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The Extraterritorial Reach of Tribal Court Criminal Jurisdiction
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Conflicts over the jurisdiction between tribal, state, and federal courts arise regularly due to the nature of overlapping sovereignty. The Supreme Court accepts an average of almost three Indian law cases a year and has decided more than twenty Indian law cases with a jurisdictional focus since 1978. As tribes become wealthier, they are increasingly acquiring new lands outside of their existing reservations. This expansion of territory generates new border zones where state and tribal interests converge. The Sixth Circuit recently decided the first federal appellate case dealing with the inherent criminal powers of tribal court jurisdiction over the conduct of Indians on tribal land that is located outside of the tribe's reservation. The unanimous decision of the Sixth Circuit panel upheld the tribe's inherent right to extraterritorial criminal jurisdiction, but read into the opinion some limiting caveats that originate from civil, not criminal, jurisdictional principles. This paper reads the Sixth Circuit's decision in *Kelsey v. Pope* as the first in what is surely to be a myriad of conflicts over the extraterritorial jurisdiction of tribal courts. It suggests that while the Sixth Circuit's approach to tribal sovereignty is generally in keeping with Supreme Court precedent, the court erred by conflating criminal with civil authority and thus over-limited its discussion of the inherent powers of tribal courts. Instead the paper suggests that a more consistent reading of the inherent extraterritorial criminal powers of Indian tribes should support jurisdiction over both tribal members and tribal territory unless Congress has expressly circumscribed tribal authority. This broader understanding of extraterritorial jurisdiction is not only simpler to apply, but finds better support in Supreme Court precedent than the convoluted reasoning adopted by the Sixth Circuit.

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After three decades on the Supreme Court, Justice Anthony Kennedy enters retirement as, arguably, both its most widely maligned member and its most enigmatic. These distinctions are related, for commentators' inability to identify any coherent, law-like explanation for Kennedy's decisions, especially in constitutional disputes, significantly fuels the widespread judgment that no such explanation exists and that he was simply "making it up." We think the common wisdom largely mistaken. This Article argues that Kennedy's constitutional decision making reflects a genuine grasp (less than perfect, more than rudimentary) of a coherent and, we think, compelling theory of constitutional law—the account, more or less, that one of us has introduced in other work and dubs "principled positivism." We develop and defend this contrarian claim by attending to many of Kennedy's most notorious opinions, from Alden to Zivotofsky, across diverse domains of constitutional law. In so doing, we aim both to support Justice Kennedy against what we consider unduly harsh criticism, and to advance the case for principled positivism as a general theoretical account of the content of American constitutional law.

Filling the Gap in the Efficiency Gap: Measuring Partisan Gerrymandering on a Per-District Basis
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In *Gill v. Whitford,* the Supreme Court dismissed a challenge to Wisconsin's state legislative map based upon a lack of standing. While the plaintiffs alleged that the statewide map violated the Equal Protection Clause of the Constitution by being gerrymandered to asymmetrically advantage one political party over the other, the Court held that such allegations were insufficient to state a personal, individualized injury under Article III's Case or Controversy Clause. Since the plaintiffs had not alleged that their voting power in their particular legislative districts had been diluted, the Court found that the plaintiffs' complaint stated only a "generalized grievance" incapable of giving them standing under Article III. The Supreme Court was likely correct to find the plaintiff's proof was incomplete, but that is only because the principal metric employed in the case—the much-celebrated "efficiency gap"—is by definition capable of identifying partisan bias only in a

statewide map and not on a district-by-district basis. In this Article, we propose a methodology by which plaintiffs can plausibly demonstrate the impact of partisan bias on a district-by-district basis by calculating the district's "vote dilution index": the percentage of voters who could be drawn into competitive districts but who have instead been "cracked" or "packed" into a noncompetitive district by mapmakers. The application of that metric reveals not only that the prevalence of partisan gerrymandering is more significant and, in many districts, more extreme than previously known, but the precise degree to which each district has been skewed to promote the dominance of one of the major political parties at the expense of the power of individual voters. By permitting comparison of the degree of vote dilution between districts while simultaneously accounting for the limitations imposed by geographical clustering of voters, the "vote dilution index" opens the door to partisan gerrymandering claims that the Supreme Court left ajar in *Whitford.*

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Waiving Goodbye to First Amendment Protections: First Amendment Waiver by Contract
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The First Amendment is an embodiment of American freedom and therefore is often considered inviolable. This is a fallacy. First Amendment rights are not absolute and may be waived. The Supreme Court has declined to outline a rule for First Amendment waiver, but the Circuit Courts have filled this gap and adapted the waiver rules from criminal procedure to permit waiver of First Amendment rights by contract. In permitting waiver of First Amendment rights, the Courts give deference to contracts and strain the outer boundaries of First Amendment protections.

Ghosting in Tax Law: Sunset Provisions and Their Unfaithfulness
by Alli Sutherland 479

Tax is a subject that could easily put many to sleep. It is dense, convoluted, and intimidating. But it also touches practically every American. This note will discuss how the recent tax overhaul by the Trump Administration includes dangerous provisions, called sunset provisions. These sunset provisions, which get their name from how the law expire after a specified date, are dangerous because

they constitute a legislative runaround. Rarely, if ever, do these provisions actually expire. Rather, law makers are able to avoid procedural requirements by placing an end date on the law, but then extending the law's effective date. This amounts to a violation of taxpayers' procedural due process, a constitutional violation which can, and should, be challenged through the court system.

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