

# ON POWER & INDIAN COUNTRY

MAGGIE BLACKHAWK†

*When we are young, the words are scattered all around us. As they are assembled by experience, so also are we, sentence by sentence, until the story takes shape.*

— Louise Erdrich (Turtle Mountain Ojibwe)<sup>1</sup>

## I. DAYS OF 2007<sup>2</sup>

At the time I was admitted to Stanford Law School, I hadn't met more than a handful of lawyers. The handful that I had met, I had known only for a few months, and they were the very women who had convinced me to apply to law school in the first place. As a Native woman, daughter of a mother who attended community college and who earned her degree after I left home, I had quite a bit of learning to do.

One of the first things that I did was to tell George. George Redman, born and raised on the Wind River Reservation in Wyoming and citizen of the Northern Arapaho Nation, had worked with lawyers as a paralegal. George knew where I could find some advice. That day, we drove the slow road from Fort Washakie to Lander, where the attorneys had their office. The drive was only about fifteen miles, but it was “off reservation”—that is, outside of the borders of the Wind River Reservation. Driving off reservation always made distances seem a bit farther. The towns were worlds apart, separated by sovereignty, culture, language, and history.

We parked the pickup, dusty with reservation soil, in front of the law firm office building. The nondescript, tan one-story was hidden behind trees and housed the firm that had served then as the attorneys for the government of the Northern Arapaho Nation. But Wyoming is such flat country that every building looms large. George and I walked into the immaculate western law office, carrying reservation dust along with us.

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† (Fond du Lac Band of Lake Superior Ojibwe) Assistant Professor, University of Pennsylvania Law School.

1. LOUISE ERDRICH, *THE PLAGUE OF DOVES* 268 (2008).

2. These headings are a far too simple homage to the great Bill Rubenstein, who drafted an essay to which we should all aspire. See generally William B. Rubenstein, Essay, *My Harvard Law School*, 39 HARV. C.R.-C.L. L. REV. 317 (2004).

He asked to speak with Berthenia Crocker, a named partner. “No, we didn’t have an appointment and, no, she likely wasn’t expecting us.” But Berthenia had worked in Indian Country long enough to understand Native manners. George had worked for the law firm years before, they had an established relationship, and he drove fifteen miles to ask for her advice. He brought with him his family member, me, who had just been admitted to Stanford Law School. If manners weren’t enough, we were certainly odd enough to pique the interest. Berthenia took the meeting.

Nervousness has a way of locking in the details of memories. I remember the shine of Berthenia’s desk when George and I first sat down. I had never been in a lawyer’s office before, and I wasn’t sure I had ever seen a space so clean and neatly organized. George spoke first and introduced us both. Berthenia thanked him for coming by and, with a curious look, turned to me. “Congratulations,” she said. “That is a great achievement. Do you know what kind of law you are interested in?”

I looked up from the shine of her desk for the first time to see bobbed blonde hair and a smile spread across a friendly face. “Federal Indian law,” I said. I placed an awkward emphasis on “federal” because I had only recently learned that Indian law made by the United States was called *federal*, as opposed to *tribal* law or the law made by tribal governments. “Oh,” Berthenia replied as only a specialist could, “that’s a big field. Are you interested in any particular areas? Environmental law? Tax?”

Without hesitation, I replied: “jurisdiction.”

Jurisdiction is a technical term, belonging to the specialized parlance of lawyers. In essence, jurisdiction means power—the ability to make and apply the laws that govern daily life. First-year law students often hear the word for the first time in their courses on civil procedure. But it isn’t until their second or third year in law school that the meaning of jurisdiction finally takes shape. However, even then the word remains technical—stripped bare of any moral content.

Outside of Indian Country, justice rarely involves jurisdiction. Justice is more often concerned with the language of rights. To the extent that justice concerns itself with jurisdiction at all, it is to seek ways to expand the jurisdiction of the federal courts to better protect rights. The simple story is that rights are the protectors of justice, and federal courts are the protectors of rights.

In Indian Country, this simple story doesn’t hold. Federal power was at the heart of American colonialism, and federal rights have long been used to further the colonial project. Instead, *jurisdiction* is synonymous with justice. Jurisdiction is at the heart of sovereignty, and sovereignty is to Indian

Country what air is to fire. Rather than the language of rights, it is the language of sovereignty that empowers Native people. The language of sovereignty offers us the power to build and shape a world of our own choosing, to constitute a government of our own design, and to make laws and define rights that fit Native values. To speak the language of sovereignty, power, and jurisdiction is to aspire for more than the ability to beg for protection by another's government. Sovereignty offers the ability to govern.

"Jurisdiction?" Berthenia replied, still smiling. "Well, that's the perfect thing to study at law school."

Before meeting Berthenia, Chai Feldblum and her team were the first lawyers I had ever met in my life. At the time, I worked as a social science researcher at the University of California, Los Angeles. I held a joint position as manager of research on the Ethnography of Autism Project and as a senior policy producer at the Center on the Everyday Lives of Families (CELF). My position at CELF was created so I could work with Chai and her team to translate our research on working families into more family-friendly workplace policy.

The most remarkable thing about Chai and her team wasn't that they were all women; it was that they weren't stereotypical lawyers. They were "lobbyists" or, in Chai's terminology, "legislative lawyers."<sup>3</sup> Rather than bringing claims in courts, legislative lawyers took their arguments to Congress, and although their arguments were at times framed in the language of rights, they weren't always so limited. Chai had risen to legislative-lawyering fame when she helped draft and pass the Americans with Disabilities Act as a lobbyist for the ACLU. As most first-year law students learn, the Supreme Court had rejected special rights protection for individuals with disabilities.<sup>4</sup> By turning to the legislature and looking beyond the language of rights as defined narrowly by the Court, Chai was able to better protect a community that, because of its small numbers, might never wield majority political power. Chai's work showed again and again that the simple story of rights and courts was *too* simple, and not just in Indian Country.

At CELF, it was my job to support Chai and her team as they advocated for better law. Over the course of a year, they taught me everything they knew about the lawmaking process. They also eventually convinced me to apply to law school.

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3. See generally Chai Rachel Feldblum, *The Art of Legislative Lawyering and the Six Circles of Advocacy*, 34 MCGEORGE L. REV. 785, 785-87 (2003).

4. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 435 (1985) (rejecting a higher standard of scrutiny for discrimination against people with intellectual disabilities).

After meeting Chai and Berthenia, I imagined that Stanford Law School would offer courses on lawmaking, jurisdiction, power, and justice. I imagined that I would study Congress and parliamentary procedure and join student groups focused on legislative lawyering. I imagined that I would learn about justice through a lens of power and an exploration of governance. Through Chai and Berthenia, I had seen firsthand the power of wielding jurisdiction and of taking one's case to the lawmaking process for redress. But the simple story still dominated at Stanford Law School. Lessons of justice were taught entirely in the language of rights. Any concern with jurisdiction or procedure often focused on the federal courts as protectors of justice through rights.

Another glaring absence at the law school was any mention of "Indian Country." Scholars of Native Studies write in great depth about the process of erasure of Native Nations and Native people as being central to American colonialism. Paintings of empty Western landscapes and stories of the disappearing Indian formed the heart of Manifest Destiny. But it is still hard to articulate the experience of erasure as a Native person. It was even more challenging to experience erasure as a Native person within an institution that aimed to educate future leaders about the law.

The United States is the only government in the world to recognize inherent tribal sovereignty and support Native Nations' ability to self-govern. Federal Indian law supports American exceptionalism in this regard. Unlike Canada, New Zealand, and other countries, the United States provides more legibility and visibility to Native Nations and Native peoples within its domestic law than any other body of law in the world.<sup>5</sup> Title 25 of the United States Code is titled "Indians" and it, among other laws, governs the relationship between the United States and the over 570 federally recognized Native Nations within its territorial borders.<sup>6</sup> Other statutes govern the United States's relationship with Native Nations in Alaska and Hawaii.<sup>7</sup>

Even beyond the specialized laws that regulate the United States's relationship with Indian Country directly, interactions between the United States, Native Nations, and Native peoples have shaped law across a broad

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5. See, e.g., CHRISTIAN W. MCMILLEN, MAKING INDIAN LAW: THE HUALAPAI LAND CASE AND THE BIRTH OF ETHNOHISTORY 91–98, 177–82 (2007) (documenting the adoption of the Marshall Trilogy internationally, but in limited form as property rights only and without recognition of inherent tribal sovereignty).

6. 25 U.S.C. §§ 1-5636 (2018).

7. 43 U.S.C. §§ 1601–1642 (2017); Hawaiian Homes Commission Act of 1920, ch. 42, 42 Stat. 108 (1921) (later adopted by HAW. CONST. art. XII).

range of subject-matter areas.<sup>8</sup> The majority of treaties negotiated and ratified by the United States in its first hundred years were with Native Nations.<sup>9</sup> Areas of law like the war powers, foreign relations, the territories, and even immigration developed in the context of Indian affairs and owe many of their characteristics—for better or for worse—to that history.<sup>10</sup>

So to experience the near invisibility of Native Nations and Native peoples at Stanford Law School when American law is virtually teeming with the legibility of Native people came as an unwelcome surprise. The first mention of Natives came in my first-year History of American Law course when an offhand comment during a lecture stated that Native Nations and Native peoples no longer existed in any real form in the United States. I was sitting in the front row of the class, as anxious and prepared as ever. The story of the disappearing Indian was so deeply taken for granted that no one questioned the comment, even as I sat next to my classmates. I was erased by the first mention I heard of Native people while in law school and in a class on the history of American law.

One way that Native people combat the active erasure of Indian Country is to self-identify. In doing so, we put our bodies and our reputations between the force of erasure and the furtherance of the American colonial project. To face a Native person is not only to face the reemergence of an erased history—it is to struggle with the difficult moral reality of being both a constitutional democracy and a colonial power that has ruled through conquest. To face a Native person is also to struggle with one's ongoing participation in the erasure of American colonialism—it is to struggle with the "Indian" Halloween costumes, headdresses and playacting during Thanksgiving, "land grab" games in elementary school, racialized mascots, and the list goes on. For academics, facing the reality of Native history, Indian Country, and the ongoing existence of Native people is to face the possibility that previous projects have been incomplete or even incorrect because of that erasure.

Simply put, recognizing Native people is difficult for non-Natives. Because it is difficult, the typical response to self-identification is often rejection. Rejection most often takes the form of disbelief or a series of requests for evidence of "authentic" Native status. Questions like, "How much Native American are you?" or "How did you find out that you were Native American?" often follow. Even worse than the requests for evidence

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8. Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1806–45 (2019).

9. *Id.* at 1809–15.

10. *Id.* at 1806–45.

are the conclusions without evidence, “funny, you don’t look that Native American.” Unlike other forms of racialization, the modern racialization of Native people doesn’t often provoke violence or disgust—it doesn’t inspire feelings of inferiority or judgment. Instead, it forces Native people to work endlessly to prove their very existence to non-Native evaluators—evaluators with little or no understanding of Indian Country and with quite a bit invested in its erasure.

These types of interactions can prove to be an incredible distraction and can often deflect real reform. Rather than discussing and debating the law of American colonialism and its impact on the laws of the United States, I was often stuck addressing fundamentals—like the very existence of Native Nations and Native people today. As the late, great Toni Morrison teaches, this distraction is often by design:

[T]he function, the very serious function of racism . . . is distraction. It keeps you from doing your work. It keeps you explaining over and over again, your reason for being. Somebody says you have no language and so you spend 20 years proving that you do. Somebody says your head isn’t shaped properly so you have scientists working on the fact that it is. Somebody says that you have no art so you dredge that up. Somebody says that you have no kingdoms and so you dredge that up. None of that is necessary. There will always be one more thing.<sup>11</sup>

There came a point in my law school tenure when the exhaustion drove me toward different solutions. I had come to Stanford Law School to defend Indian Country, tribal sovereignty, and the jurisdiction or power of Native governments. My law school education had been thorough and rigorous. I had trained in constitutional litigation with the very best, Pam Karlan, and had studied the legislative process with Jane Schacter, who combined theoretical inquiry with hands-on exercises in legislative drafting and interpretation. Both women understood fundamentally the power of the law as a tool for justice and had cut their teeth fighting alongside movements for voting rights, LGBTQIA+ rights, and gender equality. I could not have asked for better teachers.

But the language of equality and rights dominated my training, and the erasure of Indian Country left it to me to explore how I might translate the language of equality and rights into the language of power, sovereignty, and jurisdiction. I had come to law school with the general understanding that rights posed a threat to tribal sovereignty. “Rights” were often invoked as a

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11. Toni Morrison, Black Studies Center Public Dialogue Pt. 2: A Humanist View 7 (May 30, 1975) (emphasis omitted) (transcript available at <https://perma.cc/47KA-DRYN>).

means to undermine the sovereignty of Native Nations—especially the rights of non-Natives. The federal rights of non-Natives trumped inherent tribal sovereignty. Contrary to the simple story, federal rights undermined justice in Indian Country.

I soon learned that “equality” posed as much of a threat to tribal sovereignty as did rights. Equality had structured the doctrine of race jurisprudence, and by “reasoning from race,” the women’s rights movement had shaped an equality doctrine of its own.<sup>12</sup> I had been drawn to law school and trained in the law by women deeply entrenched in the struggle for gender equality. These women had inspired me by seizing and wielding power—often together with other women. But the tools of liberation that they offered—those born of the civil rights movement—were in direct conflict with the lessons of Indian Country.

Most law students are familiar with the backlash against the civil rights movement that took aim at race-based remedial legislation. Allan Bakke still takes center stage in introductory courses on constitutional law, which study in depth the 1978 case where Bakke fractured the Supreme Court with his challenge to the University of California, Davis’s admission policies.<sup>13</sup> Fewer are familiar with the far less fractured opinion that the Court issued just three months earlier, foreshadowing *Bakke*.

In March of 1978, the Court decided *Oliphant v. Suquamish Indian Tribe*.<sup>14</sup> The issues in the 6-2 opinion must have seemed far more mundane at the time—not even controversial enough to inspire separate opinions. Perhaps the only notable sign of controversy would have been the unlikely pairing of Justice Thurgood Marshall and Chief Justice Warren Burger in dissent.<sup>15</sup> But the dissent hadn’t generated enough passion even in Justice Marshall to exceed three sentences—one of them cribbed from the lower court.<sup>16</sup> The balance of the Court joined an opinion written by Justice Rehnquist that was so loosely reasoned that it should have generated outrage on that basis alone.

Mark David Oliphant and Daniel B. Belgarde arrived at the Supreme Court to challenge their convictions under the 1973 Suquamish Nation Law and Order Code as violating their Fifth Amendment right to due process.

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12. SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 1–8 (2011); see also Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 953–56 (2002).

13. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

14. 435 U.S. 191 (1978).

15. *Id.* at 212 (Marshall, J., dissenting).

16. *Id.* (quoting *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976)).

Oliphant and Belgarde had been indicted and convicted for the exotic crimes of assaulting a Suquamish police officer, resisting arrest, and for engaging in a high-speed car chase that ended with Belgarde's vehicle colliding with a police car. But the most dispositive fact of the case was that Oliphant and Belgarde were white.

The Suquamish Nation, like many Native Nations, has a constitutional government with tribal courts and a criminal code. Living within the reservation, Oliphant and Belgarde had chosen to reside within the Nation's borders. They had each recognized the Nation's government long enough to take accurate aim at Suquamish police officers and patrol cars. But the Supreme Court ruled in favor of Oliphant and Belgarde and held that the Suquamish Nation had no criminal jurisdiction over non-Indians—even non-Indians who had committed crimes within Indian Country.

For Oliphant and Belgarde, the language of rights opened the doors of the Supreme Court. The men structured their merits brief around the tensions between historical injustice and a modern liberalism born of the 1970s and steeped in Rawls, rights, and equality:<sup>17</sup>

It is asserted that a sense of *mea culpa* permeates public policy and some judicial decisions by . . . remembering only the past subjugation of Indian tribes . . . , without consideration of the benefits, rights, privileges and immunities received by all people within the United States under the Constitution . . . . It is now argued that as to some non-Indians those rights, privileges and immunities while on an Indian reservation within the United States are being sacrificed by the application to them of the concept of independent Indian tribal sovereignty . . . .<sup>18</sup>

In both *Bakke* and *Oliphant*, the Court resolved the tensions between present day claims to equality and historical injustice by leaning into equality. But in *Oliphant*, the Court was able to foster an uncontroversial

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17. John Rawls first published his *Theory of Justice* in 1971, and it quickly took hold within the legal academy and beyond. JOHN RAWLS, A THEORY OF JUSTICE 102 (1971) (“The natural distribution is neither just nor unjust; nor is it unjust that persons are born into society at some particular position. These are simply natural facts.”); see also KATRINA FORRESTER, IN THE SHADOW OF JUSTICE: POSTWAR LIBERALISM AND THE REMAKING OF POLITICAL PHILOSOPHY (2019); Katrina Forrester, *The Future of Political Philosophy*, BOS. REV. (Sept. 17, 2019), <https://perma.cc/TAT4-UD9K> (describing the influence of Rawls as: “[L]iberal egalitarians tended to insist that what mattered were institutional solutions to current inequalities; past injustices weren’t relevant, and arguments that relied on historical claims were rejected. That meant that demands for reparations for slavery and other historical injustices made by Black Power and anti-colonial campaigns in the late 1960s and 1970s were rejected too. It also meant that political philosophers in the Rawlsian strain often read later objections to the universalist presumptions of American liberalism as identitarian challenges to equality, rather than as critiques informed by the history of imperialism and decolonization.”).

18. Brief for Petitioners at 26–27, *Oliphant*, 435 U.S. 191 (No. 76-5729), 1977 WL 189288.



consensus opinion by invoking and manipulating the doctrines of American colonialism. It created what I call the “dormant plenary power doctrine” by applying the worst of a Taney Court opinion.<sup>19</sup> Yet, the modern Supreme Court put even Taney to shame by rejecting his deference to the political branches.<sup>20</sup> The Court in *Oliphant* even drew on a late nineteenth-century Supreme Court opinion, crafted in the early spirit of American eugenics and scientific racism, that presumed that people of one race could never govern people of another race fairly.<sup>21</sup> Yet, the language of colonialism garnered far less outrage and controversy than the language of rights in *Bakke*. Erasure is quite effective.

Equality boiled down to “equality of opportunity” or being welcomed into the halls of power and public resources on the same terms as all others. To the extent that equality offered more than simple formality, it aspired to “integration.” Indian Country had seen a form of integration before. The Dawes Act, passed in 1887, began the era of allotment, or efforts to break up and sell off the last of Native land to non-Natives.<sup>22</sup> One justification for selling off Native land for pennies on the dollar was that the “savages” might be better “civilized” by integrating non-Native settlers with Native people.<sup>23</sup> But allotment failed to civilize. Its only real achievement was the dismantling of institutions in which Native people wielded power—majority-minority institutions like Native governments. Allotment was ultimately deemed an abject failure and was formally repudiated by the United States forty years later.<sup>24</sup>

But the blunt tool of integration lived on—still unable to distinguish between segregated institutions and majority-minority institutions where minorities wield power. It lives on today through the promise of “diversity.” Diversity aspires to unmake segregation by reshaping public institutions into

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19. Blackhawk, *supra* note 8, at 1835–38.

20. *Id.*

21. *Oliphant*, 435 U.S. at 210–12 (majority opinion) (describing an argument that to subject non-Native people to Native courts would “tr[y] them, not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race” (second alteration in original) (quoting *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883))).

22. See Dawes Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331–342 (2018)).

23. See, e.g., Ross R. Cotroneo & Jack Dozier, *A Time of Disintegration: The Coeur d’Alene and the Dawes Act*, 5 W. HIST. Q. 405, 405 (1974) (“Under another provision of the [Dawes Act], those lands remaining after distribution of allotments to the Indians were to be sold to white settlers. . . . [I]t was hoped that the resultant close intermingling of the two cultures would result in the Indians’ more rapid acceptance of the white man’s ways.”).

24. See Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 5101–5129).

a mirror image of the public. But the deep irony is that, in a system driven by majority power, statistical mirroring of numerical minorities results in the entrenchment of minority status. Twenty percent will never wield power in a system that worships fifty-one percent. For Native people—who often constitute the statistical asterisk in every study—diversity threatens every institution where Native people govern.

Equality also threatened the very foundations of federal Indian law. Title 25 of the United States Code—captioned “Indians”—provides laws, power, and resources for Native Nations and Native peoples only. Others are not welcomed into the halls of “Indian” power and resources on equal footing. In fact, the same backlash against civil rights seen in *Bakke* came first to federal Indian law through a 1974 challenge to a government hiring preference for Native people.<sup>25</sup> The Supreme Court avoided an equality challenge by holding that being “Indian” was a political category and not a racial category.<sup>26</sup> To hold otherwise, the Court recognized, would mean that “an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.”<sup>27</sup> Equality had the potential to effectively erase all of federal Indian law and its recognition of inherent tribal sovereignty.

In my final year at Stanford Law School, I saw the first glimmer of a different path forward. Janet Cooper Alexander introduced me to “power,” and I learned the dynamics of how power worked over time and between sovereigns in her class on the federal courts. She was also patient enough to nod supportively after class while I pestered her with analogies between federal Indian law and all facets of public law—she took particular interest in the parallels between the Indian wars and the war on terror, her subject of specialty at the time. Rather than equality, federal Indian law had long been crafted in the language of power, and it was through our discussions of power that I finally found my way toward a solution.

Between her supportive nods, Janet convinced me that I could bring the lessons of Indian Country to the academy by publishing academic articles. Erasure had left federal Indian law in a constant state of precarity. Fighting that erasure in the academy might ultimately change the law. Janet mentored me through my first article and helped me find my way into the legal academy.

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25. *Morton v. Mancari*, 417 U.S. 535 (1974).

26. *Id.* at 553 n.24.

27. *Id.* at 552 (“If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.”).

## II. DAYS OF 2017

It wasn't until I looked for an academic job that I learned how difficult it would be to bring Indian Country into the legal academy. My first lesson was to learn how controversial it was to believe that law matters. Hiring committees quickly branded me a "formalist." They framed my project, in the most generous light, as interested in the law as written and the stability of law over time. In the least flattering light, some questioned whether I was aware of my own normative presuppositions, and some even considered my project anti-intellectual.

Legal realism and the critical legal studies movement reign supreme in the legal academy, and they remain convinced that the law is politics all the way down. Some even believe that the law itself is the source of subordination. Based on the simple story, they are right. The law had sanctioned slavery and Jim Crow segregation. Breaking the law, through protest or through the violence of war, brought about justice. But the simple story never holds in Indian Country. It was the breaking of law that furthered American colonialism, and it was through enforcing adherence to the law as written—in treaties and statutes—that Native Nations found justice. However imperfect, the recognition of inherent tribal sovereignty and the framework of United States law that fostered self-governance within Indian Country were born from the rigorous belief that law matters.

The critical legal studies movement has been taken to task over rights and its claim that rights are slippery terms, devoid of meaning.<sup>28</sup> Black scholars, closer to the movement, declared in passionate terms the meaning of rights to their communities.<sup>29</sup> But the critical legal studies movement hasn't yet been taken to task over the meaning of power to Native communities and the central role of law in mitigating American colonialism. Natives have long leveraged formal legal channels to protect the recognition of inherent tribal sovereignty. Non-Natives, hungry for Native land, were the source of subordination, not the legal system.

But my belief in the law was as puzzling to hiring committees as my discomfort with equality and rights. Interest in my work was often coupled

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28. See, e.g., Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 714–16, 715 n.8, 716 n.13 (2011) (reviewing the literature and describing the 1980s as the genesis of the "rights critique" by Critical Legal Studies scholars, whom others sometimes called "rights critics").

29. See, e.g., Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1364–66 (1988); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 403–05 (1987).

with confusion with where I might fit in the pantheon of the legal academy or whether I might ever achieve recognition at all. My project highlighted the voices of minorities and took particular interest in excavating levers of power for the marginalized and vulnerable. But I often confessed doubt at the ability of rights and courts to foster that power. I focused instead on legislatures, the law, and distributed sovereignty through local control. Indian Country taught me that John Hart Ely had gotten it wrong with respect to courts and Native peoples.<sup>30</sup> I witnessed firsthand that it was Congress and not the courts that had protected Indian Country—most recently in 2013, with the tiniest step toward a legislative fix for *Oliphant* in the Violence Against Women Reauthorization Act.<sup>31</sup> Judicial activism often meant furthering the colonial project—at times imposing seemingly liberal values while ignoring the law.<sup>32</sup> Rather than rights, it was power or local control that mitigated colonialism.

Luckily, despite the confusion I carried into every interview like reservation dust, I still found my first academic home at the University of Pennsylvania Law School.

### III. DAYS OF 2027?

It is far too soon to say whether or not I have been able to bring the lessons of Indian Country into the legal academy. At the time I sit and write this Essay, I have only just begun my third year of teaching at Penn Law. In the past two years, I have developed classes, mentored students, and started new research projects. However, more than changing the academy, the academy has changed me.

I came to the academy quite convinced that constitutional law offered little to my project. Federal Indian law has long rejected the frame of

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30. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 135–79 (1980) (crafting a careful analysis of how to best “facilitat[e] the representation of minorities,” but viewing “minorities” entirely through the black–white binary paradigm).

31. See Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54, 120–23 (codified as amended at 25 U.S.C. § 1304 (2018)) (recognizing inherent tribal court jurisdiction over non-Indian criminal defendants who commit a crime of domestic or dating violence against a partner who is a tribal member, reversing *Oliphant*’s complete stripping of recognition of tribal court jurisdiction over non-Indian criminal defendants).

32. See, e.g., *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2055–56 (2014) (Ginsburg, J., dissenting) (joining with Justice Thomas’s dissent from the Court’s upholding of tribal sovereign immunity and writing separately to further clarify that her dissent is rooted in concerns over the overreach of sovereign immunity more generally); *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 202–03 (2005) (Ginsburg, J.) (crafting out of equitable doctrines a limitation on a Native Nation’s ability to assert jurisdiction over land, because municipal, county, and state governments had relied on the Nation’s absence for tax and governance purposes).

constitutional law,<sup>33</sup> just like it has long rejected the tool of rights. Over time, I came to see the heart of this rejection more clearly: After *Marbury*, the Supreme Court is the final arbiter of constitutional meaning. The Supreme Court has grown increasingly hostile in recent decades to the recognition of inherent tribal sovereignty. Calling something “constitutional law” places the Court as the forum of last resort. Calling something “not constitutional law” moves the locus of control into the political branches—the Congress or the executive. Federal Indian law implicates the Constitution by its very nature in that it implicates the power and reach of the national government. In the past two years, two events brought me to see this rejection as more strategic than accurate.

The first occurred a few weeks after I started at Penn Law: Constitutional law brought me home. In the fall of 2017, the national government for the Fond du Lac Band of Lake Superior Ojibwe, the Minnesota Chippewa Tribe, called for a formal convention to rethink our antiquated constitution. The history is a bit vague as to whether this was the first formal call for a constitutional convention, but it certainly was the first formal call in living memory. The structure of the Minnesota Chippewa Tribe is a bit of a rare gem in Indian Country. Unlike other more centralized Native Nations recognized by the United States, the Minnesota Chippewa Tribe has a federal system. One constitution governs the national government, but that national government oversees six distinct bands that govern separately six geographically disparate reservations. The six bands of the Minnesota Chippewa Tribe have governed so independently for the last eighty years that few still recognize them as a federal system.

But although the structure of the Minnesota Chippewa Tribe is a gem, its constitution is not. It was initially drafted and ratified in 1936—just two years after the passage of the Indian Reorganization Act (IRA). The IRA created a formal infrastructure for the recognition of Native Nations and established parameters by which Native Nations could engineer constitutional governments that the United States would recognize. Hundreds of Native Nations adopted written constitutions in the years following 1934, making it one of the most generative constitutional moments in American history. But many of these constitutions were modified versions of a “model” constitution circulated by the Bureau of Indian Affairs.<sup>34</sup> These

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33. See Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 440 (2005); Angela R. Riley, Essay, *Native Nations and the Constitution: An Inquiry into “Extra-Constitutionality,”* 130 HARV. L. REV. F. 173, 199 (2017).

34. See FELIX S. COHEN, ON THE DRAFTING OF TRIBAL CONSTITUTIONS xxiii-xxix, 173-77 (David E. Wilkins ed., 2006).

model or “IRA constitutions” lacked separation of powers and instead constituted a “council” that would undertake all government functions—executive, legislative, and judicial—without checks and balances. The Minnesota Chippewa Tribe had a quintessential IRA constitution.

The federal government had also coerced the Nation in the 1960s to amend its constitution and to limit its membership to individuals of a certain “blood quantum.”<sup>35</sup> Blood quantum identified Native individuals at a point in history and classified them as a hundred percent Native. Descendants of that individual, if they were not parented by two one hundred percent individuals, would each be a fraction of that earlier individual—fifty percent for a first-generation descendant, twenty-five percent for a second-generation descendant, and on and on until there were no more Native people. Blood quantum is a nineteenth-century racial construct that the national government adopted within federal Indian law and policy in order to limit its obligations to Native Nations. If there were no Native people, there were no obligations. The 1936 constitution established citizenship criteria that resembled the birthright citizenship of the United States: Children of Minnesota Chippewa Tribe members were members. But the federal government threatened in the 1960s to unilaterally withdraw its treaty obligations if the Nation did not amend its membership criteria to include a blood-quantum requirement.

The Minnesota Chippewa Tribe called a constitutional convention in late summer of 2017 to open a conversation about how the constitution might be amended or rewritten. My mother and I attended our first constitutional convention meeting that fall, and I continued to attend the meetings as they were held on each band’s reservation. The convention meetings were deeply emotional and deeply inspiring. Many members and descendants expressed frustration with the tribal government structure—lack of separation of powers, lack of clarity of the powers of each band, and the “blood quantum” membership criteria topped the list of common criticisms.

A few months later, I was appointed by the council of the Fond du Lac Band to serve as a senior constitutional advisor to the president. The position pressed me to answer a range of legal questions: I researched constitutional-convention procedure and best practices developed by other Native Nations. I struggled with whether the Nation should or could remove the provision, standard to many IRA constitutions, that required the Secretary of the Interior to approve all amendments before they would take effect. I waded deep into the murky legal waters created by drafting a constitution under the

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35. See generally JILL DOERFLER, *THOSE WHO BELONG: IDENTITY, FAMILY, BLOOD, AND CITIZENSHIP AMONG THE WHITE EARTH ANISHINAABEG* 1–8 (2015).

shadow of colonialism. More than answers, my research began to raise for me questions about the United States Constitution and how the national government wielded such power over Indian Country.

The second event occurred in my second semester at Penn Law: Constitutional law came home to me. I came to the academy staunchly committed to studying the field of legislation. Indian Country had taught me to be wary of the Constitution, and my training at Stanford Law had further solidified the sense that constitutional litigation offered few useable tools to empower marginalized people. But my colleagues at Penn Law read my scholarship on petitioning and the First Amendment's Petition Clause<sup>36</sup> and decided that I would teach introductory constitutional law as part of my teaching package.

I began my preparation for the class by surveying the field for casebooks in constitutional law. The Sullivan and Feldman casebook offered finely edited cases and spartan commentary that fostered focused attention on the important details of the doctrine. The Brest and Levinson casebook offered deep context and history. But across the range of casebooks, the complete erasure of Native Nations, Native peoples, and American colonialism was striking.<sup>37</sup> I had entered the academy, in part, to combat the erasure that I had encountered in law school and beyond. Now, in my first year on the faculty, I was going to become complicit in that erasure simply because I lacked the materials to do otherwise.

In that moment, I began crafting the article that became *Federal Indian Law as Paradigm Within Public Law*, an article I published in May 2019 in the *Harvard Law Review*.<sup>38</sup> In it, I make the case that constitutional law scholars and historians have been getting it wrong because they have failed to center Native Nations and American colonialism in their understanding of the Constitution. The article isn't a casebook, and it doesn't identify every connection between federal Indian law and American public law. But it offers a tool to begin to combat the erasure of Native Nations and Native peoples within the legal academy and within the practice of law. It also serves as a strong call for others to join me in this effort.

Combatting the erasure of Native Nations, Native peoples, and American colonialism will likely ensure that never again will a Native law

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36. See generally Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131 (2016); Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538 (2018).

37. Blackhawk, *supra* note 8, at 1793–94, 1794 n.15 (surveying constitutional law casebooks for mention of Native Nations, Native people, or federal Indian law).

38. *Id.*

student sit in the front row of a classroom and have their identity erased by the only exposure they may have in law school to Indian Country. But combatting this erasure could have broader implications also, and those broader implications cannot come too soon.

In Indian Country, we are often reminded how much erasure shapes the law. A case currently pending before the Supreme Court highlights the stakes: *Sharp v. Murphy* (previously known as *Royal v. Murphy* and *Carpenter v. Murphy*).<sup>39</sup> In *Murphy*, the Court is asked whether certain parts of Oklahoma are within the borders of the Muscogee Creek Nation reservation.<sup>40</sup> The law governing *Murphy* is well settled. In a unanimous 2016 opinion drafted by Justice Thomas, the Court held that Congress must clearly and explicitly intend to diminish reservation borders.<sup>41</sup> In *Murphy*, there is no such clear and explicit textual evidence. In fact, there is so little evidence supporting petitioner’s arguments that the petitioner chose to open its brief not with extensive documentation of congressional intent, but with a photo of Tulsa—a city that would be within the reservation if the Court upholds the Tenth Circuit’s decision and resolves the case in favor of Murphy.<sup>42</sup>

During oral argument last term, the conservative Justices abandoned their usual commitments: Justice Kavanaugh, for example, abandoned his “textualism” to ask why “historical practice” shouldn’t inform the text of congressional statutes.<sup>43</sup> Mr. Murphy’s attorney tried to remind Justice Kavanaugh of the law—that the text must be clear and explicit. But Justice Kavanaugh continued unabated, stating that this case was “massively” different because of the “number of people affected.”<sup>44</sup> Chief Justice Roberts deviated from calling “balls and strikes” thrown by Congress to ponder how a businessperson in Tulsa might feel if the Court held that Tulsa was inside a reservation.<sup>45</sup> Rather than focusing on the law, the conservatives on the Court seemed poised to decide the case on the imagined feelings of non-Natives living in Tulsa—residents that the Court assumed, without polling, would be shocked to learn that they lived within the borders of an Indian reservation. In this way, erasure often becomes law.

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39. No. 17-1107 (U.S. filed Feb. 6, 2018).

40. See, e.g., Brief for Petitioner at 2, *Murphy*, No. 17-1107 (U.S. July 23, 2018). *Murphy* addresses only the Muscogee Creek Nation reservation, but the decision could be far reaching and could result in as much as half of Oklahoma falling within the borders of a reservation. *Id.*

41. *Nebraska v. Parker*, 136 S. Ct. 1072 (2016).

42. Brief for Petitioner, *supra* note 40, at 3.

43. Transcript of Oral Argument at 55–56, *Murphy*, No. 17-1107 (U.S. Nov. 27, 2018).

44. *Id.* at 56–57.

45. *Id.* at 50–53.



Legal realists would likely be unsurprised by the conservative Justices' retreat from formalism. Yet, the case has also drawn surprisingly little recognition from progressives. The language of power and jurisdiction that frames *Murphy* remains illegible to social justice activists, who aim their advocacy at equality, rights, and race. Criminal justice advocates and the growing movement for prison abolition should see Native Nations as powerful partners in the movement for reform.<sup>46</sup> It is important to remember that *Murphy* is a capital case. Not only could a Native man escape death row, but the case could also recognize the power of Native Nations to oversee the criminal justice system within Oklahoma more generally. Many Native Nations lead the country in progressive criminal justice reform, and scholars have opened a general call to center Native Nations in our study of American governance and innovation.<sup>47</sup> To date, erasure of Native Nations and American colonialism has had costs for progressive movements—as movements craft their reform toolkits too narrowly, and often overlook entirely the importance of power, jurisdiction, and majority-minority institutions.

It may be too late for this particular case. But there is still time to combat this erasure before the next *Murphy* makes it before the Court. There is still time to learn the language of power and jurisdiction, and to learn to see the injustice in stripping power from subordinated communities. Because erasure does so much harm to Indian Country, federal Indian law offers the rare opportunity where simply learning this language and recognizing the jurisdiction of Native Nations can bring about justice.

#### CONCLUSION

When I was asked by the *Stanford Law Review* to write this Essay on my experience as a woman in the legal field, I immediately thought of all of the remarkable women who have mentored and guided me through the complex world of the law—a world that hadn't been built for me or for any of us. Each of these mentors helped me identify those words scattered all around me—equality, rights, and legal change—and helped me assemble

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46. See, e.g., Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019).

47. See, e.g., Katherine Florey, *Making It Work: Tribal Innovation, State Reaction, and the Future of Tribes as Regulatory Laboratories*, 92 WASH. L. REV. 713 (2017); Elizabeth Ann Kronk Warner, *Justice Brandeis and Indian Country: Lessons from the Tribal Environmental Laboratory*, 47 ARIZ. ST. L.J. 857 (2015); Elizabeth Ann Kronk Warner, *Valuable Lessons to Learn from Tribal Innovation*, FED. LAW., Apr. 2017, at 6; see also Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675 (2012); Ann Tweedy, *Indian Tribes and Gun Regulation: Should Tribes Exercise Their Sovereign Rights to Enact Gun Bans or Stand-Your-Ground Laws*, 78 ALB. L. REV. 885 (2015).

those words, experience by experience, into my own story. Their lessons were invaluable. But they were also incomplete.

To tell my story as a woman in the law, I have to tell that story as a Native woman in the law. That story is more complex than the simple story of rights, equality, and courts. It is instead a story of power, sovereignty, and legislatures. It challenges many of our taken-for-granted assumptions about how our government and Constitution work: By contrast to slavery and Jim Crow segregation, intervention by the federal government into Indian Country only furthered the colonial project. Rights and equality continue to pose a threat to the foundations of federal Indian law.

Indian Country challenges our simple stories about American law, the United States Constitution, and our nation's history. Yet, the complex story of Indian Country may offer additional tools in the fight for liberation, and these tools might offer liberation not just for Native people, but for everyone. The complex story might also offer an alternative vision of justice for all women—one that aims for power in addition to rights and understands the value of building and preserving institutions where women govern.