STRUCTURAL FEDERAL INDIAN LAW AFTER *BRACKEEN*

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"You know, when it comes to Indian law, most of the time we're just making it up," Justice Scalia once observed. This admission echoed long-standing critiques of the Supreme Court's jurisprudence in the field, but these anxieties did not trouble the Court—until recently. Over the past two decades, the Court has begun to revisit the field's foundations, culminating in the Court's 2023 decision in Haaland v. Brackeen*, which upheld the Indian Child Welfare Act against a constitutional challenge. Though the Court upheld the law, the majority pleaded for a "theory for rationalizing this body of law." Justices Gorsuch and Thomas, each writing separately and at length, offered sharply different visions that would dramatically remake current doctrine.*

Rather than providing a single theory, this Article tries to make sense of this current moment of "confusion" in federal Indian law, in the Brackeen *majority's language, by putting the field in dialogue with structural constitutional law. The fields have much in common: both deal with legal rules governing the distribution of governmental authority, and both confront the frequent absence of textual guidance. But in structural constitutional law—which rarely considers the authority of Native nations—the Court has developed a clearer and more fully articulated methodology for resolving this problem of textual underdetermination.*

Extending this approach to federal Indian law, I argue, could produce greater clarity and rigor in the field. In particular, this method yields what I term two answers that the federal government has posited over its history to the interrelated questions of federal, Native, and state authority. I then use this framework to evaluate the visions for federal Indian law announced in Brackeen*, all of which elide or submerge the jurisprudential choices that assessing these conflicting answers requires. I conclude by offering some thoughts on how Native nations and their*

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advocates might confront this current moment of uncertainty and debate within the Court's Indian law jurisprudence.

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INTRODUCTION

"You know, when it comes to Indian law, most of the time we're just making it up."[1] In thus summing up the Supreme Court's jurisprudence, Justice Scalia captured the sense of many scholars and practitioners, and, evidently justices

1. Matthew L. M. Fletcher, *Montana Native Law Student Recalls* Babbitt v. Youpee *and Meeting Justice Scalia*, TURTLE TALK (Feb. 18, 2016) (citation omitted), https://turtletalk.blog/2016/02/18/montana-native-law-student-recalls-babbitt-v-youpee-and-meeting-justice-scalia/ [https://perma.cc/2JCG-SFMU].

too,[2] that federal Indian law[3] is unmoored from solid doctrinal foundations.[4] Many of the field's dominant principles, concepts like the federal trust responsibility[5] or so-called implicit divestiture,[6] have vague sources and status; it is often unclear what *kind* of rule—statutory? federal common law? constitutional?—they actually are. Meanwhile, the field's one unambiguously constitutional doctrine, Congress's plenary and exclusive federal authority over "Indian affairs," strikes many as similarly made up because, they argue, it has little foundation in the Constitution's text.[7]

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2. *See* California v. Cabazon Band of Mission Indians, Supreme Court Case Files Collection, Box 136, Powell Papers; Lewis F. Powell Jr. Archives, Washington & Lee University School of Law, Virginia [hereinafter Powell Papers], https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1592&context=casefiles [https://perma.cc/NU59-RLEJ] (quoting Justice Rehnquist as stating in conference, "Indian case[s] are ad hoc – no consistent principles").

3. Following the Supreme Court and the field's leading treatise, this Article refers to the field of federal law defining the relationship between Native nations and the United States as "federal Indian law." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Nell J. Newton et al. eds., LexisNexis 2024). Rather than try to euphemize the field, this language, I believe, helps highlight its colonial origins and legacies. *See infra* notes 313–17 and accompanying text. I refer to individual people of Indigenous descent as Native, and to Indigenous communities as Native nations, except when describing specific uses of "Indian" or "tribe" as terms of art within federal Indian law.

4. Critiques of the Supreme Court's Indian law jurisprudence are rife in the literature. For some examples, see WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED (2010); ROBERT A. WILLIAMS, LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573 (1996) [hereinafter Getches, *Conquering the Cultural Frontier*].

5. *Compare* Arizona v. Navajo Nation, 599 U.S. 555, 565 (2023) ("[T]his Court's precedents have stated the United States maintains a general trust relationship with Indian tribes . . . ."), *with id.* at 574 (Thomas, J., concurring) ("[W]e should clarify the exact status of this amorphous and seemingly ungrounded 'trust relationship.'").

6. *See, e.g.*, Oliphant v. Suquamish, 435 U.S. 191 (1978); Montana v. United States, 450 U.S. 544 (1981); *see also* Matthew L. M. Fletcher, *Muskrat Textualism*, 116 NW. U. L. REV. 963, 976–93 (2021) (noting the ambiguous status and source of this doctrine); 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 (1999) (observing that the implicit divestiture opinions "congeal into an incoherent muddle").

7. Critiques of the plenary power doctrine are also ubiquitous in the scholarship. For a small sampling, see Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 2 (2002); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31 (1996); M. Alexander Pearl, *Originalism and Indians*, 93 TUL. L. REV. 269 (2018); Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069 (2004); Mark Savage, *Native Americans and the Constitution: The*

For many years, these uncertainties did not seem to trouble the Court. Despite considerable scholarly critique, the justices contently repeated the same formulas that they had advanced for centuries without seriously interrogating them.[8]

No longer. Rumblings began in 2004 with *United States v. Lara*, a challenge to Congress's broad authority to regulate the "metes and bounds" of tribal sovereignty.[9] Though a bare majority of the justices invoked conventional precedents to reject the suit, four justices expressed doubts about the Court's Indian law jurisprudence.[10] This skepticism persisted in the ensuing two decades in various separate opinions,[11] but it has dramatically resurged in recent terms. In particular, during its 2022 October Term, in *Haaland v. Brackeen*, a constitutional challenge to the Indian Child Welfare Act ("ICWA"), the Court squarely confronted the question of the source of federal authority in Indian affairs for the first time since *Lara*.[12]

Writing for the *Brackeen* majority, Justice Barrett upheld the status quo, but not happily. Her opinion rounded up the usual constitutional suspects, stressing that the Court's precedents establish that "Congress's power in this field is muscular, superseding both tribal and state authority."[13] But it also critiqued the Court's Indian law jurisprudence as "unwieldy" and acknowledged "confusion."[14] And in rejecting Texas's challenge, it invited a "theory for rationalizing this body of law."[15]

Justices Gorsuch and Thomas took up this call in separate opinions, offering lengthy investigations of the constitutional foundations of the federal Indian affairs power.[16] Their explorations of the question—each over 30 pages long—were more detailed and expansive than anything that had appeared in any prior Supreme Court decision. Moreover, unlike the majority opinion embracing the status quo,

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Original Understanding, 16 AM. INDIAN L. REV. 57 (1991); Lorianne Updike Toler, *The Missing Indian Affairs Clause*, 88 U. CHI. L. REV. 413 (2021); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219 (1986); Robert A. Williams, Jr., *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence's Learning to Live with the Plenary Power of Congress over the Indian Nations*, 30 ARIZ. L. REV. 439 (1988) [hereinafter Williams, *Eurocentric Myopia*].

8. *See, e.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs . . . ."); United States v. Wheeler, 435 U.S. 313, 319 (1978) ("[T]he undisputed fact [is] that Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government.").

9. 541 U.S. 193, 202 (2004).

10. *See id.* at 211–14 (Kennedy, J., concurring); *id.* at 214–26 (Thomas, J., concurring); *id.* at 228–31 (Souter, J., dissenting).

11. This was especially true in Justice Thomas's writings. *See infra* text accompanying notes 236–37.

12. 599 U.S. 255 (2023).

13. *Id.* at 273.

14. *Id.* at 275, 279.

15. *Id.* at 279.

16. *Id.* at 297–333 (Gorsuch, J., concurring); *id.* at 334–72 (Thomas, J., dissenting).

both of their "theories" would cabin the scope of federal power and dramatically alter existing law—although in sharply different ways.

This Article assesses the conflicting theories from *Brackeen* and tries to make sense of the current moment of doctrinal confusion and uncertainty over Indian law. It seeks to offer not a single "theory," but a fuller understanding of how and why the Court's much-maligned Indian law jurisprudence looks the way that it does—one that I believe offers a clearer, more rigorous, and more disciplined method to approach questions of authority in federal Indian law.

The key to this move, this Article posits, is a term that makes a brief, seemingly throwaway appearance in the majority opinion, as well as more substantial invocations in Justice Gorsuch's concurrence: "structure."[17] It may seem obvious that in a case determining the scope of federal, state, and tribal authority, the question of how the Constitution orders these governments is relevant. "[S]tructural constitutional law," in the words of one set of commentators, consists of "the authoritative legal norms that guide the workings of government and the distribution of government power."[18] Under that definition, much of federal Indian law, which fundamentally grapples with how power is distributed among Native, state, and federal governments, is a subset of structural constitutional law.

Yet this is not how the field is treated. Both judicial decisions and scholarship addressing structural constitutional law seldom discuss Native nations; they tend to focus almost exclusively on either the separation of powers within the federal government or the federalist division of authority between states and the federal government.[19] Meanwhile, the question of constitutional structure—indeed, even the term "structure" itself—seldom appears in the Court's Indian law jurisprudence.[20]

There are several reasons for this omission. One is the perception that "[t]he constitution of the United States is almost silent in regard to the relations of the government which was established by it to the numerous tribes of Indians within its

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17. *Id.* at 274 (majority opinion); *id.* at 333 (Gorsuch, J., concurring).

18. Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. 59, 64 (2022).

19. *See, e.g.*, V. F. Nourse, *Toward a New Constitutional Anatomy*, 56 STAN. L. REV. 835, 840 (2004) (describing structural constitutional law as encompassing "separation of powers and federalism").

20. *Cf.* Maggie Blackhawk, *The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 6 (2023) [hereinafter Blackhawk, *American Colonialism*] ("[Americans] do not invoke this history [of American colonialism] when considering questions of good governance, citizenship, representation, the ideal design of our governing institutions, or the best distribution of power across the national government and within 'our federalism.'"). Maggie Blackhawk has written an important series of articles persuasively arguing that the field of structural constitutional law should take federal Indian law more seriously and that this paradigm should lead scholars in particular to reconsider how power operates. *See* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787 (2019); Maggie Blackhawk, *On Power and the Law:* McGirt v. Oklahoma, 2020 SUP. CT. REV. 367 (2021). This Article aims to reverse the directionality: to examine how the incorporation of the insights of structural constitutional law might alter federal Indian law, focusing on the Supreme Court's recent doctrine in the area.

borders," as the Supreme Court opined in the canonical case *United States v. Kagama*.[21] This absence has led some justices to conclude that Native nations are a "sovereignty outside the basic structure of the Constitution" (Justice Kennedy,[22] cited approvingly by Chief Justice Roberts[23]) or "not part of this constitutional order" (Justice Thomas).[24]

These claims do not withstand scrutiny. It is true that the constitutional text does not explicitly codify or limit tribal sovereignty. But ambiguity is not the same as absence. It is a simple, indisputable fact that Native nations have been part of the "constitutional order" of the United States ever since they were forcibly included within the nation's borders. Moreover, the problem of constitutional silence is hardly unique to Indian law: the constitutional text also fails to specify whether, say, states are constitutionally immune from suits by their own citizens,[25] whether the federal government can commandeer state officials,[26] or what the constitutional role and status of administrative agencies is.[27] Arguably, how to resolve such problems of constitutional textual underdetermination is *the* central challenge of structural constitutional law.[28]

The second challenge is that to the extent structural constitutional law and federal Indian law have been in dialogue, it has involved *substantive* comparisons: arguments that the legal category of "Indian tribes" is similar to the category of foreign nations, or territories, or, most commonly, states.[29] This has led to a scholarly

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21. 118 U.S. 375, 378 (1886).

22. United States v. Lara, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring).

23. Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 337 (2008).

24. *Lara*, 541 U.S. at 219 (Thomas, J., concurring).

25. Alden v. Maine, 527 U.S. 706 (1999).

26. Printz v. United States, 521 U.S. 898 (1997).

27. Jerry L. Mashaw, *Recovering American Administrative Law: Federalism Foundations, 1787–1801*, 115 YALE L.J. 1256, 1266 (2006) (observing "a hole in the U.S. Constitution . . . Administration was missing").

28. *E.g.*, J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1707 (2004) ("The constitutional text, although vitally important, is often too ambiguous or abbreviated to yield definitive insights into the document's meaning. . . . It is here that structural interpretation performs a unique and indispensable function . . . ."). As Thomas Colby has effectively summarized, there has been a substantial debate over the relationship between structural reasoning and textualism, with some advocating structuralism as simply a form of holistic constitutional interpretation. Thomas B. Colby, *Originalism and Structural Argument*, 113 NW. U. L. REV. 1297 (2019). As Colby notes, many important commentators—especially Charles Black in his canonical book—have described structural arguments as fundamentally opposed to textualism. *Id.* at 1306–10 (citing CHARLES L. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 11, 15 (1969)). This debate is not directly relevant, however, given the general recognition that structural arguments usually require moving beyond explicit, discrete textual provisions.

29. On the state–tribe analogy, see Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617 (1994); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989); Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within "Our Federalism": Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667 (2006); Carol

and sometimes judicial debate over the extent that tribes and Indian law more generally are "exceptional."[30] As a legal matter, however, this debate strikes me as tautological, since the very act of creating a distinct legal category makes that category "exceptional": a "county" is, by definition, different from a "state." Moreover, defining something as "exceptional" is a fraught normative exercise that requires proclaiming another category to be "normal."[31]

Instead of rehashing debates over the exceptionality of federal Indian law, this Article turns to structural constitutional law for guidance on how to address the purported problem of constitutional "silence."[32] In contrast with federal Indian law, when the constitutional text fails to resolve a question of federalism or separation of powers, the Court does not throw up its hands and declare the issue "extraconstitutional." Instead, the Court has developed a well-established set of doctrinal tools to resolve this problem. The conventional sources include principles implicit in the constitutional text; preconstitutional intellectual and political history; Founding Era drafting history and constitutional debates; and post-ratification history and practice, with particular emphasis on the early federal government.

The existence of this methodology doesn't mean that the Court does structural constitutional law particularly *well*. I suspect many in the field would argue that the Court is just making things up there, too. But viewed from the environs of federal Indian law, the grass really does look greener. In federal Indian law, uncertainty around the nature and source of legal principles creates what feels like a classificatory game that emboldens the justices and frees them from judicial discipline. By contrast, agreement on sources and their relevance in structural constitutional law, however rough, cabins the discussion and brings rigor to the debate.

Moreover, structural constitutional law's reliance on history and practice is particularly well-suited to federal Indian law. The Constitution itself might have been "almost silent" on Native nations' status,[33] but that does not mean federal

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Tebben, *American Trifederalism Based upon the Constitutional Status of Tribal Nations*, 5 U. PA. J. CONST. L. 318 (2002). On comparisons between tribes and other sovereigns generally, see Gregory Ablavsky, *Sovereign Metaphors in Indian Law*, 80 MONT. L. REV. 11 (2019).

30. On the persistence of exceptionalist narratives within Indian law, see Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431 (2005); Angela R. Riley, *Native Nations and the Constitution: An Inquiry into Extra-Constitutionality*, 130 HARV. L. REV. F. 173 (2017).

31. *See* Ablavsky, *supra* note 29, at 39–40 ("The language of exception and anomaly . . . smuggles in ideas about legitimacy.").

32. In a similar vein, Judith Resnik has significantly sought to put the field of federal courts in dialogue with federal Indian law, highlighting their shared focus on sovereignty and power. *See* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989); 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). These articles intervene in doctrinal debates within federal Indian law, especially the scope of tribal criminal jurisdiction, but both primarily seek to draw on the field to speak to arguments within U.S. constitutional law more generally.

33. *See supra* note 21 and accompanying text.

policymakers, federal and state judges, or Native leaders were. On the contrary, because Native nations' status has been the subject of constitutional debate since the Founding, there are lots of sources seeking to define the balance between federal, state, and tribal authority—many of them precisely the same kinds of evidence that the Court draws on to resolve other disputes over governmental power.

In a sense, there may actually be *too* many sources, since, as I have explored elsewhere, the sheer array of historical evidence can be overwhelming[34]—especially given the wild swings on seemingly fundamental questions that occurred in nearly every generation in federal Indian law.[35] But focusing on the oscillating debates over federal Indian policy obscures what were deeper foundational questions about constitutional *authority*—especially of the federal government over Native nations and states.

On *these* intertwined questions—what Justice Gorsuch terms the Constitution's "Indian-law bargain"[36]—federal Indian law has really only offered what I summarize as two answers. The first answer came during the Founding Era and concluded that Native nations, while in some sense subordinate to U.S. sovereignty, nonetheless lay outside the legislative jurisdiction of Congress (and entirely outside state jurisdiction) by virtue of their own sovereignty. As this principle was challenged over the nineteenth century, a new second answer arose and became dominant during Reconstruction. Under this doctrine, conventionally labeled as "plenary power," Native nations retained what U.S. officials usually described as self-government, but they were subject to Congress's legislative authority (even as they remained largely immune from state authority)—a power that expanded to encompass regulatory power over all aspects of Native life. Over the course of the twentieth century, federal policy shifted again, ultimately embracing Native self-determination. But even as both the realities and doctrine of federal Indian law changed substantially, the principle that the federal political branches had complete authority to structure national relations with Native nations endured.[37]

Just as with structural constitutional law, reconstructing these two answers does not offer a single "theory" to "rationaliz[e]" federal Indian law, since it doesn't tell us which view is legally *correct*. Deciding what answer is right is a jurisprudential question that hinges on which sources of law we privilege and why.

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34. Gregory Ablavsky, *Too Much History:* Castro-Huerta *and the Problem of Change in Indian Law*, 2022 SUP. CT. REV. 293 (2023).

35. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.01 (Nell Newton & Kevin Washburn eds., forthcoming 2025) ("[O]ne of the most consistent aspects of federal Indian policy was its inconsistency. . . . [I]n nearly every generation, federal policymakers issued broad reports and pronouncements repudiating prior policies as failures and proclaiming new, supposedly fresh approaches.").

36. Haaland v. Brackeen, 599 U.S. 255, 307 (2023) (Gorsuch, J., concurring).

37. This argument is developed more fully below. *See infra* Part II.

Nonetheless, recovering the history of these structural debates helps bring a new rigor and clarity to the current moment.[38]

In particular, many justices have obviously grown weary of the "made up" nature of the Court's Indian law jurisprudence and so have gone rummaging in the past to try to bring a new "coherence" to the law.[39] But plucking principles from history without any jurisprudential explanation, often to justify ideological conclusions, doesn't actually solve the uncertainty and subjectivism that has plagued this field; it is just a way to make law up with more footnotes. Careful reconstruction of doctrinal history underscores that the past is not just a grab bag: each of these historical answers implies a logic and set of legal assumptions that they rested on, and so selecting historical evidence is also a *jurisprudential* decision—which is a decision about law. This Article thus uses the jurisprudential history of structural federal Indian law to examine the Indian law theories of the *Brackeen* majority, as well as of Justices Gorsuch and Thomas, and assesses how their perspectives might fit—or not—within the history of Native nations' place within the constitutional order.

Reconstructing these answers also faces another challenge. More accurate accounts of doctrine crafted largely by non-Natives and applied to Native peoples do little to resolve the field's fundamental *normative* problem, its entanglement with colonialism.[40] Indeed, given federal law's long-standing denigration of Native peoples, that law's past is not the best place to look for the foundations of an anti-colonial legal order.[41] And yet, for the foreseeable future, Native nations and their advocates will continue to confront this current Court as it turns to history to remake federal Indian law. Shifting from descriptive to normative, then, this Article seeks to adopt the perspective of those advocates and suggests one way to navigate the unsettled moment of Indian law jurisprudence. In particular, it argues that the seemingly endless debates over plenary power that have long dominated the field are, at least right now, a potentially dangerous doctrinal sideshow that seeks to relitigate the past rather than think about how to successfully navigate the legal challenges that confront Native peoples today. Ultimately, I am skeptical that the Court is especially well-suited to remedying prior harms through doctrine. The most important function that federal Indian law doctrine can currently play, in my view, is to provide Native nations and the federal political branches the space and the stability needed to address these questions themselves.

In making these arguments, this Article proceeds in four Parts. Part I outlines the current classificatory challenge and uncertainty that dog federal Indian

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38. I focus here on the judiciary and the Supreme Court in particular. As others have noted, much of the balancing between federal, state, and Native authority that occurs in Congress can also be reimagined as constitutional. *See* Maggie Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, 132 YALE L.J. 2205 (2023).

39. *Brackeen*, 599 U.S. at 374 (Alito, J., dissenting).

40. On this aspect of the field, *see* Blackhawk, *American Colonialism*, *supra* note 20; Seth Davis, *American Colonialism and Constitutional Redemption*, 105 CALIF. L. REV. 1751 (2017); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

41. *See, e.g.*, Matthew L. M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627 (2006).

law and compares it to the methodology developed within structural constitutional law. Part II reconstructs what I have termed the two answers to the question of tribal, federal, and state authority in the constitutional order. Part III then uses this framework to assess the competing views of the justices on federal Indian law. Part IV shifts from descriptive to normative to examine how Native nations and their advocates might try to navigate the current moment of doctrinal and jurisprudential uncertainty.

I. FEDERAL INDIAN LAW AND STRUCTURAL CONSTITUTIONAL LAW IN DIALOGUE

One key problem confronting federal Indian law is ambiguity: it is often not clear what kind of law it is. The field's main explicitly constitutional question is the scope of federal authority—though, until recently, this question has rarely proved difficult given that the Court has repeatedly emphasized that this power is "plenary." But this breadth of federal authority dramatically alters the rest of the field. Much of Indian law involves fights over the scope of tribal and state authority—in other words, precisely the sort of jurisdictional contests that the Court routinely turns to structural constitutional law to resolve. But here, because federal authority "supersed[es] both tribal and state authority," the federal government can structure state and tribal power how it wants.[42] In other words, these broad, even foundational, questions of the distribution of power are formally questions of ordinary federal law.

In theory, this classification empowers Congress and the Executive to define the relationship between tribes, states, and the federal government. Yet the political branches have not robustly exercised that power. Amidst the myriad Indian affairs statutes and regulations, only a handful explicitly define the scope of state and tribal jurisdiction in Indian country.[43] In practice, then, the expansiveness of federal power means that federal courts, especially the Supreme Court, routinely step in to define the relationship through federal common law.

This Part explores the challenges that have flowed from this classificatory ambiguity. The problem is not necessarily the category of federal common law itself,[44] but that the category's broad discretion and uncertain scope have allowed the Court to avoid any serious consideration of sources and methods in federal Indian law. The result is confusion because the Court is effectively doing what it

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42. *Brackeen*, 599 U.S. at 273.

43. Among those few statutes are Public Law 280, which authorizes certain states to exercise criminal and civil-adjudicatory jurisdiction within Indian country, 18 U.S.C. § 1162, and the Indian Civil Rights Act, which imposes general restrictions on tribal authority, 25 U.S.C. § 1302.

44. For some of the voluminous commentary on the legitimacy and scope of federal common law, see Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1985); Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585 (2006); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805 (1988). In recounting Indian law as a paradigmatic example of federal common law, Professor Field described it as an "area[] in which no enactment gives guidance concerning the content of the rules . . . ." Field, *supra*, at 892 n.39.

does in its structural constitutional law cases but without fully explaining or justifying what it is doing and why.[45] It is this aspect of federal Indian law, I suspect, that led Justice Scalia to call it "made up."

Structural constitutional law, of course, is similarly "made up" in the sense that it consists largely of judges crafting rules in the absence of clear text. But without romanticizing the field, the Court has developed clearer, more thought-out methods to resolve disputes over authority underdetermined by text. This Part, then, recounts these methods to suggest what they might bring to federal Indian law: a doctrinal repertoire that the Court could more reflectively and thoughtfully bring to questions that it now approaches in a largely ad hoc and uncertain manner.

A. What Kind of Law Is Federal Indian Law?

In 1990, the U.S. Supreme Court decided *Duro v. Reina*, which held that tribes lack criminal jurisdiction over non-member Indians within their territory.[46] No constitutional or statutory text mandated this result; the Court instead reasoned from "a review of history" as well as concerns about defendants' rights.[47] The next year, Congress enacted the so-called *Duro* fix, which overruled the decision and restored this jurisdiction.[48] When the *Duro* fix reached the Court in 2004 in *United States v. Lara*, the justices could not agree on what kind of rule *Duro* had established.[49] A majority concluded that *Duro* had been a federal common-law decision that Congress could overrule.[50] But Justices Souter and Scalia dissented, arguing that the Court's earlier discussion of "the jurisdictional implications of dependent sovereignty was constitutional in nature" and could not be overturned by Congress.[51]

This clash reflected a key problem in federal Indian law. When the Court is interpreting a legal text, it is easy to determine *what kind* of law the Court is crafting: constitutional law flows from constitutions, statutory law from statutes, and treaty law from treaties. But what happens when, as is often the case in federal Indian law, the authoritative text runs out and the Court construes legal principles drawn from other sources? What kind of law is it crafting?

This problem of classificatory ambiguity has deep roots in federal Indian law. In one of the field's earliest and most important decisions, *Worcester v. Georgia*, Chief Justice Marshall decided to pile on justifications for invalidating Georgia's attempt to exercise jurisdiction within Cherokee territory.[52] In contrast with later decisions, Marshall had lots of text to draw from—perhaps too much. Georgia's actions, he reasoned, violated the Constitution, federal treaties with the

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45. *Cf.* Alexander Tallchief Skibine, *Constitutionalism, Federal Common Law, and the Inherent Powers of Indian Tribes*, 39 AM. INDIAN L. REV. 77 (2014) (similarly critiquing the Court's common-law classification of federal Indian law but arguing for a remedy grounded in the Dormant Commerce Clause).

46. 495 U.S. 676 (1990).

47. *Id.* at 688–96.

48. 25 U.S.C. § 1301(2).

49. 541 U.S. 193 (2004).

50. *Id.* at 207.

51. *Id.* at 228–29 (Souter, J., dissenting).

52. 31 U.S. (6 Pet.) 515, 594–96 (1832).

Cherokee Nation, *and* the federal Trade and Intercourse Acts, leaving unclear *what* source of law was the foundational basis for the holding[53]—an ambiguity that created considerable confusion in coming years.[54]

In contrast with *Worcester*, as we shall see below, many of the Court's later nineteenth-century decisions addressing federal authority over Indian affairs had comparatively little text to draw from.[55] And so, although the term did not exist, these rulings relied on structural reasoning—deriving legal principles by reasoning about the nature of sovereignty and authority under the U.S. Constitution.

This problem of the lack of text persisted in federal Indian law into the twentieth century, the "age of statutes" notwithstanding.[56] The Court's most important decisions of the era—*Williams v. Lee*,[57] *Oliphant v. Suquamish Indian Tribe*,[58] *Montana v. United States*,[59] and even *Duro v. Reina*[60]—all struggled with how to resolve questions of tribal and state authority where, at least in the Court's telling, federal statutes and treaties were silent. The answer was usually to cobble together "a host of different sources"—including "historic practices, the views of experts, the experience of forerunners of modern tribal courts, and the published opinions of the Solicitor of the Department of the Interior," as *Lara* described of *Duro*'s methodology—in reaching broad conclusions about competing claims to jurisdiction.[61]

The dispute in *Lara* between the majority and Justice Souter underscores the problem with this approach. The *Lara* majority plausibly interpreted *Duro* as federal common law, in the sense that *Duro* sought to give effect to what it perceived as congressional intent, which Congress was free to alter.[62] Gluing together lots of history and administrative practice, as the *Lara* majority observed, does not thereby magically make the resulting rules constitutional.[63]

Except, of course, when it does. After all, as Section II.B discusses, the Court's federalism and separation of powers decisions routinely adjudicate conflicts over sovereignty and jurisdiction with little or no dispositive text. In those instances, the Court turns to "history and structure" or "historical gloss" to create *constitutional* law.[64] *Duro* felt strikingly similar to those decisions—it, too, delves into prior

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53. *Id.* at 561–62.

54. *See* W. Walters, *Review Essay: Preemption, Tribal Sovereignty, and* Worcester v. Georgia, 62 OR. L. REV. 127 (1983) (discussing this ambiguity).

55. *See infra* Section II.B.

56. The "age of statutes" is the coinage of Judge Guido Calabresi, who argued that extensive statutory regulation had displaced common-law reasoning. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

57. 358 U.S. 217 (1959).

58. 435 U.S. 191 (1978).

59. 450 U.S. 544 (1981).

60. 495 U.S. 676 (1990).

61. United States v. Lara, 541 U.S. 193, 206 (2004).

62. *Id.* at 206–07.

63. *Id.*

64. For some recent examples of this approach, see *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 590 U.S. 448, 458–59 (2020) (looking to history as well as text

practice, as well as engaging broadly with questions of rights and consent, to construct a jurisdictional rule. It is easy to understand, then, why Justices Souter and Scalia thought the *Duro* Court was making structural constitutional law—even if, as Justice Thomas pointed out in his *Lara* concurrence, that classification made little sense of what the *Duro* Court said.[65]

This problem of classification turns out to be rife within federal Indian law. It appears, for instance, in the Court's inconsistent treatment of tribal and state sovereign immunity. Justices Scalia and Thomas have described tribal sovereign immunity as a "judge-invented" and "judge-made doctrine" to undermine its legitimacy.[66] But they do not apply this description to the Court's recent expansive readings of *state* sovereign immunity, which Justice Thomas himself conceded was not rooted in any specific constitutional provision.[67] (Indeed, he criticized the respondent's contrary textualist argument as an exercise in "ahistorical literalism.")[68] Instead, Thomas grounded the scope of state sovereign immunity in Founding Era understandings of sovereignty under the common law and the law of nations.[69] But why those principles do not extend equally to tribes—who Justice Thomas acknowledges were considered "quasi-foreign" at the Founding[70]—is never explained.

The question of classification was even more glaring in the Court's recent decision in *Oklahoma v. Castro-Huerta*.[71] The case ostensibly concerned statutory interpretation: whether the Indian Country Crimes Act[72] preempted state jurisdiction over crimes committed by non-Indians against Indians in Indian Country. But the core dispute between Justice Kavanaugh's five-vote majority and Justice Gorsuch's four-vote dissent was the background principle that governs state jurisdiction in Indian country. Is the presumption that state jurisdiction exists unless displaced by

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and structure to consider the constitutional status of federal officials in the territories); *Franchise Tax Bd. v. Hyatt*, 587 U.S. 230, 236–37 (2019) (examining pre- and post-constitutional history to conclude that the Constitution preserves state sovereign immunity against suits by other states); *Zivotofsky v. Kerry*, 576 U.S. 1, 10 (2015) (examining "the Constitution's text and structure, as well as precedent and history" to resolve a separation of powers dispute); *N.L.R.B. v. Canning*, 573 U.S. 513, 524 (2014) (placing "significant weight upon historical practice" to resolve a separation-of-powers conflict). On historical gloss, see *Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396, 414 (2003).

65. *Lara*, 541 U.S. at 223–24 (Thomas, J., concurring). Maggie Blackhawk proposes another way to resolve this tension by reading the congressional statute at issue in *Lara* as a form of legislative constitutionalism and by reading it in light of other areas of law for which Congress has role in defining constitutional rules. *See* Blackhawk, *supra* note 38, at 2281–88.

66. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 814 (2014) (Scalia, J., dissenting); *id.* at 814 (Thomas, J., dissenting).

67. *See Hyatt*, 587 U.S. at 247 ("There are many other constitutional doctrines that are not spelled out in the Constitution but are nevertheless implicit in its structure and supported by historical practice . . . .").

68. *Id.*

69. *Id.* at 238–40.

70. *See infra* text accompanying note 238.

71. 597 U.S. 629 (2022).

72. 18 U.S.C. § 1152.

federal law, as the majority concluded?[73] Or, as the dissent argued, is the default the opposite—does state jurisdiction not exist unless affirmatively authorized by federal law?[74]

What made *Castro-Huerta* tricky, especially for a committed originalist, was that all the justices conceded that the dissent's view was the original understanding;[75] indeed, the Supreme Court held as much in *Worcester v. Georgia*.[76] Originally, the *Castro-Huerta* majority conceded, the principle of "territorial separation" held that "state law did not apply in Indian country—in the same way that New York law would not ordinarily have applied in New Jersey."[77] But, the majority continued, this "*Worcester*-era understanding . . . was abandoned later in the 1800s. After that change, Indian country in each State became part of that State's territory."[78]

Peculiarly, the Court never explains what kind of legal rule it thinks territorial separation was: constitutional? common law? statutory? The stakes of this classification are significant. If *Worcester* announced a constitutional rule—as the decision's text suggested, given that it invoked the "settled principles of our constitution"[79]—then presumably the Court would have to decide whether *Worcester* or the Court's late-nineteenth-century "abandonment" of the case a century after the Founding represented the better constitutional interpretation. (At least in its telling: I have elsewhere argued that this is a false choice, because the *Castro-Huerta* Court's narrative of abandonment is a flawed misunderstanding of the relevant precedents and history.[80]) By contrast, if "territorial separation" was merely judge-made law akin to, say, a common-law choice-of-law principle, then it is plausible to summarily invoke the relevant precedent. And that is ultimately what the Court did—the majority simply and implicitly cast the Founding Era understanding enshrined in *Worcester* as an archaic legal idea, akin to powdered wigs or coverture, that people once believed in but subsequently abandoned.

It is hard to imagine the Court handling this question so breezily in other areas of law. What if—to follow the Court's own hypothetical—New York suddenly unilaterally seized part of New Jersey?[81] This action would almost certainly be

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73. *Castro-Huerta*, 597 U.S. at 636 ("Indian country is part of the State, not separate from the State.").

74. *Id.* at 668 (Gorsuch, J., dissenting) ("Tribal sovereignty means that the criminal laws of the States 'can have no force' on tribal members within tribal bounds unless and until Congress clearly ordains otherwise.").

75. *Id.* at 636 (majority opinion) ("In the early years of the Republic, the Federal Government sometimes treated Indian country as separate from state territory.").

76. 31 U.S. (6 Pet.) 515 (1832).

77. *Casto-Huerta*, 597 U.S. at 643.

78. *Id.*

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

80. Ablavsky, *supra* note 34.

81. Like much in federal Indian law, this *Castro-Huerta* analogy actually echoes earlier discussions. In *Cherokee Nation*, Justice Johnson offered a similar analogy that underscored Native nations' quasi-foreign status. "If the State of Maine were to extend its laws over the province of New Brunswick, and send its magistrates to carry them into effect,"

considered a *constitutional* crisis.[82] It might be difficult to say *what* constitutional provision would directly be at issue in the case—perhaps one of the provisions of Article IV?[83]—but more likely the Court would simply reason that this action violated fundamental limits on state authority inherent in the structural constitution.

Ultimately, it is this cursory and high-handed analysis that seems the greatest problem with the Court's classificatory jiu-jitsu in Indian law. Despite their many flaws, the Court's structural constitutional law decisions are not usually ad hoc and conclusory: precisely because they recognize they are venturing beyond the text, they often contain voluminous, detailed analyses of the relevant evidence and reflections on method. By contrast, *Castro-Huerta* contained all of two sentences of constitutional analysis: one a question-begging invocation of the Tenth Amendment, the other a citation to a controversial case (decided, it's worth noting, contemporaneously with *Worcester*) that addressed mudflats in Mobile, Alabama, and said nothing about state jurisdiction in Indian country.[84] *Lara* was little better: Justices Souter and Scalia sought to elevate a new structural constitutional principle recrafting all of federal Indian law on the strength of a few pages of broadly sketched reasoning.[85]

Malleability and perfunctory analysis are not unique to Indian law. But they do seem facilitated by the justices' sense that Indian law is not "real" law at all—that it is all mushy judicially crafted rules. If everything in Indian law is made up, then the Court and many other commentators find it hard to recognize the justices' seemingly arbitrary classifications and treatment of legal principles as contradictions at all.

Federal Indian law deserves better. The field's history is complex, but, as Part II explores, it is full of structural arguments about the relations between the

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he observed, "it would be a parallel case." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 29 (1831) (Johnson, J., concurring).

82. Indeed, the question of interstate disputes over territory explicitly appeared within the text of the Articles of Confederation, ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 2, and, as I and others have explored elsewhere, were one of the main impetuses for the creation of a new federal government. PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES, 1775–1787 (1983); Gregory Ablavsky, *Empire States: The Coming of Dual Federalism*, 128 YALE L.J. 1792 (2019).

83. During Removal, for instance, southern states creatively—and somewhat preposterously—argued that Native nations constituted a "new state" in violation of the New State Clause. U.S. CONST. art. IV, § 3. Perhaps New Jersey could (somewhat dubiously) argue that New York's action constituted an "invasion" in violation of the Guarantee Clause, *id.* art. IV, § 4.

84. Oklahoma v. Castro-Huerta, 597 U.S. 629, 636 (2022) (quoting Lessee of Pollard v. Hagan, 44 U.S. (3 How.) 212, 228 (1845)). Among others, John Leshy has critiqued *Pollard* in detail, observing, "[T]he majority opinion made several broad and startingly novel assertions about the U.S. Constitution that were . . . completely at odds with historical practice and understanding." John Leshy, *Are U.S. Public Lands Unconstitutional?*, 69 HASTINGS L.J. 499, 531–41 (2018). Leshy has also noted that *Pollard* itself was arguably "abandoned": "its pronouncements had little influence on future public land policy," and the "sweeping *dicta* in *Pollard* . . . would not survive the Civil War." *Id.* at 541–45.

85. 541 U.S. 193, 228–29 (2004) (Souter, J., dissenting).

federal government, Native nations, and states.[86] As *Brackeen* demonstrates, some of the justices *can* take this past seriously when they wish, in ways that allow actual engagement with the historical and jurisprudential merits of their claims.[87] In short, if the Court is going to effectively engage in structural reasoning to reach its conclusions, then it might as well do so explicitly and engage in the kind of rigorous analysis that it has said such rulings require.

B. Structural Constitutional Law: Sources and Methods

Textual uncertainties about the division of governmental authority are precisely the questions that structural constitutional law attempts to resolve. As the Court recently observed, "There are many . . . constitutional doctrines that are not spelled out in the Constitution but are nevertheless implicit in its structure and supported by historical practice."[88]

The Court's method in recent cases where it has explicitly addressed constitutional structure has been relatively consistent. First, it finds as much meaning as it can from the text, often "reading between the Constitution's lines" to find implicit as well as explicit meanings.[89] But the text in these cases often sheds little light, so the Court turns to sources of history and practice.

One important source is preconstitutional legal understandings derived from the common law. In the state sovereign immunity cases, for instance, the Court has relied on the common law and Blackstone's *Commentaries* to assert that immunity from suit was "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution."[90] Another source is the familiar evidence of Founding Era understanding, such as *The Federalist Papers*, including evidence of the drafters' intentions. In holding that ratification waived state immunity for suits under the federal government's war powers, for instance, the Court recently reasoned that the "need to . . . establish[] a strong national power to raise and maintain a military was one of the 'recognized necessities' for calling the Constitutional Convention."[91]

Finally, the Court turns to post-ratification historical practice. Here, the Court particularly emphasizes both the actions of the First Congress as well as historical practices that have been long-standing and consistent. In its recent decision that territorial officials were not "officers of the United States" for Appointments Clause purposes, for instance, the Court read both the "practice of the First Congress" and the subsequent practice "unabated for more than two centuries" as "strong evidence of the original meaning of the Constitution."[92]

This thin and brief account of the Court's recent structural cases glosses over many complexities, but the Court itself seems to have avoided the

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86. *See infra* Part II.
87. *See infra* Part III.
88. Franchise Tax Bd. v. Hyatt, 587 U.S. 230, 247 (2019).
89. Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 368 (2023).
90. Alden v. Maine, 527 U.S. 706, 713 (1999).
91. Torres v. Tex. Dep't of Pub. Safety, 597 U.S. 580, 592 (2022)
92. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius, 590 U.S. 448, 461–62 (2020).

methodological debates that have dominated some of its recent individual rights cases.[93] In part, that may be because the Court's approach to structural reasoning is broad-minded: though it relies on the past, it reflects more the banal recognition that history is relevant to constitutional interpretation than intense originalist arguments over *which* historical sources and moments are dispositive.

This seeming agreement about methodology does not mean that the Court is necessarily resolving these structural constitutional law cases well. On the contrary, dissenting justices and scholars have been quite pointed about the merits of its decisions.[94] But many of these critiques come from *within* this well-established methodology: they argue, often with considerable evidence, that the Court's reading of the relevant sources and history is partial and tendentious. But as heated as they often are, these debates underscore the value of having a shared methodology in the first place: the method channels the dispute into a contest over the meaning of an agreed-upon set of evidence.

Similarly, the point here is not to valorize or endorse the Court's recent structural constitutional law decisions as disciplined or rooted in sound interpretations of precedent, text, or history. It is instead to highlight aspects of these rulings that are so taken for granted that scholars in the field don't find them worthy of comment. A personal analogy helps: my father, like other immigrants from the Soviet Union, was astounded at the piles of fruit that he encountered in American supermarkets—abundance other shoppers found completely unremarkable because they had never known otherwise. For an Indian law scholar, the equivalent is how *seriously* the justices seem to take questions of constitutional structure. They argue and engage with each other at length; they strive toward crafting defensible distinctions and categories; they develop and articulate jurisprudential theories that they seek to apply consistently across cases. None of this means that the answers they reach are good ones, or that they are not fundamentally motivated by ideological agendas. But they do seem to be trying, and they seem to care about crafting what they consider sound law.

C. Applying Structural Constitutional Law to Federal Indian Law

How might these methods apply to federal Indian law? Above all, I think, they serve to remind the Court that it doesn't need to "make up" law—or, more charitably, construct federal common law based on its subjective read of loosely assembled sources—even when relevant legal texts have little to say. Rather, the Court and scholars have provided a relatively well-established set of tools to try to resolve such silences, especially when they concern clashes over jurisdiction and governmental authority. Part II explores what insights such approaches might offer

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93. Consider, for instance, the debates among the justices in the recent Second Amendment decisions over which time periods and methods to favor in construing constitutional rights. *See* United States v. Rahimi, 602 U.S. 680 (2024); N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022).

94. For just one example, see the storm of criticism of the Court's recent decisions on separation of powers in administrative law. *See, e.g.*, Loper Bright Enters. v. Raimondo, 603 U.S. 369, 405–51 (2024) (Kagan, J., dissenting) ("If opinions had titles, a good candidate for today's would be Hubris Squared."); West Virginia v. EPA, 597 US. 697, 783 (2022) (Kagan, J., dissenting) ("Courts should be modest. Today, the Court is not.").

if applied thoughtfully and carefully to the history of federal and state authority in Indian law.

Employing these methods also does not require the Court to embrace Souter and Scalia's call to constitutionalize federal Indian law. Though these methods developed in the context of constitutional law, the Court could easily apply them to its common-law reasoning in Indian law, too. Nothing about this approach mandates that it yield congressionally unalterable rules defining authority and jurisdiction.

Nonetheless, as Part III will explore, many on the current Court are, in fact, already pressing toward Souter and Scalia's call to reimagine tribal and state authority as *constitutionally* defined, albeit very unevenly. While Justice Gorsuch sees the Constitution prescribing the authority of all three sovereigns, Justices Thomas and Kavanaugh have pushed toward constitutionalizing state authority alone—leaving Native sovereignty uniquely subject to federal divestment. And of course, there remains the risk that this current Court will do what Souter and Scalia urged—simply bootstrap the Court's thinly argued common-law limitations on Native authority and jurisdiction into constitutional restrictions.

In short, the Court is already groping toward combining Indian law and structural constitutional law—but by doing it unthinkingly and uncritically, it has offered little analysis or clear justification of *which* rules are constitutionally fixed and *which* are subject to change. The irony is that the Court has already elaborated a methodology to grapple with precisely these sorts of challenges. Applying this approach to Indian law might help the classificatory uncertainty that has long plagued the field.

II. TWO ANSWERS

It is tempting, in making constitutional arguments grounded in history, to invoke unbroken legal traditions tracing to the Founding. But federal Indian law eludes even heroic attempts to construct such an account: the dramatic shifts in law and policy are just too obvious. In his *Brackeen* concurrence, Justice Gorsuch accurately describes the relationship between tribal, state, and federal authority as a "puzzle" with complex "historical pieces."[95]

But although little in the history of federal Indian law is simple, applying the methods the Court has developed in its structural constitutional law cases highlights the significance of one change in constitutional structure in particular. At the time of the Constitution's drafting and ratification, Native nations were understood to lie outside the legislative jurisdiction of the United States. A century later, the Court and Congress concluded that Congress *could* legislate over Native peoples, a concept captured in the doctrine of federal plenary power. This new principle, although modified in parts, endures to the present.

This Part explores this jurisprudential transformation. Though hardly the only constitutional question in federal Indian law, the question of congressional legislative jurisdiction was, for the better part of a century, perhaps the most hotly debated issue surrounding federal authority over Indian affairs. It was also entangled

95. 599 U.S. 255, 331 (2023) (Gorsuch, J., concurring).

with other key questions, including the constitutional status of Native nations and the scope of state jurisdiction in Indian country.

At the same time, it is important not to overread what this jurisprudential change legally entailed. Federal policymakers in the past sometimes deployed broad and categorical language—intense arguments over whether Indian tribes were "independent nations," for instance.[96] But what they were debating was not whether Native nations were sovereign for all aspects of federal law; rather, they were hashing out this narrower, well-known, and long-standing jurisdictional question. This debate said much more about understandings of federal power, in other words, than it resolved what Anglo-Americans continued to regard as the difficult and anomalous question of defining Native status.

A. The First Answer: Founding Era Native Independence

Applying the approaches and methodology of structural constitutional law to Native status in the Founding Era yields a comparatively clear conclusion: most Anglo-Americans understood Native nations as outside the legislative authority of Congress.

Here, it is important to distinguish two distinct, if related, questions about the position of Native nations ostensibly within the borders of the United States that are often conflated: the question of these nations' *status* under the emerging international system of sovereign states, and the question of *jurisdiction*, especially the scope of federal congressional legislative authority.

On the question of Native status, Anglo-Americans argued fiercely, as I have traced more fully in my other work.[97] There were few precedents to draw from, and the position of Native nations within the British Empire had never been fully settled. In practice, Native nations were effectively independent, foreign nations, and Native leaders forcefully articulated their status as "free and independent nations" in their negotiations with the United States.[98] But after the American Revolution, many Anglo-Americans came to believe that Native nations had been "conquered" in the war and so had lost all claim to independence.[99] This arrogant assertion proved utterly disastrous, and Congress and the Executive quickly returned to the earlier diplomatic model that had acknowledged Native nations as self-governing and autonomous.[100]

Yet Anglo-Americans refused to concede that Native nations were fully independent, sovereign nations equal to the United States for the simple reason that Native homelands lay within the purported borders of the United States and so

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96. *See infra* text accompanying notes 163–64.

97. *See, e.g.*, Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1061–67 (2015).

98. Gregory Ablavsky, *Species of Sovereignty: Native Nationhood, the United States, and International Law, 1783–1795*, 106 J. AM. HIST. 591 (2019); Seth Davis, Eric Biber & Elena Kempf, *Persisting Sovereignties*, 170 U. PA. L. REV. 549 (2022).

99. James H. Merrell, *Declarations of Independence: Indian-White Relations in the New Nation*, *in* THE AMERICAN REVOLUTION: ITS CHARACTER AND LIMITS 197, 200 (Jack P. Greene ed., 1987).

100. *Id.* at 204.

comprised, from the perspective of the federal government, part of the nation's territory. This tension led early federal officials to craft various theories of nested and overlapping sovereignty, in which Native nations' independence was in some sense subordinate to the sovereignty of the United States.[101]

But even if Native nations were not sovereign nations on the international stage—as most federal policymakers insisted—that limitation did not mandate that tribes were, therefore, subject to congressional authority. On the contrary, on this second issue of congressional legislative jurisdiction, there seemed to be something approaching a consensus among Anglo-Americans: Congress could not govern Native nations through ordinary legislation.[102]

The conventional sources for establishing structural constitutional law demonstrate this consensus. Prior to the American Revolution, though British and colonial officials argued over whether Native peoples were, in some sense, British subjects, nearly all acknowledged that Native subjecthood did not extend colonial legislative jurisdiction over Native peoples.[103] "[S]uch protection alone . . . does not subject a People residing in a foreign Country, to the Dominion or Laws of the Crown of *Great-Britain*," the South Carolina legislature reasoned in 1737.[104] The British Empire's most famous attempt to govern Indian affairs, the Royal Proclamation of 1763, explicitly regulated only British officials and non-Natives by walling off Native lands from settlement and purchase.[105]

This view persisted during the drafting of both the Articles of Confederation and the U.S. Constitution. "We have no right over the Indians, whether within or without the real or pretended limits of any Colony," the influential Pennsylvanian delegate James Wilson observed as the Continental Congress debated the Articles of Confederation.[106] Article IX of the Articles ultimately affirmed congressional authority to regulate "all affairs *with* the Indians"—language

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101. Ablavsky, *supra* note 98, at 600–06.

102. A similar argument and canvas of historical sources appear in Clinton, *supra* note 7. Besides adducing additional Founding Era evidence, I also diverge from Clinton's account in several key respects. First, Clinton fails to distinguish between questions of U.S. *sovereignty* over Native nations, which was heavily debated, and congressional legislative jurisdiction. Second, his emphasis on Founding Era political theory that required consent for legitimate authority strikes me as at odds with the era's practice. As discussed above, early federal policymakers had few qualms about concluding that the United States enjoyed sovereignty over Native nations notwithstanding their lack of consent. *See supra* text accompanying notes 99-101.

103. On this debate and the agreement on Native political autonomy, see Craig Bryan Yirush, *Claiming the New World: Empire, Law, and Indigenous Rights in the Mohegan Case, 1704–1743*, 29 LAW & HIST. REV. 333 (2011).

104. REPORT OF THE COMMITTEE, APPOINTED TO EXAMINE INTO THE PROCEEDINGS OF THE PEOPLE OF GEORGIA, WITH RESPECT TO THE PROVINCE OF SOUTH-CAROLINA, AND THE DISPUTES SUBSISTING BETWEEN THE TWO COLONIES 28 (1736).

105. BRITISH ROYAL PROCLAMATIONS RELATING TO AMERICA, 1603–1783, at 212–18 (Clarence S. Brigham ed., 1911).

106. 6 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 1078 (Roscoe R. Hill ed., 1936).

that emphasized congressional power over bilateral relations, but not power *over* tribes.[107]

The text of the U.S. Constitution provides still further evidence. As many commentators have observed, the language of the Indian Commerce Clause classes "Indian tribes" alongside other sovereigns, and it, too, provides congressional authority to regulate *with*, not *over*, those tribes.[108] But the Apportionment Clause, which excluded "Indians not taxed" from the population counted for the purposes of congressional representation, was still more significant.[109] Native peoples, after all, were the only group that the Clause categorically excluded; not only did enslaved people infamously count as three-fifths of a person, but the provision also included within the enumeration many groups then barred from the franchise (women, children, non-citizens, non-property owners). Against the backdrop of a war that had hinged on the claim that legislative jurisdiction could extend only as far as representation,[110] this choice to expressly *exclude* Native peoples seemed to reflect the structural principle that Congress could not legislate over Native nations.

But the strongest evidence that Native nations lay outside U.S. legislative jurisdiction comes from both preconstitutional and post-ratification practice. Simply put, neither the colonial-era British governments nor the early United States purported to regulate Native peoples through statutes. Instead, from the beginning, Anglo-Americans entered into treaties with Native nations, a practice that the United States maintained.[111] This choice was significant. Anglo-Americans would later debate what this long-standing practice of treaty making meant for Native nations' precise status, but one conclusion seems clear. Treaties are not statutes imposed through legislative jurisdiction; unlike laws, their legality rests on mutual consent and agreement.

Congress's early Indian affairs statutes provide further confirmation. The Trade and Intercourse Acts, the key laws governing Indian affairs for the nation's first century, asserted robust federal authority over U.S. citizens and inhabitants within Indian country[112] but made no effort to regulate Indians there until 1817.[113] Even then, the statute only established federal criminal jurisdiction for crimes committed by an Indian against a U.S. citizen or inhabitant—in the same way that the 1790 Crimes Act asserted extraterritorial federal criminal jurisdiction over "any

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107. ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 4.

108. *See, e.g.*, Clinton, *supra* note 7, at 160; Pearl, *supra* note 7, at 325.

109. U.S. CONST. art. I § 2, cl. 3.

110. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 163–95 (1969).

111. *See* COLIN G. CALLOWAY, PEN AND INK WITCHCRAFT: TREATIES AND TREATY MAKING IN AMERICAN INDIAN HISTORY (2013); FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY (1994).

112. Act of July 22, 1790, ch. 33, 1 Stat. 137; Act of Mar. 1, 1793, ch. 19, 1 Stat. 329; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of Mar. 3, 1799, ch. 46, 1 Stat. 743; Act of Mar. 30, 1802, ch. 13, 2 Stat. 139. For additional background on these laws, see FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1780–1834 (1962).

113. Act of Mar. 3, 1817, § 2, 3 Stat. 383, 383.

person or persons" who committed certain crimes against U.S. citizens even outside U.S. territory.[114]

Contemporaneous commentators agreed. In 1795, William Bradford, the second U.S. Attorney General, wrote in a letter to the Secretary of the Treasury:

> There can be no doubt, that all the laws of Congress, unless local in their nature or limited in their terms, are, in their operation coextensive with the Territory of the United States, and obligatory upon every person therein, *except independent Nations & Tribes of Indians residing on Indian lands*.[115]

In 1803, President Thomas Jefferson proposed a constitutional amendment legitimating the Louisiana Purchase. In Jefferson's mind, this amendment was necessary to extend the nation's preexisting constitutional order into its newly acquired territory and so reflected his interpretation of the powers that the federal government already enjoyed under the Constitution.[116] The amendment would have recognized the congressional power "to regulate trade & intercourse *between* the Indian inhabitants and all other persons" and "to exercise police over all persons therein [Louisiana], *not being Indian inhabitants*."[117] Similarly, in 1815, federal diplomats meeting with their British counterparts summarized the "political system" that the United States had "adopted and organized" for Native nations to their British counterparts.[118] "Under that system the Indians residing within the United States are so far independent that they live under their own customs, and *not under the laws of the United States*," they observed.[119]

The U.S. Supreme Court, too, reached a similar conclusion. In 1810, when the Court decided *Fletcher v. Peck*, its first case implicating Indian affairs, Justice Johnson, writing separately, summarized the "state of the Indian nations" by observing, "We legislate upon the conduct of [non-Native] strangers or [U.S.] citizens within their limits, but innumerable treaties formed with them acknowledge them to be an independent people."[120] Johnson soon made clear what he meant by

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114. Act of Apr. 30, 1790, ch. 9, §13, 1 Stat. 115.

115. Letter from William Bradford, Att'y Gen. to Oliver Wolcott, Jr., Sec'y of Treasury (June 19, 1795), *in* 2 TERRITORIAL PAPERS OF THE UNITED STATES 520 (Clarence Edwin Carter ed., 1934) (emphasis added).

116. *See Constitutional Amendment on Louisiana: Editorial Note*, *in* 40 THE PAPERS OF THOMAS JEFFERSON 681, 681–85 (discussing Jefferson's hesitations over Louisiana); Blackhawk, *American Colonialism*, *supra* note 20, at 33–43 (summarizing the constitutional debate).

117. Thomas Jefferson, *Revised Amendment* (July 9, 1803), *in* 40 THE PAPERS OF THOMAS JEFFERSON 686–88 (Barbara B. Oberg ed., 2013).

118. 3 AMERICAN STATE PAPERS: FOREIGN RELATIONS 717 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832).

119. *Id.* at 716 (emphasis added).

120. 10 U.S. (6 Cranch) 87, 146–47 (Johnson, J., dissenting).

"independent," stating the federal government held "the right of governing every person within their [Native] limits *except themselves*."[121]

Taken together, then, constitutional text and pre- and post-ratification history and practice demonstrate the Founding Era structural principle that Native nations lay outside congressional legislative jurisdiction. Of course, this principle applied only to those Native communities that Attorney General Bradford described as "independent"[122]—or, in the terms of the constitutional text, those who were "not taxed." Because Anglo-Americans believed that Native peoples needed to either assimilate or vanish, they anticipated a future where Native nations would cease to exist as separate sovereigns, and Native peoples would become subject to federal and state law.[123] There were some communities along the Eastern Seaboard that whites often deemed "remnants" and derided as not truly "Indian." These communities, officials believed, had already lost their independent status—or, as Justice Johnson put it in *Fletcher*, had "totally extinguished their national fire, and submitted themselves to the laws of the States."[124] The Trade and Intercourse Act itself stipulated that it did not apply to "Indians living on lands surrounded by

121. *Id.* at 147 (emphasis added). On six subsequent occasions, the Supreme Court has invoked this quotation to justify limitations on the scope of Native rather than federal jurisdiction. Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 328 (2008); Atkinson Trading Co. v. Shirley, 532 U.S. 645, 650 (2001); Nevada v. Hicks, 533 U.S. 353, 376 (2001) (Souter, J., concurring); Montana v. United States, 450 U.S. 544, 565 (1981); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 172 n.23 (1982) (Stevens, J., dissenting). But—having studied the surrounding context for years—I am fully persuaded that this reading is incorrect. The statement speaks of "a limitation on [Native] sovereignty," *Fletcher*, 10 U.S. (6 Cranch) at 147, but the Court incorrectly interpreted this language as a limitation on Native *jurisdiction*. On the contrary, the context makes very clear that the limitation on Native sovereignty at issue here is the intervention of *federal* sovereignty and jurisdiction. This interpretation flows both from the language at the beginning of the same paragraph, earlier quoted, about federal power over "strangers or citizens within their limits," *id.* at 146, but also the immediately preceding statement in the same sentence that "[a]ll the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets," *id.* at 147, which is obviously not a description of the scope of *Native* jurisdiction but rather a description of the consequences of the restrictions imposed by *federal* action. Moreover, Johnson's language here closely parallels statements by Thomas Jefferson while Secretary of State on this question two decades earlier. When asked by the British what authority the United States claimed over the "internal regulation of the Indians occupying lands within the American territory," Jefferson reportedly replied that "in respect to the internal regulation of the Indians the United States have not hitherto exercised any other jurisdiction over them than that of prohibiting them from allowing any [non-Native] person to inhabit their country, who were not provided with licenses from the government of the United States." *Enclosure: Report on Public Lands, Nov. 8, 1791*, *in* 22 PAPERS OF THOMAS JEFFERSON: MAIN SERIES 274 (Charles T. Cullen ed. 1987).

122. *See* Letter from William Bradford to Oliver Wolcott, Jr., *supra* note 115.

123. On this trope of the vanishing Indian in this era, see JEAN M. O'BRIEN, FIRSTING AND LASTING: WRITING INDIANS OUT OF EXISTENCE IN NEW ENGLAND (2010); Kathryn E. Fort, *The Vanishing Indian Returns: Tribes, Popular Originalism, and the Supreme Court*, 57 ST. LOUIS U. L.J. 297 (2013).

124. *Fletcher*, 10 U.S. (6 Cranch) at 146 (Johnson, J., dissenting).

settlements of the citizens of the United States, and being within the *ordinary jurisdiction* of any of the individual states."[125]

Parsing *when* particular Native nations ceased to be independent became perhaps *the* dominant legal question in antebellum Indian affairs. But to briefly gloss over a lengthy debate, antebellum courts mostly concluded that this issue was a political question for the Executive.[126]

As the United States grew more powerful in the early nineteenth century, however, some politicians and federal officials began to argue that it was time for a "radical change in the system" governing relations with *all* Native nations.[127] "We have always treated them as an independent people; and, however insignificant a tribe may become, and however surrounded by a dense white population, so long as there are any remains, it continues independent of our laws and authority," Secretary of War John C. Calhoun summarized in an 1822 report to Congress.[128] But this approach had failed, he argued, and so he advocated a new policy—"to extend over them our laws and authority."[129]

What Calhoun proposed was the elimination of Native sovereignty as a limit on the jurisdiction of the United States. This idea had potentially radical consequences—and not just for federal authority. From the beginning, constitutional law and practice had heavily curtailed state authority within Native territory, delineated as "Indian country." This limit had two distinct sources. It reflected the view that the Constitution had granted the federal government the exclusive authority to negotiate with Native nations,[130] but it also reflected the legal conclusion that if the United States *as a nation* lacked legislative jurisdiction over Native peoples in Indian country, then states, as constituent parts of the nation, *a fortiori*, lacked it also. Secretary of War Henry Knox expressly conjoined these issues of Native status and state jurisdiction in 1789, weeks after President Washington's inauguration: "The independent nations and tribes of [I]ndians ought to be

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125. Act of May 19, 1796, § 19, 1 Stat. 469, 474 (emphasis added).

126. *Compare* Jackson v. Goodell, 20 Johns. 188, 193 (N.Y. Sup. Ct. 1822) (ruling that Native nations in New York had "lost every attribute of sovereignty, and become entirely dependent upon, and subject to our government"), *with* Goodell v. Jackson, 20 Johns. 693, 714–17 (N.Y. 1823) (overruling that decision and holding that "when the time shall arrive for us to break down the partition wall between us and them," it must be done with Native consent and the "entire approbation of the government of the United States"). *Cf.* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 593–94 (McLean, J., concurring) (observing that although Native "self-government" was "undoubtedly contemplated to be temporary," he questioned whether identifying this "point" of transformation was a "judicial question").

127. Sec'y of War John C. Calhoun, *Progress Made in Civilizing the Indians* (Jan. 15), 1820, *in* 2 AMERICAN STATE PAPERS: INDIAN AFFAIRS 200 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832).

128. Sec'y of War John C. Calhoun, *Condition of the Several Indian Tribes* (Feb. 8, 1822), *in* 2 AMERICAN STATE PAPERS, at 275–76; *see also* Sec'y of War John C. Calhoun, *Exchange of Lands with the Indians* (Jan. 9, 1817), *in* 2 AMERICAN STATE PAPERS, at 124 ("Those tribes have been recognized so far, as independent communities, as to become parties to treaties with us, and to have a right to govern themselves without being subject to the laws of the United States.").

129. Calhoun, *Condition of the Several Indian Tribes*, *supra* note 128, at 275–76.

130. *See* Ablavsky, *supra* note 97, at 1040–45.

considered as foreign nations, not as the subjects of any particular state."[131] In other words, Native independence—their foreignness—made Native territory extraterritorial to *both* the federal and state governments for the purposes of legislative jurisdiction.

This significance of Native independence as a jurisdictional bar makes intelligible the swirling political and legal debate over Native status in the 1820s and 1830s.[132] Known at the time as "Indian Removal," at its core, the legal battle was a contest over jurisdiction. Southern state advocates proposed a theory—radically at odds with the Founding Era approach, as Calhoun's comment suggested—that the *states*, not Native nations or the federal government, enjoyed sole jurisdiction over Indian country.[133] This position required a two-pronged jurisprudential attack. State advocates critiqued, within the state–federal binary familiar to us, the long-standing principle of federal supremacy over relations *with* Native nations. But they also repeatedly and roundly assaulted what they derisively referred to as the "high pretension of savage sovereignty," recognizing that Native independence posed a distinct bar to state claims of territorial jurisdiction.[134]

These jurisdictional struggles yielded the Marshall Trilogy—the three foundational early Supreme Court precedents on Native status penned by Chief Justice Marshall. White Southerners hailed the first two of those decisions, *Johnson v. M'Intosh*[135] and *Cherokee Nation v. Georgia*,[136] as vindicating their arguments for limited Native sovereignty; *Cherokee Nation* even expressly rejected the Cherokee Nation's argument that it was a foreign state, instead labeling Native nations as "domestic dependent nations."[137] But this reading arguably misunderstood what Marshall was doing. Both *M'Intosh* and *Cherokee Nation* focused principally on the international-law status of Native sovereignty and largely echoed the earlier conclusions of federal policymakers: Native nations could not be fully independent because they fell within the borders of the United States.

By contrast, when Marshall had to decide whether Native nations were *jurisdictionally* independent of the states, in *Worcester v. Georgia*, he forcefully answered yes.[138] He offered two intertwined reasons: the Cherokee Nation remained

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131. Letter from Henry Knox to President Washington (July 7, 1789), *in* 3 PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 134, 137–38 (Dorothy Twohig ed., 1989).

132. For a recent excellent survey recounting this struggle, see CLAUDIO SAUNT, UNWORTHY REPUBLIC: THE DISPOSSESSION OF NATIVE AMERICANS AND THE ROAD TO INDIAN TERRITORY (2020).

133. On state jurisprudential theories during this period, see TIM ALAN GARRISON, THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS (2002); DEBORAH A ROSEN, AMERICAN INDIANS AND STATE LAW: SOVEREIGNTY, RACE, AND CITIZENSHIP, 1790–1880 (2007); W. Tanner Allread, *The Specter of Indian Removal: The Persistence of State Supremacy Arguments in Federal Indian Law*, 123 COLUM. L. REV. 1533 (2023).

134. SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 4–24 (1994).

135. 21 U.S. (8 Wheat) 543 (1823).

136. 30 U.S. (5 Pet.) 1 (1831).

137. *Id.* at 13–15.

138. 31 U.S. (6 Pet.) 515, 516 (1832).

a sovereign, separate nation outside Georgia's territorial jurisdiction, *and* the federal government had recognized Cherokee independence and possessed the sole authority to regulate "our intercourse with the Indian tribes."[139]

Marshall's rejection of state jurisdiction left unsettled, however, the question of whether the *federal government* could legislate for Native nations. President Jackson had strong views on this question: prior to his election, he had challenged the claim of Native immunity from federal law. "I have always thought, that Congress has much right to regulate by acts of Legislation all Indian concerns as they had of Territories," he wrote, roundly attacking the practice of treaty making.[140] And during Removal, Jackson, not Marshall or the Cherokee leaders, had triumphed *politically*, and the federal government deported the Cherokee Nation, and many other Native nations, west of the Mississippi River.

But Jackson did not win *legally*. The Indian Removal Act did not legislate *for* Native nations: it still relied on their (heavily coerced and largely fictitious) consent through the treaties that Jackson abhorred.[141] Moreover, when, in 1834, Congress debated creating a new federal territorial government over the deported Native nations, the proposal failed in part because it infringed on Native independence from federal legislation.[142] "[W]hat constitutional right had the United States to form a constitution and form of government for Indians?" John Quincy Adams, serving in Congress, demanded.[143]

Taken together, this first answer provided a clear and durable set of rules that survived even amidst constant contestation and challenge. The Constitution, along with federal statutes and treaties, precluded state jurisdiction within Indian country, which Native sovereignty rendered extraterritorial to states. The Constitution granted the federal government authority over trade and intercourse *with* Native nations but did not create congressional legislative jurisdiction *over* Indians. The Constitution instead authorized the federal government to exercise authority over Native nations only through treaties—where Native nations themselves had formally consented.

B. The Second Answer: Late-Nineteenth-Century Federal Plenary Power

Fifty years later, the law had changed. In 1886, in *United States v. Kagama*, the Supreme Court upheld the Major Crimes Act, which for the first time established federal criminal jurisdiction over crimes by Indians against Indians within Indian country, against a challenge that the law exceeded congressional authority.[144] The

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139. *Id.* at 561–63.

140. Letter from Andrew Jackson to President James Monroe (Mar. 4, 1817), *in* 4 THE PAPERS OF ANDREW JACKSON 93–99 (Sam B. Smith & Harriet Fason Chappell Owsley eds., 1980). Jackson three years later similarly urged, "do[ing] away the farce of treating with Indian tribes." Letter from Andrew Jackson to John Caldwell Calhoun (Sept. 2, 1820), *in* 4 THE PAPERS OF ANDREW JACKSON 388. "There can be no question but congress has right to Legislate upon this Subject." *Id.*

141. Act of May 28, 1830, ch. 148, 4 Stat. 411.

142. *See* FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 302–09 (1986).

143. 10 REG. DEB. 4763 (1834).

144. 118 U.S. 375 (1886).

decision is conventionally described as announcing the doctrine of federal plenary power—the rule that the federal government enjoys complete authority to legislate over Native nations. But as with many canonical opinions, *Kagama* was, in context, more an evolution than a sharp break from prior precedent; it was also not as radical or sweeping as the Court's subsequent decisions, which extended the *Kagama* principle in harsh new ways.

There was nothing inherently inconsistent about the Founding Era understanding that Native nations were in some sense subordinate to the authority of the United States but not subject to congressional legislation. But this view did rely on a distinction between *sovereignty* and legislative *jurisdiction* that was both easily misunderstood and increasingly less plausible with the ascendance of ideas of legislative supremacy. As Native nations began to seem less foreign to Anglo-Americans, the idea that they might lie outside federal legislative jurisdiction began to erode, too.

This blurring between questions of sovereignty and congressional authority first appeared in the 1846 Supreme Court decision *United States v. Rogers*, which upheld federal criminal jurisdiction over what the Court deemed a non-Native man in Indian country.[145] Chief Justice Taney—notably a Jackson appointee and ally—first reiterated the well-established sovereignty rulings of *M'Intosh* and *Cherokee Nation*: "[T]he Indian tribes residing within the territorial limits of the United States are subject to their authority," he observed.[146] But for the first time, he interpreted U.S. *sovereignty* to also encompass legislative *jurisdiction*: "[W]here the country occupied by them is not within the limits of one of the states, Congress may [therefore] by law punish any offense committed there, no matter whether the offender be a white man or an Indian."[147]

Nine years later, in the obscure inheritance dispute *Mackey v. Coxe*, the question of Native status arose again, this time in the context of an 1812 federal law that mandated that the District of Columbia acknowledge executors from states or territories.[148] The Court concluded that this statute encompassed the Cherokee Nation as a "domestic territory."[149] But, as in *Rogers*, the Court went further to opine that Native nations "are under the constitution of the Union, and subject to acts of congress regulating trade . . . . They are . . . within our jurisdiction."[150]

Ironically, neither *Rogers* nor *Mackey* actually *applied* a federal statute to Indians in Indian country. *Rogers* rested on the well-established principle that federal legislative jurisdiction extended extraterritorially over U.S. citizens,[151] while *Mackey* merely reiterated the *Cherokee Nation* holding that Native nations were

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145. 45 U.S. (4 How.) 567 (1846).

146. *Id.* at 572.

147. *Id.* This phrasing was confusing, since it was unclear whether it encompassed Indian-on-Indian crime and also seemed to rely on congressional authority to establish criminal law in the federal territories—which did not usually extend into Native lands.

148. 59 U.S. (18 How.) 100 (1855).

149. *Id.* at 103.

150. *Id.*

151. *See, e.g.*, *supra* text accompanying notes 112–113, 120–121.

domestic, not foreign.[152] But although neither case involved federal legislative jurisdiction over Native peoples, their dicta laid the foundation for its assertion.

A similar jurisdictional debate was happening simultaneously in Congress. During and after the Civil War, many in Congress took up the earlier calls that instead of governing relations with Native nations through treaties, the United States should instead legislate over them directly. But there was disagreement over whether Congress constitutionally enjoyed that authority. This argument culminated during debate over the draft Fourteenth Amendment, which limited birthright citizenship to persons "subject to the jurisdiction" of the United States.[153] This provision prompted an extensive discussion over whether Native peoples were, legally, subject to congressional legislative jurisdiction. Some argued that, constitutionally, they were not: Senator Howard of Michigan, for instance, pointed to the Indian Commerce Clause as a "full and complete recognition of the national character of the Indian tribes."[154] But others rejected that view. "[O]ver all the Indian tribes within the limits of the United States, the United States may—that is the test—exercise jurisdiction," Senator Johnson of Maryland opined.[155] "Whether they exercise it in point of fact is another question," he continued, "but the question as to the authority to legislate is one, I think, about which, if we were to exercise it, the courts would have no doubt."[156]

Debate over this question persisted. In 1870, a congressional committee tasked with reporting on the consequences of the Fourteenth Amendment for Indian tribes argued forcefully that the Constitution, treaties, statutes, and court rulings all showed that Indians "have never been subject to the jurisdiction of the United States."[157] The committee concluded that an "act of Congress which should assume to treat the members of a tribe as subject to the municipal jurisdiction of the United States would be unconstitutional void."[158]

Ironically, the same year, the Supreme Court reached the opposite conclusion in *The Cherokee Tobacco*, which vindicated Senator Johnson's prediction.[159] The case involved an attempt by the Internal Revenue Office to tax goods within Cherokee territory under a law that applied to all articles "produced anywhere within the exterior boundaries of the United States."[160] The Cherokees forcefully argued that Cherokee territory lay outside congressional legislative authority, even citing the 1870 congressional report at length.[161] But the Court rejected this position out of hand, deeming it borderline frivolous. Citing *M'Intosh*, *Rogers*, and *Mackey*, the Court held that Congress obviously *could* legislate over Native peoples in Indian country if it wished, observing, "[T]hese propositions are

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152. *See supra* text accompanying notes 136–37.
153. U.S. CONST. amend. XIV, § 1.
154. CONG. GLOBE, 39th Cong., 1st Sess. 2895 (1866) (remarks of Sen. Howard).
155. *Id.* at 2893 (remarks of Sen. Johnson).
156. *Id.*
157. S. REP. NO. 41-268, at 9 (1870).
158. *Id.*
159. 78 U.S. (11 Wall.) 616 (1870).
160. *Id.* at 618.
161. Brief for Plaintiffs-in-Error, The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1870) (No. 253), at 24–40.

so well settled in our jurisprudence that it would be a waste of time to discuss them or to refer to further authorities in their support."[162] (Arguably, there were no additional, relevant authorities to cite.)

The following year, Congress seemingly endorsed the Court's position when it enacted a law decreeing that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty."[163] Grounded in politics and interbranch rivalries, the provision—slipped into a conference report—occasioned a brief debate about its constitutionality in which its defenders argued that it reflected Congress's power to "withdraw our recognition of the national character of a people in the anomalous condition of an independent tribe" for the purposes of treaty making.[164]

Yet, despite breaking with a century of practice, the 1871 Act still failed to settle the question of federal legislative jurisdiction over Native peoples. The law, after all, only declared what the United States would *not* do. In "forever closing the only course of procedure known for the adjustment of difficulties, and even for the administration of ordinary business with Indian tribes," one Commissioner of Indian Affairs complained, "Congress provided no substitute."[165] In fact, for years after the 1871 Act, Congress implicitly assumed that Native consent was still necessary for federal law to govern internal Native issues. It continued, for instance, to negotiate bilateral agreements with Native nations, which it now ratified through statute rather than treaty.[166] It also enacted legislation that became law only if tribes consented.[167]

Arguably, then, it was not the 1871 Act ending treaty making but the 1885 Major Crimes Act that first directly challenged the original structural constitutional principle that Native nations' internal affairs lay outside congressional legislative power. The law sought to establish federal criminal jurisdiction over what had long been the paradigmatic *internal* legal issue—Indian-on-Indian crime—without any claim to Native consent. And when the Act was almost immediately challenged, in *United States v. Kagama*, the Supreme Court recognized the law's departure. The Major Crimes Act, the Court observed, was not one of the "trade and intercourse laws" that regulated relations between Natives and non-Natives; the law instead intervened in solely internal tribal matters.[168] "This proposition itself is new in legislation of congress," the Court acknowledged.[169]

But the Court upheld the statute notwithstanding its novelty by invoking prior erosions of the structural limitation on congressional authority; it even

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162. *Cherokee Tobacco*, 78 U.S. (11 Wall.) at 619.

163. Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566.

164. CONG. GLOBE, 41st Cong., 3d Sess. 1812 (1871) (statement of Sen. Armstrong).

165. FRANCIS A. WALKER, THE INDIAN QUESTION 12 (1874).

166. FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 314–26 (1994).

167. *Id.* at 327–30.

168. United States v. Kagama, 118 U.S. 375, 378–79 (1886).

169. *Id.* at 377.

expressly cited the *Rogers* dicta.[170] Yet the Court's reasoning in *Kagama* was much fuller than these earlier conclusory justifications of congressional authority and sounded heavily in structural reasoning. The opinion's key jurisprudential move was the erasure of Native independence as a jurisdictional limit. Justice Miller described Native nations "not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union."[171] But if Native nations were not sovereign, then, he reasoned, their lands and territory had to fall "under the political control of the government of the United States, or of the states of the Union. There exists within the broad domain of sovereignty but these two."[172] Under this zero-sum logic, either the states *or* the federal government had to enjoy legislative jurisdiction over Indian country.

The Court then rejected state jurisdiction. Removing Native sovereignty as a jurisdictional limitation, of course, undercut the Founding Era understanding of why Indian country lay outside state control. But by the late nineteenth century, limitations on state jurisdiction had also been written into federal treaties, statutes, and Supreme Court decisions. In other words, positive federal law now significantly limited state power in Indian country. Moving from extraterritoriality to federal preemption as the basis for limiting state power in Indian country did change the Court's jurisprudence, as its late-nineteenth-century decisions sometimes authorized state jurisdiction within Indian country, primarily over non-Indians, when the Court perceived congressional silence.[173] But this shift did not alter the core holding in *Worcester*—expressly reaffirmed in *Kagama*—that Native nations "could not be subjected to the laws of the state."[174]

But if Native peoples were still immune from state jurisdiction, then under the Court's zero-sum logic, the federal government was the *only* sovereign that could exercise legislative jurisdiction over Indian country. And so, the Court concluded, the power to enact laws over Indian country "must exist in that [federal] government, because it never has existed anywhere else."[175]

For nearly a century, Congress and the Supreme Court had considered Native nations as outside congressional jurisdiction. Now, in the wake of *Kagama*, Congress rapidly abandoned any hesitation it had about legislating over Native nations, including their internal affairs. A year after *Kagama*, Congress divided up Native lands through the Dawes Act without their consent;[176] in the following decades, it established federal tribunals to decide who qualified as a tribal member;[177] and during the creation of the state of Oklahoma from the Indian

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170. *Id.* at 380–81.

171. *Id.* at 381–82.

172. *Id.* at 379.

173. *See, e.g.*, United States v. McBratney, 104 U.S. 621, 623–24 (1881); Draper v. United States, 164 U.S. 240 (1896).

174. *Kagama*, 118 U.S. at 384 (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)).

175. *Id.* at 384–85.

176. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388.

177. Act of July 1, 1902, § 33, 32 Stat. 641, 648–49; 25 Op. Att'y Gen. 152 (1904); 26 Op. Att'y Gen. 127 (1907).

Territory, it even attempted to abolish some Native governments altogether.[178] At the same time, Congress delegated enormous amounts of authority to the Executive, which used its power to inflict now-infamous horrors on Native nations—the creation of coercive boarding schools to extinguish Native culture, the forcible confinement of Native peoples within reservations, the establishment of courts and police to uproot Native practices, and the criminalization of Indigenous religions.[179]

Yet *Kagama* arguably does not deserve as much credit, or blame, for this ensuing history as it currently receives. Here, we might distinguish between "weak" and "strong" versions of federal plenary power over Indian affairs. The "weak" version, decided in *Kagama*, held that Congress enjoyed legislative jurisdiction over Native peoples. This ruling was at odds with earlier constitutional understandings; it also was a colonial decision in the literal sense in that it subjected Native nations to an outside authority to which they did not even nominally consent.[180] But it arguably placed Native peoples in a similar situation to the millions of non-Natives who fell within the scope of congressional legislative authority.

The "strong" version of plenary power, by contrast, came when Native litigants subsequently challenged this era's aggressive uses of federal power over them. They argued, not that Congress lacked legislative jurisdiction, but that its actions violated specific provisions that restricted federal authority: treaty rights,[181] prohibitions on retroactive legislation,[182] and express constitutional guarantees like the Fifth Amendment.[183] Yet in each instance, the Court swept away those objections to federal actions, holding—in language that did not appear in *Kagama*—that "congress possesses plenary power of legislation in regard to them, [Indian tribes]."[184]

The strong version of plenary power, in short, did more than recognize congressional legislative authority; it established a broad political question doctrine that largely immunized congressional action from judicial review: "We must presume that Congress acted in perfect good faith in the dealings with the Indians," the Court reasoned in *Lone Wolf v. Hitchcock*.[185] With its expansive deference to Congress and the Executive, this strong version of plenary power eliminated any meaningful judicial check on the abuses of the assimilation era.

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178. Curtis Act, ch. 517, § 28, 30 Stat. 495 (1898).

179. On this history, see NED BLACKHAWK, THE REDISCOVERY OF AMERICA: NATIVE PEOPLES AND THE UNMAKING OF U.S. HISTORY 329–64 (2023); FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880–1920 (1984); LOUIS S. WARREN, GOD'S RED SON: THE GHOST DANCE RELIGION AND THE MAKING OF MODERN AMERICA (2017).

180. Maggie Blackhawk plausibly describes plenary power as less a doctrine than a dodge that allowed the judiciary to avoid "justification and public reason" for the United States's aggressive claims of sovereignty. Blackhawk, *American Colonialism*, *supra* note 20, at 55–65.

181. Lone Wolf v. Hitchcock, 187 U.S. 553, 556–57 (1903).

182. Stephens v. Cherokee Nation, 174 U.S. 445, 447–78 (1899).

183. *Lone Wolf*, 187 U.S. at 564.

184. *Stephens*, 174 U.S. at 478; *see also Lone Wolf*, 187 U.S. at 565, 568.

185. 187 U.S. at 568; *see also* Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902).

The other misreading of *Kagama*, coupled with Congress's simultaneous actions, is that it abandoned the principle of Native sovereignty. Sometimes, of course, the era's federal policymakers spoke in categorical terms, as if they were ending Native independence altogether. But a more accurate interpretation of the era's jurisprudence highlights *Kagama*'s emphasis on the "*attributes* of sovereignty."[186] Late-nineteenth-century federal law eliminated *one* of those attributes for Native nations—immunity from congressional legislation. At the exact same historical moment, however, federal courts routinely affirmed the persistence of *other* attributes of tribal sovereignty, including the principle that Native authority is inherent and not derived from the United States;[187] that Indian tribes retained the powers to regulate entry and to tax goods and people on their lands, including non-Natives;[188] and that tribes enjoyed sovereign immunity from suit.[189] Indeed, these decisions often expressly rejected legal arguments that Native nations' shifting status had shorn them of these rights. As one federal judge put it, rebuffing a litigant's attempt to invoke the 1871 end of treaty making to overcome tribal sovereign immunity: "They still . . . preserve their autonomy . . . they are a tribe or sovereign nation with one exception, or limitation."[190]

Kagama's reasoning has few defenders today, with justices and scholars decrying the decision as undergirding an "unprincipled assertion of raw federal authority."[191] But this rush to condemn has at times overridden the effort to understand. It is not surprising that *Kagama*'s arguments fail to persuade today, since they are the product of sharply different jurisprudential era. Yet the accurate externalist critique that the decision was an apology for colonialism proves too much, because it applies equally forcefully to most of federal Indian law, including the Founding.[192] From an internalist perspective, by contrast, the ruling distilled jurisprudential trends into the era's clearest statement of what I've termed the "second answer" to the structural questions posed by federal Indian law. We might disagree with the principles undergirding that answer, but that does not make it unprincipled.

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186. United States v. Kagama, 118 U.S. 375, 378 (1886).

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

188. *See* Morris v. Hitchcock, 194 U.S. 384 (1904); Buster v. Wright, 135 F. 947 (8th Cir. 1905).

189. *E.g.*, Thebo v. Choctaw Tribe of Indians, 66 F. 372 (8th Cir. 1895); *see also* William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 AM. U. L. REV. 1587, 1642–45 (2013) (describing *Chadick v. Duncan*, an unprinted lower federal court decision from 1894, which was the "first case of record to formally recognize the tribal immunity doctrine").

190. Wood, *supra* note 189, at 1644 (quoting the *Chadick* court's holding that the 1871 statute did not extinguish tribal sovereign immunity: "They still . . . preserve their autonomy . . . they are a tribe or sovereign nation with one exception, or limitation").

191. Haaland v. Brackeen, 599 U.S. 255, 327 (2023) (Gorsuch, J., concurring) (quoting Clinton, *supra* note 7, at 163); *see also id.* at 360–61 (Thomas, J., dissenting) (describing *Kagama*'s reasoning as "pure *ipse dixit*" and "lack[ing] any constitutional basis").

192. *See* ROBERT A. WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990); Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999 (2014).

This second answer at once built on and repudiated the first. Some of the first answer's presumptions survived into this new era: absent federal action, tribal authority endured, while states still lacked authority over Indians in Indian country. But this second answer abandoned the earlier conception of limited federal power within Indian country absent tribal consent. The Court now read the Constitution to give Congress broad power to unilaterally structure and restructure relations between the federal government, Native nations, and the states. Congress could authorize—or strip—powers from both tribal and state governments solely through ordinary legislation, and the Court would defer to its judgments.

C. New Realities, Old Answers: The Modern Era

The twentieth- and twenty-first-century history of federal Indian law presents a seeming paradox: even as the everyday realities of Native status changed dramatically, the blackletter constitutional law of Indian affairs, especially governing congressional authority, has remained largely unchanged. "Congress's power to legislate with respect to the Indian tribes" is still "'plenary and exclusive,'" in the words of *Brackeen*.[193]

Yet this tension is less paradoxical than it appears. *Kagama* broadly empowered the political branches in Indian affairs, but it did not dictate *how* they would exercise that authority. Under the ruling, it fell to Congress and the Executive to decide how the U.S. relationship with Native nations would be structured.

Over the course of the twentieth century, the political branches gave different and shifting answers to that question. For the century's first two decades, Congress and the Executive maintained the prior policy of aggressively using federal power to further assimilation.[194] But then, during the Indian New Deal of the 1930s, they repudiated that approach and embraced Native self-governance.[195] Only a decade later, they shifted again, seeking to end federal supervision over Native nations altogether in the Termination Era.[196] But by the 1970s, the Termination Era's failures and Native advocacy led the federal government to reject the prior policy and embrace what has become known as self-determination.[197]

These policy changes significantly altered the reality of Native status. The flow of federal funds and congressional affirmation of tribal authority have made tribal governments partners in federal governance—albeit unequal ones—rather than the wards and dependents policymakers envisioned in the late nineteenth century. Over the course of the century, Congress and the Executive also repudiated, both in tone and in practice, their late-nineteenth-century rejection of Native independence. The result is that Native autonomy and self-governance are not just legal abstractions but a daily reality in Indian country.

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193. 599 U.S. at 272–73.

194. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.08[3] (Nell Newton et al. eds., 2024).

195. *Id.* § 2.09.

196. *Id.* § 2.10.

197. *Id.* § 2.11.

Though it is possible to theorize these changes as working a constitutional shift,[198] as a formal matter, they came through ordinary statutory and administrative law. In a perverse way, then, the twentieth-century transformation in Native status was an unanticipated consequence of *Kagama*. By granting the political branches the power to define federal Indian law, the Court created the space for them to envision a new relationship between the federal government and Native nations—one that was, ironically, at sharp odds with late-nineteenth-century assumptions.

A similar story of transformation and continuity undergirds the past century of the Court's Indian law doctrine. The Court has broken considerably new ground, crafting novel rules restricting the scope of tribal authority and regulating the scope of state authority in Indian country, especially over non-members. It has become the key arbiter in the complex administrative relationship between tribes and the federal government. It has even curbed the scope of federal authority over Indian affairs in two ways. First, over the course of the twentieth century, the Supreme Court adopted clear statement requirements for congressional action that mandate that while Congress *can* diminish Native sovereignty and rights, it must do so unambiguously.[199] Second, in the late twentieth century, without explicitly overruling its precedents, the Court began to enforce the prohibitions of the Bill of Rights to limit the federal government's authority over Indian affairs—restrictions that it had found inapplicable earlier in the century.[200] In this sense, the Court has silently repudiated the earlier "strong" version of plenary power.

Yet throughout these changes, the Court has insisted that the federal constitutional law governing Indian affairs, especially defining congressional power, has remained unchanged. The Court has continued to uphold broad congressional authority over Indian affairs under Article I by tracing a familiar doctrinal pedigree that starts with *Kagama*.[201] In some sense, of course, this narrative of continuity is a feature of common-law reasoning. But it is also true that as a matter of formal blackletter law, little has changed. Most of these sweeping changes in federal Indian law have come through what the Court deems subconstitutional law, and none have altered the scope of federal power under Article I. In this sense, despite significant changes in both law and governance, the holding about congressional jurisdiction over Indian affairs articulated in *Kagama* remains the Court's formal answer to this question of constitutional structure.

D. The Value and Limits of History

As this Part has traced, for all the fluctuations in federal Indian law and policy, the jurisprudential challenge is not that there have been "no consistent principles" in Indian law jurisprudence, as Chief Justice Rehnquist claimed.[202] The

198. *See, e.g.*, Blackhawk, *supra* note 38, at 2269–70 (arguing that these transformations worked a shift in constitutional structure).

199. *See* Michigan v. Bay Mills Indian Cmty., 572 U.S. 782 (2014); Solem v. Bartlett, 465 U.S. 463 (1984); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

200. *See, e.g.*, Babbit v. Youpee, 519 U.S. 234 (1997); Hodel v. Irving, 481 U.S. 704 (1987); United States v. Sioux Nation of Indians, 448 U.S. 371 (1980); Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977); Morton v. Mancari, 417 U.S. 535 (1974).

201. *See, e.g.*, United States v. Lara, 541 U.S. 193, 200 (2004).

202. *See* Powell Papers, *supra* note 2.

problem instead is that—at least on the question of the scope of federal authority—there have been two consistent principles that contradict each other. The first, in the Founding Era, recognized Native nations as separate sovereigns in some sense subordinate to the United States but outside federal (and state) legislative jurisdiction. The second, from the late nineteenth century, reduced Native sovereignty to self-government still immune from state control, but placed Native nations firmly within the ambit of federal statutes. The twentieth and twenty-first centuries, then, witnessed significant changes in both the jurisprudence and governance of Indian law. But because *Kagama* had rendered the question of Native status a subconstitutional question for the political branches, these changes did not alter the constitutional principle that Congress enjoys sweeping authority over Indian affairs under Article I.

This historical taxonomy hopefully brings some clarity and rigor to what often seems, in the Court's telling, a haphazard, unprincipled mishmash. But what this history cannot *do* is determine whether any of these answers is either legally correct as a matter of jurisprudence or normatively desirable. The next two Parts turn to those questions.

III. *BRACKEEN* AND STRUCTURAL INDIAN LAW

Haaland v. Brackeen represents perhaps the most thorough-going effort in over a century to reexamine the place of Native nations within structural constitutional law.[203] The top-line vote—with seven justices voting to reject the attack on federal authority over Indian affairs—obscures deeper uncertainties. The multiple fractured opinions demonstrate that many of the justices have grown weary of the answer that the Court has been giving to these questions for over a century and are searching for new answers in federal Indian law's past.

This Part uses the history outlined earlier to investigate the justices' proposed answers to structural Indian law. It focuses on three opinions: the majority, Justice Gorsuch's concurrence, and Justice Thomas's dissent. Gorsuch's and Thomas's lengthy separate writings are especially significant: as Ian Gershengorn, who argued *Brackeen* for the intervenor Tribes argues, the "two Justices" make it a "particularly interesting and challenging time to be arguing tribal cases in the Supreme Court."[204] Both justices have more fully developed theories about federal Indian law than perhaps any justice since Chief Justice Marshall—views that would dramatically remake the field in very different ways. And in *Brackeen*, they expounded their views in perhaps unprecedented depth and detail.

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203. As noted above, *United States v. Lara*, 541 U.S. 193 (2004), raised similar questions about the scope of congressional authority over Indian affairs under Article I. But its investigation of the text and history governing Indian affairs was briefer, especially compared to the voluminous concurrences in *Brackeen*.

204. Ian Heath Gershengorn, Haaland v. Brackeen*—A Window into Presenting Tribal Cases to the Court*, 56 CONN. L. REV. 1103, 1115 (2024).

What unites all three opinions is that—despite some textualist examinations of the Indian Commerce Clause[205]—they are, at core, all fundamentally explorations of structural constitutional law. Indeed, each opinion, I argue, can be loosely mapped onto one of the structural answers from a prior era. The majority reflects the twentieth-century reiteration of precedent; Justice Gorsuch seeks to revive the Founding Era vision of federal Indian law; and Justice Thomas, although more eclectic, fundamentally grounds his argument in his interpretation of the late-nineteenth-century transformation of Native status.

If all three opinions can legitimately claim grounding in the past, which of them is right? The problem, in my view, is that all three of the opinions largely rely on the authority of history alone, without explaining the jurisprudential choices they must inevitably make when the history has provided contradictory answers. In particular, what ultimately divides Justices Gorsuch and Thomas is not the scope of federal power—both question its current broad scope—but the constitutional status of Native independence. Justice Gorsuch argues that the Founding Era constitutional order fixed Native as well as state sovereignty, while Justice Thomas claims that subsequent law has diminished Native autonomy. Arbitrating among these claims requires interrogating the jurisprudential assumptions that underlie their competing conclusions.

A. Repeating the Modern Answer: The Brackeen *Majority*

The *Brackeen* majority's approach is the most easily summarized because the opinion maintains the status quo. As in *Lara*, the Court cites the well-established precedents demonstrating that "Congress's power in this field is muscular, superseding both tribal and state authority."[206] The Court then rejects Texas's contrary arguments, declining to create a family law carveout to federal authority or to narrow the scope of the Indian Commerce Clause. The weight of history, it reasons, is just too great. The petitioners "frame their arguments as if the slate were clean," the Court argues.[207] "More than two centuries in, it is anything but."[208]

Justifying the majority opinion is straightforward, since, as even the dissents acknowledge, long-standing precedents contain language nearly *all* the opinions acknowledge would validate the statute.[209] Yet the opinion nonetheless gestures toward dissatisfaction with the existing doctrine, describing it as "unwieldy" and acknowledging "confusion."[210]

Though this language might be interpreted as an invitation for further legal challenges, the rest of the opinion makes clear that it has little interest in reexamining the foundational principles underlying the Court's precedents. Rather, these remarks are best read as reiterating the challenge confronting twentieth-century federal

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205. I have examined those views more fully elsewhere. Gregory Ablavsky, *The Original Meaning of Commerce in the Indian Commerce Clause*, 56 CONN. L. REV. 1013 (2024).

206. Haaland v. Brackeen, 599 U.S. 255, 273 (2023).

207. *Id.* at 279–80.

208. *Id.*

209. *See, e.g.*, *id.* at 368–69 (Thomas, J., dissenting) (arguing that broad statements in support of congressional authority over Indian affairs in the precedent were dicta).

210. *Id.* at 275, 279 (majority opinion).

Indian law more broadly. The *Brackeen* majority perpetuates the answer that has dominated Indian law for the last century—an endorsement of expansive federal power that recent Congresses have usually deployed, as in the case of ICWA, toward the end of enhancing tribal governmental authority and capacity.[211] After over a century, the old doctrinal foundations for broad federal authority rest uneasily with current jurisprudential assumptions. Yet as it has also done for over a century, the Court has been content to cite its precedents rather than questioning those assumptions.

B. Restoring Founding Era Understandings: Justice Gorsuch

Unlike the majority, Justice Gorsuch's concurrence offers one of the fullest accounts of the history of federal Indian law to ever appear in the *United States Reports*. Gorsuch recounts in detail what he terms the "Indian-law bargain struck in our Constitution."[212] That bargain, he argues, was a three-legged stool that implicated questions of tribal, state, and federal status.[213] Under the original understanding of the Constitution, tribes were separate sovereigns; state authority was precluded because it infringed on tribal sovereignty; and the federal government enjoyed considerable power under the Indian Commerce Clause to regulate the intercourse between Natives and non-Natives—but not authority over Native nations' internal matters. Only later, in the nineteenth century, did the Court's "atextual and ahistorical plenary-power move" expand federal power to embrace that power.[214]

Descriptively, Gorsuch's account strikes me as comparatively accurate—even though, like most jurists, Gorsuch papers over the extent of disagreement and contestation. The key challenge for him is jurisprudential, not historical. At core, Gorsuch's argument rests on structural constitutional law, in that it relies not on explicit constitutional text but on the system that the Constitution created. "[T]he Constitution reflected a carefully considered balance between tribal, state, and federal powers," Gorsuch argues.[215] "That scheme predated the founding and it persisted long after."[216]

The jurisprudential question is what makes this historical balance legally binding today. In one sense, the answer is, in Justice Gorsuch's words, "straightforward" for a committed originalist.[217] If the Constitution codified what I've labeled as the first answer—the Founding Era understanding of Native, federal, and state authority—then, for an originalist, that meaning remains binding law today. Later doctrinal developments like *Kagama* lack legal authority, by contrast, because they do not legitimately rest on "text and history."[218]

Yet this response glosses some complications. Without getting into the many varieties of originalism, none decrees that every facet of the Founding Era

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211. *Id.* at 273–75.
212. *Id.* at 307 (Gorsuch, J., concurring).
213. *Id.* at 307–08.
214. *Id.* at 328.
215. *Id.* at 326.
216. *Id.*
217. *Id.* at 308.
218. *Id.* at 326–27.

remains constitutionally binding today. They instead focus on different aspects of original constitutional understandings—the original public meaning of the text, original law, the drafters' original intent—and argue that *that* aspect remains legally binding.

Within this originalist frame, Gorsuch's structural reading makes the most sense for conceiving federal power, which the Constitution and its text establish. His view is also consistent with how the Court has long approached state authority, which the U.S. Constitution defines and limits, even if it does not create it. The greatest jurisprudential difficulty for Justice Gorsuch's theory—and, as we shall see, his sharpest break with Justice Thomas—is his contention that "the Constitution . . . reflected an understanding that Tribes enjoy a power to rule themselves that no other governmental body—state or federal—may usurp."[219] In other words, according to Justice Gorsuch, the Constitution itself codifies Native sovereignty.

Gorsuch cites no explicit constitutional text to support this conclusion. He instead presents considerable evidence that the "Founders" regarded Native nations as independent sovereigns.[220] But, from a skeptic's perspective, this evidence proves only Founding Era views of the state of the world as it then stood, not that the Constitution's drafters and ratifiers thought that the document *guaranteed* Native sovereignty. After all, throughout U.S. history, the federal government has recognized many polities as "sovereign"—the Republic of Texas,[221] say, or the Austro-Hungarian Empire[222]—that no longer exist as full sovereigns; similarly, it withheld recognition from polities like Haiti that the nation now considers sovereign.[223] There is, then, a methodological step missing that demonstrates that the Constitution does not just *permit* the federal government to acknowledge Native sovereignty but *mandates* it.

There are three potential responses to such skepticism within Gorsuch's originalist frame. One is a form of textualism: by deploying the term "Indian tribe," the Constitution codified the subconstitutional law governing tribal status, including Native independence, as it existed at the time of ratification. Though this reading packs considerable content into the Convention's choice of terms, it resembles other jurisprudential trends like unitary executive theory, which similarly reads the content of Founding Era separation-of-powers law into the constitutional phrase "the executive power." Moreover, the question of whether any particular polity fits into a constitutional category—whether Texas and Haiti are "foreign nations," for example—is different from the issue of defining the scope and contours of the constitutional category itself.

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219. *Id.* at 310.

220. *Id.* at 308–13.

221. JOHN EDWARD WEEMS, DREAM OF EMPIRE: A HISTORY OF THE REPUBLIC OF TEXAS, 1836–1846, at 15 (1971).

222. *See, e.g.*, Naturalization Convention, U.S.-Austria-Hung., Sept. 20, 1870, 17 Stat. 883.

223. JULIA GAFFIELD, HAITIAN CONNECTIONS IN THE ATLANTIC WORLD: RECOGNITION AFTER REVOLUTION 124–25 (2015).

A second response involves comparison to federalism doctrine. Unlike the Articles of Confederation,[224] the Constitution contains no explicit text expressly guaranteeing state sovereignty. Despite this absence, the Court has nonetheless repeatedly insisted that the Constitution "specifically recognizes the States as sovereign entities."[225] When examined, this legal proposition rests on inferences from the constitutional text, which "assume[s] the States' continued existence,"[226] the federal government's limited and enumerated powers, Founding Era quotes from the *Federalist Papers*, and the Tenth Amendment, which reserves undelegated powers to the states and the people.

Extrapolating this logic to Native status provides a jurisprudential foundation for constitutionalizing Native sovereignty—to argue (ironically paraphrasing *Seminole Tribe of Florida v. Florida*) that the Constitution "recognizes the [Tribes] as sovereign entities."[227] Though the Constitution does not contain nearly so detailed an account of how Native nations fit within the constitutional order as states—an unsurprising omission, since, as discussed, the document's drafters did not believe that the United States had legislative jurisdiction over Native peoples[228]—the constitutional text similarly "assumes" that "Indian tribes" will still exist.[229] Even more significantly, the invocation of the Tenth Amendment and enumerated powers in the federalism cases is, at core, an argument from "constitutional design" that eliminating state sovereignty lay outside the power of the federal government.[230] But this conclusion is equally true with respect to the federal government's legislative power over *Native* nations, at least under the conception of federal authority of what I've called the first answer. In this view, asserting that Congress or the Executive lacked the authority to alter Native sovereignty except through treaty itself represents a constitutional recognition of Native sovereignty. Indeed, for almost a century, that position was the constitutional view of most federal officials.

A third approach invokes history. Whatever the ambiguities of the constitutional text, for over a century, federal policymakers spoke and acted on the belief that the Constitution made Native nations independent. Indeed, whenever this recognition was challenged, its defenders would point to its deep-rooted grounding in the government's consistent practice.[231] In this sense, the acknowledgment that Native nations retain autonomy and self-government under federal law has been so

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224. ARTICLES OF CONFEDERATION OF 1781, art. II ("Each state retains its sovereignty, freedom and independence . . . .").

225. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 71 n.15 (1996); *see also* Alden v. Maine, 527 U.S. 706, 714 (1999) (quoting this language).

226. *Alden*, 527 U.S. at 713.

227. *Seminole Tribe*, 517 U.S. at 71 n.15.

228. *See supra* text accompanying notes 102–121.

229. *See supra* text accompanying note 226.

230. *Alden*, 527 U.S. at 713–15.

231. *See, e.g.*, 6 REG. DEB. 1026 (1830) (statement of Sen. Ellsworth) ("This Government has settled the character of the Indian tribes—it is too late for her to speculate, if she would, on this subject."); CONG. GLOBE, 41st Cong., 3d Sess. 1821 (1871) (statement of Sen. Davis) (arguing against ending treaty making with Native nations "in repudiation of the history and practice of the Government not only from its formation but from the settlement of the country").

persistent and durable—even in unfriendly decisions like *Kagama*—that it is plausible to argue that it has been "liquidated,"[232] or perhaps become a part of the nation's "history and tradition,"[233] to invoke a few of the practice-oriented theories of constitutionalism that the Court has recently floated.[234] Under this standard, when the early twentieth-century Supreme Court announced, after a century and a half of contrary law, that Congress could freely modify or even extinguish Native sovereignty, these rulings were wrong. The Court could no longer change these settled structural principles at that late date any more than, say, early twentieth-century New York State could enact gun laws that differed from earlier enactments.

Thus far, I have focused on this jurisprudential debate as an intramural debate *among* originalists, as the *Brackeen* opinions emphasize. But there is another challenge to Gorsuch's restorationist vision that reflects a broader critique of originalism—one that might explain why the three liberal justices, who joined the rest of Gorsuch's concurrence, declined to sign on to his constitutional theorizing.

The problem is that history does not run backward; you cannot rewind historical change. Gorsuch seeks to return the United States to a legal world we have lost, but the Founding Era understanding has not been the law for over a hundred years. For better or worse, modern federal Indian law was built on the one-and-a-half-century-long entanglement between federal and tribal authority that followed *Kagama*. In this sense, Justice Gorsuch's vision could dramatically unsettle that current status quo without actually remedying some of the harms he identifies. I'll explore the implications of such an upending for Native nations today further below, but it is worth querying whether such a sweeping transformation undertaken in the name of protecting Native sovereignty might harm its supposed beneficiaries.[235]

C. Enforcing Late-Nineteenth-Century Expectations: Justice Thomas

Justice Thomas has been voicing doubts about the Court's Indian law jurisprudence for decades. He first questioned federal plenary power in his concurrence in *Lara*[236] and then, in repeated separate writings since, has challenged numerous other aspects of the Court's Indian law doctrine.[237] But like Gorsuch's

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232. *See* United States v. Rahimi, 602 U.S. 680, 725 (2024) (Kavanaugh, J., concurring); N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 81–83 (2022) (Barrett, J., concurring).

233. *Rahimi*, 602 U.S. at 690; Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 237–38 (2022).

234. These methodologies have occasioned enormous academic controversy and discussion, which I omit here. The point here is simply to flag how the Court has acknowledged how post-ratification history can create binding constitutional law.

235. *See infra* Part IV.

236. United States v. Lara, 541 U.S. 193, 214–26 (2004) (Thomas, J., concurring).

237. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 U.S. 382, 399–402 (2023) (Thomas, J., concurring); Upstate Citizens for Equal. v. United States, 583 U.S. 1004 (2017) (Thomas, J., dissenting from denials of certiorari); Puerto Rico v. Sanchez Valle, 579 U.S. 59, 79–80 (2016) (Thomas, J., concurring in part); United States v. Bryant, 579 U.S. 140, 157–61 (2016) (Thomas, J., concurring); Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 814–30 (2014) (Thomas, J., dissenting); Adoptive Couple v. Baby Girl, 570 U.S. 637, 659–60 (2013) (Thomas, J., concurring). For an overview, see

concurrence, Thomas's *Brackeen* dissent represents his fullest and most detailed exploration of the history of federal authority over Indian affairs to date.

Surprisingly—given that they come out on opposite sides of the case—Justices Thomas and Gorsuch have some fundamental agreements. They differ about the scope of the Indian Commerce Clause: Thomas perpetuates his long-standing claim that the original public meaning of "commerce" referred only to trade, not non-economic activity, which Gorsuch challenges. But focusing on this familiar originalist debate over textual meaning risks obscuring the justices' deeper agreement. Neither justice reads the Indian Commerce Clause, nor the Constitution more generally, to justify federal plenary power over Indian affairs. Both justices would overrule *Kagama* and substantially limit the scope of federal power.

Their core disagreement is about where that power would then flow. While Justice Gorsuch believes limiting federal power would expand the scope of Native sovereignty, Justice Thomas posits a greater role for state authority.

Here is Thomas's argument in brief. The Indian Commerce Clause, as originally understood, granted the federal government authority only over trade with Native nations. The early federal government exercised broader authority over Indian affairs than the Clause alone granted, but only as a form of "quasi-foreign affairs" that encompassed "external relations, like matters of war, peace, and diplomacy—not internal affairs like adoption proceedings."[238] Outside those areas of federal authority, Native peoples fell within state jurisdiction. But in the late nineteenth century, the United States stopped acknowledging Native nations as even quasi-foreign—which meant that outside the narrow scope of the Indian Commerce Clause, Indian affairs now fell within state control.

As this account suggests, Justice Thomas's dissent is—remarkably given his jurisprudential commitments—anti-originalist. That is, although Thomas spends considerable time examining the Founding, he rejects Gorsuch's view that Founding Era legal understandings of Native sovereignty continue to bind today.[239] Instead, in Thomas's view, the legal changes of the late nineteenth century fundamentally and irrevocably altered Native status. In other words, he seeks to ground present-day law in the jurisprudential world, if not the doctrine, of the second answer.

Thomas's account raises significant questions. The key descriptive challenge concerns Founding Era law; the key jurisprudential challenge concerns his account of change.

1. The Descriptive Challenge: Positing a False Founding Era Consensus

The descriptive challenge for Justice Thomas's account of the Founding Era, in my view, is that his narrative misunderstands what the period's thinkers were fighting about when they argued over Indian affairs. Or not fighting, because he posits a consensus: "[T]he early dynamic of federal-Indian relations," Thomas reasons, was that "Indian affairs count[ed] as both a matter of quasi-foreign affairs

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Taylor Ledford, *Foundations of Sand: Justice Thomas's Critique of the Indian Plenary Power Doctrine*, 43 AM. IND. L. REV. 167 (2018).

238. Haaland v. Brackeen, 599 U.S. 255, 356 (2023) (Thomas, J., dissenting).

239. *Id.* at 360.

and of state jurisdiction."[240] The problem with this statement is the word *both*, which posits a straightforward subject-matter division of authority: the federal government governed "external relations" with tribes ("war, peace, and diplomacy"[241]) while all other matters fell within state jurisdiction.

But no such clean subject-matter division existed. The actual "dynamic" was an intense debate between two *competing* and *irreconcilable* positions about what category, external and internal, Native nations fell into. If Native nations were "quasi-foreign" entities that the United States could regulate solely through treaty, as federal policymakers concluded, then they lay outside *both* federal and state legislative jurisdiction, regardless of whether they fell within state borders. By contrast, if Native nations were no longer independent, as some state leaders argued, then they were within what was termed states' "ordinary jurisdiction" and subject to state regulation.[242] In other words, this was not about divvying up concurrent authority; it was a struggle over whether the federal or the state governments would have the *exclusive* power to manage relations with Native nations.[243] The fight between these positions proved the core constitutional contest over Indian affairs in the early United States.

There was another common argument that flowed from this debate—not whether "Indian tribes" as a whole were "external," but, as described above, whether a particular Native community had ceased to be "independent" and so switched from federal to state jurisdiction.[244] But this dichotomy was about applying the categories, not altering them, and the key legal issue was the separation of powers question of *what* institution could make that determination.

By positing consensus, Justice Thomas ducks this debate, but he can't. If Founding Era understandings are the touchstone for current jurisprudence, then Thomas must decide what side he thinks was right. If early federal policymakers' constitutional conclusions were correct, then Justice Gorsuch's interpretation is also right: states lacked jurisdiction over Native nations because of their quasi-foreign status. Thomas's conclusions endorsing state authority, by contrast, require arguing that dissenting state officials insisting on state jurisdiction had the stronger constitutional argument.[245] The challenge there is that as described above, Congress, the early Executive, the Supreme Court, and most conventional sources of constitutional meaning rejected this position.[246] But if that dissenting view was *not* in fact the law, then Thomas's account of the Founding Era must fail.

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240. *Id.* at 348.

241. *See supra* text accompanying note 238.

242. On this debate, see *supra* text accompanying notes 122–125. On the term "ordinary jurisdiction," see Act of May 19, 1796, § 19, 1 Stat. 469, 474.

243. *See, e.g.*, Jackson *ex rel.* Smith v. Goodell, 20 Johns. 188, 193 (N.Y. Sup. Ct. 1822) ("I know of no half-way doctrine on this subject. We either have an exclusive jurisdiction, pervading every part of the state, including the territory held by the Indians, or we have no jurisdiction over their lands, or over them, whilst acting within their reservations. It cannot be a divided empire; it must be exclusive, as regards them, or us[.]").

244. *See supra* text accompanying notes 119–22.

245. *See supra* text accompanying notes 132–33.

246. *See supra* text accompanying notes 135–43.

2. The Jurisprudential Challenge: Validating Late-Nineteenth-Century Change

For all of Justice Thomas's discussion of the Founding, however, the legal core of his claim rests in the late nineteenth century. In his account, Founding Era understandings of Native nations' quasi-foreign status are legally irrelevant because the law subsequently changed. Where Justice Gorsuch concludes that the original Constitution fixed the status of all *three* sovereigns—federal, state, and tribal—Thomas casts Native status as malleable and shifting. "[T]he fact that tribes were 'external' at the Founding," he argues in critiquing *Kagama*, does not "mean that they remained 'external' in 1886."[247]As evidence for this transformation from "external" to "internal," Thomas refers, as he has done in prior opinions, to Congress's 1871 Act that ended treaty making with Native nations.[248]

This emphasis on change is, jurisprudentially, the most interesting part of Thomas's dissent. If originalism is plausibly described as a theory of lawful change, then the challenge for Thomas is to explain both how this change happened and why it is legitimate. After all, discarding Founding Era legal understandings is in sharp tension with Thomas's commitment in other areas of law. It is hard to imagine Thomas arguing the fact that states were "sovereign" at the Founding does not mean that they are "sovereign" today.[249] Or to draw from another recent example from Thomas's jurisprudence, the ways that governments sought to prevent "irresponsible" or "unfit" persons from possessing guns in the past does not bind a government now.[250]

As with Thomas's account of the Founding, there is a descriptive challenge for this narrative of change. As recounted above, the 1871 Act resolved only the debate over the scope of federal legislative jurisdiction; the law of the era expressly acknowledged that tribes retained other "attributes of sovereignty."[251] Thomas's view thus implicitly suggests that he understands the law of the period better than federal policymakers and judges of the time.[252] They were, in this conception, *too* accommodating of Native sovereignty, and the Supreme Court must now enforce nineteenth-century law's unfulfilled colonial implications.

But another set of questions is doctrinal: given Thomas's views on the limited scope of federal power in Indian law, how did this transformation happen? After all, if Congress enjoys only limited authority over Indian affairs, where did it

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247. Haaland v. Brackeen, 599 U.S. 255, 360 (2023) (Thomas, J., dissenting).

248. *Id.* at 360 n.13.

249. *Cf.* Franchise Tax Bd. v. Hyatt, 587 U.S. 230, 241 (2019) (concluding, in an opinion written by Justice Thomas, that states "retained . . . aspects of sovereignty" defined under "the common law and the law of nations" unless removed by the Constitution).

250. *Cf.* United States v. Rahimi, 602 U.S. 680, 761–62 (2024) (Thomas, J., dissenting) (arguing that gun regulation must be closely analogous to forms of regulation applied during the adoption of the Second Amendment and its incorporation against the states).

251. *See supra* text accompanying text accompanying notes 186–90.

252. *Cf.* Lance F. Sorenson, *Tribal Sovereignty and the Recognition Power*, 42 AM. INDIAN L. REV. 69, 109 (2017) ("The historical record reveals that the political branches continued to recognize tribal sovereignty and continued to negotiate bilateral and multilateral agreements with the tribes after 1871.").

gain the authority to redefine "metes and bounds of tribal sovereignty" in 1871?[253] Thomas, after all, expressly *rejected* the existence of this federal power in *Lara*—a decision where he questioned whether the 1871 Act was even constitutional.[254] And where and how does the U.S. Supreme Court enjoy the power and jurisdiction to decide whether tribes retain "pre-existing sovereignty and autonomy" if, as this view would seem to suggest, this is not even a federal question?[255]

The best defense of Justice Thomas's approach is as follows: though Congress cannot freely alter the scope of Native sovereignty, it can decide Native nations' status for the purposes of U.S. law. In particular, returning to Thomas's dichotomy, Congress can decide whether the federal government deems Native nations to be "external," and therefore within the quasi-foreign affairs provisions that characterized the Founding Era law of Indian affairs, or "internal," and therefore subject to state law.[256] And the 1871 end of treaty making, Thomas argues, "reflects the view of the political branches that the tribes had become a purely domestic matter."[257] In declining to acknowledge Native sovereignty today, then, the Supreme Court would merely be enforcing the judgment of the political branches.

Like much within federal Indian law, this view has deep historical roots. As Thomas's dissent alludes to, and I discuss more fully above, there was long a sense among Anglo-Americans that specific Native nations had become "remnants" that fell under state jurisdiction.[258] And in defending the 1871 Act, some in Congress argued that they were not unconstitutionally limiting the President's treaty-making power but instead exercising their "right to determine who are nations or Powers with whom the United States will contract by treaty," which they insisted "belongs to the political power of the Government."[259] By the late nineteenth century, federal courts had begun to coin a term of art for this concept that federal acknowledgment of Native nations had jurisdictional consequences: tribal recognition.[260]

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253. United States v. Lara, 541 U.S. 193, 215 (2004) (Thomas, J., concurring) ("I cannot agree . . . that the Constitution grants to Congress plenary power to calibrate the 'metes and bounds of tribal sovereignty.'"); *see also id.* at 218 (describing the 1871 Act as "constitutionally suspect"); David H. Moore & Michalyn Steele, *Revitalizing Tribal Sovereignty in Treatymaking*, 97 N.Y.U. L. REV. 137 (2022) (arguing that *Zivotofsky v. Kerry*, 576 U.S. 1 (2015), demonstrates that the 1871 Act was unconstitutional).

254. *Lara*, 541 U.S. at 218 (Thomas, J., concurring).

255. Haaland v. Brackeen, 599 U.S. 255, 364 (2023) (Thomas, J., dissenting).

256. *See supra* text accompanying note 238.

257. *Lara*, 541 U.S. at 218 (Thomas, J., concurring).

258. *See Brackeen*, 599 U.S. at 347–48 (Thomas, J., dissenting); *see supra* text accompanying notes 122–26.

259. CONG. GLOBE, 41st Cong., 3d Sess. 1812 (1871) (statement of Sen. Armstrong) ("We may lawfully refuse and by law declare that we will withdraw our recognition and will not hereafter recognize as a Power with whom we will contract by treaty even France or England, or any other nation whatever.").

260. *See, e.g.*, William W. Quinn Jr., *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 AM. J. LEGAL HIST. 331, 335 (1990) ("[B]eginning around the 1870's, and in some earlier judicial decisions, 'recognize' and 'recognition' were used in a formal jurisdictional sense, i.e., that the federal government formally acknowledges a tribe's existence as a 'domestic dependent nation' with tribal sovereignty . . . .").

Yet the law of tribal recognition did not end in 1871. Today, whether a tribe enjoys federal recognition is a straightforward matter of looking at the official list of such tribes that the Bureau of Indian Affairs maintains at Congress's command.[261] Tribes receive federal recognition through either a detailed administrative investigation by the Office of Federal Acknowledgment or by Congress through statute.[262] These "authoritative pronouncements of the political branches," as Thomas wrote in *Lara* in describing other federal actions recognizing Native sovereignty, entirely resolve the question of whether the federal government acknowledges a particular Native community to enjoy the rights of sovereignty that federal Indian law affords.[263]

What Justice Thomas is arguing, then, is not that judges should respect the political branches' determinations. He is instead claiming the power to second-guess their decisions. In a prior concurrence, for instance, Thomas argued that judges should reexamine Native nations' sovereignty under federal law considering their "distinct histories"—their "varied origins, discrete treaties with the United States, and different patterns of assimilation and conquest."[264] One scholar aptly described this as a process of "judicial de-recognition."[265]

This approach strikes me as a terrible idea: Justice Thomas proposes that (almost entirely non-Native) federal judges should make these determinations of Native sovereignty based on their views of a tangled history and dangerously subjective sense of Native identity.[266] In the Supreme Court's brief late-nineteenth-century foray into this practice, its reasoning quickly devolved into what my politer students term amateur ethnography but could just as aptly be labeled racialized claptrap.[267]

But the greater challenge for Thomas's view is that the doctrine is strikingly clear: recognition is a political, not a judicial, question. Although there is scholarly and judicial debate over the distribution of this authority between political branches, no one—including Justice Thomas, who has argued that this power belongs to the Executive[268]—believes that the courts enjoy this power.[269] Thomas's position is as if, confronted with the recent question in *Zivotofsky v. Kerry* about whether Congress or the Executive possesses the constitutional power to determine

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261. 25 U.S.C. §§ 5130–5131.

262. Kirsten Matoy Carlson, *Congress, Tribal Recognition, and Legislative-Administrative Multiplicity*, 91 IND. L.J. 955, 964–65 (2016).

263. United States v. Lara, 541 U.S. 193, 222 (2004) (Thomas, J., concurring).

264. United States v. Bryant, 579 U.S. 140, 157–61 (2016) (Thomas, J., concurring).

265. *See* Sorenson, *supra* note 252, at 127–30.

266. *Bryant*, 579 U.S. at 159 (Thomas, J., concurring).

267. *See, e.g.*, United States v. Sandoval, 231 U.S. 28 (1913); United States v. Joseph, 94 U.S. 614 (1876).

268. Zivotofsky v. Kerry, 576 U.S. 1, 58 (2015) (Thomas, J., concurring in part and dissenting in part).

269. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410–11 (1964) (concluding that "[p]olitical recognition is exclusively a function of the Executive" and rejecting "[t]he possible incongruity of judicial 'recognition'").

the status of Jerusalem, the Court had instead simply arrogated that role to itself.[270] Or to make a domestic analogy, as if the Court were to suddenly decree that in light of the justices' interpretation of the Civil War, Alabama is no longer a sovereign state, notwithstanding a century and a half of contrary practice and Congress's views otherwise.[271]

Even more strikingly, the Court has expressly rejected the power that Thomas would claim for it. "In reference to all [political matters relating to Indians], it is the rule of this court to follow the action of the executive and other political departments of the government," the Court held in 1913, resolving earlier ambiguity over this authority.[272] "If by them those Indians are recognized as a tribe, this court must do the same."[273] Modern courts that have examined this question have reached the same conclusion.[274]

Perhaps, unlike the 1871 Act's nineteenth-century defenders, Justice Thomas does not regard the congressional ban on treaty making as an exercise of the recognition power. An alternate interpretation is that the statute itself redefined the category of "Indian tribe" in ways that Congress has never undone. In other words, by choosing to regulate Native nations through statute rather than treaty, Congress made tribes "internal," and that judgment remains binding law unless and until Congress renounces its legislative jurisdiction over tribes—which it has not yet done. In *Lara*, Thomas seemed to embrace this view, arguing that the Court's Indian law jurisprudence rests on "two largely incompatible and doubtful assumptions": that Congress could "regulate virtually every aspect of the tribes" and that "Indian tribes retain inherent sovereignty."[275] In *Brackeen*, he cites this earlier discussion and describes the dilemma that if Congress *can* regulate tribes, they cannot be external—therefore undercutting the justification for congressional power—as a "catch-22 of sorts."[276]

But this argument leads Thomas into his own catch-22. Where do the attributes of the legal category of "Indian tribe" come from? One possibility is that they are constitutionally defined, as Justice Gorsuch suggests. But under this view, the 1871 Act is questionable since the category of "tribe" has constitutional attributes that Congress cannot alter, akin to the way the Court discusses state status. (Indeed, Justice Gorsuch's *Brackeen* concurrence notes that the tension that Thomas identified in *Lara* could be reconciled by dispensing with the claim about congressional power.[277])

The alternate view is Congress has the power to define and redefine the category of "tribe." This perspective would legitimate the 1871 Act—but it cannot

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270. *Zivotofsky*, 576 U.S. at 5.

271. Act of June 25, 1868, ch. 70, 15 Stat. 73 (1868) (readmitting Alabama to congressional representation).

272. *Sandoval*, 231 U.S. at 46–47.

273. *Id.* (quoting United States v. Holliday, 70 U.S. (3 Wall.) 407, 419 (1865)).

274. Miami Nation of Indians of Ind. v. U.S. Dep't of Interior, 255 F.3d 342, 347–48 (7th Cir. 2001); W. Shoshone Bus. Council v. Babbit, 1 F.3d 1052, 1057 (10th Cir. 1993).

275. United States v. Lara, 541 U.S. 193, 214–15 (2004) (Thomas, J., concurring).

276. Haaland v. Brackeen, 599 U.S. 255, 368 (2023) (Thomas, J., dissenting).

277. *Id.* at 279 (Gorsuch, J., concurring).

explain how that law could constrain subsequent legislation. After all, as Thomas himself has stressed, "one Congress can never bind a later Congress."[278] Therefore, if Congress could decree that tribes were no longer "quasi-foreign" in 1871 through ordinary legislation, then it necessarily could also decree that they are "quasi-foreign" for the purposes of state jurisdiction over the adoption of Indian children through ICWA in 1978. To put it plainly, the 1871 Act did not amend the Constitution, and the Court cannot invalidate congressional statutes because they contradict other, prior statutes.

It is incongruous to see "the most committed originalist on the Court"[279] pointing to a late-nineteenth-century statute as working an unalterable and permanent change in constitutional structure. But while this seeming inconsistency might loom large in other areas of jurisprudence, it fits with precisely the sort of classificatory ambiguity that has long characterized Indian law.

3. Justice Thomas's Structural Constitutional Vision

Justice Thomas deserves credit for taking federal Indian law seriously, as Part I called for.[280] His *Brackeen* dissent represents an effort to interrogate the foundations of the field and discern core principles. And his extended foray allows us to examine the doctrinal, jurisprudential, and evidentiary bases for his conclusions.

In my read, what Justice Thomas's *Brackeen* dissent reveals is that his views on federal Indian law remain remarkably undertheorized. Thomas began his explorations of Indian law in *Lara* with a critique that federal Indian law was riddled with principles that were in "tension[]" and "schizophrenic."[281] What was necessary, Thomas argued, was "rigorous constitutional analysis."[282] But after two decades of separate writings, including his extensive *Brackeen* dissent, the contradictions in his own views strike me as equally glaring. Thus far, it is hard to say that he has offered a "theory for rationalizing this body of law."[283] Justice Thomas's policy preferences are clear: he favors much more state authority and much less federal and tribal power in Indian affairs than current law affords. But why prior law and practice—which cut in the other direction—mandate that outcome remains uncertain.

Part of the challenge is that—in contrast to the majority, which reiterates the conventional twentieth- and twenty-first-century precedential narrative, and Gorsuch's concurrence, which seeks to revive Founding Era understandings—Thomas's views map less cleanly on to a specific era of Indian law jurisprudence. That is not to say that his perspective is unprecedented: after over four centuries of arguing over very similar questions, few positions in Indian law lack a historical

278. *Id.* at 363 (Thomas, J., dissenting).

279. John O. McGinnis, *It's Now the Barrett Court*, CITY J. (Oct. 27, 2020), https://www.city-journal.org/article/its-now-the-barrett-court [https://perma.cc/S8QN-ELE5].

280. *See supra* Section I.B.

281. United States v. Lara, 541 U.S. 193, 215, 219 (2004) (Thomas, J., concurring).

282. *Id.* at 223.

283. *Brackeen*, 599 U.S. at 279.

analog. But Thomas's arguments are more of a pastiche, plucking different strands from different periods.

But Justice Thomas's core jurisprudential moves all draw from the nineteenth century. Thomas, for all his critiques of Congress's "plenary power," seems uninterested in that doctrine's core—the nature of federal authority *over* tribes. In fact, nowhere in his Indian law jurisprudence has Thomas ever seriously interrogated the scope or meaning of federal authority over *internal* tribal relations; since *Lara*, his nearly exclusive concern has been supposed federal infringements on *state* authority.

This erasure of Native sovereignty—or, to avoid getting hung up on that term's ambiguity, Native independence or autonomy—was not a feature of Founding Era jurisprudence. As described above, the federal law of that era is only intelligible by recognizing that policymakers understood Native independence as a distinct legal principle that limited both federal and state jurisdiction. Rather, sidelining Native autonomy was, ironically, the key jurisprudential move of *Kagama* and late-nineteenth-century Indian law jurisprudence more broadly. Like Thomas, the *Kagama* Court sought to collapse the question of authority in Indian affairs into zero-sum issues of federalism. If there are only two sovereigns in the United States—the states and the federal government—then, Thomas and the *Kagama* Court both reason, Native nations must fall within the jurisdiction of either one or the other.[284] In this view, the Founding Era conclusion that Native nations fell to some extent under *neither* jurisdiction was (and is) no longer viable.

But if Thomas replicates *Kagama*'s logic—ironically, given his sharp criticism of the decision—he inverts its conclusion. Because, in Thomas's view, most Indian law issues now fall outside his circumscribed view of federal authority, they must, in this account, necessarily lie within state power. This view, too, has a nineteenth-century precedent: the constitutional ideology advanced by expansionist states. One of the historians whom Justice Thomas relies on expressly *critiques* the era's legal thought in terms that apply equally to Thomas's dissent. "The primary focus of [state] courts should have been the legitimacy of state authority over Indians in the face of tribal sovereignty and treaty rights," she observed.[285] "[I]nstead judges most often examined how the states' actions fit within federalism's division of powers between the federal and state governments."[286]

The robust endorsement of state authority over Indian affairs constituted what Tanner Allread has termed "the theory of state supremacy" used to justify the mass deportation of Native peoples known as Indian Removal.[287] As described above, this strain of legal thought conjoined attacks on Native sovereignty with constitutional interpretations sharply limiting federal authority.[288] Thomas implicitly acknowledges this lineage when he approvingly cites the 1879 Wisconsin

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284. *See supra* text accompanying notes 171–175; *see also* Sorenson, *supra* note 252, at 127–30 ("[Thomas] falls into the same trap as the Court did in *Kagama*, in the belief that there are but two sovereigns within our federal system.").

285. ROSEN, *supra* note 133, at 78.

286. *Id.*

287. Allread, *supra* note 133, at 1533.

288. *See supra* text accompanying notes 132–134.

Supreme Court's decision in *State v. Doxtater*.[289] That ruling vindicated state criminal jurisdiction over Indians in Indian country—a position at odds with current blackletter doctrine[290]—by sidelining *Worcester v. Georgia* and instead citing southern state courts' Removal-era rulings that ignored the Court's precedent to reach the contrary result.[291]

Normatively, pro-Removal legal thought is a deeply fraught basis for present-day arguments; invoking its authority parallels appealing to the antebellum pro-slavery constitutional theorizing, with which it was closely entangled.[292] But it is also jurisprudentially difficult. The argument that state jurisdiction and authority over Native peoples is constitutionally mandated has always existed; it just kept losing.[293] It lost during the debate over the ratification and early interpretation of the Constitution; it lost in front of the Supreme Court during Removal itself, as well as in the late nineteenth century; it lost when the Court revisited the issue in the twentieth century. States sometimes succeeded *politically*, both during Removal and especially in the mid-twentieth century, when Congress authorized many states to exercise jurisdiction within Indian country.[294] But rather than vindicating Thomas's argument, this outcome undermines it: it demonstrates that jurisdiction in Indian country is, ultimately, wholly subject to the federal political branches to structure as they wish.

D. Assessing Brackeen

The seeming decisiveness of the vote in *Haaland v. Brackeen*—with seven justices voting to reject Texas's attack on ICWA—obscures how unsettled the current moment in federal Indian law remains. It is true, as discussed above, that the majority seems to have little appetite for future wholesale frontal attacks on federal power over Indian affairs.[295] But the majority opinion also underscores how weary the Court has grown with its prior resolutions on Indian law even as it continues to invoke them—and how little the Court has to say in response to Gorsuch's or Thomas's voluminous critiques of the status quo.[296]

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289. 2 N.W. 439 (Wis. 1879).

290. *See* United States v. John, 437 U.S. 634, 651 (1978) (holding that the Major Crimes Act preempts state criminal jurisdiction over Indians); United States v. Antelope, 430 U.S. 641, 642 n.1, 643 n.2 (1977) (noting that federal criminal jurisdiction over Indians in Indian country overlays the "otherwise exclusive jurisdiction of Indian tribes to punish Indians for crimes committed on Indian land").

291. *Doxtater*, 2 N.W. at 448–49.

292. *See* SAUNT, *supra* note 132, at 318 ("The deeply intertwined causes of slavery and [Native] dispossession were more alike than not."); Allread, *supra* note 133, at 1539 ("The subjugation of Native peoples was not the state supremacy theory's only goal; the theory also sought to perpetuate the subjugation of Black people.").

293. *See generally* Allread, *supra* note 133, at 1539 (explaining that "from the Removal Era to the present day, states have continually sought to use arguments deriving from these tenets to establish their supremacy over Native nations," even as they consistently lost in the Supreme Court).

294. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 3, § 2.10[4].

295. *See supra* Section III.A.

296. *Id.*

The likely outcome of these attacks, in my view, is not that the whole Court will embrace either Justice Gorsuch's or Justice Thomas's calls to remake all federal Indian law. It is instead that their assaults on the foundational principles have further heightened the justices' sense of a "made up" field where precedents and history can be massaged to reach a particular outcome. The moment is thus ripe for dramatic veers like in *Oklahoma v. Castro-Huerta*, where three members of the *Brackeen* majority—including Justice Barrett—joined with the two *Brackeen* dissenters to suddenly and dramatically discard long-standing precedent while professing fidelity to it.[297]

The Court, then, is still in need of a "theory for rationalizing this body of law."[298] But neither Justice Gorsuch nor Justice Thomas fully supply that theory. Part of the problem is that they seek to defend their views by arguing that their positions are the answers that (non-Native) people gave to these questions in the past. But as Part II surveyed, in a field as long-standing as federal Indian law, in which the questions have remained so persistent, it is not hard to find that people have provided different answers to these questions. What is needed is a fuller account of why these particular answers are binding law now. It is here, I suggest, that a deeper engagement with structural constitutional law may help yield, if not a better, at least a clearer and more explicit explanation of how the field should look and why.

IV. THE PATH FORWARD

Thus far, this Article has taken a descriptive, doctrinal approach to the question of structural federal Indian law. But in this Part, I step back and try to offer a normative perspective. In particular, I try to weigh how Native nations and their advocates might engage with and be affected by this current moment of doctrinal "confusion." Native nations, of course, will decide for themselves what is best for them. My goal here is simply to predict how this jurisprudence might affect the values that Native nations have repeatedly expressed as deeply held. There is also a robust literature on what decolonizing federal law and the U.S. Constitution might look like.[299] My aim here is narrower and more doctrinal: how, in the wake of *Brackeen*, might federal jurisprudence, especially the Court's decisions, alter the realities that Native nations confront?

Some of the ideas being floated have a clear valence for Native nations. Recognizing Native sovereignty as a constitutional principle, as Justice Gorsuch suggests, would likely be an unalloyed good for Indian country. What "sovereignty" means, both in an abstract sense and for Native nations specifically, is highly contested. For Indigenous communities, the term extends well beyond its formal legal definition to encompass a broader set of claims to self-determination and autonomy. But even within the Court's doctrine, it is not clear that "sovereignty" is a legal term of art that necessarily conveys a concrete set of legally enforceable

297. 597 U.S. 629 (2022).

298. Haaland v. Brackeen, 599 U.S. 255, 279 (2023).

299. *See, e.g.*, Blackhawk, *American Colonialism*, *supra* note 20, at 135–48 (stating that "borderlands constitutionalism" developed "outside the courts" as a remedy); Davis, *supra* note 40, at 1792–99 (arguing for a reliance on principles of contract and consent instead of trust-based conceptions to remedy colonialism).

rights. In practice, the term often serves to signal that a particular "sovereign" deserves dignity and respect; it recognizes a government's importance and acknowledges its interests.[300]

Comparison to the federalism doctrine is instructive. Justice Gorsuch concludes that tribes constitutionally "remain independent sovereigns with the exclusive power to manage their internal matters."[301] It is possible to give this view specific legal content: Alexandra Fay and Henry Ishitani, for instance, suggest that this rule would invalidate federal unilateral derogations of tribal self-governance and projections of state power into Indian country.[302] I suspect that in practice these boundaries would prove very difficult to draw. The Court has made very similar assertions about the states,[303] and yet distinguishing permissible and impermissible regulation has proved challenging.[304]

In my read, what is happening in these sovereignty cases is that the Court is implicitly balancing one sovereign's interests against the competing interests of other governments or private actors. In such cases, sovereignty *might* be a trump—as in the case of sovereign immunity and anti-commandeering—but more often, it is a thumb on the scale in protecting the sovereign's interests.[305]

Much of federal Indian law involves federal courts similarly balancing, sometimes explicitly, the interests of tribal governments against those of federal, state, and local governments and non-Native citizens. In those cases, the constitutional sovereignty enjoyed by other sovereigns frequently becomes a cudgel for Native opponents to wield, often successfully, to persuade judges to back them.[306] In practical terms, then, constitutionalizing Native sovereignty would serve

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300. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 714–15, 758 (1994) (arguing that states "retain the dignity, though not the full authority, of sovereignty. . . . Congress . . . must respect the sovereignty of the States").

301. *Brackeen*, 599 U.S. at 307 (Gorsuch, J., concurring).

302. *See* M. Henry Ishitani & Alexandra Fay, *Revising the Indian Plenary Power Doctrine*, 29 MICH. J. RACE & L. 1, 18–19 (2024).

303. *E.g.*, Nat'l League of Cities v. Usery, 426 U.S. 833, 845 (1976) ("We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.").

304. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 530–31 (1985) (overruling *Nat'l League of Cities*).

305. H. Jefferson Powell & Benjamin J. Priester, *Convenient Shorthand: The Supreme Court and the Language of State Sovereignty*, 71 U. COLO. L. REV. 645, 659 (2000) (studying the Court's use of the language of state sovereignty and arguing, "[t]he Court invokes the *principle of state sovereignty*, yet often all that is meant is that state governments are important institutions whose interests should not be trampled upon lightly by the federal government").

306. Such balancing is most obvious in the cases addressing state jurisdiction within Indian country, where courts apply what is known as "*Bracker* balancing," which requires a "particularized examination of the relevant state, federal, and tribal interests." Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832, 838 (1982). But it is also apparent in other cases where state and tribal interests conflict, as in *Nevada v. Hicks*, 533 U.S. 353 (2001).

less to establish an inviolable sphere of tribal authority than to give tribal governments a valuable tool to push back; it might give them, if not a thumb, perhaps a ring finger or two on a balance that has long been stacked against them.

By the same token, further expanding state authority, as Justice Thomas urges, would very likely harm Indian country. In *Castro-Huerta*, the majority claimed that it was serving Native interests by further expanding state criminal jurisdiction there[307]—a position belied by the strong, united opposition of Native advocacy organizations,[308] and by the fact that Native peoples have the lowest levels of trust and confidence in state, as opposed to tribal or federal, institutions.[309] The reasons for this hostility are complex and deeply rooted, but they reflect the realities that states and localities have traditionally favored the interests of their non-Native constituents; that these governments have been jealous of their own authority and regarded Native nations not as partners but as rivals; and that states frequently view Native peoples in Indian country—who are often immune from state taxation—principally as burdens on state resources.[310]

The most complicated question for Native advocates, in my view, concerns *federal* power—especially the doctrine of plenary power. Would eliminating plenary power as it currently stands, as Justices Gorsuch and Thomas urge, help or harm Native communities?

Nearly 40 years ago, *Arizona Law Review* hosted a famous debate between Robert Laurence and Robert Williams on whether Native nations could "live with" federal plenary power.[311] In some ways, the stakes of this debate endure. Professor Williams emphasized the doctrine's profound dignitary harms, and there the implications are clear.[312] Indian law scholars have criticized the plenary power doctrine for over a generation, and for good reason.[313] Its foundation rests on atextual jurisprudential arguments that have fallen out of fashion, and it is at odds with original constitutional understandings. Perhaps most pressingly, it is unquestionably a colonial legal doctrine, shaped to further U.S. control over Native

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307. Oklahoma v. Castro-Huerta, 597 U.S. 629, 651 (2022) (arguing that limiting state jurisdiction "would require this Court to treat Indian victims as second-class citizens"). *But see id.* at 687 (Gorsuch, J., dissenting) (critiquing the majority's paternalism for suggesting that "the Cherokee have misguidedly shown no interest in state jurisdiction").

308. Native organizations uniformly filed amicus briefs objecting to state jurisdiction. *See, e.g.*, Brief for National Congress of American Indians as Amici Curiae Supporting Respondent, Oklahoma v. Castro-Huerta, 597 U.S. 629 (2022) (No. 21-429), 2022 WL 1048902, at *1–2; Brief of Amici Curiae the Cherokee Nation, Chickasaw Nation, Choctaw Nation of Oklahoma, Muscogee (Creek) Nation, and Seminole Nation of Oklahoma as Amici Curiae Supporting Respondent, Oklahoma v. Castro-Huerta, 597 U.S. 629 (2022) (No. 21-429), 2022 WL 1057053, at *3–4.

309. Elizabeth Hidalgo Reese, *Tribal Representation and Assimilative Colonialism*, 76 STAN. L. REV. 771, 822–25 (2024).

310. *Id.*

311. Robert Laurence, *Learning to Live with the Plenary Power of Congress over the Indian Nations: An Essay in Reaction to Professor Williams' Algebra*, 30 ARIZ. L. REV. 413 (1988); Williams, *Eurocentric Myopia*, *supra* note 7.

312. Williams, *Eurocentric Myopia*, *supra* note 7, at 457.

313. *See supra* text accompanying note 7.

peoples, and it rests on the Supreme Court's dismissive and hateful rhetoric denigrating Native peoples.[314]

Overruling federal plenary power, then, would have significant symbolic significance. We sometimes dismiss actions as *merely* symbolic, but, if our recent "history wars" demonstrate anything, it is that symbols matter: they have become one of the principal ways we grapple with national memory and the enduring legacy of our nation's past.[315] Supreme Court decisions are a significant part of that symbolism. Much of the appreciative reaction within Indian country to Justice Gorsuch's opinions has been as much about their tone and language—with pronouncements that meaningfully acknowledge Native peoples and their claims—as about their holdings, which often applied well-settled law.[316] By contrast, the enduring status of the Supreme Court's nineteenth-century "racist precedents" as good law enshrines a kind of judicial monument to colonialism into the *United States Reports*.[317]

But Supreme Court opinions are not solely, or even primarily, essays on history and memory. They make law now in ways that will affect people today. The Roberts Court has proven that it will happily repudiate prior injustices in the service of furthering present injustices, at least in the eyes of its critics.[318]

For his part, Professor Laurence's essay focused on some of these practical considerations, which he termed, echoing *Worcester*, the "actual state of things."[319] Professor Williams read this as a call for quiescence and acceptance of an unjust status quo.[320] But I read these approaches as more complementary rather than contradictory. It does not foreclose the possibilities of radical reimagining to also

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314. *See* Blackhawk, *American Colonialism*, *supra* note 20, at 55 ("[T]he plenary power doctrine operated as a fig leaf for the judiciary to allow the constitution of American colonialism to continue . . . .").

315. *See* David W. Blight, *The Fog of History Wars*, NEW YORKER (June 9, 2021), https://www.newyorker.com/news/daily-comment/the-fog-of-history-wars [https://perma.cc/97KS-58WS].

316. *See, e.g.*, Julian Brave NoiseCat, *The* McGirt *Case Is a Historic Win for Tribes*, ATLANTIC (July 12, 2020), https://www.theatlantic.com/ideas/archive/2020/07/mcgirt-case-historic-win-tribes/614071/ [https://perma.cc/CXW7-RNYJ] ("[F]or the treaty rights of Indigenous nations to finally be recognized . . . is bracing, perhaps even startling, to me and other Native people"); Joy Harjo, *After a Trail of Tears, Justice for 'Indian Country'*, N.Y. TIMES (July 14, 2020), https://www.nytimes.com/2020/07/14/opinion/mcgirt-oklahoma-muscogee-creek-nation.html [https://perma.cc/KA3W-QU5E] ("[*McGirt*] was about validity, personhood, humanity — the assertion of our human rights as Indigenous peoples and our right to exist.").

317. *See generally* Adam Crepelle, *Lies, Damn Lies, and Federal Indian Law: The Ethics of Citing Racist Precedent in Contemporary Federal Indian Law*, 44 N.Y.U. REV. L. & SOC. CHANGE 529 (2021).

318. *See, e.g.*, Jamal Greene, *Is* Korematsu *Good Law?*, 128 YALE L.J.F. 629 (2019); Neal Kumar Katyal, Trump v. Hawaii*: How the Supreme Court Simultaneously Overturned and Revived* Korematsu, 128 YALE L.J.F. 641 (2019).

319. Laurence, *supra* note 311, at 435–37 (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 520 (1832)).

320. Williams, *Eurocentric Myopia*, *supra* note 7, at 456–57.

think strategically about the current legal realities that tribal governments must navigate to pursue their aims.

The question then becomes: what would it mean for Native nations if the Court repudiated plenary power, as both Justices Gorsuch and Thomas urge? Here, it is important to distinguish between two sets of questions. There is the question that obsesses public law scholars of how it would affect the Supreme Court's doctrine. And then there is the important, neglected question of what such a repudiation might mean for day-to-day governance in Indian country.

A. Doctrine

The doctrinal implications of rejecting federal plenary power depend heavily on *what* jurisprudential approach to federal Indian law the Court would ultimately embrace. Justice Gorsuch suggests that there is a "hydraulic relationship" between Native and federal authority[321]—which is true if you view the issue within the frame of Founding Era debates, which regarded Native sovereignty as a limit on U.S. jurisdiction and authority.[322] Under this view, as Justice Gorsuch, following many commentators, suggests, the doctrinal implication of limited federal authority would be expanded by Native autonomy.[323]

But the implications under the jurisprudence of the late nineteenth century are different. If the Court embraces the zero-sum logic of *Kagama* that Native nations must be under *either* federal or state authority and that Native autonomy is downstream of federal law, then the doctrinal consequence of limiting federal authority is expanded state power. This is the logic of Justice Thomas's *Brackeen* dissent, which casts Native sovereignty as something that has been lost and thus been supplanted by state jurisdiction.[324]

For Native nations, then, the doctrinal stakes of calling for the Court to overrule plenary power—as much of the field of federal Indian law has long urged—depend on whether Justices Thomas or Gorsuch could persuade more of their colleagues. Such vote counting is always risky. The outcome in *Brackeen* points in one direction, the line-up in *Castro-Huerta* in another. It is this unpredictability from case to case that makes this current moment in Indian law so unstable.

I also worry that focusing so heavily on federal plenary power distracts from the doctrinal challenges confronting Native nations today. Let me be clear: I think plenary power over tribes is normatively undesirable and ungrounded in the Founding Era constitutional understandings that the Court considers dispositive. But I also would argue that the Court and many commentators have failed to reckon with how much twentieth- and twenty-first-century changes, especially in the last 50 years, have altered the jurisprudential landscape.

Some of the current focus on federal plenary power reflects deeply justified anger at the federal government's horrific treatment of Native peoples. This perspective emerged in Justice Alito's questioning at the *Brackeen* oral argument:

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321. Haaland v. Brackeen, 599 U.S. 255, 318 (2023) (Gorsuch, J., concurring).
322. *See supra* Section II.A.
323. *See, e.g.*, Clinton, *supra* note 7; Toler, *supra* note 7.
324. *See supra* Section III.C.

he interrogated the government's attorney about whether Congress's plenary power authorized the boarding school law.[325] If plenary power underwrote those outcomes, this reasoning implies, then surely we can forestall similar abuses today by *cabining* federal authority.

One problem with this perspective is that its historical lessons are much too tidy. Federal plenary power did not single-handedly cause the calamities that the United States inflicted on Native peoples. Many of the federal government's most brutal actions against Native nations—including mass deportations and instances of attempted extermination—preceded *Kagama*, occurring while Congress thought it lacked legislative jurisdiction over Native peoples. States acted, if anything, arguably still worse—California oversaw the clearest historical example of genocide against Native peoples[326]—even as some of the most extreme violence against Native communities came not from governments but from private actors. The point here is not to arbitrate comparative complicity in historical injustice; there is plenty to go around. It is, rather, that if we are going to decide what institutions deserve authority today based on how they exercised it in the past, then *no* U.S. institution emerges blameless.

This view does not absolve plenary power from careful scrutiny, but that examination should consider how plenary power functions today, not in the late nineteenth century. Too much writing on plenary power strikes me as the jurisprudential equivalent of one of those Quentin Tarantino movies that create alternate histories where victims obtain posthumous revenge. Instead of relitigating past law, the more relevant question, to my mind, is: how does federal plenary power work now? Is it still tainted by its history?

Federal plenary power will, of course, always be rooted in colonialism; that taint is inherent. But the late twentieth century has wrought significant changes that have transformed how plenary power operates doctrinally.

First, as noted above, the Supreme Court has itself tempered some of the most significant excesses of federal authority in Indian law. The most egregious judicial rubberstamps of federal action in the late nineteenth century involved casting aside obvious rights violations like the suppression of Indigenous religions, the seizure of Native property, or in the case of the boarding schools, the denial of basic familial and parental rights. But as the Court repudiated the "strong" version of plenary power, those rights provisions now restrict federal action.[327]

Second, although the political branches could always reverse their 50-year-long push toward expanding and embracing federal autonomy, there are underlying structural changes that suggest that we may have at last moved beyond the policy whiplash of the twentieth century. The late-twentieth-century transformation of federal Indian policy didn't just happen; it was the result of sustained Native

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325. Transcript of Oral Argument at 109, Haaland v. Brackeen, 599 U.S. 255 (2023) (No. 21-376).

326. *See generally* BRENDAN C. LINDSAY, MURDER STATE: CALIFORNIA'S NATIVE AMERICAN GENOCIDE, 1846–1873 (2012); BENJAMIN MADLEY, AN AMERICAN GENOCIDE: THE UNITED STATES AND THE CALIFORNIA INDIAN CATASTROPHE, 1846–1873 (2016).

327. *See supra* text accompanying notes 180–84.

advocacy that helped change both public and elite opinion.[328] The structural shifts that this change both reflected and deepened—an organized, effective Native lobbying effort, backed by some nations' increased economic clout, and the sustained engagement of the Executive and congressional committees and their staffs—endure and have only become more entrenched.[329]

Third and finally, whatever the theoretical tension between Native sovereignty and federal jurisdiction, the past 50 years have demonstrated that in practice, expanded tribal authority, independence, and capacity are compatible with the existence of federal plenary power.[330] Indeed, as both *Lara* and *Brackeen* suggest, they are sometimes legally *dependent* on plenary power, since the doctrine forced an obviously skeptical Court to uphold congressional actions that enhanced Native authority.

This point underscores a broader shift: the potential harms that confront Native nations in twenty-first-century Supreme Court decisions are very different from those of the late-nineteenth. Few Native advocates today would say that the current problem in Indian law is *too much deference* to Congress, as it was in plenary power's heyday. Indeed, in a telling reversal, many in the field have been urging the Court to yield *more* to congressional judgments in Indian law.[331] This move reflects what the field has persuasively diagnosed as the greatest jurisprudential challenge confronting tribes before this Court: an ascendent colorblind constitutionalism threatens to ignore the structural nature of federal Indian law altogether. Such decisions purport to apply constitutional provisions equally but often vindicate the past and current *unequal* treatment of Native interests.[332] This strain appears in *Castro-Huerta* and in the Court's decision in the trust doctrine case *Navajo Nation*, as well as in recent litigation over Native free exercise claims. Indeed, the equal protection challenge in *Brackeen*—which the Court rejected for lack of standing and will likely kick around the lower courts for a while—underscores this danger and augurs further litigation in this vein.[333]

The irony of these jurisprudential fights is that federal Indian law *already* has a long-standing and robust doctrine that grants the federal political branches broad authority to structure relations between tribes, the federal government, and the states, and mandates that the Court honor those judgments: the plenary power doctrine. Whether Native nations want to strategically embrace a doctrine grounded

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328. CHARLES F. WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 205 (2006).

329. *See* Kirsten Matoy Carlson, *Lobbying Against the Odds*, 56 HARV. J. ON LEGIS. 23, 30–35 (2019) (tracing some of the structural shifts that have facilitated Native lobbying). *But see* Reese, *supra* note 309, at 826–32 (noting the limits of lobbying in protecting Native interests).

330. *See supra* Section II.C.

331. *See, e.g.*, Blackhawk, *supra* note 38; Matthew L. M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CALIF. L. REV. 495 (2020); Michalyn Steele, *Comparative Institutional Competency and Sovereignty in Indian Affairs*, 85 U. COLO. L. REV. 759 (2013).

332. *See, e.g.*, Bethany Berger, *Savage Inequalities*, 94 WASH. L. REV. 583 (2019) (discussing this risk). Recent litigation over Native free-exercise claims also underscores this dynamic. *See* Apache Stronghold v. United States, 101 F.4th 1036 (9th Cir. 2024).

333. Haaland v. Brackeen, 599 U.S. 255, 292–96 (2023).

in their denigration is a difficult tradeoff they will have to make. But—at least until Justice Gorsuch secures four more votes for his legal theory—*Brackeen* underscores the doctrine's effectiveness in fending off assaults that would undo the hard-won victories that tribal governments have written into federal law.

B. Governance

And then there is the world outside formal doctrine, where real people live. For them, a Court decision overruling plenary power would mean, most immediately, considerable uncertainty about the continued validity of the fundamental structures of day-to-day governance in Indian country that emerged over the course of the twentieth century. Could the current federal social services to Indian country survive as Spending Clause legislation? In the absence of federal plenary power, would Native governments' role in these programs suddenly get entangled in current fights over the administrative state and implicate, say, the private delegation doctrine?[334] Would federal statutes like ICWA or the Indian Gaming Regulatory Act that seek to balance state and tribal jurisdiction remain good law? Could Native nations still argue that the federal government had a trust obligation toward them, and could federal officials still fulfill that responsibility by suing to vindicate Native rights? What about the question in *Kagama* itself, the constitutionality of the Major Crimes Act and federal criminal jurisdiction within Indian country, or the Indian Civil Rights Act, which imposes most of the limits of the Bill of Rights on tribal governments?

These questions are all intriguing, perhaps even "fun" hypotheticals for law school classrooms, but tribal governments don't live in thought experiments; they must provide services for their citizens. For them, like all governments, a dramatic change to the status quo might be profoundly destabilizing. Consider what might happen in criminal justice. Federal law enforcement in Indian country is deeply flawed, and yet, because it has been the law for a century and a half, tribes routinely rely on and cooperate with the FBI and U.S. Attorneys to police crime there.[335] It would be clearly better for Native nations to undertake more of that work themselves, and recent federal legislation has slowly expanded both tribal jurisdiction and institutional capacity to fulfill that role themselves.[336]

But this restoration of Native authority has also come with federal support, resources, and, perhaps most importantly, tribal consent to opt in. What if, instead, the change was not gradual but sudden—a ruling that the federal government lacked the requisite authority? Assuming that that authority would flow to Native nations rather than the states—a big if, as discussed—Native nations would suddenly find

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334. *Cf.* Seth Davis, *Nondelegation and Native Nations*, 56 CONN. L. REV. 1069, 718–24 (2024) (arguing that delegation doctrines do not affect Native nations as separate sovereigns under well-established precedent).

335. *See* Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 775–76 (2006); Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 572–75 (1976).

336. Violence Against Women Reauthorization Act of 2022, Pub. L. No. 117-103, division W, tit. VIII, 136 Stat. 841, 895; Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, tit. IX, 127 Stat. 54, 118; Tribal Law and Order Act of 2010, Pub. L. No. 111–211, tit. II, 124 Stat. 2258, 2261.

themselves confronted with what would amount to an unfunded mandate to administer all criminal justice within their boundaries, after years of being denied that authority. In other words, the immediate effect of such a ruling would be that new obligations would suddenly be thrust on all tribal governments without their consent—all in the name of decolonization.

Part of the challenge here is that because lawyers often imbue legal doctrine with significant power, they have cast plenary power both as a symbol and cause of Native subordination. But as others have stressed, formal public law offers a poor model for how power writ large is exercised and experienced.[337] "Plenary power" prioritizes one important kind of authority—the power to legislate and command. This political model was always a poor fit for Indigenous governance, whose power was much more relational. But it is also an incomplete account of the challenges and opportunities that confront Native governments today, which often resemble those facing other governments. Absent or crumbling infrastructure, constrained resources and dependence on baroque grants and aid, lack of educational opportunities coupled with the flight of human capital, ravages wrought by opioids and substance abuse, residents' suspicion of governmental institutions—these have long been colonialism's fruits in Indian country, but they increasingly mark much of the United States, particularly rural areas. In practice, then, Native nations' power of self-determination is bound up in the same hard realities of economic and political power as it is for those other governments.[338]

The point here is not that questions of how to make life better for tribal citizens are somehow distinct from issues of "law"; the two are obviously entangled. Tribal governments confront their purported "subordinate and dependent" status not just as a Supreme Court shibboleth but as daily reality thrust upon them in their encounters with other governments. The point, rather, is to urge skepticism on the part of judges and academics about how much altering doctrine can remedy these realities.

One particular flaw in the depiction of power implied by privileging plenary power is that it ignores the reality that authority in federal Indian law has always been negotiated. Indian law is not unique in this regard, but it is especially glaring: for a century, after all, the negotiation between the United States and Native nations was quite literal, with representatives meeting face-to-face to hash out the division of authority and jurisdiction through treaties. But the negotiated nature of U.S. colonialism remained true even after plenary power's ascendance—many scholars have pointed to the persistence of legally binding tribal–federal agreements even after the end of treaty making—and has become increasingly truer today, given the ubiquity of tribal–federal contracting.

Remedying U.S. colonialism, in whatever form that means to Native nations, will inevitably also require negotiation; it will involve building tribal capacity and repurposing inherited legal and constitutional structures to support Native independence rather than subordination. That work is already underway, in

337. *See generally* Daryl J. Levinson, *Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 33 (2016).

338. Lance Morgan, *The Rise of Tribes and the Fall of Federal Indian Law*, 49 ARIZ. ST. L.J. 115, 119–21 (2017).

tribal offices and headquarters and federal buildings across the country. Indeed, Native nations have been engaged in that work since the beginning of plenary power, really. Within this frame, current doctrine, as unsatisfying and flawed as it is, has offered some stability, predictability, and space for Native nations to negotiate, even if within a heavily constrained system, what future they want for themselves. Federal law also, importantly, has provided some space for tribal consent—whose absence was, ultimately, what distinguished plenary power from the ostensibly consent-based vision that preceded it.

But unlike the work of the political branches, legal doctrine cannot easily be negotiated. Native nations can litigate; they can file amicus briefs; all of Indian country could unite to call on the Supreme Court to overrule plenary power. Yet the result and form that this legal transformation would take would still be dictated by the nine justices, and there would be no procedure for consent.

But if it cannot do the work of negotiation itself, doctrine nonetheless still matters—which is why this Article has spent so much time trying to get it right. Though the Supreme Court cannot solve the entanglement between federal Indian law and colonialism, it can exacerbate it. Plenary power gave the federal political branches the space they needed to construct U.S. imperialism. Now, just as the political branches grope toward ways to reckon with what this history created, some on the Court have sought to reverse this long-standing structural rule. In this regard, perhaps the most important current role for this current Supreme Court is, in the ironic words of the author of *Castro-Huerta*, "to do no harm"—to not dramatically upend the institutions that Native nations have been reclaiming to slowly undo colonialism's legacy.[339] Those structures are, of course, tainted by their colonial origins—but so are the doctrines that some on the Court seek to replace them with. There is no easy escape from the past. There is only the hard, slow, and often tedious work of chipping away at the weight it imposes.

CONCLUSION

During his time on the Court, Justice Scalia wrote a memo that provides some additional context to his comment about "making up" federal Indian law. The Court's Indian law precedents, he observed with frustration but resignation, were based less on "explicit legislation" than on attempts to "discern what the current state of affairs ought to be by taking into account all legislation, and the congressional 'expectations' that it reflects."[340]

These comments are notorious among Indian law scholars because they epitomize the sort of subjectivism and purposivism that jurists like Justice Scalia disdained.[341] "[T]his Court's proper role . . . is to declare what the law is, not what we think the law should be," Justice Kavanaugh intoned in *Castro-Huerta*.[342] Such

339. Transcript of Oral Argument at 56–57, United States v. Cooley, 593 U.S. 345 (2021) (No. 19-1414).

340. Getches, *Conquering the Cultural Frontier*, *supra* note 4, at 1575 (citation omitted).

341. *Id.*; *see also* Fletcher, *supra* note 6, at 976.

342. Oklahoma v. Castro-Huerta, 597 U.S. 629, 656 (2022).

pieties mask the reality that deciding what the law is in the absence of "explicit legislation" turns out to be difficult.

But not impossible. This Article has argued that the Court does not need to turn to amorphous "expectations," or its own policy judgments, to fill the gaps created by the absence of text in federal Indian law. The Court, after all, routinely adjudicates clashes over authority and jurisdiction that it itself concedes are not resolved by any dispositive text. The answers that this approach produces are still hotly contested, but they at least usually come through a method that is legible and understandable, including to the Court's critics. This Article has tried to bring some of that discipline to both the messy past of federal Indian law and to the field's current moment of uncertainty. Indian law may be confusing, but arguably no more or less so than other fields governed by judicially crafted rules that have emerged through two centuries of debate. The Court should stop using this difficulty as an excuse to make law up.