NOTE

"New World" Justice in the Modern Day: How the Divergent Evolution of Legal Pluralism in the Americas Reveals Opportunities for Advancement

Gabriel A. Jiménez[†]

Introduction

In 2007, the United Nations adopted The United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), a landmark instrument affirming that Indigenous peoples, among other things, "have the right to autonomy or self-government in matters relating to their internal and local affairs."[1] Despite passing with an overwhelming majority, UNDRIP was met with mixed

† University of Central Florida, Class of 2023; J.D. Candidate, Cornell Law School, Class of 2027.

1. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, art. 4 (Sept. 13, 2007).

global reception. Among its opponents at the time of adoption was the United States, which had voted against the declaration alongside Canada, Australia, and New Zealand.[2]

The United States would formally reverse its position in 2010 when it announced support for UNDRIP with significant caveats.[3] U.S. officials emphasized that UNDRIP is a non-binding, aspirational document and stated that their endorsement was consistent with existing U.S. legal frameworks, not a commitment to new obligations or reforms.[4] As such, the U.S. adoption of UNDRIP has not resulted in any significant changes to the structure or function of its Tribal Court Systems.

In contrast, several South and Central American countries embraced UNDRIP's principles and incorporated them into domestic legal and constitutional reforms. Bolivia adopted a new constitution in 2009 declaring itself a "plurinational state" recognizing the jurisdiction of Indigenous courts as equal in status to that of ordinary courts.[5] These reforms drew directly from international legal standards, including UNDRIP and ILO Convention 169, and were shaped by the mobilization of the Contemporary Indigenous Movement ("CIM"). Bolivia's Ley de Deslinde Jurisdiccional further defined mechanisms for coordination between Indigenous and ordinary jurisdictions, operationalizing Bolivia's 2008 Constitution's commitments to intercultural legal pluralism.[6]

The differences in how the United States and Bolivia received the United Nations' Declaration on the Rights of Indigenous Peoples are indicative of underlying differences in legal structures, political ideologies, and historical relationships with Indigenous communities. While both regions share colonial histories, the legal and constitutional frameworks within which Indigenous peoples' right to self-governance are recognized differ significantly. This note analyzes how these differences have shaped the methods and institutions through which Indigenous peoples are allowed to adjudicate disputes, and how these models can improve through exchange.

It proceeds in four parts:

Part I begins by defining the term *Indigenous* peoples in international and domestic contexts. It then traces the historical foundations of legal pluralism, from European theories of customary law to the colonial legal regimes that shaped the Americas. This section sets the stage for understanding why Indigenous and state legal systems continue to coexist, often uneasily.

Part II turns to the evolution of Tribal courts in the United States. It examines the development of Tribal courts through treaties, Supreme Court jurisprudence, and federal statutes like the Indian Reorganization Act and the Indian Civil Rights Act, beginning with Tribes' initial treatment as foreign states. This section outlines the structure, jurisdiction, and philosophical

2. Press Release, General Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples (Sept. 13, 2007).

3. Press Release, U.S. Dep't of State, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples (Dec. 16, 2010).

4. *Id.*

5. Constitución Política del Estado Plurinacional de Bolivia [Constitution] Feb. 7, 2009, arts. 1, 179, 190–192.

6. *See generally* Ley de Deslinde Jurisdiccional, Law No. 073, Dec. 29, 2010 (Bol.).

underpinnings of Tribal courts, with attention to their incorporation of restorative justice and efforts to balance federal oversight with cultural sovereignty.

Part III provides a brief illustration of legal pluralism and Indigenous justice systems in Latin America, with a focus on plurinationalist nation-states like Bolivia and Ecuador. Like part II, it explores historical roots up to the contemporary Indigenous movements that influenced the adoption of plurinational Constitutions, and how those frameworks formally recognize Indigenous legal systems. This section details the mechanisms by which Indigenous and state systems are meant to coordinate.

Part IV is diagnostic and prescriptive, analyzing the limitations of each model. In the U.S., Tribal courts are constrained by federal preemption, limited criminal jurisdiction, and structural dependence on congressional authority. In Bolivia and Ecuador, constitutional recognition has not always translated into institutional support, leading to challenges in enforcement, coordination, and rights protection. This section then considers examples from other global Indigenous justice systems that may offer practical tools or theoretical models for addressing these challenges. It also highlights opportunities for cross-pollination, demonstrating how elements of the Plurinationalist model could improve the Federal Indian Justice system and vice versa. It argues that improving Indigenous justice across the Americas requires centering Indigenous legal principles, strengthening institutional autonomy, and developing effective mechanisms of intercultural coordination.

It is important, however, to acknowledge the limited substantive scope of this note. Central and South America contain several nation states with thousands of years of history between them. To perform a truly complete analysis of the evolution of legal pluralism across the region would require scores of books. For that reason, this note narrows its focus on Ecuador and Bolivia, both states who have embraced constitutional plurinationalism, as their constitutional construction renders them particularly well suited to serve as a foil to United States. This does not mean, however, that this note will restrict its discussion to these three states exclusively.

Second, the arguments proffered by this note are the result of structural-institutional analysis rather than ethnographic study. In short, it relies on constitutional texts, legislation, judicial decisions, and scholarly commentary on each of the three to synthesize how formal legal structures allocate authority between Indigenous and state institutions and where they may fall short. While not particularly unorthodox for a piece of legal scholarship, this approach cannot capture how hundreds of Indigenous legal systems function in practice, the lived experience of legal pluralism, or whether constitutional recognition translates into meaningful self-determination for Indigenous peoples. While many of these topics are well covered elsewhere, genuine engagement with these questions would likely require participatory methods and empirical data collection.[7]

7. For ethnographic approaches to Indigenous legal systems, see generally Sally Engle Merry, *Legal Pluralism*, 22 Law & Soc'y Rev. 869 (1988); Rachel Sieder & María Teresa Sierra, *Indigenous Women's Access to Justice in Latin America* (Chr. Michelsen Inst., Working Paper No. 2010:2, 2010).

Finally, this note does not purport to answer all the questions it raises. Rather, it aspires to contribute a new way of thinking of and identifying potential sources of solutions. While this note has limited its scope to discussing our neighbors to the south, legal pluralism persists in some form in nearly every multicultural society. Readers are encouraged to continue the conversation by looking to all four corners of the earth; Canada, New Zealand, and Australia come to mind as good places to start. Finally, it's important to acknowledge that the complexity of issues, such as Tribal jurisdiction, have given rise to genuine dilemmas that have occupied legal and historical scholars for decades.

I. The Historical Foundations of Legal Pluralism in Colonized Societies

A. Defining Indigenous Peoples

The term Indigenous peoples has long eluded universal definition under international and domestic law. This is by design, as organizations like the UN are hesitant to adopt a definition at the risk of being underinclusive. Nonetheless, scholarly and institutional consensus has coalesced around several core attributes that distinguish Indigenous communities from other minority populations. International law generally recognizes Indigenous peoples as culturally distinctive groups descended from pre-colonial inhabitants, distinguished by non-dominance in the prevailing society, a continuing desire to remain distinct, and a profound, often spiritual connection with their ancestral lands.[8]

The United Nations Working Group on Indigenous Populations, for instance, emphasizes historical continuity with pre-colonial societies, self-identification, and communal solidarity as central criteria.[9] The International Labour Organization's Convention 169, while similarly avoiding a strict definition, extends coverage to groups distinguished from the national community by their social, cultural, and economic conditions "whose status is regulated wholly or partially by their own customs or traditions."[10] Across the Americas, these criteria have been incorporated at least in principle into both national constitutions and regional instruments such as the American Declaration on the Rights of Indigenous Peoples.[11]

8. While not an official definition adopted by any international instrument, Wiessner's proposed definition distills the elements that often appear in such instruments. *See* Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 66–68 (1999).

9. Erica-Irene Daes, *Working Paper on the Concept of "Indigenous People,"* U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2 (1996).

10. Int'l Labour Org., Convention Concerning Indigenous and Tribal Peoples in Independent Countries art. 1, June 27, 1989, 28 I.L.M. 1382.

11. American Declaration on the Rights of Indigenous Peoples, AG/RES. 2888 (XLVI-O/16) (2016).

B. Legal Pluralism and Its Forms

Legal pluralism, the coexistence of multiple legal systems within the same social field, is not unique to Indigenous-state relations, but it has acquired salience in societies shaped by colonization.[12]

The study of legal pluralism has evolved through distinct theoretical and historical phases, each offering different understandings of how multiple legal orders interact and what implications this multiplicity carries for law, sovereignty, and justice. Three major models of legal pluralism have come to be recognized extensively by legal scholars, each manifesting at different stages in the lifecycle of a colonial society. Because different legal frameworks can produce similar outcomes for distinct reasons, we will focus on a handful of specific traits that vary throughout these models: Who is the final arbiter of legal validity? To what extent is the secondary legal system independent? How limited is the system's jurisdiction? And finally, how fragile is the system's construction?

The first model appears the earliest in the development of a colonial society and is often referred to as "classic legal pluralism." Shortly after invasion, colonial authorities such as France and Spain often implemented repugnancy doctrines, under which Indigenous customary law was recognized only if not repugnant to justice, equity, or good conscience, and not inconsistent with statutory law.[13] The French, British, and Iberian colonial systems all selectively codified, transformed, and sometimes invented "customary law" by reinterpreting Indigenous norms into Western legal categories, often distorting their original meaning and operation.[14] This is the most basic form of legal pluralism, and is the least charitable to the minority party. Oftentimes, the limited recognition granted by the colonial force or nation-state is only to advance their own agenda and perpetuate a cycle of exploitation. In the Americas, this colonial legal pluralism took distinct forms.

For instance, European colonizers imposed structures, roles, religion, and forced labor on Indigenous peoples but through segregation permitted some continuance of Indigenous structures as a result of their own limited resources, and beliefs that doing so would be less disruptive. After independence from Spain in the Republican era, Latin American states developed assimilation policies in an effort to forcefully create nation-states based on a mestizo identity, seeking to eliminate Indigenous legal distinctiveness altogether. In North America, early treaties between the United States and Tribal nations recognized tribes as sovereign entities capable of self-governance, but the Marshall Trilogy gradually redefined this relationship as one of "domestic dependent nations" subordinate to federal authority.

Societies operating under "classic legal pluralism" exist near the opposite end of the spectrum of the ideals articulated by UNDRIP. Continuing with the analogy of Spanish colonial rule will reveal that it struggles to satisfy one of our criteria. Colonial forces were the final arbiter of legal validity, empowered

12. Sally Engle Merry, *Legal Pluralism*, 22 Law & Soc'y Rev. 869, 872–73 (1988).

13. *Id.* at 870; Brian Z. Tamanaha, *Legal Pluralism Across the Global South: Colonial Origins and Contemporary Consequences*, J. Legal Pluralism & Unofficial L. 7–15 (2021).

14. Merry, *supra* note 12, at 876–77; Tamanaha, *supra* note 13, at 19–21; Frederick Lugard, The Dual Mandate in British Tropical Africa 203, 206 (1922).

to restrict Indigenous jurisdiction seemingly on a whim. Because of this, the independence of Indigenous justice systems under repugnancy is minimal, as it derives its power entirely from the consent of the colonial force. This power imbalance breeds uncertainty and makes for fragile construction. Finally, as we will discuss later, Indigenous justice systems suffered from severely restrictive jurisdictional limitations.

The second model, post-colonial state-centric legal pluralism, is characterized by formal recognition of plurality within the state legal order.[15] This type of legal pluralism, also termed "weak" or "formal" legal pluralism, occurs when the state acknowledges or tolerates other law such as customary law of Indigenous peoples, although it may restrict its application to personal matters and explicitly subordinates non-state law to state law.[16] The circumstances giving rise to this model often present themselves after the colonizing population has existed alongside the Indigenous ones for some time.

This "weak legal pluralism" remains premised on legal centralism, the notion that state law constitutes the only legitimate source of legal authority and that other forms of ordering exist only at the sufferance of the state.[17] Even where Indigenous law is formally recognized, it operates within constraints defined by state constitutional and statutory law, with state courts retaining ultimate review authority and the power to invalidate Indigenous legal determinations deemed incompatible with fundamental state norms.[18] As Cowen notes, "the law of the colonizing power serves as the white man's own tribal law—a tribal law, however, of special status; for whereas Africans are compulsorily subject to certain branches of the colonizer's law, whites are not subject to any branch of African customary law. . . ."[19] The American Tribal court system, constrained by federal preemption and Supreme Court decisions limiting Tribal jurisdiction, exemplifies this model of state-centric legal pluralism.

Considering classic legal pluralism, "weak legal pluralism" can appear desirable by comparison. Here, despite the enduring presence of jurisdictional limitations and power imbalance, statutory recognition provides something that classic legal pluralism cannot: certainty. While legislation controlling things such as jurisdiction can serve as a limitation, it also serves as a guard against arbitrary actions by the primary nation-state. While not much, this makes for a stronger construction and allows for slightly more independence, even if a subordinate relationship undoubtedly exists.

The final model is also the most expansive. Postmodern, critical legal pluralism examines how legal subjects actively construct and transform law through emancipatory practice, recognizing that individuals perceive and navigate multiple legal orders simultaneously.[20] This approach pays particular

15. John Griffiths, *What is Legal Pluralism?* 24 J. Legal Pluralism & Unofficial L. 1, 5–8 (1986).

16. *Id.*

17. *Id.* at 3–5.

18. Lauren van Schilfgaarde, *Restorative Justice as Regenerative Tribal Jurisdiction*, 112 Cal. L. Rev. 103, 125-128 (2024).

19. Denis V. Cowen, *African Legal Studies: A Survey of the Field and the Role of the United States*, 27 Law & Contemp. Probs. 545, 555 (1962).

20. Martha-Marie Kleinhans & Roderick A. Macdonald, *What Is a Critical Legal Pluralism?* 12 Can. J.L. & Soc'y 25, 40, 46 (1997).

attention to the construction of knowledge and meaning by the subjects of law and challenges hegemonic legal discourse.[21] Building on this foundation, some scholars have proposed "transformative juricultural pluralism," a prescriptive approach that seeks to transform legally plural situations to achieve "deep or radical plurality" based on non-interference by the state, respect for cultural difference grounded in cultural incompleteness, and egalitarian mechanisms for cross-cultural dialogue.[22]

The most recent and concrete manifestation of transformative legal pluralism has been the emergence of "strong legal pluralism" or "plurinational constitutionalism," particularly in Bolivia and Ecuador. These constitutional frameworks recognize Indigenous courts and jurisdiction as equal to state courts, rather than subordinate authorities.[23] Bolivia's 2009 Constitution declares that "ordinary jurisdiction and rural native Indigenous jurisdiction enjoy equal status," while Ecuador's 2008 Constitution recognizes indigenous peoples' right to "create, develop, apply and practice their own legal system" within their territories.[24]

This plurinational model represents a fundamental challenge to legal centralism and seeks to "decolonize" the state by recognizing multiple legal orders as coordinate rather than hierarchical.[25] However, it is far from perfect legal pluralism, nor is it necessarily the final destination all systems should strive to reach. In countries like Bolivia, implementation has proven difficult, with ongoing tensions over the scope of Indigenous jurisdiction, mechanisms for resolving conflicts between legal orders, and the extent to which Indigenous law must conform to constitutional rights guarantees.[26] Despite these implementation challenges, the plurinational constitutionalism model remains an ambitious contemporary effort to realize transformative legal pluralism.[27]

II. North American Courts and the Evolution of Tribal Justice

The story of American Tribal courts cannot be separated from the long and often fraught relationship between federal Indian law and Indigenous sovereignty. Federal Indian policy has oscillated between periods of treaty recognition, removal, assimilation, and self-determination, with each leaving its imprint on the development of Tribal justice systems.

Long before the notion of "domestic dependent nations" entered the constitutional law canon, the federal government recognized Indigenous nations

21. *Id.*

22. Kimberly Inksater, *Transformative Juricultural Pluralism: Indigenous Justice Systems in Latin America and International Human Rights*, 60 J. Legal Pluralism & Unofficial L. 105, 106–08 (2010).

23. Rachel Sieder, *The Challenge of Indigenous Legal Systems: Beyond Paradigms of Recognition*, Brwn. J. of Wrld. Affrs. 18, 110–11 (2021).

24. Constitución Política del Estado Plurinacional de Bolivia [Constitution] Feb. 7, 2009, art. 179; Constitución de la República del Ecuador [Constitution] Oct. 20, 2008, art. 57.

25. Sieder, *supra* note 23, at 110.

26. *Id.* at 111.

27. *Id.* at 112.

as sovereign entities. Tribes were viewed as analogous to European powers such as France and Spain, capable of entering treaties.[28] The Treaty of Fort Pitt, concluded in 1778 with the Lenape (Delaware Nation), stands as the first formal agreement between the independent United States and an Indigenous nation, and provided for mutual aid and military alliance as well as the possibility of statehood.[29] This language reflected a view of Tribal nations as analogous to foreign countries, equal in treaty negotiations and autonomous in governance.[30]

Throughout the late eighteenth and early nineteenth centuries, dozens of treaties followed a similar model. Through the Treaty of Hopewell with the Cherokee (1785), the Treaty of Greenville with the Wyandot and allied nations (1795), and countless subsequent agreements, the federal government assumed obligations to restrain violence and uphold trade.[31] However, even then, these treaties simultaneously constrained tribal jurisdiction, limiting tribes' authority to independently punish non-member citizens who violated their laws. Regardless, these treaties were ratified in the same manner as treaties with France or Spain; negotiations were held between authorized representatives, the Senate voted to ratify the settled terms, and the instrument was given the force of law.[32] Under these instruments, Tribal nations retained jurisdiction over their internal affairs, enforced their own laws against their own members, and maintained diplomatic relationships with federal and state authorities.

This status did not last forever, however, and began to erode quickly after westward expansion by American settlers reached its boiling point. This jurisprudential shift is attributed to the famous Marshall Trilogy, a series of Supreme Court decisions that would fundamentally restructure the relationship between Tribal nations and the federal government. The shift began in *Johnson v. M'Intosh* (1823), in which the Court held that tribes possessed only a "right of occupancy" in their lands, while the United States held underlying fee title by virtue of discovery and conquest.[33]

In *Cherokee Nation v. Georgia* (1831), Chief Justice Marshall recognized the Cherokee as a "distinct political society, separated from others, capable of managing its own affairs and governing itself."[34] However, he famously declared that Tribal nations were not "foreign states" but rather "domestic dependent nations," whose relationship to the United States "resembles that of a ward to his guardian."[35] The subsequent decision in *Worcester v. Georgia* (1832) reinforced Tribal sovereignty over internal affairs, ruling that states lacked authority to regulate Indian land or internal Tribal matters absent congressional approval.[36]

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28. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV., 26–30 (2002).

29. Treaty of Fort Pitt, U.S.-Lenape, Sept. 17, 1778, arts. V-VI, 7 Stat. 13.

30. Cleveland, *supra* note 28, at 26-28.

31. Treaty of Hopewell, U.S.-Cherokee, Nov. 28, 1785, 7 Stat. 18; Treaty of Greenville, U.S.-Wyandot, Aug. 3, 1795, 7 Stat. 49.

32. U.S. Const. art. II, § 2, cl. 2.

33. Johnson v. M'Intosh, 21 U.S. 543, 5 L. Ed. 681 (1823).

34. Cherokee Nation v. Ga., 30 U.S. 1, 17–18 (1831).

35. *Id.* at 17.

36. Worcester v. Ga., 31 U.S. 515, 561–62 (1832).

Despite being generally regarded as kinder to the Native American population than the Supreme Court that would follow, the rhetoric of guardianship and dependency helped create a new and unfortunate dynamic; tribes retained sovereignty at the complete and total mercy of the federal government.[37]

As the federal government acquired land through treaty and forced cession, the model of diplomatic equality gave way to one of domestication and oversight. The Indian Reorganization Act of 1934 signaled a new approach, encouraging Tribal self-government but under federal direction. Tribes could develop constitutions and justice systems, but legal forms, court structures, and jurisdictional rules were subject to federal approval.[38]

Today, Tribal courts function as the judicial branches of more than 300 federally recognized tribes, each established pursuant to Tribal Constitutions or legislative codes but subject to constraints imposed by Congress.[39] For instance, the Navajo Nation Supreme Court was created by the Judicial Reform Act, passed by the Navajo Nation Council in 1985.[40] Tribes that don't establish their own court system may elect to use a regional Court of Indian Offenses ("CFR courts"), managed by the Bureau of Indian Affairs. CFR courts aren't tribal courts in the traditional sense; cases brought in CFR court are governed by the Code of Federal Regulations and only apply the laws of a litigating tribe upon approval by the Assistant Secretary Indian Affairs.[41] CFR courts can hear both criminal and civil cases, and while the Code of Federal Regulations cleanly lays out the limits of their jurisdiction to hear either, the law governing tribal courts is far more complex.

One of the most restrictive limitations on Tribal Court jurisdiction stems from the seminal 1978 case *Oliphant v. Suquamish Indian Tribe*. There, the Supreme Court held that tribes lack inherent criminal jurisdiction over non-Indians absent express congressional authorization.[42] The Supreme Court reasoned that Tribal jurisdiction over non-Indians would be "inconsistent with their status" as domestic dependent nations, and contrary to federal policy protecting non-Indians from Tribal authority.[43] This doctrine rendered tribes powerless to prosecute non-Indians who commit crimes within reservation boundaries, even when those crimes are violent and directly threaten the safety and welfare of Tribal members in their own communities.[44] The resulting gap forced tribes to rely on federal prosecutors or state authorities to pursue such cases, but federal prosecutors decline the majority of referred cases due to resource constraints and jurisdictional complexity, leaving a marginalized

37. *Id.*

38. Indian Reorganization Act, 25 U.S.C. § 5123.

39. Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness*, 84 U. Colo. L. Rev. 59, 73–74 (2013).

40. Robert Yazzie, *History of the Courts of the Navajo Nation*, Judiciary Committee of the Navajo Nation (Feb. 11, 2003), https://courts.navajo-nsn.gov/history.htm [https://perma.cc/DU4L-XTQG].

41. *See* U.S. Dep't of the Interior, *Tribal Court Systems*, https://www.bia.gov/CFRCourts/tribal-justice-support-directorate [https://perma.cc/2SS7-4JTT](last visited Apr. 16, 2026).

42. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).

43. *Id.* at 210.

44. Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 Conn. L. Rev. 697, 710–12 (2006).

population all the more vulnerable.[45] This arrangement undermined Tribal self-government, stripped tribes of the power to independently protect their citizens and maintain public order, and solidified the dependent relationship described by Marshall.

Congress has since carved out narrow exceptions, however, most notably the Violence Against Women Reauthorization Act of 2013, which permits tribes meeting specific procedural requirements to exercise "special domestic violence criminal jurisdiction" over non-Indians who commit acts of domestic violence against Indian victims.[46] Yet even this limited restoration of jurisdiction is conditional: tribes must provide defendants with publicly funded defense counsel, ensure judges are licensed attorneys or receive legal training, and guarantee all rights under the Indian Civil Rights Act and federal constitutional protections.[47] These requirements, though defensible from a due process perspective, impose structural and financial burdens that many smaller tribes cannot meet, effectively excluding them from exercising even this narrow form of jurisdiction.[48] More fundamentally, the framing of Tribal jurisdiction as something that must be specifically granted by Congress reflects a conception of Tribal sovereignty as a privilege rather than a right.[49] Tribes are permitted to exercise only those powers Congress chooses to restore, rather than possessing plenary authority consistent with the Supreme Court's territorial theory of jurisdiction.[50]

In civil matters, tribes face different but equally constraining limitations. Under *Montana v. United States*, Tribal courts may adjudicate civil disputes involving non-Indians only if the parties have entered into consensual relationships with the tribe, such as commercial contracts or leases, or the conduct at issue threatens the tribe's political integrity, economic security, or health and welfare.[51] On its face, this framework acknowledges some Tribal authority over non-Indians, as when the Crow Tribal Court asserted jurisdiction over contract disputes with nonmember businesses operating on Tribal land.[52] However, the *Montana* test systematically disadvantages tribes by requiring them to affirmatively prove a jurisdictional basis in every case, shifting the burden of justification onto the tribe rather than presuming territorial sovereignty.[53] In practice, federal courts have interpreted the exceptions narrowly, frequently concluding that conduct on Tribal land does not sufficiently threaten Tribal interests to justify jurisdiction even when the conduct involves environmental damage,

45. U.S. Gov't Accountability Office, GAO-11-167R, U.S. Dep't of Justice Declinations of Indian Country Criminal Matters (2010).

46. Violence Against Women Reauthorization Act of 2013, 25 U.S.C. § 1304.

47. *Id.* § 904.

48. Jordon Gross, *Taking Stock: Open Questions and Unfinished Business Under the VAWA Amendments to the Indian Civil Rights Act*, Hastings L. J. 73, 475-528 (2022).

49. *See* Frederick J. Martone, *American Indian Tribal Self-Government in The Federal System: Inherent Right or Congressional License?*, Notre Dame L. Rev. 51, 633-635 (1976).

50. Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 Calif. L. Rev. 173, 214–16 (2014).

51. Montana v. U.S., 450 U.S. 544, 565–66 (1981).

52. *Id.*

53. Judith V. Royster, *The Legacy of Allotment*, 27 Ariz. St. L.J. 1, 56-58 (1995).

exploitation of tribal resources, or interference with tribal governance.[54] This places tribes in the position of having to litigate their own authority before they can reach the merits of disputes affecting their lands and citizens, a procedural burden no state or federal court must bear.[55]

By presuming that Tribal jurisdiction over non-Indians is conditional rather than inherent, *Montana* undermines the core principle of territorial sovereignty: that a government may regulate conduct within its borders to protect its people and resources.[56] The result is a patchwork system in which tribes possess incomplete authority even within reservation boundaries, unable to ensure that their laws apply uniformly to all who reside or do business there.[57] This fragmentation weakens Tribal governments' capacity to function as fully effective institutions, particularly in cases where neither Tribal, federal, nor state courts have jurisdiction over a case arising out of on-reservation activity, leaving the community members without recourse.[58]

As far as the degree of discretion allowed in the staffing of Tribal courts, the qualifications for Tribal judges vary widely. The Navajo Nation requires its Supreme Court justices to be members of the bar, while the Ho-Chunk Nation only requires its Chief Justice to be an admitted attorney. The White Earth Band of Ojibwe require all judges to be "lawyers experienced in the practice of Tribal and federal Indian law and licensed to practice in the highest court of any state."[59] Some tribal courts require sitting judges to be fluent in their tribes indigenous language.[60] This diversity reflects tribes' efforts to balance cultural authenticity with procedural legitimacy, but it also underscores the reality that Tribal courts must constantly navigate between their own legal traditions and externally imposed standards.[61] Federal oversight such as ICRA requirements, congressional conditions on jurisdiction, or the threat of habeas review means that Tribal courts operate in the shadow of the primary state's government, effectively limiting their capacity to enjoy self-government.[62] Consequently, Tribal courts function less as fully sovereign institutions exercising inherent authority and more as subordinate bodies whose jurisdiction exists at the sufferance of federal law.[63]

Any account of legal pluralism in the United States, however, would be incomplete without an illustration of its territories. The jurisprudence and

54. *See* Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 465 (2008).

55. Royster, *supra* note 53, at 55.

56. Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 Am. U. L. Rev. 1177, 1217-1219 (2001).

57. *Id.* at 1197-1198.

58. *See* Alex Tallchief Skibine, *Incorporation Without Assimilation: Legislating Tribal Jurisdiction Over Nonmembers*, UCLA L. Rev 67 (2019).

59. Navajo Nation Code, tit. 7, § 201; Ho-Chunk Nation Const. art. VIII, § 2; White Earth Band Judicial Code § 3.01 (2021).

60. Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness [Re]Incorporating Customs and Traditions into Tribal Law*, Tribal L. J. 1, 1-22 (2001).

61. *See* Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay*, N. M. L. Rev. 18, 49-51 (1988).

62. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 57–59 (1978) (White, J., dissenting).

63. Fletcher, *supra* note 39, at 77.

legislation responsible for the modern-day status of Guam and Puerto Rico developed parallel to that of the federal Tribal courts, and form part of a broader pattern of colonial legal arrangements developed by the Supreme Court. Understanding this parallel illuminates how American law has systematically created categories of subordinate peoples whose relationship to constitutional protections remains permanently incomplete.

The acquisition of Puerto Rico, Guam, and the Philippines following the Spanish-American War of 1898 presented the Supreme Court with a question structurally analogous to that posed by Tribal nations: how to incorporate populations into American governance without extending full constitutional membership. The Court's answer came in the Insular Cases (1901–1922), a series of decisions establishing that newly acquired territories were "unincorporated" and that the Constitution applied to them only partially, at Congress's discretion.[64] In *Downes v. Bidwell* (1901), the Court held that Puerto Rico was "foreign to the United States in a domestic sense" and that its residents possessed only those constitutional rights that Congress chose to extend.[65]

The conceptual architecture of the Insular Cases bears striking resemblance to the domestic dependent nation framework established for tribes seventy years earlier in *Cherokee Nation v. Georgia*. Both doctrines create intermediate categories between foreign and domestic that enable indefinite subordination. Just as tribes were characterized as wards whose sovereignty existed at congressional sufferance, territorial residents were deemed to possess only fundamental constitutional rights while procedural protections remained discretionary.[66] In both contexts, the Court invented new constitutional categories to manage populations it considered insufficiently civilized for full membership, drawing explicitly on racial and cultural hierarchies to justify differential treatment.

The Foraker Act of 1900 established Puerto Rico's civil government, creating a territorial legislature with limited powers subject to congressional override and denying residents voting representation in Congress, a political arrangement echoing the plenary power doctrine's treatment of Tribal governments as existing at congressional pleasure.[67] The Jones Act of 1917 granted Puerto Ricans U.S. citizenship while maintaining the island's unincorporated status, producing the paradox of citizens who cannot vote for president and whose congressional delegate lacks voting power.[68] This mirrors the situation of Tribal members who hold U.S. citizenship yet whose nations lack representation in the federal government that claims ultimate authority over their affairs.

Recent scholarship has demonstrated that these parallel doctrines share both structural similarity and common intellectual origins. Professor Sarah Cleveland has traced how the legal architects of the Insular Cases drew directly on federal Indian law precedents, treating the "domestic dependent nation"

64. *See* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 Harv. L. Rev. 1787-1877 (2019).

65. Downes v. Bidwell, 182 U.S. 244, 341–42 (1901) (White, J., concurring).

66. Balzac v. Porto Rico, 258 U.S. 298, 304–14 (1922) (holding that jury trial right does not apply in unincorporated territories).

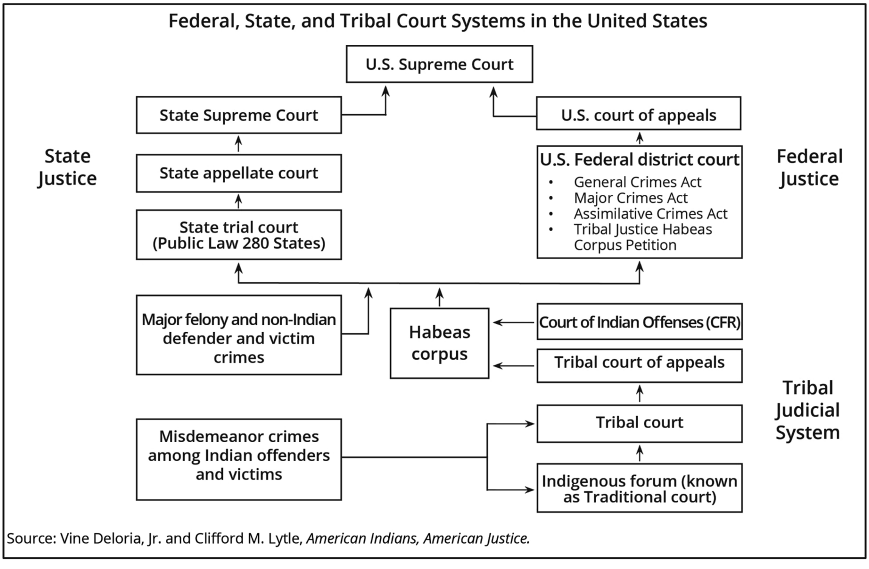
67. Foraker Act, ch. 191, 31 Stat. 77 (1900).

68. Jones Act, ch. 145, 39 Stat. 951 (1917).

framework as establishing that the Constitution permits permanent subordination of racialized populations within American sovereignty.[69] Similarly, Professor Maggie Blackhawk has shown how the plenary power doctrine developed for Indian affairs was explicitly extended to territorial governance, with courts citing Indian law cases as authority for limiting territorial residents' constitutional rights.[70]

Returning again to Tribal sovereignty, the journey from the Treaty of Fort Pitt to the present demonstrates the complex dialectic between sovereign equality and federal subordination. In short, early treaties established tribes as international coequals; the Marshall Trilogy redefined them as domestic dependents with limited sovereignty; and modern federal Indian law continued this trajectory. Tribal courts thus operate in the shadow of the federal judiciary, overseeing the tension between revitalizing distinct Indigenous legal traditions and navigating the federal legal framework that constrains their autonomy.[71]

Pictured below is a visual diagram illustrating Tribal courts' position in the greater U.S. legal system today:



Source: Vine Deloria, Jr. and Clifford M. Lytle, *American Indians, American Justice.*

III. South American Courts and Constitutional Plurinationalism

Unlike the treaty-based relationship that characterized Anglo-Tribal relations in early British North America, Spanish colonial governance rested on theological and juridical foundations asserting immediate sovereignty from the moment of discovery. The legal basis for Spanish claims derived from the 1493 papal bull *Inter Caetera* issued by Pope Alexander VI. *Inter Caetera* granted Spain exclusive rights to territories west of a meridian line not already held by

69. Cleveland, *supra* note 28, at 1, 7, 35–40.
70. Blackhawk, *supra* note 64, at 1819–27.
71. *Id.* at 1862–1863; Carpenter & Riley, *supra* note 50, at 192–94.

Christian rulers.[72] These new territories came with a new mandate, however, tasking the Spanish to convert their Indigenous populations to Christianity and bring them under the Vatican's dominion. This stood in stark contrast to the diplomatic equality implied in early North American treaties. Where those treaties were premised on consent, however coerced, the early Spanish colonial regime presumed inherent Spanish sovereignty requiring no Indigenous acquiescence. This theological foundation would shape the institutional structures through which Indigenous legal systems were subordinated, recognized, and later constitutionally rehabilitated across the Andean region.

The Spanish colonial system that emerged in the 1500s from this theological mandate created what scholars have termed a "dual republic" structure, comprising the *República de Españoles* and the *República de Indios*. This arrangement, formalized through the Leyes de Indias, established separate legal spheres for Indigenous subjects of the Spanish Crown, creating semi-autonomous spaces within which Indigenous *usos y costumbres* could operate.[73] This autonomy, however, was severely restrained. For one, Indigenous law was only allowed to operate to the extent that it did not conflict with Christian doctrine, royal authority, or Spanish notions of natural law.[74] Additionally, Indigenous authority extended only to minor matters, with serious crimes and disputes involving Spaniards reserved for colonial tribunals applying Spanish law.

The dual republic system would persist for centuries until a series of wars for independence swept its way across Central and South America in the 1800s. These wars ushered in a new era of republican nation-states, and with them new legal systems. The dual republic system was discarded in favor of a legally monist model, which more closely resembled those of European states. In doing so, they embraced unitary legal systems, casting legal pluralism to the wayside in favor of nominal equality under the law. The next two hundred years, however, would see legal pluralism reemerge, eventually giving rise to the constitutional plurinationalism of today. We now trace that story across Bolivia, then Ecuador.

A. Bolivia, the Advent of the Plurinational State, and the Ley de Deslinde Jurisdiccional.

Bolivia declared independence from Spain in 1825 and passed its first Constitution a year later in 1826. Written by Simón Bolívar, Bolivia's first Constitution restricted citizenship to people literate in Spanish and employed in a "sufficiently remunerative trade."[75] The first Constitution would be short-lived, however, and was soon superseded by Bolivia's second Constitution,

72. Matthew Cavedon, *The Enduring Role of Pope Alexander VI's Inter caetera in Spanish Colonization: The Man Who Sold the World?* (Jan. 6, 2023), CSLR Research Paper No. 1., 2023-AFF, Brill Rsch. Perspectives in Law and Religion (forthcoming), https://ssrn.com/abstract=4319067.

73. Santiago Munoz-Arbelaez, *Contested Customs: Reinventing Indigenous Authority in Sixteenth-Century Ubaque, New Kingdom of Granada*, 77 Renaissance Q. 1106-1133 (2024).

74. *Id.*

75. Indigenous Bolivian Community Justice: Resource Material for Comparative Lessons 2 (Robert H. Jerry, II & Jessica Carder eds., 2018).

setting something of a trend for the following decades to follow. In the 50 years that followed, Bolivia would go through six different Constitutions.

Although ultimately unsuccessful, Bolivian Indigenous peoples pursued campaigns in the 1910s and 20s advocating for the establishment of specialized courts for Indigenous peoples. This movement would ultimately lose momentum by 1932, however.[76] It wouldn't be until nearly a century later in 1938 that Bolivia would recognize the legal existence of its Indigenous peoples, but this acknowledgement was fleeting, and by 1967, Bolivia's fifteenth Constitution was free of any reference to Indigenous peoples or ethnic minorities.[77] Throughout the 1980's, Bolivian legislation recognized the existence of Indigenous customary law but "declared the Indians not responsible for their actions because of their primitive state, and placed them under protection of the state."[78] This language, evocative of the Supreme Court's "ward of the state" designation, would persist until political pressure of the growing Indigenous movements of the 1990's resulted in more progressive legislation remedying it.[79]

Bolivia's Indigenous movement would eventually secure its most significant victory with the passing of the 2009 Constitution, following Evo Morales's election as Bolivia's first president of indigenous decent. The new 2009 Constitution represented one of the most radical constitutional transformations in the nation's history since first achieving independence. The preamble explicitly declared a break with "the colonial, republican, and neoliberal State" and established a "Plurinational State" premised on recognition of multiple nations within Bolivian territory.[80] Article II guaranteed Indigenous peoples' "free determination, consisting of the right to autonomy, self-government, their culture, recognition of their institutions, and the consolidation of their territorial entities."[81] Perhaps the most significant addition, Article 179 established a new framework for the Bolivian Justice system comprising three different types of jurisdiction: ordinary jurisdiction (to be exercised by the Supreme Court of justice, departmental courts of justice, and sentencing courts), agro-environmental jurisdiction (to be exercised by the Agro-Environmental Court), and rural native Indigenous jurisdiction (to be exercised by the authorities of the various Indigenous peoples).[82] Article 179 also grants ordinary jurisdiction and rural native Indigenous jurisdiction equal status. Finally, Article 191 details the limits of Indigenous jurisdiction, stating that it is "based on the specific connection between the persons who are members of the respective nation or rural native Indigenous people."[83]

The jurisdictional limits placed by Article 191 were later expanded by Bolivia's *Ley de Deslinde Jurisdiccional* (Law No. 073, enacted December 29, 2010) which operationalized the constitutional framework by defining

76. James M. Cooper, *Legal Pluralism and the Threat to Human Rights in the New Plurinational State of Bolivia*, 17 Wash. U. Global Stud. L. Rev. 1, 15 (2018).
77. *Id.* at 18.
78. *Id.* at 18–19.
79. *Id.* at 20–21.
80. Constitución Política del Estado [C.P.] pmbl. (Bol.) (2009).
81. *Id.* art. 2.
82. *Id.* art. 179.
83. *Id.* art. 191.

Indígena Originario Campesina ("IOC") jurisdiction along three restrictive axes: personal, territorial, and material scope. Article 9 of the Ley de Deslinde establishes that IOC jurisdiction applies to members of the Indigenous nation or rural native Indigenous people "regardless of their role in the dispute." Critically, non-Indigenous persons are not subject to IOC jurisdiction even for acts committed within Indigenous territories.[84] Article 11 limits IOC authority to legal relations and events carried out, or whose effects are produced, within the jurisdiction of a rural native Indigenous people. This requirement ties Indigenous jurisdiction to physical location within recognized Indigenous territories.[85] Finally, Article 10 details the kinds of cases IOC jurisdiction is allowed to hear, namely matters "that have historically been heard under their own rules, procedures, and knowledge, in accordance with their self-determination."[86] Despite granting the IOC jurisdiction, the same article carves out broad exclusions: public and private international law, crimes against state security, terrorism, corruption, drug trafficking, human trafficking, crimes against minors, rape, homicide, and any matters in which the state is a party. These exclusions mirror that of the U.S.'s Major Crimes Act, and while many of these restrictions have reasonable rationales, some have been the subject of controversy.

The Ley de Deslinde calls for more than limitations on the exercise of Indigenous justice, however. Articles 13 and 14 call for coordination and collaboration between the state of Bolivia, courts of ordinary jurisdiction, and its Indigenous peoples.[87]

B. Ecuador and Jurisdictional Uncertainty

Ecuador followed a parallel yet distinct path toward plurinational constitutionalism. Ecuador achieved independence in 1822 and abolished the dual republic system shortly after, beginning an era of legal monism that would last for just shy of two centuries.[88] While Indigenous legal practices persisted in rural communities during this time, they operated as informal, extralegal systems with no official recognition.[89] Like Bolivia, Ecuador declared itself multiethnic and multicultural in its 1998 Constitution, with Article 84 authorizing Indigenous authorities to apply customary law for conflict resolution, subject to constitutional and human rights guarantees. However, like Bolivia's 1994 reforms, this recognition remained limited and subordinate, treated as an informal alternative for minor community disputes rather than a coordinate legal system, and critically, no implementing legislation specified jurisdictional boundaries, coordination mechanisms, or the legal effect of Indigenous decisions.[90]

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84. Ley de Deslinde Jurisdiccional, Law No. 073, art. 9, Dec. 29, 2010 (Bol.).
85. *Id.* art. 11.
86. *Id.* art. 10.
87. *Id.* arts. 13–14.
88. *See* Marc Simon Thomas, *Legal Pluralism and the Continuing Quest for Legal Certainty in Ecuador: A Case Study from the Andean Highlands*, 2 Oñati Socio-Legal Series 58-84 (2012).
89. *Id.*
90. *Id.*

Ten years after its 1998 Constitution and one year before Bolivia would declare itself a multi-national state, Ecuador adopted a new Constitution. Ecuador's 2008 Constitution declared the country not merely pluricultural but plurinational, reconceptualizing the state as encompassing multiple nations coexisting as constituent peoples rather than a single homogeneous nation with minority populations.[91]

Article 171 of the 2008 Constitution provides that "the authorities of Indigenous communities, peoples, and nationalities shall exercise jurisdictional functions, based on their ancestral traditions and their own law, within their territorial scope." Indigenous jurisdictional decisions "shall be respected by public institutions and authorities" and shall be "subject to the control of constitutionality."[92]

The Corte Constitucional del Ecuador (Constitutional Court of Ecuador) exercises ultimate authority over both ordinary and Indigenous jurisdictions, reviewing Indigenous decisions for constitutional compliance. This structural arrangement positions the Constitutional Court as the arbiter of Indigenous legal validity. Unlike Bolivia, Ecuador lacks a tripartite judicial structure with only ordinary jurisdiction to encompass most civil, criminal, and administrative matters through a unified court hierarchy, with Indigenous jurisdiction operating as a parallel system for qualifying disputes.

But which disputes qualify? Lacking a *Ley de Deslinde* of its own, Ecuador has not enacted comprehensive implementing legislation for its plurinational justice system.[93] A draft *Ley Orgánica de Coordinación y Cooperación entre la Justicia Indígena y la Jurisdicción Ordinaria* has been debated but not adopted, leaving jurisdictional boundaries to case-by-case constitutional adjudication.[94] This legislative vacuum produces regional variance and widespread uncertainty.

The bounds of Indigenous jurisdiction in Ecuador are not entirely without definition, however. Article 171 of Ecuador's Constitution provides that Indigenous authorities exercise jurisdiction "within their own territories" and for "the solution of their internal conflicts."[95] The phrase "internal conflicts" has been interpreted to require both parties to be Indigenous community members, though Constitutional Court jurisprudence has not established a bright-line rule.[96] The jurisdictional parameters that have emerged are the product of judicial interpretation rather than statutory definition, producing uncertainty about the precise boundaries of Indigenous authority.[97]

Another significant authority on the limits of Indigenous jurisdiction is Ecuador's Constitutional Court's decision in *La Cocha*, in which the defendants were being tried for homicide after the killing of a Kichwa community member. After being subjected to sanctions under customary procedure, the defendants

91. *Id.*
92. Constitución de la República del Ecuador art. 171 (2008).
93. Sieder, *supra* note 23, at 111.
94. *Id.*
95. Constitución de la República del Ecuador art. 171 (2008).
96. Guillermo Ciudad, *Plurinational States and Legal Pluralism: An Impossible Mission?*, 48 Pol. Sci. Rev. 252, 269 (2024).
97. *Id.*

filed a constitutional complaint contesting its validity.[98] The Court held that Indigenous jurisdiction covers internal conflicts but is limited by constitutional rights, and that crimes against life must be judged and sanctioned by the ordinary criminal justice system.[99] This produces a novel framework for determining the proper limits of Indigenous jurisdiction, yielding a different result from both the U.S. and Bolivian systems.

IV. Toward a More Complete Model of Legal Pluralism

Despite their differences, each of the three systems discussed were established for a very similar fundamental purpose: to allow the Indigenous populations within their nation-states to maintain some form of self-governance, formal recognition of Indigenous legal authority across all three jurisdictions examined, significant gaps persist between formal acknowledgment and practical realization.

A. In the United States

With this in mind, we first turn our attention to the U.S. Tribal court system. Undoubtedly, one of the most contentious issues faced by Indigenous justice systems is that limitations on Indigenous jurisdictional authority in the United States derive not from explicit congressional action, but from a judicially created doctrine. Beginning with *Oliphant v. Suquamish Indian Tribe*, the Supreme Court developed an "implicit divestiture" framework that systematically strips Tribal authority without textual basis in treaties or statutes.[100] As Professor Philip Frickey has observed, *Oliphant* represents federal common law developed "as a necessary expedient when Congress has not spoken to a particular issue" Under this doctrine, the Court has concluded that certain inherent sovereign powers were implicitly divested because their exercise would be "inconsistent with [the tribes'] status" as domestic dependent nations.[101]

This approach inverts the foundational principle established in *Worcester v. Georgia* that Indian nations retain all sovereign powers not explicitly surrendered by treaty or removed by Congress.[102] The *Oliphant* Court acknowledged that "Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians,"[103] yet proceeded to announce precisely such a prohibition based on "unspoken assumptions" divined from historical sources.

The doctrine expanded significantly in *Montana v. United States*, which extended implicit divestiture to civil jurisdiction.[104] The Court held that "the

98. *See* Corte Constitucional del Ecuador [constitutional Court of Ecuador], Sentencia No. 113-14-SEP-CC, Caso No. 0731-10-EP (May 28, 2014) [hereinafter La Cocha].

99. *Id.*

100. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978); *see* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 13–14 (1999).

101. Oliphant, 435 U.S. at 208–10.

102. Worcester, 31 U.S. at 561–62.

103. Oliphant, 435 U.S. at 204.

104. Montana, 451 U.S. at 565–66.

inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" except in two narrow circumstances: when nonmembers enter consensual relationships with tribes, or when nonmember conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[105]

The structural effect of *Oliphant* and *Montana* has been to shift the burden of proof onto tribes to demonstrate their retained authority, rather than requiring Congress or courts to identify specific divestitures. The consequences extend beyond criminal jurisdiction: *Nevada v. Hicks* applied the *Montana* framework even to conduct occurring on Tribal trust land,[106] undermining the certainty that until then the territorial presumption, that conduct occurring in "Indian Country" was largely subject to Indigenous jurisdiction, had previously protected Tribal authority within reservation boundaries.

The U.S. Tribal legal system's greatest shortcoming can be corrected by looking abroad. Legislative correction and constitutional recognition have the potential to remedy some of the *Nevada*-imposed uncertainty that arises from a lack of comprehensive legislation defining Indigenous jurisdiction. Better yet, adopting an amendment to the Constitution recognizing the several tribes of the U.S. and clearly defining their relationship to the federal government in the style of Ecuador or Bolivia, could provide an opportunity to solidify protections of certain Indigenous peoples' rights as identified by UNDRIP. Constitutionalizing Native Americans' status also has the potential to provide something valuable: certainty. By codifying their status through amendments, the United States could reduce doctrinal uncertainty, stabilize jurisdictional allocations, and better align federal Indian law with UNDRIP's recognition-oriented framework.

A second structural limitation operates through the institutional form that Tribal justice systems have been compelled to adopt. Article 34 of UNDRIP affirms that Indigenous peoples have the right "to promote, develop and maintain their institutional structures and their distinctive customs, traditions, procedures and practices."[107] Yet the practical operation of Tribal courts in the United States often replicates the adversarial nature of state and federal courts.

The origins of this institutional distortion trace to the Courts of Indian Offenses established under federal authority in 1883.[108] These tribunals applied federally drafted codes enforced by federally appointed judges, explicitly designed to suppress traditional practices and accelerate assimilation. Though Tribal courts have evolved substantially since this period, the adversarial framework persists as the dominant institutional form. As Professor Brian Tamanaha observes, "state court judges who apply customary law in the same manner that they apply state law distort its operation."[109] The essence of traditional dispute resolution "may be said to have lain in their processes, but these were

105. *Id.* at 565.

106. Nev. v. Hicks, 533 U.S. 353, 359–60 (2001).

107. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, art. 34 (Sept. 13, 2007).

108. *See* van Schilfgaarde, *supra* note 18, at 103-157 (describing the establishment of Courts of Indian Offenses in 1883).

109. Tamanaha, *supra* note 13, at 19–21.

displaced, and the flexible principles which had guided them were now fed into a rule-honing and using machine operating in new political circumstances."[110]

This process distortion occurs even when Tribal courts formally incorporate customary law. The codification of traditional norms transforms their character, particularly when those norms are enforced by drastically different dispute resolution method. Setting forth customary law in codes or judicial precedent "further transforms customary law by rendering it relatively fixed, while unwritten customary law more readily changes in relation to variations and changes in circumstances."[111]

The International Commission of Jurists' 2021 Principles on Indigenous Justice Systems recognize this tension, noting that when "State, in its legal order, recognizes courts based on customary law. . . to carry out or entrusts them with judicial tasks," such courts must meet "the basic requirements of fair trial and other relevant guarantees."[112] This conditionality contributes to pressures that push Indigenous justice systems toward state-like institutional forms.

Several factors contribute to this institutional convergence. First, federal funding for Tribal justice systems can condition support on adoption of procedural requirements that presuppose an adversarial process like that of state and federal courts. Second, the Indian Civil Rights Act of 1968 imposed modified Bill of Rights protections on Tribal governments, requiring procedural forms compatible with these guarantees.[113] The result is that Tribal courts increasingly resemble state and federal courts in form.

Like jurisdictional uncertainty, solutions to this problem can be found abroad, and they have already taken root in some parts of the country. Not every Tribal dispute resolution method adheres to the western, adversarial model. For example, the Wayuu people, an indigenous community which inhabits Colombia and Venezuela, take a more collaborative approach to dispute resolution. When a conflict arises between two members or matrilineal clans, they enlist the help of a Pütchipü'üi, an independent third party who assists the parties to reach a reparative solution.[114] To U.S. practitioners, this would appear to be akin to a mediation of sorts, a form of *alternative* dispute resolution. But to the Wayuu and in many of America's pre-colonial cultures, collaboration and reconciliation are merely the norm.

Here in the U.S., the Navajo Nation and several other peoples across the country have established Peacemaker Courts, forums that resolve disputes through community-based peacemaking rather than adversarial adjudication.[115] Peacemaker Courts draw on traditional concepts of harmony and

110. *Id.* at 21.

111. *Id.* at 22.

112. International Commission of Jurists, Principles on Indigenous and Other Customary or Traditional Justice Systems, Human Rights, and the Rule of Law 14 (2021).

113. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1303.

114. *See* UNESCO, *Evaluation of Nominations for Inscription in 2010 on the Representative List of the Intangible Cultural Heritage of Humanity* 20 (describing the Wayúu dispute resolution practice of Los Palabreros).

115. *See* Jessica Metoui, *Returning to the Circle: The Reemergence of Traditional Dispute Resolution in Native American Communities*, 2007 J. Disp. Resol. 517, 528–31 (2007); Navajo Courts, *Navajo Nation Peacemaking Program*, https://courts.navajo-nsn.gov/indexpeacemaking.htm [https://perma.cc/EEA6-C5N2] (last visited May 13, 2026) (detailing first-hand descriptions of the Navajo Peacemaking program).

relationship repair, using facilitated dialogue among parties, families, and elders to restore balance instead of focusing on guilt and punishment.[116] While not a one-size-fits-all solution, Peacemaker Courts demonstrate that traditional dispute resolution can coexist alongside adversarial tribunals, with tribes maintaining hybrid systems serving different functions.[117] As such, it may be worth considering providing them with a comparable amount of resources as are supplied to regular Tribal courts, to ensure that a "litigant's" choice of venue isn't unduly influenced by factors such as unavailability.

A final structural limitation arises not from UNDRIP, but from the U.S. Constitution. The Sixth Amendment is meant to secure an impartial jury drawn from a fair cross-section of the community, yet Native Americans facing prosecution in state or federal courts in Indian Country are frequently tried before juries that include few or no members of their own Tribal community.[118] This problem is especially acute in major-crimes cases, where federal jurisdiction displaces Tribal courts and jury pools are drawn from large, predominantly non-Native districts, so that serious offenses carrying substantial deprivations of liberty are adjudicated by juries that do not meaningfully reflect the defendant's political and cultural community.

This problem operates in multiple directions. First, the Major Crimes Act of 1885 removes the most serious offenses from Tribal jurisdiction entirely, subjecting Native Americans to federal prosecution where juries are drawn from general population pools that may include few or no Tribal members.[119] The jurisdictional scheme thus deprives tribes of authority over the most consequential cases affecting their communities while simultaneously depriving defendants of culturally-situated adjudication. This limitation creates a structural incentive to refer serious cases to state or federal systems, perpetuating the removal of significant matters from Tribal forums.

For the jury trial concern, reforms could focus on jury composition requirements rather than jurisdictional limitations. For federal prosecutions under the Major Crimes Act, legislation could require jury pools in Indian Country cases to include adequate Tribal representation, ensuring that Native American defendants receive juries that include members of their communities. For examples of this in action, one can look to Argentina, where provinces like Chaco and Neuquén mandate a special jury composition for Indigenous defendants.[120] There, whenever an Indigenous person faces a criminal jury trial, six out of twelve members of the jury must be individuals of that defendant's tribe.[121] It is worth acknowledging, however, that implementation of such legislation could lead to significant logistical difficulty in the U.S. if applied to all

116. Robert Yazzie, *"Life Comes from It": Navajo Justice Concepts*, 24 N.M. L. Rev. 175, 181–86 (1994).

117. *Id.*

118. *See* Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 Mich. L. Rev. 709, 754–56 (2006).

119. *See* Major Crimes Act, 18 U.S.C. § 1153.

120. Andrés Harfuch, Mariana Bilinski & Andrea Ortiz, *Argentina's Indigenous Jury*, *in* The Jury Expert (2016).

121. Ley Provincial 7661, art. 4 (Chaco, Arg.) (stating that "When the accused belongs to the Native Peoples Qom, Wichi or Mocoví, half the jury of twelve (12) members shall consist compulsory for [must consist of] men and women of the same original community").

trials with a Native American defendant. Unlike much of Latin America, the Native American population in the United States has declined in such a way that would make potential jurors few and far between and insufficient record keeping may make it difficult to ensure the jurors that could be assembled were all of the same tribe.

B. In Bolivia

Bolivia's 2009 Constitution represents the most comprehensive constitutional recognition of Indigenous legal pluralism in the Americas. Article 190 of Bolivia's Constitution recognizes Indigenous law in its "principles, cultural values, norms and procedures" and grants jurisdiction to Indigenous authorities.[122] Article 30 affirms Indigenous peoples' right to the exercise "of their political, juridical and economic systemsFalse"[123] Article 192 mandates that "each public authority or person shall obey the decisions of the rural native Indigenous jurisdiction" and commits the state to "promote and strengthen rural native Indigenous justice."[124]

Yet the implementing legislation the Ley de Deslinde Jurisdiccional substantially constrains these constitutional guarantees. The law imposes three simultaneous requirements for exercise of Indigenous jurisdiction: personal, material, and territorial criteria must align.[125] Regarding the personal criterion, Article 9 specifies that "the members of the respective Indigenous nation are subject to the Indigenous jurisdiction" limiting application to Indigenous persons only.[126] The territorial criterion in Article 11 confines Indigenous justice to "legal relations and events that are carried out or whose effects are produced within the jurisdiction of an Indigenous people."[127] Most significantly, the material criterion in Article 10 excludes numerous categories from Indigenous jurisdiction entirely, including homicide, corruption, labor law, and property law.[128]

These limitations generated immediate criticism from Indigenous organizations. The National Council of Ayllus and Markas of Qullasuyu ("CONAMAQ") characterized the law as contradicting constitutional provisions for jurisdictional equality.[129] Professor Matthew Doyle contends the law goes against any serious idea of legal decolonization.[130] Indigenous authorities have described the law as unconstitutional because it places limits on the ability of Indigenous communities to manage their own justice.[131] Some critics argue the law may actually discourage Indigenous justice systems as

122. Constitución Política del Estado art. 190 (Bol. 2009).
123. *Id.* art. 30.
124. *Id.* art. 192.
125. Ley de Deslinde Jurisdiccional, Law No. 073, arts. 9–11, Dec. 29, 2010 (Bol.).
126. *Id.* art. 9.
127. *Id.* art. 11.
128. *Id.* art. 10(II).
129. Fundación CONSTRUIR, Ruta Crítica para la Jurisdicción Indígena Originario Campesina: Propuesta de Modificaciones a la Ley de Deslinde Jurisdiccional 12–13 (2021).
130. Matthew Doyle, *Can States Be Decolonized? Indigenous Peoples and Radical constitutional Reform in Bolivia*, 51 J. Peasant Stud. 166, 175 (2024).
131. Fundación CONSTRUIR, *supra* note 129, at 26.

Indigenous peoples might be forced to resort to ordinary justice systems when the Indigenous alternative offers only constrained authority.[132]

A particularly consequential limitation in the Bolivian framework shared with Ecuador is the confinement of Indigenous jurisdiction to rural areas.[133] This geographic restriction contradicts the demographic reality that substantial Indigenous populations now reside in urban centers. Bolivia has the highest percentage of Indigenous peoples in Latin America,[134] yet urban Indigenous residents are effectively excluded from accessing their traditional justice systems for disputes arising in cities.

The *Ley de Deslinde*'s rural limitation reflects assumptions about Indigenous identity that conflate indigeneity with territorial presence in traditional lands. This conflation fails to account for contemporary patterns of Indigenous urbanization while implicitly suggesting that Indigenous persons who relocate to urban areas have somehow forfeited their connection to traditional legal systems. The limitation thus creates a false choice: Indigenous peoples can maintain access to their justice systems by remaining in rural territories, or they can participate in urban economic life while accepting subordination to ordinary state jurisdiction.

The practical consequences extend beyond individual cases. Rural limitations prevent Indigenous justice systems from developing jurisprudence addressing contemporary disputes that arise in urban contexts. Traditional authorities cannot adapt their methods to new circumstances because they lack jurisdiction over those circumstances. The restriction thus freezes Indigenous law in a pre-modern territorial framework while Bolivia's Indigenous population increasingly inhabits spaces beyond traditional territories.

Article 179 of Bolivia's Constitution preserves equal status among the jurisdictions comprising the Judicial Organ.[135] Article 3 of the *Ley de Deslinde* provides that Indigenous jurisdiction is of equal hierarchical status as ordinary jurisdiction.[136] Article 4 emphasizes that no one jurisdiction may interfere with the authority of another.[137] These provisions appear to establish robust parity between Indigenous and state justice systems. However, the law's substantive provisions contradict this formal equality. The exclusion of serious offenses from Indigenous jurisdiction relegates it to minor disputes, effectively characterizing Indigenous justice as a subordinate system for minor conflicts.[138] Review of Indigenous decisions by the plurinational Constitutional Court reinforces ordinary state courts as ultimate arbiters of Indigenous legal determinations.[139] While the Constitutional Court provides indigenous judges membership on its judiciary panel, it requires them to be qualified lawyers.[140]

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132. *See* Cooper, *supra* note 76, at 49–50.
133. Ley de Deslinde Jurisdiccional, Law No. 073, art. 11, Dec. 29, 2010 (Bol.).
134. Cooper, *supra* note 76, at 51 (noting that Bolivia has "the highest percentage of Indigenous peoples in Latin America (62% according to UNDP, 2006)").
135. Constitución Política del Estado art. 179(I) (Bol. 2009).
136. Ley de Deslinde Jurisdiccional, Law No. 073, art. 3, Dec. 29, 2010 (Bol.).
137. *Id.* art. 4.
138. Sieder, *supra* note 23, at 111.
139. *Id.*
140. *Id.*

Professor Guillermo Ciudad describes this as the paradox of plurinational constitutional projects: "Despite plurinationality implying a horizontal and equal relationship among justice systems, in reality, approaches stemming from the political project targeted for replacement end up being imposed, as evident through limitations on Indigenous justice concerning the right to life and the right to defense, formulated within a liberal framework linked to the Western concept of human rights."[141] The constitutional commitment to plurinationalism proves compatible with continued subordination through mechanisms other than formal hierarchy.

The Plurinational Constitutional Court has grappled with these tensions since its establishment. Court decisions must navigate between constitutional provisions advocating radical plurinationality and implementing legislation that poses significant obstacles to Indigenous jurisdiction.[142] The requirement that Indigenous magistrates on the Court possess formal legal qualifications illustrates the continuing dominance of liberal legal conceptions even within institutions designed to facilitate Indigenous perspectives.[143]

C. In Ecuador

Ecuador's 2008 Constitution represents one of the most ambitious attempts to recognize Indigenous jurisdiction within a plurinational framework. Article 171 establishes that " [t]he authorities of the indigenous communities, peoples, and nations shall perform jurisdictional duties, on the basis of their ancestral traditions and their own system of law, within their own territories."[144] The Constitution further subjects decisions to compliance with the rest of the constitution, and requires that public institutions respect Indigenous justice decisions.[145]

However, the constitutional text reveals an immediate structural limitation: the confinement of Indigenous jurisdiction to "their own territories."[146] This territorial construction ties jurisdictional authority to land rather than to Indigenous peoples themselves. The consequences prove particularly significant in Ecuador, where substantial Indigenous populations reside in urban centers rather than separate, reservation style territories.[147]

The application of this territorial limitation produces several practical consequences. First, Indigenous persons living in urban areas cannot access their traditional justice systems for disputes arising outside Indigenous

141. Ciudad, *supra* note 96, at 263 ("Despite plurinationality implying a horizontal and equal relationship among justice systems, in reality, approaches stemming from the political project targeted for replacement end up being imposed, as evident through limitations on Indigenous justice concerning the right to life and the right to defense, formulated within a liberal framework linked to the Western concept of human rights.").

142. *Id.* at 265, 266.

143. Ley No. 027 del Tribunal Constitucional Plurinacional, art. 13(2), art. 17(I)(8)–(9) (2010).

144. Constitución de la República del Ecuador art. 171 (2008).

145. *Id.*

146. *Id.*

147. U.N. General Assembly, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Addendum: Mission to Ecuador*, U.N. Doc. A/HRC/4/32/Add.2 (Dec. 28, 2006).

territories, leaving them without recourse outside of ordinary state courts even if disputes involve solely Indigenous parties and would traditionally have been resolved through community mechanisms.[148] Second, the framework creates incentives for forum shopping, with parties potentially able to characterize disputes as occurring inside or outside territorial boundaries to access preferred jurisdictional forums.[149] Third, the limitation fails to account for the reality that many Indigenous communities historically organized across non-contiguous territorial "islands," making a simple territorial jurisdiction a poor fit.[150]

Proposals for coordination legislation taking inspiration from that of Bolivia such as the Ley Orgánica de Coordinación y Cooperación entre la Justicia Indígena y la Jurisdicción Ordinaria have attempted to address these limitations.[151] Draft provisions proposed that Indigenous law could apply to both Indigenous and non-Indigenous people within Indigenous territories.[152] However, the legislation provoked substantial opposition from non-Indigenous political elites concerned about "the kinds of sanctions applied within communal Indigenous justice systems and how to guarantee constitutional and international human rights."[153]

The implementation of Ecuador's plurinational constitutional provisions has been significantly shaped by Constitutional Court interpretation. Despite constitutional language emphasizing equality between jurisdictional systems, the Court has adopted interpretations that subordinate Indigenous jurisdiction to ordinary state law in practice. The gap between constitutional aspiration and judicial interpretation demonstrates how plurinational projects can be constrained through interpretive mechanisms that reimpose hierarchical relationships nominally displaced by constitutional text.

This, like many of the issues identified above, could be remedied by more thorough coordination legislation and clearer procedural mechanisms for resolving jurisdictional conflicts. Article 171's requirement that Indigenous decisions "shall be subject to the control of constitutionality" creates a structural mechanism for this subordination, despite constitutional text that otherwise presents Indigenous justice systems as parallel and respected. Constitutional review necessarily involves evaluation of Indigenous decisions against norms developed within Western constitutional traditions, potentially displacing traditional standards with external criteria. The ICJ Principles recognize that "ordinary judicial authorities review decisions by Indigenous justice authorities" cannot "make fair and impartial decisions without an intercultural understanding of the particular context of Indigenous peoples and their

148. *See* Gonzalo Aguilar, et al., *South/North Exchange of 2009 – The Constitutional Recognition of Indigenous Peoples in Latin America*, Pace Int. L. R. Online. Comp. 2, 44-96 (2010).

149. *See* Oswaldo Ruiz-Chiriboga, *Choosing The Most Favorable Venue: Forum Shopping, Shopping Forums, and Legal Pluralism in Ecuador*, Mex. L. Rev. 12, 66-70 (2020).

150. *See* Doyle, *supra* note 130, at 175.

151. Sieder, *supra* note 23, at 111.

152. *Id.*

153. *Id.*

institutions and legal systems."[154] Whether Ecuador's Constitutional Court possesses such understanding, or whether its procedures facilitate acquiring it, remains contested.

Conclusion

Comparing the structures of Indigenous justice systems across the U.S., Bolivia, and Ecuador has revealed something unexpected. Despite being the result of different constitutional constructions and existing in different legal environments, Indigenous justice systems suffer from many of the same difficulties across all three jurisdictions. These core issues, limited jurisdiction, inherent subordination, and inconsistent institutional support could very well be symptoms of legal pluralism in the aggregate. Even if that is true, however, how significant would that be in a world where Indigenous justice is all but condemned to navigate the maze of legal pluralism forever?

While this may appear bleak, I challenge that characterization and offer that the fact that these legal systems suffer from many of the same issues, despite their differences, is exactly why looking to our neighbors in the international system is important. Achieving "true legal pluralism" is no small task; in today's legal-political climate, it would be akin to alchemy, and it is unlikely that any one state will figure it out alone. The international community can only solve this puzzle with listening, watching, and working together and, in doing so, lay the foundation for a new era of Indigenous justice.

The prescriptive implications are both modest and ambitious. The United States could legislatively override or narrow the implicit divestiture doctrine via constitutional reform, like Bolivia and Ecuador. Bolivia could amend the Ley de Deslinde to expand material jurisdiction and recalibrate how it is applied, like in Ecuador. Ecuador could finally enact comprehensive implementing legislation like Bolivia, rather than leaving Indigenous jurisdictional boundaries to case-by-case adjudication. None of these reforms would perfect any jurisdiction's Indigenous justice systems, but each would incrementally improve them, bringing their practices closer to the ideals articulated in UNDRIP. Achieving "true legal pluralism" will be a long and iterative process, yet if anything is clear from the endurance of Indigenous peoples and their cultures over hundreds, if not thousands, of years, it is their resilience. While they should not have to wait, one must believe that time is on their side.

154. Int'l Comm'n of Jurists, Principles on Indigenous and Other Customary or Traditional Justice Systems, Human Rights, and the Rule of Law 14 (2021).