

Remaking Tribal Constitutions: The Impact of Federal Indian Law on Native Nations

Presentation by

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American Federalism, Constitutional Authority, and Sovereignty

- **The roots of U.S. Constitutional Democracy**
- **The structure of the U.S. Constitution (State/Federal Powers)**

Horizontal Sovereignty: Separation of Powers

Vertical Sovereignty: Federalism

Tribal Governments and “Treaty Constitutionalism”

The “Marshall Trilogy”: Formative set of 19th Century Cases

Johnson v. McIntosh (1823): Aboriginal title as a “Right of Occupancy”

Cherokee Nation v. Georgia (1831): Indian Nations are not “foreign nations” within meaning of Constitution and cannot sue a state for violating treaty

Worcester v. Georgia (1832): Indian Nations are “domestic dependent nations” and U.S. government has sole and exclusive authority over all trade and relations with Indian Nations

The Enduring Principles of Federal Indian Law

These principles have been modified over time, but are still the cornerstone of Federal Indian law:

- 1. Tribal Sovereignty as “Retained Inherent Sovereignty”**
- 2. The Federal “Trust Relationship” with Indian tribes**
- 3. The Federal Government’s power to protect Indian tribes excludes states from exercising law on reservation**

The 19th Century Plenary Power Era

19th-century cases describe federal power over Indian affairs as “plenary,” leading to a notion that it is “unlimited” and not subject to judicial review

U.S. v. Kagama (1886) (Major Crimes Act is Constitutional)

Lonewolf v. Hitchcock (1903) (Federal power to abrogate Indian Treaty is a “political” question that the Supreme Court will not review)

U.S. v. Sandoval (1913) (Federal power to define “Indian tribe” and “Indian Country)

20th Century Construction of Tribal Sovereignty

Marshall-Cohen Model of Sovereignty:

- 1. As of the date of contact with Europeans, Tribal governments had all powers of sovereignty**
- 2. Tribes ceded some powers by treaty**
- 3. Congress has plenary authority to expressly limit tribal sovereignty by statute (e.g. Indian Civil Rights Act)**
- 4. Except as ceded by treaty or expressly limited by Congress, all powers of sovereignty are retained by the tribal government**

“Implicit Divestiture” of Tribal Sovereignty:

Starting in 1978, the Supreme Court generated the holding that Tribal governments have been “implicitly divested” of exercising sovereignty in cases where this power would be “inconsistent with their dependent status.”

Oliphant v. Suquamish Tribe (tribal governments implicitly divested of criminal jurisdiction over non-Indian defendants who commit crimes on the reservation)

Civil Jurisdiction over Non-Indians

The doctrine was expanded in a line of civil cases involving tribal regulatory or adjudicatory power over non-Indians on fee land, where the power was not supported by one of the relevant exceptions (“consensual relationship” with tribe or “direct effect” on tribe).

U.S. v. Montana (1981) (tribal government may not regulate hunting and fishing by non-members on fee lands within the reservation)

Strate v. A-1 Contractors (1997) (tribal court may not hear tort case filed by non-Indian plaintiff against non-Indian defendant when accident occurred on highway right of way running through the reservation)

Federal Indian Law and Tribal Constitutions

Policy Shifts Influence Federal-Tribal Relationship:

19th Century Policy:

Trade and Intercourse Acts (1790-present)

Removal Period (1830s-1860s)

Reservation Policy (1861-1887)

Dawes Allotment Act of 1887

CONSTITUTION OF THE INDIAN NATIONS

20th Century Policy Shifts

The Impact of the Indian Reorganization Act of 1934

IRA Tribal Governments: Structure and Powers

IRA Definitions of “Indian” include: (1) members of federally recognized tribes; (2) descendants of members residing on reservation as of 1934; (3) other persons of ½ degree of Indian blood or more

Compare Non-IRA Tribal Governments

Effect of Termination Policy (1940-1962)

Lessons Learned: IRA Era to Self-Determination Era (1970-present)

- **Need for alignment with Traditional Governance Norms**
- **Functions of Governance/Separation of Powers Issues**
- **Secretarial Approval Provisions**
- **Self-Determination and Self-Governance Authorities**

Human Rights Norms as the Framework for Self-Determination

U.N. Declaration on the Rights of Indigenous Peoples (adopted in 2007 by U.N. General Assembly) provides that:

- **Indigenous peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social, and cultural development (Art. 3)**
- **Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their “internal and local affairs” (Art. 4)**

Models of Indigenous Self-Determination

There are at least four different “models” for Indigenous self-determination, and all of these are presently operative, to some extent, within the United States and can inform interactions of tribal governments with the federal government, and with state and local governments

- **Sovereignty Model**
- **Self-Management Model**
- **Collaborative Management Model (MOU, MOA)**
- **Participatory Governance Model**

Human Rights Norms and Tribal Self-Determination

In the current era, the language used in human rights law can assist tribal governments as they revise tribal laws and/or Constitutional provisions.

Examples:

- Identity of an Indigenous “People”/Tribal identity
- Indigenous Territory/ Tribal reservation
- Free, Prior and Informed Consent/Tribal Consultation
- Intergenerational Rights and Duties (Art. 25)

Contemporary and Emerging Issues

- **Climate Change impacts on land, energy, and water**
- **Sacred sites**
- **Data Centers**
- **Data Sovereignty**
- **Artificial Intelligence**
- **Administrative agency restructuring**
- **Consultation Challenges**
- **Tribal voting rights**
- **Jurisdictional disputes**
- **The changing discourse of “equality”**

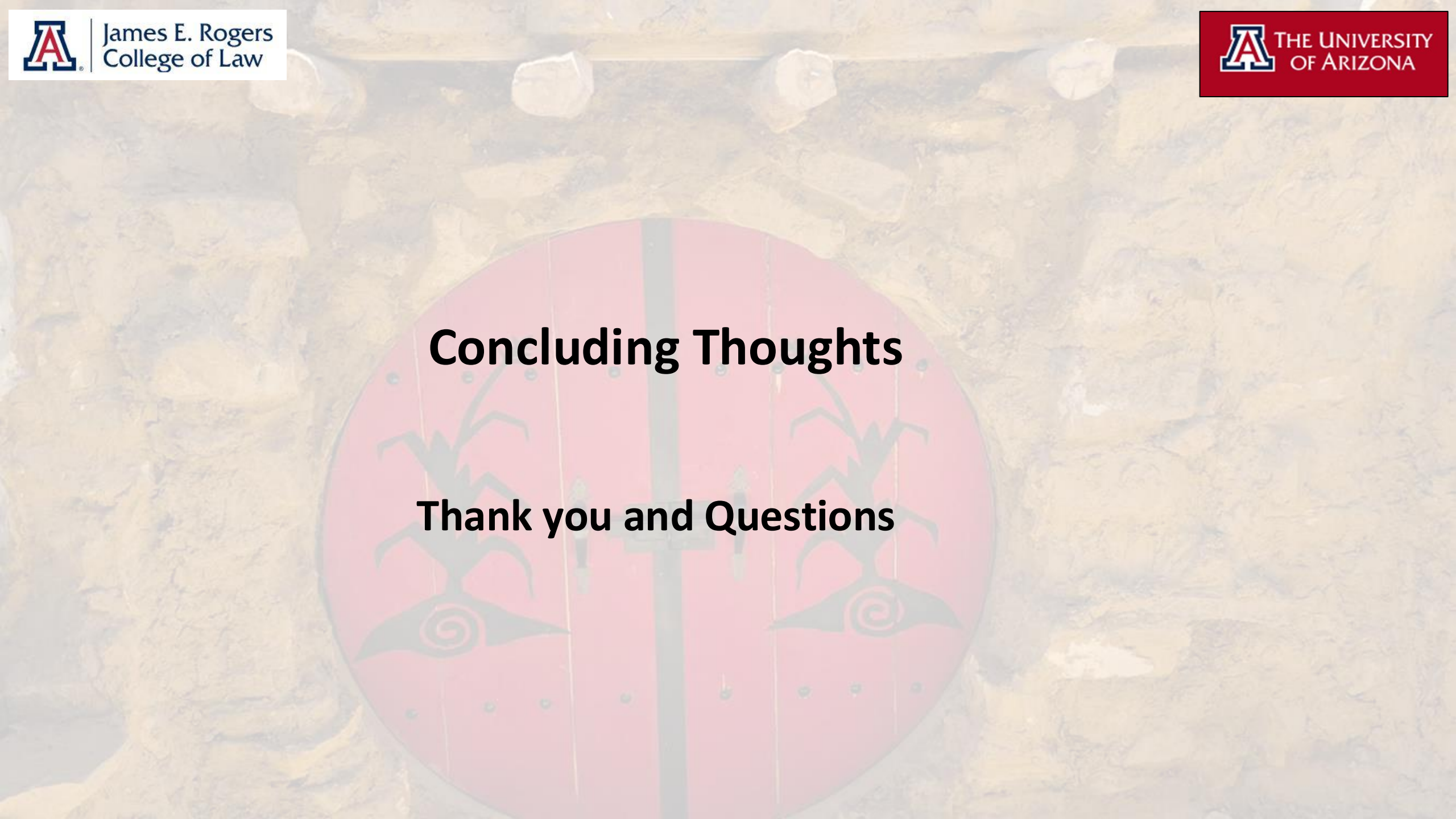
Indigenous Futures and the Importance of Cultural Sovereignty

Cultural Sovereignty is the effort of Native Nations and peoples to “exercise their own norms and values in structuring their collective futures.”

See Wallace Coffey and Rebecca Tsosie, Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations, 12(2) Stanford Law & Policy Review 191 (2001)

Institutional structures are important:

- Tribal court systems**
- Tribal educational systems**
- Tribal health systems**
- Tribal Museums and cultural centers**



Concluding Thoughts

Thank you and Questions