NOTES

DISCERNING DISCRIMINATION IN STATE TREATMENT OF AMERICAN INDIANS GOING BEYOND RESERVATION BOUNDARIES

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Generally, federal Indian law cases focus on jurisdiction inside of Indian Country. Occasionally, however, challenges arise about the application of state law to American Indians outside of Indian Country. In 1973, and again in 2005, the Supreme Court announced that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." While this statement is fairly accurate historically, it provides practically no direction for states, tribes, or lower courts to apply the rule in specific instances. Since American Indians are members of three distinct American political groups—Indian tribes, the states within which they reside, and the United States—how is discrimination to be discerned? How explicit must federal law be, and how much flexibility do states have in interpreting Congress's directives? How is the Supreme Court maxim to be applied in the context of state-tribe negotiations, which have become a practical necessity for coexistence but are only occasionally addressed by federal legislation? This Note looks to the roots and rationale of the Supreme Court pronouncement, situating it inside of a larger picture of how states may, must, and cannot treat American Indian state citizens. Ultimately, it provides a framework and four specific rules for applying the Supreme Court pronouncement in disputes regarding the power of states over American Indians beyond the borders of Indian Country, and the rights of those American Indians vis-à-vis the states.

Introduction

American Indians are members of three distinct American political groups: Indian tribes, the states within which they reside, and the United States.[1] This unique tripartite political status is something of an accident of history—the outcome of the Indian wars, a transformation of American understanding of citizenship, several aborted attempts to dismantle tribal governments and assimilate Indians, and a modern belief in the necessity of limited self-determination in Indian Country.[2] While this

1. Because this Note is about federal Indian law, I use "American Indian" and "Indian" throughout to refer to members of federally recognized tribes.

2. Throughout this Note, I use "Indian Country" to refer to territory over which an Indian tribe has a claim of sovereignty recognized by the federal government. See 18 U.S.C. § 1151 (2000) (defining "Indian Country" as "all land within the limits of any Indian reservation," "all dependent Indian communities within the borders of the United States," and "all Indian allotments").

political status underlies interactions between Indians and state governments, the exact *legal* status of American Indians outside of Indian Country is not clearly understood.[3]

In the 1973 case *Mescalero Apache Tribe v. Jones*, the Supreme Court made its first general pronouncement about the application of state law to American Indians outside of Indian Country: "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State."[4] While this statement is fairly accurate historically, it provides practically no direction for states, tribes, or lower courts to apply the rule in specific cases. Nor did the Court's repetition of the pronouncement in the 2005 case *Wagnon v. Prairie Band Potawatomi Nation* (*Prairie Band III*)[5] shed much new light on the statement's meaning.

Given the unique tripartite political status of American Indians, discerning discrimination "[a]bsent express federal law to the contrary" requires more guidance than the Supreme Court has provided. American Indians are not necessarily similarly situated to either non-Indian state citizens or citizens of other states, and it is unclear to whom courts are intended to compare them. Federal Indian law contains many common law doctrines; are courts to look for "express federal law" in treaties and statutes alone, without the assistance of unique, court-developed rules of textual interpretation? How explicit must federal law be, and how much flexibility do states have in interpreting Congress's directives? In particular, the Supreme Court has not discussed the *Mescalero Apache* pronouncement in the context of state-tribe negotiations, which have become a practical necessity for coexistence but are only occasionally addressed by federal legislation.[6] Continuing uncertainty about the extent of state

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3. Additionally, the focus of nearly all academic discussions of federal Indian law on Indian Country has left questions about Indian status outside of Indian Country virtually unexamined. Analyses of state interest typically focus on state-tribe relations or state interest in representing the needs of non-Indians.

4. 411 U.S. 145, 148–49 (1973).

5. 546 U.S. 95, 113 (2005). To prevent confusion, I have numbered certain cases in this Note that are cited repeatedly and involve the same tribes, either the Cabazon Band of Mission Indians or the Prairie Band Potawatomi Nation. A sequence of numbers does not necessarily indicate multiple dispositions of the same controversy.

6. Legislation, such as the Indian Gaming Regulatory Act (IGRA), and "[j]udicially crafted rules" often force tribes and states to negotiate by denying "both Indian Nations and states the possibility of effective regulation if they act on their own." Indian Gaming Regulatory Act, Pub. L. No. 100-497, § 11(d)(3), 102 Stat. 2467, 2476–77 (1988) (codified as amended at 25 U.S.C. § 2710 (2000)); accord Cohen's Handbook of Federal Indian Law § 6.05 (Nell Jessup Newton ed., 2005) [hereinafter Cohen's Handbook]. Even "[a]bsent federal consent or a federal legislative framework for [state-tribe] compacts, they may nonetheless be valid if their objective is not to alter jurisdiction, but to facilitate the exercise of each government's respective authority." Id. But see Seminole Tribe v. Florida, 517 U.S. 44 (1996) (finding congressional authorization for tribes to bring suit to compel states to negotiate in good faith unconstitutional abrogation of state sovereign immunity).

power over Indians has a strong potential to interfere with state-tribe negotiations, state administration, and the lives of Indians.

This Note provides a framework for applying the Supreme Court's rule in disputes regarding the power of states over American Indians beyond the borders of Indian Country, and the rights of those American Indians vis-à-vis the states. In doing so, it argues several things. First, because statutes and treaties are written against a background of federal Indian law rules of interpretation, "explicit federal law" must be understood to incorporate those rules. Second, state laws that are otherwise applicable to all citizens of the state can nonetheless be discriminatory when applied to American Indians, and a rebuttable presumption of discrimination should exist in cases where the state exempts noncitizens but not Indians, or provides alternative methods of compliance for certain groups of people and not Indians. Third, when states treat American Indians as a political rather than racial group, they must be afforded flexibility in performance of Indian-affairs tasks delegated by the federal government. Finally, this Note attempts to develop an analogue to *Mescalero Apache* that explains when states may apply law to Indians outside of Indian Country that is *not* otherwise applicable to all citizens of the state.

This Note proceeds as follows. Part I situates discussion of state-Indian interactions outside of Indian Country inside of a larger federal Indian law context. It introduces several unique doctrines of federal Indian law that have arisen out of ever-changing U.S.-Indian relations and dissonant federal Indian policies. Part II traces the history of enforcement of state law against American Indians outside of Indian Country, focusing specifically on the emergence of the Supreme Court's general pronouncement in *Mescalero Apache* and *Prairie Band III*, and the ways in which it has been interpreted by the lower courts. It demonstrates the lack of clear direction to states, tribes, and courts, and identifies some of the specific questions that remain to be answered. Part III sets out several equal protection/discrimination paradigms to help resolve problems with the Supreme Court's pronouncement, ultimately constructing an understanding of nondiscrimination that takes into account the history of federal Indian law and the unique tripartite status of American Indians.

I. Federal Indian Law and State-Indian Relations

Generally, federal Indian law cases focus on jurisdiction inside of Indian Country. Outcomes hinge on interpretation of treaties and statutes, the balance of concerns of the various governments involved, and a complicated federal common law. The history of federal Indian policy and doctrines of federal Indian law have implications for elucidating clear rules to guide interactions between state government and American Indians *outside* of Indian Country as well. This Part introduces readers to some of the most relevant policies and the doctrines that stemmed from them.

A. *Power Dynamics in the Age of Treaties*

The U.S. Constitution seems to imagine two types of Indians: assimilated and tribal. It gives states jurisdiction over the former,[7] while providing the federal government the tools of war, peace, and trade to interact with other Indians on a government-to-government basis through their tribes.[8] In addition to creating a power scheme that states resisted from the beginning, this framework lacked direction for what was to happen as the country grew, the balance of power between the United States and tribes shifted, and Indians became incorporated into the country either legally or by geographic default.[9] This section discusses federal policies and court doctrines that developed during the first century of treatymaking, before the process broke down.

1. *Early Treaties.* — In 1778, the newly confederated "United States of North-America" entered into its first Indian treaty, signed with the Delaware Nation.[10] The United States was given permission to "pass[ ] through the country of the Delaware nation," which was "the most practicable way for the troops" to reach remaining British outposts in the area.[11] In return, the United States promised "articles of clothing, utensils and implements of war . . . from time to time."[12]

The next round of U.S.-Indian treaties was negotiated to ensure peace after the end of the American Revolution. These treaties established borders, determined which laws would apply to non-Indians entering Indian Country (and vice versa), agreed for the return of fugitive slaves and prisoners, and promised that the United States would give the tribes certain goods.[13] The treaties also contained provisions in which the tribes acknowledged that they were "under the protection of the United States" and would not negotiate treaties with parties other than the federal government.[14]

7. The first constitutional clause mentioning Indians prohibits states from including "Indians not taxed" in population counts used to determine representation in Congress. U.S. Const. art. I, § 2.

8. See infra note 15 (listing constitutional provisions).

9. See Sarah H. Cleveland, Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs, 81 Tex. L. Rev. 1, 26 (2002) ("The absence of any express federal power to regulate internal Indian affairs is not surprising given that, when the Constitution was drafted, Indian tribes were highly autonomous and viewed as a serious external threat to the security of the new nation.").

10. Treaty with the Delawares, U.S.-Del. Nation, Sept. 17, 1778, 7 Stat. 13.

11. Id. art. III.

12. Id. art. V. The parties also guaranteed "the citizens of the other . . . a fair and impartial trial" if arrested, and not to aid or abet each other's enemies or escaped fugitives or slaves. Id. art. IV.

13. Francis Paul Prucha, American Indian Treaties: The History of a Political Anomaly 42–48 (1994) [hereinafter Prucha, American Indian Treaties].

14. By 1791, the United States had begun to incorporate specific language into its treaties whereby tribes acknowledged themselves "to be under the protection of the United States" and "of no other sovereign" and stipulated that they would not hold treaties with

2. *Early Conflicts.* — Following this early tradition, the Constitution reserved both the power to make treaties and regulate trade with Indians to the federal government exclusively,[15] and one of Congress's first acts was to reinforce this with explicit legislation.[16] Consequently, Congress was faced with the task of resolving state-Indian conflicts that invariably arose both before and after treaties were ratified. Often each side would accuse the other of treaty violations,[17] and the United States generally responded simply by renegotiating treaties and boundaries with the Indians to settle the dispute.[18] By 1809, the United States had signed dozens of treaties, twenty-five of which were with the same four tribes.[19]

3. *Early Solutions.* — Disagreement over land ownership and jurisdiction at this early stage was often fierce. The Supreme Court was first called upon to resolve these disputes in a series of famous cases in the 1820s and '30s that have come to be known as the "Marshall Trilogy."[20]

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individual states, persons, or foreign nations. See, e.g., Treaty with the Chippewa, Etc., art. V, Nov. 25, 1808, 7 Stat. 112, 113; Treaty with the Cherokees, U.S.-Cherokee Nation, art. II, July 2, 1791, 7 Stat. 39, 39.

15. See U.S. Const. art. I, § 8 ("The Congress shall have Power . . . To regulate Commerce with . . . the Indian Tribes . . . ."); id. art. I, § 10 ("No State shall enter into any Treaty . . . ."); id. art. II, § 2 ("The President . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ."); id. art. VI ("[A]ll Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

16. Indian Non-Intercourse Act of 1790, ch. 33, § 4, 1 Stat. 137, 138 (codified as amended at 25 U.S.C. § 177 (2000)) ("[N]o sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state . . . [unless] made and duly executed at some public treaty, held under the authority of the United States.").

17. The first tribe of Indians to sign a treaty with the United States, see supra note 10 and accompanying text, was accused of a violation serious enough to merit resolution in one article of a renegotiated treaty. See Treaty with the Delawares, U.S.-Del. Nation, Aug. 18, 1804, 7 Stat. 81 (stipulating in Article 3 of third Delaware treaty that "there is great reason to believe that there are now in the possession of the said tribe, several horses which have been stolen from citizens of the United States" and agreeing to have "the chiefs who represent the said tribe . . . use their utmost endeavors to have the said horses forthwith delivered to the superintendent of Indian affairs").

18. See, e.g., Treaty with the Cherokees, supra note 14, art. IV (setting new boundaries); Treaty with the Cherokees (Treaty of Hopewell), U.S.-Cherokee Nation, art. IV, Nov. 28, 1785, 7 Stat. 18, 19 (setting initial boundaries); Prucha, American Indian Treaties, supra note 13, at 85–86 (discussing renegotiation of boundary lines between United States and Cherokee after treaty violations).

19. 2 Indian Affairs: Laws and Treaties 1075–99 (Charles J. Kappler ed., 1904) [hereinafter Laws and Treaties] (indexing treaties by tribe). This included nine with the Delaware, eight with the Cherokee (plus one "[e]lucidation of a convention" signed by both parties), four with the Creek, and four with the Mohawk. Id.

20. For an argument that these three cases remain important to Indian law today, despite the author's belief that "the modern Supreme Court gives little precedential weight to the Trilogy," see generally Matthew L.M. Fletcher, The Iron Cold of the Marshall Trilogy, 82 N.D. L. Rev. 627 (2006). For an argument for a return to Justice Marshall's

These decisions established exclusive federal control over Indian lands[21] and elucidated the political status of Indian tribes as that of "domestic dependent nations."[22] Although the tribes would not be able to bring alleged treaty violations to American courts, the federal government could do so on their behalf.

The Court also developed three related "primary rules" for interpretation of Indian treaties at this time: "[A]mbiguous expressions must be resolved in favor of the Indian parties concerned; Indian treaties must be interpreted as the Indians themselves would have understood them; and Indian treaties must be liberally construed in favor of the Indians."[23] While the language of these rules is still quoted by courts today, their application has been colored by subsequent legislation and case law.

4. *Early Reactions.* — The holdings of the Marshall Court did not prevent American and Indian troops from fighting on every frontier over the next half century.[24] Negotiated and renegotiated peace treaties found tribes giving up larger and larger tracts of land. In 1830, President Jackson pushed for passage of the Indian Removal Act, which authorized him to grant Indian tribes unsettled lands west of the Mississippi in exchange for lands within existing state borders.[25] U.S.-Indian relations further deteriorated after the passage of the Removal Act, which led to the Trail of Tears and other forced relocations.[26]

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vision of federal Indian law, which the author sees as balancing constitutional and colonial concerns effectively, see generally Philip P. Frickey, Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law, 107 Harv. L. Rev. 381 (1993).

21. E.g., Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 586–87 (1823) ("The States, having within their chartered limits different portions of territory covered by Indians, ceded that territory, . . . the soil as well as jurisdiction . . . [to the] United States . . . [which holds] exclusive right . . . to such a degree of sovereignty, as the circumstances of the [Indian] people would allow them to exercise.").

22. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) ("[Indian tribes are] domestic dependent nations. . . . Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father."); see also Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 583 (1832) ("[O]ur government [has] admitted . . . the existence of the Indians as a separate and distinct people, and as being vested with rights which constitute them a state, or separate community—not a foreign, but a domestic community—not as belonging to the confederacy, but as existing within it . . . .").

23. Charles F. Wilkinson & John M. Volkman, Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows upon the Earth"—How Long a Time Is That?, 63 Cal. L. Rev. 601, 617–20 (1975).

24. For example, the Battle of Tippecanoe in Indiana, the Creek War in Georgia and Alabama, and the First Seminole War in Florida.

25. Indian Removal Act, ch. 148, 4 Stat. 411 (1830) (codified as amended at 25 U.S.C. § 174 (2000)).

26. Walter H. Conser, Jr., John Ross and the Cherokee Resistance Campaign, 1833–1838, 44 J. S. Hist. 191, 192 (1978).

The removal of Indian tribes to lands west of the Mississippi was only a temporary fix, and within twenty years the United States would adopt a new policy of removal—this time to designated reservations. The country continued to sign treaties with tribes, doing so from an ever increasing position of power. Settlement of Indians on reservations became common practice by 1849, in tandem with a systematic policy of destroying the subsistence base of the plains Indians to force relocation of Western tribes as well.[27]

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The legacy of this era of American history continues to impact the legal status of American Indians both inside and outside of Indian Country. Of import to the question about state power over Indians outside of Indian Country are: the development of different roles for federal and state governments; a large number of treaties that remain binding federal law unless and until repealed; the Marshall Court's rules of Indian treaty interpretation; the legal recognition by all branches of government that Indian tribes are subordinate sovereigns existing within the United States; and the dislocation of tribes and their concentration on reserves of federal land, especially in the West.

B. *Tribal Independence and the Implied Federal Plenary Power*

After the end of the Civil War, Indian policy began to shift from one of wars and treaties to direct legislative involvement in Indian Country. When Congress began to exert jurisdiction over American Indians who remained affiliated with tribes, the Supreme Court was called upon to determine whether and why the legislature had the authority to exercise such powers, and how to resolve conflicts between treaties and statutes. This section traces the emergence of two Indian law doctrines that developed at this time, each of which is important to understanding the legal relationship between states and American Indians outside of Indian Country: plenary congressional power, and the independence of Indian tribes from the constraints of the Constitution.

1. *The Removal of One Constitutional Tool.* — In 1868, the United States ratified the last of over 360 treaties that it entered into with dozens of Indian tribes.[28] In an effort to gain a say in Indian affairs, the House of Representatives attached a stipulation to the Appropriations Act of 1871 that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation,

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27. Angela A. Gonzales & Melanie A. Stansbury, Timeline of U.S. American Indian Policy and Its Impacts (Sept. 2006) (unpublished manuscript, on file with the *Columbia Law Review*).

28. Prucha, American Indian Treaties, supra note 13, at 1, app. B (counting 367 ratified treaties and "6 more whose status is questionable"; indexing ratified treaties by date); see also 2 Laws and Treaties, supra note 19, at 1075–99 (indexing by tribe most treaties cited by Prucha).

tribe, or power with whom the United States may contract by treaty."[29] All new Indian policies would be enacted through statute only.

In this new era, political pressure to combat tribalism, "civilize" Indians, and assimilate them into mainstream society[30]—along with a desire to "open to settlement by white men the large tracts of land now belonging to the reservations"[31]—transformed Indian policy away from one of separation and toward one of Americanization. The 1885 Major Crimes Act authorized federal courts to hear prosecutions of certain Indian-on-Indian felonies committed in Indian Country for the first time.[32] The General Allotment Act of 1887 provided for the division of reservations into parcels of land for distribution to individual Indians, with temporary restrictions to prevent overly hasty sale.[33] It also gave American citizenship to any Indian who was born inside of the borders of the United States and was provided with allotted land, or who had "voluntarily taken up . . . his residence separate and apart from any tribe of Indians . . . and ha[d] adopted the habits of civilized life."[34] This attempt to assimilate Indians by furnishing them with small private farms came

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29. Appropriations Act of 1871, ch. 120, § 1, 16 Stat. 544, 566 (1871) (codified as amended at 25 U.S.C. § 71 (2000)). The Treaty Clause of the U.S. Constitution creates a role for the President and the Senate, but not the House of Representatives. See U.S. Const. art. II, § 2 ("The President . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ."). This does beg the question, of course, under what constitutional power the House was acting.

30. There was a general consensus by the end of the nineteenth century that assimilation of Indians was a good thing. Whether unease with tribal autonomy developed out of an interest in Indian land or in Indian souls, speculators and reformers alike were suspicious of what they perceived as nearly independent tribal existence. See generally 2 Francis Paul Prucha, The Great Father: The United States Government and the American Indians 609–757 (1984) [hereinafter Prucha, The Great Father] (describing culmination of "drive to acculturate and assimilate" Indians at end of nineteenth century as "an ethnocentrism of frightening intensity [setting] a pattern that was not easily eradicated").

31. Id. at 659–66 (quoting Report of the Secretary of the Interior, H.R. Exec. Doc. No. 1, pt. 5, at 46-3 (1880)).

32. Major Crimes Act of 1885, ch. 119, § 9, 23 Stat. 362, 385 (current version at 18 U.S.C. § 1153 (2000)).

33. General Allotment (Dawes) Act of Feb. 8, 1887, ch. 119, 24 Stat. 388. For a description of the General Allotment Act and subsequent amendments, see 2 Prucha, The Great Father, supra note 30, at 666–71; Philip P. Frickey, Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of Lone Wolf, 38 Tulsa L. Rev. 5, 7 (2002) (explaining allotment process and how it led to loss of seventy percent of Indian land). The General Allotment Act was the first major test of the plenary power announced implicitly in *Kagama*, discussed infra text accompanying notes 40–45. The law survived *Lone Wolf v. Hitchcock*, a case in which the Court announced that congressional plenary power could be exercised unilaterally, notwithstanding conflicting treaty provisions. 187 U.S. 553, 565–66 (1903).

34. General Allotment Act § 6, 24 Stat. at 390. These Indians needed to be "born within the territorial limits of the United States," but it was irrelevant "whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians." Id.

with the added bonus of millions of spare reservation acres that could be sold in fee simple to non-Indians and corporations.[35]

2. *The Development of Another.* — The allotment policy diminished Indian territory and tribal cohesion, and checkerboarded reservations across the United States in a way that would complicate even the simplest territory-based jurisdictional system.[36] It also led to the judicial branch's first efforts to reconcile nation-separating treaties with often clearly conflicting assimilation-motivated legislation. The Court created two new doctrines at the end of the nineteenth century to match the decidedly assimilationist atmosphere of the day.

In 1883, the Court announced in *Ex parte Crow Dog* that states and territorial governments were excluded from exercising "jurisdiction . . . over Indians within [their] exterior lines, without [the Indians'] consent, where their rights have been reserved and remain unextinguished by treaty."[37] However, the case left open the possibility that acts of Congress could extend federal law and district court jurisdiction over Indian-on-Indian crime in "land reserved for the exclusive occupancy of Indians."[38] In short order, the federal government did assert jurisdiction over "major" Indian-on-Indian crimes committed in Indian Country.[39]

This exercise of congressional power was challenged and upheld in *United States v. Kagama*, where the Supreme Court announced for the first time that the federal government has plenary power over tribal Indians.[40] Since Indian Nations lie inside of U.S. territory, they are part of the United States and must fall on one side or the other of the federal sys-

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35. Id. § 5, 24 Stat. at 389–90.

36. The word "checkerboard" is regularly used to describe reservations where some land is owned by the tribe, some is owned in fee by members of the tribe, and some is owned in fee by non-Indians. There may be confusion about which parcels are which. The confusing nature of reservation ownership has led to legal rules described as a "jurisdictional crazy quilt." Nevada v. Hicks, 533 U.S. 353, 383 (2001) (Souter, J., concurring).

37. Ex parte Crow Dog (Ex parte Kan-gi-Shun-ca), 109 U.S. 556, 559 (1883).

38. Id.

39. Major Crimes Act of 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153 (2000)) (extending federal criminal jurisdiction over Indians for murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny).

40. United States v. Kagama, 118 U.S. 375, 379–80 (1886) (analogizing to federal sovereignty over Territories). As Indians gained American citizenship, they also gained constitutional protections against certain exercises of congressional power, and the meaning of this plenary power changed. For example, the First Amendment limits Congress's power to regulate the political speech of all Americans, which now includes American Indians.

tem.[41] Limited direction from the Constitution[42] suggested the federal government to be the sole arbiter of Indian affairs. Latching onto Justice Marshall's description of the relationship between Indian *tribes* and the federal government as "that of a ward to his guardian,"[43] the Supreme Court issued a decision in 1866 inviting the federal government to act as a surrogate parent for *individual Indians*, protecting them from state interference, but also protecting non-Indians from them.[44] The Court found this plenary congressional power to be implied by the structure of the Constitution and the geographic realities of the day.[45]

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41. Id. Some modern Indian law scholars believe that Indian nations have been or ought to be integrated into constitutional federalism as a separate third player. See, e.g., Richard A. Monette, A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy, 25 U. Tol. L. Rev. 617, 631 (1994) ("A careful analysis of Indian treaty jurisprudence reveals why the Union/tribe relationship is no longer international but federative in nature and why Our Federalism ought to guide it."); Frank Pommersheim, Is There a (Little or Not So Little) Constitutional Crisis Developing in Indian Law?: A Brief Essay, 5 U. Pa. J. Const. L. 271, 285 (2003) (suggesting constitutional amendment to make incorporation official and legal); Alex Tallchief Skibine, Redefining the Status of Indian Tribes Within "Our Federalism": Beyond the Dependency Paradigm, 38 Conn. L. Rev. 667, 669–91 (2006) (tracing history of incorporation of tribes into United States, and arguing that Congress can complete process of quasi-constitutional incorporation); Carol Tebben, An American Trifederalism Based upon the Constitutional Status of Tribal Nations, 5 U. Pa. J. Const. L. 318, 326 (2003) ("[T]ribal nations have been brought within the constitutional structure of [the] American government['s] . . . tripartite federalism."). There is no indication that the Court has taken this suggestion seriously.

42. See supra note 15.

43. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831); see also *Kagama*, 118 U.S. at 382 (paraphrasing *Cherokee Nation*, 30 U.S. (5 Pet.) at 17, and Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 536 (1832), as speaking of Indian tribes "as 'wards of the nation;' 'pupils;' as local dependent communities").

44. *Kagama*, 118 U.S. 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."). States have historically been suspicious of the existence of an independent sovereign power inside of their territorial boundaries, if not deeply opposed to it. See, e.g., *Worcester*, 31 U.S. (6 Pet.) 515 (arising from Georgia law prohibiting, among other things, members of Cherokee Nation from creating governing councils); *Cherokee Nation*, 30 U.S. (5 Pet.) 1 (arising out of attempts by Georgia to enforce its laws on sovereign Indian lands).

45. *Kagama*, 118 U.S. at 378, 384–85 (finding that "[t]he Constitution of the United States is almost silent in regard to the relations of the government which was established by it to the numerous tribes of Indians within its borders," but that "[i]t must exist in [the federal] government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes"). But see Lone Wolf v. Hitchcock, 187 U.S. 553, 565–66 (1903) (arguing that "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning," first through treaty power, then through congressional act after 1871). This plenary power not only replaced the treatymaking authority, but it allowed for abrogation of treaty obligations as well. Id. at 566 (citing *Kagama*, 118 U.S. at 382, to support proposition that "[congressional] power exists to abrogate the provisions of an Indian treaty"). For an argument that the plenary power is not sufficiently grounded in the Constitution to survive

Ten years later, in *Talton v. Mayes*, the Court found that the Constitution itself was not binding on Indian tribes.[46] Unlike states, which acquiesced to limitations on their sovereignty, Indian tribes lose only those powers extinguished by treaty, force of arms, or Congress's exercise of its plenary power over tribal Indians.[47] If Indian tribes were incorporated into the structure of the Constitution—a document of inherently limited powers—the Court would not be able to justify *Kagama*'s finding of congressional plenary power over Indian affairs.

However, the Court's recognition of virtually all congressional action as legitimate subsumed any acknowledgment of independent tribal sovereignty. For example, in *Lone Wolf v. Hitchcock*, the Court upheld the forced allotment of tribal lands against the will of the tribe, announcing that congressional plenary power could be exercised unilaterally, notwithstanding conflicting treaty provisions.[48] Even though *Lone Wolf* has been repudiated in part, it has never been overruled: Congress still has a nearly unlimited authority to extinguish treaties and diminish tribal sovereignty, subject to the requirement that it speak with a clear voice when

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

46. 163 U.S. 376 (1896). The *Talton* Court found that the Fifth Amendment did not apply to tribes, because it "is limitative of the powers granted in the instrument itself and not of distinct governments framed by different persons and for different purposes." Id. at 382 (internal quotations omitted). This decision has been reaffirmed consistently, and extended to find that no part of the Bill of Rights, not even the Fourteenth Amendment, applies to Indian tribal governments. See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 & n.7 (1978) ("[T]he lower federal courts have extended the holding of *Talton* to other provisions of the Bill of Rights, as well as to the Fourteenth Amendment."); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194 n.3 (1978) ("In *Talton v. Mayes*, this Court held that the Bill of Rights in the Federal Constitution does not apply to Indian tribal governments." (citation omitted)).

47. See *Santa Clara Pueblo*, 436 U.S. at 56 ("As the Court in *Talton* recognized, however, Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 589 (1823) ("The title by conquest is acquired and maintained by force. The conqueror prescribes its limits."); John P. LaVelle, Implicit Divestiture Reconsidered: Outtakes from the *Cohen's Handbook* Cutting-Room Floor, 38 Conn. L. Rev. 731, 732 (2006) (recalling that traditionally, Indian tribes have been considered to "retain their original inherent sovereign authority over all persons, property, and events within Indian country unless Congress clearly and unambiguously acts to limit the exercise of that power"). In the last thirty years, the Court has relied on these principles to find that certain sovereign powers were inherently divested from Indian tribes. See, e.g., *Oliphant*, 435 U.S. at 211 (finding that tribal "exercise of jurisdiction over non-Indian citizens of the United States would belie the tribes' forfeiture of full sovereignty in return for the protection of the United States"); LaVelle, supra, at 732 ("[T]he Supreme Court has departed from [traditional] policy in a series of cases imposing additional limitations on tribal authority by means of a judicially crafted theory which the Court has labeled the 'implicit divestiture of [tribal] sovereignty.'").

48. 187 U.S. at 566 ("[I]t was never doubted that the power to abrogate [Indian treaties] existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy . . . .").

it does so[49] and to very limited constitutional restriction having mostly to do with the Takings Clause.[50]

* * *

Several broad tenets of treaty-era law survived this early period of federal legislation inside of Indian Country. States and the federal government continued to have substantially different relationships with tribes, and courts continued to recognize the (subordinate) sovereignty of tribes. But the fundamental relationship between Indians and the federal government changed as Congress began to exert day-to-day control over the lives of individual Indians, the physical boundaries between states and tribes (and the territorial integrity of tribal lands) began to dissolve, and pro-assimilation policies eroded the power of tribal governments. This period saw the development of the twin doctrines of plenary congressional power and the independence of Indian tribes from the constraints of the Constitution, each of which is important to the legal relationship between states and American Indians outside of Indian Country. And as is discussed in Part II, it also saw the first Supreme Court cases about state authority over Indians outside of Indian Country.

C. *The Reorganizations of Tribal Government and Divisions of Power*

In 1924, Congress passed the Snyder Act, extending citizenship to all American Indians.[51] But the legal status of American Indians and their tribes remained unsettled. The twentieth century saw the political branches of the federal government pursue three very different general policies that further complicated both geography and law, each of which has been upheld by the Supreme Court as a legitimate exercise of consti-

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49. A variety of rules have been used, independently or in conjunction, to determine whether Congress has in fact abrogated an Indian treaty. A claim that a statute has abrogated an Indian treaty requires a "clear showing of legislative intent." Wilkinson & Volkman, supra note 23, at 623 (citing United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339 (1941), as early case establishing rule). Abrogation will "not lightly be implied." Id. at 625 (citations omitted). Rather, in the spirit of the liberal rules governing the interpretation of Indian treaties themselves, the abrogation will only be implied after "liberal construction" of the statute in favor of Indian rights. Id. at 626. In some cases, the courts have been unwilling to find abrogation without "express legislative reference to Indian treaty rights." Id. at 627.

50. Where Congress has acknowledged or endowed Indians with property rights, it can still take the property, but it must compensate the tribe for the taking. United States v. Sioux Nation of Indians, 448 U.S. 371, 414 n.29 (1980) (quoting Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 277–78 (1955)).

51. Indian Citizenship (Snyder) Act of 1924, ch. 233, 43 Stat. 253 (current version at 8 U.S.C. § 1401(b) (2000)) ("[A]ll noncitizen Indians born within the territorial limits of the United States [are] declared to be citizens of the United States: *Provided*, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property."). For a history of Indian citizenship before the Snyder Act, see generally Earl M. Maltz, The Fourteenth Amendment and Native American Citizenship, 17 Const. Comment. 555 (2000).

tutionally granted power. This section looks at how the judicial branch has carved out default rules based on geography, identity, and subject matter, even as federal Indian policy went through dramatic changes.

1. *The Policies: Reorganization, Termination, and Self-Determination.* — The Indian Reorganization Act of 1934 ended allotment and created a process for tribes to adopt Western, constitutional forms of government.[52] Part of the "Indian New Deal," the law was intended to assimilate tribal *governments* instead of individuals, and many tribes abandoned traditional modes of government in the wake of its passage to organize according to the Act.

At the end of World War II, however, the United States changed its Indian policy once again, returning to a goal of rapid assimilation of American Indians. Indian children were sent to off-reservation boarding schools to receive American educations.[53] Legislation terminated treaties of over 100 tribes,[54] as well as government assistance programs for Indians. Public Law 280 gave certain states criminal and civil jurisdiction over most of the Indian reservations located within their borders for the first time.[55] The Bureau of Indian Affairs established a Direct Employment Program, successfully encouraging over 100,000 Indians to leave reservations with the promise of job training and placement programs in urban centers.[56] As Congress proclaimed in 1953, it was federal

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52. Indian Reorganization (Howard-Wheeler) Act of June 18, 1934, ch. 576, 48 Stat. 984 (current version at 25 U.S.C. §§ 461–479 (2000)).

53. 2 Prucha, The Great Father, supra note 30, at 1061–62. Once again, assimilationist policy was motivated in part by a progressivist concern for the abject poverty in much of Indian Country. Id. The House of Representatives, for example, issued a report stating:

> If real progress is to be made in training the Indian children to accept and appreciate the white man's way of life, the children of elementary school age who live in violently substandard homes on reservations should be encouraged to attend off-the-reservation boarding schools where they can formulate habits of life equipping them for independent citizenship when they reach maturity.

Id. at 1062 (quoting H.R. Rep. No. 78-2, at 9 (1944)).

54. See, e.g., Klamath Indian Termination Act, ch. 732, 68 Stat. 718 (1954) (codified at 25 U.S.C. §§ 564–564w-2); Federal Supervision Termination Act, ch. 733, 68 Stat. 724 (1954) (repealed 1977 with respect to Siletz Tribe) (codified as amended at 25 U.S.C. §§ 691–708) (terminating status and rights of tribes in western Oregon); Termination Act of 1954, ch. 303, 68 Stat. 250 (repealed 1973) (terminating status and rights of Menominee Tribe).

55. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360 (2000)). For a complete discussion of state jurisdiction and Public Law 280, see generally John W. Gillingham, Pathfinder: Tribal, Federal, and State Court Subject Matter Jurisdictional Bounds: Suits Involving Native American Interests, 18 Am. Indian L. Rev. 73, 93–96 (1993).

56. Urban Indians and Health Care in America: Hearing on the FY 2004 President's Budget for Indian Programs Before the S. Comm. on Indian Affairs, 108th Cong. 4 (2003) (testimony of Kay Culbertson, President, Nat'l Council of Urban Indian Health), available at http://www.senate.gov/~scia/2003hrgs/022603hrg/culbertson.PDF (on file with the *Columbia Law Review*) (discussing Bureau of Indian Affairs relocation program and numbering those relocated at 160,000); William C. Canby, Jr., American Indian Law in a

policy "to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States."[57] Rather than solving the "Indian problem," however, this policy led to increased poverty on reservations and created pockets of poor urban Indians in distressed parts of Western cities.

In response to Indian poverty, a general societal recognition of the values of American pluralism, and the rise of pan-Indian and red power organizations, the federal government again made an about-face, this time announcing a policy of civil rights and self-determination for American Indians.[58] Federal legislation from that era and beyond extended tribal jurisdiction over Indians who did not live on reservations and expanded the powers of tribal governments. The Indian Self-Determination and Education Assistance Act of 1975, for example, provided for renewed tribal self-governance, and tribes assumed control over many of the programs previously run by the federal government.[59] The Indian Child Welfare Act of 1978 extended tribal court jurisdiction to cover certain child custody proceedings involving children living outside of Indian Country, some of whom had never stepped foot on a reservation.[60] Other statutes, such as the Indian Gaming Regulatory Act of 1988, encourage government-to-government relationships between tribes and states that had been considered not only suspect but constitutionally preempted for so much of American history.[61]

Nutshell ch. II, § G (3d ed. 1998); Gonzales & Stansbury, supra note 27 (estimating number relocated at "over 100,000").

57. H.R. Con. Res. 103, 83rd Cong., 67 Stat. B132 (1953) (enacted). The House also resolved that members of dozens of specific tribes "should be freed from Federal supervision and control," and "declared . . . that the Secretary of the Interior should examine all existing legislation dealing with such Indians, and treaties . . . [with] each such tribe" and recommend new legislation "to accomplish the purposes of this resolution." Id.

58. See 2 Prucha, The Great Father, supra note 30, at 1085–86.

59. Pub. L. No. 93-638, § 2, 88 Stat. 2203, 2203 (codified as amended at 25 U.S.C. § 450).

60. See, e.g., 25 U.S.C. § 1903(4) (defining "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe"); id. § 1911(a) ("Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction [over any child custody proceeding involving an Indian child], notwithstanding the residence or domicile of the child."); id § 1911(b) (requiring transfer from state to tribal court of foster care proceedings or proceedings to terminate parental rights under certain circumstances where the Indian child is "not domiciled or residing within the reservation of the Indian child's tribe").

61. Pub. L. No. 100-497, §§ 2–3, 102 Stat. 2467, 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701–2702); see also supra note 6. Some legislation requires states to enforce certain tribal court orders, for example protective orders in the case of the Violence Against Women Act of 1994. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40221, 108 Stat. 1796, 1930–31 (codified as amended at 18 U.S.C. § 2265 (2000)). However, "[e]stablishing procedures for enforcement . . . has been left to the states and tribes." Randy A. Doucet, Domestic Violence and Tribal Courts, *in* Wash. State Gender and Justice Comm'n, Domestic Violence Manual for Judges 2006, at

Economic revitalization and greater exercises of power by tribal governments, while successfully remedying problems in some parts of Indian Country, have led to new conflicts between tribes and states. States and tribes have fought over casinos, taxation, law enforcement, and even seemingly minor issues like tribal license plates.[62] As the impact of tribal exercises of sovereignty has begun to extend beyond the borders of Indian Country, some of these conflicts have leaked past as well. Simultaneously, new legal questions have arisen about state treatment of (and discrimination against) Indians beyond reservation boundaries.

2. *The Legal Categories: Geography, Identity, and Subject Matter.* — Each of the twentieth century federal Indian policies—from reorganization to termination to self-determination—has been upheld by the Supreme Court as a legitimate exercise of constitutionally-granted power, although individual provisions of statutes have been overturned on occasion.[63] Rapid transitions between assimilationist and separationist policies, as well as failure to resolve the territorial confusion remaining after allotment,[64] have led to numerous legal conflicts, especially over the extent of the resuscitation of tribal sovereign powers. The Court has responded by creating a complicated patchwork of rules divined from Indian law past and designed to balance the sovereign interests of federal, state, and tribal governments.

For example, in one of its most celebrated recognitions of tribal sovereignty, the Supreme Court found that tribes may determine questions of membership without being subject to review by federal courts, even if the criteria used would violate the Constitution if a state or federal government adopted it.[65] But this very decision provoked concerns among

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§ 14-1, § 14-7 (Helen Halpert ed., 2007), available at http://www.courts.wa.gov/content/manuals/domViol/chapter14.pdf (on file with the *Columbia Law Review*). "Since Section 2265 was enacted, a majority of states have addressed the issue of enforcement of out-of-state protection orders by amending their state domestic violence codes or statutes." Id.

62. The three conflicts in the *Cabazon* and *Potawatomi* cases, discussed infra Part II.D, were over taxation, law enforcement, and license plates. The two *Potawatomi* cases likely related to contemporaneous conflicts over the renegotiation of a 1995 Kansas-Potawatomi gaming compact. See Roger Myers, Speaker: Indian Casinos Should Pay Taxes, Topeka Cap.-J. (Kan.), Mar. 6, 1999, at 10-A (quoting House Speaker Robin Jennison as having stated that Indian casinos should pay some state taxes, and that "'the Indian nations would be wise to renegotiate their compacts'"); see also Tribal State Gaming Compact Between the Prairie Band Potawatomi Nation in Kansas and the State of Kansas, Apr. 20, 1995, available at http://www.accesskansas.org/ksga/PBP%20Compact.pdf (on file with the *Columbia Law Review*) (addressing questions of taxation, profit sharing, funding, regulation, and law enforcement).

63. See, e.g., Seminole Tribe v. Florida, 517 U.S. 44, 75 (1996) (finding abrogation of state sovereign immunity in Indian Gaming Regulatory Act, supra note 61 and accompanying text, unconstitutional).

64. See generally Judith V. Royster, The Legacy of Allotment, 27 Ariz. St. L.J. 1 (1995) (tracing legacy of allotment in Supreme Court decisions made after repudiation of policy by Congress).

65. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 51 (1978) (finding that federal courts may not review tribal membership determination based on patrilineal descent).

scholars about allowing tribes to exercise jurisdiction over non-Indians who enter reservations, because these non-Indians would lack both constitutional protections and rights as tribe members.[66] Because of these concerns, the Justices have resisted calls to rest decisions about jurisdiction on the physical boundaries of Indian Country, preferring to consider tribal membership or other indications of knowing availment to tribal jurisdiction.[67]

The modern trend in Indian law cases is for the Court to carve out default rules that are dependent on geography, identity, and subject matter. For example, in *Oliphant v. Suquamish Indian Tribe*, the Court announced that, until Congress says otherwise, only the federal government has criminal jurisdiction over non-Indians in Indian Country.[68] In *White Mountain Apache Tribe v. Bracker*, the Supreme Court adopted an interest-based test when a state attempts to assert civil authority over non-Indians on a reservation: Only if significant enough tribal interests are at stake is the state regulation preempted by federal common law.[69]

3. *Complications of Citizenship: Equal Protection and the Political Status of American Indians.* — While these policies and legal categories developed and changed, the political status of American Indians was growing increasingly complicated. Indians had secured citizenship only haphazardly before World War I.[70] Then in 1924, the Snyder Act granted American citizenship to all Indians.[71] But it failed to clarify whether American-citizen Indians were to be granted rights equal to other citi-

66. Angela Riley addresses many of these concerns in an article in which she criticizes the wariness that the Justices have expressed in granting tribes jurisdiction over nonmembers. Angela R. Riley, (Tribal) Sovereignty and Illiberalism, 95 Cal. L. Rev. 799 (2007).

67. See, e.g., Allison M. Dussias, Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision, 55 U. Pitt. L. Rev. 1 (1993) (assessing implications of emphasis shift from territorial-based sovereignty to membership-based sovereignty); Phillip Frickey, A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers, 109 Yale L.J. 1 (1999) (showing Court erosion of territorial-based and membership-based sovereignty with little congressional leadership).

In the field of criminal law, jurisdiction based on both complicated checkerboard geography and tribal status has led to confusion over which police force and prosecutor have authority to proceed with a given case. See All Things Considered: Legal Hurdles Stall Rape Cases on Native Lands (NPR radio broadcast July 26, 2007), available at http://www.npr.org/templates/story/story.php?storyId=12260610; All Things Considered: Rape Cases on Indian Reservations Go Uninvestigated (NPR radio broadcast July 25, 2007), available at http://www.npr.org/templates/story/story.php?storyId=12203114.

68. 435 U.S. 191, 208 (1978).

69. 448 U.S. 136, 145 (1980).

70. See Christopher K. Riggs, Dual Citizenship and the Struggle for American Indian Voting Rights in the Southwest in the 1940s, at 4 (Apr. 2006) (unpublished manuscript, on file with the *Columbia Law Review*), available at http://www.lcsc.edu/criggs/documents/VotingRights1.pdf (explaining that two-thirds of Indians had received citizenship through various treaties and statutes before passage of Snyder Act).

71. See supra note 51.

zens,[72] and it took over thirty years for all states to grant Indians the right to vote.[73] The Snyder Act also failed to specify whether American Indians were to be considered citizens of the state in which their reservation was located or they otherwise resided,[74] an issue that was not resolved conclusively until 1976.[75]

It was not until 1974 that the Supreme Court affirmed that Indians have a unique political status for equal protection purposes that extends beyond the four corners of Indian treaties and the borders of Indian Country. *Morton v. Mancari* raised the question of whether the Fourteenth Amendment interfered with the ability of federal agencies specifically created to benefit American Indians to grant hiring preferences to those Indians.[76] Relying on the "special relationship" between the United States and Indian tribes, the Supreme Court explained that tribal classifications that are political and not racial are subject to mere rational basis review.[77] Although *Mancari* stands alone and is not part of a line of equal protection cases, the Court has never signaled that the holding should be limited in any way: Indians can benefit from quotas and set-asides meant to benefit Indians as political groups, in addition to the rights and privileges guaranteed to them in Indian treaties.

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72. See Riggs, supra note 70, at 5 ("Perhaps the clearest evidence that Congress only intended to extend partial citizenship is that the act's sponsor . . . stated that he did not intend that the law would 'have any effect upon the suffrage qualifications [of Indians] in any State.'").

73. See Willard Hughes Rollings, Citizenship and Suffrage: The Native American Struggle for Civil Rights in the American West, 1830–1965, 5 Nev. L.J. 126, 135–39 (2004) (detailing post-Snyder Act evolution of Indian suffrage).

74. By continuing to exclude "Indians not taxed" from state population counts used to determine representation in Congress, the Fourteenth Amendment left this question unanswered. U.S. Const. amend. XIV, § 2; see supra note 7. The Amendment would, however, become crucial to understanding the citizenship status of Indians after the passage of the Snyder Act.

75. See Goodluck v. Apache County, 417 F. Supp. 13, 16 (D. Ariz. 1976) (ordering reapportionment of county supervisorial district because combination of Snyder Act and Fourteenth Amendment gave Indians on reservations state citizenship), aff'd sub nom. Apache County v. United States, 429 U.S. 876 (1976); Frank Pommersheim, Democracy, Citizenship, and Indian Law Literacy: Some Initial Thoughts, 14 T.M. Cooley L. Rev. 457, 463 (1997) ("Although the United States Supreme Court never squarely addressed the issue [about whether Indian people residing on reservations were state citizens], ultimately all the state and lower federal courts uniformly held in the affirmative.").

76. 417 U.S. 535, 537 (1974).

77. Id. at 552–55. See generally David C. Williams, The Borders of the Equal Protection Clause: Indians as Peoples, 38 UCLA L. Rev. 759 (1991) (analyzing Court's reasoning in *Mancari* and looking closely at all aspects of relationship between American Indians and the Equal Protection Clause). Compare the Supreme Court's holding in *Regents of the University of California v. Bakke*, four years later, where race-based quotas in public higher education were found to be unconstitutional. 438 U.S. 265, 319–20 (1978).

* * *

For American Indians, full citizenship means the privileges and immunities of national citizenship, state citizenship, and tribal citizenship. This means that states must treat them as well as other state citizens, but sometimes are required to accord them certain rights that non-Indians do not have.[78] Since only Congress has the power to abrogate Indian treaties, and since Congress has plenary power over Indian tribes in general, the courts cannot require states to treat Indians exactly the same as everyone else. This is critical to the discussion that follows.

II. State Law and American Indians Outside of Indian Country

American Indians have certain rights and privileges that other American citizens lack. Treaties and executive orders have granted members of federally recognized Indian tribes the rights to continue to live under limited tribal jurisdiction, to acquire certain resources including water and fish, and to receive benefits from the federal government. Certain federal statutes single out American Indians and Indian tribes specifically, governing the management of land held in trust for Indians or tribes, providing for the education of American Indians, or shifting jurisdiction to or away from Indian tribes. While these rights and privileges are generally exercised on land reserved for Indian tribes, many can be exercised to a limited extent outside of Indian Country. Rights granted by treaty and federal statute displace contrary state law through the Supremacy Clause.

But what happens when the text of a treaty or statute is unclear? What happens when state law comes into conflict with federal common law? How much flexibility do states have to act within the general requirements of federal Indian law? This Part discusses Supreme Court answers to questions about state-Indian interactions outside of Indian Country. It traces six early cases in Part II.A. Part II.B then analyzes *Mescalero Apache Tribe v. Jones*,[79] in which the Supreme Court made its first general pronouncement about the ability of states to enforce laws against American Indians outside of Indian Country. Part II.C looks to the aftermath of *Mescalero Apache*, analyzing decisions that struggle to determine whether the case prescribed a rule, and, if so, when and how to apply it. Part II.D focuses on two recent state-tribe conflicts, one in Kansas and the other in California, where federal courts fought over the application of *Mescalero Apache*; the Supreme Court's clarification of *when* to apply the rule; and subsequent problems that courts have faced determining *how* to apply the rule.

78. The clearest example of this is where a treaty guarantees a tribe the right to hunt or fish outside of the lands reserved for them to live on. See, e.g., infra text accompanying notes 86–90.

79. 411 U.S. 145 (1973).

A. *Before 1973: Cases About Indians Outside of Indian Country*

Before 1973, the Supreme Court heard at least six cases challenging the ability of states to enforce laws against Indians outside of Indian Country. Each posed a slightly different question about how to interpret the language of Indian treaties, state enabling acts, and other federal laws, when Indians claimed immunity from state law. The cases are grounded, more or less, in the doctrines of federal Indian law discussed in Part I. They assume that states have more police power over Indians who have gone beyond the boundaries of Indian Country than those who have stayed on reservation. But none develops a specific doctrine, and none addresses state regulation of actions taken by the tribe as a whole, as opposed to those of Indians claiming immunity based on tribal membership.

In the first two cases, the Court found alternatives to reading treaties literally where they appeared to grant Indians immunity from state hunting and fishing laws. In *Ward v. Race Horse* (1896), an Indian claimed that a treaty preempted Wyoming law because it allowed Bannock Indians to hunt in "unoccupied lands of the United States" and was never expressly repealed.[80] Wyoming claimed that the treaty ceased to apply in Wyoming once Wyoming was admitted as a state on equal footing with other states. The majority allowed for the proposition that an Indian treaty right, even if exercised outside of Indian Country, could preempt state law. Nonetheless, the Court found for Wyoming: Congress's admission of Wyoming as an equal state, without stipulation that its sovereignty was limited by Indian treaties, was tantamount to expressly repealing the treaty as it applied to Wyoming land.[81]

In *New York ex rel. Kennedy v. Becker* (1916), the Court upheld prosecution of three Seneca Indians for violating a statute prohibiting the use of fishing spears, finding that a treaty that appeared to stand in the state's way was unworkable if interpreted as the Seneca understood it.[82] The Court acknowledged that the obvious reading of the treaty allowed "the State [to] regulate the whites and . . . the Indian tribe [to] regulate its

80. 163 U.S. 504, 504 (1896), abrogated on other grounds by Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999). Article 4 of the Fort Bridger Treaty, at issue in *Ward*, states that

> The [Bannock] Indians . . . agree . . . they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.

Id. at 504 (quoting Treaty with the Eastern Band Shoshoni and Bannock, U.S.-Shoshoni (Eastern Band)-Bannock Tribe of Indians, July 3, 1868, 15 Stat. 673).

81. Id. at 515. The Court explained that "the enabling act not only contains no expression of the intention of Congress to continue the burdens in question in the State, but, on the contrary, its intention not to do so is conveyed by the express terms of the act of admission." Id.

82. 241 U.S. 556, 563 (1916).

members."[83] It rejected this reading, however, because then "either [regulator] would be free to destroy the subject of the power. Such a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both."[84]

Two of the next cases related to fishing rights guaranteed in treaties from the 1850s.[85] The Court tried to differentiate between indispensable and merely legitimate state regulations, and between regulations that conflicted with a treaty right and those that merely applied to Indians while they were exercising a treaty right. In *Tulee v. Washington* (1942), the Supreme Court found that an 1859 treaty precluded Washington from charging members of the Yakima Nation fishing license fees.[86] Mr. Tulee claimed that "the treaty [gave] him an unrestricted right to fish in the 'usual and accustomed places', free from state regulation of any kind."[87] The state claimed that it should be allowed to apply nondiscriminatory license requirements to the Yakima Indians when they fished outside of the reservation, arguing that "since [Washington's] license laws do not discriminate against the Indians, they do not conflict with the treaty."[88] The Court suggested that the state could impose nondiscriminatory "restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation" if they were "necessary for the conservation of fish."[89] Despite the legitimate "regulatory purpose" of the licensing fees in question, however, they were "not indispensable to the effectiveness of a state conservation program" and could not be applied to the Yakima.[90]

In *Puyallup Tribe v. Department of Game* (1968), the Court affirmed its *Tulee* dictum.[91] States can apply regulatory laws to individual Indians, even if those Indians are exercising rights guaranteed by treaty, as long as the laws do not conflict with the exact language of the treaty, and "provided the regulation meets appropriate standards and does not discriminate against the Indians."[92] In this case, the treaty did not mention "the manner in which the fishing may be done and its purpose," and so the state could regulate commercial Indian fishing "in the interest of conservation."[93]

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83. Id.

84. Id. The Court permitted the state to prosecute the Seneca because of "that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the State over the lands where the privilege was exercised." Id. at 564.

85. Puyallup Tribe v. Dep't of Game, 391 U.S. 392, 393 (1968); Tulee v. Washington, 315 U.S. 681, 683 (1942).

86. 315 U.S. at 685.

87. Id. at 684.

88. Id.

89. Id.

90. Id. at 685.

91. 391 U.S. 392, 399 (1968).

92. Id. at 398.

93. Id. (emphasis omitted).

The other two cases that came before the Court prior to 1973 did not involve treaties. *Shaw v. Gibson-Zahniser Oil Corp.* (1928) concerned the power of states to tax Indians.[94] If lands were always Indian land, "nothing short of an express declaration by Congress would have subjected them to state taxation."[95] In this case, however, the Department of the Interior purchased a tract of land in Oklahoma for a Creek Indian child that had previously been owned by non-Indians.[96] The Court found that the Secretary of the Interior does not automatically exempt lands from state taxation when purchasing them for an Indian and restricting their alienability.[97] Since the lands were once taxable by the state, they are among the "instrumentalities which, though Congress may protect them from state taxation, will nevertheless be subject to that taxation unless Congress speaks."[98] Additionally, although the purchase was made with congressional authorization, the statute allowing the Secretary of the Interior to acquire the land was insufficient to *permit* him to exempt it from state taxation since the law "contain[ed] no express exemption from taxation of [the lands'] proceeds."[99]

In *Organized Village of Kake v. Egan* (1962),[100] the Court found that Alaska[101] could enforce state fishing laws banning trap fishing against Tlingit Indian people exercising an aboriginal (as opposed to treaty)

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94. 276 U.S. 575, 577 (1928).

95. Id. at 579.

96. Id. at 577.

97. Id. at 581.

98. Id. To hold the lands automatically immune, explained the Court,

> would be inconsistent with one of the very purposes of their creation, to educate the Indians in responsibility, and would present the curious paradox that the Secretary by a mere conveyancer's restriction, permitted by Congress, had rendered the land free from taxation and thus actually relieved the Indians of all responsibility.

Id. at 580–81.

99. Id. at 581 (referring to Act of May 27, 1908, ch. 199, 35 Stat. 312, and explaining that in any event "the Secretary [did not] purport[ ] to make . . . such an exemption").

100. 369 U.S. 60 (1962).

101. Most Alaska Natives are not considered to be American Indians, a title reserved for the aboriginal inhabitants of the lower forty-eight states and a few tribes, including Tlingit tribes, in Alaska. The United States never signed treaties with Alaska Natives, and American law does not treat Alaska Native tribal land or sovereignty claims the same as those of American Indian tribes. See, e.g., Harrison v. State, 791 P.2d 359, 362 (Alaska Ct. App. 1990) (citing Native Vill. of Stevens v. Alaska Mgmt. & Planning, 757 P.2d 32 (Alaska 1988), to claim that "[t]he Alaska Supreme Court has held that most Native groups in Alaska are not self-governing or sovereign"). For a discussion of the unique history of tribal status, self-government, and jurisdiction in Alaska, see generally Geoffrey D. Strommer & Stephen D. Osborne, "Indian Country" and the Nature and Scope of Tribal Self-Government in Alaska, 22 Alaska L. Rev. 1 (2005). Perhaps more importantly, Alaska is a Public Law 280 state, meaning that it is one of the states to which Congress has expressly granted both criminal and civil jurisdiction over native lands. See 18 U.S.C. § 1162 (2000) (criminal jurisdiction); 28 U.S.C. § 1360 (2000) (civil jurisdiction); supra note 55 and accompanying text (discussing Public Law 280).

right.[102] The Court found for the state because of the lack of evidence that "Alaska has disclaimed the power to legislate with respect to any fishing activities of Indians in the State," and because Alaska's Statehood Act was intended to "preserve the status quo with respect to aboriginal and possessory Indians claims."[103]

B. *1973:* Mescalero Apache Tribe v. Jones

In *Mescalero Apache Tribe v. Jones*, the Court was faced for the first time with a question about the ability of states to tax tribal economic developments outside of Indian Country. The Court referenced five of the above decisions[104] to derive a general maxim: "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State."[105] It then made a very conservative reading of a federal law that allowed the Mescalero Apache Tribe to run the ski resort in question, and found that New Mexico had a limited ability to tax the enterprise.

In 1963, the Mescalero Apache Tribe acquired a ski resort adjacent to its reservation on land that it leased from the federal government,[106] with the financial assistance of the federal government,[107] and pursuant to provisions of a federal statute intended to encourage Indian economic development.[108] Five years later, the New Mexico Bureau of Revenue imposed two taxes on the tribe and resort.[109] The New Mexico Court of Appeals upheld both assessments.[110]

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102. 369 U.S. at 62, 76 ("[N]either Kake nor Angoon has been provided with a reservation and . . . there is no statutory authority under which the Secretary of the Interior might permit either to operate fish traps contrary to state law.").

103. Id. at 64–65.

104. Interestingly, the decision never mentions New York ex rel. Kennedy v. Becker, 241 U.S. 556 (1916), discussed supra text accompanying notes 82–84, which is the most extreme case supporting the *Mescalero Apache* decision.

105. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148–49 (1973).

106. Id. at 160 (Douglas, J., dissenting in part). The Sierra Blanca Ski Enterprises had been opened by a private developer two years earlier on federally owned land adjacent to the reservation. Id. at 146 (majority opinion); Ski Apache: A Mescalero Apache Enterprise, Ski Apache History, at http://www.skiapache.com/history.htm (last visited Aug. 21, 2008) (on file with the *Columbia Law Review*). While some cross-country trails did run through the reservation, the Court treated this case as a question of off-reservation state regulation. See *Mescalero Apache*, 411 U.S. at 146.

107. Mescalero Apache Tribe v. Jones, 489 P.2d 666, 668 (N.M. Ct. App. 1971), cert. denied, 83 N.M. 151 (1971), aff'd in part and rev'd in part, 411 U.S. 145.

108. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–479 (2000)); *Mescalero Apache*, 411 U.S. at 152 ("The intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" (quoting H.R. Rep. No. 73-1804, at 6 (1934))).

109. See recitation of facts in *Mescalero Apache*, 411 U.S. at 146–47; *Mescalero Apache*, 489 P.2d at 667–68.

110. *Mescalero Apache*, 489 P.2d at 667.

The U.S. Supreme Court granted certiorari to determine whether federal law immunized tribes from state taxation; or if not, if specific provisions in the Indian Reorganization Act (IRA)[111] immunized the ski resort from one or both of the taxes assessed by the State of New Mexico.[112] The Court first rejected the idea that tribes are always under the exclusive jurisdiction of the federal government as a "treacherous" generalization.[113] While acknowledging that "there has been no satisfactory authority [allowing states to] tax[ ] Indian *reservation* lands or Indian income from activities carried on *within the boundaries* of the reservation,"[114] the Court distinguished this case because "tribal activities conducted *outside* the reservation present different considerations."[115]

Having rejected the idea of blanket immunity, the Court turned to the specific language of the IRA, which governed the lease arrangement between the United States and the tribe.[116] The Court explained that, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State."[117] The majority then read the words of the IRA literally and narrowly, explaining that it was looking to the "face" of the IRA for "clear statutory guidance."[118] It found that the exact language of the IRA—that lands acquired pursuant

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111. See supra note 108.

112. *Mescalero Apache*, 411 U.S. at 147.

113. Id. at 147–48. The Mescalero Apache had argued in one of their briefs that exclusive federal jurisdiction over the tribe precluded New Mexico from taxing it. Petitioner's Reply to the Brief for the Respondents at 2–6, *Mescalero Apache*, 411 U.S. 145 (No. 71-738), 1972 WL 136294.

114. *Mescalero Apache*, 411 U.S. at 148 (emphasis added).

115. Id. (emphasis added). Nor was the Court prepared to recognize the ski resort, with its roots in the Indian Reorganization Act, as a "federal instrumentality constitutionally immune from state taxes of all sorts" (although Congress retained power to immunize the resort from state taxes if it chose to do so explicitly). Id. at 150.

116. At the time of the *Mescalero Apache* litigation, the original language of section 5 of the Indian Reorganization Act (IRA) had not been amended, and the United States Code stated that

> Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 465 (1970). Technically, the IRA had given the federal government the right to *acquire* land for tribes which would then be exempt from certain state taxes. Since the federal government already owned the land in question, the fit was not exact. But, noting that the Solicitor General had remarked in an amicus curiae brief that "'it would have been meaningless for the United States, which already had title to the forest, to convey title to itself for the use of the Tribe,'" the Court determined that "the lease arrangement here in question was sufficient to bring the Tribe's interest in the land within the immunity afforded by [section 5]." *Mescalero Apache*, 411 U.S. at 155 n.11 (quoting Brief for the United States as Amicus Curiae at 13, *Mescalero Apache*, 411 U.S. 145 (No. 71-738), 1972 WL 137541).

117. *Mescalero Apache*, 411 U.S. at 148–49.

118. Id. at 155–57.

to it were to "be exempt from State and local taxation"[119]—immunized the tribe against property taxes but not income taxes.[120] The dissent, in contrast, would have read the IRA as "an effort by Congress to extend its control to Indian economic activities outside the reservation for the benefit of its Indian wards,"[121] and it would have found that the preemptive nature of the IRA[122] gave blanket tax immunity to the tribal enterprise.[123]

C. *From 1973 to the End of the Twentieth Century:* Mescalero Apache *as Precedent?*

The *Mescalero Apache* Court used qualifiers such as "generally been held," "express," "nondiscriminatory," and "otherwise applicable,"[124] without bothering to state how they limited the case's maxim. In the nearly thirty years that followed before the Supreme Court clarified the *Mescalero Apache* rule,[125] courts struggled to interpret what the Supreme Court meant when it restated what had "generally" happened in past cases, without regard to the particulars or reasoning behind them—it was not immediately clear when courts were to follow the norm and when they could deviate from it. Nor was it clear how widely courts should search for "express federal law," since the Court did not reference the treaties or state enabling acts that had been dispositive in previous cases.[126] The decision seemed to reject the use of tests that would weigh state and tribal sovereign interests, but it did not say so explicitly.

One of the first tests of *Mescalero Apache* arose when Indian parents went to state courts to enforce tribal custody determinations that had been made according to tribal law.[127] If these Indian parents or children were "beyond reservation boundaries," *Mescalero Apache* might mean that state courts would have to apply nondiscriminatory state law instead of applying tribal law or finding that the tribal court had jurisdiction. If

119. 25 U.S.C. § 465 (2000).

120. Here, this meant that the tribe was immune from state taxes assessed against the materials purchased to build the ski lifts, but not those based on gross sales. *Mescalero Apache*, 411 U.S. at 155–57 (finding that section 5 "exempts land and rights in land, not income derived from its use" and seeing "no reason to hold that it forbids income as well as property taxes").

121. Id. at 160 (Douglas, J., dissenting in part).

122. Id. at 163 (calling "tribal corporations organized under the 1934 [Indian Reorganization] Act" enterprises "organized solely to carry out [federal] governmental objectives" (internal quotations omitted)).

123. Id. at 162 ("State taxation [here] interferes with [a] federal project. The ski resort, being a federal tool to aid the tribe, may not be taxed by the State without the consent of Congress.").

124. Id. at 148–49 (majority opinion).

125. See Wagnon v. Prairie Band Potawatomi Nation (Prairie Band III), 546 U.S. 95 (2005), discussed infra Part II.D.3.

126. See supra Part II.A.

127. The problem underlying this case no longer arises because of the Indian Child Welfare Act. See supra note 60 and accompanying text.

they were not "beyond reservation boundaries," however, *Mescalero Apache* would not be an impediment to enforcing tribal custody determinations. Following the lead of the Western District of Michigan, courts looked to "the domicile of the children at the time their physical custody was gained by the probate court," almost uniformly enforcing tribal determinations.[128] Many gave tremendous leeway to arguments that even one or two year absences from Indian Country were insufficient to change a child's domicile.[129]

Other courts asked to address the problem of state law being enforced against Indians "going beyond reservation boundaries" were uncertain whether *Mescalero Apache* presented them with a "tripartite balancing" scheme[130] or a bright-line rule. In one case, the Ninth Circuit read *Mescalero Apache* as a bright-line rule for interpreting the Commerce Clause only, and no longer relevant when the tribe stated a claim under the Supremacy Clause.[131]

In 1998, the Supreme Court complicated matters further by choosing not to follow *Mescalero Apache* in a case where it appeared that a state was attempting to apply state law against an Indian tribe for actions taken off reservation.[132] In *Kiowa Tribe v. Manufacturing Technologies, Inc.*, the Supreme Court overturned an Oklahoma decision that tribes can be sued in state court for off-reservation conduct in breach of contract, stating that "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immu-

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128. See Wis. Potowatomies v. Houston, 393 F. Supp. 719, 731 (W.D. Mich. 1973); see also Wakefield v. Little Light, 347 A.2d 228, 237–39 (Md. 1975) (finding twenty-month stay in Maryland insufficient to change child's domicile and determining exclusive jurisdiction over custody remained with Crow Court); In re Adoption of Buehl, 555 P.2d 1334, 1340–41 (Wash. 1976) ("[B]ecause the [tribal] court did not intend a change in his domicile to be accomplished by his temporary stay in Washington, the child did not go 'beyond the reservation boundaries' and become subject to Washington jurisdiction by virtue of the general rule stated in *Mescalero Apache Tribe v. Jones*." (citation omitted)).

129. See supra note 128. Even courts that chose not to recognize tribal jurisdiction over the custody dispute used the Western District of Michigan's paradigm. See In re Duryea, 563 P.2d 885, 887 (Ariz. 1977) (distinguishing case at bar because children were "voluntarily and purposely removed" from reservation, and because parents left children off reservation, possibly abandoning them); In re Doe's Adoption, 555 P.2d 906, 916–17 (N.M. Ct. App. 1976) (distinguishing because no indication child resided or was domiciled on reservation, and because proceedings initiated in state court, but acknowledging tribe might have concurrent jurisdiction); In re Greybull, 543 P.2d 1079, 1080 (Or. Ct. App. 1975) (distinguishing because parents had been absent from reservation for ten years, and children had never lived in Indian Country).

130. See *Little Light*, 347 A.2d at 237.

131. Queets Band of Indians v. Washington, 765 F.2d 1399, 1405–07 (9th Cir. 1985) (finding refusal by Washington State to apply its reciprocity statute to tribal licensing schemes constitutional under *Mescalero Apache* as grounded in Commerce Clause, but unconstitutional based on Supremacy Clause), vacated as moot, 783 F.2d 154 (9th Cir. 1986).

132. Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751 (1998).

nity."[133] The Court distinguished *Mescalero Apache* opaquely, explaining only that "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them."[134]

D. *Twenty-First Century Clarification and Expansion of* Mescalero Apache

The biggest challenge to *Mescalero Apache* came from a circuit split that the Supreme Court would resolve in 2005.[135] The *Cabazon* series of cases found the Ninth Circuit reading *Mescalero Apache* as a bright-line rule to evaluate any state conduct occurring outside of Indian Country.[136] In the *Prairie Band* series of cases, however, the Tenth Circuit believed that state law, though technically enforced off reservation, implicated tribal sovereignty concerns too much for the court to apply *Mescalero Apache*'s pronouncement.[137] It turned to an alternate interest-weighing test instead.[138] While the Supreme Court's decision in *Prairie Band III* ultimately supported the Ninth Circuit understanding, it left some of the most complicated aspects of *Mescalero Apache* unresolved. Most importantly, it failed to address what the Court meant by "nondiscriminatory state law," and to whom judges should look as similarly situated individuals or groups when attempting to discern discrimination.

1. *The Cabazon and California.* — The *Cabazon* cases originated out of a conflict between a county in California and the Cabazon Band of Mission Indians over law enforcement vehicles. Against the wishes of the tribe, the Ninth Circuit turned to *Mescalero Apache* to resolve the conflict.[139] In *Cabazon II*,[140] the Ninth Circuit determined that *Mescalero Apache* sets down a bright-line rule to be applied in every case where states enforce laws against Indians outside of Indian Country—the state law's proximate impact on tribal concerns on the reservation is irrelevant.[141] Three years later, after some of the facts of the case had changed, the Ninth Circuit found in *Cabazon III* that California's actions were unlaw-

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133. Id. at 754.

134. Id. at 755. The three-Justice dissent emphasized that the Court was not relying on any statute or treaty and urged the Court to allow "state courts to decide for themselves whether to accord [sovereign] immunity to Indian tribes as a matter of comity." Id. at 760 (Stevens, J., dissenting).

135. See infra Part II.D.3.

136. See infra Part II.D.1.

137. See infra Part II.D.2.

138. This test had been used by the Supreme Court in White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (considering federal, state, and tribal interests implicated by state taxation of non-Indian timber harvesters in Indian Country).

139. See Appellant's Reply Brief at 3, Cabazon Band of Mission Indians v. Smith (Cabazon II), 249 F.3d 1101 (9th Cir. 2001) (No. 99-55229), 1999 WL 33625952 (viewing Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), as "irrelevant" and "not controlling").

140. *Cabazon I* was a mostly unrelated but famous case about Indian gaming. See California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

141. *Cabazon II*, 249 F.3d 1101, withdrawn because of change in circumstances, 271 F.3d 910 (9th Cir. 2001).

fully discriminatory,[142] becoming the first court to find *for* a tribe under the *Mescalero Apache* rule.[143]

The *Cabazon* cases arose out of a California law prohibiting vehicles from having emergency light bars.[144] The county enforced the law against tribal police officers, arguing that the law did not exempt them even though it exempted practically every other law enforcement vehicle operating in the state.[145] Because Cabazon territory is noncontiguous, tribal police officers were forced to stop their vehicles and cover their light bars before traveling between different portions of the reservation, even in the middle of an emergency.[146]

The state's action was upheld. But the tribe had merely opposed the application of *Mescalero Apache* and had never argued that the California law was discriminatory.[147] After losing its case in *Cabazon II*, the tribe entered into a deputization agreement with the federal government. The Cabazon returned to court, this time arguing that California—which generally exempted federal officers from the light bar prohibition—was discriminating against tribal law enforcement officers by continuing to enforce the prohibition against them.[148]

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142. Cabazon Band of Mission Indians v. Smith (Cabazon III), 388 F.3d 691, 701 (9th Cir. 2004).

143. Until that point, any decision that benefited a tribe was reached because a court found a reason that *Mescalero Apache* did not apply. For example, many custody cases found courts looking past a child's prolonged stay outside of Indian Country to his domicile to determine that they need not apply a rule governing decisions "beyond reservation boundaries." See supra text accompanying notes 127–129.

144. See Cal. Veh. Code §§ 25251–25251.6 (West 2000) (regulating use of flashing lights on vehicles generally and limiting use or display of emergency light bars).

145. See Cal. Penal Code §§ 830.8, 830.39 (West 2008) (permitting specific parties to drive in California with light bars displayed, including certain authorized federal employees, Washoe tribal police officers, and law enforcement officials from Oregon, Nevada, and Arizona); Cal. Veh. Code § 165 (permitting all federal law enforcement officials to display and to use light bars).

146. See *Cabazon III*, 388 F.3d at 693 ("To avoid repeated stops and arrests, Chief Paul D. Hare, the Tribe's Director of Public Safety, instructed his officers to place canvas covers over their vehicles' light bars when they left the reservation.").

147. Cabazon Band of Mission Indians v. Smith (Cabazon II), 249 F.3d 1101, 1103–04, withdrawn because of change in circumstances, 271 F.3d 910 (9th Cir. 2001). In *Cabazon II*, the state argued that *Mescalero Apache* should govern the case, and the tribe argued that the court should use an interest-balancing test from White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980). Telephone Interview with Glenn Feldman, Attorney for Cabazon Band (Dec. 21, 2007) [hereinafter Feldman Interview] (explaining that discrimination was not argued in *Cabazon II*). Although all of the judges believed that *Mescalero Apache* was the appropriate case to use, one dissented from the opinion of the court, believing that even under the *Mescalero Apache* test, the state action was discriminatory and therefore invalid. *Cabazon II*, 249 F.3d at 1114–15 (Browning, J., dissenting).

148. Feldman Interview, supra note 148 (explaining that the Cabazon decided to follow up on dissenting judge's argument from *Cabazon II*).

In *Cabazon III*, the Ninth Circuit agreed.[149] After noting that "[t]he *Mescalero* Court did not define what constitutes a 'nondiscriminatory state law,'" the Ninth Circuit looked to the definition of discrimination in Black's Law Dictionary, finding it to mean "'[d]ifferential treatment; esp., a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored.'"[150] And after deciding that "the relevant comparison . . . is between law enforcement agencies" rather than sovereign entities or "individual California residents,"[151] the court used *Mescalero Apache*'s discrimination test to find in favor of a tribe for the first time.

2. *The Prairie Band Potawatomi and Kansas.* — In 2001, the year *Cabazon II* was decided, the Prairie Band Potawatomi Nation was deeply embroiled in two conflicts with the State of Kansas that eventually made their way to the Supreme Court in two different lines of cases. The first conflict found Kansas seeking to collect revenue from fuel later to be sold on the Potawatomi reservation, at which point it would be exempt from state taxation, by taxing distribution rather than retail sale.[152] The second conflict found the tribe ticketing motorists for traffic violations on the federal highway running through the reservation, and the state ticketing Indian motorists for driving off of the reservation with tribal license plates instead of Kansas ones.[153]

In both *Prairie Band* cases, the Tenth Circuit found that *Mescalero Apache* did not govern. The statutes being challenged had technically

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149. *Cabazon III*, 388 F.3d at 701 ("We find that application of the Vehicle Code to prohibit the tribal policing authority's display of emergency light bars does not constitute a 'nondiscriminatory application of state law.'").

150. Id. at 698 (quoting Black's Law Dictionary (8th ed. 2004)).

151. Id. at 699 & n.12.

152. Kansas explicitly amended its fuel tax to include gas intended for retail sale on Indian reservations. See 1998 Kan. Sess. Laws 449–52 (amending Kan. Stat. Ann. § 79-3408 to impose tax "on the distributor of the first receipt of the motor fuel," and adding provision to Kan. Stat. Ann § 79-3408c stating explicitly that tax did not apply directly to "any licensed retailer who is a native American [or native American tribes] whose licensed place of business or businesses are located on such retailer's [or tribe's] reservation"). The non-Indian fuel supplier for the Potawatomi gas station refused to pay the taxes, and Kansas responded with criminal charges. The tribe then challenged the gas tax in federal court as an "infringement and impairment of its self government activities." Amended Complaint for Declaratory and Injunctive Relief at 2–3, Prairie Band of Potawatomi Indians v. Richards, 241 F. Supp. 2d 1295 (D. Kan. 2003) (No. 99-4071-DES), 2000 WL 35540208; see also Brief for the United States as Amicus Curiae Supporting Respondents at 4, Wagnon v. Prairie Band Potawatomi Nation (Prairie Band III), 546 U.S. 95 (2005) (No. 04-631), 2005 WL 1687169 (recounting history of case).

153. See Andrea Albright, Official: Potawatomi Refused Compromise, Topeka Cap.-J. (Kan.), Sept. 16, 1999, at 9-A (discussing background to federal case filed by tribe over licensing controversy). The tribe was following the lead of several other Indian nations, attempting to assert sovereignty by creating a tribal license plate scheme. See generally Jonathan Taylor, Harvard Project on Am. Indian Econ. Dev., Oglala Sioux License Plates: Manager Tries to Assert Tribal Sovereignty—A Teaching Case Study in Tribal Management for Oglala Lakota College (1996) (discussing tribal efforts to gain state recognition of license plates in South Dakota and Minnesota).

been enforced outside of Indian Country. But because the court was more interested in the dramatic impact that the state law had on tribal interests *inside* of Indian Country, it used a different Indian law test that generally applied to state action inside of Indian Country.[154] In *Prairie Band I* (the fuel case), for example, the Tenth Circuit declined to consider the legal incidence of the tax dispositive.[155] Although the Kansas statute was carefully constructed to tax the fuel distributor off reservation, "the distributors are allowed to pass the tax directly to retailers [in Indian Country],"[156] and so the tax was invalid.[157] Nor were the judges convinced that *Prairie Band II* (the licensing case) should turn on the fact that Kansas was ticketing tribal cars off reservation.[158] Since the cars would be traveling on and off of the reservation, the Indians in question were only going beyond the reservation boundaries some of the time. The case was not really about the power of the state off reservation, but its power to impact Indian drivers on the reservation as well.[159]

3. Prairie Band III. — In 2005, the Supreme Court accepted *Prairie Band I* (the tax case) on certiorari, and resolved the circuit split.[160] In *Prairie Band III*, Justice Thomas summarily rejected the framework that the Tenth Circuit had used in *Prairie Band I*.[161] The Court declared that using an interest-balancing test would be "inconsistent with the special geographic sovereignty concerns that gave rise to [the balancing] test,"

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154. Compare the Ninth Circuit decisions in *Cabazon II* and *III*, discussed supra Part II.D.1.

155. Prairie Band Potawatomi Nation v. Richards (Prairie Band I), 379 F.3d 979, 983 (10th Cir. 2004), rev'd sub nom. Wagnon v. Prairie Band Potawatomi Nation (Prairie Band III), 546 U.S. 95 (2005).

156. Id. at 982.

157. Id. at 982–83. As the court wrote,

> The Nation asks us to invalidate the tax as it applies to the Nation's fuel under two independent but related doctrines. First, the Nation argues that federal law preempts the tax because federal and tribal interests against state taxation outweigh Kansas' interests in imposing the tax. Second, the Nation argues that the tax is invalid because it impermissibly infringes on its rights of self-government. Either of these doctrines would be sufficient to invalidate the Kansas fuel tax as applied here.

Id.

158. Prairie Band of Potawatomi Indians v. Wagnon (Prairie Band II), 402 F.3d 1015, 1020 (10th Cir.) (finding relevant question to be "whether defendants' actions interfere with plaintiff's sovereignty or ability to self-govern to the extent that the State's actions must be preempted by *federal law*, when some of defendants' actions may occur off the reservation"), vacated, 546 U.S. 1072 (2005).

159. Id. at 1028 (affirming issuance of permanent injunction); Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1257 (10th Cir. 2001) (affirming issuance of preliminary injunction).

160. Interestingly, the Supreme Court did not mention the *Cabazon* cases at all in its decisions, and did not acknowledge that there was a circuit split about when *Mescalero Apache* was to govern.

161. Wagnon v. Prairie Band Potawatomi Nation (Prairie Band III), 546 U.S. 95, 110 (2005).

and with the Court's attempt to establish "bright-line standard[s]" regarding taxation cases.[162]

While *Prairie Band III* explained that *Mescalero Apache* had in fact laid down a bright-line rule, and was explicit about when to apply it, the Court did little to clarify other questions that had been riddling the courts who had tried to apply *Mescalero Apache* in the past. It did not offer an idea of the types of exceptions that might explain the use of the word "generally," or ground the rule in constitutional law, text, or theory. Most importantly, the Court did nothing to clarify what it meant by nondiscriminatory law. It did not address the *Cabazon* cases and the Ninth Circuit's finding of discrimination.

Six days after publishing *Prairie Band III*, the Court simply remanded the vehicle registration case (*Prairie Band II*) with the limited instruction to reconsider it "in light of" the Court's tax decision.[163]

4. Prairie Band IV*, Taxes, and Everything Else.* — In the wake of *Prairie Band III*, courts have not had difficulty evaluating state taxes assessed off reservation;[164] but they have had difficulty analyzing other laws using *Mescalero Apache*. *Prairie Band III* upheld a tax that was specially tailored to reach goods before they entered an Indian reservation as nondiscriminatory, giving states free rein to target preretail stages as long as they do not tax Indians *more* than state citizens or at different stages. Thus, while some courts have found for tribes in *Mescalero Apache* tax cases, the decisions have all left room for the states to clarify their tax laws even with the express purpose of taxing goods before they reach Indian Country.[165]

162. Id. at 113. Several Justices have commented about their desire to streamline federal Indian law in general. See, e.g., United States v. Lara, 541 U.S. 193, 214–15 (2004) (Thomas, J., concurring in judgment) (calling inherent sovereignty and congressional plenary power "two largely incompatible and doubtful assumptions"); see also Philip P. Frickey, (Native) American Exceptionalism in Federal Public Law, 119 Harv. L. Rev. 431, 470–77 (2005) [hereinafter Frickey, (Native) American Exceptionalism] (considering Justice Thomas's critique of Indian law and its implications).

163. *Wagnon*, 546 U.S. at 1073.

164. See Canby, supra note 56, ch. IX, § A ("A distinction is drawn in the field of Indian Law between governmental power to tax or regulate and the power to adjudicate."); Cohen's Handbook, supra note 6, ch. 8 ("Taxation . . . warrants a separate discussion, because . . . the jurisdictional principles have been applied in a unique manner in the tax area."); cf. Sheppard v. Sheppard, 655 P.2d 895, 910–11 (Idaho 1982) (drawing "clear distinction" in Public Law 280 context "between state regulation, including taxation . . . and civil controversies").

165. For example, after losing a case based on the same fuel tax as *Prairie Band III*, Kansas amended the statute once again to bring fuel importers specifically within its bounds. See 2006 Kan. Sess. Laws 278–79 (amending Kan. Stat. Ann. § 79-3408 to include importers within definition of "distributor of the first receipt"—who are taxed). But see Winnebago Tribe of Neb. v. Morrison, 512 F. Supp. 2d 1182, 1186 (D. Kan. 2007) (granting tribe's motion for summary judgment based on state court's finding in Winnebago Tribe of Neb. v. Kline, 150 P.3d 892 (Kan. 2007), that tribal importer was not subject to fuel tax). Washington State amended its fuel tax in 2007 after a federal court rejected its request to have a tribal taxation case reheard in light of *Prairie Band III* as

Cases unrelated to taxation, however, seem to present a real possibility of unlawful discrimination that cannot be fixed by minor tampering with the language of state statutes. Just as the Ninth Circuit found California to be practicing unlawful discrimination in *Cabazon III*,[166] the Tenth Circuit found Kansas to be doing so in *Prairie Band IV* (the licensing case remanded by the Supreme Court).[167]

The Tenth Circuit began from the premise that "nondiscriminatory" in *Mescalero Apache* means nondiscriminatory against the Indian Nation as a sovereign entity issuing the license plate, not as against the person being ticketed.[168] The court rejected Kansas's "sole reason" for not recognizing Potawatomi licenses: the absence of the plates from the national criminal database.[169] Since Kansas recognized license plates issued by out-of-state tribes also not entered into the national criminal database,[170] the Tenth Circuit found the state's subsequent refusal to recognize the

"untimely and meritless." Squaxin Island Tribe v. Stephens, No. C03-3951Z, 2006 WL 278559, at *5 (W.D. Wash. Feb. 3, 2006); see also Squaxin Island Tribe v. Stephens, No. C03-3951Z, 2006 WL 521715, at *5 (W.D. Wash. Mar. 2, 2006) (granting permanent injunction against imposition of state tax). The decision was based in part on the fact that the state repeatedly "fail[ed] to identify which entity in the supply chain bears the legal incidence" of the tax. *Squaxin*, 2006 WL 278559, at *5. *Prairie Band III* and the *Squaxin* decisions clearly inspired the Washington State legislature to amend two of the main provisions in question in the *Squaxin* case in 2007: sections 82.36 and 82.38 of the Washington Revised Code. In addition to clarifying that taxes previously imposed on "motor vehicle fuel users" were levied specifically on nondistributors, and immediately after greatly expanding a section of the Washington Revised Code that allowed for state-tribe fuel tax negotiations, the legislature added a brand new section to the law:

> It is the intent and purpose of this chapter that the tax shall be imposed at the time and place of the first taxable event and upon the first taxable person within this state. Any person whose activities would otherwise require payment of the tax imposed by RCW 82.36.020 but who is exempt from the tax nevertheless has a precollection obligation for the tax that must be imposed on the first taxable event within this state. Failure to pay the tax with respect to a taxable event shall not prevent tax liability from arising by reason of a subsequent taxable event.

Act Relating to the Administration of Fuel Taxes, 2007 Wash. Sess. Laws, ch. 515, § 20 (adding text as new Wash. Rev. Code §§ 82.36.022 and 82.38.031).

166. See supra text accompanying notes 149–151.

167. Prairie Band Potawatomi Nation v. Wagnon (Prairie Band IV), 476 F.3d 818, 827 (10th Cir. 2007).

168. Id. at 823–24 (determining critical question to be "whether the State's law discriminates against the Nation's right to make such regulations vis-a-vis other sovereigns"). "[B]ecause the right to make motor vehicle titling and registration regulations is a traditional government function, the discriminatory effect is to be analyzed between sovereigns, not individual drivers." Id. at 826.

169. Id. at 826. The state had claimed that the absence of the plates "endanger[ed] the lives of law enforcement personnel by preventing them from obtaining crucial vehicle information." Id.

170. Although only under duress—see State v. Wakole, 959 P.2d 882, 885–86 (Kan. 1998) (finding that Kansas was required to recognize Sac & Fox Tribe of Oklahoma license plates).

plates issued by the Prairie Band Potawatomi Nation to be discriminatory.[171]

Prairie Band IV and *Cabazon III* were important victories for tribes. But it is not clear how other courts would apply the reasoning that either the Tenth or Ninth Circuit used to conclude that states were acting discriminatorily. The courts did not clarify how they chose which similarly situated parties to compare when looking for discrimination. Once they found the appearance of discrimination, they did not explain what standard to use to assess the state's justification for treating the parties differently. Although tax law may be straightened out (to the chagrin of tribes), it remains unclear how courts, states, and tribes are to approach the *Mescalero Apache* test in other circumstances.

III. Discerning Discrimination

Several factors in particular have made it difficult for courts, states, tribes, and Indians to clarify *Mescalero Apache*. First, the Constitution seems to preclude states from involvement in Indian affairs, which appears to indicate that a state should almost never be allowed to consider Indian-ness.[172] On the other hand, Indian treaties are binding on states, and the federal government has repeatedly delegated authority to the states not only to negotiate with tribes, but to enforce state law inside Indian Country.[173] Second, the federal plenary power to legislate regarding Indian Affairs, combined with a general clear statement rule when federal law implicates tribal sovereignty, appear to indicate that the Court's reference in *Mescalero Apache* to "explicit federal law to the contrary" requires a strict reading of statutes and treaties.[174] The history of federal Indian law, however, consists largely of common law, implicit divestiture, and other unlegislated rules that made certain clear statements from Congress necessary only when impacting Indian tribes negatively.[175]

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171. *Prairie Band IV*, 476 F.3d at 827 ("[W]e hold that Kansas, by recognizing vehicle registrations from other jurisdictions without concern for safety standards but refusing to recognize vehicles registered by Plaintiff due to alleged safety concerns, impermissibly discriminates against similarly situated sovereigns.").

172. See supra text accompanying notes 15–16.

173. See U.S. Const. art. VI, § 2 ("[A]ll Treaties made . . . under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); supra note 55 and accompanying text (discussing Public Law 280's conveyance of limited authority to enforce state law in Indian Country); supra note 61 and accompanying text (addressing legislation encouraging government-to-government relationships between tribes and states).

174. For a discussion of federal plenary power over Indian affairs, see supra notes 40–45. Regarding federal Indian law's clear statement rule, see supra text accompanying note 49.

175. For common law principles of interpretation of Indian treaties, see supra text accompanying note 23. Regarding common law principles of interpretation of Indian law statutes, including the clear statement rule, see supra note 49 and accompanying text. For a discussion of implicit divestiture, see supra note 47.

Finally, the most famous Indian law equal protection case found that Indians are a political group, and (federal) legislation treating them as such should be subject to mere rational basis analysis.[176] However, there is a general consensus that strict scrutiny should be applied whenever Indians are classified according to race.[177]

The outcomes of the *Mescalero Apache*, *Cabazon*, and *Prairie Band* controversies seem intuitively correct if one accepts the general premise that the courts should look for impermissible discrimination rather than weigh the sovereign interests of the state and tribe. There does not seem to be any explanation for California's refusal to exempt Cabazon police officers from its vehicle code restrictions *other* than pure animosity toward a tribe exercising its sovereignty. Nor is there any clear, benign explanation for Kansas to refuse to recognize Prairie Band Potawatomi license plates. But each court seems to have been proceeding under a different understanding of *Mescalero Apache*. This Part attempts to clarify when states may, must, and cannot classify American Indians separately from other state citizens on account of their additional political affiliation.

One of the greatest challenges to clarifying federal Indian law doctrines is that any attempt "to fix [any] internal incoherence by imposing external principles" is not only difficult, but risks creating "artificial coherence at the expense of the exceptional doctrinal, institutional, and normative features of the field."[178] But this does not preclude all attempts to look outside of federal Indian law for guidance on how to resolve specific questions related to individual doctrines, as long as one recognizes the limitations on the usefulness of any one analogy. And in fact, while the field of federal Indian law as a whole is significantly different than any other area of American law, specific "unique" aspects and doctrines have analogues in other fields. For example, the Constitution distributes state and federal power over foreign affairs similarly to its allotment of power over Indian affairs. Horizontal federalism doctrine is another place where states sometimes (but not always) are required to recognize the allegiance of (out-of-state) citizens to foreign governments. And equal protection cases that differentiate between privileges and fundamental rights include a framework to determine what level of analysis allegedly discriminatory laws are to face.

Part III.A of this Note looks at these three areas to see where case law might provide useful analogy for discerning state discrimination against

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176. See supra text accompanying note 77.

177. Laurence H. Tribe, American Constitutional Law § 16-14 (2d ed. 1988) [hereinafter Tribe, 1988 Treatise] (explaining that "Congress has no greater authority to legislate in respect of individuals of the American Indian race, solely on account of their race, than it has in regard to persons of any other race" and "any state or federal action directed at persons of the American Indian race as a racially defined class is subject to strict scrutiny to prevent invidious discrimination just as in the case of government action directed at any other racial minority").

178. See Frickey, (Native) American Exceptionalism, supra note 162, at 436–37.

Indians, while at the same time recognizing the normative, doctrinal, and institutional exceptionalism of federal Indian law. Rather than attempting to import outside theory or doctrine wholesale to clarify incoherence between federal Indian law doctrines, it merely looks to these areas of law for clues about how to address particular questions that are important to clarifying individual and vague Indian law doctrines. Part III.B then formulates a clear though multifaceted rule based on the discussion in III.A.

A. *Discrimination by Analogy*

Discerning discrimination against American Indians is more complicated than many other equal protection questions. First, the federal government has more power over American Indians than almost any other citizen. The Constitution allows for treaty negotiations with Indian tribes (although Congress no longer acquiesces to this exercise of power[179]), and the Court has recognized an implicit plenary power over Indian affairs that gives the federal government a police power in Indian Country that it does not have in state territory. Second, many of the cases coming to court involve Indians who are demanding to be treated *differently* than other Americans. Since in many circumstances the government is permitted to treat them differently, equal protection cases strictly circumscribing affirmative action as "reverse discrimination" are generally inapplicable. And finally, the government is (sometimes) permitted to single out American Indians as members of a distinct political group, but (almost) never as members of a racial minority. Courts applying *Mescalero Apache* most likely will need to determine how the state is categorizing Indians.

This section attempts to deal with these complications by analogizing Indians as a legal category with other groups of people meriting specialized rules of legal analysis to help understand when states may, must, or cannot treat Indians differently than other state citizens. First, it looks to foreign affairs, another field where the federal government has much more power to act than the states. Second, it looks to horizontal federalism doctrines that permit demands for different, rather than equal, treatment. Finally, it looks to fundamental rights, the exercise of which both the federal government and state governments are generally forbidden to restrict.

1. *Analogy 1: Foreign Affairs.* — The Constitution carves out several spheres for nearly exclusive federal jurisdiction. Indian affairs is one;[180] foreign affairs is another.[181] Two foreign affairs cases demonstrate how exclusive federal jurisdiction can interact with equal protection questions to create a different analysis for state and federal law. As such, they provide a helpful analogy for how discerning discrimination against

179. See supra text accompanying note 29.

180. See supra notes 15–16 and accompanying text; supra notes 40–45.

181. See, e.g., U.S. Const. art. I, § 10 ("No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with . . . a foreign Power, or engage in War . . . .").

American Indians can require a different analysis depending on the identity of the actor involved.

The first case is *Graham v. Richardson*, where the Supreme Court overturned state denial of welfare benefits to foreign nationals based either on residency or citizenship requirements.[182] The decision was grounded primarily in the Fourteenth Amendment, although federal preemption provided "[a]n additional reason why the state statutes . . . d[id] not withstand constitutional scrutiny."[183] *Graham* found state law distinctions between aliens and citizens subject to strict scrutiny[184] and the laws in question violative of the Equal Protection Clause.[185] The Court added that "[s]tate laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with . . . overriding national policies in an area constitutionally entrusted to the Federal Government."[186]

The second case, *Mathews v. Diaz*, upheld a federal limitation on the receipt of Medicare benefits by noncitizens who had not yet met a residency requirement.[187] Because the statute was federal, no question of preemption existed. The challenging party argued, however, that the law nonetheless violated the equal protection considerations implicated by the Fifth Amendment's Due Process Clause. The Supreme Court rejected the district court's finding "that th[e] federal statute should be tested under the same pledge of equal protection as a state statute,"[188] appearing to use a rational basis standard instead.[189]

The cases provide helpful analogy to the area of Indian law because the different holdings of *Graham* and *Diaz* came down to "[t]he distinction between the constitutional limits on state power and the constitutional grant of power to the Federal Government."[190] In an attempt to show how the two cases were consistent, the Court explained that "it is the business of the political branches of the Federal Government, rather than that of either the States or the Federal Judiciary, to regulate the

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182. 403 U.S. 365, 382–83 (1971).

183. Id. at 376–77.

184. Id. at 372 ("[C]lassifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny.").

185. Id. at 376.

186. Id. at 378.

187. 426 U.S. 67, 69 (1976).

188. Id. at 73.

189. The Court did not mention the standard of review that it was using explicitly, although rational basis review was implied by several statements. The Court found it "obvious" that the federal government had no duty to provide welfare benefits to all aliens, found the relevant question to be about "the constitutionality of the particular line Congress has drawn," and found that the challenging party had the burden to "advance[ ] principled reasoning that will at once invalidate that line and yet tolerate a different line separating some aliens from others." Id. at 82. The Court explained that "this case essentially involves nothing more than a claim that it would have been more reasonable for Congress to select somewhat different requirements of the same kind." Id. at 83.

190. Id. at 85.

conditions of entry and residence of aliens."[191] This means that state law and federal law distinguishing between citizens and aliens (or among different aliens) are held to different equal protection standards. Similarly, the place of Indians and tribes within the constitutional structure requires different rubrics to discern state and federal discrimination against Indians.

An additional problem with the state law challenged in *Graham* was that it conflicted with "broadly declared . . . federal policy."[192] Although Laurence Tribe writes that such state laws are preempted even if conforming to federal policy,[193] the different considerations of Indian law could allow for courts to review state laws based in part on their general conformity to federal Indian policy. Congress has made clear that it intends Indian tribes and states to enter into negotiations and even compacts that by definition will treat Indians differently, but which may or may not be discriminatory.[194] It makes sense for Indian law doctrine to allow states considerable flexibility when acting consistently with current federal Indian policy—whether interpreted broadly to encompass the general movement toward tribal self-determination, or more narrowly to correspond with the four corners of specific statutes—but almost none when acting in conflict.

2. *Analogy 2: Horizontal Federalism.* — As demonstrated in further detail in Part III.A.1, the foreign affairs analogy provides direction for understanding when and why states *may* treat American Indians differently than other state citizens. However, as the *Cabazon* and *Prairie Band* conflicts indicate, there are times when American Indians believe that the state *must* treat them differently than other state citizens. The analysis in these cases should stem from the same general rule: Look to current federal Indian policy for direction. In this situation, however, a horizon-

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191. Id. at 84. The *Diaz* Court considered the federal law to distinguish between different groups of aliens, as opposed to distinguishing between aliens and citizens, although that type of classification would have been acceptable as well:

> Since it is obvious that Congress has no constitutional duty to provide all aliens with the welfare benefits provided to citizens, the party challenging the constitutionality of the particular line Congress has drawn has the burden of advancing principled reasoning that will at once invalidate that line and yet tolerate a different line separating some aliens from others.

Id. at 82.

192. Graham v. Richardson, 403 U.S. 365, 378 (1971). The Court identified the broad federal policy as one where "lawfully admitted resident aliens who become public charges for causes arising after their entry are not subject to deportation, and . . . as long as they are here they are entitled to the full and equal benefit of all state laws for the security of persons and property." Id.

193. According to Tribe, there are strong indications that "all state action, *whether or not consistent with current federal foreign policy*, that distorts the allocation of responsibility to the national government for the conduct of American diplomacy is void as an unconstitutional infringement upon an exclusively federal sphere of responsibility." 1 Laurence H. Tribe, American Constitutional Law § 4-5 (3d ed. 2000) (emphasis added).

194. See supra note 6.

tal federalism analogy is more useful than a foreign affairs analogy because, like American Indians, out-of-state citizens must be treated like state citizens at times, and differently at other times.

The comparison between Indian law and horizontal federalism centers on Article IV of the U.S. Constitution, which allows disparate treatment of out-of-state citizens in some instances, but requires special treatment of them in others.[195] The Privileges and Immunities Clause bars discrimination against citizens of other states absent a "substantial reason" if they are engaged in an activity considered "fundamental to the promotion of interstate harmony."[196] As Laurence Tribe has explained, this test "permits disparate treatment of non-residents, but only where the very fact of their non-residence demonstrably creates problems for legitimate state objectives that cannot be remedied in less discriminatory ways."[197] It clarifies when a state may treat out-of-state citizens differently than in-state citizens. At the same time, the Full Faith and Credit Clause permits travelers to enforce the judicial decisions of their home state in the courts of another, and to a more limited extent, allows them to demand the protections of the laws of one state in the courts of another. Like *Prairie Band III*, modern Full Faith and Credit analysis has rejected the use of a test that weighs the interests of each state against each other.[198]

Two specific Article IV doctrines provide additional direction for courts analyzing Indian demands that states treat them *differently* than non-Indian citizens: the public policy exception to Full Faith and Credit, and skepticism of hostility to the public acts of a sister sovereign. The public policy exception has traditionally allowed courts not to enforce the law of another jurisdiction if it would "violate some fundamental principle of justice, some prevalent conception of good morals, [or] some deep-rooted tradition of the common weal."[199] The public policy excep-

195. Courts face limitations on their ability to import Article IV analysis directly to the state-tribe realm. As a constitutional requirement, Article IV specifically applies only to state-state relations, a limitation based primarily on an equality between sister states that is lacking in the tribal context. Additionally, Article IV rules are complicated. The Full Faith and Credit Doctrine, for example, is much more "exacting" about requiring recognition of "[a] final judgment" and is "less demanding with respect to choice of laws." Franchise Tax Bd. v. Hyatt, 538 U.S. 488, 494 (2003) (internal quotations omitted).

196. Supreme Court of N.H. v. Piper, 470 U.S. 274, 279 (1985) (internal quotation marks omitted); see also Toomer v. Witsell, 334 U.S. 385, 398, 400 n.34 (1948) (explaining that statutory classifications based on citizenship are prohibited "unless there is something to indicate that non-citizens constitute a particular source of the evil at which the statute is aimed," and distinguishing case upholding statute based on "a substantial reason for the discrimination beyond the mere fact of alienage").

197. Tribe, 1988 Treatise, supra note 177, § 6-35.

198. "We have, in the past, appraised and balanced state interests when invoking the Full Faith and Credit Clause to resolve conflicts between overlapping laws of coordinate States. This balancing approach quickly proved unsatisfactory." *Franchise Tax Bd.*, 538 U.S. at 495 (internal citations omitted).

199. See, e.g., Loucks v. Standard Oil Co., 120 N.E. 198, 202 (N.Y. 1918).

tion is used in a variety of fields, such as the enforcement of arbitration decisions[200] and racially discriminatory agreements.[201] The doctrine of skepticism recognizes that, notwithstanding a state's considerable leeway regarding choice of law, its "sovereignty interests" might be implicated when it "has exhibited a 'policy of hostility to the public Acts' of a sister State."[202] These Full Faith and Credit Doctrines accord with the Privileges and Immunities Clause's general bar of discrimination against out-of-state citizens.

The distinction between the legitimate public policy of preserving the fundamental principles of justice, and the illegitimate hostility to public acts of a sister sovereign, is useful in evaluating concerns that states have expressed about enforcing tribal law and court orders. Expressed concerns often center on tribal ability to act without being bound by the due process protections in the Constitution, and tribal attempts to regulate nonmembers without according them any possibility of becoming members of the tribe.[203] Fact-specific application of these concerns could legitimately justify certain state actions. Inasmuch as the federal government has allowed tribes considerable flexibility to create mechanisms of good governance that would nonetheless be prohibited by the Constitution, however, these explanations alone are insufficient to justify hostility to acts and orders of tribal governments, especially where there is a pattern of such hostility.[204] Any public policy exception would need to be tailored narrowly to accord with general federal Indian policy; for example, a state could refuse to extradite a person convicted in a patently

200. See, e.g., W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 766, 772 (1983) (upholding arbitration decision, but noting that "[a]s with any contract . . . a court may not enforce a collective-bargaining agreement that is contrary to public policy").

201. See, e.g., Tate v. Browning-Ferris, Inc., 833 P.2d 1218, 1230–31 (Okla. 1992) ("[T]he employee who brings a common-law tort action for damages occasioned by either a racially motivated discharge or by one in retaliation for bringing a racial discrimination complaint states a state-law claim for tortious employment termination under [Oklahoma's public policy exception to the at-will termination rule]." (footnote and emphasis omitted)); see also Leonard M. Baynes, Falling Through the Cracks: Race and Corporate Law Firms, 77 St. John's L. Rev. 785, 806 (2003) ("The supreme courts of Arizona, Oklahoma, and Delaware have expansively defined the good faith and public policy exceptions of at-will employments.").

202. *Franchise Tax Bd.*, 538 U.S at 489 (quoting Carroll v. Lanza, 349 U.S. 408, 413 (1955)).

203. See supra note 46 (citing cases holding that Bill of Rights does not apply to Indian Tribal Governments); supra notes 65–67 and accompanying text (discussing concerns arising from tribal right to determine membership where criteria would otherwise violate Constitution).

204. See generally Angela R. Riley, Good (Native) Governance, 107 Colum. L. Rev. 1049 (2007) (arguing that tribes can have good governance, even if they do not emulate the West).

unfair proceeding,[205] but not in a proceeding that merely did not conform to constitutional requirements not binding on Indian tribes.[206]

3. *Analogy 3: Fundamental Rights.* — The *Mescalero Apache* pronouncement needs to be augmented with a rule explaining when states can apply state law that is *not* otherwise applicable to all citizens of the state. Indians, as citizens of the United States and of the states wherein they reside, are entitled to the same protections of their fundamental rights as other Americans. The paradigm of fundamental rights is not merely a useful analogy for determining when Indians must be "held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." Rather, it is an area of law that can basically be imported directly, because its analysis is not concerned with whether the person whose right is being infringed is Indian or not.

The Due Process Clause is understood to "provide[ ] heightened protection against government interference with certain fundamental rights and liberty interests."[207] This includes substantive due process rights such as the right to marry,[208] have children,[209] educate one's children,[210] and use contraception.[211] It also applies to political rights such as voting.[212]

The strict scrutiny to which both federal and state laws restricting fundamental rights are held need not be relaxed when the rights being restricted belong to American Indians. Because of the Fourteenth

205. Cf. Bird v. Glacier Elec. Coop., 255 F.3d 1136, 1138, 1141 (9th Cir. 2001) (finding district court lacked discretion to grant comity to tribal court proceedings that "offended due process," but explaining that evaluation of tribal court procedure requires federal courts to respect tribal courts' "'special customs and practical limitations'" (quoting Wilson v. Marchington, 127 F.3d 805, 811 (9th Cir. 1997))).

206. Cf. *Wilson*, 127 F.3d at 810 ("synthesizing the traditional elements of comity" and concluding that, while "as a general principle, federal courts should recognize and enforce tribal judgments," discretion exists where "recognition of the judgment, or the cause of action upon which it is based, is against the public policy of the United States or the forum state in which recognition of the judgment is sought").

207. Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

208. E.g., Loving v. Virginia, 388 U.S. 1, 12 (1967) ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." (quoting Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942))).

209. E.g., *Skinner*, 316 U.S. at 541 (finding law mandating sterilization "runs afoul of the equal protection clause . . . [because w]e are dealing here with legislation which involves one of the basic civil rights of man").

210. E.g., Meyer v. Nebraska, 262 U.S. 390, 401 (1923) (reversing conviction of schoolteacher for instructing students in reading German, in contravention of state law, because "the individual has certain fundamental rights which must be respected").

211. E.g., Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (finding unconstitutional a law forbidding use of contraceptives because it "seeks to achieve its goals by means having a maximum destructive impact upon" a "relationship lying within the zone of privacy created by several fundamental constitutional guarantees").

212. E.g., Reynolds v. Sims, 377 U.S. 533, 561–62 (1964) ("[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.").

Amendment, the states are required to accord Indians citizenship as well. The rest of the Constitution, while not binding on American Indian *tribes*, still binds the state and federal governments with respect to individual American Indians.

B. Mescalero Apache *Revisited*

"Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State."[213] By making this statement in *Mescalero Apache*, and again in *Prairie Band III*, the Supreme Court latched onto a deceptively simple description of history. But what of law? How are courts to decide cases that question the applicability of these general laws to Indians, and how is discrimination to be discerned? The following rules are meant to complement and augment *Mescalero Apache*, transforming it into a maxim that can guide courts, states, and tribes. These rules have lost some of the simplicity of the Supreme Court's generalization, but in the process they have gained much in clarity. They are derived from the historical discussion in Part I and the legal analysis in Part II, with the assistance of Part III.A's analogies.

First and foremost, if state law conflicts with express federal Indian law read according to federal Indian law rules of statutory and treaty interpretation, it is preempted. Second, if the state law relates to a "fundamental right" such as voting or holding office, then the courts should apply strict scrutiny to any attempt to exempt or exclude (or merely single out) American Indians. Third, if the law creates an exemption for out-of-state citizens or alternative methods of compliance for certain groups of people, and an American Indian wishes for the exemption or alternative methods of compliance to apply to him, there is a rebuttable presumption of discrimination for failing to exempt members of Indian tribes. Fourth, if a law is *not* otherwise applicable to all citizens of the state, application of the law to American Indians should be subject to different levels of scrutiny depending how Indians are being classified. If the law is being applied to American Indians as members of a racial group, then strict scrutiny applies (see Rule 2). If the law regulates American Indians as members of a political group, however, it should be subject to intermediate scrutiny to determine whether the state is exercising appropriate discretion given the parameters of express federal Indian law (as read according to Indian law rules of statutory interpretation, see Rule 1).

1. *Rule 1: Federal Indian Law Preemption.* — *Mescalero Apache* and *Prairie Band III* only make sense if federal law preempts state law when interpreted according to the background of federal Indian law rules

213. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148–49 (1973), quoted in Wagnon v. Prairie Band Potawatomi Nation (Prairie Band III), 546 U.S. 95, 113 (2005).

against which these statutes are written. In general, Congress is expected to speak clearly where federal law is impinging upon preexisting tribal sovereignty or earlier treaty rights.[214] This is an old and well-established rule, and as such it should be considered part of the legislative history of any act. Inasmuch as silence is generally interpreted as a deliberate congressional intention to preserve tribal sovereignty, *Mescalero Apache*'s requirement to look to "express federal law" must account for the meaning of congressional silence or inaction in the Indian law context.

2. *Rule 2: Strict Scrutiny and Fundamental Rights.* — If the law relates to a "fundamental right," such as voting, then the courts should apply strict scrutiny to any attempt to exempt or exclude American Indians. The special place of American Indians in our legal system does not mean that the courts should apply a different rule here than they would if any other group were denied a fundamental right. This rule would be most useful when Indians sue to require a state to apply "generally applicable" laws to them.

It is difficult to find legitimate purpose in differentiating between Indians and non-Indians when it comes to the fundamental rights that are typically analyzed under strict scrutiny. Any distinction would probably need to extend to increasing rights or political participation for Indians. Legislation that treats Indians as political minorities, for example, might survive strict scrutiny. For instance, a law specifically relaxing the applicability of voter identification rules to American Indians might be a proper recognition of the fact that many older Indians lack the documentation necessary to obtain a state license.[215]

3. *Rule 3: A Rebuttable Presumption of Discrimination.* — In cases where Indians seek a generally available exemption or alternative method of compliance, there should be a rebuttable presumption of discrimination. The state would then need to make an affirmative showing as to why the absence of an exemption does not indicate a policy of hostility toward Indian tribes. Because the relationship between states and tribes is one of comity, unaffected by Article IV of the Constitution, it should not be overly difficult to rebut this presumption. The courts should use an intermediate level of scrutiny here, to allow states flexibility to create reciprocity agreements with tribes.

The general idea behind this rule is that states cannot refuse to recognize that tribes have sovereign interests. Generally applicable state laws may force American Indians to choose between their political allegiances, as they might not be able to comply with both state law and tribal law.

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214. For a discussion of the emergence of the rules of treaty interpretation, see supra text accompanying note 23. For a description of the rules governing when a statute should be construed as revoking a treaty right, see supra note 49.

215. See, e.g., Michael S. Sanchez, Op-Ed., Real ID: A Costly Idea, Las Cruces Sun-News (N.M.), Nov. 7, 2006, at 10A (arguing that REAL ID Act of 2005 "will be especially problematic for many of [New Mexico's] American Indian and elderly residents who were not born in a hospital or were not issued a birth certificate when they were born").

The difficulty is determining whether the state is justified in forcing this decision upon its Indian citizens, or whether the state is motivated by discriminatory animus.

Inasmuch as the state can avoid creating this choice, it should be expected to do so. Where the state creates exemptions for noncitizens or alternative methods for compliance for certain groups of people, but does not do so for Indians, it has demonstrated that the law need not be universally applied, and it has chosen to treat Indians differently than at least one other group. At this point, courts should assume that the state is discriminating against the Indians improperly, until the state shows a legitimate reason for why it has not created an exemption. To be legitimate, the justification must conform with federal Indian law.

To rebut the presumption of discrimination, states could make a variety of showings. A state might demonstrate that it is acting in *general* accord with the (current) federal Indian policy of self-determination. For example, it could show that it has legislation that enables it to enter into reciprocity agreements with tribes (or in some other way show that it has a general policy of respect for sovereign acts of tribes), and that it has made a good faith effort to enter into negotiations. Alternatively, the justification could resemble a public policy exception. For example, a state might be able to refuse to extradite a person lawfully convicted of a crime by a tribal court if the fairness of the procedure used to garner the conviction was questionable. This excuse would have to be subject to consideration of the federal government's allowance of flexibility to tribes to create mechanisms of good governance that would nonetheless be prohibited by the U.S. Constitution if applicable.[216] Finally, the state could justify refusal to exempt members of a tribe by showing that another horizontal federalism doctrine would find the decision acceptable if the tribe were a state. For example, a state may be able to tax members of an Indian tribe where out-of-state citizens are exempted if the tax is apportioned in a manner that is related to services provided to the tribe or its members by the state.

4. *Rule 4: Special Laws that Conform to Federal Norms.*— The *Mescalero Apache/Prairie Band III* pronouncement needs to be augmented with a rule explaining when states can apply state law that is *not* otherwise applicable to all citizens of the state. If the law is being applied to American Indians as a racial group, then strict scrutiny must apply, just as it would if the law respected a fundamental right (see Rule 2). Assuming states are treating American Indians as a political rather than racial group, however, such laws should be subject to intermediate scrutiny. As with Rule 3, this allows states flexibility in performing Indian affairs tasks delegated by the federal government.

The Supreme Court already applies rational basis review to federal law classifying Indians as a political rather than racial group, because of

216. See supra note 204 and accompanying text.

the "special relationship" between the United States and Indian tribes.[217] *Mescalero Apache* indicates that states do not have as much leeway to treat Indians differently than other citizens "[a]bsent express federal law to the contrary." Strict scrutiny of state law is probably too heavyhanded a standard, however, since states are typically delegated the right to exercise a certain amount of discretion within the parameters of "express federal [Indian] law."[218] An intermediate level of review would be preferable when applied to state law in an area where distinction may be appropriate but discrimination (with all of its negative connotations) is not.

The above paradigm provides helpful direction for when and how states *may* treat American Indians differently than other state citizens, and thus likely would be most useful when non-Indians challenge state action. It would allow courts to uphold agreements with tribes that are consistent with federal policy, are not explicitly authorized by federal law, and impact Indians "going beyond reservation boundaries." Take, for example, a non-Indian who is ticketed for not using an official state license plate. He challenges the enforcement of the law against him because the law is being applied in a discriminatory manner: The state made a reciprocity agreement that effectively allows some state citizens (Indians) an alternative method of compliance that is not available to other state citizens (non-Indians). Intermediate review would allow the state to make a showing that the reciprocity agreement in question is consistent with federal Indian law. This allows room for state flexibility in performance of tasks delegated by federal government.

Technically, this rule would supplement rather than explain the *Mescalero Apache* maxim, which only describes situations where American Indians are being "held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." It is important to state, however, because it helps flesh out the law at the core of the Supreme Court's statement. For a clear understanding of when a state must treat American Indians as it does all other state citizens, it is important to clarify when—and why—they need not always do so.

Conclusion

This Note has presented four rules that do more than explain the outcomes of the cases analyzed in Part II. Rather, they look to the roots and rationale of the *Mescalero Apache* pronouncement, explaining and elaborating on it by situating it inside of a larger picture of how states may, must, and cannot treat American Indian state citizens. These rules

217. Morton v. Mancari, 417 U.S. 535, 551–53 (1974).

218. The Indian Gaming Regulatory Act (IGRA) is an example of this type of legislation. Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 18 U.S.C. §§ 1166–1168 (2000), 25 U.S.C. §§ 2701–2721 (2000)). IGRA requires states to negotiate in good faith but not to come to any particular outcome. 25 U.S.C. § 2710. This was so even before Seminole Tribe v. Florida, 517 U.S. 44, 75 (1996), invalidated the part of the statute that permitted tribes to bring states to court for failing to negotiate in good faith.

address an area of federal Indian law long ignored by academics and underdeveloped by the courts.

"Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State,"[219] and this should continue to guide courts, so long as four principles are followed. First, when deciding whether there is "express federal law to the contrary," courts should be interpreting federal law according to federal Indian law rules of interpretation. Second, if the "nondiscriminatory state law" relates to a fundamental right, then the courts should use strict scrutiny to analyze any different treatment of American Indians. Third, if the law is "otherwise applicable to all citizens of the State," but there are exemptions or alternative methods of compliance for certain groups of either in-state or out-of-state citizens, the state has the burden of showing why it has not applied those exemptions or alternative methods of compliance to its Indian citizens. And fourth, the pronouncement needs a corollary. If a law is *not* otherwise applicable to all citizens of the state, the state may treat Indians differently as a political (though not racial) group without the permission of "express federal law," as long as the state can overcome a court's intermediate scrutiny about whether it is exercising appropriate discretion given the parameters of express federal Indian law and the current federal policy of self-determination.

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219. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148–49 (1973), quoted in Wagnon v. Prairie Band Potawatomi Nation (Prairie Band III), 546 U.S. 95, 113 (2005).