DIVIDING SOVEREIGNTY IN TRIBAL AND TERRITORIAL CRIMINAL JURISDICTION

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In both federal Indian law and the law regarding United States territories, the Supreme Court in recent decades has shown increasing skepticism about previously tolerated elements of constitutionally unregulated local governmental authority. This Article proposes a framework for resolving constitutional questions raised by the Court's recent cases in these areas. Focusing on the criminal context, where the stakes are highest both for individual defendants and for the affected communities, this Article considers three issues: (1) whether and under what circumstances Congress may confer criminal jurisdiction on tribal and territorial governments without requiring that those governments' enforcement decisions be subject to federal executive supervision; (2) whether double jeopardy should bar successive prosecution by both the federal government and a tribal or territorial government exercising federally authorized criminal jurisdiction; and (3) what, if any, constitutional procedural protections apply when a tribal or territorial government exercises criminal jurisdiction pursuant to such federal authorization.

Through close examination of these three questions, this Article aims to show that framing the analysis in terms of divided sovereignty, and recognizing the close parallels between tribal, territorial, and related federal-state contexts, may yield the most attractive resolutions that are viable in light of the Supreme Court's recent decisions. This Article contrasts this approach with an alternative framework that would organize the analysis around a distinction between "inherent" and "delegated" governmental authority.

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INTRODUCTION

Native American reservations and insular territories of the United States have long been "anomalous zones" of U.S. constitutional law, areas where usual rules do not apply and the Supreme Court's constitutional analysis has a distressingly ad hoc character.[1] In the nineteenth century, as the United States expanded across the continent and acquired its first overseas territories, the Supreme Court established that Congress has "plenary" governmental authority, beyond its usual limited enumerated powers, with respect to Indian tribes and the territories.[2] The Court further held that constitutional rights and other limitations on governmental action apply only incompletely, if at all, to governance of these areas.[3]

1. The phrase "anomalous zones" is borrowed from Gerald Neuman, who uses it to refer to "a geographical area in which certain legal rules, otherwise regarded as embodying fundamental policies of the larger legal system, are locally suspended." Gerald L. Neuman, Anomalous Zones, 48 Stan. L. Rev. 1197, 1201 (1996); see also, e.g., Kal Raustiala, Does the Constitution Follow the Flag?: The Evolution of Territoriality in American Law 5–8, 16, 46–47 (2009) (discussing Indian country and territories as examples of "intraterritoriality," meaning differentiation between "core where the Constitution and all laws applied fully" and "periphery where American law applied only partially").

2. See, e.g., Dorr v. United States, 195 U.S. 138, 142 (1904) (discussing "right of Congress to make laws for the government of territories"); United States v. Kagama, 118 U.S. 375, 384 (1886) (recognizing "power of the General Government" over Indian tribes).

3. See, e.g., *Dorr*, 195 U.S. at 142 (holding Congress's "right . . . to make laws for the government of territories" is not "subject to all the restrictions which are imposed upon that body when passing laws for the United States, considered as a political body of States in union"); Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."); Talton v. Mayes, 163 U.S. 376, 384 (1896) (indicating governmental powers of Indian tribes "existed prior to the Constitution" and "are not operated upon by" constitutional provisions).

While these rulings served initially to facilitate imperial expansion,[4] today they provide an important foundation for federal statutes and policies that enable native and territorial communities to govern themselves with unusual flexibility and autonomy.[5] But the Supreme Court seems poised to upend this framework. Its decisions in recent decades have shown increasing skepticism about the merits of allowing any extraconstitutional governmental authority within the American polity.[6]

This Article explores the implications of the shift in the Court's approach to Indian tribes and territorial governments.[7] In federal Indian law, the Court's newfound suspicion of constitutionally unregulated government power has led it both to curtail tribal power over individuals who are not members of the governing tribe, and to suggest that consti-

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4. 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. 1, 10–15 (2002) (discussing genesis of these cases in context of "[n]ation-building, expansionist impulses").

5. For a discussion of current tribal and territorial governmental arrangements and their legal underpinnings, see notes 25–50, 94–134, and accompanying text.

6. Scholars have noted this trend in federal Indian law. See, e.g., Frank Pommersheim, Broken Landscape: Indians, Indian Tribes, and the Constitution 256 (2009) [hereinafter Pommersheim, Broken Landscape] (noting recent cases may "foreshadow[] . . . a move to 'constitutionalize' Indian law"); Philip P. Frickey, A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers, 109 Yale L.J. 1, 73 (1999) [hereinafter Frickey, Common Law] (identifying "[t]he basic thrust" of recent federal Indian law decisions as impulse "to domesticate tribal power by harmonizing federal Indian law with basic Anglo-American legal values and assumptions"); Philip P. Frickey, (Native) American Exceptionalism in Federal Public Law, 119 Harv. L. Rev. 433, 468 (2005) [hereinafter Frickey, Exceptionalism] (identifying in some Supreme Court Justices' opinions an "impulse of coherence flowing from the canonical place of the Constitution in our legal culture and the related instinct that all exercises of governmental power must somehow be subject to it"). Some have contended that the Court's recent cases reflect a "constitutional crisis" in this area. See, e.g., Frickey, Exceptionalism, supra, at 464 ("[A] constitutional crisis has emerged in federal Indian law."); Frank Pommersheim, Is There a (Little or Not So Little) Constitutional Crisis Developing in Indian Law?: A Brief Essay, 5 U. Pa. J. Const. L. 271, 279–85 (2003) (discussing constitutional crisis caused by recent decisions); Frank Pommersheim, *Lara*: A Constitutional Crisis in Indian Law?, 28 Am. Indian L. Rev. 299, 303–05 (2004) (same). For an argument that the law regarding U.S. territories is also in disarray, see Christina Duffy Burnett, A Convenient Constitution? Extraterritoriality After *Boumediene*, 109 Colum. L. Rev. 973, 979–80 (2009) [hereinafter Burnett, Convenient Constitution].

7. In discussing Native Americans and their governments, this Article generally uses the terms "Indian" and "tribe" because these terms appear most frequently in the federal legal authorities discussed in this Article. This Article uses the term "territories" (and "territorial governments") to refer to the five major "insular" (i.e., overseas) areas subject to U.S. sovereignty but not included in any state—namely, Puerto Rico, the U.S. Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa. This Article uses the term advisedly, recognizing that its connotation of plenary federal control is controversial, particularly with respect to the two commonwealth territories, Puerto Rico and the Northern Mariana Islands. For discussion of this Article's methodology, see infra text accompanying notes 20–32.

tutional due process protections might apply in tribal prosecutions of such nonmembers.[8] With respect to territorial governments, the Court similarly has expressed doubts about the turn-of-the-century doctrine of the so-called *Insular Cases*, which permits departures from some constitutional requirements in territories such as Puerto Rico and Guam that the federal government does not necessarily envision as future states or even permanent U.S. possessions.[9] Meanwhile, some recent commentary has suggested that, at least on putatively originalist premises reflected in some of the Supreme Court's recent separation of powers decisions, the entire structure of territorial self-governance is unconstitutional.[10]

This Article proposes a framework for resolving several constitutional questions raised by the Court's recent cases in these areas. Focusing on the criminal context, where the stakes are highest both for individual defendants and for the affected communities, this Article considers three issues that have been debated in recent judicial opinions and commentary: (1) whether and under what circumstances Congress may confer criminal jurisdiction on tribal and territorial governments without requiring that those governments' enforcement decisions be subject to federal executive supervision under the Appointments and Take Care Clauses of the Constitution; (2) whether double jeopardy should bar successive prosecution by both the federal government and a tribal or territorial government exercising federally authorized criminal jurisdiction; and (3) what, if any, constitutional procedural protections apply when a tribal or territorial government exercises criminal jurisdiction pursuant to such federal authorization.

The fundamental dilemma presented by each of these questions—and by the case law regarding Indian tribes and the territories more gen-

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8. See, e.g., Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 328 (2008) (noting restrictions on "tribal authority over nonmember activities taking place on the reservation"); United States v. Lara, 541 U.S. 193, 200, 209 (2004) (upholding statute restoring tribes' criminal jurisdiction over nonmember Indians but reserving question of whether constitutional due process protections apply in such tribal prosecutions); Duro v. Reina, 495 U.S. 676, 688 (1990) (holding tribes lacked criminal jurisdiction over nonmembers); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) (holding tribes lacked criminal jurisdiction over non-Indians).

9. See, e.g., Boumediene v. Bush, 553 U.S. 723, 757–59 (2008) (collecting and discussing cases establishing this principle but observing "[i]t may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance"). The *Boumediene* Court then cites Torres v. Puerto Rico, 442 U.S. 465 (1979), for the proposition that "[w]hatever the validity of the [*Insular Cases*] in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico in the 1970's." *Boumediene*, 553 U.S. at 758 (second alteration in *Boumediene*) (quoting *Torres*, 442 U.S. at 475–76 (Brennan, J., concurring in the judgment)).

10. See Gary Lawson & Guy Seidman, The Constitution of Empire: Territorial Expansion and American Legal History 121–38 (2004) (asserting incongruence between Constitution and territorial self-governance).

erally—is one of reconciling the Supreme Court's recently expressed concerns about extraconstitutional governmental authority with historical and normative considerations supporting autonomous self-governance by tribal and territorial communities.

Given the Supreme Court's recognition of plenary congressional authority over territories and Indian tribes,[11] the criminal jurisdiction of territorial and tribal governments depends on federal authorization, or at least acquiescence.[12] The Supreme Court's recent decisions in these areas appear animated in part by a conviction that governmental power for which the federal government bears some responsibility should be subject to federal constitutional standards. At the same time, however, longstanding case law supports allowing tribal and territorial self-governance.[13] Indeed, although the constitutional text provides only sparse guidance on this subject, it arguably contemplates congressional organization of territorial governments,[14] and it acknowledges Indian tribes as distinct sovereigns within the American polity.[15] Furthermore, powerful normative and historical considerations support allowing these communities governmental autonomy. In many cases, the United States acquired sovereignty over tribes and territories without their consent;[16]

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11. See, e.g., United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2323–24 (2011) (collecting cases establishing "plenary authority of Congress" over Indian affairs); *Lara*, 541 U.S. at 200 (same); District of Columbia v. Carter, 409 U.S. 418, 430 & n.26 (1973) (noting congressional plenary authority over territories).

12. *Lara*, 541 U.S. at 203 (noting Congress's power to "modify the degree of autonomy enjoyed by a dependent sovereign that is not a State").

13. See, e.g., *Plains Commerce Bank*, 554 U.S. at 327 ("For nearly two centuries now, we have recognized Indian tribes as 'distinct, independent political communities,' qualified to exercise many of the powers and prerogatives of self-government." (citations omitted) (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832))); Trailer Marine Transp. Corp. v. Rivera Vazquez, 977 F.2d 1, 6–7 (1st Cir. 1992) (describing how Puerto Rico's "autonomy increased in stages" and indicating that "[t]oday, the government of the Commonwealth of Puerto Rico in many respects resembles that of a state").

14. While the Territory Clause grants Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," U.S. Const. art. IV, § 3, cl. 2, the Constitution also permits Congress to admit new states to the Union, id. cl. 1. From the early years of the Republic, Congress passed organic statutes establishing local governments for territories that would later be admitted as states. For general discussion of the state admission process, see Eric Biber, The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union, 46 Am. J. Legal Hist. 119, 125–29 (2004).

15. The Commerce Clause permits congressional regulation of commerce "with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3.

16. Although some Indian tribes accepted U.S. sovereignty by treaty, the Supreme Court has held that Congress may exercise its plenary authority over Indian affairs to supersede treaty terms with ordinary legislation. Lone Wolf v. Hitchcock, 187 U.S. 553, 565–66 (1903). For general discussion of the history of federal-tribal relations, see Cohen's Handbook of Federal Indian Law §§ 1.02[3]–.07 (Nell Jessup Newton et al. eds., 2012)

unlike states, these communities lack direct representation in the federal government,[17] and their histories and traditions may differ markedly from those of the American polity at large.[18] Courts therefore have tradi-

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[hereinafter Cohen]; see also, e.g., Robert N. Clinton, There Is No Federal Supremacy Clause for Indian Tribes, 34 Ariz. St. L.J. 113, 162–67 (2002) [hereinafter Clinton, Federal Supremacy Clause] (discussing forced subjugation of certain tribes during nineteenth century). As for territories, the Northern Mariana Islands accepted U.S. sovereignty by entering a "covenant" with the United States, see 48 U.S.C. § 1801 note (2006) (Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America § 101); what is now American Samoa ceded sovereignty to the United States after an agreement among the United States, Great Britain, and Germany assigned control of the territory to the United States, 48 U.S.C. §§ 1661–1662; the United States acquired the former Spanish colonies Puerto Rico and Guam in the treaty concluding the Spanish-American War, see Treaty of Peace Between the United States of America and the Kingdom of Spain, U.S.-Spain, art. II, Dec. 10, 1898, 30 Stat. 1754, 1755; and the United States purchased what are now the U.S. Virgin Islands from Denmark in 1916, see Convention Between the United States and Denmark for Cession of the Danish West Indies, Aug. 4, 1916, 39 Stat. 1706. For further discussion of the history of these territorial acquisitions, see generally Stanley K. Laughlin, Jr., The Law of United States Territories and Affiliated Jurisdictions §§ 3:3–:6 (1995) [hereinafter Laughlin, Territories and Affiliated Jurisdictions].

17. Although the Supreme Court held in Elk v. Wilkins, 112 U.S. 94, 102 (1884), that Native Americans born into Indian tribes do not hold U.S. citizenship as a matter of constitutional right, Congress has conferred citizenship by statute on all Indians born within the United States. 8 U.S.C. § 1401(b) (2006). Native Americans living within the United States thus are citizens and may vote in state and federal elections, but tribes are not represented directly in Congress. See generally Cohen, supra note 16, at 922–24, 932–34 (discussing Indian citizenship and related civil rights). The five major U.S. territories have nonvoting representatives in the U.S. House of Representatives, 48 U.S.C. §§ 891–894, 1711–1715, 1731–1735, 1751–1757, and individuals born in Puerto Rico, Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands (CNMI) hold U.S. citizenship by statute. 8 U.S.C. §§ 1402, 1406, 1407; 48 U.S.C. § 1801 note (Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America § 303). Individuals born in American Samoa are U.S. nationals but not citizens unless they have at least one citizen parent. 8 U.S.C. §§ 1101(a)(21)–(22), (29), 1401(e), 1408(1). But see Lisa Maria Perez, Note, Citizenship Denied: The *Insular Cases* and the Fourteenth Amendment, 94 Va. L. Rev. 1029, 1036–42 (2008) (discussing arguments that Fourteenth Amendment guarantees U.S. citizenship to individuals born in U.S. territories). U.S. citizens residing in the territories, however, are not represented by any voting member of Congress, as congressional representation is limited to states; nor may citizens residing in the territories vote in presidential elections, because the Electoral College includes only representatives of the states and the District of Columbia. See Igartua v. United States, 626 F.3d 592, 595 (1st Cir. 2010) (rejecting argument that residents of Puerto Rico may vote for congressional representatives); Igartua-de la Rosa v. United States, 417 F.3d 145, 146–47 (1st Cir. 2005) (en banc) (rejecting argument that residents of Puerto Rico have right to vote in presidential elections).

18. See, e.g., Stanley K. Laughlin, Jr., Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional, 27 U. Haw. L. Rev. 331, 335–40 (2005) [hereinafter Laughlin, Cultural Preservation] (discussing hierarchical elements of American Samoan culture); Angela R. Riley, (Tribal) Sovereignty and Illiberalism, 95 Calif. L. Rev. 799, 838–39 (2007) (discussing "illiberal" traditions of some tribes, such as gender-based or theocratic government).

tionally given Congress substantial latitude to allow these communities to govern themselves according to their own preferences and traditions.[19]

Viewed in these terms, the questions addressed here present a familiar problem of federalism—the problem of deciding when related actions by two governments (typically state and federal) should be viewed as actions of one sovereign or two. Does the federal government's role in authorizing tribal or territorial criminal jurisdiction mean that resulting prosecutions are federal action for constitutional purposes? Or should tribal and territorial self-governance entail the ability to depart from usual constitutional requirements, notwithstanding the federal government's background role in authorizing tribal and territorial jurisdiction?

The key to answering these questions, this Article contends, is recognizing the federalism problem at the core of the issue. As a practical matter, tribal and territorial criminal jurisdiction entails a form of divided sovereignty, akin to the more familiar division of federal and state authority under our constitutional system. When a tribal or territorial government prosecutes an offense under the tribal or territorial code, it does so as a functionally independent governmental entity, much like a state government prosecuting a state offense. But the federal government also bears some responsibility, as the tribal or territorial government's jurisdiction depends on federal authorization or acquiescence pursuant to Congress's plenary authority. Accordingly, in analyzing constitutional questions, the task is one of dividing up sovereignty—that is, of deciding to what degree criminal enforcement should be attributed to one level of government or the other for constitutional purposes. Through close analysis of the three questions identified above—whether presidential supervision is required, how double jeopardy applies, and which, if any, Bill of Rights protections apply in tribal or territorial prosecutions—this Article aims to show that framing the analysis in terms of divided sovereignty, and recognizing the close parallels between tribal, territorial, and related federal-state contexts, may yield the most attractive resolutions that are viable in light of the Supreme Court's recent decisions in these areas.

This Article contrasts this approach with an alternative framework, also with some support in case law, that would organize the analysis around a distinction between "inherent" and "delegated" governmental authority.[20] According to this alternative view, all constitutional constraints normally applicable to the federal government apply if governmental power exercised by a tribal or territorial government is delegated from Congress. By contrast, if federal legislation instead activates a latent inherent capacity of the recipient government, then some lesser set of

19. See infra Parts I.A.1, I.B.2.

20. See, e.g., United States v. Lara, 541 U.S. 193, 199 (utilizing this dichotomy).

constitutional protections, or even no constitutional protections at all, may be applicable.[21]

Though endowed with an alluring conceptual tidiness, this framework encounters a number of problems. First, it treats tribes and territories quite differently despite the practical similarities between them: While case law recognizes retained inherent sovereignty for tribes, territorial governments exercise only delegated federal power.[22] Second, this framework suggests that departures from the Bill of Rights in prosecutions by territorial governments are permissible under the *Insular Cases* only insofar as the federal government itself can violate those rights, a result that does not square with current practice and seems normatively unappealing.[23] Third, the framework has difficulty accounting for certain contexts where state governments exercise delegated federal criminal jurisdiction in Indian country.[24] Despite their basis in a federal delegation, courts have uniformly treated exercises of such jurisdiction as state, rather than federal, action for constitutional purposes.[25] Finally, while federal recognition that Indian tribes retain an inherent sovereignty that predates the U.S. constitution is important to many Native Americans and provides a key underpinning of tribal governmental authority, this principle has not prevented Congress or the Supreme Court from curtailing tribal jurisdiction in significant ways.[26] Developing an alternative framework, as this Article proposes, may therefore prove important even for proponents of robust tribal sovereignty.

What specific answers does the divided sovereignty framework yield? First, on the question of presidential control, the framework supports the well-established, but newly questioned, practice of allowing a tribe or territory to enforce its own substantive criminal law without federal executive supervision. As a general matter, the Supreme Court has indicated that enforcement of federal law must be subject to "meaningful Presidential control."[27] But the practical reason for requiring meaningful presidential control of enforcement in the federal context—ensuring that a federally accountable official bears responsibility for executive decisions with such significant ramifications for personal liberty—is absent when a prosecution is a vindication of local values, reflected in locally enacted law and enforcement by local authorities. Hence, even when tribal or territorial criminal jurisdiction depends on federal authorization or acquiescence, such supervision should not be constitutionally re-

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21. For further discussion of this theory and case law supporting it, see infra note 210 and accompanying text.

22. See infra note 120 and accompanying text.

23. See infra notes 145–162 and accompanying text.

24. See infra notes 205–209 and accompanying text.

25. See infra note 205 and accompanying text.

26. See supra note 8 and accompanying text (discussing judicial and legislative limitations on tribal jurisdiction).

27. Printz v. United States, 521 U.S. 898, 922 (1997).

quired. Tribes and territories, in other words, should enjoy the same autonomy in enforcing their own laws that states do in enforcing theirs.

Second, with respect to double jeopardy, the framework supports shifting the doctrine's emphasis away from formalistic questions of "sovereignty" and towards consideration of the degree to which prosecutions reflect autonomous political and moral decisionmaking. The Supreme Court has held that the double jeopardy prohibition does not bar separate prosecution by the federal government following prosecution by a state or tribe (or by a state or tribe following prosecution by the federal government) because states and tribes are "separate sovereigns" from the federal government.[28] Early in America's overseas imperial adventure, however, the Court held that territorial prosecutions do bar federal reprosecution because territorial governments derive their power entirely from Congress and thus hold no "separate sovereignty."[29] As the First Circuit has recognized in the context of Puerto Rico, this doctrine no longer reflects the practical reality of territorial government.[30] In effect, territorial governments today are local authorities that vindicate local values with much the same degree of practical independence from the federal government as a state or tribe. The First Circuit's approach therefore is correct and should be expanded to cover additional territorial governments.

Finally, on the question of whether particular individual rights apply in tribal or territorial criminal prosecutions, the framework supports an analysis focused on cultural accommodation. The skepticism about constitutionally unregulated governmental authority that animates the Supreme Court's recent cases suggests that the Court will view individual rights as at least presumptively applicable in tribal and territorial proceedings that depend on federal authorizing legislation. Nevertheless, recognizing the interplay of sovereignty at work in tribal and territorial prosecutions might support accommodating, at least to some degree, tribal or territorial procedural traditions that depart from the precise guarantees of the Bill of Rights as applied in federal prosecutions. As described in greater detail below, one approach to doing so might determine the applicability of particular rights based on the relative strength of individual and community interests, seeking in particular to avoid procedural disparities that appear likely to systematically skew case outcomes or alter the fundamental fairness of proceedings in tribal or territorial

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28. See, e.g., United States v. Wheeler, 435 U.S. 313, 329–30 (1978) (holding tribes are "separate sovereigns" from federal government for double jeopardy purposes); Abbate v. United States, 359 U.S. 187, 193–94 (1959) (holding state and federal government may separately punish offender for same offense as separate "sovereigns").

29. See, e.g., Puerto Rico v. Shell Co., 302 U.S. 253, 264 (1937).

30. See, e.g., United States v. Lopez Andino, 831 F.2d 1164, 1168 (1st Cir. 1987) (treating Puerto Rico "as a state for purposes of the double jeopardy clause" because of congressional legislation).

courts as opposed to federal courts.[31] This Article identifies support for such an approach in prior cases from tribal and territorial contexts, as well as in cases addressing analogous problems of federal-state relations.[32]

It should be emphasized that the goals of the analysis in this Article are doctrinal and practical. This Article does not seek to remake the doctrine from the ground up. Its objective, rather, is to explore a path that might give force to the concerns about extraconstitutional governance that animate the Supreme Court's recent cases, while also acknowledging practical realities and the compelling historical and normative basis for autonomous self-governance by tribal and territorial communities. Accordingly, although the Court's recent decisions on these topics have received a chilly reception from many scholars,[33] the analysis presented here accepts those decisions as established features of the legal terrain that need to be accounted for in any descriptively adequate doctrinal theory. By the same token, this Article tables questions regarding the validity of congressional "plenary" power over territories and Indian tribes, though scholars have offered powerful criticisms of the plenary power doctrine.[34] Finally, while some may question whether, given the troubled history of federal relations with tribal and territorial communities, it is

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31. See infra notes 280–287, 322–327 and accompanying text.

32. See infra notes 263–272 and accompanying text.

33. See, e.g., Pommersheim, Broken Landscape, supra note 6, at 297 (describing "pattern of doctrinal confusion" in federal Indian law cases); Burnett, Convenient Constitution, supra note 6, at 974–76 (objecting to *Boumediene*'s framework for analyzing questions regarding extraterritorial application of Constitution); Matthew L.M. Fletcher, The Supreme Court and Federal Indian Policy, 85 Neb. L. Rev. 121, 128–29 (2006) (arguing Supreme Court decisions have led to "unwelcome results for the federal government, Indians, Indian tribes, states, and non-Indians"); Frickey, Exceptionalism, supra note 6, at 436 (faulting Supreme Court for "engag[ing] in aggressive institutional and doctrinal revisionism, essentially displacing Congress as the federal agent with front-line responsibility for federal Indian policy"); David H. Getches, Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law, 84 Calif. L. Rev. 1573, 1574 (1996) (criticizing Supreme Court for "abandoning entrenched principles of Indian law in favor of an approach that bends tribal sovereignty to fit the Court's perceptions of non-Indian interests"); Pedro A. Malavet, The Inconvenience of a "Constitution [That] Follows the Flag . . . But Doesn't Quite Catch Up With It": From *Downes v. Bidwell* to *Boumediene v. Bush*, 80 Miss. L.J. 181, 182 (2010) (faulting Supreme Court for reaffirming *Insular Cases* in *Boumediene*, because "the Court's interpretation of the Territorial Clause constitutionally 'inconveniences' the territorial citizens by relegating them to second-class legal status").

34. See, e.g., Pommersheim, Broken Landscape, supra note 6, at 125 (characterizing "doctrine of plenary power" as "inaugurat[ing] extraconstitutional regime within the field of Indian law"); Cleveland, supra note 4, at 14 (characterizing plenary power doctrine with respect to both Indians and territories as incapable of justification "by mainstream forms of constitutional analysis" and rooted "in a peculiarly unattractive, late-nineteenth-century nationalist and racist view of American society and federal power"); Clinton, Federal Supremacy Clause, supra note 16, at 163 ("The legislative Indian plenary power doctrine was not a reasoned analysis derived from the text, history, or purposes of the United States Constitution. Rather, it constituted an unprincipled assertion of raw federal authority based on nothing more than the naked power to effectuate it.").

appropriate to address these communities' potential autonomy through a framework of federal law at all, this Article brackets questions of ultimate legitimacy and instead analyzes these questions from the perspective of a federal decisionmaker bound to apply federal law and to seek coherent solutions within the existing legal system.[35]

Other scholars have proposed various frameworks, including some based on federalism, for understanding the status of tribal and territorial governments.[36] Some scholars have considered doctrinal questions addressed here.[37] Few, however, have attempted an intensive analysis of specific constitutional questions based on parallel consideration of tribal,

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35. For a similar approach, see Judith Resnik, Tribes, Wars, and the Federal Courts: Applying the Myths and Methods of *Marbury v. Madison* to Tribal Courts' Criminal Jurisdiction, 36 Ariz. St. L.J. 77, 91 (2004) (noting article is written "from the perspective of federal lawmakers, asking questions about what stance national law ought to take towards [tribes]").

36. For a small sampling of such proposals, see, e.g., T. Alexander Aleinikoff, Semblances of Sovereignty: The Constitution, the State, and American Citizenship 87–93, 130–32 (2002) (arguing Congress could confer increased autonomy on territories and Constitution protects tribal self-government); Jose Trias Monge, Injustice According to Law: The *Insular Cases* and Other Oddities, *in* Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution 226, 234–37 (Christina Duffy Burnett & Burke Marshall eds., 2001) (arguing territories could be granted greater self-determination); Christina Duffy Burnett, *Untied* States: American Expansion and Territorial Deannexation, 72 U. Chi. L. Rev. 797, 876 (2005) [hereinafter Burnett, *Untied* States] (advocating "deannexationist interpretation of the doctrine of territorial incorporation" that would "preserv[e] the option of separation for any territory subject to U.S. sovereignty and federal law but denied equal representation through statehood"); Sarah Krakoff, A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation, 83 Or. L. Rev. 1109, 1195–98 (2004) (advocating "experiential sovereignty" for Indian tribes that links legal and cultural sovereignty); 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, 618–19 (1994) (advocating federalist framework in which tribes are placed on same "plane" as states vis-à-vis federal government); Nell Jessup Newton, Federal Power over Indians: Its Sources, Scope, and Limitations, 132 U. Pa. L. Rev. 195, 198 (1984) (advocating constitutional limitations on laws affecting tribal sovereignty and property rights); Saikrishna Prakash, Against Tribal Fungibility, 89 Cornell L. Rev. 1069, 1107–10 (2004) (concluding "federal government lacks a plenary, nationwide 'Indian power'" and arguing each tribe's relationship with federal government should be considered individually); Alex Tallchief Skibine, Redefining the Status of Indian Tribes Within "Our Federalism": Beyond the Dependency Paradigm, 38 Conn. L. Rev. 667, 669 (2006) (arguing Congress could "constitutionally incorporate tribes under a third sphere of sovereignty"); Carol Tebben, An American Trifederalism Based upon the Constitutional Status of Tribal Nations, 5 U. Pa. J. Const. L. 318, 320 (2003) (proposing "constitutional trifederalism" in which Indian tribes are recognized as domestic sovereigns).

37. See, e.g., Burnett, Convenient Constitution, supra note 6, at 1004–08 (discussing case law on jury rights in territorial context); Alex Tallchief Skibine, *United States v. Lara*, Indian Tribes, and the Dialectic of Incorporation, 40 Tulsa L. Rev. 47, 62–70 (2004) [hereinafter Skibine, Dialectic of Incorporation] (discussing whether due process requires tribal courts to afford defendants all Bill of Rights protections).

territorial, and state contexts, despite the important insights such a comparative perspective may afford.[38] The questions addressed here, moreover, may well be litigated soon, and their answers have immediate significance for the millions of people who live in tribal and territorial communities, some of which face severe law and order problems.[39] They have particular salience in the tribal context in light of recent legislation authorizing, for the first time in thirty-five years, tribal court criminal jurisdiction over certain individuals who are not members of any Indian tribe.[40] In addition, as this Article will show in the course of its analysis, consideration of the issues analyzed here illuminates constitutional questions of broader significance. In particular, the analysis here may shed light on the proper application of the Appointments, Take Care, and Double Jeopardy Clauses of the Constitution in the more familiar federal-state context.

This Article proceeds as follows. Part I is a brief survey of the legal landscape, summarizing the law with respect to criminal jurisdiction of Indian tribes and territorial governments. It also addresses the law regarding two analogous state contexts where state criminal jurisdiction depends on federal authorization: congressional relaxation of dormant Commerce Clause restrictions on state commercial regulation, and federal delegation of certain elements of federal criminal jurisdiction to states in Indian country. Part II analyzes the three doctrinal questions presented above: the necessity of federal executive control, the applicability of double jeopardy, and the enforceability of constitutional

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38. But see, e.g., Aleinikoff, supra note 36, at 85–87, 115–19 (discussing case law modifying constitutional requirements for territories "in response to cultural diversity" and case law addressing criminal jurisdiction of Indian tribes); Skibine, Dialectic of Incorporation, supra note 37, at 66 (applying *Insular Cases* framework to tribes and concluding Constitution applies fully to tribes only if they have been "incorporated" into the United States).

39. See, e.g., Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a), 124 Stat. 2258, 2262–63 (reporting congressional findings that thirty-four percent of American Indian and Alaska Native women will be raped in their lifetimes and that increased methamphetamine use on reservations has led to increased domestic violence, burglary, assault, and child abuse); Report by the President's Task Force on Puerto Rico's Status 64–65 (2011), available at www.whitehouse.gov/sites/default/files/uploads/Puerto_Rico_Task_Force_Report.pdf (on file with the *Columbia Law Review*) (noting Puerto Rico's "alarmingly high" murder rate and "vulnerab[ility] to transnational crime"); Angela R. Riley, Indians and Guns, 100 Geo. L.J. 1675, 1733–34 (2012) (discussing "evidence suggesting high crime rates in Indian country"); Kevin K. Washburn, Federal Criminal Law and Tribal Self-Determination, 84 N.C. L. Rev. 779, 786 (2006) [hereinafter Washburn, Tribal Self-Determination] ("For decades, crime rates involving Indians have been higher than any other racial or ethnic group in the United States."); Daniel Shea, Homicides in V.I., V.I. Daily News (Jan. 13, 2011), http://virginislandsdailynews.com/newshomicides-in-v-i-1.1089794 (on file with the *Columbia Law Review*) (reporting 2010 murder rate in U.S. Virgin Islands rendered territory "the most violent place in the United States, on a per-capita basis," with murder rate second only to Honduras globally).

40. Violence Against Women Reauthorization Act of 2013 (VAWA), Pub. L. No. 113-4, tit. IX, § 904.

procedural guarantees. Part III concludes by returning to the broader themes and implications of the analysis. It suggests that the approach proposed in this Article not only resolves open questions in federal Indian law and the law regarding U.S. territories, but also helps clarify other areas of constitutional law.

I. THE LEGAL LANDSCAPE

This Part will offer a brief summary of existing law governing the criminal jurisdiction of tribal and territorial governments, as well as analogous state contexts where criminal jurisdiction depends on federal authorization. Certain features of this legal landscape, such as congressional plenary authority over Indian country and the territories, appear well entrenched. But the Supreme Court's recent cases have introduced uncertainty by displaying discomfort with previously accepted elements of extraconstitutional authority in tribal and territorial governance.

A. *Indian Tribes*

Native American relations with the United States have a tragic history. Congress has, at various times, pursued policies aimed at the assimilation of tribal members and extinction of tribal cultural and political independence, to say nothing of historic efforts to expel or exterminate native peoples altogether.[41] Today, however, both political branches are committed, at least in principle, to supporting the sovereignty of Indian tribes as independent governmental entities.[42] As a result, "American Indian nations are now exercising more sovereignty on the ground than at any point since the early nineteenth century."[43] Yet this tribal revitalization has caused new controversies. In part because of past federal policies—particularly the turn-of-the-century policy of "allotment" that effectively opened up many Indian lands to non-Indian settlement[44]—Indian reservations today often include substantial

41. For summary accounts of the history of federal policy toward Indian tribes, see generally Cohen, supra note 16, at 3–108 (providing chapter "History & Background of Federal Indian Policy"); Washburn, Tribal Self-Determination, supra note 39, at 790–831 (focusing on criminal justice).

42. See generally Fletcher, supra note 33, at 141–54 (2006) (demonstrating federal policy of both Congress and executive branch since 1970s to support tribal self-determination).

43. Sarah Krakoff, The Renaissance of Tribal Sovereignty, the Negative Doctrinal Feedback Loop, and the Rise of a New Exceptionalism, 119 Harv. L. Rev. F. 47, 48 (2005) (citing Charles Wilkinson, Blood Struggle: The Rise of Modern Indian Nations (2005)).

44. The allotment policy involved forcible division of communal Indian lands into individual freeholds, which in many cases ended up in non-Indian hands as a result of sales or tax foreclosures. For general accounts of this period in federal Indian policy, see, e.g., Cohen, supra note 16, at 71–79; Pommersheim, Broken Landscape, supra note 6, at 126–37; Judith V. Royster, The Legacy of Allotment, 27 Ariz. St. L.J. 1, 7–18 (1995).

populations of individuals who are not members of the tribe and therefore cannot vote in tribal elections.[45] As tribes have sought to revitalize their sovereignty, courts have struggled to define the proper bounds of tribal governmental authority, particularly with respect to nonmember populations within reservation boundaries.

1. *"Domestic Dependent Nations."* — The sparse guidance the Constitution itself provides on the status of America's native peoples seems to place Indian tribes in an intermediate category between foreign and domestic states. The Constitution originally excluded "Indians not taxed" from the apportionment of direct taxes and (as in the later Fourteenth Amendment) congressional seats, thus arguably signaling Indians' status as separate from the polity.[46] The Commerce Clause—which includes the Constitution's only other express reference to Native Americans—provides for congressional regulation of "Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[47] This listing seems to characterize tribes as distinct from both U.S. and foreign states.

Early in the nation's history, the Marshall Court coined the peculiar phrase "domestic dependent nations" to characterize native communities' hybrid position.[48] Indian tribes, according to this understanding, are sovereign in their domain, and, like foreign states, are to interact principally with the federal government and not the states.[49] At the same time, Indian tribes are "dependent," lacking the capacity for external foreign relations and subject to unusually broad federal authority as "ward[s]" of the national government.[50]

Over the course of many vicissitudes in congressional policy and case law, full recounting of which is beyond the scope of this Article, the Supreme Court has continued to view Indian tribes as a sort of constitutional hybrid, resembling states in certain respects and foreign nations in

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45. See Frickey, Common Law, supra note 6, at 15 ("Because of allotment, many reservations today have a significant non-Indian population and a checkerboard land pattern with non-Indian fee property mixed in with Indian allotments and collective tribal property.").

46. U.S. Const. art. I, § 2, cl. 3; id. amend. XIV, § 2.

47. Id. art. I, § 8, cl. 3.

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

49. See id. (describing Indians as "hav[ing] an unquestionable, and, heretofore, unquestioned right to the lands they occupy" but also as being "completely under the sovereignty and dominion of the United States"); see also Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556–57 (1832) (noting congressional enactments "regulat[ing] trade and intercourse with the Indians" while also describing tribes as "distinct political communities, having territorial boundaries within which their authority is exclusive"). See generally Frickey, Exceptionalism, supra note 6, at 438–39 (describing *Worcester*).

50. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17; see also *Worcester*, 31 U.S. (6 Pet.) at 552 ("The Cherokees acknowledge themselves to be under the protection of the United States, and of no other power."); Frickey, Exceptionalism, supra note 6, at 437–38 (discussing *Cherokee Nation*).

others.[51] On the one hand, the Supreme Court has characterized tribes as retaining "inherent" sovereign authority except insofar as the federal government has explicitly or implicitly abrogated such sovereignty. In a recent formulation, "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[52] On the other hand, tribes are generally subject to "plenary" congressional authority.[53] The Court initially described this plenary authority as "inherent" in the federal government's sovereignty, but today courts tend to locate the source of this authority (rather awkwardly) in the express textual grant of the Indian Commerce Clause.[54] Under the plenary power doctrine, Congress is not limited to its enumerated powers in legislating for Indian tribes. It instead acts as a sort of super-legislature with authority to expand or contract tribal jurisdiction and uphold or override tribal laws and governmental structures.[55] Congress's actions may be constrained either by fiduciary obligations to the federal government's Indian "wards"[56] or by due process or other constitutional limitations.[57] But judicial review of federal legislation regarding Indian tribes is unusually lax.[58]

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51. For an account of the evolution of the Supreme Court's views on tribal sovereignty and the development of the plenary power doctrine, see Cleveland, supra note 4, at 25–81. As a rough generalization, the Marshall Court was relatively protective of tribal sovereignty, the Court later in the nineteenth century granted virtually unlimited power to Congress, and the Court later in the twentieth century restored some limitations on Congress's plenary power. See Pommersheim, Broken Landscape, supra note 6, at 112–15; Cleveland, supra note 4, at 35–63.

52. United States v. Wheeler, 435 U.S. 313, 323 (1978).

53. See, e.g., United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2323–24 (2011) (listing cases demonstrating tribes' "sovereign function [is] subject to the plenary authority of Congress").

54. See, e.g., United States v. Lara, 541 U.S. 193, 200 (2004) (identifying authority within Commerce Clause and Treaty Clause); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.").

55. *Lara*, 541 U.S. at 203 (noting Congress's power to "modify the degree of autonomy enjoyed by a dependent sovereign that is not a State").

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

57. See, e.g., *Jicarilla Apache Nation*, 131 S. Ct. at 2324 (noting "'the undisputed existence of a general trust relationship between the United States and the Indian people'" and discussing statutes establishing fiduciary relationship between United States and tribes (quoting United States v. Mitchell, 463 U.S. 206, 225 (1983))); United States v. Creek Nation, 295 U.S. 103, 109–10 (1935) (noting federal government's authority over Indian property is "not absolute," but rather "subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions").

58. The Supreme Court indicated early in the twentieth century that federal policy toward Indian tribes was a political question subject to no judicial scrutiny. See Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of

Under this governing framework, tribal officials, as authorities of a government with independent inherent sovereignty, have been free to define and prosecute crimes within jurisdictional confines explicitly or implicitly set by Congress. One important implication of tribes' residual sovereignty, moreover, is that tribal prosecutions for such tribal offenses do not bar separate federal or state prosecution before or after a tribal prosecution, even for an identical offense.

The Double Jeopardy Clause of the Fifth Amendment, which applies to states by virtue of the Fourteenth Amendment's Due Process Clause,[59] provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb."[60] But the Supreme Court has long held that prosecutions by "separate sovereigns" do not constitute the same offense for purposes of this provision.[61] On this theory, states and the federal government are considered separate sovereigns with separate authority to prosecute defendants for otherwise identical offenses; "[e]ach has the power, *inherent in any sovereign*, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each 'is exercising its own sovereignty, not that of the other.'"[62] Extending the same logic to tribes, the Court has held that Indian nations retain a residual separate sovereignty that renders their criminal prohibitions distinct from federal or state offenses.[63]

As a further implication of tribes' inherent sovereignty, the Supreme Court has held that tribes are not restrained by the Bill of Rights or Fourteenth Amendment. In the landmark 1896 case of *Talton v. Mayes*, the Supreme Court held that the Fifth Amendment guarantee of grand jury indictment has for its "sole object to control the powers conferred by the Constitution on the National Government" and thus does not apply to Indian tribes, whose "powers of local self government . . . existed prior to the Constitution."[64] The Court intimated cryptically that Indian tribes' "powers of local self government are also operated upon and restrained

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the government."). Although the Court has abandoned that view, it has developed unique standards for review of legislation on key issues. See, e.g., United States v. Sioux Nation of Indians, 448 U.S. 371, 415–17 (1980) (finding taking of Indian land necessitates just compensation under Takings Clause only if Congress failed to provide offsetting benefits such that trustee in good faith could have concluded transaction benefited tribe); Morton v. Mancari, 417 U.S. 535, 552–55 (1974) (upholding legislation that singles out members of Indian tribes for special treatment and rejecting view that such legislation constitutes racial discrimination subject to strict scrutiny).

59. Illinois v. Vitale, 447 U.S. 410, 415 (1980); Benton v. Maryland, 395 U.S. 784, 787 (1969).

60. U.S. Const. amend. V.

61. See, e.g., Heath v. Alabama, 474 U.S. 82, 88 (1985); Abbate v. United States, 359 U.S. 187, 194–95 (1959).

62. United States v. Wheeler, 435 U.S. 313, 320 (1978) (emphasis added) (quoting United States v. Lanza, 260 U.S. 377, 382 (1922)).

63. Id. at 328.

64. 163 U.S. 376, 384 (1896).

by the general provisions of the Constitution of the United States."[65] But the Court has since characterized *Talton* as establishing that "the Bill of Rights in the Federal Constitution does not apply to Indian tribal governments."[66]

Today, most criminal procedure requirements of the Bill of Rights nevertheless apply to tribes by statute. Exercising its plenary authority over Indian affairs, Congress enacted the Indian Civil Rights Act (ICRA) in 1968.[67] This statute requires tribes to abide by criminal procedure requirements of the Bill of Rights, with a few notable exceptions.[68] First, tribes do not need to provide grand jury indictments.[69] Second, neither are tribes required to provide appointed counsel, except in certain prosecutions authorized by two recent statutes described below.[70] Third, although the statute requires trial by jury of at least six members in all cases involving an offense punishable by imprisonment, it does not expressly require unanimous jury verdicts,[71] though such unanimity would be required for conviction by any six-member jury in federal or state court.[72] Fourth, ICRA, unlike the Sixth Amendment, generally does not require an "impartial jury." In the Sixth Amendment context, the Supreme Court has inferred from this term a "fair cross section" requirement that bars federal and state governments from systematically excluding any "distinct" group within the community from jury venires.[73] Tribes, in con-

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65. Id.

66. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194 n.3 (1978).

67. Pub. L. No. 90-284, tit. II, 82 Stat. 73, 77–78 (1968) (codified as amended at 25 U.S.C. §§ 1301–1303).

68. See 25 U.S.C. § 1302 (Supp. V 2012).

69. See id.

70. See infra notes 79–84 and accompanying text.

71. See 25 U.S.C. § 1302.

72. See Burch v. Louisiana, 441 U.S. 130, 138 (1979) (holding six-member juries must be unanimous); Ballew v. Georgia, 435 U.S. 223, 245 (1978) (finding Sixth Amendment requires at least six members on jury); Apodaca v. Oregon, 406 U.S. 404, 411 (1972) (holding nonunanimous 9–3 or 10–2 verdicts permissible for states but not federal government); Johnson v. Louisiana, 406 U.S. 356, 359–60 (1972) (same); Williams v. Florida, 399 U.S. 78, 103 (1970) (finding six-member jury permissible). The right to a jury trial under ICRA is broader than the federal constitutional right in that it applies to any offense punishable by imprisonment; the Sixth and Fourteenth Amendments require jury trial only for offenses punishable by a term of imprisonment greater than six months. See, e.g., Baldwin v. New York, 399 U.S. 66, 73–74 (1970) (identifying six-month line).

73. See, e.g., Berghuis v. Smith, 130 S. Ct. 1382, 1387 (2010) ("The Sixth Amendment secures to criminal defendants the right to be tried by an impartial jury drawn from sources reflecting a fair cross section of the community."); Holland v. Illinois, 493 U.S. 474, 480 (1990) ("Without that requirement, the State could draw up jury lists in such manner as to produce a pool of prospective jurors disproportionately ill disposed towards one or all classes of defendants . . . ."); Duren v. Missouri, 439 U.S. 357, 363–64 (1979) ("In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show . . . that the group alleged to be excluded is a 'distinctive' group in the community . . . .").

trast, have often limited jury service to tribal members or, at least, members of some Indian tribe.[74] Finally, even as to the constitutional rights that ICRA does incorporate, courts have held that the statute does not necessarily impose precisely the same requirements as the U.S. Constitution; the statute, rather, permits variations to account for tribal traditions and circumstances.[75] For example, some tribal courts have applied culturally specific notions of the reasonableness of searches and the adequacy of confrontation rights.[76]

ICRA generally limits tribes to penalties not exceeding one year's imprisonment or a $5,000 fine.[77] In addition, as a result of case law described below, tribes generally may not exercise criminal jurisdiction over non-Indians—i.e., individuals who are not members of any Indian tribe.[78] Two recent statutes relax these limitations but only if tribes abide by additional due process requirements.

First, in the Tribal Law and Order Act of 2010 (TLOA), Congress amended ICRA to permit tribes to impose penalties of up to three years for a single offense and nine years total as a cumulative penalty for multiple offenses.[79] To exercise this jurisdiction, however, tribes must provide additional due process protections, including the right to appointed counsel.[80] The TLOA, however, does not require grand jury indictment,

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74. See, e.g., Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194 & n.4 (1978); see also 25 U.S.C. § 1302(a) (lacking prohibition against all-Indian juries). For discussion of a new statute amending ICRA to require an impartial jury in certain prosecutions of non-Indians, see infra notes 81-84 and accompanying text.

75. See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) (describing lower court decision as "recognizing that standards of analysis developed under the Fourteenth Amendment's Equal Protection Clause were not necessarily controlling in the interpretation of [ICRA]"); Randall v. Yakima Nation Tribal Court, 841 F.2d 897, 900 (9th Cir. 1988) (balancing individual and tribal interests "[w]here tribal court procedures under scrutiny differ significantly from those 'commonly employed in Anglo-Saxon society'" (quoting Howlett v. Salish Tribe, 529 F.2d 233, 238 (9th Cir. 1976))); Colville Confederated Tribes v. Marchand, 33 I.L.R. 6036, 6037 (Confederated Tribes of Colville Reservation Tribal Ct. 2006) (declining to following Supreme Court's Sixth Amendment Confrontation Clause case law except to extent consistent with "our history"). See generally Mark D. Rosen, Evaluating Tribal Courts' Interpretations of the Indian Civil Rights Act, *in* The Indian Civil Rights Act at Forty 275, 275–324 (Kristen A. Carpenter et al. eds., 2012) [hereinafter Rosen, Evaluating] (including survey of tribal court applications of ICRA); Robert J. McCarthy, Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years, 34 Idaho L. Rev. 465 (1998) (same).

76. See infra notes 328–331 and accompanying text (discussing tribal court decisions reaching such conclusions).

77. 25 U.S.C. § 1302(a)(7)(B). As originally passed in 1968, ICRA limited tribes to imposing six-month sentences and fines of $500. Pub. L. No. 90-284, tit. II, § 202, 82 Stat. 73. 77 (1968). A 1986 amendment adopted these higher limits. Pub. L. No. 99-570, tit. IV, § 4217, 100 Stat. 3207, 3207-146 (1986).

78. See infra Part I.A.2.

79. Pub. L. No. 111-211, tit. II, § 234(a), 124 Stat. 2258, 2279–80 (2010) (codified at 25 U.S.C. § 1302(a), (b)).

80. 25 U.S.C. § 1302(c).

trial before a jury including nonmembers of the tribe, or, more generally, interpretation of ICRA's due process guarantees in a manner identical to corresponding constitutional requirements.

The second recent statute is the Violence Against Women Reauthorization Act of 2013 (VAWA),[81] which "recognized and affirmed" tribes' "inherent power" to exercise criminal jurisdiction over all persons, including non-Indians, who commit certain domestic violence offenses against an Indian victim and bear certain connections to the tribe.[82] To exercise this jurisdiction, tribes must provide not only the TLOA's expanded set of procedural protections, but also "the right to a trial by an impartial jury that is drawn from sources that—(A) reflect a fair cross section of the community; and (B) do not systematically exclude any distinctive group in the community, including non-Indians."[83] In addition, tribes exercising this "special domestic violence criminal jurisdiction" under VAWA must provide "all other rights whose protection is necessary under the Constitution of the United States" in order for the grant of jurisdiction to be constitutional.[84]

The exclusive remedy for tribal violations of ICRA, including its procedural requirements, is federal habeas corpus review "to test the legality of [an individual's] detention by order of an Indian tribe"; there is no direct review of tribal convictions in federal or state court.[85]

2. *The Constitution Comes to Indian Country.* — In recent decades, the Supreme Court has injected new uncertainty into this doctrinal structure by exhibiting discomfort with tribes' ability to exercise extraconstitutional governmental powers. The Court has expressed particular concerns about tribal authority over individuals who are not tribal members and thus are not represented in tribal institutions, including, in many cases, tribal juries.[86] Following the path of least resistance in the framework of prior case law, however, the Court has manifested its discontent

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81. Pub. L. No. 113-4 (to be codified in scattered titles of U.S.C.), available at http://www.gpo.gov/fdsys/pkg/BILLS-113s47enr/pdf/BILLS-113s47enr.pdf (on file with the *Columbia Law Review*).

82. Id. § 904 (to be codified at 25 U.S.C. § 1304(b)(1)). The tribal jurisdiction provision of this legislation was based on a proposal from the Obama Administration. See M. Brent Leonhard, Closing a Gap in Indian Country Justice: *Oliphant*, *Lara*, and DOJ's Proposed Fix, 28 Harv. J. on Racial & Ethnic Just. 117, 119 (2012) (arguing proposed legislation is legally permissible under *Oliphant* and *Lara*); Press Release, Office of the Assoc. Att'y Gen., Department of Justice Proposes Legislation To Help Tribes Combat Violence Against Native Women in Indian Country (July 21, 2011), available at www.justice.gov/opa/pr/2011/July/11-asg-955.html (on file with the *Columbia Law Review*) (explaining need for legislation).

83. VAWA § 904 (to be codified at 25 U.S.C. § 1304(d)(3)).

84. Id. (to be codified at 25 U.S.C. § 1304(d)(4)).

85. See 25 U.S.C. § 1303 (providing habeas corpus); see also Santa Clara Pueblo v. Martinez, 436 U.S. 49, 69–70 (1978) (deeming habeas remedy exclusive).

86. For a collection of articles noting this trend, see supra note 6.

not by altering the characterization of tribal authority as extraconstitutional but rather by curtailing tribes' authority to exercise jurisdiction over nonmembers in the first place.

A trilogy of cases, stretching from 1978 to 2004, has addressed tribal criminal jurisdiction over nonmembers.[87] The first case in this line, *Oliphant v. Suquamish Indian Tribe*, held that tribes lacked criminal jurisdiction over non-Indians.[88] Though conceding that governing statutes did not squarely resolve the issue,[89] the Court concluded that the "commonly shared presumption of Congress, the Executive Branch, and lower federal courts," to which the Court gave "considerable weight," was "that tribal courts do not have the power to try non-Indians."[90] The Court, however, ultimately rested its holding on an intuition of "inherent limitations on tribal powers that stem from their incorporation into the United States," even without congressional legislation expressly imposing such limits.[91] "[F]rom the formation of the Union and the adoption of the Bill of Rights," the Court asserted, "the United States has manifested . . . great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty."[92] The Court thus found that an exercise of tribal court criminal jurisdiction over non-Indians "would belie the tribes' forfeiture of full sovereignty in return for the protection of the United States," though it also left open the possibility that Congress might itself "decid[e] whether Indian tribes should finally be authorized to try non-Indians."[93]

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87. A separate body of case law, almost uniformly hostile to tribal jurisdiction over nonmembers, has addressed tribal civil regulatory authority in the absence of an express congressional grant of jurisdiction. See, e.g., Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 337 (2008) (rejecting tribal authority to regulate sale of fee land on reservation); Montana v. United States, 450 U.S. 544, 564 (1981) ("[E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."). For a recent critical discussion of the civil and criminal cases in parallel, see Frank Pommersheim, At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty, 55 S.D. L. Rev. 48 (2010) (characterizing cases as reflecting emergence of "new paradigm" of tribal sovereignty).

88. 435 U.S. 191, 212 (1978).

89. ICRA, for example, simply regulated tribal jurisdiction over any "persons." 25 U.S.C. § 1302.

90. *Oliphant*, 435 U.S. at 206. For critical appraisal of *Oliphant*'s historical analysis, see, e.g., Richard B. Collins, Implied Limitations on the Jurisdiction of Indian Tribes, 54 Wash. L. Rev. 479, 492–99 (1979) (describing legal and judicial precedents relied upon by *Oliphant* Court as "thin" and often inapposite); Samuel E. Ennis, Note, Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of *Oliphant*, 57 UCLA L. Rev. 553, 593–97 (2009) (contending "*Oliphant* Court relied entirely on materials that were either outdated or lacked authority to begin with" in order to conclude tribes had been divested of criminal jurisdiction).

91. *Oliphant*, 435 U.S. at 209.

92. Id. at 210.

93. Id. at 211–12.

In *Duro v. Reina*, the Court carried *Oliphant* a step further and held that tribes' submission to "the overriding sovereignty of the United States" divested them of criminal jurisdiction not only over non-Indians but also over nonmembers—that is, Indians who are not members of the particular prosecuting tribe.[94] As in *Oliphant*, the Court in *Duro* emphasized the limited character of tribal sovereignty.[95] But it also placed even greater emphasis than in *Oliphant* on due process implications of tribal jurisdiction.

The Court, for example, "hesitate[d] to adopt a view of tribal sovereignty that would single out another group of citizens, nonmember Indians, for trial by political bodies that do not include them."[96] Citing *Reid v. Covert*—a fractured decision, discussed further below,[97] that rejected the use of military courts to try capital offenses by civilian dependents of overseas service personnel[98]—the Court asserted that "[o]ur cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right."[99] In the Court's view, the jurisdiction of tribal courts even over members of the tribe was explicable only on a theory of consent. In other words, such jurisdiction was permissible only because of the "voluntary character of tribal membership and the concomitant right of participation in a tribal government."[100]

Congress swiftly overturned *Duro*. In legislation known as the "*Duro* fix,"[101] Congress "recognized and affirmed" "the inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians."[102] In the final case in the *Oliphant* trilogy, *United States v. Lara*, the Supreme Court upheld the *Duro* fix.[103] Congress's plenary power over Indian affairs, the Court reasoned, includes "the constitutional power to relax restrictions that the political branches have, over time, placed on the exercise of a tribe's inherent legal authority."[104]

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94. 495 U.S. 676, 693 (1990).

95. See id. at 685–86 (observing "tribes can no longer be considered as sovereigns" with "power to enforce laws against all who come within the sovereign's territory" and concluding "retained sovereignty of the tribes is that needed to control their own internal relations, and to preserve their own unique customs and social order").

96. Id. at 693.

97. See infra notes 164–171 and accompanying text.

98. Reid v. Covert, 354 U.S. 1, 40–41 (1957) (plurality opinion).

99. *Duro*, 495 U.S. at 693.

100. Id. at 694.

101. See, e.g., United States v. Lara, 541 U.S. 193, 216 (2004) (using term "*Duro* fix").

102. Act of Nov. 5, 1990, Pub. L. No. 101-511, tit. VIII, § 8077(b), 104 Stat. 1856, 1892 (codified at 25 U.S.C. § 1301(2)).

103. *Lara*, 541 U.S. at 210.

104. Id. at 196, 200–07.

At the same time, the Court in *Lara* avoided difficult questions about the constitutional implications of the *Duro* fix. The immediate issue in *Lara* was a double jeopardy question.[105] The defendant, who had been prosecuted in tribal court, was being reprosecuted for an identical crime in federal court.[106] The Court in *Lara* concluded that Congress's action was effective in reactivating an inherent authority of the tribe to prosecute nonmember Indians;[107] accordingly, a majority held that the tribe was a "separate sovereign" for double jeopardy purposes, notwithstanding the dependence of tribal jurisdiction on Congress's statutory repudiation of *Duro*.[108] The Court reserved, however, the question of whether "the Due Process Clause forbids Congress to permit a tribe to prosecute a nonmember Indian citizen of the United States in a forum" that "lacks certain constitutional protections for criminal defendants, in particular the right of an indigent defendant to counsel."[109]

Separate opinions by individual justices in *Lara* raised broader constitutional issues. First, Justice Kennedy, the author of the majority opinion in *Duro*, remained steadfast in his view that tribal membership provides the exclusive basis for tribes' extraconstitutional authority to impose criminal punishment. Though accepting the Court's conclusion on the double jeopardy question, he suggested that Congress's authorization of tribal criminal jurisdiction over nonmembers was plainly unconstitutional because it subjected a citizen, "within our domestic borders, to a sovereignty outside the basic structure of the Constitution."[110]

Second, in an opinion calling for a general rethinking of federal Indian law, Justice Thomas accepted for purposes of the case the political branches' "authoritative pronouncement[]" that tribal prosecution of nonmember Indians was consistent with tribes' retained sovereignty.[111] But he emphasized that if tribal criminal jurisdiction instead resulted from a delegation of federal power, then its exercise would constitute federal executive power, which Congress (he asserted) "cannot transfer . . . to individuals who are beyond 'meaningful Presidential control.'"[112] Finally, a dissent by Justice Souter (joined by Justice Scalia) characterized the delegation of federal legislative authority as the only possible basis for an expansion of tribal criminal jurisdiction. The dissent thus concluded, without addressing due process or separation of powers, that double jeopardy barred the defendant's federal prosecution.[113]

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105. Id. at 197.

106. Id.

107. Id. at 199–200.

108. Id. at 207, 210.

109. Id. at 207–09.

110. Id. at 212 (Kennedy, J., concurring).

111. Id. at 222–23 (Thomas, J., concurring in the judgment).

112. Id. at 216 (quoting Printz v. United States, 521 U.S. 898, 922–23 (1997)).

113. Id. at 230–31 (Souter, J., dissenting).

Oliphant, *Duro*, and *Lara* have opened up profound uncertainties regarding the extent and permissibility of tribes' previously settled authority to prosecute offenses against tribal law without following procedural requirements of the Constitution that would apply in federal or state court. Although scholars and tribal advocates have severely criticized these decisions for curtailing tribal authority and calling into question the extraconstitutional character of tribal sovereignty,[114] this trilogy of cases provides the framework within which other courts and governmental actors will need to resolve questions such as those concerning the need for federal executive control of tribal criminal enforcement and the applicability of Bill of Rights guarantees in tribal prosecutions.

Those questions may well arise with greater urgency soon. For the first time since *Oliphant*, VAWA, as noted, authorizes tribal criminal jurisdiction over certain non-Indians.[115] As tribes—some of which currently face grave problems of law and order[116]—seek to exercise the jurisdiction conferred by this partial "*Oliphant* fix," as well as the expanded sentencing authority under the 2010 TLOA,[117] litigation presenting such questions will likely arise more frequently, and with higher stakes.

B. *Territories*

Territories, in stark contrast to Indian tribes, have no inherent authority under the Constitution. Nonetheless, the case law places territories in a remarkably similar position to tribes.[118] Territories, like Indian tribes, are subject to "plenary" congressional authority, even though under governing statutes territorial governments exercise substantial autonomous power. In particular, territorial governments may prosecute offenders without providing the same procedural guarantees applicable in federal prosecutions. Here, too, however, the Supreme Court has called into question this constitutional exceptionalism. The Court has suggested in recent decisions that the doctrine of the *Insular Cases* that

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114. See, e.g., Frickey, Exceptionalism, supra note 6, at 457–70 (highlighting disregard for congressional plenary power and judicial deference in these cases); Getches, supra note 33, at 1575 (criticizing Court for "arrogat[ing] to itself the role of reviewing and weighing non-Indian interests and, ultimately, of redesigning the sovereignty of Indian tribes"); Ennis, supra note 90, at 556 (arguing legislative abrogation of *Oliphant* is needed "to improve reservation safety and restore territorial sovereignty to Indian tribes").

115. See supra notes 81–84 and accompanying text.

116. See supra note 39 (noting recent reports of high crime rates in tribal regions and territories).

117. See 25 U.S.C. § 1302(b) (Supp. V 2012); see also supra notes 79–80 and accompanying text (describing TLOA's expansion of penal authority).

118. Kal Raustiala uses the apt term "intraterritoriality" to describe these twin examples of unusually unrestrained congressional authority over areas considered quasi-foreign but under U.S. sovereign control. Raustiala, supra note 1, at 16.

permits such extraconstitutional governance may no longer be applicable to the United States' most significant territories.[119]

1. *"Foreign in a Domestic Sense."* — As a formal constitutional matter, all governmental power in the territories is federal in character and derives, directly or indirectly, from a delegation from Congress.[120] Although the source, nature, and extent of Congress's authority over territorial communities may have been unclear in the early years of the Republic,[121] the Supreme Court has settled on the view that the Territory Clause of the Constitution, which gives Congress the "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States,"[122] gives Congress "plenary authority" over governance of areas subject to U.S. sovereignty but not included in the bounds of any state or the District of Columbia.[123] Congress thus retains formal authority to "revise, alter, or revoke" any governmental arrangement established for the territories,[124] even if it appears unlikely today that Congress will revise such governing arrangements in a manner fundamentally contrary to territorial wishes.[125]

Congress initially used this power principally to organize and govern areas such as the Louisiana Purchase lands that fell outside the boundaries of the original thirteen states.[126] Congress expected that such territo-

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119. See Boumediene v. Bush, 553 U.S. 723, 758 (2008) (noting ties of unincorporated territory to United States may "strengthen in ways that are of constitutional significance"); cf. Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 599–600 (1976) (observing "[t]he Court's decisions respecting the rights of the inhabitants of Puerto Rico have been neither unambiguous nor exactly uniform" but deeming equal protection requirements applicable to governmental action in Puerto Rico).

120. See, e.g., *Boumediene*, 553 U.S. at 755 (noting Congress's constitutional power over territories); United States v. Wheeler, 435 U.S. 313, 321 (1978) ("[A] territorial government is entirely the creation of Congress . . . .").

121. See generally Burnett, Convenient Constitution, supra note 6, at 985 (describing uncertainty in nineteenth century over application of Constitution to territories); Cleveland, supra note 4, at 163–65 (describing early controversies over Congress's authority with respect to new territories).

122. U.S. Const. art. IV, § 3, cl. 2.

123. See, e.g., District of Columbia v. Carter, 409 U.S. 418, 430 (1973) (acknowledging Congress's plenary power over territories). Despite the clear textual grant of congressional power over the territories, early cases often described this power, like Congress's plenary authority over Indian tribes, as "inherent" in federal sovereignty rather than based in any specific enumerated power of Congress. Cleveland, supra note 4, at 25–27. A parallel provision of the Constitution establishes comparable congressional authority over the District of Columbia. U.S. Const. art. I, § 8, cl. 17 (giving Congress authority "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States").

124. United States v. Sharpnack, 355 U.S. 286, 296 (1958).

125. See Report by the President's Task Force on Puerto Rico's Status, supra note 39, at 19 ("It has been the position of several previous administrations that the question of Puerto Rico's status should be answered by the people of Puerto Rico.").

126. For discussion of this early history, see generally Arnold H. Leibowitz, Defining

ries would become additional states in the Union, as indeed they did.[127] But in the Spanish-American War, the United States acquired sovereignty over so-called "insular"—i.e., overseas—territories such as the Philippines and Puerto Rico that federal officials at the time did not expect to admit to the Union as states.[128] Today, five major nonstate "insular" areas remain under U.S. sovereignty: Puerto Rico, Guam, the U.S. Virgin Islands (USVI), American Samoa, and the Commonwealth of the Northern Mariana Islands (CNMI).[129]

The trajectory of federal policy with respect to such territories roughly parallels the history of federal Indian policy. Although historically, federal governance of such territories was often heavy handed,[130] in recent decades Congress has adopted a policy of allowing local self-governance. Beginning in the 1950s, Congress revised the "organic" statutes establishing local territorial governments to provide for locally elected governors as well as legislatures.[131] It has approved a locally drafted constitution for Puerto Rico,[132] and it has authorized the drafting of such constitutions for Guam[133] and the USVI (though neither has yet adopted one).[134] As a result, territorial authorities today in all five major

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Status: A Comprehensive Analysis of United States Territorial Relations 6–13 (1989); Bartholomew H. Sparrow, The *Insular Cases* and the Emergence of American Empire 14–30 (2006).

127. Sparrow, supra note 126, at 15. The Constitution permits Congress to admit new states to the Union, provided that "no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress." U.S. Const. art. IV, § 3, cl. 1.

128. Professor Christina Duffy Burnett has argued that it was initially controversial whether the Constitution permitted the United States to later "deannex" nonstate areas over which it had asserted sovereignty. Burnett, *Untied* States, supra note 36, at 798–800; see also Sparrow, supra note 126, at 4–5 (discussing constitutional controversies surrounding U.S. sovereignty over such territories).

129. See generally Laughlin, Territories and Affiliated Jurisdictions, supra note 16, at 25–43 (discussing history of U.S. relations with these territories); Leibowitz, supra note 126, at 140–46, 241–75, 318–23, 335–39 (same).

130. For an account of early federal policy with respect to some unincorporated territories, see Leibowitz, supra note 126, at 140–44, 255–57, 318–23; see also, e.g., Sparrow, supra note 126, at 169–211 (discussing political prosecutions conducted without jury trial in Hawaii, Philippines, and Puerto Rico).

131. See generally Lawson & Seidman, supra note 10, at 132 (describing transition from elected to appointed governors in territories).

132. 48 U.S.C. §§ 731b–731d (2006).

133. Id. §§ 1421–1424-4.

134. Id. §§ 1571–1613a. A constitutional convention in the U.S. Virgin Islands recently proposed a constitution that Congress returned to the territory for further consideration of certain controversial provisions. See Act of June 30, 2010, Pub. L. No. 111-194, 124 Stat. 1309; Dep't of Justice Views on the Proposed Constitution Drafted by the Fifth Constitutional Convention of the U.S.V.I., 34 Op. O.L.C. 1 (2010), available at www.justice.gov/olc/2010/usvi-doj-view-ltr100223.pdf (on file with the *Columbia Law*

U.S. territories enforce locally enacted criminal prohibitions in parallel to federal criminal enforcement, much like a state (or tribal) government.

Nevertheless, constitutional principles governing criminal law enforcement by territorial governments differ in several significant respects from the principles applicable to state governments. For one thing, because territorial governments (unlike states or, for that matter, Indian tribes) have no independent inherent sovereignty but rather derive all their governmental power from Congress, the Supreme Court has historically held that double jeopardy bars separate prosecution for the same crime by federal and territorial authorities.[135] Federal and territorial laws, the Court has reasoned, are "creations emanating from the same sovereignty," so a crime against the territorial government is not a separate offense from the federal crime for double jeopardy purposes.[136] But the federal circuits have split over the applicability of these holdings to Puerto Rico, which has not only a democratically elected local government but also a locally approved constitution. The First Circuit has held that Puerto Rico's substantial practical autonomy from federal control makes it a "separate sovereign" for double jeopardy purposes,[137] while the Eleventh Circuit has rejected this view.[138]

In addition, the Supreme Court held in the *Insular Cases*—landmark constitutional decisions from the turn of the last century—that the criminal procedure requirements of the Bill of Rights apply only partially in territories that Congress has not permanently "incorporated" into the United States.[139] Justice White first articulated this view in a concurring

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Review) (commenting on proposed constitution).

135. See Grafton v. United States, 206 U.S. 333, 354–55 (1907) ("[T]he government of the Philippines owes its existence wholly to the United States. . . . So that the cases holding that the same acts committed in a State . . . may constitute an offense against the United States and also a distinct offense against the State, do not apply here . . . ."); see also Puerto Rico v. Shell Co., 302 U.S. 253, 264 (1937) ("Both the territorial and federal laws and the courts . . . are creations emanating from the same sovereignty.").

136. *Shell Co.*, 302 U.S. at 264.

137. See United States v. Lopez Andino, 831 F.2d 1164, 1168 (1st Cir. 1987) (holding "Puerto Rico is to be treated as a state for purposes of the double jeopardy clause" because "its criminal laws, like those of a state, emanate from a different source than the federal laws"); see also, e.g., United States v. Bonilla Romero, 836 F.2d 39, 42 & n.2 (1st Cir. 1987) (following *Lopez Andino*).

138. United States v. Sanchez, 992 F.2d 1143, 1151–52 (11th Cir.) ("We disagree with the conclusion of the First Circuit that Congress' decision to permit self-governance in Puerto Rico makes Puerto Rico a separate sovereign for double jeopardy purposes. . . . Puerto Rico is still constitutionally a territory, and not a separate sovereign."), modified on other grounds, 3 F.3d 366 (11th Cir. 1993).

139. There is disagreement about the precise set of decisions qualifying as *Insular Cases*. See, e.g., Sparrow, supra note 126, at 257 (noting "[a]lmost every writer on the *Insular Cases* has his or her own particular list of cases, from as few as three to as many as twenty-three" and selecting an "expansive list" of thirty-five cases to include in the category); Christina Duffy Burnett, A Note on the *Insular Cases*, *in* Foreign in a Domestic

opinion in the 1901 case *Downes v. Bidwell*. There, the Court upheld import duties on goods shipped from Puerto Rico to the mainland on the grounds that Puerto Rico was not part of the "United States" for purposes of the Tax Uniformity Clause,[140] which requires that "all Duties, Imposts and Excises shall be uniform throughout the United States."[141] Characterizing the United States' new insular possessions as "foreign to the United States in a domestic sense," though not subject to foreign sovereignty, he concluded that constitutional provisions such as the Tax Uniformity Clause would not automatically restrict the federal government's actions in governing these areas.[142]

In later decisions, the full Court adopted Justice White's framework and applied it to deem the Fifth and Sixth Amendment requirements of grand jury indictment and criminal jury trial inapplicable in the Philippines (then a U.S. territory), Hawaii (then considered an unincorporated territory), and Puerto Rico.[143] At the same time, the Court made clear that "[t]he guaranties of certain fundamental personal rights declared in the Constitution, as for instance that no person could be deprived of life, liberty, or property without due process of law, had from the beginning full application in the Philippines and Porto [sic] Rico."[144]

Much as Congress exercised its plenary authority over Indian affairs to impose criminal procedure requirements of the Bill of Rights on tribal governments, Congress eventually imposed most Bill of Rights requirements on territorial governments. Today, by and large, constitutional

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Sense, supra note 36, at 389, 389–92 (discussing which cases to include in category). In *Boumediene*, the Supreme Court cited six decisions as "*Insular Cases*." See Boumediene v. Bush, 553 U.S. 723, 756–57 (2008) (citing Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903); Downes v. Bidwell, 182 U.S. 244 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Dooley v. United States, 182 U.S. 222 (1901); De Lima v. Bidwell, 182 U.S. 1 (1901)). As discussed in *Boumediene*, several of these cases established 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." 553 U.S. at 757 (citing *Dorr*, 195 U.S. at 143; *Downes*, 182 U.S. at 293 (White, J., concurring)).

140. 182 U.S. at 287 (majority opinion) ("We are therefore of opinion that the Island of Porto [sic] Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution . . . .").

141. U.S. Const. art. I, § 8, cl. 1.

142. *Downes*, 182 U.S. at 341–42 (White, J., concurring).

143. See, e.g., Balzac v. Porto Rico, 258 U.S. 298, 312–13 (1922) (discussing inapplicability of grand jury indictment requirements in Puerto Rico); *Dorr*, 195 U.S. at 148–49 (concluding "power to govern territory . . . given to Congress in the Constitution . . . does not require that body to enact for ceded territory not made a part of the United States . . . a system of laws which shall include the right of trial by jury"); *Mankichi*, 190 U.S. at 217–18 (holding inapplicable rights to grand jury indictment and criminal jury trial in Hawaii since these rights are "not fundamental in their nature, but concern merely a method of procedure").

144. *Balzac*, 258 U.S. at 312–13.

requirements applicable to the federal government apply in federal courts in the territories, while local territorial governments are subject by statute to criminal procedure requirements that apply to states under the Fourteenth Amendment.[145] Those constitutional requirements for state prosecutions include nearly all the requirements of the federal Bill of Rights, though not the requirements of grand jury indictment under the Fifth Amendment and conviction by unanimous jury verdict at trial under the Sixth Amendment.[146]

There are, however, three major exceptions to the pattern of statutory protection of constitutional rights in the territories. First, in American Samoa, there is no statutory right to jury trial. Congress has never enacted an organic statute establishing a local government for American Samoa.[147] Instead, Congress has simply provided that

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145. The bills of rights for Guam and the USVI are codified at 48 U.S.C. §§ 1421b, 1561 (2006), respectively. The Ninth Circuit construed arguably ambiguous language in the Guam statute not to apply the Fifth Amendment requirement of grand jury indictment to territorial prosecutions. See Territory of Guam v. Inglett, 417 F.2d 123, 124–25 (9th Cir. 1969) ("[W]e are inclined to agree . . . that Congress did not intend by enacting section 10(u) of the Guam elective Governor Act to repeal 48 U.S.C. § 1424(b) and thus deprive the Guam legislature of the power to determine whether offenses should be prosecuted by indictment or information."). Territorial statutes in Guam, however, require unanimous trial jury verdicts and grand jury indictment for felony offenses under territorial law. 8 Guam Code Ann. §§ 1.15, 105.30 (1997). Puerto Rico's constitution does not require grand jury indictment and permits jury verdicts by a 9–3 vote. P.R. Const. art. II, § 11. Requirements in American Samoa and CNMI are discussed further below. See infra notes 147–159, 288–304 and accompanying text.

Outside of Puerto Rico, federal courts in the insular territories do not satisfy the requirements of federal courts under Article III of the Constitution because their judges do not hold life tenure during good behavior, but they generally do apply usual federal procedural law. Compare 28 U.S.C. §§ 119, 132–135, 461 (2006) (applying general salary and tenure provisions for federal district judges to U.S. District Court for District of Puerto Rico), with 48 U.S.C. §§ 1424, 1424b (establishing that federal judges for District of Guam hold office for ten-year terms and are removable for cause), id. §§ 1611, 1614 (same for District Court of USVI), and id. § 1821 (same for District Court for NMI). See also Fed. R. Crim. P. 1(a)(1), (3) (applying federal criminal procedure rules to all district courts and to federal courts in territories, with limited exceptions). Whether particular general federal statutes apply in the territories turns on congressional intent. See generally Elizabeth Vicens, Note, Application of the Federal Death Penalty Act to Puerto Rico: A New Test for the Locally Inapplicable Standard, 80 N.Y.U. L. Rev. 350 (2005) (discussing statutory standard extending all federal laws to Puerto Rico that are not "locally inapplicable").

146. For discussion of the case law on these issues regarding states, see infra notes 201–206 and accompanying text.

147. American Samoa is also unique in that it falls within the territorial jurisdiction of no federal district court. See 28 U.S.C. §§ 81–131 (listing judicial districts but not including American Samoa). The federal government has prosecuted American Samoans for federal offenses by bringing them to Hawaii and obtaining jurisdiction under 18 U.S.C. § 3238 (2006), which permits prosecution for offenses committed "out of the jurisdiction of any particular State or district" in the district to which the offender "is first brought." See, e.g., United States v. Lee, 472 F.3d 638, 644–45 (9th Cir. 2006) ("Because American Samoa is not within any judicial district, venue was proper in the District of Hawaii in accordance

American Samoa's local constitution, developed under the auspices of the Secretary of the Interior, cannot be amended without congressional approval.[148] That constitution, by its terms, does not provide for any form of jury trial in criminal prosecutions.[149] As described in greater detail below,[150] however, the U.S. District Court for the District of Columbia, applying the D.C. Circuit's understanding of the *Insular Cases*, concluded that the Constitution requires a jury trial in criminal cases in local American Samoan courts.[151]

Second, there is also no right to jury trial in all criminal prosecutions in CNMI. The basic governmental arrangement for CNMI is established by a "covenant" under which the United States assumed sovereignty over the territory.[152] Although this covenant extends nearly all requirements of the Bill of Rights to the territory, the covenant specifies that "neither trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law, except where required by local law."[153] The CNMI legislature has not required grand jury indictment for local offenses,[154] and (with certain limited exceptions) has provided for jury trial only for felonies punishable by more than five years' incarceration or a $2,000 fine.[155] By contrast, the Fifth Amendment re-

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with § 3238.").

148. 48 U.S.C. § 1662a.

149. See Rev. Const. of Am. Sam., art. I, § 6, available at http://www.house.gov/faleomavaega/samoan-constitution.shtml (on file with the *Columbia Law Review*) (last visited Apr. 11, 2013) (describing rights of accused without any reference to right to jury trial).

150. See infra notes 288–291 and accompanying text (discussing King v. Morton, 520 F.2d 1140 (D.C. Cir. 1975), and King v. Andrus, 452 F. Supp. 11, 17 (D.D.C. 1977)).

151. See *Morton,* 520 F.2d at 1147–48 (remanding for determination whether right to jury trial applies in American Samoa based on "a solid understanding of the present legal and cultural development of American Samoa"); see also *Andrus*, 452 F. Supp. at 17 (finding denial of jury trial in criminal cases in American Samoa unconstitutional). See generally Laughlin, Cultural Preservation, supra note 18, at 352 (advocating constitutional analysis based on *Morton*).

152. After World War II, the Mariana Islands became part of a "trust territory" administered by the United States under a grant of authority from the United Nations. While the other components of this trust territory elected to become independent nations linked to the United States through treaties of "free association," CNMI's electorate voted in a referendum to accept United States sovereignty. See generally Laughlin, Territories and Affiliated Jurisdictions, supra note 16, at 95–101; Chimene I. Keitner & W. Michael Reisman, Free Association: The United States Experience, 39 Tex. Int'l L.J. 1, 33–45 (2003); Laughlin, Cultural Preservation, supra note 18, at 429–32.

153. 48 U.S.C. § 1801 note (Article V: Applicability of Laws).

154. See CNMI R. Crim. P. 7(a) ("All offenses except misdemeanors shall be prosecuted by information.").

155. 7 N. Mar. I. Code § 3101(a) (2011); CNMI R. Crim. P. 23(b); see also 6 N. Mar. I. Code § 2150(a)(8) (2011) (providing right to jury trial "in all cases in which the value of property subject to forfeiture under this sub-section exceeds $2,000"). See generally Commonwealth v. Demapan, No. 04-0006-GA, 2008 WL 3982060, at *3 (N. Mar. I. Aug. 15,

quires grand jury indictment for federal felonies,[156] and the Sixth and Fourteenth Amendments require a jury trial for any "non-petty" offense, a category that includes any crime punishable by more than six months' imprisonment.[157] In a decision addressed further below,[158] the Ninth Circuit, again applying the *Insular Cases*, upheld this partial application of Fifth and Sixth Amendment rights in CNMI.[159]

Finally, in the USVI, grand jury indictment is optional even for federal offenses charged in the federal trial court for the territory.[160] For territorial offenses, such indictment is generally required only to the extent that local legislation provides for it (and no such local legislation has been enacted).[161] The Third Circuit tersely rejected a challenge to these provisions, holding that the Fifth Amendment requirement of grand jury indictment is "not applicable" in this "unincorporated" territory, where "prosecutions have always been instituted by information rather than by indictment."[162]

2008) (demonstrating use of jury for assault with deadly weapon conviction but not for lesser convictions); Commonwealth v. Blas, No. 04-028-GA, 2004 WL 3704018, at *1 n.4 (N. Mar. I. Dec. 10, 2004) ("[O]nly the CNMI Legislature has the authority to make the right to a jury trial the same as in the continental United States." (citing 48 U.S.C. § 1801 note; Commonwealth v. Peters, 1 N. Mar. I. 466, 473 (1991))).

156. U.S. Const. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . ."). Crimes are generally considered "infamous" under the Fifth Amendment if they are felonies or are otherwise punishable by imprisonment in a penitentiary. As a practical matter, under governing federal statutes, that includes all offenses punishable by incarceration for more than a year. See 18 U.S.C. § 4083 (2006); Green v. United States, 356 U.S. 165, 183 (1958) (indicating "an 'infamous crime' within the meaning of the [Fifth Amendment Grand Jury Clause] is one punishable by imprisonment in a penitentiary," and "imprisonment in a penitentiary can be imposed only if a crime is subject to imprisonment exceeding one year" (citations omitted)), overruled on other grounds by Bloom v. Illinois, 391 U.S. 194 (1968); United States v. Darby, 37 F.3d 1059, 1063 n.1 (4th Cir. 1994) (defining "infamous crime" as one "punishable by imprisonment exceeding one year").

157. U.S. Const. amend. VI; id. amend. XIV; Baldwin v. New York, 399 U.S. 66, 69 (1970) (concluding "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized").

158. See infra notes 292–297 and accompanying text.

159. See Northern Mariana Islands v. Atalig, 723 F.2d 682, 690 (9th Cir. 1984) (upholding limited jury trial rights in CNMI).

160. 48 U.S.C. §§ 1561, 1612 (2006).

161. See V.I. Code Ann. tit. 5, § 3581 (1997) ("Every felony and every criminal action in the district court shall be prosecuted by information."); United States v. Plaskett, Crim. No. 2007-60, 2008 WL 444552, at *2 (D.V.I. Feb. 4, 2008) (finding "neither federal nor territorial crimes must be charged by indictment in the Virgin Islands" because "[n]o such local law . . . has been enacted" (citations omitted)).

162. Gov't of V.I. v. Dowling, 633 F.2d 660, 667 (3d Cir. 1980); see also United States v. Ntreh, 279 F.3d 255, 256–58 (3d Cir. 2002) (observing Virgin Islands residents have no constitutional or statutory right to indictment); United States v. Christian, 660 F.2d 892, 898–99 (3d Cir. 1981) (reviewing rationale for territorial governance and finding "no

2. *New Uncertainty in the Framework.* — Much as with federal Indian law, the Supreme Court has, of late, cast into doubt the constitutional understandings underlying the governance of the insular territories. Displaying the same discomfort with extraconstitutional authority evident in the *Oliphant* trilogy, the Supreme Court has questioned the applicability of the *Insular Cases* in their original context, the unincorporated territories, even as it has invoked them as key precedents for applying the Constitution in other areas outside the United States proper, such as Guantanamo Bay. Meanwhile, some recent federalism and separation of powers decisions raise implicit questions about the longstanding practice of territorial criminal enforcement without "meaningful Presidential control."[163]

The Court's shift towards its current approach began in the 1957 case of *Reid v. Covert*.[164] There, a highly fractured Court addressed whether civilian spouses of service personnel on overseas military bases could be tried in military courts without the protection of the full Bill of Rights.[165] A plurality of four justices categorically rejected this practice.[166] These justices distinguished the *Insular Cases* as "involv[ing] the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions"; stressing that "neither the [*Insular Cases*] nor their reasoning should be given any further expansion," they deemed the Constitution applicable "in its entirety . . . to [these] trials."[167] In contrast, concurring opinions by Justices Frankfurter and Harlan drew express support from the *Insular Cases*.[168]

Justice Harlan, in particular, echoed Justice White's reasoning in *Downes*[169] by proposing that

> there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impractical and anomalous.[170]

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constitutional basis for investigatory grand juries in the territory").

163. Printz v. United States, 521 U.S. 898, 922–23 (1997).

164. 354 U.S. 1 (1957) (plurality opinion).

165. Id. at 3.

166. Id. at 40–41.

167. Id. at 13–14, 18.

168. Id. at 51 (Frankfurter, J., concurring); id. at 74–75 (Harlan, J., concurring).

169. Id. at 63–67 & n.3 (Harlan, J., concurring) (discussing *Insular Cases*, including *Downes*).

170. Id. at 74.

He concluded that military trial should be permissible for "run-of-the-mill offenses" committed by servicemembers' dependents but not for the capital offenses at issue in *Reid*.[171]

In the ensuing decades, the Supreme Court largely avoided addressing whether the *Insular Cases* remained good law by holding in a series of decisions that the particular constitutional rights at issue were applicable in the circumstances of those cases.[172] In 2006, however, in *Boumediene v. Bush*, the Court adopted the pragmatic, context-specific approach of Justice Harlan's concurring opinion in *Reid* as a general standard for the extraterritorial application of the Constitution. The Court held specifically, based on several practical factors it considered relevant, that the Habeas Suspension Clause of the Constitution applied to military detainees at a base in Guantanamo Bay, Cuba, an area subject to de jure Cuban sovereignty but de facto permanent control by the United States.[173]

Justice Kennedy, in the majority opinion, drew support for this approach from the *Insular Cases*, much as Justice Harlan did in *Reid*. Justice Kennedy emphasized that the *Insular Cases* were rooted in a principle of cultural accommodation. Those cases, he reasoned, addressed the applicability of the U.S. Constitution's guarantees in "former Spanish colonies [that had] operated under a civil-law system, without experience in the various aspects of the Anglo-American legal tradition, for instance the use of grand and petit juries."[174] Justice Kennedy explained:

> At least with regard to the Philippines, a complete transformation of the prevailing legal culture would have been not only disruptive but also unnecessary, as the United States intended to grant independence to that Territory. The Court thus was reluctant to risk the uncertainty and instability that could result from a rule that displaced altogether the existing legal systems in these newly acquired Territories. These considerations resulted in 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.[175]

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171. Id. at 75–78.

172. See, e.g., Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 331 (1986) (free speech); Torres v. Puerto Rico, 442 U.S. 465, 471 (1979) (unreasonable search and seizure); Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 601–02 (1976) (equal protection); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668–69 n.5 (1974) (due process).

173. Boumediene v. Bush, 553 U.S. 723, 755, 771 (2008). The Court's adoption of this pragmatic analysis in *Boumediene* echoed an earlier concurring opinion by the *Boumediene* majority opinion's author, Justice Kennedy, in United States v. Verdugo-Urquidez, 494 U.S. 259, 277–78 (1990) (citing *Insular Cases* and Justice Harlan's *Reid* concurrence in concluding Fourth Amendment warrant requirement did not apply to search in Mexico).

174. 553 U.S. at 757.

175. Id. (citations omitted).

The *Boumediene* majority thus explained the *Insular Cases* narrowly in terms of a putative need for cultural accommodation in light of the presumed impermanence of American sovereignty. This characterization permitted the Court to assimilate the *Insular Cases* into its general, practicality-focused approach to extraterritoriality.[176] The Court, however, pointedly illustrated the logic of the *Insular Cases* by reference only to the Philippines, a territory to which the United States had granted independence over fifty years earlier.[177] With respect to territories still retained by the United States in 2006, the Court hinted at further extensions of constitutional rights. The Court observed: "It may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance."[178]

Accordingly, although in *Boumediene* the Court specifically addressed only the application of the Constitution to the extraterritorial area of Guantanamo Bay, the majority's analysis appears to raise anew the question of the Constitution's applicability in insular territories such as Guam and Puerto Rico.[179] At the same time, separate developments in case law regarding federalism and separation of powers threaten to undermine the long-accepted practice of autonomous territorial enforcement of criminal prohibitions enacted by territorial legislatures. Although there are historical examples of enforcement of federal criminal prohibitions

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176. See Gerald L. Neuman, The Extraterritorial Constitution After *Boumediene v. Bush*, 82 S. Cal. L. Rev. 259, 270 (2009) (describing *Boumediene* as giving "sanitized account of the motivations for the *Insular Cases* doctrine" but noting "such simplification is hardly atypical in tracing a line of precedent").

177. 22 U.S.C. § 1394(a) (2006) (recognizing independence of Philippines); Proclamation No. 2695, 3 C.F.R. 64 (Supp. 1946) (same).

178. *Boumediene*, 553 U.S. at 758. The Court also pointedly cited Justice Brennan's concurrence in *Torres v. Puerto Rico*, where he stated that "'[w]hatever the validity of the [*Insular Cases*] in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico in the 1970's.'" Id. (quoting Torres v. Puerto Rico, 442 U.S. 465, 475–76 (1979) (Brennan, J., concurring in the judgment)).

179. Shortly after *Boumediene*, the federal district court in Puerto Rico held, based in part on the Court's statements in that case, that Puerto Rico is now an incorporated territory to which the Constitution is fully applicable. Consejo de Salud Playa de Ponce v. Rullan, 586 F. Supp. 2d 22, 33, 43 (D.P.R. 2008); see also Jesse Merriam, A Clarification of the Constitution's Application Abroad: Making the "Impracticable and Anomalous" Standard More Practicable and Less Anomalous, 21 Wm. & Mary Bill Rts. J. 171, 203 (2012) (interpreting *Boumediene* to establish that "[i]f a constitutional claim arises in a land over which the United States exercises absolute control or exclusive jurisdiction, and if the court deems that the claim involves a 'fundamental meaning' of the Constitution, then the court should apply the Constitution as it would if the claim had arisen domestically"). For a contrary view that *Boumediene* entrenches the *Insular Cases*, creating "second-class legal status" for citizens in Puerto Rico and other territories, see Malavet, supra note 33, at 182.

by nonfederal actors,[180] the Supreme Court indicated in 1997 in *Printz v. United States* that, by virtue of the President's constitutional responsibility to "take Care that the Laws be faithfully executed,"[181] execution of federal laws must be subject to "meaningful Presidential control."[182] The Court also suggested that executive functions must be performed by executive branch officers subject (directly or indirectly) to presidential appointment and removal under the Appointments Clause.[183] The Clause requires appointment of all "Officers of the United States" by the President with the advice and consent of the Senate or, in the case of "inferior Officers," either by that method or by "the President alone," the "Head[] of [a] Department[]," or a "Court[] of Law."[184] The Court's decisions, moreover, suggest that the requirement of presidential control carries particular force in the criminal context.[185]

If these principles were applied without modification to the territories—as the Court's skepticism about the constitutional exceptionalism of the *Insular Cases* implies may be necessary—they would render autonomous criminal enforcement by the existing local territorial governments unconstitutional. In the federal Indian law context, Justice Thomas mused in his concurring opinion in *Lara* that Congress's *Duro* fix could not be interpreted as a delegation of federal power, because "[t]he power to bring federal prosecutions, which is part of the putative delegated power, is manifestly and quintessentially executive power" and, as such, cannot be transferred by Congress "to individuals who are beyond 'meaningful Presidential control.'"[186] Yet the criminal enforcement authority of elected territorial officials is at once federally delegated and not presidentially controlled. Indeed, for this very reason, two scholars have recently argued that, at least on originalist and formalist premises,

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180. See Harold J. Krent, Executive Control over Criminal Law Enforcement: Some Lessons from History, 38 Am. U. L. Rev. 275, 292–309 (1989) (describing roles of private citizens and state governments in early federal criminal law enforcement).

181. U.S. Const. art. II, § 3.

182. Printz v. United States, 521 U.S. 898, 922–23 (1997).

183. Id.

184. U.S. Const. art. II, § 2, cl. 2.

185. See, e.g., United States v. Lara, 541 U.S. 193, 216 (2004) (Thomas, J., concurring in the judgment) (arguing President must have some power of appointment and removal over those who bring federal prosecutions); Morrison v. Olson, 487 U.S. 654, 691 (1988) (noting criminal "law enforcement functions . . . typically have been undertaken by officials within the Executive Branch"); Buckley v. Valeo, 424 U.S. 1, 140 (1976) (per curiam) (indicating that only officers appointed in accordance with the Appointments Clause may "conduct[] civil litigation in the courts of the United States for vindicating public rights"); see also Michael G. Collins & Jonathan Remy Nash, Prosecuting Federal Crimes in State Courts, 97 Va. L. Rev. 243, 296–302 (2011) (describing constitutional issues accompanying state prosecution of federal crimes).

186. *Lara*, 541 U.S. at 216 (Thomas, J., concurring in the judgment) (quoting *Printz*, 521 U.S. at 922–23).

territorial self-governance is unconstitutional under the Appointments Clause.[187]

The Court's apparent skepticism about constitutional exceptionalism in the territories threatens to create grave legal uncertainties—uncertainties that closely parallel those created by the Court's hostility to extraconstitutional authority in the federal Indian law context. If the United States' "ties" to its insular territories have "strengthen[ed] in ways that are of constitutional significance," as *Boumediene* suggests,[188] then previously settled explanations regarding the constitutionality of self-governance arrangements for the territories may be open to question, and the Court's cases permit serious doubts as to how territorial governments may depart from either structural or procedural guarantees of the Constitution while exercising federally delegated power.

C. *States*

Before turning to an affirmative analysis of the path forward on these issues, it is useful to account briefly for related federal-state contexts that present important analogies for the criminal jurisdiction exercised by tribal and territorial governments.

States, of course, hold a very different position in the polity from tribal and territorial governments. As constituent elements of our federalist republic, states and their citizens are represented directly in the national legislature. Moreover, as guaranteed by the Tenth Amendment, they hold plenary governmental authority within their borders, except insofar as such power is constrained by the federal constitution or preempted by valid federal legislation enacted pursuant to Congress's limited, enumerated powers.[189] Nevertheless, in at least two contexts, state criminal jurisdiction may arise from federal authorization through a process analogous to federal conferral of criminal jurisdiction on native and territorial governments.[190]

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187. See Lawson & Seidman, supra note 10, at 136 ("[T]erritorial officials . . . selected in any fashion that does not comply with the Appointments Clause cannot execute the laws of the United States . . . [or] territorial laws, to the extent that the latter are also, for constitutional purposes, laws of the United States.").

188. 553 U.S. 723, 758 (2008).

189. U.S. Const. amend. X (reserving to states and the people powers not conferred on federal government); see also, e.g., United States v. Morrison, 529 U.S. 598, 618 (2000) ("[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.").

190. The examples discussed here are analogous to federal authorization of tribal or territorial jurisdiction in that they involve situations where a state's authority to punish violations of its own *state* laws depends on federal authorization. Some have suggested that Congress could also authorize states to punish *federal* crimes. For a discussion of the constitutional issues any such enactment would raise, see Collins & Nash, supra note 185, at

First, Congress may create state criminal jurisdiction by relaxing requirements of the so-called "dormant" Commerce Clause. The Commerce Clause, by its terms, provides Congress with affirmative authority to regulate interstate commerce, but this authority has long been understood to entail a "negative" aspect as well. This negative or "dormant" aspect of the Commerce Clause bars state commercial regulation if it (1) "discriminates against interstate commerce" without "'advanc[ing] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives'"[191] or (2) imposes a burden on interstate commerce that is "'clearly excessive in relation to the putative local benefits.'"[192] Congress, however, may relax these limitations on state authority by "authoriz[ing] state regulations,"[193] including criminal laws,[194] "that burden or discriminate against interstate commerce."[195]

Second, Congress also may delegate elements of federal criminal jurisdiction in Indian country to states. Under a complex patchwork of statutes and judicial doctrines, federal and tribal governments generally hold sole jurisdiction (to the exclusion of states) over crimes by or against Indians in Indian country, while states hold sole jurisdiction (to the exclusion of tribes and the federal government) over crimes by non-Indians without Indian victims.[196]

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191. Dep't of Revenue v. Davis, 553 U.S. 328, 338 (2008) (quoting Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 101 (1994)).

192. Id. at 338–39 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

193. Hillside Dairy Inc. v. Lyons, 539 U.S. 59, 66 (2003).

194. See, e.g., USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272, 1282 (2d Cir. 1995) (addressing dormant Commerce Clause challenge to civil and criminal regulations); Pic-a-State PA, Inc. v. Pennsylvania, 42 F.3d 175, 180 (3d Cir. 1994) (holding state criminal law that "complements [a] federal statute" does not violate dormant Commerce Clause).

195. *Hillside Dairy*, 539 U.S. at 66; see also, e.g., Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 154 (1982) ("When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce, and it matters not that the courts would invalidate the state tax or regulation under the Commerce Clause in the absence of congressional action.").

196. This distribution of criminal jurisdiction results principally from two federal statutes. First, the Major Crimes Act establishes federal jurisdiction over Indians who commit specified major offenses such as murder and rape in Indian country. 18 U.S.C. § 1153 (2006). Tribal courts likely retain concurrent jurisdiction over these offenses, although the Supreme Court has not resolved this issue. See United States v. Wheeler, 435 U.S. 313, 325 n.22 (1978) (reserving question); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 203 n.14 (1978) (same); Wetsit v. Stafne, 44 F.3d 823, 825 (9th Cir. 1995) (upholding concurrent tribal court jurisdiction). Second, the Indian Country Crimes Act establishes federal jurisdiction over other crimes in Indian country, unless the offense is committed by an Indian against another Indian or involves an Indian perpetrator who has already been punished under tribal law. 18 U.S.C. § 1152. This statute also does not oust tribal court jurisdiction; indeed, it preserves exclusive tribal jurisdiction for Indian-on-Indian crimes, and by barring federal jurisdiction where a tribal court has already imposed punishment, it presupposes tribal court jurisdiction for other offenses by Indian offenders. Id. Although the plain language of the Indian Country Crimes Act might appear to cover offenses by

This basic distribution of criminal enforcement authority has deep historical roots in treaties, statutes, and case law. It reflects in part the presumption, established in the Marshall Court's foundational precedents, that the federal government, and not the states, bears constitutional responsibility for regulating relations between Indians and non-Indians.[197] Yet the Supreme Court has held that Congress's plenary authority over Indian affairs entails "plenary authority to alter these jurisdictional guideposts."[198] Congress "has exercised [this authority] from time to time" by conferring elements of historically federal criminal jurisdiction on states.[199] States receiving such jurisdictional authorization from Congress apply their usual state criminal laws to offenses that would otherwise be matters within federal jurisdiction.[200]

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non-Indians against non-Indians in Indian Country, the Supreme Court held that states have exclusive jurisdiction over such offenses. See Draper v. United States, 164 U.S. 240, 247 (1896) ("[I]n reserving to the United States jurisdiction and control over Indian lands it was not intended to deprive that State of power to punish for crimes committed on a reservation or Indian lands by other than Indians or against Indians . . . ."); United States v. McBratney, 104 U.S. 621, 624 (1881) ("But that treaty contains no stipulation for the punishment of offences committed by white men against white men."). In addition to the federal jurisdiction conferred by the Major Crimes Act and Indian Country Crimes Act, federal criminal prohibitions of nationwide applicability (such as federal narcotics and organized crime laws) apply in Indian country, just as they do elsewhere in the United States. See, e.g., *Wheeler*, 435 U.S. at 330 n.30 ("Federal jurisdiction . . . extends . . . to crimes over which there is federal jurisdiction regardless of whether an Indian is involved, such as assaulting a federal officer . . . ."). For a general discussion of this jurisdictional framework, see Cohen, supra note 16, at 735–69.

197. See supra notes 46–58 and accompanying text (discussing tribes' relationship with federal government).

198. Negonsott v. Samuels, 507 U.S. 99, 103 (1993).

199. Id. For examples of statutes conferring elements of federal criminal jurisdiction on states in areas of Indian country, see, e.g., 18 U.S.C. § 1162 ("Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed . . . ."); 25 U.S.C. § 232 (2006) ("The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State have jurisdiction over offenses committed elsewhere within . . . .").

200. Commentators have faulted statutes conferring federal criminal jurisdiction on states (the most significant of which, 18 U.S.C. § 1162, is known as Public Law 280) for contributing to a collapse of law and order on affected reservations. See, e.g., Carole Goldberg & Duane Champagne, Searching for an Exit: The Indian Civil Rights Act and Public Law 280, *in* The Indian Civil Rights Act at Forty, supra note 75, at 248–59 (discussing alleged state civil rights violations in Public Law 280 jurisdictions); Carole E. Goldberg, Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 UCLA L. Rev. 535, 538 (1975) (noting dissatisfaction of states and Indians with law); Carole Goldberg-Ambrose, Public Law 280 and the Problem of Lawlessness in California Indian Country, 44 UCLA L. Rev. 1405, 1418 (1997) ("Taking account of the direct and indirect effects . . . , Public Law 280 has itself become a source of lawlessness on reservations."). These statutes have also created ambiguity over the extent of retained tribal and federal jurisdiction in affected jurisdictions. See, e.g., Vanessa J. Jimenez & Soo C. Song, Concurrent Tribal and State Jurisdiction Under Public Law 280, 47 Am. U. L. Rev. 1627, 1632–36 (1998) (examin-

Federal authorization of state criminal jurisdiction in these two contexts, much like federal authorization of tribal or territorial jurisdiction, raises the question of whether and to what degree resulting state prohibitions and their enforcement should be viewed as federal action for constitutional purposes. In light of *Printz*'s holding that enforcement of federal laws must be subject to "meaningful Presidential control,"[201] should such control be required when states exercise federally conferred criminal jurisdiction? Should double jeopardy bar federal reprosecution following a state prosecution pursuant to a federal jurisdictional grant? And should states have to follow requirements of the Bill of Rights that apply only to the federal government, not the states—most notably the requirements of grand jury indictment[202] and trial jury unanimity[203]—in conducting such prosecutions?

In practice, the answer to all these questions is "no." Courts have treated exercises of state power pursuant to congressional relaxation of the dormant Commerce Clause or federal delegation of Indian country jurisdiction as state, rather than federal, action for constitutional purposes.

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ing law's disruptive effects).

201. Printz v. United States, 521 U.S. 898, 922–23 (1997).

202. See Hurtado v. California, 110 U.S. 516, 534–35 (1884) (holding grand jury requirement in Fifth Amendment does not apply to states).

203. See Apodaca v. Oregon, 406 U.S. 404, 406 (1972) (upholding jury verdicts by margins of 10–2 and 11–1); Johnson v. Louisiana, 406 U.S. 356, 362 (1972) (upholding jury verdict by margin of 9–3). In contrast, while the Supreme Court has upheld the use of juries with as few as six members (though not fewer), e.g., Ballew v. Georgia, 435 U.S. 223, 245 (1978); Williams v. Florida, 399 U.S. 78, 103 (1970), it has required unanimous verdicts from such juries, even in state court, e.g., Burch v. Louisiana, 441 U.S. 130, 139 (1979).

The Supreme Court has also never definitively held the Eighth Amendment prohibitions on excessive fines and excessive bail to be incorporated, although it has described bail as "basic to our system of law" and noted that "the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment." Schilb v. Kuebel, 404 U.S. 357, 365 (1971); see also McDonald v. City of Chicago, 130 S. Ct. 3020, 3034–35 nn.12–13 (2010) (suggesting prohibition on excessive bail is incorporated but prohibition on excessive fines is not).

In *McDonald*, which applied the Second Amendment to the states, the Supreme Court made clear that it views the incomplete incorporation of constitutional jury rights as anomalous. See id. at 3035 & nn.13–14 (characterizing result in *Apodaca*, in which Court produced no majority opinion, as resulting from "an unusual division among the Justices" and Court's grand jury decisions as "long predat[ing]" Court's modern approach to incorporation). Some commentators have suggested that the flexibility granted to the states with respect to juries is inconsistent with the putatively originalist and formalist approach the Court has taken in recent cases addressing what questions juries must resolve (in state or federal court) in criminal trials. See, e.g., Joan L. Larsen, Ancient Juries and Modern Judges: Originalism's Uneasy Relationship with the Jury, 71 Ohio St. L.J. 959, 961 (2010) ("The jury of 2010 bears . . . faint resemblance to the jury of 1791 . . . ."). Nevertheless, the Court recently denied certiorari in a well-briefed case seeking to overrule *Apodaca* and completely incorporate Sixth Amendment jury rights against the states. Herrera v. Oregon, 131 S. Ct. 904 (2011) (mem.).

The Supreme Court itself endorsed this result with respect to the dormant Commerce Clause. In *Prudential Insurance Co. v. Benjamin*, the Court held that state laws resulting from federal authorization of discriminatory commercial regulation are an "exertion of [the state's] own power" and not a "delegation of Congress's legislative power to the states."[204] Accordingly, the only constitutional limitations on state enforcement of such laws are those that ordinarily apply to state governmental action.

Courts likewise appear to view state prosecutions pursuant to a federal grant of Indian country jurisdiction as state action, and not federal government action, for constitutional purposes.[205] The reason why is less clear. Courts, commentators, and Congress itself have generally viewed statutes conferring elements of federal criminal jurisdiction in Indian country on states as delegations of federal authority over relations with Indian nations.[206] But if that is so, then why should resulting state actions not be considered federal in character for constitutional purposes?[207] The best answer is probably that statutes conferring federal Indian country jurisdiction on states should be understood to have the same character as legislation relaxing the dormant Commerce Clause. The federal legislation, in other words, relaxes a default constitutional preemption of state authority, permitting the state to exercise its usual plenary criminal jurisdiction in areas of its territory where federal law would otherwise bar such jurisdiction.[208] This theory could make sense of the treatment of resulting state prosecutions as state, rather than federal, action. But the

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204. 328 U.S. 408, 438 & n.51 (1946) (rejecting claim that Tax Uniformity Clause, U.S. Const. art. I, § 8, cl. 1, applied to such state action).

205. The leading federal Indian law treatise reports that "[n]o court has ever suggested . . . that a state court to which Congress has delegated jurisdiction over Indians is obligated to provide indictment by a grand jury in criminal cases under the fifth amendment." Cohen, supra note 16, at 532 & n.12.

206. See, e.g., 25 U.S.C. §1302(f) (Supp. V 2012) ("Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country."); Burgess v. Watters, 467 F.3d 676, 682 (7th Cir. 2006) (describing statute as "delegation of authority"); United States v. Wadena, 152 F.3d 831, 840 & n.12 (8th Cir. 1998) (referring to jurisdiction "delegated to certain states"); Timbisha Shoshone Tribe v. Kennedy, 714 F. Supp. 2d 1064, 1071 (E.D. Cal. 2010) (noting Congress "delegates certain states . . . jurisdiction over most crimes and many civil matters throughout most of the Indian country within their borders"); Cohen, supra note 16, at 531 ("Courts typically characterize an exercise of federal power authorizing state jurisdiction over Indians in Indian country as a delegation of Congress's otherwise preemptive authority over Indian nations to the states.").

207. See, e.g., Robert N. Clinton et al., American Indian Law: Native Nations and the Federal System 677 (5th ed. 2007) (identifying issue as open question).

208. Cf. United States v. Burch, 169 F.3d 666, 671 (10th Cir. 1999) ("Upon cession of such jurisdiction to a state, federal law no longer preempts the state's exercise of its inherent police power over all persons within its borders . . . ."); Cohen, supra note 16, at 532 (proposing similar theory).

theory conflicts with Congress's own characterization of jurisdiction-conferring statutes as delegations of federal power rather than activations of state power.[209] Thus, in at least one important context, state criminal jurisdiction presents constitutional dilemmas similar to those that arise in territorial and federal Indian law contexts.

D. *Open Questions and the Counterproductive Focus on "Inherency"*

The tribal, territorial, and state contexts present a series of related questions regarding the constitutional implications of local exercise of federally authorized criminal jurisdiction. Can tribes, territories, or states autonomously enforce criminal sanctions imposed pursuant to a federal grant of criminal jurisdiction, or must any such exercise of federally conferred criminal enforcement authority be supervised by federal executive officials accountable to the President? Should double jeopardy bar subsequent prosecution by the federal government when a tribe, territory, or state has imposed criminal punishment pursuant to a grant of authority from Congress? And to what degree should constitutional constraints on federal governmental action also bind local governments in such circumstances?

The answers to these questions might once have seemed settled, but they have been thrown open by the Court's recent decisions. Given the Court's hostility to extraconstitutional authority—despite previously tolerating it in Indian country and the unincorporated territories—*Printz*'s holding that federally derived criminal laws can be enforced only by officials accountable to the President may appear hard to square with the autonomy of state, tribal, or territorial officials exercising criminal jurisdiction conferred on them by an act of Congress. Similarly, as the circuit split over Puerto Rico and the multiple separate opinions in *Lara* attest, the "separate sovereignty" doctrine of double jeopardy may be difficult to apply when one government (a state, tribe, or territory) exercises criminal jurisdiction only with the permission of another (the federal government). And the inapplicability of some or all constitutional procedural rights in tribal or territorial prosecutions under *Talton* and the *Insular Cases* appears to conflict with the animating concern of the Court's recent cases, namely that the federal constitution should regulate government action for which the federal government bears responsibility.

Some of the Court's decisions, and particularly the separate opinions of some justices, suggest an inclination to resolve these questions by distinguishing between inherent and delegated authority. The Court's early double jeopardy decisions with respect to the territories support this view, as does *Talton*'s invocation of preconstitutional tribal sovereignty to explain the inapplicability of the Bill of Rights to Native American

209. See, e.g., 25 U.S.C. § 1302(f) ("Nothing in this section affects the obligation of the United States, or any State government that has been delegated authority by the United States, to investigate and prosecute any criminal violation in Indian country.").

tribes. And the separate opinions of Justice Thomas and Justice Souter in *Lara* suggest that the applicability of structural and procedural requirements of the Constitution turns on this distinction. Likewise, some lower courts have resolved these issues by reference to this framework.[210]

Yet rigid application of this binary distinction between inherent and delegated authority would be counterproductive. In fact, this approach has significant deficiencies, even as an explanation for existing law. In the federal-state context, as this Article has demonstrated, the treatment of federally authorized state prosecutions in Indian country as state action might be shoehorned into the inherent authority framework by characterizing such prosecutions as exercises of a reactivated inherent authority of states over their territory.[211] But this view conflicts with Congress's own characterization of its authorizing statutes as delegations.[212] In the territorial context, the permissibility of unsupervised prosecutions by territorial governments appears difficult to explain under the inherent authority model, given that territorial governments exercise only delegated federal power. Furthermore, departures from the Bill of Rights under the *Insular Cases* would appear difficult to justify except on the theory that the federal government itself could violate those rights, yet the general pattern of congressional policy has been to allow territorial governments greater flexibility with respect to criminal procedure than the federal government.[213]

Finally, with respect to Indian tribes, legal recognition that their sovereignty is at least partially inherent and not federally derived is critically important to many Native Americans. This legal principle has political and cultural significance as a belated acknowledgment of tribes' dignity and standing as political communities. It has also provided a theoretical foundation for autonomous tribal self-government, including criminal enforcement without double jeopardy implications for other sovereigns. But the binary choice this framework imposes—tribal sovereignty is either inherent or not—has driven the Supreme Court to address its con-

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210. See, e.g., United States v. Archambault, 206 F. Supp. 2d 1010, 1017 n.4 (D.S.D. 2002) ("Congress is not able to delegate what it does not have, and because it does not have the power to prosecute non-member Indians without affording them the full protection of the Constitution, it cannot in turn empower tribes to do this very thing."); United States v. Weaselhead, 36 F. Supp. 2d 908, 913, 914 (D. Neb. 1997) (holding interpreting statute "as a delegation of congressional prosecutorial authority over nonmember Indians would also concede that tribes would be exercising federal power, subject to the full panoply of Constitutional rights").

211. See supra note 198 and accompanying text (arguing federal legislation may relax constitutional preemption of state authority to exercise criminal jurisdiction within its territory).

212. See supra note 199 (discussing congressional delegation of authority in Indian country).

213. See supra notes 139–162 and accompanying text (noting deviation from federal constitutional rights in territories).

cerns about tribal extraconstitutional authority through curtailment of tribes' control over nonmembers in their territory, a severe impediment to what remains of their sovereignty.

It makes sense, therefore, to consider a different approach to resolving these open doctrinal questions, one that seeks descriptive adequacy with respect to existing law, while also recognizing the concerns about extraconstitutional authority that animate the Court's recent cases. Part II turns to that inquiry.

II. DIVIDING SOVEREIGNTY

The remainder of this Article offers a preliminary sketch of a different approach to the constitutional questions presented by state, territorial, and tribal exercise of congressionally authorized criminal jurisdiction. Specifically, this Article proposes retreating from the inherent authority concept as an organizing principle and instead focusing on the practical reality of divided sovereignty in these contexts. Recognizing the interplay of federal and local authority at work in tribal and territorial criminal jurisdiction permits an analysis focused on normative considerations that support treating prosecutions as federal or nonfederal for purposes of particular constitutional doctrines. On the three questions addressed here—the necessity of federal executive supervision, the application of double jeopardy principles, and the applicability of particular Bill of Rights guarantees—such an analysis may yield the most attractive resolutions that are possible under current case law.

A. *Presidential Control*

On the first question—whether presidential control over enforcement of federally authorized tribal, territorial, or state criminal law should be required—the proper answer is "no," at least so long as a local, and not federal, criminal prohibition is being enforced. As the summary of current law above has shown, this is already at least the working assumption of courts and legislatures, although the doctrinal explanation has not been clearly articulated.[214] Instead of attempting unique, and often strained, explanations in each context, courts should simply recognize as a matter of doctrine what the cases and enactments implicitly acknowledge: When Congress has exercised a recognized authority to structure the jurisdiction of a subordinate government by conferring effectively autonomous powers of crime definition and enforcement on that government, presidential control over resulting prosecutions should not be constitutionally required, because the practical reasons for requiring such control in the usual federal context are absent.

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214. See supra Parts I.A.1, I.B.1 (summarizing existing law governing criminal jurisdiction of tribal and territorial governments).

As noted earlier, the Supreme Court held in *Printz v. United States* that the Constitution's assignment to the President of the responsibility to "take Care that the Laws be faithfully executed"[215] entails a requirement that execution of federal laws be subject to "meaningful Presidential control."[216] This requirement likely carries particular force in the criminal context.[217] This principle, and the related constitutional requirement that executive officers must be appointed directly or indirectly by the President, led Justice Thomas to muse in his *Lara* concurrence that tribal criminal jurisdiction over nonmembers pursuant to the *Duro* fix must be viewed as inherent rather than delegated. If it were delegated, he reasoned, then it would entail a "power to bring federal prosecutions" that must be subject to some measure of presidential control.[218]

According to that view, however, state prosecutions pursuant to a federal grant of criminal jurisdiction in Indian country would also require presidential control, at least if Congress's characterization of such federal laws as delegations is accurate.[219] By the same token, democratic self-governance in the territories would also be impossible, as indeed two scholars have recently suggested, because territorial authorities exercise congressionally delegated federal power yet are not presidentially controlled insofar as they are locally elected rather than federally appointed.[220]

These conundrums disappear if we abandon the distinction between inherent and delegated authority and recognize that in each of these contexts, Congress has the power to structure the criminal jurisdiction that subordinate governments may exercise *as their own* once it is federally authorized. The prohibitions enforced pursuant to such grants of jurisdiction are not federal crimes but rather state, territorial, or tribal crimes. Accordingly, there is no practical need for the President to "take care" that these laws are properly enforced, as the Constitution's Take Care Clause requires him to do with respect to federal laws. Quite the

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215. U.S. Const. art. II, § 3.

216. 521 U.S. 898, 922–23 (1997). For a more detailed discussion of the holding of *Printz*, see supra notes 181–183 and accompanying text.

217. See United States v. Lara, 541 U.S. 193, 216 (2004) (Thomas, J., concurring in the judgment) ("The power to bring federal prosecutions, which is part of the putative delegated power, is manifestly and quintessentially executive power."); Morrison v. Olson, 487 U.S. 654, 691 (1988) (noting criminal "law enforcement functions . . . typically have been undertaken by officials within the Executive Branch"). See generally Collins & Nash, supra note 185, at 296–302 (discussing constitutional problems with "delegation of prosecutorial power outside the executive branch").

218. *Lara*, 541 U.S. at 216.

219. See supra Part I.D (discussing deficiencies of inherency doctrine in federal-state context).

220. See Lawson & Seidman, supra note 10, at 136 (arguing elected territorial officials "cannot execute territorial laws, to the extent that the latter are also, for constitutional purposes, laws of the United States").

opposite, because the norms being enforced are those of the local community, enforcement discretion may be better exercised by local officials accountable to the local community rather than by federal officials accountable to the remote national President.[221]

The Appointments Clause likewise should pose no obstacle. Indeed, the Appointments Clause analysis advanced by Justice Thomas in *Lara* and in some recent scholarship regarding the territories[222] appears inconsistent with courts' longstanding interpretation of this provision. By its terms, the Clause is applicable only if an official qualifies as an "Officer of the United States," and the Supreme Court has held that a constitutional "office" requires not only "significant authority pursuant to the laws of the United States"[223] but also a "public station, or employment," in the federal government.[224] As a practical matter, state, tribal, and territorial officers satisfy neither of these prerequisites. Even if their authority depends ultimately on federal authorization or acquiescence, it is based principally on state, territorial, or tribal law. Moreover, their "station" or "employment" is in a state, tribal, or territorial government, not the federal government. In short, they are state, tribal, or territorial officers, not "Officers of the United States" within the meaning of the Appointments Clause.[225]

The majority opinion in *Lara* offers support for this understanding of Congress's authority. In *Lara*, the Court invoked historical precedents from both tribal and territorial contexts to conclude that it was "not an unusual legislative objective" for Congress "to modify the degree of autonomy enjoyed by a dependent sovereign that is not a State."[226] The

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221. Cf. Kevin K. Washburn, American Indians, Crime, and the Law, 104 Mich. L. Rev. 709, 725–38 (2006) [hereinafter Washburn, American Indians] (noting prosecutors' discretion over which criminal violations to prosecute "has been normatively justified by the premise that prosecutors take into account and indeed internalize the community's values and mores in determining which cases to prosecute" but arguing federal prosecutors fail to adequately represent affected communities in Indian country).

222. See, e.g., Lawson & Seidman, supra note 10, at 131 (interpreting Appointments Clause to cover territorial officers).

223. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3148 (2010) (quoting Buckley v. Valeo, 424 U.S. 1, 125–26 (1976) (per curiam)).

224. United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1867); see also United States v. Germaine, 99 U.S. 508, 511–12 (1879) (discussing *Hartwell* and noting federal authority is not enough to be considered officer of United States).

225. Courts have reached precisely this conclusion with respect to local government officers of the District of Columbia. See, e.g., Techworld Dev. Corp. v. D.C. Pres. League, 648 F. Supp. 106, 116 (D.D.C. 1986) (holding authority exercised by locally elected City Council of D.C., another self-governing entity subject to plenary congressional control, "is not federal authority which must be performed by 'Officers of the United States'" (quoting U.S. Const. Art. II, § 2, cl. 2)), vacated on other grounds, No. 86-5630, 1987 WL 1367570 (D.C. Cir. June 2, 1987) (per curiam). See generally The Constitutional Separation of Powers Between the President and Cong., 20 Op. O.L.C. 124, 145–48 (1996) (describing requirements of constitutional office).

226. United States v. Lara, 541 U.S. 193, 203 (2004).

Court further noted that Congress had historically exercised its "plenary" authority over Indian affairs "to enact legislation that both restricts and, in turn, relaxes . . . restrictions on tribal sovereign authority."[227]

With respect to criminal jurisdiction, this congressional authority to expand and contract sovereign authority extends to states as well, given Congress's constitutional authority to "alter [the] jurisdictional guideposts" separating state, federal, and tribal criminal jurisdiction in Indian country.[228] Similarly, in the territorial context, the Supreme Court has recognized that Congress's authority under the Territory Clause entails plenary power to select the "form of government" in the territory, without regard to the "complex distribution of the powers of government" prescribed for the federal government by the Constitution.[229] Insofar as these precedents recognize congressional authority to structure the jurisdiction exercised autonomously by subordinate state, tribal, or territorial governments, they suggest that the necessity of federal authorizing legislation for such jurisdiction does not mean that the resulting enforcement of state, territorial, or tribal law pursuant to such a federal grant of jurisdiction constitutes execution of federal law for constitutional purposes.

This view of Congress's power and its proper constitutional implications also draws support from case law in two related contexts. First, based on the principle that the Appointments Clause restricts appointments only to federal "offices" characterized by a federal "station" or "employment," courts have held (albeit not with complete uniformity) that Congress may confer on nonfederal actors, such as state officials or private parties, the authority to enforce federal laws through civil causes of action without implicating any constitutional requirement of federal supervision under the Appointments and Take Care Clauses.[230] Given that nonfederal officials thus may autonomously enforce federal law in certain circumstances, it seems all the more clear that state, territorial, and tribal governments should be free to enforce their own laws without

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227. Id. at 202.

228. Negonsott v. Samuels, 507 U.S. 99, 103 (1993).

229. Benner v. Porter, 50 U.S. (9 How.) 235, 242 (1850).

230. See, e.g., Seattle Master Builders Ass'n v. Pac. Nw. Elec. Power & Conservation Planning Council, 786 F.2d 1359, 1365–66 (9th Cir. 1986) (holding Appointments Clause does not apply to Council members serving "pursuant to a compact which requires both state legislation and congressional approval"); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States, 259 F. Supp. 2d 783, 796–97 (W.D. Wis. 2003) (holding Wisconsin governor's role under federal statute "is neither significant enough to require appointment as a federal officer nor exercised pursuant to the laws of the United States"); United States ex rel. Burch v. Piqua Eng'g, Inc., 803 F. Supp. 115, 120 (S.D. Ohio 1992) (holding qui tam plaintiffs do not violate Appointments Clause). See generally The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. at 145–46 ("[T]he simple assignment [to private individuals] of some duties under federal law, even significant ones, does not by itself pose an Appointments Clause problem.").

direct federal control, even if their authority to do so depends ultimately on a grant of jurisdiction from Congress.

Second, in *Palmore v. United States*, the Supreme Court held that Congress may establish courts for enforcement of at least local criminal laws in the District of Columbia without providing for the life tenure and protection against salary reduction that Article III of the Constitution requires for federal judges.[231] Drawing in part from the longstanding acceptance of non-Article III tribunals in other territories,[232] the Court reasoned that "the requirements of Art. III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment."[233] The Court thus concluded that in establishing a local court system for the District of Columbia "with responsibility for trying and deciding those distinctively local controversies that arise under local law, including local criminal laws having little, if any, impact beyond the local jurisdiction,"[234] Congress could provide for judges that, like their counterparts in many states, do not enjoy the tenure and salary protections guaranteed to federal judges in Article III courts.[235] The permissibility of territorial courts that lack the structural guarantees of federal tribunals reinforces the permissibility of enforcement mechanisms that likewise, at least with respect to "local criminal laws having little, if any, impact beyond the local jurisdiction," depart from structural requirements of presidential control required for enforcement of national criminal prohibitions.

Recognizing that Congress may confer criminal jurisdiction on subordinate governments in certain contexts without needing federal executive supervision would also have another benefit. It would shift the focus of the doctrinal inquiry away from the sterile distinction between inherent and delegated authority and toward the more fundamental question of how far Congress's jurisdiction-structuring authority should extend in the first place. As a practical matter, requiring presidential supervision would defeat the purpose of all such legislation, as enactments authorizing local criminal jurisdiction aim precisely to permit autonomous local enforcement of local prohibitions. The key question, then, is to what extent Congress has the authority to confer such autonomous jurisdiction, however the resulting local authority is characterized. In the territorial and tribal contexts, as the Court recognized in *Lara*, longstanding precedent supports broad congressional authority to expand or contract such

231. 411 U.S. 389, 407–08 (1973); see also U.S. Const. art. III.

232. See Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511 (1828) (holding Article III restrictions do not extend to territories).

233. *Palmore*, 411 U.S. at 407–08.

234. Id.

235. Id. at 409.

jurisdiction.[236] That authority, to be sure, may not be limitless. But where Congress may properly exercise it to confer autonomous law enforcement authority on subordinate governments, federal executive supervision of resulting prosecutions should not be constitutionally required.

B. *Double Jeopardy*

The question of whether state, tribal, or territorial prosecution should bar separate federal prosecution under the Double Jeopardy Clause largely parallels the question of whether presidential control of enforcement is required. This question, too, presents a problem of dividing sovereignty—an issue of when state, tribal, or territorial action should be viewed as an emanation of federal rather than local authority for constitutional purposes. Here, however, the Supreme Court's concept of inherent sovereignty has led it to view territorial governments differently from state and tribal authorities.

Whereas the Supreme Court has characterized states and tribes as possessing an independent sovereignty, the Court has held that territories, by virtue of exercising governmental power only by delegation from Congress, lack separate sovereignty and therefore cannot enact and enforce "offenses" distinct from identical federal crimes.[237] Hence, double jeopardy bars territorial, but not tribal, prosecution following federal prosecution (and vice versa) for the same offense. Yet once one abandons the emphasis on inherent sovereignty and views the issue in practical terms, it becomes clear—as the First Circuit has recognized with respect to Puerto Rico[238]—that the Supreme Court's governing decisions on double jeopardy in the territorial context are anomalies ripe for reconsideration. Territorial criminal prosecutions today reflect the vindication of an autonomous political community's values and interests. As such, they should not preclude separate federal prosecution of the same crimes.

Some have criticized the Court's "separate sovereignty" approach to double jeopardy as, among other things, insufficiently protective of defendants' liberty, inconsistent with the original understanding reflected in eighteenth-century British practice (which treated foreign criminal judgments as a bar to domestic prosecution), and out of step with the general application of constitutional constraints on federal prosecution to the states via the Fourteenth Amendment.[239] These criticisms are cer-

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236. United States v. Lara, 541 U.S. 193, 202 (2004).

237. Puerto Rico v. Shell Co., 302 U.S. 253, 264 (1937).

238. United States v. Bonilla Romero, 836 F.2d 39, 42 & n.2 (1st Cir. 1987); United States v. Lopez Andino, 831 F.2d 1164, 1168 (1st Cir. 1987).

239. See, e.g., Akhil Reed Amar & Jonathan L. Marcus, Double Jeopardy Law After Rodney King, 95 Colum. L. Rev. 1 (1995) (advocating reconceptualization of Double Jeopardy Clause).

tainly well founded insofar as the "separate sovereignty" approach makes a central question affecting personal liberty—whether or not an individual defendant may be subject to repeat prosecution—turn on an abstract inquiry into whether two distinct prosecuting governments within the same polity have separate "sovereignty."

But the Court's approach can be justified in practical terms. First, the "separate sovereigns" theory may make practical sense as a recognition that "separate political communities"[240] have distinct interests in redressing offenses against fundamental values reflected in each community's criminal code. Second, the "separate sovereigns" approach makes sense on the understanding that autonomous enforcement decisions of different communities reflect a judgment that separate punishment is warranted to vindicate those separate interests. Thus, as the Supreme Court itself emphasized in concluding that Indian tribes are separate sovereigns for double jeopardy purposes, successive prosecutions by a tribe or state and the federal government may be appropriate because tribes and states have "a significant interest in maintaining orderly relations among their members" or citizens and in preserving their "customs and traditions, apart from the federal interest in law and order" in the reservation or state.[241]

On this understanding, the Supreme Court's decades-old holding that territorial governments, as mere "'agenc[ies] of the federal government,'"[242] are not separate sovereigns for double jeopardy purposes should be discarded as rooted in a misguided formalism that no longer reflects practical realities. At certain times in history, the degree of federal control over territorial executive officials, who until the 1950s and 1960s were federal appointees,[243] was such that separate federal and territorial prosecution might have seemed like an improper attempt by authorities of one government to get two bites at the apple. But it makes little sense to view successive prosecution in these terms today, given the effective autonomy of territorial governments.[244]

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240. United States v. Wheeler, 435 U.S. 313, 320 (1978).

241. Id. at 331; see also Heath v. Alabama, 474 U.S. 82, 93 (1985) ("A State's interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another State's enforcement of *its* own laws.").

242. *Wheeler*, 435 U.S. at 321 (quoting Domenech v. Nat'l City Bank, 294 U.S. 199, 204–05 (1935)).

243. See Gary Lawson, Territorial Governments and the Limits of Formalism, 78 Calif. L. Rev. 853, 868–70 & nn.85–90 (1990) (summarizing changes and collecting statutes).

244. In the mid-nineteenth century, when all territories (except the District of Columbia) were envisioned as future states, the Supreme Court described territorial governments as separate "sovereigns" from the federal government, though it did not resolve whether the federal government and a territorial government could separately prosecute an individual for an identical offense. See Moore v. Illinois, 55 U.S. 13 (1852), which held:

> Every citizen of the United States is also a citizen of a State *or territory*. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an

This conclusion seems particularly apt, as the First Circuit's Puerto Rico decisions recognize,[245] with respect to the two commonwealth territories, Puerto Rico and CNMI. These territories have locally enacted constitutions that establish local governments comparable to those of the states.[246] In practical terms, however, two other organized territories, Guam and the USVI, also are effectively autonomous with respect to criminal enforcement.[247] Congress, indeed, has authorized these two territories to adopt local constitutions, though neither has yet done so.[248] The hardest case is American Samoa, which has a local constitution and locally elected governor and legislature but remains subject to the authority of the Secretary of the Interior in certain respects.[249] Here, too, though, Samoan executive officials answer to local constituents, and the federal government as a practical matter seems unlikely to attempt to direct enforcement decisions.[250]

Two recent examples illustrate this point. First, in 2009, an off-duty officer of the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) in the USVI shot and killed a neighbor who was allegedly intoxicated and threatening a former girlfriend.[251] Although an

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> infraction of the laws of either. The same act may be an offence or transgression of the laws of both.

Id. at 20 (emphasis added).

245. See, e.g., United States v. Lopez Andino, 831 F.2d 1164, 1168 (1st Cir. 1987) ("Puerto Rico is to be treated as a state for purposes of the double jeopardy clause.").

246. See 48 U.S.C. §§ 731b–731d (2006) (authorizing Puerto Rico to form a local government pursuant to local constitution); id. § 1801 (approving Covenant To Establish a Commonwealth of the Northern Mariana Islands, which establishes local government for CNMI); see also P.R. Const.; N. Mar. I. Const.

247. See 48 U.S.C. §§ 1421–1424-4 (authorizing government of Guam to establish Office of the Public Prosecutor and designating Attorney General of Guam as chief law enforcement officer); id. §§ 1571–1613a (granting USVI government power to amend, alter, modify, or repeal any criminal law).

248. See supra notes 133–134 and accompanying text.

249. Under the American Samoan Constitution, which may not be altered without Congress's consent, 48 U.S.C. § 1662a, the legislature may pass laws over the Governor's veto only with the Secretary's consent, the Secretary continues to appoint the Chief Justice and Associate Justice of the American Samoan High Court, and the Secretary may overrule decisions of the High Court's appellate division (although the Secretary has apparently never exercised this authority). Revised Const. of Am. Sam., available at http://www.house.gov/faleomavaega/samoan-constitution.shtml (on file with the *Columbia Law Review*) (last visited Feb. 8, 2013). See generally Laughlin, Territories and Affiliated Jurisdictions, supra note 16, at 296–98 (discussing American Samoan Constitution); Uilisone Falemanu Tua, A Native's Call for Justice: The Call for the Establishment of a Federal District Court in American Samoa, 11 Asian-Pac. L. & Pol'y J. 246, 271–74 (2009) (same).

250. See infra notes 253–255 and accompanying text for an example of apparently independent prosecutorial decisionmaking by federal authorities in American Samoa.

251. People v. Clarke, Crim. No. 2009-09, 2009 WL 1850607, at *1 (D.V.I. June 25, 2009).

internal ATF investigation exonerated the officer, the locally elected USVI Attorney General pressed criminal homicide charges against him. Even after ATF protested the prosecution by withdrawing all of its officers from the islands, the local prosecutor continued to pursue the case until a local trial court dismissed the charges.[252] In contrast, a federal prosecutor would have been bound to apply federal policy. A government exercising this degree of autonomy from federal interests in its criminal charging decisions is effectively a "separate political community" with separate interests that may be vindicated through successive criminal prosecution.

Second, in 2001, federal authorities successfully prosecuted one of the largest human trafficking cases in history against a businessman who allegedly coerced women from China, Vietnam, and American Samoa to work in brutal sweatshops in American Samoa.[253] The federal government brought the case in Hawaii, because no federal district court has jurisdiction over American Samoa.[254] On appeal, the Ninth Circuit expressed bewilderment at the failure of Samoan authorities to prosecute any crime.[255] The case illustrates, however, how there could have been a powerful separate federal interest in prosecution, even if there had been a local criminal action against the defendant. Human trafficking may implicate considerations of foreign policy and civil rights protection that are particular concerns of the national government. Such considerations might well have justified separate federal punishment following a local prosecution, particularly if the Samoan trial resulted in acquittal or if the defendant received a sentence far below federal guidelines.

In sum, the Supreme Court should reorient its double jeopardy doctrine toward the practical considerations underlying its separate sovereignty test. It should recognize that territorial prosecutions, no less than those of states or tribes, reflect a local decision to enforce local law. Double jeopardy principles therefore should not bar successive prosecution of an identical crime by territorial authorities before or after a federal prosecution.

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252. See Joy Blackburn, Judge Issues Ruling Formally Dismissing Case Against ATF Agent, V.I. Daily News, Nov. 6, 2010, at 3, available at http://virginislandsdailynews.com/judge-issues-ruling-formally-dismissing-case-against-atf-agent-1.1060450 (on file with the *Columbia Law Review*); Joy Blackburn, Senators Table Bill To Allow Federal Agents To Enforce Local Law, V.I. Daily News, Apr. 27, 2011, at 4, available at http://virginislandsdailynews.com/news/senators-table-bill-to-allow-federal-agents-to-enforce-local-law-1.1138147 (on file with the *Columbia Law Review*).

253. United States v. Lee, 472 F.3d 638, 639–41 (9th Cir. 2006). For further background on the case, see Adam C. Clanton, How To Transfer Venue When You Only Have One: The Problem of High Profile Criminal Jury Trials in American Samoa, 29 U. Haw. L. Rev. 325, 365–66 (2007).

254. *Lee*, 472 F.3d at 640–41.

255. Id. at 640 ("For reasons unknown to this court, American Samoa authorities did not prosecute Lee.").

C. *Procedural Rights*

The most fraught issue presented by tribal and territorial criminal jurisdiction is the question of procedural rights. Longstanding decisions—the *Insular Cases* for the territories and *Talton* for Indian tribes—indicate that tribal and territorial governments may impose criminal punishment in at least some cases without adhering to constitutionally derived rules of criminal procedure.[256] But the Supreme Court has unsettled the law in both areas by showing hostility to such exceptionalism.

After *Boumediene* and *Lara*, the case law presents a set of parallel open questions with respect to procedural requirements in prosecutions by territorial and tribal governments. With respect to territorial governments, the open questions are: (1) Do the *Insular Cases* remain good law in the five major territories? (2) To the extent those cases remain good law, what deviations from Bill of Rights requirements are permissible, and how is their permissibility to be determined? With respect to tribal governments, similarly, the open questions are: (1) Does *Talton*'s holding that tribes are not bound by the Constitution remain good law with respect to criminal prosecutions of nonmember Indians pursuant to the *Duro* fix or of non-Indians pursuant to the new *Oliphant* fix? (2) To the extent *Talton* is not good law and the Constitution applies in such prosecutions, are any deviations from the Bill of Rights permissible, and how is their permissibility to be determined?

The distinction between inherent and delegated authority criticized throughout this Article offers one framework for answering these questions. The effect of this framework would be to treat the two contexts—territories and tribes—quite differently, notwithstanding their practical similarities. On this view, because territorial governments derive all their authority from Congress, territorial prosecutions would need to abide by all criminal procedure requirements of the Bill of Rights, including the Fifth Amendment requirement of grand jury indictment, at least insofar as those requirements apply to action by the federal government in the territory. In contrast, this framework would imply that the Constitution is entirely inapplicable to Indian tribes when they exercise inherent criminal jurisdiction, including the jurisdiction over nonmember Indians or non-Indians restored by the *Duro* and *Oliphant* fixes.[257]

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256. See supra notes 139–144 and accompanying text (discussing *Insular Cases*); supra notes 64–66 and accompanying text (discussing *Talton*).

257. Like the *Duro* fix, the new *Oliphant* fix purports to restore inherent tribal sovereignty. 25 U.S.C. § 1304(b)(1) (as amended by VAWA, Pub. L. No. 113-4, tit. IX, § 904, available at http://www.gpo.gov/fdsys/pkg/BILLS-113s47enr/pdf/BILLS-113s47enr.pdf (on file with the *Columbia Law Review*)). Although in *Lara* the Supreme Court accepted this characterization of the *Duro* fix (at least for double jeopardy purposes), United States v. Lara, 541 U.S. 193, 196 (2004), it remains an open question whether the Court will consider it constitutional to restore inherent tribal jurisdiction with respect to non-Indians covered by the *Oliphant* fix. The analysis here generally presumes that the *Oliphant* fix

This pattern of results is neither descriptively nor normatively satisfying. Applying all Bill of Rights requirements to prosecutions by territorial governments would disrupt settled expectations in some territories. And while the complete absence of constitutional regulation of tribal prosecutions of nonmembers may be appealing to proponents of tribal sovereignty, that result would be inconsistent with the concerns about constitutionally unregulated governmental authority that the Court expressed in cases such as *Oliphant*, *Duro*, and *Boumediene*. Meanwhile, as this Article has shown, the inherent authority framework has difficulty explaining the treatment of state exercises of federally delegated criminal jurisdiction in Indian country as state, rather than federal, action for constitutional purposes.[258]

At the other extreme, a second possible approach would be to deem the entire Bill of Rights applicable to all congressionally authorized prosecutions by tribal or territorial governments. On this view, it would simply be impermissible, as a matter of constitutional law, to allow constitutionally unregulated criminal prosecution within the sovereign territory of the United States. As delegates of Congress's "plenary" power over the territories, territorial governments would be bound by criminal procedure requirements of the Bill of Rights, just as the federal government is. Similarly, Congress would be barred from exercising its plenary power over Indian tribes to authorize prosecutions by tribal governments that violate constitutional norms (except perhaps when tribal membership provides a robust consent basis for following unusual procedures).[259]

This view would take the Court's recent decisions to their logical limit. In effect, it would extend to Indian country and the territories the trend toward homogenization of constitutional norms reflected in Supreme Court decisions from recent decades holding that the

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validly restores inherent tribal jurisdiction, so that these two statutes present parallel constitutional questions with respect to criminal procedure. As indicated at the end of this subsection, the framework for resolving criminal procedure questions advocated here might in fact strengthen the case for the *Oliphant* fix's constitutionality.

258. See supra notes 205–209 and accompanying text (discussing conceptual difficulty of reaching this conclusion where federal statutes delegate criminal jurisdiction to states).

259. For an argument that the Bill of Rights should apply fully in tribal courts because "Congress has engaged in a course of legislative conduct with respect to Indian nations and Indian tribes that has resulted in the complete defeasance of retained tribal power and retained sovereignty," see James A. Poore III, The Constitution of the United States Applies to Indian Tribes, 59 Mont. L. Rev. 51, 53 (1998). A half-century ago, some courts took the view that at least some courts were effectively federal instrumentalities for constitutional purposes. See, e.g., Colliflower v. Garland, 342 F.2d 369, 379 (9th Cir. 1965) (concluding in some circumstances "courts function in part as a federal agency and in part as a tribal agency, and that consequently it is competent for a federal court in a habeas corpus proceeding to inquire into the legality of the detention of an Indian pursuant to an order of an Indian court"). The Supreme Court repudiated this position in *United States v. Wheeler*, which held that tribes' criminal jurisdiction is an attribute of retained inherent sovereignty. 435 U.S. 313, 323–24 (1978).

Fourteenth Amendment Due Process Clause imposes on states nearly all requirements of the Bill of Rights (which directly applies only to the federal government).[260] Some scholars have criticized this approach to the Fourteenth Amendment, arguing that it reflects a failure of imagination that has unduly constrained states' flexibility to experiment with alternative procedures.[261] Whatever the merits of this view with respect to states—a question beyond the scope of this Article—there may be distinct, and particularly compelling, normative reasons to accommodate different procedural traditions in the tribal and territorial contexts. The territories, after all, are not even permanently joined to the United States, and Indian tribes possess a sovereignty that long predates the Constitution. Furthermore, both sets of communities have traditions distinct from Anglo-American norms. Adherence to these distinct norms may be important not only to the cultural identity of these communities, but also to the public legitimacy of tribal and territorial prosecutions in the affected communities.[262]

It is worth considering, therefore, whether any intermediate course is possible. Could a sound constitutional analysis preserve room for accommodation of local procedural traditions while also maintaining adequate constitutional regulation of tribal and territorial prosecutions? In fact, as the following discussion will argue, an approach that allows limited deviations from Bill of Rights requirements to accommodate local traditions has both normative appeal and substantial support in the case law to date, particularly if state, tribal, and territorial contexts are considered in parallel.

1. *Federal-State Analogies.* — The federal-state context provides a useful starting point for the analysis. Historic case law regarding Fourteenth Amendment due process provides one model for accommodating distinct procedural traditions of tribal or territorial communities. The Supreme Court today favors near-complete incorporation of Bill of

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260. See supra notes 201–203 and accompanying text; infra note 263 and accompanying text.

261. See, e.g., Tracey L. Meares, What's Wrong with *Gideon*, 70 U. Chi. L. Rev. 215, 216 (2003) (highlighting costs of Court's shift toward focus "on the individual offender and his relationship to the Bill of Rights, often to the exclusion of the public's perception of the fairness of the criminal justice system's operation"); see also infra note 305 (discussing experimentation with jury nonunanimity permitted by Supreme Court decision).

262. See, e.g., Raymond D. Austin, Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance 109 (2009) (explaining that although "Navajo culture accords individual rights and freedoms great respect," the "Navajo perception of individual rights differs dramatically from the Anglo-American view of these rights"); Carole E. Goldberg, Individual Rights and Tribal Revitalization, 35 Ariz. St. L.J. 889, 901 (2003) [hereinafter Goldberg, Tribal Revitalization] (discussing arguments that imposition of an "alien culture of rights" on Indian tribes may "undermine[] tribal social organization and value systems").

Rights requirements into Fourteenth Amendment due process.[263] But in older cases such as *Palko v. Connecticut*, the Court applied the Fourteenth Amendment Due Process Clause more flexibly, evaluating each particular requirement of the Bill of Rights on its own merits and applying it to states only if the Court believed that "a fair and enlightened system of justice would be impossible without [it]."[264] Despite their later repudiation, cases from the *Palko*-era show that a less automatic approach to applying federal constitutional requirements in local prosecutions is at least conceptually possible.

Indeed, outside the criminal context, context-specific judgments about procedural requirements are the norm. Under the familiar *Mathews v. Eldridge* balancing test, the process due in a particular proceeding depends on weighing the "private interest that will be affected by the official action," the "risk of an erroneous deprivation of such interest through the procedures used," and "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[265] This approach may well yield different procedural requirements in different tribunals.[266] By the same token, a *Palko*-like approach to due process might yield different procedures for tribal and territorial courts than for federal and state courts.

A second line of cases might provide a more concrete framework for evaluating particular tribal and territorial practices. In decisions addressing the so-called "reverse-*Erie*" problem—the question of when federal (rather than state) procedures should attend the adjudication of federal substantive claims in state court[267]—the Supreme Court has held that federal law typically "'takes state courts as it finds them.'"[268] In other words, state procedures are presumptively adequate for the adjudication of federal claims, even when those procedures depart from constitutional requirements that would apply in federal court. At the same time, the Court has held in a handful of cases that state courts are obliged to apply federal procedures, either because those procedures are "'part and par-

263. See McDonald v. City of Chicago, 130 S. Ct. 3020, 3034–35 nn.12–13 (2010) (reviewing Court's incorporation decisions).

264. Palko v. Connecticut, 302 U.S. 319, 325 (1937), overruled by Benton v. Maryland, 395 U.S. 784 (1969).

265. 424 U.S. 319, 335 (1976).

266. See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507, 532–33 (2004) (plurality opinion) (applying *Mathews* balancing test to procedures for military detention of enemy combatants).

267. The doctrine of these cases is referred to as "reverse-*Erie*" because the question it addresses—when federal procedures apply in state court—is in some sense the reverse of the question of when state substantive law applies in federal court, which was famously addressed in Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

268. E.g., Johnson v. Fankell, 520 U.S. 911, 919 (1997) (quoting Howelett v. Rose, 496 U.S. 356, 372 (1990)).

cel'" of the federal substantive right being adjudicated,[269] or because the state procedures would unnecessarily burden federal rights or produce systematic differences in outcome in similar cases adjudicated in state rather than federal court.[270]

In a compelling recent distillation of the case law in this area, Kevin Clermont argues that reverse-*Erie* cases are best explained as balancing state and federal interests and forum-shopping concerns to determine whether state or federal procedural law should apply.[271] According to this view, courts considering a reverse-*Erie* question must "balance the state's interest in having its legal rule applied in state court on this issue in this case against the federal interests in having federal law displace the rule of this particular state, while trying to avoid differences in outcome."[272]

Tribal or territorial court adjudication of tribal or territorial criminal offenses is of course distinguishable in many respects from the reverse-*Erie* situation.[273] But tribal and territorial court adjudication does parallel the reverse-*Erie* problem in that both situations involve questions about the adequacy of local, rather than federal, procedures for adjudication of claims or offenses pursuant to a federal grant of jurisdiction. Accordingly, the reverse-*Erie* balancing test might provide a principled framework for considering whether to accommodate tribal or territorial procedural norms that depart from Bill of Rights requirements. Here, given that the federal interests at stake are the individual liberty interests protected by the Bill of Rights, this framework yields a balancing standard reminiscent of the general *Mathews v. Eldridge* test for procedural due process. Specifically, the test would weigh individual liberty interests against the tribal or territorial community's interest in maintaining its traditional procedure, with a particular emphasis on avoiding systematic differences in outcome or the fundamental fairness of proceedings.

As will be demonstrated, lower courts already employ a similar balancing analysis to assess both tribal and territorial procedures in certain contexts.[274] Furthermore, the reverse-*Erie* balance might explain the

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269. Dice v. Akron, 342 U.S. 359, 363 (1952) (quoting Bailey v. Cent. Vt. Ry. Co., 319 U.S. 350, 354 (1943)).

270. See, e.g., Felder v. Casey, 487 U.S. 131, 138 (1988) (finding state notice-of-claim rule preempted because it "will frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court").

271. Kevin M. Clermont, Reverse-*Erie*, 82 Notre Dame L. Rev. 1, 33 (2006).

272. Id.

273. For example, tribal or territorial court adjudication involves trial of a local offense, whereas the reverse-*Erie* problem arises from state court adjudication of a federal claim. Also, state courts are presumptively adequate for adjudication of federal claims, whereas tribal and territorial courts are not. See, e.g., Nevada v. Hicks, 533 U.S. 353, 366–67 (2001) (discussing "historical and constitutional assumption of concurrent state-court jurisdiction over federal-law cases" and distinguishing tribal courts).

274. See infra notes 288–298 (discussing D.C. and Ninth Circuit decisions adopting balancing approach to tribal and territorial procedures).

inapplicability of unincorporated elements of the Bill of Rights in state prosecutions pursuant to a federal delegation of criminal jurisdiction in Indian country. Such prosecutions, too, present a rough analogy to the reverse-*Erie* problem insofar as they require adjudication in state court of criminal prohibitions imposed pursuant to a federal grant of jurisdiction. But the state interest in adhering to usual state procedures is especially compelling given that state substantive law is being enforced. Hence, the interests served by requiring grand jury indictment, for example, might seem slight compared to the disruption caused by departing from usual state charging practices, and there would appear to be little risk of a systematic difference in outcomes if such state procedures were followed. Likewise, while it might present a closer question, requiring jury unanimity where states do not otherwise require it might not be sufficiently beneficial to defendants, or produce a sufficiently likely difference in outcome, to justify the disruption to usual state procedure that such a requirement in Indian country cases would cause.

Insofar as a balancing standard may help explain the otherwise mysterious pattern of results in state prosecutions in Indian country, this standard may provide an important backdrop for examination of the more challenging questions presented by territorial and tribal contexts.

2. *Territorial Criminal Jurisdiction.* — Whereas the federal-state context today presents the choice between two ready-made sets of procedural rights—the full Bill of Rights or the slightly smaller set of rights incorporated into Fourteenth Amendment due process—the territorial context presents the question of whether any broader procedural variation is possible in the territories. Nevertheless, the framework suggested by *Palko*, *Mathews v. Eldridge*, and the reverse-*Erie* cases might provide a model for accommodating local criminal procedure traditions in the territorial setting in a principled fashion.

In *Boumediene*, as discussed above, the Court interpreted the *Insular Cases* to require a pragmatic, context-dependent approach to extraterritorial application of the Constitution.[275] Such a context-specific analysis of the territorial setting should begin with recognition that territorial criminal jurisdiction presents a problem of dividing sovereignty. As discussed above, territorial governments today provide a form of substitute federalism for territorial communities. That is, while formally exercising congressionally delegated federal power, local territorial governments are by and large locally elected and locally controlled and address local governmental needs, subject to overarching federal law, much like state governments.[276]

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275. See supra notes 173–178 and accompanying text (discussing reasoning and holding of *Boumediene*).

276. See supra notes 130–134 and accompanying text (describing territorial self-governance).

From this perspective, although extraterritoriality provides the doctrinal justification for departing from federal constitutional requirements in the territorial context, framing the doctrine in such terms only distracts from the practical interests at stake. Much like states, the major unincorporated territories at this point are effectively part of the United States; at the least, they are subject to complete U.S. sovereignty unless and until Congress, at its discretion, provides statehood or independence (whether through a plebiscite or some other means).

The situation in the territories thus differs in important ways from other contexts where questions regarding the "extraterritorial" application of the Constitution have arisen. Unlike in overseas military bases, war zones, or even Guantanamo Bay, there is no foreign state that can claim sovereignty in U.S. territories, nor any diplomatic context or limitations on U.S. authority that may make compliance with constitutional procedural guarantees impracticable. Indeed, for these very reasons, critics have long argued that the imperfect application of constitutional guarantees in the territories under the *Insular Cases* is a discriminatory anomaly ripe for overruling.[277] At the same time, however, unincorporated territories may hold uniquely compelling claims to maintaining cultural and political norms that depart from federal constitutional requirements. The United States could relinquish sovereignty over these territories (even if for the moment it appears unlikely to do so). In most cases, local populations never consented to U.S. sovereignty, and territorial populations lack effective representation in the federal government (even U.S. citizens domiciled in insular territories cannot vote in presidential elections or for voting members of Congress[278]). Even some critics of the *Insular Cases* have therefore found it normatively attractive to preserve some local traditions that conflict with usual constitutional requirements.[279]

Federal-state analogues may therefore provide a more fruitful basis than other extraterritorial contexts for considering what criminal procedure guarantees apply in the territories. The federal government itself may of course enforce federal criminal laws in the territories, just as it does in states. When it does so, given the long duration of federal control over the current U.S. territories, there would seem to be no persuasive

277. See, e.g., Juan R. Torruella, The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal 268 (1985) (noting "all the underpinnings of the *Insular Cases* have been removed").

278. See supra note 17.

279. Dean Aleinikoff, for example, argues that a "thorough repudiation" of the *Insular Cases* would, given their "provenance," "mark the triumph of constitutionalism over racism," yet he also observes that "[t]here is an important difference between denying rights to a people based on assumptions of their inferiority and taking into account in the definition of rights the considered judgments of a people interested in preserving their political and cultural distinctiveness." Aleinikoff, supra note 36, at 84–85.

justification for deeming Bill of Rights requirements inapplicable. Indeed, apart from the unusual use of grand juries in the USVI described above,[280] normal federal criminal procedures generally are applicable in federal prosecutions in the major territories.[281] Enforcement of local territorial law by local territorial authorities, however, implicates considerations of local procedural autonomy similar to those that arise when Congress confers criminal jurisdiction on states.

Indeed, territorial governments exercising federally conferred criminal jurisdiction closely resemble state governments exercising federally derived criminal jurisdiction. Though formally all sovereignty over unincorporated territories is vested in Congress under the Territory Clause, organic legislation enabling democratic territorial self-governance resembles legislation removing statutory or constitutional preemption of local law in the federal-state context.[282] Much like legislation relaxing the dormant Commerce Clause or authorizing state criminal jurisdiction in Indian country,[283] these acts of Congress relax the restrictions that U.S. sovereignty places on local self-governance; such statutes, in other words, permit the territorial population to exercise governmental authority that would otherwise fall to Congress.

Accordingly, it makes sense to apply the same framework in the territorial context that the reverse-*Erie* cases suggest may apply in related federal-state contexts: a weighing of individual liberty interests against local autonomy interests, with a particular emphasis on avoiding systematic differences in outcome or the fundamental fairness of proceedings based on whether a defendant happens to be prosecuted by territorial authorities (who exercise federal power indirectly) or by the federal government itself (which exercises federal power directly).

Such an approach is consistent with *Boumediene*'s treatment of the *Insular Cases*. In *Boumediene*, the Court emphasized accommodation of civil law traditions as the rationale for the *Insular Cases*[284]—a view that seems to recognize the presence of a contrary indigenous tradition as the sole reason for departing from usual constitutional norms in the territo-

280. See supra notes 160–162 and accompanying text (explaining grand jury indictments are optional for federal crimes charged in USVI federal court); infra notes 307–308 and accompanying text (discussing disuse of grand jury indictments for criminal charges in USVI).

281. See supra note 145 (describing bill of rights in Guam and USVI).

282. See supra notes 120–125 and accompanying text (discussing Congress's plenary authority to select territory's form of government under Territory Clause).

283. See supra notes 191–195 and accompanying text (discussing dormant Commerce Clause and federal legislation that confers state jurisdiction over crimes in Indian country).

284. See Boumediene v. Bush, 553 U.S. 723, 726, 757 (2008) ("[T]he former Spanish colonies operated under a civil-law system . . . . The Court thus was reluctant to risk the uncertainty . . . that could result from a rule that displaced . . . existing legal systems in these newly acquired Territories.").

rial setting. Furthermore, as Judge José Cabranes has observed, avoidance of "irreparable injustice" has often been an important factor in cases addressing the extraterritorial applicability of constitutional rights.[285] Hence, for example, Justice Harlan concluded in *Reid* that greater procedural protections should be afforded to capital defendants than to noncapital defendants,[286] and in *Boumediene* the Court ensured the availability of habeas relief in part as a means of mitigating, in Judge Cabranes's words, the "risk of indefinite erroneous detention at the military base at Guantanamo Bay."[287] By the same token, in the territorial setting, the likely impact of a procedural variation on trial outcomes and fundamental fairness should be an important factor in the analysis.

Lower court decisions from the decades before *Boumediene*, though not entirely consistent in their approach, support such an emphasis on protecting individual liberty while also accommodating cultural and political autonomy. In *King v. Morton*, a case that addressed the necessity of jury trials in American Samoa, the D.C. Circuit mandated a context-specific inquiry similar to the one Justice Harlan proposed in his concurring opinion in *Reid*.[288] Rejecting the view that the *Insular Cases* established that jury rights are nonfundamental and therefore are simply optional in unincorporated territories, the court held that the "importance of the constitutional right at stake" necessitated an analysis based on "a solid understanding of the present legal and cultural development of American Samoa."[289] The court therefore remanded the case for a factual inquiry into such factors as

> whether the Samoan mores and *matai* culture with its strict societal distinctions will accommodate a jury system in which a defendant is tried before his peers; whether a jury in Samoa could fairly determine the facts of a case in accordance with the instructions of the court without being unduly influenced by customs and traditions of which the criminal law takes no notice; and whether the implementation of a jury system would be practicable.[290]

On remand, the district court conducted extensive factfinding on cultural and political conditions in American Samoa and concluded that

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285. See José A. Cabranes, Our Imperial Criminal Procedure: Problems in the Extraterritorial Application of U.S. Constitutional Law, 118 Yale L.J. 1660, 1704–06 (2009) (discussing case law demonstrating "[c]onstraints set forth by the Constitution on the power of the government are more likely to be enforced when the risk of irreparable injustice is high").

286. Reid v. Covert, 354 U.S. 1, 77 (1957) (Harlan, J., concurring).

287. Cabranes, supra note 285, at 1705 (discussing *Boumediene*).

288. See King v. Morton, 520 F.2d 1140, 1147 (D.C. Cir. 1975) ("[T]he question is whether in American Samoa 'circumstances are such that trial by jury would be impractical and anomalous.'" (quoting *Reid*, 354 U.S. at 75 (1957) (Harlan, J., concurring))).

289. Id.

290. Id.

jury trials would not be "impractical and anomalous" under the circumstances.[291]

Several years later, in *Northern Mariana Islands v. Atalig*, the Ninth Circuit rejected a similar challenge to the limited availability of criminal jury trials in CNMI without requiring or attempting any such extensive factfinding.[292] In the Ninth Circuit's view, *Reid* required no change to the "fundamental rights" analysis of the *Insular Cases*.[293] The court considered itself bound by the holding in those cases "that the Fifth Amendment right to grand jury indictment and the Sixth Amendment right to trial by jury are nonfundamental rights that do not apply in unincorporated territories."[294] And while the court, like the district and circuit courts in the *King* litigation, emphasized cultural autonomy as the proper rationale for procedural flexibility in the territories, it deferred to Congress's judgment that the context in CNMI made jury trial inappropriate. The court explained:

> The *Insular Cases* acknowledged that traditional Anglo-American procedures such as jury trial might be inappropriate in territories having cultures, traditions and institutions different from our own . . . . This approach allowed the Court to afford Congress flexibility in administering offshore territories and to avoid imposition of the jury system on peoples unaccustomed to common law traditions.[295]

If usual Fifth and Sixth Amendment standards applied inflexibly in such territories, the Ninth Circuit observed, "[a]ccomodation of the particular social and cultural conditions of areas such as the NMI would be difficult if not impossible."[296]

In a later decision, the Ninth Circuit characterized the D.C. Circuit's approach in *King v. Morton* as "consistent with the principles we stressed in *Atalig*" and invoked *King*'s application of Justice Harlan's "impractical and anomalous" test as a basis for upholding ancestry-based restrictions on land ownership in CNMI that almost certainly would violate constitutional equal protection requirements as applied on the mainland.[297] Even in applying this test, however, the court did not require specific factfinding regarding the cultural context but instead took judicial notice

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291. King v. Andrus, 452 F. Supp. 11, 17 (D.D.C. 1977).

292. 723 F.2d 682, 690–91 (9th Cir. 1984).

293. See id. at 689 & n.22, 690 n.25 ("[W]e believe that . . . *Reid* [did] not modify the holding of the *Insular Cases* concerning trial by jury.").

294. Id. at 688.

295. Id. at 690.

296. Id.

297. See Wabol v. Villacrusis, 958 F.2d 1450, 1461–62 (9th Cir. 1992) (noting while argument that restrictive covenant failed to be narrowly tailored "would have substantial force in an equal protection analysis . . . it is of only minimal relevance to the threshold question of the validity of the Congressional waiver of equal protection restraints in [CNMI's restrictive covenants]").

that "native ownership of land" plays a "vital role . . . in the preservation of NMI social and cultural stability" and emphasized that acceptance of these ownership restrictions was critical to the formation of the political union between CNMI and the United States.[298]

The Ninth and D.C. Circuits thus conflict over whether the *Insular Cases* simply make optional "nonfundamental" rights such as the right to jury trial or instead require a context-specific inquiry into the practicability of implementing the right in a particular territory. Yet both courts anticipated *Boumediene* in recognizing cultural autonomy as the sole persuasive rationale for the *Insular Cases* doctrine, as applied in the territorial setting. After *Boumediene*, the correct approach should fall between the Ninth and D.C. Circuit approaches. While *Boumediene* resolves the split between these courts in favor of a context-specific inquiry, its emphasis on accommodation of civil law traditions as the rationale for the *Insular Cases* supports assigning greater weight to the territorial preference for preserving indigenous procedural traditions than the D.C. Circuit did.[299] The proper inquiry, in other words, should not be simply whether implementation of particular rights would be feasible under the circumstances. Courts, rather, should focus on whether the benefit of the right to individual liberty is sufficiently substantial to justify the disruption of traditional procedural institutions and, relatedly, whether territorial institutions are sufficiently fair that the denial of the right will not produce systematically different outcomes in individual cases.[300]

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298. Id. at 1461.

299. See, e.g., United States v. Christian, 660 F.2d 892, 898 (3d Cir. 1981) (describing *Insular Cases* as "reason[ing] that the United States, in acquiring [unincorporated] possessions, did not intend to supplant indigenous procedural rules which had developed to enforce local substantive norms"); cf. Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 339 n.6 (1986) ("A rigid rule of deference to interpretations of Puerto Rico law by Puerto Rico courts is particularly appropriate given the unique cultural and legal history of Puerto Rico.").

300. Cf. Aleinikoff, supra note 36, at 87 (arguing courts reviewing territorial practices "ought to examine the centrality of the challenged practice to the particular values of self-determination and cultural autonomy being asserted, against the backdrop of evolving norms of international human rights"); Laughlin, Territories and Affiliated Jurisdictions, supra note 16, at 165–81 (advocating understanding of "impractical or anomalous" test under which "the importance of a particular right to the individual before the court" and "the impact on indigenous culture" are important factors); Gerald L. Neuman, Understanding Global Due Process, 23 Geo. Immigr. L.J. 365, 392 (2009) (suggesting "impracticable or anomalous" test might depend in part on whether "a right [is] culturally anomalous because of its incongruity with local customs").

Robert Katz proposed, before *Boumediene*, that the split in approach between the Ninth and D.C. Circuits could be explained by the different "legitimizing principles" available in the two territories at issue: Because American Samoa lacks an organized territorial government and thus formally remains subject to governance by the Secretary of the Interior, Katz suggested, U.S. authority could best be legitimated there on a theory of "liberal constitutionalism," under which U.S. authority is legitimated by strict adherence to constitutional norms and the rule of law, whereas in CNMI, which accepted U.S. sover-

This understanding of *Insular Cases* doctrine would place CNMI's unusual jury practice on solid constitutional footing. As *Boumediene* recognized, the heightened autonomy interests of unincorporated territories may justify broader procedural flexibility for territorial courts than state courts.[301] The case for such variation seems particularly strong with respect to CNMI, which accepted U.S. sovereignty through a democratic process and insisted on local control over jury rights in territorial prosecutions as a precondition for its union with the United States.[302] Even in the federal-state context, in *Duncan v. Louisiana*—a seminal decision incorporating Sixth Amendment jury trial rights into the Fourteenth Amendment Due Process Clause—the Supreme Court recognized that a procedural system without jury trials may be fundamentally fair.[303] Provided that CNMI courts otherwise fit that description, it seems reasonable to suppose that the local interest in maintaining traditional non-jury forms of criminal justice might outweigh the interests supporting adherence to Sixth Amendment jury-trial requirements in territorial prosecutions.[304]

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eignty through a democratic process, deference to CNMI's democratic preference for trial without juries better legitimated U.S. rule. Robert A. Katz, Note, The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories, 59 U. Chi. L. Rev. 779 (1992). Katz, therefore, proposed either leaving the circuit split in place or formally recognizing a differential approach based on different legitimating principles appropriate in each territory. Id. at 803–04. Katz's proposal overlooks the facts that American Samoa's jury practice was also evidently supported by democratic preferences, as the district court recognized in King v. Andrus, 452 F. Supp. 11 (D.D.C. 1977), and that judicial imposition of alien norms may only add insult to injury in a territory already subject to federal executive branch control.

301. Boumediene v. Bush, 553 U.S. 723, 757 (2008).

302. See supra notes 152–155 and accompanying text (explaining there is no right to jury trial in all criminal prosecutions in CNMI).

303. 391 U.S. 145, 150 n.14 (1968) ("A criminal process which was fair and equitable but used no juries is easy to imagine.").

304. Some have argued that CNMI, because it accepted U.S. sovereignty through a "covenant" with the United States, is not a "territory" at all but is instead linked to the United States only by treaty. See, e.g., Joseph E. Horey, The Right of Self-Government in the Commonwealth of the Northern Mariana Islands, 4 Asian-Pac. L. & Pol'y J. 180, 203–05 (2003) (arguing formation of covenant was exercise of federal government's authority to enter treaties, not Congress's power under Territory Clause). This view is arguably inconsistent with the covenant's plain terms and has been questioned by other scholars. Even if valid, however, it would only strengthen the conclusion that CNMI's jury procedures satisfy any applicable requirements of the U.S. Constitution. See 48 U.S.C. § 1801 note (2006) (Covenant To Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America § 101) (establishing commonwealth "in political union with and under the sovereignty of the United States of America"); Laughlin, Territories and Affiliated Jurisdictions, supra note 16, at 432–35 (describing covenant's own Supremacy Clause "which mentions the Covenant first 'together with those provisions of the Constitution, treaties and laws of the United States applicable to the Northern Mariana Islands' as the supreme laws" of the islands); Burnett, Convenient Constitution, supra note 6, at 1037 n.216 (discussing split opinion on whether CNMI is unincorporated territory of United States or separate sovereign associated with United

Viewing the issue in these terms also helps to rationalize Congress's general practice of extending to the territories by statute only those constitutional criminal procedure rights applicable to the states through the Fourteenth Amendment. Given that territorial governments, unlike states, formally exercise federal power conferred by Congress, the Fourteenth Amendment is not directly applicable to them. Nevertheless, the Supreme Court's judgment that certain rights are not crucial even for state criminal justice systems lends support to the view that those same rights can also be dispensed with in the territorial context.[305] Perhaps for that reason, the Supreme Court has suggested cryptically in several cases that Fourteenth Amendment standards, rather than the Bill of Rights, may be the proper constitutional baseline for assessing territorial governments' actions.[306]

States via mutually binding covenant); cf. Keitner & Reisman, supra note 152, at 42 (characterizing United States authority over CNMI as falling "somewhere in-between" treaty-based authority and plenary control).

305. Justice Powell's concurrence in the companion cases *Apodaca* and *Johnson*, which was crucial to the Court's holding that the Fourteenth Amendment permits nonunanimous jury verdicts in state courts (because the Court produced no majority opinion), employed a balancing standard of sorts. Powell's concurrence indicated that rigid application of all Sixth Amendment requirements to the states would "derogate[] principles of federalism that are basic to our system [of justice]," because states should have "freedom to experiment with adjudicatory processes different from the federal model." Apodaca v. Oregon, 406 U.S. 404, 414 (1972) (Powell, J., concurring); Johnson v. Louisiana, 406 U.S. 356, 375 (1972) (Powell, J., concurring). Christina Duffy Burnett has pointed to Justice Powell's opinion as a model for proper application of the Constitution in the territories (and in extraterritorial contexts generally). See Burnett, Convenient Constitution, supra note 6, at 1028–30 ("Powell's more flexible approach . . . closely anchors itself in the constitutional text and in doctrinal developments that provide more substantial guidance to courts than a generalized notion of fairness . . . could ever do."). Burnett argues that the Constitution should be flexible with respect to "how" it applies outside the fifty states and District of Columbia but not as to "whether" it does so. Id. at 978, 1031–32. This distinction seems partially semantic—questions of "how" the Constitution applies in particular contexts (for example, does it apply so as to require jury unanimity?) can be recast in terms of "whether" particular guarantees are applicable (for example, is there a right to jury unanimity?). But her basic approach of allowing limited exceptions to usual constitutional requirements seems similar to the approach advocated here in the territorial context. Cf. id. at 1037–39 (analyzing equal protection questions presented by landholding restrictions in CNMI).

306. See, e.g., Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 600–02 (1976); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668 n.5 (1974). In these cases, the Court reserved judgment as to whether certain constitutional rights applied to Puerto Rico by virtue of the Fifth or the Fourteenth Amendments. Given the federal character of territorial authority and the Fourteenth Amendment's express applicability only to "States," the suggestion that the Fourteenth Amendment applies to the territories seems conceptually confused, except insofar as the Court meant to suggest that Fourteenth Amendment standards provide a proper baseline to apply to local territorial governance under the *Insular Cases* because territorial governments are functionally comparable to states. For critical analysis of these statements, see Laughlin, Cultural Preservation, supra note 18.

On the other hand, a balancing approach may make the optional character of grand jury indictment for federal offenses in federal court in the USVI difficult to justify. While local tradition might explain the absence of any provision for grand jury indictments for local territorial offenses prosecuted in local courts, Congress's provision that federal offenses (and certain territorial offenses) may be charged by grand jury indictment in federal courts in the USVI if the government so chooses seems to indicate that such indictment would be feasible, at least in federal court.[307] The disuniformity in procedure for federal defendants charged in the USVI or on the mainland thus seems questionable.[308]

In sum, while the *Insular Cases* established a troubled doctrine rooted in an outdated imperialist logic, this doctrine, as recharacterized in *Boumediene*,[309] can provide a basis for affording local territorial governments a procedural flexibility analogous to that enjoyed by states exercising federally conferred criminal jurisdiction. Though formally distinct because of the congressional origins of all territorial power under the Constitution, these situations are functionally parallel: In both contexts, local procedural autonomy supports allowing limited departures from constitutional requirements applicable to the federal government that do not appear systematically significant with respect to trial outcomes or the fundamental fairness of proceedings. Indeed, consistent with the Ninth Circuit's tolerance of incomplete jury rights in CNMI,[310] the greater autonomy interest of territories to which the United States has made only an incomplete commitment may justify even greater departures from the Bill of Rights than have been tolerated for states under the Fourteenth Amendment.

3. *Tribal Criminal Jurisdiction.* — Tribal courts present the most difficult context for applying a balancing approach to criminal procedure rights. Although Congress has extended many constitutional requirements to tribal criminal proceedings by statute, the Indian Civil Rights Act generally does not fully extend the right to appointed counsel, nor does it ensure that tribal juries include nonmembers of the prosecuting tribe, even if the defendant is a nonmember (though it does require that the jury venire include a fair cross-section of the community in any prosecution of non-Indians under the new *Oliphant* fix).[311] While the Supreme Court has deemed such procedural departures permissible in prosecutions of tribal members, it has done so on the theory that tribal

307. 48 U.S.C. § 1561 (2006).

308. Cf. Joycelyn Hewlett, The Virgin Islands: Grand Jury Denied, 35 How. L.J. 263, 283 (1992) (advocating requirement of grand jury indictments for USVI).

309. See Boumediene v. Bush, 553 U.S. 723, 756–58 (2008).

310. See Northern Mariana Islands v. Atalig, 723 F.3d 682, 690 (9th Cir. 1984) (upholding limited jury trial rights in CNMI); see also supra notes 152–155 and accompanying text (discussing limited nature of these rights).

311. 25 U.S.C. § 1302 (Supp. V 2012); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904 (to be codified at 25 U.S.C. § 1304(d)(3)).

members have consented to tribal court jurisdiction by maintaining enrollment in the tribe.[312] The Court thus has left open the question of whether procedural variations from Bill of Rights requirements violate due process in prosecutions of nonmembers.[313]

Lara's holding that tribal criminal jurisdiction over nonmembers under the *Duro* fix is inherent for double jeopardy purposes might by itself answer the due process question.[314] On this view, since Congress has characterized the tribal authority exercised under the *Duro* and *Oliphant* fixes as inherent and not delegated, the Constitution is inapplicable in prosecutions conducted pursuant to these jurisdictional grants. Only tribal law and congressional enactments determine criminal procedure rights in tribal courts.[315]

Either of two theories, however, could support the application of constitutional due process restrictions to tribal prosecutions of nonmembers. First, the Court might conclude that tribal authority always has constitutional dimensions, given the background authorization or acquiescence required for its exercise, but constitutional restrictions on its exercise are suspended in the case of members due to their presumptive consent to traditional tribal procedures. This view arguably would contradict *Talton*, in which the Court reasoned that "the existence of the right in Congress to regulate the manner in which the local powers of [Indian tribes] shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States."[316] But it might also draw support from *Duro*'s suggestion,[317] reiterated in one recent civil case,[318] that consent provides the sole basis for tribal jurisdiction.

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312. Duro v. Reina, 495 U.S. 676, 693 (1990).

313. The few lower court decisions addressing the issue have avoided resolving it by disposing of the case on other grounds. See, e.g., Means v. Navajo Nation, 432 F.3d 924, 935 (9th Cir. 2005) (declining to resolve whether due process requires appointment of counsel in tribal prosecutions because tribe that conducted prosecution afforded right to appointed counsel).

314. See supra Part I.D (citing *Lara* as example of how applicability of structural and procedural requirements of Constitution may turn on distinction between inherent and delegated authority).

315. For an argument in support of this position, see Eric Wolpin, Note, Answering *Lara*'s Call: May Congress Place Nonmember Indians Within Tribal Jurisdiction Without Running Afoul of Equal Protection or Due Process Requirements?, 8 U. Pa. J. Const. L. 1071, 1097 (2006) ("In *Lara*, the Court made clear that the authority for tribal prosecution was not federal power, but tribal sovereignty.").

316. Talton v. Mayes, 163 U.S. 376, 384 (1896). Scholars also have noted that the Court's consent-based view of tribal jurisdiction is anomalous because presence within a sovereign's territory is normally considered sufficient for criminal jurisdiction. See, e.g., Frickey, Exceptionalism, supra note 6, at 479 ("When I set foot in Alaska, the law presumes my consent to Alaska's jurisdiction, regardless of the presence or absence of actual consent.").

317. *Duro*, 495 U.S. at 693.

A second, more plausible view would hold that the need for congressional reauthorization of tribal authority over nonmembers following *Duro* and *Oliphant* brings tribal actions pursuant to that authorization within the ambit of constitutional constraints on federal action. In *Duro*, the Court concluded that tribal exercise of criminal jurisdiction over nonmember Indians was inconsistent with explicit or implicit limitations placed on tribal sovereignty by Congress. *Lara* recognized Congress's authority to relax those limitations and restore tribal authority, but the Constitution may limit what criminal procedures Congress can allow when it restores lapsed criminal jurisdiction of tribal governments. In other words, when it passes legislation like the *Duro* and *Oliphant* fixes, Congress might be considered responsible for the tribes' exercise of jurisdiction to a degree that it was not when the tribe originally exercised that power, before the implicit divestiture detected by the Court in *Duro* and *Oliphant*.

Such a doctrinal conclusion, however controversial among scholars and advocates of tribal sovereignty,[319] would appear more consistent with the concerns about extraconstitutional authority animating the Court's recent cases than would a theory deeming such tribal prosecution constitutionally unregulated under *Talton*. Realistically, even *Lara*'s double jeopardy holding appears fragile. Two members of the *Lara* Court's 5–4 majority, Chief Justice Rehnquist and Justice O'Connor, have since left the Court. Moreover, by leaving open the due process question, the Court has left room for the embrace of a version of the position espoused by Justice Kennedy in his *Lara* concurrence—that the Due Process Clause, and perhaps also structural guarantees of the Constitution, preclude any conferral of criminal jurisdiction over nonmembers on "a sovereignty outside the basic structure of the Constitution."[320] A recent civil decision seems to point in that direction. In *Plains Commerce Bank v. Long Family Land & Cattle Co.*, the Court, per Chief Justice Roberts, suggested that even tribal inherent jurisdiction over civil disputes required "commensurate consent" on the part of the defendant, in part because "[t]he Bill of Rights does not apply to Indian

318. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 337 (2008) (requiring "commensurate consent" for tribal civil jurisdiction over nonmember).

319. Some have argued that requiring native communities to respect individual rights in any form may involve imposition of an alien, individualistic Western culture. See, e.g., Robert B. Porter, Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies, 28 Colum. Hum. Rts. L. Rev. 235, 278 (1997) (arguing American legal system, unlike tribal culture, is based upon individualistic principles). The case for requiring protections for individual rights would seem to be at its strongest, however, when a tribe seeks to impose criminal penalties on a nonmember. For a nuanced discussion of these issues, see Goldberg, Tribal Revitalization, supra note 262 (addressing numerous viewpoints on injection of Anglo-American "individualistic" law into Indian tribal proceedings and discussing potential issues that may arise and how they would affect tribal revitalization efforts).

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

tribes."[321] For proponents of tribal sovereignty, therefore, it is worth considering whether drawing the Court away from the inherent authority framework and toward a more pragmatic approach may be critical to upholding tribal jurisdiction.

As this Article has argued, even when state courts exercise federally conferred jurisdiction, a balancing test may explain which guarantees of the U.S. Constitution apply.[322] At the same time, while territorial courts exercise only federally delegated power, the Constitution applies incompletely to their proceedings, and, as this Article has argued, a balancing standard may govern the application of criminal procedure rights there as well.[323] Moreover, in the tribal context, not only did *Lara* hold open the possibility that tribal-inherent jurisdiction may be subject to due process limitations, but *Talton* itself indicated that some unspecified category of "general provisions of the Constitution of the United States" may apply to tribal government action.[324]

To the extent that courts accept this analysis, the state and, especially, territorial precedents discussed above may provide a model for balancing these competing interests in the tribal context. Here, too, autonomy interests of the tribe might support allowing prosecution in accordance with traditional procedures of the particular prosecuting tribe, but only insofar as the accommodation of the tribe's procedural tradition does not unduly burden the individual interests underlying an asserted procedural right. Moreover, here too, courts might assess the effect on individual rights by seeking in particular to avoid procedural discrepancies that appear likely to have systematic effects on trial outcomes or the fundamental fairness of proceedings.

In fact, some lower courts already use a version of this test in applying the due process protections extended to tribal courts by statute under the Indian Civil Rights Act. The Ninth Circuit, for example, held that "[w]here the tribal court procedures under scrutiny differ significantly from those commonly employed in Anglo-Saxon society, courts weigh the individual right to fair treatment against the magnitude of the tribal interest in employing those procedures to determine whether the procedures pass muster under [ICRA's due process provisions]."[325] Similarly, tribal courts, which, because of the limitations on federal court review

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321. 554 U.S. at 337.

322. See supra Part II.C.1.

323. See supra Part II.C.2.

324. Talton v. Mayes, 163 U.S. 376, 384 (1896); see also Eric Cheyfitz, The Colonial Double Bind: Sovereignty and Civil Rights in Indian Country, 5 U. Pa. J. Const. L. 223, 225–26 (2003) (questioning what provisions could be "if not, in significant part, a guarantee of certain individual civil rights").

325. Randall v. Yakima Nation Tribal Court, 841 F.2d 897, 900 (9th Cir. 1988) (alterations omitted) (citations omitted) (internal quotation marks omitted).

are the principal interpreters of the statute,[326] have understood ICRA to afford tribes flexibility to accommodate local traditions and practices, while nonetheless meaningfully constraining governmental action.[327] Analogous forms of balancing might be appropriate as a constitutional matter in balancing the interests at stake in tribal criminal prosecutions of nonmembers.

Although a full examination of the variety of criminal procedures applied in tribal courts is beyond the scope of this Article,[328] this standard would likely preserve space for at least some distinctive tribal procedures, while also constraining some widespread practices. Just as in the state and territorial contexts, there would seem to be no compelling reason to require grand jury indictment in tribal courts (as *Talton* squarely held[329]). There also seem to be grounds to allow substantial variation from federal jury practice, provided resulting procedures remain systematically fair; at a minimum, allowing tribes the same flexibility as states with respect to jury size and verdict unanimity seems appropriate. Rights of confrontation might also be an area where some flexibility with respect to doctrinal particulars should be permissible, at least insofar as tribes' historical traditions depart significantly from the Anglo-American historical practices on which the Court has based its recent holdings that all "testimonial" evidence is admissible only if subject to full cross-examination.[330] There might similarly be room to

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326. See supra note 85 and accompanying text (discussing limited federal court review of tribal court decisions).

327. See Mark D. Rosen, Multiple Authoritative Interpreters of Quasi-Constitutional Law: Tribal Courts and The Indian Civil Rights Act, 69 Fordham L. Rev. 479, 487–88 (2000) (noting while "[t]ribal courts have the authority to construe ICRA provisions in light of tribal needs, values, customs, and traditions," this "does not mean that tribal governments can do whatever they please within Indian country").

328. For a general discussion of tribal criminal procedures, see, e.g., Carrie E. Garrow & Sarah Deer, Tribal Criminal Law and Procedure 201–352 (2004). For surveys of tribal court ICRA rulings, see Austin, supra note 262, at 124–31 (discussing Navajo court decisions on criminal procedure rights); McCarthy, supra note 75, at 467–68 (1998) (discussing sample of cases from thirty-year period); Nell Jessup Newton, Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts, 22 Am. Indian L. Rev. 285, 290–91 (1997) (discussing sample of eighty-five tribal court decisions); Rosen, Evaluating, supra note 75 (surveying published tribal court opinions from thirteen-year period); Christian M. Freitag, Note, Putting *Martinez* to the Test: Tribal Court Disposition of Due Process, 72 Ind. L.J. 831, 832–33 (1997) (surveying due process cases across tribes). For arguments that at least some tribal courts are fundamentally fair to nonmembers, see, e.g., Bethany R. Berger, Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems, 37 Ariz. St. L.J. 1047, 1094 (2005) (discussing Navajo courts). But see Rosen, Evaluating, supra note 75, at 319–23 (noting issue as one of potential concern).

329. 163 U.S. at 384.

330. Compare Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2542 (2009) (applying Confrontation Clause to exclude affidavits by lab analysts), and Crawford v. Washington, 541 U.S. 36, 68 (2004) (interpreting Confrontation Clause to exclude "testimonial" evidence), with Colville Confederated Tribes v. Marchand, 33 I.L.R. 6036 (Confederated Tribes of Colville Reservation Tribal Ct. 2006) (declining for this reason to

adapt Fourth Amendment standards to account for culturally specific notions of what searches and seizures are reasonable.[331]

On the other hand, exclusion of nonmembers from jury service in prosecutions under the *Duro* fix would seem to pose difficult questions of fundamental fairness. In federal and state court, jury representativeness is ensured by the Sixth Amendment's "fair cross section" requirement, which precludes systematic exclusion of any "distinctive" group in the community from the jury venire.[332] Representativeness is also guaranteed by equal protection limitations on the government's opportunity to exclude members of the defendant's race from the jury through peremptory strikes.[333] Except in domestic violence prosecutions of non-Indians under the new *Oliphant* fix, however, ICRA does not incorporate the Sixth Amendment language requiring an "impartial jury" on which the fair cross section requirement is based.[334] Some tribal courts appear to have deemed requirements relating to jury representativeness inapplicable to their juries, in part because of questions regarding tribes' authority to compel nonmembers' attendance as jurors.[335] But while some accommodation of tribal circumstances may be appropriate with respect to precise doctrinal requirements of the fair cross section rule, complete absence of nonmembers from juries in prosecutions of nonmembers raises serious concerns of systematic bias that should be constitutionally regulated.[336]

Similarly, the practice of allowing incarceration for up to a year without affording appointed counsel might appear difficult to sustain, given the fundamental importance of the assistance of counsel in ensuring fairness in proceedings of any complexity. Some tribal courts appear to have adopted alternative procedural protections in an effort to ensure

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automatically adopt *Crawford*).

331. See, e.g., Goldberg, Tribal Revitalization, supra note 262, at 914–15 (discussing Hopi decision treating police stop based on family members' concern about elder's absence as permissible "welfare check" rather than unlawful search and seizure).

332. See, e.g., Holland v. Illinois, 493 U.S. 474, 480 (1990) (confirming fair cross section is required by "impartial jury" guarantee); Duren v. Missouri, 439 U.S. 357, 363–64 (1979) (describing elements of fair cross section violation).

333. See Batson v. Kentucky, 476 U.S. 79, 96–97 (1986) (holding prosecutor's actions at voir dire can raise inference of impermissible discriminatory use of preemptory strikes), modified by Powers v. Ohio, 499 U.S. 400 (1991).

334. 25 U.S.C. § 1302 (2006).

335. See Rosen, Evaluating, supra note 75, at 320 (arguing decisions excluding nonmembers from juries were necessary and reasonable).

336. Cf. Washburn, American Indians, supra note 221, at 747–64 (discussing constitutional concerns with underrepresentation of Native Americans on federal juries trying Indian country cases). In practice, some tribes include nonmembers on juries. See, e.g., Plains Commerce Bank v. Long Family Land & Cattle Co., 491 F.3d 878, 892 (8th Cir. 2007) (noting party's failure to exercise opportunity under tribal code to request summoning of non-Indians to serve on jury), rev'd on other grounds, 554 U.S. 316 (2008).

fairness for defendants not represented by counsel,[337] but it is questionable whether any such substitute protections can prevent systematic outcome effects.[338]

Consistent with the framework proposed above with respect to the necessity of federal executive control and double jeopardy, an approach that applies constitutional requirements while seeking accommodation of tribal practices would make it unnecessary to analyze whether tribal authority is inherent or delegated. Instead, insofar as tribal criminal jurisdiction over offenses against tribal law is permissible, a balancing framework should govern the applicability of particular procedural rights in any particular tribe's courts. This approach would harmonize federal Indian law with related state and territorial contexts, preserving tribal distinctiveness while also preserving fundamental constitutional guarantees. In doing so, it might lend support to the permissibility of tribal jurisdiction in the first place.

CONCLUSION

Structural and procedural constitutional questions presented by tribal and territorial criminal jurisdiction, this Article has argued, amount to problems of dividing sovereignty—of deciding whether governmental actions should be treated as local or federal for constitutional purposes. That is so because tribal or territorial prosecution always depends on governmental decisions at two separate levels of government. On the one hand, the longstanding judicial gloss on the Constitution's sparse text on tribes and territories supports allowing these communities substantial self-governance, and in practice local tribal and territorial governments decide for themselves whether to prosecute particular cases within their jurisdiction. On the other hand, under the entrenched doctrine of federal plenary power over tribes and territories, the federal government always bears some constitutional responsibility for the actions of tribal and territorial governments, if only because Congress could have chosen to bar the jurisdiction exercised by tribal or territorial authorities.

This Article has attempted to show that viewing the issues in these terms, and recognizing the important parallels among tribal, territorial, and certain federal-state contexts, may clarify the analysis of three central questions that have arisen as a result of the Supreme Court's recent decisions in these areas. First, the divided sovereignty framework supports allowing tribal and territorial authorities to continue to enforce tribal

337. See Rosen, Evaluating, supra note 75, at 311–12 (discussing claims of waived right to counsel and ineffective assistance of counsel in tribal courts).

338. For an argument against requiring appointed counsel in tribal court, see Vincent C. Milani, Note, The Right to Counsel in Native American Tribal Courts: Tribal Sovereignty and Congressional Control, 31 Am. Crim. L. Rev. 1279, 1291–99 (1994) (arguing tribal sovereignty, differences among tribes, and insufficient funding militate against requiring appointed counsel).

and territorial criminal laws without direct federal supervision. Second, the framework supports allowing both tribal and territorial governments to prosecute offenders without regard to whether the federal government has also punished those offenders for the same offense. And finally, the framework supports allowing limited accommodation of tribal and territorial procedures that depart from Bill of Rights requirements in federal or state court.

The framework may well have other applications. For instance, it may shed light on related questions in the civil context. But the analysis presented here also shows how considering tribal and territorial contexts may illuminate constitutional questions in the more familiar federal-state setting. For example, as this Article has shown, the longstanding acceptance of tribal and territorial self-governance powerfully reinforces the view that receiving authority from a federal statute is not enough, by itself, to make someone an "Officer of the United States" who must be appointed by the President or other senior federal officials under the Appointments Clause. Similarly, tribal and territorial examples help to highlight what is at stake in the Supreme Court's "separate sovereigns" approach to double jeopardy questions. Those examples may also underscore the significance for communal autonomy of the homogenization of criminal procedure accomplished at the federal and state levels by the Supreme Court's turn toward complete incorporation of the Bill of Rights in the Fourteenth Amendment. More broadly, considering tribal and territorial communities and their unique claims to autonomous self-governance may help sharpen our perspective on the basic problem of dividing sovereignty that is always at the heart of questions of federalism.

SELECTED BIBLIOGRAPHY

Aleinikoff, T. Alexander, Semblances of Sovereignty: The Constitution, the State, and American Citizenship (2002).

Amar, Akhil Reed & Jonathan L. Marcus, Double Jeopardy Law After Rodney King, 95 Colum. L. Rev. 1 (1995).

Austin, Raymond D., Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance (2009).

Berger, Bethany R., Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems, 37 Ariz. St. L.J. 1047 (2005).

Burnett, Christina Duffy, A Convenient Constitution? Extraterritoriality After *Boumediene*, 109 Colum. L. Rev. 973 (2009).

Burnett, Christina Duffy, A Note on the *Insular Cases*, *in* Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution 389 (Christina Duffy Burnett & Burke Marshall eds., 2001).

Burnett, Christina Duffy, *Untied* States: American Expansion and Territorial Deannexation, 72 U. Chi. L. Rev. 797 (2005).

Cabranes, José A., Our Imperial Criminal Procedure: Problems in the Extraterritorial Application of U.S. Constitutional Law, 118 Yale L.J. 1660 (2009).

Cheyfitz, Eric, The Colonial Double Bind: Sovereignty and Civil Rights in Indian Country, 5 U. Pa. J. Const. L. 223 (2003).

Clanton, Adam C., How To Transfer Venue When You Only Have One: The Problem of High Profile Criminal Jury Trials in American Samoa, 29 U. Haw. L. Rev. 325 (2007).

Clermont, Kevin M., Reverse-*Erie*, 82 Notre Dame L. Rev. 1 (2006).

Cleveland, Sarah H., Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs, 81 Tex. L. Rev. 1 (2002).

Clinton, Robert N., There Is No Federal Supremacy Clause for Indian Tribes, 34 Ariz. St. L.J. 113 (2002).

Clinton, Robert N., et al., American Indian Law: Native Nations and the Federal System (5th ed. 2007).

Cohen's Handbook of Federal Indian Law (Nell Jessup Newton & Robert T. Anderson eds., 2012).

Collins, Richard B., Implied Limitations on the Jurisdiction of Indian Tribes, 54 Wash. L. Rev. 479 (1979).

The Constitutional Separation of Powers Between the President and Cong., 20 Op. O.L.C. 124 (1996).

Dep't of Justice Views on the Proposed Constitution of the Fifth Constitutional Convention of the U.S.V.I., 34 Op. O.L.C. 1 (2010), available at www.justice.gov/olc/2010/usvi-doj-view-ltr100223.pdf.

Ennis, Samuel E., Note, Reaffirming Indian Tribal Court Criminal Jurisdiction over Non-Indians: An Argument for a Statutory Abrogation of *Oliphant*, 57 UCLA L. Rev. 553 (2009).

Fletcher, Matthew L.M., The Supreme Court and Federal Indian Policy, 85 Neb. L. Rev. 121 (2006).

Freitag, Christian M., Note, Putting *Martinez* to the Test: Tribal Court Disposition of Due Process, 72 Ind. L.J. 831 (1997).

Frickey, Philip P., (Native) American Exceptionalism in Federal Public Law, 119 Harv. L. Rev. 433 (2005).

Frickey, Philip P., A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers, 109 Yale L.J. 1 (1999).

Garrow, Carrie E. & Sarah Deer, Tribal Criminal Law and Procedure (2004).

Getches, David H., Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law, 84 Calif. L. Rev. 1573 (1996).

Goldberg, Carole E., Individual Rights and Tribal Revitalization, 35 Ariz. St. L.J. 889 (2003).

Hewlett, Joycelyn, The Virgin Islands: Grand Jury Denied, 35 How. L.J. 263 (1992).

Horey, Joseph E., The Right of Self-Government in the Commonwealth of the Northern Mariana Islands, 4 Asian-Pac. L. & Pol'y J. 180 (2003).

Katz, Robert A., Note, The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories, 59 U. Chi. L. Rev. 779 (1992).

Keitner, Chimene I. & W. Michael Reisman, Free Association: The United States Experience, 39 Tex. Int'l L.J. 1 (2003).

Krakoff, Sarah, A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation, 83 Or. L. Rev. 1109 (2004).

Krakoff, Sarah, The Renaissance of Tribal Sovereignty, the Negative Doctrinal Feedback Loop, and the Rise of a New Exceptionalism, 119 Harv. L. Rev. F. 47 (2005).

Laughlin, Jr., Stanley K., Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional, 27 U. Haw. L. Rev. 331 (2005).

Laughlin, Jr., Stanley K., The Law of United States Territories and Affiliated Jurisdictions (1995).

Lawson, Gary, Territorial Governments and the Limits of Formalism, 78 Calif. L. Rev. 853 (1990).

Lawson, Gary & Guy Seidman, The Constitution of Empire: Territorial Expansion and American Legal History (2004).

Leibowitz, Arnold H., Defining Status: A Comprehensive Analysis of United States Territorial Relations (1989).

Leonhard, M. Brent, Closing a Gap in Indian Country Justice: *Oliphant*, *Lara*, and DOJ's Proposed Fix, 28 Harv. J. on Racial & Ethnic Just. 117 (2012).

Malavet, Pedro A., The Inconvenience of a "Constitution [That] Follows the Flag . . . But Doesn't Quite Catch Up With It": From *Downes v. Bidwell* to *Boumediene v. Bush*, 80 Miss. L.J. 181 (2010).

McCarthy, Robert J., Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years, 34 Idaho L. Rev. 465 (1998).

Merriam, Jesse, A Clarification of the Constitution's Application Abroad: Making the "Impracticable and Anomalous" Standard More Practicable and Less Anomalous, 21 Wm. & Mary Bill Rts. J. 171 (2012).

Milani, Vincent C., Note, The Right to Counsel in Native American Tribal Courts: Tribal Sovereignty and Congressional Control, 31 Am. Crim. L. Rev. 1279 (1994).

Monette, Richard A., 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).

Monge, Jose Trias, Injustice According to Law: The *Insular Cases* and Other Oddities, *in* Foreign in a Domestic Sense: Puerto Rico,

American Expansion, and the Constitution 226 (Christina Duffy Burnett & Burke Marshall eds., 2001).

Neuman, Gerald L., Anomalous Zones, 48 Stan. L. Rev. 1197 (1996).

Neuman, Gerald L., The Extraterritorial Constitution After *Boumediene v. Bush*, 82 S. Cal. L. Rev. 259 (2009).

Neuman, Gerald L., Understanding Global Due Process, 23 Geo. Immigr. L.J. 365 (2009).

Newton, Nell Jessup, Federal Power over Indians: Its Sources, Scope, and Limitations, 132 U. Pa. L. Rev. 195 (1984).

Perez, Lisa Maria, Note, Citizenship Denied: The *Insular Cases* and the Fourteenth Amendment, 94 Va. L. Rev. 1029 (2008).

Pommersheim, Frank, At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty, 55 San Diego L. Rev. 48 (2010).

Pommersheim, Frank, Broken Landscape: Indians, Indian Tribes, and the Constitution (2009).

Pommersheim, Frank, Is There a (Little or Not So Little) Constitutional Crisis Developing in Indian Law?: A Brief Essay, 5 U. Pa. J. Const. L. 271 (2003).

Pommersheim, Frank, *Lara*: A Constitutional Crisis in Indian Law?, 28 Am. Indian L. Rev. 299 (2004).

Poore III, James A., The Constitution of the United States Applies to Indian Tribes, 59 Mont. L. Rev. 51 (1998).

Porter, Robert B., Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies, 28 Colum. Hum. Rts. L. Rev. 235 (1997).

Prakash, Saikrishna, Against Tribal Fungibility, 89 Cornell L. Rev. 1069 (2004).

Raustiala, Kal, Does the Constitution Follow the Flag?: The Evolution of Territoriality in American Law (2009).

Report by the President's Task Force on Puerto Rico's Status (2011), available at www.whitehouse.gov/sites/default/files/uploads/Puerto_Rico_Task_Force_Report.pdf.

Riley, Angela R., Indians and Guns, 100 Geo. L.J. 1675 (2012).

Riley, Angela R., (Tribal) Sovereignty and Illiberalism, 95 Calif. L. Rev. 799 (2007).

Rosen, Mark D., Evaluating Tribal Courts' Interpretations of the Indian Civil Rights Act, *in* The Indian Civil Rights Act at Forty 275 (Kristen A. Carpenter et al. eds., 2012).

Rosen, Mark D., Multiple Authoritative Interpreters of Quasi-Constitutional Law: Tribal Courts and the Indian Civil Rights Act, 69 Fordham L. Rev. 479 (2000).

Skibine, Alex Tallchief, Redefining the Status of Indian Tribes Within "Our Federalism": Beyond the Dependency Paradigm, 38 Conn. L. Rev. 667 (2006).

Skibine, Alex Tallchief, *United States v. Lara*, Indian Tribes, and the Dialectic of Incorporation, 40 Tulsa L. Rev. 47 (2004).

Sparrow, Bartholomew H., The *Insular Cases* and the Emergence of American Empire (2006).

Tebben, Carol, An American Trifederalism Based upon the Constitutional Status of Tribal Nations, 5 U. Pa. J. Const. L. 318 (2003).

Torruella, Juan R., The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal (1985).

Tua, Uilisone Falemanu, A Native's Call for Justice: The Call for the Establishment of a Federal District Court in American Samoa, 11 Asian-Pac. L. & Pol'y J. 246 (2009).

Vicens, Elizabeth, Note, Application of the Federal Death Penalty Act to Puerto Rico: A New Test for the Locally Inapplicable Standard, 80 N.Y.U. L. Rev. 350 (2005).

Washburn, Kevin K., American Indians, Crime, and the Law, 104 Mich. L. Rev. 709 (2006).

Washburn, Kevin K., Federal Criminal Law and Tribal Self-Determination, 84 N.C. L. Rev. 779 (2006).

Wilkinson, Charles, Blood Struggle: The Rise of Modern Indian Nations (2005).

Wolpin, Eric, Note, Answering *Lara*'s Call: May Congress Place Nonmember Indians Within Tribal Jurisdiction Without Running Afoul of Equal Protection or Due Process Requirements?, 8 U. Pa. J. Const. L. 1071 (2006).