

JUDICIAL IMPERIALISM: THE SUPREME COURT'S ASSAULT ON TRIBAL SOVEREIGNTY AND THE RULE OF LAW

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ABSTRACT

The rule of law requires predictability, and the rules governing Indian country create uncertainty. For example, determining whether a person can be arrested on a reservation depends upon a combination of whether the victim and perpetrators are Indians, the type of crime, and the status of the land where the incident occurred. The same goes for contract enforcement. Even when forum selection and choice of law provisions exist, it can take years to determine whether the dispute should be adjudicated in tribal, state, or federal court. Ambiguity extends to countless other areas, including marijuana legalization and usury caps.

Indian country's legal uncertainty is a consequence of judicial imperialism. Imperialism is one sovereign imposing its will upon another. The political branches abandoned their past imperial Indian policies in the 1970s, but the Supreme Court continues to impose outside sovereignties upon tribes. Moreover, the post-1970s Supreme Court has abandoned precedents supporting tribal self-governance and devised new theories to strip tribes of sovereign powers. The Supreme Court's assault on tribal sovereignty has undermined the rule of law in Indian country and constitutes judicial imperialism.

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“The Imperial Judiciary lives.”

–Justice Antonin Scalia¹

INTRODUCTION

Does the rule of law exist in Indian country?² Justice Antonin Scalia would likely answer “no.” In a famous article, Justice Scalia wrote, “Predictability . . . is a needful characteristic of any law worthy of the name” and “uncertainty has been regarded as incompatible with the Rule of Law.”³ Justice Scalia used Roman Emperor Nero’s habit of placing imperial decrees atop high columns as an example.⁴ Concealing the law from Romans meant Emperor Nero was free to do as he wished; hence, there was

1. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 996 (1992) (Scalia, J., concurring in the judgment in part & dissenting in part), *overruled by* Dobbs v. Jackson Women’s Health Org., 597 U.S. 215 (2022).

2. For the federal definition of Indian country, see 18 U.S.C. § 1151.

3. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

4. *Id.*

no predictability, the essential prerequisite for law.⁵ Sardonicly, Justice Scalia admitted the Supreme Court is as unconstrained as Emperor Nero in federal Indian law cases. At a book signing, Justice Scalia declared, “[W]hen it comes to Indian law, most of the time, we’re just making it up.”⁶

Other Supreme Court Justices have echoed Justice Scalia’s sentiments on federal Indian⁷ law’s unpredictability. Nearly fifty years ago, Justice Douglas wrote the “only beneficiaries” of the Supreme Court’s Indian law jurisprudence are “those who benefit from confusion and uncertainty.”⁸ Justice Souter claimed the law in Indian country is “unusually difficult for an outsider to sort out,”⁹ and Justice Thomas described federal Indian law as “schizophrenic,” averring that “confusion continues to infuse federal Indian law and our cases.”¹⁰ More recently, Justice Roberts asserted federal Indian law was unpredictable, premised “on a nebulous balancing” that “lacks any ‘rigid rule.’”¹¹

Justin Hooper’s traffic ticket exemplifies the vagaries of Indian law. On August 13, 2018, he was issued a \$150 traffic citation while driving through Tulsa.¹² Two years after his citation, the Supreme Court issued its opinion in *McGirt v. Oklahoma*.¹³ *McGirt* held the Creek Reservation had never been disestablished.¹⁴ Consequently, Tulsa was now recognized as “Indian country.” Hooper is an enrolled citizen of the Choctaw Nation,¹⁵ and states

5. Emperor Caligula employed the same practice. See Matthew Kaiser, *Federal Prosecutions, Inspired by Caligula*, NAT’L L.J. (July 18, 2013), <https://www.law.com/nationallawjournal/almID/1202611485800/> [<https://perma.cc/62AS-KCXS>]; *Background: Principles of the American Revolution*, KHAN ACAD., <https://www.khanacademy.org/humanities/constitution-101/x7a03a96a83aa80ff/principles-of-the-american-revolution-the-ideas-and-events-that-led-to-change/x7a03a96a83aa80ff/the-declaration-of-independence/a/briefing-document-principles-of-the-american-revolution> [<https://perma.cc/BY6J-7XTY>].

6. April Youpee-Roll, *Supreme Court Makes Up Indian Law Decisions*, INDIANZ.COM (Feb. 18, 2016), <https://www.indianz.com/News/2016/02/18/april-youpeeroll-supreme-court.asp> [<https://perma.cc/6U4B-22P3>].

7. This Article uses the term “Indian” rather than “Native American” to denote the Indigenous Peoples of present-day North America because it is the legal designation used in the U.S. Code. See Title 25 of the U.S. Code. It is also the official title of many Native Nations. See, e.g., *Who We Are*, MONT. LITTLE SHELL CHIPPEWA TRIBE, <https://www.montanalittleshelltribe.org/> [<https://perma.cc/RCSR-TLET>]; *The Narragansett Indian Tribe*, NARRAGANSETT INDIAN TRIBE, <https://narragansettindiannation.org/> [<https://perma.cc/3SAW-KA48>]; *About Poarch Creek Indians*, POARCH CREEK INDIANS, <https://pci-nsn.gov/> [<https://perma.cc/XHH2-5H4G>]; *About Us*, QUINAULT INDIAN NATION, <https://www.quinaultindiannation.com/171/About-Us/> [<https://perma.cc/T3HQ-NVLU>].

8. *DeCoteau v. Dist. Cnty. Ct. for the Tenth Jud. Dist.*, 420 U.S. 425, 467 (1975) (Douglas, J., dissenting).

9. *Nevada v. Hicks*, 533 U.S. 353, 384–85 (2001) (Souter, J., concurring).

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

11. *McGirt v. Oklahoma*, 591 U.S. 894, 972 (2020) (Roberts, C.J., dissenting).

12. *Hooper v. City of Tulsa*, 71 F.4th 1270, 1273 (10th Cir. 2023).

13. 591 U.S. 894 (2020).

14. *Id.* at 913.

15. *Hooper*, 71 F.4th at 1272.

lack jurisdiction over Indians in Indian country.¹⁶ Thus, *McGirt* inspired Hooper to file for post-conviction relief on jurisdictional grounds.¹⁷ In June of 2023, the Tenth Circuit sided with Hooper.¹⁸ The Supreme Court refused to grant a stay of the opinion, so the case is now back in the Northern District of Oklahoma.¹⁹ Due to the ticket being issued in Indian country, the rules governing Hooper's ticket are unclear.

Hooper's case is far from unusual. Basic legal questions in Indian country frequently devolve into jurisdictional nightmares. For example, in 2021, the Supreme Court was tasked with deciding whether tribal police can detain gun-toting, non-Indian, meth users on their reservations.²⁰ The Supreme Court held tribes can—if the non-Indian is not subjected to tribal law, and the detention is only long enough to transfer the non-Indian offender to state or federal law enforcement.²¹ Civil issues can be equally perplexing in Indian country as deciding where to enforce an Indian country contract—tribal, state, or federal court—can take years, even if a forum selection clause is present.²² Related jurisdictional issues extend into virtually every area of the law, and uncertainty is antithetical to the rule of law.

Uncertainty contributes to numerous social maladies in Indian country. Criminals know Indian country's byzantine jurisdictional rules cause law enforcement confusion; in fact, law enforcement officers have openly announced they refuse to work in Indian country due to its jurisdictional uncertainty.²³ Hence, criminals actively target Indian country.²⁴ As a result, Indians have the highest rate of violent victimization in the United States.²⁵ The legal uncertainty created by the Supreme Court also stifles tribal economies as businesses can avoid Indian country's legal peculiarities by operating off reservation.²⁶ Thus, the private sector is nearly nonexistent in

16. See *infra* notes 110, 233 and accompanying text.

17. *Hooper*, 71 F.4th at 1272.

18. *Id.* at 1288–89.

19. Katrina Crumbacher, *Hooper v. City of Tulsa Case to Continue in District Court*, NONDOC (Aug. 7, 2023), <https://nondoc.com/2023/08/07/hooper-v-city-of-tulsa-case-to-continue-in-district-court/> [<https://perma.cc/U25W-TGHY>].

20. See *United States v. Cooley*, 593 U.S. 345, 347–49 (2021).

21. *Id.* at 347–49, 353.

22. *Land Tenure Issues*, INDIAN LAND TENURE FOUND., <https://iltf.org/land-issues/issues/> [<https://perma.cc/4P8Q-CW29>] (“Jurisdictional challenges are common on checkerboard reservations, as different governing authorities – county, state, federal, and tribal governments for example – claim the authority to regulate, tax, or perform various activities within reservation borders.”); see also *infra* notes 266, 271 and accompanying text.

23. Adam Creppelle, *The Law and Economics of Crime in Indian Country*, 110 GEO. L.J. 569, 573 (2022).

24. *Id.* at 600.

25. *Id.* at 577–79.

26. Adam Creppelle, *It Shouldn't Be This Hard: The Law and Economics of Business in Indian Country*, 2023 UTAH L. REV. 1117, 1118–19.

Indian country²⁷ and Indians have the highest poverty rate in the United States.²⁸ Crime and poverty are symptoms of uncertain rules.

Contemporary Indian country's legal uncertainty is a consequence of imperialism—the forceful imposition of one sovereign's will upon another. When the Constitution was ratified, tribes possessed full territorial sovereignty.²⁹ They exercised jurisdiction over all people and property on their land.³⁰ If the United States wished to alter this framework, it did so expressly by treaty.³¹ This principle was firmly ingrained in the law until the late 1800s.³² At that point, the rule of law gave way to the imperial American desire for Indian land.³³ The United States ceased entering treaties and began imposing rules on tribes.³⁴ Likewise, the Supreme Court departed from the Constitution's text and treaties by allowing states to exercise jurisdiction over Indian country.³⁵ Although the United States has refuted its late 1800s Indian policy, the tangled legal web remains because the Supreme Court continues to rely on late nineteenth-century jurisprudence to diminish tribal sovereignty.³⁶

This Article argues the Supreme Court's continued assault on tribal sovereignty is judicial imperialism. Judicial imperialism is the Supreme Court's conscious decision to diminish tribal sovereignty and expand state power over tribes. The Court's choice to erode tribal sovereignty is not rooted in the text of the Constitution nor any treaty; rather, judicial imperialism relies upon racist jurisprudence without acknowledging the

27. *Id.* at 1153.

28. *Id.* at 1121.

29. See Adam Creppelle, *An Intertribal Business Court*, 60 AM. BUS. L.J. 61, 68 (2023).

30. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 161 (7th ed. 2020) (“In colonial days, the Indian territory was entirely the province of tribes, and they had jurisdiction in fact and theory over all persons and subjects present there.”); G.D. Crawford, *Looking Again at Tribal Jurisdiction: “Unwarranted Intrusions on Their Personal Liberty,”* 76 MARQ. L. REV. 401, 420 (1993) (noting that tribes could exercise criminal jurisdiction over non-Indians prior to the Supreme Court's decision in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)).

31. FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 1 (1994) (“Between 1778, when the first treaty was signed with the Delawares, and 1868, when the final one was completed with the Nez Percés, there were 367 ratified Indian treaties and 6 more whose status is questionable.”); Adam Creppelle, *Tribal Law's Indian Law Problem: How Supreme Court Jurisprudence Undermines The Development of Tribal Law and Tribal Economies*, 29 VA. J. SOC. POL'Y & L. 93, 107 (2022).

32. 25 U.S.C. § 71; Adam Creppelle, *Taxes, Theft, and Indian Tribes: Seeking an Equitable Solution to State Taxation of Indian Country Commerce*, 122 W. VA. L. REV. 999, 1003 (2020) (“Tribal sovereignty began to slide during the 1870s.”).

33. Adam Creppelle, *Holding the United States Liable for Indian Country Crime*, 31 KAN. J.L. & PUB. POL'Y 223, 229–30 (2022).

34. Creppelle, *supra* note 29, at 68, 109.

35. See Adam Creppelle, *Legal Issues in Tribal E-Commerce*, 10 AM. U. BUS. L. REV. 383, 411–13 (2022).

36. See Adam Creppelle, *Lies, Damn Lies, and Federal Indian Law: The Ethics of Citing Racist Precedent in Contemporary Federal Indian Law*, 44 N.Y.U. REV. L. & SOC. CHANGE 529, 553–56 (2021).

precedent's context.³⁷ Judicial imperialism occurs when the Court chooses to strip tribes of authority not on the basis of any law, but because legislators in the 1800s believed tribes should not exist. Judicial imperialism is acknowledging Congress's policy of supporting tribal self-governance while proudly "just making it up" in order to diminish tribal sovereignty.³⁸ "Just making it up" is the antithesis of the rule of law.

Judicial imperialism has resulted in the Supreme Court persistently imposing outside sovereignties upon tribes. The Supreme Court openly disregards tribal interests and subjects tribes to greater levels of state power.³⁹ In fact, the Supreme Court has said tribes are little more than obstacles to state sovereignty.⁴⁰ Despite acknowledging Congress's policy of supporting tribal self-governance,⁴¹ the Supreme Court has subjected tribes to greater federal and state control.⁴² The Supreme Court's choice to contravene the legislative and executive branches' attempts to foster tribal sovereignty is judicial imperialism.

The remainder of this article proceeds as follows. Part I provides an overview of the rule of law and highlights the judiciary's significance to the rule of law. Part II traces the evolution of tribal sovereignty over time. Part III demonstrates how the modern Supreme Court's federal Indian law jurisprudence perpetuates imperial policies from the United States' past. Part IV shows how judicial imperialism has undermined the rule of law in Indian country, and Part V offers suggestions to constrain the Supreme Court and restore the rule of law to Indian country.

I. RULE OF LAW AND THE JUDICIARY

Scholars have long debated the meaning of the rule of law.⁴³ No exact definition exists,⁴⁴ but the rule of law essentially means individuals, private entities, and the government itself are accountable to the law.⁴⁵ For the rule

37. See *infra* Sections V.C.–D., VI.B.

38. See *infra* Part IV.

39. See, e.g., *Oklahoma v. Castro-Huerta*, 597 U.S. 629 (2022); *Wagnon v. Prairie Band of Potawatomi Nation*, 546 U.S. 95 (2005); *Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163 (1989).

40. See, e.g., *McGirt v. Oklahoma*, 591 U.S. 894, 938 (2020) (Roberts, C.J., dissenting); *Castro-Huerta*, 597 U.S. at 637; *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 219–20 (2005).

41. See, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987); *Washington v. Confederated Tribes of the Colville Indian Rsrv.*, 447 U.S. 134, 152 (1980).

42. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206–07 (1978).

43. Robert A. Stein, *What Exactly Is the Rule of Law?*, 57 HOUS. L. REV. 185, 187 (2019).

44. *Id.* at 186.

45. U.S. AGENCY FOR INT'L DEV., GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK, A GUIDE FOR USAID DEMOCRACY AND GOVERNANCE OFFICERS 6 (2010), https://pdf.usaid.gov/pdf_docs/PNADT593.pdf [<https://perma.cc/8GRL-G7Z6>]; *What Is the Rule of Law*, UNITED NATIONS & RULE L., <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/> [<https://perma.cc/9W2R-TV77>].

of law to exist, at least three key prerequisites must prevail.⁴⁶ First, the laws must be publicly available.⁴⁷ Second, the rules must be enforced by an independent agent.⁴⁸ Third, the law must be enforced equally.⁴⁹ In addition to these pillars, the rule of law does not exist if the laws themselves are wholly arbitrary⁵⁰ or violate norms of justice.⁵¹ Hence, the rule of law is the antithesis of despotic power.⁵²

The rule of law provides certainty. Laws tell individuals which behaviors are permissible and what will occur if the law is violated. Accordingly, law allows individuals to plan their behavior. For this reason, Justice Oliver Wendell Holmes, Jr., described laws as “nothing but prophecies.”⁵³ Laws’ predictive power means the rule of law lowers “the costs of transportation from ignorance to omniscience.”⁵⁴ This is why judicial precedent is valuable; it notifies people how the law is likely to be interpreted.⁵⁵ Realizing this, Justice Louis Brandeis opined, “[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right.”⁵⁶

Justice Brandeis’s point is illuminating. Academics have spent decades arguing whether rules or standards are preferable.⁵⁷ Rules are thought to provide clear proscriptions and certainty whereas amorphous standards offer less predictability but greater applicability to actual events. In reality,

46. Some scholars have more factors, but see Stein, *supra* note 43, at 192–98 for additional points that capture the essence.

47. *Overview – Rule of Law*, U.S. CTS., <https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law> [<https://perma.cc/GD5F-8FNL>].

48. *Id.*

49. *Id.*

50. Uri Weiss, *The Regressive Effect of Legal Uncertainty*, 2019 J. DISP. RESOL. 149, 163 (“From the point of view of legal liberalism, when the law becomes oppressive, it loses its legitimacy and its authority; it becomes no more than a commandment by an officer or commander. Thus, it should no longer be considered a law.”); Todd J. Zywicki, *The Rule of Law, Freedom, and Prosperity*, 10 SUP. CT. ECON. REV. 1, 9 (2003) (“The rule of law requires that individuals be able to practically conform their behavior to the laws.”).

51. Letter from Martin Luther King, Jr., to C.C.J. Carpenter et al., Clergymen 7 (Apr. 16, 1963), https://okra.stanford.edu/transcription/document_images/undecided/630416-019.pdf [<https://perma.cc/LQX6-26GM>].

52. THOMAS PAINE, COMMON SENSE: ADDRESSED TO THE INHABITANTS OF AMERICA (1776), *reprinted in* I THE WRITINGS OF THOMAS PAINE 67, 99 (Moncure Daniel Conway ed., G.P. Putnam’s Sons, London 1894) (ebook) (“For as in absolute governments the King is law, so in free countries the law ought to be king; and there ought to be no other.”).

53. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897).

54. George J. Stigler, *Imperfections in the Capital Market*, 75 J. POL. ECON. 287, 291 (1967).

55. See William D. Bader & David R. Cleveland, *Precedent and Justice*, 49 DUQ. L. REV. 35, 45 (2011) (“In every case, the court applies the law to the litigants’ facts and doing justice in harmony with what has been done before and providing another example for future parties to know what the law is.”).

56. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

57. See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 561–62 (1992).

the distinction often makes little difference.⁵⁸ Some rules operate like standards while some standards function as rules⁵⁹ because courts adapt all laws through the process of *stare decisis*.⁶⁰ Consistent application of jurisprudence fosters predictability,⁶¹ and this is the essence of the rule of law.⁶² Thus, Nobel laureate Elinor Ostrom claims law's purpose is to "provide stability of expectations."⁶³ Ostrom warns that sudden legal changes reduce the stability institutions are intended to provide.⁶⁴

All aspects of society benefit from the rule of law. By placing constraints on the government, the rule of law prevents corruption and helps promote equality.⁶⁵ Strong rule of law helps deter crime and promote public safety by providing state-authorized mechanisms to punish crimes.⁶⁶ Confidence that the government will redress crimes deters individuals from engaging in vigilantism; moreover, fear that the law will catch perpetrators serves as a disincentive to commit crime.⁶⁷ The rule of law is also vital to economic

58. See Kevin M. Clermont, *Rules, Standards, and Such*, 68 *BUFF. L. REV.* 751, 762–63 (2020).

59. *Id.* at 761–66.

60. See *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533–35 (1928) (Holmes, J., dissenting); Clermont, *supra* note 58, at 756–57.

61. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 786–87 (1986) (White, J., dissenting) ("The rule of *stare decisis* is essential if case-by-case judicial decisionmaking [sic] is to be reconciled with the principle of the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results."), *overruled by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

62. See David Boies, *Judicial Independence and the Rule of Law*, 22 *WASH. U. J.L. & POL'Y* 57, 62 (2006) ("Remember, the rule of law has two components. One is that the result in a particular situation should be reasonably predictable. You should know what the rule of law is and you should know it in advance. The second principle is that the result should be predictable independent of the identity of the parties.").

63. ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 53 (2015).

64. *Id.*

65. U.S. AGENCY FOR INT'L DEV., *RULE OF LAW POLICY: A RENEWED COMMITMENT TO JUSTICE, RIGHTS, AND SECURITY FOR ALL* 4 (2023), <https://www.usaid.gov/sites/default/files/2023-04/USAID%20ROL%20Policy%20508%20230406.pdf> [<https://perma.cc/Y8N4-T5BL>] ("The rule of law counters corruption, punishes and deters crime, and makes human rights actionable, enforceable, and realizable for all members of society."); UNITED NATIONS & RULE L., *supra* note 45 ("It is foundational to people's access to public services, curbing corruption, restraining the abuse of power, and to establishing the social contract between people and the state.").

66. G.A. Res. 73/185, at 2 (Dec. 17, 2018), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/450/39/PDF/N1845039.pdf?OpenElement> [<https://perma.cc/22X6-LZ7J>] ("Stressing the significance of a well-functioning, efficient, fair, effective and humane criminal justice system as the basis for a successful strategy against transnational organized crime, corruption, terrorism, illicit drug production, manufacturing and trafficking, trafficking in persons and other dangerous forms of trafficking."); *Rule of Law and Security*, UNITED NATIONS & RULE L., <https://www.un.org/ruleoflaw/thematic-areas/security/> [<https://perma.cc/XGR7-ZHHU>] ("[A] strong rule of law, which protects human rights, helps prevent and mitigate violent crime and conflict by providing legitimate processes for the resolution of grievances and disincentives for crime and violence.").

67. See Stein, *supra* note 43, at 198; *Criminal Justice*, WORLD JUST. PROJECT, <https://worldjusticeproject.org/rule-of-law-index/factors/2022/Criminal%20Justice/> [<https://perma.cc/L3WS-GAMP>].

development. Indeed, the rule of law may be more important to economic development than natural resource endowments.⁶⁸ When the rule of law exists, investors trust that their private rights will be respected and contracts enforced.⁶⁹ Therefore, investors feel more confident placing their capital in jurisdictions with strong governance institutions.⁷⁰

However, some believe the rule of law is a myth. Critics assert the rule of law lacks a meaningful definition;⁷¹ indeed, critics claim the rule of law is often mistaken for the “rule of good law.”⁷² Professor Morton Horwitz contends the rule of law “*promotes* substantive inequality by creating a consciousness that radically separates law from politics, means from ends, processes from outcomes.”⁷³ The procedural mechanisms underpinning the rule of law can become time consuming and expensive barriers to justice.⁷⁴ As Dr. Martin Luther King, Jr., wrote from a Birmingham jail, “[J]ustice too long delayed is justice denied.”⁷⁵ Furthermore, critics contend the substantive and procedural elements of the rule of law are shaped by those in power to serve their own interests.⁷⁶ While many proponents of the rule of law contend laws must conform with human rights norms, numerous

68. Jason Higbee & Frank A. Schmid, *Rule of Law and Economic Growth*, ECON. SYNOPSES, no. 19, 2004, at 1.

69. *Id.*

70. *Id.*

71. Paul Burgess, *Why We Need to Abandon ‘The Rule of Law,’* IACL-AIDC BLOG (Sept. 21, 2021), <https://blog-iacl-aidc.org/2021-posts/2021/9/21/why-we-need-to-abandon-the-rule-of-law> [<https://perma.cc/2Q5X-9V4V>] (“There are a number of different conceptions of the Rule of Law.”); Mary Jane McCallum, *Oppression, Privilege and the Myth of the Rule of Law*, SENATE CAN. (Mar. 5, 2020), <https://sencanada.ca/en/sencaplus/opinion/oppression-privilege-and-the-myth-of-the-rule-of-law-senator-mccallum/> [<https://perma.cc/SF5K-T49T>] (“Yet the rule of law has never been well-defined or equally applied for Indigenous peoples.”).

72. Naomi Choi, *Challenges to the Rule of Law*, BRITANNICA, <https://www.britannica.com/topic/rule-of-law/Challenges-to-the-rule-of-law> [<https://perma.cc/3AZ5-AURK>] (“They argue that to open the concept to a whole host of extralegal considerations about substantive justice and wider societal goals is to conflate ideas about ‘the rule of law’ with notions about ‘the rule of good law,’ such that any distinction between the two is reduced to nothing.”).

73. Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 566 (1977) (reviewing DOUGLAS HAY, PETER LINEBAUGH, JOHN G. RULE, E.P. THOMPSON & CAL WINSLOW, *ALBION’S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND* (1975); E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* (1975)) (emphasis in original).

74. Choi, *supra* note 72 (“[T]oo much emphasis on procedures for preventing arbitrariness can lead to subverting the doing of justice according to what might otherwise find support in the rule of law, and the legal strictures then become themselves a form of arbitrariness that is no more legitimate.”). However, courts do have means of expediting outcomes, such as summary judgment.

75. Letter from Martin Luther King, Jr., *supra* note 51, at 5–6.

76. Horwitz, *supra* note 73, at 566; see also THUCYDIDES, *THE MELIAN DIALOGUE*, in *THE HISTORY OF THE PELOPONNESIAN WAR* ¶ 89 (Benjamin Jowett, trans., Oxford, Clarendon Press 1881), <https://people.uncw.edu/deagona/CLA%202009%20F-11/Thucydides%20Melian.pdf> [<https://perma.cc/7Z8Z-YBT4>] (“But you and we should say what we really think, and aim only at what is possible, for we both alike know that into the discussion of human affairs the question of justice only enters where there is equal power to enforce it, and that the powerful exact what they can, and the weak grant what they must.”).

atrocities—including slavery, massacres, and genocide—have been perpetrated by nations that supposedly possess the rule of law.

Rule of law skeptics often point to the judiciary as proof of the concept’s uselessness. Without an independent and impartial judiciary, the rule of law cannot exist.⁷⁷ Mechanisms have been developed to foster judicial independence including separation of powers, life tenure, and irreducible salaries.⁷⁸ Nevertheless, judges are human.⁷⁹ Though cloaked in the robe of neutrality, empirical studies show a judge’s personal characteristics influence the judge’s jurisprudence, suggesting judges are never independent of their biases.⁸⁰ Furthermore, judges may revert to their personal experiences when making decisions, or in the words of Justice Anthony Kennedy, “judicial experience and common sense.”⁸¹ As no two judges have identical backgrounds, “judicial experience and common sense” will inevitably yield different outcomes based solely upon the judge presiding over the case.⁸² Unpredictable judicial decision-making is a threat to the rule of law.⁸³

77. Conor Gilligan, *False Crime and Real Punishment: How a Weak Judiciary Has Held Back Development in Russia 4* (Apr. 25, 2017) (International Immersion Program Student Paper), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1044&context=international_immersion_program_papers [<https://perma.cc/4GG4-EFMQ>] (“Legal experts from across the West worked with the Russian government to develop the rule of law, a key part of which is an independent judiciary.”); *General Issues: Judicial Independence as a Fundamental Value of the Rule of Law and of Constitutionalism*, UNITED NATIONS OFF. DRUGS & CRIME, <https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-14/key-issues/1--general-issues--judicial-independence-as-a-fundamental-value-of-the-rule-of-law-and-of-constitutionalism.html> [<https://perma.cc/TD6D-V39Z>] (“Judicial independence is also the ‘cornerstone’ of the rule of law.”).

78. U.S. CONST. art. III, § 1.

79. At least for now, most judges are human. *But see* Ben Wodecki, *AI Helps Judges Decide Court Cases in China*, AI BUS. (July 18, 2022), <https://aibusiness.com/verticals/ai-helps-judges-decide-court-cases-in-china> [<https://perma.cc/HX7S-J38R>] (describing how China uses AI to “reduce the workloads of judges”); Alena Zhabina, *How China’s AI Is Automating the Legal System*, DW (Jan. 20, 2023), <https://www.dw.com/en/how-chinas-ai-is-automating-the-legal-system/a-64465988> [<https://perma.cc/T2J2-Y4KL>] (summarizing China’s use of AI in the courts).

80. Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 840 (2008).

81. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *see also* Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 CORNELL L.Q. 274, 275–76 (1929).

82. Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 26 (2010) (critiquing the standard of “judicial experience and common sense” as “highly ambiguous and subjective concepts largely devoid of accepted—let alone universal—meaning”); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 335 (2013) (“Does it mean that a newly appointed judge has no judicial experience to employ, or that we are supposed to be comforted by assuming that judicial experience is homogeneous among members of the federal bench, or that common sense is generously and equally distributed among them and will be applied in a uniform manner?”).

83. Boies, *supra* note 62, at 63 (“One of the struggles that we have in making the rule of law a real, practical protection instead of a theoretical protection is to try to make the judges and the juries as consistent as possible in the way that they approach the resolution of legal disputes.”).

Concerns about the judiciary and rule of law are epitomized by the notion of judicial activism. Much like the rule of law, judicial activism lacks a clear definition.⁸⁴ Nevertheless, the term is generally understood to mean judges are replacing statutes and precedents with their own policy views and biases.⁸⁵ When judges ignore the law in favor of their preferences, the predictability the rule of law is supposed to foster erodes.⁸⁶ Unconstrained by statutory text or past precedent, an activist judge is unlikely to treat individuals equally as the activist judge is guided by personal prejudices about particular subjects and people.⁸⁷ Furthermore, judicial activism typically implies the judicial branch is overriding the laws created by democratically elected legislators.⁸⁸ This undermines the separation of powers, which exist to prevent tyranny.⁸⁹

84. Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195, 1199 (2009) (“Despite their current popularity, none of these rests on a stable conception of activism.”); Corey Rayburn Yung, *Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts*, 105 NW. U. L. REV. 1, 8 (2011) (“Despite the wide modern use of the pejorative label ‘activist,’ its contours are rarely defined by those deploying it.”).

85. Lino A. Graglia, *It’s Not Constitutionalism, It’s Judicial Activism*, 19 HARV. J.L. & PUB. POL’Y 293, 296 (1996) (“By judicial activism I mean, quite simply and specifically, the practice by judges of disallowing policy choices by other governmental officials or institutions that the Constitution does not clearly prohibit.”); Diarmuid F. O’Sannlain, *On Judicial Activism*, OPENSACES, <https://open-spaces.com/articles/on-judicial-activism/> [<https://perma.cc/QPS9-XKKA>] (“Judicial activism means not the mere failure to defer to political branches or to vindicate norms of predictability and uniformity; it means only the failure to do so in order to advance another, unofficial objective. Occasionally, the fact that a judge has an ulterior motive is evident, but oftentimes it is not.”); Rayburn Yung, *supra* note 84, at 11–12 (“The core of these varied concepts of judicial activism has been the idea that judges are activist when they substitute their judgment in place of that of other significant actors.”).

86. Michael D. Weiss & Mark W. Bennett, *New Federalism and State Court Activism*, 24 MEM. ST. U. L. REV. 229, 261 (1994) (“Judicial activism also increases the case load of the courts by increasing uncertainty, which encourages more litigation.”); Edward Cumberford, *Activist Judges and the Rule of Law*, FOUND. FOR ECON. EDUC. (May 1, 1969), <https://fee.org/articles/activist-judges-and-the-rule-of-law/> [<https://perma.cc/46KN-273S>] (“Thus, decisions turn more and more upon ‘who’ is the judge than upon ‘what’ is the law. As a result, law is rapidly losing its certainty, stability, and continuity.”).

87. Cumberford, *supra* note 86 (“If the outcome of a case depends more on the personal philosophy of the judge than on any other consideration, it is pure guesswork.”).

88. See Keenan D. Kmiec, Comment, *The Origin and Current Meanings of “Judicial Activism,”* 92 CALIF. L. REV. 1441, 1448 (2004); Jane S. Schacter, *Putting the Politics of “Judicial Activism” in Historical Perspective*, 2017 SUP. CT. REV. 209, 242 & n.181.

89. THE FEDERALIST NO. 47 (James Madison) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed [sic], or elective, may justly be pronounced the very definition of tyranny.”); Margaret L. Moses, *Beyond Judicial Activism: When the Supreme Court Is No Longer a Court*, 14 U. PA. J. CONST. L. 161, 214 (2011) (“If there are no checks and balances, and no controls on separation of powers, then the Supreme Court becomes a law unto itself and descends into the abyss of unchanneled discretionary justice, where law is simply the exercise of raw political power.”); Martin H. Redish & Elizabeth J. Cisar, *“If Angels Were to Govern”: The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 466 (1991) (“[W]hatever its faults, separation of powers provides the optimum methodology for attaining the goal of assuring the maintenance of popular sovereignty and individual liberty.”).

Judicial activism is often associated with overruling legislation or precedent.⁹⁰ However, invalidating a flagrantly unconstitutional law is unlikely to qualify as judicial activism.⁹¹ In hindsight, many Americans lament the Supreme Court's failure to strike down laws permitting segregation,⁹² Japanese-American internment,⁹³ and forced sterilization of the "feeble minded."⁹⁴ Some decisions widely considered "activist" are generally recognized as producing positive social outcomes, including *Brown v. Board of Education*,⁹⁵ *Griswold v. Connecticut*,⁹⁶ and *Miranda v. Arizona*.⁹⁷ If a decision is universally embraced, arguably the decision is not activist at all.⁹⁸ Despite its imprecise definition, the frequent appearance of judicial activism in judicial opinions and scholarly discourse underscores an area of consensus: The rule of law depends on the effectiveness of the judiciary.⁹⁹

II. TRIBAL SOVEREIGNTY OVER TIME

America's Indigenous inhabitants possessed the rule of law since time immemorial. Although tribes did not have written languages, they disseminated laws through stories, ceremonies, and customs.¹⁰⁰ Indigenous law spanned all levels of human interaction, from crime to commerce to the

90. Kmiec, *supra* note 88, at 1463 ("Legal academics often describe judicial invalidation of legislative enactment as 'judicial activism.'").

91. *Id.* at 1464 ("Imagine, for example, that Congress somehow passed a bipartisan statute that established a national religion. If the Court invalidated this clearly unconstitutional law, no one would suggest that it had engaged in judicial activism.").

92. *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896).

93. *See generally* Korematsu v. United States, 323 U.S. 214 (1944).

94. Buck v. Bell, 274 U.S. 200, 205–07 (1927).

95. 347 U.S. 483 (1954).

96. 381 U.S. 479 (1965).

97. 384 U.S. 436 (1966).

98. *Nominations of William H. Rehnquist and Lewis F. Powell, Jr.: Hearings Before the S. Comm. on the Judiciary*, 92d Cong. 167 (1971) (statement of William H. Rehnquist, Supreme Court nominee) ("[I]f nine Justices, presumably of the same varying temperaments that one customarily gets on the Supreme Court at the same time, all address themselves to the issue and all unanimously decide that the Constitution requires a particular result, that, to me, is very strong evidence that the Constitution does, in fact, require that result.").

99. Mehdi J. Hakimi, *The Judiciary and the Rule of Law in Afghanistan*, 105 JUDICATURE 24, 25 (2021) ("Ultimately, an independent and competent judiciary is indispensable to a robust checks and balances system and thus often viewed as the lynchpin of a rule of law society."); Thomas E. Plank, *The Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia*, 5 WM. & MARY BILL RTS. J. 1, 2 (1996) ("Political systems that aspire to the rule of law consider judicial independence indispensable.").

100. Sheldon C. Spotted Elk, *Northern Cheyenne Tribe: Traditional Law and Constitutional Reform*, 12 TRIBAL L.J., 2012, at 2 ("Generally, tribes have held constitutional conventions, much like the work of the United States' 'founding fathers,' in order to glean their societal values and draft them into a Western document. However, they have from time immemorial held ceremonies, told stories and taught their children the mores of their way of life. Today, many tribes possess their oral constitutions, and they are often different from their written IRA document.").

family.¹⁰¹ Laws were enforced by institutions that respected due process.¹⁰² For example, among the Yurok, aggrieved individuals would hire representatives to bring their claim against the alleged offender who in turn would hire representatives to plead their case. The parties' representatives would resolve the dispute in a process much like contemporary arbitration.¹⁰³ Additionally, many tribes disbursed power among multiple institutions to prevent oppressive governance.¹⁰⁴ Strong rule of law meant Indigenous Americans enjoyed greater individual liberty¹⁰⁵ and higher standards of living than most Europeans.¹⁰⁶

Like its colonial forbearers, the newly-formed United States struggled to subdue militarily powerful tribes.¹⁰⁷ Under the Articles of Confederation, the states and national government shared authority over Indian affairs.¹⁰⁸ This was a constant source of conflict, considered among the Articles' primary defects by James Madison.¹⁰⁹ Accordingly, the United States Constitution vested the federal government with exclusive authority over Indian affairs.¹¹⁰ The Constitution also greatly enhanced the federal

101. See, e.g., RAYMOND D. AUSTIN, *NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE* (2009); Bruce L. Benson, *An Evolutionary Contractarian View of Primitive Law: The Institutions and Incentives Arising Under Customary Indian Law*, 5 REV. AUSTRIAN ECON. 41, 41 (1991); Adam Crepelle, *Tribal Law: It's Not That Scary*, 72 BUFF. L. REV. 547, 554–56 (2024).

102. E.g., *Halona v. MacDonald*, 1 Navajo Rptr. 189, 205 (Sup. Ct. 1978) (“That is because they have a traditional and abiding respect for the impartial adjudicatory process. When all have been heard and the decision is made, it is respected. This has been the Navajo way since before the time of the present judicial system. The Navajo People did not learn this principle from the white man. They have carried it with them through history.”); *Johnson v. Belgarde*, 25 Indian L. Rep. 6183, 6184 (Hopi App. Ct. 1996); Raymond D. Austin, *American Indian Customary Law in the Modern Courts of American Indian Nations*, 11 WYO. L. REV. 351, 372 (2011).

103. Benson, *supra* note 101, at 52.

104. JACK WEATHERFORD, *INDIAN GIVERS: HOW NATIVE AMERICANS TRANSFORMED THE WORLD 177–78* (2010); 1 LEWIS HENRY MORGAN, *LEAGUE OF THE HO-DÉ-NO-SAU-NEE OR IROQUOIS* 68 (Herbert M. Lloyd ed., Dodd, Mead & Co. 1901) (1851) (ebook) (“Their whole civil policy was averse to the concentration of power in the hands of any single individual . . .”).

105. ADAM CREPELLE, *BECOMING NATIONS AGAIN: THE JOURNEY TOWARDS TRIBAL SELF-DETERMINATION* 49 (2025); Jeremy Rabkin, *Commerce with the Indian Tribes: Original Meanings, Current Implications*, 56 IND. L. REV. 279, 320–21 (2023); Charles C. Mann, *Opinion, The Founding Sachems*, N.Y. TIMES (July 4, 2005), <https://www.nytimes.com/2005/07/04/opinion/the-founding-sachems.html> [<https://perma.cc/73NZ-PGWQ>] (“Compared to the despotisms that were the norm in Europe and Asia, the societies encountered by British colonists were a libertarian dream.”).

106. CREPELLE, *supra* note 105, at 49–50; ROBERT J. MILLER, *RESERVATION “CAPITALISM”:* ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 16–17 (2012).

107. Crepelle, *supra* note 33, at 229–30.

108. Brief of Amicus Curiae Professor Gregory Ablavsky in Support of Federal Parties and Tribal Defendants at 2, *Haaland v. Brackeen*, 599 U.S. 255 (2023) (No. 21-376).

109. 9 JAMES MADISON, *Vices of the Political System of the United States*, in *THE PAPERS OF JAMES MADISON* 345 (Robert A. Rutland et al. eds., 1975).

110. *Haaland v. Brackeen*, 599 U.S. 255, 333 (2023) (Gorsuch, J., concurring) (“And it secures that promise by divesting States of authority over Indian affairs and by giving the federal government certain significant (but limited and enumerated) powers aimed at building a lasting peace.”); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1014 (2015).

government's ability to wage war against Indian tribes; indeed, concerns about tribes' martial prowess served as a key impetus for the U.S. Constitution's ratification.¹¹¹ Thomas Jefferson believed the Constitution enabled the United States to expand west into Indian lands and create an "empire for liberty."¹¹² Notwithstanding, the Constitution did not abridge or alter tribes' preexisting inherent sovereign powers.¹¹³

The federal government's exclusive authority over Indian affairs went largely unchallenged until the election of President Andrew Jackson in 1828.¹¹⁴ Jackson championed the Indian Removal Act through Congress in 1830,¹¹⁵ which enabled the president to expand the American empire by strong-arming tribes into surrendering their lands.¹¹⁶ Georgia, emboldened by President Jackson's election, enacted legislation annexing the Cherokee Nation.¹¹⁷ In response, the Cherokee Nation filed an original action in the United States Supreme Court asserting the Georgia law violated the Nation's treaty-guaranteed right to self-government.¹¹⁸ The Supreme Court dismissed the case on procedural grounds,¹¹⁹ averring the Cherokee Nation did not qualify for jurisdiction because it was a "domestic dependent nation."¹²⁰ However, Georgia law also prohibited white people from

111. Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1007–08 (2014).

112. Letter from Thomas Jefferson to James Madison, U.S. President (Apr. 27, 1809), <https://founders.archives.gov/documents/Jefferson/03-01-02-0140> [<https://perma.cc/67FF-ALEE>].

113. *Brackeen*, 599 U.S. at 333 (Gorsuch, J., concurring) ("Our Constitution reserves for the Tribes a place—an enduring place—in the structure of American life. It promises them sovereignty for as long as they wish to keep it."); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 782 (1991) ("[I]t would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties.").

114. Dan Bryan, *Indian Removal and the Trail of Tears*, AM. HIST. USA (Mar. 26, 2012), <https://www.americanhistoryusa.com/indian-removal-and-trail-of-tears/> [<https://perma.cc/3V4Z-HGMU>].

115. See Indian Removal Act of 1830, ch. 148, 4 Stat. 411 (repealed 1980).

116. Harrison M. Wright, "Imperialism": *The Word and Its Meaning*, 34 SOC. RSCH. 660, 664 (1967) ("And the making of territory uninhabited, by deliberate extermination or by the removal of people, may (in most cases) be considered [imperialism] as well.").

117. See ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA, RESOLUTIONS WHICH ORIGINATED IN THE SENATE, Dec. 4, 1826, at 206–08 (adopting resolutions aimed at extinguishing title to Cherokee lands); ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA, Dec. 27, 1827, at 249 ("That all the lands appropriated and unappropriated, which lie within the conventional limits of Georgia, belong to her absolutely; that the title is in her; that the Indians are tenants at her will, and that she may at any time she pleases, determine that tenancy, by taking possession of the premises – and that Georgia has the right to extend her authority and laws over her whole territory, and to coerce obedience to [them] from all descriptions of people, be them white, red or black, who may reside within her limits."); ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA, Dec. 20, 1828, at 89 ("That all laws, usages, and customs made, established and in force, in the said territory, by the said Cherokee Indians be, and the same are hereby on, and after the first June, 1830, declared null and void.").

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

119. *Id.* at 19–20 (holding the court had no jurisdiction because there was not "a proper case with proper parties").

120. *Id.* at 17.

entering the Cherokee Nation without the state's permission.¹²¹ The white men who violated the law, Samuel Worcester and Elizur Butler, were able to invoke the Court's jurisdiction in *Worcester v. Georgia*.¹²²

In *Worcester*, decided in 1832, the Supreme Court followed the text and original meaning of the Constitution to declare Georgia's attempted exercise of power over the Cherokee Nation unconstitutional.¹²³ The Court explained:

The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.¹²⁴

Worcester affirmed the bright line rule established in the U.S. Constitution—states have no authority over Indian country.¹²⁵ Nevertheless, the Cherokee Nation's victory was short-lived. Though President Jackson knew Georgia's law was unconstitutional,¹²⁶ he refused to enforce the Supreme Court's decision.¹²⁷ This flagrant disregard for the rule of law precipitated the Trail of Tears.¹²⁸ Due to President Jackson's scorn for tribal

121. *Id.* at 13–14; ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA, Dec. 22, 1830, at 114 (“AN ACT to prevent the exercise of assumed and arbitrary power, by all persons under pretext of authority from the Cherokee Indians, and their laws, and to prevent white persons from residing within that part of the chartered limits of Georgia, occupied by the Cherokee Indians, and to provide a guard for the protection of the gold mines, and to enforce the laws of the State within the aforesaid territory.”).

122. 31 U.S. (6 Pet.) 515 (1832).

123. *See* Haaland v. Brackeen, 599 U.S. 255, 311–12 (2023) (Gorsuch, J., concurring).

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

125. *Id.*

126. *See* Andrew Jackson, Second Annual Message (Dec. 6, 1830), <https://www.presidency.ucsb.edu/documents/second-annual-message-3> [<https://perma.cc/8BW5-PH5N>] (“As individuals we may entertain and express our opinions of their acts, but as a Government we have as little right to control them as we have to prescribe laws for other nations.”).

127. Tim Alan Garrison, *Worcester v. Georgia (1832)*, NEW GA. ENCYC. (Feb. 20, 2018), <https://www.georgiaencyclopedia.org/articles/government-politics/worcester-v-georgia-1832> [<https://perma.cc/CMV7-B9WN>] (“Georgia ignored the Supreme Court’s ruling, refused to release the missionaries, and continued to press the federal government to remove the Cherokees. President Jackson did not enforce the decision against the state and instead called on the Cherokees to relocate or fall under Georgia’s jurisdiction.”); *Worcester v. Georgia*, ENCYC. BRITANNICA (Feb. 24, 2025), <https://www.britannica.com/topic/Worcester-v-Georgia> [<https://perma.cc/Z4X7-F2PB>] (“Pres. Andrew Jackson declined to enforce the Supreme Court’s decision, thus allowing states to enact further legislation damaging to the tribes.”).

128. *See* Ellen Holmes Pearson, *A Trail of 4,000 Tears*, BREWMINATE (May 31, 2018), <https://brewminate.com/a-trail-of-4000-tears/> [<https://perma.cc/L3C6-MPQH>] (“It is estimated that of the approximately 16,000 Cherokees who were removed between 1836 and 1839, about 4,000 perished.”);

sovereignty, Professor Roxanne Dunbar-Ortiz described him as “the Dark Knight in the formation of the United States as a colonialist, imperialist democracy.”¹²⁹

The Cherokee Nation and numerous tribes were forced onto reservations to make way for white settlers.¹³⁰ On reservations, tribes were supposed to be able to govern themselves free from outside interference.¹³¹ However, the federal government exercised extreme control over reservations.¹³² According to the 1848 Annual Report of the Commissioner of Indian Affairs, reservations were designed “to colonize our Indian tribes beyond the reach, for some years, of our white population.”¹³³ Nevertheless, reservations were categorically beyond state control—not even the Confederate States of America attempted to exercise jurisdiction over tribal land.¹³⁴ Following the Civil War, states tried to tax reservations, and the Supreme Court ruled states lacked power within reservations.¹³⁵ In 1879, the Supreme Court held Idaho could not serve process on a white man located on a reservation because “[t]he territory reserved, therefore, was as much beyond the jurisdiction, legislative or judicial, of the government of Idaho, as if it had been set apart within the limits of another country, or of a

The Trail of Tears, PBS, <https://www.pbs.org/wgbh/aia/part4/4h1567.html> [<https://perma.cc/M4PY-ER78>] (“Over 4,000 out of 15,000 of the Cherokees died.”); *The Trail of Tears — The Indian Removals*, U.S. HIST., <http://www.ushistory.org/us/24f.asp> [<https://perma.cc/JSY8-SKPS>].

129. ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLES’ HISTORY OF THE UNITED STATES 108 (2014).

130. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 2.06 [1] (Nell Jessup Newton & Kevin K. Washburn eds., 2024) [hereinafter COHEN’S HANDBOOK].

131. See *McGirt v. Oklahoma*, 591 U.S. 894, 929 (2020) (“And in many treaties, like those now before us, the federal government promised Indian Tribes the right to continue to govern themselves.”); Andrew Jackson, First Annual Message (Dec. 8, 1829), <https://www.presidency.ucsb.edu/documents/first-annual-message-3> [<https://perma.cc/8MUV-EXBW>] (“There they may be secured in the enjoyment of governments of their own choice, subject to no other control from the United States than such as may be necessary to preserve peace on the frontier and between the several tribes.”).

132. Adam Crepelle, *How Federal Indian Law Prevents Business Development in Indian Country*, 23 U. PA. J. BUS. L. 683, 697–98 (2021).

133. 1847–48 ANN. REP. COMM’R INDIAN AFFAIRS 4.

134. Scott A. Taylor, *The Unending Onslaught on Tribal Sovereignty: State Income Taxation of Non-Member Indians*, 91 MARQ. L. REV. 917, 932–33 (2008).

135. *In re New York Indians*, 72 U.S. (5 Wall.) 761, 771 (1867) (“We must say, regarding these reservations as wholly exempt from State taxation, and which, as we understand the opinion of the learned judge below, is not denied, the exercise of this authority over them is an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations.”); *In re Kansas Indians*, 72 U.S. (5 Wall.) 737, 757 (1867) (“Conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization. As long as the United States recognizes their national character they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of State laws.”).

foreign State.”¹³⁶ Thus, the Supreme Court continued to follow the clear rule established by *Worcester*.¹³⁷

The United States Indian policy shifted from recognizing tribes as governments to erasing tribes through assimilation in the 1880s, so the Supreme Court began departing from *Worcester*. In 1880, Congress considered legislation to open reservations to white settlers.¹³⁸ Two years later, the Supreme Court allowed states to prosecute reservation crimes involving only non-Indians in *United States v. McBratney*.¹³⁹ The Court eschewed notions of tribal sovereignty and treaty rights in favor state sovereignty under the Equal Footing Doctrine.¹⁴⁰ The Court’s interpretation of the Equal Footing Doctrine is highly suspect.¹⁴¹ Indeed, Professor Robert Clinton explained the Court’s reasoning as “the non-ward status of the accused and the victim divests the federal government of any interest in prosecution despite the occurrence of the crime in Indian country.”¹⁴² *McBratney* was the first time the Supreme Court allowed state law to penetrate a reservation.

Ex parte Crow Dog,¹⁴³ decided one year later, continued the assimilatory trend. The case stemmed from Crow Dog’s murder of another Indian, Spotted Tail, on the Great Sioux Reservation.¹⁴⁴ As an intratribal matter, the Sioux resolved the dispute pursuant to Sioux custom—which required Crow Dog to render financial compensation as a form of restitution to Spotted Tail’s family.¹⁴⁵ Americans were dissatisfied with what they viewed as a

136. *Harkness v. Hyde*, 98 U.S. 476, 478 (1879).

137. *Haaland v. Brackeen*, 599 U.S. 255, 312 (2023) (Gorsuch, J., concurring) (“But just as this Court had no power to enforce its judgment, President Jackson had no power to erase its reasoning. So the rule of *Worcester* persisted in courts of law, unchanged, for decades.”).

138. Frank Pommersheim, *Land into Trust: An Inquiry into Law, Policy, and History*, 49 IDAHO L. REV. 519, 524 (2013).

139. 104 U.S. 621 (1882).

140. *Id.* at 624 (“The State of Colorado, by its admission into the Union by Congress, upon an equal footing with the original States in all respects whatever, without any such exception as had been made in the treaty with the Ute Indians and in the act establishing a territorial government, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States.”).

141. CANBY, *supra* note 30, at 167; COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 6.01[3] (Nell Jessup Newton ed., 2012) (“The *McBratney* opinion was brief and far from clear. It purported to be based on statutory interpretation, but it is difficult to arrive at the Court’s result by any ordinary approach to statutory construction.”); DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS, JR., MATTHEW L.M. FLETCHER & KRISTEN A. CARPENTER, CASES AND MATERIALS ON FEDERAL INDIAN LAW 555–57 (7th ed. 2017).

142. Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 525 (1976).

143. 109 U.S. 556 (1883).

144. *Id.* at 557.

145. See INDIAN L. & ORDER COMM’N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER 117 (2013) (“The matter was settled according to longstanding Lakota custom and tradition, which required

lenient sentence for murder, so federal prosecutors moved to punish Crow Dog.¹⁴⁶ Crow Dog contested the federal government's jurisdiction over the case, and the Supreme Court sided with Crow Dog.¹⁴⁷ The Court noted no statute or treaty authorized the United States to prosecute reservation crimes involving only Indian parties.¹⁴⁸ The Court emphasized it would not be fair to judge "the red man's revenge by the maxims of the white man's morality"¹⁴⁹ because tribes were "a dependent community who were in a state of pupilage."¹⁵⁰

Crow Dog inspired the federal government to amplify its assimilatory effort. Soon after *Crow Dog*, the U.S. Department of the Interior created Courts of Indian Offenses to exterminate indigenous culture and accelerate Indian assimilation.¹⁵¹ Congress responded to *Crow Dog* by passing the Major Crimes Act in 1885, which for the first time, authorized the federal government to prosecute reservation crimes involving only Indians.¹⁵² The Act's constitutionality was challenged by *Kagama*, an Indian prosecuted under the law, and the Supreme Court agreed the text of the U.S. Constitution did not vest Congress with authority to pass the law.¹⁵³ Nevertheless, the Court upheld the law because "[t]hese Indian tribes *are* the wards of the nation."¹⁵⁴ Being wards of the nation meant Congress could assert extraconstitutional power over Indians for the Indians' own good.¹⁵⁵

The assimilation era reached its apex with the General Allotment Act.¹⁵⁶ Passed in 1887, the law divided reservations into 160-acre parcels.¹⁵⁷ The parcels were placed in trust for Indian heads of household for twenty-five years.¹⁵⁸ During the trust period, Indians were to abandon their Indigenous

Crow Dog to make restitution by giving Spotted Tail's family \$600, eight horses, and a blanket."); SIDNEY L. HARRING, *CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY* 110 (1994).

146. *Ex parte Crow Dog*, 109 U.S. at 557.

147. *Id.* at 572.

148. *Id.*

149. *Id.* at 571.

150. *Id.* at 569.

151. *Denezpi v. United States*, 596 U.S. 591, 606–07 (2022) (Gorsuch, J., dissenting).

152. Major Crimes Act of 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153).

153. *United States v. Kagama*, 118 U.S. 375, 378–79 (1886) (emphasis in original).

154. *Id.* at 383.

155. *Id.* at 384 ("The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else . . .").

156. General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331–358), *repealed by* Act of June 18, 1934, ch. 576, 48 Stat. 984 *and* Act of Nov. 7, 2000, Pub. L. No. 106-462, § 106(a)(1), 114 Stat. 1991, 2007.

157. CANBY, *supra* note 30, at 25; Pommersheim, *supra* note 138, at 521.

158. CANBY, *supra* note 30, at 25; Pommersheim, *supra* note 138, at 521.

cultures and assimilate into white culture.¹⁵⁹ The lands remaining after Indians received their allotments were opened to white settlers to serve as cultural role models for Indians.¹⁶⁰ Although Indians were supposed to acquire agricultural skills during the trust period, the lands Indians were allocated was often unsuited for farming.¹⁶¹ Indians were not provided with capital or farm equipment either.¹⁶² Allotment proved devastating for tribes as they lost approximately ninety million acres¹⁶³ of land and their citizens were cast into dire poverty.¹⁶⁴ Allotment was a blunt tool of American imperialism; indeed, President Theodore Roosevelt described it as “a mighty pulverizing engine to break up the tribal mass.”¹⁶⁵

While allotment was intended to eliminate tribes through assimilation, it was a step on the journey rather than the destination.¹⁶⁶ Tribal structures were largely left intact, but tribes’ status shifted from sovereigns to collections of wards. For example, the Supreme Court permitted Oklahoma to tax non-Indian-owned cattle grazing on reservations leased from Indians.¹⁶⁷ Although the Oklahoma tax caused the non-Indian to terminate the lease, the Supreme Court dismissed the idea that the tax impacted tribal

159. Wilcomb E. Washburn, *The Historical Context of American Indian Legal Problems*, 40 *LAW & CONTEMP. PROBS.* 12, 18–19 (1976) (“The principal force behind the law was the vast corps of Indian rights organizations who convinced themselves that allotment and assimilation were the only solutions to the Indian ‘problem.’”).

160. See *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 335 (1998) (“Within a generation or two, it was thought, the tribes would dissolve, their reservations would disappear, and individual Indians would be absorbed into the larger community of white settlers.”); *DeCoteau v. Dist. Cnty. Ct. for the Tenth Jud. Dist.*, 420 U.S. 425, 462 (1975) (Douglas, J., dissenting) (“The purpose was not to alter or change the reservation but to lure white settlers onto the reservation whose habits of work and leanings toward education would invigorate life on the reservation.”); *Mattz v. Arnett*, 412 U.S. 481, 496 (1973) (“Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways.”).

161. CANBY, *supra* note 30, at 26; Steven J. Gunn, *Indian General Allotment Act (Dawes Act) (1887)*, *ENCYCLOPEDIA.COM*, <https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/indian-general-allotment-act-dawes-act-1887> [https://perma.cc/TY4X-LWND] (“Most allotted lands were not suitable for agriculture.”).

162. Pommersheim, *supra* note 138, at 522 (“The allotment policy . . . was grossly undercapitalized, sometimes providing less than ten dollars per allottee for implements, seeds, and instructions.”); Gunn, *supra* note 161 (“The government made only minimal efforts to provide farming equipment to the indigenous peoples. Its annual appropriations for that purpose were often no more than \$10.00 per Native.”); R. Douglas Hurt, *Native American Agriculture*, *ENCYC. GREAT PLAINS*, <http://plainshumanities.unl.edu/encyclopedia/doc/egp.ag.052> [https://perma.cc/PS46-Q6T9] (“[The federal government] failed to provide adequate equipment, seeds, and training to enable the transition to the new system.”).

163. S. REP. NO. 112-166, at 4 (2012) (“The federal allotment policy resulted in the loss of over 100 million acres of tribal homelands.”); CANBY, *supra* note 30, at 26.

164. LEWIS MERIAM, *INST. FOR GOV’T RSCH.*, *THE PROBLEM OF INDIAN ADMINISTRATION* 3 (1928) (“An overwhelming majority of the Indians are poor, even extremely poor . . .”).

165. Theodore Roosevelt, *First Annual Message* (Dec. 3, 1901), <https://www.presidency.ucsb.edu/documents/first-annual-message-16> [https://perma.cc/5V4A-4HTR].

166. *McGirt v. Oklahoma*, 591 U.S. 894, 908 (2020) (“But to equate allotment with disestablishment would confuse the first step of a march with arrival at its destination.”).

167. *Thomas v. Gay*, 169 U.S. 264, 264–65 (1898).

sovereignty as “purely fanciful.”¹⁶⁸ On the other hand, the Supreme Court continued to recognize individual Indian immunity from state taxation if the Indians were located on their reservations.¹⁶⁹ Tribal sovereignty did not factor into the Court’s reasoning; rather, the Court explained, “[t]hese Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition.”¹⁷⁰ Nonetheless, federal courts—including the Supreme Court—affirmed exercises of tribal jurisdiction over non-Indians during the peak of the assimilation era.¹⁷¹

The United States abandoned its assimilatory effort in favor of tribal cultural preservation with the Indian Reorganization Act of 1934 (IRA).¹⁷² The IRA was designed to end allotment, build tribal land bases, and foster tribal self-government.¹⁷³ Without question, the IRA succeeded at preventing Indian land loss.¹⁷⁴ However, the IRA did this by locking Indian land in perpetual trust status.¹⁷⁵ The federal government held title to trust land, so the federal government—rather than the tribe—controlled trust land.¹⁷⁶ While the IRA was supposed to promote tribal self-governance, the IRA required tribes to obtain federal approval before tribal laws could take effect.¹⁷⁷ Thus, the IRA propagated the federal government’s view of Indians as wards. As the Secretary of Interior noted, “The whites can take care of themselves, but the Indians need some one [sic] to protect them from

168. *Id.* at 274.

169. *United States v. Rickert*, 188 U.S. 432 (1903).

170. *Id.* at 437.

171. *Morris v. Hitchcock*, 194 U.S. 384 (1904); *Buster v. Wright*, 135 F. 947, 951–52 (8th Cir. 1905) (“But the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it, or by the existence of municipalities therein endowed with power to collect taxes for city purposes, and to enact and enforce municipal ordinances.”); *Maxey v. Wright*, 54 S.W. 807, 809–10 (Indian Terr. 1900) (“We fully agree with these opinions, and hold, therefore, that unless since the ratification of the treaty of 1856 there has been a treaty entered into, or an act of congress passed, repealing it, the Creek Nation had the power to impose this condition or occupation tax, if it may be so called, upon attorneys at law (white men) residing and practicing their profession in the Indian Territory.”).

172. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101–5144).

173. *Morton v. Mancari*, 417 U.S. 535, 542 (1974) (“The overriding purpose of that particular Act was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.”); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973).

174. See Indian Reorganization Act of 1934, § 3, 48 Stat. at 984–85; CANBY, *supra* note 30, at 28.

175. See Indian Reorganization Act of 1934, § 2, 48 Stat. at 984; CANBY, *supra* note 30, at 28.

176. S. REP. NO. 101-216, at 51 (1989) (“The Indian Reorganization Act declared an end to the policy of allotment, but it severely restricted the powers and the autonomy of the new tribal governments which would operate under its authority.”).

177. COHEN’S HANDBOOK, *supra* note 130, § 2.09[2].

exploitation.”¹⁷⁸ Despite the federal paternalism, the United States recognized tribes possessed all “powers of local self-government.”¹⁷⁹

Within a decade of the IRA’s enactment, the United States resumed its cultural imperialism by adopting a policy of tribal termination during the 1950s.¹⁸⁰ The United States unilaterally extinguished the existence of over 100 Indian tribes.¹⁸¹ Terminating a tribe meant the tribe’s land and resources were more easily accessible to corporate interests.¹⁸² Plus, tribal termination ended Indians’ access to federal Indian programs, thereby resulting in lower federal expenditures.¹⁸³ Tribal termination was complemented by the Indian Relocation Act of 1956, which coerced Indians into leaving their reservations for urban areas.¹⁸⁴ And for those Indians who remained on reservations, Congress subjected them to state law through Public Law 280.¹⁸⁵ Public Law 280 served as a way to reduce federal spending on tribes and to assimilate Indians into the surrounding state.¹⁸⁶ The United States’ anti-tribal efforts were performed in the name of “Americanizing” American Indians.¹⁸⁷

President Richard Nixon formally ended tribal termination in 1970.¹⁸⁸ Nixon noted, “Even the Federal programs which are intended to meet their needs have frequently proven to be ineffective and demeaning.”¹⁸⁹ Thus, Nixon sought to replace termination with a policy of tribal self-

178. FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 212 (abr. ed. 1984).

179. Powers of Indian Tribes, 55 Interior Dec. 14, 16, 22–24, 28, 65 (1934), https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/doi_decisions_055.pdf [<https://perma.cc/7F5E-TBH7>].

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

181. LAURIE ARNOLD, *BARTERING WITH THE BONES OF THEIR DEAD: THE COLVILLE CONFEDERATED TRIBES AND TERMINATION*, at XI (2012) (“More than 100 tribes were terminated between 1953 and 1961”); DONALD L. FIXICO, *TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945–1960*, at 183 (1986) (“Between 1945 and 1960 the government processed 109 cases of termination affecting 1,369,000 acres of Indian land”); Alysa Landry, *Harry S. Truman: Beginning of Indian Termination Era*, INDIAN COUNTRY TODAY (Sept. 13, 2018), <https://ictnews.org/archive/harry-s-truman-beginning-of-indian-termination-era> [<https://perma.cc/NKA3-ND5E>] (“Within the first decade of the termination era, policies that Truman supported terminated more than 100 tribes, severing their trust relationships with the federal government.”).

182. Adam Creppelle, *Finding Ways to Empower Tribal Oil Production*, 22 WYO. L. REV. 25, 36 (2022).

183. COHEN’S HANDBOOK, *supra* note 130, § 2.10[3].

184. Indian Relocation Act of 1956, ch. 930, 70 Stat. 986.

185. Act of August 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162; 25 U.S.C. §§ 1321–1326; 28 U.S.C. § 1360).

186. Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1658, 1660–63 (1998).

187. 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, 221 (“Many Indians, however, doubted the sincerity of efforts to ‘Americanize’ them by terminating their federally recognized status as sovereign, self-defining peoples.”).

188. Special Message to the Congress on Indian Affairs, 1 PUB. PAPERS 564–67 (July 8, 1970).

189. *Id.* at 564–65.

determination.¹⁹⁰ He went so far as to advocate for complete transfer of all federal Indian programs to the tribes themselves; however, tribes feared this was a backdoor path to termination.¹⁹¹ Although Nixon's proposal did not pass, it laid the framework for what would become the Indian Self-Determination and Education Assistance Act of 1975.¹⁹² The executive and legislative branches have maintained the tribal self-determination policy for fifty years.¹⁹³

III. JUDICIAL IMPERIALISM

During the self-determination era, the Supreme Court became sharply hostile to tribal sovereignty. Tribes' success rate before the Supreme Court was twenty-nine percent during William Rehnquist's tenure as Chief Justice.¹⁹⁴ Chief Justice Rehnquist was replaced by John Roberts in 2005, and tribes' rate of success fell to eighteen percent.¹⁹⁵ Tribes' odds of prevailing at the Supreme Court are lower than other groups, including convicted criminals.¹⁹⁶ Professor Bethany Berger noted, "The decisions, moreover, were not applications of existing precedent, but rather often ignored precedent, creating new rules that undermined tribal interests."¹⁹⁷

190. *Id.* at 566.

191. PRUCHA, *supra* note 178, at 251–52.

192. Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 5301–5423).

193. *See, e.g.*, Exec. Order No. 13,175, 65 Fed. Reg. 67249 (Nov. 6, 2000); Statement on Signing the Indian Self-Determination Assistance Act Amendments of 1988, 2 PUB. PAPERS 1284–85 (Oct. 5, 1988); Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, 1 PUB. PAPERS 662–63 (June 14, 1991); Statement on Signing the Executive Order on Consultation and Coordination with Indian Tribal Governments, 3 PUB. PAPERS 2487–88 (Nov. 6, 2000); Memorandum on Government-to-Government Relationship with Tribal Governments, 2 PUB. PAPERS 2177–78 (Sep. 23, 2004); EXEC. OFF. OF THE PRESIDENT, 2016 WHITE HOUSE TRIBAL NATIONS CONFERENCE PROGRESS REPORT: A RENEWED ERA OF FEDERAL-TRIBAL RELATIONS (2017), https://obamawhitehouse.archives.gov/sites/default/files/docs/whncaa_report.pdf [<https://perma.cc/439W-2QWH>]; Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 2021 DAILY COMP. PRES. DOC. NO. 00091 (Jan. 26, 2021); Alysa Landry, *Jimmy Carter: Signed ICWA into Law*, INDIAN COUNTRY TODAY (Sept. 13, 2018), <https://icnews.org/archive/jimmy-carter-signed-icwa-into-law?redir=1> [<https://perma.cc/VPQ3-XLNS>] ("During his presidential campaign in 1976, Carter's staff reached out to the National Congress of American Indians and the National Tribal Chairmen's Association. Carter met briefly with some leaders and his staff drafted a position paper that endorsed Indian self-determination policy, already in force.")

194. Bethany R. Berger, *Hope for Indian Tribes in the U.S. Supreme Court?: Menominee, Nebraska v. Parker, Bryant, Dollar General . . . and Beyond*, 2017 U. ILL. L. REV. 1901, 1907.

195. *Id.*

196. *Id.* at 1905.

197. *Id.*

Many Indian law scholars have described the Court’s jurisprudence as activist,¹⁹⁸ but judicial activism is difficult to apply to the Supreme Court’s Indian law decisions. Judicial activism implies the Justices are disregarding the law in favor of their policy preferences; however, as Professor Gregory Ablavsky noted, the historical record in Indian law is often muddled.¹⁹⁹ Consequently, the United States’ past jurisprudential injustices provide a basis for judges to rule against tribal interests.²⁰⁰ Tribes’ sui generis sovereign status is also conflated—perhaps intentionally—with racial privilege.²⁰¹ This enables judges to oppose tribal sovereignty in the name of equal protection.²⁰² Accordingly, it is impossible to conclusively prove that the Supreme Court’s Indian law jurisprudence is “activist.”

Judicial imperialism is a better descriptor of the Supreme Court’s post-1970s jurisprudence. While the term’s meaning has varied over time,²⁰³ imperialism is “the domination of one country over another country’s

198. *E.g.*, Matthew L.M. Fletcher, *The Supreme Court’s Indian Problem*, 59 HASTINGS L.J. 579, 584–85 (2008) (“Indian law scholars have been decrying the lack of principled decisionmaking about federal Indian law for decades.”); Angelique EagleWoman (Wambdi A. WasteWin), *A Constitutional Crisis when the U.S. Supreme Court Acts in a Legislative Manner? An Essay Offering a Perspective on Judicial Activism in Federal Indian Law and Federal Civil Procedure Pleading Standards*, 114 PENN ST. L. REV. STATIM 41, 42 (2010) (“While the judicial activism and unrestrained extra-textual interpretations in federal Indian law have been known to a core group in the field, the Court’s recent unmooring of civil pleading standards from the Federal Rules and settled precedent has come as a shock to many.”). *See generally* Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391 (2008).

199. Gregory Ablavsky, *Too Much History: Castro-Huerta and the Problem of Change in Indian Law*, 2022 SUP. CT. REV. 293, 300–01; *see also* *McGirt v. Oklahoma*, 591 U.S. 894, 922–23 (2020) (“Whatever else might be said about the history and demographics placed before us, they hardly tell a story of unalloyed respect for tribal interests.”).

200. ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA*, at xxv (2005). *See generally* Maggie Blackhawk, *The Constitution of American Colonialism*, 137 HARV. L. REV. 1 (2023).

201. Gregory Ablavsky, “*With the Indian Tribes*”: *Race, Citizenship, and Original Constitutional Meanings*, 70 STAN. L. REV. 1025, 1028 (2018) (“Indian status has long been bound up with requirements of descent that, often crudely expressed in terms of ‘blood,’ seem to hearken to the worst aspects of American racial history.”); Allison Krause Elder, “*Indian*” as a *Political Classification: Reading the Tribe Back into the Indian Child Welfare Act*, 13 NW. J.L. & SOC. POL’Y 417, 419 (2018) (“At the core of the disagreement is whether the term ‘Indian’ is a racial or political classification.”).

202. *Haaland v. Brackeen*, 599 U.S. 255, 333 (2023) (Kavanaugh, J., concurring) (“I write separately to emphasize that the Court today does not address or decide the equal protection issue that can arise when the Indian Child Welfare Act is applied in individual foster care or adoption proceedings.”); Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 1016 (2011) (“Courts faced with equal protection challenges to statutes that single out Indians must now struggle to determine where political Indianness ends and racial Indianness begins.”).

203. James Thuo Gathii, *Imperialism, Colonialism, and International Law*, 54 BUFF. L. REV. 1013, 1015–16 (2007) (“While my Article will focus on imperialism and colonialism, the term ‘imperialism’ has, over the last century, had many meanings, and its uses in specific historical contexts have been varied.”).

political, economic, and cultural systems.”²⁰⁴ Countries have engaged in imperialism since the beginning of time,²⁰⁵ but many scholars believe the height of imperialism occurred between the late 1800s and World War I, when a handful of European countries “controlled over 80% of the surface of the globe.”²⁰⁶ During this period, Europeans and Americans believed they were both racially and culturally superior to the Indigenous Peoples of other areas.²⁰⁷ Thus, Europeans and Americans invaded lands inhabited by Indigenous populations, ostensibly for the benefit of the Indigenous Peoples.²⁰⁸ Economic exploitation often accompanies imperial occupation;²⁰⁹ nevertheless, the essence of imperialism is depriving the subject people of their political independence and right to self-determination.²¹⁰

As detailed above, the United States’ legal history toward Indians, as well as other Indigenous Peoples,²¹¹ can be described as imperialist. To subjugate tribes, Congress passed numerous laws, presidents implemented anti-Indian policies, and the Supreme Court validated the American empire.²¹² Social change has led the executive and legislative branches to

204. Benjamin Linzy, *From Imperialism to Postcolonialism: Key Concepts*, JSTOR DAILY (Aug. 8, 2022), <https://daily.jstor.org/from-imperialism-to-postcolonialism-key-concepts/> [<https://perma.cc/8VMX-W3K9>]; see also Gathii, *supra* note 203, at 1016; *Imperialism*, CORNELL L. SCH. LEGAL INFO. INST. (Apr. 2022), <https://www.law.cornell.edu/wex/imperialism> [<https://perma.cc/4VCX-9LLS>]; *What Is Imperialism? Definition and a Brief History*, LAW DICTIONARY, <https://thelawdictionary.org/article/imperialism-definition-laws-history/> [<https://perma.cc/N2J9-FU23>]; *Imperialism Law and Legal Definition*, USLEGAL, <https://definitions.uslegal.com/i/imperialism/> [<https://perma.cc/KH7V-43KR>].

205. PRUDENCE J. JONES, *AFRICA: GREEK AND ROMAN PERSPECTIVES FROM HOMER TO APULEIUS 74* (ebook) (detailing imperialism from the first century CE).

206. CHRISTOPHER BROOKS, *WESTERN CIVILIZATION: A CONCISE HISTORY 466* (2020) (ebook).

207. *Id.* (“At the time, however, most Europeans and Americans considered their technology as proof of their ‘racial’ and cultural superiority.”).

208. *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (“If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that ultimately, our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.”); Wright, *supra* note 116, at 672 (“Livingstone usually kept commerce in the background or, more frequently, emphasized its value for the Africans as a prerequisite to Christianity.”).

209. V.I. LENIN, *IMPERIALISM, THE HIGHEST STAGE OF CAPITALISM: A POPULAR OUTLINE 104* (Martino Publ’g 2011) (1916) (“Imperialism, which means the partition of the world, and the exploitation of other countries besides China, which means high monopoly profits for a handful of very rich countries, creates the economic possibility of corrupting the upper strata of the proletariat, and thereby fosters, gives form to, and strengthens opportunism.”).

210. Wright, *supra* note 116, at 665 (“[T]he inequality of imperialism should be considered basically as a political matter—not economic, intellectual, religious, social, or whatever. It should, in other words, relate to the infringement of a people’s political self-determination or independence.”).

211. Dave Davies, *The History of American Imperialism, From Bloody Conquest to Bird Poop*, NPR (Feb. 18, 2018, 1:27 PM), <https://www.npr.org/2019/02/18/694700303/the-history-of-american-imperialism-from-bloody-conquest-to-bird-poop> [<https://perma.cc/P8SS-MYAE>].

212. See, e.g., PAUL FINKELMAN, *SUPREME INJUSTICE: SLAVERY IN THE NATION’S HIGHEST COURT 5*, 108–09, 237 n.47 (2018).

eschew imperialism for tribal self-determination. However, the Supreme Court has chosen to disregard the political branches of government. The Supreme Court continues to deprive tribes of their ability to self-govern and to impose outside authorities on tribal land.²¹³ This is judicial imperialism.

The remainder of this Part shows how judicial imperialism has diminished tribal sovereignty in three key areas.

A. Criminal Jurisdiction

The federal government has long meddled in tribal criminal law, but the Supreme Court dealt one of its most imperial blows to Indian country criminal justice in *Oliphant v. Suquamish Indian Tribe*.²¹⁴ Decided in 1978, the case resulted from Mark Oliphant, a non-Indian reservation resident, assaulting a tribal police officer.²¹⁵ The tribe moved to prosecute Oliphant for his crime, but Oliphant argued the tribal court lacked jurisdiction over non-Indians.²¹⁶ The federal district court disagreed with Oliphant.²¹⁷ The Ninth Circuit also rejected Oliphant's claim.²¹⁸ The Ninth Circuit noted tribes possessed all powers they have not relinquished and there was no evidence the tribe surrendered its authority over non-Indians.²¹⁹ Furthermore, the Ninth Circuit emphasized the federal government had recently adopted a policy of tribal self-determination.²²⁰ According to the Ninth Circuit, being able to prosecute non-Indians was essential to tribal self-determination.²²¹

The Supreme Court reversed.²²² Although there was evidence of tribes prosecuting non-Indians over a century ago, the Court asserted tribal prosecution of non-Indians "is a relatively new phenomenon."²²³ After presenting documents and jurisprudence from the Indian removal, allotment, and termination eras, the Court announced, "These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those

213. *E.g.*, *Oklahoma v. Castro-Huerta*, 597 U.S. 629 (2022); *Washington v. Confederated Tribes of the Colville Indian Rsrv.*, 447 U.S. 134, 155 (1980); *Strate v. A-1 Contractors*, 520 U.S. 438, 458–59 (1997).

214. 435 U.S. 191 (1978).

215. *Id.* at 194.

216. *Id.*

217. *Id.* at 194–95.

218. *Oliphant v. Schlie*, 544 F.2d 1007, 1013 (9th Cir. 1976).

219. *Id.* at 1011.

220. *Id.* at 1013.

221. *Id.*

222. *Oliphant*, 435 U.S. at 212.

223. *Id.* at 197.

who drafted them.”²²⁴ The common notions of those eras were Indian tribes should not exist.²²⁵ Despite this, the Court conceded tribes had never surrendered criminal jurisdiction.²²⁶ Nonetheless, the Court concluded tribes had been implicitly divested of criminal jurisdiction over non-Indians²²⁷ and signaled the Court’s embrace of judicial imperialism.

Oliphant has complicated law enforcement in Indian country. Tribes have criminal jurisdiction over “Indians.”²²⁸ Approximately twenty tribes can prosecute non-Indians for nine offenses pursuant to the Violence Against Women Act Reauthorization Act’s (VAWA) special tribal criminal jurisdiction provision.²²⁹ Even under VAWA, the maximum jail sentence a tribe can impose is three years per offense.²³⁰ Consequently, tribes must rely on the state or federal government when non-Indians commit crimes in Indian country.²³¹ The federal government can prosecute crimes involving both an Indian and non-Indian.²³² The state has exclusive jurisdiction over crimes that only involve non-Indians.²³³ Some states possess jurisdiction over Indian country crimes involving Indians through federal legislation, such as Public Law 280,²³⁴ or judicial decree.²³⁵

224. *Id.* at 206.

225. Crepelle, *supra* note 36, at 563–67.

226. *Oliphant*, 435 U.S. at 208 (“By themselves, these treaty provisions would probably not be sufficient to remove criminal jurisdiction over non-Indians if the Tribe otherwise retained such jurisdiction.”).

227. *Id.* at 204 (“While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions.”).

228. 25 U.S.C. § 1301(2).

229. See Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 804, 136 Stat. 840, 899 (codified as amended at 25 U.S.C. § 1304(a)(5)). For a list of tribes implementing VAWA, see *Implementing Tribes*, TRIBAL VAWA, <https://www.tribalvawa.org/implementing-tribes> [<https://perma.cc/KS3A-SWUU>].

230. 25 U.S.C. § 1302(a)(7)(C).

231. See ARVO Q. MIKKANEN, U.S. DEP’T OF JUST., INDIAN COUNTRY CRIMINAL JURISDICTIONAL CHART (2022), https://www.justice.gov/d9/pages/attachments/2020/08/10/Indian_country_criminal_jurisdictional_chart_-_october_2022_version.pdf [<https://perma.cc/DY39-GKQT>].

232. *Id.*

233. See, e.g., *New York ex rel. Ray v. Martin*, 326 U.S. 496, 501 (1946); *Draper v. United States*, 164 U.S. 240, 247 (1896); *United States v. McBratney*, 104 U.S. 621, 624 (1882).

234. See *supra* note 185 and accompanying text; see also Act of June 30, 1948, ch. 759, 62 Stat. 1161 (“AN ACT To confer jurisdiction on the State of Iowa over offenses committed by or against Indians on the Sac and Fox Indian Reservation.”), *repealed by* Act of Dec. 11, 2018, Pub. L. No. 115-301, 132 Stat. 4395; Act of June 8, 1940, ch. 276, 54 Stat. 249 (“AN ACT To confer jurisdiction on the State of Kansas over offenses committed by or against Indians on Indian reservations.”); Act of July 2, 1948, ch. 809, 62 Stat. 1224 (“AN ACT To confer jurisdiction on the State of New York with respect to offenses committed on Indian reservations within such State.”); Act of Sept. 13, 1950, ch. 947, 64 Stat. 845 (“An Act To confer jurisdiction on the courts of the State of New York with respect to civil actions between Indians or to which Indians are parties.”); Act of May 31, 1946, ch. 279, 60 Stat. 229 (“AN ACT To confer jurisdiction on the State of North Dakota over offenses committed by or against Indians on the Devils Lake Indian Reservation.”); Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, § 6(a)–(b)(1), 94 Stat. 1785, 1793 (codified at 25 U.S.C. § 1725).

235. See *Oklahoma v. Castro-Huerta*, 597 U.S. 629 (2022).

This scheme is highly inefficient. Basing jurisdiction on whether someone is an Indian begs the question: “Who is an Indian?” Different federal courts use different tests to answer this question;²³⁶ plus, the tests include subjective factors.²³⁷ As a result, a person may be Indian in one courtroom but not another.²³⁸ Litigating whether a person qualifies as an Indian can take months.²³⁹ If the wrong government prosecutes, the evidence may be inadmissible in a subsequent proceeding.²⁴⁰ Furthermore, the government may be liable for an unlawful arrest or setting a lawbreaker free.²⁴¹ The Indian status question significantly complicates Indian country law enforcement.

Aside from determining whether a person is an Indian, state and federal law enforcement have little reason to prioritize Indian country crime.²⁴² Reservations are often located over 100 miles from non-Indian law enforcement.²⁴³ Once the state or federal agent reaches Indian country, the

236. Compare *United States v. Cruz*, 554 F.3d 840, 845–46 (9th Cir. 2009) (reiterating that, in determining whether someone is recognized as Indian, the factors of tribal enrollment, government recognition, enjoyment of tribal benefits, and social recognition should be considered in descending order of importance), with *United States v. Stymiest*, 581 F.3d 759, 763–64 (8th Cir. 2009) (holding that those factors need not “be tied to an order of importance” and that “there is no single correct way to instruct a jury on this issue”).

237. See *Crepelle*, *supra* note 23, at 590–91.

238. ANGELIQUE TOWNSEND EAGLEWOMAN & STACY L. LEEDS, *MASTERING AMERICAN INDIAN LAW* 49 (2013) (“[T]he Eighth Circuit test is much broader, allowing the inclusion of a person for federal criminal prosecution as an Indian when the same person may not be eligible as an Indian for tribal citizenship or federal services.”).

239. E.g., AMY L. CASSELMAN, *INJUSTICE IN INDIAN COUNTRY: JURISDICTION, AMERICAN LAW, AND SEXUAL VIOLENCE AGAINST NATIVE WOMEN* 53–54 (2016); INDIAN L. & ORDER COMM’N, *supra* note 145, at 11.

240. See CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS* 75 (5th ed. 2008) (“[T]he legality of an arrest is often of crucial importance in determining the admissibility of evidence.”); Elizabeth Reese, *Welcome to the Maze: Race, Justice, and Jurisdiction in McGirt v. Oklahoma*, U. CHI. L. REV. ONLINE (Aug. 13, 2020), <https://lawreviewblog.uchicago.edu/2020/08/13/mcgirt-reese/> [<https://perma.cc/V9ME-DLKL>] (“In Indian Country, all of these actors must navigate this jurisdictional maze on top of their job, knowing that the result of the maze may mean they are the wrong person for the job or that the whole case could get thrown out.”).

241. Mary Hudetz, *Amid a Crime Wave on Yakama Reservation, Confusion over a Checkerboard of Jurisdictions*, SEATTLE TIMES (Feb. 18, 2020, 9:49 AM), <https://www.seattletimes.com/seattle-news/times-watchdog/amid-a-crime-wave-on-yakama-reservation-confusion-over-a-checkerboard-of-jurisdictions/> [<https://perma.cc/E82X-MKGF>] (“[Washington State Patrol] feared the liability if, for example, a trooper pulled over a drunken driver who is Native American, and therefore couldn’t make an arrest, said Capt. Shane Nelson. If that driver were released and got in an accident down the road, he said, the department could be faulted for allowing the driver to remain behind the wheel. ‘If they leave, what’s the liability?’ he said. ‘To ensure we don’t get into that situation, we are choosing not to be proactive.’”).

242. *Crepelle*, *supra* note 23, at 597.

243. INDIAN L. & ORDER COMM’N, *supra* note 145, at vii, 4, 56, 81, 119–21, 166; MATTHEW L.M. FLETCHER, *AM. CONST. SOC’Y FOR L. & POL’Y, ADDRESSING THE EPIDEMIC OF DOMESTIC VIOLENCE IN INDIAN COUNTRY BY RESTORING TRIBAL SOVEREIGNTY* 6 (2009), <https://www.acslaw.org/wp-content/uploads/2018/05/Fletcher-Issue-Brief.pdf> [<https://perma.cc/TQH4-U2L7>]; *Journey Through*

roads often become unpaved²⁴⁴ and physical addresses may disappear.²⁴⁵ As a result of historic and ongoing abuse, Indians are often suspicious of non-Indian law enforcement.²⁴⁶ Evidence collection can be further exacerbated by poor medical care and the inefficient interaction of multiple law enforcement agencies.²⁴⁷ Similarly, getting reservation-based witnesses to a courthouse over 100 miles away can be a challenge.²⁴⁸ State and federal law enforcement do not receive extra compensation for dealing with these issues, and prioritizing Indian country is unlikely to result in promotions.²⁴⁹ Hence, state and federal law enforcement tend to neglect reservation crime victims.

Indian Country, Part 1: Fighting Crime on Tribal Lands, FBI (June 1, 2012), <https://www.fbi.gov/news/stories/journey-through-indian-country-part-1> [<https://perma.cc/H34U-GYVK>]; cf. Janet Reno, *A Federal Commitment to Tribal Justice Systems*, 79 JUDICATURE 113, 115 (1995) (“[F]ederal courts are often located far from Indian reservations . . .”).

244. U.S. COMM’N ON C.R., BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS 168 (2018), <https://www.usccr.gov/files/pubs/2018/12-20-Broken-Promises.pdf> [<https://perma.cc/ZZ74-AR9Z>] (“There are 13,650 miles of roads and trails that are owned and maintained by Indian tribes (93 percent of which are unpaved), and about 29,400 miles of roads owned and maintained by BIA (75 percent of which are unpaved).”).

245. Camila Domonoske, *Many Native IDs Won’t Be Accepted at North Dakota Polling Places*, NPR (Oct. 13, 2018, 1:18 PM), <https://www.npr.org/2018/10/13/657125819/many-native-ids-wont-be-accepted-at-north-dakota-polling-places> [<https://perma.cc/XCT4-KCLF>] (“Many Native American reservations, however, do not use physical street addresses.”); Katie Reilly, *North Dakota’s Voter ID Law Disproportionately Affects Native Americans. Here’s How They’re Mobilizing to Fight It*, TIME (Nov. 2, 2018, 6:46 PM), <https://time.com/5442434/north-dakota-voting-law-native-american-activism/> [<https://perma.cc/7KMG-TU3R>] (“[T]he [North Dakota] law . . . requires voters to present identification that displays a street address and disproportionately affects Native Americans on reservations, where street addresses are not common . . .”); Matt Vasilogambros, *For Some Native Americans, No Home Address Might Mean No Voting*, SALT LAKE TRIB. (Oct. 6, 2019, 5:54 PM), <https://www.sltrib.com/news/2019/10/06/some-nativeamericans-no/> [<https://perma.cc/2JCW-GGEB>] (“The Navajo Nation has 50,000 unaddressed homes and businesses, creating complications for hundreds of thousands of people.”).

246. INDIAN L. & ORDER COMM’N, *supra* note 145, at ix, 13, 69.

247. Chrystal Begay & Tinesha Zandamela, *Sexual Assault on Native American Reservations in the U.S.*, BALLARD BRIEF (2018), <https://ballardbrief.byu.edu/issue-briefs/sexual-assault-on-native-american-reservations-in-the-us> [<https://perma.cc/7Q5N-YZHH>] (“Some of the issues surrounding evidence collection could be attributed to the fact that police departments work differently for each tribe; some tribes work with tribal police and federal law enforcement officers, and some work with only one or the other.”).

248. INDIAN L. & ORDER COMM’N, *supra* note 145, at 81; Kevin K. Washburn, *American Indians Crime and the Law: Five Years of Scholarship on Criminal Justice in Indian Country*, 40 ARIZ. ST. L.J. 1003, 1022 (2008) (“Because of the hundreds of miles that lie between federal courts and the communities where the crimes occurred, it is sometimes a matter of pure luck as to whether the prosecutor, or the defense attorney, will be able to marshal their witnesses at the appropriate place and time for a trial.”); Elena Saavedra Buckley, *Feds Fail to Prosecute Crimes in Indian Country*, HIGH COUNTRY NEWS (Nov. 29, 2018), <https://www.hcn.org/articles/tribal-affairs-feds-fail-to-prosecute-crimes-in-indian-country> [<https://perma.cc/F7Y4-A5JV>] (“In major crimes like murder or child abuse, which are managed by federal agencies, victims and witnesses often have to travel long distances to testify in federal court.”).

249. See Crepelle, *supra* note 23, at 591, 597.

B. Civil Jurisdiction

Tribal civil jurisdiction over non-Indians was consistently recognized since the United States' founding,²⁵⁰ and in 1959, the Supreme Court held tribal courts have exclusive jurisdiction over civil suits against Indians that arise in Indian country.²⁵¹ Nevertheless, the Supreme Court extended *Oliphant's* judicial imperialism to tribal civil jurisdiction in 1981 in *Montana v. United States*.²⁵² The case involved non-Indian hunting and fishing on non-Indian-owned fee land within the Crow Reservation.²⁵³ The Court denied tribal jurisdiction in the case, but announced what came to be known as the *Montana* exceptions. Under *Montana 1*, tribes can regulate non-Indians who enter a consensual relationship with the tribe or its citizens.²⁵⁴ *Montana 2* permits a tribe to exercise civil jurisdiction over non-Indians engaged in activity that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."²⁵⁵

Montana has produced significant confusion for multiple reasons. One issue is bifurcating governmental power based upon the land status is highly inefficient as fee and trust land are often intermingled.²⁵⁶ Wildlife is unlikely to obey invisible land distinctions, meaning conflicting tribal and state policies cannot coexist on reservations. Likewise, inconsistent tribal and state zoning policies undermine the entire point of zoning.²⁵⁷ The second issue arises from uncertainty over whether tribes automatically have civil jurisdiction over non-Indians on trust land²⁵⁸ or must establish a *Montana* exception prior to exercising civil jurisdiction over non-Indians on trust land.²⁵⁹ A third issue is uncertainty over what conduct satisfies the *Montana* exceptions. Consent seems pellucid; nevertheless, federal courts have found a non-Indian's express consent to tribal court jurisdiction is insufficient to

250. *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 855 n.17 (1985).

251. *Williams v. Lee*, 358 U.S. 217, 223 (1959).

252. 450 U.S. 544, 565–66 (1981).

253. *Id.* at 547.

254. *Id.* at 565.

255. *Id.* at 566.

256. *DeCoteau v. Dist. Cnty. Ct. for the Tenth Jud. Dist.*, 420 U.S. 425, 467 (1975) (Douglas, J., dissenting) ("Jurisdiction dependent on the 'tract book' promises to be uncertain and hectic.").

257. *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 461 (1989) (Blackmun, J., concurring) ("This, in practice, will be nothing short of a nightmare, nullifying the efforts of both sovereigns to segregate incompatible land uses and exacerbating the already considerable tensions that exist between local and tribal governments in many parts of the Nation about the best use of reservation lands.").

258. *See Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011).

259. *See Nevada v. Hicks*, 533 U.S. 353 (2001).

satisfy *Montana* 1's consensual relationship requirement.²⁶⁰ *Montana*'s second exception, imperiling tribal welfare, is inherently vague, but nothing seems to satisfy it.²⁶¹ Fourth, it is unclear whether tribes possess civil jurisdiction over all Indians or just their citizens.

Apart from the ambiguity over the scope of tribal civil jurisdiction, the process for evaluation of tribal civil jurisdiction is extremely inefficient. Parties contesting tribal jurisdiction must exhaust their tribal court remedies.²⁶² Most tribes have trial and appellate courts.²⁶³ Moving through these systems can easily take two or more years.²⁶⁴ Once the tribal remedies are exhausted, then the party may bring the challenge to the tribe's jurisdiction in federal court, which can take years. Only then can the merits of the case be adjudicated.²⁶⁵ As a result, civil jurisdiction in Indian country is exceedingly inefficient.

Forum selection clauses are not a sure-fire remedy for Indian country's jurisdictional morass.²⁶⁶ First of all, most torts do not arise from contractual events, so forum preselection is not possible. Another problem with forum selection clauses is that they only address personal jurisdiction.²⁶⁷ Subject matter jurisdiction, on the other hand, cannot be created by consent.²⁶⁸ Tribal court jurisdiction over non-Indians involves subject matter

260. See, e.g., *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 579 U.S. 545 (2016) (per curiam); *MacDonald v. CashCall, Inc.*, No. 16-2781, 2017 WL 1536427, at *7 (D.N.J. Apr. 28, 2017), *aff'd*, 883 F.3d 220 (3d Cir. 2018) (holding consent to tribal jurisdiction in a forum selection clause did not confer jurisdiction upon the tribal court); *Smith v. W. Sky Fin., LLC*, 168 F. Supp. 3d 778, 782 (E.D. Pa. 2016) ("While consent may be sufficient to establish personal jurisdiction over a party to a contract, 'a tribal court's authority to adjudicate claims involving nonmembers concerns its subject matter jurisdiction, not personal jurisdiction."); *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 783 (7th Cir. 2014) ("Therefore, a nonmember's consent to tribal authority is not sufficient to establish the jurisdiction of a tribal court.").

261. See *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 333 (2008) ("Tellingly, with only 'one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land.'"). In 2021, the Supreme Court held tribes can "detain" non-Indians pursuant to *Montana*'s second exception. See *United States v. Cooley*, 593 U.S. 345, 347–48 (2021). This, however, is hardly a sovereign power. Tribes merely have the capacity to briefly hold non-Indian criminals and transfer them to state or federal authorities.

262. See *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987); *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985).

263. E.g., *Important Announcements*, SUP. CT. NAVAJO NATION (June 17, 2023), <https://courts.navajo-nsn.gov/indexsuct.htm> [<https://perma.cc/2U4W-FCPB>]; *Home*, CHEROKEE NATION JUD. BRANCH, <https://www.cherokeecourts.org/> [<https://perma.cc/5JBG-4Y8C>]; *Welcome to the Tulalip Tribal Court*, TULALIP TRIBES TRIBAL CT., <https://www.tulaliptribalcourt-nsn.gov/> [<https://perma.cc/N8QF-U4M9>].

264. Crepelle, *supra* note 132, at 688.

265. See *id.* at 707–08.

266. *Id.* at 688–89.

267. Crepelle, *supra* note 29, at 81.

268. *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("For example, no action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant . . . and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings.").

jurisdiction.²⁶⁹ Likewise, tribal courts have exclusive subject matter jurisdiction over suits arising in Indian country against Indian defendants.²⁷⁰ The law governing forum selection clauses in Indian country remains unsettled.²⁷¹

C. Does State Law Apply?

Judicial imperialism has blurred the line between state and tribal authority in Indian country. The leading self-determination era case addressing state power over non-Indians on reservations is *White Mountain Apache Tribe v. Bracker*.²⁷² White Mountain harvested timber on its reservation.²⁷³ White Mountain contracted with non-Indian firms to conduct some timber procurement activities.²⁷⁴ Arizona imposed taxes on the non-Indian contractors.²⁷⁵ The contractor and White Mountain challenged the tax in the Arizona court system, which upheld the state taxes.²⁷⁶

The case was appealed to the United States Supreme Court. The Court simultaneously invalidated the state tax and undermined tribal sovereignty.²⁷⁷ At the beginning of its analysis, the Court noted it long abandoned *Worcester's* bright line rule that state sovereignty ends where Indian country begins.²⁷⁸ Consequently, the Court said the answer to whether state law applies to non-Indian conduct on a reservation requires balancing tribal, state, and federal interests.²⁷⁹ Applied to the case at hand,

269. See *supra* note 260.

270. David Kevin Duffee, J. Paul Forrester, John Fortune Lawlor, Richard B. Katskee & James F. Tierney, *Keeping Current: U.S. Supreme Court Reaffirms that Forum-Selection Clauses Are Presumptively Enforceable*, AM. BAR ASS'N BUS. L. TODAY, (Jan. 23, 2014), https://www.americanbar.org/groups/business_law/resources/business-law-today/2014-january/keeping-current-u-s-supreme-court/ [https://perma.cc/4WXM-WXB9].

271. Aaron Drue Johnson, Comment, *Just Say No (To American Capitalism): Why American Indians Should Reject the Model Tribal Secured Transactions Act and Other Attempts to Promote Economic Assimilation*, 35 AM. INDIAN L. REV. 107, 118 (2010) ("Furthermore, attempts by lenders to insert contractual provisions designed to minimize jurisdictional quarrels may be ineffective."); Joel Pruett, Comment, *Nothing Personal (or Subject Matter) About It: Jurisdictional Risk As an Impetus for Non-Tribal Opt-Outs from Tribal Economies, and the Need for Administrative Response*, 40 AM. INDIAN L. REV. 131, 173 (2015) ("Despite the Supreme Court's general support for traditional forum selection clauses, there is much less agreement as to how courts should handle forum selection clauses attempting to avoid tribal civil jurisdiction.").

272. 448 U.S. 136 (1980).

273. *Id.* at 139.

274. *Id.*

275. *Id.*

276. *Id.* at 140–41.

277. *Id.* at 152.

278. *Id.* at 141.

279. *Id.* at 145 ("This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.").

the federal government extensively regulated tribal timber harvesting, indicating a strong federal interest.²⁸⁰ The state provided no services on the reservation, so its interest in taxing was low.²⁸¹ Regarding the tribal interest, the Court denominated it as obeying federal law, and the state tax impeded the tribe's ability to do so.²⁸² Therefore, the Supreme Court's decision was a product of federal paternalism and state neglect rather than tribal sovereignty—a prime example of judicial imperialism.

Bracker provides little guidance. Chief Justice Roberts recently described *Bracker* as “nebulous” and averring it “mires state efforts to regulate on reservation lands in significant uncertainty, guaranteeing that many efforts will be deemed permissible only after extensive litigation, if at all.”²⁸³ Indeed, tribes and states frequently battle over state authority on tribal land. For example, do state or tribal interest rates govern reservation loans? And can states impose their taxes on reservation commerce? The answer to these questions has significant financial implications. Money plus uncertainty means both tribes and states have an incentive to litigate.

IV. JUDICIAL IMPERIALISM AND THE RULE OF LAW IN INDIAN COUNTRY

Federal Indian law is complicated because the United States Supreme Court refuses to accept tribes as twenty-first century governments. This judicial imperialism undermines the rule of law in Indian country. By diminishing tribal sovereignty, the Supreme Court subjects Indians and non-Indians to different rules on reservations, thereby preventing the even application of the law.²⁸⁴ The Supreme Court further undermines the rule of law by disregarding legal precedents in order to impose its policy preferences on Indian country.²⁸⁵ Similarly, many Supreme Court Justices have openly expressed anti-tribal views, indicating the Supreme Court is not a neutral arbiter of justice in Indian affairs.²⁸⁶ In addition to wrecking these pillars of the rule of law, the Supreme Court's Indian law jurisprudence remains rooted in ideals that are in direct conflict with contemporary notions of justice and human rights.²⁸⁷ The Supreme Court's indifference to

280. *Id.* at 148 (“In these circumstances we agree with petitioners that the federal regulatory scheme is so pervasive as to preclude the additional burdens sought to be imposed in this case.”).

281. *Id.* at 148–49 (“And equally important, respondents have been unable to identify any regulatory function or service performed by the State that would justify the assessment of taxes for activities on Bureau and tribal roads within the reservation.”).

282. *Id.* at 149–50 (“Finally, the imposition of state taxes would adversely affect the Tribe's ability to comply with the sustained-yield management policies imposed by federal law.”).

283. *McGirt v. Oklahoma*, 591 U.S. 894, 972 (2020) (Roberts, C.J., dissenting).

284. *See infra* Section V.A.

285. *See infra* Section V.B.

286. *See infra* Section V.C.

287. *See infra* Section V.D.

constitutional principles, treaties, and precedent in federal Indian law cases has subverted the certainty the rule of law is designed to provide.²⁸⁸

A. *Unequal Application of the Law*

The law is not applied equally in Indian country because judicial imperialism has diminished tribal sovereignty. Tribes once applied their laws to all people on tribal land,²⁸⁹ and state law was categorically barred from Indian country.²⁹⁰ Hence, clear rules governed Indian country: on tribal land, follow tribal law just as people in France are obligated to follow French law. This was the original status of Indian affairs set forth in the U.S. Constitution.²⁹¹ Alas, this is no longer the case.

The Supreme Court now mandates that Indians and non-Indians be treated differently in Indian country. Indians are subject to tribal law but not state law in Indian country.²⁹² However, Indians must follow state tax laws on reservations if they are on another tribe's reservation.²⁹³ Non-Indians are sometimes subject to state law on reservations,²⁹⁴ and sometimes non-Indians are only obligated to follow tribal law.²⁹⁵ Non-Indians may also simultaneously be required to follow both tribal and state law.²⁹⁶ The inefficiency of applying different rules to Indians and non-Indians is compounded by uncertainty over the definition of "Indian."²⁹⁷ As Indians and non-Indians frequently interact, the jurisdictional cards are constantly being shuffled.

The inefficiency of Indian country's legal regime is best illustrated by the Supreme Court's post-1970s tax jurisprudence. Tribes can tax all persons located on the trust land within their reservation.²⁹⁸ Nevertheless, states may also be able to impose taxes on reservation transactions if the

288. See OSTROM, *supra* note 63, at 53–54.

289. See *supra* note 30.

290. See *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 658–59 (2022) (Gorsuch, J., dissenting).

291. During the early years of the United States, some federal laws applied to Indian country but not state territory. These laws existed to prevent war between the United States and Indian tribes. Though paternalism was a factor in their creation, these Indian laws also served to protect the United States as its ability to win a war against the tribes was in doubt. See CREPELLE, *supra* note 105, at 65.

292. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 170–72 (1973).

293. See *Washington v. Confederated Tribes of the Colville Indian Rsrv.*, 447 U.S. 134, 160–61 (1980).

294. See MIKKANEN, *supra* note 231.

295. *E.g.*, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 222 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 325 (1983).

296. See *Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163 (1989).

297. See Adam Crepelle, *Protecting the Children of Indian Country: A Call to Expand Tribal Court Jurisdiction and Devote More Funding to Indian Child Safety*, 27 CARDOZO J. EQUAL RTS. & SOC. JUST. 225, 236 (2021); Hallie Bongar White, Kelly Gaines Stoner & James G. White, *Creative Civil Remedies Against Non-Indian Offenders in Indian Country*, 44 TULSA L. REV. 427, 433–35 (2008).

298. COHEN'S HANDBOOK, *supra* note 130, § 10.04[1].

transaction involves someone who is not a member of the tribe.²⁹⁹ To determine whether the state tax applies, courts must balance the tribal, state, and federal interests.³⁰⁰ In reality, there is not much balancing. If the state claims to perform some function that in some way connects to the reservation, courts uphold the tax.³⁰¹ Allowing both the state and tribe to tax the same transaction results in double taxation. While double taxation would seem to put tribes at a severe economic disadvantage, the Supreme Court avers the effects of double taxation on tribal economies is “indirect and too insubstantial.”³⁰²

When states have the power to tax tribal commerce, the Supreme Court requires Indian country businesses “to keep detailed records of both taxable and nontaxable transactions.”³⁰³ The Supreme Court further explained:

The operator must record the number and dollar volume of taxable sales to nonmembers of the Tribe. With respect to nontaxable sales, the operator must record and retain for state inspection the names of all Indian purchasers, their tribal affiliations, the Indian reservations within which sales are made, and the dollar amount and dates of sales. In addition, unless the Indian purchaser is personally known to the operator he must present a tribal identification card.³⁰⁴

These record keeping requirements create significant operational inefficiencies and are but one consequence of the Supreme Court treating Indians and non-Indians differently in Indian country.³⁰⁵ Moreover, the Supreme Court’s tribal tax jurisprudence facilitates state economic exploitation of tribes—a hallmark of imperialism.

Notably, the United States has experience applying different rules to different people based upon political status. In 1842, the Supreme Court decided *Swift v. Tyson*. *Swift* permitted federal courts sitting in diversity to ignore state law and apply the general common law.³⁰⁶ An out-of-state citizen is needed to access diversity jurisdiction, and this provided non-citizens with the ability to forum shop.³⁰⁷ In fact, corporations could invoke

299. *Id.* § 10.03[1][c].

300. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980).

301. *E.g.*, *Flandreau Santee Sioux Tribe v. Houdyshell*, 50 F.4th 662 (8th Cir. 2022); *Tulalip Tribes v. Washington*, 349 F. Supp. 3d 1046, 1060 (W.D. Wash. 2018); *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 475 (2d Cir. 2013).

302. *Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163, 187 (1989).

303. *Washington v. Confederated Tribes of the Colville Indian Rsr.*, 447 U.S. 134, 159 (1980).

304. *Id.*

305. *Crepelle*, *supra* note 26, at 1139–40.

306. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

307. *Erie R.R. v. Tompkins*, 304 U.S. 64, 74–75 (1938) (“It made rights enjoyed under the unwritten ‘general law’ vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen.”).

diversity jurisdiction by simply incorporating in a state diverse from the opposing party.³⁰⁸ In 1934, the Supreme Court reversed *Swift* in *Erie Railroad v. Tompkins* because it “rendered impossible equal protection of the law.”³⁰⁹ First-year law students know all too well that *Erie* issues still exist; nevertheless, federal courts are able to handle *Erie* with relative predictability.³¹⁰ On the other hand, the Supreme Court has yet to create a workable framework for its Indian law jurisprudence. However, the Supreme Court does seem to be moving toward an imperial answer to the unequal application of laws in Indian country—eliminate tribal sovereignty.

B. Unpredictable Jurisprudence

The Supreme Court’s helter-skelter, imperial federal Indian law jurisprudence undermines the rule of law. Justice Antonin Scalia explained the source of Indian law’s chaos. Justice Scalia was famed for his originalist jurisprudence—the belief the Constitution should be interpreted as its text was understood at the nation’s founding.³¹¹ Additionally, Justice Scalia was known for his desire to create bright line jurisprudential rules.³¹² Originalism and clear rules, Justice Scalia contended, prevented judges from inserting their policy preferences into jurisprudence.³¹³ But when it came to Indian law, Justice Scalia had little regard for clear rules or originalism.

In a 1990 memo to Justice Brennan, Justice Scalia wrote:

[O]ur opinions in this field [federal Indian law] have not posited an original state of affairs that can subsequently be altered only by explicit legislation, but have rather sought to discern what the current state of affairs ought to be by taking into account all legislation, and

308. Corporations were only citizens of their place of incorporation until 1958 when Congress amended diversity jurisdiction of the federal courts to include a corporation’s principal place of business. See Act of July 25, 1958, Pub. L. No. 85-554, § 2(c), 72 Stat. 415, 415. For an example of a corporation changing its state of organization to access the federal courts, see *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 523 (1928).

309. *Erie*, 304 U.S. at 75; see also *Guaranty Tr. Co. v. York*, 326 U.S. 99, 112 (1945) (“The operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law.”).

310. See Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court Is Doing a Halfway Decent Job in Its Erie-Hanna Jurisprudence?*, 73 NOTRE DAME L. REV. 963 (1998).

311. ANDREW NOLAN ET AL., CONG. RSCH. SERV., R44419, JUSTICE ANTONIN SCALIA: HIS JURISPRUDENCE AND HIS IMPACT ON THE COURT 3 (2016).

312. *Id.*

313. *Id.*

the congressional ‘expectations’ that it reflects, down to the present day.³¹⁴

Justice Scalia would later state, “You know, when it comes to Indian law, most of the time we’re just making it up.”³¹⁵

Implicit divestiture is a prime example of the Court “just making it up.” Prior to the United States’ founding, tribes possessed jurisdiction over all persons on their land.³¹⁶ No law ever eliminated tribal jurisdiction over non-Indians; in fact, the Supreme Court ceded as much in *Oliphant*.³¹⁷ Absent any law, the Court simply conjured the unexpressed beliefs of past legislators and presidents to *assume* tribes had lost criminal jurisdiction over non-Indian criminals.³¹⁸ How or when tribes lost this sovereign power is never explained.³¹⁹ Implicit divestiture is legislation by imperial imagination—the judicial equivalent of a president claiming to make policy by merely thinking about it.³²⁰ Thus, under implicit divestiture, tribes can lose sovereign powers without even knowing it.³²¹

The Supreme Court’s view on implicit divestiture of tribal power stands in stark contrast with the Court’s reading of legislation supporting tribal

314. Letter from Antonin Scalia, J., Sup. Ct., to William Brennan, J., Sup. Ct. (Apr. 4, 1990), reprinted in N. BRUCE DUTHU, *SHADOW NATIONS: TRIBAL SOVEREIGNTY AND THE LIMITS OF LEGAL PLURALISM* 148–49 (2013).

315. Youpee-Roll, *supra* note 6.

316. See *supra* note 30; Crepelle, *supra* note 23, at 579–80.

317. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196 (1978); 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, 58 (1999) (“It does not seem to make much difference whether, as in *Oliphant*, the Court acknowledges that no authoritative text controls and that the Court is engaged in federal common-lawmaking that divests tribes of inherent sovereignty . . .”).

318. *Oliphant*, 435 U.S. at 203 (“This unspoken assumption was also evident in other congressional actions during the 19th century.”); *id.* at 206 (“These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them.”).

319. *Id.* at 204 (“While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions.”).

320. Cf. *Fact Check Explores Presidential Authority to Declassify*, AM. BAR ASS’N (Oct. 24, 2022), <https://www.americanbar.org/news/abanews/aba-news-archives/2022/10/fact-check-presidential-authority/> [<https://perma.cc/V7DX-YGC3>] (“In all cases, however, a formal procedure is required so governmental agencies know with certainty what has been declassified and decisions memorialized.”).

321. Alex Tallchief Skibine, *The Court’s Use of the Implicit Divestiture Doctrine to Implement Its Imperfect Notion of Federalism in Indian Country*, 36 *TULSA L.J.* 267, 298 (2000) (“What this shows is that *Montana*’s ‘general rule’ was in fact not a general rule at all until the Court decided to make it so.”); Elizabeth Reese, *Tribal Police Drag Messy Indian Sovereignty Cases Back to the Court*, SCOTUSBLOG (Mar. 22, 2021, 10:02 AM), <https://www.scotusblog.com/2021/03/tribal-police-drag-messy-indian-sovereignty-cases-back-to-the-court/> [<https://perma.cc/YU2W-AATN>] (“The court in that case said that tribes should take it up with Congress to return powers the tribes just learned they had implicitly lost.”).

sovereignty. Take the Indian Reorganization Act (IRA).³²² It was enacted in 1934 to help tribes rebuild their governments.³²³ Toward this end, the IRA allowed tribes to place land in trust.³²⁴ The land-into-trust statute contains the phrase “now under Federal jurisdiction.”³²⁵ In 2009, the Supreme Court ruled “now” meant “1934” rather than “now—at this moment in time” in order to prevent a tribe recognized after 1934 from having land placed in trust.³²⁶ Although the context and purpose of the IRA—the “common notions” of the 1934 Congress—supported allowing any tribe to have land placed in trust, the Supreme Court refused to engage in extra textual material that supported tribal sovereignty.³²⁷ Therefore, the Supreme Court unpredictably picks and chooses when it wishes to abide by “unspoken assumptions.”³²⁸

The Supreme Court’s 2022 decision in *Oklahoma v. Castro-Huerta*³²⁹ is the Court’s most recent example of Justices disregarding clear precedent in favor of their imperial preferences. *Castro-Huerta* resulted from the Supreme Court’s 2020 opinion in *McGirt v. Oklahoma*,³³⁰ which recognized most of eastern Oklahoma as Indian country.³³¹ Prior to *McGirt*, Victor Manuel Castro-Huerta was incarcerated by the state for severely neglecting his disabled, five-year-old stepdaughter.³³² The stepdaughter was an enrolled citizen of the Cherokee Nation, hence, an Indian.³³³ Castro-Huerta, a non-Indian, argued his conviction was unlawful because only the federal government has criminal jurisdiction over Indian country crimes involving both an Indian and a non-Indian.³³⁴ Oklahoma, however, argued it shared concurrent jurisdiction with the federal government over Indian crimes committed by a non-Indian against an Indian.³³⁵

322. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101–5144).

323. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973).

324. Indian Reorganization Act, § 5, 48 Stat. at 985 (codified as amended at 25 U.S.C. § 5108).

325. *Id.* § 19, 48 Stat. at 988 (codified as amended at 25 U.S.C. § 5129).

326. *Carcieri v. Salazar*, 555 U.S. 379, 388–91 (2009).

327. *See id.* at 392 (“Petitioners counter that the main purpose of § 465 was to reverse the loss of lands that Indians sustained under the General Allotment Act, so the statute was limited to tribes under federal jurisdiction at that time because they were the tribes who lost their lands. We need not consider these competing policy views, because Congress’ use of the word ‘now’ in § 479 speaks for itself and ‘courts must presume that a legislature says in a statute what it means and means in a statute what it says there.’” (citation omitted)); *id.* at 413 (Stevens, J., dissenting) (“The Court today adopts a cramped reading of a statute Congress intended to be ‘sweeping’ in scope.”).

328. *See supra* note 318 and accompanying text.

329. 597 U.S. 629 (2022).

330. 591 U.S. 894 (2020).

331. *Castro-Huerta*, 597 U.S. at 634.

332. *Id.* at 633.

333. *Id.*

334. *Id.* at 634.

335. Brief for the Petitioner at 2–3, *Castro-Huerta*, 597 U.S. 629 (No. 21-429).

Oklahoma's argument was remarkable. On multiple prior occasions, the Supreme Court had declared states cannot prosecute reservation crimes involving Indians.³³⁶ And just two years earlier in *McGirt*, Oklahoma itself argued the eastern half of Oklahoma could not be Indian country because “[t]he State would lack jurisdiction to prosecute any crime involving an Indian (whether defendant or victim) in eastern Oklahoma.”³³⁷ Likewise, Oklahoma posted on its official website that *McGirt* prevented the state from prosecuting crimes involving an Indian party.³³⁸ The complete lack of legal support for Oklahoma's argument led Justice Gorsuch to ask during the *Castro-Huerta* oral argument, “[A]re we to wilt today because of a social media campaign?”³³⁹

Justice Kavanaugh, writing for the majority, continued Justice Scalia's legacy of “just making it up” in Indian law cases. Siding with Oklahoma, the majority asserted, “To begin with, the Constitution allows a State to exercise jurisdiction in Indian country. Indian country is part of the State, not separate from the State.”³⁴⁰ The Court conceded, however, that tribes were originally considered separate from states but asserted the allotment era changed tribal status—though no explanation of exactly when or how the change occurred was provided.³⁴¹ Consequently, the majority claimed the Court had the imperial ability to balance away tribal sovereignty.³⁴² According to the Court, state authority over reservation crimes was in the

336. *E.g.*, *Kennerly v. Dist. Ct. of the Ninth Jud. Dist.*, 400 U.S. 423, 424 n.1 (1971) (per curiam) (“The statute is illustrative of the detailed regulatory scrutiny which Congress has traditionally brought to bear on the extension of state jurisdiction, whether civil or criminal, to actions to which Indians are parties arising in Indian country.”); *Williams v. Lee*, 358 U.S. 217, 220 (1959) (“But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive.”); *Williams v. United States*, 327 U.S. 711, 714 (1946) (“While the laws and courts of the State of Arizona may have jurisdiction over offenses committed on this reservation between persons who are not Indians, the laws and courts of the United States, rather than those of Arizona, have jurisdiction over offenses committed there, as in this case, by one who is not an Indian against one who is an Indian.” (footnotes omitted)); *United States v. Ramsey*, 271 U.S. 467, 469–70 (1926); *Donnelly v. United States*, 228 U.S. 243, 272 (1913) (“This same reason applies—perhaps *a fortiori*—with respect to crimes committed by white men against the persons or property of the Indian tribes while occupying reservations set apart for the very purpose of segregating them from the whites and others not of Indian blood.”); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

337. Brief for Respondent at 3, *McGirt v. Oklahoma*, 591 U.S. 894 (2020) (No. 18-9526).

338. *McGirt v. Oklahoma*, OKLAHOMA.GOV (July 26, 2022), <https://oklahoma.gov/mcgirt.html> [<https://perma.cc/7Q TZ-L5 LZ>].

339. Transcript of Oral Argument at 61, *Castro-Huerta*, 597 U.S. 629 (No. 21-429).

340. *Castro-Huerta*, 597 U.S. at 636. Notably, the Supreme Court in *Worcester v. Georgia* did not agree with the *Castro-Huerta* majority's statement. See *Worcester*, 31 U.S. (6 Pet.) at 591 (“The residence of Indians, governed by their own laws, within the limits of a state, has never been deemed incompatible with state sovereignty, until recently. And yet, this has been the condition of many distinct tribes of Indians, since the foundation of the federal government.”).

341. *Castro-Huerta*, 597 U.S. at 636–37.

342. *Id.* at 630–31.

best of interest of tribes³⁴³—though tribes themselves opposed state jurisdiction.³⁴⁴ The dissent described the majority opinion as “ahistorical,”³⁴⁵ “embarrassing,”³⁴⁶ and “paternalist”;³⁴⁷ nevertheless, Oklahoma can now prosecute reservation crimes involving Indians.

While *Castro-Huerta*’s effect on public safety remains to be seen, the decision’s impact on Indian law is stark. It shows neither current federal law and policy, firmly established precedent, nor the original understanding of the Constitution guide the Supreme Court’s Indian law jurisprudence. *Castro-Huerta* reveals the rule of law is no succor for tribes.³⁴⁸ *Castro-Huerta* proves Professor Philip Frickey’s 1999 observation remains true: “The Court has transformed itself from the court of the conqueror into the court as the conqueror.”³⁴⁹ So long as the Supreme Court continues down the imperial path, Indian law will remain mired in uncertainty.

C. Impartial Judges

The majority of Americans believe the Supreme Court Justices are guided by partisan views.³⁵⁰ This is particularly true in Indian law, as Justice Scalia noted, the Justices are free to “just make it up,” and some Justices’ views on tribes are clear. In a 1983 memo, Chief Justice John Roberts wrote that terminating tribal existence sounded like “motherhood and apple pie.”³⁵¹ In another memo, he wrote, “I view treating Indian tribal governments as states as objectionable as a policy matter”³⁵² Roberts stated a bill to place land in trust for the Las Vegas Paiute Tribe “essentially does nothing more than take money from you, me, and everyone else and

343. *Id.* at 651 (“*Castro-Huerta*’s argument would require this Court to treat Indian victims as second-class citizens.”).

344. See Brief for National Congress of American Indians as Amici Curiae in Support of Respondent at 1–2, *Castro-Huerta*, 597 U.S. 629 (No. 21-429); Brief of Amici Curiae The Cherokee Nation et al. in Support of Respondent at 3–4, *Castro-Huerta*, 597 U.S. 629 (No. 21-429); Brief for the Navajo Nation et al. as Amici Curiae Supporting Respondent at 3–4, *Castro-Huerta*, 597 U.S. 629 (No. 21-429).

345. *Castro-Huerta*, 597 U.S. at 667 (Gorsuch, J., dissenting).

346. *Id.* at 684.

347. *Id.* at 687.

348. *Id.* at 657 (“Where our predecessors refused to participate in one State’s unlawful power grab at the expense of the Cherokee, today’s Court accedes to another’s.”).

349. Frickey, *supra* note 317, at 73.

350. Daniel De Visé, *The American Public No Longer Believes the Supreme Court Is Impartial*, THE HILL (Jan. 11, 2023, 6:00 AM), <https://thehill.com/regulation/court-battles/3807849-the-american-public-no-longer-believes-the-supreme-court-is-impartial/> [<https://perma.cc/H2M8-YETW>].

351. Memorandum from John G. Roberts, Assoc. White House Couns., on Draft Indian Policy Statement to Fred F. Fielding, White House Couns. (Jan. 18, 1983), <https://turtletalk.files.wordpress.com/2007/10/roberts011883-reagan-indian-policy.pdf> [<https://perma.cc/W2SK-X252>].

352. Memorandum from John G. Roberts, Assoc. White House Couns., on Enrolled Bill H.R. 5470 to Fred F. Fielding, White House Couns. (Jan. 10, 1983), <https://turtletalk.files.wordpress.com/2007/10/roberts011083-irs.pdf> [<https://perma.cc/8GCV-YM6A>].

give[s] it to 143 people in Nevada (about \$10,000 each), simply because they want it.”³⁵³ Similarly, Roberts described a bill to settle the Shoalwater Bay Indian Tribe’s claims against the United States “as another Indian giveaway, since the amount awarded greatly exceeds any reasonable valuation of the tribe’s claim.”³⁵⁴ In private practice, Justice Roberts argued against tribal interests.³⁵⁵ On the Supreme Court, Chief Justice Roberts has expressed positive feelings about the General Allotment Act,³⁵⁶ which was designed to transfer tribal land to whites and eliminate Indigenous culture.³⁵⁷

Chief Justice Roberts’s predecessor, Chief Justice William Rehnquist, also had negative views of Indians. In *United States v. Sioux Nation of Indians*, eight Supreme Court Justices held the United States unlawfully took the Sioux Nation’s land.³⁵⁸ The Court described the United States behavior as a “ripe and rank case of dishonorable dealings.”³⁵⁹ Chief Justice Rehnquist, on the other hand, thought the Sioux were to blame for all the trouble in the Black Hills—rather than the Americans who were unlawfully invading Sioux land.³⁶⁰ In an effort to portray the Sioux as savages, Justice Rehnquist quoted a source stating Plains Indians, like the Sioux, “lived only for the day, recognized no rights of property, robbed or killed anyone if they thought they could get away with it, inflicted cruelty without a qualm, and endured torture without flinching.”³⁶¹ As one Supreme Court chronicle notes, “Rehnquist had nothing but contempt for Indian cases,” and that Rehnquist rewrote jurisprudence to ensure tribes would lose.³⁶²

Other Justices have tipped their hand against tribal interests. Justice O’Connor, in a draft opinion, asserted tribal water rights must be reduced to account for non-Indian interests.³⁶³ Opposing tribal jurisdiction over non-

353. Memorandum from John G. Roberts, Assoc. White House Couns., on Enrolled Bill H.R. 3765 to Fred F. Fielding, White House Couns. (Nov. 30, 1983), <https://turtletalk.files.wordpress.com/2007/10/roberts113083-las-vegas-paiute.pdf> [<https://perma.cc/83H7-E2RU>].

354. Memorandum from Fred F. Fielding, White House Couns., on Enrolled Bill S. 1735 to Richard G. Darman, Assistant to the President (Sept. 26, 1984), <https://turtletalk.files.wordpress.com/2007/10/roberts092684-shoalwater-bay.pdf> [<https://perma.cc/L7YG-4VUG>].

355. *E.g.*, *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 522 (1998).

356. *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 328 (2008) (“Thanks to the Indian General Allotment Act of 1887 there are millions of acres of non-Indian fee land located within the contiguous borders of Indian tribes.” (citation omitted)).

357. *See Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 254 (1992) (“The objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large.”).

358. 448 U.S. 371, 373 (1980).

359. *Id.* at 388 (quoting *United States v. Sioux Nation of Indians*, 207 Ct. Cl. 234, 241 (1975)).

360. *See id.* at 425–26, 436–37 (Rehnquist, J., dissenting); *id.* at 374–78 (majority opinion).

361. *Id.* at 437 (Rehnquist, J., dissenting) (quoting SAMUEL ELIOT MORRISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 539–40 (1965)).

362. BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 412 (1979).

363. GETCHES ET AL., *supra* note 141, at 858.

Indians, Justice Souter described tribal law as based “on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices,” averring tribal law was “unusually difficult for an outsider to sort out.”³⁶⁴ Justice Ginsburg wrote that following the plain text of *Montana* exception 2 would give tribes too much power.³⁶⁵ Justice Stevens asserted tribes should only retain jurisdiction over Indian country that remains “pristine” and undeveloped,³⁶⁶ a view that was rebuked by Justice Blackmun as “betray[ing] a stereotyped and almost patronizing view of Indians and reservation life.”³⁶⁷ Justice Kennedy repeatedly expressed doubts that tribes are capable of treating non-Indians fairly.³⁶⁸ Justice Kavanaugh has expressed hostility to Indigenous rights,³⁶⁹ and Justice Thomas seems to want to eliminate Indian law altogether.³⁷⁰

Although judges regularly put their personal preferences aside to apply the law,³⁷¹ the Supreme Court’s Indian law jurisprudence seems to be based on the Justices’ personal biases. One of the Court’s most ardent originalists, Justice Scalia, admitted the Supreme Court was not following the law but making it up.³⁷² Perhaps the Justices do not feel obligated to follow the law because they believe Indian law cases are unimportant, as Justices are on record describing Indian country cases as “peewee”³⁷³ and “chickenshit.”³⁷⁴ The Justices’ negative comments about Indian tribes and Indian law raise doubts about their impartiality.³⁷⁵

364. *Nevada v. Hicks*, 533 U.S. 353, 384–85 (2001) (Souter, J., concurring) (quoting *Ada Pecos Melton, Indigenous Justice Systems and Tribal Society*, 79 JUDICATURE 126, 130–31 (1995)).

365. *See Strate v. A-1 Contractors*, 520 U.S. 438, 457–58 (1997) (“Undoubtedly, those who drive carelessly on a public highway running through a reservation endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana*’s second exception requires no more, the exception would severely shrink the rule. Again, cases cited in *Montana* indicate the character of the tribal interest the Court envisioned.”).

366. *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 440 (1989).

367. *Id.* at 464–65 (Blackmun, J., concurring).

368. Matthew L.M. Fletcher, *Reflections on Justice Kennedy’s Indian Law Legacy*, TURTLE TALK (June 29, 2018), <https://turtletalk.blog/2018/06/29/reflections-on-justice-kennedys-indian-law-legacy/> [<https://perma.cc/G84P-6BGX>].

369. Nick Grube, *Brett Kavanaugh No Friend of Special Rights for Native Hawaiians*, HONOLULU CIV. BEAT (Sept. 5, 2018), <https://www.civilbeat.org/2018/09/brett-kavanaugh-no-friend-of-special-rights-for-native-hawaiians/> [<https://perma.cc/XS7R-FJ4S>].

370. *Upstate Citizens for Equal., Inc. v. United States*, 583 U.S. 1004, 1004–07 (2017) (Thomas, J., dissenting); Matt Ford, *Clarence Thomas Wants to Demolish Indian Law*, NEW REPUBLIC (June 23, 2023), <https://newrepublic.com/article/173869/clarence-thomas-wants-demolish-indian-law> [<https://perma.cc/32R2-7WSL>].

371. Raymond J. McKoski, *When the Law and a Judge’s Personal Opinions Collide*, 2020 NAT’L CTR. FOR STATE CTS. TRENDS STATE CTS. 76, 77.

372. *See supra* text accompanying notes 6, 315.

373. WOODWARD & ARMSTRONG, *supra* note 362, at 58.

374. *Id.* at 359.

375. *Code of Conduct for United States Judges*, U.S. CTS. (Mar. 12, 2019), <https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#> [<https://perma.cc/ZL3N-YBJ7>].

The anti-Indian bias displayed by Supreme Court Justices is particularly interesting in light of Sara Hill's nomination to serve as a federal judge for the Northern District of Oklahoma. Hill is a citizen of the Cherokee Nation and served as Attorney General of the Cherokee Nation. Her role as Attorney General led some to oppose her nomination because they doubted her ability to be fair to state and federal interests.³⁷⁶ For example, Blayne Arthur, Oklahoma Secretary of Agriculture, asserted "her previous tenure in tribal government may make it difficult for her to use clear judgement [sic]."³⁷⁷ Likewise, Senator John Cornyn expressed "concerns about whether she can treat the United States fairly and controversies with the tribes in Oklahoma."³⁷⁸ Hill was ultimately confirmed by a margin of 52 yays, 14 nays, and 34 abstentions.³⁷⁹ While many people raised concerns about Judge Hill's impartiality, no senator has expressed concerns about the aforementioned Supreme Court Justices' ability to be fair to tribal interests.

D. Unjust Laws

Just as troubling as the post-1970s Supreme Court's decisions, the modern Supreme Court continues to rely on cases rooted in antiquated ideas about Indians' place in society.³⁸⁰ Cases that describe Indians as "simple, uninformed and inferior people" and an "unfortunate race" remain binding precedent.³⁸¹ Apart from being overtly prejudiced, the factual assertions underpinning these cases are incorrect.³⁸² Worse, the Supreme Court continues to use the imperial General Allotment Act to undermine tribal sovereignty though the Act was formally repudiated by Congress nearly a century ago.³⁸³ Not only is allotment no longer the law, allotment is completely contrary to current federal Indian law as well as basic notions of

376. Jacob Fischler, *U.S. Senate Republicans Question Oklahoma Judicial Nominee on Tribal Sovereignty*, OKLA. VOICE (Nov. 15, 2023, 3:34 PM), <https://oklahomavoice.com/2023/11/15/u-s-senate-republicans-question-oklahoma-judicial-nominee-on-tribal-sovereignty/> [<https://perma.cc/FD88-V8P2>].

377. Letter from Blayne Arthur, Oklahoma Sec'y of Agric., to James Lankford, U.S. Sen. 1 (Nov. 15, 2023), <https://www.documentcloud.org/documents/24199565-letter-to-sen-lankford> [<https://perma.cc/JCS2-TEJB>]. Mike Lee, U.S. Senator from Utah, also questioned Sara Hill's loyalty. See Fischler, *supra* note 376.

378. Ashley Murray, *Potential First Native American Federal Judge in Oklahoma Advances Toward Senate Confirmation*, LA. ILLUMINATOR (Dec. 7, 2023, 4:17 PM), <https://lailluminator.com/2023/12/07/native-american-judge/> [<https://perma.cc/2HE9-A6NU>].

379. *Roll Call Vote 118th Congress – 1st Session*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_votes/vote1181/vote_118_1_00351.htm [<https://perma.cc/39LD-VPYN>].

380. See Crepelle, *supra* note 36, at 553–56, 563–67, 578.

381. *Id.* at 540, 555.

382. *Id.* at 543, 570.

383. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 339–40 (1998) ("Although formally repudiated with the passage of the Indian Reorganization Act in 1934, the policy favoring assimilation of Indian tribes through the allotment of reservation land left behind a lasting legacy." (citation omitted)); Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 6 (1995).

human rights.³⁸⁴ Hence, federal Indian law has been condemned by international human rights bodies.³⁸⁵ Notwithstanding, the Supreme Court persists in using outmoded statutes and jurisprudence in its imperial quest to enfeeble tribal sovereignty.

V. RESTORING THE RULE OF LAW TO FEDERAL INDIAN LAW

Restoring the rule of law to Indian country requires constraining the Supreme Court's judicial imperialism. This can be accomplished three ways. The Supreme Court can be reined in by returning to the original Indian law canons of construction. The Supreme Court's imperialist jurisprudence can be mitigated by mandating the Court acknowledge the racism underlying the origins of Indian law jurisprudence. Finally, Congress has the constitutional power to remove federal Indian law from the Supreme Court's grasp.

A. *Canons of Construction*

Returning to the original Indian law canons of construction would prevent judicial imperialism and restore the rule of law to Indian country.³⁸⁶ Pursuant to the canons, legislation is to be construed liberally in favor of tribal interests, and tribal sovereignty is “preserved unless Congress’s intent to the contrary is clear and unambiguous.”³⁸⁷ These canons served as a check on judicial power.³⁸⁸ Absent the canons, Congress—which the Constitution vests with plenary authority over Indian policy—could wash its hands of Indian policy.³⁸⁹ Thus, the canons long served an important

384. See *Cobell v. Kempthorne*, 455 F.3d 317, 333 (D.C. Cir. 2006) (“Most seriously, . . . no one, not even the government, doubts that racism ran rampant at Interior a century ago, see Appellants’ Reply Br. 19 (acknowledging that ‘a government expert witness . . . agreed . . . that Commissioner of Indian Affairs Sells, who held office in the early part of the last century, believed that white people were superior to Indians’) . . .”).

385. See *Mary and Carrie Dann v. United States*, Case 11.140, Inter-Am. Comm’n H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 5 rev. ¶ 173 (2002) (recommending the United States “[r]eview its laws, procedures and practices to ensure that the property rights of indigenous persons are determined in accordance with the rights established in the American Declaration, including Articles II, XVIII and XXIII of the Declaration”); U.N. Comm. on the Elimination of Racial Discrimination, 59th Sess., 1475th mtg. at 9, U.N. Doc. CERD/C/SR.1475 (Aug. 22, 2001); James Anaya (Special Rapporteur on the Rts. of Indigenous Peoples), *The Situation of Indigenous Peoples in the United States of America*, U.N. Doc. A/HRC/21/47/Add.1 (Aug. 30, 2012).

386. See *Hagen v. Utah*, 510 U.S. 399, 423 & n.2 (1994) (Blackmun, J., dissenting).

387. COHEN’S HANDBOOK, *supra* note 130, § 3.01[1].

388. COHEN’S HANDBOOK, *supra* note 130, § 3.01[2] (“The implementation and force of the canons turn on an understanding that the canons protect important structural features of our system of governance.”).

389. *McGirt v. Oklahoma*, 591 U.S. 894, 903 (2020) (“Likewise, courts have no proper role in the adjustment of reservation borders. Mustering the broad social consensus required to pass new legislation

structural role in the constitutional balance of powers and provided stability to Indian policy.³⁹⁰ The Supreme Court's departure from the canons has produced sporadic jurisprudence.

Returning to the canons would provide a clear, predictable rule: Tribal sovereignty remains intact until Congress unmistakably abrogates it.³⁹¹ As a result, the presumption would be tribes possess full territorial jurisdiction—to the exclusion of states—until Congress says otherwise.³⁹² The burden would be on the party opposing tribal sovereignty to demonstrate an element of tribal sovereignty has been definitively revoked. Hence, the imperial doctrine of implicit divestiture would disappear because an “unspoken assumption” or a “common notion of the day” would be insufficient to diminish tribal sovereignty.³⁹³ This is as it should be because “wishes are not laws, future plans aren't either.”³⁹⁴

Applying the canons to existing law would yield a practical jurisdictional scheme. Indian country is presumptively under tribal control,³⁹⁵ and Congress has defined “Indian country” as “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 through the reservation.”³⁹⁶ This definition was enacted in 1948, fourteen years after Congress ended allotment,³⁹⁷ to provide Indian country with pellucid jurisdictional rules.³⁹⁸ Accordingly, the Indian country statute

is a deliberately hard business under our Constitution. Faced with this daunting task, Congress sometimes might wish an inconvenient reservation would simply disappear. Short of that, legislators might seek to pass laws that tiptoe to the edge of disestablishment and hope that judges—facing no possibility of electoral consequences themselves—will deliver the final push. But wishes don't make for laws, and saving the political branches the embarrassment of disestablishing a reservation is not one of our constitutionally assigned prerogatives.”) *See generally* *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 487 (1979) (Powell, J., dissenting) (“Indeed, there is reason to believe that some legislative bodies have welcomed judicial activism with respect to a subject so inherently difficult and so politically sensitive that the prospect of others confronting it seems inviting.”).

390. COHEN'S HANDBOOK, *supra* note 130, § 3.01[2].

391. *United States v. Winans*, 198 U.S. 371, 381 (1905) (“Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.”).

392. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (“The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.”).

393. *See supra* note 318 and accompanying text; *see also supra* text accompanying notes 224–25.

394. *McGirt*, 591 U.S. at 907.

395. Joseph Palandrani, Note, “*The Rule of the Strong, Not the Rule of Law*”: *Reexamining Implicit Divestiture After McGirt v. Oklahoma*, 89 *FORDHAM L. REV.* 2375, 2408 (2021).

396. 18 U.S.C. § 1151(a).

397. Palandrani, *supra* note 395, at 2387, 2408.

398. *Hagen v. Utah*, 510 U.S. 399, 425 (1994) (Blackmun, J., dissenting) (“Finally, in 1948 Congress resolved the ensuing jurisdictional conflicts by extending tribal jurisdiction to encompass lands owned by non-Indians within reservation boundaries.”).

was intended to support tribal authority over Indian country.³⁹⁹ Interpreting the statute through the canons would yield Congress's desired result.⁴⁰⁰

Apart from being a logical means of statutory interpretation, applying the canons to the definition of Indian country would strengthen the rule of law.⁴⁰¹ Abiding by the canons would place everyone in Indian country under the same law—tribal law. Hence, tribal police could arrest criminals and tribal governments could assess taxes without having to discern whether the individual is an Indian. Clear rules of statutory interpretation plus the uniform application of tribal law will improve legal certainty.⁴⁰² The canons of construction would serve as a prophylactic against judicial imperialism.

B. Citing Federal Indian Law

Federal Indian law cases decided from the nineteenth through the mid-twentieth centuries rely on narratives about Indians society no longer accepts, and this contaminates the rule of law. In fact, Neal Katyal, while serving as Acting Solicitor General of the United States, admitted as much in 2011. Addressing the Federal Bar Association's Indian Law Conference, he stated, "For our office, these cases serve as a reminder that there are limits to the extent of our advocacy for the government and that we must never cross the line into prejudice and racism."⁴⁰³ Nevertheless, the cases Katyal highlighted as examples of bigotry are still routinely cited as binding precedent without any mention of the cases' ignominious, imperial origins.⁴⁰⁴

While the precedent may be too deeply ingrained to ignore, the Supreme Court should be required to acknowledge the context in which Indian law decisions were decided. For example, citing *United States v. Kagama*⁴⁰⁵ to justify Congress's extraconstitutional plenary power over tribes should be required to include a disclaimer—"Kagama was decided during the allotment era, a time when the common notion of the day was 'the only good

399. *Id.* at 425–26 ("Reservation boundaries, rather than Indian title, thus became the measure of tribal jurisdiction.").

400. *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 358 (1962) ("Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of § 1151 and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate confusion Congress specifically sought to avoid.").

401. *See Hagen*, 510 U.S. at 425 n.6 ("Congress' extension of tribal jurisdiction to reservation lands owned by non-Indians served pragmatic ends.").

402. *Cf. DeCoteau v. Dist. Cnty. Ct. for the Tenth Jud. Dist.*, 420 U.S. 425, 467 (1975) (Douglas, J., dissenting) ("Jurisdiction dependent on the 'tract book' promises to be uncertain and hectic.").

403. Neal Katyal, Acting Solic. Gen., Speech at the 36th Annual Federal Bar Association Indian Law Conference 9 (Apr. 8, 2011), <https://www.calindianlaw.org/uploads/2/8/4/5/28458371/transcript.pdf> [<https://perma.cc/F8U3-K29U>].

404. Crepelle, *supra* note 36, at 556.

405. 118 U.S. 375 (1886).

Indian is a dead Indian.”⁴⁰⁶ This requirement comports with the American Bar Association’s Model Rules of Professional Conduct,⁴⁰⁷ and the Bluebook’s recently adopted rule for citing to slave cases.⁴⁰⁸

The argument for a historical disclaimer in slavery cases is at least as strong in Indian law. While slavery is not always at issue in cases involving enslaved persons,⁴⁰⁹ the stereotypes in Indian law decisions are always vital to the Supreme Court’s formulation of the law. To illustrate, the Supreme Court held Indians do not own their land in *Johnson v. M’Intosh* because Indians were “heathens,”⁴¹⁰ “fierce savages,” and “[t]o leave them in possession of their country, was to leave the country a wilderness.”⁴¹¹ These bigoted and incorrect tropes about Indians were used to justify their dispossession by the doctrine of discovery, which meant lands inhabited by non-Christian, non-Europeans were considered uninhabited.⁴¹² Discovery has its origin in Papal Bulls, and the Pope recently repudiated discovery.⁴¹³ An honest citation to *Johnson* must acknowledge its reasoning is no longer acceptable.

Requiring the Supreme Court, as well as lower courts, to note the historical background of the nineteenth-century Indian law jurisprudence they rely on may eliminate judicial imperialism. Mandating Justices acknowledge the historical background of cases would make it harder for imperial Justices to buttress their biases by cherry-picking phrases from

406. Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, 19 NAT’L CONF. CHARITIES & CORR. 45, 46 (1892) (“A great general has said that the only good Indian is a dead one, and that high sanction of his destruction has been an enormous factor in promoting Indian massacres.”).

407. See, e.g., MODEL RULES OF PRO. CONDUCT r. 2.3(B), 2.3(C), 3.1, 3.3, 4.1 cmt. 1, 8.4(d), 8.4(g) (AM. BAR ASS’N 2023).

408. See *Twenty-First Edition Information*, THE BLUEBOOK, <https://www.legalbluebook.com/preface-to-the-twenty-first-edition> [<https://perma.cc/WU5Y-UUPC>] (publishing “Noteworthy Changes to the 2021 Printing” including Rule 10.7.1(d) that governs citation to slave cases).

409. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 10.7.1(d), at 111 (Columbia L. Rev. Ass’n et al. eds., 21st ed. 2020) (requiring a parenthetical to indicate “enslaved party” or “enslaved person at issue” when citing to slavery cases); see also David J.S. Ziff, *Citation, Slavery, and the Law as Choice: Thoughts on Bluebook Rule 10.7.1(d)*, 101 N.C. L. REV. F. 72, 77 (2023) (“When citing slave cases, courts failed to discuss the case’s slavery context eighty percent of the time.”).

410. 21 U.S. (8 Wheat.) 543, 577 (1823).

411. *Id.* at 590.

412. Robert J. Miller, *American Indians, the Doctrine of Discovery, and Manifest Destiny*, 11 WYO. L. REV. 329, 330–31 (2011) (“The English colonists in North America and then the American colonial, state, and federal governments all utilized the Doctrine and its religious, cultural, and racial ideas of superiority over Native Americans to stake legal claims to the lands and property rights of the indigenous peoples.”); Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples’ Survival in the World*, 1990 DUKE L.J. 660, 672 (“For five hundred years, this doctrine and its discourse of diminished indigenous legal status and rights has been relied on by European and European-derived settler states to regulate and legitimize their colonial activities in indigenous peoples’ territories.”).

413. Bill Chappell, *The Vatican Repudiates ‘Doctrine of Discovery,’ Which Was Used to Justify Colonialism*, NPR (Mar. 30, 2023, 1:38 PM), <https://www.npr.org/2023/03/30/1167056438/vatican-doctrine-of-discovery-colonialism-indigenous> [<https://perma.cc/PKN8-CYU3>].

allotment era jurisprudence.⁴¹⁴ Likewise, including a historical disclaimer would make it easier for people unfamiliar with Indian law to notice the Supreme Court Justices' views on Indians. By making it easier to recognize the imperial origins of the Supreme Court's Indian law jurisprudence, reliance on prejudicial precedent will be harder to justify. Thus, mandatory disclosure of Indian law jurisprudence's historical context will inhibit judicial imperialism and promote the rule of law.

C. Legislative Action

Congress can restore the rule of law in Indian country. Uncertainty in Indian country exists because Congress and the Supreme Court are at odds. Though Congress seeks to foster tribal self-governance, the Supreme Court is eager to divest tribes of their sovereign powers. Significantly, the Court's anti-tribal decisions often arise when federal legislation has not explicitly addressed an issue.⁴¹⁵ If a federal law clearly addresses a tribal issue, the Supreme Court usually defers to Congress.⁴¹⁶ The Court has ruled Congress possesses plenary power over tribes, so Congress has broad authority to provide clear rules for Indian country.

Tribal gaming is a prime example of Congress clarifying the law in Indian country. When tribes began opening bingo parlors in the 1970s, gaming was prohibited under state law.⁴¹⁷ States objected to tribal gaming because non-Indians preferred tribal gaming rules.⁴¹⁸ Accordingly, numerous lawsuits ensued over whether state gaming laws applied to Indian country casinos.⁴¹⁹ In a rare post-1970s victory, the Supreme Court affirmed tribes' right to engage in gaming on their land in *California v. Cabazon Band of Mission Indians*.⁴²⁰

414. *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 683 (2022) (Gorsuch, J., dissenting) (“That leaves the Court to assemble a string of carefully curated snippets—a clause here, a sentence there—from six decisions out of the galaxy of this Court’s Indian law jurisprudence.”).

415. *E.g.*, *Montana v. United States*, 450 U.S. 544 (1981); *Washington v. Confederated Tribes of the Colville Indian Rsr.*, 447 U.S. 134 (1980); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

416. *See United States v. Lara*, 541 U.S. 193, 196 (2004); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 46–47 (1989); Jack Fruchtman, *At Stake: Native American Sovereignty*, *MV TIMES* (Jan. 18, 2023), <https://www.mvtimes.com/2023/01/18/stake-native-american-sovereignty/> [<https://perma.cc/R4HV-CU5A>] (relaying Justice Antonin Scalia’s comment regarding the decision in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989): “But that’s what the law said, without a doubt”).

417. COHEN’S HANDBOOK, *supra* note 130, § 16.01; *History*, NAT’L INDIAN GAMING COMM’N, <https://www.nigc.gov/commission/history> [<https://perma.cc/DA56-YNC3>].

418. *See* Kevin K. Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 *NEV. L.J.* 285, 285–86 (2003).

419. COHEN’S HANDBOOK, *supra* note 130, § 16.01; NAT’L INDIAN GAMING COMM’N, *supra* note 417.

420. 480 U.S. 202, 221–22 (1987) (noting the strong federal interests advanced by tribal gaming).

While tribes prevailed in *Cabazon*, the Court's decision did not provide a clear rule.⁴²¹ The tribal victory was vulnerable because it hinged on *Bracker*'s balancing test;⁴²² hence, a minor change in federal policy could eliminate tribes' ability to offer gaming.⁴²³ This uncertainty increased the financial risk for outside investors in tribal gaming, and sans outside capital, tribes would not have been able to develop gaming enterprises.⁴²⁴ Moreover, states did not like the degree of tribal sovereignty *Cabazon* made possible.⁴²⁵ These concerns led Congress to pass the Indian Gaming Regulatory Act (IGRA) less than a year after *Cabazon*.⁴²⁶ IGRA authorizes tribal gaming but places severe limits on tribal autonomy.⁴²⁷ Though IGRA has many detractors,⁴²⁸ the legislation has provided the legal certainty necessary to transform Indian gaming into a \$40 billion a year industry⁴²⁹ and lift several tribes out of poverty.⁴³⁰

IGRA is a powerful testament to the importance of predictable rules, and Congress should apply its lesson to other Indian law issues. The simplest

421. See *id.* at 210 (“We are persuaded that the prohibitory/regulatory distinction is consistent with *Bryan*'s construction of Pub. L. 280. It is not a bright-line rule, however; and as the Ninth Circuit itself observed, an argument of some weight may be made that the bingo statute is prohibitory rather than regulatory.”).

422. *Id.* at 216–17.

423. CONG. RSCH. SERV., R42471, INDIAN GAMING: LEGAL BACKGROUND AND THE INDIAN GAMING REGULATORY ACT (IGRA) 9 (2012) (“Although the Indian tribes won a big victory in *Cabazon*, their right to engage in gaming was vulnerable because if the executive branch ever decided not to encourage Indian gaming as a means to realize federal policy goals of self-determination and economic self-sufficiency, under the reasoning of *Cabazon*, states would be able to enforce their gaming laws against tribal gaming on tribal land.”).

424. Franklin Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 ARIZ. ST. L.J. 99, 123 (2010) (“Another impetus for this rapid expansion was the opportunities that outside financial interests began to see in tribal gaming as a lucrative field of investment.”).

425. Kevin K. Washburn, *Recurring Problems in Indian Gaming*, 1 WYO. L. REV. 427, 428 (2001) (“Meanwhile, states went to Congress, seeking a legislative limitation to the tribal power recognized in the *Cabazon* decision.”).

426. Indian Gaming Regulatory Act of 1988, Pub. L. No. 100-497, 102 Stat. 2467 (codified at 25 U.S.C. §§ 2701–2721).

427. See 25 U.S.C. § 2710(d)(1)(C).

428. See, e.g., *Maverick Gaming LLC v. United States*, 658 F. Supp. 3d 966 (W.D. Wash. 2023), *aff'd*, 123 F.4th 960 (9th Cir. 2024); Complaint at 25–27, *Maverick Gaming LLC*, 658 F. Supp. 3d 966 (No. 3:22-cv-05325) (asserting IGRA violated equal protection); *Wendell Chino*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/chino-wendell> [<https://perma.cc/ZM24-3VYC>] (noting Wendell Chino, former president of the Mescalero Apache Nation, opposed IGRA because it “restricted his tribe’s sovereignty”).

429. James M. Klas, *NIGC 2022 Revenue Figures: Behind the Numbers*, INDIAN GAMING (Sept. 1, 2023), <https://www.indiangaming.com/nigc%E2%80%882022-revenue-figures%E2%80%88behind-the-numbers/> [<https://perma.cc/E37E-H6BB>].

430. KATHERINE A. SPILDE, HARV. PROJECT ON AM. INDIAN ECON. DEV., CULTIVATING NEW OPPORTUNITIES: TRIBAL GOVERNMENT GAMING ON THE PECHANGA RESERVATION 5 (2004), <https://hwpi.harvard.edu/files/hpaied/files/nigacasestudypechanga.pdf?m=1639579313> [<https://perma.cc/4REN-9Z9N>] (“Because of Indian gaming, tribes have begun the long march back from poverty and hopelessness to prosperity and hope for a better future.”).

way for Congress to restore the rule of law to Indian country is by codifying the original rule—state authority ends where Indian country begins. This would expand tribal jurisdiction and eliminate state jurisdiction in Indian country. This bright line rule would significantly reduce the potential for Indian country jurisdictional disputes and also ensure everyone in Indian country is subject to the same law—tribal law. Uniform application of tribal law, subject to the usual choice of law rules, would create a much more equitable and efficient legal regime than the one that currently exists in Indian country. Clear rules will promote investment in Indian country, furthering Congress’s policy of promoting tribal economic development through outside investment.⁴³¹ Simple rules would likely reduce Indian country crime too.⁴³²

Rather than a blanket rule, Congress could address tribal sovereignty on a piecemeal basis, as it has in IGRA and environmental law. In some environmental statutes, Congress has treated tribes as states.⁴³³ Thus, tribes have clear jurisdiction over environmental issues on their reservations.⁴³⁴ On the other hand, Congress has blocked tribes in Oklahoma from exercising jurisdiction over environmental issues.⁴³⁵ The legislation is controversial and hostile to tribal sovereignty;⁴³⁶ however, the act theoretically increases certainty for energy producers in Oklahoma.⁴³⁷ Certainty as to the rules governing Indian country is necessary for the rule of law to exist.

Legislation, however, is not without risk for tribes. Indians are approximately one percent of the United States population,⁴³⁸ and the

431. See 25 U.S.C. § 4301(a)(9).

432. See Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 202(a)(4)(B)–(C), 124 Stat. 2261, 2262; Crepelle, *supra* note 23, at 602–06.

433. See, e.g., 7 U.S.C. § 136u(a); 33 U.S.C. § 1377(e); 42 U.S.C. § 300j-11(a)(1); 42 U.S.C. § 6903(13); 42 U.S.C. § 7601(d)(1)(A); 42 U.S.C. § 9626(a); COHEN’S HANDBOOK, *supra* note 130, § 14.02[1] (“The EPA interprets federal environmental laws in light of this tribal-state allocation of authority within Indian country.”).

434. See *City of Albuquerque v. Browner*, 97 F.3d 415, 418 (10th Cir. 1996) (“Congress’s authorization for the EPA to treat Indian tribes as states preserves the right of tribes to govern their water resources within the comprehensive statutory framework of the Clean Water Act.”).

435. Tim Sowecke, *McGirt and the Oklahoma Midnight Rider*, J. REC. (Jan. 21, 2022), <https://journalrecord.com/2022/01/21/sowecke-mcgirt-and-the-oklahoma-midnight-rider/> [<https://perma.cc/GP2U-HLG2>] (“The rider allows Oklahoma to administer EPA programs across the entire state, including in Indian country, if it requests such authorization from EPA; it further requires that any tribes in Oklahoma seeking to administer federal environmental programs must first obtain a cooperative agreement with the state.”).

436. *Id.* (“At the time of its passage, an attorney for the Pawnee Nation described the rider as ‘the most scary, direct, take-the-gloves-off-and-go-for-the-jugular attack on tribal sovereignty I have ever seen.’”).

437. See *id.*

438. See *Tables: P1 Race*, U.S. CENSUS BUREAU (2020), [https://data.census.gov/table?g=010XX00US&d=DEC%20Redistricting%20Data%20\(PL%2094-171\)](https://data.census.gov/table?g=010XX00US&d=DEC%20Redistricting%20Data%20(PL%2094-171)) [<https://perma.cc/NBM3-CDES>].

poorest racial group in the country.⁴³⁹ Most Americans also lack a basic understanding of tribal sovereignty.⁴⁴⁰ This combination suggests tribes are not well-positioned for legislative success. But given the Supreme Court's judicial imperialism, congressional action is likely a lower risk for tribes. At the very least, legislation will provide clarity on what the law is in Indian country.

CONCLUSION

The Supreme Court's judicial imperialism has subverted the rule of law in Indian country. When the Constitution was written, states had no power in Indian country. No subsequent amendment to the Constitution has altered tribal sovereignty. Nonetheless, the Supreme Court has taken it upon itself to restrict tribal authority and expand state power over tribes. The Court's imperial jurisprudence has undermined tribal sovereignty and created uncertainty over what the law actually is. As a result, the Supreme Court has subverted the rule of law in Indian country based upon little more than the Justices' own personal aversion to tribal sovereignty. Until the Supreme Court is constrained, tribes will remain trapped in the age of imperialism.

439. Dedrick Asante-Muhammad, Esha Kamra, Connor Sanchez, Kathy Ramirez & Rogelio Tec, *Racial Wealth Snapshot: Native Americans*, NAT'L CMTY. REINVESTMENT COAL. (Feb. 14, 2022), <https://ncrc.org/racial-wealth-snapshot-native-americans/> [<https://perma.cc/6PNQ-4AAY>]; *American Indians and Alaska Natives: Key Demographics and Characteristics*, NAT'L COUNCIL ON AGING (Jan. 10, 2023), <https://www.ncoa.org/article/american-indians-and-alaska-natives-key-demographics-and-characteristics> [<https://perma.cc/3TJE-CEQN>].

440. See FIRST NATIONS DEV. INST., NATIVE VALUES, NATIVE VOICES: 2022 ANNUAL REPORT 2, 4–5 (2022), <https://www.firstnations.org/wp-content/uploads/2023/11/First-Nations-Development-Institute-Annual-Report-2022.pdf> [<https://perma.cc/8DDM-8PQX>]; FIRST NATIONS DEV. INST. & ECHO HAWK CONSULTING, CHANGING THE NARRATIVE ABOUT NATIVE AMERICANS: A GUIDE FOR ALLIES, 4, 14, 17, https://www.firstnations.org/wp-content/uploads/2018/12/%E2%80%A2Message-Guide-Allies-screen-spreads_1.pdf [<https://perma.cc/7BB7-KU2Z>].