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Nondelegation and Native Nations

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Essay

Nondelegation and Native Nations

SETH DAVIS

There is no nondelegation doctrine for Native nations, nor should there be one even if the Supreme Court revives the nondelegation doctrine for federal agencies and private parties. The Court has never struck down a statute on the ground that it delegated legislative power to a Native nation. Instead, it has held that Congress may recognize the sovereignty of Native nations and that their independent authority sustains statutes that rely upon Native governments to implement policy goals that they share with the United States. The Court's deferential approach is consistent with the rational-basis standard of review that applies to Indian affairs statutes. The jural argument against a nondelegation doctrine is that the sovereignty of Native nations distinguishes them from federal agencies and private parties. The functional argument against a nondelegation doctrine is twofold. First, the functionalist justifications for restricting Congress's authority to rely upon Native nations to implement shared goals are unconvincing on their own terms. Second, a robust nondelegation doctrine would undermine Congress's capacity to fulfill the federal government's obligations to support tribal self-government. This is the answer to the most trenchant critique of the Court's jurisprudence concerning delegation and Native nations.

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Nondelegation and Native Nations

SETH DAVIS*

INTRODUCTION

During the 1930s, the New Deal transformed the administrative state and federal Indian law. By the decade's end, the Supreme Court had ratified broad congressional power to delegate administrative authority to agencies and directed courts to defer to agency factfinding and policymaking.[1] Like the New Deal, the Indian New Deal of the 1930s presumed broad federal power and an active administration, which Congress had tasked with overseeing the enactment of tribal constitutions and incorporation of tribal businesses.[2]

Nearly a century later, the 2020s are shaping up to be a time of transformation for administrative law. The Court has already made major doctrinal changes to strengthen judicial power to review administrative policymaking.[3] It remains to be seen how much and how quickly the Court will alter administrative law.[4]

The fight for the fate of the administrative state has now reached federal Indian law. *Haaland v. Brackeen*, for example, was about the constitutionality of the Indian Child Welfare Act (ICWA) and a skirmish over federal administration.[5] The *Brackeen* Court rejected several of the challenges to ICWA while not resolving others. It did not reach the merits of the equal protection challenge, which depended upon the Court

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[1] *See, e.g.*, DAN T. COENEN & MICHAEL COENEN, PRINCIPLES OF CONSTITUTIONAL STRUCTURE 720 (2022) ("[A]s in other fields of constitutional law, the mood (and composition) of the Court shifted [regarding nondelegation] following the reelection of Franklin Roosevelt in 1936."); Lawrence B. Solum, *How* NFIB v. Sebelius *Affects the Constitutional Gestalt*, 91 WASH. U. L. REV. 1, 3 (2013) (describing New Deal "gestalt" of "plenary and virtually unlimited national legislative power"); Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 406 (2007) (arguing that New Deal courts "accepted" a model of "minimal judicial interference" in administrative policymaking).

[2] *See* Indian Reorganization Act, 25 U.S.C. § 5123 (tribal constitutions); *id.* § 5124 (tribal corporations); William Wood, *Indians, Tribes, and (Federal) Jurisdiction*, 65 U. KAN. L. REV. 415, 483 (2016) (describing the Indian Reorganization Act's "mechanism[s]" to create tribal constitutions and corporations).

[3] One example of a major doctrinal change is the major questions doctrine. *See* West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2609 (2022).

[4] *See* Kristin E. Hickman, *The Roberts Court's Structural Incrementalism*, 136 HARV. L. REV. F. 75, 76–77 (2022) (arguing that the Roberts Court has made incremental changes "to accommodate rather than undermine . . . the administrative state").

[5] *See* Haaland v. Brackeen, 143 S. Ct. 1609, 1627, 1638 (2023) (presenting questions of ICWA's constitutionality that included the scope of Congress's legislative power and the nondelegation doctrine).

concluding that ICWA contained unconstitutional racial classifications, nor the nondelegation challenge, which sought to revive the nondelegation doctrine as a limit on congressional power to grant authority to administer federal law.[6]

This Essay focuses upon the nondelegation doctrine. Critics of the administrative state have argued that the Court should revive the nondelegation doctrine, which it last used to invalidate a federal law in 1935.[7] Several Supreme Court Justices, including Justice Neil Gorsuch, who wrote a concurring opinion in *Brackeen* that affirmed the principle of inherent tribal sovereignty,[8] have expressed interest in reviving the nondelegation doctrine.[9]

In this Essay, I argue that there is no nondelegation doctrine for Native nations, nor should there be one. The Court has never struck down a statute on the ground that it delegated legislative power to a Native nation. Instead, it has held that Congress may recognize the sovereignty of Native nations and that their independent authority sustains statutes that rely upon Native governments to implement policy goals that they share with the United States.[10]

The jural argument against a nondelegation doctrine for Native nations is that sovereignty distinguishes them from federal agencies and private parties. Native nations, that is, have independent authority to make and enforce law. Three rules follow from this jural status. First, when Congress recognizes a Native nation's independent authority, it is not delegating

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[6] *Id.* at 1638 (holding that ICWA's challengers lacked standing to raise their equal protection and nondelegation claims).

[7] *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537, 551 (1935) (holding that Congress had unconstitutionally delegated authority to set codes of fair competition for various industries); Panama Refining Co. v. Ryan, 293 U.S. 388, 406, 433 (1935) (holding that Congress had unconstitutionally delegated authority to regulate petroleum product sales).

[8] *Brackeen*, 143 S. Ct. at 1650 (Gorsuch, J., concurring) ("[T]he Constitution safeguards the sovereign authority of Tribes . . . .").

[9] *See* Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., joined by Roberts, C.J., & Thomas, J., dissenting) (arguing that Court should "revisit" the nondelegation doctrine); *id.* at 2130–31 (Alito, J., concurring) (stating that he would have revisited the nondelegation doctrine had there been a majority vote to do so); Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) (expressing interest in "further consideration" of nondelegation doctrine "in future cases").

[10] *See* United States v. Lara, 541 U.S. 193, 199–200 (2004) (holding that Congress may recognize inherent tribal sovereignty and thus "lift the restrictions" that federal law "had imposed on the tribes' exercise" of that sovereignty); United States v. Mazurie, 419 U.S. 544, 556–57 (1975) (holding that a Native nation's "independent authority over the subject matter" provided basis for statute that recognized tribal authority to regulate liquor in Indian Country with approval from the Secretary of the Interior). For a discussion of the "recognition power," see Maggie Blackhawk, Foreword, *The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 90–95 (2023); Lance F. Sorenson, *Tribal Sovereignty and the Recognition Power*, 42 AM. INDIAN L. REV. 69, 77–82 (2017). For an incisive student Note analyzing the Supreme Court's precedent and addressing the question of executive subdelegations of authority to Native nations, see Samuel Lazerwitz, *Sovereignty-Affirming Subdelegations: Recognizing the Executive's Ability to Delegate Authority and Affirm Inherent Tribal Powers*, 72 STAN. L. REV. 1041, 1041 (2020) (arguing that "[w]hen federal agencies engage in sovereignty-affirming subdelegations—subdelegations that affirm tribal sovereignty by intermingling federal and tribal power—they should be presumed to have acted permissibly unless Congress has expressed a contrary intent").

legislative power. Second, when Congress incorporates tribal law into federal law, it is not delegating legislative power. Third, Congress may grant authority to tribal governments that is reasonably related to their independent authority over a subject matter. As Justice Gorsuch discussed in his dissenting opinion in *Gundy v. United States*, when Congress has overlapping authority with another branch, a statute granting discretion in the area of overlap is not an impermissible delegation.[11] The principle of these cases, the Court has held, applies to Native nations as well.[12]

The Court's deferential approach is consistent with the rational-basis standard of review that applies to Indian affairs statutes.[13] The test is whether a statute "can be tied rationally to the fulfillment of Congress' unique obligations toward the Indians."[14] These obligations include "further[ing] Indian self-government."[15]

The functional argument against a nondelegation doctrine is twofold. First, the functionalist justifications for restricting Congress's authority to rely upon Native nations to implement shared goals are unconvincing on their own terms. Second, a robust nondelegation doctrine would undermine Congress's capacity to fulfill the federal government's obligations to support tribal self-government. This is the answer to the most trenchant critique of the Court's jurisprudence concerning delegation and Native nations.[16] There is no compelling reason to create a nondelegation doctrine for Native nations.

This Essay begins by sketching the nondelegation doctrine and the fight for the fate of the administrative state, turns to the jural argument about the relationship between sovereignty and the nondelegation doctrine, and concludes with the functional argument.

I. THE NONDELEGATION DOCTRINE AND THE FIGHT FOR THE FATE OF THE ADMINISTRATIVE STATE

Article I vests "legislative Powers" in Congress.[17] The nondelegation doctrine denies Congress the authority to delegate those powers. At the same

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[11] *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting).

[12] *Compare Mazurie*, 419 U.S. at 556–57 (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–22 (1936)), *with Gundy*, 139 S. Ct. at 2137 n.42 (Gorsuch, J., dissenting) (citing *Curtiss-Wright*, 299 U.S. at 320).

[13] *See* Morton v. Mancari, 417 U.S. 535, 555 (1974) (holding that an Indian affairs statute did not violate due process because it was "reasonable and rationally designed to further Indian self-government"); Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CALIF. L. REV. 495, 547 (2020) ("What the Court actually did in *Morton v. Mancari* is hold that congressional Indian affairs legislation must be reasonable and rationally related to the United States' fulfillment of its duty of protection to Indians and tribes.").

[14] *Mancari*, 417 U.S. at 555.

[15] *Id.*

[16] *See* Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 253 (1997) (asking "why tribal autonomy interests outweighed delegation concerns" in *Mazurie*).

[17] U.S. CONST. art. I, § 1.

time, the Court's nondelegation jurisprudence affords Congress wide latitude to grant authority to federal agencies and rely upon private parties to implement federal policies. In recent years, however, several Supreme Court Justices have signaled their willingness to reconsider nondelegation jurisprudence.[18] Seizing upon these opinions, ICWA's challengers brought the battle over the administrative state to federal Indian law in the *Brackeen* litigation.

A. *The Nondelegation Doctrine*

1. *Delegation to Federal Agencies*

The nondelegation doctrine requires that Congress provide an intelligible principle when it grants authority to federal agencies. The Court created the intelligible principle requirement in *J.W. Hampton, Jr. & Co. v. United States* to distinguish an agency's exercise of impermissibly delegated legislative powers from the agency's permissible execution of the laws that Congress enacts.[19] A statute that provides an intelligible principle, the doctrine holds, does not delegate legislative power but instead leaves to the agency the task of implementing federal legislation. The statute in *J.W. Hampton* did not violate the intelligible principle requirement because it directed the President, when imposing tariffs, to "equalize" the different costs of production between the United States and foreign countries.[20]

The Court has held that Congress violated the intelligible principle requirement only twice. In *Panama Refining Co. v. Ryan*, decided in 1935, the Court considered a nondelegation challenge to Section 9 of the National Industrial Recovery Act (NIRA), a key piece of the New Deal policy that granted the President authority to prohibit petroleum producers from engaging in the interstate distribution of products exceeding state-law production quotas.[21] The Court held that Section 9 failed the intelligible principle requirement because it provided simply that the President would limit the prohibition to distribution of products made "in excess of the State's permission."[22] And in *A.L.A. Schechter Poultry Corp. v. United States*, also decided in 1935, the Court held that Section 3 of the NIRA lacked an intelligible principle because it granted the President unbounded authority to make "codes of fair competition" based upon input from private participants in the relevant industries.[23]

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[18] The Court, moreover, has created subconstitutional canons that arguably implement the nondelegation principle. *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 330 (2000).

[19] 276 U.S. 394, 409 (1928).

[20] *Id.* at 401–05.

[21] 293 U.S. 388, 430 (1935).

[22] *Id.* at 415, 430 (concluding that the statute provided "no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited").

[23] 295 U.S. 495, 535–48 (1935).

Panama Refining and *Schechter Poultry* were before the switch in time that saved nine and paved the path for the New Deal paradigm of public administration. In 1937, the Supreme Court, facing threats of court packing from President Franklin Delano Roosevelt, shifted to a more deferential review of federal legislation regulating the economy and granting power to federal agencies.[24] Since then, the Court has not held that a statute violates the intelligible principle requirement.[25]

2. *Delegations to Private Parties*

Before the switch in time, however, the Court suggested that there are limits on how much the federal government may rely upon private parties to implement federal policies. *Schechter Poultry* raised the private nondelegation question because Section 3 of the NIRA directed the President to rely upon recommendations from industry and trade representatives when determining what "fair competition" required.[26] In 1936, the Court in *Carter v. Carter Coal Co.* concluded that the Bituminous Coal Conservation Act unconstitutionally granted authority to a majority of the industry to adopt binding wage and hour regulations for all market participants.[27] The Court grounded its conclusion in due process, reasoning that the grant of authority was "clearly arbitrary."[28]

Lower federal courts, as well as some sitting Supreme Court Justices, have read *Carter Coal* to stand for a private nondelegation doctrine prohibiting Congress from delegating legislative powers to private persons or entities.[29] But since *Carter Coal*, the Court has not stood in the way of privatization of federal policymaking and implementation. For example, the Roberts Court recently reaffirmed federal authority to delegate the federal eminent domain power to private entities.[30]

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[24] *See, e.g.*, John Q. Barrett, *Attribution Time: Cal Tinney's 1937 Quip, "A Switch in Time'll Save Nine*,*"* 73 OKLA. L. REV. 229, 230 (2021) (explaining how in 1937 the Supreme Court "changed course" by "announc[ing] much broader constitutional interpretations of federal and state government legislative powers" and thus "took the air out of [President Franklin Delano Roosevelt's] Court-packing balloon").

[25] *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001) ("[W]e have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'").

[26] 295 U.S. at 521 n.4.

[27] 298 U.S. 238, 311 (1936).

[28] *Id.*

[29] *See* Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 721 F.3d 666, 670 (D.C. Cir. 2013) ("Federal lawmakers cannot delegate regulatory authority to a private entity."), *vacated and remanded*, Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 55 (2015) ("[T]he Court of Appeals' decision was based on the flawed premise that Amtrak should be treated as a private entity . . . ."). *See also Ass'n of Am. R.Rs.*, 575 U.S. at 62 (Alito, J., concurring) ("[H]anding off regulatory power to a private entity is 'legislative delegation in its most obnoxious form.'"); *id.* at 87 (Thomas, J., concurring) ("[T]his court has held that delegations of regulatory power to private parties are impermissible. . . .") (citation omitted).

[30] *See* PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2255 (2021) ("For as long as the eminent domain power has been exercised by the United States, it has also been delegated to private parties.").

B. Brackeen *and the Battle over the Administrative State*

The result of judicial deference to the political branches, as Chief Justice Roberts and Justice Gorsuch have put it, is an administrative state that "wields vast power and touches almost every aspect of daily life."[31] The scope of this power, some argue, is far beyond what the Framers could have "envisioned."[32] The reach of this power into individual lives is a threat to liberty. And the concentration of this power undermines democracy. Whatever checks and balances exist—whether it is congressional oversight,[33] presidential oversight,[34] or inter- and intra-agency norms, processes, and structures[35]—do not do enough to address the threats that the administrative state poses to the rule of law. Together, these arguments make a case for shrinking the administrative state.

The battle over the fate of the administrative state is being fought in many forums, including the federal courts. These partisan conflicts are reflected in the captions of recent administrative law cases: *West Virginia v. EPA*;[36] *Biden v. Nebraska*;[37] *Trump v. Hawaii*.[38] As these case names suggest, many of the skirmishes are between state attorneys general and the federal executive.[39]

The Court has strengthened judicial power to review federal administrative policymaking but has not revived the nondelegation doctrine. For example, the Court has held that Congress must explicitly and specifically authorize agency policies that would address "major questions"

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[31] Kisor v. Wilkie, 139 S. Ct. 2400, 2446 (2019) (Gorsuch, J., concurring) (quoting City of Arlington v. Fed. Commc'n Comm'n, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting)).

[32] *City of Arlington*, 569 U.S. at 313 (Roberts, C.J., dissenting) (citing Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010)).

[33] *See* Christopher J. Walker, *Restoring Congress's Role in the Modern Administrative State*, 116 MICH. L. REV. 1101, 1104 (2018) (arguing that Congress's oversight tools can be "quite powerful in shaping the principal-agent relationship between Congress and federal agencies").

[34] *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001) (arguing that the Presidency is the primary institution "setting the direction and influencing the outcome of administrative process").

[35] *See* Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1244 (2017) (arguing that "many internal [administrative] measures, ranging from substantive guidelines to management structures that allow for oversight of agency operations, qualify as forms of law").

[36] 142 S. Ct. 2587, 2609 (2022) (holding that the Environmental Protection Agency's clean energy rule was invalid under the major questions doctrine).

[37] 143 S. Ct. 2355, 2374 (2023) (holding that the federal student loan forgiveness program, which was established by Secretary of Education, involved a major question and therefore was unlawful without clear congressional authorization).

[38] 138 S. Ct. 2392, 2413 (2018) (holding that the President had "sweeping authority [under the Immigration and Nationality Act] to decide whether to suspend entry, whose entry to suspend, and for how long").

[39] For background on state litigation against the federal government, see Seth Davis, *The New Public Standing*, 71 STAN. L. REV. 1229, 1233 (2019) (noting that "states are significant public interest litigants in federal court"); Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 45 (2018) (exploring "the advent, largely over the past few decades, of high profile public-law litigation by state attorneys general (AGs)").

of economic, political, and social significance.[40] Some Justices view the major questions doctrine as a proxy for nondelegation concerns.[41]

In one of the latest skirmishes, *Haaland v. Brackeen*, arguments about the administrative state reached federal Indian law.[42] This case presented a wide-ranging challenge to ICWA[43] and its implementation by federal agencies and tribal governments. Congress enacted ICWA to fulfill the unique "Federal responsibility to Indian people" arising from "statutes, treaties, and the general course of dealing with Indian tribes."[44] The statute contains federal rights and procedures for child custody matters involving Indian children, which Congress found were necessary to enact because of systemic bias and due process violations by private, state, and federal actors in the removal of Indian children from their families and tribes.[45]

Like other recent high-profile cases, *Brackeen* pitted state litigants against the federal government. In *Brackeen*, state attorneys general made aggressive arguments against congressional power to legislate, delegate regulatory authority, and enact federal law that applied in state courts and preempted state law, as well as arguments to limit federal executive power.[46] Some of these arguments had little to do with how ICWA works and a lot to do with attacking the workings of the federal government.[47]

The *Brackeen* Court rejected several of the challenges to ICWA while not resolving others. It did not reach the merits of the equal protection challenge, which posed a threat to tribal sovereignty and were the focus of news coverage of the case.[48] The Court did not resolve the nondelegation challenge, which got less press, but also threatened tribal sovereignty as it attacked the administrative state.[49]

ICWA's challengers argued that Section 1915(c) of ICWA violated the nondelegation doctrine. Section 1915(c) incorporates Native nations' ordering of placement preferences for Indian children into the federal

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[40] *West Virginia*, 142 S. Ct. at 2609. In the October 2023 Term, during which this Essay was written, the Court heard oral argument in *Relentless, Inc. v. Department of Commerce* (Docket No. 22-1219), which presented the question whether the Court should overrule *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the leading case on judicial deference to an agency's interpretation of ambiguous statutes.

[41] *See West Virginia*, 142 S. Ct. at 2619 (Gorsuch, J., concurring, joined by Alito, J.).

[42] *See* 143 S. Ct. 1609 (2023) (considering the constitutionality of ICWA, 25 U.S.C. §§ 1901–1963).

[43] 25 U.S.C. §§ 1901–1963.

[44] *Id.* § 1901.

[45] *Id.* §§ 1901–1902; Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32–34 (1989).

[46] In *Brackeen*, both state and private litigants, as well as state and private amici, argued that ICWA was unconstitutional. *See* 143 S. Ct. at 1618, 1622–23. For background on state litigation against the federal government, *see supra* note 39 and accompanying text.

[47] *See, e.g.*, *Brackeen*, 143 S. Ct. at 1634 (rejecting an anticommandeering argument based upon ICWA's actual operation and noting that challengers provided no "details" to support their argument).

[48] *Id.* at 1638.

[49] *Id.*

scheme.[50] These preferences apply in state proceedings to decide the adoption or foster care placement of Indian children.

There were two delegation-related challenges to Section 1915(c). The first was that Congress had impermissibly delegated legislative power to Native nations.[51] The second was that Section 1915(c) unlawfully delegated regulatory power to a private entity on the theory that Native nations are private parties for purposes of the private nondelegation doctrine.[52]

The Court held that none of ICWA's challengers had standing to raise the nondelegation claim.[53] The nondelegation doctrine has not been revived—yet.

II. NONDELEGATION AND SOVEREIGNTY

A nondelegation doctrine for Native nations does not exist. The Court has distinguished statutes that rely upon other sovereigns, including those that incorporate another sovereign's law, from statutes that create federal agencies and grant them authority as well as statutes that involve private parties in federal policymaking. The distinction is that sovereigns have independent authority to make and enforce law. This distinction matters not only under current law, but also under the leading proposal for a revived nondelegation doctrine.

Under the Court's precedents, Congress may recognize a sovereign's independent authority, incorporate another sovereign's law into federal law, and grant authority that is reasonably connected to another sovereign's independent authority. The common thread to the cases involving Native nations and states is that federal courts should apply a deferential standard of review to afford Congress leeway to enact schemes for intergovernmental cooperation.

A. *Recognition vs. Delegation*

Native nations are political communities with sovereign rights, powers, and immunities. They have established governments with the authority to

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[50] Section 1915(c) provides:

> In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) . . . . Where appropriate, the preference of the Indian child or parent shall be considered . . . .

25 U.S.C. § 1915(c).

[51] Brackeen v. Haaland, 994 F.3d 249, 422 (5th Cir. 2021) (separate opinion of Duncan, J.), *aff'd in part, vacated in part, rev'd in part*, 143 S. Ct. 1609 (2023).

[52] *See id.* ("An Indian tribe is 'not part of the Government at all,' which 'would necessarily mean that it cannot exercise . . . governmental power.'" (citing Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. at 43, 88 (2015) (Thomas, J., concurring))).

[53] *Brackeen*, 143 S. Ct. at 1638.

make and enforce laws.[54] Tribal constitutions, bylaws, codes, ordinances, and court decisions establish bodies of tribal law that are distinct from state law and federal law.[55] These tribal laws regulate tribal territories, members, and nonmembers who interact with or affect the tribe or its members.[56]

The federal government has recognized the sovereignty of federally recognized Native nations. The United States Constitution's Commerce Clause addresses three different sovereigns, identifying "Indian Tribes" and authorizing Congress to regulate "Commerce with" them as well as "Commerce with" "foreign Nations" and "commerce among the several States."[57] Treaties between Native nations and the United States recognize their sovereignty, as do other agreements between the two sovereigns.[58] Myriad statutes, executive orders, regulations, and court opinions also recognize tribal sovereignty.[59]

The Court has distinguished tribal power from federal power in various areas, including criminal law. In *Worcester v. Georgia*, it held that Native nations are "independent political communities" that "retain[]" their political sovereignty.[60] This independent sovereignty, as the Court put it over a century later, includes the power "to make their own laws and be ruled by them."[61] That power in turn encompasses defining and regulating wrongs, including criminal wrongs.[62]

Native nations' jural status has consequences for structural constitutional law. One is that Native nations' governments have independent authority that does not depend upon a delegation from the federal government.[63] Native nations exercising this authority are not federal agencies, which is why, for example, the Bill of Rights does not apply to

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[54] *See* Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 557 (2021) ("American tribal governments experiment with government structures, define rights, adjudicate disputes, develop service programs, and outlaw conduct. They make laws that address everything from the smallest contract disputes to the most important questions of constitutional rights and structure.").

[55] *See id.*

[56] *See id.* at 565–69 (describing the scope of contemporary tribal governance).

[57] U.S. CONST. art. I, § 8, cl. 3.

[58] *See* Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979) (noting that a treaty is a "contract between two sovereign nations.").

[59] *See generally* Seth Davis, *Tribalism and Democracy*, 62 WM. & MARY L. REV. 431, 444 (2020) ("Federal law recognizes 'Indian tribes' as preconstitutional sovereigns separate from the federal government.").

[60] 31 U.S. (6 Pet.) 515, 559 (1832).

[61] Williams v. Lee, 358 U.S. 217, 220 (1959).

[62] *See, e.g.*, Denezpi v. United States, 142 S. Ct. 1838, 1845 (2022) ("When a tribe enacts criminal laws, then, 'it does so as part of its retained sovereignty and not as an arm of the Federal Government.'") (quoting United States v. Wheeler, 435 U.S. 313, 328 (1978)).

[63] *See id.* at 1853 (Gorsuch, J., dissenting) (noting that in *Wheeler* the Court "observed that 'the power to punish offenses against tribal law committed by Tribe members' was part of inherent tribal 'sovereignty'" and is not attributable in any way to a delegation of federal authority (quoting *Wheeler*, 435 U.S. at 328)).

tribal governments and the dual sovereignty doctrine does apply to Native nations in double jeopardy cases.[64]

In *United States v. Lara*, the Court held that there was no double jeopardy bar to tribal and federal prosecutions of the same crime where Congress had recognized and reaffirmed tribes' independent authority to prosecute Indians.[65] In 1990, fourteen years before *Lara*, the Supreme Court held as a matter of federal common law that Native nations did not have authority to prosecute non-Indians and Indians who were not members of the Native nation prosecuting them.[66] Congress responded by enacting a law recognizing that Native nations have authority to prosecute nonmember Indians and reaffirmed that rule notwithstanding the Supreme Court's contrary decision.[67] Subsequently, a nonmember Indian prosecuted by both a tribal government and the federal government challenged the successive prosecutions as unconstitutional double jeopardy.[68] Their defense, in essence, was that Congress's statute had delegated federal authority to tribal governments. The Court rejected that defense because Congress has authority to recognize Native sovereignty, and when it does, that is not a delegation of federal authority.[69] Thus, the tribal prosecution, which occurred first, was not a federal prosecution that would have barred the subsequent federal criminal action.[70]

Lara thus stands for the proposition that recognition of a tribal sovereign's independent authority is not a delegation of federal power.[71] Unlike federal agencies, Native nations do not depend upon Congress for a grant of authority.[72] The starting point of analysis is not a search for congressional delegation. Rather, it is the independent authority of tribal sovereigns and federal recognition.

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[64] *See id.* at 1849 (majority opinion) (holding that separate prosecutions for violations of a tribal ordinance and a federal statute do not offend the Double Jeopardy Clause "[b]ecause the Tribe and the Federal Government are distinct sovereigns"); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.").

[65] 541 U.S. 193, 199 (2004).

[66] Duro v. Reina, 495 U.S. 676, 688 (1990).

[67] *See* 25 U.S.C. § 1301(2) (defining "powers of self-government" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians").

[68] *Lara*, 541 U.S. at 197.

[69] *Id.* at 200 ("Congress does possess the constitutional power to lift the restrictions on the tribes' criminal jurisdiction over nonmember Indians as the statute seeks to do.").

[70] *Id.* at 210 ("[T]he Spirit Lake Tribe's prosecution of Lara did not amount to an exercise of federal power, and the Tribe acted in its capacity of a separate sovereign.").

[71] *See id.* at 199 ("The statute says that it 'recognize[s] and affirm[s]' in each tribe the 'inherent' tribal power (not delegated federal power) to prosecute nonmember Indians for misdemeanors.") (emphasis omitted).

[72] *See generally* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 665 (2022) ("Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided.").

The Roberts Court reaffirmed the dual sovereignty doctrine's applicability to tribal sovereignty in *Denezpi v. United States*.[73] In that case, the prosecution for a violation of tribal law occurred in a Code of Federal Regulations (CFR) Court, an institution organized under federal administrative regulations, funded by the federal government, and staffed with federal employees.[74] Given the extensive federal involvement, the defendant argued that the first prosecution in the CFR Court was a federal prosecution that barred a second prosecution in an Article III court.[75] The Supreme Court held that there was no double jeopardy violation because the prosecution in the CFR Court was based upon independent tribal authority to enact tribal criminal law.[76] It did not bar a subsequent prosecution for violation of a separate body of law, namely, federal law. The fact that the tribal criminal law was assimilated into the CFR did not matter.[77] It was enough that the federal government had recognized the Native nation's independent authority to enact a criminal code and that the prosecution for violation of the tribe's ordinance traced back to that authority.[78] As the Court concluded, a Native nation has an independent interest in enforcement of its criminal laws that "*is* furthered" by federal enforcement.[79]

Together, *Lara* and *Denezpi* distinguish tribal from federal powers even in cases where there is significant cooperation between the two governments. The cases might be explained by peculiarities of double jeopardy jurisprudence and the tendency of a conservative Court to rule against criminal defendants.[80] In both cases, the result was to affirm federal convictions of Native men. If this exposure of Native defendants to successive prosecutions is unjust, especially as compared to non-Native defendants,[81] however, it is not because of any delegation of federal power.

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[73] 142 S. Ct. 1838, 1845–46 (2022).

[74] *See id.* at 1855 (Gorsuch, J., dissenting) ("[F]ederal administrative authorities created this tribunal. . . . They control the hiring and firing of prosecutors and magistrates. They opened this court; they may close it.").

[75] *Id.* at 1845–46 (majority opinion).

[76] *Id.* at 1845 ("The two laws, defined by separate sovereigns, therefore proscribe separate offenses. Because Denezpi's second prosecution did not place him in jeopardy again 'for the same offence,' that prosecution did not violate the Double Jeopardy Clause.").

[77] *Cf. id.* at 1851 (Gorsuch, J., dissenting) (pointing out that Denezpi was sentenced in the first prosecution for a violation of "an assimilated Ute Mountain Ute tribal offense 'approved' by federal officials").

[78] *Id.* at 1849 (majority opinion) ("Denezpi's single act led to separate prosecutions for violations of a tribal ordinance and a federal statute.").

[79] *Id.*

[80] There are, however, exceptions to this tendency to rule against criminal defendants. Erwin Chemerinsky, *The Roberts Court and Criminal Procedure at Age Five*, 43 TEX. TECH L. REV. 13, 25 (2010) ("[I]t would be a mistake to see the Roberts Court as conservative in all areas of criminal procedure.").

[81] *See, e.g.*, Barbara L. Creel & John P. LaVelle, Opinion, *High Court Denies Rights of Natives*, ALBUQUERQUE J., June 26, 2016, at A11 ("[T]he solution cannot be at the expense of Indian people's civil rights, by allowing the federal government to target Indians, as a class, for 'easy' prosecution and imprisonment.").

On that point, *Lara* and *Denezpi* are clear: recognition of tribal authority is not delegation of federal power.

It follows that recognition of tribal authority does not violate the nondelegation doctrine. The nondelegation doctrine prohibits Congress from delegating its legislative power to the executive branch.[82] The intelligible principle requirement implements that prohibition, at least in theory.[83] And the private nondelegation doctrine, such as it is,[84] also prohibits Congress from delegating its legislative power.[85] Neither prohibition is implicated when Congress recognizes tribal authority.

Recognition in this sense is not limited to the act of recognizing a Native nation as such and establishing a government-to-government relationship with it. Rather, recognition of tribal authority includes recognizing specific instances of it. Before *Lara*, for example, Congress recognized the authority of Native nations to prosecute nonmember Indians and the Court in turn deferred to Congress's recognition of that instance of tribal sovereignty.[86] More recently, Congress has recognized the authority of Native nations in some circumstances to prosecute non-Indians, another incident of their jural status as sovereigns.[87]

In short, a statute that recognizes tribal sovereignty, including a statute that recognizes particular instances of it, does not delegate Congress's legislative power. To apply the nondelegation doctrine to any such statute simply makes no sense. If there is a constitutional limit, it does not stem from any prohibition on Congress delegating legislative power to an entity that possesses no lawmaking power of its own.

This conclusion follows even though federal recognition has federal legal consequences. Congress's recognition of tribal authority to prosecute nonmember Indians had federal constitutional consequences, as *Lara* showed.[88] The creation of tribal criminal ordinances enforceable in CFR courts had consequences under federal law too.[89] There are many other

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[82] *See* Pan. Refin. Co. v. Ryan, 293 U.S. 388, 403, 421 (1935).

[83] *See* notes 19–23 and accompanying text.

[84] Alexander Volokh, *The Myth of the Federal Private Nondelegation Doctrine*, 99 NOTRE DAME L. REV. 203, 207 (2023) (arguing that no doctrine "rules out private delegations as such").

[85] *See supra* note 27 and accompanying text.

[86] *See* United States v. Lara, 541 U.S. 193, 199 (2004) ("The statute says that it 'recognize[s] and affirm[s]' in each tribe the '*inherent*' *tribal* power (not delegated federal power) to prosecute nonmember Indians for misdemeanors.").

[87] *See* Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 811, 136 Stat. 49, 904–05 (2022); Adam Crepelle & Thomas Stratmann, *Does Expanding Tribal Jurisdiction Improve Tribal Economies: Lessons from Arizona*, 55 ARIZ. ST. L.J. 211, 214 (2023) ("Congress reaffirmed tribes' inherent authority to prosecute *all persons* who commit dating violence, domestic violence, or violate a protective order against Indian women on tribal land in the Violence Against Women Reauthorization Act (VAWA).").

[88] *See Lara*, 541 U.S. at 199.

[89] *See* Denezpi v. United States, 142 S. Ct. 1838, 1843 (2022) ("[A] tribe's governing body may enact ordinances that, when approved by the Assistant Secretary, are enforceable in C.F.R. court and supersede any conflicting federal regulations.").

examples. Federally recognized tribal sovereignty, for example, may preempt state law even in the absence of a specific federal statute doing so.[90]

Congressional recognition of tribal authority that the Court has denied may be compared with congressional authority to permit state action that would violate federal law in the absence of congressional legislation.[91] The *Wheeling Bridge Cases* are the starting point for this comparison. In the first case, the Court held that a state could not build a bridge across a river because it would unlawfully interfere with free navigation.[92] But in the second case, the Court held that Congress had authorized the construction by enacting a statute.[93]

Nearly a century later, the Court in *Prudential Insurance Company v. Benjamin* held that Congress has broad power to authorize states to regulate interstate commerce. *Prudential Insurance* involved a challenge to state taxation of insurance premiums.[94] In the absence of congressional legislation, the tax in *Prudential Insurance* would have violated the Dormant Commerce Clause's anti-discrimination rule, or so the Court assumed.[95] But Congress had enacted a statute that recognized state authority over insurance regulation and taxation.[96] This statute did not delegate Congress's legislative authority but instead authorized intergovernmental coordination in insurance law.[97] The Court reasoned that Congress has "broad authority" to act "in conjunction" with the states by authorizing them to act in ways that would otherwise violate the Commerce Clause.[98] The limits on this authority do not stem from the Interstate Commerce Clause but rather from "other constitutional provisions" that limit Congress.[99]

The analogy to *Lara* is that the Indian Commerce Clause similarly supports congressional legislation to recognize tribal authority. The Supreme Court had denied that Native nations could prosecute nonmember Indians.[100] Congress legislated to remove that restriction, which it had authority to do based upon its "broad general powers" in Indian affairs,

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[90] *See* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2494 (2022) ("Under the Court's precedents, . . . a State's jurisdiction in Indian country may be preempted (i) by federal law under ordinary principles of federal preemption, or (ii) when the exercise of state jurisdiction would unlawfully infringe on tribal self-government."); *id.* at 2521 (Gorsuch, J., dissenting) ("[T]he Court admits that tribal sovereignty *can* require the exclusion of state authority even absent a preemptive federal statute.").

[91] *See* Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1372–76 (1996) ("Congress may remove all constitutional limits on States when those limits are wholly inapplicable to Congress—that is, when they stem solely from divisions of power within the federal system.").

[92] Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 626–27 (1852).

[93] Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 421 (1856).

[94] 328 U.S. 408, 410 (1946).

[95] *See id.* at 429 (assuming that the state tax violated the Commerce Clause).

[96] *Id.* at 429–30.

[97] *Id.*

[98] *Id.* at 434. *See also* Amar, *supra* note 91, at 1375 (explaining that "the Court's theory sweeps broadly").

[99] *See Prudential Ins.*, 328 U.S. at 437.

[100] Duro v. Reina, 495 U.S. 676, 688 (1990).

including the Indian Commerce Clause.[101] Whether other constitutional provisions limited the statutory scheme was a separate question.[102]

B. *Incorporation vs. Delegation*

The Court's *Prudential Insurance* decision closely relates to the distinction between incorporation and delegation. Incorporation of another sovereign's law into federal law does not violate the nondelegation doctrine. Here too, the Court's precedents distinguish sovereigns from federal agencies and private parties that do not have independent authority.

Federal incorporation of state law is routine.[103] Sometimes, the same federal law incorporates both state and tribal law concerning a subject matter.[104] Incorporation may be justified pragmatically on several grounds, including facilitating federal lawmaking and respecting local preferences.[105]

Commentators have distinguished between static and dynamic incorporation. Static incorporation occurs when Congress enacts a statute incorporating state law into federal law as of the time of the enactment.[106] Dynamic incorporation, by contrast, occurs when Congress enacts a statute that incorporates state law as it may change over time.[107] With dynamic incorporation, that is, the question becomes one about the content of state law at the time of application of the federal statute that incorporates it.

Static incorporation is not thought to raise a constitutional problem.[108] In theory, at least, with static incorporation, Congress surveyed state law, deliberated about it, and chose simply to incorporate what it found at the time of enactment. Dynamic incorporation involves Congress's decision to accept future changes to state law, changes that Congress cannot know in

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[101] *See* United States v. Lara, 541 U.S. 193, 200 (2004) (identifying the Indian Commerce Clause as one source of Congress's authority to remove federal law restriction). *See also id.* at 211 (Stevens, J., concurring) ("Given the fact that Congress can authorize the States to exercise—as *their own*—inherent powers that the Constitution has otherwise placed off limits, . . . I find nothing exceptional in the conclusion that it can also relax restrictions on an ancient inherent tribal power." (citing Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 437–38 (1946))).

[102] *Lara*, 541 U.S. at 205 ("Nor do we now consider the question whether the Constitution's Due Process or Equal Protection Clauses prohibit tribes from prosecuting a nonmember citizen of the United States.").

[103] Joshua M. Divine, *Statutory Federalism and Criminal Law*, 106 VA. L. REV. 127, 136 (2020) ("Not only does federal law routinely incorporate state law; it tends to do so dynamically.").

[104] *See id.* at 138 (discussing federal law regulating liquor sales in Indian Country). *See also supra* notes 19–25 and accompanying text (discussing this law and the Court's precedents rejecting a nondelegation challenge to it).

[105] *See, e.g.*, Divine, *supra* note 103 at 184; Daniel C. Richman, *Defining Crime, Delegating Authority—How Different Are Administrative Crimes?*, 39 YALE J. ON REGUL. 304, 347 (2022).

[106] Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1482 (2000).

[107] *See id.* at 1483–84 (discussing the Court's adoption of a dynamic incorporation model in the context of the Assimilative Crimes Act).

[108] Franklin v. United States, 216 U.S. 559, 567 (1910); United States v. Paul, 31 U.S. (6 Pet.) 141, 142 (1832).

advance and therefore cannot deliberate about. For this reason, dynamic incorporation has seemed to raise a nondelegation concern.[109]

In *United States v. Sharpnack*, the Court held that Congress may dynamically and prospectively incorporate state law into federal law.[110] The Assimilative Crimes Act (ACA) incorporates state criminal law into federal law for federal enclaves.[111] It authorizes federal prosecutors to prosecute violations of state criminal laws within those enclaves, which are not subject to state law.[112] Rather than enact a comprehensive criminal code for federal enclaves, Congress simply borrowed from state law.[113] The earliest versions of the Act used static incorporation, requiring Congress to enact a new statute every so often when it wanted to bring federal law into conformity with state law.[114] Congress switched to dynamic incorporation with the version of the ACA that the Court considered in *Sharpnack*.[115] As new state criminal laws are enacted, they are incorporated by the ACA into federal law for purposes of criminal prosecutions within federal enclaves.[116] This prospective incorporation of state law extends to Native people and the territories of Native nations.[117]

The Court held that this prospective incorporation of state law did not unconstitutionally delegate Congress's legislative power. The Court distinguished incorporation from delegation. The ACA was "a deliberate continuing adoption" of state law, not "a delegation by Congress of its legislative authority to the States."[118] It was not a delegation because Congress could at any time enact a new law to limit incorporation under the ACA.[119] The Court noted that incorporating state criminal law for federal enclaves was "especially appropriate" and the Act was a "practical accommodation" between federal and state policies.[120]

Critics argue that *Sharpnack*'s distinction between incorporation and delegation is mere sophistry.[121] In his dissenting opinion, Justice Douglas

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[109] *See* Siegel, *supra* note 106, at 1484–85 ("Dynamic incorporation at least poses an issue under the nondelegation doctrine."). *See also* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 48 (1825) (stating that a statute that "adopts future State laws to regulate" a federal official would be a delegation of Congress's legislative authority).

[110] 355 U.S. 286, 288, 293–94 (1958).

[111] *See id.* at 292–93.

[112] *Id.* at 287–89.

[113] *Id.* at 290–92 (discussing the Act's history).

[114] *See* United States v. Paul, 31 U.S. (6 Pet.) 141, 142 (1832).

[115] *Sharpnack*, 355 U.S. at 287–88, 293–94.

[116] *Id.* at 294 (explaining that the ACA is "a deliberate continuing adoption" of state law).

[117] The ACA applies within tribal reservations, dependent Indian communities, and Indian allotments by virtue of the Indian Country Crime Act. Thus, federal law incorporates state criminal laws for federal prosecutions of Indian on non-Indian and non-Indian on Indian crimes within Indian Country. *See, e.g.*, United States v. Smith, 925 F.3d 410, 418 (9th Cir. 2019).

[118] *Sharpnack*, 355 U.S. at 294.

[119] *Id.* ("Congress retains power to exclude a particular state law from the assimilative effect of the Act.").

[120] *Id.*

[121] Sarnoff, *supra* note 16, at 240–50 ("[T]he Court's distinction between a deliberate continuing adoption and effective delegation is untenable.").

asserted that "it is Congress that must determine the policy, for that is the essence of lawmaking."[122] Prospective incorporation, in other words, is a delegation of legislative authority because it results in state legislatures making federal law without meaningful congressional deliberation.[123]

To this day, however, the Court has maintained the jural distinction between incorporation and delegation. There are reasons to think that it will continue that distinction even if it revives the nondelegation doctrine for grants of authority to federal agencies. In *United States v. Christie*, for example, Justice Gorsuch, then a judge on the Tenth Circuit, described the "efficacy and economy of design" of the ACA and explained that federal courts may consider "the propriety of an assimilated charge" and dismiss them where improper.[124] Whatever else might be said of this scheme, the ACA does not result in the combination of lawmaking, law execution, and adjudication that has so troubled critics of the administrative state.[125]

In *Brackeen*, a majority of the Fifth Circuit held that *Sharpnack*'s distinction between incorporation and delegation extended to ICWA.[126] Writing for the en banc court, Judge Dennis explained that "§ 1915(c) incorporates the law of Indian tribes on a matter within the tribes' jurisdiction and makes it applicable in an area that might otherwise be beyond the tribes' power to regulate."[127] In addition, Judge Dennis relied upon the Court's decision in *United States v. Mazurie*, which concerned a grant of federal authority to Native nations in areas where federal and tribal authority overlapped.[128]

C. *Cooperation and Delegation*

In *United States v. Mazurie*, the Court upheld the federal criminal convictions of non-Indians who had sold liquor on a tribal reservation in violation of tribal and federal law.[129] Federal regulation of liquor sales in Indian Country goes back to the Founding Era.[130] In 1953, Congress enacted a law that authorized federal agencies and Native nations to regulate liquor

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[122] *Sharpnack*, 355 U.S. at 299 (Douglas, J., dissenting).

[123] *Id.* (arguing that dynamic incorporation may incorporate "a law that could never command a majority in the Congress or that in no sense reflected its will").

[124] 717 F.3d 1156, 1170–171 (10th Cir. 2013). *See* Richman, *supra* note 105, at 347 (quoting then-Tenth Circuit Judge Gorsuch).

[125] *Cf.* Divine, *supra* note 103, at 194 ("[T]he non-delegation concern in *Gundy* and many other cases is the concentration of power in one branch . . . .").

[126] Brackeen v. Haaland, 994 F.3d 249, 347 (5th Cir. 2021) (en banc), *aff'd in part, vacated in part, rev'd in part*, 143 S. Ct. 1609 (2023).

[127] *Id.*

[128] *Id.* at 347–48 (citing United States v. Mazurie, 419 U.S. 544 (1975)).

[129] *Mazurie*, 419 U.S. at 557–59.

[130] *See* Robert J. Miller & Maril Hazlett, *The "Drunken Indian": Myth Distilled into Reality Through Federal Indian Alcohol Policy*, 28 ARIZ. ST. L.J. 223, 240 (1996) ("The Act of 1802, its purpose in part to keep peace on the frontier, was the first federal legislation regulating the alcohol trade in Indian country.").

sales in Indian Country.[131] If a tribal government made a law regulating liquor sales, and the Secretary of the Interior approved that law, then the federal Department of Justice could enforce the law through criminal prosecutions.[132] The tribal law at issue in *Mazurie* required businesses to obtain tribal licenses to sell liquor.[133] After a hearing, at which the tribal government received evidence that the defendants had been allowing kids in their bar and disturbing neighbors, including elders, the tribal government denied the defendants' application for a license.[134] The defendants continued to sell liquor on the reservation anyway.[135] The federal government prosecuted them for violating federal law, which made it a federal crime to sell liquor in violation of the tribal ordinance, which had secretarial approval.[136] The court of appeals overturned their conviction, concluding that Congress had unconstitutionally delegated legislative authority to Native nations, which the court treated as private parties for purposes of the nondelegation doctrine.[137]

The Court reversed and held that there was no nondelegation problem.[138] Justice Rehnquist wrote for the Court.[139] First, the Court concluded that Congress had authority to enact a law regulating a non-Indian selling liquor on non-Indian owned land within a reservation.[140] Second, the Court distinguished the scheme from a statutory grant of authority to an agency, reasoning that the Court's intelligible principle cases were inapplicable because Native nations have "independent authority" to make and enforce law.[141] This independent authority included the "subject matter" of liquor sales on reservations.[142] That was enough to sustain the scheme against a nondelegation challenge.[143] The court of appeals was wrong to treat Native nations as private parties rather than as sovereigns with their own authority.[144]

The Court did not decide whether the tribal government could have criminalized the defendants' conduct if Congress had not enacted the statutory scheme.[145] It was enough that the scheme involved a subject matter

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[131] *See Mazurie*, 419 U.S. at 547 (discussing the passage of the Indian liquor laws).
[132] *Id.* at 547–49.
[133] *Id.* at 548.
[134] *Id.*
[135] *Id.*
[136] *Id.* at 548–49.
[137] *See id.* at 546–50 (describing the case).
[138] *Id.* at 556–57.
[139] *Id.* at 545.
[140] *Id.* at 555–56.
[141] *Id.* at 556–57 (distinguishing Pan. Refin. Co. v. Ryan, 293 U.S. 388 (1935)).
[142] *Id.* at 557.
[143] *Id.* (holding that "independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority").
[144] *Id.* ("Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations' . . . .").
[145] *Id.* ("We need not decide whether this independent authority is itself sufficient for the tribes to impose Ordinance No. 26.").

over which the tribal government had a "degree of independent authority."[146] To the extent that tribal authority did not on its own extend to the defendants' conduct, Congress had constitutionally "delegated" its own authority.[147]

Thus, even understood as a delegation of legislative authority, as the Court later described it in *Rice v. Rehner*, the scheme in *Mazurie* was constitutional.[148] Indeed, the Court in *Rehner* held that the same statute at issue in *Mazurie* had delegated federal authority to states as well.[149] In so holding, the Court rejected any nondelegation concern.[150]

For two reasons it is surprising that the *Mazurie* opinion's author was Justice Rehnquist. The first is that Justice Rehnquist repeatedly signaled an interest in reviving the nondelegation doctrine. His concern was that Congress had surrendered "the authority to make the 'hard policy choices' properly the task of the legislature."[151] Yet in one opinion, his concurrence in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, Justice Rehnquist distinguished delegations to agencies from delegations to Native nations.[152] As to the latter, Justice Rehnquist's approach was Thayerian, deferring to Congress "because of the delegatee's residual authority over particular subjects of regulation."[153]

The second reason for surprise is that Justice Rehnquist would write an opinion for the Court four years later holding that Native governments may not criminally prosecute non-Indians. The theory of his opinion in *Oliphant v. Suquamish Indian Tribe* was that the incorporation of Native nations within the United States had implicitly divested them of some of their authority in criminal matters.[154] The Court suggested, without much support, that the political branches had not recognized this aspect of tribal sovereignty.[155] Yet four years earlier Justice Rehnquist wrote *Mazurie*, which permitted the federal prosecution of a non-Indian for violating a tribal liquor law.

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[146] *Id.*

[147] *Id.*

[148] *See* 463 U.S. 713, 731 (1983) ("[W]e expressly declined to base our holding in *Mazurie* on the doctrine of tribal self-government; rather, we held merely that the tribal authority was sufficient to protect the congressional decision to delegate licensing authority.").

[149] *Id.* at 733.

[150] *Id.* ("By enacting § 1161, Congress intended to delegate a portion of its authority to the tribes as well as to the States . . . .").

[151] Am. Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting); *see* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring) (discussing the "important functions" of the nondelegation doctrine).

[152] 448 U.S. at 684 (Rehnquist, J., concurring).

[153] *Id.* (citing United States v. Mazurie, 419 U.S. 544 (1975)). *See* Thomas W. Merrill, *Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes*, 25 RUTGERS L.J. 621, 637 (1994) (contrasting Justice Rehnquist's Thayerian approach to government action classifying individuals on the basis of gender, illegitimacy, and alienage with his more searching approach to nondelegation questions).

[154] 435 U.S. 191, 209–10, 212 (1978).

[155] *See id.* at 206 ("[T]he commonly shared presumption of Congress, the Executive Branch, and lower federal courts that tribal courts do not have the power to try non-Indians carries considerable weight."). *But see* Matthew L.M. Fletcher, *Muskrat Textualism*, 116 NW. U. L. REV. 963, 986–87 (2022) (arguing on textualist grounds that *Oliphant* was wrongly decided).

The Court's decision in *Mazurie* has seemed opaque.[156] The scheme in *Mazurie* could be understood to recognize tribal authority and to incorporate tribal law into federal law by giving it a federal criminal legal consequence. Thus understood, the scheme did not delegate Congress's legislative power. The Article I nondelegation doctrine was therefore irrelevant.

The *Mazurie* Court did not, however, challenge the premise of the lower court and the parties that Congress had delegated authority to Native nations rather than recognizing tribal authority and incorporating tribal law.[157] The key to understanding the holding in *Mazurie* is its reliance upon *United States v. Curtiss-Wright* as the controlling precedent.[158] The Court analogized the scheme to a statute granting the executive branch discretion in an area where the executive has some independent authority.[159] In *Curtiss-Wright*, the Court rejected a nondelegation challenge to a joint resolution authorizing the President to proclaim an embargo.[160] This was an area in which the President had some independent authority.[161] Decided only a year after its two decisions striking down sections of the NIRA for lack of an intelligible principle,[162] *Curtiss-Wright* concluded that there was no nondelegation issue given the President's own power over the subject matter.[163] In *Mazurie*, the Court held that *Curtiss-Wright*, not the intelligible principle cases, controlled when Congress created a scheme for cooperative regulation of liquor sales in tribal territories.[164]

Curtiss-Wright is one of a set of cases in which the Court has considered congressional grants of authority within fields of overlapping authority.[165] In *Gundy v. United States*, Justice Gorsuch considered these cases in his

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[156] *See* L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 841 (1996) ("[T]he circular reasoning of *Mazurie* is that it is the delegation itself, not sovereignty, which creates the attribute.").

[157] *See Mazurie*, 419 U.S. at 557–58.

[158] *See id.* at 556–57 (holding that limits on delegation are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter") (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–22 (1936)).

[159] *Id.*

[160] *Curtiss-Wright*, 299 U.S. at 322.

[161] *Id.* at 319–20.

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress . . . .

Id.

[162] *See supra* notes 21–24 and accompanying text.

[163] *See Curtiss-Wright*, 299 U.S. at 322 ("In the light of the foregoing observations, it is evident that this court should not be in haste to apply a general rule which will have the effect of condemning legislation like that under review as constituting an unlawful delegation of legislative power.").

[164] *Mazurie*, 419 U.S. at 556–57 (citing *Curtiss-Wright*, 299 U.S. at 319–22).

[165] The Court has qualified *Curtiss-Wright*'s "description of the President's exclusive power," which was dicta, but has not rejected the principle that Congress has authority to delegate in areas of overlapping authority. Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 21 (2015) (noting that *Curtiss-Wright*'s "description of the President's exclusive power was not necessary to the holding . . . [,] which, after all, dealt with congressionally authorized action, not a unilateral Presidential determination").

dissenting opinion, which called for reviving the nondelegation doctrine.[166] *Gundy* concerned a federal statute that required individuals convicted of crimes involving sexual acts, sexual contact, or specified offenses against minors to register their name and address with a database tracking where such individuals resided and worked.[167] A person who was convicted for not registering challenged the conviction by arguing that the statute violated the nondelegation doctrine by authorizing the Attorney General to "specify the applicability" of the statute to individuals convicted before Congress enacted the statute.[168] The Court held that the statute did not violate the nondelegation doctrine because it contained an intelligible principle, namely, that the Attorney General would "apply [the statute's] registration requirements to pre-Act offenders as soon as feasible."[169] Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, dissented and would have applied a more robust nondelegation doctrine to conclude that the Act was unconstitutional.[170]

The so-called "Gorsuch test"[171] would eliminate the intelligible principle requirement and substitute three "guiding principles" for the nondelegation doctrine.[172] The first is that Congress must "make[] the policy decisions" but "may authorize another branch to 'fill up the details.'"[173] The second is that Congress may make a legal rule that "depend[s] on executive fact-finding."[174] The third principle, which is the important one here, is that "Congress may assign the executive and judicial branches certain non-legislative responsibilities."[175] As Justice Gorsuch explained, "Congress's legislative authority sometimes overlaps with authority the Constitution separately vests in another branch."[176] One example was *Curtiss-Wright*, which stood for the principle that there is "no separation-of-powers problem" when Congress "confers wide discretion" on the executive in an area of overlapping authority.[177] The statute at issue in *Gundy* could not,

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[166] 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting) (explaining that "Congress's legislative authority sometimes overlaps with authority the Constitution separately vests in another branch.").

[167] *Id.* at 2121–22 (plurality opinion) (describing the statute).

[168] *Id.* at 2126.

[169] *Id.* at 2129.

[170] *Id.* at 2131 (Gorsuch, J., dissenting).

[171] Johnathan Hall, *The Gorsuch Test:* Gundy v. United States*, Limiting the Administrative State, and the Future of Nondelegation*, 70 DUKE L.J. 175, 177 (2020).

[172] *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting).

[173] *Id.* (citing Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 31 (1825) as an example in which the Court held that Congress could authorize federal courts to modify state procedural rules when borrowing them).

[174] *Id.* (citing Cargo of Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 388 (1813), as an example in which the Court held that Congress could make the imposition of embargo contingent upon presidential fact-finding).

[175] *Id.* at 2137.

[176] *Id.*

[177] *Id.* at 2137 & n.42 (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936)). Justice Gorsuch also cited Justice Jackson's concurring opinion in *Youngstown Sheet & Tube*

Justice Gorsuch reasoned, be saved by the *Curtiss-Wright* principle because the executive branch did not have inherent authority to make rules for the subject matter area.[178]

In *Mazurie*, as in *Curtiss-Wright*, it was enough that Congress's statute addressed a subject matter of overlapping authority, and the grant of authority had a reasonable relation to the independent authority of the actor receiving the authority.[179] The *Curtiss-Wright* Court did not precisely pin down the line between congressional and executive power.[180] Similarly, in *Mazurie*, it was enough that Native nations have independent authority to regulate the subject matter of liquor sales on their reservations. Congress's statute was reasonably related to that independent tribal authority, which sufficed to shield the scheme from a nondelegation challenge.[181]

It might be objected that *Curtiss-Wright*'s principle should be limited to cases of overlap between the branches of the federal government.[182] But the Court has not drawn that line. For example, in *Loving v. United States*, the Court quoted *Mazurie* when applying the *Curtiss-Wright* principle to a statutory grant of authority to the President.[183] In *Loving*, the Court stressed that the Constitution's text refers to presidential power.[184] The Constitution's text also refers to tribal power: The Commerce Clause refers to "Indian tribes" alongside other two other sovereigns, and the Constitution exempts "Indians not taxed" from apportionment, which also reflects the idea of tribal sovereignty.[185] By recognizing and "safeguard[ing] the sovereign authority

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Co. v. Sawyer, 343 U.S. 579, 635 (1952), which famously sketched a three-part framework for analyzing the allocation of presidential and congressional power and stated that "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *See id.*

[178] *Gundy*, 139 S. Ct. at 2143–44 (concluding that statute did "not involve an area of overlapping authority with the executive").

[179] *See* United States v. Mazurie, 419 U.S. 544, 557 (1975) (expressly declining to draw the line between tribal and federal authority because it was enough that tribal government had "a certain degree of independent authority" over the subject matter).

[180] *See Curtiss-Wright*, 299 U.S. at 319–20 (reasoning that the President has independent and even "exclusive" authority in the field of foreign affairs and that Congress had legislated an aspect of foreign affairs as to which its own authority also extended).

[181] *Mazurie*, 419 U.S. at 557 ("[W]hen Congress delegated its authority to control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life."). See Lazerwitz, *supra* note 10, at 1057 (arguing that *Mazurie* stands for proposition that "[w]hen Congress affirms tribal sovereignty, it exercises its plenary power to "grant" tribal governments authority closely related to the inherent powers they currently hold").

[182] Sarnoff, *supra* note 16, at 253 n.245 ("*United States v. Curtiss-Wright Export Corp.* [] related to concerns regarding the allocation of power among the *federal* branches.").

[183] Loving v. United States, 517 U.S. 748, 772 (1996) ("The delegated duty, then, is interlinked with duties already assigned to the President by express terms of the Constitution, and the same limitations on delegation do not apply 'where the entity exercising the delegated authority itself possesses independent authority over the subject matter.'" (quoting *Mazurie*, 419 U.S. at 556–57)).

[184] *Id.*

[185] *See* Haaland v. Brackeen, 143 S. Ct. 1609, 1648 (2023) (Gorsuch, J., concurring) (discussing U.S. CONST. art. I, § 8, cl. 3, and U.S. CONST. art. I, § 2, cl. 3).

of Tribes,"[186] the Constitution provides a predicate for applying *Curtiss-Wright*'s principle to them.

Congress has latitude to grant authority to Native nations in areas of overlapping authority. The nondelegation doctrine does not apply where Congress is legislating with respect to "matters that affect the internal and social relations of tribal life."[187] The Court has sometimes defined such matters more narrowly than Congress.[188] But the Court's shifting common law decisions about tribal authority do not define a constitutional line between permissible cooperative schemes and impermissible delegations of legislative authority. To the contrary, as the Court put it in *Mazurie*, it is for Congress to recognize independent tribal authority, including in cases where tribal authority "could extend over non-Indians."[189] It is also for Congress to decide whether to grant statutory authority that is reasonably connected with independent tribal authority over a subject matter.[190]

In short, the Court's precedents hold that Congress may recognize independent tribal authority, may incorporate tribal law into federal law, and may grant authority to Native nations in areas where tribal and federal authority overlap. The Court has never applied the nondelegation doctrine to Native nations because their independent authority distinguishes them from federal agencies and private parties.

III. DELEGATION CONCERNS AND TRIBAL SELF-GOVERNMENT

Given the Court's precedents, the burden is on those who would change the nondelegation doctrine and extend it to sovereigns such as Native nations. Bracketing the ongoing debates about history and original meaning,[191] the strongest argument for changing the doctrine is that the Court's jurisprudence elevates form over function. Put differently, it is not clear "why tribal autonomy interests [have] outweighed delegation concerns."[192] This Part answers that question.

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[186] *Id.* at 1650.

[187] *Mazurie*, 419 U.S. at 557.

[188] See *supra* notes 62–68 and accompanying text.

[189] *Mazurie*, 419 U.S. at 558–59.

[190] *Id.*

[191] Scholars have debated whether constitutional history supports a nondelegation doctrine for federal agencies and private parties. *Compare* Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021) (arguing that the nondelegation doctrine has footing in original understanding), *with* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021) (arguing that the doctrine does not have originalist footing).

[192] Sarnoff, *supra* note 16, at 253.

A. *Which Concerns Are Delegation Concerns?*

At bottom, there are two types of delegation concerns: welfarist and democratic.[193] The welfarist concern is that delegation makes society worse off. The democratic concern is that delegation makes lawmaking less democratic. Both concerns posit that there is something "special about delegation" that reduces social welfare and undermines democracy.[194]

Several common arguments against "delegation" to Native nations do not, however, single out something special about delegation. In other words, they do not single out something especially objectionable about Congress transferring its power to someone else. Instead, they are really arguments against tribal governments.

One objection is that Native nations are not accountable to nonmembers. The Court raised this concern when it held that federal common law did not permit Native nations to prosecute nonmember Indians. Justice Kennedy's opinion for the Court pointed to the principle of consent of the governed.[195] Congress, as we have seen, abrogated the Court's common law limit on the exercise of tribal sovereignty. Delegation has nothing to do with this sort of objection, which is, more than anything, a political theory argument about what makes authority legitimate.[196]

The Court has recognized as much. In *Mazurie*, the Court addressed the defendants' argument that there was a nondelegation problem because they were not members and could not vote in tribal elections.[197] That was no reason to hold that Congress had violated the nondelegation doctrine because it had nothing to do with delegation as such. A nonmember could raise the same complaint about a tribal government exercising tribal authority.

Another objection to tribal authority is that Native governments act arbitrarily. This is not a delegation concern. It applies no matter what authority (tribal, federal, etc.) the tribal government exercises. Therefore, the *Mazurie* Court was right that this objection too did not go to the nondelegation issue.[198]

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[193] *See* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1745 (2002) ("The critics of delegation have advanced numerous arguments, yet they collapse into two classes.").

[194] *Id.* at 1745–46.

[195] Duro v. Reina, 495 U.S. 676, 694 (1990) (concluding that the Court should "reject an extension of tribal authority over those who have not given the consent of the governed").

[196] The argument also "proves too much." *See* Davis, *supra* note 59, at 460 (explaining that the argument would also call into question the authority of state governments to prosecute citizens of other states and the authority of the federal government to prosecute non-citizens).

[197] United States v. Mazurie, 419 U.S. 544, 557 (1975) ("The fact that the Mazuries could not become members of the tribe, and therefore could not participate in the tribal government, does not alter our conclusion.").

[198] *See id.* at 558 n.12.

A third objection is that we have too much law.[199] The concern with an "excess of law-making" is that too much law means too many constraints on individual freedom.[200] It is hard to know what to make of this objection when it comes to Native nations. If there were no tribal governments, there would be no tribal law. Whether that would increase individual freedom is by no means as clear as it might seem, however. After all, tribal governments can act in ways that increase individual freedom. The scheme at issue in *Mazurie* is one example. Federal law generally prohibits the sale of liquor within Indian Country.[201] Nonetheless, Congress provided for an "opt-out," that is, a "safe harbor" within which a person could sell liquor without violating federal law so long as they complied with tribal law and state law.[202]

In any event, some functional arguments for the nondelegation doctrine might counsel in favor of tribal authority. Justice Gorsuch identified one such argument in his dissenting opinion in *Gundy*.[203] The argument was that a robust nondelegation doctrine would protect minorities by channeling lawmaking through Congress, where "any new law would have to secure the approval of a supermajority of the people's representatives."[204] This requirement protects minorities by ensuring that their voices are heard.[205] Tribal governance goes more than one step further by empowering Native people to make and enforce their own laws. Ultimately, that is an argument for federal recognition of tribal sovereignty and support for tribal governance.

B. *Which Delegation Concerns Are Plausible?*

There are nondelegation arguments that are not attacks on tribal sovereignty itself. The most plausible argument focuses on any statutory scheme in which a tribal government may take an action that determines rights and duties under federal law. For example, the statute in *Mazurie* provided that persons could sell liquor in Indian Country without violating federal law only if they obtained tribal and state licenses. Tribal governments could change their ordinances and thus the licensing

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[199] *See generally* Mila Sohoni, *The Idea of "Too Much Law"*, 80 FORDHAM L. REV. 1585, 1591 (2012) (unpacking "hyperlexis," or the idea that we have too much law).

[200] Gundy v. United States, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting) (quoting THE FEDERALIST No. 61, at 342 (Alexander Hamilton) (P.F. Collier & Son, 1901) (1788)).

[201] *See* 18 U.S.C. § 1154 (imposing fines or imprisonment on those who distribute alcohol in Indian Country).

[202] *See* Act of Aug. 15, 1953, Pub. L. No. 277, ch. 502, § 2, 67 Stat. 586 (codified as amended at 18 U.S.C. § 1161) (declaring that Indian liquor laws "shall not apply . . . to any act or transaction within any area of Indian country provided such act or transaction is in conformity with both the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country"); Divine, *supra* note 103, at 138 (describing the scheme as an "opt-out" that involved a "safe harbor" created by tribal law and state law).

[203] *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting).

[204] *Id.*

[205] *Id.* (arguing that legislative process "assured minorities that their votes would often decide the fate of proposed legislation").

requirements, with approval from the Secretary of the Interior. The argument is that this sort of reliance upon tribal (and state) governments, which is a kind of dynamic incorporation, gives away Congress's legislative power.[206]

It is worth noting that this argument does not apply to federal recognition of independent tribal authority. None of the true delegation concerns do because federal recognition does not involve a transfer of federal authority. Thus, if the functional concern is about national law being made by someone other than Congress, when it is Congress that is supposed to be responsible for national lawmaking, there is a functional reason for the jural distinction between recognition and delegation.

By contrast, there is a plausible nondelegation concern about dynamic incorporation because it results in changes to the content of national law without new congressional legislation.[207] This giveaway of federal power may be bad for social welfare and democracy for the same reason: delegation makes it harder to resist the policies that result. The welfarist version of this argument focuses on the welfare impacts of transfers that tribes (or states) make, while the democratic version focuses on the inability of national constituencies to hold tribal (or state) officials directly accountable.[208]

The welfarist objection might be that Congress is more likely to enact welfare-enhancing laws than tribal governments. However, there is no reason to assume that is the case, especially for the typical federal law that relies upon tribal governments. It is just as plausible to assume that tribal governments are more likely to enact welfare-enhancing laws concerning tribal matters.[209]

Even assuming that tribal governments sometimes make laws that are not welfare-enhancing, it still is not clear that the judicial response should be to create a nondelegation doctrine for Native nations. There may be no need for judicial intervention on welfarist grounds. Congress may itself respond by amending the relevant statute, for example.[210] In *Sharpnack*, the Court reasoned that this possibility supported the constitutionality of dynamic incorporation of state law through the ACA.[211] The criticism of

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[206] Sarnoff, *supra* note 16, at 253 ("[T]he [*Mazurie*] Court did not discuss why Congress could delegate unconstrained legislative power to the tribe or why tribal autonomy interests outweighed delegation concerns.").

[207] This, I take it, is the objection to the *Sharpnack* Court's distinction between incorporation and delegation.

[208] *See* Sarnoff, *supra* note 16, at 271 (making the democratic version of the argument); *cf.* Posner & Vermeule, *supra* note 193, at 1745–48 (sketching welfarist and democratic versions of nondelegation arguments).

[209] *Cf.* Divine, *supra* note 103, at 184 ("[I]t is not clear that a nationally representative body cannot conclude that the problem of crime is primarily local, not national, and that criminal laws should thus conform to local laws and the facts and needs underlying those laws. Congress expresses this intent often.").

[210] *Cf.* Posner & Vermeule, *supra* note 193, at 1746 (arguing that it is likely that "Congress wants to exert its power through the agencies, and retains power to discipline agencies that do not make the right transfers to the right interest groups").

[211] United States v. Sharpnack, 355 U.S. 286, 294 (1958).

Sharpnack is that the Court has never suggested that Congress's authority to amend a statute means that Congress may constitutionally delegate authority to a federal agency without supplying an intelligible principle. But that difference might be justified because the executive can veto a congressional statute revoking delegated authority while a state (or a tribe) cannot. That is, "delegation is more problematic when it is harder to reclaim."[212]

The democratic objection is that national lawmakers should be accountable to national constituencies who are affected by national law. Tribal governments are accountable to tribal constituencies, not national ones. By giving federal authority to Native nations, and thus effectively transforming them into national lawmakers, Congress undermines the democratic principle that the people should be able to hold their lawmakers accountable.[213] A variation on this argument is that voters will be confused when Congress delegates authority and not know whom to blame for policies that they find objectionable.[214]

There are a few responses to this democratic objection. One is to dispute the premise that delegation creates any special concern that does not apply to other types of legislation. When it comes to democracy, for example, it is not clear that citizens would be unable to hold Congress to account when they object to a statute delegating authority to another actor, or to the policy that results, whether the delegation is to a tribal government or a federal agency.[215] Another response is that the implications of democracy are complex and may be indeterminate in the case of Native nations. One could easily argue that democracy favors giving Native nations greater authority than they currently have over matters that involve their interests.[216]

C. *Tribal Self-Government and Federal Obligations*

Delegation concerns should be assessed within the context of the federal government's responsibilities toward Native nations, including the obligation to support tribal self-government. Meeting these obligations may outweigh delegation concerns, especially because they depend upon contestable empirical assumptions and value judgments concerning

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[212] Amar, *supra* note 91, at 1378, 1380.

[213] This argument is different from the argument that tribal governments should not have authority over nonmembers who cannot vote in tribal elections. *See supra* notes 195–197 and accompanying text. That argument also appeals to democracy but does not single out the delegation of federal legislative power for special concern.

[214] Gundy v. United States, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting) (positing that delegation creates "opportunities for finger-pointing").

[215] *See* Posner & Vermeule, *supra* note 193, at 1748 (noting that some critics believe delegation is undemocratic because it lessens congressional accountability).

[216] *See* Davis, *supra* note 59, at 465–66 (arguing that increased recognition of "Tribal sovereignty creates spaces for Indians to participate in American democracy that are not secured by individual rights or votes alone"); *cf.* Posner & Vermeule, *supra* note 193, at 1754 ("The problem with democratic critiques of delegation is that democratic theories are usually indeterminate at the institutional level.").

delegation and Native nations.[217] Deferential judicial review is the appropriate approach in this context. A robust nondelegation doctrine for Native nations would upend this tradition of judicial deference.

As Part II showed, the Court has taken a deferential approach to Congress's powers to recognize particular instances of tribal sovereignty, to incorporate tribal law into federal law, and to grant authority to a tribal government in an area of overlapping authority. This deferential approach is consistent with the rational-basis standard of review for Indian affairs statutes. This standard of review reflects differences between the United States' government-to-government relationship with Native nations on the one hand and Congress's relationship with federal agencies and private delegates on the other.

The Court adopted a rational-basis test for Indian affairs statutes in *Morton v. Mancari*.[218] That case concerned employment preferences for Indian people applying to or already working within the Bureau of Indian Affairs (BIA). Non-Indian employees of the BIA challenged the preferences under Title VII and the equal protection component of the Fifth Amendment Due Process Clause.[219] They argued that the federal government was discriminating against them on the basis of race.[220] The Court rejected their arguments, holding that Title VII did not repeal the preexisting preferences, which Congress authorized in the Indian Reorganization Act, and that there was no prohibited racial discrimination.[221] Indian status, the Court concluded, was a political classification, not a racial one.[222] The preferences were therefore subject to rational-basis review.[223]

Mancari's rational-basis review is tailored to the Indian affairs context. As the Court noted, "[o]n numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment," given the "unique legal status" of Native peoples.[224] The test is whether "the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians."[225] Where Congress's legislation is rationally related to this unique obligation, "such legislative judgments will not be disturbed."[226]

The employment preferences at issue in *Mancari* passed that test. The unique obligation of Congress includes "further[ing] the cause of Indian

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[217] *See* Sarnoff, *supra* note 16, at 253 (asking "why tribal autonomy interests outweighed delegation concerns" in *Mazurie*).

[218] 417 U.S. 535 (1974).

[219] *Id.* at 537.

[220] *Id.* at 547.

[221] *Id.* at 551, 555.

[222] *See id.* at 553–54 ("[T]his preference does not constitute 'racial discrimination.' Indeed, it is not even a 'racial' preference.").

[223] *See id.* at 555.

[224] *Id.* at 554–55.

[225] *Id.* at 555.

[226] *Id.*

self-government."[227] The BIA preference for Indian employees was "reasonably and directly related" to that goal by increasing "participation by the governed in the governing agency."[228] Thus, because the preference was "reasonable and rationally designed to further Indian self-government," the Court could not "say that Congress' classification violate[d] due process."[229]

The Court has applied rational-basis review to constitutional cases that involved the structure of the federal system, jurisdiction, and tribal sovereignty. For example, exclusive tribal jurisdiction over specific matters has passed the *Mancari* rational-basis test. In *Fisher v. District Court*, the Court held that a tribal court had exclusive jurisdiction over a child custody proceeding between tribal members.[230] The state courts therefore did not have concurrent jurisdiction. Federal recognition of the tribe's exclusive jurisdiction rationally furthered "the congressional policy of Indian self-government," which was embodied in tribe-specific statutes and the Indian Reorganization Act, and thus did not violate equal protection.[231]

What *Mancari* shares with *Lara* and *Mazurie* is judicial modesty. In all three cases, the Court deferred to Congress because there was no clear constitutional violation. Where there is "reasonable doubt," this Thayerian approach counsels judicial deference to Congress's judgments.[232] In *Lara*, the Court stressed that there was "no explicit language" restricting Congress's power "to relax restrictions on tribal sovereignty."[233] In *Mazurie*, the Court emphasized congressional authority to recognize tribal governments and decide whether to restrict exercises of tribal sovereignty.[234] And in *Mancari*, the Court adopted a deferential standard of review that does not disturb Indian affairs legislation so long as it is rationally related to fulfilling federal obligations to Native people.[235]

Reviving the nondelegation doctrine and applying it to Native nations would undermine this tradition of judicial deference. The argument is not that Congress's power in Indian affairs is without limit or beyond judicial review. In *Brackeen*, the Court stated that Congress's power stems from the Constitution and is limited by it.[236] The point, rather, is that the Court's

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[227] *Id.* at 554.

[228] *Id.*

[229] *Id.* at 555.

[230] 424 U.S. 382, 389 (1976).

[231] *Id.* at 391 (citing *Mancari*, 417 U.S. at 551–55).

[232] James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 151, 154 (1893). *See* Maggie Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, 132 YALE L.J. 2205, 2279 (2022) ("The Court has developed a unique and distinctively Thayerian form of rational-basis review . . . ."); Fletcher, *supra* note 13, at 547 ("What the Court actually did in *Morton v. Mancari* is hold that congressional Indian affairs legislation must be reasonable and rationally related to the United States' fulfillment of its duty of protection to Indians and tribes.").

[233] United States v. Lara, 541 U.S. 193, 204 (2004).

[234] United States v. Mazurie, 419 U.S. 544, 558 (1975).

[235] *Id.* at 555.

[236] Haaland v. Brackeen, 143 S. Ct. 1609, 1627 (2023) ("A power unmoored from the Constitution would lack both justification and limits. So like the rest of its legislative powers, Congress's authority to regulate Indians must derive from the Constitution, not the atmosphere.").

jurisprudence concerning Native nations and delegation is consistent with the standard of rational-basis review for Indian affairs legislation.

D. *Coda on the Private Nondelegation Doctrine and Due Process*

In particular cases, there may be rights-related limits to the application of statutes that rely upon Native nations. The Court's jurisprudence does not rule out the possibility of external constitutional limits that do not flow from Article I.[237]

Due process, it is sometimes argued, constrains the legislature in structuring a grant of authority. The leading case is *Carter Coal*, which has been read to stand for a private nondelegation doctrine. There, the Court concluded that "one person may not be entrusted with the power to regulate the business of another, and especially of a competitor."[238] This is an application of the maxim that "no man can be a judge in his own case."[239]

The argument that the private nondelegation doctrine applies to Native nations relies upon the Court's jurisprudence concerning the criminal and civil jurisdiction of Native nations. In the *Brackeen* litigation, the district court, as well as several judges on the court of appeals, concluded that Native nations are stripped of their jural status as sovereigns for purposes of the private nondelegation doctrine.[240] Transfers of federal authority to Native nations, in other words, are just as suspect as transfers of federal authority to private parties. This argument begins with the idea that the Court's jurisprudence divests Native nations of some aspects of their sovereignty.[241] Where this limited sovereignty runs out under the Court's doctrine, the argument goes, Native nations become indistinguishable from private parties for nondelegation purposes.[242] If Congress grants any authority to

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[237] In *Lara*, the Court held that Congress had the legislative power to recognize and reaffirm Native nations' independent authority, while noting that there might be individual constitutional rights claims in a future case. 541 U.S. at 207–09. Similarly, in *Mazurie*, the Court left open whether there are independent constitutional limits other than an Article I nondelegation doctrine when Congress grants authority to a Native nation. 419 U.S. at 558 n.12 ("Whether and to what extent the Fifth Amendment would be available to correct arbitrary or discriminatory tribal exercise of its delegated federal authority must therefore await decision in a case in which the issue is squarely presented and appropriately briefed."). The Court, noted, however, two "potential sources of protection against arbitrary tribal action" that might suffice to address individual rights concerns: the Indian Civil Rights Act, which imposes most of the Bill of Rights upon tribal governments, and the Secretary of the Interior's authority to approve a tribal ordinance. *Id.*

[238] Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).

[239] Volokh, *supra* note 84, at 257 (citation omitted). *See generally* Adrian Vermeule, *Contra* Nemo Iudex in Sua Causa*: The Limits of Impartiality*, 122 YALE L.J. 384, 384 (2012) (arguing that this maxim "is a misleading half-truth").

[240] Brackeen v. Zinke, 338 F. Supp. 3d 514, 536 (N.D. Tex. 2018), *rev'd sub nom.*, 937 F.3d 406 (5th Cir. 2019); Brackeen v. Haaland, 994 F.3d 249, 419 (5th Cir. 2021) (en banc), *aff'd in part, vacated in part, rev'd in part*, 143 S. Ct. 1609 (2023).

[241] *See Brackeen*, 994 F.3d at 422 (asserting that "Indians have no sovereignty over non-Indians and no sovereignty over state proceedings").

[242] *See id.* ("By any measure, handing off regulatory power to a private entity is 'legislative delegation in its most obnoxious form.'") (quoting Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 62, 135 (2015) (Alito, J., concurring)).

Native nations that they may not lawfully exercise under the Court's current precedents, then that grant is a delegation of legislative authority to a private party.

The Court's precedents say otherwise. In *Mazurie*, the Court assumed that Congress had granted authority to Native nations and still held that their jural status as sovereigns distinguished the grant from a delegation to a private party.[243] The Court, moreover, has held that Congress may abrogate the Court's precedents concerning tribal jurisdiction, which is impossible to square with the idea that those precedents mark a constitutional line for nondelegation purposes.[244] In the context of states, by way of comparison, the Court has never held that if Congress grants authority that the states may not lawfully exercise under the Court's current precedents, then the grant is effectively a private delegation.[245] To the contrary, in its Commerce Clause jurisprudence, the Court has held that Congress may authorize states to take actions that would violate the Commerce Clause absent congressional legislation.[246]

Thus, the private nondelegation doctrine does not apply to Native nations. The question remains whether due process constrains Congress in some other way when it wants to rely upon Native nations to implement policy concerning matters of overlapping authority and shared concern.[247] Due process "is typically unrelated to the *structure* of delegations."[248] But not always. There may be a structural due process problem when a legislature creates a scheme where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."[249] The Court has applied this standard to adjudicatory settings, where due

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[243] United States v. Mazurie, 419 U.S. 544, 557 (1975) ("It is necessary only to state that the independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority 'to regulate Commerce . . . with the Indian tribes.'").

[244] United States v. Lara, 541 U.S. 193, 199 (2004) ("The statute says that it 'recognize[s] and affirm[s]' in each tribe the '*inherent*' *tribal* power (not delegated federal power) to prosecute nonmember Indians for misdemeanors.").

[245] *Cf.* Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 434–35 (1946) ("This broad authority Congress may exercise alone, . . . or in conjunction with coordinated action by the states, in which case limitations imposed for the preservation of their powers become inoperative and only those designed to forbid action altogether by any power or combination of powers in our governmental system remain effective.").

[246] *Id.*

[247] There are other non-Article I arguments for limiting the structure of delegations. For example, this Essay does not address the argument that Congress would violate the Appointments Clause and the President's Article II powers by delegating authority to non-federal actors such as Native nations, states, or private parties. *See* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 351–52 (2002) (explaining that "it is constitutionally impossible for Congress to vest executive authority in [state officials or private parties] without in some way implicating the President's powers under Article II.").

[248] Volokh, *supra* note 84, at 221.

[249] Withrow v. Larkin, 421 U.S. 35, 47 (1975). *See* Volokh, *supra* note 84, at 222 ("Acting badly is bad, but the bias caselaw doesn't demand proof of actual bad acts; it condemns biased structures that make bad acts more probable, and the appearance of such bias.").

process requires more procedure than it does in legislative settings but has not limited it to cases involving private recipients of delegated authority.[250]

The cases make clear, however, that this due process concern does not require a bright-line rule against grants of authority to public or private actors. That is true even in adjudicatory settings.[251] Here too, the rational-basis standard of review from *Mancari*, which involved a Fifth Amendment due process claim, is relevant.[252] Blanket assertions of bias, such as those made by the defendants in *Mazurie*,[253] do not make out a viable due process claim, much less one that would justify a blanket rule against statutes that involve Native nations in federal schemes.

CONCLUSION

There has never been a nondelegation doctrine barring Congress from relying upon Native nations to implement policies that address shared concerns. The Court has not applied the intelligible principle requirement in cases involving states and Native nations. Nor has it applied the private nondelegation doctrine to bar to a federal statute that relies upon tribal implementation. To the contrary, the Court has distinguished Native nations from federal agencies and private parties in its nondelegation cases. There are good functional reasons for this distinction, which provide Congress latitude to fulfill the federal government's obligations to support tribal self-government.

My argument has implications beyond nondelegation. The structural arguments launched against ICWA in *Brackeen* assumed that broad federal power—of the sort that sustained the New Deal—is necessary to sustain tribal sovereignty. On that assumption, tribal sovereignty rises or falls with federal power, which the Court seems set to shrink. But jurisprudentially, the assumption is false. As the Roberts Court's case law shows, tribal sovereignty has independent force separate from exercises of federal power and grants of federal authority.

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[250] Volokh, supra note 84, at 222–24.

[251] *See* Tumey v. Ohio, 273 U.S. 510, 522 (1927) ("[O]fficers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is, of course, the general rule. . . . Nice questions, however, often arise as to what the degree or nature of the interest must be.").

[252] Morton v. Mancari, 417 U.S. 535, 555 (1974).

[253] *See* United States v. Mazurie, 419 U.S. 544, 558 n.12 (1975) (noting that respondents made a blanket assertion that tribal governments do not respect equal protection and due process rights of non-Indians, but did not make specific allegations about a lack of equal protection or due process in the tribal proceedings concerning their application for a license).