THE RIGHT TO PROTEST IN INDIAN COUNTRY

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From April 2016 until February 2017, thousands of people gathered along the Cannonball River on the border of the Standing Rock Sioux Reservation to protest the construction of the Dakota Access Pipeline. In response, state officials tried to close down roads leading to the Reservation, considered legislation that would immunize drivers who struck protesters with vehicles, and arrested hundreds of peaceful demonstrators. The #NoDAPL protests built upon a legacy of resistance by Indigenous communities against the actions of the United States. While the history of Indigenous resistance predates the nation's founding, the power to police protest activities on tribal lands has changed markedly.

This Symposium Piece considers the right to protest in Indian country. It confronts the framework that apportions regulatory and adjudicatory power over protest activity occurring on tribal land and suggests that such regulation ought to be left entirely to the tribal sovereign. Alternatively, it argues that state regulation of protest activity in Indian country is an infringement on tribal governments' right to make their own laws or is otherwise preempted by overwhelming tribal and federal interests. This Piece further recognizes that while the United States could impose regulations on protest activity, there are strong prudential factors that suggest it should defer regulation to the tribal sovereign. By subjecting the right to protest in Indian country solely to regulations imposed by tribal government, the United States would be respecting tribal sovereignty.

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INTRODUCTION

> The Lakota people believe that the mere existence of a crude oil pipeline under the waters of Lake Oahe will desecrate those waters and render them unsuitable for use in their religious sacraments . . . . The Lakota people believe that the pipeline correlates with a terrible Black Snake prophesied to come into the Lakota homeland and cause destruction . . . . The Lakota believe that the very existence of the Black Snake under their sacred waters in Lake Oahe will unbalance and desecrate the water and render it impossible for the Lakota to use that water in their Inipi ceremony.[1]

With the rise of oil extraction in the Bakken formation, the United States decided to reduce truck and train traffic across the prairie regions by building a pipeline.[2] To move oil from western North Dakota to the Patoka Oil Terminal in Illinois, the pipeline would have to cross the Missouri River.[3] The U.S. Army Corps of Engineers considered several routes, including one which crossed just ten miles north of Bismarck, the North Dakota state capital.[4] This route was rejected due to the threat to Bismarck's water supply, should the pipeline rupture upstream from the city.[5] The Army Corps "did not show similar concern for the Tribe's water source when they approved the route that went directly under Lake Oahe on the Missouri River, which is the Standing Rock Sioux Tribe's main source of water for drinking, irrigation, and business uses."[6] The Dakota Access Pipeline was ultimately built just five hundred feet north of the Reservation's boundary and on the Tribe's ancestral lands.[7]

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1. Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 239 F. Supp. 3d 77, 82 (D.D.C. 2017) (quoting Intervenor-Plaintiff Cheyenne River Sioux Tribe's Motion for Preliminary Injunction at 2–3, *Standing Rock Sioux Tribe*, 239 F. Supp. 3d 77 (No. 1:16-cv-1534-JEB), 2017 WL 1454128).

2. Devashree Saha, Five Things to Know About the North Dakota Access Pipeline Debate, Brookings Inst. (Sept. 14, 2016), https://www.brookings.edu/articles/five-things-to-know-about-the-north-dakota-access-pipeline-debate/ [https://perma.cc/WR6M-GPU5] (discussing how "the project is expected to create more markets and reduce truck and oil train traffic—the latter of which has been a growing concern after a spate of fiery derailments of a train carrying North Dakota crude").

3. See Lauren P. Phillips, Killing the Black Snake: The Dakota Access Pipeline's Fate Post-*Sierra Club v. FERC*, 30 Geo. Env't L. Rev. 731, 734 (2018) (discussing the possible routes for the pipeline along the Missouri River).

4. Carla F. Fredericks, Mark Meaney, Nicholas Pelosi & Kate R. Finn, Social Costs and Material Loss: The Dakota Access Pipeline, 22 N.Y.U. J. Legis. & Pub. Pol'y 563, 569 (2020).

5. See id. (citing "proximity to wellhead source water protection areas" as one of several reasons for eliminating this route).

6. Id. (footnote omitted).

7. See Marianne Engelman Lado & Kenneth Rumelt, Pipeline Struggles: Case Studies in Ground Up Lawyering, 45 Harv. Env't L. Rev. 377, 439 (2021) ("[I]t's unfortunate that this nation continues to treat our tribe and tribal nations around this country in this manner.

The response was swift. Beginning in late summer 2016, thousands of people began gathering on the northern boundary of the Standing Rock Indian[8] Tribe's reservation.[9] Many called themselves "water protectors," connecting their protest to the threat the pipeline posed to the Tribe's survival and to the disruption of "significant sites of tribal cultural, religious, and spiritual importance . . . located along the proposed route."[10] These #NoDAPL protesters eventually built a camp on tribal land and contributed an on-the-ground presence objecting to the construction of the pipeline until the camps were ordered to be dismantled due to a heightened risk of flooding in early 2017.[11]

We have every right to protest this pipeline. We have indigenous lands, we have ancestral lands, we have treaty lands. The pipeline is 500 feet from our reservation." (alteration in original) (quoting Despite Impending Deadline, Standing Rock Protesters Vow to Stay, PBS News Hour (Dec. 2, 2016), https://www.pbs.org/newshour/show/despite-impending-deadline-standing-rock-protesters-vow-stay (on file with the *Columbia Law Review*))).

8. The author recognizes that the word "Indian" has a number of problematic and even overtly racist connotations. Its use in this Symposium Piece is as a legal term of art. This Piece uses the term "Indian" instead of "Native" or "Indigenous" only when it is necessary to refer to persons who are enrolled members of federally recognized tribes. For example, Native Hawaiians are Indigenous, but they are not Indians. Rebecca Tsosie, Engaging the Spirit of Racial Healing Within Critical Race Theory: An Exercise in Transformative Thought, 11 Mich. J. Race & L. 21, 42 (2005). The term "Indian" is regularly used in federal law (e.g., Title 25 of the U.S. Code is the Title dealing with "Indians"), and it is used in the Constitution's Commerce Clause to contradistinguish "Indian [t]ribes" from fellow sovereigns "[s]tates" and "foreign [n]ations." U.S. Const. art. I, § 8, cl. 3. The term is used to codify the definition of "Indian country" at 18 U.S.C. § 1151 and is used to determine which tribes share in a government-to-government relationship through the Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-454, 108 Stat. 4791. For a discussion of how the term "Indian" is more problematic in other contexts, see H. Patrick Glenn, Legal Traditions of the World 60 n.1 (5th ed. 2014).

The author further recognizes there is divided guidance on the capitalization of the term "Indian country." The Bureau of Indian Affairs suggests always capitalizing the term. See Editorial Guide, Bureau of Indian Affs., https://www.bia.gov/guide/editorial-guide [https://perma.cc/7KXD-RP9U] (last visited Feb. 7, 2025). But the author has chosen to use the National Congress of American Indians' style preference, which capitalizes the term "Indian Country" when referring to "a general description of Native spaces and places within the United States" but not when referring to the legal term of art defined in the U.S. Code. NCAI Response to Usage of the Term, "Indian Country", Nat'l Cong. of Am. Indians (Dec. 27, 2019), https://www.ncai.org/news/ncai-response-to-usage-of-the-term-indian-country [https://perma.cc/5ZMD-4TXQ].

9. Elizabeth Ann Kronk Warner, Environmental Justice: A Necessary Lens to Effectively View Environmental Threats to Indigenous Survival, 26 Transnat'l L. & Contemp. Probs. 343, 355 (2017).

10. Id.

11. Id. at 356 ("[C]iting environmental and safety concerns associated with an increased likelihood of flooding, the State of North Dakota ordered the camps evacuated and closed.").

The #NoDAPL protests drew national attention.[12] The response from North Dakota was disconcerting. The state legislature considered legislation that "would make it legal for drivers to run over protesters who are standing in a roadway, clearing drivers of any liability, as long as their action was 'unintentional.'"[13] Two years later, South Dakota enacted a ban on "riot-boosting" aimed at "Native Americans, state farmers and ranchers, and residents of nearby states who opposed" the Keystone XL pipeline.[14] The law imposed a sentence of up to twenty-five years in prison and additional fines and civil penalties, but it was ultimately blocked by a federal judge.[15]

The Water Protectors, camping along the northern boundary of the Standing Rock Sioux Reservation, represent just the latest in a storied history of Indigenous protest and resistance. Indigenous peoples have protested against the acts of colonizers since the arrival of Europeans, with the stories of most of those protests lost to history.[16] As Chief Justice John Marshall explained in 1832: The Continental Congress "resolved 'that . . . securing and preserving the friendship of the Indian Nations appears to be a subject of the utmost moment to these colonies.'"[17]

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12. See, e.g., Mayra Cuevas, Sara Sidner & Darran Simon, Dakota Access Pipeline Protest Site Is Cleared, CNN, http://www.cnn.com/2017/02/22/us/dakota-access-pipeline-evacuation-order/ [https://perma.cc/M36E-J7SF] (last updated Feb. 23, 2017); Tom DiChristopher, Standing Rock Activists Dig in Ahead of Deadline to Clear Protest Camp, CNBC (Feb. 22, 2017), http://www.cnbc.com/2017/02/22/standing-rock-activists-dig-in-ahead-of-deadline-to-clear-protest-camp.html [https://perma.cc/CZ2K-VQA2].

13. Nina Agrawal, In North Dakota, It Could Become Legal to Hit a Protester With Your Car, L.A. Times (Feb. 3, 2017), https://www.latimes.com/nation/la-na-bills-protest-criminal-20170201-story.html (on file with the *Columbia Law Review*).

14. Andrew Malone & Vera Eidelman, The South Dakota Legislature Has Invented a New Legal Term to Target Pipeline Protesters, ACLU (Apr. 1, 2019), https://www.aclu.org/news/free-speech/south-dakota-legislature-has-invented-new-legal-term-target [https://perma.cc/PCH6-65NG] (internal quotation marks omitted) ("The law is written so broadly that even a tweet encouraging activists to '[j]oin a protest to stop the pipeline and give it all you've got!' could be interpreted as 'riot-boosting' should a fight break out at the protest.").

15. Id.

16. We know that protests by Indigenous people must have been common because, as *Cohen's Handbook of Federal Indian Law* explains, from the first days of the British colonies, the early American government "sought to forestall further Native anger by asserting greater centralized authority over Indian affairs." Cohen's Handbook of Federal Indian Law § 2.02 (2024). Officers were appointed to handle Indian affairs. "The importance of these offices is indicated by the fact that . . . Benjamin Franklin, Patrick Henry, and James Wilson" were elected commissioners of the middle department. Felix S. Cohen, Handbook of Federal Indian Law 9 (1942). Cohen tells us that there were many discussions involving these appointed commissioners, sometimes leading to "formal, written treaties with Native nations." Cohen's Handbook of Federal Indian Law, supra, § 2.03. The "first such treaty" was the 1778 Treaty with the Delaware (Lenape) Nation. Id.

17. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 549 (1832) (quoting 2 Journals of the Continental Congress 1774–1789, at 174 (Worthington Chauncey Ford ed., 1905)) (misquotation).

Protest by Native people against the United States has taken many forms, including legal challenges.[18] The first petition by an Indian tribe to reach the Supreme Court was *Cherokee Nation v. Georgia* in 1831.[19] The Cherokee Nation had a treaty with the United States, with lands clearly demarcated.[20] Georgia, claiming that the lands reserved by treaty were a part of the state, extended its criminal laws over the territory and criminally charged a Cherokee man, Corn Tassel, with violating Georgia law.[21] Corn Tassel was convicted and sentenced to death. Although the Supreme Court issued a stay of execution, Corn Tassel was hanged.[22] The Cherokee Nation retained William Wirt, one of the most notable Supreme Court advocates of the day, to represent its interests.[23] Although the Nation lost the case for lack of subject matter jurisdiction, it prevailed the following term, winning a judgment that held that the laws of Georgia do not extend to Indian lands.[24] Justice Stephen Breyer has described the case as follows:

> Wirt then found the case he was looking for. A New England missionary, Samuel A. Worcester, living in Cherokee territory had refused to sign Georgia's loyalty oath, and Georgia had jailed him. He could bring Worcester's case to the Supreme Court by way of appeal, and it was unlikely that Georgia would execute Worcester—a citizen of Vermont—before the Court could decide it. He did appeal. He pointed to the treaties and to Article VI of the Constitution, which makes treaties (along with the Constitution and federal laws) the "supreme Law of the Land." And, not surprisingly, he won the case—despite the unpopularity of the Indian tribes and the popularity of Georgia's position. The Court decided that the Cherokees owned the land; that Georgia

18. See Chronicles of American Indian Protest 110–14 (Council on Interracial Books for Children ed., 2d ed. 1979) (discussing how legal challenges and physical confrontation were both part of Cherokee protests against removal).

19. 30 U.S. (5 Pet.) 1 (1831).

20. See Gregory Ablavsky, "With the Indian Tribes": Race, Citizenship, and Original Constitutional Meanings, 70 Stan. L. Rev. 1025, 1056–57 (2018) (describing the Treaty of Hopewell and the Treaty of Holston as treaties with the Cherokee that considered jurisdiction and recognized territory belonging to the Tribe).

21. See Stephen Breyer, Making Our Democracy Work: The Yale Lectures, 120 Yale L.J. 1999, 2004 (2011) [hereinafter Breyer, Making Our Democracy Work] ("The State extended Georgia law over the Cherokee territory, invalidated Cherokee laws, and required that many of those living there sign loyalty oaths to Georgia.").

22. Id.

23. See id.

24. See id. The prevailing case is Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). For an additional academic discussion of the same story, see Barry Friedman, The History of the Countermajoritarian Difficulty: The Road to Judicial Supremacy (pt. 1), 73 N.Y.U. L. Rev. 333, 395–96 (1998).

> had no right to make laws there; and that Worcester must be freed.[25]

The *Worcester v. Georgia* opinion both culminated the first legal protest brought by a tribe in the Supreme Court of the United States and established the baseline principle that on tribal lands, the tribal sovereign—not the state—has the power to regulate conduct.[26] Worcester was a non-Indian protester.[27] Willing to work as a missionary without swearing an oath of allegiance to the State of Georgia, knowing that his continued presence in Cherokee lands was a violation of Georgia law,[28] he was willing to stand up for the rights of the Tribe against the power of the state.[29] Worcester's victory at the Court secured tribal sovereigns across the country the important recognition that when on tribal lands, even non-Indians are subject to the laws of the tribal sovereign to the exclusion of the regulatory power of the state.[30]

Protest by Indigenous people on tribal lands has been a feature of American history.[31] The #NoDAPL protesters were building on a rich tradition that developed during the civil rights era.[32] The American Indian

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25. Breyer, Making Our Democracy Work, supra note 21, at 2004 (footnotes omitted) (quoting U.S. Const. art. VI, cl. 2).

26. *Worcester*, 31 U.S. (6 Pet.) at 561–62 ("[T]he acts of Georgia . . . interfere forcibly with the relations established between the United States and the Cherokee nation . . . . They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia . . . .").

27. Sara E. Hill, Restoring Oklahoma: Justice and the Rule of Law Post-*McGirt*, 57 Tulsa L. Rev. 553, 560 (2022) (describing Worcester as "a non-Indian who lived and worked among the Cherokee people with their permission and the approval of the President").

28. See Sarah Deer & Mary Kathryn Nagle, Return to *Worcester*: *Dollar General* and the Restoration of Tribal Jurisdiction to Protect Native Women and Children, 41 Harv. J.L. & Gender 179, 207 (2018) (noting that most missionaries moved to Tennessee to continue their work after the passage of the Georgia law). Knowing that Georgia had criminalized Worcester's work, "he remained in New Echota, Cherokee Nation, where he preached the Gospel and assisted Elias Boudinot in the printing of the Cherokee Nation newspaper, the *Cherokee Phoenix*." Id.

29. See Eric Eisner, Comment, The Law-of-Nations Origins of the Marshall Trilogy, 133 Yale L.J. 998, 1007 (2024) (describing how the Governor of Georgia offered Worcester a pardon, but Worcester refused, willing to sit in jail and provide the test case necessary for the Cherokee Nation to bring its argument to the Supreme Court).

30. Philip P. Frickey, Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law, 107 Harv. L. Rev. 381, 395 (1993) [hereinafter Frickey, Marshalling Past and Present] (noting that the appropriateness of state and tribal regulatory power on tribal lands was squarely presented and decided in the *Worcester* opinion).

31. See generally Chronicles of American Indian Protest, supra note 18 (collecting primary source documents with annotation about the nature of Indigenous protest from the pre-revolutionary period through the civil rights era).

32. See Monica Krup, Note, "Riot Boosting": South Dakota's Integration of Environmental, Indigenous, and First Amendment Concerns and the Rhetoric on Protest, 22 Rutgers Race & L. Rev. 293, 317–22 (2021) (arguing that the rhetoric around protest can be used to influence legislation in ways that can preserve Indigenous rights).

Movement (AIM) featured prominently in the news cycle.[33] As "grass-roots protest shaped federal Indian policy by first placing and then keeping Native American concerns on the national agenda,"[34] AIM members physically occupied Alcatraz from 1969 to 1970, the Bureau of Indian Affairs building in Washington, D.C., in 1972, and the city of Wounded Knee, located on the Oglala Sioux Reservation, in 1973.[35] During the occupation of Wounded Knee, a seventy-one day standoff between approximately 250 protesters and "tribal law enforcement, U.S. marshals, the BIA police, and even U.S. military advisors" ended with an exchange of gunfire and deaths on both sides.[36]

This Symposium Piece builds upon a history of protest by Indigenous people and dozens of Supreme Court opinions on tribal jurisdiction to first make a legal claim and then a normative assertion about the power to regulate protests in Indian country. First, tribes have the exclusive power to regulate protest activity when it occurs in Indian country. This exercise of a tribe's inherent power applies even on land owned by the state or by nonmembers of the tribe if it occurs within the boundaries of an Indian reservation. Second, while a tribe's exercise of its inherent power to regulate these protests is not constrained by the U.S. Constitution, tribal governments should be scrupulous in the imposition of penalties for conduct which would otherwise be protected by federal law.

To justify these positions, this Piece proceeds in three Parts. Part I defines the places over which tribal regulatory authority is exclusive. It uses the contours of "Indian country"[37] to describe the legally defined spaces over which tribal exercise of their inherent regulatory power is greatest and makes clear that these spaces include land owned in fee simple by nonmembers when that land is within the reservation's boundaries.

Part II explores the inherent regulatory power of Indian tribes. It builds upon well-established Supreme Court precedent to justify why a

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33. See, e.g., Juan F. Perea, An Essay on the Iconic Status of the Civil Rights Movement and Its Unintended Consequences, 18 Va. J. Soc. Pol'y & L. 44, 54 (2010) ("This American-Indian movement intended to restore sovereignty to American-Indian nations, a sovereignty that had been under direct attack since around 1945."); Rita Lenane, Note, "It Doesn't Seem Very Fair, Because We Were Here First": Resolving the Sioux Nation Black Hills Land Dispute and the Potential for Restorative Justice to Facilitate Government-to-Government Negotiations, 16 Cardozo J. Conflict Resol. 651, 674–75 (2015) ("The Wounded Knee Standoff in 1973 is a good example of a way in which the Sioux Nation brought national attention to their anger and disillusionment with the status quo . . . .").

34. Dean J. Kotlowski, Alcatraz, Wounded Knee, and Beyond: The Nixon and Ford Administrations Respond to Native American Protest, 72 Pac. Hist. Rev. 201, 204 (2003).

35. See Brenda Jones Quick, Special Treatment Is Fair Treatment for America's Indigenous Peoples, 1997 Det. Coll. L. Mich. St. U. L. Rev. 783, 790–91.

36. Carole Goldberg, A Law of Their Own: Native Challenges to American Law, 25 Law & Soc. Inquiry 263, 268–69 (2000) (book review).

37. "Indian country" is a legal term of art defined at 18 U.S.C. § 1151 (2018). For additional context, see infra Part II.

tribe's inherent power to regulate protest activity exists throughout Indian country. Having established that such tribal power exists, it then uses the doctrines of infringement and preemption to explain why states lack concurrent regulatory authority, leaving the tribal sovereign as the sole authority to regulate protest activity in Indian country. Part II concludes with a discussion of federal power, recognizing that Congress could impose regulations regarding protest activity on tribal lands but suggesting that it will not do so both because of its stated commitment to protecting tribal sovereignty and because its recent legislative history has shown a reticence to impose new federal regulations on Indian tribes.

Part III turns to the tribal sovereign. It explains that tribal governments, unlike state or federal governments, are not bound by the U.S. Constitution—including its protections for freedom of speech, freedom of association, and the right to petition. Part III then looks at existing tribal regulation and enforcement of protest in Indian country, particularly against tribal members, and cautions tribes to be intentional with the punishment of conduct that would otherwise be federally protected.

I. PLACE MATTERS: THE SCOPE OF REGULATING PROTEST IN INDIAN COUNTRY

At the outset, it is critical to establish the boundaries between the places where a tribe exercises its inherent power to regulate protest from those places where state or federal rules apply. A tribe's inherent power is strongest when acting over its members or its territory.[38] Helpfully, there exists a federal definition that demarcates the extent of a tribe's jurisdictional authority. "Indian country" is a federal term of art that defines the physical spaces over which tribes can most readily assert their inherent powers.[39] Indian country includes:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running

38. United States v. Mazurie, 419 U.S. 544, 557 (1975) (recognizing that tribal sovereignty exists over both tribal members and tribal territory).

39. See White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980) (explaining that there is a "significant geographical component to tribal sovereignty"); Mattz v. Arnett, 412 U.S. 481, 498–99 (1973) (finding that tribal power extends to lands owned by non-Indians if still within the borders of the reservation). For an academic discussion of geography-based authority, see Allison M. Dussias, Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision, 55 U. Pitt. L. Rev. 1, 17–37 (1993); see also Kelsey v. Pope, 809 F.3d 849, 868 (6th Cir. 2016) (holding that a tribe's inherent powers extend outside of Indian country, at least when it comes to regulating members' conduct on lands owned by the tribe without restrictions on alienation); Grant Christensen, The Extraterritorial Reach of Tribal Court Criminal Jurisdiction, 46 Hastings Const. L.Q. 293, 305–10 (2019) (discussing the use of a tribe's inherent power outside of Indian country).

> through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.[40]

Although initially adopted to provide context for federal criminal laws[41] by defining the places where the federal government could prosecute Indians under the Major Crimes Act,[42] the definition is now used by courts[43] and by Congress[44] as an accepted geographic construct within which tribal sovereigns exercise their inherent regulatory and adjudicatory powers.

For purposes of regulating protest, tribes may regulate protest activity occurring on "all land within the limits of any Indian reservation"[45] even if that land is owned in fee by nonmembers or the state, and may further regulate activity occurring on "all Indian allotments"[46] even if the reservation was diminished. Indian country also includes all dependent Indian communities, which are otherwise outside of any Indian reservation, and which may exist not to provide services to a specific tribe, but to serve tribal members in general.[47] Although dependent Indian communities are

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40. 18 U.S.C. § 1151.

41. John Hayden Dossett, Indian Country and the Territory Clause: Washington's Promise at the Framing, 68 Am. U. L. Rev. 205, 267–70 (2018) (discussing the origin of the definition of "Indian country" and noting that while it is clear that it was originally part of defining criminal jurisdiction—since it was adopted along with a substantial revision to Title 18—its legislative history is limited).

42. 18 U.S.C. § 1153; see also Matthew L.M. Fletcher, The Supreme Court and Federal Indian Policy, 85 Neb. L. Rev. 121, 155 n.211 (2006) (discussing how Congress's enactment of the statutory definition of Indian country preempted state criminal law).

43. See, e.g., California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 n.5 (1987) ("This definition applies to questions of both criminal and civil jurisdiction." (citing DeCoteau v. Dist. Cnty. Ct., 420 U.S. 425, 427 & n.2 (1975))); Yankton Sioux Tribe v. Podhradsky, 606 F.3d 994, 1006 n.8 (8th Cir. 2010) ("Section 1151 was originally enacted to define criminal jurisdiction, but its definition of Indian country is widely recognized to apply to civil matters as well.").

44. Congress also regularly uses the definition of Indian country outside of the criminal law context. See 28 U.S.C. § 1738B (2018) (providing for the full faith and credit of tribal child support orders); 42 U.S.C. § 6945 (2018) (regulating entities with coal combustion residuals located in Indian country); 49 U.S.C. § 40128 (2018) (limiting the ability of commercial air tour operators to conduct flights over Indian country).

45. 18 U.S.C. § 1151(a).

46. Id. § 1151(c).

47. See, e.g., Nisqually Indian Tribe v. Gregoire, 623 F.3d 923, 927–28 (9th Cir. 2010) (describing "Frank's Landing," land held in trust by the United States for the benefit of three separate tribes, none of which had jurisdictional control over the territory, as part of Indian country because of its status as a dependent Indian community).

Indian country, they may be exempt from any one tribe's regulatory powers.[48]

A. *Indian Reservations and Allotments*

The tribal sovereign exercises its inherent authority to regulate protest activity by any person, regardless of tribal status, if it occurs within Indian country.[49] Indian country expressly includes all reservations and all Indian allotments.[50] A brief discussion of each is helpful for context, although regardless of whether an individual is protesting on an Indian reservation or an allotment, they are subject to tribal authority.

An Indian reservation broadly includes all of the land within its borders, irrespective of land ownership.[51] For some Indian reservations, virtually all of the land within its borders belongs to either the tribe or its members, or is held by the United States in trust for the tribe.[52] Other reservations were subject to a process of allotment, sometimes termed "checkerboarding," in which the federal government took reservation land controlled by the tribe and divided it into individual parcels.[53]

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48. See Rebecca Tsosie, Climate Change, Sustainability and Globalization: Charting the Future of Indigenous Environmental Self-Determination, 4 Env't & Energy L. & Pol'y J. 188, 222 (2009) (noting that "the Supreme Court has issued a restrictive definition of 'dependent Indian community,' which has impacted tribal claims to jurisdiction outside the reservation").

49. See infra Part III. Although there is some state concurrent authority over nonmembers of the tribe acting on non-Indian owned land within a reservation, state law related to protesting does not apply. The tribe's inherent power extends to protest activity due to its direct effect on the tribe's political integrity. See infra section III.A; see also Montana v. United States, 450 U.S. 544, 565 (1981) ("Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations . . . ."). The authority of the state to concurrently regulate is governed by the doctrine of Indian preemption. See infra section III.B.

50. 18 U.S.C. § 1151(a), (c).

51. See McGirt v. Oklahoma, 140 S. Ct. 2452, 2464 (2020) (holding that even non-Indian-owned land within the Muscogee (Creek) Reservation was Indian country). For a discussion of *McGirt*'s relevance to inherent tribal power, see Maggie Blackhawk, On Power and the Law: *McGirt v. Oklahoma*, 2020 Sup. Ct. Rev. 367, 392 (stating that *McGirt* "reaffirmed the power of the Muscogee (Creek) Nation to make law, execute it, and enforce it over the lands and peoples within its borders"); Elizabeth Reese, Welcome to the Maze: Race, Justice, and Jurisdiction in *McGirt v. Oklahoma*, 8/13/2020 U. Chi. L. Rev. Online 1, 1, https://lawreview.uchicago.edu/online-archive/welcome-maze-race-justice-and-jurisdiction-mcgirt-v-oklahoma [https://perma.cc/YMC3-6QGK] ("The law was clear: the Muscogee (Creek) Nation should win in *McGirt* because its reservation boundaries had never been clearly disestablished by Congress.").

52. See Adam Crepelle, The Reservation and the Rule of Law: A Short Primer on Indian Country's Complexity, 70 La. Bar J. 192, 193 (2022) ("Some reservations are contiguous and consist entirely of trust land.").

53. Taylor Graham, Note, Resolving Conflicts Between Tribal and State Regulatory Authority Over Water, 112 Calif. L. Rev. 625, 629–30 (2024) (describing the process of dividing Indian lands as "checkerboarding," and suggesting that the further division of tribal lands could be termed "double checkerboarding").

Through allotment all tribal members were then personally assigned unique parcels, and the federal government took the remaining lands to be sold as surplus.[54] Once removed from federal protection, whether patented in fee to a tribal member or opened under the surplus land program to non-Indian settlement, these lands were subject to state taxation.[55] Thousands of fee landowners subsequently lost their land for nonpayment of property taxes, resulting in the state becoming a property owner of land tracts located within Indian reservations.[56]

The process of allotment was different for each tribe.[57] Some federal laws allotting the reservation contained language of cession which, when coupled with an unequivocal commitment to pay for the lands taken, resulted in a reservation being diminished.[58] When the language of the allotment act was unclear, or there was no contemporaneous transmutation from land to money, reservations remained undiminished.[59] Like their unallotted cousins, today these undiminished reservations are contemplated by Congress to be Indian country pursuant to 18 U.S.C.

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54. See Solem v. Bartlett, 465 U.S. 463, 466–69 (1984) (discussing a brief history of the allotment process and the government's treatment of "surplus" lands); Philip P. Frickey, Domesticating Federal Indian Law, 81 Minn. L. Rev. 31, 45 n.63 (1996) ("Under allotment, 'surplus lands' on the reservation became available for non-Indian homesteading.").

55. Judith V. Royster, The Legacy of Allotment, 27 Ariz. St. L.J. 1, 12 (1995) [hereinafter Royster, Legacy of Allotment] ("Once a patent in fee was issued, the land could be alienated, encumbered, and at least as to Burke Act patents, taxed.").

56. Id. Several courts have adjudicated disputes regarding state-owned land within reservation borders. See South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 340 (1998) (addressing which environmental regulations applied to land within the original boundaries of the Yankton Sioux Reservation, on which South Dakota wanted to build a landfill, and noting the "spate of jurisdictional disputes" engendered by allotment (internal quotation marks omitted) (quoting *Solem*, 465 U.S. at 467)); Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 847 (1985) (addressing an injury that occurred on land owned by the State of Montana but within the borders of the Crow reservation).

57. Royster, Legacy of Allotment, supra note 55, at 13 (noting that "multiple cession agreements were negotiated with tribes").

58. See *Yankton Sioux Tribe*, 522 U.S. at 344 (finding that clear statutory language regarding cession coupled with a payment of a "sum certain" constitutes diminishment (internal quotation marks omitted)); Hagen v. Utah, 510 U.S. 399, 419–20 (1994) (holding that a proclamation returning reservation land to the public domain was sufficient to diminish a reservation). For an academic discussion of diminishment, see Katherine J. Florey, Indian Country's Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty, 51 B.C. L. Rev 595, 606–08 (2010) (discussing the assertion of tribal sovereignty over Indian country and the damage allotment has done to maximizing a tribal government's inherent powers).

59. For examples of the Court finding a lack of clear language in allotment acts and thus holding that the reservation was not diminished, see McGirt v. Oklahoma, 140 S. Ct. 2452, 2480–82 (2020) (holding that the Allotment Act did not diminish the Muscogee (Creek) Reservation); Nebraska v. Parker, 577 U.S. 481, 494 (2016) (holding that the Allotment Act did not diminish the Omaha Indian Reservation); *Solem*, 465 U.S. at 481 (holding that the Allotment Act did not diminish the Cheyenne River Sioux Reservation).

§ 1151(a). All the land within undiminished reservations, even if large portions have passed into the possession of nonmembers, is Indian country.[60]

For portions of a diminished reservation, § 1151(c) contemplates that the parcels still held in trust by the United States for the benefit of the tribe or its members retain their status as Indian country because they are allotments.[61] While most allotments were originally part of a large reservation, there exist a handful of parcels of federal land which were also used to provide acreage to Native people.[62] These parcels are also Indian allotments even though they were not originally contemplated within any reservation's border.[63] Regardless of whether the land is part of an Indian reservation or an allotment, it is Indian country under § 1151 and therefore subject to the tribal sovereign's inherent regulatory power.

B. *Dependent Indian Communities*

In the 1997 case *Alaska v. Native Village of Venetie*, the Supreme Court defined "dependent Indian communities" for the first time since 18 U.S.C. § 1151 was written.[64] It held that, to be a dependent Indian community, the land needed to have been both (1) set aside by the federal government for the use of Indigenous people and (2) kept under federal superintendence.[65]

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60. For example, despite fewer than two percent of tribal members living on the western half of the Omaha Indian Reservation for more than a century, a unanimous Supreme Court held that the Reservation had not been diminished. See *Nebraska*, 577 U.S. at 486, 494.

61. See United States v. Pelican, 232 U.S. 442, 451–52 (1914) (holding that a crime committed on an allotment was still a crime committed in Indian country and subject to prosecution under the Major Crimes Act); G. William Rice, Employment in Indian Country: Considerations Respecting Tribal Regulation of the Employer-Employee Relationship, 72 N.D. L. Rev. 267, 270 (1996) (describing the land at issue in *Pelican* as "land which had been carved from the tribal domain and held in trust by the United States for an individual Indian as an allotment [and] was Indian Country even though the surrounding area of the reservation had then been extinguished").

62. For example, the Trenton Indian Service Area was used to assign allotments to members of the Turtle Mountain Band of Chippewa when the size of their original reservation was insufficient to provide allotments to all tribal members. Information About TISA, My TISA, https://mytisa.org/?page_id=1199 [https://perma.cc/3E6L-6EX9] (last visited Feb. 7, 2025); see also Timothy Q. Purdon, The North Dakota United States Attorney's Office's Anti-Violence Strategy for Tribal Communities: Working to Make Reservations Safer Through Enforcement, Crime Prevention, and Offender Reentry Programs, 88 N.D. L. Rev. 957, 980 (2012) (discussing how the Trenton Indian Service Area lies outside of the Turtle Mountain Reservation but is still Indian country).

63. See Heather J. Tanana & John C. Ruple, Energy Development in Indian Country: Working Within the Realm of Indian Law and Moving Towards Collaboration, 32 Utah Env't L. Rev. 1, 10 (2012) (describing all land set aside for Indians under an allotment act as Indian country).

64. Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 527 (1998) (interpreting 18 U.S.C. § 1151 (1994)).

65. Id. at 530.

Some dependent Indian communities look like reservations, organized for Native people and controlled by them. The Pueblos, in the American Southwest, are notably dependent Indian communities even if they are not reservations,[66] and each Pueblo has the power to regulate protests occurring within or upon its lands.[67] In a handful of other places, land set aside for Indians has been inconsistently treated as a reservation or a dependent Indian community. The Reno-Sparks Indian Colony, for example, consists of land set aside by the federal government for Indians from different tribes[68] but today operates under a single tribal government.[69] Some courts have treated it as a dependent Indian community[70] and others as a reservation.[71] Whatever it is termed, it has a single government exercising an inherent sovereign power to make rules that govern the community. Dependent Indian communities, in which a single tribal government asserts exclusive governmental power over the physical territory, are no different than reservation-based tribes in exercising the power to regulate protests on their lands.

Other dependent Indian communities do not have a single tribal government with authority over the land,[72] and so although these places are also Indian country, it makes little sense to suggest that any particular tribal government should regulate protests that occur there. These places are set

66. See United States v. Sandoval, 231 U.S. 28, 47–49 (1913) (holding that, although Pueblos hold their land differently than most other Indian tribes, they are dependent Indian communities, so laws applying to Indian country also apply to the Pueblo lands). The discussion of whether Pueblo lands are reservations continues to this day. See Robert L. Lucero, Jr., *State v. Romero*: The Legacy of Pueblo Land Grants and the Contours of Jurisdiction in Indian Country, 37 N.M. L. Rev. 671, 696–97 (2007) (discussing the complicated relationship between § 1151(a) and (b) when it comes to defining the Pueblos).

67. For example, the New Mexico Supreme Court has held that the Pueblos exercise criminal power over even non-Indian-owned fee lands within the Tribe's boundaries. See State v. Romero, 142 P.3d 887, 894 (N.M. 2006) ("The State does not provide any example of Congress treating a pueblo distinctly from a reservation, especially not for the purposes of criminal jurisdiction in Indian country.").

68. United States v. McGowan, 302 U.S. 535, 538 (1938).

69. Constitution and By Laws of the Reno-Sparks Indian Colony, Jan. 15, 1936, art. III (creating a single tribal government and setting membership criteria based upon those who have ties to the community).

70. See *McGowan*, 302 U.S. at 538 ("The fundamental consideration of both Congress and the Department of the Interior in establishing this colony has been the protection of a dependent people.").

71. See Brown v. Burns, 996 F.2d 219, 220 (9th Cir. 1993) (per curiam) (referring to the Reno-Sparks Indian Colony as a "reservation").

72. See 18 U.S.C. § 1151 (2018) (distinguishing between dependent Indian communities and reservations as different types of Indian Country); C.M.G. v. State, 594 P.2d 798, 802 (Okla. Crim. App. 1979) ("Looking at the cases in which it has been found that there is a dependent Indian community, and therefore 'Indian country,' . . . Indian country need not inure to the benefit of a single tribe[;] . . . nor need title to the land remain with the Indians who are to benefit . . . .").

aside for use by Native peoples but are typically not reserved to any one tribe.

By definition, dependent Indian communities must exist outside of Indian reservations and cannot be on Indian allotments because they are contradistinguished from reservations and allotments by statute.[73] These different appellations suggest that many dependent Indian communities lay outside of the control of any particular tribe, and so, as a starting point, it makes little sense to suggest that any one tribe's rules should supersede those of other competing tribal sovereigns. This kind of dependent Indian community includes places like Indian Health Service facilities providing medical care to enrolled members from multiple tribes, housing complexes located outside the reservation but built by the United States for the purpose of providing housing to Indians,[74] and schools overseen by the Bureau of Indian Affairs designed to educate Native children from multiple tribes.[75]

While these places are also Indian country, there is no general deference to the tribal sovereign in these places. As a result, state or federal rules governing the right to protest take precedence over any particular tribal authority absent other express direction from Congress.[76]

II. TRIBAL, STATE, AND FEDERAL: AMONG COMPETING SOVEREIGNS, ONLY INDIAN TRIBES SHOULD REGULATE PROTEST IN INDIAN COUNTRY

The American system is composed of three competing sovereigns: tribes, states, and the federal government.[77] Within this system, Indian

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73. The statute is codified at 18 U.S.C. § 1151. When terms are contradistinguished within the same provision, they are meant to imply that no one term encompasses the others. See Cherokee Nation v. Georgia, 30 U.S. (6 Pet.) 1, 18 (1831) (holding that tribes cannot be states or foreign nations because they are contradistinguished from both in the Commerce Clause).

74. See United States v. South Dakota, 665 F.2d 837, 843 (8th Cir. 1981) (holding that land set aside for tribal housing located outside of the reservation but intended to provide housing for Indian persons was a dependent Indian community even if a small number of non-Indians also resided there).

75. See United States v. M.C., 311 F. Supp. 2d 1281, 1297 (D.N.M. 2004) (holding that a school operated for the benefit of Indian children, located on land owned by the Bureau of Indian Affairs, but outside any allotment or reservation, was Indian Country because it was set aside for the use of Indians and there was ongoing federal superintendence at the school).

76. This deference to Congress in the area of policymaking in Indian country is common. See Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 803 (2014) (holding that "a fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty").

77. See Matthew L.M. Fletcher, Politics, Indian Law, and the Constitution, 108 Calif. L. Rev. 495, 520 (2020) (noting that the Framers understood American federalism to include three sovereigns and pointing to the Commerce Clause as evidence of the different but sovereign nature of tribes).

tribes often struggle to ensure they are treated as co-equals.[78] Each sovereign has different regulatory schemes and enforcement provisions, and they must work together to ensure the safety of American communities. As Justice Sandra Day O'Connor so aptly remarked, "The three sovereigns can learn from each other, and the strengths and weaknesses of the different systems provide models for courts to consider."[79] Having established the contours of Indian country, this Part looks at the various sovereigns to conclude that only Indian tribes have the current regulatory power to develop and implement rules governing protests that occur in Indian country.

States may not impose their regulatory schemata on protests that occur in Indian country, even on land owned in fee by the state itself. The field of Indian law has developed a series of doctrines that help police the competing assertions of regulatory power.[80] Under *Montana v. United States* and its progeny, the tribal sovereign must have the inherent power to regulate protests by nonmembers on land within Indian country but not owned by the tribe or held in trust by the United States for the tribe.[81] While the law ultimately turns on a series of rebuttable presumptions, with tribal authority at its zenith when regulating tribal members and activity on tribal lands, the *Montana* doctrine provides a mechanism by which Indian tribes can have their inherent authority recognized to govern all protest activity in Indian country.[82]

If the tribe can exercise its inherent power to regulate nonmembers, the question that then emerges is whether the interests of the tribe in regulating nonmember activity are sufficiently robust as to preempt the state

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78. See Frank Pommersheim, Coyote Paradox: Some Indian Law Reflections From the Edge of the Prairie, 31 Ariz. St. L.J. 439, 455 (1999) ("[T]he two faces of Indian law are really necessary parts of a holistic effort to secure meaningful self-determination in a pluralistic (constitutional) republic too often defined as an assimilationist mono-culture dominated by a two (instead of three) sovereign model.").

79. Sandra Day O'Connor, Lessons From the Third Sovereign: Indian Tribal Courts, 33 Tulsa L.J. 1, 6 (1997).

80. Federal Indian Law as a field is focused on the relationship between sovereigns—tribes, states, and the federal government. It is juxtaposed against Tribal Law, which is the discipline studying a tribe's exercise of its inherent power over its members and its territory. See Aila Hoss, Federal Indian Law as a Structural Determinant of Health, 47 J.L., Med. & Ethics 34, 35 (2019).

81. See Judith V. Royster, Revisiting *Montana*: Indian Treaty Rights and Tribal Authority Over Nonmembers on Trust Lands, 57 Ariz. L. Rev. 889, 898–900 (2015) [hereinafter Royster, Revisiting *Montana*] (discussing how the Supreme Court's *Montana* decision implied limitations on a tribe's exercise of its inherent authority); see also Matthew L.M. Fletcher, A Unifying Theory of Tribal Civil Jurisdiction, 46 Ariz. St. L.J. 779, 792–99 (2014) (same).

82. See L. Scott Gould, The Consent Paradigm: Tribal Sovereignty at the Millennium, 96 Colum. L. Rev. 809, 881 (1996) ("*Montana* announced that tribes retain inherent power to regulate on-reservation activities of nonmembers who enter consensual relationships with tribes.").

interest or whether the state's concurrent authority to regulate would infringe on the right of Indians to make their own laws and be governed by them.[83] Because a tribe's inherent power to regulate protest extends to all of Indian country, and the tribal interests in regulating are sufficiently robust to preempt state regulation or would be infringed upon by concurrent state authority, tribal governments have the exclusive power to regulate protests that occur in Indian country.

Finally, while the federal government's power within Indian country is broad, tribes retain their inherent powers alongside federal regulatory power.[84] Congress has enacted laws that provide some individual rights to all persons while in Indian country,[85] but it has not adopted specific legislation regulating protest activity that occurs there. While Congress could enact regulations that are concurrent with, or that displace, tribal rules, legislative and judicial precedents suggest that doing so today would be unwise.

This Part draws upon current precedent in Indian law to make two important observations. First, tribal governments can regulate the protest activity of non-Native persons when that activity occurs on tribal lands. This is important because it establishes that there is not a regulatory or governance vacuum if states are not permitted to regulate. Second, state attempts to regulate protest activity in Indian country are prohibited either because they would infringe on the right of Indian tribes to make their own laws and be governed by them or because state regulation is preempted by overriding tribal and federal interests in promoting tribal self-government and protecting tribal sovereignty.

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83. Alex Tallchief Skibine, Redefining the Status of Indian Tribes Within "Our Federalism": Beyond the Dependency Paradigm, 38 Conn. L. Rev. 667, 684–86 (2006) (discussing how Indian preemption can displace the power of states in Indian country); see also David Getches, Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law, 84 Calif. L. Rev. 1573, 1590–91 (1996) (same).

84. Joseph William Singer, Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty, 37 New Eng. L. Rev. 641, 657 (2003) ("Plenary power over Indian affairs, therefore, exists in Congress and not in the states. . . . Plenary power does not mean that tribes have no reserved rights. They have all the inherent powers of any sovereign government . . . . This sovereignty is recognized and affirmed in the Constitution . . . .").

85. See Mark D. Rosen, Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act, 69 Fordham L. Rev. 479, 483–94 (2000) (arguing that tribal courts should be able to interpret the Indian Civil Rights Act and the individual rights that it extends to persons while in Indian country); Randa Larsen, Note, Banishing Federal Overstep: Why Protecting Tribal Sovereignty Justifies a Narrow Reading of the Indian Civil Rights Act, 108 Minn. L. Rev. 1001, 1007 (2023) (arguing for limiting federal overreach in regulating the inherent power of tribes in order to protect tribal sovereignty).

A. *Tribes Can Regulate Protest in Indian Country Under* Montana

The ability of the tribe to regulate activity in Indian country has been well litigated and is now functionally the outcome of a set of presumptive rules established by the Supreme Court.[86] Tribes have the undisputed power to regulate their members and any activity that occurs on tribal land.[87] They can overcome a presumption against tribal regulation of activity by nonmembers on nontribal lands when that activity "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[88] The following discussion synthesizes these presumptions to construct the argument that Indian tribes may regulate the acts of protest that occur anywhere in Indian country.

1. *Indian Tribes Have the Power to Regulate All Conduct on Tribal Land Regardless of Indian Status.* — The first presumption is that Indian tribes can regulate the activity that occurs on tribal land regardless of whether the persons engaged in the activity are tribal members. In a series of cases in the early 1980s, the Supreme Court made clear that an Indian tribe could exclude members and nonmembers alike from tribal lands.[89] In *Montana v. United States*, the Court explained that "the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe."[90] If the Tribe was willing to permit nonmembers on tribal land, those nonmembers were subject to the regulations imposed by the Tribe; the Court ultimately agreed "with the Court of Appeals that if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits."[91]

Because *Montana* ultimately dealt with activity on land owned by the state, the language was considered dicta but was confronted and confirmed directly by the Court the following term. In *Merrion v. Jicarilla*

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86. See Katherine Florey, Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction, 101 Calif. L. Rev. 1499, 1554 (2013) (discussing the role that membership and property play in constructing tribal court jurisdiction); Catherine T. Struve, How Bad Law Made a Hard Case Easy: *Nevada v. Hicks* and the Subject Matter Jurisdiction of Tribal Courts, 5 U. Pa. J. Const. L. 288, 316 (2003) (same).

87. Joel West Williams, The Five Civilized Tribes' Treaty Rights to Water Quality and Mechanisms of Enforcement, 25 N.Y.U. Env't L.J. 269, 299 (2017) ("Because Indian tribes are governments, they have a power that run-of-the-mill property owners do not: regulatory authority. Tribes possess sovereign governmental authority over both their members and their territory." (footnote omitted)).

88. Montana v. United States, 450 U.S. 544, 566 (1981).

89. Id. at 557 ("[T]he Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe . . . ." (citing United States v. Montana, 604 F.2d 1162, 1165–66 (9th Cir. 1979))); see also Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144 (1982) ("Nonmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them." (emphasis omitted)).

90. *Montana*, 450 U.S. at 556.

91. Id.

Apache Tribe, the Court codified the *Montana* dicta into binding precedent when it held that Indian tribes can exclude nonmembers from tribal lands or condition their entry and activity on tribal land subject to the payment of tribal taxes or compliance with tribal regulations.[92] While some non-Indian advocates, reluctant to accept tribal regulation, tried to limit the Court's holding to merely the power of taxation or suggest that the tribal power existed concurrently with a state's power to regulate, the Court made clear that a tribe's regulatory powers over nonmembers on tribal lands are absolute.[93] Just one year after *Merrion*, the Court again turned to the question of tribal regulation of nonmembers on tribal lands. In *New Mexico v. Mescalero Apache Tribe*, the Court held that tribes can impose their own hunting and fishing rules to the exclusion of any contrary state regulation; the "assertion of concurrent jurisdiction by New Mexico not only would threaten to disrupt the federal and tribal regulatory scheme, but would also threaten Congress' overriding objective of encouraging tribal self-government and economic development."[94]

Together, *Montana*, *Merrion*, and *Mescalero* establish a clear legal basis for Indian tribes to regulate the activity of all persons, both members and nonmembers of the tribe, when the activity occurs on tribal land. The power of the tribe to regulate this activity is absolute and is not subject to concurrent regulation by the surrounding state. When on tribal land, tribal rules control.[95]

2. *Indian Tribes Can Regulate the Conduct of Their Members Anywhere in Indian Country.* — Tribal land is only one part of an Indian reservation. Reservations that were subject to allotment often contain land owned in fee by individuals or even by states themselves.[96] By virtue of the relationship between an Indian tribe and its members, tribes retain the inherent authority to regulate the activity of their members anywhere in Indian country.

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92. See *Merrion*, 455 U.S. at 147 (finding that Indian tribes can condition the presence of nonmembers on tribal land by requiring them to pay taxes).

93. See New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 335 (1983) (reading the inherent powers of an Indian tribe over nonmembers to be broader than merely the power to tax discussed in *Merrion*).

94. Id. at 341.

95. The Court has recognized a very limited exception in which a state may regulate the conduct of persons on tribal lands when necessary for conservation but may not impose regulations that discriminate against tribal hunting or fishing practices, nor adopt rules that exclude tribal members from a fair share of the allotted catch consistent with the needs of conservation. See Puyallup Tribe v. Dep't of Game, 391 U.S. 392, 398 (1968) ("[T]he manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.").

96. Royster, Legacy of Allotment, supra note 55, at 17–18 (describing the process of allotment and the effect of fee land ownership in Indian country).

A tribe's inherent power over its members is akin to its inherent powers over its territory. A tribe may regulate the conduct of its members anywhere in Indian country, even on land owned in fee by nonmembers.[97] For example, in *Fisher v. District Court*, involving a custody battle over an Indian child domiciled on the Reservation, the Supreme Court did not differentiate the status of the land within the Northern Cheyenne Reservation but held that the tribal court had exclusive jurisdiction over the child if domiciled in Indian country.[98] Almost twenty years earlier, the Court recognized the inherent authority of the Navajo Nation to adjudicate the collection of a debt arising on fee land owned by non-Indians but within the boundaries of the Navajo Nation.[99] It famously held that a state may not infringe on "the right of reservation Indians to make their own laws and be ruled by them."[100] These cases indicate well-established acceptance of the proposition that a tribe's inherent authority over its members exists when those members are on nontribal fee lands as long as they are within Indian country.

The inherent authority of an Indian tribe to regulate the conduct of its members even extends beyond the reservation's borders—at least when the land is owned in fee by the tribe. The Sixth Circuit has held that tribes retain the right to regulate the conduct of their members on fee lands located outside of Indian country.[101] It reasoned that the connection between an Indian tribe and its members was sufficient to permit a tribe to punish a tribal member for conduct occurring on land owned in fee but located outside of the reservation.[102] The case law therefore provides ample authority in support of the principle that a tribe may regulate the conduct of its members anywhere in Indian country.[103]

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97. The Court has provided various explanations for a tribe's power over its members, the most compelling of which is that tribal members consent to the tribe's authority by enrolling. See Rebecca Tsosie, Tribalism, Constitutionalism, and Cultural Pluralism: Where Do Indigenous Peoples Fit Within Civil Society?, 5 U. Pa. J. Const. L. 357, 396 (2003) ("The tribe's authority to criminally regulate its members is 'but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members.'" (quoting Duro v. Reina, 495 U.S. 676, 693 (1990))).

98. 424 U.S. 382, 390 (1976) (per curiam).

99. Williams v. Lee, 358 U.S. 217, 223 (1959) (describing the Court's recognition of the Navajo Nation's authority over transactions that occur on tribal land).

100. Id. at 220.

101. See Kelsey v. Pope, 809 F.3d 849, 852 (6th Cir. 2016) (holding that a tribe retains prosecutorial authority over the offsite conduct of its members when that conduct substantially affects tribal self-governance).

102. See id. (discussing tribes' inherent sovereignty over internal relations).

103. For a general discussion of a tribe's regulatory power being strongest over its territory and its members, see Lauren van Schilfgaarde, Aila Hoss, Anne E. Tweedy, Sarah Deer & Stacy Leeds, Tribal Nations and Abortion Access: A Path Forward, 46 Harv. J.L. & Gender 1, 43–44 (2023) (doing the regulatory analysis and concluding that a tribe's regulatory power is going to be strongest over tribally run businesses operating on tribal land).

3. *The Inherent Power of Indian Tribes Extends to the Regulation of Protest by Nonmembers that Occurs on Nontribal Lands.* — The more complicated analysis emerges when an Indian tribe wants to regulate the activity of nonmembers on land neither owned by the tribe or its members, nor held in trust by the United States for the benefit of the tribe. The "pathmarking case"[104] in this area is *Montana v. United States*.[105] In *Montana*, the Crow Tribe wanted to prohibit non-Indians from fishing on the Little Big Horn River running through the center of the Reservation.[106] The Supreme Court first concluded that the land under the river belonged to Montana, not to the Crow Tribe.[107] That created a situation in which the Crow Tribe was trying to regulate the activity of nonmembers within the original boundaries of the Reservation but on land owned by the state.

The Court proceeded to articulate the metes and bounds of the inherent tribal power to regulate nonmembers through a rebuttable presumption. It began by holding that the "exercise 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."[108] The presumption then is that a tribe's inherent power to regulate nonmembers does not extend to activity occurring on tribal land, but that tribes have never lost the power to regulate the activity of nonmembers anywhere in Indian country if it is necessary to protect tribal self-government or to control internal relations.[109]

The language of these exceptions is notably broad, and so the Court continued by articulating two instances that meet this condition. First, "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[110] Second, "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[111] Collectively known as the *Montana* exceptions, these two principles have established the foundation for the extension of tribal regulatory power on nontribal lands in Indian country.[112]

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104. Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997).

105. 450 U.S. 544 (1981).

106. Id. at 547.

107. Id. at 556–57.

108. Id. at 564 (citing Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973)).

109. See id.

110. Id. at 565 (citing Williams v. Lee, 358 U.S. 217, 272 (1959)).

111. Id. at 566.

112. See, e.g., Helia Bidad, The Power of Tribal Courts in Ongoing Environmental-Tort Litigation, 132 Yale L.J. Forum 904, 907–10 (2023), https://www.yalelawjournal.org/pdf/

It is from this second *Montana* exception that Indian tribes find the right to regulate protests by nonmembers that occur in Indian country but outside of tribal lands. Rebutting earlier precedent,[113] the Supreme Court has recently decided that a single individual's conduct may have a "direct effect" on the health or welfare of a tribe.[114] *United States v. Cooley* dealt with a tribal police officer conducting an ordinary police stop on a state highway running through a reservation.[115] Having probable cause to believe that Cooley was in possession of methamphetamines and was armed, the Court concluded that *Montana*'s second exception fit the facts "almost like a glove."[116] The Court held that Indian tribes have the inherent power to "protect themselves against ongoing threats" even if that threat comes from a single nonmember on land "within the boundaries of a tribal reservation."[117] The Court recognized that nonmember activity on nontribal land within the reservation could have effects on the tribal government and community and therefore broadened the second exception to include those activities by nonmembers that have a direct effect on persons living anywhere within Indian country.[118]

Although there are no Supreme Court cases applying the *Montana* presumption and its exceptions to protest in Indian country, the issue has reached federal appellate courts. Protests, by their very nature, are capable of threatening or having a direct effect on the political integrity of an Indian tribe. In *Attorney's Process & Investigation Services v. Sac & Fox Tribe* (*API*), the Eighth Circuit held that a protest at the Sac & Fox casino, which

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F7.BidadFinalDraftWEB_ha4bjn7z.pdf [https://perma.cc/W9EF-9YMG] (discussing the role of the *Montana* exceptions to environmental regulation in Indian country); Royster, Revisiting *Montana*, supra note 81, at 896–98 (discussing the role the *Montana* exceptions play in interpreting and limiting tribal treaty rights); Kekek Jason Stark, Tribal Court Jurisdiction and the Exhausting Nature of Federal Court Interference, 92 U. Cin. L. Rev. 701, 724–26 (2024) (discussing the role of the *Montana* exceptions on controlling the jurisdiction of tribal courts).

113. See Strate v. A-1 Contractors, 520 U.S. 438, 454 (1997) (holding that a single nonmember involved in car accident on a state highway running through a reservation could not create a direct effect, in part because there was only one person involved and the harm could not be aggregated to create a direct effect).

114. United States v. Cooley, 141 S. Ct. 1638, 1643 (2021).

115. Id. at 1641.

116. Id. at 1643.

117. Id.

118. See id. (discussing the Washington State Supreme Court's conclusion that stopping non-Indian drunk drivers on nontribal land fits the second *Montana* exception because of the direct effect a drunk driver could have on tribal members and nonmembers alike in Indian country). This Piece describes the *Cooley* opinion as broadening the doctrine because a handful of appellate courts before *Cooley* required more than a direct effect but would only find that the second *Montana* exception applied if the nonmember activity imperiled the subsistence of the tribe. See, e.g., Belcourt Pub. Sch. Dist. v. Davis, 786 F.3d 653, 660 (8th Cir. 2015) ("The conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community." (emphasis omitted) (quoting Montana v. United States, 450 U.S. 544, 566 (1981))).

ultimately resulted in the physical occupation of its governance building by nonmembers, more than sufficiently satisfied the *Montana* requirements.[119] The physical occupation of the tribal government by nonmembers undoubtedly has a direct effect on the tribe's political integrity, and the occupation of the tribal casino has a direct effect on the tribe's economic security. In *API*, the Eighth Circuit upheld the principle that nonmembers can be liable under tribally created tort law for failure to comply with tribal regulations when they take their grievance from peaceful protest or petition to violence.[120]

Applying the principles of *Cooley* and *API*, it is not difficult to see how protests in Indian country have a direct effect on the political integrity, economic security, health, or welfare of the tribe. Particularly when a protest is directed at the tribal government, as in *API*, it is difficult to suggest that the protest does *not* threaten or have a direct effect on the political integrity of the tribe. While there aren't many cases of nonmembers protesting the actions of a tribal government in Indian country, there are a handful of cases in which tribal members protest the actions of their tribal government by filing a petition, issuing a press release, or appearing at tribal council meetings to question the actions of tribal government.[121] Cases involving the protest of nonmembers against the tribal government would certainly yield the same result, implicating core governance functions and being subject to nondiscriminatory regulation by the tribe.

Nonmember protests against the actions of others are more complicated but generally yield the same result. Like the protests introduced at the beginning of this Piece, protests against the Dakota Access Pipeline or in support of action to combat the epidemic of Missing and Murdered Indigenous Women result in members and nonmembers joining together.[122] While the protest may be directed at the actions of state or federal officials, these protesters, like the meth user or drunk driver described in *Cooley*, have an undisputed impact upon Indian country. By affecting the tribal government, the solemnity of tribal proceedings, or the tribal economy, protest in Indian country—even by nonmembers on nontribal land—cross the *Montana* threshold from activity regulated by the state to activity subject to regulation by the inherent power of the tribe.

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119. 609 F.3d 927, 936 (8th Cir. 2010) ("[T]ribes 'may regulate nonmember behavior that implicates tribal governance and internal relations.'" (quoting Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 335 (2008))).

120. Id. at 946.

121. See infra section IV.C.

122. For example, the #NoDAPL protest brought together Indigenous people and concerned non-Native people in opposition to the pipeline. See Nathan Bu, Note, Taking Stock: Exploring Alternative Compensation in Eminent Domain, 49 Colum. Hum. Rts. L. Rev. 213, 242–43 (2018) (discussing landowners and farmers from outside Indian country who joined the protests).

B. *The States Cannot Regulate Protest in Indian Country*

Having established that Indian tribes have the inherent power to regulate the activity of nonmembers on nontribal land, the next question is whether that power is shared concurrently with the state or whether that power belongs to the tribe alone. The answer turns on the doctrines of infringement and Indian preemption.[123] Either doctrine is sufficient to invalidate a state's regulatory rules in Indian country.[124] As the Supreme Court has explicitly articulated, the sovereign nature of tribal government has "given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members."[125] A state may not regulate the activity of even nonmembers of the tribe in Indian

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123. Indian Preemption is a doctrine developed through a series of Supreme Court cases. See, e.g., Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2491 (2022) (holding that the state was not preempted from asserting its concurrent criminal jurisdiction over non-Indians accused of committing crimes in Indian country); Ariz. Dep't of Revenue v. Blaze Constr. Co., 526 U.S. 32, 34 (1999) (holding that the state was not preempted from taxing a corporation doing business in Indian country under a federal contract); California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216–18 (1987) (holding that the state was preempted from enforcing its regulation of high-stakes bingo against persons gaming in Indian country); Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue, 458 U.S. 832, 834 (1982) (holding that the state was preempted from taxing a non-Indian construction company building a school on a reservation); Cent. Mach. Co. v. Ariz. State Tax Comm'n, 448 U.S. 160, 163–66 (1980) (holding that the state was preempted from collecting a tax on machines sold to an Indian tribe outside of Indian country when they were to be used on the reservation); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 152 (1980) (holding that the state was preempted from collecting a tax on vehicle registration or fuel used by non-Indians primarily in Indian country); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 179–80 (1973) (holding that the state was preempted from collecting its income tax from a tribal member who lived and worked in Indian country); Warren Trading Post Co. v. Ariz. Tax Comm'n, 380 U.S. 685, 691–92 (1965) (holding that the state was preempted from taxing the income of a non-Indian licensed Indian trader doing business in Indian country). For an academic discussion of Indian Preemption, see Matthew L.M. Fletcher & Randall F. Khalil, Preemption, Commandeering, and the Indian Child Welfare Act, 2022 Wis. L. Rev. 1199, 1212 (noting, in the context of the Indian Child Welfare Act, "the creation of individual rights in federal law . . . validly preempts contrary state law without running afoul of the Tenth Amendment's anticommandeering principle"); Alex Tallchief Skibine, Formalism and Judicial Supremacy in Federal Indian Law, 32 Am. Indian L. Rev. 391, 416–28 (2008) (analyzing the Supreme Court's development of, and approach to, Indian Preemption Doctrine); Charley Carpenter, Note, Preempting Indian Preemption: *Cotton Petroleum Corp. v. New Mexico*, 39 Cath. U. L. Rev. 639, 649–66 (1990) (discussing the development of Indian Preemption Doctrine).

124. See Nathan Quigley, Defining the Contours of the Infringement Test in Cases Involving the State Taxation of Non-Indians a Half-Century After *Williams v. Lee*, 1 Am. Indian L.J. 147, 155 (2012) (discussing how "infringement and preemption are independent barriers to state regulatory authority on the reservation"); see also Judith V. Royster & Rory SnowArrow Fausett, Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion, 64 Wash. L. Rev. 581, 601–02 (1989) ("This modern analysis, known as the 'infringement/preemption' test, bars state jurisdiction if it either infringes on tribal sovereignty or is preempted by federal law.").

125. *White Mountain Apache Tribe*, 448 U.S. at 142.

country if the state regulation would infringe on the right of the tribe to make its own laws and be governed by them. The state also may not regulate activity in Indian country if its interests are preempted by stronger tribal and federal concerns. As the Court has asserted, "The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members."[126]

1. *Infringement.* — The doctrine of infringement provides that a state may not assert authority in Indian country if said authority would infringe "on the right of reservation Indians to make their own laws and be ruled by them."[127] When Arizona courts attempted to enforce a debt incurred by a tribal member with a non-Native business located on land held in fee by the non-Native creditor, the Supreme Court denied them the power on the basis of infringement: "[T]o allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian."[128]

Infringement has since served as an important tool to prevent the enforcement of a variety of state regulations in Indian country. The Supreme Court has used infringement to deny states the power to regulate fishing in Indian country[129] and to force tribes to comply with state gaming ordinances.[130] Lower courts have held that a state's removal of an Indian from Indian country without complying with a tribe's extradition ordinance infringes upon the right of the tribe to make its own laws and be governed by them.[131] State courts cannot exercise jurisdiction over common law tort claims that arise in Indian country because doing so infringes upon the inherent powers of an Indian tribe.[132] State probate rules do not

126. Id. at 143.

127. Williams v. Lee, 358 U.S. 217, 221 (1959).

128. Id. at 223.

129. See Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 704 (1979) (Powell, J., dissenting in part) ("We held in *Puyallup II* that the ban on net fishing, as it applied to Indians covered by treaty, was an infringement of their rights."); see also Charles F. Wilkinson, To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa, 1991 Wis. L. Rev. 375, 409–10 ("Wisconsin natural resource laws, whether constitutional or statutory, have been overridden by the Chippewa treaties insofar as they infringe upon Indian hunting, fishing and gathering protected by treaty.").

130. See California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) ("State regulation would impermissibly infringe on tribal government, and this conclusion applies equally to the county's attempted regulation of the Cabazon card club.").

131. See Arizona ex rel. Merrill v. Turtle, 413 F.2d 683, 685–86 (9th Cir. 1969) ("Applying these considerations, we conclude that Arizona's exercise of the claimed jurisdiction would clearly interfere with rights essential to the Navajo's self-government. The essential and intimate relationship of control of the extradition process to the right of self-government was recognized long ago . . . .").

132. See Pueblo of Santa Ana v. Nash, 972 F. Supp. 2d 1254, 1267 (D.N.M. 2013) ("The limited scope for allocation of jurisdiction between the State and Indian tribe under the

apply to the estates of tribal members who were domiciled on the reservation because they infringe on the right of Indians to make their own laws and be ruled by them.[133]

The standard in infringement cases is whether the state regulation would infringe on the right of Indians to make their own laws and be ruled by them.[134] Any attempt by the state to regulate protests in Indian country would unquestionably violate this standard. Concurrent state authority in this context would therefore undermine the inherent regulatory and adjudicatory powers of tribal government.[135]

Among the responsibilities of tribal government is the responsibility to enact rules that keep the reservation community safe.[136] Protests involving large gatherings require the organization of resources on behalf of the sovereign—to provide law enforcement protection, ensure public safety, plan for increased traffic, accommodate counterprotesters, and so on. When this activity occurs on an Indian reservation, it requires compliance with tribal rules. State law enforcement largely lacks authority in Indian country.[137] Requiring compliance with state rules and tribal rules—essentially giving the state concurrent regulatory authority—would nullify

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IGRA is narrow, confined to such issues of licensing and regulation."); Medina v. Estate of Cody, 538 P.3d 737, 743 (Ariz. Ct. App. 2023) ("Applying the infringement test, we hold that the broad authority granted to the Navajo tribe to govern its enrolled tribal members under the Treaty of 1868 precludes the state court from exercising jurisdiction over this tort action.").

133. See Big Spring v. Conway (*In re Estate of Big Spring*), 255 P.3d 121, 136 (Mont. 2011) (declining a grant of state court jurisdiction in a probate matter).

134. See Alex Tallchief Skibine, The Tribal Right to Exclude Others from Indian-Owned Lands, 45 Am. Indian L. Rev. 261, 291 (2021) [hereinafter Skibine, The Tribal Right to Exclude] (discussing the application of the infringement standard to statutes of generally applicability); Kevin K. Washburn, The Next Great Generation of American Indian Law Judges, 81 U. Colo. L. Rev. 959, 961–62 (2010) (describing the infringement standard as ushering in the modern era of Indian law because it protected the tribe's right to make and be governed by its own laws); see also Patrice H. Kunesh, Borders Beyond Borders—Protecting Essential Tribal Relations Off Reservation Under the Indian Child Welfare Act, 42 New Eng. L. Rev. 15, 37 (2007) (describing the Court's use of infringement to cover not just the regulatory authority of law making but the adjudicatory power of decisionmaking).

135. See Elizabeth Kronk Warner & Heather Tanana, Indian Country Post-*McGirt*: Implications for Traditional Energy Development and Beyond, 45 Harv. Env't L. Rev. 249, 268–69 (2021) (discussing the related but separate inherent powers to make law (regulate) and to resolve disputes pursuant to law (adjudicate)); see also Seth Davis, Tribal Rights of Action, 45 Colum. Hum. Rts. L. Rev. 499, 543–44 (2014) (same).

136. See United States v. Cooley, 141 S. Ct. 1638, 1643 (2021) (holding that tribes have the right to protect themselves from ongoing threats, including "non-Indian drunk drivers, transporters of contraband, or other criminal offenders operating on roads within the boundaries of a tribal reservation").

137. State v. Branham, 102 P.3d 646, 649 (N.M. Ct. App. 2004) (holding that the state police cannot enforce tribal law on tribal lands); see also Ross v. Neff, 905 F.2d 1349, 1352 (10th Cir. 1990) (same); Adam Crepelle, Making Red Lives Matter: Public Choice Theory and Indian Country Crime, 27 Lewis & Clark L. Rev. 769, 812 n.378 (2023) ("[S]tate police lack criminal jurisdiction over Indians on reservations on non-PL 280 reservations . . . .").

tribal law in any places where the state law is more restrictive. As the Supreme Court articulated in *Mescalero*, under concurrent regulatory authority "the State would be free to impose conditions more restrictive than the Tribe's own regulations, including an outright prohibition."[138] When state regulation may displace tribal regulation, "Concurrent jurisdiction would empower [the states] wholly to supplant tribal regulations. The State would be able to dictate the terms on which nonmembers are permitted to utilize the reservation's resources."[139]

Like the hunting and fishing regulations at issue in *Mescalero*, the enforcement of state regulations related to protest would not be ancillary to tribal protections; rather, it would displace them. For example, a tribe issuing a permit to allow a protest on a public road running through the reservation runs directly counter to a state insisting the road remain open to ongoing traffic. If the state attempted to enforce its regulatory rule and use its police power to forcibly create a corridor for traffic to pass, the state action would undermine the tribal determination that the road should be closed, directly impacting the safety of both tribal and nontribal members who have a permit to engage in protest activity. The result is that the state regulations are subject to the doctrine of infringement and therefore become unenforceable.[140]

2. *Indian Preemption.* — In general, the doctrine of preemption prevents the application of state law when it either directly conflicts with federal law or attempts to regulate an area of law already entirely subject to federal superintendence.[141] Unlike conflict[142] or field[143] preemption,

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138. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 330 (1983).

139. Id. at 338.

140. Dep't of Health & Hum. Servs. v. Maybee, 965 A.2d 55, 57 (Me. 2009) ("[S]tate regulation infringes on tribal self-government . . . when the state seeks to regulate conduct that takes place entirely on a reservation." (citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980))).

141. See Kamaile A.N. Turčan, "Major Questions" About Preemption, 69 Vill. L. Rev. 737, 760–64 (2024) (describing the basics of preemption doctrine and analysis).

142. Conflict preemption provides that when a state and federal law cannot be reconciled, the federal law prevails. The principle is based in the Supremacy Clause. See David C. Vladeck, Deconstructing *Wyeth v. Levine*: The New Limits on Implied Conflict Preemption, 59 Case W. Res. L. Rev. 883, 887 (2009) ("The theory of preemption, of course, is that the Supremacy Clause of the Constitution requires state law to yield when it interferes with the attainment of goals Congress set in the legitimate exercise of its powers, generally under the Commerce Clause.").

143. Field preemption prevents states from enforcing rules when federal policy has so comprehensively covered the subject that there remains no space for the state to regulate. See Richard A. Epstein, The Case for Field Preemption of State Laws in Drug Cases, 103 Nw. U. L. Rev. 54, 55 (2008) (describing a form of preemption in which the "federal statute has *occupied the field*, blocking state efforts to impose sanctions within that field even if there is no explicit conflict"); Thomas H. Sosnowski, Note, Narrowing the Field: The Case Against Implied Field Preemption of State Product Liability Law, 88 N.Y.U. L. Rev. 2286, 2289 (2013) ("Under . . . the 'field preemption' mode of analysis, an appellate-level court defines a 'field' in which no state law claims may be brought, regardless of whether actual conflict exists.").

Indian preemption involves a balancing analysis[144] to ask whether the federal and tribal interests are sufficiently robust to preempt the state from regulating the activity of nonmembers.[145] The Supreme Court has been clear that this doctrine is distinct and unique to Indian law: "Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other."[146] This Indian preemption analysis has had profound implications in Indian country, forming the basis for denying state regulation of everything from casino gaming operations[147] to income taxes.[148]

Indian preemption analysis thus proceeds by balancing the federal and tribal interests against the state interests to determine whether a state can regulate the nonmember's conduct. As far back as 1980, the Court has recognized that the "tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law."[149] Thus the Court begins with a presumption against state regulation: "Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence."[150] There is a strong basis to preempt state action based upon congressional support of tribal self-sufficiency and economic development.[151] Against these compelling interests, the Court weighs "any applicable regulatory interest of the State" to

144. The interest-balancing approach was specifically adopted in White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), to address when a state may regulate the activities of nonmembers in Indian country. See Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 110 (2005) ("[W]e formulated the balancing test to address the 'difficult questio[n]' that arises when 'a State asserts authority over the conduct of non-Indians engaging in activity *on the reservation*.'" (second alteration in original) (emphasis added by *Wagnon*) (quoting *White Mountain Apache Tribe*, 448 U.S. at 144–45)).

145. See *White Mountain Apache Tribe*, 448 U.S. at 142–45 ("When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest.").

146. Id. at 143.

147. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 220–21 (1987) ("To the extent that the State seeks to prevent any and all bingo games from being played on tribal lands while permitting regulated, off-reservation games, this asserted interest is irrelevant and the state and county laws are pre-empted.").

148. McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172–73 (1973) ("Indians today are American citizens. . . . When the relevant treaty and statutes are read with this tradition of sovereignty in mind, we think it clear that Arizona has exceeded its lawful authority by attempting to tax appellant.").

149. *White Mountain Apache Tribe*, 448 U.S. at 143 (citing Moe v. Confederated Salish & Kootenai Tribes of the Flathead Rsrv., 425 U.S. 463, 475 (1976)).

150. Id. at 143–44 (citing *McClanahan*, 411 U.S. at 174–75).

151. See id. at 173 n.10 (creating a string cite to congressional actions which express support for tribal sovereignty, self-determination, and economic development).

determine whether the tribal or federal interests outweigh the asserted state interest.[152] It has explicitly rejected the suggestion that an express congressional statute must contemplate and then preempt the state rule, holding instead that the strength of judicially recognized federal and tribal interests alone may preempt a state's power to regulate.[153]

a. *Indian Preemption in Context.* — A single example is probably sufficient for the purposes of this Piece to demonstrate how Indian preemption works. In the 1980s, state and local rules in California did not prohibit playing bingo for money but limited the games to those run by charitable organizations and conducted by persons who were not paid for their services.[154] The rules also prohibited high-stakes bingo by limiting the prizes to no more than $250.[155] The Cabazon and Morongo Bands of Mission Indians conducted bingo on their reservations pursuant to tribally enacted ordinances.[156] The games were open to the public, with a majority of players being nonmembers of the tribe who came to the reservations for the purposes of playing.[157] When California insisted that the tribes comply with state rules regulating bingo games, the tribes sued in federal court, seeking a declaratory judgment that they were not subject to California's rules regulating gaming.[158] When the tribes prevailed in district court and at the Ninth Circuit, California appealed to the Supreme Court.[159]

After first determining that Congress had not expressly permitted California to regulate gaming activity in Indian country,[160] the Court turned to the doctrine of Indian preemption to ascertain whether the state's interests outweighed the federal and tribal interests in a manner that justified the preemption of state law.[161] The Court explained that, at the outset, the analysis weighed strongly in favor of preemption: "The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic

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152. Id. at 144 (citing *McClanahan*, 411 U.S. at 171).

153. Id. (citing Warren Trading Post Co. v. Ariz. State Tax Comm'n, 380 U.S. 685 (1965)).

154. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 205 (1987).

155. Id.

156. Id.

157. Id.

158. Id. at 206.

159. Id.

160. See id. at 210–11 (discussing how because California "regulates rather than prohibits" bingo, Public Law 280 does not express a congressional preference for the substitution of tribal law with state law).

161. Id. at 216 ("[S]tate jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests . . . are sufficient to justify the assertion of state authority." (second alteration in original) (internal quotation marks omitted) (quoting New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333–34 (1983))).

development."[162] The Court continued by recognizing that the tribe's reservations contained few resources that could be developed and that the gaming operations were the "sole source" of revenue to fund tribal government and tribal services, as well as a significant source of employment on the reservations.[163]

Engaging in interest balancing, the Court then weighed against these strong federal and tribal interests any interest asserted by California for why it needed the authority to regulate nontribal members who entered the reservations to engage in gaming.[164] California's only asserted interest was to prevent the arrival of organized crime to Indian reservations.[165] While the Court called California's interest a "legitimate concern,"[166] it reasoned that the interest was not sufficient to preempt the federal and tribal interests.[167] As a result of the *California v. Cabazon Band of Mission Indians* decision, Indian tribes are permitted to regulate gaming in Indian country despite tribal regulations being different from, or even contrary to, state regulations.[168] To ensure some federal uniformity after *Cabazon* was decided, Congress enacted the Indian Gaming Regulatory Act.[169]

Cabazon nicely illustrates how courts apply the doctrine of Indian preemption. It reaffirms that the presumptive federal and tribal interests require a consideration of tribal sovereignty and self-government.[170] To avoid preemption, a state's interest must raise more than a "legitimate concern" and must be sufficiently strong to justify the Court's intrusion into tribal sovereignty.[171] It is not surprising then that the Court has found state

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162. Id. (citing *Mescalero Apache Tribe*, 462 U.S. at 333–34).

163. Id. at 218–19.

164. Id. at 219.

165. Id. at 220 ("The sole interest asserted by the State to justify the imposition of its bingo laws on the Tribes is in preventing the infiltration of the tribal games by organized crime.").

166. Id. at 221.

167. Id. at 221–22 ("[T]he State's interest in preventing the infiltration of the tribal bingo enterprises by organized crime does not justify state regulation of the tribal bingo enterprises in light of the compelling federal and tribal interests supporting them.").

168. Kevin K. Washburn, The Legacy of *Bryan v. Itasca County*: How an Erroneous $147 County Tax Notice Helped Bring Tribes $200 Billion in Indian Gaming Revenue, 92 Minn. L. Rev. 919, 964 (2008) ("The right of Indian tribes to conduct Indian gaming free of state interference, implicitly recognized in *Bryan*, was now explicit.").

169. See Matthew L.M. Fletcher, Bringing Balance to Indian Gaming, 44 Harv. J. on Legis. 39, 54 (2007) (tying the enactment of the Indian Gaming Regulatory Act to the *Cabazon* decision).

170. Laurie Reynolds, Indian Hunting and Fishing Rights: The Role of Tribal Sovereignty and Preemption, 62 N.C. L. Rev. 743, 785 (1984) ("[C]ourts should adopt a presumption that state law is inapplicable to any activity, . . . if the federal government has recognized tribal sovereignty over that activity. [This] would reflect . . . congressional intent that Indian tribes achieve a maximum amount of self-government and self-sufficiency . . . ." (footnote omitted)).

171. *Cabazon*, 480 U.S. at 221.

regulation preempted in a majority of cases in which it directly considered the doctrine.[172]

b. *States Are Preempted From Regulating Protests in Indian Country*. — The application of the Indian preemption doctrine to state attempts to regulate protest activity in Indian country builds upon well-established legal precedent. The federal and tribal interests automatically include the need to encourage tribal self-government and to protect tribal sovereignty.[173] Against these interests it is difficult to articulate legitimate state interests[174] that differ from the asserted tribal interests and nearly impossible to find state interests which would be sufficient to displace the countervailing federal and tribal interests repeatedly recognized by Supreme Court precedent.

When protests take the form of large gatherings of persons in Indian country, states and tribes share the concern that gatherings should be peaceful. Both sovereigns want to ensure that the persons protesting do

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172. Because infringement and preemption are equally powerful alternatives to deny the state the right to regulate in Indian country, the exact count of preemption cases may be subject to disagreement, but, overall, the Supreme Court cases clearly favor preemption. The count is roughly nine to five. The Court found state power preempted in numerous cases. See Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue, 458 U.S. 832 (1982); Cent. Mach. Co. v. Ariz. State Tax Comm'n, 448 U.S. 160 (1980); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Moe v. Confederated Salish & Kootenai Tribes of the Flathead Rsrv., 425 U.S. 463 (1976); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 (1973); Warren Trading Post Co. v. Ariz. Tax Comm'n, 380 U.S. 685 (1965). The Court has upheld concurrent state regulation in significantly fewer cases. See Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022); Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005); Ariz. Dep't of Revenue v. Blaze Constr. Co., 526 U.S. 32 (1999); Dep't of Tax'n & Fin. v. Milhelm Attea & Bros., 512 U.S. 61 (1994); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).

Washington v. Confederated Tribes of the Colville Indian Reservation., 447 U.S. 134 (1980), and Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450 (1995), are not counted, as they are essentially a tie. In *Colville*, the Court concluded that the state's attempt to apply its excise tax on vehicles used on the reservation was preempted, but that the state could collect taxes on cigarettes sold to nonmembers on the reservation. See 447 U.S. at 138. In *Chickasaw Nation*, the Court held that a motor fuels tax, but not an income tax, was preempted. See 515 U.S. at 453. Similarly, Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989), is not included because only three of the Justices squarely confronted the application of the Indian preemption doctrine, but those who did decided that the state power to zone was preempted.

173. See *White Mountain Apache Tribe*, 448 U.S. at 141–42 (noting that the federal and tribal interests include the protection of tribal self-government, which includes the authority to regulate both "internal and social relations" in Indian country (internal quotation marks omitted) (quoting *McClanahan*, 411 U.S. at 173)).

174. A state interest in merely displacing the tribal sovereign in enforcing the law is not a legitimate interest because it directly contradicts the well-established federal interest in encouraging tribal self-government. See Fisher v. District Court, 424 U.S. 382, 387–88 (1976) (per curiam) (holding that a state interest in using its courts to resolve a dispute arising on nontribal land in Indian country was displaced by countervailing federal interests in tribal self-government); Williams v. Lee, 358 U.S. 217, 223 (1959) (same).

not jeopardize the safety of themselves, impartial third parties, or counter-protesters. Where the federal, tribal, and state interests align, there is no basis to allow state law to interfere with tribal regulations, because doing so would undermine the federal goals of protecting tribal sovereignty and encouraging tribal self-government.[175]

Concurrent tribal and state regulations would further undermine these powerful interests in protecting tribal sovereignty. While the Court "has recognized coextensive state and tribal civil jurisdiction where the exercise of concurrent authority does not do violence to the rights of either sovereign," when the concurrent authority would require the stricter of the regulations to control, concurrent jurisdiction is "unworkable" and, in deference to tribal sovereignty, the state authority should be "pre-empted."[176] As a result, concurrent authority has sometimes been recognized in matters of taxation when a business operating within Indian country can easily collect a cigarette or gasoline tax from nonmember purchasers and remit it to the state, while exempting tribal members consistent with their sovereign status.[177] Such a balance respects tribal sovereignty while allowing the state to collect taxes generally from nonmembers to fund services that are then provided to those nonmembers, such as the construction and maintenance of state roads.[178] In contrast to taxation, when states try to regulate physical conduct in Indian country with rules that are substantially different from those imposed by the tribe, their rules have mostly been preempted. States do not have an interest sufficient to overcome tribal sovereignty and self-government when they try to require compliance with state rules for hunting and fishing,[179] gambling,[180] or zoning land owned in fee by nonmembers on

175. See *Warren Trading Post Co.*, 380 U.S. at 690 ("Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities.").

176. *Brendale*, 492 U.S. at 466 (Blackmun, J., concurring in part and dissenting in part) (citing *Mescalero Apache Tribe*, 462 U.S. at 338).

177. See *Confederated Tribes of the Colville Indian Rsrv.*, 447 U.S. at 163–64 (holding that a state may require even tribal businesses to collect a state cigarette tax from nonmember purchasers).

178. See Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 99 (2005) (allowing the state to collect a gasoline tax when the legal incidence of the tax occurs outside of Indian country, even though the customer was a tribally owned gas station).

179. See *Mescalero Apache Tribe*, 462 U.S. at 325 ("We hold that this application of New Mexico's hunting and fishing laws is pre-empted by the operation of federal law.").

180. See California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987) (holding that "[t]he Court has consistently recognized that Indian tribes retain 'attributes of sovereignty over both their members and their territory'" (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975))).

portions of a reservation that are largely still held in trust or owned by the tribe and its members.[181]

Some states have asserted concerns that, because tribal courts have limited criminal jurisdiction over non-Indian persons in Indian country,[182] states need to enforce their criminal rules in Indian country to ensure the safety of the general community.[183] The Supreme Court allayed those concerns in 2021 in *United States v. Cooley*,[184] in which the Court unanimously[185] held that, even if an Indian tribal court could not criminally punish a non-Indian person, tribal police have the inherent authority to stop, search, detain, and turn over non-Indians who are suspected of violating state or federal laws.[186] Moreover, post-*Cooley* cases have suggested that any safety concerns posed by persons not subject to a tribe's criminal jurisdiction can be handled by tribally imposed civil penalties,[187] including the inherent

181. See *Brendale*, 492 U.S. at 430 ("*Montana* should therefore not be understood to vest zoning authority in the tribe when fee land is used in certain ways.").

182. See Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2501–02 (2022) ("[T]he State has a strong sovereign interest in ensuring public safety and criminal justice within its territory, and in protecting all crime victims.").

183. Tribal court criminal jurisdiction over non-Indians is limited to expressions of inherent tribal power recognized by Congress. See Grant Christensen, Using Consent to Expand Tribal Court Criminal Jurisdiction, 111 Calif. L. Rev. 1831, 1835 (2023) (discussing the current limitations on tribal court criminal jurisdiction over non-Indians and suggesting that the jurisdiction could be expanded from its current interpretation to include any non-Indian defendant who consents to the tribe's jurisdiction); Zachary S. Price, Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction, 113 Colum. L. Rev. 657, 676–79 (2013) (discussing jurisprudential limits on tribal court criminal jurisdiction); Lauren van Schilfgaarde, (Un)Vanishing the Tribe, 66 Ariz. L. Rev. 409, 432–34 (2024) (same).

184. 141 S. Ct. 1638, 1644–45 (2021) (discussing doubts regarding the workability of precedent regarding tribal jurisdiction over non-Indians).

185. See id. at 1641. Justice Samuel Alito concurred in the opinion, emphasizing the importance of the fact that the tribal police action occurred on a public right-of-way running through the Crow Reservation and reserving the right to consider tribal officers' general inherent police powers in future cases. No other Justice joined the concurrence. See id. (Alito, J., concurring).

186. Id. at 1646 (majority opinion) (holding that the "existing legislation and executive action appear to operate on the assumption that tribes have retained this authority"); see also Grant Christensen, Getting *Cooley* Right: The Inherent Criminal Powers of Tribal Law Enforcement, 56 U.C. Davis L. Rev. 467, 471 (2022) (emphasizing the importance of the *Cooley* decision to limit the power of states in Indian country because "among the inherent powers 'tribes have retained' is the right to stop, search, and detain non-Indians who are suspected of committing crimes in Indian country" (footnote omitted) (quoting *Cooley*, 141 S. Ct. at 1646)).

187. State v. Astorga, 642 S.W.3d 69, 79–81 (Tex. App. 2021) (finding that searches of non-Indians by tribal law enforcement may properly include any search based on probable cause that the non-Indian has violated the tribe's civil code, even if the search also turns up evidence which could be used in a criminal proceeding).

tribal power to exclude nonmembers from Indian country for failure to comply with tribal laws.[188]

The above discussion indicates that when trying to regulate protests consisting of gatherings of persons in Indian country, any interest asserted by the state will be preempted by the concomitant federal and tribal interests. When states share the same interests as tribes, the need to develop and protect tribal sovereignty and self-government suggests that the authority should not be concurrent but rather should vest entirely in the tribe. When states assert interests different from the tribe, the concurrent but differing regulations governing physical action or behavior are unworkable. Because deferring to the state interest would necessarily displace the tribal interest, and vice-versa, the Court has suggested that only one sovereign's regulatory scheme should govern.[189]

When the nature of the protest is not a gathering of persons, but rather the exercise of the right to petition government, the balance of powers is even more likely to favor the preemption of state regulatory authority. It is axiomatic that the right to petition government in Indian country is a right to petition the tribal government, for state government exists outside of the reservation.[190] Protests against tribal government, including petitioning the government or objecting to the decisions of the elected branches of tribal government, have the potential to impact the tribe's political integrity.[191] Political or policy demands by protesters go to

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188. See Skibine, The Tribal Right to Exclude, supra note 134, at 286–94 (emphasizing the origin of the tribal power to exclude); see also Knighton v. Cedarville Rancheria of N. Paiute Indians, 922 F.3d 892, 901 (9th Cir. 2019) ("[T]he tribe's right to exclude nonmembers from tribal land includes the power to regulate them 'unless Congress has said otherwise, or unless the Supreme Court has recognized that such power conflicts with federal interests promoting tribal self government.'" (quoting Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 812 (9th Cir. 2011) (per curiam))).

189. Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 467 (1989) (Blackmun, J., concurring in the judgment in part and dissenting in part) ("[W]e have long recognized that tribal authority over on-reservation conduct must be 'construed generously in order to comport . . . with the federal policy of encouraging tribal independence.'" (second alteration in original) (quoting White Mountain Apache Tribe v. Bracker, 488 U.S. 136, 144 (1980))).

190. Langley v. Ryder, 778 F.2d 1092, 1096 (5th Cir. 1985) (holding that "the general rule that the federal, not state, government has criminal jurisdiction over Indian lands applies"); Melissa Cottle, Note, Indian Land Reform: Justice for All? An Examination of Property Laws Pertaining to the Five Tribes Indians and a New Call for Reform, 39 Okla. City U. L. Rev. 71, 90–91 (2014) ("[I]f the conflict . . . arose between Indians in Indian Country, the state's jurisdiction is limited and most of the jurisdictional powers and responsibilities are left entirely to the tribe . . . . However, if the act occurred outside of Indian Country, jurisdiction typically will lie with the state government.").

191. Gabriel S. Galanda, Arbitration in Indian Country: Taking the Long View, Disp. Resol. J., Nov. 2010/Jan. 2011, at 31, 32 (describing how nonmember businesses denouncing a tribal business practice may threaten the political integrity of the Indian tribe).

the heart of the governance structure the tribe has chosen for itself.[192] Any state regulation of challenges to tribal governance decisions would necessarily be preempted by the competing tribal and federal interests in protecting tribal self-government.

C. *The Federal Government Should Not Regulate Protests in Indian Country*

While the doctrines of infringement and preemption are decisive barriers preventing a state from asserting its regulatory powers in Indian country, there is no similar principle barring federal regulation. Congress has been enacting laws regulating conduct in Indian country since its founding.[193] The Court has long deferred to Congress on questions of law and policy in Indian country, even if the enacted laws are only loosely connected to Congress's enumerated Article I powers.[194] For example, in 1886 the Court held that Congress could enact a set of criminal laws policing the conduct between tribal members on tribal land, even though such a law would not be authorized by the Commerce Clause or any other power found in Article I.[195] Instead, the Court upheld the law because the power to punish Indian-on-Indian crime "must exist" in the federal government "because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes."[196] That Congress has wide latitude to legislate the conduct of

192. Although many tribes have governance structures that resemble those of states, tribes are free to determine for themselves how to structure tribal government. See Kevin J. Worthen, Two Sides of the Same Coin: The Potential Normative Power of American Cities and Indian Tribes, 44 Vand. L. Rev. 1273, 1274 n.2 (1991) ("Government structure varies somewhat from tribe to tribe.").

193. See, e.g., Bethany Berger, Comment, Separate, Sovereign, and Subjugated: Native Citizenship and the 1790 Trade and Intercourse Act, 65 Wm. & Mary L. Rev. 1117, 1122 (2024) (discussing how congressional rules for trade with Indians go back to the First Congress in the eighteenth century); Matthew L.M. Fletcher, Uncomfortable Truths About Sovereignty and Wealth, 27 Roger Williams U. L. Rev. 288, 293 (2022) ("The First Congress enacted the Trade and Intercourse Act of 1790, which preempted state involvement in Indian affairs.").

194. See Robert N. Clinton, There Is No Federal Supremacy Clause for Indian Tribes, 34 Ariz. St. L.J. 113, 181–82 (2002) (critiquing the principle that Congress exercises plenary power in Indian country); Robert A. Williams, Jr., The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence, 1986 Wis. L. Rev. 219, 262–64 (same).

195. United States v. Kagama, 118 U.S. 375, 378–79 (1886) ("[W]e think it would be a very strained construction of this clause, that a system of criminal laws for Indians living peaceably in their reservations . . . was authorized by the grant of power to regulate commerce with the Indian tribes.").

196. Id. at 384–85.

Indians and tribal lands assumes such authority falls within Congress's "plenary power."[197]

Whether Congress should be able to assert plenary power in Indian affairs has been subject to robust critique.[198] The Supreme Court has recently walked back the notion of plenary power, opining that "we have never wavered in our insistence that Congress's Indian affairs power 'is not absolute.' . . . Article I gives Congress a series of enumerated powers, not a series of blank checks."[199] But it is clear that Congress's power to make laws for Indian country is broad[200] and that it could create rules directly regulating protests that occur on Indian reservations; "Congress's authority to legislate with respect to Indians is not unbounded. It is plenary within its sphere, but even a sizeable sphere has borders."[201]

Although Congress has not directly enacted laws to regulate protests that occur in Indian country, it has guaranteed some protections for individuals from the exigencies of tribal government. The Indian Civil Rights Act (ICRA)[202] prohibits Indian tribes from exercising their inherent powers of self-government to "make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances."[203] The ICRA also requires tribal compliance with

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197. N. Bruce Duthu, *Crow Dog* and *Oliphant* Fistfight at the Tribal Casino: Political Power, Storytelling, and Games of Chance, 29 Ariz. St. L.J. 171, 198 n.131 (1997) (describing the plenary power doctrine as originating with *Kagama*).

198. For just a sample of the scholarship exploring the plenary power doctrine in Indian law, see M. Henry Ishitani & Alexandra Fay, Revising the Indian Plenary Power Doctrine, 29 Mich. J. Race & L. 1, 2–5 (2024) (tracing the racist origins of the doctrine and suggesting a process for a revised body of federal Indian law); Michalyn Steele, Plenary Power, Political Questions, and Sovereignty in Indian Affairs, 63 UCLA L. Rev. 666, 680–84 (2016) (arguing that questions of inherent tribal authority are political rather than judicial, and tribes should use the plenary power and political question doctrines to pose these questions to Congress rather than the courts); Alex Tallchief Skibine, Dualism and the Dialogic of Incorporation in Federal Indian Law, 119 Harv. L. Rev. Forum 28, 30 (2006) (on file with the *Columbia Law Review*) (arguing for the incorporation of tribes into "Our Federalism" as a third sphere of sovereignty pursuant to Felix Cohen's "plenary power-sovereignty" paradigm (internal quotation marks omitted)).

199. Haaland v. Brackeen, 143 S. Ct. 1609, 1629 (2023) (quoting Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 84 (1977)).

200. See id. at 1628, 1631 (upholding Congress's power to make laws related to Indian children, even though those laws are not tied to commerce).

201. Id. at 1629.

202. Indian Civil Rights Act of 1968, Pub. L. 90–284, 82 Stat. 73 (codified at 25 U.S.C. § 1301–1303 (2018)). For a discussion of the limits of the ICRA, see Matthew L.M. Fletcher, Indian Courts and Fundamental Fairness: *Indian Courts and the Future* Revisited, 84 U. Colo. L. Rev. 59, 94 (2013) ("ICRA, merely a federal statute, does not carry the same weight as the United States Constitution and, therefore, provides insufficient protection for nonmembers in tribal court.").

203. 25 U.S.C. § 1302(a)(1).

other core individual rights, including protections against double jeopardy[204] and guaranteeing all persons due process and the equal protection of law.[205] It stops short of incorporating the whole Bill of Rights, notably not extending the right to counsel, the establishment of religion, or the right to bear arms,[206] but is sufficiently broad to ensure federally mandated individual protections.[207]

While Congress's enactment of the ICRA provided a set of statutory federal rights, it limited the federal enforcement of those rights to instances where a claimant was eligible for a writ of habeas corpus: "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."[208] The limited remedy provided by the ICRA was actually tested in a case centered on a tribal member's right to petition the tribal government for redress.[209] The Santa Clara Pueblo had adopted a membership ordinance that permitted male members to enroll children conceived with women who were not members of the Pueblo but did not permit female members to reciprocally enroll children born with fathers who were not tribal members.[210] Julia Martinez was a Santa Clara Pueblo woman who had married a Navajo man.[211] Her children were therefore ineligible for enrollment under the Pueblo's law.[212] Martinez petitioned the Pueblo to change its membership ordinance and to enroll her children but was unsuccessful.[213] She then turned to the federal courts, filing suit against the Pueblo by alleging that the denial of enrollment of the children

204. Id. § 1302(a)(3).

205. Id. § 1302(a)(8).

206. Angela R. Riley, Indians and Guns, 100 Geo. L.J. 1675, 1676–77 (2012) ("Congress extended select, tailored provisions of the Bill of Rights to tribal governments . . . but included no Second Amendment corollary. As a result, there are over 67 million acres of Indian trust land . . . within which individuals' gun rights are not constitutionally protected . . . ." (footnote omitted)); Angela R. Riley, (Tribal) Sovereignty and Illiberalism, 95 Calif. L. Rev. 799, 809 (2007) [hereinafter Riley, Sovereignty and Illiberalism].

207. Kristen A. Carpenter, Considering Individual Religious Freedoms Under Tribal Constitutional Law, 14 Kan. J.L. & Pub. Pol'y 561, 568 (2005) ("Often described as the 'Indian Bill of Rights,' ICRA does not literally extend the federal Bill of Rights to tribal governments, but does include a number of very similar protections.").

208. 25 U.S.C. § 1303.

209. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

210. Id. at 52.

211. Id.

212. Id. ("Two years before this marriage, the Pueblo passed the membership ordinance here at issue, which bars admission of the Martinez children to the tribe because their father is not a Santa Claran.").

213. Id. at 53.

of female members was a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[214]

The Supreme Court held that the federal court could not offer Martinez any assistance because, although she alleged that the tribe had failed to secure to her the equal protection of laws under the ICRA, the only remedy Congress provided for a violation of these rights was habeas.[215] "[U]ntil Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that § 1302 does not impliedly authorize actions for declaratory or injunctive relief against . . . the tribe or its officers."[216] The Court explained that when Congress legislates in the area of Indian affairs, it does so with dual objectives: both the protection of individual rights and the preservation of tribal self-government.[217] The Court refused to find a federal remedy for the violation of a statutorily created federal right.[218] Although it admitted that Congress could provide for federal enforcement, it had not done so explicitly in the ICRA, and it was not for the Court to imply a remedy at common law.[219]

The judicial creation of the dual doctrines of infringement and Indian preemption demonstrate a judicial protection for tribal sovereignty.[220] As *Santa Clara Pueblo v. Martinez* demonstrates, Congress has largely left the protection of individual rights and liberties up to tribal governments to enforce in tribal courts. It only permits federal interference to hear a petition for habeas from an individual to test their "detention"

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214. Id. at 53–55 (reviewing the procedural history, in which the Pueblo prevailed in the district court, Ms. Martinez prevailed on appeal, and the Supreme Court granted certiorari).

215. See id. at 72.

216. Id.

217. Id. at 64 ("Creation of a federal cause of action for the enforcement of rights created in Title I, however useful it might be in securing compliance with § 1302, plainly would be at odds with the congressional goal of protecting tribal self-government.").

218. Id. at 69 ("Given this history, it is highly unlikely that Congress would have intended a private cause of action for injunctive and declaratory relief to be available in the federal courts to secure enforcement of § 1302.").

219. Id. at 72 ("Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained. . . . Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of § 1302 . . . .").

220. See supra section II.B (discussing the doctrines of infringement and Indian preemption); see also HCI Distrib., Inc. v. Peterson, 110 F.4th 1062, 1068 (8th Cir. 2024) ("The *Bracker* preemption analysis proceeds against a 'backdrop' of tribal sovereignty, including Congress's 'overriding goal of encouraging tribal self-sufficiency and economic development . . . .'" (citation omitted) (first quoting New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983); then quoting California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987))); Pub. Serv. Co. v. Barboan, 857 F.3d 1101, 1110 (10th Cir. 2017) (noting "the federal government's long-stated policy goal of respecting tribal sovereignty").

by order of an Indian tribe.[221] The Court has more recently recognized in *United States v. Bryant* that although tribal courts are subject to the ICRA and therefore may provide different sets of procedural rights to parties before them, tribal court procedures "sufficiently ensure the reliability of tribal-court convictions,"[222] thereby vitiating the need for legislative intervention. Having established that Congress has not broadly legislated the regulation of protest in Indian country, and the courts have refused to create common law remedies to vindicate rights in Indian country in deference to tribal sovereignty, Congress should refrain from adopting federal rules governing protest on tribal land. Deference to the tribal sovereign is sufficient to protect individual rights.

Deference is further supported by the actual practice of tribes. Although not bound by the Constitution, tribal court procedures are genuinely sufficient to protect the rights of all parties that appear before them.[223] Federal deference to tribal court practice is therefore justified not only on preemption principles but also because deference ensures justice without sacrificing procedural fairness. Admittedly, the procedures in tribal court might differ from state and federal proceedings, but alternative procedures do not require sacrificing fairness in the tribal justice system. Professor Angela Riley has ably documented an example from the Navajo Nation:

> One Navajo leader explained that "[i]t was difficult for Navajos to participate in a system where fairness required the judge to have no prior knowledge of the case, and where who can speak and what they can say are closely regulated." This is because Navajo conceptions of fairness and social harmony require full community involvement in each dispute and, in particular, the participation of elders and those knowledgeable about the matter. In the Navajo system, everyone is allowed to speak, and if private discussions with elders or decision-makers helps bring peace to the community, this is acceptable.[224]

Justice, healing, and peace are goals shared by tribal and nontribal justice systems alike.[225] The Supreme Court's acceptance of tribal courts

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221. 25 U.S.C. § 1303 (2018).

222. United States v. Bryant, 579 U.S. 140, 157 (2016).

223. See id. (noting that proceedings in compliance with the ICRA "sufficiently ensure the reliability of tribal-court convictions" and, moreover, the ICRA grants habeas review in federal court to those affected by a tribal-court judgment).

224. Riley, Sovereignty and Illiberalism, supra note 206, at 840–41 (alteration in original) (footnotes omitted) (quoting U.S. Comm'n on C.R., The Indian Civil Rights Act: A Report of the United States Commission on Civil Rights 10 (1991)).

225. See, e.g., Cynthia Alkon, The Increased Use of "Reconciliation" in Criminal Cases in Central Asia: A Sign of Restorative Justice, Reform or Cause for Concern?, 8 Pepp. Disp. Resol. L.J. 41, 73 (2007) (discussing how most of the restorative justice processes used in the United States share common values, terms, and concepts).

and their alternative legal procedures, as recognized in *Bryant*, ensures that leaving the regulation of protest activity in Indian country to the tribal sovereign does not jeopardize individual rights; it merely achieves the same legal ends through a different means. Deference to these alternative but sufficient legal procedures is not a function of ignoring individual rights, but a conscious choice to respect the inherent power of a fellow sovereign to protect those rights using different legal procedures.

III. TRIBAL GOVERNMENTS AND PROTEST IN INDIAN COUNTRY

How Indian tribes, as separate sovereigns, govern protests that occur in Indian country is largely undiscussed even by First Amendment scholars. The Constitution and its attendant Bill of Rights place limitations on federal actors[226] and, through the Fourteenth Amendment, on state actors,[227] but not on tribal actors. "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."[228] The consequences of being unconstrained by constitutional rights when regulating protest activity provide an interesting counternarrative to the regulation of protest activity in the United States.

A. *Tribes Are Sovereign*

Indian tribes are sovereign governments.[229] The Supreme Court first recognized tribal sovereignty in 1831, finding that Indian tribes are a distinct appellation, contradistinguished from states and foreign nations in the Commerce Clause.[230] The Court's traditional recognition has rarely wavered and finds support even in its most recent jurisprudence. In 2023, the Court reaffirmed that tribes, like states, may assert sovereign immunity

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226. See Kurt T. Lash, Becoming the "Bill of Rights": The First Ten Amendments From Founding to Reconstruction, 110 Va. L. Rev. 411, 441–43 (2024).

227. See Christopher P. Coval, Note, *Good News* for Religious Schools and the Freedom of Speech, 83 B.U. L. Rev. 705, 723 (2003) ("[A]t this point in the Court's jurisprudence, the doctrine that the Fourteenth Amendment incorporates the Bill of Rights against the states through the Due Process Clause is largely beyond question.").

228. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

229. For examples of scholars discussing tribal sovereignty from diverse perspectives, see N. Bruce Duthu, Incorporative Discourse in Federal Indian Law: Negotiating Tribal Sovereignty Through the Lens of Native American Literature, 13 Harv. Hum. Rts. J. 141, 150–51 (2000) (exploring the theme of sovereignty through law and Indigenous literature); Sarah Krakoff, A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation, 83 Or. L. Rev. 1109, 1156 (2004) (exploring the legal origins of tribal sovereignty and early interpretations of tribal sovereigns within the framework of American federalism); Singer, supra note 84, at 653–60 (exploring how the Rehnquist Court's decisions limited tribal sovereignty); Melissa L. Tatum, Symposium Foreword, 40 Tulsa L. Rev. 1 (2004) (articulating the inherent powers of tribal governments).

230. See Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 18 (1831).

to suit.[231] It traced that power to the inherent sovereign power of tribal government, calling "[t]ribal sovereign immunity, . . . 'a necessary corollary to Indian sovereignty and self-governance.'"[232] In another case decided during the same term, Justice Neil Gorsuch, joined by Justices Sonia Sotomayor and Ketanji Brown Jackson, wrote in *Haaland v. Brackeen* that "[t]ribes remain independent sovereigns responsible for governing their own affairs" and that tribal regulation of conduct occurring in Indian country "preserve[s] the Indian-law bargain written into the Constitution's text by securing the continued viability of the 'third sovereign.'"[233]

The relationship between Indian tribes and the United States is one based on mutuality. The Supreme Court calls it a "government-to-government" relationship.[234] As the Tenth Circuit has explained, "Indian tribes are not states. They have a status higher than that of states. They are subordinate and dependent nations possessed of all powers [except] to the extent that they have expressly been required to surrender them by the superior sovereign, the United States."[235] Perhaps the most trenchant articulation of the basis of inherent tribal power comes from Justice Elena Kagan in *Michigan v. Bay Mills Indian Community*, in which she wrote for the Court, "While each State at the Constitutional Convention surrendered its immunity from suit by sister States, 'it would be absurd to suggest that the tribes'—at a conference 'to which they were not even parties'—similarly ceded their immunity."[236] When a tribe acts, it does so pursuant to its inherent authority as a sovereign government. From this inherent power comes the authority to regulate the nature of protest and the behavior of protesters.

B. *Tribal Sovereignty Gives Tribes the Inherent Power to Regulate Protesters*

More than a century of Supreme Court jurisprudence confirms that the inherent authority of Indian tribes includes the power to regulate the

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231. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 143 S. Ct. 1689, 1702 (2023) (holding that Congress had unambiguously waived that immunity for a small set of claims brought pursuant to the Bankruptcy Code).

232. Id. at 393 (quoting Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014)).

233. Haaland v. Brackeen, 143 S. Ct. 1609, 1647 (2023) (Gorsuch, J., concurring) (citing O'Connor, supra note 79).

234. Yellen v. Confederated Tribes of the Chehalis Rsrv., 141 S. Ct. 2434, 2444 n.5 (2021) ("Federal acknowledgement or recognition of an Indian group's legal status as a tribe is a formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government." (internal quotation marks omitted) (quoting 1 F. Cohen, Handbook of Federal Criminal Indian Law § 3.02[3] (N. Newton ed. 2012))).

235. Nat'l Lab. Rels. Bd. v. Pueblo of San Juan, 276 F.3d 1186, 1192 n.6 (10th Cir. 2002) (en banc) (alteration in original) (quoting Native Am. Church v. Navajo Tribal Council, 272 F.2d 131, 134 (10th Cir. 1959)).

236. *Bay Mills Indian Cmty.*, 572 U.S. at 789–90 (quoting Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 782 (1991)).

behavior of those within Indian country separate from state or federal regulations. The Court first recognized that an Indian tribe exercising its inherent powers is not subject to even constitutional restraints in a case dealing with the size of grand juries.[237] In *Talton v. Mayes*, Talton, a Cherokee Indian, was indicted and convicted of murder by the Cherokee Tribal Court using a grand jury of five persons.[238] Talton appealed his conviction through the federal courts, arguing that the Tribal Court's use of a grand jury of five persons violated his Fifth Amendment right to a grand jury.[239] The Court disagreed.[240] It reasoned that the U.S. Constitution only applied to the Cherokee Tribal Court's criminal proceedings if, when prosecuting Talton, the Cherokee Nation was exercising powers delegated to it by Congress.[241] The Court reasoned that when the Cherokee created the procedures for a grand jury it did so not at the direction of Congress or subject to a power delegated to it by the Constitution, but through its inherent power as a sovereign government.[242] Tribes are "a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union, or of the state within whose limits they resided."[243]

The Constitution is not a bar to the regulations that Indian tribes may impose, a notion that the Court has consistently upheld. Eighty years after *Talton*, the Court was asked whether a criminal prosecution, first by a tribal court and then by the United States for the same underlying criminal conduct, violated the double jeopardy rights of an Indian defendant.[244] In *United States v. Wheeler*, a unanimous Court allowed the two prosecutions on the basis of the dual sovereignty doctrine.[245] It reasoned that when a

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237. See Talton v. Mayes, 163 U.S. 376, 381–82 (1896) (concluding that the U.S. law governing the size of the grand jury does not apply to a murder committed within the Cherokee Nation's jurisdiction, given the crime's local nature).

238. Id. at 379.

239. Id.

240. Id. at 381–82 ("The crime of murder committed by one Cherokee Indian upon the person of another within the jurisdiction of the Cherokee nation is, therefore, clearly not an offence against the United States, but an offence against the local laws of the Cherokee nation.").

241. Id. at 382 (suggesting the case turned on whether the Cherokee Nation's powers are derived from the U.S. Constitution, and thus bound by the Fifth Amendment, or if they are independent powers subject only to general constitutional provisions and congressional authority).

242. Id.

243. Id. at 384 (internal quotation marks omitted) (quoting United States v. Kagama, 118 U.S. 375, 381–82 (1886)).

244. See United States v. Wheeler, 435 U.S. 313, 314 (1978) ("The question presented in this case is whether the Double Jeopardy Clause of the Fifth Amendment bars the prosecution of an Indian in a federal district court . . . when he has previously been convicted in a tribal court of a lesser included offense arising out of the same incident.").

245. Id. at 313. The dual sovereignty doctrine holds that a single act that violates the laws of different sovereigns may be prosecuted once by each sovereign without offending

tribe criminally prosecuted a tribal member, it was relying on its inherent criminal powers to create and enforce its own law on tribal land.[246] That power predated the creation of the United States, and therefore the two different prosecutions did not place the defendant's liberty twice in jeopardy for the same offense.[247] The dual sovereignty doctrine has been used by the Court to justify actions taken by tribes pursuant to their inherent or "primeval sovereignty."[248] While *Wheeler* was about a tribe's ability to prosecute separately from the United States, its recognition that tribes exercise a preconstitutional power has considerably broader implications.[249]

Since *Talton*, modern iterations of the Court have reaffirmed this position.[250] In a case discussing the power of the tribe to regulate discriminatory bank lending on the reservation, Chief Justice John Roberts reminded the parties that "[t]ribal sovereignty, it should be remembered, is 'a sovereignty outside the basic structure of the Constitution.' The Bill of Rights does not apply to Indian tribes."[251] A decade later Justice Ruth Bader Ginsburg, writing for a unanimous Court, reiterated, "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."[252]

Taken together, the inherent authority to create regulations governing Indian country and the exemption from compliance with the U.S. Constitution mean that Indian tribes will sometimes develop unique and culturally appropriate rules to govern themselves. As the Second Circuit

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the defendant's right to be free from double jeopardy under the Fifth or Fourteenth Amendments. The Supreme Court adopted the doctrine in Bartkus v. Illinois, 359 U.S. 121, 139 (1959). For a discussion of the doctrine, see Anthony J. Colangelo, Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory, 86 Wash. U. L. Rev. 769, 772–78 (2009); Michael A. Dawson, Note, Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine, 102 Yale L.J. 281, 289–99 (1992).

246. *Wheeler*, 435 U.S. at 322 ("It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members.").

247. Id. at 328 ("[T]he power to punish offenses against tribal law committed by Tribe members, which was part of the Navajos' primeval sovereignty, has never been taken away from them, either explicitly or implicitly, and is attributable in no way to any delegation to them of federal authority.").

248. Id.

249. Craig Smith, Comment, Full Faith and Credit in Cross-Jurisdictional Recognition of Tribal Court Decisions Revisited, 98 Calif. L. Rev. 1393, 1415 (2010) (discussing how "after *Wheeler*, tribes are pre-constitutional entities whose sovereignty does not spring from either the federal government or the Constitution").

250. See, e.g., Denezpi v. United States, 142 S. Ct. 1838, 1844–45 (2022) ("Because the sovereign source of a law is an inherent and distinctive feature of the law itself, an offense defined by one sovereign is necessarily a different offense from that of another sovereign.").

251. Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 337 (2008) (citation omitted) (quoting United States v. Lara, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring in the judgment)).

252. United States v. Bryant, 579 U.S. 140, 149 (2016) (internal quotation marks omitted) (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978)).

has explained, "Because tribal powers of self-government are 'retained' and predate the federal Constitution, those constitutional limitations that are . . . framed as limitations on *federal* and *state* authority do not apply to tribal institutions exercising powers of self-government with respect to members of the tribe or others within the tribe's jurisdiction."[253] Robert Yazzie, former Chief Justice of the Navajo Nation, has written powerfully about the differences between the Indigenous legal traditions and much of American common law. He explained, "[W]hile Anglo law is concerned with social control by humans, Navajo law comes from creation. It concerns life itself, and the means to live successfully. The way to a meaningful life can be learned in teachings which are fundamental and absolute."[254]

Using the example of Navajo law, Yazzie suggests that peacemaking can resolve conflicts without resorting to the adversarial system that is the hallmark of most American courts.

> For example, traditional Navajo tort law is based on *nalyeeh*, which is a demand by a victim to be made whole for an injury. In the law of *nalyeeh*, one who is hurt is not concerned with intent, causation, fault, or negligence. If I am hurt, all I know is that I hurt; that makes me feel bad and makes those around me feel bad too. I want the hurt to stop, and I want others to acknowledge that I am in pain. The maxim for *nalyeeh* is that there must be compensation so there will be no hard feelings. This is restorative justice. Returning people to good relations with each other in a community is an important focus. Before good relations can be restored, the community must arrive at a consensus about the problem.[255]

As a result of starting in a different place, Indigenous law may create rules and craft punishments that are at first difficult for non-Native observers to accept. By building a legal tradition that starts from the obligations people owe each other and the rules that emerge from custom and tradition, Indian tribes have crafted rules designed to protect their communities.[256]

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253. Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 880–81 (2d Cir. 1996).

254. Robert Yazzie, "Life Comes From It": Navajo Justice Concepts, 24 N.M. L. Rev. 175, 176 (1994).

255. Id. at 184–85.

256. There is a strong tradition in Indigenous legal scholarship that focuses on understanding and defending legal principles developed by Indigenous communities. See Raymond D. Austin, American Indian Customary Law in the Modern Courts of American Indian Nations, 11 Wyo. L. Rev. 351, 364–65 (2011) (stating that the importance of culture, values, languages, and religious practices must be taken into account when attempting to revitalize tribal law); Matthew L.M. Fletcher, The Supreme Court's Legal Culture War Against Tribal Law, 2 Intercultural Hum. Rts. L. Rev. 93, 94–95 (2007) (highlighting that tribal law is largely influenced by oral tradition); Matthew L.M. Fletcher, Tribal Employment Separation: Tribal Law Enigma, Tribal Governance Paradox, and Tribal Court Conundrum, 38 U. Mich. J.L. Reform 273, 279–80 (2005) (outlining the differences between employment

Most tribal regulation applicable to protest mirrors states' legislative and administrative rules, in that tribes have adopted rules to protect both protesters and the surrounding general public.[257] Tribal and nontribal governments alike broadly use time, place, and manner restrictions to police protest activity.[258] Not all tribal regulations, however, will necessarily find analogous corollaries with state law. One particular tribally imposed punishment for protest meaningfully tests the principle that tribes ought to be free to regulate protest activity without federal intervention: banishment.

C. *Examples of Tribal Regulation: Banishment in Response to Tribal Protest*

Although banishment as a punishment can find support in American law, even from early Supreme Court authority—"[t]he right to confiscate and banish, in the case of an offending citizen, must belong to every government"[259]—its use highlights the tension between tribal sovereignty and adequate individual rights. This section lays out the federal case law surrounding banishment as a punishment for protest and then defends its use. Ultimately, this Piece argues that tribes have the inherent power to banish anyone from Indian country but that tribes should be judicious in the use of this severe punishment.

It is important to recognize that banishment applies not only to tribal members but may be imposed against any person. Banishment, or at least exclusion from Indian country, can itself be used as a form of protest. The most interesting recent case on banishment arises from South Dakota. In response to then-Governor Kristi Noem's repeated claims that tribal communities were allowing drug cartels to operate within their territory,[260] the

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in the U.S. and tribal governments, namely that tribal communities are close-knit and officials are held especially accountable); Pat Sekaquaptewa, Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking, 32 Am. Indian L. Rev. 319, 351–55 (2008) (describing the vast differences between traditional U.S. legal customs and tribal law); Christine Zuni Cruz, Tribal Law as Indigenous Social Reality and Separate Consciousness [Re]Incorporating Customs and Traditions Into Tribal Law, 1 Tribal L.J. 1, 16 (2000) (describing how Navajo laws are directly influenced by the tribe's own traditional law).

257. See, e.g., Puyallup Tribal Code § 9.12.330 (2014) (establishing a process by which tribal members can protest the results of an election).

258. Hulbert v. Pope, 70 F.4th 726, 739 (4th Cir. 2023) ("[T]ime, place, and manner restrictions have a vital role to play. They allow protests to proceed, while ensuring that legislative sessions can go forward and that the safety of the public is guaranteed.").

259. Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 20 (1800) (opinion of Cushing, J.).

260. Statement of Oglala Sioux Tribe President Frank Star Comes Out on Governor Noem's Uninvited Appearance at a Tribal-Federal Meeting and Other Recent Actions, Native Sun News Today (Apr. 8, 2024), https://www.nativesunnews.today/articles/statement-of-oglala-sioux-tribe-president-frank-star-comes-out-on-governor-noems-uninvited-appearance-at-a-tribal-federal-meeting-and-other-recent-actions/ [https://perma.cc/J5UB-DSEM] ("We remind the Governor that any cartel dealers must first pass through state jurisdiction prior to any presence on Tribal Jurisdiction . . . . Our Tribe has banished convicted drug dealers from our Reservation.").

Oglala and Cheyenne River Sioux tribes voted to banish the governor from their reservations.[261]

Much of the case law surrounding a tribal government's regulation of protest in Indian country is centered around the authority of the tribe to banish its members for conduct that would otherwise be constitutionally protected if the Constitution gave rights that must be respected by tribal governments. This section will examine three cases that reach different outcomes on tribal banishment orders. These cases will provide helpful context before the Piece mounts a defense of banishment on tribal sovereignty grounds.

1. Poodry v. Tonawanda Band of Seneca Indians. — The case arose from a conflict within the Tonawanda Band of Seneca Indians, whereby several tribal members, including Peter Poodry, protested against the tribal council's misuse of tribal funds, suspension of tribal elections, and burning of tribal business records by first petitioning the government and then forming an alternate general council.[262] In retaliation, the tribal council imposed the severe punishment of permanent banishment on the dissenting members, effectively stripping them of their tribal citizenship, excluding them from the reservation, and denying them all tribal benefits and privileges.[263] The notice given to Poodry read:

> It is with a great deal of sorrow that we inform you that you are now banished from the territories of the Tonawanda Band of the Seneca Nation. You are to leave now and never return.
>
> According to the customs and usage of the Tonawanda Band of the Seneca Nation and the HAUDENOSAUNEE, no warnings are required before banishment for acts of murder, rape, or treason.
>
> Your actions to overthrow, or otherwise bring about the removal of, the traditional government at the Tonawanda Band of Seneca Nation, and further by becoming a member of the Interim General Council, are considered treason. Therefore, banishment is required.
>
> According to the customs and usage of the Tonawanda Band of Seneca Nation and the HAUDENOSAUNEE, your name is removed from the Tribal rolls, your Indian name is taken away, and your lands will become the responsibility of the Council of

261. Amelia Schafer, Kristi Noem Banned From Cheyenne River Reservation, ICT News (Apr. 4, 2024), https://ictnews.org/news/kristi-noem-banned-from-cheyenne-river-reservation (on file with the *Columbia Law Review*).

262. Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 877–78 (2d Cir. 1996) (noting that the petitioners "apparently accused members of the Council, particularly its Chairman, respondent Bernard Parker, of misusing tribal funds, suspending tribal elections, excluding members of the Council of Chiefs from the tribe's business affairs, and burning tribal records").

263. Id. at 876.

> Chiefs. You are now stripped of your Indian citizenship and permanently lose any and all rights afforded our members.
>
> YOU MUST LEAVE IMMEDIATELY AND WE WILL WALK WITH YOU TO THE OUTER BORDERS OF OUR TERRITORY.[264]

When petitioners refused to leave, members of the Tribal Council continued to allegedly harass and assault the protesters and their families, including by "stoning" one protester and cutting electricity to the protesters' homes and businesses.[265] Members of the Council contacted the New York Department of Public Health, which instructed the Tonawanda Indian Reservation Medical Clinic to remove the protesters from the list of persons eligible to receive medical services.[266] Thereafter the protesters were denied health care services and medications ordinarily provided to other members of the Tribe.[267]

Poodry turned to the federal courts to seek redress against the Council. He argued that he had been convicted of treason, had his tribal membership revoked, and was subject to a banishment order all without a trial;[268] had been denied the right to peaceably assemble;[269] had been subject to cruel and unusual punishment;[270] and had been deprived of his liberty and property without due process of law[271]—all in violation of his rights under the ICRA.[272] The ICRA provides a set of individual rights which apply to all persons regardless of tribal affiliation,[273] but the Supreme Court has clarified that the only remedy the federal courts can use to effectuate those rights is a writ of habeas corpus[274] because that is

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264. Id. at 878.

265. Id. (internal quotation marks omitted).

266. Id.

267. Id.

268. Id. at 879. While the U.S. Constitution does not bind Indian tribes, the ICRA includes a right to a speedy trial in all criminal proceedings. 25 U.S.C. § 1302(6) (2018).

269. *Poodry*, 85 F.3d at 879. The ICRA protects the right of the people peaceably to assemble and to petition for a redress of grievances. 25 U.S.C. § 1302(a)(1).

270. *Poodry*, 85 F.3d at 879. The ICRA prohibits the use of cruel and unusual punishment. 25 U.S.C. § 1302(a)(7)(A).

271. *Poodry*, 85 F.3d at 879. The ICRA makes it unlawful for any tribe to deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law. 25 U.S.C. § 1302(a)(8).

272. See supra section III.B.

273. David Wilkins, Speech at the 50 Years of the Indian Civil Rights Act Symposium: Battling for Human Rights in Indian Country (Mar. 8–9, 2018), *in* 19 Tribal L.J. 1, 3 (2019) ("Although the ICRA extended to all 'persons' in Indian Country a modified statutory version of many of the rights laid out in the U.S. Bill of Rights, the only remedy spelled out in that act is the writ of habeas corpus.").

274. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978) ("[The] implication of a federal remedy in addition to habeas corpus is not plainly required to give effect to Congress' objective of extending constitutional norms to tribal self-government. Tribal forums are available to vindicate rights created by the ICRA . . . .").

the only remedy provided by Congress.[275] The district court reasoned that despite the alleged violations of the ICRA, Poodry and the other petitioners were not detained and so could not avail themselves of the only remedy available for a violation of their rights.[276] It therefore dismissed the case for lack of subject matter jurisdiction.[277]

A divided Second Circuit panel reversed.[278] The majority began by recognizing that actual *physical* custody is not required to have a successful habeas petition; the individual seeking the writ need only show a sufficient restraint upon their liberty.[279] Relying on the Supreme Court's 1963 decision in *Jones v. Cunningham*, the Second Circuit explained that "[h]istory, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus."[280] It then reasoned that Poodry and his fellow petitioners had their liberty restrained because they were permanently banished from the reservation: "[W]e think the existence of the orders of permanent banishment alone—even absent attempts to enforce them—would be sufficient to satisfy the jurisdictional prerequisites for habeas corpus."[281] Having determined that the federal courts could exercise jurisdiction over Petitioner's writ of habeas corpus, it remanded the case for further proceedings.[282]

In *Poodry*, the federal courts ultimately intervened, preventing the Tribe from further resolving the dispute using its internal laws, customs, and traditions.[283] Was federal intervention necessary? The tribal custom likely would have restored Poodry's right to return to his community.[284]

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275. 25 U.S.C. § 1303 ("The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.").

276. *Poodry*, 85 F.3d at 879.

277. Id. at 876.

278. Id. at 879.

279. See id. at 893.

280. Id. (internal quotation marks omitted) (quoting Jones v. Cunningham, 371 U.S. 236, 240 (1963)).

281. Id. at 895.

282. Id. at 901 (permitting Poodry to proceed with a writ of habeas corpus against tribal officials, but not against the Tribe itself). The Tribe also permitted Poodry to remain on the Reservation. See Patrice H. Kunesh, Banishment as Cultural Justice in Contemporary Tribal Legal Banishment as Cultural Justice in Contemporary Tribal Legal Systems, 37 N.M. L. Rev. 85, 124 n.297 (2007) [hereinafter Kunesh, Banishment as Cultural Justice] (suggesting that the federal courts didn't need to get involved to protect Poodry because the situation could have been resolved using tribal law since "the clan mothers removed the Chairman of the Council of Chiefs from his position because he was leading the banishment action against the petitioners").

283. Kunesh, Banishment as Cultural Justice, supra note 282, at 124 n.297.

284. See id. ("One wonders whether the internal political problems and the banishment issues eventually would have been resolved according to such tribal custom and tradition.").

Professor Patrice Kunesh notes that under Seneca tradition, the Tribal Council is composed of people appointed by clan mothers.[285] She highlights the Second Circuit's recognition that the clan mothers had removed the tribal chief for proceeding with the banishment action against Poodry and "wonders whether the internal political problems and the banishment issues eventually would have been resolved according to such tribal custom and tradition."[286] Professor Kunesh's observation is additional justification for federal deference, suggesting that tribes are themselves better at regulating and resolving protests against the tribal government without federal intervention.

2. Tavares v. Whitehouse. — This case arose from a series of protests against tribal leadership led by members of the United Auburn Indian Community,[287] including Jessica Tavares. The Tribal Code includes a provision imposing "a duty on all tribal members 'to refrain from damaging or harming tribal programs or filing of false information in connection with a tribal program'"[288] and "requires members 'to refrain from defaming the reputation of the Tribe, its officials, its employees or agents outside of a tribal forum[.]'"[289] The Tribe's Enrollment Ordinance provides that tribal members can be disenrolled for making "misrepresentations" against the Tribe.[290]

Four tribal members, including Tavares, disagreed with how the five-member Tribal Council was governing internal tribal affairs.[291] They submitted a recall petition to the Tribe's Election Committee raising allegations of financial mismanagement, retaliation, and denial of due process.[292] The Election Committee rejected the petition because it lacked the required forty percent of signatures and because some of the signatures were not notarized, a requirement of tribal law.[293] Around the same time, the four tribal members circulated two media releases detailing their

285. Id. at 119 ("The Chiefs are appointed by the Tribe's clan mothers who, in consultation with their respective clans, provide recommendations to the Chiefs on all matters of tribal affairs.").

286. Id. at 124 n.297.

287. The United Auburn Indian Community of the Auburn Rancheria of California is one of 574 federally recognized tribes. See Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs, 89 Fed. Reg. 944, 946 (Jan. 8, 2024).

288. Tavares v. Whitehouse, 851 F.3d 863, 867 (9th Cir. 2017) (quoting Ordinance 2004-001 III(B)).

289. Id. (alteration in original) (quoting Ordinance 2004-001 III(I)).

290. Id.

291. See id.

292. Id.

293. Id.

complaints, including allegations that the Council had engaged in "questionable financial practices" and "cover-ups of financial misdealings,"[294] parts of which were ultimately published in mainstream newspapers like the *Sacramento Bee*.[295]

Four days after the recall petition was rejected, the Tribal Council sent each of the four petitioning tribal members a Notice of Discipline and Proposed Withholding of Per Capita which alleged that the members had libeled and slandered the tribe through the press releases and had taken "'[h]armful and damaging actions to tribal programs, specifically our tribal businesses and government, and provid[ed] outsiders with false information about tribal programs,' in violation of tribal law."[296] The Notice also included the Council's decision to withhold per-cap distributions[297] from the members and to temporarily banish them from the reservation.[298] Alleging that the Council's actions violated their rights under the ICRA, Tavares and the three other petitioners filed a petition for a writ of habeas corpus in federal court.[299] The district court dismissed the complaint, reasoning that the petitioners had not been detained and therefore the federal court lacked subject matter jurisdiction.[300]

In a divided opinion, the Ninth Circuit affirmed.[301] It compared the federal habeas statute, which gives federal courts jurisdiction over habeas writs whenever the petitioner is "in custody,"[302] with language from the ICRA, which allows a petitioner to use the federal courts only to "test the legality of his detention by order of an Indian tribe."[303] The Ninth Circuit reasoned that the use of "detention" instead of "custody" in the ICRA was meaningful, requiring physical confinement or imprisonment.[304] It cited *Santa Clara Pueblo* for the proposition that Congress made a more limited

294. Id. (internal quotation marks omitted) (quoting a press release circulated by the petitioners).

295. Id.

296. Id. at 868 (alterations in original) (quoting the Tribal Council's Notice of Discipline and Proposed Withholding of Per Capita).

297. Id. Per-cap distributions are the pro rata share of tribal profits that tribal governments share with their members. These can come from casino revenues or the development of natural resources, or other tribal economic endeavors. For a discussion of per caps, see Arthur Acevedo, An Argument in Support of Tax-Free Per-Cap Distribution Payments Derived From Native American Nations Gaming Sources, 37 N. Ill. U. L. Rev. 66, 77 (2016) (discussing the development of per-cap payments under the Indian Gaming Regulatory Act).

298. *Tavares*, 851 F.3d at 868.

299. Id. at 869.

300. Id.

301. Id. at 878 (Wardlaw, J., concurring in part and dissenting in part).

302. 28 U.S.C. §§ 2241, 2255 (2018).

303. 25 U.S.C. § 1303 (2018); *Tavares*, 851 F.3d at 871.

304. *Tavares*, 851 F.3d at 871–73.

choice in crafting the federal habeas remedy in order to minimize the federal court's intrusion on tribal power; "legislative investigation revealed that the most serious abuses of tribal power had occurred in the administration of criminal justice. In light of this finding, . . . Congress chose at this stage to provide for federal review only in habeas corpus proceedings."[305]

The Ninth Circuit distinguished these facts from *Poodry v. Tonawanda Band of Seneca Indians* by explaining that *Poodry* applied only to cases of permanent banishment.[306] Citing other authority from the Second Circuit,[307] the Ninth Circuit reasoned that while Tavares alleged serious violations of the ICRA, those violations did not sufficiently restrain the petitioner's liberty so as to trigger the habeas writ.[308] The court also reasoned that the more limited reading of the habeas remedy in the ICRA was consistent with policies respecting the inherent sovereignty of tribal government, stating that "federal courts lack jurisdiction to review direct appeals of tribal membership decisions because they fall within the scope of tribes' inherent sovereignty. In many cases, a tribe's decision to temporarily exclude a member will be another expression of its sovereign authority to determine the makeup of the community."[309]

Judge Wardlaw, writing in dissent, would have held that the federal courts did have subject matter jurisdiction to hear Tavares' petition.[310] The dissent argued that Tavares was sufficiently restrained to be detained for the purposes of the ICRA:

> Tavares presents us with precisely the kind of case over which Congress intended to establish federal jurisdiction: having exercised her right to free expression which Congress, through the ICRA, had explicitly guaranteed her, Tavares suffered retaliation from the [United Auburn Indian Community] in the form of 'severe restraints on individual liberty' not shared by other members of her tribe.[311]

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305. Id. at 873 (internal quotation marks omitted) (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71 (1978)).

306. Id. at 875 ("[E]ven under *Poodry*'s logic, the Second Circuit limited habeas jurisdiction only to permanent banishment orders, not temporary exclusion orders like those in this case." (citing Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 901 (2d Cir. 1996))).

307. Id. at 873–74 (discussing *Poodry* and *Shenandoah v. United States Department of the Interior*).

308. See id. at 877 ("[R]ecognizing the temporary exclusion orders at issue here as beyond the scope of 'detention' under the ICRA bolsters tribes' sovereign authority to determine the makeup of their communities and best preserves the rule that federal courts should not entangle themselves in such disputes.").

309. Id. at 876 (citation omitted).

310. Id. at 878.

311. Id. at 879.

The dissent went on to describe the constraints:

> Tavares is banned from "all Tribal properties and/or surrounding facilities." This total physical exclusion affects Tavares's daily life in many ways: she cannot walk her grandchildren to school, attend tribal meetings, ceremonies, and events, or join her family and friends for any purpose on tribal land. A former leader of the [United Auburn Indian Community], she no longer can "participate in the ceremonies and events of the Tribe's culture and heritage." Instead, she "ha[s] had to sit outside the fence and look on, as if [she] were [a] criminal[] or untouchable[]." Tavares has demonstrated a severe restraint on her liberty not shared by other members of the tribe, which satisfies her burden of showing that she is in "custody," and thus in "detention."[312]

Despite the efforts of the dissent and the possibility of a circuit split between *Tavares* and *Poodry*, the Supreme Court denied review to Tavares' appeal.[313]

3. Chegup v. Ute Indian Tribe of the Uintah & Ouray Reservation. — After individual tribal members (including Angelita Chegup[314]) attempted to intervene in federal litigation seeking to quiet title land in the name of the Ute Tribe, the Tribal Business Committee enacted a tribal resolution that initiated banishment proceedings against the members.[315] The Committee alleged that the tribal members, by injecting themselves into ongoing tribal litigation, were delaying the judicial proceedings, costing the Tribe millions of dollars in additional legal fees, and "sought 'to destabilize the tribal government, causing waste in resources, delay in providing services, and diminishe[d] . . . respect [for] the Tribe as a sovereign entity.'"[316] The Business Committee issued a notice of a hearing occurring one week later and informed the tribal members they were able to appear with or without counsel.[317]

Chegup obtained legal counsel on the day of the hearing, but given the short notice, counsel was unable to attend.[318] Chegup asked the Business Committee to permit counsel to appear telephonically, but the request was denied because "applicable tribal guidelines 'd[id] not provide for telephonic participation at the hearing,' and that the banished

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312. Id. at 887 (alterations in original) (footnote omitted).

313. See Tavares v. Whitehouse, 138 S. Ct. 1323, 1324 (2018) (mem.).

314. Because Chegup was the lead plaintiff in the lawsuit described in this section, the author collectively refers to the tribal members as "Chegup."

315. Chegup v. Ute Indian Tribe of the Uintah & Ouray Rsrv., 28 F.4th 1051, 1056 (10th Cir. 2022).

316. Id. at 1056 (alterations in original) (quoting Appendix at 31, *Chegup*, 28 F.4th 1051 (Nos. 19-4178 & 20-4015)).

317. Id.

318. Id. at 1057.

members had been 'given reasonable time to provide for an attorney's attendance.'"[319] Chegup decided not to participate in the hearing without counsel, and the Committee proceeded to hold the hearing without any of the accused members present.[320] It heard testimony about how the objections raised by tribal members in federal court proceedings interfered with the interests of the Ute Tribe and, purporting to apply its own guidelines, issued a Banishment Order to temporarily exclude Chegup from the Reservation.[321]

In addition to excluding Chegup from the Reservation for a period of five years, the Banishment Order also garnished Chegup's tribal dividends and bonuses and "terminated the banished members' 'rights . . . to tribal employment, Housing Authority units, or Housing Department units'; revoked any land assignments that had been previously granted to them; and barred them 'from obtaining tribal employment, tribal housing of any type, or land assignments.'"[322]

Chegup filed a writ of habeas corpus in federal court to challenge the Banishment Order and the Tribe objected to any federal court oversight.[323] The Tenth Circuit did not weigh in on the circuit split that had been created by *Poodry* and *Tavares* but instead held that the tribal members needed to do more to exhaust their tribal remedies before the case could be considered by the federal court:

> For now, it is enough to note that because this ICRA case presents difficult and important questions about the scope of the right to habeas corpus, the crucial comity concerns that motivate tribal exhaustion doctrine are at their peak. That summit must be reached before the district court may properly turn to the substance of the claims—including the determination whether temporary banishment constitutes detention.[324]

D. *In Defense of Banishment as an Exercise of Tribal Sovereignty*

Professor and Tribal Court Justice Angela Riley has written powerfully about the competing interests that exist in American jurisprudence when an individual's asserted rights conflict with Indigenous cultural norms: "On the one hand, tribal sovereignty guards Indian nations' inherent right to live and govern beyond the reach of the dominant society. . . . On the other hand, critics charge that imposing liberalism onto Indian nations is

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319. Id. (alterations in original) (quoting Appendix at 23, *Chegup*, 28 F.4th 1051 (Nos. 19-4178 & 20- 4015)).

320. Id.

321. Id. at 1057–58.

322. Id. at 1058 (quoting Appendix at 24, *Chegup*, 28 F.4th 1051 (Nos. 19-4178 & 20-4015)).

323. Id. at 1059.

324. Id. at 1070.

necessary to prevent intrusions on individual rights by tribal governments."[325] Riley explains that Indian tribes "inhabit a strange sovereign space in the U.S. legal system, one which they alone occupy."[326] As a corollary of this sui generis position, tribal sovereigns may exercise their inherent powers in ways that may appear illiberal, but increased federal control only undermines the guarded separatism that protects tribal sovereignty.[327]

Although there may be sharp criticism of the decisions of the tribal sovereign, the expansion of federal powers into Indian country in order to promote liberal values would undermine the essential nature of tribal sovereignty.[328] Patrice Kunesh, former Deputy Solicitor of the Interior, has opined specifically on the tribal use of banishment as a remedy in tribal court proceedings: "[I]nherent in the tribe's authority to make its own laws and be governed by them is the authority to banish and exclude persons from tribal lands."[329] Her article concludes that "respect for tribal sovereignty requires restraint in extra-tribal judicial review and oversight of tribal banishment and exclusion decisions" and so "tribes must be allowed to define and experience their individual and particular senses of cultural justice."[330]

Indian tribes are free to exercise their inherent sovereignty subject to only express limitations imposed by federal law. As scholar Felix Cohen[331] wrote in 1942:

> Perhaps the most basic principle of all Indian law, supported by a host of decisions . . . is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.*[332]

The power to exclude persons from the reservation, including the power of banishment, exists within the authority of the tribal sovereign

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325. Riley, Sovereignty and Illiberalism, supra note 206, at 800.

326. Id. at 802.

327. Id. at 820–35 (comprehensively laying out the basis of tribal sovereignty and demonstrating that federal interference undermines the protections of tribal self-government).

328. See id. at 803 ("Though I do not always agree with the decisions of tribal courts and tribal councils in these matters, I nevertheless advocate against further expansions of federal control over tribal decision-making that would impede tribal self-governance and risk the destruction of tribal culture." (footnote omitted)).

329. Kunesh, Banishment as Cultural Justice, supra note 282, at 90.

330. Id. at 90–91.

331. See Grant Christensen, Predicting Supreme Court Behavior in Indian Law Cases, 26 Mich. J. Race & L. 65, 100 n.156 (2020) ("Felix Cohen is widely considered the father of modern Indian law."); see also Philip P. Frickey, Transcending *Transcendental Nonsense*: Toward a New Realism in Federal Indian Law, 38 Conn. L. Rev. 649, 649–50 (2006) (discussing the seminal importance of Felix Cohen and his *Handbook of Federal Indian Law*).

332. Felix S. Cohen, Handbook of Federal Indian Law 122 (2d ed. 1942).

because it is a power that has never been surrendered. While Indian tribes may avail themselves of that remedy pursuant to their inherent power, this Piece cautions them to do so sparingly.

Federal Indian law scholarship is replete with contributions whose goal is to argue against federal regulation, both legislative and judicial, of a tribe's inherent power.[333] The federal courts, in deference to inherent tribal sovereignty, have upheld tribal action that would otherwise appear to interfere with individual rights.[334] In *Santa Clara Pueblo*, the Supreme Court upheld a tribal membership ordinance that discriminated on the basis of gender,[335] and in *United States v. Bryant*, the Court upheld using an uncounseled tribal-court criminal conviction resulting in jail time as a predicate offense for the purposes of federal criminal law.[336] But between *Santa Clara Pueblo* and *Bryant*, the Court has been more circumspect. In *Duro v. Reina*, Justice Anthony Kennedy wrote that tribal courts lack criminal jurisdiction over nonmember Indians at least in part because tribal courts "are influenced by the unique customs, languages, and usages of the tribes they serve."[337] Although *Duro* was overturned by both Congress[338] and the Court,[339] it serves as a reminder that the federal courts may interfere with an inherent tribal power.

To avoid inviting federal interference with tribal regulations, Indian tribes should be mindful of where their laws and regulations deviate materially from the individual rights otherwise protected by federal law. When tribes make an informed and intentional decision that a remedy like banishment is the proper consequence for a violation of tribal law, then the

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333. For just a few examples, see, e.g., Robert N. Clinton, There Is No Federal Supremacy Clause for Indian Tribes, 34 Ariz. St. L.J. 113, 118 (2002) (arguing that tribal power is not automatically foreclosed by the exercise of federal power); 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, 6–7 (1999) (critiquing the Court's jurisprudence protecting some nonmembers from tribal regulation); Frickey, Marshalling Past and Present, supra note 30, at 403–04 (reminding the academy that the tribal sovereign was originally understood to be capable of self-governing without federal oversight).

334. Riley, Sovereignty and Illiberalism, supra note 206, at 801–02 (discussing Supreme Court precedent that has reaffirmed tribes' ability to take actions that might elsewhere be unlawful because tribes are not bound by the Constitution).

335. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978).

336. United States v. Bryant, 579 U.S. 140, 156–58 (2016).

337. 495 U.S. 676, 693 (1990).

338. Michalyn Steele, Comparative Institutional Competency and Sovereignty in Indian Affairs, 85 U. Colo. L. Rev. 759, 774 (2014) ("In 1990, Congress enacted what is called 'the *Duro* fix,' amending the Indian Civil Rights Act to define tribal 'powers of self-government' to include criminal jurisdiction over 'all Indians.'" (quoting Department of Defense Appropriations Act of 1991, Pub. L. No. 101-511, § 8077(b), (c) (codified at 25 U.S.C. § 1301(2) (2018)))).

339. United States v. Lara, 541 U.S. 193, 207–10 (2004) (stating that "*Duro* . . . [is] not determinative because Congress has enacted a new statute" that clarified the extent of the inherent tribal power to include the ability to criminally prosecute all Indian persons).

remedy should be enforced by tribal courts. When federal courts are granted jurisdiction to review the decision of the tribal sovereign, like in *Santa Clara Pueblo* and *Bryant*, they should abstain from intruding upon the inherent sovereignty of tribal government.

This abstention is supported by repeated recognition that among the primary goals for federal–tribal relations is a commitment by the United States to respect the sovereignty and encourage the self-governance of tribal communities.[340] Repeated federal review of tribal decisions is at best intruding upon those principles of self-government and at worst overstepping the limits of federal judicial power.[341] As Justice Breyer cautioned, "[E]ven if a judge knows 'what the just result should be,' that judge 'is not to substitute even his juster will' for that of 'the people.'"[342]

The caveat here is that the decision to enact a punishment like banishment should be informed and intentional. A tribal government should pursue a remedy that looks like it might intrude upon rights ordinarily protected by federal law only when it is crafted to be consistent with tribal culture. Indian tribes will avoid cases like *Duro*, in which the Supreme Court questioned the efficacy of tribal judicial structures, by tying a remedial provision to tribal culture and pursuing it only in situations when it is culturally appropriate.

CONCLUSION

Judge Theodore McMillian, dissenting in a complicated case about the competing powers of extradition between states and tribes, reminded the Eighth Circuit:

> It is almost always a mistake to seek answers to Indian legal issues by making analogies to seemingly similar fields. General notions of civil rights law and public land law, for example, simply fail to resolve many questions relating to American Indian tribes and individuals. The extraordinary body of law and policy holds its own answers, which are often wholly unexpected to those unfamiliar with it.[343]

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340. Alex Tallchief Skibine, Deference Owed Tribal Courts' Jurisdictional Determinations: Towards Co-Existence, Understanding, and Respect Between Different Cultural and Judicial Norms, 24 N.M. L. Rev. 191, 209–17 (1994) (arguing that deference to tribal court decisions is the best method of upholding the federal government's goals of promoting tribal self-government and respecting tribal sovereignty).

341. Grant Christensen, Article III and Indian Tribes, 108 Minn. L. Rev. 1789, 1823 (2024) (suggesting that federal courts lack the judicial power conferred under Article III to hear most challenges to tribal court decisions).

342. Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution 17 (2005) (quoting Learned Hand, The Spirit of Liberty 109 (2d ed. 1960)).

343. Davis v. Muellar, 643 F.2d 521, 530 (8th Cir. 1981) (McMillian, J., dissenting) (quoting American Indian Policy Review Commission, 95th Cong., 1st Sess., Final Report 99 (Comm. Print 1977)).

This Piece has tried to find some of those answers when protest activity occurs in Indian country.

With three competing sovereigns, Indian law makes it difficult to parse the similar interests asserted by each to determine which has the authority to regulate. Helpfully, we are not writing on a blank slate. States lack the power to regulate tribal members or activity on tribal lands without an express act of Congress or the consent of the Indian tribe, and neither exists for protest activity. As a matter of established federal common law, states also may not regulate even nonmembers' activity on nontribal lands within Indian country either if doing so would infringe on the right of the tribe to make its own laws and be governed by them or if the federal and tribal interests in defeating state regulation are sufficiently compelling to preempt the state law. When it comes to protest activity, which so intimately affects the safety of the community and the validity of the tribal government, state regulatory authority cannot be countenanced under the law: It both infringes on tribal power and is preempted by joint federal–tribal interests. States, therefore, may not regulate protest activity in Indian country.

The United States has an obligation to ensure the safety of tribal communities, both to protect tribal members and the general public. Congress and the courts have concomitantly recognized the overriding federal interests in protecting tribal self-government and encouraging tribal self-sufficiency. Because of these dual objectives, Congress has been increasingly reticent to regulate the behavior of persons in Indian country when the corresponding tribe has the power to make and enforce rules to keep the reservation community safe. While Congress could enact new rules regulating protest activity in Indian country, those rules would potentially intrude upon tribal sovereignty. Congress should not enact new legislation that would deeply intrude on the inherent regulatory power of Indian tribes–and it should refrain from doing so as a matter of public policy.

That leaves the tribal sovereign. When an Indian tribe enacts rules respecting protest activity, it is exercising its preconstitutional inherent powers to proscribe the time, place, and manner of permitted activity in Indian country. These tribal regulations are the ones that control both tribal members and nonmembers when they engage in protest activity. While tribal rules, including tribal punishments, may vary from those imposed by their state sisters, the nature of tribal sovereignty requires that they be respected. That respect extends even to tribal policies that seem to conflict with other deeply held constitutional rights, such as the banishment of those who protest on tribal lands. As the Supreme Court reminded us in *Santa Clara Pueblo v. Martinez*, it is not up to the federal courts to "determine which traditional values will promote cultural survival and should therefore be preserved" and which of them are inimical to cultural

survival and should therefore be abrogated.[344] "To abrogate tribal decisions . . . for whatever 'good' reasons, is to destroy cultural identity under the guise of saving it."[345]

344. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 54 (1978) (internal quotation marks omitted) (quoting Martinez v. Santa Clara Pueblo, 402 F. Supp. 5, 18–19 (D.N.M. 1975)).

345. Id. (internal quotation marks omitted) (quoting *Martinez*, 402 F. Supp. at 18–19).