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# Sovereign Metaphors in Indian Law

Gregory Ablavsky

*Panelist, Associate Professor of Law, Stanford Law School; J.D./Ph.D., American Legal History, University of Pennsylvania,*  
[ablavsky@law.stanford.edu](mailto:ablavsky@law.stanford.edu)

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# ARTICLES

## SOVEREIGN METAPHORS IN INDIAN LAW

Gregory Ablavsky\*

### I. INTRODUCTION

The status of Native nations under federal law, the Supreme Court has repeatedly stated, is unique. “The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence,” Chief Justice Marshall announced in *Cherokee Nation v. Georgia*;<sup>1</sup> it was “marked by peculiar and cardinal distinctions which exist nowhere else.”<sup>2</sup> Fifty years later, Justice Miller reiterated Marshall’s point: “The relation of the Indian tribes living within the borders of the United States . . . to the people of the United States, has always been an anomalous one, and of complex character.”<sup>3</sup>

Anomalous compared to what? Marshall’s statements came in a paragraph that sought to explain why the “term *foreign nation*,” which, Marshall noted, might ordinarily be thought to apply to tribes, did not.<sup>4</sup> Similarly, Justice Miller’s assertion came as he attempted to puzzle through Native nations’ “difficult to define” position within Anglo-American jurispru-

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\* Associate Professor of Law, Stanford Law School; J.D./Ph.D., American Legal History, University of Pennsylvania. Thanks to Michael Abrams and the staff of the Crown Law Library for research assistance on this Article.

1. 30 U.S. 1 (1831).

2. *Id.* at 16.

3. *United States v. Kagama*, 188 U.S. 375, 381 (1886). 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, 433 (2005); Angela R. Riley, *Native Nations and the Constitution: An Inquiry into Extra-Constitutionality*, 130 HARV. L. REV. F. 173 (Apr. 2017).

4. *Cherokee Nation*, 30 U.S. at 16.

dence.<sup>5</sup> “They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people.”<sup>6</sup>

As these quotes suggest, the status of Native nations within federal law has almost always been defined with reference to other sovereigns. In this Article, I explore the comparisons between “Indian tribes” and the other sovereigns mentioned in the U.S. Constitution: foreign nations, states, and the U.S. territories. In each instance, I examine the analogies’ function in the historical growth and development of federal Indian law as well as in current jurisprudence.

This exploration reveals that tribes were not as anomalous as the Court has suggested. Even while the Court proclaimed the tribes’ uniqueness, it readily applied doctrines developed in the context of foreign nations, states, and U.S. territories to Native nations straight up, ignoring the differences between the situation of tribes and other sovereigns. The Court continues to engage in this practice in the present. Yet these invocations of other sovereigns have usually served a particular purpose: either to cabin the scope of tribal authority or to aggrandize federal power. It is only when doctrines derived from other sovereigns might benefit tribes—might suggest a broader scope for tribal authority or capacity—that tribes become exceptional and anomalous. In these instances, as Marshall and Miller’s quotes demonstrate, tribes become defined by what they are not—their differences from other sovereigns now serve to justify diminishing tribal authority. Rhetoric about tribes’ uniqueness, in other words, has provided a powerful and ongoing ideological tool in constructing U.S. colonialism over Native peoples. This narrative about what tribes *lack* when compared to other sovereigns—full sovereignty, territorial control, open citizenship, constitutional status—has become a constant, and pernicious, trope within the discourse of Indian law.

## II. FOREIGN NATIONS

### A. *Historically*

“Nations” is arguably the oldest legal frame Europeans used for indigenous peoples, tracing back to the very beginning of colonization.<sup>7</sup> Although the word’s connotations of unity and centralized political organization poorly fit the complex Native world of villages and loose confederations,

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5. *Kagama*, 188 U.S. at 381.

6. *Id.*

7. See KAREN ORDAHL KUPPERMAN, *INDIANS AND ENGLISH: FACING OFF IN EARLY AMERICA* 77–109 (2000).

tions,<sup>8</sup> it accurately conveyed a sense of Native separateness and autonomy from Europeans. This frame allowed Europeans to extrapolate to Native peoples the legal instruments that they had long used to govern relationships among “nations”—formal, written treaties, most notably.<sup>9</sup> For their part, Native communities engaged in the same project, readily assimilating Europeans into the legal forms and customs they used to structure cross-cultural diplomacy.<sup>10</sup>

But, while Native nationhood provided Europeans a ready legal frame for their relationship with indigenous communities, it also had implications at odds with their colonial aims. In particular, it suggested that Native nations, as separate, independent polities, existed outside the jurisdiction and control of Europeans. Early on, many Europeans began to craft legal theories that resisted this conclusion, and that would serve as the basis for claiming authority over both Native lands and peoples.<sup>11</sup> These conflicting ideas—of Natives as autonomous nations and as subordinate communities subject to European control—clashed within European legal thought throughout the seventeenth and eighteenth centuries, even as most Native communities in fact remained outside European authority.<sup>12</sup>

The United States inherited this duality of legal thought. The new nation initially made an abortive attempt to resolve the tension produced by Native independence by labelling the Native peoples within its new borders as “conquered,” and so subject to the jurisdiction of both state and federal governments.<sup>13</sup> This claim failed spectacularly, spawning wars that the new nation could ill-afford.<sup>14</sup> A chastened Washington Administration quickly retreated, with Secretary of War Henry Knox proclaiming that “independent nations and tribes of Indians ought to be considered as foreign nations, not

8. See generally MICHAEL J. WITGEN, *AN INFINITY OF NATIONS: HOW THE NATIVE NEW WORLD SHAPED EARLY NORTH AMERICA* (2012); STEVEN C. HAHN, *THE INVENTION OF THE CREEK NATION, 1670–1763* (2004).

9. See COLIN G. CALLOWAY, *PEN AND INK WITCHCRAFT: TREATIES AND TREATY MAKING IN AMERICAN INDIAN HISTORY* (2013).

10. E.g., JAMES H. MERRELL, *INTO THE AMERICAN WOODS: NEGOTIATORS ON THE PENNSYLVANIA FRONTIER* (2000); ROBERT A. WILLIAMS, *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600–1800* (1997).

11. See CHRISTOPHER TOMLINS, *FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580–1865*, 95–132 (2010); ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990); Daragh Grant, *The Treaty of Hartford (1638): Reconsidering Jurisdiction in Southern New England*, 72 *WM. & MARY Q.* 461 (2015).

12. See GREGORY EVANS DOWD, *WAR UNDER HEAVEN: PONTIAC, THE INDIAN NATIONS & THE BRITISH EMPIRE 174–211* (2002) (tracing debates over Native status in the British Empire after the Seven Years’ War).

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

14. See Gregory Ablavsky, *The Savage Constitution*, 63 *DUKE L.J.* 999, 1018–33 (2014).

as the subjects of any particular state.”<sup>15</sup> The new federal government employed this legal frame by maintaining the diplomatic and legal norms acknowledging Native nationhood adopted by earlier empires.

Yet, as I have explored more fully elsewhere, recognizing Native peoples as fully sovereign, independent nations *within* the United States conflicted with the new nation’s own assertions of territorial sovereignty.<sup>16</sup> Native peoples, Anglo-Americans concluded, had to be subject to U.S. sovereignty in some fashion.<sup>17</sup> Moreover, as colonization proceeded and Native nations east of the Mississippi became increasingly subject to federal power as a matter of fact, many Anglo-Americans vociferously argued that the model of Native nationhood was archaic and should be dispensed with altogether.<sup>18</sup>

The confrontation between the nationhood frame, with its recognition of Native rights to autonomy, and the longstanding view that Native peoples were merely the subjects of the colonizing power, was at the core of the legal and jurisdictional battle known as Removal, which sought to resolve centuries of swirling debates over Native status. Southern states, eager to possess Native lands, insisted that tribes were subject, like all others, to state and federal territorial jurisdiction: they enacted a series of laws that purported to legislate for Indian country within their borders, as part of their ordinary legislative jurisdiction.<sup>19</sup> Native peoples and their allies, by contrast, argued that the tribes remained independent nations, a status that they insisted had been repeatedly recognized and endorsed by the federal government.<sup>20</sup>

The contest produced Chief Justice John Marshall’s attempt to parse the meaning of Native nationhood in *Cherokee Nation v. Georgia*.<sup>21</sup> Marshall at once acknowledged that the Cherokee Nation was a separate state, governed by its own laws, and denied that it was a “foreign nation” for the purposes of the Supreme Court’s original jurisdiction under Article III.<sup>22</sup>

15. Henry Knox to George Washington (July 7, 1789), in 3 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES 134, 134–40 (W. W. Abbot & Dorothy Twohig eds., 1987).

16. Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1061–68 (2015).

17. *See id.*

18. *E.g.*, Letter from Andrew Jackson to James Monroe (Mar. 4, 1817), in 4 THE PAPERS OF ANDREW JACKSON: MAIN SERIES 93, 96 (“If [Indians] are viewed as an independent Nation, possessing the right of sovereignty and domain, then negotiating with them and concluding treaties, would be right and proper. But this is not the fact—all Indians within the Territorial limits of the United States, are considered subject to its sovereignty, and have only a possessory right to the soil.”).

19. *See, e.g.*, 1826 Ga. Laws 68; 1827 Ga. Laws 99–101; 1827 Ga. Laws 236; 1828 Ga. Laws 87–88; 1830 Ga. Laws 154; 1830 Ga. Laws 127; 1830 Ga. Laws 114.

20. *See* THEDA PERDUE & MICHAEL D. GREEN, *THE CHEROKEE NATION AND THE TRAIL OF TEARS* 69–89 (2007).

21. 30 U.S. 1 (1831).

22. *Id.* at 17–18.

Because the Cherokee Nation was within the borders of the United States and did not participate in the community of nations, he reasoned, it could not be foreign.<sup>23</sup> Tribes, rather, were, “domestic dependent nations,” a neologism Marshall coined by repurposing the era’s international-law thought.<sup>24</sup>

On its face, Marshall’s phrase encapsulated, rather than resolved, earlier tensions. As Marshall’s subsequent decision in *Worcester v. Georgia*<sup>25</sup> made clear, “domestic dependent nations” retained jurisdictional autonomy from the states.<sup>26</sup> His language there reaffirmed the vitality of the analogy between Native and foreign nations: treaty and nation, he noted, had “definite and well understood meaning[s]” that the United States had applied “to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.”<sup>27</sup> Yet Marshall could not undo the implications of his earlier pronouncement: subsequent decisions would place considerably more emphasis on dependency than nationhood. Little more than a decade after Marshall’s decision, the Court, in upholding federal power to regulate Indian country in *United States v. Rogers*,<sup>28</sup> dubiously concluded that Native peoples “have never been acknowledged or treated as independent nations by the European governments.”<sup>29</sup>

*Rogers* augured a clear shift in the Court’s jurisprudence, away from international law and toward positive law as embodied by congressional legislation as the principal source of law in Indian affairs. By the time of the Civil War, an increasingly emboldened Congress was routinely enacting statutes that expanded federal authority ever further into Native self-governance. In 1871, in the midst of a struggle between the Senate and the House, Congress enacted a law stating, “hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation . . . with whom the United States may contract by treaty.”<sup>30</sup> This move, while practically insignificant, was symbolically important in ratifying the shift in thinking about tribal status from foreign to domestic. By 1886, when the *Kagama* Court affirmed Congress’s broad power to legislate over Indians, any suggestion of Native autonomy based on nationhood was swept away.<sup>31</sup> Tribes were, the Court acknowledged, “a

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23. *Id.*

24. *Id.* at 17.

25. 31 U.S. 515 (1832).

26. *Id.*

27. *Id.* at 519.

28. 45 U.S. 567, 572 (1846).

29. *Id.*

30. Act of Mar. 8, 1871, ch. 120, 16 Stat. 544, 566 (1871); see also Lance Sorenson, *Tribal Sovereignty and the Recognition Power*, 42 AM. INDIAN L. REV. 69, 105–11 (2017) (describing the legislative history of this provision).

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

separate people” with limited powers of self-governance, but this separateness did not bar Congress from asserting jurisdiction through ordinary legislation.<sup>32</sup> On the contrary, the tribes’ status as distinct from the states, the Court reasoned, *bolstered* the congressional claim to authority, given the nation’s obligation to protect its Native wards.<sup>33</sup>

By the late nineteenth century, then, the analogy between Native communities and foreign nations, which had done so much work in earlier legal thought, played little role in the Court’s Indian law jurisprudence. The older decisions endured as a matter of positive law, yet the Court glossed over their sources and reasoning. The *Kagama* Court, for instance, relied extensively on both *Cherokee Nation* and *Worcester*, which it described as the “best statement[s]” on Native status—yet it read the former primarily as an articulation of Native dependence and the latter for establishing the principle of exclusive federal, rather than state, jurisdiction over Indian affairs.<sup>34</sup> “The North American Indians do not, and never have, constituted ‘nations’ as that word is used by writers upon international law,” the Court opined in 1901.<sup>35</sup> Pontificating at length on the “natural infirmities of the Indian character” and tribes’ supposed lack of government, the Court concluded: “In short, the word ‘nation’ as applied to the uncivilized Indians is so much of a misnomer as to be little more than a compliment.”<sup>36</sup>

But there was one exception to the Court’s general retreat from thinking about Indian law as a form of foreign relations law—a subset of cases dealing with congressional power to abrogate Indian treaties. Beginning with *Cherokee Tobacco*<sup>37</sup> in 1870 and culminating with *Lone Wolf v. Hitchcock*<sup>38</sup> in 1903, the Court affirmed that, with respect to congressional authority, Indian treaties were to be regarded no differently than treaties with foreign nations. Both, the Court concluded, were subject to abrogation by statute under the last-in-time principle.<sup>39</sup> This tidy analogy ignored how much the Court’s abandonment of conceptions of tribes as foreign nations had altered the jurisprudential landscape. The relationship between the United States and foreign nations, the Court had reasoned in upholding the congressional power to abrogate, was “reciprocal”: if the United States opted to break a treaty, the other nation “may also decline to keep the corresponding engagement.”<sup>40</sup> But tribes, no longer fully autonomous actors

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32. *Id.* at 381–83.

33. *Id.* at 381–84.

34. *Id.*

35. *Montoya v. United States*, 180 U.S. 261, 265 (1901).

36. *Id.*

37. 78 U.S. 616, 620–21 (1870).

38. 187 U.S. 553, 565–67 (1903).

39. *Cherokee Tobacco*, 78 U.S. at 620–21; *Lone Wolf*, 187 U.S. at 565–67.

40. *Chae Chan Ping v. United States*, 130 U.S. 581, 601 (1889).

under federal law, were now unambiguously under federal jurisdiction. Unsurprisingly, then, federal courts held that tribes *lacked* the power to abrogate the treaties they had entered with the United States, since those treaties had become part of binding federal law.<sup>41</sup>

In other words, by the late nineteenth century, tribes and foreign nations really were differently situated, largely as a consequence of the Court's own rulings. Yet in this one small corner of Indian law jurisprudence, the Court continued to uphold the analogy between the two. The comparison no longer served to advance tribal autonomy and jurisdictional independence, though, as it had done in the days of Marshall and the struggle over Removal. Rather, assimilating the status of tribes and foreign nations for the purposes of federal law now served only as the justification for eliminating one of the last few extant barriers over unbridled federal power in Indian country.

### B. Today

Over the twentieth century, federal Indian law persisted in its abandonment of its international-law origins; it had become firmly, and solely, a “domestic” concern. Even the decisions most protective of tribal autonomy depicted the comparison to foreign nations as a thing of the past: “Originally,” the Court stated in *Williams v. Lee*,<sup>42</sup> the tribal victory often described as the foundation of modern Indian law jurisprudence, “the Indian tribes were separate nations within what is now the United States.”<sup>43</sup> Most cases, including *Williams*, relied on concepts of federal preemption of state action to protect Native autonomy.<sup>44</sup> This doctrinal perspective guarded against state encroachment, but did little to protect tribes against federal erosions, particularly from the Supreme Court. For the current Court, the idea that tribes might be akin to foreign nations is unthinkable. It has routinely stripped tribes of rights of territorial jurisdiction that would be obvious, even banal, in the context of a foreign nation, but that the Court nonetheless deemed “incompatible” with the tribes’ “dependent” status.<sup>45</sup> While the Court acknowledges Indian law’s roots in “military and foreign policy,” it does so largely to uphold expansive federal power.<sup>46</sup> And even this position is controversial: tribes, Justice Thomas has opined, “never fit comforta-

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41. See *Whitmire v. Cherokee Nation*, 30 Ct. Cl. 138, 157 (1895) (holding a tribe’s national council “can not control or abrogate the treaty obligations of the nation to the United States”).

42. 358 U.S. 217 (1959).

43. *Id.* at 218.

44. *Id.* at 219–20.

45. See, e.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Montana v. United States*, 450 U.S. 544 (1981).

46. *United States v. Lara*, 541 U.S. 193, 201 (2004) (quoting F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 208 (1982 ed.)).



bly within the category of foreign nations,” before pointing to the 1871 Act ending treaty-making as evidence that the political branches “no longer considered the tribes to be anything like foreign nations.”<sup>47</sup>

Yet, as in the late nineteenth century, there is a glaring exception to this rule—the Court’s current case law on tribal sovereign immunity. In these cases, the Court has struggled to reconcile its constitutional-law decisions that gave sweeping scope to state immunity, its statutory decisions that gave Congress authority over foreign sovereign immunity, and its common-law rulings on tribal immunity. In deciding how to characterize tribal immunity, the Justices repeatedly argued that tribes were more similarly situated to foreign nations: they could not enjoy the “sister state” exception to sovereign immunity, for instance;<sup>48</sup> their immunity could be freely altered by Congress;<sup>49</sup> and, according to some Justices, they should be subject to a “commercial activity” exception.<sup>50</sup>

The most sustained use of the metaphor, though, came in the recent case of *Upper Skagit Indian Tribe v. Lundgren*,<sup>51</sup> where the Tribe invoked its immunity to attempt to bar a quiet title suit concerning recently purchased off-reservation property.<sup>52</sup> The Lundgrens argued that tribal immunity was subject to the “immovable property exception”—a concept with deep roots in international law that a sovereign is subject to suit concerning land owned within another’s dominion.<sup>53</sup> Although the majority remanded the case to assess this question, the analogy garnered support from Chief Justice Roberts, who concurred,<sup>54</sup> and particularly from Justice Thomas, joined by Justice Alito, who dissented at length.<sup>55</sup>

The case, and Thomas’s arguments in particular, represented a striking return to a much earlier era of Indian-law reasoning. Like Marshall’s decisions nearly two centuries earlier, Thomas’s opinion was replete with citations to hoary international-law treatises by Bynkershoek and Henry Wheaton; for the first time since *Worcester*, the Court directly cited to the influential eighteenth-century scholar Emer de Vattel in an Indian law case.<sup>56</sup> The weight of this precedent was intended to demonstrate how deeply

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

48. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991).

49. *Kiowa Tribe v. Manufacturing Techs.*, 523 U.S. 751, 759 (1998).

50. See *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indians*, 498 U.S. 505, 515 (1991) (Stevens, J., concurring); *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2047–48 (Thomas, J., dissenting).

51. 138 S. Ct. 1649 (2018).

52. *Id.*

53. *Id.* at 1654.

54. *Id.* at 1655–66 (Roberts, J., concurring).

55. *Id.* at 1656–63 (Thomas, J., dissenting).

56. *Id.* at 1657–85. Vattel briefly appeared within a quotation from Chancellor Kent in a late-nineteenth-century Indian law decision by the Court, *Marks v. United States*, 161 U.S. 297, 301 (1896).

rooted the immovable property exception had been in early international-law thought.

The *Lundgren* Court's revival of the foreign nation analogy was deeply ironic. For over a century, the Supreme Court had denied Native nations the protections of international law on the theory that they were not foreign, and, increasingly, that they were not really nations.<sup>57</sup> In the reverse situation, for instance—states claiming property rights within Indian country—the Court did not even seem to consider the application of the immovable property exception to sovereign immunity, likely because those lands had been rendered “domestic.”<sup>58</sup> As in the late nineteenth century, then, the Court selectively revived the analogy to foreign nations only to weaponize it against Native peoples.

Yet *Lundgren* also points toward a larger truth. The Court often acts and speaks as if the analogy between tribes and foreign nations is rooted firmly in the past, an archaism rendered irrelevant by changed circumstances, as if the legal transformations that happened in the late nineteenth century were irrevocable rather than the legal and policy reflections of a particularly imperialist era. But as *Lundgren* suggests, the primary barrier to invoking the analogy in contemporary law is the Court itself. The Court has, after all, reversed benighted holdings of the late nineteenth century before, even when they claimed to be rooted in the Constitution.<sup>59</sup> Moreover, treating the tribes as akin to foreign nations arguably has a particularly strong claim to positive law under originalist constitutional interpretations.<sup>60</sup>

What would it look like to take the analogy between Native and foreign nations seriously in current law? It would not necessarily imply that Indian country would cease to be part of the United States and become fully independent: analogies do not require equivalence. But it might mean that the Supreme Court would look to international law—either contemporary or at the time of the Constitution's adoption—as a source to puzzle through Native status, as it once did, and, as *Lundgren* demonstrates, it can readily do again. It would almost certainly point toward greater tribal autonomy from other jurisdictions, particularly states, as *Worcester* suggests—a case that the Supreme Court has repeatedly and unpersuasively sought to distinguish away.<sup>61</sup> Perhaps most significantly, it would require the Court to ac-

57. See Section II. A., *supra*.

58. See *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997).

59. *E.g.*, *Brown v. Bd. of Education*, 347 U.S. 483 (1954); see also *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) (abrogating *Ward v. Race Horse*, 163 U.S. 504 (1896), as resting on a “false premise”).

60. See generally Ablavsky, *supra* note 16, at 1053–87.

61. Justice Scalia, for instance, argued that *Worcester* “must be considered in light of the fact that [t]he 1828 treaty with the Cherokee Nation . . . guaranteed the Indians their lands would never be

knowledge the term “nation” within Justice Marshall’s formulation, instead of sweeping it aside in favor of an exclusive reliance on ideas of domesticity and dependence. As Marshall acknowledged and emphasized, nationhood implied both rights and dignity, a perspective that this current Court has all but abandoned.

### III. STATES

#### A. *Historically*

If foreign nations were the first sovereign to which tribes could be compared, the American Revolution and the constitutional entrenchment of federalism created another: states. The appeal of this analogy lay in its potential to resolve some of the paradoxes created by comparing Native with foreign nations. If Native polities were fully sovereign nations, then it would be difficult to understand how they could also be part of the territory of another sovereign nation, the United States. But federalism, with its concept of divisible sovereignty, offered a potential resolution to this conflict. States, after all, were firmly within the borders of the United States, and yet considered sovereign. If Native peoples were more akin to states, they could at once be sovereign and yet subordinate to the federal government.<sup>62</sup> This was particularly true in the area of foreign affairs, where the early United States was especially eager to limit Native autonomy.

In this sense, statehood and “domestic dependent nationhood” bore a certain resemblance. As conceived of in the antebellum United States, both derived from a domesticated form of international law principles, and both implied that sovereigns subject to overarching federal authority nonetheless retained those rights not ceded to the federal government.<sup>63</sup> For this reason, federalism has long been one of the most appealing and enduring metaphors for scholars and commentators looking for models for the relationship between tribes, states, and the federal government.<sup>64</sup>

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subjected to the jurisdiction of any State or Territory.” *Nevada v. Hicks*, 533 U.S. 353, 362 n.4 (2001) (quoting *Organized Village of Kake v. Egan*, 369 U.S. 60, 71 (1962)). Yet, not only did *Worcester* not discuss or rely on this treaty language, later post-Removal treaties contained nearly identical language. *See infra* n.76.

62. Ablavsky, *supra* note 16, at 1075–77; *see also* Gregory Evans Dowd, *Indigenous Peoples Without the Republic*, 104 J. AM. HIST. 19, 36–38 (2017).

63. Of course, tribes, unlike states, did not ratify the Constitution and so did not actually cede any rights. *See Talton v. Mayes*, 163 U.S. 376, 384–85 (1896).

64. For works invoking this metaphor, *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); Wenona T. Singel, *The First Federalists*, 62 DRAKE L. REV. 775 (2014); Alex Tallchief Skibine, *Redefining the Status of Indian Tribes within Our Federalism: Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667 (2006); Carol Tebben,

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Early on, many Anglo-Americans, picking up on this similarity, began floating the possibility that Native nations might become states not merely in a metaphorical sense but literally—that is, that Native nations might be admitted as states into the union. The very first Indian treaty that the United States entered, the 1778 treaty with the Delawares, contained a provision suggesting that the Delawares should gather other “friend[ly]” tribes and then “join the present confederation, and to form a state whereof the Delaware nation shall be the head, and have a representation in Congress.”<sup>65</sup> Although some commentators have dismissed this provision as motivated by wartime exigencies, it fits with the capacious imaginings of the union of many early American leaders, who easily anticipated enfolding Quebec or the Caribbean as states.<sup>66</sup> The treaty’s provision promising congressional representation reappeared in treaties concluded after the Revolution.<sup>67</sup> Some observers thought some Native leaders shared this aim: one Virginian thought that Alexander McGillivray, a Creek leader who used an alliance with Spain to resist U.S. expansion, aimed at forcing the United States to “admit them [the Creek nation] as a member of the federal Union.”<sup>68</sup>

Although nothing came of these early proposals, they prefigured debates about the relationship between Native nations and states during the fights over Removal. While, as discussed in the prior section, Removal’s opponents likened Native peoples to foreign nations, Removal’s proponents viewed them through the lens of statehood. For them, the similarity between Native nations and states presented both a problem and its potential solution. A problem, because those urging Removal regarded Native peoples as states’ rivals for sovereignty and jurisdiction: Native nations were too akin to states to coexist within the same territory. This was particularly true of the so-called “civilized” tribes of the Southeast, which, in their push to acculturate, had established institutions nearly indistinguishable from those of surrounding states. The written constitutions of the Cherokees, Creeks, and others created Native legislatures, two-tiered courts, and an executive.<sup>69</sup> White southerners found this parallel too close for comfort, and began arguing that Native nations constituted “new states” within their boundaries, a contradiction forbidden under the U.S. Constitution.<sup>70</sup>

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*American Trifederalism Based upon the Constitutional Status of Tribal Nations*, 5 U. PA. J. CONST. L. 318 (2002).

65. Treaty with the Delawares, art. VI, Delaware Nation-U.S., Sep. 17, 1778, 7 Stat. 13.

66. ARTICLES OF CONFEDERATION of 1781, art. XI.

67. Treaty of Hopewell, Cherokee Nation-U.S., art. XII, Nov. 28, 1785, 7 Stat. 18, 20.

68. Letter from Arthur Campbell to Edmund Randolph (Aug. 16, 1787), in 4 CALENDAR OF VIRGINIA STATE PAPERS AND OTHER MANUSCRIPTS 333–34 (Henry W. Flournoy ed., 1884).

69. See generally DUANE CHAMPAGNE, SOCIAL ORDER AND POLITICAL CHANGE: CONSTITUTIONAL GOVERNMENTS AMONG THE CHEROKEE, THE CHOCTAW, THE CHICKASAW, AND THE CREEK (1992).

70. Gregory Ablavsky, *Empire States: The Coming of Dual Federalism*, 129 YALE L.J. at \*69–\*70 (forthcoming 2019).

Yet statehood also seemed to offer a solution to the ambiguities of Native status. In 1834, President Jackson's allies in Congress introduced a bill that would have organized Native nations removed west of the Mississippi into a federal territory, under a federally appointed governor.<sup>71</sup> Because every federal territory was understood to be on the path toward statehood, this bill raised the prospect, as its backers urged, that the tribes might eventually "be admitted as a State to become a member of the Union."<sup>72</sup> This proposal met considerable opposition. John Quincy Adams thought it exceeded congressional authority and would "totally . . . change the relations of the Indian tribes to this country."<sup>73</sup> For others, the prospect of an Indian state conflicted with the country's character as a white nation: it was a proposal to "add to our Union men of blood and color alien to the people of the United States," one southern congressman warned, which might soon lead to the statehood of "our brethren of Cuba and Hayti" (both predominantly black), as well as the free black colony in Liberia.<sup>74</sup> For their part, Native leaders were also opposed to the proposal, which would at once have expanded federal authority in Indian country and replaced tribal governments with a pan-tribal legislature.<sup>75</sup> In the face of opposition from multiple directions, the bill failed. Though efforts to create a federally sponsored pan-tribal government sporadically recurred throughout the nineteenth century, they suffered similar results.

The failure of these proposals to create a Native state doomed what Removal's proponents had touted as the primary legal benefit of pushing Native peoples beyond the Mississippi: the resolution of the conflict between tribal and state authority. Removed tribes would be placed on federal lands outside state borders; the dubiously secured treaties that the federal government had used to force tribes westward promised that the tribes' new lands would never "be included within the territorial limits or jurisdiction of any State."<sup>76</sup> But, as Removal's opponents foresaw, these guarantees proved worthless as the non-Native population of the United States swelled and expanded. Native nations west of the Mississippi soon found themselves repeatedly enfolded within the borders of newly created states,

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71. FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 302–09 (1984); *see also* RONALD N. SATZ, *AMERICAN INDIAN POLICY IN THE JACKSONIAN ERA* (1974).

72. H.R. Rep. No. 474, at 14 (1834).

73. 6 REG. DEB. 1063 (1830); 10 REG. DEB. 4770 (1834).

74. 10 REG. DEB. at 4776–77.

75. *See* PRUCHA, *supra* note 71 at 302–09.

76. Treaty of New Echota, art. 5., Cherokee Nation-U.S., Dec. 29, 1835, 7 Stat. 478; *see also* Treaty of Dancing Rabbit Creek, art. IV, Choctaw Nation-U.S., Sep. 27, 1830, 7 Stat. 333; Treaty of Pontotoc Creek, Chickasaw Nation-U.S., Oct. 20, 1832, 7 Stat. 381.

quickly recapitulating the jurisdictional conflicts between Native and state sovereignty at the core of the fights over Removal.<sup>77</sup>

Ultimately, this process played out for the removed tribes in Indian Territory as well. In the late nineteenth century, Congress abandoned the earlier vision of the Territory as a separate homeland for Native peoples; it opened large portions of the Territory for white settlement and moved toward the creation of a single territory, Oklahoma, that would ultimately be admitted as a state.<sup>78</sup> Faced with the prospect that they would become a minority in a white-dominated state, some leaders of the Five Civilized Tribes pushed to create their own separate state, Sequoyah, from the eastern portion of the territory.<sup>79</sup> Although similar to the prior century's proposal for an Indian state, Sequoyah would be Native only in its demographics: like every other state, Sequoyah's borders, jurisdiction, and citizenship would be defined by territory, not Indian status.<sup>80</sup> In shedding any aspect of the structures and protections of Indian law, Sequoyah represented the ultimate triumph of the statehood model for Indian country, embraced largely out of desperation as one of the only viable avenues to preserve Native autonomy. Nonetheless, the push for statehood failed, largely as a result of partisan politics. Congress feared admitting a state dominated, not by "alien[s]," but by Democrats.<sup>81</sup>

One of the ironic consequences of Sequoyah and Native participation in Oklahoma's statehood process was the assumption, currently being tested before the U.S. Supreme Court, that statehood disestablished the tribes' reservations.<sup>82</sup> This idea had its echo in the two most recent states admitted to the Union, Alaska and Hawaii. Depending on the measure used, both states have the highest proportion of indigenous citizens of any state in the union,<sup>83</sup> and in both instances admission required grappling with the status

77. See generally SIDNEY L. HARRING, *CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY* (1994).

78. See ANGIE DEBO, *AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES* (1940); RICHARD WHITE, *THE REPUBLIC FOR WHICH IT STANDS: THE UNITED STATES DURING RECONSTRUCTION AND THE GILDED AGE, 1865–1896*, 635–40 (2017).

79. ROBERT L. TSAI, *AMERICA'S FORGOTTEN CONSTITUTIONS: DEFIANT VISIONS OF POWER AND COMMUNITY* 155–78 (2014); Stacy L. Leeds, *Defeat or Mixed Blessing: Tribal Sovereignty and the State of Sequoyah*, 43 *TULSA L. REV.* 13 (2007).

80. See generally CONST. OF THE STATE OF SEQUOYAH (1905).

81. See DAVID W. LEVY, 1 *THE UNIVERSITY OF OKLAHOMA: A HISTORY* 151 (2005) (arguing that Sequoyah was "probably doomed . . . by the reluctance of the Republican administration and the Republican Congress . . . to admit another staunchly Democratic state"); PRUCHA, *supra* note 71, at 302–09.

82. *Murphy v. Royal*, 875 F.3d 896 (10th Cir. 2017), *cert. granted*, 86 U.S.L.W. 3584 (U.S. May 21, 2018) (No. 17-1107).

83. *Demographics*, NATIONAL CONGRESS OF AMERICAN INDIANS (Oct. 22, 2018), <https://perma.cc/KB88-KACG>; 2010 CENSUS BRIEFS, *THE NATIVE HAWAIIAN AND OTHER PACIFIC ISLANDER POPULATION: 2010* (2012).

and claims of these indigenous populations.<sup>84</sup> Yet in both cases, the result of statehood was the triumph of assimilationist logic that ensured that two states' Native communities enjoy *fewer* rights under federal law than the federally recognized Native communities in other states.<sup>85</sup> In this sense, the logic of state authority advanced during Removal finally reached its most lasting expression.

### B. Today

The paradox of the present is that, even though there are no longer proposals for the creation of a separate Native state (in contrast, for instance, with the recent Canadian establishment of an Inuit-run territory in Nunavut<sup>86</sup>), Native nations and states are arguably more similar now than in the past. This shift reflects important changes in both federalism and Indian law. States, as federalism scholars have emphasized, are no longer separate sovereigns ruling their own domains: they are now bound up with a dramatically expanded federal administrative state, in which they exert what scholars have called the “power of the servant” to influence policy from the inside.<sup>87</sup> For their part, tribes, while still subject to federal plenary power, now enjoy the benefit of a federal policy of self-determination, which has affirmed, through repeated executive orders, the government-to-government relationship.<sup>88</sup> Within the executive branch as well as in Congress, then, states and tribes share some similarity: both are sovereign stakeholders with whom federal agencies are mandated to consult before enacting policies that affect them. And, by virtue of the Spending Clause and the Indian Self-Determination and Education Act, both states and tribes have increasingly become the local administrators, under federal guidelines, of federal programs dispersing funds from the national treasury.<sup>89</sup> Some corners of federal law, particularly environmental law, have in fact codified the tribe-state

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84. See, e.g., Alaska Native Claims Settlement Act, Pub. L. 92-203, 85 Stat. 688 (1971); Hawaii Admission Act, Pub. L. 86-3, § 4, 73 Stat. 4, 5 (1959).

85. See *Rice v. Cayetano*, 528 U.S. 495 (2000); *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998).

86. Nunavut Act, S.C. 1993, c 28 (Can.); see also Anthony Depalma, *A New State for Inuit: Frigid but Optimistic*, N.Y. TIMES (Jan. 29, 1999), at 1.

87. E.g., Heather K. Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010); Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996 (2014); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023–2110 (2008).

88. Special Message to Congress on Indian Affairs, PUB. PAPERS: 1970, at 564 (Jul. 8, 1970); Consultation and Coordination with Indian Tribal Governments, Exec. Order No. 13,175, 3 C.F.R. 304 (2000), reprinted in 25 U.S.C. § 450 app. at 531–33 (2012); Memorandum, 74 Fed. Reg. 57,881 (Nov. 5, 2009).

89. Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 5301–5423 (2015); see also Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1 (2011) (describing the role of states in administering federally funded programs).

analogy. The Clean Air Act, Clean Water Act, and Safe Drinking Water Act all expressly grant the EPA administrator “to treat Indian tribes as States” for the purposes of establishing environmental standards within Indian country,<sup>90</sup> and the EPA has interpreted other statutes as granting similar authority.<sup>91</sup> Courts have upheld this tribal authority against challenges.<sup>92</sup>

This similarity does not mean that tribes and states now enjoy equal power. Because the many proposals for Native representation in Congress came to naught, Native nations have never enjoyed the benefit of the “political safeguards of federalism,” which proved strikingly consequential in Indian affairs.<sup>93</sup> As Removal highlights, states often got the federal government to back their claims against Native nations by flexing their political and electoral power. But the rise of the federal administrative state and growth in the scope and effectiveness of tribes’ lobbying have made the long-standing contest between tribes and states for federal support slightly more equal. The recent conflicts over Bears Ears, Dakota Access, and treaty fishing rights suggest that tribes can sometimes get a sympathetic administration to back their interests against those of the states—even as subsequent events underscore how tenuous, fragile, and dependent on partisan politics such outcomes are.<sup>94</sup>

The Supreme Court has also been drawn to the tribe-state analogy in recent years, but for very different reasons. For many of the Justices, the most striking fact about Native nations is that they *are not* states, and so do not fit cleanly within constitutional categories. Justice Kennedy, for instance, has emphasized that the Constitution established a “federal structure” constituted solely of states and the federal government, reducing tribes to a “historical exception” whose authority is predicated on tribal members’ consent.<sup>95</sup> “[T]he States (unlike the tribes) are part of a constitutional framework that allocates sovereignty between the State and Federal Governments,” Justice Thomas opined in the same case, reiterating, “The tribes,

90. 42 U.S.C. § 7601(d) (2013); 33 U.S.C. § 1377(e) (2013).

91. See Toxic Substances Control Act, 15 U.S.C. § 2601 (2012); Emergency Planning and Community Right to Know Act, 42 U.S.C. § 11001 (2012); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2012); Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136u (2012).

92. *City of Albuquerque v. Browner*, 97 F.3d 415, 422 (10th Cir. 1996).

93. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

94. See *Washington v. United States*, 138 S. Ct. 1832 (2018) (per curiam) (mem.); Julie Turkewitz, *Trump Slashes Size of Bears Ears and Grand Staircase Monuments*, N.Y. TIMES (Dec. 4, 2017), at A1, available at <https://perma.cc/2PSZ-KUYB> (discussing how President Trump has ordered the diminishment of the Bears Ears national monument boundaries established by President Obama); Brian Naylor, *Trump Gives Green Light To Keystone, Dakota Access Pipelines*, NAT’L PUB. RADIO (Jan. 24, 2017), available at <https://perma.cc/VED5-WCKX> (reporting on President Trump’s decision to reverse President Obama’s orders halting the construction of both the Keystone XL and Dakota Access pipelines).

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



by contrast, are not part of this constitutional order.”<sup>96</sup> In subsequent cases, Thomas has gone still further and revived the zero-sum language of the Removal era, insisting that tribal authority represents a derogation from an imagined right of total state territorial sovereignty.<sup>97</sup>

The Court’s use of a state yardstick to measure the shortcomings of tribal sovereignty has important doctrinal consequences. During the oral argument in *Dollar General Corporation v. Mississippi Choctaw Tribe*,<sup>98</sup> for instance, several Justices focused on the absence of any procedure for removal from tribal court or for the U.S. Supreme Court to review tribal court judgments.<sup>99</sup> These omissions, these Justices implied, supported the negative inference that neither Congress nor the drafters of the Constitution anticipated that Native nations would exercise jurisdiction over nonmembers of the tribe, since this was at odds with the Constitution’s promise of a “neutral forum” to resolve disputes.

This odd counterfactual relied on a strikingly anachronistic understanding of both Indian law and federalism. The drafters of the Judiciary Act of 1789 did not think of tribes as akin to states: as noted above, they thought of them primarily as akin to foreign nations, and perhaps even outside the scope of federal jurisdiction, and so were hardly likely to extend a removal statute to them. Moreover, in valorizing the restraints of federal due process within state courts, the Justices rely on a model of federalism sharply at odds with U.S. history and practice. Most restrictions of the Bill of Rights did not apply to the states until the 1920s at the earliest,<sup>100</sup> only forty years before most constitutional restrictions were extended to encompass tribes;<sup>101</sup> in both instances, some rights have not been incorporated. And it is hard to argue that U.S. Supreme Court review of state supreme court judgments provides a particularly meaningful restraint on state courts, given that the Court reviews a tiny fraction of such appeals.<sup>102</sup>

96. *Id.* at 218–19 (Thomas, J., concurring).

97. *See* *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1662 (2018) (recognizing tribal sovereign immunity “would contradict the bedrock principle that each State is ‘entitled to the sovereignty and jurisdiction over all the territory within her limits’” (quoting *Lessee of Pollard v. Hagan*, 44 U.S. 212, 228 (1845) (Thomas, J., dissenting))); *Upstate Citizens for Equality v. United States*, *cert. denied*, 199 L. Ed. 2d 372, 374 (2017) (Thomas, J., dissenting) (attacking an interpretation of the Indian Commerce Clause as “giving Congress the power to destroy the States’ territorial integrity”).

98. 136 S. Ct. 2159 (2016).

99. Transcript of Oral Argument, *Dollar General Corp.*, 136 S. Ct. 2159 (No. 13-1496).

100. *See, e.g.*, *Gitlow v. New York*, 268 U.S. 652 (1925) (incorporating First Amendment protection of free speech into the Fourteenth Amendment guarantee of due process); *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245 (1934) (incorporating the right to free exercise of religion).

101. Indian Civil Rights Act, Pub. L. No. 90-284, Title II, § 202, 82 Stat. 77 (1968).

102. In the past term, the Court heard 74 cases total, eight of which were of state supreme court decisions. *See, e.g.*, *StatPack: October Term 2017*, SCOTUSBLOG, available at <https://perma.cc/RCC6-XJT3>. According to Westlaw, there were 539 petitions from state supreme courts to the Supreme Court that term, for a grant rate of 1.5%. *See* WESTLAW (search (“Petition #for writ #of certiorari #to the” +S

As these examples suggest, there is a strong appeal in analogizing tribes and states—formally, the only two subnational sovereigns within the United States. Yet the prospect of statehood has always represented a Faustian bargain for Native peoples: it promised to place Native sovereignty and self-government on a clearer constitutional footing, but at the cost of those aspects of Native governance that make Native nations indigenous.<sup>103</sup> For good reasons, states lack the authority to deviate from majoritarian national norms or to define their own membership, yet both powers are arguably central to what it means to be Native. It is unsurprising, then, that most proposals for Native statehood in U.S. history were, at root, assimilative, coming either from non-Natives seeking to tame Native sovereignty or, in the case of Sequoyah, from Native leaders seeking to use any available legal tool to preserve a modicum of sovereignty under federal law. States might be, as Justices Kennedy and Thomas insist, on firmer constitutional ground, but they are also, in important ways, less than tribes. However credible some scholars' claims that states are more than mere arbitrary administrative units,<sup>104</sup> states do not and cannot have the same ties to place nor the same claim to status as a distinct people as indigenous peoples who have lived there since time immemorial. In this sense, indigenous statehood would be a loss more than a gain. As the Tenth Circuit opined in 1959, "Indian tribes are not states. They have a status higher than that of states."<sup>105</sup>

#### IV. TERRITORIES

##### A. *Historically*

The third sovereign routinely invoked in comparison to tribes is not, formally speaking, a sovereign at all: the U.S. territories. Yet, from the beginning of the United States, the status of Native nations within its borders has been complicatedly bound up with the federal government's power over territory.<sup>106</sup>

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("Supreme Court of" OR "Supreme Judicial Court" OR "Supreme Court #of Appeals" OR "Court of Appeals of New York" OR "Court of Appeals of Maryland" OR "Court of Appeals of the District of Columbia") +S denied) & DATE (aft 09-30-2017)).

103. Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. LAW REV. 799, 835–47 (2007).

104. Ernest A. Young, *The Volk of New Jersey? State Identity, Distinctiveness, and Political Culture in the American Federal System* (2015) (unpublished manuscript), available at <https://perma.cc/AA47-X4FV>.

105. *Native Am. Church of N. Am. v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959).

106. See generally John Dossett, *Indian Country and the Territory Clause: Washington's Promise at the Framing* 68 AM. L. REV. 205 (2018).

Territory, both historically and today, is an evocative word with multiple meanings. At least three distinct definitions of the term operated in Anglo-American debates over Native status: territory as the formally organized jurisdictions outside the states and under federal control (the “U.S. territories”); territory as property owned by the federal government, wherever situated; and territory in an international-law sense, as all the land within the borders of the United States. But, while conceptually distinct, in practice Anglo-Americans routinely blurred the boundaries between these understandings of territory. In fact, the conflation of these three meanings, often in a single court decision, provided a powerful intellectual tool for expanding federal authority over Native nations.

The first meaning of territory, as a jurisdiction outside the states administered by the federal government, is a term of art tracing to early debates over how the United States should govern westward expansion. After the American Revolution, states ceded their western land claims to the federal government, with the stipulation that these lands would eventually be admitted as coequal states.<sup>107</sup> The question then became how these jurisdictions would be governed prior to statehood. The solution, codified in the Northwest Ordinance, was the creation of temporary, federally run territorial governments that would administer a given territory until admitted as a state.<sup>108</sup> The Constitution blessed this solution by granting Congress the power to make “all needful Rules and Regulations” for these federal territories.<sup>109</sup>

From the beginning, governance of the U.S. territories and what was known as “Indian affairs” were intertwined. The early territories were vast—the first territory, the Northwest Territory, encompassed nearly the entire present-day Midwest through Minnesota—and were barely inhabited by Anglo-Americans.<sup>110</sup> Nearly all of the territories remained, both in practice and under federal law, Indian country, owned and governed by Native nations.<sup>111</sup> The converse was also true: most Indian country, and Native people, in the early United States fell within the federal territories.<sup>112</sup> Consequently, it became easy to think of territorial governance and Indian affairs as synonymous. Federal law reinforced this view: the Northwest Ordi-

107. See PETER S. ONUF, *THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES, 1775–1787*, at 4–39 (1983).

108. 32 *JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789*, 334–43 (Roscoe R. Hill ed., 1936).

109. U.S. CONST. art. IV, § 3, cl. 2.

110. See PETER S. ONUF, *STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE* 58–66 (1987); Gregory Ablavsky, *The Rise of Federal Title*, 106 *CALIF. L. REV.* 631, 643–44 (2018).

111. See Act of May 19, 1796, ch. 30, §§ 1, 16, 1 Stat. 469, 469–73 (1796) (defining a border between the United States and Native nations and defining “the Indian country, over and beyond the said boundary line”).

112. *Id.*

nance contained specific provisions governing Indian affairs and mandating the “utmost good faith . . . towards the Indians.”<sup>113</sup> There was also significant overlap in personnel. Federally appointed territorial governors were *ex officio* federal superintendents of Indian affairs, charged with negotiating treaties with, and at times leading military campaigns against, Native nations.<sup>114</sup> This charge arguably became the governors’ most substantial, and onerous, governmental responsibility.<sup>115</sup>

The U.S. territories were distinctive because, in an era marked by intense confrontations over the scope of federal and state authority, they were acknowledged as an exclusively federal space entirely outside state control. The antebellum Supreme Court repeatedly upheld Congress’s sweeping power to administer the territories as it saw fit, emphasizing that in the territories the federal government enjoyed all the powers of both the national and state governments.<sup>116</sup> One North Carolina Senator suggested that this exclusion of state authority, particularly over Indian affairs, was the primary impetus for the creation of the territorial system in the first place: state cessions, he suggested, were “only desireable in as much as the clashing claims and encroachments of the St[at]es on their Constitutional powers are thereby silenced and the government freed from the disgrace and expences enivitably attendant on disputes with the Indians.”<sup>117</sup> The idea that the federal government possessed the sole constitutional authority outside state borders also served to justify federal assertions of power over Indian affairs. In defending the provisions of the Trade and Intercourse Act that punished crimes by U.S. citizens in Indian country, for instance, some in Congress insisted that “the power of the General Government to legislate in all the territory belonging to the Union, not within the limits of any particular State, cannot be doubted.”<sup>118</sup>

113. 32 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 108, at 340.

114. *See* Act of May 26, 1790, ch. XIV, 1 Stat. 123 (1790) (“And the powers, duties, and emoluments of a Superintendent of Indian Affairs for the Southern department, shall be united with those of the Governor”); Letter from Alexander Hamilton to John Francis Hamtramck (May 23, 1799), *in* THE TERRITORIAL PAPERS OF THE UNITED STATES, VOL. III, THE TERRITORY NORTHWEST OF THE RIVER OHIO, 1787–1803, CONTINUED 24, 24–25 (Clarence Edward Carter ed., 1934) (“You are aware that the Governors of the North Western Territory and of the Mississippi Territory are severally *ex officio* Superintendants of Indian Affairs . . . [T]hey are to be the organs of all negotiations and communications between the Indians and the Government”).

115. *See, e.g.*, Letter from William Blount to John Gray Blount (June 26, 1790), *in* 2 THE JOHN GRAY BLOUNT PAPERS 67, 67–72 (Alice Barnwell Keith ed., 1959) (William Blount, the Governor of the Southwest Territory at the time, noted, “The duties of Governor I should not mind they will be easy enough but those of Superintendent of Indian Affairs will be laborious and disagreeable”).

116. *See, e.g.*, *Sere v. Pitot*, 10 U.S. 332 (1810); *American Ins. Co. v. Canter*, 26 U.S. 511, 542 (1828); *United States v. Gratiot*, 39 U.S. 526 (1840); *Benner v. Porter*, 50 U.S. 235 (1850).

117. Letter from Benjamin Hawkins to William Blount (Apr. 24, 1792), Folder 4: 1792, William Blount Papers, Manuscript Division, Library of Congress, Washington, D.C.

118. 2 ANNALS OF CONG. 751 (1792).

Yet this quote hints at a second meaning of territory at the time—“territory” as land owned by the United States, that is, where the federal government itself held title as proprietor. The language of the Constitution suggested this conflation, since it granted Congress power over “the Territory or other Property belonging to the United States.”<sup>119</sup> The same constitutional Clause, in short, authorized federal authority not only over the federal territories but over federal public lands wherever situated, and the Supreme Court freely cited precedents from the two contexts interchangeably.<sup>120</sup>

This overlap between questions of property and jurisdiction had important implications for Indian affairs, where such conflation was already rife: “[I]n the discussion of our Indian relations, the claims to soil and to sovereignty, have been confounded as identical,” one Tennessee Supreme Court Justice would later complain.<sup>121</sup> Early on, the federal government asserted a quasi-property right in Native lands by claiming the right of preemption, the sole right to purchase land from Native nations.<sup>122</sup> Many commentators went further and suggested that Native peoples were actually federal tenants, with the underlying title held by Anglo-Americans.<sup>123</sup> In *Johnson v. M’Intosh*,<sup>124</sup> Chief Justice Marshall endorsed that view, concluding that the United States possessed fee title by virtue of discovery while Native peoples retained only the right of occupancy.<sup>125</sup> The consequence of this ruling was that all Native lands became a kind of federal property, since the federal government held the underlying title, regardless of whether those lands fell within the boundaries of a state government.

These meanings of territory, as federal property and within federal jurisdiction, flowed from the Constitution’s language. Yet they existed alongside a third meaning of territory derived principally from international law—territory as all the land within a nation’s internationally recognized

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119. U.S. CONST. art. IV, § 3, cl. 2.

120. See, e.g., *United States v. Gratiot*, 39 U.S. 526, 537 (1840) (citing the Court’s precedents concerning the territories to uphold the proposition that federal power over federal property is “without limitation”).

121. *State v. Forman*, 16 Tenn. 256, 275 (1835).

122. Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137, 138 (1790).

123. See Address and Remonstrance of the General Assembly of the State of Tennessee, Aug. 9, 1796, in 1 AMERICAN STATE PAPERS: INDIAN AFFAIRS 625–26 (Walter Lowrie & Matthew St. Clair Clarke eds., Gales & Seaton 1832) (describing the land’s Native inhabitants as “tenants at will”); see also STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER 150–89 (2005) (describing the shift from conceptions of Indians as owners to the claim that they were simply “occupants”).

124. 21 U.S. 543 (1823).

125. *Id.* at 574.

borders.<sup>126</sup> This meaning proved highly significant for Anglo-Americans' thinking about Native status. Native nations, they reasoned, fell within the boundaries of the United States as defined in the 1783 Treaty of Paris.<sup>127</sup> Although there was considerable debate about what rights, exactly, flowed from this jurisdictional fact, there was near-universal agreement among Anglo-Americans that the United States enjoyed some authority over Native peoples merely by virtue of the fact that they fell within the nation's "territorial limits."<sup>128</sup> "The Indian territory is admitted to compose a part of the United States," Justice Marshall reasoned in proclaiming the Cherokees a "domestic" nation.<sup>129</sup> "In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States."<sup>130</sup>

What united these three distinct meanings of "territory"—as federally managed jurisdiction, as federal property, and as the space of entire nation—was that all suggested a broad scope of federal power, whether as territorial government, as property owner, or as the repository for national sovereignty. They provided, then, a ready tool for those seeking to expand federal authority over Native nations, as officials freely invoked, and conflated, all three ideas of territory. Andrew Jackson, for instance, early on argued for congressional power by casually equating the national territory of the United States with the U.S. territories: "The Indians are the subjects of United States, inhabit its territory and acknowledging its sovereignty . . . I have always thought, that Congress had as much right to regulate by acts of Legislation all Indian concerns as they had of Territories."<sup>131</sup> A similar blurring occurred in *United States v. Rogers*.<sup>132</sup> There, Jackson-appointed Chief Justice Taney relied on all three conceptions of territory to uphold a broad assertion of federal criminal jurisdiction. First noting that Europeans had not "regarded [tribes] as the owners of the territories they respectively occupied," Taney concluded: "[W]e think it too firmly and clearly established to admit of dispute, that the Indian tribes residing within the territorial limits of the United States are subject to their authority, and

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126. See EMER DE Vattel, *THE LAW OF NATIONS* 214 (Béla Kaposy & Richard Whatmore eds., Thomas Nugent trans., Liberty Fund 2008) (1758) ("The whole space over which a nation extends its government, becomes the seat of its jurisdiction, and is called its *territory*").

127. Ablavsky, *supra* note 16, at 1063–64.

128. *Id.* at 1061–68.

129. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

130. *Id.*

131. Letter from Andrew Jackson to James Monroe, *supra* note 18, at 95.

132. 45 U.S. 567 (1846).

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where the country occupied by them is not within the limits of one of the States, Congress may by law punish any offense committed there.”<sup>133</sup>

Jackson and Taney’s intermingling of these distinct meanings of territory ignored important differences between them, particularly concerning geographical scope. Federally owned territory existed wherever the federal government held title, and the “territorial limits” of the United States encompassed the whole nation, yet the U.S. territories definitionally existed only outside of states. This distinction arguably mattered little at the beginning of the nineteenth century, when the three sources of power largely overlapped. Yet the differences among them became increasingly important by the century’s end, when erstwhile territories throughout the U.S. West became states containing large Native populations.<sup>134</sup> If federal power over Indian affairs was predicated on congressional power over the U.S. territories, as the earlier rhetoric might suggest, then there was a substantial question over whether that authority could persist after statehood. Early on, new states like Alabama and Tennessee had insisted that it could not,<sup>135</sup> and, by the late nineteenth century, federal courts began to agree with them, holding that statehood, and particularly the promise that newly admitted states would be on an “equal footing” with existing states, stripped aspects of federal power over Indian affairs.<sup>136</sup> Congress attempted to foreclose these arguments by requiring new states to disclaim jurisdiction over Indian lands and people on admission to the union,<sup>137</sup> but the Court distinguished those disclaimers as not altering jurisdictional boundaries.<sup>138</sup> This equal footing claim was implausible on its face—the Supreme Court had, after all, already held that the original states lacked jurisdiction in Indian country.<sup>139</sup> Such a legally questionable claim could nonetheless gain widespread currency because, for much of the nineteenth century, Anglo-American jurisprudence had unthinkingly conflated Indian and territorial affairs.

In *United States v. Kagama*,<sup>140</sup> however, the Court mitigated much of the force behind the equal footing argument by, ironically, doubling down on the language of territoriality.<sup>141</sup> In determining the constitutionality of a

133. *Id.* at 572.

134. See HARRING, *supra* note 77, at 44–53.

135. See *Caldwell v. State*, 1 Stew. & P. 327, 351 (Ala. 1832) (Saffold, J., concurring); *State v. Foreman*, 16 Tenn. 256, 329 (1835).

136. *Ward v. Race Horse*, 163 U.S. 504 (1896); *United States v. McBratney*, 104 U.S. 621 (1881); *United States v. Ward*, 28 F.Cas. 397 (Cir. Ct. D. Kan. 1863).

137. See generally David E. Wilkins, *Tribal-State Affairs: American States as ‘Disclaiming’ Sovereigns*, 28 *PUBLIUS* 55 (1998) (describing the creation of jurisdictional disclaimers in states’ acts of admission).

138. *Draper v. United States*, 164 U.S. 240 (1896).

139. See *Worcester v. Georgia*, 31 U.S. 515 (1832).

140. 110 U.S. 375 (1886).

141. *Id.* at 379.

federal statute that applied to inter-Indian crime in California, the Court noted that the offense was committed “within a state, and not within a territory,” which, it observed, was a novel claim of federal authority.<sup>142</sup> Yet the Court waved this distinction away. Extensively citing precedents concerning the U.S. territories, the Court once again conflated all three meanings of territory, at once invoking federal authority derived from “ownership of the country,” from the “power of congress to organize territorial governments, and make laws for their inhabitants,” and from Indians’ presence “within the geographical limits of the United States.”<sup>143</sup> By extending the multiple meanings of territorial authority to lands *within* state borders, the Court ensured that the federal government would continue to enjoy broad power over Indian affairs even after statehood. Although the Court still fitfully endorsed equal footing arguments in subsequent cases, *Kagama* provided a powerful tool for beating back state challenges to federal authority within their borders.<sup>144</sup>

*Kagama* also played another role in endorsing expansive federal power: legalizing the United States’ foray into formal overseas imperialism. As Sarah Cleveland has charted, federal efforts to claim authority over its newly conquered overseas territories—Puerto Rico, Guam, the Philippines, and Cuba—drew extensively on the legal principles established to govern Native peoples within the United States.<sup>145</sup> In this instance, the line of legal influence was reversed, as federal power over Indian affairs, long derived from territorial thought, became a source for claiming sweeping authority over newly colonized peoples unconstrained by the protections of the U.S. Constitution. In the most important of the so-called Insular Cases, *Downes v. Bidwell*,<sup>146</sup> the Supreme Court determined that the Constitution did not necessarily apply in the territories of its own force.<sup>147</sup> Justice Brown’s majority cited *Johnson v. M’Intosh* at length,<sup>148</sup> while the case’s most influential opinion, Justice White’s concurrence crafting a doctrine of selective

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142. *Id.* at 380.

143. *Id.* at 379–380.

144. *See, e.g.*, *United States v. Sandoval*, 231 U.S. 28 (1913); *United States v. Nice*, 241 U.S. 591 (1916).

145. *See generally* 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) (describing the interconnections between plenary power over Indian affairs and the territories); *see also* RICHARD DRINNON, *FACING WEST: THE METAPHYSICS OF INDIAN-HATING AND EMPIRE BUILDING* (1980) (tracing the links between anti-Indian rhetoric and U.S. overseas imperialism).

146. 182 U.S. 244 (1901).

147. *Id.* at 244. For background on the Insular Cases, *see* RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE, (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015); BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* (2006).

148. *Bidwell*, 182 U.S. at 281.



incorporation, twice cited *Kagama* as endorsing the “plentitude of the power of Congress” over federal territories.<sup>149</sup>

The irony of *Downes v. Bidwell* is that it extended the territorial logic of Indian affairs overseas just as that link was being severed in the continental United States: with the early twentieth-century admissions of Oklahoma,<sup>150</sup> New Mexico,<sup>151</sup> and Arizona,<sup>152</sup> there were no more federal territories in the contiguous United States. The federal government, too, increasingly sought to devolve the federal authority upheld in *Kagama* back to the states whose jurisdictional claims the Court had rejected.<sup>153</sup> Today, all federally recognized tribes exist within the boundaries of a state,<sup>154</sup> and, although numerous indigenous peoples live within the U.S. territories, they are not legally considered “Indians” under U.S. law.<sup>155</sup> Moreover, much of the land within Indian country is not owned by the federal government, or even by the tribe.<sup>156</sup> The federal government’s status as territorial sovereign, of course, endures, but the claim that territorial sovereignty alone might confer federal authority outside of the Constitution’s enumerated powers would be a difficult one under current law.<sup>157</sup>

The result is that, although courts still occasionally cite the Property Clause to justify federal authority in Indian country,<sup>158</sup> this invocation is vestigial. Like the analogy to foreign nations, it reflects a jurisprudential world that has faded. Unlike the analogy to foreign nations, the doctrine that invocations of territory supported—nearly unlimited federal power over the lives and affairs of Indian people—survives largely unchanged, though the Court has subbed in the Indian Commerce Clause to justify this

149. *Id.* at 290 (White, J., concurring).

150. Oklahoma Enabling Act, ch. 3335, 34 Stat. 267 (1906).

151. New Mexico and Arizona Enabling Act, ch. 310, 36 Stat. 557 (1910).

152. *Id.*

153. See Act of Aug. 25, 1953, Pub. L. 83-280, Stat. (1953) (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1321–1326).

154. See Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 83 Fed. Reg. 4235 (Jan. 30, 2018).

155. See 25 C.F.R. § 83.1 (defining indigenous as “native to the continental United States,” which is limited to “the contiguous 48 states and Alaska”). The Department of Interior recently enacted regulations that would permit federal recognition of a Native Hawaiian Governing Entity, but its provisions are limited solely to Hawaii. See 43 C.F.R. § 50.4 (defining a Native Hawaiian as a descendent of the aboriginal people of “the area that now constitutes the State of Hawaii”).

156. See Judith Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

157. See Cleveland, *supra* note 145, at 14 (“The nineteenth century history of the inherent powers doctrine reveals that the doctrine cannot be justified by mainstream forms of constitutional analysis”).

158. 1-5 Cohen’s Handbook of Federal Indian Law § 5.01 (2017); Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 210 n.73 (1984).

authority.<sup>159</sup> But the changes wrought by the twentieth century have made this authority seem puzzling, or even incoherent, within present law.<sup>160</sup>

### B. Today

Federal power over the territories may no longer provide much direct support for federal authority in Indian affairs, but the two doctrines' shared origins mean that the similarities between the status of Native nations and the U.S. territories under formal law are striking. Like Indian country, the U.S. territories today enjoy considerable autonomy under their own constitutions and elected officials, yet, like tribes and unlike states, they are subject to federal plenary power.<sup>161</sup> Like tribes, the territories enjoy sovereign immunity in federal court as a matter of federal common law rather than the Eleventh Amendment.<sup>162</sup>

Perhaps the most fundamental congruence between tribes and the territories rests in what they are not—states.<sup>163</sup> In both cases, this difference gets expressed throughout the language of exception and anomaly. Doctrinally, the territories, like Native nations, are “extraconstitutional” in the sense that many basic constitutional protections do not apply there of their own force.<sup>164</sup> Most, though not all, residents of the territories are U.S. citizens,<sup>165</sup> but, like Indians, their citizenship derives from statute rather than

159. See *Cotton Petrol. 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.”). Ironically, it was largely because of the perceived limitations of this Clause that the *Kagama* Court relied on ideas about territorial sovereignty to justify federal plenary power. See *United States v. Kagama*, 118 U.S. 375 (1886) (describing the invocation of the Indian Commerce Clause to justify criminal jurisdiction in Indian country as a “very strained construction”).

160. See *United States v. Lara*, 541 U.S. 193, 219 (2004) (Thomas, J., concurring).

161. See *United States v. Lopez*, 514 U.S. 549, 588 n.3 (1995) (Thomas, J., concurring) (“Congress has plenary power over . . . the territories”); *United States v. Lebron-Caceres*, 157 F. Supp. 3d 80, 97 (citing *United States v. Wheeler*, 435 U.S. 313, 322 (1978)) (“[T]erritorial governments are entirely a creation of Congress”).

162. See *Marx v. Guam*, 866 F.2d 294, 297–98 (9th Cir. 1989) (“The Supreme Court and this court have recognized that territorial governments have a form of inherent or common law sovereign immunity”); see also *Consejo de Salud de la Comunidad de la Playa de Ponce, Inc. v. Gonzalez-Feliciano*, 695 F.3d 83, 103 n.15 (1st Cir. 2012); *Sunken Treasure, Inc. v. Unidentified, Wrecked and Abandoned Vessel*, 857 F. Supp. 1129, 1134 n.10 (D.V.I. 1994).

163. Cf. *Developments in the Law - The U.S. Territories*, 130 HARV. L. REV. 1616, 1632–56 (2016) (proposing a model of “territorial federalism,” even while noting that “different rules apply” for territories than for states).

164. See *Boumediene v. Bush*, 553 U.S. 723, 757 (2008) (summarizing the “doctrine of territorial incorporation, under which the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories.”).

165. See *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015) (upholding the exclusion of American Samoans from U.S. citizenship).

from the operation of the Fourteenth Amendment.<sup>166</sup> Similarly, although both Native nations and the territories are bound by most of the restrictions of the Bill of Rights, this limitation comes largely through congressional discretion to extend or withhold certain rights, and the constitutional protections afforded need not match the rights enjoyed against states “jot-for-jot.”<sup>167</sup>

For the territories as for the tribes, their status as “extraconstitutional” sovereigns distinct from states has represented an opportunity as well as a challenge. Home to large indigenous populations, many territories have sought, similarly to Native nations, to maintain their indigeneity by enacting laws that use ancestry to delineate property rights and political participation.<sup>168</sup> These laws, and the legal challenges surrounding them, closely resemble ongoing controversies in federal Indian law, to which they have frequently been analogized.<sup>169</sup> Both the territories and Native nations, then, present a similar problem to the U.S. constitutional order—how far distinct communities may deviate from the norms that constrain state and federal governments.<sup>170</sup>

The tribe-territory analogy is not perfect. In some respects, territories enjoy more extensive authority than tribes under federal law. This is especially true in the realm of jurisdiction, where territories, unlike tribes, possess the unquestioned right to subject anyone within their territory, regardless of citizenship, to their legislative and adjudicatory authority. This di-

166. Compare, e.g., Jones-Shafroth Act, ch. 145, 39 Stat. 951 (1917) (making Puerto Ricans U.S. citizens) with Indian Citizenship Act, ch. 233, 43 Stat. 253 (1924) (conferring U.S. citizenship on “all non-citizen Indians born within the territorial limits of the United States”); see also Bethany R. Berger, *Birthright Citizenship on Trial: Elk v. Wilkins and United States v. Wong Kim Ark*, 37 CARDOZO L. REV. 1185, 1185–1258 (2016) (describing the history explaining the exclusion of Indians from citizenship).

167. *Nevada v. Hicks*, 533 U.S. 353, 384 (2001) (Souter, J., concurring); see *Torres v. Commw. of Puerto Rico*, 442 U.S. 465, 470 (1979) (“Congress may make constitutional provisions applicable to territories in which they would not otherwise be controlling.”).

168. See *Davis v. Commw. Election Comm’n*, 844 F.3d 1087 (9th Cir. 2016) (invalidating restriction of voting rights in the Northern Mariana Islands to individuals of “Northern Marianas Descent”); *Wabol v. Villacrusis*, 958 F.2d 1450 (9th Cir. 1990) (upholding ancestry-based restrictions on land ownership in the Northern Marianas by concluding that ordinary Fourteenth Amendment equal protection doctrine did not govern by virtue of the Insular Cases); see also *Developments in the Law*, *supra* note 163, at 1680–1703 (“While the *Insular Cases* were originally conceived as instruments of American expansion . . . they have today been reclaimed to serve as bulwarks for cultural preservation.”); but see Rose Cuison Villazor, *Problematizing the Protection of Culture and the Insular Cases*, 131 HARV. L. REV. F. 127, 146–50 (2017) (noting some of the limitations of this approach).

169. See *Davis*, 844 F.3d at 1094 (rejecting analogy between Northern Mariana Islands residents and members of federally recognized tribes).

170. See Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799 (2007); Rogers M. Smith, *The Insular Cases, Differentiated Citizenship, and Territorial Statuses in the Twenty-First Century*, in RECONSIDERING THE INSULAR CASES, *supra* note 147, at 103; Rose Cuison Villazor, *Blood Quantum Land Laws and the Race versus Political Identity Dilemma*, 96 CALIF. L. REV. 801 (2008).

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vergence likely reflects the fact that the territories look more “normal” to outside observers: that is, they look more like states.<sup>171</sup> Because the territories are not indigenous polities, belonging and jurisdiction rest on territorial presence rather membership.<sup>172</sup> Moreover, many of the territories fit more cleanly into the well-established structures of federalism. Puerto Rico, the Northern Mariana Islands, and the Virgin Islands, for instance, all possess a dual court system—a federal territorial court (in Puerto Rico’s case, an Article III court) alongside a local court system, from which litigants can appeal to the U.S. Supreme Court.<sup>173</sup>

But, if the territories enjoy greater practical authority than tribes, they differ from Native nations because they are not considered sovereigns under federal law, at least for the purpose of double jeopardy. In the 2016 case of *Sanchez Valle*,<sup>174</sup> the Supreme Court assessed whether Puerto Rico could enjoy the benefits of the “dual sovereignty” exception to the bar on double jeopardy, which permits multiple governments to prosecute an offender for the same offense so long as their fundamental authority derives from distinct sources.<sup>175</sup> The Court has long recognized that tribes, states, and the federal government are all separate sovereigns under this test,<sup>176</sup> but not, the Court ruled in *Sanchez Valle*, Puerto Rico: the territory’s authority, unlike that enjoyed by tribes and states, was still delegated federal sovereignty.<sup>177</sup>

Although *Sanchez Valle* ultimately placed tribes and territories into opposing categories, the logic it employed should be familiar to Indian law scholars. Puerto Rico, as the facts suggested, is a complicated case: just as it had routinely done for states prior to their admission to the union, Congress had authorized the territory to create a constitution based on popular sovereignty that provided for self-governance.<sup>178</sup> Yet Congress did not then admit Puerto Rico to statehood. The result was that the territory, like tribes, remained in a liminal space within federalism. The Court resolved this challenge of history by ignoring it, instead adopting a highly formal test that collapsed authority back into clean conceptual categories of the federal government, states, and foreign nations.<sup>179</sup> Such formalistic reasoning among

171. See *Developments in the Law - The U.S. Territories*, *supra* note 163, at 1632 (“[T]he federal-territory relationship has more or less gradually progressed toward functionally mimicking the federal-state structural relationship.”).

172. Although, in some instances, non-indigenous residents’ rights to vote and own land may be limited. See *Cleveland*, *supra* note 145 and accompanying text.

173. See *Territorial Courts*, FEDERAL JUDICIAL CENTER, available at <https://perma.cc/SG64-LBFJ>.

174. 136 S. Ct. 1863 (2016).

175. *Id.* at 1867.

176. See *Bartkus v. Illinois*, 359 U.S. 121 (1959); *United States v. Wheeler*, 435 U.S. 313 (1978).

177. *Sanchez Valle*, 136 S. Ct. at 1876.

178. *Id.* at 1869.

179. *Id.* at 1871–73.

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sovereigns is the staple of many Indian law cases in which the Court has slowly chipped away at the scope of tribal authority. Unsurprisingly, Justice Thomas, the Court's most vocal proponent of pushing tribes into supposedly more coherent jurisprudential boxes, concurred to argue that Native nations, too, should no longer be considered sovereign for the purposes of Double Jeopardy.<sup>180</sup>

Although *Sanchez Valle*'s practical implications were limited to double jeopardy doctrine—ironically, the purportedly non-sovereign territories retain greater jurisdictional rights under federal law than sovereign tribes—the Supreme Court's examination of the “deepest wellsprings” of sovereignty was nonetheless symbolically significant.<sup>181</sup> As one Puerto Rican commentator observed, the ruling “insult[s] our pride as self-governing United States citizens.”<sup>182</sup> Sadly, such dignitary harms in Supreme Court rulings are deeply familiar to the members of Native nations.

Ultimately, it is this similarity in the attitude of contemporary jurisprudence that makes the comparison between Native nations and the U.S. territories particularly apt. The law that applies to both the territories and the tribes is the shared legacy of U.S. empire. Emphasizing this fact is more than a way to signal moral disapproval; it is key to understanding the central logic of both bodies of law. Empires, scholars have emphasized, operate on the fundamental principle that “different peoples within the polity will be governed differently.”<sup>183</sup> The Supreme Court enabled this differential treatment by repeatedly carving out geographical and political exceptions to the constitutional doctrines that supposedly governed the United States. The Court aggrandized federal power and stripped away constraints, relying particularly on asserted racial differences and the supposed incapacity of the nation's imperial subjects to justify this uneven approach.<sup>184</sup>

This legacy has had paradoxical consequences in the present. On the one hand, these imperial precedents endure as formal law, as the Court has managed to abstract them from their unabashedly racist origins and treat them as a matter of settled law.<sup>185</sup> On the other hand, the imperial logic of differential treatment no longer seems intelligible within a contemporary jurisprudence deeply committed to principles of formal equality of both

180. *Id.* at 1877 (Thomas, J., concurring).

181. *Id.* at 1871.

182. Rafael Matos, Opinion, *Puerto Rico's Rude Awakening*, THE NEW YORK TIMES, Jan. 20, 2018, available at <https://perma.cc/QY6V-8JGM>.

183. JANE BURBANK & FREDERICK COOPER, EMPIRES IN WORLD HISTORY: POWER AND THE POLITICS OF DIFFERENCE 8 (2010).

184. See Cleveland, *supra* note 145, at 258–67.

185. *Id.* at 278. (“The Supreme Court has spent much of the past century repackaging the inherent powers doctrines into traditional enumerated categories without significant change to the underlying holdings.”).

sovereigns and citizens. Both the territories and Native nations strike the present Court as constitutional anomalies, puzzles of sovereignty that the Justices keep attempting to shove into what they perceive as “normal” constitutional structures—and repeatedly failing, precisely because both are built on imperial histories of difference. This challenge will likely remain irresolvable as long as the Court continues to imagine empire and its legacies as outside the broader U.S. constitutional tradition rather than fundamental to it.

## V. CONCLUSION

Anomaly and exception presume the existence of some “normal” order. Yet, as the dissent in *Sanchez Valle* sought to underscore, sovereigns are not naturally occurring, notwithstanding widespread efforts to naturalize their authority.<sup>186</sup> Nation-states, as a wealth of historical scholarship has demonstrated, were a highly artificial, self-consciously constructed model for political organization.<sup>187</sup> As for federalism, its status as an invented ideology is not only acknowledged but celebrated in American civic and constitutional culture.<sup>188</sup> Native nations are no different; though rooted in deep indigenous ties between peoples and lands, they too grew, developed, and became nations through self-conscious creation and change.<sup>189</sup> All these sovereigns—nation, state, and tribe—appear in the Constitution’s text,<sup>190</sup> yet in none of these cases did the sparse language dictate something as complicated as a fully elaborated constitutional structure. Justices Kennedy and Thomas seem to measure constitutionality based on the number and specificity of a concept’s appearance in the constitutional text (a test that would render slavery three times more constitutional than, say, freedom of

186. *Commw. of Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1878 (2016) (Breyer, J., dissenting).

187. See, e.g., BENEDICT R. ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (rev. ed. 2006); DAVID A. BELL, *THE CULT OF THE NATION IN FRANCE: INVENTING NATIONALISM, 1680–1800* (2003); LINDA COLLEY, *BRITONS: FORGING THE NATION, 1707–1837* (3d ed. 2009). On the construction of the United States as a nation, see CARROLL SMITH-ROSENBERG, *THIS VIOLENT EMPIRE: THE BIRTH OF AN AMERICAN NATIONAL IDENTITY* (2010); DAVID WALDSTREICHER, *IN THE MIDST OF PERPETUAL FETES: THE MAKING OF AMERICAN NATIONALISM, 1776–1820* (1997).

188. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (“Federalism was our Nation’s own discovery”); see also ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010) (describing the construction of federalism as an ideology in the early United States).

189. See, e.g., STEVEN C. HAHN, *THE INVENTION OF THE CREEK NATION, 1670–1763* (2004); WILLIAM GERALD MCLOUGHLIN, *CHEROKEE RENASCENCE IN THE NEW REPUBLIC* (1986); Claudio Saunt, *Telling Stories: The Political Uses of Myth and History in the Cherokee and Creek Nations*, 93 *J. AM. HIST.* 673 (2006).

190. See, e.g., U.S. CONST. ART. I § 8 cl. 3.

speech or equal protection).<sup>191</sup> Yet the constitutional text was merely the start for centuries of dialogue, contestation, and experimentation over sovereignty that the Court shorthands as “history and structure.”<sup>192</sup> As this Article has underscored, from the nation’s very foundation, this history has involved all *three* sovereigns.

Acknowledging this shared history of construction suggests that none of these sovereigns has a greater claim to normative status than any other. To be sure, power and authority are arrayed unequally among them, producing conflict. In this context, analogies and comparisons among sovereigns are not only unavoidable, but useful. But the language of exception and anomaly does more: it smuggles in ideas about legitimacy. Little surprise, then, that one of the primary uses of such comparisons in Indian law has been to construct narratives about tribal shortcomings. In this sense, older ideas about the hierarchy of peoples and civilizations, the intellectual core of imperialism, never vanished; they were just laundered through the purportedly neutral language of modern jurisprudence.

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191. Compare U.S. CONST. Art. I, § 2, cl. 3; § 8, cl. 1; Art. IV, § 2, cl. 3 with *id.* Amend. I; Amend. XIV.

192. *Alden v. Maine*, 527 U.S. 706, 724 (1999).