16

Territorial Jurisdiction

Tribes need greater territorial integrity to function as nations. This requires transferring federal control over trust land to the tribes themselves and recognizing tribal law as the primary force in Indian country. Until tribes are able to determine the property regimes in their territory and enforce their laws against all people in their territory, tribes will remain "domestic dependent nations."

16.1 SOVEREIGNTY AND LAND

Control over the land within their territories is vital to tribes' being able to operate as governments. Although tribes have exercised limited dominion over their land for the past two centuries, tribes exercised complete sovereignty over their land for most of history. Myriad Indigenous property regimes are discussed in Chapter 1, and tribes retained sovereignty over lands long after European arrival. As Justice Douglas wrote:

> [The Indian] neither had nor gave deeds to his land. There was no recording office. But he knew the land where he lived and for which he would fight. If the standards of the frontier are to govern, his assertion of ownership and its recognition by the United States could hardly have been plainer.[1]

Tribes' willingness to fight and die for their land forced the United States to enter treaties. By acquiring tribal lands through treaties, the United States recognized tribal sovereignty. After all, it would be nonsensical to

[1] Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 360 (1945) (Douglas, J., dissenting).

buy land *directly from tribes* if the United States did not believe tribes possessed rights to it.[2] The United States continued to negotiate with tribes and purchase their lands even after the United States abandoned treaty making with tribes.[3]

The United States continued purchasing land from tribes because tribes retained sovereignty over their land. Undoubtedly, tribes suffered blows to their authority, but tribes' ability to govern their land has always been recognized. For example, *Johnson* v. *M'Intosh* acknowledged:

> The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws. If they annul the grant, we know of no tribunal which can revise and set aside the proceeding.[4]

Thus, the Court in *Johnson* stated, "It has never been contended, that the Indian title amounted to nothing."[5] A decade later, the Court elaborated on the value of Indian title explaining it is "considered as sacred as the fee simple of the whites."[6] The Supreme Court has consistently confirmed the sacredness of Indian title,[7] as well as tribal authority over the resources on their land.[8] Accordingly, there is an established basis for tribal sovereignty over land and resources under existing law.

Actualizing tribal sovereignty requires revising Indian country's land tenure rules. Trust land is a prime place to start. Trust land is exceedingly difficult to use because of the federal bureaucracy encumbering it. Trust land's inalienability makes it challenging to use as collateral. Moreover, the federal strings attached to trust land are premised on the idea Indians are incompetent.[9] There is little dispute on these points; nevertheless, tribes are generally leery of abandoning trust land. Their reluctance is largely based on past experiences – allotment and termination.

[2] Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 368–69 (1945) (Murphy, J., dissenting); *id.* at 360–61 (Douglas, J., dissenting).

[3] South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 346 (1998); Keith Richotte, Jr., Federal Indian Law and Policy: An Introduction 141 (2020).

[4] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 593 (1823).

[5] *Id.* at 603.

[6] Mitchel v. United States, 34 U.S. 711, 746 (1835) (quoting Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1931)).

[7] Cnty. of Oneida v. Oneida Indian Nation of New York, 470 U.S. 226, 235 (1985); Oneida Indian Nation v. Cnty. of Oneida, 414 U.S. 661, 669 (1974); United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 345 (1941).

[8] United States v. Shoshone Tribe of Indians, 304 U.S. 111 (1938).

[9] Cohen's Handbook of Federal Indian Law § 15.06[6] (Nell Jessup Newton et al. eds. 2012 ed.).

Tribes lost millions of acres of land to these federal policies, and the land loss has severely diminished tribal sovereignty. Accordingly, calls to end trust land are often interpreted as a move toward eliminating tribal sovereignty.

The debate over trust land usually revolves around whether trust land should be abolished in favor of privatization. But this largely misses the mark. Trust land and tribal sovereignty are different things.

16.2 REPLACING TRUST LAND WITH TRIBAL LAND

Trust land is often blamed for reservation poverty. Private, fee simple land ownership is widely considered the premier status for economic development,[10] but private land ownership is not necessary for a robust free market economy. Hong Kong is illustrative. The island state is ranked third in the World Bank's ease of doing business index[11] and is consistently held out as the exemplar of laissez-faire. But with few exceptions, land is not privately owned in Hong Kong.[12] Instead, the central government owns the lion's share of the land, and people lease it from the government.[13] Registering property in Hong Kong usually takes less than a month,[14] which is slightly longer than the United States' average.[15]

While this discussion simplifies Hong Kong's property system, the lack of private ownership and use of leases is not so different from trust land.

[10] Evelyn Iritani, *Ownership Structure of Tribal Land Exacts a Multibillion-Dollar Penalty*, UCLA Anderson Rev. (Aug. 26, 2020), https://anderson-review.ucla.edu/native-american-land/ [https://perma.cc/XCK4-KRNQ].

[11] World Bank Grp., Doing Business 2020: Comparing Business Regulation in 190 Economies 4 (2020), https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf [https://perma.cc/NK2D-6EDV]; *Ease of Doing Business in Hong Kong*, Trading Econ., https://tradingeconomics.com/hong-kong/ease-of-doing-business [https://perma.cc/A3ZJ-9S9C].

[12] *Basic Knowledge of Land Ownership in Hong Kong*, Cmty. Legal Info. Ctr., www.clic.org.hk/en/topics/saleAndPurchaseOfProperty/basic_knowledge_of_land_ownership_in_hong_kong [https://perma.cc/6EKJ-QUBZ].

[13] *Id.*

[14] World Bank Grp., Doing Business 2020: Comparing Business Regulation in 190 Economies, Economy Profile: Hong Kong SAR, China 24 (2020), www.doingbusiness.org/content/dam/doingBusiness/country/h/hong-kong-china/HKG.pdf [https://perma.cc/XF2D-3NVT].

[15] World Bank Grp., Doing Business 2020: Comparing Business Regulation in 190 Economies, Economy Profile: United States 37–50 (2020), www.doingbusiness.org/content/dam/doingBusiness/country/u/united-states/USA.pdf [https://perma.cc/H24Y-YA3D].

What is vastly different between trust land and the Hong Kong real estate market is the ease of using property. One can access land simply and efficiently in Hong Kong. Hence, businesses can effortlessly operate in Hong Kong. Not so in Indian country. This suggests the problem with trust land is not primarily federal ownership; rather, this indicates inefficient federal management is the main problem with trust land.

The Helping Expedite and Advance Responsible Tribal Home Ownership Act (HEARTH) underscores this point. The HEARTH Act does not alter the status of trust land. The Act simply lets tribes process land leases in lieu of the BIA.[16] Despite this reform being minor – title to trust land remains with the federal government and tribes have to follow federal leasing rules – tribes that have adopted the Act have seen significant benefits. At the Ho-Chunk Nation, lease approval time dropped from eighteen months to about one month after adopting the Act.[17] This makes it much easier to obtain a home loan or start a business on trust land.[18] By making it easier to use trust land, tribal economies will improve.[19] None of this is to say trust land is ideal, but it is to emphasize the major issue is accessing trust land. If people can lease and engage in other activities within a reasonable time, trust land will not hamstring tribal economies.

The HEARTH Act suggests tribes should have greater control over the administration of their land. This is essential for tribes to be able to function as governments. The federal government does not impose land ownership regimes on states, and the federal government should not dictate tribal property rights regimes either. The same goes for other resources on tribal land. If the federal government does not regulate an activity on state land, the presumption should be the feds do not need to regulate the

[16] Jodi Gillette, *Strengthening Tribal Communities Through the HEARTH Act*, White House Blog (July 30, 2012), https://obamawhitehouse.archives.gov/blog/2012/07/30/strengthening-tribal-communities-through-hearth-act [https://perma.cc/7TVE-5HJQ].

[17] Ctr. for Indian Country Dev. of the Fed. Res. Bank of Minneapolis & Enterprise Cmty. Partners, Tribal Leaders Handbook on Homeownership 88 (Patrice H. Kunesh ed., 2018), www.minneapolisfed.org/indiancountry/resources/tribal-leaders-handbook-on-homeownership/case-study-hearth-act-implementation [https://perma.cc/G2MG-9C8P].

[18] Gillette, *supra* note 16; Emily Proctor, *How Can the HEARTH Act Assist Tribal Governments?* Mich. St. U. Extension (Dec. 30, 2013), www.canr.msu.edu/news/how_can_the_hearth_act_assist_tribal_governments [https://perma.cc/YRE2-A7A3]; *HEARTH Act*, Citizen Potawatomi Nation Cultural Heritage Ctr. (2013) www.potawatomiheritage.com/encyclopedia/hearth-act/ [https://perma.cc/3JSY-E76Z].

[19] *HEARTH Act Leasing*, U.S Dep't of the Interior, Indian Affs., www.bia.gov/service/hearth-leasing [https://perma.cc/7P8J-KAH7].

activity on tribal land. This would leave tribes subject to generally applicable federal laws governing land and natural resources, though there may be reasons why the federal law should not bind tribes in some cases, such as when a federal law interferes with a tribal treaty right.

While this may seem radical, tribes have displaced the federal government in many roles through self-governance contracts, and the existing evidence indicates tribes consistently outperform the federal government at managing tribal resources. For example, waters on the Fort Peck Reservation, located in northeastern Montana along the Canadian border, were being degraded by erosion resulting from livestock grazing. The federal government was using a chemical assessment to measure reservation water quality, which does not always identify impacts on plant and animal life. Accordingly, the Fort Peck Tribes implemented the Clean Water Act's "tribes as states" provision. Under this authority, the tribes have assumed management of the reservation's waters and have added biological criteria to water quality management. Through the use of biological criteria, the Environmental Protection Agency notes the tribes have "identified and addressed specific environmental problems within the reservation."[20] Other tribes have achieved similar successes under the Clean Water Act and other programs allowing tribes greater sovereignty.[21] The reason is simple: Tribal leaders are accountable to tribal citizens for their performance whereas distant, federal bureaucrats are not. Thus, tribes have a much stronger incentive to execute their duty.

With the ability to design their own property regimes, a diverse array of tribal land and resource frameworks can be expected. Some tribes may wish to do away with trust land and create land regimes predicated on private property rights. Other tribes may prefer a land system wherein the tribal government holds title to the land, similar to the current trust regime. Indeed, the HEARTH Act shows economic development and capital access can occur on efficiently managed leased land. Alternatively, some tribes may have no desire to make their land easier to develop or

[20] U.S. Env't Protection Agency, Case Study: The Fort Peck Tribes Use Biological Criteria Their Water Quality Standards (2003), www.epa.gov/sites/default/files/2014-11/documents/casestudy-fortpeck.pdf [https://perma.cc/K2PZ-DTTZ].

[21] *Case Studies, Video, and Publications on Tribal Water Quality Standards*, U.S. Env't Protection Agency (updated Oct. 26, 2023), www.epa.gov/wqs-tech/case-studies-video-and-publications-tribal-water-quality-standards [https://perma.cc/PK2M-K4FF]; *EPA Actions on Tribal Water Quality Standards and Contacts*, U.S. Env't Protection Agency (updated Apr. 12, 2024), www.epa.gov/wqs-tech/epa-actions-tribal-water-quality-standards-and-contacts [https://perma.cc/HJN3-ML88].

may devise differing land tenure systems for particular portions of their land. Then a tribe may devise a completely new land management system. The freedom to decide tribal property regimes must belong to the tribes themselves because each of the 574 federally recognized tribes is a separate sovereign. Each tribe has its own unique history, culture, goals, location, land base, and natural resource endowments. A one-size-fits-all, federally mandated, property ownership structure makes little sense. Each tribe is in the best position to make the decision for itself, so tribes should be empowered to make their own rules.

Though each tribe must decide for itself whether it wants trust land, land reform should not be foisted upon tribes overnight. After 200 plus years of federal interference with tribal land, law, and economies, a transition period is warranted. Tribes will need to deliberate and decide on which land tenure rules are ideal for their circumstances. Some tribes may be ready and eager to seize control of their land right away; in fact, several already have through the HEARTH Act. Once a tribe is ready to establish its own land tenure systems, the federal government should provide it with the resources to implement the rules it has developed. Federal support for tribal land tenure reform does not have to increase the federal budget. Rather, the United States can allocate the funds it is currently using to administer trust land and other BIA programs directly to the tribes.

A famous study on the impact of tribal self-determination illustrates this point. Due to the federal government's tribal self-determination policy, the federal government can transfer the funds it would use to perform an activity on a reservation directly to the tribe, thereby allowing the tribe to use those funds to administer the activity itself. Dr. Mathew Krepps chose to test whether tribes were more effective at managing forests than the BIA. He examined the forests of seventy-five tribes. Controlling for differences in the tribal forests, Dr. Krepps found tribally managed forests have outputs up to 40 percent greater than forests managed by the BIA. Dr. Krepps' also concluded tribes obtain higher prices for their timber than the BIA. According to Dr. Krepps, "What is suggested is that all tribes, regardless of wealth or experience, enjoy a decided motivational advantage over BIA foresters who are paid flat salaries regardless of how well they manage Indian forests."[22]

[22] Matthew B. Krepps, *Can Tribes Manage Their Own Resources? A Study of American Indian Forestry and the 638 Program* 22–23 (Malcolm Wiener Ctr. for Soc. Pol'y, Harv. Project on Am. Indian Econ. Dev., Harv. Univ. John F. Kennedy Sch. Of Gov't, PRS 91-4, 1991).

Enabling tribes to create their own land tenure systems is consistent with the United States' professed tribal self-determination policy. It is also in accord with the United States Constitution and hundreds of treaties guaranteeing tribes' existence as sovereigns.[23] Furthermore, transferring from trust land to tribal governance of tribal lands adds no cost to the federal budget. No one is harmed by granting tribes control over trust land either, because the tribe is merely displacing the federal government as the land's sovereign. And by all accounts, the federal government has been abysmal at managing trust land. Plus, if tribes do not like the results their newly crafted rules are producing, tribes have the power to implement reforms – a feature tribes lack under the current trust land system.

The most significant obstacle to trust land reform is that it will almost certainly require an act of Congress. Altering more than 200 years of federal Indian law and policy is a major action. Notwithstanding, there are reasons to believe congressional action is possible. First of all, Congress enacted the HEARTH Act approximately ten years ago, and the Act is universally considered a success. Congress has considered expansions of the reforms set forth in the HEARTH Act too.[24] Hence, trust land reform is on Congress' radar. And as noted, the reform is cost-neutral and will likely lead to improved tribal economies, which will make tribes less dependent upon federal funds. The legislation also only directly impacts tribes and the United States. Individual states currently lack regulatory authority over trust land, so states are not impacted by the trust reform.[25] Moreover, trust land is predicated on outmoded beliefs about Indian incompetency, and Congress has recently enacted legislation repealing several antiquated laws relating to Indians.[26] Although congressional action is difficult to assume, legislation is plausible. Given the widely recognized issues with

[23] Haaland v. Brackeen, 599 U.S. 255, 333 (2023) (Gorsuch, J., concurring).

[24] U.S. Representative Don Young of Alaska introduced H.R. 215, American Indian Empowerment Act of 2017 on Jan. 3, 2017, then introduced a revised version, H.R. 8951, on Dec. 10, 2020. The latter has been referred to the House Committee on Natural Resources but there has been no further action on this proposed legislation. For the text and additional information regarding this bill, see *H.R.8951 – American Indian Land Empowerment Act of 2020*, Congress.gov, www.congress.gov/bill/116th-congress/house-bill/8951?s=1&r=53 [https://perma.cc/C5HT-AD5X].

[25] Lance Morgan, *Ending the Curse of Trust*, Indian Country Today (updated Sept. 12, 2018), https://indiancountrytoday.com/archive/ending-the-curse-of-trust [https://perma.cc/8K8R-MWF7].

[26] Repealing Existing Substandard Provisions Encouraging Conciliation with Tribes Act of 2022, RESPECT Act, Pub. L. No. 117–317, 136 Stat. 4419.

trust land and the lack of reasons for not providing tribes greater control over *their land*, legislation reforming trust land is a realistic hope.

16.3 TRIBAL LAND AND JURISDICTION

Tribes' desire to preserve trust land is largely linked to court decisions tying trust land to tribal jurisdiction and fee simple land to state jurisdiction. For example, in 2008, the Supreme Court held in *Plains Commerce Bank* v. *Long Family Land & Cattle Company*[27] that tribes had lost the ability to govern sales of fee land located within their reservations to non-Indians even if the non-Indian entered a consensual relationship with the tribe and its citizens. The Court proclaimed, "Our cases have made clear that once tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it."[28] The Court further averred, "[E]fforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid.'"[29] Likewise, the Supreme Court has held tribes cannot levy taxes on fee lands located within the boundaries of their reservations.[30] Tribal jurisdiction over fee lands has been diminished in numerous other situations.[31] Additionally, trust land is exempt from state taxation whereas states can tax fee lands within a reservation – even when the fee lands are owned by an individual Indian or the tribe.[32] The Supreme Court justifies diminishing tribal jurisdiction over fee lands on the theory that "[f]ee land owned by nonmembers has already been removed from the tribe's immediate control."[33] As a result, fee simple land – particularly when owned by a noncitizen of the tribe – reduces tribal sovereignty and trust land preserves it.

The trouble is ownership and jurisdiction are terms with entirely different definitions. Ownership is the legal right to use, possess, transfer, and dispose of a thing.[34] Property owners can exclude others from using

[27] Plains Com. Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008).
[28] *Id.* at 328.
[29] *Id.* at 330.
[30] Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645 (2001).
[31] Strate v. A–1 Contractors, 520 U.S. 438 (1997); Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989); Montana v. United States, 450 U.S. 544 (1981).
[32] Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251 (1992).
[33] Plains Com. Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 336 (2008).
[34] *Ownership*, Legal Info. Inst., Cornell L. Sch., www.law.cornell.edu/wex/ownership#:~:text=Ownership%20is%20the%20legal%20right,such%20as%20intellectual%20property%20rights [https://perma.cc/GU75-8LKP].

their property; however, the extent of an individual's property rights is determined by a government. For example, water law is very nuanced, but generally speaking, water law is governed by the state. Thus, individuals' property rights in the stream crossing their property vary from state to state. Eastern states typically follow the riparian doctrine wherein property owners can make "reasonable use" of waterbodies abutting their property provided the use does not infringe upon the rights of other riparian rights owners.[35] Contrarily, western states allocate property rights in water based on the doctrine of prior appropriation, which grants the senior water user priority over junior users in the event of a water shortage, hence the moniker "first in time, first in right."[36] The citizenship of the owner of the water right does not matter. The property owner's water rights are determined by the state where the water is located.

While property law governs the relationship between individuals and things, jurisdiction determines the relationship between an individual and a government. Jurisdiction is a sovereign's ability to exercise power and often has a territorial element, meaning within set boundaries the government has jurisdiction. If a sovereign's rules are violated within its borders, the sovereign has authority to punish the transgressor. No individual has to be harmed. All that needs to occur is a rule violation. This was on full display when Women's National Basketball Association star Brittney Griner was convicted of bringing less than a gram of hash oil into Russia. Griner was almost certainly the only person to come into contact with the infinitesimal amount of oil she possessed, and no one was injured because of her consumption of the oil. Nevertheless, she broke Russian law within the boundaries of Russia, so Russia had jurisdiction to prosecute and sentence her to nine years in jail.[37]

Despite widespread international outrage over Griner's conviction, the world respected Russia's right to prosecute Griner. By entering the sovereign territory of Russia, she subjected herself to Russian jurisdiction, and jurisdiction is a key ingredient of sovereignty. Jurisdiction is what differentiates sovereigns from corporations and social clubs. Individuals can

[35] Reed D. Benson et al., Water Resource Management: A Casebook in Law and Public Policy 32–37 (8th ed. 2021).

[36] *Id.* at 123–32.

[37] A. Martínez & Charles Maynes, *A Court in Moscow Sentences WNBA Star Brittney Griner to 9 Years on Drug Charges*, NPR (Aug. 5, 2022), www.npr.org/2022/08/05/1115859404/a-court-in-moscow-sentences-wnba-star-brittney-griner-to-9-years-on-drug-charges [https://perma.cc/VN67-2887].

own property, but private persons cannot exercise jurisdiction. Though governments can own property within their borders and beyond, property ownership is not the essence of government, at least in free market economies. Instead, asserting jurisdiction is the hallmark of sovereignty. Jurisdiction is what invigorates the rules crafted by sovereigns.

To help illustrate the difference between property ownership and jurisdiction, assume Jill is a United States citizen who goes on vacation in France. Jill attends a party at a Parisian home. The home is owned by Karl, a German. At the party, things get rowdy, and Jill punches Don, an Italian. Which cops are called? The French. France is a sovereign, so it has jurisdiction over those who violate French law within the borders of France. It does not matter that none of the individuals involved were French. It makes no difference that the crime occurred on property owned by a German. Governments exercise jurisdiction over the persons and property within their borders. As the property's owner, Karl can prevent the unruly partygoers from returning to his home, but he cannot put them in jail. Incarceration is a sovereign function. Failure to distinguish between property ownership and jurisdiction in Indian country stems from a failure to view tribes as bona fide governments. Making trust status, or even tribal ownership, a requirement for tribal jurisdiction essentially demotes tribes from governments to landowners' associations, a group of property owners.

Territorial jurisdiction is vital if tribes are to operate as governments. Nowhere else in the United States does jurisdiction hinge upon the citizenship of the landowner. Moreover, Congress has explicitly included non-Indian fee lands in the statutory definition of "Indian country": "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent ...."[38] Congress treats non-Indian lands within reservations as Indian country in numerous other statutes.[39] The Supreme Court recognized as much in 2020 when it stated "there is no reason" why tribes cannot "continue to exercise governmental functions over land even if they no longer own it communally."[40] This makes sense. Tribes are governments, and governmental authority does not depend upon a property owner's identity.

[38] 18 U.S.C. § 1151 (2024).

[39] 18 U.S.C. §§ 1152, 1553 (2024); Adam Crepelle, *It Shouldn't Be This Hard: The Law and Economic of Business in Indian Country*, 2023 Utah L. Rev. 1117, 1158–59 (2023).

[40] McGirt v. Oklahoma, 591 U.S. 894, 907 (2020).

Disconnecting land ownership from tribal jurisdiction is a key step in treating tribes as nations. Restricting tribal jurisdiction to lands held in trust or owned by Indians creates a highly impractical governance structure. Although the Supreme Court is responsible for entangling tribal jurisdiction with land ownership, the Court has admitted tying jurisdiction to landownership "would produce almost surreal administrative problems."[41] The impracticality of basing jurisdiction on landownership is likely why Congress included fee simple lands in the definition of Indian country.[42] Thus, Indian country governance can be greatly simplified by treating tribes as nations and honoring their right to assert jurisdiction over all person and activities within their borders.

16.4 JURISDICTION OVER NONCITIZENS

While tribal jurisdiction is currently at its apex on trust land, the Supreme Court has increasingly moved toward restricting tribal jurisdiction over non-Indians on trust lands. Tribal jurisdiction over non-Indians on reservations was presumptively valid until the Supreme Court's 1978 decision in *Oliphant* v. *Suquamish Indian Tribe*.[43] Three years later, *Oliphant* was largely extended to non-Indians on non-Indian-owned fee lands in *Montana* v. *United States*.[44] *Montana* expressly recognized tribal jurisdiction over non-Indians on fee lands who enter a consensual relationship with the tribe or its citizens. However, the Supreme Court has since tightened the *Montana*'s consent requirement, asserting, "Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations."[45]

Following *Oliphant*, the Supreme Court has attempted to rationalize the restrictions on tribal jurisdiction based upon political participation. Tribal governments exist independently of the United States Constitution. Pursuant to federal law, tribal citizenship is essentially limited to individuals of Indian ancestry.[46] Consequently, tribal governments are different than other United States governments, which are bound by the

[41] Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 262–63 (1992).
[42] Seymour v. Superintendent of Wash. St. Penitentiary, 368 U.S. 351, 358 (1962).
[43] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
[44] Montana v. United States, 450 U.S. 544 (1981).
[45] Plains Com. Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 337 (2008).
[46] Adoptive Couple v. Baby Girl, 570 U.S. 637, 690 (2013) (Sotomayor, J., dissenting).

Constitution and have no ancestry requirement for citizenship. Courts and Congress have increasingly countenanced the constraints on tribal jurisdiction on these two points.

This argument has come to be known as the democratic deficit theory. Justice Stevens made this argument in a 1982 dissent opining:

> The tribes' authority to enact legislation affecting nonmembers is therefore of a different character than their broad power to control internal tribal affairs. This difference is consistent with the fundamental principle that "[i]n this Nation each sovereign governs only with the consent of the governed." Since nonmembers are excluded from participation in tribal government, the powers that may be exercised over them are appropriately limited.[47]

The democratic argument carried the day in *Duro* v. *Reina*, which limited a tribe's criminal jurisdiction to the tribe's own citizens, because the "[p]etitioner [was] not a member of the Pima-Maricopa Tribe, and [was] not now eligible to become one. Neither he nor other members of his Tribe may vote, hold office, or serve on a jury under Pima-Maricopa authority."[48] Although Congress legislatively overruled *Duro*, Justice Kennedy expressed qualms about tribes prosecuting citizens of other tribes. Justice Kennedy emphasized tribes are not bound by the United States Constitution and Indians cannot participate in the governments of tribes they are not citizens of.[49] For this reason, the Supreme Court has surmised, "[T]ribes generally have no interest in regulating the conduct of nonmembers …"[50]

Congress has expressed similar sentiments. During Justice Breyer's 1994 confirmation hearing, Senator Pressler of South Dakota asked:

> Now, Indian tribes do not allow non-Indians to participate in their elections, to serve in tribal office, or to serve on tribal juries. So you have this situation of non-Indians living and owning property within a reservation subject to the jurisdiction of the tribal courts and the tribal police and so forth, but they cannot vote in the tribal elections. So they come to me, and they will come to you in the courts, seeking some kind of relief.
>
> Nonetheless, tribes in my State have imposed licensing fees on liquor stores owned by non-Indians on fee-owned land located within the boundaries of the Indian reservation ….
>
> … [G]iven the fact that non-Indians have no right to participate in tribal governments, do you see any constitutional problem when a tribe taxes a business owned

[47] Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 173 (1982) (Stevens, J., dissenting).
[48] Duro v. Reina, 495 U.S. 676, 688 (1990).
[49] United States v. Lara, 541 U.S. 193, 212–14 (2004) (Kennedy, J., concurring).
[50] Plains Com. Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 335 (2008).

by a non-Indian located on fee-owned land but within the boundaries of the reservation? Or, stated another way, is it constitutional for tribes to tax and regulate those who have no ability to influence how their taxes will be acquired and spent?[51]

This argument also appeared during the debate surrounding the Violence Against Women Act's provisions authorizing tribal jurisdiction over non-Indians.[52]

The democratic deficit argument is peculiar to Indian tribes. Just think if it applied to other governments. Kansas could not arrest the Texans within its borders because Texas citizens do not vote in Kansas elections, and the United States could not prosecute the foreign citizens on its soil.[53] Likewise, governments would not be able to hear tort or commercial disputes involving noncitizens. This, of course, would be absurd. Neither states nor the federal government could function under such system. Hence, they do not. States and the United States exercise jurisdiction over *all persons* within their borders because this is what sovereigns do. The democratic deficit argument is particularly ironic considering Indians continue to face state-imposed barriers to exercising their right to vote in state and federal elections.[54]

Furthermore, tribes' status as extraconstitutional governments does not mean individuals have fewer rights in Indian country than outside of it. All tribes are bound by the Indian Civil Rights Act, which is analogous to the Bill of Rights, and some tribes provide parties with stronger due process protections than non-Indian governments. Plus, states and the federal government disregard the Constitution all the time. Numerous exceptions have been crafted by courts to justify law enforcement acting contrary to the Fourth Amendment's warrant requirement.[55] State prosecutors withhold evidence favorable to defendants, and this subverts

[51] *Nomination of Stephen G. Breyer to be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 252 (1994) (statement of Larry Pressler, U.S. Sen. from S.D.).

[52] Jane M. Smith & Richard M. Thompson II, Cong. Research. Serv., R42488, Tribal Criminal Jurisdiction over Non-Indians in the Violence Against Women Act (VAWA) Reauthorization and the SAVE Native Women Act, 13–14 (2012).

[53] Duro v. Reina, 495 U.S. 676, 707 (1990) (Brennan, J., dissenting).

[54] James Thomas Tucker, Jacqueline De Leon, & Dan McCool, Native Am. Rts. Fund, Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters 2 (2020), https://vote.narf.org/wp-content/uploads/2020/06/obstacles_at_every_turn.pdf [https://perma.cc/B6K5-T4RW].

[55] *Fourth Amendment*, Legal Info. Inst., Cornell L. Sch., www.law.cornell.edu/wex/fourth_amendment#:~:text=Other%20well%2Destablished%20exceptions%20to,of%20items%20in%20plain%20view [https://perma.cc/KZN6-NBHM].

the defendant's constitutional right to a fair trial.[56] States also underfund public defenders which deprives indigent persons of their constitutional right to an attorney.[57] State and federal prosecutors have also been shown to disproportionately target minorities, a potential violation of the Constitution's Equal Protection Clause.[58] Other examples of constitutional malfeasance exist.[59] The Supreme Court has even affirmed the extradition of American citizens to foreign tribunals that do not offer criminal procedural safeguards in line with the United States Constitution.[60] This is not to say constitutional rights do not matter. It is to point out the different standard tribal governments are held to.

16.5 WHY TRIBES SHOULD HAVE CRIMINAL JURISDICTION OVER NON-INDIANS

Tribes are governments, and the first function of any government is the protection of its citizens. The possibility that a tribal court may be unfair to a non-Indian is not a valid reason to prevent every tribe from prosecuting non-Indians. Although a tribal court may occasionally err (as state and federal courts do),[61] tribes have no incentive to wrongfully

[56] Ari Shapiro, *Guilt by Omission: When Prosecutors Withhold Evidence of Innocence*, NPR (Aug. 4, 2017), www.npr.org/2017/08/04/541675150/guilt-by-omission-when-prosecutors-withhold-evidence-of-innocence [https://perma.cc/ZL54-WX9L].

[57] Phil McCausland, *Public Defenders Nationwide Say They're Overworked and Underfunded*, NBC News (updated Dec. 11, 2017), www.nbcnews.com/news/us-news/public-defenders-nationwide-say-they-re-overworked-underfunded-n828111 [https://perma.cc/G8UY-Y2TS].

[58] James E. Johnson et al., Brennan Ctr. for Just. & Nat'l Inst. on L. & Equity, Racial Disparities in Federal Prosecutions (2010), www.brennancenter.org/sites/default/files/2019-08/Report_Racial-Disparities-Federal-Prosecutions.pdf [https://perma.cc/PBW5-JAG7].

[59] *Constitutional Waivers by States and Criminal Defendants*, 134 Harv. L. Rev. 2552, 2553–54 (2021).

[60] Charlton v. Kelly, 229 U.S. 447, 476 (1913).

[61] In a dissent for a recent denial of certiorari by the United States Supreme Court, Justice Gorsuch asserted both the Supreme Court and the Second Circuit Court of Appeals erred – the former because it refused to review the Second Circuit's decision and the latter because it allowed a district court to "assume the 'dual position as accuser and decisionmaker'" when the district court established its own prosecutorial office to try, convict, and sentence a defendant the U.S. Attorney declined to prosecute. See Donziger v. United States, 598 U.S. ___, 143 S. Ct. 868 (2023). Justice Sotomayor spoke at a gathering in June of 2022 and admitted the Supreme Court has made mistakes. See Lawrence Hurley, *Liberal Justice Sotomayor Says U.S. Supreme Court "Mistakes" Can Be Fixed*, Reuters (June 16, 2022), www.reuters.com/legal/government/liberal-justice-sotomayor-says-us-supreme-court-mistakes-can-be-fixed-2022-06-16/ [https://perma.cc/CWV3-FEUY].

convict non-Indians. To begin with, tribes usually have limited budgets, and tribal dockets often face significant backlogs. A criminal case drains judicial resources. The cost of the criminal trial is worth it if an actual criminal is removed from the community, but the tribe derives zero benefit from prosecuting innocent non-Indians, or other innocent persons for the matter. If the tribe convicts someone, incarceration is a likely next step. Placing a criminal behind bars costs most tribes about $100 per day, which would amount to a nice income on many reservations.[62] These costs can be far higher if an inmate has medical issues. For example, the Eastern Band of Cherokee Indians spent more than $60,000 on healthcare for a non-Indian the tribe prosecuted under VAWA.[63] Given tribes' scarce resources, it is safe to assume tribal governments would rather spend their money on things besides wrongfully incarcerating non-Indians.

In addition to budgetary concerns, Congress' purported plenary power is another incentive for tribes to treat non-Indian defendants fairly. Tribal sovereignty, though it predates the formation of the United States, now exists at the whim of Congress. Throughout the years, Congress has wielded its power to diminish tribal sovereignty. Tribes know one foul move by any one of the 574 federally recognized tribes would likely lead to severe consequences for all of Indian country. This is a formidable incentive for tribal courts to treat non-Indians fairly. Between budgetary constraints and the plenary power doctrine, concerns of tribal courts targeting non-Indians for convictions seem overstated.

Additionally, tribes' lack of jurisdiction over non-Indians is colonialism. During the 1800s, citizens of the United States and European colonial powers were exempt from local laws in their Asian colonies.[64] In lieu of local jurisdiction, the colonial powers vowed to punish crimes committed by their citizens. This immunity from local law is known as extraterritoriality.[65] The American envoy to China claimed extraterritorial jurisdiction was necessary because of "the superior civilization and respect for individual rights consequent thereon, which prevail in

[62] Nat'l Cong. of Am. Indians, VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five-Year Report 19 (2018), www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf [https://perma.cc/A3MK-84BH].

[63] *Id.* at 31.

[64] *Unequal Treaty: Chinese History*, Britannica (updated Sept. 1, 2019), www.britannica.com/event/Unequal-Treaty [https://perma.cc/G47Q-5YHM].

[65] Kallie Szczepanski, *What Is Extraterritoriality?*, Thought Co. (updated Apr. 11. 2019), www.thoughtco.com/what-is-extraterritoriality-194996 [https://perma.cc/49YT-JQHU].

Christendom."[66] Accordingly, Asian tribunals were deemed unworthy of prosecuting citizens of the "culturally superior" western nations. In theory, this could have worked as the United States and European nations could have diligently pursued their citizens who harmed the Indigenous inhabitants of China, India, and other countries. But in reality, the West did not.

Although the West claimed extraterritoriality was needed because Asian justice systems were too brutish and inept, extraterritoriality led to the rampant abuse of local populations. American and European immunity from local jurisdiction made it nearly impossible for Asian nations to maintain law and order because the Asian countries lacked jurisdiction over western criminals.[67] Hence, extraterritoriality "allowed foreigners to get away with murder."[68] For example, in 1860, British citizen Michael Moss shot a Japanese official who was attempting to arrest him for discharging a firearm too close to the shogun's castle. The British prosecuted and convicted Moss – who was indisputably guilty. However, Moss' conviction was quickly overturned, and he was awarded $2,000 for wrongful imprisonment.[69] In colonial India, Bal Gangadhar Tilak mocked Britain's claim of judicial superiority, declaring, "The Goddess of British Justice, though blind, is able to distinguish unmistakably black from white."[70] Many westerners believed extraterritoriality was morally and legally wrong; in fact, western exemptions from local laws were likened to the United States' tolerance of slavery.[71] Nevertheless, westerners clung to extraterritoriality until the end of World War II, when imperialism was no longer acceptable to the world order.[72]

Extraterritoriality remains the law in Indian country. Reservations' experience with extraterritoriality is reminiscent of the experience of Asian nations 200 years ago – outsiders enter a territory and are largely free to pillage the Indigenous inhabitants at their whim. More curiously, extraterritoriality did not become the law in Indian country until *Oliphant* v. *Suquamish Indian Tribe* in 1978, three decades after the world rejected the practice and everything it represented.

[66] *Extraterritoriality – China*, Am. Foreign Relations, www.americanforeignrelations.com/E-N/Extraterritoriality-China.html [https://perma.cc/5YQA-CLHM].
[67] Pär Kristoffer Cassel, Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan 150 (2012).
[68] *Id.* at 159.
[69] *Id.* at 93.
[70] Elizabeth Kolsky, Colonial Justice in British India: White Violence and the Rule of Law 4 (2011).
[71] *Id.* at 19.
[72] Szczepanski, *supra* note 65.

Oliphant is colonialism writ large. It stands for the proposition that tribal justice systems are good enough for Indians but inadequate for non-Indians. *Oliphant* places a lower value on Indian lives than non-Indian lives. Indeed, *Oliphant* incentivizes non-Indians to target Indian victims by shielding perpetrators from the government most responsive to Indian victims. *Oliphant* is at odds with the proposition of equality before the law. And until *Oliphant* falls, the United States will remain the last bastion of the repudiated imperial doctrine of extraterritoriality.

Once tribal criminal jurisdiction over non-Indians is recognized, tribal civil jurisdiction over non-Indians will naturally follow. After all, if tribes can put non-Indian criminals in jail, tribes should logically be able to hold non-Indians liable for tort, breach of contract claims, and tax obligations. Certainly, tribal incentives are different in these matters than in the criminal context. Criminal prosecutions drain tribal resources and provide no benefit to the community unless the wrongdoer is convicted. Civil cases are different because they can result in the redistribution of wealth. Thus, a tribal court ruling in favor of an Indian against non-Indian may take money out of non-Indian pockets and places it in Indian hands. This incentive does exist, but it is shortsighted. A single, rogue tribal court decision undermines the tribe's institutional credibility and will result in less economic activity on the tribe's land. A dubious tribal court decision also has adverse reputational effects for tribal courts in general. Hence, bad judicial behavior is detrimental to tribal economies and sovereignty, so tribal courts have an incentive to be fair.

✦✦✦

Tribes must be able to control their land and the people upon it if they are to operate as governments. The constraints on tribal land and jurisdiction are based upon outmoded ideals about Indigenous Peoples. Moreover, the available evidence shows tribes are better at governing their territories than the United States. Respecting tribes' right to govern their land free from outside interference will drastically simplify Indian country's legal regime and empower tribal law.