

# INDIAN SOVEREIGNTY IN CONTEXT

DIANE P. WOOD\*

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## INTRODUCTION

Almost 200 years ago, in the *Cherokee Nation* cases,<sup>1</sup> Chief Justice John Marshall famously described Indian tribes as “domestic dependent nations.”<sup>2</sup> It’s a catchy phrase, but it falls far short of a clear description of the complex relationship between the Indian tribes, bands, nations, and similar groups in the territory encompassed by the United States and the government of that territory. It also elides the equally complex issue of the relationship between Indian tribes and the constituent states of the United States. In the end, the problem may be that modern notions of self-determination, integrity of national boundaries, and conquest simply do not map well onto the history of our part of the North American continent from the late fifteenth century to the present. The best we can do is to articulate rules, canons of interpretation, and principles from the law that has developed in the hope of clarifying and settling the law we now have.

No one could have undertaken that task with more sensitivity, expertise, and objectivity than the Reporters of the American Law Institute’s soon-to-be-published Restatement of the Law of American Indians—Professors Matthew L.M. Fletcher and Wenona T. Singel and Attorney Kaighn Smith, Jr. Indeed, this may have been one of the most challenging Restatements the ALI has ever undertaken. Most of the time, the common law (or interstitial law relating to a statute) has developed organically in the state and federal courts, and the job of the Reporters is to distill the rules that have emerged. This isn’t always easy, of course: sometimes no single rule floats to the top of the barrel, and so the Reporters must choose the one that seems best to represent the state of the law. Sometimes (though less often) the Reporters propose that the ALI adopt a minority position that is better reasoned or that seems to capture a trend of thinking.

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\* Judge, U.S. Court of Appeals for the Seventh Circuit.  
1. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).  
2. *Id.* at 17.

## I. CHALLENGES FOR THIS RESTATEMENT

Our Reporters for the *American Indian* project had no such straightforward task. This becomes apparent immediately when one reads the “Reporters’ Introduction” to the work as a whole. Rather than a collection of judges and legislatures all dealing with a more-or-less agreed-upon subject matter (e.g., torts, property, contracts, conflicts, and so on), we find wildly differing philosophies, policies, and goals. The Reporters identify no less than *seven* periods through which the law has moved: (1) colonial, (2) American treaty, (3) removal, (4) assimilation and allotment, or reservation, (5) reorganization, (6) termination, and, finally, (7) self-determination.<sup>3</sup> And this does not seem to be one of those situations in which, as Dr. Martin Luther King, Jr. stated, “the arc of the moral universe” has consistently “ben[t] toward justice,”<sup>4</sup> no matter how satisfactory we might find the final stage of self-determination. Instead, regrettably, through much of the history of Indian law, terrible things were happening on the ground, even while judges purported to be following rules of law and canons that were supportive and respectful toward Indian people, Indian tribes, and Indian country.

One lens through which we might productively view this complex history is that of sovereignty. Both in the United States and globally, recognition that sovereignty is no longer (if it ever was) an attribute that attaches only to defined nation-states is commonplace. Dean (then professor) Michael P. Scharf captured this point nicely in a couple of quotations with which he began an article entitled *Earned Sovereignty: Juridical Underpinnings*.<sup>5</sup> The first, from Stephen Leacock, was short and to the point: “Sovereignty either is or is not.”<sup>6</sup> The second, from former U.N. secretary-general Boutros Boutros-Ghali, was this: “It is undeniable that the centuries-old doctrine of absolute and exclusive sovereignty no longer stands, and was in fact never so absolute as it was conceived to be in theory.”<sup>7</sup>

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3. RESTATEMENT OF THE L. OF AM. INDIANS ch. 1, hist. n. (AM. L. INST., Proposed Final Draft 2021) [hereinafter RESTATEMENT L. AM. INDIANS].

4. Martin Luther King, Jr., *Our God Is Marching On!* (Mar. 25, 1965). The phrase actually appears to have originated with Theodore Parker, an American transcendentalist and minister of the Unitarian Church. But Dr. King made it famous for our time, and President Barack Obama also picked it up. Takim Williams, *#InContext: Theodore Parker & Martin Luther King Jr.*, HUM. TRAFFICKING INST. (Feb. 8, 2017), <https://traffickinginstitute.org/parker-king/#:~:text=victory%20of%20justice.-%E2%80%9CHow%20long%3F,to%20understand%20the%20moral%20universe> [https://perma.cc/STP4-YQ4M].

5. 31 DENV. J. INT’L L. & POL’Y 373 (2003).

6. *Id.* at 373 (quoting G. C. FIELD, *POLITICAL THEORY* 60 (1956)).

7. *Id.* (quoting *INTERNATIONAL LAW: CASES AND MATERIALS* 18 (Louis Henkin, Richard Crawford Pugh, Oscar Schachter & Hans Smit, 3d ed. 1993)).

What is true at the international level can be even more true within a country. The United States, for example, must consider at least the following permutations of sovereignty: that of the federal government itself; that of other countries in the world; that of the constituent states; and (of course) that of the Indian tribes. Fine lines must be drawn if one is to avoid messy overlaps of sovereignty, which in turn can create legal uncertainty. Justice Anthony Kennedy recognized as much in the case of *U.S. Term Limits, Inc. v. Thornton*,<sup>8</sup> which concerned a state's ability to impose additional or different qualifications on candidates for the U.S. House of Representatives or Senate. The Supreme Court rejected Ohio's effort to add term-limit restrictions on candidates for those offices on the ground that giving this power to the states would be inconsistent with the U.S. Constitution's vision of a uniform national legislature.<sup>9</sup> But it was not Justice Stevens's opinion for the majority that stuck with people. It was Justice Kennedy's concurrence, where (speaking of the states) he wrote that "[f]ederalism was our Nation's own discovery. The Framers split the atom of sovereignty."<sup>10</sup> Evocative language indeed, especially if we contemplate the violence that typically attends atom-splitting.

There is no doubt that Indian tribes today enjoy certain attributes of sovereignty. And this is not new. The law of nations informed early encounters between the English and continental European settlers. Compacts between the two groups took the form of treaties; and for their own purposes, tribes, bands, nations, and comparable groups governed themselves and managed external relations with others.<sup>11</sup> But, as chapter 1 of the new Restatement makes clear, there is a competing model that stands in serious tension with the sovereignty concept: that of a guardian and ward, trustee and beneficiary, or, however phrased, one entity that depends in significant ways on another.<sup>12</sup> There may come a day, even if it is not this day, when we finally need to decide which model is the right one for Indian law.

## II. TRIBAL SOVEREIGNTY: A COMPARATIVE LOOK

This Essay begins by exploring the ways in which tribal sovereignty does, or does not, conform to sovereignty as understood at the international level. Although this question pervades the entire Restatement, it is especially apt for the chapter on Federal-Tribal Relations, given the fact

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8. 514 U.S. 779 (1995).

9. *Id.* at 783.

10. *Id.* at 838 (Kennedy, J., concurring).

11. Francesco Mauro & Preston D. Hardison, *Traditional Knowledge of Indigenous and Local Communities: International Debate and Policy Initiatives*, 10 *ECOLOGICAL APPLICATIONS* 1263, 1264 (2000).

12. RESTATEMENT L. AM. INDIANS, *supra* note 3, § 4.

that, generally speaking, only the federal government can override Indian sovereignty.<sup>13</sup> After isolating the attributes of classic sovereignty where Indian law seems to have strayed significantly from the nation-state model, I offer some thoughts on the delicate balancing act that continues to this day and how the Restatement has resolved some of the more contested (if not contentious) issues posed by Indian law—issues that concern not only the interests of the federal government, but also those of the states. Perhaps in the end what we really need are better procedural mechanisms that would allow us to shift our attention from the abstract question of Indian sovereignty and toward accommodation models that better respect all involved persons and entities.

North America (and for that matter, Central and South America) were populated continents at the time people from the British Isles and continental Europe began to arrive with the intention of staying. And, as is well known, there was a classic clash of civilizations: concepts of property, territory, leadership, law, and much more varied greatly as between the newcomers and the existing residents. Suffice it to say that the newcomers, through wars, conflicts, treaties that often did not last long, and other measures, and even such natural phenomena as disease, relegated the Indigenous population to what we now call Indian country. Although this is by no means an inconsiderable area—it includes some one hundred million acres and would be the fourth-largest state if it were consolidated into one unit—it still pales in comparison to the 2.43 billion acres covered by the United States as a whole.<sup>14</sup> And the political status of American Indians, on and off reservations, has changed markedly.

Let's look at that status from the point of view of public international law. The last time the ALI defined the term "states" was in the Restatement (Third) of the Foreign Relations Law of the United States in 1986. (The Fourth Restatement, which has since been published, did not address this subject.) Section 201 of the Third Restatement defines a state as follows: "Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities."<sup>15</sup> Unpacking that, we find five requirements: (1) there is a definable "entity"; (2) this entity has a defined territory; (3) it has a permanent population; (4) it has its own government; and (5) it either engages in, or has the capacity to engage in, formal relations with other comparable entities.<sup>16</sup> As a close examination shows, in some of these areas, Indians in the United States come very close to the international

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13. *Id.* § 2.

14. *Id.* at ch. 1.

15. RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. § 201 (AM. L. INST. 1986).

16. *Id.*

model; in others, there is a considerable gap between their characteristics and those of a state.

*Entity.* There seems to be little doubt that Indian law satisfies this part of the definition. Section 2 of the Restatement defines and describes the term “Indian tribe” as follows:

- (a) An “Indian tribe” is any Indian or Alaska Native tribe, band, nation, pueblo, village, or community that either:
  - (1) the Secretary of the Interior; or
  - (2) Congress pursuant to its plenary authority has acknowledged to exist as an Indian tribe.
- (b) An Indian tribal entity not recognized as stated in subsection (a) is a “nonrecognized tribe” but may be recognized by a State for state-law purposes.<sup>17</sup>

As of now, there are 574 tribal entities recognized by the federal Bureau of Indian Affairs, the responsible agency within the Department of the Interior.<sup>18</sup> And for these purposes, “recognition” means acknowledgement as a *sovereign* entity.<sup>19</sup> Just as is the case at the international level, recognition is a political act,<sup>20</sup> and so recognition of an Indian tribe is a political statement confirming that the tribe has certain rights as a sovereign within the United States. Just as is the case with the fifty states and the territories of the United States, that sovereignty is not absolute, but that does not mean that it is nonexistent.

*Defined Territory.* If one goes back far enough into the history of the various Indian tribes and other groups, the concept of “defined territory” is a poor fit for the relation between the tribes and the land. But I will put that qualm to one side and address the current situation. And for that, the Restatement again gives us a relatively straightforward answer. Section 3 defines “Indian country,” and it does so in terms of specific land areas. Here is what it says:

- (a) Indian country is land set apart for the benefit of Indians or Indian tribes that is under federal jurisdiction. Land is considered “Indian country” for criminal and civil purposes if it is classified in one of the following categories:
  - (1) reservation lands,
  - (2) dependent Indian communities,
  - (3) Indian allotments,

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17. RESTATEMENT L. AM. INDIANS, *supra* note 3, § 2.

18. *Id.* § 2 cmt. b.

19. *See id.* § 2 cmt. a.

20. *Compare id.*, with RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S. §§ 202 cmt. a, 203 cmt. a (AM. L. INST. 1986).

- (4) land held in trust by the United States for the benefit of Indian tribes or individual Indians within or without reservation boundaries, and
- (5) land owned in fee by an Indian or Indian tribe upon which the United States has placed a restriction of alienation or encumbrance within or without reservation boundaries.
- (b) The United States may create additional Indian country lands by proclaiming new Indian reservations, acquiring land in trust for the benefit of Indian tribes or individual Indians, or enacting federal legislation.
- (c) The United States may terminate or diminish reservations. Former reservation lands subjected to termination or diminishment by the United States are no longer Indian country.<sup>21</sup>

Part (a) offers a stable definition of Indian country and so, without too much of a stretch, satisfies the “defined territory” criterion of international law.

What are we to make, however, of subparts (b) and (c)? It is not the case that the United States may either expand or contract the boundaries of the existing states. Article IV, section 3 of the Constitution says so, by forbidding either the creation of a new state within the jurisdiction of any other state or by forming any state “by the Junction of two or more States, or Parts of States,” unless both the affected states and Congress agree to the change.<sup>22</sup> New lands acquired by the United States become territories, and should those territories ever become states, they join the Union on an equal footing with all previous states.<sup>23</sup> Yet as section 3 of the Restatement rightly states, when it comes to Indian country, Congress has the power both to add and to take away.<sup>24</sup> Over the years, Congress has done both: it has purchased lands in trust for Indians, and (particularly through the allotment years) it has diminished, sometimes to the vanishing point, other parts of Indian country.<sup>25</sup> If this power were tempered by consent provisions along the lines of the ones we see in Article IV, section 3, there would be much less risk of destabilizing the sovereignty of the tribe by changing its territory. But at present there is no such safeguard, and any change would have to come from Congress.

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21. RESTATEMENT L. AM. INDIANS, *supra* note 3, § 3.

22. U.S. CONST. art. I, § 3, cl. 1.

23. See *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374–75 (1977).

24. RESTATEMENT L. AM. INDIANS, *supra* note 3, § 3.

25. *Id.* § 3 cmts. j, k.

*Permanent population.* This criterion takes us back to the very first section in the Restatement: section 1, which defines the term “Indian.” This section wisely does not try to pack in every complexity that can arise, instead opting just to say that “[f]or purposes of federal law, an ‘Indian’ is a member or citizen of a federally recognized tribe . . . [unless a particular federal statute has a different definition].”<sup>26</sup> For this element, tribes have retained a significant degree of autonomy, although there is almost always both a genealogical dimension (“Indian blood”) and a membership dimension (affiliation with a particular tribe).<sup>27</sup> This seems no more or less complex than the definitions of citizenship that countries on the international stage use. Some focus on where a person was born; some focus on that person’s parentage or ancestry; and some use a combination of the two.<sup>28</sup>

*Own government.* Here we encounter a significant disconnect between the version of sovereignty Indians enjoy and that which one would find in an international actor or even in a state of the United States. Tribes do not have plenary power to govern the territories that they have. Instead, as the Restatement as a whole illustrates, their governing powers are restricted in a number of ways: the law distinguishes between tribal members and non-members, it restricts such important matters as criminal jurisdiction, and it draws interesting and sometimes almost counterintuitive lines about intra-reservation and extra-reservation regulatory measures.<sup>29</sup> Those lines depend on the content of either treaties or federal legislation that affects them.

Granted, there are also subjects that are off-limits for the states of the United States. The Compact Clause of the Constitution spells this out in detail. Among the more important restrictions are these: states may not enter into treaties with foreign powers; they may not coin money; they may not impair any obligation of contract; they may not impose import or export duties; and they may neither keep troops or “Ships of War” during peacetime nor, “unless actually invaded,” engage in war.<sup>30</sup> That is actually quite a list when one thinks of the normal powers that international actors have, but it is short compared to the restrictions woven throughout federal law that relate to Indian tribes. Yet, counterintuitively to lawyers steeped in ordinary federal-state relations, Indian tribes enjoy certain freedom

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26. *Id.* § 1.

27. *Id.* § 1 cmt. c.

28. See, e.g., *Check if You’re a British Citizen*, GOV.UK, <https://www.gov.uk/check-british-citizenship> (last visited Mar. 3, 2022); *Who Is a Canadian Citizen?*, GOV. OF CAN. (July 15, 2020), <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/canadian-citizenship/overview/who-canadian-citizen.html> [<https://perma.cc/QDL7-B2SF>].

29. RESTATEMENT L. AM. INDIANS, *supra* note 3, at ch. 1.

30. U.S. CONST. art. I, § 10, cl. 3.

from federal law.<sup>31</sup> This is because they predate even the colonies, let alone the formation of the United States as a country. Their existence thus has nothing to do with the Federal Constitution, though they are recognized in a few key places, such as the Indian Commerce Clause.<sup>32</sup> Thus, the Bill of Rights and the Fourteenth Amendment do not apply, of their own force, to Indian tribes.<sup>33</sup> Statutes such as the Indian Civil Rights Act<sup>34</sup> fill that gap to a certain degree, but the implications of this principle can be huge. For now, however, it is enough to say that the self-governance attribute of international states appears only in a weakened form in Indian tribes.

*Formal relations with other states.* Whether you think the ability to enter into foreign relations with other states is a critical part of sovereignty depends on your general view of multitiered structures. Such structures are common: some are federations, such as the United States, Mexico, and Germany; some are confederations, such as Canada and Switzerland; and some are more loosely configured unions, such as the European Union, with fully sovereign Member States but also a supranational governing apparatus with its own legal personality that can make and enforce rules binding on its constituent states.<sup>35</sup> The states of the United States, as I noted earlier, are prohibited by the Constitution from entering into independent, international agreements with foreign powers.<sup>36</sup> Not only that—they may not “enter into any Agreement or Compact with another State” without the consent of Congress.<sup>37</sup> And yet, despite those qualifications, no one would deny that the states enjoy considerable sovereignty.<sup>38</sup>

The situation is harder to summarize for Indian tribes. Let’s start with treaty law, which is introduced in section 5 of the Restatement. The first key point is that treaties between the United States and Indians, just like treaties between the United States and foreign powers, are part of the Supreme Law of the Land for purposes of Article VI, section 2 of the Constitution.<sup>39</sup> Like all treaties, their status is on a par with legislation passed by Congress. This means that a later Congress always has the power to abrogate them, just as it can with any treaty if it wishes to do so

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31. RESTATEMENT L. AM. INDIANS, *supra* note 3, § 8 cmt. a.

32. U.S. CONST. art. I, § 8, cl. 3.

33. *See Talton v. Mayes*, 163 U.S. 376, 382–85 (1896).

34. 25 U.S.C. §§ 1301–1303.

35. *See Treaty on European Union* art. 48, Feb. 7, 1992, 1992 O.J. (C 224) 1.

36. U.S. CONST. art. I, § 10, cl. 3.

37. *Id.*

38. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 134 (1996); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014); *Allen v. Cooper*, 140 S. Ct. 994 (2020); *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320 (2015); *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

39. *See, e.g., Herrera v. Wyoming*, 139 S. Ct. 1686 (2019).

and is willing to pay the political price.<sup>40</sup> But, to put the point tactfully, Indian treaties have not had as much staying power as international treaties<sup>41</sup>—though the Supreme Court’s recent decision in *McGirt v. Oklahoma*<sup>42</sup> may have signaled an era of new respect for Indian treaties.<sup>43</sup>

This will depend on the approach the Court takes to the interpretation of Indian treaties. The Restatement addresses this in section 6, under the rubric of canons of construction. It identifies several key points: first, that a treaty must be liberally construed in favor of the signatory tribe or tribes; second, genuine ambiguities must be resolved in favor of the tribe; third, that the interpretation must look back to the understanding that the *Indians* would have had at the time of the negotiations; and, finally, that the surrounding circumstances and history must be factored in.<sup>44</sup>

These are not the general canons of construction you would find for state-to-state treaties at the international level. Most people would agree that the Vienna Convention on the Law of Treaties of 1969 comes as close to an authoritative statement of customary international law on the interpretation of international treaties as one can find.<sup>45</sup> Part III of that Convention discusses this issue. Article 31 provides that treaties should be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”<sup>46</sup> It calls on the parties to take into account, together with that context, any later agreement or practice between them.<sup>47</sup> Article 32 authorizes resort to supplementary materials, such as the preparatory work and the circumstances of the conclusion of the treaty.<sup>48</sup> Notably, even though states often come to the table with greatly disparate bargaining power, there is no provision calling for special treatment for the weaker party<sup>49</sup> (though bribery and coercion are a different matter).<sup>50</sup>

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40. See, e.g., *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984).

41. See Kristen A. Carpenter, *Interpretive Sovereignty: A Research Agenda*, 33 AM. INDIAN L. REV. 111, 116 (2009).

42. 140 S. Ct. 2452 (2020).

43. See *id.* at 2482 (emphasizing that it is important for the U.S. government to honor its treaties with Indian tribes).

44. *Id.*

45. See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980); Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT’L L. 281, 291 (1988).

46. Vienna Convention on the Law of Treaties, *supra* note 45, art. 31.

47. *Id.*

48. *Id.* art. 32.

49. See Vienna Convention on the Law of Treaties, *supra* note 45.

50. *Id.* arts. 49–52.

The Restatement we are now considering provides numerous examples of courts citing the canons that relate to Indian treaties.<sup>51</sup> These canons, it notes, “derive[] in large part from the status of the federal government as protector of Indian tribes.”<sup>52</sup> The language of the nineteenth-century cases leaves little room for the imagination: the Court saw this canon as necessary to protect a weaker, inferior party<sup>53</sup>—hardly the kind of party, one might think, that at the same time is capable of exercising sovereign powers on its own. In the end, the canon may have been the Court’s best tool to counteract the original imbalance of bargaining power between the federal government and the tribes, at a time when the non-Indian population of the country was still hostile to tribal rights.<sup>54</sup> If so, then it is more like a substantive rule than just a tool for interpretation.

Treaties with Indian tribes ended when, in 1871, Congress enacted legislation pursuant to which it decided that henceforth it would address Indian relations exclusively through statutes rather than new treaties.<sup>55</sup> (Congress explicitly left existing treaties in force, however.<sup>56</sup>) Many of the same principles apply to these statutes<sup>57</sup>—the key difference is that there was no longer any need, even cosmetically, to obtain the consent of the affected tribe or tribes.<sup>58</sup> But the theme of the trust relationship continued, as did the need to define where Indian sovereignty could begin and where federal protection dropped off.<sup>59</sup> This is far from the only example one can find of one sovereign—call it Country A—extending its protection over another sovereign, Country B, in the international arena. Think of Puerto Rico. It has substantial sovereignty, and it exercises many powers of self-government, but in the end, Puerto Rico is a territory of the United States.<sup>60</sup> As a territory, Puerto Rico has agreed to rely on the United States for its external protection, just as Guam and the Northern Mariana Islands have

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51. See, e.g., RESTATEMENT L. AM. INDIANS, *supra* note 3, § 6 cmts. a–d.

52. *Id.* § 6 cmt. a.

53. See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 546–47, 552 (1832); see also *Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886).

54. See RESTATEMENT L. AM. INDIANS, *supra* note 3, § 6 cmt. a.

55. Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified as amended at 18 U.S.C. § 71).

56. *Id.*

57. David M. Blurton, *Canons of Construction, Stare Decisis and Dependent Indian Communities: A Test of Judicial Integrity*, 17 ALASKA L. REV. 37, 42–43 (1999).

58. See Phillip M. Kannan, *Reinstating Treaty-Making with Native American Tribes*, 16 WM. & MARY BILL RTS. J. 809, 817–18 (2008).

59. See Blurton, *supra* note 57, at 43.

60. See *Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1679 (2020) (Sotomayor, J., concurring); see also *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1868 (2016).

done.<sup>61</sup> But the analogy is not a perfect one, because the “protective” responsibilities the U.S. government has undertaken vis-à-vis the tribes go well beyond international affairs.<sup>62</sup>

A similar set of canons comes into play for statutes addressing Indian affairs, as section 8 of the Restatement confirms. In this setting, we encounter another issue: whether the canons protective of Indian interests take precedence over the familiar *Chevron*<sup>63</sup> and *Skidmore*<sup>64</sup> forms of deference. The Reporters point out that there is a conflict in the circuits on this point,<sup>65</sup> and so we all will just have to stay tuned.

### III. UNSOLVED PROBLEMS

Last, let me flag some problems that the Restatement was not in a position to resolve definitively. The first relates to a favorite topic of mine, extraterritoriality, which operates in fascinating ways with respect to tribal authority on tribal land.<sup>66</sup> It raises the question of the importance of a territorial link between an action and the prosecutor (or regulator) when it comes to a tribe’s legislative and adjudicative authority. Like nearly everything else in Indian law (or so I have come to think), this becomes more complex each time you peel off a layer.

Here are some points that caught my attention. First, relative to other sovereigns, Indian tribes do not enjoy as much power over civil regulatory matters in their own territory. As the Restatement points out in section 29, there is a presumption that (U.S.) states may regulate nonmembers of the tribe even within Indian country. And the tribe’s authority to regulate nonmembers is restricted.<sup>67</sup> Some limits apply even on tribal land, and limits exist on fee land under the *Strate v. A-1 Contractors*<sup>68</sup> decision. At the same time, *off* the reservation the tribes have surprisingly robust authority to do things that look like civil regulation. For instance, as *Herrera v. Wyoming*<sup>69</sup> shows, tribes may have the right to engage in off-reservation hunting, fishing, and other usufructuary activities by virtue of

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61. See Ediberto Román, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1, 15 n.114 (1998).

62. See generally Eli Keene, *Resources for Relocation: In Search of a Coherent Federal Policy on Resettling Climate-Vulnerable Communities*, 48 TEX. ENV’T L.J. 119, 135 (2018).

63. 467 U.S. 837 (1984).

64. 323 U.S. 134 (1944).

65. RESTATEMENT L. AM. INDIANS, *supra* note 3, § 8 cmt. c.

66. See Zachary D. Clopton, *Extraterritoriality and Extranationality: A Comparative Study*, 23 DUKE J. COMPAR. & INT’L L. 217, 218, 234–44 (2013).

67. RESTATEMENT L. AM. INDIANS, *supra* note 3, § 27.

68. 520 U.S. 438 (1997).

69. 139 S. Ct. 1686 (2019).

their treaties with the United States.<sup>70</sup> The exercise of these rights can lead to mind-twisting interactions among federal, state, and tribal law. Water and air rights are also common subjects. For instance, the litigation in the Seventh Circuit about the threat posed by the Asian carp to the Great Lakes system was brought not only by states, but also by a tribe<sup>71</sup>—yet no one thinks that any one state, or any one tribe, has full territorial jurisdiction over the Lakes.

The second question relates to the *Cayetano/Mancari* problem: Is Indian status exclusively political, or are there enough racial or ethnic dimensions to it? Will the Supreme Court decide to revisit *Morton v. Mancari*<sup>72</sup> and take the approach indicated in *Rice v. Cayetano*,<sup>73</sup> thereby striking down legislation that singles out Indian tribes (as a group or individually) or Indians (as a group or individually) for special treatment? If the Court were to take such a step, the Indian Child Welfare Act<sup>74</sup> would be at risk, as would countless other legislative enactments. Yet even though the Bill of Rights does not directly apply to Indians,<sup>75</sup> we still have the Indian Civil Rights Act (ICWA), and it states that “[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws.”<sup>76</sup> Obviously, ICWA is not a tribal law; it is an act of Congress. But as an act of Congress, it must pass muster under the Fifth Amendment, including the equal protection “dimension” of the Fifth Amendment.

Finally, the Restatement invites a comprehensive discussion about the best way to reconcile the two principles underlying Indian sovereignty: first, the understanding that, even after all these years of life as “dependent domestic sovereigns,” the emphasis should still be on the word “sovereign,” and second, the canons relating to the interpretation of both treaties and statutes dealing with Indians in a way that emphasizes the word “dependent” instead.

It is hard to walk away from this Restatement without a sense that, of the seven eras the Reporters identified, the present Self-Determination Age comes as close as is possible to where we should be, both for the Indians and Indian tribes within this country and for the rest of the population. The idea of self-determination fits comfortably within broader human rights instruments, such as the Universal Declaration of Human

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70. *Id.* at 1700, 1702–03.

71. *Michigan v. U.S. Army Corps of Eng’rs*, 758 F.3d 892, 894 (7th Cir. 2014).

72. 417 U.S. 535 (1974).

73. 538 U.S. 495 (2000).

74. 25 U.S.C. §§ 1901–63.

75. *United States v. Bryant*, 136 S. Ct. 1954, 1962 (2016).

76. § 1302(a).

Rights and the Covenant on Civil and Political Rights.<sup>77</sup> I hope that self-determination is working the way it should, and I also hope that over time, more people will find their way to cultural, social, and economic security so that these communities can take their place in our broader society.

It has been a pleasure learning about Indian law from this project, and I once again thank the Reporters for a magnificent job, the ALI for taking on such an ambitious work, and both the *Wisconsin Law Review* and Indigenous Law Student Association for putting all of this together.

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77. See Suzan Dionne Balz, *A Country Within a Country: Redrawing Borders on the Post-Colonial Sovereign State*, 2 MICH. J. RACE & L. 537, 545–47 (1997).