Tribes and Trilateral Federalism: A Study of Criminal Jurisdiction

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This Article uses criminal jurisdiction to describe tribal political status in our national constitutional order. In 2022, Congress and the Supreme Court altered the already byzantine scheme of criminal jurisdiction on tribal land through the Reauthorization of the Violence Against Women Act ("VAWA") and Oklahoma v. Castro-Huerta*, respectively. By instating both tribal and state jurisdiction over a common class of offenders without any structure for coordinating prosecutions, VAWA and* Castro-Huerta *have jeopardized the rule of law and necessitated a new kind of inter-sovereign cooperation—in other words, they created a federalism problem. The Article adapts existing theories of federalism to understand the import of these federal interventions, illuminate tribal political status in American constitutionalism, and suggest federalism values (e.g. innovation, local self-determination, minority empowerment, effective dissent) to resolve tribe-state conflict.*

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INTRODUCTION

In 1789, the people of thirteen young American states defined a new sovereign. By ratifying the Constitution, the citizens of the states formed a national government to reign supreme over the United States of America. The two preexisting sovereigns of this American territory—states and tribes—would ultimately bow before the supremacy of the national government. The states formally accepted their subordination through ratification conventions.[1] And they have jealously guarded the remaining attributes of their independent sovereignty throughout the ensuing centuries.[2] In contrast, tribes and their citizens were absent from the drafting convention and ratification process.[3] America's Native nations were subjected to subordination by treaties and conquest.[4]

To this day, America houses three kinds of sovereign.[5] Yet when we discuss the political mechanisms for managing our overlapping sovereigns—i.e., federalism—American jurists tend to focus exclusively on the relationship between states and the federal government. We leave out the original American sovereigns, the Native political communities labeled tribes by American law.[6] As subordinated sovereigns retaining powers of self-

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1. U.S. CONST. art. VI, cl. 2; *id.* art. VII. Of course, the states would go on to fight a whole Civil War contesting the consequences of this formal commitment.

2. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558 (1954) (describing how states retain influence over the federal government and through that influence maintain autonomy).

3. *See* Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J.C.R. & C.L. 45, 55 (2012).

4. *Id.* at 52–53, 55 (describing how, in many cases, tribes have freely consented to American action through treaties, but too often the federal government has disregarded the limits of that consent). In Matthew Fletcher's words, "Anyone with even a superficial knowledge of American political theory would have to shake their head at the irony of a group of people subject to the control of a government only through what could charitably be described as acquiescence, and less charitably as violent conquest." *Id.* at 52.

5. Throughout this piece, I describe both tribal and state political status as sovereign. I do not mean to imply all the expectations of Westphalian sovereignty, nor do I mean to imply that tribal sovereignty is equivalent to state "sovereignty." Sovereignty is admittedly a slippery term. However, it is the term American law has chosen, so I embrace it, even as it confounds political theorists. *See* Sanford Levinson, *Shards of Citizenship, Shards of Sovereignty: On the Continued Usefulness of an Old Vocabulary*, 21 CONST. COMMENT. 601, 611 (2004) (reviewing T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP (2002)). I also use the terms "Indian" and "tribe," as they remain the legal terms of art in American law despite compelling arguments about their pejorative valence. *See* JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES, at xviii–xix (2016).

6. *See generally* Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican*

government, tribes are part of American federalism in practice, even if they are excluded from American federalism in theory. In this Article, I address this absence in the literature. I situate tribes within existing conceptions of federalism, and I ground this theoretical endeavor in a study of criminal jurisdiction. I demonstrate how federal interventions in criminal jurisdiction have long failed to live up to our federalism commitments, and the consequence is a significant impediment to the rule of law in Indian country. Native women face the brunt of the harm; the federal government's failure to ensure a coherent and constitutional arrangement for tribal criminal justice has exposed Native women and girls to horrific rates of violence and fueled the ongoing crisis of missing and murdered Indigenous people.[7]

Broadly defined, federalism describes a structure of government composed of multiple political entities sharing common territory. It is a political system featuring local self-rule and centralized shared rule.[8] Federalism is an essential aspect of the American constitutional order. In the words of Federalist Society founder, Steven Calabresi, "[t]he federal character of the American Constitution is . . . by far its most important structural feature. The only difficult question is how to make sure that it is enforced vigorously and properly."[9] As Alison LaCroix argued, federalism is not only a descriptive arrangement of institutions, but an ideological commitment to divided authority developed from a distinct imperial experience.[10] American federalism is lauded as a great innovation, promising to combat tyranny of the majority and ensure stability where social

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Democracy, 25 U. TOL. L. REV. 617 (1994); Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. F. ON C.L. & C.R. 1 (2003); Carol Tebben, *An American Trifederalism Based upon the Constitutional Status of Tribal Nations*, 5 U. PA. J. CONST. L. 318 (2003); Wenona T. Singel, *The First Federalists*, 62 DRAKE L. REV. 775 (2014).

7. *See* SARAH DEER, THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA 31–32 (2015); *infra* Section I.A.

8. DAVID J. ELAZAR, EXPLORING FEDERALISM 12 (1987).

9. Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 790 (1995).

10. ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 6, 35 (2010). American federalism is a story of both continuity and ideological revolution. The constitutional structure produced by the 1787 convention, implemented by the first Congresses and further defined by the federal judiciary, represented a notable transformation from the decentralized rule of the British Empire to a new idea of federal republic. *Id.* at 6. At the same time, its framers were actively drawing from a long history of federal models. *See Notes on Ancient and Modern Confederacies [April-June?] 1786*, FOUNDERS ONLINE (1975), https://founders.archives.gov/documents/Madison/01-09-02-0001 [https://perma.cc/4YYU-GCAY].

heterogeneity would otherwise create instability.[11] It is said to accommodate local tastes and values,[12] encourage experimentation and productive competition,[13] protect individual rights,[14] and limit government abuse.[15] To achieve these ends, federated governments have to adapt over time as global developments bring about new challenges.[16] Thus, federal constitutions should be understood as establishing instruments for recalibrating the distribution of power in pursuit of our normative commitments.[17]

Not all federal relations are the same. Tribes occupy a distinct relationship with the national government. The foundation of the political relationship between tribes and the United States is pre-Constitutional.[18] Central tenets of federal Indian law are premised on the European law of nations[19] and intergovernmental treaties that predated the independence of the American states and the advent of our national government.[20] This diplomatic relationship, originally akin to that of foreign nations, gave way to a domestic relationship, more akin to federalism, as the United States forcibly integrated tribes into the American political body. Tribes were written into the Constitution,[21] but they were never formal parties to that founding document.[22] Instead, the Supreme Court claimed supremacy for the national

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11. Calabresi, *supra* note 9, at 761–62; *see also* Ferran Requejo & Marc Sanjaume-Calvet, *Tackling the Two Faces of the Territorial Tyranny of the Majority—A Revised Federal Institutional Design*, *in* DEFENSIVE FEDERALISM: PROTECTING TERRITORIAL MINORITIES FROM THE "TYRANNY OF THE MAJORITY" 1, 4 (Ferran Requejo & Marc Sanjaume-Calvet eds., 2023).

12. Calabresi, *supra* note 9, at 775.

13. *Id.* at 777.

14. Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1230 (1994).

15. *Id.*

16. Patricia Popelier, *Exclusive Powers and Self-Governed Entities: A Tool for Defensive Federalism?*, *in* DEFENSIVE FEDERALISM: PROTECTING TERRITORIAL MINORITIES FROM THE "TYRANNY OF THE MAJORITY," *supra* note 11, at 46–47.

17. *Id.* at 60–61 (describing the framework of Dynamic Federalism); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1502 (1994).

18. Talton v. Mayes, 163 U.S. 376, 384 (1896) (holding that tribes' powers of self-government do not derive from the U.S. Constitution); *see* Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 31 (1996).

19. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 567, 573 (1823).

20. 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.02[1] (Nell Jessup Newton ed., 2023) [hereinafter COHEN'S HANDBOOK] (discussing seventeenth century treatymaking between Native Nations and the English).

21. U.S. CONST. art. I, §§ 2, 8.

22. This is not to say that Native peoples did not discuss, debate, or otherwise engage with the Constitution. *See* Gregory Ablavsky & W. Tanner Allread, *We the (Native) People?: How Indigenous Peoples Debated the U.S. Constitution*, 123 COLUM. L. REV. 243, 250 (2023) (describing Native ratification debates that occurred around the Founding).

government through a long line of opinions qualifying and diminishing tribal sovereignty.[23] With the backing of the Court, Congress unilaterally asserted plenary power over Indian affairs, historically to displace, dispossess, intern, and coercively assimilate tribes.[24] Many tribes have experienced federal supremacy as processes of invasion, conquest, and resistance.[25] Thanks to unwavering tribal advocacy, more recent federal policies have featured efforts to protect tribal self-government and limit external interference in domestic tribal affairs.[26] In light of these differences, tribes and states cannot be addressed interchangeably in constitutional theory. Instead, I rely on Richard Monette's conceptualization of two planes of sovereignty: the superior plane of the national government, and the subordinate plane shared by tribes and states.[27]

Despite this common sovereign status, tribes do not enjoy the same federalism benefits as states. Indeed, much of my project catalogues the disparate ways the federal judiciary and Congress approach federalism as applied to states versus federalism as applied to tribes. As Wenona Singel observed, the notion of federalism is not applied equally or neutrally: for states, diversity and innovation are promoted values; for tribes, diversity and innovation are typically circumscribed.[28] Pluralism is a virtue for states. Assimilation is preferred for tribes. The total assimilation of Native people was once an explicit national policy goal, one that has guided federal statutes that are still with us today. Even in our present "Self-Determination Era,"[29] tribes are under pressure to conform to American conventions as American

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23. *See Johnson*, 21 U.S. (8 Wheat.) at 587 (creating concept of Indian title); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (classifying tribes as domestic dependent nations); United States v. Kagama, 118 U.S. 375, 384 (1886) (justifying limitless federal power over tribes); Lone Wolf v. Hitchcock, 187 U.S. 553, 565–66 (1903) (articulating plenary power doctrine); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978) (describing tribes as "quasi-sovereign").

24. *See Lone Wolf*, 187 U.S. at 565–66; Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1012 (2015); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1796–97 (2019).

25. Historic policies of assimilation and removal, plus critical instances of federal inaction, exposed tribes to monstrous settler violence, which at times has met the modern standard of genocide. *See* BENJAMIN MADLEY, AN AMERICAN GENOCIDE: THE UNITED STATES AND THE CALIFORNIA INDIAN CATASTROPHE, 1846–1873, at 3 (2016).

26. *See, e.g.*, Indian Self-Determination and Education Act, Pub. L. No. 93-638, 88 Stat. 2203 (codified at 25 U.S.C. §§ 5301–5423).

27. Monette, *supra* note 6, at 618–19.

28. Singel, *supra* note 6, at 782. *But see* Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1715–16 (2012) (describing how tribes are not bound by the Second Amendment and are free to innovate in the realm of gun control).

29. COHEN'S HANDBOOK, *supra* note 20, § 1.07.

judges and politicians continue to regard Native legal traditions and institutions with suspicion.

History may explain the federal government's disparate treatment of its subordinate sovereigns, but it does not justify the denial of tribal access to the full benefits of federalism today. On a theoretical level, tribal political power springs not from the federal government, but from pre-existing sovereignty. Even more than states, whose claims to pre-constitutional sovereignty are largely legal fiction, tribes can claim authority and legitimacy independent from our shared constitutional order.[30] Tribes and their citizens would benefit from the freedom to innovate in the absence of paternalist safeguards. Moreover, our national democracy would benefit from fuller tribal self-government. Once we understand tribes as sovereign actors within American federalism, the case for tribal autonomy cannot be ignored.

Throughout this project, I use criminal jurisdiction to guide my study. Of course, many areas of law offer vehicles to examine tribes and federalism. Taxation, gaming, child welfare, and environmental regulation all feature relationships between tribes, states, and the federal government. But criminal law and its administration offer unique insights.

First, criminal justice is central to political self-determination. Public safety is regarded as the most basic responsibility a sovereign government owes its citizenry.[31] Conversely, the enforcement of criminal law is arguably the purest demonstration of sovereign power.[32] Criminal legal systems employ physical force and coercion to detain, incarcerate, and even kill citizens. In democratic states, the authority to use the threat of violence in the name of justice is based in community consensus. Outside appeals to natural law, the substance of criminal law is supposed to be a distillation of community mores.[33] According to Kevin Washburn, "through criminal laws, the community defines what it values and what it abhors. In essence, criminal laws codify the moral foundations of the community."[34] Thus, we recognize

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30. Nearly every state to enter the Union since 1789 (with exceptions such as Hawaii and Texas) was created out of national power rather than inherent pre-Constitutional sovereignty. Within our federated constitutional system, tribal members deserve local self-rule at least as much as state residents—arguably more, given their lack of representation in Congress.

31. *See* Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1597 (2016).

32. *See infra* Part II.

33. Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 834 (2006).

34. *Id.* (footnote omitted).

criminal jurisdiction as an essential attribute of sovereignty.[35] Consequently, legal battles over criminal law and criminal jurisdiction constitute a significant portion of federal Indian law casebooks.[36]

Second, the histories of Indian country and the American frontier are intimately bound up in experiences of violence, crime, and lawlessness. Violence—both legal and illegal—is central to the experience of Native people under European colonialism.[37] The criminalization of Native identity facilitated American imperial expansion and the destruction of Native institutions.[38] The federal judiciary's long tradition of disdain and distrust of tribal justice is rooted in perceptions of the criminality and lawlessness of Indian spaces[39]—lawlessness initially brought about by the destructive, destabilizing effects of European contact such as disease,[40] displacement,[41] introduction of violent technologies,[42] and racialized Indian slave trades.[43] This process was buttressed by European ethnocentrism[44] and the imperatives of empire.[45] As Lisa Ford asserted, the perfection of settler sovereignty

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35. *See* Oklahoma v. Castro-Huerta, 597 U.S. 629, 668 (2022) (Gorsuch, J., dissenting) (asserting that "the power to punish crimes by or against one's own citizens within one's own territory to the exclusion of other authorities is and has always been among the most essential attributes of sovereignty").

36. Washburn, *supra* note 33, at 785 ("It is no accident that many of the most important and controversial principles of federal Indian law have been established in criminal cases.").

37. NED BLACKHAWK, VIOLENCE OVER THE LAND 1, 7 (2006) (describing American history as a place of violence).

38. *See* LUANA ROSS, INVENTING THE SAVAGE: THE SOCIAL CONSTRUCTION OF NATIVE AMERICAN CRIMINALITY 41 (1998); SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 13–14 (1994); Heidi Kiiwetinepinesiik Stark, *Criminal Empire: The Making of the Savage in a Lawless Land*, 19 THEORY & EVENT, no. 4, 2016, https://www.ucis.pitt.edu/global/sites/default/files/Downloadables/ProQuestDocuments-2020-07-04%5B8893%5D.pdf.

39. *See* Stark, *supra* note 38, at 10; Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1410–11 (1997).

40. *See* NED BLACKHAWK, THE REDISCOVERY OF AMERICA: NATIVE PEOPLES AND THE UNMAKING OF U.S. HISTORY 4 (2023).

41. *See* Eve Tuck & K. Wayne Yang, *Decolonization Is Not a Metaphor*, 1 DECOLONIZATION: INDIGENEITY, EDUC. & SOC'Y 1, 25 (2012).

42. BLACKHAWK, *supra* note 37, at 27.

43. *See id.* at 24 (describing Indian slavery in the Spanish colonial world); BLACKHAWK, *supra* note 40, at 52–53 (describing Indian slavery in the British colonial world).

44. *See* Val Napoleon, *Thinking About Indigenous Legal Orders*, 42 DERECHO & SOCIEDAD 137, 139–43 (2014) (describing difficulties in recognizing legal systems premised on fundamentally foreign ontologies).

45. LISA FORD, SETTLER SOVEREIGNTY: JURISDICTION AND INDIGENOUS PEOPLE IN AMERICA AND AUSTRALIA, 1788–1836, at 2 (2010).

demanded the delegitimization of tribal jurisdiction.[46] This legal destruction of tribal justice was carried out to the furthest extent in terms of criminal jurisdiction.

Third, criminal justice is a realm in which state sovereignty is robust, while tribal sovereignty is starkly limited. State sovereignty ebbs and flows: as subordinate sovereigns, states experience relative highs and lows of sovereign authority in different aspects of government. Tribal sovereignty also experiences highs and lows, though not always in the same ways.[47] For example, state sovereignty is at an all-time low in the realm of foreign affairs: states have no authority to make treaties with other nations or declare war.[48] State sovereignty is much greater in the realms of education, family law, public health, general welfare, and public safety. Criminal justice sees state sovereignty at its fullest. In contrast, tribal criminal justice is sharply circumscribed due to Congress and the Supreme Court. In an age of mass incarceration, states are allowed to deal out excessively punitive sentences,[49] bounded primarily by the Eighth Amendment.[50] In contrast, Congress limits tribal punishments to a default maximum of one-year imprisonment for any individual offense.[51] While states can prosecute nearly anyone who commits a crime on state land, tribes have long been limited to prosecuting only Indians.[52] This striking asymmetry between America's subordinate sovereigns makes criminal law a useful tool for examining federalism.

Fourth, criminal jurisdiction in Indian country has recently undergone major changes. Criminal jurisdiction—namely, the question of which sovereigns have the authority to prosecute crimes committed in a territory—has evolved significantly within a generation. Several decades ago, the Supreme Court severely limited tribal prosecutorial authority in *Oliphant v. Suquamish Indian Tribe* by eliminating tribal criminal jurisdiction over all

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46. *Id.* at 183.

47. Tribal authority over people, property, and activity on tribal land depends on a variety of factors. The Supreme Court outlined the current standards for tribal civil jurisdiction in *Montana v. United States*, 450 U.S. 544, 565–66 (1981).

48. U.S. CONST. art. I, § 10, cl. 1.

49. *See* Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL'Y INITIATIVE (Sept. 2021), https://www.prisonpolicy.org/global/2021.html [https://perma.cc/6CNA-8FB3].

50. U.S. CONST. amend. VIII.

51. Three-year sentences are only available to tribes that have adopted TLOA-enhanced sentencing. The majority of tribes are essentially limited to misdemeanor sentencing. *See infra* Part II.

52. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978). As this Article will show, VAWA created a class of exceptions to the rule in *Oliphant*.

non-Indians.[53] At that time, states' criminal jurisdiction in Indian country only included those crimes involving exclusively non-Indians. For any criminal case in which a non-Indian harmed an Indian, only the federal government possessed the authority to prosecute. Tribes retained jurisdiction over cases exclusively involving Indians. Observers have referred to this arrangement as a "de facto jurisdictional void,"[54] resulting in dire rates of violence, primarily against Native women.[55] Table 1 illustrates a simplified account of jurisdiction after *Oliphant*. It notably excludes the extension of some states' jurisdiction delegated by the federal government in Public Law 280.[56]

	Indian offender	Non-Indian offender
Indian victim	Tribal jurisdiction Federal jurisdiction	Federal jurisdiction
Non-Indian victim	Tribal jurisdiction Federal jurisdiction	State jurisdiction

Table 1: Criminal Jurisdiction in Indian Country 1978–2012

This chart represents a simplified account of jurisdiction in Indian country prior to VAWA 2013. It does not include cases of victimless crimes, crimes outside the Major Crimes Act list, Public Law 280 jurisdiction, or duplicative prosecutions (where order of prosecution and resolution of a former prosecution in tribal court can affect federal jurisdiction).

In the last decade, Congress and the Supreme Court altered the jurisdictional status quo in markedly different ways. Congress responded to Native advocacy and enhanced tribal jurisdiction in the name of tribal self-government by reversing *Oliphant*'s restriction in narrow ways. Congress passed the Violence Against Women Act reauthorization bill in 2013 ("VAWA 2013"). VAWA 2013 introduced special domestic violence criminal jurisdiction for tribes, allowing tribes to prosecute a class of non-

53. *Id.*

54. Angela R. Riley & Sarah Glenn Thompson, *Mapping Dual Sovereignty and Double Jeopardy in Indian Country Crimes*, 122 COLUM. L. REV. 1899, 1913 (2022).

55. DEER, *supra* note 7, at 31–32.

56. See *infra* Part II for a discussion on Public Law 280.

Indian domestic violence offenders for the first time since *Oliphant*.[57] Table 2 illustrates a simplified account of jurisdiction after VAWA 2013. The 2022 Violence Against Women Act reauthorization ("VAWA 2022") expanded that limited special jurisdiction to a wider group of non-Indian offenders.[58] In its VAWA legislation, Congress reaffirmed tribal criminal jurisdiction as an attribute of inherent sovereignty and a necessity of self-government.

	Indian offender	Non-Indian offender
Indian victim	Tribal jurisdiction Federal jurisdiction	Federal jurisdiction *Limited tribal jurisdiction*
Non-Indian victim	Tribal jurisdiction Federal jurisdiction	State jurisdiction

Table 2: Criminal Jurisdiction in Indian Country 2013–2021

This chart represents a simplified account of jurisdiction in Indian country after VAWA 2013.

In recent years, the Supreme Court has had its own misadventure in criminal jurisdiction. In 2020, the Court delivered the landmark decision of *McGirt v. Oklahoma*—a criminal jurisdiction case that resulted in the recognition of tribal land across Eastern Oklahoma.[59] In recognizing the continued existence of the Muscogee (Creek) Reservation, the Court held that the State of Oklahoma lacked jurisdiction to prosecute and punish Jimcy McGirt, a tribal member.[60] As Indian country celebrated this victory for tribal sovereignty, the backlash brewed. The State of Oklahoma soon returned, asking the Supreme Court to reverse *McGirt*.

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57. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54, 120–23 (codified as amended at 25 U.S.C. § 1304).

58. Violence Against Women Reauthorization Act of 2022, Pub. L. No. 117-103, § 804, 136 Stat. 840, 898–904 (codified as amended at 25 U.S.C. § 1304).

59. McGirt v. Oklahoma, 140 S. Ct. 2452, 2457 (2020). About forty-three percent of Oklahoma is now considered Indian Country, thanks to *McGirt*. Mark Sherman & Ken Miller, *Justices Limit 2020 Ruling on Tribal Lands in Oklahoma*, ASSOCIATED PRESS (June 29, 2022, 11:08 AM), https://apnews.com/article/supreme-court-ruling-oklahoma-tribal-lands-6e8a77018292e749f8597af98e85bbe0 [https://perma.cc/JWY2-26KE].

60. *McGirt*, 140 S. Ct. at 2457.

The result was *Oklahoma v. Castro-Huerta.*[61] While the Court declined to revisit the status of tribal land in Oklahoma, it gave Oklahoma a major consolation prize: state jurisdiction in Indian country. In its 2022 decision, the Court upended a basic principle of federal Indian law first enunciated by Chief Justice John Marshall in 1832. In *Worcester v. Georgia*—"the most important decision in federal Indian law"[62]—Marshall asserted that state law had no authority in Indian country.[63] Over the years, the Court has slowly chipped away at this assertion. In *Castro-Huerta*, the Court took a bold step, claiming that *Worcester* was obsolete, that reservations are state territory, and that, consequently, states have criminal jurisdiction over all non-Indian offenders in Indian country.[64] Table 3 illustrates a simplified account of jurisdiction after VAWA 2022 and *Castro-Huerta*.

	Indian offender	Non-Indian offender
Indian victim	Tribal jurisdiction Federal jurisdiction	Federal jurisdiction *Limited tribal jurisdiction* *State jurisdiction*
Non-Indian victim	Tribal jurisdiction Federal jurisdiction	State jurisdiction *Limited tribal jurisdiction*

Table 3: Criminal Jurisdiction in Indian Country 2022

This chart represents a simplified account of jurisdiction in Indian country after VAWA 2022 and Castro-Huerta.

Criminal jurisdiction in Indian country has long been labeled a "jurisdictional maze,"[65] and the maze has shifted once again. *Oliphant* was the biggest modern source of incoherence, and VAWA should be understood as an attempt to restore jurisdictional sense. With *Castro-Huerta*, the Supreme Court threw a wrench in the project of coherence.[66] Tribes, states,

61. Oklahoma v. Castro-Huerta, 597 U.S. 629 (2022).

62. Phillip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 10 (1999).

63. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

64. *Castro-Huerta*, 597 U.S. at 655–56.

65. *See, e.g.*, Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 504 (1976).

66. Native advocates and scholars denounced *Castro-Huerta* as a terribly mistaken decision and "a massive blow to tribal sovereignty." *NARF/NCAI Joint Statement on SCOTUS Ruling on*

and the federal government have more overlapping criminal jurisdiction than ever. However, there is no national scheme for coordinating prosecutions. For a particular class of non-Indian offenders who harm Native victims, we could see three separate sovereigns juggling prosecutorial prerogatives. Before VAWA and *Castro-Huerta*, Indian country had a particular public safety problem. The absence of jurisdiction excepting underutilized federal jurisdiction created a jurisdictional void in which offenders could escape the rule of law.[67] The Court has created a new problem. Instead of an absence of jurisdiction, residents of Indian country are now subject to overlapping, excessively complex concurrent jurisdiction exercised by tribes, states, and the federal government.

In this Article, I address the new problem with a novel approach. I recognize the byzantine scheme of criminal jurisdiction in Indian country as a federalism problem: destructive conflict between sovereigns in our common constitutional system. I posit that as a federalism problem, criminal jurisdiction warrants a federalism solution. In other words, to achieve better governance, we should strive for an institutional arrangement guided by federalism values, such as self-rule, innovation, and minority empowerment.[68] Our national project for pluralist democracy demands that self-determination be allowed to flourish on tribal land. Through a curated survey of federalism theories, I ultimately argue that to achieve the best promises of federalism, tribal autonomy must be protected as a constitutive element of our federal structure.

Part I begins with an overview of the American federal system—how states, tribes, and the federal government relate to one another. I do not touch on the related but distinct political status of American territories—such an inquiry lies beyond the scope of this project.[69] Part II then recounts the major

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Castro-Huerta v. Oklahoma, NATIVE AM. RTS. FUND (July 7, 2022), https://narf.org/castro-huerta-v-oklahoma-scotus-ruling [https://perma.cc/FC5Y-DTVZ] (statement of Fawn Sharp, President, National Congress of American Indians); *see also* Elizabeth Hidalgo Reese, *Conquest in the Courts*, THE NATION (July 6, 2022), https://www.thenation.com/article/society/supreme-court-castro-huerta/ [https://perma.cc/27QE-SBTH].

67. There is a perception of Indian country as a law-free zone for white offenders who victimize Native women. Garet Bleir & Anya Zoledziowski, *The Missing and Murdered: "We as Native Women Are Hunted,"* INDIANZ (Aug. 27, 2018), https://www.indianz.com/News/2018/08/27/the-missing-and-murdered-we-as-native-wo.asp [https://perma.cc/ZHT9-J9G3].

68. *See infra* Part IV.

69. *See, e.g.*, Puerto Rico v. Sanchez Valle, 579 U.S. 59, 59–60 (2016); Christina Duffy Ponsa-Kraus, *The* Insular Cases *Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2452 (2022); Addie C. Rolnick, *Indigenous Subjects*, 131 YALE L.J. 2652, 2657–60 (2022).

cases and statutes that have defined criminal jurisdiction in Indian country prior to VAWA 2013. Throughout this section, I observe competing impulses in federal law and policy: on the one hand, federal recognition of tribal sovereignty, and on the other, federal disdain for tribal justice and distrust of tribal institutions. I suggest that these persistent attitudes help explain the distinct landscape of tribal criminal jurisdiction as well as the transformation of the tribal-federal relationship from diplomatic to federalist.

Part III addresses the most recent developments in criminal jurisdiction. I examine the fine details of VAWA 2013, VAWA 2022, *McGirt v. Oklahoma*, and *Oklahoma v. Castro-Huerta*—including all the opportunities and barriers these legal developments present to the administration of tribal justice. Finally, Part IV employs theories of federalism to make sense of the criminal jurisdiction developments. I identify opportunities for tribal innovation, minority empowerment, national agenda-setting, interdependence, and tribal dissent. Along the way, I engage with the concern that assimilation is the cost of tribal autonomy in the American constitutional order.

I. A SKETCH OF AMERICAN FEDERALISM

In this Part, I explore the relationships between tribes, states, and the federal government. I begin with an attempt to define federalism as a system of government, an aspirational goal, and a political practice. Next, I turn to the legal and historical structures that guide current relations between the sovereigns in the United States. I give an overview of the constitutional provisions concerning tribes' relationship to the national government, treaty histories, the trust relationship, and the plenary power doctrine. The Native Nations of the United States are characterized by incredible diversity, and by discussing tribes categorically I do not mean to undercut their heterogeneity. Rather, I aim to describe their common political status in the American federal system. In this Part, I also consider the relationships between the individual citizens of these polities and the federal government.

A. Defining Federalism

Federalism is a governing system of "self-rule plus shared rule."[70] Proponents of the 1789 Constitution described this structure as a division of

70. ELAZAR, *supra* note 8, at 12.

power that would safeguard the rights of the American people.[71] As James Madison wrote in The Federalist 51:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.[72]

In this passage, Madison describes two forms of federalism: first, that of the relations among states and the national government, and second, the separation of powers within each of those governments. The first form is central to this study of tribal political status.

Madison did not include tribes in his description of the federal system of America; at the time of the Constitutional Convention, tribes operated more like foreign nations.[73] The young republic's political ties to tribes were better characterized as diplomatic, rather than federal. But federalism evolves. Beyond basic principles, the system articulated by the first founding generation does not wholly describe the federalism we experience today.[74] Federalism should be understood as more than constitutional positivism; at heart, it is the practice of coordinated sovereigns. In other words, understanding federalism requires some empirical study, not just formalist theory.[75] While their incorporation was not completed in the 1789 Constitution, tribal sovereigns have become important players in American federalism.

Federalism describes political systems in which political power is shared between central and subordinate authorities, and the political authority of the subordinates exists independent of the central government.[76] Our cities and counties are not part of our federalist structure because their authority is entirely delegated by the states. In contrast, states have political authority independent from the national government.[77] The original thirteen states possessed sovereign authority prior to the adoption of the Constitution, and they retain residual sovereignty. Every state admitted to the Union since ratification has been assigned the same independent authority under the equal

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71. THE FEDERALIST NO. 51 (James Madison), NO. 9 (Alexander Hamilton).
72. THE FEDERALIST NO. 51 (James Madison).
73. *See infra* Part II.A.
74. Kramer, *supra* note 17, at 1490–91.
75. *See* ELAZAR, *supra* note 8, at xii.
76. Kramer, *supra* note 17, at 1488 n.5.
77. *Id.*

footing doctrine, even though most never existed independent of the national government.[78] Tribes, like the original thirteen states, all possessed independent sovereignty prior to the advent of the United States. The doctrines of federal Indian law recognize the persistence of inherent tribal sovereignty, limited by federal legislation. Thus, tribes are also subordinate political authorities in our federal system.

Federalism is a malleable, dynamic term. It means more than the structures sketched out in the Constitutional text. Federalism describes an arrangement of institutions, the work of political actors, and a common political culture.[79] Federalism invokes a myriad of political virtues, at times in tension with one another.[80] Federalism is meant to protect individual freedoms but also to ensure self-determination through local majoritarian rule.[81] It enables pluralism on a national scale by facilitating regional self-sorting into homogenous political communities.[82] A fundamental purpose of federalism is stability:[83] since the inception of the United States, federalism has been an essential means for national political consensus in our pluralist democracy. It enables the peaceful coexistence of disparate interests by facilitating local self-rule and restraining national majoritarian intervention.[84] To be sure, throughout our history, the limits of local self-determination have been fiercely, even violently contested. As our democracy expands to include ever more diversity, the continued negotiation of federalism remains critical to national stability.

According to Larry Kramer, federalism is all about finding the appropriate balance between state and federal power, and the best model of federalism is one that can effectively adapt its allocations of authority.[85] Some government services are best administered at the state level, while others are best

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78. *See* Pollard v. Hagan, 44 U.S. (3 How.) 212, 216 (1845); Shelby Cnty. v. Holder, 570 U.S. 529, 544 (2013).

79. *See* ELAZAR, *supra* note 8, at 12 ("The essence of federalism is not to be found in a particular set of institutions but in the institutionalization of particular relationships among the participants in political life."); *see also* Kramer, *supra* note 17, at 1488 n.5 ("Federalism is a theory of institutions."); *id.* at 1551 (describing the culture of federalism).

80. *See* Requejo & Sanjaume-Calvet, *supra* note 11, at 7.

81. *See* Amar, *supra* note 14, at 1243; James F. Blumstein, *Federalism and Civil Rights: Complementary and Competing Paradigms*, 47 VAND. L. REV. 1251, 1253 (1994).

82. *See* Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 88 (2014).

83. *See* Calabresi, *supra* note 9, at 762.

84. *Id.*

85. Kramer, *supra* note 17, at 1502, 1514.

administered nationally.[86] And the most ideal distribution of authority differs over time in response to changing conditions.

I take Kramer's description to imply that federalism is not only a set of institutional relationships but also a practice. Institutional relationships must evolve to meet new challenges of governance. Actors in every level of government play a role in this work. Elected representatives in both the national government and the subordinate sovereigns are essential to the practice of federalism. They implement national mandates, exercise discretion in the administration of national policies, and develop cooperative arrangements for better government, all the while responding to the desires of various constituencies.

Courts can also play a significant role in the practice of federalism. Writing in 1994, Kramer observed that federal courts were largely abstaining from the negotiation of federalism, leaving it instead to the political process.[87] To Kramer, this was not a bad thing: judges are not the best actors to define our federalism as they lack the resources and mechanisms to evaluate effective governmental arrangements, they lack democratic legitimacy to make such major decisions, and they are institutionally reluctant to make expedient changes to the status quo.[88] What Kramer missed in his 1994 account is that while the federal judiciary may have stepped back from delineating state powers, it still continued to aggressively police tribal sovereignty. Moreover, the Supreme Court has since come to take a far more active role in defining the relationship between states and the federal government. The anti-commandeering doctrine,[89] stricter readings of Congress's Commerce Clause power,[90] and heightened limitations on Congress's Fourteenth[91] and Fifteenth Amendment[92] Enforcement Powers are mechanisms by which the present Court works to redefine federalism.[93]

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86. *Id.* at 1513.

87. *Id.* at 1514.

88. *Id.* at 1500.

89. *See* New York v. United States, 505 U.S. 144, 144–45 (1992); Printz v. United States, 521 U.S. 898, 898–99 (1997); Murphy v. Nat'l Collegiate Athletic Ass'n, 584 U.S. 453, 472 (2018).

90. *See* United States v. Lopez, 514 U.S. 549, 549 (1995); United States v. Morrison, 529 U.S. 598, 598–99 (2000); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 520–21 (2012).

91. City of Boerne v. Flores, 521 U.S. 507, 507 (1997).

92. Shelby Cnty. v. Holder, 570 U.S. 529, 553 (2013).

93. *See* MICHAEL S. GREVE, REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN 1 (1999) (describing a federalist renaissance at the Supreme Court).

B. Sovereign-to-Sovereign Relations

States and tribes have approximately parallel sovereign status rooted in distinct histories and sources of authority. In this section, I first review states' relation to the federal government as outlined in the 1789 Constitution. Next, I consider tribes' relation to the federal government, informed by the Constitution, treaty history, and the doctrine of plenary power. Along the way, I consider how both states and tribes are practically dependent on the federal government. Last, I briefly consider relations between the subordinate sovereigns.

States feature prominently in the text of the Constitution. They directly mediate the development of national politics.[94] The people of the states elect members of the House of Representatives,[95] and originally the state legislatures selected senators.[96] The states appoint electors to vote for the President.[97] States determine the time, place, and manner of federal elections.[98] When Congress proposes amendments, they must be ratified by three-fourths of state legislatures or state conventions.[99] As Herbert Wechsler observed, states' role in the national political process results in a system that is intrinsically adapted to resist intrusions by the federal government into state domains.[100] And of course, the Tenth Amendment explicitly reserves all power not delegated to the United States by the Constitution to the states and the people.[101]

The Constitution also imposes restrictions on states. The Supremacy Clause of Article VI states that the Constitution, the laws, and the treaties of the United States "shall be the supreme Law of the Land," binding on every judge in every state.[102] States are forbidden from entering into treaties or alliances,[103] minting their own currency,[104] or imposing duties on imports or exports.[105] States cannot maintain troops or engage in war without direction

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94. Wechsler, *supra* note 2, at 548.
95. U.S. CONST. art. I, § 2, cl. 3.
96. *Id.* § 3, cl. 1 (amended 1913).
97. *Id.* art. II, § 1, cl. 2.
98. *Id.* art. I, § 4, cl. 1.
99. *Id.* art. V.
100. Wechsler, *supra* note 2, at 558. *But see* Kramer, *supra* note 17, at 1508 (claiming that the political safeguards, namely representation in the Senate, "basically evaporated" with the ratification of the Seventeenth Amendment).
101. "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." U.S. CONST. amend. X.
102. *Id.* art. VI, cl. 2.
103. *Id.* art. I, § 10, cl. 1.
104. *Id.*
105. *Id.* cl. 2.

from Congress.[106] And states must give full faith and credit to the other states.[107]

Native people are mentioned explicitly only twice in the 1789 Constitution. First, the Article I apportionment of taxes and representatives excludes "Indians not taxed."[108] Second, in the Commerce Clause: Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[109] While the first occurrence indicates how Indians are decidedly outside the national political body, the second presents an ambiguous status by apparently distinguishing tribes from both states and foreign nations.[110] On their own, these references to Native people do little to explain tribes' status in American governance.

The structure of the Constitution is more informative. Scholars and jurists examine the Indian Commerce Clause and the apportionment formula in the context of a whole constellation of provisions—the Treaty Clause, the Territory Clause, the War Power Clause, the Spending Clause, the Supremacy Clause, and the Powers Denied States Clauses—to elicit a political relationship between the federal government and Indian tribes.[111] Gregory Ablavsky's *Beyond the Indian Commerce Clause* draws on such a collection of constitutional provisions as well as practice in the Washington Administration to stake out a historically rigorous, originalist argument for a broad and exclusive federal power to manage relations between Indians and non-Indians in American territory.[112] Justice Gorsuch refers to this arrangement as the Constitution's "Indian-law bargain," in which tribes retained sovereign authority in all aspects of internal self-government, the federal government gained exclusive power to govern relations with tribes

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106. *Id.* cl. 3.

107. *Id.* art. IV, § 1.

108. *Id.* art. I, § 2, cl. 3 (amended 1866). This apportionment provision was then reiterated in the Fourteenth Amendment.

109. *Id.* § 8, cl. 3; *see also* Ablavsky, *supra* note 24, at 1015 (discussing the original meaning of the Indian Commerce Clause).

110. In *Cherokee Nation*, Chief Justice Marshall determined that tribes were not foreign nations for the purposes of constitutional interpretation, and instead should be considered "domestic dependent nations," whose "relation to the United States resembles that of a ward to his guardian." Cherokee Nation v. Georgia, 30 U.S. 1, 13 (1831). This decision was central to the development of what Skibine calls the dependency paradigm of Indian law. Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within "Our Federalism": Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667, 670–72 (2005).

111. *See* Haaland v. Brackeen, 599 U.S. 255, 310 (2023) (Gorsuch, J., concurring); Fletcher, *supra* note 3, at 74; Ablavsky, *supra* note 24, at 1040–41. Ablavsky argues that the drafters of the Constitution understood broad national power over Indian affairs emerging out of the aggregation of multiple constitutional provisions, in an interpretation akin to field preemption. *Id.* at 1044.

112. Ablavsky, *supra* note 24, at 1050–51.

and enforce this constitutional arrangement, and states had no role to play in Indian affairs.[113] Others disagree. Justice Thomas reads each provision individually, declining to find a common scheme.[114] Moreover, Justice Gorsuch admits that this original constitutional arrangement has been significantly distorted and does not describe present day practice.[115]

To understand tribes' relations to the other sovereigns, we have to examine a broader range of constitutive documents. While states' relationship with the federal government is defined absolutely by the Constitution, tribes' relationship to the federal government is rooted in treaties.[116] The treaty relationship predates the Constitution and the Union itself.[117] The preceding British colonial governments' engagement with Native Nations indicates a basic recognition of tribal sovereignty.[118] There are many examples of government-to-government diplomacy, as Europeans and Natives negotiated treaties and waged wars.[119] After the American Revolution, formal diplomacy between tribes and American colonists remained important. Wenona Singel has argued that treaties were the foundational constitutive documents of the federal-tribal relationship in the early republic.[120] Treaties were the first step in the incorporation of tribes into the American federal system.[121] But the United States officially stopped making treaties with tribes in 1871.[122]

The European law of nations offered the United States a legal mechanism to incorporate and subordinate tribal sovereigns in the American system. The federal government traces its authority over tribes and Indians to the doctrine of discovery, a mechanism from the European law of nations to facilitate the colonization of the Americas.[123] The doctrine of discovery asserts that whichever European power first "discovers" part of the New World earns the exclusive right to claim that land and treat with Native inhabitants.[124] In

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113. *Brackeen*, 599 U.S. at 308 (Gorsuch, J., concurring).

114. *Id.* at 350 (Thomas, J., dissenting).

115. *Id.* at 326 (Gorsuch, J., concurring) (observing that "the Constitution reflected a carefully considered balance between tribal, state, and federal powers. That scheme predated the founding and it persisted long after. It is not, however, the balance this Court always maintained in the years since.").

116. Fletcher, *supra* note 3, at 55, 59.

117. *See* COHEN'S HANDBOOK, *supra* note 20, § 1.02–03.

118. *Id.* § 1.02 (1).

119. *See, e.g.*, NICOLE EUSTACE, COVERED WITH NIGHT: A STORY OF MURDER AND INDIGENOUS JUSTICE IN EARLY AMERICA 3 (2021).

120. Singel, *supra* note 6, at 790.

121. *Id.* at 791.

122. 25 U.S.C. § 71 (2018).

123. Johnson v. M'Intosh, 21 U.S. 543, 573–74 (1823).

124. *Id.* at 573–74.

Johnson v. M'Intosh, Chief Justice Marshall imported this international law doctrine into American law, asserting that the United States inherited Britain's claims to the lands of North America, subject only to the Indian right of occupancy.[125] With the doctrine of discovery, the Supreme Court was able to both assert the United States' status among European nations and subordinate the legal claims of Native nations.[126] This colonial concept from European international law became the root of a series of Indian law concepts: the notion of Indian title, tribes as domestic dependent nations, the trust relationship, and ultimately the plenary power doctrine.[127]

The plenary power doctrine encapsulates a fundamental difference between tribes and states as they relate to the federal government. Federal power over states is limited by the text of the Constitution.[128] With respect to states and non-Indians, the national government is a government of enumerated powers.[129] While those powers have expanded over time, they all draw authority from the founding document.

Not so with tribes. According to the Supreme Court, Congress exercises plenary power over tribes.[130] The plenary power doctrine asserts vast Congressional authority over tribes and Indians.[131] Justified by this doctrine, Congress has historically legislated to interfere in internal tribal

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125. *Id.* at 574.

126. *Id.* at 573–74.

127. ROBERT J. MILLER ET AL., DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES 3–4 (2010).

128. M'Culloch v. Maryland, 17 U.S. 316 (1819). The first line of Article I of the U.S. Constitution reads: "All legislative Powers herein granted shall be vested in a Congress of the United States." U.S. CONST. art. I, § 1. This line has been read to describe a government of limited powers. William N. Eskridge, Jr. & Neomi Rao, *Article I, Section 1: General Principles*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/articles/article-i/clauses/749 [https://perma.cc/AS83-DHVZ]. Those powers "herein granted" are enumerated in Section 8 of Article I. U.S. CONST. art. I, § 8.

129. United States v. Lopez, 514 U.S. 549, 552 (1995) ("We start with first principles. The Constitution creates a Federal Government of enumerated powers."). *But see* Kramer, *supra* note 17, at 1488 (asserting that judges and advocates who cling to the notion of enumerated powers are "stunningly ignoring that the practical effect of this enumeration has been all but obliterated in the years since the New Deal").

130. Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903). While Justices Gorsuch, Alito, and Thomas question the legitimacy of this doctrine, a current majority reaffirmed Congress's plenary power in its recent opinion. Haaland v. Brackeen, 599 U.S. 255, 275 (2023). Some observers, such as Justice Alito, are tempted to read plenary by its standard dictionary definition—absolute. *Id.* at 374 (Alito, J., dissenting). But this definition is unhelpful and does not describe the actual doctrine as it functions today.

131. *See Lone Wolf*, 187 U.S. at 565–67.

government,[132] unilaterally abrogate its treaties with tribes,[133] diminish reservations,[134] steal children away to boarding schools,[135] and wholly terminate tribes.[136] Such power is untethered from the constitutional text.[137] The Court first articulated this doctrine in *United States v. Kagama*, a case reviewing the constitutionality of Congressional intervention into tribal criminal jurisdiction.[138] The *Kagama* Court cited no constitutional provision, but instead found that such power "must exist in [the federal] government, because it has never existed anywhere else . . . because it has never been denied."[139] Legal scholars have linked the nineteenth-century origins of the Indian plenary power doctrine to other troubling doctrines enabling unbridled national power in the government of the territories, immigration, and foreign affairs.[140] Essentially, Congress has used its proclaimed plenary power over

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132. United States v. Kagama, 118 U.S. 375, 384 (1886).

133. *See Lone Wolf*, 187 U.S. at 567. *But see* United States v. Sioux Nation of Indians, 448 U.S. 371, 424 (1980) (finding that the violation of the Fort Laramie Treaty of 1868 constituted a taking, such that the United States was obligated to compensate the Sioux Nation).

134. *See, e.g.*, McGirt v. Oklahoma, 140 S. Ct. 2452, 2464 (2020).

135. *See* BRYAN NEWLAND, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT 53 (2022), https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf [https://perma.cc/E5LR-2D4T]; Christie Renick, *The Nation's First Family Separation Policy*, THE IMPRINT (Oct. 9, 2018), https://imprintnews.org/child-welfare-2/nations-first-family-separation-policy-indian-child-welfare-act/32431 [https://perma.cc/UFX8-K9H7].

136. H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953).

137. *See* BLACKHAWK, *supra* note 24, at 1856 ("The plenary power doctrine is the paradigmatic example of how the law of subordination had to leave the Constitution entirely in order to thrive."). The Court at times has tried to base plenary power in the Indian Commerce Clause, but as Ablavsky argues, reliance on the Indian Commerce Clause for the doctrine of plenary power is "historically untenable." Ablavsky, *supra* note 24, at 1017. The *Brackeen* majority cites the Commerce Clause in conjunction with the Treaty Clause and an appeal to constitutional structure to ground the plenary power. Haaland v. Brackeen, 599 U.S. 255, 273–75 (2023).

138. United States v. Kagama, 118 U.S. 375, 375–76 (1886).

139. *Id.* at 384–85. According to Philip Frickey, *Kagama* is an embarrassment to American law:

> Its apparent inconsistency with the most fundamental of constitutional principles . . . is an embarrassment of constitutional theory. Its slipshod method of bootstrapping a congressional plenary power over Indian affairs is an embarrassment of logic. Its holding, which intimates that congressional power over Indian affairs is limitless, is an embarrassment of humanity.

Frickey, *supra* note 18, at 35.

140. *See* ALEINIKOFF, *supra* note 5, at 5; Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 12 (2002).

Indian affairs to change our constitutional order in regard to tribes wholly outside the amendment process.

Plenary power supposedly has limits, but those limits are poorly defined. In *Haaland v. Brackeen*, Justice Amy Coney Barrett asserted on behalf of the majority that "Congress's authority to legislate with respect to Indians is not unbounded. It is plenary within its sphere, but even a sizeable sphere has borders."[141] Unfortunately, Justice Barrett neglected to identify those borders. One account of boundaries centers the trust relationship.[142] Alex Skibine argued that the trust relationship should be understood as both the source of plenary power and its limit.[143] In practice, that means that Congress can only use its plenary power to act in the interest of Indians. But this interpretation has a lot of troublesome history to overcome, given federal policies of assimilation and termination, not to mention federal support for campaigns of extermination.[144]

Philip Frickey also suggested limits based in international law. International law justified congressional power over tribes in the first place, so international law should define its limits.[145] International law, including the evolving body of law around the rights of Indigenous peoples, should continue to inform federal Indian law and constitute the limits of federal power.[146] While these proposed limits could make the plenary power doctrine more palatable, none have been wholly embraced by the federal government. In our present era of tribal self-determination, tribes enjoy respect and relative deference from the federal government. But histories of removal and termination remind tribes that their continued existence depends on the will of Congress, so long as the plenary power doctrine remains good law.

The Roberts Court may be poised to transform the plenary power doctrine, to abandon its disturbing origins and refashion it with clearer constitutional restraints. In *Brackeen*, Justice Barrett recounted the history of plenary power with one striking omission: *Kagama* is nowhere to be found.[147] By excising *Kagama* from the canon, Justice Barrett was able to use more recent caselaw to tell a story of plenary power rooted in the Constitution.[148] While the

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141. *Brackeen*, 599 U.S. at 276.

142. Skibine, *supra* note 6, at 42.

143. *Id.*

144. COHEN'S HANDBOOK, *supra* note 20, § 1.04.

145. Frickey, *supra* note 18, at 37.

146. *Id.*; *see* ALEINIKOFF, *supra* note 5, at 86.

147. Justice Barrett cites long lists of precedent, but *Kagama* never makes an appearance. Haaland v. Brackeen, 599 U.S. 255, 275 (2023).

148. *Id.* at 273–74.

majority's constitutional analysis was admittedly hazy, perhaps it signals an interest in critically reevaluating this central tenet of federal Indian law.

Justice Gorsuch took a bolder stance in his concurrence. Comparing *Kagama* to *Plessy v. Ferguson*, he rejected the entire premise of Congressional plenary power.[149] According to Justice Gorsuch, *Kagama* was a "doctrinal misstep" that "sent this Court's Indian-law jurisprudence into a tailspin from which it has only recently begun to recover."[150] His account of Congressional power over Indian affairs is rooted in the Indian Commerce Clause,[151] and it does not allow for federal legislation that limits, modifies, or in any way eliminates tribal self-government.[152] Justices Samuel Alito and Clarence Thomas are also skeptical of plenary power, though they are less inclined to find any alternative constitutional bases for major Indian policies including the Indian Child Welfare Act.[153] Thus, the hefty *Brackeen* decisions may foretell future changes in the formal relationship between tribes and the federal government, at least in the dimension of Congressional plenary power.[154]

In the practical operation of federalism, tribes and states share a major commonality: reliance on federal funding. The federal government has limited power to unilaterally enforce policies on the states. But it has extensive power to incentivize state cooperation through its powers to raise taxes and spend money.[155] In theory, states are at liberty to refuse federal grants when they do not approve of the policy strings attached. In practice, few can govern without federal support.[156] Generally speaking, tribes are even

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149. *Id.* at 326–27 (Gorsuch, J., concurring). Justice Gorsuch asserted that the doctrine lacked a constitutional basis and led to results that should be inconceivable "for anyone who takes the Constitution's original meaning seriously." *Id.* at 328.

150. *Id.* at 326.

151. *Id.* at 319–20, 325.

152. *Id.* at 325–26.

153. *See id.* at 335 (Thomas, J., dissenting), 373–74 (Alito, J., dissenting).

154. For a more in-depth review of the plenary power issue in *Brackeen*, see M. Henry Ishitani & Alexandra Fay, *Revising the Indian Plenary Power Doctrine*, 29 MICH. J. RACE & L. (forthcoming 2024).

155. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 577–78 (2012) (describing line between incentives and coercion).

156. According to the Tax Foundation, in fiscal year 2017, 22.9% of all state revenue came from federal grants-in-aid. Janelle Fritts, *Which States Rely the Most on Federal Aid?*, TAX FOUND. (Feb. 12, 2020), https://taxfoundation.org/state-federal-aid-reliance-2020/ [https://perma.cc/9SAH-XM3Y]. Federal aid accounted for 46.1% of Montana's revenue, 44.5% of Wyoming's, and 43.7% of Louisiana's. *Id.* On the other end of the spectrum, federal aid only accounted for 20.7% of Hawaii's revenue and 21.1% of Virginia's. *Id.* Pandemic relief resulted in even higher rates of state reliance on federal funds. According to the Pew Charitable Trusts, in fiscal year 2020, 36% of all state revenue came from federal aid. *Where States Get Their Money:*

more dependent on federal funding, given the history of dispossession and current law undermining tribal power to tax.[157] In this way, tribes and states are both beholden to federal policy priorities due to their dependence on federal funding.

While tribes and states share common dependencies on the federal government, tribes lack the safeguards that states have to prevent federal domination. From the provisions of the Constitution and the institutions and practices that have grown out of its structure, states enjoy various political and legal mechanisms that insulate them from federal overreach.[158] In contrast, tribes are subject to the undefined plenary power of Congress, without robust political safeguards.[159] National termination policy exemplifies this difference in stark terms: in the mid-twentieth century, the federal government was literally terminating tribes, stripping them of their sovereign political status;[160] states have never faced such a naked existential threat from the federal government.[161] One of the many lauded benefits of vertical federalism is its function to check federal tyranny.[162] Federalism may protect states and their citizens, but the history of federal-tribal relations is full of unchecked federal power.[163]

FY 2020, PEW (Feb. 24, 2022), https://www.pewtrusts.org/en/research-and-analysis/data-visualizations/2022/where-states-get-their-money-fy-2020 [https://perma.cc/968S-DSZL]. Federal funding was the single largest source of dollars in eighteen states (whereas state taxes were the largest source for the other thirty-two states). *Id.* In 2020, federal aid accounted for 56.3% of Wyoming's revenue, 50.7% of Alaska's, 50.6% of Louisiana's, and 50.2% of South Dakota's. *Id.* Meanwhile, Hawaii's federal aid rose to 24.4% of the state's revenue, and Virginia's portion rose to 27.8%. *Id.*

157. Land is wealth, and Native Nations have been repeatedly robbed. Today, tribes are limited in their power to tax activity on the land within their reservations. To be sure, the Court has recognized tribal power to tax as "an essential attribute of Indian sovereignty." Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982). But in 2001, the Court limited that power to tribal trust land. Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001). Meanwhile, the Court allows state taxation on fee lands. Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 270 (1992); *see also* Matthew L.M. Fletcher, *Uncomfortable Truths About Sovereignty and Wealth*, 27 ROGER WILLIAMS U. L. REV. 288, 303 (2022).

158. U.S. CONST. amend. X.

159. Lone Wolf v. Hitchcock, 187 U.S. 553, 567 (1903).

160. *See* H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953) (enacted) (announcing policy of termination); *see also, e.g.*, Menominee Indian Termination Act, H.R. Res. 2828, 83d Cong., 68 Stat. 250 (1954), *repealed by* Menominee Restoration Act, H.R.J. Res., 93d Cong., 87 Stat. 770 (1973).

161. *But see* CHARLES SUMNER, *Emancipation Our Best Weapon*, *in* CHARLES SUMNER: HIS COMPLETE WORKS 1, 14 (1872) (describing how rebellion of slaveholding states justified exceptional federal intervention).

162. *See* Wechsler, *supra* note 2, at 543–44.

163. Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 195 (1984).

Finally, I will add a word on horizontal federalism, that is, the federalist relations among the subordinate sovereigns. In recent decades, federalism scholarship has seen a growing literature on horizontal federalism, on those relationships between states.[164] The Constitution guides these interstate relations via the Full Faith and Credit Clause[165] and the Dormant Commerce Clause.[166] While there is not a singular authoritative theory of horizontal federalism, issues of horizontal federalism are everywhere.[167] Just as state policies regularly impose costs and burdens onto other states and individuals outside state territorial boundaries, so too do state and tribal policies generate unwanted spillover effects.[168] These horizontal federalism conflicts can result in federal intervention by the judiciary or Congress.

Indeed, conflict between states and tribes is the driving force behind much of federal Indian law jurisprudence.[169] And these conflicts are often far more direct than the imposition of economic externalities from one state's new set of auto emissions regulations. In the 1830s, the State of Georgia attempted to nullify the laws of the Cherokee Nation, abolish its government, and assume its territory.[170] These state actions paired with tribal resistance brought about John Marshall's landmark decisions in *Cherokee Nation v. Georgia*[171] and *Worcester v. Georgia.*[172] Thus, from the 1830s to the most recent 2022 ruling in *Oklahoma v. Castro-Huerta*,[173] conflicting claims between tribes and states have occupied judicial and political attention and worked to define the meaning of tribal sovereignty.

C. Individuals' Relationships with the Federal Government

We can also examine American federalism through the individual rights and liberties ensured by the federal government. Upon the ratification of the Constitution and the Bill of Rights, American citizens enjoyed a body of

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164. *See* Gerken & Holtzblatt, *supra* note 82, at 60 n.7.

165. U.S. CONST. art. IV, § 1.

166. *See, e.g.*, Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2459 (2019).

167. *See* Gerken & Holtzblatt, *supra* note 82, at 62.

168. *See, e.g.*, Washington v. Confederated Tribes, 447 U.S. 134, 154 (1980) (explaining problem of double taxation in cigarette sales); Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 676 (1979) (observing that settlers' overfishing effectively robbed Indians of their treaty rights); California v. Cabazon Band of Mission Indians, 480 U.S. 202, 211 (1987) (describing potential negative effects of tribal gambling operations on state).

169. *See* COHEN'S HANDBOOK, *supra* note 20, § 1.03(2).

170. JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 516 (1998).

171. Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

172. Worcester v. Georgia, 31 U.S. 515 (1832).

173. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022).

enumerated rights against the newly formed national government. The rights to due process, jury trials, free speech, and more prevented abuse by the national government. In the early years of our federalist system, they did not restrict state[174] or tribal governments.[175]

The Fourteenth Amendment enabled Americans to exercise constitutional rights against states.[176] By the process of incorporation, the Supreme Court gradually imposed most of the Bill of Rights on states.[177] The Fourteenth Amendment and the Habeas Corpus Act of 1867 both arose out of the Civil War, and both exemplify a great shift in state-federal relations.[178] The Civil War vindicated federal supremacy by crushing the Southern slave power; that victory and the following years of Reconstruction mark a significant expansion of federal power over states.[179] Central to this expansion was the federal guarantee of individual rights—starting with notions of birthright citizenship[180] and universal male suffrage.[181]

Tribal governments were not bound by the Bill of Rights for most of American history.[182] Indeed, today they are still untouched by some constitutional provisions, such as the Establishment Clause,[183] the right to bear arms,[184] the right to a public defender,[185] and the freedom of travel.[186]

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174. *See* Barron v. Mayor of Baltimore, 32 U.S. 243, 250 (1833).

175. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

176. U.S. CONST. amend. XIV, § 1.

177. *See* McDonald v. City of Chicago, 561 U.S. 742, 763 (2010).

178. U.S. CONST. amend. XIV, § 1; Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385 (1867) (extending right to federal habeas review to detainees in state courts).

179. Eric Foner, *Reconstruction*, BRITANNICA (Nov. 25, 2023), https://www.britannica.com/event/Reconstruction-United-States-history [https://perma.cc/CB54-SUXQ].

180. U.S. CONST. amend. XIV, § 1.

181. U.S. CONST. amend. XV, § 1. To be sure, this constitutional aspiration has been resisted since its ratification.

182. Talton v. Mayes, 163 U.S. 376, 384 (1896).

183. *See Indian Civil Rights Act*, TRIBAL LAW & POL'Y INST., https://www.tribal-institute.org/lists/icra.htm [https://perma.cc/4FPV-MRHX] (explaining that Congress chose to exclude the equivalent of an Establishment Clause from "Indian Bill of Rights" that was passed in 1968).

184. Riley, *supra* note 28, at 1676.

185. For cases in tribal court involving Indian defendants facing a possible sentence of less than one year in prison, tribes are not obligated to provide counsel. Barbara L. Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, MICH. J. RACE & L. 317, 347–48 (2013). *But see* 25 U.S.C. § 1302(c)(1)–(2) (requiring court-appointed counsel for indigent defendants in TLOA cases); *id.* § 1304(d)(2) (requiring court-appointed counsel for indigent defendants in VAWA cases).

186. States cannot burden citizens' right to travel. Shapiro v. Thompson, 394 U.S. 618, 630 (1969). In contrast, tribes retain the power to wholly exclude people from their territory. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141 (1982).

This discrepancy stems from the Indian Civil Rights Act of 1968 ("ICRA"), in which Congress exercised its plenary power[187] to impose most—but not all—of the Bill of Rights upon tribes.[188] While ICRA sought to enshrine major American constitutional principles of individual liberty in tribal governments, the Act simultaneously restricted federal intervention to protect tribal self-government. While Americans can bring a range of civil claims in federal court against states for violating their constitutional rights, federal courts will not hear the same claims against tribes.[189] Federal review is limited to habeas petitions.[190] Except in cases of physical detention, the federal judiciary will not intervene in tribal governance, even to enforce individual constitutional rights.

Another important distinction pertains to national citizenship. In *Dred Scott v. Sandford*, Justice Taney infamously found that free Black men were not citizens of the United States.[191] In doing so, he distinguished Black people from Indians: although Indians were "uncivilized," the United States had always recognized them as free and independent peoples, and they could someday be naturalized like other foreign nationals.[192] When the Fourteenth Amendment was ratified in 1868, it overturned *Dred Scott* and gave citizenship to everyone born in the United States—except Indians.[193] When Nebraska officials denied John Elk, a Native man, the right to vote in 1880, Elk brought suit under the Fourteenth and Fifteenth Amendments.[194] Elk was born in the United States, had severed his political relationship with his tribe, and claimed American citizenship by birthright.[195] The Supreme Court disagreed, relying heavily on the second clause of the first sentence of the Fourteenth Amendment: "All persons born or naturalized in the United

187. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 57 (1978).

188. The ICRA provisions are not verbatim copies of the Bill of Rights. *See* 25 U.S.C. §§ 1301–03.

189. The Supreme Court articulated this distinction in *Santa Clara Pueblo v. Martinez*, in which a tribal member sought declaratory and injunctive relief against her tribe in federal court on the theory that the tribe violated ICRA's guarantee of equal protection. 436 U.S. at 51. The Tenth Circuit had found that the tribe's citizenship rules featured invidious discrimination based on sex, in violation of equal protection. *Id.* at 55. The Supreme Court reversed—not because the tribe's actions did not amount to an equal protection violation, but because the statute provides no means for federal review. *Id.* at 58, 72. The Court refused to find any implied right to civil actions in federal court. *Id.* at 72.

190. 25 U.S.C. § 1303.

191. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 454 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

192. *Id.* at 403–04.

193. U.S. CONST. amend. XIV, § 1.

194. Elk v. Wilkins, 112 U.S. 94, 96 (1884).

195. *Id.* at 95.

States, *and subject to the jurisdiction thereof*, are citizens of the United States and of the state wherein they reside."[196] According to the Court, anyone born into tribal membership was excluded from this provision and could only become a citizen through naturalization.[197] In 1924, Congress finally corrected this ruling with the Indian Citizenship Act, making all Indians American citizens.[198]

This difference in the mechanisms of naturalization offers yet another distinction between states and tribes' status in our federal system. On the one hand, these cases emphasize tribal sovereignty, as the Court effectively treated tribes as foreign nations.[199] On the other hand, the denial of citizenship to Native people denoted inferior political status and historically facilitated discriminatory and even genocidal policies.[200] The Indian Citizenship Act represents a milestone in the incorporation of tribes into the American constitutional order.

One last individual right worth examining is that against double jeopardy. Double jeopardy and the corresponding dual sovereignty doctrine showcase the intersection of federalism and criminal law through recognition of both state and tribal sovereignty.[201] The Fifth Amendment restricted prosecutorial action by the federal government upon ratification, was then incorporated via the Fourteenth Amendment to restrict states,[202] and eventually was imposed on tribes via the Indian Civil Rights Act.[203] The double jeopardy clause guarantees that "No person shall . . . for the same offence . . . be twice put in jeopardy of life or limb."[204] Under the dual sovereignty doctrine, the Supreme Court interprets this provision to prohibit duplicative prosecutions stemming from a single sovereign.[205] And the Court recognizes both states and tribes as distinct sovereigns, such that states, tribes, and the federal government can

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196. U.S. CONST. amend. XIV, § 1; *Elk*, 112 U.S. at 102 (emphasis added).

197. *Elk*, 112 U.S. at 102.

198. Indian Citizenship Act, Pub. L. No. 68-175, 43 Stat. 253 (1924) (codified at 8 U.S.C. § 1401(b)).

199. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 454 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (characterizing Native people as foreign nationals).

200. *See* MADLEY, *supra* note 25, at 171.

201. *See generally* Riley & Thompson, *supra* note 54.

202. *See* U.S. CONST. amend. V; Benton v. Maryland, 395 U.S. 784, 787 (1969); Riley & Thompson, *supra* note 54, at 1904.

203. *See* Riley & Thompson, *supra* note 54, at 1904.

204. U.S. CONST. amend. V.

205. *See* United States v. Lanza, 260 U.S. 377, 382 (1922) (describing "two sovereignties, deri[v]ing power from different sources"); Riley & Thompson, *supra* note 54, at 1901.

all prosecute the same conduct without violating the Fifth Amendment.[206] When the Court applied the dual sovereignty doctrine to tribal courts in *United States v. Wheeler* (1978), it affirmed that tribal prosecutorial power is inherent to tribal sovereignty rather than a power delegated by the federal government.[207]

To be sure, multiple prosecutions can only occur when multiple sovereigns have criminal jurisdiction. The potential for double tribal-federal prosecution depends on a number of factors: the identities of the defendant and victim, the nature of the offense, the location of the offense, the order of prosecutions, and even the outcome of an initial prosecution.[208] According to Angela Riley and Sarah Glenn Thompson, the defendants facing double prosecution are "overwhelmingly, if not exclusively, Indian."[209]

II. CRIMINAL JURISDICTION IN INDIAN COUNTRY

Criminal jurisdiction is a measure of sovereignty. It is a stark projection of state power, one that claims authority over people's lives, liberties, and property. In the Western tradition, criminal law is regarded as a fundamental basis of government. Thomas Hobbes wrote that the purpose of the commonwealth is to ensure peace and defense, and the Hobbesian sovereign must have all the power necessary to secure stability.[210] John Locke asserted that the primary purpose of political society is "the preservation of property," by which he meant "the mutual preservation of [individuals'] lives, liberties, and estates."[211] Locke defined political power as "a right of making laws with penalties of death, and consequently all less penalties."[212] And, of course, we have Max Weber's famous formulation that "a state is a human community that (successfully) claims the monopoly of the legitimate use of physical

206. *Lanza*, 260 U.S. at 382; United States v. Wheeler, 435 U.S. 313, 332 (1978).

207. *Wheeler*, 435 U.S. at 328. The Court recently extended this holding to include Courts of Indian Offences implementing tribal law. Denezpi v. United States, 596 U.S. 591, 605 (2022).

208. The General Crimes Act includes a provision that prevents federal prosecution when an offender has already been punished for the offense by the tribe. Riley & Thompson, *supra* note 54, at 1923–24.

209. *Id.* at 1928. This observation is tied to the fact that tribal/federal double prosecutions vastly outnumber state/federal double prosecutions. *Id.* at 1933.

210. THOMAS HOBBES, LEVIATHAN 179 (Lerner Publ'g Grp. 2018) (1651).

211. JOHN LOCKE, TWO TREATISES OF GOVERNMENT (1690), *reprinted in* LOCKE: POLITICAL WRITINGS 325 (Hackett Publ'g 2003). Locke also characterizes liberty as freedom from violence from others, something that can only be achieved by law in a political community. *Id.* at 289.

212. *Id.* at 262.

force within a given territory."[213] In all these accounts, the maintenance of public safety through the execution of criminal sanctions represents a function of the state.

Criminal law maintains political and social orders. Just as it defines community mores and the edges of acceptable behavior, criminal law also polices relations of power. In his dissection of the public execution, Michel Foucault described capital punishment as an essential "juridico-political" ceremony "by which a momentarily injured sovereignty is reconstituted."[214] In bloody spectacle, public executions demonstrated the awful superiority of the sovereign in relation to the subject.[215] According to Foucault, such a show of state violence "did not re-establish justice; it reactivated power."[216] Douglas Hay described English criminal law as a legal means to enforce the division of property.[217] According to Hay, criminal law upheld a structure of political authority premised on property.[218] The distribution of punishment and mercy—subject to the discretion of the ruling class—legitimated the English status quo.[219]

In the United States, criminal law works to enforce a racial order.[220] In the words of Michelle Alexander, "mass incarceration defines the meaning of blackness in America."[221] Criminal law is state power informed by the mores of the political community, and it can exact incredible harm to people deemed foreign to that community.

Criminal jurisdiction is the assertion of criminal law onto bodies. Thus, the imperfect criminal jurisdiction of both tribes and states is an informative measure of their status in our federalist system. Today, criminal jurisdiction in Indian country is complicated. State criminal jurisdiction is largely territorial—state prosecutorial authority depends on the geographic location of the criminal action. State prosecutions are limited by state boundaries, state law, and the federal Constitution. Federal prosecutorial authority is geographically broad—it can cover all people within the national borders of

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213. MAX WEBER, POLITICS AS A VOCATION (1919), *reprinted in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 78 (H.H. Gerth et al. eds., Routledge 2009) (emphasis removed).

214. MICHEL FOUCAULT, DISCIPLINE & PUNISH 51 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1975).

215. *Id.* at 51–52.

216. *Id.*

217. DOUGLAS HAY, *Property, Authority and the Criminal Law*, *in* ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND 17–64 (1975).

218. *Id.* at 25.

219. *Id.* at 63.

220. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 2 (2d ed. 2020).

221. *Id.* at 192. *See generally* JACKIE WANG, CARCERAL CAPITALISM (2018).

the United States. Instead, it is limited by federal statute and the federal Constitution, primarily the constitutional limitations on federal legislation. Tribal jurisdiction is different. Tribal jurisdiction not only depends on geographic location, but also on the identities of the parties involved and the nature of the crimes committed.[222] While states and the federal government prosecute non-residents and non-citizens routinely, tribes are mostly limited to policing and prosecuting Indians.[223]

In this Part, I review the origins of our modern jurisdictional scheme. I recount the cases and statutes that define the limits of tribal, state, and federal prosecutorial power. This tradition features opposing federal attitudes of disdain and recognition—how courts and Congress have been at once compelled to disparage and distrust tribal institutions but also respect tribal sovereignty. Federal impositions on tribal sovereignty can often be traced to racist assumptions of savagery, suspicions of a lack of fundamental fairness in tribal law, and the old notion that tribes are lawless and lacking the capacity to govern.[224]

The American assumption of Indian lawlessness is tied to colonial processes involving the destruction of Native legal traditions, the racialization of Indians, the criminalization of Native identities, and the prominent role of violence as a tool of colonization.[225] The destruction of Native legal and cultural institutions was a product of disease,[226] land dispossession,[227] violent conquest,[228] and forced assimilation[229]—all resulting from contact with Europeans. Meanwhile, settler ethnocentrism mistook differences in Native legal traditions for a total absence of justice.[230] The

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222. Riley & Thompson, *supra* note 54, at 1923–24.

223. *Id.*

224. Advocates for the extension of state criminal law onto tribal territory have historically relied on a savage versus civilized dichotomy to undermine tribal sovereignty. HARRING, *supra* note 38, at 52. According to such proponents: "[I]t was not sound public policy to extend any notion of sovereignty or law to the Indian tribes because that would lead to violence [and] disorder . . . and also serve the fiction of assigning some legitimacy to political structures that were primitive and uncivilized." *Id.*

225. *See* ROSS, *supra* note 38, at 12, 14 (destruction of legal traditions); *id.* at 18, 38 (assimilationist, racist policies criminalized Native culture); *id.* at 41 (criminalization of Native resistance). For the role of violence in these processes, see BLACKHAWK, *supra* note 37, at 7.

226. *See* BLACKHAWK, *supra* note 40, at 4.

227. *See* Goldberg-Ambrose, *supra* note 39, at 1410.

228. *See* BLACKHAWK, *supra* note 37, at 7.

229. *See* HARRING, *supra* note 38, at 13; ROSS, *supra* note 38, at 14.

230. As Val Napoleon explains, law is culturally bound, and thus law in foreign cultural contexts can be difficult to identify and understand. Recognizing other legal traditions is challenging when you are operating from a fundamentally foreign ontology. In particular, people

American racialization of Indians took this mistake a step further, essentializing lawlessness and violence as inherent aspects of Indianness.[231] Consider the Declaration of Independence, which lists among its grievances how the King "has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions."[232] These racial expectations justified increased violence by settlers against Native people.[233] As violence proliferated on the frontiers, policymakers in Washington used racist narratives to justify paternalist and assimilationist Indian policy.[234] While federal actors have largely abandoned overtly racist language denigrating tribal governance, echoes of these ideas persist.[235]

The opposing impulse is the federal recognition of tribal sovereignty. From its earliest dealings with Native nations, the United States has treated tribes as foreign sovereigns.[236] The United States carried on this tradition from the earliest years of the Republic.[237] The Court and Congress are beholden to the legal notion of tribal sovereignty, which today includes the

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in Western legal systems are not primed to recognize legal traditions developed by less centralized societies. Napoleon, *supra* note 44, at 139–41.

231. *See* PHILIP J. DELORIA, INDIANS IN UNEXPECTED PLACES 20–21 (2004); MADLEY, *supra* note 25, at 15 (describing the great irony of European settlers subscribing to a narrative of settlement, of turning chaos into order and transforming savagery into civilization, when, in reality, they did the exact opposite, from the perspective of Native people in California).

232. THE DECLARATION OF INDEPENDENCE para. 29 (U.S. 1776).

233. The conflation of Indians with violence justified white violence in what Phil Deloria calls the logic of defensive conquest. DELORIA, *supra* note 231, at 50; *see also* MADLEY, *supra* note 25, at 119–20 (mass reprisals for invented slights in California); RICHARD WHITE, THE MIDDLE GROUND: INDIANS, EMPIRES, AND REPUBLICS IN THE GREAT LAKES REGION, 1650-1815, at 391 (1991) (describing backcountry settlers justifying their use of violence and cruelty as "Indian means").

234. *See* HARRING, *supra* note 38, at 60; Goldberg-Ambrose, *supra* note 39, at 1410–11.

235. The Supreme Court still invokes the motif of warring tribes, especially when siding against tribal parties. *See, e.g.*, Transcript of Oral Argument at 173, Haaland v. Brackeen, 599 U.S. 255 (2023) (No. 21-376) (Alito, J., questioning); Arizona v. Navajo Nation, 599 U.S. 555, 560 (2023). American political media often situates "tribalism" as the antithesis of democracy. Seth Davis, *Tribalism and Democracy*, 62 WM. & MARY L. REV. 431, 433 (2020).

236. *See* COHEN'S HANDBOOK, *supra* note 20, § 1.02 (discussing seventeenth century treaties such as the 1608 diplomatic exchange between Virginia and Powhatan of the Virginia Tidewater Confederacy, the 1621 Treaty between King James and Massasoit, and the 1679 Treaty between New York and the Mohawk Nation).

237. Upon independence, the Continental Congress immediately appointed representatives to negotiate with tribes on behalf of the newly formed country. A significant function of the 1777 Articles of Confederation was the federal assumption of exclusive power to manage affairs with Indians. *See* COHEN'S HANDBOOK, *supra* note 20, § 1.03; BLACKHAWK, *supra* note 40, at 232–33.

ideal of tribal self-determination.[238] While the long record of federal Indian law features recurring disdain and distrust, it also shows the persistent federal recognition of tribal sovereignty.

A. Treaties and Statutes in the Early Republic

In the years following American independence, the United States negotiated issues of criminal jurisdiction with tribes through treaties. The 1778 treaty between the United States and the Delaware Nation featured a provision for the extradition of criminals.[239] Article IV asserts that "neither party shall proceed to the infliction of punishments on the citizens of the other, otherwise than by securing the offender . . . till a fair and impartial trial can be had by judges or juries of both parties[.]"[240] The nature of such proceedings was to be determined by Congress in council with representatives of the Delaware Nation.[241] In this way, the young American republic recognized Delaware criminal jurisdiction and Delaware criminal law, in an agreement that reflected the relatively co-equal status of the two sovereigns.

Subsequent treaties from the 1780s featured extradition clauses for non-Indian and Indian offenders who committed crimes against American citizens.[242] They also shared a common provision that Americans who settled on Indian lands in violation of the treaties "forfeit[ed] the protection of the United States" such that the tribe "may punish him as they please."[243] In these documents, the United States recognized tribal jurisdiction coextensive with

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238. *See generally* DUANE CHAMPAGNE & CAROLE E. GOLDBERG, CAPTURED JUSTICE: NATIVE NATIONS AND PUBLIC LAW 280 (2020).

239. Treaty with the Delawares art. IV, Del. Nation-U.S., Sept. 17, 1778, 7 Stat. 13. This treaty, made years before the Constitution, also guaranteed Delaware territorial rights "in the fullest and most ample manner" and invited the Delaware Nation to form a state "and have a representation in Congress." *Id.* art. VI.

240. *Id.* art. IV.

241. *Id.*

242. *See* Treaty with the Wyandot, etc., art. IX, Jan. 21, 1785, 7 Stat. 16 (for the detention and delivery of Indians who commit crimes against American citizens); Treaty with the Shawnee, art. III, Shawnee Nation-U.S., Jan. 31, 1786, 7 Stat. 26 (implementing the same extradition agreement); Treaty with the Chickasaw art. V, Chickasaw Nation-U.S., Jan. 10, 1786, 7 Stat. 24 (providing for the extradition of both Indian and non-Indian offenders who commit serious crimes against Americans); Treaty with the Choctaw art. V, Choctaw Nation-U.S., Jan. 3, 1786, 7 Stat. 21 (with the same extradition clause as the Chickasaw treaty); Treaty with the Cherokee art. VI, Cherokee Nation-U.S., Nov. 28, 1785, 7 Stat. 18 (with the same extradition clause).

243. Treaty with the Wyandot, etc., *supra* note 242, art. V; *see also* Treaty with the Chickasaw, *supra* note 242, art. IV; Treaty with the Choctaw, *supra* note 242, art. IV; Treaty with the Cherokee, *supra* note 242, art. V (also known as the Treaties of Hopewell).

tribal land, and American jurisdiction over crimes committed on tribal territory was premised on tribal consent.

Congress also defined jurisdiction in Indian country through statute. In the Trade and Intercourse Act of 1790, Congress asserted federal jurisdiction over crimes and trespasses committed by non-Indians on tribal land.[244] The Trade and Intercourse Act of 1796 set more penalties for American citizens who committed crimes and trespasses on tribal land.[245] The 1796 Act also insulated Indians from state jurisdiction.[246] In the 1817 General Crimes Act, Congress claimed federal jurisdiction for crimes involving both Indians and non-Indians in Indian country.[247] Notably, the General Crimes Act only asserted federal jurisdiction over Indian offenders who had not already been punished under tribal law.[248] All these statutes reflected a basic recognition of tribal authority to police, prosecute, and punish criminal offenders. They complemented the early treaties by honoring tribal jurisdiction, subject to federal intervention for cases involving American citizens. States were wholly excluded from this early jurisdictional scheme.

Although states were formally excluded, they still sought to intervene in Indian affairs—none more brazenly than Georgia. In the early 1930s, the Supreme Court reviewed a series of conflicts between the State of Georgia and the Cherokee Nation,[249] culminating in *Worcester v. Georgia*.[250] In *Worcester*, a white missionary from Vermont was arrested, convicted, and imprisoned by the State of Georgia for residing on Cherokee land without a

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244. Trade and Intercourse Act of 1790, Pub. L. No. 1-33, § 5–6, 1 Stat. 137.

245. Trade and Intercourse Act of 1796, Pub L. No. 4-30, § 4, 1 Stat. 469.

246. *Id.* § 14. If any Indians from friendly tribes commit crimes on state land, proof of their crimes must be delivered to their tribes for trial and punishment. *Id.* Only if the tribe failed to punish the offender within eighteen months would the federal government exact punishment. *Id.*

247. General Crimes Act, 18 U.S.C. § 1152 (1817).

248. Riley & Thompson, *supra* note 54, at 1910.

249. In 1830, Georgia arrested, convicted, and sentenced a Cherokee citizen under Georgia state law for the murder of another Cherokee citizen on Cherokee land. The Georgia appellate court claimed full criminal and civil jurisdiction over the tribe, citing racist ideas that Indians were inherently violent and "incapable of complying with the obligations which the laws of civilized society imposed." *See* State v. Tassel, 1 Dud. 229, 236–37 (1830). Cherokee Nation appealed the decision to the Supreme Court, and Chief Justice John Marshall immediately issued a writ of error, ordering Georgia to appear before the Court. HARRING, *supra* note 38, at 29. Georgia ignored the order and instead hanged the defendant on Christmas Eve, just two weeks before his Supreme Court hearing. *Id.* at 30. Days after the execution, Cherokee Nation filed *Cherokee Nation v. Georgia*, to challenge Georgia's claim of jurisdiction at the Supreme Court. Cherokee Nation v. Georgia, 30 U.S. 1 (1831); *see also* SMITH, *supra* note 170, at 516. The Court infamously declined to reach the merits of the case due to a lack of original jurisdiction. *Cherokee*, 30 U.S. at 13.

250. Worcester v. Georgia, 31 U.S. 515 (1832).

state permit.[251] Worcester, with the help of the Cherokee Nation, argued that Georgia had no authority to police activity on tribal land. The Court agreed. Writing for the majority, Chief Justice John Marshall proclaimed that Indian territory was "completely separated from that of the states."[252] Vis-à-vis the states, Cherokee Nation retained sovereign control over its territory, "in which the laws of Georgia can have no force."[253] Georgia had no jurisdiction in Indian country.[254]

B. State Encroachment in the Late Nineteenth Century

In 1881, the Supreme Court began to chip away at *Worcester*. In *United States v. McBratney*, the Court found that the State of Colorado had criminal jurisdiction over a non-Indian who murdered another non-Indian on the Ute Reservation.[255] The Court generalized the rule in *McBratney* to stand for state jurisdiction over crimes involving exclusively non-Indians in Indian country.[256] In this way, the Court began to disturb the federalist structure set out at the founding. States gained a toehold in Indian country; no longer could one claim that state laws "have no force" on tribal land.[257]

In this period, the Court also reviewed the extent of federal criminal jurisdiction under the General Crimes Act. In *Ex parte Crow Dog*, the Court considered whether the federal government could prosecute a crime

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251. *Id.* at 537.

252. *Id.* at 557.

253. *Id.* at 561.

254. *Id.* at 561–62. Despite Cherokee Nation's formal victory in the Supreme Court, Georgia got what it wanted. Georgia ignored the Court's order and kept Worcester in state prison until the governor pardoned him in 1837. *See* SMITH, *supra* note 170, at 518. Andrew Jackson's administration began its policy of removal in 1838, coercively displacing the Cherokee Nation and the majority of tribes in the Eastern United States. Thousands died on the Trail of Tears; as many as one in three forced migrants perished on the journey. *See* Fletcher, *supra* note 3, at 83; COHEN'S HANDBOOK, *supra* note 20, § 1.03.

255. United States v. McBratney, 104 U.S. 621 (1881). In its brief opinion, the Court found that when Congress brought Colorado into the Union, the state "acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation," in violation of a treaty with the Ute Tribe. *Id.* at 624. This case came before the Supreme Court as a challenge to a federal prosecution. McBratney was tried and convicted in federal district court, and he contested federal jurisdiction over himself and his offense. *Id.* at 621.

256. Draper v. United States, 164 U.S. 240, 242–43 (1896).

257. As Sidney Harring observes, *McBratney* "undermin[es] the very fabric of Marshall's *Worcester* opinion." HARRING, *supra* note 38, at 54.

involving only Indians on tribal land.[258] Despite an internal tribal resolution, federal agents brought a federal prosecution, and Crow Dog's subsequent habeas petition reached the Supreme Court. The Court found no legal basis for federal criminal jurisdiction over Crow Dog.[259]

The Court delivered its holding with a discussion that both affirmed tribal sovereignty and disparaged tribal legal traditions. The Court elevated self-government as the highest goal of "civilized life," which the United States sought "to introduce" to the tribes through the ward-guardian relationship.[260] The Court exhibited concern about imposing foreign, unknown laws and penalties on Indian defendants.[261] It worried that federal courts would try "[Indians] not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race . . . opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature."[262] While *Crow Dog* can be celebrated as a victory for tribal sovereignty,[263] the opinion itself drips with condescension.

In response, Congress passed the Major Crimes Act.[264] The 1885 Major Crimes Act overturned *Crow Dog* by asserting federal authority to prosecute serious crimes committed by Indians against Indians in Indian country.[265] In other words, Congress interjected federal actors and federal law into entirely internal matters of tribal self-government. The constitutionality of the Major Crimes Act was tested shortly thereafter in *United States v. Kagama*.[266] As discussed above, the Court upheld the Major Crimes Act, but it struggled to find a constitutional basis. Instead, it relied on paternalist, racist reasoning:

> From their very weakness and helplessness . . . there arises the duty of protection, and with it the power. . . . The power of the general government over these remnants of a race once powerful, now weak

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258. *Ex parte* Kan-gi-shun-ca (Crow Dog), 109 U.S. 556, 572 (1883). The defendant, Crow Dog, had killed Spotted Tail on the Brule Sioux reservation. Crow Dog had accepted responsibility for the murder through customary tribal proceedings, resulting in Crow Dog's family paying Spotted Tail's family a small fortune in restitution alongside an apology. *Id.* at 571–72; *see* Washburn, *supra* note 33, at 802.

259. *Crow Dog*, 109 U.S. at 572.

260. *Id.* at 568.

261. *Id.* at 571.

262. *Id.*

263. According to Kevin Washburn, *Crow Dog* "represented a high point for the recognition of tribal self-government." Washburn, *supra* note 33, at 802.

264. Major Crimes Act, ch. 341, § 9, 23 Stat. 362, 385 (1885) (current version at 18 U.S.C. § 1153 (2000)).

265. *Id.*

266. United States v. Kagama, 118 U.S. 375, 375 (1886).

> and diminished in numbers, is [n]ecessary to their protection, as well as to the safety of those among whom they dwell.[267]

In *McBratney* and *Crow Dog*, the Supreme Court adjusted the relationships between tribes, states, and the federal government through the delineation of criminal jurisdiction. Congress responded to the latter with the Major Crimes Act, and the Court accepted this correction in *Kagama*.[268] *McBratney* and the Major Crimes Act both represent substantial changes to the American constitutional order. The Major Crimes Act should be understood as part of a larger federal initiative aimed at assimilating Native people into the United States.[269] The year after *Kagama*, Congress passed the infamous Dawes Act, also known as the General Allotment Act of 1887.[270] The Dawes Act was one of the single most devastating policies ever to hit Indian country; the assimilationist program facilitated the loss of ninety million acres of tribal land.[271]

C. Twentieth-Century Attacks on Tribal Jurisdiction

In 1953, Congress passed House Concurrent Resolution 108, formally announcing the federal policy of termination.[272] The United States would pursue the total integration of Native people into the American political mainstream "as rapidly as possible," by eliminating reservations and ceasing federal funding for tribes.[273] Two weeks later, Congress passed Public Law 83-280 ("PL 280") to facilitate this goal by incorporating Native people and Native land into existing state legal systems.[274] Both policies represented constitutional change outside the amendment process, ordained by Congressional plenary power. Both policies threatened to wholly redefine our

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267. *Id.* at 384; *see* Kathryn E. Fort, *The Vanishing Indian Returns: Tribes, Popular Originalism, and the Supreme Court*, 57 ST. LOUIS U. L.J. 297, 318–19 (2013).

268. 118 U.S. at 385.

269. *See* Washburn, *supra* note 33, at 804–05; Riley & Thompson, *supra* note 54, at 1911.

270. Indian General Allotment Act, ch. 119, 24 Stat. 388 (1887) (repealed).

271. COHEN'S HANDBOOK, *supra* note 20, § 1.01.

272. After a brief respite in the early twentieth century known as the reorganization era, Congress returned to its assimilative mission with gusto. *See* H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953).

273. *Id.*

274. Act of Aug. 15, 1953, Pub. L. No. 83-280, 82 Stat. 78 (codified at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321–26, and 28 U.S.C. § 1360). For a comprehensive account of PL 280, see generally CHAMPAGNE & GOLDBERG, *supra* note 238. It should be noted that in addition to PL 280, there are several more targeted federal statutes that give states concurrent jurisdiction in Indian country. *See, e.g.*, Kansas Enabling Act, 18 U.S.C. § 3243; *Understanding Tribal-State Jurisdiction*, NATIVE AM. RTS. FUND, https://narf.org/tribal-state-jurisdiction [https://perma.cc/P7JK-72W4].

federal system. And both policies proved disastrous for Native communities. The federal government has since renounced the policy of termination,[275] but PL 280 continues to impede tribal governance to this day.

On its face, PL 280's primary goal was to address lawlessness in Indian country by delegating federal criminal jurisdiction to states.[276] As Carole Goldberg observed, the policy was premised on the racist assumption that the lawlessness of Indian country arose from some inherent deficiency in Native Nations, rather than the impoverishment, dispossession, and systematic prejudice of colonization—not to mention federal policies that restricted the development of tribal courts.[277] PL 280 forcibly integrated tribes into state legal systems in California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska.[278] For some affected tribes, PL 280 violated specific treaty provisions.[279] This delegation of jurisdiction transformed the federal system, further subverting *Worcester*'s promise. Notably, PL 280 was and remains an unfunded mandate, and states have largely neglected to meet their delegated responsibilities.[280]

Perhaps the most significant consequence of PL 280 lies in its sustained impediment to the development of tribal justice systems. PL 280 gave states concurrent jurisdiction in Indian country without technically usurping tribal jurisdiction. However, the federal government refused to fund PL 280 tribes, even after it repudiated termination and began investing in tribal self-

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275. *See* Special Message on Indian Affairs, *in* PUBLISHED PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RICHARD NIXON 564, 564–67 (July 8, 1970).

276. *See* Goldberg-Ambrose, *supra* note 39, at 1408. This decision to expand state jurisdiction into Indian country was based on the assumptions that (1) tribal legal systems were too weak and ineffective to address crime, and (2) federal policing and prosecution were too expensive. *Id.*

277. *Id.* at 1410.

278. Act of Aug. 15, 1953, Pub. L. No. 83-280, 82 Stat. 78 (naming California, Minnesota, Nebraska, Oregon, and Wisconsin as mandatory PL 280 states); Act of Aug. 8, 1958, Pub. L. No. 85-615, § 2, 72 Stat. 545 (adding Alaska to the list of mandatory states). Eight more states voluntarily opted in before Congress amended the statute to require tribal consent. *See* STEVEN W. PERRY ET AL., BUREAU OF JUST. STAT., STATE PROSECUTORS' OFFICES WITH JURISDICTION IN INDIAN COUNTRY, 2007, at 2–4 (2011), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/spojic07.pdf [https://perma.cc/KJ32-KHQ2].

279. CAROLE GOLDBERG ET AL., LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280, at 6 (2007), https://www.tribal-institute.org/download/pl280_study.pdf [https://perma.cc/4RRC-5YJ7].

280. Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535, 552 (1975). Many reservations were left with no police whatsoever when federal agents withdrew. *Id.*

governance elsewhere.[281] Meanwhile, PL 280 exacerbated jurisdictional gaps, insofar as state failures resulted in total vacuums where practically no public safety authority exists.[282] In sum: "Public Law 280 has itself become a source of lawlessness on reservations."[283]

The 1968 Indian Civil Rights Act ("ICRA") placed significant restrictions on tribes' exercise of criminal jurisdiction.[284] First, ICRA imposed most of the due process protections of the Fourth, Fifth, and Sixth Amendments, and the Eighth Amendment ban on cruel and unusual punishment.[285] Second, ICRA imposed severe limits on sentencing. Initially, ICRA limited tribal court sentences to a maximum of six months of incarceration and $500 in fines for any discrete offense.[286] In 1986, these caps were adjusted to one year in prison and $5,000 in fines.[287] Essentially, ICRA reduced tribal jurisdiction to misdemeanor prosecutions. The United States' stark circumscription of tribal sentencing is particularly remarkable given its demonstrated penchant for mass incarceration.[288]

In 1978, the Court stepped in to undermine tribal jurisdiction further. In *Oliphant v. Suquamish Indian Tribe*, two non-Indian defendants prosecuted in tribal court for crimes on tribal land filed petitions of habeas corpus,

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281. GOLDBERG ET AL., *supra* note 279, at 6–14. The Indian Self-Determination and Education Assistance Act of 1975 facilitated major development in tribal justice systems and other tribal government infrastructure. 25 U.S.C. §§ 450–58. For more discussion on the Indian Self-Determination Act, its relation to tribal self-determination, and its historical/political context, see Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777, 780, 792 (2006). But PL 280 tribes were left out, and this decision stunted their legal development. As the Tribal Law and Policy Institute documented in 2000, outside PL 280 states, over seventy percent of tribes had tribal police departments, whereas within PL 280 states (not including Alaska), only twenty-one percent of tribes had tribal police departments. GOLDBERG ET AL., *supra* note 279, at 14. PL 280 reservation residents were also significantly less satisfied with the availability and quality of law enforcement than their non-PL-280 counterparts. *Id.* at ix.

282. Goldberg-Ambrose, *supra* note 39, at 1418.

283. *Id.* Although the 1968 tribal consent amendment stopped the expansion of PL 280, it did not work retroactively, and to this day 51% of all tribes in the lower forty-eight plus all 239 Alaska Native villages remain subject to its regime. *See* GOLDBERG ET AL., *supra* note 279, at 6–7.

284. *See* Pub. L. No. 90-284, 82 Stat. 73 (codified at 25 U.S.C. §§ 1031–1303).

285. *Id.*

286. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified at 25 U.S.C. §§ 1301–02) (since amended).

287. 25 U.S.C. § 1302(a)(7).

288. The United States houses over twenty percent of the world's prison population, despite making up merely five percent of the global population. *Mass Incarceration: What's at Stake*, AM. C.L. UNION, https://www.aclu.org/issues/smart-justice/mass-incarceration [https://perma.cc/ZR8F-H2YM].

asserting that the Suquamish Indian Tribe lacked jurisdiction.[289] In its disdainful, ahistorical opinion,[290] the Court asserted that criminal jurisdiction over non-Indians was incompatible with tribal status in the American constitutional system.[291] According to the Court, "[t]his principle would have been obvious a century ago when most Indian tribes were characterized by a 'want of fixed laws [and] of competent tribunals of justice.'"[292] Congress has the power to restore tribal jurisdiction over non-Indians, but until Congress took affirmative action to do so, non-Indian offenders like Oliphant would not be subject to tribal jurisdiction.[293]

In 1990, the Court diminished tribal criminal jurisdiction once again. Riding on the logic of *Oliphant*, *Duro v. Reina* held that tribes lacked the inherent authority to prosecute non-member Indians for crimes committed on tribal land.[294] The majority included an aside to comment on the "special nature of the tribunals at issue."[295] Despite the assimilative mandate of ICRA, the Court still worried that tribal courts were too foreign, that they were "influenced by the unique customs, languages, and usages of the tribes they serve . . . and their legal methods may depend on 'unspoken practices and norms.'"[296] In other words, the Court worried that tribal courts would not be fair to outsiders. *Oliphant* and *Duro* mark the continuation of the Court's long

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289. Oliphant v. Suquamish Indian Tribe, 435 US 191, 194 (1978). The Court stated that criminal activity was "usually handled by social and religious pressure and not by formal judicial processes." *Id.* at 197. To back up this claim, the Court referenced the statement of a federal agent in 1834, who told Congress that "the Indian tribes are without laws." *Id.* In this single paragraph, the majority undermined every historical argument for tribal jurisdiction over non-Indians.

290. At the outset of the opinion, the Court mischaracterized the history of tribal justice as a novel development, asserting that tribes lacked "any semblance of a formal court system" prior to the mid-twentieth century. *Id*. The opinion went on to describe tribes as "quasi-sovereign." *Id.* at 208.

291. *Id.* at 210.

292. *Id.* (quoting H.R. Rep. No. 474, 23d Cong., 1st Sess., 18 (1834)).

293. *Id.* at 212. Tribes can choose to interpret *Oliphant* narrowly. The Eastern Band of Cherokee Indians Supreme Court has held that *Oliphant* only shields non-Indian United States citizens from tribal prosecution, whereas foreign nationals are subject to tribal criminal jurisdiction. *See generally* E. Band of Cherokee Indians v. Torres, No. CR 03-1443, 2005 WL 6437828 (E. Cherokee Sup. Ct. Apr. 12, 2005); E. Band of Cherokee Indians v. Martinez, 15 Am. Tribal Law 45 (E. Cherokee Sup. Ct. 2018). The Eastern Band of Cherokee Indians courts have also held that non-Indian American citizens can choose to waive *Oliphant* and consent to tribal jurisdiction. *See generally* E. Band of Cherokee Indians v. Eckley, No. CR 03-1308, 2004 WL 5806989 (E. Cherokee Ct. Jan. 27, 2004); E. Band of Cherokee Indians v. Bowers, No. CR 06-1599-61, 2007 WL 7080171 (E. Cherokee Ct. Mar. 8, 2007); E. Band of Cherokee Indians v. Brooms, No. CR 07-1497-99, 2007 WL 7079611 (E. Cherokee Ct. Nov. 28, 2007).

294. Duro v. Reina, 495 U.S. 676, 679 (1990).

295. *Id.* at 693.

296. *Id.*

tradition of disdain and distrust of tribal justice in the late twentieth century. These decisions also represent further judicial meddling with the federalist relations of the subordinate sovereigns by circumscribing tribal jurisdiction and demoting tribal justice systems relative to those of the states.

D. Congressional Action for Tribal Self-Government

In the last few decades, Congress has begun to restore tribal criminal jurisdiction, albeit in small steps. Within a year of *Duro v. Reina*, Congress legislated the "*Duro* Fix."[297] The 1990 *Duro* Fix explicitly recognized "criminal jurisdiction over all Indians" as an "inherent power of Indian tribes."[298] In 2004, the Court upheld the *Duro* Fix in *United States v. Lara*, stating Congress possessed the power to roll back restrictions of tribal authority and restore inherent powers of sovereignty.[299]

Congress continued its work refashioning tribal jurisdiction with the 2010 Tribal Law and Order Act ("TLOA").[300] TLOA allows tribes to impose sentences of up to three years in prison per offense, which can be stacked to a maximum of nine years per proceeding.[301] TLOA also raised the maximum fine to $15,000.[302] These modest sentence enhancements are available to tribes that ensure certain due process protections: the right to effective assistance of counsel at least equal to that under the United States Constitution, the right to a public defender for indigent defendants, the right to a proceeding presided over by a judge with formal legal training and license, the right to public access of tribal criminal laws and procedures, and the right to recorded proceedings.[303] These requirements, which go beyond those imposed in ICRA, presume an adversarial model in the likeness of American criminal justice. If tribal courts want to hand out short felony sentences, they must mimic American courts and all their defendant protections. Establishing those protections can be expensive, at times

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297. Department of Defense Appropriations Act, Pub. L. No. 101-511, 104 Stat. 1856 (codified at 25 U.S.C. § 1301 (2018)).

298. § 1301(2).

299. United States v. Lara, 541 U.S. 193, 196 (2004). The Court found that the Turtle Mountain Band of Chippewa Indians' prosecution of Billy Jo Lara was an exercise of its inherent tribal authority, not delegated federal authority, such that the dual sovereignty doctrine applied. *Id.* at 210.

300. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, title II, 124 Stat. 2261 (codified at 25 U.S.C. § 1302).

301. § 1302(a)(7)(C)–(D).

302. *Id.*

303. § 1302(c)(1)–(5).

prohibitively so.[304] TLOA also established the Bureau of Prisons Pilot Program to incarcerate offenders convicted under tribal law in federal prisons.[305]

This restoration of limited tribal felony jurisdiction showcases Congressional intent to recognize tribal sovereignty and enhance tribal self-determination. Yet its conditions for eligibility indicate the continued federal distrust of tribal law. In TLOA, these two enduring attitudes result in restored authority at the cost of assimilation. Tribes can overcome the limitations of federal distrust by conforming to American legal and political norms.

This process of empowerment through assimilation might also be characterized as the incorporation of tribes into American constitutionalism. As tribes attain more recognition and authority and begin to wield power more comparable to states than colonies, the imposition of American legal norms may be the cost of full recognition of sovereignty in the American political order. To be sure, this framing does not transform conditions of enhanced jurisdiction into something other than requirements of assimilation, and those conditions cannot be separated from the racially tinged history of federal distrust.

III. NEW DEVELOPMENTS

In recent years, Congress has taken steps to fix *Oliphant* and map a path to jurisdictional coherence. In the Violence Against Women Act, Congress exercised its plenary authority and took up its obligation to protect the boundaries of tribal sovereignty. By extending tribal criminal jurisdiction on tribal lands, Congress improved local governance by tinkering with federalism. Unfortunately, the Court's contemporaneous actions threatened this effort. In *Castro-Huerta*, the Court injected new incoherence into the jurisdictional scheme. By extending state authority onto tribal territory, the Court blurred the boundaries of the subordinate sovereigns and produced a new federalism problem. This Part recounts these novel changes and explores developing relationships between the sovereigns.

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304. *See* Samuel E. Ennis & Caroline P. Mayhew, *Federal Indian Law and Tribal Criminal Justice in the Self-Determination Era*, 38 AM. INDIAN L. REV. 421, 447–48 (2013); Riley, *supra* note 31, at 1631 (finding reservations with the worst crime lack the structural capacity to implement TLOA).

305. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, title II, sec. 304(c), 124 Stat. 2261, 2281; *see also* 25 U.S.C. § 1302(d)(1)(B).

A. The Violence Against Women Act

The 2013 Reauthorization of the Violence Against Women Act ("VAWA 2013") marked a turning point in federal treatment of tribal criminal justice. Armed with damning statistical evidence, tribal advocates finally achieved the first step to an *Oliphant* fix.[306] To address the staggering rates of violence against Native women, Congress restored tribal criminal jurisdiction over a select group of non-Indians.

Native people, and Native women in particular, experience violent crime at higher rates than all other demographic groups.[307] More than four in five Native women and men have experienced violence, and more than one in three have experienced violence in the past year.[308] Domestic violence is especially prevalent,[309] and more than half of Native women will be sexually assaulted in their lifetimes.[310] These exceptional rates of violence are part of the broader crisis of missing and murdered Indigenous women, girls, and two-spirit people.[311] Native people are particularly vulnerable to interracial violence: 97% of Native female victims experienced violence by a non-Native perpetrator, and 90% of Native male victims experienced violence by a non-Native perpetrator.[312] Only 35% and 33%, respectively, reported experiencing intraracial violence.[313]

Given the prevalence of interracial violence, *Oliphant*'s limit on tribal jurisdiction has been utterly debilitating for tribal justice.[314] The Supreme Court stripped tribal courts of the authority to prosecute these crimes, leaving only federal prosecutors to hold non-Indian offenders accountable. Those

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306. Riley & Thompson, *supra* note 54, at 1915.

307. Sarah Deer, *Native People and Violent Crime: Gendered Violence and Tribal Jurisdiction*, 15 DU BOIS L. REV. 89, 90–91 (2018).

308. ANDRE B. ROSAY, NAT'L INST. JUST., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN 1 (2016), http://nij.gov/journals/277/Pages/violence-against-american-indians-alaska-natives.aspx [https://perma.cc/VF9J-KL8G].

309. *Id.* at 2 (finding Native people suffer sexual violence, intimate partner violence, stalking, and psychological aggression by intimate partners at higher rates than their white counterparts).

310. Deer, *supra* note 307, at 91.

311. Often abbreviated as "MMIWG" (Missing and Murdered Indigenous Women and Girls), "MMIP" (Missing and Murdered Indigenous People), or "MMIWG2" (Missing and Murdered Indigenous Women, Girls, and Two-Spirit people), the crisis involves a network of problems, including violence against women, historical and intergenerational trauma, mental health crises, the foster care system, and the widespread failure of authorities to pursue cases of missing Native women. *See, e.g.*, TO' KEE SKUY' SOO NEY-WO-CHEK', YEAR 3 PROGRESS REPORT 2 (2022), https://yuroktribalcourt.org/wp-content/uploads/2022/07/Yurok-Tribe-Year-Three-Report-Toolkit-FINAL-DRAFT.pdf [https://perma.cc/HZB9-VC3T].

312. ROSAY, *supra* note 308, at 4.

313. *Id.*

314. *See* Riley & Thompson, *supra* note 54, at 1913–14.

federal prosecutors stationed in Indian country do a dismal job; the high declination rates for Indian country crimes have created a "de facto jurisdictional void."[315] As discussed in Part II, tribes subject to state jurisdiction under PL 280 hardly fare better.[316] In 2012, the Senate Committee on Indian Affairs found that "[c]riminals tend to see Indian reservations and Alaska Native villages as places they have free rein, where they can hide behind the current ineffectiveness of the judicial system."[317] Sarah Deer characterized the high rates of sexual violence against Native women and the history of federal indifference as legacies of colonialism.[318]

Congress responded to this problem in VAWA 2013. The tribal provisions of VAWA 2013 drew from a Department of Justice proposal informed by extensive tribal consultation.[319] The resulting statute affirmed and expanded tribal jurisdiction. It named this restored authority "special domestic violence criminal jurisdiction" and located its source in tribes' inherent sovereign powers.[320] Special domestic violence criminal jurisdiction, or "SDVCJ," covered crimes of domestic violence, dating violence, and the violation of related protection orders committed by non-Indians against Indians on tribal land.[321] Not all non-Indian domestic violence offenders fell within SDVCJ. VAWA 2013 only applied to offenders with preexisting ties to the tribe: they must reside on the reservation, work on the reservation, or be involved in a romantic, intimate, or spousal relationship with either a tribal member or a non-member Indian who resides on the reservation.[322]

SDVCJ came with conditions. Again, the cost of enhanced tribal authority was assimilation, such that tribal courts exercising SDVCJ had to model themselves after American courts.[323] In addition to all the due process requirements of ICRA and TLOA, VAWA 2013 added basic rules for jury selection. All SDVCJ defendants have the right to a jury drawn from a fair

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315. *Id.* at 1913; *see also* Deer, *supra* note 307, at 93. Native victims not only lack access to justice through criminal prosecutions, they also lack access to victim services such as medical care, advocacy services, and other legal services. ROSAY, *supra* note 308, at 6.

316. Deer, *supra* note 307, at 93.

317. S. REP. NO. 112-265, at 7 (2012).

318. DEER, *supra* note 7, at x.

319. NAT'L CONG. AM. INDIANS, VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 4 (2018) [hereinafter FIVE-YEAR REPORT], https://archive.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf [https://perma.cc/ZY7C-ZTHU].

320. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-14, sec. 904, § 204(b)(1), 127 Stat. 54, 121 (2013) (codified at 25 U.S.C. § 1304).

321. § 1304(b).

322. § 1304(b)(4)(B).

323. Riley, *supra* note 31, at 1571–72.

cross section of the community, including non-Indians.[324] Defendants may challenge deficiencies in tribal proceedings in federal court via a writ of habeas corpus. Of course, tribal courts were still bound by the TLOA/ICRA sentencing limitations.

In 2014, three tribes were selected to pilot the new policy: the Pascua Yaqui Tribe in Arizona, the Tulalip Tribes in Washington, and the Confederated Tribes of the Umatilla Indian Reservation in Oregon.[325] In 2015, SDVCJ eligibility was opened to other federally recognized tribes. By 2018, eighteen tribes had implemented SDVCJ.[326] In those first five years, the implementing tribes made 143 arrests, oversaw 74 convictions, and 5 acquittals.[327] Tribal courts tried non-Indian defendants in five jury trials.[328] Not a single defendant made a habeas petition.[329] In fact, many defendants asserted that they preferred to have their cases heard in tribal court rather than federal court, citing tribal courts' greater focus on rehabilitation and respect for defendants' dignity.[330] They surely appreciated the sentencing cap of three years' incarceration as well.

VAWA 2013 was the first, meaningful step forward, and tribal advocates were quick to identify its gaps and shortcomings. VAWA 2013 only allowed for the prosecution of domestic violence and dating violence crimes, and implementing tribes found that their SDVCJ cases often involved related offenses outside the scope of their jurisdiction.[331] Implementing tribes were alarmed that many—in some places a majority[332]—of their domestic violence cases involved children, but VAWA 2013 did not cover any crimes against children.[333] While the tribes could charge the offenders with their crimes against their intimate partners, they had to refer the crimes against children to other authorities.[334] Implementing tribes also expressed concern that VAWA 2013 did not cover crimes against tribal law enforcement

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324. § 1304(b)(4)(d)(iii).

325. NAT'L CONG. AM. INDIANS, *supra* note 319, at 5–6.

326. *Id.* at 1. Out of the 574 federally recognized tribes in the United States, this modest showing is most likely due to a lack of resources. Many tribes simply do not have the infrastructure, formalized codes, personnel, and money necessary to enact VAWA jurisdiction.

327. *Id.*

328. *Id.* at 7. In fact, the very first jury trial resulted in an acquittal. *Id.* at 20.

329. *Id.* at 8.

330. *Id.* at 19. In the first five years, fifty-one percent of defendants participated in rehabilitative programming. *Id.* at 20.

331. *Id.* at 22.

332. The Fort Peck Tribe reported that fifty-eight percent of their SDVCJ cases involved children. *Id.* at 24.

333. *Id.*

334. *Id.*

personnel.[335] When offenders resisted arrest, fought with tribal police, threatened tribal police, and assaulted tribal jailors, the tribes again could only refer these cases to outside authorities.[336] The implementing tribes also highlighted other gender-based offenses not covered by VAWA 2013, including stalking, sex trafficking, and sexual assault by strangers.[337] Tribes brought these gaps to the attention of Congress.[338] In 2022, Congress enacted its response.

In VAWA 2022, Congress responded to these concerns.[339] The amended list of covered crimes now includes assault of tribal justice personnel, child violence, obstruction of justice, sexual violence, sex trafficking, and stalking, in addition to dating violence, domestic violence, and the violation of protection orders already covered by VAWA 2013.[340] Given the expansion of covered crimes beyond domestic violence, Congress renamed SDVCJ to the more general name of "special Tribal criminal jurisdiction," or "STCJ."[341] Congress specified that tribes could prosecute non-Indians who commit crimes against non-Indian victims under the assault of tribal justice personnel and obstruction of justice provisions.[342] Notably, VAWA 2022 also removed the requirement of any community ties for defendants to be subject to STCJ.[343] In these ways, VAWA 2022 substantively expanded tribal criminal jurisdiction.

VAWA 2022 signaled greater federal deference to tribal codes and tribal courts. Congress amended the definitions of dating violence and domestic violence to reference tribal codes, indicating that tribes retain the authority to define the scope of these offenses and in effect the extent of their jurisdiction.[344] Congress also codified an exhaustion requirement for habeas relief.[345] Before defendants can seek review by a federal court, they must first exhaust the remedies available to them within the tribal court system.[346]

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335. *Id.* at 27.
336. *Id.*
337. *Id.* at 22.
338. Riley & Thompson, *supra* note 54, at 1915.
339. *See* Violence Against Women Reauthorization Act of 2022, Pub. L. No. 117-103, § 804, 136 Stat. 840, 898–904 (2022) (codified as amended at 25 U.S.C. § 1304).
340. § 1304(a)(5).
341. § 1304(a)(14).
342. § 1304(b)(4)(A).
343. § 1304(c).
344. § 1304(a)(6)–(7).
345. § 1304(f)(2).
346. *Id.*

Congress also responded to tribes' concerns about access to offenders' criminal history information[347] and jail and prison space.[348] To address the prohibitive cost of detention facilities, Congress expanded the Bureau of Prisons Tribal Prisoner Program.[349] Now, the Bureau of Prisons will supply prison beds for up to one hundred tribal prisoners convicted of violent crimes with sentences of at least one year.[350] These amendments responded to tribes' concerns, but they did not resolve every issue. Tribes are still seeking federal support for pretrial detention and healthcare costs for non-Indian inmates.[351]

Finally, Congress initiated a pilot program for tribes in Alaska. VAWA 2013 only applied to tribes in the lower forty-eight. VAWA 2022 expanded special tribal criminal jurisdiction to Alaska.[352] Affirming the inherent sovereign power of tribes in Alaska,[353] Congress established a pilot program through which every year up to five tribes in Alaska could begin exercising special tribal criminal jurisdiction.[354] The Department of Justice has set out a three-track process for participation in the Alaska Pilot Program.[355]

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347. NAT'L CONG. AM. INDIANS, *supra* note 319, at 36. Tribal courts rely on defendants' criminal histories in determining appropriate sentences, conditions of probation, and eligibility for rehabilitative programs. The Department of Justice first addressed this need in 2015 by creating the Tribal Access Program, which gave tribes access to national crime information databases. VAWA 2022 codified the program and provided for relevant technical assistance and training. *See* U.S. DEP'T OF JUST., TRIBAL ACCESS PROGRAM FOR NATIONAL CRIME INFORMATION: OVERVIEW (2019), https://www.justice.gov/tribal/file/796691/download [https://perma.cc/C66J-X4FV]; 34 U.S.C. § 41107(1). In addition to national criminal information systems, Tribes have successfully sought access to state databases as well. *See* Cal. State Leg., Assemb. B. 44, 2023 Cal. Leg., 2023–2024 Reg. Sess. (Cal. 2023) (codified at CAL. GOV'T CODE § 15168 (2024)) (granting tribes access to California Law Enforcement Telecommunications System as of January 1, 2024).

348. NAT'L CONG. AM. INDIANS, *supra* note 319, at 30–31.

349. 25 U.S.C. § 1302(a).

350. § 1302(a)(2).

351. The cost of detention is a significant burden. NAT'L CONG. AM. INDIANS, *supra* note 319, at 30–31. While some tribes have their own jail facilities, operated by the BIA or by a 638 contract, others have to contract beds from other facilities. Since non-Indian offenders are not covered by IHS, tribes risk incurring huge costs if inmates require medical attention in jail or prison. *Id.*

352. 25 U.S.C. § 1305(c).

353. § 1305(c)(1).

354. § 1305(d).

355. *Violence Against Women Act 2022 Reauthorization—Alaska Pilot Program*, U.S. DEP'T OF JUST., https://www.justice.gov/tribal/vawa-2022-alaska-pilot-program#process [https://perma.cc/4WRL-S6YL]. So far, the Native Villages of Chickaloon and Dot Lake have obtained federal awards to renovate their justice systems for the purpose of adopting VAWA jurisdiction. *See FY 2023 OVW Grant Awards by Program*, OFF. OF VIOLENCE AGAINST WOMEN, https://www.justice.gov/ovw/awards/fy-2023-ovw-grant-awards-program#TribalJurisdictionAK [https://perma.cc/DY8J-2BEV] (scroll down to ribbon labeled "OVW Fiscal Year 2023 Special

As of November, 2022, thirty-one tribes have implemented special tribal jurisdiction under VAWA 2013, and four tribes have implemented the fuller jurisdiction of VAWA 2022.[356] The three original pilot program tribes—Umatilla, Pascua Yaqui, and Tulalip—as well as the Chickasaw Nation in Oklahoma are currently exercising full STCJ under VAWA 2022.[357] Forty-one other tribes are exploring VAWA.[358] Three tribes have utilized the Bureau of Prisons Tribal Prisoner Program: Umatilla, Tulalip, and the Eastern Band of Cherokee Indians.[359] The limited enactment of VAWA tribal jurisdiction is primarily due to lack of resources.[360] Tribes have to cover the costs of updating codes, hiring law-trained legal personnel, establishing tribal public defender offices, providing courts of record, and contracting detention facilities. These initial costs to build up a tribal legal system that conforms with all the requirements of VAWA are in many cases prohibitive.[361] VAWA 2022 does provide for reimbursement of expenses for implementation,[362] and we have yet to see how much this provision helps tribal legal development.

VAWA 2013 and 2022 have inspired robust intertribal cooperation. Upon the passage of VAWA 2013, the Department of Justice created the Inter-Tribal Working Group ("ITWG"), a voluntary group for tribes interested in implementing VAWA jurisdiction.[363] The ITWG was created to provide peer-to-peer technical assistance and to share technical challenges and solutions associated with implementation.[364] Participating tribes share resources and advice on a range of issues, such as code drafting, building public defender systems, and developing victim-centered protocols.[365] At ITWG meetings, tribes also raise unanswered questions about the extent of VAWA's jurisdiction. For example, does VAWA authorize tribal jurisdiction for offenders on probation off reservation? If an offender lives off-reservation and violates the conditions of their probation, does the tribe have jurisdiction to adjudicate the violation?

Tribal Criminal Jurisdiction: Targeted Support for Alaska Native Tribes Special Initiative—Solicitation").

356. Chart, Inter-Tribal Working Group, 19th Meeting on Special Tribal Criminal Jurisdiction (Dec. 5, 2022) (on file with author).

357. *Id.*

358. *Id.*

359. *Id.*

360. NAT'L CONG. AM. INDIANS, *supra* note 319, at 29; Riley & Thompson, *supra* note 54, at 1916.

361. NAT'L CONG. AM. INDIANS, *supra* note 319, at 29.

362. 25 U.S.C. § 1304(h).

363. NAT'L CONG. AM. INDIANS, *supra* note 319, at 34.

364. *Id.*

365. *Id.*

VAWA has also helped to cultivate better relationships between tribes and federal actors. First, programs like the Inter-Tribal Working Group, the Tribal Access Program, and the Bureau of Prisons' Tribal Prisoner Program place tribal representatives in cooperative relationships with federal agencies. Second, implementing tribes have reported improved relations with their counterparts in U.S. attorneys' offices.[366] In fact, cooperation on VAWA cases has led to better communication and accountability for non-VAWA cases.[367] Some tribes have developed strong working relationships with federal prosecutors through dual appointments, such that tribal prosecutors are also appointed as assistant U.S. attorneys.[368]

An important critique of VAWA 2013 and 2022 argues that the many conditions of special tribal criminal jurisdiction demand tribal conformity to an American model of criminal justice. Essentially, the price of restored jurisdiction is assimilation.[369] In this way, VAWA, like TLOA and ICRA, can be characterized as yet another extension of the American colonial project.[370] Angela Riley described this arrangement as "the double bind of tribal sovereignty."[371] When tribal power is dependent on federal recognition, and federal recognition is in turn tied to a narrow conception of judicial legitimacy, tribes are pressured to abandon tribal practices perceived to be too foreign to principles of American constitutionalism.[372] In other words, the federal government is still in the business of denigrating and mistrusting tribal justice when it does not emulate American legal norms.

This exchange of tribal power for the cost of conformity can also be characterized as further tribal incorporation into the American federal system. Even if constitutional theory has yet to incorporate tribes into our reigning conceptions of federalism, the federal government has taken many steps to incorporate tribes into the actual practice of American federalism. ICRA, TLOA, and VAWA and their defendant protections are all arguably part of this incorporation. The imposition of American due process principles and structures onto tribes is in effect an expansion of the Constitution.

One must ask: how much assimilation does incorporation require? The total adoption of American constitutional rights and norms might sound sensible because we require it of states. But tribes occupy a fundamentally

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366. *Id.* at 36.
367. *Id.*
368. *Id.* (describing the Tulalip Tribes' arrangement).
369. Riley, *supra* note 31, at 1595.
370. *Id.*
371. *Id.*
372. *Id.*

different relationship with the Constitution, and tribes' status in American federalism is not the same as states. Indeed, so long as tribes lack representation in Congress, so long as tribes lack any formal role in the constitutional amendment process, their relationship to the Constitution is necessarily distinct. So, rather than trying to enhance tribal sovereignty by making tribes look and act like states, we might instead imagine a federal system in which tribes attain a political status equal to but distinct from states.

B. McGirt *and* Castro-Huerta

To understand *Oklahoma v. Castro-Huerta*, you have to start with *McGirt v. Oklahoma*.[373] In July 2020, the Supreme Court delivered a momentous decision, brought about by tribal advocates in Oklahoma and across Indian country.[374] *McGirt v. Oklahoma* held that approximately a third of Oklahoma—including three million acres and most of the city of Tulsa—was part of the Muscogee (Creek) Reservation.[375] Justice Neil Gorsuch's opinion focused primarily on treaties,[376] statutes,[377] and canons of interpretation.[378] But at its heart, *McGirt* was a criminal jurisdiction case. Jimcy McGirt was an enrolled member of the Seminole Nation of Oklahoma.[379] In 1997, the State of Oklahoma prosecuted and convicted him for serious sexual offenses and sentenced him to a whopping one thousand years plus life in prison.[380] In postconviction proceedings, McGirt argued that the state lacked jurisdiction, for he was an Indian and his offenses occurred in Indian country.[381] When the Supreme Court reviewed his claims, it found he was right. Congress established the Muscogee (Creek) Reservation in an 1832 treaty,[382] and no subsequent act of Congress ever eliminated the reservation.[383] The State of Oklahoma had no jurisdiction.

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373. *See generally* McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

374. *Examining* Oklahoma v. Castro-Huerta*: The Implications of the Supreme Court's Ruling on Tribal Sovereignty: Hearing Before the H. Subcomm. for Indigenous Peoples of the U.S.*, 117th Cong. 1 (2022) [hereinafter *Hearing Examining* Oklahoma v. Castro-Huerta] (statement of Sara Hill, Att'y Gen., Cherokee Nation).

375. 140 S. Ct. at 2482.

376. *See id.* at 2461.

377. *See id.* at 2463, 2476–77 (discussing first the Muscogee Creek Allotment; then discussing the Major Crimes Act; and then discussing the Oklahoma Enabling Act).

378. *See id.* at 2468 (discussing original meaning, ambiguity, and extratextual sources).

379. *Id.* at 2459.

380. *Id.* at 2482 (Roberts, C.J., dissenting).

381. *Id.*

382. *Id.* at 2459.

383. *Id.* at 2482.

Chief Justice John Roberts penned an ominous dissent, in which he was joined by the other conservative appointees except Justice Gorsuch. The dissent argued that taken altogether, Congress' actions regarding the Muscogee Nation collectively amounted to the termination of the reservation.[384] Despite any clear statement of termination in any statute, the dissent inferred Congressional intent to disestablish the reservation. Moreover, the dissent feared for the future of governance in Oklahoma. In its opening paragraph, the dissent worried that the majority opinion will lead to the recognition of reservations across the eastern half of Oklahoma, including "19 million acres that are home to 1.8 million people, only 10%–15% of whom are Indians."[385] These demographic concerns serve as bookends for the dissent's statutory interpretation arguments, reminding us of the millions of white people who might someday wake up in Indian country, subject to tribal jurisdiction.[386] The dissent hinted at an impending breakdown of law and order: thousands of convictions for serious crimes might be thrown out, dangerous offenders would be released, and the State would not be able to prosecute future crimes involving Indians across northeastern Oklahoma.[387] For all these reasons, the majority opinion would destabilize governance in the State of Oklahoma.[388] In these concerns about demographics and violent crime, it is hard not to hear echoes of older, cruder attacks on tribal justice.

With the appointment of Justice Amy Coney Barrett to replace the late Justice Ruth Bader Ginsburg, the *McGirt* dissenters became the majority. In 2022, they jumped on an opportunity to again address the situation of criminal jurisdiction in Oklahoma Indian country.

Victor Manuel Castro-Huerta was the next defendant to test criminal jurisdiction in the State of Oklahoma. Castro-Huerta was a non-Indian who lived in Tulsa.[389] Before *McGirt*, he was tried and convicted by the State of Oklahoma for child neglect for his mistreatment of his stepchild, a Cherokee Indian.[390] While his case was pending appeal, the Supreme Court delivered

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384. *Id.* at 2487 (Roberts, C.J., dissenting).

385. *Id.* at 2482. After *McGirt*, the Oklahoma Court of Criminal Appeals recognized other Indian reservations, including the Cherokee, Choctaw, Chickasaw, and Seminole Reservations. Oklahoma v. Castro-Huerta, 597 U.S. 629, 632–34 (2022).

386. *McGirt*, 140 S. Ct. at 2500 (observing that the population of the territory has been consistently eighty-five to ninety percent white as a practical concern). To be sure, most non-Indians would not be subject to tribal criminal jurisdiction, but the dissent notes that those with consensual relationships with the tribe could be subject to tribal taxes. *Id.* at 2482–502.

387. *Id.* at 2500–01.

388. *Id.* at 2501.

389. *Castro-Huerta*, 597 U.S. at 633.

390. *Id.*

its opinion in *McGirt*.[391] Castro-Huerta had a new defense: the State of Oklahoma never had jurisdiction to prosecute his case, because it involved an Indian victim on the Cherokee Reservation.[392] Under *Worcester*, the case and the conviction should be thrown out. The Oklahoma Court of Criminal Appeals agreed and vacated the conviction.[393] Meanwhile, federal prosecutors took up the case, got Castro-Huerta indicted by a grand jury, and secured a plea agreement.[394]

The recognition of the Cherokee Nation Reservation allowed Castro-Huerta to practically exchange his original thirty-five year sentence from the state court for a seven year sentence followed by deportation under the federal plea agreement.[395] Castro-Huerta was not a U.S. citizen and apparently resided in Tulsa in violation of American law.[396] According to the majority opinion, "Castro-Huerta in effect received a [twenty-eight year] reduction of his sentence as a result of *McGirt*."[397] The Supreme Court granted cert to review the question of Oklahoma's authority to prosecute non-Indians like Castro-Huerta who commit crimes against Indians in Indian country.[398] Notably, the Court did not take up the second question petitioned by the state: whether *McGirt* should be overruled.[399]

In his opinion for the majority, Justice Brett Kavanaugh lingered over these facts at the outset. Like a direct continuation of the *McGirt* dissent, the opinion focused first on the practical administrative consequences of the jurisdictional rules of Indian country. Justice Kavanaugh reported that Oklahoma courts have been forced to reverse many state convictions.[400] Justice Kavanaugh lamented: "After having their state convictions reversed, some non-Indian criminals have received lighter sentences in plea deals negotiated with the Federal Government. Others have simply gone free."[401]

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391. *Id.*

392. *Id.* at 634. The City of Tulsa is situated on both Muscogee Creek and Cherokee land. In the wake of *McGirt*, the Oklahoma Court of Criminal Appeals remanded Castro-Huerta's case to the district court, instructing the trial court to determine whether the offense occurred on either the Muscogee Creek Reservation or the Cherokee Reservation. Castro-Huerta v. State, No. F-2017-1203, 2021 WL 8971915, at *1 (Okla. Crim. App., Apr. 29, 2021). The court found that it had occurred on the Cherokee Reservation. *Id.*

393. *Castro-Huerta*, 597 U.S. at 634.

394. *Id.* at 635.

395. *Id.*

396. *Id.*

397. *Id.*

398. *Id.* at 629 (granting certiorari to Question 1 of petition).

399. Petition for Writ of Certiorari at 4, *Castro-Huerta*, 597 U.S. 629 (No. 21-429).

400. 597 U.S. at 635.

401. *Id.*

He expressed concern over the very low rate of federal prosecutions resulting from state referrals and alarm that many criminals would not be held accountable.[402]

He was right, of course. The jurisdictional maze established by Congress and the Court seriously undermines criminal justice in Indian country. The federal government created this de facto jurisdictional vacuum by hobbling tribal courts and failing to fill the gap with federal governance. In *Castro-Huerta*, the Court recognized the status quo of Indian country as an affront to law and order.

The majority accurately identified a problem, but it prescribed a solution that undermines tribal sovereignty and one of the most fundamental tenets of federal Indian law. To address the jurisdictional vacuum, the Court overturned *Worcester*.[403] According to the majority, "Indian country is part of the State, not separate from the State."[404] While the federal government may preempt state jurisdiction, states are by default entitled to sovereignty and jurisdiction over all the territory within their boundaries including Indian country.[405] The Court then reasoned that Oklahoma must have jurisdiction unless it was preempted by the federal government.[406] The Court found no preemption in the General Crimes Act,[407] PL 280,[408] the Oklahoma Enabling Act,[409] or any treaties[410]—never mind the fact that in each of those statutes, Congress acted under the assumption that *Worcester* was good law and that states had no authority in Indian country.[411] In this way, the Court struck down one of the most basic principles of federal Indian law to hold that Oklahoma

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402. *Id.*

403. *See id.* at 636.

404. *Id.*

405. *Id.* The majority relied on *United States v. McBratney*, 104 U.S. 621, 623–24 (1882), *Draper v. United States*, 164 U.S. 240, 244–47 (1896), and *Nevada v. Hicks*, 533 U.S. 353, 361 (2001) to argue that *Worcester* had long been abandoned in the 1800s. *See id.* at 637–38. *McBratney* in particular does a lot of work for the majority in its preemption discussion. *Castro-Huerta*, 597 U.S. at 644. Apparently, unbeknownst to federal Indian law scholars and practitioners, *Worcester* was abandoned in the 1800's. *Id.*

406. *Id.* at 638.

407. *Id.* at 639.

408. *Id.* at 647–48.

409. *Id.* at 654.

410. *Id.*

411. As the dissent observes, it is highly likely that the Congress that passed the General Crimes Act assumed that states had no jurisdiction in Indian country, since the GCA was passed just a few years after John Marshall wrote *Worcester v. Georgia*. *Id.* at 670.

retained criminal jurisdiction over Castro-Huerta.[412] Justice Gorsuch penned a furious dissent, joined by the liberal appointees.[413]

The majority opinion wholly ignored the federalism issues at play in Oklahoma. As the dissent forcefully asserted, the majority failed to recognize any of the compelling reasons why tribes would not want state jurisdiction on their lands.[414] Instead, the majority characterized concurrent jurisdiction as an unqualified good.[415] There is a reason why we do not allow Texas to enforce its laws in California.[416] It would be a substantial incursion into the self-government and self-determination of Californians. Similarly, the expansion of Oklahoma criminal law onto tribal land is an affront to tribal sovereignty. In the language of federalism, the jurisdictional separation of the subordinate sovereigns allows for local self-determination and self-rule, enabling states to cater to local tastes and facilitate democratic pluralism on a national scale. One might argue that there is a crucial difference between states and tribes, in that tribal members and residents can vote in state elections and thus are represented in state policy decisions. And perhaps this distinction is important in theorizing our federalism.[417] However, the Court never even approached this discussion.

Under the majority's reasoning, Congress can act to overturn this ruling and restore *Worcester*. Just as Congress fixed *Duro v. Reina* and has begun

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412. *Id.* at 655. The consequences of the decision are still unfolding. While *Castro-Huerta* answered the limited question of state jurisdiction over non-Indians in Indian country, some Oklahoma legal actors are now trying to extend the Court's reasoning to justify state jurisdiction over *Indians* in Indian country. *See* State *ex rel.* Ballard v. Crosson, 540 P.3d 16, 18–19 (Okla. Crim. App. 2023) (Rowland, P.J., concurring) (suggesting that courts must now apply a balancing test to determine if the state has jurisdiction over Indians who commit crimes in Indian country).

413. *Castro-Huerta*, 597 U.S. at 656. Remarking on the wrongness of the majority holding, Gorsuch stated, "Truly, a more ahistorical and mistaken statement of Indian law would be hard to fathom." *Id.* at 667 (Gorsuch, J., dissenting). He continued, "[T]oday's decision surely marks an embarrassing new entry into the anticanon of Indian law." *Id.* at 684 (Gorsuch, J., dissenting).

414. *Id.* at 688. ("Few sovereigns or their citizens would see that as an improvement. Yet it seems the Court cannot grasp why the Tribe may not.").

415. *Id.*

416. *Id.*

417. One argument against the further empowerment of tribes that seems to animate the Court is the "democratic deficit." *See* ALEINIKOFF, *supra* note 5, at 115. This argument concerns the presence of non-Indian residents who are permanently ineligible for membership, who cannot vote or run for office, yet might be subject to tribal jurisdiction. *Id.* Aleinikoff sees a way around this objection by cultivating a denizen status for permanent nonmember residents that would occupy a middle space between full political rights and total political exclusion. *Id.* at 147. I would argue that VAWA has begun this process by requiring tribal jury selection to include non-Indians. Alex Skibine suggests a bolder solution: tribes could treat nonmember residents like lawful permanent residents in the American immigration regime and offer them a pathway to tribal citizenship. Skibine, *supra* note 6, at 21.

to fix *Oliphant*, Congress can also fix *Castro-Huerta*.[418] Under the Court's preemption framework, Congress could assert its plenary power over Indian affairs and formally impose a jurisdictional arrangement that excludes states altogether. While tribal advocates lobby for another Congressional fix, tribal legal systems must navigate a new world of criminal jurisdiction. Table 4 illustrates current criminal jurisdiction in Indian Country not affected by PL 280.

	Indian offender	Non-Indian offender
Indian victim	Tribal jurisdiction Federal jurisdiction - Major Crimes Act	Federal jurisdiction - General Crimes Act Limited tribal jurisdiction - VAWA 2013/2022 State jurisdiction - *Castro-Huerta* (2022)
Non-Indian victim	Tribal jurisdiction Federal jurisdiction - General Crimes Act	State jurisdiction - *McBratney* (1881) Limited tribal jurisdiction - VAWA 2022

Table 4: Criminal Jurisdiction in Indian Country 2022 (with authorities)

This chart represents a simplified account of present-day criminal jurisdiction in Indian Country for territories not affected by PL 280.

On the ground, tribal justice systems in Oklahoma are undergoing rapid transformational growth. The confluence of *McGirt*, VAWA 2013, and VAWA 2022 has considerably expanded tribal criminal jurisdiction. As Cherokee Nation Attorney General Sara Hill testified before Congress, in recent years, the Cherokee Nation has increased spending on public safety by $40 million to meet the dramatic increase in caseload.[419] Prior to *McGirt*, Cherokee Nation saw fewer than 100 criminal cases filed each year.[420] In the year after *McGirt*, the Cherokee Nation had over 3,700 cases filed, and, with VAWA 2022, Hill expects that number to only increase.[421]

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418. For one simple fix, see the dissent's suggestion of a brief amendment to PL 280. *Castro-Huerta*, 597 U.S. at 695 (Gorsuch, J., dissenting).

419. *Hearing Examining* Oklahoma v. Castro-Huerta, *supra* note 374, at 2 (statement of Sara Hill, Att'y Gen., Cherokee Nation).

420. *Id.*

421. *Id.*

Castro-Huerta complicates this development by introducing concurrent state jurisdiction. Concurrent jurisdiction means more actors are jointly responsible for criminal justice in Indian country. Yet in practice it can mean no actors take responsibility. The former United States Attorneys amicus brief described this phenomenon as a "pass-the-buck dynamic," in which overlapping jurisdiction results in serious underenforcement.[422] Mary Kathryn Nagle, counsel to the National Indigenous Women's Resource Center, reported that within months of the decision, individual U.S. Attorneys' Offices adopted policies deferring prosecutions of crimes committed by non-Indians against Indians on tribal lands to state actors.[423] In light of the lessons of PL 280, Nagle warned that "such a grant of jurisdiction to States inevitably results in a decrease in federal resources, a decrease in prosecutions, and an increase in violent crimes against our Native people."[424] To address these problems and effectively enforce criminal laws, the various sovereigns need to develop means to allocate cases and resources and share information. They need to find methods for investigations that cross reservation boundaries. They need to share criminal history information, including protection orders and probation conditions from both tribal and state courts. And they need to negotiate protocols to avoid excessively punitive and costly duplicative prosecutions.

C. Voluntary Tribal-State Cooperation

In Oklahoma, much of this cooperative work was already well underway when *Castro-Huerta* was handed down. For example, Cherokee Nation already had cross-deputization agreements with all the law enforcement agencies operating within their reservation borders.[425] Indeed, most of the criminal cases in tribal court were initially referred to tribal prosecutors by state law enforcement acting under the cross-deputization agreements.[426]

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422. Brief for Former United States Attorneys Michael Cotter et al. as Amici Curiae at 13, Oklahoma v. Castro-Huerta, 597 U.S. 629 (2022) (No. 20-7622).

423. *Hearing Examining* Oklahoma v. Castro-Huerta, *supra* note 374, at 2 (statement of Mary Kathryn Nagle, Counsel, National Indigenous Women's Resource Center).

424. *Id.*

425. *Id.* at 3 (statement of Sara Hill, Att'y Gen., Cherokee Nation).

426. *Id.*; *see also* Brief for Cherokee Nation as Amicus Curiae Supporting Respondent at 11–12, Oklahoma v. Castro-Huerta, 597 U.S. 629 (2022) (No. 21-429); Grant D. Crawford, *Teaming Up: Cross Deputization Allows Cooperation Between Agencies, Tribal Marshals*, TAHLEQUAH DAILY PRESS (May 29, 2018), https://www.tahlequahdailypress.com/news/local_news/cross-deputization-allows-cooperation-between-agencies-tribal-marshals/article_d2a62aba-1aa9-5e42-936a-5c6e268a6558.html [https://perma.cc/9Q6K-ENQV].

Cherokee Nation's successful arrangements with state actors exemplify the potential of voluntary inter-sovereign cooperation. They also represent a growing pattern in tribal-state relations.

Indian country has seen a rise in voluntary cooperation in recent decades. Like Cherokee Nation and Oklahoma, many tribes and states have created mutual aid and cross-deputization arrangements to overcome jurisdictional barriers to policing and prosecutions.[427] The Arizona Department of Public Safety and the Fort McDowell Yavapai Nation have a mutual aid agreement, under which both the Yavapai Nation and Arizona can request assistance from the officers of the other.[428] Arizona also has mutual aid and cross-deputization agreements with Navajo Nation[429] and the Hopi Tribe, authorizing both tribal and state officers to enforce criminal laws around the reservations.[430] In 2011, the State of Oregon passed SB 412, granting tribal law enforcement officers the power to pursue suspects and make arrests off the reservation for crimes under state law.[431] In 2013, the State of Oklahoma passed HB 1871, amending the Oklahoma criminal code's definition of peace officers to include tribal police.[432]

Cooperative agreements also occur on the local level. For instance, the Pascua Yaqui Tribe has a recent agreement with Pima County, under which Pima County will appoint tribal prosecutors as special deputy county attorneys to prosecute cases committed by non-Indians on the reservation.[433]

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427. As of 2002, ninety-three tribal police agencies reported that states recognized them as peace officers, and eighty-four reported cross-deputization agreements, and these numbers have only increased. Kevin Morrow, *Bridging the Jurisdictional Void: Cross-Deputization Agreements in Indian Country*, 94 N.D. L. REV. 65, 68 (2019).

428. NAT'L SHERIFFS' ASS'N & OFF. OF CMTY. ORIENTED POLICING SERVS., CROSS-DEPUTIZATION IN INDIAN COUNTRY 17 (2018), https://www.sheriffs.org/sites/default/files/Cross%20Deputization%20in%20Indian%20Country.pdf [https://perma.cc/7DJ8-GE49].

429. *Id.* at 20.

430. Ariz. Dep't of Pub. Safety, *Hopi Tribe and Arizona Department of Public Safety Sign Mutual Aid Agreement During Indian Nations and Tribes Legislative Day in Phoenix*, NEWSWIRES (Jan. 12, 2022), https://www.einnews.com/pr_news/560456797/hopi-tribe-and-arizona-department-of-public-safety-sign-mutual-aid-agreement-during-indian-nations-and-tribes-legislative-day-in-phoenix [https://perma.cc/6HJJ-ERH3].

431. CHAMPAGNE & GOLDBERG, PROMISING STRATEGIES: PUBLIC LAW 280, at 12 (2013), https://www.ojp.gov/ncjrs/virtual-library/abstracts/promising-strategies-public-law-280 [https://perma.cc/8AX8-4EG8].

432. *See Bill Information for HB 1871*, OKLA. STATE LEGISLATURE, http://www.oklegislature.gov/BillInfo.aspx?Bill=hb1871&Session=1300 [https://perma.cc/S9DD-MHET]; OKLA. STAT. tit. 21, § 99 (2022).

433. Carmen Duarte, *Pima County, Pascua Yaqui Tribe Partner To Prosecute Cases*, TUSCON.COM (Dec. 30, 2022), https://tucson.com/news/local/pima-county-pascua-yaqui-tribe-

Pascua Yaqui also has an agreement with the U.S. Attorney's Office such that tribal prosecutors can also be sworn in as special U.S. assistant attorneys.[434] In this way, Pascua Yaqui can effectively manage prosecutions under tribal, state, and federal law.

In addition to sharing policing and prosecutorial authority, tribes and state actors have built partnerships through rehabilitative and diversion programs. Tribal Healing to Wellness Courts offer an alternative to incarceration rooted in community and culture.[435] Since these courts are based in tribal custom, they differ from tribe to tribe.[436] Generally speaking, they provide restorative and reparative justice guided by traditional concepts of healing and conflict resolution.[437] Some wellness courts have proven so successful that local counties have sought to participate. The Leech Lake Band of Ojibwe Indians and Cass County of Minnesota established a joint wellness court program, in which one tribal judge and one state judge hold sessions together.[438] The Yurok Tribe and Humboldt County of California also operate a joint family wellness court on a similar model.[439]

There are also many examples of voluntary tribal-state cooperation outside the realm of criminal law. As Matthew Fletcher observed, "[h]undreds, if not thousands, of these agreements exist and are in operation at this moment."[440] Tribes and states have engaged in agreements for the co-management of

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partner-to-prosecute-cases/article_b2c2dca8-8617-11ed-83d7-4f8da0a2e8f5.html [https://perma.cc/GXL2-DPFF].

434. *Id.*

435. TRIBAL L. & POL'Y INST., OVERVIEW OF TRIBAL HEALING TO WELLNESS COURTS 20–21 (2nd ed. 2014).

436. *Id.* at 21.

437. *Id.* at 10.

438. *See* TRIBAL L. & POL'Y INST., TRIBAL HEALING TO WELLNESS COURTS: INTERGOVERNMENTAL COLLABORATION 29 (2021).

439. *See "Family Wellness Court" Brings Humboldt County Superior Court and Yurok Tribal Court Together*, REDWOOD NEWS (July 6, 2018), https://kiem-tv.com/2018/07/06/family-wellness-court-brings-humboldt-county-superior-court-and-yurok-tribal-court-together/ [https://perma.cc/WG9E-U95P]; SUPERIOR CT. OF CAL. HUMBOLDT CNTY. & YUROK TRIBAL CT., FAMILY WELLNESS COURT 1–2 (2018), https://tribaljustistg.wpengine.com/wp-content/uploads/2019/03/JPA-Final-copy-HM-Joint-Jurisdiction.pdf [https://perma.cc/D3WR-X33R].

440. Fletcher, *supra* note 3, at 69.

natural resources and state parks[441] and for the coordination of taxation, zoning, economic development, and child welfare—just to name a few.[442]

This all can be understood as federalism in practice. The proliferation of intergovernmental cooperation agreements demonstrates tribal and state actors' ability to adapt to new conditions of governance.

D. Trend in National Indian Policy

The confluence of VAWA and *Castro-Huerta* created more overlap in tribal and state governance in the field of criminal justice. For tribes to maintain public safety effectively on their lands, they must coordinate with state actors. This increasing interdependence between tribes and states in criminal justice may be part of a broader trend in federal Indian policy.

In the era of self-determination, Congress has introduced major policies that rely on tribe-state cooperation. Some notable examples include the Alaska Native Claims Settlement Act ("ANCSA"),[443] the Indian Child Welfare Act ("ICWA"),[444] and the Indian Gaming Regulatory Act ("IGRA").[445] With each of these statutes, Congress took action to balance tribal and state powers in governance areas critical to tribal development: land rights, child welfare, and economic development. Each of these policy schemes features direct cooperation between tribes and states. In key areas of government, Congress has reconfigured federalist relationships by placing tribes increasingly in contact with their state counterparts.

Against these relatively recent statutes, PL 280 stands as both a precursor and a cautionary tale. PL 280 can be distinguished from newer policies in that

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441. *See, e.g.*, Dylan Sollfrank, *Tribal Co-Management of California Forestlands: A Review*, AM. BAR ASS'N (Jan. 11, 2023), https://www.americanbar.org/groups/environment_energy_resources/publications/nar/tribal-co-management/ [https://perma.cc/C8PS-JYMZ]; OFF. OF THE GOVERNOR OF THE STATE OF CAL., STATEMENT OF ADMINISTRATION POLICY: NATIVE AMERICAN ANCESTRAL LANDS 4 (Sept. 25, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/09/9.25.20-Native-Ancestral-Lands-Policy.pdf [https://perma.cc/MSU3-PHUP] (embracing tribal self-determination and announcing policy of co-management).

442. *See* Pippa Browde, *Sacrificing Sovereignty: How Tribal-State Tax Compacts Impact Economic Development in Indian Country*, 74 HASTINGS L.J. 1, 21–22 (2022) (discussing tax compacts); Fletcher, *supra* note 3, at 68–69.

443. Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified at 43 U.S.C. §§ 1601-1629h).

444. Indian Child Welfare Act, Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901-1963).

445. Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 18 U.S.C. §§ 1166-1168, 25 U.S.C. §§ 2701-2721).

it stands for a one-sided expansion of state power into tribal governance, crafted to facilitate the total assimilation of Indians into states' political regimes and the destruction of tribes as independent political entities.[446] PL 280 is a termination policy. And its utter failure to improve public safety and the administration of criminal law on tribal land demonstrates the danger of unilaterally expanding state authority into tribal affairs.[447]

When the convergence of state and tribal governance involves the enhancement of tribal power, the results are better. Statutes like ICWA, IGRA, and ANCSA feature mechanisms to balance competing tribe and state interests without wholly subordinating the former. ICWA allows for tribal intervention in state proceedings and the transfer of jurisdiction.[448] IGRA established a compacting system that operates in neither state nor tribal jurisdiction but rather in an inter-sovereign diplomatic space.[449] ANCSA created Native corporations to manage Native economic and land-based interests within Alaska's legal system.[450] IGRA and ANCSA both feature the concentration of tribal economic power and strong economic incentives for states to collaborate with tribes.[451]

The recent development in criminal jurisdiction may be read against this pattern of federally facilitated tribal-state cooperation. Congress has been refashioning the structure of American federalism by altering tribal-state relations across various policy areas. To be sure, the current state of criminal jurisdiction in Indian country did not arise from a singular cohesive policy. Rather, the overlap in governance and need for cooperation came about from the combination of Congressional action and Supreme Court decisions.

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446. Public Law 280, Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1321-1326).

447. The bipartisan Indian Law and Order Commission found that state criminal jurisdiction in Indian country was generally a bad policy decision. INDIAN L. & ORD. COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT AND CONGRESS OF THE UNITED STATES 11–15 (2013), https://www.aisc.ucla.edu/iloc/report/files/Chapter_1_Jurisdiction.pdf [https://perma.cc/8UJU-YPUH].

448. 25 U.S.C. § 1911(b).

449. 25 U.S.C. § 2710(d).

450. 43 U.S.C. § 1606. Combined with *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), and PL 280, ANCSA created more jurisdictional problems than it resolved; while tribes have asserted concurrent sovereign authority over their traditional territories, the state has essentially claimed exclusive criminal jurisdiction across all the land within state borders. *See* Zoom Interview with Rick Garcia, Co-Dir. of L. & Pol'y, Alaska Native Women's Res. Ctr. (Mar. 30, 2023). In fact, VAWA 2022 represents a major breakthrough by offering a definition of tribal jurisdiction in Alaska for the first time in any federal law. *Id.*

451. To be sure, this cursory review of three notable statutes is far from comprehensive. A deeper, more thorough accounting of federal Indian policy attempts to resolve federalism problems will be the premise of a future project.

Because of this piecemeal enactment, the federal government did not provide a designated means of negotiating jurisdiction, and tribes and states have been left to work out how best to coexist and cooperate.

IV. THE FUTURE OF TRIBES IN AMERICAN FEDERALISM

Federalism evolves. Federal policies and decisions have drawn tribes into a tighter orbit around the national government, increasingly in line with states as parallel subordinate sovereigns. The confluence of VAWA and *Castro-Huerta* is the latest stage of this development, one that has shifted conditions of American federalism in terms of criminal jurisdiction. The subordinate sovereigns must adapt accordingly.

In this last Part, I take on two complementary tasks. I employ various theories of federalism to better understand tribes' political status in our federalist system. Recognizing tribes as part of American federalism constitutes a crucial conceptual move because it opens up a world of theory to understand evolving inter-sovereign relationships and guide the practice of federalism. This section is not exhaustive—I do not engage with every purported virtue or purpose of federalism. To be sure, tribes' political status should be informed by our country's commitments to diversity, popular sovereignty, and stability through coexistence. However, for this limited section, I focus on those ideas of federalism that I find most generative in understanding concurrent criminal jurisdiction. Each section suggests distinct goals of federalism, which in turn help us envision what healthy federalist relationships should look like for tribes. At the same time, I outline the federalism argument for tribal sovereignty. Throughout my discussion of various theories of federalism, I identify an implicit need for tribal autonomy. Taken together, these observations suggest that the protection of tribal sovereignty within the framework of federalism enhances our national democracy.

A. Tribal Innovation

One of the great purported benefits of federalism is how it enables innovation at the state level.[452] Beyond formalist arguments about the state and tribal sovereignty as ends in themselves, the autonomy of the subordinate sovereigns can benefit the country as a whole. Federalism allows for variation and experimentation, through which local progress can inspire national

452. *See* Calabresi, *supra* note 9, at 775–77; Amar, *supra* note 14, at 1233, 1236–37.

change.[453] A strong, healthy federalism encourages innovative differentiation among the states, cultivating the famous "laboratories of democracy."[454]

Applied to tribes, this theory of federalism recognizes a national interest in the preservation of tribal autonomy and tribal difference. In the realm of criminal justice, innovation at the tribal level may be particularly valuable to our national democracy.[455] The American model of criminal justice premised on the necessity of incarceration is omnipresent in state and federal criminal systems. American feminist movements targeting sexual violence and domestic violence have embraced the punitive logic of the carceral state,[456] to the great detriment of poor women of color.[457] As Angela Y. Davis observes, the prison system is so deeply ensconced within the economic, political, and ideological life of the United States that it has become difficult for Americans to imagine life without expansive incarceration.[458] According to Davis, to address mass incarceration and its many forms of social domination, we need to "imagine a constellation of alternative strategies and institutions."[459] Efforts of innovation and revitalization in tribal courts engage in precisely this work. Given the federally imposed three-year sentencing limit, tribes must think more broadly, critically, and holistically when it comes to matters of public safety and public welfare. Unlike states, they cannot rely on mass incarceration as social control.

As discussed above, tribal wellness courts have received substantial recognition as promising alternatives to incarceration. Successful wellness courts demonstrate how the incorporation of therapy, drug testing, community service, education, and vocational training can help offenders address underlying problems without hefty prison sentences.[460] These courts prioritize accountability and responsibility over punishment.[461] Of course,

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453. Amar, *supra* note 14, at 1236–37.

454. Lenore T. Adkins, *State Government: Where Innovation Often Flows*, SHARE AM. (Feb. 10, 2020), https://share.america.gov/state-government-where-innovation-often-flows [https://perma.cc/8Q5P-MK8D]; *see* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

455. *See* Riley, *supra* note 31, at 1619–20; *see also* Deer, *supra* note 307, at 102–03.

456. AYA GRUBER, THE FEMINIST WAR ON CRIME 68–69 (2020).

457. *Id.* at 5, 58 (describing reliance on police and prisons as "feminism's tragedy" and how police intervention and arrest overall benefits white women but increases violence in lives of women of color).

458. ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 106–07 (2003).

459. *Id.* at 107; *see also* GRUBER, *supra* note 4566, at 203 (describing the punitive response to domestic violence as "a failure of imagination").

460. *See* TRIBAL L. & POL'Y INST., *supra* note 435, at 3–6.

461. *See id.* at 20.

these courts are rooted in tribal traditions,[462] so their practices cannot be simply replicated or appropriated; nonetheless, tribal wellness courts model culturally informed diversionary programming that should inspire other criminal justice reforms.

Tribes also model holistic approaches to social problems, recognizing how policing and criminal sanctions alone are insufficient to address major issues. In *We Are Dancing for You*, Cutcha Risling Baldy describes the revitalization of a Hupa coming-of-age ceremony as a means of uplifting and protecting Hupa women and girls,[463] addressing historical and personal trauma,[464] and thus getting at the causes underlying high rates of violence experienced by Native women.[465] According to Risling Baldy, the revitalization of girls' coming of-age-ceremonies constitutes decolonial praxis by "(re)writing, (re)righting, and (re)riteing" systems of gender.[466] By bringing whole communities together to celebrate young women, by grounding them in their culture and their power as women, and by rejecting the alleged universality of male domination, these ceremonies reassert Native feminisms and combat colonial systems of violence.[467] In this way, this revitalization work addresses systemic threats to Native women outside the criminal legal system.

Wellness courts and revitalization programs represent two ways in which tribes are already thinking and operating beyond the American carceral status quo, to invest in better strategies and institutions and to ensure public safety and human flourishing. The recognition of tribal sovereignty within American federalism enables such efforts to grow. Conversely, state incursion into tribal jurisdiction and excessive federal oversight impede tribal innovation.

B. Empowering National Minorities

Another view of federalism asserts that our federal structure is designed to empower geographically based minorities. As James Blumstein describes, federalism enables majoritarian control at the sub-national level, so that communities composed of national minorities can enjoy democratic self-

462. *Id.* at 9.

463. *See* CUTCHA RISLING BALDY, WE ARE DANCING FOR YOU: NATIVE FEMINISMS AND THE REVITALIZATION OF WOMEN'S COMING-OF-AGE CEREMONIES 20 (2018).

464. *Id.* at 126.

465. *Id.* at 127–28.

466. *Id.* at 21.

467. *See id.* at 9.

government locally.[468] At the same time, the federal government can assert national hegemony over local interests when they conflict with important national interests, especially in the protection of individual rights.[469] Unrestrained local majoritarianism can facilitate the oppression of local minorities.[470] Thus, the goal of federalism is to facilitate regional political autonomy while preserving fundamental rights.[471]

Blumstein's account of federalism offers a strong argument for tribal autonomy subject to some federal oversight. Native people constitute a small minority of the national population and the population of every state.[472] Tribal governments offer the only sovereign political space where Native people enjoy dominant political power. The expression of distinct Native cultures, Native traditions, and Native political priorities in tribal law should be recognized as healthy signs of federalism at work. From a national perspective, the enhancement of tribal self-government through the restoration of jurisdiction can be understood as minority empowerment. From a local perspective, it can be understood as the triumph of democratic self-rule.

To be sure, the minority-empowerment framework simultaneously endorses federally imposed limits to local majoritarian rule. This argument concedes that the national government plays an important role in enforcing the rights of local minorities. That includes non-Indians in Indian country. This attention to the fundamental rights of local minorities probably justifies the imposition of due process and equal protection rights in ICRA, but not the anomalous sentencing or jurisdictional restrictions. This federalism framework justifies greater tribal autonomy and the rejection of those paternalist criminal justice training wheels that never encumber states.

C. Directing National Politics

Concurrent jurisdiction may facilitate tribal influence through productive inter-sovereign conflict. A developing literature on horizontal federalism

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468. *See* Blumstein, *supra* note 81, at 1253.

469. *Id.* at 1260.

470. *Id.* at 1261.

471. *Id.* at 1252.

472. *See QuickFacts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/map/US/RHI325221 [https://perma.cc/2VTV-9SWX] (choose "American Indian and Alaska Native alone, percent (a)" from the "Select a fact" dropdown menu). Alaska has the highest percentage of Native residents at 15.7% according to the Census Bureau.

explores the problems and opportunities created by interstate conflict.[473] Much of this scholarship focuses on spillover: when the laws of one state affect residents of another. Opponents of spillover effects rely on notions of territoriality, sovereignty, and self-rule to argue that Californian climate regulations should not be allowed to burden Texan residents economically, or that Texan education policies should not be allowed to affect the textbooks Californian children read.[474] Yet spillover is everywhere, and no state enjoys perfect territorial sovereignty in our federal system.[475] In fact, state spillover is facilitated by the Full Faith and Credit Clause.[476] Like states, tribes also treasure the principles of territoriality, sovereignty, and self-rule. And more than states, tribes experience constant infringement on their rights to self-government by the other subordinate sovereigns.

This section focuses not on the problem with inter-sovereign conflict in horizontal federalism, but on the utility of such conflict. In *The Political Safeguards of Horizontal Federalism*, Heather Gerken and Ari Holtzblatt argued that interstate friction created by spillovers is useful in a pluralistic democratic system.[477] Spillovers force interstate engagement and compromise.[478] They prevent enclaves from growing isolated and force people to consider the beliefs and political priorities of other communities.[479] While sometimes this engagement with foreign ideas leads to acceptance or accommodation, at other times it inspires heated national debate.[480] Perhaps the most important function of interstate conflict is directing national politics.[481] Interstate conflict can place issues on the national political agenda, form cohesive coalitions, and overcome congressional gridlock.[482] After all, not every political issue can be left up to the states. As Gerken and Holtzblatt observed, issues like gun rights and immigration demand national political action.[483] Thus, interstate conflict that brings national attention to critical national issues is healthy for our pluralist democracy.

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473. *See generally* Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493 (2008); Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31 (2007).

474. Gerken & Holtzblatt, *supra* note 82, at 63.

475. *Id.* at 62.

476. *See* U.S. CONST. art. IV, § 1.

477. Gerken & Holtzblatt, *supra* note 82, at 62.

478. *Id.* at 88.

479. *Id.* at 95.

480. *Id.* at 96.

481. *Id.* at 63, 90.

482. *Id.* at 90–91.

483. *Id.* at 86.

Conflicts resulting from overlapping jurisdiction in Indian country may be able to generate the same impetus for national legislation. If tribes were recognized to inhabit comparable roles as states in our federalism—if tribal interests in self-government and territorial sovereignty were valued like those of states—collisions of tribal and state policies could inject tribal perspectives into national debate. This could be particularly fruitful in the realm of criminal justice. We are in a political moment where much of the American public is seriously questioning the legitimacy and efficacy of our criminal legal systems. Native experiences can inform and complicate that national discussion. Conflicts in policing, detention, representation, diversion, and punishment may well arise from concurrent jurisdiction between tribes and states. Criminalized activity may differ between state codes and tribal codes, and those discrepancies can fuel national political debate. Tribal policy preferences could gain national attention precisely through conflict with states.

D. Interdependence and Insider Dissent

The concept of uncooperative federalism can also help us understand the status of tribes in American federalism, particularly as they collaborate with other sovereign actors to navigate concurrent jurisdiction. While this model of federalism was initially articulated to describe the relationship between states and the federal government, many of its insights are applicable to tribes. According to uncooperative federalism, integration with other governments can produce new forms of tribal power and resistance, so long as tribal sovereignty remains intact.

This relatively recent conception of federalism arose in response to the idea of cooperative federalism. In the cooperative model, states act as servants and allies to the federal government to carry out national policy goals on a local level.[484] Cooperative federalism is characterized by effective state integration, rather than state sovereignty.[485] In their 2009 article, Jessica Bulman-Pozen and Heather Gerken articulated uncooperative federalism as a means to recognize the ways that state integration into the federal system actually enables sophisticated forms of contestation.[486]

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484. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258 (2009).

485. *Id.* at 1262.

486. *Id.* at 1263.

Bulman-Pozen and Gerken identified a range of powers that result from integration, which they label collectively as "the power of the servant."[487] This includes the power of dependence: when the federal government delegates responsibilities to states, it comes to rely on states.[488] The resulting dependence can give states power and influence in national affairs.[489] The power of the servant also includes the power by integration: when states participate in federal programs, state actors develop relationships with federal counterparts, and they can earn loyalty and support from those federal actors.[490] Moreover, through integration state actors learn to work the federal system effectively.[491] Related to these first two powers, Bulman-Pozen and Gerken identify a distinct power of agenda-setting.[492] The federal government has to be more responsive to state challenges to a policy when the state plays a role in administering the policy.[493] The federal government can override the state's position or accommodate it, but it cannot easily ignore the state.[494] In this way, integration enables greater engagement and allows states more sway in national agenda-setting. Finally, the insider positionality of states integrated into a federal system gives state dissent greater authority.[495] Not only can states materially impede or sabotage national policies from within the system, but they also have a stronger claim to legitimacy as critics.

These powers of the servant and their underlying insights can be applied to tribes, both in their relations with the federal government and in their relations with states. VAWA-implementing tribes have already reported benefits from stronger relationships with their state and federal counterparts, resulting in greater responsiveness from those external actors.[496] Tribes learn to navigate state and federal political and bureaucratic systems to establish and manage cross-deputization agreements, access to criminal data, and funding and technical support for the development of criminal legal systems.[497] With this familiarity with political and administrative channels and their personnel, tribes can more effectively advocate and achieve future policy goals.

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487. *Id.* at 1265.
488. *Id.* at 1266.
489. *Id.*
490. *Id.* at 1268–70.
491. *Id.* at 1268–69.
492. *Id.* at 1287.
493. *Id.*
494. *Id.*
495. *Id.* at 1288.
496. NAT'L CONG. AM. INDIANS, *supra* note 319, at 36.
497. *See supra* Section III.C.

Tribes' integration with state and federal criminal systems may also bring about tribal power in terms of regional and national agenda-setting. Integration can offer tribal institutions external legitimacy—legitimacy that can enhance tribal dissent, enable tribal challenges to the status quo, and draw national attention to tribes' modeling alternative forms of governance. In the realm of criminal law, tribal experiences with the crisis of missing and murdered Indigenous women and children, tribal innovations in culture-based diversion programs, and issues with incarceration can and should instruct the future development of state and federal criminal systems.

Tribes should benefit from the power of dependence. Tribal courts, tribal prosecutors, and tribal police fill a major gap in the administration of criminal law in Indian country—especially where tribes are implementing VAWA jurisdiction. While the federal government and PL 280 states have long shared that jurisdiction over crimes involving Indians, their history of inaction and underperformance has resulted in a de facto jurisdictional gap. As tribes step up to ensure public safety, states and the federal government will likely come to rely on tribes to continue to fulfill that role. State and federal prosecutors are already unable, ill-equipped, or unwilling to fulfill the roles of police and prosecutors in Indian country.[498] It seems unlikely that they would step up to the task after tribes have assumed responsibility for the job. Then, so long as the other sovereigns actually care about maintaining public safety and rule of law on tribal lands, tribes should wield power and influence rooted in state and federal reliance.

To these many American-centric federalism ideas, I will add that international studies of federalism offer additional and at times diverging approaches.[499] Patricia Popelier, Professor of Constitutional Law at the University of Antwerp, has used the Belgian experience to explore federal arrangements for cooperation.[500] While American theorists of cooperative and uncooperative federalism discuss the most productive aspects of integration, Popelier warned against integration as a step toward centralization.[501] Instead, she pairs the duty to cooperate with the principle of

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498. For an in-depth discussion of federal prosecutor ineptitude in Indian country, see generally Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709 (2006).

499. The American federalism model has been criticized for its alleged blindness to the self-government of minority nations. Requejo & Sanjaume-Calvet, *supra* note 11, at 11. I would suggest that a conception of American federalism that includes tribal sovereignty would not be vulnerable to such critique.

500. *See generally* Popelier, *supra* note 16.

501. *Id.* at 46.

exclusivity,[502] suggesting that exclusive jurisdiction of subnational authorities over key areas of government necessitates cooperation without necessarily inviting the tyranny of the majority.[503] According to Popelier, exclusivity plus a duty to cooperate is preferable to concurrency.[504] Adapted for American use, this framework would justify exclusive tribal criminal jurisdiction on reservations and a legal duty imposed on the states and federal government to cooperate with tribes to manage spillover effects and ensure effective governance. It avoids concurrent jurisdiction and federal integration wherever possible.

E. On Integration

Tribes and their supporters have good reason to be wary of integration into state and federal legal systems and cooperative federalism frameworks. However, there is a case for optimism. In the twentieth century, imposed integration was a first step toward termination. As Maggie Blackhawk has forcefully argued, individual rights imposed by the federal government have historically worked to assimilate Native people and undermine tribal power.[505] But if structural integration and termination are uncoupled and tribal sovereignty is preserved, integration may be a positive development. Integration into regional and national systems can enhance tribal power by giving tribes the benefits of uncooperative federalism.

To be sure, integration costs some degree of assimilation, which may remain an unconscionable price to many tribes. As noted before, the procedural rights demanded by TLOA and VAWA can be understood as both a critical mechanism for constitutional accountability as well as an imperialist imposition into tribal self-determination.[506] The costs of such requirements—in both literal dollars and intellectual autonomy—are ones tribal leaders must weigh carefully. In exchange for accommodating American legal norms, tribes may gain access to new tools for challenging the imperative of assimilation and negotiating better, more equal government-to-government partnerships.

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502. *Id.* at 51–53.

503. *Id.* at 54–55.

504. *Id.* at 57.

505. Blackhawk, *supra* note 24, at 1847, 1872.

506. *See* Riley, *supra* note 31, at 1571 (observing that "the laws make clear that sovereignty comes at a price, potentially working to effectuate further assimilation of tribal courts and Indian people"). For a comparable tension in cross-border issues in international law, see Steven Arrigg Koh, *Core Criminal Procedure*, 105 MINN. L. REV. 251, 291 (2020).

Sometimes subordinated minorities must engage with dominant legal norms and ideologies in liberatory work; the real question is how to participate in colonial venues while still challenging colonial assumptions, how to speak the language of the ascendant legal regime without reinforcing its domination. Tribes are in a difficult place: tribal legal power is tied to external legitimacy, and tribes must treat with their colonial rulers in the language of the colonizers to attain legal and political recognition.[507] The procedural conditions baked into every expansion of tribal criminal jurisdiction reflect engagement with and accommodation of American legal ideology.[508] And we should worry that this engagement may further legitimate colonial rule and the paternalism of federal Indian policy.

Critical race theorists offer a nuanced appraisal of this kind of problem. Kimberlé Crenshaw addressed an analogous issue in *Race, Reform, and Retrenchment*, her famous rebuke to the Critical Legal Movement's critique of rights.[509] Reflecting on the Civil Rights Movement and efforts for Black liberation, Crenshaw identified a need for engagement with dominant legal institutions and ideologies, even when such institutions and ideologies historically worked to maintain racial hierarchies.[510] The critical deconstruction of our liberal legal commitments is important and valuable, but until another viable avenue for progress emerges, participation in the legal system remains necessary.[511]

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507. *See* Gerald Torres & Kathryn Milun, *Translating* Yonnondio *by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625, 629 (1990) (describing translation as "the confrontation between irreconcilable systems of meaning produced by two contending cultures"); Alexandra Fay, Note, *True Co-Management: Critical Approaches to Indigenous Food Sovereignty*, 41 YALE L. & POL'Y REV. 233, 255–57 (2022).

508. American conceptions of justice are thoroughly wedded to adversarial procedure. As Robert Kagan explicates in *Adversarial Legalism*, a commitment to adversarial legalism is so deeply embedded in judges and lawyers that zealous advocacy and defendant protections are valued above pursuit of truth in criminal cases. ROBERT A. KAGAN, ADVERSARIAL LEGALISM 243 (2001) (recounting a situation where a defendant's in-court confession was treated as a procedural problem rather than a welcome addition to the record). Kagan does not characterize adversarial legalism as a legal ideology *per se*, but he does describe it as a pervasive set of beliefs and practices that enhance political legitimacy in the United States. *Id.* at 4.

509. *See generally* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987). For the Critical Legal Studies critique of rights, see generally Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984).

510. Crenshaw, *supra* note 509, at 1366–68.

511. The Critical Legal Studies movement did a lot of work to deconstruct American law and its commitments. But it failed to produce an alternative. *Id.* at 1366.

Such engagement can be productive. In Crenshaw's words: "The fundamental problem is that, although Critics criticize law because it functions to legitimate existing institutional arrangements, it is precisely this legitimating function that has made law receptive to certain demands . . . ."[512] In our liberal legal system, the very process of legitimation offers opportunities for ideological change, namely through the exposure of contradictions that create crises in legitimacy.[513] Civil rights activists have succeeded in achieving legal and social change through precisely this strategy: by engaging with institutional logics to reveal internal contradictions in American commitments to equality, freedom, and white supremacy.[514] In this way, popular struggles can be understood as both "a reflection of institutionally determined logic and a challenge to that logic."[515] Demands for change that do not engage with institutional logic are likely to be ineffective.[516]

Under this theory of change, tribes are better off negotiating jurisdiction in the language of American constitutionalism, rather than simply demanding sovereign powers while wholly rejecting American constitutional norms. By demonstrating tribal courts' capacity for fairness under American standards, tribes expose the absurdity of federally imposed restrictions of tribal jurisdiction. By revealing such policies as racist paternalism within the logic of American law, tribes may incite a crisis of legitimacy, and thus seed the ground for political progress. By insisting on consistent adherence to our national federalism commitments, tribes can win the political autonomy and power necessary to build effective, culturally sound criminal legal institutions.

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512. *Id.*

513. *Id.* at 1367. Crenshaw suggests that this strategy is particularly effective when there is "a political or ideological need to restore an image of fairness that has somehow been tarnished." *Id.* at 1368.

514. *Id.* at 1369.

515. *Id.* at 1367.

516. *Id.* On the other hand, legal theory developed for Black liberation does not necessarily apply identically to matters of tribal sovereignty. For one thing, the institutional logic relevant to the Civil Rights Movement is not the same as the institutional logic of Indian affairs. Equal citizenship through integration is central to the story of Black-white racial power relations in the United States. Black nationalism plays an important role in movements for Black liberation, but Black nationalism as separatism can be regarded as incompatible with American liberal ideology. *See* ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION 1–3 (2010). Whereas tribal sovereignty is premised on Indian separatism, and tribal sovereignty is already part of our institutional logic. As sovereign nations, tribes should have more leeway to make demands without wholly conforming and push the boundaries of American constitutionalism.

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In sum, many theories of federalism can be recruited for the federalism argument for tribal sovereignty. The fruition of all these potential benefits of federalism—innovation, minority empowerment, national political development, productive interdependence, and insider dissent—depend on tribal sovereignty and tribal power independent from the other sovereigns. Both tribes and our national democracy have much to gain from the appropriate integration of tribes into American federalism, and that integration must preserve tribal autonomy. The kind of contestation that directs national politics requires power on both sides—as sovereigns, tribes must be equal, though not identical, to states in these disputes. The judiciary should not shield states from tribal spillovers while allowing state spillovers. Likewise, interdependence only results in power if tribes have sufficient autonomy to threaten noncompliance. And autonomy is the necessary precondition for the laboratories of democracy: tribal self-rule enables tribal innovation and difference. These promises of federalism can only be achieved with national investment in tribal self-government.

V. CONCLUSION

Tribes are part of American federalism, and their status in American federalism is evolving. Today, concurrent criminal jurisdiction presents challenges to effective public safety and self-government in Indian country. To meet those challenges, legal theory and practice must be attuned to the tri-sovereign reality of our federal system. Federalism theory that recognizes tribal sovereignty as a fundamental element of our constitutional structure recognizes crises in Indian country as federalism problems, and thus invites theoretically rich federalism solutions attuned to federalism values. Guided by our common commitment to pluralist democracy, political actors should pursue intergovernmental arrangements that promote tribal innovation and difference, enhance tribal power, produce generative political friction, and facilitate productive interdependence. To this end, Congress should continue its work of restoring tribal jurisdiction post-*Oliphant*. And as the Court continues to review major Indian law questions, it should endeavor to safeguard the sovereign status of tribes in our federalism.