NOTE

ICRA'S EXCLUSIONARY RULE

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ABSTRACT

The Fourth Amendment does not limit the actions of the 574 federally recognized Indian tribes. In an affront to tribal sovereignty, Congress enacted the Indian Civil Rights Act ("ICRA") in 1968. The ICRA provides limitations on tribal governments that parallel the Bill of Rights. For example, the ICRA provides that no Indian tribe shall "violate the right of the people to be secure . . . against unreasonable search and seizures."

But the ICRA—like the Fourth Amendment—does not state what happens when police obtain evidence from an unreasonable search or seizure and prosecutors seek to introduce that evidence in a criminal trial. Federal courts have developed an exclusionary rule for evidence obtained in violation of the Fourth Amendment: subject to myriad exceptions, if police obtain evidence unconstitutionally, then that evidence may not be introduced in a criminal trial. This Note asks whether the ICRA's search-and-seizure provision incorporates such an exclusionary rule.

This Note advances an interpretation of the ICRA based on the statute's 1968 meaning: the ICRA's text compels an exclusionary rule, conditioned on deterring tribal police misconduct, but not subject to the myriad exceptions that apply in the Fourth Amendment context. And, with important qualifications, this Note explains why a court applying this interpretation should turn to tribal law. A deterrence-based exclusionary rule requires courts to consider whether exclusion deters police misconduct, how to measure the benefits of deterrence against the harms of excluding probative evidence, and how much deterrence is

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necessary for exclusion. Comity, self-determination, and federalism all compel deference to tribal law in answering these questions. Thus, tribal law can and should guide the application of the ICRA's search-and-seizure provision in a criminal prosecution.

This Note contributes to the legal and academic landscape in three ways. First, it adds to an ever-growing body of literature advocating for federal and state deference to tribal law. Second, this Note fills a gap in the literature by addressing a remedy that the ICRA does not expressly provide—namely, exclusion. Most academics and courts describe federal habeas review as the ICRA's only available remedy outside of tribal courts. Finally, this Note provides a roadmap for litigants arguing for or against a suppression motion based on an ICRA violation. Only a limited number of reported cases address whether the ICRA incorporates an exclusionary rule, and even fewer provide a full analysis. This Note thus answers an open question in a way that harmonizes constitutional criminal procedure with deference to tribal legal precedent.

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INTRODUCTION

The Bill of Rights does not apply to or limit the 574 federally recognized tribal governments.[1] Nor does the Fourteenth Amendment, which by its terms applies to states but not tribes.[2] Instead, the federal government passed the Indian Civil Rights Act ("ICRA") in 1968 to apply provisions identical to those in the Bill of Rights to tribal governments.[3] Today, just as the Bill of Rights limits the

[1] Palencia v. Pojoaque Gaming, Inc., 28 Indian L. Rep. 6149, 6151-52 (Pojoaque Tribal Ct. 2001) ("Tribes are inherently sovereign. Tribes were not established by the United States Constitution and tribes are not restricted by the Bill of Rights, the protections for individuals against government actions."); *see also* Duro v. Reina, 495 U.S. 676, 693 (1990) ("[T]he Bill of Rights does not apply to Indian tribal governments."), *superseded by statute on other grounds*, Act of Nov. 5, 1990 (*Duro* Fix), Pub. L. No. 101-511, sec. 8077(b)-(d), § 201, 104 Stat. 1856, 1892-93 (codified as amended at 25 U.S.C. § 1301), *as recognized in* United States v. Lara, 541 U.S. 193, 200 (2004); Talton v. Mayes, 163 U.S. 376, 384 (1896) (holding that Fifth Amendment does not apply to tribe exercising its inherent, retained sovereign authority). A list of the 574 federally recognized tribes as of January 28, 2022, is available at *Tribal Leaders Directory*, U.S. DEP'T OF INDIAN AFFS., https://www.bia.gov/service/tribal-leaders-directory [https://perma.cc/G7VY-67NH] (last visited Oct. 25, 2022).

In this Note, I try to emphasize sovereigns' authorities. For example, I ask whether the Bill of Rights *limits* a sovereign's authority rather than whether the Bill of Rights *protects* an individual from a sovereign's actions. Admittedly, the distinction is somewhat semantic. Limits on government action and protections for individuals are two sides of the same coin. As Justice Sonia Sotomayor described, "I see the Bill of Rights . . . as basically setting the limits, giving individual freedom to do certain things and stopping the government from intruding in those liberties." Transcript of Oral Argument at 88, Dobbs v. Jackson Women's Health, No. 19-1392 (U.S. Dec. 1, 2021). Here, the emphasis on limits is intentional—this Note is about *sovereign* authority.

One more comment on terminology. Tribal governments are "variously called tribes, nations, bands, pueblos, communities, and Native villages." Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 557 (2021). The terms "Native American," "Indian," "Indigenous People," and combinations of these terms describe individuals. *See* Michael Yellow Bird, *What We Want To Be Called: Indigenous Peoples' Perspectives on Racial and Ethnic Identity Labels*, AM. INDIAN Q., Spring 1999, at 1, 3, 7. This Note follows Professor Elizabeth Reese and uses the terms interchangeably "to reflect the divide in what different members of the group—including scholars—prefer, and also to normalize the common use and presence of both for readers." Reese, *supra*, at 558 n.6.

[2] *See* U.S. CONST. amend. XIV ("[N]or shall any *State* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (emphasis added)); Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889, 899 (2003) ("The rights protected by the United States Bill of Rights and *Fourteenth Amendment* are not rights enforceable against tribal governments." (emphasis added)).

[3] Indian Civil Rights Act (ICRA), Pub. L. No. 90-284, §§ 201-203, 82 Stat. 73, 77-78 (1968) (codified as amended at 25 U.S.C. §§ 1301-1304). The ICRA "prohibit[s] Indian governments from denying most, but not all of the rights protected under the United States Bill of Rights." Goldberg, *supra* note 2, at 895. Section I.A.2, *infra*, highlights differences between the ICRA's provisions and the constitutional text.

federal government, and just as the Fourteenth Amendment's incorporation of the Bill of Rights limits state governments, so too does the ICRA limit tribal governments.

But a fundamental difference exists between the ICRA and its constitutional counterparts. The people of the United States granted power to the federal government but then limited and reserved that power in the Bill of Rights.[4] By contrast, Congress—representing the people and states of the United States—limited the power of unrepresented sovereigns when it passed the ICRA.[5] The

[4] *See* LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 24 (2001) (describing founding-era notion that government exists by consent of governed and written compact limits government by reserving rights). The idea that "the people" ratified the Constitution is an ahistorical myth—unless "the people" is narrowly defined to mean wealthy White male property owners. *See* Mark S. Stein, *Originalism and Original Exclusions*, 98 KY. L.J. 397, 398 (2010) ("Only a small minority of the adult population was able to participate in ratifying the Constitution or its amendments. Among those excluded from the franchise were women, African-American slaves, almost all Native Americans, and many poor white males, who were excluded by property qualifications and poll taxes." (footnotes omitted)). Even in myth, however, this view of governments and consent was nowhere to be found when Chief Justice John Marshall justified the dispossession of Indian legal title with the doctrine of discovery. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 591-92 (1823) ("However this restriction [on Indian legal title to land] may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice."); *see also* WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED 72-77 (2010) (describing how, under doctrine of discovery, "federal government now held legal title to Indian land along with the exclusive preemptive right to extinguish the Indians' occupation by purchase or conquest" (footnote omitted)).

[5] The 90th Congress—serving from January 1967 to January 1969—included only one Indigenous American, Congressman Ben Reifel of South Dakota and citizen of the Rosebud Sioux Tribe. *See Congress Profiles: 90th Congress (1967-1969)*, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Congressional-Overview/Profiles/90th/ [https://perma.cc/5TGW-ZL5V] (last visited Oct. 25, 2022) (choose Member Information; select PDF of the biographical directory); Wasuta Waste Win, *RST Tribal Member To Be Honored*, LAKOTA TIMES (Dec. 10, 2020), https://www.lakotatimes.com/articles/rst-tribal-member-to-be-honored/ [https://perma.cc/U499-ER6D].

Interestingly, the 90th Congress should have included a delegate who represented the Cherokee Nation. Ezra Rosser, *The Nature of Representation: The Cherokee Right to a Congressional Delegate*, 15 B.U. PUB. INT. L.J. 91, 91-92 (2005). The 1835 Treaty of New Echota—which formalized the forced removal of the Cherokee Nation from their homelands in the Southeastern United States and resulted in the Trail of Tears—guaranteed this right. Treaty with the Cherokees, Cherokee-U.S., art. 7, Dec. 29, 1835, 7 Stat. 478, 482 ("[W]ith a view to illustrate the liberal and enlarged policy of the Government of the United States towards the [Cherokee] Indians in their removal beyond the territorial limits of the States, *it is stipulated that they shall be entitled to a delegate in the House of Representatives of the United States whenever Congress shall make provision for the same*." (emphasis added)). In

ICRA is a federal statute that begins with the mandate, "No Indian tribe in exercising powers of self-government shall . . . ."[6] The ICRA, however popular or normatively desirable, is thus an imposition by one sovereign—the United States—upon others—the 574 federally recognized tribal nations.[7]

The ICRA's textual limitations on tribal governments largely parallel the text of the First, Fourth, Fifth, Sixth, and Eighth Amendments; the Fourteenth Amendment's Equal Protection Clause; and Article I, Section 10's prohibition against bills of attainder and ex post facto laws.[8] Paragraph 1302(a)(2), for instance, is substantively identical to the Fourth Amendment:

> No Indian tribe in exercising the powers of self-government shall . . . violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and

August 2019, nearly 200 years after the treaty, Cherokee Principal Chief Chuck Hoskin, Jr., nominated Kimberly Teehee to serve as the first Cherokee Nation delegate. *Delegate to Congress*, CHEROKEE NATION, https://www.cherokee.org/our-government/delegate-to-congress/ [https://perma.cc/SB5H-8KHT] (last visited Oct. 25, 2022). The United States has yet to honor this promise as of September 22, 2022, although Delegate-Designee Teehee continues to stress the importance of Congress doing so. *See* Cherokee Nation, *It's Time for Congress To Seat the Cherokee Nation Delegate*, YOUTUBE, at 2:07 (Sept. 22, 2022), https://www.youtube.com/watch?v=2ClBxXALQ0c.

[6] 25 U.S.C. § 1302(a).

[7] Professor Robert Clinton has observed that "by imposing such limitations on tribal government, the ICRA purports to curtail the powers of Indian tribes to structure their own governing mechanisms in tribally centered, non-western ways that may not comply with the adversarial and individual-rights focus of much of the Bill of Rights." Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 198 (2002); *see also* INDIAN L. & ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER 17 (2013) ("Without question, ICRA infringes on Tribal authority: it limits the powers of Tribal governments by requiring them to adhere to certain Bill of Rights protections . . . ."); VINE DELORIA, JR. & CLIFFORD M. LYTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY 213 (1984) ("The ICRA basically distorted reservation life because it meant the imposition of certain rules and procedures with respect to the tribal courts that did not exist and could not exist in any of the other reservation institutions . . . ."); Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 272 (1997) ("The ICRA introduced a jurisprudence of rights to the Indian nations that fundamentally changed the manner in which their tribal courts dealt with the cases that came before them. The requirements of due process and equal protection, while subject to tribal interpretation, nonetheless significantly altered the focus of attention away from the tribal community towards the individual.").

[8] *See* 25 U.S.C. § 1302(a)(1)-(10); *see also* U.S. CONST. art. I, § 10; *id.* amends. I, IV, V, VI, VIII, XIV. Section I.A.2, *infra*, highlights differences between the ICRA's provisions and the constitutional text. For simplicity, I often refer to "the ICRA's Bill of Rights equivalents." When I do so, however, I am also referring to the provisions that match the language in Article I, Section 10, and the Fourteenth Amendment.

particularly describing the place to be searched and the person or thing to be seized.[9]

Congress enacted the ICRA after federal courts had interpreted the identical language in the Bill of Rights—for example, the meaning of "search" in the Fourth Amendment.[10] But the ICRA's text is silent with respect to these interpretations. Nothing in the statute requires that the ICRA's provisions be given the same legal effect as their counterparts.[11] And in *Santa Clara Pueblo v. Martinez*,[12] the Supreme Court suggested that judicial constructions of the Bill of Rights are not dispositive interpretations of the ICRA's text.[13] Specifically, the Court seemingly approved of the lower court's "recogni[tion] that standards of analysis developed under the Fourteenth Amendment's Equal Protection Clause were not necessarily controlling in the interpretation of this statute."[14]

Since then, some tribal courts have also concluded that federal interpretations of the Bill of Rights do not bind tribal courts when they apply the ICRA.[15] The Appellate Court of the Hopi Tribe, for example, stated, "[T]he interpretation of the equal protection clause of the Indian Civil Rights Act is not constrained by federal interpretations of the Fourteenth Amendment. Rather, it should be interpreted with due regard for the historical, governmental, and cultural values

[9] 25 U.S.C. § 1302(a)(2).

[10] *See, e.g.*, Olmstead v. United States, 277 U.S. 438, 464, 466 (1928) (limiting definition of search to trespass or invasion of physical property), *overruled by* Katz v. United States, 389 U.S. 347, 353 (1967); *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (defining search by reference to person's subjective and objective expectations of privacy).

[11] *See* 25 U.S.C. § 1302 (omitting reference to Supreme Court's interpretations of Bill of Rights). A potential exception to the ICRA's omission of judicially defined rights is the Sixth Amendment's right to court-appointed counsel for indigent criminal defendants. I discuss the statutory text and its possible implications in Section I.A.2 and Part IV, *infra*.

[12] 436 U.S. 49 (1978).

[13] *Id.* at 55.

[14] *Id.*; *see also* Matthew L.M. Fletcher, *Resisting Congress: Free Speech and Tribal Law*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY 133, 148 (Kristen A. Carpenter, Matthew L.M. Fletcher & Angela R. Riley eds., 2012) ("[T]ribal decision makers can interpret the rules required by the ICRA in accordance with tribal law, customs, and traditions . . . ."); Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479, 487 (2000) (describing "doctrine that ICRA's statutory terms need not be ascribed the same meaning as their sister terms in the federal Constitution" as "well-established"). Section I.A.3, *infra*, discusses *Santa Clara Pueblo* in detail.

[15] *See* Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 496 (1998) ("Even as [northwestern tribal courts] have recognized that the ICRA grants to tribal members rights comparable to those contained in the Bill of Rights, the courts routinely have ruled that the meaning and application of the ICRA is not determined by Anglo-American constitutional interpretations."). *See generally* Rosen, *supra* note 14 (surveying tribal courts' varying interpretations of ICRA).

of the Indian tribe."[16] Other tribal courts, by contrast, have incorporated federal interpretations without much discussion.[17] And compared to tribal courts, federal courts generally fail to attend to the differences between the ICRA and the Bill of Rights.[18]

One reason these differences matter is that federal courts have interpreted the Bill of Rights to provide rights and remedies that the text does not obviously compel.[19] Consider the Fourth Amendment, which guarantees a protection against unlawful searches and seizures.[20] But the text does not say what happens if that right is violated. Courts have filled that silence by developing an exclusionary rule—subject to myriad exceptions, prosecutors may not introduce unlawfully obtained evidence in their cases in chief.[21]

Because the ICRA is a federally imposed limitation on tribal authority, the question of whether the ICRA incorporates an exclusionary rule is a question both of how far the ICRA goes in limiting tribal authority and of who should

[16] Nevayaktewa v. Hopi Tribe, 1 Am. Tribal L. 306, 314 (Hopi App. Ct. 1998); *see also* Navajo Nation v. Rodriguez, 5 Am. Tribal L. 473, 478 (Navajo 2004) ("In interpreting the Navajo Bill of Rights and the Indian Civil Rights Act, as with other statutes that contain ambiguous language, we first and foremost make sure that such interpretation is consistent with the Fundamental Laws of the Dine. . . . [T]he Indian Civil Rights Act does not require our application of federal interpretations, but only mandates the application of similar language."); Palencia v. Pojoaque Gaming, Inc., 28 Indian L. Rep. 6149, 6152 (Pojoaque Tribal Ct. 2001).

[17] *See* Swinomish Indian Tribal Cmty. v. Reid, 11 Am. Tribal L. 182, 185 (Swinomish Tribal Ct. 2012) ("Where the language of the ICRA and the federal constitution are so similar, federal case law interpreting the rights protected by that language will be most persuasive.").

[18] *Compare* Tom v. Sutton, 533 F.2d 1101, 1104 n.5 (9th Cir. 1976) ("[C]ourts have been careful to construe the terms 'due process' and 'equal protection' as used in the Indian Bill of Rights with due regard for the historical, governmental and cultural values of an Indian tribe. As a result, these terms are not always given the same meaning as they have come to represent under the United States Constitution."), *with* United States v. Becerra-Garcia, 397 F.3d 1167, 1171 (9th Cir. 2005) ("[The ICRA] imposes an 'identical limitation' on tribal government conduct as the Fourth Amendment. Thus, we analyze the reasonableness of the stop under well-developed Fourth Amendment precedent, which nets the same result as an analysis under ICRA." (footnote omitted) (citations omitted)), *and* 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.").

[19] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 467-73 (1966) (construing Fifth Amendment to mandate set of warnings to suspects in custodial interrogation); Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963) (holding that Sixth Amendment requires states to provide counsel to indigent defendants).

[20] U.S. CONST. amend IV.

[21] *See infra* Section I.B (tracing development of exclusionary rule and describing its current status and exceptions).

decide those limits.[22] Put another way, do the limitations that Congress imposed on tribes via the ICRA come from the statute's text alone? Or do these limitations extend to federal judge-made law interpreting the Bill of Rights? And who should decide if and when federal judge-made law attaches to the ICRA? The exclusionary rule is the perfect vehicle to answer these questions because of the rule's attenuated relationship to the Fourth Amendment's text, history, and tradition.[23] In addition, the rule directly relates to the regulation of police conduct—and thus to a tribe's police authority and criminal jurisdiction.

This Note centers tribal legal authority in answering whether the ICRA compels exclusion after tribal police obtain evidence in violation of the statute. Two hypotheticals demonstrate the harms that flow from excluding tribes in the interpretation and application of the ICRA's search-and-seizure provision. Each hypothetical contains multiple offenses to tribal sovereignty.

Hypothetical 1. Relying in good faith on a defective warrant, Fort Peck tribal police unlawfully search the home of a Fort Peck citizen as part of a robbery investigation. The officers find evidence necessary for conviction. They give the evidence to a federal prosecutor, who files charges. The federal court admits the evidence. The Fort Peck citizen is convicted.

Here, under the ICRA, the United States prohibited unreasonable searches by the Fort Peck police as a matter of federal law.[24] Second, the United States arrogated itself of jurisdiction over the Fort Peck citizen with another statute, the Major Crimes Act ("MCA").[25] Third, under Fort Peck law, Fort Peck courts exclude evidence obtained in violation of tribal law.[26] Because the federal court determined that the tribal officers' violation of the ICRA does not demand exclusion, however, the Fort Peck citizen was denied an evidentiary benefit that he would have received in tribal court.[27]

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[22] *See* VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 130 (1983) (asserting that ICRA's incorporation of constitutional provisions against tribes "cannot help but restrict the power of tribal court judges and suggests a further erosion of traditional Indian practices"); JUSTIN B. RICHLAND, ARGUING WITH TRADITION: THE LANGUAGE OF LAW IN HOPI TRIBAL COURT 13 (2008) (highlighting tribal jurists' concerns with "navigating the relationship between federal oversight of tribal sovereignty and the demands of self-governance").

[23] *See infra* Section I.B.

[24] *See* 25 U.S.C. § 1302(a)(2); *see also infra* Section I.A.

[25] *See* 18 U.S.C. § 1153; *see also infra* Section I.C.3.

[26] *See* 6 FORT PECK TRIBES COMPREHENSIVE CODE OF JUSTICE § 305 (2018); Mitchell v. Fort Peck Tribes, 15 Am. Tribal L. 286, 289 (Fort Peck Ct. App. 2017) ("Any evidence obtained in connection with an unlawful search must be suppressed as a matter of law.").

[27] The federal court's decision to admit the evidence is an assumption for this hypothetical. The assumption is probable because federal courts do not exclude evidence when police rely in good faith on defective warrants. *See, e.g.*, United States v. Leon, 468 U.S. 897, 913 (1984); *see also infra* Section I.B. To be sure, *Leon* construed the Fourth Amendment and not the ICRA. *See Leon*, 468 U.S. at 913. But, as this Note shows, federal courts have often failed to distinguish the two. *See infra* Section II.B.

Hypothetical 2. Relying in good faith on a defective warrant, Swinomish tribal police unlawfully search the home of a non-Indian as part of a robbery investigation. The officers find evidence necessary for conviction. They give the evidence to a Washington state prosecutor, who files charges. The state court suppresses the evidence. The non-Indian defendant is acquitted.

Here again, the United States made it unlawful for Swinomish police to conduct unreasonable searches as a matter of federal law.[28] Second, the United States stripped Swinomish's jurisdiction over the non-Indian defendant with a case, *Oliphant v. Suquamish Indian Tribe*.[29] Third, the United States authorized Washington state to exercise criminal jurisdiction on tribal lands with a statute, Public Law 280,[30] and with cases, *Oklahoma v. Castro-Huerta*[31] and *United States v. McBratney*.[32] Fourth, Swinomish courts would have admitted evidence based on these facts.[33] Because the state court determined that the tribal officers' violation of the ICRA demanded exclusion, the non-Indian defendant received a windfall that he would not have received in tribal court.[34]

[28] *See* 25 U.S.C. § 1302(a)(2).

[29] 435 U.S. 191, 212 (1978) (holding tribes lack criminal jurisdiction to prosecute non-Indians).

[30] Act of Aug. 15, 1953, Pub. L. No. 83-280, § 7, 67 Stat. 588, 590 (codified as amended at 18 U.S.C. § 1162); WASH. REV. CODE § 37.12.010 (2022) (assuming criminal jurisdiction over non-Indians on Indian reservations pursuant to Public Law 280); *see also* M. Brent Leonhard, *Returning Washington P.L. 280 Jurisdiction to Its Original Consent-Based Grounds*, 47 GONZ. L. REV. 663, 716 (2012) (confirming Washington has jurisdiction over crimes committed by non-Indians on Swinomish Reservation).

[31] No. 21-429, slip op. at 24 (U.S. June 29, 2022) (holding state courts have jurisdiction over crimes committed by non-Indians against Indians, even within Indian Country).

[32] 104 U.S. 621, 624 (1881) (holding state courts have jurisdiction over crimes committed by non-Indians against non-Indians, even within Indian Country).

[33] Swinomish Indian Tribal Cmty. v. Reid, 11 Am. Tribal L. 182, 186 (Swinomish Tribal Ct. 2012) (denying motion to suppress because officers who executed defective warrant nevertheless acted in good faith).

[34] The state court's decision to exclude the evidence is an assumption for this hypothetical. This assumption is reasonable because of a pattern of federal and state cases holding that tribal officers have exceeded their investigatory authority. *See, e.g.*, United States v. Cooley, 919 F.3d 1135, 1143 (9th Cir. 2019), *vacated*, 141 S. Ct. 1638, 1646 (2021); State v. Astorga, 642 S.W.3d 69, 83 (Tex. App. 2021). For Washington cases specifically, compare *State v. Schmuck*, 850 P.2d 1332 (Wash. 1993) (en banc), holding tribal officers may stop and detain non-Indian drivers on reservation roads, with *State v. Eriksen*, 259 P.3d 1079 (Wash. 2011) (en banc), holding tribal officers may not pursue and stop non-Indian driver off tribal land, even in hot pursuit. *But see* United States v. Cooley, 141 S. Ct. 1638, 1643 (2021) (holding tribes have authority to temporarily detain and search non-Indians on public highways in Indian reservations); Sarah A. Sadlier, Comment, *Federal Indian Law—Tribal Criminal Jurisdiction—Tribal Sovereignty—United States v. Cooley*, 21 TRIBAL L.J. 72, 86-88 (2022) (applauding Court's decision in *Cooley* but calling it "unexpected" and cautioning that Court may not continue shift toward recognizing tribal sovereignty).

The juxtaposition of the two defendants highlights an injustice: the non-Indian defendant receiving an evidentiary benefit denied to the Fort Peck citizen, even though the Swinomish and Fort Peck courts would have reached opposite results after applying their respective laws. A correct interpretation and application of the ICRA, however, can limit this injustice.

This Note proceeds as follows. Part I outlines the legal background most relevant to the analysis—the ICRA, the Fourth Amendment's exclusionary rule, and the doctrine that determines criminal jurisdiction among the federal, state, and tribal governments.

Part II compares different types of "silver-platter cases"—that is, cases that address the admissibility of evidence in one jurisdiction when that evidence was unlawfully obtained in another. The question of whether the ICRA incorporates an exclusionary rule will most often appear as a silver-platter case. This is because a motion to suppress will likely follow when a tribal officer obtains evidence in violation of the ICRA and gives that evidence to federal and state prosecutors. As Part II shows, three common silver-platter iterations are not instructive to the issue at hand: (1) state officers obtain evidence in violation of the Fourth Amendment and give that evidence to federal prosecutors; (2) state officers obtain evidence in violation of their state constitution and give that evidence to federal prosecutors; and (3) foreign officers obtain evidence in a way that violates the foreign country's laws and give that evidence to federal prosecutors. And the silver-platter cases directly on point—that is, cases that address an ICRA violation by tribal officers in a state or federal prosecution—are typically underdeveloped.

Part III turns to tribal law, surveying tribal cases and statutes that address an exclusionary rule. The authorities cited in this Part extend beyond cases considering ICRA violations. Instead, by surveying how tribes deal with evidence obtained in violation of tribal law, this Note briefly illustrates how different tribes resolve questions of exclusion.

Part IV advances an interpretation of the ICRA based on the statute's 1968 meaning: the ICRA's text compels an exclusionary rule, conditioned on deterring tribal police misconduct, but not subject to the myriad exceptions that apply in the Fourth Amendment context. With important qualifications, a court applying this interpretation should turn to tribal law. A deterrence-based exclusionary rule requires courts to consider whether exclusion deters police misconduct, how to measure the benefits of deterrence against the harms of excluding probative evidence, and how much deterrence is necessary for

After holding that a tribal officer exceeded investigatory authority, courts may then hold that the officer's search was unreasonable. *See, e.g.*, *Cooley*, 919 F.3d at 1148 ("In sum, when a tribal officer exceeds his tribe's sovereign authority, his actions may violate ICRA's Fourth Amendment counterpart because, when the Fourth Amendment was adopted, officers could not enforce the criminal law extra-jurisdictionally in most circumstances."). And after that, a court may exclude evidence obtained in the search. *See, e.g.*, *id.*; *Astorga*, 642 S.W.3d at 83-85. Notably, Washington courts exclude unlawfully obtained evidence regardless of whether police act in good faith. *See* State v. Sanchez, 875 P.2d 712, 715 (Wash. Ct. App. 1994).

exclusion. Tribal law can provide answers to these questions. And comity, self-determination, and federalism all compel deference to tribal law. Thus, tribal law can and should guide the application of the ICRA's search-and-seizure provision in a criminal prosecution.

This Note contributes to the legal and academic landscape in three ways. First, it adds to an ever-expanding body of literature advocating for federal and state deference to tribal law.[35] Closest to this Note is a 2016 note that advocates for deference to tribal law when federal courts review habeas petitions for ICRA violations.[36] That note's thesis is that the "most reasonable interpretation of ICRA for federal courts to adopt is that the language of ICRA requires tribes to address each provision and define a right that fits within its terms."[37]

Second, this Note fills a gap in the literature by addressing a remedy that the ICRA does not explicitly provide—namely, exclusion. To be sure, the exclusionary rule is not a right of action, but courts have described it as a

[35] *See generally, e.g.*, Reese, *supra* note 1 (spotlighting invisibility of tribal law in American legal academia and in federal and state courts, situating tribal law within American law, describing benefits from study of tribal law, and warning of harms from continued ignorance); Wenona T. Singel, *The First Federalists*, 62 DRAKE L. REV. 775 (2014) (showcasing how tribes exemplify principles of federalism but are not accorded deference given to states when states exemplify analogous principles); Kevin K. Washburn, *Tribal Courts and Federal Sentencing*, 36 ARIZ. ST. L.J. 403 (2004) [hereinafter Washburn, *Courts and Sentencing*] (suggesting reform to U.S. Sentencing Commission's policy of ignoring tribal court sentences by "giv[ing] individual tribal governments the ultimate power to determine whether their tribal court sentences should be used in subsequent federal sentencing proceedings"); Barbara L. Creel, *Tribal Court Convictions and the Federal Sentencing Guidelines: Respect for Tribal Courts and Tribal People in Federal Sentencing*, 46 U.S.F. L. REV. 37 (2011) (responding to Washburn, *Courts and Sentencing*, *supra*, by finding that true respect for tribal sovereignty comes from recognizing differences between federal and tribal court convictions); Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779 (2006) [hereinafter Washburn, *Criminal Law and Self-Determination*] (providing normative basis for tribal self-determination in criminal justice and positing ways forward); Elizabeth Ann Kronk Warner, *Tribes as Innovative Environmental "Laboratories,"* 86 U. COLO. L. REV. 789 (2015) (spotlighting tribal environmental law as valuable source of experimentation and innovation in environmental regulation); Kelly Stoner & Richard A. Orona, *Full Faith and Credit, Comity, or Federal Mandate? A Path That Leads to Recognition and Enforcement of Tribal Court Orders, Tribal Protection Orders, and Tribal Custody Orders*, 34 N.M. L. REV. 381 (2004) (emphasizing doctrine of comity as providing path toward recognition of tribal court orders in state court and focusing on orders in Violence Against Women Act and Indian Child Welfare Act).

[36] Note, *ICRA Reconsidered: New Interpretations of Familiar Rights*, 129 HARV. L. REV. 1709, 1722-23 (2016) [hereinafter *ICRA Reconsidered*].

[37] *Id.* at 1723.

remedy.[38] And most academics and courts describe federal habeas review as the ICRA's only remedy available outside of tribal courts.[39]

Third, this Note provides a roadmap for litigants arguing for or against a suppression motion based on an ICRA violation. Only a limited number of reported cases address whether the ICRA incorporates an exclusionary rule, and even fewer offer complete analyses. This Note thus answers an open question[40] in a way that harmonizes criminal procedure precedent with respect for tribal legal precedent.

I. THE RIGHT, THE REMEDY, AND THE FORUM

This Part lays the groundwork to address whether the ICRA incorporates an exclusionary rule for violations of the statute's search-and-seizure provision. Section I.A first details the legal right at issue—the ICRA's protection against unreasonable search and seizures. Section I.B traces the development of the exclusionary remedy in the federal context. Section I.C concludes by mapping criminal jurisdiction in Indian Country.

A. *ICRA*

To provide background on the ICRA's search-and-seizure provision, this Section begins with a discussion of Congress's plenary power—that is, Congress's ostensible authority to enact a statute like the ICRA. Second, this Section contextualizes the statute and explicates its text. Third, this Section discusses the seminal case interpreting the ICRA's remedies. To finish, this Section discusses how recent cases have applied the ICRA to different tribal contexts.

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[38] *See infra* Section I.B (focusing on how courts justify and conceive of exclusionary rule).

[39] *See, e.g.*, Goldberg, *supra* note 2, at 899 ("The only remedy available in federal court to enforce the Indian Civil Rights Act is a writ of habeas corpus . . . ." (footnote omitted)); *ICRA Reconsidered*, *supra* note 36, at 1718 n.85 ("The only ICRA remedy that may be sought outside of tribal courts is a writ of habeas corpus, but even there a petitioner must normally have first exhausted remedies in tribal court."); Reese, *supra* note 1, at 587 ("Because tribal courts have sentencing limits and ICRA has a tribal court exhaustion requirement, ICRA cases rarely make it to federal court before the offenders are released. Thus, ICRA rights are almost exclusively enforced—and interpreted—in tribal courts." (footnotes omitted)).

[40] In *United States v. Cooley*, federal prosecutors conceded to the Ninth Circuit that the ICRA incorporates an exclusionary rule that would apply in federal court in the event of a tribal officer's violation of the ICRA. *See* Petition for a Writ of Certiorari at 8, United States v. Cooley, 141 S. Ct. 1638 (2021) (No. 19-1414). In oral argument, Justice Sotomayor questioned this decision and stated that arguing against application of the exclusionary rule "would have been my litigation strategy." Transcript of Oral Argument at 47-48, *Cooley*, 141 S. Ct. 1638 (No. 19-1414).

1. Congress's Plenary Power

Since the infamous 1886 decision *United States v. Kagama*,[41] the Supreme Court has recognized Congress's plenary power to regulate tribes.[42] The Court originally rested this authority on colonialist arguments, reasoning that "Indian tribes *are* the wards of the nation" and that "[t]hey are communities *dependent* on the United States."[43] In sum, the plenary authority arose from the federal government's (racially charged) "duty of protection."[44]

While the rationales for Congress's plenary authority have shifted over the years, its suspect nature has not. Now, the Court typically relies on the Indian Commerce Clause.[45] Other possible bases that the Justices have cited include the Treaty Clause (or, more accurately, legislation made pursuant to treaties) and preconstitutional authority.[46]

All have shortcomings. First, the Indian Commerce Clause may indeed be best understood as "authoriz[ing] Congress to regulate all 'intercourse' between non-Indians and Indians."[47] But even that understanding fails to explain

[41] 118 U.S. 375 (1886).

[42] *Id*. at 383-84; *see* Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1015 (2015).

[43] *Kagama*, 118 U.S. at 383-84; *see also* Clinton, *supra* note 7, at 175-76 ("As employed in *Kagama*, wardship was not about federal treaty obligations of protection of tribal sovereignty, which was the original conception of dependence offered in *Cherokee Nation*. Instead, the *Kagama* wardship rationale was about supposed racial, cultural, economic and political inferiority of tribes. Federal power over them derived from the federal government's paternalistic superior authority to provide their governance." (citing *Kagama*, 118 U.S. at 375; Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831))).

[44] *Kagama*, 118 U.S. at 384.

[45] Ablavsky, *supra* note 42, at 1014-15; *see, e.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."); *see also* U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have power . . . [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes.").

[46] United States v. Lara, 541 U.S. 193, 200-01 (2004). The Treaty Clause authorizes the President—not Congress—to make treaties. Nevertheless, Congress may enact legislation pursuant to treaties. *Id*.; *see* U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties.").

[47] Brief for Tribal Defendants at 2, Haaland v. Brackeen, No. 21-376 (U.S. Aug. 12, 2022) (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515 *passim* (1832)). *Compare* Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201, 243 (2007) (finding original public meaning of Indian Commerce Clause provided for "only *commercial* transactions with Indian *tribes* rather than all affairs with all Indians"), *with* Matthew L.M. Fletcher, *ICWA and the Commerce Clause*, *in* FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT AT 30, at 28, 33, 41 (Matthew L.M. Fletcher, Wenona T. Singel & Kathryn E. Fort eds., 2009) (arguing that "Indian Commerce Clause should be interpreted broadly to include subject matters beyond the narrow meaning (whatever it may be) of 'commerce'" before concluding that "Congress's Indian Commerce Clause authority extends into the realm of social legislation and regulation of family affairs").

Congress's authority to enact statutes—such as the ICRA and the MCA—that regulate noncommercial activity occuring wholly within tribes. Second, Congress, by legislative fiat, ended treaty making in 1871.[48] And although the statute doing so maintained preexisting treaties, grounding Congress's authority over all 574 tribes in pre-1871 treaties is incongruous with the government's recognition of tribes since 1871.[49] Third, preconstitutional sovereign authority over tribal nations lacks textual support.[50]

After examining the mismatch between legal authority and Congress's activity, Professor Robert Clinton concludes, "there is no acceptable, historically-derived, textual constitutional explanation for the exercise of any federal authority over Indian tribes without their consent manifested through treaty."[51] Some scholars seek to better define the sources of Congress's power. These scholars turn to some combination of the dormant Indian Commerce Clause,[52] international law,[53] and concepts from the law of nations and historical relationships that scholars say are embedded in the Constitution.[54] Taking a different tack, Professor Saikrishna Prakash argues that a single doctrine should

[48] Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (1871) (codified as amended at 25 U.S.C. § 71). This proscription might itself be unconstitutional as violative of the principle of separation of powers. *See* Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1102 n.206 (2004) (finding act "unconstitutional because it sought to prevent the President from making further treaties with the Indian tribes"). It is true, however, that the statute did not invalidate preexisting treaties.

[49] *See, e.g.*, *Petitions Resolved*, U.S. DEP'T OF INDIAN AFFS., https://www.bia.gov/as-ia/ofa/petitions-resolved/acknowledged [https://perma.cc/MCM4-YL7G] (last visited Oct. 25, 2022) (listing eighteen tribes that received federal acknowledgment from Department of Interior since 1980).

[50] *Lara*, 541 U.S. at 225 (Thomas, J., concurring).

[51] Clinton, *supra* note 7, at 115.

[52] *See* Alex Tallchief Skibine, *Constitutionalism, Federal Common Law, and the Inherent Powers of Indian Tribes*, 39 AM. INDIAN L. REV. 77, 118 (2014) ("Once it is accepted that because of tribal incorporation, Congress no longer has plenary power over Indian tribes, the extent of this redefined congressional power still has to be determined. There are various ways to conceptualize some limits on congressional power over Indian tribes under the Commerce Clause.").

[53] *See* Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 36-37 (1996) ("[T]he interpretation not only of the existence and nature of congressional power, but of its constitutional limits as well, should be informed by international law, including the evolving component of it concerning the rights of indigenous peoples.").

[54] *See* Ablavsky, *supra* note 42, at 1084 ("[T]he authority that the United States originally claimed over Indian tribes was importantly different from later, more aggressive invocations of federal power. It was *not* plenary; it acknowledged tribal sovereignty and restricted the authority of the United States to the regulation of Natives' international alliances and land sales. Furthermore, this authority's origins in the law of nations suggested substantial checks based on treaty and customary law.").

not apply the same approach to all tribes.[55] More specifically, he asserts that only treaties and federal land ownership can justify Congress's plenary power.[56]

The point here is not to reconcile Congress's plenary authority with the ambiguity of that authority's source, a task beyond this Note's scope. What matters for present purposes is the recognition that Congress's plenary authority is constitutionally suspect. As Part IV discusses, this suspect authority cuts in favor of a deferential approach in applying the ICRA to limit tribal action.

2. Statutory Text

In the 1960s, as with today, the Bill of Rights did not apply to tribes.[57] Against this backdrop, in 1961, Senator Sam Ervin's Subcommittee on Constitutional Rights recognized a series of civil rights abuses by tribal governments that could not be remedied in federal court.[58] Seven years and many hearings later, Congress passed the ICRA.[59] Since 1968, Congress has amended the ICRA five

[55] Prakash, *supra* note 48, at 1110-14 ("Once we stop stereotyping the tribes, it becomes clear that meaningful variations across the Indian tribes make for varying degrees of federal power.").

[56] *Id*.

[57] Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1346 (1969) [hereinafter *The Indian Bill of Rights*] ("The doctrine that the Constitution does not restrict the actions of tribal governments grew out of the tribes' historically anomalous position in our governmental structure."). The Court established this principle roughly seven decades earlier in *Talton v. Mayes*, 163 U.S. 376 (1896).

[58] Alvin J. Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S.D. L. REV. 1, 1-2 (1975). For other analyses of the legislative history, see, for example, Donald L. Burnett, Jr., *An Historical Analysis of the 1968 Indian Civil Rights Act*, 9 HARV. J. ON LEGIS. 557 (1971); Joseph de Raismes, *The Indian Civil Rights Act of 1968 and the Pursuit of Responsible Tribal Self-Government*, 20 S.D. L. REV. 59 (1975); and *The Indian Bill of Rights*, *supra* note 57, at 1354.

Scholars vary in how they frame Congress's consideration of tribal civil rights. *Compare* Porter, *supra* note 7, at 271-72 ("Addressing the reality that the Indian nations were not subject to the Constitution and the Bill of Rights and unable to ignore the testimony of individual Indians complaining of abuses by their own governments, Congress passed the Indian Civil Rights Act (ICRA). Adapted from the Bill of Rights, the ICRA imposed upon tribal governments the strictures of Anglo-American law at its most fundamental level—the rights of individuals." (footnotes omitted)), *with* de Raismes, *supra*, at 72 ("Senator Ervin's Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary commenced hearings on the rights of reservation Indians. The hearings were held around the country, and many Indian people testified to various abuses of tribal self-government.").

[59] Indian Civil Rights Act (ICRA), Pub. L. No. 90-284, 82 Stat. 77, 77-78 (1968) (codified as amended at 25 U.S.C. §§ 1301-1304).

times.[60] None of the amendments affect the search-and-seizure provision.[61] For this Note's primary inquiry, therefore, the 1968 ICRA controls.

The ICRA's original text matches language in the First, Fourth, Fifth, Sixth, and Eighth Amendments, the Fourteenth Amendment's Equal Protection Clause, and Article I, Section 10's prohibition against Bills of Attainder and Ex Post Facto laws.[62] But these provisions are not perfect copies of their Bill of Rights counterparts. For example, section 202(1), a First Amendment parallel, omits an Establishment Clause. Section 202(6), a Sixth Amendment parallel, appears to specifically reject the application of *Gideon v. Wainwright*[63] by not requiring tribes to provide counsel for indigent clients.[64] And section 202(7), an

[60] *Indian Civil Rights Act*, TRIBAL CT. CLEARINGHOUSE, https://www.tribal-institute.org/lists/icra.htm [https://perma.cc/42T8-YBYD] (last visited Oct. 25, 2022) (discussing amendments). First, in 1986, Congress increased the sentencing limitations to one year and $5,000. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, sec. 4217, § 202(7), 100 Stat. 3207, 3207-146 (codified as amended at 35 U.S.C. § 1302(a)(7)). Second, in 1991, Congress overturned *Duro v. Reina*, 495 U.S. 676 (1990), and explicitly authorized (or, perhaps more accurately, restored) tribal criminal jurisdiction over nonmember Indians. *See* Act of Nov. 5, 1990 (*Duro* Fix), Pub. L. No. 101-511, sec. 8077(b)-(d), § 201, 104 Stat. 1856, 1892-93 (codified at 25 U.S.C. § 1301). *See generally* Alex Tallchief Skibine, United States v. Lara*, Indian Tribes, and the Dialectic of Incorporation*, 40 TULSA L. REV. 47 (2004) (examining constitutionality of amendment and extent of Congress's authority). Third, in 2010, Congress again increased the sentencing cap, this time to three years and $15,000. To sentence defendants at this level, however, tribes must also offer heightened procedural protections. *See* Tribal Law and Order Act of 2010 (TLOA), Pub. L. No. 111-211, sec. 234, § 202, 124 Stat. 2261, 2279-82 (codified at 25 U.S.C. § 1302). *See generally* Sarah Deer, *Native People and Violent Crime: Gendered Violence and Tribal Jurisdiction*, 15 DU BOIS REV. 89 (2018) (discussing importance of increased sentencing ability and criminal jurisdiction as well as challenges posed by procedural requirements). Fourth, in 2013, Congress limited the application of *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), and explicitly authorized tribal criminal jurisdiction over non-Indians for crimes of domestic violence, dating violence, or violation of a protection order. As with the previous amendment, however, the increase in (or restoration of) criminal jurisdiction came with strings attached—tribes again have to meet increased due process protections. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, sec. 904, § 204, 127 Stat. 54, 120-23 (codified as amended at 25 U.S.C. § 1304). *See generally* Deanna Tamborelli, Note, *Beyond VAWA: Localism as an Argument for Full Tribal Criminal Jurisdiction*, 100 B.U. L. REV. ONLINE 305 (2021) (arguing that Violence Against Women Act does not go far enough and that full tribal criminal jurisdiction is necessary). Most recently, in 2022, Congress again renewed the Violence Against Women Act, this time expanding the list of crimes for which tribes retain jurisdiction. *See* Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, sec. 804, § 204, 136 Stat. 840, 898-99 (codified at 25 U.S.C. § 1304).

[61] *See* public laws cited *supra* note 60.

[62] ICRA § 202, 82 Stat. at 77-78 (codified as amended at 25 U.S.C. § 1302(a)(1)-(10)); *see also* U.S. CONST. art. I, § 10; *id.* amends. I, IV, V, VI, VIII, XIV.

[63] 372 U.S. 335 (1963).

[64] *Id.* at 344-45.

Eighth Amendment parallel, limits tribes' abilities to punish defendants—the original session law capped punishments at six-month sentences and $500 fines.

The ICRA reflects a balance. On the one hand, the ICRA "clearly was a product of the civil rights movement and the focus on protecting constitutional rights against governmental intrusion."[65] Congress's motivation was to protect "the rights of individual American Indians from being infringed by Indian tribes exercising powers of self-government."[66] In particular, Congress paid heed to individual rights in criminal proceedings.[67]

The legislative history revealed that the ICRA "plac[ed] certain *limitations* on an Indian tribe in the exercise of its powers of self-government" to achieve the statute's goal of protecting individual Indians.[68] The ICRA originally restricted tribal sentencing to a six-month term of imprisonment and a $500 fine.[69] For the first ten years after enactment, Courts interpreted the ICRA as a waiver of tribal sovereign immunity.[70] And, by providing a habeas remedy, Congress gave federal courts supervisory authority over tribal adjudications that result in incarceration.[71]

At bottom, the erosion of tribal sovereignty is an inevitable consequence of the ICRA. As Professor Robert Porter describes, "[U]nder the guise of strengthening tribal governance, Congress further imposed the Anglo-American legal tradition on the Indian nations through the ICRA and continued its 100-year attack on traditional methods of governance and dispute resolution."[72]

But the statute also reveals some attempts to accommodate tribal governmental interests. After an extensive review of the ICRA's legislative history, Alvin Ziontz concludes that Congress meant for the ICRA to be a set of restraints "operating *within* the structure of tribal government."[73] For instance, the ICRA's omission of an Establishment Clause was out of deference to religious-based Pueblo governments.[74] And, as a result of recognizing tribal

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[65] Clinton, *supra* note 7, at 198.

[66] *Constitutional Rights of the American Indian: Hearings on S. 961, S. 962, S. 963, S. 964, S. 965, S. 966, S. 967, S. 968, and S.J. Res. 40 Before the Subcomm. on Const. Rts. of the Comm. of the Judiciary*, 89th Cong. 2 (1965) [hereinafter *1965 Hearings*].

[67] Ziontz, *supra* note 58, at 17.

[68] S. REP. NO. 90-841, at 6 (1967) (emphasis added).

[69] Indian Civil Rights Act (ICRA), Pub. L. No. 90-284, § 202(7), 82 Stat. 77, 77 (1968) (codified as amended at 25 U.S.C. § 1302(a)(7)(B)); *see also* Clinton, *supra* note 7, at 199.

[70] Porter, *supra* note 7, at 272.

[71] ICRA § 203, 82 Stat. at 78 (codified as amended at 25 U.S.C. § 1303).

[72] Porter, *supra* note 7, at 272; *see also* Clinton, *supra* note 7, at 198-99 (discussing ICRA's imposition of "western legal values on kinship and communally-oriented tribal societies with different customary legal values").

[73] Ziontz, *supra* note 58, at 6; *see also* Creel, *supra* note 35, at 65 ("The final version of the ICRA reflected a compromise between the original intention to bring tribes fully under the umbrella of the federal Constitution and the recognition of tribal sovereignty.").

[74] Kristen Carpenter, *Individual Religious Freedoms in American Indian Tribal Constitutional Law*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY, *supra* note 14, at 159, 167.

structure, the ICRA leaves room for each tribe to interpret the meaning and legal effect of its substantive provisions.[75] Furthering this idea, an influential 1969 note exhorts those interpreting the ICRA to "remember that Congress has strongly supported the policy of allowing Indian tribes to maintain their governmental and cultural identity."[76]

3. *Santa Clara Pueblo v. Martinez*

Federal courts liberally construed the ICRA in the decade following enactment.[77] They extended jurisdiction beyond habeas review.[78] And they inferred waivers of tribes' sovereign immunities.[79]

Ten years after the ICRA's enactment, in *Santa Clara Pueblo*, the Supreme Court addressed the ICRA's putative waiver of Santa Clara Pueblo's sovereign immunity, causes of action, and plausible interpretations.[80] The Pueblo extended tribal membership to children of male members—but not to children of female members—who married outside of the Pueblo.[81] The daughter of a Santa Clara Pueblo woman and a Navajo man was thus ineligible for membership. Along with her mother, the daughter petitioned the Pueblo for membership and, when unsuccessful, brought suit for a violation of the ICRA's equal protection provision.[82]

The Supreme Court began its analysis with sovereign immunity. Because the ICRA did not unequivocally waive tribal sovereign immunity, the Court held

[75] *See, e.g.*, Fletcher, *supra* note 14, at 138 ("And so ICRA allows Indian tribes to decide for themselves what individual speech rights mean in each tribal community."); Rosen, *supra* note 14, at 501.

[76] *The Indian Bill of Rights*, *supra* note 57, at 1355.

[77] Porter, *supra* note 7, at 272 ("For the first 10 years following its enactment, the statute was interpreted as providing a cause of action against tribes and as a waiver of tribal sovereign immunity. As a result, tribes were sued routinely for money damages in federal court." (footnote omitted)).

[78] *See, e.g.*, Dodge v. Nakai, 298 F. Supp. 26, 34 (D. Ariz. 1969) (awarding injunctive relief to non-Navajo plaintiff who claimed that Navajo Tribal Council's exclusion of him from Navajo Reservation—an exercise of Navajo Nation's power of self-government—violated ICRA's due process provision); DELORIA & LYTLE, *supra* note 22, at 132-33 ("In enjoining the tribal council order [in *Dodge*], the federal court went beyond the express provision of section 1303 (habeas corpus) and thus opened the door to challenging tribal government decisions by a variety of civil remedies, such as injunctions, declaratory judgments, and the like.").

[79] *See, e.g.*, Daly v. United States, 483 F.2d 700, 705 (1973) ("While the Indian Civil Rights Act does not abrogate the sovereign immunity of Indian tribes by specific language, we read the Act to do so by implication.").

[80] 436 U.S. 49, 59, 60, 63 (1978). For a powerful discussion of the case and its implications, see generally Rina Swentzell, *Testimony of a Santa Clara Woman*, 14 KAN. J.L. & PUB. POL'Y 97 (2004).

[81] *Santa Clara Pueblo*, 436 U.S. at 51.

[82] *See id.* at 51-53.

"that suits against the tribe under the ICRA are barred by its sovereign immunity from suit."[83] Consistent with the Court's sovereign immunity doctrine, however, the Court also held that the suit could proceed against an individual officer of Santa Clara Pueblo.[84]

Next, the Court addressed whether the ICRA authorized a cause of action for declaratory or injunctive relief. The Court noted that "providing a federal forum for issues arising under [the ICRA] constitutes an interference with tribal autonomy and self-government."[85] In addition, the Court considered the ICRA's two competing purposes: first, strengthening individual rights, and second, respecting self-determination.[86] This juxtaposition counseled hesitancy before inferring a cause of action.[87] As a result, the Court held that the ICRA did not authorize a private cause of action.[88]

Because the Court's holding was jurisdictional, the Court had no occasion to address whether Santa Clara Pueblo's membership rules violated the ICRA's equal protection provision. Nor did the Court prescribe how to interpret the ICRA's constitutional provisions. Still, the opinion leaves some clues.

First, the Court seemingly approved of the lower court's "recogni[tion] that standards of analysis developed under the Fourteenth Amendment's Equal Protection Clause were not necessarily controlling in the interpretation of the statute."[89] Second, the Court speculated as to why Congress did not explicitly provide for a private right of action: "Congress may also have considered that resolution of statutory issues under § 1302, and particularly those issues likely to arise in a civil context, *will frequently depend on questions of tribal tradition and custom* which tribal forums may be in a better position to evaluate than federal courts."[90] And third, the Court repeatedly referenced the statute's aim of furthering self-determination.[91] Taken together, these statements suggest that the ICRA's provisions do not require uniform application. Rather, application of the ICRA could permissibly vary depending on which tribe was involved.

[83] *Id*. at 59.

[84] *See id*. (citing *Ex Parte* Young, 209 U.S. 123 (1908)).

[85] *Id*.

[86] *See id*. at 62-63 ("Two distinct and competing purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of individual tribal members vis-à-vis the tribe, Congress also intended to promote the well-established federal 'policy of furthering Indian self-government.'" (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974))).

[87] *Id*. at 64.

[88] *See id*. at 67-69.

[89] *Id*. at 55-56.

[90] *Id*. at 71 (emphasis added).

[91] *See id*. at 62-63, 66, 70-72.

4. Applications Since *Santa Clara Pueblo*

Since *Santa Clara Pueblo*, tribal courts have held that the ICRA need not be interpreted in alignment with federal interpretations of the Bill of Rights.[92] The Pueblo of Pojoaque Tribal Court, for example, describes the proper application of the ICRA's Bill of Rights provisions to each tribe: "[A]s a self-governing sovereign, each tribe determines the purpose of the ICRA provisions, their definitions and how they apply to its tribe."[93] Cases from the Navajo Nation Supreme Court and the Appellate Court of the Hopi Tribe, among others, take a similar stance.[94]

An example of how tribal norms can affect the ICRA's application comes from the Cheyenne River Sioux Tribal Court of Appeals. In *Cheyenne River Sioux Tribe v. Williams*,[95] the court considered the application of the open-fields doctrine where tribal game personnel entered a landowner's open fields to investigate unlicensed hunting.[96] If the ICRA's search-and-seizure provision were to be interpreted in lockstep with the Fourth Amendment, then the court would have had no occasion to examine the doctrine's compatibility with the tribal context. The court, however, rejected lockstep interpretation: "Certainly, federal case law construing the Fourth Amendment of the United States Constitution is *not* dispositive in the tribal context, because the Fourth Amendment does *not* apply against Indian tribes due to their independent sovereign status."[97] As a result, the court considered the doctrine's applicability to the case at hand. The court held that "the tribe's legitimate interest in wildlife as a valuable (tribal) resource justifie[d] the application of the 'open fields' doctrine in this case."[98] But the court cautioned against the breadth of its holding, stating that the application of the open-fields doctrine "*may not* be so [justified] in other instances, where the tribal interest is more attenuated."[99]

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[92] *See* Reese, *supra* note 1, at 588 ("Despite the similarities of ICRA and federal constitutional provisions, federal constitutional precedent does not bind tribal courts' interpretations of ICRA, though many courts rely on it as persuasive authority. Different interpretations of the same language have evolved in tribal courts for the last fifty years." (footnotes omitted)). For a comprehensive survey of tribal interpretive methodologies of the ICRA, see generally Rosen, *supra* note 14.

[93] Palencia v. Pojoaque Gaming, Inc., 28 Indian L. Rep. 6149, 6152 (Pojoaque Tribal Ct. 2001).

[94] *See, e.g.*, Navajo Nation v. Rodriguez, 5 Am. Tribal L. 473, 478 (Navajo 2004); Nevayaktewa v. Hopi Tribe, 1 Am. Tribal L. 306, 314 (Hopi App. Ct. 1998).

[95] 19 Indian L. Rep. 6001 (Cheyenne River Sioux Ct. App. 1991).

[96] *Id.* at 6002-03. The open-fields doctrine holds that police officers do not act unreasonably for purposes of the Fourth Amendment when they enter the open fields surrounding one's home. *See* Oliver v. United States, 466 U.S. 170, 176-77 (1984).

[97] *Williams*, 19 Indian L. Rep. at 6003.

[98] *Id.*

[99] *Id.*

Given the diversity of tribal legal systems, however, some tribal courts interpret the ICRA's provisions in lockstep with the statute's Bill of Rights counterparts.[100] The Coeur d'Alene Tribal Court, for example, expressed that "[t]he Fourth Amendment is made applicable to the sovereign Indian nations by virtue of the Indian Civil Rights Act" and that the Tribe expressly codified the constitutional and statutory provision in its own tribal code.[101] The court did not distinguish tribal understandings of searches and seizures from federal understandings.[102] In fact, the court cited federal and Idaho cases with approval and without cabining their applicability.[103]

Compared to tribal courts, federal courts are less likely to attend to the differences between the ICRA and the Bill of Rights. The Second Circuit has stated, "there 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."[104] But this assertion overlooks nuance that stems from the sources of the rights. The ICRA is statutory—not "constitutional." A federal court's decision to interpret the ICRA in lockstep with the Constitution seems far more invidious than the same decision from a tribal court. The tribal court, of course, is applying a statute to its own government; the federal court is applying a statute to a separate sovereign.

The Ninth Circuit has done slightly better. It has generally stated that "resolution 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.'"[105] The circuit has also offered a bifurcated inquiry. If an ICRA provision and a constitutional provision share the same language and history, then the Ninth Circuit will turn to federal

[100] Reese, *supra* note 1, at 570; Swinomish Indian Tribal Cmty. v. Reid, 11 Am. Tribal L. 182, 185 (Swinomish Tribal Ct. 2012).

[101] Coeur d'Alene Tribe v. Goddard, 38 Indian L. Rep. 6019, 6021 (Coeur d'Alene Tribal Ct. 2011). Several tribes incorporate the ICRA into their constitutions or statutes. *See* Elmer R. Rusco, *Civil Liberties Guarantees Under Tribal Law: A Survey of Civil Rights Provisions in Tribal Constitutions*, 14 AM. INDIAN L. REV. 269, 270, 274 (1988) (finding twenty-two of 220 surveyed tribal constitutions incorporated ICRA). In addition, tribes sometimes interpret the ICRA to set a floor and tribal law to offer increased protections. *See, e.g.*, Davisson v. Colville Confederated Tribes, 10 Am. Tribal L. 403, 408 (Colville Tribal Ct. App. 2012) ("Colville tribal law, with respect to due process and equal protection . . . has always been [as] protective as, if not more protective, than the federal Indian Civil Rights Act.").

[102] *See Goddard*, 38 Indian L. Rep. at 6021.

[103] *See id.* at 6020 (citing, for example, Florida v. Wells, 495 U.S. 1 (1990)).

[104] Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 900-01 (2d Cir. 1996).

[105] Alvarez v. Tracy, 773 F.3d 1011, 1021 (9th Cir. 2014) (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71 (1978)), *rev'd on other grounds*, 835 F.3d 1024 (9th Cir. 2016).

jurisprudence to interpret the ICRA.[106] But if language and history differ, then the Ninth Circuit will be more deferential to tribal customs and traditions.[107]

Finally, other cases recognize that the ICRA and the Bill of Rights are different but that the ICRA's provisions nevertheless call for application of federal jurisprudence. The Eighth Circuit, in a Fourth Amendment context, has said that "[i]n light of the legislative history of the Indian Civil Rights Act and its striking similarity to the language of the Constitution, we consider the problem before us under fourth amendment standards."[108] This approach seems identical to the Ninth Circuit's approach where provisions' texts and histories overlap.[109]

A conflict between federal circuit courts and some tribal courts has therefore emerged. The Navajo Nation, Hopi Tribe, Pueblo of Pojoaque, and Cheyenne River Sioux Tribe, for example, contemplate multiple permissible applications of the ICRA. These applications turn on the relevant tribal contexts. The circuit courts, to the contrary, generally prioritize uniformity at the expense of sovereignty. This Note ultimately interprets the ICRA to yield applications dependent on specific tribal contexts.[110]

B. *The Fourth Amendment's Exclusionary Rule*

The previous Section describes the creation of a legal right.[111] But the ICRA's text does not prescribe a remedy for a violation of this right. So too with the Fourth Amendment—it provides an identical limitation on the federal government but no remedy.[112] Despite this textual silence, the Supreme Court has developed an exclusionary rule.[113] With some (now gaping) exceptions,

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[106] *Id*. at 1022 ("Federal Constitutional jurisprudence informs our interpretation of the ICRA where the rights are the same."); *accord* Kelsey v. Pope, 809 F.3d 849, 864 (6th Cir. 2016) ("[A]s the Band's criminal procedures do not 'differ significantly from those "commonly employed in Anglo–Saxon society" . . . federal constitutional standards are employed in determining whether the challenged procedure violates the Act.'" (quoting Randall v. Yakima Nation Tribal Court, 841 F.2d 897, 900 (9th Cir. 1988))).

[107] *Alvarez*, 773 F.3d at 1022 ("However, the rights afforded by the ICRA are not coterminous with the Constitution where the language and the history of the ICRA and the Constitution differ.").

[108] United States v. Lester, 647 F.2d 869, 872 (8th Cir. 1981) (citing Loncassion v. Leekity, 334 F. Supp. 370, 374 (D.N.M. 1971)).

[109] *See, e.g.*, United States v. Becerra-Garcia, 397 F.3d 1167, 1171 (9th Cir. 2005) ("[W]e analyze the reasonableness of the stop under well developed Fourth Amendment precedent, which nets the same result as an analysis under ICRA.").

[110] *See infra* Part IV; *see also ICRA Reconsidered*, *supra* note 36, at 1723 ("Federal courts should not ask, 'Does the tribe's practice accord with a federal understanding of a "reasonable seizure"?' but rather, 'Does the tribe's practice accord with a permissible understanding of a "reasonable seizure"?'").

[111] 25 U.S.C. § 1302(a)(2).

[112] U.S. CONST. amend. IV.

[113] *See infra* notes 120-29 and accompanying text.

federal and state courts exclude evidence in a criminal trial that was obtained in violation of the Fourth Amendment.[114] This Section traces the exclusionary rule's development with a focus on the Court's rationales. Later, Part IV relies on the rule's development and rationales in the Fourth Amendment context to determine whether and how an analogous rule applies in the ICRA context.

1. Text, History, and Development

As a purely textual matter, the Fourth Amendment does not support exclusion.[115] On the other hand, the text does not foreclose an exclusionary remedy. The Amendment does not say, for example, "The only remedy for a violation of this right is monetary damages."[116] Still, because of the text's silence, any exclusionary rule is necessarily atextual.

Like the text, history and tradition do not support an exclusionary remedy.[117] At common law, the victim of an unlawful search and seizure could sue in trespass or false imprisonment for civil damages or in replevin for the return of seized property.[118] In the United States, the practice of admitting unconstitutionally obtained evidence continued undisturbed until the late nineteenth century.[119]

In 1886, in *Boyd v. United States*,[120] the Supreme Court held for the first time that evidence seized in violation of the Fourth Amendment could not be used in a criminal proceeding.[121] To reach this result, the Court relied on the "intimate

[114] *See infra* Section I.B.2.

[115] *See* U.S. CONST. amend. IV; *see also* Akhil Reed Amar, *Against Exclusion (Except to Protect Truth or Prevent Privacy Violations)*, 20 HARV. J.L. & PUB. POL'Y 457, 459 (1997) ("The Fourth Amendment generally does not require, does not call for, does not even invite, the exclusion of evidence as a remedy for an unconstitutional search or seizure. Nowhere does the text say such a thing.").

[116] *See* Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition?,"* 16 CREIGHTON L. REV. 565, 598 (1983).

[117] *See* Amar, *supra* note 115, at 459 ("[H]istory emphatically rejects any idea of exclusion. The English common law cases underlying the Fourth Amendment never recognized exclusion." (footnote omitted)); *see also* WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602-1791, at 403, 431 (2009).

[118] *See* CUDDIHY, *supra* note 117, at 593; JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 43-44 (2018).

[119] *See, e.g.*, United States v. La Jeune, 26 F. Cas. 832, 843 (C.C.D. Mass. 1822) (No. 15,551); *see also* SUTTON, *supra* note 118, at 44 (citing 4 J. WIGMORE, WIGMORE ON EVIDENCE, § 2183, at 626 (2d ed. 1923)).

[120] 116 U.S. 616 (1886).

[121] *Id.* at 638; *see also* TRACEY MACLIN, THE SUPREME COURT AND THE FOURTH AMENDMENT'S EXCLUSIONARY RULE 3-5 (2013) ("*Boyd v. United States* was the first time that the Court ruled that evidence procured through a Fourth Amendment violation could not be used in a criminal proceeding."); SUTTON, *supra* note 118, at 47.

relation" between the Fourth and Fifth Amendments.[122] Less than two decades later, however, the Court cabined *Boyd* and affirmed a trial court's admission of unconstitutionally obtained evidence.[123]

The true takeoff of the Fourth Amendment's exclusionary rule came in 1914 in *Weeks v. United States*.[124] The Court held that "[t]he effect of the Fourth Amendment is to put *the courts* of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints."[125] The Amendment thus limited not only federal police officers but also federal courts.[126] In the Court's view, the Fourth Amendment would amount to valueless words if the district court could admit unconstitutionally obtained evidence.[127] In 1920, the Court extended its reliance on a constitutional rationale for exclusion in *Silverthorne Lumber Co. v. United States*.[128] And the Court continued to apply a constitutionally required exclusionary rule during the twenty-nine years following *Silverthorne Lumber Co*.[129]

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[122] *Boyd*, 116 U.S. at 633-35 ("[A] compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment.").

[123] *See* Adams v. New York, 192 U.S. 585, 597 (1904).

[124] 232 U.S. 383 (1914).

[125] *Id*. at 391-92 (emphasis added).

[126] Professor Tracey Maclin notes that *Weeks* returned to *Boyd*'s theory that "the admission of illegally acquired evidence tainted the respective judicial proceedings." MACLIN, *supra* note 121, at 17.

[127] *See Weeks*, 232 U.S. at 393 ("If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.").

[128] 251 U.S. 385, 392 (1920) ("The *essence of a provision* forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." (emphasis added)). In addition to the constitutional rationale, scholars and jurists later read a judicial-integrity rationale into *Weeks* and *Silverthorne Lumber Co*. *See* Thomas S. Schrock & Robert C. Welsh, *Up from* Calandra*: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 282 (1974) (finding *Weeks* "expressed a serious concern for judicial integrity"); Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1382 (1983) (finding same in *Silverthorne Lumber Co*.).

[129] *See, e.g.*, Gouled v. United States, 255 U.S. 298, 312-13 (1921); Amos v. United States, 255 U.S. 313, 316-17 (1921); Agnello v. United States, 269 U.S. 20, 34-35 (1925); *see also* MACLIN, *supra* note 121, at 26.

2. Incorporation and Foundation

Before 1949, the Fourth Amendment neither limited the actions of state police nor the admissibility of unconstitutionally obtained evidence in state court. As a result, the federal and state systems separately developed rules and standards to protect against unreasonable searches and seizures.[130] *Wolf v. Colorado*[131] addressed whether the Fourteenth Amendment's Due Process Clause applied the Fourth Amendment to the states—and with it, the Fourth Amendment's exclusionary rule.[132] The Court held that the Fourteenth Amendment incorporated the "core" of the Fourth Amendment.[133] But the Court also left the exclusionary rule behind, holding that the rule was outside the "core" and thus did not apply to the states.[134]

Twelve years later, *Mapp v. Ohio*[135] overruled *Wolf*.[136] *Mapp* returned to *Boyd*'s joinder of the Fourth and Fifth Amendments to hold that the exclusionary rule was constitutionally required.[137] But the Court also relied on justifications besides the Constitution. For example, the Court emphasized the deterrent benefits of exclusion.[138] As in *Wolf*, the Court considered state practice—by 1961, more than half of the states had adopted a version of the exclusionary rule.[139] For good measure, the Court also invoked judicial integrity as a reason for incorporating the exclusionary rule.[140]

The *Mapp* opinion is an interpretation of the constitution despite its use of nonconstitutional arguments.[141] Professor Yale Kamisar offers the best reading of the case:

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[130] By 1949, thirty-one states rejected *Weeks*'s exclusionary rule and sixteen states agreed with *Weeks*. *See* Wolf v. Colorado, 338 U.S. 25, 38 tbl.I (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

[131] *Wolf*, 338 U.S. 25.

[132] *Id*. at 25-26.

[133] *Id*. at 27.

[134] *Id*. at 33.

[135] *Mapp*, 367 U.S. 643.

[136] *See id*. at 660.

[137] *Id*. at 657.

[138] *Id*. at 656.

[139] *Id*. at 651.

[140] *Id*. at 659.

[141] Justice John Marshall Harlan, dissenting in *Mapp*, recognized the majority opinion as a constitutional holding. *Id*. at 678 (Harlan, J., dissenting) ("Essential to the majority's argument against *Wolf* is the proposition that the [exclusionary] rule of [*Weeks*] . . . derives not from the 'supervisory power' of this Court over the federal judicial system, but from Constitutional requirement." (citation omitted)). Contemporaneous and modern critics of the opinion also recognize *Mapp* as a constitutional opinion. *See, e.g*., Francis A. Allen, *Federalism and the Fourth Amendment: A Requiem for* Wolf, 1961 SUP. CT. REV. 1, 26 ("[*Mapp*'s] essential position is that the exclusionary rule is part of the Fourth Amendment;

> [T]he exclusionary rule is a command of the Constitution—whether or not it is a more effective deterrent than "other means of protection" . . . , whether or not it "fetters law enforcement" . . . , whether or not the federal rule was "too strict or too lax" . . . , whether or not "it also makes very good sense" . . . , and whether or not a significant reappraisal of the rule's value and importance had occurred in the states since *Wolf* . . . .[142]

The exclusionary rule's constitutional foundation would not last long, however. In *Linkletter v. Walker*,[143] the Court declined to give *Mapp* retroactive effect.[144] The Court began by citing *Wolf* for the principle that the Constitution did not require the exclusionary rule because the rule was "not necessary to the enforcement of the Fourth Amendment."[145] The Court then turned to *Mapp*—but construed the case as merely correcting *Wolf*: "*Mapp* had as its prime purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless police action."[146] In other words, the Court held that the exclusionary rule was not automatically required by the Fourth Amendment—instead, *Mapp* incorporated the exclusionary rule because it was the only effective deterrent. Presumably, therefore, the exclusionary rule would not be required if a more effective deterrent were available. By the same token, if excluding evidence did not deter police misconduct, then the exclusionary rule would be inapplicable.

The Court put the constitutional status of the exclusionary rule on life support: "Indeed, all of the cases since *Wolf* requiring the exclusion of illegal evidence *have been based on the necessity for an effective deterrent to illegal police action*."[147] The Court would never suspend a criminal defendant's right to counsel simply because the defendant had an unwinnable case. Nor would it suspend someone's right to free speech simply because no one would listen to the speaker. In short, constitutional rights are not contingent on their efficacy. By making the exclusionary rule contingent on its deterrent effect, the Court distanced the rule from the Constitution.[148]

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the Fourth Amendment is part of the Fourteenth; therefore, the exclusionary rule is part of the Fourteenth."); Collins v. Virginia, 138 S. Ct. 1663, 1677 (2018) (Thomas, J., concurring) ("*Mapp* suggested that the exclusionary rule was required by the Constitution itself.").

[142] Kamisar, *supra* note 116, at 623-24.

[143] 381 U.S. 618 (1965).

[144] *Id*. at 619-20.

[145] *Id*. at 636.

[146] *Id*.

[147] *Id*. at 636-37 (emphasis added).

[148] *Id*. at 649 (Black, J., dissenting) ("The inference I gather from [the majority opinion] is that the rule is not a right or privilege accorded to defendants charged with crime but is a sort of punishment against officers in order to keep them from depriving people of their constitutional rights. In passing I would say that if that is the sole purpose, reason, object and

The holding appears even more anomalous in light of the Court's contemporaneous retroactivity jurisprudence. At the time of *Linkletter*, the Court always gave retroactive effect to cases adopting new constitutional rules of criminal procedure.[149] And because *Mapp* held that the exclusionary rule was a constitutional rule, this should have been an easy case for retroactive application. *Linkletter*, therefore, necessarily reflects a shift in the Justices' thinking around the exclusionary rule's constitutionality or the Court's retroactivity jurisprudence, or both.

Still, claiming that *Linkletter* fully abrogated the exclusionary rule's constitutionality goes too far. The *Linkletter* Court acknowledged that *Mapp* "affirmatively found that the exclusionary rule was 'an essential part of both the Fourth and Fourteenth Amendments' and the only effective remedy for the protection of rights under the Fourth Amendment."[150] And the Court emphasized the narrowness of its retroactivity holding, thus leaving *Mapp*'s constitutional holding (ostensibly) undisturbed.[151] Indeed, most scholars and jurists point to a 1974 case—*United States v. Calandra*[152]—as marking the complete "deconstitutionalization" of the exclusionary rule.[153] There, the Court

effect of the rule, the Court's action in adopting it sounds more like law-making than construing the Constitution."); *see also* MACLIN, *supra* note 121, at 114-15 ("[B]y relying on deterrence as the basis for the exclusionary rule, [the Court] transformed exclusion from a constitutional mandate to a rule based upon its ability to deter police misconduct."); Kamisar, *supra* note 116, at 624 (finding that since *Linkletter*, Court no longer perceives true relationship between exclusionary rule and Fourth Amendment and instead comprehends exclusionary rule as judge-made law justified by its pragmatic effects).

[149] *See Linkletter*, 381 U.S. at 628 ("It is true that heretofore, without discussion, we have applied new constitutional rules to cases finalized before the promulgation of the rule."); *see also* Kamisar, *supra* note 116, at 627-28. For example, the Court gave *Gideon v. Wainwright* retroactive effect just two years prior. *See* MACLIN, *supra* note 121, at 109-10.

[150] *Linkletter*, 381 U.S. at 634 (quoting Mapp v. Ohio, 367 U.S. 643, 657 (1961)).

[151] *Id.* at 639-40 ("All that we decide today is that though the error complained of might be fundamental it is not of the nature requiring us to overturn all final convictions based upon it.").

[152] 414 U.S. 338, 348 (1974).

[153] Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1119 (1978); *accord* Kamisar, *supra* note 116, at 640 ("Not surprisingly, upon reading *Calandra* two of the exclusionary rule's staunchest friends lamented that the process of 'deconstitutionalizing' the rule had been completed." (citing Schrock & Welsh, *supra*, at 1119)); William J. Mertens & Silas Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 384 (1981) ("[W]hatever life remained in the principle that the exclusionary rule vindicates a personal right of the accused was abruptly extinguished by the Burger Court in *United States v. Calandra*." (footnote omitted)); MACLIN, *supra* note 121, at 153 ("[B]oth supporters and opponents of the rule concluded that *Calandra* marked the end of the rule's constitutional status.").

definitively stated that the exclusionary rule "is a *judicially created* remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[154]

Linkletter's timing is particularly important for this Note. Decided in 1965, *Linkletter* was the Supreme Court's final word on the exclusionary rule before the ICRA's enactment.[155] The constitutional status of the rule post-*Linkletter* may be stated as follows: the Constitution requires that a federal court exclude unconstitutionally obtained evidence only if the exclusion would effectively deter police misconduct. Thus, in 1968, the textual provision, "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures,"[156] implicitly attached an exclusionary remedy. And this remedy, while not obvious from the Constitution's text, was conditioned on the practical rationale of deterring police misconduct.

3. Consequences of a Deterrence Rationale

If the basis for the exclusionary rule is deterrence, then application of the exclusionary rule is necessarily contingent on its effectiveness in deterring police misconduct.[157] Since *Linkletter*, the Court has undertaken the causal inquiry of whether excluding unconstitutionally obtained evidence will deter police misconduct.[158] But the justices are not professional criminologists, sociologists, or economists. Their causal claims are often fraught with conclusory empirical assumptions.[159]

Dissenting in *Calandra*, Justice William Brennan seemed to view the case as breaking from the constitutional grounding of the exclusionary rule. 414 U.S. at 360-61 (Brennan, J., dissenting) ("For the first time, the Court today discounts to the point of extinction the vital function of the rule to insure that the judiciary avoid even the slightest appearance of sanctioning illegal government conduct."). To Justice Brennan, *Linkletter* was distinguishable in that it dealt with the question of retroactivity and the states' reliance on *Wolf* before *Mapp*. *See id*. at 359-60.

[154] *Calandra*, 414 U.S. at 348 (majority opinion) (emphasis added).

[155] *See* MACLIN, *supra* note 121, at 115-25 (summarizing Warren Court exclusionary cases after *Linkletter*, none of which came before 1968).

[156] U.S. CONST. amend. IV.

[157] *See* Schrock & Welsh, *supra* note 128, at 319.

[158] *See, e.g.*, United States v. Leon, 468 U.S. 897, 921 (1984) (holding exclusionary rule inapplicable when police rely in objectively good faith on warrant unsupported by probable cause, because "[p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations").

[159] *See, e.g.*, Kamisar, *supra* note 116, at 640 ("*Calandra*'s interest-balancing is based on a shaky—one might even say "nonexistent"—empirical foundation."). Future Chief Justice Warren E. Burger argued that the exclusionary rule does not deter police misconduct for four reasons: (1) police are not personally punished by exclusion, (2) police do not study case law and thus will not understand whether their actions in a given situation will result in exclusion, (3) police often do not learn about how particular cases are affected by the exclusion of

In *Hudson v. Michigan*,[160] for example, the Court held that the exclusionary rule does not apply to evidence that police obtain after violating the knock-and-announce requirement.[161] The Court asserted that exclusion for a knock-and-announce violation *would* yield (1) a flood of frivolous motions to suppress;[162] and (2) police officers stalling so that any discovered evidence would not be excluded, which would result in physical harm and the destruction of evidence;[163] but *would not* yield (3) any meaningful deterrence of police

evidence stemming from their misconduct, and (4) police assume that the public is more likely to support them than the criminal defendants who benefit from the exclusionary rule. Warren E. Burger, *Who Will Watch the Watchman?*, 14 AM. U. L. REV. 1, 10-12 (1964). But Burger did not support these arguments with quantitative data. Nor did he acknowledge that police *departments* might follow case law and change their institutional practices if courts excluded a lot of their evidence. *See id*.

Anecdotal evidence challenges then-Judge Burger's view. One New York City police officer described *Mapp*'s effect on the Big Apple: "Before [*Mapp*], nobody bothered to take out search warrants. . . . [T]he Supreme Court had ruled that evidence obtained without a warrant—illegally if you will—was admissible in state courts. So the feeling was, why bother?" Sidney E. Zion, *Detectives Get a Course in Law*, N.Y. TIMES, Apr. 28, 1965, at 50. So too on the other side of the country—"neither the district attorney's office nor the police department of Los Angeles, for example, paid any attention to the commands of the fourth amendment until the adoption of the exclusionary rule." John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1034 (1974).

[160] 547 U.S. 586 (2006).

[161] *See id*. at 594. Under well-established Fourth Amendment principles, police are required to knock and announce their presence. *See* Wilson v. Arkansas, 514 U.S. 927, 931 (1995) ("An examination of the common law of search and seizure leaves no doubt that the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering."); *see also* Blanche Bong Cook, *Something Rots in Law Enforcement and It's the Search Warrant: The Breonna Taylor Case*, 102 B.U. L. REV. 1, 47-50 (2022) (detailing history and constitutional incorporation of knock-and-announce requirement). The police in *Hudson*, despite having a search warrant, waited only three to five seconds after announcing themselves before entering the house. *Hudson*, 547 U.S. at 588. Michigan conceded that the entrance violated the knock-and-announce requirement. *Id*. at 590.

[162] *Hudson*, 547 U.S. at 595 ("In addition to the grave adverse consequence that exclusion of relevant incriminating evidence always entails (viz., the risk of releasing dangerous criminals into society), imposing that massive remedy for a knock-and announce violation would generate a constant flood of alleged failures to observe the rule . . . .").

[163] *Id*. ("If the consequences of running afoul of the rule were so massive, officers would be inclined to wait longer than the law requires—producing preventable violence against officers in some cases, and the destruction of evidence in many others.").

The majority contradicted itself. Consider two juxtapositions. First: (1) exclusion would not significantly deter police misconduct, and (2) a cost of the exclusionary rule is that police would refrain from timely entry. *Compare id*. at 596 ("Viewed from this perspective, deterrence of knock-and-announce violations is not worth a lot."), *with id*. at 595 ("If the consequences of running afoul of the rule were so massive, officers would be inclined to wait

misconduct.[164] As an alternative to exclusion, the Court claimed that civil suits for damages would effectively deter misconduct.[165] So too, the Court stated, would modern police professionalism and in-house discipline.[166] These claims all allege empirical, cause-and-effect relationships about the real world. But the Court did not support these claims with empirical, real-world studies.

In reality, the causal impact of exclusion on deterring police misconduct is impossible to ascertain with accuracy. As Professor Christopher Slobogin explains, to measure the deterrent benefit of the exclusionary rule, "the deterrence researcher would compare the behavior of two populations, one of which operates under the desired disincentive, one of which does not, with all other variables held constant."[167] And any accurate cross-sectional study between two states requires the doubtful assumption that the states are identical in all criminal law norms and cultures other than their disparate applications of the exclusionary rule.[168] Longitudinal, observational, and economic studies of the exclusionary rule's benefits are similarly unhelpful.[169]

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longer than the law requires . . . ."). If (2) is true, then exclusion necessarily deters untimely entry, so (1) would be false. Second: (1) prohibiting sudden and unannounced entrances protects life and property, and (2) violence and the destruction of evidence will result from police waiting too long to enter. *Compare id*. at 593-94 (identifying protection of life and property as interests served by knock-and-announce requirement), *with id*. at 595 (asserting that waiting too long would "produc[e] preventable violence against officers in some cases, and the destruction of evidence in many others"). If both are true, then life and property are doomed either way.

[164] *See id*. at 596. Here, the Court reasoned that police have little incentive to violate the knock-and-announce requirement. *See id*. If they do violate the requirement, they "can realistically be expected to achieve absolutely nothing except the prevention of destruction of evidence and the avoidance of life-threatening resistance by occupants of the premises." *Id*. The Court's logic is thus that excluding evidence would not deter police misconduct (i.e., knock-and-announce violations) because that very misconduct does not generally yield lots of evidence. *See id*. Of course, this is an empirical statement and clashes with the facts of *Hudson* itself, where police obtained the incriminating evidence only after a knock-and-announce violation. *Id*. at 588.

[165] *Id*. at 598 ("As far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts."). For an exposé on how the Court has limited remedies for police abuse by assuring the availability of other remedies—but then limited the latter remedies by assuring the availability of the former ones—see generally Leah Litman, *Remedial Convergence and Collapse*, 106 CALIF. L. REV. 1477 (2018).

[166] *See Hudson*, 547 U.S. at 598.

[167] Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 369.

[168] *See id*. at 370 n.11 ("As a practical matter, however, differences between cultures (e.g., crime rates, gun control, police and court organization) would make quantitative comparisons of police behavior virtually impossible.").

[169] *Id*. at 369-72; *see also* United States v. Leon, 469 U.S. 897, 943 (1984) (Brennan, J., dissenting) ("By remaining within its redoubt of empiricism and by basing the rule solely on

Moreover, the causal inquiry raises the subsequent question of how much deterrence is needed for suppression: Any possible deterrence?[170] Five fewer police misdeeds for one motion to suppress?[171] Or enough to outweigh the costs of exclusion?[172] The Court has settled on this third possibility—"the exclusionary rule does not apply when the costs of exclusion outweigh its deterrent benefits."[173]

The adoption of a cost-benefit analysis creates another problem. The costs of exclusion and the benefits of deterrence are largely unquantifiable.[174] Benefits of deterrence might include the vindication that a victim of police abuse feels when the court grants a motion to suppress and the relief that a community feels after a police department changes its procedures. Costs of exclusion might include the injustice that a victim of a violent crime feels after an assailant goes free because of a police error and the anxiety that a community feels as reported violations of criminal laws go unpunished.[175] But as Professor Brandon Hasbrouck points out, the Court's cost-benefit analysis involves "haphazardly balancing the needs of the state against the rights of individuals."[176]

To summarize, a deterrence-based exclusionary rule breeds unfettered judicial discretion in at least three ways: (1) causal claims cannot be tested so judges substitute their own empirical assumptions, (2) the amount of deterrence needed to trigger exclusion is a policy decision, and (3) the costs and benefits of exclusion distill to value judgments. The consequence of endorsing such judicial

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the deterrence rationale, the Court has robbed the rule of legitimacy. A doctrine that is explained as if it were an empirical proposition but for which there is only limited empirical support is both inherently unstable and an easy mark for critics. The extent of this Court's fidelity to Fourth Amendment requirements, however, should not turn on such statistical uncertainties.").

[170] While deterrence has developed into a necessary condition for application of the exclusionary rule, it is not a sufficient condition. *See Hudson*, 547 U.S. at 596.

[171] In *Leon*, Justice Byron White cited empirical studies of the costs of the exclusionary rule. *See Leon*, 469 U.S. at 907 n.6. One study suggested that the exclusionary rule resulted in the nonprosecution or nonconviction of 0.6% to 2.35% of felony arrestees. *Id*. (quoting Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. BAR FOUND. RSCH. J. 611, 621). Justice White did not balance these citations against studies of the benefits of the exclusionary rule, positing instead that no deterrent benefit would result from exclusion in *Leon*. *See id*. at 908 n.6.

[172] *See, e.g.*, Utah v. Strieff, 579 U.S. 232, 235 (2016).

[173] *Id*.; *see also Leon*, 469 U.S. at 910.

[174] According to Professor Blanche Bong Cook, this cost-benefit analysis in *Hudson* "allowed the Court to privilege the increased professionalism of the police over the Fourth Amendment safety and sanctity protections against forceful government intrusion." *See* Cook, *supra* note 161, at 57.

[175] Burger, *supra* note 159, at 22 (worrying that exclusionary rule leads to "sour and bitter feeling that is psychologically and sociologically unhealthy").

[176] Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 156-57 (2022).

discretion is that exceptions now swallow the exclusionary rule. The exclusionary rule does not apply if (1) police misconduct is *attenuated* from discovery of the evidence;[177] (2) police, despite acting unconstitutionally, have done so in objective *good faith*;[178] (3) police would have *inevitably discovered*

[177] Traditional attenuation involves the link between the unconstitutional act and the obtainment of evidence. Courts will analyze the temporal proximity between the two, any intervening circumstances, and the purpose and flagrancy of the unconstitutional action. *See* Brown v. Illinois, 422 U.S. 590, 603-04 (1975).

In a modern attenuation case, the Court held that the exclusionary rule did not apply when an officer unconstitutionally stopped someone in a parking lot, asked for the detainee's identification, *then* learned that the detainee had an outstanding arrest warrant, and discovered drugs in a search incident to arrest. *See Strieff*, 579 U.S. at 235-36, 242. The time between the unlawful stop and the discovery of drugs was "only minutes." *Id*. at 239. Nevertheless, the knowledge of the outstanding arrest warrant became an intervening circumstance that attenuated the unconstitutional act from the discovery of the evidence. *Id*. at 240.

Also, attenuation can now limit exclusion when the interests protected by exclusion are different from the interests protected by a law or requirement that the police violated. *See* Hudson v. Michigan, 547 U.S. 586, 592-93 (2006). Under this attenuated-interests theory, the exclusionary rule does not apply when "even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." *Id*. at 593. In *Hudson*, the knock-and-announce interests were the protection of human life, protection of human property, and protection of privacy and dignity destroyed by sudden intrusion. *Id*. at 594. The exclusionary rule interest was the prevention of unlawful searches and seizures. *Id*. at 593 ("Until a valid warrant has issued, citizens are entitled to shield 'their persons, houses, papers, and effects,' from the government's scrutiny. Exclusion of the evidence obtained by a warrantless search vindicates that entitlement." (citation omitted)). So identified, the *Hudson* Court held that because "interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable." *Id*. at 594.

[178] The exception is traceable to *Leon*. *See* 468 U.S. at 908. More recently, *Davis v. United States*, 564 U.S. 229 (2011), asserted that police themselves may be negligent without an exclusionary consequence. *Id*. at 238 ("[W]hen the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful, or when their conduct involves only simple, 'isolated' negligence, the 'deterrence rationale loses much of its force,' and exclusion cannot 'pay its way.'" (quoting *Leon*, 468 U.S. at 908 n.6, 909, 919; Herring v. United States, 555 U.S. 135, 137 (2008))). To be sure, the language from *Davis* about a police officer's own negligence was not necessary to the holding. The case involved police reliance on Eleventh Circuit case law that was ultimately held incorrect. *Id*. at 239-40. Nevertheless, treating this language as insignificant dicta would be a mistake: given the direction of the exclusionary rule, one may likely assume that the rule is now cabined to police action that is "'deliberate,' 'reckless,' or 'grossly negligent.'" *Id*. at 238 (quoting *Herring*, 555 U.S. at 137); *see also* Tracey Maclin & Jennifer Rader, *No More Chipping Away: The Roberts Court Uses an Axe to Take Out the Fourth Amendment Exclusionary Rule*, 81 MISS. L.J. 1183, 1190 (2012) ("The revolution is over and the opponents of the exclusionary rule have won (Though we concede that some 'mop-up' work may be required to convince the lower courts that the Court meant what it said in *Davis* and *Herring*, namely, that exclusion is unwarranted in all cases where police reasonably believed their conduct complied with the law).").

the evidence;[179] or (4) notwithstanding an unconstitutional act, police discovered evidence due to an *independent source*.[180]

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Two points conclude this Section. First, for the past four decades, the Court's opinions have consistently disclaimed the constitutional basis for the rule.[181] So how has the exclusionary rule remained binding on the states? If the exclusionary rule does not derive from the Constitution, then it must come from the Court's supervisory power.[182] The supervisory power seemingly gives the Court "oversight of the administration of criminal justice in the federal courts."[183] And using this power, the Court may prescribe rules of evidence and procedure that bind the lower *federal* courts.[184] But rules made under the

[179] *See, e.g.*, Nix v. Williams, 467 U.S. 431, 444 (1984). In *Hudson*, the Court noted that police misconduct must be the "but-for" cause of obtaining evidence in order to trigger exclusion—although "but-for causality is only a necessary, not a sufficient, condition for suppression." 547 U.S. at 592. There, the Court found that the knock-and-announce violation was not the but-for cause of the discovery of the evidence. *See id.* According to the Court's logic, the police had a search warrant, so they could have entered the house lawfully if they had not done so unlawfully. *See id.* ("Whether that preliminary misstep had occurred *or not*, the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house."); *see also* Albert W. Alschuler, *The Exclusionary Rule and Causation:* Hudson v. Michigan *and Its Ancestors*, 93 IOWA L. REV. 1741, 1779 (2008) (summarizing causation standard from *Hudson* as accepting government's argument that "if they hadn't done it wrong, they would have done it right").

[180] *See, e.g.*, Murray v. United States, 487 U.S. 533, 537 (1988).

[181] *See, e.g.*, *Leon*, 468 U.S. at 906 ("The rule thus operates as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.'" (quoting United States v. Calandra, 414 U.S. 338, 348 (1974))); *Davis*, 564 U.S. at 236 ("The Amendment says nothing about suppressing evidence obtained in violation of this command. That rule—the exclusionary rule—is a 'prudential' doctrine . . . ." (citing Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998))).

[182] Alfred Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 182-85, 201-02 (1969) (examining exclusionary rule as case study of Court's supervisory power and considering power's purposes).

[183] *Id.* at 193. Under Professors Thomas Schrock and Robert Welsh's more general definition, an appellate court has this oversight over the lower courts in the appellate court's system. *See* Schrock & Welsh, *supra* note 128, at 271 n.65.

[184] *See* McNabb v. United States, 318 U.S. 332, 340 (1943) ("[T]he scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence.").

Although the supervisory power has long been accepted, the power is surprisingly unsupported by the "Constitution's text, structure, and history." Amy Coney Barrett, *The*

supervisory power are not constitutional rules and cannot bind Congress or the states.[185] Thus, as Professors Thomas Schrock and Robert Welsh describe, the continued application of the exclusionary rule to the states "suggest[s] that the Court has a general authority to impose on state courts and state officials rules grounded not in the constitutional rights of the persons seeking to invoke them but rather in a subconstitutional calculation of costs and benefits."[186] That is untenable.[187]

Second, the erosion of the exclusionary rule from *Weeks* to the Roberts' Court was not inevitable. The experiences of states—and tribes—reveal otherwise.[188] One third of states have rejected the good-faith exception to the exclusionary rule in interpretations of state constitutional counterparts to the Fourth Amendment.[189] These rejections reveal that identically worded textual provisions on the state level have prompted different rules from the federal interpretation based on different rationales. Thus the mere similarity of the search-and-seizure provisions in the ICRA and the Fourth Amendment is insufficient to require the same exclusionary rule in the ICRA context.[190]

C. *Criminal Jurisdiction*

Thus far, this Part has examined (1) a limitation on tribal governments in the form of a federal statutory right to be free from unreasonable searches and seizures by tribal police officers, and (2) federal responses to violations of the same constitutional right by federal or state police officers. To complete the

Supervisory Power of the Supreme Court, 106 COLUM. L. REV. 324, 328 (2006). Moreover, the supervisory power raises separation-of-powers concerns: when a federal court excludes evidence, it superintends not only itself but also the executive branch. *See* Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656, 1661 (1963). Shifting the source of the exclusionary rule from the Constitution to the supervisory power, therefore, raises new questions (e.g., Where does the supervisory power come from? Does it violate the separation of powers?) just as it dismisses others (e.g., What in the Constitution's text or history supports exclusion?).

[185] Hill, *supra* note 182, at 193.

[186] Schrock & Welsh, *supra* note 153, at 1118.

[187] *See* Collins v. Virginia, 138 S. Ct. 1663, 1680 (2018) (Thomas, J., concurring) ("[T]he [exclusionary] rule governs the methods that state police officers use to solve crime and the procedures that state courts use at criminal trials—subjects that the Federal Government generally has no power to regulate. These are not areas where federal common law can bind the States." (citations omitted)). *But see generally* Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975) (suggesting that subconstitutional rulemaking applies to states).

[188] 2 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES § 11.05(2) (4th ed. 2015). For tribes' different treatments of the exclusionary rule, see *infra* Part III.

[189] SUTTON, *supra* note 118, at 64; *see also* FRIESEN, *supra* note 188, § 11.05(2).

[190] *See infra* Part IV.

background, this Section describes how courts have jurisdiction over claims of unreasonable searches and seizures by tribal officers.

This Section traces the "maze" of criminal jurisdiction in Indian Country.[191] As preexisting sovereigns, "[t]ribal power to govern the people within the territory predates the U.S. Constitution."[192] But the federal government has frequently abrogated this power. Consider three factors—where a crime took place, who was involved, and what crime occurred.[193] Table 1 offers a simplified summary, and the text that follows describes each factor and its effect on tribal, federal, and state jurisdiction.

[191] Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 504 (1976).

[192] Creel, *supra* note 35, at 57.

[193] *See* Alex Treiger, Note, *Thickening the Thin Blue Line in Indian Country: Affirming Tribal Authority to Arrest Non-Indians*, 44 AM. INDIAN L. REV. 163, 170 (2019).

Table 1. Criminal Jurisdiction.[194]

Within Indian Country					
Not Public Law 280 Jurisdiction			**Public Law 280 Jurisdiction (Without Federal Reassumption)**		
Offender	**Victim**	**Jurisdiction**	**Offender**	**Victim**	**Jurisdiction**
Non-Indian	Non-Indian	State, exclusive of federal and tribal.	Non-Indian	Non-Indian	State, exclusive of federal and tribal.
Non-Indian	Indian	Federal and state, exclusive of tribal. Exception gives tribal jurisdiction for certain domestic violence offenses.	Non-Indian	Indian	State, exclusive of federal and tribal. Exception gives tribal jurisdiction for certain domestic violence offenses.
Indian	Non-Indian	Federal, traditionally exclusive of state (but perhaps no longer), and probably not of tribal.	Indian	Non-Indian	State, exclusive of federal, but not of tribal.
Indian	Indian	*If crime enumerated in MCA:* Federal, exclusive of state, but probably not of tribal. *Otherwise:* Exclusive tribal jurisdiction.	Indian	Indian	State, exclusive of federal, but not of tribal.
Non-Indian	Victimless	State, exclusive of federal and tribal.	Non-Indian	Victimless	State, exclusive of federal and tribal.
Indian	Victimless	Perhaps federal and tribal.	Indian	Victimless	State or tribal.
Outside Indian Country					
State, exclusive of federal, and presumptively exclusive of tribal. Presumption against tribal jurisdiction likely changing.					

[194] For a more detailed table, see DUANE CHAMPAGNE & CAROLE GOLDBERG, CAPTURED JUSTICE: NATIVE NATIONS AND PUBLIC LAW 280, at 9 fig.1.1, 10 fig.1.2 (2d ed. 2020). The

1. Location

One question that determines jurisdiction is where a crime occurred—specifically, whether the crime occurred within "Indian Country."[195] The federal definition of Indian Country includes "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, . . . (b) dependent Indian communities . . . , and (c) all Indian allotments, the Indian titles to which have not been extinguished."[196] Because the definition includes all land within the boundaries of a reservation, crimes committed on public roads or on property owned by non-Indians within a reservation still occur in Indian Country.[197]

Tribal Jurisdiction. A crime's occurence within Indian Country is generally considered a necessary but not sufficient condition for tribal jurisdiction.[198] Tribal police officers also have investigatory "authority to detain temporarily and to search a non-Indian on a public right-of-way that runs through an Indian reservation."[199] As tribal police exercise this authority, fruits of searches incident to detentions may yield motions to suppress.[200] These motions will presumably

table here has been updated to reflect the Court's decision in *Oklahoma v. Castro-Huerta*. *See* No. 21-429, slip op. at 4 (U.S. June 29, 2022) (authorizing concurrent state jurisdiction over crimes committed by non-Indians against Indians in Indian Country); *see also infra* text accompanying footnotes 207-10.

[195] Treiger, *supra* note 193, at 170; *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 9.02[1][b] (Nell Jessup Newton ed., 2017).

[196] 18 U.S.C. § 1151.

[197] *See id*. § 1151(a); Treiger, *supra* note 193, at 170.

In a major development, Indian Country now formally includes Tulsa and much of Eastern Oklahoma. In 2020, the Supreme Court recognized the treaty-defined boundaries of the Muscogee (Creek) Reservation. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020). As a result, the Muscogree (Creek) Nation's "jurisdiction over criminal issues is now vastly expanded and encompasses its 3.25 million-acre Reservation instead of just the approximately 135,000 acres of 'Indian Country' that was formerly presumed to comprise the MCN's territory." Robert J. Miller & Torey Dolan, *The Indian Law Bombshell:* McGirt v. Oklahoma, 101 B.U. L. REV. 2049, 2090 (2021).

[198] Addie C. Rolnick, *Recentering Tribal Criminal Jurisdiction*, 63 UCLA L. REV. 1638, 1674 (2016) ("No specific federal statute defines Indian country as a limit on tribal jurisdiction, although tribal criminal jurisdiction is often assumed to exist only in Indian country."). *But see* Kelsey v. Pope, 809 F.3d 849, 863 (6th Cir. 2016) (recognizing Little River Band of Ottawa Indians' jurisdiction over one of its members for conduct occurring outside of Indian Country). *See also* Rolnick, *supra*, at 1677 (discussing *Kelsey*); Treiger, *supra* note 193, at 170 n.43 (discussing prevailing assumption and change).

[199] United States v. Cooley, 141 S. Ct. 1638, 1641 (2021).

[200] *See* Mikaela Koski, Comment, *Tying a Tribal Officer's Hands: Tribal Law Enforcement Authority Under* United States v. Cooley, 126 PENN ST. L. REV. 275, 301-05 (2021) (highlighting uncertainty surrounding extent of authority recognized in *Cooley*).

argue ICRA violations and, accordingly, an application of the exclusionary rule.[201]

Federal Jurisdiction. Indian Country provides a hook for federal jurisdiction under the General Crimes Act and MCA, described below.[202] That said, the federal government has delegated some of this jurisdiction to states with Public Law 280, discussed below.

State Jurisdiction. Public Law 280 gives some states criminal jurisdiction for all state crimes committed by Indians in Indian Country.[203] Enacted in 1953, Public Law 280 makes such jurisdiction mandatory in six states and elective in others.[204] The jurisdiction provides a delegation from the federal government to the states—meaning, the state may exercise the jurisdiction that the federal

[201] With respect to tribal investigatory jurisdiction, cross-deputization agreements might also give rise to motions to suppress for ICRA violations. As described by an Assistant U.S. Attorney in the Western District of Oklahoma,

> Cross deputization can give officers in the field authority under state, tribal, and federal law all at the same time. In other words, a cross deputized officer can have authority to simultaneously act as an officer under the state's law, the tribe's law, and the federal government's law, ensuring that crime is quickly and adequately addressed to enhance public safety.

ARVO MIKKANEN, U.S. ATT'Y'S OFF., W. DIST. OF OKLA., FEDERAL CROSS DEPUTIZATION OF LAW ENFORCEMENT IN INDIAN COUNTRY 1 (2020). Thus, cross-deputized tribal officers who continue to act under tribal authority *and* cross-deputized state and federal officers who temporarily act under tribal authority can violate the ICRA. *See id*. For an in-depth examination of cross-deputization agreements, see generally Kevin Morrow, *Bridging the Jurisdictional Void: Cross-Deputization Agreements in Indian Country*, 94 N.D. L. REV. 65 (2019).

[202] *See* Section I.C.3, *infra*; *see also* 18 U.S.C. §§ 1152-1153.

[203] Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162).

[204] Those states are Alaska (except for the Metlakatla Reservation), California, Minnesota (except for the Red Lake Reservation), Nebraska, Oregon (except for the Warm Springs Reservation), and Wisconsin. *See* 18 U.S.C. § 1162; *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 195, § 6.04[3][a]. The election was not subject to tribal consent before 1968, but an amendment that year made tribal consent necessary for this jurisdiction. *See id*. Ten states have at some point elected to exercise this optional jurisdiction, namely, Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington. *Id*. § 6.04[3][a] n.47. In some of these states, jurisdiction has been retroceded (e.g., Nevada), limited in scope (e.g., Arizona accepted only regulatory jurisdiction), or limited in application to specific tribes (e.g., only the Confederated Salish and Kootenai Tribes have consented to jurisdiction in Montana; no tribes have consented in Utah). *See id*. For informative background on this complicated law, see generally CHAMPAGNE & GOLDBERG, *supra* note 194.

government otherwise would have.[205] This delegation, however, has undermined tribal criminal justice systems.[206]

Finally, in a shocking development in June 2022, the Supreme Court abrogated an important historical distinction between state and tribal land.[207] Before *Oklahoma v. Castro-Huerta*, a crime's occurrence in Indian Country foreclosed state jurisdiction over crimes perpetrated by non-Indians against Indians (with the exception of Public Law 280 jurisdictions).[208] The Court upended this settled understanding and held that states have jurisdiction over all crimes committed by non-Indians, even within Indian Country.[209] As Professors Gregory Ablavsky and Elizabeth Hidalgo Reese describe, "To put it bluntly, this decision is an act of conquest. And it could signal a sea change in federal Indian law, ushering in a new era governed by selective ignorance of history and deference to state power."[210]

2. Indian Status

A second question that determines jurisdiction is whether the perpetrator or the victim is an Indian. Currently, a judge-made, two-prong test governs: "[P]roof of Indian status . . . requires only two things: (1) proof of some quantum of Indian blood, whether or not that blood derives from a member of a federally recognized tribe, and (2) proof of membership in, or affiliation with, a

[205] Rolnick, *supra* note 198, at 1656.

[206] *Id.* at 1656-57 ("In the first decades after the law's passage, states frequently operated as if tribal criminal courts and law enforcement agencies did not exist or did not matter. Federal agencies likewise relied on the existence of state authority to justify withholding base funding for law enforcement and criminal justice from tribes subject to Public Law 280." (footnote omitted)).

[207] Oklahoma v. Castro-Huerta, No. 21-429, slip op. at 4 (U.S. June 29, 2022) ("[T]he Constitution allows a State to exercise jurisdiction in Indian country. Indian country is part of the State, not separate from the State.").

[208] *See* CHAMPAGNE & GOLDBERG, *supra* note 194, at 9 fig.1.1, 10 fig.1.2.

[209] *Castro-Huerta*, slip op. at 24-25 ("We conclude that the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country."). The question presented in *Castro-Huerta* was whether states have jurisdiction over crimes committed by non-Indians against Indians in Indian Country. *Id.* at 1. When paired with *United States v. McBratney*, which the *Castro-Huerta* court recognized as granting state jurisdiction over crimes committed by non-Indians against non-Indians in Indian Country, the effect of *Castro-Huerta* is to give states jurisdiction over *all* crimes committed by non-Indians in Indian Country. *See id.* at 6 (citing *United States v. McBratney*, 104 U.S. 621, 623-24 (1882)).

[210] Gregory Ablavsky & Elizabeth Hidalgo Reese, Opinion, *The Supreme Court Strikes Again—This Time at Tribal Sovereignty*, WASH. POST (July 1, 2022, 7:00 AM), https://www.washingtonpost.com/opinions/2022/07/01/castro-huerta-oklahoma-supreme-court-tribal-sovereignty/.

federally recognized tribe."[211] The second prong—membership or affiliation—is a fact-intensive inquiry.[212]

Because of this test—and its implications for the MCA, which authorizes federal prosecutions over certain crimes committed by Indians against Indians in Indian Country[213]—Native Americans are "the only persons who can be twice punished based upon their race and political status."[214] The MCA "subjects Indian defendants to federal prosecution for crimes occurring on tribal lands and often results in harsher convictions and sentences than would be meted out in state courts."[215] The Supreme Court nevertheless rejected an Equal Protection challenge to the MCA in *United States v. Antelope*.[216] The *Antelope* Court relied on *Morton v. Mancari*[217] to reason that the MCA relies on a political—and not racial—classification.[218]

But *Mancari* was a far cry from *Antelope*. *Mancari* upheld a federal statute that gave hiring preference for Bureau of Indian Affairs positions to Indigenous people.[219] As Professor Sarah Krakoff describes, *Mancari*'s statute "furthered the political and trust relationship with tribes" while *Antelope*'s MCA involved "the federal government's discriminatory or baseless actions toward American Indians."[220] And Professor Addie Rolnick further demonstrates the false equivalency between *Antelope* and *Mancari*: "First, [*Antelope*] involved a law that allegedly disadvantages Indians, rather than a law that benefits them. Second, it involved a law extending federal power over Indians, rather than a law intended to strengthen tribal self-government and self-determination."[221] In sum, Indian status for criminal jurisdiction continues to rest on political affiliation *and* race, reinforced by the leap from *Mancari* to *Antelope*.

Tribal Jurisdiction. With an important exception, the perpetrator's Indian status is a necessary condition for tribal jurisdiction. This condition comes from

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[211] United States v. Zepeda, 792 F.3d 1103, 1113 (9th Cir. 2015). For a discussion of whether Indian status is a political or racial classification, as well as whether the blood-quantum prong should be dropped, see generally Alex Tallchief Skibine, *Indians, Race, and Criminal Jurisdiction in Indian Country*, 10 ALB. GOV'T L. REV. 49 (2017). This two-prong test traces back to *United States v. Rogers*, 45 U.S. 567 (1846).

[212] Treiger, *supra* note 193, at 171.

[213] *See infra* Section I.C.3

[214] Barbara L. Creel, *Is the Court of Indian Offenses of Ute Mountain Ute Agency a Federal Agency for Purposes of the Fifth Amendment's Double Jeopardy Clause?*, 49 PREVIEW U.S. SUP. CT. CASES, Feb. 22, 2022, at 7, 11.

[215] Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041, 1058 (2012).

[216] 430 U.S. 641, 650 (1977).

[217] 417 U.S. 535, 554 (1974).

[218] *Antelope*, 430 U.S. at 646-47.

[219] *Mancari*, 417 U.S. at 554.

[220] Krakoff, *supra* note 215, at 1059.

[221] Addie C. Rolnick, *The Promise of* Mancari*: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. Rev. 958, 994 (2011) (footnote omitted).

Oliphant v. Suquamish Indian Tribe.[222] Relying on selectively chosen legislative histories and "implicit conclusions," the *Oliphant* Court stripped tribes' authority to prosecute non-Indians.[223] The lack of legal authority for this holding is concerning. The opinion is federal common law that has a devastating effect on tribal criminal jurisprudence.[224]

Because *Oliphant* was not a constitutional decision, Congress could overturn it. Indeed, Congress did so in part when it amended the ICRA for the fourth and fifth times with the 2013 and 2022 Violence Against Women Reauthorization Acts—the important exception to *Oliphant*.[225] The 2013 statute "restore[d] tribal jurisdiction over non-Indians who commit crimes of domestic violence against tribal Indians while in Indian Country."[226] And the 2022 reauthorization expanded the list of crimes for which tribes retain jurisdiction.[227]

Notably, Indian tribes retain criminal jurisdiction over Indians from other tribes. The Court temporarily removed this jurisdiction in *Duro v. Reina*.[228] In so doing, the Court extended *Oliphant*.[229] It held that the Salt River Pima-

[222] 435 U.S. 191, 212 (1978).

[223] *See id.* at 204 ("While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions.").

[224] Professors Russel Lawrence Barsh and James Youngblood Henderson criticize *Oliphant*'s logic:

> What is both surprising and distressing is the way in which Justice Rehnquist took it upon himself to argue that Congress and the courts had always assumed that tribal jurisdiction did not extend to non-Indian criminals, and that this implicit assumption was supported by considerations of public policy. It is in the attempt to support these assertions that the *Oliphant* opinion exhibits an unusual propensity for the selective use of history, assuming conclusions, and even according greater weight to defeated bills than enacted law.

Russell Lawrence Barsh & James Youngblood Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609, 616-17 (1979). For further dismantling of *Oliphant*'s logic, see Skibine, *supra* note 52, at 86-87.

[225] Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, sec. 904, § 204, 127 Stat. 54, 120-23 (codified as amended at 25 U.S.C. § 1304); Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, sec. 804, § 204, 136 Stat. 840, 898-99 (codified at 25 U.S.C. § 1304).

[226] Skibine, *supra* note 211, at 53.

[227] Violence Against Women Act Reauthorization Act of 2022 sec. 804, § 204, 136 Stat. at 899.

[228] 495 U.S. 676, 684-88 (1990), *superseded by statute*, Act of Nov. 5, 1990 (*Duro* Fix), Pub. L. No. 101-511, sec. 8077(b)-(d), § 201, 104 Stat. 1856, 1892-93 (codified as amended at 25 U.S.C. § 1301), *as recognized in* United States v. Lara, 541 U.S. 193, 200 (2004).

[229] Skibine, *supra* note 52, at 78, 89-92 (charting evolution of implicit divestiture doctrine—the idea that "upon incorporation into the United States, Indian tribes were implicitly divested of any sovereign power inconsistent with their status as domestic dependent nations"—from *Oliphant* to *Duro*).

Maricopa Tribe could not prosecute a member of the Torres-Martinez Band of Cahuilla Mission Indians, and more generally, that a tribe could not prosecute nonmember Indians.[230] Congress rejected this holding in its third amendment of the ICRA and restored jurisdiction over nonmember Indians.[231] The Court affirmed Congress's ability to do so in *United States v. Lara*.[232]

Federal Jurisdiction. The federal government has jurisdiction over crimes committed by both Indians and non-Indians.[233] In cases of crimes committed by non-Indians against non-Indians and victimless crimes committed by non-Indians, however, the federal government does not have jurisdiction.[234] Other considerations apart from Indian status, such as Public Law 280, can limit federal jurisdiction.[235]

State Jurisdiction. As a result of *Castro-Huerta*, states now have jurisdiction over all crimes committed by non-Indians in Indian Country.[236] And a footnote in *Castro-Huerta* continued the upheaval of settled law: the Court opened the question of whether a state might have jurisdiction over crimes committed by Indians against non-Indians in Indian Country.[237] Notwithstanding the sea change that this footnote portends, and with the exception of Public Law 280 jurisdictions, states lack jurisdiction over crimes committed by Indians in Indian Country.[238]

3. Crime

A third question that determines jurisdiction is what crime was committed. The Indian Country Crimes Act ("ICCA" or "General Crimes Act"), enacted in 1854, extends general U.S. criminal laws to offenses committed in Indian Country.[239] The ICCA contains three exceptions: "(1) crimes committed by Indians against other Indians; (2) crimes committed by Indians against anyone if such Indian perpetrator has already been punished under the laws of the tribe; and (3) any case where, by treaty stipulations, the exclusive jurisdiction over such offenses has been reserved to the Indian tribe."[240]

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[230] *Duro*, 495 U.S. at 679, 684-88.

[231] *Duro* Fix, sec. 8077(b)-(d), § 201 (codified as amended at 25 U.S.C. § 1301) (defining "powers of self-government" to mean "inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians").

[232] 541 U.S. at 210.

[233] *See* CHAMPAGNE & GOLDBERG, *supra* note 194, at 9 fig.1.1, 10 fig.1.2.

[234] United States v. McBratney, 104 U.S. 621, 624 (1881); *accord* Treiger, *supra* note 193, at 175 & n.86; Skibine, *supra* note 211, at 54.

[235] *See supra* text accompanying notes 203-06.

[236] *See supra* text accompanying notes 207-10.

[237] Oklahoma v. Castro-Huerta, No. 21-429, slip op. at 19 n.6, 24 n.9 (U.S. June 29, 2022).

[238] *See* CHAMPAGNE & GOLDBERG, *supra* note 194, at 9 fig.1.1, 10 fig.1.2.

[239] 18 U.S.C. § 1152.

[240] Skibine, *supra* note 211, at 51.

The MCA, enacted in 1885, extends federal criminal jurisdiction—exclusive of state jurisdiction but probably concurrent with tribal jurisdiction[241]—over enumerated crimes committed by Indians in Indian Country.[242] The MCA applies regardless of whether the victim is an Indian.[243] As with much else in Federal Indian Law, the MCA's constitutionality is doubtful.[244] The effect of the statute is significant—federal prosecutors can compel Indian defendants to face charges in federal court, even for crimes committed against other Indians in Indian Country.[245]

[241] The MCA probably does not divest tribes of criminal jurisdiction over Indian defendants who commit the enumerated crimes in Indian Country. *See* Duro v. Reina, 495 U.S. 676, 680 n.1 (1990) ("It remains an open question whether jurisdiction under § 1153 over crimes committed by Indian tribe members is exclusive of tribal jurisdiction."); Wetsit v. Stafne, 44 F.3d 823, 825 (9th Cir. 1995) (holding tribes retain jurisdiction over crimes within MCA); Rolnick, *supra* note 198, at 1655 (discussing modern authorities that agree "that congressional silence on tribal jurisdiction over major crimes, like tribal inactivity, does not equate to loss of jurisdiction"). In a Public Law 280 jurisdiction, tribes have concurrent jurisdiction with states. *Id*. at 1660.

[242] 18 U.S.C. § 1153(a) (enumerating "murder, manslaughter, kidnapping, maiming, [aggravated sexual abuse felonies under 18 U.S.C. ch. 109A], incest, a felony assault under [18 U.S.C. § 113], an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and [embezzlement or theft under 18 U.S.C. § 661]").

[243] *Id*. (applying to "[a]ny Indian who commits against the person or property of another Indian or other person").

[244] Congress enacted the MCA in reaction to *Ex Parte Kan-gi-shun-ka* (*Ex Parte Crow Dog*), 109 U.S. 556 (1883). There, the Court held that a federal court did not have jurisdiction over a murder where the perpetrator and victim were both Brulé Sioux and the crime took place in Indian Country. *Id*. at 572. The Brulé Sioux Tribe punished the perpetrator according to the tribe's own laws. *See* Creel, *supra* note 35, at 61-63. For Congress, this was not enough. *See id*. Congress thus enacted the MCA. *See id*. And in *United States v. Kagama*, the Court upheld Congress's authority to enact the statute. *See* 118 U.S. 375, 383-84 (1886); *see also supra* text accompanying notes 41-44. Professor Barbara Creel describes the implications of the MCA:

> It is not an overstatement to say that the congressional reaction to Crow Dog was fueled by the federal government's desire to bring Indians into the federal arena to make sure that Indians were punishable by the death penalty. From the tribal point of view, the Major Crimes Act was not a "partnership" between the Sioux, tribal family, and the federal government. Rather, the Major Crimes Act constituted a sea change for tribal federal relations: a stripping away of tradition, and a shift in power from that of tribal community to self-govern under "local law of the tribe" to the federal government. This was a direct displacement of tribal right to govern crime and punishment and a denouncement of tribal traditional justice.

Creel, *supra* note 35, at 63.

[245] *See* Washburn, *Criminal Law and Self-Determination*, *supra* note 35, at 834 ("[T]he power to prosecute and imprison an Indian for an on-reservation crime against another Indian is perhaps the single most aggressive use of federal power against an Indian that routinely occurs in the modern era.").

Tribal Jurisdiction. Tribes retain concurrent jurisdiction over crimes enumerated in the General Crimes Act and MCA.[246] So too tribes retain jurisdiction over crimes committed by Indians against Indians that are not enumerated in the MCA.[247] Finally, tribes also have jurisdiction over crimes committed by non-Indians against Indians that are enumerated in the 2022 Violence Against Women Act Reauthorization Act.[248]

Federal Jurisdiction. Federal jurisdiction exists under the General Crimes Act and MCA.[249] As mentioned above, however, the federal government has sometimes delegated this jurisdiction to states with Public Law 280.[250]

State Jurisdiction. States were thought to lack jurisdiction over crimes committed by Indians against non-Indians in Indian Country—that is, crimes under the General Crimes Act.[251] As mentioned above, however, the Supreme Court opened the possibility of this jurisdiction in *Castro-Huerta*.[252]

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To conclude this Part, consider that its three Sections, taken together, have built a house of cards. The ICRA establishes an individual right and a limitation on tribal authority—but Congress's authority to enact the ICRA is constitutionally suspect. Federal courts will exclude unconstitutionally obtained evidence—but the Supreme Court now asserts that this is not constitutionally mandated. And the federal government has both asserted jurisdiction over crimes by Indians against Indians on Indian land and stripped tribes' abilities to prosecute non-Indians—but neither the legislative nor the judicial action is grounded in the Constitution's text. How far will these doctrines go in limiting tribal sovereignty?

II. INAPPLICABLE AND UNDERDEVELOPED SILVER PLATTERS

This Part discusses different iterations of the so-called silver-platter doctrine—that is, cases in which police officers from one jurisdiction unlawfully obtain evidence and provide that evidence to prosecutors in another jurisdiction.

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[246] The statutory grant of federal jurisdiction probably does not divest tribes of criminal jurisdiction over Indian defendants who commit the enumerated crimes in Indian Country. *See Wetsit*, 44 F.3d at 825; Rolnick, *supra* note 198, at 1655; *see also* Duro v. Reina, 495 U.S. 676, 680 n.1 (1990) ("It remains an open question whether jurisdiction under § 1153 over crimes committed by Indian tribe members is exclusive of tribal jurisdiction.").

[247] *See* CHAMPAGNE & GOLDBERG, *supra* note 194, at 9 fig.1.1, 10 fig.1.2.

[248] Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, sec. 804, § 204, 136 Stat. 840, 898-99 (codified at 25 U.S.C. § 1304) (listing assault of tribal justice personnel, child violence, dating violence, domestic violence, obstruction of justice, sexual violence, sex trafficking, stalking, and violation of protection order).

[249] *See* 18 U.S.C. §§ 1152, 1153.

[250] *See supra* text accompanying notes 203-06.

[251] *See* CHAMPAGNE & GOLDBERG, *supra* note 194, at 9 fig.1.1, 10 fig.1.2.

[252] *Oklahoma v. Castro-Huerta*, No. 21-429, slip op. at 19 n.6, 24 n.9 (U.S. June 29, 2022).

This Note's central question—whether the ICRA incorporates an exclusionary rule—will likely arise in a silver-platter case where tribal police obtain evidence in violation of the ICRA and then give it to state or federal prosecutors ("ICRA silver platter").

The classic iteration involves state police obtaining evidence in violation of the Fourth Amendment and giving it to federal prosecutors ("Fourth Amendment silver platter").[253] But the doctrine need not be so limited. State police could give evidence to federal prosecutors after violating their state constitution but not the Fourth Amendment ("state-law silver platter").[254] Going the other way, federal police could give evidence to state prosecutors after obtaining it in a way that violated the state constitution.[255] Police officers in a foreign country could give evidence to U.S. prosecutors after obtaining it in a way that violated the foreign country's laws ("international-law silver platter").

Section II.A explores the Fourth Amendment, state-law, and international-law silver platters. These cases may seem relevant to this Note's inquiry but are ultimately inapplicable. Section II.B surveys the ICRA silver-platter cases. These cases are on point but generally underdeveloped; however, two offer strong analysis.

A. *Inapplicable Silver Platters*

1. Fourth-Amendment Silver Platters

The leading silver-platter case is *Elkins v. United States*.[256] The Court held that if state police violate the Fourth Amendment in obtaining evidence, then that evidence is inadmissible in federal court.[257] Justice Potter Stewart, writing for the Court, emphasized federalism and comity,[258] basing the exclusionary rule on a deterrence rationale.[259] He took notice of state court adoptions of the exclusionary rule.[260] Each state's decision was, in Justice Stewart's view, a

[253] *See* Elkins v. United States, 364 U.S. 206, 208 (1959); Lustig v. United States, 338 U.S. 74, 79 (1949).

[254] For an argument that federal courts should exclude evidence taken by state police in violation of state constitutional law, see generally Ronald S. Range, *Reverse Silver Platter: Should Evidence that State Officials Obtained in Violation of a State Constitution Be Admissible in a Federal Criminal Trial?*, 45 WASH. & LEE L. REV. 1499 (1988).

[255] For an analysis of how state courts treat evidence obtained by federal police in violation of state law, see generally D. Anthony, *Perils of the Reverse Silver Platter Under U.S. Border Control Operations*, 16 U. MASS. L. REV. 232 (2021).

[256] *Elkins*, 364 U.S. 206.

[257] *Id.* at 223. *Elkins*'s holding is now subject to myriad exceptions discussed in Section I.B.3, *supra*.

[258] *Elkins*, 364 U.S. at 221.

[259] *Id.* at 217.

[260] *See id.* at 218-21.

policy choice—that is, each state decided whether the deterrent benefits of exclusion were worth the costs to the criminal justice system.[261]

According to Justice Stewart, if a federal court admitted tainted evidence from a state that adopted an exclusionary rule, the admission would diminish the deterrent benefit that the state sought from exclusion.[262] In dicta, however, Justice Stewart did not accept the converse. In his view, if a state did not adopt an exclusionary rule, then a federal court should still exclude the evidence because the state could choose other means to deter police misconduct.[263]

Justice Stewart's logic is hard to reconcile. A state's possible choice of other deterrents applies just as well to exclusionary-rule states: if a federal court admitted tainted evidence, the state could still otherwise deter police misconduct—for example, through civil damages or police disciplinary rules. Conversely, the concern about frustrating state policy applies just as well to non-exclusionary-rule states: if a federal court excludes evidence from a non-exclusionary-rule state, the federal court upsets that state's chosen policy. The state's choice to not adopt an exclusionary rule involves the normative determination that criminal defendants should not receive a windfall because of a police officer's error. The non-exclusionary-rule state cannot reverse that windfall after the federal court excludes the evidence.

Justice Stewart made one final relevant point. To assess whether there has been an unreasonable search and seizure by state police—thus triggering the exclusionary rule in federal court—"the test is one of *federal* law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed."[264] That is, federal Fourth Amendment jurisprudence determines the reasonableness of the police conduct. Where police conduct comports with a state constitution but violates the Fourth Amendment, a federal court must suppress the evidence under *Elkins*. In contrast, where police conduct violated a state constitution but comports with the Fourth Amendment, *Elkins* gives no indication of whether a state court should admit or exclude the evidence.

In this Note's inquiry, *Elkins* is persuasive rather than controlling. *Elkins* is not on point because it interprets and applies the Fourth Amendment; this Note's focus is on the ICRA. But *Elkins* is still closer to this Note's inquiry than the state-law and international-law silver-platter cases, which narrow *Elkins*'s

[261] *See id*.

[262] *Id*. at 221 ("[W]hen a federal court sitting in an exclusionary state admits evidence lawlessly seized by state agents, it not only frustrates state policy, but frustrates that policy in a particularly inappropriate and ironic way. For by admitting the unlawfully seized evidence the federal court serves to defeat the state's effort to assure obedience to the Federal Constitution.").

[263] *Id*. ("In states which have not adopted the exclusionary rule, on the other hand, it would work no conflict with local policy for a federal court to decline to receive evidence unlawfully seized by state officers. The question with which we deal today affects not at all the freedom of the states to develop and apply their own sanctions in their own way.").

[264] *Id*. at 224 (emphasis added).

application.[265] These cases distinguish *Elkins* on the ground that the state or foreign police have not violated federal law.[266] Here, by contrast, the ICRA is a federal law.

In Part IV, this Note adopts the premise that a federal court's admission of evidence from an exclusionary-rule sovereign would upset that sovereign's chosen policy. But this Note also applies *Elkins*'s federalism rationale—as opposed to its dicta—to evidence obtained from a non-exclusionary-rule sovereign. The need for comity and successful federal prosecutions is particularly strong in the Indian law context, where federal law abrogates tribal criminal jurisdiction over non-Indian defendants.[267] If a federal court excludes evidence when a tribal court would not, then tribal policy faces treble frustration—first, Congress imposed the ICRA; second, the Supreme Court immunized non-Indian defendants from tribal adjudications; and third, the federal court applied an atextual rule to exclude probative evidence in the defendant's trial. Justice Stewart's reassurance that a sovereign can still sanction police would not remedy the affront to comity.

2. State-Law Silver Platters

In the state-law silver-platter cases, state officers obtain evidence in violation of state—but not federal—law.[268] State officers then give that evidence to federal prosecutors. Circuit courts uniformly allow this practice.[269]

In these cases, arguments for comity—at least as Justice Stewart conceived of them—fail.[270] Instead, the circuit courts focus on the need for uniformity in federal evidentiary rules.[271] The cases also speak of the danger of using suppression "to hamper the enforcement of valid federal laws,"[272] and of the impropriety of federal judges arrogating to themselves the authority to make

[265] *See infra* Sections II.A.2, II.A.3 (discussing cases cabining *Elkins* applicability to violations of federal law).

[266] *See infra* Sections II.A.2, II.A.3.

[267] *See supra* Section I.C.

[268] *See generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (describing how state constitutions can—and should—raise individual protections above federal constitutional floor).

[269] United States v. Quinones, 758 F.2d 40, 43 (1st Cir. 1985) ("It is well settled that in federal prosecutions evidence admissible under federal law cannot be excluded because it would be inadmissible under state law."); United States v. Pforzheimer, 826 F.2d 200, 204 (2d Cir. 1987); United States v. Rickus, 737 F.2d 360, 363 (3d Cir. 1984); United States v. Clyburn, 24 F.3d 613, 616 (4th Cir. 1994); United States v. Walker, 960 F.2d 409, 415 (5th Cir. 1993); United States v. Combs, 672 F.2d 574, 578 (6th Cir. 1982); United States v. Singer, 943 F.2d 758, 761 (7th Cir. 1991); United States v. Eng, 753 F.2d 683, 686 (8th Cir. 1985); United States v. Chavez-Vernaza, 844 F.2d 1368, 1373 (9th Cir. 1987); United States v. Mitchell, 783 F.2d 971, 973 (10th Cir. 1986).

[270] *See, e.g.*, *Chavez-Vernaza*, 844 F.2d at 1373; *Eng*, 753 F.2d at 686.

[271] *See, e.g.*, *Pforzheimer*, 826 F.2d at 204.

[272] *See, e.g.*, *Chavez-Vernaza*, 844 F.2d at 1374.

pronouncements on state constitutional law.[273] Further, the circuit courts narrow the exclusionary rule by defining it as a federal rule meant to protect against violations of federal law.[274] Based on this definition, the *federal* exclusionary rule cannot protect against violations of *state* law. But this definition picks and chooses from *Elkins*. The courts stress the language from *Elkins* that "[t]he test [for an unreasonable search] is one of federal law,"[275] but they overlook the federalism interests that *Elkins* emphasizes. Allowing state officers to flout state constitutional law and give evidence to federal police officers diminishes the state's interest in the enforcement of its constitutional norms.[276]

In the end, these state-law silver-platter cases do not control this Note's inquiry.[277] ICRA violations are violations of federal law. Thus, applying the ICRA to assess the reasonableness of a seizure and the application of the exclusionary rule readily comports with *Elkins*'s mandate that in silver-platter cases, "the test is one of *federal* law."[278]

3. International-Law Silver Platters

In international-law silver-platter cases, federal prosecutors receive evidence from foreign police who obtained it in violation of the foreign country's laws. The Supreme Court has stated that this evidence is admissible: "It is well established, of course, that the exclusionary rule, as a deterrent sanction, is not applicable where a . . . foreign government commits the offending act."[279]

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[273] *See, e.g.*, *Pforzheimer*, 826 F.2d at 204 ("Thus, if state law were to be applied herein, we would have to decide the breadth of Vermont constitutional law . . . . Since we find it unnecessary to do otherwise, we believe the interests of comity would be served best if we left this issue to the Vermont Supreme Court for determination when the issue arises in that court.").

[274] *See, e.g.*, *Clyburn*, 24 F.3d at 616 ("The importance of applying only federal standards is especially pronounced in cases involving illegal search and seizure claims because the exclusionary rule for such claims was created to deter violations of federal constitutional law, not violations of state law.").

[275] *E.g.*, United States v. Walker, 960 F.2d 409, 416 (5th Cir. 1993) (quoting Elkins v. United States, 364 U.S. 206, 224 (1959)); *Pforzheimer*, 826 F.2d at 203 (same).

[276] *See Elkins*, 364 U.S. at 221; *see also supra* text accompanying notes 258-63 (discussing importance of federalism in Justice Stewart's opinion).

[277] Some cases addressing this Note's question do erroneously cite the state-law silver-platter cases for authority. *See, e.g.*, United States v. Becerra-Garcia, 397 F.3d 1167, 1173 (9th Cir. 2005) (citing *Chavez-Vernaza*, 844 F.2d at 1374).

[278] *Elkins*, 364 U.S. at 224 (emphasis added).

[279] United States v. Janis, 428 U.S. 433, 455 n.31 (1976); *see also* Caitlin T. Street, *Streaming the International Silver Platter Doctrine: Coordinating Transnational Law Enforcement in the Age of Global Terrorism and Technology*, 49 COLUM. J. TRANSNAT'L L. 411, 429, 432-37 (2011) (describing general rule that exclusionary rule does not apply to tainted evidence obtained internationally, with two exceptions: (1) foreign law enforcement "shocks the conscience" of U.S. court and (2) U.S. officials act in joint venture with foreign officials).

Circuit courts have similarly admitted evidence, primarily on the grounds that exclusion in the United States would not deter misconduct in another country.[280]

These cases are not persuasive in the ICRA context. An exclusion due to an ICRA violation would better serve the deterrence rationale than an exclusion due to an international-law violation. The federal government has assumed criminal jurisdiction over certain crimes, defendants, and lands.[281] Federal courts are thus more essential to criminal accountability in Indian Country than they are to accountability for crimes in states and foreign countries. As a result, exclusion of evidence in a federal court for an ICRA violation will have a greater effect than it would in the state- or international-law context.

In addition, application of the international-law silver-platter cases involves analogizing tribes to foreign countries. This analogy (perhaps surprisingly) can cut in different ways. Professor Kevin Washburn writes, "At first glance, treating tribal courts like foreign courts seems symmetrical and, perhaps, respectful. . . . The authority of tribal courts, like the authority of foreign courts, arises from a source of sovereignty that is foreign to the states and the United States."[282] But, Professor Washburn warns, such an analogy might be used to perpetuate bias: "[T]reating tribal courts like foreign courts may reflect something other than respect for tribal sovereignty. It may reflect suspicion and mistrust of the processes and results of criminal justice in tribal courts."[283]

Professor Washburn made these comments in a discussion of whether tribal courts should be treated as foreign courts under the U.S. Sentencing Guidelines.[284] But his analysis transfers well to the exclusionary rule context. Applying the international-law silver-platter cases to evidence obtained by tribal police in violation of the ICRA might seem respectful. Such cases rely, however, on the premise that foreign police misconduct cannot be deterred. Under Professor Washburn's reasoning, then, the application of the international-law silver-platter cases might suggest a suspicion and mistrust of tribal police—that is, a belief that tribal police misconduct cannot be deterred as federal or state police misconduct can.

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[280] *See, e.g.*, United States v. Mount, 757 F.2d 1315, 1317 (D.C. Cir. 1985) ("It is obvious, and the decisions have therefore recognized, that since United States courts cannot be expected to police law enforcement practices around the world, let alone to conform such practices to Fourth Amendment standards by means of deterrence, the exclusionary rule does not normally apply to foreign searches conducted by foreign officials."); United States v. Morrow, 537 F.2d 120, 139 (5th Cir. 1976); United States v. Maher, 645 F.2d 780, 782-83 (9th Cir. 1981); United States v. Rosenthal, 793 F.2d 1214, 1230 (11th Cir. 1986).

[281] *See supra* Section I.C.

[282] Washburn, *Courts and Sentencing*, *supra* note 35, at 418-19.

[283] *Id.* at 420.

[284] *Id.* at 418-20.

B. *Underdeveloped ICRA Silver Platters*

Several courts have addressed whether to apply the exclusionary rule to evidence that tribal police obtained in violation of the ICRA. They have often done perfunctory work. For example, in *United States v. Medearis*,[285] the district court did not acknowledge that tribal officers violated the ICRA rather than the Fourth Amendment.[286] The court simply (and erroneously) applied the Fourth Amendment to the facts.[287] The same district court did only a little better in *United States v. Erickson*.[288] The case's entire statutory analysis follows:

> Technically, the Fourth Amendment does not apply to tribal officers who stop and arrest individuals and search for evidence within Indian territory. Nonetheless, the Indian Civil Rights Act ("ICRA"), imposes the same standards on tribal officers as the Fourth Amendment. This Court therefore will analyze the reasonableness of Defendant's stop and arrest and the search and seizure of evidence obtained therefrom under Fourth Amendment precedent already developed which produces the same result as an analysis under the ICRA.[289]

This analysis is typical from courts asking whether the ICRA incorporates an exclusionary rule.[290]

The most thorough analysis comes from Judge Marsha Berzon, writing for a Ninth Circuit panel in *United States v. Cooley*.[291] Judge Berzon began by noting that the Fourth and Fourteenth Amendments do not apply to tribes. She stated that Congress enacted the ICRA pursuant to its plenary authority, noting that the ICRA's search-and-seizure provision mirrored that of the Fourth Amendment.[292] She then continued where other federal courts had stopped. She asserted—correctly, as this Note argues[293]—that the "parallelism" between the two search-

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[285] 236 F. Supp. 2d 977 (D.S.D. 2002).

[286] *See id.* at 980-81.

[287] *Id.*

[288] *See* No. 08-cr-30009, 2008 WL 1803626, at *1 (D.S.D. Apr. 18, 2008).

[289] *Id.* (citing United States v. Schmidt, 403 F.3d 1009, 1013 (8th Cir.2005)); *see* United States v. Clifford, 664 F.2d 1090, 1091 n.3 (8th Cir. 1981); United States v. Becerra-Garcia, 397 F.3d 1167, 1171 (9th Cir. 2005); United States v. Lester, 647 F.2d 869, 872 (8th Cir. 1981); People v. Ramirez, 56 Cal. Rptr. 3d 631, 635-41 (Ct. App. 2007); *see also* United States v. Youngbear, No. 11-cr-00151, 2012 WL 176247, at *4 (N.D. Iowa Jan. 20, 2012) (interpreting ICRA by immediately jumping to Fourth Amendment); United States v. Nealis, 180 F. Supp. 3d 944, 948 n.2 (N.D. Okla. 2016) (same); State v. Astorga, 642 S.W.3d 69, 78 (Tex. App. 2021) (considering motion to suppress for traffic stop by Ysleta del Sur Pueblo tribal police without mention of ICRA); United States v. Cooley, No. 16-cr-00042, 2022 WL 74001, at *4-5 (D. Mont. Jan. 7, 2022) (same).

[290] *See* cases cited *supra* note 289.

[291] 919 F.3d 1135, 1141 (9th Cir. 2019), *vacated*, 141 S. Ct. 1638, 1641-42 (2021).

[292] *Id.* at 1144.

[293] *See infra* Part IV.A (noting parallel language but considering different implications of this language).

and-seizure provisions "does not directly settle whether the exclusionary rule applies to violations of [the ICRA's provision]."[294]

Judge Berzon explained that Congress enacted the ICRA in response to tribal authorities conducting unreasonable searches and seizures.[295] She noted that the exclusionary rule could safeguard the ICRA's search-and-seizure provision in the same way that it safeguards the Fourth Amendment.[296] And she inferred from the contemporaneous understanding of the federal exclusionary rule in 1968 that the ICRA would carry the same remedy as the Fourth Amendment.[297] She concluded that the ICRA incorporates an exclusionary rule.[298] Finally, she applied the rule to what she held was a violation by a Crow officer of the ICRA's search-and-seizure provision.[299]

Judge Berzon included an important disclaimer in a footnote: "We do not decide whether the exclusionary rule also applies in tribal court proceedings to evidence obtained in violation of ICRA's Fourth Amendment analogue."[300] In so doing, she evidently anticipated the possibility of varying applications of the ICRA's exclusionary rule in different courts.

Another strong opinion comes from Justice Ronald Robie on the California Court of Appeals. In *People v. Ramirez*,[301] Justice Robie first rejected an argument that the ICRA's textual silence foreclosed exclusion.[302] He responded to that argument by noting that Congress legislates against a common-law backdrop.[303] He explicated the relevant common law, tracing the development of the exclusionary rule from *Weeks* to *United States v. Leon*.[304] And while acknowledging that the exclusionary rule stood on shaky ground in 2007,[305] he found that the 1968 understanding of the exclusionary rule was dispositive to the

[294] *Cooley*, 919 F.3d at 1144.

[295] *Id.*

[296] *Id.*

[297] *Id.* at 1144-45.

[298] *Id.* at 1145.

[299] *Id.* at 1147. Judge Berzon held that a Crow officer had violated the ICRA because he exceeded his authority as a tribal officer when he temporarily detained a non-Indian on a public right-of-way within the Crow Tribe's reservation. *Id.* at 1143. The Supreme Court vacated this part of the opinion. *See* United States v. Cooley, 141 S. Ct. 1638, 1641-42 (2021).

[300] *Cooley*, 919 F.3d at 1145 n.7.

[301] 56 Cal. Rptr. 3d 631 (Ct. App. 2007).

[302] *Id.* at 638.

[303] *Id.* ("Thus, where a common-law principle is well established, . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'" (alteration in original) (quoting Astoria F.S. & L. Ass'n. v. Solimino, 501 U.S. 104, 108 (1991))).

[304] *Id.* (citing Weeks v. United States, 232 U.S. 383, 398 (1914); Wolf v. Colorado, 338 U.S. 25, 27-28, 33 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643, 660 (1961); Elkins v. United States, 364 U.S. 206 (1960); *Mapp*, 367 U.S. at 655-656; United States v. Calandra, 414 U.S. 338, 348 (1974); United States v. Leon, 468 U.S. 897 (1984)).

[305] *Id.*

interpretation of the ICRA.[306] That is, he anchored his interpretation of the statute in the law as it existed in 1968 and concluded that the ICRA incorporates the exclusionary rule.[307] He next turned to the legislative history and found that Congress intended to apply an exclusionary rule.[308] He further determined that the deterrence rationale for the federal rule was similarly applicable in the tribal context.[309] Finally, he analyzed *Elkins* and the silver-platter doctrine,[310] reasoning that if tribal police were free to violate the ICRA and turn over the fruits of their illegality to federal prosecutors, then Congress would fail in its goal to protect individual Indians against unreasonable searches and seizures.[311] For all of these reasons, Justice Robie concluded that the ICRA incorporates an exclusionary rule and that it should be applied to evidence that the Jackson Rancheria Tribal Police Department obtained in violation of the ICRA.[312]

Judge Berzon's and Justice Robie's opinions are admirable.[313] They did well to recognize that the ICRA is not the Fourth Amendment. Unlike judges in other courts, they performed an independent statutory analysis. But Judge Berzon and Justice Robie fell short in their respective applications of the ICRA after proffering compelling interpretations of the statute. For example, they did not consider how exclusion might deter the Crow Tribal Police or the Jackson Rancheria Tribal Police. And that task, in this Note's view, requires turning to tribal law.

III. TRIBAL EXCLUSIONARY RULES

Before this Note interprets and applies the ICRA, this Part surveys tribal law. Note that this Part offers a sampling, not a synthesis. The latter would be inappropriate given the diversity of tribal law. In addition, some authorities in this Part address violations of statutes other than the ICRA. These authorities remain relevant, however, as they demonstrate tribes' normative choices around exclusion.

Compare two cases in which tribal officers rely on defective warrants. In *Swan v. Colville Confederated Tribes*,[314] the Colville Confederated Tribes Court

[306] *Id.* at 638-39.

[307] *Id.* at 639 ("Because Congress acted against this background, we take it as given that Congress expected this well-established common law principle—the exclusionary rule—to be as much a part of the prohibition against unreasonable searches and seizures in section 1302(2) as it was then considered a part of the identical prohibition in the federal Constitution."). Section IV.A similarly focuses on the ICRA's historical context.

[308] *Id.*

[309] *Id.* at 639-40.

[310] *Id.* at 640.

[311] *Id.*

[312] *See id.* at 635, 640.

[313] *See* State v. Madsen, 2009 S.D. 5, ¶¶ 19-20, 760 N.W.2d 370, 376-77 (citing *Ramirez* with approval).

[314] No. AP06-011, 2007 WL 7123855 (Colville Tribal Ct. App. Oct. 5, 2007).

of Appeals rejected an application of the good-faith exception to the exclusionary rule and vacated a conviction.[315] Although the court did not seem to categorically reject a good-faith exception, the court distinguished *Leon* on the facts: "The affidavit in *Leon* was extensive in listing the investigation done prior to requesting a search warrant. Here, no investigation seems to have been done, except for verifying that the residence was in Appellant's name."[316] Thus, where the Supreme Court has continued to expand *Leon*, the Colville Confederated Tribes Court of Appeals has cabined it.[317]

But in *Swinomish Indian Tribal Community v. Reid*,[318] the Swinomish Tribal Court came to the opposite result. The court found *Leon* to be persuasive.[319] It accepted the good-faith exception and the deterrence-based rationale for the exclusionary rule.[320] According to the court, "The purpose of the exclusionary rule is to deter unlawful and over-zealous police conduct. The courts have accepted that it is proper to balance the costs and benefits of excluding evidence between the intended deterrent effect and the possibility of impeding the criminal justice system."[321]

In a different context, the Confederated Salish and Kootenai Tribes ("CSKT") Court of Appeals considered a forcibly taken blood test in *Confederated Salish and Kootenai Tribes v. Conko*.[322] The defendant had allegedly driven while intoxicated and crashed into another car.[323] Tribal police took the defendant to a hospital, and over the defendant's objections, instructed the doctor to test the defendant's blood.[324] The officers' instructions violated a tribal statute, which provided that officers may not order a test from a nonconsenting arrested driver.[325]

Like the federal courts, the CSKT court balanced deterrence benefits with costs to law enforcement.[326] On the one hand, allowing the evidence "would

[315] *Id*. at *4 ("Where an affidavit is so deficient in the basic information, a judge should not issue a warrant, and if the warrant is issued, law enforcement should not be able to hide behind a 'good faith' argument.").

[316] *Id*. (citing United States v. Leon, 468 U.S. 897 (1984)).

[317] *See supra* note 178 (describing good-faith exception).

[318] 11 Am. Tribal L. 182 (Swinomish Tribal Ct. 2012).

[319] *Id*. at 186.

[320] *Id*.

[321] *Id*. The Swinomish Tribal Court has incorporated federal cases in other instances. In *Swinomish Indian Tribal Community v. Seward*, 15 Am. Tribal L. 373 (Swinomish Tribal Ct. 2014), the court cited federal law for the proposition that someone cannot object to the admission of evidence that police unlawfully obtain from a third party, violating that person's rights. *See id*. at 374-75.

[322] 25 Indian L. Rep. 6157, 6158 (Confederated Salish and Kootenai Tribes Ct. App. 1998).

[323] *Id*. at 6157-58.

[324] *Id*. at 6158.

[325] *See id*.

[326] *See supra* Section I.B.3 (considering federal courts' balance).

provide an incentive to law enforcement to ignore the clear language in the statute."[327] The court also recognized a connection between suppression and the conduct that the statute requires: "Suppressing the evidence puts law enforcement in the same position it would have been in if it had obeyed the statute."[328] On the other hand, suppressing the evidence would harm the Tribes' law enforcement efforts.[329] The court ultimately held that evidence should be excluded.[330] Thus, unlike the federal courts, the CSKT court prioritized giving effect to the Tribes' positive law: "Allowing the police to act directly contrary to this statute and then reap the reward for that violation in the form of enhanced evidence against the defendant would defeat the council's purpose."[331]

Still other cases, such as ones from the Hopi Tribe and the Coeur d'Alene Tribe, show tribes excluding evidence without discussion after finding an unlawful search or seizure.[332] The Winnebago Tribal Court, construing the Winnebago Code, has also excluded evidence.[333] But the Winnebago court also emphasized that it would revisit the issue.[334] And the court suggested that tribal customs and traditions could affect an exclusionary analysis.[335] Finally, other tribes, such as the Crow Tribe and the CSKT, have adopted an exclusionary rule

[327] *Conko*, 25 Indian L. Rep. at 6159.

[328] *Id*.

[329] *See id*. ("The Tribes' code reflects a clear policy against driving while intoxicated, which arguably would not be served by letting a defendant frustrate law enforcement's attempt to gather relevant evidence by refusing the blood test.").

[330] *Id*.

[331] *Id*.

[332] *See, e.g*., *In re* D.N., 22 Indian L. Rep. 6071, 6072 (Hopi Child Ct. 1995) (holding school teacher's search of student was unreasonable and thus granting motion to suppress); Coeur d'Alene Tribe v. Goddard, 38 Indian L. Rep. 6019, 6021 (Coeur d'Alene Tribal Ct. 2010) (citing Weeks v. United States, 232 U.S. 383 (1914); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); State v. Arregui, 254 P. 788 (1927)).

[333] Winnebago Tribe v. Pretends Eagle, 24 Indian L. Rep. 6240, 6244 (Winnebago Tribal Ct. 1997).

[334] *Id*. ("For now, the Court decides that the proper action is to exclude the evidence without deciding the policy reasons for this action. This decision does not mean that a different remedy may be imposed in a future case.").

[335] *Id*. ("Finally the Court notes in this case neither party brought to the attention of the Court any tribal customs or traditions which would help the Court in interpreting the Constitution.").

by statute.[336] Neither the Crow Tribe's nor CSKT's statute provides for any exceptions to the exclusionary rule.[337]

All in all, the authorities from the tribes reflect diversity in the use of federal law, rationales for exclusion, and categorical approaches to exclusion. And a proper interpretation of the ICRA, as the next Part shows, will allow for applications of the ICRA that reflect this diversity.

IV. INTERPRETING AND APPLYING THE ICRA

This Part interprets and applies the ICRA. Section IV.A develops an interpretation of the ICRA based on the statute's 1968 meaning. Section IV.B describes how the best application of this interpretation to individual cases requires deference to tribal law, although such deference is subject to important qualifications.

A. *Interpreting the ICRA*

This Section interprets the ICRA to find that the text compels an exclusionary rule, but only if exclusion will deter tribal police misconduct. This interpretation comes from the statute's 1968 meaning. This Section also explains flaws with interpreting the ICRA in lockstep with the Fourth Amendment.

1. The ICRA's Text Compels an Exclusionary Rule Conditioned on Deterrence

The ICRA, unlike the Fourth Amendment, became law against a backdrop of history and tradition that recognized an exclusionary rule. While the Fourth and Fourteenth Amendments were ratified in a context that did not contemplate exclusion,[338] the rule was known and available when Congress enacted the ICRA in 1968.[339] Thus, for an originalist, the ICRA's text has different legal

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[336] CROW L. & ORDER CODE § 8A-2-108 (2005); LAWS OF THE CONFEDERATED SALISH & KOOTENAI TRIBES, CODIFIED § 2-2-802 (2013), https://csktribes.org/index.php/component/rsfiles/files?folder=Appellate%2BCourt%252FCriminal%2BOpinions&Itemid=101. The CSKT court did not mention the suppression statute in *Conko*. *See* Confederated Salish and Kootenai Tribes v. Conko, 25 Indian L. Rep. 6157, 6158-59 (Confederated Salish and Kootenai Tribes Ct. App. 1998). For a more recent case where the CSKT court did rely on the statute, see *Confederated Salish and Kootenai Tribes v. Moulton*, No. AP-09-cr-01864, at *13 (Confederated Salish and Kootenai Tribes Ct. App. 1998).

[337] CROW L. & ORDER CODE § 8A-2-108 ("The Court *shall* prohibit the introduction or use at trial of any evidence seized in a search conducted in violation of any applicable and recognized law." (emphasis added)); LAWS OF THE CONFEDERATED SALISH & KOOTENAI TRIBES, CODIFIED § 2-2-802.

[338] *See supra* text accompanying notes 117-19 (describing absence of exclusionary remedy from English common law to 1886).

[339] *See supra* Sections I.B.1, I.B.2 (describing development and incorporation of exclusionary rule).

significance based on the statute's historic context. The exact words, "the right of the people to be secure . . . against unreasonable search and seizures,"[340] may have been intended in 1968 as a term of art. Congress, by copying the language of the Fourth Amendment, may have intended "to apply to the tribal governments the same substantive standards that the federal courts have evolved in applying the language to state and federal governments."[341]

The view that Congress so intended finds additional support in the negative-implication canon of statutory interpretation: "the expression of one thing implies the exclusion of others."[342] As originally enacted, the ICRA expressly distinguished the statute's right-to-counsel provision from the construction that federal courts gave to the Sixth Amendment.[343] The ICRA made no similar express distinction for the search-and-seizure provision. By negative implication, then, the ICRA's search-and-seizure provision was meant to have the same construction that federal courts gave to the Fourth Amendment.[344]

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[340] 25 U.S.C. § 1302(a)(2).

[341] *The Indian Bill of Rights*, *supra* note 57, at 1354.

[342] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 96 (2012).

[343] Indian Civil Rights Act (ICRA), Pub. L. No. 90-284, § 202(6), 82 Stat. 77, 77 (1968) (codified as amended at 25 U.S.C. § 1302(a)(6)) ("No Indian tribe . . . shall . . . deny to any person in a criminal proceeding . . . *at his own expense* to have the assistance of counsel for his defense." (emphasis added)); *see supra* text accompanying notes 63-64.

[344] Interestingly, the 2016 note applied the same canon to reach the opposite result—namely, that the negative-implication canon suggests that the non-Sixth Amendment provisions were *not* meant to have the same constructions that federal courts give to their constitutional counterparts. *See ICRA Reconsidered*, *supra* note 36, at 1722. The note applied the canon to the statute's language after its third amendment, the Tribal Law and Order Act of 2010 (TLOA), Pub. L. No. 111-211, sec. 234, § 202, 124 Stat. 2261, 2261 (codified at 25 U.S.C. § 1302). This amendment added section 1302(c) to the codified statute and extended a tribe's sentencing authority so long as the tribe "provide[s] to the defendant the right to effective assistance of counsel *at least equal to that guaranteed by the United States Constitution*." TLOA, sec. 234, § 202 (codified at 25 U.S.C. § 1302(c)) (emphasis added). Because the amendment expressly linked the right-to-counsel provision to the Sixth Amendment, the note reasoned that, by negative implication, the ICRA's other provisions did not need to match their parallel guarantees in the Bill of Rights. *ICRA Reconsidered*, *supra* note 36, at 1722. Otherwise, the note said, the "at least equal to that guaranteed by the United States Constitution" clause would be surplusage. *Id*.

The note's error is that the clause plays a specific role: it differentiates subsections 1302(a)(6)-(7) from subsections 1302(b)-(c). Subsections 1302(a)(6)-(7) contain the original sentencing cap and the requirement that the defendant has a guarantee of assistance to counsel at his own expense. Subsections 1302(b)-(c), by contrast, reflect the Tribal Law and Order Act's compromise: the sentencing caps are raised, but tribes must provide counsel. Thus, the clause, "at least equal to that guaranteed by the United States Constitution," does not impact the ICRA's other Bill of Rights provisions by negative implication. Rather, it simply mandates that an increase in a tribe's sentencing abilities accompanies an increase in a defendant's rights.

The prior-construction canon provides further support: "If a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort, . . . they are to be understood according to that construction."[345] Applying this rationale, the next interpretive step involves defining the substantive standard that attached to the textual provisions in 1968.

Recall *Linkletter v. Walker*—the Supreme Court's final word on the exclusionary rule before the ICRA's enactment.[346] The *Linkletter* Court nominally recognized the exclusionary rule's constitutionality but conditioned the rule's application on deterrence.[347] That is, immediately before 1968, exclusion was constitutionally required *only if* exclusion was a "necessity for an effective deterrent to illegal police action."[348]

Applying these understandings to the ICRA, the legal effect of the ICRA in 1968 is that the search-and-seizure provision requires exclusion only if exclusion will have a deterrent effect. The ICRA's four subsequent amendments in 1986, 1991, 2010, and 2013 do not alter this understanding because they did not modify the ICRA's search-and-seizure provision.[349]

But the application of originalist methodology to this understanding nets an interesting result: the ICRA is not subject to the myriad exceptions that apply to the Fourth Amendment's exclusionary rule. This result comes from the two ideas that unite most originalists.[350] First, the fixation thesis—"the claim that the communicative content of the constitutional text is fixed at the time each provision is framed and ratified."[351] And second, the constraint principle—"a normative principle that maintains that the legal content of constitutional doctrine should be constrained by the original meaning of the constitutional text."[352]

If the ICRA's content was fixed to *Linkletter*'s version of the exclusionary rule in 1968, and a court's interpretation of the ICRA is today constrained by that original content, then the exclusionary-rule decisions that came after 1968 do not affect the ICRA's search-and-seizure provision. For example, a judge applying this interpretation today could exclude evidence obtained through a

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[345] SCALIA & GARNER, *supra* note 342, at 247; *accord* Shapiro v. United States, 335 U.S. 1, 16 (1948) ("In adopting the language used in the earlier act, Congress 'must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment.'" (quoting Hecht v. Malley, 265 U.S. 144, 153 (1924))).

[346] 381 U.S. 618 (1965).

[347] *Linkletter*, 381 U.S. at 636; *see also supra* notes 143-55 and accompanying text.

[348] *Linkletter*, 381 U.S. at 636-37; *see also supra* notes 149-54 and accompanying text.

[349] *See supra* note 60; *see also* SCALIA & GARNER, *supra* note 342, at 203 ("If the legislature amends or reenacts a provision other than by way of a consolidating statute or restyling project, a significant change in language is presumed to entail a change in meaning.").

[350] *See* Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1964 (2021).

[351] *Id.*

[352] *Id.*

tribal officer's violation of the ICRA despite the officer's good faith, attenuation between misconduct and obtainment, inevitable discovery of the evidence, or an independent source of obtainment.[353]

This result, however, may not categorically exclude evidence when an exception to the exclusionary rule is present. Because *Linkletter* enshrined deterrence as the basis for applying the exclusionary rule, and because the exceptions to the exclusionary rule that the Supreme Court has recognized followed from a (perhaps flawed) deterrence analysis, *Linkletter*'s deterrence-based approach could compel application of those exceptions to the ICRA.[354] By this reasoning, once *Linkletter*'s understanding is fixed as the ICRA's exclusionary rule, all of the post-*Linkletter* deterrence-based holdings could follow as a matter of logic.

2. Flaws with a Lockstep Interpretation

Some courts have gone no further in their analyses than to recognize that the ICRA's search-and-seizure provision and the Fourth Amendment share identical language. Relying on this parallelism, they then assert that the ICRA imposes the same constraints on tribes that the Fourth Amendment imposes on the federal government.[355] Said otherwise, these courts hold that the 1968 Congress linked the guarantees of the ICRA to those of the Constitution. Under this theory, the ICRA would incorporate pre-1968 judicial precedent *and* continuously incorporate post-1968 judicial precedent. The ICRA would thus be an example of dynamic incorporation, "adopt[ing] [judicial interpretations] not only as they exist at the time of adoption, but also as they change."[356]

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[353] *See supra* text accompanying notes 177-80.

[354] *See supra* Section I.B.3.

[355] *See, e.g.*, cases cited *supra* notes 285-89.

[356] Joshua M. Divine, *Statutory Federalism and Criminal Law*, 106 VA. L. REV. 127, 134 (2020).

An example of dynamic incorporation is the Assimilative Crimes Act, 18 U.S.C. § 13, which criminalizes conduct violative of a state criminal code occurring on federal land within that state. The federal statute thus incorporates state criminal codes—not only codes in place at the time of the Assimilative Crimes Act's 1996 enactment but also codes that states continue to enact. *See* Divine, *supra*, at 137. I am grateful to Professor Gary Lawson for this example.

An originalist theory of statutory meaning might net this same result. In 1968, Congress might have fixed the criteria for determining the ICRA's meaning to Supreme Court precedent. The criterion set (i.e., Supreme Court precedent) for determining the ICRA's meaning would thus be what originalism "fixes," but the elements of the set could evolve (e.g., *Leon* could enter the set after its boundaries are fixed). *See generally* Gary Lawson, *Reflections of an Empirical Reader (Or: Could Fleming Be Right this Time?)*, 96 B.U. L. REV. 1457, 1468-71 (2016).

The prior construction canon aids this interpretation too. Section 202(8) of the ICRA contains a due process clause.[357] Congress presumptively was aware that the Fourteenth Amendment's due process clause incorporated the Bill of Rights—along with continuous judicial interpretations of the Bill of Rights—against the states.[358] In particular, the Fourteenth Amendment's incorporation of the Fourth Amendment encompasses ongoing interpretation of the Fourth Amendment. Thus if section 202(8) does the same work as the Fourteenth Amendment, then it applies new interpretations of the Fourth Amendment to the tribes just as the Fourteenth Amendment applies those new interpretations to the states.

In addition, some of the ICRA's legislative history indicates that Congress intended the courts to interpret the ICRA coterminously with its Bill of Rights equivalents. For example, the ICRA's statement of purpose defines its limitations on tribal governments as "the same as those imposed on the Government of the United States by the U.S. Constitution and on the States *by judicial interpretation*."[359] Applied here, the Fourth Amendment's exclusionary rule—a judicial interpretation of the Constitution—would thus apply to the ICRA.

Despite these reasons cutting in favor of a lockstep interpretation, courts should reject such an interpretation for three reasons. First, the legislative history cuts both ways.[360] For example, an earlier draft of the ICRA provided, "[A]ny Indian tribe in exercising its powers of local self-government shall be subject to the same limitations and restraints as those which are imposed on the government of the United States by the United States Constitution."[361] Congress's rejection of this draft and its decision to enact specific provisions might suggest that Congress did not intend for the Bill of Rights and the ICRA to move in lockstep. Also in the legislative history was a proposal for the ICRA to codify an exclusionary rule.[362] Should anything be inferred from the Senate's rejection of this proposal? After reviewing the implications of drafting changes, Ziontz concludes, "It is incorrect to say that Congress intended Indian tribes to be subject to the same constitutional restrictions as federal and state governments."[363]

Second, a coterminous interpretation of the ICRA with the Bill of Rights is more likely to clash with Congress's "policy of allowing Indian tribes to

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[357] Indian Civil Rights Act (ICRA), Pub. L. No. 90-284, § 202(8), 82 Stat. 77, 77 (1968) (codified as amended at 25 U.S.C. § 1302(a)(8)).

[358] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 655, 657 (1961).

[359] S. REP. NO. 90-841, at 6 (1967) (emphasis added).

[360] *Cf.* SCALIA & GARNER, *supra* note 342, at 281 ("With major legislation, the legislative history has something for everyone.").

[361] S. 961, 89th Cong. (1965).

[362] *1965 Hearings*, *supra* note 66, at 224.

[363] Ziontz, *supra* note 58, at 6.

maintain their governmental and cultural identity."[364] This is because a lockstep interpretation gives federal judges the power to continuously update the ICRA's limitations on tribal governments. For example, federal courts are grappling with whether and how the Fourth Amendment guards against the government gathering data that individuals disclose to third parties.[365] A lockstep approach would alter the limitations on tribal governments' abilities to collect data every time a federal case alters the limitations on federal and state governments' abilities to collect data. Put another way, a lockstep interpretation replaces tribal diversity with the uniformity of federal judicial interpretation.

Third, a lockstep interpretation gives federal courts illegitimate supervisory authority over tribal police practice. In 1968, the exclusionary rule was arguably still grounded in constitutional language.[366] But since 1968, the Court has understood the exclusionary rule to be fully atextual.[367] Thus, if judicial interpretations of the Fourth Amendment apply to the ICRA's search-and-seizure provision, then the ICRA's search-and-seizure provision contains *no* exclusionary rule. As with the Fourth Amendment today, any application of the exclusionary rule under the ICRA would result from a "prudential doctrine."[368]

Said otherwise, if the Fourth Amendment's exclusionary rule is an application of the Court's supervisory power rather than the Constitution itself, then, by analogy, the ICRA's exclusionary rule is better justified as a judge-made rule of evidence than as a necessary implication of the statutory text. And if the Court cannot harness its supervisory power to "govern[] the methods that state police officers use to solve crime,"[369] then, by analogy, the legitimacy of judge-made rules of evidence to regulate tribal police practices becomes more suspect.

B. *Applying the ICRA*

The final project for this Note is to apply the ICRA. The 1968 interpretation—that the ICRA incorporates a deterrence-based exclusionary rule—prompts the question of whether exclusion will deter tribal police misconduct. As detailed earlier, the deterrence rationale relies on a series of empirical assessments and policy judgments: whether exclusion will deter police misconduct or whether

[364] *The Indian Bill of Rights*, *supra* note 57, at 1355; *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 63 (1978) (recognizing this policy manifested in Congress's decision not to include establishment clause); Section I.A.2 (describing ICRA's omissions).

[365] *See generally* Matthew Tokson, *The Aftermath of* Carpenter*: An Empirical Study of Fourth Amendment Law, 2018-2021*, 135 HARV. L. REV. 1790 (2022) (describing flux in Fourth Amendment law as courts grapple with digital information and novel surveillance technologies).

[366] *See supra* notes 143-55 and accompanying text.

[367] *See, e.g.*, United States v. Leon, 468 U.S. 897, 906 (1983); Davis v. United States, 564 U.S. 229, 236 (2011).

[368] *Davis*, 564 U.S. at 238; Collins v. Virginia, 138 S. Ct. 1663, 1677 (2018) (Thomas, J., concurring).

[369] *See Collins*, 138 S. Ct. at 1679.

other remedies are adequate (i.e., empirical assessments) and how to identify and weigh the costs and benefits of exclusion (i.e., policy judgments).[370] So who should make these empirical assessments and policy judgments?

The answer is the relevant tribe.[371] Tribes are best positioned to make the empirical assessment of whether exclusion will deter police misconduct and the policy choice of how much deterrence is necessary to justify the law-enforcement costs of exclusion. And to position tribes as the decisionmakers, federal and state courts will need to turn to tribal law. Tribal law indicates what a tribal court would do when presented with a motion to suppress. With important qualifications explained below, the source of the law that a tribal officer violates—i.e., tribal statutes or the ICRA—may not matter. What matters is how tribal law expresses the empirical assessments and policy choices that surround decisions to exclude.

This Section proceeds by demonstrating how a federal or state court should apply the ICRA. It then turns to normative justifications—comity, self-determination, and federalism—to bolster the conclusion that tribes should determine application of the ICRA's exclusionary rule even in federal or state court.

1. Nuts and Bolts

How should a federal or state court respond when presented with a motion to suppress evidence that tribal police obtained in violation of the ICRA? The best-case scenario would be to certify the question to the tribal court of the relevant tribe.[372] In the federal-state context, "nearly all states have adopted procedures that permit federal courts, while retaining jurisdiction of a case, to certify uncertain state law issues to the state's supreme court for authoritative resolution."[373] Here, the certified question would ask whether exclusion would deter tribal officer misconduct based on the relevant facts.

In the absence of certification, the next step would be to turn to tribal law. For example, the trial court in *United States v. Cooley* could have turned to the Crow

[370] *See supra* Section I.B.3.

[371] The relevant tribe is the tribe whose officer unlawfully obtained evidence. If the Swinomish Indian Tribal Community and CSKT treat the exclusionary rule differently, for example, then courts hearing motions to suppress for ICRA violations by the tribes' respective officers can—and should—come to different results. *See supra* Part III.

[372] *See, e.g.*, HOPI INDIAN TRIBE L. & ORDER CODE tit. I, § 1.2.7(a) ("The Appellate Court has jurisdiction to answer questions of Hopi Tribal law, including Hopi constitutional law, certified from any tribal, federal, or state court or from any tribal, federal or state administrative agency."); ARIZ. R. SUP. CT. § 27(a)(1); UNIF. CERTIFICATION OF QUESTIONS OF L. §§ 2-3 (UNIF. L. COMM'N 1995); *see also ICRA Reconsidered*, *supra* note 36, at 1728 n.145.

[373] RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1116 (7th ed. 2015) (1953).

Tribal Code.[374] Had it done so, it would have seen that the Crow Tribe codified an exclusionary rule, seemingly without exception.[375] At this stage, however, the court should proceed with caution. The statute that includes the exclusionary rule is from 2005—after *Oliphant* but before the 2013 Violence Against Women Reauthorization Act.[376] The Crow Tribe's legislature thus could have assumed that the benefits of the Tribe's exclusionary rule would not apply to non-Indian defendants. Similarly, the author of this Note is not aware of any state or federal court decision to date that has incorporated tribal policy bearing on exclusion; in the absence of such authority, the Tribe's legislature might have assumed that a federal or state court would not give deference to its no-exception rule. Thus if a federal or state court adopts the statutory exclusionary rule without analysis, the court might be giving a defendant a remedy the legislature never intended to provide.

In an analogous context, Professor Barbara Creel critiques a proposal to count tribal court convictions in the federal sentencing guidelines. She writes, "Recognizing difference is respectful. Understanding unique political, geographical, and historical factors, and taking those factors into account when evaluating criminal justice in Indian Country, is consistent with respectful treatment."[377] Here, even though the Crow Tribe's Code clearly proscribes the admission of unlawfully seized evidence, respect for tribal sovereignty demands recognition of the specific legal context in which the Crow legislature enacted the statute.[378] In sum, deference to tribes requires more than mechanical application of tribal statutes.[379]

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[374] United States v. Cooley, No. 16-cr-00042, 2022 WL 74001, at *4-5 (D. Mont. Jan. 7, 2022); *see also supra* note 199 and accompanying text.

[375] CROW L. & ORDER CODE § 8A-2-108 (2005), https://indianlaw.mt.gov/_docs/crow/codes/title_08a.pdf [https://perma.cc/6KES-L6PR].

[376] *See supra* notes 222-26 and accompanying text.

[377] Creel, *supra* note 35, at 85 (critiquing, for example, Washburn, *Criminal Jurisdiction and Self Determination*, *supra* note 35, at 848-50).

[378] Indeed, the Crow Tribe filed an amicus brief in *United States v. Cooley* to defend the Tribe's—and thus Officer Saylor's—authority to perform investigatory stops on the Tribe's reservation. *See* Brief Amici Curiae of the Crow Tribe of Indians, the National Congress of American Indians, and Other Tribal Organizations, United States v. Cooley, 141 S. Ct. 1638 (2021) (No. 19-1414), 2020 WL 4353085. Although the brief does not analyze the exclusionary rule, the Tribe's defense of its jurisdiction expresses a desire for the federal prosecution of the non-Indian defendant to proceed. As a result, using the Tribe's own statutes to provide a windfall to the defendant may be far more offensive than respectful.

[379] Professor Washburn also cabins his proposal to count tribal court convictions in the federal sentencing guidelines. He describes that a unilateral incorporation of tribal court convictions might be inconsistent with "[t]he most fundamental principle of tribal self-government . . . that it is each tribal government's right to choose the public policies that best serve its own governmental purposes." Washburn, *Courts and Sentencing*, *supra* note 35, at 445. As a result, he sets the inclusion of tribal court convictions as a default while

Admittedly, research infrastructure is a practical limitation. Professor Elizabeth Reese advocates for the legal academy to give more attention to tribal law but highlights that "the first issue is access."[380] While "[a] great deal of tribal court opinions are accessible through a simple search" of research databases, "each database covers only a handful of tribes."[381] Relevant here, a federal or state court applying tribal law needs a sufficient body of case law to determine the scope of a tribe's exclusionary rules.

For example, the Colville Confederated Tribes Court of Appeals has at least once rejected an application of the good-faith exclusionary rule.[382] But would the court reach the same result when presented with slightly different facts or with a non-Indian defendant? A federal or state court cannot adequately give deference to tribes when only limited information is available. This is a classic catch-22: a federal or state court cannot adequately cite tribal law because of a lack of access, but databases do not have the incentive to increase tribal law access because of a lack of citations.[383]

As a result of these limitations, this Note proposes two default positions. Here, this Note turns to two of the Indian canons of statutory construction—in Professor Alexander Tallchief Skibine's words, the "tribal sovereignty canon" and the "Indian ambiguity canon."[384] The tribal sovereignty canon requires a "'clear' indication of congressional intent before a statute is construed to intrude on tribal sovereignty."[385] The Indian ambiguity canon has two components: first, "the statute has to be 'liberally construed'" and second, "ambiguous provisions [are] to be interpreted for the benefit of the Indians."[386] Professor Skibine defines

acknowledging that "the better approach to the treatment of tribal court sentences is to give individual tribal governments the ultimate power to determine whether their tribal court sentences should be used in subsequent federal sentencing proceedings." *Id*.

[380] Reese, *supra* note 1, at 622.

[381] *Id*. at 624.

[382] Swan v. Colville Confederated Tribes, No. AP06-011, 2007 WL 7123855, at *1 (Colville Ct. App. Oct. 5, 2007).

[383] *See* Reese, *supra* note 1, at 622 ("If there is real demand from the academy for centralized, ready access to existing tribal law documents, the market will answer by increasing the availability of such documents.").

[384] *See* Alex Tallchief Skibine, *Textualism and the Indian Canons of Statutory Construction*, 55 U. MICH. J.L. REFORM (forthcoming 2022) (manuscript at 2), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3813569 [https://perma.cc/W64A-DF6Q].

[385] *Id*. (manuscript at 27). Professor Skibine proposes a two-prong inquiry for this canon. First, a court should determine if a possible interpretation of a federal statute interferes with tribal sovereignty. If it does, then the court would need to justify that interference with an unequivocal expression of congressional intent. If such an expression is not present, then the court should change its interpretation so as not to interfere with tribal sovereignty. *See id*.

[386] *Id*. (manuscript at 2); *see also* County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 269 (1992) ("When we are faced with these two possible

"liberal construction" as a construction that fulfills or effectuates a statute's purpose.[387] He adds that there is no clear test for whether ambiguity exists.[388]

Both canons are relevant to the ICRA. After all, the ICRA interferes with tribal sovereignty, which triggers the tribal sovereignty canon.[389] Second, the ICRA's silence on exclusion renders the statute ambiguous, which triggers the Indian ambiguity canon.[390] This prompts the question of whether an application of the exclusionary rule is favorable to tribes (as sovereigns) and Native Americans (as individuals).

If the defendant is non-Indian, then the default should be the admission of evidence. The primary interference with tribal sovereignty comes from *Oliphant* and the abrogation of tribal criminal jurisdiction over non-Indians.[391] As Professor Creel notes, the "United States has a federal trust responsibility 'to maintain peace and protect Indian women, children and families on the reservation.'"[392] When a federal court excludes unlawfully obtained but otherwise trustworthy evidence from a tribal officer, it hamstrings a federal

constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" (quoting Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985))).

[387] *See* Skibine, *supra* note 384 (manuscript at 2).

[388] *See id*. (manuscript at 3). Professor Skibine describes how textualist judges can avoid application of an ambiguity-dependent canon, such as the Indian ambiguity canon, by finding no ambiguity. *Id*. He also describes textualist critiques of ambiguity-dependent canons—namely, that such canons encourage judges to turn to a statute's purpose or policy. *See id*. (manuscript at 22); *see also* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 123 (2009) ("Substantive canons are in significant tension with textualism . . . .").

As Professor Skibine highlights, however, now-Justice Barrett has acknowledged that "a canon's grounding in the Constitution provides a potential justification for the way in which its application causes a judge to deviate somewhat from her ordinary obligation of faithful agency by departing from the most plausible interpretation of a statute." *Id*. at 169; *see also* Skibine, *supra* note 384 (manuscript at 3) (citing Barrett, *supra*, at 111-12, 123-24, 169). Perhaps as a result, Professor Skibine proceeds to source the Indian canons in the Constitution and Congress's plenary powers. *See id*. (asserting that tribal sovereignty canon protects trust relationship between federal government and tribes against congressional abuse of plenary power, much like federalism is constitutional norm that protects against congressional overstep).

[389] *See* Skibine, *supra* note 384 (manuscript at 28) ("The Indian Civil Rights Act . . . provides a good example of . . . a statute [that interferes with tribal sovereignty] since it imposed on tribal governments the duty to protect rights similar to those found in the Bill of Rights.").

[390] *See id*. (manuscript at 2).

[391] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).

[392] Creel, *supra* note 35, at 85 (quoting *Tribal Law and Order Act of 2009: Hearing on H.R 1924 Before the Subcomm. of Crime, Terrorism, and Homeland Security*, 111th Cong. 38-39 (2009) (statement of Assoc. Att'y Gen. Thomas Perrelli)).

prosecution made all the more necessary by *Oliphant*. The construction of the ICRA that is favorable to the tribes thus holds that the ICRA does not incorporate an exclusionary rule. After all, tribal officers themselves supplied the evidence in question.

But a construction that favors tribes and Indigenous people is less obvious when the defendant is Indian. In this case, Native interests are on both the prosecutorial and defense sides: tribal officers have provided evidence but an Indigenous defendant faces criminal charges.

On the one hand, a tribe may still have an interest in the success of the federal or state prosecution. As a practical matter, federal prosecutions have become important to law enforcement in Indian Country—even if the prosecutions are the result of constitutionally suspect jurisdiction stripping and assumption.[393] Because of federal laws such as the ICRA's limitations on tribal sentencing authority, federal prosecutions may offer penalties that tribal prosecutions cannot.[394] Professor Washburn describes that "although the United States theoretically shares criminal jurisdiction with tribal governments, federal jurisdiction in Indian country is far more pervasive because federal law has largely ousted tribal jurisdiction for all felony offenses."[395] The tribe's interest in the federal or state prosecution, buoyed with evidence from the tribe's officers, may thus be legitimate.

But on the other side, an Indigenous defendant has a great interest in exclusion. The evidence in question would likely be for a prosecution only made possible by the MCA, Public Law 280, and Congress's plenary power.[396] And as Professor Creel reminds us, one must not lose sight of "the historical disadvantages Native Americans face in the federal criminal justice system."[397] What's more, one of the ICRA's purposes was to protect the civil rights of *individual* Indians.[398] Thus a liberal construction, meant to give full purpose and effect to the statute, would cut for the defendant.[399] And, unlike the case of the non-Indian defendant, a tribe may still be able to hold the Indian defendant accountable (subject, unfortunately, to the ICRA's constitutionally suspect limitations on tribes' sentencing authority).[400] Finally, lenity would support interpreting the ICRA's ambiguity around the exclusionary rule as a reason to

[393] *See* Washburn, *Criminal Law and Self-Determination*, *supra* note 35, at 849 (noting practical issues that would arise from repeal of MCA despite Act's illegitimacy and harmfulness to self-determination); Creel, *supra* note 35, at 85 (same); *see also supra* Section I.B.C (describing constitutionally suspect jurisdiction stripping and assumption).

[394] *See* 25 U.S.C. § 1302(a)(7), (b); *supra* note 60.

[395] Washburn, *Courts and Sentencing*, *supra* note 35, at 405.

[396] *See supra* Section I.C.

[397] Creel, *supra* note 35, at 75.

[398] *See supra* notes 57-59, 65-72 and accompanying text.

[399] The ICRA balanced its goal of protecting individuals with recognition of self-determination. *See supra* notes 73-76.

[400] *See supra* notes 60, 241 and accompanying text.

apply the rule.[401] All in all, the default application of the ICRA for an Indian defendant should be exclusion.[402]

The above positions are merely defaults. Ideally, federal and state courts will certify questions. Federal and state courts should alternatively look to tribal cases and statutes for clearly discernable intentions that a tribe's laws could apply to the facts of a federal or state motion to suppress. Most importantly, a federal and state court applying the ICRA should defer to tribal sovereignty in analyzing whether exclusion will yield deterrence.

2. Normative Rationales

Three normative reasons support centering tribes and tribal law in construing the ICRA: comity, self-determination, and federalism.

"Comity, in its bare essence, upholds and demands that a nation's sovereignty be recognized and cherished. A failure to give recognition to tribal judgments by foreign sovereigns, like states, weakens an Indian tribe's ability to control its internal relations."[403] To understand how comity supports deference to tribal law, recall the two hypotheticals in the Introduction.[404] The first involved an Indian defendant from a tribe that excludes unlawfully obtained evidence. The federal court in this first hypothetical admitted evidence. The second involved a non-Indian defendant from a tribe that admits evidence in the given circumstances. The state court in this second hypothetical excluded evidence. The result was that the non-Indian defendant received the windfall of exclusion denied to the Indian defendant. And this result was the opposite of the one that the respective tribal courts would have reached had they adjudicated the cases.

In both hypotheticals, deferring to the tribe's determination of the exclusionary rule's applicability would show respect for the tribe's sovereignty and laws. It also would avoid the injustices of the results described above. In sum, because both applying the exclusionary rule and not applying it can help or hurt tribal interests, the ICRA should be applied with deference to tribes.

Comity has already influenced federal applications of the ICRA. Indeed, comity interests motivate federal courts to apply an exhaustion requirement to ICRA habeas review. For example, the Eighth Circuit has said, "As to tribal remedies, we have held, *as a matter of comity*, that tribal remedies must

[401] *See* Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L. REV. 918, 921 (2020) (describing historical rule of lenity as "requiring a judge to consult the text, linguistic canons, and the structure of the statute, and then, if reasonable doubts remain, interpret the statute in the defendant's favor").

[402] This distinction between Indian and non-Indian defendants would pass scrutiny as a political classification under the Court's current jurisprudence. *See supra* notes 213-21.

[403] Stoner & Orona, *supra* note 35, at 388 (footnote omitted) (citing Hilton v. Guyo, 159 U.S. 113, 227 (1895)).

[404] *See supra* text accompanying notes 24-34.

ordinarily be exhausted before a claim is asserted in federal court under the Indian Civil Rights Act."[405]

So too state courts have afforded one another comity in decisions regarding exclusion. For example, the Iowa Supreme Court applied Missouri's good-faith exception to the exclusionary rule.[406] The court admitted evidence obtained in a search in Missouri by Iowa and Missouri officers.[407] Iowa itself does not have a good-faith exception but the court determined that deferring to Missouri law was appropriate.[408] Similar rationales should guide a federal or state court to apply tribal law.

Turn next to self-determination. Professor Washburn offers the following definition: "In its purest form, the theory of tribal self-determination is that Indian tribes themselves should design, operate, and provide the normative standards for their governing institutions."[409] He proposes incremental reforms toward increased self-determination in Indian criminal justice. For example, "tribal communities should be able to select which federal prosecutors are assigned to their reservations."[410] Going bigger, Professor Washburn also proposes an "opt out" approach to repealing the MCA—that is, "tribes with appropriate capacities could leave the federal system and undertake their own felony criminal justice systems."[411]

Applying the ICRA with deference to tribes furthers self-determination. If a court interprets the ICRA's exclusionary rule to turn on the rule's deterrent effect, tribes should answer the normative questions that describe and affect their governing institutions—for example, whether exclusion will deter tribal officers at all, whether tribes have other methods of deterring police misconduct, and whether the benefits of deterring misconduct is worth the costs of losing probative evidence.[412] Further normative questions—all best answered by tribes—include whether the admission of evidence will render a tribal statute prohibiting unlawful searches and seizures toothless, whether a windfall to the

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[405] Necklace v. Tribal Ct. of Three Affiliated Tribes of Fort Berthold Rsrv., 554 F.2d 845, 846 (8th Cir. 1977) (per curiam) (emphasis added); *see also* Valenzuela v. Silversmith, 699 F.3d 1199, 1205-06 (D.N.M. 2012) ("The tribal exhaustion rule is based on 'principles of comity' . . . ." (quoting Burrell v. Armijo, 456 F.3d 1159, 1168 (10th Cir. 2006))).

[406] *See* State v. Davis, 679 N.W.2d 651, 655 (Iowa 2004).

[407] *See id*.

[408] *See id*. at 659.

[409] Washburn, *Criminal Law and Self-Determination*, *supra* note 35, at 849.

[410] *Id*. at 852.

[411] *Id*. at 853. This proposal shares the element of tribal choice with Professor Washburn's other proposal to allow tribes to determine whether their criminal convictions should count toward the federal sentencing guidelines. *See* Washburn, *Courts and Sentencing*, *supra* note 35, at 445-47; *see also* Bruce D. Black, Commentary, *Commentary on* Reconsidering the Commission's Treatment of Tribal Courts, 17 FED. SENT'G REP. 218, 218 (2005) (proposing for tribal governments to have option to opt out of federal sentencing guidelines and create their own sentencing system).

[412] *See supra* Section I.B.3.

defendant will perpetuate the lack of criminal accountability in Indian Country, and whether the federal assumption of jurisdiction over Indian defendants should come with heightened evidentiary protections.

A deterrence-based exclusionary rule might also prove useful to tribes in the context of cross-deputizations. Tribes and states sometimes enter cross-deputization agreements, which allow one sovereign's officers to act under the authority of another sovereign.[413] Cross-deputized state officers acting under tribal authority would be subject to the ICRA.[414] An exclusionary rule might therefore be an important deterrent against misconduct as state officers enforce tribal law against Indigenous people.

Last, federalism supports deference to tribes. Speaking in the federal-state context, Judge Jeffrey Sutton notes the benefits of multiple applications of the exclusionary rule:

> [C]onstitutional law can be, and should be, interactive between the States and the national government. The development of the exclusionary rule followed (and continues to follow) a Hegelian path, as the state and federal courts respond to strengths and weaknesses of their own decisions and to those of other sovereigns.[415]

In the ICRA context, multiple possible outcomes would have similarly positive, if not more positive, effects. As Professor Wenona Singel describes, "When culturally diverse groups exercise authority in smaller subnational sovereigns, they also contribute to the nation's pluralism, allowing ideological differences to be channeled into distinct policies and creating a richer national dialogue as a result."[416] Indeed, Professor Singel continues, federalism benefits seem more ripe in the tribal context: "The [574] federally recognized tribes in the United States represent approximately 175 living languages and tremendous cultural and religious distinctiveness as well. This cultural diversity supports a wide variety of institutional and policy diversity within tribal governance."[417]

Deference to tribes in exclusionary-rule decisions may lead to insights that shape federal and state understandings of police accountability, judicial integrity, and the role of tainted evidence in the adversarial system. Normalizing the practice of certifying questions to tribal courts and integrating robust discussions of tribal law in federal and state opinions holds promise beyond the context of the ICRA's exclusionary rule. In short, applying the ICRA with deference to tribes both respects the qualities of federalism that tribes exercise and recognizes the opportunities to learn from tribal legal innovations.

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[413] MIKKANEN, *supra* note 201, at 1.

[414] *See id*.

[415] SUTTON, *supra* note 118, at 67.

[416] Singel, *supra* note 35, at 837-38.

[417] *Id*. at 838 (footnotes omitted). Professor Singel also describes the disparate treatment of federalism values in the U.S. legal system—while federal courts have respected state federalism, they have treated tribal federalism as a danger. *See id*. at 781.

CONCLUSION

The foregoing discussion of statutory interpretation and application is not merely academic. Congress's and the Supreme Court's curtailment of tribal jurisdiction and assumption of federal criminal jurisdiction have had devastating consequences.[418] For example, Indigenous children experience reported violent crime at ten times the national average.[419] And Indigenous women, compared to women of other ethnicities, face murder rates that are ten times higher.[420] Murder is the third leading cause of death among Indigenous women.[421] Much of this terror may be laid at the feet of non-Native people—"[t]he majority of these murders are committed by non-Native people on Native-owned land."[422]

Another statistic further reveals the flaws in the current system. In 2016, the National Crime Information Center reported 5,712 cases of missing Indigenous women—but the U.S. Department of Justice missing persons database reported only 116 cases.[423] Given that the federal government has assumed authority to prosecute murders and rapes with the MCA and abrogated tribal authority to hold non-Indian perpetrators accountable, this disparity is especially disturbing.

More injustice is present in the treatment of Indigenous defendants in federal courts. Professor Creel summarizes the costs of the federal government's assumption of jurisdiction: "because of the Major Crimes Act's jurisdictional requirement, a disproportionate number of Natives are subject to federal criminal prosecution, and once in the penal system, they tend to remain indefinitely."[424] Another result of the MCA is that Indigenous juvenile defendants "are prosecuted in federal court and face harsher federal penalties."[425] In 2019, Indigenous children were 3.3 times more likely to be incarcerated than their White peers.[426]

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[418] INDIAN L. & ORDER COMM'N, *supra* note 7, at ix ("Ultimately, the imposition of non-Indian criminal justice institution in Indian country extracts a terrible price: limited law enforcement; delayed prosecutions, too few prosecutions, and other prosecution inefficiencies; trials in distant courthouses; justice system and players unfamiliar with or hostile to Indians and Tribes; and the exploitation of system failures by criminals, more criminal activity, and further endangerment of everyone living in and near Tribal communities.").

[419] TROY EID, CHAIRMAN, INDIAN L. & ORDER COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER 3 (2015).

[420] *Murdered & Missing Indigenous Women*, NATIVE WOMENS WILDERNESS, https://www.nativewomenswilderness.org/mmiw [https://perma.cc/64F6-65KZ] (last visited Oct. 25, 2022).

[421] *Id*.

[422] *Id*.

[423] *Id*.

[424] Creel, *supra* note 35, at 74.

[425] *Id*.

[426] Josh Rovner, *Disparities in Tribal Youth Incarceration*, SENT'G PROJECT (July 15, 2021), https://www.sentencingproject.org/publications/native-disparities-youth-incarceration/ [https://perma.cc/L8ZQ-9TDA].

A court's interpretation and application of the ICRA can affect this injustice and violence. Decisions to exclude otherwise probative evidence may contribute to the dearth of criminal accountability in Indian Country. And decisions to admit unlawfully obtained yet probative evidence may perpetuate the entanglement of Indigenous people in the federal penal system.

Interpreting the ICRA in harmony with its 1968 meaning can position tribes as decisionmakers. Future briefs in support of motions to suppress, reply briefs, and orders will address whether exclusion deters misconduct, how to measure the costs and benefits of exclusion, and how much deterrence is necessary for exclusion. These legal arguments should cite tribal law, the authority that can best answer these questions in the tribal context.