, Professor Wilkinson praised the judicial approach to Indian law.¹²⁴ Others were not as sanguine about the Court's role,¹²⁵ however, at least in part because by this time the Court had begun to back away from the approach described above.

B. The Model Frays: The Rise of a Common Law of Colonialism

Beginning in the early 1970s, the Court began undercutting the plenary power/canonical interpretation model of federal Indian law that had remained largely intact since the nineteenth century. Three categories of cases began to move in another direction.

1. *Reservation Diminishment.* — As a result of allotment, large numbers of non-Indians currently reside upon and own fee land on some reservations.¹²⁶ Following the influx of non-Indians, some states assumed they had jurisdiction over at least the non-Indians and their lands. Nonetheless, federal law defines Indian country as including all lands within the boundaries of a reservation.¹²⁷ Under this definition, the non-Indians and their fee lands are on the reservation and presumably subject to tribal and federal, rather than state, jurisdiction.

Beginning in the 1960s, the Court heard a series of cases considering the legacy of allotment. In each instance, the issue was whether Congress, when it imposed allotment on a reservation, had also diminished the reservation boundaries so that non-Indian areas were out-

Wheat.) 543, 573, 588–90 (1823) (distancing the Court from any normative defense of justifications based on “the character and religion of [the] inhabitants” and labeling the European colonial claims as “pompous”). In addition, as suggested in Part I, consider the obvious tension — hypocrisy might be a better term — of forming a constitutional democracy based on consent of the governed and protection of liberty and property by unilaterally displacing preexisting indigenous institutions and acquiring the indigenous land estate.

¹²³ See WILKINSON, *supra* note 71, at 53–54.

¹²⁴ See *id.* at 120–22.

¹²⁵ See, e.g., Milner S. Ball, *Constitution, Court, Indian Tribes*, 12 AM. B. FOUND. RES. J. 1 (1987); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219.

¹²⁶ For a useful examination of the demographics in Indian country, see L. Scott Gould, *The Congressional Response to Duro v. Reina: Compromising Sovereignty and the Constitution*, 28 U.C. DAVIS L. REV. 53, 122–46 (1994).

¹²⁷ See 18 U.S.C. § 1151 (2000).

side. In the first two cases, in which the demographics were substantially Indian, the Court found no diminishment.¹²⁸ In the next two cases, however, with much worse demographics from the tribal perspective, the Court found diminishment.¹²⁹

These cases, like those that followed, all presented a straightforward issue of federal Indian law. As the Court explained in *Solem v. Bartlett*,¹³⁰ the allotment statutes seldom said anything about reservation borders.¹³¹ This was probably because, when Congress imposed allotment upon the reservations, Congress assumed that Indian country included only the lands of tribes and their members.¹³² Today, however, Indian country is understood to include all lands within reservation boundaries. This left the Court with two choices. First, consistent with longstanding principles, the Court could have accorded Congress the authority to redraw reservation boundaries unilaterally but assumed that Congress did not intend to harm tribes in this way unless the congressional intent was clear. Accordingly, because the allotment statutes did not squarely reduce boundaries,¹³³ the historical boundaries would remain. Alternatively, the Court could have abandoned the Indian law canons and simply used ordinary techniques of statutory interpretation, under which the probable legislative intent and the purpose of a statute generally govern when the statutory text is silent.¹³⁴

The Court followed neither of these approaches. Under the first, the tribes would always prevail; under the second, the non-Indians would almost always prevail (given that the probable congressional intent was to destroy reservations). With cases going in both directions, something else had to be controlling, and the *Solem* Court provided the necessary link: after noting that the allotment act did not evince a clear congressional intent, the Court went on to examine subsequent events on the reservation and the current “character” of the reservation. And in fact, an examination of the early allotment cases indicates that the results were driven by demographics and pragmatic considerations about which local sovereign — the state or the tribe — was better situated to provide public services.¹³⁵ Since that time, the Court

¹²⁸ See *Mattz v. Arnett*, 412 U.S. 481, 499, 506 (1973); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 354, 359 (1962).

¹²⁹ See *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604–05, 615 (1977); *DeCoteau v. Dist. County Court*, 420 U.S. 425, 427–28 (1975).

¹³⁰ 465 U.S. 463 (1984).

¹³¹ *Id.* at 468.

¹³² See *id.*

¹³³ See *id.* at 473.

¹³⁴ On these two choices, see Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 20–27 (1999).

¹³⁵ See *id.*

has continued to reach results more consistent with these contextual factors than with any plausible doctrinal framework.¹³⁶ The Court has never devised a way to integrate context with doctrine in the diminishment cases and thereby create a plausible understanding of federal Indian law that could justify these results in a principled fashion.

I have called these diminishment cases one aspect of “a common law for our age of colonialism.”¹³⁷ The results purport to rest on statutory interpretation, but they cannot plausibly be understood that way. Instead, they constitute decisional law — common law — that implicitly rejects the old model, under which colonialism was Congress’s responsibility and the judicial role was to allow Congress to establish even draconian federal Indian policy, but only when Congress had squarely taken responsibility for the results. Instead of upholding the original reservation boundaries and shifting the burden of policymaking inertia to Congress, where non-Indians could presumably find receptive ears for their complaints, the Court abandoned the old allocation of institutional responsibilities and reached the results that a majority of Justices thought made the most sense in context. By doing so, the Court aggrandized a power to act in the absence of clear congressional directives — a dormant plenary power over Indian affairs, if you will. Now, if Congress has not already taken away tribal interests, the Court might.

2. *State Authority over Nonmembers in Indian Country.* — As explained in section III.A.2, *McClanahan* forbade the states from taxing the reservation-based income of a reservation Indian.¹³⁸ The Court reached a result entirely consistent with the foundational Indian law idea that, unless Congress clearly authorizes state law to apply in Indian country, the state law is excluded. Rather than basing its ruling on the traditional canons designed to protect tribal sovereignty, however, the Court explicitly rejected respect for tribal sovereignty and stated that its holding was rooted in federal preemption. “[T]he trend has been away from the idea of inherent Indian sovereignty . . . and toward reliance on federal pre-emption,” the Court wrote.¹³⁹ “The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty,” the Court continued, “and to look instead to the applicable treaties and statutes which define the limits of state power.”¹⁴⁰ This language is problematic for reasons large and small: it seems to

¹³⁶ See *id.* (discussing *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998); *Hagen v. Utah*, 510 U.S. 399, 420–21 (1994)).

¹³⁷ *Id.* at 58.

¹³⁸ *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 181 (1973).

¹³⁹ *Id.* at 172.

¹⁴⁰ *Id.* The Court concluded: “The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read.” *Id.*

abandon the foundational canonical interpretation approach, and it makes the result in the case inexplicable on its own terms.¹⁴¹ Ironically, the only obvious way to justify the result in *McClanahan* is the traditional approach holding that without clear congressional authorization, states have no role in Indian country.¹⁴²

The opaqueness of *McClanahan* left room for case-by-case discretion. For example, the Court soon heard several cases involving tribal efforts to use their jurisdictional immunity for economic benefit through transactions with nonmembers. In none of these later cases did clear federal treaty or statutory language either preclude the tribal economic development scheme or allow the application of state law to undercut the scheme. Under the foundational Indian law approach consistent with what the Court *did* in *McClanahan*, the Court should have refused to intervene and left the states to seek congressional relief. Under what the Court *said* in *McClanahan* about preemption, however, the Court could have done the opposite, allowing state law to apply and leaving the tribes the burden of seeking a federal statute overturning the decision. The Court did neither in a consistent manner, instead deciding some cases favoring states and others favoring tribes, based on what can only be considered ad hoc reactions to the facts.

The initial cases concerned tribal attempts to sell cigarettes to nonmembers free of the state tobacco tax. The first held that neither a tribe nor its members were allowed to abet a non-Indian in violating state law by possessing cigarettes without the state tax stamp off the reservation.¹⁴³ In the second case, the tribe argued that the state tax interfered with the federal policy of encouraging tribal economic development and that the tribal cigarette tax left no room for state taxation.¹⁴⁴ But the Court took a dim view of a tribal economic development scheme under which “the value marketed by the smokeshops to

¹⁴¹ First, by giving the back of its hand to “platonic notions of Indian sovereignty” and stressing federal preemption based on treaties and federal statutes, the Court seemed to take the “Indian” out of Indian law and turn the issues into garden-variety matters of federal preemption. Second, the preemption analysis in *McClanahan* is problematic in and of itself, as the relevant treaties and federal statutes were silent regarding the state’s power to tax in the circumstances. *See id.* at 174–77. In routine federal preemption analysis, absent statutory text expressly preempting state law, the courts presume that state law is not preempted unless federal positive law occupies the field or there is a strong indication of preemptive congressional intent. *See, e.g.,* *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 157–58 (1978). Neither field preemption nor congressional preemptive intent was clearly present in *McClanahan*, however.

¹⁴² Much of the opinion in *McClanahan* implicitly follows this approach. *See* 411 U.S. at 174–79.

¹⁴³ *See* *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 483 (1976).

¹⁴⁴ *See* *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154–55 (1980).

persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest. What the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation."¹⁴⁵ Even though the federal statutes encouraging tribal economic development seemed no less preemptive of state law than the statutes and treaty involved in *McClanahan*, the Court held that the state cigarette tax was not preempted for sales to nonmembers.¹⁴⁶ It was simple enough for the Court to point out that the statutes did not expressly preempt the state tax, had no evident intent relevant to the precise question, and had not authorized the tribe to preempt state law.¹⁴⁷

Yet some tribal economic development plans that were dependent upon business from nonmembers survived judicial scrutiny in the post-*McClanahan* era. For example, the Court barred the application of state hunting and fishing laws to a tribal hunting and fishing resort.¹⁴⁸ The tribe was marketing an exemption from state law to nonmembers, like in the cigarette cases.¹⁴⁹ But here the value was reservation-based — taking animals there — and the Court found no off-reservation spillover effects.¹⁵⁰ In a much more significant decision, the Court upheld a tribal bingo operation.¹⁵¹ There, too, the tribe was marketing an exemption from state law to nonmembers, but the Court saw the gaming as providing on-reservation value and again saw no important off-reservation effects.¹⁵²

¹⁴⁵ *Id.* at 155 (citations omitted).

¹⁴⁶ *See id.* at 159.

¹⁴⁷ *See id.* at 155, 158–59. A later case held that a state law limiting the number of liquor licenses applied in Indian country. *Rice v. Rehner*, 463 U.S. 713, 733–35 (1983). This result was plausible because a federal statute could be read as authorizing the application of all state liquor laws in Indian country. *See id.* Apparently confused by the language in *McClanahan*, the Court unfortunately went through a preemption analysis and somehow concluded that the tribal sovereignty interest was minimal in light of the longstanding, but later repealed, federal prohibition of alcohol in Indian country. *See id.*

¹⁴⁸ *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 325 (1983).

¹⁴⁹ *See id.* at 327–29.

¹⁵⁰ *See id.* at 341–42.

¹⁵¹ *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221–22 (1987). This decision led to tribal and state negotiations for federal legislation, which culminated in the Indian Gaming Regulatory Act of 1988, Pub. L. No. 100-497, 102 Stat. 2467 (codified as amended at 18 U.S.C. §§ 1166–1168 (2000) and 25 U.S.C. §§ 2701–2721 (2000)).

¹⁵² *See Cabazon Band*, 480 U.S. at 219–21. In this era, another area of ad hoc, common law decisionmaking involved whether a state could tax a non-Indian doing business on the reservation under contract with the tribe. *Compare Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186–87 (1989) (holding that a state may impose a severance tax on a non-Indian company extracting oil and gas from reservation lands because it was unclear whether the tax would adversely affect the tribe and because the state was providing reservation-based services to the oil producer), *with White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 148–50 (1980) (holding that a state may not impose its gross-receipts and fuel-use taxes on the reservation activities of a non-Indian contractor performing operations for the tribe because the cost of the taxes would be

3. *Tribal Authority over Nonmembers in Indian Country.* — In *Oliphant v. Suquamish Indian Tribe*,¹⁵³ the Court held that a tribe could not criminally prosecute a non-Indian who had committed an on-reservation assault of a tribal member.¹⁵⁴ Under foundational federal Indian law, the decision was flatly wrong: no treaty or federal statute forbade the tribe from exercising what should have been understood as an aspect of its retained sovereignty. The Court did not distort any federal positive law to justify its result. Instead, the Court supplemented foundational Indian law with a new common law approach under which the Court would decide, on a case-by-case basis, whether an exercise of authority was inconsistent with the tribe's status as a domestic dependent nation.¹⁵⁵

The historical assumptions of the federal branches about tribal power supposedly informed this inquiry,¹⁵⁶ but the *Oliphant* Court was mostly moved by concerns about civil liberties.¹⁵⁷ ICRA applies to a tribal court hearing a criminal case against anyone, including a non-Indian, and provides federal judicial relief by writ of habeas corpus.¹⁵⁸ But ICRA rights are not precisely the same as constitutional rights in federal or state court: the tribe may presumably use an all-Indian jury,¹⁵⁹ and ICRA does not require the appointment of free counsel for indigent defendants.¹⁶⁰ Moreover, non-Indians have no right to vote in tribal elections or to participate in tribal affairs. Recognizing the common law nature of its decision, the Court acknowledged that Congress could overturn it by authorizing tribes to exercise jurisdiction over non-Indians.¹⁶¹

Since *Oliphant*, a long series of decisions have addressed whether tribal authority over nonmembers is inconsistent with the tribe's status as a domestic dependent sovereign. At the outset, the Court sometimes authorized tribes to regulate nonmembers in Indian country,¹⁶² but the

passed along to the tribe and because the state was providing no reservation-based services). Under fundamental federal Indian law principles, these cases should have been easy: without clear congressional authorization, a state may not impose a tax associated with tribal operations in Indian country.

¹⁵³ 435 U.S. 191 (1978).

¹⁵⁴ *Id.* at 194–95.

¹⁵⁵ *See id.* at 209–10.

¹⁵⁶ *See id.* at 206.

¹⁵⁷ *See id.* at 210–12.

¹⁵⁸ *See* 25 U.S.C. §§ 1302–1303 (2000).

¹⁵⁹ *See Oliphant*, 435 U.S. at 194 n.4.

¹⁶⁰ *See* 25 U.S.C. § 1302(6) (forbidding a tribal court from denying a criminal defendant “at his own expense to have the assistance of counsel for his defense”).

¹⁶¹ *See Oliphant*, 435 U.S. at 212.

¹⁶² *See, e.g., Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987) (requiring nonmember defendant in a tribal court civil action to exhaust all tribal remedies before seeking federal judicial relief from the tribal court adjudication); *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 200–01 (1985) (upholding the application to a non-Indian of a tribal severance tax on miner-

recent trend has been decidedly to the contrary.¹⁶³ Whatever else might be said about these cases,¹⁶⁴ one aspect of them is particularly troubling. Under foundational federal Indian law, Congress bore the responsibility of modifying the area in light of social evolution, unanticipated developments, or whatever else. Instead, in *Oliphant* and its progeny, the Court updated the field to reflect judicial perceptions of progressive legal norms without waiting for Congress to resolve the matter. For example, despite Congress's failure to forbid tribal criminal jurisdiction over non-Indians in ICRA or in earlier statutes providing federal criminal jurisdiction in Indian country, the Court in *Oliphant* stepped into what it must have perceived as a legal void and "fixed" the problem. But under foundational Indian law, things Congress has not done to diminish tribal authority are not voids — they are areas of retained tribal authority.

These cases are also more troubling than the diminishment cases discussed earlier, for at least those cases posed arguably serious contextual problems that Congress had not addressed and that the tribes and the states were perhaps powerless to fix by themselves. In many of the cases involving implicit divestiture of tribal authority, however, there was not a strong argument "on the ground" for immunizing nonmembers from tribal authority. In *Oliphant*, for example, ICRA clearly applied in tribal court and provided most important rights to criminal defendants.¹⁶⁵ ICRA also placed a six-month limit on tribal incarceration.¹⁶⁶ If the tribal court had violated any of those rights, the federal district court was available to provide habeas corpus relief. Had a problem been documented, nonmembers (and the states in which they lived) could have sought congressional action. Why not wait and see how it worked out?

The norms that have influenced the Justices in these cases are not exceptional — indeed, they are mainstays of American law. A clear

als extracted from the reservation); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152–54 (1980) (approving a tribal cigarette tax as applied to nonmember purchasers).

¹⁶³ See, e.g., *Nevada v. Hicks*, 533 U.S. 353, 374 (2001) (forbidding a tribal court from hearing a civil case brought by a member against nonmember state officers who had executed a state court search warrant); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001) (denying a tribe the authority to impose an occupancy tax on nonmember guests at a nonmember hotel); *Strate v. A-1 Contractors*, 520 U.S. 438, 442 (1997) (preventing a tribal court from hearing a civil case brought by a nonmember against another nonmember for an auto accident on a state highway on the reservation).

¹⁶⁴ For my views, see Frickey, *supra* note 134, and Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of Lone Wolf*, 38 TULSA L. REV. 5 (2002).

¹⁶⁵ See *Oliphant*, 435 U.S. at 194.

¹⁶⁶ Pub. L. No. 90-284, § 202(7), 82 Stat. 73, 77 (prior to 1986 amendment) (current version at 25 U.S.C. § 1302(7) (2000)).

example is *Strate v. A-1 Contractors*,¹⁶⁷ which denied tribal court jurisdiction over a tort suit arising out of a reservation auto accident between nonmembers on a state highway.¹⁶⁸ The Court was concerned about a nonmember defendant being relegated to an unfair, foreign forum.¹⁶⁹ Generally, a person sued in an out-of-state court by an in-state plaintiff can remove the case to federal court.¹⁷⁰ Congress “forgot” to pass a similar removal statute allowing nonmember defendants to remove from tribal courts, so the Court fixed this “omission” by creating a common law rule denying tribal court jurisdiction in the first place. No doubt this move came so naturally to the Justices that it struck them as obviously correct. The problem, of course, is that because of the exceptionalism of federal Indian law, there are many aspects of this area that are not consistent with the broader general law. Until recently, it was assumed that any resulting conflicts were the responsibility of Congress, not the Court. By incremental steps, the Court has been supplementing the plenary power of Congress with its own plenary common law authority to address matters that Congress has “missed.” The judicial approach has become a robust common law-making for what the Justices perceive to be the contemporary problems arising from Indian law exceptionalism.

In short, the traditional model based on judicial deference to congressional power, tempered by interpretive side constraints, has been substantially displaced by a model of ad hoc common law-making.¹⁷¹ Had this evolution been propelled by a deepening normative sense for the historical and contemporary problems with colonialism, it might have been defensible, even though forbiddingly difficult to implement because of limited judicial capacity and endless local variation. Instead, it seems plain that the trend has been motivated by a judicial sense that Congress has failed to step in and fix a myriad of festering local problems by eliminating tribal authority. The Court has become

¹⁶⁷ 520 U.S. 438.

¹⁶⁸ *Id.* at 442.

¹⁶⁹ *See id.* at 459.

¹⁷⁰ *See id.* at 459 n.13 (citing 28 U.S.C. § 1441 (2000 & Supp. II 2002)).

¹⁷¹ The Court’s most recent federal Indian law decision, *City of Sherrill v. Oneida Indian Nation*, 125 S. Ct. 1478 (2005), is yet another example. In *Sherrill*, the Court revisited its decision in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), which had held that the State of New York had illegally acquired certain lands from the Oneida tribe and that the Oneida claim was not time-barred. *Id.* at 253. The Court in *Oneida* clearly anticipated — indeed, invited — a negotiated solution to the complex knot of problems resulting from the clouded land title. *See id.* at 253–54. When negotiations stalled, the Oneida Tribe bought parcels of the land in question and refused to pay local taxes on that land, on the ground that it was legitimately Indian tribal land. *See Sherrill*, 125 S. Ct. at 1488. The lower courts agreed with the tribe, but the Court reached out to take certiorari and reversed. The Court’s response in *Sherrill*, in great tension with both the doctrinal and normative thrusts of *Oneida*, was to deny tax immunity on the ground that too much time had passed since the illegal transactions. *Id.* at 1491.

colonialism's handyman, jerry-rigging a ruthlessly pragmatic blend of federal Indian law with general American law. Without any apparent sense of its normative and practical importance, the most commonly invoked protection of tribal interests under American law — narrow interpretation of existing positive law, thereby ordinarily putting the burden of congressional inertia upon tribal opponents — is being displaced by a newfound willingness of Justices to engage in case-by-case adjudication that almost always dismisses tribal prerogatives as inconsistent with the broader legal landscape.

Concerns about the exceptionalism of Indian law have even led some Justices to suggest that the Court, not Congress, should have the *final* say about some matters.¹⁷² That they would embrace this notion indicates their impatience with the field and their sense that they should not just take on the frontline responsibility of harmonizing it with the broader general law, but have ultimate control over it as well. This shift of authority would be a remarkable inversion of the longstanding approach of congressional plenary power and judicial deference.

In recent years, there have been hints in this direction.¹⁷³ Just last year, a clear conflict between judicial and congressional power arose. The next Part turns to an extended discussion of this controversy.

IV. *DURO*, THE *DURO* FIX, AND *LARA*: JUDICIAL SUPREMACY CONFRONTS INDIAN LAW EXCEPTIONALISM

A. *Duro v. Reina*: *Slouching Toward Judicial Supremacy*

In *Duro v. Reina*,¹⁷⁴ the Court extended *Oliphant* to preclude tribal criminal jurisdiction over a nonmember Indian (that is, an Indian who belongs to a tribe other than the one seeking to prosecute).¹⁷⁵ In one sense, the decision was unsurprising, as distinguishing between nonmember Indians and non-Indians might seem implausible. But there were two significant distinctions between *Oliphant* and *Duro*. First,

¹⁷² See *infra* Part IV, pp. 460–72.

¹⁷³ In an area probably considered remote from federal Indian law — federal jurisdiction — the Court signaled that its authority trumped that of Congress by holding that a provision of the Indian Gaming Regulatory Act allowing a tribe to sue a state in federal court for failing to negotiate in good faith about gaming compacts violated the states' Eleventh Amendment immunity from suit in federal court. See *Seminole Tribe v. Florida*, 517 U.S. 44, 72–73 (1996). The Court's hostility to affirmative action also created concerns that the deference to Congress displayed in *Morton v. Mancari*, discussed *supra* pp. 446–47, might be abandoned in future cases regarding preferences for tribal members, or at least be limited to the BIA. See, e.g., *Rice v. Cayetano*, 528 U.S. 495, 520 (2000); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 244–45 (1995) (Stevens, J., dissenting).

¹⁷⁴ 495 U.S. 676 (1990).

¹⁷⁵ See *id.* at 685.

unlike its assumption in *Oliphant* about the supposed historical lack of tribal criminal authority over non-Indians, surely the Court in *Duro* realized that tribes had routinely exercised such power over nonmember Indians.¹⁷⁶ Second, while non-Indians like Oliphant can be prosecuted federally,¹⁷⁷ *Duro* created a jurisdictional void in which no sovereign — federal, tribal, or state — had authority to prosecute the nonmember Indian.¹⁷⁸ The *Duro* Court simply indicated that if there was a problem, it was for others to fix.¹⁷⁹

From this summary, *Duro* might seem to have been just one more exercise of the Court's common law of colonialism that is subject to congressional override. Justice Kennedy's majority opinion was, however, constitutional in rhetorical tone.

Justice Kennedy spoke not only in the common law mode of custom, history, and policy, but also in the lofty fashion of a civics lecture about citizenship within the American constitutional scheme.¹⁸⁰ He stressed that a nonmember Indian, like all other nonmembers, has no right to participate in the elections or affairs of the tribe seeking to prosecute him.¹⁸¹ The nonmember Indian's allegiance is to the United States, not to the prosecuting tribe: "Indians like other citizens are embraced within our Nation's 'great solicitude that its citizens be protected . . . from unwarranted intrusions on their personal liberty.'"¹⁸² Tribal courts are not obligated to accord nonmember Indians full constitutional rights and are institutions of peculiar origin, customs, and design.¹⁸³ The freedom that federal law provides for tribal sovereignty "is all the more reason to reject an extension of tribal authority over

¹⁷⁶ See Brief Amici Curiae of the Rosebud Sioux Tribe et al., *Duro*, 495 U.S. 676 (No. 88-6546), 1989 WL 1126953, at *5-7.

¹⁷⁷ It is a federal crime for a non-Indian (like Oliphant) to commit a crime against an Indian (like his alleged victim). See General Crimes Act, 18 U.S.C. § 1152 (2000).

¹⁷⁸ Had the nonmember Indian committed a serious offense, he would have been subject to federal prosecution under the Major Crimes Act, which reaches "[a]ny Indian" who commits an enumerated offense in Indian country. *Id.* § 1153(a). Because *Duro*'s crime did not fall within that statute, however, and because his victim was a tribal member, federal jurisdiction was precluded. See *id.* § 1152 (extending federal criminal jurisdiction to Indian country but excepting situations in which both the perpetrator and victim are "Indian"). Except in states in which Congress has authorized wide-ranging criminal jurisdiction in Indian country, state jurisdiction over crimes in Indian country is limited to circumstances with non-Indian perpetrators and victims. See *United States v. McBratney*, 104 U.S. 621, 624 (1881). With tribal prosecution precluded by the decision in *Duro*, no sovereign had authority to bring charges.

¹⁷⁹ See 495 U.S. at 698.

¹⁸⁰ See *id.* at 693-94.

¹⁸¹ See *id.* at 679.

¹⁸² *Id.* at 692 (omission in original) (quoting *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978)).

¹⁸³ *Id.* at 693.

those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system.”¹⁸⁴

Moreover, Justice Kennedy hinted that, although the jurisdictional void that his opinion created could be fixed by federal legislation, Congress might not have plenary power to handle the problem any way it wished. In discussing why a tribal court should not have authority over a nonmember, he included a startling aside: “Our cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right.”¹⁸⁵ To be sure, perhaps Justice Kennedy’s intention was simply to say that when the Constitution forbids Congress from doing something to an American citizen, the Court should use federal common law to prevent a tribe from doing the same thing. Even that analogy confronts well-entrenched Indian law exceptionalism, however — the holding in *Talton v. Mayes* that the Court will not impose constitutional limitations upon tribal action¹⁸⁶ and the notion that it is up to Congress to consider whether limitations of that sort should be adopted. In any event, Justice Kennedy’s dictum is subject to a broader reading: that he intended to deter Congress from fixing the jurisdictional void by authorizing tribal courts to reassert jurisdiction over nonmember Indians.

This expansive understanding is consistent with Justice Kennedy’s suggestions for solutions to the jurisdictional problem. According to Justice Kennedy, the way to deal with it would be for states, with tribal consent, to accept criminal jurisdiction over Indian country under Public Law 280.¹⁸⁷ The obvious practical response is that tribes are unlikely to find this a tolerable solution. Justice Kennedy also implicitly acknowledged that Congress could amend federal criminal statutes applicable to Indian country to extend federal jurisdiction to minor offenses by nonmember Indians.¹⁸⁸ The practical response to this suggestion — obvious only to those who work in Indian law — is that United States Attorneys often have difficulty enforcing even the existing federal laws covering crimes in Indian country.¹⁸⁹ Nowhere did Justice Kennedy mention that another way to deal with the issue — one acceptable to tribes and likely to result in better enforcement — would be for Congress to authorize the tribal prosecutions that his

¹⁸⁴ *Id.* at 694.

¹⁸⁵ *Id.* at 693 (citing *Reid v. Covert*, 354 U.S. 1 (1957)).

¹⁸⁶ See 163 U.S. 376, 385 (1896).

¹⁸⁷ See *Duro*, 495 U.S. at 697.

¹⁸⁸ See *id.* at 697–98.

¹⁸⁹ For a thorough study of the myriad problems with federal law enforcement in Indian country and a critique of the institutional competence of the FBI, the federal prosecutors, and federal juries in Indian country cases, see Kevin Washburn, *American Indians, Crime and the Law*, 104 MICH. L. REV. (forthcoming Feb. 2006).

opinion forbids.¹⁹⁰ Presumably, based on his broad understanding of the inconsistency of tribal prosecution with American values, that approach would be inconceivable.

B. The “Duro Fix” and the Majority Opinion in Lara

Justice Kennedy did not prove prescient. In short order, Congress enacted the “*Duro* fix,” which amended ICRA to specify that the tribes’ “powers of self-government” include “the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.”¹⁹¹ Last year, a case involving the statute provoked the most explicit exchange ever among the Justices concerning Indian law exceptionalism.

In *United States v. Lara*,¹⁹² a tribe had convicted Lara, a nonmember Indian, for assault. The federal government then prosecuted him for violating federal criminal law by the same acts.¹⁹³ The case differed from *Wheeler* because there the defendant in the tribal and federal prosecutions was a tribal member.¹⁹⁴ Recall that the Court in *Wheeler* had no difficulty concluding that the tribe retained its inherent, extraconstitutional authority to prosecute its members, and therefore double jeopardy was not implicated because the tribal and federal prosecutions were by different sovereigns. Because the Court had held in *Duro* that tribes lacked the authority to prosecute nonmember Indians, the question in *Lara* was whether tribal prosecutions of such persons pursuant to the *Duro* fix are actions grounded in delegated federal authority or in inherent tribal power. If they are the former, double jeopardy would bar a subsequent federal prosecution; if they are the latter, it would not.

Starting from foundational Indian law principles, even as supplemented by the new common law of colonialism, the case should have been easy. *Duro* created federal common law preempting the exercise of the tribe’s inherent authority to prosecute nonmember Indians. Congress then overrode *Duro* by removing the preemptive effect of that decision upon the tribe’s retained authority. Indeed, Congress

¹⁹⁰ This omission was in stark contrast to Justice Rehnquist’s opinion in *Oliphant*, which squarely assumed that Congress had the authority to overturn the decision by legislation authorizing the tribes to prosecute non-Indians. See 435 U.S. 191, 208 (1978).

¹⁹¹ Department of Defense Appropriations Act of 1991, Pub. L. No. 101-511, § 8077(b), 104 Stat. 1856, 1892 (1990) (amending 25 U.S.C. § 1301(2) (1988)). This statute had a one-year sunset provision, *id.* § 8077(d), 104 Stat. at 1893, but the next year Congress made it permanent, see Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 (codified at 25 U.S.C. § 1301 note (2000)). On the legislative process associated with these provisions, see Nell Jessup Newton, Commentary, *Permanent Legislation To Correct Duro v. Reina*, 17 AM. INDIAN L. REV. 109 (1992).

¹⁹² 124 S. Ct. 1628 (2004).

¹⁹³ *Id.* at 1631.

¹⁹⁴ See *supra* p. 450.

drafted the statute to make clear that it was removing a federal common law preemption of inherent tribal authority, not delegating federal authority.¹⁹⁵ Thus, following the *Duro* fix, tribal exercises of criminal jurisdiction over nonmember Indians are actions of inherent tribal authority, and a subsequent federal prosecution of the same person would not violate double jeopardy.

Even a few decades ago, this decision would have been a foregone conclusion by a unanimous Court. In an area of plenary congressional authority, it would seem straightforward that Congress may readjust federal, tribal, and state jurisdiction as it sees fit.¹⁹⁶ In the past, when the Supreme Court has determined that tribes retain some controversial authority, the Court has assumed that Congress could override the decision by truncating tribal power through federal legislation.¹⁹⁷ There is no logical reason why, in the reverse situation when the Court acts first to limit tribal power by decisional law, Congress could not override that decision by a statute authorizing the tribe to act in the disputed manner. In either instance, the tribe acts with whatever retained, inherent authority federal law has not preempted. As I shall explain, however, in *Lara* a badly divided Court had a difficult time reaching this straightforward result.

The Court's fractured approach to *Lara* vividly demonstrates that, as Professor Frank Pommersheim had contended, a constitutional crisis has emerged in federal Indian law.¹⁹⁸ To be sure, the crisis is not new, but the recognition of it is. The Constitution was written in a time when tribes were powerful and occupied much of North America. War, peace, trade, and treaty-making — as contemplated by Articles I and II of the Constitution — were the orders of the day. By the end of the nineteenth century, when tribes had been subjugated, the Constitution no longer fit the context. But the Constitution was never amended formally to incorporate tribes into the constitutional structure and, ideally, to recognize their unique status and legitimate claims to continued self-government. Instead, Congress simply began legislating as if it had plenary authority over Indian country, and the Court ratified this arrogation of power. In the last three decades, the Court has also been exercising an extraconstitutional power over Indian af-

¹⁹⁵ See *Lara*, 124 S. Ct. at 1632–33 (summarizing the legislative history of the *Duro* fix).

¹⁹⁶ As of course Congress has done in such statutes as the Major Crimes Act, see *supra* p. 441, and Public Law 280, see *supra* p. 444.

¹⁹⁷ See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978).

¹⁹⁸ Professor Pommersheim presciently identified this situation while *Lara* was making its way through the lower courts. See Frank Pommersheim, *Lara: A Constitutional Crisis in Indian Law?*, 28 AM. INDIAN L. REV. 299, 303–05 (2003–2004) [hereinafter Pommersheim, *Lara*]; see also Frank Pommersheim, *Is There a (Little or Not So Little) Constitutional Crisis Developing in Indian Law?: A Brief Essay*, 5 U. PA. J. CONST. L. 271, 279–85 (2003) [hereinafter Pommersheim, *Constitutional Crisis*].

fairs, in increasingly serious tension with congressional supremacy. This constitutionally unmapped collision course of the Court and Congress led to *Lara*.

The Court decided *Lara* by the thinnest and most ephemeral of margins. Only five Justices deferred to congressional authority and ratified the *Duro* fix, thereby recognizing that the tribal prosecution of the nonmember Indian defendant was an act of retained, extraconstitutional tribal authority.¹⁹⁹ One of that majority — Chief Justice Rehnquist — has since died, and another — Justice O'Connor — has announced her intent to retire. Accordingly, it is especially important to examine the views of the four Justices who did not join the *Lara* majority. Both Justice Souter, in a dissent joined by Justice Scalia, and Justice Kennedy, concurring in the judgment, argued that tribal authority should be subject to the constitutional norms that federal courts routinely invoke to cabin federal and state power. The seduction of coherence with the broader legal landscape was so powerful that neither Justice Souter nor Justice Kennedy paused to consider why federal Indian law has been so exceptional, much less whether the novelty of this context provides normative and practical justifications for a more limited judicial role. In contrast, Justice Thomas, also concurring only in the result, addressed the disjunction between federal Indian law and the broader public law with remarkable candor. Their views are considered in turn.

C. *Kennedy the Mystic: Deep Constitutional Structure, Consent of the Governed, and Judicial Supremacy*

Writing only for himself in *Lara*, Justice Kennedy returned to the themes of constitutional citizenship that he had expressed for the Court in *Duro*. For Justice Kennedy, the Constitution “is based on a theory of original, and continuing, consent of the governed.”²⁰⁰ The people condition this consent, he reasoned, upon a federal structure that limits the powers of both the national and state governments.²⁰¹

¹⁹⁹ Chief Justice Rehnquist and Justices Stevens, O'Connor, and Ginsburg joined Justice Breyer's majority opinion, which concluded that the *Duro* fix authorized the tribe to exercise its inherent authority to prosecute *Lara*. Accordingly, the later federal prosecution did not trigger double jeopardy because it was by a separate sovereign. *Lara*, 124 S. Ct. at 1639.

The majority avoided deciding whether other attributes of the *Duro* fix — such as subjecting only nonmember Indians, rather than all American citizens, to the jurisdiction of courts that are not obliged to apply all federal constitutional constraints — might violate constitutional limitations such as equal protection or due process. *See id.* at 1637–39. Recently, the Ninth Circuit upheld the *Duro* fix against these challenges. *See Means v. Navajo Nation*, 420 F.3d 1037, 1044, 1048 (9th Cir. 2005). For further discussion of these issues, see Will Trachman, Comment, *Tribal Criminal Jurisdiction After U.S. v. Lara: Answering Constitutional Challenges to the Duro Fix*, 93 CAL. L. REV. 847, 860–90 (2005).

²⁰⁰ *Lara*, 124 S. Ct. at 1640 (Kennedy, J., concurring in the judgment).

²⁰¹ *Id.*

Justice Kennedy suggested that Congress's authorization of tribal prosecution violates the constitutional structure, for it allows an American citizen to be tried within the United States by a government to which that person has not granted the consent of the governed.²⁰² The statute "subject[s] American citizens to the authority of an extraconstitutional sovereign to which they had not previously been subject."²⁰³

At the most basic level, Justice Kennedy's assertions are question-begging. It is of course true that tribes routinely exercised authority over nonmember Indians long after the time of discovery by Europeans.²⁰⁴ At what point in history did tribes lose the inherent authority to deal with such persons? Justice Kennedy made no argument that the tribes had clearly ceded this power or that Congress had squarely preempted it by statute. Justice Kennedy might believe that the grant of citizenship to all Indians somehow destroyed this inherent tribal authority, but the Indian Citizenship Act of 1924²⁰⁵ says nothing of the kind. Thus, according to foundational Indian law, the tribes would have retained this power. Even under the Court's new common law of colonialism, the *Duro* decision would have been simply the Court's effort to do what Congress presumably would wish to do but had not done. Accordingly, when Congress adopted the *Duro* fix, the Court's own dormant exercise of federal plenary power was lifted, and the always-present-but-preempted-for-a-while inherent tribal authority could again be exercised.

To reach a contrary conclusion, Justice Kennedy may have assumed that the Court in *Duro* exercised a unilateral judicial authority to abolish inherent tribal authority once and for all. On this view, inherent tribal authority was like a bursting bubble, gone forever following the pin prick of *Duro*. Left unaddressed was how the Court — not Congress with its supposed plenary power, not the executive branch with its authority over relations with other sovereigns — could even plausibly be understood as having an unchecked power to destroy governmental authority that preexists the founding of this country.

²⁰² See *id.* at 1641.

²⁰³ *Id.* For Justice Kennedy, *Lara* did not squarely raise this constitutional question. Under his line of argument, it was the first, tribal prosecution that was constitutionally infirm, not the second, federal one, which was the subject of this double jeopardy challenge. Because *Lara* had not objected to the tribal prosecution, it was not before the Court. As such, Justice Kennedy assumed that the tribe acted within its inherent authority, whether legitimately or not, and thus the federal prosecution was by a different sovereign and inoffensive to double jeopardy principles. Accordingly, he concurred in the judgment. See *id.*

²⁰⁴ See Brief Amici Curiae on Behalf of Eighteen American Indian Tribes at 22–23, *Lara*, 124 S. Ct. 1628 (No. 03-107), 2003 WL 22766745; see also Brief Amici Curiae of the Rosebud Sioux Tribe et al., *supra* note 176, at *5–7.

²⁰⁵ Pub. L. No. 68-175, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (2000)).

More charitably, perhaps the thought is that somehow, somewhere, at some unspecified time, something happened in the American governmental system that had the effect of not merely preempting this tribal authority subject to later revival, but destroying it. On this notion, the Court is not the agent of destruction, but merely the diviner and messenger of it.

In this way, Justice Kennedy's opinion is mystical, in two senses of the word. His argument from deep constitutional structure and ongoing consent of the governed is not only obscure, but also seems to depend upon a direct communication with a sacred constitutional omnipresence to which at least some of the rest of us are not privy. Justice Kennedy made no attempt to link his argument to constitutional text, presumably because no such linkage is apparent. In a sense, this approach mirrors that taken in *Kagama*, which found a plenary congressional authority over Indian affairs despite no basis in constitutional text for it.²⁰⁶ Both Justice Kennedy's separate opinion in *Lara* and the opinion in *Kagama* assumed that the absence of a palatable alternative provided a kind of necessity defense authorizing the transformation of an extraconstitutional policy argument into a structural constitutional one. Both applied the doctrine of "it-must-be-somewhere"²⁰⁷ even though, under the rule of law, it should have been permissible for the answer to be "nowhere."

Justice Kennedy's line of reasoning exemplifies the root problem in federal Indian law. The place of federal Indian law in American public law can be understood by imagining layers of law, with American constitutionalism built on top of American colonialism. Above the colonial line, America has what amounts to a civil religion of constitutionalism.²⁰⁸ Justice Kennedy is one of many believers who have in the Constitution a "faith [that] is the substance of things hoped for, the evidence of things not seen."²⁰⁹ This constitutional faith may be crushed when the eye drifts below the colonial line, which is presumably one reason why most eyes never venture that far. I say "may be" rather than "is" because a true believer like Justice Kennedy might respond to the problem not by a loss of faith, but by a call to missionary work. For in both *Duro* and his separate opinion in *Lara*, Justice Kennedy has sought to bring our civil religion to Indian country.

One problem with this constitutional evangelism is the judicial tyranny of it. "The original, and continuing, consent of the governed" is a strange idea to take below the colonial line. Just when and how did

²⁰⁶ See *supra* pp. 441–42.

²⁰⁷ Comment, *Federal Plenary Power in Indian Affairs After Weeks and Sioux Nation*, 131 U. PA. L. REV. 235, 246–48 (1983) (analyzing *Kagama*).

²⁰⁸ See SANFORD LEVINSON, CONSTITUTIONAL FAITH 9–53 (1988).

²⁰⁹ *Hebrews* 11:1 (King James).

all the Indian tribes become part of the constitutional system? The answer from constitutional text is never, and if it is to happen, something on the order of a constitutional amendment or renewed, targeted treaty-making would be required. Neither Congress, through its long-established plenary power, nor the Court, through its newer common law of colonialism, ever gave Indian tribes the choice of providing, or withholding, the “consent of the governed” to any unilateral aspect of federal control.²¹⁰ Congress did not even give individual Indians the option of declining American citizenship when, in 1924, it unilaterally bestowed this status upon them.

Although no doubt well-intended, Justice Kennedy’s argument reduces to this remarkable contention: tribes may be judicially subjugated based on the mystical implications of a document by which they have never consented to be bound and to which they have never even been coercively tied through the formal procedures specified in the document, because the document is manifestly good. The argument is driven by an almost irresistible impulse of coherence flowing from the canonical place of the Constitution in our legal culture and the related instinct that all exercises of governmental power must somehow be subject to it. The contention is propelled by compulsion, not by text, doctrine, logic, history, comparative institutional competence, social evolution, or careful appreciation of current context. Once understood as the seduction that it is, the argument requires resisting.

*D. Souter the Alchemist: Turning Common Law
into Constitutional Law*

Justice Souter, joined by Justice Scalia, dissented in *Lara*. Justice Souter acknowledged that Congress intended the *Duro* fix to allow inherent tribal authority to operate anew.²¹¹ Nonetheless, because he concluded that Congress lacked the authority to do so, he understood the statute to be a delegation of federal authority. It followed that the tribal prosecution of Lara was federal in nature, and thus double jeopardy barred the later federal prosecution of him.²¹² To support this argument, Justice Souter took a simpler route than an excursion into deep constitutional structure. He contended that the Court’s decisions beginning in *Oliphant* were based on the Constitution rather than on common law, thus precluding their override by ordinary legislation.²¹³

²¹⁰ To be sure, many tribes entered into treaties pledging allegiance to the United States, but unless the treaty squarely provided that the tribe was subjecting itself to federal plenary power, the treaty would be read otherwise under the Indian law canons. See *supra* section II.C, pp. 439–40.

²¹¹ See *United States v. Lara*, 124 S. Ct. 1628, 1651 (2004) (Souter, J., dissenting).

²¹² See *id.*

²¹³ See *id.* at 1650–51.

In this way, he abjured Justice Kennedy's mysticism by turning to magic.

Justice Souter's primary argument was that several precedents spoke of the tribes' lacking inherent power over nonmembers and being able to regulate them in the future upon a "delegation" from Congress.²¹⁴ To be sure, that is what a few cases say. But to conclude that these cases command that any congressional revival of inherent tribal authority constitutes a delegation of federal power is to transform loose language into constitutional holdings. In none of the earlier cases did the Court make any effort to explain that this understanding of tribal power was constitutionally based, much less that it should be or even conceptually could be. Indeed, had someone suggested substituting "authorization" for "delegation," it seems very unlikely that any Justice at the time would have thought it would make a difference. Tellingly, *Oliphant*, the progenitor of this line of cases, uses these terms interchangeably.²¹⁵ Perhaps that is why Chief Justice Rehnquist, the author of *Oliphant*, provided the crucial fifth vote in *Lara*.

More fundamentally, Justice Souter faced the same challenges as Justice Kennedy: What provision of the Constitution forbids inherent tribal authority over nonmember Indians? By what right does the Supreme Court claim the authority to immunize its decisions about tribes from congressional override? Justice Souter's basic response was that tribes are intimately bound up with the federal government, such that they lack independent authority.²¹⁶ Although Justice Souter did not acknowledge it — perhaps did not realize it — the logic of this argument would require overruling *Talton v. Mayes*, the century-old precedent holding that tribal action is not federal action.

Justice Souter's dissent is less opaque than Justice Kennedy's concurring opinion because it is grounded in the everyday stuff of law: the

²¹⁴ See *id.* at 1649 (citing *South Dakota v. Bourland*, 508 U.S. 679, 695 n.15 (1993); *Duro v. Reina*, 495 U.S. 676, 686 (1990)).

²¹⁵ At one point, the opinion notes that the tribe did not claim "affirmative congressional authorization" for its attempt to prosecute a nonmember. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978). At another place, the opinion refers to an Indian treaty as requesting "affirmative congressional authority" to deal with non-Indians. *Id.* at 197–98. The Court described an Attorney General opinion as concluding that a tribe "did not have criminal jurisdiction over non-Indians absent congressional authority." *Id.* at 199. Later, the Court wrote that "Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress." *Id.* at 208. Still later, using a phrase squarely applicable to the rationale of the *Duro* fix, the Court stated that "[in] submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress." *Id.* at 210. Finally, after considering several reasons why its decision might result in bad policy, the Court wrote that "these are considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians." *Id.* at 212.

²¹⁶ *Lara*, 124 S. Ct. at 1649–50 (Souter, J., dissenting).

precedents. Yet in my view, it is more disappointing. Justice Kennedy fled to deep constitutional structure presumably because neither positive nor decisional law provided a strong argument for his mission of constitutionalism. In contrast, any eye can see the matters on which Justice Souter rested his opinion — and thus can perceive the shape-shifting quality of his effort. Like Justice Kennedy and Professor Pommersheim, Justice Souter may have intuited a constitutional crisis in Indian law,²¹⁷ but he provided no honest way out of it.

*E. Thomas the Skeptic: What's an Honest Formalist To Do
in Federal Indian Law?*

According to *The Gospel of Thomas*, an apocryphal text from the early Christian era,²¹⁸ Jesus said: “Know what is in front of your face, and what is hidden from you will be disclosed to you.”²¹⁹ Justice Thomas’s opinion concurring in the judgment in *Lara* has a similar quality. It encourages his colleagues to see what is right at the end of their noses — that federal Indian law is awash with “confusion” arising from “doubtful assumptions”²²⁰ and thus in need of “rigorous constitutional analysis.”²²¹ Justice Thomas’s analysis is the most candid statement by a Supreme Court Justice on federal Indian law since the Marshall Court. Although some aspects of his analysis are subject to rejoinder,²²² by raising these questions forcefully, he performed an important service that was long overdue.

²¹⁷ The basic instinct driving Justices Kennedy and Souter is the notion that, somehow, the Constitution must apply to all sovereign acts within the borders of the United States, bringing with it the Court’s judicial review to domesticate potential governmental lawlessness. Professor Judith Resnik has identified this *Marbury* paradigm as the central, unifying feature of the canon of federal courts. See Judith Resnik, *Tribes, Wars, and the Federal Courts: Applying the Myths and the Methods of Marbury v. Madison to Tribal Courts’ Criminal Jurisdiction*, 36 ARIZ. ST. L.J. 77 (2004). In my view, the problem with this analysis is that it conflates two questions. I agree with Professor Resnik that, even when federal (or state) power has been asserted on the basis of necessity, it should be subject to constitutional constraint. Accordingly, her analysis correctly suggests that the doctrine of congressional plenary power should be reconsidered. Tribal power is another matter. There is simply no plausible argument for the proposition that the Constitution applies to tribal action in addition to federal and state action. To be sure, this positivist response is inconsistent with an expansive understanding of the commitment to constitutionalism. But the rule of law, not normative commitments, must determine when the rule of law applies. A proper commitment to constitutionalism in federal Indian law would not bring the Constitution to Indian country by judicial fiat, but instead would encourage a process by which tribes would be integrated into the constitutional framework through negotiation and consent.

²¹⁸ See generally ELAINE PAGELS, *THE GNOSTIC GOSPELS* (1979) (discussing *The Gospel of Thomas*, among other works, as an early Christian text of the gnostic tradition).

²¹⁹ *Gospel of Thomas* 5:1, in *THE COMPLETE GOSPELS: ANNOTATED SCHOLARS VERSION* 305, 306 (Robert J. Miller ed., rev. ed. 1994).

²²⁰ *Lara*, 124 S. Ct. at 1641–42 (Thomas, J., concurring in the judgment).

²²¹ *Id.* at 1647.

²²² See *infra* Part V, pp. 472–89.

Much of Justice Thomas's opinion was conventional. He properly understood the *Duro* fix to involve an affirmation of inherent power, not a delegation of federal authority.²²³ Justice Thomas also forthrightly explained why the *Duro* fix was constitutional and no double jeopardy violation had occurred: Assuming that *Duro* had been rightly decided, it was simply a common law decision concluding that tribal prosecution of nonmember Indians conflicted with federal policy.²²⁴ Later "authoritative pronouncements of the political branches" — congressional passage and presidential signature of the *Duro* fix and the current Justice Department position that tribes have inherent authority to prosecute nonmember Indians — overrode *Duro* by "mak[ing] clear that the exercise of this aspect of sovereignty is not inconsistent with federal policy."²²⁵

Beyond these points, however, Justice Thomas's opinion took a remarkable turn. He posited that federal Indian law precedents are based on "two largely incompatible and doubtful assumptions": that Congress has plenary authority over the tribes, and that the tribes nonetheless retain sovereignty.²²⁶ Of course, his concern about the confusing domestic dependent status of tribes is not novel. But in challenging the concept of congressional plenary power, Justice Thomas did something no other Justice had ever undertaken.

For an honest textualist and originalist, Justice Thomas seemed to be suggesting, the concept of congressional plenary power over Indian affairs is preposterous. Nothing in the Treaty Clause or the Indian Commerce Clause could be stretched that far.²²⁷ Indeed, the 1871 statute purporting to end treatymaking with tribes — treatymaking being "the one mechanism that the Constitution clearly provides for the Federal Government to interact with sovereigns other than the States" — is constitutionally suspect as in derogation of the President's authority over the treaty process.²²⁸ In any event, invoking the Treaty Clause to justify congressional plenary power was "especially ironic

²²³ See *Lara*, 124 S. Ct. at 1646 (Thomas, J., concurring in the judgment). He cogently explained that any delegation of that sort would be constitutionally suspect in any event, for it would transfer a core executive function — the prosecution of crime — to an entity not simply beyond the President's appointment and removal authority, but entirely outside the executive branch. See *id.* at 1642–43; cf. *Morrison v. Olson*, 487 U.S. 654, 692–93 (1988) (suggesting the unconstitutionality of a situation "in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the 'faithful execution' of the laws").

²²⁴ See *Lara*, 124 S. Ct. at 1646 (Thomas, J., concurring in the judgment).

²²⁵ *Id.*

²²⁶ *Id.* at 1642.

²²⁷ See *id.*

²²⁸ *Id.*

in light of Congress' enacted prohibition on Indian treaties."²²⁹ He concluded:

We might find that the Federal Government cannot regulate the tribes through ordinary domestic legislation and simultaneously maintain that the tribes are sovereigns in any meaningful sense. But until we begin to analyze these questions honestly and rigorously, the confusion that I have identified will continue to haunt our cases.²³⁰

V. THE COURAGE OF OUR CONFUSIONS: RECONSIDERING INDIAN LAW EXCEPTIONALISM IN THE TWENTY-FIRST CENTURY

Justice Thomas's opinion in *Lara* does directly what the opinions of Justice Kennedy and Justice Souter do obliquely — it acknowledges the constitutional puzzle that Professor Pommersheim identified. However academic it might have seemed when he phrased it, Pommersheim's question of "what exactly should be the position of the tribal sovereign in a constitutional republic as we head into the twenty-first century?"²³¹ has moved center stage. Addressing that question honestly will require moving past the smaller certainties of Justice Kennedy and Justice Souter to the larger confusion of federal Indian law. The inquiry should recognize that the pursuit of coherence has a seductive quality that can oversimplify the problem of determining which principles to privilege and how to mold them together. A candid analysis will include doctrinal, institutional, and normative perspectives.

A. Doctrinal Vectors

The fragmentation of the Court in *Lara* points in a number of conflicting directions. Two potential continuities with established federal Indian law doctrine are apparent: the bare majority of Justices maintained allegiance to the plenary power doctrine, and no Justice directly questioned the newer common law of colonialism. Justice Thomas lodged a formidable attack upon the former, however, and Justices Kennedy and Souter took different tacks in attempting to elevate the latter to constitutional status. Justice Thomas also openly questioned the consistency of tribal sovereignty with the American scheme. Justices Kennedy and Souter suggested answers to Justice Thomas's puzzle. For Justice Kennedy, the nature of American citizenship seems inconsistent with the existence of a third category of sovereigns within the borders of the United States that are not limited by the Constitu-

²²⁹ *Id.* at 1648.

²³⁰ *Id.*

²³¹ Pommersheim, *Lara*, *supra* note 198, at 305.

tion. For Justice Souter, the allegiance between the tribes and the federal government is so close that the former at least sometimes amount to mere agents of the latter and thereby are subject to constitutional limitations.

A full analysis of all these potential doctrinal vectors is impossible because of both the constraints of this Article and the summary nature of the recent arguments. In this section, I develop what a first cut at a candid response seems to require. I suggest that some of the doctrinal difficulties may turn out to be less cumbersome than feared, but the overall confusion seems beyond judicial repair.

1. *Reconsidering Congressional Plenary Power and the Common Law of Colonialism.* — In earlier work, I have suggested that a centralized federal legislative power over Indian affairs — “plenary” in the sense of preemptive of state authority, not in the sense of beyond constitutional constraints — might be a defensible reading of the structures and relationships in the Constitution.²³² This sort of inherent power argument is unlikely to persuade every Justice,²³³ but it might provide a mediating position for a majority of Justices and also open some possibilities for principled limitations upon congressional power.

But let us give Justice Thomas his due: consider what congressional authority in Indian affairs would involve if limited to Congress’s enumerated powers. At first blush, it would seem that over a century of federal Indian policy would be jeopardized. For example, after *United States v. Lopez*,²³⁴ it is difficult to imagine how a Congress limited to its enumerated powers would have the authority to enact the Major Crimes Act. Nor would it be simple to defend the imposition of limitations upon tribal action that is found in ICRA or the

²³² See Frickey, *supra* note 58, at 52–72. In a nutshell, the argument is based on the premise that the external sovereignty of the country — which, at least at the time of the Framing, included Indian affairs — is lodged exclusively with the national government. See *id.* Sovereignty over immigration decisions has been viewed as a federal matter, and sovereignty over Indian affairs should be viewed likewise. In immigration law, the Supreme Court concluded that “the centralized national government must have inherent and plenary power over the immigration of foreigners.” *Id.* at 62 (citing *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); *The Chinese Exclusion Case*, 130 U.S. 581 (1889)). In federal Indian law, a similar approach suggests that the national government have power over Indians — “foreigners’ already in the midst of a colonial country.” *Id.* I contend, however, that this does not translate into a congressional power that is “plenary” in the sense of “absolute.” Instead, it simply allocates the power to the federal government rather than the states, subject of course to the limitations of the Bill of Rights. *Id.* at 37, 72. The majority opinion in *Lara* contains language pointing in this direction. See *Lara*, 124 S. Ct. at 1634.

²³³ Cf. Prakash, *supra* note 58, at 1102–04 (rejecting my inherent power argument). Professor Prakash’s contention is that, from originalist and textualist perspectives, an argument for inherent congressional authority is precluded. On his premises, he seems correct. My argument is grounded, however, in the structures and relationships in the Constitution and in precedent that has recognized such powers to exist in some circumstances. See Frickey, *supra* note 58, at 52–72.

²³⁴ 514 U.S. 549 (1995).

authorization of state law in Indian country provided by Public Law 280.

Although some long-entrenched statutory schemes such as these would be vulnerable to constitutional attack, Congress would have significant prospective authority to reformulate federal Indian policy through ordinary legislation. First, its power to regulate commerce with the Indian tribes would still authorize a vast amount of federal legislation, even under the narrow conception of “commerce” embraced in *Lopez*. For instance, the regulation of non-Indian participation in Indian gaming would be within congressional authority. Second, the Court has acknowledged the capacity of Congress to place conditions on the acceptance of federal money,²³⁵ thereby allowing Congress to achieve indirectly what it cannot legislate directly. Under the spending power, Congress could presumably condition federal largesse to tribes upon tribal acceptance of reasonable conditions that are rationally related to the programs being funded.²³⁶ Thus, a grant of funding to tribal courts would presumably support a condition requiring the tribal courts to adhere to ICRA. Federal funds for tribal law enforcement might be conditioned upon tribal agreement to authorize federal jurisdiction under the Major Crimes Act on its reservation. Either of these approaches may well be a dubious invasion of tribal self-determination, but even a post-plenary power era Congress could probably do both.

Justice Thomas forcefully suggested that the 1871 statute purporting to forbid further treaty-making with Indians is an unconstitutional infringement of presidential power.²³⁷ It is not clear that the statute makes much difference, however. Since 1871, a variety of agreements have been negotiated with tribes by the executive branch, with ultimate federal approval occurring through bicameralism and presidential signature.²³⁸ These arrangements are surely valid federal law.²³⁹ If the President wished to send the Senate a new treaty with a tribe, the Senate could refuse to ratify it for any reason — including heeding the objection of the House of Representatives that it should have an equal role in Indian affairs. Thus, as a practical matter, although the 1871 statute does seem unconstitutional, that conclusion is unlikely to matter.

²³⁵ See *South Dakota v. Dole*, 483 U.S. 203, 206–09 (1987).

²³⁶ Of course, Congress could not place conditions upon funds already owed to tribes, such as funds for treaty claims.

²³⁷ See *Lara*, 124 S. Ct. at 1644 (Thomas, J., concurring in the judgment).

²³⁸ See HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 26, at 127.

²³⁹ In a world lacking in congressional plenary power, though, Congress and the President would need to agree to the same deal to which the tribe consented, not change it before congressional ratification, as was done with the treaty challenged in *Lone Wolf*. See *Lone Wolf v. Hitchcock*, 187 U.S. 533, 556 (1903).

It is plausible to contend that the presidential role in Indian affairs should not be limited to treaty-making (with a cooperative Senate), signing or vetoing legislation, and faithfully executing the law. By analogy to foreign affairs, the President may have greater inherent authority over Indian affairs than is commonly understood today. For example, the recognition of a tribe as a sovereign could be an executive, not congressional, function. Under current law, however, it is again hard to see much practical reason for inquiry along these lines. The congressional delegation to the President and his subordinates of authority to manage Indian affairs is expansive.²⁴⁰ The President's possible additional responsibilities would not likely be undertaken in the absence of at least tacit congressional approval.

In short, cutting back congressional power over Indian affairs to those actions consistent with Congress's enumerated powers would not necessarily cripple the federal capacity to develop reasonable policies for the future. The most important issue would be how the Supreme Court would implement this new understanding. Critically, if congressional power would no longer be considered "plenary," there would be no reason to think that Congress can do anything it wants when other constitutional values are at stake.

Accordingly, beyond applying current doctrine about commerce and conditional federal spending and potentially allowing enhanced presidential authority, the Court should acknowledge that all of the constitutional limitations upon congressional power — not just those in Article I — apply fully in federal Indian law. As an example, consider the Takings Clause. The Court in *Lone Wolf* fell into the plenary-equals-absolute trap by refusing to provide *any* judicial review of congressional transformation of tribal property into individual Indian allotments and private lands.²⁴¹ *Sioux Nation* provided a more plausible approach by imposing a "good-faith trustee" test in place of non-justiciability.²⁴² Even under that standard, however, Indian property is much less protected against federal interference than is private property. Moreover, certain kinds of tribal property are still considered outside the protection of the Takings Clause.²⁴³ This peculiar and unfair scheme remains rooted in the notion that, without congression-

²⁴⁰ See 25 U.S.C. §§ 2, 9 (2000).

²⁴¹ See *supra* pp. 442–43.

²⁴² See *supra* pp. 447–48.

²⁴³ Another aspect of exceptionalism is that the limited protection provided by *Sioux Nation* for compensation for the loss of Indian land only applies to lands like that at issue in the case — where the Indian title is recognized in a treaty, statute, or agreement. Aboriginal lands that have not been so recognized, or lands set aside for Indians by the federal government in other ways, may not be protected by the Fifth Amendment. See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 288–89 (1955) (aboriginal title); *Sioux Tribe v. United States*, 316 U.S. 317, 325–26, 330–31 (1942) (land buffering reservation border that was set aside by executive order).

al entrenchment, tribal property rights remain at the whim of the conqueror.

Moving from absolutist conceptions of congressional power over Indian affairs might also affect judicial authority because it implicitly delegitimizes much of the Court's own common law of colonialism. Although Justice Thomas may not have recognized this implication, it follows from his critique. It has never been clear where the Court's authority to pronounce federal common law over Indian affairs is rooted. Courts usually justify federal common law by identifying "a federal enactment, constitutional or statutory, that [they] interpret[] as authorizing the federal common law rule."²⁴⁴ In *Oliphant* and its progeny, however, the Court never even attempted to link its presumed decisional authority to undercut tribes with any of these sources. Indeed, in *Lara*, Justices Souter and Thomas engaged in a telling exchange on precisely this point.²⁴⁵ If Congress were made to hew to its enumerated powers, the Court's federal common law authority would presumably be reduced correspondingly. By removing Congress from its position as czar over Indian affairs, the Court would be jettisoning itself from its position as the czar's front-line agent.

Precisely how this truncation of federal common law would play out is hard to predict. The only substantial limit upon federal common law is the Justices' sense of judicial restraint²⁴⁶ — something noticeably lacking in federal Indian law for at least three decades. Nonetheless, an appropriate focus on positive federal law and the congressional and presidential policies favoring tribal sovereignty would make some decisions beyond the pale. For example, the best argument for the outcome in *Oliphant* under a cabined federal common law would seem to be that the federal General Crimes Act²⁴⁷ — which *Oliphant*, the non-Indian, violated by assaulting a tribal mem-

²⁴⁴ Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 887 (1986); see also *id.* at 929 (stating that federal common law may be authorized if "the rule created fit[s] best with the scheme of the authorizing enactment and with the intent of its framers, insofar as we know that intent").

²⁴⁵ In attempting to read *Oliphant* and later cases as based upon constitutional rather than common law, Justice Souter noted the Court's statement in *Oliphant* that, "even ignoring treaty provisions and congressional policy," tribes lack criminal jurisdiction over non-Indians because it is "inconsistent with their status" as subordinate sovereigns. *United States v. Lara*, 124 S. Ct. 1628, 1651 n.2 (2004) (Souter, J., dissenting) (emphasis omitted) (quoting *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978)) (internal quotation marks omitted). Justice Thomas rightly responded that *Oliphant* could not possibly be understood as anything other than a common law decision, but he acknowledged that the exclusion of treaties and congressional policies from the analysis "removes from consideration most of the sources of federal common law," making the holding in *Oliphant* "puzzling" and an example of the "confusion" he "hope[s] the Court begins to resolve." *Id.* at 1646 n.4 (Thomas, J., concurring in the judgment).

²⁴⁶ See Martha A. Field, *The Legitimacy of Federal Common Law*, 12 PACE L. REV. 303, 304-05 (1992).

²⁴⁷ 18 U.S.C. § 1152 (2000).

ber — cast a common law penumbra authorizing the Court to withdraw tribal jurisdiction over him. This understanding would be impossible to square with traditional federal Indian law, for the canons of interpretation would require that concurrent tribal jurisdiction remain unless Congress has squarely preempted it.²⁴⁸ But we move far beyond that level of dubiousness when we consider *Duro*. Properly read, no federal statute reached the crime perpetrated by a nonmember Indian upon a member Indian.²⁴⁹ In that circumstance, the decision in *Duro* removing tribal jurisdiction was incontrovertibly wrong, for there is no federal positive law that arguably undercuts tribal authority by providing federal jurisdiction.²⁵⁰ Indeed, in implicitly understanding the federal scheme of criminal jurisdiction in Indian country as authorizing it to create a jurisdictional void over a particular type of crime, the Court in *Duro* violated any sensible notion of federal common law-making.

2. *Reconsidering Citizenship and Tribal Sovereignty.* — In *Lara*, Justice Kennedy was deeply troubled that tribes could prosecute nonmember Indians. He found it constitutionally suspect that an American citizen could be prosecuted within the borders of the United States by a sovereign that is not governed by the Constitution. As stated, of course, his argument would apply equally to prosecution of tribal members, who are also American citizens. In response, Justice Kennedy suggested, as he had done in *Duro*, that prosecution of members was acceptable because they had given the “consent of the governed” to their own tribes.

Justice Kennedy’s analysis *might* be a plausible understanding of liberal political theory.²⁵¹ As a legal argument, however, it runs hope-

²⁴⁸ Another question is whether the Indian law canons of construction would make sense in a post-plenary power world. As discussed earlier, the best understanding of these canons in current federal Indian law is that they are a second-best method of limiting congressional intrusions upon the sovereignty of tribes when direct constitutional review is either unavailable or remarkably relaxed. See *supra* pp. 445–46. Thus, the canons seem linked to both concepts — the plenary power of Congress and the sovereignty of tribes — problematized by Justice Thomas. Nonetheless, a variety of justifications for stringent canons would remain. Invasions of tribal sovereignty, even those pursuant to express congressional powers or negotiated agreement, should have legal effect only if quite clear. This has always been the rule for negotiated arrangements, as *Worcester* demonstrates. See *supra* pp. 439–40. By analogy to the approach taken with conditional federal funding of state programs, see *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17–27 (1981), any conditions attached to federal funding of tribal operations should take legal effect only if they are quite explicit. Statutes that invade core tribal interests should be treated like federal intrusions upon core state functions and interpreted narrowly. See *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991).

²⁴⁹ See *supra* pp. 460–61.

²⁵⁰ Indeed, at least once in recent Indian law, the Court itself has recognized that the absence of federal jurisdiction is an important aspect of the common law calculus. See *Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 854 (1985).

²⁵¹ I say “might” because the argument has never been fleshed out in any satisfactory way.

lessly aground, for neither citizenship nor consent can be logically deployed to defeat tribal jurisdiction. Most fundamentally, as Justice Thomas was quick to point out,²⁵² what triggers the criminal authority of a sovereign is the breach of its peace, not the citizenship of the culprit. If I were to travel to Alaska and commit a crime, the state may prosecute me even though I am not an Alaska citizen, do not vote in Alaska elections, and would face a jury of Alaskans. It is immaterial that I am an American citizen. Justice Kennedy's suggestion that the consent of the governed is present because I have consented to the constitutional scheme of state as well as federal powers²⁵³ is beside the point, as of course Alaska has just as much jurisdiction over a Canadian within its borders as it does over me.

In my estimation, there are three major reasons why the analogy between state and tribal jurisdiction might be deemed to miss the mark for tribal courts. The first is that Alaska courts must follow the Constitution. But of course that requirement does not turn on my identity as an American citizen; Alaska courts must give aliens the same constitutional rights. Moreover, ICRA imposes the most important protections upon tribal courts, and the federal courts are available for habeas corpus. If the two primary rights "missing" from ICRA — free representation for indigent defendants and a jury that includes nonmembers — need to be extended to somehow save the tribal criminal justice scheme, the courts could interpret ICRA's due process clause to require both. It is hard to believe that a "rights deficit" is the fundamental problem.

A second, and I think more important, objection to the analogy between tribal courts and state courts is a perceived absence of virtual representation in the tribal context. When I am prosecuted in Alaska, the assumption is that the process will be fair because Californians and Alaskans are similar — just Americans. Although Californians are not actually represented in the Alaska legislature, they are virtually represented because they are so similar to Alaskans. But when a nonmember Indian citizen is prosecuted in a tribal court, Justice Kennedy might think unfairness may occur because the nonmember Indian and the members are not sufficiently similar to ensure that the interests of the former will be protected by the legal system of the latter.

Justice Kennedy's invocation of citizenship is not responsive to any concern about the absence of virtual representation. Under *Oliphant*, a non-Indian Canadian citizen is just as immune from tribal prosecution as a non-Indian American. It is difficult to believe that Justice

²⁵² See *United States v. Lara*, 124 S. Ct. 1628, 1645 (2004) (Thomas, J., concurring in the judgment).

²⁵³ See *id.* at 1640 (Kennedy, J., concurring in the judgment).

Kennedy would think that tribes should be able to prosecute a Canadian Native, either.

Nor does a theory of actual consent support Justice Kennedy's position. When I set foot in Alaska, the law presumes my consent to Alaska's jurisdiction, regardless of the presence or absence of actual consent. When a nonmember (Indian or non-Indian) ventures upon an Indian reservation, however, his or her consent to tribal criminal jurisdiction is not only not presumed, it is deemed essentially irrelevant by *Oliphant* and *Duro*. It does not matter whether the reservation had conspicuous signs warning that entry would be deemed implied consent.²⁵⁴ Moreover, if we consider the Court's cases regarding civil jurisdiction as well as the ones regarding criminal jurisdiction, there is no coherent approach to consent running through them.²⁵⁵

What *Duro* actually turned on was not citizenship or consent, but a largely unexpressed notion of membership status. And this leads to the third and most important objection to the analogy: despite almost two centuries of case law, some Justices just cannot fathom how tribes are sovereigns within the borders of the United States. Instead, tribes are implicitly viewed as membership organizations.

But even membership is not up to the conceptual challenge here. If a tribe is a sovereign, of course, citizenship, membership, or actual consent should not matter to its authority to sanction breaches of the peace. If it is not a sovereign, membership can matter, but not enough to make a difference in these contexts. To be sure, if I join a private club, I am agreeing to its rules and bylaws, including sanctions that may be levied upon me for misconduct. But my consent is insufficient to justify some sanctions: "consent" is not a defense to imprisoning me for nonpayment of dues, for example, even if the bylaws so provide. So it is completely unclear why a tribe — if analogized to a private association rather than a sovereign — is allowed to incarcerate a member (who, even if viewed as impliedly consenting to the application of tribal law, presumably does not actually consent to be incarcerated).

When stripped of abstract and misplaced concerns about citizenship, consent, and membership, Justice Kennedy's basic complaint is that there are only two sovereigns under the Constitution, federal and state, both governed by the founding document. Tribes are outside this framework. Even this is not quite right — more accurately, the

²⁵⁴ See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 193 n.2 (1978) (noting the presence of such signs at the reservation borders). *Duro* acknowledged that tribes generally have a right to exclude nonmembers but seemed to conclude that tribes have no right to condition entry upon implied consent to tribal criminal jurisdiction. See 495 U.S. 676, 689 (1990). *Duro* did withhold judgment on a situation in which a nonmember had given manifest and informed consent to such jurisdiction. See *id.*

²⁵⁵ See Frickey, *supra* note 10, at 1768–77.

Constitution *encompasses* only two sovereigns, and tribes sit outside that framework as preexisting entities with a reservoir of retained, inherent, extraconstitutional authority. Beyond this conceptual misunderstanding, Justice Kennedy's more important mistake is thinking that the Court has any legitimate authority to incorporate tribes into the constitutional structure in a way that domesticates tribal authority with constitutional values. That project would not be patching the constitutional roof to prevent constitutional rights from escaping; it would be uprooting the whole structure and replacing its foundation.²⁵⁶

Taking a different tack to undermining tribal sovereignty, Justice Souter suggested that the tribes were so linked to and subordinated by the federal government that they could not be understood as separate sovereigns.²⁵⁷ It is impossible to square this argument with precedent. *Talton* rejected the argument that because Congress has plenary power over the tribes, tribal prosecution of a member is federal rather than inherently tribal.²⁵⁸ Likewise, *Wheeler* found no double jeopardy violation when a tribe prosecuted a member under tribal law and the federal government later prosecuted the same person under federal law for the same misconduct.²⁵⁹ Again, the Court squarely understood the tribe to stand apart from the federal government as a sovereign, notwithstanding that it also understood the tribe's sovereignty to be subject to "complete defeasance" by Congress.²⁶⁰ Arguments about tribal subordination to federal authority have no more power when the tribe is prosecuting a nonmember.

²⁵⁶ The best argument I can come up with to support anything approximating Justice Kennedy's intuition would contend that the Citizenship Clause of the Constitution, U.S. CONST. amend. XIV, § 1, could be implicated by the actions of entities that are not federal or state actors. Cf. *The Civil Rights Cases*, 109 U.S. 3, 44–47 (1883) (Harlan, J., dissenting) (arguing that racial discrimination in public accommodations threatens citizenship rights even if no state action was involved). From this unprecedented start, one might be able to spin an argument that, by virtue of Section 5 of the Fourteenth Amendment, Congress has the authority to enact legislation to guard against such violations. Thus, Congress might have Section 5 authority to pass a statute like ICRA, imposing limitations upon tribal action similar to those found in the Bill of Rights, or even the power to prohibit tribal jurisdiction over all U.S. citizens or some subset of them — for example, nonmembers. If Congress has legislative authority under Section 5, maybe the Court would have an associated federal common law decisional authority to protect citizenship rights.

As stated, the argument would only go so far as to authorize a common law decision like *Duro*. It certainly would not prevent Congress from overriding the decision by legislation, as it did. In any event, the argument is wholly speculative and ungrounded in precedent.

²⁵⁷ See *Lara*, 124 S. Ct. at 1649–50 (Souter, J., dissenting).

²⁵⁸ See 163 U.S. 376, 384 (1896) (“[T]he existence of the right in Congress to regulate the manner in which the local powers of the Cherokee nation shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States.”).

²⁵⁹ See 435 U.S. 313, 329–30 (1978).

²⁶⁰ See *id.* at 323.

In any event, Justices Kennedy and Souter are wrong in supposing that the constitutional scheme does not account for the tribes. As Chief Justice Marshall understood long ago in *Cherokee Nation*, the Commerce Clause includes tribes in a list with other acknowledged sovereigns: foreign nations and the states.²⁶¹ One need not be able to translate *noscitur a sociis* to recognize that the Constitution places tribes on a sovereign plane. In addition, as Chief Justice Marshall recognized in *Worcester*, the constitutional framework places authority over Indian affairs in the federal, not state, government by its allocation of the treaty power, the commerce power, and the powers concerning war and peace.²⁶²

It is not responsive to suggest that under a post-plenary power regime, the President, by analogy to foreign affairs, might have the unilateral authority to terminate tribal sovereignty. Even if that were true, it would not change the fact that the Constitution considers tribes sovereign — it would just mean that American recognition of a tribe, like recognition of Libya, is a question formally allocated to the executive branch. In any event, at this writing, the federal government recognizes over three hundred tribes in the continental United States and over two hundred more in Alaska.²⁶³ There is no place in this scheme for unilateral judicial termination.

This discussion also answers Justice Thomas's concern that tribes are no longer sovereign. Their sovereignty is recognized in the Constitution and has been acknowledged by both Congress and the executive branch. To be sure, in 1871 Congress purported to end treaty-making with tribes. Yet executive acquiescence in that political compromise does nothing to invalidate the numerous later federal acts recognizing and reaffirming the sovereignty of tribes — the Indian Reorganization Act, President Nixon's formal abandonment of the policy of termination, Congress's belated acknowledgment that the termination policy was dead,²⁶⁴ and so on. Indeed, if the political branches had understood tribal sovereignty to be abolished by some prior act — the 1871 statute, the 1924 statute conferring citizenship on Indians, or something else — Congress would never have needed to proclaim a policy

²⁶¹ See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

²⁶² See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

²⁶³ See BUREAU OF INDIAN AFFAIRS, DEP'T OF THE INTERIOR, TRIBAL LEADERS DIRECTORY § 5 (Spring/Summer 2005), available at <http://www.doi.gov/leaders.pdf> (listing 585 recognized tribal entities, including 225 in Alaska).

²⁶⁴ See Tribally Controlled Schools Act of 1988, Pub. L. No. 100-297, § 5203(f), 102 Stat. 385, 386 (codified as amended at 25 U.S.C. § 2501(f) (Supp. II 2002)) ("The Congress hereby repudiates and rejects House Concurrent Resolution 108 of the 83rd Congress and any policy of unilateral termination of Federal relations with any Indian Nation.").

of termination in 1953 and then embark on a tribe-by-tribe process of terminating the federal relationship.²⁶⁵

Nonetheless, Justice Thomas performed a valuable service in explicitly posing this question about tribal sovereignty (as he did by raising the question about congressional plenary power). It does little good for the Court to acknowledge tribal sovereignty in some abstract way and then issue decisions that are inconsistent with any plausible conception of it.

3. *Reconsidering State Authority.* — *Lara* did not directly raise any question about state authority in Indian country. Yet the concerns about limiting federal power over Indian affairs and about whether tribes remain sovereigns do, of course, implicate significant questions about state power.

Chief Justice Marshall's understanding that the power to deal with Indians and their lands is concentrated in the federal government remains the most plausible approach to the Constitution. The occasional case allowing state power to creep into Indian country has concerned special circumstances that involved non-Indians.²⁶⁶ These decisions do not undermine the central constitutional idea — that the relations between tribes and the American government should be governed largely by negotiation. Even according the President a certain measure of inherent authority — for example, to recognize tribal governments — does nothing to undermine the essentials of this core consideration.

A central problem for the states has been the haphazard way that Congress has partially integrated them into Indian law. In a realm of congressional plenary power, the states have had to frown and bear it. For example, it seems very unlikely that states understood Public Law 280 as requiring them to provide public services to Indian reservations but giving them no taxation authority in those domains to raise funding for those services. Yet that is how it has worked out.²⁶⁷ Unfunded mandates and other structural impositions upon states sometimes present serious constitutional problems outside Indian law.²⁶⁸ In a post-plenary power regime, they would pose similar problems inside Indian law.

²⁶⁵ See H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953).

²⁶⁶ See *supra* pp. 457–59.

²⁶⁷ See *supra* p. 449.

²⁶⁸ See, e.g., *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that Congress may not conscript state executive officers to implement a federal program); *New York v. United States*, 505 U.S. 144, 187–88 (1992) (holding that Congress may not compel a state legislature to implement a federal program).

B. Institutions at Crossroads

The tribes and the federal government were no doubt pleased with the outcome in *Lara*. In the aftermath of the decision, however, virtually every institution in federal Indian law is potentially in turmoil.

Begin with the tribes, for examining their position illuminates the problems that the other institutions face as well. Under the old plenary power/canons model, the tribes were trapped in a paradigm that fed on itself. In briefs before the Supreme Court, counsel for tribes would necessarily have to confess that, under current law, Congress possessed a plenary power over Indian affairs. Counsel would then attempt to make a silk purse out of this sow's ear. The common argument took one of two related forms, reflecting the twin aspects of this paradigm. First, if the entity that had formulated the antitribal policy was not Congress — in other words, if it was a state or the executive branch — then tribal counsel would argue that the entity had clearly acted *ultra vires*.²⁶⁹ If Congress was the culprit, then counsel would contend that the statute lacked sufficient clarity to satisfy the Indian law canons.²⁷⁰ These dual strategies won many important cases for tribes. In these cases, however, the Court would often pick up on this dualist quality and go out of its way to acknowledge congressional plenary power while still awarding the win to the tribe.²⁷¹ Every victory was bittersweet from the broader perspective of promoting more tribal self-governance in the longer term, for each ratified the tribes' subordination to Congress.²⁷²

The plenary power/canons paradigm forced tribes to be pragmatic. Winning in the Supreme Court meant that the burden of legislative inertia fell on tribal opponents. As tribes became sophisticated lobbyists, they could often prevent reactive federal legislation,²⁷³ as of course it is much easier to kill legislation than to pass it.²⁷⁴ In this way, the para-

²⁶⁹ See, e.g., Brief Amici Curiae of Pueblo of Laguna et al., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (No. 85-1708), 1986 WL 728104, at *7-27 (arguing that California did not have jurisdiction to regulate Indian gaming because Congress had not authorized such regulation); Brief for the Petitioner, *Bryan v. Itasca County*, 426 U.S. 373 (1976) (No. 75-5027), 1975 WL 173723, at *22-48 (arguing that the states did not have the authority to tax Indian property as a result of a federal law granting states civil jurisdiction over Indian reservations).

²⁷⁰ See, e.g., Brief for Petitioners, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (No. 76-682), 1977 WL 189105, at *12-13 (arguing that, although Congress has plenary power over Indian affairs, ICRA did not "expressly" abrogate tribal sovereign immunity from suit).

²⁷¹ See, e.g., *Santa Clara Pueblo*, 436 U.S. at 56 ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.").

²⁷² Of course, the majority opinion in *Lara* is subject to the same concern. See, e.g., William Bradford, "Another Such Victory and We Are Undone": A Call to an American Indian Declaration of Independence, 40 TULSA L. REV. 71, 90-102 (2004).

²⁷³ See WILKINSON, *supra* note 71, at 53-54.

²⁷⁴ See, e.g., KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 314-15, 395-96, 398 (1986).

digm, as suggested earlier,²⁷⁵ had some of the features of the camel: ugly and mean-spirited, but nonetheless somewhat functional.

The rise of the common law of colonialism posed a huge problem for tribal advocates. It upset the simplicity of the standard argument: even if Congress had not clearly authorized the invasion of tribal authority, the Court might use federal common law to reduce tribal sovereignty. No longer could counsel for tribes say to the Justices, in effect, “Don’t worry about functionality or fairness; those are issues for Congress.” Instead, counsel was required to attempt to educate nine non-Indian Justices about such particularistic questions as how a non-Indian would be treated if criminally prosecuted in a tribal court (as if all tribal courts were fungible), how hunting by non-Indian fee simple landowners on the reservation might undermine legitimate tribal interests²⁷⁶ (as if all reservations or non-Indians were fungible), or how authorizing a county rather than a tribe to zone non-Indian fee land on the reservation might conflict with important tribal cultural and religious values²⁷⁷ (as if all such values were similar). Often the Court has taken one factual situation and spun a general common law rule out of it — either not recognizing or not caring that a one-size-fits-all solution should not be imposed on communities as radically varied as those composing America’s Indian country.²⁷⁸

In addition, the common law mentality has led to a dramatic shift toward historical inquiries — for example, how tribes had exercised criminal authority over nonmembers, or how the opening of a reservation to non-Indian settlement had affected the delivery of public services. It also has encouraged the Court to undertake abstract inquiries about contemporary values — for example, whether Indian citizenship somehow conflicts with tribal court jurisdiction over nonmember Indians. In effect, the Supreme Court has become the site of an ongoing mini-constitutional convention for evaluating the essentially insolvable conundrums of the place of tribes in the American constitutional system. Cases come to the Court with their own complicated facts and background, much of which is novel rather than a good basis for gen-

²⁷⁵ See *supra* p. 451.

²⁷⁶ Cf. *Montana v. United States*, 450 U.S. 544, 567 (1981) (denying a tribe authority to regulate nonmember hunting on nonmember fee lands, absent special circumstances).

²⁷⁷ Cf. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 432 (1989) (White, J., announcing the judgment of the Court) (holding that the county could zone nonmember land in an open portion of the reservation); *id.* at 444 (Stevens, J., announcing the judgment of the Court) (holding that the tribe could zone nonmember land in the closed portion).

²⁷⁸ In *Oliphant*, for example, a case involving a reservation occupied by over 2900 nonmembers and only fifty tribal members, the Court concluded that tribal criminal jurisdiction over nonmembers was precluded. See 435 U.S. 191, 193 n.1, 204 (1978). Rather than acknowledge that the context was not a good basis for generalization across Indian country, the Court imposed this rule on all tribes.

eralization, and yet they become the battleground for the application of de Tocqueville's American values of liberty, egalitarianism, individualism, populism, and laissez-faire. Native American exceptionalism in federal public law has collided with American exceptionalism in a case-by-case agony of happenstance.

Now, in addition to the common law power providing for judicial intrusion upon tribal authority when Congress has failed or refused to intrude, several Justices have suggested that the Court, not Congress, sometimes has the last word on tribal authority. If the mentality of Justices Kennedy or Souter were to prevail, the Court would have the final say in an area in which, of all the institutions involved, it surely knows the least and is least able to provide a forum for wide-ranging dialogue and jurisgenerativity. A bare majority of Justices, at least for the time being, have avoided this arrogation of authority by continuing to follow the doctrine of congressional plenary authority. At the same time, the candor of Justice Thomas points in two starkly opposing directions: a reduction of federal power over tribes, without a sense for whether a corresponding expansion of state authority would be the other shoe to drop, or a judicial termination of tribal sovereignty. The only certainty is that, of all the political entities involved, the tribes will have the least influence on whatever direction federal Indian law will take.

As the disarray on the Court continues to unfold, Congress, the executive branch, and the states may be left in subordinate positions. If the Court attempts to solve the confusions of federal Indian law, some institutions will be winners and others losers, of course. Considering the doctrinal and practical difficulties with the options available to the Court, the Justices will be buying themselves years of thankless work without any certain payoff.²⁷⁹

²⁷⁹ Efforts to integrate tribes into the constitutional structure might be usefully compared to other examples in which the Supreme Court has "updated" or "completed" the Constitution to promote symmetrical limitations on government action. Two illustrations are the incorporation doctrine, applying the Bill of Rights to the states, *see, e.g.,* *Duncan v. Louisiana*, 391 U.S. 145 (1968), and "reverse incorporation," interpreting the Due Process Clause of the Fifth Amendment to contain an implied equal protection component, *see* *Bolling v. Sharpe*, 347 U.S. 497 (1954). Whatever might be said about the textual and historical difficulties in justifying these moves, at least the Court was implementing a notion of national citizenship and creating greater symmetry between the constitutional limitations applicable to the federal and state governments. These were classic analogical moves: governmental power subject to the Constitution, regardless of its source, should be limited similarly. The power of the analogical argument follows from the creation of national citizenship by Section 1 of the Fourteenth Amendment, which established that the United States is one nation, not a loose allegiance of sovereign states.

Forced judicial incorporation of tribes into the constitutional structure would be a very different, and far more difficult, venture. Tribes are not subject to the analogical argument because they are uniquely different from the federal and state governments: they are not creatures of constitutional creation, they act with preconstitutional power, and they remain semi-autonomous nations within a nation. In contrast to the Reconstruction Amendments, there never has been a

The Court could continue on its current path, supplementing the plenary power of Congress with a judicial common law power. As I have explained, however, every feature of this approach is subject to great doctrinal doubt and forces the Court to address matters on an unpredictable case-by-case basis that it has the least competency to handle. If the Court were to broaden its power to include judicial supremacy on some issues in the field, it would expand its unmanageable, undemocratic role exponentially. If, instead, the Court were to conclude that its common law of colonialism has been a false move, it would be stuck with the question of how to extricate itself from that practice. It could require announcing that, now that certain ground rules are in place as a common law matter, the Court will expect Congress to retake the lead in federal Indian law decisionmaking, as Congress did with the *Duro* fix. The old plenary power/canons model would be rehabilitated, at least prospectively. Of course, that model too is rooted in a serious doctrinal conundrum, the notion of congressional plenary power. Nonetheless, as compared to the common law of colonialism, the old model reflected a modest, but important, normative mediation of colonialism by generally leaving tribal authority intact and putting final resolution of the issue in a congressional context in which tribes had the benefit of inertia and hence some bargaining power.

It is hard to imagine that a majority of Justices would backtrack on Indian law doctrine any further than simply returning to the old model. If they did decide to peek behind the curtain of plenary power, they would be asking fundamental questions about how the Constitution allocates authority over the field to Congress and the executive branch. Justice Thomas sketched the ways in which, from originalist and textualist perspectives, these questions have had dubious answers for over a century. Although I have suggested that some cutback on congressional power could empower tribes and would not necessarily cripple the political branches, this path leads into the unknown.

In short, the Court has written itself into a tough spot. Its current practice of the common law of colonialism is fraught with doctrinal and practical problems. Moving past it into the constitutional realm of judicial supremacy would be asking for a good deal more trouble. Conversely, peeling off this relatively recent layer of judge-made federal Indian law while leaving in place the problematic plenary power/canons model that rests beneath would beg the question why a reconsideration of the field should only go so far. Adherence to the

“constitutional moment” during which the nation and the nations within it were collectively reorganized. Indeed, the Court itself has held that the Fourteenth Amendment was not designed to reconstruct national citizenship in a way affecting tribal Indians. See *Elk v. Wilkins*, 112 U.S. 94, 102 (1884).

traditional model of federal Indian law — as exemplified by the Marshall Court’s decisions and most cases until the 1970s — along with acquiescence of the political branches in this model, an acknowledgment that the Constitution is not inconsistent with the notion of inherent national authority over inherently national matters, and judicial humility and restraint may be the best responses that the Court could publicly muster. More privately, one would think that the Justices would be loath to take on such complex, thankless, and frustrating issues. The time is ripe for them to have the courage of their confusion — and ours, as well.

From doctrinal and pragmatic perspectives, then, the best answer might well be a return to a more modest judicial role, one that provides side constraints — constitutional and canonical — on the congressional power to invade tribal prerogatives and that leaves room for the affected parties to negotiate rather than litigate most issues of twenty-first-century federal Indian law.²⁸⁰ But Indian law is not just a matter of doctrine, comparative institutional competence, and other prudential concerns. At heart, it is also about values — inherently contestable issues surrounding our colonial past, present, and future.

C. *Exceptionalism as Normativity*

The primary progenitor of the doctrinal, institutional, and pragmatic framework of federal Indian law, Chief Justice Marshall, seemed to recognize the core normative dilemma of building constitutionalism on a foundation of colonization. I have argued that the aggressive canons of treaty interpretation and other exceptional aspects of federal Indian law that he embraced were motivated by a basic desire to mediate colonialism and constitutionalism.²⁸¹ In the first two germinal opinions in the field, Chief Justice Marshall began by attempting to insulate the Court from consideration of fundamental values,²⁸² then essentially admitted the harshness of colonialism.²⁸³ Then, in *Worcester*, he more squarely faced the heart of the matter. He suggested that the United States had been created by a process difficult to defend norma-

²⁸⁰ See T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 140–50 (2002); RUSSEL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* 222–32, 269 (1980).

²⁸¹ See Frickey, *supra* note 43.

²⁸² See *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 588 (1823) (stating that the Court “will not enter into the controversy, whether agriculturalists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits”).

²⁸³ See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15 (1831) (acknowledging that “[i]f courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined”).

tively,²⁸⁴ yet he recognized that the colonial practices and results were deeply rooted and in many instances beyond judicial reconsideration.²⁸⁵ Like any good judge, he tried to do the best he could with what he had. Consider his work: *Worcester* excluded the states from Indian policy,²⁸⁶ envisioned the federal-tribal relationship as one of treaty-making rather than coercion,²⁸⁷ indulged in generous assumptions about federal purposes,²⁸⁸ and imposed the canons as significant side constraints upon the negotiating process.²⁸⁹ This framework made no fetish of consistency with general principles of broader public law or with the cultural assumptions of the dominant society. Instead, its exceptionalist quality seemed motivated by normative concerns: mediating the harshness of colonialism and providing some room for cultural difference and autonomy. Of course, one could imagine an even more jurisgenerative approach from the tribal perspective — for example, recognizing them as full sovereigns under international law — but it is difficult to see how the Court could retain its credibility with the broader society by any such move. In both American tradition and practical judgment, decisional law without sufficient cultural connection lacks roots deep enough to withstand the inevitable conflicting pressures.²⁹⁰

In his best moments, then, Chief Justice Marshall provided examples of what “doing Indian law” should be about. By this I do not mean that the fundamental question in federal Indian law should be “WWJ(M)D?”²⁹¹ Chief Justice Marshall’s opinions, like all others, lack canonical truth. What is retrievable here is not a set of outcomes, but an attitude: a sense that federal Indian law is deeply normative; that courts have a mediating capacity, but that knotty questions today should be approached largely by negotiation rather than by the unilateral federal resolution of the past; and that the colonial/constitutional dilemma merits the courage of our confusions, a preference for the broader confusion rather than any pat answer providing an artificial, smaller certainty.

In the last analysis, it should be unsurprising that federal Indian law has turned out as confused as it is. For beneath questions about

²⁸⁴ See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 543–47 (1832).

²⁸⁵ See *id.* at 543.

²⁸⁶ See *id.* at 591–96.

²⁸⁷ See *id.* at 549–51.

²⁸⁸ See *id.* at 559.

²⁸⁹ See *id.* at 582.

²⁹⁰ See generally Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003).

²⁹¹ What would John (Marshall) do? *But cf.* Kathleen M. O’Sullivan, Note, *What Would John Marshall Say? Does the Federal Trust Responsibility Protect Tribal Gambling Revenue?*, 84 GEO. L.J. 123 (1995).

constitutional text, original intent, common law authority, and so on lies a much more fundamental normative confusion — regarding the founding of the United States and the development of our constitutional traditions. We have every right to be confused about what we should make of our origins, our evolution, our sense of nationhood, and our creation of a constitutional democracy through colonialism.

VI. CONCLUSION

After five hundred years, it is high time to face this most fundamental of confusions. The exercise should not be a retrospective on national guilt, however: “The point is not to assign blame — an essentially fruitless exercise.”²⁹² Instead, the point is to look forward into the twenty-first century with an honest eye, a humility about institutions and the unilateral solutions they might attempt to generate, and a sense of collective engagement. In not merely a symbolic sense, a commitment to renewed treaty-making, whether of the Article II variety or by agreements ratified through bicameralism and presentment, would be a major step toward greater normative, doctrinal, and practical legitimacy.²⁹³ Professor Pommersheim’s suggestion of a constitutional amendment²⁹⁴ may seem utopian, though less so after *Lara* than before it. The Justices themselves have sometimes acknowledged that they cannot effectively deal with the questions of federal Indian law and would support some process — a study commission, for example — that could examine issues from all sides and propose needed reforms.²⁹⁵ Of course, the creation of a study commission is often a way to avoid difficult questions rather than the first step in solving them. Any jurisgenerative process would require a serious commitment from the tribes, the federal branches, and the states to engage in the process with equal concern and respect.

²⁹² FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 21 (1995).

²⁹³ One possibility would be the negotiated drafting of a model treaty that could then be altered to fit the specifics in which any particular tribe finds itself. An important project would be to work out a way to prevent the treaty from being abrogated at will. See also ALEINIKOFF, *supra* note 280, at 140–50; BARSH & HENDERSON, *supra* note 280, at 270–82.

²⁹⁴ See Pommersheim, *Constitutional Crisis*, *supra* note 198, at 285–87; Pommersheim, *Lara*, *supra* note 198, at 305–06.

²⁹⁵ Justices O’Connor and Breyer toured Indian country following the Court’s 2000 Term and took part in a panel discussion for tribal judges in Reno, Nevada. See *Supreme Court Justices Visit Reno*, NEV. NEWS, July 24, 2001, <http://www.unr.edu/nevadanews/detail.aspx?id=34>. I also participated in this discussion and heard both Justices acknowledge that legislation, perhaps following a study commission, might be necessary to repair federal Indian law.

In 1982, Canada provided greater entrenchment to the unique status of its Natives.²⁹⁶ More recently, it designated a region as a homeland for Native people.²⁹⁷ Australia began struggling anew with the status of its Native peoples in the 1990s, stimulated by a decision of its high court.²⁹⁸ Both countries have worked to recognize the innate and legitimate exceptionalism of Native peoples in law and fact. Yet for the past three decades, the highest Court of the United States has been on a decisional path that undercuts tribal prerogatives, and recently several Justices openly challenged the notion that tribes should be recognized as self-governing in the first place. Whatever the appropriate answers are for America, it is exceedingly doubtful that these judicial solutions are among them. Whatever processes would produce appropriate results, it is equally doubtful that case-by-case litigation is among them. An appropriate first step would be a judicial acknowledgment of these realities.

²⁹⁶ See RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA, § 35, Part II of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.); CONSTITUTIONAL CONFERENCE, § 37, Part IV of the Constitution Act, 1982.

²⁹⁷ See Nunavut Act, 1993 S.C., ch. 28 (Can.); Nunavut Land Claims Agreement Act, 1993 S.C., ch. 29 (Can.).

²⁹⁸ *Mabo v. Queensland II* (1992) 175 C.L.R. 1 (Austl.).