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## INTRODUCTION

“Few things confound the Supreme Court more than Indian law,” says Professor Stephen Wermiel.<sup>1</sup> The Supreme Court has heard an average of two Indian<sup>2</sup> law cases per term since 1953,<sup>3</sup> including at least four cases during October Term 2015,<sup>4</sup> and still, several jurists have conceded that this area of law is a mess. Justice Thomas has expressed his frustration with the Court’s doctrinal “confusion” in Indian law cases, writing, “the time has come to reexamine the premises and logic of our tribal sovereignty cases.”<sup>5</sup> A few years ago, Judge Wollman complained during oral argument that in Indian law cases, “the Supreme Court sort of makes it up as it goes along.”<sup>6</sup> The Chief Justice of the North Dakota Supreme Court has remarked: “[I]n matters involving jurisdiction on Indian reservations, we often are unable to know what the law is until the United States Supreme Court tells us what it is.”<sup>7</sup> This edition of *Developments in the Law* does not clear up that confusion. Instead, the five Chapters that make up this issue “aspire to explain and prescribe Indian law where . . . it counts — on the ground.”<sup>8</sup>

Professor Philip Frickey’s skepticism about imposing doctrinal coherence on Indian law may have inspired his call for scholarship in Indian law to move away from “abstract formulation[s] about the nature and extent of tribal sovereignty” toward a more “functional jurisprudence, in which objective, scholarly work interrogates the law and

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<sup>1</sup> Stephen Wermiel, *SCOTUS for Law Students: Indian Cases at the Court*, SCOTUSBLOG (Jan. 4, 2016, 9:48 AM), <http://www.scotusblog.com/2016/01/scotus-for-law-students-indian-cases-at-the-court> [http://perma.cc/5JPK-8TPG].

<sup>2</sup> This edition of *Developments in the Law* uses the terms “Indian,” “American Indian,” and “Native American” to refer to indigenous peoples of the contiguous forty-eight states. The terms “Indian” and “American Indian” are most commonly used in federal law, and “Native American” is popular in academic literature. See, e.g., DAVID E. WILKINS & HEIDI KIWETINEPINESIHK STARK, *AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM* xvii (3d ed. 2011).

<sup>3</sup> Matthew L.M. Fletcher, *The Supreme Court’s Indian Problem*, 59 HASTINGS L.J. 579, 579 (2008).

<sup>4</sup> See *Menominee Indian Tribe of Wis. v. United States*, No. 14-510 (U.S. Jan. 25, 2016); *United States v. Bryant*, 136 S. Ct. 690 (2015) (mem.); *Nebraska v. Parker*, 136 S. Ct. 27 (2015) (mem.); *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 135 S. Ct. 2833 (2015) (mem.).

<sup>5</sup> *United States v. Lara*, 541 U.S. 193, 214 (2004) (Thomas, J., concurring in the judgment).

<sup>6</sup> Fletcher, *supra* note 3, at 579 (quoting Oral Argument at 14:51, *Prescott v. Little Six, Inc.*, 387 F.3d 753 (8th Cir. 2004) (No. 03-3702), <http://media-oa.ca8.uscourts.gov/Oaudio/2004/6/033702.mp3>).

<sup>7</sup> *Winer v. Penny Enters.*, 674 N.W.2d 9, 18 (N.D. 2004) (VandeWalle, C.J., concurring specially).

<sup>8</sup> Philip P. Frickey, *Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law*, 38 CONN. L. REV. 649, 651 (2006).

life on the ground.”<sup>9</sup> Frickey argues that the source of doctrinal incoherence in Indian law is the paradox at the heart of an enterprise in which the Court applies the Constitution to a group, Indian tribes, that has “never been brought into the United States through formal means, such as by a constitutional amendment incorporating them into the federal-state design.”<sup>10</sup> After all, federal Indian law is “the law governing the historical and ongoing colonial process underpinning the United States.”<sup>11</sup> For Frickey, the Court’s search for doctrinal coherence comes with the consequence of “displacing Congress as the federal agent with front-line responsibility for federal Indian policy,” even though the Court has “an even more inferior constitutional pedigree than Congress has” to “inject itself into Indian affairs.”<sup>12</sup>

In a review of the field since Frickey issued his challenge for more functional scholarship, Professor Matthew Fletcher found that “several American Indian legal scholars are doing their damndest to meet Frickey’s call. Federal and state judges are not the only audience. Legal scholarship is for practicing attorneys; tribal, state, and federal leaders; and many others, too.”<sup>13</sup> This edition of *Developments in the Law* falls within that functional trend in Indian law scholarship by examining how law interacts with real problems — problems like skewed incentives in some tribal governments, drunk drivers evading tribal law enforcement, obstacles to administering justice according to community values, barriers to Native Americans voting in state and federal elections, and exploitation of international indigenous groups by transnational extraction industries. This edition is also not just for judges. The Chapters have recommendations for Congress, tribal governments and their citizens, Indian law practitioners, and international human rights activists, too.

Any study of Indian law will be influenced by its long and complicated history. Over the last two centuries,<sup>14</sup> federal policies toward Native Americans went through “drastic fits and starts[,] . . . twice cycl[ing] between coercing assimilation and encouraging tribal self-government.”<sup>15</sup> After an aggressive policy of breaking down reserva-

<sup>9</sup> *Id.* at 660.

<sup>10</sup> Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 436 (2005).

<sup>11</sup> *Id.* at 434.

<sup>12</sup> *Id.* at 436.

<sup>13</sup> Matthew L.M. Fletcher, *American Indian Legal Scholarship and the Courts: Heeding Frickey’s Call*, 4 CALIF. L. REV. CIR. 1, 18 (2013), <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1004&context=clrcircuit> [<http://perma.cc/F2SW-5ZFY>].

<sup>14</sup> Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137, 1138 (1990).

<sup>15</sup> See Dawes Act, ch. 119, 24 Stat. 388 (1887), *repealed by* Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, §§ 101-103, 114 Stat. 1991, 1991-2006 (codified at 25 U.S.C. §§ 2201-2219 (2012)).

tions,<sup>16</sup> Congress in 1934 adopted the goal of self-determination for tribes with the Indian Reorganization Act<sup>17</sup> (IRA). The IRA ended the federal government's land grab on reservations and instead empowered the Secretary of the Interior to take land into trust for the benefit of Indian tribes;<sup>18</sup> it also offered tribes the opportunity to reorganize their governments with federally approved constitutions,<sup>19</sup> allowed tribes to create corporate arms,<sup>20</sup> and instituted an Indian hiring preference in federal agencies that handled Indian affairs.<sup>21</sup> In 1953, Congress reversed course, choosing "an effort to terminate the sovereignty of tribes and eliminate the legal distinctions between Indians and non-Indians."<sup>22</sup> In 1970, President Nixon announced that the federal government would again commit to supporting tribal sovereignty,<sup>23</sup> and Congress affirmed this commitment by passing, among other things, the Indian Self-Determination and Education Assistance Act<sup>24</sup> in 1975.<sup>25</sup> Respecting tribal sovereignty has been the formal policy of the federal government ever since. Yet even as Congress and the executive branch re-embraced the goal of Indian self-determination, several scholars have argued that the Supreme Court moved in the opposite direction; the Supreme Court has decided seventy-two percent of Indian law cases against tribal interests since 1986.<sup>26</sup> In so doing, Frickey argues, the Court displaced the "traditional model [of deciding Indian law cases] based on judicial deference to congressional power" for "a model of ad hoc common law-making" in which the Court has the final say.<sup>27</sup>

These cycles, culminating in the modern era of self-government, took place against the backdrop of two unique features of federal In-

<sup>16</sup> For example, Congress passed the Dawes Act, which divided up reservation lands and required Indians to accept individual allotments and U.S. citizenship. Dawes Act, ch. 119, 24 Stat. 388.

<sup>17</sup> Pub. L. No. 73-383, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (2012)); see Frickey, *supra* note 15, at 1138 n.7, 1180.

<sup>18</sup> See 25 U.S.C. §§ 463, 463b, 463d-e, 465, 465a, 487 (2012).

<sup>19</sup> See *id.* §§ 476-478.

<sup>20</sup> See *id.* §§ 472, 472a.

<sup>21</sup> See *id.* § 469.

<sup>22</sup> Frickey, *supra* note 15, at 1138 n.7.

<sup>23</sup> *Id.*

<sup>24</sup> Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 450-450n, 455-458e (2012)).

<sup>25</sup> Many scholars credit the federal policy shift toward recognizing broader tribal sovereignty to the advocacy of Indian tribal leaders. See generally CHARLES WILKINSON, *BLOOD STRUGGLE* (2005).

<sup>26</sup> See Wermiel, *supra* note 1; see also David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 280 (2001) (citing an even higher percentage of cases decided against Indian interests through 2001).

<sup>27</sup> Frickey, *supra* note 10, at 459.

dian law. First, the federal government has claimed authority to govern Indian tribes that is both exclusive as to the states and plenary as to the tribes.<sup>28</sup> Second is the paradox that Frickey recognizes: tribes exist outside the American constitutional structure and retain their inherent right to govern themselves, including the right to exercise civil and criminal authority over their members.<sup>29</sup> Fraught questions about the nature of tribes' sovereign authority arise when tribes attempt to act toward their members in ways some would denounce as illiberal<sup>30</sup> or attempt to govern nonmember activities in Indian country.<sup>31</sup>

Today, Indian law continues to develop. In 2012, the American Law Institute (ALI) announced that, for the first time, it would publish a Restatement of American Indian Law,<sup>32</sup> and in May 2015, the ALI membership approved the first nine sections of the draft.<sup>33</sup> The Supreme Court is grappling with four Indian law cases in October Term 2015.<sup>34</sup> In *Dollar General Corp. v. Mississippi Band of Choctaw Indians*,<sup>35</sup> the Court will decide whether tribal courts may exercise jurisdiction over civil tort claims against nonmembers who choose to oper-

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<sup>28</sup> See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) ("The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union."); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (describing Indian tribes as "domestic dependent nations" whose relationship "to the United States resembles that of a ward to his guardian"). See generally Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015) (exploring early interpretations of federal authority over Indian tribes). Today, federal power over Indian country is not entirely exclusive: for example, Congress transferred its federal law enforcement authority over tribes to some states in 1953 under Public Law 280. Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588 (codified in scattered sections of 18, 28 U.S.C.).

<sup>29</sup> See, e.g., *United States v. Wheeler*, 435 U.S. 313 (1978) (holding that the Double Jeopardy Clause of the Fifth Amendment does not bar subsequent federal prosecution after Navajo defendant was convicted in Navajo court); *Talton v. Mayes*, 163 U.S. 376 (1896) (holding that the Fifth Amendment right to indictment by a grand jury did not apply to a Cherokee defendant tried in Cherokee court).

<sup>30</sup> See generally *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (holding that tribal sovereign immunity does not permit federal courts to remedy violations of the Indian Civil Rights Act); Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799 (2007).

<sup>31</sup> See, e.g., *Montana v. United States*, 450 U.S. 544, 564-65 (1981) (holding that because the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation," *id.* at 564, the Crow Tribe may not regulate non-Indian hunting and fishing on lands not owned by the tribe).

<sup>32</sup> Fletcher, *supra* note 13, at 5.

<sup>33</sup> *Restatement of the Law, The Law of American Indians*, AM. LAW INST., <https://www.ali.org/projects/show/law-american-indians> [<http://perma.cc/LE44-TVJD>].

<sup>34</sup> See *supra* note 4 and accompanying text.

<sup>35</sup> 746 F.3d 167 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2833 (2015) (mem.).

ate businesses on tribal land.<sup>36</sup> In *United States v. Bryant*,<sup>37</sup> the Court will decide whether tribal court convictions for domestic violence (to which the Sixth Amendment right to counsel did not apply) may trigger repeat-offender provisions of the Violence Against Women Act.<sup>38</sup> The two other cases this Term involve a dispute over the borders of the Omaha Indian Reservation brought by businesses seeking to avoid paying the tribe's liquor taxes<sup>39</sup> and a question about the tolling of the statute of limitations on a claim for breach of a self-determination contract between an Indian tribe and a federal agency.<sup>40</sup> Although these cases span the substantive fields of the Court's docket from tort law to criminal law to land disputes to civil procedure, underlying each case is that federal indecisiveness over the proper role of different governments in internal Indian affairs. These cases ask, sometimes explicitly and sometimes implicitly, *who decides* — who decides whether punitive damages should be levied against a child molester,<sup>41</sup> who decides whether an abuser has offended in the past,<sup>42</sup> who decides who pays liquor taxes,<sup>43</sup> who decides how to provide and how to fund healthcare services for tribal members<sup>44</sup> — *the tribe, or someone else?*

The following Chapters analyze five developments in law affecting indigenous peoples at each level of government, from local tribal governments to multinational organizations. Chapter I begins with a look at tribal governments, in particular those with constitutions passed around the time of the IRA or modeled after constitutions passed at that time.<sup>45</sup> These tribes have been criticized for lacking independent courts and concentrating power in a single legislative branch, often called a tribal council.<sup>46</sup> Many have encouraged tribes to adopt inde-

<sup>36</sup> See Brief for the Petitioners at i, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, No. 13-1496 (U.S. Aug. 31, 2015); Brief for Respondents at i, *Dollar Gen. Corp.*, No. 13-1496 (U.S. Oct. 2015).

<sup>37</sup> 769 F.3d 671 (9th Cir. 2014), *cert. granted*, 136 S. Ct. 690 (2015) (mem.).

<sup>38</sup> See Petition for a Writ of Certiorari at i, *Bryant*, No. 15-420 (U.S. Oct. 2015); Brief in Opposition to Petition for Writ of Certiorari at i, *Bryant*, No. 15-420 (U.S. Nov. 4, 2015).

<sup>39</sup> See *Smith v. Parker*, 774 F.3d 1166 (8th Cir. 2014), *cert. granted*, *Nebraska v. Parker*, 136 S. Ct. 27 (2015) (mem.).

<sup>40</sup> See *Menominee Indian Tribe of Wis. v. United States*, No. 14-510 (U.S. Jan. 25, 2016). The Court unanimously held that the Tribe was not entitled to equitable tolling. See *id.* at 1.

<sup>41</sup> *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014).

<sup>42</sup> *Bryant*, 769 F.3d 671.

<sup>43</sup> *Parker*, 774 F.3d 1166.

<sup>44</sup> *Menominee*, 136 S. Ct. 750.

<sup>45</sup> See Eric D. Lemont, *Introduction to AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS 2* (Eric D. Lemont ed., 2006); see also Elmer Russo, *The Indian Reorganization Act and Indian Self-Government, in AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS, supra*, at 49.

<sup>46</sup> See Lemont, *supra* note 45, at 2.

pendent tribal courts to improve governance;<sup>47</sup> Chapter I offers an addendum to that recommendation, arguing that certain tribes should also focus on developing independent executive tribal branches.<sup>48</sup>

The Chapter begins with a brief history of IRA tribal governments, how IRA government structures can create obstacles to good governance, and past proposals for reform.<sup>49</sup> Observing that tribal executive branches have been largely under-studied in proposals for reforming IRA tribal governments, the Chapter analyzes how the simultaneous development of independent tribal executive branches and tribal courts could be the best prescription for overcoming political opposition from powerful tribal councils as well as for overcoming obstacles facing small and poor tribes.<sup>50</sup> The Chapter concludes by discussing additional benefits that independent tribal executive branches, and three-branch separation of powers more generally, can offer tribes as they pursue good governance.<sup>51</sup>

Chapter II crosses the reservation boundary to chase the issue of “fresh pursuit.” Criminals who flee across reservation borders implicate a “jurisdictional maze,” “complicated by the conflicting claims of three sovereigns to law enforcement authority.”<sup>52</sup> Tribal police departments are a relatively recent development — emerging in their modern form only in the 1970s<sup>53</sup> — and the law governing tribal law enforcement officers’ authority to pursue criminals past the reservation border remains dangerously murky.<sup>54</sup> When tribal police officers are prohibited from pursuing or even hesitate to pursue, for example, a drunk driver who crosses the reservation border, both Indian communities and their neighbors suffer.<sup>55</sup>

The Chapter identifies this practical gap in law enforcement on the borders of Indian reservations and evaluates three options for closing it. First, the Chapter diagnoses the flaws in relying on courts to recognize tribes’ inherent authority to engage in fresh pursuit.<sup>56</sup> Next

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<sup>47</sup> See, e.g., Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 283–84 (1997) (noting — and raising objections to — the focus on strengthening independent tribal courts).

<sup>48</sup> See *infra* ch. I, pp. 1682–83.

<sup>49</sup> See *infra* ch. I, pp. 1664–68.

<sup>50</sup> See *infra* ch. I, pp. 1668–81.

<sup>51</sup> See *infra* ch. I, pp. 1682–83.

<sup>52</sup> Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 504 (1976).

<sup>53</sup> See generally L. Edward Wells, *Policing Indian Country: Law Enforcement on Reservations*, in 1 AMERICAN INDIANS AT RISK 113, 115–21 (Jeffrey Ian Ross ed., 2014) (chronicling important developments and laws impacting tribal policing during the self-determination era).

<sup>54</sup> See *infra* ch. II, p. 1687.

<sup>55</sup> See *infra* ch. II, pp. 1687–90.

<sup>56</sup> See *infra* ch. II, pp. 1690–94.

comes an explanation of how state and local actors have addressed this policing gap and how those approaches have failed to resolve the problem completely.<sup>57</sup> The Chapter concludes by arguing for congressional legislation that addresses the issue, evaluating the political and constitutional challenges to such legislation, and offering guiding principles for federal lawmakers who could solve this policing gap.<sup>58</sup>

Chapter III heads to Washington, D.C., to interrogate the relationship between the federal government and tribes by analyzing how the federal government has imposed its vision of due process rights on tribal courts. The Chapter begins with historical context for European and, later, U.S. distrust of tribal governments administering justice within their own borders — despite evidence that many native nations had sophisticated governments.<sup>59</sup> That strand of mistrust runs through modern legislation, like the 1968 Indian Civil Rights Act<sup>60</sup> (ICRA), which encourages tribal courts to look more like federal courts. Yet in *Santa Clara Pueblo v. Martinez*,<sup>61</sup> the Supreme Court limited ICRA's reach, holding that ICRA provides a remedy only for violations of habeas corpus rights.<sup>62</sup> As a result, tribal courts are primarily responsible for interpreting ICRA. Still, federal courts performing habeas review remain split on what degree of deference to give to tribal interpretations of ICRA: some depend only on definitions of rights as developed under federal law,<sup>63</sup> and others recognize at least some role for tribes to interpret ICRA rights consistently with their own cultural values and customs.<sup>64</sup> The Chapter then advocates for removing the uncertainty around the role of tribal courts in defining due process rights by encouraging federal courts to adopt the more deferential approach.<sup>65</sup>

Chapter IV also examines the relationship between Indians and state and federal governments, but shifts the focus to how Indians can influence those governments: this Chapter addresses the voting rights

<sup>57</sup> See *infra* ch. II, pp. 1694–700.

<sup>58</sup> See *infra* ch. II, pp. 1700–07.

<sup>59</sup> See *infra* ch. III, pp. 1709–10.

<sup>60</sup> Pub. L. No. 90-284, tits. II–VII, 82 Stat. 73, 77–81 (codified as amended in scattered sections of 18 and 25 U.S.C.).

<sup>61</sup> 436 U.S. 49 (1978).

<sup>62</sup> *Id.* at 71.

<sup>63</sup> See, e.g., *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 900–01 (2d Cir. 1996) (“[T]here is simply no room in our constitutional order for the definition of basic rights on the basis of cultural affiliations, even with respect to those communities whose distinctive ‘sovereignty’ our country has long recognized and sustained.”).

<sup>64</sup> See, e.g., *Alvarez v. Tracy*, 773 F.3d 1011, 1021 (9th Cir. 2014) (“[R]esolution of statutory issues under the ICRA will ‘frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts.’” (quoting *Santa Clara Pueblo*, 436 U.S. at 71)).

<sup>65</sup> See *infra* ch. III, pp. 1720–28.

of Indian citizens and the issues faced in protecting them. Voting rights generally are not an uncommon subject for academic study, but Indian voting rights remain an often overlooked area of the field. Chapter IV begins with a history of Indian voting rights and attempts at disenfranchisement<sup>66</sup>: all Indians were guaranteed federal citizenship in 1924,<sup>67</sup> but state citizenship remained an unresolved question for much longer.<sup>68</sup> And given the role states play in administering elections, Indians have faced numerous obstacles in casting their votes in both state and federal elections.<sup>69</sup> The Chapter then discusses the Voting Rights Act of 1965<sup>70</sup> and recent related litigation as it has affected Indian voters in particular. While the Act has been used with some efficacy in protecting Indian voting rights, not only do the unique circumstances of Indian voters present difficulties in leveraging the Act to its full potential, but cracks are also appearing in the Act's doctrinal foundation.<sup>71</sup> Accordingly, securing Indian voting rights into the second century of full Indian citizenship will require something more: the Chapter concludes by reviewing recently proposed federal legislation directed toward protecting Indian voting rights and addresses possible challenges — both political and constitutional — facing such legislation.<sup>72</sup>

Chapter V goes global. With the 2007 adoption of the United Nations Declaration on the Rights of Indigenous Peoples<sup>73</sup> (UNDRIP), the cause of indigenous rights became fully included within the global aspirations of human rights law.<sup>74</sup> At the same time, the expansion of global trade and investment has presented new iterations of familiar conflicts between indigenous rights and global capitalism.<sup>75</sup> This Chapter specifically explores the conflicts between transnational extractive industries and indigenous groups globally.<sup>76</sup> Chapter V offers an overview of the developments in international law as it relates to indigenous peoples and to recent global economic changes affecting

<sup>66</sup> See *infra* ch. IV, pp. 1732–41.

<sup>67</sup> See Indian Citizenship Act of 1924, Pub. L. No. 68-175, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (2012)).

<sup>68</sup> See *infra* ch. IV, p. 1733.

<sup>69</sup> See Pamela S. Karlan, *Lightning in the Hand: Indians and Voting Rights*, 120 YALE L.J. 1420, 1427–29 (2011) (reviewing LAUGHLIN MCDONALD, *AMERICAN INDIANS AND THE FIGHT FOR EQUAL VOTING RIGHTS* (2010)) (noting that “[s]tates with large Indian populations used a variety of devices to keep Indians off the rolls,” *id.* at 1427, including literacy tests, which were similarly used to disenfranchise blacks and Latinos).

<sup>70</sup> Pub. L. No. 89-110, 79 Stat. 437.

<sup>71</sup> See *infra* ch. IV, pp. 1742–47.

<sup>72</sup> See *infra* ch. IV, pp. 1747–54.

<sup>73</sup> G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

<sup>74</sup> See *infra* ch. V, pp. 1757–60.

<sup>75</sup> See *infra* ch. V, pp. 1760–62.

<sup>76</sup> See *infra* ch. V, pp. 1762–68.

them.<sup>77</sup> The Chapter then analyzes the power imbalance between these new international legal regimes and their effects on indigenous rights.<sup>78</sup> It concludes by evaluating several proposals seeking to protect indigenous rights when extractive corporations move in,<sup>79</sup> ultimately endorsing an arrangement in which developed economies include indigenous-rights protections in international investment treaties and impose an obligation on investors to respect such rights as a condition precedent to claiming a particular treaty's protections.<sup>80</sup>

Each of these Chapters echoes the underlying *who decides* questions animating Indian law today: Chapter III tackles the issue head-on, arguing that tribes should be left to decide what rights are important in their own courts,<sup>81</sup> as does Chapter V, which argues for a broader indigenous voice in international trade.<sup>82</sup> But the *who decides* question also pervades Chapter I, which describes how many internal tribal constitutions that raise separation of powers issues were the product of a federal law,<sup>83</sup> and Chapter II, which argues that the best solution to respect the authority of tribal police departments is through federal law.<sup>84</sup> And it is at the heart of Chapter IV, which raises serious questions about how to protect the right of Native American citizens to have a voice in shaping the state and federal laws that affect them.<sup>85</sup> The Chapters also heed Frickey's call to speak to a wider audience than just the Supreme Court. While Chapter III speaks to federal courts, Chapters II and IV contemplate congressional legislation. Chapter I speaks to tribes directly. And Chapter V evaluates reform proposals aimed at the United Nations, regional human rights courts, and transnational corporations. By offering proposals for reform aimed at a wide audience of policymakers, we hope that this edition of *Developments in the Law* will contribute to answering the *who decides* questions for the next generation of Indian law.

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<sup>77</sup> See *infra* ch. V, pp. 1755–68.

<sup>78</sup> See *infra* ch. V, pp. 1762–68.

<sup>79</sup> See *infra* ch. V, pp. 1768–73.

<sup>80</sup> See *infra* ch. V, pp. 1773–78.

<sup>81</sup> See *infra* ch. III, pp. 1720–28.

<sup>82</sup> See *infra* ch. V, pp. 1773–78.

<sup>83</sup> See *infra* ch. I, pp. 1664–68.

<sup>84</sup> See *infra* ch. II, pp. 1700–07.

<sup>85</sup> See *infra* ch. IV, pp. 1742–47.