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Cover Page Footnote

Jeremy Wood is a judicial law clerk on the Washington Court of Appeals. He extends special thanks to Assistant United States Attorney Rebecca Cohen and the Honorable J. Michael Diaz, former Assistant United States Attorney and current King County Superior Court Judge. While externing for the United States Attorney's Office for the Western District of Washington, the author drafted several memoranda for Cohen and Judge Diaz. This article grew out of two of those memoranda. Thanks are also owed to the talented and dedicated staff of the American Indian Law Journal who shepherded this article to completion, sharpening and strengthening it along the way.

TRIBAL EXCLUSION AUTHORITY: ITS SOVEREIGN BASIS WITH RECOMMENDATIONS FOR FEDERAL SUPPORT

By Jeremy Wood

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TRIBAL EXCLUSION AUTHORITY: ITS SOVEREIGN ROOTS AND RECOMMENDATIONS FOR FEDERAL SUPPORT

By Jeremy Wood[*]

I. INTRODUCTION

In August 2013, a plane landed in Qagun Tayagungin, a small city at the beginning of the Aleutian chain.[1] The city, known in English as Sand Point, first emerged in the nineteenth century as a fishing post maintained and operated in part by its Aleut residents.[2] On that day in August, those residents gathered to meet the plane and formed a semicircle around its exit ramp.[3] A man, previously identified by the community as a drug-dealer, stepped out.[4] When he did, the crowd handed him a return ticket and did not let him leave the tarmac until he boarded a plane that would take him away from the community.[5]

Such moments show the necessary role that exclusion, the civil act of removing persons from a community space, plays in the

[*] Jeremy Wood is a judicial law clerk on the Washington Court of Appeals. He extends special thanks to Assistant United States Attorney Rebecca Cohen and the Honorable J. Michael Diaz, former Assistant United States Attorney and current King County Superior Court Judge. While externing for the United States Attorney's Office for the Western District of Washington, the author drafted several memoranda for Cohen and Judge Diaz. This article grew out of two of those memoranda. Thanks are also owed to the talented and dedicated staff of the American Indian Law Journal who shepherded this article to completion, sharpening and strengthening it along the way.

[1] Dan Joling, *In Alaska Village, Banishment Helps Keep Peace*, NEWSMINER, May 1, 2014, http://www.newsminer.com/news/alaska_news/in-alaska-village-banishment-helps-keep-peace/article_cc940f74-df60-11e3-8d73-001a4bcf6878.html [https://perma.cc/FF8W-BH63].

[2] *The History of Sand Point*, EXPLORE NORTH, http://www.explorenorth.com/library/communities/alaska/bl-SandPoint.htm [https://perma.cc/X84Z-2C6W].

[3] Joling, *supra* note 1.

[4] Joling, *supra* note 1.

[5] Joling, *supra* note 1.

tribal repertoire of crime prevention tools.[6] As hostile Supreme Court precedent has restricted tribal criminal jurisdiction, the remedy of exclusion—executed either in an informal, traditional manner, as at Sand Point, or through formal civil procedures—enables tribal governments to keep their communities safe.

In addition to these jurisdictional restrictions, there are statutory limitations on the ability of tribes to issue sentences sufficient to fully address epidemic levels of drug dealing, abuse, and domestic violence. Sentencing maximums imposed upon tribes, pursuant to the Tribal Law and Order Act, pale in comparison to those available to state and federal judges.[7]

The first purpose of this article is to bolster exclusion's potential to fill those spaces where Supreme Court precedent and statutes limit tribal jurisdiction and sentencing authority. Tribes have created careful legal schemes to administer exclusion, to which the federal courts should defer. The United States federal government should also further tribal exclusion efforts by prosecuting violations of exclusion orders and implementing policy to require that prosecutors charge such cases.

At the same time, exclusion is a stark remedy, and its effect on those excluded is severe. When imposed upon tribal members, it can entail a loss of community, family, and heritage. The second purpose of this article is to highlight the sensitive attention that tribal legislators and courts have paid to these concerns. Rather than second-guessing these tribal initiatives, federal actors should support their furtherance by deferring to tribal decisions.

This article is presented in four parts. Part Two examines the practice of exclusion in the tribal context. It considers the pressures that led to a modern resurgence in the use of exclusion as well as the efforts of tribal lawmakers to procedurally regulate it. Amongst those lawmakers, tribal legislators have promulgated statutes that delineate the offenses subject to exclusion, the rights of the excluded, and the proper jurisdictional framework for the practice's exercise.

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[6] The relevant authorities and discussion characterize this practice as both exclusion and banishment. Notwithstanding minor distinctions some have raised between the terms, this article uses "exclusion" for purposes of consistency.

[7] *See* Indian Civil Rights Act of 1968, § 202, 25 U.S.C. § 1302 (2016). Pursuant to § 1302(b), tribal courts may sentence "defendant[s] to term of imprisonment greater than 1 year but not to exceed 3 years for any 1 offense."

Part Three turns to United States federal law. It first considers the common law's traditional recognition of a sovereign's power of exclusion as a necessary incident of the police power. Early on, federal courts acknowledged that same power in tribal governments.[8] This part then examines how this recognition and other circumstances led the United States to enter into treaties with tribal nations to protect this power of exclusion. Part Three ends by following the decline of this recognition, when policies of allotment devastated the tribal land base and the Supreme Court sapped the force of the exclusion power along with it.

Part Four considers the important work the United States executive and legislative branches have done in recent years to support the exclusion power. Various United States Attorney's Offices have prosecuted individuals who enter tribal lands in violation of a tribal exclusion order.[9] By continuing to do so, they would further the United States' trust obligation to protect tribal nations from hostile settler encroachment. This part also details recent congressional efforts to reaffirm an expanded tribal power of exclusion in the prosecution of domestic violence offenses, a power that may eventually be applied in the prosecution of drug-related offenses and those related to violence against children.

Part Five turns to the courts and presents, in three sections, how current jurisprudence might develop to support tribes in exercising the power of exclusion. The first section considers how courts might better recognize the necessary tribal jurisdiction to impose exclusion. They can do so by resting such jurisdiction either on inherent tribal sovereignty or through interpreting the holding in *United States v. Montana*. The second section examines the effect of federal public accommodations statutes on tribal exclusion power. It stresses thoughtful caution when application of such law would impair treaty exclusion rights. And it examines how, in the commercial context, access to tribal commercial spaces may not implicate intramural tribal affairs, but tribal regulation of that access certainly does. In the last section, this article considers recent

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[8] Johnson v. M'Intosh, 21 U.S. 543, 593, (1823); Morris v. Hitchcock, 194 U.S. 384, 391–92 (1904).

[9] *See, e.g.*, United States v. Nichols, No. CR 14-30038-MAM, 2014 WL 4185360, at *1 (D.S.D. Aug. 20, 2014); *see also* Press Release, United States Department of Justice, U.S. Attorney's Office, District of South Dakota, Man Charged with Criminal Trespass (Jan. 29, 2015), https://www.justice.gov/usao-sd/pr/man-charged-criminal-trespass [https://perma.cc/792A-BA8F].

decisions on habeas corpus petitions brought by excluded persons. Based on these cases, the article suggests that federal district courts should decline to exercise habeas corpus jurisdiction in challenges to the exclusion of nonmembers, should defer to tribal procedural protections, and should avoid conclusions that imply that tribes should change their law.

II. TRIBAL EXCLUSION PRACTICES

Tribes inherently enjoy the power of exclusion, and they maintain that power unless it is abrogated by Congress. Many tribal governments have recognized the customary roots of exclusion in their legal heritage. The Nisqually and Tohono O'odham Tribes have done so in appellate opinions, recognizing that the practice of exclusion predates modern tribal organization.[10] The Snoqualmie Tribe, by constitutional provision, limits the exclusion of tribal members "in accord with Snoqualmie tribal tradition."[11] Amongst the Cheyenne people, traditional soldier societies continue to implement informal extrajudicial exclusions.[12]

Tribal nations have employed this practice since time immemorial. Three examples are helpful. At some point between the twelfth and fifteenth centuries, the Iroquois Nations of the Haudenosaunee Confederacy promulgated their constitution, the Gayanashagowa, or Great Law of Peace, which as Congress has acknowledged, served to inspire the framers of the United States

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[10] *See, e.g.*, Stepetin v. Nisqually Indian Cmty., 2 N.I.C.S. App. 224, 234 (Nisqually Tribal Ct. App. 1993), http://www.codepublishing.com/WA/NICS/html/2NICSApp/2NICSApp224.html [https://perma.cc/3HZN-9F94]; Escalante v. Sells Dist. Council, No. CTA-0133 (Tohono O'odham Ct. App. Jan. 27, 2017), at 10, https://turtletalk.files.wordpress.com/2017/02/2017-01-27-decision-of-appeal-003.pdf [https://perma.cc/66TP-U52Z].

[11] SNOQUALMIE TRIBAL CONST. art. II, § 3, http://www.snoqualmietribe.us/sites/default/files/linkedfiles/constitution.pdf [https://perma.cc/B9FP-GV7M].

[12] Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. REV. 85, 95 (2007). These societies could banish those found guilty of murder, disobedience of the orders of a traditional society, theft, rape, incest, or abuse of power. *Id.* In 2005 the Dog Soldiers of the Crazy Dog Society and the Kit Fox Society decided at council to banish an Indian Health Services doctor for performing religious ceremonies on tribal land in a manner that caused "sacrilege and desecration to [their] culture."[12] *Id.* at 96 (alteration in original). The Dog Soldiers drove the doctor, a nonmember, to the border of the reservation and ordered him to leave. *Id.* The Northern Cheyenne Tribal Court, however, overturned this traditional banishment. *Id.*

Constitution.[13] Section twenty of that instrument authorizes the Haudenosaunee Confederacy leadership to banish a chief from all Haudenosaunee territory for the crime of murder .[14] Section seventy-four permits the same sanction to be imposed upon adopted members of the confederated nations who cause a disturbance.[15] Similarly, one scholar of Cherokee law has noted that the Cherokee Nation possibly authorized exclusion as a sanction for violations of "food and field regulations, refusal to work, [or failure to] contribute [the proper] share of work and crops."[16]

Under traditional Cheyenne law, community chiefs could order the exclusion of a person who committed murder or drove another person to suicide.[17] Otherwise, the continued presence of the guilty party was thought to cause continuing danger to community welfare and emotional harm to the victim's family.[18] If the chiefs were absent, the military societies could order an emergency exclusion under certain circumstances.[19]

Exclusion was not a death sentence. Those excluded generally found a hospitable and unquestioning reception in neighboring tribes.[20] Amongst the Cheyenne themselves, such resident aliens were protected from harm.[21] But homesickness, understandably, still affected the excluded.[22]

Also, exclusion was not necessarily permanent. Although exclusion orders were phrased for an indefinite duration, they were regularly commuted after five to ten years.[23] For example, in deciding whether to allow readmission, the Cheyenne community leadership considered the excluded person's penitence and character, the safety of the community, and the mitigating factors of

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[13] *See* H.R. Con. Res. 331, 100th Cong. (1988); Robert B. Porter, *Building a New Longhouse: The Case for Government Reform Within the Six Nations of the Haudenosaunee*, 46 BUFF. L. REV. 805, 814–16 (1998).
[14] GREAT LAW OF PEACE § 20, http://cscie12.dce.harvard.edu/ssi/iroquois/simple/1.shtml [https://perma.cc/5A6P-5MKB].
[15] *Id.* at § 74.
[16] RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT 36 (1975).
[17] KARL N. LLEWELLYN & E. ADAMSON. HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE 166–67 (1941).
[18] *See id.* at 133.
[19] *Id.* at 166–67.
[20] *Id.* at 133.
[21] *Id.* at 166.
[22] *Id.* at 133.
[23] *Id.* at 137.

the underlying offense.[24] Readmission also required the consent of the military societies and the victim's representatives.[25] Even once readmitted, the once-excluded individual was permanently barred from certain Cheyenne rituals and sacred spaces.[26]

Notable Professor Karl Llewelyn praised this exclusion scheme, characterizing it as "a technique of multiple excellence."[27] It discouraged revenge, rehabilitated the offender, and allowed for restoration of right relations "when dangers of social disruption were over."[28]

In the nineteenth century, several tribes adopted constitutions to codify traditional powers of exclusion, including the Delaware, Sisseton-Wahpeton, and Pamunkey Nations.[29] Many of the relevant provisions specifically addressed the exclusion of white nonmembers who refused to obey tribal law or who committed acts of sexual exploitation against tribal members.

In recent years, tribes have increasingly turned to exclusion to address crises not amenable to other measures.[30] United States law and the narrow powers it recognizes in tribes failed many of these communities. Reliance on exclusion, one Haudenosaunee journalist explained, comes "out of desperation."[31] The "American route, which has proven to be a failure" requires replacement by "ancestral discipline."[32]

For example, many tribes have turned to exclusion to confront drug-dealing epidemics. This problem exploded in recent decades. The Lummi Tribe faces an OxyContin trade estimated at $2 million per annum, "easily surpassing fishing industry profits."[33] Discussing the plague of drugs on his reservation, Lummi Tribal Chairman Darrel Hillaire explained, "We need to go back to our old

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[24] *Id.* at 167–68.
[25] *Id.* at 167.
[26] *Id.*
[27] *Id.* at 158.
[28] *Id.*
[29] DAVID E. WILKINS & SHELLY HULSE WILKINS, DISMEMBERED: NATIVE DISENROLLMENT AND THE BATTLE FOR HUMAN RIGHTS 50–51 (2017).
[30] *Id.* at 68–71 (identifying twenty-six tribal communities in twenty states that have ordered exclusions).
[31] Sarah Kershaw & Monica Davey, *Plagued by Drugs, Tribes Revive Ancient Penalty*, N.Y. TIMES (Jan. 18, 2004), http://www.nytimes.com/2004/01/18/us/plagued-by-drugs-tribes-revive-ancient-penalty.html.
[32] *Id.*
[33] *Id.*

ways . . .We had to say enough is enough."[34] The Yupik residents of Akiak in Southwest Alaska have struggled against the state's foot-dragging in combatting their community's drug problem. When asked about the lack of support from local state law enforcement, those residents explained, "If they do not enforce [tribal banishment orders] we will enforce [them] ourselves. We will get a group of men together and go to that person and tell him to leave and to not come back."[35] Amongst other tribes, the Cheyenne River Sioux, Standing Rock Sioux, and Saginaw Chippewa of Michigan have all acted to exclude drug dealers from their reservations.[36]

Exclusion also allows tribes to combat ills that non-Indian sovereigns are not forced to face. In one noted case, a tribe used exclusion to remove a nonmember who stole and reported tribal traditions for his own academic gain. Tito Naranjo, a professor at the University of New Mexico, is a member of the Santa Clara Pueblo married to a woman from the Taos Pueblo.[37] He received the opportunity to watch the Taos Deer Dance at Christmas.[38] Without asking the Taos for permission and knowing it would likely not be granted, he wrote an essay to run in a local newspaper.[39] In his words, he would have been a "wimp" to defer to the concerns of the Taos community.[40] In response, a Taos spiritual leader filed a complaint in tribal court calling for Naranjo's exclusion.[41] The petition was granted.[42]

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[34] *Id*.
[35] Joling, *supra* note 1.
[36] Levi Rickert, *Standing Rock Sioux Tribe to Banish Meth Dealers from Tribe*, NATIVE NEWS Online (Jul. 29, 2015), http://nativenewsonline.net/currents/standing-rock-sioux-tribe-to-banish-meth-dealers-from-tribe/ [https://perma.cc/8FPF-K4YH]; *Cheyenne River Sioux Tribal Council Votes to Banish Drug Dealers for Life from Tribe*, NATIVE NEWS ONLINE, (Jul. 9, 2015), http://nativenewsonline.net/currents/cheyenne-river-sioux-tribal-council-votes-to-banish-drug-dealers-for-life-from-tribe/ [https://perma.cc/DZ2W-S5CU]; Press Release, Banishment, SAGINAW CHIPPEWA INDIAN TRIBE, (Feb. 25, 2015), http://sagchip.org/news.aspx?newsid=309#.WqgYYGrwaUk [https://perma.cc/EWK5-BNH2].
[37] Marissa Stone, *Dancing with Fire: Santa Clara Tribal Member Banished from Taos Pueblo for Writing Essay About Tribe's Sacred Deer Dance*, SANTA FE NEW MEXICAN (Feb. 6, 2004), https://web.williams.edu/AnthSoc/native/naranjo.htm [https://perma.cc/3LMR-LGYF].
[38] *Id*.
[39] *Id*.
[40] *Id*.
[41] *Id*.
[42] *Id*.

Tribes have also used exclusion to combat racism exhibited by non-Indians towards tribal members. In 2015, the Fort Peck tribal council passed a resolution to exclude Former School Superintendent Kim Hardin after Hardin sent an email to another non-Native teacher in which she referred to Native teachers as "renegades."[43] One of the councilmembers who moved for her exclusion reported that Hardin's actions had created a racial divide in the community.[44] By excluding such a person, the Tribe defended the dignity of its people from the bigotry of nonmembers.

The frequency with which exclusion is applied varies across tribes. One New Mexico attorney reported that she only dealt with a handful of exclusion orders in her twenty-five years of practice.[45] By contrast, the Fond Du Lac Band of Lake Superior Chippewa excluded seventy-seven people from 2001 to 2014.[46] In a similar period, the Eastern Band of Cherokee Indians excluded sixty-two people.[47] The Flambeau Band of Lake Superior Chippewa uses exclusion not only as a tool to remove offenders but also to shame them as examples by posting their names online.[48]

Recognizing the impact of exclusion, tribal lawmakers based exclusion statutes on a careful balancing of individual due process and community welfare.

A. *Tribal Exclusion Statutes*

Many tribes have enacted statutes providing for exclusion. The National Congress of American Indians has urged all tribes to enact such legislation.[49] A brief survey of tribal exclusion

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[43] Aja Goare, *Montana School Superintendent Fired, Banished From Reservation*, KTVQ (May 1, 2015), http://www.ktvq.com/story/29137083/eastern-montana-school-superintendent-fired-banished-for-alleged-racism [https://perma.cc/U2XN-YL7Y] (The term "renegade" when applied to Native individuals is widely considered a slur; it derives from western American characterizations of Native people who refused to relocate onto reservations.).

[44] *Id.*

[45] T.S. Last, *More Tribes Bring Back Sentence of Banishment*, ALBUQUERQUE J. (Jun. 24, 2016), https://www.abqjournal.com/797280/more-tribes-bring-back-sentence-of-banishment.html [https://perma.cc/GSU7-TLLR].

[46] *Id.* (Excluded tribal members were allowed to retain their membership).

[47] *Id.*

[48] *Id.*

[49] National Congress of American Indians, Res. SD-15-053, *Enforcement of Exclusion Orders, Protective Orders, and Trespass Violations in Indian Country*, at 2 (2015), http://www.ncai.org/resources/resolutions/enforcement-of-

ordinances shows points of similarity and difference in the ways different tribes have chosen to codify the power to exclude. The following examination focuses on such points as they are related to statements of legislative intent, the class of persons subject to exclusion, the classes of offenses that justify exclusion, tribal efforts to overcome jurisdictional hurdles, and statutory due process requirements.

1. Statements of Legislative Intent

Statements of legislative intent found in tribal codes shed light on the policies underlying tribal exclusion ordinances. The Makah Tribal Code, for example, explains that the exclusion ordinance was passed because nonmembers "[were] increasingly acting in utter disregard of Tribal law," destroying and polluting tribal resources, trespassing on tribal property, and harming "the natural, social and psychological well-being of members and all persons on the Reservation."[50] Similarly, the Tulalip Tribal Code takes note of "population increases on and in the vicinity of the Tulalip Indian Reservation" associated with its extensive commercial developments.[51] Although such developments have brought substantial economic benefits and improved Tulalip tribal relationships with neighboring communities, they have also allowed for new forms of personal and property crime.[52] As a result, the Tulalip code notes a "greater number of instances in which it may be necessary to exercise its exclusion power."[53] The Pascua Yaqui

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exclusion-orders-protective-orders-and-trespass-violations-in-indian-country [https://perma.cc/7VYF-7ZGD].

[50] MAKAH TRIBAL CODE § 9.1.01, https://www.narf.org/nill/codes/makahcode/makahlawt9.html [https://perma.cc/QKX6-ULQF].

[51] TULALIP TRIBAL CODE § 2.40.010(2), http://www.codepublishing.com/WA/Tulalip/?Tulalip02/Tulalip0240.html&?f [https://perma.cc/Q4QR-89P4]. The Tulalip Tribes maintain extensive gaming and retail businesses which employ many non-Indian workers and which draw customers from throughout the Pacific Northwest, Canada, and further abroad. *See* Richard Walker, *Feds Side with Tulalip Tribes in Quil Ceda Tax Fight*, INDIAN COUNTRY TODAY (Aug. 12, 2015), https://indiancountrymedianetwork.com/news/politics/feds-side-with-tulalip-tribes-in-quil-ceda-tax-fight/ [https://perma.cc/6M4K-NS8B].

[52] *E.g.*, *Tulalip Police searching for suspects in armed robbery at Seattle Premium Outlet Mall*, MARYSVILLE GLOBE (May 28, 2010), https://blog.seattlepi.com/marysville-pi/2010/05/28/tulalip-police-searching-for-suspects-in-armed-robbery-at-seattle-premium-outlet-mall/.

[53] TULALIP TRIBAL CODE § 2.40.010(2).

Tribal Code roots its exclusion authority in the "sacred duty and obligation," recognized in the tribal constitution, of the Tribe to protect natural, economic, cultural, and social resources.[54] The Confederated Tribes of the Warm Springs' tribal code roots its exclusion authority in treaty language providing that the tribal reservation "shall be set apart, and, so far as necessary, surveyed and marked out for [the Tribes'] exclusive use; nor shall any white person be permitted to reside upon the same without" tribal and federal permission.[55]

2. Persons Subject to Exclusion and Offenses That Justify Exclusion

Tribal exclusion codes designate persons whom a tribe may exclude and the offenses for which those persons may be excluded. While some tribes only permit the exclusion of nonmembers,[56] there are others that allow exclusion to be applied broadly with few exceptions, such as those authorized to remain on reservation by federal law[57] or those who retain real property on the reservation[58]. In surveying tribal constitutions, Professor David Wilkins identified thirty-two codes that authorized the exclusion of nonmembers who threaten a tribe's well-being and thirty codes that authorized the exclusion of any person not legally entitled to remain on tribal lands.[59]

Tribal codes allow for exclusion as a remedy for a broad host of offensive conduct. Beyond general violations of tribal law, these offenses include those affecting a tribe's natural resources,

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[54] PASCUA YAQUI TRIBAL CODE, tit. 5, ch. 8, § 10, http://www.pascuayaqui-nsn.gov/_static_pages/tribalcodes/.

[55] WARM SPRINGS TRIBAL CODE § 300.1 (quoting Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963), https://warmsprings-nsn.gov/government/tribal-code/.

[56] *E.g.*, CHEHAILIS TRIBAL CODE § 2.20.030, http://www.codepublishing.com/WA/ChehalisTribe/; MAKAH LAW AND ORDER CODE § 9.2.01, https://www.narf.org/nill/codes/makahcode/; PORT GAMBLE S'KLALLAM TRIBAL LAW AND ORDER CODE § 22.01.03, https://www.pgst.nsn.us/government/law-and-order-code.

[57] *E.g.*, COLVILLE TRIBAL LAW AND ORDER CODE § 3-2-3, https://www.cct-cbc.com/current-code/; COQUILLE TRIBAL ORDINANCES § 652.375(2)(a), http://www.coquilletribe.org/?page_id=1326; NEZ PERCE TRIBAL CODE § 4-4-2, http://www.nezperce.org/~code/pdf%20convert%20files/14feb17%20Code%20with%20TOC.pdf [https://perma.cc/T9CL-GDTF].

[58] *E.g.*, COLVILLE TRIBAL LAW AND ORDER CODE § 3-2-3; NEZ PERCE TRIBAL CODE § 4-4-2.

[59] WILKINS & WILKINS, *supra* note 29, at 53.

economic welfare, and cultural integrity as well as the laws of other jurisdictions.

The first category includes the unauthorized exploitation of game, fish, timber, other vegetation, and mineral resources.[60] It also includes trespassing on protected lands closed to all persons or nonmembers by a respective tribal government.[61] By using exclusion to address these offenses tribes may regain control of resources that carry deep cultural and financial value and that have often been prime targets for exploitation by non-Indians.

The second category aims at the sort of economic exploitation too often attributable to nontribal members in Indian country. Thus, the Tulalip, Chehalis, Colville, Warm Springs, and Port Gamble S'Klallam tribes allow for the exclusion of those committing fraud and usury as well as those who refuse to comply with tribal business or employment regulations.[62] Other tribes may exclude those who refuse to pay tribal taxes; an issue of historic contention in compliance.[63] As discussed earlier, commerce in drugs poses an acute threat to tribal communities. Recognizing this threat, the Tulalip legislature enacted a mandate requiring the Tribe to petition for the permanent exclusion for offenses related to the production or sale of drugs.[64]

The third category aims at persons like Tito Naranjo who seek to colonize, exploit, or denigrate tribal culture. Thus, the Pascua Yaqui Tribe allows for the exclusion of those found "conducting any sociological or anthropological studies without

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[60] *E.g.*, COLVILLE TRIBAL LAW AND ORDER CODE § 3-2-4(a)(8); COQUILLE TRIBAL ORDINANCES §§ 652.150(1), 652.375(1)(b); MAKAH LAW AND ORDER CODE § 9.2.02(j); PORT GAMBLE S'KLALLAM TRIBAL LAW AND ORDER CODE § 22.02.01(h), (i); TULALIP TRIBAL CODE § 2.40.050(12).

[61] *E.g.*, NEZ PERCE TRIBAL CODE § 4-4-3(c); TULALIP TRIBAL CODE § 2.40.030(2).

[62] *E.g.*, CHEHALIS TRIBAL CODE § 2.20.050(N), (O), (R), http://www.codepublishing.com/WA/ChehalisTribe/; COLVILLE TRIBAL LAW AND ORDER CODE § 3-2-4(6); COQUILLE TRIBAL ORDINANCES § 652.375(1)(c); NAVAJO NATION CODE tit. 17, ch. 5, § 1901(C)(2)(d), (e), http://www.navajonationcouncil.org/Code%20Page.html; NEZ PERCE TRIBAL CODE § 4-4-3(f), (g); PORT GAMBLE S'KLALLAM TRIBAL LAW AND ORDER CODE § 22.02.01(k), (n), (o), (p); TULALIP TRIBAL CODE § 2.40.050(18), (20); WARM SPRINGS TRIBAL CODE § 300.310(10)– (12).

[63] *E.g.*, CHEHALIS TRIBAL CODE § 2.20.050(L); COLVILLE TRIBAL LAW AND ORDER CODE § 3-2-4(4); NEZ PERCE TRIBAL CODE § 4-4-3(d); TULALIP TRIBAL CODE § 2.40.050(16); WARM SPRINGS TRIBAL CODE § 300.310(4); *see* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144–45 (1982).

[64] TULALIP TRIBAL CODE § 2.40.050(26); *see* WARM SPRINGS TRIBAL CODE § 300.310(16).

prior tribal council permission."[65] The Chehalis and Port Gamble S'Klallam tribal codes similarly allow for the exclusion of those found "[c]onducting missionary activities without permission of the Business Committee."[66] Such an enactment mirrors those of foreign jurisdictions historically plagued by violent proselytism.[67] Because these harms are acutely tied to histories of colonial exploitation, it is proper that tribes should have the power to resist them and to do so through the mechanism of exclusion.

The fourth category of offenses warranting exclusion—violations of other jurisdictions' laws—allows tribes to better cooperate with neighboring jurisdictions in creating a consistent criminal overlay. Many tribes regularly order exclusions for violations of state and federal laws, as well as the laws of other tribes, even if they are not prosecuted in another jurisdiction.[68] Many tribes similarly allow for the exclusion of individuals found evading the authorities of other jurisdictions.[69] The Tulalip code also allows for the exclusion of registered sex offenders, regardless of where the underlying sex offense or registration requirement arose.[70] Similarly, Chehalis and Port Gamble S'Klallam tribal codes allow for the exclusion of juvenile nonmembers hiding in tribal lands in order to avoid school attendance elsewhere.[71] The constitutions of the Shoalwater and Skokomish tribes permit the exclusion and extradition of individuals accused of crimes in other jurisdictions.[72]

The jurisdictional pitfalls of federal Indian law can make it difficult for tribes to address these harms, even through exclusion. Through smart drafting, tribal legislatures seek to overcome these

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[65] PASCUA YAQUI TRIBAL CODE tit. 5, ch. 8, § 50(B)(1); *see* CHEHALIS TRIBAL CODE § 2.20.050(Q); NAVAJO NATION CODE tit. 17, ch. 5, § 1901)(C)(2)(c); NEZ PERCE TRIBAL CODE § 4-4-3(i); TULALIP TRIBAL CODE § 2.40.050(1).
[66] CHEHALIS TRIBAL CODE § 2.20.050(W); *see* PORT GAMBLE S'KLALLAM TRIBAL LAW AND ORDER CODE § 22.02.01(aa).
[67] *See, e.g.*, Penal Law, 5737–1977, §§ 170–174, LSI 54 (1977) (Isr.).
[68] *E.g.*, CHEHALIS TRIBAL CODE § 2.20.050(B); PASCUA YAQUI TRIBAL CODE tit. 5, ch. 8, § 50(A); TULALIP TRIBAL CODE § 2.40.050(4), (5).
[69] *E.g.*, CHEHALIS TRIBAL CODE § 2.20.050(C); TULALIP TRIBAL CODE § 2.40.050(6).
[70] TULALIP TRIBAL CODE § 2.40.050(13); *see* Allie Hostler, *Hoopa Tribe Starts Banishment Process of Non-tribal Member Sex Offenders*, TWO RIVERS TRIB. (May 29, 2013), www.tworiverstribune.com/2013/05/hoopa-tribe-starts-banishment-process-of-non-tribal-member-sex-offenders/ [https://perma.cc/BQ6Q-UJSJ].
[71] CHEHALIS TRIBAL CODE § 2.20.050(U); PORT GAMBLE S'KLALLAM TRIBAL LAW AND ORDER CODE § 22.02.01(w).
[72] WILKINS & WILKINS, *supra* note 29, at 53.

pitfalls and to enlist the support of other sovereigns in furthering tribal welfare.

3. Statutory Efforts to Overcome Jurisdictional Limitations

Tribal codes address the complex jurisdictional doctrines tribes navigate to protect their communities. Many of these codes reflect the perspective that exclusion as a civil remedy allows a broad exercise of jurisdiction. The Chehalis exclusion ordinance makes this utility explicit in permitting the exclusion of those who violate the tribal code "whether or not the Tribe has jurisdiction to prosecute the person for the act."[73] This allows the Confederated Tribes of the Chehalis Reservation to exclude, for example, non-Indians over whom it may not have criminal jurisdiction.[74]

As discussed below, other tribes have incorporated the United States Supreme Court's test for tribal civil jurisdiction, as pronounced in *United States v. Montana*. Pursuant to that test, tribes may exercise civil jurisdiction over nonmembers on nonmember fee land that is located within the bounds of a reservation in two instances.[75] The first arises when the nonmember has entered a consensual relationship with a tribe or its members.[76] The second arises when the nonmember's conduct threatens "the political integrity, the economic security, or the health or welfare of the tribe."[77] The Nez Perce Tribal Code paraphrases this same language to allow exclusion of anyone "doing or attempting to do any act upon the reservation which unlawfully threatens the peace, health, safety, morals or general welfare of the tribe, its members, or other persons."[78] Similarly, the Colville code deems exclusion a proper remedy for an offense that "substantially threatens or has some direct effect on the political integrity, institutional process, economic security or health or welfare of the Colville Confederated Tribes, its members or reservation residents."[79] This language warrants the respect of nonmember judiciaries, for it serves as a

[73] CHEHALIS TRIBAL CODE § 2.20.050(A).
[74] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).
[75] 450 U.S. 544, 565–66 (1981).
[76] *Id.* at 565.
[77] *Id.* at 566.
[78] NEZ PERCE TRIBAL CODE § 4-4-3(a).
[79] COLVILLE LAW AND ORDER CODE § 3-2-4 (1979).

legislative determination of what conduct meets the *Montana* exceptions.

Tribal exclusion codes also allow for intergovernmental collaboration when limitations on tribal jurisdiction bar the prosecution of certain offenders. For example, the Pascua Yaqui Tribal Code authorizes the tribal prosecutor to refer cases to the office of the United States Attorney.[80] The Confederated Tribes of the Warm Springs permits the referral of cases to the Bureau of Indian Affairs, the United States Attorney, and state prosecutors.[81] And the Coquille Tribal Code authorizes the council to enter "cooperative intergovernmental law enforcement agreements" to enforce both its exclusion and trespass ordinances.[82]

Notwithstanding this demonstrated commitment to ensuring that tribal law is enforced, those tribes that have enacted exclusion ordinances have incorporated extensive due process protections.

4. Statutory Due Process

Notwithstanding the keen concern tribal lawmakers have for public safety, they have shown similar vigilance in ensuring due process. Outside certain narrow circumstances, many tribal codes place the burden of proving the propriety of exclusion on the tribe.[83] Tribal codes also generally affirm rights to notice and hearing, counsel, and appeal.[84] These rights may be curtailed for certain classes of offenders, such as those offenders found guilty of domestic violence.[85] Yet tribes do not ignore the continuing social bond the excluded person may hold with the tribal community. For example, the Tulalip code recognizes that excluded persons may

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[80] PASCUA YAQUI TRIBAL LAW AND ORDER CODE tit. 5, ch. 8, § 110(A).
[81] WARM SPRINGS TRIBAL CODE § 300.800.
[82] COQUILLE TRIBAL CODE § 652.800.
[83] *E.g.*, COLVILLE TRIBAL LAW AND ORDER CODE § 3-2-6(b); NEZ PERCE TRIBAL CODE § 4-4-5(b); PORT GAMBLE S'KLALLAM TRIBAL LAW AND ORDER CODE § 22.04.08.
[84] *E.g.*, COLVILLE TRIBAL LAW AND ORDER CODE §§ 3-2-6, 3-2-7; NEZ PERCE TRIBAL CODE §§ 4-4-5, 4-4-6; PORT GAMBLE S'KLALLAM TRIBAL LAW AND ORDER CODE § 22.04.04; TULALIP TRIBAL CODE § 2.40.070. Tribes may have curtailed the scope of appellate review. For example, the Port Gamble S'Klallam Tribal code permits appeal only of whether the tribal council followed the procedural requirements for exclusion. § 22.06.02. And it requires an excluded appellant to show not only a procedural failure, but resultant prejudice. § 22.06.04(b).
[85] TULALIP TRIBAL CODE § 2.40.170(3). Recall the precedent in Cheyenne traditional law for emergency exclusion by the military societies. *See supra* body of text accompanying note 19.

nonetheless enter the reservation to attend the funeral of a family member, absent a substantial threat of harm to the community.[86]

The Confederated Tribes of the Warm Springs has crafted separate procedural schemes for the exclusion of resident versus nonresident nonmembers. It has done so in recognition of the fact that an increasing number of nonresidents have entered the reservation to traffic illegal drugs, whereas nonmember residents typically work for the Confederated Tribes or the Bureau of Indian Affairs and have strong social ties with the tribal community.[87] Nonresidents "are not legally entitled to reside on the Reservation."[88] In addition to enumerated reasons similar to those discussed above,[89] nonresidents may be excluded for "[failing] to establish a legitimate purpose for [their] presence on the territory of The Confederated Tribes."[90] The Confederated Tribes' burden to justify exclusion is low, and a nonresident may not appeal his or her exclusion.[91] By contrast, a resident may only be excluded for the reasons discussed above in section II.A.2, the burden is higher, and he or she may appeal his or her exclusion.[92] These procedural protections demonstrate the respect these tribes have shown for the rights of residents facing exclusion. These procedural protections should encourage non-tribal governments to respect tribes in exercising their exclusion authority.

Tribal courts tasked with the interpretation and application of these procedural requirements are developing a rich body of case law on due process in the exclusion context.

B. *Exclusion in Tribal Court*

Tribal courts of appeals have developed rich case law concerning exclusion.[93] The tension between two broad themes, the

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[86] § 2.40.130.
[87] WARM SPRINGS TRIBAL CODE §§ 300.300, 300.400.
[88] § 300.300.
[89] *See supra* Section II.A.2.
[90] WARM SPRINGS TRIBAL CODE § 300.310(17).
[91] §§ 300.315, 300.345.
[92] §§ 300.415, 300.445.
[93] The Snoqualmie Tribe is a notable exception, failing to provide for judicial process in exclusion. Pursuant to Article II of the Snoqualmie Tribe's constitution, tribal or general council is the "sole determinate of . . . banishment actions [which] are matters within the exclusive internal sovereignty of the Snoqualmie Indian Tribe and not justiciable in any court of law." CONST. OF THE SNOQUALMIE TRIBE OF INDIANS, art. II, § 5. This nonjusticiability, however, has drawn ire from the federal courts. In mid-2008, the Snoqualmie Tribal Council

respect for the due process rights of the excluded and the necessity to protect tribal communities, rives this case law.

1. Due Process Rights

Recognizing the "significant impact on the excluded individual [and their] spouse and children," tribal appellate courts have insisted upon the protection of the due process rights of the excluded.[94] In doing so, they have taken to task tribal trial courts, executives, and legislatures.

Due process requires allowing the excluded to challenge their exclusion. A recent case from the Tohono O'odham Court of Appeals shows the seriousness with which tribal judiciaries take this right.[95] Stephanie Escalante and Nolan Lopez, both tribal members, lived on the Tohono O'odham reservation.[96] Police received reports of illegal activity at Escalante's property.[97] In response, the local district council voted to banish Escalante and Lopez permanently.[98] When Escalante tried to reenter the reservation to retrieve her grandchildren's medical records, she was arrested and incarcerated for sixty days.[99]

Escalante and Lopez sued in tribal court to contest the validity of their exclusions, but the trial court dismissed the action, holding that the Tribe's sovereign immunity deprived the courts of subject matter jurisdiction.[100] On review, the court of appeals explained that this ruling diverged from tribal law.[101] The Tohono

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passed a resolution banishing nine tribal members, including a former chairman, for treason. Sweet v. Hinzman, No. C08-844JLR, 2009 WL 1175647, at *1 (W.D. Wash. Apr. 30, 2009) (The banishees could not challenge such action within the tribe because they lacked a court and the constitution rendered their banishment a nonjusticiable political question; they therefore filed a petition for habeas corpus in the United States District Court for the Western District of Washington).

[94] Lopez v. Chehalis Tribe, 4 N.I.C.S. App. 8, 15 (Chehalis Tribal Ct. App. 1995), http://www.codepublishing.com/WA/NICS/html/4NICSApp/4NICSApp008.html [https://perma.cc/52NY-78FT].

[95] Escalante v. Sells Dist. Council, No. CTA-0133 (Tohono O'odham Ct. App. Jan. 27, 2017), https://turtletalk.files.wordpress.com/2017/02/2017-01-27-decision-of-appeal-003.pdf [https://perma.cc/66TP-U52Z].

[96] *Id.* at 1.

[97] *Id.*

[98] *Id.* at 2.

[99] *Id.*

[100] *Id.* at 3.

[101] *Id.* at 6–7.

O'odham tribal code waived sovereign immunity to injunctive and declaratory actions entreating the court to "determine the validity of a law, rule, or regulation."[102] Further, the tribal prosecutor followed guidelines indicating that banishment orders were subject to judicial review.[103]

The court also held that due process under the Tohono O'odham Constitution requires judicial review of exclusion orders.[104] Escalante and Lopez alleged that they had suffered from their "dislocation from the family home and inability to attend ceremonial, governmental, commercial, or social events."[105] Moreover, Escalante was incarcerated.[106] Under such circumstances, the Tohono O'odham District Council had "an obligation not only to protect its community, but also to ensure the fairness of banishment proceedings."[107]

Other tribal courts have played a vital role in balancing those obligations. The Squaxin Island Court of Appeals held that those facing exclusion may require counsel in a matter concerning the exclusion of one of its own trial judges.[108] The defendant had no criminal record before being charged with delivery of a controlled substance.[109] She lived on her tribe's reservation where she worked as a tribal historian and a lay judge in fishing disputes.[110] Without the benefit of counsel, she pled guilty as charged.[111] The trial record was unclear as to whether she was advised of her rights or understood that by pleading guilty she agreed to a lifetime exclusion.[112]

The court of appeals held for the defendant, concluding that she did not knowingly and voluntarily plead guilty.[113] Even though the defendant was a lay judge for certain other matters, she did not

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[102] *Id.* at 5 (quoting TOHONO O'ODHAM CODE § 2102(A)).
[103] *Id.* at 5–6.
[104] *Id.* at 7.
[105] *Id.* at 8.
[106] *Id.*
[107] *Id*. at 9–10.
[108] Mosier v. Squaxin Island Tribe, 6 N.I.C.S. App. 162 (Squaxin Island Tribal Ct. App. 2004), http://www.codepublishing.com/WA/NICS/html/6NICSApp/6NICSApp162.html [https://perma.cc/B3YE-3LHA].
[109] *Id.* at 163.
[110] *Id.* at 163, 167.
[111] *Id.* at 163.
[112] *Id.*
[113] *Id.* at 166–67.

have sufficient legal training to understand the consequences of her plea.[114] She had also been denied her due process right to a separate exclusion hearing.[115] Under such facts, the court held that upholding the exclusion would constitute injustice and, as such, allowed the defendant to withdraw her guilty plea and remanded the matter to the trial court with the benefit of counsel that she may have private retained.[116]

The Skokomish Tribal Court of Appeals noted the political importance of due process in *Skokomish Indian Tribe v. Chaplin* as follows:

> most tribes understand that exercising this [exclusion] authority arbitrarily or in violation of established procedures creates a climate that discourages the investment of time, energy and financial resources in the tribe and the reservation by the tribe's business partners, tribal tenants, the non-member spouses and parents of tribal members.[117]

In *Chaplin*, the appellate court reversed an exclusion order because the trial court had failed to comply strictly with the governing statute.[118] A tribal member had accused her nonmember daughter-in-law of assault and theft.[119] Without further investigation, the tribal council authorized the tribal attorney to file a complaint to exclude the nonmember.[120] The tribal attorney filed the motion.[121] The nonmember's husband appeared in court to explain that the mother-in-law was lying and often meddled in their marital affairs.[122] A hearing on the merits revealed no evidence to support the mother-in-law's allegations.[123] Nonetheless, the trial court ordered exclusion for the unproven offenses.[124]

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[114] *Id.* at 167.
[115] *Id.* at 166.
[116] *Id.* at 167.
[117] Skokomish Indian Tribe v. Chaplin, 7 NICS App. 127, 127 (Skokomish Tribal Ct. App. 16, 2006), http://www.codepublishing.com/WA/NICS/html/7NICSApp/7NICSApp127.html [https://perma.cc/59UL-Q9W8].
[118] *Id.* at 131.
[119] *Id.* at 128.
[120] *Id.*
[121] *Id.*
[122] *Id.* at 128–29.
[123] *Id.* at 134.
[124] *Id.* at 129.

The court of appeals reversed based on procedural and substantive errors.[125] Skokomish tribal statute required the party seeking civil exclusion, here the mother-in-law, to file a proper request for exclusion.[126] The mother-in-law had not done so.[127] Thus, the trial court "erred in failing to require strict compliance with the procedures governing a complaint for exclusion."[128] The court did not explain why it emphasized strict compliance, but such a requirement is reasonable given the gravity of exclusion.[129] Like any analogously serious sentence, an exclusion order must be executed under the highest standard of legal compliance. The court of appeals recognized it was not a threat to be casually applied.[130]

The court also took issue with the fact that the Skokomish Tribe may have replaced the original complainant, the mother-in-law, as petitioner for the exclusion.[131] While the Skokomish Tribe's exclusion ordinance allowed the complainant and petitioner to be different persons, the court found this to be in conflict with the Tribe's rules of civil procedure.[132] In doing so, it cited to the Skokomish Tribal Code, which provides that "[j]udges and the administrator of the Tribal Court have a duty to tell the Skokomish Tribal Council which additional rules are needed to govern common procedural questions faced by the court."[133] However, the court carefully noted that the mother-in-law not only disappeared from the face of the complaint but also had "herself excused from even having to appear and give testimony at the court hearing."[134] In so stating, the court seemed to emphasize the important right of confrontation.

Other tribal courts of appeals have developed frameworks to ensure that those facing exclusion are not haled into a court lacking proper jurisdiction. The Chehalis Tribal Court of Appeals has, pursuant to this consideration, required that trial courts conduct a two-tiered analysis before ordering an exclusion.[135] The trial court

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[125] *Id.* at 136–37.
[126] *Id.* at 131.
[127] *Id*.
[128] *Id*.
[129] *See id*.
[130] *See id*.
[131] *Id.* at 132.
[132] *Id*.
[133] *Id.* at 136 (quoting SKOKOMISH CODES AND ORDINANCES § 3.01.012).
[134] *Id.* at 132.
[135] Foster v. Chehalis Tribe, 4 N.I.C.S. App. 26, 29 (Chehalis Tribal Ct. App. Oct. 31, 1995).

must conclude first that a defendant committed a charged offense and second that exclusion on the basis of that offense is "necessary to protect the health, safety, or welfare of the community."[136] The Port Gamble S'Klallam code requires the tribal council make this same two-tiered finding before ordering an exclusion.[137]

Just as tribal appellate courts have reversed trial courts for failing to comply with statute, they have also chastised executive officers when they attempt to usurp the rule of law. Separation of powers is a notoriously controversial issue in Indian country.[138] The distinct legal heritage of each tribe does not always conform to the tripartite model of the United States Constitution with its checks and balances.

In *Chehalis Indian Tribe v. Charles*, the tribal governing body, the business committee, had decided to exclude a nonmember who had lived on the reservation for decades.[139] While the business committee had filed a petition with the court, as was its right, it had provided no witnesses and instead asked the trial court to accept "automatically" all evidence admitted at its earlier legislative hearing.[140] The court of appeals rejected this hubristic request and concluded that simply "[b]ecause the Business Committee finds that [the nonmember] should be excluded does not mean the court will also reach that finding without substantial evidence."[141] Rather, the business committee had to prove its case like any other litigant.[142] In reaching such a decision, the court affirmed that the tribal governing body was subject to due process.[143]

Lastly, tribal appellate courts have not hesitated to criticize tribal legislation, either in dicta or by striking down offensive laws. As an example of dicta, the Chehalis Court of Appeals in *Lopez v. Chehalis Tribe* urged the Chehalis Tribe's council to legislate for

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[136] *Id.*
[137] PORT GAMBLE S'KLALLAM TRIBAL CODE § 22.04.08(b).
[138] *See generally, Tribal Executive Branches: A Path to Tribal Constitutional Reform*, 129 HARV. L. REV. 1662 (2016).
[139] Chehalis Indian Tribe v. Charles, 3 NICS App. 298, 302 (Chehalis Tribal Ct. App. 1994), http://www.codepublishing.com/WA/NICS/html/3NICSApp/3NICSApp292.html [https://perma.cc/RDN5-YDCG].
[140] Chehalis Indian Tribe v. Charles, 3 NICS App. 292, 296 (Chehalis Tribal Ct. App. 1994).
[141] *Id.*
[142] *Id.* at 296–97.
[143] *Id.*

stronger defendant's rights while suggesting a statute of limitations for exclusion cases.[144]

In *Burns Paiute Tribe v. Dick*, the Burns Paiute Tribe struck down a tribal statute as vague and overbroad.[145] In that case, the Burns Paiute Tribe had excluded several members for certain traffic and criminal charges.[146] The trial judge had allotted each appellant fifteen minutes to gather his things before going, under escort, to leave the reservation.[147] He did so in accordance with a tribal statute providing for the exclusion of those who violate any tribal, federal, or state law, or else harm the health, welfare, culture, or spirit of the Tribe.[148] On appeal, the excluded members argued the exclusion ordinance was too vague to "inform those who are subject to it what conduct will render them liable to its penalties."[149]

The court agreed, also concluding that the statute was too broad; it allowed for the exclusion of a nonmember who committed "a parking violation on the reservation or [who] committed an infraction in Florida."[150] The Burns Paiute Tribe argued it would never enforce it in such a broad fashion.[151] The court rejected this contention and focused upon the statute rather than its executive enforcement.[152] As such, the court reversed the order of exclusion.[153]

The reasoning in *Dick*, however, came under critical scrutiny in *Hoopa Valley Tribe v. Jones*.[154] The Hoopa Court of Appeals, in a learned opinion by Judge Matthew Fletcher, explained that the court in *Dick* had identified no actual vagueness in the statute at

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[144] Lopez v. Chehalis Tribe, 4 N.I.C.S. App. 8, 15 (Chehalis Tribal Ct. App. 1995), http://www.codepublishing.com/WA/NICS/html/4NICSApp/4NICSApp008.html [https://perma.cc/52NY-78FT].
[145] 3 N.I.C.S. App. 281, 284 (Burns Paiute Tribal Ct. App. 1994), http://www.codepublishing.com/WA/NICS/html/3NICSApp/3NICSApp281.html [https://perma.cc/URY8-87T7].
[146] *Id.* at 282.
[147] *Id*.
[148] *Id.*
[149] *Id.* at 284.
[150] *Id.*
[151] *Id.*
[152] *Id*.
[153] *Id.* at 285.
[154] Hoopa Valley Tribal Council v. Jones, 11 N.I.C.S. App. 100, 105–06 (Hoopa Valley Tribal Ct. App. 2013), http://www.codepublishing.com/WA/NICS/html/11NICSApp/11NICSApp100.html [https://perma.cc/25BD-FLE8].

issue in that case.[155] Rather, it had drawn concern to the overbreadth of the statute, which could allow for exclusion of those who committed traffic violations.[156] But "the breadth of the Exclusion Ordinance [was] a policy question left to the policymaking branch of government" not to the courts.[157] The statute at issue in *Jones*, which is identical to that in *Dick*, might reach minor offenses, but "a person of common intelligence could easily discern that possibility."[158]

This sampling of tribal appellate opinions demonstrates the serious commitment tribal courts have made to protecting due process for those facing exclusion. This commitment has served to guarantee a defendant's rights to counsel, confrontation, judicial review, and other procedural safeguards, while simultaneously requiring that tribal governments make their case in strict compliance with tribal law. They have not hesitated to chastise the political branches of tribal governments or to strike down impermissible legislation. The examples illustrated demonstrate that due process is well protected within tribal governments. Other examples show an equally important concern for tribal welfare.

2. Protection of Tribal Welfare

Tribes have shown an equal unwillingness to allow nonmembers to exploit the complexities in tribal jurisdiction to escape sanction. The checkerboard of nonmember fee land on reservations can often obstruct tribal efforts to exclude the owners of property lying within the bounds of a reservation. Thus, the Chehalis court in *Lopez*, cited above,[159] also recognized the "necessity of preserving the Tribe's sovereign powers, not the least important of which is the Tribe's power to exclude."[160] Because tribes generally lack criminal jurisdiction over non-Indians,[161] exclusion is a necessary tool to allow for the removal of those who

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[155] *Id*.
[156] *Id.* at 106.
[157] *Id.*
[158] *Id.*
[159] *See supra* note 94.
[160] Lopez v. Chehalis Tribe, 4 N.I.C.S. App. 8, 15 (Chehalis Tribal Ct. App. 1995), http://www.codepublishing.com/WA/NICS/html/4NICSApp/4NICSApp008.html [https://perma.cc/52NY-78FT].
[161] *Compare* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978) *with* 25 U.S.C. § 1304 (2016).

harm the community's members. Tribes have used it for this purpose. Thus, in *Schoening v. Chehalis Tribe*, the court held that the Chehalis Tribe's jurisdiction over non-Indians extended to the exterior borders of the reservation.[162] All those residing within the reservation were subject to the Chehalis Tribe's personal and territorial jurisdiction.

The Hoopa Court of Appeals refused to recognize a limitation on its jurisdiction over persons on private fee land that would endanger public safety in *Hoopa Valley Tribe v. Jones*.[163] In that case, an excluded tribal member had appealed his exclusion as an unconstitutional taking of his real property within the reservation.[164] The trial court found that he had conveyed the property at issue to his daughter who reconveyed it to him after proceedings were already underway.[165] On that basis, the court concluded that the after-acquired nature of the property precluded a takings claim.[166] In dicta, however, the court explained that it would not have concluded the property unconstitutionally taken even if the appellant had held it at the time of trial.[167] Exclusion did not cause a person to lose his property, it "merely" effected an easement precluding the person from occupancy.[168] The excluded party retained the rights to "develop the property, rent it, sell it, alienate it in any other manner, exclude others, etc."[169] A taking, by contrast, required the destruction of a parcel's economic value, which was absent in this case.[170] To hold otherwise, the court noted, would allow any person who has ever been incarcerated to claim their sentence effected a taking.[171]

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[162] Schoening v. Chehalis Tribe, 6 NICS App. 110, 111 (Chehalis Tribal Ct. of App. 2003), http://www.codepublishing.com/WA/NICS/html/6NICSApp/6NICSApp110.html [https://perma.cc/F72F-CSS6].
[163] Hoopa Valley Tribal Council v. Jones, 11 N.I.C.S. App. 100, 111 (Hoopa Valley Tribal Ct. App. 2013), http://www.codepublishing.com/WA/NICS/html/11NICSApp/11NICSApp100.html, [https://perma.cc/25BD-FLE8].
[164] *Id.* at 102.
[165] *Id.* at 109.
[166] *Id.* at 105.
[167] *Id.* at 111 n.4.
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*

This article now turns to discuss the longstanding recognition in United States federal law of the exclusion power held generally by all sovereigns and specifically by tribes.

III. THE TRIBAL EXCLUSION POWER IN AMERICAN LAW

The federal courts have long recognized a tribal power to exclude both as an incident of inherent sovereignty and as a recognized treaty right. This section traces the history of that dual recognition from ancient principles of common law and international law to Indian law precedent in American jurisprudence. Although Western legal systems have recognized the sovereign power to exclude since ancient times, United States courts have deliberately and gradually divested that power from tribes to facilitate non-Indian settlement in tribal territories.

A. *The Sovereign's Inherent Exclusion Power*

Western sovereigns have used exclusion as a punishment for crimes and political hubris since ancient times.[172] During certain historical periods, it was the primary form of punishment utilized by societies unable or unwilling to employ widespread incarceration. For example, between 1650 and 1750, Amsterdam banished 97 percent of noncapital criminal defendants.[173] This practice did not cease in the United States. The Constitution of Maryland explicitly contemplates the exercise of the exclusion power,[174] and courts in at least twelve states have either upheld intrastate exclusions or recognized that they may be permissible under proper conditions.[175]

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[172] *See, e.g.*, THUCYDIDES, THE HISTORY OF THE PELOPONNESIAN WAR, bk. 1, translated by Richard Crawley (discussing the ostracism of Themistocles from Athens). The earliest colonial settlements in America similarly employed banishment as a criminal sanction. *Smith v. Doe*, 538 U.S. 84, 98 (2003) (citing T. BLOMBERG & K. LUCKEN, AMERICAN PENOLOGY: A HISTORY OF CONTROL 30–31 (2000)).

[173] WILKINS & WILKINS, *supra* note 29, at 15.

[174] MD. DECLARATION OF RIGHTS art. 24.

[175] *See* State v. Franklin, 604 N.W.2d 79, 84 (Minn. 2000); State v. Collett, 208 S.E.2d 472, 473 (Ga. 1974); Cobb v. State, 437 So.2d 1218, 1220 (Miss. 1983); State v. Morgan, 389 So.2d 364, 367 (La. 1980); State v. Wacey C., 86 P.3d 611, 614 (N.M. Ct. App. 2004); People v. Pickens, 542 N.E.2d 1253, 1256 (Ill. App. Ct. 1989); Predick v. O'Connor, 660 N.W.2d 1, 7–8 (Wis. Ct. App. 2003); State v. Jacobs, 692 P.2d 1387, 1389 (Or. Ct. App. 1984); State v. Setzer, 242 S.E.2d 509, 510–11 (N.C. Ct. App. 1978); State v. McBride, 873 P.2d 589, 593

Between 1998 and 2001, Houston County, Georgia, banished 142 individuals.[176] Outside such explicit affirmances, scholars have identified subtler exclusion practices—for example, sentencing courts ordering defendants excluded as a condition of probation, or governors making exclusion a condition of pardon.[177]

The right to exclude originates in the inherent authority of the sovereign to police for the general welfare.[178] The Supreme Court, drawing upon international law authority Ermin de Vattel, explained that the "sovereign may forbid the entrance of his territory, either to foreigners in general, or in particular cases, and under particular circumstances, or as to particular individuals, and for particular purposes."[179] That power carried the right to exclude as well as the corollary power to condition admittance.[180] As Supreme Court Justice William Patterson explained, "it is a power, that grows out of the very nature of the social compact" and must belong to every government.[181]

The sovereign's recognized right of exclusion features prominently in the Marshall trilogy, the foundation of federal Indian Law. In *Cherokee Nation v. Georgia*, Justice Marshall cited Vattel in explaining that tribes retained their status as nations with all the sovereignty inherent to that status, until qualified by Congressional fiat or ruled inconsistent with domestication.[182] Thus, American law understood tribal sovereignty to carry the inherent authority to exclude.[183] Similarly, in the earlier case of *Johnson v. M'Intosh*,

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(Wash. Ct. App. 1994); People v. Brockelman, 933 P.2d 1315, 132 (Colo. 1997); Larson v. State, 572 So.2d 1368, 1371 (Fla. 1991).

[176] WILKINS & WILKINS, *supra* note 29, at 17.

[177] Matthew D. Borrelli, *Banishment: The Constitutional and Public Policy Arguments Against This Revived Ancient Punishment*, 36 SUFFOLK U. L. REV. 469, 478 (2003); *e.g.*, *In re* Cammarata, 67 N.W.2d 677 (Mich. 1954).

[178] Gibbons v. Ogden, 22 U.S. 1, 67 (1824)

[179] *Id.*; EMER DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, WITH THREE EARLY ESSAYS ON THE ORIGIN AND NATURE OF NATURAL LAW AND ON LUXURY, bk. II, § 94, at 169–70 (J. Chitty ed., 1839).

[180] *Id.*

[181] Cooper v. Telfair, 4. U.S. 14, 19 (1800) (Paterson, J., concurring).

[182] Cherokee Nation v. Georgia, 30 U.S. 1, 53, 8 L. Ed. 25 (1831).

[183] For example, in *Roff v. Burney*, 168 U.S. 218 (1897), the Supreme Court recognized that because tribes controlled admission into their territory, they could order expulsion. *Id.* The banished person in that case was not a tribal citizen by blood but had received that status by tribal edict upon marrying a tribal member. *Id.* The tribe later disenrolled and expelled him. *Id.* The Court upheld the tribe's control of its citizenship and held that "all personal rights

Justice Marshall pronounced that "no tribunal [could] revise and set aside" a tribe's decision to abolish one's property rights and exclude him from its territory.[184]

The Eighth Circuit elaborated upon this power in *Buster v. Wright* as follows:

> to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it.[185]

Late into the twentieth century, the Supreme Court reaffirmed these holdings in *Merrion v. Jicarilla Apache*.[186] There, the Court held a tribe could tax the business activities of nonmember lessees on their land. In doing so, the Court stated the following:

> Nonmenbers who lawfully enter tribal lands remain subject to the tribe's power to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct…When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its ultimate power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry. However, it does not follow that the lawful property right to be on Indian land also immunizes the non-Indian from the tribe's exercise of its lesser-included power to…place other conditions on the non-Indian's conduct or continued presence on the reservation. A nonmember who

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[including residence on the reservation] founded on the mere [citizenship] status created by the prior act fell when that status was destroyed." *Id.*

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

[185] Buster v. Wright, 135 F. 947, 950 (8th Cir. 1905).

[186] Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

> enters the jurisdiction of the tribe remains subject to the risk that the tribe will later exercise its sovereign power.[187]

The Court explicitly grounded this right in tribal sovereignty rather than any humbler right incidental to landownership. It explained that the sovereign power to exclude was not "merely the power possessed by any individual landowner or any social group to attach conditions…to the entry by a stranger onto private land or into the social group."[188] It recognized that a contrary position would "denigrate[] Indian sovereignty."[189] Such a holding derives in a clear line from the position espoused by Vattel, grounding the power of exclusion in the sovereign's general power to police for the general welfare.

In more recent years, the Supreme Court has retreated from that line. In *Strate v. A-1 Contractors*, the Court instead characterized the right of exclusion as a mere component of landownership, such as might be enjoyed by any private party.[190] In that specific case, the Associated Tribes of the Fort Berthold Indian Reservation had entered into an agreement with the State under which the tribe retained no gatekeeping authority over a certain right of way.[191] On this basis, the Court held it had lost the "landowner's right to occupy and exclude."[192]

But the police power of exclusion is greater than that of a landowner. In *Illinois Central Railroad Co. v. State of Illinois*, the Supreme Court held that the state of Illinois could not convey tidelands within the public trust to a railway in a manner that would place it outside state jurisdiction.[193] It held that a sovereign could not "abdicate its police powers in the administration of government and the preservation of the peace."[194] While the purposes of governance may at times require the sovereign to delegate such powers to other bodies, like the state in *Strate* or private parties, "there always remains with the [sovereign] the right to revoke those

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[187] *Id.* at 144–45.
[188] *Id.* at 146.
[189] *Id*.
[190] Strate v. A-1 Contractors, 520 U.S. 438, 455–56 (1997).
[191] *Id.* at 456.
[192] *Id*.
[193] Illinois Cent. R.R. Co. v. State of Illinois, 146 U.S. 387, 453 (1892).
[194] *Id*.

powers and exercise them in a more direct manner, and one more conformable to its wishes."[195]

Viewed in light of such a rule, the consequences of *Strate* become apparent. With *Strate*, the Court departed from *Illinois Central Railroad Co.* and severed the exclusion power from its roots in sovereignty, replanting that stick amongst the frail bundle of the landowner's rights. As discussed below, continued judicial endorsement of outdated allotment policies has already plucked several of those sticks from the bundle.

Such a change in the law departs from the executive's longstanding recognition that the tribal exclusion power has been affirmed in countless treaties.

B. *The Treaty Right*

This section examines the process by which the United States and various Indian nations signed treaties that recognized the right to exclude. It focuses on nine treaties that Washington Territorial Governor Isaac Stevens signed with tribal nations throughout the Pacific Northwest in the mid- to late-1850s.[196] These treaties share the same Article Two (hereafter Common Article Two), by which reservations were established for a tribe's "exclusive use" where no "white man [would] be permitted to reside upon [reservation land] without permission of the tribe and the superintendent or agent."[197] The Indian canons of construction require this language to be analyzed in light of the "history of the treaty, the negotiations, and the practical construction adopted by the parties."[198] The history underlying Common Article Two provides for this consideration.

In the early 1850s, United States settlement policy in the Pacific Northwest had grown increasingly schizophrenic. While assuring tribal nations that it would protect them against encroachment absent transfer of land by treaty, it had also passed

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[195] *Id.* at 453–54.

[196] *E.g.*, Treaty with Nisqually, Puyallup, etc., Dec. 26, 1854, 10 Stat. 1132; Treaty Between the United States and the Qui-nai-elts and Quil-leh-ute Indians, July 1, 1855–Jan. 25, 1856, 12 Stat. 971; Treaty Between the United States and the Dwámish, Suquámish, and Other Allied and Subordinate Tribes of Indians in Washington Territory, Jan. 22, 1855, 12 Stat 927.

[197] Nisqually Treaty, *supra* note 196, at 1133; Qui-nai-elts Treaty, *supra* note 196; Dwámish Treaty *supra* note 196, at 928.

[198] Choctaw Nation of Indians v. United States, 318 U.S. 423, 432 (1943).

the Donation Land Act, unleashing eager homesteaders into the region.[199] Conflict became inevitable. In 1854, the Commissioner of Indian Affairs described the circumstances behind this eventuality as follows:

> Indian tribes still claim title to the lands on which the whites have located, and which they are now cultivating. The jealousy which has resulted from this state of things has naturally led to repeated hostilities, resulting in severe suffering, and in some instances the murder of white settlers, and hindering the general growth and prosperity of the civil communities of those Territories.[200]

Governor Isaac Stevens of the Washington Territory was tasked with negotiating treaties to resolve this conflict and free up land for white settlement.[201] Tribal leaders agreed to negotiate so they might protect their resource rights and avoid violence.[202] The first of the Stevens Treaties failed to achieve this result.[203] Within a year of signing the Treaty of Medicine Creek, the Nisqually led their tribal allies to war against the settlers of Puget Sound in order to preserve their most valuable farmlands that were not included within the treaty reservation.[204] This conflict, known as the Puget Sound War, remained in the minds of later treaty negotiators and informed the Snoqualmie negotiators of the treaty of Point Elliot to remark, "[i]f you whites pay the Indians that fight you, it must be good to fight."[205]

Other negotiators simply wanted the settlers to leave so that they might regain some peaceful prosperity. Thus, tribal parties to

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[199] Pursuant the terms of the Act, a settler could claim as much of 640 acres, much of it held by local tribes, for the sole cost of four years' cultivation. Act of Sept. 27, 1850, ch. 76, 9 Stat. 496. Congress made the act applicable to Washington Territory in 1854. Act of July 17, 1854, ch. 84, sec. 6, 10 Stat. 305, 306.

[200] Opinion Regarding the Boundary of the Skokomish Reservation along the Skokomish River, Op. Solic. of the Interior M-37034, at 8 (2016) (quoting H.R. MISC. Doc. NO. 33-38, at 2–3 (1st Sess. 1854)).

[201] VINE DELORIA, JR., INDIANS OF THE PACIFIC NORTHWEST: FROM THE COMING OF THE WHITE MAN TO THE PRESENT DAY 53–55 (1977).

[202] *Id.*

[203] *See* RICHARD KLUGER, THE BITTER WATERS OF MEDICINE CREEK: A TRAGIC CLASH BETWEEN WHITE AND NATIVE AMERICA (2011).

[204] *Id*.

[205] S. EXEC. Doc. No. 35-1, pt. I at 581 (2nd Sess. 1858).

the Treaty of Point No Point asked Stevens to "order[the settlers] to go away."[206] A Skokomish member explained that his fellow Skokomish wanted to plant potatoes in their territory but feared that settlers would steal them unless Congress ratified their tribal boundaries and recognized their power to exclude settlers.[207] The tribal negotiators wanted those settlers gone regardless of their status as residents, transients, or exploiters of tribal territories.[208] They negotiated a multi-faceted treaty framework that echoed the understanding embedded in the common law that sovereigns enjoyed the police power to exclude persons from their territory.[209]

In light of this history and the understandings of the Indian signatories, the Ninth Circuit, in analyzing the treaty with the Confederated Tribes of the Warm Springs, has correctly explained that Common Article Two was "designed to provide [the Tribe] land where they would be able to separate themselves from non-Native Americans" and must be construed to effectuate this purpose.[210] The author will return below to the Ninth Circuit's treatment of Common Article Two in considering whether federal courts should allow the exclusion of federal officers enforcing generally applicable federal law.

Regardless of this historical backdrop, the strong right of exclusion affirmed in common law and treaty was soon eroded by the greed of the allotment era Congress.

C. *Allotment and the Judicial Impairment of the Exclusion Power*

In the last decades of the nineteenth century, as the fires of the Indian Wars cooled, a boundless hunger for tribal lands rekindled in the East. In quenching that hunger, the United States

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[206] George Gibbs, Treaty of Hahd-skus, or Point No Point (Jan. 1855), *reprinted in* OFFICE OF INDIAN AFFAIRS, DEP'T OF THE INTERIOR, REPORT ON SOURCE, NATURE, AND EXTENT OF THE FISHING, HUNTING AND MISCELLANEOUS RELATED RIGHTS OF CERTAIN INDIAN TRIBES IN WASHINGTON AND OREGON TOGETHER WITH AFFIDAVITS SHOWING LOCATIONS OF A NUMBER OF USUAL AND ACCUSTOMED FISHING GROUNDS AND STATIONS 346–37 (July 1942) (Treaty Council Minutes).

[207] S. EXEC. Doc. No. 35-1, pt. I at 582 (2nd Sess. 1858).

[208] *Id.*

[209] *See supra* notes 177–94 and accompanying text.

[210] U.S. Dep't of Labor v. Occupational Safety & Health Review Comm'n, 935 F.2d 182, 185 (9th Cir. 1991) (considering similar treaty language and history with the Confederated Tribes of the Warm Springs in Oregon).

would break its recent promises to protect the right of tribes to exclude settlers. Two examples are instructive.

The appropriation of the Black Hills in the territory of the Sioux Nation is emblematic of these pressures and their result. The United States had earlier agreed to protect the rights of the Lakota to the Black Hills from settler depredations.[211] This changed when gold was discovered in the Black Hills in 1875 and settler immigration intensified.[212] Rather than meet this settler violence with force of arms, the United States concluded, in the words of the Secretary of the Interior, that it had become "impossible to keep the white people out." [213] Instead of protecting tribal interests, the guns were turned against the Lakota in the Black Hills War, and their exclusive monopoly upon their sacred sites was shattered.[214]

In another example, the United States reneged on earlier treaty promises to the Nez Perce by shrinking their reservation. The Nez Perce Tribe signed a treaty with the United States in 1855 guaranteeing its exclusive use and occupancy of an extensive reservation.[215] In 1861 the Commissioner of Indian Affairs informed the Senate Committee on Indian Affairs that an "invasion" of gold mining settlers had begun to increasingly threaten these treaty rights.[216] Senator James Nesmith of Oregon observed that while the Nez Perce had "faithfully observed the obligations of the treaty," the United States had violated it by "permitting [American] citizens to invade their reservation in search of gold."[217] The next year, the Indian agent on the Nez Perce reservation issued an injunction against the entry and residence of settlers.[218] The Commissioner

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[211] *See* United States v. Sioux Nation of Indians, 448 U.S. 371, 374 (1980).
[212] *Id.* at 376.
[213]Ann E. Tweedy, *Unjustifiable Expectations: Laying to Rest the Ghosts of Allotment-Era Settlers*, 36 SEATTLE U. L. REV. 129, 148 (2012) (quoting *Washington. The Sioux Warriors Fold Their Blankets and Steal Away. Spotted Tail Becomes Irate and Expresses His Views in Un-courtly Terms. He Hints the Government is Bound to Rob Them of Their Lands*, CHI. DAILY TRIB., June 5, 1875, at 5).
[214] JOHN S. GRAY, CENTENNIAL CAMPAIGN: THE SIOUX WAR OF 1876 at 23-29 (1976).
[215] Treaty Between the United States of America and the Nez Percé Indians, June 11, 1855, 12 Stat. 957.
[216] Office of the Solicitor, U.S. Dep't of the Interior, Opinion Regarding the Status of the Bed of the Clearwater River Within the 1863 Treaty Boundaries of the Nez Perce Reservation (Idaho) (Jan. 15, 2016), M-37033, at 5–6 (quoting THE NEZ PERCE NATION DIVIDED: FIRSTHAND ACCOUNTS OF THE EVENTS LEADING UP TO THE 1863 TREATY 69 (Dennis Baird et al. eds., 2002)).
[217] CONG. GLOBE, 37th Cong., 2nd Sess. 2095 (1862).
[218] *See* U.S. Dep't of the Interior, *supra* note 215, at 6.

reported to the Secretary of the Interior that the Nez Perce Indian Reservation would "in a short time be so overrun and occupied by whites, as to render it practically useless for Indian purposes."[219] The United States ultimately responded to settler violence by negotiating a subsequent treaty that reduced the Nez Perce reservation by ninety percent.[220] It determined that this was the "best way to preserve peace."[221] Again, the United States broke its promise to maintain the rights of tribes in the exclusive use and possession of their reservations.

The pressure of settlement, fanned by executive acquiescence, soon translated into congressional policy. "Driven by a greed for the land holdings of the tribes," Congress passed the General Allotment Act also known as the Dawes Act after its sponsor, Massachusetts Senator Henry Dawes.[222] The Dawes Act authorized the President to survey those reservations he deemed suitable for agriculture and to divide them into allotments for individual Indians.[223] Accordingly, President Theodore Roosevelt characterized the Act as "a mighty pulverizing engine to break up the tribal mass [in that [i]t acts directly upon the family and the individual."[224] Once persons on the selected reservations had received the allotments, the surplus was opened to settlement.[225]

Additionally, the allotments were not safe from further alienation. By the original Act's terms, the United States would hold the allotments in trust for twenty-five years, after which the persons would take them in freely alienable fee.[226] But Congress quickly bowed to the entreatments of settlers and amended the original Act

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[219] Letter from Chas. E. Mix, Acting Comm'r, to C.B. Smith, Sec'y of the Interior (Jan. 31, 1862), *in* THE NEZ PERCE NATION DIVIDED: FIRSTHAND ACCOUNTS OF THE EVENTS LEADING UP TO THE 1863 TREATY 158 (Dennis Baird et al. eds., 2002).
[220] U.S. Dep't of the Interior, *supra* note 215, at 7.
[221] Baird, *supra* note 218, at 352 (citing Official Proceedings of the I863 Council, Source M, Reel 6, Frame 654+).
[222] Cobell v. Babbitt, 91 F. Supp. 2d 1, 7–8 (D.D.C. 1999), *aff'd in part, remanded in part sub nom.* Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001).
[223] *Id.*
[224] Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 847 n.361 (2007) (quoting CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 19 (1987)).
[225] The creation and sale of surplus land violated the terms of many treaties that called for tribal consent and compensation under such circumstance. In *Lone Wolf v. Hitchcock*, the Supreme Court held that Congress had the power to unilaterally abrogate these bilateral treaties. 187 U.S. 553, 566 (1903).
[226] Dawes Act, ch. 119, sec. 5, 24 Stat. 388, 389 (1887).

to allow the Secretary of the Interior to cut short this trust period and confer fee title on any Indian deemed "competent and capable of managing her affairs."[227]

Without these restrictions on alienation, the land quickly transferred from Indian hands to those of settlers and federal institutions like the military and National Park Service. Many tribal allottees struggled to succeed agriculturally, for their efforts were often hampered by the general economic downturn of the time.[228] Because the allotments had become subject to state taxation, many were ultimately seized for nonpayment of those taxes.[229] Speculators purchased up these lands in "voluntary or fraudulent sales…[or] at sheriffs' sales for nonpayment of taxes or other liens."[230] The climate of allotment encouraged other settlers to simply squat on reservation land without attempting to buy it, confident that their crimes would face little repercussion.[231] Between the passage of the Dawes Act in 1887 and its repeal pursuant to the Indian Reorganization Act in 1934, tribes lost an estimated two-thirds of their land base.[232]

With the loss of their land, tribes lost the power guaranteed by treaty to control settler violence on their reservations. In this period, tribes continued to exercise jurisdiction over land remaining in Indian hands, regardless of the changed character of the surrounding area.[233] Thus, in 1908, the Rosebud Sioux Police,

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[227] Burke Act, ch. 2348, 34 Stat. 182 (1906) (codified as amended at 25 U.S.C. § 349 (1982)).

[228] *A Path Forward: Trust Modernization and Reform for Indian Lands: Hearing Before the S. Comm. on Indian Affairs*, 114th Cong. 7 (2015) (prepared statement of Kevin Washburn, Asst. Sec'y, Indian Affairs, U.S. Dep't of the Interior).

[229] Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 12 (1995) (citing JANET A. MCDONNELL, THE DISPOSSESSION OF THE AMERICAN INDIAN 1887–1934, at 100–01, 106–01 (1991)).

[230] *Id.*

[231] *See, e.g.*, Tweedy, *supra* note 212, at 146 n.91; *No School for 'Squatters,' Peculiar Situation in 'Sooner' Town in Tripp County*, POTTER COUNTY NEWS & COURIER, June 11, 1908, at 6 (describing squatters who took up residence on the Rosebud Reservation before it was opened); *Otis' Days Numbered: Confidently Asserted That the President Will Soon Make a Change: The General Has Been Carrying Measures with Too High a Hand*, MINN. TRIB., Sept. 26, 1899, at 1 (discussing the fact that settlers were building on lands within the Leech Lake reservation prior to its being "offered for sale," despite a contrary order of the Secretary of the Interior and also noting that "[i]t is not expected that the [Interior] department will take any action to eject these parties").

[232] Cobell v. Babbitt, 91 F. Supp. 2d 1, 8 (D.D.C. 1999), *aff'd in part, remanded in part sub nom.* Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001).

[233] Tweedy, *supra* note 213, at 159.

enforcing federal regulations, arrested a tribal member on his allotment in the otherwise open area of the reservation for hosting an illegal dance.[234] After the Tribe released the arrested member, the member notified the state police of his detention; the police then arrested the tribal officers.[235] With their authority so compromised, tribes and their members struggled to maintain the safety of their communities.[236] As Indian Superintendent Thomas King reported in regards non-Indian exploitation of tribal members on the Cheyenne River Sioux Reservation, "[T]he feeling [among settlers] is that the Indian is fair game for anyone who can hit the mark."[237]

Around the same time, both the Supreme Court and Eighth Circuit recognized that allotment did not prevent tribes from imposing certain business regulations on those doing business within their territories. In *Morris v. Hitchcock*, the Supreme Court powerfully declared that allotment and the consequent opening of many reservations did not:

> deprive these Indians of the power to enact laws with regard to licenses or taxes, nor exempt purchasers of town or city lots from the operation of such legislation. Purchasers of lots do so with notice of existing Indian treaties…Such lands are sold under the assumption that the purchasers will comply with the local laws.[238]

Similarly, in *Buster*, discussed above,[239] the Eighth Circuit concluded that:

> [the Creek Nation's] jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it…The theory that the…conveyance of the title to lots or lands within it to private individuals exempts the…owners or occupants of such lots from the

[234] *Id.*
[235] *Id.*
[236] *Id.*
[237] *Id.*
[238] 194 U.S. 384, 391–92 (1904).
[239] *See supra* note 185 and accompanying text.

> exercise of all its governmental powers…is too unique and anomalous to invoke assent.[240]

The Solicitor of the Interior agreed, recognizing in 1934 that tribes retained the power to exclude as a landowner, as well as a local government, for this power derives from "dominion as well as sovereignty."[241]

However, Superintendent King's words concerning the increasing vulnerability of tribes and their members would prove prescient. Since allotment, tribes have struggled to exercise their power to exclude nonmembers from checkerboarded reservations. In *Montana v. United States*, the Supreme Court interpreted the allotment period to have deprived tribes not only of land but of their sovereign jurisdiction.[242] The relevant treaty in that case, the 1868 Fort Laramie Treaty, provided in its second article that a reservation would be "set apart for the *absolute and undisturbed use and occupation*" of the Indians therein named.[243] The Court recognized that this right arguably preserved the Crow Tribe's jurisdiction over hunting and fishing in areas of the tribe's exclusive use and occupation.[244]

In concluding that the Crow Tribe lacked jurisdiction to regulate non-Indian fishing on nonmember fee land within the bounds of its reservation, the Court explained that the Allotment Era Congress did not intend "that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs."[245]

The Supreme Court has explained that treaty language recognizing the right to exclude "with respect to reservation lands must be read in light of the subsequent alienation of those lands."[246] It has questioned whether "Congress would intend that non-Indians

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[240] Buster v. Wright, 135 F. 947, 951–52 (8th Cir. 1905).
[241] Oscar L. Chapman, Assistant Sec'y, Opinion, 55 Interior Dec. 14 (1934), *reprinted in* 1 U.S. DEP'T OF THE INTERIOR, OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR RELATING TO INDIAN AFFAIRS, 1917–1974, at 445, 467).
[242] 450 U.S. 544 (1981).
[243] *Id.* at 553 (emphasis added) (quoting Second Treaty of Fort Laramie, art. II, May 7, 1868, 15 Stat. 649, 650).
[244] *Id.* at 556.
[245] *Id.* at 559, n.9.
[246] *Id.* at 561.

purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government."[247] Most poignantly, the Court has held that Congress's purpose of so-called "peaceful assimilation" could not "be advanced if feeholders could be excluded from fishing or hunting on their acquired property."[248] By making these statements, the Court argued that the alienation of tribal lands had shattered the exclusivity of their use and occupation by tribes. In doing so, the Court prioritized the intent of the Allotment Congress and the expectations of that era's rapacious settlers over the treaty rights of tribes and the intent of today's Congress.[249]

To reach this result, the Court had to narrow *Morris* and *Buster* to their facts, holding them to stand for the proposition that tribes may regulate the conduct of those who enter consensual relationships with those tribes or their members.[250] But the *Buster* court had pronounced broadly that "[t]he theory that the consent of a government…to the conveyance of the title to lots or lands within it to private individuals exempts the…owners or occupants of such lots from the exercise of all its governmental powers…is too unique and anomalous to invoke assent."[251] Such an understanding had prevailed when the United States negotiated provisions like Common Article Two with tribes. Unless *Montana* is read to impliedly give assent to such an anomalous theory, then *Montana* must stand, in this respect, for the proposition that residence within the boundaries of a tribal reservation exhibits a sufficient consensual relationship to support tribal civil jurisdiction.

While Congress has since disavowed the policy of allotment, the Supreme Court has refused to abandon it and continues to perpetuate the allotment agenda. While the Indian Reorganization Act repudiated the allotment policies of previous legislation, it "did not restore to the Indians the exclusive use of those lands that had already passed to non-Indians."[252] Inasmuch as tribes no longer

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[247] *Id.* at 559, n.9.
[248] *Id.* at 559, n.9.
[249] *See* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 79–80 (1999).
[250] Montana v. U.S., 450 U.S. 565–66 (1981).
[251] *Buster*, 135 F. at 951–52.
[252] Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 423 (1989).

possess exclusive use over much of their reservations, they lack the power to exclude absent the two exceptions announced in *Montana*.

The power to exclude has been used to affirm tribal zoning authority in reservation areas of predominately tribal ownership. In *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, the Yakima Nation argued that it maintained the right to regulate the use of nonmember fee land within its reservation as an incident of its treaty power of exclusion.[253] The relevant treaty with the Yakimas indicated that the land reserved by the Yakima Nation "shall be set apart…for the [Yakimas'] exclusive use and benefit…[and no] white man, excepting those in the employment of the Indian Department, [shall] be permitted to reside upon the said reservation without permission of the tribe."[254] However, the Court held that the power to exclude only extended as far as the Yakima Nation's "exclusive use and benefit" of the land.[255] As such, a majority of the Court recognized only the power to zone where it was necessary to protect the welfare of the tribe, in accordance with the relevant *Montana* exception.[256]

However, a minority, announcing the judgment as to a consolidated case and concurring in the overall judgment, explained why the introduction of non-Indian landownership should not limit exclusionary jurisdiction. The appellants in *Brendale* were landowners on the Yakima reservation.[257] One lived in an open area, defined by non-Indian ownership over the majority of land.[258] The other lived in a closed area defined by majority tribal ownership.[259] Justice Stevens, joined by Justice O'Connor, concluded that the Yakima Nation could exercise zoning authority over the closed area.[260] The Supreme Court reasoned that non-Indian ownership over a "very small proportion" of the area, did not "deprive the tribe of the right to ensure that this area maintains its unadulterated character."[261] The Supreme Court recognized the impact a contrary holding would have on that character in the following passage:

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[253] *Id.* at 422.
[254] Treaty Between the United States and the Yakama Nation of Indians, June 9, 1855, 12 Stat. 951, 952.
[255] *Brendale*, 492 U.S. at 422.
[256] *Id.* at 424–25.
[257] *Id.* at 417–18.
[258] *Id.*
[259] *Id.*
[260] *Id.* at 444 (Stevens, J., concurring).
[261] *Id.*

> The incremental shifts in the texture and quality of the surrounding environment occasioned by discrete land-use decisions within an expansive territory are not readily monitored or regulated by considering whether the uses that were actually authorized on [the relevant] property imperiled the political integrity, the economic security, or the health or welfare of the Tribe.[262]

Stevens' opinion provides a powerful reflection on the impact of recent directions in relevant law. Tribal sovereignty and self-government depend on the right to control entry to the sovereign's territory. By reducing the tribal exclusion power to an incident of landownership, courts have ensured that allotment can continue to wreck its terrible magic, carving away at tribal well-being.

In summary, the courts have retreated from the bold recognition of early precedent and the terms of treaties. Earlier courts, including the Supreme Court, recognized that the right to exclude was an incident of sovereign police authority. As such, the sovereign could exercise it within the borders of its domain, regardless of who owned the land on which a to-be-regulated activity occurred. But conceding to the policies of allotment, the Supreme Court has retreated and allowed a policy directed at divesting tribes of their landholdings to inappropriately divest them of their police power. *Brendale*, a split opinion recognizing the tribal power to zone and exclude when a tribe controls the majority and the character of a relevant area, presents a narrow exception to this rule, but by and large, courts guided by opinions like *Montana* and *Strate* have reduced tribes to landowners.

As discussed below, the judiciary has departed from the trajectory of the other political branches as the latter become more willing to reaffirm the relationship of the exclusion power to sovereignty.

IV. SUPPORT FROM THE POLITICAL BRANCHES

In signing treaties with Indian nations, the United States assumed an obligation to protect tribes in the exclusive use of their

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[262] *Id.* (second alteration in original).

reservations.[263] As discussed above,[264] this protection was a guiding motivation for the relevant tribal signatories. This section discusses how the political branches of the federal government, the executive and the legislative, can each assist in upholding that trust.

Pursuant to its treaty promises, the United States should assist in the enforcement of exclusion orders. The same administration that enacted the Indian Reorganization Act recognized an inherent tribal authority to exclude nonmembers since at least 1934, when Interior Solicitor Nathan Margold and his assistant Felix Cohen published an opinion entitled "Powers of Indian Tribes."[265] According to Solicitor Margold, those powers included the power

> [t]o remove or to exclude from the limits of the reservation nonmembers of the tribe, excepting authorized Government officials and persons now occupying reservation lands under lawful authority, and to prescribe appropriate rules and regulations governing such removal and exclusion, and governing the conditions under which nonmembers of the tribe may come upon tribal land.[266]

The Department of Justice has put the Interior's recognition of a tribal power to exclude into practice by enforcing federal trespass laws.[267] The United States Attorneys for the Districts of New Mexico and South Dakota have provided powerful and recent examples of this action.[268] In New Mexico, the Nambe Pueblo

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[263] *See, e.g.*, Treaty with the Nisqualli, Puyallup, Etc., 10 Stat. 1132 (1854); Treaty with the Quinaielt, Etc., 12 Stat. 971 (1855); Treaty with the Dwamish, Suquamish, Etc., 12 Stat. 927 (1855).
[264] *See supra* Section III.B.
[265] Chapman, *supra* note 241.
[266] Chapman, *supra* note 241, at 446.
[267] The Coquille Tribal Code authorizes intergovernmental cooperation in the enforcement of not only exclusion but trespass violations. COQUILLE INDIAN TRIBAL CODE § 652.800.
[268] Other states have been less supportive. For example, in 1999, the Alaska Native Village of Perryville passed a resolution banishing John Tague, a tribal member who had repeatedly committed threatening and assaultive acts. *See* Ryan Fortson, *Advancing Tribal Court Criminal Jurisdiction in Alaska*, 32 ALASKA L. REV. 93, 148 (2015). Perryville followed this resolution by successfully filing for a permanent injunction against Tague in State court. *Id.* Tague violated this injunction, returning to Perryville. *Id.* Perryville then filed for and obtained a writ of assistance requiring the Alaska State Troopers remove Tague from the village. *Id.* Alaska responded by writing the court to challenge

passed a resolution in February 2014 excluding a non-Indian named Steve Romero from its boundaries indefinitely.[269] Romero was a repeat drug and domestic violence offender.[270] The Pueblo therefore deemed him a threat to the community and the maintenance of peace therein.[271] As such, they excluded him.[272] But Romero violated that order and returned to the reservation to harass tribal members.[273] The U.S. Marshal's Service removed him.[274]

The United States Attorney then entered and charged Romero with criminal trespass for violating the Nambe Pueblo's exclusion order under the Indian Country Crimes Act and New Mexico law.[275] He may face up to a year in prison.[276]

The United States Attorney for the District of South Dakota brought similar charges in *United States v. Nichols*.[277] Steve

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the validity of the tribe's banishment order and writ of assistance. *Id.* It argued that Perryville could not exercise such sovereignty because it lacked Indian country status. *Id.* The court ultimately upheld its earlier order, concluding that Alaska lacked standing to seek vacatur of the injunction. *Id.* at 149. It also upheld the injunction but narrowly because Tague was a tribal member. *Id.*

[269] T. S. Last, *More Tribes Bring Back Sentence of Banishment*, ALBUQUERQUE JOURNAL (Jun. 24, 2016), https://www.abqjournal.com/797280/more-tribes-bring-back-sentence-of-banishment.html [https://perma.cc/W57M-GM63].

[270] *Id.*

[271] *Id.*

[272] *Id.*

[273] *Id.*

[274] *Id.*

[275] Complaint, United States v. Romero, No. 16-MJ-2671 at 1 (D.N.M. 2016), http://www.indianz.com/News/2016/06/24/12117946183.pdf [https://perma.cc/M4S7-DPYJ]. It may also be noted that Alaska State Troopers have informally enforced tribal exclusion orders as trespass violations, even absent tribal territorial jurisdiction. *See* Lisa Demer, *Young Man Blamed for 3 Arson Deaths in Alaska Village gets Traditional Justice: Banishment*, ALASKA DISPATCH NEWS (Sept. 12, 2016), https://www.adn.com/alaska-news/rural-alaska/2016/09/11/young-man-blamed-for-three-arson-deaths-gets-traditional-justice-banishment/ [https://perma.cc/LSS7-ZKCK]. At a conference in October 2017, Alaska Attorney General Jahna Lindemuth acknowledged that tribal exclusion orders were independent sovereign actions over which her State generally had no authority. *See* Rachel D'Oro, *Alaska AG Outlines State Position on Tribal Banishment*, ASSOCIATED PRESS (Oct 18, 2017), https://www.usnews.com/news/best-states/alaska/articles/2017-10-17/alaska-ag-outlines-state-position-on-tribal-banishment. Alaska, Lindemuth further stated, would only become involved to enforce tribal exclusion orders when asked or to address citizen complaints of tribal overreaching; she further expressed sympathy for tribes seeking to protect the public safety in the absence of law enforcement. *Id.*

[276] Last, *supra* note 269.

[277] United States v. Nichols, No. CR 14-30038-MAM, 2014 WL 4185360, at *1 (D.S.D. Aug. 20, 2014); *see also* Press Release, United States Department of Justice, U.S. Attorney's Office, District of South Dakota, Man Charged with

Nichols, a non-Indian resident of Chicago, had been convicted several times in federal court for violent assaults committed within the Rosebud reservation.[278] The tribal court and council ordered his exclusion, which he subsequently violated several times.[279] On March 14, 2014, he was arrested by the tribal police for driving on a public Bureau of Indian Affairs road within the boundaries of the reservation.[280] Because he was not Indian, the tribal police contacted the FBI.[281] The United States Attorney charged him with violating South Dakota's Criminal Trespass statute as incorporated by the Assimilative Crimes Act and the Indian Country Crimes Act.[282] The court's disposition of the matter is discussed more fully below.

The National Congress of American Indians supports these federal prosecutions. In 2015, it passed a resolution urging federal law enforcement and United States Attorney's Offices to "fully enforce tribal exclusion orders, protection orders and trespass laws against those who cause serious threats to persons and damage to property in Indian [c]ountry."[283] It also called upon Congress to "consult with Indian tribes and develop legislation to increase federal penalties and deterrence for Native and Non-Natives who violate tribal exclusion orders…and repeat offenders of Indian country hunting, fishing, and trespass laws."[284]

In order to recognize tribal sovereignty, foster a spirit of collaboration, and earn the trust of tribes, the United States federal

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Criminal Trespass (Jan. 29, 2015), https://www.justice.gov/usao-sd/pr/man-charged-criminal-trespass [https://perma.cc/792A-BA8F].

[278] *Nichols*, 2014 WL 4185360, at *1.

[279] *Id.* at *2.

[280] *Id.*

[281] *Id.* at *2.

[282] *Id.* The Indian Country Crimes Act of 1817, otherwise known as the General Crimes Act, allows the federal criminal law applicable on federal enclaves to be enforced in Indian country except when the perpetrator and victim of a crime are both Indians. 18 U.S.C. § 1152. The Act does not apply where tribal jurisdiction over the relevant offender or offense is absolute or where the tribe has prosecuted the crime already. *Id.* The Assimilative Crimes Act of 1825 authorizes the United States to borrow from state law to fill gaps in the federal criminal law applicable on federal enclaves. 18 U.S.C. § 13. To "assimilate" a state law, a reviewing court must conclude either (1) that Congress has not already made the relevant offense punishable or (2) that federal law would not preclude the application of state law under review. Lewis v. United States, 523 U.S. 155, 164-65 (1998).

[283] Nat'l Congress of Am. Indians, Res. #SD-15-053 (2015), http://www.ncai.org/attachments/Resolution_oEXKTUgJPQQsNIEzwGfqIcVwhgUpygIwAUSMaVZCNXOvgCyFwfQ_SD-15-053.pdf [https://perma.cc/F48M-868U].

[284] *Id.*

government should develop an official policy deferring to tribes regarding their exclusion practices. For example, the Department of Justice or local United States Attorney's Offices should issue regulations requiring line prosecutors to either charge exclusion violations referred by tribes under state trespass statutes or provide tribes with justification for their declining to do so. Doing so will further what one scholar has recently characterized as the "duty of protection" the federal government has assumed to protect the safety of tribal communities that have been partially divested of sovereign power.[285]

Congress may also further tribal efforts by affirming broader tribal jurisdiction to better facilitate the exclusion of offenders. It took a substantial step by reauthorizing the Violence Against Women Act (VAWA) in 2013. Amongst its provisions, that Act amended 18 U.S.C. § 2265 to recognize full tribal jurisdiction "to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings [and] to exclude violators from Indian land."[286] While this power has allowed tribal governments to make substantial progress in confronting non-Indian domestic abusers, critics have pointed to a range of offenses it does not cover. These offenses include crimes committed by offenders without sufficient tribal ties, crimes between strangers, and crimes against children.[287]

Congress recently considered expanding the jurisdiction reaffirmed under VAWA. Senate Bill 2785, introduced without passage in the 114th Congress, would have expand VAWA's grant of special criminal jurisdiction to cover drug-related crimes, crimes against children, and crimes against tribal law enforcement.[288]

Federal prosecutors and Congress should continue to maintain this support in bolstering the tribal power of exclusion. As one scholar notes, support from the political branches for the expansion of tribal self-government in law and order should encourage federal courts to exercise great caution when considering

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[285] Hoopa Valley Tribal Council v. Jones, 11 N.I.C.S. App. 100, 105–06 (Hoopa Valley Tribal Ct. App. 2013), http://www.codepublishing.com/WA/NICS/html/11NICSApp/11NICSApp100.html, [https://perma.cc/25BD-FLE8].
[286] 18 U.S.C. § 2265(e).
[287] *See generally* SARAH DEER, THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA (2015).
[288] S. 2785, 114th Cong. (2016).

challenges to the tribal exclusion power.[289] Those courts, on their own, can take immediate steps to broadly interpret tribal jurisdiction in the exercise of the exclusion power.

V. A NEW FEDERAL JURISPRUDENCE OF EXCLUSION

For better or worse, challenges to tribal exclusion orders will often reach the federal courts. Challenges to these orders raise many unresolved issues. This article highlights three areas of concern. First, it addresses the jurisdictional question by explaining that tribes retain sufficient jurisdiction to order exclusions on either an independent and inherent sovereign basis or on the proper application of the *Montana* exceptions. Second, it looks to circumstances where federal public accommodations laws may seem to impair tribal exclusionary power. Third, it responds to recent litigation on the use of habeas corpus as a remedy to exclusion.

A. *Tribal Exclusion Jurisdiction*

There is little question that the *Montana* presumption placed severe limitations on tribal jurisdiction over civil matters, including those concerning exclusion.[290] But this article considers two bases on which courts may rely in their efforts to support the right to exclude. First, courts can recognize that the tribal power of exclusion rests on a separate and independent basis of sovereignty, which is distinguished from the general civil jurisdiction covered under *Montana*. Second, courts can support the tribal exclusion power under the two-prong *Montana* test itself.

1. The Independent Basis Theory

The independent basis theory to support the right of exclusion draws on longstanding Supreme Court precedent and

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[289] *See generally* Mary Swift, *Banishing Habeas Jurisdiction: Why Federal Courts Lack Jurisdiction to Hear Tribal Banishment Actions*, 86 WASH. L. REV. 941 (2011). Furthermore, in 1991 Congress found that that violations of the Indian Civil Rights Act could be best remedied by increased funding and support for tribal courts rather than federal judicial intervention. *See, e.g.*, American Indian Equal Justice Act, S. 1691, 105th Cong., 2d Sess. (1998); U.S. COMM'N ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT (June 1991) at 71–74.

[290] *See supra* notes 241–47 and accompanying text.

traces back to the work of the jurist Vattel.[291] As the Court in the *Merrion* opinion recognized, tribes maintain a power of exclusion that is independent of their status as landowner.[292] Rather, it proceeds from the sovereign's power to control entry onto its territory.[293]

The District Court for the District of South Dakota rested on similar grounds in upholding charges against Nichols.[294] After Nichols was charged, he moved to dismiss the trespass charges, collaterally attacking the Rosebud Sioux Tribe's original exclusion as ordered without personal jurisdiction.[295]

In considering the extent of a tribe's civil regulatory jurisdiction, the court recognized that "as a general matter," under *Montana*, "tribes do not possess authority over non-Indians who come within their borders."[296] Thus, outside the *Montana* exceptions, they cannot "regulate the use of [nonmember fee] land."[297] But "[a]s part of their residual sovereignty, tribes retain the inherent power to exclude outsiders from tribal territory."[298] This power "exists independently of their general jurisdictional authority. Even when they lack civil or criminal jurisdiction over a nonmember, their officers nonetheless may eject individuals who have violated tribal law or stop, detain and deliver them to the proper authorities."[299] As such, the court pointed back to the *Merrion* opinion's recognition of the exclusion power's separate basis in tribal sovereignty.[300] By doing so, the court suggested that the Rosebud Sioux Tribe had an independent basis for jurisdiction over Nichols even though he was arrested for traveling on a non-tribal road; this is the same situation found in *Strate*. But unlike in *Strate*, the Rosebud Sioux Tribe was not trying to adjudicate conduct on land that they did not own. Rather, it attempted to exclude Nichols from the reservation as a step collateral to any particular conduct

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[291] *See supra* Section III.A.
[292] *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144–47 (1982) (indicating that the dissent's contrary view was "overly restrictive").
[293] *Id.*
[294] United States v. Nichols, No. CR 14-30038-MAM, 2014 WL 4185360, at *1 (D.S.D. Aug. 20, 2014).
[295] *Id.*
[296] *Id.* at *3.
[297] *Id.* at *4.
[298] *Id.* at *3.
[299] *Id.*
[300] *Id.*

triggering the exclusion.[301] Put otherwise, *Strate* pertained to tribal jurisdiction over conduct; *Nichols* pertained to jurisdiction over the entry of persons.

Ultimately the court decided the matter on Nichol's failure to exhaust his challenge to tribal jurisdiction in tribal court.[302] It also noted that the *Montana* exceptions might well have supported general tribal civil jurisdiction.[303] But the strongest jurisdictional basis was the separate and independent basis for the exclusionary power.[304] As such, it provides a model to preserve *Merrion*'s broad recognition of tribal authority into the future.

Still, careful application of *Montana* holds its own promise.

2. Preserving the Exclusionary Power Under *Montana*

As discussed above, *Montana* introduced a presumption against general tribal civil jurisdiction over the conduct of nonmembers on fee land. Thus, in considering how courts can broadly recognize tribal exclusionary authority, it must be noted that the *Montana* exceptions do not limit tribal control over exclusion from tribal lands. The Tenth Circuit's holding in *Norton v. Ute Indian Tribe of the Uintah and Ouray Reservation* supports this conclusion.[305]

In that case, Utah state police had pursued Todd Murray, a Ute tribal member, onto his reservation and shot him to death.[306] Murray's family and tribe sued the involved officers in tribal court for wrongful death, trespass, and other torts.[307] The officers sued in federal court seeking an injunction.[308] The federal court granted this relief, holding that the Supreme Court had foreclosed tribal civil jurisdiction over state police officers, thus making tribal exhaustion unnecessary.[309]

The Tenth Circuit reversed that order. It concluded that the officers had failed to exhaust their tribal remedies, a necessary

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[301] *See id.* at *1–2.
[302] *Id.* at *5.
[303] *Id.*
[304] *See id.* at *3.
[305] Norton v. Ute Indian Tribe of the Uintah & Ouray Reservation, 862 F.3d 1236 (10th Cir. 2017).
[306] *Id.* at 1241–42.
[307] *Id.* at 1240–41.
[308] *Id.* at 1242.
[309] *Id.* at 1241.

prerequisite to federal court jurisdiction because the trespass claim "at least arguably implicate[d] the tribe's core sovereign rights to exclude and to self-govern."[310] It characterized the power to exercise these rights as "traditional and undisputed."[311] Further, it held that adjudication of a trespass claim concerned not the tribal court's adjudicatory authority but its regulatory power to control entry.[312] Although the Tenth Circuit held *Montana* to govern, it did so to "'readily agree[]' that the tribe had jurisdiction to bar nonmembers from tribal land and recognized that the tribe may place conditions on nonmembers' entry onto tribal land over and above the authority that tribes have to regulate nonmember conduct on reservation land in general."[313]

Returning to *Montana*'s effect on fee land, the Supreme Court recognized two exceptions to the presumption against tribal jurisdiction. The first arises when the offender has entered into a consensual relationship with the tribe or its members, and the second arises when the relevant conduct threatens "the political integrity, the economic security, or the health or welfare of [a] tribe."[314] As discussed above, many tribes have incorporated these exceptions into their exclusion codes.[315] Further, most circumstances of exclusion will fit within one or both of these exceptions.

The Ninth Circuit's opinion in *Hardin v. White Mountain Apache Tribe* is illustrative of this fact.[316] In *Hardin*, the tribal defendant had excluded Hardin for concealing stolen federal property.[317] In upholding the exclusion, the court recognized the diminution of tribal criminal jurisdiction affected by *Oliphant v. Suquamish Indian Tribe*,[318] a case in which the Supreme Court had concluded that tribes generally lack criminal jurisdiction over non-Indians.[319] However, the Ninth Circuit recognized that *Oliphant* had not limited a tribe's civil power to exclude those it could not prosecute.[320] The court also recognized that *Montana* does not limit

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[310] *Id.*
[311] *Id.* at 1244 (quoting Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 331 (2008)).
[312] *Id.* at 1245.
[313] *Id.* (quoting Montana v. U.S., 450 U.S. 544, 566 (1981)).
[314] *Montana*, 450 U.S. at 566.
[315] *See supra* Section II.A.3.
[316] Hardin v. White Mountain Apache Tribe, 779 F.2d 476 (9th Cir. 1985).
[317] *Id.* at 478.
[318] *Id.*
[319] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).
[320] *Hardin*, 779 F.2d at 478.

this authority when a tribe exercises it to "keep reservation peace and protect the health and safety of tribal members."[321]

Thus, the court held that the "intent of the tribal [exclusion] ordinance is merely to remove a person who 'threatens or has some direct effect on the…health or welfare of the tribe,' a permissible civil regulation of the Tribe's internal order."[322] Similarly, by choosing to enter and reside on the reservation, Hardin had entered a sufficient consensual relationship to justify subjecting him to exclusion.[323] Although *Hardin* is distinguishable from *Strate*, because Hardin lived pursuant to a lease with the tribe that expressly reserved the tribe's power to exclude, the exclusion at issue extended beyond the leased trust land under his home, for it encompassed the entire reservation.[324]

Hardin provides important lessons to courts upholding the tribal exclusionary power. First, in applying the first *Montana* exception, the Ninth Circuit accorded comity and deferred to the tribe's assertion that it was acting to protect tribal welfare. As discussed earlier, tribes must confront many social ills in their communities, including drug commerce, violence, and colonial exploitation, which were all introduced by non-Indians.[325] Tribal governments are in the best positions to assess these ills and craft appropriate solutions. Courts should not second-guess the intent behind these solutions.

The expertise that tribal courts and legislatures utilize in interpreting and applying the first *Montana* exception highlights the importance of the tribal exhaustion requirement. The Supreme Court has held that parties challenging tribal regulatory or adjudicative jurisdiction generally must do so first in tribal court.[326] Moreover, they must maintain that challenge through the entire process afforded by tribal law, including administrative, trial, and appellate review.[327] This provides federal courts reviewing tribal actions "the

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[321] *Id.* (quoting Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587, 593 (9th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984)).
[322] *Id.* at 479 (citation omitted) (quoting Montana v. U. S., 450 U.S. 544, 566 (1981)).
[323] *Id.*
[324] *Id.* at 478.
[325] *See supra* Section II.
[326] Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856–57 (1985).
[327] *See* Burlington N. R.R. Co. v. Crow Tribal Council, 940 F.2d 1239, 1246–47 (9th Cir. 1991).

benefit of [tribal] expertise in such matters" "by allowing a full record to be developed in the Tribal Court."[328] That expertise may pertain to both the "factual and legal bases for the challenge to [tribal] jurisdiction."[329] To excuse exhaustion and thus provide "unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs."[330] The factual concerns underlying exclusionary jurisdiction are complex and are often unique to the tribal context. Strict adherence to the exhaustion doctrine and comity between federal and tribal courts are therefore necessary.

Regarding the second *Montana* exception, courts should follow *Hardin* and recognize that nonmembers enter a consensual relationship with a tribe by virtue of their entry onto reservation land.[331] This follows Vattel's longstanding principle that the exclusion power is a corollary of the right to control entry. *Montana* limits tribal regulatory and adjudicative jurisdiction over *conduct* by nonmembers on their own fee land. Once on that land, nonmembers can act without otherwise entering a consensual relationship with the tribe whose reservation surrounds it. But they enter such a relationship at the time they come on to the reservation.

Even this broad interpretation of the first *Montana* exception does not apply, most offensive conduct will imply or involve a sufficient consensual relationship. The transactions involved in the drug trade provide an obvious commercial example, but the same can be said for instances of violence perpetrated by non-Indians.

The recent case of *Dollar General Corp. v. Mississippi Band of Choctaw Indians* provides a helpful example.[332] Here, Dollar General contracted with a youth job training program operated by the Mississippi Band of Choctaw Indians.[333] A Dollar General manager allegedly molested a tribally enrolled youth participating in the youth training program, who had been assigned to work at

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[328] *Nat'l Farmers Union Ins. Cos.,* 471 U.S. at 856–57.
[329] *Id*. at 856; *see also* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15 (1987) (quoting *National Farmers Union Ins. Cos.*, 471 U.S. at 856).
[330] Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1987).
[331] Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479 (9th Cir. 1985).
[332] Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians, 746 F.3d 167, 169 (5th Cir. 2014), *aff'd sub nom.* Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians, 136 S. Ct. 2159, (2016).
[333] *Id.* at 169.

Dollar General.[334] The case concerned the jurisdiction of the Mississippi Choctaw Tribal Court over tort claims based upon the alleged molestation.[335] The Fifth Circuit concluded that the company had entered a sufficient consensual relationship with the tribe and its members by contracting with a tribal job training program and taking on the victimized youth in an internship capacity.[336] If the posture of the case were transformed into an action for exclusion against the manager, a sufficient consensual relationship would also be found. The abusive manager consents to enter a relationship with his victim by commission of his offense.[337] *Montana* does not require the consensual relationship to preexist the offensive conduct.

Similarly, there is no just reason to say that the person who abuses his spouse has entered a sufficient relationship but the person who chooses to abuse a stranger has not. Both offending persons can foresee the territorial sovereign exercising its jurisdiction over such conduct or over such persons to conclude that they are not wanted on the reservation.

Thus, courts can support tribal exclusion power under the *Montana* exceptions by exercising a spirit of comity and deferring to tribal interpretations of the tribal welfare exception, as well as by interpreting the consensual relationship exception broadly. Even so, special issues arise when tribes seek to exclude those persons protected by federal law.

B. *Exclusion and Generally Applicable Federal Law*

Tribal exclusion actions may, at times, conflict with federal statutes guaranteeing access to certain persons. As an example, the Makah Tribal Code allows for the exclusion of persons with

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[334] *Id.*
[335] *Id.*
[336] *Id.* at 173.
[337] *See* Montana v. U. S., 450 U.S. 544, 565 (1981) ("[A] tribe may regulate…the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."); *see also* United States v. Nichols, No. CR 14-30038-MAM, 2014 WL 4185360, at *5 (D.S.D. Aug. 20, 2014) (indicating that the defendant "appear[ed] to have had, and maintained, a consensual relationship with a female tribal member" based on their domestic/sexual relationship). While a victim of sexual molestation or assault does not consent to the offense, the lack of mutuality should not serve to immunize the offensive conduct from tribal authority.

contagious diseases.[338] This provision may allow exclusions that would seem to violate Title III of the Americans with Disabilities Act (ADA), which guarantees disabled persons equal access to places of public accommodation.[339] When the exercise of tribal rights interferes with public accommodation protections, the results are "difficult case[s], in which significant values are in conflict that cannot be fully reconciled. Both the Indian tribes and people with disabilities share strong interests in maintaining independence and self-sufficiency, and both groups face substantial obstacles in protecting those interests, historically and currently."[340]

This article considers the possibility that an exclusion action may conflict with a federal statute to provide some thought on when the tribal exclusion power might trump generally applicable federal accommodations law. It concludes that such instances might arise when tribes retain a treaty-protected right of exclusion or when the tribe has taken steps to regulate and protect against discriminatory barriers to access.

The Eleventh Circuit considered whether Title III provided a private right of action against Indian tribes in *Florida Paraplegic, Ass'n.. v. Miccosukee Tribe of Indians*.[341] Here, two associations for the advancement of disabled people's rights sued for injunctive relief against the defendant tribe (d/b/a its casino) to remedy failures to meet ADA requirements for the accessibility of public accommodations.[342] The court considered, first, whether ADA Title III applies to Indian tribes, and, second, whether the Act abrogates tribal sovereign immunity.[343]

The Eleventh Circuit applied a Ninth Circuit test to determine whether Title III provided a right to plaintiffs. Pursuant to *Donovan v. Coeur d'Alene Tribal Farm*, a general federal statute presumptively applies to Indian tribes unless its application would (1) abrogate treaty rights, (2) interfere with purely intramural matters touching exclusive rights of self-government, or (3) contradict Congress's intent.[344] Because the third exception focuses

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[338] MAKAH LAW AND ORDER CODE § 9.2.02(k).
[339] 42 U.S.C. § 12182.
[340] *See* Hollynn D'Lil v. Cher-Ae Heights Indian Community of the Trinidad Rancheria, 2002 WL 33942761 (N.D. Cal. Mar. 11, 2002).
[341] Fla. Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla., 166 F.3d 1126 (11th Cir. 1999).
[342] *Id.* at 1127.
[343] *Id.* at 1128–31.
[344] Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985).

on the specific text and intent of the relevant federal statute, consideration of whether application of ADA Title III contradicts congressional intent would not bear upon application of other statutes. Thus, this article focuses on the first two exceptions.

1. Impairment of the Treaty Right to Exclude

A court will not presume a general federal statute to apply to Indian tribes if that application would impair a treaty right. Under this rule, analysis of a relevant federal statute consists of two parts. First, the court must identify and interpret the relevant right in the treaty.[345] Second, it must consider whether the right is sufficiently specific to bar application of the statute.[346] The scope of the right will depend on how the statute will be applied; in some circumstances, the right will be too general to bar application, but in others it will be sufficiently specific.

The first step looks to the treaty history of the specific tribe involved in a given case. Once the appropriate treaty is identified, it is interpreted in accordance with the Indian canon of statutory construction. The canon requires that "[a]mbiguities in tribal treaties [be] construed liberally to favor Native Americans and to respect traditional notions of Native American sovereignty."[347] Further, "treaties with the Indians must be interpreted as they would have understood them."[348] Intent may be evidenced by "the history of the treaty, the negotiations, and the practical construction adopted by the parties."[349]

As discussed above,[350] Common Article Two of the Stevens Treaties provided reservations to be established for the tribes' "exclusive use" where no "white man [would] be permitted to reside upon [reservation land] without permission of the tribe and the superintendent or agent."[351] The tribal negotiators wanted those settlers gone regardless of their status as residents, transients, or usufructory exploiters of tribal territories.[352] Interpretation in the

[345] US DOL, 935 F.2d 182, 184 (9th Cir. 1991)
[346] *Id.*
[347] *Id.* at 185.
[348] Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970).
[349] Choctaw Nation v. United States, 318 U.S. 423, 432 (1943).
[350] *See supra* Section III.B.
[351] *E.g.*, Treaty with the Nisqualli, Puyallup, etc., 10 Stat. 1132 (1854).
[352] Opinion Regarding the Boundary of the Skokomish Reservation along the Skokomish River, Op. Solic. of the Interior M-37034, at 9–10 (2016).

light of such facts suggests that the right reserved under Common Article Two not only covered the exclusion of non-Indians from residence on the reservation but "set[] forth a general right of exclusion."[353]

Once the tribe and court identify the relevant treaty right, the tribe must show that the general right, as applied to the proposed statutory application, would present what the Sixth Circuit in *Soaring Eagle Casino & Resort v. NLRB* called a specific and "direct conflict [with] the entry necessary for effectuating the statutory scheme."[354] In *United States Department of Labor v. Occupational Safety & Health Review Commission* (*US DOL*), the Ninth Circuit considered whether treaty language similar to Common Article Two presented such a conflict. In *US DOL*, the tribe sought to exclude federal inspectors acting pursuant the Occupational Safety and Health Act (OSHA).[355] Recognizing that the treaty provided for a general right of exclusion, the Court analyzed whether that right was broad enough to allow the tribe to exclude the OSHA inspectors.[356] In doing so, it looked to an earlier Ninth Circuit case, *United States v. Farris*, which analyzed Article Two of the Treaty of Medicine Creek.[357]

The *Farris* court had considered whether the treaty protected certain Puyallup Indians from federal prosecution for running an illegal gambling operation. While the court in *Farris* only considered the "exclusive use" component of Common Article Two,[358] *US DOL* also described that court as having interpreted the bar on non-Indian residence.[359] *US DOL* interpreted *Farris* to have "restricted the treaty rights exception to only subjects specifically covered in treaties, such as hunting rights."[360] Applying the *Coeur d'Alene* standard to its evaluation of the applicability of OSHA, *US*

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[353] *See* US DOL, 935 F.2d 182, 185 (9th Cir. 1991). (interpreting language nearly identical to that found in Common Article Two in a case considering whether an application of federal statute is barred by a tribe's treaty).
[354] Soaring Eagle Casino and Resort v. N.L.R.B., 791 F.3d 648, 661 (6th Cir. 2015).
[355] *US DOL*, 935 F.2d at 183.
[356] *Id.* at 184–87.
[357] *Id.* at 186–87 (citing United States v. Farris, 624 F.2d 890 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981), *and superseded by statute*, 18 U.S.C. § 1166).
[358] *Farris*, 624 F.2d at 893.
[359] *US DOL*, 935 F.2d at 185–86 (citing Treaty with the Nisqualli, Puyallup, etc., 10 Stat. 1132 (1854)).
[360] *Id.* (citing *Farris*, 624 F.2d at 893).

DOL held that a "generalized right of exclusion may not be sufficient to bar application of [OSHA]."[361] If the court held otherwise, "the enforcement of nearly all generally applicable federal laws would be nullified, thereby effectively rendering the…rule inapplicable to any tribe which has signed a Treaty containing a general exclusion provision."[362]

The cases interpreting the conflict between exclusion rights vary depending on whether they rely on Common Article Two or not. Many of those that do not have involved the entry of federal officers acting on the basis of their limited statutory authority.[363] In order to bar the entry of federal officers, treaty language must specifically speak to their exclusion.[364] The Tenth Circuit found such language in the 1868 treaty with the Navajo Nation (the Nation).[365] The Nation had signed that treaty with the United States after wars, numerous forced marches (remembered today as the Long Walk), and internment in the concentration camps of Bosque Redondo.[366] The Nation had a specific interest in limiting the entry of settlers and federal officers "in order to achieve an end to conflict and ensure peace."[367] They, therefore, negotiated a treaty that permitted entry to only those "federal personnel…*specifically* so authorized to deal with Indian affairs."[368] This language "provid[ed] for specific exclusion rights over *all* persons" and, therefore, barred the applicability of a general statute such as OSHA.[369]

Common Article Two was drafted with reference to a history and set of concerns distinct from those underlying the Navajo Treaty. As discussed above, the principle contention expressed by many Northwest tribes was with private settlers, not the federal government. By agreeing to move onto a reservation, where federal officers would help them, treaty negotiators intended, albeit under duress, to consent to the ultimate authority of the United States. Thus, Common Article Two laid out a cooperative scheme for the

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[361] *Id.* at 186.
[362] *Id.* at 187.
[363] *See, e.g., id.* at 186.
[364] Donovan v. Navajo Forest Prods. Indus., 692 F.2d 709, 711 (10th Cir. 1982).
[365] *Id.*
[366] *See generally* LYNN R. BAILEY, BOSQUE REDONDO: AN AMERICAN CONCENTRATION CAMP (1970).
[367] *See Navajo Forest Prods. Indus.*, 692 F.2d at 712.
[368] *Id.* at 711 (emphasis in original).
[369] Soaring Eagle Casino and Resort v. N.L.R.B., 791 F.3d 648, 660 (6th Cir. 2015) (discussing *Navajo Forest Products Industries*, 692 F.2d 709) (emphasis added).

right to exclude non-Indians that could be exercised by both the tribe and federal superintendent. Such language, as interpreted in *US DOL*, *Farris*, and *Soaring Eagle*, would be insufficient to allow for the exclusion of federal officers. Yet the right must stand for something, or it will present "an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the [United States] for more."[370] Common Article Two recognizes the right the Indian negotiators sought, the power to exclude private settlers who act without federal mandate from their reservations. To interpret the treaty so narrowly as to incapacitate the ability of tribes to exclude those private non-Indian individuals, even in the context of a statute protecting access to public accommodations, would render it a nullity.[371]

2. Intrusion on Tribal Self-Governance in Intramural Affairs

The second *Coeur d'Alene* exception bars a statute's application if it would concern "exclusive rights of self-governance in purely intramural matters."[372] Intramural matters are those "such as conditions of tribal membership, inheritance rules, and domestic relations."[373] Notably, the operation of tribal commercial enterprises falls within such intramural matters.[374] The Ninth Circuit, however, has suggested that tribal efforts to regulate non-intramural conduct may be sufficient to bar statutory application.[375] If the tribe has regulated the conduct and the plaintiff has not exhausted his tribal

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[370] United States v. Winans, 198 U.S. 371, 380 (1905) (interpreting another Stevens treaty that was drafted and negotiated by the same federal agents as the Treaty of Medicine Creek).

[371] This treaty right does not unsettle the purpose of Title III. The Senate and House reports accompanying that Title emphasized Congress's intent that the statute should provide "people with disabilities [with] equal access to the array of establishments that are available to others who do not currently have disabilities." S. REP. NO. 101–116, at 59 (1989); *see also* H.R. REP. NO. 101–485, pt. 2, at 100 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 382–83. Because this title accords disabled persons the same scope of access as non-disabled persons, and because non-disabled non-Indians' access is qualified by the treaty right of exclusion, disabled non-Indians are entitled to that same qualified scope of access.

[372] Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985) (quoting United States v. Farris, 624 F.2d 890, 893–94 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981), *and superseded by statute*, 18 U.S.C. § 1166).

[373] *Id.*

[374] *Id.*

[375] Solis v. Matheson, 563 F.3d 425, 433 (9th Cir. 2009).

remedies pursuant to that regulation, application of the statute would intrude on tribal self-governance.

Coeur d'Alene itself held that this exception was inapplicable to "[t]he operation of a farm that sells produce on the open market and in interstate commerce" because it was "not an aspect of tribal self-government."[376] Similarly, in *Florida Paraplegic*, the Eleventh Circuit found the tribal casino to be a normal "commercial enterprise."[377]

But the second *Coeur d'Alene* exception may be satisfied not only when statutory application would touch intramural conduct but also when it would intrude on tribal regulation of non-intramural conduct.[378] In *Solis v. Matheson*, an Indian-owned retail store appealed the United States Department of Labor's efforts to apply the Fair Labor Standards Act (FLSA), arguing its operation was an intramural, tribal matter.[379] The court easily dismissed this argument, for the store was a commercial enterprise not owned by the tribe and engaged in extensive employment of and commerce with both nonmembers and non-Indians.[380] The court did, however, recognize that the tribe had a "strong interest as a sovereign in regulating economic activity involving its own members within its own territory."[381] The court suggested that application of federal law, therefore, could interfere with self-government not only by directly regulating governmental conduct but also by preempting tribal efforts to regulate non-governmental conduct.[382] In the case under its review, the FLSA did not threaten such interference as the tribe "ha[d] not enacted wage and hour laws."[383] That result might have differed if the tribe had enacted such laws.

Tribal regulation of casinos is illustrative of how exclusion from a commercial facility is used to regulate intramural activity. For example, chapter 17.05 of the Nisqually Tribal Code concerns procedures for barring a patron from the tribal casino. Pursuant to that chapter, the "Tribal Gaming Agency may bar a patron from the

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[376] *Id.* (quoting *Farris*, 624 F.2d at 893).
[377] Fla. Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla., 166 F.3d 1126, 1129 (11th Cir. 1999).
[378] *Solis*, 563 F.3d at 433.
[379] *Id.* at 429.
[380] *Id.* at 434.
[381] *Id.* at 433 (quoting N.L.R.B. v. Pueblo of San Juan, 276 F.3d 1186, 1200 (10th Cir. 2002)).
[382] *Id.* at 434.
[383] *Id.*

casino if the Agency determines that the patron poses a threat to the safety or security of the gaming operation" based on its observation of the patron's "behavior, recent criminal history or association with gangs or other criminal organizations."[384] The Agency cannot bar a patron based on criminal history alone without "other evidence to suggest that the person poses a threat to safety and security at the Casino."[385] The code provides aggrieved patrons an administrative remedy, allowing them to "appeal the barring or request a removal of the bar to the Tribal Gaming Commission."[386] The Tribal Gaming Commission is required to "restore the patron's access to the Casino if it is determined that the patron is no longer a threat to the safety and security of the Casino."[387] While the preceding protections apply broadly to all patrons, only tribal members are entitled to restored access at the "earliest possible date" and cannot be permanently barred.[388]

This hypothetical consideration of the ADA Title III's relation to tribal exclusion actions teaches two important lessons regarding generally applicable federal laws and exclusion. First, courts must look carefully to treaty provisions pertaining to exclusive tribal use of the reservation. Interpretation of such provisions may differ depending on whether the excluded person is a private actor or a federal officer acting according to an official mandate. Second, courts must remember that concerns of tribal self-government do not only arise when the site of exclusion is a governmental institution like public housing. Tribes have important and intramural governing concerns in regulating the adjudication of exclusion actions concerning nongovernmental spaces. Thus, the *Coeur d'Alene* test will preclude the application of federal accommodations law until the complainant has exhausted his tribal remedies to exclusion, unless a federal agency brings enforcement litigation.

This article turns last to an issue gaining recent traction in the federal courts, the use of habeas corpus as a device to allow federal judicial intervention in exclusion decisions.

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[384] NISQUALLY TRIBAL CODE § 17.05.01(a).
[385] *Id.* § 17.05.01(b).
[386] *Id.* § 17.05.04.
[387] *Id.*
[388] *Id.*

C. *Habeas Corpus*

Increasingly, excluded persons have petitioned the federal courts to grant them writs of habeas corpus to challenge their exclusion. They ask for such relief under the Indian Civil Rights Act (ICRA). ICRA provides that the "privilege of the writ of habeas corpus shall be available to any person in a court of the United States, to test the legality of his detention by order of an Indian tribe.[389] Congress guaranteed a broad panoply of rights under Title I of ICRA, including due process and equal protection in tribal court, but it provided a narrow opportunity for relief through habeas corpus alone.[390] How it reached this result is detailed at length in the most important ICRA case, *Santa Clara Pueblo v. Martinez*.[391]

In *Martinez*, Martinez famously challenged the Santa Clara Pueblo's ordinance granting membership status to the children of mixed marriages when the father was a tribal member.[392] She argued that the ordinance violated her children's rights to equal protection under ICRA.[393]

The United States Supreme Court considered whether ICRA provided such a cause of action. The Supreme Court explained that Congress had passed the ICRA with "[t]wo distinct and competing purposes," the protection of individual civil liberties in the tribal context and the furtherance of tribal sovereignty.[394] In doing so, it distinguished the "interference with tribal autonomy and self-government" that would result by recognizing such a cause of action from the substantive changes ICRA mandated in tribal proceedings.[395]

Congress had not intended to provide a federal forum to resolve disputes properly adjudicated within the tribe's own bounds.[396] The Supreme Court cited Congress's rejection of an earlier bill that would have allowed de novo review of all tribal convictions, paying them less respect than federal agencies receive.[397] The Court concluded that such a provision would

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[389] 25 U.S.C. § 1303.
[390] 25 U.S.C. § 1302.
[391] Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).
[392] *Id.* at 51.
[393] *Id.*
[394] *Id.* at 62.
[395] *Id.* at 59.
[396] *See id.*
[397] *Id.* at 67.

"deprive the tribal court[s] of all jurisdiction in the event of an appeal, thus having a harmful effect on law enforcement within the reservation," because instead, Congress passed a law allowing only habeas corpus relief.[398] Such a limitation indicated recognition by Congress "that resolution of statutory issues under [ICRA], and particularly those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts."[399]

By including the above limitation, ICRA preserves an important space in American jurisprudence for tribes to consider and adjudicate such compelling arguments on their own terms. As the Court explained, "Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians."[400]

In the decades following *Martinez*, a split has emerged between the Second and Ninth Circuits over whether the narrow window so carefully constrained by the higher court may be widened to embrace habeas corpus challenges to exclusion orders under ICRA. This section will discuss and critique the Second Circuit's seminal decision in *Poodry v. Tonawanda Band of Seneca Indians*,[401] which allowed for the issuance of habeas corpus relief in the exclusion context. The critique stems from numerous subsequent decisions by the Ninth Circuit and its subsidiary district courts.

The Second Circuit decided *Poodry* in 1996.[402] The Tonawanda Band had permanently excluded certain members of the Band's Council of Chiefs after those members broke away and

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[398] *Id.* (quoting S. 962, 89th Cong. (1965)).
[399] *Id.* at 71. The district court had further explained that federal courts should not "determine which traditional values will promote cultural survival and therefore should be preserved and which of them are inimical to cultural survival and should therefore be abrogated. Such a determination should be made by the people of Santa Clara; not only because they can best decide what values are important, but also because they must live with the decision every day. Obviously they can and should be the judges of whether a particular rule is beneficial or inimical to their survival as a distinct cultural group." Martinez v. Santa Clara Pueblo, 402 F. Supp. 5, 18 (D.N.M. 1975); *rev'd*, 540 F.2d 1039 (10th Cir. 1976); *rev'd*, 436 U.S. 49 (1978).
[400] *Santa Clara Pueblo*, 436 U.S. at 65.
[401] Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874 (2d Cir. 1996).
[402] *See id.*

formed their own competing government.[403] Having characterized the petitioners' formation of a competing council as an act of treason, the Tonawanda Band had sent groups of fifteen to twenty-five people to demand the members' immediate removal.[404] Those excluded sued in federal court, arguing that their exclusion constituted a detention triggering ICRA's habeas corpus provision.[405] The Second Circuit concluded that it did. In reaching this conclusion, the court explained that petitioners had met the three requirements for habeas relief: there was (1) a criminal sanction, (2) sufficient detention, and (3) an exhaustion of all other available remedies.

Analysis of these three elements in *Poodry* and the Ninth Circuit's responses are instructive.

1. A Criminal Sanction

Regarding the first requirement for habeas relief, the Second Circuit held habeas relief directed against a separate sovereign was likely available only in the criminal context.[406] However, the Second Circuit explained that whether a relevant sentence was criminal or civil depended on the Anglo-American heritage of the habeas writ rather than tribal tradition.[407] It noted that exclusion had "clearly and historically been punitive in nature."[408] Faced with conflicting testimony on whether exclusion was viewed as civil or criminal in tribal custom, the court relied on Anglo-American common law to conclude it was criminal for the purposes of habeas corpus relief.[409] Exclusion is a fundamentally civil proceeding as recognized under most tribal laws and under Supreme Court precedent. Yet the writ of habeas corpus is designed to provide relief from criminal detention.

Drawing on *Poodry,* the District Court for the District of Oregon reconciled this contradiction in *Alire v. Jackson*.[410] The Second Circuit had confronted an exclusion ordered in direct

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[403] *Id.* at 877–78.
[404] *Id.* at 878.
[405] *Id.* at 879.
[406] *Id.* at 888; *see also* Alire v. Jackson, 65 F. Supp. 2d 1124, 1127 (D. Or. 1999).
[407] Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 900 (2d Cir. 1996).
[408] *Id.* at 889.
[409] *Id.* at 888.
[410] *Alire*, 65 F. Supp. 2d 1124 (1999).

response to alleged acts of treason. While allowing that habeas review might extend beyond cases involving a criminal conviction, it had to "ar[i]se in a criminal context."[411] In the Oregon case, the Confederated Tribes of the Warm Springs Reservation had excluded a nonmember caregiver previously convicted in tribal court of children under her care.[412] It was not until several months later, however, that many tribal members petitioned successfully for the tribal council to exclude her.[413] The district court reasoned that her exclusion lacked the close temporal nexus to a criminal proceeding described in *Poodry*.[414] As such, the court lacked subject matter jurisdiction to entertain her petition for habeas corpus.

The District Court for the Eastern District of California, however, disagreed. In *Quair v. Sisco*, it considered an exclusion ordered absent an underlying criminal prosecution.[415] Although the court considered the relevant facts at extraordinary length, it concluded that "the imposition of [exclusion] renders…proceedings criminal [per se] for purposes of habeas corpus relief."[416]

This conclusion departs from *Poodry* and *Martinez* and disables tribes in exercising perhaps their only tool to combat lawlessness within their reservations without federal interference. The *Alire* rule requiring a close temporal nexus between a criminal proceeding and the exclusion order furthers the purposes of ICRA to provide federal relief in the most extreme cases while protecting the Act's goal of aggrandizing tribal sovereignty. Other districts should adopt the *Alire* rule so as to provide a forum to persons improperly detained in criminal contexts without further carving away at the fragile civil jurisdiction of tribes.

2. Sufficiency of Detention

Returning to *Poodry*, the Second Circuit considered whether permanent exclusion effected a detention within the meaning of ICRA. Detention, the Supreme Court had held, did not require actual physical custody.[417] Rather, it required "severe restraints on

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[411] *Poodry*, 85 F.3d at 888.
[412] *Alire*, 65 F. Supp.2d at 1125.
[413] *Id.*
[414] *Id.* at 1128.
[415] Quair v. Sisco, 359 F. Supp.2d 948 (E.D. Cal. 2004).
[416] *Id.* at 967.
[417] Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 893 (2d Cir. 1996).

individual liberty."[418] A "short-lived suspension of privileges" was not severe enough to suffice.[419] The exclusion of the petitioners, however, was sufficient. The Second Circuit cited the forceful groups sent to demand removal, accompanying assaults, the denial of electrical service to the petitioners, and their disenrollment to justify exclusion.[420] Though the petitioners had not yet been removed, they lived under the uncertainty of not knowing "if, when, or how their sentences [would] be executed."[421] The court analogized this state of uncertainty to that of American citizens ordered denaturalized though not yet deported, whose rights to petition for habeas corpus had long been recognized.[422] Like the denaturalized, the excluded faced the loss of cultural, economic, and social ties with their nation.[423]

The Ninth Circuit distinguished and rejected *Poodry*'s understanding of detention in *Tavares v. Whitehouse*.[424] Disagreeing with internal governance decisions, certain members of the United Auburn Indian Community submitted their grievances to the mass media to accuse the tribal council of fraud in tribal financial matters.[425] They alleged to the media that the tribe and its enterprises were not "stable partner[s] for business."[426]

In response, the United Auburn Indian Community tribal council banned these members temporarily from tribal lands and facilities for slandering the tribal government in non-tribal fora.[427] The exclusion orders were issued for between two and ten years.[428] Yet the petitioners maintained the right to vote by absentee ballot in tribal elections.[429] They kept their medical benefits.[430] None of the

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[418] *Id.* at 894 (quoting Hensley v. Mun. Court, San Jose Milpitas Judicial Dist., Santa Clara Cty., California, 411 U.S. 345, 351 (1973)).
[419] *Id.*
[420] *Id.* at 895.
[421] *Id.*
[422] *Id.* at 895–96.
[423] The dissent, by contrast, argued that ICRA's habeas corpus remedy was designed to protect those liberties shared by the American public generally, rather than those enjoyed especially by tribal members. *Id.* at 902 (Jacobs, J., dissenting).
[424] Tavares v. Whitehouse, 851 F.3d 863 (9th Cir. 2017), cert. denied, No. 17-429, 2018 WL 1460776 (U.S. Mar. 26, 2018).
[425] *Id.* at 867.
[426] *Id.* at 868.
[427] *Id.*
[428] *Id.*
[429] *Id.*
[430] *Id.*

petitioners were disenrolled.[431] They could still access private lands within the reservation.[432]

The members had received no right to hearing or appeal,[433] so the tribal members took their claim to federal court and filed for habeas corpus relief under ICRA. The district court dismissed for lack of subject matter jurisdiction, concluding that the exclusions did not rise to the level of a "detention" sufficient to warrant relief under ICRA.[434]

Affirming that order, the Ninth Circuit distinguished ICRA's limited relief to petitioners in "detention" with the federal courts' broader jurisdiction to grant habeas corpus writs to petitioners "in [the] custody" of federal and state authorities.[435] The Ninth Circuit explained that when Congress passed ICRA, detention was understood to constitute a narrow subset of custody.[436] Custody referred to "physical control of the person" with or without physical confinement,[437] but detention specifically required physical confinement.[438] The Ninth Circuit then held that three reasons precluded the exercise of habeas jurisdiction under ICRA.

First, unlike those presented in *Poodry*, these exclusions were temporary.[439] Even the Second Circuit itself had limited *Poodry* in this matter. In *Shenandoah v. United States Department of the Interior*, it held that temporary exclusion orders presented an insufficient limitation on the petitioner's liberty to support habeas corpus jurisdiction.[440]

Second, the Ninth Circuit explained that "[i]n many cases, a tribe's decision to temporarily exclude a member will be another expression of its sovereign authority to determine the makeup of the community."[441] The federal courts lacked jurisdiction to review such determinations, and thus it was not proper to include exclusion within the definition of "detention."[442]

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[431] *Id.*
[432] *Id.*
[433] *Id.*
[434] *Id.* at 869.
[435] *Id.* at 871.
[436] *Id.*
[437] *Id.* (quoting Preiser v. Rodriguez, 411 U.S. 475, 484–85 (1973)).
[438] *Id.*
[439] *Id.* at 875.
[440] *Id.* at 875 (citing Shenandoah v. U.S. Dept. of Interior, 159 F.3d 708, 714 (2d Cir. 1998))
[441] *Id.* at 876.
[442] *Id.*

Third, habeas corpus relief was improper because it would interfere with the authority to exclude nonmembers, as recognized in *Merrion*.[443] But the court also clarified that inherent sovereignty supported the exclusion of members and nonmembers alike.[444]

Considering these reasons and the interpretive canon requiring that ambiguous statutes be construed to favor tribal sovereignty, the Ninth Circuit concluded that when Congress used the word "detention," it had not meant to include exclusion orders, at least when temporary in duration.[445] To the extent that the petitioners brought meritorious claims, the proper remedy must be sought in tribal court, not in recourse to the federal courts.[446]

Tavares provides a persuasive outer limit for federal court intervention. The writ of habeas corpus is justly extraordinary. While the availability of such relief is integral to maintaining the rule of law, the interference it represents becomes problematic when applied by the colonizer against the governments of the colonized. Therefore, courts should be extremely reluctant to grant such writs and should not do so where exclusion is only temporary. To act otherwise would be a retreat from the Court in *Martinez*'s stand against federal intrusion into tribal affairs. As the Ninth Circuit noted, the canons of construction, properly established to protect tribal sovereignty, urge that ICRA's ambiguities be interpreted against this intrusion. The Second Circuit, by contrast, relied on general habeas corpus law, not habeas corpus principles particular to the Indian law context.

Further, *Tavares* explained why federal courts should hesitate to review even the exclusion of members, stating that such review might lead to interference with the decision to exclude nonmembers.[447] Courts should carefully guard against such interference. The *Poodry* court, based on its facts and its citation to denaturalization cases, construed exclusion as a loss of national and political identity.[448] While exclusion may force nonmembers to forsake certain social or employment ties, it does not entail the corresponding loss of homeland. Thus, *Alire* distinguished *Poodry*

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[443] *Id.*
[444] *Id.* at 876–77.
[445] *Id.*
[446] *Id.* at 878.
[447] *Id.* at 877.
[448] Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 896 (2d Cir. 1996) (citing Trop v. Dulles, 356 U.S. 86, 101–02 (1958)).

from the nonmember in its own case who had "not been stripped of her Indian name, her lands, her tribal citizenship, or her tribal membership, nor has she been [excluded] from her own tribe's reservation or territory."[449] Similarly *Quair* held that the excluded petitioners were detained because their exclusion was coupled with disenrollment; the court contrasted the petitioners with excluded nonmembers who would not face such a double harm.[450] Such a holding conforms to the purpose of exclusion as a recognized treaty right: controlling the entry of nonmembers in order to ensure the peace and welfare of a tribe.

To conclude otherwise would turn ICRA into a hammer, battering away at the sovereign boundaries of Indian country. Further, courts considering petitions for habeas corpus filed by excluded nonmembers should distinguish *Poodry*. The Second Circuit in that case held that exclusion was a sufficiently severe restraint on liberty to trigger habeas corpus because it worked a "destruction of [the petitioners'] social, cultural, and political existence."[451] It reached this conclusion in explicit rejection of the dissent's argument that ICRA served to provide relief from restraints on liberties shared by the American public and not those enjoyed specifically by tribal members.[452]

Additionally, its analogy to the denaturalization of American citizens loses all sense if applied to persons deprived of a membership they never had. The American public has, pursuant to *Merrion*, *Cherokee Nation*, and associated cases, no right to settle or trespass on Indian lands.

In contrast, the consequences of exclusion for members are grave. The excluded may lose the right to attend important family and ceremonial functions.[453] They lose the right to certain services and political rights.[454] Perhaps most importantly they may lose a great degree of respect.[455] The petitioners in *Tavares* complained

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[449] *Alire*, 65 F.Supp. 2d at 1129.
[450] *Quair*, 359 F.Supp.2d at 967; *but see Tavares*, 851 F.3d at 876 (explaining that federal courts lack jurisdiction to review membership decision and thus, exclusion of members as well).
[451] *Poodry*, 85 F.3d at 897.
[452] *Id.*
[453] Tavares v. Whitehouse, No. 2:13–cv–02101–TLN–CKD, 2014 WL 1155798, at *4 (E.D. Cal. Mar. 21, 2014). But as discussed earlier, certain tribes guarantee the right of banished people to attend ceremonial occasions. *See, e.g.*, Tulalip Tribal Code § 2.40.130.
[454] Tavares, 2014 WL 1155798, at *9.
[455] *Id.*

that elders amongst their members had lost the right to access services reserved to elders, and others alleged that they were treated as "criminals or untouchables."[456] Similarly, a woman facing exclusion on the Lummi reservation after her son, who was listed on her lease, was convicted of drug-dealing, described the experience as "[s]piritually…tak[ing] your insides and turn[ing] them inside out."[457]

In sum, *Tavares* sets the best example for lower courts to follow. Lower courts should hold that exclusion does not effect a detention necessary for the exercise of federal jurisdiction, especially when the exclusion is temporary, directed against nonmembers, or implicates tribal decisions regarding membership. The harms not only of exclusion but also of impairing its use are grave and best resolved by tribal governments. For this reason, lower federal courts have looked to what remedies tribes may offer.

3. Availability of Tribal Remedies

Returning to *Poodry*, as discussed further below, the court recognized that the tribe allowed no other remedies, explaining that "there is no tribal review available in the circumstances of this case."[458] Absent federal habeas review, the excluded would have "no remedy whatsoever."[459] Thus, tribes should offer the excluded the option of review.

Sweet v. Hintzman,[460] the first exclusion case to proceed to federal trial, illustrates this necessity. Here, the Snoqualmie council had preliminarily excluded certain members who had established a shadow government to replace the established government.[461] After that, the council provided improper notice to the excluded.[462] It

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[456] *Id.* at *4.
[457] Sarah Kershaw & Monica Davey, *Plagued by Drugs, Tribes Revive Ancient Penalty*, N.Y. TIMES (Jan. 18, 2004), http://www.nytimes.com/2004/01/18/us/plagued-by-drugs-tribes-revive-ancient-penalty.html.
[458] Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 885 (2d Cir. 1996).
[459] *Id.*
[460] Sweet v. Hintzman, No. C08-844JLR, 2009 WL 1175647 at *10 (W.D. Wash. Apr. 30, 2009).
[461] Rob Roy Smith, *Enhancing Tribal Sovereignty by Protecting Indian Civil Rights: A Win-Win for Indian Tribes and Tribal Members*, 0 AMERICAN INDIAN L.J. 41, 43 (2012).
[462] *Id.* at 49.

changed the time and date of the exclusion hearing many times.[463] It notified the excluded only as to the city in which the proceeding would take place.[464] When the excluded learned more details by word of mouth and appeared to testify, they were denied entry to the venue by tribally contracted police officers.[465] The excluded waited several hours before they left frustrated at the denial of their right to testify.[466] The trial provided further opportunity to question whether ICRA was properly interpreted by federal or tribal law. The excluded members argued that federal constitutional law ought to control while the tribe pointed to tribal statute and traditions of exclusion from the remote and recent pasts.[467]

Counsel in *Sweet*, Rob Roy Smith, has speculated that these courts may have dismissed legal actions for lack of jurisdiction if they saw "due process or a functioning tribal court" permitting the excluded to seek an internal tribal review of the exclusions.[468] Similarly, the Eastern District of California concluded that exhaustion of remedies to exclusion is futile in the absence of a tribal court.[469]

However, courts considering whether such remedies satisfy due process should take a narrow purview, upholding the strict requirements of ICRA without coercing tribal governments to restructure. As discussed above, tribal courts have vigilantly upheld the proper procedures of exclusion, and the federal courts should

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[463] *Id.*
[464] *Id.*
[465] *Id.*
[466] *Id.*
[467] The tribe may have gone too far for the federal court's preference in suggesting the banished were lucky as traditionally those accused of treason would have been sent over the Snoqualmie Falls in a canoe. *Id.* at 48.
[468] *Id.* at 46. Smith issued a powerful call for an expansion of tribal civil rights. *See generally id.* He errs, however, in arguing that cases such as *Sweet* do represent an "infringement on tribal sovereignty." *Id.* at 53. In furtherance of this argument, he notes that the *Sweet* court's emphasis on the due process concerns with the procedure of banishment rather than the substantive right of banishment actually "bolster tribal sovereignty and respect for tribal institutions." *Id.* But de does not explain how the right to determine process is less intrinsic to tribal sovereignty than the rights underlying that process or how sovereignty is bolstered when tribal law requires federal court approval. This lack of explanation weakens his otherwise worthy suggestion. Tribes should take due process seriously because it is such an important part of their self-governing authority and their responsibility, not out of concern for the dictates of supervising federal courts. Smith properly encourages tribal members to address deficiencies in their own communities.
[469] Quair v. Sisco, 359 F. Supp. 2d 948, 972 (E.D. Cal. 2004).

defer to those procedures. But when tribal courts lack the power to review exclusion orders, the tribes risk swift and far reaching federal intervention that may infringe upon sovereignty.

Sweet provides an example of a federal court that insisted on a minimum of due process but remained deferential to tribal government in structuring how due process would operate.[470] As such, it provides guidance to tribes worried about federal intervention. The petitioners were challenging their exclusion by petitioning the tribal council.[471] The court also held that the notice provided was insufficient to satisfy due process. Under such facts, the court granted the first writ of habeas corpus since *Martinez* was decided. In doing so, it carefully limited its order:

> [It] refuse[d] Petitioners' invitation to determine whether the charges against them were or were not false…[and] decline[d] Petitioners' request to determine what rules and procedures regarding [exclusion] Respondents either had in place or should have had in place. The court also [would] not determine whether Respondents followed the rules and procedures they had in place or whether they should have followed certain other rules and procedures. Beyond determining whether or not Petitioners were provided with notice and an opportunity to be heard, the court [did] not believe it should delve into the inner workings of the [exclusion] process.[472]

Not only will the establishment of the measures lacking in *Sweet* dissuade federal court intervention, it will also provide meaningful civil rights to tribal members.[473]

Rob Roy Smith recommends two steps establishing a system of administrative and judicial review. First, tribes should provide an administrative mechanism of review to allow tribal executives and legislatures to reconsider exclusion decisions.[474] Second, tribes

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[470] Sweet v. Hintzman, No. C08-844JLR, 2009 WL 1175647 at *9 (W.D. Wash. Apr. 30, 2009).
[471] *Id.* at *10.
[472] *Id.* at *9.
[473] Smith, *supra* note 461, at 52.
[474] *Id.* at 54.

should ensure "the existence of a fully functioning independent tribal court system" to review those administrative decisions.[475] Of course, this two-step model is only instructive and those operating in accordance with the model should defer to the plurality of tribal legal traditions.[476] Even if this process is properly informed by tribal tradition, ICRA requires any resultant system of review to provide for procedural protections, such as notice and hearing.

Courts considering the issuance of habeas corpus writs should be careful to avoid providing substantive direction to tribes. Habeas corpus relief under section 1303 of ICRA is limited to correcting infringements of rights under § 1302, as interpreted under tribal law. The appropriate consequence of a petition for habeas corpus, therefore, should never be a direction to readmit the excluded or reenroll the disenrolled. Rather, courts should remand such matters so such infringments can be reevaluated in tribal court in accordance with tribal law.[477] At the time of ICRA's passage, Congress noted that ICRA "should not be considered as the final solution to the many serious constitutional problems confronting the American Indian."[478] While this statement shows only a partial view of the good work underway in Indian country, it reflects the contest between federal courts and tribes to solve those problems where they still arise. Tribes can take the lead by establishing processes for the review of exclusion decisions that better comply with ICRA.

Just as courts should be slow to direct substantive results on the issuance of habeas corpus, they should also be quick to accept tribal efforts to remedy procedural deficiencies on remand. In *Quair*, the District Court for the Eastern District of California held that it was unclear whether the tribe had adequately protected the due process rights of the excluded.[479] Following the district court's order, the tribe's general council notified the excluded petitioners that it would hold a rehearing to reconsider the exclusion.[480] It

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[475] *Id.*

[476] For example, the tribe may choose to subject banishment to the review of elders or other traditional leaders rather than law-trained judges. *See, e.g.*, Brandi N. Montreuil, *Elder's Panel Honored by Tulalip Tribal Court*, TULALIP NEWS, (Nov. 5, 2014) http://www.tulalipnews.com/wp/2014/11/05/elders-panel-honored-by-tulalip-tribal-court/ [https://perma.cc/VXN2-JJ7J].

[477] Quair, 359 F.Supp.2d at 962.

[478] Santa Clara Pueblo, 436 U.S. at 71 (quoting 113 CONG. REC. 13,473 (1967)).

[479] Quair v. Sisco, 359 F. Supp. 2d 948, 977–78 (E.D. Cal. 2004).

[480] Quair v. Sisco, No. 1:02-CV-5891DFL, 2007 WL 1490571, at *1 (E.D. Cal. May 21, 2007).

informed the petitioners that they would have the right to counsel at the hearing as well as the right to present and cross-examine witnesses.[481] The petitioners refused to attend, arguing that such a hearing would still violate ICRA as the tribe lacked a court with formal judicial procedures.[482] In the petitioners' absence, the general council again voted to exclude the petitioners.[483]

Reviewing the matter again, the Eastern District of California held the newly provided measures likely to be adequate.[484] The court also recognized that they differed from Anglo-American due process.[485] Namely, the tribe's general council, constituting its entire membership, had combined executive, legislative, and judicial functions.[486] Further, the tribe had no written standards to govern the procedure of exclusion.[487]

On these bases, the disenrolled petitioners contended that the tribe had violated ICRA per se, but the court refused to enter a per se analysis.[488] Rather it employed a test promulgated by the Ninth Circuit in *Randall v. Yakima Nation Tribal Court*.[489] Under the *Randall* test, a court considering a tribal procedural matrix that "differ[s] significantly from those 'commonly employed in Anglo-Saxon society'" must "weigh 'the individual right to fair treatment' against 'the magnitude of the tribal interest' [in employing these procedures] to determine whether the procedures pass muster under [ICRA]."[490] Such an approach best serves to "guarantee that tribal governments respect civil rights while minimizing federal

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[481] *Id.*
[482] *Id.*
[483] *Id.* at *2.
[484] *Id.* at *5.
[485] *Id.*
[486] *Id.*
[487] *Id.*
[488] *Id.* at *4.
[489] Randall v. Yakima Nation, 841 F.2d 897, 900 (9th Cir. 1988).
[490] *Quair*, 2007 WL 1490571 at *5 (quoting *Randall*, 841 F.2d at 900 (citations omitted)). However, the Ninth Circuit also recognized that when the "comity analysis concerns for respecting a sovereign's procedures and avoiding paternalism are reduced when tribal court laws and procedures governing trials and appeals track those of our federal courts." Bird v. Glacier Elec. Coop., Inc., 255 F.3d 1136, 1143 (9th Cir. 2001). When tribal law so tracks its federal counterpart, courts within the Ninth Circuit must apply federal standards. *Id.* Thus, while tribes must balance other comity concerns in drafting statutes that depart from their state and federal equivalents, they should do so aware that a federal court sitting in habeas review may interpret them through the colonizing lens of federal law.

interference with tribal culture and tradition."[491] Because the petitioners in *Quair* made no argument why their interests outweighed those of the tribe in maintaining its independent procedures, the court denied their petition for habeas relief.[492]

In sum, tribes should continue developing and protecting due process rights of the excluded. As seen throughout this article, tribes have done just that. Their lawmakers have crafted elaborate exclusion codes that establish certain due process rights and their courts have interpreted these to protect those facing exclusion. Tribes, cognizant of their unique challenges and strengths, their traditions and histories, are best equipped to define due process in this context. Accordingly, federal courts should narrowly construe ICRA to avoid impairing tribal efforts to do justice.

VI. CONCLUSION

The power to exclude is by no means a panacea to the challenges facing Indian country. An example, drawn again from Alaska, is illustrative. Derek Adams grew up in his Yup'ik home village of Nunam Iqua.[493] He suffered neglect from his mother and abuse from his father.[494] He took to beating and burning dogs because he was angry that he had "never got[ten] to experience what every other kid got to experience with their parents."[495] In 2012, he shot his father.[496] The elder Adams and his girlfriend had been drinking homebrew when the father, driven by jealous paranoia, threatened to kill his girlfriend and burn Derek in his house.[497] Derek, who was frightened, reacted in violence.[498]

In 2013, Derek was drunk too.[499] He went to a village hangout but could not get in. He smoked a cigarette and failed to put it out.[500] The building caught fire, burning three people, including

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[491] Alvarez v. Lopez, 835 F.3d 1024, 1029 (9th Cir. 2016) (quoting Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 467 (1996).
[492] *Quair*, 2007 WL 1490571, at *5.
[493] Demer, *supra* note 275.
[494] *Id.*
[495] *Id.*
[496] *Id.*
[497] *Id.*
[498] *Id.*
[499] *Id.*
[500] *Id.*

Derek's godfather and an eight-year-old boy to death.[501] Nunam Iqua banished him for life.[502] He moved to the neighboring village of Emmonak.[503] The elder city manager told him he was "not a bad person…[but] a good person [with]…a chance to make a change in [his] life."[504] He told him to "[t]ake it from here" before banishing him as well.[505] Derek ended up as a day laborer in Bethel, hungry, homeless, and alone.[506]

Easy answers do not exist in a case like Derek's. Exclusion is particularly powerful medicine because it undermines an equally powerful asset for tribal members: community belonging. Substance abuse denied Derek a fair childhood and led him down a path of recklessness, violence, and isolation. But that abuse and its consequences, along with the absence of law enforcement resources from within or without the village's tribal government, made exclusion necessary.

The cases discussed throughout this article show the severity of exclusion, but they also show its vital utility to tribes working to protect their communities. Tribes have carefully applied this power, both since time immemorial and in modern legislation tailored to their needs and the impact of applicable federal law. They have interpreted this legislation in their courts to protect the civil due process rights of the excluded. These examples provide not only inspiration to other tribal lawmakers, but a caution to non-tribal authorities that would try to intervene and subvert tribal sovereignty.

The courts have recognized the necessity of exclusion since the founding years of the American Republic. They have concordantly affirmed the same sovereign power in tribal governments, possessed since time immemorial, as an incident of the sovereign police authority. Additionally, the United States entered treaties affirming that power.

But policies of allotment changed all that. Since Congress embarked on that policy and began dicing the tribal land base, the courts have become less consistent. Thus, cases like *Merrion* and *Brendale* recognize the basic connection of the exclusion authority

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[501] *Id.*
[502] *Id.*
[503] *Id.*
[504] *Id.*
[505] *Id.*
[506] *Id.*

to tribal sovereignty, but others like *Montana* and *Strate* reduce it to a stick in the private landowner's bundle of rights.

For their part, the political branches have tried to mitigate the judicial assault on the exclusion power. The United States Attorneys for two districts have brought the might of the federal government to support tribal exclusion orders, and Congress has reaffirmed tribal jurisdiction over domestic violence and may do the same over drug crimes and violence towards children. The Department of Justice should issue guidance requiring that Assistant United States Attorneys charge exclusion order violations as trespasses under state law or else draft and submit memoranda justifying their declination.

Yet change must come in the judiciary. The schizophrenic nature of existing precedent provides the courts with the tools to recognize a broader tribal power of exclusion. They can return to a recognition of this right as an incident of sovereign police authority. Or they can strongly affirm its support in the *Montana* exceptions. Additionally, courts should be slow to apply federal accommodations statutes that would impair sovereign tribal exclusion authority. And when petitioned to issue writs of habeas corpus, those courts should defer to tribal procedural mechanisms and avoid imposing substantive requirements on tribal governance. Such statutes and the possibility of habeas corpus relief may advance important policy goals, but those goals are best pursued through tribal governance, reflecting the will of tribal communities and the strength of tribal sovereignty.