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***Oklahoma v. Castro-Huerta*, Jurisdictional Overlap, Competitive Sovereign Erosion, and the Fundamental Freedom of Sovereign Nations**

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OKLAHOMA V. CASTRO-HUERTA, JURISDICTIONAL OVERLAP, COMPETITIVE SOVEREIGN EROSION, AND THE FUNDAMENTAL FREEDOM OF NATIVE NATIONS

MICHAEL D.O. RUSCO*

Pay no attention to the man behind the curtain.
—**Wizard of Oz (Metro-Goldwyn-Mayer 1939)**

In addition to its stunning internal flaws, the United States Supreme Court’s opinion in Oklahoma v. Castro-Huerta exemplifies Indian law’s broader flaws as a jurisprudence. Castro-Huerta holds that states have concurrent criminal jurisdiction with federal and tribal governments over crimes by non-Indians against Indians on reservation lands. Justice Gorsuch deftly addresses many of the glaring internal flaws in Kavanaugh’s majority opinion, but not all. He does not dissect the hollow assertion that reservations are part of the surrounding state both geographically and politically. This cannot go unaddressed, particularly given its weak analysis, misguided use of precedent, and broader consequences.

Castro-Huerta’s holding affects the precise kind of “jurisdictional overlap” at the root of the slow erosion of tribal sovereignty over time, as first explained in a prior article. The Founders believed two governments generally cannot co-exist, i.e. overlap. They had a firm idea of what happens when jurisdictional overlap occurs: one government slowly subsumes the other over time until nothing meaningful is left, here labeled “competitive sovereign erosion.” The

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Founding Fathers believed this proposition so much and feared it so deeply that it played a central role in how the Constitution was written, specifically the categorical division of authority between the federal and state governments. Tribal sovereignty will continue to be vulnerable to competitive sovereign erosion until a solution is reached that results in either a respect for tribal borders, or a qualitative division of governmental authority between tribal governments, the federal government, and the states. Anything less will continue the long-term war of sovereign attrition historically experienced by tribes.

Analyzing Indian law as a competitive sovereign erosion problem of the sort contemplated by the Framers and discussing it in terms of United States federalism has additional jurisprudential and advocacy advantages. Doing so disconnects Indian law from the tortured logic exemplified by Castro used to reach anti-Indian results, and reconnects it to the intuitively fair, commonly accepted, and historically effective answers used when White cultures have had the same kinds of problems. From an advocacy perspective, competitive erosion adopts a conceptual framework and lexicon that resonates with conservatives commonly opposed to tribal sovereignty. Using competitive erosion can present tribal sovereignty in a way that persuadable conservatives can embrace.

Tribes wanting to maintain their separate existence need to overturn the assertion that reservations are part of the state, oppose practices that give the appearance of being part of state government, and push congress for legislation that will eliminate jurisdictional overlap between tribes, states, and the federal government.

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I. INTRODUCTION

The Founding Fathers believed two governments generally cannot co-exist and had specific ideas about what happens when they do: one government slowly subsumes the other over time until nothing meaningful is left.¹ The Founders referred to this process as *imperium in imperio* and feared it so much

1. Michael D. Oeser, *Tribal Citizen Participation in State and National Politics: Welcome Wagon or Trojan Horse?*, 36 WM. MITCHELL L. REV. 793, 799–801 (2010) (published under a prior name); BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 358 (1967) (“The key doctrine of federalism could survive criticism only to the extent that it could somehow be distinguished from the ancient belief that *imperium in imperio* was an illogical and unresolvable solecism. So [the federalists] reexamined that old formula, took it apart, and showed not its falsity, but its irrelevance in the American situation.”); Alison L. LaCroix, *The Authority for Federalism: Madison’s Negative and the Origins of Federal Ideology*, 28 L. & HIST. REV. 451, 504 (2010) (“The central constitutional question of the late eighteenth-century Anglo-American world was whether more than one source of governmental authority could legitimately exist within a single state—the *imperium in imperio* question.”); FORREST McDONALD, *STATES’ RIGHTS AND THE UNION: IMPERIUM IN IMPERIO 1776-1876*, at 1–5 (2000) (summarizing the prevailing understanding at the time of the American Revolution that sovereignty was indivisible, but that, “[a]s time passed, several leading patriots came to a way of thinking about sovereignty that would make it logically divisible. That way was both subtle and simple: governments at various levels had certain responsibilities, and inherent in those responsibilities was the power to carry them into execution,” thus creating an institution that allowed for “divided sovereignty”).

that it played a central role in how the Constitution was written,² specifically the topical division of power between the federal and state governments and the Tenth Amendment's reservation of rights to the states, "or the people."³ The Founders knew they needed to prevent the concentration of power in either the states or the federal government; either would threaten the thing they most wanted to protect—the freedom of the people.⁴

We call the topical division of power created by the founders "federalism." The main purpose of federalism is to prevent *imperium in imperio*.⁵ Federalism

2. Oeser, *supra* note 1, at 830–31; THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 244 (Ralph Ketcham ed. 2003) ("The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents . . . We apprehend that two coordinate sovereignties would be a solecism in politics. That therefore as there is no line of distinction drawn between the general, and state governments; as the sphere of their jurisdiction is undefined it would be contrary to the nature of things, that both should exist together, one or the other would necessarily triumph in the fullness of dominion."); THE FEDERALIST NO. 20 (James Madison & Alexander Hamilton); THE FEDERALIST NO. 15 (Alexander Hamilton); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("Federalism was our Nation's own Discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other."); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 643 n.26 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part); District of Columbia v. Heller, 554 U.S. 570, 652 & n.15 (2008) (Stevens, J., dissenting); Bush v. Gore, 531 U.S. 98, 142 (2000) (Ginsburg, J., dissenting); Alden v. Maine, 527 U.S. 706, 751 (1999); Saenz v. Roe, 526 U.S. 489, 504 n.17 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 150 (1996) (Souter, J., dissenting). According to Westlaw, Justice Kennedy's phrase has been cited by law review articles 235 times.

3. U.S. CONST. art. 1, §§ 8–10 (legislative powers); U.S. CONST. art. 2 (executive powers); U.S. CONST. art. 3 (judicial powers); U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

4. *Thornton*, 514 U.S. at 838 (Kennedy, J., concurring) ("Federalism was our Nation's own Discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other."); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) ("Perhaps the principal benefit of the federalist system is a check on abuses of government power."); see also Clarence Thomas, *Why Federalism Matters*, 48 DRAKE L. REV. 231, 236–38 (2000) (highlighting that the purpose of federalism is to protect individual rights).

5. Alison L. LaCroix, *Rhetoric and Reality in Early American Legal History: A Reply to Gordon Wood*, 78 U. CHI. L. REV. 733, 733, 757–58 (2011) ("[T]he federalism of the late eighteenth- and early nineteenth-century United States was specifically designed to avoid the ancient problem of *imperium in imperio*, or dominion within a dominion, that had so troubled the British Atlantic political world for decades. The significant innovation of the American federal idea was to authorize the division of sovereignty and to create viable legal categories that could contain multiple sources of governmental power within one overarching system. . . . Federalism was not just the result of Americans finally internalizing the fear of *imperium in imperio* and finding the language to describe their homegrown

is also the reason Americans still debate states' rights, the limits of the commerce clause, and unfunded mandates. Progressives and conservatives⁶ have clearly staked positions vis a vis all these issues, but they all agree that dividing power between the federal government and the states is a necessary feature of our government. Moreover, conservatives take the positions they do on issues of federalism based on closely held conservative principles: the reserved rights of states, the superiority of local government, and the supremacy of individual freedom and choice. These principles appear congruent with respect for tribal sovereignty, and yet conservatives are notorious opponents of tribal peoples. Some conservatives are likely motivated by racial bigotry, but Native Nations need ways to reach persuadable conservatives.

Building on prior work,⁷ this Article refers to *imperium in imperio* as “competitive sovereign erosion.”⁸ Further, this Article refers to the circumstance that results in competitive sovereign erosion—i.e., two governments asserting authority over the same people in the same place at the same time—as “jurisdictional overlap.” *Oklahoma v. Castro-Huerta*⁹ represents further proof that jurisdictional overlap and the competitive sovereign erosion that results are the root causes of the slow erosion of tribal¹⁰ sovereignty over time, as first explained in a prior article.¹¹ *Castro-Huerta* strongly suggests that tribal sovereignty will continue to be vulnerable until a solution is reached that results in either comprehensive sovereign separation as a result of respected tribal borders, or a selective division of authority between

remedy for it. Federalism was a rejection of that specter based on both their experience with local government and their theory that sovereignty could be divided along subject-matter lines, lines that would in turn be policed by an institution with a special mandate to monitor these boundaries.”)

6. This Article will adhere to the definition of and values related to conservatism from the Reagan-Bush era for purposes of simplicity.

7. Oeser, *supra* note 1, at 799–801, 826–33.

8. This Article will at times refer to this theory as “competitive erosion” and “sovereign erosion” depending on which term is more relevant to the context being discussed.

9. 142 S. Ct. 2486 (2022).

10. “A caveat about terminology is in order.” William J. Hapiuk, Jr., *Of Kitsch and Kachinas: A Critical Analysis of the Indian Arts and Crafts Act of 1990*, 53 STAN. L. REV. 1009, 1010 n.1 (2001). “It is well established that Indians prefer to be identified by a tribe that they are a member of first, followed by all other terms. Nevertheless, when discussing federal Indian law, the scope and applicability is often broad, making specification of a single tribe difficult. Therefore, general terms will be utilized here.” Calandra McCool, *Welcome to the Mvskoke Reservation: Murphy v. Royal, Criminal Jurisdiction, and Reservation Diminishment in Indian Country*, 42 AM. INDIAN L. REV. 355 n.2 (2018).

11. Oeser, *supra* note 1, at 833–42.

tribal, federal, and state government.¹² Anything less will continue the long-term war of sovereign attrition historically experienced by Native nations.¹³

Analyzing Indian law as a competitive erosion problem of the sort contemplated by the Framers and discussing it in terms of United States federalism has jurisprudential and advocacy advantages. From a jurisprudential perspective, doing so disconnects Indian law from the contrived, tortured logic exemplified by *Castro-Huerta*'s majority opinion and historically used to reach anti-tribal results. In the same stroke, competitive erosion theory reconnects Indian law to the intuitively fair, normative, and historically effective answers used when white cultures have had the same kinds of problems, i.e., a division of authority.

On a broader level, competitive sovereign erosion theory further reveals the textualism of today's Court as façade and misdirection that must be deconstructed. As *Castro-Huerta* makes clear, today's textualists simply ignore any text that does not support the conclusion they wish to reach, i.e., states are the dominant sovereign in our system of government.¹⁴ This leaves us arguing over which text is the "right" one, when the real problem is not textual at all. The real problem is a refusal to recognize that Native Nations and peoples are entitled to the same sovereign rights to individual and collective freedom and choice as non-native society, and that those rights slowly die as a result of jurisdictional overlap and competitive sovereign erosion. Those fundamentals are conceptual, not textual, and must be the starting place for any understanding of Indian law.

From an advocacy perspective, competitive erosion starts from conceptual bases that persuadable conservative jurists can embrace: opposition to government oppression, libertarian concepts of freewill/choice, the root of all government power is the people, and a strong belief in local government and reserved rights.¹⁵ Competitive erosion theory also harnesses the persuasive power of reframing Indian law in terms of freedom, the same fundamental freedom The Founders conceived as belonging to all people.

Castro-Huerta holds that states have concurrent criminal jurisdiction with federal and tribal governments over crimes by non-Indians against Indians on

12. *Id.* at 842–55.

13. *Id.*

14. *Castro-Huerta*, 142 S. Ct. at 2510 (Gorsuch, J., dissenting) (stating that the majority disavows "adverse rulings from [Oklahoma] courts; disregard[s] [a] 1991 recognition that it lacks legal authority to try cases of this sort; and ignore[s] fundamental principles of tribal sovereignty, a treaty, the Oklahoma Enabling Act, [the Oklahoma] constitution, and Public Law 280")

15. *See infra* note 67.

reservation lands.¹⁶ The holding affects the precise kind of incremental sovereign loss predicted by competitive erosion, and historically experienced by tribal nations. At the same time, *Castro-Huerta* sets the stage for future sovereign conflicts (and likely tribal losses) by further overlapping state and tribal jurisdiction thanks to its broad assertion that reservations are geographically and politically part of the surrounding state.¹⁷ Tribal governments and citizens fan the flames of this dynamic when they do things that make tribal territory and reservation citizens appear to be part of state government and territory, i.e., voting in state elections and organizing reservation territory as a part of the state legislature.¹⁸ These acts are tantamount to consent to be governed by the products of state political processes and consent to territorial incorporation into state government.¹⁹

It would be foolish not to recognize the benefits Native Nations and peoples have received as a result of participation in state political processes. These benefits might outweigh the long-term implications of competitive erosion for some Nations. The co-existence of competitive sovereign erosion and the benefits gained from state political participation thus calls for a risk-benefit analysis. Each Native Nation has a right to make this decision for itself.²⁰ The consequences of competitive erosion should be part of the decision-making process, as should whether the same success can be achieved through lobbying and negotiation. If the same advantages can be achieved in ways that avoid the possibility of consent to state authority, the risk averse choice is to end direct participation in state elections and government.

This Article first summarizes *Castro-Huerta*'s majority opinion, and makes several observations unaddressed by the dissent, including how Justice Kavanaugh's assertion that reservations are geographically and politically part of the surrounding state is fundamentally flawed. Next, this Article explains competitive sovereign erosion, i.e., why two governments generally cannot co-exist, as the Founding Fathers understood the concept, and specifics on how it occurs. Third, this Article shows how Native nations' incremental sovereign losses closely follow the pattern predicted by competitive erosion theory and how *Castro-Huerta* represents a step in that progression by increasing jurisdictional overlap between Native nations and states. This section also points out that reservation-resident tribal citizens and governments likely

16. *Castro-Heurta*, 142 S. Ct. at 2504.

17. *Id.*

18. Oeser, *supra* note 1, at 833–42.

19. *Id.*

20. *Id.* at 842–55.

accelerate competitive sovereign erosion when they participate in state political processes by increasing jurisdictional overlap. Fourth, this Article outlines the choices tribal governments have in avoiding competitive erosion to facilitate a cost-benefit analysis: comprehensive tribal-state separation through mutually respected borders, topical division of authority within a reserved rights framework, or incorporation into state government. Last, the Article also asserts that tribal governments likely can achieve the same political results through lobbying and diplomacy without the risks associated with direct participation.²¹

II. *OKLAHOMA V. CASTRO-HUERTA* DISSECTED

I consider civil liberty, in a genuine, unadulterated sense, as the greatest of terrestrial blessings. I am convinced that the whole human race is entitled to it. And, that it can be wrested from no part of them, without the blackest and most aggravated guilt.

—Alexander Hamilton²²

A. *A Simple Jurisdictional Story Made Complex and Shocking.*

The procedural and jurisdictional facts of *Castro-Huerta* are short and fairly dull when limited to only those that are relevant.²³ Victor Manuel Castro-Huerta was convicted of a felony in October 2017.²⁴ The crime occurred in Tulsa, Oklahoma and was tried in an Oklahoma court.²⁵ Castro-Huerta appealed.²⁶

21. A previous article considered competition between federal, state, and tribal governments. Oeser, *supra* note 1. This Article will focus on the tribal-state relationship for simplicity's sake and in light of the fact that *Castro-Huerta* focused on state jurisdiction inside reservation borders.

22. Letter from Alexander Hamilton to Samuel Seabury (Feb. 23, 1775) (located in 1 THE PAPERS OF ALEXANDER HAMILTON 165 (Harold C. Syrett, ed., 1961)).

23. The facts of the case are palpably shocking. *Castro-Huerta*, 142 S. Ct. at 2491. No one with a conscience can read how this child was treated and not be sickened. That said, questions of sovereignty are not about what happens in a particular case. It's about who has authority. The question was never about whether Castro-Huerta should be punished or that he should be punished severely. The question was who should decide guilt and punishment. Including these facts is an appeal to emotion, and their inclusion shows the court's bias. Moreover, there is a distasteful subtext to their inclusion, and indeed the whole appeal, that Indians are not capable of enforcing the law because they are Indians.

24. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2491 (2022); Petition for Writ of Certiorari at 4, *Castro-Huerta*, 142 S. Ct. 2486 (No. 21-429).

25. *Castro-Huerta*, 142 S. Ct. at 2491.

26. *Id.*

While on appeal, the United States Supreme Court decided *McGirt v. Oklahoma*.²⁷ *McGirt* held that the Muscogee-Creek Reservation had never been disestablished because Congress had never clearly expressed an intent to do so.²⁸ *McGirt* also held that Congressional silence on the matter did not amount to a clear expression, or even ambiguity, as a matter of law.²⁹ In fact, quite the opposite. Congressional silence meant Congress had never expressed any intent, clear, express, or otherwise, *as a matter of law*.³⁰ The Court wrote:

Oklahoma does not point to any ambiguous language in any of the relevant statutes that could plausibly be read as an Act of disestablishment. Nor may a court favor contemporaneous or later practices instead of the laws Congress passed. . . . To avoid further confusion, we restate the point. There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help "clear up . . . not create" ambiguity about a statute's original meaning.³¹

The Oklahoma Court of Criminal Appeals applied the same reasoning and held that the original boundaries of the Cherokee, Choctaw, Chickasaw, and Seminole Reservations also still existed.³²

The Oklahoma Court of Criminal Appeals subsequently vacated Castro-Huerta's conviction in light of *McGirt* and an earlier Oklahoma decision.³³ The earlier holding stated that the federal General Crimes Act grants the federal government exclusive jurisdiction over crimes committed by non-Indians against Indians in "Indian Country."³⁴ Castro-Huerta was subsequently indicted in federal court for the same crime and plead guilty.³⁵ The State of Oklahoma

27. *Id.*

28. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2468 (2020).

29. *Id.* at 2468–69.

30. *Id.*

31. *Id.* (emphasis added).

32. Petition for Writ of Certiorari, *supra* note 24, at 22 (citing *State ex rel. Matloff v. Wallace*, 2021 OKCR 21, ¶15, 497 P.3d 686, 689 (reaffirming recognition of the Cherokee, Choctaw, and Chickasaw Reservations)); *Grayson v. State*, 2021 OKCR 8, ¶10, 485 P.3d 250, 254 (Seminole Reservation).

33. *Castro-Huerta*, 142 S. Ct. at 2491–92.

34. Petition for Writ of Certiorari, *supra* note 24, at 4–5 (citing *Bosse v. State*, 2021 OK CR 3, ¶¶ 23–28, 484 P.3d 286, 294–95).

35. Again, the nature of his sentence is not relevant to the presence or absence of jurisdiction, nor should the outcome of one case be the basis for making huge changes to jurisdiction. *Supra* note 23. That said, in the end, Castro-Huerta was sentenced to seven years imprisonment followed by deportation.

appealed the state court's vacation of Castro-Huerta's state conviction to the United States Supreme Court.³⁶ The Court granted certiorari.³⁷ It is worth noting that while Oklahoma's appeal was pending, the United States charged and convicted Castro-Huerta, sentencing him to prison followed by deportation.³⁸

B. Castro-Huerta's Majority Opinion and Its Unaddressed Additional Flaws.

Justice Gorsuch deftly rebuts the majority opinion in his well-written and sourced dissent.³⁹ The points made there need not be revisited, but important additional counter arguments need to be made. For instance, Justice Kavanaugh's assertion that reservations are geographically and politically part of the surrounding state.⁴⁰ This idea has played a supporting role in previous decisions,⁴¹ but roars to the front in *Castro-Huerta*. The idea also breaks with a long line of prior precedent that states have no jurisdiction over crimes against Indians inside reservation territory.⁴² This makes a detailed review of Kavanaugh's reasoning and supporting precedent apropos, if not imperative.

Justice Kavanaugh begins his statement of the law with the surprising and utterly novel assertion that the "Constitution allows a State to exercise jurisdiction in Indian Country" and that "Indian country is part of the State, not separate from the State."⁴³ While these sentences have no supporting citations, he references the Tenth Amendment two sentences later.⁴⁴ Kavanaugh's use of the Tenth Amendment to assert that reservations are part of the surrounding state defies reason, particularly from a "textualist." It is hard to understand how Kavanaugh missed the fact that the Tenth Amendment never mentions "Indians" or "tribes," much less whether power over Indians resides with the state or federal government; it focuses exclusively on the categorical division of authority between the federal and state governments, and "the people," leaving to the states only powers not expressly granted to the federal

36. *Castro-Huerta*, 142 S. Ct. at 2492.

37. *Id.* at 2492–93.

38. *Id.* at 2492.

39. *Id.* at 2505–27 (Gorsuch, J., dissenting). Other scholars have lauded Justice Gorsuch's opinions on Indian law. Matthew L.M. Fletcher, *Muskrat Textualism*, 116 N.W. U. L. REV. 963, 970–71, 1000–03 (2022).

40. *Castro-Huerta*, 142 S. Ct. at 2493–94, 2502–04.

41. *Utah & N. Ry. Co. v. Fisher*, 116 U.S. 28, 31 (1885); *U.S. DEP'T INTERIOR, FEDERAL INDIAN LAW* 510, 501 n.1 (1958); *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 72, (1962); *Nevada v. Hicks*, 533 U.S. 353, 361–63 (2001).

42. *Castro-Huerta*, 142 S. Ct. at 2505–27 (Gorsuch, J., dissenting).

43. *Id.*

44. *Id.* at 2493.

government, or reserved to “the people.”⁴⁵ In so much as the Tenth Amendment controls what happens to powers addressed elsewhere in the Constitution, the Court,⁴⁶ Congress,⁴⁷ practitioners,⁴⁸ and scholars⁴⁹ have consistently interpreted the reference to “Indian Tribes” in the Commerce Clause, alongside the Treaty Power and War Power, as granting authority to govern relations with Native nations exclusively to the federal government and denying it to the states.

Another Constitutional point not made in Justice Gorsuch’s dissent concerns how the Fourteenth Amendment Apportionment Clause shows that Indians were not citizens of state governments, and therefore not subject to state jurisdiction.⁵⁰ The Fourteenth Amendment’s Apportionment Clause established

45. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

46. *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 205 n.2 (2005); *United States v. Lara*, 541 U.S. 193, 200 (2004); *Negonsott v. Samuels*, 507 U.S. 99, 103 (1993); *Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 523 n.10 (1986) (citing *Oneida Cnty. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 234 (1985)); *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832, 837 (1982); *Washington v. Confed. Tribes of the Colville Indian Rsrv.*, 447 U.S. 134, 136 (1980); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980); *Morton v. Mancari*, 417 U.S. 535, 552 (1974); *McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 164, 172 n.7 (1973); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

47. Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 140–51 (2006).

48. Jessica Intermill, *Competing Sovereigns: Circuit Courts’ Varied Approaches to Federal Statutes in Indian Country*, FED. LAW., Sept. 2015, at 65; Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1058–60 (1995); COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 5.02[2] (Nell Jessup Newton ed., 2012); CONF. OF WESTERN ATT’YS GEN., AMERICAN INDIAN LAW DESKBOOK 1 (Julie Wrend & Clay Smith eds., 1993). See generally Reid Peyton Chambers, *Compatibility Of The Federal Trust Responsibility With Self-Determination Of Indian Tribes: Reflections On Development Of The Federal Trust Responsibility In The Twenty-First Century*, NAT. RESC. DEV. INDIAN COUNTRY, Nov. 10, 2005, at 13A.

49. Fletcher, *supra* note 47, at 165 (“It is now clear that many statutes contained in Title 25 rest on the plenary and exclusive authority of Congress to legislate in this area that the Court has always recognized.”); Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1058 (1994) (arguing for federal supremacy over Indian affairs based on constitutional history). Prof. Gregory Ablavsky agrees with the exclusive and plenary nature of federal authority over Indian affairs, but disagrees that the basis for that authority comes from the Indian Commerce clause. Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1023–32, 1043–44 (2015). Instead, federal authority came from an “interrelated, coherent bundle of powers,” mainly the treaty power, war power, and foreign affairs power. *Id.* at 1040 (citing 33 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 458 (Roscoe R. Hill ed., 1936)).

50. *Elk v. Wilkins*, 112 U.S. 94, 99 (1884) (“The members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States.”); *United States*

the formula for determining how many *citizens* each state had, and consequently, how many representatives each state could send to the House of Representatives.⁵¹ The responsibility to pay taxes was the touchstone for both federal and state citizenship.⁵² The clause explicitly excludes “Indians not taxed.” The necessary implication is that “Indians” were not state citizens. Consequently, they were not subject to state law inside their territory.⁵³

The necessity of the conclusion drawn from the Apportionment Clause becomes clear when considered in conjunction with the closed-circuit nature of American democracy.⁵⁴ Democratic theory assumes that all people governed by a particular government have the right to participate in that government.⁵⁵ Conversely, all those who participate in a government are subject to the products of that participation, i.e., the resulting laws.⁵⁶ Any other construction results in flaws in authority that the Founders specifically rejected.

Consider a person bound by laws they have no say in making. Such a person is not free, but a subject in the feudal sense of the authority making the laws. This is precisely what the American Colonies rebelled against: British

v. Wong Kim Ark, 169 U.S. 649, 680–82 (1898); Tuaua v. United States, 788 F.3d 300, 305–06 (D.C. Cir. 2015); Matter of Cantu, 17 I. & N. Dec. 190, 195 (BIA 1978).

51. U.S. CONST. amend. XIV, § 2 (“Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”). The purpose of this formula to exclude non-citizens is also reflected in the discretion it gives states to exclude people who participate in rebellion. *Id.*

52. Along with the Fifteenth Amendment, it played a central role in Reconstruction by helping protect the right of former slaves to vote by eliminating the “3/5ths Compromise” contained in the original Apportionment Clause in Article I. Michael Kent Curtis, *The Klan, the Congress, and the Court: Congressional Enforcement of the Fourteenth and Fifteenth Amendments & the State Action Syllogism, A Brief Historical Overview*, 11 U. PA. J. CONST. L. 1381, 1397–98 (2009); Donald P. Judges, *Bayonets for the Wounded: Constitutional Paradigms and Disadvantaged Neighborhoods*, 19 HASTINGS CONST. L.Q. 599, 670 (1992) (“Abolition of slavery; vesting of citizenship; guarantees of due process, privileges or immunities, and equal protection; and extension of the franchise all were necessary to bring former slaves out of their caste status and into the remainder of American society.”).

53. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014) (citing United States v. Wheeler, 435 U.S. 313, 323 (1978)).

54. Oeser, *supra* note 1, at 823–24; Porter v. Hall, 271 P. 411, 416 (Ariz. 1928), *overruled by* Harrison v. Laveen, 196 P.2d 456 (Ariz. 1948); *see also In re Liquor Election in Beltrami Cnty.*, 163 N.W. 988, 990 (Minn. 1917).

55. In *Porter v. Hall*, the Arizona Supreme Court wrote:

The theory on which democracy is founded is that every person who is bound to obey the laws should participate in making them, and, conversely, that everyone who participates in making the laws should be subject to their jurisdiction. . . . It is almost unhear[d] of in a democracy that those who make the laws need not obey them.

Porter, 271 P. at 416; *see also In re Liquor Election*, 163 N.W. at 990.

56. *Porter*, 271 P. at 416.

Parliament imposing laws requiring colonists to pay taxes to which Parliament was not bound. Parliament had no reason to stop establishing new taxes because neither its members nor the British subjects they represented were required to pay the taxes imposed on the American colonists.

Consider the inverse, a person who votes in an election that produces laws that the voter is not bound by. This is essentially the same position British Parliament had *vis-a-vis* the colonies. Individually, such a voter imposes their will on other voters to the extent of the non-bound voter's vote. A small number of non-bound voters likely goes unnoticed, but larger numbers of non-bound voters begin to have an impact at some point, more so where margins of victory are slim.

The Fourteenth Amendment makes clear that Indians were not state citizens.⁵⁷ Because Indians were not state citizens, they could not vote in state elections. Because they could not vote in state elections, they were not bound by the products of state political processes. Consequently, Justice Kavanaugh's assertion that the Constitution supports reservations being part of the surrounding state appears wholly without support.

It is fair to say that the clarity about tribal jurisdictional and territorial autonomy prevalent in the early Republic no longer exists. The courts have read-in exceptions, particularly in the areas of criminal law,⁵⁸ taxation,⁵⁹ federal

57. *Elk v. Wilkins*, 112 U.S. 94, 99 (1884); *United States v. Wong Kim Ark*, 169 U.S. 649, 680–82 (1898); *Tuaua v. United States*, 788 F.3d 300, 305–06 (D.C. Cir. 2015).

58. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022); *Nevada v. Hicks*, 533 U.S. 353, 364 (2001); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (finding tribes lack inherent criminal jurisdiction over non-Indians).

59. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 116 (2005) (Ginsburg, J., dissenting) (permitting state tax on off-reservation receipt of motor fuel by non-Indian fuel distributors who delivered to station owned by Indians on Indian land). Both the Nation and the State have authority to tax fuel sales at the [tribe-owned gas station].

As a practical matter, however, the two tolls cannot coexist. If the Nation imposes its tax on top of Kansas' tax, then unless the Nation operates [its gas station] at a substantial loss, scarcely anyone will fill up at its pumps. Effectively double-taxed, the [gas station] must operate as an unprofitable venture, or not at all.

Id. (citations omitted); *see also* *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653–59 (2001) (finding tribe lacked authority to impose hotel taxes on non-Indian guests at hotel located on non-Indian fee land within the reservation); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 171–72 (1989) (finding concurrent state and tribal jurisdiction with regard to the imposition of severance taxes on oil and gas production by non-members); *Washington v. Confederated Tribes of the Colville Rsrv.*, 447 U.S. 134, 164 (1980) (finding concurrent jurisdiction of state and tribal governments to tax cigarette purchases by non-members).

regulations,⁶⁰ and zoning laws.⁶¹ But those inconsistencies are better understood as the progression of a flawed jurisprudence sometimes combined with a hostile Court enabling hostile federal policy, as explained *infra*. Those decisions are not the products of fair jurists interpreting normative understandings of sovereignty and fundamental concepts underlying American freedom and democracy. Moreover, flawed judgments that produce inappropriate, inconsistent results should not be used as a justification for additional flawed inconsistent results.

Next, Justice Kavanaugh quotes from *Lessee of Pollard v. Hagan*,⁶² for the proposition that, “a State is generally ‘entitled to the sovereignty and jurisdiction over all the territory within her limits.’”⁶³ *Pollard* is about the Equal Footing Doctrine and whether Alabama or the federal government owned a parcel of land on the shores of a navigable river; no Native nation or reservation land was involved. More importantly, Kavanaugh cuts off a modifying phrase that adds an exception to the otherwise absolute character suggested by Kavanaugh’s misleading snippet—“*subject to the common law*, to the same extent that Georgia possessed it before she ceded it to the United States. . . . Then to Alabama belong the navigable waters, and soils under them, in controversy in this case, *subject to the rights surrendered by the Constitution to the United States . . .*”⁶⁴ When read in context, the exception would appear intuitively to apply to lands set aside for tribes by treaty and reserved in a state’s enabling act. The area at issue in *Castro-Huerta* had been set aside by treaty and in the Oklahoma Enabling Act,⁶⁵ plainly making *Pollard* inapplicable.

Imagining his first assertion to be well-founded, Justice Kavanaugh next blithely dismisses the long-acknowledged legal foundations of tribal

60. *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 178–79 (2d Cir. 1996). It is worth noting that this area of law is substantially fractured, with everything from opposing approaches to nuances between circuits that reach similar results. *Scalia v. Red Lake Nation Fisheries, Inc.*, 982 F.3d 533, 535 (8th Cir. 2020) (“For a statute of general applicability to apply to Indian self-government, this court looks for either an ‘explicit statement of Congress’ or ‘evidence of congressional intent to abrogate . . . in the legislative history of a statute.’”) (quoting *United States v. Dion*, 476 U.S. 734, 739–40, (1986)); *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1198–99 (10th Cir. 2002) (distinguishing between when a tribe is acting as a property owner and when a tribe is exercising sovereignty).

61. *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 410 (1989) (limiting tribal authority to zone fee land located within reservation but owned by non-Indians).

62. 44 U.S. 212, 228 (1845).

63. *Castro-Huerta*, 142 S. Ct. at 2493.

64. *Pollard*, 44 U.S. at 228–29 (emphasis added).

65. *Castro-Huerta*, 142 S. Ct. at 2507–09 (Gorsuch, J., dissenting).

sovereignty.⁶⁶ Kavanaugh recognizes he must disconnect the idea of tribal authority from the well-reasoned, well-supported, and more ethically consonant reasoning exemplified by the dissent if he is to reach his desired result. Oddly, Kavanaugh's intellectual crusade against the freedom of Indian peoples to choose their own government flies in the face of what are ostensibly bedrock conservative beliefs: individual freedom, opposition to government oppression, opposition to government disconnected from the communities governed, the root source of all government power is the individual, the only legitimate source of government authority is consent of the governed, local governments with reserved rights are best, and last but not least, individual choice.⁶⁷ None of these mean anything if they do not apply, as the Declaration said, to all people. Consent means nothing without the unfettered discretion to withhold it and to control which government to grant it to.

Justice Kavanaugh writes that the "notion[s]" of tribal sovereignty found in Chief Justice Marshall's opinion in *Worcester v. Georgia*, and its progeny, have "yielded to closer analysis."⁶⁸ He relies on *Organized Village of Kake v. Egan*, one case in a co-existing parallel line that sees tribal sovereignty as broadly subservient to state sovereignty.⁶⁹ This subservience includes both civil and criminal jurisdiction in Kavanaugh's mind, and almost certainly legislative. Unfortunately for Kavanaugh, *Kake* is a bad rock on which to build his view of tribal sovereignty, another point that did not appear in the dissent.

66. *Id.* at 2493.

67. Republican Nat'l Comm., REPUBLICAN PLATFORM 2016 i–ii; *Republicanism*, STANFORD ENCYC. PHIL., (June 29, 2022), <https://plato.stanford.edu/entries/republicanism/> [<https://perma.cc/5CV5-XKD6>]; Brad Cook, *Traditional Republican Values*, NH BUS. REV. (June 21, 2019), <https://www.nhbr.com/traditional-republican-values/> [<https://perma.cc/2KA2-3JGP>]; Alfred S. Regnery, *The Pillars Of Modern American Conservatism*, INTERCOLLEGIATE STUD. INST. (Apr. 3, 2018), <https://isi.org/intercollegiate-review/the-pillars-of-modern-american-conservatism/> [<https://perma.cc/L2RC-57S7>].

68. *Castro-Huerta*, 142 S. Ct. at 2493.

69. *United States v. McBratney*, 104 U.S. 621, 623–24 (1882); *Draper v. United States*, 164 U.S. 240, 244–47 (1896); *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 72 (1962); *Cnty. of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 257–58 (1992); *Nevada v. Hicks*, 533 U.S. 353, 361 (2001). Professor Matthew Fletcher characterizes this line of jurisprudence as "Canary Textualism." Fletcher, *supra* note 39, at 974–77. "Canary Textualism's pursuit of judicial policy preferences stands in stark opposition to the stated default interpretive rules that had governed federal Indian law since the early nineteenth century." *Id.* at 977.

Kake relies on *Utah & Northern Railway. Co. v. Fisher*,⁷⁰ a case often cited for the broad assertion that reservations are part of the surrounding state.⁷¹ The case uses those words but ignores the reality that its facts cannot be interpreted as such.⁷² Subsequent jurists hostile to tribal sovereignty, like Kavanaugh, are happy to take advantage of *Utah & Northern*'s overstatement, cheerfully ignoring its inherently flawed nature.

Utah & Northern involved state taxation of a railroad line situated on a tract of land through an Idaho reservation.⁷³ The opinion seems to weave between three alternative arguments to find a way to validate the tax.⁷⁴ First, the Court *Utah & Northern* ignores treaty language setting aside the reservation for the tribe's "absolute and undisturbed use," excluding all but "authorized" government agents, and requiring the consent of a majority of the adult males to cede further lands.⁷⁵ The Court brushes the treaty aside because prohibiting the tax was not "necessary" for the tribe to "enjoy the full benefit of the stipulations for their protection."⁷⁶ This reasoning is facially inconsistent with "absolute and undisturbed use" and seems to condescendingly say the tribe will just not know the difference. Next, the Court argues that the tribe ceded the tract where the rail line sat, thus subjecting it to state jurisdiction.⁷⁷ Assuming the tribe ceded the land, the case ceases to stand for a reservation being part of the state. Last, the Court asserts that the building of the rail line inside the reservation alone somehow gave the state the right to tax it,⁷⁸ which again conflicts with the treaty language, and with common understandings of territorial jurisdiction. No one thinks Nebraska gets to tax land in Wyoming because a Nebraska-based railroad runs its tracks through Wyoming; only Wyoming can tax land inside its borders.

Justice Kavanaugh's last effort to find mooring is a series of cases that include statements made in passing that support this belief. These cases all suffer from similar flaws, either unsupported assertion, casual dicta, or faulty

70. 116 U.S. 28, 31 (1885).

71. *Hicks*, 533 U.S. at 361–63; *Thomas v. Gay*, 169 U.S. 264, 273, 275, 277 (1898); *Evans v. Shoshone-Bannock Land Use Policy Commn.*, 736 F.3d 1298, 1307 (9th Cir. 2013); *Colliflower v. Garland*, 342 F.2d 369, 376 (9th Cir. 1965); *Warren Trading Post Co. v. Ariz. State Tax Commn.*, 380 U.S. 685, 688 (1965).

72. Oeser, *supra* note 1, at 805 n.50.

73. *Utah & N. Ry. Co.*, 116 U.S. at 28–29.

74. *Id.* at 31–33.

75. *Id.* at 30–31.

76. *Id.* at 31–32.

77. *Id.* at 31–33.

78. *Id.* at 32.

reasoning. The first is *New York ex rel. Cutler v. Dibble*.⁷⁹ *Cutler* involved the sale of a large tract of the Seneca Reservation in New York. The land was conveyed to the buyers by treaty to which the United States was a party. New York had a statute that made it

unlawful for any persons other than Indians to settle and reside upon lands belonging to or occupied by any tribe of Indians, and declared void all contracts made by any Indians, whereby any other than Indians should be permitted to reside on such lands; and if any persons should settle or reside on any such lands contrary to the act, it was made the duty of any judge of any county court where such lands were situated, on complaint made to him, and due proof of such residence or settlement, to issue his warrant, directed to the sheriff, commanding him to remove such persons.⁸⁰

The local district attorney sued the buyers under the New York non-intercourse statute to void the sale and remove the buyers from possession.⁸¹ The buyers argued that Congress had exclusive authority to regulate inside tribal territory, and that the state statute was void.⁸² The Court held that the New York statute was valid because it did not “conflict” with federal law.⁸³

Kavanaugh pulls the following quote from the case: “States retain ‘the power of a sovereign over their persons and property, so far as . . . necessary to preserve the peace of the Commonwealth.’ ”⁸⁴ The problem is that the case is odd for several reasons, and therefore is a bad foundation to make sweeping jurisdictional and jurisprudential changes. First, the *Cutler* Court postured the legal issue oddly. It never analyzed whether federal jurisdiction was exclusive, even though the argument was made.⁸⁵ Instead, the Court reframed the question to consider the existence of a conflict between federal law and the New York statute.⁸⁶ Limiting the analysis to deciding whether a conflict existed made the case much easier given that the federal and state laws were largely congruent. The exclusivity of federal was never decided, making Kavanaugh’s use of *Cutler* off point. A more precise interpretation would be that state law that

79. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2493 (2022) (citing *New York ex rel. Cutler v. Dibble*, 62 U.S. 366 (1858)).

80. *New York ex rel. Cutler v. Dibble*, 62 U.S. 366, 368 (1858).

81. *Id.*

82. *Id.* at 369.

83. *Id.* at 371.

84. *Castro-Huerta*, 142 S. Ct. at 2493.

85. *Dibble*, 62 U.S. at 368.

86. *Id.* at 367–68, 370–71.

doesn't conflict with federal law can be enforced inside reservation territory if its purpose is to support territorial integrity.

Second, *Cutler's* reasoning is fundamentally flawed. The *Cutler* majority ignored the proper analysis at the time. In fact, *Cutler* "ignored every fundamental principle of . . . Indian . . . Law dealing with the federal-tribal-state relationship existing then."⁸⁷ "Moreover, subsequent treatment of this issue by the Supreme Court strongly suggests that [*Cutler*] has been effectively overruled or, at the very least, limited to its holding."⁸⁸

Last, *Cutler's* outcome also feels more like the result of basic personal jurisdiction principles than Indian law. The defendants were citizens of New York. States have jurisdiction over their citizens regardless of where they are present.⁸⁹ For instance, personal service of process is valid on a state citizen even when located in another state,⁹⁰ or even another country.⁹¹ From this perspective, the outcome in *Cutler* makes far more sense and disconnects *Cutler* from being about Indian law. Kavanaugh's use of a case about protecting the Seneca from non-Indian intrusion to broadly extend state jurisdiction over reservation territory drips with irony.

Kavanaugh next quotes from *Surplus Trading Co. v. Cook*: "[R]eservations are part of the State within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have

87. Robert B. Porter, *Legalizing, Decolonizing, and Modernizing New York State's Indian Law*, 63 ALB. L. REV. 125, 157 (1999) ("*Dibble* is a peculiar case because it stands for the proposition that a state can apply its laws within Indian territory if such laws are designed to "protect" Indian interests. . . . Oddly, although *Dibble* was decided only twenty-six years after *Worcester*, which concluded that states have no power over Indian affairs—the *Dibble* court makes no mention of the *Worcester* decision. In sustaining this particular State law, however, the Court ignored every fundamental principle of Federal Indian Control Law dealing with the federal-tribal-state relationship existing then as well as now.").

88. *Id.* at 158.

89. *Milliken v. Meyer*, 311 U.S. 457, 462 (1940) ("Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service."); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989) ("[D]omicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there."); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 594 U.S. 915, 924 (2011) ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile . . .").

90. *Nixon v. Nixon*, 348 S.W.2d 434, 436 (Tex. App. 1961), *writ refused NRE* (Oct. 18, 1961).

91. An individual real person is always subject to personal jurisdiction in his or her state of domicile. *Baker v. Baker*, 603 P.2d 590, 594 (Idaho 1979).

only restricted application to the Indian wards.”⁹² The paragraph where the quote appears is entirely unsupported by any case citations whatsoever.

The quote also represents dicta in its purest form, again making its use for sweeping jurisprudential changes incredibly inappropriate. *Surplus Trading* considered whether state taxes were owed on a shipment of blankets stored on a federal military camp.⁹³ No Indian, tribal government, or reservation territory was part of the facts of the case. The non-Indian blanket owner argued that no state taxes were owed because the military camp was federal land where the state had no jurisdiction.⁹⁴ The Court disagreed, holding that state taxing jurisdiction extended to lands not formally withdrawn from its jurisdiction so long as the exercise of jurisdiction did not conflict with the federal government activity for which the federal government held the land.⁹⁵ The opinion makes assertions about state’s ability to tax on Indian reservations as an example of when a state can impose taxes inside land held by the federal government. The case was never about Indians or reservation territory. Kavanaugh’s later use of *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*⁹⁶ falls flat for the exact same reasons because it wholly relies on *Surplus Trading* for the same principle.⁹⁷

Next in Kavanaugh’s parade of foul balls is *New York ex rel. Ray v. Martin*.⁹⁸ “[I]n the absence of a limiting treaty obligation or Congressional enactment[,] each state ha[s] a right to exercise jurisdiction over Indian reservations within its boundaries,” he wrote in *Castro-Huerta*, citing *Martin*.⁹⁹ The facts of *Martin* parallel *United States v. McBratney*¹⁰⁰ but played out in New York state court.¹⁰¹ In *McBratney*, a white citizen of the State of Colorado killed another white citizen of the State of Colorado on the Ute Reservation.¹⁰² The question was whether the federal district court had jurisdiction over the case.¹⁰³ Federal district courts only had jurisdiction over murder cases where

92. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2493 (2022) (citing *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651 (1930)).

93. *Surplus Trading Co. v. Cook*, 281 U.S. 647, 649–51 (1930).

94. *Id.*

95. *Id.* at 651–58.

96. 502 U.S. 251, 257–58 (1992).

97. *Castro-Huerta*, 142 S. Ct. at 2493 (citing *Surplus Trading Co.*, 281 U.S. at 651).

98. 326 U.S. 496 (1946).

99. *Castro-Huerta*, 142 S. Ct. at 2493 (citing *Martin*, 326 U.S. at 499).

100. 104 U.S. 621, 621–24 (1882).

101. *Martin*, 326 U.S. at 497–501

102. *McBratney*, 104 U.S. at 621.

103. *Id.* at 621.

the crime was committed on lands under the *exclusive* jurisdiction of the United States; otherwise, the state court had jurisdiction.¹⁰⁴ The Ute Reservation was established by treaty prior to the creation of the Territory of Colorado.¹⁰⁵ The federal act establishing the Colorado Territory exempted lands set aside for Indian tribes from the territory.¹⁰⁶ No similar exemption was made in the Colorado Enabling Act.¹⁰⁷

The Court ruled that western states are admitted to the Union on an equal footing with the original 13 colonies. “Equal footing” meant that the state had jurisdiction “over its own citizens and other white persons throughout the whole of the territory” within its borders, including the Ute Reservation unless an exemption had been made within the Colorado Enabling Act.¹⁰⁸ No such exemption had been made. So, the state court had jurisdiction, the United States’ jurisdiction was not exclusive, and therefore, the federal district court did not have authority to hear the case.¹⁰⁹ *Martin* involved a habeas corpus petition filed by a New York prisoner convicted in federal court of murdering a New York State citizen inside the Alleghany Reservation.¹¹⁰ The reservation was located within the State of New York. The Court used *McBratney* to hold that the State of New York had authority to prosecute the prisoner.¹¹¹

Martin and *McBratney* are the closest to supporting Kavanaugh’s point, although they are not directly on point. They hold that states have criminal jurisdiction over crimes committed by non-Indians against non-Indians. Kavanaugh stretches this holding thinly to include state jurisdiction when the victim is Indian. Whereas tribal interests were at a minimum when only non-Indians are involved, a sovereign’s interests are at their highest when the safety of citizens is at issue, making *Martin* and *McBratney* tenuous support for Kavanaugh’s assertion.

Kavanaugh attempts to salve the wound by suggesting that states have an equal interest in protecting their Indian and non-Indian citizens.¹¹² The statement belies a comical ignorance of, if not intentional blindness to, the

104. *Id.* at 621–22.

105. *Id.*

106. *Id.* at 621–22.

107. *Id.* at 622–24.

108. *Id.*

109. *Id.*

110. New York *ex rel.* Ray v. Martin, 326 U.S. 496, 497–501 (1946).

111. *Id.* at 497–99.

112. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2501–02 (2022).

history of relations between states and tribes, particularly Oklahoma and the tribes there.¹¹³

Lastly, Kavanaugh uses *Nevada v. Hicks*: “State sovereignty does not end at a reservation's border.”¹¹⁴ But *Hicks* relies on a *Utah & Northern Railway Co.*,¹¹⁵ a case already cited for the same proposition and fundamentally flawed as explained above.¹¹⁶ Citing multiple cases for the same proposition sometimes shows the strength of the proposition as long-standing precedent. But a chain of precedent with flaws in each link suggests there is no strong support to be found, particularly when the flawed cases cite to each other. An opinion that reverses hundreds of years of precedent and takes away the freedom of millions of people to choose how they live on their ancestral lands should be made of sterner stuff.

A last, rather troubling, issue unaddressed by the dissent is the incompatibility of *Castro-Huerta*'s use of the Equal Footing Doctrine¹¹⁷ with the requirement of clear Congressional expression in *McGirt*. Justice Gorsuch addressed the Majority's use of Oklahoma's Enabling Act and the Equal Footing Doctrine with interpretive arguments about the text and circumstances surrounding Oklahoma's admission of the state.¹¹⁸ He did not address the conceptual incompatibility of the Equal Footing Doctrine with *McGirt*'s requirement of a clear expression of congressional intent to abrogate tribal

113. *United States v. Kagama*, 118 U.S. 375, 384 (“Because of the local ill feeling, the people of the States where [Indian tribes] are found are often their deadliest enemies.”); *Angie Debo, AND STILL THE WATERS RUN* 92–125 (1940); *Castro-Huerta*, 142 S. Ct. at 2510 (Gorsuch, J., dissenting); *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020).

114. *Castro-Huerta*, 142 S. Ct. at 2494 (citing *Nevada v. Hicks*, 533 U.S. 353, 361 (2001)).

115. *Utah & N. Ry. Co. v. Fisher*, 116 U.S. 28, 31 (1885).

116. See *supra* notes 73–78 and accompanying text.

117. The Equal Footing Doctrine stands for the proposition that states admitted to the Union after the original 13 have the same sovereign status as the original 13 states. Frank W. DiCatri, *Are All States Really Equal? The “Equal Footing” Doctrine and Indian Claims to Submerged Lands*, 1997 WIS. L. REV. 179, 181–85 (1997); *United States v. Holt State Bank*, 270 U.S. 49, 58–59 (1926). The original 13 states were assumed to have complete sovereignty within their borders, including authority over all navigable waters and land underlying those waters, subject only to what they had given to the federal government. The basis for this belief was the reserved-rights doctrine. Ergo, under the equal footing doctrine, subsequent states get that same complete sovereignty, subject to express reservation. In the context of Indian law, this has been taken to mean that states have jurisdiction over all navigable waters and submerged lands in the state, including those inside Indian territory, except where explicitly reserved to the tribe. The upshot at this point is that the admission of a new state to the Union extinguishes all tribal authority over navigable waters and submerged lands absent express reservation in the state's enabling act. *Montana v. United States*, 450 U.S. 544, 551–53 (1981). *Equal Footing Doctrine Generally*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artIV-S3-C1-3/ALDE_00013710/ [<https://perma.cc/HR6J-5GXV>].

118. *Castro-Huerta*, 142 S. Ct. at 2508–09.

sovereignty or its conclusion that congressional silence represents an absence of the same, as a matter of law.

A full discussion of this problem is beyond the scope of this Article, but the problem must be noted. As previously stated, *McGirt* held that Congressional silence on the location of reservation territorial borders previously set by treaty did not amount to the kind of clear expression required to disestablish the reservation, as a matter of law.¹¹⁹ Congress' silence did not even amount to ambiguity.¹²⁰ In fact, quite the opposite. Congressional silence meant Congress had never expressed any intent—clear, express, or otherwise—as a matter of law.¹²¹ Consequently, the Court held that the reservation's territorial borders remained the same because Congress had never made any statement about the Creek Reservation after first establishing it. Oklahoma courts extended the decision in *McGirt* to confirm the original territorial borders of the other Five Civilized Tribes in Oklahoma, including the Cherokee Nation.

McGirt's “clear expression” and “silence is not clarity” holdings were not limited to cases about reservation borders. Those holdings flowed from the fact that the case involved the authority of a sovereign people with reserved rights, the recognition of that sovereignty by the United States in a treaty, and the trust responsibility of Congress *and the Court* when interpreting federal acts affecting tribal sovereignty.¹²² *McGirt's* holdings are an expression of existing

119. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2468–69 (2020).

120. *Id.*

121. *Id.*

122. The U.S. Supreme Court has been clear on its position on the source of tribal sovereignty, and when laws of “general applicability” apply to tribes. *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1192 (10th Cir. 2002); Intermill, *supra* note 48, at 65. “Indian tribes are neither states, nor part of the federal government, nor subdivisions of either. Rather, they are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate.” *Pueblo of San Juan*, 276 F.3d at 1192 (emphasis added); *McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 171, 172 (1973) (“[T]he . . . Indian [tribes’] . . . claim to sovereignty long predates that of our own Government.”); Intermill, *supra* note 48, at 65. “Indian tribes retain ‘attributes of sovereignty over both their members and their territory’ to the extent that sovereignty has not been withdrawn by federal statute or treaty.” *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987) (emphasis added); Intermill, *supra* note 48, at 65; *see also, McGirt*, 140 S. Ct. at 2466 (“Plainly, these laws represented serious blows to . . . Creek [sovereignty]. But, just as plainly, they left the Tribe with significant sovereign functions over the lands in question. For example, the Creek Nation retained the power to collect taxes, operate schools, [and] legislate through tribal ordinances . . .”). “So where Congress has not abrogated [tribes’ pre-constitutional rights and sovereign powers, they] remain in place, unaffected by federal law.” Intermill, *supra* note 48, at 65; *Iowa Mut. Ins. Co.*, 480 U.S. at 14; *McGirt*, 140 S. Ct. at 2466. Congress’ intention to abrogate Indian sovereign rights must be “clear and plain.” *United States v. Dion*, 476 U.S. 734, 738 (1986); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999) (“Congress may abrogate Indian treaty rights, but it must clearly express its intent to do

case law that defines the reserved rights nature of tribal sovereignty. “Clear and plain” congressional intention to abrogate only exists when Congress “actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.”¹²³ This intent must appear on the face of the statute or in its legislative history.¹²⁴ “The same test applies to the inherent sovereign rights of tribes, even when those rights are not protected by treaty.”¹²⁵ “[A]mbiguities of congressional intent must be resolved in favor of the tribal sovereignty.”¹²⁶

Consequently, *McGirt*, at a minimum, more accurately holds that treaty rights cannot be altered without a clear expression of Congressional intent to do so, and that Congressional silence about a treaty right in a subsequent act falls short of clarity or ambiguity as a matter of law. A slightly broader interpretation still in line with existing Supreme Court precedent would expand this interpretation to tribal sovereignty generally as a matter of reserved sovereign rights, doing away with the need to base this limitation in treaty language.

McGirt's requirement of clarity by subsequent Congressional acts to abrogate treaty rights is diametrically opposed to *Castro-Huerta*'s holding about enabling acts admitting states to the Union. Both are acts of Congress. Both impact tribal rights guaranteed by treaty. But *Castro-Huerta* reads the Equal Footing Doctrine as superseding tribal sovereignty absent an express statement preserving it in a state enabling act whereas *McGirt* follows the exact opposite presumption: the absence of an express statement leaves tribal sovereignty undisturbed. Put another way, refocusing on “silence,” *Castro-Huerta* presumes state sovereignty supersedes tribal sovereignty when an

so.”); *see also* *Dion*, 476 U.S. at 738–39 (citing decisions announced from 1876 through 1979); Intermill, *supra* note 48, at 66. The Federal Government has a longstanding policy of encouraging tribal self-government. *See, e.g., Iowa Mut. Ins. Co.*, 480 U.S. at 14; *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 890 (1986); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138, n.5 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143–44, 143 n.10 (1980); *Williams v. Lee*, 358 U.S. 217, 220–21 (1959). This policy reflects the Federal Government’s “retained sovereignty” policy position. *Iowa Mut. Ins. Co.*, 480 U.S. at 14; *United States v. Mazurie*, 419 U.S. 544, 557, (1975). The federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively pre-empted by federal statute. *Iowa Mut. Ins. Co.*, 480 U.S. at 14; *Williams*, 358 U.S. at 220. “[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.” *Williams*, 358 U.S. at 220; *Iowa Mut. Ins. Co.*, 480 U.S. at 14.

123. *Dion*, 476 U.S. at 738–40 (emphasis added).

124. Intermill, *supra* note 48, at 66 (citing *Merrion*, 455 U.S. at 148 n.14).

125. *Id.*

126. *E.E.O.C. v. Fond du Lac Heavy Equip. and Const. Co., Inc.*, 986 F.2d 246, 250 (8th Cir. 1993) (citing *Cotton Petrol. Corp. v. New Mexico*, 490 U.S. 163, 178 (1989)).

enabling act is silent on its impact on tribes whereas *McGirt* presumes tribal sovereignty remains where an act of Congress is silent on its impact on tribal sovereignty.

Some might argue that enabling acts are a special case, and therefore, warrant an exception to *McGirt*. But enabling acts are still acts of Congress. The interpretive task is the same in all relevant aspects, as is the federal government's fiduciary role vis a vis Native governments and their citizens. And while equal footing requires equal treatment, no intellectually honest argument can be made that the original states were not subject to existing federal treaties, or that they were not aware of the reservations within their borders, or the relationship between the tribes there and the federal government. What is left of equal footing as applied to tribes is a distinction without an ethical meaningful difference that passes the smell test and cases that baldly stretch to dispossess tribes.

C. Additional Observations about Castro-Huerta.

Castro-Huerta is both microcosm and cautionary tale. The case distills into one majority and one dissent the two world views that have competed for control of federal Indian law since at least *Worcester v. Georgia*. Kavanaugh's majority presumes states have authority inside reservation borders, and thinks tribal sovereignty only exists, if at all, where affirmatively granted by the federal government.¹²⁷ There is a more limited exception to state authority where it would unlawfully infringe tribes' right to self-government, as narrowly construed by Court conservatives.¹²⁸

Kavanaugh and his majority make their contempt for tribal sovereignty clear by never using the term. In fact, they steer clear of terms even suggestive of sovereignty, choosing "Indian Country" over "territory" or "reservation," and "tribe" over "nation" or "government." They reserve those terms for states.¹²⁹ One of the more stunning moments in the opinion was Kavanaugh's assertion that states are equally interested in protecting both their Indian and non-Indian citizens;¹³⁰ empirical data exists showing just how untrue that statement is.¹³¹

127. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2491–2505 (2022).

128. *See infra* note 163.

129. *Castro-Huerta*, 142 S. Ct. at 2491–2505.

130. *Id.* at 2501–02.

131. *Id.* at 2523; Brief for Former United States Attorneys Michael Cotter, D. Michael Dunavant, Halsey B. Frank, Troy A. Eid, Thomas B. Heffelfinger, David Iglesias, Brendan V. Johnson, Wendy Olson, Timothy Q. Purdon, & R. Trent Shores as Amicus Curiae Supporting Respondent, at 13, *Castro-*

Justice Gorsuch’s dissent capably states the opposing view that acknowledges and respects tribal sovereignty in a way that is more consonant with normative understandings of sovereignty and democratic theory that apply in non-Indian contexts. It recognizes the right of Native peoples and their governments to exclude state authority from Native territory. In so doing, the dissent and its antecedents function—when successful—as a form of federalism between Native Nations and states.

Justice Gorsuch’s dissent marshals the history, treaties, statutes, and precedent that support the continued existence of tribal sovereignty, although it leaves out some key arguments as pointed out above. Gorsuch’s dissent uses time-honored analytical approaches, supported by relevant sources, a stark contrast to the shallow, poorly sourced argument of the majority.

The majority cannot use traditional, “palms-up” legal analysis, textualist or otherwise. The only way to reach results inconsistent with tribal sovereignty is to depart from the reasoning that calls for it. The majority opinion flatly abandons the kind of libertarian, reserved rights beliefs commonly associated with conservative thought and proponents of states’ rights. It leaves any informed reader wondering what the Court Conservatives actually stand for. Do they believe in individual freedom and oppose government oppression? Do they believe local governments are best and that sovereigns all start from a position of reserved rights because their authority comes from individuals where all authority starts? Do they believe that all people are created equal under these inalienable rights? If they do, then those principles must be applied consistently, and people embracing those principles must see tribal sovereignty as a valid expression of free will of tribal people authorizing tribal authority. Any other approach exposes the Court’s Conservatives as little more than sophists and Pharisees, engaging in the exact kind of judicial activism they criticize other judges and courts for.

Kavanaugh also continues the pattern of basing anti-tribal opinions on a fear of subjecting non-Indians to tribal jurisdiction and laws. He points out that “[a]bout two million people live” in the area declared part of the Creek Reservation in the “wake” of *McGirt*, and that “the vast majority [of them] are

Huerta, 142 S. Ct. 2486 (No. 21-429) [hereinafter *United States Attorneys’ Amicus Brief*]; Brief for National Indigenous Women’s Resource Center et al. Supporting Respondent, at 12, *Castro-Huerta*, 142 S. Ct. 2486 (No. 21-429) [hereinafter *National Indigenous Women’s Resource Center Amicus Brief*]; C. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535, 552, 552 n.92 (1975); INDIAN LAW & ORDER COMM’N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES xi, xiv, 11–15 (Nov. 2013).

not Indians.”¹³² The argument is that people that cannot participate in making a law should not be subject to that law; doing so is contrary to important principles underlying U.S. democracy. The U.S. Supreme Court has increasingly used participation-based reasoning—as opposed to territory-based reasoning—to resolve sovereignty conflicts contrary to tribal interests, particularly in the area of criminal jurisdiction.¹³³ The Court is reluctant “to adopt a view of tribal sovereignty that would single out [a] group of citizens...for trial by political bodies that do not include them.”¹³⁴

The Supreme Court has relied on participation-based reasoning in the area of tribal civil regulatory authority over non-citizens, as well. The rules for determining the extent of a tribe’s authority within its own territory turn in part on whether non-tribal citizens and non-Indian lands are involved.¹³⁵ Tribes’ inherent civil regulatory authority generally does not apply to “nonmembers” on “non-Indian” land and extends only to what is “necessary to protect tribal self-government or to control internal relations.”¹³⁶ In a case about land use regulation, the Court explicitly compared reservation citizens and non-Indian residents in terms of population, land ownership, ability to vote in county elections, ability to vote in tribal elections, and access to tribal services.¹³⁷ The Court has made member/non-member demographics a factor in diminishment

132. *Castro-Huerta*, 142 S. Ct. at 2492.

133. In *Oliphant v. Suquamish Indian Tribe*, the Court made specific note of the large non-Indian presence on the reservation in terms of both land ownership and population, and that non-members could not serve on tribal juries. 435 U.S. 191, 193–94, 193 n.1, 194 n.4 (1978). *Oliphant* ultimately held that the exercise by tribes of criminal jurisdiction over non-Indians was “inconsistent with [tribes’] status” and contrary to the federal government’s “great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty.” *Oliphant*, 435 U.S. at 208, 210. *Duro v. Reina* similarly concluded that jurisdiction over non-member Indians is an “external” power “inconsistent with the Tribe’s dependent status.” 495 U.S. 676, 686 (1990). *Duro* explicitly based part of its reasoning on the inability of non-member Indians to participate in the government prosecuting them. *Duro*, 495 U.S. at 693; see also Joseph William Singer, *Canons of Conquest: The Supreme Court’s Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 665–68 (2003). Interestingly, participation concerns do not factor in the state context, or even the international context absent obvious disparities in procedural protections. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 48, at 226–28.

134. *Duro*, 495 U.S. at 693.

135. *Montana v. United States*, 450 U.S. 544, 563–65 (1981); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 411 (1989); *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997); see also COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 48, at 229–32.

136. *Montana*, 450 U.S. at 563–65.

137. *Brendale*, 492 U.S. at 445–47.

cases where guidance is not found from treaties, statutes, or legislative history.¹³⁸

Kavanaugh and the Justices joining the majority seem stunningly oblivious to the fact that the argument goes both ways. Tribes and their citizens do not want to be subject to state law when on their ancestral lands. Moreover, tribes did not create this problem; the states did.¹³⁹ In the context of *Castro-Huerta*, Oklahoma and its citizens ignored known tribal borders at their peril. Turning to the national context, the checkerboarding that exists on reservations is the product of profoundly immoral legislation and policies meant to destroy tribal society and transfer massive amounts of tribal land and resources out of tribal hands. The use of the continuing consequences of genocidal policies to justify additional harm to the sovereign freedom tribes are entitled to and have been promised is the very antithesis of justice.

III. JURISDICTIONAL OVERLAP AND COMPETITIVE SOVEREIGN EROSION

I believe there are more instances of the abridgement of freedom of the people by gradual and silent encroachments by those in power than by violent and sudden usurpations.

—James Madison¹⁴⁰

Competitive sovereign erosion is a process. That process only occurs in a specific factual scenario, i.e., two governments asserting the *same authority*

138. *Solem v. Bartlett*, 465 U.S. 463, 470–72, 471 n.12, 472 n.13 (1984)

When an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of state and local governments. . . . Resort to subsequent demographic history is, of course, an unorthodox and potentially unreliable method of statutory interpretation. However, in the area of surplus land Acts, where various factors kept Congress from focusing on the diminishment issue, the technique is a necessary expedient.

Id. at 772, nn.12–13 (citations omitted); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 602–14 (1977); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 356–57 (1998).

139. See generally Ann E. Tweedy, *Unjustifiable Expectations: Laying to Rest the Ghosts of Allotment-Era Settlers*, 36 SEATTLE U. L. REV. 129 (2012); Alexis E. Applegate, *Tribal Authority to Zone Nonmember Fee Land Using the First Montana Exception: A Game of Checkers Tribes Can Win*, 40 B.C. ENVTL. AFF. L. REV. 159, 163–71 (2013).

140. Letter from James Madison to Patrick Henry (June 6, 1788) (available at *General Defense of the Constitution*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-11-02-0062> [<https://perma.cc/HA7M-AR92>]).

over the *same people and territory* at the *same time*.¹⁴¹ This Article refers to this fact scenario as “jurisdictional overlap.” Jurisdictional overlap can come about in different ways. Once it does, the process of slow sovereign loss is the same, regardless of cause.

The theory assumes that two or more governments in this position will pass laws and sometimes those laws will attempt to govern the same object or activity. Any differences between the two laws will force the people subject to both jurisdictions to choose which law to follow, and by extension, which to violate. Each government will then attempt to enforce its law; this enforcement will likely end up in court. At some point, it will come down to which of the two governments has the greater *ability to enforce* its law.

Typically, one government will win most, if not all, of these enforcement contests.¹⁴² Each time this happens, the government unable to enforce its law loses sovereignty, *qua* authority, over the object or activity being governed.¹⁴³ Over time, these losses add up, bit by bit, slowly hollowing out the subordinate government.¹⁴⁴ Taken to its logical conclusion, the subordinate government would only have authority over objects and things not important enough for the dominant government to take interest in.¹⁴⁵

The Founding Fathers referred to this idea as *imperium in imperio* and feared that it would result in the federal government eventually subsuming the states.¹⁴⁶ The importance of this underlying assumption in how the Constitution was written cannot be overstated.¹⁴⁷ The most notable consequence was the Constitution’s categorical division of authority between the federal and state governments and the Tenth Amendment’s presumption of reserved rights.¹⁴⁸

Much has been written about the intensity of the disagreements preceding the adoption of our present Constitution. Great men engaged in high-minded debates, newspaper articles traded barbs, and delegates took hostages to achieve quorum when necessary.¹⁴⁹ But as much as early Americans disagreed over the

141. *See supra* notes 1–3 and accompanying text.

142. *See supra* notes 1–3 and accompanying text.

143. *See supra* notes 1–3 and accompanying text.

144. *See supra* notes 1–3 and accompanying text.

145. *See supra* notes 1–3 and accompanying text.

146. THE FEDERALIST NO. 15, at 103 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

147. Oeser, *supra* note 1, at 826–33.

148. *Id.* at 842–55.

149. THE ANTIFEDERALISTS, at xxi–xxiv, 27–28 (Cecelia M. Kenyon ed., 1966); *see also* ANTI-FEDERALIST PAPERS THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 2, at 241; Nathaniel Breeding, *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to*

proposed Constitution, it was what they agreed on that can teach us the most in the present context.

Two sides emerged during the debates about how to structure our government: Federalists and Anti-Federalists. Both had a clear idea of how much was at stake, the needs of the new nation, and the theoretical tensions at issue. They disagreed mainly about whether the new Constitution sufficiently met those challenges, not what the challenges were. Federalists and Anti-Federalists alike believed that if two sovereigns tried to exert authority over the same people, territory, or both, at the same time, one would succumb to the other.¹⁵⁰

The Federalists thought the new Constitution sufficiently, although not completely, addressed the problem with its innovative approach to division of power embodied in the Tenth Amendment. Anti-Federalists disagreed¹⁵¹ and had some fairly specific ideas of how and how fast the federal government would subsume the states in spite of the Tenth Amendment. Some thought the new Constitution squeezed the states out from the beginning;¹⁵² others thought the process would happen over time, bit by bit, federal law by federal law, federal judgment by federal judgment.¹⁵³

their Constituents, PENN. PACKET & DAILY ADVERTISER, Dec. 18, 1787, <https://www.loc.gov/resource/bdsdcc.c0401/?st=text> [<https://perma.cc/ZC2K-VYKP>].

150. ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 2, at 244 (“We apprehend that two co-ordinate sovereignties would be a solecism in politics. That therefore as there is no line of distinction drawn between the general, and state governments; as the sphere of their jurisdiction is undefined it would be contrary to the nature of things, that both should exist together, one or the other would necessarily triumph in the fullness of dominion.”); THE FEDERALIST NO. 20, at 103 (James Madison & Alexander Hamilton) (Clinton Rossiter ed., 2003).

151. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 162, 181 (1996) (noting that Madison wrote that the “only way to judge the Constitution was to ‘consider it minutely in its parts’” while recognizing that “[i]t is in a manner unprecedented: We cannot find one express example in the experience of the world:—It stands by itself.”); THE FEDERALIST NO. 15, at 103 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (“While [the Anti-Federalists] admit that the government of the United States is destitute of energy, they contend against conferring upon it those powers which are requisite to supply that energy. They seem still to aim at things repugnant and irreconcilable; at an augmentation of federal authority without a diminution of State authority; at sovereignty in the Union and complete independence in the members. They still, in fine, seem to cherish with blind devotion the political monster of an *imperium in imperio*.”).

152. THE ANTIFEDERALISTS, *supra* note 149, at xlii–xlvii.

153. RAKOVE, *supra* note 151, at 181 (“[C]onsolidation had two distinct meanings [to the Anti-Federalists]: one descriptive, the other predictive. They did not entirely agree whether consolidation inhered in the ‘absolute and uncontrollable power’ the Union would immediately possess over those ‘objects’ placed under its control; or whether it was better conceived as a tendency that would unfold

Human nature compounds the competitive sovereign erosion problem according to The Founders. Human beings are self-interested and therefore power-seeking by nature. “Brutus,” considered one of the most well-reasoned and articulate of the Anti-Federalists, wrote in 1787 “it is a truth confirmed by the unerring experience of ages, that every man, and every body of men, invested with power, are ever disposed to increase it, and to acquire a superiority over every thing that stands in their way.”¹⁵⁴ Professor Jack N. Rakove of Stanford wrote:

[This] presumption . . . bore the imprint of the ideology that had carried the colonists from resistance to revolution in the decade before independence: the belief that the innate human craving for power would exploit any opportunity to exercise dominion. Create a constitution that merely permitted the abuse of power, this theory predicted, and those who wielded it would soon find and exploit its weakest points for their own insidious and ambitious ends.¹⁵⁵

So, while competitive erosion meant the federal government could *potentially* overwhelm the states, man’s power-seeking nature meant that it would eventually happen. “[A]lthough the government reported by the Convention does not go to a perfect and entire consolidation, yet it approaches so near to it, that it must, if executed, certainly and infallibly terminate in it.”¹⁵⁶

Five aspects of the proposed government represented the greatest risks of consolidation of power according to the Anti-Federalists: (1) the creation of a standing federal army, (2) the unlimited nature of the federal government’s authority to tax, (3) the malleability of the “necessary and proper” clause, (4) the potential for abuse of the supremacy clause and (5) the independence of the federal judiciary.¹⁵⁷ Anti-Federalists worried the states would have no revenue because any conflict between state and federal taxation would be trumped by the supremacy clause as interpreted by the federal judiciary and enforced by

gradually but ineluctably as the new government deployed its powers and monopolized the most productive sources of revenue to render the states impotent for all effective purposes of government.”). “Centinel,” an Anti-federalist essayist, wrote, “It is a solecism in politics for two co-ordinate sovereignties to exist together, you must separate the sphere of their jurisdiction, or after running the race of dominion for some time, one would necessarily triumph over the other.” SAMUEL BRYAN, CENTINEL V (Dec. 4, 1787).

154. ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 2, at 275.

155. RAKOVE, *supra* note 151, at 182–83; *see also* THE ANTIFEDERALISTS, *supra* note 149, at xliv–xlvi, lxii–lxv.

156. ANTI-FEDERALIST PAPERS, *supra* note 2, at 271.

157. RAKOVE, *supra* note 151, at 183–88; THE ANTIFEDERALISTS, *supra* note 149, at xlii–xlvii.

federal troops. Anti-Federalists also thought the ambiguity of the “necessary and proper” clause meant the legislative authority of the federal government would eventually be interpreted as boundless, and ultimately be used by federal courts again wielding the supremacy clause to abolish state laws at will, again backed up by federal forces. In other words, the Anti-Federalists thought they would end up having hostile federal laws broadly interpreted and unilaterally imposed on their states with their only recourse being to a biased court¹⁵⁸—a proposition strikingly similar to that faced by tribes today.

IV. INDIAN LAW AS A COMPETITIVE SOVEREIGN EROSION PROBLEM

Freedom and justice cannot be parceled out in pieces to suit political convenience. I don't believe you can stand for freedom for one group of people and deny it to others.

—Coretta Scott King¹⁵⁹

Tribes face the same essential dilemma as the Founders—how to create an equitable, sustainable system of government encompassing multiple sovereigns that prevents one sovereign from swallowing another.¹⁶⁰ The fundamental tension in federal law concerning tribes is how federal, tribal, and state sovereignty overlap and compete, and how the executive, legislative, and judicial branches of each sovereign attempt to resolve that competition.

A. Tribal Nations' Incremental Sovereign Losses Are the Result of Competitive Erosion Caused by Jurisdictional Overlap and Castro-Huerta Is a Step in That Process.

Native Nations' piecemeal sovereign losses over the last 200-plus years mirror how the Anti-Federalists thought the federal government would

158. With regard to the proposed powers of the Supreme Court, “Brutus” wrote that they would, “[O]perate to effect, in the most certain, but yet silent and imperceptible manner, what is evidently the tendency of the constitution—I mean, an entire subversion of the legislative, executive and judicial powers of the individual states. Every adjudication of the supreme court, on any question that may arise upon the nature and extent of the general government, will affect the limits of state jurisdiction. In proportion as the former enlarge the exercise of their powers, will that of the latter be restricted.” ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, *supra* note 2, at 296.

159. Coretta Scott King, Remarks on the Introduction of the Employment Non-Discrimination Act of 1994 (June 23, 1994), <https://awpc.cattcenter.iastate.edu/2017/03/09/remarks-on-the-introduction-of-the-employment-non-discrimination-act-of-1994-june-23-1994/> [<https://perma.cc/73SG-TDK2>].

160. Oeser, *supra* note 1, at 794–802, 826–27.

consume the states over time. Many individual battles for authority over specific issues have ended up in court. Over time, and with exceptions, the losses have mounted, and a general downward trajectory has become apparent.

Since the clear Marshallian construction of tribal sovereignty, tribes have lost pieces of sovereignty, bit by bit, law by law, judgment by judgment: the ability to protect their citizens from crime regardless of the perpetrator's race (judgments in 1854, 1885, 1946, 1978, 1990, 2022),¹⁶¹ the ability to manage and protect their environment by uniform regulation throughout their territory (1989 judgment),¹⁶² the ability to develop their economies and infrastructures through exclusive uniform taxation (judgments in 1980, 1989, 2001, 2005),¹⁶³ basic respect for their borders (judgments in 1903, 1960, 1998, 2001),¹⁶⁴ and the ability to protect their citizens from the unlawful assertions of authority from foreign governments (2001 judgment).¹⁶⁵ Clear analogies exist between these losses and Anti-Federalist concerns regarding competition for tax

161. The Indian Country Crimes Act of 1854, (codified at 18 U.S.C. § 1152); The Major Crimes Act of 1885 (codified as amended at 18 U.S.C. § 1153) (granting federal courts jurisdiction over a set of “major” crimes committed by Indians against Indians); *Williams v. United States*, 327 U.S. 711, 712, 718 (1946) (assuming without analysis that the Assimilative Crimes Act, 18 U.S.C. § 13, applies to Indian Country); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (tribes lack criminal jurisdiction over non-Indians); *Duro v. Reina*, 495 U.S. 676 (tribes lack criminal jurisdiction over non-member Indians); 25 U.S.C. § 1301(2) (1990) (restoring tribal jurisdiction over non-member Indians); *United States v. Lara*, 541 U.S. 193, 210 (2004); *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2504 (2021).

162. *Brendale v. Confederated Tribes & Bands of Yakima*, 492 U.S. 408 (1989).

163. *Washington v. Confederated Tribes of the Coville Reservation*, 447 U.S. 134, 163–64 (1980) (concurrent jurisdiction of state and tribal governments to tax cigarette purchases by nonmembers); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176–87 (1989) (concurrent state and tribal jurisdiction concurrent with regard to the imposition of severance taxes on oil and gas production by nonmembers); *Atkinson Trading Co, Inc. v. Shirley*, 532 U.S. 645, 653–59 (2001) (tribes lacks authority to impose hotel taxes on non-Indian guests at hotel located on non-Indian fee land located with Navaho reservation); *Wagon v. Prairie Band Potawatomi Nation*, 546 U.S. 99, 116 (2005) (Ginsburg, J., dissenting) (“Both the Nation and the State have authority to tax fuel sales at the [tribe-owned gas station]. . . . As a practical matter, however, the two tolls cannot coexist. . . . If the Nation imposes its tax on top of Kansas’ tax, then unless the Nation operates [its gas station] at a substantial loss, scarcely anyone will fill up at its pumps. Effectively double-taxed, the [gas station] must operate as an unprofitable venture, or not at all.”).

164. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903); *Nevada v. Hicks*, 533 U.S. 353, 361 (2001); *Federal Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 116–17 (1960) (“[I]t is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests.”); *United States v. Brisk*, 171 F.3d 514, 520–21 (7th Cir. 1998); see also Alex TallChief Skibine, *Applicability of Federal Laws of General Applicability to Indian Tribes and Reservation Indians*, 25 U.C. DAVIS L. REV. 85, 87, 88 (1991); COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 48, at 128–32.

165. *Nevada v. Hicks*, 533 U.S. 353, 364 (2001).

revenue, broad interpretations of the “necessary and proper” clause, and abuse of the supremacy clause by federal courts. There is no reason to think these losses will end before little remains for tribes to govern in their own territories.

Castro-Huerta squarely fits the competitive erosion pattern in that it establishes broad jurisdictional overlap between tribes and states, undaunted by two centuries of precedent, a treaty, the Oklahoma Enabling Act, and the Oklahoma Constitution to the contrary.¹⁶⁶ This overlap invites future competition for authority by a court happy to ignore anything contrary to unrestricted state authority. This presumption of unrestricted authority by the judiciary is congruent with competitive sovereign erosion’s vision of how the judiciary contributes to sovereign erosion. *Castro-Huerta* likely will not result in huge changes on reservations from the average tribal citizen’s perspective;¹⁶⁷ however, its long-term impact on tribal sovereignty could be immense, and should not be underestimated.

It is fair comment that when read narrowly *Castro-Huerta* does not reduce tribal or federal jurisdiction and instead simply creates concurrent state criminal jurisdiction, but Kavanaugh’s language about how far state jurisdiction extends into tribal territory is not so limited. In fact, it is quite comprehensive—“Indian country within a State’s territory is part of a State, not separate from a State.”¹⁶⁸ Kavanaugh’s statement about the supremacy of state authority inside reservations is similarly comprehensive: it is presumed unless preempted by federal law or exercise of state jurisdiction would unlawfully infringe tribes’ right to self-government, as narrowly construed by the Court.¹⁶⁹ The comprehensive nature of these statements makes the need to address Indian law from a competitive erosion perspective more urgent.

No one seriously doubts that *Castro-Huerta* will adversely affect tribal authority in some measure, particularly tribes outside Oklahoma. The opinion may not extinguish tribal sovereignty explicitly, but it will certainly take up conceptual, and likely practical, space formerly occupied by tribes.¹⁷⁰ In

166. *Castro-Huerta*, 142 S. Ct. at 2510.

167. Indian Legal Program, *Oklahoma v. Castro-Huerta: Rebalancing Federal-State-Tribal Power*, ARIZ. STATE UNIV. SANDRA DAY O’CONNOR COLL. OF L. (July 7, 2022), https://vimeo.com/728199379?embedded=true&source=vimeo_logo&owner=12531945 [<https://perma.cc/GU46-956C>] (discussion of case between Prof. Stacy Leeds, Prof. Robert Miller, and Dean Kevin Washburn and moderated by Derrick Beetso).

168. *Castro-Huerta*, 142 S. Ct. at 2504.

169. *Castro-Huerta*, 142 S. Ct. at 2493–94, 2502–04.

170. *Castro-Huerta*, 142 S. Ct. at 2523. The Court also neglects to consider actual experience with concurrent state jurisdiction on tribal lands. According to a group of former United States

addition, the jurisdictional “math” works out very differently for tribes outside Oklahoma.¹⁷¹ *McGirt* tripled the jurisdiction of Oklahoma tribes, expanding it into new areas previously exclusively under state authority. The only areas newly subject to state jurisdiction were the comparatively small reservation lands as they stood pre-*McGirt*. On balance, that meant far more state land became subject to tribal authority in Oklahoma, than the reverse. But *McGirt* only changed reservation boundaries inside Oklahoma. There was no *McGirt* jurisdictional expansion outside Oklahoma to offset the jurisdictional loss from *Castro-Huerta*.

The two most common answers to sovereign erosion problems are comprehensive jurisdictional separation through respected territorial boundaries or topical division of authority combined with a reserved rights structure. Either response keeps one government out of the way of the other. After *Castro-Huerta*, tribal borders are no barrier to state jurisdiction, and no topical division of power exists between tribes and states. Supreme Court opinions and antique treaties have never been a sufficient bulwark. Consequently, reversing the holding that tribes are geographically and politically part of the surrounding state takes on greater importance.

B. Advantages of Competitive Sovereign Erosion and the Façade of Textualism

Treating tribal-state jurisdictional conflicts as competitive sovereign erosion has both jurisprudential and advocacy advantages. From a jurisprudential perspective, the competitive sovereign erosion theory disconnects Indian law from the tortured logic commonly used in anti-tribal decisions, such as *Castro-Huerta*. Competitive erosion theory points out that

Attorneys, in practice concurrent jurisdiction has sometimes “create[d] a pass-the-buck dynamic . . . with the end result being fewer police and more crime.” United States Attorneys’ Amicus Brief, *supra* note 131, at 13; *see also* Carole Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535, 552, 552 n.92 (1975); Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1423 (1997). Federal authorities may reduce their involvement when state authorities are present. In turn, some States may not wish to devote the resources required and may view the responsibility as an unfunded federal mandate. Thanks to realities like these, “[a]lmost as soon as Congress began granting States [criminal] jurisdiction” through Public Law 280, “affected Tribal Nations began seeking retrocession and repeal.” National Indigenous Women’s Resource Center Amicus Brief, *supra* note 131, at 12. Recently, a bipartisan congressional commission agreed that more state criminal jurisdiction in Indian country is often not a good policy choice. *See* INDIAN LAW & ORDER COMMISSION, *supra* note 131 at xi, xiv, 11–15.

171. Prof. Kirsten Matoy Carlson shared this idea with me in a conversation during the drafting of this Article. She has consented to its inclusion here.

the problem faced by tribes is not new, unique, or special because it is the same problems faced by The Founding Fathers, i.e., jurisdictional overlap. By extension, the same answer applies, i.e., division of authority.

Competitive sovereign erosion theory also exposes Scalia-Thomas-Kavanaugh textualism as an activist, results-oriented façade, simply rationalizing the real cause of losses of Native Nation sovereignty.¹⁷² Their textualism falls miserably short of an understanding that all people have an inalienable right to freedom and individual choice, even Indians. Scalia-Thomas-Kavanaugh textualism blithely looks past the fact that sovereignty is the collective expression of that individual freedom and choice. Native Nations relinquished their dominion over and freedom on the 2,373,714,880 acres this nation now sits on with the expectation that their right to that dominion and freedom would be respected on just 56,200,000 acres. Non-Natives can thank Natives for all the history and advantages that have come as a result of the existence of the United States. All Native Nations and peoples wanted, and continue to want to this day, is to live in peace according to their own customs and laws. Meanwhile, Kavanaugh cannot bring himself to use language that might suggest in passing that tribes are sovereign.

In place of Scalia, Thomas, and Kavanaugh's ethically hollow textualism, competitive erosion theory reconnects Indian law with the same values, logic, and solutions used by The Founders to answer competitive erosion. This is the same time-tested answer used in non-Indian contexts. Competitive erosion theory challenges tribal opponents with the idea that "all [people] are created equal," Indians are people, and therefore, Indians possess the same inherent rights to only be governed by their consent.

Competitive erosion theory also presents an advocacy advantage as well. It adopts a conceptual framework and lexicon that resonates with conservatives commonly opposed to tribal sovereignty. Competitive erosion shares many beliefs in common with modern conservative jurists: opposition to government oppression; opposition to government disconnected from the communities governed; the root source of all government power is the individual; the only

172. Several notable scholars are skeptical of textualism's legitimacy, both inside and outside the Indian law context. Matthew L.M. Fletcher, *Textualism's Gaze*, 25 MICH. J. RACE & L. 111, 112 (2020); Fletcher, *supra* note 31; Eric J. Segall, *Originalist Fiction As Constitutional Faith*, U. CHI. L. REV. ONLINE (2020) ("[Neither] the Supreme Court as an institution, nor any individual Supreme Court Justice, has ever consistently applied originalism as a method of constitutional interpretation. My book devotes three chapters to substantiating with abundant case law evidence the thesis set forth by, among many others, Professor David Strauss and Dean Erwin Chemerinsky, that constitutional law is mostly the aggregate of the Justices' value preferences. Therefore, the idea that judges have used originalism to decide constitutional law cases is simply wrong as a descriptive matter.").

legitimate source of government authority is consent of the governed; local governments with reserved rights are best; and last but not least, individual choice.¹⁷³ This can present tribal sovereignty in a way that persuadable conservatives can embrace.

C. Sources of Jurisdictional Overlap

Competitive sovereign erosion only happens when jurisdictional overlap occurs, and only then in the absence of some mitigating influence, like federalism. The U.S. Constitution protects the states through the topical division of authority we call federalism. So, even though the federal and state governments assert authority over the same people and territory at the same time, they do not assert the *same authority*. This topical division of authority prevents jurisdictional overlap.

How the jurisdictional overlap is created does not matter. If the overlap exists, competitive sovereign erosion is almost certain to occur. The degree to which it occurs depends in part on how different the laws are between the two sovereigns and how much the two are willing to respect the sovereignty of the other.

Jurisdictional overlap comes about in a couple of ways. Certainly federal courts have been a major source of jurisdictional overlap,¹⁷⁴ as seen in *Castro-Huerta*,¹⁷⁵ but so has federal legislation.¹⁷⁶ Unfortunately, Native Nations also contribute to jurisdictional overlap.

Native governments and their citizens create jurisdictional overlap any time they act in a way that consents to state authority inside reservation territory. They also create jurisdictional overlap any time they act in a way that is inconsistent with tribal sovereignty.¹⁷⁷ Native Governments and their citizens

173. *See supra* note 67.

174. *See supra* notes 60–63 and accompanying text.

175. *Castro-Huerta*, 142 S. Ct. at 2504.

176. The Major Crimes Act, Act of Mar. 3, 1885, ch. 341, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153 (2006)); Pub. L. No. 83-280, Ch. 505, 67 Stat. 588 (1953) (section 7 repealed and reenacted as amended 1968) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321–1326, 28 U.S.C. § 1360, 1360 note); The General Allotment Act, Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (repealed 2000); Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(1)(C) (2006).

177. Judges, scholars, and philosophers from Locke to modern times have conceived of the consent given by citizens in several ways. Citizens give what can be termed a general, initial consent to the form and authority of a government in one of two ways: (1) expressly, as through the naturalization process. 8 U.S.C. §§ 1421–1458 (2006). Another is impliedly, by maintaining a presence within the government's territory and enjoying the benefits associated with that presence. John Locke, *Second Treatise on Government*, in TWO TREATISES ON GOVERNMENT § 119 (P. Laslett rev. ed.,

consent to state authority inside reservation territory primarily in two ways: voting in state elections inside reservation territory and organizing reservation territory as a political subdivision of the state. Native governments and their citizens acquiesce to state authority inside reservation territory when they fail to assert authority they possess.

i. Voting by Reservation-Resident Native Citizens in State Elections

One way citizens of democratic governments consent to government authority is by ongoing, broad-based political participation, including, but not limited to, voting.¹⁷⁸ The consent that forms the basis of American government is “a process of continuing consent, expressed through continuing participation.”¹⁷⁹ “[C]onsent and the withholding of consent [are] the primary means of holding government accountable for its actions. . . . Accountability is not simply a response to crises or abuses, but rather is a feature of the routine conduct of the public policy process.”¹⁸⁰ In other words, voting in periodic elections provides the mechanism through which Americans attempt to ensure that the government accurately and continuously reflects the will of the people. Former U.S. Supreme Court Justice Stephen Breyer calls this “active liberty,” i.e., “an active and constant participation in collective power” and a “sharing of a nation’s sovereign authority among its people.”¹⁸¹

1963) (“[E]very Man, that hath any Possession, or Enjoyment, of any part of the Dominions of any Government, doth thereby give his tacit Consent, and is as far forth obliged to Obedience to the Laws of that Government, during this Enjoyment, as anyone under it; whether this his Possession be of Land, to him and his Heirs for ever, or a Lodging only for a Week; or whether it be barely travelling freely on the Highway . . .”). Birth constitutes a third type of implied general consent. Consent is implied from birth in the territory. *Jus soli*, BLACK’S LAW DICTIONARY (8th ed. 2004). It is also implied from birth to a parent who is a citizen. *Jus sanguinis*, BLACK’S LAW DICTIONARY (8th ed. 2004). In reality, however, the unborn cannot consent to anything. The same can be said for children in general until they become self-sufficient enough to emigrate should they choose to do so, and assuming such migration is possible. Consequently, this Article limits itself to forms of consent that can be given or withheld freely.

178. Kenneth W. Johnson, *Sovereignty, Citizenship and the Indian*, 15 ARIZ. L. REV. 973, 978 (1973); BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 173 (1967).

179. Francis R. Hill, *Putting Voters First: An Essay On The Jurisprudence Of Citizen Sovereignty In Federal Election Law*, 60 U. MIAMI L. REV. 155, 156 (2006) (emphasis added).

180. *Id.* at 159.

181. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 5, 15 (2005). Professor Hill and Justice Breyer are far from alone in their perspectives. *See, e.g.*, J. P. PLAMENATZ, *CONSENT, FREEDOM AND POLITICAL OBLIGATION* 168, 170–71 (2d ed. 1968) (“Where there is an established process of election to an office, then, provided the election is free, anyone who takes part in the process consents to the authority of whoever is elected to the office.”) (emphasis added); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 11–14

When reservation-resident tribal citizens participate in state elections, they literally embody the unification of tribal and state authority by consenting to the authority of both with no clear, dependable mitigating influence, like federalism. Their participation amounts to consent to be governed by the products of both political processes. When tribal citizens do this outside reservation territory, it makes sense given their residing on state lands. In that case, they will be bound by both laws, although there is little doubt that tribal law could never supersede state law on state lands. Tribes have very little authority outside reservation territory, so it presents practically no threat to state jurisdiction. The same cannot be said about state authority inside tribal territory.

Reservation-resident Native citizens validate existing assertions of state authority inside reservation borders and invite future assertions when the vote in state elections.¹⁸² This is a problem because the Court has given states many important powers inside tribal territory and seems prepared to grant even more.

Voting in state elections thus accelerates competitive sovereign erosion by increasing sovereign overlap. The problem manifests when reservation-resident tribal citizens, or non-Indians within tribal territory, are presented with conflicting laws. In such a situation, which do they follow, and which will be enforced by the courts? Over time, which laws will generally dominate, giving force to the customs and values of the culture who made them? This conflict has played out throughout the course of Indian law.¹⁸³

(1948); PETER SINGER, *DEMOCRACY AND DISOBEDIENCE* 50–51 (1973); Alan Gewirth, *Political Justice*, in *SOCIAL JUSTICE* 137–38 (Richard B. Brandt ed., 1972).

182. Participation in tribal political processes by tribal citizens who live off reservation presents an interesting and problematic inverse corollary. S.E. Ruckman, *Creeks Step Closer to Constitutional Amendment*, *NATIVE AM. TIMES*, Jan. 30, 2009, at 1.

183. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. 1, 2 (1831); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 192–94; *Duro v. Reina*, 495 U.S. 676 (1990); *Montana v. United States*, 450 U.S. 544, 563–65 (1981); *Brendale v. Confederated Tribes*, 492 U.S. 408 (1989); *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 172 (1973) (Arizona income tax inapplicable to reservation citizen who derived all her income from reservation sources); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141–45 (1980) (holding that a state motor carrier and fuel tax was pre-empted from application to logging company doing business with tribe in tribal territory); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215–16 (1987) (holding that state and local laws may be applied to on-reservation activities of tribes and tribal members, even though not expressly authorized by Congress, when state authority is not pre-empted by the operation of federal law; pre-emption occurs when state jurisdiction interferes or is incompatible with federal and tribal interests reflected in federal law, unless state interests at stake are sufficient to justify the assertion of state authority); *South Dakota v. Bourland*, 508 U.S. 679, 681–82 (1993).

ii. Incorporation of Reservation Territory into State Government

Organizing reservation territory as political subdivisions of the state essentially, if not literally, makes reservations part of the surrounding state and suggests that Native Nations consent to state authority.¹⁸⁴ State voting precincts and legislative districts are subdivisions of state government. The election of reservation citizens to state office to represent reservation territory in the state legislature incorporates reservation lands into state government. Tribes lower themselves to the same level of other political subdivisions of the state over which the state has considerable authority. Equating reservation lands with state political subdivisions marginalizes the perception of tribes as separate governments with independent sovereign powers and makes them appear more like counties or cities—simple organizational sub-structures incorporated under the authority of the state and subject to state authority.

V. CONCERNS AND CRITICISMS OF COMPETITIVE SOVEREIGN EROSION.

Some assert that the consequences of participation are merely theoretical. The argument goes: “The Supreme Court has shown a willingness to give some measure of substance to tribal sovereignty. Federal policy supports self-determination at the moment. Congress has clearly rejected the extinction of tribes as a goal.”

Unfortunately, as pointed out earlier, losses of Native sovereignty closely fit the pattern of jurisdictional overlap and competitive sovereign erosion, particularly when viewed over the history of federal Indian law.¹⁸⁵ The occurrence of isolated victories do not disprove the overall downward direction of tribal authority over time, and the theory never assumes a unidirectional progress.

More immediately, *Castro-Huerta* adds considerable mass to competitive sovereign erosion theory. *Castro-Huerta*'s assertion that reservations are geographically and politically part of the surrounding state is broad and unconditional, as is its assertion that states presumptively have jurisdiction inside tribal territory absent federal preemption or “unlawful[] infringe[ment]

184. Such annexation is usually considered an act of war absent consent. James P. Terry, *The President as Commander in Chief*, 7 AVE MARIA L. REV. 391, 455 (Spring 2009) (Iraq annexation/occupation of Kuwait); Robert D. Sloane, *The Changing Face of Recognition in International Law: A Case Study of Tibet*, 16 EMORY INT'L L. REV. 107, 134 (2002) (Chinese annexation of Tibet); Shaun Walker, *Ossetians Warm to Moscow's Embrace*, INDEPENDENT (Aug. 9, 2009), <https://www.independent.co.uk/news/world/europe/ossetians-warm-to-moscow-s-embrace-1769709.html> [<https://perma.cc/3VME-TVYP>] (Russian annexation of part of Georgia).

185. See *supra* Section IV.A.

on tribal self-government,”¹⁸⁶ which has been narrowly interpreted.¹⁸⁷ It is a quintessential case and reads like foreshadowing for future adverse decisions on the same theory.

Others react strongly to the suggestion that voting in non-Native elections by reservation resident tribal citizens—along with representation of reservation territory in state legislatures—might not be a good thing for Native nations, categorically in all situations. Essentially: “Voting can never be a bad thing. How could it be when we have experienced so many benefits and advantages through participation? Suggesting otherwise is a betrayal of all that tribes have fought for.”

Fear of losing all those considerable benefits is absolutely understandable. Participation in non-Native political processes has given Native nations and peoples feelings of hope, power, and respect. Whatever the value of the tangible benefits provided by such political participation, the value of the feelings it has kindled far exceeds it. On a broader level, it is understandably hard for anyone raised in the United States to see how voting could ever be a bad thing in any context.

The notion that the right to vote and other manifestations of citizenship might reflect defeat for a group rather than victory is not one that many of us are likely to immediately realize, but it is one that American Indian history forces us all to consider.

—James Madison¹⁸⁸

But gaining the right to vote can be a bad thing where it is a consequence of a person’s preferred sovereign being subsumed by a more dominant adverse sovereign. Ask any conquered people how they feel about their newly gained

186. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2493–94, 2502–04 (2022).

187. This reads like the second exception to the *Montana* Test: tribes can regulate non-member conduct that “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Strate v. A-1 Contractors*, 520 U.S. 438, 457 (1997). The language of the second *Montana* exception feels similar to the expression of the broad police powers possessed by sovereigns, i.e., “to protect the health, safety, and general welfare” of citizens. *See Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972); *see, e.g., Gillette v. United States*, 401 U.S. 437 (1971); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Reynolds v. United States*, 98 U.S. 145 (1878). Unfortunately, the second *Montana* exception has been read far more narrowly. *Strate*, 520 U.S. at 457; *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 658–59.

188. AMERICAN INDIANS AND U.S. POLITICS: A COMPANION READER 49 (John M. Meyer ed. 2002).

citizenship.¹⁸⁹ The most recent example would be Ukraine,¹⁹⁰ but the same dynamics appear whenever there has been conquest.¹⁹¹ Many Native people do not see themselves as federal or state citizens to this day, and for that reason, do not vote in federal or state elections.¹⁹²

As understandable as it is to fear losing the benefits of political participation, it would be folly to fail to acknowledge the evidence that competitive sovereign erosion is at work simply because we are disturbed by the implications of one of its causes. The pattern is there. The benefits of voting and other forms of participation by reservation-resident tribal citizens is beyond question. Both can and do exist; assertions that voting has advantages is not

189. It is doubtful that the people of the occupied areas of Ukraine are happy about the prospect of gaining the right to vote in Russian elections. Jason Beaubien, Kat Lonsdorf & Charles Maynes, *Occupied Regions of Ukraine Vote to Join Russia in Staged Referendums*, NPR (Sept. 27, 2022) <https://www.npr.org/2022/09/27/1125322026/russia-ukraine-referendums> [<https://perma.cc/TWN4-9AGN>]. It was similarly doubtful that the French were excited by the prospect of gaining German citizenship. See generally THOMAS R. CHRISTOFFERSON & MICHAEL S. CHRISTOFFERSON, *FRANCE DURING WORLD WAR II: FROM DEFEAT TO LIBERATION* (2006). The same when Emperor Caracalla granted Roman citizenship to all free men in the Empire. *CONSTITUTIO ANTONINIANA* (212 A.D.); see also RUSSEL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* xii (1980).

190. Tim Lister, Julia Kesaieva, Olga Voitovych, Simone McCarthy & Mick Krever, *Occupied Parts of Ukraine Vote on Joining Russia in “Sham” Referendums*, CNN (Sept. 23, 2022), <https://www.cnn.com/2022/09/23/europe/occupied-ukraine-referendum-russia-intl-hnk/index.html> [<https://perma.cc/NS3G-QVMN>].

191. Treaty of Guadalupe Hidalgo, Mex.-U.S., art. VIII, July 4, 1848, 9 Stat. 922.

192. See Robert B. Porter-Odawi, *Two Kinds of Indians, Two Kinds of Indian Nation Sovereignty: A Surreply to Professor Lavelle*, 11 KAN. J.L. & PUB. POL’Y 629, 643 (2002) [hereinafter Porter, *Two Kinds of Indians*] (“[W]hy so many Senecas do not vote in the White Man’s elections was because we take pretty seriously the fact that we have our own nation, our own elections, and our own sovereignty.”); Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER. L.J. 107, 128 (1999) [hereinafter Porter, *The Demise*] (“‘This was a violation of our sovereignty. Our Citizenship was in our own nations. . . . There was no great rush among my people to go out and vote in the white man’s elections.’”) (quoting Tuscarora Chief Clinton Rickard in Laurence Hauptman, *Congress and the American Indian*, in *EXILED IN THE LAND OF THE FREE* 3263 (Oren Lyons & John Mohawk eds., 1991)); David Wilkins, *An Inquiry into Indigenous Political Participation: Implications for Tribal Sovereignty*, 9 KAN. J.L. & PUB. POL’Y 732, 734 (2000) (“Part of the reason for the reluctance or refusal of political scientists to examine indigenous political participation rests on the fact that politically tribal nations, generally—although this is changing for some tribes—do not consider themselves to be part of the pluralistic mosaic that is predominant in political science literature. Tribes perceive of themselves not only as preconstitutional entities, but more importantly, as extra-constitutional polities.”); see also THEODORE W. TAYLOR, *THE STATES AND THEIR INDIAN CITIZENS* 91 n.30A (1972) (“Some Maine Indians publicly opposed the removal of the constitutional exception and the granting of the right to vote because they saw it ‘as a step to[]wards the termination of the special Indian-State relationship.’”) (quoting Letter from Edward C. Hinckley, former Comm’r of Indian Affairs for Me., to Thomas Tureen (Mar. 24, 1972)).

denial of competitive sovereign erosion or its potential risks. What is called for is an objective judgment about the comparative risks and benefits.

Overfocusing on Native voting in state elections as a source of jurisdictional overlap misconstrues competitive sovereign erosion in a couple of ways. First, voting by tribal citizens in state elections outside reservation territory is of marginal consequence at best. Only voting by reservation-resident tribal citizens creates the overlap that results in competitive sovereign erosion by giving consent within tribal territory. So only that subset of Native voting is a problem.

Moreover, and likely more importantly, voting by reservation-resident Native citizens is not the only source of jurisdictional overlap. Judicial opinions, legislation, and executive actions also create legislative overlap. *Castro-Huerta* makes this clear. So, competitive sovereign erosion will continue to impact tribes, even if Native participation in state politics inside reservation territory remains unchanged. Conversely, the answers that will solve the jurisdictional overlap problem will also solve the participation issue.

VI. CHOOSING A NEW TRIBAL-STATE RELATIONSHIP: A TRIBE SPECIFIC COST-BENEFIT ANALYSIS

No one can deny that tribes and their citizens have had greater success in federal and state politics in recent years, becoming better able to influence legislation and policy targeting tribes.¹⁹³ This puts a difficult sovereign decision in front of tribes. On the one hand, the benefits of participation in non-tribal political processes and incorporation into state political structures might outweigh the long-term implications of competitive erosion for a particular tribe. Tribal political successes at the state and national level have been notable.¹⁹⁴ However, the consequences of competitive erosion should be part of the decision-making process. These consequences need to be balanced against the benefits tribes have won through participation in non-tribal political

193. Oeser, *supra* note 1, at 808–12; Caitlin O’Kane, *A Record Breaking 6 Native Candidates Were Elected to Congress on Tuesday*, CBS NEWS (Nov. 6, 2020), <https://www.cbsnews.com/news/six-native-americans-elected-to-congress-record-breaking/> [<https://perma.cc/9ANB-94H8>]; Felicia Fonseca & Angeliki Kastanis, *Native American Votes Helped Secure Biden’s Win in Arizona*, AP NEWS (Nov. 19, 2020), <https://apnews.com/article/election-2020-joe-biden-flagstaff-arizona-voting-rights-fa452fbd546fa00535679d78ac40b890> [<https://perma.cc/F846-SLVB>]; Kirsten Matoy Carlson, *Lobbying Against the Odds*, 56 HARV. J. ON LEGIS. 23, 38–41 (2019); *National Caucus of Native American State Legislators*, NAT’L CONF. OF STATE LEGISLATORS, <https://www.ncsl.org/legislators-staff/legislators/quad-caucus/national-caucus-native-american-state-legislators.aspx> [<https://perma.cc/28B7-EW86>] (last visited accessed Aug. 23, 2022) (Eighty-nine members).

194. *See supra*, note 182.

processes, and whether those same benefits can be achieved without such direct participation.¹⁹⁵

The importance of this decision makes a detailed cost-benefit analysis appropriate, if not imperative. Moreover, it would be inappropriate to suggest that a single analysis can or should be applied to all tribes generally. On the contrary, each tribe has the right to make this decision for itself and have its decision respected. The individual circumstances of each tribe are different and must be accounted for. Thus, the answer will not be the same for all tribes. For instance, the Navajo appear to embrace participation in state political processes and structures,¹⁹⁶ whereas members of the Iroquois Confederacy appear committed to separation.¹⁹⁷

Making an informed decision about whether or not to participate in state political processes requires perspective on each alternative. This makes a brief review of the history and benefits gained from participation by tribes and tribal citizens appropriate. This review will demonstrate the extent of tribal involvement in state politics. This review will also provide the basis for

195. Compare Carlson, *supra* note 193, at 63–71 (discussing tribes’ shift from court based advocacy to legislative advocacy in response to the Supreme Court’s increasingly hostile position on tribal sovereignty and increasing success in passing or affecting legislation), and Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Policy that Works* 22 (Harvard Kennedy Sch., Working Paper No. RWP10-043, 2010), <http://nrs.harvard.edu/urn-3:HUL.InstRepos:4553307> [<https://perma.cc/Q4GF-66MK>] (stating that from 1973–2010, “151 sponsors of 41 combined House and Senate legislative proposals supporting or expanding tribal self-determination” and “2,405 sponsors of 305 legislative measures aimed at improving conditions for American Indians, typically through increased spending on health, education, housing and the like.”), with David H. Getches, *Beyond Indian Law: The Rehnquist Court’s Pursuit of States’ Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 280–81 (2001) (finding that tribes lost 82 percent of the cases decided by the Supreme Court from 1991–2000).

196. *Navajo Election Administration*, NAVAJO NATION, <https://navajoelections.navajo-nsn.gov/> [<https://perma.cc/X9B4-JZKZ>] (Nation facilitates voter registration in state elections for reservation citizens); *Precincts and Vote Centers*, NAVAJO CNTY. AZ., <https://navajocountyaz.gov/Portals/0/Departments/Elections/Documents/Vote%20Center%20Primary%20and%20General%202022.pdf?ver=m0MEApfbrVPdrx4yTBKhcw%3d%3d×tamp=1651778881616> [<https://perma.cc/WS9B-5L6K>] (showing state election polling sites hosted at Navajo Nation facilities); see also Dr. Ponka-We Victors, *Native Candidates Score in Legislative, Other Bids*, INDIAN COUNTRY TODAY (Nov. 12, 2020), <https://icnews.org/news/native-candidates-light-up-state-local-ballots> [<https://perma.cc/YX4U-C6L9>].

197. Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107, 127–28 (1999); *Ex Parte Green*, 123 F.2d 862, 863 (2d Cir. 1941); *Albany v. United States*, 152 F.2d 266 (6th Cir. 1945); see also *Williams v. United States*, 406 F.2d 704 (9th Cir. 1969); *United States v. Neptune*, 337 F. Supp. 1028, 1030 (D. Conn. 1972).

determining appropriate remedial action should a tribe choose to avoid the consequences of such participation.

Tribal governments and their citizens have several options in dealing with competitive erosion: comprehensive tribal-state separation by bolstering respect for reservation borders, topical separation of authority under a reserved rights framework, or incorporation into state government structure. The advantages tribes presently enjoy are discussed first for comparison.

A. A Summary of Tribal Participation in State Political Processes and Its Benefits

Tribal citizens have fought long and hard for the right to vote in state elections.¹⁹⁸ Tribal citizens were not allowed to vote even after becoming state and federal citizens. Proponents of tribal voting successfully challenged restrictions on tribal citizen voting in a series of state court cases. Later, tribes also fought successfully to place precincts on reservation lands, have translators available at polling places, and prevent gerrymandering to marginalize tribal populations.¹⁹⁹ Recognizing that tribal participation in tribal elections was consistently higher than tribal participation in non-tribal elections, some tribes moved their election dates to coincide with non-tribal elections.²⁰⁰

198. DANIEL MCCOOL, SUSAN M. OLSON & JENNIFER L. ROBINSON, *NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE* 10–20 (2007) (discussing strategies by states to prevent or limit Indian voting); *Harrison v. Laveen*, 196 P.2d 456, 460 (Ariz. 1948) (finding Indians' relationship with the federal government "resembles" that of ward to its guardian but Indians are not "under guardianship" as contemplated in Arizona Constitution and statutes, and therefore cannot be excluded from voting); *Montoya v. Bolack*, 372 P.2d 387, 388 (N.M. 1962) (holding that those parts of the Navajo Reservation within the exterior boundaries of New Mexico were politically part of the state, and therefore, reservation residents were state residents for voting purposes); *Swift v. Leach*, N.W. 437, 438 (N.D. 1920) (finding trust patent Indians who had become civilized and severed their tribal relations were qualified as to vote); *Acosta v. San Diego County*, 272 P.2d 92, 94 (Cal. Dist. Ct. App. 1954) (rejecting the argument that a reservation Indian was not a state resident and ordered county to provide welfare benefits to plaintiff).

199. MCCOOL, OLSON & ROBINSON, *supra* note 198, at 10–20; Jeanette Wolfley, *Jim Crow, Indian Style: The Disenfranchisement of Native Americans*, 16 AM. INDIAN L. REV. 167, 167–92 (1991) (discussing various techniques used to exclude Indians from voting); Danna R. Jackson, *Eighty Years of Indian Voting: A Call to Protect Indian Voting Rights*, 65 MONT. L. REV. 269, 275–81 (2004) (discussing the Voting Rights Act of 1965 which prohibits any individual action or law denying or abridging voting rights on account of race or color); Willard Hughes Rollings, *Citizenship and Suffrage: The Native American Struggle for Civil Rights in the American West, 1830–1965*, 5 NEV. L.J. 135–39 (2004).

200. John M. Glionna, *Finding a Voice in Politics*, L.A. TIMES, May 22, 2004, at A-1; Sarah Kershaw, *Politicians Go Courting on Indian Reservations*, N.Y. TIMES, Sept. 23, 2004, at A1.

Three developments in the last seventy-five years stand out as the most influential in the area of tribal participation in state politics: (1) the creation of pan-tribal organizations focused on promoting comprehensive political action, including voter engagement, (2) the rise of tribal gaming enterprises, and (3) more recently, the position of tribal populations as “swing votes” in “battleground” states. Together these developments have led to an unprecedented level of tribal political power in both state and federal politics.

The National Congress of American Indians came into existence in 1944 with the goals of coordinating tribal opposition to federal termination policies, securing Native voting rights, and pressing for a commission to hear Native land claims.²⁰¹ NCAI’s strategy included educating the public and elected officials about tribal issues, lobbying, litigating voting rights cases, monitoring elections and encouraging tribal citizen voting—essentially comprehensive political participation in state and federal politics.²⁰² When the federal termination policy was abandoned, NCAI continued its effort to support tribal government and individual rights. In recent years, NCAI’s efforts to encourage tribal voting have been directed through its Native Vote Initiative,²⁰³ and appear to have experienced steady success.²⁰⁴

The seeds of influence sown by the NCAI took root in the fertile earth provided by tribal gaming enterprises. Gaming enterprises gave successful tribes the resources to fund candidates, hire lobbyists, purchase issue-based advertising in prime-time slots, and make donations that gave them access on both sides of the isle.²⁰⁵ This trend has continued and accelerated. A recent

201. *Mission & History*, NATIONAL CONGRESS OF AMERICAN INDIANS, <https://www.ncai.org/about-ncai/mission-history> [<https://perma.cc/C3HQ-CNPN>] (last visited May 6, 2023); THOMAS W. COWGER, *THE NATIONAL CONGRESS OF AMERICAN INDIANS: THE FOUNDING YEARS* 3, 9–10, 44–45, 64–65, 151–54 (1999).

202. COWGER, *supra* note 201, at 3, 9–10, 12, 44–45, 64–65, 151–54.

203. *Policy Issues*, NAT’L CONG. OF AM. INDIANS, <https://www.ncai.org/policy-issues> [<https://perma.cc/WCN9-E852>] (last visited May 6, 2023); *About Native Vote*, NATIVE VOTE, <http://www.nativevote.org/about/> [<https://perma.cc/DX62-G38D>] (last visited May 6, 2023); MCCOOL, OLSON & ROBINSON, *supra* note 198, at 177–79.

204. Jodi Rave, *Indian Voter Turnout Still Being Tallied*, BISMARCK TRIBUNE, Dec. 3, 2008, at B1 (suggesting a strong general trend of increasing tribal voting based on preliminary numbers collected by NCAI).

205. James Dao, *Indians’ New Money Buys Lobbying Power*, N.Y. TIMES, Feb. 9, 1998, at B1, (“Indians, of course, have been coming to Washington for as long as it has existed, to talk over treaty rights and other issues. And since the early 1990’s at least, tribes have been using newfound gambling wealth to expand their political muscle.”); David Wilkins, *An Inquiry into Indigenous Political Participation: Implications for Tribal Sovereignty*, 9 KAN. J.L. & PUB. POL’Y 732, 732–34 (2000) (“Part of the reason for the reluctance or refusal of political scientists to examine indigenous political

study done by the Associated Press in 2003 showed that tribes contributed about \$7 million to federal candidates, political action committees, and national parties in the 2001–2002 election cycle.²⁰⁶ According to the Center for Responsive Politics, tribes donated more than \$19 million to federal candidates alone in the 2022 election cycle.²⁰⁷ That represents a 40% increase from 2010, and a 325% increase from 2000.²⁰⁸

As tribal gaming has grown, it has developed its own independent economic force in some places, employing so many non-Indians it has become difficult to oppose without collateral economic damage to tribal and non-tribal citizens alike.²⁰⁹ The federal government has effectively made further tribal engagement in state political processes a high priority for tribes with the passage of the Indian Gaming Regulatory Act and its tribal-state compacting requirement.²¹⁰

With the seeds sown and the ground fertile, changes in the political climate have provided ripe conditions for those seeds to sprout. Since the 2000 election, margins of victory between the two major parties appear to be narrowing.²¹¹ Given that tribal populations generally strongly favor Democrats as a group,²¹²

participation rests on the fact that politically tribal nations, generally—although this is changing for some tribes—do not consider themselves to be part of the pluralistic mosaic that is predominant in political science literature. Tribes perceive of themselves not only as pre-constitutional entities, but more importantly, as extra-constitutional polities.”); MCCOOL, OLSON & ROBINSON, *supra* note 198, at 176–77.

206. Sharon Theimer, *Indians Get Lobbying Advantage*, STARNEWS ONLINE (Mar 17, 2003), <https://www.starnewsonline.com/story/news/2003/03/18/indians-get-lobbying-advantage/30511468007/> [<https://perma.cc/Q3WP-T36V>].

207. *Indian Gaming Summary*, OPEN SECRETS, <http://www.opensecrets.org/industries/indus.php?cycle=2008&ind=g6550> [<https://perma.cc/5XAA-YX8C>] [hereinafter CRP Campaign Contribution Graphs].

208. *Id.*

209. Tim Johnson, *The Dealer's Edge: Gaming in the Path of Native America*, NATIVE AMERICAS, Spring/Summer 1995, at 16, 18.

210. 25 U.S.C. § 2710(d)(1)(C); Kathryn R.L. Rand, *Caught In The Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence Over Indian Gaming*, 90 MARQ. L. REV. 971, 972, 1000 (2007); see also W. Dale Mason, *Indian Gaming: Tribal Sovereignty and American Politics* 70–128, 146–75 (2000).

211. MCCOOL, OLSON & ROBINSON, *supra* note 198, at 176–77 (“Efforts to mobilize Indian voters have been greatest in a few western swing states, where such voters can make the difference between defeat or victory in certain races”); Kershaw, *supra* note 200 (“In the last few years, political races from Congress to county sheriff have begun to hinge on the Indian vote, particularly in places like South Dakota, where the Indian population is 8 percent. Republicans and Democrats alike, including the presidential candidates, are courting Indians as never before.”); Glionna, *supra* note 200.

212. CRP Campaign Contribution Graphs, *supra* note 207.

they can tip election, and while it might be hard to prove,²¹³ they probably have. In *Native Vote: American Indians, the Voting Rights Act, and the Right to Vote*, the authors characterize this new group of participating native peoples as a “swing-vote electorate,”²¹⁴ and they aren’t alone.²¹⁵ Tribal citizens are credited with winning Arizona for President Joe Biden in 2020.²¹⁶ Regardless of what the reality is, major parties have paid more attention to tribal voting blocks in recent years than ever before based on that perception.²¹⁷

Although it is difficult to establish clear causation when it comes to elections and politics, the election of tribal citizens to non-tribal political office represents strong evidence of the level of tribal influence. Today, at least eighty-nine tribal citizens have been elected to state legislatures in the continental states,²¹⁸ many of whom represent districts that overlap with reservation lands. That represents a 254% increase from 2010.²¹⁹

213. It is impossible to point to a particular vote that won a particular race, even when the margin of victory is narrow.

214. MCCOOL, OLSON & ROBINSON, *supra* note 198, at 176.

215. U.S. Federal News, *Native Americans Could Decide Race In Key States*, Nov. 3, 2008 (2008 WLNR 21919854); Jodi Rave, *The National Congress of American Indians Leading National “Election Protection” Measure*, BISMARCK TRIBUNE (Nov. 1, 2008), https://bismarcktribune.com/news/state-and-regional/steps-taken-to-protect-voting-rights-for-indians/article_71e65f77-0cff-584b-8317-6cc1ed2d4fa6.html [<https://perma.cc/957T-3CLM>]; Anne T. Denogean, *60 Years Ago in Arizona, Indians Won Right to Vote*, TUCSON CITIZEN, July 24, 2008 (“American Indian clout in Arizona sometimes manifests as the swing vote. An exceptional Indian turnout in 2002 helped put Janet Napolitano into office as governor in a race decided by 11,819 votes.”); Denis Staunton, *Presidential Hopefuls Hot on the Trail of Native American Vote*, IRISH TIMES (May 31, 2008) <https://www.irishtimes.com/news/presidential-hopefuls-hot-on-the-trail-of-native-american-vote-1.1216193> [<https://perma.cc/2FGB-GBPC>]; *The Race is on for Congressional District 1: Norris; Navajos Are “Sleeping Giant”*, NAVAJO TIMES, Feb. 28, 2002, at A1.

216. Fonseca & Kastanis, *supra* note 193.

217. Glionna, *supra* note 200; Daniel Lathrop, *Native Americans Launch D.C. Lobbying Campaign*, HILL, July 15, 1998, at 9. (“The Democratic National Committee (DNC) has aggressively targeted American Indians in recent years and continues to do so. The DNC has brought tribal leaders to Washington for political training, formed an advisory committee on American Indian concerns and adopted an official plank supporting tribal sovereignty.”); Brenda Norrell, *Rockin’ Out the Native Vote - ‘Rez Rock the Vote’ Airs on PBS*, INDIAN COUNTRY TODAY, October 6, 2004. (“[B]oth Democrats and Republicans are vying for the Native vote. President Bush met with tribal leaders and veterans during the opening of the National Museum of the American Indian and reaffirmed tribal sovereignty. . . . The Democratic National Committee in Washington, D.C. is now preparing American Indian field directors and hosting the first ever Native American Field Training Program. . . . New Native American Field Directors are being deployed to battleground states with significant Native American populations including Arizona, New Mexico, Washington, Colorado, Nevada, Oregon, Michigan, Wisconsin, Florida and Minnesota.”).

218. *National Caucus of Native American State Legislators*, *supra* note 193.

219. Oeser, *supra* note 1, at 797–98, 798 n.22, 811.

The causal connection between tribal participation and state or federal election results stretches a bit thinner when the candidates in question are non-Indian and the district in question is not made up primarily of tribal voters. Nonetheless, many attribute the outcome of some races fitting that description to tribal interests. For instance, tribal citizens likely contributed significantly to President Joe Biden's 2020 win both in Arizona and nationally. Arizona was a battleground state in that election.²²⁰ Tribal citizens made up only about 3.9% (285,811) of Arizona's population of 7.42 million. Arizona counties with high native populations voted heavily in favor of democrats.²²¹ Biden carried the state by 0.4%, or less than 11,000 votes.²²²

Similarly, tribal citizens make up only about 2% of Washington State's population; however, tribal votes and tribal gaming revenues have been credited with providing important financial support that resulted in the defeat of U.S. Senator Slade Gordon in 2000, the 129-vote victory of Gov. Christie Gregoire in 2004, and the 2006 re-election of U.S. Senator Maria Cantwell.²²³ In the 2002 South Dakota race for U.S. Senate, Tim Johnson trailed Republican challenger John Thune most of the night, but took the lead when the last two precincts were counted—precincts that covered most of the Pine Ridge Indian Reservation.²²⁴

The one political activity tribes can, and historically have, engaged in that does not imply consent to be governed is lobbying.²²⁵ Lobbying and negotiation

220. *Data*, U.S. CENSUS BUREAU, <https://www.census.gov/data.html> [<https://perma.cc/YD2Y-4TXR>] (last visited May 5, 2023). Population estimates based on bridged race categories released by the National Center for Health Statistics.

221. Anna V. Smith, *How Indigenous Voters Swung the 2020 Election*, HIGH COUNTRY NEWS (Nov. 6, 2020), <https://www.hcn.org/articles/indigenous-affairs-how-indigenous-voters-swung-the-2020-election> [<https://perma.cc/V8Z6-PDPN>].

222. *Id.*

223. Amy Argetsinger, *Judge Upholds Win For Wash. Governor*, WASH. POST (June 7, 2005), <https://www.washingtonpost.com/archive/politics/2005/06/07/judge-upholds-win-for-wash-governor/1bd0e872-4717-4ef6-90f4-d5b24d78af95/> [<https://perma.cc/YAF6-XKER>]; Lynda V. Mapes, *More Natives Step Into Legislature*, SEATTLE TIMES (Jan. 9, 2007), <https://www.seattletimes.com/seattle-news/more-natives-step-into-legislature/> [<https://perma.cc/5YYX-NZTZ>].

224. MICHAEL BARONE & RICHARD E. COHEN, *THE ALMANAC OF AMERICAN POLITICS* 1468 (2004).

225. Oeser, *supra* note 1, at 835; Carlson, *supra* note 193, at 24 (“American Indians, and especially Indian nations, have a long and rich history of engaging with the United States government. Since its formation, the United States has established legal relationships with American Indians, treating them as separate political communities or tribes. During the first century of its existence, the United States government and Indian nations entered into over 400 treaties.”); Michael D. Oeser,

do not carry the same implication of consent-to-governed because they do not constitute direct political participation or territorial incorporation into state government. Instead, they fall in line with tribes' long history of diplomatic negotiations with both the federal and state governments.²²⁶ Tribes have advocated to federal and state governments since first contact without such behavior being seen as an implied invitation to govern. Tribes and non-tribal governments termed these efforts "diplomacy" when tribes were universally seen as separate; "lobbying" is just the name they have been given since non-tribal governments laid sovereign claim to tribal citizens and lands.

Notable scholars make compelling arguments that tribal lobbying and negotiation have had a far greater and more positive impact on tribal society than the occasional and erratic court opinion and have supporting data.²²⁷ The data suggests that tribes have steadily increased lobbying activities and political contributions for decades. The increases accelerated in the late 1970s and early 1980s when tribes recognized that winning in the Supreme Court had become the exception and not the rule.²²⁸ Since then tribes have successfully introduced

Kirsten Matoy Carlson & Patrice Kunesh, *Tribal Influence in Federal and State Politics*, in *TRIBAL ADMINISTRATION HANDBOOK: A GUIDE FOR NATIVE NATIONS IN THE UNITED STATES* 265, 265 (Rebecca M. Webster & Joseph Bauerkemper eds., 2022); FREDRICK E. HOXIE, *THIS INDIAN COUNTRY: AMERICAN INDIAN ACTIVISTS AND THE PLACE THEY MADE* 70–71 (2013); EDWARD LAZARUS, *BLACK HILLS/WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES, 1775 TO THE PRESENT* (1991). See generally Carol Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 *LAW & SOC'Y REV.* 1123 (1994); HERMAN VIOLA, *DIPLOMATS IN BUCKSKINS: A HISTORY OF INDIAN DELEGATIONS IN WASHINGTON CITY* 13–21, 190 (1995); Daniel Carpenter, *On the Emergence of the Administrative Petition: Innovations in Nineteenth-Century Indigenous North America*, in *ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW* 349 (Nicholas R. Parrillo ed., 2017).

226. Oeser, *supra* note 1, at 835.

227. Carlson, *supra* note 193, at 63–71 (discussing tribes' shift from court based advocacy to legislative advocacy in response to the Supreme Court's increasingly hostile position on tribal sovereignty and increasing success in passing or affecting legislation); Cornell & Kalt, *supra* note 195 (stating that from 1973–2010, "151 sponsors of 41 combined House and Senate legislative proposals supporting or expanding tribal self-determination" and "2,405 sponsors of 305 legislative measures aimed at improving conditions for American Indians, typically through increased spending on health, education, housing and the like"); Maggie Blackhawk, *Federal Indian Law As Paradigm Within Public Law*, 132 *HARV. L. REV.* 1787, 1799 (2019) ("The paradigm of federal Indian law offers equally surprising lessons on which branch is best suited to protect against majority tyranny. The judiciary, long viewed as the ideal branch to empower in order to protect minorities, has been devastating to Indian law. Throughout the twentieth century, it has often been Congress and the Executive—and the ability to access the lawmaking process through petitioning and lobbying.").

228. Carlson, *supra* note 193, at 23, 63–71 (discussing tribes' shift from court based advocacy to legislative advocacy in response to the Supreme Court's increasingly hostile position on tribal sovereignty and increasing success in passing or affecting legislation).

and modified much of the legislation affecting tribes. Prof. Kirsten Matoy Carlson writes:

Tribal governments and organizations have successfully prevented Congress from enacting legislation harmful to Indian Country. My research shows that Congress enacted less than 1% of all Indian-related bills with unified Indian opposition in the 97th, 100th, 103th, 106th, and 109th Congresses. More frequently, when Indians opposed a bill, Congress amended the bill to satisfy at least some of the Indian opponents' concerns. In short, Congress enacts very few bills with unified Indian opposition and is much more likely to enact bills that Indians oppose if a committee amends the bill in response to Indian opposition.²²⁹

The choice of whether to pursue comprehensive separation from state political processes or measured incorporation into state political processes would appear to tip more in favor of separation if many of the benefits of participation can be had while avoiding the risks.

B. Comprehensive Tribal-State Separation Via Respected Reservation Borders

A return to a separation based on negotiated treaties would be the simplest alternative to adopt but presents considerable hurdles. Precedent for such a relationship exists—the period during when *Worcester v. Georgia* was good law and the Non-Intercourse Acts²³⁰ were the primary law governing Indian affairs.²³¹ This approach could adequately limit state authority inside reservation borders. Concerns about law enforcement and other services could be addressed through intergovernmental agreements and cross deputization, methods already proven workable.²³² These agreements would respect tribes

229. Kirsten Matoy Carlson, *Bringing Congress and Indians Back into Federal Indian Law: The Restatement of the Law of American Indians*, 97 WASH. L. REV. 725, 731 (2002); see Kirsten Matoy Carlson, *Beyond Descriptive Representation: American Indian Opposition to Federal Legislation*, 7 J. OF RACE, ETHNICITY, & POLITICS 65, 72 (2022).

230. RUFUS WAPLES, TREATISE ON PROCEEDINGS IN REM § 318 (1882).

231. Probably somewhere around the late 1880s–1890s when *United States v. McBratney*, *Draper v. United States*, and *United States v. Kagama* were decided, maybe later. *Organized Vill. of Kake, v. Egan*, 369 U.S. 60, 72–73 (1962).

232. See generally, Kevin Morrow, *Bridging the Jurisdictional Void: Cross-Deputization Agreements in Indian Country*, 94 N.D. L. REV. 65 (2019); JEFFREY S. ASHLEY & SECODY J. HUBBARD, NEGOTIATED SOVEREIGNTY: WORKING TO IMPROVE TRIBAL-STATE RELATIONS (2004); COMM'N ON TRIBAL-STATE RELATIONS, STATE-TRIBAL AGREEMENTS: A COMPREHENSIVE STUDY (1981); CONFERENCE OF W. ATTORNEYS GEN., AMERICAN INDIAN LAW DESKBOOK 500–31 (Clay

and their territory by representing grants of authority from tribes to non-tribal authorities to operate inside tribal territory. Non-tribal authorities would be acknowledging the sovereign status of tribes in the same stroke. On the other hand, the risks to pursuing comprehensive separation are well known. Non-tribal interests have proven unable to honor treaty agreements and non-tribal courts have consistently increased the breadth of federal and state authority over tribes and tribal lands.

More specific steps are required to implement comprehensive separation. The connections between state government, reservation citizens, and reservation territory must be severed. This will require action on several fronts, each focusing on ending the ways tribal and state authority overlap with regard to person and place. The first important nexus that must be separated is dual citizenship.

i. Separating Tribal Citizen from State Citizen

As stated earlier, reservation citizens consent to state authority by voting in state elections. By living on the reservation, they bring that authority inside tribal territory. Unfortunately, tribes have no control over who the surrounding state considers eligible to vote in state elections, i.e., who is a state citizen. Any effort to create civil or criminal penalties associated with participation in state politics would likely invite challenges under voting rights laws—misguided though they may be—at a time when tribes are better off keeping decisions about their sovereignty out of court. That said, tribes still retain considerable

Smith ed. 2004); P.S. Deloria & Robert Laurence, *Negotiating Tribal-State Full Faith and Credit Agreements: The Topology of the Negotiation and the Merits of the Question*, 28 GA. L. REV. 365 (1994); Matthew L.M. Fletcher, *The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Tax Agreements*, 82 U. DET. MERCY L. REV. 1 (2004); B. Kevin Gover, *Tribal-State Dispute Resolution: Recent Attempts*, 36 S.D. L. REV. 277 (1991); Joel H. Mack & Gwyn Goodson Timms, *Cooperative Agreements: Government-to-Government Relations to Foster Reservation Business Development*, 20 PEPP. L. REV. 1295 (1993); W. Dale Mason, *Tribes and States: A New Era in Intergovernmental Affairs*, 28 PUBLIUS 111 (1998); Daniel McCool, *Intergovernmental Conflict and Indian Water Rights: An Assessment of Negotiated Settlements*, 23 PUBLIUS 85 (1993); June M. Mickens, *Tribal and State Intergovernmental Child Support Agreements: The Process Behind the Contract*, 9 AM. J. FAM. L. 11, 11–12 (1995); T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 140–42 (2002); AM. INDIAN LAW CTR., COMM'N ON STATE-TRIBAL RELATIONS, HANDBOOK ON STATE-TRIBAL RELATIONS (1984); Frank Pommersheim, *Tribal-State Relations: Hope for the Future?*, 36 S.D.L. REV. 239 (1991); Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 HARV. L. REV. 922 (1999).

discretion in determining their own citizenship.²³³ This situation raises the possibility of disenrollment as a tool. As controversial as such a measure would surely be, it is not without precedent.

Certain voluntary actions done with an intent to renounce citizenship result in the loss of U.S. citizenship.²³⁴ Such actions include becoming a citizen of another country, declaring allegiance to another country, serving in government office of another country when such service requires an oath of allegiance, and formally renouncing allegiance to a State Department Official while abroad.²³⁵ Conversely, those seeking U.S. citizenship via naturalization must pledge “to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the applicant was before a subject or citizen” and “to bear true faith and allegiance to the [Constitution and the laws of the United States].”²³⁶ Other countries have similar statutes.²³⁷ These acts provide a strong indication that the individual in question has withdrawn consent to being a citizen or transferred allegiances, or both.

The U.S. Supreme Court has specifically held that voting in a foreign election does not constitute such an act,²³⁸ but the difference between the voluntary act of voting and the voluntary acts currently resulting in loss of citizenship seems scant. Citizenship in a country is usually a prerequisite to voting in a country. Citizens of one American state who subsequently vote in the elections of another state generally lose their citizenship in the first state.²³⁹

233. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Red Bird v. United States*, 203 U.S. 76 (1906) (*Cherokee Inter-marriage Cases*); *Roff v. Burney*, 168 U.S. 218 (1897); *Smith v. Babbit*, 100 F.3d 556, 558 (8th Cir. 1996).

234. 8 U.S.C. § 1481(a).

235. *Id.*

236. *Id.*

237. *See, e.g., Annelies Lottman, No Direction Home: Nationalism and Statelessness in the Baltics*, 43 *TEX. INT'L L.J.* 503, 506–14 (2008); Yousef T. Jabareen, *Constitution Building and Equality in Deeply-Divided Societies: The Case of the Palestinian-Arab Minority in Israel*, 26 *WIS. INT'L L.J.* 345, 368–70 (2008); John Rockwell Snowden, Wayne Tyndall & David Smith, *American Indian Sovereignty and Naturalization: It's a Race Thing*, 80 *NEB. L. REV.* 171, 181 (2001); Peter J. Spiro, *Questioning Barriers to Naturalization*, 13 *GEO. IMMIGR. L.J.* 479, 501–08 (1999); *STANDING COMM. ON CITIZENSHIP & IMMIGR., CANADIAN CITIZENSHIP: A SENSE OF BELONGING* 16 (1994) (recommending that Canadians who naturalize elsewhere forfeit Canadian citizenship).

238. *Afroyim v. Rusk*, 387 U.S. 253 (1967); *Cantoni v. Acheson*, 88 F.Supp. 576, 577 (N.D. Cal. 1950) (interpreting 8 U.S.C. § 801 (1940)).

239. *ALASKA STAT. § 15.05.020(6)* (2009); *ALASKA STAT. § 15.25.043(3)* (2009); *OHIO REV. CODE ANN. § 3503(H)* (West 2004); *GUAM CODE ANN. tit. 3, § 9124(b)* (2008); *HAW. REV. STAT. § 11–13(7)* (2009); *Klumker v. Van Allred*, 811 P.2d 75, 78–79 (N.M. 1991); *N.M. STAT. ANN.*

Some tribes had similar laws, historically. The Iroquois considered participation in another government's affairs grounds to exclude those doing so from leadership within the Iroquois Confederacy.²⁴⁰

Tribes could adopt similar rules to resolve the dual-citizenship problem by automatically dis-enrolling, temporarily or permanently, any reservation citizen who registers to vote in state elections, files to run for state office, or serves in elected state office.²⁴¹ A preemptive measure may seem severe, but any law requiring affirmative enforcement will likely leave the vast majority of dual citizenship cases intact, even if a tribe expends considerable resources on policing.²⁴²

Given the severity of disenrollment, significant post-deprivation due process protections would be appropriate. Tribes should consider carefully the burdens of persuasion and standard of proof involved in any post-disenrollment hearing, taking into account the reliability of state and tribal voter registration records, among other factors. Provisions might also be made to allow disenrolled individuals to re-enroll on certain conditions, such as expiration of a

§ 1-1-7(H) (1978); OR. REV. STAT. § 247.035(e) (2009); 25 PA. CONS. STAT. § 2814(h) (2007); WIS. STAT. § 6.10(10) (2004).

240. See Chief Irving Powless, Jr., Speech to the University of Buffalo Law School (Mar. 21, 1998) (reprinted in Irving Powless Jr., *The Haudenosaunee, Yesterday and Today: A Conflict of Concepts and Laws*, 46 BUFF. L. REV. 1081, 1083 (1998)) ("The Iroquois Confederacy have never accepted this law. We do not consider ourselves as citizens of the United States. This law is a violation of the treaties that we signed that prove that we are sovereign. Because we are a sovereign people, the United States cannot make us citizens of their nation against our will. . . . I have never voted in any election of the United States, and I do not intend to vote in any coming elections. Most of our people have never voted in your elections."). Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER. L.J. 107, 159 (1999); Doug George-Kanentiio, *Why Iroquois Will Not Vote*, NEWS FROM INDIAN COUNTRY, Nov. 15, 1996, at 14A ("According to Iroquois law, [Iroquois citizens] are expressly prohibited from participating in the political process of an alien nation."); Laurence M. Hauptman, *Congress, Plenary Power, and the American Indian, 1870 to 1992*, in EXILED IN THE LAND OF THE FREE 317, 326 (1992) ("The Citizenship Act did pass in 1924 despite our strong opposition. By its provisions all Indians were automatically made United States citizens whether they wanted to be so or not. This was a violation of our sovereignty. Our citizenship was in our own nations. We had a great attachment to our style of government. We wished to remain treaty Indians and reserve our ancient rights. There was no great rush among my people to go out and vote in the white man's elections. Anyone who did so was denied the privilege of becoming a chief or a clan mother in our nation.") (emphasis added) (quoting Tuscarora Chief Clinton Rickard).

241. Tribes could affect such laws by regularly comparing tribal voter registration records with county voter registration records.

242. Given the Supreme Court's use of participation-based reasoning to limit tribal authority over non-citizens living on the reservations, tribes might consider ways to allow non-citizen reservation residents to participate in reservation government in some fashion. Unfortunately, such a discussion is beyond the scope of the present paper.

minimum period of disenrollment, tribal service, an oath of allegiance, or some combination thereof.²⁴³ Tribes adopting such a law should also set its effective date far enough in the future to allow tribal members to remove their name from the state voter rolls beforehand.²⁴⁴ The effects of disenrollment also should be limited to the individual who registers to vote in a non-tribal election, avoiding any impact on the tribal citizenship of relatives or descendants.

Not registering to vote in state elections would have the additional consequence of making tribal citizens ineligible to vote in federal elections, a collateral effect with bothersome implications that need to be avoided. States set voter qualifications, thereby controlling who votes, subject to Constitutional limitations.²⁴⁵ States do not separate qualifications for state elections from qualifications for federal elections. Hence, anyone who does not register to vote in state elections becomes ineligible to vote in federal elections.

The prospect of foregoing federal suffrage should give pause to pro-tribal interests. Federal legislation, policies and programs affect much of reservation life, a strong argument for continued federal participation.²⁴⁶ Tribes' political/diplomatic leverage relies in large part on their ability to affect federal elections via reliable voting blocks. On the other hand, the implications of participation in state elections, as laid out above, are equally grave.

Three possible solutions present themselves: (1) creation of an alternative, strictly federal registration by states; (2) creation of a process by which tribal

243. It warrants mentioning that disenrollment does not affect the culture of a dis-enrolled individual, although many will surely feel that way. The inability to vote in tribal elections will not affect dis-enrollees ability to live their lives according to traditional customs, beliefs and values.

244. *See generally*, MD. CODE ANN., ELEC. LAW § 3-501(1) (West 2009); N.Y. ELEC. § 5-400(1)(g) (McKinney 2007); KY. REV. STAT. ANN. § 116.0452(3)(a) (West 2020).

245. U.S. CONST. art. I, § 2; U.S. CONST. amend. XVII; *Katzenbach v. Morgan*, 384 U.S. 641, 647 (1966).

246. Some states exercise substantial law making and enforcement powers over reservation territories pursuant to PL-280, suggesting a similar argument in favor of continued tribal participation in state political processes in such cases. However, the powers exercised by states and the implications of participation in state political processes differ from those in the federal context making state participation inadvisable if the affected tribes wish to avoid further losses of sovereignty. First, in contrast to the many tribes and tribal peoples who consented to federal citizenship, the vast majority of tribes and tribal peoples opposed, and continue to oppose, incorporation into the surrounding states. Oeser, *supra* note 1. Second, precedent exists for dual citizenship with the federal sovereign. American federalism, if fully embraced in the tribal context, would avoid sovereign competition through limitation of federal authority, and thereby avoid erosion of the tribal sovereignty. Oeser, *supra* note 1; *supra* Sections III.B., III.C.1. No comparable mechanism for dividing sovereignty three ways (tribal-federal-state) presently exists. Without such a limitation, tribal sovereignty will suffer. Oeser, *supra* note 1; *supra* Sections III.A–B. Even if such a limitation could be devised, a three-way split of authority would leave fewer matters affecting tribal citizens and lands in tribal control.

citizens register to vote in federal elections independent of state registration processes; or (3) giving up federal suffrage and limiting tribal participation in federal politics to lobbying. Having states create an alternative, strictly federal voter registration role would be the most straightforward alternative, requiring political/diplomatic effort, but not fundamental change in law.²⁴⁷ Tribes could encourage states to adopt alternative procedures by pointing out that they would eliminate the inequity of reservation voting in state matters. Inasmuch as voting for members of Congress constitutes a state matter, tribes could distinguish this type of participation by the impact federal legislators have on federal laws affecting tribes.²⁴⁸

Creating a process by which tribal citizens register to vote independent of the state appears to be a reasonable interpretation of the federal Constitution but has never been tested before. The Constitution requires that voters in federal elections for Congress meet the same “[q]ualifications requisite for [e]lectors of the most numerous Branch of the State Legislature.”²⁴⁹ It does not, however, require that the state be the entity doing the registering. As long as state standards are used, a federal, or even tribal, entity could handle the process of registration. Failing the Constitutionality of an arrangement along these lines, amendment of the Constitution would be necessary, and is unlikely, to say the least.

The last option—foregoing federal suffrage and limiting tribal participation in federal politics to lobbying—represents a difficult course, but one with precedent and some arguments in its favor. Precedent for such forbearance is readily found before 1924. Prior to the 1924 Indian Citizenship Act, many tribal citizens did not vote in either state or federal elections. Such forbearance does not rely on the agreement or approval of others to pursue. It also sends a strong, consistent message of commitment to separate authority, leaving nothing to be construed as consent to non-tribal authority. Unfortunately, the downside to this approach suggests it would be a poor choice. As noted above, the impact of federal policies and legislation relating to tribes, the collateral political clout tribal participation affords tribes, and the improbability of a cessation of federal law making vis-à-vis tribes, all make federal elections a battlefield tribes should be loathe to relinquish.

247. Creation of special reservation ballots that include only federal elections would largely achieve the same goals but would not create as clear a separation of citizenship.

248. Votes cast on the reservation would have to be allocated, but this could be done according to established district lines, although they would no longer be state lines.

249. U.S. CONST. art. I, § 2, cl. 1 (qualifications for electors of federal representatives); U.S. CONST. amend. XVII, § 1 (qualifications for electors of federal senators).

ii. Separating Tribal Territory from State Territory

Dis-enrolling individuals who register to vote in state elections ends the problem of dual citizenship, but dis-enrollees living on the reservation could still participate in state elections while there. The same can be said for non-tribal citizens living on the reservation, of which there are many. These territorial aspects have to be dealt with as well, but with different measures.

To begin, tribes need to legislatively oppose the implied annexation that arises from the establishment of voting districts on reservation lands. To do this, tribes need to adopt laws prohibiting the establishment of state polling places on tribal lands. Tribes should also oppose the use of ballots within the reservation that include candidates for election to state office or measures concerning the adoption of proposed state laws. Tribes may need to seize voting machines, ballots, and other equipment as a regulatory measure to prevent votes from being cast,²⁵⁰ but need not impose criminal penalties for activities associated with state voting within tribal territory. Any regulatory method pursued by a tribe needs to anticipate challenges based on existing civil rights and voting laws, initiated or supported by any of the individuals and organizations with vested interests in continued on-reservation state voting.

The last, and most problematic, step in bringing equitable coherence to territorial sovereignty in the tribal context is severing the legal connection that makes tribal authority within reservations contingent on the ownership status of the land. *McGirt*²⁵¹ makes this point explicitly: Ownership and governance have been largely separated for ages outside manorial or communist states.²⁵² Only in the tribal context have they been alloyed in an effort to rationalize an unethical, if not immoral, annexation of territory via tortured logic, out of sync with basic American sovereign concept. The situation arose, for the most part, as a result of the General Allotment Act—as described above, a unilateral act designed to take land from Indians and destroy tribes, a policy clearly at odds with any concept of government by consent. Changing the law would be consistent with a genuine abandonment of the allotment and termination policies.

250. Any equipment or materials seized could be returned on the promise no further attempts would be made to establish polling places within tribal territory.

251. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2464 (2020).

252. Richard A. Monette, *Governing Private Property in Indian Country; The Double-Edged Sword of the Trust Relationship and Trust Responsibility Arising Out of Early Supreme Court Opinions and the General Allotment Act*, 25 N.M. L. REV. 35, 36 (1995); Richard Monette, *Imposing Communism*, 12 LEWIS & CLARK L. REV. 991, 992 (2008).

Unfortunately, this answer is also politically difficult. Non-tribal reservation residents in all probability would strongly oppose such a measure because it would make them subject to a government of which they could never be citizens.²⁵³ States would also oppose such a law because a change in the status of these lands would have a sizeable impact on ad valorem tax revenues.²⁵⁴ Neither of these objections is taken seriously when White governments are at issue. Everywhere else, the location of the land determines who the taxing authority is.

C. Topical Separation Under a Reserved Rights Framework

A second option focuses on separating how tribal and state authority overlap in terms of subject matter, as opposed to how they overlap in terms of person and place. Pursuing this option would likely involve some type of negotiated agreement between tribes, states, and the federal government.²⁵⁵ The specific language, form, and process of adoption for any law segregating authority is beyond the scope of the present Article. That said, using some form of affirmative law seems necessary under this approach given that federal courts have proven unwilling to maintain a coherent sovereign boundary. Affirmative law would remove the placement and solidity of the tribal-state boundary from the schizophrenia of federal Indian law jurisprudence, to a large extent. However, the adoption of any law changing the sovereignty or territory of a government would certainly involve considerable political, electoral, and procedural hurdles at all levels to say the least, hurdles tribes would not have complete control over—a factor weighing against pursuit of this option. Beyond these hurdles, such agreements would likely cut both ways. On the one hand, the agreement itself would implicitly acknowledge the sovereignty of the tribe. On the other hand, reaching agreement would likely require additional cessions of sovereign authority, territory, or resources.²⁵⁶

253. ALENIKOFF, *supra* note 232, at 114–117.

254. Press Release, U.S. Sen. Charles E. Schumer & Rep. Michael Arcuri (NY-24), Sen. Schumer, Rep. Arcuri: Local Communities, Taxpayer Must Have Better Protections Against Land Into Trust, (July 15, 2009) (available at 2009 WLNR 13408750) (“I have long expressed my serious reservations about the land into trust process,” said Senator Schumer. “One of my fundamental concerns is that taking land into trust will deprive local governments of much needed revenue to pay for schools, road maintenance, and other crucial county functions, and that the gap will have to be made up by local taxpayers. This bill will ensure that counties are reimbursed for any possible property tax base loss, and provide some measure of protection against these decisions.”).

255. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 48, at 589–94.

256. Some scholars have heralded intergovernmental agreements as a means to achieve an adequate division of authority and the future of tribal-state coexistence, borrowing from the example

Whatever form the proposed limiting law takes, it should employ a retained-rights paradigm, similar to how authority is divided between the states and the federal government under the 10th Amendment. For instance, the agreement might read:

The powers not delegated to the United States or the State by this agreement, nor prohibited by it to the Tribe, are reserved to the Tribe, or to the Tribe's citizens. Remaining powers not delegated to the State by this agreement, nor prohibited by it to the Federal Government, are reserved to the Federal Government, or to the Tribe's citizens.

The idea here is to leave as little authority in the hands of the state and federal governments as possible, leaving the "vast inherency" to the tribe.

D. Incorporation into State Government

Right now, tribes have a measure of independence that states generally oppose. That independence represents something the states want, or more accurately, want to eliminate. However, if tribes continue to participate in state politics without seeking some segregation of authority, tribal independence will likely disappear one day as a result of the state-tribal competition for sovereignty, thus dissolving any previous bargaining advantage.

Alternatively, tribes could affirmatively seek to incorporate into the surrounding state but make incorporation contingent on the preservation of some measure of the advantages they enjoyed prior to incorporation. Tribes pursuing this course would also need to make sure any such concessions could not easily be undone post incorporation. Examples of advantages tribes might preserve would be legalizing certain types of gaming that would otherwise be prohibited, control of environmental standards within the former tribal territory, preservation of hunting rights, preservation of fishing rights, and preservation of sacred sites. Tribes might also be able to preserve access to specific federal benefits, like the Indian Health Service.²⁵⁷

of the use of such agreements in the state-to-state context. See Matthew L.M. Fletcher, *Reviving Local Tribal Control in Indian Country*, 53 *FED. LAW.* 38 (2006); Matthew L.M. Fletcher, *Retiring the "Deadliest Enemies" Model of Tribal-State Relations*, 43 *TULSA L. REV.* 73, 74–75 (2007). Certainly such agreements help solve discrete problems and present opportunities for cost sharing. However, the viability of the agreements as a means of reaching broader issues of sovereign division is questionable. See Ezra Rosser, *Caution, Cooperative Agreements, and The Actual State of Things: A Reply to Professor Fletcher*, 42 *TULSA L. REV.* 57, 58 (2006); COHEN'S HANDBOOK, *supra* note 48, at 589–94.

257. The tribe would cease to be politically autonomous, but federal benefits are not necessarily dependent on enrollment. *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84–86 (1977); *Wallace v. Adams*, 204 U.S. 415 (1907); *Simmons v. Eagle Seelatsee*, 244 F. Supp. 808 (E.D. Wash. 1965), *aff'd*,

Tribes would likely be unable to preserve exemptions from state taxation, but states would also assume responsibility for spending those taxes for the benefit of the former tribal citizens and the former reservation area. Admittedly, securing these advantages might prove politically and legally difficult. That difficulty will need to be part of the equation in deciding whether or not to incorporate.

VII. CONCLUSION

Ultimately, Indian law and Native sovereignty is about the fundamental freedom that all people have a right to, or at least it needs to be. The right to freedom is fundamental because it is universal and innate. Sovereignty is the collective expression and actualization of that individual freedom. Native peoples have not changed in any way relevant to the quantity or quality of the freedom or right to consent they possess. They have always possessed the same free will as any other human being, the same ability to choose whether or not to join politically with the surrounding state or the federal government. There is no qualitative or quantitative difference between the free will of Native people and non-Natives. What has changed over time are the non-Natives making decisions about Native sovereignty, their character, and their commitment to the rule of law. The present Supreme Court is just the most recent iteration of the non-Natives making those decision, although this Court seems far more comfortable contriving reasons that abandon fundamental fairness and judicial integrity.

Native advocates need to consistently include arguments based on that fundamental freedom for a couple of reasons. First, it has the jurisprudential and advocacy advantages mentioned above, not the least of which is they will resonate with persuadable conservatives. Second, failure to make these arguments—alongside others—surrenders the very freedom Native peoples seek. Only by presenting these arguments consistently can the Court be forced to struggle with them, and persuadable conservatives be given the ability to agree with them.

384 U.S. 209 (1966); Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 B.Y.U. J. PUB. L. 1, 160 (2004).