Introduction: The American Indian Constitution

In one sense, there is but one Constitution of the United States. The original copy, engrossed on parchment by Jacob Shallus, sits in the main chamber of the National Archives. In another sense, there are many “Constitutions.” There is the Constitution of Dred Scott v. Sandford (1857), and there is the one of Loving v. Virginia (1967). There is the Constitution of Plessy v. Ferguson (1896), and there is the one of Brown v. Board (1954). There is the Constitution of Bowers v. Hardwick (1986), and there is the one of Lawrence v. Texas (2003). One could play this game all day—and have fun with it at a party of lawyers—but the point is simple: the Constitution changes over time, not just by the formal Article V amendment process, but also with each decision of the Supreme Court. To follow through on the last example from above, the Constitution has been interpreted to permit the criminalization of sex acts between two people of the same gender (Bowers v. Hardwick) and then, 17 years later, construed to prohibit such laws (Lawrence v. Texas). Our Constitution today is different in many respects than the Constitution of any prior time. Whether we have a “living” Constitution or an “originalist” one, in some important ways today’s Constitution bears little resemblance to the one in a vault in Washington. Layers of meaning and interpretation have accreted onto it like sediment, and then pressure and time have metamorphized it so that if the Founders could see the Constitution in action today, there is no doubt

3. Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding segregation of public facilities so long as they were equivalent in quality).
it would be as unrecognizable to them as sandstone pressed and twisted into quartzite. This is a familiar story.

THE AMERICAN INDIAN CONSTITUTION

But there is yet another sense of the Constitution, and this one is much less familiar. Over the past two centuries, a parallel constitution of sorts has been doing the important work of defining the rights of and role of governments in regulating the lives of millions of people within the boundaries of the United States. The people are called “Native Americans” today but in the law are referred to as “Indians” or “American Indians.”7 For them, this other Constitution, call it the “American Indian Constitution,” has delineated the scope of permissible and impermissible action by the federal, state, and tribal governments on issues including property rights, criminal jurisdiction, voting, governance, and taxation. The reason to call it a different constitution is not because of the object of its decisions—Native Americans—but because the rules for them are often different.

To pick just one of the many examples, consider two male citizens of Arizona who want to get married. Under the Supreme Court’s ruling in Obergefell v. Hodges (2015), the answer of whether they can get legal recognition for their marriage is clear under the United States Constitution—the right to marry regardless of gender is guaranteed by the Due Process and Equal Protection clauses of the Fourteenth Amendment.8 But the answer is likely different under the American Indian Constitution. If these two Arizonans happen to be enrolled members of the Navajo Nation (Diné), living in, say, Kayenta, Arizona, they cannot legally marry. For members of the Navajo Nation, issues of family law, inheritance, membership, and voting rights depend entirely on tribal law, and the Diné Marriage Act of 2005 bans same-sex marriage.

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7 The title of the United States Code dealing with Native Americans is entitled “Indians.” The federal government agency responsible for administering the law is called the “Bureau of Indian Affairs.” Native American lands are known as “Indian Country.” The term is offensive in regular conversation, but ubiquitous in law. This creates some side-eyed glances at cocktail parties and condescending looks at faculty meetings. But it is unavoidable. There are some exceptions. The term “Native American” appears in five of 48 chapters of Title 25, including the Native American Graves Protection and Repatriation Act. It is difficult for law to change, however, because even if Congress were to rename “Indian Country” as “Native American Country” in the statute, there are hundreds of cases using the former term. Since law is built on language, and precision matters, undoing word-wrongs from the past is no easy feat. This book will use the legal terms not because of a preference of the author but because (at present) they are unavoidable.

Introduction: The American Indian Constitution

Obergefell doesn’t apply to them under the American Indian Constitution, even though they are American citizens.\(^9\) If the two men go to Phoenix, they can legally wed, and under federal and state law, they will be considered a married couple. But unless they renounce their tribal membership, this may be effectively worthless to them as a legal matter. If their property, their culture, and their home are on the Navajo Nation Reservation, an Arizona marriage is likely irrelevant. Questions of political participation, ownership of property, inheritance, medical care decision making, and so on will be up in the air. Their access to a wide range of federal benefits depends on their membership in a federally recognized tribe, and in some instances, being in a same-sex marriage may make this impossible.\(^10\) Perhaps most fundamentally, their family may not be considered as such by their own community. Therefore, the practical answer as to whether two Americans of the same sex can legally wed depends on whether they are covered by the United States Constitution or the American Indian Constitution.

There is, of course, no such thing as the “American Indian Constitution.” We have but one Constitution. Yet, for many Americans, the Constitution means something other than what it means for the rest of America. There is, in a very real sense, a separate constitution for Indians. To be sure, it is ultimately through an interpretation of the United States Constitution that this anomalous result obtains: specifically, the Supreme Court has repeatedly held that the Bill of Rights and the Fourteenth Amendment do not apply in Indian Country, except in a limited way in criminal cases.\(^11\) This creates a massive carve-out,

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\(^9\) There may be potential avenues of federal review for these two hypothetical men. Although Santa Clara Pueblo, discussed in Chapter 6 below, held that tribal decisions are not generally reviewable in federal courts, even when guaranteed by federal statute (the Indian Civil Rights Act), it is possible that the couple might be able to challenge their expulsion in Navajo courts and then seek review in the U.S. Supreme Court under Obergefell. This would be new ground. Speculating about how the current or any Supreme Court would rule is fraught and unwise. Suffice it to say that under current law, a tribe has wide latitude to deny two American citizens rights guaranteed by the federal Constitution. This is not to say they would, but rather that they can, and that this is a different position than that of the several states.

\(^10\) Even where Indians are disenrolled from their tribes, they may be eligible for federal benefits under the Snyder Act, which makes eligibility dependent on blood quantum, not membership. See, for example, Indian Health Service Eligibility Rules at https://www.ihs.gov/IHM/pc/part-2/p2c1/#2-1.2. For a discussion of the implication of this on the status of Indians, see Chapter 4.

\(^11\) Technically, the Court held that the Bill of Rights is not enforceable in federal court. See, Santa Clara Pueblo v. Martinez, 436 U.S. 439 (1978). This means that if a tribe chooses to ignore its obligations under the Bill of Rights (as applied to it in part by the Indian Civil Rights Act of 1968), the aggrieved tribal member has no recourse in federal court, as would a citizen of a state that deprived that person of their federal
Native Americans and the Supreme Court since it is through the Bill of Rights and the Fourteenth Amendment that many constitutional liberties are preserved.

There is nothing in the text or structure of the Constitution that compels this result. The text of the Bill of Rights doesn’t make it inapplicable to Indian tribes, nor does the text of the Fourteenth Amendment or any other part of the Constitution. Instead, the different results have evolved over time as the Supreme Court has wrestled with the complex issue of the scope of Indian sovereignty. At the end of the day, under our Constitution, there are in fact two separate constitutions, depending on where, when, and on whom the Constitution is acting. The two Navajo men in the hypothetical above are citizens of Arizona and of the United States, but their constitution is different from two non-Navajo men living just down the road in Flagstaff or Phoenix.

STRAUSS’S ORIGINALIST NIGHTMARE LIVES TODAY

The potential impact of this fact can be seen in relief in the introduction to Professor David Strauss’s book, The Living Constitution. In a section called, “The Originalists’ America,” he sets out a laundry list of the absurdities (in his view) that would be realities if originalists got their way and the Constitution was frozen at the Founding:

- “The government would be free to discriminate against women.”
- “The … government could discriminate against racial minorities (or anyone else) pretty much any time it wanted to.”
- “The Bill of Rights would not apply to the states.”
- “States could freely violate the principle of ‘one person, one vote’ in designing their legislatures.”

The picture Strauss wants to paint is an alternate history of America without the heroic Supreme Court and Constitution. But one does not have to imagine a dystopian America in a parallel universe where originalism reigned and these bad things were true—they are the law of the land for millions of American citizens. In “Indian Country,”

\[\text{constitutional rights. There is the possibility that a federal court might review a tribal court decision on the matter, if the case involved federal law or involved non-members. See Judith Royster, “Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions,” 46 Kan. L. Rev. 241 (1998). Whether it would work in this case is unresolved.}


13 This is the term of art for areas covered by the general subject of “Indian law.” Federal law defines it this way: “…the term ‘Indian country’ … means (a) all land
Introduction: The American Indian Constitution

reality, more or less. Replace “states” with “tribes” in these statements, and all are true today:

- Tribes are free to discriminate against women;
- Tribes can discriminate against non-members (or anyone else) pretty much anytime they want to;
- the Bill of Rights does not apply to tribes;
- Tribes can and do violate the principle of “one person, one vote.”

But it doesn’t stop there. The fact that the federal Bill of Rights doesn’t protect a group of American citizens is just part of the story. Another part has to do with federal statutes. Under the Supremacy Clause of the Constitution, federal law trumps state law.\(^{14}\) If Congress passes a law providing for minimum requirements of workplace safety, all states are bound. But, tribes may not be.\(^{15}\) Tribes are more powerful than states in this regard, in that many federal laws do not apply to tribes.\(^{16}\) To be clear, it doesn’t have to be this way. The Court has held that Congress has plenary authority in Indian Country, so surely Congress could impose a particular federal law or regulatory regime (such as that of the Occupational Health and Safety Administration) in Indian Country, subject to “constitutional” requirements, such as the “clear statement rule,” which requires Congress be explicit when overriding Indian sovereignty. But, the fact is that Congress has been held by courts not to have done so, and, unlike the states, which are automatically bound by congressional acts, the tribes are currently operating under an extra-congressional state of affairs in many areas. The 574 tribes are laboratories of democracy (or maybe triboc-

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\(^{14}\) See Article VI, clause 2: “This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be 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, anything in the Constitution or laws of any State to the contrary notwithstanding.” 18 U.S.C. § 1151. It is in these places that the different rules for Native Americans obtain.


\(^{16}\) See Chapter 6.
Native Americans and the Supreme Court

racy) unconstrained by the predominant counter-majoritarianism of the United States Constitution. Tribes are, and have been, a different kind of America.

The major upshot of this is that the American Indian Constitution offers us an alternative view of constitutional law that is not dead or in the fantasies of a group of originalist scholars and judges, but that is quite alive. This book explores this odd reality with the hope of better understanding our Constitution as it works in practice throughout America. A close read of the key cases that define our American Indian Constitution will help us learn about the law in places like Tuba City, Arizona (Navajo), and Pine Ridge, South Dakota (Sioux), as well as hundreds of communities who live predominately under laws written by Indians for Indians, to paraphrase one of the cases we will discover in the chapters that follow.

INDIAN COUNTRY

Indian reservations cover large swaths of America, constituting more than 56 million acres. If lumped together, reservations would be the eleventh biggest state, about the size of Pennsylvania and Ohio combined. These tribal areas are home to nearly one million Americans and are cultural homelands to over 2.5 million Americans with a specific tribal affiliation. If aggregated into a state, “Indian Country” would be about the population of Montana, and have larger populations than seven other states and the District of Columbia. Sixteen U.S. senators represent populations similar to or smaller than reservation Indians. Imagine if they had this kind of political power how different our country would look.

The law in Indian Country and the rights of the Indians (and others) who live there matter a great deal. And that law is overwhelmingly Indian law—Indian law only somewhat constrained by the U.S. Constitution in the way that state and local law is.

Indian Country is America, but also not “America.” 17 Tribal land can be effectively closed off to non-members, and there is no possibility of outsiders joining the polity without the consent of the tribal government. Illinois is open to every American, either for a visit or a permanent residence. This includes tribal members, of course. But the same is not true of Indian reservations. The Rosebud Sioux or the Menominee can shut their borders and bar any

17 I use the term “America” here to mean the legal polity that exists in the mind of the average U.S. citizen. Of course, native peoples are Americans, and were even before granted citizenship in 1924, and whatever its legal status, tribal land is America. In fact, “Indians” today are descendants of the original Americans, and thus arguably have a strong claimer to that title.
Figure I.1 An Indian-New-Deal era map of what remained of Native America

Source: https://tile.loc.gov/image-services/iiif/service:gmdd370:g3701:g3701g:ct002650/full/pct:12.5/0/default.jpg.
non-member from entering. The Supreme Court declared as much in the famous case, *Worcester v. Georgia*, when it noted that non-members can enter Cherokee land only “with the assent of the Cherokees themselves.” The leading treaties on Indian law declare that today: “A tribe needs no grant of authority from the federal government to exercise the inherent power of exclusion from tribal territory, either as a government or as a landowner.”

A Menominee tribal member can move to Chicago, and instantly become a member of the various polities that residence there involves—the City of Chicago, Cook County, and Illinois. But the same is not true in the opposite direction. If someone from Chicago wanted to move to Keshena, Wisconsin (pop: 1,262), located on the Menominee Reservation, they may be able to find a place to live, but they would not become members of the tribe that governs that land by virtue of their being physically living there.

The rules are different in these places too. All 326 reservations in the United States have some sovereignty—the scope of which we will discuss in the chapters that follow—to decide what behavior is in and what behavior is out. And yet these islands of sovereignty are not fully sovereign. Congress has plenary—or absolute—power there. But even when Congress has acted to influence conduct on reservations, the courts have used the Constitution as a shield to advance the separateness of Indians. Sometimes the Court has tried to override the political branches in the other way too. After 230 years, Indian tribes are truly neither fish nor fowl when it comes to governance. Sometimes law treats them as if they were separate governments, akin to states or foreign governments, while other times the law treats them as if they were no more than a cultural association or social club, with rules of membership, behavior, and exclusion. America is full of ethnic, religious, and cultural enclaves with special rules. Amish communities in the Midwest, Hasidic communities in Brooklyn, and countless others exist in our diverse society. As we will see, tribes are sometimes viewed as if they were California or Colorado, and sometimes as if they were the just the Amish.

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18 Tribal exclusion has roots that long predate the arrival of European settlers, and many have continued the practice, whether in whole (excluding all non-members) or in part (excluding specific individuals or classes of individuals, such as criminals) over the past several hundred years. The Covid pandemic of 2019–20 brought the issue to a head, as under-resourced and vulnerable tribes sought to close their borders to outsiders. Some states objected, but largely on the grounds that non-members should be permitted to use state and federal roads that pass through Indian Country. See, e.g., Aaron Bolton, “Montana Is Open, But For Now The Blackfeet Nation is Closed,” NPR All Things Considered, June 17, 2020.


THE PATH OF THE BOOK

This book is just a snapshot, telling the story of eight modern American Indian cases at the Supreme Court. In looking at these important cases, many other Supreme Court cases, as well as laws and historical events will be considered to set the context. A reader should come away with a pretty decent sense of the state of affairs in Indian law today, as well as how we got here.

The cases begin in 1955 during the first years of the Warren Court; then key cases from the Burger, Rehnquist, and Roberts Courts are considered. They were chosen from hundreds of options based on an assessment of their importance to the state of the law today. Others might choose different cases to tell a different story, and that would be welcome. For this story about the distinctiveness and constitutional strangeness of tribes, this is the canon.

The goal is not to provide a comprehensive treatment of American Indian Law or even Supreme Court jurisprudence on the topic but rather to introduce the topic to those unfamiliar with it and to offer a different perspective for those who are. Accordingly, much will be left out. How could it not? There are 574 federally recognized tribes (which is less than the thousands of tribes that existed at first contact), and each of them had a distinct history for the 167 years from the ratification of the Constitution to our first case, let alone the several millennia that preceded the creation of the United States.

A BRIEF HISTORY OF INDIANS AT THE SUPREME COURT

Over the past 228 years—from the Supreme Court’s first ever case, West v. Barnes (1791), through to the end of the term in 2019—the Supreme Court has decided 450 or so cases that considered issues of American Indian Law. The number of non-trivial cases heard per year are shown on Figure I.2.

Although Indian cases have been a constant for the Supreme Court over the past two centuries, the pattern in Figure I.2 in part reflects the choice of cases covered in this book. About one-third of these cases have been decided since Tee-Hit-Ton (1955), the first case we will consider. Most of the cases prior to 1955 are of no modern importance in the big picture of Indian law. They consist mainly of land disputes or other relatively small matters that made their way to the Supreme Court before it had discretionary jurisdiction. But a few
of them—*Johnson v. M’Intosh* (1823), *Worcester v. Georgia* (1832), *Ex parte Crow Dog* (1883), and others—loom as large as the Supreme Court’s canonical cases that are more familiar. The chapters below are about modern cases, but each of these major cases from the prior centuries gets a full treatment. One cannot possibly understand any modern case without understanding these cases first.

The modern era for tribes starts, more or less, with our second case—*Williams v. Lee* (1959). This is the start of an era, the era of “self-determination,” when Indians began to press their rights in non-tribal courts. It was during the Warren Court (1953–1969) that the concept of advancing the cause of civil rights in federal court took firm root in American life generally, and it was especially true for Indians. Indian identity was reinvigorated by the Indian New Deal, part of the larger New Deal, and the passage of the 1934 Indian Reorganization Act, which directed significant resources to Indian Country.

It was further invigorated by activist movements that moved and worked in parallel to those fighting for civil rights for African-Americans and women. As in those areas, the Indian movement brought cases to and changed attitudes on the Court and in the other halls of power in Washington. At the end of our journey, the power the movement won comes to a halt, as the 1980s dawn and the winds shift again. But a tribe of just 25 running a bingo hall and card room in the desert of California would disrupt everything, earning a Supreme Court victory that inspired (maybe, forced) Congress to create an Indian gaming

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22 *Worcester v. Georgia*, 31 U.S. 515 (1832) (ruling a state statute criminalizing non-members of a tribe being present on their land without a license was unconstitutional, and thereby upholding the legal authority of the tribe over their lands).

23 *Ex parte Crow Dog*, 109 U.S. 556 (1883) (holding that the United States lacked criminal jurisdiction over a tribal member for crimes committed against another tribal member on tribal land).

24 *Williams v. Lee*, 358 U.S. 217 (1959) (holding that state civil jurisdiction does not cover activities on tribal land, even involving non-members). This case is the subject of Chapter 2.


industry worth nearly $40 billion per year. This has enriched and empowered American Indians to assert their rights as never before. This money led to power. Although this book does not offer much speculation about the future, it is likely that as much as most American governments have wanted to take power from Indians, this power is not going away and not going to let that ever happen.

The first major Indian case was *Fletcher v. Peck* (1810). Not surprisingly, it was about land. Europeans arrived on this continent with many goods and technologies the native peoples wanted—the one thing Indians had that the settlers wanted was land and the resources (e.g., beaver pelts) that were its fruits. President Thomas Jefferson made this clear in an 1803 letter he wrote to William Henry Harrison, then governor of the Indiana Territory. Jefferson proposed a devious scheme to obtain Indian land:

> To promote this disposition to exchange lands which they have to spare and we want, for necessaries, which we have to spare and they want, we shall push our trading houses, and be glad to see the good and influential individuals among them run in debt, because we observe that when these debts get beyond what the individuals can pay, they become willing to lop them off by a cession of lands.

In other words, Jefferson’s plan was to sell goods to the Indians on credit, extending it beyond their ability to repay. When they did not pay, the government would seize their land to pay down the debt. As always, government would take what it wanted at the point of a gun.

The early Indian cases, including the famous *Johnson v. M’Intosh* (1823), were about who owned Indian land, but notably, the Indians themselves were not typically parties to these cases. It was non-Indians arguing with other non-Indians about who owned Indian land or which non-tribal government had authority over Indian land. Indians were objects of inquiry, not participating as equal parties under the law.

The first major Indian law case before the Supreme Court in which Indians were a party was not until 1831—in *Cherokee Nation v. Georgia*, four decades into the Supreme Court’s history. From *Cherokee Nation* (1831) to *Tee-Hit-Ton* (1955), the Court heard only several dozen consequential Indian cases over a span of more than 120 years. Some of these were monumental, including *Ex Parte Crow Dog*, 109 U.S. 556 (1883) (holding United States lacked criminal jurisdiction over an Indian accused of murdering another Indian); *Elk v. Wilkins*, 112 U.S. 94 (1884) (denying Indians birthright citizenship under the Fourteenth Amendment); *United States v. Kagama*, 118
Figure I.2 Significant Indian cases per term since 1800

Source: author's own.
Indian cases at the Supreme Court have happened since 1955, hence this book’s focus on that period.

**LAW AND THE STORY OF THE ONEIDA**

The story of American Indians is not primarily a legal story. But law—American law imposed from outside these communities—has undeniably shaped the course of this history. Consider the Oneida. Members of the Iroquois Confederacy, the Oneida were one of the few tribes of New York to support the American colonies in their revolt. In the Treaty of Fort Stanwix (1784), they were promised to be secure “in the possession of the lands on which they are settled.” These lands were reduced in a 1788 “treaty” with New York, leaving them with 300,000 acres out of the millions that they initially called home. Then and now, states cannot make treaties, but the Oneida abided the illegal usurpation of their land by New York.

Land sales by Indians to states and to private individuals were sufficiently troubling that the First Congress passed the Trade and Intercourse Act (1790), which, among other things, forbade any land sales by Indians or tribes to anyone other than the federal government. New York flouted the law. It continued to purchase land from the Oneida in violation of federal law, despite warnings from the Washington Administration that the sales were illegal and thus void.

Over the following decades, the federal government looked away as New York continued to acquire more land from the tribe to open the state up to settlement. The federal government was not just indifferent; in some cases it actively encouraged illegal purchases. Agents of the Bureau of Indian Affairs, a federal department theoretically responsible for helping Indian peoples, worked with New York to remove the Oneida from the state. After the

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31 For a discussion of this history, see *City of Sherill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005).

32 *Id.* at 205–206.
Removal Act (1830) gave authority for the president to move many southern tribes west of the Mississippi, the Oneida saw the writing on the wall and decamped to Wisconsin. By the 1840s, most of the Oneida were gone. As the Supreme Court noted, “[b]y 1920, the New York Oneidas retained only 32 acres in the State.”33 It wasn’t just law (or the lack of it) that drove the Oneida out of New York, but it played a big role.

Reinvigorated by the Indian activism of the 1960s (and the enactment of 28 U.S.C. § 1362 (1966) that established federal court subject matter jurisdiction over claims like this one), the Oneida sued. The litigation, which started in 1970, made its way to the Supreme Court in 1985. The Oneida pointed to one transaction—the sale of 100,000 acres to New York in 1795—and claimed it was void under the Trade and Intercourse Act of 1793.34 They sought a limited remedy—one year’s rental value of the land—in order to make it easier for the courts to rule for them and thus create a powerful precedent for their broader goal of returning to their ancestral lands.

The Supreme Court ruled (repeatedly) for the tribe.35 On remand, the district court entered judgments of $15,994 against Oneida County and $18,970 against Madison County, representing the full fair market rental value, minus set-offs for improvements, plus pre-judgment interest.36 The win was symbolic—no person would sue for 15 years to get less than $40,000. The litigation was also a test case, establishing Indian rights to land. With that determined, the tribe went to New York in search of a broader settlement. When the efforts stalled, the tribe bought more parcels of land, and, citing its sovereignty, refused to pay taxes to the state. This was intended to provoke a dispute that would get the tribe back the land illegally taken from it.

The case went back up to the Supreme Court in 2005. In City of Sherrill v. Oneida Indian Nation (2005), Justice Ginsburg ruled against the tribe’s claim for the effective return of vast swaths of its former territory.37 The Court worried about “longstanding observances and settled expectations,” characterizing the area of New York and its inhabitants as “distinctly non-Indian [in] character.”38 Accordingly, the Court refused to permit the tribe to “rekindl[e]
embers of sovereignty that long ago grew cold.” The justices therefore refused to give tribes effective control over central New York despite the sale of the land so many years ago being plainly in violation of federal law.

But the story didn’t end there. On remand from the Supreme Court, the Second Circuit Court of Appeals decided—forty years after the litigation started!—that the Oneida had sovereign immunity that prevented New York from foreclosing on tribal land acquired in the meantime. This victory brought New York back to the bargaining table. Another Supreme Court win for another tribe gave the Oneida enormous leverage in these negotiations. A 1987 Supreme Court case—California v. Cabazon Band of Mission Indians—protected Indian gaming from state regulation. The Oneida took advantage of the Cabazon case, building the enormously profitable Turning Stone Casino, situated between Syracuse and Utica. Under the Second Circuit’s decision in Oneida Nation, the profits were not taxable by New York State.

In 2014, Governor Andrew Cuomo and Oneida Chief Ray Halbritter reached a settlement (not a “treaty,” mind you, since states can’t make “treaties”) of the lawsuit that started nearly four decades earlier. The tribe got land—some 25,000 acres. The federal government would hold the land in trust, as it does for other Indian land. The Oneida would get some sovereignty over the land, including the right not to pay state taxes or be subject to state regulation, and police power over vast swaths of Oneida County. The state got money—some $11 million up front, and 25 percent of the revenues from its 2,000 slot machines at Turning Stone (an estimated $50 million a year).

For most Oneida today, this story is not central to their day-to-day life, and ancient traditions may be more salient. The Oneidas are a matrilineal society with three clans—Turtle, Wolf, and Bear. Much of tribal life revolves around these structures, dating back to when Columbus was sailing around the Caribbean. According to tradition, the women of the tribe—“Clan Mothers”—

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39 Id. at 215.
40 Technically, the tribe owned the land in fee, not in trust, and the dispute was about taxes, not the underlying land claims. But the Court’s opinion was styled as if it were about the broader issues, which is the ultimately goal the Oneida were after.
41 See Oneida Indian Nation of New York v. Madison County, Oneida County, N.Y., 605 F.3d 149 (2d Cir. 2010).
43 The settlement agreement can be found at: https://www.tax.ny.gov/pdf/publications/oin_settlement_agreement.pdf.
44 See id.
make long-term decisions, while the men decide things in the short run. Every decision is considered in light of the next seven generations.

For the average Oneida, life takes place on what Will and Ariel Durant called the “banks” of the river of civilization. It is there, they wrote, that “unnoticed, people build homes, make love, raise children, sing songs, write poetry and even whittle statues.” The river, by contrast is “filled with blood from people killing, stealing, shouting, and doing things historians usually record.” The Supreme Court sets the course of the river. Its decisions direct the flow and determine where the banks are and what can be done there. But, as in all Anglo-American law, the people on the banks get to play a big role in the shape of the river because they bring cases and controversies to the Court. This book is about the river, but it is also about the banks.

The complex mix of law, history, state action, federal action, land, money, and so much more at play in the story of the Oneida is replayed for nearly every one of the hundreds of tribes that have interacted with American governments over the past several centuries. In the chapters that follow, we will look at a few of these cases. The goal is to pique your interest, not to satisfy your curiosity.

A NOTE ABOUT “CONSTITUTIONAL”

The term “constitutional” is used throughout this book, sometimes in ways that may be unfamiliar or uncomfortable for some readers. One reviewer of the manuscript objected to the fact that the word “constitutional” was used to describe the result or grounds of analysis by the Supreme Court in some cases: “[The author] repeatedly calls decisions ‘constitutional’ when they contain practically no mention of the Constitution (i.e., Johnson v. M’Intosh).” While it is true that Chief Justice John Marshall does not explicitly invoke the Constitution in deciding that Native Americans did not have recognizable title to land that they could transfer to non-Natives, no legal materials are cited for the proposition in the conventional sense. The Court considers the question of Native ownership in light of the existence of the United States as sovereign, founded as it is on the Constitution. The Court writes:

The United States, then, has unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold and assert in themselves the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of

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46 See id.
47 See id.
49 Id.
occupancy either by purchase or by conquest, and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise.\textsuperscript{50}

The decision is “constitutional” in the sense that it is not grounded in a statute or common law rule. Rather, the Court decided it based on the overall structure of government over the United States and its interplay with the inhabitants that pre-existed it. It is “constitutional” in this sense. But, if readers object to this term, they should substitute whatever term appeals to them. It matters not to the analysis.

The basis for any government power over the Native peoples of the Americas is found in the Constitution. Article I, section 8, clause 3 of the Constitution gives Congress power to “regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” This is the sole basis for the plenary power that Congress purports to exercise over Native Americans. It is, as several justices have noted and as discussed below, a very flimsy reed on which to found such enormous power. Congress can, with the flick of a pen and the consent of the president, take away Indian sovereignty or enhance it. Congress could possibly solve all of the pathologies set out below, if it wanted to or had the will. Certainly this is not what was imagined as flowing from “regulating commerce.” But that is where we are. In this sense, every decision involving tribes is in some ways a matter of constitutional interpretation. By enforcing Title 25 of the United States Code or a particular statute about Indians, the Court is adhering to the broad reading of the Indian Commerce Clause. By meteing and bounding the scope of Indian sovereignty over land, by enforcing or not enforcing treaties, by deciding which courts get to decide what and when, the Supreme Court, making it up as it goes along, gets to decide the relations between those that call themselves “Indians” and those who are not. It is at the Court where the rights of Native Americans to govern themselves, to tax, to govern others, and to set their own destiny, as a people distinct from others, is determined.

\textsuperscript{50} Johnson v. M’Intosh, 21 U.S. 543, 587 (1823).